Liability for loss or damage to cargo in multimodal transport agreements - An African perspective.

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And to the most high, I owe my entire existence.

Abstract

The absence of a harmonised legal regime that regulates the liability for loss or damage to cargo in the multimodal carriage of goods has been an international problem for quite some time. Like many other international and regional economic communities, SADC,
COMESA and CEMAC have all tried to solve this problem by designing regulations of their own with the intention of regulating multimodal transport in their respective regions. It is these efforts at harmonisation that form the subject matter of this treatise.

This research is an exploration into the regulation of multi modal transport with specific reference to liability for loss or damage to cargo in African multimodal transport as provided for in the SADC Protocol on Transport, Communication and Meteorology, the COMESA Charter and its attendant protocols and the CEMAC Interstate Multimodal Cargo Transport Convention. This paper thoroughly reviews the literature written on the selected treaties and this includes published and unpublished government reports, preparatory documents, books, journals and case law. The treaties are described and analysed in order to determine the manner in which they regulate liability for loss or damage to cargo in multimodal transport agreements if they do so at all.

This research scrutinises the form and structure of each of the selected instruments in order to establish the extent to which they work together to form a truly harmonised regulatory regime in multimodal transport in Africa. Finally, this study utilises all the data it acquires on the regional treaties it focuses on to recommend the best method through which multimodal transport law, particularly on liability for or damage of cargo, may be harmonised in Africa.

**Keywords**

1. Multimodal Transport
2. Multimodal Transport Agreements
3. Loss or Damage of Cargo

4. Multimodal Transport Operators

5. Regulation of Liability
Opsomming

Die afwesigheid van ’n geharmoniseerde wetlike bewind, wat die aanspreeklikheid reguleer vir verlies of skade aan vragte in die multimodale vervoer van goedere, is al vir ’n geruime tyd ’n internasionale probleem. Verskeie internasionale en plaaslike/regionale ekonomiese gemeenskappe, soos SAOG (Suider-Afrikaanse Ontwikkelingsgemeenskap), COMESA en CEMAC, het al hierdie probleem probeer oplos deur hul eie regulasies te ontwerp, met die bedoeling om multimodale vervoer in hul onderskeie streke te reguleer. Dit is hierdie pogings om harmonisering wat die onderwerp/inhoud vorm van hierdie verhandeling.

Hierdie navorsing is ’n verkenning/ondersoek in die regulering van multimodale vervoer met spesifieke verwysing na die aanspreeklikheid vir verlies of skade aan vragte in die Afrikaanse multimodale vervoer, soos voorsien deur die SAOG Protokol oor Vervoer, Kommunikasie en Meteorologie, die COMESA-handves en sy gepaardgaande protokolle, sowel as die CEMAC Interstate Multimodal Cargo Transport Convention. Hierdie stuk/referaat bestudeer deeglik die literatuur geskryf oor die gekose verdrae en dit sluit gepubliseerde, sowel as ongepubliseerde regerings verslae, voorbereidende dokumente, boeke, tydskrifte en regspraak in. Die verdrae word beskryf en ontleed ten einde te bepaal op welke wyse, indien dit enigsinsdoen, hierdie verdrae die aanspreeklikheid vir die verlies of skade aan vragte in multimodale vervoer ooreenkomste reguleer.

Hierdie navorsing neem onder die loop (of bestudeer deeglik) die vorm en struktuur van elk van die gekose instrumente om vas te stel tot watter mate hulle saam werk om ’n werklike geharmoniseerde regulatoriese bewind in multimodale vervoer in Afrika te vorm. Ten slotte gebruik hierdie studie al die data wat verkry is op die plaaslike/regionale verdrae, waarop dit fokus, om die beste metode aan te beveel waardeur multimodale vervoersreg, veral die aanspreeklikheid vir skade of verlies aan vragte, geharmoniseer kan word in Afrika.
Sleutelwoorde

1. Multimodale Vervoer
2. Multimodale Vervoer Ooreenkomste
3. Verlies of Skade van vrag
4. Multimodale Vervoer Operateurs
5. Regulering van Aanspreeklijkheid
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LIST OF ABBREVIATIONS

AFRAA  African Airlines Association

AFCAC  African Civil Aviation Commission

CEMAC  Central African Economic and Monetary Community

COMESA  Common Market for Eastern and Southern Africa

COGSA  Carriage of Goods by Sea Act

EU    European Union (Abbreviation)

IATA  International Air Transport Association

ICAO  International Civil Aviation Organisation

IMO  International Maritime Organisation

MTO  Multimodal Transport Operator

RISDP  Regional Indicative Strategic Development Plan

SADC  Southern African Development Community

SARPS  Standards and Recommended Practices

SSATP  African Transport Policy Programme

UN  United Nations

UNCITRAL  United Nations Committee on International Trade Law

USA  United States of America
Chapter 1 Introduction and problem statement

1.1 Introduction

Prior to the arrival of containerisation in the mid-1960s, the international transportation of goods was a very complex affair. From as far back as the 6th century AD, a carrier was deemed by Roman edict to be in the position of an insurer of the cargo in its care. This rendered the carrier strictly liable to the shipper for any loss or damage of cargo in its care. Furthermore, because cargo was consigned as loose packages, cases of theft, damage and erroneous delivery were frequent. The balance of risk in these circumstances was lopsided, to the carrier’s detriment. This problem was however alleviated by the introduction of containerisation. The containerisation of sea freight was pioneered by the Matson Line for its Hawaii/Mainland carrier service in the mid-1960s and with it came the advent of multimodal carriage of goods. Although it was a welcome improvement, the containerisation and multimodal carriage of cargo wrought a new set of problems, some of which will be discussed hereunder.

1.2 Problem statement

The advent of containerisation in the 1960s greatly increased the practice of shipping international cargo on a door to door basis as opposed to the incumbent port to port shipment of cargo. This meant that instead of dealing with a separate contract at each stage of the journey, a consignor of cargo could now only contract with one service provider. This service provider, the multimodal transport operator, would be responsible for the cargo for the entire duration of the journey. Not only did the development of containerisation simplify the international carriage of goods, it also ultimately altered the relationship between the parties involved therein. The South African law, as in many

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2 Gilbert Containerisation and the Industrial System: An Insider’s View.
other countries in Africa and the world, has not been reformed to accommodate and cater for this change.

The use of containers in multimodal transport has raised difficult and largely unsolved legal problems. In Africa and the world at large, hitherto, there is no single, universally accepted instrument that harmonises or attempts to regulate the law on international multimodal transport. The failure to achieve so far a widely accepted international regulation on multimodal transport does not make the task of finding a solution any easier.

In Africa, this void is further aggravated by the fact that there are no African unimodal transport conventions in place, as is the case in Europe and the USA. Consequently, parties to multimodal transport agreements have to rely on a conglomeration of European unimodal conventions, each designed to regulate a different leg of the multimodal journey. Needless to say, the drafters of the present international unimodal transport conventions did so with particular focus on Europe. Most, if not all of these conventions are of minimal assistance in the regulation of multimodal transport in Africa.

The regulation of multimodal agreements in Africa mostly depends on the individual agreements between contracting parties. Parties can choose to incorporate European unimodal conventions into their contract. This however creates problems because these conventions impose different liability regimes for the different stages of the transport that they govern. They each require a different quantum of proof and at times also impose the onus of proving loss upon different parties. Parties can also opt to apply the municipal law of a chosen country to govern their agreement. This choice is no more feasible than the first because there are as many legal systems in Africa as there are countries and the same uncertainty afflicting the first option still remains present.

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3 D’Arcy Schmitthof’s Export Trade: The Practice of International Trade at 609.
4 Faghfouri International Regulation of Multimodal Transport – In Search for Uniformity at 96.
5 D’Arcy Schmitthof’s Export Trade: The Practice of International Trade at 609.
The uncertainty and unpredictability of the law in this area has made the transacting of multimodal transport in Africa particularly difficult for contracting parties. Since damage can occur at any stage of the journey, parties cannot know beforehand which liability regime will apply when damage does occur. It is therefore difficult to make meaningful anticipatory arrangements. It is also difficult to determine which unimodal convention will apply or worse, which country’s municipal law will be applied to resolve any dispute that may occur.

In response to these problems, several instruments have been put in place with the aim of harmonising trade law in Africa, intra-African multimodal transport being a key priority. Regional groupings such as SADC, CEMAC and COMESA have all drafted instruments providing for multimodal transport regulation in their respective regions.

This research aims to execute a comparison of the CEMAC Interstate Multimodal Cargo Transport Convention, the SADC Protocol on Transport Communication and Meteorology and the COMESA Charter and its attendant protocols to establish whether or not they have succeeded in creating a harmonised and effective normative multimodal liability regime. In the process, the broader regulatory regime for multimodal transport created by these instruments will be discussed. The UNCITRAL draft convention on international multimodal transport will be referred to as a source of best practice.

1.3 What is a liability regime?

The term ‘liability regime,’ in this dissertation can have one of two meanings. The one is a narrower meaning that relates to the direct liability of the carrier for damage to the cargo in a relationship between the carrier and the person on whose behalf the carriage is done. The second is a broader meaning which relates to the broader regulation of transport indicating the obligations, requirements and similar regulations applicable to the transport of goods. It will depend on the context whether a broader meaning is intended or rather the narrower one. It must be kept in mind that the subject matter of the research are treaties between states and although they have an influence on the relationship
between individuals it mainly regulates the relationship between states. A large portion of the discussion focusses on the treaties themselves and how they regulate transport.

**1.4 Research methodology**

This research has mainly been conducted by way of literature review. The paper relies largely on the analysis of secondary data on the three instruments referred to above, which data includes inter alia published and unpublished government reports, statutes and the preparatory discussions of international instruments. The research was also partially dependent upon case study analysis.

Furthermore, there has been an extensive utilisation of tertiary data acquired from published books, journal articles, case law and internet sources. The use of such data is necessary in the interpretation and analysis of the secondary data. This research mainly follows a qualitative research paradigm but in order to ascertain the similarities and differences and strengths and weaknesses of the instruments that form its subject matter, it has also conducted a comparative analysis.

**1.5 Outline of study**

The second chapter of this research focuses on the SADC Protocol on Transport Communication and Meteorology. Before the protocol itself is discussed, this chapter briefly focuses on the historical development of SADC as a regional economic community. In order to put it in context, the background of the SADC Protocol is then discussed with particular attention being devoted to the objectives behind its creation. Chapter Two then proceeds to deal with the legal nature of the SADC Protocol. This is where the effects of signing the protocol on a country are examined in detail to determine whether or not it is binding and also to determine upon whom it is binding. The extent of the SADC Protocol’s application is then discussed under the heading ‘Scope of application.’ The bulk of the chapter’s attention is however devoted to examining the SADC Protocol’s liability regime in order to determine the circumstances under which it will attach, if at all.
After having discussed the SADC Protocol in Chapter Two, this research proceeds to deal with the COMESA Charter and its attendant protocols in Chapter Three. Much like the preceding chapter, Chapter Three commences by giving a brief historical background of COMESA as a regional economic community. The background of the COMESA Charter and its attendant protocols, especially the COMESA Protocol on Transit Trade and Transit Facilities, is discussed. This discussion serves to shed light on the intended purpose of the COMESA Charter and its affiliated protocols. Chapter Three then proceeds to analyse the legal effect of the COMESA Charter and the scope of its application. Finally, the COMESA Charter’s liability regime is discussed at length.

Chapter Four deals with the CEMAC Multimodal Transport Convention and it adopts a structure akin to that of Chapters Two and Three preceding it. The discussion on the CEMAC Convention starts with a brief discussion of CEMAC’s historical background. Thereafter, the chapter focuses on the background of the CEMAC Convention and the objectives of its formation. After having discussed the convention’s background, Chapter Four examines the legal effect of ratifying the convention as well as the extent of the convention’s application. Finally, Chapter Four looks at the substantive provisions creating the convention’s liability regime at length and then concludes.

Chapter Five conducts a comparative analysis of the instruments focused on in this research. All three of the instruments selected for this study are then juxtaposed with each other and are compared along fixed parameters. This is the chapter that discusses the strengths and weaknesses of each one of the international treaties that this paper discusses. It explores features such as the theoretical underpinnings of each treaty, each treaty’s form and content and whether a treaty is an instrument of public law or an instrument of private law.

Chapter Six is the concluding chapter and being the concluding chapter, it sums up the findings of the research and does a chapter by chapter synopsis. Taking note of all the findings arrived at in the preceding discussion chapters, Chapter Six ties everything together and gives final thoughts on the implications that the research findings raise. Chapter Six then proceeds to make recommendations on how best the law regarding the
liability for loss or damage to cargo in multimodal transport agreements in Africa may be improved, going into the future.

1.6 Research objectives

The principal aim of this research is to establish how the CEMAC Interstate Multimodal Cargo Transport Convention, the SADC Protocol on Transport Communication and Meteorology and the COMESA Charter regulate liability for loss or damage of cargo in multimodal transport agreements as well as to determine which approach is best suited for the regulation of multimodal transport liability in Africa. This research will also determine whether or not the treaties aforementioned can be harmonised and how best that can be done. To be able to do so it is also necessary to establish how these instruments regulate multimodal transport in general.

Chapter 2 The SADC Protocol on Transport Communication and Meteorology
2.1 Introduction

The development and harmonisation of regulatory frameworks on transport within the region has been a paramount objective for the Southern African Development Community\(^6\) ever since its infancy.\(^7\) From the onset, SADC’s goal has been to create an integrated transport law within the region while at the same time integrating the SADC member states into the global economy in an effective and competitive manner.\(^8\) In order to bring this objective to fruition, the SADC has over the years developed a number of regional instruments - policy frameworks meant as guides for member countries to develop their municipal laws.

Although most of the instruments on regional transportation passed by the SADC over the years are more policy frameworks than binding conventions, some of them do contain substantive legal provisions that regulate multimodal transport and set out discernible liability regimes. The SADC Protocol on Transport Communication and Meteorology\(^10\) is one such instrument. It is this Protocol that will be the subject matter of debate in this chapter. This chapter will provide a background of the Protocol before continuing to carry out a detailed examination thereof and setting out how the Protocol provides for liability for loss or damage in multimodal transport agreements.

2.2 Background of the SADC Protocol on Transport Communication and Meteorology

The SADC is an organisation formed by a number of Southern African countries\(^9\) in 1992 in order to evolve common political values and legal systems as well as to achieve complementarity between national and regional strategies and programmes.\(^10\) It was

\(^6\) Hereinafter SADC  
\(^7\) Preamble to the SADC Protocol on Transport Communication and Meteorology  
\(^8\) Mkapa “Foreword” SADC Regional Indicative Strategic Development Plan  
\(^10\) Hereinafter The Protocol  
\(^9\) Composed of Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, Zimbabwe  
\(^10\) Harald Economic Integration in Southern Africa – a Risk of Strong Polarisation Effects or a Chance for Joint Development? at 571  
\(^13\) Hereinafter SADCC
reconstituted from the Southern African Development Coordination Conference\textsuperscript{13} of 1976, an earlier arrangement whose main drive was the need by member countries to harmonise development in the region and also to wean themselves from economic reliance upon the South Africa of that time. It was transformed into SADC in August 1992.\textsuperscript{11}

Even from the infant stages of SADC’s formation, the development and integration of transport regulation in the region has always been a paramount objective. In the RISDP, which paints a fuller picture of SADC’s strategic objectives as adopted by SADC in 2003, frameworks for developing and harmonising legal and regulatory frameworks on transport in the region are dealt with on a priority basis.\textsuperscript{12}

The realisation that any region striving for stronger integration needs an efficient transport system to facilitate trade and socio economic ties\textsuperscript{13} drove the SADC countries into working towards a single instrument of regional harmonisation. The result of the deliberations was the passing of the SADC Protocol on Transport Communication and Meteorology in Maseru in Lesotho on 24 August 1996. It came into force on the 6\textsuperscript{th} of July 1998. The Protocol was commissioned by the member states to effect fundamental reforms in the transport and communications sectors in the region.\textsuperscript{14}

The SADC Protocol is a policy and regulatory framework that was agreed upon by the SADC member states in order to nurture an integrated multimodal transport system throughout Southern Africa that remains efficient, reliable, economically viable and environmentally responsible.\textsuperscript{15} The SADC Protocol was adopted in order to enhance trade

\textsuperscript{11} Mutambara Regional Transport Challenges Within SADC and Their Implications for Economic Integration and Development
\textsuperscript{12} Article 4.11.3 of the SADC RIDSP
\textsuperscript{13} Preamble to the SADC Protocol on Transport Communication and Meteorology
\textsuperscript{14} Mamelodi E-Government in Africa Progress Made and Challenges Ahead
\textsuperscript{15} SADC Documents and Publications: Protocol on Transport Communication and Meteorology (1996)
liberalisation and co-operation between member countries.\textsuperscript{16} It is the instrument through which transport and communications constraints in the region are addressed.\textsuperscript{17}

Because it regulates transport, communications and meteorology, the SADC Protocol is divided into three components. Chapter Three to Chapter Nine deals with the transport component while Chapters Ten to Eleven deal with communications and Chapter Twelve with meteorology. Since the second and third components of the protocol referred to above are not pertinent to the research question, they will not be focused upon in this research.

The provisions regulating liability for loss or damage to cargo in the SADC Protocol however do not take the form of peremptory injunctions. They are rather discursive and directory in nature. As will more fully appear in the discussion to follow, the SADC Protocol makes suggestions and recommendations for the member states and it is up to the member states to enact legislation in their respective jurisdictions which give effect to these suggestions.

2.3 Legal nature of the SADC Protocol

The starting point for any meaningful discussion of the SADC protocol’s regulatory regime ought to be the scope of the Protocol’s applicability. The Treaty of SADC is the primary source of all SADC law and is binding upon all signatory states\textsuperscript{18} whereas the protocols passed in pursuance to it are secondary sources of SADC law. While the Treaty of SADC clearly provides for the treatment to be accorded its provisions, it is silent on the legal standing of secondary sources such as the protocols.\textsuperscript{19} This lacuna can however be rectified by looking at the wording of the Treaty of SADC itself.

\textsuperscript{16} Van Niekerk The South African Law of International Trade: Selected Topics 3\textsuperscript{rd} Ed at 8
\textsuperscript{17} Mutambara Regional Transport Challenges Within SADC and Their Implications for Economic Integration and Development
\textsuperscript{18} Article 6(1) of the Treaty of SADC
\textsuperscript{19} Salami Legal and Institutional Challenges of Economic Integration in Africa at 671
According to Article 1 of the Treaty of SADC, all protocols to be signed and ratified by the member countries are instruments of implementation of the SADC Treaty and they will have the same legal effect as the SADC Treaty.20 The legal nature and applicability of the SADC Protocol is therefore tied in with the legal nature and applicability of the treaty establishing the SADC itself. Therefore, in order to establish the applicability and legal effect of the protocol, one will have to discuss the legal nature of the Treaty of SADC.

The legal nature of international treaties such as the treaty establishing the SADC can be determined by reference to the Vienna Convention on the Law of Treaties of 1969.21 In terms of article 1 (b) of the Vienna Convention, a state will not be bound by an international agreement if it has not consented to be so bound by way of ratification, approval or accession. By acceding to the SADC Treaty, the ratifying states expressly undertake to uphold the principles and objectives of the treaty in crafting the laws of their respective jurisdictions.22 The SADC Treaty and the various protocols attendant thereto (including the protocol under discussion) therefore bind the member states to enact laws that give effect to the policies they enunciate.

Article 6(4)-(5) of the SADC Treaty provides that

Member states shall take all necessary steps to accord this treaty the force of national law

Put in simpler terms, the SADC Protocol on Transport Communication and Meteorology is not binding upon private individuals but legally binds and commits member states to take necessary legislative action in order to achieve the objectives set out therein.23

20 Article 1 (2) of the Treaty of SADC
21 Hereinafter The Vienna Convention
22 Afadameh SADC at 30: Re-examining the Legal and Institutional Autonomy of the Southern African Development Community at 9
23 Mokgware Southern African Development Community (SADC): Towards Economic Integration at 13 27 Article 1.2 of the Protocol
2.4 Scope of application

Article 2.1 sets out the regulatory delimitation of the SADC Protocol. According to Article 2.1 (a), the scope of the protocol comprises of the entirety of the transport, communication and meteorology sectors in each member state...

...including, but not limited to: a) all policy, legal, regulatory, institutional, operational, logistical, technical, commercial, administrative, financial, human resource and other issues;

The scope of the protocol’s application as stated hereunder is however too wide and is to a large extent vague. It is submitted that a more precise delimitation of the protocol’s applicability can be derived from the manner in which key terms are defined therein.

The term “multimodal transport” is defined in the SADC Protocol as

...the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country but excluding the picking up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract.27

This definition of multimodal transport is almost identical to that put forward by UNCTAD in its 1980 Convention,24 which definition has to date been accepted as the most authoritative.25 Suffice it to say, multimodal transport in the SADC Protocol has to a large extent been given its generally and internationally accepted meaning.

Multimodal transport can only be regarded as such in terms of the SADC Protocol if the cargo has been transported from one country to another. Being a transaction of an international nature it is therefore a crucial prerequisite for the applicability of the SADC Protocol. It follows therefore that agreements of a purely national or domestic nature can not ordinarily be regulated in terms of the SADC Protocol.

Like the 1980 UNCTAD Convention, the protocol also strikes a difference between multimodal and intermodal transport. In terms of the SADC Protocol, in intermodal transport, the carrier does not assume liability for loss of or damage to the cargo “for the entire transport from origin to final destination.” In the same section, the protocol also defines a multimodal transport agreement as

.. a contract where a multimodal transport operator undertakes against payment of freight to perform or procure the performance of international multimodal transport.

Cumulatively, the definitions given to key terms in the protocol clearly demarcate the extent to which the SADC Protocol will be applicable. Suffice it to say, the SADC Protocol only regulates liability for loss or damage to cargo in multimodal transport in situations where

1. There is an agreement for the carriage of goods by two or more modes of transport by a single carrier against the payment of freight
2. The carrier is responsible for the goods throughout the whole transport from departure to arrival
3. The carriage must take place between two or more countries

2.5 The SADC Protocol’s Liability Regime

No individual section in the SADC Protocol is devoted to the regulation of liability for loss or damage of cargo in multimodal transport. The provisions regulating liability for loss or

26 Article 1.1 of the SADC Protocol
27 Article 1.2 of the SADC Protocol
damage of cargo are thus not concentrated in one segment of the protocol but are to be found in different sections of the protocol. The provisions on liability gleaned from the protocol will be illustrated in this section and discussed in detail.

2.6 When does liability attach?

The SADC protocol obliges the member states to ensure that carriers “implement measures that enhance the security of cargoes.” This is achieved by imposing several sub duties which will be discussed hereunder. The protocol itself does not directly impose liability on multimodal transport operators but it creates norms and standards in terms of which the MTO may become liable under the domestic law of a member country should those standards not be adhered to.

2.6.1 Use of Unitised Loading Units

Article 3.4.1 mandates the member states to promote and provide for the use of unitised loading units in the transportation of cargo and makes express mention of freight containers in several instances. Freight containers are defined in the definitions as articles of transport equipment that are, “of a permanent character, strong enough to be suitable for repeated use and specially designed to transport goods by more than one mode.”

The protocol in Article 6.6 permits member countries to set permissible and impermissible axle mass loads in road transportation. In addition to requiring that proper unitised loading units be utilised, the protocol also requires that the cargo be loaded and arranged in a careful manner and to this extent prohibits overloading of cargo.

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28 Article 3.4.4 (h)
29 Article 3.4.1 (c) and article 3.4.4 (d) of the SADC Protocol
30 Article 1.2 of the SADC Protocol
In terms of the protocol therefore, a carrier must make use of suitable containers in the carriage of cargo consigned to it. The containers must be strong enough to carry the cargo through different modes of transport and must not be overloaded.

2.6.2 Use of unseaworthy, unairworthy or unroadworthy vehicles

2.6.2.1 The Road leg

Road transport is the most dominant mode of transportation in Africa. According to UNCTAD it accounts for as much as 90% of all African interurban transport.\textsuperscript{31} Likewise, roads also remain the most dominant mode of transportation in the SADC region.\textsuperscript{32} As a result, the SADC Protocol devotes more attention to regulating fitness standards of road vehicles than vehicles in any other mode of transport in the carriage of freight. A roadworthy vehicle has been defined as a road vehicle upon which there exists no safety related defect.\textsuperscript{33}

The rules relating to the standards of fitness of road vehicles are provided for under Article 6.3 of the SADC Protocol. It mandates member states to enforce harmonised standards pertaining to vehicle inspection, testing and certification.\textsuperscript{38} Provisions on the use of roadworthy vehicles are also provided for in Article 6.4. Article 6.4.1 requires member states to implement regulations for the use of safe vehicles and equipment in the carriage of cargo.\textsuperscript{34}

Furthermore, Article 6.4.1 obliges member states to accede to the Agreement Concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval of Motor Vehicle Equipment and Parts 1958. This agreement defines uniform technical prescriptions for wheeled vehicles, equipment and parts.\textsuperscript{35}

\textsuperscript{31} Sectoral approach chapter 7
\textsuperscript{32} Mutambara Regional Transport Challenges Within SADC and Their Implications for Economic Integration and Development
\textsuperscript{33} Rechnitzer The Effect of Vehicle Roadworthiness on Crash Incidence and Severity at 1
\textsuperscript{38}Article 6.3.2 (a) – (d)
\textsuperscript{34} Article 6.4.1
\textsuperscript{35} Preamble to the Agreement Concerning the Adoption of Uniform Conditions of Approval and Reciprocal Recognition of Approval of Motor Vehicle Equipment and Parts 1958
multimodal transport operator in a contracting country is therefore compelled to ensure that its vehicles comply with the requirements of the 1958 agreement as the SADC Protocol compels the member country to accede to that agreement.

2.6.2.2 The Rail Leg

Article 7.4 of the SADC Protocol sets minimum standards of care in the carriage of goods by rail. In terms of Article 7.4.1 (b), there must be minimum standards of safety in the placement and securing of cargo on open top and flat train wagons. The protocol also provides for the development and implementation of uniform technical standards relating to operational equipment in the carriage of cargo by rail.42 In terms of Article 7.5 (b), member countries are to make sure that operational equipment such as wagons, coaches and locomotives are kept in proper working condition by the carriers.

The SADC Protocol therefore creates minimum standards for the placement of cargo upon train wagons and for equipment such as container skids, pallets or other such apparatus used to fasten cargo down and protect it from damage during carriage. These are the standards around which member states are urged to model their municipal laws and by which carriers may be found liable.

2.6.2.3 The Sea Leg

Maritime and inland waterway transport is probably the most clearly regulated mode of transport in the SADC Protocol. The SADC Protocol explicitly prohibits the use of unseaworthy ships in the international conveyance of cargo. According to article 8.5.2 of the protocol, this serves to promote the safety of life and property at sea. In light of the foregoing, it appears that the SADC Protocol urges the individual member states to specifically legislate against the operation of unseaworthy vessels. One way through

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36 Article 7.4.1 (b) (iii) of the SADC Protocol
42 Article 7.5 (b)
37 Article 8.5.2 of the SADC Protocol
which this could be achieved by the member states is to classify the use of unseaworthy vessels with the consequence of loss of or damage to cargo as negligence.

In article 8.5.1, the member states affirm their intent to abide by the international standards and recommended practices of the International Maritime Organisation\textsuperscript{38} whose overall objective is the promotion of safe and secure carriage as well as the prevention of maritime pollution.\textsuperscript{39}

Maritime carriage under the SADC Protocol is therefore subject to the regulations set out by the various sub-committees of the IMO, especially the Committee on Carriage of Cargoes and Containers\textsuperscript{40}. These include the range of measures in the CCC’s SOLAS\textsuperscript{41} which are designed to improve the safety of shipping for example the requirement for the installation of fire protection, detection and extinguishing equipment on ships\textsuperscript{48}. It is also required in article 8.5.8 that such equipment aboard the ships is kept in good working order.

It is likely that a carrier who fails to install and maintain such equipment resulting in loss or damage to cargo will be seen as having failed to adhere to the protocol’s standards and norms of reasonable care and will therefore likely be considered negligent. This is because courts of law in member states are inclined to interpret the law in a manner which gives effect to the protocol’s standards.

2.6.2.4 The Air Leg

Chapter 9 of the SADC Protocol regulates the carriage of goods by air. By reference, the member states in article 9.1.1 subject themselves to the international standards of air freight put forward by the International Civil Aviation Organisation in its Standards and

\begin{footnotes}
\item[38] Hereinafter the IMO
\item[39] IMO What is it? At page 5
\item[40] Hereinafter the CCC
\item[41] International Convention for the Safety of Life at Sea 1974
\item[48] SOLAS regulation X1-1/7
\end{footnotes}
Recommended Practices.\footnote{Hereinafter the ICAO SARPs} Annexure 8 of the ICAO SARPs which is solely meant to provide for the airworthiness of aircraft sets out minimum requirements for airworthiness. According to Chapter 5 thereof, all organisations designing and manufacturing aircrafts must implement safety management systems that inter alia identify safety hazards and provide for continuous monitoring and regular assessment of safety performance\footnote{Article 5.3 (a) – (d) of ICAO SARPs’s Annexure 8}. An aircraft manufactured in a manner not conformant to this set procedure will therefore not be airworthy in terms of Annexure 8 and, likewise, the SADC Protocol. Article 29 of the Chicago Convention on International Civil Aviation\footnote{Hereinafter the CCICA} which established the ICAO provides that a pilot in command of an aircraft is mandated to confirm that an aircraft is airworthy before transporting goods internationally by air.

2.6.3 Untrained or Unqualified staff

Not only does the protocol set minimum standards for vehicles to be used in the commercial conveyance of cargo, the protocol also demands minimum standards in respect of the personnel who operate these vehicles. From the provisions of the protocol to be discussed below, it emerges that a multimodal transport operator carrying on business with untrained or unqualified personnel in its employ will be liable for any loss or damage to cargo in its care as a result of error which could have been averted had the employees been properly skilled for their jobs. It is generally considered negligent for a carrier to employ servants it knows to be unskilled in the execution of its duties.\footnote{McNiece Affirmative Duties in Tort at 1272.}

2.6.3.1 The Road Leg

The obligation of the carrier regarding the use of trained and qualified personnel in transport operations first emerges in article 5.4(g) of the SADC Protocol. The protocol in

\begin{footnotesize}
\footnote{Hereinafter the ICAO SARPs} \footnote{Article 5.3 (a) – (d) of ICAO SARPs’s Annexure 8} \footnote{Hereinafter the CCICA} \footnote{McNiece Affirmative Duties in Tort at 1272.} \footnote{Article 6.2 (b) of the SADC Protocol}
this article demands the standardisation among member states of regulations on carriers’ obligations regarding inter alia their drivers. Though the requirement for the use of qualified and trained personnel in multimodal carriage is not put forth in clear and express terms in article 5.4(g), such a requirement can reasonably be inferred from the wording of this article.

Article 6.2(b) follows up on the provisions of article 5.4(g) discussed above. As in article 5.4, the obligation of the carrier to use only trained and qualified personnel in the conveyance of cargo in article 6.2(b) is not stated in express terms but is rather inferred in the language employed in the wording of article 6.2(b). Article 6.2(b) requires that harmonised control measures regarding inter alia vehicles and their drivers be put in place. The reason for providing for these harmonised “control measures” for drivers and their vehicles, as the protocol says, is to attain the protocol’s road traffic objectives.

The road traffic objectives to which article 6.2(b) refers, are set out in the preceding article 6.1. These are the enhancement of overall quality of road transportation in the region with emphasis on the enhancement of safety and security of cargo in transit. When read together, the articles discussed above collectively require that vehicles used in the conveyance of cargo in multimodal transport agreements and the personnel that operate them be of a standard that ensures the safety and security of cargo. Regarding drivers, the protocol provides that these standards can only be achieved and maintained through continuous training, assessment and certification.46

2.6.3.2 The Sea Leg

The obligation of the carrier or MTO to employ only trained and qualified staff in commercial transportation in the region is not only limited to carriage by road. In article 7.7, this requirement is also extended to carriage by rail. Article 7.7 is wholly dedicated to the development of human resources in rail transportation. In this section, the protocol calls for a uniform syllabus for the training of all staff and personnel involved in rail

46 Article 6.9 of the SADC Protocol
transportation, including maintenance personnel, crews and operating staff.\textsuperscript{47} It also provides for the development of common competence evaluation and certification standards for all personnel concerned with rail transportation in the region.\textsuperscript{48} Any individual whose qualifications fall below the certification standards to be set by the member states in terms of this article will be unfit in terms of this article and employment thereof in the conveyance of cargo by rail in violation of the protocol will most certainly visit liability upon the carrier if loss or damage should occur.

The requirement for the employment of only trained and qualified personnel in the conveyance of cargo is most clearly provided for in article 8.5(e) of the Protocol which deals with maritime transportation. Article 8.5(e) incorporates the international standards and recommended practices of the IMO to maritime training in the region, including the training of seafarers.\textsuperscript{49} Most of the international standards and recommended practices of the IMO regarding training and minimum competence levels for personnel employed in maritime transportation are contained in the International Convention on Standards of Training, Certification and Watch keeping for Seafarers\textsuperscript{50}, which was adopted on 7 July 1978 and entered into force on 28 April 1984.

The SADC Protocol itself also expressly provides that member countries will ensure that seafarers are trained in conformity with the STCW.\textsuperscript{51}

This convention prescribes minimum standards relating to training, certification and watch keeping for seafarers, which requirements member states are compelled to either meet or exceed.\textsuperscript{52} The convention does not only set qualification standards for masters, officers and watch personnel on seagoing merchant ships from member countries; it also applies to ships from non-party states when they visit ports under the control of contracting states.\textsuperscript{53} In order to secure a certificate of competence in terms of the STCW, an applicant

\textsuperscript{47} Article 7.7 of the SADC Protocol
\textsuperscript{48} Article 7.7 (b) of the SADC Protocol
\textsuperscript{49} Article 8.5 (e) of the SADC Protocol
\textsuperscript{50} Hereinafter STCW
\textsuperscript{51} Article X of the STCW
\textsuperscript{52} http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on- Standards-of-Training,-Certification-and-Watchkeeping-for-Seafarers-(STCW).aspx
\textsuperscript{53} Article X of the STCW
will have to show that he is medically fit and technically capable of executing duties as a mariner. Therefore the standards set out for seafarers in the STCW are both technical and medical.\textsuperscript{54} These facts are proven by means of a medical certificate and a certificate of proficiency respectively.\textsuperscript{53}

Regulation I/9 in Chapter 1 of the STCW sets out several criteria to be met before an individual can be deemed medically fit for employment in transportation of goods by sea. The regulation generally states that prospective employees should have no medical condition or impairment that may prevent them from effectively and safely executing their routine duties on a ship upon which they may be employed. Any individual afflicted by any such condition will thus not be eligible for employment as a seafarer in terms of the STCW and in turn the SADC Protocol.

Regulations on the technical standards required of prospective seafarers are scattered throughout Chapter 1. Regulation I/1.33, for instance, sets out qualification requirements for seafarers working on deck and regulation I/1.34 sets out minimum requirements for seafarers working in an engine room. All these regulations are incorporated into the SADC Protocol through the reference made in article 8.5(e).

2.6.3.3 The Air Leg

The protocol also provides for the use of only trained and qualified personnel in the transportation of goods by air. The ICAO’s international standards of airfreight are incorporated into the protocol by reference in article 9.4 of the protocol. These standards, as earlier stated, are found in the ICAO SARPs. Annex 1 of the SARPs is devoted to the regulation of personnel training and licensing.

In terms of rule 1.2.1 of Annex 1, a person will not be a flight crew member of an aircraft unless he/she holds a valid licence showing compliance with the requirements of Annex

\textsuperscript{54} Comprehensive Review of the STCW Convention Presentation by Nazha N Director of Personnel Standards and Pilotage CMAC November, 2010

\textsuperscript{53} Regulation I/2 of the STCW
1. Individuals may only hold valid licences in terms of the protocol if they have undergone the approved training and medical assessment. This means that the prospective airmen should not only meet specific requirements of medical fitness but should also be in possession of a combination of skills, knowledge and attitudes required to perform flight duties to the prescribed standard. This is very similar to the requirements set out in the IMO’s STCW discussed above. Any carrier by air or MTO employing personnel whose competency level is below the standards set out in Annex 1 will thus undoubtedly be liable for any loss or damage upon the cargo resulting from error or lack of skill on the part of its servants.

2.7 Timeframes and Calculation of Damages

No particular provisions in the SADC Protocol provide for specific time limits for the prosecution of claims arising from loss or damage to cargo in multimodal transport agreements. Likewise, there are also no specific provisions in the protocol that provide for notice periods. Furthermore, the protocol neither provides a formula by which damages payable may be calculated nor does it provide a limit for the amount that may be claimable as damages for loss or damage as other conventions do.

Under the SADC Protocol, time limits, notice periods and the calculation and quantum of damages are left to the individual member states to resolve. Article 2.4 of the protocol makes it the responsibility of each member state to enact rules and regulations that give effect to the provisions of the protocol. The issue of timeframes and quantum of damages is thus one of those aspects that may be provided for by the individual member countries by way of enacting rules and regulations thereon.

2.8 Conclusion

In final summation, the SADC Protocol was put in place to serve primarily as a policy framework to guide member states parties in the formulation of their domestic law

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55 Article 1.1 of Annexure 1 to the ICAO SARPs
56 See the Hague Visby Rules, COTIF, CMR
pertaining to international transportation. The protocol itself is not directly binding on multimodal transport operators in the region however it binds the member countries. Although no specific provision in the protocol directly imposes liability on the contracting parties, standards and norms are created with which the parties must comply. Non-compliance with these standards and norms will likely result in the multimodal transport operator being liable under the municipal law of individual countries for negligence.

When read together, the articles of the protocol discussed above cumulatively call upon the member countries to ensure that multimodal transport operators in their jurisdictions and the region duly exercise reasonable care in the conveyance of consigned cargo by ensuring that the vehicles are technically fit and the personnel operating them is properly qualified.

The SADC in its attempt to harmonise multimodal transport regulation in the region has enacted the SADC Protocol as a nonbinding set of regulations that work as a general guide for the member states in the enactment of their respective municipal laws. Since the protocol is merely a guide, each member state will therefore be free to legislate on the subject in any manner it deems most compliant with the protocol. Whether this route is the best approach for the harmonisation of multimodal transport law in the region will be dealt with in chapters to follow.\footnote{See Chapter five}
Chapter 3 Multimodal liability in the COMESA charter

3.1 Introduction

The Common Market for Eastern and Southern Africa\textsuperscript{58} is a regional economic community created by eastern and southern African states with the primary goal of fostering the economic well-being of their population through regional integration.\textsuperscript{59} The COMESA charter’s main theme is the integration and development of business in Eastern and Southern Africa,\textsuperscript{60} therefore COMESA is chiefly concerned with enhancing the trade competitiveness of enterprises in its member states on a regional and global level. Suffice

\textsuperscript{58} Hereinafter COMESA. \\
\textsuperscript{59} Regional Workshop on Trade Facilitation and Promotion of Intra-African Trade for Eastern and Southern Sub-Region 20\textsuperscript{th} – 30\textsuperscript{th} April 2010 Dar es Salaam, Tanzania. \\
\textsuperscript{60} Looking Back: Evolution of PTA/COMESA at 5.
it to say, the main focus of the member states in creating COMESA was the formation of a large economic trading unit capable of overcoming some of the economic barriers faced by individual states.  

The COMESA governments recognised at the highest levels that in order to catch up to the more developed parts of the world, it was necessary for the member states to bridge existing gaps in the priority sectors of their economies. This recognition was coupled with a collective realisation that a well-developed and sustainable transport sector is a sine qua non for the meaningful economic development of any region. As a result, the transport sector regulation, particularly the carriage of goods within and among countries, was one of the sectors given chief priority in the COMESA Charter and the several other instruments attendant to it.

Article 84 of the COMESA Charter obliges member states to develop co-ordinated and complementary transport and communications policy and regulations in order to improve and expand existing links among member states as well as help mould new ones. COMESA’s transport and communication programmes therefore mainly focus on the harmonisation of transport law and policy. COMESA has over the years developed a number of model policy and regulatory guidelines in transport that complement the charter in creating a multimodal liability regime for the region. It is this liability regime that this chapter seeks to critique.

This chapter aims to conduct a detailed discussion of the provisions of the COMESA treaty and its annexes in order to establish whether or not there is an identifiable multimodal transport liability regime therein. In doing so, this chapter will present a brief background of the COMESA treaty’s development and how it came to be. The chapter will then go on

61 Overview of COMESA.
62 Khumalo NEPAD: The Transport Challenges at 1.
63 Thomas DBSA’s Approach to Risk Analysis and Mitigation with Reference to the Transport Sector at 1. Particularly Annex 1 to the COMESA Charter, “Protocol on Transit Trade and Transit Facilities”
64 COMESA Key Infrastructure Projects at 3.
65 Regional Workshop on Trade Facilitation and Promotion of Intra-African Trade for Eastern and Southern Sub-Region at 5.
to discuss the legal effect of signing the COMESA treaty as well as establish the treaty’s sphere of application. The main focus of this chapter’s bulk will however be on discussing the features of the COMESA treaty’s multimodal transport liability regime if one has been established.

3.2 Background of the COMESA Charter

COMESA’s genesis can be traced back to 1965 where the United Nations Economic Commission for Africa\textsuperscript{66} covered a ministerial meeting of newly liberated Eastern and Southern African states\textsuperscript{67} held in Lusaka in Zambia. It was at this meeting that recommendations were made for the creation of an economic community for Eastern and Southern African states. As a direct result of these recommendations, the Lusaka Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa was signed by the member states.

A period of preparation then ensued and culminated in the signing of the treaty establishing the Preferential Trade Area for Eastern and Southern Africa\textsuperscript{78} in December 1981. The signing of the PTA Treaty was the foundation upon which COMESA was later to be built. This is because from inception, the PTA Treaty envisaged its transformation into a common market and this prospect was realised in November 1993 when the member states signed the Treaty Establishing COMESA. The PTA was COMESA’s rudiment.

COMESA was notified to the World Trade Organisation\textsuperscript{68} under the Enabling Clause on 29 June 1995\textsuperscript{69} and was for a long time the only regional economic bloc in Africa notified to the WTO. This effectively gave the COMESA member states an enhanced participation in global trade, exposed them to the advantages commonly associated therewith and went

\textsuperscript{66} Hereinafter ECA.
\textsuperscript{67} Comprised of Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe. \textsuperscript{78}Hereinafter PTA.
\textsuperscript{68} Hereinafter the WTO.
\textsuperscript{69} History of COMESA: Looking Back, Evolution of PTA/COMESA at 4.
a long way towards realising one of COMESA’s core objectives which was to give its members a competitive edge in world trade.

### 3.3 Legal effect of the COMESA Charter

The COMESA treaty has been described as the most detailed African REC treaty in terms of providing for the legal status of its instruments in the domestic jurisdictions of its member states.\(^\text{70}\) The primary source of COMESA law is the charter. It constitutes the fons et origo of all COMESA law.\(^\text{71}\) In order to conduct a thorough assessment of the COMESA charter’s legal status however, it is necessary to also consider the legal consequences attached to secondary sources of COMESA law, such as the protocols and the declarations of the COMESA Court of Justice. This prevents an isolated analysis of the charter and allows a more contextual debate of the COMESA charter’s legal effect.

It has been submitted by some that the COMESA Charter is a “self-executing” treaty.\(^\text{72}\) This means that upon ratification, the charter automatically becomes law in the ratifying state and immediately becomes binding upon all and sundry in that particular jurisdiction. Be that as it may, it appears from its form that the COMESA charter is more an undertaking by each member state to direct the development of their policies and law in a manner favourable to the principles laid out in the charter and to abstain from measures likely to jeopardise implementation thereof.\(^\text{73}\) This is not unlike the SADC protocol discussed above.

Kiplagat posits that,

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\(^{70}\) Salami Legal and Institutional Challenges of Economic Integration in Africa at 673.

\(^{71}\) Kiplagat Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience at 450.

\(^{72}\) Kiplagat Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience at 451.

\(^{73}\) Article 5(1) of the COMESA Charter.
The structure of the treaty is based on the co-operation among the executives of Member states and private parties have no standing to raise issues or to attempt the enforcement of the provisions of the Treaty.\textsuperscript{74}

This reasoning appears to be based on the principle of privity. Since private parties are not directly privy to the signing of the charter, they cannot seek to have any rights or obligations arising thereunder enforced. If private parties cannot seek the enforcement of the charter because they are not privy thereto, then for the same reasons it should follow that the charter cannot be binding upon them in the absence of national legislation that renders it so.

Much like the SADC Protocol on Transport Communication and Meteorology, the COMESA charter is not directly binding upon private parties in member states, but mandates the states themselves to ensure that they co-ordinate their domestic transport law with the principles it lays out.

\textbf{3.4 Scope of application}

Multimodal transport is defined in article 2 of the COMESA charter as

\begin{quote}
...the transport of goods and services from one point to another on the basis of a single contract issued by the person organising such service while such person assumes responsibility for the execution of the whole operation.\textsuperscript{75}
\end{quote}

While this definition is fairly comprehensive in its rendering of the meaning of “multimodal transport” in the COMESA charter, it is submitted that this definition is not entirely exhaustive.

Much like the SADC Protocol on Transport Communication and Meteorology, a more concise delimitation of the COMESA Charter’s multimodal liability regime can be assembled from the words employed in defining the key terms therein. Therefore, in order to establish the extent of the charter’s sphere of application, an examination of the definitions given to the key terms employed therein is indispensable. One definition in the

\textsuperscript{74} Kiplagat Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience at 446.

\textsuperscript{75} Article 2 of the COMESA treaty.
COMESA charter that is crucial for the determination of the charter’s sphere of influence is that given to the term ‘transport.’ An examination of the definition given to the term ‘transport’ would thus be a good place to start.

It has been submitted that the term ‘transport’ in the COMESA charter covers three sub-sectors namely; civil aviation, surface transport which covers road and rail and maritime and inland water transport. ‘Transport’ in the COMESA charter includes pipeline transport as well as port operations. It is apparent that transport is given a much broader meaning in the COMESA charter than in most other international instruments.

Not only does the COMESA charter define transport, it goes further to define the term ‘transport operations.’ Transport operations are defined in Article Two as:

...the provision of services for the carrying of goods and passengers for hire or reward and all matters incidental to or connected therewith.

This definition is in tandem with that given to the term ‘common carrier’ which is provided in the same article of the charter. In terms of Article Two ‘common carrier’ includes:

...a person or undertaking engaged in the business of providing services for the carriage of goods or passengers for hire or reward and operating as such under the laws of a member state...

From the provisions above, it emerges that in addition to being carriage of cargo by different modes under one contract, the carriage must be for a pecuniary benefit and must have been conducted by a common carrier in order for it to be classified as having been multimodal transport under the COMESA charter. It must be noted that unlike in the SADC protocol, multimodal transport does not necessarily have to be international for it to be recognised as such under the COMESA charter.

3.5 The COMESA Charter’s Liability Regime

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76 COMESA Regional Key Infrastructure Projects at 5.
88 Article 90.
The core purpose of the COMESA charter is to establish the structures of COMESA and specifically provide for the duties and the powers of each of COMESA’s different arms. The regulation of liability for loss in the multimodal transport of goods is therefore dealt with in a subsidiary manner in the COMESA charter. Detailed provisions on liability for loss or damage to cargo in the COMESA region are provided for in several regulations attendant to the COMESA charter, which regulations will also be discussed hereunder.

3.6 When does Liability Attach?

The provisions regulating transport and communication are set out in Chapter Eleven of the COMESA Charter.

3.6.1 Use of Unroadworthy, Unseaworthy or Unairworthy Vehicles

In addition to the COMESA charter, transit traffic in the COMESA region is regulated by the COMESA Protocol on Transit Trade and Transit Facilities. Article 1 thereof states that ‘means of transport’ includes ‘any railway stock, containers, water-going vessels, road vehicles and aircraft.’ Annex 1 further puts in place a requirement that all persons intending to engage in the operation of transit traffic be registered by the competent authority from member states before commencing business. Article 5 follows up and specifies that all means of transport to be used in transit trade should be licensed by the competent authority in member states. It goes on to set out the minimum technical requirements to be met by any ‘means of transport’ before it can be licensed for use in transit trade.

The minimum technical standards to be met by any means of transport to be used in the carriage of goods within COMESA are more clearly specified in Appendix Two of Annex

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77 Chapter 4 of the COMESA Charter.
78 Annex 1 to the COMESA Charter.
91 Article 1(a) of Annex 1.
79 Article 4(1) of Annex 1.
one of the COMESA charter.\textsuperscript{80} Although the main purpose for the technical requirements set out in Appendix 2 is to ensure that licensed vehicles are constructed and kept in a way that ensures that customs inspection is conducted with relative ease, some of these requirements also ensure that the vehicles are constructed in a manner that ensures the safety of the goods carried as well as of other transporters.

It is therefore accurate to submit that vehicles not meeting the above identified technical requirements are either unroadworthy, unseaworthy or unairworthy by COMESA standards. While non-compliance with the standards set out in the COMESA charter and its annexes is undoubtedly frowned upon, the charter does not itself impose any legal sanction for non-compliance. Legal liability will only be visited upon non-complying parties if member states put in place legislation that specifically does so.

3.6.1.1 The Road Leg

Recent statistics suggest that road transport accounts for about 90% of all cargo transported in the entire COMESA, EAC and SADC region.\textsuperscript{81} In light of this fact, it is sufficient to contend that road transport is the commonest mode of transport in the region. The transportation of goods by road in the COMESA region is provided for under article 85 of the COMESA Charter. Article 85 is made up of several undertakings by the member states to harmonise COMESA road transport regulation. One aspect which has been given much attention in the COMESA charter is the requirement for vehicle roadworthiness.

Article 85(b) and article 85(o) of the charter raise issues of particular interest when discussing the roadworthiness of vehicles utilised in transport operations in COMESA. In article 85(b), the member states make a specific undertaking to,

\begin{enumerate}
\item[\textsuperscript{80}] Regulations Relating to Technical Conditions Applicable to Means of Transport other than Porters and Pack Animals which may be Accepted for Transport of Goods Within the Common Market Under Customs Seal (Appendix 2 to Annex 1.)
\item[\textsuperscript{81}] Pearson Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area (TRALAC Working Paper No. S11WP11/2011 September 2011 at 2.)
\end{enumerate}
...harmonise the provisions of their laws concerning the equipment for and markings of vehicles used in inter-state traffic in the common market.

While in article 85(o) they undertake to,

..agree on common policies for the manufacture and the maintenance of road transport equipment.

These two articles when read together oblige member states to put in place minimum requirements for technical equipment used in the carriage of goods by road and to ensure that carriers take the necessary measures to confirm that equipment used in such carriage meet the specified technical standards. This is equipment which usually pertains to the safety of the vehicles and cargo in transit, such as safety harnesses that tie containers down or standardised fire extinguishers. The absence of such tools often render the vehicles unroadworthy.

Article 85(j) of the COMESA charter further makes reference to the adoption of “...common rules and regulations governing the dimensions (and) technical requirements...”\(^{82}\) of vehicles used in the conveyance of goods along inter-state trunk roads within the Common Market.

3.6.1.2 The Rail Leg

Most of the rail backbones in the COMESA region and Africa at large had already been built by the beginning of the First World War while a number of branches and extensions were built during the twenty-first century with only a few being built in the last forty years.\(^{83}\) Just like the state of the rail transport infrastructure discussed above, African rail transport regulation is greatly lagging behind acceptable international standards. The

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\(^{82}\) Article 85(j) of the COMESA treaty.

\(^{83}\) COMESA Sixth Meeting of Ministers of Infrastructure Responsible for Transport, Communications, Information Technology and Energy (Lusaka Zambia 19-20 October 2012 at 22.)

\(^{97}\) Article 86(2)l of the COMESA charter.
Carriage of goods by rail is provided for under article 86 of the COMESA treaty. The wording of article 86 closely follows that utilised in article 85 of the charter. The provisions requiring operational fitness of vehicles used in the transportation of goods by rail in article 86 however are rather brief and do not provide regulations in as detailed a fashion as article 85.

In article 86(2)(c) of the charter, the member states undertake among other things to adopt common safety rules for rolling stock utilised in commercial transportation by rail. Article 86(2)(k) further goes on to provide rather vaguely that member states are mandated to establish common standards for the construction and maintenance of railway facilities. No particular rail equipment is specifically singled out in this provision but it is safe to assume that the rolling and running stock as well as the rail tracks utilised in the carriage of goods are all included in the phrase ‘railway facilities.’

This is followed up by article 86(2) (l) wherein member states are obliged to, “agree on common policies for the manufacture of railway transport equipment and railway facilities.” This article is almost on all fours with article 85(o), with the only difference being that the latter regulates road transport while the former regulates transportation by rail.

3.6.1.3 The Air Leg

Carriage of goods by air in the COMESA region is regulated under article 87 of the charter. The charter, in article 87, makes a broad request upon member states to ratify international transport law instruments from “relevant international organisations” and then goes on to specify particular organisations. What this means is that the charter
mandates its signatories to ratify not only international transport law instruments from the specified organisations but instruments from similar organisations as well.

By express reference in article 87 the provisions of the policy and regulatory instruments from the African Civil Aviation Commission (AFCAC), African Airlines Association (AFRAA), the International Air Transport Association (IATA) and the International Civil Aviation Organisation (ICAO) all become part of the COMESA charter.

Article 87(3) of the charter is couched in peremptory language and it makes it mandatory for member states to adopt common policies and regulations for the international carriage of goods by air by acceding to and ratifying a number of international instruments thereon from the above-mentioned international organisations. Regulatory responsibility for civil aviation in Africa falls generally under the broad umbrella of the ICAO. This is because the Chicago Convention and its annexes form the primary international air law regulating the conduct of international civil aviation. The most noteworthy of the international air law instruments incorporated into the COMESA charter thus emanate from the ICAO.

Suffice it to say therefore, the reference by article 87 to the aforementioned international instruments effectively incorporates the liability regimes set out therein into the COMESA charter. A discussion of the liability regime set out in any of those instruments is therefore inevitably a discussion of the COMESA charter’s own liability regime.

Janic posits that the root cause of many aircraft disasters originates in maintenance workshops and in factories where vital aircraft components and systems are produced. It is therefore no surprise that article 87(1) of the charter demands the standardisation of aviation hardware as well as aircraft maintenance procedure within COMESA.

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85 African Civil Aviation Commission (AFCAC), African Airlines Association (AFRAA), the International Air Transport Association (IATA) and the International Civil Aviation Organisation (ICAO)
86 Ruwantissa The future of African Civil Aviation 31-49.)
87 African Civil Aviation Policy (Second Session of the African Union Conference of Ministers Responsible for Transport 21-25 November 2011 Luanda Angola.)
88 Janic An Assessment of Risk and Safety in Civil Aviation at 46).
Article 29 of the Chicago Convention provides perhaps the most express requirement for airworthiness under the COMESA charter. In terms of article 29(b)

Every aircraft of a contracting state engaged in international navigation, shall carry... a certificate of airworthiness.

Needless to say, an aircraft is only able to carry a certificate of airworthiness if it has been certified as such. The Chicago Convention therefore obliges all transport operators to ensure that airplanes are airworthy before taking off.

The requirement for airworthiness as laid out by the ICAO is further affirmed by Annex 1 of the Yamoussoukro declaration to which all the COMESA states are signatories. It provides that

States parties reaffirm their obligation to comply with the civil aviation safety standards and practices recommended by the ICAO.

3.6.1.4 The Sea Leg

Intercontinental transport is dominated by maritime shipping and this explains why sea transport regulation is often afforded much attention in most international transport law instruments, the COMESA charter being no exception.

Article 88 of the charter is devoted to the regulation of maritime transport and ports services. It is submitted that the COMESA treaty has one of the widest and most inclusive interpretations of ‘maritime transport.’ Post shipment activities such as offloading, trans-shipment and storage are all included as part of maritime transport. The consideration here is therefore not only limited to the seaworthiness of oceangoing vessels transporting

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89 Convention on International Civil Aviation done at Chicago 7 December 1944.
90 Article 29(b) of the Chicago Convention.
91 Article 6.12(c) OF Annex 1 to the Yamoussoukro Declaration.
92 Pedersen Freight Transport under Globalisation and its Impact on Africa at 87.
93 Article 88(k) of the charter.
cargo but also to the operation worthiness of the cargo handling equipment, storage facilities and equipment used in general operations. Article 88 requires that these be efficient and that they be maintained in perfect working order.\textsuperscript{94}

Article 88 of the charter loosely calls upon member states to take measures to "ratify or accede to International Conventions on maritime transport,"\textsuperscript{95} however it does not specify the particular conventions to be ratified. Ambiguity of this nature militates against harmonisation and in practice often results in discord.

Other than the requirement that cargo handling equipment be kept in good working order in 88(k) above and the vague requirement for the ratification of 'International Conventions,' the COMESA charter does not create a direct obligation for member countries to ensure the use of seaworthy vessels in international multimodal transport.

3.6.1.5 Inland waterway and Pipeline

Unlike most other conventions on international transport law, the COMESA charter classifies inland waterway transport and pipeline transport as independent modes of transport in article 89 and 90 respectively.

Article 89 (b) of the charter which regulates inland waterway transport obliges member states to,

\ldots install and maintain efficient cargo handling equipment, cargo storage facilities and general operations and train related manpower resources.

This section is identical to section 88 (k) discussed above. It requires that the member states put in place minimum standards for all cargo handling and storage facilities used in inland waterway transport as well as minimum standards for the maintenance thereof.

\textsuperscript{94} Article 88(k) of the charter.

\textsuperscript{95} Article 88(a) of the charter.
Should these facilities be anything below the prescribed standard, they will be unfit for operation.

Article 89 also obliges the member states to put in place minimum standards for technical equipment to be used aboard vessels to promote safety in inland water transport services. These may include, for example, communication equipment for sending and receiving distress signals.\(^{96}\) Suffice it to say, vessels operating without the prescribed technical equipment will no doubt fail to meet the charter’s standard of seaworthiness.

Article 90 on the other hand simply calls upon member states to ensure that pipeline services and facilities are maintained in good working order.\(^{97}\)

### 3.6.2 Improper packaging, loading or marking

The express requirement for minimum standards on packaging, loading and marking of cargo appears quite a lot throughout the length of the COMESA charter. Article 86(g) of the charter obliges member states to “harmonise procedures with respect to the packaging, marking and loading of goods and wagons for interstate railway transport.” Articles 89(e) and 91(b) both contain an exactly identical express requirement. This recurrence demonstrates that regardless of which mode of transport is used, the requirement for efficient loading, proper packaging and clear marking remains in place.

The requirement for proper packaging, marking and loading of cargo in the COMESA charter is not only provided for in such express terms as are discussed above. This requirement is also clearly implied in several other sections of the charter. Article 88(k) of the COMESA charter makes it obligatory for member states to ensure the installation of efficient cargo handling equipment as well as cargo storage facilities. This requirement does not only appear in article 88(k); the exact same provision is contained in article 89(b).

\(^{96}\) Article 89 (i) of the COMESA charter  
\(^{97}\) Article 90 (2) of the COMESA charter
The term ‘cargo handling equipment’ refers to material handling equipment used to trans-ship containers from ships to barges, trucks and trains and vice versa.\(^98\) It includes cranes and other loading or unloading equipment provided by the harbour.\(^99\) This equipment is crucial in ensuring the proper loading, discharging or trans-shipment of cargo from one mode of transport to the next. What articles 88(k) and 89(b) do therefore is mandate the member states to put in place minimum standards for the handling properties of such equipment so as to ensure proper loading of cargo. Use of cargo handling equipment which does not adhere to the set standard is therefore likely to visit liability upon any party doing so should loss occur as a result of improper loading.

The COMESA charter is quite particular regarding the standards for the packaging of cargo during commercial carriage. Article 91 of the charter which regulates multimodal transport provides at 91(e) that member states “shall ratify or accede to international conventions on multimodal transport and containerisation and take such steps as necessary to implement them.” Suffice it to say, cargo carried from, to or through the COMESA region must be carried in containers that meet the prescribed technical specifications.

Annex 1 to the COMESA charter defines a container as being an article of transport equipment that is inter alia fully or partially closed to constitute a compartment intended for containing goods and capable of being sealed, of a durable nature and intended for repeated use. It must also be specifically designed for the transport of goods by one or more modes of transport without intermediate unloading and reloading of its contents. Furthermore, it must be fitted with devices for easy handling, particularly for its transfer from one mode of transport to another and it must have an internal volume of at least one cubic metre.\(^100\)

Cargo packaging equipment which does not comply with the standards set out in Annex 1 as discussed in the preceding paragraph will not fit within the COMESA charter’s

\(^98\) De Koster Transhipment of Containers at a Container Terminal: An Overview at 1.
\(^99\) Buhr-Hansen Optimizing Ports Through Computer Simulation Sensitivity Analysis of Pertinent Parameters at 520.
\(^100\) Article 1 (a)-(f) of Annex 1 to the COMESA charter.
definition of container. Cargo transported in such equipment will therefore not be regarded as having been properly packaged for carriage in terms of the COMESA charter. The COMESA charter urges the member states to make the carrier liable for any loss occurring as a result of improper loading and packaging of goods.

Article 85(j) of the COMESA charter provides overload control in road carriage. It mandates member states to adopt common rules and regulations governing the maximum weight loads allowable per axle for vehicles used in interstate trunk roads within the region. Axle loads exceeding the prescribed maximums will therefore be regarded as overloading and will most likely impute culpability on the parties responsible should damage or loss of cargo occur as a result of such overloading.

According to article 116(d) of the charter:

...member states shall agree to standardise all aids to the recognition and movement of goods and their containers such as labels and transit documents.

What this section does therefore is oblige member states to standardise markings on cargo and containers for ease of identification and reference.

3.6.3 Untrained or unqualified staff

The general principle in most international transport law instruments is that the carrier, where liable, is liable for the fault or negligence of all its employees including the master and crew of any vessel.\footnote{Hellawell Allocation of Risk Between Cargo Owner and Carrier at 359.} This is a principle to which the COMESA charter is no exception. It is therefore up to the carrier to enlist only properly trained and qualified staff in the execution of its business.

Article 85(c) of the charter demands that member states adopt “common standards and regulations for the issuance of driving licences.” In other words, this section requires the member states to standardise the levels of competency required of drivers in the region before such drivers can be licensed to carry goods by road. It is therefore submitted that
the charter authorises the member states to put in place a uniform vetting procedure as well as a harmonised continuous assessment regimen.

This requirement is not only limited to carriage by road; the same principle is apparent in COMSEA air transport regulation. In a paper delivered in Abuja Nigeria, the AFCAC Director of Safety and Technical Services speaking about AFCAC’s attitude towards human resources said, “human resource is key to aviation efficiency, safety, security and regularity.” He further went on and stated that human resources development is essential for maintenance of employees’ competency and efficiency. From the foregoing it is manifest that the AFCAC frowns upon the employment of underqualified and undertrained staff in the carriage of goods by air. Because of the incorporation by reference of AFCAC regulation into the COMESA charter in article 87, the attitude of AFCAC is the attitude of COMESA.

3.7 Conclusion

The effectiveness of the COMESA charter and the COMESA Protocol on Transit Trade and Transit Facilities is contingent upon their provisions being legislated into the municipal laws of the member countries. The provisions of the charter do not directly create liability for the carrier for loss or damage to cargo that is in its care even though the carrier’s conduct is in direct contravention of the charter’s provisions.

From the foregoing discussion, it emerges however that although the protocol does not provide substantive regulations that directly bind private parties, it puts in place a network of standards and norms which, when read together, set out an identifiable liability regime for the regulation of the relationship between the MTO and the consignor or consignee of cargo. Therefore if ‘liability regime’ is to be construed in an inclusive and broad manner, the network of norms and standards that the Charter and its attendant protocols create do constitute an identifiable multimodal transport liability regime.

102 Woldeyohannes Efforts and Commitment Towards the Provision of Sustainable Aviation Training in Africaat 16.
Chapter 4 Liability for loss or damage to cargo in terms of the CEMAC Interstate Multimodal Cargo Transport Convention

4.1 Introduction

The Central African Economic and Monetary Community (CEMAC) is a monetary union created by several Central African States\textsuperscript{103} for the furtherance of regional economic cooperation in Central Africa. It is the African regional economic community with arguably the most progressive international multimodal transport regulation regime to date. CEMAC remains the only African REC that has been able to put in place an International Multimodal Transport Convention\textsuperscript{104} that not only binds the signatory member states but also private citizens operating within the region, shippers and carriers alike. It is this

\textsuperscript{103} Comprised of Gabon, Cameroon, the Central African Republic, Chad, The Republic of Congo, Equatorial Guinea

\textsuperscript{104} Hereinafter ‘the convention.’
convention that this chapter will explore with the core purpose of affirming or disproving the existence of a discernible and functional multimodal transport liability regime therein.

In order to provide an understanding of the CEMAC international multimodal transport convention, it is crucial to understand the region as well as the events that culminated in the formation of CEMAC and the legislation of the convention. Akin to the preceding chapters, this chapter will start on a brief discussion of the historical background of CEMAC and the Convention. The legal consequences attendant to the ratification of the Convention will further be examined in order to determine the extent of the Convention’s effectiveness. The core business of this chapter is however to do a detailed critique of the CEMAC Multimodal Transport Convention and its attendant regulations with particular emphasis on the convention’s liability regime.

4.2 Historical background of the CEMAC Multimodal Transport Convention

CEMAC is one of the oldest regional economic groupings in Africa. It has roots in the pre-independence economic unions created by the French in areas of central and western Africa that were under their rule. In actual fact, the CEMAC treaty can be traced back to the Union Douaniere Equatoriale\textsuperscript{105} (UDE) which was formed in 1959 by the Central African Republic, the Democratic Republic of Congo, Gabon and Chad prior to their independence from France.\textsuperscript{106}

In the period following their independence, the UDE member states resolved to maintain the UDC as a functional organisation. After Cameroon joined the union in 1961, the members met in Brazzaville in the Republic of Congo in 1964. Following a series of discussions, the members resolved to replace the UDC with the Union Douanière et Économique de l’Afrique Centrale\textsuperscript{107} (UDEAC) in what has generally come to be known

\textsuperscript{105} Equatorial Customs Union.
\textsuperscript{106} Leke History and Structure of CEMAC 2012.
\textsuperscript{107} Customs and Economic Union of Central Africa.
as the Treaty of Brazzaville. Because the UDEAC is now outdated and obsolete, this research will not dwell upon it at great length and henceforth reference will only be made to it in juxtaposition with the CEMAC treaty.

Being the direct predecessor of CEMAC, the UDEAC served as the foundation upon which CEMAC was later to be built. The Treaty of Brazzaville did not enforce a common external tariff for trade or create a monetary union between the member states.\(^{108}\) This coupled with the economic crisis that struck the region in the late 1980s to early 1990s gave UDEAC member states the impetus to create a more efficient integration initiative.\(^{109}^{110}\) As a result, the member states met in March 1994 in N'Djamena Chad and signed the Treaty of N'Djamena. In this treaty, the member states agreed to replace

\(^{108}\) de Matons Facilitation of Transport and Trade in Sub-Saharan Africa: A Review of Legal Instruments at 76.

\(^{109}\) de Matons Facilitation of Transport and Trade in Sub-Saharan Africa: A Review of Legal Instruments at 110.
the UDEAC with a new organisation called CEMAC in an attempt to rectify the UDEAC’s earlier noted shortcomings.

Even though the agreement to remove the UDEAC and establish CEMAC was arrived upon in 1994, UDEAC was officially superseded by CEMAC in June 1999. The treaty establishing CEMAC therefore officially came into force in June 1999 and on the same day the UDEAC became obsolete. Be that as it may, a number of UDEAC conventions, regulations and agreements were carried over to CEMAC under their original UDEAC qualification.\textsuperscript{111} Among the conventions carried over from the UDEAC to CEMAC, and retained in their original form with only minor modifications, was the Convention on Interstate Multimodal Cargo Transport.\textsuperscript{112} This is the treaty which forms the subject matter of this chapter.

In 1980, the United Nations put in place the Convention on International Multimodal Transport of Goods.\textsuperscript{113} This convention however failed to receive the requisite number of ratifications from the signatory countries and as a result, this convention failed to come into force.\textsuperscript{114} As a result of this failure, it became apparent to the then UDEAC member states that there existed a gap in regional and international transport law. There was no clear and definite regulatory framework for multimodal transport operations in the region. This gap prompted them to take positive rectifying measures. Tasked with fixing this lack of regulation in regional multimodal transport, the UDEAC member states met on July 5 1996 and created the Interstate Multimodal Cargo Transport Convention which exists to date. As a result, the CEMAC convention borrows a great deal from the failed UN convention of 1980.\textsuperscript{115}

\begin{footnotes}
\footnote{\textsuperscript{111} de Matons Facilitation of Transport and Trade in Sub-Saharan Africa: A Review of Legal Instruments at 109.}
\footnote{\textsuperscript{112} Convention inter-Estas de multimodal de merchandises (Act 4/96-UDEAC-611-CE-31).}
\footnote{\textsuperscript{113} UN Doc.TD/MT/CONF/16}
\footnote{\textsuperscript{114} Schommer 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] 2005) at 39.}
\footnote{\textsuperscript{115} De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa 2 ed at 111.}
\end{footnotes}
4.3 Legal effect of the CEMAC Convention

There are several legal corollaries attendant to the ratification of the CEMAC multimodal transport convention, the bulk of which are provided for in article 2 to 4 of the convention in remarkable detail. When discussing the legal effects of ratifying the CEMAC multimodal transport convention however, a brief examination of the debate on whether or not the convention is a self-executing treaty is a necessary digression.

According to Vazquez\textsuperscript{116};

\begin{quote}
At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by parliament, and a non-selfexecuting treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative implementation.
\end{quote}

According to article 2 of the convention, the essential pre-requisite for the application of the CEMAC convention is that either the place from where the goods are placed into the carrier’s care or the place to where the goods are consigned must be in a contracting country. There is no further requirement upon the member states to legislate the convention into their domestic laws. From the aforementioned it would appear that the CEMAC multimodal transport convention is a self-executing treaty.

This essentially means that after ratification, the convention will automatically take precedence over a ratifying country’s domestic law on matters falling under the convention’s scope. A ratifying country’s municipal law will only be applicable in cases that are not regulated by the convention such as licensing, security or insurance. This position is further affirmed in article 3 which states;

\textsuperscript{116} Vazquez The Four Doctrines of Self-Executing Treaties at 695
Where a multimodal transport contract has been entered into in terms of article 2, the provisions of the present convention shall apply to the contract.\textsuperscript{117}

One of the most notable features of both article 2 and 3 is the repeated use of the word ‘shall.’ This usage implies that both provisions are peremptory and therefore in circumstances falling within their ambit, compliance with them is obligatory. Article 2 and 3 demonstrate in no uncertain terms that once a dispute ensues, recourse to the CEMAC Multimodal Convention is compulsory and it applies automatically with minimum restriction when acceptance and/or delivery of cargo has taken place in one of the member states.\textsuperscript{118}

Put simply, once ratified, the CEMAC convention automatically becomes law in the ratifying country and is binding upon all parties entering into interstate multimodal transport agreements if they have satisfied the requirements of article 2. This is the legal effect of ratifying the convention.

4.4 Scope of application

Unlike the other conventions discussed in this study, the CEMAC multimodal transport convention contains express provisions clearly setting out the extent of the convention’s application. Be that as it may however, an examination of the key definitions employed in the convention remains crucial for a comprehensive discussion of the convention’s scope of application to emerge.

\textsuperscript{117} Article 3 of the CEMAC Convention.
\textsuperscript{118} De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa 2 ed at 111

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The first feature of the CEMAC multimodal transport convention that establishes boundaries within which the convention functions is the convention’s title. The whole title appears to have been constructed around the phrase ‘Interstate Multimodal Transport.’ An appreciation of the meaning of this phrase as it is used in the convention is an appropriate point of departure for a discussion of the convention’s scope.

Interstate multimodal transport is defined in article 1(1) of the CEMAC convention as being;

...the carriage of goods by at least two different modes of transport, under a multimodal transport contract from the place in a State where the goods are taken over by the multimodal transport contractor to the place designated for delivery in a different state.\textsuperscript{119}

While this definition is largely in line with the universally accepted definition of international multimodal transport,\textsuperscript{120} it adds the provision that carriage and delivery should take place in two or more countries. The convention’s title also makes specific reference to cargo transport but is silent on passenger transport. This specific mention of only cargo transport suggests that unlike the other conventions discussed earlier, the application of the convention is confined to only cargo transport and excludes passenger transport.

Arguably, the most candid delimitation of the convention’s scope is laid out in the provisions of article 2 thereof. As indicated earlier, in order for the convention to be applicable to a contract of carriage, it is required in Article Two that either the place from which the goods are picked up or the place to where they are to be delivered must be situated in a contracting state.\textsuperscript{121} Therefore by action of this article, the convention has

\textsuperscript{119} Article 1(1) of the CEMAC Convention on Interstate Multimodal Cargo Transport.

\textsuperscript{120} See definition in article 1(1) of the UN Convention on International Multimodal Transport of Goods (1980).

\textsuperscript{121} Article of the CEMAC convention
no automatic application in a situation where neither the place from where the goods are taken nor the designated place of consignment is in a contracting state. This rule is however not immutable and like any other rule of law, it has its exceptions.

The doctrine of party autonomy in international contract law dictates that private parties have the right to expressly choose the law in terms of which their rights in an international contract are to be governed. Because parties in international agreements are free to subject their contracts to any legal regime of their choosing, the application of the CEMAC multimodal transport convention can be extended to situations wherein the conditions stated in Article 2 are absent but the parties have chosen to subject their contract to the convention.

In a nutshell, the scope of the CEMAC convention’s application is as follows: The convention only regulates the carriage of goods if two or more modes of transport are used, if the carriage takes place through more than one country or if the goods are either picked up or delivered in a contracting country. It is also applicable where parties to the contract of carriage have agreed to have it apply to them.

4.5 The CEMAC Convention’s liability regime

The CEMAC multimodal transport convention is arguably one of the most expansive and elaborately drafted international regulatory instruments in Africa. Unlike the other instruments herein discussed, the convention’s provisions are couched in plain language and as a result, the convention’s liability regime is patently manifest and often does not have to be deduced or implied. This section carries out a detailed exploration of the
convention’s multimodal transport liability regime and where necessary, reference will be made to other instruments that are connected to the convention.

4.6 When does liability attach

The liability of the carrier for loss of or damage to cargo in its care under CEMAC multimodal transport convention is based on the principles of presumed fault and negligence.\textsuperscript{124} This principally means that should damage occur to cargo while it is in the carrier’s care, the carrier is automatically presumed liable for the loss. Liability will only be refuted if the carrier manages to prove the existence of a separate extraneous cause of the damage.\textsuperscript{125} This provision bears a striking resemblance to the liability of carriers by sea put in place by the Hamburg rules of 1992.

4.6.1 Presumed fault and negligence under the CEMAC Convention

The basis of liability in the CEMAC Multimodal transport convention is the principle of fault and negligence but the convention itself does not expressly define what negligence and fault are. In order to determine what implications arise from the incorporation of the principle of negligence and fault in the CEMAC Convention, this research will briefly examine the meaning of these principles at International Law.

The modern day concept of negligence was created in the English case of Donoghue v Stevenson.\textsuperscript{139} In this case, the court held that in certain contracts, negligence will be presumed even where there is no direct evidence thereof, the mere presence of damage is enough to give rise to the presumption of negligence. Multimodal transport agreements under the CEMAC Convention fall under this category of contracts because the

\textsuperscript{124} (e) of Preamble to the CEMAC Convention.
\textsuperscript{125} El Latif Liability of the Carrier in Courtesy Carriage and Gratuitous Carriage at 105.
\textsuperscript{139}Donoghue v Stevenson [1932] UKHL 100.
convention’s preamble says so. McNiece and Thornton define fault as, “active misconduct working positive injury to others,” and negligence as, “passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not
created by any wrongful act of the defendant.”126 It is submitted that this has become
the generally accepted definition of fault and negligence and it is therefore highly likely
the terms will bear the same meaning in the CEMAC convention.

This implies that in multimodal transport agreements regulated by the CEMAC
Convention, the carrier is obliged to exercise diligence when carrying out its mandate
under the carriage agreement. This assertion ties in with the provisions of Article 16(1)
of the convention which in the event of damage, loss or delay imposes upon the carrier
a duty to prove that he and/or his servants “took all measures as could reasonably be
required to avoid the occurrence and its consequences.”127 Furthermore, this approach is
markedly visible in article 31(1) which incorporates the provisions of the Brussels
Convention128 into the CEMAC convention. This convention establishes parameters for
the limitation of carrier liability and the main parameters therein are fault and negligence.

4.6.2 Interpretation of presumed fault and negligence

Because no disputes arising from international multimodal transport agreement under the
CEMAC Convention have yet been adjudicated upon, it is difficult to say with absolute
certainty how the courts will interpret fault and negligence, should such a dispute be
brought before them. Be that as it may, it is submitted that in adjudicating upon a dispute
under the CEMAC Convention, a court is highly likely to adopt the English interpretation
of presumed fault and negligence because it has come to be the globally accepted
interpretation thereof.129

126 McNiece Affirmative Duties in Tort at 1272.
127 Article 6(1) of the CEMAC convention.
128 Brussels Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, and
Protocol of Signature 10 October 1957.
129 Monti Transforming the English Negligence Law into French Administrative Law.
4.6.3 Unseaworthy, Unairworthy and Unroadworthy Vehicles

Although the convention does not itself put in place an express requirement for seaworthiness, airworthiness or roadworthiness of vehicles used in the conveyance of cargo in international multimodal contracts, several of its attendant regulations do.

4.6.3.1 The Sea leg

Additional regulations on the sea leg of a multimodal carriage in terms of the CEMAC convention are provided for by the CEMAC Merchant Shipping Code.\textsuperscript{130} In terms of Article 1 of this code, the provisions of the code are applicable to inter alia all foreign crews, passengers and vessels sailing in waters under the jurisdiction of a member state of CEMAC.\textsuperscript{131}

Article 402 of the code puts in place the requirement for seaworthiness of vessels to be employed in the conveyance of cargo in the CEMAC region. According to this article, a carrier is obliged at the beginning of each journey to act promptly and, “make and keep the ship seaworthy given the journey that he must perform and the goods that should be transported.”\textsuperscript{146} This particular provision seems to suggest that the seaworthiness of a sea-going vessel will depend on the specific details of each particular carriage especially the length of the voyage or the nature of the cargo. Therefore, it can be argued that the general definition of “seaworthiness” is of limited application hereunder.

Before a sea-going vessel can lawfully be used in the business of conveyancing cargo in CEMAC territory, it must be issued with various licences and permits.\textsuperscript{132} A safety

\textsuperscript{130} Regulation 03/01 UEAC 088-CM-06.
\textsuperscript{131} Article 1 of CEMAC Merchant Shipping Code. \textsuperscript{146} Article 402(1) (a) of the Code.
\textsuperscript{132} Most of these are listed in Article 17 of the Merchant Shipping Code.
Certificate is one such document. This certificate is only issued by the Safety Commission after it has carried out an inspection on the vessel and is satisfied that all of the requisite safety equipment is aboard.133 A list of the safety equipment referred to is provided in Article 140 of the code and it includes firefighting equipment, equipment to plug water leakages and equipment for loading and securing cargo, to mention only a few. The safety certificate will be revoked if at any time the Safety Commission satisfies itself that a particular ship has fallen out of compliance with set conditions of issuance. Suffice it to say, only a seaworthy vessel will bear a valid safety certificate.

Complementary to that submission is Article 402(1)(b) and (c) which further require carriers to “man, equip and supply the ship properly”134 as well as put and keep in good condition “all the parts of the ship into which the goods will be loaded.”135 The cumulative effect of all these articles is a requirement on carriers to ensure that any sea-going vessels provided are seaworthy and are fit for the conveyance of cargo entrusted to them.

4.6.3.2 The Road Leg

The structure of the CEMAC Road Traffic Code136 is identical to the Merchant Shipping Code discussed above. This code provides additional regulations for the road leg of the international multimodal transport agreement under the CEMAC Multimodal Transport Convention. It sets minimum standards on weight, dimensions and other vehicle characteristics137 for vehicles to be used in the road leg of multimodal carriage under the CEMAC convention.

133 Article 139 of the Code
134 Article 402(1)(b) of the Code
135 Article 402(1)(c) of the Code
136 CEMAC Road Traffic 04/01 UEAC 089-CM-06 of August 2001
137 De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa 2nd ed at 118.
Chapter 2 of this code puts in place the technical standards required of the bodies of and equipment carried aboard motor vehicles. The articles falling under this chapter\textsuperscript{138} are very detailed and they regulate many aspects of the motor vehicles involved in road carriage of cargo in CEMAC. These include lights, fire prevention and extinguishing equipment, organs and visibility equipment, fastening devices for trailers and cargo among others.

The absence of these conditions on a vehicle used for the conveyance of cargo in terms of the CEMAC multimodal transport convention would render that particular vehicle unroadworthy.

4.6.3.3 The Air leg

The CEMAC Civil Aviation Code provides additional regulation for the carriage of goods by air under the CEMAC multimodal transport convention. This code contains the principal terms allowing member states to implement the provisions of the Convention on International Civil Aviation\textsuperscript{139} even though they may not be signatories thereof. Although this code does not establish regulations ensuring airworthiness certification, it puts in place a requirement for regular maintenance of every carrier’s aircraft in authorised workshops. This ensures that aircrafts are kept in good working condition.

4.6.4 Improperly drafted multimodal transport documents

In terms of Article 6 of the CEMAC multimodal transport convention, once a carrier agrees to transport particular cargo against the payment of freight in a multimodal transport

\textsuperscript{138} Article 23 – article 65 of the CEMAC Road Traffic Code.

\textsuperscript{139} Central African Republic Executive Summary

agreement, the carrier is under obligation to issue the consignor with a multimodal transport document. At the instance of the consignor, the multimodal transport document can either be negotiable or non-negotiable.\textsuperscript{140} This document is similar in many respects to a bill of lading and only differs principally on the fact that whereas the former covers the entire journey, the latter only covers the sea leg.

The CEMAC convention binds the carrier to accurately set out specific information when it drafts the multimodal transport document referred to in the preceding paragraph. According to Article 9, the multimodal transport document will inter alia specify the quantity of the goods, i.e. the number of constituent packages or pieces making up individual units of the cargo.\textsuperscript{156} The convention further requires that the documents specify the name and address of the recipient as well as the place of delivery of the goods.\textsuperscript{157} In the same provision, the carrier is required to include information on the general nature of the goods\textsuperscript{141} and the specific routes to be taken for each leg of the journey.\textsuperscript{142}

It must be pointed out that most of the details insisted upon by the convention in Article 9 appear to be safeguards meant to prevent damage and/or loss of cargo. For instance the requirement that the place of delivery be specified prevents the carrier from delivering the wrong cargo to the wrong recipient and the requirement that the nature of the goods be specified helps the carrier and the stevedores to gauge their conduct when loading or arranging the cargo onto a vessel.

\textsuperscript{140} Article 6(1) of the CEMAC Convention.  
\textsuperscript{156} Article 9(1) (a).  
\textsuperscript{157} Article e and g.  
\textsuperscript{141} Article 9(a) (1).  
\textsuperscript{142} Article 9(m).
The consequences that flow from the carrier’s failure to comply with the requirements of Articles 6 and 9 discussed above are set out in Article 12 of the convention. In the words of Article 12, if the multimodal transport operator will

...include incorrect information concerning the goods in the multimodal transport document or fails to include the information required under article 9 or article 10, it will be responsible, without benefit of limiting liability under this Convention, for any loss, damage or expense incurred by a third party including a consignee who acted in reliance on the description of goods data in the multimodal transport document issued.\(^\text{143}\)

Put simply, the carrier will be liable for any loss suffered by any party as a result of improperly drafted multimodal transport documents issued by it.

4.6.5 Delayed delivery

Under the convention, the liability of the multimodal transport operator regarding the goods covers the period from the time it takes the goods into its care up until the time of delivery.\(^\text{144}\) Cargo is deemed to have entered into the care and custody of the multimodal transport operator from the instant they are taken from the hands of the sender or any person acting on its behalf and into the hands of an authority or third party to whom the goods are to be delivered for transportation.\(^\text{145}\) This mandate extends throughout the carriage up until the time the cargo is delivered to the consignee or when it is made available to it depending on the terms of the contract of affreightment.

The duty of the multimodal transport operator to deliver the goods to the consignee at the agreed time is not only enforceable at contract; it is further buttressed in Article 16

\(^{143}\) Article 12.
\(^{144}\) Article 15(1).
\(^{145}\) Article 15(2) (a) (i) and (ii).
of the convention. According to Article 16, the carrier is not only liable for loss suffered as a result of damage or loss of the goods entrusted to it, if it fails to deliver on the date contractually agreed upon, it will also be liable for loss suffered as a result of the delay.

Article 16 further goes on to provide that if the goods that form the subject matter of a contract of carriage have not been delivered within 90 days after the contractual date of delivery, the consignor or consignee may treat the goods as lost.\textsuperscript{146} This means that the multimodal transport operator will be liable for loss of cargo if it delays delivery for more than 90 days unless it can prove that it did all that can be expected of a diligent carrier to avoid the delay.

4.6.6 Untrained and Unskilled staff

In terms of Article 17 of the convention as read with Articles 21 and 22 thereof, a multimodal transport operator is responsible as for the acts or omissions of its servants or agents in the exercise of their functions as well as for the acts and omissions of any other person whose services it utilises in the execution of its duties under the contract of carriage. It must further be noted that the multimodal transport operator is responsible for these acts and omissions as though they were acts of its own.\textsuperscript{147}

This principle is also noticeable in the CEMAC Merchant shipping code which defines a carrier as including:

\begin{quote}
 Any person to whom the performance of the transport contract or part thereof is entrusted by the carrier\textsuperscript{148}
\end{quote}

When it enters into the contract of affreightment, the multimodal transport operator professes itself to be an expert in the business of carrying goods internationally through

\begin{footnotes}
\item[146] Article 16(2).
\item[147] Article 17.
\item[148] Article 2(53) of the CEMAC Merchant Shipping Code.
\end{footnotes}
different modes of transport. From the provisions of the convention codes discussed above, it is only fair to assume that by so doing, the multimodal transport operator gives a tacit guarantee to the consignor that all its servants and agents to whom the cargo will be entrusted throughout the carriage are competent in their respective fields of operation.

What these provisions mean is simply that the servant is an extension of the multimodal transport operator. The multimodal transport operator will therefore be liable for loss or damage to goods that results from an unskilful execution of duties on the part of any of its servants or agents.

One may also argue that the use of unskilled and untrained staff constitutes serious negligence on the part of the employer. According to Mc Niece and Thornton, “For one to use a chattel known to be defective in such a way as to create a serious risk of harm to others is palpably a misfeasance.”

4.6.7 Overloading

This principle is not given a great deal of attention in the CEMAC multimodal transport convention itself but is dealt with in much detail in several of the codes attendant to the convention.

4.7 Limitation of liability

Several multilateral international conventions regulating the transportation of people and goods specify the amounts to which the carrier, the consignor or the personnel in their

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149 McNiece Affirmative Duties in Tort at 1272.
employ may limit their liability for personal injury or damage to and/or loss of property,\textsuperscript{150} the CEMAC convention being no exception. The convention puts in place a monetary ceiling for the multimodal transport operator’s liability and the operator will not be liable for any amount exceeding the limit stipulated in the convention.\textsuperscript{151}

Article 19 of the charter was put in place particularly to provide for an acceptable limitation of liability for loss or damage of cargo in international multimodal transport agreements falling within the convention’s ambit. The carrier will however only find refuge in the provisions of Article 19 if it can demonstrate that the loss or damage to cargo did not result from an act it committed either with intent to cause such loss or recklessly with knowledge that such loss would probably occur.\textsuperscript{169} This can only be done if the carrier demonstrates that prior to the carriage, it had taken all steps expected of a prudent carrier in its position.\textsuperscript{152} These include ensuring that its vehicles are operation worthy, its employees are well trained and that the carriage is executed as per the stipulated regulation.

According to Article 19(1), the liability of a multimodal transport operator for loss or damage to cargo in its care in any circumstances will not exceed 2000 CFA francs per kilogram of the gross weight of the goods lost or damaged. This provision is followed by 19(2) to 19(6), all of which provide the technical detail on how the amounts are to be calculated, what forms an individual package as well as how the limitation will be construed in every individual leg of the journey.

\textsuperscript{150} Asser Golden Limitations of Liability in International Transport Conventions and the Current Crisis 645.
\textsuperscript{151} Article 21(3).
\textsuperscript{169} Article 22(1).
\textsuperscript{152} D’Arcy Schmitthoff’s Export Trade: The Law and Practice of International Trade at 340.
4.7.1 Concomitant causes

The convention in Article 18 furthermore provides for the apportionment of liability in cases of contributory fault or where there are concomitant causes for the loss or damages. The principle in Article 18 is that the carrier must be held liable for only that loss that can be directly linked to fault or negligence on its part or on the part of its employees. Where there is more than one cause for the loss or damage to cargo while it is in the carrier’s care, the carrier will only be liable to compensate the cargo owner for that proportion of the damage that is attributable to the conduct of the carrier or its servants and/or agents.

4.8 Timeframes

The bulk of these are provided for under Chapter 5 which deals with rights and actions. The convention stipulates timeframes for the institution of claims for loss resulting from damage, loss of cargo and delayed delivery, however because delay falls outside the scope of the research question, this section will only concentrate on loss and damage.

The convention divides damage into two general categories: Damage which is apparent and damage which is not apparent. The timeframes for a notice in cases of apparent or patent defects are shorter and more stringently enforced. Article 24(1) provides that the recipient of a damaged or incomplete shipment should give notice of such damage or incompleteness to the delivering carrier no later than one day after it has taken delivery of such goods. Failure by the consignee to give such notice within the stipulated time will give rise to a presumption that the goods were delivered to it in the condition described in the multimodal transport document.

In cases where the damage or incompleteness is not easily ascertainable however, the convention gives the consignee six days to serve the carrier with the notice specifying the
nature of the damage or incompleteness.\textsuperscript{153} Just like in cases of patent damage, a failure by the consignee to serve the carrier with the requisite notice will culminate in a presumption that the cargo was delivered in the state that is described in the accompanying documents.

This chapter provides detailed regulation on the reckoning of days provided for under the convention. In terms of Article 24(7) of the convention, if a notice period provided for in terms of the convention falls on a day which is not a business day, the notice period will be extended to the next working day. Article 24 also gives clarity on the person to whom notice is to be given. In terms of Article 24(8) notice will deemed to have been given to the carrier itself if it has been given to a servant, an agent or anyone who acts on the carrier’s behalf.

4.9 Conclusion

In summation, the CEMAC Convention creates a set of rules that directly bind private parties entering into multimodal transport agreements within the region. The convention creates rights and obligations for the contracting parties that may be enforced in any court of law applying it to a dispute. A substantial part of the CEMAC Convention appears to have been borrowed from older international treaties such as the 1980 UN Convention on international multimodal transport and the Hamburg rules of 1992. This gives the Convention a strong international law foundation.

Because it provides detailed regulations on the matters it governs, the CEMAC Convention has only a few attendant instruments that set out the finer requirements regarding vehicle dimensions, load sizes to mention only a few. The drafters of the Convention did not design it as an instrument of public law that is meant to guide policy making or as a

\textsuperscript{153} Article 24(2).
model, but as a set of rules to be used in private law. It has thus far been successful at harmonising multimodal transport law in central Africa.

Chapter 5 Comparative analysis

5.1 Introduction

In order to conduct an apposite evaluation, it is vital to start by gathering crucial data on the particular subject matter focused on.\textsuperscript{154} This is why in the preceding chapters, this research has examined and presented the key features of the liability regimes propounded in each of the African regional treaties selected for this study. The data thus far acquired has demonstrated that the international treaties that form the subject matter of this study are varied both in form and in substance. It has also been demonstrated thus far that despite the apparent differences, the instruments in question also bear quite a few connections that are worth mentioning. The purpose of this chapter is to, through a comparative analysis, shed light on the differences and similarities in the form and substance of the treaties discussed herein.

In this chapter, the essential characteristics of each of the selected treaties will be juxtaposed with the rest in order to illuminate the strengths and weaknesses of each convention. This chapter will further attempt to determine the most favourable approach to multimodal liability among those adopted in the treaties discussed herein. After the introduction, the first part of this chapter utilises various parameters to compare the international treaties under discussion. Thereafter, the disadvantages of the CEMAC Convention will be discussed briefly and then the chapter will be concluded.

\textsuperscript{154} Critical Analysis – So what does that really mean? (www.brad.ac.uk/academic-skills/)
The comparative analysis will be executed through pre-determined parameters of comparison. These parameters should make simpler the comparative analysis, help the analysis focus on relevant variables and relate them to the choices of processes and content suitable in the current attempt to harmonise African multimodal transport law.

5.2 Parameters of comparison

When carrying out a comparative analysis it is imperative that the parameters by which two or more variables may be deemed equivalent or by which one may be deemed superior to another be defined. One of the key objectives of this chapter is therefore to clearly set out the parameters by which the international instruments in question will be comparatively analysed. Under this heading, the parameters according to which the comparative analysis of the SADC Protocol, the COMESA Charter and the CEMAC Convention is to be carried out are discussed in detail.

5.3 Theoretical frameworks

In order to fully comprehend the nature of an international treaty, it is necessary to first understand its rudiments and these can be determined by examining the treaty’s theoretical underpinnings. The theoretical framework underlying the provisions of a treaty is perhaps one of the treaty’s most essential identifying characteristics. It is therefore only proper that first the parameter by which the treaties selected for this research are to be compared be the treaties’ theoretical frameworks.

International regulation of multimodal transport generally allows for two theoretical approaches. One approach entails the application of the different liability regimes

155 Higby Parameters for Comparison of Analytical Methods: Difficulties in Retail Sampling of Tobacco Products Validity of “Reference” Methods at 1.

156 Schommer International Multimodal Transport: Some Thoughts with Regard to the “Scope of application”, “Liability of carrier” and “Other conventions” in the UNICITRAL Draft Instrument
regulating individual modes of transport utilised in the multimodal carriage. The other approach disregards the individual regimes and unifies them all in one liability regime that regulates the entire length of the multimodal journey. The former approach is generally referred to as the network liability system while the latter is called the uniform liability system.\textsuperscript{157}

Each of the international treaties discussed in this research falls under at least one of the theoretical frameworks referred to above. What follows now is a discussion of the theoretical frameworks with particular focus on how one, the other or both have influenced the development of the international treaties discussed herein.

5.3.1 Network liability system

It has been said that multimodal transport agreements can generally be considered as ‘chain contracts’ for the simple reason that they are made up of several different unimodal transport contracts chained together to form one contract.\textsuperscript{158} The network liability system welds different liability regimes governing the individual legs of a multimodal carriage together so that the rules of each regime apply successively one after the other so an existing network of rules is created. For example if the road leg is governed by the CMR\textsuperscript{159} and the sea leg by the Hague-Visby Rules\textsuperscript{160} and the Air leg by the Montreal Convention\textsuperscript{161} this would be a network of rules.

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\textsuperscript{157} Schommer 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 22.

\textsuperscript{158} Erasmus University Rotterdam European Strategies to Promote Inland Navigation at 4.

\textsuperscript{159} Convention on the Carriage of Goods by Road (Geneva 19 May 1956).

\textsuperscript{160} The Hague Rules of 1924 as amended by the Protocol adopted at Brussels February 23 1968.

\textsuperscript{161} Convention for the Unification of Certain Rules for International Carriage by Air Signed at Montreal on 28 May 1999.
This is the approach to multimodal transport regulation that appears to have been adopted in both the SADC Protocol on Transport Communication and Meteorology and the COMESA charter and its supporting protocols. In both instruments, rules from international institutions such as the ICAO and the IMO are incorporated and used together. These rules govern only specified legs of the multimodal carriage for example the air leg in the case of the ICAO rules or the sea leg in the case of the IMO rules.

5.3.2 Uniform liability system

The CEMAC Convention on the other hand appears to have taken more influence from the uniform liability system than from the network liability system. In the uniform liability system, the same set of rules apply regardless of the leg of the journey at which the damage or loss occurs. International transport instruments such as the Hamburg Rules, The Hague Visby Rules and the 1980 United Nations multimodal transport law convention have all had the principle of uniform liability as a foundation.

The CEMAC convention puts forth detailed regulations on almost all of the pertinent aspects of multimodal transport including the duties and rights of parties, timeframes for claims and monetary limits of liability. What the structure of the CEMAC convention reveals is an obvious effort by the member states to congregate all the provisions they deemed ideal for a proper regional multimodal liability regime in one instrument and this is the true embodiment of the uniform liability system.

The regulation of matters considered less crucial is regulated to regulations ancillary to the convention. These include the details on the requisite vehicle dimensions, the training and licensing of employees et cetera and they have been provided for in instruments such as the CEMAC Merchant Shipping Code or the Road Transport Code. The features

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162 See article 8.5.2 and 9.1.1 of the SADC Protocol and Article 87 of the COMESA Charter.
of the CEMAC convention demonstrates that unlike the other two treaties discussed before it, the CEMAC multimodal transport convention takes influence from both the network liability system and the uniform liability, although it does so to varying extents.

5.3.3 Advantages and disadvantages

Like all legal theories, the utilisation of either a pure network liability system or a pure uniform liability system can either be advantageous or disadvantageous. Whether or not one of the systems is advantageous or disadvantageous depends on the surrounding circumstances of each case. The advantages and disadvantages of both the uniform liability system and the network liability system will now be examined.

The network liability system is based on well-known tried and tested liability regimes that are often familiar to both parties. This makes its application easy as neither of the parties will have to incur the expense of familiarising itself with a new set of rules before it commits to the transaction. Be that as it may, it has been said that, the network liability system unduly favours the carrier at the expense of the shipper. This is because it is impossible for the shipper to predict the stage of the journey at which its cargo will be damaged whereas the carrier knows the risk it runs from the beginning and it is able to plan more prudently.\footnote{\textit{Schommer 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 23.}}

The uniform liability system on the other hand "is more likely to make the convention clearer, less prone to ambiguity and therefore easier to apply."\footnote{\textit{UNCTAD The Feasibility of an International Instrument (UNCTAD/SDTE/TLB/2003/1 at 19).}} It simplifies the liability regime and at the same time gives the shipper better security.\footnote{\textit{UNCTAD The Feasibility of an International Instrument (UNCTAD/SDTE/TLB/2003/1 at 19).}} It however may also result in unnecessary additional expense and delay if one party to the transaction is not familiar with the terms of the convention to be applied.
The CEMAC Convention borrows principles from both theoretical frameworks and this makes it more comprehensive in its application than both the SADC Protocol and the COMESA Charter. Although the SADC Protocol and the COMESA Charter are flexible and allow the contracting parties to utilise several different international instruments, the benefits of this approach are lopsided and they favour the carrier at the expense of the shipper. It is therefore submitted that in the theoretical framework of the CEMAC, multimodal transport convention is to a large extent more preferable than that adopted in the other two and is better suited for African multimodal transport law.

5.4 Domestic administration and politics

The form and substance of an international accord cannot be understood in isolation. This is because the empirical outcomes of each accord are shaped by various other elements such as the socio-political. Furthermore, the connection between an accord’s form and its substance cannot be understood without looking to the domestic politics and institutions that shape its construction. It is prudent therefore for this chapter to examine the politics underlying the treaties it discussed albeit briefly.

The majority of the states that are behind the drafting of the SADC Protocol on Transport Communication and Meteorology as well as the COMESA Charter and its attendant protocols are predominantly Anglophone countries. On the other hand, all of the countries that make up CEMAC are Francophone states. Even though constitutional practice varies from one state to another, countries that share the same colonial background generally tend to adopt a similar approach to the incorporation of international treaties in their domestic jurisdictions. Whereas states in Anglophone Africa generally adopt a Common

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165 Raustiala Form and Substance in International Agreements at 582.
185 Raustiala Form and Substance in International Agreements at 582.
law approach to international treaties, the approach of Francophone Africa slants more towards the Civil law perspective of the same.\textsuperscript{166,167}

In Common law jurisdictions,\textsuperscript{168} the executive usually ratifies those international agreements that may be classified as simple whereas major treaties have to be referred to the legislature for ratification.\textsuperscript{169} Conversely, Civil law countries generally regard the ratification of international treaties as a presidential prerogative.\textsuperscript{170} A good example is in article 53 of France’s 1958 Constitution whose influence on Francophone African countries is evident in provisions such as Article 43 of the Cameroonian Constitution which vests the obligation to ratify international treaties in the president.\textsuperscript{171}

These different approaches ultimately influence the form and substance of international treaties agreed to between or among countries falling into either one of the aforementioned categories. The influence of the SADC Protocol’s Anglophone roots is apparent in the protocol’s overemphasised reference to the sovereignty of each member state.\textsuperscript{172} This attitude dominates the rest of the protocol. The SADC protocol is not a self-executing treaty. This means that it only becomes law in a ratifying country after it has been legislated by parliament into the country’s domestic law.

COMESA is similarly composed of Anglophone states and as a result, the COMESA charter and the protocols attendant to it follow the same paradigm on the ratification of

\textsuperscript{166} De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa at 1.
\textsuperscript{167}.
\textsuperscript{168} For example the UK’s unwritten constitution which requires all treaties that modify domestic law must be subjected to parliamentary approval.
\textsuperscript{169} De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa 2\textsuperscript{nd} at 2.
\textsuperscript{170} De Matons JG A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa at 2.
\textsuperscript{171} Article 43 of the Constitution of the Republic of Cameroon 96-06 of 1996
\textsuperscript{172} Second paragraph of Preamble to the SADC Protocol
international treaties. The COMESA instruments merely give guidance on the essentials of ideal regulatory frameworks, but it is really up to the individual member states to adopt the recommendation as well as the form in which the recommendations will be implemented. More often than not members implement only some of the recommendations and leave out the rest. For example, only Kenya and Uganda have implemented COMESA’s partial carrier licensing scheme. No other country has done so.\textsuperscript{173}

The Common law approach to ratification of international treaties does however have its advantages. Although it is an additional hurdle, ratification through majority consent of parliament gives an international treaty an appearance of legitimacy and cultivates the political will to uphold the principles that the treaty promotes. The Common law approach also betters the integration of international treaties into the domestic laws of ratifying countries because both ratification and legislation are executed by the legislature.

CEMAC on the other hand is wholly composed of Francophone states and their Civil law approach is apparent throughout the CEMAC convention. As stated earlier, the CEMAC convention is a self-executing treaty and does not need to be further legislated into the domestic law of a ratifying country. Once ratified, the convention automatically becomes binding and takes precedence over all the issues that fall under its ambit in the ratifying country.\textsuperscript{193}

It must be stated that the status of the CEMAC convention in the domestic jurisdictions of the states that ratify it is more preferable over that of the other two conventions. The absence of a requirement to further have the convention legislated into the ratifying

country’s domestic law means that there is less bureaucracy and the convention’s effectiveness is instant. The risk that ratifying states may renge on their obligations under the convention is drastically reduced if not entirely eradicated because the convention becomes active immediately after ratification. This risk is very much present in the other two treaties and in fact often materialises.

**5.5 Public or private law**

Public international law has traditionally been defined as the body of norms binding upon civilised states in their relations with one another while Private International Law is defined as “the body of norms applied in international cases to determine the judicial jurisdiction of a state, the choice of a particular system of law and the effect to be given to foreign judgements.” These two definitions are a valuable start to the discussion on whether or not an international instrument regulates public law or private law.

International instruments that are concerned with public law are those which are oriented towards the performance of government regulatory functions. This refers to instruments that prescribe the manner in which ratifying states are to exercise their regulatory prerogatives in their respective jurisdictions. Among the instruments under scrutiny in the current discourse, the SADC Protocol and the COMESA Charter fall squarely within this category. Both these instruments do not directly regulate private parties operating in the region but they oblige member states to direct the development of policy and law in their jurisdictions in the manner they specify.

The SADC Protocol does not make provision for the sanctioning of member states which subsequently renge on their obligation to align their domestic laws with its provisions

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174 Stevenson The Relationship of Private International Law to Public International Law at 561.
175 Stevenson J R The Relationship of Private International Law to Public International Law at 562.
176 De Matons A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa at

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without just cause. In other words, the obligations created by the SADC protocol have not been coupled with a sound enforcement mechanism. There is nothing stopping the ratifying states from flouting the treaties’ provisions and any country which feels so inclined may do so without consequence.

Unlike the SADC Protocol, COMESA Charter does put in place an enforcement mechanism. Article 7 of the COMESA Charter establishes the Court of Justice of the Common Market. The Court of justice is vested with a general jurisdiction which allows it to adjudicate upon matters referred to it, including cases wherein member states have contravened the provisions of the Charter or any other protocols of the Common market. The court’s power can only be exercised if a case has been referred to it. Furthermore, there is no real mechanism through which judgements of the court may be executed. In the end the Court of Justice is more cosmetic than effective.

The CEMAC convention on the other hand directly regulates the conduct of private parties in ratifying states as long as their activities fall within its ambit. There is no opportunity for member states to subsequently default on their word in terms of the convention because the rights and obligations that the convention creates are for private parties and are therefore much easier to enforce. The execution of the liability regime established in the convention is not at the mercy of the politicians who may at that time be in charge of the member states. It creates real rights that are enforceable in courts of law.

Although the approach adopted by the drafters of the COMESA Charter and its protocols and the SADC Protocol has its advantages, it is submitted that the approach adopted by the CEMAC states in this respect is to a large extent more preferable. The international rights and obligations created by the CEMAC Multimodal transport convention are enforceable in domestic courts and therefore are to a large extent more guaranteed than those created by the other two treaties.
5.6 Form and structure

The form and structure of an international instrument have a strong bearing on the effects of the instrument’s substantive content. International treaties fall into one of two categories, soft law or hard law. Treaties that contain vague and imprecise commitments such as the SADC Protocol and the COMESA charter are at international law often classified as soft law, whereas treaties that create legally binding obligations that are precise and that delegate authority for interpreting and implementing the law are classified as hard law. The CEMAC Convention easily becomes hard law once incorporated into the domestic jurisdiction of a ratifying country.

Hard law international treaties allow international actors to reduce transaction costs, strengthen the credibility of their commitments as well as to resolve problems of incomplete contracting. In other words, they make international transactions easier for contracting parties because the rights and obligations of each are clearly spelt out. Soft law instruments however seldom promote access to an independent judiciary and often do not establish sound mechanisms for enforcement. In matters such as the regulation of multimodal transport, hard law is more preferable.

Furthermore, an international treaty which is formulated in general terms must be complemented by detailed domestic statute if it is to be effectively enforced. Meanwhile, international treaties that provide detailed regulations require less bolstering provisions from domestic law because the international treaty already provides all the necessary regulations that put it in force.

178 Raustiala Form and Substance in International Agreements at 582.
179 Abbott Hard and Soft Law in International Governance at 421.
180 Abbott KW and Snidal D Hard and Soft Law in International Governance (http://journals.cambridge.org/abstract_S0020818300441111 at 422).
181 De Matons JG A Review of International Legal Instruments: Facilitation of Transport ad Trade in Africa 2nd ed (SSATP African Transport Policy Program at 7)
In the present discussion, the SADC Protocol and the COMESA charter provide general guidelines on the regulation of international multimodal transport law in their respective regions. They both leave it to the ratifying states to provide detailed regulations on things such as timeframes, monetary limits and jurisdiction. This means that the bulk of the regulation is left to the legislatures of the individual member states and this has often led to disharmonv in regional multimodal transport regulation. The structure of both the SADC Protocol and the COMESA Charter do not promote commitment to the principles they enunciate.

On the other hand, the CEMAC multimodal transport convention provides detailed regulation on the multimodal transportation of goods in its region. It does not create a model for member states to develop their laws around but puts in place a solid and enforceable liability regime. The structure of the CEMAC Convention is typical of the Civil law style of legal drafting. According to Tetley, “the aim of the style is to be concise, to present a single, general, harmonious phrase that by its broad detail encompasses all particular details.”

Although the COMESA Charter and the SADC Protocol create a more flexible and adaptable solution, the form and structure of the CEMAC Convention makes for a better regional transport law convention.

5.7 Registration with the UN

According to Article 102 of the UN Charter, every international treaty to which a member of the UN is party shall be registered with the UN Secretariat and published by it.183 If

183 Article 102(1) of the UN Charter.
such an instrument is not so registered, it cannot be invoked before any organ of the UN.\textsuperscript{184} Presently, none of the regional instruments discussed in this paper has been registered with the treaty section of the United Nations’ Secretariat as required by Article 102 of the UN Charter.

This means that none of the parties to the treaties discussed herein may resort to the UN or any of its arms to enforce any obligation or protect any right given under the treaties. This state of affairs is especially disadvantageous in the case of the SADC Protocol and the COMESA Charter. This is because these treaties regulate relationships between nations and it is highly unlikely that an international dispute will be subjected to the jurisdiction of a domestic court. Without the aid of the UN, enforcing a treaty of such a nature becomes particularly daunting.

Under the CEMAC convention however, the inability of the parties to utilise the UN’s enforcement mechanisms is not as big a problem as it is in the other two instruments. The CEMAC convention regulates the relationship between private parties and therefore the rights and obligations it creates are easily enforceable in a court of law in any member state’s domestic jurisdiction. Again this point demonstrates why the approach adopted by the CEMAC member states in drafting the CEMAC convention is more preferable than that adopted in the SADC Protocol and the COMESA Charter.

\textbf{5.8 Provision for timeframes and limitation of liability}

Of the three international treaties discussed in this paper, only the CEMAC Convention provides detailed regulations that directly stipulate timeframes and limit liability in international multimodal transport agreements. The other two are silent on the matter.

\textsuperscript{184} Article 102(2) of the UN Charter.
and therefore leave the provision of timeframes and the limitation of liability in regional multimodal transport to the individual member states.

5.9 Disadvantages of the CEMAC Multimodal Transport Convention

In all of the scenarios above, the approach adopted by the drafters of the CEMAC Convention has been the most favourable, however it is not without fault. As mentioned earlier, the CEMAC Convention is hard law. Hard law often restricts the parties’ behaviour in a rigid manner which often results in the parties incurring significant additional costs in international transactions.¹⁸⁵

There is an undeniable nexus between international multimodal transport regulation and international transport technology. Transportation technology is dynamic and everchanging and international transport regulation must be able to keep up with the developments that take place in transportation technology. International instruments that are as rigid as the CEMAC Convention stagnate the law and inhibit the law’s ability to adjust to the technological changes that take place in international transport law.

5.10 Conclusion

Although the SADC Protocol and the COMESA Charter create a more flexible and adaptable form of regulation which is easily customisable to the circumstances of each ratifying country, it is argued that such an approach, while effective in a more developed legal system, is ill suited for the regulation of multimodal transport in Africa. This approach does not ensure that the rights and obligations created by the international treaties that utilise it are adequately safeguarded. The risk of countries reneging on international

¹⁸⁵ Abbott Hard and Soft Law in International Governance at 422).
obligations in African continental law is a very real one and only an instrument with sound enforcing measures will suffice.

The approach adopted in the CEMAC Convention, while rigid and potentially expensive, is to a large extent the most preferable amongst those discussed. This is because it is easily enforceable and also because it regulates contractual relationships in private law. Its effectiveness is not vulnerable to the non-compliance of member states.

Whereas the SADC Protocol and the COMESA Charter function by establishing a network of standards and norms that guide the crafting and interpretation of transport law in their respective regions, the CEMAC Convention established a binding set of rules. It therefore suffices to say that although they differ in approach, all three treaties do set out identifiable multimodal transport liability regimes.
Chapter 6 Conclusion and recommendations

6.1 Introduction

This study set out to examine the selected international treaties in order to determine whether or not they establish identifiable multimodal liability regimes in their respective regions. It has also sought to determine whether or not collectively these instruments are capable of creating a well-co-ordinated continental multimodal transport liability regime and how best they can be harmonised. The discussion of the multimodal liability regimes put forward in each of the selected international treaties in the previous chapters has given rise to several issues. This chapter ties together the issues that have been raised in the preceding discussions, synthesises them and integrates them in order to arrive at appropriate conclusions.

However, before conclusions are arrived at, this chapter will present a brief summary of the main findings from the considerations put forward in each of the preceding chapters. After having briefly summarised the findings in the previous chapters, this chapter will then draw conclusions from these findings. Finally, based on the findings of the research and the conclusions deduced from those findings, this chapter will give recommendations on how best multimodal transport regulation in Africa may be improved.

6.2 Summary of chapters

The SADC Protocol on Transport Communication and Meteorology was discussed in Chapter Two. It emerged that the SADC Protocol was intended as a policy document and a guide around which the signatory states are to develop inter alia their domestic
transport laws. It enjoins the ratifying states to suit their domestic legislation in a manner which promotes the principles it establishes and prohibits them from acting in a manner that is contrary thereto. However, the SADC Protocol does not bind private parties and its terms hold no sway in the protection of rights and enforcement of obligations arising out of multimodal transport agreements in the region. Therefore the SADC Protocol does not create a truly enforceable multimodal transport liability regime.

Furthermore, the SADC Protocol does not put in place a solid mechanism for ensuring that the states that ratify it uphold their obligations under it. Its success is therefore dependent largely on the will of the signatory states to implement it. This has been the SADC Protocol’s greatest criticism.

Chapter Three of this treatise deals with the COMESA Charter and its subordinate protocols and much like the SADC Protocol, the COMESA charter and its protocols are instruments of policy rather than law. The COMESA Charter, as read with the COMESA Protocol on Transport, amount to an agreement among the member states to ensure that their domestic laws are developed in conformity with the charter’s stipulations.

As opposed to the SADC Protocol, the COMESA Charter does somewhat try to establish an enforcement mechanism for its provisions and those of the protocols that are attendant to it. It makes provision for a Court of Justice for the Common market.\textsuperscript{186} There is however no system that guarantees the enforcement of the judgement handed down by the court. Therefore although the COMESA Charter does establish an enforcement mechanism, the mechanism it puts in place is not enough to guarantee that the member states are compelled to uphold their obligations in terms of the COMESA Charter and its protocols.

\textsuperscript{186} Article 7 of the COMESA Charter
The CEMAC Multimodal transport convention is discussed in the fourth chapter. This treaty is very different from the other two instruments discussed in the paper. It is a self-executing treaty which does not have to be bolstered by additional domestic regulations before it can be effective. As opposed to the other two treaties, the provisions of the CEMAC convention establish a very detailed set of regulations that provide for almost every aspect of international multimodal transport. Furthermore, unlike the other two treaties the CEMAC Convention directly regulates the conduct of private parties whose transactions fall within its ambit.

Because it is not concerned with the conduct of states, the effectiveness of the CEMAC Convention is less susceptible to non-compliance on the part of ratifying states. The CEMAC Convention is enforceable in any court of law hearing a dispute arising out of a contract that falls under the convention’s ambit. Whether or not the court will enforce the rights and/or obligations created by the convention is beyond the control of any of the governments. The CEMAC Convention therefore creates a solid enforcement mechanism for the rights and obligations it creates.

6.3 Final conclusions

The SADC Protocol on Transport, Communication and Meteorology, the CEMAC Multimodal Transport convention and the COMESA Charter and its supporting protocols have demonstrated that there are generally two approaches to regulating liability for loss or damage to cargo in multimodal transport agreements in Africa. On the one hand, there is an indulgent approach under which a model is created and member states are enjoined to develop their policy and laws around it but no real sanction is stipulated for non-compliance. This is the approach that the SADC Protocol and the COMESA Charter generally fall under. On the other hand, there is a stricter approach which creates a detailed set of regulations that automatically become law which is binding upon the
private citizens of a member state upon ratification. This is the approach adopted by the drafters of the CEMAC Convention.

The former approach, while preferable in advanced legal systems such as in the European Union because it is flexible and can easily be customised to the individual needs of a ratifying state, is to a large extent unsuitable for Africa. It is difficult to monitor the effectiveness of, as well as to enforce compliance with, an international instrument that adopts the indulgent approach of multimodal transport regulation. As has happened with SADC Protocol and the COMESA Charter, each member country may interpret the international instrument differently and therefore integrates it and executes it differently.

This research has shown that it is more effective to adopt the stricter approach when regulating liability for loss or damage to cargo in multimodal transport agreements in Africa. A good number of the countries that are signatory to both the COMESA Charter and the SADC Protocol, which both utilise the lenient approach, have failed to implement many of the provisions suggested by the two treaties without just cause and therefore the treaties have largely failed to achieve their intended objectives. Meanwhile, the CEMAC Convention which adopts the stricter approach has to a large extent been effective as an instrument of regional multimodal transport regulation because its effectiveness is not dependant on the compliance of the member states, but on that of the individual parties involved in the multimodal transport agreement.

Compliance with international obligations is easier to enforce on private parties than on sovereign states. Even where a regional regulatory instrument empowers them to do so, African Regional Economic communities have tended to shy away from imposing or endorsing punitive measures against states that renege on their international and even regional obligations because of their amplification of the doctrine of sovereignty. As a result, regional treaties that create rights and obligations for states, as opposed to individuals, have to a large extent been rendered ineffective in the prevailing environment. Regional treaties that create rights and obligations for individuals are
therefore better suited for the regulation of any subject matter in Africa, loss and damage of cargo included. The CEMAC Convention regulates the rights and obligations of private citizens and is therefore easier to enforce than the other two instruments selected for this research.

Regional instruments that are specifically devoted to the regulation of particular subject matters more often provide clearer, focused and more effective regulation, as compared to regional instruments that provide for more than one subject matter. The SADC Protocol and the COMESA Charter are concerned with more than just the regulation of liability for loss or damage to cargo in multimodal transport agreements in their regions.

They both also deal with formulation of policy in matters that are not even remotely connected to multimodal transport, for instance communication and meteorology in the case of the SADC Protocol. The CEMAC Convention on the other hand is solely concerned with multimodal transport regulation. As a result, whereas the former treaties are somewhat indistinct and unclear in their regulation, the CEMAC Convention is to a large extent focused and clear.

6.4 Recommendations

It is submitted that moving forward, the most viable solution to the current problems plaguing African multimodal transport regulation is the creation of a single harmonised liability regime. It is also submitted that in order to eradicate fragmented and disharmonised regulation of multimodal liability in Africa, co-operation among states should be more multilateral than bilateral. International instruments on the regulation of multimodal transport liability entered into amongst African states should constantly be reviewed to ensure that they keep up with international trends and technological developments in international transportation of goods.
The harmonisation of multimodal transport regulation in Africa can best be achieved through the utilisation of the uniform liability system of international regulation. African states must draw from the already existent non-binding regimes and create a set of regulations that are to be wholly ratified by member countries and that bind private parties entering into multimodal transport agreements within the member states’ jurisdictions. African states must also ensure that the harmonised legal regime they create is enforceable judicially against the private parties concerned.

Not only must African states harmonise the law regulating multimodal transport, they must also ensure that the interpretation of the law is harmonised as well. In order to achieve this, it is recommended that the states should create a unified repository wherein all decided cases on African multimodal transport disputes are to be reported. This is a strategy that has been successfully employed by numerous international organisations such as UNCITRAL in harmonising various aspects of International Law and is therefore highly likely to benefit the harmonisation of multimodal transport law in Africa.

One of the main reasons that the regulation of liability for loss or damage to cargo in multimodal transport agreements in Africa remains fragmented is because each regional economic community creates its own liability regime organisations such as COMESA and are based on a conglomeration of bilateral agreements. African transport law is dominated by bilateral treaties. It is recommended that international cooperation amongst African states be more multilateral than bilateral. Multilateral arrangements involve more countries and are more likely to further harmonisation than bilateral arrangements which are often difficult to enforce.

International multimodal transport law has often been castigated for being stagnant, antiquated and incompatible with the dynamic practices of the international transport industry. Multimodal transport law in Africa suffers from the same vice. In order to prevent this problem, it is recommended that African states should not only create a
harmonised liability regime, they should also ensure that they meet on regular intervals to review the harmonised regime and ensure that it evolves to reflect the current state of international transportation.
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