Explanatory notes to MULTIDOC 95

The significant increase in the volume of goods carried under multimodal transport arrangements which has taken place during recent years and the fact that more and more shipowners find it necessary to offer through transport services covering the entire movement of goods on a "door-to-door" basis has underlined the need and the importance of uniformity in the rules governing multimodal transportation, particularly in the absence of an international convention which applies such rules by legislation.

Already in the early stages of containerisation in the 1960's an attempt was made to develop such rules under the auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the Comité Maritime International (CMI), resulting in what became known as the Draft TCM Convention. The Convention, however, never gained the acceptance needed to enter into force.

The lack of an international convention applicable to multimodal transports was seen by a number of industry parties as a disadvantage in as much as the commercial parties offering these modes of transport would have to provide their own documents suitable to their needs, with the apparent risk that a multitude of differing multimodal transport documents might be developed.

As a result, the International Chamber of Commerce (ICC), as the representative of all interests concerned with international trade and its finance, issued in 1973 the so-called ICC Uniform Rules for a Combined Transport Document in the hope that these would secure some uniformity by their incorporation into the various multimodal transport documents. The Rules, which were subsequently revised in 1975 to take into account the practical difficulties of application concerning the multimodal operator's liability for delay, did provide some uniformity in the area of multimodal transport as they formed the basis of the most widely used multimodal transport documents such as the COMBIDOC Combined Transport Document issued by BIMCO in 1977 and the FIATA (The International Federation of Freight Forwarders' Associations) combined Transport Bill of Lading.

In the late 1980's, however, pending the entry into force of the United Nations Convention on International Multimodal Transport of Goods 1980 (The MT Convention) the Committee on Shipping of UNCTAD instructed the UNCTAD Secretariat, in close co-operation with other industry parties, to elaborate provisions for multimodal transport documents based on the Hague Rules and the Hague-Visby Rules and the existing ICC Uniform Rules for a Combined Transport Document. This initiative resulted in the joint UNCTAD/ICC Rules for Multimodal Transport Documents which became effective as from 1 January, 1992, effectively superseding the previous ICC Uniform Rules.

The UNCTAD/ICC Rules are available to international trade for worldwide application and will be acceptable to the international banking community, being fully compatible with the ICC Uniform Customs and Practice for Documentary Credits (UCP 500) which became effective 1 January, 1994. Like their predecessor, the

UNCTAD/ICC Rules (not having the force of law) will be given legal effect by their incorporation into the multimodal transport contract evidenced by the MT document and they contemplate, as did the ICC Uniform Rules for a Combined Transport Document, that the issuer is to be responsible for the entire period of transport.

Against this background, BIMCO's Documentary Committee agreed that a small Sub-committee composed of experts within the field of multimodal transport should be established with a view to consider a possible revision of the COMBIDOC Combined Transport Document to make it compatible with the UNCTAD/ICC Rules. A sample of the revised edition of the COMBIDOC, is the final result of the work of the Sub-committee. Considering the fundamental revision of the COMBIDOC and the fact that it has been made compatible with the UNCTAD/ICC Rules for Multimodal Transport Documents, it was officially adopted by BIMCO's Documentary Committee in May, 1995 under the following title:

MULTIMODAL TRANSPORT BILL OF LADING issued by The Baltic and International Maritime Council (BIMCO), subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481).

In conformity with the UNCTAD/ICC Rules, the Multimodal Transport Bill of Lading, now code named MULTIDOC 95, has been developed in a negotiable as well as a non-negotiable form. As will be seen, the non-negotiable form, code named MULTIWAYBILL 95 is, in addition to the UNCTAD/ICC Rules, also subject to the CMI Uniform Rules for Sea Waybills. It appears in a light blue colour, clearly cross stamped "Non-Negotiable" and it is advised that whenever there is no specific need for a negotiable document members should make use of this form.

In addition, members attention is also drawn to the following important information: The P & I Clubs are generally not prepared to cover cargo liability if the lost or damaged cargo has been carried on terms less favourable to the Carrier than the Hague-Visby Rules (save where the contract of carriage is on terms less favourable than the Hague-Visby Rules solely because of the incorporation of mandatorily applicable law). Accordingly, whilst some clubs are prepared to provide cover for carriers under through transport arrangements, this may be contingent upon the fact that the individual club approves in advance of the particular contract of carriage.

Although the UNCTAD/ICC Rules, which now form the basis of the MULTIDOC 95 are based on the Hague and Hague-Visby Regimes, there are a few elements in the Rules which could be said to be less favourable than the Hague or Hague-Visby Rules. Thus, realising that there may be no coverage by right it is strongly advised that whenever members wish to make use of the MULTIDOC 95 they make prior consultation with their P & I Club to clarify the position.

There is also reason to underline that the MULTIDOC 95 is an alternative document to the COMBICONBILL Combined Transport Bill of Lading, as revised 1995, and is recommended to members only if they are asked by their customers to issue a multimodal transport document subject to the UNCTAD/ICC Rules.

Basic Character of MULTIDOC 95

As may be recalled, the COMBIDOC Combined Transport Document adopted the so-called "network approach" from the ICC Uniform Rules for a Combined Transport when the stage of transport where loss or damage occurred is known. The solution adopted in the MULTIDOC 95" concerning the basis of liability by and large corresponds to the COMBIDOC solution.

As regards limitation of liability, it is specifically stated in sub-clause 12(d), which corresponds to the UNCTAD/ICC Rules, that when the loss or damage occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory law would have provided another limit of liability, if a separate contract had been made for the particular stage of the transport, then the limit of liability shall be determined by reference to the provisions of such convention or mandatory law.

Therefore, the tradition of the "network formula" from the COMBIDOC has basically been continued for the purpose of the MULTIDOC 95.

Special Observations

In revising the COMBIDOC, but without amending its original structure, the Sub-committee has recognised the importance of complying with its terms of reference, i.e. to make the document subject to the UNCTAD/ICC Rules, but at the same time – appreciating that they are a set of general rules to be converted into specific clauses – to adjust certain provisions, prepare additional clauses or make clarifications so as to prepare a multimodal transport document in its own right.

Face of the Document

Except to reflect the fact that the MULTIDOC 95 now appears in a negotiable and non-negotiable version, few changes have been made to the face of the document. However, as will also be seen, the signature box has been amended in order to meet the requirements of Article 26 of the UCP 500 according to which the multimodal transport document must on its face appear to indicate the name of the carrier or multi-modal transport operator (MTO) and to have been signed or otherwise authenticated by:

- The carrier or MTO or a named agent for and on behalf of the carrier or MTO, or
- The master or a named agent for and on behalf of the master.

Accordingly, the name of the MTO should be stated on the dotted line appearing immediately after the words "multimodal Transport Operator as Carrier".

As will also be seen, a so-called "Right of Control" provision has been included on the face of the MULTIWAYBILL according to which the consignor shall be entitled to transfer the right of control of the cargo to the consignee.

Despite the fact that the right of control provision is already provided for in the CMI Uniform Rules for Sea Waybills, the Sub-committee was of the opinion that specific attention should be given to this provision as it is a requirement for the consignor to exercise the option to transfer right of control of the cargo that this be noted on the waybill. This could, for instance, be done in the following way: **I, the Consignor, (named in the Consignor Box on the face of this waybill) hereby transfer the right of control of the cargo carried under this waybill to the Consignee (named in the Consignee Box on the face of this waybill).**

The Sub-committee did not find it necessary to state specifically on the face of the MULTIWAYBILL that, where the consignor has exercised his option to transfer right of control to the consignee, then the consignee shall be the only party to give the carrier instructions in relation to the contract of carriage. This clearly follows from the underlying CMI Uniform Rules for Sea Waybills.

Standard Terms and Conditions

Clause 1 – Applicability As will be seen, the provisions of the MULTIDOC 95 shall apply whether there is a unimodal or a multimodal transport contract involving one or several modes of transport. In other words the MULTIDOC 95 can also be used for port-to-port shipments, for instance, to cover situations when a transport which was originally intended to be performed as a multimodal transport may turn out to be performed as a single transport mode only.

Clause 2 – Definitions In line with other BIMCO standard documents, the MULTIDOC 95 contains a set of definitions. As the definitions are identical to those of the UNCTAD/ICC Rules it may be appropriate to refer to the explanation of the Rules as they appear in ICC Publication 481.
The definition of "MT document" includes negotiable and non-negotiable transport documents. The paper document may be replaced by electronic data interchange messages.

The definition of "Carrier" is included in order to distinguish any performing carrier (not identical to the MTO) from the MTO.

The definition of "Delivery" only deals with the situation at the place of destination. Since the shipper controls the handing over of the goods for carriage, and problems seldom occur in practice to determine the beginning of the carrier's period of responsibility, it is sufficient to refer to the case when the goods are delivered to the consignee and third parties subsequent to carriage.

In addition to the definitions mentioned in the UNCTAD/ICC Rules, a definition of "Merchant" has been included to cover inter alia the Consignor and Consignee. In those clauses which only apply to one of those persons, the term "Consignor" or "Consignee" has been specifically referred to.

Clause 3 – MTO's Tariff This Clause incorporates the terms of the MTO's tariff to the extent that it is not inconsistent with the terms and conditions of the MULTIDOC

95.

Clause 4 – Time Bar The time bar of nine months as provided for in the previous COMBIDOC has been maintained although it differs from the one year period provided for in the Hague and Hague-Visby Rules and the national laws regulating the transport of goods by sea in many countries. However, it has been felt that, as far as multimodal transport is concerned, it would be reasonable to cut the twelve months to nine months to enable the MTO to have three months in which he himself may lodge a counter-claim against the actual carrier without being ousted by the time bar.

Clause 5 – Law and Jurisdiction The Sub-committee involved in the drafting of the MULTIDOC 95 felt that the provisions of the COMBIDOC, which contained a number of options for where the claimant could instigate court proceedings against the MTO, could give rise to a number of impractical jurisdictions being involved in a particular case. It is therefore clearly stated that disputes arising under the MULTIDOC 95 shall be determined at the place where the MTO has his principle place of business.

It should be observed, however, that some jurisdictions by law do not recognise limitations in the claimant's right to instigate court proceedings at other places than where the MTO has his principal place of business.

Clause 6 – Methods and Routes of Transportation Sub-clause (a) merely states what would apply in accordance with general background law, whereas sub-clause (b) is a clarification of events special for the carriage by sea.

Clause 7 – Optional Stowage In Sub-clause (a) the words "or similar articles of transport used to consolidate goods" have been added to the enumeration of containers, transportable tanks, flats and pallets. This has been done to cope with technical innovations which might appear in the future as regards how to consolidate goods.

Sub-clause (b) provides the MTO with a right to carry containers, trailers and transportable tanks on deck without clausing the multimodal transport document in which case the usual bill of lading liabilities apply.

Clause 8 – Delivery of the Goods to the Consignee The provisions of this Clause as they now apply to the MULTIDOC 95 and the MULTIWAYBILL 95, respectively, are compatible with those in the UNCTAD/ICC Rules Article 4.3 There is, however, one exception to the effect that Clause 8 of the MULTIWAYBILL takes into account that, unless prohibited by applicable national law, the consignor or someone else who may have acquired the consignor's or consignee's right of control, may change the name of the consignee.

Clause 9 – Hindrances, etc. Affecting Performance Sub-clause (a) sets the general standard, providing that the MTO has to use reasonable endeavours to complete the transport and to deliver the goods at the place designated for

delivery. What is "reasonable" has to be decided by reference to the facts of each individual case.

Clause 10 – Basis of Liability Sub-clause (a) provides that the period of responsibility includes the whole time when the MTO is in charge of the goods. The particular problem as regards when the goods are to be deemed delivered at destination is now covered by the definition of "Delivery".
Sub-clause (b) contains an important provision as regards the MTO's possible liability for delay in delivery. Liability for delay is not expressly referred to in the Hague-Visby Rules and, in some jurisdictions, it is uncertain whether the Hague-Visby Rules will actually cover such delay.

Sub-clause (b) provides that the MTO shall only be liable for loss following from delay in delivery if the consignor has made a declaration of interest in timely delivery which has been accepted by the carrier in writing. Where the MTO has accepted liability for delay, it could in some jurisdictions be said that there is an increase in the MTO's exposure of liability compared to what would apply in accordance with the Hague-Visby Rules. This may cause the relevant P & I Club to refuse providing cover under MULTIDOC 95 in a particular event, unless the MTO has obtained prior approval from his P & I Club to this effect.

The UNCTAD/ICC Rules contain a provision converting pending delay into a right for the claimant to treat the goods as lost. In accordance with these Rules, sub-clause 10(e) provides that if the goods have not been delivered within 90 days following the date of delivery as established by sub-clause (d), the claimant may treat the goods as lost in the absence of evidence to the contrary.

Clause 11 – Defences for Carriage by Sea or Inland Waterways As will be seen, this Clause provides for the basic liability regime to be compatible with the Hague-Visby Rules where there is carriage of goods by sea or inland waterways and damage takes place during such carriage. The two main defences available to the MTO under the Hague-Visby Rules, i.e. the defence of nautical default and fire, are specifically mentioned.

Whilst the relevant Article in the UNCTAD/ICC Rules makes no reference to the additional defences normally applicable to the carrier under the Hague-Visby Rules Article 4.2(c) to (p) the Sub-committee decided to make reference to these defences. However, the Committee realised that listing all the defences specifically would burden the text too much. Therefore, a general reference to Article 4.2 (c) to (p) of the Hague-Visby Rules had been made.

The Sub-committee considered it a matter of course that, in the event the Hague Rules and not the Hague-Visby Rules apply to a transport by sea, the carrier would be entitled to invoke the Hague-Visby Rules Article 4.2(c) to (p) which of course corresponds exactly to the Hague Rules.

In line with the Hague-Visby Rules all defences provided to the MTO are subject to the overriding requirement that when loss or damage has resulted from

unseaworthiness of the vessel, the MTO must prove that due diligence has been exercised to make the vessel seaworthy at the commencement of the voyage.

Clause 12 – Limitation of Liability In accordance with the UNCTAD/ICC Rules sub-clause (a) follows the limits of liability as set out in the Hague-Visby Rules, i.e. 666.67 SDR per package, or 2 SDR per kilogramme whichever is the higher. (In the event the US COGSA applies to the sea carriage the statutory limit of USD 500 per package or customary freight unit applies).

If the multimodal transport does not according to the contract include carriage of goods by sea or inland waterways the limit is 8.33 SDR per kilogramme (See sub-clause 12(c)). In accordance with the UNCTAD/ICC Rules sub-clause 12(c) provides for no additional unit limitation.

As will be seen, sub-clause (b) includes the so-called "container formula" meaning that the claimant can use the units inside the container for limitation purposes provided that they have been enumerated in the multimodal document.

As mentioned in the introductory notes, sub-clause (d) reintroduces the "network approach" in so far that if loss or damage can be localised to one particular stage of the multimodal transport where, according to an applicable international convention or national law another limit of liability would apply, then such loss or damage shall be determined by reference to such convention or national law. The words "In any case" have been added to clarify that sub-clause (d) supersedes the provisions of sub-clause (a) and sub-clause (c).

As mentioned earlier, liability for delay is not expressly referred to in the Hague-Visby Rules and therefore some jurisdictions, although applying the Hague-Visby Rules, may impose upon the owners liability for delay. Sub-clause (e) ensures that, in those circumstances, the MTO shall also have a right to limit such liability. Sub-clause (g) makes it clear that the MTO shall not be able to limit his liability in circumstances when loss or damage has been caused by his personal act or omission done with the intent to cause such loss or damage.

It is suggested that the same acts committed by any of his servants or agents for whom the MTO is responsible would not affect the MTO's right to limit his liability as such servants or agents would in the circumstances act beyond the scope of their employment (See sub-clause 10 (c)).

Clause 13 – Assessment of Compensation This Clause reflects the principles of international conventions and national laws dealing with matters of assessment of compensation.

Clause 14 – Notice of Loss of or Damage to the Goods Again this Clause reflects the UNCTAD/ICC Rules. A distinction has been made between apparent and non-apparent loss or damage as appearing in sub-clause (a) and sub-clause (b), respectively. In the former case, notice should be given in writing to the MTO when the goods were handed over to the consignee. In the latter case, notice should be

given within six consecutive days after the day when the goods are handed over to the consignee. In case of late notice, the MTO would have established a prima facie case to the effect that it is presumed that no loss or damage has occurred unless the contrary could be proven by the claimant. The Clause does not deal with actions by the MTO against the consignee and therefore no period for notice of such claims has been provided.

Clause 15 – Defences and Limits for the MTO, Servants, etc. This Clause purports to protect the servants and agents whose services the MTO has made use of in order to perform the multimodal contract and thereby indirectly the MTO himself by providing that the same protection which applies to the MTO shall also be afforded to such servants and agents whether claims made are founded in contract or in tort (See sub-clause (c)).

The above-mentioned provision is by and large the same as the "Himalaya" Clause found in bills of lading and other transport documents. However, it is uncertain, at least in some jurisdictions which apply Anglo-American law, whether the protection given under the "Himalaya" or similar provisions also applies to independent contractors as distinguished from servants or agents. In multimodal transport arrangements this is of particular importance as the MTO often engages various sub-contractors in order to perform the multimodal contract. Therefore, with a view to protect such sub-contractors from claims from third parties it is stipulated that in entering into the multimodal contract the MTO does so not only on his own behalf but also as agent or trustee for such persons.

However, in order to protect the MTO from recourse actions made against him by a sub-contractor, a so-called "Circular Indemnity" Clause has been incorporated (sub-clause (b)) which prescribes the merchant to undertake in his contract with his customers that no claim be made against the sub-contractors. Should a claim nevertheless be made as a result of which the sub-contractor claims against the MTO then the merchant shall indemnify the MTO against all consequences thereof.

Clause 16 – MTO's Responsibility This Clause corresponds with Article 3 of the UNCTAD/ICC Rules and similar provisions in the previous COMBIDOC. In the explanation to Article 3 of the Rules it is stated as follows:

"With respect to the responsibility for information in the MT document, the expression in Article 3.4 of the Hague-Visby Rules, "third party", has not been used since the governing factor is whether or not the consignee has relied and acted upon the information and not his position as a "party" or "third party" in relation to the MTO. In particular, such an expression may be misleading where the seller has handed over the goods to the carrier, and the buyer under an FOB or an FCA contract has concluded the contract of carriage. In such case, the FOB/FCA-buyer – although relying on the information in the MT document – could not be considered a "third party".

The second sentence of the Clause provides for the so-called Doctrine of Estoppel which excludes the carrier from proving (once the bill of lading has been transferred

to a third party) that the goods did not correspond with the information in the bill of lading at the time such goods were received for shipment or loaded on board the vessel. In some jurisdictions, for instance, in Scandinavia, the waybill consignee is not afforded the protection of the Doctrine of Estoppel as is a consignee under a bill of lading.

However, in accordance with BIMCO's Documentary Committee's decision to make the MULTIWAYBILL 95 subject to the CMI Uniform Rules for Sea Waybills (which was in conformity with a decision to make the BIMCO GENWAYBILL Non-Negotiable General Sea Waybill subject to the CMI Rules), the Sub-committee agreed to provide expressly in the MULTIWAYBILL that "As between the carrier and the consignee the information in the MT Waybill shall be conclusive evidence of receipt of the goods as so stated and proof to the contrary shall not be permitted, provided always that the consignee has acted in good faith."

Clause 17 – Consignor's Responsibility Also this Clause corresponds to the UNCTAD/ICC Rules and what was provided for in the COMBIDOC. The Clause emphasizes the importance of the consignor providing accurate details of the goods to the MTO at the time such goods are to be taken in charge by the MTO by making the consignor liable under the principle that he is deemed to have guaranteed to the MTO the accuracy of all information given with respect to the goods and, in particular, their dangerous character. The consignor's duty to indemnify the MTO against loss resulting from wrong information in these respects is not limited to cases where inaccurate information is given but also applies when the information is inadequate. The consignor remains liable even if he has assigned his rights under the multimodal transport contract to someone else by transferring the document. The fact that the MTO may proceed against the consignor does not in any way prevent him from holding other persons liable as well, for instance, under the principle that anyone who tenders goods of a dangerous nature to the MTO under the applicable law could become liable in tort.

Clause 18 – Return of Containers This Clause, which is to be found in a number of private forms of bills of lading or multimodal transport documents, is meant to take into account the increasing problem of containers, pallets or similar articles of transport received by the consignor or consignee for packing and unpacking not being returned to the MTO in the same good order and condition as when handed over or which may not be redelivered at all. The Clause operates as follows:

Sub-clause (a) sets out the basic responsibilities of the consignor and the consignee to redeliver within the time prescribed in the MTO's tariff, containers, pallets or similar articles of transport to the MTO in a clean state and in the same good order and condition as when received, normal wear and tear excepted.

Sub-clause (b) (i) deals with the loading side of the transport, i.e. the consignor's liabilities as a result of his non-compliance with the basic responsibilities under (a). As will be seen, the Clause seeks to extend the coverage of the contract of carriage as regards the consignor's responsibilities for containers, pallets or similar articles of transport during the period between handing over to the consignor and

the return to the MTO of such articles, which would otherwise not be covered by the contract of carriage.

Sub-clause (b) (ii) deals with the discharging end of the transport, i.e. the consignee's liabilities as a result of his non-compliance with the responsibilities under (a). It should be noted, however, that there may be no legal basis to extend the coverage of the contract of carriage to a third party, such as the consignee, who has no contractual link with the MTO or the carrier. Since, therefore, it may prove to be difficult, at least in some jurisdictions, to hold the consignee responsible, not being a party to the contract of carriage, sub-clause (b) (ii) holds the consignor and the consignee jointly and severally liable for non-compliance with the provisions of (a).

Clause 19 – Dangerous Goods This Clause sets out in clear terms that the consignor shall comply with mandatory national law or international conventions as regards shipment of goods of a dangerous nature.

In accordance with the Hague-Visby Rules Article 4.6, it provides the MTO with various remedies to dispose of the dangerous goods in the event the consignor fails to provide the necessary information on such goods and of which the MTO is unaware. In addition, the consignor shall be liable for and hold harmless the MTO for all loss, damage, delay or expenses that may arise from the carriage of dangerous goods.

Clause 20 – Consignor-packed Containers, etc. This Clause provides for the basis of liability as regards FCL packed containers. In line with common practice the MTO accepts no responsibility for loss or damage caused by the negligent filling, packing or stowage of the container or caused as a result of the contents being unsuitable for carriage in containers.

Clause 21 – Freight This Clause provides the MTO, without having to consult the Merchant, with a right to inspect the contents of containers, trailers or similar articles of transport for the sole purpose of verifying the freight basis.

Clause 22 – Lien This Clause is self-explanatory.

Clause 23 – General Average As will be seen and in accordance with other general average clauses, general average shall be adjusted at any port or place determined by the MTO. Also reference is now made to the York-Antwerp Rules 1994 which have been recommended for use by the Comité Maritime International as soon as practicable after 31 December, 1994.

Clause 24 – Both-to-Blame Collision Clause This is a standard clause which forms part of almost every standard document issued by BIMCO.

Clause 25 – U.S. Trade This Clause provides for the application of the U.S. Carriage of Goods by Sea Act, 1936 throughout the carriage by sea and the time that the goods are in the actual custody of the MTO or of any sub-contractor whose

services he makes use of in order to perform the multimodal transport. As already mentioned, in the event the U.S. COGSA applies, the MTO shall not become liable for loss or damage to the goods in an amount exceeding USD 500 per package or customary freight unit.

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