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Global transportation liability regimes, procurement impacts and responsive contract structures

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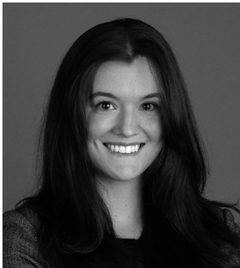
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Abstract
Global transportation and logistics is an essential supply chain function in the 21st century. Enterprises must do well to perform or procure this function to achieve other objectives of their supply chain strategy. No sourcing of raw materials, finished goods, inventory management or customer delivery can occur without transportation and logistics. Variance due to the practical risk of loss or damage as goods transit broad geographies is one of the greatest challenges in effectively doing so. For example, harm to goods while in transit directly affects inventory levels as well as production and sale capacity. This paper examines the dominant international conventions for multimodal traffic and comparative US laws for variance in potential monetary recovery in cargo claims. It concludes with a concise summary of those liability regimes together with the contracting practices that often assist in managing global procurement across disparate international laws.

Keywords
transportation, logistics, international law, cargo claims, carrier liability, master services agreement (MSA)

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INTRODUCTION
The domestic and international transportation of goods necessarily involves complex, even conflicting, legal regimes governing the liability of carriers and other service providers. International conventions such as the Hague-Visby Rules and the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) standardise liability across borders for particular modalities. These serve to protect buyers and sellers of goods by defining transportation and logistics provider responsibilities, the ways in which claims may be filed for loss, and the monetary recovery if loss is proven. Domestic laws may have a similar effect for losses that occur during movements within a single jurisdiction. In the US,

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domestic surface transport is regulated by federal statutes such as the Carmack Amendment (Carmack), which sets forth specific rules and liability limits for rail and motor carriers. Understanding these various legal regimes directly affects the way enterprises procure transportation and logistics services, the contracts under which those services are purchased, the process for claims adjudication and the liability for loss, damage or delay of goods.

SURFACE-BASED LIABILITY SCHEMES

The principal surface transportation modalities are road and rail transport. For surface-based transportation providers, liability and its limitations are determined by the location where loss occurred as well as the specific mode. For instance, the CMR Convention and Carmack both govern liability for motor carriers internationally and in the US, respectively, while the Convention Concerning International Carriage by Rail (COTIF) and Carmack's rail provisions govern liability for rail carriers.

The CMR Convention

The CMR Convention is an international treaty that governs the transportation of goods by road across international borders. Under the CMR Convention, motor carriers are generally liable for the loss, damage or delay of goods occurring during transport if the loss, damage or delay was due to their fault or negligence. The CMR Convention stipulates that a motor carrier is not liable if it can prove that the loss, damage or delay resulted from specific exempted circumstances such as inherent defects in the goods, acts of war or natural disasters.

In addition to addressing the scope of liability, the CMR Convention also establishes specific limits of liability for motor carriers in the event of loss, damage or delay of goods during transit. The motor carrier's liability is limited to 8.33 Special Drawing Rights (SDR) per kilogram of gross weight of the lost or damaged goods. This monetary limit provides a standardised measure to determine compensation but also reflects a compromise between the interests of motor carriers and shippers. Additionally, the CMR Convention allows for higher liability limits if agreed upon in the contract of carriage, providing flexibility for parties seeking greater assurance.

A number of countries have adopted the CMR Convention including many European Union (EU) member states, as well as other countries such as Switzerland, Turkey and Russia. The US and Canada, however, are not parties to the CMR Convention, demonstrating that a fair portion of the globe and some significant road transportation regions still opt to use their own laws and conventions to govern liability of surface transportation.

Carmack and motor carriage

The US applies Carmack to motor carrier liability, which is found under statute at 49 U.S.C. § 14706. Under Carmack, motor carriers in interstate commerce are generally liable for the full value of the goods lost or damaged unless they can prove that the loss or damage results from specific exceptions, such as an act of God, public enemy, authority of law or inherent vice in the goods. These exceptions are asserted as defences to a claim. They are similar to those available to motor carriers under the CMR Convention. Another similarity

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is that loss caused by the shipper's own negligence or improper handling is excepted.

A motor carrier's liability for loss or damage under Carmack is uncapped, although parties will often agree to limitations in exchange for favourable service rates (for example, US$100,000 per truckload of cargo). In addition to allowing liability limits, Carmack also includes provisions for addressing claims, disputes and delays. Carriers are required to handle claims promptly and are given a specified period to resolve them, ensuring that shippers have a clear process for seeking redress in the event of loss or damage.

COTIF

Liability for international rail carriers is governed by COTIF. Rail carriers are liable for loss or damage to the goods between the time of acceptance and delivery, as well as for loss and damage resulting from time during which the transit period was exceeded.[1] As with the motor carrier-based liability regimes, certain exceptions exist under COTIF for rail carriers to relieve them of liability. For example, a rail carrier may be relieved of liability if the loss, damage or delay resulted from a fault or order of the person entitled to relief, by the inherent vice of the goods, or by circumstances which the rail carrier could not avoid and the consequences of which it was unable to prevent. The rail carrier is also relieved of liability when the loss or damage arises from the special risks inherent in specified circumstances. In addition, COTIF also applies limitations of liability based on the goods carried or circumstances of the loss, including completion of administrative formalities.[2]

While COTIF is not globally adopted, its rules have been adopted by the following countries: the EU, Afghanistan, Albania, Algeria, Austria, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece; Hungary, Iran, Iraq, Ireland, Italy, Jordan, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Morocco, The Netherlands, North Macedonia, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and the UK. COTIF does not have force of law or any other binding authority in US domestic commerce and accordingly, it does not apply to US cross-border transportation with Mexico and Canada, which are also not member countries.

Carmack and rail carriage

As with motor carriers in the US, liability for domestic rail carriers is governed under Carmack's provisions found under statute at 49 U.S.C. § 11706. Rail carriers providing transportation in the US or on a shipment to an adjacent foreign country, either Canada or Mexico, are liable for the actual loss or injury to property caused by the receiving or delivering rail carrier or any other rail carrier over whose line or route the property was transported in the US or from a place in the US to a place in an adjacent foreign country under a through bill of lading (BOL). As with motor carriers under Carmack, rail carriers may avoid liability when they can demonstrate that the loss or damage resulted from an act of God, public enemy, authority of law, inherent vice in the goods or shipper's

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own negligence or improper handling. Also as with motor carriers, rail carriers can limit liability through tariffs, BOL or under contract subject to the actual value of the goods.

AIR-BASED LIABILITY SCHEMES

As with surface-based carriers, the liability of air carriers can depend on the location of the transportation. The Montreal Convention (Montreal) is the leading force in determining liability for air carriers in international travel. Although the US has adopted Montreal for international transportation, the convention does not apply to domestic air traffic which is instead subject to common law.

The Montreal Convention

Montreal is a multilateral treaty that governs the international liability for air carriers. Montreal is a two-tier liability system allowing shippers to recover with a near strict liability regime for claims up to a SDR threshold and a negligence standard for claims over that threshold. Air carriers are subject to Montreal's liability standards between the place of departure and destination as well as while the air carrier is being embarked or disembarked. Although Montreal applies a near strict liability, air carriers can seek exemptions if they can prove damage was caused by events outside the control of the air carrier and could not have been avoided even with the air carrier's exercise of due care.

As with other liability regimes, air carriers can also avoid liability for damage to cargo caused by an act of war, armed conflict, inherent defect, quality, vice, defective packaging by a third party or act of public authority. Montreal sets a limitation that the air carriers' liability for cargo loss or damage shall not exceed 26 SDR; however, the parties are free to contract to set a recovery amount that exceeds 26 SDR. Montreal also sets out a claims period for damaged goods of 14 days from the date of receipt and a claims period for delayed goods of 21 days from the date of delivery.

The Montreal Convention has been ratified by over 130 countries including all EU member states, UK, US, Canada, China, Mexico, Brazil, India, etc. The convention applies to international carriage in which the departure and destination nations are parties. If one country is not a party and the other is, Montreal will cover carriage to the extent there is an agreed-upon stopping place in another country, regardless of whether that country is a signatory. In the US, federal common law is used to determine air carrier liability. Parties will often use Montreal when contracting for even domestic air cargo service. US courts do recognise the liability regime when it is invoked under contract.

US federal common law

US federal common law governs cargo liability for domestic flights. Air carriers are liable for cargo loss when the loss occurs due to the air carrier's failure to exercise reasonable care in handling the cargo. As with Montreal, the air carrier's liability applies unless the loss resulted from factors beyond its control, such as inherent defects in the cargo or natural disasters. Most air carriers in the US seek to limit their liability for domestic flights through an air waybill, which is typically US$0.50 per pound, unless the shipper demands a higher amount. Unlike Montreal, however, US federal common law and judicial precedents

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provide additional guidance on interpreting liability terms and resolving disputes related to cargo damage.

OCEAN-BASED LIABILITY SCHEMES FOR CARRIERS

As for surface and air-based transportation, several factors can determine the liability scheme that applies to a particular ocean-based movement, but the Hague/Hague-Visby Rules (the Rules) and the Carriage of Goods by Sea Act (COGSA) are the two prevailing regimes that govern liability for cargo loss, damage or shortage that may occur in international trade and US trade.

The Hague/Hague-Visby Rules

The Rules are an international convention applicable to contracts of carriage that are covered by a BOL or similar document of title related to the carriage of goods by sea where: (1) the BOL is issued in a contracting nation state; (2) the carriage is from a port in a contracting nation state; or (3) the contract contained in or evidenced by the BOL provides that the Rules or the legislation of any contracting nation state governs the contract. Liability under the Rules will attach if the ocean carrier fails to make the ship seaworthy, properly man, equip and supply the ship, or properly and carefully load, handle, stow, keep, care for and discharge the goods from 'tackle to tackle', which means liability attaches to the carrier from when the goods are loaded on board the carrier's vessel until they are discharged from the vessel.

Unless one of the Rules' 17 enumerated defences apply, the carrier is liable for loss or damage to cargo in an amount not to exceed 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of the goods that were lost or damaged, whichever is the higher. Under the Rules, shippers must assert a claim or bring suit with respect to the goods carried within one-year statute of delivery or the date when they should have been delivered. The Rules apply to contracts of carriage by ocean where the port of loading and the port of discharge are in different countries and both countries are contracting parties to the Rules.

COGSA

COGSA applies to contracts or carriage between shippers and ocean carriers for the international carriage of goods by sea (except for live animals) to or from foreign ports and US ports.[3] A carrier's liability under COGSA is from 'tackle to tackle' and predicated on: (1) failure to exercise due diligence to make the vessel in all respects seaworthy and to properly man, equip and supply the vessel; (2) fault; or (3) negligence. Unless one of COGSA's eight enumerated defences apply, the ocean carrier is liable for loss or damage to cargo in an amount not to exceed US$500 per package or per customary freight unit if the goods are not shipped in packages.

COGSA pre-empts the application of other liability regimes for contracts of carriage in the US foreign trade, but the Harter Act or Carmack (see, supra at Section II.A) will apply to contiguous and non-contiguous domestic trade, including coastwise shipping, inland water shipping and movements in interstate or intrastate commerce. Shippers have a one-year statute of limitations from the delivery or the expected delivery of the goods for a shipper to file a lawsuit for cargo loss, damage or shortage under COGSA.

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WAREHOUSEMAN LIABILITY

Warehousing (including storage and fulfilment) services is one of the oldest forms of business in the supply chain industry. Unlike transportation, there is no international convention that governs the accepted liability of a warehouseman. This places warehousing services almost entirely in a commercial realm as opposed to a heavily regulated environment. It also provides warehousemen an opportunity to force shippers and depositors alike away from the harsh liability regimes governing transportation providers into more disadvantageous evidentiary circumstances upon occurrences of loss, particularly absent substantial evidence of where loss or damage occurred in the supply chain. Rather, the regime for liability pertaining to lost, stolen, damaged or destroyed goods in storage requires consultation not only with the jurisdiction where the goods are stored but also industry custom in that jurisdiction.

Liability regime

While the distinctions between common law, civil law or mixed jurisdictions cannot be understated, the law pertaining to loss or damage to goods in custody or in bailment strikes a similar chord between jurisdictions. In short, absent contrary terms accepted by a depositor, a warehouseman's liability is singularly focused on fault. In common law jurisdictions, including the vast majority of the US, fault is determined under the theory of negligence. That is, a depositor must establish a warehouseman's duty of care relating to the goods, breach of that duty of care, causation and damages. In the US, this proposition is also codified in each state's commercial code. Simply, a warehouseman is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Conversely, a warehouseman is not liable for damages that could not have been avoided by the exercise of that care.

The establishment of a liability regime based on fault negates the common misconception among depositors that a warehouseman is an insurer of the goods in its possession. Practically, this means that warehousemen are customarily not responsible for loss, damage or destruction of goods caused by acts of God or other events typically described as 'force majeure' absent showing a fault.

Limitations of liability

The limitation of that liability is not set by convention but rather by industry practice and commercial negotiation. Certain organisations, however, publish standard warehousing terms in their jurisdictions that help establish market expectations; notably, those include the Dutch Warehousing Conditions in Europe and the Standard Contract Terms and Conditions for Merchandise Warehouses issued by the International Warehouse Logistics Association in the US. Practically, the limitation of liability will depend materially on the value of the goods in storage, the strength and sophistication of the respective parties, and the availability of either the depositor's or the warehouseman's applicable insurance policies to cover the loss or damage.

COMPARATIVE VARIANCE OF LIABILITY REGIMES

The stark differences between the compulsory liability regimes for global

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transportation and logistics services are clear. They directly affect the financial exposure for harms to goods and, due to modal variance, loss to a single item may be far more valuable when occurring under one mode relative to another. Consider for example the international conventions that apply recovery in a SDR/kg metric: ocean service yields 2 SDR per kg; road service yields 8.33 SDR per kg; rail service yields 17 SDR per kg; and air service yields 26 SDR per kg. These standards are different from domestic US liability regimes and, just as under conventions, US standards vary across mode. Variance also exists in the form of claims notice periods, limitations on the time in which one may file lawsuit, the requirements for proving a claim and the exclusions available to service providers in denying claims.

A comparative summary is shown in Table 1.

The practical effect of these variances is meaningful for supply chain management professionals around the world. The cost of service, necessity of first-party insurance cover and standard operating procedures for filing of claims are each influenced by these legal regimes. Consider that these establish the industry standards of minimum liability, although each allow parties to contract for higher standards. This means that high-value cargoes may receive higher levels of liability but at higher service rates. The bargained exchange between higher liability and reasonable rates of service may mean that first-party insurance is actually more cost-effective than paying for a carrier's liability. Insurance cover will also respond differently in the event of a claim, since the standards applied will be under the policy terms rather than exclusions available under law applicable to the carrier's service. Even in the earliest event of a claim, the fact that a Montreal claim may need to be filed within 14 days while a Carmack claim must be filed within nine months challenges the standard operating procedures around receiving shipments, inspection of count

TABLE 1 Comparative summary of select global liability regimes

Mode	*Liability Regime*	*Limitation of Liability*	*Jurisdiction*
Surface (carriage)	CMR Convention	8.33 SDR per kg	Europe
Surface (carriage)	Carmack	Negotiated limitation unless a higher value is declared by the shipper	US
Surface (rail)	COTIF	17 SDR per kg, although typically determined by the goods and circumstances of the loss	Europe
Surface (rail)	Carmack	Negotiated limitation unless a higher value is declared by the shipper	US
Air	Montreal Convention	26 SDR per kg	International
Air	U.S. Federal common law	Typically, US$0.50 per pound, unless a higher value is declared	US
Ocean	Hague-Visby Rules	666.67 SDR per package or unit, or 2 SDR per kg of gross weight of the goods	International
Ocean	COGSA	US$500 per package/freight unit	Between the US and foreign ports
Warehousing	No universal convention – based on fault	Freely negotiated between the parties; sample terms exist in certain jurisdictions	Industry custom exists in each jurisdiction

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and condition and delivering notice to the responsible service provider.

GLOBAL CONTRACT STRUCTURES

Global transportation and logistics services can amount to some of the largest expenses, and even the largest single contracts by spend, for enterprises with high traffic volumes. Among mature buyers and sellers of goods, the common practice is to contract for services rather than buying on the spot market under *ad hoc* supplier paperwork. Contracting under one's own templates is both permitted under the applicable legal regimes and also a sensible approach to supply chain management. It allows the buyer of the transportation or logistics services to tailor terms to company policy and the precise needs of its inbound or outbound supply chain. The structure used in approaching global and domestic service can also vary widely based upon each particular use case.

Some procurement fact patterns benefit from single-use contract structures specific to a particular mode, geography, facility or other unique practical application. For example, it is common that ocean carrier service contracts stand alone due to the degree of regulation for that mode and historic industry practice. An ocean contract can be incorporated in a master services agreement (MSA), although doing so may be cumbersome for negotiation and contract administration over its life cycle. In the US, the same can be said for rail carrier agreements. Sensitive cargoes such as the transportation of temperature-controlled goods or bulk hazardous materials, hazardous waste or dangerous goods are other common examples. The degree of regulation for those movements and the need for special handling often require targeted terms not suitable for broad-based contracts.

Other procurement fact patterns instead benefit from more complex contract structures. It is increasingly common to go to market with regional or global MSAs that establish the enterprise-wide terms for transportation and logistics services in a largely mode-agnostic fashion. The immediate benefits in doing so include achieving harmony of terms across the portfolio of service providers and facilitating ease of adding or removing services, modes and regions subject to the MSA. Those unique expressions of service often take the form of scopes of work (SOW), service schedules and similar contractual tools that can be added to or removed from an existing MSA. Ancillary services may be easily added as well, such as supply chain consulting or web-based transportation management system licences. Enterprises with high degrees of vendor management often add service level agreements (SLAs) or key performance indicator (KPI) terms under the MSA.

Managing disparate liability regimes naturally emerges as a key textual challenge when drafting, implementing and managing bids under complex contract structures. Table 1 signals a few ways in which tranches of service, liability and geography may be developed. The most frequently used solution is to prepare SOW or similar contract tools on a mode-specific basis. Deploying an air cargo SOW will naturally use different liability levels, claims periods, insurance standards and rating from a road transport SOW. Even within a single mode, however, there may be variance. If one chooses to use an ocean carriage SOW, which is less common and yet achievable, then the traffic to and

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from the US will often express liability in terms of COGSA while traffic under the same SOW outside of the US trades will be subject to a separate liability term invoking Hague-Visby. Finally, this variance within a single mode and other factors may drive separate SOWs for particular mode and geography pairings. Deploying one SOW for US motor carriage and a separate SOW for EU road transport is often a more streamlined approach to purchasing those services and managing liabilities due to the disparate legal regimes and industry customs.

Any seasoned practitioner will recognise that there is no one-size-fits-all supply chain. The same principle stands true for supply chain contracting. Despite the factually intensive nature of transportation and logistics procurement, particularly on a global scale, the various applicable legal regimes allow for negotiating most terms and for developing new and novel structures in support of strong administrative practices. Those factors may weigh in favour of singular contract templates on a service, mode or geographic basis (or even, as already mentioned, on a facility-by-facility basis) or they may instead weigh in favour of a global transportation and logistics MSA style approach. Firmly understanding the industry-specific legal landscape across the geographic territories is the first step in unlocking the creativity required for dynamic contracting structures.

CONCLUSION

The legal regimes that developed over centuries in the transportation and logistics sectors are as varied and nuanced as the modes and geographies they serve. Each mode, whether air, ocean, surface or warehousing, operates under distinct legal liability regimes, often influenced by international treaties, national regulations and industry practices. By clearly defining liability terms and conditions in transportation contracts, shippers and carriers can mitigate risks, ensure proper coverage and establish clear protocols for claims and compensation.

This contractual clarity helps parties navigate the complexities of different liability schemes, enhances predictability and protects interests in the event of loss or damage. It can be accomplished with confident global contracting strategies that lower friction when negotiating during bid processes, allow for harmony of terms and facilitate ease of updating services. Those professionals responsible for transportation and logistics functions of their enterprise-wide supply chains are limited only by imagination and the practicalities of what may be negotiable when going to market.

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(2) *Ibid.*, Art. 25, 26, 30, 32, 33, 40, 42, 43 and 45 for the separate and applicable limitations of liability.

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