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# Determining the Liability for Carriage of Goods by Road in West Africa – Can OHADA Uniform Rules on Transport be a Foundation?

Damilola Osinuga  
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*Economic integration has been on African leaders' lips since the Organization of African Unity was created in 1963. The justification for this is not implausible — to promote regional trade and ensure economic prosperity. On January 1, 2020, African nations opened their borders to duty-free trade of goods and services under the continental free trade agreement. Transport of commodities is without a doubt essential for market access and intra-African trade. The low purchasing power of the populace and the geography of the continent, which is made up of a sizable number of landlocked provinces, favours road transportation. However, in West Africa, there is no uniform legal framework for determining liability for goods carriage by road. This article investigates whether the OHADA Uniform Rules on Transport can serve as a foundation for a West African liability regime.*

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## I. Introduction and Statement of Problem

Transport is an essential human activity globally. It is crucial to every economy and plays a major role in the development of any economy. It can be said to be indispensable (Delgçay Murat & Kdogan Kağan, 2011). Transport creates market access and valuable links between regions and economic activities (Delgçay Murat & Kdogan Kağan, 2011). Inadequate transport limits a country's ability to maximize the use of its natural resources and distribute food and distribute other finished products. It also helps to integrate local regions. (Edith Aghadiaye Olamigoke & Adebayo Adewunmi Emmanuel, 2013) It is rudimentary to state that transportation includes carriage by air, rail, sea, and road.

Numerous pieces of literature, points to the fact that carriage of goods by sea is by far the most popular mode of transportation for trade between countries (89.8%) (Llano, De la Mata, Díaz-Lanchas, & Gallego, 2017). However, for door-to-door trade, road transport is the most convenient, particularly when multimodal transport such as ship-to-door or door-to-ship is involved.

To be competitive at the global level, Africa as a continent need to ensure the seamless movement of goods within the continent and its sub-regions. Accordingly, the cost and quality of road transport services is critical to competitive trade.

The establishment of the African Continental Free Trade Area ("AfCFTA") is an opportunity for Africa to improve intra-Africa trade. Conversely, the African continent and its sub-regions need an efficient transport system to facilitate efficient cross-border

movements and consequently achieve the goal of reducing the barriers that affect the seamless movement of goods and people. To further lay credence to the importance of transport to AfCFTA and regional trade in Africa, at the 31<sup>st</sup> Ordinary Session, on July 1<sup>st</sup> and 2<sup>nd</sup> 2018, Nouakchott, Mauritania, transport was listed as one of the top five priority areas adopted by the African Union for initial commitment (African Union, 2018).

Road transport dominates African trade. According to a World Bank study (World Bank, 2017), the trade value of about US\$200 billion is transported through road networks connecting strategic trade corridors such as deep-sea ports and economic hinterlands (Sinate, 2018). It is estimated that road transport accounts for 80 to 90% of passenger and freight traffic (Commonwealth Network, 2020).

Road transportation is the economy's lifeline in the local regions (Oladipo O. Olubomehin, 2012). Research shows that the use of roads for the carriage of goods and passengers is of more significant influence on the economy than it used to be. (Chartres John, 1989).

One important issue to address in the issue of road transport in Africa is the inadequate uniform legal framework for determining parties' liability in the event of loss or damage arising from a contract of carriage of goods by road. The lack of certainty as it relates to its legal liability is the primary source of inefficiencies in the cross-border road transport system (Etiyel Chibira, 2020). The lack of certainty of law in this area could lead to increased non-tariff trade cost such as litigation, legal opinion and enforcement of a judgement. There is, therefore, a need to eliminate all non-tariff barriers (including legal uncertainty relating to carriage of goods by road) to achieve the aim of the AfCFTA (*to create one African market*).

This paper seeks to discuss the importance of road liability in achieving regional integration. The paper discusses the current lack of a liability regime, and its impact on economic and regional integration in the Economic Community of West African States (ECOWAS) region. The paper submits that the Organisation pour l'harmonisation en Afrique du Droit des Affaires ("OHADA") existing uniform rules for carriage of goods by road can be a foundation to achieving certainty in relation to carriage of goods by road in West Africa. The paper will also be a contributor to the discussion of a relatively recent academic interest area, i.e., road liability in West Africa regional integration. The available literature on the subject in West Africa is very limited and scarce.

This paper will restrict its scope to West Africa. This is based on the premise that the African Union ("AU") stated that Regional Economic Communities ("RECs") will serve as building blocks to the African Economic Community and urged the RECs and the AfCFTA Secretariat to collaborate in the implementation of the AfCFTA Agreement.<sup>11</sup>

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<sup>11</sup> See the Resolution of the Assembly Of The African Union Thirteenth Extraordinary Session (On The AfCFTA) 5 December 2020 Johannesburg, South Africa Virtual Platforms (Zoom).

Accordingly, RECs will take steps *to* deepen their own integration and promote continental integration initiatives.<sup>12</sup>

## II. Importance of Road Transport to Trade in West Africa

The role of Africa in world trade is marginal, having a meagre share of 2.4% in global exports (Schmieg, 2016); yet, trade is central to development in Africa. (Luke, 2020) African leaders and stakeholders recognize that trade is a proven potent engine for economic growth and development. Hence the reason that there have been many efforts to liberalize trade on the continent by effective regional integration.

Regional integration and the growth of the internal market can play an essential role in the development of Africa. Trade within Africa has unique growth potential. Research shows that intra-African exports have increased rapidly in the last few years by 25%(Economic Commission for Africa, 2012); accordingly, regional trade offers more significant potential to economic development and growth (Schmieg, 2016).

Despite the potential for growth that regional trade has, there are trade barriers that have affected Africa's economy. These challenges ranges from fluctuating commodities prices, high cost of transportation, lack of infrastructure, technological challenges, and high tariffs among member countries. For example, the cost of transportation is three times higher than the cost of transportation in other African regional economic communities (Organization for Economic Cooperation and Development & World Trade Organization, 2015).

The above analysis underscores the fact that whilst regional trade is a priority in comparison to international trade, there are muddles confronting seamless regional trade. This underlines the importance of establishing of the Continental Free Trade Area ("CFTA")<sup>13</sup>.

To allow deeper integration, in January 2012 at the 18<sup>th</sup> African Union Summit of African Heads of State held in Addis Ababa, fifty-four African Union member states agreed to establish the CFTA.<sup>14</sup> A framework agreement for the establishment of the AfCFTA was signed by 54 nations,<sup>15</sup> making it the world's largest free trade area into force.<sup>16</sup> The Agreement finally came into force on January 1, 2020. The AfCFTA was

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<sup>12</sup> Proximity of nations increases the potential for trade amongst them therefore the Acqis principle is a welcome idea.

<sup>13</sup> Before the establishment of the CFTA, there has been negotiation for an African Economic Community since the adoption of the Lagos Plan of Action in 1980. The efforts were then consolidated by the Treaty Establishing the African Economic Community (Abuja Treaty) which was adopted on 3 June 1991 and entered into force on 12 May 1994. Finally, in 2012, African leaders agreed to establish the CFTA.

<sup>14</sup> The AfCFTA has been negotiation for an African Economic Community since the adoption of the Lagos Plan of Action in 1980. The efforts were then consolidated by the Treaty Establishing the African Economic Community (Abuja Treaty) which was adopted on 3 June 1991 and entered into force on 12 May 1994.

<sup>15</sup> As at September 2021, 39 African Countries have deposited their instrument of ratification. (Tralac, 2021).

<sup>16</sup> As at July 7, 2019, 54 countries have signed the signed the ACFTA leaving Eritrea as the only nation out of not to sign up to the deal.

signed to boost trade, boost economic growth, and strengthen integration among African countries. The pact is expected to boost intra-African trade by making Africa a single market, harnessing the immense potential of its 1.2 billion people and its cumulative GDP of over US\$3.4 trillion. The United Nations Economic Commission for Africa ("UNECA") estimates that the implementation of the Agreement could increase intra-African trade by 52% by 2022 (Economic Commission for Africa, African Union and African Development Bank, 2017) (compared with trade levels in 2010) and double the share of intra-African trade (currently around 13% of Africa's exports) by the start of the next decade.

Article 5 of the Agreement establishing the African Continental Free Trade Area stipulates that the existing RECs will serve as building blocks and will continue to exist. Further credence is given to this by Article 19(2) of the Agreement establishing the AfCFTA<sup>17</sup> and Article 8(2) of the Protocol on Trade in Goods.<sup>18</sup> The implication is that AfCFTA envisages a situation whereby RECs achieve full regional integration, which will be the foundation for achieving a collective, integrated African society. Accordingly, efforts must be made by existing RECs to achieve regional integration. Moreover, research has shown that countries with close borders and geographical proximity are likely to trade more with each other because of connectivity and market access (Eddie Norton & Michael Rolfe, 2021).

It is expected that with AfCFTA in place, road transport will take a dominant position, mainly because the quality and density of the road network are better than the available railway network in Africa, particularly in West Africa. Road transportation brings flexibility, speed, convenience, and adaptability (Poliak, Tomicova, Cheu, Fedorko, & Poliakova, 2019).

There is no doubt that carriage of goods by sea is a popular means of transportation, but the burden on maritime transportation is overwhelming and there is a need to look for an alternative (Imran Ur Rahman, Buddhi Prasad Sharma, & Enitilina Fetuu, 2020). Furthermore, as earlier discussed, road transport is used a lot as a sub-transport segment.

Regional roads are a good measure to increase production and economic activities within the regions. They can lead to better outcomes and socio-economic development of the regions and thus the country (Chandra & Thompson, 2000).

In West Africa, road transport is also the most used sub-sector of transportation. Although, in comparison to other regions in Africa, West Africa has a relatively well-developed regional road network (Ranganathan, 2011). However, with the potentials of

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<sup>17</sup> "Notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves".

<sup>18</sup> "Notwithstanding the provisions of this Protocol, State Parties that are members of other RECs, which have attained among themselves higher levels of elimination of customs duties and trade barriers than those provided for in this Protocol, shall maintain, and where possible improve upon, those higher levels of trade liberalisation among themselves".

intra-African trading and the possibility of a surge in demand for door-to-door delivery and multimodal transportation, there is no gainsaying that road transportation is essential to regional integration and transit facilitation.

Twenty five percent of West African countries are landlocked and depend on coastal countries for access to regional and international markets. The expansion of the transport infrastructure and development of transportation is of fundamental importance for the movement of people and goods, but also for the promotion of intra-regional trade, value chain development, and commercial/economic opportunities (World Bank, 2021).

Organizations like the World Bank have taken concerted efforts to assist West African countries to improve regional connectivity and ensure seamless mobility (World Bank, 2018). The African Development Bank ("AFDB") has also played a significant role in enhancing connectivity. The AFDB has supported projects like (1) Dakar – Bamako – Ouagadougou – Niamey Corridor; Dakar – Abidjan Corridor; (2) Abidjan – Lagos Corridor;(3) Lome – Ouagadougou Corridor; (4)Tema – Ouagadougou Corridor.(African Development Bank, 2019) This reiterates the importance of connectivity of roads to West African trade.

For AfCFTA to realize its full potential, all bottlenecks that may affect the seamless use of road transport must be reduced or, where possible, eliminated. Some of the efforts that should be taken concertedly include but are not limited to (Etiyel Chibira, 2021):

- ❖ Network quality and capacity improvement through intelligent transport systems
- ❖ Accelerated review, simplification and harmonization of corridor, transit agreements and procedures guided by the objectives of the AfCFTA
- ❖ Simplification of procedures, greater transparency in implementing the procedures and providing better information to the public regarding the procedures and border rules
- ❖ Regulatory harmonization in the transport environment and systems standardization to ensure market access for international carriers, interoperability for infrastructure and rules applied to carriers. E.g., "elimination of procedures and regulations that inhibit competition and efficiency."
- ❖ Reduced level of regulation of transport and logistics services as it pertains to market access and operating time for trucks; and encouraging increased competition in the provision of these services
- ❖ Improved coordination and cooperation by between corridor management institutions, regulatory authorities and other import corridor structures and stakeholders

- ❖ Address road transport regulatory fragmentation among trading partners (Etiyel Chibira, 2020)

### **III. Addressing the fragmentation of cross border road transport liability in West Africa through a unified road transport liability regime**

The role of transportation in creating seamless trade in any economy cannot be overemphasized in any international trade literature. There is no doubt that the African Union and ECOWAS perspective is to create a single market. The idea will give rise to freedom of goods and services within Africa.

Indisputably, Law is a fundamental instrument of all transnational economic integration (Helmut Wagner, 2007). However, several unharmonized national, bilateral, corridor and multilateral instruments relating to road transportation could affect the movement of goods by road. These instruments, or sometimes a lack of instrument dealing with regulatory control, regulatory requirements, liability in the event of damage, market access standards and regulations, may lead to regulatory inconsistencies and inefficiencies that create barriers to non-tariff trade. However, this study highlights the lack of harmonization associated with the carriage of goods by road in West Africa.

Globally, the international convention governing a contract for carriage of goods by road is the Convention on the Contract for the International Carriage of Goods by Road, popularly known as the CMR. Most African states<sup>19</sup> are not a party to the CMR.<sup>20</sup> Unlike in Europe, the CMR does not create a uniform liability regime for road transport in Africa, considering that less than 5% of the countries in Africa have ratified the CMR. Also, there is no regional instrument from the African Union, nor a REC adopted legal framework for West Africa by ECOWAS (with the exception for some states which are members of OHADA). For other countries, liabilities are determined by the contractual provisions of parties to a road carriage, where there is a contract. Where there is no contract, national legislation and tort laws are resorted to determining parties' liabilities in a contract of road carriage.

The OHADA<sup>21</sup> Acte Uniforme Relatif Aux Contrats De Transport de Marchandises Par Route which can be translated as OHADA Uniform Act Relating to Contracts for the Transport of Goods by Road ("AUDTMR OHADA"), governs the liability of carriage of goods by road between members of the OHADA.

Putting the current status of legal framework into context within West Africa, it means that some countries in West Africa have a mandatory regime for carriage of goods by

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<sup>19</sup> Only Morocco and Tunisia are parties to the CMR countries among 55 African Nations.

<sup>20</sup> Entered into force on 2 July 1961.

<sup>21</sup> OHADA was established by a treaty signed on October 17, 1993. The purpose of this Treaty was to harmonise the business law of African States through the development and adoption of simple, modern, and appropriate standard rules to the situation of their savings. It was conceived that uniform treaties on commercial law would promote a stable business environment and the expeditious resolution of disputes. Today, OHADA has unified eight subjects: general commercial law: January 1, 1998; company law: January 1, 1998; securities law: January 1, 1998; debt recovery and enforcement law: July 10, 1998; bankruptcy law: January 1, 1999; arbitration law: June 11, 1999; accounting law: January 1, 2001, for consolidated accounts; January 1, 2002 for combined accounts; and the law regulating contract for carriage goods by road: January 1, 2004.

road by virtue of their membership of OHADA, whilst some others do not have any legal framework governing the liability of carriage of goods by road.

Accordingly, the conclusion of a contract for international carriage by road is more complicated for a carrier. Parties would be left to determine their liabilities, duties, and rights by negotiating their desired terms in a contract. Freedom of contract is a well-known principle; however, it is not without its disadvantages. Most carriers have different standard terms and conditions. These contracts are drafted to be in favour of the carrier and are definitely a lopsided contract (Stevens, 2004). This is because the carriers, in most instances, have the economic advantage and would accordingly not be able to negotiate the contract. Whilst having a standard contract, is a good self-help and highly useful, it does not eliminate the need to improve the law governing road carriage in West Africa.

Furthermore, the current fragmented framework places an onerous responsibility on the carrier to have a good knowledge of national transport regulations of the different countries in West Africa to transit the corridors of the region. To complicate this, different countries have different legal systems and different applications of contracts leading to legal uncertainty even in determining liabilities in the event of claims. An example to illustrate this point is below.

A consignment from Lagos to Abidjan would pass through countries like Nigeria (which does not have any legal framework on road carriage), through Togo, Benin, and Burkina Faso before getting to Abidjan (all of which have a legal framework for carriage of goods by road). Where there is a written contract on jurisdiction and choice of law, it might be a bit easier to determine the law by looking at the text of the contract. Where there are no written contracts, it might be a bit more complex. Whilst it is agreed that conflict of law rules will apply, the application in Africa, and West Africa in particular, is not entirely certain. The understanding of conflict of laws in Africa is minimal (Chukwuma Okoli, 2019) and might even be said to have stagnated.<sup>22</sup> The consequence of leaving the resolution to conflict of laws will lead to uncertainty.

The lack of a uniform regime would create different standards for liabilities, compensation, and evidence of a contract, such as consignment notes and what should be considered a contract of carriage. Issues such as a competent jurisdiction could also remain uncertain, particularly when the place of loss or damage cannot be ascertained.

There is no doubt that uncertainty about the applicability of a legal regime casts doubt on every judgment concerning road carriage. Therefore, nothing should be spared to minimize or, where possible, eliminate doubt concerning the applicability of a legal regime.

Certainty is an essential principle of law. The certainty of law can be judged from the predictability of results obtained while resolving legal disputes. Vanessa Mak succinctly

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<sup>22</sup> In Africa, there is no such thing as an “African private international law” or “African Union private international law” akin to, for example, “EU private international law”.

defines the concept of legal certainty as "*the predictability of outcomes in legal disputes*".(Mak, 2013) Legal certainty includes the need for uniform interpretation and application of laws in an area of law (Alexander V. Demin, 2020).

An uncertain legal regime is clearly undesirable. Regions and countries with low legal certainty generally have uncompetitive economies. In an uncompetitive economy, prices tend to rise higher. The "*pursuit of higher returns*" and low level of competition threaten consumers in the country with low legal certainty (Fábio Ulhoa Coelho, 2015). Legal uncertainty has been said to be able to restrict the growth of an economy (A. Chong, 2000).

The current disharmonization of law regulating the carriage of goods by road leads to transaction costs and reduced economic trade and prosperity. Studies show that legal diversity increases the transaction costs of cross-border contracting and reduces the possibility of involvement of consumers and small businesses owners in transactions wherein the law is unclear (Helmut Wagner, 2007). It is usual for business owners to refrain from transactions in which costs of information such as law, administrative procedures, and legal opinion and the costs of enforcement are unpredictable (Helmut Wagner, 2007). This transaction cost will consequently lead to high transportation costs, which will impact on trade and likely affect a country's economic growth (Fujimura, 2004). Undoubtedly, legal uncertainty is regarded as a non-tariff trade barrier. Removal of trade barriers (*whether tariff trade barriers or non-tariff trade barriers*) is crucial to achieving the potential of free trade in West Africa.

The legal response to the uncertainty and unpredictability predicating the legal regime of carriage of goods by road in West Africa is harmonization. Adopting a uniform system of liability governing carriage of goods by road is an appropriate solution. Uniformity of law is not a new concept of law and dates to the earlier periods of civilization (Bokareva, 2019). Adopting a uniform liability system will provide the desired predictability because a uniform liability system will be applicable all through the carriage period. Furthermore, each party would know the extent of their liability, the rules applicable and the foreseeability of legal commitment.

In addition, a uniform liability system would help avoid enquiries as to where a loss occurred, and which law will be applicable – whether the law of a particular country is applicable or not. Accordingly, the adoption of a uniform liability system would eliminate unnecessary litigation.

A uniform liability regime on road transportation in West Africa would help unify the laws governing documentation of road transport consignments, principles of liability, the law governing determination of which courts have jurisdiction over road carriage claims, issues relating to time bar as well as the procedure for applying damages to claims from shippers and consignee. Such rules would further deal with the content of the carriage document and its effect on international transport of goods by road in West Africa. Issues such as the language of the contract documentation, number of copies of the document and the signature (whether electronic or physical) will also be addressed in the treaty. Issues relating to packing the goods for transport, carriage of dangerous

goods, inspection of goods at the commencement of carriage and disposal of the goods will be addressed in such uniform set of rules.

Any uniform set of rules for carriage of goods by road transport in West Africa should determine the rights, duties, and liabilities of parties under an international road carriage contract. Such regime will be attractive when it is balanced and able to achieve a middle ground between the cargo and the carriers.

The proposed uniform rules should deal with important rights and duties of the parties involved in a carriage of goods by road contract. Topical issues such as consignment note, right of disposal, dangerous goods, delay, limitation of liability and carrier's defence need to be adequately addressed in the proposed set of rules. This paper submits that the set of rules should incorporate similar provisions of the CMR. This is based on the overall success that CMR have achieved over the last 5 decades. Furthermore, an entirely new uniform law may generate costs as opined by *Steven D. Walt* with regard to the United Nations Convention on Contracts for the International Sale of Goods (CISG) (Walt, 1999). Issues such as a lack of case laws may further increase cost and lead to uncertainty of resolution in disputes for a few years.

#### **IV. Commentary on OHADA Liability Regime**

The CMR, although largely successful in Europe, does not have many African signatories. This might be connected to the fact that when the Convention came into force, road connectivity in Africa was largely underdeveloped. However, the only road instrument governing carriage of goods by road in Africa is the AUDTMR OHADA. The AUDTMR OHADA derives valuable inspiration from the CMR.

The AUDTMR OHADA is applicable in sixteen countries, namely Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo. Among these sixteen countries, nine of them are members of the ECOWAS region. All French speaking countries in West Africa have adopted this uniform set of rules as the extant legal framework for carriage of goods by sea.

The OHADA Uniform Act on the Contract for the Carriage of Goods by Road ("AUDTMR OHADA") consist of 31 Articles and 7 chapters. The treaty entered into force on January 1, 2004. AUDTMR OHADA is binding for all members of OHADA because of its supranational character. The OHADA Treaty (i.e., the treaty establishing OHADA), pursuant to Article 10 of the Uniform Act of any subject overrides the domestic law provisions of member states (Paul Gerard Pougue, 2011). The provision of Article 10 states in direct translation that:

*Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law. (OHADA Treaty, 1993)*

Article 1(1) of the AUDTMR OHADA stipulates that the treaty shall apply to every

contract for the carriage of goods by road, when the place of picking up the goods and the place designated for delivery are situated in the territory of an OHADA State Party or on the territory of two different States, of which at least one is an OHADA Member. The law is automatically applicable and do not require the provisions of the contract of carriage to incorporate the provisions of AUDTMR OHADA (Ferrari Franco, 2001). Further reference was made to its mandatory nature in Article 28, which states that *"any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void."*

The AUDTMR OHADA pursuant to Article 3 states that a contract for the carriage of goods exists as soon as the sender and the carrier reach an agreement concerning the carriage of goods in consideration of an agreed price. Therefore, whether the Agreement is oral or written, once an agreement is reached for carriage of goods by road and there is payment for such carriage, the AUDTMR OHADA shall be applicable.

Article 4 of the AUDTMR deals with the requirement and content of a consignment note. The provision provides in Article 4(4) that the absence, irregularity, or loss of the consignment note does not affect the existence or the validity of the contract of carriage. Accordingly, the AUDTMR OHADA does not enforce strict conformity to Article 4's requirements and provisions.

The AUDTMR provides for a presumed liability. Article 16 (1) provides that the carrier shall be liable in the event of loss (total or partial loss), damages or delay occurring during delivery. Accordingly, the carrier is obliged to deliver the goods at the place and in the condition, he has received them. In the event of a failure to do so, he is liable, without the cargo interests having to prove fault.

Article 17 provides for a carrier's defences. A carrier can be exempt from liability if he can prove that the loss, damage, or delay was caused by a wrongful act or instruction by the shipper or consignee, by an inherent vice of the goods or by circumstances which the carrier could not have avoided, and the consequences of which he was unable to prevent. He can also be exempt from liability when the loss or damage arises from the special risks inherent in certain listed circumstances listed in Article 17(2) of the AUDTMR OHADA.<sup>23</sup>

Article 18 of the AUDTMR OHADA addresses the limitation of liability in the event of a loss, damage, or delay. The provision provides a limit of 5000 Franc CFA as compensation for damage, or of total or partial loss of the goods, except in instances where there is a declaration of a special interest in delivery. Compensation will be equivalent to the additional loss or damage that may be proven up to the total amount

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<sup>23</sup> (a)use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note; b)the lack of, or defective condition of packing in the case of goods which, by their nature,are liable to wastage or to be damaged when not properly packed or when not packed ; c)handling, loading, stowage or unloading of the goods by the sender, the consignee or a person acting on behalf of the sender or the consignee; d)the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage , especially through breakage, rust, decay, desiccation, leakage or normal wastage; e)insufficiency or inadequacy of marks or numbers on the packages; f) the carriage of livestock.

of the special interest declared. The carrier will not be able to limit his liability where loss or damage occurred because of an act or omission of the carrier which was done with intent to cause such loss, damage or delay, or which was done recklessly and with the knowledge that such loss, damage or delay would probably result.<sup>24</sup>

The AUDTMR OHADA seem to have dealt with the challenges that arose in the case of *Quantum Corporation Inc. v Plane Trucking Ltd*, *per*<sup>25</sup> as to whether the CMR automatically applied to multimodal transport contract. The English court in this case was faced with questions of whether liability depends upon the carrier having explicitly contracted transport partially by road or whether a contract of carriage by road includes a partial transport by other means of transportation. The court dismissed Air France's claim that the CMR only applies to contracts involving road carriage from beginning to end. The Court decided that CMR can be applied to the road leg of a wider contract of carriage involving multiple modes of transportation. The approach taken in England on this point is different from the position in Netherland<sup>26</sup> and Germany.<sup>27</sup> However, despite the AUDTMR OHADA's similarity with CMR, Article 22 of the AUDTMR OHADA specifically states that it applies to all combined transport, accordingly, resolving a potential litigation area of whether AUDTMR OHADA applies to a contract of combined transport or not.

The AUDTMR OHADA also provides that an action should be brought within be one year from the date of delivery whilst notification must be made to the carrier within 60 days.<sup>28</sup> In a bid to avoid or minimize certainty of a competent court, Article 27 provides that disputes regarding road carriage contracts should be resolved by arbitration, while Article 28 provides the factors to determine a competent jurisdiction where parties have failed to choose a designated national court or arbitral tribunal.

## **V. AUDTMR OHADA as a Foundation to a West African Road Transport Liability Regime?**

This paper suggests that the ratification of AUDTMR OHADA by the remaining members of 44% of ECOWAS member states can help establish a uniform set of rules of carriage of goods by road.

Standardization is an essential element of trade facilitation and regional integration. The AUDTMR OHADA affords contracting parties' legal certainty and legal foreseeability of the claims recoverable and claims that may be instituted against parties to a contract of carriage of goods by road. The adoption of a uniform set of rules like the AUDTMR OHADA implies that parties in a road transport contract would no longer have to bother with the fragmentation of legal regime governing a contract carriage of goods by road.

One positivity in consolidating and expanding the existing AUDTMR OHADA is that the expansion will reduce the possibility of conflicts of jurisdiction. There is no doubt that

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<sup>24</sup> Article 21 of the AUDTMR OHADA.

<sup>25</sup> Lord Justice Aldous, Lord Justice Mance and Lord Justice Latham [2002] EWCA Civ 350.

<sup>26</sup> See Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); Rb Rotterdam 11 April 2007, *S&S* 2009, 55 (*Godafoss*); Rb Haarlem 17 May 2006, *S&S* 2008, 43.

<sup>27</sup> BGH, 17 July 2008, *TransportR* 2008, 365.

<sup>28</sup> Article 25 of the AUDTMR OHADA.

the issue of liability for road carriage will be addressed in future. However, having a separate instrument for West Africa may create some undesirable conflict. For instance, where West Africa/ECOWAS decides to draft its own regional instrument, a West African country that has acceded to both AUDTMR OHADA and the new instrument might lead to some conflicts of jurisdiction.

Another benefit of the AUDTMR OHADA is that 9 of the 16 members of the ECOWAS are already parties to the instrument. Whilst the CMR is a significant influence of AUDTMR OHADA, the AUDTMR OHADA is a more attractive option than the CMR; this is because it is easier to have the whole region accede to a regional instrument than a region acceding to a global convention.

However, the AUDTMR OHADA is not entirely without its weaknesses. The first challenge of AUDTMR OHADA is that not all members of ECOWAS are members of OHADA. Six ECOWAS members<sup>29</sup> do not belong to OHADA and are not bound by the terms of the AUDTMR OHADA. However, this may be resolved by extending the application of the AUDTMR OHADA to every country within the ECOWAS. A look at Article 53 of the OHADA Treaty provides that any Member State of the African Union may become a member of OHADA. All English-speaking countries of the ECOWAS are members of the African Union and, accordingly, they are at liberty to join OHADA.

Furthermore, the provision of AUDTMR OHADA states that the instrument is applicable to every "*contract for the carriage of goods*". The implication is that for the provision of the AUDTMR OHADA to be applicable, goods must be sent and handed over to the carrier expressly for the purpose of transporting goods for a reward.<sup>30</sup> This means that where carriage of goods is just an ancillary carriage, like an obligation in a contract for the sale of goods, AUDTMR OHADA would not be applicable.(Ferrari Franco, 2001) Therefore, some contracts will be excluded from the application of AUDTMR OHADA. This restriction should be deliberately avoided to allow a legal manoeuvring of potentially knotty issues where the treaty would be applicable, thus getting into some of the problems encountered with the application of CMR in Europe.<sup>31</sup>

There may be a need to also a need to review some of the provisions of the AUDTMR OHADA. For example, the current monetary limit may require an upward review. Worthy of mention is the currency that the treaty employs is the CFA franc. This may be changed to a more acceptable currency considering that the Anglophone countries do not use CFAF as their official currency.

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<sup>29</sup> Nigeria, Ghana, Sierra Leone, Liberia, Cape Verde and Gambia.

<sup>30</sup> Article 2(a) OHBLA Act.

<sup>31</sup> Quantum Corporation Ltd v. Plane Trucking Ltd and Air France [\[2002\] 2 Lloyd's Rep. 25.](#)

## VI. Conclusion

It is desirable to have a legal regime governing carriage of goods by road rather than leaving it to freedom of contract between parties. A uniform liability regime creates predictability and protects parties with weaker bargaining power. In addition, the outcome of liability will be consistent. Losses and damages sought will be predictable by stakeholders.

Allowing parties to determine the terms of contracts in relation to liability, documents, obligations, and jurisdiction might create unpredictability and uncertainty. A stronger party may take unfair advantage of the weaker party.

In consequence, if there is a need for a legal regime, there is no need to start from scratch. It is advisable that West Africa start with the use of AUDTMR OHADA, which was modelled upon the CMR convention. The CMR Convention is a successful convention that has regulated road carriage for more than 60 years.

The AUDTMR OHADA provides parties to a road carriage contract with a uniform set of rules, rights, duties, and liabilities. It is a balanced instrument because it balances the interests of the carriers and the cargo.

The AUDTMR OHADA is an example of an excellent sub-regional liability regime that seems to be working. The mandatory adoption and supranational character of the AUDTMR OHADA have shown how vital a road liability regime is to international trade. There is no doubt that legal rules must be consistent and practicable. The CMR, although a global convention, has not been able to achieve wide range acceptance in the African continent.

The author opines that acceptance will be more easily achieved if ECOWAS can consolidate on the existing liability regime of AUDTMR OHADA.

The overall conclusion of this article is that AUDTMR OHADA could prove as a fruitful foundation to create uniformity for carriage of goods by road. Uniformity of legal framework for liability in carriage of goods could help remove some unwarranted transaction costs such as litigation, provision of legal opinion and other ancillary issues arising from the uncertainty of the liability regime. If these costs are eliminated, there will be a ripple effect on transports cost, which means freight rates could be kept low. Consequently, the consumer would pay less for the products he is buying in the local shop.

While portions of the AUDTMR OHADA are insufficient and not adequate for immediate adoption by ECOWAS, despite the imperfection of the AUDTMR OHADA, it could be a starting point for the regulation of international carriage of goods by road in West Africa. Like every bilateral or multilateral treaty, it would not be devoid of criticism, but it would bring a certain level of certainty. The AUDTMR OHADA might just be a step towards achieving not just a West African road transport regime but also an African road transport regime.

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