

Liability in multimodal transport

Liability for loss and damage to goods during an international multimodal transport

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1 Introduction

An increasing amount of the international carriage of goods consist of so called ‘door-to-door’ transport,¹ where the goods are carried from the consignor’s ‘door’ to the consignee’s ‘door’. Such transportation usually involves at least two modes of transport, making it multimodal. International multimodal transport has for decades suffered from the fact that there is no uniform legal system governing it. Several attempts have been made in order to solve this problem, but none of them has been subject to success.² The European Commission identified this unpredictable situation as a barrier that deters parties from choosing this type of transport.³

Multimodal transport is a transport based on one single contract, which includes at least two different modes,⁴ for example carriage by sea and road. It is therefore the opposite of unimodal transport in which involves carriage by one mode only. The container revolution in the 1960s and 1970s along with the technological developments made it a lot easier to transfer goods from one mode to the other,⁵ which led to a rapid increase in multimodal transport.⁶ Today it is one of the most common forms of carriage of goods.⁷ Although there have been remarkable developments in the transportation industry, especially when it comes to multimodal transport, the legal framework has not been able to keep up.⁸

¹ UNCTAD, *Multimodal transport; the feasibility of an international legal instrument* (13 January 2003) UNCTAD/SDTE/TLB/2003/1, http://unctad.org/en/docs/sdtetlb20031_en.pdf. page 4

² Andrew Tettenborn & Baris Soyer, *Carriage of goods by sea, land and air* (2014) Informa law from Routledge. page 232

³ *Ibid.* page 233

⁴ Michiel Spanjaart, *Multimodal Transport Law* (2017) Routledge. page 14

⁵ UNCTAD, *Multimodal transport; the feasibility of an international legal instrument* (13 January 2003) UNCTAD/SDTE/TLB/2003/1, http://unctad.org/en/docs/sdtetlb20031_en.pdf. page 4

⁶ Spanjaart, *op. cit.*, page 12

⁷ Johan Schelin, *Future Logistics and Transport Law* (2008) Jure AB. page 39

⁸ Marian Hoeks, *Multimodal Transport Law* (2010) Kluwer Law International. page 10 and David Alan Glass *Meddling in the multimodal muddle?-a network of conflict in the UNCITRAL Draft Conventino on the Carriage of Goods [wholly or partly][by sea]* (2006) Informa. page 309

What characterize international transportation is that it often involves great values in which are exposed to several hazards and risks. Therefore, there is a distinct tendency for risk equalization through both statutory and contractual liability regimes.⁹ The different modes of transport have, since the beginning been regulated by their own rules.¹⁰ Today liability in international unimodal carriage is governed by mandatory conventions. The need for such mandatory scheme is usually justified by the need for a harmonized and balanced legal system in the area of carriage of goods,¹¹ which facilitates international trade.

The work regarding a convention for multimodal transport started as early as in the 1920s.¹² Considering the fact that no past attempts on drafting a multimodal convention have been subject to success, it is questionable whether there will be enough incentive to make more efforts in the near future. This is especially due to all the resources and work put into such a process. Today's legal framework consists of a mixture between international unimodal conventions, regional agreements, national laws and contractual regulations.¹³ In other words, the current framework governing liability is eminently fragmented and complex. Such an unpredictable situation is thought to be both inefficient and costly, due to for example transaction costs and increased insurance premiums¹⁴. This creates a detrimental effect on multimodal transport.¹⁵

⁹ Kåre Lilleholt, *Knophs oversikt over Norges rett* (2013) 13th edition, Universitetsforlaget AS. page 446

¹⁰ Hoeks, op. cit., page 14

¹¹ Tettenborn & Soyer, op. cit., page 232

¹² Erling Selvig, *Multimodal Transport - The 1980 U.N. Convention* (1980) Papers of a one day seminar, Southampton University Faculty of Law. page 9

¹³ Mahin Faghfour, *International Regulation of Liability for Multimodal Transport - In Search of Uniformity* (2006) WMU Journal of Maritime Affairs, Vol. 5, No.1, 95-114. page 100

¹⁴ Hoeks, op. cit., page 16

¹⁵ Glass (2006), op. cit., page 310

1.2 Methodology

The objective of this dissertation is to look at how one can regulate liability for loss and damage to goods during an international multimodal transport by using the legal framework existing today. The aim is to find a way to regulate it which is simple, fair and creates legal certainty, which will make multimodal transport a more attractive choice when carrying goods. As the thesis is focusing on the existing legal status, a dogmatic approach will be used. However, it will also include some comparative features as it will compare liability regimes in different unimodal conventions, and also different countries' and authors' approach to the problem. The current legal framework is as mentioned both fragmented and complex. Due to the fact that liability in multimodal transport has been a problem for decades, it is no surprise that the amount of legal literature concerning this is extensive.

2 The contracting parties

In a multimodal transport there are two parties to the contract of carriage. The ‘consignor’ or the ‘consignee’ and the ‘multimodal transport operator’ (hereafter: MTO).¹⁶ The ‘consignor’ is the one who delivers the goods, or the goods are delivered behalf on to the MTO, while the ‘consignee’ is the one entitled to receive the goods.¹⁷ Whether or not it is the consignor or the consignee who enters into a contract with the MTO, is based on the sales contract, e.g. the INCOTERMS¹⁸ being used.¹⁹ The MTO is the one who undertakes to perform the multimodal transport and is therefore the ‘carrier’ in the multimodal transport contract.²⁰ Nonetheless, the MTO is often a freight forwarder who is specialized in logistics and does not provide transportation itself.²¹ Instead it will contract with different carriers and organize the entire transport. The MTO also has to make sure that there are connections between the different stages by organizing intermediate activities such as loading, reloading and storage. It does therefore not only contract with the different carriers, but also with stevedores, warehouses and so on.²² As one can see, a multimodal transport makes life a lot easier for the consignor/consignee as it only needs to conclude one contract for the entire carriage.²³

The multimodal transport contract only governs the relationship between the MTO and the consignor/consignee. The MTO’s subcontractors are therefore not part of the multimodal transport agreement.²⁴ The relationships between the MTO and the subcontractors will be

¹⁶ Selvig, (1980) op. cit., page 4

¹⁷ United Nations Convention on International Multimodal Transport of Goods Art. 1 (5)-(6)

¹⁸ INCOTERMS are a series of standard contract clauses in international trade published by the International Chamber of Commerce

¹⁹ Håkon Rønnevig, *Transportrett* (2001) Fagbokforlaget. page 110

²⁰ United Nations Convention on International Multimodal Transport of Goods Art. 1 (2) - (3)

²¹ Lissi Andersen Roost, *Multimodale Transporter* (2012) Jurist- og Økonomiforbundet. page 84 and Diana Faber, *The problems arising from multimodal transport* (1996) Lloyd's maritime and commercial law quarterly pt. 4. page 504

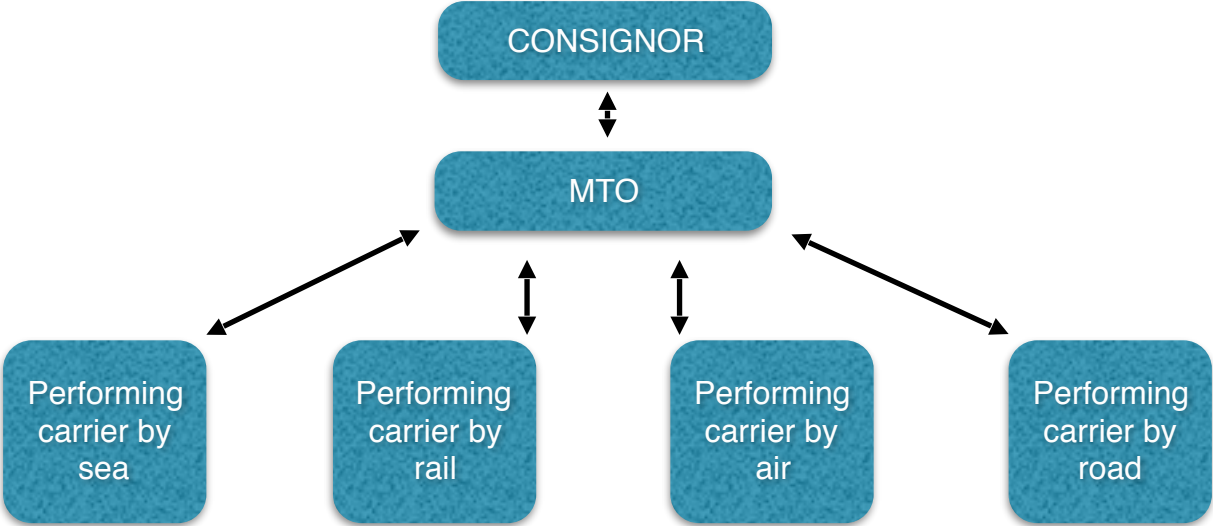
²² Roost, op. cit., page 84-85

²³ Spanjaart, op. cit., page 3

²⁴ Roost, op. cit., page 114 and Selvig, (1980) op. cit., page 4

governed by international conventions, national law or other provisions applicable to those contracts,²⁵ and the MTO will in these cases operate as a consignor.²⁶ Due to this, there are at least two levels of contracts existing in in a multimodal transport. When damage or loss to goods happens during the carriage, the claimant will turn to the MTO for compensation, as there is no contractual relationship with the original consignor/consignee and the performing carriers.²⁷ However, the MTO may turn to the subcontractor actually causing the damage in a recourse action.²⁸ The different levels of contracts in multimodal transport are often subject to different liability regimes and can therefore create recourse gaps.²⁹

A multimodal transport can be illustrated like this;



It is important to notice that this is just a simplified way of showing how the multimodal transport is arranged. In practice it may differ from this, for example the MTO might contract with another carrier who again subcontracts his part to another carrier and so on.³⁰

²⁵ Selvig, (1980) op. cit., page 4-5

²⁶ Hoeks, op. cit., page 7

²⁷ The liability for some subcarriers towards the consignor/consignee may in some cases be governed by an international convention, cf. Selvig (1980) op. cit., page 5. See CMR Art. 34

²⁸ Hoeks, op. cit., page 8

²⁹ I.c

³⁰ Roost, op. cit., page 84

3 The unimodal liability regimes

In this chapter, the thesis will analyze how the unimodal conventions governing carriage by sea, road, rail and air regulate liability for loss and damage to goods. The main focus will be on the respective convention's basis of liability for loss and damage to goods and exceptions to this, the liability period, followed by the carrier's right to limitation and how it might lose this right, and in addition the time limit for actions.

3.1 Carriage by sea

Today we have four international conventions governing maritime transport. First out was The Hague Rules in 1924,³¹ which was amended into The Hague-Visby Rules (hereafter: HVR) in 1968.³² Then came the Hamburg Rules in 1978,³³ and lastly the Rotterdam Rules in 2008.³⁴ Due to the lack of success for the other conventions, The HVR still represent the global standard in the field of carriage of goods by sea.³⁵ However, it might be too early to state the success of the Rotterdam Rules, considering they are still in the ratification process.³⁶ When looking at the liability for loss of or damage to goods in carriage by sea, the thesis will be based on the HVR, as they represent the global standard today.

The HVR apply to contracts of carriage by sea covered by a bill of lading (hereafter: B/L) or another negotiable transport document.³⁷ When such document is issued, the rules are

³¹ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels (1924)

³² The Hague Rules as Amended by the Brussels Protocol, Brussels (1968)

³³ United Nations Convention on the Carriage of Goods by Sea, Hamburg (1978)

³⁴ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York (2008)

³⁵ Hugo Tiberghien & Johan Schelin, *On Maritime & Transport Law* (2016) Poseidon Förlag AB. page 26

³⁶ Johan Schelin, *Talks on the Rotterdam Rules* (2014) Poseidon Förlag AB. page 123

³⁷ HVR Art. I (b)

mandatory.³⁸ This is as long as the document is issued in a contracting state, from a port in a contracting state or it is stated in the contract that the Rules will apply.³⁹

The basis of liability for loss and damage to goods in the HVR, is a liability based on fault with a reversed burden of proof.⁴⁰ This means that the carrier has to prove that the damage or loss did not occur due to neglect or fault by the carrier, its agents or servants, in order to turn the burden of proof and escape liability. If the carrier fails to do so, it has to compensate. Furthermore, when it comes to seaworthiness of the vessel and damage or loss caused thereof, the carrier is liable if this is caused by want of due diligence on its part.⁴¹ Nonetheless, the HVR have listed up a number of exceptions were the carrier is relieved from liability;⁴²

- Fault in navigation
- Fire, unless it is caused by the actual fault or privity of the carrier
- Perils, dangers and accidents of the sea or other navigable waters
- Act of God
- Act of war
- Act of public enemies
- Arrest or restraint of princes, rulers or people, or seizure under legal process
- Quarantine restrictions
- Act or omission of the shipper or owner of the goods, his agent or representative
- Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general
- Riots and civil commotions
- Saving or attempting to save life or property at sea
- Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods

³⁸ HVR Art. III para 8

³⁹ HVR Art. X.

⁴⁰ The standard rule is explained in para 2 (q)

⁴¹ HVR Art. IV para 1

⁴² HVR Art. IV para 2 (a)-(p)

- Insufficiency of packing
- Insufficiency or inadequacy of marks
- Latents defects not discoverable by due diligence

Thus, the only independent exceptions are the first two relating to error in navigation and fire. Under these two circumstances, the carrier would not be liable even if it acted with neglect. The other exonerations do not have the same characteristics. In these cases, even though the carrier can prove that such a situation existed, it is still liable if the claimant can prove that negligence occurred.⁴³

The period of liability is based on a 'tackle-to-tackle' principle, which comprises the time when the vessel's tackle is hooked to the goods at the port of the loading and unhooked at the port of discharge.⁴⁴ In other words, the carrier can be relieved from liability if the damage or loss happened before the loading or after the discharge is finished.

The carrier's liability is limited to 666,67 SDR⁴⁵ for each package/unit or 2 SDR/Kg of gross weight of the goods lost or damaged, whichever is the higher.⁴⁶ However, according to Article (hereafter: Art.) IV para 5 (e) the limitation of compensation is not applicable if the act or omission originated from intent by the carrier, or recklessness with knowledge that damage would probably result. If such circumstances are proven, the carrier is liable for the total amount of the loss.

The time limit for actions is one year calculated from the time the goods were delivered or were agreed to be delivered. This period can be extended if the parties have agreed to it.⁴⁷

⁴³ Schelin (2008), op. cit., page 45

⁴⁴ HVR Art. 1 (e)

⁴⁵ SDR stands for Special Drawing Rights and the value is based on a basket of five following currencies: Dollar (US), Euro, Chinese renminbi, Yen (Japan) and the British pound sterling.

⁴⁶ HVR Art. IV para 5 (a)

⁴⁷ HVR Art. III para 6

3.2 Carriage by road

In 1956 nine countries signed the Convention on the Contract for the International Carriage of goods by Road (Hereafter: CMR).⁴⁸ Its liability regime derived from the respective provisions of the CIM of 1952.⁴⁹ The reason for this was that the drafters of both CMR and CIM were under the assumption that road and rail transport were in direct competition, so that harmonization was necessary, especially in regards to the liability regime.⁵⁰ The CMR Convention from 1956 is still today the European standard regarding road carriage.⁵¹

The CMR applies to every contract for the carriage of goods by road, as long as the pick up place and the delivery place are situated in two different countries, where at least one is a contracting state.⁵² The convention is mandatory and contradicting provisions shall be null and void.⁵³

The liability found in the CMR is a strict one.⁵⁴ According to Art. 17, the carrier is liable for loss or damage occurring between the time when he takes over the goods and the time of delivery. However, Art. 17 contains both general and special exoneration grounds.

The general exoneration grounds are applicable if the wrongful act or neglect was caused by the claimant or its instructions, an inherent vice of the goods or through circumstances which

⁴⁸ Malcolm A. Clarke, *International Carriage of Goods by Road: CMR* (1991) 2nd edition, Sweet & Maxwell. page 1

⁴⁹ Ibid. page 13 and Tettenborn & Soyer, op. cit., page 193

⁵⁰ Clarke (1991), op. cit., page 2

⁵¹ Ulla Fabricius, *Lov om Fragtaftaler ved international vejtransport (CMR)* (2005) 3rd edition, Jurist- og Økonomforbundets Forlag. Page 48

⁵² CMR Art. 1 para 1

⁵³ CMR Art. 41 (1)

⁵⁴ Tettenborn & Soyer, op. cit., page 193

the carrier could not avoid.⁵⁵ It has been discussed whether or not the latter exemption leads to the liability being based on fault.⁵⁶ The CMR does not mention how «could not avoid» shall be interpreted, and it has therefore been subject to different interpretations,⁵⁷ where there are examples of courts taking a more fault based approach.⁵⁸ Such an interpretation of the term would weaken the initiate strict liability. However, it is clear that the liability is stricter than the one governing transport by sea, yet one can ask how much difference there is in practice between a fault based liability rule and a strict liability with a long list of exonerations.

The special exoneration grounds are applicable if the loss or damage arise from;

- use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note-;
- 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 packed or when not properly packed;
- handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee;
- 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, normal wastage, or the action of moth or vermin;
- insufficiency or inadequacy of marks or numbers on the packages;
- the carriage of livestock

In order for a special exoneration to apply, the carrier must prove that there is a probability that such risk occurred, and further, that the risk could have caused the loss or damage.⁵⁹

These exonerations do not automatically lead to the carrier being relieved from liability, yet it

⁵⁵ CMR Art. 17 para 2

⁵⁶ Tiberg & Schelin, op. cit., page 124

⁵⁷ Tettenborn & Soyer, op. cit., page 195

⁵⁸ Tiberg & Schelin, op. cit., page 174-175

⁵⁹ Clarke (1991), op. cit., page 403

turns the burden of proof and it is then up to the claimant to prove that the risk was not the cause.⁶⁰

The carrier can limit the compensation to 8.33 SDR per kilogram of the goods lost or damaged. Nonetheless, if the damage or loss was caused by intent or willful misconduct by the carrier or its agents or servants, the right to limitation dissipates.⁶¹ Actions need to be brought within one year calculated from the date of delivery according to Art. 32.

3.3 Carriage by rail

The COTIF Convention governing carriage by rail was established in 1890 and was the first attempt to try to unify transport law.⁶² The convention has been subject to a handful of revisions, and it is still today the standard regime for rail transport in Europe and some part of North Africa and the Middle East.⁶³ In 1980 the appendix called CIM was added,⁶⁴ which was in 1999 amended by the Vilnius Protocol.⁶⁵ This appendix governed the liability for lost and damaged goods and was based on CMR, who then again was based on the 1952 version of the CIM.⁶⁶

CIM applies to every contract of carriage of goods by rail for reward, as long as the place of taking over the goods and the delivery place are situation in two different member states, or where one of them is a member state and the parties have agreed that the contract is subject to

⁶⁰ CMR Art. 18.2

⁶¹ CMR Art. 29

⁶² Hoeks, op. cit., page 261 & Spanjaart, op. cit., page 10

⁶³ Hoeks, op. cit., page 261

⁶⁴ Ibid. page 262

⁶⁵ Ibid. page 261

⁶⁶ Ibid. page 263

the convention.⁶⁷ Whenever the convention applies, any stipulation which would contradict with the CIM shall be null and void, and the convention is therefore mandatory.⁶⁸

The carrier bears a strict liability for loss and damage to goods occurred between the time of taking over the goods and the time of delivery.⁶⁹ Unlike the liability regime in the CMR, the fact that railway carrier bears a strict liability for loss and damage to goods has never been questioned.⁷⁰

As with the road carrier, the rail carrier can be relieved from liability if it can prove that the loss or damage arose from the general or special exoneration grounds.⁷¹ These exoneration grounds are;

- carriage in open wagons pursuant to the General Conditions of Carriage or when it has been expressly agreed and entered in the consignment note; subject to damage sustained by the goods because of atmospheric influences, goods carried in intermodal transport units and in closed road vehicles carried on wagons shall not be considered as being carried in open wagons; if for the carriage of goods in open wagons, the consignor uses sheets, the carrier shall assume the same liability as falls to him for carriage in open wagons without sheeting, even in respect of goods which, according to the General Conditions of Carriage, are not carried in open wagons;
- absence or inadequacy of packaging in the case of goods which by their nature are liable to loss or damage when not packed or when not packed properly;
- loading of the goods by the consignor or unloading by the consignee;
- the nature of certain goods which particularly exposes them to total or partial loss or damage, especially through breakage, rust, interior and spontaneous decay, desiccation or wastage;

⁶⁷ CIM Art. 1 (1)

⁶⁸ CIM Art. 5

⁶⁹ CIM Art. 12 § 1

⁷⁰ Tiberg & Schelin, *op. cit.*, page 190

⁷¹ CIM Art. 23 §§ 1-3

- irregular, incorrect or incomplete description or numbering of packages;
- carriage of live animals;
- carriage which, pursuant to applicable provisions or agreements made between the consignor and the carrier and entered on the consignment note, must be accompanied by an attendant, if the loss or damage results from a risk which the attendant was intended to avert

If the carrier can prove the existence of one or more of these exonerations, it turns the burden of proof towards the claimant.⁷²

The carrier can limit the compensation to 17 SDR per kilogram.⁷³ If the loss or damage results from intent by the carrier or recklessly and with knowledge that such loss or damage would probably result, the right to limitation ceases.⁷⁴ Actions need to be brought within one year.⁷⁵

3.4 Carriage by air

The international carriage of goods by air was first regulated by the Warsaw Convention⁷⁶ of 1929, but due to reasons like lack of predictability when it came to liability and outdated limitation levels, the Montreal Convention⁷⁷ (Hereafter: MC) was drafted in 1999.⁷⁸ 137 states have signed the Warsaw Convention, whereas the MC only has 131 parties.⁷⁹ Although the Warsaw Convention has more parties, the thesis will focus on the MC. The reason for this

⁷² CIM Art. 25 § 2

⁷³ CIM Art. 30 § 1

⁷⁴ CIM Art. 36

⁷⁵ CIM Art. 48 § 1

⁷⁶ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw (1929)

⁷⁷ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal (1999)

⁷⁸ Tiberg & Schelin, op. cit., page 200

⁷⁹ ICAO, *Current lists of parties to multilateral air law treaties* <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> Read 19 March 2018

is that both Norway and the European Union have ratified this convention.⁸⁰ Having said that, the two conventions are quite similar.

The MC applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. Gratuitous carriage by aircraft performed by an air transport undertaking is also included in the scope of application.⁸¹ The place of departure and the place of destination need to be situated in two member states. However, if the place of departure and the place of destination are in the same member state, the requirement is fulfilled if there is a stopping place in another state, even though this stopping place is not part of the convention.⁸²

The carrier is liable for lost or damaged goods as far as it occurred during the carriage by air, which includes the period when the carrier was in charge of the cargo.⁸³ As with the CMR and CIM, this suggests a strict liability, albeit with some exceptions;

- inherent defect, quality or vice of that cargo;
- defective packing of that cargo performed by a person other than the carrier or its servants or agents;
- an act of war or an armed conflict;
- an act of public authority carried out in connection with the entry, exit or transit of the cargo
- If the damage was caused or contributed to by negligence or other wrongful act or omission of the claimant⁸⁴

The carrier can limit the compensation to 17 SDR per kilogram.⁸⁵ However, this right to limitation ceases if the damage or loss resulted from an act or omission by the carrier, its

⁸⁰ Hoeks, Op.cit. at page 220

⁸¹ MC Art. 1 para 1

⁸² Hoeks, Op.cit. at page 227

⁸³ Hoeks, Op.cit. at page 237

⁸⁴ MC Art. 20

⁸⁵ MC Art. 22 para 3

servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result.⁸⁶

Actions need to be brought within two years from the arrival or when the plane ought to have arrived or when the carriage stopped.⁸⁷ As with the other conventions, the MC is mandatory.⁸⁸

3.5 Comparison

Each transport mode has its own peculiarities, which is well reflected in their liability regimes. Although there are a lot of similarities between these four conventions, there are some crucial differences present regarding the carrier's liability for loss and damage to goods.

The basis of liability vary between the HVR and the other carriage conventions. Whereas the liability in the HVR is based on presumed fault, the others include a strict liability for lost and damaged goods. In theory, it takes less to be held liable when there is a strict liability rule, than when the liability is fault based. Therefore, a fault based liability is better for the carriers, even though it is presumed. On the other side, one can as previously mentioned, speculate how much more preferable a liability based on presumed fault versus a strict liability with numerous exonerations actually is in practice for the carriers.

The exonerations vary between the conventions, and are designed for the specific mode of transport. The nautical fault exception in the HVR, would for example never be applied to carriage by air, road or rail. Furthermore, carriers under the HVR enjoy a far wider range of exonerations, compared to the carriers of the other modes. Although the exonerations differ, one can find similarities between some of them, for example between the special risks in CMR and CIM.

⁸⁶ MC Art. 22 para 5

⁸⁷ MC Art. 35

⁸⁸ MC Art. 49

The sea carrier's liability is as mentioned based on a 'tackle-to-tackle' principle, which comprises the time from the beginning of the loading until the end of discharge. This deviates from the other conventions which operate with a period from the receiving to the delivery of the goods.⁸⁹ In other words, the road, rail and air carriers can be held liable for a longer period than the sea carrier.

The limitation levels vary greatly between the conventions, from 2 SDR to 17 SDR per kilogram. For instance, if 400 kilograms of cargo is damaged during a sea transport, the carrier only has to cover 800 SDR,⁹⁰ whereas the air carrier would have been liable for 6800 SDR. In other words, the sea carrier only has to cover cirka 12 % of what the air carrier would have to cover. This seems reasonable considering the fact that airfreight is far more expensive than carrying goods by sea. Yet, this shows how the limitation levels can lead to tremendous different outcomes for the carriers based on which means of transport they operate.

To lose its right to limitation in carriage by sea, rail and air the carrier or his servants or agents must either have acted with intent or recklessly with knowledge that damage or loss would probably result. The CMR does not use this wording, instead the carrier loses its right to limitation due to intent or willful misconduct. The question is then what 'willful misconduct' implicates. The term is well-known in English law and encompasses acts and omissions which the carrier or persons on his side do with intent, knowing that damage or loss will probably result, or in cases where they are aware of the risk, but recklessly disregarding the possibility of such a result.⁹¹ In other words, when determining if 'willful misconduct' is fulfilled, one has to look at both the conduct itself and the state of mind of the actor.

According to this, it is clear that the wording used in the CMR does not involve a change from the other conventions, just a different use of words. Based on this, when it comes to loss of right to limitation, it does not matter which convention applies, as they all comprise the same.

⁸⁹ Hoeks, Op.cit. at page 320

⁹⁰ Assumed that the kilogram alternative and not the package alternative applies

⁹¹ Tettenborn & Soyer, Op.cit. at page 205.

The MC gives the claimant two years to bring action against the carrier, while the other conventions only give claimants one year. It is then less favorable for carriers if damage or loss happens during air carriage, as claimants will have a longer period to bring actions against them, than they would in a situation where the transport was by sea, road or rail.

In conclusion, this shows that there are some profound differences which distinguishes the four conventions. Which convention applies can therefore be of great importance to both the carrier and the claimant, where some will be more favorable than others.

4 Do the unimodal conventions apply to multimodal transport?

In the previous chapter one could see that the unimodal transports are currently governed by mandatory conventions, which stipulate different basis of liability for the carrier when loss or damage occurs. The question is whether these can be applied also to multimodal transport or if this type of carriage is subject to freedom of contract.

The thesis will in the following go through the conventions mentioned in chapter 3 and attempt to determine whether or not they apply to multimodal transport. It is important to mention that if the unimodal conventions do not apply, the parties can still agree that the conventions shall regulate the multimodal transport, by virtue of freedom of contract.⁹²

4.1 Multimodal transport under the Hague-Visby Rules

Although the container revolution had started and multimodal transport had developed when the Hague Rules were amended by the Visby Protocol in 1968, the convention does not mention multimodal transport, nor did it extend its scope of application. Whether or not the HVR apply to the sea leg of a multimodal transport has, as with the other conventions' applicability, been debated back and forth.⁹³ In order to determine this, one needs to look at the scope of application.

The convention will apply to a contract of carriage in which is covered by a B/L or any similar document of title, as long as this document relates to the carriage of goods by sea.⁹⁴ First of all, the Art. regarding scope of application mentions «contracts of carriage». As

⁹² Per Vestergaard Pedersen, *Transportret* (2008) Forlaget Thomson. page 931

⁹³ Hoeks, op. cit., page 250

⁹⁴ HVR Art 1 (b)

multimodal transport is a contract where the MTO promises to transport goods from one place to another, the requirement seems fulfilled.⁹⁵ The other prerequisite for the HVR to apply is that the contract has to be «covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea». A B/L is a document issued by a carrier to a shipper, which serves three different functions. Firstly, it serves as a receipt from the carrier which proves that the goods are received for transportation. Secondly, it is evidence of a transport contract between the carrier and the shipper. Thirdly, it is a document of title.⁹⁶ Being a document of title means that the possession of the document is regarded as equivalent to possession of the goods themselves, and the B/L is therefore negotiable.⁹⁷ Reading this, it seems like the convention will apply to the sea leg of a multimodal transport, as long as there is a B/L covering this.

On the other hand, Art. II mentions a «contract of carriage by sea», and Art. X governing the geographical scope states that the provisions apply to every B/L relating to the carriage of goods between ports in two different States. This suggests that there needs to be a contract of carriage by sea, and not just a contract of carriage. However, it is important to keep in mind that Art. I is the one governing scope of application and is therefore entitled to greater weight. Moreover, Art. X determine the geographical scope, and by stating that the rules apply to the carriage of goods between ports does not exclude the convention from governing the sea stage of the multimodal transport, it just excludes the convention from applying to other parts of such a transport.

4.2.1 Case law and legal literature

In countries like Germany and Italy, the prevailing view is that since the HVR do not mention multimodal transport, the convention cannot be applied to the sea leg of such a transport.⁹⁸

⁹⁵ Spanjaart, *op. cit.*, page 13. However; see chapter 6 regarding the *sui generis* doctrine

⁹⁶ Hoeks, *op. cit.*, page 314 and Pedersen, *op. cit.*, page 471-477

⁹⁷ Tettenborn & Soyer, *op. cit.*, page 142

⁹⁸ Hoeks, *op. cit.*, page 312-313

This can seem reasonable considering the fact that multimodal transport had developed when the Visby protocol was drafted, and choosing not to mention it may indicate that they did not want the convention to regulate this.

In the English judgement *Pyrene v. Scindia*⁹⁹, regarding a damaged fire tender, the scope of the Hague Rules was discussed. One of the questions was whether this convention was applicable, even though it was a transport which covered both sea and road transport. The court answered this question in the affirmative, and since the scope of application in the Hague Rules correspond with the HVR, one can assume that the same would be the conclusion regarding this convention. This opinion was upheld in *Mayhew Foods v. OCL*.¹⁰⁰ Based on this, it seems like the standpoint in English judiciary is that the HVR apply to the sea segment of a multimodal transport. The American view coincides with this.¹⁰¹

Dutch judiciary has also supported this view and considered HVR to apply to the sea segment of multimodal transport.¹⁰² One case called *Colombia* concerned a transport of mangoes and melons from Costa Rica to the Netherlands. Before arriving at the destination, the fruit had rotten and the court considered the damage occurred during the sea stage of the transport. Due to this, the court concluded that the HVR should regulate the liability.¹⁰³

According to the Danish author *Per Vestergaard Pedersen*, the HVR will apply to the part of the contract which relates to carriage by sea. This seems to be in accordance with the general view in Denmark.¹⁰⁴ Yet, if the contract is an 'open' contract where the different means of transport are not specified, he finds the convention inapplicable. He believes that such

⁹⁹ *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd.* (1954) 1 Lloyd's Law Reports, 321. Treated by Hoeks, op. cit., page 312

¹⁰⁰ *Mayhew Foods Ltd v. O.C.L.* (1984) 1 Lloyd's Law Reports, 317. Treated by Hoeks, op. cit., page 312

¹⁰¹ Hoeks, op. cit., page 312

¹⁰² Hoeks, op. cit., page 251

¹⁰³ Judgement RB Rotterdam 17 September 2003, S&S 2007, 63 presented by Hoeks, op. cit., page 256

¹⁰⁴ Bredholt et al, *Søloven* (2012) 4th edition, Jurist- og Økonomforbundets Forlag. page 371

contracts do not relate to carriage by sea, and can therefore not fall within HVR's scope of application.¹⁰⁵

This shows that there are differing views in the legal field regarding the convention's applicability to the sea segment of a multimodal transport. However, the industry itself does not seem to struggle with this. The general standpoint in the maritime and transport industry is that the convention applies to the sea leg of a multimodal transport which is covered by a B/L.¹⁰⁶ As both the contracting parties usually agree that the HVR apply, the convention's applicability is in practice not as problematic as it sounds. There are therefore not that many disputes concerning this issue.

One question which is, on the other hand, highly disputed both in the industry and the legal field, is if the HVR apply to 'multimodal bills of lading'.¹⁰⁷

4.1.2 Multimodal Bill of Lading

The development talked about in chapter 1 with containerization, multimodal transport and an expansion in door-to-door transport has led to the rise of multimodal B/L.¹⁰⁸ Such B/L does not provide for carriage from port-to-port, but throughout the entire transport from A to B.¹⁰⁹ The wording used in HVR opens up for other documents than the traditional B/L, as long as it is a «similar document of title».¹¹⁰ There is no guidance as to what aspects have to be similar. One can assume that a prerequisite is that it needs to serve the same functions to fall within, i.e. serve as a receipt, an evidence of the transport contract, and be a document of title.

¹⁰⁵ Pedersen, op. cit., page 1010

¹⁰⁶ Hoeks, op. cit., page 282

¹⁰⁷ Tettenborn & Soyer, op. cit., page 138

¹⁰⁸ Richard Aikens, Richard Lord, Michael Bools, *Bills of Lading* (2015) 2nd edition, Informa Law from Routledge. Page 415

¹⁰⁹ Donald James Hill, *Freight Forwarders* (1972) Stevens & Sons. page 332

¹¹⁰ HVR Art. 1 (b)

The first two conditions regarding a receipt and an evidence of the contract do not offer much difficulties.¹¹¹ Nevertheless, to create a document of title is more complicated.¹¹² Frequently, multimodal B/L will be a ‘received for shipment bill’ and not a ‘shipped’ B/L.¹¹³ This only indicates that the goods will be shipped, but not that the goods have been shipped on board. The reason for this is the multimodal aspect, in which the goods often are transported with other modes prior to the sea leg. A multimodal B/L issued by another carrier than a sea carrier will generally not be as acceptable to the financial community.¹¹⁴ Whether or not such a document will serve as a ‘document of title’ is uncertain.¹¹⁵

4.2 Multimodal transport under the CMR

Due to the increase in door-to-door transport, carriage of goods by road has become increasingly important.¹¹⁶ It plays a role in almost every multimodal carriage and is often the only option in certain areas. Such transport is also a more flexible and cheaper way of transporting goods.¹¹⁷ Whether the CMR applies to multimodal carriage has been subject to a great deal of debate ever since the rise of this type of carriage.¹¹⁸

The scope of application has been subject to different interpretations, some suggesting it applies to multimodal transport and some with the opposite view.¹¹⁹ As previously mentioned,

¹¹¹ Hoeks, op. cit., page 314 and Kurt Grönfors, *Transportsrättsliga studier* (1975) Akademiförlaget. page 213

¹¹² Grönfors, op. cit., page 213

¹¹³ Hoeks, op. cit., page 316

¹¹⁴ Hill (1972), op. cit., page 332 & Glass (2006), op. cit., page 311

¹¹⁵ Tettenborn & Soyer, op. cit., page 144 and Hoeks, op. cit., page 317

¹¹⁶ Tiberg & Schelin, op. cit., page 167

¹¹⁷ I.c.

¹¹⁸ Hoeks, op. cit., page 145

¹¹⁹ Ibid. page 149

the CMR applies to every contract for the international carriage of goods by road.¹²⁰ It also applies to so called ‘mode-on-mode transport’, where the truck together with the goods are carried on a ferry or a different type of transport means, without the goods being unloaded from the vehicle.¹²¹ Since this includes more than one mode of transport, it falls within the term ‘multimodal transport’.¹²² The question is if the convention can be applied to the road leg of a multimodal transport, which does not fall within the scope of Art. 2.

4.2.1 Case law and legal literature

A well-known judgement concerning this issue is the English *Quantum* case.¹²³ The case concerned a loss of hard disks owned by Quantum, which were transported from Singapore to Dublin. The disks were flown from Singapore to Paris by Air France, but from Paris to Dublin, the disks were transported by road, including mode-on-mode transport from Paris to Manchester. The subcontractor who performed the road leg of the transport, was Plane Trucking. During the road stage in England, the goods were stolen by Plane Trucking’s employees, and both Air France and Plane Trucking accepted liability. The question however, was whether the liability should be governed by the CMR. Quantum argued that the CMR was applicable and invoked Art. 29. According to this rule, the carrier loses its right to limitation if the goods are stolen by someone it is responsible for. To rephrase, if Quantum could convince the court that CMR was applicable, full compensation would be given. Air France on the other side, argued that CMR was not applicable, as it was a multimodal transport and therefore, their general conditions should be applied.¹²⁴

In the Commercial Court, Judge Tomilson looked at the contract as a whole and stated that this was not a contract for the carriage of goods by road but «a contract predominantly for

¹²⁰ Clarke (1991), op. cit., page 66 and Hoeks, op. cit., page 147

¹²¹ CMR Art. 2.1 and Tiberg & Schelin, op. cit., page 212

¹²² Hoeks, op. cit., page 147

¹²³ *Quantum Corporation Inc. and others v. Plane Trucking Ltd and Another* [2001] and [2002]

¹²⁴ Tiberg & Schelin, op. cit., page 214.

carriage by air»,¹²⁵ and the CMR was therefore not applicable. The decision was appealed by the claimants, who argued that the CMR could still be applicable where a contract embraced more than one type of carriage.¹²⁶ The Court of Appeal stated that when the transport is actually performed by road, the CMR shall be applicable.¹²⁷ The court concluded that the road leg of a multimodal transport could qualify as a «contract for the carriage of goods by road» according to Art. 1 CMR,¹²⁸ and as a consequence the carrier lost its right to limitation.¹²⁹

There are numerous case law and legal literature that support the Court of Appeal's view in *Quantum*,¹³⁰ and consider the words «contract for the carriage of goods by road» not to exclude other modes from being part of the same contract.¹³¹ The general view in many European states is that CMR is applicable in such situations.¹³² Norwegian and Danish courts have also chosen this approach.¹³³ Although this has not always been the status quo in Denmark.¹³⁴ The Finnish author *Hannu Honka* and the Swedish authors *Schelin* and *Tiberg* are also under the same impression.¹³⁵ Along with authors in for example Belgium, France, Germany and Holland.¹³⁶ The well-known English authors Clarke and Hill suggested that the CMR was applicable to multimodal transport, long before the *Quantum* case.¹³⁷

¹²⁵ *Quantum Corporation Inc. and others v. Plane Trucking Ltd and Another*, [2001] Vol 2, Lloyd's Law Reports. page 139

¹²⁶ *Quantum Corporation Inc. and Others v Plane Trucking Limited and Another*, [2002] Vol 2, Lloyds's Law Reports. page 25

¹²⁷ Pedersen, op. cit., page 943

¹²⁸ Hoeks, op. cit., page 165 and

¹²⁹ Tiberg & Schelin, op. cit., page 214

¹³⁰ Hoeks, op. cit., page 166

¹³¹ Ibid. page 149

¹³² Schelin (2008), op. cit., page 44

¹³³ Judgements: ND-2012-289, ND-2013-296, ND-2012-210 Presented by Erling Selvig, "Kommentarer 2009-2014 til Nordiske domme i sjøfartsanliggender" (2018) *Nordisk skibsrederforening*. Obtained from: Lovdata

¹³⁴ Pedersen op. cit., page 965 and 968

¹³⁵ Schelin (2008), op. cit., page 44 and Tiberg & Schelin, op. cit., page 215

¹³⁶ Malcolm Clarke, *A Multimodal Mix-up*, Journal of Business Law, J.B.L. 2002, Mar, 210-217. page 2

¹³⁷ Clarke (1991) op. cit., page 67 and Hoeks, op. cit., page 156

Nonetheless, this perception is not completely unilateral, and the decision in *Quantum* has been subject to a great deal of criticism.¹³⁸ The current prevailing view in German legal literature is that the road leg of a multimodal transport does not fall within Art. 1 of the CMR.¹³⁹ After several years of going back and forth, the German Supreme Court decided in 2008 that CMR could not be applied to multimodal transport, except what fell within the scope of Art. 2.¹⁴⁰ Authors and case law from other countries like Italy and some of the Scandinavian countries have also taken this approach.¹⁴¹ For example in 2004, the Supreme Court of Belgium decided, in the judgement *TNT Express* regarding liability for damage to goods, that CMR is not applicable to multimodal transport, but to contracts that govern road transport only.¹⁴² The Swedish authors Heidbrink and Ramberg are on the same side,¹⁴³ along with several danish authors.¹⁴⁴ The reasons behind this view vary, but the most common will be mentioned in the further.

Most of the opponents against applicability read the wording «contract for the carriage of goods by road» restrictively, to involve road transport only.¹⁴⁵ Furthermore, CMR's Protocol of Signature provides that the parties to the convention shall negotiate a convention covering contracts for combined carriage.¹⁴⁶ The opponents interpretation is then that they would not state this, if CMR already applied to multimodal transports.¹⁴⁷ Another reason is the existence of Art. 2. Some claim that if the drafters had intended for CMR to cover more than what falls

¹³⁸ Tiberg & Schelin, op. cit., page 215

¹³⁹ Hoeks, op. cit., page 171

¹⁴⁰ Case I ZR 181/05 from 17.07.2008. The judgement is treated by Hoeks, op. cit., page 172-173 and can be found here: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2008-7-17&Seite=0&nr=44860&pos=13&anz=42>

¹⁴¹ Hoeks, op. cit., page 266

¹⁴² Judgement C.03.510.N. From 8.11.04. The case is treated by Pedersen, op. cit., page 945 and can be found here: <https://justitie.belgium.be/sites/default/files/downloads/AC%202004%2011.pdf>

¹⁴³ Pedersen, op. cit., page 982-983

¹⁴⁴ Ibid. page 975-977

¹⁴⁵ Hoeks, op. cit., page 175. See for example Fabricius, op. cit., page 41

¹⁴⁶ Andrew Messent & David A. Glass, *CMR: Contracts for the International Carriage of Goods By Road* (2000) 3rd edition, Informa Law. page 2

¹⁴⁷ Hoeks, op. cit., page 176

within Art. 2, they would not have restricted this to situations where the goods are not unloaded. To rephrase, if the drafters intended to cover more than Art. 2, they would have explicitly mentioned it, like they did with mode-on-mode transport.¹⁴⁸

Additionally, the words «place of taking over the goods and the place designated for delivery, as specified in the contract» in Art. 1 have been used as an argument.¹⁴⁹ Since a multimodal transport will include more than just road transport, there exists a risk that the place of taking over the goods and the delivery place are not connected to the road leg of the transport.

According to Art. 17 the carrier is during this time liable for loss or damage to goods. In other words, if the wording refers to the entire multimodal contract, then the liability regime in the CMR would be applicable to the entire carriage, not just the road stage.¹⁵⁰ This would not be a reasonable solution, considering the fact that CMR is designed for road transport only.¹⁵¹ On top of this, it could be in conflict with other mandatory conventions. Therefore, the view among the opponents is that this indicates that multimodal transport cannot fall within, due to the unfortunate result this may have.

Finally, the consignment note has been mentioned.¹⁵² According to Art. 4 the contract of carriage «shall be confirmed by the making out of a consignment note». However, this is not a precondition for the application of CMR, and the thesis will therefore not elaborate further on this.¹⁵³

4.2.2 Does the road leg need to be international?

If one assumes that CMR will apply to the road stage of a multimodal transport, the question

¹⁴⁸ Hoeks, op. cit., page 177-178

¹⁴⁹ Ibid. page 180

¹⁵⁰ I.c.

¹⁵¹ Except from mode-on-mode transport in Art. 2

¹⁵² Hoeks, op. cit., page 189

¹⁵³ Clarke (2002), op. cit., page 2 and CMR Art. 4

is then if the road leg itself needs to be international, or if it is fulfilled as long as the entire multimodal carriage is international. This topic has similarly been debated back and forth.¹⁵⁴ According to Art. 1 the convention applies «when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries». As multimodal transport only involves one contract for the entire voyage, and the convention uses the wording «as specified in the contract», it seems like it is the entire voyage that has to be international and that it does not matter whether the road leg is national. On the other hand, one must keep in mind that multimodal transport was not that relevant in 1956, and the contract would at that time usually only govern road transport. Today the prevailing view is that the road leg itself needs to be international.¹⁵⁵

4.2.3 Concluding words

Above all, it is clear that the CMR's scope of application has been subject to a massive debate. Whether or not the CMR will be applicable to multimodal transport will fluctuate depending on which country the claim is being raised. To give an illustration, if there is a multimodal transport from England to Germany, the road leg will according to English courts be governed by the CMR, whereas the German courts will have the opposite view. By knowing the status in the different countries, the claimants can choose to raise actions where it will be most beneficial for them. Likewise, what lays in the international requirement have been debated back and forth and will vary depending on the courts.

Although the scope of application only mentions carriage by road, I find it important to accentuate that it does not say that the transport has to be exclusively by road, nor does it say that most of the transport has to be by road. It is also worth mentioning that the CMR was adopted in 1956, prior to the huge increase in multimodal transport. The convention has not been amended over the years,¹⁵⁶ and one must therefore have this in mind when interpreting

¹⁵⁴ Hoeks, *op. cit.*, page 152-157

¹⁵⁵ *Ibid.* page 155 and Schelin (2008), *op. cit.*, page 44

¹⁵⁶ Spanjaart, *op. cit.*, page 11

the convention. Uniform law is not meant to be frozen in time,¹⁵⁷ and one must therefore interpret the convention in a dynamic way, which will fit today's situation.

The reasoning behind the opponents argument concerning Art. 2 is not particularly convincing. A mode-on-mode transport differs from a 'normal' type of multimodal transport as two modes are operating at the same time. In such a case there rests a conflict as to which regime should govern this, and by including Art. 2 it seems like the drafters expanded CMR's scope of application to cover other modes, in order to solve this conflict. As I see it, this was not an attempt to exclude other 'normal' forms of multimodal transport.

Furthermore, the place of taking over and delivery of the goods can seem to relate to the start and the finish of the entire voyage, as it refers to what is «specified in the contract». On the other hand, it is, as previously mentioned, important to interpret this in a way that will suit the current situation. When CMR was adopted, multimodal transport was not a common form of transport, and it was natural to use the word «contract» as this related to the road transport only. Today the «contract» does no longer govern the road transport only, but sometimes several transport modes. It is clear that the CMR was not designed for other modes of transport, despite what falls within Art. 2. In order for the scope of application to fit today's situation, one must as I see it, read «contract» as the road leg of the transport. This thinking is similar to the one in *Quantum* where the road stage of the multimodal transport was considered to fall within the wording «contract for the carriage of goods by road».

The fact that the CMR's Protocol of Signature suggests that the parties to the convention shall negotiate a convention covering combined carriage, can in my point of view, not be regarded as a proof that the convention does not apply to such transport today. Again, it is important to emphasize the fact that multimodal transport was not very relevant when the CMR was drafted. Nevertheless, the drafters viewed it as an important factor to find a uniform way to regulate this type of transport. Yet, if the drafters knew the unregulated, fragmented and

¹⁵⁷ Clarke (2002), op. cit., page 5

complex situation existing today in regards of multimodal transport, I agree with Clarke's opinion that they would have wished CMR to apply.¹⁵⁸

4.3 Multimodal transport under the CIM

As mentioned earlier, the COTIF Convention is the oldest instrument in uniform transport law, and was established in 1890. This was a long time before the containerization, and the increase in multimodal transport. However, when the CIM appendix governing liability was added in 1980, multimodal transport had become a more common form of carriage. There is a lack of case law and legal literature regarding CIM's relation to multimodal transport.¹⁵⁹ However, as the CIM is modeled after CMR, this convention will be relevant when interpreting the CIM and its relation to this sort of carriage.¹⁶⁰

The scope of application is similar to the CMR's and concerns every international «contract of carriage of goods by rail».¹⁶¹ Unlike the CMR, the convention requires that both the place of taking over and delivery place to be situated in Member States.¹⁶² The CIM includes certain multimodal aspects.¹⁶³ In Art. 1 §§ 3 and 4, the convention extends its scope to cover also supplementing carriage by sea, road and inland waterway.¹⁶⁴

Art. 1 § 3 states that the convention will cover both supplementing carriage by road and inland waterway in which is subject to the same contract, as long as it is «internal traffic of a

¹⁵⁸ Clarke (2002), op. cit., page 5

¹⁵⁹ Hoeks, op. cit., page 266

¹⁶⁰ Ibid. page 276

¹⁶¹ CIM Art. 1 § 1

¹⁶² CIM Art. 1 § 1

¹⁶³ Schelin (2008), op. cit., page 43

¹⁶⁴ I.c.

Member State». By only including domestic transport, the convention avoids conflict with the CMR.¹⁶⁵

The next paragraph relates to supplementing carriage by sea and transfrontier carriage by inland waterway.¹⁶⁶ If this supplementing carriage is performed on services included in the list of services provided for in COTIF Art. 24 § 1, the CIM is applicable.¹⁶⁷

The question is if the convention can a part from these rules apply to the rail stage of a multimodal transport. As with the CMR, by reading the scope of application restrictively, it seems like the convention relates to contracts governing rail transport only. The authors who have taken this approach, e.g. *Koller*, also tend to be in the same view regarding CMR's applicability to multimodal transport.¹⁶⁸

Another argument is that the drafters were aware of the discussion regarding CMR's scope of application and its relation to multimodal transport.¹⁶⁹ If the drafters wanted the CIM to apply to this sort of carriage, they could have added this to the scope of application. Since they chose not to, this can be an indicator that the CIM does not govern such transport. On the contrary, this argument can be turned around; If the drafters did not want the CIM to apply to multimodal transport, they could easily have excluded this, which they did not do. This can likewise be an indicator that it does apply.

In regards to the inclusion of multimodal transport in Art. 1 §§ 3 and 4, this does not necessarily exclude other forms of multimodal transport. The situations referring to in these paragraphs are situations similar to Art. 2 where the convention will govern other transport modes. This is as far as I see it not a contradiction to the convention's application on a rail stage of a multimodal transport.

¹⁶⁵ Assumed that the «international» requirement in the CMR refers to the road transport and not the entire multimodal transport.

¹⁶⁶ CIM Art. 1 § 4

¹⁶⁷ Pedersen, op. cit., page 1017-1018

¹⁶⁸ Hoeks, op. cit., page 170 and 266

¹⁶⁹ Ibid. page 276

Although there rests a lack of legal material regarding CIM's applicability to a rail stage of a multimodal transport, it is clear that there is insecurity as to whether or not it applies. In contrast to the CMR, one does not know the status in the different countries. Nevertheless, due to the authors view and the similarity between the two conventions, one may assume that the countries which are in favor of CMR's applicability to the road leg of a multimodal transport, will have the same approach regarding CIM's.

4.4 Multimodal transport under the Montreal Convention

According to Art. 1, the MC applies to «all international carriage (...) performed by aircraft for reward». Furthermore, Art. 18 states that this comprises the time when the carrier is in charge of the goods, but does not extend to any other transport modes performed outside an airport. As long as the goods are in the carrier's charge inside the airport, the convention applies, regardless of the means of transport.¹⁷⁰ Numerous airports today include a great deal of transport performed by other modes, such as trains between the different terminals and a lot of road movements, and the MC will govern these movements. Provided that these movements fall within the same contract, the MC can be applied to the entire multimodal transport as long as it finds place inside the airport area.

In the case of unlocalized damage or loss the convention can however be applicable to other modes of transport outside the airport. Provided that such carriage falls within the «performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment» any damage that occurs is presumed to result from the air stage, unless one can prove the contrary.¹⁷¹

¹⁷⁰ Hoeks, op. cit., page 239

¹⁷¹ MC Art. 18 (4)

On top of these situations, the MC is the only convention who explicitly regulates multimodal transport. In Art. 38 para 1 it is stated that the convention applies to the air carriage during a «combined carriage». It is clear that the term ‘combined carriage’ refers to multimodal transport as it states that the combined carriage is «performed partly by air and partly by any other mode of carriage». The term ‘combined carriage’ is also just a different name for the same concept.¹⁷² Therefore, the MC will govern the air stage of a multimodal transport, yet not the other transport modes.¹⁷³ Art. 38 favors the network system, which the thesis will come back to, where the different liability regimes regulate their own segment of the multimodal carriage.

4.5 Summing up

All things considered, it is clear that there are a lot of unsureness and different views regarding unimodal convention’s applicability to multimodal transport. Unlike the MC, none of the conventions explicitly state that they apply, and their scope of application have therefore been subject to a great deal of debate both between courts and authors in different countries, but also within the same country.

The one who has brought the most attention is undoubtedly CMR. This is probably due to the fact that carriage by road place a part in almost every multimodal transport. Transport by sea is also quite common in multimodal transport, but due to the general view in the industry that HVR apply, the convention’s scope has not been as controversial.

In some countries the parties will be bound by the mandatory conventions, while in others the parties have to implement them in the contract for the conventions to apply. For example Germany seems generally restrictive when it comes to applying unimodal conventions to multimodal transports, whereas the Netherlands is more lenient. This illustrate the unpredictable and complex situation existing today, which will induce friction costs,

¹⁷² Spaanjar, op. cit., page 13

¹⁷³ Pedersen, op. cit., page 1015

expensive and complicated disputes and trials.

If one finds multimodal transport to be subject to freedom of contract, this can be a threat to small and medium-size parties.¹⁷⁴ The standard term contracts used today in multimodal transport are commonly issued by the carrier, and as a consequence of this, the contracts are often favoring the carrier.¹⁷⁵ For big companies, this is not that dicey, as they have the power and resources to negotiate with the carriers. Nonetheless, for smaller actors the possibility to negotiate is reduced, and there rests a threat of being abused by the bigger players. In order to protect these actors it is important to have mandatory rules governing the relationship between them, which makes the risk distribution fairer. This will make it easier and more attractive for smaller companies to enter and stay in the market.

¹⁷⁴ Hoeks, *Op.cit.* at page 14

¹⁷⁵ UNCTAD , “Multimodal transport; the feasibility of an international legal instrument”, 13 January 2003, UNCTAD/SDTE/TLB/2003/1, http://unctad.org/en/docs/sdtetlb20031_en.pdf. page 10

5 The different solutions to the problem

There are three main solutions as to how one can regulate liability in multimodal transport, namely a uniform system, a network system and a modified system.¹⁷⁶ In the following, the thesis will go through these solutions and look at their strengths and weaknesses. It should be pointed out that the network system mentioned below is a ‘pure’ network system with no supplementary rules. In legal literature some writers tend to connect the modified system and the network system,¹⁷⁷ which the thesis will distinguish between.

5.1 The uniform system

A uniform system involves a system where there is a convention or another legal framework governing the entire multimodal transport.¹⁷⁸ The same liability regime would be applicable throughout the entire voyage, irrespective of during which stage damage or loss to goods occur, or in which country actions are brought. This would create uniformity for multimodal transport and would be both easy to understand and apply. As a consequence, it would not include high administrative costs, disputes or trials.¹⁷⁹ The uniform system is favored by the transport customers, as it provides coverage for the entire voyage.¹⁸⁰ The European Commission stated in 2001 that a uniform system could save up to EUR 50 million every year in friction costs,¹⁸¹ and today this sum is probably a lot higher.

¹⁷⁶ Hoeks, op. cit., page 25

¹⁷⁷ See e.g. *Erik Røsæg* in Schelin (2008), op. cit., page 71

¹⁷⁸ Hoeks, op. cit., page 25

¹⁷⁹ Pedersen, op. cit., page 932

¹⁸⁰ Faghfour, op. cit., page 109

¹⁸¹ Hoeks, op. cit., page 16

Nonetheless, a uniform system could potentially cause problems for the MTO by creating recourse gaps.¹⁸² In a uniform system, the same limitation level would apply regardless of the performing mode. Yet, in the relationship between the MTO and the performing carriers, the limitation levels will be dependent on the transport mode, which may deviate from the limitation level in a uniform system. As a consequence, the MTO could risk getting a lot less in return in the recourse action against the performing carrier, or even risk not getting coverage at all. This could for example be the case if the damage or loss could not be localized. The MTO would in such circumstances be liable towards the consignor/consignee based on the uniform liability regime, as this applies throughout the entire voyage. Yet, as the MTO would not be able to prove that the loss or damage happened during a specific transport stage, the unimodal conventions would not be applicable. Due to this, the MTO would not receive compensation from the performing carriers, which would create a recourse gap for the MTO. Unlocalized damage or loss is very common in multimodal transport, as the goods are often carried out in containers and the loss or damage will not be noticed until the end of the entire transport.¹⁸³ Furthermore, in a uniform system the carrier would not be able to benefit from less burdensome liability rules which would otherwise have applied to the specific mode.¹⁸⁴ On the other hand, in a uniform system, the liability rules are predictable and the MTO can calculate how much it risks losing if such a situation would occur. It does therefore not lead to particularly high insurance premiums or other friction costs for the MTO.

Based on this, there is no doubt that a uniform system governing liability in multimodal transport would be a good option. One can then ask why the past attempts on making such a system have failed. One of the main reasons behind the elusive success has been the existence of international regimes governing the liability in unimodal carriage.¹⁸⁵ As one saw in chapter 3, the conventions are mandatory, and since the general view is that a multimodal contract is a mixed contract between different transport modes,¹⁸⁶ it is difficult to create a multimodal

¹⁸² Ibid. page 26

¹⁸³ Per Ekelund, *Transportaftaler* (1997) 2nd edition, Jurist- og Økonomforbundets Forlag. page 63

¹⁸⁴ Hoeks, op. cit., page 26

¹⁸⁵ Glass (2006), op. cit., page 307

¹⁸⁶ Hoeks, op. cit., page 13

convention without conflicting with the consisting conventions.¹⁸⁷ Another reason can be the sectors' different opinions. It may perhaps be difficult to negotiate and come to an agreement regarding the different aspects in a liability regime when the cultures in the different transport sectors vary a great deal and have deep roots. To illustrate, the maritime sector might advocate for a liability rule which is based on fault, while the aviation sector wants strict liability.

5.2 The network system

The network system is a system in which applies the different unimodal conventions based on where the damage or loss occurs.¹⁸⁸ To illustrate, if damage to goods happens during the road leg of a multimodal transport, the CMR will apply. It does not provide its own rules, but becomes a chain of different regimes, as if it were separate contracts.¹⁸⁹ The liability regime will therefore be the same as the one governing liability for the performing carrier, unlike with a uniform system. Hence, no recourse gaps will occur. This system uses the current conventions governing carriage of goods and knits them together, so that there is no need to create a new convention governing multimodal transport.

One of the greatest benefits with such a system is the lack of recourse gaps. This puts the MTO in a much better situation, than under a uniform system or a modified system. The risk of not getting coverage during the recourse action is not present, as the same rules will apply in the relationship between the claimant and the MTO, and the MTO and the performing carriers. By using such a system, it makes it a lot more attractive for MTO's to organize this type of transport. It is therefore no surprise that the network system is highly supported among the carriers.¹⁹⁰ Another benefit is that the different segments of the carriage will be governed by rules which are specifically designed for that type of transport.

¹⁸⁷ Schelin (2008), *op. cit.*, page 71 and Hoeks, *op. cit.*, page 26

¹⁸⁸ Hoeks, *op. cit.*, page 25

¹⁸⁹ *Ibid.* page 28

¹⁹⁰ Faghfour, *op. cit.*, page 109

Although there are positive sides to this system, such as the fact that no additional regime has to be drafted, the lack of recourse gaps and specifically fitted rules, there are some profound difficulties which will be discussed in the following.

5.2.1 Drawbacks

Aforementioned, the convention's liability levels vary a great deal. Considering the fact that the goods are identical and the transport falls within one contract, it seems unreasonable and hard to justify that the parties will be subject to different rules.¹⁹¹ For instance, the MTO can be liable for almost 80% more if the goods are carried by air than by sea. On the other hand, the MTO organizes the transport and can therefore choose the different modes.

Additionally, time bar for actions and notice of damage vary, which is also hard to justify. The question is if these start running after the entire multimodal transport or post their carriage stage.¹⁹² The latter solution can seem unreasonable, considering the fact the voyage can last for a long time following the stage, and the claimant might not find out about the loss or damage before the end of the entire transport. The claimant can then end up having little time to bring actions or notice, or even risk losing these rights.

One great issue regarding a network system is when the conventions overlap. This can for example occur in cases where damage or loss happens during a mode-on-mode transport which falls within both Art. 2 CMR and HVR. Yet, one can ask how common it is to issue a B/L during mode-on-mode transports.¹⁹³ The same scenario can occur during a channel tunnel, for example one from France to United Kingdom where the vehicle is carried by a train through the tunnel.¹⁹⁴ Art. 2 has tried to solve the issue regarding which regime to apply by stating that the CMR shall apply unless loss or damage happened «by some event which

¹⁹¹ Glass (2006) op. cit., page 321 and Schelin (2008), op. cit., page 72

¹⁹² Hoeks, op. cit., page 29

¹⁹³ Ibid. page 362

¹⁹⁴ Ibid. page 358

could only occurred in the course of and by reason of the carriage by that other means of transport». ¹⁹⁵ However, conflict can still occur if this is not the case. Furthermore, conflict may also occur if loss or damage to goods happens during the unloading and reloading period. To illustrate, if the goods are directly loaded from a vehicle onto a train, both the CMR and CIM are applicable. ¹⁹⁶ Based on this, it is clear that the unimodal conventions do not take each other into consideration. Determining which convention shall prevail is difficult, ¹⁹⁷ as there are no rules that solve this. ¹⁹⁸ It is then up to the different courts to decide what framework prevails.

Another problem is when none of the regimes applies. To illustrate, if the goods are lost after the road carrier has delivered the goods to the sea carrier but before the sea carrier has started loading the goods on board the ship, the liability regime in neither CMR nor the HVR will apply. ¹⁹⁹ The fact that there are gaps in the liability regimes of the unimodal conventions which can lead to no liability, makes it less appealing to choose this system.

Additionally, the network system is inapplicable where loss or damage is unlocalized. ²⁰⁰ If the claimant cannot prove that damage or loss arose from one of the stages, the carrier can escape liability. Due to the fact that goods are often carried in sealed containers, it is often difficult to identify at which stage of the carriage, loss or damage occurred. ²⁰¹ The same can be the case for gradual damage. ²⁰² Unlike the uniform and modified system, these circumstances would not put the MTO in danger of recourse gaps. Yet, the risk would lay on the consignor/consignee, as it would in such case not receive indemnity for its loss.

¹⁹⁵ CMR Art. 2.1

¹⁹⁶ They both apply to loading and discharging, see CMR Art. 17.1 and CIM Art. 23 § 1

¹⁹⁷ Hoeks, *op. cit.*, page 26

¹⁹⁸ *Ibid.* page 19

¹⁹⁹ Spanjaart, *op. cit.*, page 2

²⁰⁰ *I.c.* However, see the exception in MC Art. 18 (4)

²⁰¹ Faghfour, *op. cit.*, page 101

²⁰² Pedersen, *op. cit.*, page 934 and Schelin (2008), *op. cit.*, page 76

Furthermore, problems can occur if the contract is unspecified or if the modes described in the contract do not correspond with the performing modes. The first situation is quite common in the multimodal transport industry.²⁰³ Whether it is the contracting or performing mode which shall prevail, is disputed.²⁰⁴ The Court of Appeal in *Quantum* stated that it was the performing of the contract which was crucial.²⁰⁵ This view has been heavily criticized.²⁰⁶ The Swedish authors *Schelin* and *Tiberg* admit that the view in *Quantum* can make it more difficult to foresee the carrier's liability in cases where the parties have not decided how the transport shall be carried out at the time when the contract is entered into. Yet, they believe that a system where no conventions are applicable, if the means of transport are not specified in the contract, opens up for a possibility to circumvent the mandatory liability regimes.²⁰⁷ The same thinking can be used in a situation where the performing modes do not harmonize with what is described in the contract. The MTO can then put the mode of transport in the contract which serves the best protection for it, and then carry out the transport by different modes. Although it would be more foreseeable for the parties involved that the contracting mode prevails, it increases the chances to circumvent the mandatory conventions. In the end, why should the MTO be protected by a more favorable liability regime, when it actually chooses to perform the transport by another mode? Moreover, as shown in chapter 3, the liability regimes are designed for the specific transport mode, and it can therefore be difficult to apply these to a transport in which they were not initially meant for.

Then again, one can argue that it would be more reasonable towards the consignor/consignee to let the contracting mode prevail. This would increase the foreseeability and not put this party in a situation where it risks being subject to more burdensome liability regimes than what it agreed on.

Due to for example the fact that there are gaps in this system, a pure network system is not

²⁰³ Spanjaart, op. cit., page 16

²⁰⁴ E.g. Fabricius, op. cit., page 39 and Pedersen, op. cit., page 941

²⁰⁵ Pedersen, op. cit., page 957

²⁰⁶ Tiberg & Schelin, op. cit., page 215

²⁰⁷ Ibid. page 215

used in practice, nor in any national law. It is therefore more a theoretical than a practical approach to liability in multimodal transport.²⁰⁸

5.3 The modified system

Lastly, the modified system can be seen as a compromise between the two previous ones. This system will use the current conventions as far as they apply to the carriage and have separate rules when they do not.²⁰⁹ The fact that there is no uniform system governing multimodal transport, has led to numerous contractual provisions and standard contracts. This system eliminates the risk of not getting compensation when the unimodal conventions are inapplicable, e.g. due to gaps between the conventions or unlocalized losses. It therefore solves some of the issues that a pure network system brings with it.²¹⁰ However, when it comes to the other drawbacks involved in a network system, these will still be present in a modified system.

This system is commonly used in practice and comes in different forms.²¹¹ The earlier mentioned Rotterdam Rules is an example of a modified system. One aim behind this convention was to fill some of the legal gaps concerning multimodal transport.²¹² The convention applies to carriage by sea, but also to additional carriage by other modes of transport.²¹³ To rephrase, it can be applied to the other modes, as long as some of the transport is carried out by sea. However, if the unimodal conventions governing the other modes apply, these shall prevail.²¹⁴ Based on this, when loss or damage to goods occurs, which is not covered by the unimodal conventions, for example due to unlocalized loss, the Rotterdam

²⁰⁸ Pedersen, op. cit., page 934

²⁰⁹ Hoeks, op. cit., page 30

²¹⁰ Pedersen, op. cit., page 939

²¹¹ Ibid. page 936

²¹² Schelin (2014), op. cit., page 27

²¹³ Rotterdam Rules Art. 1.1 and 5.1

²¹⁴ Rotterdam Rules Art. 82

Rules have a ‘fall-back’ solution, and will therefore apply. Yet, this convention has as mentioned not entered into force, and it is uncertain whether it will or not.

One acknowledged modified system in the four nordic countries is the so called NSAB 2000,²¹⁵ which is made for freight forwarders. This document was negotiated between the freight forwarders and the transport users, and has therefore had great impact in the industry.²¹⁶ As with the Rotterdam Rules, this document is set with a ‘fall-back’ solution if the unimodal conventions do not apply. However, if it is proved that for example loss or damage occurred while the goods were transported with a particular means of transport, the freight forwarder shall instead be liable based on the specific transport’s liability regime.²¹⁷ To rephrase, if the unimodal conventions are applicable, they will prevail and a modified system will therefore not be in conflict with these regimes, like the uniform system would be.

Another example of a modified system is the UNCTAD/ICC Rules. Due to the lack of success for the attempts on drafting a multimodal convention, UNCTAD²¹⁸ together with the ICC²¹⁹ created this modified system which came into force in 1992.²²⁰ Based on this framework, the MTO will be liable throughout the entire journey.²²¹ As with the Rotterdam Rules and NSAB 2000, if there are mandatory provisions of international conventions which apply to the multimodal transport, these will supersede the UNCTAD/ICC Rules.²²² Other examples of a modified system is the BIMCO’s «COMBICONBILL 95» and FIATA Bill of Lading.²²³

²¹⁵ Rønnevig, op. cit., page 81

²¹⁶ I.c.

²¹⁷ NSAB 2000 § 23

²¹⁸ Stands for United Nations Conference on Trade and Development

²¹⁹ Stands for International Chamber of Commerce

²²⁰ UNCTAD, *Implementation of multimodal transport rules* (27 June 2001) UNCTAD/SDTE/TLB/2, <http://unctad.org/en/docs/posdtetlbd2.en.pdf>. page 12

²²¹ UNCTAD/ICC Rule 4.1

²²² UNCTAD/ICC Rule 13

²²³ Faghfour, op. cit., page 100 and Hoeks, op. cit., page 30

5.3.1 Drawbacks

The modified system contains some of the same weaknesses as found in the network system. The parties will be subject to different regimes, although both the goods and the contract are identical. Problems can also occur when the conventions conflict, when the contract is unspecified or when the contracting mode and the performing mode do not correspond.

Moreover, one great drawback with this system is the possibility of recourse gaps for the MTO. As it contains ‘fall-back’ rules, the consignor/consignee does not risk loss of compensation because the unimodal conventions are inapplicable. However, these ‘fall-back’ rules do not regulate the relationships between the MTO and the performing carriers, as this is not part of the multimodal transport contract.²²⁴ The MTO might therefore find itself in a situation where the loss or damage to goods is unlocalized and as a consequence none of the regimes regulating the different transport stages can be invoked. As with the uniform system, this can put the MTO in a situation where it has to pay huge indemnities to the consignor/consignee, while getting nothing in return from the carriers who actually performed the transport.

Additionally, the network system is already considered of some being too complex, and the modified system would exceed this complexity.²²⁵ On top of having the conventions in which include a great deal of difficult obstacles, one has supplementing rules. In other words, it involves more rules in need of interpretation, which have to be combined and applied.²²⁶ Due to its complexity and difficulties in application, the system will lead to high administrative costs, disputes and trials.²²⁷ On top of this, as shown in chapter 4, the standard term contracts used today is normally issued by and favoring the carrier. As the modified system to a high degree is based on standard term contracts, this system will be a threat to small and medium sized parties.

²²⁴ See chapter 2

²²⁵ Pedersen, *op. cit.*, page 939

²²⁶ *l.c.*

²²⁷ *l.c.*

6 The Sui Generis approach

Another way in solving the main issue is the ‘sui generis’ approach. This is not a solution in itself, but a way that will make the uniform system easier to implement. The term is Latin and means ‘being the only example of its kind’.²²⁸ If multimodal transport is considered to be an autonomous form of contract, a uniform system governing this will not conflict with the consisting conventions as they will not apply to multimodal transport.²²⁹

The question is why a multimodal transport should be regarded as a type of its own? It is undoubtedly still a contract where the carrier promises to carry goods for the consignor/consignee.²³⁰ Yet, except from just ensuring that the goods are carried from A to B, the MTO has to organize and coordinate the entire voyage where at least two different modes of transport are included. In order to make sure that the goods can be carried out smoothly and efficient, the MTO has to facilitate the connections between the transport stages, which involves e.g. reloading and storage in warehouses.²³¹ In other words, the MTO takes on tasks that would otherwise have been subject to separate contracts. As mentioned in chapter 2, the MTO usually specializes in logistics. These services provided by the MTO involves more than just a mix of unimodal transports, it involves both organizing and know-how.²³² By connecting services which are fundamentally of individual character, and put them together into a whole, one may argue that this is something else than just a carriage contract.

In the earlier mentioned Belgian judgement *TNT Express*, the court considered a multimodal transport to be a contract sui generis, which did not fall within the existing conventions.²³³

The Norwegian author *Erling Selvig* stated in 1980 that the prevailing view at that time was

²²⁸ Hoeks, op. cit., page 75

²²⁹ Unless the conventions explicitly state that they apply, as the MC does in Art 38.

²³⁰ Spanjaart, op. cit., page 13

²³¹ Roost, op. cit., page 81

²³² Schelin, (2008) op. cit., page 77

²³³ Judgement C.03.510.N. From 8.11.04. The case is treated by Pedersen, op. cit., page 945 and can be found here: <https://justitie.belgium.be/sites/default/files/downloads/AC%202004%2011.pdf>

that multimodal transport was a distinct type of contract of carriage, which had to be distinguished from unimodal transport. Splitting up the multimodal contract into several unimodal contracts could according to him not be justified.²³⁴ The Swedish author *Kurt Grönfors* is also promoting this view, and state that multimodal transport contract must be looked upon as an integrated whole which cannot be divided into minor parts. He believes such transport has special regulatory needs which differ from unimodal carriage.²³⁵ Both *Spiegel* and *De Vos* from the Netherlands are backing this view.²³⁶

Nevertheless, these authors' standpoint is more the exception than the rule. Today the prevailing view is that multimodal carriage is a mix of unimodal transports.²³⁷ The Supreme Court in Germany clarified in 2001 that the sui generis doctrine is not followed by German judiciary. The court stated that it is still a contract of carriage even though the carrier is responsible for some other tasks than just the transport.²³⁸ The Danish author *Lissi Andersen Roost* pointed out that there are great concurrence between unimodal and multimodal transport. Yet, the multimodal differs from the unimodal by the fact that there has to be at least two different transport modes, in which will involve extended services. Although there are some dissimilarities, *Andersen Roost* does not believe this is enough to conclude that it is a contract sui generis.²³⁹ She also mentions that the Rotterdam Rules indicates that the maritime sector is against the sui generis approach.²⁴⁰ The reason for this is the convention's Art. 82, which gives precedence to the other unimodal carriage conventions as far as they apply to a part of the contract of carriage.

²³⁴ Selvig (1980), op. cit., page 17

²³⁵ Grönfors, op. cit., page 218

²³⁶ Hoeks, op. cit., page 75

²³⁷ Ibid. page 13

²³⁸ Case I ZR 282/98 from 22.02.2001. The judgement is treated by Hoeks, op. cit., page 75 and can be found here: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=74f62f9b9b5fa70e56823f669f790fbf&nr=22744&pos=9&anz=18>

²³⁹ Roost, op. cit., page 191

²⁴⁰ Ibid. page 256

The benefit with the sui generis approach, is that a uniform system would be easier to reach. Having said that, if one considers multimodal transport to be a type of its own while there is no uniform system in force, it will be subject to freedom of contract. This would put multimodal transport in an unwanted situation with all the disadvantages mentioned in chapter 4, and makes multimodal transport an unattractive choice for carriage of goods. Due to this risk and the prevailing view today, I am doubtful that the sui generis approach will gain any further success.

7 Conclusion

Multimodal transport has since the container revolution been a popular way to carry goods, and will most likely continue on being one of the most common forms of transportation. Due to the fact that the legal framework has not been able to keep up with the industry, international multimodal transport has become increasingly complex.

All things considered, it is clear that when loss or damage to goods occurs in a multimodal transport, there exists a lack of legal certainty regarding which rules to apply. The solutions will vary greatly from case to case, which is weakening the rule of law for the parties involved. The aim behind this thesis was to find a satisfying way to regulate liability for lost and damaged goods during an international multimodal transport, in which the thesis has failed. A uniform system would undeniably be the best option, as it would provide simplicity, transparency and does not lead to high administrative costs, disputes and trials. However, due to the prevailing view that multimodal transport is a mix between unimodal transports, one cannot ignore the existing carriage conventions. If such system entered into force, it would inevitably conflict with these regimes, assumed that they apply to their part of the multimodal transport. Had the majority, on the other hand, agreed that multimodal transport was a contract *sui generis*, it would have been possible. Yet, due to the general standpoint today, it is doubtful that this approach will gain success.

In conclusion, the current legal framework is unfit to regulate liability for loss and damage to goods in an international multimodal transport in a satisfying way. This makes this type of transport a less attractive choice when carrying goods and will have an effect on international trade. Considering the fact that all past attempts on fixing this have failed, I am doubtful that there will be enough incentive to make more efforts in the near future. Therefore, the MTO and their customers just have to bite the bullet. There will however, always be positive features to this type of transport, as it is time saving, cheaper, and more friendly towards the environment.²⁴¹

²⁴¹ Hoeks, *op. cit.*, page 4

Bibliography

Literature

Aikens, Richard, Lord, Richard and Bools, Michael, *Bills of Lading* (2015) 2nd edition, Informa Law from Routledge.

Andersen Roost, Lissi, *Multimodale Transporter* (2012) Jurist- og Økonomiforbundet.

Bredholt, Jørgen, Martens, Jesper, Mathiasen, Jens V and Philip, Allan, *Søloven med kommentar* (Copenhagen 2001) 4th edition. Jurist- og Økonomiforbundets Forlag.

Clarke, Malcolm A., "A Multimodal Mix-up" *Journal of Business Law, J.B.L.* 2002, Mar, 210-217.

Clarke, Malcolm A, *International Carriage of Goods by Road: CMR* (1991) 2nd edition, Sweet & Maxwell.

Ekelund, Per, *Transportaftaler* (1997) 2nd edition, Jurist- og Økonomiforbundets Forlag.

Faber, Diana, "The problems arising from multimodal transport" *Lloyd's maritime and commercial law quarterly*. 1996 pt. 4.

Fabricius, Ulla, *Lov om Fragtaftaler ved international vejtransport (CMR)* (2005) 3rd edition, Jurist- og Økonomiforbundets Forlag.

Faghfour, Mahin, "International Regulation of Liability in Multimodal Transport - In Search of Uniformity" *MU Journal of Maritime Affairs*. 2006, Vol. 5, No.1, 95-114.

Glass, David Alan, "Meddling in the multimodal muddle? - a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly][by sea]" *Informa*. 2006.

Grönfors, Kurt, *Transporträttsliga studier* (1975) Akademiförlaget.

Hill, Donald James, *Freight Forwarders* (1972) Stevens & Sons.

Hoeks, Marian, *Multimodal Transport Law* (2010) Kluwer Law International.

Lilleholt, Kåre, *Knophs oversikt over Norges rett* (2013) 13th edition, Universitetsforlaget AS.

Messent, Andrew and Glass, David A., *CMR: Contracts for the International Carriage of Goods By Road* (2000) 3rd edition, Informa Law.

Rønnevig, Håkon, *Transportrett* (2001) Fagbokforlaget.

Schelin, Johan, *Future Logistics and Transport Law* (Stockholm 2008SJEKK) Jure AB.

Schelin, Johan, *Talks on the Rotterdam Rules* (2014) Poseidon Förlag AB.

Selvig, Erling, "Kommentarer 2009-2014 til Nordiske domme i sjøfartsanliggender" *Nordisk skibsrederforening* 2018. Obtained from: Lovdata

Selvig, Erling, "Multimodal Transport - The 1980 U.N. Convention" *Papers of a one day seminar, Southampton University, Faculty of Law*. 12th September 1980

Spanjaart, Michiel, *Multimodal Transport Law* (2017) Routledge.

Tettenborn, Andrew and Soyer, Baris, *Carriage of goods by sea, land and air* (Abingdon 2014) Informa law from Routledge.

Tiberg, Hugo and Schelin, Johan, *On Maritime & Transport Law* (2016) Poseidon Förlag AB.

Vestergaard Pedersen, Per, *Transportret* (2008) Forlaget Thomson.

Internet sources

ICAO, *Current lists of parties to multilateral air law treaties* <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>

UNCTAD, *Implementation of multimodal transport rules* (27 June 2001) UNCTAD/SDTE/TLB/2, <http://unctad.org/en/docs/posdtetlbd2.en.pdf>

UNCTAD, *Multimodal transport; the feasibility of an international legal instrument* (13 January 2003) UNCTAD/SDTE/TLB/2003/1, http://unctad.org/en/docs/sdtetlb20031_en.pdf

Legislation

Convention concerning International Carriage by Rail (COTIF), (1980)

Convention for the Unification of Certain Rules for International Carriage by Air, Montreal (1999)

Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw (1929)

Convention on the Contract for the International Carriage of Goods by Road, Geneva (1956)

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels (1924)

Nordisk Speditørforbunds Almindelige Bestemmelser, 2000

The Hague Rules as Amended by the Brussels Protocol, Brussels (1968)

UNCTAD/ICC Rules for Multimodal Transport Documents, 1992

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York (2008)

Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) - Appendix B to COTIF, (1999)

United Nations Convention on International Multimodal Transport of Goods, Geneva (1980)

United Nations Convention on the Carriage of Goods by Sea, Hamburg (1978)

Case Law

Belgium: C.03.510.N. From 8.11.04. The case is treated by Pedersen, op. cit., page 945 and can be found here: <https://justitie.belgium.be/sites/default/files/downloads/AC%202004%2011.pdf>

England: *Mayhew Foods Ltd v. O.C.L.* (1984) 1 Lloyd's Law Reports, 317. Treated by Hoeks, op. cit., page 312

England: *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd.* (1954) 1 Lloyd's Law Reports, 321. Treated by Hoeks, op. cit., page 312

England: *Quantum Corporation Inc. and others v. Plane Trucking Ltd and Another*, [2001] Vol 2, Lloyd's Law Reports. page 139

England: Quantum Corporation Inc. and Others v Plane Trucking Limited and Another, [2002] Vol 2, Lloyds's Law Reports. page 25

Germany: Case I ZR 181/05 from 17.07.2008. The judgement is treated by Hoeks, op. cit., page 172-173 and can be found here: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2008-7-17&Seite=0&nr=44860&pos=13&anz=42>

Germany: I ZR 282/98 from 22.02.2001. The judgement is treated by Hoeks, op. cit., page 75 and can be found here: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=74f62f9b9b5fa70e56823f669f790fbf&nr=22744&pos=9&anz=18>

Netherlands: RB Rotterdam 17 September 2003, S&S 2007, 63 presented by Hoeks, op. cit., page 256

Norway and Denmark: ND-2012-210, ND-2012-289 and ND-2013-296. Presented by Selvig, Erling, "Kommentarer 2009-2014 til Nordiske domme i sjøfartsanliggender" (2018) *Nordisk skibsrederforening*. Obtained from: Lovdata