Master Thesis

Pro-rata Liability in Multimodal Transport

Contents

Abbreviations

MTO – Multimodal Transport Operator

HVR – The Hague-Visby Rules

B/L – Bill of Lading

1 Problem statement

This paper is concerned with the issues of multimodal transport and studies the usefulness of applying a distance pro-rata approach to allocating liability between the parties involved.

2 Dansk Resume

Den internationale transportbranche har været under drastisk udvikling de sidste 100 år. Senest med indførslen af containeriseret transport, har det været muligt at benyttes sig af en multimodal tilgang til transport af gods. Multimodal transport er en transportform, hvor der hyres én overordnet transportør, Multimodal Transportøren, der påtager sig ansvaret for at transporten udføres. Da det oftest er umuligt at foretage hele transporten ved én transportform, er det oftest nødvendigt at gøre brug af flere typer transport, deraf betegnelsen "multimodal transport". De eksisterende unimodale transportkonventioner, såsom CMR konventionen (vejtransport), CIM konventionen (jernbane transport) og Haag-Visby Reglerne (havtransport) regulerer udelukkende reglerne for én type transport, deraf ordet "unimodal". De gamle unimodale konventioner blev skabt før multimodal transport var anvendeligt, hvorfor deres fokus på de enkelte transporttyper har skabt både overlap og huller i den juridiske anvendelighed af konventionerne ved multimodal transport. Særligt problemet omkring de unimodale konventioners anvendelsesområde, der ved konventionernes ordlyd, udelukkende regulere reglerne omkring de enkelte unimodale transporttyper.

For at imødekomme den multimodale udvikling, udarbejdede UNCTAD[1] et udkast til en Multimodal Transport Konvention,[2] der, på trods af stærk opbakning fra næsten 90 lande, endnu ikke er trådt i kraft.

Som alternativ til den fejlslagne Multimodale Konvention, har flere brancheorganisationer udarbejdet visse standard kontrakter, der helt eller delvist inkorporerer de unimodale konventioners

[1] Underorganisation til FN's Generalforsamling; "United Nations Conference on Trade and Development"; Roost, s. 24
[2] United Nations Convention on International Multimodal Transport.

anvendelighed på den multimodale transportaftale. Især fastsættelsen af, hvilket system, der regulerer erstatningsansvaret for de forskellige transportører er essentielt.

Der eksisterer i grove træk tre systemer, der regulerer hvilket erstatningsansvarssystem, der pålægges ansvarlige transportører, hvis der opstår en skade. Enhedsansvaret pålægger ansvaret mellem godsejeren og multimodal transportøren gennem kontrakten. Det er derfor aftalt mellem parterne, hvilket ansvarssystem, der skal regulere erstatningen til godsejeren ved skade på hans varer. Ulempen ved enhedsansvaret er, at Multimodal Transportøren kan risikere at ende i en regres fælde, hvor han ikke kan kræve regres for det fulde erstatningsbeløb mod sine undertransportører. Alternativt benyttes netværksansvaret, der pålægger det ansvarssystem, der er gældende for den type transport, hvor skaden er sket. På denne måde undgår multimodal transportøren regresfælden, men systemet har vist sig at være mangelfuldt, hvis skaden ikke kan lokaliseres. Der er derfor forsøgt at lave en kombination mellem de to systemer. Det modificerede netværksansvar, hvor ansvarssystemet følger netværkstilgangen for lokaliserbare skader og enhedsansvar for ulokaliserbare skader.

Ulempen ved det modificerede netværksansvar er, at den part, der har en interesse i at lokalisere skaden, pålægges den fulde bevisbyrde. Derudover er risikoen for regresfælden ikke udelukket, da der stadig pålægges et enhedsansvar for ulokaliserbare skader.

Dette speciale fokuserer derfor på et pro-rata systemet, der bygger på en procentmæssig fordeling af ansvar, i forhold til transportens længde. Ydermere undersøges det om det er muligt at fordele ansvar pro-rata mellem den/de ansvarlige transportører, og om et pro-rata system kan bruges som et alternativ til de eksisterende systemer.

I specialet er det undersøgt, om pro-rata systemet kan fungere som et særskilt system, der tildeler godsejeren et erstatningskrav når skaden er umiddelbar. Denne tilgang vil medføre uforholdsmæssige byrder på de involverede parter, og medføre at systemet ikke kan anvendes i praksis. Alternativt er det forsøgt at anvende pro-rata systemet som en modifikation til netværksansvaret, hvor pro-rata tilgangen anvendes på ulokaliserbare skader.

3 Introduction and background

In our modern world, the average consumer has little thought towards the fruits being from South America, the Ethiopian coffee we drink is transported from the Horn of Africa, perhaps through pirate-infested waters, and that the mobile phone in your pocket is transported all the way from Japan to your address.

The import and export of goods from other countries and continents have increased by more than 600% since the 1980s for the developed countries.[3] An explanation to the still increasing transport of goods lies with the development of the container. The container revolution of the 1960s provided operators and carriers with the means to transport goods from the port of discharge to the point of destination, by several carriers, providing diverse types of transport. This development of the container meant the rise of multimodal transport. Before the development of the container, cargo owners hired different carriers individually, with individual transport contracts and individual liability regimes. Because the transport of goods was unimodal, the transport conventions were formed based on unimodal transport. The transport of goods meant loading and unloading each kilogram of goods by hand; it was easy for the carrier to check and ensure the apparent order and condition of the goods. By ensuring that the apparent order and condition of the goods were conforming with the transport document, the localization of damages would in most cases be apparent.

The unimodal conventions of that time are still in force today, albeit with some revisions of the text, but the requirement for carriers to check the apparent order and condition of the goods are still in force. With the development of the container, the carrier is not necessarily able or allowed to open the container. The carrier is left in a position, where he is required on a conventional level, to confirm the good apparent order and condition of the goods he receives, without being able or allowed to open the container to confirm. His only chance for discovering any damage to the goods is by checking the outside of the container. The limited ways of discovering damage to the goods increase the chance for the source of the damage to be non-localized.

[3] UNCTAD Handbook of Statistics 2016, p. 2

If the carriage is performed by several carriers, transporting under one multimodal transport contract, the applicable liability regime has proven difficult to determine. Because of the lack of support for the UN Convention on International Multimodal Transport, the current unimodal conventions applies through different systems with each their pros and cons.

As an attempt to accommodate for the irregular liability regimes of the unimodal transport conventions, several liability application systems have been attempted. The uniform system applies one fixed liability regime between the claimant and the MTO. The system promotes predictability, because both the claimant and the MTO is fully aware of the level of compensation, in the case of damage, loss or delay. The downside of the uniform system is the chance for a recourse trap. The recourse trap prevents the MTO from being able to recourse the full compensation, paid to the claimant, towards the responsible sub-carrier, because the liability regime, governing the relationship between the MTO and the sub-carrier not necessary corresponds with the liability regime between the claimant and the MTO. The Network system is a different approach, it applies liability according to the applicable unimodal transport convention, depending on which transport leg, the damage can be localized to. The downside of the network system is the non-localized damages. If the damage cannot be localized, the applicable liability regime cannot be defined. To prevent the downsides of both systems, several combinations of a modified system have been attempted. The primary function of the modified network system is to apply a general liability regime, like the uniform system, but with the ability to alter the liability regime to the applicable unimodal convention, if the damage is localized to a specific transport leg. However, there is still a chance for the MTO to find himself in a recourse trap for non-localized damages.

These systems have been implemented in several ways; the primary implementation was the creation of The Multimodal Transport Convention, one Convention on Multimodal Transport, which was supposed to bring uniformity to the field. However, albeit support from numerous countries, the convention has failed to gain grounds and is still not in effect. Alternatively, different associations, such as BIMCO, FIATA, and NSAB has created standard contracts, that apply the Modified Network System, and does provide some uniform regulation.

4 The Authors own words

In 2016, I sat in a class about multimodal carriage, the lecturer spoke about the current systems of defining an applicable liability regime for damages. He explained how the uniform system applies one agreed liability regime between the cargo owner and the MTO, the ease of applicability of the system in practice but also how the MTO could risk ending in a recourse trap. He then went on to explain how the Network system approaches the applicability of a liability regime in reverse of the uniform system and focuses on the liability regime of the applicable unimodal conventions; but also, how a situation of non-localization would render the system useless.

I began to consider a different approach than the uniform and network system. The system would instead focus on allocation of liability depending on the actual service that the carriers perform. The services delivered by a carrier is, essentially, carriage of goods over a distance. Because the unimodal conventions all have an approach of limitation of liability based on the weight of the goods, the idea began to take shape. By distributing liability for carriers to a multimodal transport by the services provided by the carriers, transporting over distance, I decided to use the opportunity to study the viability and legitimacy of such system by writing this master's thesis.

5 Methodology

The focus of this paper is the liability of carriers and the MTO regarding multimodal transport. The aim of the paper is to research if a pro-rata liability regime based on the distance transported by each carrier would be conflicting with the unimodal transport conventions and if such system could be an alternative to the current uniform, network – and modified systems.

The study is based on a comparative approach to the unimodal conventions, their applicability, and their liability regimes. Furthermore, it goes in depth with a case analysis of several essential cases on the field. The comparative method applied, is chosen to examine the different approaches to the current issues presented by Multimodal Transport; issues that are not only present in highly abstract legal theory, but is also present in case law and even on a conventional level. The basis of the

comparative analysis is primarily the focus on international transport of goods following the Hague-Visby Rules (Sea), the CMR Convention (Road) and the CIM Convention (Rail). Furthermore, it compares the effects of the unimodal transport conventions with the Multimodal Transport Convention, although the convention itself is not in force. The reason for the comparison is that the Multimodal Transport Convention is the only convention to cover Multimodal Transport. Although not in force, the ideas behind the convention and the wording in the convention can provide an insight of how one could approach a convention covering Multimodal Transport.

Due to the international character of the paper and the topic of Multimodal Transport, the authors presented and analyzed in the paper will be from different countries. The issue of analyzing the approaches of national authors, to such a complicated issue, is above all the differences between the national approaches to the issue, and to which extend it shines through on the authors view on the matter.

The national legal systems of member states of the European Union are either civil law or common law. Civil law is based on legislation with the interpretation of courts to form case law. The case law is not binding but serves as a "guideline" for future cases. In contrary, common law is primarily based on judicial decisions, interpreted strictly from legislation, of which the courts are bound. It is, therefore, the interpretation of the written legislation that forms the binding law.

The jurisdiction for interpretation of the international private law is assigned to the national courts because there is no existing supranational court to interpret the provisions of private law. As a result, the differences between civil law and common law systems can result in unequal interpretation.

A similar issue is present in chapter 10.2.3 concerning the use of the pro-rata approach as a modification to the network system. The author De Witt refers to the German authors Ebenroth/Fischer/Sorek, who addressed a similar approach, as the system presented in the chapter by the author. It has not been possible to acquire a copy of their book *"haftungsprobleme im internationalen multimodalen gütertransport, 1988"*, Furthermore, if it had been possible to acquire, the German capabilities of the author would not suffice. Therefore, the discussion is based on the arguments against the system as provided by De Witt.

The case law, presented in the paper, is not an attempt to exhaust the case law on the issue, but rather an effort to demonstrate the difficulties of analyzing the laws of International Multimodal

Transport, for both authors and courts alike. Because the case law presented in this paper by no means is exhaustive, it cannot demonstrate the accuracy or the different approaches to disputes by all member states of the EU. Furthermore, each case presented is very comprehensive, and to make a thorough analysis of each entire case would be too burdensome for this paper, therefore, the analysis of the case law is aimed towards a demonstration of the issues illustrated in the chapters of, which the cases are presented. Some of the cases presented in the paper can only be obtained through a subscription to different legal databases, of which the author has not been able to gain access. The discussion of the case law that was unobtainable is therefore based on the summary and analysis of acknowledged writers such as Marian Hoeks and Ralph De Witt. It does, however, present an issue, regarding the validity of the analysis of this paper, because the chance for a faulty interpretation is higher when secondary literature is used. Furthermore, the book "Multimodal Transport" by Ralph De Witt was written in 1995, the primary issue of the age of the book is that several changes to the unimodal transport conventions have been implemented after 1995, such as the Vilnius Protocol to COTIF/CIM in 1999. Furthermore, De Witt was sure that the Multimodal Transport Convention eventually would enter into force,[4] a fact that today seems highly doubtful.

By using the comparative method, it is possible to compare the wording of the international conventions with the interpretation of courts and the following analyze of authors. It is, therefore, a combination of the various aspects and views from both the convention, courts and authors that, to some extent, can provide a harmonizing effect on a field where uniformity is essential, but difficult to achieve.

The primary function of the paper is to analyze if a pro-rata liability system would be corresponding with the current unimodal conventions. There are several factors that the pro-rata system can calculate from, but for this paper, the main factor is distance.

It has proven difficult to conclusively determine the ration between localized and non-localized damages. De Witt refers to several reports and authors,[5] of whom most agree, that the majority of cases of non-localized damage is between 50-80 percent. It shall be noted, however, that these

[4] De Witt, p. 320;" There *is one major point though. <u>When</u> the Multimodal Transport Convention enters into force"*; when De Witt wrote the book, according to the wording used, he was sure that the Multimodal Transport Convention would, at some point, enter into force. A view that, today, is very doubtful.
[5] De Witt, p. 428

reports are over 30 years old, thereby not providing a clear image of the current ratio between localized and non-localized damage.

The paper primarily focuses on the liability of the carrier, albeit the liability systems provides allocation of liability for the consignor/claimant as well. The consignor/claimant liability is mentioned briefly but is not a subject of this paper.

6 The Unimodal Transport Conventions

To understand the application of the liability systems in multimodal transport, one must first understand the liability systems of the unimodal transport conventions. Unimodal transport is the most basic method of transportation, where the whole transport is performed by one means of transport and governed by one unimodal transport convention. It can, however, also be carriage by different means of transport, governed by a unimodal convention that allows for other means of transport, such as the CMR Convention Article 2.

The first aspect to consider when comparing these unimodal conventions is the applicability. In order to compare the conventions, there must be a common sphere of legal applicability to compare. Subsequently, a comparison of the general liability rules and the liability limitations of the conventions, to compare how the conventions apply liability to the parties involved.

6.1 The CMR Convention

The Convention on the Contracts for the International Carriage of Goods by Road (CMR Convention) was signed in Geneva on the 19th of May 1956 and has currently been ratified by a total of 44 states. It governs the international transport by road as a unimodal transport convention.

6.1.1 General and Extended Scope of Application – Article 1 & 2

The applicability of the CMR Convention can be found in Article 1 (1) of the Convention which reads:

> *This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, 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, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.*

The convention requires the carriage to be performed 1) by road in a vehicle, 2) for reward, 3) different states of dispatch and delivery, 4) at least one of the States being a signatory state.

These requirements rarely offer any issues when the contract of carriage is unimodal, and issues relating to unimodal transport are not relevant for this paper.

Article 2 of the CMR Convention extends its application of the mode of transport to cover not only road carriage but also mode-on-mode carriage. The mode-on-mode carriage is a type of transportation where one mode of transport is performed "on top" of another type of transport. An example of the mode-on-mode transport is road carriage where part(s) of the journey is performed by the lorry carried on a ship. This type of transport is called "Roll on-Roll off" or simply "ro-ro" because of the transporting lorry rolling onto the ship and rolls off the ship at the port of destination. If Article 2 of the CMR Convention had not been in effect, this type of transport would have been normal Sea transport governed by e.g. the HVR.

The biggest interpretational issue of applicability of the CMR Convention, about multimodal transport, is the wording *"This convention shall apply to every contract for the carriage of goods by road."* Hoeks divides the article into three interpretational categories:[6]

(i) The CMR applies to road carriage provided for in a multimodal contract by means of Article 1 CMR, even if the road stage is merely domestic, as long as the contract as a whole is international.

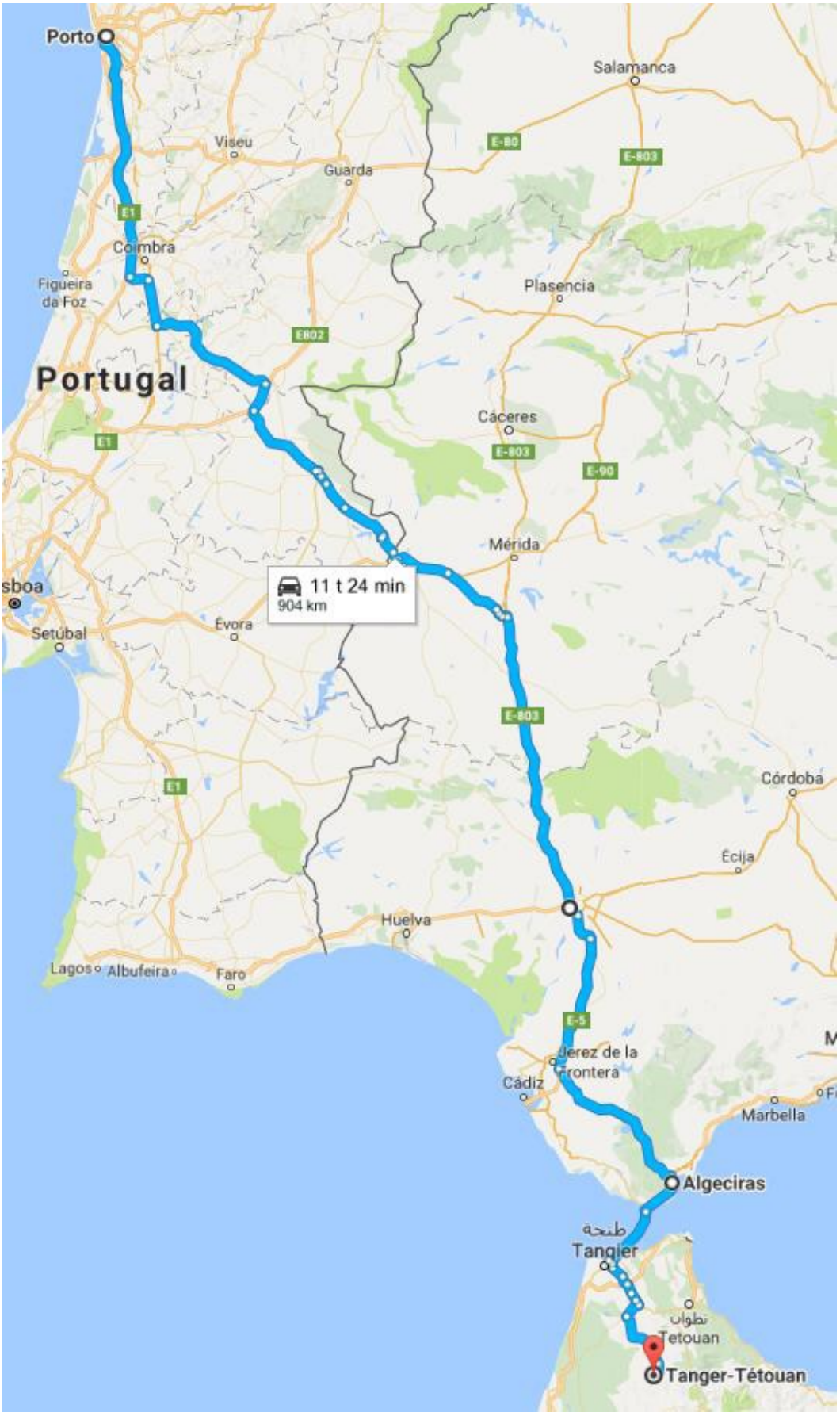
[6] Hoeks, Multimodal Transport Law, p. 148

(ii) *The CMR applies to road carriage provided for in a multimodal contract by means of Article 1 CMR, but only if the road leg itself is international.*

(iii) *The CMR does not apply to any part of a multimodal transport via Article 1 CMR because a multimodal contract is not a contract for the carriage of goods by road.*

To illustrate the issues of interpreting the wording of Article 1(1) of the CMR Convention, Hoeks provides an example of transport from Warsaw (Poland) to Rabat (Morocco)[7]. This example has been slightly changed for this paper and involves the carriage of general cargo from Porto (Portugal) to Tanger-Tétouan (Morocco) via Algeciras (Spain) and Tangier (Morocco), but the principle is the same.

[7] Hoeks, p. 150


Porto
Salamanca
Viseu
Guarda
Coimbra
Figueira da Foz
Plasencia
Portugal
Cáceres
Mérida
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904 km
Évora
Setúbal
Córdoba
Écija
Huelva
Lagos
Albufeira
Faro
Jerez de la Frontera
Cádiz
Marbella
Algeciras
Tanger
Tetouan
Tanger-Tétouan

If the sea transport from Algeciras to Tangier is performed by ro-ro transport, in accordance with article 2 of the CMR Convention, the entire journey from Porto to Tanger-Tétouan would be governed by the CMR Convention.

If the sea transport between Algeciras and Tangier is not performed by ro-ro transport,the first interpretation would allow for both the journey from Porto to Algeciras and the journey from Tangier to Tanger-Tétouan to be covered by the CMR Convention, since the CMR Convention applies to any multimodal carriage, even if a single road leg is not international.

Following the second interpretation, it would only be the journey from Porto to Algeciras that would be subject to the CMR Convention, because the sea carriage would be governed by a different transport convention, such as the HVR, and the short road carriage from Tangier to Tanger-Tétouan is not international.

The third interpretation of the example, the entire journey would not be subject to the CMR Convention. Since the interpretation follows, that a contract of carriage, by other means of transport than road, (multimodal) cannot be governed by the CMR Convention. Thereby eliminating the applicability of the CMR, regardless of the main part of the carriage being performed by road.

As Hoeks points out, it is undesirable to have a transport convention, being this sensible to the carrier's choice of transporting the goods, using a different mean of transport, either by mode-on-mode, subject to Article 2 or off the trailer, subject to Article 1 with the mentioned interpretational issues.

Hoeks compares the applicability of the CMR Convention, in multimodal transport, by an illustration of several cases. The first case was the transportation of a mobile crane from Cairo to Alexandria by road, then transported to Antwerp by sea and lastly by road to Geleen. During the road transport from Cairo to Alexandria, the lorry tipped, and the crane was damaged. The court to address the dispute was the *Rechtbank* Rotterdam. The Court concluded that the CMR Convention applied during the stage of road transport, despite not being between one or more states.[8] The second case is very similar to the first case. The judgment, also from the *Rechtbank* Rotterdam, involved the transport of pharmaceuticals between Carponage in Italy to Spijkenisse in the Netherlands. Like the first case, the

[8] Hoeks, p. 145; Case: Rb Rotterdam 24 Jan. 1992, S&S 1993, 89

road carriage was not international but performed between Carponage and Milan. During the road transport, the pharmaceuticals were damaged. Unlike the first case, the court concluded that the CMR Convention was not applicable to the road transport leg, mainly because the road carriage was not between two states.[9]

These cases illustrate that even when the same court interprets the convention, it renders difficulties. In the first case, the court interpreted the applicability of the CMR Convention to apply when the place of dispatch and place of delivery of the multimodal performance is in different states. Meaning that the individual stages of the transport do not have to be international. In the second case, the court interpreted the applicability of the CMR Convention to only apply for a road carrier, in case the place of taking over the goods to the place of delivering to a 2nd carrier or delivery was located in different states. This means that the individual stages had to be between two states for the CMR Convention to apply.

In the *Quantum Corporation Inc. v. Plane Trucking* case, Air France contracted with Quantum Corporation for the transport of hard disk drives from Singapore to Paris by air, followed by transport from Paris to Dublin by road and ro-ro transport (CMR Art. 2.) over the Irish Sea.

The road transport from Paris to Dublin was performed by a sub-carrier of Air France, Plane Trucking, While the goods were in the custody of Plane Trucking, their own employees stole the goods. Both Plane Trucking and Air France accepted liability, but Air France claimed right to limit liability according to their general conditions of 17 SDR per Kg. thereby preventing the loss of limitation of liability of the Warsaw Convention Article 25.[10]

Quantum Corporation claimed the liability regime should follow the CMR Convention and held the argument that the contract was a multimodal transport contract with the CMR Convention applying to the road leg. The outcome of this argument would be a loss of rights for limiting liability, whereby Quantum could claim damages for the full loss, according to the CMR Convention Article 29.

[9] Hoeks, p. 146; Case: RB Rotterdam 19 Mar. 1998

[10] **General conditions - 11.7:** Unless the carrier has made a special declaration of value for carriage and has paid the supplementary sum applicable, liability of Carrier shall not exceed the applicable Convention limit or, if no Convention applies, 17 Special Drawing Rights, per kilogram of cargo destroyed, lost, damaged or delayed. …"

Two questions arose from the case:

> *"1. The first is to what extent the application of the Convention depends upon a carrier having obliged itself contractually to carry by road (and by no other means). This depends upon the force, in context, of the word "for" in the reference in article 1 of the Convention to a "contract for the carriage of goods by road." The second is to what extent (if at all) a contract can be both for the carriage of goods by road, within article 1, and for some other means of carriage, to which CMR does not apply."*[11]

In the first question of the contractual obligation of carrying the goods by road, the court addressed the issue of the wording *"contract for the carriage of goods by road."* The wording *"for"* constitutes the application of the CMR Convention to relate to the contract itself, and not, as for instance the Warsaw convention, the actual carriage.[12]The court found, following a thorough European case law analysis that European authorities suggested that the CMR Convention should be applied to the road carriage from Paris to Dublin.[13]

The second question relates to the extent of applicability of the CMR Convention in a multimodal agreement, especially relating to its international character of the place of taking over the goods and place of delivery. The court found that *"the concept of a contract for the carriage of goods by road embraces a contract providing for or permitting the carriage of goods by road on one leg when such carriage actually takes place under such contract. The place of taking over and delivery of the goods under article 1(1) are to be read as referring to the start and end of the contractually provided or permitted road leg."*[14] The court finally concluded that the CMR Convention applied to the contract, thus enabling Quantum to prove willful misconduct of the other parties and eliminating their right of liability limitation.

Following the presented case law and analysis of Hoeks, it is not completely clear, how the CMR Convention should be interpreted, in relation to its applicability under a multimodal contract.

[11] Quantum Corporation Inc. & Ors v Plane Trucking Ltd. & Anor [2002] EWCA Civ 350 (27th March, 2002) p. 14
[12] Quantum, p. 20
[13] Quantum, p. 56
[14] Quantum, p. 59

However, the analysis does suggest, that the CMR applies to a multimodal contract when the road leg itself is international.

6.1.2 The Liability Regime of the CMR Convention

The carrier is liable in the time between him taking over the goods to the time of delivery, cf. art. 17 (1). Delay has occurred when the carrier has failed to deliver within the agreed time limit, or when the time for a reasonable transport by a diligent carrier to transport the goods is exceeded, cf. art. 19. If the goods are not delivered within 30 days after the expiration of the time limit, or 60 days after the carrier took over the goods, the goods are considered lost, cf. art. 20 (1).

The carrier can exempt himself from liability in the general and special circumstances mentioned in art. 17 (2) and 17 (4). The general exemptions of art. 17 (2) are:

- Wrongful act or neglect by the claimant
- Damage resulting from the wrongful instructions of the claimant
- By the inherent vice of the goods
- By circumstances of which the carrier was unable to prevent

If the carrier wishes to exempt himself from liability, according to the general exemptions of art. 17 (2), he bears the burden of proving that the damage resulted from one of the four exemptions.

The special exemptions of art. 17 (4) are:

- Damage resulting from an open, unsheathed vehicle of which has been agreed upon in the contract
- Damage resulting from defective or lack of packaging of the goods, when the nature of the goods is subject to damage when not package properly.
- Handling, loading, stowage or unloading performed by the claimant
- By the nature of certain goods, of which by their nature are particularly exposed to damage
- Wrong or missing marks or numbers on the packages
- Livestock

In contrary to art. 17 (2), the burden of proof that befalls the carrier, only requires him to prove that the damage could be attributed to one of the special risks mentioned in the article, cf. art. 18(1).

If the claimant proves that the goods have been damaged or lost during the time of responsibility of the carrier, and the carrier cannot exempt himself from liability, cf. art. 17 (2) & 17 (4), the value of the goods are calculated by the value, fixed according to the commodity exchange price upon the carrier receiving the goods cf. art. 23 (1-2). The carrier can, however, limit his liability to 8,33 SDR per Kg. with the addition of carriage charges, customs duties, and other charges, unless the damage resulted from delay, of which the entire compensation is limited to a refund of the carriage charges, Cf. art. 23 (5). Regardless of the type of damage, the carrier is only liable proportional to the value the goods have diminished, and compensation cannot exceed the amount payable for a total loss, cf. art. 25.

The carriers right to limit liability is excluded if the damage or loss was caused by the willful misconduct or gross negligence of the carrier, cf. art. 29.[15]

6.1.3 Mandatory recourse

The main rule of freedom of contract, cf. art. 40, states that *"Carriers shall be free to agree among themselves on provisions other than those laid down in Article 37 and 38"*. The provisions of article 37 and 38 are therefore mandatory, and cannot be deviated.

Article 37 mandatory applies the right to recourse any compensation paid by a carrier towards other carriers, who have taken part in the carriage. The provisions state that 1) A carrier being responsible for the loss or damage shall be solely liable for any compensation paid 2) if there are two or more responsible carriers, they shall be liable proportionally to each their liability, and if no such apportion of liability can be established, proportionally by their share of payment 3) in case of non-localized damage, the liability of each carrier is calculated as stated above.

The article, therefore, allows the distribution of liability for non-localized damages to be calculated by any proportional factor of which the carriers can agree. In contrary, article 38, concerning the

[15] By the carrier or his agents, servants or any other person acting on his behalf, cf. art. 29

insolvency of a carrier, applies the mandatory distribution of the insolvent carriers to be calculated by the proportion of the share of payment, removing the freedom for carriers to choose which factor to divide liability.

6.1.4 Partial Conclusion

The applicability of the CMR Convention in multimodal transport has been subject to debate for several years. Although the wording of the Convention does not directly incorporate its applicability in multimodal transport, the above case analysis alongside with the analysis of Hoeks does indicate that the convention applies if the road leg itself is international. However, it cannot be finally concluded, because nor the case law or the authors mentioned, cannot reach a conclusion on the matter. If the Convention does apply to the road leg of a multimodal transport, either as defined in the contract, from the above analysis of applicability, by national law or by contractual agreement, the liability regime as described in Chapter 5.1.2 regulates the liability of the carrier. The regime applies liability on a responsible carrier who cannot prove that the damage resulted from the exemptions mentioned in Article 17 (2) & 17 (4) but can limit his liability to 8.33 SDR per kg., cf. article 23 (5) unless the damage was caused by a willful act or gross negligence by the carrier or his servants, cf. article 29.

The convention does have mandatory provisions regarding recourse between carriers. By default, the responsible carrier bears the burden of compensation. If more than one carrier is responsible, or if it cannot be determined which carrier is responsible, the compensation is divided between the carriers proportionally by an agreed factor, or by the share of payment, cf. article 37. On the contrary, if a responsible carrier is insolvent, the factor to divide his share of compensation between the carriers, is fixed to the share of payment.

6.2 The Hague-Visby Rules

The Visby Protocol was amended in 1968 to update the 1924 Hague rules. It follows from Article 1 & Article 10 of the HVR, that the rules only govern any contract of carriage with an issued bill of lading, and where the bill of lading is issued in a contracting state. The carriage is from a contracting state, when the bill of lading incorporates the rules or when governing national law applies the rules.

Following Article 4, The issued bill of lading acts as prima facie evidence of the receipt, the quantity, and quality of the goods. Furthermore, the B/L is a "document of title" meaning the holder of the document is the rightful "owner" of the goods. A B/L can, therefore, be traded several times during the transport period, and the original buyer of the goods is not necessary the same person who owns the cargo when arriving at the designated port. Because of the B/L function as a document of title, the carrier will only deliver the goods to the holder of the original B/L.[16]

6.2.1 The Liability Regime of The Hague-Visby Rules

The liability regime of the HVR differs slightly from e.g. The CMR convention. In the case of damage or loss, the claimant can choose between calculated damages based on either the number of packages for 666,67 SDR per Package or the gross weight of 2 SDR per Kg, whichever is higher. It is therefore not only a difference of the amount but also an alternative in the way of calculating the damages. However, the rules do not contain a provision regarding damages for delay. It is therefore not directly possible for a claimant to claim damages based solely on delay, covered by the rules.[17]

The period of responsibility of the carrier follows the "tackle to tackle" principle as laid out in Article 1 (e). The period is calculated from the time the tackle of the vessel is hooked/unhooked from the point of discharge/destination or from the time the goods carried crosses the rail of the vessel.

[16] Wilson, p. 120
[17] FTA Website - http://www.fta.co.uk/policy_and_compliance/sea/long_guide/delay.html

The court addressed the issue of damage occurring between the two ways of calculating the period of tackle to tackle in the case *Pyrene Co v. Scindia.* The issue of the case was that damage occurred after the tackle of the vessel was hooked onto the goods, but when loading the goods onto the ship, before crossing the rail of the vessel, the goods fell back onto the shore where the damage occurred. The court held the HVR applicable to the carrier's ability to limit his liability according to the liability regime of the rules, even though no B/L had been issued.[18]

Because the HVR only applies during the Tackle to Tackle period, warehousing of the goods does not apply the rules, unless specifically agreed. As a result, transshipment between two transport legs can create a liability gap. Since the HVR only applies during the tackle to tackle period, the rules cannot apply to any other type of transport.[19] The question risen from this issue is the applicability of the HVR in a sea to sea transshipment. In the case Mayhew Foods v Overseas Containers, the court found that the tackle to tackle principle is not suspended during transshipment between two sea legs because the HVR applies to the contract.[20]

In *Mayhew Foods Limited v. Overseas Containers Ltd.,* the damage was easily localized, because the damage resulted from insufficient refrigeration. The issues of the case were the applicability of the HVR, or if the lower liability limit of clauses in the contract applied. The transport of the goods was from Uckfield (UK) to Jeddah (Saudi Arabia). It was supposed to have been transported to Southampton as "intended port of loading" and to Jeddah as "intended port of discharge." However, the goods were instead loaded at Shoreham (UK) and transported to Le Havre (France) by a different vessel, where it was loaded onto the correct vessel. The court held, that the goods could have been saved if the cause for damage was discovered before being loaded onto the correct vessel in Le Havre and that the HVR applied to both transport legs. De Witt refers to the case because; if the court had reached the decision that the HVR did not apply to the Shoreham-Le Havre leg, there would have been two different liability regimes applicable to the two sea carriage legs, namely that of the contract clauses and the HVR.

[18] *Pyrene Co Ltdv Scindia Steam Navigation Co Ltd [1954] 2 QB 402.* Pp. 415-418
[19] Hoeks. PP. 321-322
[20] Mayhew Foods Ltd. v. Overseas Containers Ltd; Singh, Lachmi, The Law of Carriage of goods by Sea, 2011, p. 17

Regarding the applicability of the HVR in multimodal transport, the main issue is the requirement of the contract to be a *"… contract of carriage of goods by water…"* and the issuance of a Bill of Lading,[21] which both indicates that the rules cannot apply to a multimodal contract. Pedersen states that the wording of the rules, cited above, infers that the requirements are aimed towards the contract and not the actual carriage.

Hoeks refers to German scholars who holds the opinion that the rules can only apply to unimodal transport because multimodal transport is not directly mentioned.[22] Hoeks argues that in the Netherlands and in England the multimodal carriage by sea can be governed by the HVR, insofar the Bill of Lading is a through Bill of Lading and *"…relates to the carriage of goods by sea."*[23] It could be argued, that the wording of the article, merely requires the through Bill of Lading to have a relation to the carriage by sea, thereby allowing the rules to apply to multimodal transport. Furthermore, the argument that the rules should not apply to multimodal transport would render the rules almost useless, because transportation over the sea, in most cases, would require some form of transportation to and from the harbor. If the rules did not apply to the sea stage of a combined – or multimodal transport, the rules would be almost impossible to apply. However, it cannot be concluded that the rules apply mandatory to all carriages by sea.

Because of the uncertainty of the applicability of the rules, most carriers, performing sea transport, incorporates a Paramount clause. The clause defines the applicability of the chosen convention to apply mandatory to the Bill of Lading and any dispute concerning the transport. As a result, a multimodal transport contract that holds a paramount clause, incorporating the HVR, forces the rules to apply mandatory.[24]

[21] Pedersen, Per Vestergaard, Transportret – Introduktion til reglerne om transport af gods, 1. edition, 2008, p. 1010.
[22] Hoeks, p. 313
[23] Hoeks, p. 317-318; Article 1 (b)
[24] Pedersen, p. 1010

6.2.2 Management, Navigation, and Fire

The HVR contain unique exceptions of liability. The rules exempt liability caused by nautical fault, management of the ship and fire, cf. art. 4 (2). The exceptions date to the nineteenth century, long before the creation of the rules, and have deep roots in sea transport. They are designed to prevent or exclude the liability of the carrier, in case the damage resulted from either of the exemptions. The exemption of navigation covers negligence of the master or crew, that resulted in either hitting a reef, running ground or collision with another vessel.[25]

Damage resulting from management of the ship has proven more difficult to determine. The question is if the management of the ship falls inside or outside the carrier's responsibility to take proper care of the cargo. Wilson refers to the *"Gosse Millerd v Canadian Government Merchang Marine"* where Greer LJ explained the difference

> *"If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved"*[26]

Meaning the carrier is liable for negligent actions directed towards the cargo itself, whereas he is exempted from liability if the negligent action is directed towards the ship, thereby causing damage to the cargo indirectly.

The last exemption is damage caused by fire, resulting from the negligent conduct of his agents or servants, meaning that damage by fire caused by the carrier himself, regardless of the provision, applies personal liability.

In addition to the three specific exemptions above, Article 4 (2) (q) contains a so-called *"catch-all"* exemption as follows:

[25] Wilson, Jon F, Carriage of goods by sea, 3rd. edition, 1998, p. 257
[26] Quoted from Wilson, p. 257

"any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage"

The carrier can, therefore, exempt himself from liability if he can prove that the damage was not caused by fault or neglect by him or his servants. The burden of proof does not involve proving what caused the damage, however, lifting the burden of proof, can prove difficult, without an explanation of what caused the damage.[27] The exemption involves any damages occurred where the carrier can lift the burden of proof, that he or his servants did not cause the damage because of fault or neglect. One of the best examples is the case *Leesh River Tea Co v British India SN Co,*[28] where the cargo was damaged because stevedores hired by the carrier had stolen a storm valve. The carrier proved that the stolen storm valve had no relation to the unloading and care of the goods because the theft was deemed an act separate from the operation of unloading or handling of the goods.

6.2.3 Partial Conclusion

The Hauge-Visby rules hold the lowest liability regime of all the international unimodal transport conventions. The rules only apply to contracts where a bill of lading has been issued, and the phrase *"…relates to the carriage of goods by sea"*, along with the court ruling in the *Mayhew Foods case*, would indicate that the rules are not only limited to apply to unimodal transport but can govern the sea carriage under a multimodal transport contract. On the contrary, the requirement in art. 2, indicates the opposite, that the contract of carriage, must be a contract for carriage over water, for the rules to apply.

Furthermore, the very limited period of responsibility of the "tackle-to-tackle" principle, along with the exemptions of Article 7 (2) & 7 (4) and the carrier's ability to limit any liability to 2 SDR per Kg, or 666,67 SDR per package, provides a very carrier friendly liability regime.

[27] Wilson, p. 261
[28] Quoted from Wilson, p. 262

6.3 COTIF/CIM

The Convention concerning International Carriage by Rail (COTIF) was introduced in 1890 after several years of negotiation. It has been revisited several times since along with the implementation of Appendix B of Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) to form the COTIF/CIM convention.

6.3.1 Applicability of the COTIF/CIM Convention

With the latest revision of the convention, the Vilnius Protocol, 1999, The scope of application of the Convention, as subject to Article 1(1) states that:

"These Uniform Rules shall apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage."

The COTIF/CIM convention differs from the CMR Convention in its application by the fact that it does not require a specific vehicle of transport, whereas the CMR Convention requires the transportation to be carried out by a vehicle, the COTIF/CIM convention merely requires the transport to be by rail. In practice, this variation has little to no effect, because transportation by road by other means than a vehicle, and transportation by rail by other means than trains is unlikely.

It can be argued that some specific situations where transport being carried by tram (railway on the road) can prove issues regarding which convention applies.

In contrary to the CMR Convention, the COTIF/CIM convention requires the transportation from the place of taking over the goods, and the place of delivery to be situated in two different countries, both being signatory states. In the CMR Convention, it is only required that one state is a signatory state.

However, Article 1(2) of the COTIF/CIM seeks towards harmonization with the geographical scope of application of the CMR Convention. article 1 (2) states that:

Article 1(2)

"These Uniform Rules shall apply also to contracts of carriage of goods by rail for reward, when the place of taking over of the goods and the place designated for delivery are situated in two different States, of which at least one is a Member State and the parties to the contract agree that the contract is subject to these Uniform Rules."

Thus, allowing for the parties to a contractual expansion of the geographical application of the COTIF/CIM convention to be like the CMR Convention.

Regarding the applicability of the COTIF/CIM, in a multimodal transport contract, the applicability of the convention, compared to the CMR convention is very similar. Although the applicability of the COTIF/CIM in multimodal transport has not been addressed in case law yet, the similarity to the CMR Convention indicates that the applicability in multimodal transport would follow the same approach as discussed above.

The Vilnius Protocol broadened the applicability of the COTIF/CIM regarding Multimodal Transport. Before the protocol, the 1990 COTIF/CIM resulted in a dispute in 2002, regarding cigarettes being transported by road from Langenhagen to the Hannover, where it was to be transported by Rail to Bishkek. Because the 1990 COTIF/CIM convention had article 2(2), which read:

Article 2(2)

"The system of law provided for in §1 may also be applied to international through traffic using in addition to services on railway lines, land and sea services and inland waterways. Other internal carriage performed under the responsibility of the railway, complementary to carriage by rail, shall be treated as carriage performed over a line, within the meaning of the preceding subparagraph."

The Article expanded the requirements of the application of the COTIF/CIM convention to only apply to contracts of carriage performed over a line.

This requirement was removed with the Vilnius Protocol, which indicates that the COTIF/CIM seeks towards harmonization with multimodal transport.

Article 27(2) imposes liability on a sub-carrier if the main carrier is evenly responsible according to COTIF/CIM. The question is, if the sub-carrier is responsible regardless of the type of transport he performs, or of liability on the sub-carrier, according to Article 27(2) requires whole or part of the transport of the sub-carrier to be performed as rail carriage.

According to Article 3 (2) CIM the sub-carrier is a carrier of whom the main carrier has entrusted to perform whole or part of the journey by rail, but who has not concluded the contract of carriage with the consignor. Article 3 thereby prevents the limits of the scope of the CIM regime to extend to other modes of transport for the sub-carrier, subject to Article 27 (2).[29]

With the changes brought by the Vilnius Protocol, the carriage is, however, not entirely restricted to the carriage by rail. To some extent, the 1999 CIM also incorporates other types of transport. It follows from Article 1 § 3-4 that:

§ 3

"When international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply."

§ 4

"When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention."

[29] Hoeks, p. 269

The primary function of both paragraphs is the application of CIM on other types of transport. the application requires that the other means of transport, road or inland waterway, is part of a single transport, where the main method of transportation is by rail.

Therefore, COTIF/CIM applies to some parts of a multimodal transport, in the right circumstances. The consequence of the extended scope of applicability of the COTIF/CIM can result in recourse gaps, where a MTO, being responsible according to Article 1 § 3-4. The Sub-carrier, performing national rail carriage, is considered a "carrier," cf. art. 27, § 2. As a result, a rail performing sub-carrier can be held liable according to the convention, whereas a sub-carrier, performing transport by other means, cannot, and is therefore liable according to national law.[30]

6.3.2 The Liability Regime of the COTIF/CIM Convention

The carrier is liable for damage or loss in-between the time he takes over the goods to the time he delivers the goods, cf. art. 23, § 1. This includes loss or damage resulting from delay. The carrier can, however, exempt himself from liability, if the damage or loss was caused by the claimant or any other person entitled by him, by a defect of the goods or by circumstances of which he was unable to prevent and unable to foresee, cf. art. 23, § 2. If the carrier wishes to rely on the exemptions of art. 23, § 2, he bears the burden of proof, cf. art. 25, § 1. Furthermore, the carrier can exempt himself from liability, cf. art. 23, § 3, if the circumstance causing the damage was either by carriage in open wagons, according to an agreement in the contract, the absence of inadequacy of the packaging of the goods, when the goods are liable to damage, by their nature, if not properly packed, loading and unloading of the claimant, damage caused by the nature of the goods, incorrect description of the goods, live animals or if the claimant appointed an attendant of the goods, and the damage occurred from a risk which the attended was supposed to prevent. If the Carrier wishes to rely on the exemptions of art. 23, § 3, he is only required to prove that the damage could have occurred from any of the circumstances mentioned.

[30] Hoeks, p. 269

If the carrier is unable to exempt his liability for the damage or loss, he is liable for the total or partial loss of the goods. The value of the goods shall be calculated according to the commodity exchange, the market price, the usual value of goods of the same kind and quality on the same day of when the goods were taken over, in this order, cf. art. 30, § 1. The compensation cannot, however, exceed 17 SDR per Kg., unless the damage or loss resulted from an act or omission, committed with intent or recklessly by the carrier or any of his agents, cf. art. 36 & 40.

Regarding recourse actions, the CIM convention follows the same provisions as the CMR Convention, cf. article 50.[31]

6.3.3 Partial Conclusion

With the updated version of the CIM convention, brought by the Vilnius Protocol, the wording of the CIM corresponds in it applicability with the CMR Convention. The scope of applicability of the COTIF/CIM convention is to cover all contract for the carriage of goods by rail, and the interpretation follows the same interpretation of the CMR Convention. However, as a result, the COTIF/CIM convention follows the same issues of applicability to multimodal transport, as the CMR Convention. There are some differences, for example, the requirement for both the place of taking over the goods and the place of delivery, to be signatory states. Furthermore, the convention lacks a similar provision as CMR art. 2 that allows for "ro-ro" transport, but the convention does cover some other types of transport than rail, cf. art. 1 §§ 3-4, but requires the main part of the transport to be performed by road.

The liability regime follows the same approach as the CMR convention, except with the liability limitation being a staggering 17 SDR per Kg., in contrary to the 8,33 SDR of the CMR.

[31] See chapter 6.1.3

6.4 The General Burden of proof

The liability regime for each convention of international transport is of the utmost importance. There are essentially two outcomes of a transport agreement, either the goods are delivered on time and without damage or not delivered in time, not delivered in a state as per the transport document (damaged) or not delivered at all.

The conventions, therefore, seek to provide the parties involved with a liability regime that will, to some extent, define the rules of liability, to create predictability of an outcome of liability, in the case of damage.

De Wit[32] describes the liability system like a "tennis game" where each part must play the game according to the specific set of rules, to "return the ball" of the burden of proof. Generally, the carrier has prima facie liability to perform the carriage in accordance with the contract.[33]

Before placing the prima facie liability on the carrier, the claimant must prove that there is a contract of carriage and that the performance of the carriage was not performed in accordance with the contract.

In practice, this is done by the claimant making a reservation or giving a notice of damage or delay to the carrier. This notice or reservation does not present any legal evidence but ensures the claimant's right to legal actions. Besides giving notice or making a reservation to the carrier, the claimant must present the contract of carriage, along with the receipt from the carrier for taking over the goods, shown without any reservations, and that the goods were missing or damaged upon delivery. By doing so, the claimant proves that there was a contract of carriage, that the goods were handed over to the carrier in good condition and that the carrier did not deliver the goods in accordance with the contract, either by late delivery, no delivery or delivery of damaged goods.

[32] De Wit, Ralph, Multimodal Transport, 1995, p. 332
[33] Article 17 (1) of the CMR convention, Article 3 of The Hague-Visby rules and articles 23 (1) & 25 (1) of the CIM Convention

6.4.1 The Carriers burden of proof

During the first stage of the "game" of shifting the burden of proof, De Witt, explains the relationship of the burden of proof, between the claimant and the carrier, to be in such close relation, that it can be treated as one stage. The reasoning behind this point of view, is, that the claimant must prove the existence of the contract and the non-performance. Similarly, the carrier must either dismiss the claim of a contract, dismiss the non-performance claim or prove that he was not responsible for the damage/delay of the performance.[34]

6.4.1.1 The Contract

Providing or proving the existence of the transport contract rarely provides any issues, since both the CMR Convention (Article 4), the CIM Convention (Article 6) and the HVR (Article 1, (b)) requires the contract of carriage to be confirmed in a transport document.

However, the existence of a transport document does not automatically represent a contract of carriage, and the provisions of the document do not always state the provisions of the contract. Instead, the carrier, if he has issued or signed the document, will either include or refer to the provisions of the contract in the transport document.

The formation of a contract of carriage does not entail any specific requirements; it is, therefore, sufficient to merely refer to the intentions of the parties. A contract of carriage, for example, a bill of lading, can, therefore, differ from the original contract. It would, therefore, be incorrect to refer to the transport document as being the contract of carriage.[35] The relationship between a carrier and a third-party holder of the bill of lading, is governed by the provisions of the bill of lading, however, the relationship between the carrier and the shipper, can be governed by the contract of carriage, especially if the contract directly or indirectly implies the intention of providing the contract precedence.

[34] De Wit, Ralph, Multimodal Transport, 1995, p. 336
[35] De Wit, Ralph, Multimodal Transport, 1995, p 233

Furthermore, some transport documents have been held to form a "false" through bill of lading. In *Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd*.,[36] a sea carrier was paid to perform an inland carriage. The goods arrived at the inland destination severely damaged. The carrier held that he was not liable for the inland carriage as stated in a booking note. The court only discharged the carrier's argument because the booking note was not signed. If the booking note had been signed, the transport would form a two-leg carriage, on sea and on land, to form a through bill of lading, instead of a multimodal contract of carriage.[37]

An even more apparent issue of the contract is the interpretation of its provisions, especially concerning the apparent order and condition of the goods

6.4.1.2 The Apparent order and condition of the goods

Besides the evidentiary function of the existence of a contract of carriage, the transport document constitutes *prima facie* evidence to the weight, quantity, number of packages and volume of the goods. Furthermore, it provides evidence to the apparent good order and condition of the goods and the packaging of the goods.

The weight, quantity, number of packages and the volume of the goods can be described as the "quantity" of the goods, stating the amount of goods transported, whereas the apparent good order of the goods or the packaging is described as the "quality." The distinction between the two categories is that the quantity of the goods is noted on the transport document by the consignor, and the carrier is often very limited in confirming the correctness of the statement in the case of a sealed container. The carrier is therefore only obliged to admit a receipt for shipment of "said to contain" goods.

The statement of the quality of the goods is, in contrary to the quantity, stated by the carrier. The statement of the quality of the goods provides the same issues as the quantity of the goods, especially when the goods are transported in a sealed container. The carrier is therefore limited to check the

[36] 650 F.2d 633, 1984 A.M.C. 839
[37] De Witt, p. 334

apparent condition of the outside of the container for any leaks, smell or apply any reasonable means to ensure the quality of the goods, and make his reservations accordingly.[38]

If the carrier received a non-sealed container or if the inspection of the containers apparent condition or external circumstances proves to require internal inspection of the goods, the carrier is obliged to do so. The requirement of the unimodal conventions, to inspect the goods quantity and quality, is significantly restricted using container transport.

7 The Container Revolution

Humans have always traded with one another, but especially since the 17th and 18th century, trade across the globe started to spread. With the East India company and the Verenigde Oost-Indische Compagnie (England and the Netherlands) developing into international trade using bills of lading and Letters of credit as we know it today.[39]

The development of international trade, especially in transport by sea, was drastically improved by the inventions of the industrial revolution, such as the steam engine. The most recent, and most influential inventions of international trade was the standardization of the container.

Up until the global acknowledgment and standardization of the container, every pound transported, either by ship, rail, road or air, had to be manually loaded and unloaded.

The story goes that trucking magnate Malcom McLean was watching longshoremen loading and discharging cargo manually at the port of New York in 1937 when he came up with the idea of simplifying the loading and discharging. In the 1950s McLean began developing the container, at first, he tried to develop a "roll-on roll-off" type container which was scratched for the simpler system of transporting only the body of the trailer[40]

[38] De Wit, p. 352
[39] Van Ham, p. 2.
[40] Van Ham, p. 17.

On April 26, 1956, a container ship called the *Ideal X* sailed from Newark to Hudson, carrying 58 containers measuring 33-ft each. The ship belonged to the Pan-Atlantic Steamship Corporation, owned by McLean, and the voyage marks the beginning of the containerization.

During the 1960s and up until the 80s and 90s the development of the container made the loading onto the vehicle, the storage and management of the containers on top of the vehicle and the unloading of the containers to the docks, a lot easier, less time consuming and less expensive.

Especially during the Vietnam war, the Pan-Atlantic Steamship Corporation supplied tree containerships, each carrying 476 containers to transport military supplies from US West Coast ports to Okinawa, Japan. The use of containers reduced the man hours needed to load and unload the 20.000 tons of supplies from 12.000 man hours to 750, which is a 93% decrease.

Although it has not proven possible to locate any statistics on the ratio between localized – and non-localized damage, De Witt refers to several authors, claiming that most claims of damage to cargo are non-localized.[41] Authors such as Peyrefitte, L, *"Le Régime juridique des transports combinés",* 1972, *"60 to 80 % of all cases; Lord Diploc, "A Combined Transport Document"*, *1972, "it is only rarely that the stage at which loss or damage to the goods occurred can be proven".* Ebenroth, C.T., Fischer, R. and Sorek, C., *"Die Haftung im multimodalen Gütertransport bei unbekanntem Schadensort,"* 1990k, *"About 80 % unlocalized damage".*

On the other hand, De Witt also refers, amongst others, to the paper *"The Economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention,"* UN Convention, 1991, *"about 80% of claims occurrences are known loss/damage."*

It is therefore uncertain of the ration between localized – and non-localized damages, but despite the ratio, risen disputes of non-localized damages, along with scholar writings and critique of the unimodal systems, does indicate that the container revolution has brought cases of non-localized damages. To control the differences in the unimodal conventions, their applicability, and liability regimes, The UN attempted to form a Convention on Multimodal Transport.

[41] De Witt, p. 428; It is important to stress, that the comments are merely cited from the book, and the accuracy of the quotations, the translations and the citing's could not be confirmed.

8 Multimodal transport

8.1 The United Nations Convention on International Multimodal Transport

Back in the 1930s, the first attempt to form a multimodal transport convention was made as a theoretical idea by the *International Institute for the Unification of Private Law* (UNIDROIT). In the 1960s the containerization began to flourish because of its beneficiary ways of employing a container in transport. The development and use of container transport lead to transportation being carried out by one operator, to undertake the entire transport, regardless of several different legs of transport being applied. The concept of multimodal transport suddenly changed from being a theoretical idea to a practical way of transporting goods.

The main issue of the multimodal way of transportation is the absence of one legal uniform international multimodal transport system. If the applicable unimodal systems that were developed at the time (and still today) had been uniform in applicability, liability, etc., the issues of multimodal transport had been non-existing. Because of the difference approaches and liability systems of the unimodal transport conventions, the use of one operator, under a multimodal transport contract, provided parties involved with several issues, such as the conflicts of laws, conflicts of forum, liability gaps, issues of recourse and non-localization of damages, leading to disputes with unpredictable results.

In 1965, CMI undertook, under the supervision of UNIDROIT, to form a legal regime to regulate multimodal transport, resulting in the 1969 Tokyo Rules and the 1971 Rome Draft. It is argued that the draft failed to gain recognition because of unsatisfactory from the USA and other non-European countries.[42]

Although the Draft failed to gain recognition, the need for a multimodal transport convention was still present. The United Nations Economic and Social Council (ECOSOC) formed in 1973 an Intergovernmental Preparatory Group (IPG) to form a multimodal transport Convention under the authority of UNCTAD. With objection from developing countries and disputes with the Code of

[42] UN, The Economics and commercial implications of the entry into force of the hamburg rules and the multimodal transport convention, 1991, p. 23

Conduct for Liner Trade Conferences and the Hamburg Rules, the IPG decided to decrease the legal concept of the convention to only govern contracts for private matters on multimodal transport.

At a diplomatic conference in 1980, close to 90 states joined together to form the United Nations Convention on International Multimodal Transport (Multimodal Convention). Although the support for the convention was extensive, the convention has failed to gain any legal ground. As of today, it has been ratified and signed by only a few countries, and is therefore not in force, since it requires the adoption of at least 30 countries.[43]

In regular maritime transport contracts, the contracting carrier / Shipping lines would disclaim liability for parts of the transport carried out by a sub-carrier. The disclaimer for opting out of liability, gradually changed with the implementation of container transport, because of the lower risks and higher controllability of the cargo. The shipping lines instead abandoned the disclaimer and accepted full liability of door-to-door transport, for instance, The Merchants Guide *"In the preamble the Carrier undertakes to act as principal throughout… this means that the Carrier is personally liable to the merchant… at all times throughout Carriage, and is at no time in an agent only position unless specifically provided for elsewhere."* [44]

Although unimodal maritime transport shifted towards a more multimodal friendly approach, the UNCTAD argued that the connection with laws regulating maritime transport was difficult to separate from and resulted in the failure of the Multimodal Transport Convention. The reason for the failure of the Multimodal Transport Convention is argued to result from the absent support from the Hamburg rules. UNCTAD argues, that, because of the lack of support for the Hamburg rules, the Multimodal Transport Convention would result in a liability gap between the MTO and the subcontracting ocean carriers, liable under the HVR, and the tackle-to-tackle principle.[45]

Furthermore, the simple fact that the convention required 30 countries to ratify the convention, a number held by Hoeks to be high[46], could indirectly have the implication that it would not have a "trial period" for a few countries. Furthermore, Hoeks argues, that the close relation of the

[43] The Conventions Article 35
[44] The Merchants Guide, p. 44
[45] UN, The Economics and commercial implications of the entry into force of the Hamburg rules and the multimodal transport convention, 1991, p. 27
[46] Hoeks, p. 21

convention with the Hamburg rules, which she does not consider to be very carrier friendly *"All in all, it seemed the shippers were uncertain as to the benefits the Convention might offer them, while the maritime industry offered resistance and resorted to adverse lobbying, neither of which heightened the chances of the Convention."*[47]

Nevertheless, the Multimodal Transport Convention is interesting, regarding this paper, because it incorporates a modified liability system on a conventional level.

It follows from Article 16, that the MTO is responsible for any loss, damage or delay occurring during the period of responsibility, subject to Article 14 By the MTO and his "*servants, agents or from any other person of whose services he makes use for the performance of the multimodal transport contract"*[48] Resulting in the MTO being responsible for loss, damage or delay occurring while in charge of a sub-carrier.

Furthermore, it allows for the limitation of his liability, following the principle of the modified system. The MTO can, therefore, limit his liability to 2.75 SDR per Kg. or 920 SDR per package, according to Article 18. In contrary to the uniform approach in Article 18, Article 19 allows for any international convention or mandatory national law, that results in a higher liability limit, to apply, thereby following a network approach. It is required, however, that such applicability of other international conventions or mandatory national law, that the damage is localized in a way that fulfills the requirements for applicability.

[47] Hoeks, p. 22
[48] Article 14 (3)

8.2 The definition of Multimodal Transport

Article 1 of The United Nations Convention on Multimodal Transport of Goods defines Multimodal transport as:

> *""International multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the MTO to a place designated for delivery situated in a different country."*[49]

By following the wording of the Multimodal Transport Convention, Multimodal Transport is the carriage of goods between two countries, using at least two different modes of transport, with one single contract to govern the carriage.

Hoeks has made a slight modification to the definition to *"capture all contracts"* and defines multimodal transport as:

"A single contract of carriage whereby a single carrier promises a consignor to carry goods, which either: a. Prescribes the use of at least two different modes of transport, or b. allows for the use of more than one mode of transport while two or more modes of transport are actually used during its performance. "[50]

By expanding the definition of multimodal transport, Hoeks allows for an otherwise unimodal contract to become multimodal, thereby changing the characterization of the performance and subsequently the applicable liability regime. The expansion further allows for what she describes as "unspecified" or "optional carriage contracts", contract types that allows the carrier to perform the carriage with the transport mode of his choosing, to become multimodal, should the carrier choose to perform the carriage in a way that fulfills the requirements for a multimodal transport.

[49] Although signed in 1980, it has yet to have gained acceptance and likely never will, Hoeks, p. 6
[50] Hoeks, p. 63

The first requirement to a Multimodal Transport is the use of more than one mode of transport, or as described by Hoeks *"it prescribes – or allows for – the use of more than one mode of transport in the performance of the contract."*[51]

The question is, what should define the different modes of transport, and how should the different modes differentiate between one another? Regarding transport, the initial, or most distinct way of differentiating the modes of transport is by dividing them into their "medium" of Land, Sea, and Air.

By dividing according to the medium of transport, the modes are, at first glance, easy to differentiate; Transport by boat is Sea transport e.g. Governed by the HVR, Road carriage is Land transport under the CMR Convention, and transport by airplane would be air transport for instance under the Warsaw Convention. However, performing the division by the medium is already shattered when comparing Road and Rail carriage, since both are on land. Furthermore, as mentioned under the different Unimodal Conventions, the CMR Convention also governs "Ro-ro" transport, and COTIF/CIM governs transport by both road and inland waterways, subject to CIM Article 1, §§ 3-4.

A different approach is to distinguish the different modes by the vessel used to transport. This view does present some issues as well because the transport of goods could either be by airplane, helicopter or air balloon, all of which is considered Air Transport. Similarly, transport by ship and submarine are both transport by sea, but could just as well be transport by Inland waterways.

Therefore, differentiation on either the medium or the vessel itself does not present sufficient factors to be able to distinguish the different modes from each other.

De Witt refers to the deciding factor to be a combination of the different vessels applied, on different mediums with a transshipment between, for the transport to be Multimodal. De Witt explains his view by the example of sea transport. If the carriage by sea is followed by a second leg of transport over inland waters, without transshipment in between, the carriage can only be regarded as being unimodal, regardless of the transport being on both sea and inland waters. Thereby, he concludes that the key factor must be the different vessels applied. On contrary, Hoeks describes the opinion of other writers, such as Haak and Van Belen to grant the importance of the vessel to be less, than

[51] Hoeks, p. 65

according to De Witt, especially from the view that e.g. Sea carriage and inland waters are to be regarded as two different mediums of transport, regardless of the vessel applied.[52]

It could be argued that the change of medium changes the carriage, as mentioned above, the definition of mediums to merely consist of Land, Sea or Air is too narrow. Instead, it could be argued, that the definitions of mediums should be based on the applicable unimodal conventions, which would result in a more exhaustive or "precise" list of mediums. The issue of such definition of mediums, however, is that several of the unimodal conventions covers different mediums, e.g. Ro-ro transport (Sea) in the CMR Convention and Article 1 § 3 of the COTIF/CIM (Inland and road transport). The change of mediums can therefore not stand alone, as a reason for the carriage to become multimodal. Similar, the change of vessel does not automatically lead to a Multimodal carriage, because, for example, a transshipment from one lorry to another would merely be a unimodal carriage under the CMR Convention. As a result, the requirements for the transport to transform from unimodal to multimodal transport must be a combination of the circumstances mentioned above.

The factors to consider, when determining if the requirement of different modes applies or not, must based on the above discussion, be when transshipment has taken place between two different vessels, with the purpose of carrying the goods on at least two different mediums, where different unimodal convention applies.

Roost, however, discusses the requirement of several modes in a different context. She argues that the requirement lies with the contract, in combination with the actual carriage. According to Roost, either the contract can specify the modes allowed, or it can be unspecified. According to her, a contract of carriage by several vehicles of the same type (consecutive carriage) is still unimodal carriage, e.g. Road transport, governed by the CMR Convention Chapter VI.[53] Similarly, a specified transport of carriage by either road (CMR) or rail (COTIF/CIM) can, either explicit or implicit, allow for the use of other modes of transport, by ro-ro or piggyback. Usually, the allowance for ro-ro or piggyback transport is explicitly agreed in the contract, however, in some situations, where such

[52] Hoeks, p. 66
[53] Roost, p. 56

transport is necessary, be agreed implicit. An example could be a contract for road transport from Denmark to the UK.

It is important to distinguish "multimodal transport" from a "multimodal transport agreement", the difference is present in the above discussion, where authors such as De Witt debates the requirements for the actual transport to become multimodal, whereas Roost debates the requirements for a contract to be multimodal transport. As Roost explains, a unimodal transport is only one mode of transport, whereas a unimodal transport contract, can allow for ro-ro, still being governed by "one" convention.

By referring to the definition of Multimodal transport, in the Multimodal Transport Convention the requirements are: "[1] *carriage of goods by at least two different modes of transport [2] on the basis of a multimodal transport contract."*

The first sentence requires the carriage of at least two different modes to apply, however, following the arguments of Roost, carriage by more than one mode of transport can be governed by a unimodal carriage contract e.g. By ro-ro or piggyback transport.

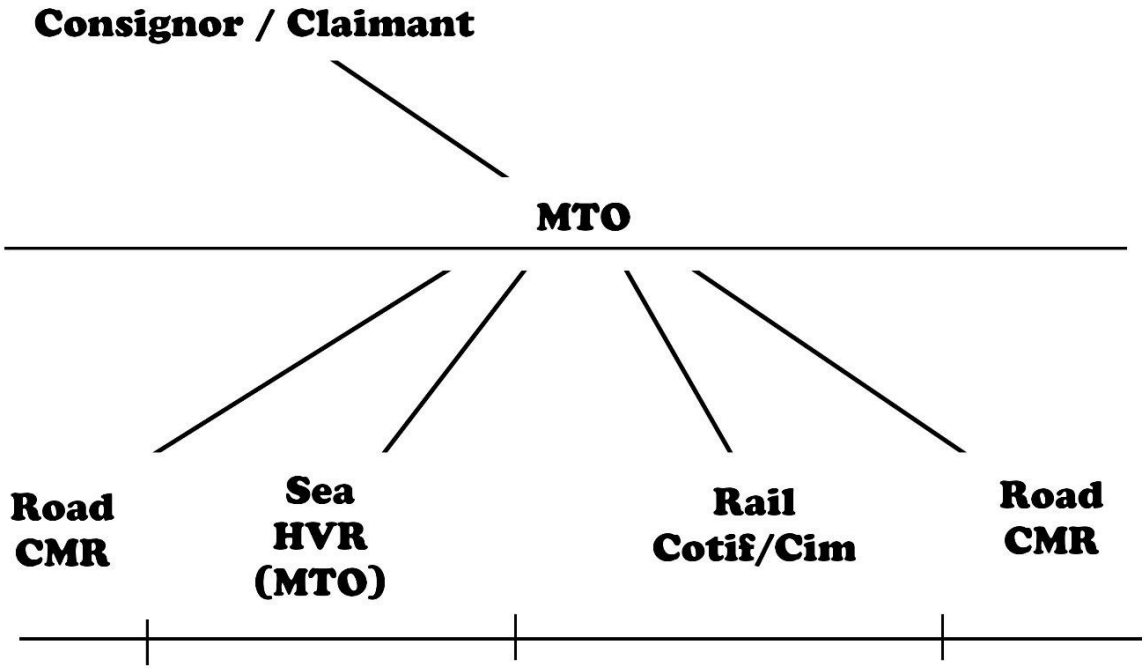
The second sentence, the requirements for the transport to be governed by one single contract of multimodal carriage, is the fundamental requirement of the multimodal transport. The requirement of multimodality therefore lies the contract itself, and not merely the performed transport.

As an example, transport from Copenhagen (Denmark) to London (UK) governed by one contract of rail transport, where ro-ro transport is either implicit or explicit agreed, from Rotterdam (The Netherlands) to London, is, despite being multimodal, still a unimodal contract, governed by one convention (CMR).

The discussion of the difference between multimodal transport and the multimodal transport contract is apparent when the contract of carriage is unspecified.

Besides the requirements of different modes of transport, Multimodal transport also requires the different modes applied to be carried out under one single contract between a Consignor and a carrier. The carrier agrees to be responsible for the entire carriage, even if he does not perform the entire transport himself. Multimodal transport can, therefore, have the following setup:

Illustration 1:



As present in the above illustration, the contract for carriage, between the Consignor and the MTO, involves several transport legs. In this example, the MTO does not merely function as a freight forwarder, but as a carrier himself for the sea leg. The other carriers, contracting with the MTO, has the function as sub-carriers to the MTO. By appointing the MTO to be responsible for the entire transport (and his sub-carriers), the Multimodal Contract thereby excludes the use of individual unimodal carriages.[54]

[54] Hoeks, p. 65

8.3 Liability systems

Several attempts to form a multimodal transport convention has failed.[55] The fundamental issue of forming a multimodal transport Convention lies with the fact that multimodal transport is not one type of transport, but an attempt to combine several types of transport, with each their own convention. Instead of forming an entirely new legal regime, applying the accepted unimodal conventions to multimodal transport is the current way of establishing carrier liability.[56]

There are several ways of applying the unimodal conventions to multimodal transport, namely the uniform system, the Network system and the Modified system.

8.3.1 The Pure Uniform liability system

The uniform system is based on the idea of unifying the operator liability in the multimodal transport contract, for the whole journey, to all transport legs irrespectively of the mode of transport used. This system has a big advantage for its simplicity and predictability. By applying the same liability regime to all parts of the journey, all parties to the Multimodal Transport contract are aware of the extent of liability for damages and delay.

This simplicity and predictability ensure that the involved parties can easily predict the level of liability. Thus insurance costs and freight calculation is based on already established contractual terms.[57] By having a predictable system, parties to a dispute can predict and calculate the result of the dispute without going to court.

Another similar advantage of the Uniform system is its usefulness and indifference to the type of loss. Since one liability regime determines the level of liability, the calculation of damages does not rest on the stage of which the loss occurred. The calculation of damages for the MTO does not change

[55] See Chapter 7.1
[56] De Witt, p. 137
[57] Hoeks, p. 26.

depending on which carrier (type) is responsible for the loss, and even in situations of non-localized damages, gradual occurrence of damage and delay, the agreed liability regime applies.

The simplicity of the uniform system eliminates the issues of unpredictability for the consignor of the network system (below) but instead shifts the unpredictability to the MTO, which is the main drawback of the uniform system. the MTO will often apply sub-carriers to perform whole or part of the transport. While the MTO is liable according to the contractual uniform liability system towards the consignor, his recourse actions against a responsible sub-carrier will most likely be governed by mandatory liability regimes. An example could be the transport of goods by road-sea-road (not governed by Article 2 of the CMR Convention). If the MTO agrees to a liability regime like the regime in the CMR Convention between him and the consignor, and the cargo is lost at sea by a sub-carrier. The MTO can limit his liability to 8.33 SDR per Kg according to CMR Article 23 (3) towards the consignor, but can only recourse 2 SDR per Kg. from the (sea) sub-carrier, since the sub-carrier can limit his liability according to the HVR Article IV (5) a. As a result, the MTO is forced to take out higher insurances to cover the difference between his liability and his ability to recourse the claim. [58]

8.3.2 The Pure Network system

The pure Network system establishes the same liability between the consignor and the MTO, as well as the MTO and his sub-carriers. The unimodal conventions are thereby applied, depending on which type of transport was performing the carriage, when the damage or delay occurred. Applying the same liability system and limitations of liability to both the consignor - MTO relation and the MTO – Sub-carrier relation results in the elimination of the recourse trap as mentioned in the Uniform system.[59]

The idea of applying the same liability system to the whole "chain" of responsible parties will, in theory, provide the most equitable result for all, since no party falls into the recourse trap, and from

[58] De Witt. P. 145
[59] Roost, p. 116

the ability to recourse the full compensation, only the party responsible for the loss or delay ends up paying the compensation.

A key element in the uniform system is the predictability of the agreed liability regime; such predictability cannot exist in the Network system since the liability regime is not established until localization of the damage has been concluded.

The quote from Kurt Grönfors, as presented by Roost, describes the network system very well:

"One Disadvantage of the Network System is that the customer might be covered not up to one and the same limit for the whole transit but follow the ups and downs of a switchback railway in an amusement park. And as far as legal relationships are concerned this is not at all amusing."[60]

Should a dispute between two parties to a multimodal contract arise, the lack of predictability is prone to cause several issues. The Network system applies the unimodal transport conventions depending on the localization of damages. If it is even possible to localize the damage, there can be situations where, even if the applicable conventions have been established, they do not cover the damage itself. An example, where applicable conventions do not cover the damage, is the issues of liability gaps. De Witt gives the example of a multimodal transport from Köln (Germany) to Damascus (Syria). The container Is transported from Köln to Antwerp (Belgium) by road, then it is placed on a ship to Mersin (Turkey) and finally transported by rail to Damascus (Syria).[61] In this example, the first (road) leg will be governed by the CMR Convention, the second (sea) leg by the HVR and lastly the (rail) leg by the COTIF/CIM.

If the damage occurs while warehoused in Mersin, the damage is localized, but the HVR do not extend the scope of applicability to warehousing,[62] leading to national law being applicable instead, which presents its own issues.

It is one thing to predict which unimodal convention applies when solving a dispute with the network system, but if the involved parties must also consider national law, the predictability of the system is close to none.

[60] Roost, p. 117; Grönfors.Kurt, transporträttsliga studier, 1975, p. 220
[61] De Witt, p. 140
[62] Chapter 5.2.1

If a dispute should arise, the lack of predictability would inevitably force the involved parties to seek the dispute solved by going to court. De Witt presents the choice of forum to present even further issues. Even if the contract indicates which court should have jurisdiction and which national law to be applicable in case of no mandatory law, it is not necessarily certain that the appointed court will apply the choice of national law.[63]

In the Danish "Salmonroe" case [64] a shipment of salmon roe was shipped from Billund (Denmark) to Frankfurt (Germany) by road, followed by air transport from Frankfurt to Narita (Japan). The cargo was damaged during the road leg in Germany. The Danish supreme court upheld that the entire journey was governed by the Danish Air Carriage Act (Warsaw Convention) because an Air Waybill was issued by the Japanese carrier (Japanese Airlines). The contract had the option to be performed by other means of transport, and the air carrier had contracted with a (road) sub-carrier. The Danish Supreme Court found that the contractual carrier was liable for the Air Carriage Act and for the CMR Convention. The sub-carrier was only liable for the CMR Convention. By applying this construction, the court provided the consignee with a freedom of choice of law. Thereby granting him the ability to choose the period of limitation from the Air carriage act, and the liability regime of the CMR Convention.

Although the transport was a unimodal transport governed by the Air Carriage Act, the judgment of the Danish Supreme Court still applies for a multimodal network approach. If the carriage from Denmark to Japan had merely been one leg of a multimodal carriage, the network system would divide the different legs, and apply the applicable unimodal conventions (the Danish Air carriage act/Warsaw). It is highly doubtful that parties to a multimodal contract would be able to foresee an outcome like that of the Danish Supreme Court. It shall be noted that the judgment, in this case, has been highly criticized by several authors.[65] The reasoning behind the criticism relies on the fact that the claimant were in a better position than if there had been no option to apply other means of transport at all. Furthermore, the Danish Air Carriage Act was regulated not long after the judgment by § 108, no. 4. That places all responsibility to be governed by the Air act if a carrier applies different means of transport in contrary to the judgment. Roost presumes that the change was merely a

[63] De Witt, p. 142
[64] U.2008.1638H (Lakserogn)
[65] Roost, p. 60 n. 23; also refers to Ulfbeck & Taiger Ivø, Optioner og ansvar i transportaftaler, ET.2008.331 p. 336

codification of existing customary law, which is why the judgment seems to contradict with the customary law at the time. Roost also address the consideration of the Supreme Court towards the claimant. She argues that the court had a misunderstood understanding of whom the option benefitted. The judgment seems to hold the argument, that the option only benefitted the carrier by allowing him to option out of the agreed method of transport, but failed to understand that the option would also benefit the claimant, by allowing cheaper and faster transportation.

Furthermore, the CMR Convention is only applicable to a contract of carriage by road[66], as mentioned above. Since the court argued the contract to be a contract of air carriage, it is difficult to see how and why it should also be governed by the CMR Convention.

8.3.2.1 Localized vs. unlocalized damage or loss

The primary issue of the pure network system is the reliance of localized damage. If the damage, loss or delay cannot be localized to a specific carrier, the network system falls short, because a liability regime, according to any of the unimodal conventions, cannot be established.

By applying the use of container transport, the possibility of being able to localize the damage or loss decreases a great deal,[67] since the container will rarely be opened during transport. Since the inspection of the goods is not performed in a way that can guarantee the apparent order and condition of the goods (by opening the container), the discovery of damage will, in most cases, occur when the consignee opens the container. in such cases, the only way to localize the damage would be by performing an examination of the container and the goods. In some situations, e.g. By salt water damage, examination post-delivery can provide evidence to the localization of the damage. Such evidence can only be proven in situations where the damage occurred by a single event, as the example with salt water.

Damage can also occur as a chain of events or "progressively," during several different transport legs. In the case of damage occurring progressively, the localization of damage is impossible. The burden

[66] CMR Article 1.
[67] See Chapter 6

of proof does not befall the damage itself, but on the cause of the progressive damage. De Witt refers to a case from 1986, where a road carrier was not able to relieve himself of liability, even if the damage occurred at sea, during a force 11 storm. The reason for the damage was insufficient stowage inside the container by the road carrier.[68]

Delay provides the Network system with even further issues, especially in cases where insignificant delay occurs for several carriers. Small delays that do not constitute delay to the extent that applies liability on the individual carriers, but the combined delay imposes liability. De Witt gives the example of a road carrier, delivering the cargo to the following carrier with two days of delay. The receiving carrier is a sea carrier that, because of the two days of delay, cannot ship the goods for another week, and the following carrier cannot perform his carriage until 14 days later. Suddenly two days of delay results in several weeks of delay.[69]

As shown in the above examples, the pure network system has an advantage over the uniform system regarding reaching an equitable result, because the liability system is controlled by the applicable unimodal transport convention, thereby eliminating the issue of the recourse trap as is present in the uniform system. however, the pure network system has proven to be unfit for non-localized damage, delay, progressive damage and liability gaps. Since the use of container transport is so widely used, often damage to cargo cannot be localized. the pure network system will therefore only be desirable in situations where damage can be localized.

8.3.3 The Modified Liability System

With the drawbacks of both the uniform and the network system, the usefulness of the systems in their pure form, not being suitable in practice, it has been attempted to reach a more suitable system. Different fora have attempted to modify or combine the systems to form a more practical oriented approach. The modified network system is the combination of network liability for localized damage and applying an agreed applicable liability regime (uniform system) if the damage cannot be localized.

[68] De Witt, p. 389; Rennes, 7 May 1986m D.M.F., 1988, 488
[69] De Witt, p. 140

Such modifications can be established by national legislation, such as the Dutch Civil Code[70]:

Article 8:42 Liability of the combined carrier

1. When the combined carrier does not deliver the goods without delay at the place of destination in the condition in which he has received them, and it has not been established where the event occurred that has caused the loss, damage or delay, then the carrier is liable for the damage resulting therefrom, unless he proves that he is not liable for any of the parts of the transport where the loss, damage or delay may have occurred.

2. Any stipulation (clause) in derogation from the present Article is null and void.

Article 8:43 Maximum indemnity

1. If the combined carrier is liable for damage caused by damage, total or partial loss, delay or any other event causing damage to the goods, and it has not been established where the event occurred that has lead thereto, then his liability is determined according to the rules of law applicable to the part or parts of the transport where that event may have occurred and from which results the highest amount of damages.

2. Any stipulation (clause) in derogation from the present Article is null and void.

The Dutch national law dictates that the burden of proof befalls the carrier. The Law establishes that If he cannot prove where the damage occurred, the liability regime that results in the highest amount of damages applies.

The code presents a solution to the issues of the network system because the claimant can claim damages according to the highest liability regime, applicable to the legs of the journey where it is possible for the damage to have occurred. The burden of proof, therefore, befalls the carrier, to prove that the damage or loss occurred at a stage that provides the carrier rights to lower his liability.

[70] Book 8, Article 8:42 – 8:43

If national law does not modify the systems, the parties can instead agree to the modifications on contractual terms. If doing so, the contractual parties will seek towards the most beneficiary liability level. The variation of the contractual terms is therefore wide, and the concept of a modified system is an abstract idea of several different combinations of liability. One can therefore not determine the modified system as one system but as a variety of combinations of the network and the uniform system.

Similar to the pure network system, the issues regarding localized damage are minor, because the applicable liability system depends on the damage being localized to a specific leg.

Regarding non-localized damage, De Witt hold the argument, that there should be no requirement for the burden of proof, regarding applicable liability regimes. It would, therefore, befall the part, who would benefit of localization to prove where the damage occurred, and which liability regime would be applicable. If the claimant can prove his *prima facie* case, the carrier is left with the burden of proof of localization, unless the claimant has an interest as to localizing the damage to a specific transport leg.[71] In the *Mayhew Foods Limited v. Overseas Containers Ltd.* case, the claimant held the burden of proof for both the localization of the damage, as well as the applicability of the HVR. However, because the applicability of the contractual limitation of the contract clauses was in favor of the carrier, the carrier presented the majority of evidence.[72]

Regardless of how the liability system for non-localized damage is defined, the following recourse actions of the MTO towards his sub-carriers can provide several issues.

If the MTO is held liable against the system that provides the highest compensation to the claimant, by a fixed liability regime, his ability to recourse the compensation towards his subcarriers can result in the same recourse trap as present under the uniform system.

An example could the transport of 1000 kg. by road (CMR) followed by sea (HVR) than rail (COTIF/CIM) and road (CMR) to the point of delivery, each carrier being paid the same. By following the system present in the Dutch national system, the liability system to provide the highest

[71] De Witt, p. 387
[72] De Witt, p. 391

compensation would apply, namely liability after COTIF/CIM of 17 SDR per Kg. The MTO would be liable for 1000 kg. multiplied by 17 (SDR), for a total compensation of 17.000 SDR.

To demonstrate the issues present, there are three potential solutions to the issue. These issues are general issues that potentially could occur, depending on the contract. 1) The MTO cannot recourse any compensation towards his sub-carriers. As a result, he is stuck with the burden of paying the entire compensation himself. 2) The MTO can recourse towards his sub-carriers, but they are each able to limit their liability according to the mandatory conventions applicable to their transport leg. The first issue is how to allocate the extent of the recourse claim towards each carrier, should it be proportionated to each their share of payment as subject to CMR art. 37 (b-c)? if the allocation of liability can be established, and the carriers can limit their liability according to the applicable uniform transport conventions of their own leg, the road carriers can limit liability to 8.33 SDR per Kg. in proportion to their liability, the sea carrier can limit his liability even more, to 2 SDR per Kg. 3) The MTO can recourse against each sub-carrier, similar to solution number two, but where the liability is not allocated at all. As a result, the MTO can claim 17.000 SDR from the rail carrier, 8330 SDR from each road carrier and 2000 SDR from the sea carrier. The MTO cannot claim damages that extend further than the compensation he has paid himself, but he is able to recourse the full compensation, which would prevent the recourse trap. The downside, however, is that the sub-carriers are in fact held liable to the same extent as if they carried full liability for the entire transport on a unimodal level. Because the compensation is based on COTIF/CIM, being 17.000 SDR in total, the recourse is divided by some undefined factor, e.g., By payment as under the CMR. Since the sub-carriers are paid the same, the allocation of liability is 25% for each sub-carrier. The total compensation is 17.000 SDR, and the liability allocation makes each sub-carrier liable for 25%, each sub-carrier is, therefore, liable for 4.250 SDR, meaning the sea carrier would be liable for more than double that of which he would be liable for if the damage was located to him.[73]

Neither of the solutions are desirable because the first and second solution results in a recourse trap for the MTO. The third situation results in the sub-carriers with a low liability limitation, such as defined in the HVR, being liable for a much higher compensation.

[73] As calculated above, the sea carrier would be able to limit his liability, according to The Hague-Visby rules, meaning a limit of 2.000 SDR in total.

8.3.4 Partial Conclusion

The uniform system applies liability according to an agreed, fixed liability regime, it provides predictability and reduces the need for solving a dispute by court or arbitration, because the applied liability can be calculated based on the agreed liability regime. The downside of the system is the recourse trap. The MTO, being liable towards the claimant, cannot by certainty claim damages towards his sub-carriers, because the liability of the sub-carrier is regulated by a different liability regime. As a result, the MTO is not able to recourse the full compensation, leaving him in a recourse trap, that forces him to pay compensation for damages of which he did not cause.

Alternatively, the Network system applies liability according to the regime applicable to the transport leg where the damage occurred. By reversing how the liability regime is defined, it is ensures that the MTO or any other carrier using sub-carriers, does not end up in the recourse trap. However, the system has the initial downside of unpredictability, which would most likely result in more disputes being solved by court or arbitration. Furthermore, the main issue of the network system is the non-localized damages, delay, progressive damage and liability gaps. Especially non-localized damages render the network system useless, because a liability regime cannot be established.

To overcome the issues of both the uniform – and network system, the modified network system incorporates a uniform approach to non-localized damages, and a network approach for localized damages. The downside of the modified system is, that in the attempt to overcome the downsides of the other two systems, it still incorporates the downsides, albeit in a different manner. The unpredictability regarding localized damages is still present, and the chance for the MTO to end in a recourse trap is still possible for non-localized damages.

9 The Maze of claiming damages

As mentioned above, the current structure of liability in Multimodal Transport revolves around several unimodal conventions and national law. A claimant, making a claim for damages, loss or delay, must, therefore, consider the possible applicable unimodal conventions, their mandatory applicability, liability gaps, and overlapping applicability, etc.

Regardless off the claimant being the insurer of the cargo owner, or the cargo owner himself, the claimant is forced to address the issues the same way.

9.1 The applicable range of the Unimodal Conventions

To define the applicable international transport convention, the claimant must first address the issue of locating the appropriate jurisdiction. Often, the jurisdiction is defined in contractual choice-of-law clauses, making it easier to determine the forum of which to solve the dispute.[74] When the forum has been established, the following issue is to determine the applicable law. Some states have ratified and incorporated the unimodal conventions directly without any changes, or incorporated the general system of the Convention into national legislation, with the implementation of higher requirements. Some states have not ratified the convention at hand but have molded the applicable national law to follow the provisions of the convention.

If the claimant can identify the applicable forum, the issue of localizing the damage emerges. As described in the chapter of the network system[75], the non-localized damages present the claimant with the issue of determining which applicable unimodal convention applies. If the damage cannot be localized, the dispute depends on any applicable national law and contract clauses, such as defined by the standard industry solutions.[76]

[74] Lamont-Black, p. 710, n. 15
[75] Chapter 8.3.2
[76] The industry solutions of standard contracts could be the COMBICON 2016, c. 11 (1), MULTIDOC 2016, c. 12 (d), FIATA 1992, c. 8.6. (a) and NSAB 2015, §2. See chapter 6.1.1

Should any of the parties be able to prove localization of the damage, the issue of the unimodal conventions, applicable range arises. As described under both the CMR Convention and COTIF/CIM, both conventions "expands" their applicability to other transport modes. The CMR convention being applicable to ro-ro transport, and the CIM convention to road and sea transport cf. CIM art. 1 §§ 3-4. Should the party, proving the localization, be able to prove the applicability of the convention to govern the transport leg of which the damage is localized to, the next issue, is to prove that the convention applies to Multimodal Transport, as present in chapter 6.1.1 with the two different approaches in case law, to the application of the CMR.

9.2 The Basis of calculation of damages

With the divergent backgrounds, risks and mode of transport, that the Unimodal Convention was developed, they provide different limits of compensation, as well as on what grounds the calculations should be based. Especially when the applicability of one specific liability regime is defined, e.g. by non-localized damage, the calculations and limitations provide difficulties. Both the CMR Convention and COTIF/CIM initiates the basis of calculation to be calculated by the commodity exchange[77], however the CMR Convention does not mention the time and place, in contrary to CIM, that requires the price of the commodity exchange to be calculated on the time and place of the carrier taking over the goods.

When the applicable unimodal convention has been determined, and the basis of calculation for the value of the goods have been established, the applicable convention also must also apply liability on the specific type of damage, e.g. the HVR does not cover liability for delay, unless the delay has cause damage or loss of the goods.[78] Or damage to goods during furniture removal during road carriage covered by the CMR Convention.[79] If liability has been established, the conventions allow the responsible part to limit his liability according to a fixed price. The COFIT/CIM – and CMR Convention limits liability according to the price per kilogram[80] whereas the HVR limits either by price per Package

[77] CIM art. 30(1) & CMR art. 23(2)
[78] See Chapter 5.2
[79] CMR art. 1 (4) (c)
[80] COTIF/CIM = 17 SDR pr. Kg. & CMR = 8.33 SDR pr. Kg.

or price per Kilogram, whichever is higher.[81] The limitation can only be broken if the damage or loss resulted from an act or omission from the carrier, committed with intent or recklessly, with the knowledge that the risk of damage was imminent.[82]

Furthermore, the conventions, if the limitation is applied, also prevents any further actions to claim damages above the limitations of the conventions.[83] However, both the CMR and CIM allows for a refund of carriage charges, customs duties, etc.[84] whereas the HVR does not mention any provisions, providing a legal basis for claims of refund for carriage charges or customs duties. Lamont-Black argues that the reasoning for the silence regarding custom duties and carriage charges in the HVR can be explained by the basis of calculation being at port of destination, where the "value" of the goods have increased by the fact that they have already been transported, thereby, indirectly, allow for compensation for carriage charges and custom duties.

Lamont-Black concludes that the current approach of claiming damages is complex and unfit for the modern multimodal transport. She claims the current system, of imposing the claimant to steer through such complex and varying liability systems, to be inappropriate.[85] She suggests that the only way forward is to simplify the multimodal transport system to detach itself from the disorder created by the unimodal conventions.

9.3 Standard contracts

The previous attempts of forming a Multimodal Transport Convention has already been addressed in this paper.[86] The following chapter focuses on the standard contracts of different transport associations, and how they impose liability on a contractual level.

[81] 666,67 SDR pr. Package or 2 SDR pr. Kg.; As a result, any package weighing 333 kg. or more is limited by 2 SDR pr. Kg, whereas packages under 333 kg. is limited by 666,67 SDR pr. Package.
[82] Hague-Visby art. 4*bis* (4); CMR art. 29; CIM art. 36.
[83] CMR art. 28; CIM art. 41 & Hague-visby art. 4*bis*
[84] CMR art. 23 (4); CIM art. 30 (4)
[85] Lamont-Black, p. 723
[86] See Chapter 5.5

The use of standard contracts is a way to reach some sort of uniformity within Multimodal Transport. By supplying standard contracts to the parties involved in Multimodal Transport, any disputes that would arise would be governed, to some extent, by similar provisions, thereby reaching a somewhat uniform system

Examples of standard contracts that regulates Multimodal Transport could be the BIMCO MULTIDOC 95 and the FIATA FBL. Both transport documents incorporate a modified network system. They apply liability limitation to the same limit as provided in the HVR, of 2 SDR per Kg. or 666,67 SDR per Package or unit, cf. MULTIDOC 95, c. 12 (a) (ii) & FIATA FBL, c. 8.3, however, if the transport did not involve transport by sea or inland waterways, the liability limitation is set to 8,33 SDR per Kg. similar to the CMR Convention, cf. MULTIDOC 95, c. 12(c) & FIATA FBL, c. 8.5.

In 2015, the General Conditions of the Nordic Association of Freight Forwarders (NSAB) was updated. The NSAB 2015 follows a similar approach as the BIMCO MULTIDOC and the FIATA FBL. NSAB 2015 applies the limitation of liability to be fixed at 8,33 SDR per Kg. cf. NSAB 2015, § 21, however, regulated by the modified network system, cf. § 2.

The three standard contracts/provisions apply liability according to the modified network system, by applying a fixed liability regime, unless the damage can be localized to a specific transport leg. As a result, the burden of proof befalls the party who has interests in the application of a liability system according to the unimodal conventions.

However, as described in chapter 8.3.3, concerning the Modified Network System, the modified approach attempts to provide a way to eliminate the downsides of the uniform – and network system, but it cannot be guaranteed to catch them all.

10 Implementation of the Pro-Rata liability system

10.1 Description of the idea

Applying liability according to a transport contract can revolve around several aspects. It can be based on an agreed liability regime as used under the uniform liability system, or it can be based on the applicability of the unimodal conventions, such as the network system.

However, a different aspect of the calculation of liability, is the very essence of transport, namely the transport itself. The basic performance of a transport contract is the transportation of goods from A to B.

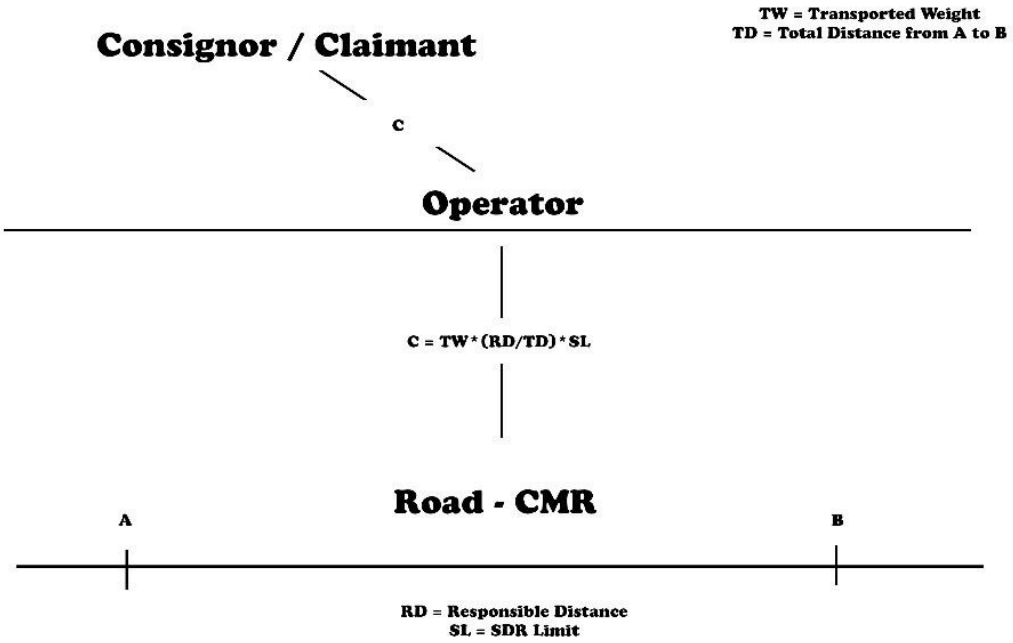
One could therefore also consider applying a system of liability based on the distance transported for each leg of transportation where each leg/carrier is responsible for a *pro-rata* liability of the cargo.

The calculation of damages in the relevant unimodal conventions are calculated on the basis on Special Drawing Rights (SDR) for the gross weight of the cargo.[87]

It is, therefore, possible to create a formula, based on 1) the distance transported, 2) the total distance 3) the weight transported and 4) the SDR limit of the applicable unimodal convention. For illustrative purposes, the first example applies the distance based liability limitation on unimodal transport.

[87] The Hague-visby rules can also apply a limit to the number of packages for 666,67 SDR pr. Package, Article 4 (5).

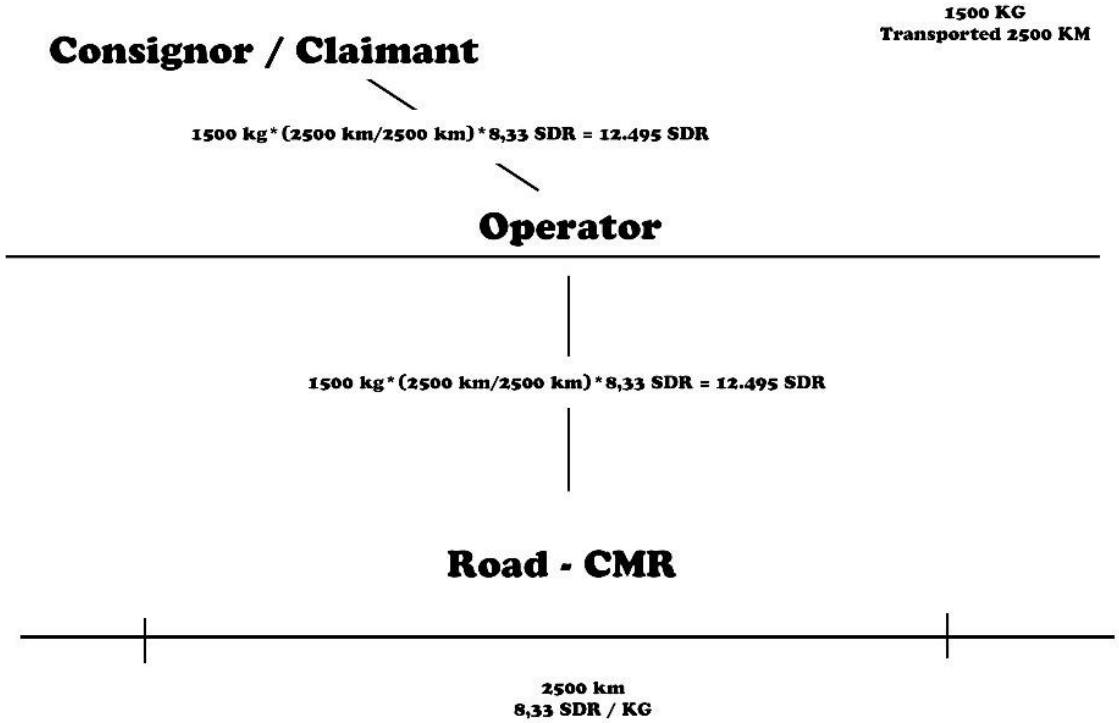
Illustration 2:



In the above example, there is a contract of carriage between A and B where the transport is carried out solely by a road carrier. To calculate the total damages (C), the total weight is multiplied by the percentage of the total distance the carrier is responsible and the SDR limit. Since the road carrier transports the total distance, he is responsible for 100% of the transport.

If the distance and total weight of the cargo is entered into the formula, with 1500 kg and a total distance of 2500 km, the example will be the following:

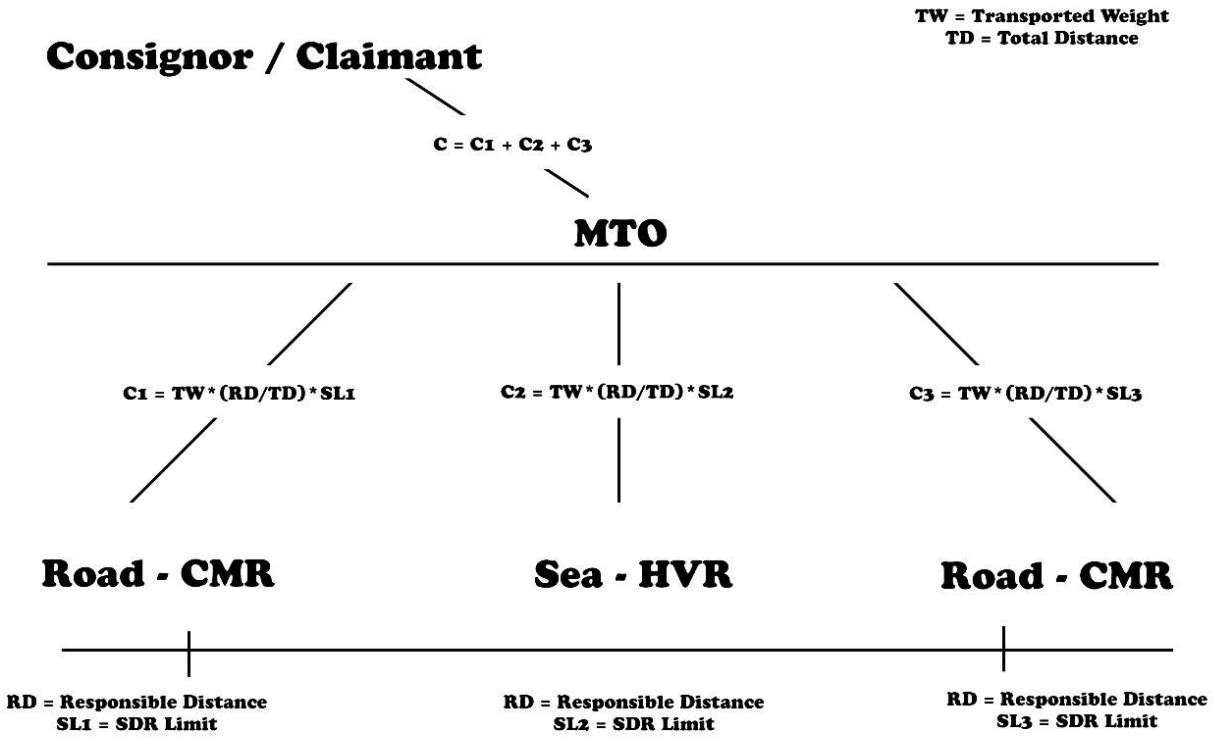
Illustration 3:



The total distance transported is 2500 km, of which the road carrier is responsible for 100% of the distance. Therefore, the road carrier is also responsible for 100% of the liability for damages, with limitation according to the applicable (CMR) convention of 8,33 SDR per kg.

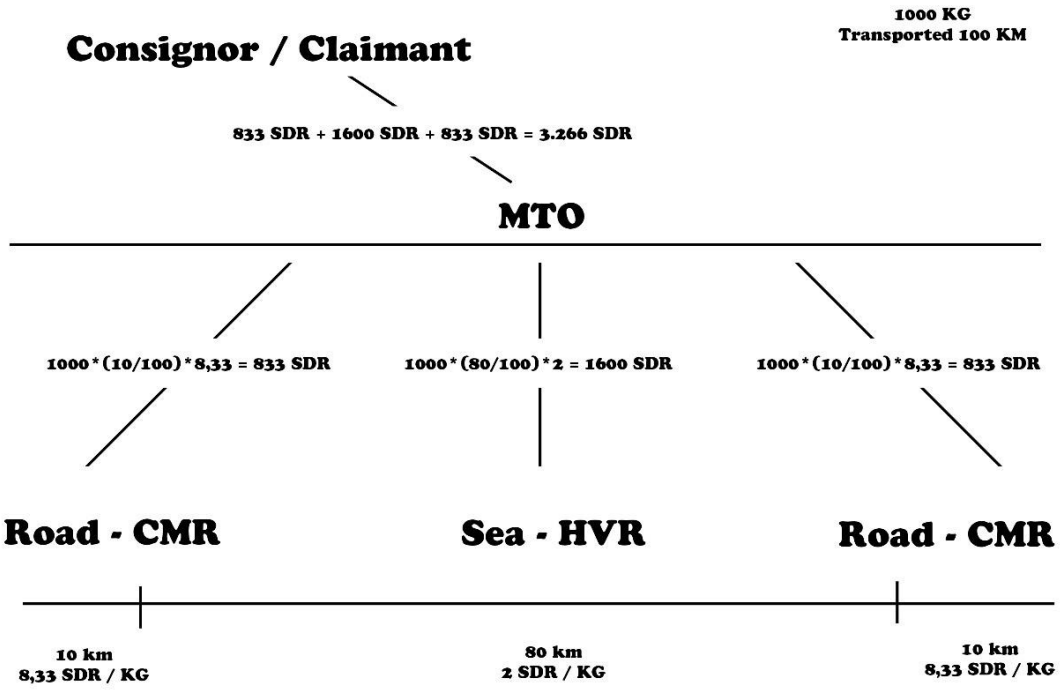
It is present, that the pro-rata approach applies the same liability, and is, essentially, the same as the regular approach of applying liability in unimodal contract. The only difference is, that the system holds the pro-rata distance transported divided by total distance factor. In this case the distance transported and the total transport is the same, because it is unimodal.

Illustration 4:



Expanding the formula to apply to multimodal transport is possible by applying the same formula as per the example for unimodal transport. the difference being that each carrier is responsible for a percentage, equal to the percentage of the entire transport, of which each carrier performs. The MTO is therefore responsible for an amount equal to the combined limit of liability for each carrier.

Illustration 5:

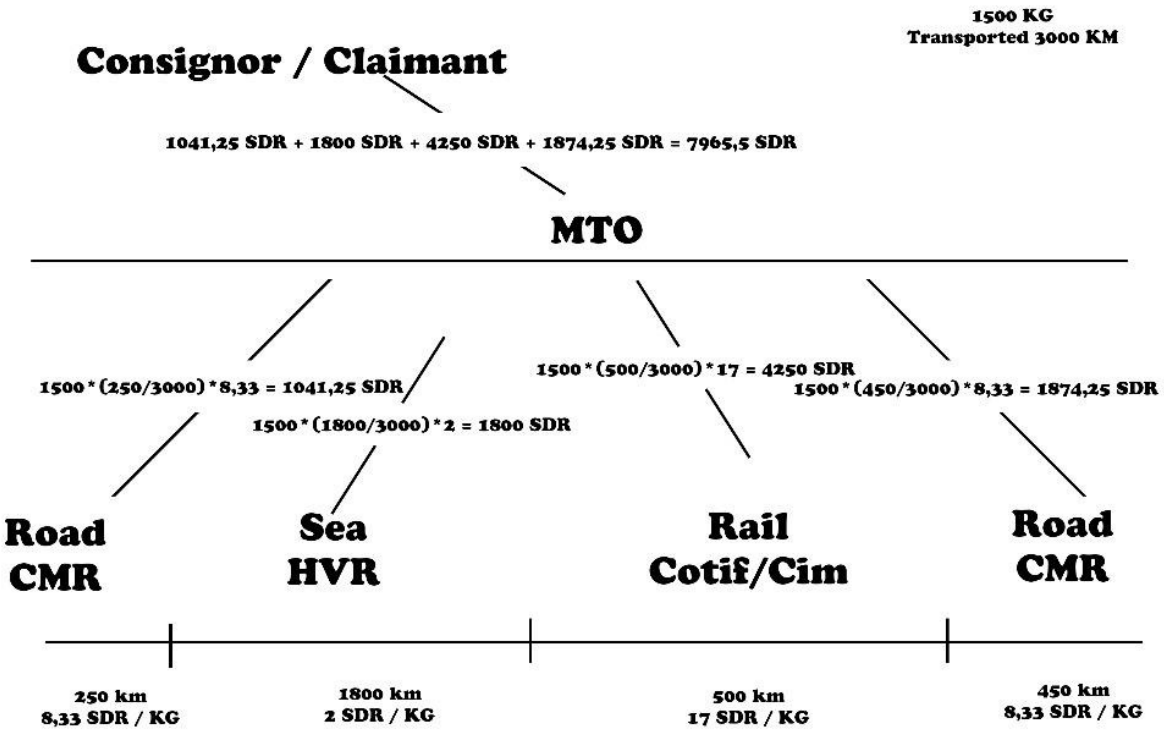


The above example is an illustrative example of a multimodal transport contract. The Claimant hires the MTO to perform a multimodal transport. The MTO hires three different carriers, a road carrier, a sea carrier and another road carrier. Each of the road carriers transports the cargo 10 km, and the sea carrier transports the cargo 80 km. The road carriers are therefore responsible for the distance carried divided by the total distance (10 km / 100 km) which equals 10% each. The same calculation for the sea carrier makes him responsible for 80%. Each carrier is therefore responsible for the calculated percentage, limited by each their applicable unimodal convention.

The road carriers are therefore each responsible for 10% of 1000 kg for 8,33 SDR per Kg, which equals 833 SDR per Road carrier. The Sea carrier is responsible for a higher percentage (80%) of the total length of the transport, but the lower SDR limit of 2 SDR per Kg. makes him able to limit his liability to 1600 SDR.

Adding the liability of each leg (833 SDR + 1600 SDR + 833 SDR = 3.266 SDR) forms the liability of the MTO to the Claimant.

Illustration 6:



Like the previous example (illustration 5) the above example is a contract of multimodal carriage, where the Claimant hires the MTO to perform the multimodal carriage. In this example, there are four different carriers, performing by either road, sea or rail.

The total weight transported is 1500 kg, the total length of the multimodal transport is 3000 km. The first carrier is a road carrier, transporting the goods a total of 250 km. By applying the formula, this road carrier is responsible for 250/3000 = 8,33% of the 1500 kg, a total of 125 kg or 1041,25 SDR.

The second carrier is a sea carrier, transporting the goods 1800 km, which is the longest part of the transport. Because the sea carrier can limit his liability down to 2 SDR per Kg, the sea carrier is the part responsible for the 2nd lowest liability, even if his part equals 60 percent of the total transport. The difference between the sea carrier and the rail carrier is apparent when calculating the liability of the rail carrier. He is only responsible for 500 km, equal to 16,6% of the transport. However, his

limit is very high, 17 SDR per Kg, compared to the other types of carriers. This higher limitation results in a total of 4250 SDR, or more than 50% of the total amount of damages to pay.

it might seem disproportionate that the Rail carrier, only being responsible for 16,6% of the transport, is responsible for more than 50% of the total damages. However, the reason for his higher part of the total damages lies with his ability only to limit his responsibility to 17 SDR per Kg. according to the COTIF/CIM convention.

10.2 Ways to implement the Pro-rata liability system

The implementation of the pro-rata liability regime can be achieved in numerous ways. This paper will focus on mainly two approaches, as an independent system, equal to the uniform, the network, and the modified system or by implementing the system as a modified system, to form a part of the network system for non-localized damages.

10.2.1 Pure Pro-Rata system

The pure pro-rata system is based on the issues of localizing the loss or damage. As mentioned previously, both the modified and especially the network system is based on the ability to localize at which stage the damage occurred, and if localization cannot be established, one must take alternative measures into consideration. The pure pro-rata system does not require localizing of the damage or loss, an issue which is often the issue in the case of container transport with the current systems. Instead, it can be divided into a two-stage system based on the distance transported.

10.2.1.1 The first stage (non-localized damage)

During the first stage, it is presumed that the localization of the damage or loss cannot be established. By applying the uniform system, the Claimant can claim damages from the MTO according to the agreed liability regime, and he can be exempted from the dispute. However, the potential consequences of the recourse trap would follow in the still unsolved dispute. If the network system is applied, the involved parties would be dependent on the damage to be localized. The network system would provide with a more accurate outcome of damages that the Claimant could claim towards the MTO, however, the prospects of having to wait for examination, arbitration or a court decision will most likely be undesirable.

The Claimant is rarely in the shipping trade himself; he is often merely a merchant or company that hires the MTO to perform a transport of his goods. Of the involved parties in a multimodal contract, the Claimant can in some cases be categorized as the weaker party, regarding his knowledge and connection with the shipping trade. He is most likely dependent on the delivery of his goods and might suffer a big loss in case of damage or delay. It is therefore important that he is the part to protect in case of damage or loss, since he is often not familiar with the shipping trade and is the part to suffer the immediate consequences of non-performance, in relation to his further trade.

By applying the pro-rata liability system, all parties are aware of the total amount of damages to pay, following the same benefits of the uniform system of predictability. The Claimant can, therefore, claim the calculated damages towards the MTO immediately after discovering the damage or loss. By doing so, the Claimant is partially compensated for the immediate loss suffered for his non-performance of his trade-contracts.

10.2.1.1.1 Agreed transport length or actual transport length

To reach an equitable result, the calculation can either be based on the agreed transport length or the actual transport length. If applying joint liability, and a carrier chooses to deviate from the agreed transport route, the carrier either lowers or raises his own liability, depending on the deviation being

a shorter or a longer route. To reach the most equitable result, the damages should, therefore, be calculated on the actual length of the performed transport, thereby reaching the correct liability according to the actual transported length. However, the implementation of sub-carriers, either performing by different means or over a longer or shorter distance, could have the same effects of a recourse trap as seen under the uniform system.

by relieving the Claimant from loss, the MTO can recourse his claim towards the carriers. Like the transparency and predictability of the liability of the MTO towards the Claimant, the MTO can calculate the damage claim towards each individual carrier from the same calculation as given in the illustrations above.

If a sea carrier agreed to transport goods from Cape Town (South Africa) to Ancona (Italy) via the west coast of Africa in the South Atlantic Ocean through the Strait of Gibraltar for a total of 6.641 NM (12.299 km), but instead chose to transport the goods via the Suez Canal for a total of 6.539 NM (12.110 km).[88] by taking the shorter route through the Suez Canal, the sea carrier saved a total of 189 km.

By expanding the example to form a multimodal transport, a carrier performing the 2nd part of the transport from Ancona to Paris (France) for approximately 1500 km[89] would in the contract agreed example be liable for a total of $\frac{1500\,km}{1500\,km+12299\,km} = 10{,}87\,\%$. If the sea carrier chose the shorter route, the rail carrier would be responsible for the same 1.500 km, but the total distance would be lower, and his liable percentage would be $\frac{1500\,km}{1500\,km+12110\,km} = 11{,}02\,\%$. This small difference in percentage might seem trivial, however, the difference would differ from case to case. If the calculated damages were based on the actual transport length, the sea carrier, in this example, would lower his liability, by lowering the total transport length. By doing so, the other carriers, who performs according to the agreed route or length, would suffer a higher liability. One could easily imagine a scenario where a sea carrier, transporting up to 20.000 containers with hundreds of different contracts of carriage. If such carrier were to be responsible for a system where deviation from each successive carrier could impose a higher liability for the sea carrier, the unpredictability of such

[88] Calculated via www.sea-distances.org

[89] The distance in this example is not accurate, since the distance between Ancona and Paris could not be calculated precisely.

system would result in excessive insurance costs. It is therefore a question of predictability vs the most equitable result. On the other hand, it is impossible to predict to which extend such deviation would raise or lower liability. As shown in the above example, the difference of distance only resulted in a difference of 0,15% higher liability for the rail carrier.

Basing the system on the agreed transport route, any use of sub-carriers would prove to result in the same recourse trap as present in the uniform system. If a specific route from A to B to C were agreed between the parties, and the responsible carrier, transporting from A to B chooses to apply sub-carriers, performing a different route or by different means of transport, the carrier responsible for the A to B transport, would be responsible for his liability according to the distance and type that he should have transported by, but his ability to recourse the paid compensation towards the actual carriers would be limited to the applicable unimodal transport conventions of his sub-carriers.

This is an example of the issues when comparing predictability and equity. On one hand, the system attempts to be predictable by following the agreements of the contract, but with the risk of ending in a recourse trap. On the other hand, applying the actual length transport would result in the most equitable result, but would apply unpredictability towards the carrier's actual liability and impose a liability system where carrier liability depends on the performance of other carriers.

10.2.1.1.2 Individual or joint carrier liability

The following section focuses on the actual carriers' liability towards the MTO and the question if and how responsible carriers should have joint or individual liability.

Article 37 of the CMR Convention addresses the question of individual or joint liability. Subparagraph (a) defines the liability of a responsible carrier to be individual and "solely" responsible. Thereby establishing that any claim arising from localized damage can only be raised against the responsible carrier. Clarke suggests that any claim raised against a responsible carrier, where the likelihood of him being or becoming insolvent is present, should also be raised as a joint liability towards the other carriers involved, purely to determine liability and ensure the claim being raised in time.[90]

[90] Clarke, Malcom A., International Carriage of Goods by Road: CMR, p. 175

Furthermore, subparagraph (b) provides that if two or more carriers are responsible for the damage or loss, each carrier shall be responsible for a part equal to their share of liability. Because the liability of such responsible carriers under the pro-rata system is determined by their share of the total transported length, the alternative approach of dividing liability proportionally from the paid share, as mentioned under the subparagraph, is not mandatory, and merely a way to solve a dispute in case of a silent contract.

According to subparagraph (c), a situation where *"it cannot be ascertained to which carrier's liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in b)"* meaning non-localized loss is subject to the same allocation of liability as provided for in subparagraph (b). Parties to a contract are therefore free to agree to a distribution of liability under the CMR Convention of both localized as well as non-localized damage.

In case a responsible carrier is insolvent, or if it is apparent that the carrier will be insolvent, the other carriers responsible under Article 37 are jointly liable according to their share of payment, subject to Article 38. In contrary to Article 37 (b), the liability according to share is mandatory from the wording of Article 38, meaning a pro-rata liability system based on distance would contradict with article 38. In a situation where the liability of the responsible carriers is based on distance, and it is present that one of the responsible carriers are on the verge of insolvency. His "share" of liability based on payment, instead of distance, can amount to a very undesirable and unequal result.[91]

COTIF/CIM Article 27 § 4 governs the liability of a carrier and his sub-carriers. It is stated that if a carrier and a sub-carrier are both liable for damage or loss, they are joint and several liable. Any rightful claimant can therefore freely choose towards whom he directs his claim, leaving action of recourse to the defendant against other liable parties.

[91] Similar system of recourse is found in article 50 CIM

10.2.1.2 The second stage

During the first stage, the damage was not localized. By not having a requirement for the calculation of damages, the Claimant is relieved, because of the simplicity of calculating the pro-rata liability.

The second stage is entered when/if the damage becomes localized. This can occur for several reasons, for example by examination of the goods showing damage because of salt water, in a multimodal transport, where only one leg was performed at sea.

The localization of damage raises several issues, for instance, would and should the Claimant receive higher damages, if the localized damage would render a higher compensation following from a higher liability regime or vice versa. Furthermore, how should non-responsible carriers reclaim the compensation they had already paid for the pro-rata system. The following chapter will focus on the most apparent issues and discusses how these issues could be accommodated.

There are three main situations of the second stage, either 1) the MTO has not paid the pro-rata compensation to the Claimant, 2) the MTO has paid the Claimant, but has not yet received remedies from the carriers or 3) the MTO has paid the Claimant, and the MTO has received remedies from the carriers.

10.2.1.2.1 No compensation has been paid

If no damages had been paid between the involved parties, the situation would be straightforward, following the same formula as per the previous examples, except the carrier which bears the responsibility for the localized damage, would be responsible for 100% of the damage, irrespective of the distance he carried the goods.

The Claimant and the MTO are both bound by a contract, in the case of loss, damage or delay, by any reason that cannot be held against the Claimant, the MTO is responsible for any damages claimed, with respect to the applicable liability regime. Should the Claimant claim damages towards the MTO, the MTO can claim remedies towards the responsible carrier. Similarly, as established above, the main party to protect is the Claimant.

By providing the Claimant with the freedom of choosing whom to claim damages towards, he is protected to the most extent, and regardless of whom he claims damages towards, it will inevitably be at the expense of the responsible carrier.

10.2.1.2.2 The MTO have paid the Claimant but have not received remedies from the responsible carrier

Already when the MTO has paid damages, calculated from the above formula, issues arise. The damages paid was calculated on an average, based on the carrier's responsible distance compared to the total distance. If the damage later becomes localized, the result calculated from the unlocalized pro rata will always differ from the calculation in case of localized damages.[92]

The example in illustration 5 above can help demonstrate the issue. In the example, a Claimant hires a MTO to transport 1000 kg. of goods for a total of 100 km. the MTO applies three different carriers, an initial road carrier for 10 km, a sea carrier for 80 km and the last road carrier for 10 km. the calculated damages were 3.266 SDR in the case of non-localized damage, by applying the pro-rata formula.

If the damage becomes localized to either of the road carriers, the calculated damages result in $1000 \text{kg} * 100\% \text{ liability} * 8{,}33 \text{ SDR} = 8.330 \text{ SDR}$, more than twice the amount the Claimant originally received from the MTO. On contrary, if the damage is localized to the sea carrier,

the result would be $1000 \text{kg} * 100\% \text{ liability} * 2 \text{ SDR} = 2000 \text{ SDR}$

Localized damages that provide the Claimant with a higher compensation than non-localized damage would provide several conventional issues. The CMR convention prevents any carrier to agree to a lower level of liability than those provided for in Article 29, similarly as the HVR Article IV (5) (a), according to Article IV (5) (g) and Article 5, subject to Article 30 § 2 of the COTIF/CIM. Any agreement to limit the claim of the Claimant to only apply to the non-localized damage without any rights to further claim for localized damage would be null and void.

The system would, therefore, prove to conflict with the applicable unimodal conventions that has been subject to this paper. To prevent the system conflicting with the applicable conventions, the

[92] The calculated damages will always differ, unless the results, by a mere coincidence are the same.

Claimant would, therefore, have the rights to claim further compensation, in case the localization of damage would place a higher liability on the responsible carrier. To prevent the system from conflicting with the applicable unimodal conventions, the Claimant should, therefore, have the rights to claim compensation up to the limit established by the liability regime of the responsible carrier.

If the localization of damages would establish a lower compensation than what the Claimant has already received from the MTO, the question is, if the MTO should have the rights to reclaim the difference.

The concept of the pro-rata liability system is to ensure both an equitable result, as well as a predictable outcome. If the Claimant could receive compensation to a limit higher, based on the pro-rata system, than what a responsible carrier would be able to limit his liability to, in case the damage becomes localized, the MTO, who paid compensation to the Claimant, and has recourse action against the responsible carrier, would end up in the same recourse trap as is the issue of the uniform system.

There are two ways to solve this issue, 1) Changing the responsible carrier's rights to limit his liability to equal the amount paid from the MTO to the Claimant or 2) allowing the MTO to reclaim the difference between the compensation paid from him to the Claimant and the responsible carriers liability limit.

By applying the first approach, the Claimant is secured his compensation thereby creating security for the Claimant. By securing his level of compensation, the Claimant can apply the compensation paid to him in his further trades. Furthermore, the MTO, who paid compensation to the Claimant, has full recourse towards the responsible carrier, ensuring that he is fully compensated for his loss.

The first approach would, therefore, result in a secure and predictable approach for both the Claimant and the MTO. On the contrary, the responsible carrier would be liable to a higher limit than what he would otherwise be able to limit his liability. As a result, the compensation paid by him would vary depending on the setup of the multimodal transport.

An example could be carriage of 1000 kg. of goods, a total of 1000 km. the first 95 km by road (CMR) the next 5 km by sea (HVR) and the last part of 900 km by rail (COTIF/CIM). The first 95 km would amount to a total of 791,35 SDR, the 5 km of sea transport would be 10 SDR, and the last rail transport

would be 15.300 SDR, resulting in a total of 16.101,35 SDR. If the damage is localized to the sea carrier he would, according to the HVR, be able to limit his damages to 2000 SDR. By preventing his rights to limit his liability, because the Claimant already received compensation from the MTO, the responsible sea carrier would have to pay 14.101,35 SDR more than he would otherwise be able to limit his liability. As a result, the Claimant would receive 14.101,35 SDR more, by the simple fact that the MTO had paid compensation before the localization of the damage. If the last 900 km transported, by a different (not responsible) carrier, had been sea carriage under the HVR, the total damage would only be 601,35 SDR more than what the responsible sea carrier would otherwise be able to limit his liability. The first approach would, therefore, result in a system that leaves little protection or rights to the limitation of liability for the responsible carrier. Furthermore, the system would punish carriers that are able to limit their liability a lot, such as under the HVR, whereas the use of carriers with a very high limit of liability, e.g. COTIF/CIM, would amount to a very unpredictable and unjust system for the responsible carrier under the HVR.

The second approach instead allows the responsible carrier to limit his liability according to the applicable unimodal convention. Following the example above, the responsible sea carrier (HVR) can limit his liability accordingly, thereby only being responsible for compensation of 2000 SDR. The MTO, however, would end in a recourse trap, where he cannot recourse the full claim of 16.101,35 SDR, leaving him with a deficit of 14.101,35 SDR. The grounds for the claim from the Claimant to the MTO has changed from being non-localized to localized; the MTO would, therefore, have the rights to reclaim the 14.101,35 SDR from the Claimant. This approach prevents the issues of the first approach, and the unpredictability and the unjust result of the responsible carrier is eliminated. Instead, the unpredictability lies with the Claimant because the compensation paid to him is not guaranteed. However, the system can arguably be described as a modification to the network system, where the Claimant would have no rights to claim compensation before the damage has been localized or it has been determined that localization cannot be established. The system, therefore, favors the Claimant, by allowing him to claim compensation at an earlier stage. By following the second approach, the Claimant would merely be compensated to the same extent as he would if the Network System for localized damages were applied.

It is clear, that the second approach, although not perfect, is the most just system. The first approach has several advantages of predictability and protection of both the Claimant and the MTO. However,

the unjust result of a responsible carrier and his inability to limit his liability according to the unimodal conventions is a very undesirable.

10.2.1.2.3 All carriers have paid damages according to the Pro-rata liability

In the third situation, all carriers, who performed the actual carriage, has paid compensation to the Claimant when the damage becomes localized. It presents similar issues as present in the second situation (above) of recourse, albeit with some modifications. The difference between the second and third situations is the carrier's ability to recourse against the responsible carrier, instead of merely the MTO's rights to recourse. The arguments for the responsible carriers right to limit his liability according to the applicable unimodal convention follows from the same points of view in the situation as above. The question remains; how should the non-responsible carriers reclaim their paid compensation? Towards the MTO, the Claimant or the responsible carrier?

The person in possession of the overcompensation is the Claimant. It would, therefore, be reasonable that the non-responsible carriers can reclaim overpaid compensation from the Claimant directly. Furthermore, the carriers contracted with the MTO, as a result, they should also be able to reclaim the compensation from him, leaving the MTO with the burden of reclaiming the compensation from the Claimant.

10.2.1.3 Partial Conclusion

Applying a pure pro-rata based system to solve disputes arising from damage or loss during transport is theoretically, an adjustment of the network system. It is founded on the allocation of liability based on distance transported. The idea behind applying a distance based liability system is to apply a predictable and just system to divide compensation between responsible carriers without the faults of the uniform and network system.

Following the preceding section, a pure pro-rata system would, in theory, be an expansion of the modified network system. The pure system would seek towards compensating the Claimant at an

earlier stage than the network system. By authorizing the Claimant with the ability to claim compensation already when damage or loss is apparent, the Claimant is relieved from the impending loss relating to his further business. Leaving the other parties involved to contest each other's claims. Because of the relatively high chance for non-localization of damages in container transport, the system would provide for an alternative way of allocating liability and would supply the Claimant with compensation at a much earlier stage.

The downside of the system is the recourse issues if the damage should become localized. If no compensation has been paid, simply because the localization was easy to determine, the Pro-rata system merely follows the same approach as the Network system. The genuine issues rise when compensation, in one way or the other, has been paid. The non-responsible carriers and the MTO are therefore left with the burden of reclaiming the difference if localization results in a lower compensation than the pro-rata liability. The Claimant is left in a situation where he has received compensation, but with the probability that he will later be met with a claim to repay compensation.

Although the system, in theory, does not conflict with the unimodal conventions subject to this paper, the practical use of the system would most likely fail to gain acceptance. The reason being the expanded right for a Claimant to claim compensation when damage is apparent, based on the pro-rata liability, the uncertainty of joint liability for insolvency between carriers where carriers can risk being liable based on both distance and payment. The system, as a pure system, would therefore doubly find ground in "the real world." Furthermore, the entire idea of allowing the claimant rights to initial compensation is the claim that a sender would be the weaker party. This might be true in some cases, but the sender might just as well be bigger companies, shipping massive quantities of goods. If so, the consignor cannot be defined as a weak party, quite the opposite. Because the freedom of contract allows the parties involved to negotiate contractual terms, the Multimodal carrier would have an interest in signing with the bigger companies, thus allowing the consignor to dictate contractual terms. Furthermore, the sender would most likely be covered by cargo insurance, thereby exempting himself from any loss as a consequence of damage. If the sender does have insurance, the entire argument for applying the expanded rights to compensation is removed.

10.2.2 Pro-Rata modification of the Network system

The primary issue of the pure pro-rata system is the right for a claimant to claim compensation when damage is apparent. If the initial possibility for compensation is removed, the pro-rata liability system can be modified to correspond to the network system. The network system, as mentioned above, is based on the ability to locate the damage to a specific leg of the transport. By doing so, the liability regime of the applicable unimodal transport convention is defined. The issue of the pure Network system is the lack of options to define a liability regime for non-localized damages, delay or damages occurring over time.

Instead of applying the pro-rata system as a pure system, it could also be implemented as an alternative to the current approach under the modified network system for non-localized damages. As described above, the current approach of liability for non-localized damage is to either apply the liability regime that provides the claimant with the highest compensation, such as established in the Dutch Book 8, Article 8:42 – 8:43, or by an agreed liability regime as defined in the mentioned standard contracts, NSAB2016, MULTIDOC 95 & FIATA FBL

Instead, the compensation could be calculated, based on the pro-rata limit. By doing so, the efficiency of the network system, regarding localized damage, will remain, however, the pro-rata system could provide a different approach to liability for non-localized damage.

10.2.3 The Pros and cons of the system

10.2.3.1 Fluctuating value of the goods

One of the primary benefits of the pro-rata system is the separate processing of the different liability regimes of the transport legs. As an example, the value of the goods is calculated differently between the unimodal conventions.[93] Because of the nature of the pro-rata regime, it can be incorporated that the maximum compensation follows the value of the goods, e.g., if the value changes during the

[93] See Chapter 8.2

carriage. If 1000 kg. is transported by road, sea, road, rail, each transporting 100 km for a pro-rata responsibility of 25% each, the road carriers can limit their liability to $1000 \text{kg} * 25\% * 8{,}33 \text{ DR} = 2.082{,}5 \text{ DR}$, the sea carrier can limit his liability to $1000 \text{kg} * 25\% * 2 \text{ DR} = 500 \text{ DR}$ and the rail carrier can limit his liability to $1000 \text{kg} * 25\% * 17 \text{ DR} = 4.250 \text{ DR}$, for a total of 6.832,5 SDR. to reach the maximum liability, the value of the goods must exceed the limited liability.

If the value of the goods, when the first road carrier took over the goods, according to the commodity exchange, was 5 SDR per Kg, 3 SDR per Kg. when the sea carrier discharged the goods and the second road carrier took over the goods, and 7 SDR when the rail carrier took over the goods. Because of the pro-rata calculation, the value of the goods can be divided and applied to the different stages of transport, according to the value of the time of calculation. For the initial rail carrier, the value of the goods was 5 SDR per kg. for 1000 kg, equal to 5.000 SDR in total, however, because he is only responsible according to the pro-rata value, the "maximum" value of goods he is responsible for, is

$1000 \text{kg} * 25\% * 5 \text{ DR} = 1250 \text{ DR}$. Because he cannot be responsible for damages above the value of the goods, he cannot be liable for more than 1.250 SDR, instead of his rights to limit liability to 2.082,5 SDR. During the sea carriage, the calculation is based on the value of the goods at the time of delivery, cf. HVR art. 4 (5) (b), of 2 SDR pr. kg. the maximum value that the sea carrier can be

responsible for is therefore $1000 \text{kg} * 25\% * 3 \text{ DR} = 750 \text{ DR}$. In contrary to the initial road carrier, the value of the goods is higher than his rights to limit liability, making him liable for 500 SDR. The same calculation for the second road carrier, following the value of 3 SDR pr. kg. would be the same, however, his limitation of liability is 2.082,5 SDR pr. kg, thereby higher than the pro-rata value of the goods, he cannot be liable for an amount higher than 750 SDR. The value of the goods during the final rail carriage was established to be 7 SDR pr. Kg. for a total of 7.000 SDR. The pro-rata value

of the goods is therefore $1000 \text{kg} * 25\% * 7 \text{ DR} = 1750 \text{ DR}$, thereby limiting the liability of the rail carrier to be responsible for the maximum pro-rata value, instead of his liability limitation of 4.250 SDR.

The calculation of the value of the goods is just one element in the labyrinth of claiming damages for non-localized damages that the pro-rata system could solve. Other examples could be regulating the compensation to the time bars of the conventions, which is at max two years in COTIF/CIM, cf. art. 48, three years in CMR, cf. art. 32 and one year in the HVR, cf. art. 3 (6).

De Witt refers to the German authors Ebenroth/Fischer/Sorek[94] who, apparently, had a similar idea of dividing liability according to the distance transported. Although it has not been possible to establish the structure of their approach, the arguments against the system would likely be similar to arguments against the system laid out in this thesis.

De Witt refers to the criticism by other German authors such as Herbert, R., and Koller, I. De Witt concludes, that a system based on liability divided in proportion to the individual carriers transported length, would apply liability based on the performance of the carrier, and does not consider the "risks" for the cargo to be damaged. He argues, that *"The risk to which the goods are exposed in any given trajectory does not depend upon its length, but rather upon its nature; and the goods are exposed to the greatest risk during handling, not during actual carriage."*[95]

If it can be concluded that the primary risks do not lie with the transport of the goods, but the transference between the different carriers, the argument of the risk being primarily during loading and unloading of the container, speaks against a liability system based on the distance. However, because the system merely focuses on non-localized damage, it cannot be concluded whether the damage occurred during transport or between carriages. Therefore, the "risk" is dispersed over the entire transport, from the point of loading to the point of discharge. Furthermore, the consideration of where the "risk" is highest might not be a factor of the pro-rata system, but neither is it in the uniform, network – or modified system.

Another critique of the system is the factor incorporated in the system; distance is not necessary an important factor for the cargo owner. His main interest is to get his goods transported from A to B, and that the goods are delivered at a specific time. So why would the cargo owner care if the carrier chooses to transport the goods three times around the world if the goods are delivered in time? It should be noted, that the pro-rata system presented in this paper is focused on distance as the dividing factor, however, a pro-rata system based on time, e.g., For how long were the different carriers in possession of the goods or based proportionally on their share of payment similar to CMR art. 37 & 38. There is an array of different factors to apply to the pro-rata system, even a combination

[94] De Witt, p. 386, n. 297
[95] De Witt, p. 386, n. 297

of distance, time and payment can be applied. The key point here is that the allocation of liability between carriers can be distributed according to the percentage of an agreed factor, all depending on which factor is essential to the individual carriage.

Comparing the system to the current approach of the modified network system, the pro-rata system does present some concerns, regarding the complication of the system. The simple approach of applying a uniform liability system to non-localized damages will, in any case, be a simpler way of calculating damages, however, if simplicity is highly important for the contracting parties, they are free to choose whichever system they deem most useful. The system presented in this paper is merely an alternative way of calculating damages. As has been presented previously, the competing factors will often be predictability versus a precise and just result. Furthermore, the uniform approach of the modified network system forces the burden of proof on the party with interest in a different liability system to apply. On the contrary, the pro-rata system, might require an analysis of both the contract and the actual carriage, but does prevent any of the parties to bear the burden of proof, by applying an average of liability divided pro-rata. It could be argued that the analysis of the contract and the actual carriage necessary in the pro-rata system is similar or like the analysis required by the party to bear the burden of proof in the modified network system. instead of forcing one party to bear the entire burden of proof, the pro- rata system applies a fixed, agreed and just system for liability calculation, where neither of the parties bears the entire burden of proof. Of cause, the system does present the possibility for disputes to arise, e.g., By the calculation of distance, which carrier (and system) to be responsible for which parts of the carriages, etc. but such disputes could very easily be eliminated by a precise and well-written contract.[96]

11 Conclusion

Transportation of goods has changed significantly since the 18th century; goods are transported in far greater quantities, transported by various means of transport, bigger vessels and different

[96] For example, how far did a sea carrier actually transport the goods? All ships are fitted with a very precise gps system, and the exact location of the ship can be found by different gps systems, for example, www.vesselfinder.com will show the exact location of ship.

combinations of types of transport. To accommodate for the increase in transportation, the unimodal transport conventions were drafted to create uniformity within each their own field of transportation. With the development of the container, the way of transporting goods has shifted from separate unimodal contracts on the applied transport legs, to one combined multimodal transport contract, governing the entire transport, regardless of the modes of transport used.

The unimodal conventions have developed during this period, but without being able to accommodate for the multimodal approach. Although the conventions have come closer to uniform applicability in recent years, the applicability and liability regimes for the unimodal conventions are still merely unimodal. The application of the unimodal conventions in multimodal transport, therefore, presents several issues. The applicability of the CMR Convention, cf. article 1 (1) has been subject to much debate in relation to multimodal transport. The issue lies with the wording *"This Convention shall apply to every contract for the carriage of goods…"* in particular the *"… contract for…"* which can be interpreted in several ways. The dominant interpretations are 1) any contract that involves road carriage, including multimodal transport, where the multimodal contract must be international 2) Any contract that involves road carriage, including multimodal transport, but where the road leg itself must be international and 3) the convention only applies to a unimodal contract for road carriage, and cannot apply to any other (multimodal) contract. The issue was apparent in the *Quantum case* where it was concluded that the CMR Convention could apply to a contract involving different modes of transport if *"The place of taking over and delivery of the goods under Article 1(1) are to be read as referring to the start and end of the contractually provided or permitted road leg"*.[97] With the introduction of the Vilnius Protocol for rail carriage, the modification made the CIM convention resemble the CMR Convention regarding applicability, albeit with some differences still. The issues of applicability of the CIM Convention, therefore, follows the same approach as the CMR Convention. Similar issues of applicability can be found in the HVR. The Rules requires the issuance of a Bill of lading, and that such bill of lading relates to the carriage of goods. It can, therefore, be argued, that a multimodal contract, involving sea carriage, does not mandatory apply the rules. On the contrary, the requirement is merely the bill of lading to "relate" to the goods, which is followed

[97] Quantum Corporation Inc. & Ors v Plane Trucking Ltd. & Anor [2002] EWCA Civ 350 (27th March, 2002) p. 59

by the ruling in the *Mayhew Foods case*. Similar to the applicability of the CMR and the CIM convention, the mandatory applicability in multimodal transport is not resolved.

To overcome the issues of the unimodal Conventions, The United Nations Convention on International Multimodal Transport was formed. It was supposed to bring uniform legislation to multimodal transport, and ensure not only predictability but also a just and fair approach to liability. Although it had support from numerous states, it has yet to enter into force, and most likely never will.

Instead of relying on the mandatory application of the rules and conventions, the applicable liability regime is often agreed on a contractual level instead, e.g., By a Paramount clause in sea carriage defining the applicable unimodal convention to be the HVR.

The importance of defining the applicability of the conventions is to establish which liability regime to apply in case of damage, loss or delay. The different conventions each hold their different approach to liability, exemptions from liability, calculation of the value of the goods, limitation of liability and recourse actions. Because the systems differ to such a large extent, the uncertainty of which regime would eventually apply has forced transport associations to create standard contracts that regulate the system of defining the applicable system. Standard contracts, such as the MULTIDOC 95, FIATA FBL and the NSAB2016 applies a modified network system to determine which regime to apply. There are, in general, three different systems to define the regime. The Uniform system defines the applicable liability system directly in the contract, e.g., That the liability between the consignor and the MTO is governed by a liability regime like the CMR Convention. Defining a fixed regime of liability ensures predictability, if damage, loss or delay occurs. However, the downside of the uniform system emerges if the applicable liability regime between the MTO and the responsible sub-carrier is different from the agreed regime between the Consignor and the MTO. In such case, the MTO end up being responsible for compensation higher than what he can recourse towards the responsible carrier. Alternatively, the Network system applies liability according to the regime, regulated by the regime to apply to the type of transport performed by the responsible carrier. By applying liability according to the Network system, the recourse trap is eliminated. However, the predictability of the uniform system is no longer present, because the applicable regime is only defined when the damage has been localized to a specific leg. If the damage cannot be localized, the Network system falls short,

because the applicable liability regime cannot be defined. To overcome the approaches of the Uniform – and Network system, various combinations of the two has been attempted, where the network system applies to localized damage and a uniform system is applied to non-localized damage. It could be argued that the modified network system eliminates the issues of the uniform– and network system, however, that is unfortunately not the case. The system is still unpredictable regarding which regime applies to localized damage, and the recourse trap is still present for non-localized damages.

Therefore, authors such as Hoeks, Roost and others deem it necessary to define one uniform system to regulate Multimodal Transport.[98] It is present, with the failure of the UN Multimodal Transport Convention, that conventional regulation might not be the best approach to reach uniformity to multimodal transport. Therefore, this paper has focused on the usefulness of a pro-rata based liability system, as an alternative to the uniform, network – and modified network system.

The main principle of the system is to allocate liability pro-rata according to a defined factor. The factor applied in this paper is distance. This allows the pro-rata system to divide liability between carriers based on the distance transported for each carrier in proportion to the total distance transported.

Initially, the paper investigated the use of a pure pro-rata system. It was argued that the consignor, not being in the shipping trade himself, would be a weak party, in relation to his knowledge of the trade. Therefore, the argument that the Pro-rata system should allow the consignor to claim damages from the MTO when damage, loss or delay was present presented several issues. The first issue was defining if the transport length should be calculated by agreed transport length or actual transport length. The arguments for and against the actual transported length and agreed transport length is very similar to the arguments for and against the uniform – and network system; should the factor be calculated based on contractual terms or factual terms, or put in other words predictability vs. equity? The downside of applying the agreed transport length would initially be the chance for a carrier, employing sub-carrier, being liable for a different regime than what he could recourse towards the sub-carriers. By applying the actual transported length instead, the liability of the individual carriers would change depending on how other carriers performs the actual carriage of

[98] Roost, p. 301; Hoeks, p. 484

their part. Neither of these factors are desirable. However, the downside of applying agreed transport length would seem to be significantly more undesirable than the small variations of liability as is present with the actual transport length.

Another issue of the system is how the carriers should be liable towards each other. It could be argued, that the actual carriers should have individual liability, forcing the MTO to be liable for any of his sub-carriers, in the case of insolvency. By applying individual liability, the MTO must also factor in the possibility for any hired sub-carrier to become insolvent. However, this does seem to contradict with the mandatory rules of Article 37 and 38 in the CMR Convention and article 50 in the CIM convention, that applies joint liability between each carrier, divided by an agreed factor, unless the reason for the joint liability is insolvency of a carrier, the factor to divide the liability of the insolvent carrier is by share of payment.

This does present an issue because the initial division of liability is divided by a distance based factor, where the distribution of liability between carriers in case of insolvency is based on the share of payment. Furthermore, the question is, if this mandatory joint liability should be aimed towards any carriers to the multimodal contract, even sea carriers subject to the HVR, only road and rail carriers or only towards the MTO.

Furthermore, if the initial calculation for pro-rata compensation of non-localized damage has been paid to the claimant, and an examination of the goods proves the localization of the damage, the reclaim of compensation paid to the claimant would be extremely burdensome for any part to hold a reclaim.[99]

The system does present some advantages over the uniform – and network system, however, especially the disadvantages of reclaiming compensation paid for non-localized damages, if localization is proven at a later stage, would render the system useless.

The biggest issue of the pure pro-rata system is, therefore, the initial compensation for non-localized damages when the damage, loss or delay is apparent. Furthermore, the arguments for such initial claim is the classification of the consignor to be a “weak party” of whom the system should protect.

[99] See chapter 10.2.1.1.2

However, the claimant can just as well be multi-billion dollar companies and is often covered by insurance that would relieve him of any loss.

Alternatively, the pro-rata system can be applied as a modification to the network system to substitute the uniform approach for non-localized damages. By following through with the ideology of applying liability according to factual terms, instead of contractual terms, which is the force of the network system, a pro-rata modification to the network system can provide some advantages over the other approaches to a modified system as mentioned in the paper.

The primary advantage is the elimination of the recourse trap, which is still present in the modified network system. Furthermore, the modified network system imposes the burden of proof, regarding localization, upon the part which has an interest in localizing the damage to a leg that applies a different or lower liability regime than what had otherwise been agreed. Instead, the system applies all applicable system pro-rata to each leg. If a dispute should arise of how the pro-rata should be interpreted and calculated, the burden of proof is equally apportioned between the involved parties.

The system is not meant to be a complete solution to all issues of multimodal transport, but it does present an alternative way of approaching allocation of liability for non-localized damages. Like any other system, the pro-rata approach has its drawbacks. It could be argued, that most damages occur during handling and not during the actual carriage, which is not taken into consideration. However, such consideration is not found in the uniform, network or modified system either. Furthermore, it is highly doubtful that the claimant has any interest in the actual transport length of the carriage, if the goods are delivered in time. As mentioned above, the factor applied in the pro-rata system in this paper is the transport length, it might just as well be time carried, the share of payment or any other factor deemed important for the parties.

It can, therefore, be concluded, that a pro-rata system has the potential as an alternative to the current uniform approach for non-localized damages in the modified network system. It does have its drawbacks, and is not a perfect solution to the issues of Multimodal Transport, but could be an alternative way of dividing and calculating the compensation paid for damage, loss or delay.

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