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Multimodal Aspect of the
Rotterdam Rules: a critical
analysis of the liability of the
MTO

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Summary

The aim of this work is to critically examine the multimodal aspect of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), in order to determine if the Convention would, in practice, bring the long desired legal uniformity and an overall beneficial environment for the shipping industry. The focus is on the liability provisions of the Convention, as compared to the regulations currently in vigour and to the previous regulatory attempts to regulate multimodal carriage. The study focus on the basis of the carrier's liability, the liability system and limitation of liability, as well as the new position of the sub-carriers (referred to as performing parties) in the new Convention. The analysis of hypothetical scenarios will show how the Rotterdam Rules will affect specific cases, while pointing out the positive and negative aspects of its provisions in practice.

Abbreviations

ALADI	Latin American Integration Association
ASEAN	South-East Asian Nations
BIMCO	Baltic and International Maritime Council
BL	bill of lading
CMI	Comité Maritime International
CMNI	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway
CMR	Convention on the Contract for the International Carriage of Goods by Road
COTIF-CIM by Rail	Convention Concerning International Carriage by Rail
FIATA Associations	International Federation of Freight Forwarders
HGB	Handelsgezetzbuch (German Commercial Code)
HR	Hague Rules
HVR	Hague-Visby Rules
ICC	International Chamber of Commerce
MERCOSUR	Southern Common Market
MC	Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air)
MT Convention	United Nations Convention on the Multimodal Transportation of Goods
MTO	multimodal transport operator
POD	port of discharge
POL	port of loading
RHA	Road Haulage Association

RR	Rotterdam Rules
SDR	Special Drawing Rights
UK	United Kingdom
UN	United Nations
UNCITRAL Trade Law	United Nations Commission on International
UNCTAD Development	United Nations Conference on Trade and
UNECE Europe	United Nations Economic Commission for
UNIDROIT Private Law	International Institute for the Unification of
U.S.	United States
WC	Warsaw Convention

1 Introduction

Containerisation changed the shape of the world economy by making shipping cheap. Without the sophisticated contemporary infrastructure and transport systems, the development of world trade would not have reached the current globalization level. The fact is that the efficiency of the international carriage of goods has rapidly increased by the augmented use of the container. In the last three decades, containerisation enabled cargo-handling processes to gain a high level of standardization, overcoming many of the technical difficulties, lessening the occurrence of pilferage during cargo transferral and reducing loading and discharging time. The container proved the means by which cargo could most easily be transported by all modes, thus increasingly developing the multimodal transportation.

In fact, before the container revolution, shippers had to sign several contracts of carriage to send their cargo abroad, each with a different carrier and relating to each part of the carriage. Each of the different contracts would be under distinct regulations, having their own legal regime and pertaining to a specific type of carriage (road, sea, air etc). As containerisation developed, goods started to be carried out on a multimodal basis and the possibility of making use of a single contract for the whole carriage made things much easier for shippers, who were able to deal with only one party, the multimodal transport operator (MTO), who would be responsible for the entire shipment. As this multimodal option appealed shippers, it became clear that appropriate regulations needed to be formulated in order to deal with the legal problems related to these door-to-door operations.

Unfortunately, the international transport law has not been able to appropriately assist, and there is still an undesirable legal gap in respect to multimodal transport regulations. The first attempts to establish uniform rules for multimodal transport started around the 1930s, but no draft

instrument has had enough support from the international community in order to enter into force.

Therefore, the evolution in transport practice was not accompanied by transport law. There is no carriage convention dealing with multimodal transport currently in force. One of the consequences of this is that, in the event of loss, damage or delay, in order to determine liability issues, the parties concerned have to turn to the current complex regulatory status that involve the application of national laws, international conventions on unimodal transport and the standard form contracts created by the industry in order to determine liability issues.

Since the multimodal carrier most often subcontracts the performance of parts of the journey, there are usually two or more layers of contract involved in a multimodal carriage. Although directly liable to the shipper, because of this intricate liability regime, the MTO might not be able to recover his loss in an eventual recourse action against the performing party. This is a major concern from the carrier's part relating to liability systems.

In fact, because there has not been an international convention successfully capable of harmonizing the multimodal transport law, the current multiplicity of schemes that apply when dealing with multimodal carriage creates an unhelpful uncertainty as to which liability regime shall apply in given situations. Determining the applicable regime is highly necessary since the existing regimes differ greatly when it comes to the basis of carrier liability or the extent thereof.

However, the Rotterdam Rules, which is now open for ratification, contains a strong multimodal aspect, introducing its "maritime plus" scope of application, thus dealing with door-to-door transport. Recognizing that multimodal carriage contracts have become the norm instead of port-to-port contracts, the drafters of the Rotterdam Rules tried to fill the international multimodal gap. The aim of the Rules, expressed in its preamble, is to achieve widespread adoption and consequentially bring the so waited uniformity to most multimodal carriage contracts. The idea is that, by replacing the current 'patchwork' of maritime and unimodal conventions for

road, rail and inland water transport, there will be an eradication of the unnecessary costs that usually arise out of legal complexity.

Nevertheless, some of its provisions, especially when it relates to liability system, are excessively complex, what brings doubt as to its positive effects. One may question if it, rather than introducing a new set of rules, the United Nations should just have updated the Hague-Visby Rules while trying to get greater adoption of the existing unimodal conventions such as the CMR.

1.1 Scope

At this point, the Rules can no longer be changed. They must either be adopted 'as is' or rejected in full. Therefore, the aim of this work is to investigate if the Rotterdam Rules, if they come into force, will in fact bring a beneficial uniformity and if its multimodal provisions will contribute to solve the current liability problems.

First, there will be a background explanation of the historical development of container transport and the consequential expansion of multimodal contracts. The legal framework referring to transport law currently in vigour will be examined.

Following that, the work will focus on the study of the liability of the carrier, showing the importance of having an adequate and predictable liability regime. The way in which the liability regime is determined will be demonstrated and there will be an analysis of the regime proposed by the Rotterdam Rules.

The fourth chapter will study the liability systems currently in effect, comparing it to the system proposed by the new convention. The goal is to present the positive and negative aspects of each system, comparing the network and uniform approaches and then to analyse how the "limited network" approach of the Rotterdam Rules works.

The fifth chapter will deal with limitation of liability, since this represents one of the most outstanding differences among the various unimodal conventions. It refers to the liability limitations a carrier can invoke if there has been no conscious recklessness or wilful misconduct.

The limitation amount proposed by the Rotterdam Rules will be contrasted with the limitations currently in vigour and there will be an analysis of its basic consequences to the shipping industry. Under this topic, there will also be a discussion of the definition of package as regards limitation of liability in containerised cargo, as well as the limitation in case of delays.

Further on, there will be an analysis of the relationship of the multimodal carrier with the sub-carriers, specially how the new convention categorizes the different types of sub-contracting parties and the consequences thereof. The aim is also to show in which cases the cargo claimant is entitled to sue a sub-carrier directly, and to demonstrate the rights and remedies available for the subcarrier in each case.

Subsequently there will be a case analysis discussion in order to demonstrate the practical effects of the new convention in possible scenarios, especially how it will relate to the other unimodal conventions currently in force.

There will be a summary and further debate on the probable consequences of the Rotterdam Rules to the multimodal carriers and its benefits to the international community as a whole. In short, the aim of this work is to introduce, analyse and discuss the liability regime of the multimodal carrier in the Rotterdam Rules.

1.2 Methodology

The objective of this dissertation is to analyze the liability provisions of the new convention on carriage of goods by sea in order to evaluate how this new instrument affects the liability of the multimodal carriers.

In order to achieve this, a qualitative methodology will be used. There will an analysis of the comments of the drafters of the Rotterdam Rules and a comparative approach will be prioritized. Provisions from other conventions currently in force, specially the carriage of goods conventions, i.e. the Hague Visby and the Hamburg Rules, will be compared to the Rotterdam Rules. Other relevant unimodal carriage conventions, like the CMR, COTIF-CIM, CMNI and the Montreal Convention will be analysed in order to examine how they will relate to the Rotterdam Rules if it comes

into force. To illustrate this, case analysis will be used. Possible case scenarios will be drawn and the likely outcomes will be discussed. Some attention will also be directed to the provisions of the MT Convention of 1980, which is of relevance to the issue, although it never entered into force. The views of the relevant doctrine on the matter will be contrasted.

2 Background

No study about multimodal carriage would be complete without reference to the history behind the container revolution. It is undeniable that multimodalism flourished with containerisation. Therefore, the link between containerisation and multimodalism has to be made. Also, in order to analyse and compare the Rotterdam Rules, a brief introduction to the regulations on multimodal carriage currently in vigour must be made, as well as a proper explanation with regards to the scope of the Rules.

2.1 Containerisation

Although wooden containers were already in use by the British and French railways in the nineteenth century,¹ the embrace of containerisation took time. It is undeniable that transportation costs matter a great deal and container transport turned out to be the solution for it saved time by making loading and unloading more efficient.²

It can be said that the advent of modern container transport was introduced by Malcom Purcell McLean, an American in the trucking business with no maritime experience, but with an obsessive focus on cutting transport costs.³ McLean had been thinking about the hardships of loading and unloading goods already by 1937.⁴ In 1953, worried about highway congestions and the competition from domestic ship lines, Malcom McLean thought about putting truck trailers on ships, ferrying them up and

¹ Already by 1792, boxes very similar to modern containers were used for combined rail- and horse-drawn transport in England. See: “History of Containerization”, Available in: <http://www.worldshipping.org>.

² Mark LEVINSON describes quite well the difficulties of loading and unloading of cargo before the use of containers. (p. 16-18). He also refers to a government-sponsored study of the cost of transportation that was carried in the US in 1954. It was based on a voyage from Brooklyn(U.S) to Bremerhaven (Germany) with a vessel called the *Warrior*, which carried goods stored in pallets. The *Warrior* spent half the total duration of the voyage docked in port, with cargo handling at both ends of the voyage accounting for 36.8 percent of the outlay. The study concluded that a reduction of the costs of receiving, storing, and loading in port was the best method of dropping the total cost of shipping. See LEVINSON, “The Box”, p.34.

³ LEVINSON, “The Box”, p. 40.

⁴ CUDAHY, “The Containership Revolution”, available at <http://www.worldshipping.org>.

down the U.S. (United States) coast.⁵ McLean's ideas were based on a system of "intermodalism", by which a container, with the same cargo, could be transported with minimum interruption via different transport modes during its entire journey.⁶

McLean started putting his ideas into practice by 1955, by acquiring a small steamship company, named Pan Atlantic.⁷ Taking advantage of a government maritime-promotion program, he acquired cheap tankers and converted them to haul truck trailer bodies⁸, what would reduce the space occupied by each trailer by one third and what would enable them to be stacked. McLean ordered the production of containers that would fit his T-2 tankers efficiently, and adapted the vessels to be able to easily stow and load the containers. The matter of loading was resolved by the use of adapted cranes, which made it unnecessary for longshoremen to even touch the containers.⁹

On April 26, 1956, the Ideal X made its first commercial voyage from the Port Newark to Houston, being loaded in just three hours.¹⁰ This showed that container shipping could drastically reduce transportation cost.¹¹ Although Malcom McLean was not the inventor of the shipping container, he was the one who managed to make it economically efficient, because he realized that an entirely new way of handling freight was necessary.¹²

It is true that, at first, the handling of containers did not lead to cost savings for many reasons. With the available technology, it was very difficult to handle containers and there were no advantages over handling loose freight. Customs authorities also often charged duties on the container

⁵ LEVINSON, "The Box", p. 43.

⁶ See: <http://www.worldshipping.org>.

⁷ CUDAHY, "The Containership Revolution", available at <http://www.worldshipping.org>.

⁸ Which were "trailers detached from their steel beds axles, and wheels". Cf. LEVINSON, "The Box", p.47.

⁹ LEVINSON, "The Box", p.49-51.

¹⁰ LEVINSON, "The Box", p. 51.

¹¹ From about \$5.83 per ton to 15.8 cents per ton at the time. Cf. LEVINSON, p. 52.

¹² LEVINSON, "The Box", p. 53.

themselves. Besides, there was no standardization of container sizes¹³ and there was always a high costs of sending empty containers back.¹⁴

Although the Ideal X (and three other converted T-2 tankers that entered Pan Atlantic service in 1956) is often called the world's first successful containership, the basic design features that characterize the modern containership were not introduced until 1957.¹⁵ By this time, improved containerships were developed, which did not depend on land-based cranes for they had shipboard cranes. Also, while Ideal X had transported containers individually attached to a flat spar deck, following containerships were built to stack containers one atop another in below-deck racks and to haul additional units stacked atop each other as deck cargo, being able to carry much more containers.¹⁶

Further research also established the best cost efficient size for containers, for common standards were needed to enable land and sea carriers to handle one another's containers.¹⁷ By 1958, the shipping industry recognised that a containership could be loaded and unloaded in almost one-sixth of the time required for a conventional cargo ship and with about one-third of the labour.¹⁸

Huge changes were seen from 1965 to 1969. Although the first generation of containerships had consisted almost entirely of older vessels originally built for other purposes and adapted to carry containers, the second generation was at sea by the end of 1969, representing larger, faster and fully containerized ships that were designed to efficiently work with dockside container cranes.¹⁹

¹³ Among the primitive different kinds of containers, there were the wooden ones, which were cheaper, but not so protective as the steel ones, which were too expensive. Cf. LEVINSON, "The Box", p.32.

¹⁴ LEVINSON, "The Box", p.32.

¹⁵ CUDAHY, "The Containership Revolution", p. 05, available at <http://www.worldshipping.org>.

¹⁶ CUDAHY, "The Containership Revolution", p.06, available at <http://www.worldshipping.org>.

¹⁷ So long as containers came in dozens of shapes and sizes, they would do little to reduce the total cost of moving freight. Cf. LEVINSON, "The Box", p. 142.

¹⁸ LEVINSON, chapter 6.

¹⁹ They were also quite expensive. Cf. LEVINSON, "The Box", p. 214.

By the 1980s, new bigger containerships could move substantially more cargo with less cost than previously designed container vessels.²⁰ It is undeniable that the global economy benefited from these new bigger vessels,²¹ so big that the market demanded Post-Panamax ships, which were cost effective in long routes.²²

Cheaper shipping costs stimulated globalization, since it allowed firms to reach international markets that were too expensive before. If, in one hand, containerisation had a negative impact in workers overall bargaining power, bringing them less stability, since it was easier for companies to move production to places with lower wages,²³ on the other hand, the consequences for consumers were quite positive, for customers started to have access to a variety of products which competition made cheaper.

2.2 Multimodal transport

Historically, cargo carried from an inland location overseas would probably travel under at least three separate contracts of carriage, sometimes concluded with three separate carriers. The cargo could, for example, first travel by land under a consignment note from the manufacturing plant to the port of loading, then it would travel by sea under a bill of lading to the port of discharge, completing its journey by land under yet another transport document. Each of these different contracts of carriage would be under distinct regulations, having its own legal regime.²⁴

However, with the exponential growth of container transport, a great percentage of transported goods started to be carried out on a multimodal

²⁰ LEVINSON, “The Box”, p. 234.

²¹ CUDAHY, “The Containership Revolution”, p.07, available at <http://www.worldshipping.org>.

²² LEVINSON, “The Box”, p. 235.

²³ Conversion of wage levels is one consequence of this. For longshoremen, the threat was obvious and there were many strikes, for they resisted anything that might eliminate jobs. But, as the author also shows, working conditions of the longshoremen before the advent of container shipping were really bad and dangerous, and automation that arrived during World War II was still very limited. Also, another aspect that makes container transport cheap is that the crew is small. Cf. LEVINSON, “The Box”, p. 4-25.

²⁴ Sturley 2007 apud HOEKS, “Multimodal Transport Law”, p. 2.

basis.²⁵ The ‘door-to-door’²⁶ transport’ is usually carried out on the basis of a single carriage contract, performed by a MTO, utilizing more than one mode of transportation, with the cargo remaining in the container throughout the entire carriage. This is what is known as multimodal carriage, also called combined carriage, intermodal carriage, multimodalism and intermodalism.²⁷

Therefore, currently, for multimodal consignments, a shipper have two choices: to deal with a series of carriers and non-carriers (e.g. terminal operators, warehouses, etc.) operating under separate contracts for each mode of transport in order to have his goods delivered to the consignee (the unimodal way); or to mandate one single intermediary (the MTO), under a single contract, to choose the best mode of transport and deal with all subcontractors involved in the consignment (the multimodal way).

A good definition of international multimodal transport is found in the United Nations Convention on International Multimodal Transport of Goods of 1980, as being:

“(…) 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 multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.”²⁸

The MTO is responsible for the carriage of the goods from the moment he receives them from the shipper until the moment he delivers

²⁵ According to UNCITRAL, it is estimated that of the 60 million containers carried in 2000, 50 per cent of them were carried in a multimodal basis, with some countries showing a higher percentage. In: UNCITRAL. Note by the Secretariat, A/CN.9/WGIII/WP.29 at para. 25.

²⁶ NEELS highlights that door-to-door transport differs from multimodal transport in the sense that door-to-door simply means that the goods are taken transported from a place located inland outside the port of loading to another place inland outside the port of destination. The door-to-door transport is not necessarily performed by different modes of transport. Cf. NEELS, “The Rotterdam Rules and Modern Transport Practices”, p. 3.

²⁷ HOEKS, “Multimodal Transport Law”, p. 2. It should be noted that, in this work, the terms combined carriage, intermodal carriage, multimodalism and intermodalism are going to be used as synonyms, although some might interpret them differently.

²⁸ Article 1(1).

them to the consignee. He might subcontract the whole or part of the journey, but he is still responsible for the whole transit.²⁹

2.3 Regulations on multimodal transport

With the container revolution and the consequent growth of multimodal transport,³⁰ the need for a multimodal regime covering door-to-door operations became clear. Unfortunately, the international transport law has not followed this container revolution. Several attempts were made, but there is still no international uniformity on a multimodal regime.

The first attempts to establish uniform rules for multimodal transport started around the 1930s.³¹ Among the failed efforts, there is the Draft TCM Convention³² and the 1980 Convention on International Multimodal Transport (MT Convention), by the United Nations (UN).³³

Because of this lack of uniformity, regional, subregional and national laws have been created. Reference can be made to the works of the Andean Community, the Latin American Integration Association (ALADI), the Southern Common Market (MERCOSUR) and the Association of South-East Asian Nations (ASEAN).³⁴ Examples of countries that have

²⁹ NEELS, "The Rotterdam Rules and Modern Transport Practices", p. 3.

³⁰ It is important to make it clear that cargo shipped under a multimodal contract is not necessarily carried in containers and that containers may be carried also by only a single mode of transport. The multimodal aspect is related to the carriage being made by more than one mode of transport. However, the increasing use of container has facilitated the emergence of multimodal carriage. Cf. HOEKS, "Multimodal Transport Law", p. 2.

³¹ Cf. Preparation of a Preliminary Draft of a Convention on International Intermodal Transport. UNCTAD Document TD/B/AC.15/2, 1973, p. 3.

³² An attempt made by UNIDROIT in conjunction with the Comité Maritime International (CMI), combining the CMI's Draft Convention on Combined Transports (the Tokyo Rules of 1969) and a UNIDROIT's (International Institute for the Unification of Private Law) draft from 1961, under the auspices of UNECE. This is known as the Rome Draft Convention on the Combined Transport of Goods, which never went beyond the proposal stage. Cf. FAGHFOURI, "International Regulation of Liability for Multimodal Transport", p. 96. Available at: <http://www.immta.org>.

³³ Sponsored by UNCTAD, it has never entered into force. Cf. FAGHFOURI, "International Regulation of Liability for Multimodal Transport", p. 97.

³⁴ Andean Community Decision 331 of 4 March 1993 as Modified by Decision 393 of 9 July 1996: "International Multimodal Transport"; MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995; ALADI Agreement on International Multimodal Transport, 1996; ASEAN Draft Framework Agreement on Multimodal Transport (final draft, as of 19-20 March 2001). Cf. comparative table (UNCTAD/SDTE/TLB/2/Add. 1) summarizing the information contained in document UNCTAD/SDTE/TLB/2 of 27 June 2001, which is available www.unctad.org.

national regimes on multimodal carriage in vigour are The Netherlands, Germany, China, Mexico, India, Argentina and Brazil.³⁵

Amongst most of these regimes, there are significant differences on important points like the basis of carrier liability, time bars and limitation of liability. This multiplicity of schemes creates an undesired uncertainty as to which regime shall apply in given situations.³⁶ In addition, this uncertainty is pointed out as augmenting transaction costs, since it gives rise to more legal and evidentiary enquiries, increasing the cost of litigation and insurance. This is a considerable concern especially for developing countries and small and medium size transport users, for equitable access to markets and participation in international trade is harder without a predictable legal framework.³⁷

However, the current reality is that the international framework is based on unimodal transport conventions. There is the Warsaw Convention (WC), which is now largely superseded by the Montreal Convention (MC) covering air carriage³⁸. Relating to transport by rail there are the various versions of the COTIF-CIM³⁹. The CMNI⁴⁰ refers to carriage by inland

³⁵ Germany: §§ 452-452d *Handelsgesetzbuch* (HGB); India: Multimodal Transportation of Goods Act, 1993 (No.28 of 1993); Mexico: Regulation on International Multimodal Transport, 6 July 1989; The Netherlands: Civil Code, book 8, title 2, Section 2, Articles 8:40-52 BW; Argentina: Law No. 24.921: Multimodal Transport of Goods, Official Bulletin 12 January 1998; Brazil: Law No. 9.61 of 19 February 1998 on Multimodal Transport of Goods; China: Maritime Code, 1993, Chap. IV, Sec. 8: Special Provisions Regarding Multimodal Transport Contract; Regulation Governing International Multimodal Transport of Goods by Containers, 1997; Contract Law, 1999, Chap. 17, Sec. 4: Contracts for Multimodal Transportation. Cf. also the comparative table (UNCTAD/SDTE/TLB/2/Add. 1) summarizing the information contained in document UNCTAD/SDTE/TLB/2 of 27 June 2001, which is available at www.unctad.org.

³⁶ HOEKS, "Multimodal Contract Law", p.8.

³⁷ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", p. 10, in: UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

³⁸ The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention of 12 October 1929 as amended in The Hague in 1955, in Guatemala City in 1971, by Protocol No. 4 in Montreal in 1975 and supplemented by the Guadalajara Convention supplementary of 1961) and the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 (Montreal Convention). Cf. www.icao.int.

³⁹ The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 as amended by the Protocol of Modification of 3 June 1999 (Vilnius). Appendix B (CIM). Cf. www.unece.org.

⁴⁰ The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001. Cf. www.unece.org.

waterway. Regulating road carriage, there is the CMR⁴¹ Convention.⁴² And carriage by sea is currently regulated by the Hague Rules (HR)⁴³, Hague-Visby Rules (HVR)⁴⁴ and Hamburg Rules⁴⁵.

It should be noted, however, that, apart from the maritime conventions (HR, HVR⁴⁶ and Hamburg Rules), all of these unimodal international conventions have some kind of multimodal provision, extending its application to transportation by a mode other than its main scope.

As per the Hague(-Visby) Rules, the conventions require the use of a bill of lading for its application and there is a discussion on whether the multimodal or combined transport bills of lading can be considered to meet such requirement.⁴⁷ Also, in relation to multimodal transport, the HR and HVR have a provision that allows the carrier to contractually avail himself from liability for loss occurred before or after the sea leg (article 7), which, in these conventions, refer to tackle-to-tackle period, excluding the period from which cargo is in the custody of the carrier before loading or after discharge. This way, unless national legislation applies on a supplementary basis prohibiting such exclusion, the carrier will not be liable for loss before or after tackle.⁴⁸

Although the Montreal Convention, which has worldwide coverage, in its article 38.1, provides that the convention only applies to air carriage,

⁴¹ Mainly the ro-ro or roll-on, roll-off carriage of Article 2 CMR causes the CMR to apply to carriage to other continents but this type of carriage is not often used for long sea stages. As a result the CMR is unlikely to be of import concerning carriage from Europe to other continents than Africa or Asia

⁴² These being regional, instead of global arrangements. Cf. HOEKS, "Multimodal Transport Law", p.9.

⁴³ The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924. Cf. www.admiraltylawguide.com.

⁴⁴ The Hague Rules as Amended by the Brussels Protocol of 23 February 1968. Cf. www.admiraltylawguide.com.

⁴⁵ The United Nations Convention on the Carriage of Goods by Sea of 31 March 1978. Cf. www.uncitral.org

⁴⁶ The HR and HVR apply to the period between the moment when the goods are loaded on to the ship and the moment when they are discharged from the ship. Cf. Article 1(e).

⁴⁷ This has not been settled in England or The Netherlands, for example, and in Germany, the legal opinion is that such multimodal transport bill does not meet the requirements set in the HR or HVR. HOEKS, "Multimodal Transport Law", p. 351.

⁴⁸ And it must be noted that, since during the period before loading and after discharge cargo usually must be handled, transhipped and temporarily stored in port area, it is mostly susceptible to damage or loss. Cf. HOEKS, "Multimodal Transport Law", p. 352.

article 18.4 introduces two exceptions in which the Montreal Convention applies: when carriage is made by other mode of transport without the consent of the consignor;⁴⁹ and when there is carriage by other means outside the airport for purpose of loading, discharge or shipment.

The COTIF-CIM 1999 Convention, in its article 1.4, provides that:

“When the 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 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.”

Here it should be pointed out that the list of services mentioned in article 24 has a restricted amount of entries and that a consignment note which confirms the contract of carriage does not have effect as a bill of lading (based on article 6 paragraph 5 COTIF/CIM), what minimizes the chance of conflicts between the COTIF-CIM and the sea carriage conventions or the CMNI. However, a conflict between the COTIF-CIM and the Rotterdam Rules(RR) are more likely to occur.⁵⁰

Concerning carriage by inland waterway, the CMNI, in its article 2(1), states that the convention applies to contracts for carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in waters to which the maritime regulations apply is the greater. Although this is quite a minor extension of applicability, this might generate conflicts with the scope of application of the Hamburg Rules and with the Rotterdam Rules⁵¹, which, as will be shown, have a maritime plus scope.

⁴⁹ Regarding this provision, Hoeks highlights that, since contracts for the carriage of goods are consensual by nature, the applicable legal regime is determined by the content of the contract that is concluded. This way, it is possible to say that the other conventions generate the same effect, even without mentioning it, like the MC. Cf. HOEKS, “Multimodal Carriage with a Pinch of Sea Salt”, p. 5.

⁵⁰ HOEKS, “Multimodal Carriage with a Pinch of Sea Salt”, p.8. A proper analysis of the scope of application of the Rotterdam Rules will be made in the next chapter.

⁵¹ HOEKS, “Multimodal Carriage with a Pinch of Sea Salt”, p. 7.

Pertaining to carriage by road, the CMR creates a uniform liability system in its Article 2 (1), which provides that, when there is a specific type of multimodal carriage known as roll on-roll off carriage, either by sea, rail, inland waterways or air, the liability provisions of the CMR applies to the whole journey. Exception is made to cases in which the loss, damage or delay are localized and caused by an act of the non-road carrier.

Finally, in relation to carriage by sea, the reference to multimodal contracts present in article 1(6) of the Hamburg Rules⁵² must be mentioned. This article basically states that, when there is a multimodal contract of carriage, the Hamburg Rules apply only to the sea leg. The convention is the only sea carriage instrument that takes the possibility of multimodal carriage into account, thus recognising that a multimodal contract does not exclude the sea contract.⁵³ The application of the liability regime of the Hamburg Rules covers the period during which the carrier is in charge of the goods at the port of loading and ending at the port of discharge.⁵⁴

It is also important to mention that the industry has created contractual provisions on multimodal transport. The best example is a cooperation between United Nations Conference on Trade and Development (UNCTAD) and the International Chamber of Commerce (ICC), the ICC/UNCTAD Rules for Multimodal Transport Documents of 1992⁵⁵. These rules are contractual in nature, with no force of law, and they will only apply if incorporated in a contract of carriage. Besides, they will only take effect in case they are not contrary to the mandatory provisions of international conventions.⁵⁶ However, it can be said that the UNCTAD/ICC Rules have been successful, for they have been incorporated by the Baltic

⁵² The Hamburg Rules came to replace the Hague Rules of 1924, adopting a new approach to cargo liability which increased the carrier's responsibility. It contained a clause obliging new member States to renounce their membership in the Hague Rules. However, the number of nations adhering to the Hamburg Rules remains relatively small (currently 34 countries), and a dual regime of law concerning the carriage of goods by sea was created. Cf. www.uncitral.org

⁵³ HOEKS, "Multimodal Carriage with a Pinch of Sea Salt", p.9.

⁵⁴ Article 4. By contrast, the Hague and Hague-Visby Rules do not refer to multimodal transport and provides that the carrier's period of responsibility is from when the goods are loaded into the ship to when they are unloaded, also known as "tackle to tackle". Cf. Article 1(e) of the Hague-Visby Rules.

⁵⁵ Available at: <http://r0.unctad.org/en/subsites/multimod/mt3duic1.htm>.

⁵⁶ Cf. FAGHFOURI, "International Regulation of Liability for Multimodal Transport", p. 99-100.

and International Maritime Council (BIMCO) and the International Federation of Freight Forwarders Associations (FIATA) into their standard form documents (Multidoc 95⁵⁷ and FBL 92⁵⁸).

Indeed, it should be noted that multimodal transport is typically conducted on the basis of standard term contracts, which, however, are usually issued unilaterally by the carrier, what often makes them less favourable to the shipper. Specially small and medium size parties are not capable of negotiating these contracts, thus becoming prone to abuse by the issuing party.⁵⁹ That is why mandatory minimum standards of liability were gradually introduced in the form of international transport conventions conducted on standard terms. As shown, however, in the field of multimodal transport, no agreed international minimum standards are in force.

2.4 The Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as Rotterdam Rules(RR), was adopted in December 11, 2008, under the auspices of United Nations Commission on International Trade Law (UNCITRAL).⁶⁰ Although the text of the convention has been signed by 22 nations, only Spain has ratified it, and it is not yet into force.⁶¹

The Rotterdam Rules have a broad geographical scope of application, differing from the other ocean conventions on the fact that it takes into account not only the port of loading (POL) and port of discharge

⁵⁷ Multimodal Transport Bill of Lading, issue by BIMCO. Available at: https://www.bimco.org/en/Members/Chartering/BIMCO_Documents/Bill_of_Ladings/MULTIDOC95.aspx.

⁵⁸ Standard Conditions (1992) governing the FIATA multimodal transport bill of lading. Available at: <http://www.transportrecht.org/dokumente/FBL.pdf>.

⁵⁹ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", p. 10, UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁶⁰ The Comité Maritime International (CMI) conducted the preparatory work on the Convention at the request of UNCITRAL including a preliminary draft text for the Convention. Cf. www.rotterdamrules.com

⁶¹ The signing ceremony was held in Rotterdam from 20 to 23 September 2009. The following countries have signed it: Armenia, Cameroon, Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo, and the United States of America, all together representing 25% of the world's trade. Cf. www.rotterdamrules.com. The UNCITRAL Proposal does not allow for any reservations.

(POD), but the place of receipt and of delivery of the goods, while requiring that carriage by sea be international. Also, contrary to the HVR⁶² and Hamburg Rules⁶³, the Rotterdam Rules do not include the agreement of the parties as a connecting factor. This way, the Rotterdam Rules would also apply if the POL and POD are both in non contracting states, as long as they are in different states and either the place of receipt or place of delivery is in a contracting state.

Also, the Rotterdam Rules adopted a mix of the documentary approach employed by the HR and the contractual and documentary approach utilized by the Hamburg Rules. This means that they apply to all contracts of carriage by sea, but not to charterparties, even though they do apply, as the HR, to bills of lading issued pursuant to a charterparty when such bills govern the relation between carrier and the bill of lading holder. The Convention bases its application, in addition, on the type of trade. The Rotterdam Rules apply to contracts in the liner transportation⁶⁴, except charter parties, and similar contracts and do not apply to contracts of carriage in non-liner transportation, except where there is no charter party and a transport document or electronic record is issued.⁶⁵

Originally, the Rotterdam Rules were intended to be no more than a port-to-port instrument.⁶⁶ Nevertheless, after considering the current international multimodal gap and the reality that the increased door-to-door containerized trade or multimodal carriage contracts have become the norm instead of port-to-port contracts, the drafters decided that the new instrument had to be 'unimodal plus'.⁶⁷ As a result, the RR wound up regulating the whole of a contract of carriage which comprises a sea leg, including the stages that are to be performed by road, rail, air and inland waterway.⁶⁸

⁶² The HR refers only to the place where the bill of lading is issued and the HVR refers, in addition, to the state where carriage has begun.

⁶³ The Hamburg Rules refer to both port of loading and port of discharge.

⁶⁴ It thus apply to bills of lading, sea waybills and similar contracts.

⁶⁵ Articles 5 and 6 of the Rotterdam Rules..

⁶⁶ Thus replacing the HVR and Hamburg Rules.

⁶⁷ Hancock, "Multimodal transport and the new UN Convention on the Carriage of Goods", p. 484.

⁶⁸ HOEKS, "Multimodal carriage with a pinch of sea salt", p. 2.

As highlighted by Hoeks, this new approach is not exactly a new concept, since it is common practice in the transport industry to try to extend the scope of the sea carriage conventions (HVR and Hamburg Rules) to other modes through the use of paramount clauses.⁶⁹ In fact, courts have often enforced contractual clauses that extend maritime regimes inland.⁷⁰ Thus, it can be said that Himalaya clauses also have the practical effect of extending the maritime regime inland.⁷¹ A Himalaya clause acts extending the protection from liability clauses to benefit the servants and agents of the carrier.⁷² Nonetheless, considering that the contractual solution of the Himalaya clause is not enough to respond to the needs of the industry, the drafters of the RR expressly provided for the extension of the carrier's statutory defences and limits of liability to third parties through Article 4.1.

Also, it can be noticed that many provisions from previous conventions have been absorbed (although not in identical terms) making the new instrument a kind of "mix and match selection" in some aspects, but in other aspects introducing different and ambitious provisions.⁷³

Although the text of the convention does not mention multimodal transport, its scope of application does cover door-to-door transport. Actually, according to the definition of contract of carriage (article 1(1)⁷⁴), the RR applies to unimodal transport when the contract of carriage only provides sea transport, but it also operates as a multimodal convention when the contract provides for sea carriage and carriage by other means of transport.⁷⁵

It is important to note that the title of the convention itself and the provision on its scope when referring to "wholly or partly by sea" have a threefold meaning: 1) that the RR cover more than sea carriage alone; 2) that the instrument was originally conceived as a maritime law draft; 3) that

⁶⁹ HOEKS, "Multimodal Transport Law", p. 335.

⁷⁰ STURLEY, "Transport Law for the Twenty-first Century", p.32.

⁷¹ STURLEY, "Transport Law for the Twenty-first Century", p.32.

⁷² This issue will be dealt with more extensively in chapter 6.

⁷³ THOMAS, Preface to "The New Convention for the Carriage of Goods by Sea" p. V.

⁷⁴ Article 1 (1) reads as follows: "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."

⁷⁵ NEELS, "The Rotterdam Rules and Modern Transport Practices", p. 3.

the presence of a maritime leg in the contract of carriage is a prerequisite of its application. Also, attention must be drawn to the fact that the convention does not require the non-sea leg to be ancillary to the sea part, which can even be shorter than the eventual non-sea leg.⁷⁶

That is why the RR cannot be considered a true multimodal convention. Combined transport by other means without carriage by sea is excluded of its scope of application.⁷⁷ For the convention to apply, it is imperative that the contract (at least) provides for sea carriage (with or without any previous or subsequent carriage by other modes), although it might happen that there is in fact no sea transport.⁷⁸

This Convention's actually limited scope in fact contradicts the goal of creating a "binding universal regime to support the operation of contracts of maritime carriage involving various modes of transport" announced in its preamble.⁷⁹ In this respect, one can argue that the RR, instead of promoting unification, will only increase the complexity of existing multimodal transport regimes while creating unpredictability, especially in relation to the applicable liability regime, as will be discussed later.

If the international community rejects the Rotterdam Rules, what we will see is the continuation of the current confused patchwork system of mandatory instruments. Assuming that no national or regional alternative is more positive than international uniformity in the field of multimodal transport, what must be analysed are the practical consequences of the multimodal aspect of the Rotterdam Rules on the carrier's liability - especially how it relates to the other mandatory carriage conventions-, in order to evaluate if it introduces a real beneficial environment, or if the international community would benefit more from the *status quo*.

⁷⁶ HOEKS, "Multimodal Transport Law", p. 335.

⁷⁷ That is why the convention has also been called "wet multimodal".

⁷⁸ NEELS, "The Rotterdam Rules and Modern Transport Practices", p. 4.

⁷⁹ TETLEY, "A Critique of and the Canadian Response to the Rules", p. 291.

3 Liability Regime of the MTO

Since it is inevitable that some portion of cargo transported internationally will be lost or damaged during voyage, or that some delay will occur, any convention dealing with carriage of goods must provide for rules relating to the allocation of liability in these cases. The need to establish uniform international rules to allocate liability for the risk of loss, damage to goods or delay in delivery has been subject of attention since long. In the field of carriage of goods by sea, the subject was first dealt with by the International Law Association in 1882, when the conference at which the Hague Rules were adopted was held.⁸⁰

Because of the lack of an international convention on multimodal transport, when it comes to liability for loss, damage or delay (hereafter "loss"), it is difficult to determine which liability regime is considered applicable.

3.1 Determining the applicable liability regime

To establish the liability regime, many issues have to be taken into consideration, like the nature and extent of the multimodal contract, which modes of transport have been used, the documents that have been drawn up and the scope of application of possibly applicable unimodal conventions.⁸¹

The applicable regime will influence the action of all of the parties involved in the carriage. For example, a carrier's decision of the appropriate level of care it must use will surely be based, in a great part, on its potential liability. A shipper, on the other hand, will not bother to carefully prepare goods for shipment or to appropriately insure them if he knows that he will not be liable for loss. The extent and cost of cover offered by insurers will also depend on liability rules.⁸²

⁸⁰ STURLEY, "Transport Law for the Twenty-first Century", p. 3.

⁸¹ HOEKS, "Multimodal Transport Law", p. 11.

⁸² STURLEY, "Transport Law for the Twenty-first Century", p.29.

When determining the applicable liability rules, in case the loss or damage can be localized to a particular modal stage of the transport, it is first necessary to find out if a regional, subregional or national mandatory multimodal liability regime applies, in the relevant forum, to the claim. If this mandatory regime exists, it must be applied. However, if there is no such regime, one must question if there is a mandatory unimodal convention or national law that applies, according to the geographical and substantive scope of the legislation. In case there is not such legislation either, it is possible that the contract has incorporated the UNCTAD/ICC Rules, in which case these standard form contract terms will be applicable. And in case these rules have not been incorporated to the contract, the liability of the MTO may be further excluded or limited contractually, if allowed by national law.⁸³

Otherwise, in the often case that loss cannot be localized to a particular modal stage of the transport, the difference is that it is not possible to apply a unimodal convention or national law. One must verify if there is an applicable regional, subregional or national mandatory multimodal liability regime, and if the contract have incorporated standard form rules.⁸⁴

In this view, the benefits of an adequate, uniform and easily predictable liability regime are obvious. Not only litigation becomes less necessary, but also the law interferes less with the flow of trade.⁸⁵

3.2 The basis of liability and burden of proof

In relation to the basis of liability and burden of proof, the Hague Rules lacks provisions on the liability of the carrier. Even if art.2 provides that, subject to art.6, the carrier must be subject to the responsibilities and liabilities and entitled to the rights and immunities established in the

⁸³ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 8, in UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁸⁴ ⁸⁴ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 8, in UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁸⁵ STURLEY, "Transport Law for the Twenty-first Century", p.30.

subsequent articles, art. 3 only sets out the obligations of the carrier, and art. 4 the carrier's actual or presumed exonerations from liability. The carrier's liability in case of breach of its obligations is implied and the allocation of burden of proof is not clearly regulated (only by art. 4.1 and 4.2). The Hamburg Rules, on the other hand, provides for a presumed fault regime in its art. 5(1) that lacks so much clarity that it was necessary to annex a Common Understanding to the convention to make this clear.⁸⁶ The liability regime and the general allocation of burden of proof are set out in art.5(1), but there no provisions relating to the obligations of the carriers.

In respect to the Rotterdam Rules, the proposed allocation of liability is based on a general principle in contractual obligations, which refers to the almost universal interpretation of the Hague Rules and the Hague-Visby Rules and to the same principle adopted under the Hamburg Rules.

A positive aspect of the RR is that the liability regime it provides is much clearer when compared to the HVR and Hamburg Rules, both in relation to the allocation of the burden of proof and to the basis of the liability of the carrier. The RR's liability regime can be categorized as a qualified presumed fault regime. The basis of liability is presumed fault, but this can be rebutted with the appropriate discharge of the obligations imposed on carriers by the Convention.⁸⁷

According to its article 17, the carrier is responsible for loss, damage or delay occurred while the goods are in the carriers custody (art. 17(1)), but the carrier is relieved of this liability if it proves absence of fault⁸⁸ (17(2)). Further, art. 17(3) lists the excepted perils the carrier can benefit of in order to exclude liability. In relation to these, it is of value to note that the exonerations from liability in respect to fault in navigation and in management of the ship are now suppressed by the Rotterdam Rules. The excepted perils are considered cases of reversal of the burden of proof.

⁸⁶ In the Common Understanding, it is established that " the liability of the carrier under this Convention is based on the principle of presumed fault or neglect."

⁸⁷ THOMAS, "An analysis of the liability regime of carriers and maritime performing parties", p. 52.

⁸⁸ Or absence of fault of any performing party. Chapter 6 will analyse the role of the parties categorized as performing parties by the Convention.

Therefore, the allocation of the burden of proof is the following: first, pursuant to paragraph 1 of article 17, the claimant bears the initial burden of proof for damage, loss or delay and its occurrence during the period of the carrier's responsibility. If he so proves, this proof entails a presumption of liability of the carrier (as the general principal in contractual obligations), and the carrier, in order to defeat the presumption of fault, has two alternatives:(i) to prove the absence of fault, or (ii) to prove that the loss, damage or delay was caused or contributed to by one of the events enumerated in paragraph 3 (the excepted perils of the Hague Rules and the Hague-Visby Rules, as amended).

Also, it should be understood that, while the proof of absence of fault relieves the carrier from liability, the proof under an excepted peril simply creates a presumption of absence of fault⁸⁹ that the claimant can overcome by proving: (i) that the fault of the carrier caused or contributed to the excepted peril relied on by the carrier,(ii) that an event other than an excepted peril, caused or contributed to the loss, damage or delay, or (iii) that the loss, damage or delay was caused or probably caused by unseaworthiness of the ship or improper crewing, equipping and supplying the ship.

This is actually a codification of what the jurisprudence has established under the Hague Rules and the Hague-Visby Rules.⁹⁰ In the end, the claimant never has the burden of proving the fault of the carrier and the system of allocation of the burden of proof is regulated in a more complete and clearer way if compared to the one provided for in the HR/HVR system. This level of detail can bring about greater uniformity in the way that different jurisdictions currently approach the burden of prove issue. This level of detail can also make it open to different interpretations in different jurisdictions. But this would only be an initial consequence. Surely with time case law and judicial precedent will be developed.

⁸⁹ In this respect, similarly to article 18(2) of CMR.

⁹⁰ See: Berlingieri et al., "The Rotterdam Rules: an attempt to clarify certain concerns that have emerged", p. 9. Available at: /www.mcgill.ca.

It becomes clear, as said, that the excepted perils⁹¹ are not exonerations from liability, but only cases of reversal of the burden of proof.

On the down side, the Rotterdam Rules introduce a very wordy and complex provision with regards to the liability regime of the MTO. As such, it may be open to different interpretations in different jurisdictions, at least initially, until a body of case law and judicial precedent has been developed.

⁹¹ Except those that relate to fault in navigation and management of the ship and fire (Article 4(2)(a) and (b) of the HVR) that have been positively suppressed by the Rotterdam Rules.

4 Liability System

Another consequence of the combination of this unimodal international framework, with the regional, subregional, national laws and the standard term contracts created by the industry is that the applicable liability rules vary to a great extent from case to case, creating uncertainty as to the extent of a multimodal carrier's liability in each case.⁹²

One key issue that surrounds any discussion on liability related to multimodal carriage is the choice of the most suitable liability system. Three options can be pointed out: uniform, network and modified liability system.

In an uniform system, the same liability rules apply to the whole journey, irrespective of where loss happened, and it does not matter if it can be localized or not. By contrast, in the network system, different liability rules will apply depending on the unimodal stage of transport during which loss occurs. Mandatory regimes apply, but freedom of contract prevails where there are "convention gaps".⁹³ In this system, where loss can be localized, the so called "alternative" or "fall-back" rules apply.⁹⁴

But, as mentioned, there is also the modified liability system. Here, like in the uniform system, some rules apply irrespective of the unimodal stage of transport during which loss occurred. However, the application of some other rules (relating to liability) will depend on where the loss took place. This system represents a compromise or a middle-way between a uniform and a network system.⁹⁵

There are advantages and disadvantages in each system.⁹⁶ The basic advantages of the uniform liability system are its simplicity, transparency,

⁹² HOEKS, "Multimodal Maritime Law", p. 9.

⁹³ BAUGHEN, "Shipping Law", p. 183.

⁹⁴ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁹⁵ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁹⁶ A thorough discussion on the advantages and disadvantages of both regimes is available in the CMI paper "Door-to-door Transport" Yearbook 2000, available at: http://www.comitemaritime.org/singapore/issue/issue_door.html. See also: UNCITRAL Secretariat Notes "General Remarks on the Sphere of Application of the Draft Instrument"(A/CN.9/WG.III/WP.29), available at: http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

and predictability, for there is no need to identify the modal stage where a loss occurs. Since carrier's liability is uniform throughout a multimodal transaction and do not vary throughout the journey,⁹⁷ the system is well suited to the needs of the transport user (the shippers).

However, the institution of a unimodal system raises a concern regarding an eventual increase of the carrier's liability exposure, since the MTO would not be able to take advantage of potentially less onerous liability rules, provided for a particular mode of transport during which a loss occurs.⁹⁸

On the other hand, a pure network system is considered impossible to work taking into account the level of containerisation achieved.⁹⁹ It would benefit the MTO in the view of the commercial practice of subcontracting with unimodal carriers for parts of the performance of a multimodal transport contract. In a network system, the liability of the MTO to the shipper would correspond to any liability of any performing carrier¹⁰⁰ to him, making his recourse back-to-back.¹⁰¹

Indeed, it is of the carrier's interest that the rules applicable to the subcontract are applied to the corresponding stage of the multimodal contract, in order to avoid any recourse problem. When damage, loss or delay occurs during a stage of the carriage performed by a subcontractor, the MTO who has subcontracted may be able to seek recourse from that actual carrier. Although the MTO will be burdened with carrier liability as regards the consignor or consignee for the entire transport, in relation to the actual carrier he might be able to seek redress for damage or loss. However, this recourse action might not always provide the MTO with the desired amount

⁹⁷ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 16. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁹⁸ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

⁹⁹ BAUGHEN, "Shipping Law", p. 183.

¹⁰⁰ The subcontracting of carriage is common in multimodal transport. When subcontracting, the MTO becomes the consignor in relation to the employed carrier. As a consequence, there will be at least two contract levels: the main contract, between the original consignor and the multimodal carrier, and one or more contracts for the subcontracts between the MTO and the actual carrier (or carriers), also known as performing carrier. Cf. HOEKS, "Multimodal Contract Law", p. 5.

¹⁰¹ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

of compensation, since the two layers of contracts may be subject to different legal regimes, leading to different levels of liability for the multimodal and the actual carrier.¹⁰²

Therefore, the disadvantage for the carrier in the uniform system is that his rights of recourse against his subcontractors are based on the applicable unimodal conventions. This way, the MTO might not be able to recover from its subcontractors the compensation paid by him to the shipper (there is no guarantee of a back-to-back liability), thus having to bear the commercial, litigation and insurance risks.¹⁰³

Conversely, the network system works to the shipper's disadvantage in the sense that it is still necessary to establish when, and of course, during which mode of transport, the loss occurred. Since in the container carriage loss is often concealed, it is quite hard to determine where it happened.¹⁰⁴ Obviously, the cargo claimant will always try to claim on the basis of the convention that is most favourable to him.¹⁰⁵

Additionally, there is the possibility that loss occurs gradually over the whole journey or that it spans two legs. A consequence of this could be a gap of liability regimes between the application of unimodal conventions.¹⁰⁶

Referring to the disadvantages of the network system, Hancock highlights that it tends to increase insurance and litigation costs. Since the system depends on an unpredictable event, it is difficult to assess risk exposures. In addition, when loss occurs, parties have the tendency to argue and to try to engage in deeper investigation regarding when exactly the loss occurred and, thus, which regime should apply.¹⁰⁷ It thus places an extra

¹⁰² HOEKS, "Multimodal Transport Law", p. 7.

¹⁰³ HANCOCK, "Multimodal transport and the new UN Convention on the Carriage of Goods", p. 489.

¹⁰⁴ One particular aspect of container shipping is that no one opens it along the way, what prevents the long standing problem of theft at ports. Cf. LEVINSON, "The Box", p.28.

¹⁰⁵ BAUGHEN, *Shipping Law*, 4th ed, 2009, p. 183.

¹⁰⁶ HANCOCK, "Multimodal transport and the new UN Convention on the Carriage of Goods", p. 488.

¹⁰⁷ HANCOCK, "Multimodal transport and the new UN Convention on the Carriage of Goods", p. 488-489.

burden on cargo-claimants, with a tendency of increasing insurance premiums.¹⁰⁸

Additionally, an important point that must be recognized is that the adoption of a pure network system of liability would need to discuss the use of "fall-back" provisions on liability and limitation of liability for cases where loss cannot be localized.¹⁰⁹ This is not necessary in a uniform system, which makes the basis of liability clear from the start.¹¹⁰

According to Hoeks, thanks to the lack of a uniform multimodal regime and the generally accepted view that the multimodal contract is a mixed contract, the network system seems to be the only legitimate approach when applying the existing carriage conventions.¹¹¹

Alternatively, a modified system basically provides more flexibility, admitting various arrangements, being able to make a system more uniform or more network-like. It may effectively provide a workable consensus, since it can consider all the conflicting views and interests. But it might also introduce a system too complex to be widely accepted, without fully bringing the benefits of either system, and also never fully solving the concerns relating to them.¹¹²

4.1 The current reality

Since presently there is no applicable international instrument on multimodal transport, the liability of the multimodal carrier is usually determined by the portion of the multimodal transport where the damage, loss or delay occurred. Therefore, effort is made to try to find out during which leg of the journey the event took place and then applying the referred

¹⁰⁸ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

¹⁰⁹ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 17. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

¹¹⁰ HANCOCK, "Multimodal transport and the new UN Convention on the Carriage of Goods", p. 488-489.

¹¹¹ HOEKS, "Multimodal Transport Law", p. 10.

¹¹² UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 18. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

liability regime (unimodal convention or national law).¹¹³ So it can be said that the network system currently prevails.

However, the UNCTAD/ICC Rules, influenced by the 1980 MT Convention, operates a modified system, which applies the monetary limits of liability of mandatory unimodal regimes in case of localized loss.¹¹⁴ The 1980 MT Convention provided for a uniform system with the exception that when the loss can be localized the "limits of liability are determined by reference to any applicable international Convention or mandatory national law which provides a higher limit of liability than that of the 1980 MT Convention" (Art. 19). The UNCTAD/ICC Rules, on the other hand, in cases of localized loss, provide for the application the "limits of liability of any mandatory international Convention or mandatory national law, which would have provided another limit of liability, had a contract been made separately for that particular stage of transport "(Rule 6.4).

4.2 The proposed limited network solution of the RR

The liability system in the Rotterdam Rules is disposed in article 26, which reads as follows:

"When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

¹¹³ HOEKS, "Multimodal Transport Law", p. 9.

¹¹⁴ Both the UNCTAD/ICC Rules and the 1980 MT Convention have influenced regional, subregional and national laws. Cf. UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 18. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

- (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument."

What this article basically states is that when there is an inland transport convention, its liability rules may apply when the loss or damage occurs during this inland leg. There are many important points to be highlighted in this article. First, it should be noted that the article does not refer to national laws, for it aims at uniformity. Although countries like China, India, Canada, Australia and Sweden were in favour of broadening the scope of art. 26 to include national law, the argument that this would be a move against uniformity prevailed.¹¹⁵ Only in cases in which the inland part of the journey is international – thus being in the scope of application of a mandatory¹¹⁶ international transport conventions – that the liability provisions of the other international instruments are applicable.¹¹⁷ This way, the liability provisions of the Rotterdam Rules will apply when the loss, damage or delay occurs during a subsidiary inland transport to which national law would have applied (under an independent contract).¹¹⁸

Also, only provisions (of the other conventions) which are directly related to liability should be applied, for the non-liability provisions of the Rotterdam Rules will always be applicable to the entire journey. Therefore, only provisions regarding limitation of liability and time for suit will be applicable.¹¹⁹

¹¹⁵ There was even a rejected compromise proposal permitting States to make a declaration that their own courts would be allowed to apply national law. See A/CN.9/621, Report of the 19th Session, paras. 189-190; A/63/17, Report of UNCITRAL's 41st Session, paras 92-96 and 98.

¹¹⁶ Gertjan van der Ziel strongly highlights this point, for the prevalent provision must have a mandatory character, which can be either one-sided or two-sided. Cf "Multimodal Aspects of the Rotterdam Rules", p. 984.

¹¹⁷ Gertjan van der Ziel is of the opinion that here there is an exception in respect to inland waterway transport, since the CMNI allows its parties to declare that they will also apply the convention to its national carriage. According to the author, it is the liability provisions of the CMNI, and not the RR, which must apply in cases where the damage occurs during inland navigation in a State that has made this declaration. Cf. "Multimodal Aspects of the Rotterdam Rules", p. 984.

¹¹⁸ VAN DER ZIEL, "Multimodal Aspects of the Rotterdam Rules", p. 984.

¹¹⁹ Provisions from other mandatory conventions that are indirectly related to carrier's liability, such as jurisdiction, evidentiary aspects of transport documents, successive

Additionally, when the article states that the damage, loss or delay have to have happened “solely before their loading onto the ship or solely after their discharge from the ship”, it excludes concealed damage¹²⁰ and any gradually occurring damage¹²¹. This means that in case of continuing damage, if at least one of the carriage segments is the sea leg, the Rotterdam Rules prevails. It is a provision that does establish some uniformity and legal certainty in a situation which is usually very complicated to deal with.¹²²

Therefore, according to article 26, the RR incorporates by reference the international unimodal conventions in vigour at the time of the occurrence¹²³ of the damage or loss. In sum, in case the damage is unlocalised, in the sense that it has occurred during more than one leg or that it is impossible to prove where it happened, the RR prevails.¹²⁴

This is being classified as a limited network system,¹²⁵ and it represents a political compromise, since it preserves the provisions on carrier liability, limitation of liability and time for suit of the already existing international conventions relating to carriage other than by sea.¹²⁶

In relation to unlocalized damage, the idea is that this should be dealt with solely by the Rotterdam Rules. This might create a problem, because the other Conventions also include provisions for unlocalized damage to some extent. Taking the CMR as example, its system is basically identical

carriers and so on, are excluded. Cf. VAN DER ZIEL, “Multimodal Aspects of the Rotterdam Rules”, p. 984.

¹²⁰ Which, as shown, is the most likely to occur in container transport.

¹²¹ When damage occurs during carriage by sea and continues during the non-sea leg of the journey.

¹²² HOEKS, “Multimodal Transport Law”, p. 340. However, the author also point out that ”granting precedence to the new regime does not prevent one or even more than one of the existing carriage regimes to apply under these circumstances. Thus, conflicts between the conventions are even more likely to occur when the damage or loss occurred or was caused during more than one transport stage and one of the transport concerns international sea carriage. Under these circumstances the limited network does not grant precedence to even the rules on carrier liability, limitation of liability or time for suit of the other applicable conventions, which causes all of the mandatory rules of the other conventions to become sources of potential conflict”.

¹²³ It is important to notice that possible future conventions that come into force are also included. Cf. VAN DER ZIEL, “Multimodal Aspects of the Rotterdam Rules”, p. 985.

¹²⁴ HANCOCK, “Multimodal transport and the new UN Convention on the Carriage of Goods”, p. 490.

¹²⁵ HANCOCK, “Multimodal transport and the new UN Convention on the Carriage of Goods”, p. 490.

¹²⁶ HOEKS, “Multimodal Transport Law”, p. 337.

to that of the Rotterdam Rules in this regard. The CMR, in its articles 17 and 2 brings general liability rules then exceptions for localized damage. When damage is not localized, the general liability rule applies. Thus both the RR and the CMR include liability rules for unlocalised damage and these rules are different, therefore, conflict between them would be possible. Also in rail law there are liability rules for unlocalized damage, even where other transport modes are involved. This is implicit in CIM Rules arts 27 §4(b) and (for certain listed services) 48. The inland waterways regime, on the other hand, provides that the carrier remains liable if the goods are trans-shipped, what also applies if they are trans-shipped to another mode of transport. Therefore, the same problem as of the CMR and rail conventions with the RR occurs. To face such problems, the RR introduced article 82, which deals with the relationship between the Rotterdam Rules and other international conventions regulating carriage by air, road, rail or inland waterway¹²⁷, and, at least in theory, should resolve these issues.¹²⁸

According to Hoeks, even in case loss can be localised, an “obscure patchwork of different regimes that were not designed to complete each other“ will cover the claim. The consequence will be an undesired uncertainty and differing views from various courts of law on which provisions of each convention should take precedence over the RR.¹²⁹

In fact, the burden placed upon the cargo claimant by art. 26 must be recognized. The problem is that in most cases, the claimant is not familiar with the limitation of carrier’s liability under the various potentially applicable unimodal conventions.¹³⁰ Therefore, he will not be able to predict the outcome of his claim. Actually, by the time the contract is signed, the parties might not know for sure which liability systems will govern it. This could happen, for instance, when the mode of transport to be used is not yet known. In this case, the parties will not be able to measure the risk they will be exposed to. That is why the system adopted by the RR is confusing and

¹²⁷ As far as these relevant conventions are in force at the time the Rotterdam Rules enter into force.

¹²⁸ The conflicts between the RR with other conventions is excluded from the scope of this work.

¹²⁹ HOEKS, “Multimodal Transport Law”, p. 340.

¹³⁰ TETLEY, “A Critique of and the Canadian Response to the Rules”, p. 291.

not at all practical for the parties involved. It would have been better if the convention governed all issues related to all stages of the carriage.

5 Limitation of Liability

A limitation of carrier's liability is currently considered an essential element in a transport convention. It benefits both carrier and cargo owner by ensuring predictability and certainty, especially regarding container carriage. Without being entitled to limit its liability, the carrier would be liable for all loss or damage even in cases where he does not have knowledge of the content of a container. Therefore, a limitation of liability allows for the costs of both shipper and carrier to be reduced although full compensation for high-level losses are not possible.¹³¹

Although all carriage regimes seem to adhere to certain basic liability concepts,¹³² there are great differences in compensation to be paid between the liability regimes, as can be observed in the following table.

SEA			INLAND WATERWAY	ROAD	RAIL	AIR
Hague Rules	Hague-Visby Rules	Hamburg Rules	CMNI	CMR	COTIF-CIM	Warsaw Convention/ Montreal Convention
£100/pkg	2SDR/kg or 666,67 SDR/pkg	2,5 SDR/kg or 835 SDR/pkg	2 SDR/kg or 666,67 SDR/pkg	8,33 SDR/kg	17 SDR/kg	17 SDR/kg

¹³³Table showing the limits of liability currently in vigour in the international unimodal conventions.

As shown in the table above, the limitations in relation to land and air transport are generally expressed per kilo and they are much higher than the equivalent maritime limits¹³⁴, which also include package limitations.

¹³¹ GIRVIN, "The Right of the Carrier to Exclude and Limit Liability", p. 129.

¹³² Hoeks gives as example of basic concepts the carrier's automatic liability for failure to deliver the results he has contracted, unless this failure was due to force majeure, and the inability to invoke the available liability limit when it is proved that the carrier has wilfully misconducted himself or has caused the damage or loss of the cargo with intent. Cf. "Multimodal Contract Law", p. 11.

¹³³ Cf. Article IV, s.5 of the Hague Rules; Article IV, s.5(a) of the Hague-Visby Rules; Article 6 of the Hamburg Rules; Article 20 of the CMNI, which actually stipulates that in case goods are carried in containers, the limit of 666.67SDR/pkg shall be replaced by 1,500 SDR for the container without the goods it contains and, in addition, 25,000 SDR/pkg for the goods which are in the container; Article 23, s.3 of the CMR; Article 40 of the CIM Convention; Article 22, s. 3 of the Montreal Convention.

¹³⁴ As per the Hague Rules, which have an even larger group of adherents than the HVR, it is important to notice that they are not per se implemented as an instrument of international law. In its protocol of signature, the parties have the possibility to implement the

This variety of compensation limits is due to the fact that carriage law has developed per mode of transport, nationally as well as internationally, each evolving in its own legal form.¹³⁵ Also, it must be recognized that each convention contains provisions that are particularly directed to the conditions of that type of transport. Although much higher limits are found in land and air conventions, like the Montreal Convention, it must also be acknowledged that they contain provisions rendering their limitation on liability incapable of being exceeded, even in the case of intentional acts or theft. Also, usually the freight payable for the mode of transport covered by these other transport conventions is usually much higher than under the maritime transport conventions.¹³⁶

In relation to the sea conventions, although the limitation amounts in the Hamburg Rules are higher than the HVR's¹³⁷, the conventions' dual approach of combining a container clause with a high standard of breaking limitation is basically the same.

In the field of multimodal regulation, the limits of liability set out in the 1980 MT Convention are 2.75 SDR per kg or 920 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of liability of 8.33 per kg has been adopted.¹³⁸ Actually, it can be said that the 1980 MT Convention adopted a network limitation regime, for it contained three limitation regimes. For unlocalised damage, the applicable regime would depend on whether or not the contract involved carriage by sea or by inland waterways. If it does involve such carriage, art. 18(1) provided for a limitation of 920 SDRs per package or 2.75 SDRs per kg of gross weight of the goods lost or damaged. If such carriage is not involved, article 18(3) applied a limitation figure of 8.33

convention either by giving it the force of law or by including it in their national legislation, adapting it to suit national needs. Since many countries chose this option, the HR lacked the possibility of bringing much harmonization, especially in relation to carrier liability limit. See Hoeks, *Multimodal Transport Law*, p. 350. It is possible to see the various package and kilo limitations currently in force at www.mcgill.ca.

¹³⁵ HOEKS, "Multimodal Contract Law", p. 11.

¹³⁶ UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)A/CN.9/642., p. 35.

¹³⁷ See HVR, art. 4(5)(a).

¹³⁸ UNCTAD, "Multimodal Transport: the feasibility of an international legal instrument", table 1, p. 18. UNCTAD Document UNCTAD/SDTE/TLB/2003/1.

SDRs per kg of gross weight of the goods lost or damaged. This is actually the limitation figure adopted by CMR, but is lower than the figure of 17 SDRs per kg adopted by the Warsaw Convention for air carriage and by COTIF/CIM for rail carriage.

If the damage could be localized, art 19 of the 1980 MT Convention provided for the application of the limitation regime contained in the `applicable international convention or mandatory national law`, provided that contained higher limitation figures than those contained in art. 18. Therefore, art.19 would have no application where the damage could be shown to have occurred on a sea leg where the HVR figures are lower than those in art. 18, but would apply where the damage could be shown to have occurred on an air or rail leg.¹³⁹

The limits of liability set out in the UNCTAD/ICC Rules correspond to those in the Hague-Visby Rules (as amended in 1979), but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit is adopted.

The limits proposed by the Rotterdam Rules are 3 SDR/kg or 875 SDR per package (whichever is higher),¹⁴⁰ which are higher than the limits currently in vigour for the ocean conventions. The Rotterdam Rules allows carriers to adopt higher limits if they wish (art. 59.1), but any lowering of the Convention limits is void.¹⁴¹

This limit represents an increase of approximately 33% and 50% from the 666 SDR/pkg or 2 SDR/kg present in the HVR. Even when considering the standpoint of states members to the Hamburg Rules, the increase has been 4.8% and 20% , respectively.¹⁴² Also, as observed by Tetley, in case the liability limits of the RR apply to damage caused during road carriage, the increase in liability of the carrier will be unreasonably high compared to the existing regime in Canada, for example. As a

¹³⁹ BAUGHEN, "Shipping Law", p. 185.

¹⁴⁰ Article 59 of the RR. This way, when a package or unit weighs in excess of 333 kilograms there is advantage in adopting the weight limitation. Cf. THOMAS, "An analysis of the liability regime of carriers and maritime performing parties", p. 75.

¹⁴¹ Art. 79.1(b).

¹⁴² UNCTAD report of working group III 12th session - UN doc A/CN.9/642 (31-40 Oct 2007) and to a/cn.9/645 (14-25 jan 2008), available at: http://www.uncitral.org/uncitral/commission/working_groups/3Transport.html.

consequence, the contracting carrier will need to insure a high liability shortfall to cover what he is liable for and how much he could recover from any subcontracting party.¹⁴³

During the Rotterdam negotiations, it was pointed out that the limits of liability in the context of a multimodal transport were noticeably higher than the maritime limits established in the Hague and Hague-Visby Rules, for multimodal carriers were subject to the higher land and air limitations. And since the Rotterdam Rules were to have a maritime plus scope of application, it should consider these higher limits. The increase of the average value of cargo and the depreciation of the limitation amount of the existing maritime conventions caused by inflation were also put as reasons. Clearly, the greater benefits are for cargo insurers, for whom these higher limits of liability, in relation to goods of value that exceeds the limits adopted by the HVR, will allow a recovery of 50 % more on the basis of the kilogramme limitation today possible under HVR, or 20% more than that under the Hamburg rules.¹⁴⁴

In addition, it should also be recognized that shippers who declare high value cargo for shipment always have the option of increasing the carrier's liability by declaring the actual value of cargo. In fact, shippers of high value cargo have the alternative to declare these valuable cargo and then pay an increased *ad valorem* freight rate or to not declare it and acquire additional insurance to supplement the amounts not covered by the carrier. So the argument that high value shippers will not be covered by lower limitation of liability is weak.¹⁴⁵

In addition, the right to limit liability does not exist when the loss or delay is attributable to the personal act or omission of the person claiming this right done with the intent to cause such loss or delay or recklessly and with the knowledge that such loss or delay would probably result (art. 61).

Among the critics of the liability increases are, obviously, P&I Clubs, which were always contrary to any increase in limitation amounts

¹⁴³ TETLEY, "A Critique of and the Canadian Response to the Rules", p. 291.

¹⁴⁴ BERLINGIERI, "General Introduction", p. 23.

¹⁴⁵ See: UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)A/CN.9/642, p. 32.

established by the HVR.¹⁴⁶ In fact, the limits provided by the Hague-Visby Rules can be considered much higher in practice (therefore satisfactory) than the limits set by the other unimodal conventions, given the volume of container traffic and the “per package” liability limit it proposes. It should be noted that the liability limits for recovery in the CMR, Montreal and COTIF-CIM conventions are based only on weight. Although the per kilogram limitation level of such conventions is much higher than the Hague-Visby level (or even those of the Hamburg Rules), in practice, the level of recovery is much greater under the conventions that allow for a per package calculation of the limitation level. Statistics show that, because of the typically higher value of cargo carried by air, the liability limits established in the Montreal Convention only covered about 60 per cent of the claims for loss or damage to air cargo. In relation to international road transport, the portion of cargo claims covered by the liability limits set forth in the CMR are said to be even less than 60 per cent.¹⁴⁷

It can be said that in respect to liability limits, the Rotterdam Rules would change to a great extent the existing dynamics between the shipper, carrier, performing parties and insurers.

5.1 Package limitation

In order to calculate the liability amount, the definition of package or shipping unit is important.¹⁴⁸ Prior to the widespread containerisation, most goods were shipped in a crate or a large wooden box that counted as one package. After the modern containerisation, the per package limitation level started to be based on the number of packages inside the container, meaning that the notion of “package” started to apply in relation to the individual packages inside the container and not to the container itself. A practical consequence of this was an increase in the amounts recoverable from the carrier, as compared to the per kilogram limitation level or pre-container per

¹⁴⁶ BERLINGIERI, “General Introduction”, p. 23.

¹⁴⁷ See: UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)A/CN.9/642, p. 32.

¹⁴⁸ See CARR, “International Trade Law”, p. 259-260.

package limitation.¹⁴⁹ Since both HR/HVR and Hamburg Rules are conventions that predated the advent of modern container transport, the most reasonable would be for any new convention based on container transport to have lower limits of liability.

The package limitation was first introduced by the HVR, by the so called “container clause”, in order to clarify the identification of package when goods are shipped in containers.¹⁵⁰ Under the Hamburg Rules, when packages are sent in containers or pallets, the number of packages in this transport article must be enumerated in the bill of lading (or contract of carriage). If this is not done, the container is treated as a shipping unit (art.6(2)(a)).¹⁵¹ This is the same method of calculation of liability adopted by the Rotterdam Rules. Since most cargo today are shipped in containers, this rule is of great importance, and it also relates to the way transport documents are completed and issued.¹⁵²

5.2 Limitation of liability due to delay

Liability for delay in delivery is not specifically covered by the HVR.¹⁵³ However, with the exception of the Hague and Hague-Visby Rules in the field of sea-carriage, all unimodal transport conventions for the carriage of goods by land, sea, air and inland waterways, as well as the 1980 MT Convention contain rules to regulate this issue. In the Hamburg Rules, the liability of the carrier where there is a delay in delivery is two and a half times the freight payable for the goods (art. 5 (1-2)). But this amount must not be greater than the total freight payable under the contract (article

¹⁴⁹ UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)A/CN.9/642, p. 34.

¹⁵⁰ See art. 4(5)(c) of the HVR, which reads: ” Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit”.

¹⁵¹ Carr, “International Trade Law”, p. 302.

¹⁵² THOMAS, “An analysis of the liability regime of carriers and maritime performing parties”, p. 75.

¹⁵³ Although some jurisdictions tend to read art. IV(1) widely. Reference should be made to *Anglo-Saxon v Adamastos Shipping Co* [1957] 1 Lloyd’s Rep 79. See CARR, “International Trade Law”, p. 285.

6(1)(b)).¹⁵⁴ The 1980 MT Convention also referred to limitation of liability in case of delays (art. 18(4)), adopting the same amounts as the Hamburg Rules. This same scheme is adopted by the Rotterdam Rules, in its art. 60.

Delay is defined by the RR as occurring “when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed”(art. 21).

This is a positive approach, since it must be recognized that, in the modern global environment, delay in delivery has become of great concern in connection with effective supply chain management.¹⁵⁵ Actually, by covering damages resulting from delay in delivery, the RR ends an international debate as to what extent these type of damages were covered by the HVR and respective national legislation or whether national provided a separate liability rule.¹⁵⁶ According to the RR, the cargo claimant has to prove that delay occurred during the carrier’s period of responsibility.

On the other hand, the Convention is deficient in relation to how the calculation of compensation for damages resulting from delay should be proved by claimants. Thus, although it is relatively easy to prove carrier liability when delay caused damage or loss, when delay has caused only pure economic loss, the position has always been more debatable.¹⁵⁷ The Convention actually leaves it to the Courts to decide to what extent carriers will be liable for all possible financial consequences of a particular delay. This is an undesirable solution that provides no certainty as to a final judicial decision.¹⁵⁸

¹⁵⁴ CARR, “International Trade Law”, p. 301.

¹⁵⁵ UNCTAD, UNCTAD/SDTE/TLB/2003/1, Multimodal Transport: the feasibility of an international legal instrument, table 1, p.16.

¹⁵⁶ VON ZIEGLER, “Liability of the Carrier for Loss, Damage or Delay”, p. 99.

¹⁵⁷ NEAME, “What Impact will the Rotterdam Rules have on Shipowners?”, available at: <http://www.hfw.com/publications>.

¹⁵⁸ According to Craig Neame, when in doubt, courts will most probably rule in favour of claimants, being less generous to carriers trying to scape liability. See: NEAME, “What Impact will the Rotterdam Rules have on Shipowners?”, available at: <http://www.hfw.com/publications>.

5.3 Claims subject to limitation

While the text of the HR provided in article IV.5(a) that the limitation would be available in relation to “any loss or damage to or in connection with the goods”, and Hamburg Rules provided for a limitation in the event of “loss of or damage to the goods”, the RR expressly makes limitation available to the carrier in case of “breaches of its obligations under this Convention” (art. 59.1). This wording allows for greater clarity and in fact prevents an old discussion as to whether or not the limitation should refer to cases of misdelivery and misinformation regarding the goods.¹⁵⁹ The clear consequence of this provision is that the limitation of liability available to the carrier will cover more claims.

¹⁵⁹ GIRVIN, “The Right of the Carrier to Exclude and Limit Liability”, p. 130.

6 Sub-contracting Parties under the Rotterdam Rules

A carrier, especially when it is a MTO, more often than not utilizes the service of several subcontractors in the performance of its obligation under his contract with the shipper. Such sub-contractors, or sub-carriers may perform the whole or parts of the multimodal carriage, and usually include unimodal carriers (like inland hauliers), feeders, terminal operators, warehousemen and stevedores.

These sub-carriers only have a contractual relationship directly with the MTO¹⁶⁰, thus not being part of the multimodal carriage contract between MTO and shipper. Since under the rule of privity of contract, only a party to the contract can rely on its terms, the cargo claimant cannot sue a sub-carrier under the multimodal carriage contract. The sub-carrier can only be sued by the cargo claimant in tort.

As in the approach made by the HVR(art. I(a)) and the Hamburg Rules(art. 1.1), in the RR the carrier is the contractual carrier.

In the HR there are no provisions relating to the consequences of performance of the whole (or a part of the carriage) by a sub-carrier. As a consequence, the cargo claimant may sue the sub-carrier only in tort. The same happens with the HVR. Article *4bis* rule 2 of the HVR provides that the defences and limits of liability provided for in the Rules shall extend to a servant or agent of the carrier as long as the servant or agent is not an independent contractor. Since this is the case of sub-carriers, such article

¹⁶⁰ The action against the party will be in contract if the carrier is considered to have acted for the account of the shipper or consignee. And it will be in tort if that is not the case. Berlingieri highlights the fact that there can be great disparity or some uncertainty as to the legal nature of the contract between the MTO and such subcontractors. At present, it varies according to each jurisdiction and sometimes there is also an uncertainty as to the legal nature of this contract, what gives rise to conflicting court decisions. Therefore, if the shipper or consignee brings an action directly against any such subcontractors, it is possible that even in the same country the action will be treated as an action in contract, on the grounds that the carrier has entered into the contract for the account of the shipper or consignee or as an action in tort. See: BERLINGIERI, “General Introduction”, p. 15.

4bis has little application.¹⁶¹ The Warsaw Convention also applies only to contractual carriers, as well as the CMR and COTIF-CIM.

Faced with this lack of mandatory provision, the industry has introduced Himalaya clauses in its contractual provisions, aiming at extending the contractual carrier's benefits to entities that are not party to the contract of carriage. The Himalaya clauses, however, are only a contractual arrangement instead of a legal provision. That is why the more recent international conventions, in contrast, extend their regulation to sub-carriers with no direct contractual relationship with the shipper. This is the case of the CMNI, the Montreal Convention and the Hamburg Rules. The latter¹⁶², distinguished between carrier and actual carrier in its art. 1(2) while also stating, in its art. 10(2) that all its provisions governing responsibilities of the carrier "also apply to the responsibility of the actual carrier for the carriage performed by him" and of the latter's servants and agents. The idea was to allow the claimant to sue both the contractual carrier or the actual carrier who caused the damage.

Acknowledging this reality, in the RR the concept of actual carrier has been expanded as the performing party (art. 1(6)). Since the RR have a multimodal reach, it needed to embrace parties beyond carriers and thus, compared with "actual carrier" under Hamburg Rules (i.e., an ocean carrier who actually carries the goods), the "performing party" of the RR covers a much broader range of parties involved in a carriage of goods.

The Convention, thus, created two categories of sub-carriers, that it called "performing parties". It distinguishes between a performing party itself and a maritime performing party. This distinction will be analysed fully in the next sub-chapters. It is important, however, to first note that the RR have created these two categories distinguishable based on where they perform their services: if it is in the port area and/or during the voyage between the ports of loading and discharge, or if it performs services outside of the port area or sea voyage. If the sub-contractor performs services inside the ports or between the ports, the liability provisions of the RR will apply

¹⁶¹ BERLINGIERI, "General Introduction", p. 14.

¹⁶² By copying aviation *Guadalajara* aviation convention 1961.

to it. Nevertheless, if it performs services outside the port area, provisions of other international unimodal conventions or national law will apply.

This is not present in either in the HR, HVR or Hamburg Rules. The HR and HVR are not applicable to port or after port. Although the Hamburg Rules are applicable in port area (but not outside), in port, its liability provisions are only applicable in relation to the carrier by sea, and not any other possible sub-contractors.

In addition, the Rotterdam Rules, through its art. 4 (1)¹⁶³, fully extends the scope of all its provisions relating to the carrier's defences and limits of liability to maritime performing parties, the master, crew, and other persons performing services on board the ship – who may not be servants or agents of the carrier¹⁶⁴ or sub-carrier, as is the case when the carrier or sub-carrier is a time charter- and to employees of the carrier or of a maritime performing party.

6.1 Performing parties

As performing parties, the Convention identifies a number of parties who participate in the carriage of goods wholly or partly by sea, but who are not incorporated into its liability regime and on whom no duties are directly imposed by its text. They may perform significant services and in respect to them the carrier (or the maritime performing party, according to art. 19(3)) is vicariously responsible. Therefore, the obligations owned by them should be determined by reference to the applicable law and not under the new convention.¹⁶⁵

¹⁶³ Article 4.1 provides the following: “ Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against: (a) The carrier or a maritime performing party; (b) The master, crew or any other person that performs services on board the ship; or (c) Employees of the carrier or a maritime performing party.”

¹⁶⁴ The distinction made in art. 19 between the master and crew of the ship and the employees of the carrier is based on the fact that master and crew may not be employees of the carrier when the carrier is not the operator of the ship.

¹⁶⁵ THOMAS, “An Analysis of the Liability Regime of Carriers and Maritime Performing Parties”, p. 61.

This is the position of the master and crew of a carrying vessel (art. 18(b)), employees of carriers (art. 18 (c)) and agents and independent contractors who perform any of the carriers or maritime party's obligations under the contract of carriage acting "either directly or indirectly, at the carrier's request or under the carrier's supervision or control" (art. 1(6)). These performing parties are only to be sued directly by the cargo claimant based on obligations arising outside the convention (that is, based in tort).

Thus, the case with performing parties under the RR is basically the same currently in vigour in the other carriage conventions: the cargo claimants should bring their claims against their contractual counterparty, for instance, the MTO, even when the loss, damage or delay was caused by the subcontractor. The claimant can only claim directly against a subcontractor in tort. The MTO, when sued on the basis of his contract with the cargo claimant, is then entitled to seek an indemnity from his subcontractor, but in accordance with the terms of their own agreement or local law, which can provide for a different liability scheme.

In relation to subcontracted inland hauliers, they will usually be considered performing parties, thus being usually excluded from a direct action from the cargo claimant.¹⁶⁶ Thus, it can be said that the Rotterdam Rules do not directly substantially affect inland carriers. These might only be affected by any applicable national law or international inland convention. Therefore, only actions based on tort can be instituted against the inland carrier, unless any national law or applicable convention allows for an action based on the subcontract.¹⁶⁷

Actually, during the negotiation of the RR, it was proposed that the inland carriers should be subject to the same rules as the maritime performing carriers (which, under the RR, will be subject to the same liability regime as the carrier, as will be shown later), but this was abandoned as there was much opposition from railroad and road carriers.

¹⁶⁶ They will only be considered maritime performing parties when they perform their services 'exclusively' within the terminal area, as will be shown later, and this is not so common.

¹⁶⁷ As highlighted by Alexander van der Ziel, sometimes the claimant is also the consignee under the subcontract and, in these cases, the law might recognise his contractual rights against the subcarrier. Cf. "Multimodal Aspect of the Rotterdam Rules", p. 991.

This is so, even though in a logical and theoretical level, these carriers could be liable in the same way as the maritime performing carriers.¹⁶⁸ Therefore, this provision represents a great compromise and it is one of the pragmatic solutions encountered by the drafters.

In face of this relationship of the MTO with the performing carrier, the effects of the liability provisions of the RR are of great importance. Most of the time, there could be substantial disparity between what MTOs will have to pay the cargo claimant under the RR and what they can recover from the performing parties. Taking inland hauliers as an example (when they are not acting as maritime performing party), usually the standard contracts between them and MTOs provide for lower liability limits. It would be very demanding for MTOs to renegotiate contracts with hauliers, for they will not easily agree to be subject to the Rotterdam higher liability limits.

In this sense, the RR have created a major concern in relation to shortfalls in the MTOs possibility of redress. As shown in the previous chapters, the increased limitation of liability adopted by the RR might burden the MTO without it being able to seek redress accordingly from the performing party, with which it has a separate contract.

6.2 Maritime performing parties

As seen, the convention does not present much change in the fact that the contracting multimodal carrier is responsible for the performance of all sub-carriers. Nevertheless, among the new definitions introduced by the RR, one of major importance is the maritime performing party. This is a new legal entity created by the Rules and defined by article 1 (7). This new category includes all carrier's sub-contractors who exclusively carry out their services between the time that the goods arrive at the port of loading and the time they leave the port of discharge. This will include, among others, shipowners who charter their vessels to ship operators who issue operator bills, operators providing space to other operators under

¹⁶⁸ STURLEY, "Transport Law for the Twenty-first Century", p. 25.

alliances/consortia/slots, feeder vessel operators, terminal operators, stevedoring companies and inland carriers such as road or rail hauliers (although in a much lesser scale).

Article 19 of the RR, establish the liabilities of such maritime performing parties, stating the following:

Article 19 Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

- (a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and
- (b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

Therefore, a maritime performing party is subject to the same obligations as carriers, as long as the conditions of paragraph 1 of art. 19 are complied with. Attention should be drawn to paragraph 2 of art. 19, according to which, although carriers may assume obligations greater than

those provided for in the Convention¹⁶⁹, a maritime performing party will only be bound by these additional obligations if he expressly agrees to it. In addition, like the carrier, a maritime performing party is vicariously responsible for the acts and omissions of any person to whom he entrusts the performance of his obligations under the contract of carriage (art. 19(3)).

Following this provision, art. 20 expressly introduces the maritime performing party's direct and several liability with the carrier under the Rotterdam Rules. According to these provisions, a shipper is entitled to sue the maritime performing party directly (differently from performing parties). In this case, this type of subcarrier, can benefit from the rights and remedies provided in relation to the contracting carrier.

This is a major change, since, as shown, currently the parties defined by the RR as maritime performing parties are treated by other international carriage conventions as performing parties (as defined by the RR), not subject to direct claims based on the multimodal carriage contract, even when the loss, damage or delay was caused by the sub-contractor.

However, the provisions designed by the RR allow the claimant to directly sue the subcontractor when he is a maritime performing party. This will cause first time seen situations like, for instance, cargo claimants suing port terminal operators and feeder vessel owners based on a contract that they are not directly part of and that they did not negotiate. A general identifiable concern is that cargo interests that bring a claim against a maritime performing party have no contractual relationship with them. The consequence of this is that the claimant will have no interest in amicably settling the case faster, since there is no concern in retaining a nice commercial relationship. This might lead to time-consuming and more expensive claims.

In addition, basically, these new maritime performing parties created by the RR are going to be subject to an increase in risk, what ultimately means that they will have to pay higher insurance premiums.

¹⁶⁹ See art. 79(1) of the RR. Similar provisions can be found in the HVR (art. III(8)) and Hamburg Rules (art. 23.1).

Specifically in relation to port terminal operators, the consequence is that they will have to deal with a greater number of claims. Port terminal operators, which have become extremely important for the logistics of marine transport with the development of container trade, will be categorized as maritime performing parties¹⁷⁰. The motivation of the Rotterdam Rules in relation to port terminal operators was that they would benefit from not having to rely on Himalaya clauses, thus being subject directly to a mandatory Himalaya-type protection provided for in the Convention.¹⁷¹ However, at the moment, terminals usually have to handle only a small number of claims from shipping lines, and they are not ready to handle a large number of claims from individual cargo claimants.¹⁷² Also, the terminals' current liability exposure under their agreements with the shipping lines are far less than what they will be subject to compared to the proposed Rotterdam liability scheme. Therefore, terminals are likely to end up with worse claims, what might impact their insurance coverage costs. As a consequence, most of these terminals will end up having to pass on the extra cost of supporting larger claims. This way, MTOs will either have to pay increasing operational terminal costs or contractually agree that it will handle these claims or they will even end up indemnifying terminals in respect of any extra liability incurred.¹⁷³

Another identifiable maritime performing party that is of great importance are feeder vessel operators. At present, most feeder service providers contract with main liner shipping companies (who act as MTOs) on the basis of a standard agreement that incorporates the feeder vessel operator's standard bill of lading defining its liability to the main line

¹⁷⁰ In fact, with the adoption of the RR, all port enterprises that work inside a port will be considered maritime performing parties, and thus subject to a uniform regime.

¹⁷¹ CHUAH, "Impact of the Rotterdam Rules on the Himalaya Clause", p.233.

¹⁷² Diana Whitney, legal counsel for Hutchison Ports UK, commented that port terminal operators have long been subject to the same situation according to which they are subject to very few claims coming directly from shippers. She expressed concern that the major ports will be targeted. In: NEAME, Craig, "Terminal Operators Face "Front Line" in Rotterdam Rules", Feb 2010, available at: <http://www.hfw.com/publications>.

¹⁷³ NEAME, "What Impact will the Rotterdam Rules have on Shipowners?", available at: <http://www.hfw.com/publications>.

operator.¹⁷⁴ Usually these agreements incorporate the provisions of the Hague or Hague-Visby Rules in respect to the liability of the subcontractor to the principal carrier. In addition, they usually stipulate that the MTO will deal with all claims brought by cargo interests and then pass on the claims to the performing carrier on the terms of their own agreement.¹⁷⁵ If this scenario remains, while the Rotterdam Rules (with their higher liability limits) will govern the maritime performing party's liability to the claimant, the feeder's agreement with the MTO will govern his recovery. This way, if the MTO handles the claim, there will be a shortfall in relation to what he can recover from the feeder, based on their agreement. Obviously, in case the RR are adopted, a revision of these MTO agreements with feeder vessels will be needed (and this is not easy to achieve, for feeders will not easily accept handling claims based on higher liability limits).

As mentioned, sub-carriers as inland hauliers can also be considered maritime performing parties. When the RR imposes on them (as maritime performing carriers) the same responsibilities and the same liability regime as of the MTO, this creates clear benefits for the shipper and consignee. This is because, if they wish to claim directly against the sub-carrier, they will know which liability regime will be applicable. This is also beneficial for the MTO since, if it needs to seek redress from these maritime performing parties, the liability regime applicable would be the same as that applicable to it, thus allowing full compensation.

In order to make further analysis of the positive or beneficial effects for sub-carriers (especially road or rail hauliers) resulting from the application of the RR when they are considered maritime performing parties, it is necessary to compare the provisions of RR that would apply to them with those that would otherwise apply, in particular in regard to basis

¹⁷⁴ The same can be said about alliance/consortia agreements and vessel sharing agreements between large liner operators, who also define the liability of the performing carrier to the carrier whose boxes it is carrying. Cf. NEAME, "What Impact will the Rotterdam Rules have on Shipowners?", available at: <http://www.hfw.com/publications>.

¹⁷⁵ NEAME, "What Impact will the Rotterdam Rules have on Shipowners?", available at: <http://www.hfw.com/publications>.

of liability of the carrier and limitation of its liability. This will be done at some scale on the next chapter, under case analysis.

Additionally, it should be noted that, although the Convention allows the carrier to increase its limits of liability in favour of shippers, a maritime performing party will only be bound by these higher limits (or any other obligations assumed by the carrier over those considered in the Convention), unless it expressly agrees to accept these terms (art. 19(2)).

7 Case Analysis

To illustrate how the Rotterdam Rules will work, it is useful to work with possible case scenarios, establishing what liability scheme will be applicable when carriage is made between countries that would supposedly have adopted the Convention, and also considering carriage among States not party to the Convention. The aim is to show and analyse how the Rotterdam Rules will relate to the international unimodal conventions, how this would affect the liability of the MTO and if the Convention in fact will be bringing some positive uniformity, as proposed.

Hypothetical case 1:

Imagine that Sweden and Denmark adopt the Rotterdam Rules. A possible situation would be carriage from Stockholm to Copenhagen, considering that the Swedish inland leg would take place by road, and the crossing of the Öresund by sea. In this case, both countries are party to the CMR convention. The new regime will have the following effects: the inland stretch in Sweden remains uncovered by any international convention since this road leg is carried out in the same country. Therefore the Rotterdam Rules regime would apply to the sea leg and for the road stretch as well. In case of localised damage in the Swedish leg, the Rotterdam Rules provisions on liability would also be applicable.

Now, if the carriage was to be made by road only (with the crossing of the channel by bridge), the CMR provisions on liability would have applied to the whole journey, thus imposing a limit of liability of 8,33 SDR/kg.

Considering the first scenario in which there is first a carriage by road in Sweden and then a carriage by sea to Denmark, if there is loss or damage localised in the road leg in Sweden, while the MTO would be liable in respect to the cargo claimant based on the RR liability amounts (3 SDR/kg or 875 SDR per package), the MTO will be able to receive compensation from the road haulier who performed the carriage in Sweden

on the basis of the Swedish Inland Carriage of Goods by Road Act, which provides for a limit of compensation of SEK 150 per kilogram, what is equal to approximately 13.6 SDR,¹⁷⁶ thus much higher than the limit the MTO will be subject to in relation to the cargo claimant. This is a comfortable position for the MTO, although, in this case, the adoption of the RR does not show any promotion of uniformity in liability rules.

In this case, what should also be stressed is the importance that the contract expressly provides for the mode of transport to be applied. One of the consequences of the RR is that there will be the need for the contract to state the mode of transport that will be utilised, if the parties wish to know what liability rules will regulate their contract. If the contract only stipulates that the goods must be carried from Sweden to Denmark, leaving the carrier free to choose the best mode of transport, the shipper will not be able to know what rules, especially the ones relating to liability, will apply to the contract. The carrier will have the freedom to choose the best option for him.

In relation to limitation of carrier's liability for the road part in Sweden, the applicable limitation will vary from 8,33 SDRs per kg (which is the CMR limit), to 3 SDRs per kg or 857 SDRs per unit, whichever is the higher (according to the Rotterdam Rules). There is no logical reason for this variation and these different possibilities illustrate the weaknesses of the door-to-door approach in the Rotterdam Rules. Secondly, it is obvious that this outcome actually worsens uniformity, instead of promoting it, for in the above example the Rotterdam Rules add yet another regime for the inland transport (without removing any), even in a case which would involve States parties to it.

Hypothetical case 2:

Let's consider carriage from Houston to Berlin through the port of Rotterdam. The carriage from Houston to Rotterdam is performed by sea and the on-carriage to Berlin by road haulage. Damage occurs between

¹⁷⁶ TIBERG, "Transport Law", p. 599-602. Available at: <http://www.ielaws.com/modeltransweden.pdf>.

Rotterdam and Berlin. Here, if the shipper had made a separate and direct contract with the carrier in respect of the carriage from Rotterdam to Berlin, the CMR would have applied to the damage, since Germany and the Netherlands are party to the CMR (only one need to be, in fact) and the damage occurred during the period of this hypothetical contract.

An interesting possibility would be for the carrier's bill of lading (BL) to refer to Houston (U.S.) jurisdiction and Texas (U.S.) law to apply and that there is localised damage in the road leg between Rotterdam and Berlin. Considering that the U.S. would be a party to the RR but it is not party to CMR, one might find it awkward that a Houston court would apply the CMR. Although this might sound weird, it is the intention of art. 26 of the RR¹⁷⁷, where it incorporates by reference the liability provisions of other international transport conventions.¹⁷⁸

Currently, in this case the applicable liability regime for the sea leg would be the HR, since the US is a party to it. For the inland leg between Rotterdam and Berlin, as said, the CMR applies. There is no mandatory convention that applies where loss is unlocalised. Considering this, the adoption of the RR is beneficial in promoting uniformity.

Hypothetical case 3:

Imagine a multimodal contract for carriage from Berlin (Germany) to Boston (U.S.), where the goods are carried by road from Berlin to Rotterdam (The Netherlands), and by ship from Rotterdam to New York (U.S.) and by rail from New York to Boston. Assuming the United States is a contracting State to the RR, while Germany and The Netherlands are not, the question as to the applicable liability provisions would depend upon where the goods were damaged. Since the place of delivery is situated in a contracting state, the RR applies to the contract of carriage. Its liability

¹⁷⁷ Here Van der Ziel highlights that earlier drafts of art. 26 actually provided that the article would apply "regardless of the national law otherwise applicable to the contract of carriage". See Report of the 19th Session A/CN.9/621, para 192.

¹⁷⁸ As previously discussed, the Rotterdam Rules will apply to any inland legs except where a unimodal international convention applies compulsorily. For example, if a container is discharged at Hamburg and carried by road to Berlin, the Rotterdam Rules will apply to the carriage from Hamburg to Berlin because CMR does not govern domestic movements.

provisions will be applicable to loss, damage, or delay occurred during the sea leg and also in case of unlocalised damage.

According to the RR, the cargo claimant can sue the MTO under the Convention regardless of where the goods are damaged. However, if it is proved that the goods were damaged in the sea leg, the cargo claimant can also sue the ocean carrier who carried the goods from Rotterdam to New York, for an ocean carrier who delivers goods in the port of a contracting State is liable under the RR as a maritime-performing party. Here it should also be noted that stevedores or terminal operators who worked at the port of New York can also be liable under the Convention if the goods were damaged during their custody, but those who worked at Rotterdam cannot. This is because, as previously discussed, the maritime performing party is subject to the liability regime of the RR only when it “received the goods for carriage in a contracting state, or delivered them in a contracting state, or performed its activities with respect to the goods in a port in a contracting state.”¹⁷⁹. Therefore, a stevedore or a terminal operator who provides services in the port of a non-contracting State is not regulated under the Convention. It becomes clear that the intention of the RR is to avoid interference with activities that have no geographic connection with the contracting State.

Now, in the same case, let’s consider that the goods were damaged between Berlin and Rotterdam. In this case, there is a mandatory international carriage convention, the CMR (since both German and The Netherlands are party to it), whose liability provisions would apply. The road carrier would not be liable to the cargo claimant under the Convention because it is not a maritime-performing party. The trucker would only be liable to the MTO under the CMR. As it was shown in chapter 6, the CMR does not allow the cargo claimant to (directly) sue the sub-carrier, with whom he has no contractual relationship. The trucker can only be sued by the cargo claimant in tort.

Finally, considering that the cargo is damaged between New York and Boston, the normal liability provisions of the RR would apply, since

¹⁷⁹ Art. 19.1(a) of the RR.

this inland leg is national and only covered by a national law. If it had not been subject to a multimodal contract, this railroad leg would have been governed by national U.S. law, more specifically, the Carmack Amendment¹⁸⁰ that regulates domestic railroad transportation.

In this case, in order to verify if there would be any shortfall in relation to what the MTO can recover from the rail haulier, it actually is necessary to analyze what are the liability limits provided by the US national law. As shown in chapter 6, the MTO, when sued on the basis of his multimodal carriage contract with the cargo claimant, is entitled to seek an indemnity from his subcontractor. But this recovery is to be made in accordance with the terms of their own agreement or local law. When the applicable regulation (either local law or unimodal transport convention), provides for a higher limit of liability than that of the RR, the MTO faces no shortfall problem. However, when the liability regime applicable to his contract with the performing carrier provides for lower limits of liability, the MTO will not be able to recover the whole amount paid in damages to the cargo claimant. This would probably not be the case in hypothetical case 3 (the same with case 2, based on the high limit of liability of the CMR), for the US Carmack Amendment in fact subjects a carrier to strict liability for actual loss or injury to property without subjecting him to any mandatory limit of liability.¹⁸¹

Hypothetical case 4:

Multimodal contract of carriage from Beijing (China) to London (UK), with road carriage from Beijing to Shanghai (China), sea carriage from Shanghai to Felixstowe (UK), and road carriage from Felixstowe to London.

¹⁸⁰ The Carmack Amendment to the Interstate Commerce Act of 1887 governs certain rail and motor transportation by common carriers within the United States. See: <http://www.subrogationrecoverylawblog.com/tags/carmack-amendment/>.

¹⁸¹ According to the Carmack Amendment, a carrier or freight forwarder may limit this strict liability only by bargaining with the shipper for alternative contract terms. See: EDRICH, "Regulation of Third Party Surface Transportation", p. 20. Available at: http://law.du.edu/pdfdocuments/v34no3_edrich.pdf.

First, let's consider that China is a party to the RR and the UK is not. Being a multimodal contract with a sea leg, the RR would apply.

As discussed, the cargo claimant has a contractual relation only with the MTO. However, the MTO, has several different contractual relations, one with each sub-contractor. In relation to the Chinese road haulier who performs carriage to Shanghai, the national rules of China will govern the liability of this contract. The MTO will also have a contractual relation with the terminal port operator in Shanghai. This relationship will be based on a private terminal handling agreement. The MTO will most probably enter into a charterparty agreement with a shipowner for the sea carriage, which will be governed by the RR, since place of taking over of the goods is placed on a State party to the Convention. The MTO will also have a contract with the port of Felixstowe based on a private terminal handling agreement. And, finally, the MTO will enter into a carriage contract with a road haulier, which will be based on the Conditions of Carriage of the Road Haulage Association (known as RHA 2009).

Considering damage occurs in a localised stage, in order to determine what liability regime will govern the relation of the MTO with the cargo claimant, the question to ask is if an international convention applies, in which case it will be the applicable liability regime. If it does not apply the RR will govern the claim. Where loss or damage is unlocalised, the RR will apply. In this given case, even if loss is localised in any part of the non-sea leg, the liability provisions of the RR will apply, since no international mandatory convention applies.

However, it is worth mentioning that, if the damage occurs during the road leg in the UK, the standard rules of the RHA 2009 will govern the liability regime of the MTO with the road carrier. Considering that the limits of liability provided by RHA 2009 are £1,3000 per tonne, which would equal to approximately 1.33 SDR per kilogram, there is a possibility that the MTO will suffer a shortfall when seeking redress from the road haulier since

the weight limitation of the RR is 3SDR per kilogram. It is also true that the RR provide for a package limitation that the RHA do not allow¹⁸².

As a contrast, the reality today, without the adoption of the RR, is that the relationship of the MTO with the cargo claimant is regulated by the bill of lading¹⁸³. Today, in the above case, instead of the RR applying to the whole journey, this contract would be based in the provisions of the bill of lading issued.

Hypothetical case 5:

Now let's change the place of delivery of case 4, considering Copenhagen as a final destination, thus allowing for a multimodal contract of carriage from Beijing to Copenhagen, with road carriage from Beijing to Hong Kong, sea carriage from Hong Kong to Felixstowe, feeder carriage from Felixstowe to Hamburg (Germany), and road carriage from Hamburg to Copenhagen. In this case, in the relation of the MTO with the cargo claimant, the only case in which the RR would not apply would be if there were localised damage between Hamburg and Copenhagen, to which the CMR would apply (since both Germany and Denmark are parties to it).

In this case, nowadays, without the adoption of the RR, this multimodal contract would be regulated by the HVR in the sea leg (since Hong Kong is party to the HVR), by the CMR in the road leg between Hamburg and Copenhagen, and by the terms of the bill of lading in the remaining parts.

¹⁸² Thus, further analysis of this financial imbalance would be necessary.

¹⁸³ The HVR do not apply mandatorily to the sea leg in this case because a bill of lading is not issued in a contracting State and the carriage is not from a contracting State. The HVR could be applied to the bill of lading by reference into the contract, with a clause paramount (art. 10 of the HVR). If the case was of an export from the UK to China, the HVR would, instead, apply to the sea leg.

8 Summary and Conclusions

The intent of the Rotterdam Rules is to be an instrument based on the realities of the shipping industry. Its extended scope of application, covering door-to-door is a basic need in the multimodal reality of containerized transport. The convention intends to update the transport law, since most existing regimes are out-of-date. In fact, the HVR, which covers most of the shipping community, was negotiated much at the beginning of the container revolution. Even the Hamburg Rules, which were adopted more than two decades after the container revolution, did not substantially update the HVR, only expanding the tackle-to-tackle scope of the HVR to port-to-port coverage.

Therefore, the Rotterdam Rules must be recognized for its expanded scope of application. The door-to-door approach of the Rotterdam Rules is a basic need in the multimodal reality of containerised transport. Nonetheless, when the RR extends the maritime regime to the inland legs, it only makes mandatory a practice that has already been done by other methods, as with the introduction of paramount clauses in transport contracts.

It is also true that the Rotterdam Rules goes further than the current maritime conventions on carriage of goods in relation to the basis of the carrier's liability. It must be recognized that article 17 regulates in a complete and clear manner the system of allocation of the burden of proof that exists at present. It clarifies some aspects that are unclear under the Hague Rules and the Hague-Visby Rules system. Although it might seem that it benefits the shipper as cargo claimant, for it does not have the burden of proving the fault of the carrier, a clear set of rules is beneficial for all parties.

In respect to the relationship of the MTO with its sub-contractors, the Rotterdam Rules brings about a new scheme, distinguishing between performing parties and maritime performing parties. It seems that the basic idea of the Rotterdam Rules is to embrace all the parties who perform the carriage in its liability regime. It imposes on the maritime performing

parties liabilities, but at the same time it extends to them the protections provided by the Rules. In a way, the Convention enhances the claimant's chances of recovery.

It might also be said that this approach breaches the principle that contractual relations exist only between the parties. Allowing the cargo claimant to directly sue these maritime performing parties, the Convention gives shippers the right to sue parties on the basis of a contract they were not part of. It also creates awkward and unexpected situations. Under such scheme, parties such as port terminal operators would have to be prepared to face much more complex and numerous claims than they are currently prepared to face.

In this respect, it is questionable that the Himalaya clause is not enough to respond to the needs of the industry. It is true that it is only a contractual arrangement instead of a mandatory legal provision. However, when the drafters of the RR decided to expressly provide for the extension of the carrier's statutory defences and limits of liability to third parties, they also put some parties in pretty uncomfortable positions, as is the case of the port terminal operators. At least, if it comes into practice, the RR will require a period of adaptation.

On the other hand, the Rotterdam Rules will rarely apply to hauliers, because they can only be maritime performing parties where they perform their services exclusively within the terminal area. In a way, it can be said that this also goes against any effort to introduce a uniform regime.

Nonetheless, it is undeniable that uncertainty in relation to the issue of carrier liability during multimodal transports is an obstacle to efficient transport chain. In this sense, as shown, the RR performs well in relation to unlocalised loss. It introduces a liability regime for this type of damage, filling this current regulatory gap. A harmonised fall back solution for undisclosed events causing loss, damage or delay would surely be one of the most important achievements of the Rotterdam Rules if they enter into

force. This, of course, considering that its article 82¹⁸⁴ is capable of eliminating any conflict of conventions.

However, as can be drawn up from the case analysis, when signing a door-to-door contract, unless the parties agree beforehand what will be the type of transport modes used, there will still be much unpredictability as to the applicable liability regime. This is because, as showed, the modified network liability system proposed by the RR on multimodal contracts of carriage is based on an interaction between the Convention and the different unimodal liability systems on carriage by road, rail, air and inland waterway. Basically, the carrier's liability will vary according to where in the multimodal chain the damage, loss or event causing delay occurred. This way, whenever loss is localized, the mode-specific liability system will be applied under a multimodal contract of carriage.

Although a pure multimodal convention providing for a unimodal system of liability would bring much more simplicity, while eliminating litigation costs, it is not possible to ignore the commercial influence of some segments of the industry and their power to persuade States in ratifying such mandatory international instrument. In this sense, the pragmatic approach is a basic requirement for the worldwide adoption of an international instrument. Nonetheless, as showed, it is debatable if the liability regime adopted by the RR is the best to cover multimodal contracts.

Although the system proposed by the Convention is not easy or predictable, it is also true that multimodal transportation has become increasingly complex. It would not be reasonable to expect less from a convention that intends to cover door-to-door transport, bringing transportation law up to date. Therefore, the fact that the Rotterdam Rules regulates the carriage contract more thoroughly is not entirely a negative aspect.

If, as done in this work, one disregards the fact that legal obstacles need to be overcome in respect to the interaction with the unimodal conventions, it has been shown by the analysis of potential cases that the RR

¹⁸⁴Article 82 regulates situations where the unimodal regimes have extended their scope of application to what might be characterised as traditional maritime carriage in order to avoid conflicts of conventions.

will in fact promote uniformity in the best case scenario that the Convention has worldwide adoption.

Nevertheless, the Convention's maritime plus concept is not innovative, since the phenomenon "unimodal plus" is already present in other transport conventions, which, as shown, have multimodal aspects. The adoption of a network system of liability do not present substantial difficulties, since currently the majority of the multimodal contracts of carriage already operate under network systems and that the Rotterdam Rules' provisions do not change much for inland sub-carriers. Also, the widespread adoption of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 with their own contractual versions of limited network systems seems to support this view. It is true, however, that contractual provisions are not capable of setting aside mandatory law.

Indeed, on the whole, these contractual schemes seem to address the situations involving unlocalized loss. These solutions are considerably in accordance with general transport law, although not mandatorily applicable. Also, despite the popularity of these standard contracts, they are far from adequately responding to the need for uniformity in the multimodal transport practice.

Also, it can be said that, for a convention that aims at promoting uniformity in the field of multimodal carriage, the Rotterdam Rules fails in having its provisions based on the sea carriage conventions, especially where it relates to limitation of liability. Substantively speaking, most differences introduced by the Rotterdam Rules in relation to liability are minor departures from the previous maritime conventions. A positive aspect of this is that courts would be expected to look to existing case law interpreting the current maritime conventions (in special the HVR) when applying the Rotterdam Rules. However, when trying to regulate multimodal transport, one has to take into account that each mode of transport has its own peculiarities. This reflects very well in the different limits of liability found in respect to each mode.

In respect to the changes to the carriers liabilities introduced by the Rules, including the elimination of the nautical fault defence and the higher

limits of liability, the Convention will alter the allocation of risk between carrier and cargo claimant in favour of the latter and will, accordingly, result in an increase in the carrier's potential liability and costs when compared to his position under the current maritime conventions.

As with any new legal regime, if the Rules come into effect, it is expected that there will be a period of increased claims activity and litigation. This should be considered normal, as the courts try to clarify the consequences of the Rules in practice. Therefore, the short term result will be an increase of legal costs on cargo claims and some management time spent trying to adapt to the new provisions.

In sum, it is undeniable that the Rotterdam Rules bring greater uniformity to multimodal carriage. It also fills the regulatory gap of unlocalised damage, which is so common in container transport. On the other hand, it largely increases the package and weight limitation amounts.

But it is also true that Rotterdam Rules might be the best compromise at present. The truth is that the Convention, if it enters into force, will substantially change the current dynamics of the parties involved and some time will be needed for adaptation.

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