Carrier liability in multimodal contracts of carriage: The multimodal choice of law issue

Transportørens transportansvar i multimodale transportkontrakter: Det multimodale lovvalgsproblem

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Formålet med specialet er at definere transportansvaret for transportøren, der transporterer gods i henhold til en multimodal transportkontrakt. Specialet er afgrænset til sø- og vejtransport, og koncentreres derfor til formålet på Haag-Visby reglerne og CMR-konventionen. For at danne rammen om problemerne inden for dette særlige juridiske område præsenteres indledningsvist et kort historisk perspektiv på multimodal transport. Efterfølgende definerer specialet de faktiske og retlige karakteristika ved den multimodale transportkontrakt med det formål at afgrænse den multimodale transportkontrakts retlige kvalifikation. Desuden indeholder specialet en analyse af transportørens transportansvar under Haag-Visby-reglerne og CMR-konventionen, der regulerer henholdsvis sø- og vejtransport. På denne baggrund foretages en individuel og komparativ analyse af retspraksis for at bestemme henholdsvis Haag-Visby-reglernes og CMR-konventionens anvendelighed på sådanne karakteriserede multimodale transportaftaler. Med hensyntagen til begrænset retspraksis, tilslutter dette speciale sig den nuværende konsensus om, at Haag-Visby-reglerne finder anvendelse på søstrækningen af et multimodalt transportforløb.

CMR-konventionens anvendelighed på multimodale transportkontrakter er i imidlertid rod til uoverensstemmelser mellem forskellige jurisdiktioner. Quantum dommen, som er den førende dom i engelsk retspraksis, støtter CMR-konventionens anvendelse på vejstrækningen i en multimodal transportaftale, mens tyske, hollandske og danske domstole har den modsatte opfattelse. Baseret på en fortolkning af konventionsteksten, dens kontekst, formål, "Protocol of Signature" samt forarbejder konkluderes det i specialet, at CMR-konventionen ikke finder anvendelse ex proprio vigore på multimodale transportaftaler. Afhandlingen konkluderer overordnet, at transportørens ansvar således afhænger af flere aspekter. Hvis transportaftalen indeholder transport på vandet, er denne del af transportforløbet reguleret af Haag-Visby-reglerne. En eventuel vejstrækning i det multimodale forløb er derimod reguleret af eventuelle nationale ufravigelige regler i overensstemmelse med parternes lovvalg eller i mangel af et sådant parternes valg af værneting. Hvis ikke sådanne regler findes i national lov, og hvis parterne har valgt et værneting, der ikke foreskriver CMR-konventionens anvendelse, er vejtransportdelen underlagt fuldstændig partsautonomi.

The purpose of this thesis is to determine the carrier's liability in multimodal contracts for the carriage of goods. In doing so, this thesis focuses on the Hague-Visby Rules and the CMR Convention, as its scope is limited to sea and road carriage. To provide necessary background information on the issues within this legal field, the thesis briefly presents a historical perspective of multimodal transport. Subsequently, the thesis has defined the actual as well as the legal characteristics of the multimodal contract of carriage to establish its proper qualification. Furthermore, the thesis provides an analysis of the carrier liability within the Hague-Visby Rules and the CMR Convention governing sea and road carriage. Against this background, the thesis

has conducted an analysis as well as a comparative study of case law regarding the applicability of the Hague-Visby Rules and the CMR Convention respectively, to such characterised multimodal contracts of carriage. Considering a limited amount of case law, the thesis agrees with the current consensus on the fact that the Hague-Visby Rules apply to the sea part of a multimodal carriage.

The applicability of the CMR Convention to multimodal contracts of carriage does, however, present discrepancies among jurisdictions. The Quantum case, a leading case in English jurisprudence, supports the CMR Conventions application to the road leg of a multimodal contract of carriage, whereas German, Dutch and Danish courts hold the opposite view. Based on an interpretation of the convention text, its context, 'Protocol of signature', objective, and travaux préparatories it is concluded that the CMR Convention does not apply ex proprio vigore to multimodal contracts of carriage. The thesis overall concludes that the liability of the carrier, thus, depends on multiple aspects. If there is a sea leg, such leg is governed by the Hague-Visby Rules. If there is a road leg, such leg is left to be governed by possible national mandatory rules by virtue of legislation provided for by the choice of law, or in the absence of such, the choice of jurisdiction by the parties. If no such mandatory legislation exists, the fragment of road carriage is subject to complete party autonomy.

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Introduction

International carriage of goods forms the veins of international trading. Carriers across the globe ensure that merchants are able to focus their energy on the sales and purchase transaction only. In turn, a fundamental trust in the carrier to care for and deliver the goods in good shape and timely fashion is imperative. Where trust is lacking a well-balanced liability regime, may keep the blood flowing. The rules on transport liability deal with whether and to what extent the carrier is liable for the financial loss suffered by the cargo owner for loss of or damage to goods or for delay arising while the goods are in the carrier's custody[1]. A harmonised liability regime provides commercial parties a predictable legal position in all possible relations and only then both parties can enter a contract for carriage of goods with equally resting heart rate.

Such well-balanced liability regimes have been achieved on a unimodal basis by harmonisation through global conventions. Harmonisation precludes the adoption of possibly divergent liability standards leading to legal uncertainty, higher insurance policies, and expensive legal bills to solve complex international disputes. As such the current unimodal conventions are a powerful and successful tool when liability must be determined in contracts where only one mode of transport is utilised.[2] However, the existing conventions partly reflect an outdated era. The practical development within the transportation of goods, specifically the introduction of the container, has made door-to-door transport possible by using multiple modes of transportation under the same contract.[3] Since the containerization of the trade, several hundred million TEU's[4] are transported all over the world every year, in a multimodal fashion[5].

This development allows purchasers of transport to merely conclude a single contract for the entire transportation of its goods sold, while leaving the specifics of the transport operation to

[1] *Appel* et al. (2020) p 517.

[2] Bull argues that CMR has been successful at least in the sense that most European countries have adopted it, cf. *Bull* (2000) p 29.

[3] *Andersen Roost* (2012) p 15.

[4] Twenty-foot equivalent unit, a unit of cargo capacity often used to describe the capacity of container ships and container terminals, based on the volume of a 20-foot-long intermodal container.

[5] www.worldshipping.org

the professional carriers.[6] Matters become more complex, however, when these carriers use different modes of transport, and the need for harmonisation within the area of the multimodal transport law becomes only more relevant as globalisation expands by the day.[7]

Even though unimodal transport is successfully regulated problems arise either when more of the liability regimes or where none of the liability regimes are applicable. In addition to the more abstract question relating to whether the liability conditions are even met, in a multimodal carriage situation, the potential application of a liability regime that is drafted to fit only one modality of transport becomes somewhat difficult or forced. The issues materialise when the unimodal transport laws each prescribe different substantive solutions to the same problems which is most clearly illustrated by a comparison of the relevant rules concerning the carrier's right to limit its liability and the limitation of claims against the carrier. The mere fact that the regulations are unimodal, and contracts are multimodal, entails gaps as well as overlaps, which in turn add to legal unpredictability.

Research question and delimitation of scope

By extension of the above, the target of this thesis is to explore and set out the extent and limitations of the carrier's liability in multimodal contracts for the carriage of goods. The presentation will essentially be limited to the transport laws of unimodal maritime and road transport, and multimodal transport. In respect of the limited vocabulary of the thesis, these modes of transport have been selected to illustrate the problems arising in multimodal transport. In doing so, the paper will analyse and interpret the application of the Hague-Visby Rules that mandatorily apply within the Nordic maritime systems, to multimodal contracts for carriage. Furthermore, the present thesis will compare the application of the Hague-Visby Rules to the extent to which the CMR Convention applies and identify possible divergencies and differences in interpretation. This is done by looking at how Nordic theory and case law, compare to how English and German courts have settled these issues.

The purpose is to shed light on the choice of law issues faced, when unimodal conventions that are not designed for multimodal carriages, are attempted to be applied to situations essentially lying outside the sphere of their primary scope of application. Tricky questions often have multiple answers and, accordingly, the difficulties are dealt with in different manners by jurisdictions worldwide, consequently leading to an insecure disharmonious legal position. This is not only dissatisfactory for the international trade but can also lead to consequences such as forum shopping, and lengthy legal procedures.

The paper is divided into 6 sections. Sections 1 and 2 provide the historic background as well as the crucial qualification of the multimodal contract of carriage. Following this, section 3 provides an analysis of the different liability systems proposed to govern such multimodal contracts of carriage. Section 4 gives a brief overview of the provisions in the Hague-Visby Rules and the CMR Convention governing carrier liability. Maritime transport has been chosen because of its long historical tradition, which has had a decisive influence on the development of legal regimes for all modes of transport.[8] Transport by road has been chosen in coalition with maritime transport as these account for the vast majority of the world's transportation of goods

[6] *Andersen Roost* (2012) p 15.

[7] See https://data.worldbank.org for exports and imports of goods and services worldwide from 1960-2021 (measured in US$); See https://unctadstat.unctad.org/EN/ for total trade growth rate worldwide.

[8] *Midtgaard Fogt* in Formueretlige emner (2019) p 149.

and thus is subject to the vast majority of disputes worldwide.[9] This provides the necessary backdrop for section 5 that deals with the theoretic question of whether the chosen unimodal conventions apply to multimodal contracts of carriage and, finally, section 6 shall sum up the deductions and attempt to answer the liability pursuant to which a carrier under a multimodal contract of carriage can expect subjection to.

This thesis will not bring forth a comparative overview of domestic rules on multimodal transport or contract law in general, nor will it asses the feasibility of creating any such harmonised rules. The thesis will merely analyse, whether, and to what extent, a multimodal carrier is subject to specific unimodal liability conventions and if not give a universal perspective of how multimodal contracts of carriage are regulated in different jurisdictions.

The focus will remain on the international carriage of goods and this thesis will neither cover domestic carriage of goods nor the relationship between national and international carriage. Even though the thesis limits itself to sea and road carriage, references to other modes of transport and their respective mandatory regulations will inevitably occur.

Method and sources

This thesis will use the dogmatic legal method to determine the correct existing law. The conclusions will be reached by using the relevant sources of law.[10] Legislation within transport law is of a highly international nature, which means that the interpretation of provisions in the relevant conventions and the application of the other sources of law must take account of international considerations required by this area of law. No express provision requires international interpretation by compulsion but the general rules of interpretation in the Vienna Convention on the Law of Treaties[11], arts 31-32, primarily require consideration of the blackletter text, context, object, and purpose of a convention, bearing in mind that a treaty should be read as a whole.[12]

Accordingly, international legal sources and case law are used as part of this thesis which will conduct a comparative analysis. In this regard, relevant case law from courts in large shipping nations, particularly English, German, Dutch, and Danish courts have been chosen. To ensure authenticity, quotations and terms are used in their original language. Interpretation of the *travaux préparatoires* will also be included for analysis and interpretation of conventions, but only as a secondary source of law.[13] Scholarly opinions will be included for analytical purposes but have no official weight.

1 Transport law in a historical perspective

Preliminarily, the paper will touch upon a few points in history that seem to have impacted modern transport law. The difficulties agreeing on harmonised international regulation of multimodal contracts of carriage described herein form the background of this thesis.

Discussions of multimodal transport date back to the early 1900s. Already at this point in history, it was clear that especially transport by sea required a combination of road transport in

[9] Ibid

[10] See *Blume* (2020) p 178.

[11] The Vienna Convention on the Law of Treaties of 23 May 1969.

[12] *Linderfalk* (2007) p 108.

[13] *Midtgaard Fogt* in Formueretlige emner (2019) p 148; Art 32(a) of the Vienna Convention on the Law of treaties.

order to reach the destination of the receiver.[14] When it comes to maritime law, the bill of lading was, originally, a simple document that established the conditions of carriage, without any detailed allocation of liability and the parties were generally free to agree on any contractual terms they wanted. This had the effect, that carriers exploited their freedom of contract frequently, to exempt themselves from liability.[15] This eventually resulted in the creation of the Hague Rules;[16] a set of rules whose purpose was to establish a proportionate balance between the liability of the carrier and the cargo owners, with the result that they were able to apply by mandatory force.[17] The Hague Rules were later amended by the Visby Protocol[18] and are now named as the Hague-Visby Rules. The Hague-Visby Rules are now ratified by all Nordic countries.[19]

As for road transport, the CMR Convention[20] was adopted in 1956 and was one of the last types of transport to be the subject of uniform law. Although road transport has developed considerably since, no major revision of the convention has taken place.[21] The Preamble to the CMR Convention regards the purpose of the convention with the following comment:

"*Having recognised the desirability of standardising the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability".*

Thus, the purpose was largely the same as under the Hague Rules: desirability to create a standardised legal position regarding liability and transport documents.

The introduction of the container led to a preference for door-to-door transport, which inevitably entails the use of several modes of transport.[22] The idea of regulating multimodal transport was already proposed prior to the drafting of the Hague Rules in 1924. During frequent conferences it was decided that multimodal transport should, for the time being, stay subject to party autonomy.[23] In 1948 a proposition was submitted by Swedish scholar Algot Bagge in cooperation with the International Chamber of Commerce (ICC) modelled by the Hague Rules. The proposition was to create a convention based on a so-called network system of liability, but it was subsequently disregarded due to scepticism amongst the negotiating countries.[24]

[14] *Andersen Roost* (2012) p 16.

[15] *Falkanger* et al. (2017) p 340.

[16] The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (hereinafter referred to as 'the Hague Rules')

[17] See *Alistar Clarke* (1976) pp 3-7.

[18] Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, 1968 (hereinafter referred to as 'the Visby Protocol').

[19] Within the specific area of maritime law, the legal position in Scandinavia is developed through cooperation of the respective Maritime Law Committees to create practically identical maritime codes (*Falkanger* et al. (2017) p 28).

[20] Convention on the Contract for the International Carriage of Goods by Road 1956 (hereinafter referred to as 'the CMR' or 'the CMR Convention).

[21] *Bull* (2000) p 29.

[22] See *Andersen Roost* (2012) p 16-17.

[23] It was discussed by the CMI (Comité Maritime International) in conferences in Paris in 1911 and Copenhagen in 1913 (*Andersen Roost* (2012) pp 17- 20).

[24] *Andersen Roost* (2012) p 20 et seq.

In 1957 Bagge continued his work with the draft of what was to become *the United Nations Convention on International Multimodal Transport 1980* (hereinafter referred to as 'the Geneva Convention'). This convention is modelled after the Hamburg Rules.[25] Lengthy negotiations *inter alia* relating to discrepancies regarding the suitability of the network or uniform liability system respectively, led to the adoption of the Geneva Convention in 1980. The disagreements were, however, so immense that even though the UN adopted the convention it has yet to come into force due to an insufficient number of ratifications.[26]

The most recent addition of uniform multimodal carriage regimes is the Rotterdam Rules.[27] They were originally intended to govern only sea transport, but currently encompass contracts for multimodal carriage with a sea leg as well and are thus referred to as a 'maritime plus' system.[28] Due to its 'maritime plus' nature, this regime naturally offers some difficulties fitting into the existing uniform transport laws which do not always entail a sea leg. During the negotiations, a working group was called on to address potential conflicts with other mandatory transport conventions which could have the effect that state parties would hesitate to accede.[29] For this very reason, the Rotterdam Rules has yet to come into force.[30]

The above review of legislative history provides an impression of the considerations behind attempts to provide uniformity within transport law. In addition, it gives an impression of the particular difficulties faced when it comes to uniform regulation of multimodal transport. Noticeably the discrepancies caused by inconsistency amongst the countries' preferences regarding the choice of uniform or network liability systems.

2 Qualification of the multimodal contract of carriage

It is already apparent, that the legal position within multimodal contracts of carriage features challenges. The current section will focus on the delimitation of the multimodal contract of carriage with the overarching aim of determining that very legal position.

Currently, no dedicated international regime mandatorily governs multimodal transport. Several attempts have been made to harmonise multimodal transport, most importantly the Geneva Convention and the Rotterdam Rules. These have, however, not been ratified by numerous large shipping nations and are not in force.[31] Instead, multimodal transport is governed by a spaghetti bowl of unimodal transport laws as well as individual clauses drawn up by the contracting parties, and national complementary legislation. The following sections of this thesis will attempt to detangle the straws within the spaghetti bowl to determine which legal rules, if any, apply to multimodal contracts. For this purpose, a qualification of the multimodal carriage, alongside an assessment of when such a carriage derives legal effects is necessary. In order to do so, the present section will attempt to distinguish the multimodal contract of carriage from the

[25] United Nations Convention on the Carriage of Goods by Sea, 1978.

[26] *Andersen Roost* (2012) p 24-25; At the time of writing only 13 of the required 30 member states have either signed or ratified the Geneva convention.

[27] The UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (hereinafter referred to as 'the Rotterdam Rules').

[28] *Hoeks* (2010) p 22.

[29] UNCITRAL Report, A/CN.9/526 (2003) p 59.

[30] In the interest of capacity, however, assessment of the Rotterdam Rules as well as the Hamburg Rules falls outside the scope of this thesis.

[31] Supra section 1.

unimodal contract of carriage. In doing so, an assessment of whether the multimodal carriage is a collection of unimodal carriages, a *sui generis* contract, or a third category, will be determined.

2.1 The substantial characteristics of the multimodal contract of carriage

The discussion in the current section forms part of the background to the overarching research question on delimiting the carrier's liability in multimodal contracts. Without having qualified the multimodal contract and addressed the existing legal discussion it entails, alongside the outcome in leading precedence, the research undertaken in the following parts would be disengaged and somewhat incomprehensible. The qualification particularly affects the applicable set of rules and therefore the carrier liability, which inevitably makes the discussion imperative. Accordingly, an extensive analysis is devoted to determining the characteristics of a multimodal contract of carriage in order to qualify it as such.

In the absence of enforceable harmonised legislation to guide the qualification, this thesis will use a variety of legal sources to help delimit the meaning of a multimodal contract of carriage. Firstly, the section will present the qualification of the multimodal carriage provided in the (unenforceable) Geneva Convention. Furthermore, the section will examine how unimodal carriages are characterised and how conventions governing unimodal contracts of carriage attempt to distinguish themselves from multimodal ones. Case law rendered by a variety of different jurisdiction will provide an impression of how the commercial parties might expect their contract to be qualified in the respective jurisdictions. And finally, the opinions of different legal scholars will be compared and evaluated considering the aforementioned case law and conventions.

The Geneva Convention is drafted with the intention to govern all types of multimodal transport. Although it is not in force, it does, for the purposes of this thesis, still provide interpretative guidance.[32]

The multimodal transport is defined in art 1 which reads as follows:

"'International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country(...)"

This definition should accordingly be read in conjunction with the art 1(2) defining the term "multimodal transport operator" which provides[33]:

"'Multimodal transport operator' means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts ***as a principal****, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and* ***who assumes responsibility for the performance of the contract****."*[34]

[32] See *Linderfalk* (2007) p 255 et seq.

[33] UNCTAD Report, UNCTAD/SDTE/TLB/2 (2001) p 5.

[34] My highlights.

According to this definition, multimodal transport is a carriage of goods by two or more modes of transport, under the same contract, (one document) and one responsible party (MTO) for the entire carriage.[35] The responsible party may, however, subcontract the performance to other (sub)carriers. This composition requires the existence of one solitary contracting carrier (the MTO), and accordingly, the use of several different contracts with individual unimodal transport documents will be subject to their individual legal regime, regardless of the goods being transported in an overall (multimodal) fashion. In this respect, the legal relationship between the contracting carrier (the MTO) and the performing sub-carriers will be regulated by the respective individual conventions.[36]

2.1.1 Unimodal carriages

The opposite of a multimodal transport operation is a unimodal transport operation. As the name suggests, unimodal transports are traditionally and in its purest sense a carriage of goods by one – and only one – mode of transport. If performance of the transport contract requires the use of several means of transport but of the *same type*, it is still a unimodal contract of carriage. This type of carriage is called successive transportation.[37] An example is Chapter VI of the CMR Convention "Provisions Relating to Carriage Performed by Successive Carriers" which regulates contracts for international road transport carried out on the basis of *one* contract but by using several road vehicles.

While the definition of a unimodal *carriage* only allows for one mode of transportation, the situation may be different in a unimodal *contract* of carriage. Specifically, the so-called roll-on roll-off transports (typically referred to as 'Ro Ro transport' or 'Piggy Back transport') are still characterised as unimodal.[38] As the name suggests, during Ro Ro transport the cargo is loaded onto one means of transport, which hereinafter will be transported on a different means of transport[39] i.e. a lorry is loaded with cargo and the lorry drives onto (rolls on) a ferry from Denmark, which then transports the lorry to Germany where the lorry drives off (rolls off) and continues its journey towards its end destination in France. Ro Ro transport is regulated in CMR art 2 and presupposes that the goods are not transhipped.

The unimodal conventions themselves demand attention to the *contract* of carriage rather than the *de facto* execution. Under this so-called "contractual approach", the applicability of a convention is connected to the actual contract of carriage. The CMR Convention, the Montreal Convention[40], the CIM Convention[41] and the Hague-Visby Rules are all triggered by the use of contracts for the carriage of the respective mode of transport, cf. CMR art 1(1), ("*This Convention shall apply to every contract for the carriage of goods by road*(..)", Hague-Visby Rules, art 2 ("u*nder every contract of carriage of goods by sea*(…)", Montreal Convention, art 1(2) ("*any carriage in which, according to the agreement between the* parties(…)" and the CIM Convention, art 1 ("*carriage under a through consignment note*(…)"). Accordingly, the

[35] Cf. Geneva Convention art 1(3)*"Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport."*

[36] UNCTAD Report, UNCTAD/SDTE/TLB/2 (2001) p 5.

[37] *Andersen Roost* (2012) p 56.

[38] *Fabricius* (2017) p 92.

[39] *Andersen Roost* (2012) p 57; CMR art 2; CIM § 5.

[40] The Convention for the Unification of Certain Rules for International Carriage by Air (1999).

[41] Uniform Rules concerning the Contract for International Carriage of Goods by Rail, (Appendix B to The Convention concerning International Carriage by Rail (COTIF)) (1999).

prevailing view among theoretics is that the terms of the contract are decisive for the characterisation as such.[42]
To clarify, this overall means that when deciding whether to use the unimodal or multimodal legal regimes, one will have to inspect the underlying contract and not the actual operation. By extension of this, note that while the definition of unimodal *transport* does not allow the use of more than one mode of transport, this is not excluded by the definition of a unimodal transport *contract*. Thus, such a contract may well contain terms on Ro Ro transport while remaining unimodal, at least if the goods are not transhipped. The distinction between a *de facto* operation and *de jure* qualification will prove to be an important and recurring element throughout.

2.1.2 Option to use a different mode of transport

The previous section established the relevant point of departure: the *contract* of carriage. Furthermore, it was concluded, that a unimodal contract may provide for more than one mode of transport in situations where no transhipment takes place. The following section will analyse the situations in which a transhipment does, in fact, take place.[43] It is not uncommon to see contracts containing the option to switch one mode of transport with another one. In these situations, the parties typically do not specify whether they wish for the contract to be a unimodal or a multimodal contract.[44]

The Danish Supreme Court has on one occasion had the opportunity to decide whether an option to change the mode of transport qualifies the contract as unimodal or multimodal. In the case U 2008.1638 HD,[45] the parties agreed on one mode of transport for the overall contract, with the option to use a different mode of transport (for a specific part of the operation). The Supreme Court should decide whether the qualification of the contract as one for carriage by air or whether the fact that the transport was *de facto* carried out by a different mode of transport by virtue of an option to do so, should be decisive when determining the applicable law for the leg of the transport carried out by mode of the optioned for transport.

In the *Salmon Roe* case, a Japanese company bought salmon roe from a Danish seller. The Danish seller then entered a contract with a freight company, managing the overall transport as contracting carrier. The freight company did, however, not perform the actual carriage but instead assigned the entire carriage to an airline. The airline then chose to allocate part of the journey to a trucking company that, as a sub-carrier, carried the salmon roe by road from Denmark to Germany and subsequently the airline would, itself, fly the salmon roe from Germany to the end destination in Japan. The salmon roe was damaged during the road transport between Denmark and Germany, and the question before the Danish Supreme Court was whether the CMR Convention (rules of the road) or the Montreal Convention (rules of the air) should apply. If the CMR applied to all contractual relations, none of the carriers would be liable because the claim would be time barred pursuant to the one-year time bar in the CMR Convention.[46] If, however, the Montreal Convention applied they would be liable under the rules of that convention, in which case the claim would not be time barred.[47]

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[42] See *Goldsmith* in U.2008B.259 p 260; See *Andersen Roost* (2012) p 69; See *Ulfbeck & Taiger Ivø* in ET.2008.331 note 16.

[43] This thesis will only deal with the implications of an option regarding the qualification of the transport contract as either uni- or multimodal. An in-depth interpretation in terms of who has the right to exercise the option under what contractual terms is beyond the scope of this thesis.

[44] See *Ulfbeck & Taiger Ivø* in ET.2008.331 chapter V, section 4.

[45] U 2008.1638 HD, hereinafter referred to as '*Salmon Roe'*.

[46] CMR art 32 (1-year time bar).

[47] Montreal Convention art 35 (2-year time bar).

The contract of carriage was indicated in a booking note and in an air waybill issued to the freight company (the contracting carrier) by the airline, as a contract for carriage by air, giving the airline an *option* to substitute for road transport. In this case, the Danish Supreme Court found that neither the existence nor the actual exercise of an option in a unimodal transport contract changes the fact that the parties did conclude a contract for unimodal transport with the following reasoning:

"Transporten er både i bookingbekræftelse og luftfragtbrev angivet som en flytransport fra Billund i Danmark til Narita i Japan. Højesteret tiltræder, at aftalen om hele denne transport derfor må anses for en aftale om flytransport og som sådan underlagt de regler, der gælder for flytransport."[48]

Accordingly, the rules regulating liability of carriage by air were applied to determine the liability of both the contracting carrier and the airline (both of whom were obliged to carry the goods for the entire journey).

Based on the *Salmon Roe* case, Danish scholar Adam Goldsmith argues that options should be rendered invalid by default in unimodal contracts of carriage, but not in multimodal ones, making the validity of the option subject to the qualification of the contract.[49] His arguments are based on the fact that the CMR Convention takes a contractual approach, and thus, only applies to contracts for the carriage by road.[50] In Goldsmith's opinion, this condition cannot be met in situations where the carrier unilaterally substitutes modes of transport pursuant to a contract for the carriage by air, because the Montreal Convention cannot accept the application of the CMR, in a situation where the convention excludes itself.[51] He derives the absolute consequence that in conventions taking a contractual approach, an option to opt-in for such a mode of transport is invalid – at least if the overall contract is qualified as a unimodal contract for the carriage by a different mode of transport than the one governed by the convention. According to this view, any such contract must *e contrario* be qualified as a multimodal one or be the bearer of an invalid option.

Rightfully so, this view has been criticised, due to the fact that the Supreme Court derives legal effects from the carrier's exploitation of the option with the following remark:[52]

"Udnyttelse af en sådan option indebærer imidlertid, at ladningsejer over for den kontraherende transportør yderligere kan påberåbe sig de ansvarsregler, som gælder for den måde, hvorpå transporten helt eller delvist faktisk blev udført."[53]

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[48] *Salmon Roe* p 1652.

[49] See *Goldsmith* in U2008B259 p 265-266.

[50] A thorough discussion the CMR's applicability to multimodal contracts and the specific difficulties with the contractual approach are accounted for in section 5.2.

[51] By 'unilateral substitution' is referred to the situation where an otherwise agreed option is exploited by decision of the carrier. Not the situation where the carrier, without prior agreement or legal authorisation in an agreed upon option, replaces an otherwise agreed means of transport with another. Whether or not the carrier by virtue of noncompliant substitution thereby can improve his legal position are on account, of limited space, not discussed in this thesis.

[52] *Andersen Roost* (2012) p 60.

[53] *Salmon Roe* p 1652 ("Højesterets begrundelse og resultat").

The Supreme Court thus, effectively, argues that the exploration of such an option entails that the cargo owner may further invoke the liability rules applicable to the way in which the carriage was actually performed. If the option was invalid, it would not be possible to tie legal effects to it. Whether the legal effects thus tied to it do (or even should) hold precedence is another aspect up for analysis.

In this regard, the remark is rather extensive as it puts the cargo interest in a more favourable position than it would have been, had the carrier without the cargo interest's consent performed the carriage wholly or partly with a different means of transport than by airplane.[54] Furthermore, it presupposes that an option within a contract of carriage is only to the advantage of the carrier. This is not accurate. In fact, arguments have been proposed to the effect that the purpose of an agreed option is to grant the carrier authorisation to perform the carriage by the means most efficient, depending on the preferences of the cargo interest, without being legally prejudiced after the conclusion of the contract.[55] Finally, the Supreme Court did not clarify whether the rules triggered by the option are only applicable if the damage occurred during the mode contained in the option or whether the cargo interest can invoke such rules regardless of where the damage occurred (even in the case of latent defects).

Professor in maritime law Vibe Ulfbeck and Ph.D. Stinne Taiger Ivø submit that the many indefinite questions the case entails speak in favour of a narrow interpretation, insofar as the reasoning cannot extend further than to the one specific type of transport contract (unimodal contracts of carriage, and only insofar as the damage is localised to the optioned for leg of the route).[56] In this thesis, the view is endorsed and accordingly, the reasoning in the *Salmon Roe* case should not extend to multimodal contracts.[57]

The importance of options to the qualification of the transport contract has, however, been answered differently in different jurisdictions. The Danish *Salmon Roe* case stands in contrast to German jurisprudence in which an option would make the contract for the carriage by air a multimodal one.[58]

Specifically, the German Supreme Court (BGH) held in BGH, 17. Mai 1989 - I ZR 211/87 that in a situation where the carrier, contrary to the contract for carriage by air, partly performed the carriage by a means of road, the carrier is liable at least applicable to the mode of transport (erroneously) opted for. Furthermore, the BGH specified that the carrier would have been liable pursuant to the rules of the road for this section of the route, had the performance by road been endorsed by the contract.[59] In contrast to what the Danish Supreme Court ruled in the *Salmon Roe* case, where the carrier was held liable to the agreed set of rules (air) even though optioning for road carriage was endorsed by the contract.

In English jurisprudence, the leading case is the Quantum Corporation Ltd and others v. Plane Trucking and another rendered by the Court of Appeal in 2002.[60] In this case, a carriage of

[54] The Danish aviation law § 108(4) subjects the (air) carrier's liability fully to the Danish aviation law if, without the consent of the contracting entity, the carrier carries out the transport wholly or in part by another means of transport.

[55] *Andersen Roost* (2012) p 61.

[56] *Ulfbeck & Taiger Ivø* in ET 2008.331.

[57] *Andersen Roost* (2012) p 62.

[58] Ibid p 57.

[59] BGH 211/87 pp 6-7 ('Entsheidungsgrunde' para II.1).

[60] Hereinafter referred to as '*Quantum'*.

goods was to be transported from Singapore to Dublin. The contracting carrier – Air France – had taken on the entire journey. The parties agreed, at the initiation of the contract, that the goods should be flown from Singapore to Paris and then transported by road from Paris to Dublin. The contract contained an option to substitute the road leg with air transport if Air France so desired. Air France was, thus, not contractually obliged to use road transportation. They merely had a right to choose it or to choose any other means of transport if desired.

In the view of the Commercial Court, the contract was "*predominantly for carriage by air*" and the fact that the carrier was not obliged to perform the contract partly by road had the consequence that the carriage could not be qualified as a contract for the carriage of goods *by road* in compliance with CMR art 1.[61] The Court of Appeal, however, treated this contract as closer to that of a multimodal kind. It abolished the idea of subjecting the contract to the set of rules pursuant to which the predominant part of the journey took place and instead qualified the contract as both a contract for the carriage by air and road (a multitude of unimodal contracts).[62] In summary, if the qualification of the contract is subject to English jurisdiction, the manner in which the carriage is actually performed may be relevant where the carrier has been given a total or partial freedom of choice as to the manner of performance.

To sum up, the English Court of Appeal would have rendered the contract subject to dispute in the *Salmon Roe* case a multimodal one. This is in contrast to the point of view of the Danish Supreme Court but more in line with German jurisprudence. The conclusion is therefore that a contract containing an option to perform by a different means of transport for part of the journey will be rendered either a unimodal one or a multimodal one, depending on which jurisdiction the parties subject the contract to.

2.1.3 Circumstantial conclusion of multimodal contracts of carriage

The overarching conclusion of the previous sections is that the contract is qualified by determining what the contracting parties have agreed in terms of the performance *within the contract.* It is already clear, that the parties to a transport contract must choose their words wisely, and that a specific contract (in every aspect) is preferable. It is, however, unrealistic to assume that commercial parties are familiar with all legal terms and their consequences. The following section, therefore, aims to determine whether a multimodal contract can arise purely based on the fact that circumstances suggest so.

What constitutes a multimodal contract is – in essence – a carriage made up of at least two different modes of transport.[63] In some cases, however, the contract does not explicitly state that the transport must be carried out by at least two different means of transport. Instead, this may sometimes simply be implied or even seem apparent from the circumstances. It raises the question of where the lower barrier to the conclusion of a multimodal transport agreement lies. In this regard, the use of the words 'unimodal' or 'multimodal' is irrelevant to the qualification of the contract. Instead, the provisions regarding the actual performance are the relevant interpretive tool.[64]

In Danish jurisprudence, a multimodal contract for the carriage of goods can be concluded merely as long as circumstances favour this conclusion.[65] It is, however, a requirement that it

[61] *Quantum* in 2 Lloyds Law rep. para 24.

[62] Ibid paras 62 and 65. See section 5.2.1 for extensive analysis of the *Quantum* case.

[63] Supra section 2.1.

[64] *Ulfbeck & Taiger Ivø* in ET 2008.331.

[65] Ibid chapter V, section 4; *Andersen Roost* (2012) p 63.

appears from the circumstances that the transport *is to be carried out* as multimodal transport.[66] In this regard, it is not sufficient that it appears from the circumstances that the transport *can and probably will* be carried out multimodally.[67] German legal theoretics share this view also with regard to German national law.[68]
Circumstances such as the issuance of a certain transport document, what type of carrier initial contact has been made to, as well as the fact that one type of transport is much more proximate than another are *inter alia* indications that can be considered.[69]A more elaborate review of the individual circumstances included in the assessment of whether a multimodal contract of carriage has circumstantially been agreed upon is, however, outside the scope of this thesis.

2.1.4 Conclusion

On account of the analysis above, it is apparent that disagreements already as to the mere qualification of the multimodal contract make it a complex area of law. Perhaps this particular legal field is challenging because of the fact that there is no legal text nor leading precedence. Therefore, the courts and various theoretics are left to their own imagination (and international principles of interpretation) when interpreting the legal scope of a contract of carriage. Based on the above, it seems crucial to keep a distinction between whether it is the *contract* that is multimodal, which is presumed to have an impact on the legal effect, or whether it is the *transport* alone that is multimodal, upon which the legal position is more unclear.

In conclusion, it appears from the majority of case law in precedence, that an option within a contract of carriage does not make a contract of carriage a multimodal one. Instead, what is decisive is that it is agreed or sufficiently clear from the circumstances that the carriage is to be performed using at least two different modes of transport.

To make an uncertain legal position more clear, an attempt to delimit the multimodal contract can be accomplished by analysing the following: 1) does the contract provide for one or more modes of transport, if more; 2) is it successive or Ro Ro transport, if no; 3) is the second mode of transportation clearly cut out or is it merely an option to use a different mode of transport, and lastly 4) does any other circumstances point to the fact that a multimodal transport contract has been agreed.

2.2 The legal characteristics of the multimodal contract

In the previous section, the substantial nature of the multimodal contract was established. Once the contract of carriage is qualified as multimodal, the law governing such contract must be identified to determine under which rules carrier liability is to be determined. To do so, the legal nature of the multimodal contract will be dissected.[70]

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[66] The requirement is based on the Danish case U 1984.577 SH in which the Danish Court of Commerce treated a contract that only called for the application of the Hague-Visby Rules, but required the use of road transport, as a contract of multimodal kind. The Court found that the case was to be determined by the Hague-Visby Rules on the ground that carrier did not issue a CMR consignment note but had accepted the bill of lading without objection. It must therefore be assumed that the regulation of the relationship between the parties was considered contractual, and thus the court must have viewed this as a multimodal transport that – pursuant to Danish jurisprudence – is subject to freedom of contract.

[67] *Ulfbeck & Taiger Ivø* in ET.2008.331 chapter V, section 4; *Andersen Roost* (2012) p 63.

[68] See *Andersen Roost* (2012) footnote 33 (it has not been possible to obtain the references cited therein).

[69] *Ulfbeck & Taiger Ivø* in ET.2008.331; See *Andersen Roost* (2012) p 71 et seq.

[70] An analysis of the so-called 'transportløfte' and its meaning within general (Nordic) contract law to the qualification of the multimodal contract is outside the scope of this thesis.

2.2.1 *Sui generis*, a multitude of unimodal contracts, or a third kind

An important distinction is whether the multimodal contract is a multitude of unimodal contracts, a *sui generis* contract, or even none of the aforementioned. The characterisation of the multimodal transport contract as a multitude of unimodal contracts automatically brings the unimodal contracts of carriage directly within the scope of application of those rules. Contrarily, the characterisation of the multimodal transport contract as contract *sui generis* has the ultimate consequence of it falling outside the scope of application of the special transport legislation and effectively submits it to total freedom of contract due to the lack of mandatory multimodal regimes. Accordingly, this determination is indispensable and will be scrutinised in the following section.

The first approach is to characterise the multimodal contract of carriage as a multitude of unimodal contracts.[71] If the multimodal contract of carriage is qualified as a multitude of unimodal contracts, then each convention governing unimodal carriage is triggered by the respective unimodal contracts on the different fragments of the multimodal contract.[72] The consequence of this qualification is that the parties will have several different mandatory rules govern their relationship, but these mandatory rules are in force during different stages of the transport operation and sometimes no legal regimes apply at all.[73] Furthermore, the parts of the transport operation not covered by any convention (terminal stages, transhipment, etc.) are necessarily left to the freedom of contract.

Nonetheless, this is the legal position in English jurisprudence. This is assumed in the abovementioned *Quantum* case, in which the English Court of Appeal concluded that the (multimodal) contract of carriage was a contract for carriage by road in so far as the carriage from Paris to Dublin was regarded *and* a contract of carriage by air regarding the rest of the carriage.[74]

On the other hand, German and Dutch courts have chosen to qualify the multimodal contract of carriage as *sui generis* [75] The consequence of this is that none of the unimodal conventions apply to multimodal contracts of carriage enforced in Germany and the Netherlands. Danish jurisprudence is the most consistent with this definition.[76]

In the case U 1984.577 SH, rendered by the Danish Court of Commerce, the sender of a batch of prawns contracted with a carrier to ship the prawns from Denmark to England. The contracting carrier agreed with a sub-carrier that the sub-carrier would take on the entire journey from Denmark to England. The sub-carrier issued a bill of lading, providing for the Hague-Visby Rules, but the carriage required the use of road transport as well. The prawns were damaged *en route*, and the contracting carrier compensated the sender but did subsequently seek recourse from the employed sub-carrier.

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[71] See *Goldsmith* in ET.2009.72.

[72] Supra section 2.1.1.

[73] See *Bäckdén* (2019) pp 4-5.

[74] Supra section 2.1.2.

[75] Cf. BGH 181/05 and Court of Appeal Den Haag Case no 105.106.644. Both cases are analyzed in section 5.2.1.

[76] *Fabricius* (2017) p 62; See *Vestergaard Pedersen* (2008) p 966; Ulfbeck and Taiger Ivø argue that this position presupposes the issuance of one transport document to cover the entire transport. If, on the other hand, the carrier has issued separate transport documents to each leg of the route, they argue that is could be a multitude of unimodal contracts of carriage (*Ulfbeck &Taiger Ivø* in ET.2008.331 chapter V, section 4).

The Danish Court of Commerce held that the case was to be determined by the Hague-Visby Rules, but their reason is interesting. The court applied the Hague-Visby Rules, not by reference to mandatory application to sea carriage, but on the ground that the contracting carrier did not issue a CMR consignment note and had accepted the bill of lading without objection. It must therefore be assumed that the regulation of the relationship between the parties was considered contractual, and thus, the court must have viewed this as a multimodal contract and not merely transport by sea.[77] The Court of Commerce did, however, refrain from making general remarks as to the characterisation of the contract. If, on the other hand, the English Court of Appeal rendered judgement, it probably would have applied the Hague-Visby Rules to the sea part of the carriage and the CMR Convention to the road part of the carriage with reference to their mandatory scope of application.[78]

Even though the *sui generis* theory is the prevailing one in European jurisprudence it holds several flaws. First of all, it does not give account to the multimodal provisions in the otherwise unimodal transport conventions, that explicitly address the combined use of different means of transport under the same contract of carriage.[79] As an example, art 31(1) of the Warsaw Convention, governing carriage by air, asserts that in the case of combined carriage performed partly by air and partly by some other means of transport, the convention applies to the air part of that transport (if conditions otherwise prescribed in art 1 are present). Accordingly, the *sui generis* theory is contradictory to some of the current unimodal transport conventions that explicitly declare themselves applicable to a certain mode of carriage, even if it is performed based on a contract that also includes other modes of transport.[80]

In German jurisprudence, the theory has partly been based on the argument that the unimodal conventions that apply to contracts of carriage by a particular mode of transport do not apply to contracts of carriage by *that particular mode* and, *in addition*, one or more other modes of transport.[81] And as a consequence, unimodal conventions do not apply to multimodal contracts, and must instead be regarded as a contractual type of their own. However, if the reason for definition of the contract as *sui generis* is based on the fact that the unimodal conventions do not apply, then realising that some unimodal conventions provide application makes the basis of the theory hollow.

As a means to mend these problems, it has been proposed in theory that the multimodal contract is neither *sui generis* nor a multitude of unimodal contracts.[82] It is supported by the fact that a multimodal contract of carriage, is in fact, *a contract of carriage,* just like the unimodal ones.[83] A major difference between unimodal and multimodal transport contracts is that a multimodal transport contract not only involves the transport itself. The carrier is also responsible for planning, potential storage of the goods in warehouses in between transhipment, and transhipment itself.[84] As such, the problems will be solved by means of a necessary interpretation of the

[77] *Ulfbeck & Taiger Ivø* in ET.2008.331 chapter V, section 4.

[78] Infra section 4.2.

[79] *Goldsmith* in U2008B.259 p 262.

[80] *Hoeks* (2010) p 76.

[81] BGH 181/05; *Bäckdén* (2019) p 64.

[82] *Andersen Roost* (2012) p 137 et seq.

[83] Andersen Roost presents an extensive analysis of the characteristics of the transport contract on p 79 et seq (ibid).

[84] *Andersen Roost* (2012) pp 81 and 85.

unimodal transport conventions, to determine whether they are immediately applicable to the contract of carriage bearing characteristics of a multimodal one or not.[85]

2.2.2 Conclusion

In Danish jurisprudence, no definite legal position has been established. By means of interpretation of the sparse case law within Danish jurisdiction, the analysis proposes that the Danish courts regards the multimodal contract as *sui generis.*

In the opinion of this thesis, however, the most plausible (or perhaps just the least problematic) theory is *prima facie,* that the multimodal contract of carriage is a contract with the main purpose of transporting goods,[86] and thus is not *sui generis* but a variety of the contract of carriage of goods. Furthermore, the analysis shows several problems in characterising the multimodal contract of carriage as a collection of unimodal contracts of carriage. Specifically, the fact that the multimodal carrier is responsible not only for the transport operation of each individual part of the carriage but also for the planning of it as such, as well as the terminal stages. Accordingly, regard should be given to both theories and the multimodal contract lies somewhere in between the two, as a contract of carriage of its own kind with special regulatory needs when it comes to liability.[87]

3 Choice of law (uniform or network liability system)

In the absence of a harmonised legal regime for multimodal transport, the legal literature has various ways in which the applicable laws should be identified, and as mentioned above, the indifferent preferences when it comes to choosing a liability system have caused member states to be reluctant with ratification of uniform liability conventions.[88] Generally, two different systems are proposed: regulation of the entire multimodal journey by one and the same legal regime known as the *uniform system* or separate regulation of the individual fragments of the multimodal contract of carriage, the so-called *network system*.[89] By recognising the shortcomings in the former, a *modified network system* has been proposed as well. In order to support the examination of carrier liability in multimodal contracts of carriage, the differences and similarities of these systems of liability are analysed below, with the objective of determining the law under which that very liability should be determined under.

3.1 The uniform system

The uniform system entails that a single uniform liability system regulates the entire multimodal carriage. The advantages of the uniform system are evidently the foreseeability and manageability it entails. Furthermore, having the entire transport operation governed by the same rules, reduce the amount of disputes connected with the fact that it is often difficult to establish during which mode of transport damage has been caused (unlocalised damage).

The main disadvantage of the uniform system is that in practical reality the contracting carrier sub-contracts to individual unimodal carriers.[90] Thus, the contracting carrier is potentially subject to different rules in its relationship to the sender and its relationship to the sub-carrier,

[85] Ibid p 135.

[86] Ibid p 134.

[87] To ensure that no stages of the transport operation are left unregulated.

[88] Supra section 1.

[89] *Bäckdén* (2019) p 60; *Andersen Roost* (2012) p 115.

[90] *Bäckdén* (2019) p 61; *Eftestøl-Wilhelmsson* (2016) p. 65.

potentially disturbing its rights of recourse, as the contracts are not 'back-to-back'. As an example, a sea carrier liable under the Hague-Visby Rules are subject to extensive exemptions under art IV.[91] A contracting carrier subject to a uniform system bears the risk of being prejudiced by liability that fails to recognise the Hague-Visby Rules defences. Thus, he might be liable pursuant to a set of uniform rules without granting indemnity from the sub-carrier who is exempt by virtue of the exemptions in the Hague-Visby Rules.[92]

A variation of the uniform system whereby regulation of the entire multimodal journey is governed by the law applicable to the most significant part of the multimodal journey is proposed. This concept has however not found support in case law and doctrine.[93]

3.2 The network system

The network system entails that carrier liability is regulated individually by separate unimodal systems applicable to the particular sections of the transport operation. This entails, that if the existing unimodal conventions apply by mandatory force to unimodal contracts, then carrier liability is defined within the respective unimodal conventions and differs depending on where the damage occurred.[94] The network system is efficient if the legal regimes used in the respective parts on the multimodal contract are identical to the ones issued between the contracting carrier and the sub-carriers (back-to-back).[95]

The network system has been criticised for being too complex, giving the cargo interest too little notice of what rules will in fact govern the carriage, resolving in extensive need for litigation, particularly in respect of the borderline between modes.[96] Another obstacle with the network system is that in situations where the loss or damage is concealed the law applicable may prove difficult to determine. Due to the scope of application of the current unimodal transport conventions, none of them are applicable unless the damage is localized.[97]

A similar issue occurs in the situation of intermediate or terminal stages that none of the current conventions grasp. This could be the situation where the items had to be stored in a warehouse prior to sea transport.[98] In the event that the parties have not contractually regulated this conventional gap, domestic ancillary rules pursuant to the (usually chosen) jurisdiction must – in lack of an alternative - be activated, potentially leaving room for forum shopping.

The opposite problem may also materialise; that multiple conventions compete for the application. Some unimodal conventions do not only regulate carrier liability during the actual

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[91] An extensive analysis of carrier liability under the Hague-Visby Rules are provided in section 4.1.

[92] See *Glass* (2004) p 281.

[93] See *Goldsmith* in U2008.259; In the *Quantum* case the Commercial Court argued that the law applicable to the predominant part of the carriage should apply to the entire carriage, but the Court of Appeal explicitly rejected the idea of such application (*Quantum* in 2 Lloyds Law rep. paras 61-63).

[94] Applicability of the Hague-Visby Rules and the CMR Convention, in particular, are discussed in section 5.

[95] Thus, securing option for recourse in all contractual relations down the chain of transport contracts.

[96] *Glass* (2004) p 281.

[97] It follows *e contrario* from the scope of application of the respective conventions that any damage must be localised in order for the rules to apply, as they apply to damage that occurs during transport by a particular mode of transport (*Hoeks* (2010) p 17); In specific circumstances of combined road and air transport, however, air carriage conventions may apply even in situations of unlocalised loss based on art 18(3) of the Warsaw Convention or art 18(4) of the Montreal Convention.

[98] Hague-Visby Rules limits the carrier's liability to when the carrier has the goods in its 'custody'. The custody principle under the Hague-Visby Rules does not extend to storage units prior or subsequent to the journey (*Bäckdén* (2019) p 42).

transport but also during loading and unloading.[99] The containerization of the trade has efficiently allowed a container to be unloaded from i.e. a road vehicle while simultaneously being 'loaded' onto a ship, in which case both the CMR and the Hague-Visby Rules would *prima facie* apply.[100] The CMR Convention may, in this case, infringe on the Hague–Visby Rules. The possible conflicts materialise if it is determined that the unimodal conventions are considered mandatorily applicable to carriage under multimodal contracts and the network system is immediately employed.[101]

3.3 The modified network system

The modified network system is modified to the extent that it supplements the ordinary network system with a "catch-all" provision in the terminal stages.[102] This entails that any stages of the transport, not subject to mandatory legislation, will be subject to a unified general liability rule. This avoids the unfortunate situation that liability in the previously mentioned gaps between conventions might be governed by national legislation. This system thus promotes foreseeability in comparison to the network system while maintaining the contracting carriers' possibility of recourse against a sub-carrier, as was the concern with the uniform system.

Dutch and German national systems are essentially modified network systems. These are the only states that, to this date, have domestic regimes including rules specifically designed to regulate multimodal transport contracts.[103] (Although England can, on account of the decision in the *Quantum* case, be regarded as having a clear legal position on multimodal contracts, applying it to a network system).[104]

The relevant law in Germany is the Handelsgezetsbuch (HGB) which unifies transportation by road, rail, inner waterways, and air as well as multimodal transport and subjects them all to the same set of rules.[105] Even though maritime transport is covered by separate legislation (also found in the HGB (book 5) multimodal transport is always subject to the same rules whether it includes maritime transport or not.[106]

German transport law is based on the premise that the existing unimodal conventions are not applicable to multimodal contracts and the HGB must be read with this in mind.[107] Under the HGB it is a prerequisite that a mode of transport is subject to separate liability regimes, in order to even qualify as an individual mode of transport.[108] Hence, for example, loading carried out by forklift is not considered a mode of transport and will thus not cause a transport contract to be regarded as a multimodal contract.[109] This means *prima facie* that multimodal contracts

[99] CMR art 17(1); the Montreal Convention art 18(3); CIM art 23 § 1; HVR art VIII.

[100] Cf. CMR art 2 and HVR art VII.

[101] *Bäckdén* (2019) p 98; Infra section 5.

[102] *Bäckdén* (2019) p 71.

[103] *Hoeks* (2010) p 456; *Bäckdén* (2019) p 73; *Eftestøl-Wilhelmsson* (2016) pp. 24–27.

[104] Supra section 2.1.2; Infra section 5.2.1.

[105] HGB §§ 452 through 452d regulates multimodal transport.

[106] HGB § 452 determines that it regulates multimodal transport regardless of whether part of the carriage is performed by sea.

[107] This specific subject is elaborated and discussed in detail in section 5.

[108] HGB §452.

[109] *Andersen Roost* (2012) pp 230-231; See *Bäckdén* (2019) p 74.

should be left to the general rules of liability unless it is subject to an international convention that actually regulates multimodal transport.

In order to regulate multimodal contracts of carriage, the HGB stipulates a network approach under a hypothetical contract formula. This hypothetical solution only applies to localised damage. The idea is that the carrier liability will be settled pursuant to the rules that *would* have applied, had the parties entered into a separate agreement on a unimodal basis.[110] Thus, the network system is imposed with mandatory force by way of using the rules that would have applied if the carrier and the sender in a hypothetical scenario had entered into several unimodal agreements. Thereby, the HGB avoids the requirement stipulated by itself of the autonomous applicability of unimodal conventions.[111]

A different modified network system proposed is one where the liability is uniform, but a limited network system applies to limitation of liability.[112] This, however, seems more complex than the prior, and it is a precondition that the uniform liability system must be less strict, than all potential unimodal conventions applied in the relationship between the contracting carrier and the sub-carrier. Otherwise right of recourse is still compromised.[113]

3.4 Summary

The present section revealed several flaws regarding both the uniform and the network system. The obvious disadvantage to the otherwise concise uniform system is the contracting carrier's risk of losing its right of recourse in situations where the employed sub-carrier is *de facto* tortfeasor but subject to higher limitations of liability. This issue is solved by employing the network system which is, however, incomprehensible and does not grasp all aspects of the multimodal contract. Consequently, the most desirable liability system is a variation of the network system that additionally regulates the parts of the contract of carriage that are unique to the multimodal one.

4 Carrier liability in Unimodal Conventions

The previous section concluded that, preferably, the liability rules of the unimodal regimes should apply to some extent when determining carrier liability in multimodal contracts of carriage. In section 5 below, an analysis of whether the existing unimodal conventions even can apply to multimodal contracts is given. However, in order to place that analysis in its legal setting, first the legal context will be accounted for. Thus, the carrier liability in the unimodal conventions subject to the thesis is presented and briefly discussed in the current section. This will provide the background for the overall research question and in particular expose similarities and (most importantly) differences that may have a significant impact on the carrier's liability.

4.1 The Hague-Visby Rules

The Hague-Visby Rules govern international carriage of goods by sea. Carriage of goods by sea is divided into two categories: carriage of goods under charter parties and carriage of goods

[110] *Andersen Roost* (2912) pp 222-223 and 232-233; See Bäckdén (2019) p 75.

[111] *Bäckdén* (2019) pp 74-75.

[112] *Glass* (2004) p 281.

[113] As an example, the liability is presumed under the CMR Convention and negligence based under the Hague-Visby Rules (Infra sections 4.1-4.2).

under bills of lading. Carriage of goods under charter parties is specifically excluded from the scope of the Hague-Visby Rules and will not be addressed in this thesis.

As for the scope of application, the Hague-Visby Rules apply to a contract of carriage by sea that has undertaken an obligation to issue a bill of lading.[114] When such a contract of carriage exists, the carrier cannot exclude or mitigate its liability beyond the conventional defences as the Rules provide for mandatory law once within the scope of applicability. The parties can, however, agree to subject the carrier to liability higher than imposed by the Hague-Visby Rules, but never the other way around.[115]

Under the Hague-Visby Rules, the carrier is liable for damage to the goods in his care, but avails of a number of conventional exemptions and limitations of liability. The starting point is art III(2) which states that:

"Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Thus, the material scope of application is determined. It is also implied through art III(2) that the actual liability is shaped by the extensive amount of limitations in art IV. The geographical scope of the Rules is determined by art X and the period of liability is specified in art VII from the time of loading to the time of discharge. Delay of the goods is not regulated in the Hague-Visby Rules.

The most notable exemptions are the ones exempting the carrier from liability insofar as the damage is caused by fault or neglect by master, agent, or servant in either the navigation, or the management of the ship[116] and the directly followed provision exempting the carrier from liability in cases of fire not caused by his own fault.[117] Both provisions are unique to the Hague-Visby Rules.[118] The exceptions listed in art III.2(c)-(p) range from usual force majeure situations as well as situations caused by the shipper rather than the carrier, insufficient packaging, and the like.

The liability and the option to be able to invoke the limitations in art IV is balanced out by the sea carrier's duty to keep its vessel seaworthy and if the vessel is not seaworthy (to the specific cargo carried on board) he will not be able to invoke any of the limitations.[119] The duty to keep the vessel seaworthy initiates already before the commencement of the voyage and is thus referred to as a duty to keep the vessel initially seaworthy. Unseaworthiness that is not initial and occurs during the voyage does not preclude exoneration from liability. This is also the case with initial unseaworthiness that was not caused by the carrier's want of due diligence.[120] In other

[114] Applicability to contracts of carriage by sea and bills of lading in relation thereto are thoroughly discussed in section 5.1.

[115] HVR art III(8) and art V; *Spanjaart* (2018) p 87.

[116] Not to be confused with the management of cargo (*Falkanger* et al. (2017) pp 354-356). Distinction between the two are for purposes of limited space excluded from the present thesis.

[117] HVR arts III(2)(a) and (b).

[118] The Rules are historically conditioned in the fact that at the time the Hague Rules were drafted, it was customary to use wooden ships, and navigation were performed by sequential or radionavigation. Navigation at sea was thus associated with far greater uncertainty than today, were satellite-based navigation systems such as GPS is primarily used, but despite this the Rules have not been amended (*Andersen Roost* (2012) p. 280).

[119] HVR art IV(1).

[120] HVR art IV(1); *Bäckdén* (2019) p 43.

words, if the loss or damage can be traced to such unseaworthiness at the commencement of the voyage, it is irrelevant whether the cause can also be said to have been one encompassed by art IV(2).

No explicit provision in the Hague-Visby Rules does, however, state the carrier's liability for the state of the cargo, which has led to discussion of the basis of liability in theory. The extensive and almost force majeure-like list of exemptions introduced in art IV by the following: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from(...)",* implies that the carrier *e contrario* is responsible in any other events than the ones listed. Despite this, the liability is predominantly considered to be fault-based (with reversed burden of proof).[121]

The reasoning is based on the fact that several provisions impose on the carrier a cautious behaviour. Arts III(1) and IV(1) impose duties of due diligence in respect of making the vessel seaworthy by demanding the carrier to "properly" and "carefully" handle (etc.) the goods carried.[122] Furthermore, art IV(2)(b) renders the limitation in case of fire useless if it was caused by the "fault" or "privity" of the carrier. Legislative history also suggests that the Hague-Visby Rules should subject carrier liability to a negligence norm.[123]

The carrier is not only liable subject to his own negligence but will also face liability for cargo damage if caused by the fault or neglect of his agents and servants, still subject to the exceptions in arts IV(2)(a) and (b).[124] This form of liability is arguably a combination of a negligence based and a strict liability as servants and agents are still subject to the negligence norm, but the carrier is liable for this negligence even though he has not himself acted negligently.[125]

Claims are time-barred for one year after delivery took place or should have taken place.[126] The quantitative limitation of the payable amount for loss of and damage of goods is 666.67 units of account pr. unit lost or damaged or 2 units of account pr. kg. of gross weight lost or damaged. The chosen "unit of account" is special drawing rights established by the International Monetary Fund (referred to as SDR).[127]

4.2 The CMR Convention

The CMR Convention governs international carriage of goods by road. The applicability of the CMR Convention demands a contract for the carriage of goods by road with an additional prerequisite that the carriage is performed by a vehicle, which in turn is defined as motor vehicles, articulated vehicles, trailers, and semi-trailers.[128] While the Hague-Visby Rules are silent on the carrier's liability for the state of the cargo, the CMR quite implicitly states that "*The carrier shall be liable for the total or partial loss of the goods and the damage thereto*."[129] While the mandatory character of the Hague-Visby Rules only applies to the carrier side, the mandatory

[121] *Bäckdén* (2019) p 43; *Todd* (2016) p 311; See *Falkanger* et al. (2017) p 331.

[122] HVR art III(2).

[123] The Hague-Rules is the result of a committee proposal based on the Harter Act (1893) subjecting the carrier *prima facie* to negligence liability.

[124] Follows *e contrario* from HVR art IV(2)(q).

[125] *Falkanger* et al. (2017) p 192.

[126] HVR art III(6)

[127] The SDR is not a currency, but a reserve assets. Its value is based on a basket of five currencies (see more on: imf.org).

[128] CMR arts 1(1) and 1(2).

[129] CMR art 17(1).

character of the CMR Convention works both ways. Neither the carrier nor the cargo-interested party are allowed to depart from the provisions of the convention irrespective of which side such deviation might favour.[130] Contrary to the Hague-Visby Rules, the CMR Convention also regulates carrier liability for delay.[131]

The road carrier is subject to a stricter liability than the sea carrier. The CMR Convention impose on the road carrier *at least* presumed liability, to which he is only exempt when the damage is attributable to the cargo side, or due to inherent vice of goods, or due to force majeure-like situations.[132] This means that to avoid liability, the carrier must show that the damage was caused by a matter within the listed exemptions in arts 17(2) and (4). Arts 17(2) and (4) largely exempt the carrier in situations not caused by his negligence but do not thereby generally allow the carrier exoneration from liability by virtue of negligence with a reversed burden of proof (as is the case with the Hague-Visby Rules). The rule *only* allows a possible counterproof in the case of deficiencies on the cargo side or force majeure.[133] Accordingly, the liability has been proposed to be even more strict than the presumed liability but still less than absolutely strict.[134]

The carrier cannot avoid liability by showing that the damage or loss resulted from defects in the vehicle used for carriage, or from fault or neglect of the owner of the leased vehicle or his representatives.[135] The road carrier remains personally liable where he has delegated the performance of any of his duties to a third party.[136] The period of liability is the time when the carrier takes over the goods and the time of delivery and claims are time-barred for one year.[137] The time starts running from delivery in the case of damage and 30 days from alleged time of delivery in cases of total loss and in all other cases, on the expiry of a period of three months after the making of the contract of carriage.[138] These rules are more detailed than the equivalent provision in the Hague-Visby Rules and can, accordingly, impact the cargo-interests risk of having his claim for *inter alia* total loss time-barred.

Liability is limited to 8,33 SDR pr. kg., but the right to limit liability is lost if the carrier or someone for whom he is responsible has been grossly negligent.[139] The limitation amounts are thus significantly higher pr. kg. than the equivalent 2 SDR in the Hague-Visby Rules. Thus, even if the carrier, in any event, would be liable on basis of liability under both the CMR Convention and the Hague-Visby Rules, choosing the correct applicable law still has significant effect on the calculation of such.

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[130] This is evident from the wording of art 41 of the CMR Convention stating that "*any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void"*.

[131] CMR art 17(1).

[132] *Bäckdén* (2019) p 50; *De Wit* (1995) p. 96.

[133] See *Midtgaard Fogt* in Formueretlige emner (2019) p 174.

[134] *Alistar Clarke* (2003) p 167; See *Bull* (2000) p 94. The basis of liability will, for the purposes of this thesis, not be discussed thoroughly. The purpose is merely to illustrate the difference in basis of liability in the CMR Convention and the Hague-Visby Rules with the overarching aim of emphasising the importance of applying the correct legal regime.

[135] CMR art 17(3); See *Falkanger* et al. (2017) p 346.

[136] CMR art 3; *Messent & Glass* (2018) p 80.

[137] CMR arts 17(1) and 43.

[138] Ibid.

[139] CMR art 23(3); See U 2002.6/2 HD in which a sub-carrier left lorry unguarded for 46 hours and the cargo (videocameras) was stolen. The contracting carrier was held liable for the entire claim for damages because the sub-carrier had acted with gross negligence by leaving the cargo without surveillance.

5 Can unimodal conventions apply to multimodal contracts?

The characteristics of the multimodal transport contract and the system to which different jurisdictions handle those have been established in the previous sections. Furthermore, the fact that no enforceable legal regime governing multimodal exists is established. By extension, the present section will examine what possibilities the existing unimodal regimes provide when it comes to multimodal contracts of carriage. Specifically, the CMR Convention and the Hague-Visby Rules. If these legal regimes apply *ex proprio vigore* the previous section established that once within the scope, they apply with mandatory force. In such case, carrier liability will be subject to the mandatory application of the respective unimodal conventions applicable to the individual fragments to the extent they fall within the scope of application.

For the sake of clarity, the parties may naturally agree to apply both the CMR Convention and the Hague-Visby Rules outside their immediate scope of application, if they do not conflict with other mandatory rules.[140] The following section does not intend to address such a situation, but rather the question of whether they apply with compulsory effect to multimodal contracts and, if so, to what extent.

Several issues may materialise when applying unimodal transport conventions to multimodal contracts of carriage. As briefly mentioned above most of the unimodal conventions take on the contractual approach, which may in turn cause problems with their application to multimodal contracts.[141] Furthermore, the discussion in the present section relies on the premise that multimodal transport contracts are not *sui generis*. If so, then already because of the characterisation as *sui generis,* none of the reviewed conventions apply.[142]

In this regard, however, it has been argued that the *sui generis* theory is a consequence of the non-applicability of unimodal conventions to multimodal contracts of carriage.[143] However, to the extent the *sui generis* theory is used to enhance the argumentation of non-applicability of unimodal conventions, the theory is both part of the argumentation and a result of it, thus the argumentation becomes circular, and if the following section reveals the possible application of the unimodal convention for carrier liability in unimodal contracts of carriage, that *sui generis* theory descents on account of that.[144] This would also be in accordance with the conclusion in the present thesis, that the multimodal contract should not be seen as *sui generis* but rather a new kind of contract for the carriage of goods, which does not by default, exclude application of the current regimes governing such contracts.[145]

5.1 Hague-Visby Rules

The Hague-Visby Rules apply to "*every contract of carriage of goods by sea*"[146] which are in turn defined as "*contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea*".[147] In this regard, an important distinction is the one between application to a contract of carriage that prescribes the

[140] HVR art X(c); See *Fabricius* (2017) pp 44-45.

[141] Supra section 2.1.1.

[142] Supra section 2.2.1.

[143] *Bäckdén* (2019) p 63.

[144] Ibid p 64; Supra section 2.2.1.

[145] Supra section 2.2.1.

[146] HVR art II.

[147] HVR art I(b); Art I(b) also grant application of HVR to bills of lading or similar documents issued under or pursuant to a charter party. This is, however, not relevant in the current context, and will thus not partake in the discussion.

issuance of a bill of lading and the actual bill of lading itself.[148] Accordingly, the distinction will be explored rather elaborately, as this may have an impact on if, and to what extent, the Hague-Visby Rules apply to multimodal contracts of carriage.

The first indicator is that art II prescribes liability on the carrier who have committed himself to carry under a "*contract of carriage of goods by sea*". Accordingly, the carrier is liable for the carriage of goods but only in so far as the carriage is subject to a *contract* of carriage. By the definition of the contract of carriage provided in art I(b), some authors have suggested that the Rules apply to the bill of lading only.[149]

However, an obligation imposed by way of art III(3) resting on the carrier to issue a bill of lading to the shipper, if the shipper so requests, entails an inconsistency insofar as the convention applies to bills of lading rather than to the contract of carriage. If the applicability of the convention presupposes the existence of a bill of lading, the obligation to issue the very same becomes somewhat redundant. Thus, the interpretation in question is not in coherence with the general rules of interpretation of treaties,[150] and accordingly, doctrine has presumed that this obligation only applies if the carrier has undertaken to issue a bill of lading.[151] This is in line with the wording of the Swedish Maritime Code which defines the applicability of the Hague-Visby Rules as "*Det är därmed fråga om sjötransport av gods mellan två stater när ett konossement ska utfärdas*".[152]

In turn, the threshold for the subsequent obligation to actually issue such a document must be rather high. If not, the carrier might determine the legal position onerous to his advantage simply by omitting issuance of a bill of lading, consequently leaving the contract of carriage outside the scope of the Hague-Visby Rules. To remedy this problem, it is widely accepted that the implication of art I(b) entails that the Hague-Visby Rules are triggered when a contract of carriage provides for the issuance of a bill of lading, irrespective of whether it is actually issued.[153] This is also consistent with the UK high court case Pyrene Co Ltd v Scindia Navigation Co Ltd (hereinafter referred to as '*Pyrene v. Scindia'*) in which Judge Devlin J. stated:

> *"In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply."*[154]

In line with this, and for the purposes of the impending analysis, the present thesis finds it most consistent with the overall convention, to interpret the scope of application in a manner that encompasses a contract of carriage by sea that has – already prior to the issuing – undertaken an obligation to issue a bill of lading.

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[148] See *Bäckdén* (2019) p 206.

[149] See *Vestergaard Pedersen* (2008) p 465.

[150] *Linderfalk* (2007) p 108.

[151] *Bäckdén* (2019) pp 206-207; See *Sejersted* (1976) p 32 who states that a bill of lading merely recapitalises the terms of a previously concluded agreement.

[152] SFS 1994:1009, Chapter 13 § 1 (13:1).

[153] *Bäckdén* (2019) p 208; *Treitel & Reynolds* (2011) p 648; *Aikens* et al. (2021), p 364; *Todd* (2016) p. 330; *Sejersted* (1976) p 32.

[154] *Pyrene v. Scindia* (1954) in 1 Lloyd's Rep. 321 p 329; Infra section 5.1.1.

An explanation of the discrepancy between art II and art I(b) might be found in the historical conditions of the fact that the division between contracts of carriage and bills of lading, was not as articulated when the original Hague Rules were drafted in 1924.[155] Accordingly, the distinction holds little practical relevance within contracts exclusively for carriage of goods by sea where the parties more often than not deliver the goods without any formal preliminary contract with the line, and in such a case, the bill of lading is the only document to contain the conditions of carriage and no issues arise as the two coincide.[156]

The bill of lading is, however, not restricted to maritime transport and can be issued as a transport document for any kind of transport *inter alia* pursuant to a multimodal contract of carriage.[157] However, the possible hurdle for multimodal application of the Hague-Visby Rules is that art I(b) requires that the document *relates* to the carriage of goods by sea. This does, however, not in itself exclude the application to multimodal transport if the carriage comprises a sea leg. This is a matter of interpretation of when a contract 'relates' to carriage of goods by sea.

Art I(e) defines the period of liability "*from the time when the goods are loaded on to the time when they are discharged from the ship*". In turn, art II stipulates that the Rules will govern the responsibilities, liabilities, rights, and immunities of the carrier in relation to matters from loading until the discharge of goods. Interpretation of when a contract 'relates' to carriage of goods by sea, is accordingly from the time when the goods are loaded on to the time when they are discharged from *the ship*. As a consequence, the Hague-Visby Rules can only apply within this period of time i.e. the sea leg.

This is also in accordance with the *travaux préparatoires* to the Danish Maritime Code implementing the Hague-Visby Rules.[158] The report from the Danish Maritime Law Committee had the following comment on the definition of the contract of carriage: "*Omfatter en transportaftale udover søtransport også transport med andet transportmiddel, er således alene søtransportleddet omfattet af konventionens bestemmelser*."[159] The committee based this on the fact that both art I(b) of the Hague-Visby Rules and art 1(6) of the Hamburg Rules defined the contract of carriage as carriage *by sea.*

In doctrine, the common perception agrees that the combination of arts I(b) and II indicates that the Hague-Visby Rules apply to contracts of carriage by sea to which a bill of lading is to be issued, and if a bill of lading concerns multimodal transport, the Hague-Visby Rules only apply to the sea part of the transport.[160] This is in part because of the general construction of the convention as a whole, which contains provisions that are meaningless outside the context of sea carriage and that cannot be rendered meaningful by permissible alteration.[161] The effect would be that those provisions will be inapplicable and disregarded in a multimodal contract of carriage. This is *inter alia* regarding the exemptions in arts IV(2)(a) and (b). These are unique to the convention and provide a significant limitation of liability.[162] Furthermore, art X(b) that

[155] Supra section 1.

[156] *Falkanger* et al. (2017) p 320.

[157] *Bäckdén* (2019) p 211.

[158] LBKG 2018.12.17 nr 1505. The Danish Maritime Code also implements the Hamburg Rules to the extend they do not conflict with the Hague-Visby Rules.

[159] Betænkning 1215/1990 p 34.

[160] *Treitel & Reynolds* (2011) p 651; *Hoeks* (2010) p 318; See *Aikens* et al. (2021) p 502.

[161] See *Aikens* et al. (2021) p 502; See *Bäckdén* (2019) p 212 et seq.

[162] Supra section 3.1; Also, exemptions in HVR arts IV(2)(c) and (i) are maritime specific.

defines the compulsory application to carriages transpiring from a *port* in a contracting state is hardly transferable.[163] These provisions, as well as the obligation to keep the vessel seaworthy in art III(1), seem strenuous to apply to i.e. a lorry.

On the other hand, it would not be far-fetched to interpret art IV(2)(a) to be an exemption of liability if act, neglect, or fault caused by servants of the carrier in the *management of the ship, vessel,* or even *aircraft* (the list could go on) was the cause of the damage. Simply applying the logic of the convention would perhaps be possible regarding some of the provisions but bearing in mind that a treaty must be read in its whole, and under the assumption that all terms of a treaty add meaning to the treaty and thus no terms are redundant, it becomes clear that the convention in its whole intended to govern only sea legs.[164]

5.1.1 Case law on the applicability of the Hague-Visby Rules to multimodal contracts

Case law on the applicability of the Hague-Visby Rules is generally sparse, perhaps because of the rather clear and predominant consensus on the legal position. The Hague-Visby Rules have, however, been applied to the sea leg pursuant to some multimodal contracts and even to other legs, but with reference to agreement between parties in situations where no other conventions mandatorily applied.[165] The former does, however, hold little precedence as the courts have not directly considered whether the contract *as a whole* is directly subject to the Hague-Visby Rules but instead have only considered whether the individual contractual terms are contrary to them.[166]

One example is the case U 2007.1123 SH in which the Danish Maritime and Commercial High Court rendered a pre-contracted forum clause invalid pursuant to § 310 of the Danish Maritime Code by immediate application of the code. However, the court did not decide whether the multimodal transport contract was subject to the code in its entirety or whether only § 310 applied *ex proprio vigore,* or whether it was the entire Chapter 13 (incorporating the Hague-Visby Rules).

Two English cases do, however, in coalition with each other provide a clearer picture of the legal position in English jurisprudence. In *Pyrene v. Scindia*, Pyrene Co sold a fire tender to a buyer. The fire tender was being lifted onto the ship, but before it crossed the rail it was dropped and damaged. As per the contract of sale between the seller and buyer, the possession of the property had not passed to the buyer at this stage. A bill of lading had been drawn up but was not issued. The seller sued the owner of the ship for the cost to repair the tender. The shipowner admitted liability but argued that liability would be limited by the Hague Rules art 4(5).[167] In this case, the court found that the intention of the contracting parties to have a bill of lading govern their relationship was sufficient to make it a contract of carriage 'covered by a bill of lading' and thus trigger the Hague Rules. Furthermore, it was held by way of *obiter dictum* that the Hague Rules apply to a contract or *part of a contract*, in so far as the latter relates to the carriage of goods by sea.

By reference to *Pyrene v. Scindia*, the English Queens Bench division subsequently applied the Hague-Visby Rules to a multimodal contract of carriage in the case *Mayhew foods v. Overseas*

[163] Though *port* might easily be switched to *airport* it is difficult to determine when a lorry or train is at 'port'.
[164] *Linderfalk* (2007) p 108.
[165] U 1982.398 HD.
[166] See FED 2004.702 HD.
[167] Equivalent to HVR art IV (5)(a)(f)(g) and (h).

Containers.[168] The contract provided for carriage from Uckfield, England to Jeddah, Saudi Arabia. The bill of lading granted the carrier wide liberty concerning route and means of transportation. The actual carriage took place from the English port of Shoreham to Le Havre in France by a different vessel where it was transhipped onto a ship. In this regard, Judge Bingham J. stated the following:

"As Mr. Justice Devlin pointed out in Pyrene Co. Ltd. v Scindia (...) the rights and liabilities under the Rules[169] attach to a contract or part of a contract. The contract here was for carriage of these goods from Uckfeld to the numbered berth at Jeddah. The Rules did not apply to inland transport prior to shipment on board a vessel, because under s. 1(3) of the 1971 Act, they are to have the force of law only in relation to and in connection with the carriage of goods by sea in ships. But the contract here clearly provided for shipment at a United Kingdom port, intended to be Southampton but in the event Shoreham, and from the time of that shipment, the Act and the Rules plainly applied."[170]

5.1.2 Conclusion

Based on the above, the applicability of the Hague-Visby Rules can be narrowed down to sea carriages operated pursuant to an underlying contract of carriage that prescribes the issuance of a bill of lading. It is a prerequisite that an obligation to issue a bill of lading is present in the contract of carriage, but it is not demanded that the bill of lading is actually issued. Such a legal position would lead to the unfavourable position that the carrier might onerously determine the applicable law after the contract conclusion. If, however, the contract is *only* evidenced by the bill of lading, the bill becomes the contract of carriage by sea and the Rules apply to that contract. A requirement that the contract of carriage 'relates' to carriage of goods by sea, entails that the Rules apply to all contracts of carriage under which a bill of lading *for sea carriage* is issued. If the contract of carriage includes carriage by other modes than sea, doctrine and case law have largely agreed that the Rules apply only to the part of the contract concerning sea carriage. In other words, the Hague-Visby rules can apply to multimodal contracts of carriage but only to a certain extend (the sea leg). Based on an interpretation of the individual provisions in the convention in their overall context, as well as from supplementary teleological interpretation, the analysis conducted in this section has also established that this result is the most appropriate one, and accordingly, this thesis echoes the current legal position.

5.2 CMR Convention

In the section above, it is concluded that the Hague-Visby Rules do apply to multimodal contracts but limited only to the sea leg of one as such. By extension, this section is dedicated to determining the extent to which the CMR Convention applies to multimodal contracts of carriage. This is done by looking at how Nordic theory and case law compare to how English and Germanic[171] courts have settled these issues. Ultimately, this will lead to an understanding of the liability the carrier will be subject to, in a given situation under a given jurisdiction.

The CMR Convention applies to "*every contract for the carriage of goods by road*"[172] but as with the Hague-Visby Rules, the provisions in the CMR do not specify whether a multimodal contract of carriage conforms with the requirement of being a contract for carriage *by road*.[173]

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[168] *Mayhew foods v. Overseas Containers* (1984) in 1 Lloyd's Rep. 317.

[169] In that case the Hague-Visby Rules.

[170] *Mayhew Foods v. Overseas Containers* (1984) in 1 Lloyd's Rep. 317 p 320.

[171] Specifically, Germany and The Netherlands.

[172] French (original language): *"La présente Convention s'applique à tout contrat de transport de marchandises par route"*.

[173] CMR art 1.

The equivalent means of interpretation will in the following guide the delimitation of the contract of carriage by road.[174]

In the "Protocol of Signature" to the CMR Convention the following is stated:

"*The Undersigned undertake to negotiate conventions governing furniture removals and combined transport".*[175]

What can be deduced from this is, that it was likely not the intention of the drafters that it should directly regulate multimodal transport operations other than those covered by art 2 of the convention (Ro Ro of transport).[176] This is supported by the UN commentary to the convention interpreting the *travaux préparatoires* to state that it was not the intention that art 2 should extend its scope to multimodal transports. Rather it had the quite opposite purpose to ensure that Ro Ro transports were characterised as unimodal.[177] The commentary does, however, open the door for the application of the convention to different fragments of the contract than road transport under three cumulative conditions:

"The application of the law on the other means of transport is provided for only under three cumulative conditions - namely that the damage is not caused by an act or omission of the carrier by road, that the damage results from an event which could only have occurred during the carriage of the road vehicle by the other means of transport, and that the event actually occurred by reason of carriage by this other means of transport."[178]

This does, however, refer to the situation within the scope of art 2, and is limited to application on the mode of transport (other than the road vehicle) utilised in the Ro Ro operation. Accordingly, no onerous conclusion to the problem can be extracted from this. It is, therefore, up to the courts to decide, and thus, the next step is to review decisions rendered by courts in different jurisdictions subject to the CMR Convention.

5.2.1 Case law on the applicability of the CMR Convention to multimodal contracts

The following analysis of case law intends to delimit the application of the CMR Convention to multimodal contracts for the carriage of goods. Furthermore, this study of case law is for the purposes of the present thesis presumed to reveal patterns or inconsistencies within courts in different jurisdictions, which serves to illustrate the inadequacy of the multimodal regime as is. The overarching aim is, however, to foresee which legal system the carrier is subject to in different jurisdictions, in order to determine its liability.

5.2.1.1 Quantum Corporation inc. and others v. Plane Trucking Ltd. and another

The *Quantum* case rendered by the English Court of Appeal has granted prejudicial status regarding the application of the CMR Convention to multimodal contracts of carriage within its jurisdiction.[179] In this case, 11.250 hardware drives were going from Singapore to Dublin. The carrier was Air France who took on the entire carriage as contracting carrier. Air France only

[174] Supra section 5.1 and 5.1.1.

[175] CMR Protocol of signature, ad. art 1, paragraph 4.

[176] *Andersen Roost* (2012) p 142; Supra section 2.1.1.

[177] CMR commentary (1975) p 17, para 51: *"In the opinion of the authors of the CMR, the situation described in this article does not constitute a combined transport operation, but a transport operation which is performed simultaneously at two different levels and may be described as "piggy-back" carriage."*

[178] Ibid p 19, para 60.

[179] See *Andersen Roost* (2012) p. 67; See G*lass* (2004) p 262; See *Hoeks* (2010) p 216.

flew the hardware drives from Singapore to Paris and instead chose a sub-carrier to drive the hardware drives from Paris to Dublin. *En route* from Paris to Dublin (somewhere in England) the consignment was lost in a fake "hijack" in which the truck driver was involved. The sender and receiver of the hardware drives (Quantum Corporation) claimed compensation for the loss.

The issues were addressed on the basis that this was a single contract of carriage from Singapore to Dublin and that carriage by road from Paris to Dublin was the intended mode of performance when the contract of carriage was made, but that Air France was not contractually obliged to carry the goods in that manner and might if they so wished have carried the goods on that leg by air.[180] In other words, it was an option for the carrier to choose whichever mode of transport was most preferred (road or air).[181]

The Claimant argued that the CMR Convention was compulsory applicable, and that Air France could only invoke the liability limitation in its general conditions for as long as they were not inconsistent with the CMR. By reference to art 29 of the CMR, they claimed that Air France could not avail itself of the CMR limits of liability because the damage was caused by wilful misconduct from an employee at the trucking company (chauffeur) which is regarded as wilful misconduct of Air France through identification.[182]

The commercial court rendered the CMR Convention inapplicable. Lord Justice Mclaren, expressed scepticism to the fact that there might be a clash of conventions if the Warsaw Convention applied to the air part of the transport and CMR applied to the road part.[183] To this, the Court of Appeal merely replied with the fact that nothing in either convention prevents the carrier from undertaking higher responsibility.[184] The commercial court also argued against application of the CMR Convention with the reasoning that the place of taking over of the goods specified in the contract could only be Singapore, which is the place of which the contractual carrier assumed liability for the goods, and that this would result in the CMR Convention applying to the air carriage from Singapore to Paris which was both "*absurd*" and "*contrary to the Warsaw Convention*".[185]

Furthermore, the CMR Convention attaches a number of legal effects to the place of taking over the goods and delivery, *inter alia,* time-bar of claims and jurisdiction.[186] In cases where road transport is part of a multimodal journey, it is not clear whether these terms refer to the start and end of the road carriage or the start and end of the overall multimodal carriage.[187] The Court of Appeal provided a different interpretation of the contract in the case and a possible solution to that problem:

"The place of taking over and place designated for delivery, as specified in the contract, can - at least in art 1 - be read as referring to the places which the contract specifies for the taking over and delivery by the carrier in its capacity as international road carrier".[188]

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[180] *Quantum* in 2 Lloyds Law rep. 25 p 25.

[181] For thorough discussion on options see section 2.1.2

[182] CMR art 3; *See* Vestergaard (2008) p 275; Supra section 4.2.

[183] *Quantum* in 2 Lloyds Law rep. 25 p 32, para 28.

[184] Ibid; See CMR art 41 and art 32 of the Warsaw Convention (which was the air-carriage rules subject to scrutiny in this case) for reference.

[185] *Quantum* in 2 Lloyds Law rep. 25 pp 25-26.

[186] CMR arts 31 and 32.

[187] *Hoeks* (2010) p 217, who does, however, argue in favour of application of the CMR to multimodal contracts.

[188] *Quantum* in 2 Lloyds Law rep. 25 p 33, para 33.

And regarding this the Court of Appeal concluded that, "*The place of taking over and delivery of the goods under art 1(1) are to be read as referring to the start and end of the contractually provided or permitted road leg."*[189]

Furthermore, Lord Judge Tomlinson held in the first instance, that the correct approach was to interpret the contract as a whole*,* and unless the contract *as a whole* could be said to be a contract by road, any road carriage that it embraced must, pursuant to the wording of art 1, fall outside the scope of the CMR. This was based on the view that the applicable law depends on a uniform system, in which the law applicable by mandatory force to the predominant part of the operation applies to the entire contract. Furthermore, the commercial court emphasised the fact that the CMR Convention had the purpose of standardising road transportation and referred to the *travaux préparatoires* as displayed above.[190]

The Court of Appeal disagreed with the commercial court in using the theory of applying the law applicable to the predominant part of the journey. They argued that this would cause several problems. One of them being in the situation that a multimodal contract of carriage provided for two individual carriages approximately the same length. In this instance, no such predominant part existed. The Court of Appeal stated the following:

"its effect would be to take agreed international carriage by road outside any Convention (...) in circumstances where the contract overall could not be characterised as primarily for road carriage."[191]

Lastly, the Court of Appeal argued, that it diminished the extent to which a journey from (in this case) Paris - Dublin is. Instead, they held that when determining whether there was a carriage by road under art 1, the *actual* operation of the contract under its terms should be considered. Accordingly, the Court of Appeal found that the concept of a contract for the carriage of goods by road embraces a contract providing for or permitting the carriage of goods by road on one leg, when such a carriage actually takes place under such contract, with the effect that the carrier's liability was subject to the CMR Convention.[192]

The Court of Appeal also conveyed this in a type of *Obiter Dictum* by saying that in situations where the carrier had left the means of transport open, either entirely or as between a number of possibilities at least one of them being transport by road, *and* in situations where the carrier may have undertaken to carry by some other means, but reserved an option to carry by road, the CMR would also apply to the road leg.[193]

The case has been criticised both in theory and by courts.[194] Amongst critics is Danish scholar in transport law Per Vestergaard Pedersen, who disregards the Court of Appeal's idea of

[189] Ibid p 39, para 59.

[190] Supra section 5.2.

[191] *Quantum* in 2 Lloyds Law rep. 25 p 40, para 62.

[192] Lord Justice Aldous, Mance and Latham, L. JJ held that: *"(...) these provisions (of the convention) contemplated that whether there was a contract for carriage and on what conditions could be determined by reference to a document which would necessarily reflect the reality that the contract had now become, by agreement or election, one for the carriage by road." (*Ibid p 31, para 21).

[193] *Quantum* in 2 Lloyds Law rep. 25 p 26, para 4 and p 30, para 15.

[194] BGH 181/05 (infra section 5.2.1.2); C.03.0510.N *TNT Express*; *Vestergaard Pedersen (2008)* p 953 et seq.

changing the legal status of a contract of carriage based on the *de facto* mode of transport.[195] Based on the research conducted in section 2 of this thesis stressing the importance of *de jure* characterisation of the multimodal contract, this view is endorsed.[196] Vestergaard shares *inter alia* the scepticism of the commercial court regarding a potential clash of conventions and argues that art 1 excludes application based on the wording.[197]

5.2.1.2 BGH, 17 July 2008, I ZR 181/05

The legal position is, however, different in Germany as illustrated by the following case in which the German Supreme Court, Bundesgerichtshof (BGH), expressly stated disagreement with the English Court of Appeal on the latter's interpretation of the CMR Conventions art 1. In this case, 24 containers of copying machines were to be carried from Japan to Germany. The containers were carried by sea from Tokyo to Rotterdam and from Rotterdam the intention was to carry the copying machines by road. However, a road accident occurred before the goods reached the end destination damaging some of the copy machines. This case is especially interesting, as the German Court of Appeal granted itself jurisdiction pursuant to the jurisdiction provision in art 31 of the CMR Convention, which it found applicable pursuant to its art 1. Thus, submitting road carriage under a multimodal contract to the CMR Convention.

This decision was, however, overruled by the Supreme Court (BGH) by concluding that CMR art 1 did not provide for the application of the convention to multimodal contracts, with the following statement:

> *"Der Wortlaut des Art. 1 Abs. 1 CMR (...)spricht aber eher gegen die direkte Geltung der CMR für den multimodalen Frachtvertrag, weil dort die Beförderung eben nicht (nur) auf der Straße mittels Fahrzeugen i.S. des Art. 1 Abs. 1 CMR durchgeführt wird, sondern auch mit anderen Beförderungsmitteln."*[198]

The BGH, thus, found that the wording of art 1 precluded application of the convention *ex proprio vigore* to multimodal transport contracts, because in these situations the carriage is not (only) carried out by road by means of vehicles within the meaning of art 1(1) but also by other means of transport. The BGH also referred to the Protocol of Signature as referred to above.[199]

The decision is in line with the opinion of the German legislators, who considered multimodal transport to be a mode of transport *sui generis* and should be read with attention to the fact that German doctrine considers the multimodal transport agreement to be just that.[200] The German Supreme Court had the following statement, regarding the decision rendered by the Court of Appeal:

> *"Eine Zuständigkeit der deutschen Gerichte für die Entscheidung des Rechtsstreits besteht nicht, weil die CMR grundsätzlich nicht auf multimodale Frachtverträge anwendbar ist*".[201]

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[195] *Vestergaard Pedersen* (2008) p 954.

[196] Danish scholar Ulla Fabricius also shares this view (*Fabricius* (2017) p 50).

[197] *Vestergaard Pedersen* (2008) p 961; See opposite *Hoeks* (2010) p 214 et seq.

[198] BGH 181/05 premise 21aa).

[199] Ibid premise 22b); Supra section 5.2.

[200] *Andersen Roost* (2012) p 214.

[201] BGH 181/05 para 16.2.

Thus, leaving clear precedence for future German courts when it comes to application of the CMR Convention to multimodal contracts of carriage, and accordingly, the predominant position in German doctrine is that the CMR Convention does not apply to multimodal transport contracts.[202] Instead, multimodal transport is governed by the national German Rules (HGB).[203]

Dutch jurisprudence is in accordance with this case. In a case from 22 June 2010, the Court of Appeal Den Haag explicitly concurs with the interpretation of the BGH in the above-mentioned case.[204] Furthermore, they highlighted the risk that such immediate application of unimodal conventions may lead to the undesirable result that the jurisdiction provisions of the respective conventions only apply to the individual routes. Contrary to the BGH, the Dutch Supreme Court used appropriateness as a factor in their interpretation.[205] This problem does, however, only materialise in a network system of liability, which both Germany and The Netherlands, by virtue of national legislation, impose.[206]

5.2.1.3 U 2008.1638 HD – Salmon Roe case

In Danish jurisprudence, the application of the CMR Convention has only been subject to scrutiny in a contract of carriage containing an *option* to opt for road transport. In this case, the Supreme Court rendered the CMR Convention applicable insofar as the transport purchaser (the shipper) so wished. The Supreme Court did, however, refrain from commenting on whether the CMR Convention in general applies to multimodal contracts. The contract of carriage in question was qualified as a unimodal contract of carriage by air, and thus, the precedent should only apply with caution to multimodal contracts.[207]

By way of *obiter dictum,* the Danish Supreme Court stated that the fact that an option to carry by another mode is invoked will have the consequence that the cargo owner in relation to the contracting carrier may invoke the liability rules relating to the mode of transport by which the transport was in fact carried out.[208] In spite of the controversial *obiter,* the contract was characterised as a unimodal one; an agreement for carriage by air only. The *obiter* did, however, allow the CMR Convention application simultaneously with the rules of liability for air transport, but only for the optioned in leg. The Supreme Court expressed carrier liability accordingly:

> *"(..)for enhver transportskade efter luftfartsloven og for den skete skade yderligere efter CMR-loven(...)".*[209]

Danish Scholars have broadly agreed that the many unresolved questions raised in relation to the case have the ultimate effect, that the reasoning cannot extend to multimodal contracts of

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[202] Ibid premise 20c.

[203] Supra chapter 3.3.

[204] Court of Appeal Den Haag Case no 105.106.644.

[205] Something that Andersen Roost argues has decisive effect in Danish jurisprudence as well (*Andersen Roost* (2012) p 269 et seq.).

[206] Supra section 3.3; Art 8:41 of the Dutch Civil Code provides: "*In a contract of combined carriage of goods, each part of the carriage is governed by the judicial Rules applicable to that part*" (my translation).

[207] For thorough presentation of this case, see section 2.1.2 in which a discussion of why the reasoning of this case is problematic is unfolded.

[208] Supra footnote 53.

[209] *Salmon Roe* p 1652 ("Højesterets begrundelse og resultat"). 'CMR-loven' and 'Luftfartsloven' incorporated the CMR Convention and (at the time of the decision) the Montreal Convention to Danish national law.

carriage.[210] Furthermore, the Supreme Court only considers whether performance affects the characteristics of a transport contract when the carrier has utilised an option to substitute the mode of transport. Thus, it has not been considered in Danish precedents whether the CMR Convention would be considered applicable to road carriage under a multimodal contract. However, according to Ulfbeck and Taiger Ivø, the prevailing view in Denmark is that it is not.[211]

5.2.2 Conclusion

The analysis in the present section has revealed vast discrepancies in case law regarding application of the CMR Convention to multimodal contracts of carriage. Jurisprudence seems to reflect the attitude in national doctrine (although unsaid) towards the legal qualification of the multimodal contract. Accordingly, in English jurisprudence multimodal contracts of carriage are considered to be a plurality of unimodal transport contracts, therefore nothing stands in the way of applying unimodal conventions, which is also in accordance with their pledge to the network system.[212] While the English Court of Appeal chose to interpret the wording of CMR art 1 in a broad sense including road parts of a multimodal carriage, the BGH used the same interpretive methods to reach the opposite result. A result that is in accordance with the German narrative of qualifying the multimodal contract of carriage as *sui generis*. This seems to imply that to find an answer, one must dig deeper than the simple interpretation of the wording of the convention. This was done by the Dutch Court of Cassation, using means of subjective interpretation of appropriateness.

The Danish Supreme Court has not yet ruled on the direct application of the CMR Convention to multimodal transport contracts, but an interpretation of the sparse case law in existence leads to the plausible prospect that Danish courts cannot be expected to apply the CMR Convention *ex proprio vigore* to a multimodal contract of carriage. This is also consistent with the assumption that Danish law considers multimodal transport contracts to be a *sui generis* contract which is not *prima facie* regulated by any of the unimodal conventions. Perhaps, the answer lies within the confines of this very theory. One may speculate, if the Danish courts have not sought it necessary to comment on the potential application due to the apparent non-applicability, as a result of perceiving the multimodal contract of carriage *sui generis*.

The respective supreme courts have each applied different considerations to reach their result. A door is therefore open to the possibility of deciphering which one is the most accurate. In this context, attention should be paid to the methods of interpretation most consistent with the principles recognised by the Vienna Convention.[213] The starting point is the wording of CMR art 1 that in its *ordinary meaning* provides application to a contract for the carriage *by road*. The convention does not give any onerous definition of, whether a carriage by road can be a road leg in a multimodal contract. However, the objective of the CMR is to uniformly regulate the international carriage of goods *by road.*[214] And when reading the Protocol of Signature, which has undertaken to negotiate conventions on multimodal transport, a pattern seems to form indicating that the current convention does not apply.

Moreover, it is largely supported by the *travaux préparatoires* that the CMR should not apply to multimodal contracts. Ultimately, the strict interpretation of the wording is supported by

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[210] Supra section 2.1.2.

[211] *Ulfbeck & Taiger Ivø* in ET.2008.331 chapter V, section 3; *Vestergaard Pedersen* (2008) p 966.

[212] Supra section 3.3.

[213] Vienna Convention on the Law of Treaties arts 31 and 32.

[214] The Preamble to the CMR Convention.

reference to Protocol and preparatory works, and thus, is the most compelling one. Therefore, the case rendered by the BGH should *prima facie* have the highest prejudicial value.[215] Ultimately, this means *de lege lata* that the CMR Convention, in its present form, applies to contracts for carriage by road *only.*[216]

Whether or not *de lege lata* is favourable, however, remains a topic open for discussion. Such discussion is outside the scope of this thesis, but it is worth noting that despite the considerable advancements in trade, such as the containerization, the CMR Convention has not undergone modernisation.[217]

6 Conclusion

The objective of this thesis has been to assess carrier liability within multimodal contracts of carriage. The focus has been limited to analysis of multimodal contracts of carriage containing a sea or road leg. The analysis has made only one thing clear: that nothing is clear. Under the current legal position, the vague definitions delimiting the scope of application under conventions originally designed to govern only one mode of transport leaves courts with a complex task of interpretation. Attempts to reconcile the two spans from extending the rules of a unimodal regime to other modes of transport to interpreting the scope of application of the regimes differ between member states, with the consequence of uncertainty and possibility of forum shopping.

As illustrated above, merely reaching a joint definition of the multimodal contract of carriage already causes problems. The current thesis has, however, found that the multimodal contract of carriage is determined by offset in the terms of the contract. Furthermore, the thesis has found that the multimodal contract of carriage is neither a plurality of unimodal contracts nor is it a *sui generis* type of agreement. Instead, it is concluded that the multimodal contract of carriage is in fact a contract of carriage, but with different features than the unimodal one. The multimodal contract of carriage still holds characteristics of a transport contract, but with special regulatory needs as it comes with larger areas of responsibilities for the carrier, to which the most appropriate regulatory method is a modified network system of liability. Accordingly, the legal qualification does not by default put the multimodal contract outside the scope of the unimodal transport conventions, and thus, the Hague-Visby Rules and the CMR Convention have been individually analysed in order to determine their applicability to multimodal contracts respectively.

It is largely agreed that the Hague-Visby Rules apply to multimodal contracts of carriage that comprise a sea leg but only to the sea part of such carriage. Coarsely, the thesis has concluded that the *prima facie* most appropriate interpretation as to the applicability of the CMR Convention, is that it does not apply to multimodal contracts of carriage. The discrepancy between application of the Hague-Visby Rules and non-application of the CMR Convention is found in the definition of the contract of carriage. The contract of carriage by sea is defined as a contract

[215] The Dutch Court of Cassation also rendered the CMR non-applicable but with reference also to considerations of appropriateness (supra section 5.2.1.2). Although, it has become rather clear, that the autonomous application of unimodal conventions to multimodal contracts entails problems, this is not a recognised method of interpretation in the interpretation of international treaties (See *Linderfalk* (2007) p 158 note 61). Perhaps an interpretation of 'appropriateness' *could* fall within the scope of the 'good faith' obligation in art 31(1) of the Vienna Convention on the Law of Treaties but such discussion is outside the scope of this thesis.

[216] See opposite *Bäckdén* (2019) p 261 et seq.

[217] *Bull* (2000) p 29.

(as any contract) prescribing the issuance of a bill of lading (which might also be issued for multimodal operations) that must merely *relate* to carriage by sea. Accordingly, a multimodal contract of carriage might *relate* to the sea purely if it contains sea carriage, whereas a multimodal contract of carriage is not a contract for the carriage of goods (only) *by road* just because it encompasses road carriage.[218]

This means, *de lege lata,* that the carrier who has undertaken to carry goods under a multimodal contract of carriage, can expect to be subject to the Hague-Visby Rules by mandatory effect if the contract comprises a sea leg. However, if the multimodal contract of carriage comprises carriage by road the carrier can expect his liability to be governed by possible national mandatory rules by virtue of legislation provided for by the parties' choice of law, or in the absence of such, the choice of jurisdiction. If no such mandatory legislation exists, the fragment of road carriage is subject to complete party autonomy. If, however, the parties have chosen to subject the contract to English jurisdiction, the carrier can expect *ex proprio vigore* application of the CMR Convention because the English Court of Appeal with prejudicial effect has rendered the CMR Convention applicable by virtue of the *Quantum* case.

The inadequacy of the multimodal regime materialises because the carrier is subject to mandatory rules on some parts of the journey but not on other parts of the journey. In order to avoid conflicting decisions, the courts should, in the opinion of the present thesis, not allow the CMR Convention application *ex proprio vigore* to multimodal contracts of carriage. This result is most in line with an interpretation of the wording, as well as the objective and the *travaux préparatoires* of the convention. Instead, encouragement to fulfil what the founding fathers of the CMR Convention proposed in 1956 should be given; to revive negotiations to complete a harmonised regime for regulation of multimodal contracts of carriage.

Abbreviations

Art/arts	Article/arts
BGH	Bundesgerichthof
Cf.	Confer
CMI	Comité Maritime International
Ed.	Edition
Et al.	Et alia (and others)
Ibid	Ibidem
Multimodal contracts	Multimodal contracts for the carriage of goods
Multimodal conventions	International conventions governing unimodal transport of goods
No	Number
p/pp	Page/pages
SDR	Special drawing rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission on International Trade Law
Unimodal contracts	Unimodal contracts for the carriage of goods
Unimodal conventions	International conventions governing unimodal transport of goods
v.	Versus

[218] Supra section 5.2.

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CMR or the CMR Convention	The Convention on the Contract for the International Carriage of Goods by Road 1956

Citation in text	Full reference
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HVR or The Hague-Visby Rules	The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, 1968.
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