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MTO'S RIGHT TO REDRESS: IS AN UNLOCALIZED LOSS REALLY AN INSURMOUNTABLE OBSTACLE?

1. INTRODUCTION

The law should not put you into the position where you have to bear the consequences of an incident you did not cause. However, for the multimodal transport operator (MTO), this may be the reality in cases involving an unlocalized loss.

The multimodal carriage of goods can be defined as the carriage of goods by at least two different modes of carriage, on the basis of a single multimodal contract, to a place designated for delivery situated in a different country[1]. Thus, the single multimodal contract is a basis for the multimodal carriage of goods. This contract can be defined as a single contract of carriage from a place in one country to a place designated for delivery situated in a different country, whereby a single carrier promises a consignor to carry goods, which either prescribes the use of at least two different modes of carriage, or allows for the use of more than one mode of carriage, while two or more modes of carriage are actually used during its performance[2].

In the multimodal carriage of goods, the single carrier that promised a consignor to carry goods is the MTO. However, because the multimodal carriage of goods involves more than just one mode of transport, there might be other carriers involved. The reason for this is that the MTO might not perform the carriage of goods by himself but can subcontract parts of the carriage or even the whole carriage to unimodal carriers[3]. This

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[1] M. Hoeks: *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods,* Alphen aan den Rijn 2010, p. 4.

[2] *Ibidem*, p. 50.

[3] F.W.H. Chan, J.J.M. Ng, B.K.Y. Wong: *Shipping and Logistics Law: Principles and Practice in Hong Kong*, Hong Kong 2002, p. 453.

might be the case if the MTO lacks the capacity to perform one or more modes of carriage required for the multimodal carriage of goods. The MTO very often instructs another carrier or carriers to perform certain parts of the multimodal carriage of goods[4]. In the contractual relationships between the MTO and the other carriers, the MTO assumes the role of the consignor and the other carriers assume the role of the carrier[5].

Therefore, if the carriage of goods in question is multimodal, the legal framework for the international carriage of goods will regulate two contractual relationships. The first contractual relationship is between the MTO and the consignor. The second contractual relationship is often between the performing carrier and the consignor, which will be the MTO. In the multimodal carriage of goods, the regulation of both contractual relationships is therefore interconnected through the position of the MTO as the carrier as well as the consignor.

In cases involving an unlocalized loss, the MTO might find himself in the position where the goods were damaged during the multimodal carriage of goods, which was performed by performing carriers, but he will be the one who has to bear the consequences. If the container with the cargo is sealed, the determination of the performing carrier during whose period of responsibility the loss or damage occurred might be impossible and the loss will be unlocalized.

The legal framework for the international carriage of goods in the current form might cause that the MTO will be held liable by the consignor under the multimodal contract for the carriage of goods but the MTO will not be able to indemnify himself from the responsible performing carrier under the unimodal contract for the carriage of goods. Exercising the right to redress under the current legal framework for the international carriage of goods by the MTO could therefore be a challenge if it is connected with the occurrence of an unlocalized loss.

The legal framework for the international carriage of goods is designed in such a way as to accommodate the consignor's claim separately for the multimodal carriage of goods and separately for the unimodal carriage of goods[6]. However, this article will focus on how the legal framework for the international carriage of goods would operate if these two claims were connected through the position of the MTO as the carrier as well as the consignor in cases involving an unlocalized loss. Therefore, the research question of this article is: Can the MTO exercise his right to redress against the performing unimodal carrier under the current legal framework for the international carriage of goods in cases involving an unlocalized loss and if not, what are the possible solutions to the problem causing his inability to indemnify himself?

[4] M. Spanjaart: *Multimodal Transport Law*, Abingdon 2018, p. 50.
[5] *Ibidem*, p. 50.
[6] J. Chuah: *Law of International Trade: Cross-Border Commercial Transactions*, London 2013, p. 448.

2. LEGAL ASPECTS OF MTO'S RIGHT TO REDRESS

2.1. CONTRACTUAL RELATIONSHIPS

In the multimodal carriage of goods, there are usually four types of parties involved — the consignor, the MTO, the performing carrier/s and the consignee[7]. The best way how to explain the relationships among them within the multimodal carriage of goods is to use an example of the multimodal scenario. The multimodal scenario involves more than one mode of transport and all of these four parties are involved.

As an example, let us take company X, a fashion retailer in Perth, Australia, which orders 5,000 eco t-shirts from company Y, a fashion manufacturer from Kiev, Ukraine. The carriage of goods in this scenario will take place first by a railway from Kiev, Ukraine, to the railway yard in Bratislava, Slovakia, where the goods will be transloaded from the train onto a road truck. The carriage of goods will then continue to the port of Rotterdam, the Netherlands, where the goods will be transloaded onto a sea vessel and carried to the port of Perth, Australia, which will be their final destination.

This multimodal scenario entails three modes of transport — by railway, road and sea. If, for example, company Y would be the one required to contract for the carriage of goods under the contract for the sale of goods, it would most likely make use of the services of the MTO, because contracting with separate carriers for the carriage of goods by railway, road and sea would be more costly and time consuming[8]. However, the MTO does not have to perform the whole carriage by himself. The MTO might, for example, lack the capacity with regard to the carriage by railway, road or sea. He would therefore subcontract the actual carriage to a third party. This will often be a unimodal carrier, who would most likely provide for the required mode of transport.

Thus, in this scenario, the consignor would be company Y, which would enter into a multimodal contract for the carriage of goods with the MTO. The MTO would be the one responsible towards company Y to perform the carriage. The performing carrier in this case would most likely be a unimodal carrier or carriers, depending on the carriage capacity of the MTO, with whom the MTO would enter into unimodal contract(s) for the carriage of goods. The performing carrier(s) would then most likely be the carrier(s) who would actually perform the carriage of goods. The con-

[7] The United Nations, Economic Commission for Europe, the European Conference of Ministers of Transport, the European Commission, *Terminology on Combined Transport*, Paris 2006, p. 28, see: https://www.oecd-ilibrary.org/transport/terminology-on-combined-transport-english-french-german-russian_9789282102114-en-fr (accessed: August 20, 2018).

[8] M. Hoeks: *Multimodal…*, *op. cit.*, p. 3.

signee to whom the goods would be delivered in this case by the performing carrier(s) would be company X.

Therefore, in the multimodal carriage of goods, it is possible to distinguish two layers of contractual relationships: (1) the relationship between the consignor and the MTO, which is based on the multimodal contract for the carriage of goods and (2) the relationship between the MTO and the performing carriers, which is often based on unimodal contracts for the carriage of goods.

2.2. LEGAL FRAMEWORKS

Sub-section 2.1 identified two usual types of contractual relationships involved in the multimodal carriage of goods. The legal framework governing the international carriage of goods will govern those contractual relationships. However, the relationships involved are based on different types of contracts — multimodal and unimodal. Therefore, the multimodal legal framework will govern the contractual relationship between the consignor and the MTO and the unimodal legal framework will govern the relationship between the MTO and the performing carrier(s).

2.2.1. UNIMODAL LEGAL FRAMEWORK

The international legal framework, which often governs the relationship(s)between the MTO and the performing carrier(s), consists of several international conventions, each of them regulating a certain mode of transport. The Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) governs the carriage of goods by road. The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) is the main source of law when it comes to the carriage of goods by air. The international rail carriage of goods is subject to the Convention Concerning International Carriage by Rail, namely its Appendix B, which provides Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (COTIF-CIM). The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) regulates the carriage of goods by inland waterways and the Hague-Visby Rules (HVR) are the most important convention in the case of the carriage of goods by sea[9].

[9] With regard to maritime conventions, the HVR are the most important; however, other convention should be mentioned as well in order to provide the full picture of maritime legal framework. The history of maritime conventions is as follows. The Hague Rules were adopted in 1924; in 1968 the Visby protocol amended them and together they are intended to be read and interpreted as a single document known as the Hague-Visby Rules. In 1979, the SDR Protocol was adopted to amend the Visby Protocol. However, the Hague Rules, together with the Protocols of 1968 and 1979, were seen as no more than an attempt to pre-empt more fundamental changes to the existing international regime applicable to the carriage of goods by sea. In 1978, the Hamburg Rules were signed

These conventions represent the international legal basis for the unimodal carriage of goods and all of them constitute mandatory law, which is applicable if the contract for the carriage of goods falls within the scope of their application[10]. If the mandatory convention regulates a certain issue, the provisions of the convention solely govern that issue[11]. These conventions deal, for example, with the liability of the carrier, exceptions of liability, limitation of liability and limitation periods.

2.2.2. MULTIMODAL LEGAL FRAMEWORK

Currently, there is no international convention in force that contains the uniform liability rules for the MTO, as it is in the case of the unimodal carriage of goods. The 1980 United Nations Convention on International Multimodal Transportation of Goods (MT Convention), which was meant to provide for uniform liability rules, was not ratified by the required number of contracting States[12]. Due to the absence of an international uniform regulation of the MTO's liability, the multimodal legal framework governing the contractual relationship between the consignor and the MTO consists of several international, regional and national sources of law and contractual standard rules[13].

The international instruments which constitute a part of the multimodal legal framework are the international unimodal conventions. These conventions are used as a part of the multimodal legal framework in two situations.

The first situation covers the multimodal provisions within the unimodal conventions. An example of the multimodal provision within the unimodal convention is Article 2(1) of the CMR Convention. This Article deals with the roll-on/roll-off carriage of goods. The roll-on/roll-off carriage of goods describes a situation in which the truck carrying the goods boards the ferry, for example in the Netherlands, and drives off again, for example in the UK, to continue the carriage by road[14]. The goods are in this case carried by more than one mode of transport. In this case

and entered into force on November 1, 1992. The Hamburg Rules offered an alternative to the Hague Rules and Hague-Visby Rules and although many provisions of the Hamburg Rules were based on the earlier models, the convention as a whole was designed to supersede the previous regimes. On December 11, 2008, the Rotterdam Rules were adopted with an intention to supersede the Hague Rules, Hague-Visby Rules and Hamburg Rules, once ratified by the sufficient number of Contracting States. For more information, see: www.imo.org (accessed: August 16, 2018).

[10] M. Spanjaart: *Multimodal…*, *op. cit.*, p. 87.

[11] *Ibidem*, p. 88.

[12] So far there are only 11 States which are parties to the MT Convention, see: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en (accessed: July 20, 2018).

[13] Erasmus University Rotterdam, Faculty of Law: *Intermodal Liability Working Paper*, Project title: European Strategies to Promote Inland Navigation 2004, p. 8, see: http://www.factline.com/download/229119.1 (accessed: August 2, 2018).

[14] M. Spanjaart: *Multimodal…*, *op. cit.*, p. 136.

however, the liability of the carrier would be determined according to the CMR Convention[15].

The second situation when the unimodal conventions can be used to determine the MTO's liability is when they are directly applied to the individual legs of multimodal contract for the carriage of goods, even though they are supposed to govern the unimodal contracts for the carriage of goods. The HVR may serve as an example. Article I(b) stipulates that the HVR are applicable to every contract for the carriage of goods covered by a bill of lading or any similar document of title, in so far as such a document relates to the carriage of goods by sea. The phrase "in so far" implies that the HVR also govern the carriage of goods by sea within the multimodal contract, provided that there is a bill of lading[16]. Whether or not it is possible to apply the HVR to the carriage of goods by sea within the multimodal contract varies across the jurisdictions. In England, based on *Mayhew Foods v. Overseas Containers*[17], the HVR should be applicable. In the Netherlands, based on *Duke of Yare*[18], *the Colombia*[19] and *the Eurocolombia-Sierra Express-Ibn Bajjah*[20], similarly the HVR should be applicable. However, in Germany, since the HVR do not explicitly mention the multimodal transport, their scope does not cover the sea segments of contracts, which include other types of carriage besides carriage by sea[21].

The absence of an international multimodal instrument with the uniform liability rules caused several countries to attempt to regulate the MTO's liability through their involvement in regional organizations. In 1993, the Andean Community enacted Decision 331, which provides liability rules in cases of a multimodal contract for the carriage of goods. This decision was modified in 1996 by Decision 393. The MERCOSUR enacted the Partial Agreement for the Facilitation of Multimodal Transportation of Goods in 1995. The ALADI enacted the Agreement on International Multimodal Transport in 1996. The purpose of all of these regional documents is to provide liability rules in cases of a multimodal contract for the carriage of goods and they regulate issues such as liability of the MTO, assessment of compensation, time limits and jurisdiction[22].

As an example of national legislation dealing with liability issues in the multimodal contract for the carriage of goods, the national legislation of the Netherlands,

[15] I. Carr, P. Stone: *International Trade Law*, Abingdon 2014, p. 386.

[16] M. Spanjaart: *Multimodal…*, *op. cit.*, p. 176.

[17] Judgement of the Commercial Court (Queen's Bench Division) published in, Lloyds Rep. 1984, p. 317.

[18] Judgement of the Court of Rotterdam of 10 April 1997, S&S 1999, p. 19; Judgement of the Hague Court of Appeal of 26 September 2000, S&S 2001, p. 21.

[19] Judgement of the Court of Rotterdam of 17 September 2003, S&S 2007, p. 63.

[20] Judgement of the Hague Court of Appeal of 22 March 2003, S&S 2005, p. 113; Judgement of 17 November 2006, LJN AY8288.

[21] M. Hoeks: *Multimodal…*, *op. cit.*, p. 312, 313.

[22] United Nations Conference on Trade and Development: *Implementation of Multimodal Transport Rules*, report prepared by the UNCTAD secretariat 2001, para: 47–122, see: http://unctad.org/en/docs/posdtetlbd2.en.pdf (accessed: June 26, 2018).

Germany, Brazil and India will be used. In the Netherlands, it is the Dutch Civil Code (DCC) governing the multimodal contract for the carriage of goods, namely Articles 8:40 to 8:52 of Book 8. In Germany, the relevant source of law is Book 4 of the German Commercial Code (GCC), namely Sections 452 to 452d of the Third Sub-chapter — Carriage Using Various Modes of Transport. In this regard, India enacted the Multimodal Transport of Goods Act and Brazil enacted Law No. 9.61 on Multimodal Transport of Goods.

With regard to the contractual standard rules, the 1992 UNCTAD/ICC Rules for Multimodal Transport Document (UNCTAD/ICC Rules) can serve as an example. The UNCTAD/ICC Rules are, however, contractual in nature and therefore applicable if incorporated into the contract for the carriage of goods[23].

2.3. DETERMINATION OF CARRIER'S LIABILITY

The normal circumstances, where the goods are delivered according to the contract, either multimodal or unimodal, entail no need to deal with the determination of the carrier's liability. However, if the goods are not delivered as agreed in the multimodal contract for the carriage of goods by the parties, it will be necessary to determine the liability of the carriers involved. Thus, this sub-section will examine the systems used to determine the liability of the MTO and the performing carriers.

2.3.1. PERFORMING CARRIER'S LIABILITY

As stated in Sub-section 2.2.1, the performing carrier's liability will often be determined according to the applicable unimodal convention. These conventions provide a uniform set of rules[24] with regard to the performing carrier's liability. They regulate issues such as the basis of the carrier's liability, exceptions of liability, limitation of liability and limitation periods.

If, therefore, one of the performing carriers involved in the multimodal carriage of goods will not deliver the goods according to the unimodal contract for the carriage of goods or at all, his liability towards the MTO will often be determined by the uniform set of rules provided by the unimodal convention applicable to the contract between the MTO — as a consignor — and the performing carrier. If the performing sea carrier were the one who caused the breach of the unimodal contract between him and the MTO, the HVR would determine his liability towards

[23] *Ibidem*, para: 12.

[24] M. Hoeks: *Multimodal…*, *op. cit.*, p. 10.

the MTO if the contract fell within the scope of application of the HVR. Similarly, if it were the performing road carrier, the CMR Convention would govern the MTO's claim against him.

2.3.2. MTO'S LIABILITY

In the multimodal carriage of goods, the determination of the MTO's liability is more complicated than it is in the case of the performing carrier's liability. Due to the fact that there is currently no international convention in force which would provide uniform liability rules governing the multimodal contract for the carriage of goods, the present multimodal legal framework determines the MTO's liability in most cases according to the network liability system[25]. This sub-section will therefore focus on explaining how the network liability system determines the MTO's liability. Nevertheless, a characterization of the uniform liability system will be provided as well because the creation of such a mandatory international regime has many supporters, especially in third world nations[26].

The uniform liability system subjects the entire multimodal contract for the carriage of goods to the same rules of liability, irrespective of the modes of transport that are actually used to perform the carriage[27]. This means that the same rules apply irrespective of the unimodal stage of transport during which the loss, damage or delay occurs[28]. There would be no difference between cases where loss can or cannot be localized[29]. The rules applicable to the multimodal contract for the carriage of goods are set from the outset[30] and as compared to the network liability system, their applicability does not depend on identifying the mode of transport during which the loss, damage or delay occurred. However, from the point of view of the MTO, the main disadvantage of the uniform liability system is the fact that the multimodal contract for the carriage of goods will be subject to specific liability rules. These specific liability rules may be different from the liability rules applicable to the unimodal contracts for the carriage of goods concluded by the MTO with performing carriers[31]. The MT Convention, even though it is not in force, is an example of an international regulation of the MTO's liability based on the uniform liability

[25] Erasmus University Rotterdam, Faculty of Law: *Intermodal…*, *op. cit.*, p. 20.

[26] *Ibidem*, p. 18.

[27] M. Hoeks: *Multimodal…*, *op. cit.*, p. 20.

[28] United Nations Conference on Trade and Development: *Multimodal Transport: The Feasibility of an International legal Instrument*, report prepared by the UNCTAD secretariat 2003, para: 44, see: http://unctad.org/en/docs/sdtetlb20031_en.pdf (accessed: June 29, 2018).

[29] *Ibidem*.

[30] Erasmus University Rotterdam, Faculty of Law: *Intermodal…*, *op. cit.*, p. 18.

[31] J. Monios, R. Bergqvist: *Intermodal Freight Transport and Logistic*, Boca Raton–London–New York 2017, p. 216.

system[32]. However, the MT Convention also contains an element of the network system. In cases where the loss can be localized, the limits of liability are determined by reference to any applicable international convention or mandatory national law, which provides a higher limit of liability than the MT Convention[33]. Therefore, the MT Convention is also considered to operate on the basis of a modified liability system[34].

In the network liability system, the MTO's liability varies according to the individual leg of the multimodal contract for the carriage of goods to which the loss or damage can be attributed[35]. If the loss or damage can be localized, the law applicable to the leg during which the loss or damage occurred will provide the liability rules[36]. Thus, if the loss or damage occurred during the carriage of goods by road, the liability rules would be provided by the CMR Convention under the condition that the carriage of goods would fall within the scope of application of the CMR Convention. Therefore, the network liability system does not provide substantive rules on its own but only links the existing set of unimodal rules[37].

However, in order for the network liability system to work properly in cases where the loss or damage cannot be localized, a residual liability system is needed[38]. Two examples of the network liability system with a residual liability system for an unlocalized loss are the DCC and the GCC. Article 8:41 of the DCC provides that in the event of a multimodal contract for the carriage of goods, each part of the carriage within a multimodal contract for the carriage of goods shall be governed by the rules applicable to that part. According to Article 8:42 of the DCC, if the MTO did not deliver the goods according to the multimodal contract for the carriage of goods and it has not been established where the event that has caused the loss, damage or delay occurred, the MTO is liable for the damage resulting from an unlocalized loss, unless he proves that he is not liable for any of the parts of the transport where the loss, damage or delay may have occurred. If such a defence is not possible or the MTO is unsuccessful, the residual liability system will apply. Article 8:43 of the DCC contains a residual liability system which provides that in the case of an unlocalized loss or damage, the liability of the MTO is determined according to the rules of law applicable to the part or parts of the transport where the loss or damage may have occurred and from which results the highest amount of damages. The GCC, in stipulates Section 452a that if the loss or damage is localized, the liability of the MTO shall be determined in accordance with the legal provisions which would apply to the contract of carriage covering the leg of carriage during

[32] United Nations Conference on Trade and Development: *Multimodal…*, *op. cit.*, para: 13.
[33] Erasmus University Rotterdam, Faculty of Law: *Intermodal…*, *op. cit.*, p. 15.
[34] *Ibidem*, p. 21.
[35] United Nations Conference on Trade and Development: *Multimodal…*, *op. cit.*, para: 49.
[36] J. Monios, R. Bergqvist: *Intermodal…*, *op. cit.*, p. 22.
[37] M. Hoeks: *Multimodal…*, *op. cit.*, p. 22.
[38] Erasmus University Rotterdam, Faculty of Law: *Intermodal…*, *op. cit.*, p. 21.

which the loss or damage occurred. However, in cases where the loss or damage cannot be localized, it requires the application of the first sub-chapter of the GCC, which serves as a residual liability system.

2.4. RECOURSE ACTION

Normally, when the goods are delivered according to the multimodal contract for the carriage of goods, the MTO will not end up in the situation where he needs to exercise his right to redress through the recourse action. However, if the consignee received the goods not in accordance with the contract or did not receive them at all, the right to redress will became very important for the MTO.

If the goods were not delivered according to the multimodal contract for the carriage of goods or at all, the liability of the MTO will be determined according to the multimodal legal framework. If the MTO is held liable towards the consignor, he will have to pay damages.

However, where the MTO did not actually perform the carriage of goods by himself, he would turn to the performing carrier(s) for compensation. The basis for his claim would be the compensation paid to the consignor but his recourse action would be exercised on the basis of the unimodal contract for the carriage of goods. The liability of the performing carrier would be determined according to the law applicable to the contract of carriage between the MTO and the performing carrier, which will often be a unimodal convention. The MTO's claim would be then enforced through the recourse action. If the MTO concluded the unimodal contract with the performing road carrier to provide the road leg within the multimodal contract for the carriage of goods, the MTO would act as a consignor and not as a carrier. Therefore, if for example the performing road carrier were held liable under the CMR Convention for non-performance of the contract, the MTO would be entitled to damages, which would constitute his compensation.

3. UNLOCALIZED LOSS

3.1. DEFINITION OF UNLOCALIZED LOSS

The issue of an unlocalized loss represents a typical problem in the area of the carriage of goods. The term "unlocalized loss" refers to more than just an event of a loss of goods. It covers the actual loss of the goods as well as the damage to the cargo or its delay[39].

[39] M. Hoeks: *Multimodal…*, *op. cit.*, p. 17.

The loss is considered to be unlocalized when the stage where it occurred cannot be determined[40]. Therefore, if the carriage of goods involves more than one mode of carriage and the goods are lost, damaged or delayed in delivery, the loss is unlocalized if it is not possible to determine during which mode of carriage it occurred.

The reason why this problem occurs is the container revolution. On the one hand, the invention of the container made the transportation of cargo much easier and cheaper because there is no need to transload the cargo when the mode of transport is changing, for example from the road vehicle to the vessel[41]. It is only the container that needs to be transloaded[42]. On the other hand, due to the fact that cargo is usually packed in a sealed container[43], the performing carriers are not able to check the content of the container. The performing carriers can often examine only the outside condition of the container for any leaks or smell[44]. In cases where the loss or damage to the cargo arises during the carriage, it is usually the consignee of the goods who finds out that the goods are lost or damaged after the delivery. The fact that the container is sealed may therefore make it impossible to determine during which mode of carriage the loss or damage actually occurred.

The problem of an unlocalized loss is thus connected with both types of carriage of goods — unimodal as well as multimodal. In the case of the unimodal carriage of goods, if, for example, the consignor decided not to make use of the MTO's services and concluded several unimodal contracts for the carriage of goods, the problem may exist as well. However, if a multimodal contract for the carriage of goods was concluded, the consignor does not have to deal with multiple performing carriers and can hold the MTO, who assumed responsibility for the whole carriage of goods, liable[45]. Thus, from the point of view of the consignor, the problem of unlocalized loss is not of as much importance as it is from the point of view of the MTO.

3.2. PROBLEM CAUSED BY UNLOCALIZED LOSS

In this sub-section, an analysis of the problem that an unlocalized loss is causing to the MTO's right to redress under the legal framework for the international carriage of goods will be performed.

If the liability of the MTO for the breach of the multimodal contract for the carriage of goods was determined according to the multimodal legal framework

[40] *Ibidem*, p. 17.

[41] I. Carr, P. Stone: *International…*, *op. cit.*, p. 374.

[42] C. Murray, D. Holloway, D.T. Hunt: *The Law and Practice of International Trade*, London 2012, p. 361.

[43] *Ibidem*, p. 362.

[44] R. De Witt: *Multimodal Transport: Carrier Liability and Documentation*, London 1995, p. 352.

[45] D. Dąbrowski: *The Multimodal Carrier's Liability for Non-Localized Loss*, Problemy Transportu i Logistyki 2016, Issue 4, p. 204.

operating on the basis of the uniform liability system, the position of the MTO would be subject to the same uniform liability rules. These rules would be applicable irrespective of the unimodal stage of carriage during which the loss, damage or delay occurs[46]. For the purpose of this analysis, the MT Convention will be used. Under the MT Convention, the liability of the MTO is based on the principle of presumed fault or neglect[47]. Article 16(1) of the MT Convention stipulates that the MTO shall be liable for the loss, damage or delay if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless the MTO proves that he, his servants or agents or any other person whose services he makes use of for the performance of the contract took all measures that could reasonably by required to avoid the occurrence of the loss, damage or delay and its consequences. Therefore, in cases involving an unlocalized loss if the MTO were not able to use such a defence or the defence was not successful, he would be held liable towards the consignor. Thus, the consignor would be compensated by the MTO.

If the liability of the MTO for the breach of the multimodal contract for the carriage of goods were determined according to the multimodal legal framework operating on the basis of the network liability system, the MTO's liability would vary according to the individual leg of the multimodal contract for the carriage of goods to which the loss or damage could be attributed[48]. However, in cases involving an unlocalized loss, a residual liability system would be applicable. For the purpose of this analysis, the DCC will be used. Article 8:42 of the DCC stipulates that in cases of an unlocalized loss, the MTO is liable for the damage resulting from the loss, damage or delay of the goods, unless he can prove that he is not liable for any of the parts of the transport where the loss, damage or delay may have occurred. Therefore, in a case involving an unlocalized loss if the MTO were not able to use such a defence or the defence was not successful, he would be held liable towards the consignor. Again, the consignor would be compensated by the MTO as a result.

Therefore, if the MTO was held liable towards the consignor, the multimodal legal framework puts him, as a carrier, in cases involving an unlocalized loss, into the position where he would have to compensate the consignor. Thus, at this point, the MTO would most likely decide to proceed with his recourse action. The MTO's recourse action would be based on his unimodal contract for the carriage of goods with the performing carrier and regulated by the unimodal legal framework.

Under the unimodal legal framework, the basis of liability in all the modes of carriage, often governed by the unimodal conventions, is generally presumed fault[49]. This means that if there is sufficient evidence of the occurrence of the loss or dam-

[46] United Nations Conference on Trade and Development: *Multimodal…*, *op. cit.*, para: 44.

[47] United Nations Conference on Trade and Development: *Implementation…*, *op. cit.*, para: 20.

[48] United Nations Conference on Trade and Development: *Multimodal…*, *op. cit.*, para: 49.

[49] C. Besong: *Towards a Modern Role for Liability in Multimodal Transport Law*, PhD Thesis, London 2007, p. 144.

age, the carrier is liable to the consignor for that loss or damage and it is presumed that the loss or damage occurred during the period of responsibility of the carrier[50]. The carrier then has a duty to adduce evidence that the loss or damage is covered by an exception provided by the applicable unimodal convention[51].

If the goods were carried using the multimodal carriage of goods, adducing sufficient evidence of the occurrence of the loss or damage triggers the presumption that the damage occurred during the carriage period[52]. However, what it cannot do is pinpoint where the loss or damage occurred, because the goods have been carried using different modes of carriage[53]. Nevertheless, for the MTO's recourse action to succeed, the MTO must prove which one of the performing carriers failed to deliver the goods in the same condition as he received them[54] to trigger the presumption that the damage occurred during the period of responsibility of that particular performing carrier. Thus, if the loss cannot be attributed to one of the transport stages, or in other words to one of the performing carriers, none of the unimodal conventions will govern the MTO's claim for indemnification[55].

Therefore, the unimodal legal framework, in cases involving an unlocalized loss, puts the MTO as a consignor into the position where he is not able to start legal proceedings for breach of the unimodal contract for the carriage of goods.

If the position of the MTO under the multimodal legal framework is compared with the position of the MTO under the unimodal legal framework, it is clear that the legal framework for the international carriage of goods does not take into account the MTO's right to redress in cases involving an unlocalized loss. Under the multimodal legal framework, he is required to pay the compensation to the consignor but under the unimodal legal framework he is not able to redress himself from the responsible performing carrier.

4. POSSIBLE SOLUTIONS

4.1. NEW RECOURSE SYSTEM

Section 3 revealed that the MTO's right to redress under the current legal framework for the international carriage of goods does not work properly in cases involving an unlocalized loss. Thus, a change is necessary. This section will try to provide a solution as to how the new recourse system for the multimodal carriage

[50] *Ibidem*, p. 144.
[51] *Ibidem*, p. 144.
[52] *Ibidem*, p. 150.
[53] *Ibidem*, p. 150.
[54] M. Spanjaart: *Multimodal…*, *op. cit.*, p. 51.
[55] M. Hoeks: *Multimodal…*, *op. cit.*, p. 17; S. Lamont-Black: *Claiming Damages in Multimodal Transport: A Need for Harmonization*, Tulane Maritime Law Journal 2012, Vol. 36, Issue 2, p. 711.

of goods should be designed in order to incorporate the MTO's right to redress in cases involving an unlocalized loss. The focus of this article is on the interest of the MTO's indemnification but for the new recourse system to be feasible, interests of the other parties involved in the multimodal carriage of goods, namely the consignor and performing carriers, also need to be taken into account.

This article will argue that the new recourse system should be designed in a similar way to the recourse system in the successive carriage under the CMR Convention. The successive carriage very much resembles the characteristics of the multimodal carriage of goods. In the successive carriage, one carrier takes over goods from another carrier for the purpose of carrying a consignment to its destination, or else to a point in transit where he in turn hands over the goods to another carrier[56]. If the carriers involved in the carriage of goods were carriers also providing different modes of transport than the mode of transport by road, such carriage of goods would be possible to characterize as multimodal carriage of goods[57].

4.1.1. INTERESTS OF PARTIES INVOLVED

The MTO's interest in cases involving an unlocalized loss is to exercise his recourse action as identified in Section 3. He wants to indemnify himself from the actually responsible performing carrier under the unimodal legal framework for the compensation he had to pay to the consignor under the multimodal legal framework.

From the consignor's point of view, his main interest in cases involving an unlocalized loss is to hold the responsible party liable and to receive damages. Contracting with the MTO is therefore the best option to protect his interest. Contracting with unimodal carriers separately may put the consignor into a position where if it proves impossible to discover at which stage of the carriage the damage occurred, each carrier will be tempted to decline liability and the consignor will be left to bear the loss[58]. However, if the consignor decides to contract with the MTO, even if it is not possible to identify the actually responsible performing carrier, it is clear which party can be held liable[59]. The MTO, by entering into a multimodal contract for the carriage of goods, assumed responsibility for the whole performance of the contract[60].

[56] A. Messent, D.A. Glass: *CMR: Contracts for the International Carriage of Goods by Road*, Abingdon 2017, p. 340.

[57] *Ibidem*, p. 340.

[58] M. Hoeks: *Multimodal…*, *op. cit.*, p. 4.

[59] *Ibidem*, p. 4.

[60] The MT Convention in Article 1(2) defines the MTO as "a 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".

Another interest of the consignor is to contract with one party, the MTO, in order to avoid contracting with separate unimodal carriers, which means entering into several contracts for the unimodal carriage of goods governed by the unimodal legal framework[61]. This interest of the consignor therefore lies in the uniform set of rules governing his contractual relationship with the MTO.

The interests of performing carriers are somewhat more complex. Their main interest is to rely on the applicable unimodal legal framework[62]. The unimodal conventions reflect the specific customs and practices inherent to their own carriage modes, which have developed separately from one another[63]. If the performing carriers were subject to the multimodal legal framework, they would not be able to make use of unimodal liability rules, which may be less onerous[64]. This interest of performing carriers could also be seen during the drafting process of the Rotterdam Rules. The drafters of the Rotterdam Rules originally intended to apply the carrier's obligations to all performing parties, irrespective of whether they acted within the maritime leg or not[65]. However, industry groups lobbied heavily against such a regulation because inland carriers (unlike sea carriers) would be subject to different regimes depending on whether or not the multimodal carriage of goods involved a sea leg and they might find themselves subject to liabilities beyond what they were insured for[66]. Another interest of the performing carriers is the same as the MTO's. None of the carriers involved in the multimodal carriage of goods wants to be responsible for a loss, damage or delay that he did not cause. Why should a performing sea carrier be responsible for damage caused by, for example, a performing road carrier or a performing rail carrier? Nevertheless, there is a difference between the position of the MTO and the position of performing carriers. If the MTO subcontracted all parts of the carriage to performing carriers, even though the MTO assumed responsibility for the whole carriage of goods, he would not actually perform any carriage of goods. If the damage occurred, he would be in fact responsible for an event that happen during the carriage in which he did not take any part. On the other hand, the performing carriers participated in the carriage and even though it is not possible to determine which one of them caused the damage, they all had the responsibility under the unimodal contracts for the carriage of goods to deliver the goods in condition according to those contracts.

Therefore, the new recourse system has to take into account interests of all the parties involved in the multimodal carriage of goods. The consignor needs to retain

[61] M. Hoeks: *Multimodal...*, *op. cit.*, p. 4.

[62] Erasmus University Rotterdam, Faculty of Law: *Intermodal...*, *op. cit.*, p. 19.

[63] K.F. Haak, M. Hoeks: *Arrangements of Intermodal Transport in the Field of Conflicting Conventions*, Transport 2004, Vol. 3, p. 423.

[64] Erasmus University Rotterdam, Faculty of Law: *Intermodal...*, *op. cit.*, p. 19.

[65] N. Bond: *The Maritime Performing Party and the Scope of the Rotterdam Rules*, Australian and New Zealand Maritime Law Journal 2014, Vol. 28, Issue 2, p. 102.

[66] *Ibidem*, p. 102.

his ability to claim damages from a party, which does not have to be identified according to the mode of carriage during which the loss or damage occurred. The MTO needs to be able to indemnify himself from the actually responsible performing carrier who caused the loss or damage to the goods. From the performing carriers' point of view, it seems that the main interest is to retain the option to rely on the legal framework designed for the particular mode of carriage but in cases involving an unlocalized loss, they have the same interest as the MTO, which means not being held liable for the loss or damage they did not cause.

4.1.2. RECOURSE SYSTEM IN SUCCESSIVE CARRIAGE

In successive carriage, the performing road carriers, subcontracted by the road carrier to perform all or parts of his obligations under the contract for the carriage of goods with the consignor, become parties to that contract with the consignor if they qualify as successive carriers under Article 34 of the CMR[67]. Article 34 of the CMR Convention provides that if the carriage by road is governed by a single contract but performed by successive road carriers, each shall be responsible for the performance of the whole operation, the second and each successive carrier becoming a party to the contract of carriage under the terms of the consignment note by reason of his acceptance of goods and the consignment note.

The requirements for the successive carriage are therefore one single contract of carriage and acceptance of the goods and the consignment note by the successive carriers[68]. Thus, the first requirement is that the carriage of goods must be governed by a single contract. This means that the carriage in question must be governed by a single contract before a performing road carrier can become a successive carrier under Article 34 of the CMR Convention[69]. The fact that the performing road carrier takes over the goods from another one is not sufficient and it is essential that one contract is entered into for the whole carriage[70]. The second requirement concerns the acceptance of the goods and the consignment note. Each performing road carrier becomes a successive carrier and therefore a party to the contract of carriage with the consignor by reason of his acceptance of the goods and the consignment note[71].

The result of Article 34 of the CMR Convention is that the performing road carrier will become a successive carrier. The consequence of the performing road carrier being successive carrier under Article 34 of the CMR Convention is that he is responsible for the whole performance of the contract of carriage as carrier even

[67] A. Messent, D.A. Glass: *CMR*..., *op. cit.*, p. 340.

[68] S. Lamont-Black: *The concept of the successive CMR carrier on trial*, European Journal of Commercial Contract Law 2017, Vol. 9, Issue 1–2, p. 2.

[69] A. Messent, D.A. Glass: *CMR*..., *op. cit.*, p. 341.

[70] *Ibidem*, p. 341.

[71] *Ibidem*, p. 348.

if the loss, damage or delay was caused without fault on his part[72]. Thus, the successive carrier becomes a party to the original contract with the consignor.

The regulation of which party should be sued in the concept of the successive carriage can be found in Article 36 of the CMR Convention. Legal proceedings in respect of liability for loss, damage or delay shall be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred[73]. Also, an action may be brought at the same time against several of these carriers[74].

Because each successive carrier is responsible for the whole performance of the carriage, the liability of the carriers involved in the successive carriage is joint and several[75]. The consignor can therefore make a claim against any of the carriers mentioned by Article 36 for the full amount of compensation, regardless of the share of responsibility of the carrier who is actually being sued[76]. Thus, the carrier sued under Article 36 of the CMR Convention is not necessarily the carrier responsible for the loss[77].

The recourse system between the successive carriers can be found in Article 37 of the CMR Convention. This Article is designed to enable a carrier to overcome the obstacle of privity of contract in seeking recourse against another carrier who may have no contractual tie to him[78]. Article 37 stipulates that a carrier who has paid compensation in compliance with the provisions of the CMR Convention shall be entitled to recover such compensation, together with interest thereon all costs and expenses incurred by reason of the claim, from other carriers who have taken part in the carriage.

For cases involving a localized loss, Article 37(a) of the CMR Convention provides that the carrier responsible for the loss or damage shall be solely liable for the compensation, whether paid by himself or by another carrier. Therefore, if the claim is brought against the carrier who actually caused the loss or damage, he will be solely liable for it. If, however, the claim is brought against a carrier other than the one who actually caused the loss or damage, the carrier who paid the compensation will exercise his right to redress against the actually responsible carrier to recover such compensation. If more than one carrier caused the loss or damage, Article 37(b) of the CMR Convention provides that each of them shall pay an amount proportionate to his share of liability. Article 37(b) further stipulates that if it is impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him.

[72] *Ibidem*, p. 362.
[73] Article 36 of the CMR Convention.
[74] Article 36 of the CMR Convention.
[75] A. Messent, D.A. Glass: *CMR...*, *op. cit.*, p. 369.
[76] *Ibidem*, p. 369.
[77] S. Lamont-Black: *The concept...*, *op. cit.*, p. 525.
[78] A. Messent, D.A. Glass: *CMR...*, *op. cit.*, p. 373.

For cases involving an unlocalized loss, the Article 37(c) of the CMR Convention prescribes that the amount of compensation shall be apportioned between all the carriers. Thus, if it is not possible to determine the responsible carrier, the compensation has to be borne by them all proportionally[79]. Nevertheless, the establishment of the liability of the carriers other than the carrier who paid the compensation to the consignor in cases involving an unlocalized loss is problematic in the successive carriage under the CMR Convention as well. However, it is argued that Article 17 and Article 18 of the CMR Convention, which deal with the burden of proof and available defences, also apply to claims between carriers under Article 37 of the CMR Convention[80]. Thus the presumed fault system will apply to the carriers under Article 37 of the CMR Convention as well.

In successive carriage, the basis for a recourse action is the compensation paid to the consignor by the carrier sued by the consignor. With regard to recourse proceedings, Article 39(1) stipulates that the decision in the proceedings between the consignor and the carrier who compensated him is binding in the recourse action[81]. Therefore, in recourse proceedings, neither the validity nor the amount of the claim can be disputed[82].

4.1.3. PROPOSAL OF NEW RECOURSE SYSTEM

In this sub-section, the new recourse system drawing inspiration from the concept of successive carriage under the CMR Convention will be introduced. It will be argued that such a new recourse system can remove the problem of the MTO's indemnification in cases involving an unlocalized loss while taking into account also interests of the consignor and performing carriers.

Nevertheless, before the new recourse system is introduced, there are several matters that need to be resolved. These matters precede the application of the new recourse system so attention will be given to them first.

The new recourse system as such needs to be incorporated in a legal instrument so it can form a part of a legal framework. The MT Convention can serve as an example of such an international multimodal instrument. The MT Convention contains the uniform liability rules governing the contractual relationship between the consignor and the MTO. The MT Convention does not focus on the contractual relationship between the MTO and performing carriers. The new recourse system could make such an international multimodal instrument whole, meaning covering

[79] J. Chuah: *Law…*, *op. cit.*, p. 434.

[80] A. Messent, D.A. Glass: *CMR…*, *op. cit.*, p. 380.

[81] M. Spanjaart: *The successive carrier: a relic from the past*, Uniform Law Review 2016, Vol. 21, Issue 4, p. 525.

[82] *Ibidem*, p. 525.

the contractual relationship between the MTO and the consignor as well as the contractual relationship between the MTO and performing carriers.

Further, the ability of such an international multimodal instrument containing the new recourse system to govern relationships involved in the multimodal carriage of goods needs to be created. The method used in successive carriage in Article 34 of the CMR Convention, which makes successive carriers parties to the original contract with the consignor, should be used in the international multimodal instrument as well. As a single contract required by Article 34 of the CMR Convention, the multimodal contract for the carriage of goods would be used. As a consignment note, the multimodal transport document would be used. The international multimodal instrument containing the new recourse system should define the transport document similarly to the UNCTAD/ICC Rules. The UNCTAD/ICC Rules in Article 2.6 define the multimodal transport document as a "document evidencing a multimodal contract for the carriage of goods". Article 3 of the UNCTAD/ICC Rules provides that "the multimodal transport document shall be prima facie evidence of the MTO taking in charge of the goods". The international multimodal instrument containing the new recourse system should incorporate a similar definition of the multimodal transport document. Such a multimodal transport document would then operate in the same way as a consignment note and the performing carriers would become a party to the multimodal contract for the carriage of goods by reason of acceptance of the multimodal transport document as well as the goods[83]. By use of this method, the performing carriers would become parties to the contract between the consignor and the MTO. The international multimodal instrument containing the new recourse system would then be capable of combining the contractual relationship between the consignor and the MTO and the contractual relationships between the MTO and performing carriers.

With regard to the ability of an international multimodal instrument containing the new recourse system to govern relationships involved in the multimodal carriage of goods, the liability system that such an international multimodal instrument would take needs to be discussed. In successive carriage under the CMR Convention, if the performing carrier accepts the consignment note as well as the goods, he becomes a successive carrier and then the relationships between the successive carrier, the first carrier and the consignor is all subject to the CMR Convention[84]. Thus, the uniform liability system adopted by the CMR Convention will determine liability issues. In the multimodal carriage of goods, for the new recourse system to be able to operate in the same way as the recourse system in successive carriage under the CMR Convention, the international multimodal instrument within which the new recourse system would be incorporated should also operate on the basis of the uni-

[83] J. Chuah: *Law*..., *op. cit.*, p. 430.
[84] A. Messent, D.A. Glass: *CMR*..., *op. cit.*, p. 340.

form liability system. The MT Convention can be used as an example in this situation as well. Nevertheless, for such an international multimodal instrument containing the new recourse system to come into force, there would have to be a compromise achieved with regard to the interests of parties involved in the multimodal carriage of goods. This will, however, be the subject of Sub-Section 4.1.4.

The last matter is the question who to sue. In order for there to be a need for a recourse action as such, there would have to be compensation paid to the consignor by one of the carriers involved in the multimodal carriage of goods. Article 36 of the CMR Convention could serve as a basis for the future regulation of whom the consignor should sue for damages. In cases involving a localized as well as an unlocalized loss, the consignor could decide which of the carriers he wishes to sue. It could be either the first carrier, which in the multimodal carriage of goods would be the MTO, or the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred. The consignor could make a claim against any of those carriers for the full amount of compensation, regardless of the share of responsibility of the carrier who would be actually sued[85].

At this point, the new recourse system would come into play. Similarly, it should be designed according to the recourse system in successive carriage under the CMR Convention.

If the carrier who paid the compensation to the consignor were the actually responsible performing carrier, he would be solely liable for it. In such a case, there would be no need for a recourse action.

If the carrier who paid the compensation to the consignor were not the actually responsible performing carrier, the new recourse system would operate on the basis of Article 37 of the CMR Convention. The new recourse system would be designed according to whether the loss is possible to localize or not.

In cases involving a localized loss, the carrier who paid the compensation to the consignor would exercise the recourse action against the actually responsible performing carrier. The actually responsible performing carrier would be solely liable and would have to indemnify the carrier who paid the compensation to the consignor for the compensation paid, together with interest thereon all costs and expenses incurred by reason of the claim. If more than one performing carrier caused the loss or damage, each of them would pay the carrier who compensated the consignor an amount proportionate to his share of liability.

In cases involving an unlocalized loss, the new recourse system would stipulate that the amount of compensation shall be apportioned between all the carriers, as is the case of Article 37(c) of the CMR Convention. The MTO would assume responsibility for the carriage of goods through the whole journey and the performing carriers as well just only for their own part. Thus, in cases involving an unlocalized

[85] *Ibidem*, p. 369.

loss, all of the carriers involved in the multimodal carriage of goods would bear the consequences of an unlocalized loss. Compared to the current recourse system in the legal framework for the international carriage of goods, this would be a significant change. In cases where due to the sealed container it is not possible to determine which of the carriers involved in the multimodal carriage of goods caused the loss or damage to the goods, all of the carriers involved would be responsible for the loss and none of them would have to solely compensate the consignor in the end. The new recourse system would unburden the MTO from the necessity to identify the actually responsible performing carrier in cases involving an unlocalized loss in order to start legal proceedings under the unimodal legal framework. Such a regulation would also ensure that if the carrier sued by the consignor were the performing unimodal carrier, he would also not have to solely bear the consequences of an unlocalized loss.

Lastly, the new recourse system should contain a similar regulation for recourse proceedings as can be found in Article 39(1) of the CMR Convention. In the recourse proceedings, neither the validity nor the amount of the claim would be possible to dispute and the decision in the proceedings between the consignor and the carrier who compensated him would be binding.

4.1.4. FUNCTIONING AND FEASIBILITY

In this sub-section, the functioning and feasibility of the new recourse system will be examined. First, an example of how the new recourse system would deal with cases involving an unlocalized loss will be provided. Next, the result of taking into account the interests of the parties involved in the multimodal carriage of goods by the new recourse system will be scrutinized. Lastly, this sub-section will examine the chances of an international multimodal instrument containing the new recourse system for the multimodal carriage of goods to come into force.

For a practical example of how the new recourse system would deal with cases involving an unlocalized loss, the multimodal scenario from Sub-section 2.2 will be used. If the cargo were carried in the sealed container and delivered damaged to the consignee in Perth, company Y would decide to start legal proceedings in order to claim damages. The liability of the carriers involved in the multimodal carriage of goods would be determined by the international multimodal instrument as joint and several and thus company Y would not have to identify the actually responsible performing carrier. The MTO as the first carrier and the performing sea carrier as the last carrier would be available for company Y to sue. The carrier who was performing that portion of the carriage during which the event causing the damage occurred would not be identified and therefore would not be an option for company Y. Let us say that the MTO would be required to compensate company Y

for the damages. He would then proceed with his recourse action. Because the regulation for cases involving an unlocalized loss would provide that the amount of compensation should be apportioned between all of the carriers involved in the multimodal carriage of goods, the MTO would in the end compensate the consignor only for the part apportioned to him. The result would be the same if the performing sea carrier were the one who had to compensate the consignor.

Sub-section 4.1.1 identified the interests of the main parties involved in the multimodal carriage of goods. Thus, this sub-section will also look at how the new recourse system takes into account the interests of the consignor, the MTO and performing carriers.

The interest of the consignor in the multimodal carriage of goods is his ability to claim damages from a party, which does not have to be identified according to the mode of transport during which the loss or damage occurred. The determination of who to sue by the international multimodal regime containing the new recourse system, which would be based on Article 36 of the CMR Convention, is an answer how to take into account this interest. This interest of the consignor would be preserved by being able to sue the MTO, as the first carrier, the last carrier or the actually responsible performing carrier in cases involving a localized and the MTO as the first carrier and the last carrier in cases involving an unlocalized loss.

By this new recourse system for the multimodal carriage of goods, the interests of the MTO and performing carriers would be preserved as well. If the loss were possible to localize, only the actually responsible performing carrier would in the end pay for the loss or damage to the goods and the new recourse system would allow the MTO or other performing carriers not to suffer the consequences of someone else's mistake. If the loss were not possible to localize, the consequences would be borne by all carriers involved in the multimodal carriage of goods proportionally. None of them would have to solely bear the consequences and the carrier who compensated the consignor, which may be the MTO or one of the performing carriers, would be at least partially indemnified.

Nevertheless, the new recourse system for the multimodal carriage of goods as such is not capable to cover all of the interests as identified in Sub-section 4.1.1. If the international multimodal instrument governed the relationship among the consignor, the MTO and the performing carriers by the same method as the CMR Convention, a consensus would have to be achieved with regard to the determination of possible defences available to carriers and liability limitations. The liability of the carries involved in the multimodal carriage of goods would be determined according to the international multimodal instrument and not according to the applicable unimodal convention.

Because the new international multimodal instrument would be based on the uniform liability system, like the CMR Convention, a consensus would have to be achieved with regard to the interest of the consignor and the interest of performing

carriers. The consensus would be needed to incorporate the interest of the consignor in the uniform set of rules governing his relationship with the MTO and the interest of performing carriers to continue to rely on the unimodal legal framework designed for the particular mode of carriage. However, these interests are in direct conflict and the MTO is the one caught in their middle. Thus, a consensus would have to be achieved in order for such an international multimodal instrument incorporating the new recourse system to come into force. Due to the fact that this article focuses on the MTO's right to redress in cases involving an unlocalized loss and not on the regulation of these aspects of carrier's liability, the concrete form of the consensus is beyond the scope of this article and thus left for further discussion to future authors of such an international multimodal instrument.

With regard to the feasibility of such an international multimodal instrument containing the new recourse system, despite the fact that it might solve the problem of an unlocalized loss for the MTO's right to redress, its feasibility is questionable. In the past, attempts to enact such an instrument regulating the multimodal carriage of goods were made, without success. The first one was the TCM Draft Convention of 1972 and the second one was the MT Convention of 1980. Nevertheless, the TCM Draft Convention failed to mature beyond the proposal stage[86] and the MT Convention was never ratified by the required number of signatory States[87]. The most recent attempt to, at least partly, regulate the multimodal carriage of goods are the Rotterdam Rules and it looks like they are going to share the fate of their predecessors[88], as the results of their ratification seem rather negative[89]. Based on these attempts, it seems that the willingness of the national States to regulate the multimodal carriage of goods cannot be expected.

4.2. LOCALIZATION OF LOSS

Thus, because the feasibility of an international multimodal instrument containing the new recourse system seems unlikely, another way to accommodate the MTO's right to redress would be localizing the loss. If the loss were localized, the MTO would not have a problem with proceeding with his recourse action under the unimodal legal framework. The actually responsible performing carrier would be identified and the MTO's claim based on the unimodal contract for the carriage of goods would be governed by the applicable unimodal convention.

[86] M. Hoeks: *Multimodal…*, *op. cit.*, p. 20.

[87] So far, there are only 11 States which are parties to the MT Convention, see: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en (accessed: July 29, 2018).

[88] So far, there are only 4 States which are parties to the Rotterdam Rules, see: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (accessed: July 29, 2018).

[89] See: http://www.rotterdamrules.com/content/introduction.

However, the problem of localizing the loss is connected with the use of sealed containers in the international carriage of goods[90]. The container revolution can be dated back to the 1950s[91] and since then the problem has continued to exists. The fact that the container is sealed and the status of the cargo is not possible to check is the main reason why the problem of unlocalized loss has emerged. However, in the same way as the container revolution changed the international carriage of goods[92], new technological developments can change the way in which sealed containers are used. The technological development that could eliminate an unlocalized loss is the IoT.

The term IoT describes a system in which the material world communicates with computers by exchanging data with ubiquitous sensors[93]. These sensors are connected to or contained within a certain object in the real world and allow for constant tracking of the condition of the object in real time. Equipping containers with IoT sensors allow the real-time collection and transmission of data concerning not just geographic location, speed and direction of travel but also the internal conditions of the container[94]. Such sensors could monitor almost any relevant condition of the goods. If, for example, the container contained fragile goods, the vibration sensor could be installed in it to monitor any of its shakes or inadequate movements. In the case of perishable goods, where a certain temperature or a moisture level is required, the container could be equipped with a sensor that would monitor the required level. The same goes for the complete loss of the goods or the container. A sensor tracking the movement of the container or the lock on the container could be installed and tracked in real time or the sensor could be installed directly within the cargo itself. It would really depend on the content of the container and the attributes of the goods what kind of sensors should be installed.

The recent activity of the Maersk Line could serve as an example. The world's largest container shipping company is using the IoT for its Remote Container Management software, which allows customers to monitor and make decisions as their cargo moves[95].

Thus, in order to solve the problem of an unlocalized loss, this article argues that the sensor-equipped container should become an international standard. There are two ways in which this could happen. The first way is to amend the current legal

[90] I. Carr, P. Stone: *International…*, *op. cit.*, p. 374.

[91] M. Hoeks: *Multimodal…*, *op. cit.*, p. 3.

[92] I. Carr, P. Stone: *International…*, *op. cit.*, p. 374.

[93] K. Witkowski: *Internet of Things, Big Data, Industry 4.0: Innovative Solutions in logistics and Supply Chains Management*, Procedia Engineering 2017, Vol. 182, p. 766.

[94] K. Fenner: *Filling the Evidence Gap: A Case for the Internet of Things?*, Womble Bond Dickinson 2016, see: https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/filling-evidence-gap-case-internet-things (accessed: June 25 2018).

[95] S.-S. Sit: *Maersk Let Customers Track Containers with IoT*, Supply Management 2017, see: https://www.cips.org/supply-management/news/2017/december/maersk-moves-to-reshape-supply-chains-with-iot/ (accessed: June 29, 2018).

framework for multimodal containers. This legal framework consists of laws, regulations, conventions and standards on both international and national basis[96]. Many of the international conventions have been established under the umbrella of the United Nations and its sponsored organizations and national laws and regulations have been developed to apply the international conventions and national requirements[97]. It is more likely that revision of international legal framework for multimodal containers, which would incorporate sensor-equipped containers, would be more feasible for national States than entering into a new international regime for the multimodal carriage of goods. The second way is the direct self-regulation by the business sector for the international carriage of goods. After all, the MTO and the unimodal carriers are the entities which would benefit from this new standard.

Therefore, by equipping containers with such sensors and by receiving data from the containers through an Internet or GPS connection, the problem of unlocalized loss could be eliminated once and for all. The MTO could directly and in real time monitor the location and the condition of the goods, which would allow him to identify the responsible performing carrier, who would subsequently be liable in case of a recourse action.

If this solution were feasible, the legal framework for the international carriage of goods would allow for the MTO's right to redress because the problem of an unlocalized loss would disappear. If the elimination of cases involving an unlocalized loss was successful, there would also be no need for a new recourse system for the multimodal carriage of goods. The multimodal legal framework operating on the basis of the network liability system could work as designed. The liability of the MTO would be determined according to the applicable unimodal convention and the same unimodal convention would also govern the MTO's recourse action.

5. CONCLUSION

The focus of this article in Section 2 and Section 3 was on the first part of the research question. These sections provided an answer whether the MTO can exercise

[96] The Institute of International Container Lessors, see: https://www.iicl.org/aboutIndustry/laws.cfm (accessed: August 10, 2018).

[97] Primary legislation regulating multimodal containers consists of: (1) the 1972 Customs Convention on Containers, which recognizes containers as an instrument of international traffic and establishes a framework for containers to be used in international transportation, (2) The 1975 Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, which establishes a framework for international transport by road, (3) the 1972 International Convention for Safe Containers, which regulates the safety of human life and provides uniform international safety regulations to facilitate the international transport of containers, (4) the ISO Standards for Freight Containers and Chassis, which deal with a variety of aspects of different types of freight containers, (5) the US Roadability Regulations, which establish regulatory requirements for the safe operation, inspection, repair and maintenance of multimodal chassis in the US and (6) the 2006 US Safe Port Act, which establishes regulatory security requirements for the operation of multimodal containers in the US.

his right to redress against the performing unimodal carrier under the current legal framework for the international carriage of goods in cases involving an unlocalized loss.

The legal aspects of the MTO's right to redress were examined first. There are usually two contractual relationships involved in the multimodal carriage of goods. The multimodal contract for the carriage of goods is a basis for the relationship between the consignor and the MTO. The basis for the relationship between the MTO and the performing carriers are often the unimodal contracts for the carriage of goods. The legal framework for the international carriage of goods governs these contracts for the multimodal as well as unimodal carriage of goods.

Under the legal framework for the international carriage of goods, the multimodal legal framework, governing the multimodal contract for the carriage of goods, and the unimodal legal framework, governing the unimodal contracts for the carriage of goods, can be recognized. The multimodal legal framework consists of various international, regional and national legislations and the contractual standard rules. The reason for the variety of sources of law is the absence of an international instrument containing uniform rules regulating the multimodal carriage of goods. The absence of the uniform liability rules included in such an international instrument also means that in the current multimodal legal framework the MTO's liability is determined according to the network liability system. The international unimodal legal framework consists of several unimodal international conventions. If the unimodal contracts for the carriage of goods fall within their scope of application, they will govern such contracts. Also, these conventions operate on the basis of the uniform liability system.

The MTO's right to redress will be exercised through recourse action. The basis of the MTO's claim against the performing carrier will be the compensation paid to the consignor; however, under the unimodal legal framework, the basis for his recourse action will be the performance of the unimodal contract for the carriage of goods not in accordance with the conditions agreed by the parties in the multimodal contract for the carriage of goods. Therefore, the MTO's recourse action will be connected with the multimodal legal framework as well as with the unimodal legal framework.

However, if the MTO's right to redress is connected with the issue of an unlocalized loss, the legal framework for the international carriage of goods causes a problem for the MTO's indemnification. The term "unlocalized loss" refers to a situation in which it is not possible to determine during which performing carrier's period of responsibility the loss, damage or delay to the goods occurred. The loss is not possible to localize due to the use of sealed containers in the international carriage of goods. The performing carriers are limited in their ability to check the condition of the cargo inside the sealed container. They can only examine the outside of the container with regard to a possible leak or smell.

Despite the use of sealed containers in the international carriage of goods, the legal framework for the international carriage of goods does not take this issue fully into account. The multimodal legal framework operating on the basis of the uniform liability system as well as the network liability system provides the determination of the MTO's liability towards the consignor in cases where the loss cannot be localized without regulating his right to redress. The regulation of the MTO's right to redress is left to the unimodal legal framework. However, under the unimodal legal framework, the MTO's right to redress is based on the breach of the unimodal contract for the carriage of goods. The MTO, in order to start legal proceedings against the actually responsible performing carrier under one of the applicable international conventions, must prove which one of the performing carriers failed to deliver the goods in the same condition as he received them to trigger the presumption that the damage occurred during the period of responsibility of that particular performing carrier. Only in such a case the applicable unimodal convention would govern his claim. Therefore, if the loss cannot be attributed to one of the performing carriers, none of the unimodal conventions will govern the MTO's claim for indemnification.

The answer to the first part of the research question therefore is that under the current legal framework for the international carriage of goods, the MTO cannot exercise his right to redress against the performing unimodal carrier in cases involving an unlocalized loss. If the loss remains unlocalized, the MTO's indemnification will not be possible.

The focus of the article in Section 4 was on the second part of the research question. This section provided an answer as to how the problem causing his inability to indemnify himself can be solved.

The new recourse system contained in the international multimodal instrument, based on the concept of successive carriage under the CMR Convention, is the first solution. An international multimodal instrument containing the new recourse system would use the same method as is used in Article 34 of the CMR Convention. By using this method, the performing carriers would become a party to the contract between the consignor and the MTO. The regulation of who to sue would be based on the concept of successive carriage as well. Similarly to Article 36 of the CMR Convention, the consignor could decide to sue the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred regardless of their share of responsibility. His ability to claim damages from a party, which does not have to be identified according to the mode of transport during which the loss or damage occurred, would be preserved. The new recourse system based on the concept of successive carriage would then come into play. If the carrier who compensated the consignor were the actually responsible performing carrier, he would be solely liable for it. If the carrier who compensated the consignor were not the actually responsible performing

carrier, the new recourse system would be designed according to whether the loss is localized or unlocalized. In cases of a localized loss, the carrier who compensated the consignor would exercise his recourse action against the actually responsible performing carrier. If more than one carrier caused the loss or damage, each of them would be proportionally liable. In cases of an unlocalized loss, the new recourse system would stipulate that the amount of compensation should be apportioned between all the carriers proportionally. In this way, the recourse claim would not require the identification of the actually responsible carrier, as is the case in the current legal framework for the international carriage of goods. The problem identified in Section 3 would therefore not exist. Nevertheless, the feasibility of the new recourse system contained in the international multimodal instrument is questionable based on the past outcomes of similar international multimodal instruments.

The localization of the loss through IoT based, sensor-equipped containers is the second solution. These sensors could monitor the cargo within a sealed container in real time and therefore it would be easy to identify during which mode of carriage the loss or damage to the goods occurred. Identification of the actually responsible performing carrier would thus be possible as well. In such a case, the current multimodal legal framework operating on the basis the network liability system would determine the liability of the MTO according to the same unimodal convention under which the MTO would exercise his right to redress. The feasibility of this solution is greater because the willingness of national States to change the legal framework for multimodal containers is higher than it is with regard to adopting the international multimodal instrument containing the new recourse system. Also, there might be a no need for such a legislative change because the private actors involved in the international carriage of goods might accept the sensor-equipped container as a new standard by means of self-regulation.

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International legislation:

Appendix B to the Convention concerning International Carriage by Rail — Uniform Rules Concerning the Contract of International Carriage of Goods by Rail — (COTIF-CIM)

Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)
Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)
Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)
Customs Convention on Containers, 1972
International Convention for Safe Containers, 1972
ISO Standards for Freight Containers and Chassis
The Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, 1975
The Hague-Visby Rules — The Hague Rules as Amended by the Brussels Protocol, 1968 (HVR)
UNCTAD/ICC Rules on Multimodal Transport Documents (UNCTAD/ICC Rules, 1992)
United Nations Conference on a Convention on International Multimodal Transport (MT Convention)
United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)
United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)

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MTO'S RIGHT TO REDRESS: IS AN UNLOCALIZED LOSS REALLY AN INSURMOUNTABLE OBSTACLE?

S u m m a r y

This article will examine whether the current legal framework for the international carriage of goods allows the multimodal transport operator (MTO) to exercise his right for redress in cases involving an unlocalized loss. The article will also provide solutions for a problem the MTO might encounter when exercising his recourse action.

By the use of the descriptive method, legal aspects of the MTO's right for redress will be examined in Section 2 with focus on usual contractual relationships involved in the multimodal carriage of goods, the multimodal as well as the unimodal legal framework, systems for liability determination and the recourse action. In Section 3, through the descriptive method, the term unlocalized loss and reasons for it to arise will be examined and through the comparative method the multimodal as well as the unimodal legal framework will be analysed in order to find out whether the current legal framework for the international

carriage of goods takes into account the MTO's right for redress in cases involving an unlocalized loss. By the use of combination of the descriptive and the normative method in Section 4, solutions to the problem identified in Section 3, that the MTO might encounter when initiating his recourse action, will be provided.

The Section 3 will reveal that the MTO will encounter the problem of identifying the actually responsible performing carrier in cases involving an unlocalized loss and therefore his recourse action will not be possible under the unimodal legal framework even though that the multimodal legal framework will provide for determination of his liability also in cases involving an unlocalized loss. Section 4 will provide two solutions to the problem — the new recourse system for the multimodal carriage of goods based on the concept of the successive carriage under the CMR Convention and localization of a loss by the use of the Internet of Things (IoT).

Key words: MTO, Multimodal Transportation, Recourse Action, Unlocalized Loss, Unimodal Conventions, Uniform Liability System, Network Liability System, Localization of Loss, Internet of Thing, Successive Carriage.