

# Study on the Necessity of Drafting a New Convention for International Multimodal Transport in the Context of the Belt and Road Initiative

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**Abstract:** *The International Multimodal transport's actual relevance lies in its ability to provide efficient, integrated or coordinated operation between the different modes of transports involved, especially when it comes to operations going beyond established political boundaries. China's Belt and Road Initiative is a vast transcontinental development project which carries in itself, a multimodal component and aims to promoting and improving global connectivity among nations across the continents of Asia, Africa, America and Europe. From a legal perspective, there is still, to date, no international legal liability regime in force to govern multimodal transport contracts. However, the current legal framework consists of a complex formation of mandatory International Unimodal Transport Conventions designed to regulate Carriages by Sea, Air, Road, Rail respectively, various regional/sub-regional agreements, and standard form contracts. Besides, there are also national legislations concerning international multimodal transport system, where there is a wide range of fragmented laws. However, the International Conventions that provide regulations for the international multimodal transport are not in force: the 1980 UN Convention and the 2008 Rotterdam Rules. Therefore, a question arises: what kind of legal regime should govern the multimodal transport aspect of the Belt and Road? This research was carried out in order to brainstorm what type of legal framework to provide and suitable to implement for international multimodal transport in the Belt and Road Initiative context. A call for a redefined system through a new Convention for the multimodal aspect of the Belt and Road Initiative is needed. The suggested liability system for multimodal transport of the Belt and Road Initiative is one that shifts the focus from mixed contract approach, to sui generis approach. This actually stems from the need to reconsider and redefine the nature of multimodal transport contracts. From a standpoint of the Belt and Road Initiative, adopting a sui generis approach would be a step forward in finding the solution to different problems brought up by the diversification of unimodal Conventions. Finally, in order for the new Convention to be successful, it is suggested for it to adopt a distributive approach when it comes to the applicable regulations concerning important matters in a multimodal transport contract in the Belt and Road Initiative.*

**Keywords:** New Convention; International Multimodal Transport; Belt and Road Initiative

## 1. Introduction

### 1.1 Background of the study

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<sup>1</sup>. Its actual relevance lies in its ability to provide efficient, integrated or coordinated operation between the different modes of transports involved, especially when it comes to operations going beyond established political boundaries. China's Belt and Road Initiative is a vast transcontinental development project. It carries in itself, a multimodal component and aims to promoting and improving global connectivity among nations across the continents of Asia, Africa, America and Europe. The "Belt" refers to land-based routes with six (6) Economic Corridors, while the "Road" refers to maritime routes through the South China Sea and the Pacific and Indian Ocean. Additionally, the project also comprises railway and airports projects. Be it inside or outside the scope of the Belt and Road, multimodal transport retains its main characteristics. However, the only difference is the

scope in which the contract is performed, either inside the scope of the Belt and Road or outside of it. Just as the classical multimodal transport, the multimodal aspect of the Belt and Road Initiative, is obviously also not exempt from the strike of legal uncertainty. From a legal perspective, there is still, to date, no international legal liability regime in force to govern international multimodal transport contracts. However, the current legal framework consists of a complex formation of mandatory International Unimodal Transport Conventions designed to regulate Carriages by Sea, Air, Road, Rail respectively, various regional/sub-regional agreements, and standard form contracts<sup>2</sup>. Besides, there are also national legislations concerning the international multimodal transport system, where there is a wide range of fragmented laws. However, the International Conventions that provide for international multimodal transport are not in force. First, the United Nations Convention on the International Multimodal Transport of goods which was adopted in May 1980 was never enforced by relevant countries for diverse reasons. Second, the 2008 United Nations Convention on carriage of goods wholly or partly by Sea, or the so-called 'Rotterdam Rules', more recent but haven't either gained global approval, at least not yet. The

<sup>1</sup> Article 1 of the United Nations Conference on International Multimodal Transport of goods, Volume I, 1980.

<sup>2</sup>UNCTAD Report on 'Implementation of Multimodal Transport Rules - Comparative Table', UNCTAD/SDTE/TLB/2/ Add.1 (2001)

approaches to multimodal transport adopted by these two multimodal Conventions are totally different.

### 1.2 Importance of the research.

The background of this study induces a question that needs an adequate answer: regarding the uncertain setting of the international multimodal transport legal framework, what regime should govern the multimodal transport aspect of the BRI? When it comes to the regulation of international multimodal transport outside the context of the Belt and Road Initiative, it is of utmost importance to understand the reasons for the failure of the previous regulations on the subject matter, in order to provide for some approaches of solutions for the BRI multimodal transport. This article's importance lies in the fact that it provides for innovative ways to tackle the issue of the multimodal transport in the context of the BRI. Moreover, this article advocates for the draft of a new convention endeavored in a manner that its characteristics stem from and mold into the BRI core principles. Another important characteristic of the new drafted Convention would consist in an implementation which maintains the diversity of unimodal regulatory frameworks and national laws of BRI participating countries.

### 1.3 Relevant previous research and gaps

There is an extensive literature on the global multimodal transport and the BRI concept and vision. However, when it comes to the BRI multimodal legal framework, the literature is relatively limited. There is literature available on the BRI that mostly explain its international multimodal aspect and concern, its concept and vision. The "Belt" is a network of overland road and rail routes, oil and natural gas pipelines, and other infrastructure projects that will stretch from Xi'an in central China through Central Asia and ultimately reach as far as Moscow, Rotterdam, and Venice. Rather than one route, belt development corridors are set to run along the major Eurasian Land Bridges, through China-Mongolia-Russia, China-Central and West Asia, China-Indochina Peninsula, China-Pakistan, Bangladesh-China-India-Myanmar. The "Road" is its maritime equivalent-- the 21st-Century Maritime Silk Road--a network of planned ports and other coastal infrastructure projects that dot the map from South and Southeast Asia to East Africa and the northern Mediterranean Sea. The maritime route extends to the Oceanic nations in the Southern Pacific. In the north, the Arctic sea routes have been planned<sup>3</sup>. The BRI seeks to promote an efficient flow of materials and deep integration of markets to achieve diversified, balanced, mutually beneficial, and sustainable development (Grieger, 2016)<sup>4</sup>. A key policy document entitled 'Vision and Actions on Jointly Building the Silk Road Economic Belt and 21<sup>st</sup> Century Maritime Silk Road' states 'Countries along the Belt and Road have resource advantages and their economies are

mutually complementary' (Liu and Dunford, 2016)<sup>5</sup>. The BRI architects promote cooperation through policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bond. It is more correct to observe that the BRI is less institutionally-focused, rather than operating without any institutional arrangement whatsoever. The BRI does not have a stringent international institutional structure in the legal sense. There does not seem to be a clear plan for a strict BRI legal framework. China adopts a non-treaty-based approach to the BRI (Heng Wang, 2019). There is no BRI-wide treaty or similar international law instrument establishing the BRI. The BRI neither has a constituting treaty with all BRI states (a BRI-wide treaty), as is the case with international organizations, nor formal membership protocols. BRI-specific documents are not binding. China seems to prefer avoiding treaties with measurable compliance requirements in favor of less formal but more flexible arrangements (Du, 2016). BRI-specific documents call for voluntary cooperation instead of hard law-imposing treaty obligations backed by enforcement mechanisms (Decision time: Australia's engagement with China's BRI, 2017). BRI-specific documents are patchy among BRI states, given the huge variation among these countries. They are adapted to BRI states and international organizations. They need to be understood on a case-by-case basis (Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative between the Government of the People's Republic of China and the Government of New Zealand Paragraphs III.2, III.4. 2017). Certainty and predictability to BRI individuals and businesses could be achieved through the means of harmonization which relies on uniform substantive law governing civil and commercial matters among participating countries, and a uniform supranational judicial system to hear transnational disputes. However, this approach is too ambitious to be realistic. The second approach, more favorable is judicial cooperation covering jurisdiction, applicable law, mutual judicial assistance and mutual enforcement of judgments in civil and commercial matters between difference states (Zheng Sophia Tang, 2019).

International Multimodal Transport is not covered by any international legal convention in force, unlike the unimodal transport where each mode of transport is covered by an international regime. Discussion on the need for an international legal solution to door-to-door traffic started early 1970s. However, early attempts at governing international multimodal transport on an international level did not meet with success (Schmeltzer et al., 1970). The failed 1980 UN Convention on International Multimodal Carriage of goods was criticized for not providing a uniform liability regime (Massey, 1972). On the other hand, the dream of a single regime for all modes was characterized as a utopia (Mc Dowell, 1972). The convention was nevertheless criticized for being too close to the Hamburg rules (Driscoll et al., 1982).

<sup>3</sup>Legal Aspects of China's Belt and Road Initiative: A Preliminary Assessment, Gan Ching Chuan; Cao Fuguo; M.M. Akanbi; M.T. Adekilekun; AloyOjilere; Gregory W K Siau; 2018, P4; Updated 2019

<sup>4</sup>Grieger, G. (2016). One Belt, One Road (OBOR): China's regional integration initiative. European Parliament Briefing, 12.

<sup>5</sup>Liu, W., & Dunford, M. (2016). Inclusive globalization: Unpacking China's Belt and Road Initiative. *Area Development and Policy*, 1(3), 323-340.

Literatures concerning issues such as international harmonization of the Belt and Road multimodal legal framework, liability of the carrier, documentary issues, are still issues to be thoroughly discussed. Also, the question according to which international unimodal or multimodal transport Conventions can be applicable to the multimodal aspect of the Belt and Road are still not adequately addressed. It is of utmost importance to determine the legal framework potentially applicable to the Belt and Road multimodal transport system.

#### **1.4. Identifying unanswered questions addressed by this research**

This research addresses the question of the nature of international multimodal transport contracts in the scope of the BRI, as well as the regime applicable to the BRI multimodal aspect. The uncertainty that reigns in the classical system of international multimodal transport is due to the fact that most of the approaches used to regulate international multimodal transport contracts are not representative of such a mode of transport. Instead, unimodal legal frameworks are used to regulate multimodal transports contracts because each of unimodal transports are considered as specific types of transport modes. That means that multimodal transport's nature is still not properly settled. This is the reason why this paper advocates for a redefined nature of multimodal transport in the BRI context, in order to prevent the situation of uncertainty. In other words, multimodal transport in the BRI context has to be considered as a specific and different type of transport system, and be assigned a different type of regulation that would encompass other unimodal transport systems. In other words, it is of utmost importance that each mode of transport is included and considered in the legal framework. That is the reason why this paper aims for an all-inclusive multimodal transport system for the Belt and Road, and the support of each and every industry related to such unimodal transport systems. Another problem to be addressed and solved, is the fact that traditionally, the approach to regulation was the Convention approach, where each and every issue were regulated by the Convention. However, regarding the approach to flexibility that the BRI upholds, such an approach would fail in the context of the BRI. Therefore, the solution would be to adopt a distributive approach to legal framework of the multimodal transport in the Belt and Road context. In other words, such regulation allocates issues between on one hand, a Convention-like setting which provides for partial unification, and in other hand, unimodal regulations, national laws and contractual terms.

#### **1.5. Purpose of the study**

There's a quite noticeable lack of certainty in International Multimodal Transport legal frameworks, of which the BRI is concerned. The Belt and Road initiative offers an opportunity to all actors involved to challenge the existing legal framework and moving forward from it, as well as to provide a new vision and framework to the International Multimodal Transport system. The main issue is to draft a Convention which implementation would maintain the diversity of unimodal transport regulatory frameworks and

national laws of BRI participating countries. This purpose answers the question of whether can be achieved certainty and flexibility for the multimodal transport in the BRI context.

#### **1.6. Method used to seek the answer**

The problem of the regime applicable to the BRI multimodal system has to be addressed and solved. For this reason, this paper's findings are the result of an extensive literature review focusing on international multimodal transport regulatory framework and the BRI legal aspects.

Data has been collected through library research. It has involved reading and analysis of case studies, international treaties, national legislations and regulations, journal articles and reviews, books written or edited by renowned scholars and experts in diverse fields such as International Law, International Transport law, Maritime Law, International Conventions, National regulations etc. The researcher has selected library research because this legal study is data based. Moreover, the problem has been defined through analyzing diverse articles and Conventions and literature in the relevant field of international multimodal transport, and the Belt and Road available literature. In accordance with its objectives, this study was performed using a comparative approach of international conventions providing for the international multimodal transport, as well as the BRI related literature. In this way, it was also possible to limit the scope of the study by collecting only necessary data to solve the existing problems. This was done, laying out specifically, the reasons of the failure precedent regulatory frameworks on the subject, in order to provide some approaches of solutions that can be potentially applicable to the BRI multimodal transport system.

## **2. The obstacles to existing multimodal conventions applying to the Multimodal aspect of the Belt and Road Initiative**

Sixty-nine countries including China are involved in B&R and the number is likely to continuously grow as the project progresses<sup>6</sup>. Although the needs for legal certainty will not be extremely strong at the beginning, more intensive connections and more frequent transactions inevitably call for more predictable and reliable law which helps private parties to better predict the legal consequences of their cross-border activities and resolve disputes<sup>7</sup>. Therefore, various regulations pertaining to multimodal transport are potentially applicable. However, the question that emerges here is why not apply the already existent international multimodal regulations to the BRI multimodal transport. The non-in forced regulations on International Multimodal transport consist of the 1980 United Nations Convention on the International Multimodal transport of goods herein

<sup>6</sup> According to the information provided by the Belt and Road Portal, available at [https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat\\_id=10076](https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076) (visited 10 May 2017).

<sup>7</sup> D Chen and S Deakin, "On Heaven's Lathe" (2015) 8 Law and Development Review 123-145. See also the Belt and Road and cross border judicial cooperation

referred to as the 1980 UN Convention, as well as the United Nations Convention on the Transport of goods Wholly or Partly by Sea, herein referred to as the 2008 Rotterdam Rules. The former was one of the first Conventions designed to regulate International Multimodal Carriage of goods. However, it failed to enter into force for various reasons. The second, which is more recent than the previous, and also quite up to date with recent technological advancements, is however designed to regulate not only Carriage of goods by sea, but also multimodal carriage comprising a sea leg. It is still under investigations by relevant countries, on its benefits for various actors and its impacts on respective countries. What are the obstacles that impede on the applicability of these conventions to the multimodal aspect of the BRI?

Here are just few of them:

**Incompatibility with some aspects of the BRI multimodal transport:** the 1980 UN Convention and the 2008 Rotterdam Rules may not be compatible with existing laws in some countries along the Belt and Road. The former Convention is deemed outdated regarding the technological advancements witnessed recently in international trade, and the second convention has failed to provide for a holistic multimodal regime<sup>8</sup>. In other words, even though the 1980 UN Convention applies to true multimodal transport, under a single contract of carriage<sup>9</sup>, it was closely linked with the Hamburg Rules<sup>10</sup> which in turn have failed to gain much support among major maritime nations<sup>11</sup>. The 2008 Rotterdam Rules on the other hand, operates as a unimodal convention (as regulating sea carriage) and a wet multimodal convention (as regulating multimodal transport only including a sea leg) at the same time<sup>12</sup>. None of the two conventions provide for a legal framework that is compatible with the vision of the BRI.

**Limited ratifications by BRI countries:** as of 2019, only 11 countries<sup>13</sup> had ratified the 1980 UN Convention and as of 2021, only 3 nations<sup>14</sup> had ratified the 2008 Rotterdam Rules. This means that the two conventions are not yet widely accepted and adopted in the international community. In other words, the two types of legal frameworks have not been adopted and implemented by the countries already involved in the BRI. However, participating countries have their own domestic laws and regulations regarding multimodal carriage of goods, which are not consistent with the two conventions.

<sup>8</sup> A Summary of General criticisms of the UNCITRAL Convention (The Rotterdam Rules); William Tetley; 2008; 1

<sup>9</sup> K. Nasser, 'The Multimodal Convention' (1988) 19(2) JMLC 231, 238; see also (Jeon, 2013) P. 75

<sup>10</sup> The Hamburg Rules were adopted on 31 March 1978 and entered into force on 1 November 1992

<sup>11</sup> See Jeon, 2013 P. 77

<sup>12</sup> The Rotterdam Rules a practical annotation; Yvon Baatz et al., Informa; London 2009; 15;16

<sup>13</sup> Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Norway, Rwanda, Senegal, Venezuela and Zambia have so far joined the MT Convention

<sup>14</sup> Spain, Togo and Congo have ratified the Rotterdam Rules

**Diverse cultural and legal systems to the BRI:** the ambitious BRI covers a large number of countries cross East Asia, South Asia, Central Asia, West Asia, Europe, Africa and America with widely diverse legal cultures and traditions. Regional harmonization requires the finding of a common ground and shared legal language across multiple legal families, including the former soviet-socialist law, diverse civil laws, Islamic law, common law, customary law, Hindu law. This daunting task may not be achievable as a matter of reality. This is the greatest difficulty that prevents successful regional harmonization. Furthermore, the level of development in law varies among BRI countries<sup>15</sup>.

### 3. Key Characteristics of the New Convention: A Distributive Approach

The standard provided by the classical system has proven defective to adequately define the nature of international multimodal transport contract. Therefore, the BRI new Convention would endeavor to redefine the multimodal system through the distributive approach. In other words, such approach maintains the applicability of a BRI multimodal Convention (through the adoption of a partial unification and a principle-based approaches), unimodal conventions, as well as the diversity of national regulations and finally contractual provisions.

Essentially, partial unification means provision by a regulatory framework, on absolutely essential issues related to the BRI multimodal aspect. On the other hand, the principles provide for a behavioral standard concerned with the integrity, skill, care, diligence and reasonable care with which businesses operate conflicts of interests. The advantage for adopting such an approach consists in establishing a standard which leaves room for other regulatory frameworks mandatorily applicable to multimodal contracts. Moreover, this approach fits perfectly the vision and goal of the BRI project which seeks not to impose mandatory laws on participant nations and actors, but rather more flexible ones.

#### 3.1 Principle-based law for the BRI multimodal aspect

The term 'principle' can be used to simply refer to general rules, which set out the main obligations on businesses, and from which other rules can be derived. In fact, Principles refer to both the type of rule and its position in the hierarchy of Rules. This approach allows for future proofing, enabling the law to respond to new issues as they arise without having to create new rules. The Principles have a number of characteristics as follow: they are drafted at a high level of generality with the intention that they should be overarching requirements that can be applied flexibility to a rapidly changing industry. They contain terms that are qualitative not quantitative: general, usually evaluating terms - 'fair'; 'reasonable'; 'suitable'- as opposed to bright line rules - 'within two business days-. They are purposive, expressing the reason behind the Rule. They have a very broad application to a large range of circumstances. The

<sup>15</sup> The BR and cross border Judicial cooperation; Zheng Sophia Tang; Hong-Kong Law Journal, 2019; 5

Principles are largely behavioral standards: they are concerned with the 'integrity', 'skill, care and diligence', 'transparency' and 'reasonable care' with which businesses operate and manage their related conflicts. The Principles would enable supervisors or enforcers to police the spirit of the Rules as well as the letter and the need for the rules to anticipate every possible situation. The Principles should also be supported by formal and informal guidance in setting and developing standards. With the adoption of this approach, there would be no need to make new rules but a combination of exhortation -in discussion papers, speeches, examples of good and bad practice and other materials-, supervisory work, etc.

The principle should deal with the issue of mutual enforceability of Court decisions in other jurisdictions, un-localized loss or damage, by encouraging the establishment of a system of checking of goods at each beginning and each end of each mode of transport used for the Multimodal Transport, or by default, a system which allows each modal carrier to provide proofs of their due diligence and good faith exercise in the actual carriage of the goods. Other issues to be dealt with by the principle are: harmonization of international contractual law; principles of fairness, transparency and equality; standardization of documents requirements and procedures; dispute resolution mechanisms; data protection and privacy; breach of contract penalties and compliance requirements.

### 3.2 Partial unification for the BRI multimodal aspect

Partial unification means provision, by a Convention, on absolutely essential issues in the BRI Multimodal transport contract such as: definition of all related notions in International MT in the context of BRI, Multimodal Transport, Multimodal Transport Operator, Multimodal Transport Document and Electronic Transport Records -definition and issuance-, the scope of application, mandatory application, period of responsibility, fault basis of liability with the burden of proof on the Operator to exempt himself from liability, period of responsibility of the MTO, average liability principle. This approach consists in establishing a foundation and a standard for Multimodal transport contracts in the BRI. Two crucial partial unification considerations are presented here: redefining the nature of the MT contract and providing for a system of liability that expresses such nature.

**Redefining the nature of international multimodal transport in the BRI context.** Basically, three theories exist on the nature of Multimodal contracts: the mixed contract, the absorbed contract and the *sui generis* contract.

The mixed theory admits that the different stages of the transport have the distinct feature of certain unimodal contracts which are regulated by their own provisions. Since the current legal system of multimodal regimes adopts the network system of liability, the multimodal contract for the carriage of goods is generally considered to be a mixed contract<sup>16</sup>. The Rotterdam Rules took the same approach in

article 26. With this theory comes easily the application of the network system of liability, dealing with the collision of conventions. However, this approach disregards the nature of the multimodal transport contract, it splits the multimodal transport contract into different parts and applies a unimodal regime to the multimodal contract as a whole.

The absorbed theory is more focused on the situations where a contract of carriage primarily relies on one specific mode of transport, which also includes another minor, subordinate mode of transport, allowing the main mode of transport to absorb the less significant mode of transport which precedes and follows the main carriage. The main mode of the contract, which is the predominant one, determines which regime applies to the contract as a whole, whereas the other subordinate modes of the contract are absorbed into the main element. However, this is not different than applying unimodal regime to such contract. Therefore, it is believed that this approach was not enough to explain the core nature of the multimodal transport contract. A part from the fact that this approach also dismisses the core nature of the multimodal transport and applies a unimodal regime to such as a whole, hypothetically applying this to the BRI, would also bring a confusing situation where it would not always be easy to assess the applicable predominant regime. Therefore, this approach was considered not enough to explain the nature of the Multimodal transport contract<sup>17</sup>.

The *sui generis* theory entails that the multimodal transport could not be subordinated to any unimodal transport convention but instead encompasses the complete organization of the transport chain. Since a contract for multimodal transport is an autonomous form of contract, it should not be regarded as a contract for a particular mode or fall within rules directed towards contracts for a single mode. Thus, a multimodal transport contract is a contract *sui generis*<sup>18</sup> which is not made up of a series of unimodal contracts<sup>19</sup>. The new contract is considered to be of a new type of contract with its own unique character, formed by combining several contracts into a new whole<sup>20</sup>. This approach prevailed during the adoption of the 1980 UN Convention, however, it has been losing its support upon the

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International, 2010), para 2.2.5; Quantum Corporation Inc. and Others v Plane Trucking Ltd.

<sup>17</sup> Coping with Muddles and Uncertainty in the Field of Multimodal Transport Liability; Haedong Jeon; Faculty of Business and Law, School of Law, University of Southampton, May 2013, P. 18

<sup>18</sup> The term *sui generis* means 'being the only example of its kind' or 'constituting a class of its own'.

<sup>19</sup> E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport- The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), A17; DC Jackson, 'The Conflict of Conventions', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), G2; See also DA Glass, *Freight forwarding and multimodal transport contracts* (2<sup>nd</sup> edn, Informa, 2012), paras 3.117-3.118

<sup>20</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010); 61

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<sup>16</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law

failure of the Convention<sup>21</sup>. Although the adoption of the sui generis approach to define the BRI multimodal transport contract seems feasible, the real challenge nevertheless remains: its ability to resolve the collision of conventions and laws applicable to the BRI.

**To provide an answer to the question of collision of conventions** according to the sui generis approach, a basic rule can be induced: applying unimodal conventions to unimodal transport contracts, and applying multimodal regime to multimodal contracts. However, there is currently no multimodal regime in force and the overlapping scopes of application of existing unimodal regimes has to be solutioned. Therefore, two potential solutions are presented: either the new multimodal regime exclude any applicability to unimodal contracts or the provisions contained in unimodal regimes denounced by states. In other words, the new multimodal regime would exclude the scope of application of Multimodal transport from unimodal conventions but include the applicability of unimodal conventions to such multimodal regime.

#### **Establishing a multimodal system of liability for the BRI.**

A liability system that expresses the adoption of the sui generis approach has to be provided for. The suggested solution is a two-fold proportional or average liability rule that is calculated in proportion with the number of modes of transport used in the multimodal transport contract, and where modal carriers are made part of the original multimodal transport contract. Therefore, instead of placing the absolute focus on the modes of transport used, the focus is shifted to the multimodal transport contract itself and the responsibilities thereof. The suggested solutions to the liability system, depending on the situation, are as follow: **the joint and several liability**<sup>22</sup> in case there's no fault nor localization of loss, damage or delay. This liability provides a uniform solution in case of non-localized loss, damage or delay. Here the cargo claimant seeks compensation with the MTO, which can seek recourse with the modal carrier(s). The modal carriers would bring their share of compensation in the limits provided for by the unimodal conventions applicable to their respective modes of transport. However, in case there is actual proof of fault and localization, the **pure several liability**<sup>23</sup> system would be applicable where the MTO and the modal carriers are liable only for the damages they are actually responsible for. Because, localization of damage, loss or delay allocates the fault and the proportion of compensation. Here, the problem would lie in the assessment of the proportion of responsibility or fault of each party involved in the actual carriage of the goods.

<sup>21</sup>Coping with Muddles and Uncertainty in the Field of Multimodal Transport Liability; Haedong Jeon; Faculty of Business and Law, School of Law, University of Southampton, May 2013, P.17

<sup>22</sup> The joint and several liability is a liability system that allows for the claimant to claim for the total amount of compensation from any of the several defenders who caused damage, regardless of their degree of fault or negligence. [www.doc.player.net-joint](http://www.doc.player.net-joint) and several liability law. However, in the scenario of a multimodal contract, practically, the compensation claim directed towards the MTO would be more convenient for the claimant

<sup>23</sup> In the pure several liability, each of the defendants is only responsible for an amount of the plaintiff's damage in proportion of their respective faults-[www.justia.com](http://www.justia.com) pure several liability

This two-fold liability system protects and guarantees the MTO's recourse action right. Whether or not the damage is localized, the Multimodal Operator is responsible, together with other carriers, vis a vis the cargo claimant, but all the carriers share the responsibility to compensate the MTO.

#### **4. Some Challenges and Conclusion**

Although the adoption of the distributive approach may bring certainty and flexibility to BRI multimodal transport contracts, it can nevertheless be quite confusing and challenging to implement. Moreover, it may be time-consuming. It may take several years to implement as the project is still ongoing, and for the fact that such legal framework's practical suitability needs to be tested for each mode of transport. Moreover, the scopes of application of unimodal conventions has to be dealt with, to avoid conflicts between unimodal and multimodal regimes. Also, because the amendment of a Convention usually takes several years before completion. Adopting the sui generis for the BRI seems feasible. However, carriage of goods by sea applies three conventions which are still applicable differently depending on the country. Therefore, the regime applicable to the Maritime Silk Road of the BRI has to be addressed. The adoption of the principle-based approach is quite a gigantic task which would need the establishment of a multicultural institution that would continuously endeavor on the respect of the standard provided, as well as the actual implementation of such principles and their accommodation to the BRI core principles. Moreover, should be addressed the questions of uniformizing the multimodal transport document under the Belt and Road as well as its consideration as a document of title.

There's a quite noticeable lack of certainty in International Multimodal Transport legal frameworks, of which the BRI is concerned. The Belt and Road initiative offers an opportunity to all actors involved to challenge the existing legal framework and moving forward from it, as well as to provide a new vision and framework to the International Multimodal Transport system. There are crucial considerations that can't be overlook by the new Convention: first, it should be integrative of each and all of the modes of transport and their transition points, as well as cost-effective. It should therefore gain acceptance of the industries of each mode of transport and also gain support from relevant nations of the BRI. Second, it should have a mandatory application and should support a redefined network system of liability. Third, it has to propose a proportional limitation of liability, not too high so not being able to be borne by the MTO, nor not too low to be able to make up for the losses incurred by the cargo claimant, as well as to protect the right of the MTO to recourse action. Fourth, the limitation of liability has to be predictable, easy to understand, and of simple implementation, which stems from the need of providing certainty to the contract by providing rules that can be readily applicable by the MTO. The distributive approach for the BRI multimodal aspect would come as a solution to the failure of the classical system to adequately provide for international multimodal transport in the BRI. It would provide for opportunities to develop a competitive advantage. It would also strengthen the relationship between diverse actors

involved by building a culture of trust and integrity, as well as re-instill confidence between the international trade actors.

### **Author Profile**

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