CMR: what if the courts got it wrong?

Delphine Defossez*

Abstract

The purpose of this research is to provide a better understanding of the problematic provisions of the CMR. This analysis will allow an assessment of the CMR in order to decide whether the CMR is badly drafted or wrongly interpreted. By showing the different interpretations, this research highlights the hypothesis that the CMR was not badly drafted, but on the contrary, that the divergence in interpretation of the provisions are due to the approach taken by national courts.

Introduction

Carriage of goods by road is of utmost importance within the European framework, making effective legal tools indispensable.[1] Despite its shortcomings, the Convention on the Contract for the International Carriage of Goods by Road (CMR)[2], achieves important goals; harmonisation of most of the road carriage and provisions of a framework which makes the life of carriers easier. Road carriage before the CMR was under-developed, and its regulation left to the law of the Contracting states. [3] The CMR brought, to a large extent, legal order to the carriage of goods by road. Its regulatory effect is particularly visible in the relations between the sender and the carrier and the liability for damages.[4] In the field of commercial law, CMR is one of the few conventions that achieved a great international unification and provides legal

---

* LL.B (Maastricht University), LL.M. (European University Institute); LL.M. candidate at Swansea University

[1] Isabelle Bon-Garcin, "The 50th Anniversary of the CMR Convention – Future and Perspectives of International Road Transport, Conclusions of the Symposium held at Deauville (France) – 18-19 May 2006" (2006) Unif. L. Rev. 698, p.698

[2] Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 (as amended by Protocol to the Convention for the International Carriage of Goods by Road, July 7, 1978, 1208 U.N.T.S. 427 and Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Roads (CMR) Concerning the Electronic Consignment Note, February 20, 2008, No. 5742)

[3] Rolf Herber, 'CMR: UNIDROIT Should Not Let This Child Go!' (1998) 3 Unif. L. Rev. n.s. 475, p.476; José Capel Ferrer, 'La Convention CMR – Pilier du transport international par route' (2006) 11 Unif. L. Rev. n.s. 517, p.517; Christian Jung, 'The Convention on the Contract for the International Carriage of Goods by Road (CMR): Survey, Analysis and Trends of Recent German Case Law' (1997) 2 Unif. L. Rev. n.s. 148, p.419

[4] Dr Gerhard Blasche, 'Convention on the Contract for the International Carriage of Goods by Road-CMR: An Introduction' (1975) 3 Int'l Bus. Law. 24, p.26; Herber, (n 3), p.476; Ling Zhu and Co, 'Carrier's Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU' (2010) IFSPA 103, p.114

certainty.[5] However, perfection does not exist. Even though the CMR gives the impression of full harmonisation of the law, its application and construction is left to national courts, leading to different interpretations and contrasting results. Main objectives of the CMR are therefore undermined by national interpretations.

The CMR, though operating for over 50 years, is one of the most recent conventions. It also introduced a different regime than other transport conventions.[6] Unlike the other conventions, the CMR has not yet been amended or supplemented to fit the current requirements of the trade. In the post-war context, clear and simple solutions were the main goal of the drafters; nonetheless, it is admirable and astonishing that the CMR has not yet needed to be supplemented. Most of its provisions are still capable of regulating modern business. However, the CMR is starting to show signs of aging. Some of its provisions do not fit with modern technology or modern business.[7] Overall, the CMR achieved its objectives and can be considered as a stable convention.[8] More than that, the CMR has been introduced in most of

[5] Herber, (n 3), p.475

[6] The most recent being Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) of 3 October 2000. Even though the CMR was greatly inspired by the CMI, the two conventions diverge radically on certain aspects.

[7] For a good overview please see: J. Putzeys, "L'adaptation de la Convention CMR à l'ère informatique", (2006) Unif. L. Rev 523; Bon-Garcin, (n 1), p.706

[8] It might be due to the strict revision provision embodied in Article 49 CMR that Contracting States have decided to leave it intact. See: Capel Ferrer, (n 3), p.517; Bon-Garcin, (n 1), p.702

the Contracting States national legislation.[9] The CMR influences national law and international law alike, making it a good piece of legislation.[10]

The CMR is a strict convention, which does not leave much room of manoeuver to the parties or Contracting States. For instance, Contracting States are precluded of entering into bi or multilateral agreements, Article 1(5), or any direct or indirect derogation to the rules of the convention is void, Article 41.[11] It only covers the essential features, which is what national and international legislatures seek in a Convention.[12] Even though a strict system was put into place, most of the articles dealing with the liability of the carrier have received divergent interpretations, undermining the purpose of the Convention. Indeed, the number of judgments in different jurisdictions is impressive and can be conflicting with one another.[13] This in turn led to the criticism that the CMR is incomplete as it leaves certain issues to the Contracting States and their judges. But can we really expect a 50 years old convention to have foreseen all the changes that occurred? The beauty of this convention is exactly residing in the fact that it survives the passage of time while still providing a solid framework, but it could not have done this without leaving some room to the courts of the Contracting States.

---

[9] Portugal : CMR was approved in Portuguese law in the Decreto Lei nº 46 235, de 18 de Março de 1965, and entered into force in December 1969- Aviso da Direcção Geral dos Negócios Económicos, DG nº 129, 2º Série de 03.06.1970 – the Protocols are embodied in the Decreto nº 28/88, de 6 de Setembro. In Austria and Denmark, the CMR applies to national carriage too, §439a Austrian HGB. See: Roland Loewe, "La CMR a 40 ans" (1996) 1 Unif. L. Rev. n.s. 429, p.429; Calr Ulrich Mayer, 'CMR - Aperçu et reflexions sur la Jurisprudence autrichienne en dernier ressort (1994-1996)' (1997) 2 Unif. L. Rev. n.s. 169. In Germany and The Netherlands, the CMR was used as a basis for the national law. German Act: Gesetz zu dem Ubereinkommen derVereinten Nationen vom **1** 1.April 1980 uberVertrage Ober den internationalen Warenkaufsowie zurAnderung des Gesetzes zu dem Ubereinkommen vom 19. Mai 1956 uber den Bef6rderungsvertragim internationalen Stralenguterverkehr(CMR), Bundesgesetzblatt 1989 II, p. 586. Belgium instead of reproducing the content of each article, has decided for the application 'as is' of the CMR. The CMR was approved through a Belgian law of 4th of September 1962, *Moniteur belge,* 8th of November 1962, entry into force 17th of December 1962. Then the Loi du 3 mai 1999 relative au transport de choses par route, *Moniteur belge,* 30 June 1999**,** 24507 e. s, extended its application to national transport. It has been modified in 2014. Spain: Law No. 16/1987 of 30 July 1987 (the so-called *'Ordenaci6n de los Transportes Terrestres"* - "LOTT"). Greece: Law n° 559 of 9/12 March 1977 which entered into force on 22 August 1977. See: Georgios Panopoulos, 'La jurisprudence grecque en matière de Conventions Internationales relatives aux transports terrestres et ariens' (2004) 9 Unif. L. Rev. n.s. 625. France did not transposed it in French law, as there are some divergences with its Commercial Code. But France has a *loi d'orientation des transports intérieurs* du 30 décembre 1982 (LOTI). According to Article 8(2), clauses in contracts are not applicable *per se* unless there is a convention defying the relationship between the parties. Parties therefore could subject internal contract to the CMR but the provisions cannot be against public order. All these difficulties make France reluctant to apply CMR to national transport. For a case where it was accepted see: Cour de Cassation ch. Com, 1/7/1997*, (Sté Doumen et Rhône Méditérranée c/ Sté Navigation et transport et SCAC) Dalloz 1998, Jur, 143, Obs. Mercadal – Letacq BTL 1997. 537.* For the opposite view see: M. Tilche, "Adoption de la CMR comme loi nationale : pourquoi la France résiste", (2006) Unif. L. Rev 693

[10] Isabelle Bon-Garcin, (n 1), p.700

[11] With the exception of the recourse between subcarrier, mentioned in Article 40.

[12] Loewe, (n 10), p.430

[13] For the year 1965 to 1995, 415 cases were reported in Germany, while in France a rough 300 are available. See: Jung, (n 3)

Focusing on existing divergences regarding Articles 1, 17, 23, 29 and 31-32, this paper will show why, in the view of the author, the problem of different interpretations ought to be traced to the approach taken by national courts rather than the wording of the Convention itself. Courts have since long started to shape the wording of the CMR in a way that fits the national laws and concepts the best. However, the purpose of the CMR was not to create imbalance but rather to harmonise the law on carriage, which it did quite well.

To attain the objective set out above this paper focuses on Belgian, French, Dutch, German, English, Italian and Portuguese jurisprudence, with some examples taken in other legal systems. It is divided into seven parts. The first section explains the view of the Court of the Justice of the European Union (CJEU) on the matter. The five next sections are dedicated to the provisions having received the most divergent interpretation, namely Articles 1-2, 17, 23, 29 and 31-32. While courts seem to have recognized that there is a need of uniformity, they have adopted creative interpretation in order to correct the defects in the law or the outcome they judge not favorable to the party they are trying to protect. Following the hypothesis that the problem does not come from the wording of the CMR but from the approach of some national courts, part 7 proposes some changes to the CMR or to the way of interpreting it.

The position of the CJEU on the matter

Courts of the Member States have repetitively seek guidance from the Court of Justice of the European Union (CJEU) regarding the interpretation of the CMR in light of European law. Some courts have also tried to obtain a more general interpretation of the CMR. However, as was highlighted in the *Tatry*[14], the *TNT Express*[15], the *Nipponkoa*[16] and finally the *"Kintra" UAB* case[17], the Court cannot interpret the provisions of the CMR and has only jurisdiction 'to give a preliminary ruling [that] extends only to rules which are part of EU law'.[18] In deciding, the CJEU restated what it has established in numerous cases; European law should be interpreted as far as possible in light of international law.[19] The Court ruled that the CMR must be interpreted autonomously.

---

[14] Case C-406/92 *Tatry* [2006] ECR I-5439

[15] Case C-533/08 *TNT Express Nederland BV v Axa Versicherung AG* [2010] ECR I-4107

[16]Case C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd v. Inter-Zuid Transport BV* [2013] ECLI:EU:C:2013:858

[17] Case C-157/13 *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* [2014] ECLI:EU:C:2014:2145

[18] Paragraph 30 of *Nipponkoa Insurance Co. (Europe) Ltd v. Inter-Zuid Transport BV*

[19] Case C-284/95 *Safety Hi-Tech v S.& T.* [1998]ECR I-4301, at 22; Case C- 76/00 *Petrotub and Republica v Counsil* [2003] ECR I-00079, at 57

The Court was required to clarify the relation between Article 31 CMR and Article 71 Brussels I. Article 71 Brussels I clearly says that the Regulation "shall not affect any conventions to which the member states are parties and which in relation to particular matters govern jurisdiction or the recognition or enforcement of judgments". Article 31 CMR clearly contains a provision on jurisdiction. Accordingly, the CMR should be given priority over Brussels I. However, the Court refused to follow this analysis.[20] The Court acknowledged that European law does not prevail over international law. As clearly highlighted in the *TNT Express*, in case of conflict, EU law will be put aside to give full effect to the international convention.[21] However, international conventions cannot go against the *raison d'être* of the European instrument.[22] In other words, if the provisions of international conventions provide a less favourable outcome than the EU instrument itself, the Court will be inclined to give more weight to the European instrument, above all if the mutual trust in the administration of justice is at stake.[23] The provision of the conventions can go beyond the scope of Article 71 Brussels I but cannot restrict it, which is the case with Article 31 of the CMR.

Since the CMR is not part of the *acquis communautaire,* the CJEU explained in the *TNT Express* case, that it could not interpret the provisions of the Convention.[24] This might be the reason why courts, such as the CJEU and the *Hoge Raad*, prefer applying Brussels I

---

[20] See: 'Lis Pendens and Res Judicata in CMR cases New 2013 ECJ Case Law Requires Immediate Action – or Immediate „Torpedoes"' <http://www.internationallawseminar.com/Prior/2014/downloads/files/Lis%20Pendens.pdf>

[21] The CJ in this case stated at paragraph 42: 'As is set out in the order for reference, this issue arises, first, because the *lis pendens* rule laid down by the CMR and by Regulation No 44/2001, although expressed in each in similar terms, is liable to have a different effect depending on whether the CMR and the national case-law relating to it, or Regulation No 44/2001 and the Court's case-law concerning the regulation, are applied (…)'
At paragraph 48, the Court held: 'In the light of that objective, the Court has held that the rules laid down in specialised conventions have the effect of precluding the application of the provisions of the Brussels Convention relating to the same question (see, to this effect, *Tatry*, paragraph 25).'

[22] Paragraph 49 of the judgment: 'While it is apparent from the foregoing considerations that Article 71 of Regulation No 44/2001 provides, in relation to matters governed by specialised conventions, for the application of those conventions, the fact remains that their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation No 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.'

[23] This doctrine was established in various cases such as Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 18; Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 84; and Case C-301/08 *Bogiatzi* [2009] ECR I-10185, paragraph 19. It was reiterated in paragraph 51 of this judgment. And re-affirmed at paragraph 38-39 in Case C-452/12 *Nipponkoa Insurance Co. (Europe) Ltd v. Inter-Zuid Transport BV* [2013] ECLI:EU:C:2013:858.

[24] The Court decided not to follow the opinion of the Advocate General Kokott or the reasoning of the *Hoge Raad* itself, namely that the provisions in the CMR that coincides with the articles of the Brussels I Regulation should regarded as part of the articles of Brussels I. See: [AG76]-[AG80]

Regulations, with which they are familiar, instead of trying to keep the uniformity of the CMR. The difference in certainty provided by the procedural rules in both Brussels I and CMR, is not that great except if the parties have chosen their forum.[25] Probably, the main reason is the certainty that EU provides that attracted the Dutch court.

By rendering a judgment which on the one hand states that the CMR has an autonomous meaning, but on the other states that Article 71 Brussels I prevails, the Court added some oil to the fire. Indeed, the provision of the CMR is to be interpreted in different ways depending on whether European law applies to the case or not. Furthermore, the interpretation given by the CJEU is not followed everywhere. In Portugal, a recent case, referring to the *TNT* case, established that Article 31 CMR does not conflict with European law.[26]

The interpretation of the CMR given by the CJEU was more than welcomed by some countries. In the *Godafoss*, the *Hoge Raad* refused to apply the CMR to multimodal transport, using some vague arguments. One of the most famous being the end sentence in the decision: 'a system in which the applicable law changes based on the specific stage of the transport is unworkable'. This sentence is in perfect contradiction with Dutch domestic law on multimodal transport that does exactly the same, as it is a network system. Probably the Dutch court fears that Article 31 CMR will not grant jurisdiction to the Dutch courts. The *Hoge Raad* went on and established that the European jurisdiction and enforcement rules are fitting multimodal transport, whereas the CMR does not.[27]

Multimodal transport under the CMR; Articles 1 and 2.

Article 1 which defines the scope of the CMR leaves no one indifferent. Some countries, such as France and Belgium, did not possess any definition of a road carriage contract in their own Civil Code.[28] Therefore, even the vague definition in the CMR was welcomed, whereas other countries still rely on their own national definition.[29] At the same time, Article 1 has generated

---

[25] Article 23 Brussels I makes the choice of jurisdiction exclusive whereas Article 31(1) CMR makes it non-exclusive.

[26] Acórdão do Tribunal da Relação do Porto, 02/03/2015, processo nº 39/13.6TBRSD.P1

[27] Hoeks, Maria Anna Ida Henriëtte Hoeks, 'Multimodal Transport Law : The law applicable to the multimodal contract for the carriage of goods' (PhD Thesis, Erasmus Universiteit Rotterdam, 2009), p.142

[28] Arts. 1782 to 1786 du Code Napoléon. Article 101 of the French Commercial Code defined the contract further but never as the CMR does. See: Ghislain de Monteynard, 'Les juges nationaux face aux silences de la CMR: jurisprudence française' (2006) 11 Unif. L. Rev. n.s. 619

[29] Spain: Lei 15/2009 *Contrato de Transporte Terrestre de Mercancías* (LCTTM). See: Alfonso Cabrera Canovas, *El transporte internacional por carretera* (ICG MARGE, 2011)

judicial debate as to its interpretation. Courts in different countries have interpreted aspects of Article 1 differently. One point on which most of the courts agree is that 'contract for the carriage of good by road' is not to be read literally, i.e that the whole voyage is conducted by road; part of the voyage is enough.[30]

The major point of divergence and uncertainties lies with the multimodal aspect that the CMR could have and if it fits the wording of the Convention. Two groups have formed over time, the pros-multimodal and their opponent. Both sides have valid arguments, as will be explained later. The wording of the Convention being so vague, national courts can give a narrow interpretation, or on the contrary, a very broad one. Unlike other provisions, the type of interpretation chosen does not depend on which interest is at stake, i.e cargo or carrier interests. The interpretation mostly depends on how far the national courts are willing to go. Another reason lies also in whether national legislation governing multimodal transport is in place or not.

The main opponents to the application of the CMR to multimodal are Germany and The Netherlands. The rationale behind such a decision lies in the fact that The Netherlands and Germany consider multimodal contract as *sui generis* and therefore have enacted national law to that effect.[31] Unsurprisingly, in one of its landmark judgments, the *Godafoss* case[32], the *Hoge Raad* interpreted Article 1 narrowly, excluding the autonomous application of the CMR to the road leg in a multimodal carriage. The BGH reached a similar outcome; the contract for the carriage of goods by road means carriage solely by road.[33] For the Dutch courts, *transport*

---

[30] Dutch case : Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*; Rb Rotterdam 28 October 1999, *S&S* 2000, 35; French case : Cour de Cassation ch. Com., 25/11/1995, *BACC* 1995, IV, 248-249; English case: *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another* [2002] 2 Lloyd's Rep. 25, *ETL* 2004, p. 535-560; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2006] 1 Lloyd's Rep. 279; German cases: LG Bonn 21 June 2006, 16 O 20/05; OLG Düsseldorf, 28.9.2005, (I-18 U 165/02). However in a recent judgement the BGH has clarified its views as being quite the opposite. BGH 24.6.1987, *TranspR* 1987, 447-454; BGH 30.9.1993, *TranspR* 1993, 16-18; BGH 17.7. 2008, *TranspR* 2008, 365-368

[31] Under Dutch law, multimodal contracts are regulated by Articles 8:40 through 8:52 BW in conjunction with Article 6:215 BW. Article 8:41 BW is the most important for our purpose, it states that the appropriate rules of law apply to each part of a carriage. Under German law §§ 452-452d of the Commercial Code deals with certain multimodal contracts.

[32] Hoge Raad, 1 June 2012, NJ 2012, 516 (*Godafoss*)

[33] BGH 17.7.2008, *TranspR* 2008, 365. However, the lower court, *OLG,* reached an opposite answer, relying on another cases, and establishing that the CMR was applicable to the road transport of a part of a multimodal carriage contract. '*Der Senat hat diese Frage in seinem Urteil im Verfahren 18 U 38/00 dahin beantwortet, dass die CMR auch den grenzüberschreitenden Straßentransport erfasst, der lediglich eine Teilstrecke eines multimodalen Frachtvertrages ist. An dieser Auffassung hält der Senat trotz der von Koller in TranspR 2003, 45 ff mit beachtenswerten Argumenten vertretenen gegenteiligen Auffassung fest.*' OLG Düsseldorf, 28.9.2005, (I-18 U 165/02). See: Hoeks (PhD thesis, n 27), p.81

superposé does not change the nature of the carriage to a multimodal one.[34] For the BGH, saved for the mode on mode, the CMR does not applies to multimodal.[35] Needless to repeat that both Germany and The Netherlands are from the view that there is no need to extend the CMR to multimodal as this mode is covered by national law.[36]

Similarly to Germany and The Netherlands, the general Italian law of transport regulates multimodal contracts.[37] The most restricted interpretation of Article 1 CMR was given by the *Corte Suprema di Cassazione*. According to the Court, if the requirement of Article 6 (1) (k) is not met, the CMR is not applicable. Article 6 (1) (k) requires 'A statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention'. However, this interpretation is dubious as the CMR is deemed to apply even in absence of a consignment note, as stated in Article 4.[38] Furthermore, the *Corte Suprema di Cassazione* is of the opinion that the applicability of the CMR is not automatic but is contingent upon an agreement between the parties.[39] Such a view was problematic before the amendments to the Civil Code. With the amendments, this ruling has lost in value. Indeed, Article 1696 C.C now includes the same limitation as in the CMR, i.e 8.33 SDR per kilo. Furthermore, most of the courts and commentators in Italy are criticising this judgment. As rightly pointed out by the Court of Lucca, the decision of the *Corte Suprema di Cassazione* goes against Article 41 of the CMR.[40]

The Austrian OGH clearly stated in a 1994 case the legal regime applicable to the carrier responsibility is determined by the modes used, therefore excluding the possibility of the CMR being applicable to multimodal transport and bringing Austrian law in line with German, Dutch and Italian law. [41]

The approach of these courts is problematic, certainly when one leg of the multimodal transport is subject to the Warsaw Convention. Article 31 of the Warsaw Convention, clearly stipulates

[34]'*Indien er geen sprake is geweest van stapelvervoer, doch van gecombineerd vervoer…*' the Court view expressed by this statement is that the good staid on their 'wheels' and therefore no multimodal transport occurred. Rb Rotterdam 5 June 1992, *S&S* 1993, 107.

[35] BGH 17.7.2008, *TranspR* 2008, 365

[36] Vibe Ulfbeck, "Multimodal Transports in the United States and Europe - Global or Regional Liability Rules?", (2009) *Tul. Mar. L. J.* 37, p. 73; Hoeks, (PhD thesis, n 27), p.71

[37] Andrea Salesi & Alessandro Pesce, "Multimodal Mayhem*",* (2002) 17 MAR. ADvoc. 22-23

[38] Corte di Cassazione Civile, III Sezione, 28 novembre 1975, *Messageria Emiliana s.n.c. c/. Arden Italiana, Revue de Droit Uniforme* (1976), p. 247 ; Corte di cassazione, 26 novembre 1980, *Droit Européen des Transport*s (1983), p.70. See : Hoeks, (PhD thesis, n 27), p.119

[39] Corte di Cassazione n° 1937/98; Corte di Cassazione n. 2529/2006 *Assocam c. Reiser Curioni;* Corte di Cassazione n. 11282/2005*, Geologistic c. Socota*.

[40] Tribunale Lucca 24 April 2013, *Calzaturificio Roberto Del Carlo s.r.l. c. Bartolini S.p.a*

[41] OGH 13.7.1994 (7 *0b* 586/93), TranspR 1995, 21(22)

that the Convention only applies to the air part of the carriage. Therefore, if there is a road leg afterwards, judges will have to apply national law. This solution is viable as long as the carriage by road is limited in distance and number of countries crossed. Otherwise, this might quickly end up in a very hard problem to solve, certainly if the damages are unlocalised. Unless the parties agreed on a choice of *forum* and law, the court dealing with the case will have a hard time. Indeed, these courts cannot rely on formal requirements that would trigger the applicability of the CMR as there are none. A consignment note is not a prerequisite for the CMR to apply, Article 4. Furthermore, by making the leg road of a multimodal journey subject to national law, the situation looks similar to the one before the introduction of the CMR. As a result, the narrow interpretation of Article 1 first does not take into consideration the purpose of the Convention to harmonise the law and second, brings the whole industry back to the time before the introduction of the CMR.

On the other side of the spectrum, the famous case of *Quantum Inc v Plane Trucking Ltd* reached the opposite conclusion.[42] For the English court, CMR applies to contracts wholly or partly executed by road. Mance LJ further expressed his opinion about the relationship between Article 1 and 2. By applying the CMR to multimodal transport, the English courts bring it in line with the Hamburg Rules and the air conventions.[43]

However, among those which argue that the CMR is applicable to the road part of a multimodal transport, two divergent views can be spotted. The first position is that as long as the multimodal transport is international, the CMR applies, even if the road leg is domestic or if there is domestic road transport, then sea transport and again domestic transport.[44] The first position does not take into account Article 17 CMR. It would be odd if the 'taking over' in Article 1 refers to a different place than the 'taking over' of Article 17. If both articles refer to the same place, then it would mean that multimodal carriers will always be subject to the CMR which extend the Convention further than it was originally intended.[45] The second position is that the

[42] [2002] 2 Lloyd's Rep. 25. Even in the *Godafoss* the *Rechtbank* took the English approach before the *Gerechtshof* and the *Hoge Raad* overturned it. Rb Rotterdam 11.4.2007, *S& S* 2009, 55

[43] Article 31 Warsaw Convention, Article 38 Montreal Convention and Article 1(6) Hamburg Rules. See: Hoeks, (PhD thesis, n 27), p.121; Théodora Nikaki, 'Bringing Multimodal Transport Law IntoThe New Century: Is the Uniform Liability System The Way Forward? (2013) 78 J. Air L. & Com. 69, p.83

[44] This approach was accepted by a Dutch court in the case Rb Rotterdam 24 January 1992, *S&S* 1993, 89.See also: M.A. Clarke, *International carriage of goods by road: CMR*, London: LLP 2003, p.46; C. Hancock, 'Multimodal transport and the new UN Convention on the carriage of goods', (2008) JIML 484, p. 495

[45] Austrian case: OGH Wien 19.1.1994, *TranspR* 1994, 437-439; Dutch cases: Rb Haarlem 16 March 2005, *S&S* 2006, 137; Rb Rotterdam 30 November 1990, *S&S* 1991, 56; Hof Den Haag 25 May 2004, *S&S* 2004, 126; English cases: *Princes Buitoni Ltd. v Hapag-Lloyd Aktiengesellschaft and Another,* [1991] 2 Lloyd's Rep. 383; German cases: BGH 17.5.1989, *TranspR* 1990, p. 19-20,

road leg needs to be international for the CMR to apply. There is no consensus on whether the CMR is applicable to multimodal transport but courts are agreeing that if the CMR is to apply to multimodal carriage, it will only apply when the road leg is composed of an international element. Judgments in different jurisdictions have accepted the second position.[46]

Belgium has a somewhat in between approach; CMR applies to multimodal if the road carriage crosses one or more borders. The picture is blurred by some cases in which Belgian courts have held that the CMR only applies if the goods were to be carried by road *ab initio*. When the mode of transport is left open and the carrier then transport the goods by road, the CMR is deemed not to be applicable.[47] The Belgian and the French approach could be summarised as followed; if there is a combined transport bill in which it is clearly stated that the goods will be carried by road from one place to another, then the CMR applies. If the combined transport bill is silent, then the CMR will not be applicable.[48]

The approach of Mance LJ in *Quantum* regarding the relation between Article 1 and 2, namely that Article 2 deals with contracts wholly conduct by road, whereas Article 1 makes it possible to apply the CMR to multimodal transport, is in the opinion of the author, the one making more sense. Indeed, the narrow interpretation does not fit modern needs nor probably the intent of the drafter as by the time the CMR was drafted multimodal transport was starting to develop.[49] But, it is true that a provision worded like Article 31 Warsaw would have avoided a large number of problems.

---

[46] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 Lloyd's Rep. 25 but also the *Datec Electronic Holdings Ltd v UPS Ltd.,* [2007] 1 *WLR* 1325b; Dutch cases: Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); Rb Rotterdam 23 April 1998, *S&S* 2000, 10;; Rb Maastricht 28 May 2003, *S&S* 2004, 57; Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*; Rb Rotterdam 3 May 2006, *S&S* 2007, 114; ; Rb Rotterdam 1 March 2001, *S&S* 2002, 89; Rb Rotterdam 15 May 2008, *LJN* BD4102; Hof Den Bosch 2 November 2004, *S&S* 2006, 117; French cases: Cour de Cassation 25 November 1995, *BACC* 1995, IV, p.248-249; Belgian cases: Rb Antwerpen 23 September 1975, *ETL* 1976, 279.

[47] Vredegerecht Overijse-Zaventem 21 November 2002, confirmed by Cour de Cassation de Belgique, 8/11/2004, C.03.0510.N (*TNT Express Belg. v. Mitsui Sumitomo Ins. Co.*); Cour d'Appel de Bruxelles, 2/9/2011, 20Q8/AR/1077 (*NV De post v NV Gebroeders lauwe David)*; Hof van Beroep Antwerp, 31.10.2011, 2010/AR*1875* (*N.V. DPD Belgium v P.f. Timmermans*). For the discussion around this judgment please refer to: Wouter Verheyen, 'Fleximodal Contract and the CMR: The Belgian Approach' (2012) JILM 364

[48] Rechtbank Antwerp, *23/9/75*, [*1976*] *11 E.T.L. 279* (*Atlas Assurance Co. Ltd. v Ocean Transport and Trading Ltd.);* Rechtbank Antwerp, 4/1/1977, [*1977*] *12 E.T.L. 843* (*Atlas Assurance Co. Ltd. v P & O Steam Navigation (Osaka Bay));* Cour de Cassation ch Com., 7/12/2004, D. 2005, 2392

[49] For the importance of multimodal transport today please refer to: United Nations Conference on Trade and Development, 'Development of Multimodal Transport and Logistics Services' (2003) TD/B/COM.3/EM.20/2; Philippe Delebecque, 'La Convention CMR, les transports superposes et multimodaux' (2006) 11 Unif. L. Rev. n.s. 569, p.570

The jurisprudence about Articles 1 and 2 is not limited to the multimodal question; other parts of Article 1 were also challenged in courts. For instance, there are conflicting judgments in The Netherlands as to the scope of applicability of the CMR. Only recently did the *Rechtbank* Rotterdam acknowledged that the CMR is applicable to the carriage of goods by road if the road stage itself crossed one or more State.[50] Before that decision, the *Rechtbank* found it sufficient if the entire contract of carriage was between two different countries. Most of courts agree that the actual performance of the contract is not decisive when deciding if the contract is governed by CMR, therefore rejecting the view expressed by the English court.[51]

Whereas in Germany and Austria, the scope of applicability has been put under scrutiny by the courts. The courts were disputing the correct understanding of 'carriage of goods […] in vehicles'. The main issue is whether freight forwarders are carriers for the Convention.[52] For a forwarding agent to fall within the scope of the CMR, the forwarder needs to perform the carriage himself, forwarder working for a fixed remuneration or consolidated cargo forwarder. Additionally, German law needs to apply to all these contracts. The reason is in section 412-413 of the German Commercial Code, which was also adopted in Austria, whereby forwarders have the same legal status as carriers.[53] An identical approach is taken in France with regard to forwarders.[54]

The convention does not apply to trucks stolen if they are using their own power. However, if the stolen trucks are on top of another transport system, such as train or boat, then the Convention applies.[55] There are also judgments as to what is included in the term vehicle but this is not a main point of divergence among the Contracting States.[56]

---

50 Rb Rotterdam 3 May 2006, *S&S* 2007, 114

51 Belgian case: Cour de Cassation de Belgique, 8/11/2004, C.03.0510.N (*TNT Express Belg. v. Mitsui Sumitomo Ins. Co.*); Danish case: *Airlines v. Mah & Freight A/S,* UfR 2008.1638H; French case: Jugement du tribunal de commerce de Bobigny du 24 novembre 1995, *Les Mutuelles du mans v Transport Assistance Services (7A.S),* reported in Bulletin des Transports et de la logistique-1996--n. 2643- 15-01-1996

52 Jung, (n 3), p.149

53 §413 HGB. Affirmed in Bundesgerichtshof, 10.2.1982 - (I ZR 80/80), BGHZ 83, 96

54 The definition of *commissionaire* was established in numerous cases. The three characteristics of the commissionaire are similar to the German ones. Cour d'Appel 22 Février 2002 arrêt n' 98-18975 (*Groupeco / Transport Orta*); Cour de Cassation ch. Com., 5/2/2002, Arrêt no 00-12045 (*Société Transnord / Société Transsud*); Cour de Cassation ch. Corn, 19/02/1985, *Bull* no 71; Cour de Cassation ch Com, 26/2/1985, *Bull* no 81; Civ premiere 10 février 1998, *Bull* no 59

55 OLG Dusseldorf, 26.10.1995 - (18 U 27/95), *TranspR* 1996, 152

56 Examples of cases: Rb Antwerpen 28 January 1985, *ETL* 1990, 210; *Thermo Engineers Ltd and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 Lloyd's Rep. 200; Rb Rotterdam 11 April 1996, *S&S* 1998, 102

Divergent approaches exist concerning umbrella contracts. Under German and English law, CMR applies to umbrella contracts, while under Belgian law, an unspecified contract of carriage is regarded as contract *sui generis*.[57] This in turn produces great difficulties with regard to umbrella contracts under which most of the package delivery companies operate, such as UPS, TNT, etc.

Finally, Article 2(2) is a rather confusing provision referring to the multi-purpose companies in which the carrier carried the goods by more than one means. No consensus exists as to its interpretation among the courts of the contracting States. The *travaux préparatoires* being of no assistance, the courts have to give their own interpretations. Dutch and English courts have adopted a carrier friendly approach to the interpretation of that provisions.[58]

Obligations of the carrier and force majeure: Article 17.

Article 17 lays down the obligation of the carrier, namely to take over the goods in one place and to deliver it in the same condition at another place.[59] If the goods are damaged or not delivered or delayed, then the carrier is liable.[60] The carrier's defences are laid down in paragraphs 2 and 4 of the same article.

Depending on the approach to paragraph 1, paragraph 2 can embody force majeure or not. Paragraph 1 can be interpreted in two ways; first, Article 17(1) imposes strict liability, no fault is required and therefore only objectively unpreventable and truly unforeseeable events will be excluded, bordering on *force majeure*. Second, Article 17(1) applies to negligence and the presumption will be rebutted by the carrier showing a high standard of care.[61]

---

57 LG Düsseldorf 16 June 2004, I-18 U 237/03; BGH 29.6.2006, *TranspR* 2006, 466-468; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2007] 1 *WLR* 1325. See: V. Malsch & K. Anderegg, 'Zur transportrechtlichen Rechtsprechung des Oberlandesgerichts Düsseldorf', (2008) *TranspR* 45
D.A. Glass, 'Meddling in the multimodal muddle?', (2006) LMCLQ 307, p.314

58 A Dutch case: Hoge Raad, 29 June 1990, *S&S* 1990, 110 (*Gabriele Wehr*); Hof Den Bosch 23 March 1994, *S&S* 1994, 86; Hof Den Bosch 23 March 1994, *S&S* 1995, 67; English case: *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 Lloyd's Rep. 295.

59 Article 17(1)

60 Article 23 CMR stated that in addition to damages, the carrier will have to reimburse the carriage charges, the custom duties and other charges in proportion to the loss. For Portuguese judges, the presumption of the fault of the carrier comes from the conjunction of Article 17 (1) and 18(1) CMR and similar to Article 799(1) Civil Code. See: Supremo Tribunal de Jutiça, 8/04/1987, processo nº Bol.366/507; Supremo Tribunal de Jutiça, 5/12/1991, processo nº 080818; Supremo Tribunal de Jutiça, 29/10/1996, processo nº 96A43; Supremo Tribunal de Jutiça, 10/07/2008, processo nº 07B3704; Supremo Tribunal de Jutiça, 29/04/2010, processo nº 982/07.1TVPRT.P1.S1 ; Acórdão do Tribunal da Relação de Coimbra, 4/11/2008, processo nº Col.V/9; Acórdão do Tribunal da Relação de Coimbra, 13/11/2001, processo nº Col.V/19; Acórdão do Tribunal da Relação Lisboa. 2/2/1993, processo nº Col.I/122; Acórdão do Tribunal da Relação Evora. 19/3/1992, processo nº Col.II/285

61 Jung, (n 3), p. 155

Most jurisdictions decided to follow the *force majeure* approach.[62] However, what constitutes *force majeure* differs greatly. The spectrum goes from a strict approach to a much lenient one. Strangely, the differences in the requirements of *force majeure* does not reflect the type of interests the courts mostly protect. As will be elaborated later on with regard to Article 29 and breaking the limit, Germany is more cargo owner friendly, while The Netherlands is more carrier friendly. However, with regard to paragraph 2, *force majeure* is more easily proven in Germany than in The Netherlands.

In The Netherlands, a strict approach of *force majeure* is applied. *Force majeure* is defined as meaning an unavoidable circumstance, i.e that the carrier took all the measures that could reasonably be expected from a careful carrier.[63]

Germany took an in between approach, the concept of unavoidable circumstances is also used, however it is not entirely identical to the Dutch concept. Indeed, German courts have refused to draw the conclusion that only force majeure is applicable.[64] Furthermore, the German doctrine is easier to prove than the Dutch one, i.e the damage could not have been avoided even if the carrier took the maximum reasonable amount of care possible.[65] Austrian courts use the same standard as the German ones.[66] Both the BGH, in a case of 1997, and the Austrian courts accepted the defence of *force majeure*.[67]

In English law, the consensus is to refuse to use the term *force majeure* but rather use the term utmost care. The underlying reason for this approach is that if the drafters intended for Article 17(2) to refer to *force majeure*, they would have expressly used the word.[68] The burden of proving loss rests on the carrier, Article 18(1).

In France and Belgium, *force majeure* is commonly used with regard to CMR, requiring the event to be unavoidable.[69] French law is relatively in line with the CMR with that respect,

---

[62] No distinction will be drawn between theft cases and armed robbery or others. The discussion is on general terms.

[63] Hoge Raad, 17 April 1998, NJ 1998, 602 (*Oegema/AMEV*); Hoge Raad, 24 April 2009, NJ 2009, 204 (*Vos Logistics/AIG*); Hof Arnhem 30 August 2011, S& S 2012, 33 (*Amlin Corporate Insurance N.V/ Van Maanen Koeltransport B.V*)

[64] This in turn is more in line with the approach in Paragraph 7.2 of the German Act on Road Traffic (*Strassenverkehrsgesetz*). See also: Jung, (n 3), p.155

[65] See cases: BGH 9.9.2010, I ZR 152/09, *TranspR* 2011, 178-181; BGH 13.11.1997, I ZR 157/95, *TranspR* 1998, 250

[66] OGH Wien 19.1.1994, *TranspR* 1994,282

[67] BGH 13.11.1997, I ZR 157/95, *TranspR* 1998, 250; OGH Wien 19.1.1994, *TranspR* 1994,282

[68] M.A. Clarke, *International Carriage of Goods by Road: CMR* (5th ed, 2009), p.229-231

[69] The unpredictable element was rejected by the *Cour de Cassation ch. Com., 27/1/1981 (Sté Philippe c/ Sté SAUNIER DUVAL et a.,Sté Busquets c/ Sté SAUNIER DUVAL et a.) Bull. des Transports 1981. 219, Obs* p.214; Cour de Cassation ch Com, *Bull. de Transport* 1988, 437 ; Cour de Cassation ch. Com. 30/6/ 2004 (*Sté*

Articles L. 133-1 and L. 133-2. Portuguese courts also use *force majeure* (*caso fortuito*) which is further defined as an unforeseen cause with consequences that were impossible to prevent. [70]

Few disputes arose with regard to the 4th paragraph of this article. As the German and Austrian courts have ruled, the principle *in claris non fit interpretatio* applied and that no further interpretation was needed, the provision being clear.[71] However, in France, and to some extent in Spain, the Supreme Court decided otherwise, giving no weight to this principle.[72] The Belgian Supreme Court decided that carrier could not invoke paragraph 4 in a criminal proceeding.[73]

Article 23: where the age of the CMR is visible

Calculation of damages is undoubtedly a crucial part of any convention but also one of the first parts that is showing signs of ageing. The fact that CMR is ageing is visible from Article 23. When it was drafted, the limit for compensation largely covered an average value consignment. However, the value of the consignments have dramatically rise. The balance of risks it achieved more than 50 years ago, is no more fair. The carriers, of course, strictly stick to the wording of the Convention, as it is advantageous to them. But it does no more reflect the reality, which is cargoes nowadays are more valuable than they were 50 years ago.[74] There is a cry for changes to reflect a more modern reality, as cargo owners are no more compensated as they should.

Money issues lead to the strongest arguments and fights. If the provision dealing with the calculation of compensation is not crystal clear or does not protect one party enough anymore, the parties fight even stronger. The CMR does not derogate from this reality, which engenders

---

Manufacture Française des Pneumatiques Michelin et Cie et a c/ Sté Transports JMP) Pourvoi n°S 03-13.091; Cour de cassation, ch. Com., 29 février 2000 (*Sté Spanghero viandes abattoir c/ Cie AGF et Sté Bosc)* JCP 2000. IV. 1692 ; RJDA 4/2000. 414; Cour de Cassation, ch. Com., 1/10/1997 (*The British Foreign Marine Insurance c/. Sté Szymanzki*) *Bull. civ*. IV n° 240; BTL 1997. 708; BTL 1997. 708; Hof van Beroep Antwerpen 13.10.1986, ETL 1987, 443; Rb Antwerpen 31.10.1997, *ETL* 1998, 835. See: Théodora Nikaki, 'The Quest for an International Multimodal Transport Convention: Does the CMR Liability System Fit the Bill?' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, 2013),191-216

70 'caso fortuito, causa imprevisível e a cujas consequências não se podia obstar' this concept can be found in Article 487(1) Civil Code, Article 383 and 376 Commercial Code. See cases: Acórdão do Tribunal da Relação de Lisboa, 19/02/2015, processo nº 2459/12.4TVLSB.L1-8; Acórdão do Tribunal da Relação do Porto, 20/10/2011, processo nº 2015/07.9TBMTS.P1; Acórdão do Tribunal da Relação do Porto, 10/03/2015, processo nº 4562/13.4TBMAI.P1

71 BGH 28.3.1985, *Droit europ6en des transports,* No 2 1986, 174; OGH 2.9.1987, *Rev. dr. unif. / Unif. L. Rev.* (1988), 724

72 Cour de Cassation ch. Com, 23/2/1982, (*Affaire Sté Floch et Cie c/ Sté le Dauphin et Cie*.), *Bull.des transports,* No 2012 (1982), 285; Audiencia Provincial Lleida, 25/06/2015, (SAP L 466/2015)

73 Cour de Cassation de Belgique, 15/05/2012, P.11.1958.N

74 Herber, (n3), p.477

numerous litigations. Article 23 at first sight seems clear and well drafted. But even when the wording seems crystal clear some litigation may occur. For instance, in Austria, the court was asked to clarify the first paragraph of Article 23, whether if the gain in value of goods during carriage could be the basis of the calculation or not.[75] In Portugal, judges have repetitively held that the compensation needs to be fair, close to the real price of the goods and proved by the sender.[76] The opposite view also exists, with cases strongly objecting that the CMR is detrimental to the injured party. In France, the refusal to introduce the CMR as national law leads the injured party to have less compensation than it would have had under the CMR.[77] Obviously in France, as is the case with the CMR, if there is a declaration of value on the consignment note, then the limitation will not apply.[78]

Paragraph 4 has also generated some litigation. Paragraph 4 enumerates the further damages that could be asked. It requires the carriage charges, customs duties and other charges to be repaid 'in full in case of total loss and in proportion to the loss sustained in case of partial loss'. A carrier-friendly jurisdiction, such as The Netherlands, may opt for a narrow interpretation with regard to the requirements of refunds of custom duties and other charges. Indeed, the *Hoge Raad* decided that no other costs are refundable unless they are normal for the execution of the carriage.[79] Similar interpretations can be found in France, Belgium and Spain.[80] Whereas in the UK, VAT is also included, as was established in *James Buchanan v Babco*.[81]

Designed as mechanism to protect the carrier, Article 23 does not protect the carrier at all risks. Article 29 rectifies any injustices in the outcome Article 23 could create by allowing the injured party to break the limit in case of willful misconduct on the side of the carrier. Article 29 has however engendered controversy. Modern courts and academics have expressed their concerns relating to the reach Article 29 could have, by either interpreting it loosely, for countries favorable to its use, or in a draconian way, by countries protecting carriers' interests.

---

[75] OGH 13.7 1994 (7 Ob 565/93), TranspR 1995, 285.

[76] Article 342 (1) and (2) Civil Code. Acórdão do Tribunal da Relação de Lisboa, 19/02/2015, processo nº 2459/12.4TVLSB.L1-8;Acórdão do Tribunal da Relação do Porto, 14/06/2010, processo nº 155643/09.6YIPRT.P1

[77] Loi d'Orientation des Transports Intérieurs du 30 décembre 1982 (dite LOTI). See : Cour d'Appel d'Aix en Provence, 2ème Chambre, 24/4/2008, No 2008 / 174 (*S. A. DIMOTRANS EUROPE SUD EST and S. A. R. L. TISSERANT ASSURANCES c/ S. N. C. FRATELLI Y...ET CLAUDIO X... and S. A. R. L. TEXPROGET*). See : Tilche, (n 10), p. 695

[78] Cour de cassation, ch. com. 11 janvier 1995 (*Sté Lab c/. Moiroud,)* BTL 1995. 620

[79] Hoge Raad, 14 July 2006, NJ 2006, 599

[80] Cour de Cassation ch. Com, 05/10/2010, Arrêt n° 952 (09-10.837); Tribunal Supremo, 2004, (STS 6777/2004); Cour de Cassation de Belgique, 23/01/2014, C.12.0356.N ; Cour de Cassation de Belgique, 27/05/2011, C090618N- C090620N; Cour de Cassation de Belgique, 16/01/2009, C.07.0300.N; Cour de Cassation de Belgique, 21/01/2005, C020572N

[81] *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C.141

Article 29: wilful misconduct or equivalent

A snowball effect took place in certain jurisdiction due to the fact that Article 23 does no more reflect reality. In these jurisdiction, the threshold of Article 29 is easily met. Article 29 embodies a strong weapon against the carrier or its agents, that if activated will oblige the carrier to pay for the full value of the goods. Therefore, the limitation set in Article 23 is not applicable in case of wilful misconduct or a fault equivalent to wilful misconduct by the carrier. The provision leaves no doubt as to who is included in the term 'carrier'; the agents and servants are also mentioned.[82] Article 29 is probably the provision having attracted the most litigation.

The first sentence of the Preamble of the CMR has been ignored by national courts in interpreting Article 29.[83] Indeed, the sentence refers to the desirability of standardization which is clearly not achieved in this case. As far as wilful misconduct, *dol* in the French version of the CMR, is concerned, most jurisdictions interpret it as a conduct with intent, therefore giving a similar result.[84] However, the second part of the sentence, 'by such default as, in accordance with the law of the court or tribunal seised of the case, is considered equivalent to wilful misconduct', brought divergent and even irreconcilable outcomes. This sentence leaves the interpretation open to the courts. A direct result of this sentence is its contradiction with the aim of the CMR, i.e to harmonise the road carriage.

The variation in the interpretation of the 'fault equivalent to wilful misconduct' are spectacular, from really strict interpretation to relatively indulgent interpretation in which the intentional element of the *dol* is put aside as long as the effects are similar to the one of a *dol*.[85] However, no courts have tried to place Article 29 in its context, preferring to stick to the wording, leading to misinterpretation.[86] The second sentence was added because the concept of *dol* and wilful

[82] Duygu Damar, *Wilful Misconduct in International Transport Law* (Springer, 2011), p.228; Duygu Damar, 'Breaking the Liability Limits in Multimodal Transport' (2012) *Max Planck Private Law Research Paper No. 13/12*

[83] that sentence states that the Contracting States recognised "the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to [...] the carrier's liability"

[84] For instance in Germany or The Netherlands. In Austrian, *Grobe Fahrlässigkeit* is equivalent to *faute lourde* in French and therefore fall within the meaning of wilful misconduct and the CMR. OGH 14.7.1993 (701b 540/93), TranspR 1994, 189; ZfRV 1994, 31; OGH 25.1.1990 (70b 698/89), TranspR 1990, 235; LG Salzburg (22 R184/95), TranspR 1996, 340 (341). See: Damar, (n 81), p.228

[85] For instance Switzerland does not require any intention. See: S. Grignon- Dumoulin, "Forum shopping – Article 31 de la CMR", (2006) Unif. L. Rev 609, p.613

[86] Otmar J Tuma, 'The Degree of Default under Article 29 CMR', (2006) 11 Unif. L. Rev. n.s. 585, p.586; Johan Schelin, 'CMR Liability in a Law & Economics Perspective' (2004) <www.juridicum.su.se/transport/Forskning/artiklar/Scandinavian.pdf> p.177

misconduct are not exactly identical. *Dol* is much more restricted than wilful misconduct.[87] Indeed, the concept of *dol* has been taken from the text of the French Civil Code of 1804, whereas wilful misconduct is a Common law concept.[88] Furthermore, French courts often equate *dol* to *faute lourde*.[89] One view would be that 'fault equivalent' means that the upper limit is the *dol* and the lower limit is wilful misconduct, resulting in the concept of 'equivalent to wilful misconduct' meaning whatever that can fit in between the two concepts and therefore reconciling the two concepts.[90] That the drafters have thought of all the difference in numerous jurisdictions while drafting the CMR would make them genius or this approach would sound too far reaching. However, that is how the majority of the courts are dealing with this provision, i.e as if the drafters, while including the 'equivalent to wilful misconduct' thought about each specific jurisdiction and the concept existing there. By using this egocentric approach, the courts overlooked the wording of the preamble and the unifying purpose of the CMR.

Divergent interpretation can be spotted in each of the jurisdictions. In The Netherlands, the equivalent to wilful misconduct is conscious recklessness[91] (*bewuste roekeloosheid)* while in Germany it refers to reckless with the knowledge of the likelihood of damage conduct (*leichtfertig und mit Wahrscheinlichkeitsbewusstein*).[92] Even though the concepts look identical, the interpretation is different yet again. The *Hoge Raad* determined that the result must be more likely than not, i.e higher than 50 percent chance of the loss occurring.[93] The second difference is that the awareness cannot be deduced from the objective circumstances of

[87] For instance in a recent case, the contract required the carrier to park is vehicle in a safe place. That a theft occurred and was facilitated by the fact that the back of the truck was toward the fences, did not amount to dol. The carrier fulfilled his contract, namely to park the truck in a guarded and safe area. See: Cour d'Appel d'Orléans Com, 28/2/ 2008, RG: 06/03378

[88] R. Wijffels, 'Artikel 29.1 CMR, Belgisch roet in de uniformiteit (de la suie belge dans l'uniformité)', in *Liber Amicorum* ed Putzeys, (Bruylant, Bruxelles, 1996) p. 215-228

[89] *"En raison même de sa gravité la faute lourde est assimilable au dol et elle oblige I'assureur la réparation intégrale du prejudice subi"* Cour de Cassation ch. Corn, 25/5/1954, *Bull. sect. com. et fin.* n°195; Cour de Cassation ch. Com. 30/6/ 2004 (*Sté Manufacture Française des Pneumatiques Michelin et Cie et a c/ Sté Transports JMP*) Pourvoi n°S 03-13.091; Première chambre civile 29 octobre 2014, pourvoi n° 13-21. 980; Cour d'Appel d'Orléans. Com., 8/10/ 2009, 07 / 02272 (*Société DHL GLOBAL FORWARDING (UK) LTD c/ S. A. S TOE TRANSMANCHE and Société M C NAMARA FREIGHT LTD*); Cour de Cassation, ch. Com., 13/1/1981 (*Sté Création TRIUMPH c/. Sté HANSEN Transport de Confection*) ; Cour de Cassation ch. Com., 22/9/1983 (*SARL Sertranex c/. Stés Fica et Etex*)

[90] Tuma, (n 85), p.590

[91] Meaning that the party is aware of the damage or loss is likely to result. The term wilful misconduct, *bewuste lichtvaardigheid* was introduced in Dutch law for the Warsaw Convention and now is to be found in Article 8:1108 BW. Hoge Raad, 5 January 2001, No. C 99/029 HR, ETL 1 (2001), 97 et seq; Hoge Raad, 5 January 2001, No. C 99/162 HR, ETL 1 (2001), 116 et seq

[92] Before 1998 and the *Transportrechtsreformgesetz*, gross negligence was the equivalent. See for instance the case: OLG Nurnberg, 23.3.1995, (12 U 4139/94), RIW 1995, 684. Now the applicable Paragraph is 435 HGB. See case: BGH 25.3.2004 *VersR* 2004, 1335

[93] Hoge Raad, 10 August 2012, NJ 2012, 652 (*Traxys/ Maat*); Hoge Raad, 5 January 2001, NJ 2001, 391 (*Overbeek/Cigna*); Hoge Raad, 5 Januray 2001, NJ 2001, 32 (*Van der Graaf/Philip Morris I*)

the case, unlike in Germany. However, these differences are reduced by two instruments: the doctrine of contributory negligence in Germany (*Mitverschulden*)[94] and the aggravated assertion duty in The Netherlands (*verzwaarde stelplich*)[95].

In Portugal, national judges follow a more literal and restrictive approach, requiring the carrier to have committed a *dolo*, as defined in Article 483 Portuguese Civil Code, but a lower degree of fault will not give rise to full compensation.[96] Recent trend of the Supreme Court in Portugal, is that negligence is equivalent to *dolo*.[97] Under Portuguese law, especially Article 483 Civil Code, the distinction between *dolo* and negligence does not affect the remedies available.[98] Indeed, contractual responsibility arises indifferently of the type of fault, but with the presumption of a *culpa lato sensu*.[99] As it is stipulated in the CMR and reiterated by Portuguese courts, the burden of proof shifts. Indeed, the carrier has to prove its innocence in cases not involving *dolo*, while in case involving *dolo* the burden of proof lies with the damaged party.[100]

Belgium takes a strict approach; according to its jurisprudence, *faute lourde* cannot be equated to *dol*, as there is a need for intent which is not present in a *faute lourde*.[101] The Belgian courts totally disregard the second part of the sentence, namely 'or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct', as in Belgian law *dol* exists. In my opinion, the Belgian courts approach the second sentence as having been included for the countries that do not possess *dol* in their national law. Since it is not the case with Belgian law, the courts disregard this part of the sentence. Furthermore, if the sender did not require special care of the goods or this requirement

---

94 This doctrine limits the carrier liability even after unlimited liability was found, due to the fault of the shipper. BGH 1.7.2010, *TranspR* 2011, 78. Two types of case law have been created for this doctrine, first cases related to the value of the cargo and second, case related to the awareness of the shipper that the carrier's organization was defective.

95 It was first introduce in the case Rb. Rotterdam 4 May 2005*, S& S* 2006, 138 (*TNT v Siemens*). The duty makes it less onerous on the cargo claimant in specific cases.

96 Supremo Tribunal de Justiça, 06/07/2006, processo nºs 06B1679; Acórdãos da Relação do Porto, 29/10/2009, processo nº982/07.1TVPRT.P1; Acórdãos da Relação do Porto, 25/10/2012, processo nº 9268/07.0TBMAI.P1

97Supremo Tribunal de Jutiça, 05/06/2012; Supremo Tribunal de Justiça, 14/06/2011, processo nº 437/05.9TBAGN.C1; Supremo Tribunal de Justiça, 15/05/2013, processo nº 9268/07.0TBMAI.P1.S1; Acórdão do Tribunal da Relação do Porto, 26/06/2014, processo nº 5403/11.2TBMAI.P1; Acórdão do Tribunal da Relação de Coimbra, 27/5/2014, processo nº 1168/13.1TBGRD.C1

98 Acórdãos do Tribunal da Relação de Coimbra, 14/04/2015, processo nº 266/11.0TBLMG.C1

99 Article 798 Civil Code. Acórdão do Tribunal da Relação do Porto, 25/10/2012, processo nº 9268/07.0TBMAI.P1; Supremo Tribunal de Justiça, 06/07/2006, processo nº 06B1679; Acórdãos da Relação do Porto, 29/10/2009, processo nº 982/07.1TVPRT.P1

100 Supremo Tribunal de Justiça, 11/3/1999, processo nº 99BO97/JSTJ00036059

101 Cour de Cassation de Belgique, 30/3/2000, *ETL* 3 (2000), 392; Cour d'Appel de Bruxelles, 17/10/1996, *ETL* (1996), 694 et seq. The two judgments referred to Articles 1116 and 1150 Belgian Civil Code. Cour de Cassation de Belgique, 27/1/1995, RDC 1995. 232 (*Tr. Route Wagon c/. Van der Hofstadt Serge*)

is written in the consignment note, then the carrier has only to exercise due diligence.[102] Spanish jurisprudence is less clear; according to Article 22 of the LOTT, only intent is accepted, following the Belgian view. However, in most judgments the courts refused to state whether the act was intentional or not. Once the court awarded full compensation after having established that the fault was a *culpa muy grave*, which is equal to *faute lourde*.[103]

In some countries, unintentional gross negligence is equated to wilful misconduct, provided that a degree of incompetence is involved.[104] The Italian courts, basing themselves on Article 1129 Italian Civil Code, require a *colpa grave,* an inexcusable gross negligence.[105] A similar approach is taken in Austria; intention is required but gross negligence, *grobe Fahrlissigkeit,* is also accepted as equivalent to wilful misconduct.[106]

Belgium, France, Spain, Italy and Portugal, all have a similar approach. This is probably due to the fact that civil law only recognises intent *("dolus")* and negligence *("culpa")*, no other degree of fault is accepted.[107] In The Netherlands and Germany, such distinction is done but with more nuances.

The burden of proof in the UK is based on the balance of probability.[108] In other countries, through case law, a significant modification of the burden of proof occurred. For instance, the Austrian Supreme Court has held that since the evidence of what happened to the goods is in the carrier's sphere, the carrier has a duty to cooperate. This duty of cooperation includes the giving of the security measures taken generally and for that particular consignment.[109] A similar approach can be found in German case law. Both approaches are consistent with the text of the CMR.

---

[102] A similar approach is taken in France. For instance in a case involving Chanel products, Chanel did not specify any special measure. The truck was parked in a guarded parking with camera and was considered enough protection. Cour de Cassation ch Com., 13/7/2010, Arrêt n° 828 (09-15.472)

[103] Tribunal Supremo, 9/2/1999 (No. 78/1999). See: Fernando Martinez Sanz and Co, *Aspectos jurídicos y económicos del transporte: hacia un Transporte Mas Seguro, Sostenible y Eficiente, (*Volume 1, Universitat Jaume I, 2007), p.781-782

[104] Bon-Garcin, (n 1), p.710

[105] In Italy, the lack of due diligence and carelessness lead to wilful misconduct. Corte di Cassazione, 19 Nov. 2001, No. 14456; Corte di Cassazione, 16 September 1980, No.5269*;* Corte di Cassazione, 29 Mars 1985, n° 2204 (*SPA Danzas c/. La Suiza - Corrpania Anonima de Seguros Cenérales*) *Revue de Droit Uniforme* (1986), p. 641

[106] OGH 10.4.1974, 2 0b 156, 157/74

[107] For instance in the Spanish civil code, Articles 1102 and 1107 are dedicated to intent while Article 1103 and 1104 are dedicated to negligence. The French and Belgian Civil Code have an identical structure.

[108] *Datec v. UPS* [2006] 1 *Lloyd's Rep* 279

[109] O.G.H. 14.7.1993*, TranspR.* (1994), 189; O.G.H. 17.3.2005*, TranspR.* (2005); O.G.H**.** 11.5.2005*, TranspR.* (2005), 411.

Article 29 in conjunction with Article 31 and 32, facilitates forum shopping.[110] The time limit applicable depends on how the court of the *lex fori* sees the fault. The combination Article 29 and 31 screams for divergent interpretations.[111] In the next section, reasons will be given as to how this interrelation between the two provisions enhance forum shopping. This will be discussed in the next section.

Article 31-32: jurisdiction and prescription

Unlike other international conventions, the CMR possesses a provision embodied a *lis pendens* and *res judicata* in addition to the rules on jurisdiction. Article 31 on jurisdiction merely determines in which country proceedings are to start, thereafter national law comes into play in determining which court will have jurisdiction.[112] Even with the rules stated in Article 31, one of the major issues is that parallel litigation will be possible, which will lead to two enforceable judgments between the same parties, as was the case in the *TNT Express*.[113]

The second important issue is forum shopping. Logically, carriers prefer commencing proceedings in The Netherlands rather than Germany.[114] The likelihood that the courts will break the limit aside, another reason can be found for a carrier to start proceedings in The Netherlands instead of Germany. This reason lies in the principle invented by the German courts called the *aktive Leistungsklage*. According to this principle, the jurisdiction of the negative *Feststellungsklage* often first seized, could be ignored. However, Dutch courts and the CJEU support the opposite approach, i.e the negative declaratory actions are given priority over later claims for payment by the creditor against the debtor.[115] The German approach can be said as fairer. Indeed, the carrier will be the first aware that loss or damages occurred, he can go and

---

110 Franco Ferrari, ''Forum Shopping' Despite International Uniform Contract Law Conventions' (2002) 51 Int'l & Comp. L.Q. 689

111 Grignon- Dumoulin, (n 84), p.610

112 For instance in France only the Tribunal de commerce has jurisdiction to hear a case in which transport is done for commercial purpose, according to the French NCPC. Furthermore, there is no direct action against the sender in the CMR, therefore Rome I and L. 132-8 of the Commercial Code will be applicable. See: Cour d'Appel d'Orléans Com., 14/9/ 2007, 06/2136 (*S.A.R.L Transport PAGE c/ SAS CHARAL*)

113 German courts are of the opinion that if proceedings started in Germany the parties are bound by them, BGH 20.11.2003, I ZR102/02, *TranspR* 2004; Case C-533/08 *TNT Express Nederland BV v Axa Versicherung AG* [2010] ECR I-4107

114 Hoeks, 'Liability, Jurisdiction and Enforcement Issues In International Road Carriage: CMR Carrier Liability in the Netherlands and Germany and the Influence of the EU' (n 68)

115 See: Christoph Zarth, 'EuGH: Rechtsprechung des BGH zur negativen Feststellungsklage in CMR-Fällen obsolet' (8 January 2014, Blog) <http://www.cmshs-bloggt.de/commercial/eugh-rechtsprechung-des-bgh-zur-negativen-feststellungsklage-in-cmr-faellen-obsolet/>; Jasper R. Groen, 'Forum shopping under CMR: 'A radical change for German interests'' <http://www.forwarderlaw.com/library/view.php?article_id=928>

seize the court of his choice to be granted a negative *Feststellungsklage* or declaration of non-liability, therefore restricting the possible damages to the victim. But, the carrier which wants to start proceedings in a jurisdiction, he has to do it as quickly as possible when the matter is pending, otherwise his attempt will be thwarted by virtue of Article 31(2).[116]

The Act implementing the CMR in Germany[117], Article 1a, which is drafted in a nearly similar wording to Article 31(1) CMR, has created problems. The problematic words were 'the place designated for delivery', but the existing conflict in interpretation has been ended by the decision of the Karlsruhe Court of Appeals. In its judgment, the court decided that the 'place designated for delivery' is the place contracted for where the goods should be delivered and not the place where the goods actually arrive.[118] Some countries regarded the place of 'taking over' as the place where the contract started.[119] The problem with this definition of 'taking over' is that it does not reflect the reality that a subcontractor might have performed only part of the contract. Therefore, the subcontractor might be confronted with consequences stemming from a larger contract that he is not aware of.[120]

Regarding the issue of *forum non conveniens*, the English court in *Royal v.MK*[121], following the reasoning in *Milor*[122], which was given on the same topic but under the Warsaw Convention, rightly concluded that since the principle of *forum non conveniens* is only applied in a minority of jurisdictions, it will give a strong power to only few Contracting States which sounds surprising. This approach shows, that even though not all aspects of the CMR are clearly delineated, the completeness and the integrity of the text is assumed.[123]

---

116 This is called *Der Hollandischer Trick* by German lawyer. For cases: Hoge Raad, 18 December 2009, LJN: BI6315, NIPR2010, 48

117 Gesetz zu dem Ubereinkommen derVereinten Nationen vom 1 1.April 1980 uberVertrage Ober den internationalen Warenkaufsowie zurAnderung des Gesetzes zu dem Ubereinkommen vom 19. Mai 1956 uber den Bef6rderungsvertragim internationalen Stralenguterverkehr(CMR), Bundesgesetzblatt 1989 II, p. 586

118 If there is only a provisional place of delivery in the original contract but at a later stage the parties agreed on a new place of destination, then according to both the courts of Munich and Hamburg, the new order will be regarded as a valid stipulation. See: Jung, (n 3), p.150-151

119 Austrian case: OGH Wien 1.4.1999, *TranspR* 2000, 34-36; Dutch case: Rb Maastricht 28 May 2003, *S&S* 2004, 57. However the Dutch case law is not entirely settled in this area as there are judgments reaching the opposite conclusion: Rb Rotterdam 19 October 2000, *S&S* 2001, 126. See also Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); Rb Rotterdam 11 April 2007, *S&S 2009, 55 (Godafoss)*; French case: Cour de Cassation ch Com, 11/10/2011, Arrêt n° 958 (10-25.813); German case: BGH 31.5.2001, *TranspR* 2001, p. 452-453; OLG Köln 25.5.2004, *TranspR* 2004, p. 359-361

120 Hoeks, (PhD thesis, n 27), p.95

121 *Royal & Sun Alliance Ins plc v. MK Digital FZE (Cyprus) Ltd* [2005] 2 Lloyd's Rep 679

122 *Milor v. British Airways* [1996] QB 702

123 Malcolm Clarke, 'National Judges Facing Gaps in the CMR: British Case-law', (2006) 11 Unif. L. Rev. n.s. 633, p.635

The text of the CMR was also kept safe by the Supreme Court of Belgium, which refused, and therefore rendered void, an exclusive jurisdiction clause which was pointing toward Belgium. However, through the application of Article 31, Belgium would not have had jurisdiction.[124]

Article 32(2) is a copy of Article 46(3) CMI, and was written at a time where photocopies were relatively rare. At that time, in case of a complaint, the carrier needed to have the original documents, as the procedural law of most countries were requiring it. Nowadays, at the exception of very peculiar pieces of documents, there is no need for this requirement. Reformulating this paragraph to reflect this modern trend will also put an end to existing conflicting judgments.[125]

Suggested improvements

The CMR is not flawless. However, the drafters tried to set straight forward aims and establish rules to achieve these goals. Even though the CMR is ageing, it still fits modern trade well. However, some improvements are needed to reach a higher level of harmonisation.

The amount of divergent judgments are in its major part due to the approach taken by national courts. The blame is not only on the drafters but also on the national courts interpreting the Convention and forgetting the simplest rule on treaties' interpretation. The rules on interpretation of treaties are clear; in case of conflict between national law and the convention, the interpretation should be in favour of the convention.[126] Normally, international law prevails over national laws.[127] Article 31 of the Vienna Convention requires a treaty to be interpreted in good faith. The principle *in claris non fit interpretatio* is of utmost importance. As the CJEU also stated, the provisions of the CMR have autonomous meaning. Interpreting some concepts in light of national law which share one of the languages of the CMR, i.e French or English, is going against the purpose the CMR tries to achieve. Indeed, if the provisions in the English text were to be interpreted according to English law and the provisions in the French text according

[124] Cour de Cassation de Belgique, 21/1/2010, C.08.0246.N. The Supreme Court already established that a choice of law does not exclude the application of Article 31 CMR. Cour de Cassation de Belgique, 8/12/2006, C060005N
[125] Cour de Cassation de Belgique, 27/9/1984, *Rev. dr. unif. I Unif. L. Rev.* (1984); Cour d'appel de Paris, 21 December 1978, *Bulletin des transports,* NO 1859 (1979), 84 ; Audiencia Provincial Madrid, 4/05/2015, SAP M 8455/2015 ; Tribunal Supremo, 12/6/1997, RJ 1997 , 4769; Tribunal Supremo, 24/6/2000 which affirmed the judgments on prescription and procedure of 10/6/1985, Tribunal Supremo, 24/2/1995, RJ 1995, 1111, and Tribunal Supremo, 29/6/1998, RJ 1998, 5282, with regard to the CMR.
[126] Article 27 of the Vienna Convention on the law of treaties. See: Waldemar Czapski, 'Application et interpretation de la Convention CMR A la lumiere du droit international', (2006) 11 Unif. L. Rev. n.s. 545, p.546
[127] Article 8(2) of the Portuguese Constitution and the jurisprudence of the Tribunal Constitucional. For instance: Acórdãos nº 118/85, publicado no Boletin nº 360; Acórdãos nº 300/87, publicado no Boletin nº 501; Acórdãos nº 218/88, publicado no Boletin nº 370; Supremo Tribunal de Justiça, 02/11/2010, processo nº 776/04.6TCGMR.G1.S1; Spain: Tribunal Supremo, 2007, SSTS 6-6-2007

to French law, we would not have one convention but various. Academics have expressed their disagreement with the use of national law as subsidiary to fill the CMR lacunas.[128] This takes the common character of the CMR away. It is time national courts remember that the CMR tries to achieve uniformity and that its provisions have autonomous meaning. This in turn will reduce the number of litigation.

A useful amendment could be to introduce an article similar to Article 7(1) of the Vienna Convention on International Sale of Goods. This article requires the courts of the Contracting States to interpret the Convention taking into account the need to promote a uniform interpretation and its international nature.

The most reluctant courts to apply the CMR to multimodal transport, namely the Dutch and German courts, have already applied the CMR to multimodal carriage.[129] The BGH admitted in its landmark judgment against the application of the CMR to multimodal that the provisions about the scope do not compel an interpretation as it gave.[130] Interesting enough, if the applicable law is German, then the CMR applies indirectly through §§ 452 or 452a HGB. One of the reasons for the German reluctance could be grounded on a fear that if the CMR applies to multimodal transport, the carriers will start proceedings in The Netherlands and therefore lower the chance of being caught under Article 29. The position with regard to multimodal transport is not as irreconcilable as the literature seems to suggest.

Restricting the application of the CMR to unimodal transport, is not taking into consideration the present reality. Nowadays, goods are rarely only carried by road. Restricting a convention that gives the opportunity to include multimodal transport and therefore bring uniformity, would be jumping back in time. It is true that the drafting of a separate multimodal convention was foreseen when the CMR was drafted, and reference is made in the *travaux préparatoires* of the CMR, but this convention never came into being. It might be true that the drafters of the CMR did not entirely intend this convention to be extended to multimodal transport but they probably did not foresee the rapid growth of road transport. Making the CMR applicable to multimodal transport is giving a little twist to the intention of the drafters, but not to the wording

[128] For instance: Alfonso Cabrera Cánovas and Francisco Sánchez Gamborino, *El convenio CMR* (ICG Marge, 2012), p.131
[129] Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); BGH 24.6.1987, *TranspR* 1987
[130] BGH 17.7.2008, *TranspR* 2008, p. 365-368

of the Convention. Being a French convention, it was broadly written, and like with the French Civil Code, it can therefore be adapted to modern needs.[131]

Turning to the discussion about the difference between the French and English texts as an argument to exclude the multimodal aspect of the CMR, is a nonsense. The word 'de' in French can be translated as 'of' but also 'for'. It would sound very odd that the French text will require a 'c*ontract* pour *le transport de marchandise par route'.* This reflects the German way of interpretation, namely literal. As a native French speaker, I would have translated the *'contrat* de *transport de marchandise par route*' as it is in the English version, i.e 'contract *for* the carriage of goods by road'.

There is also a discussion regarding whether the 'ou' in Article 29 is cumulative or alternative.

The principle *in claris non fit interpretatio* should be applied to Article 17(4) as the provision does not leave room for interpretation. Article 17 should be looked at through the lenses of *force majeure,* which is the most widespread approach. However, the different offences falling under *force majeure* will have to stay at the discretion of national judges. Looking at the jurisprudence on the topic, the approaches do not differ greatly and the main focus of the reforms should not be on this article but rather on Articles 23 and 29.

Article 23 is no more in line with the current need of the trade. The figure it is based on is a more than 50 years old one. The value of cargoes have grown dramatically, making the balance of risks weigh more in favour of carriers to the detriment of cargo owners. A direct result of this unfair balance is that a majority of cargo owners have recourse to Article 29 in order to break the limit imposed by Article 23.

The most problematic part of Article 29 is the 'equivalent to wilful misconduct'. This sentence was added due to the insistence of the British commissioner at the time emphasising the dissimilarity of the concept of wilful misconduct at Common law as opposed to Continental law.[132] The word *dol* in French does not have a proper equivalent in English. However, this second sentence only led to more divergence than harmonisation, leaving a large room of manoeuvre for national judges to decide the case in a way they deem fit. The easiest solution to that problem is to return to the exact wording of the CMI, which was also used Article 18(2) of

---

[131] The Code Napoléon enacted in 1806 is still applicable in France and Belgium. Napoléon wanted a text which could survive for decades and therefore required the drafter to write a code that was very broad and on some articles very vague. The code can be regarded as a genius invention.
Comparing to the German Civil Code (BGB) which was very precise and amended numerous times.
[132] Loewe, (n 10), p.439

the CMR's little sister the CVR. By restricting the scope of Article 29 to wilful misconduct or *faute lourde*, judgments in different countries will be in line with each other. However, one should be careful; the compensation under the CMI is four times higher than under the CMR. This would neither be an adequate option, as a too heavy burden will be placed on the carriers.

The place of the taking over in Article 31 CMR should be interpreted in case a subcontractor is involved as the place where the subcontractor took the goods over. Supporting the English approach embodied in *Quantum* and the Dutch case of *Resolution Bay.*[133] The other approach is not sustainable for one good reason, most of the subcontractors issue transport documents of their own, which does not mention the original place of taking over but the place where it effectively took over the goods.[134]

The 'return of the documents thereto' in Article 32(2) should be deleted or amended and be read as follows: 'in case of peculiar documents, such documents should be returned when the claim is made'. A further amendment to this paragraph, would be to follow the approach taken by the Belgian Supreme Court and require the notice to contain a rough evaluation of the claim against the carrier.[135]This amendment will shorten the procedure and exchanges between parties.

When the CMR was drafted, it was advised to refer cases for interpretation to the International Court of Justice.[136] This proposal was forcefully fought against. But with the current situation and the massive amount of divergent cases, certainly with regard to Article 29, it might be interesting to reconsider the proposal. Article 47 provides jurisdiction to the ICJ. Some countries have made reservations concerning this article.[137] It is true that the likelihood of a Contracting State asking the ICJ to review a judgment of another Contracting State on the belief that the latest Contracting State has misinterpreted the Convention, is not high. One of the reasons for the reluctance in using the mechanism provided by this article is based on the fact that States are not prepared to make private disputes states disputes. Indeed, only States have access to the ICJ and no State will sue another State on a matter of interpretation of a private law convention.[138] Additionally, the confidentiality of private case will not be upheld in front of the ICJ.[139]

---

133 Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*). *Quantum Corp Inc v Plane Trucking Ltd.*, [2002] 2 Lloyd's Rep. 25

134 Certainly the strict Austrian approach of looking at the original documents to know the place of taking over, as mentioned in OGH Wien. 1.4.1999, *TranspR* 2000, 34, at p. 36.

135 Cour de Cassation de Belgique, 07/12/2012, C.12.0098.N

136 Article 47 CMR. See: Loewe, (n 10), p.432

137 For instance Czech Republic. See: Alexander J. Bělohlávek and Naděžda Rozehnalová, 'Czech Yearbook of International Law - Rights of Host States within the System of International Investment Protection – 2011' (Juris Publishing Inc., 2011) p.285

138 Tuma (n 83), p. 605

139 Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention,* (Kluwer Law International, 2010), p. 4

A better suggestion would be to introduce a superior authority which judgments are binding over all national courts. With the number of signatory countries, this idea will be costly and hard to put in place. The problem lies in that none of the Contracting States will agree to follow the opinion on the interpretation of one of the Contracting States above its own. There are various reasons for this; sovereignty, interpretation that will not fit national law, to decide which country is right in its interpretation, etc. Therefore, there is a need of a superior authority structure. This structure already exists, the Court of Justice of the European Union (CJEU). Looking at Article 31(3) and (4) CMR, it is stipulated that a judgment in a Contracting State will be enforceable in all the Contracting States. This recognition of judgments is one of the cornerstone ideas of the European Union. Of course, the CJEU would not have automatic jurisdiction over the matters but the parties could refer their cases or ask the higher judicial authority in their country to refer a question as to the interpretation to the CJEU.[140] This in turn will reduce forum shopping. The CJEU has until now refused to interpret the provisions of the CMR. However, if all the contracting parties subject themselves to the CJEU, their reluctance might disappear. In the current state of affairs, it is normal that the CJEU does not want to interpret the CMR, risking to jeopardise its uniformity and being only available to Member States, therefore creating a discrimination.

The drafter of the CMR had included a mechanism enabling the Contracting States to convene a conference for the revision of the Convention, Article 49. Such mechanism could be used to improve the Convention. For instance, the limit under Article 23 could be raised or Article 29 could be reworded in order to avoid the different interpretation and to be more in line with the other international transport law conventions. However, it has never been used until now.

Conclusion

A perfectly harmonized system will never occur, without the imposition of a higher system and having a court to judge it. National laws and approaches to the problems are divergent *per se*. The CMR did its best to reconcile these, sometimes very, divergent points of view. For some countries, like Belgium, the adoption of the CMR as national law was beneficial as it adapted the outdated system that was applicable until then.[141] Moreover, its scope of application is

[140] Tuma, (n 85), p.605

[141] Kathleen Spenik, 'La CMR comme Ioi nationale et Ioi du cabotage en Belgique' (2006) 11 Unif. L. Rev. n.s 689, p.692

relatively extended, it applies to contract of carriage of goods if one of the countries is a Contracting State.

We have seen that some courts have gone some way towards lessening the (excessive) burden on the injured party by interpreting the CMR in more broad terms than the bare statutory wording. Other courts have decided to stick to the wording of the Convention. One of the reasons for this divergence is that some countries are more cargo interests oriented and others are more carrier interests oriented. For instance, Germany protects more cargo interests, while The Netherlands offers more protection to carriers.[142] Expressing considerable unease over the stringency and disproportionality of the sanction of breaking the limit, the Dutch *Hoge Raad* have sought to escape the conclusion by establishing a very high standard for breaking the liability limitation under the CMR, whereas the German courts are more inclined to award damages in full. Other countries, such as France, Belgium and Portugal, are situated in between this broad spectrum. For the UK courts, the wording of the CMR is always the starting point.[143] The CJEU endorsed a more Dutch approach to the interpretation of the CMR. In the *"Kintra" UAB* case[144], the Court specifically rejected the position of the Federal Court of Justice of Germany. Therefore, the Court encourages forum shopping.

The English way of interpreting the treaty, along with the Portuguese and the Belgian one or the Spanish interpretation to a certain extent, are the most appropriate ones. Indeed, the courts of these countries are not looking at the CMR only through national eyes, or if they do, their national laws are so close to what was intended for the CMR that their judgments end up being fair. These courts place the CMR in a broader picture, taking into account its purpose and other conventions.

Looking at the Vienna Convention on Treaties interpretation, the provisions of the CMR should be interpreted taking into account the objectives of the convention. Most of the courts in the jurisdictions under scrutiny have not taken this principle into consideration while interpreting the CMR. Surprisingly, the English courts have moved away from their systematic approach to conventions with Common law eyes and moved to being 'good Europeans'. As Clarke so greatly wrote: 'courts start from a presumption that a transport regime that looks complete and self-contained is indeed complete and self-contained, and that courts should not actively look

[142] Groen, (n 113)
[143] For instance: *Rosewood Trucking Ltd v. Balaam* [2005], EWCA Civ 1461
[144] Case C-157/13 *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* [2014] ECLI:EU:C:2014:2145

for gaps through which to bring in national law.'[145] Needless to say that such approach has its danger, i.e a too literal interpretation which will no more fit the commercial purpose of the Convention. But, if this approach is given some flexibility, then it starts to produce the most sensitive outcomes, at least for now.

[145] Clarke, (n 121), p.633