TOWARDS A LIABILITY REGIME FOR ROAD CARRIAGE THE EUROPEAN EXPERIENCE: THE CMR CONVENTION

Stevens, F.

AntwerpLaw Advocates.

ABSTRACT

Road transportation is, in most European countries, governed by the "CMR" Convention. The acronym CMR is short for the French title of the Convention: Convention relative au transport de Marchandises par Route (Convention relating to the carriage of Goods by Road).

This Convention, which was opened for signature on May 19, 1956, has been adopted by more than 40 countries. This broad success of the Convention, coupled with the practical experience of almost 50 years of case law, applying the provisions of the Convention to actual transport problems, makes the CMR-Convention into an example well worth looking into for any State wishing to develop a legal regime for carriage of goods by road. Moreover, the CMR is generally considered a good Convention. It provides the parties involved in road carriage with a uniform set of rules, determining their rights, duties and liabilities. It is also a balanced Convention, taking into account and seeking a compromise between the interests of both the cargo and the carriers.

The CMR-Convention describes the rights and duties of the parties, among others with regard to making out the consignment note, packing the goods for transport, checking the goods at the beginning of the carriage, changing the instructions of the carrier and disposing of the goods, performing the carriage within a reasonable time, and sending dangerous goods. Furthermore, the Convention sets up a liability regime, with on the one hand a presumption of liability against the carrier, but on the other hand a number of specific, transport-related defenses and a limitation of liability, that can only be broken in exceptional circumstances. The CMR-Convention also deals with certain aspects of claims and procedures between the parties; it provides an exhaustive list of courts that have jurisdiction over road carriage claims, and determines the applicable time bar. By making the carrier's liability predictable, the Convention has also made this liability readily insurable.

1. INTRODUCTION

As with other economic activities, the determination of the duties, rights and liabilities of the parties involved with road carriage, is in principle left to negotiations between the parties and freedom of contract. This freedom, however, has several disadvantages.

For the customers, this freedom of contract means that it is not clear in advance which rules or conditions will govern the contract of carriage. To a certain extent, this problem can be alleviated by the use of Standard Terms and Conditions, but even then, different carriers may be using different sets of Terms and Conditions. Furthermore, the use of Standard Terms and Conditions introduces a new problem, i.e. that of validly agreeing upon or incorporating these Terms and Conditions into the contract. Finally, freedom of contract may lead to lopsided contracts when the parties to the contract do not have the same economic weight or bargaining power.

In a multi-national setting, these problems are multiplied, since different legal systems are involved.

In Europe, these considerations have led to the development of an international convention on the carriage of goods by road, commonly known as the CMR-Convention. (The acronym CMR is short for the French name of the Convention: "Convention relative au transport de Marchandises par Route" (Convention relating to the carriage of Goods by Road)). The work on this Convention was started by UNIDROIT in 1948, and later taken over by UNECE (United Nations Economic Commission for Europe). These efforts were successfully concluded on May 19, 1956, when the CMR-Convention was opened for signature.

At present, more than 40 countries have become a party to the Convention, thereby submitting almost all international carriage by road in Europe to a uniform system of law. Moreover, several countries have incorporated the provisions of the CMR-convention into their national law or made the Convention applicable to inland carriage by road, thus broadening even more the impact of the CMR-convention.

This broad success of the Convention, coupled with the practical experience of almost 50 years of case law, applying the provisions of the Convention to actual transport problems, makes the CMR-Convention into an example well worth looking into for any State wishing to develop a uniform legal system of road carriage.

The CMR-Convention describes the rights and duties of the different parties involved in road carriage, sets up a liability regime, and deals with certain aspects of claims and procedures between the parties. These different aspects of the Convention will be further described below.

2. RIGHTS AND DUTIES OF THE PARTIES

The CMR-Convention describes, from the conclusion of the contract of carriage to the accomplishment of same, the most important rights and duties of the parties involved, i.e. the cargo interests (sender and consignee) on the one hand, and the carrier(s) on the other hand.

The list is not exhaustive, though. For a number of duties, the Convention leaves it to the parties themselves to decide who of them will perform that duty. For practical purposes, one of the most important of these "non-regulated" duties is the loading and stowing of the goods on the truck. The Convention does not oblige one of the parties to perform these tasks; they are free to decide among themselves who will do so. Problems arise, however, when there is no explicit agreement in this respect; the court will then have to find which party actually loaded and/or stowed the goods, which can sometimes be difficult to prove.

Below is an overview of the most important rights and duties as set out by the CMR-Convention.

2.1 Consignment Note

In principle, a consignment note must be made out for every carriage. This consignment note serves both as a proof of the contract of carriage and as a proof of a number of factual elements. Nevertheless, art. 4 CMR explicitly provides that the absence or irregularity of the consignment note does not render the contract of carriage invalid and does not preclude the applicability of the Convention.

The consignment note is made out in three original copies (in practice by using a print-through set of forms): the first copy is for the sender, the second copy accompanies the goods and is handed over to the consignee, and the third copy is retained by the carrier.

Art. 6, 1 CMR enumerates the particulars that must be included in the consignment note. These particulars include obvious information such as the date of the consignment note, the place where it is made out, name and address of the sender, carrier and consignee, starting and ending point of the carriage, a description of the goods, the marks and numbers of the goods, and the weight or quantity of the goods. Furthermore, possible charges relating to the carriage and instructions for Customs or other formalities must be mentioned in the consignment note. Art. 6, 2 CMR lists a number of particulars that have to be mentioned if they are applicable. In addition to these mandatory particulars, the parties are free to enter into the consignment note any other particulars they deem useful.

Most of these particulars are provided to the carrier by the sender, and the latter is liable for any loss or damage caused by the incorrectness or incompleteness of the information he provides (art. 7 CMR). Along the same lines, the sender has to provide the carrier with all documents and information he needs to fulfill Customs or other formalities with regard to the carriage. Here also, the sender is liable if he fails to do so (art. 11 CMR).

2.2 Packing the Goods

The sender must pack or prepare the goods in such way that they can withstand the carriage without damage, and without inflicting damage on the carrying vehicle or on other goods carried in the vehicle. If the packing is defective or inadequate, the sender is liable to the carrier for the loss or damage caused thereby (art. 10 CMR). If, however, the defectiveness or inadequacy was apparent at the time the goods were handed over to the carrier, and no reservation in this respect was entered into the consignment note, the sender's liability disappears.

2.3 Checking the Goods

When the sender hands over the goods to the carrier, the latter has to check the accuracy of the statements in the consignment note with regard to the number of packages and their marks and numbers (art. 8 CMR). If he notices any discrepancies, the information in the consignment note should be corrected. If, however, the carrier has no reasonable means of checking the accuracy of these statements, he should make a reservation in the consignment note to that effect, and indicate the reasons why he is unable to perform these checks.

The carrier also has to check the apparent condition of the goods and their packing (art. 8 CMR). If the apparent condition of the goods or their packing is not as may be expected, the carrier should enter reservations in the consignment note. This checking, however, is limited to the *apparent* condition; the carrier is not required to open packages, to judge the quality or the aptness of the packing, etc.

This requirement to check the goods at the beginning of the carriage is a protection for the carrier, and is meant to ensure that the carried goods are described in the consignment note as correctly as possible. Nevertheless, if the carrier omits to enter reservations in the consignment note, he is still allowed to prove afterwards that the goods or their packing were, in fact, not in apparent good order at the time they were handed over to him by the sender. In that case, however, the carrier has the full burden of proof, and thus a much more difficult task than simply entering the appropriate reservations at the beginning of the carriage.

2.4 Right of Disposal

In most cases, the carrier simply transports the goods to the consignee and delivers them to him. In certain circumstances, however, this turns out to be impossible. It can also happen that during the carriage, the initial instructions are changed.

If the carrier is unable to complete the carriage as foreseen, he must request instructions from the person entitled to dispose of the goods (art. 14 CMR). If it is not possible to obtain instructions, or

at least not within a reasonable time, the carrier has to take the measures that he deems appropriate and in the best interest of the person entitled to the goods.

The CMR-Convention further regulates who of the cargo interests, sender or consignee, has the right to change the carrier's instructions (the "right of disposal"), and at which point this right passes from the sender to the consignee (art. 12 CMR). In principle, the right of disposal lies with the sender, up to the moment that the consignment note is handed over to the consignee. It is possible, though, to provide in the consignment note that the right of disposal will immediately lie with the consignee.

The changed instructions must be possible for the carrier to execute without interference with the normal working of the carrier's company and without prejudice to the consignments of other senders, and the person giving the instructions must indemnify the carrier for all expenses or losses caused by executing these instructions. Finally, the instructions cannot result in a splitting up of the consignment.

2.5 Delay

The parties can agree upon a time-limit within which the goods have to be delivered. If they do not do so, the carrier has to perform the carriage within a period of time that is reasonable for a diligent carrier, taking into account all circumstances of the carriage (art. 19 CMR). The compensation for delay in delivery is limited, however, to an amount equal to the transport price (art. 23, 5 CMR).

If the goods are still not delivered 30 days after the expiry of the agreed time-limit, or 60 days after the goods were handed over to the carrier if there is no agreed time-limit, the cargo interests are allowed to consider the goods lost, and to claim compensation for a total loss (art. 20, 1 CMR).

2.6 Dangerous Goods

If the goods to be carried are of a dangerous nature, the sender must inform the carrier of the exact nature of the danger and of the precautions to be taken, or he must prove that the carrier already has the necessary information from some other source (art. 22 CMR). The CMR-Convention does not really define "goods of a dangerous nature"; meant are all goods that present an immediate danger under normal transport conditions. There is a specific convention on the carriage of dangerous goods by road (the ADR-Convention), but art 22 of the CMR-Convention is not limited to the goods listed in the ADR-Convention.

If the sender does not inform the carrier, or does not provide sufficient information, he is liable for all expenses, loss and damage caused by the goods. Furthermore, if dangerous goods are sent without informing the carrier, the latter has the right to unload and destroy the goods at any time, without compensation to the sender.

3. LIABILITY REGIME

The Convention's liability regime is a compromise between the carrier's interests and the cargo's interests. On the one hand, the carrier's liability is presumed, which makes it very easy for the cargo interests to put forward a *prima facie* case against the carrier. On the other hand, the carrier is not only granted the classic "force majeure" defense, but also a number of specific, transport-related defenses, combined with a simplified burden of proof. Moreover, the carrier's liability is limited, except in case of willful misconduct.

3.1 Presumed Liability

Under the CMR, the carrier has an obligation of result: he is obliged to deliver the goods to the consignee in the same condition he has received them from the sender. If the carrier fails to do so, he is presumed to be liable, without the cargo interests having to prove a fault.

In order to make a case against the carrier, the cargo interests only have to prove that the promised result (delivery in the same condition) was not delivered. They can do so very easily by making reservations at the time of delivery for apparent loss or damage, or within seven days of delivery for non-apparent loss or damage (art. 30, 1 CMR).

If no such reservations are made, there is a presumption that the carrier has delivered the goods in such condition as described in the consignment note. This presumption, however, is rebuttable; the cargo interests are allowed to prove that, even though no reservations were made at delivery or within seven days thereafter, the goods were nevertheless not delivered in the condition as described in the consignment note. In that case, though, the cargo interests have the full burden of proving that the goods were delivered damaged or with shortages.

If the cargo interests have proven (by timely reservations or by other means) that the goods were not delivered as they should have been, which gives rise to a presumption of liability against the carrier, the burden of proof shifts to the latter, who then has to prove one of the several defenses available to him.

3.2 Carrier Defenses

The carrier is only liable for loss or damage that occurs between the time when he takes over the goods from the sender and the time he delivers the goods to the consignee (art. 17, 1 CMR). The first possible defense for the carrier is therefore to prove that the loss or damage already existed before the goods were handed over to him by the sender, or that the loss or damage only occurred after he delivered the goods to the consignee. This is often an issue with closed packages such as boxes, crates, containers, etc., where the carrier can only check the exterior, but not the actual contents of the package.

Next, art. 17, 2 CMR grants the carrier a number of classic defenses: wrongful act or neglect of the claimant, instructions of the claimant, inherent vice of the goods, and "force majeure". With regard to these defenses, the carrier has a full burden of proof: he has to prove the defense, and he has to prove causation.

Thirdly, art. 17, 4 CMR provides the carrier with a number of specific, transport-related defenses: use of open unsheated vehicles (art. 17, 4, a), lack of packing or defective packing (art. 17, 4, b), handling, loading, stowing or unloading of the goods by the sender or consignee (art. 17, 4, c), the damage-prone nature of certain kinds of goods (art. 17, 4, d), insufficiency or inadequacy of marks or numbers on the packages (art. 17, 4, e), and the carriage of livestock (art. 17, 4, f). With regard to these defenses, the carrier's burden of proof is lightened. The carrier still has to prove the defense (e.g. he has to prove that the packing was defective), but he does not have to prove actual causation. It is sufficient that he can show that the defense he invokes *might* have been the cause of the loss or damage (art. 18, 2 CMR). In that case, there is a presumption that the defense was indeed the cause of the damage. This presumption is rebuttable, though; the cargo interests are allowed to prove that the defense was in fact not the cause of the loss or damage.

3.3 Limitation of Liability

If the carrier is liable for the loss or damage, he is entitled to limit his liability to 8,33 SDR (Special Drawing Rights) per kilogram of gross weight short or damaged (art. 23, 3 and art. 25 CMR).

Limitation of liability is one of the cornerstones of the CMR-Convention. Limitation is the rule, breaking the limitation is the exception. The limitation can only be broken in case of willful misconduct of the carrier or of his agents or servants, when the latter are acting within the scope of their employment (art. 29 CMR). The burden of proving the willful misconduct lies with the claimant.

There is another case in which the compensation to the claimant can exceed the limitation amount, although this is, strictly speaking, not a case of breaking the limitation. The sender has the option of declaring a special interest in delivery in the consignment note and putting an amount thereto. In that case, this amount becomes the maximum amount of liability of the carrier, but the sender is due a surcharge on the normal transport price.

4. PROCEDURAL ASPECTS

In every carriage, the intention is, of course, to deliver the goods complete and without damage to the consignee. Unfortunately, it does not always happen that way, which gives rise to claims between the cargo interests (and/or their insurers) and the carrier(s).

The CMR-Convention contains a number of provisions that concern such claims.

4.1 Jurisdiction

In order to avoid uncertainty about the competent court, art. 31 CMR provides an exhaustive list of courts with which a transport claim can be filed. The claimant can choose between (1) the courts of the country where the defendant has his principal place of business or has his branch or agency through which the contract of carriage was made, (2) the courts of the country where the goods were taken over by the carrier, (3) the courts of the country where the goods were delivered or had to be delivered, or (4) the court upon which the parties had agreed, but he cannot file his claim with any other court.

Arbitration is possible, if there is an arbitration clause in the contract of carriage, and provided that this clause explicitly requires the arbitrators to apply the CMR-Convention (art. 33 CMR).

4.2 Time Bar

All claims arising out of a carriage governed by the CMR-Convention become time barred after one year, except in case of willful misconduct where the period of limitation becomes three years (art. 32, 1 CMR).

The starting point of the time bar, however, depends on the circumstances. In case of partial loss, damage or delay in delivery, the time bar starts to run from the date of delivery. In case of total loss, the time bar starts to run from the 30th day after the expiry of the agreed time limit, or from the 60th day from the date on which the goods were handed over to the carrier if there is no agreed time limit. In all other cases, the time bar starts to run 3 months after the making of the contract of carriage.

As a one year period of limitation is rather short, though, the CMR-Convention provides a specific suspension mechanism. If the claimant sends the carrier a written claim, holding him liable and requesting compensation, the period of limitation is automatically suspended until the time the carrier rejects the claim in writing and returns the documents attached thereto.

4.3 Mandatory and Overriding

The CMR-Convention is a mandatory system of law. Art. 41 explicitly provides that any contractual stipulation that directly or indirectly derogates from the Convention is null and void. The CMR-Convention is not a fully exhaustive system of law, though; not all aspects of the contract of carriage are regulated by the Convention. These non-regulated aspects remain subject to national law.

Furthermore, art. 28 provides that the carrier can always invoke the provisions of the Convention, regardless of the legal basis on which the claimant grounds his claim. For instance, even if the cargo interests file claim against the carrier based on tort instead of on the contract of carriage, the carrier can still invoke the defenses, time bar, limitation, etc. of the CMR-Convention.

5. CMR INSURANCE

By providing a uniform set of rules, and even more by providing a limitation of liability, the CMR Convention has made the carrier's liability predictable, and therefore perfectly insurable. As a consequence, the insurance market has developed a standard CMR policy, covering the carrier's liability under the CMR Convention.

This policy, however, only provides coverage for the carrier's liability as limited in accordance with art. 23 and 25 CMR. If the limitation is broken and the carrier is held liable for the full amount of the damage, the insurance will only cover up to the limitation amount, and the balance (which can be very important) will have to be paid by the carrier himself.

6. CONCLUSION

The reasons for developing a specific legal regime, rather than leaving road carriage to freedom of contract, primarily lie with the predictability and the protection of economically weaker parties offered by a legal regime. Freedom of contract may lead to uncertainty and unpredictability, and may also provide stronger parties with an unfair advantage.

If the choice is made to create a legal regime for road carriage, there is no need to start from scratch. Several examples can be found in other countries, such as for instance Europe, where the CMR-Convention has been regulating a major part of the road carriage for over 40 years now.

Generally speaking, the CMR is considered a good Convention. It provides the parties involved in road carriage with a uniform set of rules, determining their rights, duties and liabilities. It is also a balanced Convention, taking into account and seeking a compromise between the interests of both the cargo and the carriers.

This does not mean, of course, that the CMR-Convention is perfect. Certain aspects of road carriage are left out of the Convention, and other aspects, although included, are not regulated as clearly as could have been hoped for.

Nevertheless, for those intending to develop a legal regime for road carriage, the CMR-Convention is a valid example and a valuable source of inspiration. For instance, the 16 OHADA countries (Western and Central Africa) have recently adopted a Uniform Act on the carriage of goods by road, that is, to a very large extent, based on the CMR-Convention.

TOWARDS A LIABILITY REGIME FOR ROAD CARRIAGE THE EUROPEAN EXPERIENCE: THE CMR CONVENTION

Stevens, F.

AntwerpLaw Advocates.

BIOGRAPHY

Frank Stevens

Education: Law degree, University of Leuven, Belgium – LL.M. in Admiralty, Tulane Law School, New Orleans, USA.

Belgian lawyer. Admitted to the Antwerp Bar since 1993. Partner in the law firm AntwerpLaw Advocates since 2003.

Practice focuses on maritime and transport law, and marine and transport insurance.

Author of several publications on transport law, and of a recent handbook on the carriage of goods by sea, which was awarded the "Albert Lilar Award" in 2003. Guest teacher at the University of Antwerp at several occasions.