

Dr K. F. Haak

the | **LIABILITY**
of the | **CARRIER**
under the | **CMR**



| STICHTING VERVOERADRES THE HAGUE

K. F. HAAK

THE LIABILITY OF THE CARRIER
UNDER THE CMR

(with summaries in French and German)

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FOREWORD

The book presented here is the translated version of the revised publication of the doctoral thesis entitled 'De Aansprakelijkheid van de Vervoerder ingevolge de CMR' for which the author was awarded his doctoral degree in December 1984 from the Rijksuniversiteit Utrecht, The Netherlands.

The publisher of this book is the Stichting Vervoeradres (Waybill Foundation), the institution within which, after discussion between the carriers' and shippers' representatives mentioned below, standard conditions of transport are drawn up and which also publishes, inter alia, the CMR consignment note. In this institution cooperate the trade organisations in The Netherlands for the professional transport of goods by road, namely, the KVO, KNVTO, NOB wegtransport, PCB wegvervoer with the Nederlandsch Binnenvaartbureau on the one hand and the organisation of commercial transport consumers, the shippers' organisation, EVO on the other.

These organisations promote the interests of their members at both national and international level. Thus for many years they have devoted themselves at the international level to securing the abolition of the existing quota system, removal of obstacles at frontiers, the introduction of a uniform regulation of weights and measures for freight vehicles and a workable regulation of driving times within Europe. Viewed in this light the publication of this book by the Stichting under the auspices of the organisations mentioned above also falls within this cadre. The CMR Convention, to which virtually every European country has acceded, is variously interpreted. Having regard to that undesirable situation for international trade relations the organisations that cooperate in the Stichting Vervoeradres with the publication of this book aim to furnish an aid for all those involved in their own country with the application of the CMR Convention in conformity with the original aim of that Convention, namely, the aspiration of greater uniformity regarding international carriage of goods by road within Europe.

The Board of Governors is convinced that the publication of this book can be a real contribution to the attainment of that aim.

The Hague, September 1986

Board of Governors
Stichting Vervoeradres

TABLE OF CONTENTS

Foreword		v
List of Abbreviations		xi
Table of works referred to by name		xiii
Introduction: Scheme of treatment		1
Chapter 1	Description of the Convention	
§ 1	Place of the Convention	7
§ 2	History of the Convention	8
§ 3	Nature of international convention law	10
§ 4	Interpretation of international convention law	15
§ 5	Caselaw	22
§ 6	Literature	31
Chapter 2	Scope of application of the Convention	
§ 1	Introduction	39
§ 2	Function of the scope rule	40
§ 3	Requirements for application of the Convention	43
§ 4	Transport contract and related contracts	53
§ 4.1	Introduction	53
§ 4.2	Transport contract	54
§ 4.3	Freight forwarding contract	58
§ 4.3.1	General	58
§ 4.3.2	France	61
§ 4.3.3	Italy	63
§ 4.3.4	Belgium	63
§ 4.3.5	The Netherlands	65
§ 4.3.6	Federal Republic of Germany	68
§ 4.3.7	England	74
§ 4.3.8	Other countries	76
§ 4.4	Transport operator contract	76
§ 4.5	Chartering contract	78
§ 4.5.1	The Netherlands	78
§ 4.5.2	Other countries	81
§ 4.6	Haulage contract	82
§ 4.6.1	The Netherlands	82
§ 4.6.2	Other countries	85
§ 4.7	Other contracts	86
Chapter 3	Special types of carriage	
§ 1	Introduction	89
§ 2	Roll-on/roll-off carriage (Art.2 CMR)	93
§ 2.1	Origin of the provision	93
§ 2.2	Application of the provision (Art.2(1) first sentence CMR)	96

§ 2.3	External legal consequences (Art.2(1) second and third sentences; Art.2(2) CMR)	99
§ 2.4	Internal legal consequences	103
§ 3	Sub-carriage (Art.3 CMR)	104
§ 4	Successive carriage (Artt. 34-40 CMR)	106
§ 4.1	Origin of the regulation	106
§ 4.2	Application of the regulation (Artt. 34, 35 CMR)	107
§ 4.3	External legal consequences (Artt. 34, 36 CMR)	113
§ 4.4	Internal legal consequences (Artt. 37-40 CMR)	115
Chapter 4	Liability of the carrier	
§ 1	Introduction	119
§ 2	Basis of liability	121
§ 3	Importance of proof	128
§ 4	Origin of the system	132
§ 5	Substance of the liability model	139
§ 5.1	Introduction	139
§ 5.2	General grounds of exoneration (Art.17(2) CMR)	140
§ 5.2.1	Fault or instructions of the claimant	140
§ 5.2.2	Inherent vice	141
§ 5.2.3.1	Circumstances which the carrier could not avoid and the consequences of which he was unable to prevent	143
§ 5.2.3.2	Theft	144
§ 5.2.3.3	Fire	147
§ 5.2.3.4	Miscellaneous	149
§ 5.3	Defective condition of the vehicle (Art.17(3) CMR)	150
§ 5.4	Special grounds of exoneration (Art.17(4) CMR)	153
§ 5.4.1	Use of open vehicle (Art.17(4)(a) CMR)	154
§ 5.4.2	Absence or defective condition of packing (Art.17(4)(b) CMR)	155
§ 5.4.3	Handling, loading, etc., by the sender (Art.17(4)(c) CMR)	157
§ 5.4.3.1	Defectiveness required?	158
§ 5.4.3.2	On whom rests the obligation to act as specified in Article 17(4)(c) CMR?	161
§ 5.4.3.3	Factual or juridical criterion?	163
§ 5.4.3.4	Duty of inspection?	165
§ 5.4.4	Nature of the goods (Art.17(4)(d) CMR)	167
§ 5.4.5	Insufficiency or inadequacy of marks or numbers (Art.17(4)(e) CMR)	173
§ 5.4.6	Carriage of livestock (Art.17(4)(f) CMR)	174
§ 5.5	Liability for agents and servants (Art.3 CMR)	174
§ 6	Period of liability	179
§ 6.1	Introduction	179
§ 6.2	Substance of the concepts of taking over and delivery	180
§ 6.3	Evidentiary rules (Artt. 8, 9 and 30 CMR)	185
Chapter 5	Compensation	
§ 1	Introduction	197
§ 2	Substance of the concepts of loss, damage and delay	199
§ 3	Loss	203

§ 3.1	Calculation of the concept of value (Art.23(1), (2) CMR)	203
§ 3.2	Limits (Art.23(3) CMR)	207
§ 3.2.1	History	207
§ 3.2.2	Present and future state of affairs	210
§ 3.2.3	Application	214
§ 3.3	Remaining damage factors (Art.23(4) CMR)	218
§ 4	Damage (Art.25 CMR)	226
§ 5	Delay (Art.23(5) CMR)	228
§ 6	Special provisions (Arts.24, 26 CMR)	230
§ 7	Interest and conversion (Art.27 CMR)	235
§ 8	Preserving the regulation (Art.28 CMR)	237
§ 9	Penetrating the regulation (Art.29 CMR)	241
Chapter 6	The Claimant	
§ 1	Introduction	251
§ 2	Concepts of sender and consignee	253
§ 3	Basis of the right to claim	257
§ 4	Exercise of the right to claim	267
§ 5	Intermediaries	270
Chapter 7	Jurisdiction	
§ 1	Introduction (Art.31 CMR)	275
§ 2	Nature of the jurisdiction provision	276
§ 3	Scope of the jurisdiction rule (Art.31(1) opening words CMR)	280
§ 4	Choice of court (or tribunal) (Art.31(1) opening words CMR; Art.33 CMR)	281
§ 5	Courts referred to by the Convention (Art.31(1) (a), (b) CMR)	285
§ 6	Other aspects of procedural law (Art.31(2)-(5) CMR)	291
Chapter 8	Limitation of actions	
§ 1	Introduction (Art.32 CMR)	293
§ 2	Scope (Art.32(1) first sentence CMR)	294
§ 3	Periods of limitation (Art.32(1) opening words CMR)	295
§ 4	Commencement of the periods (Art.32(1)(a)(b)(c) CMR)	297
§ 5	Suspension and interruption (Art.32(3) CMR)	301
§ 6	Special suspension rule (Art.32(2) CMR)	302
§ 7	Counterclaim (Art.32(4) CMR)	308
§ 8	Recourse action (Art.39(4) CMR)	310
§ 9	Conclusions	311
Sommaire		313
Zusammenfassung		323
Annex 1	English text of the CMR	333
Annex 2	French text of the CMR	347
Annex 3	German translation of the CMR	361
Annex 4	English text of the CMR Protocol (1978)	375

Annex 5	French text of the CMR Protocol (1978)	379
Table of cases		383
Index		391

LIST OF ABBREVIATIONS

AA	Ars Aequi
AG	Amtsgericht
All ER	All England Law Reports
AWD	Aussenwirtschaftsdienst des Betriebs-Beraters
BGB	Bürgerliches Gesetzbuch
BGH	Bundersgerichtshof
BT	Bulletin des Transports
BW	Burgerlijk Wetboek
CA	Court of Appeal; Cour d'Appel
Cass.	Cour de Cassation
CC	Code civil; Codice civile
CCom	Code de commerce; Codice commerciale
CIM	Convention internationale concernant le transport des marchandises par chemins de fer
CMR	Convention relative au contract de transport international de marchandises par route
CPrC	Code de procédure civil
DB	Der Betriebs-Berater
DVZ	Deutsche Verkehrszeitung
ETL	European Transport Law
FIATA	Fédération Internationale des Associations de Transitaires et Assimilés
HGB	Handelsgesetzbuch
HL	House of Lords
HR	Hoge Raad
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
IPRax	Praxis des Internationalen Privat-und Verfahrensrechts
IRU	International Road Transport Union
JCB	Juris Classeur Belge
JdT	Journal des Tribunaux
JMLC	Journal of Maritime Law and Commerce
JPA	Jurisprudence du Port d'Anvers
Ktg	Kantongerecht
KVO	Kraftverkehrsordnung
LG	Landgericht
Lloyd's Rep	Lloyd's Law Reports

LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MDR	Monatschrift für Deutsches Recht
MLR	Modern Law Review
NBW	Nieuw Burgerlijk Wetboek
NILR	Netherlands International Law Review
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
OGH	Oberste Gerichtshof
ÖJZ	Österreichische Jüristenzeitung
OLG	Oberlandesgericht
QB	Queen's Bench Division
RabelsZ	Rabels Zeitschrift
Rb	Rechtbank van Koophandel
RFDA	Revue française de droit aérien
RIW	Recht der Internationalen Wirtschaft
RM Themis	Rechtsgeleerd magazijn Themis
RW	Rechtskundig Weekblad
Rz	Randziffer
SEW	Sociaal Economisch Weekblad
S&S	Schip en Schade
Stb	Staatsblad
TPR	Tijdschrift voor Privaatrecht
TRANS	Transport
Trb	Tractatenblad
Tr. gr. inst.	Tribunal de grande instance
Tr Comm	Tribunal de Commerce
ULC	Uniform Law Cases
ULR	Uniform Law Review
Unidroit	Institut international pour l'unification de droit privé
VersR	Versicherungsrecht
WOW	Wet Overeenkomst Wegvervoer
WP	Working Party
WPNR	Weekblad voor Privaatrecht Notarisambt en Registratie
WvK	Wetboek van Koophandel
ZPO	Zivilprozessordnung

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(Only works which are cited by the name of the author alone or by a general name are included in this table)

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Asser-Scholten (Algemene Deel)	Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen Deel, by Paul Scholten, 3rd ed., supplemented with practical information by G. J. Scholten, Zwolle 1974.
Asser-Rutten I	Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht, Part I, De verbintenis in het algemeen, 6th ed. by L. E. H. Rutten, Zwolle 1981
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Introduction; scheme of treatment

‘Das Recht der Haftung aus Frachtgeschäften gehört zu den unübersichtlichsten und kompliziertesten Teilgebieten des Handelsrechts.’

It is with such barely encouraging words that Helm opens his study of the liability of the carrier.¹ Whoever becomes acquainted with any part whatsoever of transport law will sooner or later acknowledge that Helm’s lament has lost none of its topicality. The unsurveyability of the transport law terrain must in large measure be ascribed to the existence of different sources of law (conditions, statutes, conventions) that have been drawn up throughout its history for separate branches or means of transport. This in part explains its complexity but to this must also be related the fact that the nature of transport law was regarded as an exceptional one, or at least assumed an independent place in the system of general private law.² With every possible distinction that is determinable amongst the different regulatory transport regimes, the question arises, what is the relationship between transport law (national and international) and general private law? This question is connected, on the one hand, with the traditional distinction drawn between civil and commercial law (to what extent is it possible to assimilate transport law to general private law, or divergence therefrom justifiable?) and, on the other, the mingling or merging of national and international legal aspects.

The unsurveyability and complexity just mentioned have contributed in great measure to transport law being stamped as ‘special’, as law that is difficult to handle and, consequently, both in legal practice and legal science it was and is still practised by specialists, often of branches of transport. Having regard to the developments that have occurred in recent years in the field of transport law³ as well as in the area of unification of numerous private law fields, the question arises whether this notion can be maintained. Such developments compel continuous reflection (and further reflection) on questions such as: how must the place and nature of transport law in the private law context be further determined? To what extent does the fact that the present enquiry concerns legal materials forming part of international commercial law here play a role? In regard to the application of national law, including conflicts of law choice of law rules, to what extent should an attitude of restraint be practised? Despite the differences between the regulatory transport regimes, and in fact underlying them, is a picture of consistent, autonomous legal

1. Helm, *Haftung*, p.1

2. See, Wachter, pp.95 et seq.

3. J. Ramberg, *The implications of new transport technologies*, ETL 1980, pp.119 et seq.

concepts not slowly being sketched?⁴ One must be fully alive to these and similar questions before one subjects a particular part of the overly fragmented field of transport law to examination.

In the course of the present enquiry into the liability of the carrier in international road transport, as that is regulated by the Convention on the Contract for the International Carriage of Goods by Road (CMR), the conviction has grown that one may, indeed can not abstract this subject of enquiry from the remainder of transport law, which must itself be seen in the wider context of unified law.

Formalised law only displays its true stature when it has functioned in practice for a period of time. Now that the CMR has attained the stage of adulthood (since 1961 it has entered into force throughout virtually all of Europe)⁵ – which is not to say that it has yet experienced all of its growing pains – and having regard also to the enormous growth in international transport of goods by road, it appears to be an opportune moment to draw up a balance of its vicissitudes during this period. Not that criticism of the CMR is lacking. In this study, besides an assessment of the caselaw and literature concerning the CMR, attention will be paid to proposals based on practical experience as well as on ideas (some vigorous) expressed in the literature, and which have, at least in part, in view the reform of the CMR.⁶

Central to this enquiry is the heart of the CMR: the liability of the carrier for loss of and for damage to goods occurring during the time when these are entrusted to him as well as for delay in delivery. The content of the Convention will be ascertained by way of analysis of the most important elements that this material has brought to development: caselaw and legal literature. It will be demonstrated that academically based reflections have yielded fruit in judicial decisions. This is postulated with some emphasis in order to counter the quite widely held belief that practical transport law and academic theorizing should be poles apart. Also, or rather, precisely because transport law is fragmented, it requires, as does every other law having a practical significance, a systematically thought out foundation. Perhaps the chronic lack of academic

4. Thus, C. M. Schmitthoff, ICLQ 1968, at p.563: 'One of the most remarkable developments on the contemporary legal scene is the emergence of an autonomous law of international trade, which, by tolerance of the national sovereigns, is breaking through the barriers of national legal systems and assuming universal character' and at p.566: 'In the law of international trade of the future we shall become increasingly accustomed to working with synthetic non-national legal concepts. The production of such concepts which are internationally acceptable is the greatest contribution which comparative law can make to the unification or harmonisation of the law of international trade.'

See also Kropholler, p.37: 'Ferner wird das internationale Handelsrecht (...) von einer Reihe von Autoren aus aller Welt als autonomes Rechtssystem in statu nascendi angesehen.'

5. Transport, p.1359; see also Groth, p.1. An Agreement dating from 1974 between the CMEA (eastern block) countries is synchronised with the CMR, see D. Richter-Hannes, *Etudes offertes à René Rodière*, Paris 1981, p.506.

6. The first joint proposal on behalf of the International Chamber of Commerce and the International Union of Transporters dates from November 1967. The second, much more radical, proposal by the International Federation of Freight Forwarders dates from November 1983, hereafter referred to as FIATA Report.

interest in transport law is also due in part to the complexity and unsurveyability referred to earlier.

The nature of this legal regime, intended as a uniform regime,⁷ necessitates establishing the essence thereof in the *first* chapter, before entering upon the substance of the Convention. One is here concerned with elements that have contributed to the formation and development of uniform convention law in general,⁸ such as methods of interpretation, their individual order of priority, the influence that ought to be given to sometimes scanty historical facts and the indispensability of comparison of caselaw and literature. The view is defended that reflecting on the character of uniform transport law is essential because that establishes the approach to interpretation of the substance of the Convention: the nature of uniform convention law acts as it were as a direction coefficient for the development thereof.⁹ The Convention is often interpreted inaccurately as a result of the failure to recognise, or at least not fully to recognise, this nature. The extent to which the notion defended here is shared by judges and legal writers is examined.

Consequently some consideration is paid in the first chapter to the nature and purport of the Convention so that the material subsequently treated by chapter can be tested against it.

Before penetrating to the centre of the Convention, one must obviously establish in which circumstances it is applicable, and that is the subject of the *second* chapter. The desired uniformity can be endangered by the so-called aggressive scope rule of Article one, which can foster the impression that application of the Convention is imposed. In the light also of the approaches formulated in the first chapter, the relationship between the scope rule, with its thrust towards uniformity, and the conflict rules of private international law will be examined. With the question of the application of the Convention one can group the problems to be identified into those that concern the transport contract and those that concern the remaining elements in Article one. Having dealt with these conditions, upon which the applicability of the Convention is dependent, the thorny question of the demarcation of the substance of the transport contract from the forwarding contract, which is not covered by the Convention, as well as from other contracts related to the transport contract, persistently predominates. To a great extent the problem in this area is due to the absence of adequate instrumentation whereby the transport contract could be differentiated from related contracts.

The *third* chapter is devoted to an examination of special types of transport, namely, roll-on/roll-off transport (Art.2), sub-contracted transport (Art. 3) and successive carriage (Artt.34 et seq.), and provides an examination of the relationship, and the differences, between these types of transport. The liability

7. See the Preamble to the CMR.

8. Transport law has transpired to be pre-eminently a suitable medium for the development of uniform law. See *infra* Chapter 1, n.6.

9. See J. Jakubowsky, *Law and International Trade* (Festschrift Schmitthoff), Frankfurt am Main 1973, p.210: 'The conception regarding the rules of international trade law as a part of international law in the broad sense serves the proper and uniform interpretation and application of such rules.'

of carriers under these types of transport displays an external as well as an internal aspect.

The liability of the carrier is scrutinized in the *fourth* chapter. Just as in every transport regulation, this liability is also central under the CMR. Nobody would deny that on this crucial point maximum clarity is desirable and necessary. The reality in the various countries demonstrates rather a situation inversely proportionate to the required degree of uniformity in this area, as witness the prevailing current of judicial decisions, which not infrequently dissent from each other.¹⁰ Thus it has come about that a settled pattern appears to be wanting. It is highly detrimental to the aims of the Convention when decisions as to the most important substantive elements of the Convention are not predictable with a reasonable degree of certainty. The method of treatment in the fourth chapter differentiates between substantive and procedural elements. Under substantive fall dogmatically tinted subjects such as the basis of liability, notions of impossibility, responsibility for persons and material employed by the carrier; the significance of matters such as proof, burden of proof and evidentiary value are gone into under procedure. To be in the right is meaningful only by way of getting one's rights. With the help of the views revealed in the first chapter, and by reflecting on these central principles, an elaboration of the regime of liability, differentiated by purpose, is attempted.

Once this regime has been elaborated, it follows that one should thrust on to the practical consequences of liability, namely, the extent of compensation for damage. In the *fifth* chapter the liability model is, as it were, converted into money. This chapter is concluded by a treatment of two general transport law rules that concern the liability model including the extent of compensation. The first rule, which concerns extra-contractual claims against the carrier, confers a somewhat privileged effect on the transport contract, whereby the liability model is preserved. The second rule, which is invoked when the carrier's wilful misconduct or gross negligence is responsible for the damage to the goods, breaks through the liability model.

In practice, not only have difficulties arisen with regard to establishing the extent of compensation for damage but likewise the Convention appears to offer insufficient connecting factors for the question who is entitled to claim against the carrier for eventual compensation. This is the subject of the *sixth* chapter. One is here concerned with a recalcitrant issue of contract law that has been incompletely clarified in transport law. A development in German caselaw, in which various facets of this issue are illuminated, deserves consideration.

Attention is paid in the *seventh* chapter to the issue of international competence. Substantive uniformity will be advanced to the extent that greater certainty as to competence exists. The views set forth in the first chapter here receive a concrete form.

10. See R. Wiffels, ETL 1976, pp.208-230.

Finally, the limitation of actions regulation (periods of limitation), including the legal remedies of suspension and interruption, has given rise to various problems. Thus, there appears to exist a difference of opinion as to the interpretation of the special suspensive rule, which functions exclusively in favour of the claimant. Also the fact that the Convention itself regulates, as far as periods of limitation are concerned, certain matters while referring others to national law can create confusion. This *eighth* and final chapter closes with an inventory of objections raised to this regulation.

Description of the convention

'National law is one thing, and international another.'¹

§ 1. Place of the convention

The Convention on the Contract for the International Carriage of Goods by Road (CMR) can be allocated to the terrain of international (European) commercial law. This area of law, which arose in the early Middle Ages and is often referred to as the *lex mercatoria*,² was from earliest times distinguished by a strong international character and consisted almost entirely of unwritten law. By contrast, cultural and social-political changes so developed that in the course of the nineteenth century many European countries codified the then existing law. This codification movement, which above all gave expression to the notion of the sovereignty of nations, probably unfavourably influenced the development of large sectors of international commercial law.³ Without doubt, the commercial spirit was thereby initially obstructed in its attempts to create transnational areas of law, but adapted itself quickly, in the wake of the codifying nations, to the new circumstances. It can be postulated that by the end of the nineteenth century (trade) practice was stronger than (the sovereignty) principle; by means of laying down, inter alia, conventions, it was endeavoured to regulate legal relations in a uniform manner, as far as possible independently of nations. In this way it was sought to bring about new areas of law which would be governed by one definite, uniform system of law. This unification movement may, as a reaction to the codification era, therefore be seen in historical perspective as a continuation of the old *lex mercatoria*.⁴ This likewise explains why it was those areas of law that from earliest times had been counted as belonging to commercial law that were taken into consideration.⁵

1. R. David, *International Encyclopedia of Comparative Law*, Tübingen–The Hague–New York 1971, Chapter 5, *The International Unification of Private Law*, no.70.

2. Thus, for example, by C. M. Schmitthoff in his seminal article 'Das neue Recht des Welthandels,' *RebelsZ* 1964, p.27; B. Goldman, *Etudes de philosophie du droit*, *Frontières du droit et 'lex mercatoria'*, Paris 1964, pp.177 et seq.; E. Langen, *Transnational Commercial Law*, Leyden 1973, pp.8 et seq.

3. Wery, p.7.

4. C. M. Schmitthoff, *loc. cit.*, p.49.

5. See J. G. Sauveplanne, *Rechtsstelsels in vogelvlucht*, Deventer 1981, p.25: 'Trade has always been a trailblazer for legal unification.' The term '*lex mercatoria*', because of its diverse use, appears (due to its historical – or nostalgic? – overtones) to capture the imagination of those who devote themselves to the full development of uniform law. There need be little objection to the terminological propagation of the notion of a new *lex mercatoria* provided one realises that, contrary to earlier times, not only do international trade usages and standard contracts belong to

It is consequently no surprise that, in complete conformity with the requirements of international commercial law, it was above all the contract for the international carriage of goods that was the subject of unification.⁶ Conventions concerning, in chronological order, rail, sea, and air carriage were laid down. These conventions were drawn up, as were those of later date for the remaining branches of transport, on the basis of the relevant means of transport. In the period between the two World Wars the carriage of goods by heavy goods lorry increased significantly in importance. Following the Second World War, principally as a result of technological developments in the field of transport, road transport had become a link in the chain of supply of goods, the possible absence of which was no longer within the bounds of contemplation. Consequently, a convention concerning the international carriage of goods by road had to come.

§ 2. History of the Convention⁷

A tripartite commission of experts drawn from Unidroit, the International Chamber of Commerce and the International Road Transport Union began work in 1948. A comparative law study carried out by Unidroit⁸ served as the

the sources of this area of law, but also enacted law. See C. M. Schmitthoff, *loc. cit.*, pp.59 et seq. The question that recurs in the literature is to what extent can the *lex mercatoria* be considered to be a normative autonomous system. On this recently, H. Braeckman, *De Lex Mercatoria*, RW 1983/1984, pp.2651 et seq., with references to the abundant literature from various countries on the *lex mercatoria*. Braeckman regards the autonomy of the *lex mercatoria* to be considerable, having regard to the fact that its development is dependent on the room allowed it by national law. A critical examination of the *lex mercatoria* is provided by P. Lagarde in his contribution to *Le droit des relations économiques internationales, Etudes offertes à Berthold Goldman*, Paris 1982, pp.125 et seq.

6. That transport law is an eminently suitable legal area for effectuating unification is underlined by C. M. Schmitthoff, *op cit.*, p.47; E. von Caemmerer, *Probleme des Europäischen Rechts*, (Festschrift Hallstein), Frankfurt am Main 1966, pp.63, 70, 94; Helm, *Haftung*, pp.1, 184; Kropholler, pp.24, 168, 170, 172; H. Dölle/R. Herber, *Kommentar zum Einheitlichen Kaufrecht*, München 1976, Art.2 EKG, Rz 2; J. G. Sauveplanne, *Eenvormig privaatrecht*, RM Themis 1961, p.260; M. Matteucci, *Rev. Unif* 1967, p.17; R. Monaco, *ULR* 1975, p.43; R. Rodière, *International Encyclopedia of Comparative Law*, Tübingen-The Hague-New York 1972, Chapter 1, *Law of Transports*, no.2; P. Müller, *Die Vorbehalte in übereinkommen zur Privatvereinheitlichung*, Tübingen 1979, p.182; D. Richter-Hannes/R. Richter, *Möglichkeit und Notwendigkeit der Vereinheitlichung des internationalen Transportrechts*, Potsdam-Babelsberg 1978 conclude at p.124: 'Insgesamt lässe sich feststellen, dass eine Vereinheitlichung des internationalen Transportrechts keine Utopie, sondern möglich und unter dem Gesichtspunkt des internationalen multimodalen Transports sogar nötig ist.' See also A. L. Diamond, *Unification*, (Festschrift Sauveplanne), Deventer 1984, p.48.

7. A number of documents identifiable by reference codes operated by the Economic Commission for Europe, and from which the genesis of the CMR can in part be unearthed, were made available to the present writer for perusal by the Netherlands Ministry of Traffic and Water. The larger part of the documentation, which also serves as source material in the following Chapters, was made available by the International Road Transport Union (IRU), established in Geneva. See further Loewe, nos.1-5 as well as the dissertations of Heuer, pp.11-20 and Nickel-Lanz, pp.5-13, 187-189.

8. In this comprehensive 78 page study the substance of the most important transport law concepts of a large number of European countries is compared.

starting point for its work. Meanwhile, a Working Party was set up by the (UN) Economic Commission for Europe with the task of regulating the multi-faceted problem connected with both the carriage of goods as well as that of persons.⁹ The tripartite commission¹⁰ produced a draft in 1949 and submitted it to the European Working Party for discussion.¹¹ Thereupon regular and close consultation took place between the committee of experts and the European Working Party, in which also representatives of various countries were included.¹² An important moment in the course of the negotiations was the decision of the now quadripartite commission¹³ meeting at Rüdesheim (4-12 June 1951) to adopt for the disputed liability regime of the carrier the correctly modified version of Article 27 of the rail convention (CIM).¹⁴ (The modification was proposed by a CIM commission meeting from 19 to 24 February in Wengen and from 29 March to 7 April 1951 at Montreux and adopted at a meeting from 10 to 15 October 1951 in Bern.) Following a critical examination by a 'Small Committee of Experts'¹⁵ the matter appeared to be concluded but a new commission advised reconsideration of the results so far achieved.¹⁶ After a year of hard negotiations

9. The Working Party set up by the United Nations Economic Commission for Europe, Inland Transport Committee, Sub-committee on road transport, received on 5 May 1949 the following commission: 'Le groupe est chargé de définir les problèmes qui se posent en ce qui concernent le développement et l'amélioration des transports de voyageurs et de marchandises par route en Europe ...' (TRANS/SCI/22, 8 October 1949).

10. In the documents made available to the present writer the official title is: Comité du contrat de transport international par route. The Committee was under the chairmanship of the Swede Bagge.

11. TRANS/WP 9/11, 10 October 1949.

12. E/ECE/TRANS/SCI/116, 30 April 1951 and TRANS/WP9/11, Rev. 1, 8 January 1952. On the significance of the cooperation between the committee and the Working Party Heuer notes at p.14: 'Die mit dieser Anregung eingeleitete Koordination der Arbeit des Sachverständigenausschusses und des Binnenverkehrsausschusses ist im wesentlichen bis zum Abschluss der Verhandlungen beibehalten worden.'

13. The committee became quadripartite as of 1951 when the representative of the International Association of Transport Insurers became a member.

14. See Art.17(2) CMR. E/ECE/TRANS/SCI/116, p.5 and TRANS/WPG/11, Rev. 1, 8 January 1952, p.2. Although Bagge found the new version to be an improvement and recommended adoption ('la nouvelle solution est plus claire et satisfait mieux aux exigences juridiques que l'ancienne rédaction') he noted at the same time in his letter of 28 December 1951 to the European Commission that: 'Il serait cependant à désirer que la signification de l'expression "des circonstances que le transporteur ne pouvait pas éviter ..." soit éclaircie.' There is many a judge who would endorse this telling observation.

15. Set up by the European Working Party and comprising Hostie (Unidroit), Sydow (Sweden), chairman of the previously established group of experts of the Working Party, and Kopelmanas (Secretary of the Comité des Transports intérieurs). Its conclusions are set out in document TRANS/WP 9/22, 21 December 1953.

16. This committee was also chaired by Sydow. The text of the draft proposed by this committee is based on that of the Small Committee and is to be found as Annex to the document referenced as TRANS/152, TRANS/WP 9/32, 10 May 1955.

on the limit of the carrier's liability,¹⁷ it was at the final meeting of the above committee¹⁸ that, following exhausting discussions as a result of which the most important amendment to be noted was an increase in the limit from 18 to 25 gold francs, the draft was adopted: the Convention on the Contract for the International Carriage of Goods by Road (CMR) and Protocol of Signature, Geneva, 19 May 1956.¹⁹

At the instigation of the International Chamber of Commerce and the International Road Transport Union, the Economic Commission for Europe convened a conference under the chairmanship of Loewe from 14 to 16 January 1972 at Geneva at which questions, in part drawn up by the above organisations, directed to whether a revision, even a partial revision, was necessary or even desirable, were examined.²⁰ The result of the meeting led certainly to taking stock of a number of unclear and undesirable matters revealed by practice but not to revision of the Convention. Subsequently, in Geneva on 5 July 1978, a Protocol was agreed with the purpose of substituting the Special Drawing Right on the International Monetary Fund for the gold franc as the unit of calculation.²¹ This Protocol entered into force on 28 December 1980.²²

§ 3. Nature of international convention law

With the CMR one finds oneself, from the point of view of substantive law, in an area in which the unification of legal rules is, from the point of view of the practical utility thereof, certainly feasible. The countries in which the Convention is applicable form, as it were, one legal area connected by one legal system. The Convention may consequently be regarded as a separate system beside the national legal systems, which is of importance, as will be dealt with shortly, for its interpretation.²³ In this way the existing frag-

17. J. Vrebos, ETL 1966, p.678; see *infra* Chapter 5, § 3.2.1.

18. The meeting took place in Geneva from 12 to 19 May, TRANS/168, TRANS/WP 9/35, 6 June 1956.

19. E/ECE/253, E/ECE/TRANS/489. For the text of the Convention see Annexes 1-3; authentic texts: English and French (Art. 51 CMR). Austria, West Germany and Switzerland have agreed on a joint German translation, see Annex 4; Muth-Glöckner, p.194. The Protocol was signed by ten States. The Convention entered into force in accordance with Art.43 on 2 June 1961, three months after Italy as fifth State following Yugoslavia, France, Austria and The Netherlands had acceded. Up to the present 24 States have ratified or acceded; see Transport, p.1359. Groth, p.1, expresses the hope that Albania, Ireland, Turkey and Cyprus will accede on the basis of their membership of the European Commission for Europe, see Art.42.

20. W/TRANS/SCI/438, 19 April 1972. The amendments proposed by these organisations can be found in document W/TRANS/SCI/301/Add.1, 14 November 1967. These facts will recur several times in the following Chapters.

21. For the text see Annexes 4 and 5. See on this Chapter 5, § 3.2.2.

22. Transport, p.1422.

23. Wery, pp.13-14.

mentation can be resisted.²⁴ It emerges quite clearly from the vast literature on uniform law that the general aim of the movement towards uniform law is grounded in a firm conviction that a uniform international complex of norms is essential to give full effect to international legal relations. Inherent in the need of trade and legal practice for legal certainty in a particular legal area is the implication deriving from both the basis and the object of the unification movement that national law in principle ought not to be considered as a source of law for international legal relations.²⁵ The notion that uniform law is autonomous in character is, with various terminological differences, generally accepted by practitioners of uniform law.²⁶ The most important normative implication to emerge from this proposition is that a convention is thus autonomous, that is to say, must be interpreted by reference to itself.²⁷

What does this autonomy mean in concrete terms for the application of a convention? Two aspects, which are of importance in regard to the interpretation of convention law, can here be distinguished. The first, the prohibitive aspect, means that in principle no recourse may be had to national law, including conflicts of law in the application of uniform law. The second aspect, the directive aspect, implies that as far as possible a method of interpretation should be employed that, in conformity with the nature of uniform law, is directed towards fulfilling and furthering the principles underlying the Convention.

Both aspects prompt a number of comments as to the role and significance of national law in relation to the nature and interpretation of uniform law. As already noted, the consequence of the autonomous character of uniform law is that national law is in principle not suitable to the task of regulating international legal relations. A uniform legal model ought to be considered as

24. P. M. F. Durand, *Revue trimestrielle de droit commercial* 1956, p.621.

25. For example, M. J. Bonell, *RabelZ* 1978, p.490: 'Was nun speziell die typischen Vertragsverhältnisse des internationalen Handels betrifft, so scheinen diese schon ihrem Wesen nach ungeeignet, innerhalb einer einzigen nationalen Rechtsordnung lokalisiert zu werden.' See David, *op. cit.*, no.23.

26. The issue of autonomy is discussed by the following: M. J. Bonell, *Das autonome Recht des Welthandels*, *RabelsZ* 1978, pp.485-506; P. G. Vallindas, *Autonomy of International Uniform Law*, *Revue Hellénique de droit* 1955, pp.8-14; David, *op. cit.*, no.261; Wery, *passim*; J. Jakubowsky, *The autonomy of international trade law and its influence on the interpretation and application of its rules*, in: *Law and its international trade (Festschrift Schmitthoff)*, Frankfurt am Main 1973, pp.207-214; C. M. Schmitthoff, *loc. cit.*, pp.59, 71, as also *International Trade Law and private international law (Festschrift Hans Dölle)*, Munich 1976, pp.257-272; A. V. M. Struycken, *De bevoegdheidsregeling van het Europese Executieverdrag*, 1978, pp.6,8; D. Martiny, *RabelsZ* 1981, pp.427 et seq.; J. Stalev, *Etudes offertes à René Rodière*, Paris 1981, p.312. Different is, for example, E. Langen, who speaks of 'Transnational Commercial Law', Leyden 1970 and whose views build more or less on the conflict of laws model. That is also the case with his *Transnationales Recht*, Heidelberg 1981. Kropholler, p.37, reserves the term autonomy for national law and prefers to speak of 'internationales' law (p.6), which is criticised by P. L. Wery, *NJB* 1976, p.475. Despite extensive consideration of the issue of interpretation of uniform law, Miller, pp.330-369 disregards the autonomous character thereof, which perhaps explains her ambivalent attitude regarding the application of national law.

27. Helm, Art.1 CMR, Anm. 4, on which see the present writer in *NJB* 1979, p.890; Dölle/Wahl, Art.17 EKG, Rz 20; M. J. Bonell, *op. cit.*, p.42: 'Vereinheitlichtes Recht is als geschlossenes Ganzes zu begreifen und aus sich selbst heraus auszulegen.' See further the caselaw cited in § 5 infra.

more capable than any national legal system whatsoever of producing stability and legal certainty,²⁸ and therefore justice.²⁹

At this point, however, one encounters the thorny issue of the demarcation between uniform law and pure national law. In other words, the boundaries of the legal area commanded by rules of uniform law are not always to be delineated with precision. The question of the scope of the uniform law rules in issue is of practical importance given that the answer thereto is in principle decisive of the law applicable to the international legal question to be resolved. The answer to the question is not always easy because the area of law for which unification is intended can often not be sharply drawn.³⁰ Various causes, which deserve attention having regard to the issue of interpretation to be dealt with in the following section, can be indicated for this.

History shows that drawing up uniform law requires³¹ a careful weighing of the scales between the measure of unification thought necessary and that thought desirable; besides legal motives, more often than not political and economic motives play an important, even a decisive role,³² which explains the many enforced compromises shrouded in obscure rules and vague concepts. The drafters could employ rules and concepts the content of which is different in different countries or indeed elect to choose precisely one particular meaning. Consequently, the Convention systematically demonstrates a sometimes necessary, by its nature unavoidable, degree of inconsistency and incompleteness.³³ And thus uniform law is from the outset a fragile law, whose capacity for life is influenced unfavourably by the manifold application of national legal concepts and principles by the judge in conflict with the aim of the uniform law. The least dangerous engagement, *nolens volens*, of national law occurs when a convention itself refers to the law of a particular country. In this manner the CMR invokes *expressis verbis* the assistance of national law in a number of cases.³⁴ The circumstances outlined above, which to a greater or lesser extent manifest themselves in every part of uniform law

28. H. Schadee, WPNR 1960, 4628; Loewe, nos. 38, 39, 42.

29. The way in which motives other than practical businesslike ones can often play a role in the unification movement, and the extent thereof, has been elaborated in a thoughtful paper by F. Fabricius: *Internationales Handelsrecht und Weltfrieden, Law and its International Trade* (Festschrift Schmitthoff) Frankfurt am Main 1973, pp.101-144.

30. Wery, n.71; Kropholler, pp.301 et seq.; Miller, p.337: 'A preliminary difficulty is to determine where the uniform law stops, and where, consequently, the rules of municipal law start to be applicable.'

31. What Lord Wilberforce noted in another context (*Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 559) applies here with equal force: 'To plead for complete uniformity may be to cry for the moon.'

32. See the problems indicated in Chapter 5, § 3.2, which arose upon the establishment of the limit in Art.23(3) CMR. See further, the present writer, *Recht door Zee* (Festschrift Schadee), Zwolle 1980, p.97, partly with reference to the genesis of the Hamburg Rules.

33. For the disadvantages accompanying unification, see J. Kropholler/P. H. Neuhaus, *Rechtsvereinheitlichung-Rechtsverbesserung?* *RebelsZ* 1981, pp.73 et seq.

34. See Art.16(5), Art.29(1), Art.32(3) CMR.

and consequently also in the CMR, testify that the border between uniform and strictly national legal sources is in some degree vague. The scope of uniform rules can in some cases be determined only hesitantly. The autonomous character of uniform law does not in consequence automatically entail that it is a fully closed system, but rather that the system exhibits multiple openings towards national legal systems.

When national conflicts rules are engaged does the danger then threaten that uniform law will be prejudiced by application of national substantive private law? To this one should bear the following in mind. Substantial differences exist in the various national legal systems regarding the law of carriage of goods by road. These differences, which promote legal uncertainty in international trade relations, remain unaffected by the operation of the conflicts rules of the classical Savignian private international law system. It is here not possible to go into the relationship between international and uniform private law other than to note that³⁵ the system of conflict rules is exceptionally unsystematic and inconsistent;³⁶ the rules themselves can vary from country,³⁷ just like national substantive law, which would seem to be sufficient reason to regard them as in principle an unreliable guide for effecting the legal certainty aimed at. The explanation for this stems principally from the different premises from which uniform law and conflict of laws proceed. Whereas the conflicts rule is intended to maintain, to respect the existing substantive differences between the national legal systems, uniform law aims to eradicate precisely these diversities.³⁸ The marked reluctance of uniformists to engage the conflict of laws is hereby explained.³⁹ But this reaction should, as much as

35. Extensively on this, see: E. von Caemmerer, *Rechtsvereinheitlichung und internationales Privatrecht, Probleme des europäischen Rechts* (Festschrift Hallstein), Frankfurt am Main 1966, pp.63-95; R. David, *op. cit.*, nos. 95-105; Kropholler, pp.167-213; J. G. Sauveplanne, *Eenvormig Privaatrecht*, RM Themis 1961, pp.230-234; *ibid.*, NJB 1979, p.693; J. Stalev, *op. cit.*, pp.311-322. To the extent that further harmonisation or unification of conflict of laws takes place, so accordingly the importance of the distinction between uniform private law and conflict of laws becomes weaker, despite the different starting points.

36. In The Netherlands H. U. Jessurun d'Oliveira has put himself forward as the most consistent opponent of Savignian conflict of laws. See, *De anti-kiesregel*, Deventer 1971; C. W. Dubbink, *Het rechtvaardigheidsgehalte van het internationaal privaatrecht*, Speculum Langemeijer, Zwolle 1973, pp.63 et seq. has ensured a certain counter current to this 'Amsterdam School', as has also H. Drion, RM Themis 1976, pp.491-493.

37. Integration of conflicts rules has also been sought for some considerable time. An important development in the area of contract law in the EEC is the establishment of the Convention on the Law Applicable to Contractual Obligations (Trb. 1980, 156).

38. See Wery, p.13; J. G. Sauveplanne, *op. cit.*, pp.230-231; E. von Caemmerer, *op. cit.*, p.81; Kropholler, p.183: 'Ohne Rechtskollisionen kein Kollisionsrecht.' *Contra*, P. Müller, *op. cit.*, p.7.

39. G. Philips, *Erscheinungsformen und Methoden der Privatrechtsvereinheitlichung*, Frankfurt am Main 1965, pp.37 et seq.; M. J. Bonell, *op. cit.*, p.489; particularly, David, *op. cit.*, nos. 62, 270. For a concrete instance where proponents of uniform law disagree on the desirability of invoking conflict of laws, see Wery, p.24 n.68 and J. G. Sauveplanne, *Uitlegging van eenvormig privaatrecht, Verzekering van vriendschap* (Festschrift Dorhout-Mees), Deventer 1974, p.101.

possible, be avoided⁴⁰ for it leads to, or at least promotes, the irrevocable nationalisation of international legal relations.⁴¹

It has frequently been the subject of enquiry and discussion whether it would not be useful to embody the normative nature of uniform law in the text of the Convention in question.⁴² Such a provision would underline the nature of the legal system involved⁴³ because the international law obligation of the States and their judges to endeavour to ensure unification would thus be expressed. Whereas no miracles might be expected from such a provision in a convention, this approach, which gives expression to the prohibitive aspect mentioned above, could nevertheless exert a psychological effect on those charged with the application of uniform law.⁴⁴ Although the CMR lacks such a provision, the function thereof is assumed by the Preamble, which expresses, as it were, the pretensions of the Convention, indicating the direction that development of the Convention rules ought to take.

Besides the factors already mentioned and which are contained in the Convention itself, mention must be made of a number of exogenous elements that could prevent development in accordance with the character of convention law.⁴⁵ In connection with the subject of methods of ascertaining law which is shortly to be discussed, one may here mention merely the fact that uniform law, given the absence of an international legal decision-making or advisory body, must usually be applied by national courts of justice.⁴⁶ It is often the case that the national judge lacks the required insight into the nature and the justifiable claims of the uniform law, conversant as he is with his own national

40. For the cases where conflicts of law can be invoked, with all the consequent uncertainty, in CMR law: R. van Rooy, *Private international law aspects of road transport*, Hague-Zagreb Essays 2, pp.66-85. See also pp.246, 247. The inconsistent character of conflicts law has on occasion led to some manipulation in the law of the sea. Thus, the Rb Rotterdam strove with praiseworthy tenacity to apply uniform law, whereby the end justified the conflict of laws means. W. E Haak, WPNR 1977, 5397; *ibid.*, NJB 1982, p.718: 'In this manner is uniform convention law shrunk to a fan of national, amongst themselves divergent, Hague Rules, where it attempts by means of rules of private international law to maintain or lose its position.'

41. David, *op cit.*, no.247.

42. See, e.g., Art.17 Uniform Law on Sales, Art.3 Hamburg Rules. On this method, J. Eörsi, *American Journal of Comparative Law* 1979, p.313, 326. On the relationship between Art.17 Uniform Law on Sales, on which H. Dölle/E. Wahl, *op cit.*, Art.17 EKG, Rz 13; M. J. Bonell, *op cit.*, p.42 and Art.7 Vienna (Uncitral) Convention concerning International Sales, see M. J. Bonell, *ULR* 1978, II, pp.2-12.

43. Art.3 Hamburg Rules provides: 'In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.' See on this, amongst others, S. Mankabady, *The Hamburg Rules on the Carriage of Goods by Sea*, Leyden-Boston 1978, pp.45-49, respectively K. Simmonds, pp.117-123; M. Mustill, *Colloquium on the Hamburg Rules*, London 1979, pp.31-35; G. Auchter, *ETL* 1979, p.121.

44. For a positive approach also J. Jakubowsky, *op cit.*, p.214; Kropholler, pp.240-243.

45. For a summary, David, *op. cit.*, nos. 55-85, 248-259; Kropholler, pp.24-30, §§ 17-22; J. Jakubowsky, *op cit.*, p.213: 'The sources of the differences in the interpretation and application of uniform law are manifold.'

46. J. Jakubowsky, *op cit.*, p.213 terms this the most significant obstructive circumstance. On this further § 4.

legal system upon which his actions and thoughts largely – and understandably – rest. The nature of uniform law is even less visible to the judge when international conventions are interwoven with national law by means of national legislative techniques. In this manner can the above-mentioned shifting, or at least blurring, of boundaries between the national and international legal spheres arise, with all that that entails.⁴⁷ Such blurring of boundaries damages the autonomy of uniform law whenever national legal concepts dominate convention rules: it is an encapsulating process.⁴⁸

The question that arises is how are the injurious consequences of all this to be reversed? To this end in the cadre of this study some observations concerning the employment of methods of interpretation by the national judge are necessary.⁴⁹

§ 4. Interpretation of international convention law

The preceding discussion leads to the second aspect of the norm postulation that results from the autonomous character of convention law. What actual methods are available to the judge in the cadre of application of uniform (transport) law? It was postulated above that on the basis of the prohibitive aspect the judge, if he wishes to respect the nature of uniform law, must be able to distance himself from his national legal system. That is easier said than done.

‘Es blieb allerdings zu fragen inwieweit diese grundsätzlichen Überlegungen zum internationalen Einheitsrecht und zu Auslegungsregeln (...) im internationalen Seehandelsrecht in die Tat umgesetzt werden können.’⁵⁰

47. See *Vaststellingswet* Book 8, first part of the *Nieuwe Burgerlijk Wetboek*, Means of Transport and Traffic, MvT p.3, sub 7, on which the present writer, *WPNR* 1977, 5402 sub 7. Another example of this blurring in Belgium is reported by Y. de Bouver, *SEW* 1980, pp.105-106. See concerning German sea law: K. H. Necker, *Recht über See* (Festschrift Stödter), Hamburg 1979, p.96. A constitutional law factor can also contribute to the mingling of legal spheres, to the detriment of uniform law, namely, the fact that and the means whereby a convention is supposed first to be introduced into the legal system before it can be applied. See also L. Erades, *RM Themis* 1982, pp.56-57. An example of a court discerning and exorcising the danger due to this ‘transformation process’ is to be found in *OLG Dusseldorf* 27.3.1980, *VersR* 1980, p.826. Concerning this ‘transformation process’ von Caemmerer, *op cit.*, p.72 had already proposed: ‘Doch sollte das nicht hindern, dem internationalen Charakter des Einheitsrechtes bei seiner Auslegung und Handhabung gleichwohl voll Rechnung zu tragen.’

48. The contrary applies also to infiltration, see Wery, p.28. This form of reflex operation does not impair the character of uniform law; on the contrary, it is often a confirmation of it. For the possible reflex operation of the CMR on Swedish national transport law, see G. Pettersson/J. Wetter, (1978) 4 *LMCLQ*, 569.

49. For other means, Kropholler, in particular ‘V. Kapitel: Methode’, pp.235 et seq.; J. G. Sauveplanne, *Mesures tendant à concilier les divergences et à résoudre ces divergences par voie juridictionnelle*, *Annuaire Unidroit* 1959, pp.277-297; *ibid.* in collaboration with T. J. Dorhout Mees, *Rapport sur les procédures relative à la conciliation et la solution des divergences d’interprétation du droit uniformé*, *Annuaire Unidroit* 1963, pp.19-40.

50. K. H. Necker, *Recht über See* (Festschrift Stödter), Hamburg 1979, p.95.

This question, raised by Necker in the context of carriage by sea, applies with equal force to the subject-matter being treated in this study: the international carriage of goods by road. How is one to translate the prohibitive and interrelated directive aspects of convention autonomy into deeds? How should the person who has to apply the law, the judge, aware on the one hand of the aim as well as the scope of uniform law and on the other not deaf to sceptical remarks and penetrating questions regarding the realisation of the Convention aims in practice, to fulfil his task? With these questions one enters an area sown with snares and traps: the interpretation of convention law has set many pens in motion and is regarded as one of the most difficult aspects of uniform law.

In the final analysis one is here concerned above all else, in the opinion of the present writer, with the attempt to establish academically sound methods suitable for the harmonious development of uniform law and at the same time to take into account the practical application thereof. Just as there exists no general formula for the application of national law, so there is no general formula in the case of uniform law. Ready cut keys to the problem do not exist in the area of ascertaining the law. It is in part the task of legal science to develop methods that, in conformity with the nature and aim of uniform law, create a favourable climate for its application.⁵¹

The Preamble to the CMR Convention has, as was stated in the preceding section, a normative function for the interpretation of the Convention. This function is of importance for the granting of priority to one from amongst the generally available methods of ascertaining the law, that is to say, from amongst the grammatical, the systematic, the historical and the teleological methods.^{52,53} Which method, including in this also the judicially refined variations per analogiam and a contrario, is to be preferred cannot in general terms be stated.⁵⁴ Is the same also true for the interpretation of uniform law?

51. A positive and not easily to be overemphasised influence must be accorded to the appearance of J. Kropholler's *Internationales Einheitsrecht (Allgemeine Lehren)*, Tübingen 1976, reviewed A. E. von Overbeck, *RabelsZ* 1977, pp.177-185 and P. L. Wery, *NJB* 1976, pp.474-475. One can regard as a public law equivalent of this work, S. Sur, *L'interprétation en droit international public*, Paris 1974.

52. G. J. Wiarda, *Drie typen van rechtsvinding*, Zwolle 1980, p.34; Kropholler, p.260; Bos, *NILR* 1980, p.136.

53. A different sort of distinction, much used in convention law, is that between the objective and the subjective methods. The objective confines itself to the text while the subjective method attaches much value to the principles and motives of the drafters hidden behind the text; see O. C. Giles, *Uniform Commercial Law*, Leyden 1974, pp.40-51; Kropholler, p.259; A. Bremidas, *Methods of Interpretation and Community Law*, Amsterdam–New York–Oxford 1978, pp.1-70.

Both distinctions are more or less validated by Artt.31-33 Vienna Convention of 23 May 1969 (for the text, *Transport*, p.763; came into force on 27 January 1980, *Transport*, p.1391). A treasure trove of information concerning the creation of this Convention is to be found in R. G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties*, Frankfurt 1978, in particular pp.237-263 on Artt.31-33. See also Bos, *op. cit.*, pp.143 et seq., who, as to the result achieved, remarked: 'One may wonder at once whether these methods, virtually so different in outcome, were rightly combined, and whether the suggestion that their amalgamation is the best possible guarantee of an acceptable interpretation is entirely warranted.' (p.145).

54. Asser/Scholten, pp.44, 78; Pitlo, *op. cit.*, p.134; Wiarda, *op. cit.*, p.20; Wery, pp.17, 18.

Different writers give a positive answer to this question: there is no preference whatsoever for a particular method.⁵⁵ Having established this it is nevertheless appropriate to add a number of marginal notes. To indicate a preference for the grammatical, the systematic or the historical method of interpretation would not appear to be readily defensible.⁵⁶ Even though these three methods have no special relationship to each other, this is otherwise when one uses the teleological method, the aims of which produce a special relationship among the first three methods. The teleological method has the function, in the area of uniform law, more clearly than in national law, of safeguarding interpretation in conformity with the purport and nature of the particular provisions concerned.⁵⁷ It results from this that it controls whether the interpretation arrived at by means of the first three methods is in conformity also with the aims of the subject-matter concerned. The security function of the teleological method compels one to embark on a comparison of judicial decisions as well as legal literature.⁵⁸ This method also offers possibilities of attempting cautious use of the comparative convention method.⁵⁹ Having regard to the function of the teleological method indicated here, this method must be considered as better able to do justice to the autonomous character of uniform law.

The pronounced preference for the methods indicated requires further explanation and elaboration. It is precisely because of the usual absence of supranational courts in the field of uniform law (also in the legal area treated in this study) that the national judge should realise that he, together with his colleagues in other countries who are confronted with the same uniform law, is invested with an international function and therefore has the task of optimally realising the aims of the particular law to be applied by him. In striving towards 'Entscheidungseinklang' he should be prepared to enter upon a dialogue with his colleagues in other countries, at least as a minimum to take cognisance and account of their decisions. It may likewise be claimed

55. Wery, p.18; Bos, pp.155 et seq.; Groth, p.44. Contra Royer, p.52, who considers the comparative law method to be of decisive significance and appears, at pp.32 et seq., to encompass hereunder also comparative caselaw and literature. In the same vein, see also H. Schadee, WPNR 1960, 4628.

56. See the following section for examples of the application of this method.

57. See Kropholler, p.276: 'Die teleologische Auslegung, die auf den Zweck einer Norm blickt, ist auch im internationalen Einheitsrecht gemäss der objektiven Theorie (...) die wichtigste Interpretationsmethode.' Ibid., Europäisches Zivilprozessrecht, Heidelberg 1982, Einleitung, Rz 27. See also D. Martiny, *RabelsZ* 1981, p.427.

58. Following Wery, the present writer refers here to comparative caselaw. Kropholler opts, as does Royer, pp.32 et seq., for the term comparative law on the basis of pure aesthetic reasoning (p.281 n.74): he regards the comparative caselaw method as a variation, a refinement of the comparative law method (pp.278, 280). One should here note that 'comparative law' plays an equally important role in national law but, in contrast to uniform law, does not necessarily spring from the nature of the law. With some scepticism, Hill/Messent also pronounce in favour of comparative caselaw: 'Attempts to rely on foreign caselaw thus also demonstrate well the difficulties involved in achieving a uniform approach to the interpretation of the Convention. Nor should this be regarded as surprising: judicial divergence of opinion is to be expected internationally as it is nationally.' (p.xli).

59. Wery, p.29; Kropholler, p.274.

that he be acquainted with the notions advanced in the legal literature concerning the relevant subject-matter. It is in this way that the judge may be regarded as capable of giving form to uniform law. It is through judicial decisions that the concepts regulated in the convention are, as it were, extended.⁶⁰ Principles hide behind these concepts. It is principally in regard to transport law that one can postulate that a number of concepts and terms, which are underlain by the same principles and which are in continuous development, occur in diverse regulations.⁶¹ In part it is the task of legal science to trace these principles⁶² and to analyse the concepts based thereon.⁶³ Courts in their decisions process the results reached by academics.⁶⁴ It is precisely with a view to central concepts in a convention that by application of the teleological method it can be avoided that the judge jumps to conclusions concerning concepts belonging to the national system, as a result of which the desired legal unity may be disturbed.⁶⁵ The function thus ascribed to the teleological method has, as it were, a dimension not possessed by the first three methods of interpretation and offers in consequence a greater perspective for development of uniform law. In the manner described above meaning is thus given to the term autonomous convention interpretation, and one that appears most suited to the character of uniform law.

The view thus defended as to the content of the concept autonomous convention interpretation can meanwhile render sterling service when one comes up against the so-called gap or lacuna problem. Here merely a word. A distinction is drawn in the literature on legal theory between lacunae that the drafters of the Convention permitted to remain and those lacunae that they failed to notice and did not consciously allow in the regulation.⁶⁶ As a rule the judge struggles with the problem of how he should fill in ascertained lacuna. The ascertainment and subsequent filling in of lacunae is undeniably an act of interpretation.⁶⁷ The fact that the distinction referred to here is not always easy to draw has often led to the judge falling back on

60. What J. G. Sauveplanne, *Codified and Judge-made Law*, Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. letterkunde, Amsterdam-Oxford-New York 1982, p.28, said of law: 'The life of a code depends on its judicial interpretation' applies here with even greater force.

61. Wery, p.29; Kropholler, p.274.

62. Asser-Scholten, pp.63, 65.

63. Kropholler, p.326.

64. *Ibid.*, pp.310, 316.

65. *Ibid.*, p.312.

66. H. Dölle/E. Wahl, *Kommentar zum einheitlichen Kaufrecht*, München 1976, Art.17 EKG, Rz 18.

67. *Ibid.*, Art.17 EKG,Rz 5 and 70. See Kropholler, p.292: 'Es ist jedoch allgemein anerkannt, dass eine scharfe Grenze zwischen Interpretation und Rechtsfortbildung nicht gezogen werden kann, dass die Lückenfüllung also nur eine Fortsetzung der Auslegung auf einer anderen Stufe ist.' Miller, p.337: '... the question to be asked is: is the uniform law really silent? This is a matter of interpretation of the uniform law ...'

national law also to fill lacunae, just as is the case with obscure concepts and inconsistent passages, which are not infrequent in uniform law, and thereby choosing the easiest path.⁶⁸ In the view of the present writer, such a course of conduct unfortunately narrows the aim of uniform law. In justification of this approach, namely the determination of known or suspected lacunae and their subsequent supplementation or completion by national law, including conflict of laws, appeal is often made to the intention of the drafters of the Convention. But in this way one loses sight of the fact that the nature of uniform law means that convention drafters of necessity must sometimes make use of at first sight vague, to some extent lacuna suggestive, terms. Rather than seeking salvation in national law, the teleological method offers, as explained above, the possibility of developing uniform law in conformity with its nature.⁶⁹

One is not hereby stating that upon the ascertainment of lacunae in the applicable regulation, national law, including conflict of laws,⁷⁰ may or must never be applied; rather, that one should only have resort thereto upon arriving at the reasoned conviction that the legal question to be resolved is not covered by the uniform regulation. The CMR in no way regulates all the aspects inherent in the contract for the international carriage of goods by road.⁷¹

68. R. van Rooy, *Hague-Zagreb Essays* 2, p.74; Muth-Glöckner, *Einleitung*, Anm. 6; Dorrestein, no.89. W. Voigt, *DVZ* 1972, n.99, p.8, expresses himself more cautiously, indicating that the German KVO law, in contrast to the HGB, does enter into consideration for the task of filling in. See, however, J. G. Sauveplanne, *RM Themis* 1961, p.272. See further § 6 *infra*.

69. Dorrestein calls in aid of his view (see *infra* § 6) Art.53 CIM (former), which he extends to a general prohibition of interpretation of uniform law. Art. 53 CIM provides: 'A défaut de stipulations dans la présent Convention, les dispositions des lois et règlements nationaux relatifs au transport dans chaque Etat sont applicables.' See further on this Von Nanassy, pp.788-791. This article subsequently underwent certain amendment in 1970 (Art.54) and in the COTIF version (Art.10). Although a similar provision is lacking in the CMR, Dorrestein is of the opinion that a universal prohibition for the interpretation of the CMR arising out of such a provision must apply. That his extensive interpretation of Art.53 CIM is totally unsupported appears not only from Von Nanassy, p.790 but also clearly from Boudewijnse, pp.43, 51, 172, 286 n.142, as well as from the German Explanatory Memorandum (Drucksache 1114, p.34), from which it appears that an eventual adoption of a provision such as Art.53 CIM in the CMR would apply to questions such as absence of intention, formation and existence of the contract and like issues, cases thus of conscious lacune. The passage in the German Explanatory Memorandum ('Eine dem Artikel 53 CIM entsprechende ausdrückliche Klarstellung dieser Rechtslage ist nicht für nötig erachtet worden') is based on a report of the special ECE Working Party. The report states: 'Proposition d'insérer dans la Convention un article semblable à l'article 53 de la CIM. La proposition du Gouvernement de la République fédérale d'Allemagne a été examinée par le Groupe de travail qui a jugé qu'une telle disposition n'était pas nécessaire' (TRANS/168, TRANS/WP 9/35, 6 June 1956, p.27, no.96).

70. For the subsidiary role allocated to conflict of laws in the development of uniform law, see E. von Caemmerer, *Rechtsvereinheitlichung und internationales Privatrecht, Probleme des europäischen Rechts* (Festschrift Hallstein), Frankfurt am Main 1966, pp.78, 79.

71. Examples of this are the formation and termination of the contract, the liability of the carrier prior to receiving the goods, the question who is obliged to load and unload, as well as who is entitled to commence suit for compensation for damage against the carrier. A number of these subjects are later discussed at the appropriate place.

The path indicated by the teleological method is without doubt not an easy one. Cases can occur in which this method offers no satisfactory solution. It then becomes inevitable that the assistance of national law will be sought, although that does not automatically have to be the *lex fori*.⁷² Comparative law can be of distinct benefit here.⁷³

In support of the fact that one does not have to be too influenced by a particular national legal system reference can be made to a method that has been employed on a number of occasions by the Court of Justice of the European Communities.⁷⁴ In appropriate cases the Court refers not to a particular national legal system but seeks those elements that the different legal systems have in common; thus, it takes a sort of third path. It is not to be discounted that the approach of this community law court will radiate out in a reflex movement to the courts of the various countries that fall under the same uniform legal area.

Reference can be made to a number of factors of differing types which exert a disturbing effect on the interpretation and development of convention law and likewise are often seized upon by the same proponents of the conflict of laws to justify the application of national law.⁷⁵ One can also refer to the circumstance where a judge, however convinced of the desirability and utility of comparative law, encounters besides the practical impossibility that he can discover in the case no clearly discernible line that compels him to follow it, or does discover such a line but nevertheless considers there to be reason to deviate from the charted course.⁷⁶ It is precisely in the case where a common supreme court for the interpretation of a section of uniform law is absent, as is the case with the Convention dealt with in this study, that the national

72. Royer, p.45; Wery, p.27.

73. Kropholler, p.204; J. G. Sauveplanne, *Rechtsstelsels in vogelvlucht*, Deventer 1981, p.27.

74. The following quotation is taken from the caselaw of the EC Court of Justice concerning the EEC Jurisdiction and Enforcement of Judgments Convention of 1968: 'The terms civil and commercial cases must not be interpreted according to the law of the one or the other state concerned but on the basis of, on the one hand, the aims and system of the convention and, on the other, those general principles that are to be found in all national legal systems.' Extensively on the approaches of the Court of Justice, see A. Bremidas, *Methods of Interpretation and Community Law*, Amsterdam–New York–Oxford 1978. Positive appreciation for the approach of the court is also forthcoming from M. J. Bonell, *RabelsZ* 1978, p.501; Lord Denning, in the decision *Buchanan v. Babco* cited in the following section; D. Martiny, *Autonomie und einheitliche Auslegung im Europäischen Internationalen Zivilprozessrecht*, *RabelsZ* 1981, pp.427 et seq. See also J. C. Schultz, *IPRax* 1983, pp.97 et seq.

75. For objections of a practical nature and proposed solutions, see David, *op. cit.*, pp.104-120. It is not always clear to what extent these objections are, at least in part, intermingled with economic, political and/or legal theoretical aspects, which makes objections to them not always easy. See on this, M. J. Bonell, *RabelsZ* 1978, pp.504/505; see also, Miller, pp.365 et seq.

76. Probably unattainable in practice but very desirable would be the establishment of an international judicial decision-making organ for transport law, which, whether or not through the device of preliminary decisions, could advance legal unity and therefore legal certainty. The case for the establishment of such courts has several times been pleaded, see, David, *op. cit.*, 303; Kropholler, p.137; H. Dölle/E. Wahl, *op. cit.*, Art.17 EKG, Rz 7; O. C. Giles, *Uniform Commercial Law*, Leyden 1970, p.23; Wery, p.16; Groth, p.36.

judge ought to appreciate, as has been noted earlier, that he must share his judicial freedom with his colleagues in other countries which form part of the legal area in which the uniform law is in force.⁷⁷ This will induce him, also in the case of the interpretation of vague texts and the filling in of lacunae, to strive for an interpretation that is meaningful to his judicial colleagues. This applies even more when he does not follow a particular course laid down by his colleagues. One of the requirements of a good system of administration of justice is properly reasoned judicial decisions. Reasoned judicial decisions are essential particularly in the area of uniform law in regard to which judges in different countries share the common task of developing it to the full.⁷⁸ Such decisions not only increase their own constitutive value but at the same time make it possible for legal literature to follow the development critically, to steer or correct its course and to offer suggestions.

No-one denies that ultimately the appropriate organisational action needs to be taken in order to improve the required cooperation and exchange between judicial decision-making and legal literature in the field of uniform law.⁷⁹ For this reason there should be a vigorous effort to improve the quality of collections of judicial decisions so that courts would be better placed to perform their task.⁸⁰

Research into and analysis of judicial decisions reveal to what extent the judge himself is aware of the commission thus imposed on him. Here one encounters a juridical-sociological aspect, namely, to what extent is the judge so encapsulated in his own legal system that he can no longer be regarded as able to perform his international legal function properly? What directions does the legal literature indicate he should take? Having regard to the importance attached to caselaw and legal literature in the conception sketched here, attention will to a great extent be concentrated in the following Chapters on these two components. These are in any event of essential significance for the application and interpretation of CMR law as that has been developed up to the present time. In the following sections enquiry will be made as to the extent that caselaw and legal literature on the CMR in different countries Party to the Convention have indicated acceptance, or otherwise, of the views presented above.

77. The practical value of the comparative caselaw method is also pointed out by R. J. C. Munday, *The Uniform Interpretation of International Conventions*, ICLQ 1978, pp.458/459: 'In the absence of any supreme international jurisdiction capable of resolving differences between national courts, the most effective approach for all states concerned is to pay serious heed to one another's case law.' See, Kropholler, p.205.

78. Kropholler, p.281: 'Gerade bei der Auslegung internationalen Einheitsrecht sollten Entscheidungen deshalb so sorgfältig und durchschaubar wie möglich formuliert werden. Namentlich dürfen die trägenden Argumente nicht hinter den Auslegungscanones versteckt werden.'

79. *Ibid.*, pp.283, 284, 316 et seq.; J. G. Sauveplanne, *op. cit.*, pp.102-103.

80. Collections of CMR caselaw and commentaries have appeared regularly during the years. See § 6 *infra*. Study meetings of judges can also be of importance. For a report of such meetings, see, A. Tunc, *Revue de droit comparé* 1979, pp.630-644, on *reasoning* pp.637-640, from which it appears that considerable emphasis was laid on the giving of reasons by French judges, on which more in the following section. Further, F. Herbert, *SEW* 1977, pp.97-104 on a meeting devoted to the method of the EC Court of Justice.

§ 5. Caselaw

a. In the Federal Republic of Germany the Bundesgerichtshof adopted a clear position in a dispute as to the interpretation of the impossibility provision contained in Article 17(2) CMR. This decision is of particular importance because during the preparation of the Convention the German delegation urged the inclusion of an impossibility provision corresponding to the German KVO law. Although the attempt failed⁸¹ this did not prevent the German government in the Explanatory Memorandum to the CMR Bill of Approval submitted in 1959 from interpreting the CMR impossibility provision in the spirit of the rejected German proposal. According to the Explanatory Memorandum the formulation employed in Article 17(2) CMR is nothing other than a paraphrase of the German concept 'höhere Gewalt', which principally implies that causes stemming from the exercise of the business, such as collisions, and causes that are not totally unforeseeable, such as theft, can never relieve the carrier of his liability.⁸²

In a case where an innocent carrier was in a collision with an oncoming vehicle the person entitled to the load claimed, relying on the relevant passage in the above Explanatory Memorandum, that the carrier accordingly could not be relieved of his liability on the ground of Article 17(2) CMR. The BGH rejected this interpretation on systematic, historical and grammatical grounds of interpretation and accordingly openly distanced itself from the opinion of the German government.⁸³ The interpretation advocated by the BGH meant that the circumstance where the carrier was collided with was to be considered clearly as one which the carrier could not avoid and the consequences of which he was unable to prevent. The court explained moreover why neither the national KVO nor the HGB laws should be declared applicable:

'Zunächst muss bei der Auslegung internationaler Abkommen, die privatrechtliche Beziehungen der Angehörigen der Vertragsstaaten regeln, allgemein beachtet werden, dass innerstaatliche Begriffe und Rechtsgrundsätze nicht unbesehen als dem Abkommen zugrundeliegend angesehen werden dürfen, da sonst das Ziel einer möglichst einheitlichen Rechtsanwendung in den Vertragsstaaten nicht erreicht werden könnte.'⁸⁴

The result at which the court arrived was ultimately tested against the views of writers and a number of foreign judicial decisions.⁸⁵

Likewise illustrative on this point is a decision of OLG Dusseldorf. To the proposed question whether theft from a vehicle, in casu close to the Swiss-

81. On this Chapter 4, § 4.

82. BT-Drucksache 1144, 3. Wahl, Periode, p.40.

83. BGH 28.2.1975, NJW 1975, p.1597.

84. NJW 1975, p.1598.

85. In an even earlier case of 21.12.1966, NJW 1967, p.499, the BGH had decided that for the interpretation of Art.17(2) CMR, § 429 HGB, to which the court in the above decision also referred, should not be a yardstick.

Italian border, should be regarded as a circumstance as referred to in Article 17(2) CMR, the court after extensive reasoning and in partial reliance on the above decision replied in the negative.⁸⁶ The court also expressly rejected the possible application of Swiss and Italian law and partly on the ground of public international law considerations emphasized the autonomous character of the CMR on grounds of principle:

‘Dies bedingt insbesondere bei Abkommen, die – wie die CMR – privatrechtliche Beziehungen der Angehörigen von Vertragsstaaten regeln, die das Völkerecht entwickelt hat. Daraus kann jedoch nicht gefolgert werden, die Auslegung habe nach ausländischem Recht entsprechend einem fremden Schuldstatut zu erfolgen. Vielmehr beschränke sich die Anwendung des Völkerrechts darauf, dem Ziel der Auslegung eines solchen Abkommens, einen effektiv möglichst gleichwirkenden Schutz bei allen Vertragspartnern zu gewährleisten, zu dienen und dem Grundsatz der Harmonie der Rechtsanwendung in allen Vertragsstaaten Geltung zu verschaffen. Deshalb soll die Auslegung in erster Linie aus dem Abkommen selbst erfolgen...’⁸⁷

The highest German court also appeared to employ this approach in a case where opinions may differ as to the question whether the CMR, in regard to the thorny issue who is entitled to claim compensation, demonstrates a lacuna or not.⁸⁸ Confronted with the question whether the consignee can, according to the CMR, file his own claim against the carrier for compensation, the BGH adopted at the outset the position that whether the CMR itself supplied the answer to this question could be left in abeyance, which amounted to the applicable national law supplying the definitive answer.⁸⁹ This view has been heavily criticised in the literature precisely because of the application of national law.⁹⁰ The alternative, essentially different, approach of the BGH was noticeable when it was confronted for the third time with the issue, as to which the CMR does not excel in clarity,⁹¹ and as to which the parties as well as the lower courts had omitted to indicate a particular law. The BGH having granted the consignee the right of claim, it reasoned as follows:

‘Die CMR enthält allerdings keine Vorschrift, die diesen Anspruch ausdrücklich regelt. Zur Auslegung der CMR kann auch nicht der im nationalen deutschen Recht bestehende Grundsatz ohne weiteres herangezogen werden, wonach der Verfügungsberechtigte die Ansprüche aus dem Frachtvertrag geltend machen kann; denn die

86. OLG Dusseldorf 27.3.1980, VersR 1980, p.826; ETL 1983, p.89.

87. VersR 1980, p.826. Also Schultz points out that authentic text interpretation is a public international law duty, *Recht door Zee* (Festschrift Schadee), Zwolle 1980, p.179.

88. Extensively on this Chapter 6. The same approach to the interpretation of Art.29 is to be found in BGH 14.7.1983, VersR 1984, p.134, on which further Chapter 5, § 9.

89. BHG 21.12.1973, VersR 1974, p.325; BGH 10.4.1974, VersR 1974, p.796.

90. Helm, Art.17 CMR, Anm, 30; G. Groth, RIW/AWD 1977, p.267. For further criticism see Chapter 6, § 4.

91. See, I. Koller, VersR 1982, p.415.

CMR als internationales Abkommen ist in erster Linie aus sich selbst heraus, evtl. unter Heranziehung von Materialien auszulegen.⁹²

The BGH supported its decision also on the basis of the grammatical, systematic and historical interpretation methods. The most important consequence of this was that the court accepted the right of disposal as a criterion.⁹³

The decisions cited here in connection with the CMR do not stand alone. The BGH has also given evidence of this view in air transport. In a case where damage occurred during the unloading of goods, the question arose whether this damage occurred during the period ('Obhutperiode') during which the carrier is liable. When do the goods come into the possession of the consignee, for it is at that moment that the period in question comes to an end. On this the BGH judged as follows:

'Das Berufungsgericht stellt dem gegenüber zu sehr auf die deutschen Rechtsbegriffe Besitz und Gewahrsam. Abgesehen davon, dass Obhut und Besitz oder Gewahrsam auch vom Wortsinn her nicht ohne weiteres gleichgestellt werden können, ist das schon deshalb bedenklich, weil es sich hier um die Auslegung eines internationalen Abkommens handelt, dessen Ziel es ist, ein einheitliches Privatrecht der internationalen Luftbeförderung für die Vertragsstaaten zu schaffen. Bei der Auslegung derartiger Abkommen ist dem Wortlaut besondere Bedeutung beizumessen, aber auch dem logisch-systematischen Zusammenhang und der Entstehungsgeschichte; sie sind aus sich heraus auszulegen und zu ergänzen; innerstaatliche Rechtsbegriffe dürfen dabei nicht unbesehen übernommen werden, weil sonst das Ziel der Rechtvereinheitlichung gefährdet wurde.'⁹⁴

With this consideration of principle the German court employed a method of ascertaining the law that it had earlier applied in air transport.⁹⁵

b. The decisions noted here have not failed to produce an effect on foreign decisions. Thus the Austrian OGH appears also to be a proponent of autonomous convention interpretation. This court was faced with answering the question whether in the event of theft of the goods during the transport the carrier could successfully invoke the impossibility provision contained in Article 17(2) CMR. As was the case in the German decision noted above the persons entitled to the goods opposed this by pleading that the relevant CMR passage should be equated with the concept of 'höhere Gewalt', as that was developed in Germany and Austria. Were the claimants to be successful on

92. BGH 6.7.1979, VersR 1979, p.1105 (1106).

93. On the merits of this legal development see further Chapter 6.

94. BGH 27.10.1978, VersR 1979, p.83 (85). D. Schoner, Air Law 1979, pp. 222 et seq., correctly points out that with this method the BGH is one with its colleagues in England and Belgium; see the present writer, NJB 1979, pp.25 et seq., with a view to these cases.

95. See, e.g., BGH 19.3.1976, VersR 1976, p.778; BGH 16.2.1979, VersR 1979, p.643. The BGH considered here concisely and weightily: 'Die jetzige massgebliche Fassung ist angesichts ihrer freien Formulierung (...) aus sich selbst heraus unter Berücksichtigung ihrer Entstehungsgeschichte und ins besondere ihres Zwecks auszulegen.'

this point the margin for the carrier to rely on impossibility would become very narrow having regard to the very strict requirements attaching to the concept of 'höhere Gewalt'. The OGH rejected the argument. Before subjecting the particular rule of uniform law to close scrutiny, the OGH expressed itself in unmistakable terms on the recognition of convention autonomy:

'Darüber hinaus ist aber davon auszugehen dass bei der Auslegung internationaler Abkommen, die privatrechtliche Beziehungen der Angehörigen der Vertragsstaaten regeln, innerstaatliche Rechtsbegriffe nicht unbesehen als dem Abkommen zugrunde liegend angesehen werden dürfen, da sonst das Ziel einer möglichst einheitlichen Rechtsanwendung in den Vertragsstaaten nicht gesichert wäre.'⁹⁶

By means of the systematic, grammatical and historical interpretation methods thereupon employed the court came to the conclusion that the Convention concept was wider than 'höhere Gewalt'. This was established by foreign (in casu German) literature and caselaw. By choosing to proceed from the teleological method of interpretation, followed by clear reasoning based on the three remaining classical methods of interpretation, the court emphatically distanced itself from national legal concepts.

c. In Belgium the highest court of law has displayed the same pattern of autonomous convention interpretation. It concerned, just as in the last cited case in Germany, a question of air transport law. How was one to interpret the Convention concept occurring in Article 25 of the Warsaw Convention, 'recklessly and with knowledge that damage would probably result'. Could this somewhat obscure provision be interpreted by reference to national law? The Hof van Cassatie considered as follows:

'That internal law can only be considered in so far as the Convention itself refers to it or permits the same; considering that interpretation of an international convention integrating the law cannot occur by reference to the national law of one of the States Parties to the Convention; that, where the text requires interpretation, this must occur on the basis of the particular elements of the Convention, in particular its subject, its object and its context, and in addition its preparation and its drafting history; that it would be pointless to elaborate a convention laid down in international legislation if the courts of each State could interpret it according to their own legal principles;

That the provisions thereof, being a compromise between the different States Parties to the Convention, form an autonomous juridical system that is independent of national legislation, even if several of these States have extended the application thereof to internal air transport.'⁹⁷

The Hof van Cassatie turned its subsequent methods to these essential preliminary considerations as to the nature and purport of the relevant uniform

96. OGH 16.3.1977, ÖJZ 1978, p.101; ULR 1978, p.373.

97. Hof van Cassatie, 27.1.1977, RW 1978/1979, p.26; ETL 1978, p.126.

law. The grammatical, and above all the historical method, were here clearly under the baton of the teleological, autonomous approach.⁹⁸ It must be hoped that, just as is the case in Germany, the Hof van Cassatie will opt for the same approach in regard to the CMR. As far as the present writer is aware, it has as yet given no evidence of this.

d. In France there is little of the proposed interpretation method to be perceived in the caselaw of the Cour de Cassation and lower courts. It is not improbable that the style that is so representative of the caselaw in that country allows little or no room for such reasoning.⁹⁹ Leaving aside the question whether and to what extent French caselaw is in or out of step with that of the other countries, which should become apparent in the following Chapters, it is clear that the national method of ascertaining the law is not appropriate in the case of uniform law for the further development of central concepts. One must hope that, in regard to questions that must be resolved in cooperation with colleagues in other countries, the self-complacency with the present style of reasoning will allow room for reflection on the foundations of the common legal area. One may here allow oneself to be encouraged by tendencies indicated in England, of which more shortly.

Meanwhile a dot on the skyline is perceptible in the form of a judgment on appeal from which one may deduce that something of the above mentioned German and Austrian caselaw has penetrated. Just as with the question previously posed whether theft of goods from a vehicle in Italy under circumstances that could be regarded as releasing the carrier of liability, the CA Rennes had decided in the negative, basing itself on Article 103 CComm that in addition to 'irrésistibilité', 'imprévisibilité' was also required.¹⁰⁰ The Cour de Cassation judged that due to the addition of the requirement of unforeseeability Article 17(2) CMR had been infringed.¹⁰¹

e. Italian caselaw has been built up in much the same model as the French. Given the extremely small number of cases available to the present writer no judgement can be made as to the interpretation method followed for the CMR. This applies equally to Switzerland, for which there is scarce caselaw,¹⁰² and

98. The case was well reviewed precisely as a result of the considerations directed to the character of uniform law; see, Rodière, ETL 78, p.24; McGilchrist, (1977) 4 LMCLQ, 539; D. Schoner, Air Law 1979, pp.222-226; A. A. van Wijk, in: Non sine causa (Festschrift Scholten), Zwolle 1979, pp.519-55; Cour de Cassation, Gabon 15.12.1980, RFDA 1981, p.363.

99. For a critical voice on the chronic lack of reasoning in French caselaw, *Revue de droit comparé* 1979, p.629.

100. CA Rennes 11.4.1979, referred to in the case cited in the following note.

101. Cass. 27.1.1981, BT 1981, p.219. See for this in French eyes trailblazing case, A. Seriaux, *Rec. Dalloz* 1982, pp.110-114, who maintains that the case deviates from the dominant doctrine.

102. See, Nickel-Lanz, no.10. As far as the present writer is aware, the only published caselaw is to be found in ETL 1984, p.259 (Tribunal de première instance, Geneva of 1.5.1980).

which in the area of ascertainment of law falls strongly under German influence.¹⁰³

f. What is the position in the Netherlands as to the ascertainment of law regarding uniform law?¹⁰⁴ Attention may first be directed to the CMR regarding which there exists a decision of the Hoge Raad that is worthy of mention. In this case the court was faced with the question whether the carrier, sued for damage occurring to the goods as a result of the overturning of the vehicle, could successfully rely on the fact that the goods had been loaded by the sender (cf. Art.17(4)(c) CMR). A positive answer to this question would in accordance with Article 18(2) CMR for the present relieve the carrier of his liability. More difficult would be the situation where, in order to be able to profit from this privileged circumstance under evidentiary law, the carrier must first prove that the sender had incorrectly loaded. In a clearly presented argument the Hoge Raad first elaborated the CMR system of liability by means of the systematic method. Thereupon the court upon application of the grammatical, systematic (a contrario), historical and comparative convention methods quashed the decision of the Hof The Hague that the burden of proof of incorrect loading by the sender rested on the carrier.¹⁰⁵

Unlike its colleagues in Germany, Austria and Belgium the Hoge Raad persists in its policy of not demonstrating *expressis verbis* its support for autonomous convention interpretation.¹⁰⁶ This is not to say that the Hoge Raad will not allow itself to be led in part by views of foreign writers and judges or in other ways does not strive for autonomous interpretation. Examples are to be found above all in sea and air law, which in clearly reasoned decisions make it evident that the Dutch supreme court follows international legal developments.¹⁰⁷ Nevertheless, one may regret that the

103. Apparent from a communication of the highest Swiss court, *Revue de droit comparé* 1979, p.639; see, P. L. Wery, *NJB* 1978, p.60.

104. Wery, p.22, argued in 1971 that the Hoge Raad showed too little evidence of giving consideration to views in other countries; he repeated the complaint in *NJB* 1978, p.60.

105. HR 18.5.1979, *S&S* 1979, 73; *NJ* 1980, 574. See further on this question in regard to Art.17(4)(c) CMR, below Chapter 4 § 5.4.3.1.

106. In the first case before the Hoge Raad of 7.12.1973, *S&S* 1974, 20; *NJ* 1974, 307, the court considered, diverging fundamentally from the view of the Procurator General who reasoned from the basis of ordinary law, that where a person concludes a transport contract with a carrier, although not a sender within the meaning of Artt. 12 and 13 CMR, nevertheless these provisions do not exclude his deriving under the contract a claim against the carrier. The decision, excepting the proposition that national law should be applicable, is otherwise convincingly refuted by Th. H. J. Dorrestein, *NJB* 1974, p.1256. One can agree with Helm, *Frachtrecht*, Art.17, Anm.30, that one is here concerned with an exceptional case. On this case see further Chapter 6 § 2.

107. For the law of the sea, see, HR 14.4.1972, *S&S* 1972, 45; *NJ* 1972, 269 and HR 1.5.1981, *S&S* 1981, 76; *NJ* 1981, 604. Both cases concern the problem of conversion of the gold franc. On this see further Chapter 5, § 3.2. For air law see, HR 6.1.1978, *S&S* 1978, 32; *NJ* 1978, 450. Although it does not appear from the relevant considerations that account was taken of views in other countries, the passage cited hereunder may be regarded as of importance and deserves to be viewed as *obiter dictum*. The passage reads: '(...) Another view would fail to do justice to the purport of the Convention to ensure unity, to the greatest possible extent, in regard to essential aspects of the liability of the air carrier under the laws of the Contracting States.' See, HR

Hoge Raad does not recognise the autonomous character of convention law more emphatically. Considering the international function of the judge it ought to be posited that recognition in this respect can be of importance for lower courts as well as foreign courts in the development of uniform law.

g. It has been pointed out on more than one occasion in the literature by both proponents and opponents of uniform law that Anglo-Saxon law with its strict grammatical/objective method of interpretation and its system of *stare decisis* constitutes a serious obstacle to the development of uniform law. Only in the last decade has a development here come about that has not remained unremarked by the international law forum. Is it indeed a fact that English judges when called upon to interpret uniform law are so wedded to their national, non-continental legal system and legal methods that they are utterly incapable of exercising their international function? Do their legal views and their way of thought prevent them from being open to views in other countries? From the caselaw to be further discussed it is rather the opposite that appears to be the case. One decision in proceedings centred on the interpretation of Article 23(4) CMR has received international attention, not so much for the substantive question there at issue,¹⁰⁸ but rather for the manner in which the judges arrived at their decision.

The legal question to be decided in that case can be summarised as follows. Can the sender, besides compensation for missing goods, which led to the imposition of a tax charge of £30,000 by reason of resulting failure to discharge the necessary documents, claim the amount of the charge from the carrier, or ought this head of damage to fall to the account of the sender? At three levels it was decided in the first sense. On which ground did this decision rest? Article 23(4) CMR provides:

‘In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded ... but no further damages shall be payable.’

Was the sum of £30,000 to be understood by the phrase ‘other charges incurred in respect of the carriage of the goods’ or did it fall within the reach of the closing phrase ‘no further charges shall be payable’? Must the first phrase be widely or narrowly interpreted? The Court of Appeal, as did the Queen’s Bench, chose the wider view. What was the reason behind this approach? Lord Denning explains:

‘This Art.23(4) is an agreed clause in an international convention. As such it should be given the same interpretation in all the countries who were parties to the Convention. It would be absurd that the Courts of England should interpret it differently from the Courts of France, of Holland, or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We must,

12.2.1982, S&S 1982, 56; NJ 1982, 589. In this decision the Hoge Raad came to the same conclusion as the House of Lords (the text of which hereunder) concerning the interpretation of the concept ‘damage’ in Art.26(2) Warsaw Convention, without involving that openly in its considerations.

108. With respect to this see Chapter 5, § 3.3.

therefore, put on one side our traditional rules of interpretation. We have for years tended to stick too closely to the letter – to the literal interpretation of the words. We ought, in interpreting this Convention, to adopt the European method.¹⁰⁹

In the remainder of his argument Denning appears to be a convinced proponent of the procedure of the EEC Court of Justice, which judges more according to the spirit than the letter: in other words, the teleological method.¹¹⁰ This method can be of benefit in particular in cases where lacunae occur. According to Denning Article 23(4) CMR demonstrates a lacuna. How does he resolve this?

‘The only sensible solution is that the carrier should compensate the sender for the expense. The men who framed the Convention and agreed to it must be presumed to have intended this.’¹¹¹

Further:

‘Conclusion. We are told that there have been no decisions so far in other countries on this article of the Convention. So we feel an especial responsibility in expressing our views on it. Where we lead, others may follow. But I would like to assure them that if it had come first before them, we should be only too glad to follow them.’¹¹²

The other judges agreed with him and underlined the importance of unification, which requires adaptation of English methods of ascertaining the law.¹¹³ In the House of Lords¹¹⁴ the method of ascertaining the law as that was advanced and applied by Lord Denning met with opposition principally from Lord Salmon, who considered Denning’s method impermissible:

‘For a court to construe a statute is one thing but to graft a provision on to it on the ground that the Court thinks it is reasonable to do so would bring the law into chaos and also introduce a like chaos into the business of international carriers and those who contract with them to carry goods by land from one country to another.’¹¹⁵

109. CA 15.11.1976 [1977] 1 Lloyd’s Rep 234 (236, 237), *Buchanan and Co Ltd v. Babco Forwarding and Shipping (UK) Ltd*.

110. Lord Denning was a propagandist for this approach for some time; see *Discipline of Law*, London 1979, particularly pp.9-22, in which he in his own inimitable manner describes the motives of the ‘intention seekers’. See also H. U. Jessurun d’Oliveira in his review of Denning’s *The Family Story*, London 1981 (NJB 1981, p.1184).

111. [1977] 1 Lloyd’s Rep 237.

112. *Ibid.*, p.238.

113. *Ibid.*, p.242 (Roskill and Lawton).

114. HL 25.7.1977 [1978] 1 Lloyd’s Rep 119.

115. *Ibid.*, p.128. See also, Hill/Messent, p.xxxviii.

This forceful statement carries little conviction when one considers that the result of Denning's method is the same as the substance of Salmon's opinion: both make appeal to the same grounds – justice and reason.

Besides other CMR decisions,¹¹⁶ one decision on the interpretation of Article 26(2) Warsaw Convention has above all attracted attention, and for which the basis was laid in *Buchanan v. Babco*. Contrary to the Court of Appeal, the House of Lords came to the decision that under 'damage' was also to be understood partial loss.¹¹⁷

These decisions are principally of importance due to their extensive comparison of caselaw and literature, including foreign sources, as well as for the historical interpretation method, hitherto not permitted under English law, that is to say, for the question under what circumstances may, or ought, the travaux préparatoires to be consulted.¹¹⁸

It appears from these decisions that English judges appreciate fully the international function that they should exercise together with other judges. In addition to all the criticism that can be levelled from legal-theoretical as well as practical points of view at the trailblazing way in which Denning introduced and applied the continental, teleological method of interpretation in England, it may be stated that his starting point must be applauded in the light of the development of uniform law.¹¹⁹ The development demonstrates sufficiently that, which is the subject of this section, there are hopeful indications that the traditional English methods of interpretation and views, which have been regarded as a persistent obstacle to a desirable development of uniform law, are capable of adapting and directing themselves to the aims of uniform law. The English judges have shown clearly that they are receptive to conceptions existing in other countries. As Bremidas has written:

116. For example, CA 16.11.1976 [1977] 1 Lloyd's Rep 346 (348-351).

117. CA 7.6.1979 [1980] 1 Lloyd's Rep 149 (Denning dissenting!); HL 20.5.1980 [1980] 2 Lloyd's Rep 295 (*Fothergill v. Monarch Airlines Ltd*), on which see, D. Schoner, *Air Law* 1980, pp.174 et seq., respectively *Air Law* 1981, pp.40 et seq. See, R. H. Mankiewicz, *Zeitschrift für Luft – und Weltraumrecht* 1981, p.119; Hill/Messent, p.xli.

118. D. Schoner comments on this, *Air Law* 1981, p.43: 'This is a big step forward for English courts; but it should also be most inspiring for foreign judges. As far as a foreigner is concerned, it is most impressive to see that the highest British court has discussed the opinion of foreign writers and judgments. It can only be hoped that foreign judges follow this example.' See also ETL 1983, no.5, which is completely devoted to caselaw from different countries on Art.26(2) Warsaw Convention. It is all the more to be regretted that this most highly interesting case was not referred to by the Hoge Raad in its decision of 12.2.1982, S&S 1982, 56; NJ 1982, 589.

119. The approach advocated by Denning was received with approval by M. Kerr, *Modern Trends in Commercial Law*, *Modern Law Review* 1978, pp.17, 18; D. Schoner, *Air Law* 1978, pp.224, 225 as well as n.125; D. J. Hill (1977) 2 LMCLQ, p.213; J. A. Jolowicz, in: *New perspectives for a Common Law for Europe*, Leyden 1978, pp.250-253; M. J. Bonell, *ULR* 1978, II, pp.11-12, the present writer, *NJB* 1979, pp.29, 30. Prior to *Buchanan v. Babco* indications in that direction were pointed out by, inter alia, O. C. Giles, *op. cit.*, p.37; C. M. Schmitthoff, *Methoden für Rechtsvergleichung*, Frankfurt 1974, p.52; H. Dölle/E. Wahl, *op. cit.*, Art.17 EKG, Rz 28. A. C. Hardingham (1978) 1 LMCLQ, pp.450-459, reacted 'pass'. Disapproval was registered by V. Sachs and C. Harlow, *MLR* 1979, pp.580-581; similarly by, Th. H. J. Dorrestein, *NJB* 1979, pp.181 et seq.

'English courts are bound to bow to the winds of change and follow the same methods as the European Court for the interpretation of Community law. This will obviously be a very difficult and long lasting process requiring above all a change in the mentality of the English judiciary.'¹²⁰

Cases such as *Buchanan v. Babco*, *Fothergill v. Monarch Air Lines* and the reactions they have engendered are illustrative of the mental process. The indications are that this process, albeit convulsively as is always the case in uniform law, is in a position favourably to assert itself.¹²¹

In conclusion it can be stated that from the examples presented in this section it appears that the judge, conscious of his task regarding uniform law, appears not only able but also prepared to discharge this task. And this appears to be a not unimportant assertion in the light of the realisation of the primary aim of the CMR precisely at that point where, given the lack of a communal court, the engagement of the national judge is regarded as the most serious obstacle to the development of uniform law.

§ 6. Literature

In the light of the interpretation of the Convention, one might now take a bird's eye view at how a number of writers, who have been engaged with the CMR, assess what has been denoted above as the autonomous character of the Convention.

a. Muth-Glöckner¹²² pays virtually no attention to the subject-matter. In their view the Convention shows a strong resemblance to the German KVO and as a result of this KVO law is to be applied whenever a lacuna is established.¹²³ No opinion is expressed on interpretation of the Convention provisions. With this position the writers reject the view of Vogt who allowed a filling in role to general HGB law but who in principle rejected KVO law from this role.¹²⁴

120. A. Bremidas, *Methods of Interpretation and Community Law*, Amsterdam–New York–Oxford 1978, p.280. See, J. G. Sauveplanne, *Codified and judge-made law*, Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Amsterdam–New York–Oxford 1982, pp.115,116.

121. See, W. Tetley, *Maritime Cargo Claims*, 1978, pp.39-45; K. R. Simmonds, *The Hamburg Rules on the Carriage by Sea*, Leyden-Boston 1978, pp.122, 123; High Court of Australia 12.12.1980, ULR 1981, p.186; Hill/Messent, op. cit., p.xxxvii.

122. W. Muth-H. Glöckner, *Leitfaden zur CMR*, 5. überarbeitete Auflage, Berlin 1983.

123. No. 3. It is noteworthy that, due in part to autonomous convention interpretation by the BGH, the authentic text of the CMR has been adopted in the latest edition.

124. W. Vogt, DVZ 1972, no.99, p.8: 'Fragen, die in der CMR nicht geregelt sind, können nicht etwa unter entsprechender Heranziehung entsprechender Bestimmungen der KVO beantwortet werden. Denn die KVO ist eine nur und ausschliesslich für den innerdeutschen Güterfernverkehr geltende Sonderregelung, deren Anwendung aus den aufgezeigten rechtssystematischen Gründen auf den völlig gleichwertigen und selbständigen Regelung der CMR unterliegenden Beförderungsvertrag nicht möglich ist.' On this controversy see, Heuer, p.35.

It is characteristic of Precht-Endrigkeit¹²⁵ that, before beginning their article-by-article commentary on the Convention, they first give an account of the matter dealt with here. The writers recognise the primacy of convention law above national law.¹²⁶

Like Precht-Endrigkeit, Heuer¹²⁷ expresses his opinion on the issue of the scope of the Convention and the relationship of CMR law to national sources of law.¹²⁸ His thesis amounts to the warning to exercise great caution in regard to the application of national law, which should be an exception. In conformity with the aim of the Convention it ought to be interpreted from within itself. Apart from that it appears from the remainder of his book that he concentrates above all on views that have emerged in German literature and caselaw.

The work of Helm¹²⁹ is quintessentially of German origin and character. This author is a staunch champion of autonomous convention interpretation. On the relationship between national and convention law, he states:

‘Als Internationales Einheitsrecht hat die CMR die Aufgabe, zur Rechtsangleichung beizutragen. Sie kann diese Aufgabe am besten erfüllen, wenn sie von den Gerichten der beteiligten Staaten möglichst einheitlich interpretiert und ergänzt wird. Soweit irgend möglich, sollte die CMR daher aus sich heraus ohne Rückgriff auf nationales Recht interpretiert und durch Analogie ergänzt werden.’¹³⁰

The influence of Kropholler is no stranger here.¹³¹ The writer draws heavily on caselaw and literature, also from foreign sources, in his considerations.

One meets a strongly casuistical treatment of the CMR in Groth.¹³² In continuation of earlier caselaw commentaries, he provides short summaries of a number of decisions of foreign courts, which is valuable for comparative law.¹³³ His opinion on the interpretation of the Convention is somewhat ambivalent. He appears on the one hand to have no difficulty in accepting that the Convention is to be interpreted by means of national law¹³⁴ and he

125. Precht/Endrigkeit, *CMR-Handbuch*, 3. Auflage, Hamburg 1972.

126. *Ibid.*, pp.41-44.

127. Heuer, *Die Haftung des Frachtführers nach der CMR*, Hamburg 1975.

128. *Ibid.*, pp.24-27; pp.33-37.

129. Helm, *Frachtrecht, Güterberförderung über die Strasse*, Berlin–New York 1979.

130. *Ibid.*, Art.1 CMR, Anm. 4.

131. *Ibid.*, Art.1 CMR, Anm. 1. There is no smoke without fire. A fire is indicated by Kropholler, p.312 n.23; for the degree of care to be adopted by the carrier Helm would fall back too much on national law. Despite this criticism of the 1966 dissertation Helm maintains this opinion in his most recent work, Art.17 CMR, Anm. 5, on which further Chapter 4, § 2.

132. Groth, *Übersicht über die internationale Rechtsprechung zur CMR*, Karlsruhe 1981.

133. See, *RIW/AWD* 1977, pp.265 et seq.; *VersR* 1983, pp.1104 et seq.

134. Groth, p.36.

entertains objections to the historical, systematical and teleological methods of interpretation,¹³⁵ while on the other hand he deems it wrong to fall back fully on national law.¹³⁶ Although he considers the teleological method unsuitable for the interpretation of uniform law¹³⁷ it is precisely by use of this method that in a particular case he fills in a lacuna in the Convention.¹³⁸ While he expresses a preference for the grammatical method, he regards the English decision of *Buchanan v. Babco* as instructive and likewise abandons his standpoint whenever it brings international legal unity into difficulty.¹³⁹

b. At various places in his 'Note Explicative sur la CMR' Loewe¹⁴⁰ warns of the nationalisation of the Convention. The preference for nationalism that manifests itself in the caselaw is, in his view, responsible for the strongly divergent interpretation of some convention provisions. Measuring convention concepts against the yardstick of national law does scant justice to the most important aim of the Convention.¹⁴¹

c. In her Swiss dissertation on the CMR, Nickel-Lanz¹⁴² does not fully explore the problematic considered here of ascertaining the law. Admittedly the writer allows some room for foreign literature and jurisprudence in her considerations, in regard to which she expresses the hope in the final sentence of her book that the Swiss judiciary will take note thereof in handing down future decisions,¹⁴³ but nothing more.

In two virtually contemporaneous Swiss publications in part directed to the CMR the question of the nature of the Convention and the implications for the interpretation thereof are treated rather less satisfactorily. Aisslinger¹⁴⁴ suffices with the proposition that, in the case of the nucleus of the Convention (Artt. 17-29) national law should find no application and that for the rest it should fulfil merely a secondary function.¹⁴⁵ The argumentation is for the rest strongly oriented towards Swiss law. In his comparative law enquiry

135. *Ibid.*, p.44.

136. *Ibid.*, pp.13, 14; see also p.46 where he turns against the view of Dorrestein.

137. *Ibid.*, p. 46.

138. *Ibid.*, p.75.

139. *Ibid.*, p.72 respectively p.88.

140. Loewe, pp.311 et seq.

141. *Ibid.*, nos. 16, 38, 39, 42, 153.

142. Nickel-Lanz, *La convention relative au contrat de transport international de marchandises par route (CMR)*, Hamburg 1976.

143. *Ibid.*, no. 223.

144. Aisslinger, *Die Haftung des Strassenfrachtführers und die Frachtführerhaftpflichtversicherung*, Zurich 1975.

145. *Ibid.*, pp.61, 62.

Edis¹⁴⁶ strongly urges a more extensive harmonisation and unification of particular aspects of transport of goods by road, which in the CMR and in the national regulations examined by him are at present regulated differently.

d. The short commentary to the Convention by Constanzo¹⁴⁷ makes no mention of the matter dealt with in this Chapter. Pesce¹⁴⁸ is more extensive on this point. Before beginning his article-by-article commentary on the CMR, he devotes, besides to historical aspects, some attention to the uniformity intended by the CMR. Conflict of law rules and other national law rules play merely a secondary role.¹⁴⁹

e. In his contribution to the Hague–Zagreb Colloquium on the Law of International Trade in 1976 Filipović¹⁵⁰ concluded that Yugoslav courts in general clearly strive to interpret the Convention in a manner that will contribute to international unification.

f. In France a commentary on the CMR by Rodière appeared.¹⁵¹ In the Foreword, this influential author points out the importance and authority of foreign caselaw.

‘L’esprit comparatif gagne le monde judiciaire et un précédent étranger doit avoir d’influence sur le juge français que tel ou tel précédent français. Si nous n’en sommes pas encore exactement là, si la jurisprudence française a plus d’autorité en fait devant nos tribunaux que la jurisprudence étrangère, c’est par un reste de cet esprit nationaliste qui a envahi le Monde avec la codification napoléonienne. Cet état d’esprit est en voie de régression.’

This declaration of principle implies that he cites much foreign caselaw. The writer brings his study to an end with a number of comments on the interpretation of the Convention. He goes no further than to posit the general adage ‘the happy medium’ (not too narrow, but above all not too broad). Certainly he yet again enjoins the French courts to accept the authority of foreign caselaw, thereby emphasising their international task.

In addition, as part of *Lamy Transport*, a systematic elaboration of the CMR with citation of virtually exclusively French caselaw is published annually.¹⁵²

146. Edis, *Die Haftung des Frachtführers nach schweizerischem Obligationen und türkischem Handelsrecht*, Bern-Frankfurt 1975.

147. Constanzo, *Il contratto di trasporto internazionale nella CMR*, Milan 1971.

148. Pesce, *Il contratto di trasporto internazionale di merci su strada*, Padua 1984.

149. *Ibid.*, pp.19 et seq., 29 et seq.

150. V. Filipović, *Some Yugoslav court decisions on carriage of goods by road*, Hague-Zagreb Essays 2, pp.57-65.

151. R. Rodière, *La CMR*, BT 1974, pp.182-185; 206-208; 230-232; 242-244; 266-269; 278-280; 290-293; 314-316; 326-328; 338-341; 350-353; 362-364.

152. *Lamy Transport*, Vol. I, ‘Route’, edited by P. Brunat, Paris 1984.

g. In Belgium it was Libouton who first enriched the literature with a trio of CMR caselaw collections.¹⁵³ The short analyses of Belgian, Dutch and French judicial decisions are of great importance in that they make it possible for the judges to orient themselves in regard to the interpretation of the Convention. Although the writer does not in general refrain from expressing his judgement of the decisions, he does not present his own vision of the interpretation issue as such. In particular, his position on the autonomy of the Convention is not clear.¹⁵⁴

This is even more strongly the case with Wijffels¹⁵⁵ in his contribution to a CMR working meeting. In succession to Rodière he calls upon the judges to be aware of their community task in regard to interpretation of the CMR. He postulates, although on factual grounds, a divergence in the caselaw, but offers no remedy for this evil. Such a publication, partly as a result of the framework selected, is more likely to engender despondency than to elicit positive reflection on the task that the judges have jointly to perform.

A systematically structured caselaw collection by Ponet, which broadly covered the same legal area as Libouton, appeared in 1980,¹⁵⁶ while De Vos appeared in 1981.¹⁵⁷ Having regard to the structure of these publications (the plain, sometimes paraphrased, citation of the most important considerations from the judicial decisions) it is no surprise that the authors do not mention the subject-matter of this Chapter.

This cannot be said of the so far most recent work in Belgium, that of Putzeys.¹⁵⁸ That writer holds the view that the CMR should be interpreted on the basis of national legal principles; the national law is to be indicated by the conflict of laws rules leading to application of the *lex contractus*.¹⁵⁹ This proposition does not prevent him from furnishing, apparently with approval,

153. J. Libouton, *Les transports routiers internationaux*; survey 1965-1971, *JdT* 1972, pp.381-386, pp.397-405; *ETL* 1973, pp.1-90. Survey 1972-1973 *JdT* 1974, pp.505-515; pp.528-531. Survey 1974-1980, *JdT* 1982, pp.693-704; pp.713-738.

154. Thus, e.g., at *JdT* 1982, p.714, he agrees with the decision noted above of the BGH of 28.2.1975, *NJW* 1975, p.1597, in which application of national law to the interpretation of Art.17(2) CMR was dismissed, yet at the same time does not reject the equation by Hof The Hague 22.1.1974, *S&S*1975, 90, of the Convention provision with the Dutch concept of *force majeure*.

155. R. Wijffels, *Legal interpretations of CMR: the continental viewpoint*, *ETL* 1976, pp.208-230.

156. F. Ponet, *De overeenkomst van internationaal wegvervoer (CMR)*, Antwerp 1980.

157. J. de Vos, *Internationaal goederenvervoer over land en zee*, Vol. 5: *Verdrag betreffende de Overeenkomst tot Internationaal vervoer van goederen over de weg (CMR)*, Ghent 1981. See also the summary surveys by Y. Merchiers, *TPR* 1979, pp.115-121; *TPR* 1982, pp.790-800.

158. J. Putzeys, *Le contrat de transport routier de marchandises*, Brussels 1981.

159. *Ibid.*, no. 256. See also, 'Notions et sources', p.11. Even stranger is his reproach of nationalism against the Paris CA in regard to the interpretation of an arbitration clause in which application of Swedish law was stipulated, no. 1110. See on this below, Chapter 7, § 4. In his

an extensive quotation of Loewe in which autonomous interpretation is advocated, when dealing with the question of how Article 17(2) CMR is to be interpreted.¹⁶⁰

In the Manual of Belgian Commercial Law¹⁶¹ only one observation is made as to the matter under discussion here: lacunae ought to be filled by the national law, indicated by the conflict of laws.

h. In England a number of case-studies have appeared as a result of decisions of the English courts.¹⁶² In these studies the writers evidence great interest in continental considerations on the CMR.

It is gratifying that – due also in part to CMR caselaw in England? – interest in the CMR has led to publications by Donald,¹⁶³ Clarke,¹⁶⁴ Ridley¹⁶⁵ and Hill/Messent.¹⁶⁶ The first of these authors gives a practice oriented, non-judicial concise commentary of a number of subjects dealt with by the Convention.¹⁶⁷ Clarke is more thorough. Prior to describing the transport contract he sets out on the basis of the decision in *Buchanan v. Babco* the argumentation that came to the fore in the interpretation of the CMR.¹⁶⁸ His conclusion, following that of the House of Lords, is that in such a case the ordinary law applies, not the method recommended by Denning. In a brief summary of the decisions in *Buchanan v. Babco* and *Fothergill v. Monarch Air Lines* he gives the following guideline: in the first place, one should look to the wording of the English text of the CMR; should this appear to be unclear then the following resources may be utilised: a. the French text; b. the teleological method and c. the historical method.¹⁶⁹

contribution to *Etudes offertes à René Rodière*, Paris 1981, pp.473-479, he severely criticises Belgian caselaw that declares void jurisdiction clauses under which reference is to be made to foreign courts.

160. *Ibid.*, no. 742.

161. L. Frédéricq, *Handboek van Belgisch Handelsrecht*, Brussels 1980.

162. Commentaries by D. J. Hill, A. C. Hardingham and D. Glass will be presented in the following Chapters.

163. A. E. Donald, *The CMR*, London 1981.

164. M. Clarke, *International Carriage of Goods by Road*, London 1982.

165. J. Ridley, *The Law of the Carriage of Goods by Land, Sea and Air*, sixth edition, London 1982, pp.57-68. In this work merely an occasional rule of the CMR is reproduced.

166. D. J. Hill/A. D. Messent, *CMR: Contracts for the International Carriage of Goods by Road*, London 1984.

167. Thus, e.g., the pivotal Articles 17 and 18 CMR are not treated. Similar non-judicial guides for practice have also appeared elsewhere: *CMR-Commentaires*, FNTR-AFTRI, Paris 1975; *Syllabus De CMR*, Instituut voor wegtransportrecht, Brussels 1982.

168. *Op. cit.*, nos. 3-5.

169. *Ibid.*, no. 7.

In an Introduction, Hill/Messent give an account of the interpretation problematic dealt with here. On the basis of different CMR decisions in England the writers point out the shift mentioned above from a strict literal approach to a teleological or purposive approach. They consider comparative caselaw useful, certainly over a long period, although it can conceal dangers. National law should only be applied when it is clear that the Convention itself offers no regulation.¹⁷⁰ It is noticeable that despite much citation of continental caselaw, the book is virtually devoid of continental literature.

i. A particular viewpoint as to the interpretation of the Convention is not to be distilled from the contributions originating from Scandinavia of Sevón¹⁷¹ on a number of judicial decisions rendered in Denmark or from Wetter¹⁷² on the CMR regulation of limitation periods.

j. This cannot be said of Dorrestein.¹⁷³ Before revealing his view on the interpretation of the CMR, he makes a number of comments on the relationship of national law to the CMR. National law applies to unregulated or not fully regulated matters, just as it does to undefined concepts occurring in the Convention. Subsequently, he develops this thesis into a general prohibition on seeking for 'supra-national' rules.¹⁷⁴ Dorrestein prescribes this directive also for the interpretation of the CMR itself.¹⁷⁵ The result of such a view of uniform law is without more that a choice of applicable law will have to be specified in regard to every transport contract. Another implication of this view is that this writer accords no, or at best little, authority or consequently room to the views of foreign courts and writers. In short, the writer has not understood it in terms of uniformity. He endeavours to defend this thesis, which fails to grasp the nature and purport of the Convention, with practical arguments.¹⁷⁶

It is clear that Dorrestein's conception of uniform law does not square with

170. Hill/Messent, *op. cit.*, p.xliii.

171. L. Sevón, the CMR-Convention and its application by Scandinavian courts, *Jur Unif* 1971, pp.293 et seq.

172. J. Wetter, The time bar regulations in the CMR-Convention, (1979) 4 *LMCLQ* 504 et seq., on which see further Chapter 8.

173. Th. H. J. Dorrestein, *Recht van het internationale wegvervoer*, Zwolle 1977.

174. *Ibid.*, no. 89.

175. *Ibid.*, no. 91.

176. Besides the relevant passages in his book (nos. 86-93) one should compare NJB 1979, pp.181 et seq., with the postscript by the present writer, at p.184. Dorrestein's evidence for the view he advances is not completely consistent, which deprives his arguments of credibility. Thus he regards, on the one hand and in the light of the diversity in the caselaw, as felicitous that not all judicial decisions are published and available (NJB p.181), but, on the other, advances the non-availability of caselaw as one of the most important reasons why no uniformity can be sought (*op. cit.*, nos. 89, 91). This argument does not apply, however, for an occasional caselaw survey; what the judge may or must do with it remains an open question. On the one hand the judge should, barring exceptions, not concern himself with decisions of foreign colleagues (*op. cit.*, no. 91; NJB p.181), although this does not apply to the Dutch legal scene for such are

what has been said in preceding sections as to the nature of convention law and the task of the judge in regard to the development of uniform law.

In Korthals Altes/Wiarda¹⁷⁷ attention is also paid to the matter dealt with in this Chapter. In a number of places and in varying formulations the authors underline the importance of interpretation, but at the same time, on the basis of the diversity in the caselaw, do not fail to caution against pitching one's expectations in regard to the attainability of uniform law too high.

The extremely concise treatment of the CMR in the fourth volume of Dorhout Mees' standard work presumably allowed for no view to be expressed on the issue under consideration.¹⁷⁸

It is clear, having made this tour of the literature, that not every author who concerns himself with the CMR deals explicitly with the matter under discussion in this Chapter. The writers who do deal with the nature of the Convention draw direct consequences therefrom for its interpretation. With a majority of these writers the influence of literature on uniform law in general is noticeable. One finds in the CMR literature virtually no particular, as opposed to a general, view as to the way in which autonomous ascertainment of law ought to be actualised. It is precisely on this point that legal science should concentrate in the interest of the legal certainty that is so necessary for practice. It will also be necessary for legal science to continue to spare no pains to effectuate this actualisation so as to advance the harmonious development of convention law, including the CMR.

consumed avidly abroad (op. cit., no. 91). A similar ambiguity is demonstrated by Dorrestein in RM Themis 1982, pp.51 et seq. On the views of Dorrestein see further, P. L. Wery, RM Themis 1984, p.305.

177. A. Korthals Altes/J. J. Wiarda, *Vervoerrecht*, Deventer 1980.

178. T. J. Dorhout Mees, *Nederlandse handels – en faillissementsrecht*, IV, *Vervoer*, seventh edition, revised by A. C. van Empel, Arnhem 1980, nos. 8.83-8.89a.

Scope of application of the Convention

'It is extremely difficult to determine exactly the legal regime governing the activities surrounding the actual transport of the goods from one point to another.'¹

§ 1. Introduction

Extremely diverse matters can be grouped under the umbrella of the heading of this Chapter. The most important task set by the Convention is to establish a uniform regulation for the liability of the carrier. But to the question, what falls within the concept of carrier, the Convention fails to provide an answer.² One is therefore faced with the task of determining the meaning of the concept of transport contract, the most important condition for which, and consequently for the application of the Convention, being that enumerated in Article 1 CMR; the same delimits related contracts from the transport contract (§ 4.2). One encounters this problem of delimitation right across the board of transport law in every country. The extent to which the CMR is here a contributor to the issue is investigated in § 4. Greater clarity can in this respect be obtained by paying more attention to those contracts that belong to transport law in a wider sense and thereby ascertain in which respects such contracts differ from the transport contract. As such the following are in issue: the freight forwarding contract (§ 4.3), the transport operator contract (§ 4.4), the chartering contract (§ 4.5), the haulage contract (§ 4.6) and then other contracts (§ 4.7).

The Convention does in fact take account of different types of transport. Besides the general regulation of the carrier the CMR furnishes a specific regulation for roll-on/roll-off or piggy-back transport (Art.2), sub-transport (Art.3), and successive transport (Artt.34-40). Although the Convention accommodates the regulation of roll-on/roll-off transport under the Chapter 'Scope of Application', it is considered systematically justified, taking account of the relationship to the other types of transport, to deal with this matter in a separate third Chapter.

1. J. Ramberg, *Les auxiliares de transport dans les pays du marché commun*, Rouen 1977, Synthesis Report, p.3.

2. It appears from reports of proceedings of the negotiations that from the outset the intention was pursued to let the Convention begin with definitions. By carrier was understood: 'Carrier refers to the person undertaking to effect transport by means of a vehicle of which he is the owner, operator or charterer.' (Report Small Committee, TRANS/WP 9/22, 21 December 1953, Appendix, p.1). In a commentary on the definition in an earlier report the undesirable connection between the person of the carrier and the vehicle utilised by him was pointed out (E/ECE/TRANS/SC1/79, 1 May 1950, p.3). Finally, and without a reasoned explanation, the definitions were dropped from the draft (TRANS/WP 9/32, 10 May 1952, Annex 1, p.2). An explanation for the omission of, inter alia, the definition of carrier can be found in the fact that Unidroit had undertaken to provide a separate regulation for the freight forwarder (see, TRANS/WP 9/22, p.2). See § 4.2 *infra*.

An important question for convention law generally and therefore also for the CMR, is whether the scope of application of the uniform law is dependent on national law. Considering the importance of this question a general treatment is accorded to the function of the scope rule, also of the type occurring in Article 1 CMR (§ 2).

Apart from the concept of transport contract, the application of the Convention is made dependent on a number of conditions of varying types also stipulated in Article 1. In this connection further enquiry is made of a number of elements, some of which are specified individually in paragraphs 2–5 of Article 1 CMR, such as: a. transport for reward; b. the requirement that the place of taking over the goods and the place designated for delivery are situated in two different countries; c. the concept of vehicle; and d. the concept of goods. A number of special cases of transport to which the Convention does not apply are gone into (e) as also the prohibition imposed on the Contracting States not to restrict the sphere of operations of the CMR (f). The conditions mentioned are treated in § 3.

§ 2. Function of the scope rule

The Convention determines in Article 1(1) its own radius of action.³ This provision must be viewed against the background of what has been noted in the first Chapter regarding the aim and nature of the Convention. This provision is intended to preclude the applicability of the Convention being made dependent on any conflict rule of private international law.⁴ The absence of such a scope rule would expose the applicability of the Convention to the individually divergent and uncertain conflicts rules, the function of which is to indicate a particular source of law of the Contracting States. One of the primary aims of the Convention is to bring about uniformity in regard to a particular international legal relationship. To create a uniform and mandatory liability regime for the carrier without a prior postulated scope rule would insufficiently guarantee the principal aim of the Convention. The present scope rule can therefore be regarded, in the context of international contracts for the carriage of goods by road, as a factor promoting legal certainty.⁵ In the absence of such a provision one would, in connection with a contract for international road transport, be referred in The Netherlands to the law of the country of loading,⁶ in the Federal Republic of Germany to the law of the place of performance and in France to the law of the place of conclusion

3. The interesting question from the point of view of public international law, namely, in what way the States Parties to the CMR have incorporated the Convention into their legal system, must here be left to one side: see, OLG Dusseldorf 27.3.1980, VersR 1980, p.286, as well as L. Erades, RM Themis 1982, p.56.

4. E. van Caemmerer, *Rechtsvereinheitlichung und Internationales Privatrecht, Probleme des Europäischen Rechts*, (Festschrift Hallstein), Frankfurt am Main 1966, pp.75, 78.

5. See, Heuer, p.27.

6. R. van Rooy, *Private international law aspects of road transport*, Hague–Zagreb Essays 2, p.85.

of the contract.⁷ Besides these rules, which adopt different connecting factors and which certainly cannot be regarded as hard and fast rules, there exists a plethora of other specific choice of law rules.⁸ Both Van Rooy and Rodière point out that the above rules are to be preferred, while at the same time conceding that certainty can in no way be built thereon. Having summarised a number of differing connecting factors, Rodière states:

‘No one of these a priori systems is satisfactory. A certain predominance of a particular connecting factor can be picked out in the one or the other legal system.’⁹

The uncertain and for practice untenable result that Van Rooy arrives at is evident from his conclusion:

‘No fixed choice of law rule for the international carriage by road contract being detectable in Dutch private international law at present, preference should be given to application of the law of the country of loading, except in situations where the circumstances of the individual case point to the law of another country.’¹⁰

These statements demonstrate the inadequacy of choice of law rules. The inclusion of a scope rule as contained in Article 1 CMR is consequently indispensable. Such a provision replaces the function of the choice of law rule in order from the outset to obtain certainty as to the applicability of the Convention law.¹¹ Besides the function of indicating which legal relationships are covered by the Convention, this rule at the same time isolates the Convention law from national law, including conflict of laws.¹²

Besides the necessity and function of the scope rule of Article 1 CMR one must also point out its pretensions. Otherwise than with most transport conventions, one of the two places (of taking over of the goods and of delivery) need not be situated in a Contracting State. The rule possesses therefore a certain degree of expansion. By offering two connecting factors, in any event as a facultative condition, for the applicability of the Convention, the choice of

7. R. Rodière, *International Encyclopedia of Comparative Law, Law of Transport*, Chapter 1, p.5.

8. Which will in practice often lead to application of the *lex fori*, see, E. von Caemmerer, *op. cit.*, p.83.

9. *Op. cit.*, p.5.

10. *Op. cit.*, p.85.

11. E. von Caemmerer, *op. cit.*, p.78: ‘Die Kollisionsrechtliche Frage stellt sich gar nicht mehr’; Kropholler, p.190: ‘Sie gehen den allgemeinen Kollisionsnormen vor’; J. Reithmann, *Internationales Vertragsrecht*, *op. cit.* 1980, p.365, sub 426, 427. See also, Rb Rotterdam 27.4.1971, S&S 1971, 73; NJ 1972, 482; Tr Comm Paris 7.11.1973, BT 1973, p.514. Contra, OLG Dusseldorf 18.11.1971, VersR 1973, p.177, on which critically, Kropholler, AWD 1973, p.401, who points out the advantages and disadvantages of the scope of the CMR from a legal-political viewpoint.

12. Kropholler, p.191, terms this rule a ‘Internationalitätsbestimmende oder Kollisionsrechtliche Abgrenzungsnorm’; see also, E. von Caemmerer, *op. cit.*, p.82. Groth, p.13, follows Kegel and speaks of ‘selbständige Kollisionsnorm’.

the drafters, however much made in anticipation of ratification by a large number of countries, appears to be justified.¹³ The choice made by the drafters of the Convention does however raise the question whether the solution opted for is not at the cost of the desire for uniformity expressed in the Preamble.¹⁴ How shall a judge in a non-Contracting State view this scope provision? This is by no means unimaginable because the Convention offers the claimant also the possibility to petition the courts of a non-Contracting State.¹⁵ A judge in such a case will, where a dispute concerning a contract for the international carriage of goods by road is brought before him, and after pronouncing himself competent, first have to decide whether the Convention is applicable. The difference between his position and that of his colleague in a Contracting State is that he, in regard to the applicability of the Convention, may certainly avail himself of the national conflict rules that are there for his use, because the CMR (including Article 1) does not fall within his own legal sphere and is for him in consequence foreign law. Whether he ultimately decides for application of the Convention is in part dependent on his national choice of law rules.¹⁶ The Convention accommodates him in this by prescribing that the statement that the transport is subject, notwithstanding any clause to the contrary, to the provisions of the Convention (Art.6(1)(k) in conjunction with Art.7(3) CMR) shall be contained in the consignment note.¹⁷ Where the conflict of laws of the non-Contracting State recognises party autonomy concerning choice of applicable law, the court of that State will – leaving aside the question whether Article 6(1)(k) ought to be regarded as a so-called

13. In favour of the scope rule: W. E. Haak/P. Storm, Netherlands Reports to the VIIIth International Congress of Comparative Law, Pescara 1970, p.188. By applying the self-evident term 'aggressive scope' also to less expansive scope rules, the differentiating capability of this term is, in the view of the present writer, damaged. Also in favour: E. von Caemmerer, *op. cit.*, p.83; Kropholler, p.193, with extensive reasoning. Doubtful: R. van Rooy, *op. cit.*, p.69. Critical: Loewe, nos. 39, 40.

14. During the negotiations, Switzerland attempted to secure acceptance of a more reserved point of departure (namely, that both despatch and destination countries should be Contracting States), TRANS/WP 9/35, 6 June 1956, p.2.

15. See, Art.31 CMR, on which further Chapter 7. This 'risk' was consciously accepted during the negotiations. See, E/ECE/TRANS/WP 9/16, 18 February 1952, p.3.

16. Other conflict of laws doctrines could also finally prevent him from applying the CMR, e.g., the public policy of the *lex fori*.

17. The opening words of Art.6(1) CMR provide accordingly. It should be borne in mind that application of the Convention is not dependent on the presence or regularity of a consignment note (Art.4 CMR). Criticism was directed at this paramount clause from various sides during the negotiations, namely, from the IRU (TRANS/WP 9/11, 8 January 1952, p.4); by The Netherlands (E/ECE/TRANS/SCI/79, 1 May 1950, p.3); by France and Switzerland (TRANS/WP 9/32, 10 May 1955, p.2); but all to no purpose: 'La plupart des représentants ont toutefois marqué leur préférence pour la clause paramount pour des raisons d'uniformisation et de simplification de droit. Il a été fait ressortir que, si la convention est signée par un grand nombre de pays, cette clause n'aura guère d'effet pratique' (TRANS/WP 9/35, 6 June 1956, p.2). At a special meeting of the working group of the Comité des Transports Interieurs (sub-committee of the CEE), 14-16 February 1972 in Geneva, charged with considering a number of proposed amendments, Norway once more raised the issue of the functioning of the paramount clause, W/TRANS/SCI/438, 19 April 1972, p.8.

paramount clause – perhaps apply the Convention, but then as foreign law.¹⁸

Consequently, in such cases it remains to be proved whether and to what extent the scope rule is to be respected.

Thereafter, a certain degree of pessimism appears justified when such a judge, having decided for application of the CMR, proceeds to interpret the Convention.¹⁹

In the meantime, the practical importance of the subject under discussion has been overtaken, as far as the application of the CMR within Europe is concerned, by the fact that virtually all European countries have either ratified or acceded to the CMR.²⁰ The problem remains undiminished nevertheless for the carriage of goods by road to the Middle East and Africa, in short, to those countries belonging to a totally different legal family.

§ 3. Requirements for application of the Convention

One must look next at the requirements that must be fulfilled for application of the CMR. The following will be treated in consecutive order: a. the contract for reward; b. the condition that the place of taking over of the goods and the place designated for delivery are situated in two different countries; c. the concept of vehicle; d. the concept of goods. Thereafter a number of special cases to which the Convention does not apply arise for treatment (e) as well as the prohibition imposed on the Contracting States not to agree to vary the provisions of the Convention (f).

(a) Article 1(1) CMR specifies as an element the contract for the international carriage of goods by road for reward.²¹ The basis for the applicability of the

18. See, Precht/Endrigkeit, pp.46, 47; Heuer, pp.28, 29; Loewe, nos. 39, 78-81, 93, 94. The Italian Corte di Cassazione by decision of 28.11.1975, ULR 1975, 1, p.247 and 26.11.1980, ULR 1981, 1, p.271, ETL 1983, 70, incorrectly held that the application of the CMR to carriage between Contracting States was dependent on the inclusion of this clause in the consignment note; critically on this, Libouton, p.699; Clarke, no. 12. The FIATA Report, p.7, in the light of the view held in Italy, proposed an amendment to the formulation of the scope of the Convention in Art.1 CMR, namely: 'This Convention shall apply *mandatorily* to every contract ...' For a case where such a clause led to the intended result, see, Rb Rotterdam 26.7.1978, S&S 1979, 49. For a case where the clause produced no, or at least no direct, effect, see, Rb Amsterdam 19.11.1975, S&S 1976, 55.

19. See, D. Koole, Aspecten van verzekering bij export, Deventer/The Hague 1979, p.90: 'The question is actually whether a carrier to the Middle East, should he be sued in Iraq in connection with damage, will have to contend with the conditions of the CMR or whether the Caliph of Bagdad shall confront him with applicable passages from the Koran.' Kropholler, p.193, on the contrary considers that *Entscheidungseinklang* will not be unfavourably influenced by the scope rule.

20. Cf. on this Chapter 1, n.19. For application of the CMR to an agreement between Turkey and Iraq, cf. CA Versailles 13.11.1985, BT 1986, p.42.

21. The requirement of 'for reward' has not given rise to difficulty, see, Clarke, no. 19. Contrary to air law, free transport is excluded from the CMR, see, Putzeys, no.17. See also, Helm, *Frachtrecht*, Art.1 CMR, Anm.6, who distinguishes the requirement of 'for reward' from the criterion of professionalism.

CMR is the contract as such and not – as is the case with international rail transport – the taking over of the goods accompanied by a consignment note.²² That the contract is neither formal nor real is confirmed by Article 4, which provides that the absence, irregularity or loss of the consignment note does not affect the validity of the contract. A consequence of using consensus as a point of departure is that the CMR is applicable also where the performance of the contract does not, or not completely, conform to expectations.²³

(b) The subject of the contract must also be international carriage: the places of taking over and delivery of the goods must be situated in two different countries.²⁴ It goes without saying that one distills this element from the consignment note, although the absence or irregularity thereof is of no influence on the applicability of the Convention. The primary rule is that these places ('as specified in the contract') be designated in the consignment note.²⁵ As a consequence of this rule one cannot – principally for practical reasons – avoid a certain formality.²⁶ Circumstances can lead to the situation where

22. Contra, incorrectly, the decision of the Corte di Cassazione mentioned in n.18, supra. Artt.1 and 8 CIM, where relevant, provide: 'This Convention shall apply ... to the carriage of goods consigned under a through consignment note ...; Art.8. The contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage together with the consignment note.'

Art.1 Warsaw Convention is, contrary to the CMR, also applicable to free transport as well as to actual transport. The unsatisfactory situations that this difference in criteria can lead to was demonstrated by the decision of the LG and OLG Frankfurt am Main of 26.2.1981, respectively 11.11.1981, VersR 1982, p.697. A contracted carriage of goods by air from West Germany to France could not go ahead due to lack of space on board, whereupon the goods were shipped by road to the place of destination. In this situation the courts declared both the CMR (due to the lack of a contract within the meaning of Art.1 CMR) and the Warsaw Convention (due to the lack of actual air transport) inapplicable. Acceptance of a tacit amendment of the original contract was prevented by IATA Resolution 507B. One thing and another led to application of the general transport conditions printed on the reverse of the air consignment note.

23. See, OLG Dusseldorf 13.7.1978, p.1016; Rodière, p.184 sub 7; Ponet, pp.43, 44. The extremely central role of consensus is apparent from a decision of the Hoge Raad of 17.11.1978, S&S 1979, 23; NJ 1980, 484 note B.W. The fact that the parties agreed that the transport to be performed should be international was sufficient for application of the CMR. The actual places that would be involved and, to a lesser extent, the moment when the consignment note would be handed over were – correctly – deemed irrelevant. For a case where the application of the Convention escaped the court's attention, Cass. 5.7.1977, BT 1977, p.402.

24. It follows from this that the simple act of land border crossing is no criterion.

25. See, Art.4, first line; Art.6(1), opening words and (d) CMR.

26. How else is the existence of the contract to be proved? See, Rb Amsterdam 7.11.1979, S&S 1980, 79. Although application of the Convention is not dependent on the existence of the consignment note, the functioning of the convention regime is certainly based on the presence of a similar document: see Artt.4-16, Artt.24, 26, 30 and 34 CMR. See, Donald, p.63 et seq. The consignment note is mandatorily required in accordance with administrative law provisions: in accordance with Art.6 Regulation No. 11, Council of the European Communities (Discrimination Regulation) a transport document should be drawn up for every transport within the Community. Administrative regulations exist also for transport charges; see, Putzeys, nos. 180 et seq. In accordance with Art.18 Uitvoeringsbesluit Autovervoer Goederen (Executive Decision on Motor Transport of Goods, (The Netherlands)) border crossing carriage of goods may only take place in possession of transport documents prescribed by the Minister.

formality can assume decisive significance²⁷ and thereby supplant consensus.

The question here arises whether the applicability of the Convention is dependent on the will of the parties under all circumstances. Ought, in other words, contracts that purport to reject the Convention to be respected in conformity with that purport?

In one case of actual border crossing carriage, which, at least according to the courts that heard the matter, was not intended by the parties to it to be international within the meaning of Article 1(1) CMR, the Hoge Raad decided that a contract that was so founded was not covered by the Convention. The Rechtbank Amsterdam had determined that the contract between a Dutch freight forwarder and a German carrier to transport goods from Glanerbrug (situated 250 metres from the Dutch–German border and on the Dutch side) to Ebersdorf (FRG) could not be considered as international carriage within the meaning of Article 1 CMR.²⁸ The Hof Amsterdam upheld this judgment.²⁹ On appeal in cassation it was vainly pleaded that the court of appeal had regarded the distance to be covered on Dutch territory as judicially irrelevant, contrary to Article 41 CMR. The Hoge Raad considered however:

‘It appears from the Preamble that the Convention purports to effect a uniform regulation of the contract for the international carriage of goods by road. In connection herewith it is unacceptable that with Article 1(1) it was intended to declare the Convention applicable to a contract of carriage by road to a place within a Contracting State from the land frontier of the State itself. A contract that envisages such carriage – whereby the taking over of the goods on the frontier clearly must occur at a place suitable for that purpose – does not lose that purport by virtue only of the fact that that place is situated just over the frontier.’³⁰

The court followed in this the conclusion of the Advocate General in which a number of arguments against issuing a declaration of reversal had been advanced. The Advocate General noted in his conclusion that in international carriage by rail, which had served as a model in the creation of the CMR, transport from the frontier was excluded from the convention regime. Given that he could discover no argument for assuming that the CMR drafters had

27. Caselaw sometimes attempts to derive the essentials of the contract from what the document says thereover: V. Filipović, *Hague-Zagreb Essays* 2, p.58, citing Supreme Court Zagreb, 8.2.1964: ‘The contract being informal, any consignment note drawn up is only a document of proof. But if the clauses of the consignment note are not in accordance with the oral agreement, the jurisprudence considers that the written document alters the oral agreement if the party confronted with it did not make any remarks on its content.’ See also, Rb Kh Antwerp 9.12.1977, ETL 1978, p.110, and the same court 3.4.1977, ETL 1977, p.411; Rb Rotterdam 13.4.1973, S&S 1973, 92.

28. The Rechtbank in its decision of 19.11.1975, S&S 1976, 55, considered itself, as a result of non-applicability of the Convention, without jurisdiction to entertain the petition of the Dutch claimant.

29. Hof Amsterdam 14.10.1977, S&S 1978, 15. Judges who also snip such international chains into national links are: Rb Rotterdam 4.11.1969, S&S 1970, 82; CA Paris 17.12.1970, BT 1971, p.49; 21.1.1972, BT 1972, p.64; 9.3.1974, BT 1974, p.23, according to Libouton, 1982, p.697, ‘un arrêt très contestable.’ Contra, Rb The Hague 24.3.1977, S&S 1978, 30.

30. HR 16.3.1979, S&S 1979, 64; NJ 1980, 562.

wished to abandon that principle, he concluded that where parties intended such a 'from-near-the-border carriage', this was not contrary to Article 41 CMR. Respect for the conclusions drawn by the Advocate General does not remove the fact that this line of argument is not convincing, for the simple reason that this exception, which is stipulated in all versions of the CIM, was in fact not included in the CMR.³¹

The issue here was never the subject of discussion.³² The Advocate General called in aid a number of writers, including 'the very authoritative author René Rodière'. Certainly, Rodière accepts that in extreme cases such a practice permitted by the parties need not be in conflict with the mandatory rule character of the Convention; but he doubted the desirability of such a practice.³³

Here one should be aware of the fact that the contract upon which proceedings were founded (carriage from Glanerbrug to Ebersdorf) was part of a carriage from Hengelo, The Netherlands to Ebersdorf, FRG. If one leaves this fact out of consideration then the decision of the Hoge Raad appears, to the present writer, in itself to be correct.

Meanwhile, the above demonstrates that in practice it will not always be easy to determine on the basis of the factual state of affairs the parties' intention.³⁴ Thus, the Rechtbank Rotterdam considered the CMR to be applicable to a contract of carriage from Scheveningen, the Dutch port, to Haverhill, in England. In reaching this conclusion the court considered, *inter alia*, the following:

'Norfolk's argument that the CMR can only be of application where there is a question of "international road transport", under which one is apparently to understand that the goods must be transported by road vehicle in at least two countries (in *casu* the transport by road in The Netherlands was effected exclusively on the private property of Norfolk) is dismissed in its totality by the court as contrary to Article 1 CMR. Even with extensive interpretation of the cited paragraphs of Article 1 CMR the carriage at issue cannot be viewed as a "from frontier" carriage within the United Kingdom.'³⁵

31. Nanassy, p.42; Nanassy-Wick, p.32; Boudewijnse, pp.53, 54. The primary rule of the CIM leaves the Convention intact in such situations. In the opinion of the present writer it is incorrect to compare the situation in this case with the exceptional situation of the CMR.

32. Chr. P. Verwer, NJB 1979, p.853 refers to a lacuna in the CMR.

33. BT 1974, p.185 sub 9. Elsewhere, Rodière goes deeper into the question in issue, *Droit des transports*, Paris 1977, pp.302, 303. Subject to certain conditions he accepts the possibility of non-applicability of the CMR, provided that a 'contrat unique' is carefully avoided. But with the same breath he adds: 'Mais une pareille manière de fait irait contre les intérêts pratiques qui font souhaiter l'unification des règles de droit et on ne voit pas bien, en présence de régimes nationaux généralement sévères pour les transporteurs, leur intérêt à se soustraire délibérément à la CMR.' Besides the decision cited by the Advocate General, Rb Kh Brussels, he could have referred to CA Paris 9.3.1974, BT 1974, p.213.

34. Loewe, no.48; Dorrestein, no.98; Ch. P. Verwer, NJ 1979, p.853; see also, Rb Kh Antwerp 9.12.1977, ETL 1978, p.110; Hill/Messent, pp.1 et seq.

35. Rb Rotterdam 3.6.1983, S&S 1983, 111.

Leaving aside that a decision on the question whether in casu one was faced with one international or two national contracts is not easy, there are nevertheless a number of arguments that can be mentioned with which to criticise the result obtained in these proceedings, which continued to the highest level. The result of these judicial decisions could be that by means of certain techniques (trailer contracts) and practices (groupage shipments organised by international freight forwarders) a certain part of international road transport will be removed from the applicability of the CMR. A matter that can lead to uncertainty in practice concerns the last passage of the above cited consideration of the Hoge Raad: it should involve real frontier cases.³⁶ Finally, one may join with Rodière in asking oneself what benefit is there for parties who intend to evade the Convention. Certainly in the case of Dutch law the legal position is much the same for national as for international road carriers, seeing that the Law on Road Transport Contracts has adopted the CMR in large measure.³⁷ If this process of infiltration continues also in other countries, the question as to benefit looms even larger.³⁸ But if the infiltration process does not, or only insufficiently, continue, then as a result of the pruning of international transport there will come about a steadily changing legal regime, one that will mean a step back and a disintegration of the field of unification of international road transport law. This would be even more regrettable given that in practice the diametrically opposed phenomenon occurs more frequently: the voluntary adoption of the Convention to national legal relations.³⁹ Accordingly one may hope that the above cited decision of the Hoge Raad concerning contentious 'frontier cases' will be interpreted

36. See the decision also cited by Advocate General Franx of Rb Kh Brussels 10.11.1971 (4 km. from the border), on which Libouton, 1973, p.20; see also, Libouton, 1982, p.697.

37. Law of 2 December 1982, Stb. 670. Having regard to the differing limits it would appear that the solution would have to be found primarily in the area of insurance.

38. For Sweden, see, G. Pettersson/J. Wetter, (1978) 4 LMCLQ, pp.567 et seq. For Belgium, see, Wegtransportrecht of 19 May 1982, no.7 (official organ of the Belgian National Federation of Professional Transporters), in which mention is made of the preparation of the Algemene Voorwarden Wegverwoer (A.V.W.V.: General Road Transport Conditions), which declare the CMR to be in principle applicable to all national road transport and further regulate a number of legal questions not covered by the Convention. As a result, confusion in Belgium arising from a ministerial decree and concerning the voluntary adoption of CMR applicability to national transport, has been brought to an end, a situation that had been sought since the coming into effect of the CMR. See, Putzeys, nos. 189, 191-194. The Belgian situation is positively received by L. Brunat, BT 1982, p.130, who considers the same situation to be desirable for France, but who correctly sees the mandatory rule character of Artt. 103 and 105 CComm as an obstacle. A comparison with the situation in The Netherlands shows that in Belgium one stage less was required, namely, the intervention of the national legislator. Voluntary adoption of the CMR in The Netherlands can only be achieved with due regard for the provisions of Art.24 WOW.

39. For The Netherlands: see, Rb Amsterdam 19.11.1975, S&S 1976, 55; Rb Rotterdam 1.10.1976, S&S 1977, 17; Rb Amsterdam 3.10.1979, S&S 1980, 78; Rb Den Bosch 27.3.1981, S&S 1983, 89. Further Th. H. J. Dorrestein, Beursbengel 1981, p.9. For France: see, Tr Comm Paris 31.3.1971, BT 1971, p.168. See, Rodière, n.33 supra. For Belgium: Y. de Bouver, SEW 1980, pp.105, 106. For England: Hill/Messent, p.12, consider voluntary adoption of the Convention possible.

strictissimo sensu.⁴⁰ Only in regard to contracts where one can speak of 'from frontier' carriage, and where the intention of the parties that different national transport contracts are envisaged is clearly evident, is the CMR not applicable.

(c) As mentioned previously, the drafters of the Convention had to abandon at the eleventh hour the plan to provide definitions of a number of transport law concepts at the outset of the Convention. Among the definitions that disappeared were carrier, transporter, sender and consignee. In addition, the original definition of the concept of vehicle, which read, 'Vehicle refers to any motor lorry or motor-drawn vehicle used for transport', has disappeared.⁴¹ At the suggestion of the Swiss Government a special working party replaced that provision by the present provision of Article 1(2) CMR,⁴² with its reference to another convention, but without providing any further reasons.⁴³ In this provision an anchor is sought for the concept of vehicle with the definition in Article 4 of the Geneva Convention on Road Traffic of 19 September 1949.⁴⁴ The problems that were identified and then pushed aside are characteristic of the lengthy negotiations. Besides the fact that the solution chosen is scarcely elegant from the legislation point of view, it engenders a number of objections. When referring the concept of vehicle to the Road Traffic Convention insufficient account was probably taken of possible developments in international transport. That Convention clearly has a different purport than the CMR, which regulates exclusively contracts for international carriage by road. In international transport law in particular there are manifold technical developments to which a juridical answer can be given only with difficulty. Blurring the boundaries between the concepts of vehicle, goods and packing is part of this development.⁴⁵

Next, it may be questioned whether developments in the field covered by the Road Traffic Convention are of consequence for the CMR. According to

40. In the same vein, Libouton, 1982, p.697.

41. TRANS/WP 9/22, 21 December 1953, Appendix, p.2.

42. TRANS/WP 9/28, 24 January 1955, p.2.

43. Nevertheless, a lively discussion on this took place behind the scenes; when the Belgian delegate proposed an amendment during the last session of the special working party, it was rejected because, inter alia, 'le texte en question avait fait l'objet de longues discussions'. TRANS/168; TRANS/WP 9/35, 6 June 1956, p.3 sub 8.

44. Trb 1951, 81. The Netherlands is a Party to this Convention, see, Trb 1952, 146. On this Convention: P. Vergneaud, *Les transports internationaux*, Paris 1963, pp.62, 63. For the text of Art.4 see, Hill/Messent, p.243, n.7.

45. For blurring of the boundaries between vehicle and goods see, Rodière, BT 1973, p.459 sub 2. As far as techniques are concerned the arsenal of concepts plays a role in regard to the so-called haulage contract, whereby drive unit and trailer are in different hands, which raises the question, by which legal regime is the relationship between the parties to be regulated: see, Rb Kh Antwerp 27.10.1971, ETL 1972, p.1054, on which see, Libouton, 1974, p.508. See further, § 4.6 infra.

Loewe, it was certainly the drafters' intention to conform to the (administrative law) Road Traffic Convention.⁴⁶ This point of view serves him well in connection with a problem arising with Article 1(2) CMR. It would appear to be virtually incontrovertible that CMR countries that are not Party to the Road Traffic Convention of 1949 are nevertheless bound by Article 4 of this Convention. *Quid iuris*, if this last-mentioned provision should be amended? If such should be the case then one is faced with a delicate situation. The Road Traffic Convention was subject to a measure of amendment on 8 November 1968.⁴⁷ Does the amended version now apply to CMR countries that are not Party to the new Road Traffic Convention?⁴⁸ An undesirable discrepancy between the CMR countries could result from this. This brings Loewe to propose that the definitions of the new Road Traffic Convention are applicable and then totally, to the CMR countries (n'en déplaise the text of Article 1(2) CMR) when the last CMR country that is also Party to the Road Traffic Convention of 1949 accedes to the Convention of 1968 in force.⁴⁹ Loewe's reasoning can be sound only if one proceeds from the assumption that the drafters of the CMR consciously sought affiliation with the Road Traffic Convention and hence also with the developments that occur in the area covered by that Convention. His reasoning not only strains the text of the CMR, it also ignores the problem indicated above concerning technical developments in international transport law. Nor does he take into account the fact that the drafters of the CMR found themselves in the doldrums as far as definitions were concerned and the reference to Article 4 of the Road Traffic Convention was an *ad hoc* solution. However understandable Loewe's position is, CMR countries, whether or not they have acceded to the Road Traffic Convention of 1949 or of 1968, remain bound by Article 4 of the Convention of 1949. One may hope that the coupling of the Road Traffic Convention, and any possible developments in that field that may occur, will not present any obstacles to international private law contracts.

(d) The impression exists that the problem surrounding the concept of vehicle is less in practice than that concerning the concept of goods. The laying down of a criterion for determining the concept of vehicle does not automatically exclude a vehicle from being at the same time goods. In particular is this so when a haulage contract is considered a contract of carriage (which is the subject of the following section of this Chapter and in which differing contracts are examined). If one proceeds on the basis that a haulage contract

46. Loewe, no.31.

47. Vienna Convention on Road Traffic of 8.11.1968, Trb. 1974, 35 (174), in force as of 21.5.1977. The Netherlands has not (yet) ratified, in contrast to the CMR countries Bulgaria, West and East Germany, France, Hungary, Luxemburg, Czechoslovakia, Yugoslavia. As a non-CMR country Russia is a Party to the Road Traffic Convention. Definitions contained in the Convention of 1949 were slightly refined in the new Road Traffic Convention.

48. The new version applies to the acceding States according to Art.48 of the new Road Traffic Convention; see Putzeys, no.152.

49. Loewe, nos. 32 and 33, opposed by Dorrestein, no.99.

ought to be regarded as a contract of carriage, then there are far-reaching implications: a vehicle can then also be particularised as goods.⁵⁰ Thus reasoned the Rechtbank Amsterdam in a decision in which this approach was adopted, as follows:

‘The contract of carriage of Jonker/Mandersloot is a separate contract, which likewise is governed by the provisions of the CMR Convention. It is not contrary to the definition provided in the first paragraph of Article 1 of the Convention, given developments in international transport, the demands of practice and the intentions of the drafters of the Convention text, to regard a loaded trailer without drive unit as “goods”, and which the carrier delivers to its destination across the frontier by means of his own drive unit under tow.’⁵¹

Whether this interpretation indeed tallies with the intention of the drafters of the Convention avoids refutation for lack of documentary proof available to the present writer. Drawing general conclusions from such a judicial decision not only has direct consequences for the application of Article 2 CMR (roll-on/roll-off carriage) and Article 34 CMR (successive carriage), on which more in the following Chapter, but also for the question whether in the event of computation of damage the vehicle itself ought to be regarded as goods or alternatively as packing including in consequence its contents.⁵² The Convention makes no attempt to provide a definition of goods.⁵³ To that extent the Convention is no obstacle to the above cited consideration.

(e) The Convention does, however, indicate indirectly in the fourth paragraph of Article 1 CMR which goods fall outside the ambit of operation of the Convention. It concerns an exceptional trinity of post, funeral and furniture transport. Transport of animals, also live, does fall within the regime of the Convention.⁵⁴ During the negotiations a number of other instances of transport of goods were discussed but all of them disappeared.⁵⁵ Of the three

50. See, Helm, *Frachtrecht*, § 425 HGB, Anm. 38.

51. Rb Amsterdam 16.4.1975, S&S 1975, 81; see, Dorrestein, no.98e; see, Rb Amsterdam 15.11.1972, S&S 1973, no.23; HR 17.11.1978, S&S 1979, 23; NJ 1980, 484. The blurring of the boundaries between vehicle and goods inevitably produces confusion: see, Rb Rotterdam 2.1.1976, S&S 1977, 66, where the Rechtbank had to decide on the juridical characterisation of a container that was first transported by chassis trailer to a rail station and then, without chassis, transported further by train. See, Rb Kh Antwerp, *supra* n.45.

52. The CMR does not know the so-called container clause, as is found in Art.4.5.c of the amended Brussels Bills of Lading Convention; cf., Art.8.5.2.15(3). The BGH decided, in a decision of 19.9.1977, VersR 1977, p.1050 that a container was ‘Packung’ within the meaning of § 660 HGB. Contra, Rb The Hague 24.3.1977, S&S 1978, 30. That a container can be goods as much as packing appears from OLG Hamburg 13.12.1979, VersR 1981, p.1072.

53. The draft provision originally read: ‘Goods refer to the object to which the transport contract relates.’ TRANS/WP 9/22, 21 December 1953, Appendix, p.2. Putzeys, no.170, incorrectly states that Loewe, no.25, would view the concept of goods restrictively.

54. See, Art.17(4)(f) in conjunction with Art.18(5) CMR.

55. Such as, e.g., ‘goods for account of military, customs, health or police authorities in vehicles whose total capacity is placed at the disposal of such authorities’ (TRANS/WP 9/22, 21 December 1953, Appendix, p.3); also goods carried partly by rail where the CIM applies (TRANS/WP 9/32,

exceptional cases of carriage, the first two are regulated by other conventions. The most recent postal convention ratified by The Netherlands is the Postal Convention of Lausanne.⁵⁶ In the case of the transport of corpses the governing enactment is the Agreement concerning the transport of deceased bodies (Strasbourg, 26 October 1973).⁵⁷ On the basis of the authentic text of Article 1(4)(b) CMR the transport of corpses should be understood in a broad sense.⁵⁸

Less obvious than the preceding two groups is the fact that furniture removals are excluded from the ambit of operations of the Convention.⁵⁹ Following some discussion on this the contract of furniture removal suffered the same fate as that of combined transport, so that the Protocol of Signature provides:

‘The undersigned undertake to negotiate conventions governing contracts for furniture removals and combined transport.’⁶⁰

10 May 1955, Annex 1, p.3). A peculiarity was and is dangerous goods (see, Artt.6(1)(f), 7(2) and 22 CMR). Originally it was the intention to exclude also these goods: E/ECE/TRANS/SC1/79, E/ECE/TRANS/WP 9/13, 1 May 1950, p.4. During the special revision meeting attention was again extensively bestowed on this type of goods (W/TRANS/SC1/438, 19 April 1972, p.17 sub 110, p.20). The difficulty is that one cannot contrive to couple this to an adequate convention. The first ADR Convention (Accord européen relatif au transport international des marchandises dangereuses par route) dated from 30 September 1957, on which in relation to the CMR, R. Wijffels, ETL 1969, pp.871-887. On the relationship CMR, dangerous goods and a new relevant agreement see the volume of proceedings of the one day seminar held under the auspices of Lloyd’s of London published by London Press Ltd, ‘International Road Haulage’ (one day seminar, London 5.10.1977) with contributions by Wilson, Hill and Adler; see also, (1977) LMCLQ p.546.

56. Trb 1975, 91; The Netherlands ratified on 21.11.1975. During the special revision meeting mentioned in the previous footnote England proposed substituting for Art.1(4)(a) CMR a formulation that is also employed in the amended Warsaw Convention, *ibid.*, p.4.

57. Trb 1975, 94, ratified by The Netherlands on 24.11.1975.

58. See, Dorrestein, no.101b; see, Hill/Messent, p.12.

59. Rodière, BT 1974, p.184 sub 4. OLG Hamburg 3.7.1980, VersR 1980, p.1095 decided that the CMR was in casu not applicable, even though the goods that were the subject of the furniture removal formed part of a ‘Sammelladung’. The fact that a special furniture removal van was not used was not able to influence this. For a critical opinion of this case, H. Bischof, VersR 1981, pp.708 et seq. See, OLG Celle 12.6.1981, VersR 1981, p.1183 for a case concerning an international furniture removals contract, where an unsigned CMR consignment note was issued; see also, Rb Kh Antwerp 14.10.1980, ETL 1981, p.461. The Rb Rotterdam 12.2.1982, affirmed by Hof The Hague 4.5.1984, S&S 1984, 116, correctly decided that the transport of exhibition goods did not fall within the concept of furniture removals within the meaning of Art.1(4)(c) CMR. On the furniture removals contract see also, Rodière, Sirey, nos. 232, 233; Putzeys, nos. 102, 102a.

60. Objection was lodged – unsuccessfully – against the exclusion of the furniture removals contract as well as to the reference to the Protocol (TRANS/168, TRANS/WP 9/35, 6 June 1956, pp. 4, 5). Likewise without success was the attempt from the side of the English to make an express exception for ‘les déménagements de matériel d’usine de matériel de théâtre, le transport des bagages personnel non accompagnés, ainsi que le transport des objets destinés aux foires et expositions internationales’.

The energy to negotiate a convention concerning the furniture removals contract is apparently consumed by the negotiations for a convention concerning combined transport: as far as one can ascertain the first-mentioned convention has never been negotiated. However, ‘Conditions

Paragraph 3 of Article 1 CMR provides expressly that the Convention shall apply also where the transport entity is in (greater) part or entirely in the hands of a public law organisation. Although one may here contemplate above all the situation in Eastern block countries, in the West European countries nationalisation is also not an unknown phenomenon.⁶¹ Contracts of carriage of military goods fall under the scope rule of the Convention,⁶² to the extent that such contracts are for reward.⁶³

(f) Article 1(5) CMR allows the Contracting States the possibility to enact rules concerning frontier traffic or transport covered by a consignment note representing title to the goods. As far as is known, no use has been made of this possibility.⁶⁴ It recalls a long-drawn-out issue during the preparation of the Convention. After ample discussion it was decided in 1950 that the International Chamber of Commerce should conduct an enquiry into the need for a representative consignment note.⁶⁵ The Rüdeshheim draft of 1951 allowed the parties the choice between a negotiable or non-negotiable consignment note. This possibility of choice remained, although amended, in the draft of the Small Committee.⁶⁶ In 1955 the representative consignment note departed the convention stage: it would have been a permanent departure were it not for the Austrian delegate who in the very last phase of negotiations once more broached the subject of the representative consignment note.⁶⁷ In

générales pour les déménagements internationaux établies sous les auspices de la Commission économique pour l'Europe de l'Organisation des Nations Unies' (CGDI) of 12.4.1962 have been laid down.

61. Rodière, BT 1974, p.184 sub 5, refers in this context to the situation in England in the years 1947–1953.

62. Despite protests from the side of the English and French (TRANS/168, TRANS/WP 9/35, 6 June 1956, p.3 sub 7).

63. Loewe, no.34.

64. The FIATA Report, p.7, proposes the abrogation of this possibility.

65. E/ECE/TRANS/SC1/79, TRANS/WP 9/13, 1 May 1950, pp.5, 6. The purpose of a representative consignment note was to endow a consignment note, just as was the case with a shipping law bill of lading, with the character of a document of title.

66. Art.3(3) read: 'Except when otherwise stated, the waybill shall not represent a title to the goods.' (TRANS/WP 9/22, 21 December 1953, Appendix, p.3). A similar possibility of choice is also to be found in the ICC Rules (1975): Rule 3 (negotiable document) and Rule 4 (non-negotiable document).

67. 'Le représentant de l'Autriche a proposé le texte d'un article nouveau ainsi libellé:

1. La présente Convention n'a pas pour effet de modifier le droit national des pays contractants en ce qui concerne la validité et les effets de lettres de voiture ou autres documents représentatifs de marchandises.

2. Pour les transports devant s'effectuer entre un lieu de prise en charge et un lieu de livraison, situés l'un et l'autre sur leurs territoires, deux ou plusieurs pays contractants peuvent convenir des conditions régissant la validité et les effets de lettres de voiture ou autres documents représentatifs de marchandises.'

Austria received no support at all for the first paragraph. The second paragraph, as amended, was elevated to the present fifth paragraph in place of the clear provision: 'Les Parties Contractantes peuvent par voie d'accord bilatéral, soustraire à la présente Convention leur trafic frontalier.' (TRANS/168, TRANS/WP 9/35, 6 June 1956, pp.5 and 6, sub 15-17.)

practice the representative consignment note in international road transport is an outmoded concept.

§ 4. The transport contract and related contracts

§ 4.1 *Introduction*

The primary aim of the Convention is to regulate uniformly the liability of the carrier. The condition precedent for this is that clarity should exist as to what falls within the concept of transport contract. The answer to this is decisive for the application of the Convention.

As will subsequently be demonstrated on the basis of literature and caselaw, it can be stated here already that the required certainty as to the above question is entirely lacking. Dissension on the answer to the question posed above induces legal uncertainty as to the application of the Convention. What does this uncertainty consist of and what causes have contributed to it? A discussion with any attempt at completeness of this issue, which manifests itself across the entire front of transport law, cannot occur here. Here it suffices to indicate the most important causes of the problem, in as far as the application of the CMR is or has been an issue.

The issue of the content of the transport contract is as old as transport law itself. The principal reason for concentrating attention on the content of the transport contract arises from the need for criteria by which to distinguish the transport contract from related contracts, related that is in the transport sphere. This need poses characterisation problems for jurists, particularly when economic phenomena are classified within a juridical framework. Whereas the carrier's liability is regulated by mandatory rules virtually right across the board,⁶⁸ with contracts related to the transport contract one finds oneself in an area where as a result of the absence or failure to enact legal rules freedom of contract has led to a great extent to the use of standard conditions.⁶⁹

(The question does, nevertheless, arise whether, from the point of view of economic reality, one is justified into dividing into disparate juridical categories every main and subsidiary contract possibly occurring in the sphere of transport, all of which share the common goal of transportation.) The existence of these differing regimes perhaps explains the numerous attempts on the part of the carrier to seek refuge in areas of greater freedom of contracting.

What are the criteria for regarding contracts having reference to transport

68. Korthals Altes/Wiarda, pp.13, 14. The mandatory rule character of the CMR appears from Art.41 thereof.

69. The charter conditions frequently employed in The Netherlands, namely, Fenex, provide in Art.11(4): 'The charterer is liable to the principal only for damage if the latter proves that the damage was caused deliberately or results from his own joint fault.' Art.11(6) reads: 'The charterer, even in cases of taking over of transport otherwise than as carrier, is nevertheless liable according to these conditions.' H. Schadee, *Auxiliaires*, p.201, expressed the following opinion of such clauses: 'En étudiant les conditions Fenex, on est frappé par l'imagination des juristes qui les ont conçus – à peu près tout de qui peut arriver est à la charge de l'expéditeur (= sender). C'est un vrai pactum léonin.'

as transport contracts and as such brought within the reach of the Convention or not as the case may be? Is it possible to construct a practically viable yardstick by which the juridical consequences of sometimes scarcely distinguishable economic activities may be indicated? This line of questioning obliges one first and foremost to identify the content of the transport contract and on that basis to ascertain the essential distinguishing character thereof (§ 4.2) in order then to examine the most common of the contracts related to the transport contract. In this context, one would consider the forwarding contract (§ 4.4), the chartering contract (§ 4.5), the haulage contract (§ 4.6) and a number of other contracts (§ 4.7). In answering the questions raised here recourse will be had to the relevant literature and caselaw from a number of countries.

§ 4.2 *Transport contract*

One can point to the historical background of the concept of transport contract as being one of the most important causes of the obscurity referred to above concerning the distinction between the different contracts that fall within the field of transport law.⁷⁰ This explains why different views exist as to the nature of the contract.⁷¹ This does not dispel the view that the transport contract can better be regarded as a contract *sui generis*.

The primary obligation owed to the sender which the carrier assumes is to transport the goods from the place of taking them over to the place of destination where without delay he shall deliver them in the state in which he received them.⁷² Besides this obligation to transport, one can specify the performance of attendant services as a subsidiary obligation.⁷³ It will appear subsequently that aspects of renting and letting and bailment have not been entirely ousted from the transport contract.

The fact that the concept of transport has in itself no strongly distinguishing force probably in part explains why a number of contracts are – juridically – a continuation of each other and can be designated as mixed contracts.⁷⁴

70. Wachter, pp.95 et seq.; Dorrestein, *De formele structuur van de overeenkomst tot vervoer historisch-dogmatisch onderzocht*, in, *Met eerbiedigende werking* (Festschrift Hijmans van den Berg), Deventer 1971, pp.337 et seq.; Rodière, *Sirey*, no. 241; Dorhout Mees, no. 8.7; Korthals Altes/Wiarda, pp.23 et seq.

71. Wachter, p.105, characterises the transport contract as a contract for the performance of services; Dorrestein, p.342 and *NJB* 1980, p.182, regards it as a contract of work, while Korthals Altes/Wiarda, p.25, as well as Dorhout Mees, no. 8.7, classify it as a contract *sui generis*. Outside The Netherlands one finds the same problematic which indicates the historical background of this contract; cf. Heuer, p.42; Putzeys, nos. 20 et seq. The significance of this strongly historical-dogmatic discussion lessens proportionately as a greater degree of unanimity grows regarding the legal consequences to which this contract leads.

72. The concept of transport contract is often interpreted by reference to a number of factual elements; cf. Rodière, *Sirey*, nos. 228 et seq.; Rodière, *Dalloz*, nos. 128 et seq.; Korthals Altes/Wiarda, pp.19 et seq.; Putzeys, nos. 5 et seq.; Helm, *Frachtrecht*, § 425 HGB, Anm.33 et seq.; Clarke, no. 12.

73. See, the comparative law report of Unidroit: *U.D.P. 1948-Papers XXIII 1948*; carriage by road. Cf. also, *CA Paris* 23.2.1983, *BT* 1983, p.407.

74. Korthals Altes/Wiarda, p.20.

A clear distinguishing criterion would be of practical value as the transport contract is in all essential matters governed by mandatory law while other contracts, in so far as they fall outside the category of transport contract, are not. On this point the Convention fails us; just as in the CIM, although not in a large number of other Conventions concerning transport law, the CMR does not contain a definition of the transport contract, from which elements could be distilled by which to delimit other contracts in the transport sphere.

Does the absence of a suitable definition mean that in order to substantiate the concept of transport contract one must refer to national law? Here one must be careful. Application of criteria drawn from a particular national system in order to ascertain the content of the transport contract would put in danger the principal aim of the Convention, namely, to lay down a uniform regulation of the carrier's liability.⁷⁵ The ideas set forth in the first Chapter concerning the interpretation of the Convention oblige an enquiry into the content of the concept of transport contract. A conception opposed to this misjudges the function of the scope rule as 'internationalitätsbestimmende Abgrenzungsnorm', as described in § 2 above. The absence of a substantive criterion of the concept of transport contract, which can lead to disintegration rather than uniformity of the legal terrain here concerned, ought in principal to be prevented by that function. This function should serve, therefore, as a guiding principle in the search for further substantiation of the concepts of transport and transport contract. An obvious step now is to enquire as to the reason for the absence of a definition of this concept.

Research into the preparation of the Convention produces the following results. In a comparative law report prepared by Unidroit it was noted in connection with the nature of the transport contract:

'In most countries contracts for the carriage of goods are considered as a sub-group of the contract of hire or services. But in its nature it is also akin to a contract of deposit.'⁷⁶

In May 1950 a discussion took place in the Working Party specially charged with juridical questions, on the basis of a draft definition proposed by the tripartite committee, in which a certain connection between the carrier and the means of transport was required. According to the committee the carrier

75. In this sense, Rb Rotterdam 31.1.1967, S&S 1967 no. 56; 'that the CMR ... provides no definition of the therein frequently used term "carrier" ("transporteur"); that in consequence a meaning must be sought by means of interpretation of those Convention provisions that fall to be considered; that the Preamble of the CMR reads: [see the text of the Preamble in English and French, Annexes 1 and 2 below]; that according to this Preamble the CMR is a convention that aims at the uniform regulation of international road transport and in particular the liability of the carrier; that this implies, not that the concept of carrier under the CMR must be viewed restrictively, — as was argued by the defendant, although the Rechtbank does not read that from the history of the Convention as that is known to it — but rather that it be so interpreted that a harmonising operation of the CMR be guaranteed ...'

By a systematic interpretation of the Convention the Rechtbank arrived at the correct opinion that the defendant's proposition, that carrier within the meaning of the CMR is only that person who himself, fully or in part, effects the performance, was incorrect. Contra, incorrectly, Ktg Rotterdam 17.11.1969, S&S 1970, 98, as also Dorrestein, no. 98a.

76. U.D.P. 1948 Papers XXIII 1948, p.4.

had to be the 'owner or operator'.⁷⁷ The requirement of this connection was drawn into question in the discussions:

'Il a été suggéré de ne pas exiger du transporteur la qualité propriétaire ou d'exploitant du véhicule et de qualifier tout simplement de transporteur la personne qui s'engage à exécuter un transport. Il a été également suggéré que le Comité tripartite étudie l'ensemble du problème de l'affrètement dans le cadre de la convention.'⁷⁸

This suggestion was adopted only in part in the so-called Rüdeshheim Draft in 1951.⁷⁹ There one finds in the first Article the following definition:

'Transporteur signifie la personne qui s'engage effectuer un transport au moyen d'un véhicule dont il est le propriétaire, l'exploitant ou l'affrèteur.'⁸⁰

The Working Party, in the meantime under the chairmanship of Buzzi-Quatrini, nevertheless persisted in its view that the definition should reflect no connection whatsoever between carrier and the means of transport.⁸¹ But the committee defended its proposal by relying on the fact that this definition drew the line between the carrier on the one hand and the 'commissionnaire' on the other. The latter, a legal person over whose legal position differing views existed in the various countries, as will emerge later, would be excluded from the scope of the Convention by the proposed formulation. As the definition proposed by the committee regards the charterer in sea and inland waterway law as a carrier, this in its turn urges the inclusion of a definition of this legal person. During the negotiations thereon the representative of Unidroit disclosed that the plan had been adopted to regulate also the status of the 'commissionnaire' by convention.⁸² At the same time it was decided to confirm the text of the then Article 2(1) as that which without further amendment appears in Article 1 CMR. With this double decision, namely, to include chartering in the Convention regime and to leave regulation of the commissionnaire to another convention, the problem in question was relegated to an uncertain future. This proposal was implemented in 1953 by the Committee of Experts under the chairmanship of Sydow in the following manner:

(a) 'Carrier' refers to the person undertaking to effect transport by means of a

77. TRANS/WP 9/11, 10 October 1949, p.2.

78. E/ECE/TRANS/SC 1/79; E/ECE/TRANS/WP 9/13, 1 May 1950, p.3.

79. See, Chapter 1, § 2. This draft was the work of the 'comité du contrat de transport international par route' under the chairmanship of Bagge.

80. TRANS/WP 9/11, Rev. 1, 8 January 1952, p.7.

81. E/ECE/TRANS/SC 1/130. E/ECE/TRANS/WP 9/11, Annex 4, 18 February 1952, p.1.

82. *Ibid.*, p.3; also, TRANS/WP 9/22. 21 December 1953. After great difficulty this convention was opened for signature in 1965 but has not since come into force. On this convention, Baumhöfener, *passim*.

vehicle of which he is the owner, operator or charterer.

(b) 'Charterer' refers to the person who has concluded a contract with the operator of a vehicle under which the total capacity of the vehicle and its crew are placed at his disposal for a given journey or series of journeys or for such journeys as are prescribed by him within a given period.⁸³

At the same time a provision was adopted in the interest of the person entitled to the goods, in which the charterer, unless otherwise stipulated, would be liable to the person entitled as carrier alongside the operator.⁸⁴ When a follow-up draft,⁸⁵ compiled by a special working group chaired by Sydow, was presented in 1955 it appeared that, without any explanation, all definitions had disappeared.⁸⁶

From this historical survey it is manifest that the drafters of the Convention were not successful in determining the content of the transport contract. As to the actual motives that led to the scrapping of the relevant definitions there is no information at all. It appears clearly from the proposals and the discussions thereon that the general consensus was that the person who (merely) assumed the obligation to have goods transported was to be kept outside the scope rule of the Convention; and at the same time that the carrier need not necessarily have access to his own means of transport. The uncertainty concerned far more, as appears from the available travaux préparatoires, namely, the question whether the concept introduced from sea and inland waterway law transport, that of chartering, could be regarded as transport. It will be seen subsequently in § 4.5 when dealing with the chartering contract that this uncertainty exists also in practice. At the end of the day all that remains is that the Convention applies to every contract of transport of goods.

Is it open to one to conclude that on the basis of the historical facts set out above concerning the concept of transport contract that further substantiation of the concept ought to occur outside the Convention? It was stated above yet again that such would sell the principal aim of the Convention short. (It may here be added that even if a definition had been provided no high hopes therefor need have been nourished for the definitions of the concept of transport contract are generally nothing more than the colourless platitude that one is thereby to understand the contract by which the carrier assumes the obligation to transport or to have transported.)⁸⁷ It may be stated that the

83. TRANS/WP 9/22, p.2 in conjunction with Appendix, 21 December 1953, p.1.

84. TRANS/WP 9/22, p.10 in conjunction with Appendix, p.17.

Not in this nor in any previous draft convention was there mention of hire (with crew)(now Art.17(3) CMR), which following the dropping of the definitions at a later stage would have been, according to Dorrestein, no. 98a, incorrectly maintained.

85. TRANS/152. TRANS/WP 9/32, 10 May 1955.

86. There were differences of opinion on other definitions. It is not unlikely that, in the light of other weighty problems, there was no desire after so many years of negotiations to waste any more time on this question.

87. In Book 8 NBW one finds as a definition in Art.8.2.1.1: 'The contract of transport of goods is a contract whereby one party (the carrier) assumes the obligation as against the other party (the sender) to transport property.' The FIATA Report provides the following definition: "'Carrier"

concept of transport contract, even though the Convention itself was unable to furnish any further substance thereto, ought in principle to be interpreted autonomously. But that poses a problem, which may be approached with the assistance of the arguments advanced in Chapter 1, § 4 as follows. Although the drafters of the Convention were not successful in providing a definition of the concept of transport contract, with as a consequence that one may speak of a lacuna, it does not without more follow from this that the concept of transport contract must be given substance by reference to national law. The concept of transport contract, which is precisely the central object of unification, ought rather to be interpreted in conformity with the aim of the Convention. A certain reservation regarding the application of national law is a consequence of the prohibitive aspect that is derived from the autonomous character of uniform law.⁸⁸ This does not entirely preclude situations occurring in which the teleological method fails to provide a satisfactory solution. In such a case recourse must be had to national law, without thereby losing sight of the aim of the Convention.⁸⁹ Whenever the courts are charged with the task of determining the content of the transport contract they should take into account what has been decided elsewhere on this. A major difference between the two situations would thus not exist, namely, the situation where the Convention did provide a definition expressing to some extent the content of the transport contract, and the actual situation in which there is no definition. The difference is at best one of degree. When determining the content of the concept of the transport contract one ought to consider the Convention system and its general principles as these have been revealed by caselaw and literature in other CMR countries. The question in which situations is one faced with the delimitation problem here under discussion so as to distinguish the transport contract from related contracts can best be illustrated by dealing with a number of the legal concepts thus related to the transport contract (§ 4.3–4.7).

§ 4.3 *Freight forwarding contract*

§ 4.3.1 *General*

Although in theory there exists great unanimity concerning the distinction between the transport contract and the freight forwarding contract it appears in practice that the interweaving in fact between these contracts gives rise to confusion, which may be regarded as insoluble. Between theory and practice there yawns a deep fissure.⁹⁰ The problem does not lie so much in the question what

means any person who on his own behalf or through another person acting on his behalf concludes a contract with the sender for the carriage of goods by road and who acts as a principal, not as an agent or on behalf of the consignor, and who assumes responsibility for the performance of the contract.’

88. See Chapter 1, p.12.

89. See Chapter 1, p.19.

90. Helm, *Speditionsrecht*, p.8, Anm.4: ‘Die Abgrenzung des Speditionsvertrages zu anderen Verträgen ist theoretisch einfach, bereitet aber (...) vielfach praktische Schwierigkeiten.’ In the

obligations do each of the contracts give rise to but rather in the interpretation of the complex of facts that originates in essence in a factual interpretation problem. An extensive disquisition of the many facets of the freight forwarding contract would not be at home in this present study.⁹¹ But this legal figure too often forces its way over the horizon of the legal area under discussion, like a many-headed hydra, to be ignored. Thus a short exposition of the problem that confronts one engaged in the area of enquiry under discussion is justified.

While the carrier assumes the obligation to move the goods, the freight forwarder assumes the primary obligation of effecting transportation of the goods. The demarcation line between the two contracts brings the carrier within the mandatory rules of the Convention regime, according to Article 41 CMR, whereas the legal position of the freight forwarder by contrast is to a large extent regulated by standard conditions.⁹²

The legal uncertainty as to the application of transport law or freight forwarder law is primarily to be ascribed to two factors. In the first place a source of confusion lies in the nature of the freight forwarding contract. The expression, 'effect transportation', remains shrouded in vagueness and in itself does not signify more than that there is some element of 'intermediation'. But in reality the nomenclature of this contract conceals a whole gamut of divergent activities. The term freight forwarding contract appears scarcely adequate as a juridical tarpaulin with which to cover the actual load.

Whereas the role of the freight forwarder can be perhaps exclusively characterised from the angle of legal history as that of intermediary between sender and/or consignee and carrier, this view is too restrictive for the modern international carriage of goods. The freight forwarder has played a prominent role in the developments that have occurred in the last decades in the field of international transport law, particularly in regard to combined transport.⁹³ As a result of the pioneering function that the freight forwarder filled in that development it is probably more correct to regard the freight forwarder, from the organisational point of view, as the architect of modern international transport.⁹⁴ Not being bound to a fixed juridical pattern the freight forwarder was pre-destined flexibly to ride with this development. Until the developments in international transport law have come to a halt it remains

same sense, *ibid.*, p.71, Anm.8; p.77, Anm.7. The complaint is repeated, Helm, *Frachtrecht*, § 425 HGB, Anm.43 et seq.; Art.41 CMR, Anm.2. Helm is supported in this by Peyrefitte, *Auxiliaires*, p.184: 'Si ce critère paraît simple en théorie, son application aux situations concrètes soulève parfois des difficultés. Car la plus grande confusion règne dans la pratique.' Cf. Nossovitch, p.30; Clarke, no. 12; Hill/Messent, p.3.

91. Some monographs on this legal concept are: D. J. Hill, *Freight Forwarders*, London 1972; Helm, *Speditionsrecht*; Baumhöfener; Nossovitch; J. Trappe et al give a survey of the situation in a number of EEC countries in, *Les auxiliaires de transport dans les pays du marché commun*, Rouen 1977.

92. Given the absence of international legislation the charterer enjoys the full freedom that standard conditions generally provide. For a review of these conditions as they are employed in various EEC countries, see, *Auxiliaires*, pp.225 et seq.

93. For the developing interaction between international chartering and combined transport, see, Nossovitch, pp.147 et seq.

94. Thus, J. Dervieux, *ETL* 1969, p.459.

impossible to effect a certain measure of uniformity regarding the legal position of the international freight forwarder, although the desire to do so has often been expressed.⁹⁵ The development in international transport law referred to was in part made possible because the freight forwarder, like a chameleon, increasingly appeared not simply as a connecting link but as an operator of the transport. The nature of this last function brings with it that also carriage must be included in the freight forwarder's juridical bundle of duties.⁹⁶ As a result of his flexible character the freight forwarder was also more or less obliged in an increasing number of cases to undertake activities that traditionally belonged to the area of the carrier.⁹⁷ This development, the result of which was that the international freight forwarder was increasingly considered as a carrier, was eased juridically due to the already long existing and recognised possibility of 'Selbsteintritt'.⁹⁸

Summarising the above, it can be said that the international freight forwarder has frequently parted from his own terrain and just as frequently entered upon the domain of the carrier.

The frequent breach of boundaries between the two legal areas gave rise to a certain shifting and obscuring of those boundaries. For the second factor in the legal uncertainty prevailing in practice as to the exact delimitation between freight forwarding contract and transport contract one can point to the absence of legal instruments of characterisation and demarcation with which to combat and clarify the legal uncertainty that has arisen. Having regard to the fact that in this process of breaching of boundaries the judge is increasingly called upon to indicate precisely where the boundary line must be drawn and in this finds little or no support in legal rules, it need occasion no surprise that he attempts to seek refuge with criteria that, however faultily, can provide some orientation. On the basis of a series of criteria the judge has attempted, in many opportunistic ways, to seize upon factual elements that point him in the direction of either transport or freight forwarding. This approach to ascertaining law does not allow of identifying any systematic approach.

The above explains to a great extent the judicial impotence and uncertainty. As long as the yardstick for delimiting transport from freight forwarding in the various countries remains uncertain, it means a permanent legal uncertainty with regard to application of the Convention. The extent to which the problematical situation sketched here concerning the applicability of the CMR has acquired substantial stature appears from the following survey of a number of countries.

95. D. J. Hill, *Auxiliaires*, p.86. J. Ramberg, *Auxiliaires*, Synthesis Report, p.34. Nossovitch, p.27 correctly describes the *commissionnaire de transport* further as ' *pierre d'achoppement dans l'unification du contrat de commissionnaire de transport international*'.

96. Cf., e.g., Art.1(2) Convention on International Multimodal Transport of Goods.

97. The charterer often presents himself 'more or less' voluntarily as carrier: '... in the trade a large number of freight forwarding enterprises have voluntarily accepted a carrier liability ...' thus J. Ramberg, 'The implications of new transport technologies', ETL 1980, pp.119, 128-129. The writer refers for this to the international documents presented by the charterers, by which in practice they became the leading combined transport operators, whose position was for the first time regulated by ICC Rules.

98. Cf. § 412 HGB.

§ 4.3.2 France

The question of the applicability of the CMR has been raised in France in a large number of proceedings. In the area of intermediary between sender and carrier, the legal figure of 'commissionnaire de transport' demands all attention.⁹⁹ The judge has been petitioned to the highest level on several occasions in an attempt to find acceptance of the proposition that this legal figure ought to be brought under the operation of the CMR. These attempts have been frustrated by an unwavering line of caselaw since 1970.¹⁰⁰ One wonders accordingly what is the mainspring of this recurring attempt to change the policies made rigid by the highest court. As the principal cause reference must be made to the extensive confusion that in France surrounds the commissionnaire de transport.¹⁰¹ Many writers have referred to the peculiar character of this cuckoo in the international nest.¹⁰² The difference between the liability of the commissionnaire de transport compared with that of 'transitaires'¹⁰³ under French law and the normal type of freight forwarder in most other European countries lies in the fact that he is liable to the person who commissions him for the errors of those whom he engages to effect the transport,¹⁰⁴ which he has undertaken to take care of. Although his legal position accordingly appears comparable to that of the carrier, the commissionnaire de transport disposes of his own legal liability regulation laid down in Articles 97 and 99 CComm.¹⁰⁵ Nevertheless, Ramberg draws the conclusion in his consideration of this legal figure that the commissionnaire de transport ought

99. According to Peyrefitte, *Auxiliaires*, p.182, this legal figure is governed by a 'régime assez rare meme en droit français'.

100. Cass. 16.20.1970, BT 1970, p.144; Cass. 21.12.1970, BT 1971, p.317, on which Rodière, p. 310; CA Paris 10.12.1971, BT 1972, p.19, on which Rodière, p.14; Tr Comm. Paris 21.3.1973, BT 1973, p.244, on which L. Coutret, BT 1973, p.237, 238 and L. Brunat, p.248; CA Paris 7.5.1973, BT 1973, p.231; CA Paris 28.9.1973, BT 1974, p.22; Tr. gr. inst. Paris 11.12.1973, BT 1974, p.68; CA Douai 25.10.1974, BT 1975, p.48; CA Poitiers 10.12.1974, BT 1975, p.58; Cass. 27.10.1975, BT 1975, p.526; Cass. 13.2.1978, BT 1978, p.210; Cass. 25.6.1979, BT 1979, p.452, on which L. Brunat, BT 1979, p.446; Tr. Comm. Paris 25.1.1980, BT 1980, p.203; CA Paris 27.2.1980, BT 1980, p.384; Cass. 21.6.1982, BT 1982, p.427, on which critically Brunat, p.422. Cf. Nossovitch, pp.234 et seq.; Libouton, 1982, p.694 sub 7.

101. Cf., e.g., CA Paris 28.9.1981, BT 1981, p.526 and Tr. gr. inst. Mulhouse 18.11.1981, BT 1982, p.156. Just as was stated in § 4.3.1, the argument also applies here that it is difficult in practice to distil whether it is transport or charter from the factual material. 'La question essentielle ... est de savoir en quelle qualité l'entreprise de transport a contracté avec l'expéditeur ...: question bien délicate, qui implique la recherche de la commune de l'intention des parties et dont la solution dépendra des circonstances particulières à chaque espèce,' thus L. Brunat, BT 1979, p.448; cf., *ibid.*, BT 1982, p.422. See also, Nossovitch, pp.30, 39.

102. Wachter, p.111; Hill, nos. 96 and 103; Peyrefitte, *Auxiliaires*, pp.182, 183; Rodière, Sirey, nos. 697 et seq.; Rodière, Dalloz, no. 288; H. Schadee, BT 1982, p.402.

103. On this intermediary, see, Rodière, Dalloz, nos. 313, 314; Peyrefitte, p.188.

104. Rodière, Sirey, nos. 707 et seq.; Rodière, Dalloz, nos. 300 et seq.; Peyrefitte, p.183: 'il assume la responsabilité du déplacement de bout en bout'; J. Ramberg, *Auxiliaires*, *Synthesis Report*, p.18.

105. Art.97 CC: 'Il est garant de l'arrivée des marchandises et effets dans la delai déterminé par la

to bear the same liability as a carrier under the CMR.¹⁰⁶ As already noted, French caselaw has consistently denied this, basing its argument on statute and doctrine.¹⁰⁷ Whereas the carrier assumes the obligation to transport the goods, the commissionnaire de transport undertakes to ensure that the transport is effected, on the understanding that he assumes liability for that transport even though he does not himself perform the transport. Establishment of this fact is of great importance in the opinion of the present writer for the question regarding the applicability of the CMR. Application of the Convention ought not in principle to be dependent on a distinction based on national law.

Pleading for the legal relationship between the commissionnaire de transport and the sender to be brought within the scope of the Convention appears to be a logical consequence of the fact that the Convention regime is certainly applicable to the legal relationship between the commissionnaire de transport and the carrier.¹⁰⁸ In addition, one also encounters the voluntary acceptance of the CMR to the relationship between commissionnaire de transport and sender.¹⁰⁹ These arguments suffice, in the opinion of the present writer, to consider the commissionnaire de transport as a carrier within the meaning of Article 1 CMR.

Support for the view defended here is provided by Coutret, on this point a dissident in French legal literature.¹¹⁰ In a series of three articles he took up the position, contrary to the doctrine advanced by the Cour de Cassation and by Rodière, that the CMR is applicable to the legal relationship between the person issuing the commission or the sender and the commissionnaire de transport.¹¹¹ His objections to the prevailing doctrine in France, which he considers unjustified, amount in essence to the following.

In the first place he refers to the fact that the French legislation and the

lettre de voiture, hors les cas de la force majeure légalement constatée.' Art.99 CC: 'Il est garant des faits du commissionnaire intermédiaire auquel il adresse les marchandises.'

The confusion in France between the carrier and the commissionnaire de transport is, according to Rodière, Dalloz, no. 299, due in part to weak editing of this provision.

106. J. Ramberg, *Auxiliaires*, Synthesis Report, p.18.

107. Cf. Rodière, *Sirey*, nos. 228, 698; Nossovitch, pp.30, 140.

108. R. Rodière, *BT* 1974, p.183; Libouton, 1973, p.15; Nossovitch, pp.142 et seq. For some recent caselaw see, Cass. 8.7.1981, *BT* 1981, on which B. Marcadal, *Recueil Dalloz Sirey*, 1981, p.543, as also, CA Paris 15.12.1982, *BT* 1983, p.29. The ambiguous character of the commissionnaire de transport produces the situation that, as far as the applicability of the CMR is concerned, he can be regarded as sender as against the carrier engaged by him and as against the sender, albeit indirectly, as carrier under the CMR.

109. Nossovitch, p.141. Cf. Cass. 21.6.1982, *BT* 1982, p.579.

110. E. Coutret, *BT* 1972, p.447.

111. *BT* 1972, pp.447 et seq.; *BT* 1973, pp.237 et seq. In the same journal R. Rodière, sets out his own views, *BT* 1972, pp.14 et seq. and *BT* 1974, pp.183 et seq. and at this last place defends the view that the CMR is not applicable to the commissionnaire de transport on grounds of pure French dogma, with exception for the argument advanced at p.184 where he relies on an (old) decision concerning the CIM, on which Nossovitch, p.138, who incorrectly neglects to mention that Rodière's vision is fundamentally opposed by Coutret.

formalistic caselaw based thereon is outdated.¹¹² Of greater importance for the subject under discussion is his subsequent argument that from the point of view of continued international harmonisation the prevailing doctrine must be seen as totally nationalistic and isolationist.¹¹³ In the light of the tenaciously conservative caselaw, Coutret must be seen for the time being as a voice crying in the French wilderness.¹¹⁴ One may conclude from the above that in answering the question whether the CMR is applicable to the relationship between commissionnaire de transport and sender, the prevailing doctrine in France compels recourse only to an outdated dogma. In this manner not only is the aim of the Convention time and again missed but the fact that in other countries legal figures related to the commissionnaire de transport have certainly been brought under the scope of the CMR is ignored. Considering that which, vis-à-vis the person issuing the commission, the commissionnaire de transport binds himself to do, he can only be regarded as contracting in the sense of Article 1 CMR.

§ 4.3.3 *Italy*

Italian law is also familiar with the figure of the commissionnaire de transport adopted from French law. The legal position of the spedizioniere-vettore is regulated by legislation in Article 1741 CC.¹¹⁵ This figure stands between the spedizioniere and the vettore, the latter falling under the CMR, the former not. A noticeable difference with the situation in France is that the question whether this legal figure falls under the CMR or not is answered in the affirmative.¹¹⁶

§ 4.3.4 *Belgium*

In Belgium a distinction is drawn in the field of intermediary in transport law between two types of commissionnaire: the commissionnaire-freight forwarder and the commissionnaire-carrier.¹¹⁷ Although for a considerable period confusion between the two legal figures existed, now unanimity as to the content of these two concepts prevails in the literature: the former assumes the obligation to effect transport, the latter to transport the goods, although

112. In particular, he severely criticises the strict division attempted in France between Artt.96 CC et seq. (commissionnaire de transport) and Art.103 CC (vouturier). He bases his view that the CMR ought to be of direct application to the legal relationship of principal/sender and commissionnaire de transport on Art.101 CC, which reads: 'La lettre de voiture forme un contrat entre l'expéditeur, le commissionnaire et le voiturier.' Merely the fact of the increase in confusion in French practice in the last decade would seem to confirm the correctness of this argument.

113. BT 1972, p.447 and BT 1973, p.340.

114. The point of view of Ramberg, *supra*, n.104, leads to the same result as the view of Coutret.

115. A. Dani, *Auxiliaires*, p.207; E. Coutret, BT 1972, p.448.

116. *Ibid.*, p.209.

117. Frédéricq, nos. 1565, 1672; Putzeys, nos. 67 et seq.

he may permit another to perform.¹¹⁸ Consequently, the liability of the commissionnaire-freight forwarder is not regulated under the CMR whereas that of the commissionnaire-carrier is.¹¹⁹

As was pointed out in the introduction to this section the question of which criteria ought to be utilised in drawing the line of demarcation between the freight forwarding contract and the transport contract arises time and again across the entire front of transport law. Nor is it different in Belgium.¹²⁰ The attempts by carriers to attain the less restrictive freight forwarder atmosphere, when compared with transport, has led in Belgium to a pattern card of judicially employed criteria.¹²¹ Having regard to the casuistical and strictly factual method of approach of the delimitation issue as between commissionnaire-freight forwarder and commissionnaire-carrier, every attempt to develop a more abstract normative scheme appears doomed to failure. In his collection of judicial decisions Ponet lists no less than eleven criteria on the basis of which the applicability of the CMR is established.¹²² These criteria are employed with caution, even more so when more than one occurs at the same time, for they have in principle only an indicative value. Although the judge is the rightfully designated person to characterise the disputed legal relationship between the parties, it is up to the parties to present suitable factual material. In this way the issue of characterisation is transformed into a question of evidentiary law and procedural law. It has been argued in Belgium on the ground of Article 1315 CC that proof of the disputed legal relationship lies on the person entitled to the goods.¹²³ With as much or more justice it must be said that the burden of proof, the commission to collect the evidence, whether or not based on presumptions, cannot be laid on the other party.¹²⁴ A similar evidentiary commission can be employed in doubtful cases when the recommended criteria appear inadequate.

118. Van Rijn/Heenen, nos. 1799,1800. Libouton, 1973, p.7; Libouton, 1974, p.505; Libouton, 1982, pp.693-694. On the substance of both concepts see further his extensive study: *L'intermédiaire ('commissionnaire') de transport en droit belge, Auxiliaires*, pp.89-192. Cf. Putzeys, nos. 67-89.

119. Putzeys, nos. 80, 88.

120. One finds in Belgium also the ravine already indicated between theory and practice: 'Dans la pratique des affaires et du droit, une confusion se fait souvent entre le commissionnaire de transport et le commissionnaire-expéditeur ... Pour déterminer la qualité juridique de l'intermédiaire, ce qui n'est pas toujours aisé, il convient d'analyser les opérations dont le commissionnaire a été chargé en fait: ce sera avant tout une question d'espèce,' thus J. Libouton, *Auxiliaires*, p.96; also, Libouton, 1982, p.694.

121. For Belgium may it suffice to refer to the summary given by Libouton, 1973, pp.6-11; Libouton, 1974, pp.505-506; *Auxiliaires*, pp.96-102; Libouton, 1982, pp.694-695.

122. Ponet, pp.19 et seq. For The Netherlands see *infra* § 4.3.5.

123. Cf. Rb Kh Antwerp 27.2.1967, ETL 1968, p.1244. Art.1315 CC reads: 'He who claims the performance of an obligation must prove the existence thereof. Inversely, he who asserts to be free thereof must produce proof of payment or of the fact that has rendered his obligation non-existent.' On this provision, M. Storme, *De bewijstlast in het Belgisch privaatrecht*, Ghent 1962, pp.83 et seq.

124. The Hof van Beroep, Brussels quashed by decision of 24.1.1969, ETL 1969, p.937 the

How heavy the burden of proof turns out to be is demonstrated by the results of the proceedings in which the characterisation problem formed the main issue: in the majority of cases the disputed legal relationship was designated as being that of carrier.¹²⁵ The Hof van Beroep Brussels stated thus:

‘Whoever accepts a transport commission without making known that he will not act as carrier, is deemed to be a carrier within the meaning of the CMR Convention.’¹²⁶

§ 4.3.5 *The Netherlands*

The situation in The Netherlands is to a great extent identical to that in Belgium. The absence of a manageable yardstick with which to distinguish transport and freight forwarding also bedevils practice in The Netherlands, so that the judge must lay his measuring line primarily with the help of indicative criteria. It is unnecessary to add that analysis of caselaw on this point produces a diffuse image. The principal cause of the existing uncertainty can here also be ascribed to the difficulty of reaching the juridical category of transport or freight forwarding from a given fact complex.¹²⁷ This is a characterisation problem in optima forma: it was expressed by one court as follows:

‘That the key to resolving the dispute that has arisen between the parties lies in the answer to the question of the nature and purport of the governing contract, having regard to the fact that the answer, the content of which is disputed by the parties, is determinative of the legal rules that govern the contract and consequently also of the

decision mentioned in the preceding footnote. In the same sense, Hof van Beroep, Brussels also by decision of 24.1.1969, ETL 1969, p.943 and subsequently by decision of 23.12.1971, ETL 1972, p.865. In agreement with this, Libouton, 1974, p.10, with the argument that the person entitled to the goods is usually not able to produce evidence. Contra, Clarke, no. 12.

The above-mentioned Rb Kh Antwerp took the correction to heart, see, e.g., 3.4.1977, ETL 1977, p.411 and the caselaw mentioned by Libouton, 1982, p.894.

125. Hof van Beroep, Brussels 25.5.1972, ULC 1974, p.338; also, 19.10.1972, ETL 1973, p.503, in which the international charter company Kühne & Nagel vainly appealed to a reference by them to general charter conditions. The commission was for ‘transport by truck’. In the absence of contradiction this appeared to be sufficient to conclude for carriage. Before courts in The Netherlands these same charterers had, formerly, more success; see *infra*.

In contrast to n.123 the court mentioned there appeared to be rather strict on the ‘charterer’. In a decision of 28.3.1966., ETL 1966, p.712, Rb Kh Antwerp stamped the charterer a carrier because it had performed transport from the quay to a nearby street. The decision ignored the notion that such performance must be accounted an essential part of the bundle of responsibilities such that in *casu* this transport was absorbed by the charter contract; cf. J. Libouton, *Auxiliaires*, p.93; T. W. Mertens, *Scheepsraad*, p.93. See further, Libouton, 1982, p.694.

126. Hof van Beroep, Brussels 26.4.1983, ETL 1983, p.511. In much the same vein, Hof The Hague 24.2.1984, S&S 1984, 112.

127. H. Schadee, *Auxiliaires*, p.196, who adds thereto – as further explanation – that the difference between the two contracts is very subtle (p.199). This strongly differentiated comment is based upon the communal object of the two contracts: the safe and sound arrival of the goods. Cf. the arbitral decision 23.8.1977, S&S 1981, 129 in which the arbitrators, on the ground of the substance of the contract in dispute, concluded for a mixed contract, which meant that the FENEX conditions were held applicable.

legal consequences flowing from the contract in the concrete circumstances of the present case.¹²⁸

One attempts to analyse the expression ‘nature and purport of the contract’ by seeking elements derived both from the moment at which the contract was concluded and from the method by which it is to be performed.¹²⁹ Originally there was a desire to ascribe a determinative significance to a particular criterion, namely, the way in which transport costs were charged (‘lump sum’, ‘feste Kosten’, ‘forfait’), but gradually this endeavour had to be discontinued.¹³⁰ In the analysis of the relevant caselaw, in which it is stated why a determinative significance must, or should not, be attached to particular factual elements or combinations thereof, the following criteria came to the fore: the terminology employed as between the parties or in advertising,¹³¹ demanding the transport costs as a lump sum,¹³² using certain documents,¹³³ actually performing the transport oneself,¹³⁴ the use of material, one’s own

128. Rb Breda 23.2.1965, S&S 1965, 86.

129. H. Schadee, loc. cit., p.200.

130. The Dutch law confers on the criterion merely an indicative value; H. Schadee, loc. cit., p.198. Contra possibly, Dorrestein, no.25.

131. Rb Amsterdam 8.4.1964, ULC 1964, p.169, upheld by Hof Amsterdam 6.1.1966, S&S 1968, 83: ‘our liners, our vehicles’ does not necessarily imply carriage.

Hof The Hague 9.1.1970, S&S 1970, 97: ‘both transports were properly carried out by us,’ refers to carriage.

Rb Breda 23.2.1965, S&S 1965, 86: ‘international transports’, refer to carriage.

Hof Den Bosch 21.12.1965, S&S 1966, 24: ‘freight forwarding company’ is not decisive.

Rb Rotterdam 4.11.1969, S&S 1970, 82: ‘zum Versand zu bringen’ indicates freight forwarding.

Ktg Rotterdam 17.11.1969, S&S 1970, 98: ‘transport performed by your company’ does not necessarily imply carriage.

Rb Amsterdam 8.3.1972, S&S 1972, 9: freight forwarding can be deduced from the expression, ‘International freight forwarding – vehicle transport – air mail rates (IATA agents).’

Rb Rotterdam 23.4.1976, S&S 1977, 10: ‘WETRAM’ indicates carriage.

Rb Rotterdam 26.11.1976, S&S 1977, 22; NJ 1979, 321: ‘Frachtsatz’ indicates carriage rather than freight forwarding.

132. Rb Breda 23.2.1965, S&S 1965, 86; Hof The Hague 17.5.1968, S&S 1968, 82; NJ 1969, 279; Rb Rotterdam 10.11.1970, S&S 1971, 61; Rb Rotterdam 23.4.1976, S&S 1977, 10, upheld by Hof The Hague 11.11.1977, S&S 1978, 58; Rb Maastricht 21.2.1974, S&S 1976, 38; Rb Rotterdam 26.11.1976, S&S 1977, 22; Ktg Rotterdam 17.11.1969, S&S 1970, 98; Hof Amsterdam 6.1.1966, S&S 1968, 83, upholding Rb Amsterdam 8.4.1964, ULC 1964, p.169; Rb Rotterdam 21.3.1980, S&S 1981, 29; Rb Breda 7.7.1981, S&S 1982, 96; Ktg Nijmegen 2.5.1980, S&S 1983, 41; Rb Dordrecht 28.5.1975, S&S 1982, 33; Rb Roermond 25.11.1983, S&S 1984, 93.

133. Rb Amsterdam 8.4.1964, ULC 1964, p.169, appeal dismissed by Hof Amsterdam 6.11.1966, S&S 1968, 83; Hof Amsterdam 22.6.1967, S&S 1968, 81; Hof The Hague 11.11.1975, S&S 1978, 58; Rb Rotterdam 21.3.1980, S&S 1981, 29; Rb Roermond 25.11.1982, S&S 1984, 93; Hof The Hague 24.2.1984, S&S 1984, 112; Rb Rotterdam 1.2.1985, S&S 1986, 45.

134. Rb Rotterdam 31.1.1967, S&S 1967, 56, appeal dismissed by Hof The Hague 17.5.1968, S&S 1968, 82; Rb Amsterdam 8.4.1964, ULC 1964, p.169, appeal dismissed by Hof Amsterdam 6.11.1966, S&S 1968, 83; Ktg Rotterdam 17.11.1969, S&S 1970, 98; Hof Den Bosch 8.1.1970, NJ 1971, 49; Hof The Hague 9.1.1970, S&S 1970, 97; Rb Amsterdam 14.1.1970, S&S 1972, 77; Rb Maastricht 21.2.1974, S&S 1976, 88.

or borrowed,¹³⁵ the manner of expressing the order,¹³⁶ registration in the trade register,¹³⁷ the freight forwarder acting as carrier,¹³⁸ the previous dealings between the parties.¹³⁹

The proposition posited by Schadee is probably correct that, just as was previously established for Belgium, provided a number of criteria are satisfied the temptation exists to lean towards a presumption of carriage, although the opposing party can rebut any such presumption.¹⁴⁰ If the judge ascertains insufficient connecting factors he will be tempted to lay the burden of proof of carriage on the transporter/freight forwarder's opposing party.¹⁴¹ With this strategy the judge in a sense bounces the question back at the parties in the proceedings. In the majority of cases it seems that the sender's opposing party gets the worst of it, with the result that he is regarded as carrier. An indication of this could be the fact that only two cases of the Hof Amsterdam¹⁴² resulted in a favourable outcome for the sender's opposing party, contrary to the decisions of other Dutch courts of appeal.¹⁴³

How should this caselaw be evaluated? As a choice is unavoidable, it would seem to be practical and equitable to proceed on the assumption that the contract is a transport contract.

At this point one must realise three things. In the first place this postulate

135. Hof Den Bosch 21.12.1965, S&S 1966, 24; Ktg Rotterdam 17.11.1969, S&S 1970, 98; Rb Rotterdam 10.11.1970, S&S 1971, 61; Hof The Hague 11.11.1977, S&S 1978, 58.

136. Unclear phraseology construed against the opposing party of the person entitled to the goods by Hof Amsterdam 22.6.1967, S&S 1968, 81; arbitral award 20.4.1982, S&S 1983, 19: 'As usual please collect these goods ... and reforward ...': Rb Amsterdam 17.11.1982, S&S 1983, 36; Rb Rotterdam 20.7.1984, S&S 1985, 43.

137. Rb Rotterdam 23.4.1976, S&S 1977, 10.

138. Hof The Hague 9.1.1970, S&S 1970, 97; Rb Rotterdam 10.11.1970, S&S 1971, 61; Cf. D. Schoner, *Air Law* 1980, p.13.

139. Hof The Hague 11.11.1977, S&S 1978, 58; Rb Breda 7.7.1981, S&S 1982, 96; arbitral award cited at n.136.

140. H. Schadee, *loc. cit.*, p.200. This appears clearly in the decision of Rb Rotterdam 10.11.1970, S&S 1971, 61; 23.4.1976, S&S 1977, 10; Rb Maastricht 18.12.1975, S&S 1976, 88; Hof The Hague 11.11.1977, S&S 1978, 58.

141. The example derived from proceedings that ended with the decision of Hof The Hague 4.6.1980, S&S 1982, 33. Having examined the case for and against transport and freight forwarding the Rb Dordrecht lay the burden of proof initially on the plaintiff, the person entitled to the goods. From the judgment that followed it appears how simply the required evidence was delivered: 'Whoever accepts the obligation to transport without demonstrating that he will merely act as freight forwarder must be taken to be a carrier.'

142. Hof Amsterdam 22.6.1967, S&S 1968, 81 (Jonker); 6.1.1966, S&S 1968, 83 (Gerlach). On these decisions see, T. W. Mertens, *Scheepsraad*, Zwolle 1973, pp.90 et seq.; Th. H. J. Dorrestein, *RM Themis* 1968, pp.300 et seq.; Dorhout Mees, no.8.35.

The verdict of Libouton, 1973, p.13 that, 'The Dutch courts' findings are severe on transport firms which give the sender the impression that they are assuming liability for the carriage', is in regard to these decisions not sustainable.

143. Hof Den Bosch 21.12.1965, S&S 1965, 24; Hof The Hague 17.5.1968, S&S 1968, 82; Hof The Hague 9.1.1970, S&S 1970, 97; Hof The Hague 11.11.1977, S&S 1978, 58.

connects up with the sketch above of the actual activity of the international freight forwarder as that has developed in recent years. Next, it is, having regard to the legal consequences attaching to the existing sharp dichotomy, primarily the carrier who attempts to escape the onerous, mandatory rule governed category in favour of a lighter, freer category. Finally, a heavier burden of proof can be required of a person who engages professionally in modern transport by offering services concerning the end product primarily desired by the sender (undamaged transport of goods to the place of destination), than from that person's opposing party. The notion underlying this is that Article 41 CMR compels the courts to prevent the uniform liability model from being deprived of meaning in favour of the present markedly disharmonious law of freight forwarding, which is characterised in all countries by exemption clauses. From this point of view one ought, seeing the possibility of application of the CMR, to exercise a necessary caution against application of conditions of freight forwarding.¹⁴⁴

§ 4.3.6 *Federal Republic of Germany*

In 1974 Libouton was able to say that the characterisation problem here under discussion as to the applicability of the CMR did not exist in Germany.¹⁴⁵ If this statement was in fact true (*quod non*),¹⁴⁶ then it was a case of the quiet before the storm. Appearances can be deceptive. This storm, which burst in 1972 with the intervention of the Bundesgerichtshof,¹⁴⁷ concerned precisely the problem with which one is engaged in this Chapter and reveals an interesting course to observe: sufficient reason to consider it in this context.

The contract of freight forwarding is regulated by §§ 407-415 HGB¹⁴⁸ and is further developed in the Allgemeine Deutsche Spediteurbedingungen (ADSp).¹⁴⁹ Just as in the legal systems considered above the Spediteur can be described as a person who assumes the obligation to have goods transported ('to send'). Regarding the range of factual and legal activities that are ascribed to him in the exercise of his task one must wrestle here also with the problem

144. The following judicial consideration must be regarded as inadmissible: 'The parties are free to declare conditions of freight forwarding applicable to their transport contract,' Hof Amsterdam 15.11.1972, S&S 1973, 25. Contra, incorrectly, Korthals Altes/Wiarda, p.48.

145. Libouton, 1974, p.507. In the same vein, D. J. Hill, p.64: 'This confusion has been avoided in the other codes, particularly those which are based on the German HGB.'

146. The caselaw developed by the BGH since 1962 from §§ 412-413 HGB has been opposed from the outset, as appears from the literature subsequently mentioned.

147. BGH 18.2.1972, VersR 1972, p.873.

148. For a commentary on this regulation see, Helm, Speditionsrecht, passim. For a brief characterisation, J. Trappe, Auxiliaires, pp.10-50.

149. For the English text of ADSp (1972) see, Auxiliaires, pp.227 et seq.; for the German text and commentary, Helm, Speditionsrecht, pp.88 et seq.

of precisely delimiting the border between freight forwarding and carriage.¹⁵⁰ In a number of statutorily regulated cases the Spediteur is actually equated with the carrier. This concerns the situations in which the Spediteur himself transports (Selbsteintritt: § 412 HGB), charges a fixed sum (Spediteur zu festen Kosten: § 413(1) HGB) and manifests joint cargo activities (Sammelladung-Spediteur: § 413(2) HGB).¹⁵¹

In 1972 the BGH applied, following § 413(2) HGB and in detriment to the conditions of freight forwarding (ADSp), the mandatory rules of KVO transport law in a case in which transport considered to be ‘Sammelladungsverkehr’ had occurred.¹⁵² This same extensive interpretation method was maintained by the BGH in a case in which the freight forwarder had not performed the carriage with his own means of transport but had charged a fixed sum, and held that, as in casu border-crossing transport was involved, and having regard to Article 41 CMR, the CMR and not the ADSp was applicable.¹⁵³ The reasoning of the highest German court to allow the CMR to prevail over the ADSp on the grounds of §§ 412-413 HGB can best be illustrated by the following consideration:

‘Zweck der Vorschriften der §§ 412, 413 HGB ist einen Spediteur, der seinen eigentlichen Arbeitsgebiet verlässt, also nicht nur Gütersendungen durch Frachtführer für Rechnung eines anderen in eigenen Namen besorgt (§ 407 HGB), sondern wie im Streitfall nach § 413 Abs. 1 HGB sich über einen bestimmten Satz der Beförderungskosten eindigt und damit den Frachtvertrag für eigene Rechnung schliesst, ... wie einen Frachtführer ... zu behandeln. Dies wird nur erreicht, wenn der Spediteur die Rechte und Pflichten eines Unternehmers in diesem Bereich hat.

150. Cf. R. Herber, VersR 1981, p.994: ‘Die Grenzen der Spediteurtätigkeit gegenüber derjenigen als Frachtführer sind nun aber schon immer zweifelhaft gewesen’; cf. Precht/Endrigkeit, p.56. Examples from caselaw are: OLG Munich 30.10.1974, VersR 1975, p.129; OLG Bremen 12.2.1976, VersR 1976, p.584; OLG Dusseldorf 27.10.1977, VersR 1978, p.369; BGH 13.1.1978, VersR 1978, p.318.

151. § 412 HGB reads: ‘Der Spediteur ist, wenn nicht ein anderes bestimmt ist, befugt, die Beförderung des Gutes auszuführen. Macht er von dieser Befugnis Gebrauch, so hat er zugleich die Rechte und Pflichten eines Frachtführers oder Verfrachters; er kann die Provision, die bei Speditionsgeschäften sonst regelmässig vorkommenden Kosten sowie die gewöhnliche Fracht verlangen.’

§ 413 HGB reads: ‘Hat sich der Spediteur mit dem Versender über einen bestimmten Satz der Beförderungskosten geeinigt, so hat er ausschliesslich die Rechte und Pflichten eines Frachtführers. Er kann in einem solchem Falle Provision nur verlangen, wenn es besonders vereinbart ist. Bewirkt der Spediteur die Versendung des Gutes zusammen mit den Gütern anderer Versender auf Grund eines für seine Rechnung über eine Sammelladung geschlossenen Frachtvertrages, so finden die Vorschriften des Abs. 1 Anwendung, auch wenn eine Einigung über einen bestimmten Satz der Beförderungskosten nicht stattgefunden hat. Der Spediteur kann in diesem Falle eine den Umständen nach angemessene Fracht, höchstens aber für die Beförderung des einzelnen Gutes gewöhnliche Fracht verlangen.’

152. BGH 3.3.1972, VersR 1972, p.431 (with reference to BGH 25.10.1962, VersR 1962, p.1171) on which, critically, Helm, Speditionsrecht, p.81; cf. J. Trappe, Auxiliaires, p.42; G. Groth, RIW/AWD 1977, p.265.

153. BGH 18.2.1972, VersR 1972, p.873, approved by Helm, Speditionsrecht, p.77 and Heuer, p.31.

Da die Rechte und Pflichten dieses Unternehmers nach den Vorschriften der CMR nicht abdingbar sind, können sie auch nicht durch § 52.c ADSp über die §§ 412, 413 HGB abbedungen werden; ...¹⁵⁴

This decision, which advocates a broad interpretation of §§ 412-413 HGB, was upheld with conviction by the BGH¹⁵⁵ and has been followed by most of the courts of appeal.¹⁵⁶ The doctrine laid down in this caselaw, which draws the boundary between carriage and freight forwarding at the cost of the latter, has been extremely severely criticised in the German literature.¹⁵⁷ One or two even trembled to adopt the BGH's doctrine.¹⁵⁸

It is not possible given the scope of this work to pursue this criticism.¹⁵⁹ It will be obvious that such a difference of meaning between caselaw and literature would have a crippling effect on the development of the caselaw. It will occasion no surprise therefore that the legislature attempted to cut this Gordian knot. By Ministerial Regulation¹⁶⁰ Article 1 KVO was extended by addition of a fifth paragraph, which reads:

‘Hat ein Spediteur nach den §§ 412, 413 HGB Rechte und Pflichten eines Frachtführers, so gelten die Vorschriften dieser Verordnung über die Haftung aus dem Beförderungsvertrag nur, so weit wie der Spediteur das Gut mit eigenen Kraftfahrzeugen im Güterfernverkehr (§ 12 GüKG) befördert.’

With this solution the legislature, in conformity with the wishes of the writers, shifted the buoys in the course marked out by the BGH in favour of the freight forwarder. But presently it transpired that this intervention by the legislature had not solved the problem concerning the CMR. The writers were

154. BGH 21.11.1975, VersR 1976, p.434. In this decision the view that the CMR was only applicable in the case where the Spediteur performed the transport with his own means of transport was yet again rejected.

155. As also: BGH 17.10.1975, VersR 1976, p.36; BGH 9.2.1979, VersR 1979, p.445; with a certain nuance: BGH 13.1.1978, VersR 1978, p.318; BGH 23.6.1978, VersR 1979, p.946: ‘Der Senat hat sich ins besondere ... mit der vom Schrifttum geäußerten Kritik auseinandergesetzt und keine Veranlassung gesehen, vor diesen Grundsätzen abzugehen.’

156. For an extensive summary of the courts of appeal for and against see, H. Roesch, VersR 1979, pp.890-893, to which add, OLG Munich 4.4.1979, VersR 1979, p.713; OLG Hamburg 6.12.1979, VersR 1980, p.290; OLG Dusseldorf 18.1.1979, VersR 1979, p.356.

157. H. Roesch, VersR 1976, pp.25-29; *ibid.*, VersR 1979, pp.890-893 and H. Bischof, VersR 1976, pp.305-308; *ibid.*, VersR 1979, pp.691-698; *ibid.*, VersR 1981, pp.710-711 express the criticism most extensively in the literature. Cf. also W. Schmid-Lossberg, MDR 1979, pp.452-454 and H. Schmidt, RIW/AWD 1975, p.47.

158. J. F. Bartels, VersR 1975, p.598 and VersR 1980, pp.611-613; K. Heuer, VersR 1980, p.63, contra J. Knorre, VersR 1980, pp.1005-1006.

159. H. Bischof, VersR 1979, pp.696-697 formulated seven fundamental objections of an historical, dogmatic and practical nature. See also VersR 1980, pp.710-711. For a short substantive review, see also, A. Merz, VersR 1982, pp.213-218.

160. Regulation TSF No.4/78 of 18.9.1978 Bundesanzeiger No.179 of 22.9.1978; came into effect on 1.10.1978; at the same time the ADSp were brought into conformity with it.

not entirely satisfied.¹⁶¹ That the issue was resolved for inland transport may have been true but of interest for the subject under discussion is the question whether this amendment could influence the caselaw concerning the international carriage of goods by road.

The answer to this question cannot be viewed in isolation from the appraisal of the line advocated by the BGH. Before setting out a personal view on this it is of interest to note that the writers who virtually unanimously opposed the BGH's doctrine are divided amongst themselves precisely as to the question of the desired effect of the amendment on the applicability of the CMR. This controversy arose as a result of a number of cases concerning the applicability of the CMR and arising after the amendment of 1978. Standing at the crossroads, how did the judges decide: to pursue the BGH line or to turn in the direction indicated by the legislature?

Two appeal courts directly took up the influence of the amendment on international transport in their considerations. First, OLG Munich. This court hastened to pronounce the BGH doctrine dead.¹⁶² In a case in which § 413 HGB in conjunction with § 1(5) KVO was not in issue, and was not a matter of contention between the parties, the appeal court nevertheless felt called upon to render, excessively, a judgment on the disputed subject, which for clarity leaves nothing to be desired:

'Die Auslegung des Art.17 CMR im Lichte der VO TSF, Nr 4/78 vom 18.9.1978 (Banz 1978, Nr 179) ergibt, das "Frachtführer" i.S. dieser Vorschrift auch bei Vorliegen der Voraussetzungen der §§ 412 oder 413 HGB nur derjenige Spediteur ist, der das Gut mit eigenen Kraftfahrzeugen im grenzüberschreitenden Verkehr befördert ... Diese verkehrspolitische Entscheidung betrifft zwar formell nur den Bereich der KVO, der Sache nach aber auch den Bereich der CMR. Die Rechtsprechung der BGH zu beiden Bereichen beruht nämlich auf den gleichen Erwägungen-letzlich dem Gedanken der Gleichstellung von Schiene und Strasse. Darüber hinaus ist das Ausbleiben einer entsprechenden Regelung im Bereich der CMR offensichtlich nur darauf zurückzuführen, dass eine Änderung dieses internationalen Übereinkommens, mit erheblichen Verfahrensschwierigkeiten verbunden ist. Dies gilt um so mehr, als es sich offensichtlich nur um ein Problem handelt, das der bundesdeutschen Rechtsordnung eigen ist ...'¹⁶³

In complete harmony with the spirit of the above-cited consideration is the provocative recommendation of the case by Mälzig,¹⁶⁴ who did not hesitate to state that the 'trägerische Boden', which in his view underpinned the constant BGH caselaw, was swept away by the arrival of the amendment. To this

161. H. Roesch and H. Bischof already cited in n.157 above; G. Kirchhof on OLG Cologne 15.11.1982, VersR 1983, p.488: 'Die Neufassung des § 1 KVO mit der Einfügung des Abs. 5 hat zunächst mehr Frage aufgeworfen als sie Probleme gelöst hat.'

162. This court hereby confirmed that it had never been a fervent supporter of the doctrine; cf. OLG Munich 30.10.1974, VersR 1975, p.129; see, H. Bischof, VersR 1976, p.307.

163. OLG Munich 4.4.1979, VersR 1979, pp.713, 714.

164. A. Mälzig, VersR 1979, p.714; in agreement, J. Knorre, VersR 1980, p.125.

decision and the appended annotation Heuer immediately and sharply reacted.¹⁶⁵

The polarization of the views of Mälzig and Heuer, both advocates in respectively Munich and Hamburg, manifested itself in the next following judgment of OLG Hamburg.¹⁶⁶ In an extensive reasoned judgment this court set out the reason why, despite the amended § 1 KVO, the BGH line should be followed without change for international carriage. In casu this meant that the Spediteur zu festen Kosten, who had engaged a carrier for the international transport of goods, was held liable for the entire carriage.¹⁶⁷ The case subscribed further to the above-cited leading BGH case of 1975. As far as the KVO amendment was concerned this court held that this could merely cast a different light on national legal relationships in transport law and left international transport law undisturbed. The view that, in the absence of a regulation à la Spediteur zu festen Kosten, the CMR could be supplemented by national law, in casu KVO law, was resolutely dismissed by the court.¹⁶⁸ The decision of the OLG Hamburg has convinced other appeal courts.¹⁶⁹ Even the OLG Munich subsequently abandoned its position, cited above, at least for application of the CMR.¹⁷⁰

Having encountered the above caselaw and the reactions to it that were manifested, one can properly conclude that the attempt by the national legislature to resolve the chronic controversy as to the applicability of the CMR by adding a supplementary provision to § 1 KVO must be regarded as a failure. The amendment produced instead new matter for dispute with as an initial consequence that within the two camps that prior to the amendment were divided on the correctness of the BGH doctrine, now division has been created with resulting uncertainty for practice.¹⁷¹ Although the majority of

165. K. Heuer, VersR 1980, p.63, contra, H. Roesch, VersR 1981, p.913. Also critical of the decision of OLG Munich, J. F. Bartels, VersR 1981, p.612. Opposed to Heuer and Bartels, J. Knorre, VersR 1980, p.1005.

166. OLG Hamburg 6.12.1979, VersR 1980, p.290.

167. Just as, e.g., Rb Rotterdam 31.1.1967, S&S 1967, 56 on the basis of Art.3 CMR.

168. VersR 1980, p.294.

169. Principally followed in the decisions of OLG Cologne 23.10.1980, VersR 1981, p.168 (with postscript by J. Knorre), as well as OLG Frankfurt am Main 14.7.1980, MDR 1981, p.147; OLG Nuremberg 14.5.1981, VersR 1982, p.377.

170. OLG Munich 14.1.1981, VersR 1981, p.562.

171. The amendment produced an opposite effect on OLG Dusseldorf; see the decision of 18.1.1979, VersR 1979, p.357. Although this court was an opponent of the BGH line, after the amendment it completely changed tack! The court laconically considered: 'Wenn sich ... der Spediteur mit dem Versender über einen bestimmten Satz der Beförderungskosten geeinigt hat (§ 413 Abs. 1 HGB), ist die Anwendung des § 32 ADSp durch die Bestimmungen der CMR ... ausgeschlossen ... Der Senat hat zwar früher eine andere Auffassung vertreten ... Er hat diese Auffassung aber wieder aufgegeben und sich der Rechtsprechung des BGH angeschlossen ... Dass die Kl. den Transport nicht selbst mit einem eigenen Kfz durchgeführt hat, sondern durch die Fa. O. hat durchführen lassen, ist ohne Bedeutung. Auch im Fall des Selbsteintritts (§ 412 HGB) und der Spedition zu fixen Kosten (§ 413 Abs. 1 HGB) kann der Spediteur die Beförderung durch Unterfrachtführer durchführen lassen.'

the opponents to the BGH doctrine recognised that a national law, or amendment thereto, ought not to have any direct influence on the application of international law, the reflex operation of such legal-political legislation should not be regarded as excluded.¹⁷²

The question arises as to how the uncertainty indicated above can be brought to an end. Some support the idea of a statutory revision of German freight forwarding law,¹⁷³ others have expressed the expectation that the BGH will cut the knot.¹⁷⁴ For its part the BGH has seized its chance. Shortly and concisely, it has affirmed that it adheres to the 'old doctrine'.¹⁷⁵

It is notable that in seeking a solution to the division over drawing the demarcation line between carriage and freight forwarding people have reasoned primarily from the base of national law. The method of ascertaining the law employed by the OLG Munich cited above is an illustration of this legal pattern of thought. The liability of the carrier under the CMR was thus interpreted in the light of the German statutory amendment. This approach should be opposed because it utterly fails to appreciate the nature of the uniform law of the CMR.¹⁷⁶ The view disputed here regarding which cases of freight forwarding fall under the CMR, and which do not, incorrectly fails to realise that the fact of a national law or amendment thereto, is here irrelevant. Differences of opinion as to the interpretation of national law obscures the question of the applicability of the Convention. The theatre of conflict needs to be moved from the national to the international front. It is at this last front that it needs to be decided which of the three exceptional Speditions cases regulated by §§ 412-413 HGB, which are considered as transport under German law, retain this status when they acquire an international dimension. It is at that level also that it must be judged whether the doctrine of the BGH can be maintained, and not in the light of whatever national legislation. To this end further enquiry of the three exceptional Speditions cases is necessary.

As to the case of *Selbsteintritt* (§ 412 HGB), that is to say, when the Spediteur himself performs the transport, there is unanimity of opinion that this

172. Writers who have argued that the amendment need have no effect on international transport are: Helm, *Frachtrecht*, § 1 KVO, Anm.9, 9a; W. Schmid-Lossberg, MDR 1979, p.452; H. Bischof, *VersR* 1979, p.695; H. Roesch, *VersR* 1979, pp.892-893; K. Heuer, *VersR* 1980, p.63; J. F. Bartels, *VersR* 1980, p.612; A. Merz, *VersR* 1982, p.213; F. J. Pöttinger, *VersR* 1984, p.502. An opposite view is put forward by: A. Mänzig, *VersR* 1979, p.714; J. Knorre, *VersR* 1980, p.125, who takes a step back at p.1005.

173. H. Roesch, *VersR* 1979, p.893, offers a revised formulation of §§ 412-413 HGB. H. Bischof, *VersR* 1979, p.697, approves of an amendment to § 409 HGB. A more fundamental approach is advocated by R. Herber, *VersR* 1981, pp.990 et seq.; A. Merz, *VersR* 1982, pp.213 et seq.

174. K. Heuer, *VersR* 1980, p.63; J. F. Bartels, *VersR* 1980, p.162; H. Roesch, *VersR* 1979, p.893.

175. BGH 10.2.1982, *VersR* 1982, p.543; ETL 1983, p.32: the amendment has no effect outside the scope of the KVO. It concerned here a case of *Sammelladung*. In a case where a *Fixkost-Spediteur* wished to call in aid the ADSp at the cost of the CMR, the BGH by decision of 5.6.1981, *VersR* 1981, p.1030, rejected the plea. In this sense also, OGH 4.11.1981, *ÖJZ* 1982, p.160.

176. Cf. K. Heuer, n.174 above.

falls under the CMR.¹⁷⁷ In the second case, that of the Spediteur zu festen Kosten regulated in § 413 Abs. 1 HGB, it is less simple. In so far as § 413 Abs. 1 HGB conforms to the actual substance of the contract (in casu to transport), then this Spediteur should be governed by the CMR. The BGH has rightly held that as to the concept of transport contract the CMR is not restricted to the case where the carrier himself, let alone with his own means of transport, performs the transport.¹⁷⁸

The third case, the Sammelladung Spediteur (§ 413 Abs. 2 HGB), produces in practice the greatest difficulties. It is not clear from § 413 Abs. 2 HGB that this Spediteur has assumed the obligation to transport the goods. In general it may be said that a situation has gradually occurred in which such international freight forwarders increasingly act in an organisational sense as operator with carrier's liability.¹⁷⁹ The circumstances of the particular case can also assist in providing indications as to what obligations the sender's opposing party has agreed to assume.

On the basis of these observations concerning the exceptional Speditions cases, it is possible that the judge will regard the concept of transport contract within the meaning of Article 1 CMR rather more restrictively than does the caselaw based on §§ 412-413 HGB.¹⁸⁰

From the analysis of caselaw and literature in Germany concerning the delimitation problem between freight forwarding and transport with a view to the applicability of the CMR it is clear that the legal battle has so far been waged almost entirely within the national arena. This applies also to the suggested solutions advanced in the literature that the legislature should intervene, or intervene again. This approach does not appreciate the nature of the CMR. As long as the Convention is incomplete on this point only the judge can find the way out of the maze. It is therefore desirable that the BGH firmly adheres to the line according to which for the interpretation of the CMR national views in principle play no role.

§ 4.3.7 England

In contrast to the continental legal systems the legal position of the freight forwarder is not statutorily regulated in England.¹⁸¹ Establishing the legal position of the freight forwarder on the basis of caselaw is consequently an

177. Cf. H. Roesch, *VersR* 1979, p.890.

178. BGH 21.11.1975, *VersR* 1976, p.434.

179. Cf. J. Ramberg, *ETL* 1980, pp.128-129; cf. § 4.3.1 above. Contra, H. Bischof, *VersR* 1979, p.697.

180. It is interesting that it appears from a comparison of the disputed issue concerning the legal position of the German Spediteur with the French *commissionnaire de transport* that the question of possessing one's own means of transport or not is totally irrelevant to the legal position of the latter whereas for the former (at least according to KVO law) it is of determinative significance.

181. Hill, no.22; *Auxiliaires*, p.53. For the text of the Standard Trading Conditions, see, *Auxiliaires*, p.289.

uncertain activity as this figure, according to the circumstances, can act for the sender or for the carrier or for both at the same time.¹⁸² In addition to this, the institution of *Selbsteintritt*, as a result of which the freight forwarder is regarded as carrier, is also recognised in English law.¹⁸³ The delimitation problem between freight forwarder and carrier also exists here without any diminution. Only by means of careful analysis of the factual situation can it be said which legal rules must be declared applicable.¹⁸⁴

In one case the question whether the sender's opposing party was to be regarded as an agent or as a principal and consequently as carrier within the meaning of Article 1 CMR, was, after weighing the pros and cons, answered in the latter sense by Judge Martin.¹⁸⁵ This casuistical approach produced, as elsewhere, legal uncertainty.¹⁸⁶ Hill correctly attached to this situation the consequence that:

'With the advent of CMR, containerisation and combined transport operations the situation is likely to become even more complicated.'¹⁸⁷

Finally, it may be pointed out that, certainly where the freight forwarder is regarded as carrier, the application of the Convention leads to the conclusion that the question whether the carrier must according to Common Law be regarded as either a common or as a private carrier is utterly devoid of any significance.¹⁸⁸

182. J. Ramberg, *Auxiliaires*, Synthesis Report, p.5. Hill/Messent, pp.3 et seq. The intermediary in Yugoslav transport law finds himself in the same ambiguous position, V. Filipović, *Hague-Zagreb Essays 2*, pp.58-59.

183. Hill, no.23; *Auxiliaires*, p.77.

184. D. J. Hill, *Auxiliaires*, p.66 and p.85; Clarke, no.12; Hill/Messent, p.3.

185. QB 10.10.1979, [1981] 1 Lloyd's Rep 192 (*Tetroc Ltd. v. Cross Con (International) Ltd.*). The court attached importance not only to the words of the contract but, in the manner of continental judges, also to the method of accounting for the performance by the sender's opposing party; cf., also Clarke, no.12; Hill/Messent, pp.5 et seq.

186. J. Ramberg, *Auxiliaires*, Synthesis Report, p.6: 'Unfortunately is not always that it appears clearly from the contract that the freight forwarder has accepted to assume the role of a "contracting" carrier with the liability falling upon such a carrier under national law or international conventions ...; there is no easily available criterion to assist courts of law in distinguishing between the freight forwarder and as a "contracting" carrier.' The advice of Donald, p.104 to freight forwarders to take out CMR liability insurance has much to commend it.

187. D. J. Hill, *Auxiliaires*, p.61, as addendum to his conclusions as expressed earlier in 1972 (Hill, no.66). The CMR was incorporated into English law by s.1 Carriage of Goods by Road Act 1965, as amended by the Carriage by Air and Road Act 1979; for the text see, Donald, pp.105 and 109 respectively. Hill/Messent, Appendix A.

188. There are differing views on the applicability of the rules relating to common or private carriers; see, Hill, nos. 26-29. For the differences between these two concepts see, O. Kahn-Freund, *The Law of Carriage by Inland Transport*, London 1965, pp.196-201; J. Ridley, *The Law of Carriage of Goods by Land, Sea and Air*, London 1982, pp.7, 20.

§ 4.3.8 *Other countries*

From Denmark there is, to the knowledge of the present writer, but one judicial decision in which the applicability of the CMR formed the main issue.¹⁸⁹ On appeal a court characterised the sender's opposing party as carrier by recourse to the method of organisation of the transport concerned as well as the way in which the freight was charged for.¹⁹⁰ In consequence the CMR was declared applicable and the carrier relied in vain, following Article 41 of the Convention, on the conditions of freight forwarding stipulated by him.¹⁹¹

One presumes that the situation in Luxembourg as to the issue in question is identical with that in Belgium.¹⁹² This presumption, which rests upon but one decision of the highest court in Luxembourg, seems distinctly dubious.¹⁹³

§ 4.4 *Transport operator contract*

A figure who both juridically and in an economic-organisational sense stands between the transporter and the freight forwarder is the transport operator. He is the person who, although he developed from freight forwarding, does not, as does the freight forwarder, assume the obligation of transporting, but who undertakes the transport, although not himself effecting it.¹⁹⁴ This intermediate position raises the question, into which legal category must the transport operator be placed: is he to be regarded as carrier, as freight forwarder or instead as contractor *sui generis*? The answer to this question depends on whether his legal position is governed by the CMR or not. Having regard to the substance of the contract one must answer the question in the first sense. In particular, the fact that he does not dispose of his own means of transport is no reason for a contrary answer.¹⁹⁵ This view means that the

Hill, no.30; Auxiliaires, pp.77-78, reduces this distinction to an academic question on the ground of Art.1 Freight Forwarding Conditions. He thereby fails to appreciate that, in international circumstances, this distinction is rendered irrelevant by Art.41 CMR.

189. L. Sevon, *The CMR Convention and its application by Scandinavian Courts*, ULC 1971, pp.293 et seq.

190. CA Vestre Landsret 8.7.1969, ULC 1971, p.295.

191. *Dispositions générales de la Fédération Nordiques des Transitaires applicables aux transport, à l'expédition et au magasinage*; for a French translation of the authentic Swedish text see, *Auxiliaires*, pp.311 et seq.

192. Libouton, 1973, p.19.

193. The Cour Supérieur de Justice du Grand Duché de Luxembourg referred in its decision of 14.2.1967, ETL 1969, p.1146 to French law. Otherwise the decision gives no indication at all that the CMR was applied.

194. Wachter, pp.128-129; Dorrestein, nos.26, 32; Korthals Altes/Wiarda, p.48; Van Oven, no.120.

195. Wachter, p.129; Dorrestein, nos.36, 39; Van Oven, no.120; H. Schadee, BT 1982, p.403. See in the same sense for Belgium, Putzeys, nos.67, 74.

transport operator falls within the scope of the CMR.¹⁹⁶ Dorrestein is opposed to this view.¹⁹⁷ and has argued on several occasions for recognition of the transport operator as an independent juridical category.¹⁹⁸ Dorrestein calls the text and history of the Convention in support of his proposition. Against this the following can be mustered.

It is not clear from the text of Article 1 CMR, as Dorrestein himself also recognises,¹⁹⁹ what exactly is to be understood by the concept of transport contract. The history of the Convention shows that the attempt to require a particular connection between carrier and means of transport had to be abandoned. In addition, one is fumbling in the dark for the true reason for the disappearance of a definition. The historical argument therefore appears to be a weak spot in Dorrestein's argument. Further, it seems that Dorrestein's standpoint does not entirely agree with the rest of his exposition.²⁰⁰ Fourthly, it appears that an independent position for the transport operator has played the judge false.²⁰¹ Finally, what Dorrestein proposes deviates from the situation indicated above as to similar legal figures in Italy, Belgium and the Federal Republic of Germany.²⁰² The French *commissionnaire de transport* consequently appears yet again to make good his unique position.²⁰³

It follows from the above that the point of view that the transport operator

196. See Rb Maastricht 21.2.1974, 18.12.1975, S&S 1976, 88.

197. No.33.

198. RM Themis 1968, pp.277-303; NJB 1973, pp.1126 et seq.

199. No.98a.

200. In no.26 he states: '(transport operators) are virtually or entirely indistinguishable from carriers'.

In no.32 he advocates the same liability regime for carrier and transport operator during the period between taking over and delivery of the goods.

At no.36 indent sub a) he states that there is: 'no legally distinctive criterion (of transport) in regard to transport operations'.

At the same place: 'It must positively be stated that transport within the meaning of our statute (and also within the meaning of the CMR) does not have a formally legally distinctive criterion by which it can without more be delimited from transport operations.'

201. The dogmatic and in practical terms impossible to follow results to which the 'national statute', in casu Art.91 WvK, leads was discovered by Rb Amsterdam 5.12.1979, S&S 1980, 96. The defendant was to transport goods on behalf of the plaintiff but due to an absence of own vehicles was allowed to have the transport effected by another. Apparently inspired by Dorrestein, no.33, the *Rechtbank* reasoned: 'The established facts make it clear that the defendant did not act as CMR carrier towards Schaap, but as transport operator. The CMR is therefore neither as mandatory law nor regulatory law applicable to the contract concluded between the parties for the transport by third party carriers.' Consequently the *Rechtbank* concluded for application of Art.91 WvK to this contract, because it was not demonstrated that there had been a stipulation for application of the FENEX conditions! A more perfect example of hopeless disorientation in the border area of transport, transport operation and freight forwarding, is scarcely imaginable. Contrary to Rb Amsterdam, Rb Almelo 22.8.1979, S&S 1980, 61, declared Art.91 WvK inapplicable to the transport operator.

202. See, § 4.3.3, 4.3.5 and 4.3.6 above.

203. See, § 4.3.2 above. H. Schadee also draws a parallel between the transport operator and the *commissionnaire de transport, Auxiliaires*, p.199 n.1; also, BT 1982, p.403.

should be regarded as a carrier and consequently falls within the scope of the CMR is confirmed by the situation pertaining in other countries.

§ 4.5 *Chartering contract*

§ 4.5.1 *The Netherlands*

It is of importance to the application of the CMR whether the contract whereby a person places his vehicle at the disposal of the other party should be regarded as a transport contract within the meaning of Article 1 CMR. Here one treads a terrain sown with snares and traps. There exists little certainty as to the nature of this phenomenon in the field of (international) road transport. The concept of charter has been derived from the concept of charter employed in sea and inland waterway law. The view of the Dutch legislature is that this phenomenon must be regarded as carriage.²⁰⁴ The question is, however, whether such a proposition does not in general go too far. One may imagine that the transplantation of chartering to road transport might have legal consequences other than it has in sea and inland waterway law.²⁰⁵ Again, whereas the contract of charter in sea and inland waterway law is not regulated by mandatory law but by numerous standard conditions, for international road transport no deviation from the Convention regime is allowed by Article 41 CMR.

As was stated above at § 4.2 the chartering contract was a subject of discussion during the Convention negotiations. The charterer was regarded as a carrier while he had control of the vehicle including crew.²⁰⁶ That is the most certain thing that can be extracted from the further course of the negotiations leading to the establishment of the Convention.

As alternatives to the characterisation of transport there are also either hire/rental or a contract *sui generis*. The *Rechtbank Rotterdam* has held for the former.²⁰⁷ *Dorrestein* advocates a contract *sui generis*,²⁰⁸ but this has been rejected by the *Rechtbank Utrecht* on the ground of insufficient distinguishing character.²⁰⁹

Due to its character the chartering contract appears a difficult legal concept to classify. Nevertheless, it seems, on the basis of the following caselaw, that the characterisation as carriage has gained the upper hand in The Netherlands.

204. Art.15 WOW. See also, *Dorrestein*, no.43.

205. See, *Putzeys*, no.43.

206. See, *Dorrestein*, no.98a.

207. *Rb Rotterdam* 4.2.1976, S&S 1976, 56 (transport under CMR); it was not apparent whether or not it here concerned hire without a crew, an essential fact in the view of the national legislature, given that uncrewed chartering falls under the ordinary law. For a case of crewed chartering, see: *Rb Rotterdam* 12.12.1975 (referred to at S&S 1979, 23; *NJ* 1980, 484). For a contrary decision see the same *Rechtbank* in its judgments of 3.9.1976, S&S 1977, 56 and 23.6.1978, S&S 1979, 77, upheld by *Hof The Hague* 14.11.1980, S&S 1981, 42.

208. No.44.

209. *Rb Utrecht* 20.2.1980, S&S 1980, 108 (national transport), upheld by *Hof Amsterdam* 4.11.1982, S&S 1983, 101.

Before examining this caselaw more closely it is well to realise that it here concerns primarily actions for non-performance brought by the parties to the chartering contract. Whether a direct action by the person entitled to the goods for damage according to the CMR is possible remains uncertain.²¹⁰

The first case in which the characterisation of the chartering contract was raised as the main issue will be dealt with here, the second will be treated in the following section, § 4.6.

In August 1968 Zuiderwijk contracted with Wetram to place its articulated lorries, ready to roll and including drivers and necessary licences, at the disposal of Wetram for the purpose of transportation, Zuiderwijk receiving a particular freight price less a percentage commission for Wetram. Zuiderwijk having performed some 1500 transports the parties found themselves in disagreement as to the reimbursement required for this number of transports performed. When Zuiderwijk began proceedings against Wetram on this account, the latter invoked, inter alia, limitation of action under Article 32 CMR. The most important issue in the proceedings was whether the legal relationship between the parties was to be characterised as a transport contract and in consequence ought to be regulated by the CMR. The Rechtbank held:

‘Where Wetram has concluded the contract in dispute in its own name and for its own account and the drivers with their articulated vehicles for the purpose of performing the contract concluded by Wetram have each time for a period of a week behaved in accordance with the instructions given by Wetram, the contract concluded between the parties must – according to its nature and purport – be regarded as a chartering contract. Zuiderwijk consequently does not appear as an independent carrier.’²¹¹

This proposition, which allowed no room for the CMR, found no favour in the eyes of the court of appeal. The Hof considered:

‘that it is beyond dispute (...) that in 1968 the parties contracted that Zuiderwijk would, with one or more freight vehicles from its business, effect international transport for Wetram, which has been done since 1974 by placing at the disposal of Wetram, against payment, articulated lorries with driver and required documentation; that Zui-

210. Cf. M. Goût, *La traction routière*, published on behalf of IDIT, Rouen 1979, p.23, on which see further below.

Contra: Hof The Hague 5.1.1979, S&S 1980, 10. Henri Essers placed his drive unit with crew at the disposal of Streekvervoer Wegtransporten for one year against fixed payment per kilometre. When damage to the goods during the transport performed by Essers occurred, the consignee brought proceedings against Essers who claimed to be merely a hirer, not a carrier. The Hof characterised in favour of transport on the basis of the facts (including, inter alia, indications in the consignment note), and considered: ‘Essers’ driver reported to Castelletti in Milan with more-over a drive unit plus empty trailer and there loaded the goods. Essers’ driver did not go with a drive unit to collect an already laden trailer. Such facts bring with them that Castelletti could and did presume that the drive unit with trailer was a vehicle within the meaning of Art.1(2) CMR whereby the goods would be transported by Essers. The mutual relationship between Streekvervoer and Essers could not be known to Castelletti with the result that as against Castelletti Essers could not invoke it.’

These considerations are from the point of view of transport law not without more logically and civil law theoretically explicable. Cf. also Putzeys, no.57. Also critical, Dorhout Mees, no.8.83a. For the distinction between an internal and an external aspect in such contracts, see below § 4.6.

211. Rb Rotterdam 12.12.1975, referred to at S&S 1979, 23; NJ 1980, 484.

derwijk assumed the obligation to Wetram to effect international transports against payment and to that end concluded contracts with Wetram, and neither the fact that Wetram in turn also concluded transport contracts with its clients nor that Zuiderwijk had no prior knowledge thereof, which contracts were performed, Zuiderwijk's drivers understanding from Wetram that they were performing Zuiderwijk's contract, does not detract therefrom.²¹²

The Hof further considered that Zuiderwijk, as appeared from the formulation employed by it, had considered itself as a carrier; all of which resulted in application of the CMR. On appeal in cassation Zuiderwijk argued that the chartering contract concluded in August could not without more be put on a line with the transport contracts that derived from it. The Hoge Raad held that, given the facts as they had been determined by the Hof, no indication had been given by it that it had taken an incorrect view of the concept of transport contract.²¹³ The Hoge Raad, as did the Hof, considered the CMR to be applicable to the transport contracts which derived from the basis contract of 1968. Neither court came to a characterisation of the chartering contract underlying the series of transport contracts nor in particular to the question whether this contract ought to be regarded as a chartering contract.²¹⁴ Circumstances could occur in which such a contract would not always be regarded as a transport contract. Thus it appears that in the above proceedings, Zuiderwijk had no influence at all on the actual transportation. Its role was confined to the simple one of driving.²¹⁵ Where in a similar situation one nevertheless decides for transport it would appear to be correct in that instance to regard Wetram as sender for Zuiderwijk in the sense that Zuiderwijk appears as sub-carrier, as performer of the contract concluded by Wetram.²¹⁶ The fact that Zuiderwijk regards itself as carrier would in this way not be prejudiced.

212. Hof The Hague (undated), referred to at S&S 1979, 23; NJ 1980, 484.

213. HR 17.11.1978, S&S 1979, 23; NJ 1980, 484, on which with reservations, Libouton, 1982, p.696.

214. Cf. B. Wachter in his annotation to the decision, NJ 1980, 484. Contra, apparently, Rb Arnhem 8.1.1981, S&S 1982, 75: 'It is true that the defendant was not an independent carrier (...) and equally is it so that Hartrans (plaintiff) in its turn concluded contracts with third parties; that does not take away from the fact that it was the defendant who actually effected the transport, and if the legal relationship with Hartrans is not quite a transport contract, in its performance it is so closely related thereto and the extraneous elements thereof are of such an immaterial nature that the rules applicable to a transport contract ought as far as possible to be applied to it.'

215. See, Dorrestein, no.44, no.52e. In a similar case this writer rejected the identification with transport. This standpoint is very close to that of Rodière, who stipulated as a condition of transport that the 'maîtrise de l'opération (de transport)' must be laid upon the carrier; Rodière, Sirey, no.234; BT 1975, p.137. See below § 4.5.2. In such a case the liability of the 'hirer' will most probably be determined by a less exacting regime. See also OGH 8.9.1983, ETL 1985, p.382.

216. See J. Putzeys, *La traction routière*, pp.35 et seq. The CMR does not regulate the relationship among carriers, with exception for the case of successive transport (Artt.34 CMR et seq.) where mutual recourse is a matter only of mutual agreement (Art.40 CMR); see on this Chapter 3.

From the above it can be appreciated that the chartering contract can only with caution be regarded as a transport contract. The (internal) legal relationship between the charterer and the charterer can in some situations be further determined as an indeterminate contract by analogy with contracts that are regulated by law.²¹⁷ Further comparative law study can protect one from a too hasty application of the Convention to legal relationships that are not intended therefor.²¹⁸

§ 4.5.2 Other countries

In France and Belgium, 'location de véhicules' is regarded as a separate category next to 'affrètement' and 'transport'.²¹⁹ Although not entirely centred on the CMR, Rodière, Goût and Putzeys demonstrate that the border between transport and charter can only be determined in the light of the concrete circumstances.²²⁰ Consequently, it remains difficult to distill it from the casuistical general rules. An important criterion remains the question who is burdened with 'la maîtrise de l'opération de transport'.²²¹ It occasions no surprise that the caselaw in France on this matter demonstrates a changeable picture.²²²

In the Federal Republic of Germany there exists the concept of Wagen-

217. In this regard Art.16 WOW appears to be too absolute. For a more subtle approach see, R. Rodière, BT 1975, p.221 et seq. and M. Goût, *La traction routière*, pp.11-12, 17 et seq. It must be conceded in favour of legislation that in the present dilemma there is much to be said from the point of view of legal certainty for its choice.

218. See Hof van Cassatie. 16.6.1966, ETL 1966, p.943: 'Celui qui a donné un camion avec chauffeur est responsable de la faute du conducteur resté son préposé.' Contra, Cass. 7.3.1980, BT 1980, p.344; cf. also, Cass. 13.10.1980, BT 1980, p.598. Cf. B. Wachter in his annotation to HR 17.11.1978, NJ 1980, 484, sub 3: 'that if one wants to advance legal unity by means of the CMR Convention, while at the same time by its implementation maintain a system of ideas at the national level that as regards actual points of departure differs from views elsewhere, on balance one possibly prejudices the movement towards legal unity ... It is possibly then not right to collect together juridically a range of related contracts, still less contracts that can be distinguished from each other.'

219. Rodière, Sirey, nos.734 et seq.; Rodière, Dalloz, nos.327 et seq. At BT 1975, p.136 he provides the following definition: 'La location de véhicules est le contrat par lequel un contractant (généralement propriétaire de la chose louée) appelé "loueur" met à la disposition d'un autre contractant appelé "locataire", la jouissance d'un véhicule défini, pour un temps déterminé, ou une opération définie, et moyennant un prix fixé d'avance ou fixable suivant des critères déterminés pour lui permettre d'exécuter des transports routiers des marchandises.' See also Lamy, nos.701 et seq.

220. R. Rodière, BT 1975, p.125 et seq., 220 et seq., 400 et seq., 532 et seq.; M. Goût, *La traction routière*, pp.17 et seq.; Putzeys, nos.43 et seq.

221. See, e.g., Putzeys, no.62.

222. For the question whether the 'loueur' or the 'locataire' must in casu be regarded as carrier under the CMR, the French Cour de Cassation has on a number of occasions accorded determinative significance to the issue and signing of the consignment note. This has led to the locataire being regarded as the carrier: Cass. 13.10.1980, BT 1980, 598 (on which see, Libouton, 1982, p.696), as well as Cass. 17.12.1980, BT 1981, 155. Quite properly B. Mercadal, *Recueil Dalloz Sirey* 1981, p.544, expressed his criticism of the maintenance of this criterion. In this way

stellungsvertrag (§§ 14, 15 KVO). The contract is seen as an advance contract in regard to the transport contract.²²³ The juxtaposition of Wagenstellungsvertrag and Frachtvertrag results from the vision of the German legislature that, as is the case in rail transport, the transport contract commences from the moment of taking over of the goods.²²⁴ It would not be correct to put the Wagenstellungsvertrag on one line with the charter contract under discussion here.²²⁵ In Germany the charter contract is seen as hire/rental, unless the crew is supplied when it is regarded as transport.²²⁶ Elsewhere the distinction with transport is likewise maintained.²²⁷

Taking the broad perspective of the subject it can be said that there exists no 'einheitliche' vision of the nature of the charter contract in the law of road transport. Although from practical considerations an equation with the transport contract is often defended, it appears, having regard to the resultant legal consequences, that as far as international transport is concerned this is not always justified. Nor from the legal historical and systematic point of view is one compelled to equate the contracts. Here the position is adopted that the charter contract must be distinguished from the transport contract as a basis or advance contract. In this conception the charter contract is a means of attaining the object (namely, the carriage of goods). When a person places his crewed vehicle at the disposal of another in the cadre of a charter contract and assumes the obligation as against that person actually to transport, thereby preserving as against that person a certain measure of independence, he is to be regarded as a carrier.

§ 4.6 Haulage contract

§ 4.6.1 The Netherlands

The haulage of laden vehicles is, in part due to containerisation, now a permanent feature of modern transport law. The physical separation of the

an evidentiary provision (Art.9 CMR) is used improperly to resolve a disputed issue of material law. See also CA Paris 22.2.1980 BT 1980, p.239; CA Paris 2.12.1981, BT 1982, p.73; CA Paris 3.10.1980, BT 1980, p.519; CA Paris 31.3.1981, BT 1981, p.368; OLG Hamburg 16.11.1980, VersR 1982, p.556.

223. Helm, Frachtrecht, § 14 KVO, Anm. 2 and 6.

224. For criticism of this view, Helm, Frachtrecht, § 15 KVO.

225. This identification was suggested by Ponet, p.37, with reference to a decision of LG Bremen of 6.5.1965, ETL 1966, p.691. In this decision the question was posed whether the CMR must be declared applicable to a transport that had not actually commenced. This question has no relevance whatsoever to the issue raised in this section.

226. Helm, Frachtrecht, § 425 HGB, Anm. 44; Helm, Speditionsrecht, p.9, Anm. 4bb.

227. See for Switzerland, Edis, p.56. For England, cf. QB 22.11.1979, [1980] 1 Lloyd's Rep. 279 (Walek & Co. v. Chapmann and Ball), ETL 1983, p.95, in which 'hire' is considered; See, Clarke, no.12. For Austria, OGH 8.9.1983, ETL 1985, p.282. For England, cf. on the trailer-operator, Hill/Messent, p.205.

locomotive source from the freight area creates problems for the lawyer just as when he is called upon to give a juridical evaluation of other economic phenomena.²²⁸

Is the person who places his haulage power at the disposal of another to be regarded as a carrier under the CMR? That is the question.²²⁹ Should one regard the haulage contract as a species of the charter contract dealt with in the preceding section, then one could suffice with a reference to the arguments presented there. Just as in the case of chartering, the question of the nature of the haulage contract is disputed in the literature.²³⁰ The discussion of the nature of the contract at issue is dominated by two factors: is there a taking over of or power over the property and what is the part played by the vehicle?²³¹ The text of the Convention gives no definite answer.²³² In the opinion of the present writer it appears to be incorrect to make the applicability of the CMR as between the proprietor of the vehicle and his opposing party dependent on the introduction of a vehicle by the carrier.

The question of the nature of the haulage contract in the light of the application of the CMR has been the subject of a number of judicial decisions.²³³ The *Rechtbank Amsterdam* preceded implicitly from the position of transport and consequently applied the CMR.²³⁴ In a subsequent decision the *Rechtbank* decided further that it was not contrary to the definition given in the first paragraph of Article 1 of the Convention – in the light of the development of international transport, the demands of practice and the intentions of the drafters of the Convention text – to regard a laden trailer without drive unit, which the carrier transports to its destination across the

228. J. Putzeys, *La traction routière*, p.30 sub 2; B. Mercadal, *La traction routière*, Rapport de synthèse, p.5: 'Le droit se trouve devant un problème qui est constant: celui de qualifier les faits qu'on lui soumet.' See for legal problems arising from insurance for haulage, *Binding Advice* 15.9.1983, S&S 1984, 117.

229. B. Mercadal, *La traction routière*, Rapport de synthèse, p.19.

230. Rodière, *Sirey*, no.277: 'La doctrine s'est longtemps partagée en camps bien tranchés. Pour les uns, le remorquage était un louage; pour d'autres, c'était un transport.' See, Lamy, no.7. Cf. *Dorhout Mees*, no.9.420.

In the Dutch statute both the haulage contract and the chartering contract are characterised as transport contracts.

231. The Dutch statute considers the vehicle as an essential of the transport contract. *Dorrestein*, no.69 in conjunction with no.98e, requires that the vehicle be supplied by the carrier whereas he elsewhere states, at no.68, that employment of a vehicle is unnecessary. *Korthals Altes/Wiarda*, p.23, regard the vehicle as in principle irrelevant. The import of this view is merely that goods do not need to be transported *in* a vehicle.

232. In the English text: 'in vehicles': in the French text: 'au moyen de véhicules'.

233. The haulage contract has given rise to questions also outside the transport law field pure and simple; see, Hof *The Hague* 22.4.1977, S&S 1977, 88; see also, Putzeys, no.56c for various aspects. For administrative law problems concerning Spanish law see, F. M. Sanchez Gamborino, *La traction routière*, pp.47 et seq.

234. *Rb Amsterdam* 15.11.1972, S&S 1973, 53. Also: *Rb The Hague* 24.3.1977, S&S 1978, 30; *Rb Groningen* 4.11.1983, S&S 1984, 59.

border by means of his own drive unit, as goods.²³⁵ The decision appears correct although in so far as it is based upon the intentions of the drafters of the Convention, the reasoning does appear doubtful.²³⁶ In effect the person who places his vehicle at the disposal of his opposing party is here seen as the carrier. It was this characterisation that was in principal the main issue in the appeal. The extent to which juridical characterisation is dependent on factual interpretation was realised in these proceedings by the plaintiff, Vink, who had placed a vehicle crewed by a driver at the disposal of the opposing party, Kruidenier, for the purpose, against a kilometer-based tariff, of hauling a trailer loaded and owned by the defendant. The articulated combination was destroyed in an accident whereupon Kruidenier brought proceedings for compensation for damage to the trailer according to the CMR. Vink replied with the contention that the contract in issue was not to be regarded as a transport contract but as one of hire/rental, so that application of the CMR remained out of contention. The Rechtbank Rotterdam considered:

‘The court considers in the first place that the contract in issue, merely because the driver was employed by Vink, cannot be regarded as a contract of hire and rental. In contrast, the contract possessed all the elements of a transport contract within the meaning of Art.1 of the CMR Convention: Vink assumed the obligation as against Kruidenier to transport the goods by road ...’²³⁷

In contrast to the Rechtbank who would have nothing of hire and rental, the Hof decided:

‘That the contract possessed elements of hire and rental does not detract from the fact that it complies with the above-mentioned definition [i.e., transport contract] and in consequence is subject to the provisions of the CMR.’²³⁸

The ground of appeal in cassation objecting to the refusal to permit proof of the characterisation of transport contract was rejected by the Hoge Raad with but one sentence:

‘This ground fails in that it fails on all counts to recognise that the juridical characterisation of a contract is a matter for the judge and is not in itself subject to the burden of proof.’²³⁹

235. Rb Amsterdam 16.4.1975, S&S 1975, 81.

236. See § 3 below.

237. Rb Rotterdam 3.9.1976, S&S 1977, 56. In a similar sense, Rb Utrecht 20.2.1980, S&S 1980, 108: ‘... leaving aside that a contract of hire partly comprising a person does not seem very possible.’ See, Dorrestein, no.43.

238. Hof The Hague 31.3.1978, S&S 1980, 10. Cf. Dorhout Mees, no.9.184. This consideration is on all fours with the former decision of the Hoge Raad, HR 12.3.1954, NJ 1955, 386 (Codam/Merwede).

239. HR 5.10.1979, S&S 1979, 117; NJ 1980, 485. In HR 18.6.1982, S&S 1982, 85; NJ 1983, 384, it was also assumed, tacitly, that a haulage contract was transport.

From this it appears that, although the determination of the nature of the contract at issue is a matter of juridical characterisation for the judge, this characterisation is dependent of factual interpretation.²⁴⁰

As appeared from the case concerning the charter contract dealt with in the preceding section, the court does not need to render a judgment on the nature of the haulage contract. The result of this is that, considering the procedural aspects of such proceedings, the person who places a freight vehicle with crew at the disposal of his opposing party will be regarded, as previously, as a carrier. Consequently the eventual object of this contract, namely, carriage, absorbs the substance of the contract, in other words, the simple placing at the disposal of another of the haulage power of the former. With reference to the conclusion already drawn with regard to the charter contract, it is the better opinion that that applies here also provided that the independence of the haulage contractor remains intact. In this context it is worth mentioning that haulage contractors are advised to assume only the obligation of transporting the vehicle itself and not of transporting the goods present therein or thereon.²⁴¹

§ 4.6.2 *Other countries*

In France the haulage contract is regarded as either hire/rental or as transport.²⁴² Goût has demonstrated on the basis of an analysis of caselaw that the judge adopts a position with a particular nuance. His conclusion is that the haulage contract is not to be characterised as a transport contract but as 'un contrat de louages de services'. As against the opposing party the 'tractionnaire' has an obligation 'de resultat', of achieving a particular result, whereas as against the sender/consignee in principal only an obligation 'de moyen', of exercising the required skill and care.²⁴³

In Belgium Putzeys arrives with hesitation at the characterisation of transport.²⁴⁴ He expands this by attaching thereto the distinction between external and internal legal consequences. He would bring merely the external relation under the CMR, that is to say, the relationship between the 'tractionnaire'

240. See, B. Wachter in his annotation at NJ 1980, 484 sub 3. See also B. Mercadal, *La traction routière*, Rapport de synthèse, p.7: 'le juge est toujours maître de la qualification juridique d'une opération économique'.

241. As is recommended by Dorrestein, no.98e; see, Putzeys, no.56 bis. M. H. Claringbould, *Goederenvervoer over de weg*, Deventer 1984, pp.24-25. See also, Rb Amsterdam 16.4.1975, S&S 1975, 81.

242. A definition of the 'contrat de traction' is given by M. Goût, *La traction routière*, p.10: 'Le contrat de traction est le contrat par lequel un professionnel appelé "tractionnaire" met à la disposition d'un entrepreneur de transport, sa force de traction d'un ensemble routier non pourvu de moyen de déplacement par lui-même, pour un temps ou une opération définie et moyennant un prix fixé d'avance ou fixable suivant des critères déterminés.'

243. *Ibid.*, p.26; J. Putzeys, *La traction routière*, p.31; also, Putzeys, nos. 55 et seq.

244. J. Putzeys, *La traction routière*, pp.35-40; Putzeys, nos. 57-59.

and the person entitled to the goods.²⁴⁵ He considers, contrary to the caselaw in The Netherlands, that the CMR is not applicable to the legal relationship between the 'tractionnaire' and his opposing party. Goût, Mercadal²⁴⁶ and Putzeys all urge great caution in this area.

In general the haulage contract is seen in Germany as transport, but in certain circumstances transport law norms can be superseded by those of the general 'Werkvertrag'.²⁴⁷

§ 4.7 *Other contracts*

The fact that the transport contract is built of various elements that can also be essential elements of other contracts explains why the delimitation problem can also occur in regard to these contracts.²⁴⁸ Apart from the elements of hire/rental, as that has been discussed in the preceding section, the transport contract is often interwoven before, during or following the actual transport with elements of bailment. In combined transport in particular bailment is an essential element in the flow of goods from producer to consumer.²⁴⁹ It is not clear to what extent such elements must be ascribed to a particular contract.

In one case where a carrier took over goods and began the actual transport only after a lengthy period of time, he asserted the existence of a contract of bailment and denied therefore the application of CMR transport law to the case in hand. The Rechtbank dismissed the carrier's standpoint and considered, having reasoned for application of the CMR despite the intertwining of contracts:

'Certainly the CMR imposes heavier duties on the carrier than does the BW on the bailor, yet this does not bring with it that when both qualities combine in the same person there occurs a conflict of duties. In addition the rules provided in the CMR concerning the position of the carrier are mandatory (Art.41 CMR) and consequently

245. The trailer to be hauled is regarded by Putzeys as the packing of the particular goods. The carrier can protect himself from ignorance of the nature and latent condition of the goods by means of the so-called 'said to contain' clause; see, n.241 above.

246. B. Mercadel, *La traction routière*, Rapport de synthèse, pp.20 et seq.

247. Helm, *Frachtrecht*, § 425 HGB, Anm.46. In Switzerland there is no longer any desire to identify without more transport and haulage; see, Edis, pp.57-59. For Spain see, F. M. Sanchez Gamborino, *La traction routière*, pp.47 et seq.

248. *Ibid.*, Anm.43-49; Rodière, Sirey, nos. 241-245; Korthals Altes/Wiarda, p.20; Putzeys, nos.92 et seq. This issue obviously occurs in legal areas other than road transport: see, e.g., Rb Amsterdam 28.6.1967, S&S 1972, 76 (bailment against freight forwarding) and Hof Amsterdam 27.6.1979, S&S 1979, 99 (bailment against sea transport).

249. See, R. Rodière, *Le statut de dépositaire*, BT 1977, p.486. Much information is provided on this by D. J. Hill, *The warehousing contract*, ULR 1978, pp.54-131 in particular pp.59 et seq. and pp.71 et seq. In a draft accepted by a Unidroit study group in 1981 on this contract the liability of the International Terminal Operator was described as follows: 'ITO means any person acting in a capacity other than that of a carrier who undertakes against remuneration the safe-keeping of goods before, during or after international carriage ...' CMI News Letter, June 1982, p.8.

whenever the contract in issue is to be regarded also as a contract of bailment, these rules are applicable to the legal relationship between the parties.²⁵⁰

On appeal the Hof went much further: the taking over of goods concerned in *casu* merely transport.²⁵¹

At the conclusion of the actual transport the same problematic can occur, as witness the following case. Carrier Ribro stored ten barrels of pig entrails on 22 May 1970 upon conclusion of the actual carriage and informed Smits, the consignee, that the warehousing charges would take effect on 28 May 1970. When Smits came to collect the barrels on 6 July 1970 it transpired that – due to exchange with other goods – they had disappeared. When the goods again arrived at the place of destination Smits initiated proceedings against Ribro and claimed damages for primarily a fall in the price of the goods. Ribro wished to see the damages restricted to damages for delay up to the amount of the carriage charges (Art.23(5) CMR). The Rechtbank considered the moment of informing the consignee as the end of the transport contract so that thereafter the legal relationship was to be viewed as one of hire/rental; consequently, the CMR was not applicable.²⁵² The Hof expressed no opinion on hire/rental but stated that the transport contract did not come to an end on 22 May 1970.²⁵³ This interpretation fits better into the system of the CMR.²⁵⁴ The ground of appeal in cassation stated that the Hof had failed to recognise that the CMR did not exclude the goods remaining with the carrier by virtue of another contract. The Hoge Raad considered the ground of appeal to rest upon a mistaken interpretation of the judgment of the Hof and consequently dismissed it.²⁵⁵ Wachter's advice that it should not be over hastily concluded in the interest of the consignee that another contract has come into existence as a result of which his legal position, defined by mandatorily applicable rules, threatens to become undermined,²⁵⁶ may very well as a general rule be sound but it fails to appreciate the fact that in the proceedings in question it was precisely the consignee who in fact was the victim of the Hoge Raad's decision.

250. Rb Rotterdam 3.5.1974, S&S 1974, 63; NJ 1975, 210.

251. Hof The Hague 15.6.1979, S&S 1980, 44.

252. Rb Rotterdam 21.5.1976, S&S 1979, 83; NJ 1980, 518.

253. Hof The Hague 10.5.1978, S&S 1979, 83; NJ 1980, 518.

254. In agreement with the decision of the Hof: Th. H. J. Dorrestein, 'Recht door Zee' (Festschrift Schadee), Deventer 1980, p.58.

255. HR 20.4.1979, S&S 1979, 83; NJ 1980, 518. Further on this decision see, Chapter 4, § 6.2.

256. NJ 1980, 518, note sub 3.

Special types of carriage

'The existing international transport conventions covering road and rail transit are not adequate to cover the methods of transport currently in use.'¹

§ 1. Introduction

Whereas in the previous Chapter enquiry was made as to the conditions required for application of the Convention the present Chapter is concerned with those provisions that regulate a number of special 'transport variants'. The purport of Articles 2, 3, 34-40 CMR, which regulate certain types of carriage, namely, piggy-back or roll-on/roll-off carriage, sub-carriage and successive carriage, is in principle to declare the CMR liability regime, which is the subject of the fourth Chapter, applicable also to these types of carriage. Before proceeding to consider the specific regulations separately, an attempt will be made in this introductory orientation to indicate the connexity as well as the difference between the regulations. In this way one is better able to do justice to the provisions.

The specific regulations have various features in common.

In the first place, one can point to the fact that these provisions prevent, in the given circumstances, the carrier from contractually exempting himself from the liability that the Convention by virtue of Articles 17 CMR et seq. imposes on him. This emerges clearly from Article 2 CMR which, as part of the chapter concerning the application of the Convention, quite clearly provides that in principle the CMR remains applicable even where part of the journey does not take place by road. The rule of Article 2 CMR does not as such encompass combined transport, which is characterised by the fact that goods are the subject of but one contract although transported by different means of transport.² Transshipment of the goods occurs in the case of combined transport but is absent from the Article 2 CMR regulation of roll-on/roll-off carriage, where unloading and therefore transshipment is excluded. It is for this reason that reference has been made to the unique character of this provision.³

In a separate chapter of the Convention the single Article 3 CMR provides that the carrier is responsible for the conduct of, inter alia, independent (sub-)contractors he makes use of in performing the contract of carriage. Between such persons and the person or persons entitled to the goods there exists no contractual relationship, no privity of contract. It will depend upon the contract concluded between carrier and sub-carrier or sub-carriers upon

1. D. J. Hill, (1975) 3 LMCLQ p.307.

2. Hill/Messent, p.14 comprehend roll-on/roll-off operations also under combined transport.

3. R. Rodière, BT 1973, p.458; Becker, p.177. See also, Art.30(4) Convention concerning International Multimodal Transport, below n.17.

whom the burden of compensation for damage will finally rest.⁴

Articles 34 CMR et seq. maintain the Convention regime even more forcefully than does Article 3 CMR. Applicability of the regulation concerning successive carriage produces the result that carriers, among whom there need be no mutual contract, are each severally liable for the entire journey. As against the persons entitled, successive carriers form as it were a partnership: each carrier is responsible for the performance of the contract as against the person or persons entitled to the goods and with whom he need stand in no contractual relationship. Only after a claim has been brought and in accordance with the rights of recourse that are regulated by the Convention will it emerge upon whom the compensation for damage finally rests.

Just as in the case of Article 2 CMR, so with Article 34 CMR is a sub-contract involved. In this sense the legal areas of roll-on/roll-off carriage and successive carriage (Artt.2 and 34 CMR respectively) overlap that of sub-carriage (Art.3 CMR).

A second connective aspect of the particular regulations is, beside the substantive, also the procedural advantage that accrues to the claimant from these regulations. If it concerns a case of roll-on/roll-off carriage he can spare himself a detective search for one or more carriers and go straight as a die to the original contract partner, the road carrier, even for damage that has occurred during a journey in which he has had no direct involvement.⁵ Given the conditions stipulated in Article 2 CMR the road carrier undergoes a legal metamorphosis in favour of the claimant according to the nature of the journey to be completed. The same advantage to the claimant is manifest also in the case where there is no question of anything other than sub-carriage; the claimant may direct his claim for damages directly to the address of his opposite party without enquiry as to place or cause of damage. He stands in no contractual relationship to the independent sub-carrier utilized by his opposite party,⁶ leaving aside whether this is a road or other carriage within the meaning of Article 2 CMR. Should he wish, for whatever reason, nevertheless to commence proceedings against the sub-carrier, this is possible only on the ground of breach of an extra-contractual obligation.⁷ Such an action needs to take into account also the validating effect of the Convention regime.⁸

The advantage mentioned above comes even more to the fore in the case of successive carriage (Art.34 CMR). For the claimant there is the added

4. The resolution or the shifting of the burden of compensation for damage in the mutual relationship between carriers is left unregulated by the CMR, unlike the case of successive carriage regulated by Artt.34 et seq. Hill, no.293 speaks of a lacuna on this point.

5. R. Rodière, BT 1973, p.460; Loewe, no.56; Heuer, p.175.

6. On this see further § 3.

7. In England the owner of the goods has rather a contractual claim against the following carrier as a result of the 'right in bailment', see, O. Kahn-Freund, *The Law of Carriage by Inland Transport*, London 1965, pp.193 et seq. Cf. QB 5.5.1975, [1975] 2 Lloyd's Rep 508; CA 16.11.1976, [1977] 1 Lloyd's Rep 361 (*Ulster-Swift v. Taunton Meat*).

8. See Artt.28 and 29 CMR, on which further Chapter 4.

advantage, when compared with the situation under Articles 2 and 3 CMR, that, as was said earlier, the carrier is also liable for damage occurring during the journey on which a person other than himself or persons employed by him was engaged. Contrary to the situation under Articles 2 and 3 CMR, the Convention construes here a direct contractual relationship between the claimant and every successive carrier for the complete performance of the contract.⁹ This can be of importance in particular in the event of insolvency of one of the carriers.¹⁰ However difficult it might be to mark the point of change between the legal areas covered by Articles 3 and 34 CMR, that is how great in principle the difference in legal consequences is, particularly for the sub-carrier, and that in favour of the claimant.

Thirdly, it can be pointed out that the three regulations here under discussion have in common that each exhibits an aspect of combined transport. Although at the time of drafting the CMR there was an awareness of the fact that regulations concerning combined transport existed in various conventions,¹¹ instead of adopting one such regulation there was a preference for including a number of practical matters that had a close connection with the issue of combined transport. Due to the uncheckable rise of the container, which has contributed greatly to the significance and scope of international road carriage, the need has increasingly arisen for a regulation concerning container transport.¹² The need is for a practical regulation that accords with the

9. Practice knows, under various names, not necessarily juridical, a range of 'successive' carriers; see, Dorrestein, nos. 45-50; Helm, *Frachtrecht*, § 432 HGB, Anm. 1-27; R. Züchner, *VersR* 1969, pp.203-208; K. Endrigkeit, *VersR* 1969, pp.587-589; Aisslinger, pp.41-54.

10. See, Rodière, p.351.

11. All Conventions concerning transport, with the exception of the Brussels Bills of Lading Convention, take account of this to a greater or less extent; see, R. Rodière, *International Encyclopedia of Comparative Law*, Vol. XII, Chapter 1, p.13.

Art.2 CIM (general combined transport) and an exceptional application thereof for the rail/sea journey (Art.63 CIM) cannot be equated precisely with Art.2 CMR. Like Art.31 Warsaw Convention they regulate combined transport in the proper sense. On these CIM Articles see, J. F. Wick, *Le droit de transport par chemins de fer*, Neuchâtel 1976, pp.29-33; pp.393-400; Becker, pp.161 et seq. On Art.2 CIM also R.Rodière, *BT* 1973, p.150; Boudewijnse, pp.54 et seq.

12. It is not practicable to attempt to cite the literature with any degree of completeness. Here one must suffice by mentioning a number of publications which describe the historical and legal aspects of the container in the law of transport, as well as a number of reflections on the Convention concerning international multimodal transport of 1980: D. J. Hill, *The infrastructure of combined transport*, *ETL* 1975, pp.600 et seq.; R. Loewe, *Geschichte des Entwurfes des Übereinkommens über die gemischte Beförderung im internationalen Güterverkehr*, *ETL* 1976, pp.587 et seq.; J. G. Helm, *Combined transport by road and rail*, *ETL* 1976, p.700; T. J. Armstrong, *Packaging trends and implications in the container revolution*, (1981) *LMCLQ*, pp.427 et seq. characterises containerisation as the 'keystone of a developing intermodal transportation system'. On the Convention of 1980: W. J. Driscoll, *The Convention on international multimodal transport*, (1978) *JMLC*, pp.441 et seq.; E. Crispeels, *The United Nations Convention on international multimodal transport of goods*, *ETL* 1980, pp.355 et seq.; A. Xerri, *A new attempt at unification*, *ULR* 1980 II, pp.138 et seq.; Editorial note, *Air Law* 1981, pp.105-115; R. Rodière, *BT* 1981, pp.490, 502, 518, 530, 542 et seq.; I. Koller, *VersR* 1982, pp.1 et seq.; P. B. Larssen/H. J. Dielmann, *VersR* 1982, pp.417 et seq.; S. Harrington, *Legal problems arising from containerisation and intermodal transport*, *ETL* 1982, pp.3 et seq. D. Richter-Hannes, *Die UN Konvention über die internationale Multimodale Güterbeförderung*, Vienna 1982.

reality of container transport. The actual problem of combined transport exists in the fact that transport by container is seen as one complete unity from the economic standpoint as a result of technical developments in transport, whereas the juridical reality is totally different.¹³ However that may be, the various juridical cadres exhibit great divergences among themselves and fail to interact properly with each other.¹⁴

As was mentioned above, the CMR does not regulate combined transport as such, only a special variation thereof mentioned previously.¹⁵ Although a number of writers regard the means of transport regulated in Article 2 CMR as combined transport,¹⁶ in the opinion of the present writer such an approach can cause confusion because the provision is only concerned with the situation where the goods are not unloaded or transhipped from the vehicle.¹⁷ Roll-on/roll-off contracts are concerned with goods as their object in a different way to a contract for combined transport in the true sense of the

See likewise the contributions of S. Mankabady and J. Ramberg to *Etudes offertes à René Rodière*, Paris 1981, pp.417 et seq. and pp. 481 et seq. as also that of E. Kardos-Kapony in, *Unification (Festschrift Sauveplanne)* Deventer 1984, pp.131 et seq.

13. See, G. Tantin, *ETL* 1980, p.367: 'La difficulté du problème réside dans le fait que les divers transports considérés relèvent de régimes différents, alors que l'opération est conçue comme un tout.'

14. According to E. Chrispeels, *ETL* 1980, pp.35-357, the further harmonisation of conventions could led to the reduction of divergences.

15. Extensively on the creation, variations and application of this means of transport, for which terms such as piggy-back, Huckepackverkehr, kangoeroevervoer, Rollende Landstrasse, etc., have been in vogue, see, L. van Beerendoncks, *De huidige situatie van het gecombineerd spoorwegvervoer met betrekking tot België* (Congress Combined Transport, 9 May 1980, Ghent). See also, R. Züchner, *Zur Rechtsnatur der Beförderungsvertrages beim Huckepackverkehr*, *VersR* 1966, pp.900 et seq. See, W. Scheer, *Die Haftung des Beförderers im gemischten Überseeverkehr*, Hamburg 1969, p.3; M. Norf, *Das Konnossement im gemischten Warenverkehr*, Karlsruhe 1976, p.64.

16. A. E. Donald, *ETL* 1976, p.171; D. J. Hill, *ETL* 1976, p.182; Helm, *Frachtrecht*, Art.1 CMR, Anm. 1; Clarke, no.17; Hill/Messent, p.14; contra, W. Scheer and M. Norf, mentioned in the preceding note; cf. Putzeys, nos. 259 et seq.

In support of the standpoint taken here reference can also be made to the Signature of Protocol in which the signatories intend to negotiate a convention concerning combined transport.

17. If transhipment is in contravention of the contract, Art.2 CMR nevertheless remains applicable, according to CA Rouen 16.6.1972, *ETL* 1972, p.1040 and Rb Kh Antwerp 9.11.1977, *ETL* 1978, p.110.

The divergent character compared to combined transport was also expressed in Art.30(4) UN Convention on International Multimodal Transport:

'Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, [similarly Art.2 CIM] shall not for State Parties to conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.'

Art.1(1) reads:

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

concept.¹⁸ An important consequence of this view is that container transport falls outside the scope of Article 2 CMR except where the container and the vehicle together are transported.¹⁹ The situation can occur that a contract purely of combined transport can be regarded at the same time as one of roll-on/roll-off within the meaning of Article 2 CMR. This is so when the haulage contract, which so frequently occurs in international road transport, is seen as a contract of carriage. The vehicle (within the meaning of Art.1(2) CMR) which is to be hauled is in such a case regarded as goods.²⁰

The connecting factor between roll-on/roll-off (Art.2 CMR) and successive carriage (Artt.34 CMR et seq.), looked at against the background of combined transport, is the fact that in both regulations the road carrier remains liable to the claimant for damage to the goods for the entirety of the carriage over one or more journeys, even though not personally performed.

The principal difference between the two areas is that roll-on/roll-off carriage occurs with transport other than road vehicles, which produces a difference in the legal regime to be applied. Each legal area substantively excludes the other, while both include sub-carriage (Art.3 CMR).²¹ This produces the result, as will appear below at § 3, that the legal position of the sub-carrier changes as he is regarded either as a roll-on/roll-off carrier or as a successive carrier.

§ 2. Roll-on/roll-off carriage (Art.2 CMR)

§ 2.1. *Origin of the provision*

As was remarked earlier in the Introduction, the creation of this provision cannot be viewed in isolation from the developments concerning combined transport. It is no surprise therefore to read the observation concerning combined transport appended at the end of the preparatory study by Unidroit:

'It is evident that such kind of transport offers the greatest advantages for trade and also for communications. For this reason one may ask whether an international convention dealing with carriage by road should not also govern transport of this type.'²²

18. R. Loewe, ETL 1975, p.593; *ibid.*, Note explicative, no.51; Lamy, no.50; Nickel-Lanz, no.18.

19. J. van Rhijn, ETL 1966, p.651; J. G. Helm, ETL 1975, p.706; D. J. Hill, ETL 1976, p.184.

20. On this construction, see Chapter 2, §§ 3 and 4.6.

21. See, Loewe, no.55: 'Les transporteurs des différents modes de transport ne deviennent jamais transporteurs successifs au sens des artt. 34, e.s.' This fact does not however exclude the possibility that these structures follow or replace each other in time: see, the decisions of Rb Kh Antwerp dated 28.3.1966, ETL 1966, p.708 and 8.5.1973, TPR 1979, p.119 (no.131); *contra*, incorrectly, Rb Rotterdam 13.4.1972, S&S 1973, 92, on which critically, Libouton 1974, p.529. One realises that a successive carrier, other than a roll-on/roll-off carrier, can only be confronted with the CMR liability regime.

22. Preliminary Study 'Carriage by Road', Doc.1. U.D.P. 1984-Papers XXXIII 1948, p.76.

The question to what extent adoption of such a regulation was desirable depended also on the scope of the convention in preparation as that was imagined at that time by its drafters. The above-cited approach recommended by Unidroit could perhaps have been supported by the Convention drafters but how form was to be given to what was needed appeared less simple. Even before the negotiations had begun a group of specialists had noted:

‘Une problème qui exige un examen très approfondi c’est de savoir s’il faut limiter l’extention éventuelle de la définition des transports routiers internationaux aux cas où les deux parcours se font entièrement par la route et sans transbordement, ou si elle doit s’appliquer aussi à un transport intérieur combiné.’²³

It is possible that this was the reason why a provision such as Article 2 CMR did not appear in the first draft of the Convention. In 1950, however, at the instigation of the English delegation the drafters expressed the wish to extend the application of the Convention to those cases in which the means of transport was itself the object of carriage without at the same time goods being transhipped.²⁴ In the Rüdeshheim draft of 1951 one finds expressed in plain language the thoughts of the working group, whereby the extensive character of the provision comes to the fore in Article 2(2):

‘La présente Convention s’étend au cas où la marchandise, sans être transbordée, est acheminée avec la véhicule, sur une partie du parcours, par un autre moyen de transport’²⁵

This provision was based on the idea of a uniform, i.e., CMR legal regime covering not only road but also any other sort of journey and it won the approval of a large majority of the delegates.²⁶ The principle so expressed did not hold sway for very long. The ‘alternative’ IRU conditions which appeared not long thereafter did adopt this rule but also added thereto (in Art.35):

‘Si, sur une partie du trajet, la marchandise, sans être transbordée, est transportée par une autre moyen de transport, le transporteur routier sera responsable de la perte, des avaries ou du retard dans la limite de la responsabilité du tiers transporteur.’²⁷

23. Rapport du Groupe de spécialistes, ‘Développement et amélération des transports de voyageurs et de marchandises par route en Europe’ (CEE/CTI); TRANS/SCI/22, 8 October 1949, p.8.

24. E/ECE/TRANS/SCI/79; E/ECE/TRANS/WP9/13, 1 May 1950, p.4. In the meantime the English delegate let it be understood in 1951 (E/ECE/TRANS/SCI/116, 30 April 1951, p.9) that such an extension of the proposed rule would in no way lead to an amendment to the existing carriage by sea law.

25. TRANS/WP9/11, Rev.1, 8 January 1952, p.8.

26. Certainly not from the Dutch side: E/ECE/TRANS/SCI/130; E/ECE/TRANS/WP9/16, 18 February 1952, Annex 4, p.4.

27. E/ECE/TRANS/SCI/130; E/ECE/TRANS/WP9/16, 18 February 1952, Annex 2, p.10.

This shows that a first, albeit tentative, step towards the so-called chameleon system (network system, système réseau) was taken. A special working group extended the Article originally proposed in this direction:

‘Si les marchandises sont transportées avec le véhicule par mer, chemin de fer, voie navigable intérieure ou air sur une partie du parcours, sans rupture de charge sauf, éventuellement, pour l’application des dispositions ... (etc.).’²⁸

Principally because of the opposition of the English delegation, it remained uncertain until the last moment whether this proposed provision would be retained.²⁹ At the meeting at which the finishing touches were put to the Convention not only was an interim provision concerning cooperation with transport regulated by the CIM³⁰ referred to the Protocol of Signature,³¹ but the pressure on the part of the English to extend the formulation of the provision further was bowed to.³² As far as content and formulation are concerned, in its definitive version the provision is far removed from that which was originally envisaged, a fact that one need not necessarily regard as an improvement.³³ As will appear in the following sections, there is certainly

28. TRANS/152; TRANS/WP9/32, 10 May 1952, Annex 1, p.3.

29. The English delegate proposed a very extensive reformulation consisting of three paragraphs and not less than 41 lines of text, likewise based on the chameleon system. (TRANS/152, TRANS/WP9/32, 10 May 1952, Annex 2, pp.1 and 2.) Germany opposed the chameleon system and argued for a more easily applicable model: TRANS/152, TRANS/WP9/32, 10 May 1952, p.3 sub 15.

30. In an earlier draft the following was withdrawn from the operation of the CMR via Art.1(4)(c):‘(the) carriage performed by regular road services which are complementary ...’; TRANS/152; TRANS/WP9/32, 10 May 1952, Annex 1, p.3.

31. Under 2 with reference to Art.1(4) the Protocol reads:
‘The undersigned undertake to negotiate conventions governing contracts for furniture removals and combined transport.’
Neither from the ‘travaux préparatoires’ available to the present writer nor from the literature is there a reason to be found for what is provided in the Protocol under 1:
‘This convention shall not apply to traffic between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland.’ On this, Donald, p.16. It is possible that this sentence was adopted in the closing phase at the request of the English in order not to alienate them entirely. (The formula binds the continental countries to nothing.)

32. That did not mean, however, that the English delegate was satisfied. Even though the final text was from his hand, he declared that it did not sit comfortably with English trade practice. As a consequence he requested a study of possible conflicts between his rule and the existing relevant transport legislation: TRANS/168, TRANS/WP9/35, 6 June 1956, p.6 sub 19. Finally the English delegate shifted his ground: by arguing the need to refine the English text he requested postponement of signature of the Convention. But by this time the patience of his colleagues was (long since) exhausted! (p.29).

33. R. Rodière speaks of ‘termes fort indigestes’ (BT 1973, p.458), ‘texte, rédigé de façon lourde’ (BT 1974, p.184) and ‘formule ... assez complexe’ (BT 1973, p.150). The English delegate to the conference mentioned in the following note characterised the rule as ‘assez embrouillé’. Ramberg, p.245 calls the rule ‘complicated’. See Dorrestein, no.104 in fine: ‘Yet it remains all rather puzzling.’ Putzeys, no.267 calls Art.2 CMR ‘indigeste’. See also FIATA Report, p.7. Hill/Messent,

reason for not wholeheartedly judging favourably the functioning of the provision in practice. The question is rather whether dissatisfaction with the provision will lead to abrogation as was advocated by England in 1972.³⁴ Having regard to the role that England played in the creation of the provision, as well as to the English literature on this,³⁵ it is understandable that this provision, in particular for the island inhabitants, has become an obsession.

§ 2.2 *Application of the provision (Art.2(1) first sentence CMR)*

Before proceeding to examine the way in which Article 2 CMR regulates the substance of the legal relationship between the sender (hereafter in the broader sense of claimant) and the carrier on the one hand and, on the other, between the carriers, it is necessary to touch upon the scope and purport of the provision. The practical significance is not confined to the ferry, roll-on/roll-off carriage between the Continent and England, but also occurs in the transport between the European continent and the Scandinavian block and Africa (road/sea) as well as in the transport over, for example, the Alps (road/rail).³⁶

The purport of Article 2 CMR is, not forgetting either its position in the first chapter of the Convention, to extend the CMR regime to those cases that strictu sensu do not fall under international road carriage. The extension of the operation in space of the Convention is laid down in the principal rule of Article 2 CMR, first sentence with the understanding that the Convention remains applicable where the vehicle is transported by sea, rail, inland waterways or air. This rule is restricted in two ways. The first is the prohibition on unloading.³⁷ Article 2 CMR is applicable only when the vehicle containing the goods is the object of carriage.³⁸

A second restriction on the extensive character of the provision is formed

p.14: 'Article 2 is not a satisfactory provision.'

34. At the CMR revision conference the English delegate suggested a number of editorial improvements in the sense of the Warsaw Convention and TCM (E/ECE/TRANS/SCI/438, 19 April 1972, pp.4-7). In regard to a solution in the sense of the Warsaw Convention Loewe correctly brought to the attention of the meeting that, contrary to Art.31 Warsaw Convention, Art.2 CMR is not a pure provision of combined transport. Furthermore the suggested conflict with air law was unfounded from the point of view of theory as well as from a practical point of view. See Loewe, no.59; also at ETL 1976, pp.596-597; Precht/Endrigkeit, p.51.

35. D. J. Hill, ETL 1976, p.184; (1975) LMCLQ, pp.306-307, established the fact of great uncertainty in the carriage between England and the continent, due in part to the existence side by side of three possible legal regimes. Similarly, again in Hill, nos. 290-292 he raised a number of critical questions regarding matters arising with this provision. As to the various possible cases in which the CMR can be of application see, Clarke, no.15; Hill/Messent, pp.1-2.

36. Nickel-Lanz, no.17; Precht/Endrigkeit, p.51; R. Züchner, VersR 1966, p.903; Dorrestein, no.102.

37. The FIATA Report added thereto: '... and (not) reloaded to such other mode of transport ...' See, Hill/Messent, p.17.

38. See, Clarke, no.15.

by the fiction maintained in the second sentence of Article 2(1) CMR, the purport of which is that the parties to the roll-on/roll-off carriage resolve subject to conditions the issue of damage according to the liability regime that is applicable to the underlying contract for the journey concerned.³⁹ This second restriction, given that it and to the extent that it is invoked by the parties,⁴⁰ displaces the principal rule, namely, the application of the CMR.

The third sentence of Article 2(1) CMR again invokes the principal rule where there is no mandatory regime governing the underlying contract. Finally, the second paragraph of Article 2 CMR provides, also employing a fiction, that the carrier by road remains within the terms of Article 2(1) second sentence CMR where he utilises means of transport other than road vehicles in performance of the one and the same transport.⁴¹

A number of writers correctly point out that the prohibition on unloading and transshipment only applies to other vehicles than those intended in Article 1(2) CMR.⁴² This view refers to the distinction drawn above in the Introduction between combined and roll-on/roll-off carriage.⁴³

An exception hereto is made by Article 2 CMR itself in its reference to Article 14 CMR, whereby provision is made for the situation where the carriage cannot be performed as envisaged.⁴⁴ This excluded situation should certainly be distinguished from the case where, in deviation from the terms of the contract, the goods are unloaded or transhipped. The *Rechtbank van Koophandel Antwerp*, correctly considered:

'A person who accepts an international carriage by road and at his own initiative allows this to be interrupted by a sea transport involving unloading of the goods may not invoke this fact against the sender or consignee, with the intention of thereby depriving them of the protection of the CMR where it does not appear that the sender or consignee agreed to this interruption.'⁴⁵

This prompts the query how one is to decide on the application of Article 2

39. In this Chapter by underlying contract is understood the contract that the sender would have made with the roll-on/roll-off carrier.

40. See below § 2.3, in particular the comments on proving the conditions.

41. Nickel-Lanz, no.18, n.22 remarked correctly on this that it will not always be easy in such cases to determine in which character – consequently by which legal regime to judge – the liability will be established. See, R. Rodière, BT 1973, p.461 sub 13. For a case in which the carrier had both the character of road and roll-on/roll-off carrier see the 'Duchess of Holland' dealt with below.

42. A. E. Donald, ETL 1976, p.171; Dorrestein, no.102; Clarke, no.16; see, Rb The Hague 24.3.1977, S&S 1978, 30; Hof van Beroep, Brussels 19.12.1968, ETL 1969, p.948.

43. See, Loewe, no.59 and W/TRANS/SCI/438, 19 April 1972, p.5 sub 19. Contra, D. J. Hill, ETL 1976, pp.182-183.

44. On these exceptional cases: R. Rodière, BT 1973, p.459 sub 3; Helm, *Frachtrecht*, Art.2 CMR, Anm. 4.

45. Rb Kh Antwerp 9.12.1977, ETL 1978, p.110. In the same sense: CA Rouen 16.6.1972, ETL 1972, p.1040; Tr. Comm. Paris 23.4.1982, BT 1982, p.383. Similarly: Loewe, no.57; Helm, *Frachtrecht*, Art.1 CMR, Anm. 6.

CMR in the mirror image of the Antwerp case, namely, when contrary to what was originally agreed the goods laden vehicle, instead of being unloaded, is itself transported. This question must be seen in the context of the application of the Convention on the basis of a consensual or factual criterion, as was seen earlier.⁴⁶ In conformity with the judgment there cited with approval it follows that the contract norm prevails over the actual performance of the carriage, with the result that in such a case the CMR is not applicable.⁴⁷

The statement made above that in the actual practice of container transport Article 2 CMR is applicable only where the carriage is performed by means of roll-on/roll-off prompts Hill to ask whether in a number of situations the Convention ought to be applied. In those cases that do not fall within the scope of Article 2 CMR does the contract of combined transport not crowd out the contract of road transport?⁴⁸ If the answer to this question is in the affirmative, as is suggested by Hill, and would in general be correct this results in a further restriction on the applicability of the CMR.⁴⁹

One cannot agree with Hill on this. In the first place the purport of this provision is given insufficient significance by this interpretation of the contract, which is of a factual nature, in the context of Article 2 CMR. The purport of Article 2 CMR is, if not actually to extend then certainly to further the scope of the Convention laid down in Article 1 CMR. The problem posed

46. See, Chapter 2, § 3 sub (a).

47. Along the same lines: Helm, *Frachtrecht*, Art.1 CMR, Anm. 6 and Art.2 CMR, Anm. 1; Putzeys, no.276; cf. Libouton, 1982, p.698. Contra: Dorrestein, no.102. Posing the problem is placed strongly in perspective when one realises that substance is given to Art.2 CMR by means of the chameleon system, on which see below, § 2.3.

48. ETL 1976, p.184.

49. The same result as that reached by Hill was also reached by Rb Rotterdam in a decision of 2.6.1976, S&S 1977, 66; NJ 1977, 156, regarding the carriage of a container from Uithoorn to Italy, for the most part by rail but excepting the beginning and end phases. The *Rechtbank* correctly judged that the conditions of Art.2 CMR had not been fulfilled. The question remained why the contract under consideration was not an international contract of carriage of goods by road within the meaning of Art.1 CMR. As with Hill, the *Rechtbank* initiated upon this determination an enquiry as to whether the CMR via Art.2 was applicable, which appeared not to be so.

The Rb Dordrecht 15.12.1976, referred to at S&S 1982, 33, struggled with the problem in a case involving much the same sort of carriage as in the case above. At first the *Rechtbank* played with the idea that the CMR was applicable on the grounds of Art.1 and 2 but abandoned that because – contrary to Art.41 CMR – the parties had not stipulated the application of the CMR and the court did not consider itself able to provide a justifiable interpretation of these provisions of the Convention. This remarkable consideration was incorrectly disregarded by Hof The Hague 4.6.1980, S&S 1982, 33; NJ 1981, 179.

See also, Rb Kh Antwerp 7.9.1973, ETL 1973, p.754. This court correctly judged that in regard to a transport by sea which is extended by road the conditions of Art.2 CMR were in *casu* not fulfilled, but failed, as in the case before Rb Rotterdam, to appreciate that the question was whether the CMR following Art.1 was applicable to the remainder of the carriage.

In superbly reasoned fashion Rb The Hague by decision of 24.3.1977, S&S 1978, 30, concerning carriage from diverse locations in England to Nederhorst den Berg, The Netherlands, held that re-assembling the goods following the sea journey was in no sense an obstacle to the application of the Convention to the remainder of the carriage by road.

by Hill – is container transport from London to Paris international road or combined transport, with the application or not of the CMR dependent on the answer – should be resolved in the context of Article 1 CMR. Upon application of the latter, there should be a prior establishment on the basis of Article 1 CMR that the Convention is applicable.⁵⁰ The problem posed by Hill and his solution therefor are consequently grounded upon an incorrect premise and constitute an unnecessary restriction on the scope of the Convention. With ostensible retroactive effect the CMR would in this fashion be rendered inoperative. In the second place, one can point out in refutation of Hill that the purport of what is an extensive rule can be significant for the resolution of the interpretation dilemma raised by him. The Convention maintains its validity under the conditions stipulated in Article 2(1) first sentence CMR. By means of this provision a natural interruption in the carriage by road is repaired. The provision forms as it were an unbreakable link in the chain of international road carriage. In this manner a contract of road carriage of containers London–Paris is equated but for the sea journey with a contract involving any place on the Continent outside France to Paris.⁵¹

§ 2.3 *External legal consequences (Art.2(1) second and third sentences; Art.2(2) CMR)*

The way in which Article 2 CMR seeks to effect the operation in space of the Convention is highly unsystematic. This cannot be ascribed only to the pomposity of formulation but derives also from a lack of appreciation and failure to exploit the chameleon system underlying the provision. The question arises whether this system is justified in international commercial law relations, having regard to the following quotation:

‘Le droit commercial est en faveur de la simplicité et le système de réseau n’est pas simple. Son principal défaut réside dans le fait que le client ne peut pas savoir à l’avance comment le risque de perte ou d’avarie sera réparé ou réparti.’⁵²

This negative judgement of the system underlying Article 2 CMR applies yet more forcefully as the deficiency indicated in the quotation applies not only to the client but in particular also to the carrier.⁵³ The task for which the

50. For a correct statement of the problem in respect of pure container transport see, Hill/Messent, pp.16-17. The authors suggest in this respect the voluntary adoption of the CMR by the parties.

51. The view defended here finds support in the caselaw of Rb Kh Antwerp mentioned by Libouton, 1982, pp.697-698. See further, Rb Kh Antwerp 9.12.1977, ETL 1978, p.110, with extensive reasoning; CA Rouen 16.6.1972, ETL 1972, p.1040, see n.49 above; Rb Rotterdam 10.11.1970, S&S 1971, 61; ETL 1971, p.273; Rb Rotterdam 3.6.1983, S&S 1983, 111; Cass. 17.2.1970, ETL 1970, p.439; ULC 1970, p.293, and builds upon the view defended above that the applicability of the Convention is primarily dependent on the agreement of the parties. Contra, Clarke, no.15 and perhaps OLG Dusseldorf 11.2.1982, VersR 1983, p.483.

52. G. Tantin, ETL 1980, p.376.

53. The system is founded on differing systems concerning combined transport, e.g., ICC Rules (1975), Art.8.2.2.2 NBW, Art.31 Warsaw Convention, Artt.2, 63 CIM. On the significance of

chameleon system is dedicated is to effectuate a supple concatenation of the statutory and/or convention rules that may be applicable and which are often substantively divergent. In contrast to the so-called uniform liability system the chameleon system proceeds in deference to the transport regulations applicable to the different journeys.

Article 2(1) second sentence CMR declares, under conditions that will be dealt with later, the regime governing the underlying contract of carriage applicable to the road carrier.⁵⁴ This fiction is maintained in the second paragraph when the road carrier also exercises the function of roll-on/roll-off carrier.

Although in general it is not possible to say to whose advantage the invocable liability model is (on which see below), it can be stated that, leaving aside the uncertainty as to the applicable law, an immediate disadvantage for the carrier lies in the fact that his legal position can be determined by a legal regime that generally lies outside his sphere of operations. He must continually take account of divergent, usually two regimes and weigh the advantages and disadvantages against each other. In contrast to this practical disadvantage for the carrier and his insurer, the position of the claimant, at least on the procedural level, compares favourably.⁵⁵

Setting aside the principal rule of Article 2(1) first sentence CMR will occur when three conditions are met: loss, damage or delay in delivery have occurred during some part other than the road journey, which was not occasioned by an act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the other means of transport.⁵⁶ The detailed formulation states that the damage must have been caused in every respect otherwise than through the medium of the road carrier. With the implementation of liability regimes other than that of the CMR thus dependent on the three conditions mentioned above the question arises, upon which party does the burden of proof rest. The majority of writers have virtually or even completely ignored this question. The most obvious answer would appear to be to burden with proof of the conditions the party invoking the law of the underlying contract, consequently, that party who considers that in *casu* another legal regime will profit him more than the CMR.⁵⁷ It

Art.2 CMR for combined transport see, W. J. Driscoll, (1978) JMLC, p.441 and R. Loewe, ETL 1975, p.593.

A uniform liability system underlies the UN Convention on International Multimodal Transport of Goods adopted in May 1980 at Geneva.

54. This escaped the attention of Tr Comm Paris 11.5.1983, BT 1984, p.74 with critical note by Brunat. Just as incorrectly Rb Roermond 29.9.1983, S&S 1984, 93, applied the CMR in place of the law of sea carriage.

55. See, Loewe, no.56.

56. R. Rodière, BT 1973, p.460 sub 8, correctly points out that this also applies even if such is only partly the case. See also, Loewe, no.60. The requirements are cumulative, see, QB 22.9.1980 [1980] 1 Lloyd's Rep 204 (Thermo Engineers v. Ferrymasters), on which see, Clarke, no.17 and Hill/Messent, pp.20 et seq. dealing extensively with these conditions.

57. Heuer, p.177; Helm, Frachtrecht, Art.2 CMR, Anm. 5 appears to agree. Likewise, Dorrestein, no.107. Cf. in another context, Putzeys, no.276.

depends, therefore, on the result of a comparison between the CMR and the other liability model which party is to be burdened with proof of the conditions. From the caselaw it is apparent that in the majority of cases that will be the carrier.⁵⁸ Because of the existing uncertainty as to fulfilling the required proof there is little certainty as to the outcome in regard to damages. Declining to invoke another regime will generally occur when it is not distinctly probable that one will profit from that regime. In that case, as in that where the conditions are not proved, the CMR remains applicable following Article 2(1) first sentence thereof. It cannot be excluded that in many cases it is simpler and at least as practicable for the carrier, in those cases where he is able, to invoke directly the grounds of exemption provided in the CMR liability model.

Even where one has concluded the evidence phase, it would be premature to celebrate. What is actually the situation? Just as where one fails to provide the required proof (or one simply declines to invoke the law of the underlying contract), the CMR remains fully operative even where one succeeds with the evidence advanced, provided the applicable statutory or convention regime concerned is not of a mandatory character. It is manifest that this restriction brought about by the chameleon system merely increases the uncertainty in this field.⁵⁹ Having regard to the comments made previously on the system, in particular concerning the divergence between transport regulations, this last sentence of Article 2(1) CMR is a source of confusion. A pertinent illustration of this combination of, namely, the conflict between the rule that puts aside the CMR (Art.2(1) second sentence CMR) and the rule (Art.2(1) third sentence CMR) that recalls the CMR is to be found in the case of the 'Duchess of Holland', which proceeded as follows.

A carrier who had assumed the obligation of transporting laden vehicles from Etten-Leur to Liverpool was sued for late delivery by the person entitled to the cargo. The cause of the late delivery of one of the vehicles was that by mistake it was not shipped. The carrier compensated his client for damage in the sum of £10,000 but his liability insurer took the position that by virtue of Article 23(5) CMR the carrier was liable in damages only to the extent of the carriage charges (in casu £1500). The pertinent issue in this case therefore was whether the delay occurred during the transport by other means than by road and which arose from a fact that could only have occurred in the course of and by reason of that other means of carriage. An affirmative answer would have led to application of marine transport law, at least were this law to contain mandatory provisions on this point, whereupon liability of £10,000 in accordance with the parties' agreed provision for delay in delivery, a negative answer by contrast leading to CMR law with its prescribed liability maximum of £1500. The claim hovered accordingly between the two stools of the CMR and the Bills of Lading Convention. The *Rechtbank* judged that

58. Rb Harlem 14.11.1972, S&S 1974, 88; That this burden of proof is certainly not easy appears from Rb Amsterdam 18.1.1978, S&S 1978, 101, in which it was considered that it was most likely that the damage in casu was caused at sea but that did not exclude the possibility of the damage having occurred on the road. See also, Heuer, n.68A. Whether the burden of compensation for damage rests also on the carrier depends on the question whether he will be able in casu to shift the duty to render compensation for damage onto the sub-carrier, on which see below § 2.4.

59. See, R. Rodière, BT 1973, p.461 sub 13; Dorrestein, no.107.

the carrier had discharged the burden of proof of the conditions stipulated in Article 2 CMR and consequently could invoke maritime transport law. The reasoning of the Rechtbank was that the mistake in not transporting the vehicle had to be ascribed to the sea carrier.⁶⁰ The fact that the liability regulation for delay in the maritime transport law concerned is determinable by the parties (Art.477 WvK) did not in the view of the Rechtbank detract herefrom because Article 477 WvK formed part of maritime transport law (Artt.466-480 WvK) that in accordance with Article 517d WvK (former) is applicable to the transport of goods by sea from Dutch harbours.

The weak link in the reasoning of the Rechtbank was demonstrated in masterly fashion on appeal by the Hof, whereupon the foundations of the judgment of the lower court collapsed.⁶¹ According to the Hof the culpable fact did not fall within the conditions of Article 2(1) second sentence CMR; consequently, the claim could not be judged according to maritime transport law. The essential element in the decision resides in the final sentence of the first paragraph, a matter mentioned above but not stated *expressis verbis* by the Hof: the Hague Rules do not comprise mandatory law for the period prior to loading. If the culpable fact was to be judged according to maritime transport law – which was not the case here – the final sentence of Article 2(1) CMR would still call up CMR law because of the absence of a mandatory law character in the Hague Rules prior to the loading of the goods on board.⁶²

In conclusion it can be stated yet again that the system does not work satisfactorily in practice. It is therefore understandable that practice seeks solutions in the context of a uniform system, in casu on the basis of the principal rule of the CMR system: parties agree that the carrier shall not invoke the law of the underlying contract.⁶³ It follows from Article 41 CMR that such agreements cannot prevent a claimant, for whatever reason, from nevertheless invoking another legal regime.

Although the judgement on the substance and functioning of the rule has turned out to be negative, perhaps there is compensation to be found in a positive judgement on the other aspects thereof. What arguments can be marshalled in justification of the regulation? This question prompts an enquiry

60. Rb Rotterdam 9.1.1978, S&S 1979, 18. It is interesting to note the qualities of both road and sea carrier were united in the one person. Just as did the Rechtbank, QB 22.9.1980 [1980] 1 Lloyd's Rep 200 (*Thermo Engineers v. Ferrymasters*) applied the law of sea carriage in a case where the damage occurred during the embarkation of the vehicle; also, the compensation for damage was not determined on the basis of the Hague Rules, on which critically Hill/Messent, p.25. See further, Rb Rotterdam 21.6.1985, S&S 1986, 56, in which the Hague Rules were applied in an identical case to *Thermo Engineers*. In the Rotterdam case transport did not occur under a bill of lading but under a non-negotiable waybill which referred to the law of the Hague Rules.

61. Hof The Hague 19.12.1979, S&S 1980, 33; NJ 1981, 286; see, Loeff, *Vervoer over zee*, no.308. OLG Hamburg 15.9.1983, VersR 1984, p.534 came to the same conclusion as did Hof The Hague. In this case sea law was not mandatory because no bill of lading had been issued.

62. In agreement with the decision, Libouton 1982, p.698.

63. D. Koole, *Aspecten van verzekering bij export (Aspects of insurance on export)*, Deventer/The Hague, 1979, p.88.

into the manner whereby a right of recourse by the road carrier against the roll-on/roll-off carrier can be realised. This section will be concluded with a treatment of the mutual relationship between the road and the roll-on/roll-off carrier.

§ 2.4 *Internal legal consequences*

The existence of the Convention regulation concerning roll-on/roll-off carriage, which in principle entails that the legal position of the carrier is more burdensome, has been defended by reference to the possibility of seeking recourse from the roll-on/roll-off carrier. To the extent that on the ground of Article 3 CMR the carrier is liable for the person utilised by him, this argument appears rather unconvincing. The judicial metamorphosis imposed on him by the fiction of Article 2(1) second sentence CMR works exclusively externally. Whether and to what extent the road carrier can recover from the roll-on/roll-off carrier the damages for which he is liable to the sender, there appears to be little or no objection that can be made to this regulation. The right of recourse would remove the discrepancy, from which disadvantageous consequences flow for the carrier, between the CMR and other mandatorily applicable legal regimes.⁶⁴ Such an appraisal of matters is too simplistic and incomplete and consequently incorrect.⁶⁵ In which cases is there a possibility of recourse?⁶⁶

In the first place, recourse is a possibility where the carrier has failed to invoke the regime governing the underlying contract of carriage against the claimant;⁶⁷ it is hereby highly uncertain whether he will succeed in his claim for recourse against the roll-on/roll-off carrier on the ground of the contract of carriage concluded with him. Secondly, recourse is a possibility when the carrier succeeds in proving the conditions, which puts him in position to invoke the liability model of the underlying contract, yet within that model cannot exempt himself. In that case the discrepancy between the different legal systems is neutralised and yet it still remains uncertain whether the road carrier will succeed in his recourse action. Thirdly, there should be the possibility of recourse where the carrier can in principle invoke the application of the other legal regime but that law appears not to be mandatory. Here also there remains a certain discrepancy between the CMR and the other liability model, in which case it is just as uncertain whether the carrier will succeed in his recourse action.

It appeared earlier that the legal position of the road carrier as that is governed by Article 2 CMR has little certainty. That uncertainty is inadequately compensated for by the possibility of recourse. The Convention itself makes no mention at all of recourse in the case of roll-on/roll-off carriage. Rodière has tilted at windmills when advocating analogous application

64. Loewe, no.56. Heuer, p.175, speaks in this respect of a guarantee. Less convincingly Drucksache 1144, Deutscher Bundestag, 1959, p.35, has 'möglichst'.

65. Dorrestein, no.104.

66. The Convention does not regulate recourse.

67. Rb Amsterdam 18.1.1978, S&S 1978, 101.

of the recourse regulation concerning successive carriage (Art.37 CMR), albeit to a restricted degree.⁶⁸ He advances no argument for this convention systematic approach. There would appear to be little to be weighed against such thinking in itself, though it is questionable whether the intended regulation, which after all is consensual law, would achieve much purpose. However that may be, although in regard to Articles 37 CMR et seq. the recourse action will possibly be judged according to CMR law, that will never be the case with the recourse action based upon liability according to Article 2 CMR having regard to the fact that the applicable law of the underlying contract can never be CMR law.

On balance it can be said that application of Article 2 CMR encounters a number of objections of a practical and juridical-technical nature, which produces uncertainty. Besides the complicated formulation and construction of the regulation, it suffers also from the fact that the chameleon system underpinning the regulation is insufficiently developed, with the result that it lacks a solid foundation. Having regard also to the limited contribution to combined transport, the method whereby it is attempted to provide Article 2 CMR with a certain expansion beyond its own scope must be regarded as rather unfortunate.

§ 3. Sub-carriage (Art.3 CMR)

Contained in a separate chapter of the Convention, Article 3 CMR provides that the carrier is liable for the acts and omissions of his agents and servants and also for any other persons of whose services he makes use for the performance of the carriage.⁶⁹ The legal position of the carrier is thus made more onerous whenever, in the performance of his obligations either for the entire journey or for a part thereof, he enlists the aid of a (sub-)carrier with whom in his own name he concludes a contract of carriage. The purport of Article 3 CMR is to regulate the legal position of the principal carrier rather than that of the sub-carrier.⁷⁰ For that reason also Article 3 CMR deserves attention. Nevertheless, this provision indirectly contains a norm for the legal position of the sub-carrier.

It is a matter of distinct importance to the sub-carrier to know whether he falls within the scope of Article 2 or Articles 34 et seq. CMR or under none of these. Juridical characterisation of his status is determinative of the law to be declared applicable. In this connection it should be noted that both the legal areas previously mentioned (roll-on/roll-off and successive carriage) always presuppose sub-carriage.⁷¹ There is no foundation whatsoever for the view

68. R. Rodière, BT 1973, p.462, nos. 14-16.

69. On Art.3 CMR see further Chapter 4 § 5.5.

70. To an extent it is not correct to speak, as does Hill, no.292, of a lacuna in the CMR: '... it is clear that there is a lacuna concerning the status of subcontractors ...'

71. In this sense also LG Duisburg 10.5.1968, ETL 1969, p.979, which declared Art.34 CMR applicable to the sub-contract of carriage in question. In agreement with this decision, Heuer,

that Article 3 CMR should be restricted to persons other than carriers.⁷² The significance of this provision for the claimant is that, even where the carriage is performed by a person or persons other than his opposite contracting party, he can claim against the latter as the party liable.⁷³ He does not enter into a legal contractual relationship with the independent carriers utilised by his opposite party.⁷⁴

This general rule is breached by the Convention rule concerning successive carriage (Artt.34 et seq. CMR). Under the conditions to be mentioned in the following section the legal position of the sub-carrier is made more onerous in two ways.⁷⁵ Not only does there exist, in contrast to Article 3 CMR, a contractual relationship between the claimant and the sub-carrier, but also the liability of the latter extends to journeys in which he has had no part or share, which produces a rigorous change in his legal position. As will appear from the following section, although the step from Article 3 to Article 34 CMR is *de facto* small, the *legal* consequences thereof are disproportionately great.

Alongside this rule the Convention *expressis verbis* in Article 28(2) CMR leaves open the possibility that the claimant or a carrier who is not under a contractual relationship with a subsequent carrier may initiate proceedings *ex lege* against the sub-carrier.⁷⁶

p.168, n.582; dismissive, Libouton 1973, p.69, who apparently overlooks that sub-carriage is a condition of applicability of Art.34 CMR. See also, Dorrestein, no.103.

72. In this respect a notable judgment was pronounced by Ktg Rotterdam 17.11.1969, S&S 1970, 98, in which the judge on the ground of systematical and grammatical interpretation came to the conclusion that Art.3 CMR did not encompass (sub-)carriers and consequently by carrier within the meaning of the CMR was always to be understood the actual carrier. For a correct interpretation of Art.3 CMR cf. the decisions of Hof Den Bosch 8.1.1970, NJ 1971, 49 and Hof The Hague 9.1.1970, S&S 1970, 97; in the same sense the convincing Rb Rotterdam 31.1.1967, S&S 1967, 56; see, however, Rb Amsterdam 22.4.1981, S&S 1982, 116. In the same sense QB 5.5.1975 [1975] 2 Lloyd's Rep 502 and CA 16.11.1976 (1977) 1 Lloyd's Rep 346 (*Ulster-Swift v. Taunton Meat*).

73. The liability of the sub-carrier is relevant only for the questions regulated by the CMR. When the sub-carrier infringes an obligation that is not covered by the Convention (e.g., not performing the contract) the liability of the carrier for the failure to perform by the sub-carrier ought to be judged by the applicable national law: BGH 9.2.1979, VersR 1979, p.445; ETL 1980, p.84.

74. Hill, no.291 and ETL 1976, p.198: 'There is no provision in CMR that a sub-contractor will be directly liable to the sender or any other claimant under the Convention.' Cf. Hill/Messent, p.27. Likewise, Rb Amsterdam 4.2.1976, S&S 1976, 56 as well as 21.4.1981, S&S 1982, 116. See also the decision of the French Cour de Cassation, n.76 below. Contra, Hof The Hague 5.1.1979, S&S 1980, 10, on which critically, Dorhout Mees, no.8.83a as well as Libouton 1982, p.699. A contractual legal relationship between the claimant and the 'actual carrier' could be effected only by the (Convention) legislator; cf. Art.1 sub 2j Convention of Guadalajara; Art.10 Hamburg Rules; Art.34 CMR, below at § 4.

75. Nothing changes for the principal carrier: OLG Hamburg 6.12.1979, VersR 1980, p.290.

76. See, Hill, no.292; also at ETL 1976, pp.199, 200. Cass. 21.6.1982, BT 1982, 513; Rev. crit. d.i.p. 1983, p.77 note Henri Batiffol, is illustrative of the position stated here. Three carriers were involved in the carriage of goods from France to Iran. The first, Iranian, carrier, who had performed his part without damage, sought recourse from the third, German, carrier, involved by the second, French, carrier. The Court held that the German carrier had failed to perform as against the second carrier and had committed a tortious act against the first carrier.

In the situation in which a contractual or extra-contractual relationship is created between claimant and sub-carrier, the liability of the latter is determined on the basis of the CMR liability model.⁷⁷ This can make his legal position more onerous, if application of the CMR regime would lead to his liability being more expansive by comparison with the legal system that governs the mutual legal relationship with the principal carrier. This is of importance having regard to the fact that the mutual relationship thus referred to will often be governed by a legal system other than the CMR liability model, whether it be national or international.⁷⁸ The resolution of the legal relationship between principal and sub-carrier is regulated by the Convention only when the latter falls under Articles 34 et seq. CMR. In the event that the sub-carrier remains outside the scope of the regulation concerning successive carriage, the Convention does not regulate any possible right of recourse.⁷⁹

§ 4. Successive carriage (Artt.34-40 CMR)

§ 4.1 *Origin of the regulation*

Just as in the case of Article 3 CMR the regulation of successive carriage forms a separate chapter in the Convention. During the creation of the Convention Articles 34-40 CMR gave less occasion for discussion than did Article 2 CMR treated above. Articles 34-40 CMR originated with Articles 49 et seq. CIM, albeit in much less detail. By contrast, Article 34 CMR is new and, as far as the underlying concept is concerned, is probably derived from German law.⁸⁰ Originally little difficulty was perceived with regard to Article 34 CMR but that image has not remained constant.⁸¹ In the first draft one finds the virtually identical formulation as in the present text.⁸² In 1955 the Netherlands delegate, supported by the IRU, attempted to induce the special working group to protect the successive carrier by adopting a formal criterion in the provision.⁸³ The intention of the Netherlands delegate was that the requirement of entering one's name and address on the second copy of the consignment note (see, Art.35 CMR) would operate as a condition of liability of the successive carrier. The Netherlands delegate continued during the final session of the special working group to press the view that the proposed

77. See, Art.34 respectively Art.28(2) CMR.

78. In respect of Art.2 CMR that is always another legal regime, see § 2.3 above.

79. See § 2.4 above. Cf. OLG Dusseldorf 12.2.1981, VersR 1982, p.302.

80. See, § 432 HGB.

81. Libouton 1974, p.529, no.93: 'La plus grande confusion règne sur la notion de 'transporteur successif' au sens de l'article 34 de la CMR.'

82. TRANS/WP9/11, Rev.1, 8 January 1952, p.22. The same text in TRANS/WP9/22, 21 December 1953, Appendix p.20.

83. TRANS/152, TRANS/WP9/32, 10 May 1955, p.14, nos. 64, 65. See, Dorrestein, no.294.

requirement be adopted as a condition.⁸⁴ Following the establishment of the rule the motives therefor were set out in a declaration. The essential point of the declaration by the Netherlands delegate was that a second carrier would be manoeuvred into an inequitable position in the light of the fact that this person often only undertook a national journey. Even in the event that he takes over the goods in order to provide an 'assistance service', an event that was unforeseen by the parties to the original contract, he would unjustly be made liable according to CMR law, of which he would probably be ignorant and which in any event is probably more strict than the national law. In the view of the Netherlands delegate no one profits from this situation.⁸⁵

The only effect produced by the Netherlands proposal was, by comparison with the previous draft, that, besides taking over the goods also acceptance of the (original) consignment note should take place.⁸⁶ It is to be questioned what exactly is the effect of the addition compared with what the Netherlands delegate envisaged. On the basis of the Convention's history one could certainly take the position that, although it does not appear from the text, taking over of the goods and accepting the consignment note, which latter is not mandatory, give rise to a rebuttable presumption of liability.⁸⁷ If one disregards this historical note then the resultant effect of the Netherlands ego trip is a step backwards compared with the earlier text. While originally presented as an objectively ascertainable fact for invoking the operation of the provision, the requirement concerned was exchanged for the bare fact of accepting the consignment note. The importance of this question in practice will be returned to in § 4.2.

During the so-called revision conference in 1972 not a word was directed to the rule even though some clarification would have been desirable having regard to the caselaw and legal literature to be mentioned below.⁸⁸

§ 4.2 *Application of the regulation (Artt.34, 35 CMR)*

Article 34 CMR states the following conditions for its application: a. that the international carriage concerned is the object of a single contract and b. that the second and possible other successive carrier accepts both the goods and

84. TRANS/168, TRANS/WP9/35, 6 June 1956, p.24, no.86.

85. Ibid., no.87. The degree of justice contained in the provision (consequently the protection for the carrier) is guaranteed by Art.6(1k) CMR, according to Loewe, no.275, on which Dorrestein, Beursbengel 1981, p.9.

86. Document no.95, no. 86; acceptance of the consignment note was supported by the following reasoning: 'pour préciser que cette responsabilité est *assumée* [emphasis added by the present writer] dès acceptation de la marchandise et de la lettre de voiture ...'

87. This would accord with the interpretation of the German government, with which the notion is closely allied; see, Helm, *Frachtrecht*, § 432 HGB, Anm. 21: 'die bloße Empfangnahme des Frachtbriefs genügt nicht; vielmehr gehört die Wille dazu ...'

88. The Dutch aversion to the regulation can be found in the Explanatory Note to the national legislation where the regulation is described as 'extremely complicated and very unclear'. In Swedish law the main idea of the regulation is incorporated into the national legislation, 4 (1978) LMCLQ, p.569. The FIATA Report at p.27 proposed abandoning the rule on successive carriage.

the consignment note. Three questions have arisen as a result of the interpretation of these conditions.

1. When is there but one single contract?
2. Seen against the background of the formality free character of the international contract of road carriage which is expressed in Article 4 CMR, is acceptance of the consignment note a requirement?
3. Is the carrier who does not himself perform the carriage also caught by the rule?

This sub-section will examine how these questions have been answered in the caselaw and in the legal literature.

1. It is clear that the question whether the relevant international contract of carriage is the object of a single contract is one of a purely factual nature. One does not have much of a hold on this condition because many contracts are concluded orally. In the caselaw it is not always clear whether this condition is properly fulfilled.⁸⁹

From this angle it appears, just as with the delimitation problem between the carriage and freight forwarding contract, that the application of Article 34 CMR is also no stranger to the problem of delimitation.⁹⁰ In a number of cases an appeal to Article 34 CMR was rejected because there appeared to be two contracts.⁹¹ A consequence of this is that it is not excluded that in that case either the Convention in its entirety is not applicable to the actual border-crossing carriage where both contracts are governed by national law,⁹² or is partially applicable in combination with national law.⁹³ Interpretation of contracts that outwardly appear the same can therefore lead to the application of different legal systems.

In conclusion of this interpretation problem one may question whether the regulation concerning successive carriage is possibly also of application if a vehicle other than that intended by Article 1(4) CMR is used. It was stated in § 1 that the delimitation between combined and international road transport is a factual question. Article 34 CMR envisages only linked road transport. From this point of view it follows that a roll-on/roll-off carriage cannot fall under Article 34 CMR. If one agrees with this view then one should also be aware of the possibility that Article 34 CMR can certainly be applicable to the road carrier as opposing party of the roll-on/roll-off carrier.⁹⁴

89. See, Rb Den Bosch 11.12.1964, S&S 1967, 5: no question of there being only one contract; the facts noted in the judgment point rather in another direction. Rb Amsterdam 16.4.1975, S&S 1975, 81: no successive carriage; from the considerations that supported the judgment this is not convincing. Rb Almelo 9.6.1976, S&S 1978, 8: application of Art.34 CMR.

90. For the interweaving of the question whether transport or freight forwarding contract, and also the role of Art.34 CMR therein: Rb Rotterdam 31.1.1967, S&S 1967, 56; Rb Rotterdam 4.11.1969, S&S 1970, 82; Rb Rotterdam 5.4.74, S&S 1975, 53; Cass. 25.1.1972, BT 1972, p.148.

91. Cf. the decisions of Rb Den Bosch (n.89 above) and Rb Rotterdam 4.11.1969, S&S 1970, 82; CA Paris 17.12.1970, BT 1971, p.49; Cass. 21.1.1972, BT 1972, p.64.

92. Cf. HR 16.3.1979, S&S 1979, 64; NJ 1980, 562, on which see, Chapter 2 § 3; see, Precht/Endrigkeit, p.123. Cf. Hill/Messent, p.195.

93. CA Paris 21.1.1972, mentioned at n.91.

94. Contra, Rb Rotterdam 13.4.1973, S&S 1973, 92.

2. The second question – is acceptance of the consignment note necessary for application of Article 34 CMR? – appears at first sight upon a reading of the text to have no actual foundation. The historical facts relating to this provision given earlier furnish enough material however to cause one to hesitate before giving a positive answer to the question. Hill, who examined the question most fully, offers the suggestion with regard to Article 4 CMR that acceptance of the consignment note should not be a constitutive requirement. Although Hill was originally hesitant to make a decision⁹⁵ he finally came via systematic interpretation to the conclusion that Article 34 CMR as *lex specialis* derogated from the principle expressed in Article 4 CMR.⁹⁶ The position alternatively adopted by Hill, that issuance and acceptance of a consignment note is a condition of application of Article 34 CMR has been followed by virtually the entire spectrum of writers.⁹⁷ Caselaw, with exceptions, the most important being mentioned below, has in general taken the same standpoint, although a number of decisions concerning the requirement of acceptance of the consignment note are susceptible of criticism.⁹⁸

The requirement of acceptance of the consignment note should be looked at in historical context. As was stated above, one could on the basis of the originally proposed formulation, ‘*pourvu qu’il sache ou doive savoir*’, even though no mention is made there of the requirement of acceptance of the consignment note, gain the impression that the knowledge that in *casu* international carriage under a single contract was concerned is enough for application of Article 34 CMR.⁹⁹ Because the existence and equally the acceptance of the consignment note is on this view required, it is to be regarded as the material doctrine. Although the coming into effect of legal consequences was coupled to the ‘*conditions de la lettre de voiture*’, it does not follow that a special requirement was introduced in derogation of Article 4 CMR. This view, which leads to a significant extension of the scope of Article 34 CMR, finds support in the interpretation of § 432 HGB, to which the provision exhibits a close relationship. If one bears in mind the moment and the circumstances under which the final formulation, which besides intended no substantive change, came about,¹⁰⁰ then the material doctrine would be preferable

95. Hill, no.290; Hill/Messent, p.200.

96. Art.35 refers to Artt.8 and 9, not to Art.4 CMR; ETL 1976, pp.197-198 as also Hill/Messent, p.201; A. C. Hardingham, 4 (1978) LMCLQ, p.501.

97. An exception is constituted by Libouton 1982, p.737, who opposes the formalistic character of this interpretation of Art.34 CMR; Putzeys, no.288, n.200/1, opposes the view of Libouton. Putzeys also points out that successive carriage within the meaning of the Convention does not often occur in practice. Hill/Messent, p.204, correctly point out that the consignment note does not need to be issued at the same moment as the goods are taken over.

98. E.g., Rb Rotterdam 13.4.1973, S&S 1973, 93 in which on the ground of the second consignment note national law was incorrectly applied; criticised by Libouton 1974, p.529, with approval of Dorrestein, no.50. Cass. 15.5.1972, BT 1972, p.438, with critical note at p.439. For the English caselaw see, Hill/Messent, p.201: for Germany: BGH 9.2.1984, VersR 1984, p.578; ETL 1985, p.275; BGH 25.10.1984, VersR 1985, p.134; ETL 1985, p.268.

99. See also, M. M. C. J. M. de Nerée tot Babberich, Beursbengel 1982, p.215.

100. See above, § 4.1.

to the formal. In the literature the material doctrine is put forward on the basis of historical grounds only by Nickel-Lanz, although not consistently defended.¹⁰¹ In the caselaw there are a number of decisions of Belgian courts that are of importance. Although the *Rechtbank van Koophandel Ghent* originally defended the material viewpoint,¹⁰² it adopted a contrary position in a later decision.¹⁰³ The *Hof van Beroep, Ghent* had earlier without giving reasons attached no significance to the absence of a consignment note in regard to the applicability of Article 34 CMR.¹⁰⁴ A consistent approach was equally lacking at the *Rechtbank van Koophandel Antwerp*. Although this court had originally¹⁰⁵ laid down that Article 34 CMR did not derogate from Article 4 CMR, this court expressly defended the opposing view in a later decision,¹⁰⁶ while in a subsequent reasoned judgment the first position was again supported.¹⁰⁷

In a recent decision the *Rechtbank van Koophandel Brussels* has also spoken out in favour of the material doctrine. To that end the court considered as follows:

‘First and foremost, according to the spirit and the letter of the CMR Convention such strict formulation is not necessary to bring about application of the Convention; that appears perfectly clearly from Article 4 of the Convention. Whether there is an existent consignment note or not, as soon as a particular carriage satisfies the definition of Article 1 of the Convention, this last must be given application, notwithstanding any stipulations suggesting otherwise.

There is no reason whatsoever for adopting, in connection with Article 34, another view on this point. It follows from this that the absence of a consignment note does not automatically exclude the application of Article 34: a different view would lead to promoting “successive carriage” to a contract of obligations that could be created only by issuance of a consignment note; it would mean that parties, notwithstanding their intention thereto, would be totally excluded from the regulation of ‘successive carriage’ upon absence of a consignment note. One can perceive no good reason to

101. Nickel-Lanz, no.199. See also above n.97.

102. Rb Kh Ghent 27.9.1977, cited by Ponet, p.403. The *Rechtbank* expressly left open the possibility that the knowledge of the sub-carrier concerning the existence of the contract and the conditions under which the carriage was to take place could in the absence of a consignment note also be deduced from other factors. This standpoint did not lead in casu to application of Art.34 CMR. See also Rb Kh Brussels, n.108 below.

103. Rb Kh Ghent 21.11.1978, Ponet, p.403. Ponet leaves the reader uncertain whether there were any, and if so which, reasons given in this unpublished judgment for this volte face.

104. Hof van Beroep, Ghent 20.11.1975, ETL 1976, p.231.

105. Rb Kh Antwerp 16.4.1975, ETL 1975, p.548. In an earlier decision of 17.2.1974, ETL 1975, p.511, the court held in conformity with this: ‘it also appears from the text and the construction of Articles 34 to 40 CMR that carriage by “successive carriers” presupposes the transfer and taking over of goods between the carriers.’

106. Rb Kh Antwerp 3.4.1977, ETL 1977, p.411. One can deduce this standpoint, albeit somewhat less positively, from an earlier decision dated 20.6.1975, ETL 1975, p.540. According to Libouton, 1982, p.737 the *Rechtbank* appears to have changed course in a decision of 25.3.1976.

107. Rb Kh Antwerp 16.4.1978, Ponet, p.404.

support such rigidity. Delivery of the consignment note is purely a means whereby integration of the successive carrier in the original contract can be deduced, and it is not the only possible evidence of "succession".¹⁰⁸

When one compares the two approaches with each other, historical interpretation argues for the material doctrine, grammatical for the formal; the systematic interpretation approach supports both.¹⁰⁹ In itself, the historical argument appears more convincing. But for two reasons the case ought, in the view of the present writer, nevertheless to be settled in favour of the formal criterion. In the first place, abandonment of all formal requirement would give one even less, even no means of coming to the application of Article 34 CMR, which would increase legal uncertainty and remove the legal protection that only the formal criterion offers to the sub-carrier. The court at Brussels failed to appreciate this. In the second place one cannot contend that the caselaw, other than marginally, indicates a preference for the material doctrine, never mind is moving in that direction, with the result that one can speak of a prevailing opinion.¹¹⁰ This last is strengthened when one takes into account that the material standpoint is laid down in only a limited, in part unpublished, number of decisions of the courts of but one country.¹¹¹ The irresolute policy of these courts does not enhance the credibility of the material doctrine adopted by them a number of times and then again abandoned.

3. A third complication with regard to the applicability of Articles 34 et seq. CMR concerns the question whether by first or successive carrier within the meaning of the provision is to be understood exclusively the person who performs the carriage or also the person who assumed the obligation of the carriage but allows another to perform it. The answer to the question clearly appears from a reading of the text of Articles 36 and 37 CMR. In the first of these Articles it is apparent that an action may be brought against the 'carrier who was performing that portion of the carriage', in the second a right of recourse appears to lie against 'other carriers who have taken part in the carriage'. This has apparently brought some to state that for the rule to apply not only the first but also the successive carrier or carriers must have actually transported in fact.¹¹² The controversy comes more sharply to the fore in caselaw than in the literature. A number of courts in The Netherlands support

108. Rb Kh Brussels, 6.4.1984, ETL 1984, p.431 (441).

109. That systematic interpretation, by referring to Artt.8 and 9 via Art.35 CMR, would be decisive for the formal standpoint, as Hill intends in his second alternative, does not seem to be convincing. Art.4 CMR played no role at all in the negotiations.

110. The claim of Libouton 1982, p.737, in defence of his preference for the substantive standpoint that there is a 'dominant' caselaw is not tenable.

111. The content of the Italian case cited by Libouton is not given.

112. Expressly, Libouton 1974, p.529, n.94; Loewe, no.276; Rb Amsterdam 4.3.1981, S&S 1982, 19, with appeal to Dorrestein, no.294.

what for convenience may be termed the narrower point of view that only carriers who themselves perform the carriage can be considered for application of Articles 34 et seq. CMR.¹¹³ In contrast, courts in England¹¹⁴ and Germany¹¹⁵ appear to have a bias in favour of a wider view, namely, that carriers who do not actually perform the carriage also fall under Article 34 CMR, while their colleagues in Belgium¹¹⁶ and France¹¹⁷ are divided on the question.

The wider view is, in the opinion of the present writer, to be preferred for the following reasons. In the first place there is no reason to employ a more narrow concept in regard to that of carrier than was decided upon on the basis of Articles 1 and 3 CMR. Article 34 CMR must not be detached from those Articles, from which it appears that a contract of carriage does not imply that the carrier must personally perform the carriage, whereas Article 34 CMR, as was argued above, presupposes sub-carriage. A convention systematic approach should here be given priority over a possible grammatical interpretation of certain passages in Articles 35, 36 and 37 CMR. Secondly, reliance on these latter passages does not appear convincing. Article 37 CMR, as will be demonstrated below at § 4.4, regulates the mutual relationship between the successive carriers in contrast to the external rule of Article 3 CMR, which provides, *inter alia*, that the carrier is answerable for the sub-carriers utilised by him in performing the contract of carriage.¹¹⁸ It is logical and in conformity with the restricted possibility of initiating proceedings against the class of successive carriers laid down in Article 36 CMR that in establishing the burden of proof among the mutual relationships the carrier

113. Ktg Rotterdam 17.11.1979, S&S 1970, 98; Hof Leeuwarden 22.5.1974, S&S 1977, 41; Rb Amsterdam 4.3.1981, S&S 1982, 19 as also 16.4.1975, S&S 1975, 81; 21.4.1982, S&S 1982, 116; Rb Rotterdam 2.3.1984, S&S 1985, 32. *Contra*, perhaps, Rb Arnhem, 8.1.1981, S&S 1982, 75.

114. QB 5.5.1975 [1975] 2 Lloyd's Rep 502, with appeal to Art.1 CMR (at p.508); CA 16.11.1976 [1977] 1 Lloyd's Rep 346 (*Ulster-Swift v. Taunton Meat*); QB 20.10.1977 [1978] 1 Lloyd's Rep 281 (*SGS-Ates v. Grappo*); QB 22.11.1979 [1980] 2 Lloyd's Rep 279 (*Walek v. Chapmann and Ball*); QB 6.3.1981 [1981] 2 Lloyd's Rep 106; CA 16.7.1981 [1981] 2 Lloyd's Rep 402 (*Cummins v. Davis Freight*); see also Hill/Messent, pp.201 et seq.

115. OLG Dusseldorf 8.5.1969, ETL 1970, p.446; OLG Karlsruhe 7.12.1979, VersR 1980, p.877 with appeal to Helm, *Frachtrecht*, Art.3 CMR (intended was Art.34 CMR). Helm himself speaks rather of analogous application: LG Saarbrücken 22.8.1980, VersR 1981, p.423. BGH 25.10.1984, VersR 1985, 134; ETL 1985, p.268 left the question unanswered.

116. The following have expressly declared for the narrow standpoint:

Rb Kh Antwerp 17.2.1974, ETL 1974, p.504; 3.4.1977, ETL 1977, p.411.

The following have expressly declared for the broader:

Rb Kh Brussels 28.2.1975, ETL 1975, p.419; Hof van Cassatie. 30.5.1980, ETL 1983, p.79; see also, M. M. C. J. M. de Nerée tot Babberich, *Beursbengel* 1982, p.216.

117. In France the Cour de Cassation has declared itself for both the broader standpoint (Cass. 15.1.1972, BT 1972, p.148) and the narrower (Cass. 15.5.1972, BT 1972, p.438).

The following courts have declared for the narrower standpoint:

CA Agen 29.6.1981, BT 1981, p.433; Tr. gr. inst. Metz 10.11.1981, BT 1982, p.38; Tr. gr. inst. Valence 18.11.1981, BT 1982, p.211.

118. The FIATA Report at p.8 clarifies this to some extent by supplementing it in the sense that after 'agents and servants' 'carriers' are mentioned.

who has not taken part in the carriage should escape. This view squares also with Article 37(c) CMR, on which see § 4.4 below. Finally, it is to be realised that Article 37 CMR is merely regulatory law (cf. Article 40 CMR). The second argument presented here anticipates the central aspects of the Convention regulation concerning successive carriage to be set out below. In the succeeding sections this regulation will be looked at more closely from the position of the claimant (§ 4.3), and then as to the mutual relationship between the carriers (§ 4.4).

§ 4.3 *External legal relationships (Artt.34, 36 CMR)*

The regulation concerning successive carriage is to the advantage of the claimant.¹¹⁹ Besides the immediate opposing party, the principal carrier, the claimant enters into a contractual relationship with each successive (sub-)carrier.¹²⁰ Provided the necessary conditions are fulfilled the sub-carrier is deemed to be a party to the contract that his principal or his successor concluded with the sender. The most important legal consequence of the rule is that the sub-carrier is brought by virtue of the Convention into a legal relationship with the claimant.¹²¹ The sub-carrier forms as it were a unit with his predecessor and his successor, with joint and several liability for the performance of the original contract of carriage throughout its entire journey.¹²² The consequent burdening of the sub-carrier's legal position imposed on him by virtue of coming within reach of Article 34 CMR is distinctly severe.¹²³ Meanwhile a certain caution would seem to be called for in regard to attaching far-reaching, perhaps too far-reaching legal consequences to the situation sketched here. The liability so extended is, namely, not without its own perspective.

1. In the first place Article 36 CMR restricts the radius of action of the claimant to the first carrier,¹²⁴ the last carrier and the carrier who was performing that part of the carriage during which the event causing the loss, damage or delay occurred. Proceedings cannot be initiated against every successive carrier. When consequently a sub-carrier is neither the first nor the last carrier and can prove that the damage did not occur during his part of

119. See § 1 above.

120. Art.34 CMR always presupposes sub-carriage: § 1 above; Helm, *Frachtrecht*, § 432 HGB, Anm. 3; Heuer, p.160; D. J. Hill, *ETL* 1976, p.198; Precht/*Endrigkeit*, p.124; see further the English caselaw at n.114 above.

121. In *Ulster-Swift v. Taunton Meat* the 'artificial statutory contract' was contrasted with English law, on which A. C. Hardingham (1978) 5 *LMCLQ*, pp.502-503.

122. K. *Endrigkeit*, *VersR* 1969, p.589; 'Gesamtschuldnerische Haftung'; Rodière, p.351, no.133; Nickel-Lanz, no.202; Hof van Beroep, *Antwerp* 10.12.1983, *ETL* 1983, p.309.

123. The extension of liability to the entire journey can be a heavy burden especially if one is but a link in the chain: see, *Rb Kh Antwerp* 28.3.1966, *ETL* 1966, p.708; *Cass.* 19.1.1976, *BT* 1976, p.149; Hof van Beroep, *Brussels* 26.4.1983, *ETL* 1983, p.311; Hof van Beroep, *Antwerp* 14.12.1983, *ETL* 1983, p.809. See, Ponet, p.404; Donald, p.12; Clarke, no.54.

124. That is naturally not an extension (see Art.3 CMR), well illustrated by *OLG Hamburg* 6.12.1979, *VersR* 1980, p.290.

the journey, he escapes the external liability.¹²⁵ The question arises whether this 'escape route' is also open to the last carrier if he, like the just-mentioned intermediate carrier, proves that the damage was not caused during his part of the journey. The question is posed by Rodière who replies in the negative.¹²⁶ Loewe supports the opposing view.¹²⁷ In this controversy one may ask oneself whether, and if so to what extent, the right of recourse regulated in Article 37 CMR, more in particularly under c., which is explained below at § 4.4, can here serve as an argument. If one accepts this argument, which brings with it that the last carrier in the situation considered here cannot be liable, then one will be inclined also in this last case to relieve the last carrier of the 'Gesamthftung' of Article 36 CMR. One cannot come to such a conclusion. The interest of the claimant that exists here in an easily found and proceeded against debtor is of a higher order than the possible result to which one comes by reason of a mutual legal relationship between carriers. A contrary view would too radically reduce the legal consequences invoked by Article 34 CMR, contrary to its purport.

2. A second restriction of the principle of joint and several liability, viewed not so much from the material as from the practical point of view, is found by extension of the first restriction and is of a jurisdictional nature. The final clause of Article 36 CMR, which was added at a later stage, provides that an action may be brought at the same time against several of these carriers.¹²⁸ One should nevertheless realise that the action brought simultaneously against different carriers needs fall within the scope of the limits stipulated by Article 31(1) CMR under a. and b., as well as within the period of limitation (Art.32 CMR). If the carriers are sued before one forum, that court must be one that is competent to take cognisance of the action against each individual successive carrier. This will more often be so in the cases regulated by Article 31(1) CMR under a.¹²⁹ The way in which Article 31 CMR is applied demonstrates that in practice there is a real restriction on liability.

3. A third restriction arises from the fact that the liability of the sub-carrier

125. As in the case of the carrier Furtrans in the circumstances decided by QB 20.10.1977 [1978] 1 Lloyd's Rep 281 (*SGS-Ates v. Grappo*), in which four carriers, of whom three were sub-carriers, were involved. The carrier who was sued was able to show that he had not been the last carrier, nor the carrier on whose journey the damage had occurred. For A. C. Hardingham (1978) 5 LMCLQ, p.504, this decision raises more questions than it answers. See also, Hill/Messent, pp.201 et seq.

In another case the sub-carrier did not succeed in avoiding liability: QB 5.5.1975 [1975] 2 Lloyd's Rep 502 (*Ulster-Swift v. Taunton Meat*), appeal dismissed in CA 16.11.1976 [1977] 1 Lloyd's Rep 346.

126. Rodière, p.351, n.131, with an appeal to the CIM and the (procedural) interest of the claimant, which last argument seems more convincing than the first as it recalls the purport of the regulation concerning successive carriage. See, Precht/Endrigkeit, p.126.

127. Loewe, no.280.

128. See on this the critical comments of the Swiss delegate who foresaw jurisdictional problems, TRANS/152, TRANS/WP9/32, 10 May 1955. He was reassured with the guarantee that the forum concerned, in the event that the action would be initiated 'at the same time', would be competent within the cadre laid down by Art.31 CMR. See also, Hill/Messent, pp.212 et seq.

129. See, Loewe, no.281.

to the claimant is limited to damage caused by loss, damage and delay.¹³⁰

If as a result the legal consequences of the principle invoked by Article 34 CMR of joint and several liability are externally restricted in the above manner by Article 36 CMR, the legal consequences are internally reduced even further by Article 37 CMR, as is demonstrated below.

§ 4.4 *Internal legal consequences (Artt.37-40 CMR)*

By contrast to the case of roll-on/roll-off carriage the Convention regulates the mutual relationships between successive carriers. In general terms the regulation is derived from the CIM. It is precisely because every procedure to pursue a right of recourse involving as a consequence a number of concerned parties strongly resembles musical chairs that the rules of play should be as clear as possible. Unfortunately the regulation in issue does not comply with this requirement. On the contrary, it is distinctly complicated.¹³¹ This argument will be explained in what follows.

Article 37 CMR concerns the question on which carrier, if one of the carriers has defaulted as against the claimant in his (external) duty to make compensation for damage, the burden of damages finally rests. In principle it is that carrier by whose action the damage was caused (Art.37(a) CMR).¹³² (One generally assumes that this passage is aimed at compensation for damage as that is established in conformity with Artt.17 et seq. CMR.)¹³³ Article 37(b) CMR is a logical complement to this. These two provisions are consequently based on the principle of individuality. By contrast, when one is groping completely in the dark for the cause of the damage, the principle of joint and several liability means that the collective debt is spread over the carriers in relationship to their individual abilities (Art.37(c) CMR). It is an interesting question under what circumstances must this last provision be applied. How do the principles of individuality and joint and several liability relate to one another? The answer to this depends on the manner in which Article 37(c) CMR is interpreted. Is it sufficient that a carrier, in order to evade collective liability, proves that in his individual period of transport the damage did not arise or could not have arisen (the so-called negative proof) or must he show where the damage did arise (so-called positive proof)? Both Rodière and Nickel-Lanz answer in the former sense.¹³⁴ In this view Article 37(c) CMR is applicable only in the case that no single carrier succeeds in proving, either negatively or positively, where the damage arose.¹³⁵

130. See, Dorrestein, no.296, who proffers a number of thoughts critical of the rule as such. Contra: Nickel-Lanz, no.202.

131. Muth-Glöckner, Art.37, Anm. 2; Hill, no.293; Dorrestein, no.300.

132. For a curious appeal to Art.37 CMR in a case concerning an ordinary assignment see, Rb Rotterdam 5.4.1974, S&S 1975, 53.

133. Rodière, p.532, no.135; Loewe, nos.283, 284; to an extent different, Nickel-Lanz, no.203.

134. Ibid.

135. In this connection it is important to take carefully into account the indications given in Artt.8 and 9 CMR.

In application of Article 37(c) CMR the yardstick utilised for sharing the burden is the fee earned by each carrier. From the above it follows that substance can be given in the same manner to the joint liability principle laid down in Article 38 CMR (solvency).¹³⁶ The result thus arrived at significantly reduces the joint liability principle and is in conformity with the standpoint defended above that a carrier, who has not himself performed the carriage, can be included without objection in the regulation concerning successive carriage seeing that such a carrier can in principle escape the collective burden of liability via Article 37(a) CMR in conjunction with Article 37(c) CMR and cannot be proceeded against under Article 36 CMR. This conclusion is confirmed by the caselaw.¹³⁷

The idea of unity is fragmented in yet another way, namely, when it is considered that the right of recourse need not necessarily be brought to completion on the basis of the CMR liability model.¹³⁸ The applicable law regime depends on the (sub-)contract of carriage concluded by the carriers.¹³⁹ Confirmation of this is to be found in Article 40 CMR which to a large extent regards the right of recourse as regulatory law, the only instance thereof in the Convention.¹⁴⁰

In the meantime the already not simple Article 37 CMR is made more obscure by the mandatory law of Article 39 CMR.¹⁴¹ This provision lays

In a case where a successive carrier appealed to Art.37(c) CMR, this proved to be very profitable given that he himself had used 95% of the freight: QB 22.11.1979 [1980] 2 Lloyd's Rep 279 (Walek v. Chapmann and Ball).

136. Rodière, p.352, no.136. Contra, Nickel-Lanz who in this case would let the 'innocent' carrier share the burden. This appears to be inconsistent.

137. In two recourse proceedings it was held that no mutual burden rests on a person who had not actually transported; in consequence the entirety fell to the account of the sub-carriers: QB 6.5.1981 [1981] 2 Lloyd's Rep 106; CA 16.7.1981 [1981] 2 Lloyd's Rep 402 (Cummins v. Davis Freight), as well as Hof van Cassatie 30.5.1980, ETL 1983, p.79; see, Clarke, no.55. Cf. Hof van Cassatie 25.5.1984, RW 1984-1985, p.2274.

138. Loewe, no.289; Heuer, p.169.

139. For a case where the underlying contract ran parallel with the CMR liability model see, QB 22.11.1979 [1980] 2 Lloyd's Rep 279 (Walek v. Chapmann and Ball). The recourse claim by the first carrier against the sub-carrier for damage occurring as a consequence of a defect in the trailer was awarded on the ground of Art.17(3) CMR. A clause had been included in the underlying contract whereby the sub-carrier (in casu the hauler) would exempt his opposite party from claims for damage resulting from any defect in the vehicle. An interesting detail is that the trailer had been placed at the disposal of the sub-carrier by the principal carrier! A remarkable decision is that of Rb Arnhem 8.1.1981, S&S 1982, 75: although Art.34 CMR was not expressly declared to be applicable, the recourse claim of the carrier against the person who had placed a tractor at his disposal was based directly on Art.37 CMR given the absence of any other connecting factor. The Rechtbank came to this conclusion because it considered the haulage contract to be so closely related to the transport contract that for the performance thereof it was to be regarded as carriage; see Chapter 2, § 4.5.1, n.214.

140. Art.40 is derived from Art.53 CIM which permits derogation across the entire front of successive carriage. Loewe, no.228 incorrectly states that carriers can derogate from Art.39(2) CMR.

141. Precht/Endrigkeit, p.130. One may question whose interest is served by this mandatory legal provision. In the opinion of the present writer it constitutes an unnecessary infringement on the freedom of contract of the carriers amongst themselves.

down a number of rules of a procedural and jurisdictional nature that are deemed to be taken into account in settlement of the mutual adjudicatory procedure.

Looking first at Article 39(2) CMR; the jurisdiction rule of Article 31(1)(a) CMR applies to a carrier who has fulfilled his external obligation to compensate for damage and thereafter wishes to recover from another carrier. In place of the omission of the rule stated in Article 31(1) CMR there is the provision in favour of the carrier seeking recourse that he can bring his action before the competent court of the country within whose territory one of the carriers concerned is ordinarily resident, etc.,¹⁴² which does not necessarily mean one and the same court. One ought to take into account with this extension that Article 39(2) CMR, contrary to Article 31(1)(a) CMR, refers to a competent court. It is therefore at least doubtful whether in practice it will be easy to realise this rule. It is not the impression of the present writer that the national jurisdictional rules are attuned to this provision.¹⁴³

A further complication in the exercise of the right of recourse is occasioned by the first paragraph of Article 39 CMR which provides that the carrier must previously have given the person against whom he seeks recourse due notice and opportunity to enter an appearance in the proceedings brought by the claimant against the carrier seeking recourse.¹⁴⁴ When one is alone proceeded against by the claimant for compensation as first or successive carrier, while the chance of recourse against other carriers cannot be regarded as excluded, it is sensible to give notice of the proceedings to all the carriers under pain of the risk of being met with the opposition of those against whom at a later stage recovery may be sought.

Finally, Article 39(3) CMR declares paragraphs 3 and 4 of Article 31 CMR to be applicable; and a further modification is made to the limitation period regulation of Article 32 CMR concerning the moment at which the period of limitation begins to run (Art.39(4) CMR). This last can be regarded as an

142. In a case where the English, the first, carrier commences a recourse action against a Dutch sub-carrier this would mean that the English court has no jurisdiction. It was correctly held that by 'the carriers concerned' was not understood he who sought recourse. The fact that the main claim is in this way procedurally separated from the recourse action can change that as little as can the formulation of the Article: (a carrier *may* make his claim: QB 6.5.1981 [1981] 2 Lloyd's Rep 106; CA 16.7.1981 [1981] 2 Lloyd's Rep 402 (Cummins v. Davis Freight). See, Clarke, no.55; Hill/Messent, pp.228-229.

143. Some pessimism is justified. Art.39(2) CMR imposes on the States the public international law duty to concretise in their national law of procedure the judicial competence indicated in that provision. A problem arises here that will be dealt with in Chapter 7.

144. An attempt thereto failed in the complicated proceedings heard before the QB 20.11.1973 (Tatton v. Ferrymaster), ETL 1974, p.167, and in which it was held that a French sub-carrier had been given due notice in accordance with Art.39(1) CMR by the principal, English carrier and in consequence were the English carrier to proceed against the French carrier in France the latter would not be able to oppose the former concerning the compensation for damages to be determined. The difficulty with such a case is that this rule does not run parallel with Art.39(2) CMR. Art.39(1), unlike Art.39(2) CMR, is not a jurisdiction rule. The result of the decision is unsatisfactory to the extent that the liability of the sub-carrier as against the principal carrier in the main procedure cannot be examined. The problem can, however, to a great extent be avoided when the claimant takes proceedings against successive carriers en bloc.

important extension of the carrier's usual period.¹⁴⁵ Just as the legal relationship between the claimant and successive carriers under Article 36 CMR is restricted in scope to compensation for damage according to Articles 17 et seq. CMR, as to which see above at § 4.3, this applies equally to the exercise of mutual recourse.¹⁴⁶

145. See on this below, Chapter 8 § 8.

146. See. QB 1.11.1976 [1977] 1 Lloyd's Rep 411 (Muller v. Laurent Transport): claims concerning any other possible duties fall outside the scope of the Convention.

Liability of the carrier

‘It is essential, when applying the formulation used in the CMR, to try not to be influenced by national definitions of this kind or by the meaning which national courts or jurists attribute to them.’¹

§ 1. Introduction

The nucleus of the CMR, as is the case with other Conventions in the field of transport law, comprises provisions regulating the liability of the carrier. Therefore it is primarily Articles 17 and 18 CMR that are the subject of this Chapter while the other Articles of this central fourth Chapter of the Convention, concerning the calculation and extent of compensation for damage, will be discussed in the following Chapter.

The lion’s share of the legal literature and caselaw on the CMR relates to the pivotal Articles 17 and 18 CMR, which are the most important in practice. As a result of the system of liability based on these provisions a division occurs of the risks connected with transportation between the parties involved with the carriage. In practice this system does not appear to function without blemish. Elaboration of the liability model operated by the Convention can best be achieved by discussing the different aspects thereof.

An understanding of the basis of liability is indispensable for a justifiable division of the transportation risks consisting of damage to and loss of the goods as well as for delay in delivery (§ 2); likewise, of the way in which the process of establishing liability takes place at law (§ 3).

It is often suggested that the first aspect is really a matter of purely academic consideration whereas the second attracts more attention from practitioners. Such an approach can only be termed superficial. Rather it is the interweave between both equations of the liability model that deserves to be emphasised. It is the type and content of the transport contract that determine the obligations binding on the carrier. In general, the view is held that the primary obligation of the carrier, namely, delivery of the goods in the condition in which he received them, must be characterised as an obligation to effect a particular result, an ‘obligation de résultat.’ The only significance of this appears to be that this characterisation serves as basis for the division of the burden of proof. The often strongly dogmatically tinted views on the basis of liability can accordingly not be viewed separately from the place and function of the proof of the relevant cause of damage and the circumstances in which the damage has occurred. This last prompts an enquiry to what extent the proof (presumption) plays a role in the process of establishing the carrier’s liability and more particularly the way in which form is given thereto by means of the division of the burden of proof.² The division of the risks

1. Loewe, no.153

2. H. Roesch, *VersR* 1976, p.711: ‘Es kommt vielmehr allein darauf an, dass der Frachtführer

connected with transportation between carrier and person entitled to the cargo guarantee a richly variegated store of cases and doctrinal views in the legal literature. Attempts initiated in the past to shift these risks to one side in order to bring an end to the differences have so far had no success.³ As long as the insurance practice continues to localise commercial transport interests with both carriers and cargo owners one remains certain of judicial proceedings concerning the (CMR) carrier's liability.⁴ The drafters of the CMR, contrary to the wish of the Netherlands delegate – on which see § 4 – subscribed to the classical division pattern and in the result adopted the liability model of the CIM almost in its entirety. Historical research can illuminate the motivations for this choice and be of importance in interpreting Articles 17 and 18 CMR (§ 4).⁵

Having explained in this way the theoretical, procedural and historical context of the liability of the carrier, one should then examine the way in which the system functions in practice (§ 5). This requires investigation of the circumstances to which damage, loss and/or delay give rise and which play an important, causal, role in the liability model utilised by the Convention. Although it would be defensible to elaborate these concepts in this context, preference ought to be given, from the viewpoint of functionality as well as in regard to the content of the succeeding Chapter, in which the calculation and extent of the damage and compensation therefor will be examined, to that Chapter. A determination of liability or exoneration therefrom appears to be the result of a procedure the successful conclusion of which for the carrier depends in large measure on being in principle in a position to appreciate all the ins and outs of the actual damage. The judge is frequently petitioned to assist by employing the division of risk key handed to him by the Convention. The scene shaped by caselaw and in the legal literature during past years is thus charted. In this attention ought also to be paid to the liability of the carrier for those persons of whose services he makes use in performance of the transport contract (Art.3 CMR).

A peculiarity in transport law and therefore in CMR law is that the regulation of liability does not govern the transport contract in its entirety but merely for a particular period. It is thus of importance to the carrier to know precisely during which period of the contract his legal position will be regulated by the CMR system of liability (§ 6). The Convention limits liability for damage, loss and delay to the period stipulated in Article 17(1) CMR, namely, from the moment when he takes over the goods to the moment of delivery thereof. When the moments of start and finish of this period cannot be estab-

sich von einer ihm in Art. 17 Abs.1 CMR auferlegten Haftung durch den Beweis befreien kann, dass der jeweiligen Schaden durch Umstände verursacht worden sei, die er nicht vermeiden und deren Folgen er nicht abwenden konnte.'

3. Cf. on this 'The essential role of marine cargo insurance in foreign trade,' publication from 'International Union of Marine Insurance,' Zurich 1975.

4. See on this in the context of the Dutch Law, J.W. Wurfain, *Goederenvervoer over de weg*, Zwolle 1984, pp.36-37.

5. See, e.g., HR 18.5.1979, S&S 1979, 73; NJ 1980, 574. The reasoning of the Hoge Raad – on which see further § 5.4.3 – was based on the historical-comparative convention method of interpretation.

lished with sufficient certainty this can lead to friction with other, national, legal systems.⁶ Rules of evidence are also of importance regarding the question of the duration of the period of liability. These are relevant to both the beginning (Artt.8 and 9 CMR) and the end of that period (Art.30 CMR).

§ 2. Basis of liability

Article 17(1) CMR provides that during the period that the goods are in the charge of the carrier he is liable for loss and damage thereto as also for delay in the delivery thereof. One may regard this as the principal rule of the liability model. In the second paragraph a number of circumstances are specified which relieve the carrier of the liability imposed on him: the exoneration rule. In the following paragraphs of Article 17 CMR as well as in Article 18 CMR it is elaborated further how form is to be given to the liability model, that is to say, how the above-mentioned principle and exoneration rules relate to each other, which will be examined in the sections following hereafter.

In practice it appears that much of the difficulty that has transpired in regard to the carriage of goods can be ascribed to the field of tension between the two rules just mentioned. The CMR liability model is no exception to this, as witness the over-abundant caselaw on this part of the Convention. The discussions in both caselaw and legal literature concerning the liability of the carrier concentrate to a significant extent around the issue, on what basis does this liability rest.⁷ Much of this discussion is taken up by theoretical-dogmatic tinted considerations, which cannot be viewed in isolation from the developments that have occurred during the last decades in the field of the law of liability in general. An enquiry into the basis upon which liability rests has as its purpose to determine more closely the content of the obligation that flows from the transport contract, which is of importance in view of the exoneration of liability offered by Article 17(2) CMR. Just as the Convention does not engage in specifying the concept, the nature, the creation and the dissolution of the transport contract, so also it does not pronounce on the obligation(s) that spring forth from the contract. Only the chronological, factual conclusion of the carriage is set out (Artt.4-16 CMR), while in Articles 17-30 CMR the establishment, calculation and conclusion of the obligation to compensate for damage in substitution of the principal obligation are regulated. One may consequently state that the CMR, in imitation of other conventions, has left all sorts of questions of contract law out of consideration and confined itself to the most important legal consequences of shortcomings regarding the most essential of the obligations flowing from the contract. Given that the contract is presumed to be a transport contract, one can only indirectly determine what is the content of the obligation of the carrier. The principal obligation of the carrier, for which failure to perform

6. On this problematic see further Chapter 5.

7. Ramberg, p.223 distinguishes no less than five different types. The difference in the basis of liability he considers to be the predominant reason for the diversity existing amongst the existing transport law systems (p.247). Cf. also Grönfors, *RebelsZ* 1978, p.697. Equally, Hill/Messent, pp.67-69.

calls into being the liability of the carrier, contains two elements, which as a rule of transport law is at least beyond dispute: the preservation as well as the delivery of the goods.⁸ (No uniform typological term exists for this liability. The term, which is often approved in Germany, 'Obhutshaftung', points only to one element in the carrier's obligation in distinction to 'Verspätungshaftung'.)⁹

Two elements in particular are to be discovered in the field of tension between the principal and the exoneration rule. One may here lay the emphasis upon either the content of the obligation or the consequences which lead to the exoneration of liability. With this last element the emphasis falls upon proof and the burden of proof, on which see further § 3. There exists no objection to this provided one does not separate the two elements from each other.

After many years of discussion on the nature of the transport contract on the ground of the concepts of objective and subjective circumstances beyond one's control, the conclusion has been reached in The Netherlands that an obligation of result rests upon the carrier, which entails that in principle the carrier is liable when he has not fulfilled his principal duty to carry the goods in undamaged condition to the place of destination. He is relieved of this liability when he demonstrates a cause which has prevented him from fulfilling his obligation and for which he is not responsible. The connection between the contents of the obligation and the burden of proof was expressed by the Hoge Raad in a case concerning national road transport, as follows:

'For the non-liability of the carrier it is not sufficient that he has performed as to the employment of material and personnel for which he was under an obligation according to the contract. He must also prove that with such employment of material and personnel a careful carrier (...) could not have avoided the cause of the damage nor prevented the consequences thereof.'¹⁰

The utilisation of doctrinaire tainted national concepts such as objective and subjective circumstances beyond one's control is, as was elaborated above in Chapter One, not particularly apt to interpret a central provision such as Article 17(2) CMR. A comparison of caselaw and legal literature as well as an

8. Cf. Chapter 2, § 4.2. See also Royer, p.228; Wachter, p.111; Dorrestein, no.197; Korthals Altes/Wiarda, p.25, p.29, p.73; Van Oven, no.125; Loeff, nos.191-193; Rodière, Sirey, no.493; Rodière, Dalloz, no.208; Helm, Frachtrecht, § 425 HGB; Anm.69 no.70.

9. Helm, Haftung, p.93; Helm, Frachtrecht, Art.17 CMR, Anm.2, Anm.24; Heuer, p.67, p.129.

10. HR 19.2.1982, S&S 1982, 57; NJ 1982, 402. With this decision the HR quashed the decision of Hof Amsterdam of 5.12.1980, S&S 1981, 97 in which it was held that the carrier was not obliged to do more than employ sufficient material and personnel. In this case the HR anticipated the CMR rule of exoneration adopted by the Netherlands Law. In a subsequent consideration, which was merely obiter dictum, the HR elaborated further the burden of proof. The case demonstrated clearly that more is expected of a careful carrier than is often suggested by the concept of 'reasonableness'. See, e.g., Clarke, no.78. It is thus misleading to speak here of subjective force majeure, as do Dorhout Mees and Van Oven. In comparison with Art.17(2) CMR the addition to Art.20(1) WOW of the adjective 'careful', which also appears in § 429 HGB, is to be regretted. As will emerge below the opinion in Germany is unanimous that the CMR brings with it a heavier liability for the carrier than does § 429 HGB.

historical enquiry serve to indicate here the proper direction to be taken.

In contrast, in Germany the problem under discussion has not been approached from the same direction as in The Netherlands (does the transport contract give rise to a best endeavour or to a result obligation?); rather, the discussion has centred on the deeper question, what is the basis on which the liability of the carrier rests. In essence, although the terminology is different, one is here concerned with substantively the same discussion. The question is capable of being formulated thus: must the carrier's liability be considered as 'Gefährdungshaftung' or as 'Verschuldenshaftung' with a reversal in the burden of proof?¹¹

The first view is held by the majority of German writers,¹² while the second standpoint is adopted by Helm and, in his footsteps, by Heuer.¹³ Although it is conceded on both sides that the dispute is primarily of a theoretical nature, the discussion and the arguments therein put forward are of substantial importance because insight is thereby offered in the way in which the CMR liability model is interpreted.

Roesch acts as spokesman for those who regard the CMR liability as 'Gefährdungshaftung' and who point out a parallel with a number of other transport systems in which the divergence with § 429 HGB is clearly noticeable.¹⁴ For this view he appeals to the Explanatory Note to the German Law of Approval.¹⁵ Roesch derives from this that according to Article 17 CMR a heavier liability rests upon the carrier than that which is imposed upon him by § 429 HGB in which 'Verschuldenshaftung' is laid down.¹⁶ The difference between these types of liability comes to the fore with the burden of proof: whereas the carrier in order to exonerate himself from liability under § 429 HGB can suffice with proof that neither he nor those persons for whom he is responsible are to blame for the occurrence of damage, a heavier burden of proof is required of the carrier under the CMR, as also under the CIM, the Warsaw Convention and the corresponding German regulation thereof. This carrier, in order to exonerate himself from liability, must prove that the damage is due to a circumstance that neither he nor the persons for whom he is responsible could avoid. This latter view, here only summarily expressed, is, with the exception of the writers mentioned above, openly shared by the

11. Helm, Haftung, pp.102 et seq.; Helm, Frachtrecht, Art.17 CMR, Anm.3; Groth, p.36.

12. Precht/Endrigkeit, p.85; Muth-Glöckner, Art.17, Anm.1; H. Roesch, VersR 1976, pp.707-711.

13. Helm, Haftung, p.105; Helm, Frachtrecht, § 429 HGB, Anm.66; Art.17 CMR. Anm.4. Heuer, p.51. Hofmann in VersR 1976, p.1151 adopts a middle position.

14. § 429(1) HGB reads: Der Frachtführer haftet für den Schaden, der durch Verlust oder Beschädigung des Gutes in der Zeit von den Annahme bis zur Ablieferung oder durch Versäumerung der Lieferzeit entsteht, es sei denn, dass der Verlust, die Beschädigung oder die Verspätung auf Umständen beruht, die durch die Sorgfalt eines ordentlichen Frachtführers nicht abgewendet werden konnten.

15. Deutscher Bundestag, Drucksache 1144, p.40.

16. VersR 1976, p.708.

Bundesgerichtshof. This court stated that with liability as laid down in Article 17 CMR it:

‘nicht nur um eine dem § 429 HGB entsprechende Verschuldenshaftung mit umgekehrten Beweislast handelt; denn es genügt nicht dass der Frachtführer die Vermutung eines ihm zurechenbaren Verschuldens widerlegt; vielmehr muss er gegebenenfalls darlegen und nach Art. 18 CMR beweisen dass der Schaden auch bei Anwendung der äussersten nach den Umständen möglichen Sorgfalt nicht hätte abgewendet werden können.’¹⁷

In contrast to Roesch and the Bundesgerichtshof, Helm and Heuer take the view that CMR liability must be classed as ‘Verschuldenshaftung’ with reversed burden of proof.¹⁸ This viewpoint does not mean that the CMR liability can be equated with § 429 HGB. In contrast to this provision the CMR liability regime imposes on the carrier a greater duty of care in which the criterion of ‘äussersten wirtschaftlich zumutbaren Sorgfalt’ is utilised, which according to Helm corresponds to the consideration of the BGH cited above.¹⁹ This criterion derives originally from German railway law and according to these writers must therefore be judged against the criterion of duty of care developed in and applicable to that field of law.²⁰ In the result the CMR liability falls, in the view of Helm and Heuer, between, on the one hand, ‘Verschuldenshaftung’ as that is regulated by § 429 HGB and, on the other, ‘Gefährdungshaftung’.²¹

Further reason not to emphasise the difference between the viewpoints is provided by the solution to another closely related controversy concerning a possible equivalency between the exoneration rule according to CMR and German law. Whereas the standpoint was originally defended that both concepts could be equated qua substance, at the present it is generally accepted that the formulation employed by the CMR encompasses more cases of circumstances beyond one’s control than the German concept of ‘höhere Gewalt’ permits.²² If finally one thinks that both viewpoints have in common that the

17. BGH 28.2.1975, NJW 1975, p.1598; on this approvingly Libouton, 1982, p.714. Already in this sense BGH 21.12.1966, NJW 1967, p.499, one of the first decisions on the CMR: ‘Es handelt sich bei der Haftung des Frachtführers nach Art. 17 CMR um eine Gefährdungshaftung ...’ (p.500). Another variant on this theme reads: ‘... ein besonderes gewissenhafter Frachtführer bei Anwendung der äussersten ihm zumutbaren Sorgfalt.’ (BGH 5.6.1981, VersR 1981, p.1030; ETL 1982, p.301.)

These decisions are also of importance for another, closely connected controversy, whether, and if so to what extent, the exoneration rule of Art.17(2) CMR is equivalent to the German concept of ‘höhere Gewalt’: on this question, for which an historical enquiry is necessary, see below § 4.

18. See footnote 13, supra p.123.

19. Helm, Haftung, pp.36, 42, 102, 109; Helm, Frachtrecht, § 429 HGB, Anm.21; Anm.66; Art.17 CMR, Anm.5; Heuer, p.52.

20. Helm, Haftung, p.41; Helm, Frachtrecht, Art.17 CMR, Anm.5; Heuer, p.53

21. The primarily terminological controversy can perhaps in part be explained by Helm’s aversion to use of the term ‘Gefährdungshaftung’ in the field of private law, which he explains extensively in Helm, Haftung, p.103, n.513; Helm, Frachtrecht, Art.17 CMR, Anm.4.

22. The reason for thinking of equivalency is a passage from Nanassy, p.535, where it is stated

emphasis falls fully on the proof to be adduced, then one may properly conclude that the significance of the theoretical difference is minimal²³ or even nil.²⁴

One learns from Edis and Aisslinger that in Switzerland the liability of the carrier according to Article 17 CMR must be considered as 'Gefährdungshaftung'.²⁵

Perspective is given to the controversy noted here between the views advocated in the German legal literature by an extensive comparative law study by Zachert, who arrives at the following conclusion:

'Die oben aufgezeigten rechtstheoretische Unterschiede zwischen einerseits vermuteter Verschuldenshaftung (...) und andererseits der einen Gefährdungshaftung (...) sind, wie das praktische Ergebnis lehrt, nicht zu überschätzen.'²⁶

The correctness of this statement for this subject is confirmed by a closer look at the situation in France where Rodière above all has concerned himself with the subject under discussion. His approach to the problem shows a marked resemblance to that of the German writers, except that also here the terminology is different. Rodière distinguishes typologically the following models: 'présomption de faute' and 'présomption de responsabilité'.²⁷ In the first category it will be sufficient if the carrier proves that he has exercised sufficient care. According to Rodière the liability of the carrier according to

the new formula of Art.27(2) CIM (which is identical to Art.17(2) CMR) contains no essential difference in respect of the previously employed term 'Höhere Gewalt.' Cf. also Nanassy-Wick, p.188; Wick, p.245. The German Explanatory Note was in accord with this version: BT-Drucksache 1144, p.40: 'Nach der Entstehungsgeschichte war dabei nicht beabsichtigt, an dem früheren Rechtszustand etwas zu ändern.' This approach is repeated by Becker, pp.111/112. See also Helm, Frachtrecht, Art.17 CMR, Anm.4 and the literature cited there. This material is encountered again at § 4 below.

23. Helm, Haftung, pp.106-111; Helm, Frachtrecht, Art.17 CMR, Anm.4: 'Die Frage ist überwiegend von theoretischer Bedeutung da die Ergebnisse weitgehend mit der hier vertretene Auffassung übereinstimmen.'

24. H. Roesch, VersR 1976, p.711: 'Denn Für die Rechtspraxis dürfte es irrelevant sein, ob die Frachtführerhaftung nach Art.17 Abs.1 CMR nun im Hinblick auf die Haftungs-befreiungsmöglichkeit nach Art. 17 Abs.2 CMR Gefährdungshaftung oder Verschuldenshaftung ist. Es kommt vielmehr allein darauf an, dass der Frachtführer sich von seiner ihm in Art.17 Abs.1 CMR auferlegten Haftung durch den Beweis befreien kann dass der jeweilige Schaden durch Umstände verursacht worden sei, die er nicht vermeiden und deren Folgen er nicht abwenden konnte.'

25. Edis, p.99: 'Die Frachtführerhaftung in der CMR ist als reine Gefährdungshaftung normiert.'

26. U. Zachert, Gefährdungshaftung und Haftung aus Verschulden im deutschem und französischen Recht, Frankfurt/Berlin 1971, p.194. This monograph deals with the theories which are raised in both countries. Despite the different methods of approach in each country generally one arrives at the same result and appreciation of the developments which have occurred in this sector of private law.

27. Rodière, Sirey, no.537; Rodière, Dalloz, no.223. Cf. also DMF 1978, p.455.

the CMR belongs to the (heavier) category of 'présomption de responsabilité',²⁸ in which case he will be relieved of liability only where he demonstrates a cause which is not ascribable to him.

Just as in Germany so also in France it appears that the significance of the distinction lies in the difference in the burden of proof. In particular this difference emerges when the cause of the damage remains unknown. Following his classification of the transport contract, Rodière states:

'Il ne suffit pas que le voiturier émette une hypothèse et l'étaye par les arguments plus séduisants. Il doit établir la cause du dommage et qu'elle ne lui est pas imputable.'²⁹

In comparison with the situation in Germany it is equally important in the light of the interpretation of Article 17 CMR that Rodière is of the opinion that the carrier can successfully invoke the formula expressed in this Article in more cases than if he were to endeavour to exonerate himself on the basis of national law.^{30,31}

The view of Rodière is shared by Loewe³² and Nickel-Lanz. The latter also points out that the drafters originally proceeded from the concept of 'présomption de faute'.³³

From a comparative law point of view the statement of Ridley is of importance, namely, that the liability of the carrier under the CMR occupies a middle position between the liability of the common carrier and that of the

28. Hereby the carrier under the CMR finds himself keeping company with his colleagues under the CIM, the Brussels Bills of Lading Convention and national (French) transport legislation. Rodière argues for reserving the first (lighter) category for the air carrier; Rodière, Dalloz, no.251. In the same sense: J. L. Magdelénat, *Le fret aérien*, Montreal/Paris 1979, p.124. For a critical consideration of the distinction argued for by Rodière see the present writer, *Recht door Zee* (Schadee Festschrift) Zwolle 1980, pp.95/96 and the literature cited there. As Rodière so also Putzeys, no.653 et seq.

29. Rodière, Sirey, no.527, no.543; Rodière, Dalloz, no.223.

30. Rodière, Sirey, nos.528, 542. According to Rodière the elements of *imprévisibilité* and *insurmontabilité* belonging to 'force majeure' operate only to a reduced degree. Cf. Rodière, Dalloz, no.235 note 3. The highest French court has likewise decided in a sensational case, 27.1.1981, BT 1982, p.219 that the requirement of *imprévisibilité* did not apply to Art.17(2) CMR. Cf. *Tr Comm Poitiers* 16.12.1985, BT 1986, p.237. To the extent that this decision deviates from French law cf. A. Sériaux, *Rec. Dalloz* 1982, pp.110-114 where the decision is subject to a critical review on that point.

31. For the similarity and differences between concepts of force majeure in general see E. H. Kaden, *Zufall und höhere Gewalt in Deutschen, Schweizerischen und Französischen Recht*, *RabelsZ* 1967, pp.606-631, in which he comes to the conclusion that substantial differences exist between the conceptions of force majeure employed in the different countries. In practice the temptation exists to substitute this formulation by formulations which emphasise more clearly the substantive requirements. Ramberg, p.226 gives in contrast his judgement that little difference exists between the German, French and English conceptions of force majeure.

32. Loewe, no.153

33. Nickel-Lanz, nos. 126, 129.

private carrier and consequently is not linked to national law.³⁴ Equally important is that Clarke, just as Rodière, holds the view that unforeseeability is not required by Article 17(2) CMR.³⁵

When one surveys the results of this tour around the heavily terminologically and theoretically tinted issue of the basis of the carrier's liability, the conclusion appears to be justified that the significance of differences, which vary between the countries, is minimal. Moreover, because many of the judicial decisions falling to be decided are dependent on the factual circumstances, one is wary of drawing general conclusions.³⁶ Having regard to the content of the (verbal) conflict summarised above there appears to be sufficient reason to divert attention from the basis of liability in order to direct it to factors of an evidentiary nature inherent in the problem under discussion.

It is frequently pointed out, as appears from the above and will transpire even more clearly in the following sections, that it ultimately comes down to the proof required in the proceedings.³⁷ The function of proof in respect of transport risks appears from the system of the CMR. By the creation of presumptions of causality based on rules of experience it is attempted in advance to share the risks.³⁸ The parties to the transport can discount these risks in their course of dealings. The risk is built into the liability model via the division in the burden of proof, with the result that one can state that the transport risk can further be effectuated via the risk of proof. The stability of this liability model, based on economic motives, ought to be safeguarded. Particular attention will be paid below to the evidentiary elements in the CMR liability model.

34. J. Ridley, *The Law of the Carriage of Goods by Land, Sea and Air*, London 1982, p.61. On the substance of the concepts of common and private carrier, pp.7, 20. Cf. likewise O. Kahn-Freund, p.197; Clarke, no.66; Putzeys, no.742. See also Hill/Messent, p.68.

35. Clarke, no.78, who is incorrectly still of the opinion that such condition is required in French caselaw. That view was overruled by Cass. 27.1.1981, BT 1981, p.219, on which see § 5.

36. Thus R. Wijffels, ETL 1976, p.229 states that courts in the Netherlands, northern Belgium and northern Germany are less strict on carriers than other courts; Clarke, no.78 states that Belgium and Germany are strict but Korthals Altes/Wiarda, p.136 are of the contrary opinion that courts in Belgium and France uphold less strict force majeure views than their colleagues in Germany. The latter view is the least correct, as will appear in § 5. The strong indignation over the rigid CMR liability system, as reproduced by the FIATA Report, p.2, appears to be too unshaded in meaning.

37. Cf. K. Grönfors, *RabelsZ* 1978, p.201: 'Wie gross ist aber wirklich der Unterschied zwischen diesen beiden Typen von Haftungsregeln? Nicht so wesentlich, wie man vielleicht im ersten Augenblick annehmen möchte. Alles hängt davon ab, welche Anforderungen man an der Entlastungsbeweis bei der Verschuldenshaftung stellt.' In similar vein, Helm, *Haftung*, p.106: 'Gerade die Beweisregelung ist sehr oft für die Haftung entscheidend und kann daher nicht ausser acht gelassen werden.'

38. Clarke, no.82.

§ 3. Importance of proof

The path from the (theoretical) discussion on the basis of the liability to the establishment of a solid duty to compensate for damage passes through the indispensable link of the law of evidence. Giving solid form to substantive law occurs through the elements of the law of evidence, such as means of proof, the burden of proof, its division, and evaluation of proof; in other words, to have (substantive) law on one's side is not necessarily to have (formal) justice dispensed. Whoever is thus of the opinion, now that the spotlight has shifted from the basis of liability to shine on the law of evidence, that consequently the area of theorising is also left behind is, as will emerge directly, deceived.

The caselaw indicates that in practice there is no absolute certainty as to the place of proof in the system of the CMR liability model.³⁹ On this point even some writers do not regard everything as clear.⁴⁰

The CMR liability model is composed of substantive (Art.17 CMR) and evidentiary (Art.18 CMR) elements. The interplay between these provisions must not be lost sight of. The question, what actual proof can the carrier be required to adduce can be reckoned one of the most important problems of liability under the CMR.⁴¹ The carrier is relieved of liability if he can discharge the heavy burden of proof imposed on him by Article 18(1) CMR. This burden is eased for him by Article 18(2) CMR if the carrier can demonstrate one of the circumstances specified by Article 17(4) CMR, assuming that such circumstances, in the light of the other facts of the case, are considered to be the cause of the damage. In turn it is open to the claimant to prove that the specified circumstances (alone) could not be the cause of the damage.

With the procedural law technicalities of the (re-division) of the burden of proof one finds oneself in a controversial area of the law.⁴² The drafters of the Convention tried, following other transport law conventions, to banish this problem by including a separate provision concerning the burden of proof (Art.18 CMR) and to prescribe this as mandatory law (Art.41(2) CMR). Whereas the division in the burden of proof is generally to be gleaned on the basis of the formulation of a legal rule, the Convention in Article 18 CMR permits of no possible doubt. The task of adducing evidence laid on the carrier

39. Thus, e.g., Donaldson J in *Ulster-Swift v. Taunton Meat Haulage* [1975] 1 Lloyd's Rep 506 in regard to Art.18(2) CMR: 'This I find a very curious paragraph' and on appeal Megaw LJ [1977] 1 Lloyd's Rep 351: '... the elaborate wording and the complexity of the articles [17 and 18] do not provide a direct or a well-surfaced road to the destination.'

40. Dorrestein, no.210; Korthals Altes/Wiarda, p.140. Contra Clarke, no.83: 'the pattern formed by the cases is surprisingly clear'.

41. D. Glass, ETL 1979, p.711 n.46. See also Hill/Messent, p.104: 'Unfortunately, there is no internationally accepted code of rules of evidence, and the degree of proof required may differ from one jurisdiction to another.'

42. Thus previously, H. J. Scheltema, *Bewijsrecht*, Zwolle 1939, p.44, stated: 'The question of the division of the burden of proof is one of the most difficult in evidentiary law, if not of the entire civil law.' B. M. Maassen, *Beweismassprobleme in Schadenersatzprozess*, Cologne 1975, p.125 declared the law of evidence totally chaotic and argued for a complete revision. At p.135 he termed the reversal of the burden of proof in transport law confused.

by Article 18(1) CMR flows directly from liability according to Article 17 (1) CMR. As was stated in the preceding section, this legal consequence is the most important reason to consider the principal obligation of the carrier as a result obligation. Article 18(2) CMR changes the turning point in the evidentiary position and consequently in the legal position of the carrier through the introduction of the presumptions of causality based on the circumstances specified in Article 17(4) CMR. The quicker this turning point is reached on behalf of the carrier, the more in effect the character of the contract as a result obligation is deprived of meaning.⁴³ In order to preclude every doubt a regulation in the system of the Convention concerning the burden of proof is not an extravagant luxury. Thus, Article 18(2) CMR functions in practice as the central provision concerning the exoneration of liability of the carrier. It is no surprise, therefore, that, besides the historically and dogmatically charged Article 17(2) CMR, Article 18(2) CMR appears to be the most tested provision in the CMR system of liability. The possibilities offered by Article 18(2) CMR produces the result that in a relatively uncomplicated manner the carrier is relieved of the heavy liability according to Article 18(1) CMR. On his own he would generally not achieve that or at best only with much effort. That the circumstances specified in Article 17(4) CMR are usually referred to with the adjective 'privileged' is thus fully justified.⁴⁴

A considerable degree of uncertainty appears still to exist in practice as to the application and operation of Article 18(2) CMR.⁴⁵ It is not readily imaginable how the drafters of the Convention could have avoided these uncertain factors.⁴⁶ The problem is not so much of a transport law nature as one of the law of evidence. On this, given the intended division of transport risks, the maximum has been done.⁴⁷

Under what circumstances does Article 18(2) CMR produce a favourable result for the carrier? The carrier is required to prove that the damage for which it is alleged he is liable could have been the result of one or more hazards which are inherent in the circumstances specified in Article 17(4) CMR. It appears from Article 17(4) CMR and Article 18(2) CMR that not only must the proof be directly related to the case in hand but also that only a relatively low degree of proof is demanded.

The proof demanded by Article 18(2) CMR⁴⁸ fluctuates between two

43. See Van Oven, no.127.

44. Thus, e.g., Heuer, p.91; Dorrestein, no.210. Contra Putzeys, no.678.

45. D. Glass, ETL 1979, p.711, n.46: 'Much of the difficulty exercising the continental courts is caused by the problem of how much content to infuse into the words "establishes ... in the circumstances of the case," in art.18(2).'

46. This problem is inherent in the majority of transport conventions; see, Hill/Messent, p.104.

47. This is probably not the case with Art.18(4) CMR in regard to which there is insufficient awareness of the implications of the preceding rules. Cf. on this the critical extensive analysis of D. Glass, ETL 1979, pp.687 et seq. – likewise to be dealt with in § 4.

48. The 'establishes' mentioned in Art.18(2) CMR requires less of the carrier than the imposed proof of Art.18(1) CMR; Loewe, no.106; D. Glass, ETL 1979, p.695.

extremes. On the one hand, it is insufficient, if the carrier wishes to attain the coveted turning point, that he suffices by demonstrating the special circumstances specified in Article 17(4) CMR. On the other hand, proof of the specified circumstances is made more onerous in the sense that the carrier must demonstrate the causality between those circumstances and the damage. Both extremes deserve to be carefully avoided. Judicial practice has not always fully appreciated this.⁴⁹ Apparently encouraged by the text of Article 18(2) CMR the attempt has been made to allow the carrier to benefit also in those cases of the rule being favourable to him when it is theoretically not to be excluded that the damage could be traced to one of the circumstances mentioned in Article 17(4) CMR. A number of courts have clearly opposed this view by pointing out that it is not a question of what is theoretically possible but rather of what on the basis of actual facts is probable.⁵⁰ It is from this line of approach that one can perhaps explain why certain judicial decisions, opposed to the view that on the basis of Article 18(2) CMR one could suffice with a demonstration of a theoretical possibility, have tipped the balance the other way by demanding so much factual proof that the intended lightening in regard to the proof of causality has been reduced to a nullity.⁵¹

If the turning point in favour of the carrier is eventually attained, the claimant in turn can attempt to undo the effect thereof by proving that the

49. Helm, *Frachtrecht*, Art.18 CMR, Anm.13 expresses himself in somber terms: 'Die internationale Rechtsprechung zu diesem Problem ist wenig aufschlussreich, da die Rechtsordnungen in den Einzelheiten des Beweisrechts schon im grundsätzlichen keine Übereinstimmung zeigen.' Similarly, Hill/Messent, pp.104-105. Contra Clarke, no.83 (see note 40 above).

50. See for a vain appeal by the carrier to the circumstances specified in Art.17(4) CMR for example the following caselaw:

Rb. Dordrecht 22.12.1971, S&S 1972, 50: the carrier cannot suffice with vague assertions.

Hof Den Bosch 5.1.1979, NJ 1979, 527: the concrete risks ought to be traced back not to theoretical but to actual causes.

OLG Frankfurt am Main 8.7.1980, VersR 1981, p.85: 'Zur Darlegung der Transportgefahr i.S. von Art.18 Abs.2 CMR genügt nicht nur die Aufzeichnung der theoretischen Möglichkeit oder die alleinige Tatsachenbehauptung. Vielmehr müssen die tatsächlichen Umstände unstreitig sein oder bewiesen werden, aus denen sich die Gefahr ergibt.' Also, extensively, BGH 4.10.1984, VersR 1985, p.133.

CA Lyon 7.10.1976, BT 1977, p.85: 'il ne suffit pas une allégation gratuite.'

CA Nîmes 29.10.1980, BT 1981, p.256: 'mais attendu que la preuve du vice de la marchandise doit être positive et résulter d'une constatation matérielle certaine et non d'une simple affirmation.'

Likewise: CA Paris 3.11.1970, BT 1971, p.213; CA Paris 29.4.1972, BT 1972, p.194. Cf. also Cass. 4.2.1986, BT 1986, p.1967.

Cf. Heuer, p.113; Libouton, 1973, p.50; Loewe, no.170; Rodière, Sirey, no.527 as also BT 1974, p.290, no.81. D. Glass, ETL 1979, p.695; Nickel-Lanz, no.135; Clarke, no.83; Groth, p.61. BGH 4.10.1984, VersR 1985, p.133.

51. Such is the case in particular regarding the frequently claimed ground specified in Art.17(4)(c) CMR (handling, loading, etc., of the goods by the sender).

OLG Schleswig 30.8.1978, VersR 1979, p.141: (Die Darlegungslast) 'wird aber nicht schon dadurch genügt, dass der Frachtführer nur eine theoretische Möglichkeit aufzeigt, wonach der Schaden durch eine unsachgemässe Verladung entstanden sein kann. Vielmehr muss er – wie sonst bij Erschütterung eines prima-facie-Beweises – den Beweis für Fehler beim Beladen erbringen. Ist dieses Beweis geführt, *dann* wird vermutet ...'

In the same vein: OLG Dusseldorf 13.1.1972, VersR 1973, p.178; Kammergericht 13.3.1980, VersR 1980, p.948.

damage cannot be ascribed to the circumstances advanced by the carrier. For this the 'normal' proof is, according to Article 18(2) second sentence CMR, required.⁵² The allegation and proof by the sender alone that (also) other causes have resulted in the damage need not necessarily lead to the carrier no longer being able to profit from the previously mentioned privileged position. It is for the claimant to prove that the situations advanced by the carrier have absolutely or in part not occasioned the relevant damage.^{52a} Such proof will in practice generally be accompanied by proof of other causes of the damage, which in principle are for the risk of the carrier. The carrier can still attempt to avoid his liability by, for example, invoking (what is for him the heavier) Article 17(2) CMR. If the claimant adduces only partial proof in refutation, the carrier continues to profit from his favourable legal position to the extent that the causes advanced by the claimant leave the circumstances advanced by the carrier untouched. The result of this is that according to Article 17(5) CMR the damage will be shared between the parties to the extent that the causes advanced by both have contributed to the damage.⁵³ The weighing of (possible) causes contributing to the damage, to which the judge may be compelled by Article 18(2) CMR in conjunction with Article 17(5) CMR, is a subtle matter. The proffered space between the above-mentioned extremes ought to be made use of by the judge, and in a reasoned manner. The judicial decisions would then be as variegated as the instances that occur in practice.

It is therefore desirable that, with a view to a comparison of like cases, the judge should attempt as much as possible to be informed of decisions of colleagues in other countries. One should, however, not lose sight of the fact that with this pure evidentiary law problem there are numerous other, more or less accidental, factors that play a role in bringing about a judicial decision, which ostensibly hinders the movement towards a uniform liability model.

From the above it appears that the bottle-necks in the CMR system concern in particular the question what precise burden of proof rests upon the carrier according to Article 18(1) CMR and where exactly lies the turning point of the evidentiary advantage expressed in Article 18(2) CMR.⁵⁴ The power of the Convention drafters extended no further than the establishment of the system of liability and in particular the mandatory law character of the division of the burden of proof (cf. Art.41(2) CMR). At the same time the key provision of the division of the burden of proof (Art.18(2) CMR: 'in the circumstances of the case') allows the judge considerable freedom. Making the system operational occurs ultimately by the parties and the judges. How

52. On the ground of practical considerations R. Züchner, *VersR* 1967, p.1028, considers it fair not to impose too high requirements for this proof.

For that reason both D. Glass, *ETL* 1979, p.697 and Clarke, no.83 have heavily criticised the judicial decisions regarding *Ulster-Swift v. Taunton Meat Haulage* (on which § 5.4.4 below) whereby the carrier incorrectly got the worst of it by requiring of him despite the wording of Art.18(2) CMR a *probatio diabólica*. In English evidentiary law the criterion of the balance of probabilities is employed, see Clarke, no.82; Hill/Messent, p.106.

52a. BGH 28.3.1985, *VersR* 1985, p.754.

53. Cf. Heuer, pp.114, 115; Nickel-Lanz, no.151; Clarke, no.84; Hill/Messent, p.103.

54. By D. Glass, *ETL* 1979, p.687 vividly typified as 'The Divided Heart of CMR.'

the judges have discharged this task will be examined in § 5. Prior to this it is necessary to be acquainted with the history of the creation of the liability system.

§ 4. Origin of the system

The object of this section is to ascertain what illumination can be cast on the basis of the CMR liability model by an enquiry into the creation of the model.

The comparative law Unidroit Report, which underpinned the CMR negotiations, posited the thesis that under the then applicable law there were broadly two systems to be considered in the domain of the liability of the carrier.⁵⁵ One of those systems was to be characterised by absolute liability with a restricted number of grounds of exoneration (the so-called French system).⁵⁶ The other, the German system, which was more favourable to the carrier, was based on the concept of fault, albeit with reversal of the burden of proof.⁵⁷ Although this dichotomy, as also the division by country,⁵⁸ strikes the present writer as too schematic, too lacking in nuance, the tenor thereof is clearly apparent, namely, the influence of the 'théorie du risque' in the first model.⁵⁹ Despite this, the first draft to emerge from the tripartite committee appears to proceed from the second: the liability of the carrier rests upon fault (negligence), with reversal of the burden of proof.⁶⁰ That an important difference was apparently seen with, for example, the CIM is a clear indication that the above two-part division was not persuasive. A discussion of the basis and elaboration of the system of liability, with all its inevitable confusion, can therefore not be excluded. The Report stated thereover:

'Une échange de vues extrêmement serrée a eu lieu sur les principes que devrait consacrer la convention sur le contract de transport routier international dans la domaine de la responsabilité du transporteur.'⁶¹

55. UDP 1948, Carriage by road – Doc 1, Rome March 1948.

56. Op. cit., p.21. Within the sphere of this system are to be found Belgium, The Netherlands, Italy, Luxemburg, Portugal, Roumania, Spain and England.

57. Unidroit ascribed Switzerland and the Scandinavian countries to the German system.

58. Whether the German system was then so 'subjective' may be doubted as appears below from the history of the concept of force majeure. One should be careful with division into categories. Thus Korthals Altes/Wiarda, pp.12, 13 distinguish sharply between an Anglo-Saxon and a continental system. The question is whether such a distinction is supportable; cf. K. Grönfors, *RabelsZ* 1978, p.702.

59. For the course of this theory in France see W. Vogt, *Die Entwicklung der Responsabilité sans faute in der neueren französischen Lehre und Rechtsprechung*, Berlin 1975.

60. TRANS/WP9/11, 10 October 1949, Nickel-Lanz, no.126; as also E/ECE/TRANS/SCI/116, 30 April 1951, p.6.

61. E/ECE/TRANS/WP9/13, 1 May 1950, p.12.

It is worthy of mention that at the same meeting a veritable assault was mounted by the Netherlands delegate against the traditional liability model, which was characterised by a division of transport risks between the carrier and the person entitled to the goods. The most important reason for replacing the then, and still, operative pattern was, according to the Netherlands delegate, that the traditional system proceeded too much from opposing interests of the parties concerned with the carriage. Although the drafters of the Convention did not react at once with particular enthusiasm to the proposals from the Dutch side and in contrast followed the considerably less original Belgian proposal, namely, to attune the CMR as to liability to the CIM, the Netherlands was offered the opportunity to elaborate and explain its proposals in a note.⁶²

The principal points of the proposal were the following. In the first place, the regulation would proceed less than had previously been the case from opposing private law interests. The insight that the joint interests of the parties concerned with the carriage are of primary significance ought to be allowed to break through. In the second place, the note pointed out that the system of compensation for damage in the traditional transport rule rested on the uncertain method of reconstruction of facts that had occasioned the damage, which was not only impracticable but also generally inequitable. Finally, the traditional liability model was too dependent on the parties' position of power. In place of this the proposal⁶³ argued for the introduction of a system of compensation for damage the nucleus of which was that all imaginable damage would be divided in categories and in which would be stated who would bear the risk of what percentage of each category.⁶⁴

The note was subsequently submitted to a committee of experts for appraisal.⁶⁵ Meanwhile the secretariat of the European Commission had refuted the Netherlands proposal in an extensive note;⁶⁶ likewise, the delegate of the International Chamber of Commerce had presented his verdict on the note to the committee of experts.⁶⁷ These experts lined up behind the fundamental criticism of the secretariat to the Netherlands proposal.⁶⁸ While the Nether-

62. TRANS/WP9/16, 22 December 1950.

63. TRANS/WP9/16, Annex.

64. The proposal goes back, according to H. Schadee, *NJB* 1967, p.156, to Dijkmans van Gunst and is also broached in connection with the preparation of an inland waterways convention (alternative phenomenological system).

65. E/ECE/TRANS/SCI/116, 30 April 1951, p.2.

66. E/ECE/TRANS/SCI/116, Annex, pp.1-8.

67. Annex, pp.9, 10.

68. Same document as in n.65, pp.2-5. One may ask what motivated the Netherlands delegate. Although it cannot be denied that the proposal contained elements deserving, even then, of further study, it must from the very outset have been *luce clarius* that the chance of acceptance of the proposal was minimal. Besides originality and courage a certain naivety, having regard to the revolutionary character thereof as well as the circumstances accompanying its presentation, cannot be denied. The proposal amounts to a deprivatisation of the transport contract and regarded the entire 'transport happening' as a 'service social' whereby possible injurious consequences were

lands project was shunted aside, the decision was taken to continue along the path already taken of the traditional liability model and to adapt the draft agreed in 1950 at Pallanza, in which the middle ground was occupied between the (former) CIM and the Hague Rules, in the direction of the results of the most recent CIM revision conference at Wengen at which the decision was taken for a new, (and still applicable), version of the circumstances beyond one's control (cf. Art.27(2) CIM).⁶⁹ In the next succeeding draft, agreed at Rüdesheim in 1956 following the CIM revision meetings at Wengen in February 1951 and Montreux in April–May 1951, one encounters the following formula: the carrier is relieved of liability if he proves that the damage was caused, *inter alia*, by:

'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.'⁷⁰

The chairman of the quadrupartite committee, the Swede Bagge, justified this adoption, besides referring to the preceding discussions in which a preference had been expressed for the CIM model, with the following explanation:

'Comme la nouvelle solution est plus claire et satisfait mieux aux exigences juridiques que l'ancienne rédaction, il conviendra dans la mesure du possible d'adopter cette solution.'

It is evidence of honesty that in the next breath he added:

'Il serait cependant à désirer que la signification de l'expression "des circonstances que le transporteur ne pouvait pas éviter ..." soit éclaircie.'⁷¹

Subsequently he drew attention to the fact, which, it was later to transpire, was an important fact, that the formula did not imply 'unforeseeability' to the letter, whereupon he recommended that it be investigated whether this was indeed the intention of the drafters of the formula. The clarification desired by Bagge never emerged during the subsequent course of the negotiations. One gathers rather the impression that, as is usually the case at international-diplomatic meetings, the uncertainty touched upon by Bagge was swallowed in compromise and in any event was preferred to the drafting of a new formulation.

As will emerge from what follows, the uncertainty signalled by Bagge has since given rise to deep divisions of meaning. Perhaps it is more correct to say that in fact the existing controversy as to the concept of 'höhere Gewalt', the

spread via a system of *forfeit* among the interested parties involved with the transport.

69. See further on this Chapter 1, § 2. Further E/ECE/TRANS/SCI/116, pp.5, 6.

70. TRANS/WP9/11, Rev. 1, 8 January 1952, p.16. In this phase the evidentiary rule is not yet separated from substantive law. As far as the CIM is concerned that occurred, according to a statement of Bagge (*ibid.*, p.2), only in October 1951 in Bern. The IRU conditions also follow this trail: E/ECE/TRANS/WP9/16, Annex 2, p.6 and Annex 3, p.4.

71. *Ibid.* p.2. Hill/Messent, p.76: 'This expression is somewhat unspecific and even loose to the mind of a common lawyer.'

elimination of which was precisely what was attempted with the assistance of the new formula, perpetuated itself in a new form.

In a subsequent draft the rule as to proof in the substantive (present) Article 17(2) CMR was separated and taken up as a distinct provision in Article 18 CMR.⁷² The matter was hereby certainly not settled: *in cauda venenum*.

In April 1955 a special working group extended the liability regulation with two paragraphs.⁷³ The first paragraph regulated the liability of agents and servants.⁷⁴ Of more substance was the second provision, following directly upon the exoneration rule, which is now to be found in Article 17(3) CMR (liability for defective condition of the vehicle). The reasons for these supplements were not given. The first provision is closely related to Article 39 CIM and to Article 20 Warsaw Convention. As for the second addition, which is unknown to other conventions which served as models for the CMR, it can be stated, having regard to the positional placing of the supplementary provision, that it was intended to furnish the new force majeure formula with a wider scope than had formerly been possessed by the concept of 'höhere Gewalt'. The following may serve as explanation of this.

In the period following the CIM revision meeting at Wengen in 1951 at which the new force majeure formula of Article 27(2) CIM (Art. 17(2) CMR) was drafted, the discussion of the content of the formula got under way and penetrated to the drafters of the CMR. With the addition of Article 17(3) CMR, by which a claim to a (latent) defect in the vehicle was excluded, it was implicitly admitted that other factors within the operation of the carrier could in principle be considered as grounds of relief within the meaning of Article 17(2) CMR. Confirmation of this standpoint can be derived from the German reaction, supported in this only by Austria, to the formulation of the new force majeure formula, whereby it was sought further to supplement that formula with the words 'extérieures à l'exploitation'. The purport of the proposal was clear: the thus altered formula would thereby be returned substantively to the same narrow criterion as previously had been prescribed for the concept of 'höhere Gewalt' in the CIM.⁷⁵ In the interests of certainty the drafters apparently wanted to oppose this at that time *voguish* interpretation of the new formula, which was promoted by Von Nanassy. This authoritative writer argued that the element 'arising externally', although to be sure it was not to be derived from the letter of the new formula, nevertheless this did not hinder reading such element into the formula; to state such element explicitly was, according to Von Nanassy, unnecessary given that a cause of damage arising within the operation could generally be considered as

72. The English translation contained for that matter the term 'negligence' (now: 'wrongful act or neglect') and 'circumstances over which the carrier had no control' (now: 'circumstances which the carrier could not avoid').

73. TRANS/WP9/32, 10 May 1955, Annex 1, p.10.

74. 'Le transporteur est responsable du fait de ses représentants ou de ses préposés, agissant dans l'exercice de leur fonctions, comme de son propre fait.'

75. Precisely the same attempt was put into effect on the German side at the CIM revision of 1952; cf. Boudewijnse, p.169.

a circumstance that must be regarded as capable of being avoided.⁷⁶ This view, on which more directly, rests to a great extent on the premise that one can deduce from the deliberations which led to the acceptance of the new formula that merely a formal and not a substantive amendment was intended.⁷⁷

Finally, the attempt on the part of the Netherlands – encouraged perhaps by the running aground of the German proposal? – during the final session to interpret the force majeure formula in a way diagonally opposed to the German view was striking. The proposal suggested the addition of ‘except in circumstances provided for in Article 17 paragraph 2’ to ‘The carrier shall not be relieved of liability by reason of the defective condition of the vehicle’ in the (present) third paragraph of Article 17 CMR.⁷⁸

Adoption of that proposal would have had as a consequence that in certain circumstances a defective vehicle would have led to exoneration of liability, namely, when no blame would attach to the carrier for that fact. The proposal was rejected and the provision tightened up.⁷⁹ The other paragraph (liability for agents and servants) imported into the preceding draft was finally removed to a separate Article 3 CMR, at the same time constituting a separate Chapter II of the Convention.

It appears from this historical review that the drafters of the Convention preferred to chose the liability model of the CIM above an original draft. The advice offered on the part of the Belgian delegate played an important role in this: not only was the advice to follow the CIM, but Belgium together with other countries also took the initiative to amend the CIM on the crucial matter of the view of force majeure.⁸⁰ The Netherlands proposals, originally proceeding from an entirely different system of liability, and which argued for a particular interpretation of the new force majeure formula, appear by contrast to lead to a fiasco.

Before drawing particular conclusions from the historical facts presented above, in particular in regard to the exoneration rule laid down in Article 17(2) CMR, one should ascertain what was the ratio of the substitution of the then existing ‘höhere Gewalt’ in international rail transport by the formulation that has been encountered since 1952 in Article 27(2) CIM and from the outset in Article 17(2) CMR.

To this end some attention must be paid to the view of Von Nanassy as that is set out in the passages at pp. 515-517 and pp. 521-537 of his book. As has already been said above, this author, basing himself on the relevant documents containing the deliberations which led to the partial revision of

76. Nanassy, p.534.

77. Cf. Deutsche Bundestag, Drucksache 1144, p.40.

78. It was proposed that after the word ‘exciper’ in the French text should be added: ‘que dans les conditions prévues au paragraphe [now] 2’; TRANS/WP9/35, 6 June 1956, p.14. A. von Oven (‘Recht door Zee’, p.145) considers this standpoint as typical of the obstinacy of the misunderstanding existing in The Netherlands concerning the concept of force majeure in sea and inland waterways law.

79. TRANS/WP9/35, p.14.

80. Nanassy, p.515; Nanassy-Wick, p.188; Boudewijnse, p.166.

the CIM in 1952, emphasised that merely a formal and not actually a substantive change was involved.⁸¹ This view brought with it that the liability of the carrier remained based on 'Gefährdungshaftung'. The carrier would, according to this view of things, only be able to relieve himself of liability in the event of 'höhere Gewalt' and not for 'niederer Zufall'. The mainspring of the problem came from the different views on the concept of 'höhere Gewalt'. Slowly the dominant view became that 'höhere Gewalt' consisted of four elements. The damage-producing causes should be external to the operation, exceptional and unforeseeable; in addition, the causes and their consequences must not be capable of being prevented.⁸² According to Von Nanassy, these four elements were not eliminated by the new CIM formula. As a consequence he concluded that the new formula did not constitute much of an advance – on the contrary, the diversity of meaning would increase.⁸³ This last might originally have been the case with in particular the law of rail transport, but as far as the CMR is concerned his prophecy has come to naught. The historical enquiry has shown that the interpretation problem was signalled and met in time. Furthermore, Von Nanassy's reading of the historical facts is opposed by others. Here one may simply refer to the concise and lucid treatment of this question by Becker.⁸⁴ This writer points out that the view of Von Nanassy was certainly shared by a number of participants at the conference but, on the other hand, not by a great number of others. Von Nanassy's reading appears to Becker to be incorrect.⁸⁵

Whatever the above case may be, there is another argument, which Von Nanassy and also Wick ignore, which has more weight. The view of those authors attaches too little significance to the intentions of the drafters of the new force majeure formula: to ease the development of the concept of force majeure loose from a particular national conception. A term that is so dogmatically laden as 'höhere Gewalt' is too fixed and therefore unsuitable for the development of the law in international practice. Not only Becker but

81. Nanassy, p.516 The revisor of his book, J. Wick, unreservedly maintained the view at that time held by Von Nanassy; Nanassy-Wick, pp.245-247. The latter book is less suitable for judging the dispute as the text is removed from its historical context and has a less differentiated approach. See for a brief review of the views held at the time of the CIM revision conference, Boudewijnse, pp.166-169.

82. Nanassy, p.532. In the extensive literature in which the concept of 'Höhere Gewalt' is broached one encounters the following description: Eine aussergewöhnliches – nicht in dem in Frage stehenden Betrieb entstehendes, sondern in diesem Sinne – von aussen kommendes, regelmässig unvorhersehbares, auch durch vernünftigerweise zu erwartende, wirtschaftlich zumutbare Sorgfalt nicht abzuwendendes Ereignis, das auch nicht wegen seines Häufigkeit in Kauf genommen werden muss; Becker, p.109; Muth-Glöckner, Art.17, Anm.3.

83. Op. cit., p.536.

84. Becker, pp.108-112. The view of Becker that the element of unforeseeability is maintained is, however, incorrect.

85. See also F. Seligsohn, briefly reproduced by Boudewijnse, p.167. The view of Becker, that changes in substance are effected, is shared by the CMR writers Helm, Heuer, Loewe, Muth, Precht/Endrigkeit and Nickel-Lanz. The rail literature remains in general attached to the old doctrine; cf. J. Haenni, International Encyclopedia of Comparative Law, Law of Transport, Vol. XII, Carriage by Rail (Chap. 2), no.243.

also other authors have elucidated this argument and have given it as their view that the development of the law derives more benefit from a more descriptive exoneration rule. In addition, this offers the possibility of autonomous convention interpretation.⁸⁶ This aspect is clearly elucidated, not only by Muth,⁸⁷ but also by Loewe:

‘It is essential, when applying the formulation used in the CMR, to try not to be influenced by national definitions of this kind or by the meaning which national courts or jurists attributed to them.’⁸⁸

Rodière expressed himself in the same vein, pointing out the importance of this in the light of the interpretation of the Convention in the Anglo-Saxon countries.⁸⁹

The correctness of the view of these writers would appear to be confirmed by the fact that both caselaw and legal literature have eased Article 17(2) CMR loose from the German view, operative at that time, as that was published by Von Nanassy and Wick.⁹⁰

However much a certain correction of the standpoint adopted by Von Nanassy, both from an historical point of view as from that of uniform law, must be applauded, hard-headedness directs that a number of facts not be lost sight of. When one becomes acquainted with the cases that Von Nanassy examined in order to judge whether these would fall within the scope of the new formula of Article 27(2) CIM (Art. 17(2) CMR), one cannot escape the impression that often the same practical result would be reached when compared with the old concept of ‘höhere Gewalt’. As a result of the casuistical thrust of the issue, practical cases will for the greater part be within the scope of both formulae.⁹¹ Placing the controversy in better perspective is further justified for the law of road transport by the addition of Article 17(3) CMR (no possibility of relief due to the defective condition of the vehicle): a victory for the view of Von Nanassy.⁹²

Reviewing the entire picture historically, the following conclusions would

86. Cf. Chapter I, pp.16 et seq.

87. Muth-Glöckner, Art.17, Anm.2.

88. Loewe, no.153.

89. Rodière, p.279, no.75; cf. Rodière, Sirey, nos.542 et seq. In the opinion of the present writer Hill/Messent, p.69, fail to perceive this aspect.

90. Just like Von Nanassy so also Dorrestein, no.206, fails to understand this argument and, by linking to a particular national conception, falls into the same error as Von Nanassy at that time, whom he so savagely attacked. Similarly, H. J. Finger, *Internationale Eisenbahnverkehr*, Berlin 1965, pp.74 et seq.

91. Nanassy, p.535. To an extent this question also appears capable of being described as largely a terminological competition; experts gave the view at that time that no real changes for practice were to be expected, see Boudewijnse, p.168.

92. Nanassy, p.532: ‘Es können nie Ereignisse als höhere Gewalt betrachtet werden, die ihren Ursprung in dem Zustand oder in der Beschaffenheit der Einrichtungen (Material oder Personal) der Eisenbahn haben.’ Cf. Nickel-Lanz, no.128.

appear to be justified. Whereas one groped originally in the dark as to the substance that the drafters of the Convention had wanted to confer on Article 17(2) CMR, an exoneration formula taken from the CIM, greater clarity resulted eventually from the addition of Article 17(3) CMR and the rejection of both the German and the Netherlands proposal to modify paragraph 3 in the manner thereby proposed. The extent to which the caselaw and legal literature has ascertained the historical state of affairs concerning the basis of the liability should emerge amongst other things in the following section.

§ 5. Substance of the liability model

§ 5.1 Introduction

This section contains an analysis of the liability model as that has been given shape and form in caselaw and legal literature. The analysis follows the system of the Convention (Artt.17 and 18 CMR), in which expression is given to the liability of the carrier. As far as the possibilities of relief are concerned, the system exhibits a division in two parts, consisting of general and exceptional grounds of exoneration, being Article 17(2) CMR and Article 17(4) CMR. There is thus a fairly clear differentiation in the regulation of the liability of the carrier.

As is the case across the entire front of the law of transport, both categories of grounds of exoneration have given rise to questions specific to each ground. Thus, for example, one of the weightier questions is how far the scope of the general force majeure formula (Art.17(2) CMR) extends. In connection with the second category, that of exceptional grounds of exoneration, a question that plays a role in particular is, with what evidentiary conditions must the carrier comply according to Article 18(2) CMR in order to obtain the benefit of the legal consequences as also the question in what regard can paragraphs 3-5 of that Article derogate from the result first arrived at.

The division into two sorts of grounds of exoneration reveals, in the light of the proof to be adduced by the carrier, a certain tension whereby the question as to the ratio of the division into two parts is justified. It is submitted that the ratio consists of the following: that the circumstances mentioned in Article 17(2) CMR do not concern exceptional transport risks, whereas those mentioned in Article 17(4) CMR are inherent in the carriage of goods and as such create an increase in the chance of damage to the goods.⁹³ It is hereby consistent that in regard to the first category (Art.17(2) CMR) a heavier burden of proof rests upon the carrier than in regard to the second category covered by Article 17(4) CMR. The term 'privileged circumstances' for those circumstances falling within the second category has become current.

It follows logically from the evidentiary law aspects deriving from this distinction that, in the interest of effecting exoneration of liability, the carrier will employ every means to escape to the second category, will use anything that will assist him over the often thorny barrier of proof of causality. The extent to which these attempts have met with success is revealed in the following caselaw analysis. Indicative of this practice is the fact that, if at all

93. Heuer, pp.78, 79.

possible, appeal is made simultaneously to different circumstances specified in Article 17(4) CMR.

The treatment of the categories mentioned here is interrupted by the damage-causing circumstance provided in Article 17(3) CMR, namely, the defective condition of the vehicle, for which no relief is possible under any condition.

Finally, it is natural to include with this matter the liability of the carrier for those persons whom he has engaged in the performance of the contract, which liability, as has been set out in § 4 above, was transferred from its original place (Art.17 CMR) and placed in a separate Article 3 CMR during the final negotiations. For the remaining paragraph 5 of Article 17 CMR, the application of which results in a division of damage between the parties, an individual treatment is not practical having regard to the fact that in principle all the circumstances mentioned in Article 17 CMR can play a role. Consequently, this paragraph will be repeatedly treated, to the extent that that is appropriate, with each part.

§ 5.2 *General grounds of exoneration (Art. 17(2) CMR)*

Article 17(2) CMR, in imitation of the CIM, distinguishes four cases in which the carrier, if and to the extent that he succeeds in his task of proving his case, is relieved of liability. These four cases are:

1. the wrongful act or neglect of the claimant (§ 5.2.1);
2. the instructions of the claimant given otherwise than as a wrongful act or neglect on the part of the carrier (§ 5.2.1);
3. inherent vice of the goods (§ 5.2.2);
4. circumstances which the carrier could not avoid and the consequences of which he was unable to prevent (§§ 5.2.3.1-4).

§ 5.2.1 *Fault or instructions of the claimant*

These first two grounds of exoneration clearly have an individual meaning and are seldom applied in practice. One is here aware that it will be easier for the carrier, instead of one of the circumstances given here, to appeal to a circumstance mentioned in Article 17(4) CMR, in particular under b, c, e and f, whereby the claimant does not need to allege blame.⁹⁴ An error by the claimant can, under certain circumstances, be the failure to furnish facts as specified in Articles 7, 10, 11 and 22 CMR.⁹⁵ The categories in question can play a role also in connection with the issue of use of an unsuitable vehicle (see § 5.3 below).

Rodière correctly points out that this ground brings with it that the term claimant must be judged as at the moment that the culpable fact manifests itself,⁹⁶ or, which may be added thereto, the instruction was given. Another

94. Cf. also Clarke, no.71; Hill/Messent, pp.72 et seq.

95. For Art.11 CMR cf. Clarke, no.75; Libouton, 1982, p.714, who correctly points out that between the inequalities regarding the document and the damage sufficient causal connection should exist for the application of this provision. For Art.22 CMR cf. Heuer, pp.82-83.

96. Rodière, p.278.

interpretation would lead to the result that the carrier would be denied these grounds of exoneration upon rights of the sender, in accordance with Article 12(2) CMR, being assigned to the consignee.⁹⁷ Partly as a result of the manifold overlapping with the special circumstances mentioned in Article 17(4) CMR it can be said that only exceptionally has the carrier made his escape to that category of circumstances.⁹⁸

§ 5.2.2 *Inherent vice*

Article 17(2) CMR specifies as the third ground of exoneration the inherent vice of the goods (*eigen gebrek, vice propre*).

First of all, the substance of this concept should be investigated, without losing sight of the category specified in Article 17(4)(d) CMR (nature of the goods), which in contrast to inherent vice is regarded as a privileged circumstance. In the legal literature one finds arguments for both a restrictive and an extensive interpretation of the concept of inherent vice. The approach that interprets the concept restrictively argues that by inherent vice must be understood a defect that is essentially foreign to the goods concerned. The term is so understood also in the law of insurance (cf. Art.249 WvK). In particular, it flows from this view that there need exist no connection between the inherent vice and the carriage.⁹⁹ To take as an example the carriage of gas lighters, among which a number are leaky. The escape of gas and friction cause an explosion. The damage is thus imputable to the inherent vice of the goods and has no connection with the carriage or with the nature of the goods.¹⁰⁰

One arrives at a broader interpretation of the concept when one considers the relationship between the (nature of the) goods and a normally performed transport as decisive.¹⁰¹ To take as an example the carriage of a machine which is inadequately secured to the base of the crate in which it is packed.¹⁰²

One goes yet further when one (virtually) equates the concept of inherent vice with the nature of the goods, which under certain circumstances can also lead to exoneration from liability.¹⁰³ The inherent vice that is equally inherent

97. This need not however mean that the sender can never be regarded as claimant; for the substance of this concept see Chapter 6 below. Cf. also Putzeys, no.756.

98. Rb Rotterdam 12.4.1972, S&S 1972, 102; CA Paris 25.22.1977, BT 1978, p.66; Cass. 5.7.1976, BT 1976, p.377; Cass. 8.10.1979, BT 1979, p.545; Tr Comm Paris 30.6.1981, BT 1981, p.448.

99. Heuer, pp.78-79, 85-86; Nickel-Lanz, no.125; Putzeys, no.759; Donald, p.54.

100. Cf. Tr Comm Lyon 1.7.1975, BT 1975, p.395; CA Lyon 7.10.1977, BT 1977, p.84.

101. Cf. Loewe, no.152; Precht/Endrigkeit, pp.86-87; Dorrestein, no.204; Korthals Altes-/Wiarda, p.137; Clarke, no.76; Nanassy, p.529: '... eine Beschaffenheit gewisser Güter oder deren Verpackung ... die das betreffende Gut unfähig macht, den mit dem Transport notwendigerweise verbundenen Gefahren sicher Widerstand zu leisten.' Hill/Messent, pp.74-75.

102. Cf. the proceedings which led to the decision of BGH 20.10.1983, VersR 1984, p.262.

103. One encounters this view in France, cf. Rodière, 1974, pp.279, 290, 293; Rodière, Sirey, nos.539, 543; Rodière, Sirey, no.233; Nickel-Lanz, no.125; likewise in the rail law literature, cf. Nanassy, pp.529-530; Boudewijnse, pp.162-163.

in the nature of the goods will according to this view be brought to light during the normal course of the carriage.¹⁰⁴ In objection to this view it can be pointed out that as a result thereof the distinction with the circumstances mentioned in Article 17(4)(d) CMR (the nature of the goods) disappears.¹⁰⁵ Furthermore, a restrictive interpretation fits rather better into the system of the distinction adopted by the Convention between general and special grounds of exoneration.^{105a}

In the meantime, choosing in favour of the restrictive view is hindered by an historical fact that the previously cited writers have failed to perceive. Article 17(2) CMR, the home of the concept of inherent vice, was adopted from the CIM, as appeared from § 4 above. It is noteworthy that in Article 27(2) CIM immediately following upon the term inherent vice there was added, albeit between parentheses, 'détérioration intérieure, déchet, etc'. This addition was left out of Article 17(2) CMR; by contrast, it does appear in Article 17(4) CMR, although in a somewhat amended version: 'détérioration intérieure et spontanée, déchet normal'. According to Von Nanassy, the concept reflects the broader French view.¹⁰⁶ It is manifest from the definition which Von Nanassy gives of the concept of inherent vice that a relationship between the nature of the goods and the carriage concerned necessarily needs to exist.¹⁰⁷ Even Von Nanassy recognises that this description of the substance leads to a blurring of the boundaries with the category specified in Article 27(3)(d) CIM (= Art.17(4)(d) CMR), with the consequence that practically all substance is removed from the concept of inherent vice.¹⁰⁸ Although the view of Von Nanassy argues therefore for a broader conception of the concept of inherent vice for carriage by rail, this leaves undisturbed the fact that the addition in the CIM referred to above was omitted when the force majeure provision was adopted in Article 17(2) CMR. Add to this the disadvantage recognised even by Von Nanassy of blurring of boundaries together with overlapping of the category specified by Article 27(3) CIM (Art.17(4)(d) CMR) (nature of the goods), then, in the view of the present writer, this final objection is of decisive significance in choosing for a more restrictive interpretation. Although it may be conceded to Von Nanassy that there can occur instances in practice in which it will not always be easy sharply to draw the line between the respective categories,¹⁰⁹ that does not take away the fact that the line of division does exist and is of importance for the proof to be adduced.

104. Nanassy, p.529.

105. Libouton, 1974, p.511: 'La distinction entre le vice propre et la nature propre doit plutôt être recherchée dans le caractère exceptionnel (vice propre) ou habituel (nature propre) du défaut ou de la particularité d'une marchandise donnée.' Cf. Hill/Messent, p.105.

105a. See comment on CA Agen 26.11.1985, BT 1986, pp.235-236.

106. See note 103 above.

107. See note 101 above.

108. Nanassy, pp.529-530.

109. Nanassy, p.553; Boudewijnse, p.162; Clarke, no.95.

It is precisely the carrier who may have an interest in proving that the damage was caused by an inherent vice in the goods when appeal to Article 17(4)(d) CMR is in principle excluded, as appears to be the case with refrigerated transport following Article 18(4) CMR.¹¹⁰ In other cases the carrier will attempt to profit from the absorbent effect which Article 17(4)(d) CMR exercises upon these categories following a broader interpretation.¹¹¹ Viewed from this standpoint it will occasion no surprise that on the part of the carrier an appeal to the category here under discussion has been made in only a small number of cases, and then without success.¹¹²

§ 5.2.3.1 *Circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*

This force majeure formula has already been discussed in the context of the basis of the liability model (§ 2) as well as in the light of historical considerations (§ 4). This formula is as it were the cornerstone of the Convention, whereby the general norm, which is determinative of the substance of the obligation of the carrier, is given expression. As has already appeared above from § 2 the formula here under discussion has been the object primarily of theoretical considerations the results of which have to an extent had repercussions in practice. In the analysis of caselaw a picture emerges on this point that is difficult of description in general terms. Even though certain controversies in this field have in theory been settled, this does not mean that the result thereof is to be found in the caselaw. The following examples may serve as illustration of this.

In the legal literature on the CMR it is now, after initial opposition in Germany, undisputed that the circumstances specified in Article 17(2) CMR are not confined to causes arising externally. In practice it appears that such cases regularly occur in which application of this view encounters difficulties which are predominantly evidentiary in nature.¹¹³

110. According to D. Glass, ETL 1979, p.711, the fulfilment of this burden of proof plays a central role in the interpretation of Art.17(4)(d). He distinguishes thereby between the following categories: 'The essential contrast of possibilities under art. 17(4)d is between goods which may contain some pre-transit defect or bad condition and goods which, though not defective, carry a transit risk.' Cf. also p.709. Also Libouton, 1974, p.511 refers to the importance of the distinction between both categories. Originally (Libouton, 1973, pp.34-35) his standpoint was uncertain. On the one hand he referred to the importance of the distinction, on the other he cited Rodière apparently with approval, whose view in practice could lead to the removal of the difference between the categories.

111. Rb Rotterdam 21.3.1980, S&S 1981, 29, placed own fault on a line with the category regulated by Art.17(4)(d) CMR. Equally: Hof Arnhem 10.4.1973, S&S 1973, 82, on which critically Libouton, 1974, p.511.

112. CA Paris 28.10.1969, BT 1969, p.7; Rb Arnhem 28.1.1971, S&S 1973, 82; Hof van Beroep Brussels 3.10.1970, ETL 1973, p.34; CA Angers 11.7.1977, BT 1977, p.435; CA Nîmes 29.10.1980, BT 1981, p.256; CA Paris 22.4.1980, BT 1980, p.435; CA Paris 10.11.1981, BT 1982, p.183. Cf. for more caselaw, Libouton, 1982, p.714; Putzeys, no.761.

113. See the caselaw mentioned below at fire.

Moreover, the answer to the question whether such circumstances, in so far as causes arising externally are concerned, were unavoidable and the consequences of which could have been prevented depends on the degree of care or effort that is demanded of the carrier. It has been shown above that a number of leading writers argue for a greater than normal effort.¹¹⁴ Although these writers arrive at the same conclusion by different paths (via ‘Verschuldenshaftung’ or ‘Gefährdungshaftung’), it is no simple exercise to determine along which path the caselaw stipulates concrete conditions as to the care to be exercised by the carrier. So much for these examples; in the caselaw dealt with below abundant illustrative material will be presented.

In general it appears from the analysis of the caselaw and legal literature that relief from liability via the general grounds of exoneration is not quickly to be obtained by the carrier. The proof to be adduced by him may consist of a so-called positive proof (the concrete cause of damage is proved) or the correspondingly termed negative proof (circumstances are proved which are of such a nature that they thereby preclude that causes, for which the carrier is liable, have contributed to the damage).¹¹⁵

The system of the Convention brings with it that this ground of exoneration functions in practice as a coping-stone; the carrier will only call this ground in aid when it appears that he will be unable to relieve himself of liability by means of the special grounds of exoneration specified in Article 17(4) CMR. For this reason the most divergent instances from the richly variegated species of carriage are to be found in the caselaw under this category. That does not, however, take away the fact that in the course of the years a number of fixed headings have been formed with a more or less stable jurisprudence. In what follows below these headings will be dealt with (§ 5.2.3.2 and 3) with reference to what has been discussed above in sections 2, 3 and 4. Thereafter, the remaining cases will be dealt under a separate heading (§ 5.2.3.4).

§ 5.2.3.2 *Theft*

Since the earliest days of transport law theft as such has never been considered to be a ground of exoneration. It was feared that were it otherwise the carrier, in regard to the goods entrusted to him, would be tempted, whether or not in concert with others, to misappropriate them.¹¹⁶ This means that an appeal to theft can impose great problems of proof on the carrier.¹¹⁷ The theft must

114. Cf. § 2.

115. Cf. Korthals Altes/Wiarda, p.74.

116. Cf. J. Ridley, *The Law of the Carriage of Goods by Land, Sea and Air*, London 1982, p.16. In the same sense even earlier, the *Unidroit Report, Carriage by Road*, Rome 1948, p.23.

117. Theft is an enormous damage causing factor in transport law. In road transport this crime has taken on spectacular forms; the cases known through the caselaw are probably merely the tip of the iceberg. Organised gangs form particularly in Italy a permanent threat to international road transport. Insiders speak of a new Bermuda triangle, of sea law notoriety; cf. G. Fourcade, BT 1982, p.398; see also OLG Celle 22.6.1981, VersR 1981, p.1183: ‘Lastzüge am Brenner: Zwischen Alpen, Mailand und Verona ein Bermuda-Dreieck für Brummis.’ See further, BT 1977, p.372; BT 1979, p.513; BT 1980, p.167; BT 1981, pp.202, 208-209.

have been unavoidable by the carrier. The caselaw, which in general goes against the carrier and, viewed from a sense of justice, perhaps sometimes transgresses the boundary of fairness, must be understood against this historical background and allowing for the positions of the parties as to proof.¹¹⁸ The proof to be adduced appears often to be a stumbling block for the carrier.¹¹⁹ Yet here it should be remembered that one judge may be less susceptible to imaginative tales than another. Thus the *Rechtbank Den Bosch* gave short shrift to the factual account submitted by the carrier, as follows:

‘Whereas in the judgment of the *Rechtbank* even Italian thieves cannot perform the impossible, it can only be that the facts are otherwise than as presented by the defendants.’¹²⁰

By contrast, in a virtually identical case the *Rechtbank Amsterdam* considered the carrier relieved of his liability.¹²¹

As far as transport of goods by road is concerned the insurers, united in the *Vereniging van Transportassuradeuren* (Association of Transport Insurers), reacted to this threat with an own risk clause (G 22 of 5.8.1974, amended 8.2.1977; own risk 20% with a minimum of Dfl.25000. This risk abates when a security system is installed and is in operation at the time of the theft. The regulation is a typical opportunistic product and has been roundly criticised). Cf. J. W. Wurfain, *Hague-Zagreb Essays* 2, p.144. Cf. also R. Wijffels (1977) 1 LMCLQ, pp.30, 34 and the unpublished caselaw cited there; Th. H. J. Dorrestein, *Beursbengel* 1976, pp.449 et seq. In addition to everything one should not forget that this is not a pure southern European situation, as witness the following quotation taken from *Rb Amsterdam* 5.5.1976, S&S 1976, 90: ‘It is also generally known that also in the Netherlands theft of and from freight vehicles regularly occurs.’

118. In the English whisky case (*Buchanan v. Babco*, HL [1978] 1 Lloyd’s Rep 119) the carrier, beside damages in the value of the whisky of £7000, was also condemned in the sum of £30,000, which was the sum due under the Customs and Excise Act 1952, on the ground of ... fairness. The boundary of fairness was overstepped in a case of *Tr Comm Paris* 11.1.1980, BT 1980, p.94: despite armed robbery a plea of force majeure was dismissed because a sleeping driver could not be regarded as a serious guard. To make matters worse the carrier was denied a claim to the limit because the court considered Art.29 CMR to be applicable! The annotator of the case correctly commented: ‘*l’appréciation paraît sans indulgence!*’ On the other hand, application of Art.29 CMR need not always be unfair; cf. *Cass.* 13.1.1981, BT 1981, p.128: a driver cannot suffice merely with the locking of his vehicle when he is aware of the high value of his load. From this point of view the decision of *Tr Comm Grenoble* 8.3.1982, BT 1982, p.298, is likewise unsatisfactory. Although theft occurred on a guarded, locked parking terrain the carrier was held liable. The carrier was probably more than happy that he avoided the carousel of Art.29 CMR. In violent contrast to this is the decision of *Hof Den Bosch* 2.1.1979, S&S 1979, 115. Although the driver left his trailer laden with copper unsupervised for five (!) days in the vicinity of an Italian filling station, the Hof did not regard this conduct as such a great error that it must be equated with gross fault. That was by contrast certainly present with theft of a vehicle parked in a railway goods yard, *Cass.* 14.1.1981, ETL 1983, p.51. Cf. further Chapter 5, § 9.

119. *Rb Breda* 23.2.1965, S&S 1965, 86; *Rb Amsterdam* 30.3.1977, S&S 1978, 36; *Rb Amsterdam* 19.7.1978, S&S 1979, 104; *Rb Dordrecht* 16.12.1981, S&S 1982, 117; arbitral award 20.4.1982, S&S 1983, 19; *Tr Comm Paris* 10.12.1973, BT 1974, p.45; *CA Paris* 14.6.1977, BT 1977, p.354; *CA Aix-en-Provence* 17.10.1978, BT 1978, p.585; *Rb Kh Brussel* 22.6.1973, BT 1974, p.252; *Hill/Messent*, pp.80-81.

120. *Rb Den Bosch* 3.6.1977, S&S 1978, 29. In this sense also *OLG Celle* 13.6.1977, *VersR* 1977, 860.

121. *Rb Amsterdam* 11.5.1977 and 30.1.1980, S&S 1980, 85 (on which *Libouton*, 1982, p.715), upheld by *Hof Amsterdam* 25.3.1982, S&S 1983, 9.

In particular, the (absence of) security of parked vehicles has in practice given rise to problems. As a rule it emerges that an appeal to Article 17(2) CMR has the greatest chance of success if the vehicle was parked on terrain that, as evidenced by manifest security measures, was specially intended therefor.¹²² There need be no objection in general against such a proposition on condition that one is also prepared to enter upon the question whether it can in concrete terms be required of the carrier that he make use of such risk-reducing opportunities.¹²³ It can here be of significance whether the carrier has received particular instructions from the sender in regard to the relevant transport concerning, for example, the route to be followed, crewing of the vehicle or a period to be taken into consideration.¹²⁴

In the light of the large number of cases of theft there does exist the inclination under certain circumstances to doubt whether the unforeseeability criterion has been fulfilled. Could it not be postulated that a carrier who assumes the obligation to transport to areas where theft is the order of the day thereby assumes a certain foreseeable risk? This question is of importance where the criterion of unforeseeability is regarded as an element of force majeure within the meaning of Article 17(2) CMR, as is the case for example under Netherlands law.¹²⁵ In the case of the CMR it must be accepted that

122. The carriers were to hear this rule in the following decisions: Rb Amsterdam 5.5.1976, S&S 1976, 90; Rb Rotterdam 11.6.1976, S&S 1977, 91; Rb Amsterdam 12.9.1979, S&S 1980, 34; Rb The Hague 22.6.1983, S&S 1984, 11, confirmed by Hof The Hague 22.3.1985, S&S 1985, 122; CA Aix-en-Provence 11.5.1969, BT 1969, p.389; CA Aix-en-Provence 17.10.1978, BT 1978, p.585; CA Toulouse 16.3.1981, BT 1981, p.318; CA Limoges 1.3.1983, BT 1983, p.330 held the carrier liable in a case where the vehicle was stolen from the carrier's own locked garage. L. Brunat, BT 1983, p.327, correctly stated that in France the caselaw imposes overly heavy requirements on the carrier. This appears most clearly from a decision of Tr. gr. inst. Metz 18.5.1982, BT 1983, p.347, in which the carrier, in contrast to Tr. gr. inst. Poitiers 16.12.1985, BT 1986, p.237, vainly claimed Art.17(2) CMR in a case where he was the victim of an armed raid in Italy. The critical comment to this in BT reads: 'le contrat de transport n'oblige pas à l'héroïsme.' As the last-mentioned judgment so also QB 6.11.1984 [1985] 2 Lloyd's Rep (Silber v. Island Trucking): the fact that the carrier could furnish no reason at the trial for having parked on the approach to a motorway instead of in a guarded garage led to liability following an armed robbery. Contra, QB 11.3.1981 [1985] 2 Lloyd's Rep (Gally Footwear v. Laboni), in which the carrier was held liable because the drivers of the two vehicles could have taken turns to visit the café.

Rb Kh Brussel 22.6.1973, BT 1974, p.252; ETL 1974, p.330; Hof van Beroep Brussel (undated), BT 1978, p.39; Rb Kh Liege 13.12.1977, ULR 1980, 1, p.270; BGH 21.12.1966, VersR 1967, p.153; OLG Munich 27.3.1981, VersR 1982, p.264; BGH 5.6.1981, VersR 1981, p.1030; ETL 1982, p.301; OLG Dusseldorf 25.6.1981, VersR 1982, p.606; OLG Hamburg 1.4.1982, VersR 1982, p.1172; OLG Dusseldorf 27.3.1980, VersR 1980, p.826, ULR 1981, 1, p.256; OGH 16.3.1977, ULR 1978, p.370; Hof van Cassatie 12.12.1980, ETL 1981, p.250. See also § 5.2.3.3.

123. To this end an inventory of sufficiently guarded places was made in France by the 'Syndicat des sociétés françaises d'assurances maritimes et de transport', cf. BT 1983, pp.279, 290, 451, 522, 534. This institute also instituted a theft clause of 19.5.1983, cf. BT 1983, p.334, on which A. Fourcade, and p.538.

124. See for this in particular BGH 14.7.1983, VersR 1984, p.134, as well as BGH 16.2.1984, VersR 1984, p.551.

125. Assen-Rutten, 4, 1, p.257. Equally in Belgium (Putzeys, no.738) and France (Rodière, Sirey, no.528). For Russian law, see Nicolas Sokolow, *Droit et Pratique du commerce international*, 1978, pp.324-325.

Article 17(2) CMR does not require the element of unforeseeability.¹²⁶ For this reason it is important in application of Article 17(2) CMR that one puts one's mind to an autonomous interpretation of this provision.¹²⁷ Taking casuistry also into account it is nevertheless not easy to apply Article 17(2) CMR in this manner. A first condition thereto is the exclusion of national law.¹²⁸ An apt example of this method is to be found in a judgment of OLG Dusseldorf. The carrier claimed exoneration of liability for theft at the Swiss–Italian border on the ground of force majeure according to both Swiss and Italian law. The court considered extensively why there was no room for application of national law (neither Swiss nor Italian).¹²⁹ Upon enquiring into caselaw and legal literature the court came to the conclusion that the carrier could in *casu* be relieved of his liability according to Article 17(2) CMR. The court with this judgment followed, taking into account also the reasoning whereby the necessity of autonomous convention interpretation was underlined, the direction earlier indicated by the BGH¹³⁰ and in so doing contributed to the actualisation of the primary aim of the Convention.

§ 5.2.3.3 *Fire*

The cases in which transported goods are destroyed by fire may roughly be divided in two groups. The first group concerns those cases in which fire breaks out during the journey; with the second group the accident occurs precisely during an interruption in the journey. Both groups pose a number of specific legal questions.

1. In regard to the first group it can be determined that in many cases defects in the vehicle or in the tyres cause overheating whereby fire breaks out, as a result of which the load (generally also the vehicle) is destroyed. The pertinent question that thereby arises is: does the cause of the fire lie in a technical defect in the vehicle or does the cause arise externally? The importance of the question resides in the fact that the carrier can claim exoneration from liability in regard to the latter cause but not in regard to the

126. Loewe, no.153; Nickel-Lanz, no.128; Rodière, Sirey, no.542; cf. BT 1977, p.31; equally Cass. 27.1.1981, BT 1981, p.219, approved by commentator at BT 1981, p.214. To the extent that this case signifies a discrepancy in respect of French law, see A. Sériaux, *Recueil Dalloz* 1982, pp.110-114. Contra CA Toulouse 16.3.1981, BT 1981, p.318. See also Libouton, 1982, p.714; Clarke, no.78

127. Korthals Altes/Wiarda, p.136. Contra Dorrestein, nos.89, 203, 206, who holds that the concept of force majeure ought to be judged according to national law. One may question what that means for Netherlands law in the light of the fact that Dutch transport law is not entirely clear. Whereas, for example, Van Oven, no.127, as also Doorhout Mees, no.8.20, holds that transport law recognises a deviating concept of force majeure, Korthals Altes/Wiarda, p.75 denies such a deviation. Dorrestein, no.208b adopts something of a middle position: foreseeability is certainly the criterion but is not determinative.

128. Cf. what is remarked on this in Chapter 1, §§ 3 and 4.

129. OLG Dusseldorf 27.3.1980, *VersR* 1981, p.826.

130. BGH 21.12.1966, *NJW* 1967, p.499 (likewise theft), as also BGH 28.2.1975, *NJW* 1975, p.1598, on which § 2 above, followed by OGH 16.3.1977, *ULR* 1978, p.370; cf. also Rb Kh Liege 13.12.1977, *ULR* 1981, 1, p.270.

former. If the carrier wishes to render himself safe via Article 17(2) CMR then he needs to adduce the necessary proof. The caselaw appears to maintain a distrustful stance as to invocation of Article 17(2) CMR in the case of fire. In the majority of cases the carrier's case collapses under the burden of proof.

In one of the oldest CMR cases in the Netherlands the heart of the problem came clearly to the fore.¹³¹ Despite the fact that it concerned two new tyres which went on fire and the carrier could demonstrate that it could not have been anything else otherwise the cause of the fire must have arisen externally, he did not succeed in proving also that the driver could not have avoided the externally arising circumstances. To succeed in such dual burden of proof will often be an herculean task. Often the carrier will stumble at the first fence, namely, proof that the damage was caused by an accident that arose externally.¹³² In that case there is no need to even begin on the second fence, namely, proof that the externally arising circumstances were unavoidable by the carrier. Even less so when the carrier is not able to prove that he took normal measures of control into account.¹³³ This severity appears to exist across the board.¹³⁴

There is always a ray of light. In a number of cases the carrier has managed to discharge his burden of proof.¹³⁵

In conclusion it can be stated in regard to the first distinguishable group that the chance of the carrier achieving exoneration of his liability is extremely slight owing to the heavy burden of proof laid on him as to causality and unforeseeability. In the CMR there is in this respect no place for an exception for fire.¹³⁶ And correctly so. Caselaw that went in an opposite direction would prejudice the special category as that is regulated in Article 17(3) CMR (no exoneration for the defective condition of the vehicle). It will appear from the treatment of this Article in the following section that the dominant caselaw there brought to the fore is in conformity with the interpretation of Article 17 (3) CMR.

131. Rb Amsterdam 28.10.1964, S&S 1965, 5; Hof Amsterdam 21.10.1965, S&S 1965, 85. Strongly approved by R. Züchner, VersR 1969, p.686.

132. As long as uncertainty exists concerning the cause the carrier remains liable. In this sense: Hof van Beroep Brussel 17.6.1971, ETL 1971, p.825; cf. ETL 1972, p.595. LG Wupertal 12.1.1968, cited by Heuer, p.221 and J. Willenburger, NJW 1968, p.1023.

133. Hof Leeuwarden 26.10.1977, S&S 1979, 83.

134. Rb Alkmaar 8.6.1967, S&S 1968, 13; NJ 1967, p.374; Rb Kh Antwerp 9.4.1969, ETL 1969, p.1028; OLG Dusseldorf 21.8.1969, cited by Heuer, p.199. LG Frankfurt 17.4.1968, cited by Heuer, p.213; OLG Dusseldorf 18.11.1971, VersR 1973, p.177; BGH 5.6.1981, VersR 1981, p.1030; ETL 1982, p.301.

135. Rb Rotterdam 20.4.1965, S&S 1966, 30, followed by Rb Rotterdam 21.1.1969, S&S 1969, 70, confirmed by Hof The Hague 13.2.1970, S&S 1970, 47, followed by Hof The Hague 22.10.1971, S&S 1972, 21. This caselaw deviates from the remaining caselaw on this matter. Critically on this, Helm, *Frachtrecht*, Art.17 CMR, Anm.8; cf. also Libouton, 1973, p.36.

136. This exception is confined exclusively to the carrier by sea, Art.4(2)(b) Brussels Bills of Lading Convention and has even survived the UNCITRAL storm: Art.5(4)(a)(1) Hamburg Rules 1978.

2. The answer to the question whether fire can serve as a ground of exoneration in the second group distinguished here, namely, in those cases where fire breaks out during an interruption in the journey, is less positive. In practice it amounts to the question being answered against the background of another question, namely, whether parking a laden vehicle in a particular place for a particular period was responsible or not, or – in the context of the carriage concerned – was necessary.¹³⁷ As a consequence of this in a number of cases an appeal by the carrier to Article 17(2) CMR was allowed.¹³⁸ It is precisely because of the fact of answering the question in issue against the background of the question whether parking a laden vehicle under certain circumstances was or was not responsible that there are, in the opinion of the present writer, no grounds existing to depart in this respect from the caselaw concerning theft dealt with in the previous sub-section. As a result of this the carrier will only be relieved of his liability when he demonstrates that, taking into account the circumstances of the case, parking the vehicle in a place other than that of the accident could not reasonably have been required of him.¹³⁹ Having regard to the basis of the liability (see § 2 above) strict conditions should be required as to the proof of the care exercised.

§ 5.2.3.4 *Miscellaneous*

Just as varied as the practice of transport activities and the cases of damage resulting therefrom are the circumstances that are pleaded on behalf of the carrier in order to effect relief from liability via the general grounds of exoneration here under discussion. The cases have to be assessed every time in the light of the concrete situation. As appeared with the discussion of the previous groups, so also here a clear picture emerges in regard to the ‘remnant’ group that is witness to a certain severity. A number of leading cases of the German and Austrian supreme courts are illustrative of these situations and in which, on the one hand, a discernible distance was created from the concept of force majeure prevailing in Germany and in the law of rail but yet in which, on the other hand, the carrier remained liable.¹⁴⁰ This approach was forged in regard to road traffic accidents caused by third parties. In similar cases a carrier can in principle attempt to relieve himself of liability via Article 17(2) CMR.¹⁴¹

137. In contrast therefore to the first group where the question is principally whether the cause arose externally.

138. Rb Amsterdam 13.12.1972, S&S 1973, 40; Rb Roermond 29.5.1980, S&S 1981, 74; Rb Arnhem 25.11.1982, S&S 1984, 115. In these cases the courts came to the conclusion that the outbreak of fire, in the light of the circumstances, ought not to be attributed to the lack of care of the carrier. Contra CA Brussels 12.12.1977, BT 1978, p.39 and Rb Amsterdam 22.4.1981, S&S 1982, 116.

139. The Rb The Hague 22.6.1983, S&S 1984, 11, confirmed by Hof The Hague 22.3.1985, correctly considered a carrier who had unnecessarily left his vehicle in an unguarded place liable for the (fire) damage.

140. See the cases mentioned in n.130 above.

141. BGH 28.2.1975, VersR 1975, p.610; ETL 1975, p.516. In similar vein OLG Munich 16.1.1974,

Does the fault of a third party operate also as an exonerating circumstance when this in combination with a fact for which the carrier is liable caused the damage? In the caselaw the question is answered in the negative.¹⁴² This view, which curtails the scope of Article 17(2) CMR, is not actually supported by Article 17(5) CMR. On the contrary. Although that provision is not particularly clear the purport thereof is that a distinction is to be made between causality factors that are imputable to the carrier and those that are not. One can perceive no reason why this rule should not apply when the damage is caused in part by a factor that is not imputable to the carrier.

In addition, the carrier has pleaded, generally in vain, as exonerating circumstances the weather,¹⁴³ bad roads,¹⁴⁴ strike action,¹⁴⁵ and traffic conditions.¹⁴⁶

§ 5.3 *Defective condition of the vehicle (Art.17(3) CMR)*

It is important to read this provision in its historical context. As appeared above in § 4 this provision was a reaction as much to a narrow as to a broad interpretation of the general force majeure formula of Article 17(2) CMR as that was at that time advanced by both the German and the Netherlands delegations. The provision has thus served to determine the further content of Article 17(2) CMR via systematic interpretation.¹⁴⁷ As to substance the provision is closer to the German view than to that of the Dutch regarding the concept of force majeure.

The circumstance that the carrier by road, contrary to that of his colleagues in other branches of transport, is absolutely liable for the (latent) defects of

ETL 1974, p.615. In the BGH case (on which see above § 2) the BGH distanced itself from national law even more clearly than in 1966. Cf. also Putzeys, nos.764 et seq.

142. Rb The Hague 21.1.1974, S&S 1975, 22; confirmed by Hof The Hague 3.6.1976, S&S 1977, 3. Critised Korthals Altes/Wiarda, pp.142, 178. The Hague decision was approved by Dorrestein, no.233 and Libouton, 1982, p.717, the latter also somewhat critical. Unclear is Putzeys, nos.7 et seq. Of uncertain outcome: Rb Amsterdam 20.4.1977, S&S 1978, 68; Super Court Zagreb 23.12.1963, Filipović, op. cit., p.63.

143. Rb Amsterdam 9.2.1977, S&S 1978, 67 (St Gotthard pass holdup); Rb Amsterdam 11.3.1964, NJ 1965, 69 (driving rain); Hof van Beroep Brussels 25.5.1972, TPR 1979, p.117 as also Rb Kh Kortrijk 25.2.1972, ULR 1973, p.438 (thunder storm). In all these cases the carrier was held liable. Cf. also Putzeys, nos.749, 750.

144. Rb Rotterdam 19.6.1970, S&S 1973, 75 (carriage to Oslo); Rb Amsterdam 25.6.1975, S&S 1976, 49 (carriage to Russia); CA Nîmes 5.11.1980, BT 1980, p.600 (carriage to Russia); OLG Hamburg 29.5.1980, VersR 1980, p.950, on which H. Bisschof, VersR 1981, p.539 (carriage to Russia). In none of these cases was the carrier able to deliver exonerating proof. See for the connection with this category further § 5.4.2 (unpacked goods).

145. Cass. 9.10.1974, BT 1974, p.491; CA Paris 22.4.1980, p.435.

During the final negotiations leading to the Convention the attempt was made by the English to introduce strike action as a ground of force majeure, TRANS/WP9/35, 6 June 1956, p.14. For a blockade of the border cf. Helm, Frachtrecht, Art.17 CMR, Anm.12.

146. Vrederegerecht Antwerp 26.10.1971, ETL 1972, p.1058 (vainly). Rb The Hague 24.3.1978, S&S 1978, 30 (burden of proof). See also n.141 above, as also Putzeys, no.743.

147. R. Züchner, VersR 1969, pp.682 et seq.

the vehicle employed by him explains perhaps the many attempts to break through this strict regime. These attempts have been made in several directions.

A first escape route was indicated when dealing with Article 17(2) CMR in regard to the category of fire.¹⁴⁸

Besides this, the carrier has frequently attempted to evade his liability via Article 18(4) CMR, which provision may be regarded to a certain extent as a species of Article 17(3) CMR. Whether this attempt has been positively accepted will be discussed below under the category of nature of the goods (§ 5.4.4).¹⁴⁹

A third route led via a restrictive interpretation of the provision here under discussion: the possible unsuitability of the vehicle ought not, in the light of the transport actually agreed, to be subject to Article 17(3) CMR. If, on the contrary, one is of the view that also the situation where the vehicle appears to be unsuitable for the carriage contracted for must be brought within the scope of this provision then this means an important increase in the burden of the carrier's liability. A more stringent view of Article 17(3) CMR means that the carrier can in principle make an appeal to other damage-causing circumstances.¹⁵⁰ Otherwise, one is generally of the opinion, given the absence of any evidentiary law regulation on this point, that the burden of proof rests upon the carrier to demonstrate that given certain circumstances the damage-causing circumstances cannot be imputed to be the defective condition of the vehicle.¹⁵¹

An extensive interpretation is supported by Loewe,¹⁵² Ponet,¹⁵³ Putzeys¹⁵⁴ and Clarke;¹⁵⁵ a restrictive interpretation is advocated by Rodière¹⁵⁶ and Libouton.¹⁵⁷ No single approach can be discovered in the caselaw.¹⁵⁸

It transpires from the historical investigation (§ 4 above), that, at least as

148. § 5.2.3.3; cf. also Helm, *Frachtrecht*, Art.17 CMR, Anm.6; Nickel-Lanz, no.132.

149. § 5.4.4.

150. As such arise for consideration the categories of instructions or fault of the claimant (Art.17(2) CMR), on which § 5.2.1 above, as well as the circumstances specified in Art.17(4)(a) and (b) CMR, on which §§ 5.4.1 and 5.4.2 below.

151. Helm, *Frachtrecht*, Art.17 CMR, Anm.6; contra Heuer, p.59.

152. *Op. cit.*, no.157.

153. *Op. cit.*, p.220.

154. *Op. cit.*, no.770 bis.

155. *Op. cit.*, no.79.

156. BT 1974, p.280; cf. also Hill/Messent, p.83.

157. JdT 1974, p.512, despite his earlier approval at p.511 of CA Colmar which apparently advocates an opposing view.

158. A broad interpretation is to be found in the following judgments:

Rb Rotterdam 25.5.1973, S&S 1977, 67; CA Amiens 24.11.1974, BT 1975, p.23; CA Paris 22.2.1980, BT 1980, p.239; CA Aix-en-Provence 10.11.1976, BT 1977, p.248; Tr Comm Toulouse 25.6.1980, BT 1980, p.518. This need not always signify that the carrier is completely

far as it can be ascertained, the only reason for drafting Article 17(3) CMR was to preclude an undesirable interpretation of Article 17(2) CMR. It is therefore pure speculation when Rodière and Libouton determine the substance of the provision here under discussion, which is absent from the CIM, by a *contrario* reasoning based on CIM caselaw concerning the defective condition of the vehicle. Even less convincing is the view of Clarke who assumes that the provision may be interpreted by analogy with the law of the sea concept of '(un)seaworthiness'.¹⁵⁹

It appears to the present writer that there are no valid arguments to be advanced for an interpretation broader than the natural meaning of the concept of defect. Here one subscribes to the standpoint defended in connection with the concept of inherent vice of the goods.¹⁶⁰ Whether or not there is a question of a (latent) defect ought to be determined independently of the contracted carriage. It follows from this choice that, having regard to the circumstances of the case, the question whether or not in the light of the carriage actually contracted there is an issue of an unsuitable vehicle and whether the carrier is liable for that unsuitability, is not governed by either Article 17(3) CMR nor by any other Article of the Convention. The question ought to be decided on the basis of what the parties have agreed thereon. To the extent that the blame has to be ascribed to the wrongful act or neglect or by the instructions of the claimant within the meaning of Article 17(2) CMR, the carrier can appeal to such circumstances in relieving himself of liability. Whether the carrier will ultimately be able to free himself of his liability where there is a question of a vehicle unsuited to the carriage concerned depends, clearly, on precisely the conditions just mentioned and stipulated by contract or usage.¹⁶¹ A fixed pattern is likewise not to be expected of the caselaw analysis which is perhaps to be blamed upon the fact that the choice of the vehicle is generally left unregulated. The solution to the issue will according as the circumstances allow depend, on the one hand, on the reasonable care that in the light of the carriage proposed the carrier must employ in the use of the vehicle employed by him and, on the other, the discharge of a reasonable duty of information and inspection by the claimant. An assessment of the caselaw relevant to this point ought also to be seen in this light.¹⁶²

liable. In the Aix-en-Provence decision the carrier was adjudged 25% liable.

The following came to a more restrictive interpretation:

CA Colmar 11.1.1972, BT 1972, p.90; CA Venice 31.10.1974, ETL 1975, p.242; CA Paris 10.12.1972, BT 1972, p.35.

159. *Op. cit.*, no.79.

160. § 5.2.2.

161. In tanker transport the use of unsuitable vehicles often leads to contamination: the transported material mixes (as a result of insufficient cleaning) with the remains of previously transported material. Cf. Rb Rotterdam 25.5.1973 and 20.2.1976, S&S 1977, 67; Rb Arnhem 15.1.1978, S&S 1982, 75; Rb Utrecht 1.9.1982, S&S 1983, 40. Likewise, smell and colour damage can occur.

162. In such cases the carrier in exonerating his liability can point to the fact that the sender neglected to specify a particular type of vehicle: CA Venice 31.10.1974, ETL 1975, p.242; CA Aix-en-Provence 10.11.1976, BT 1977, p.248; LG Offenburg 21.1.1969, VersR 1969, p.560 note J. Willenberg; alternatively that the sender accepted a vehicle with a manifest defect: Rb Dordrecht 22.12.1971, S&S 1972, 50; CA Paris 26.5.1982, BT 1982, p.503, in which the carrier

As for the 'material' defects these appear to be generally concerned with brake installations,¹⁶³ tyres,¹⁶⁴ tarpaulins covering the load¹⁶⁵ and other parts of the vehicle.¹⁶⁶ In so far as the defect actually concerns a vehicle that is equipped to relieve the goods of the influence of heat, cold, temperature variations or humidity of the air, the issue here under discussion is not governed by Article 17(3) CMR but by Article 17(4)(d) CMR in conjunction with Article 18(4) CMR. As will appear below at § 5.4.4 this delimitation is not always clearly recognised.

§ 5.4 *Special grounds of exoneration (Art.17(4) CMR)*

The circumstances enumerated in Article 17(4) CMR, which are considered as special risks, are the pre-eminent grounds of exoneration for the carrier.¹⁶⁷ However, when one or more of the circumstances enumerated in Article 17(4) CMR occurs the carrier, under the conditions specified above in § 3, is discharged from adducing the usually thorny proof of causality. The widespread acceptance of what for the carrier are liberating circumstances would serve significantly to place in perspective the liability resting upon him according to Article 17(1) CMR. Before turning to an examination of the various circumstances it may be pointed out that a claim to different grounds at the same time is not excluded.¹⁶⁸ Even less does a claim to one or more circumstances

remained 70% liable; or which otherwise appeared to be unsuitable: OLG Hamm 19.2.1973, VersR 1974, p.28, ETL 1974, p.753. Cf. further also Libouton, 1982, p.716; Putzeys, no.770 ter. Often, as witness the following caselaw, the carrier will remain liable:

Hof van Beroep Brussels 15.4.1971, cited by Libouton, 1974, p.511; Rb Rotterdam 27.4.1971, S&S 1971, 73; NJ 1972, 483; CA Colmar 11.1.1972, BT 1972, p.90; CA Paris 10.12.1971, BT 1972, p.35; Tr Comm Toulouse 25.6.1980, BT 1980, p.518; CA Paris 22.2.1980, BT 1980, p.239; CA Paris 2.3.1981, BT 1981, p.166; CA Paris 2.12.1981, BT 1982, p.73; Rb Rotterdam 20.2.1976, S&S 1977, 67; Super Court Zagreb 24.2.1962, Hague-Zagreb Essays 2, p.63; OLG Frankfurt am Main 25.10.1978, VersR 1978, p.535.

163. OLG Dusseldorf 18.11.1971, VersR 1973, p.177; Rb Kh Antwerp 24.3.1976, TPR 1979, p.117.

164. Rb Amsterdam 15.12.1971, S&S 1972, 92. Further the caselaw mentioned at § 5.2.3.3.

165. Binding Advice 21.4.1970, S&S 1971, 19; Hof Arnhem 6.12.1978, S&S 1979, 114; Rb Kh Brussels 4.2.1972, ETL 1972, p.573; OLG Frankfurt am Main 25.10.1978, VersR 1978, p.535; QB 22.11.1979, [1980] 2 Lloyd's Rep 279 (Walek & Co v. Chapman and Ball). For a case of porous tarpaulins, cf. Rb Rotterdam 3.6.1983, S&S 1983, 111.

166. Super Court Appeal Zagreb 23.1.1963, Hague-Zagreb Essays 2, p.62.

167. The expression special risks can be misleading. There is in principle nothing special about the risks mentioned here; on the contrary, reasoning from actual transport, learning from experience, these are in fact normal risks. Cf. Heuer, p.79.

168. Combination of Artt. 17(4)(a)/17(4)(b)/17(4)(c)/17(4)(d) CMR: OLG Frankfurt am Main 25.10.1978, VersR 1978, p.535.

Combination of Artt. 17(4)(a)/17(4)(b)/17(4)(c) CMR: Rb Rotterdam 3.6.1983, S&S 1983, 111.

Combination of Artt. 17(4)(a)/17(4)(b)/17(4)(d) CMR: LG Offenburg 21.1.1969, VersR 1969, p.560.

Combination of Artt. 17(4)(b)/17(4)(c) CMR: Rb Amsterdam 14.1.1970, S&S 1972, 77; Rb Amsterdam 28.11.1973, S&S 1974, 78; Rb Amsterdam 4.2.1976, S&S 1976, 71; Rb The Hague 17.10.1966, Asser Card System 5150; Rb Kh Antwerp 28.3.1966, ETL 1966, p.712; Rb Kh Brussels

exclude a claim, albeit secondary, to the general grounds of exoneration.¹⁶⁹

Finally, one is mindful of the fact that, contrary to the general grounds of exoneration, the circumstances here under discussion only apply in regard to damage and loss and not to cases of delay.

§ 5.4.1 *Use of open vehicle (Art.17(4)(a) CMR)*

In this category one is concerned with risks connected with the carriage of goods in open vehicles which are not closed with tarpaulins. These risks consist for the most part of loss and damage due to causes penetrating from without (e.g., weather conditions). The question whether theft can be understood under these risks is disputed.¹⁷⁰ One can agree without hesitation with the view of a number of writers on the CMR that theft likewise falls within the scope of Article 17(4)(a) CMR as a potential risk.¹⁷¹ Having regard to the unfavourable caselaw for the carrier as to theft (cf. § 5.2.3.2 above) this provision can under certain circumstances offer some certainty.

Moreover, one may ask oneself what is to be understood by an open vehicle not closed with a tarpaulin. A number of writers have pointed out that even where a roof is provided but the sides and back of the vehicle remain open one is still concerned with an open vehicle.¹⁷²

The possibility of invoking this ground of exoneration with a view to benefiting from the presumption of causality that is favourable to the carrier, is coupled to a trinity of cumulative conditions.

1. In the first place the use of such a vehicle must have been expressly agreed. Failure to come to such an agreement consequently excludes a claim to this circumstance.¹⁷³ The provision leaves the question untouched whether the vehicle employed was suitable or not for the carriage in question (cf. § 5.3 above).

2. The second condition for a claim to this ground of exoneration is that what is expressly agreed as to this be stated in the consignment note.¹⁷⁴ Failure so

12.4.1972, TPR 1979, p.116; CA Grenoble 3.4.1980, BT 1980, p.301.

Combination of Artt. 17(4)(b)/17(4)(d) CMR: Hof Den Bosch 5.1.1979, S&S 1980, 22; Tr Comm Verviers 27.9.1976, JCB 1977, p.534.

Combination of Artt. 17(4)(b)/17(4)(c)/17(4)(d) CMR: Rb Rotterdam 21.3.1980, S&S 1981, 29.

Combination of Artt. 17(4)(c)/17(4)(d) CMR: Rb Den Bosch 26.5.1976, S&S 1978, 9; Rb Arnhem 26.9.1978 and 11.1.1979, S&S 1980, 45; LG Bremen 14.5.1970, cited by Heuer, p.210; OLG Hamm 19.2.1973, VersR 1974, p.28.

In OLG Munich 27.6.1979, VersR 1980, p.241 an appeal to Art.17(4)(c) CMR was considered to be excluded by an appeal to Art.17(4)(d) CMR.

169. Rb Dordrecht 22.12.1971, S&S 1972, 50; Rb Rotterdam 21.3.1980, S&S 1981, 29; OLG Schleswig 30.8.1978, VersR 1979, p.141.

170. Nanassy, pp.541-542, respectively 574-575.

171. Loewe, no.171; Heuer, p.92; Nickel-Lanz, no.137; contra Dorrestein, no.211.

172. Heuer, p.91; Nickel-Lanz, no.136; Boudewijnse, p.184; Putzeys, no.777.

173. Cf. OLG Hamburg 22.9.1983, VersR 1984, p.235; Rb Den Bosch 7.5.1982, S&S 1984, 91.

174. The Netherlands delegate vainly attempted during the closing stages of the negotiations on the Convention to have this condition excluded; TRANS/168, TRANS/WP9/35, 6 June 1956, p.14.

to comply with this formality derived from rail transport has on a number of occasions prevented the carrier from successfully invoking this ground.¹⁷⁵

3. A third condition resides in the restriction specified in Article 18(3) CMR: the loss (there is no mention of damage) must not be exceptionally great. This restriction must be viewed together with what has already been noted above and the disputed question in rail transport whether theft also falls within the scope of this provision.¹⁷⁶ The sender is burdened with proof of the exceptionally great shortfall or loss.¹⁷⁷ This third condition lends perspective to the privileged evidentiary position of the carrier.¹⁷⁸

In the light of the above conditions coupled to employment of this category it will occasion no surprise that in practice there has been no intensive use made of these grounds of exoneration.¹⁷⁹ In those cases where carriers have chanced their luck with this category they encounter the specified conditions as impregnable obstacles in their path.¹⁸⁰

§ 5.4.2 *Absence or defective condition of packing (Art.17(4)(b) CMR)*

Just as defects in or the nature of the goods are to be considered as grounds of exoneration, so also in the case of the packing thereof. It was pointed out above that there is a relationship between this and the category regulated by Article 17(4)(d) CMR.¹⁸¹ The question whether there is defective packing depends on the one hand on the nature of the goods and on the other on the carriage contracted. Further specification of the substance of this ground of exoneration can only take place in relation to the concrete circumstances and is consequently a factual matter.¹⁸²

175. OLG Dusseldorf 8.5.1969, ETL 1970, p.446; Rb Kh Brussels 4.2.1972, ETL 1972, p.573; OLG Frankfurt am Main 25.10.1978, VersR 1978, p.535; Tr Comm Toulouse 25.6.1980, BT 1980, p.518.

176. A proposal to add a provision to the CIM in which theft would be excluded was rejected, and the present provision inserted instead. Cf. Nanassy, p.574.

177. LG Offenburg 21.1.1969, VersR 1969, p.560; ETL 1971, p.283. This only when the carrier has been able to demonstrate that the shortfall was able to occur by reason of use of an open vehicle; cf. Nanassy, p.575.

178. Cf. Nickel-Lanz, no.137.

179. Separate from this it can be stated that the provision has become outdated with the disappearance of tarpaulins, cf. Dorrestein, no.211. Cf. on this Rb Rotterdam 3.6.1983, S&S 1983, 111.

180. See the decisions cited at n.173 and n.175.

181. § 5.4.

182. In the following cases an appeal by the carrier to Art.17(4)(b) CMR was made in vain: Hof Den Bosch 21.12.1965, S&S 1966, 24; Rb Dordrecht 18.5.1966, S&S 1966, 89; Rb Dordrecht 22.12.1971, S&S 1972, 50; Rb Amsterdam 28.11.1973, S&S 1974, 78; Rb Maastricht 21.2.1974, 18.12.1975, S&S 1976, 88; Rb Amsterdam 4.2.1976, S&S 1976, 71; Rb Almelo 9.6.1976, S&S 1978, 8; Rb Roermond 4.11.1976, ETL 1977, p.432; Rb Rotterdam 17.6.1977, S&S 1980, 44, confirmed by Hof The Hague 15.6.1979, S&S 1980, 44; Hof Den Bosch 5.1.1979, S&S 1980, 22; Rb Rotterdam 30.1.1981, S&S 1981, 98; Ktg Nijmegen 16.1.1981, S&S 1983, 41; Rb Roermond

In principle one should proceed from the situation that normally occurs during the carriage.¹⁸³ Thus one should take into account, for example, the place of delivery.¹⁸⁴ Which party should ensure the (correct) packing falls under the contract and is not regulated by the Convention.¹⁸⁵ As a rule, making the goods ready for dispatch and transport is done by the sender.¹⁸⁶ In the context of special transport this can sometimes be reversed. One can think of amongst other things the transport of clothing, cars,¹⁸⁷ meat, etc. In the absence of legislative prescriptions and mutual agreement one is thrown back on usage in the particular trade, and thereafter upon the reasonableness that the concrete situation demands of the parties vis-à-vis each other.¹⁸⁸ One should guard against imposing in this respect too great a duty upon the carrier. In general, a claim to this provision can be denied him only where the defective condition of the packing was patent.¹⁸⁹ This conforms to Article 10 of the Convention.¹⁹⁰ Likewise, it is against this background that the way in

4.10.1973, ETL 1974, p.201 considered the carrier exonerated.

Of uncertain result: Rb The Hague 17.10.1966, Asser Card System 5150.

Outside The Netherlands the carrier ostensibly fares better:

Rb Kh Verviers 27.9.1976, JCB 1977, p.524; Tr Comm Castres 5.2.1979, BT 1979, p.242; CA Paris 23.6.1975, BT 1975, p.360; CA Lyon 7.5.1981, BT 1981, p.410; Tr Civ et Pen Milan 23.3.1973, ETL 1974, p.490; LG Hamburg 22.1.1969, cited by Heuer, p.215; OLG Hamm 4.11.1971, ETL 1974, p.499; Rb Kh Antwerp 16.1.1974, ETL 1975, p.98; Rb Kh Ghent 27.9.1977 and Hof Antwerp, cited by Ponet, p.248, as well as the unpublished caselaw further cited by Ponet, p.252.

The claim to Art.17(4)(b) CMR was dismissed in the following cases:

Rb Kh Antwerp 28.3.1966, ETL 1966, p.712; OLG Hamburg 29.5.1980, VersR 1980, p.950; QB 10.10.1979, [1981] 1 Lloyd's Rep 192 (Tetroc v. Cross-con); BGH 20.10.1983, VersR 1984, p.262; CA Versailles 29.2.1984, BT 1984, p.249.

183. CA Poitiers 31.3.1971, BT 1971, p.168: 'qu'un emballage même solide et en bois, n'aurait aucunement préservé le matériel en raison de l'extrême violence du choc.' Cf. also Clarke, no.88: 'Packing is defective if it does not enable the particular goods to withstand the dangers of normal transit of the kind contemplated by the particular contract.' Hill/Messent, pp.85 et seq.

184. Carriage to Russia, the Middle East requires perhaps different packing than carriage exclusively within the West Europe road network; cf. Rb Amsterdam 25.6.1975, S&S 1976, 49, followed in 1.6.1977, S&S 1978, 74; CA Paris 12.7.1978, BT 1979, p.159.

185. This rule conforms to the standpoint adopted above at § 5.4.1 regarding the unsuitability of the vehicle.

186. See Dorrestein, nos.10 et seq., as also his binding advice of 3.8.1976, S&S 1977, 89. Cf. NJW 1968, p.1023.

187. Cf. OLG Dusseldorf 8.5.1969, ETL 1970, p.446.

188. Cf. Rb Kh Antwerp 13.10.1972, ETL 1973, p.330. Heuer, p.97 points out that usage in a particular trade need not always be a proper criterion.

189. Tr. gr. inst. Metz 7.9.1982, BT 1983, p.346. As a result of insufficient supervision the carrier remained 40% liable in CA Aix-en-Provence 9.12.1980, BT 1981, p.143, while CA Paris 19.9.1979, BT 1979, p.481 held the carrier fully liable for insufficient supervision, on which critically Rodière, BT 1979, p.473. Cf. Clarke, no.90.

190. CA Lyon 7.10.1976, BT 1977, p.84. Cf. Putzeys, no.787; Clarke, no.89; Hill/Messent, p.88. See also Binding Advice 30.3.1981, S&S 1981, 120.

which the packing¹⁹¹ was effected as well as the quality thereof should be determined.¹⁹²

Contrary to the preceding category (Art.17(4)(a) CMR) it is here considered that theft is not covered by the present ground of exoneration. Although differences of opinion on this may exist under the CIM,¹⁹³ on the basis of the text of Article 17(4)(b) CMR there is no room for any doubt.¹⁹⁴

Finally reference should be made to another aspect of an evidentiary nature, which leads one to Articles 8 and 9 CMR, in which the packing of the goods as well as their apparent condition is referred to.¹⁹⁵ These Articles prescribe the manner in which the carrier can in this respect strengthen his evidentiary position by entering a reservation. Such a reservation can demonstrate that the actual defect did not occur during the carriage.¹⁹⁶ Should the carrier neglect to enter a reservation in such cases his evidentiary position thereby becomes particularly precarious.¹⁹⁷

It appears from the above that the difficulties to which a claim to this category leads are primarily caused by the failure of the parties to agree on the pertinent matters as well as by factors of an evidentiary nature.

§ 5.4.3 *Handling, loading, etc., by the sender (Art.17(4)(c) CMR)*

It is to Article 17(4)(c) CMR that the dubious honour falls not of being the most tested but certainly the most disputed ground of exoneration. The provision is concerned not only with damage occurring at the moment of handling, loading or unloading the goods but also with damage that is manifested during the course of the actual carriage.¹⁹⁸

Analysis of the caselaw concerning this ground of exoneration produces a

191. Rb Amsterdam 14.1.1970, S&S 1972, 77 (vain claim to defective construction of cases). In the same sense Rb Amsterdam 4.2.1976, S&S 1976, 71.

192. The carrier ignores poor quality: Rb Kh Antwerp 13.10.1972, ETL 1973, p.330; CA Paris 23.6.1975, BT 1975, p.360; CA Grenoble 3.4.1980, BT 1980, p.301; Super Court Zagreb 2.9.1967 and 6.3.1968, Hague-Zagreb Essays 2, p.63.

193. Nanassy, p.545.

194. Cf. Nickel-Lanz, no.142.

195. On these provisions cf. § 6.3 below.

196. Kammergericht 13.3.1980, VersR 1980, p.948; CA Toulouse 17.2.1971, BT 1971, p.353.

197. The carrier had to experience this in the following cases: Rb Kh Antwerp 21.10.1975, ETL 1976, p.271; Tr Comm Charleroi 26.6.1977, ETL 1977, p.776; CA Agen 19.3.1980, BT 1980, p.502; CA Paris 21.1.1981, BT 1981, p.221; CA Toulouse 22.1.1976, BT 1976, p.72; CA Paris 19.3.1979, BT 1979, p.481; Tr Comm Montauban 19.1.1973, BT 1973, p.170; CA Paris 10.2.1984, BT 1984, p.558.

According to L. Brunat, BT 1973, p.162, also BT 1976, p.73, there remains to the carrier in such a case merely a claim to the general grounds of exoneration.

198. Cf. Clarke, no.91.

veritable tower of Babel.¹⁹⁹ Application of this provision has produced results which generally point in differing, even in diametrically opposed directions.²⁰⁰ What is the reason for this undesirable situation? An important cause lies in the application of national law.²⁰¹ In addition an historical aspect plays a role. The provision was adopted with a number of variations from the CIM. It was not, or only marginally, appreciated to what consequences this could lead. Finally, more has been read into the provision, to the detriment of the CMR, than is deserved. As a result of these causes Article 17(4)(c) CMR has been as it were enveloped in practice by a complex of questions which hinder the effective application of the provision. In order to obtain greater clarity regarding the fortunes and misfortunes of Article 17(4)(c) CMR an independent treatment of the mutually interwoven and inter-dependent questions is called for.²⁰²

The order of treatment of a number of sub-questions is as follows:

1. Is it necessary for a claim to this provision that the actions were inexpert or defective? (§ 5.4.3.1).
2. Is a duty to effect an action specified in Article 17(4)(c) CMR regulated by the Convention? (§ 5.4.3.2).
3. In a claim to this provision does the question of who (as a matter of law or contract) is under a duty to effect an action specified in Article 17(4)(c) CMR play a role? (§ 5.4.3.3).
4. Leaving aside the answers to the above questions, is the carrier under a duty to inspect the loading and stowing before commencing the transport? (§ 5.4.3.4).

§ 5.4.3.1 *Defectiveness required?*

Contrary to the ground of exoneration specified in Article 17(4)(b) CMR, Article 17(4)(c) CMR does not indicate why the enumerated actions of the sender produce risks. For many judges this has perhaps been the reason to read this provision as if it contained *defective* handling, loading, etc.²⁰³ This standpoint is incorrect and foreshadows the required burden of proof according to Article 18(2) CMR regarding proof of causality. Historical enquiry reveals that this provision attempts only to express that each party is responsible for his own contribution.²⁰⁴ The drafters of the Convention did

199. Libouton, ETL 1973, p.42, stated this rather euphemistically: 'a certain amount of confusion exists on this point.'

200. Loewe, no.160; R. Wijffels, ETL 1976, pp.208 et seq., followed by Hill/Messent, pp.89 et seq.

201. Loewe, no.160.

202. The existing situation can form a threat to autonomous interpretation of conventions. The established legal diversity (quot iudices, tot sententiae) can make courts wary of this method of establishing the law, cf., e.g., CA 16.11.1976 [1977] 1 Lloyd's Rep pp.350-351 (Ulster Swift v. Taunton Meat); HL 25.7.1977 [1978] 1 Lloyd's Rep pp. 123, 125, 133 (Buchanan v. Babco): 'Our courts are therefore thrown back on their own resources' (at p.128).

203. Also Heuer, p.99 makes this mistake.

204. Dorrestein, no.213; Nickel-Lanz, no.143; Nanassy, pp.547 et seq.

not adopt the conformable CIM provision in an unabridged form.²⁰⁵ The distinction drawn by the CIM between loading by the sender and/or unloading by the consignor and defective loading by the sender rests upon, on the one hand, damage which manifests itself at the time of the loading and/or unloading, and damage, on the other hand, which appears during the journey. The first category is, having regard to the period for which the carrier is liable, *de jure* superfluous but was adopted in connection with the evidentiary position of the carrier.²⁰⁶ As for the second category, it will often be difficult to prove afterwards that the damage was caused by inexpert loading by the sender and not by careless driving by the carrier.²⁰⁷ The distinction has scarcely no substantive point as the first category absorbs the second. By reason of this it would seem self-evident that the drafters of the CMR restricted adoption to the first category and regarded this as applicable not only to damage at the time of loading and/or unloading but also to damage during the carriage. Because the CIM requirement that the loading and/or unloading by the sender-consignor must be effected in accordance with the applicable regulations (which would be unsuitable to the nature of road carriage) or in accordance with the contract between the parties, was not adopted, for the CMR there remains as the only criterion the bare fact of handling, loading, stowage or unloading of the goods by the sender, the consignor or persons acting on their behalf.

The thought that this conclusion would lead to results whereby the liability of the carrier would be deprived of too much meaning ignores the fact of the evidentiary regulation mentioned above of Article 18(2) CMR. If the carrier wishes to profit from the ground of exoneration here under discussion he should demonstrate on the basis of the factual situation that the damage could have been a consequence of the actions specified in Article 17(4)(c) CMR, which, as will emerge below, will often result *de facto* in an attempt to prove defectiveness in one of these actions. The view that the carrier is nevertheless not obliged to prove that the actions specified were defective was held by the Hoge Raad when quashing a judgment holding that the same had to be proved.²⁰⁸ By means of systematic, grammatical and comparative convention interpretation the Hoge Raad brought the provision at issue back to proper proportions:

205. Art.27(3)(c) CIM.

206. Nanassy, pp.551, 553.

207. Cf. Hof Den Bosch 21.12.1965, S&S 1966, 25; Cass. 5.7.1977, BT 1977, p.402; OGH 21.3.1977, ULR 1978, II, p.292. In those cases the damage was divided equally among the parties.

208. HR 18.5.1979, S&S 1979, 73; NJ 1980, 574. The Hoge Raad quashed the decision of Hof The Hague in which it was decided, *inter alia*, 'As incorrect loading or stowage is not proved the remainder of the probandum – the causal connection between load and damage – need not be examined.' In this way the Hof did not come to the burden of proof according to Art.18(2) CMR. The courts cited by the Advocate General in his conclusions before the above HR case, to whose first category in which defectiveness is not stated as a requirement the following are to be added, came to the same extensive interpretation of Art.17(4)(c) CMR.

Rb Dordrecht 22.12.1971, S&S 1972, 50 quashed by Hof The Hague 19.12.1973, S&S 1974, 71; NJ 1974, 411; CA Paris 8.6.1967, cited by R. Wijffels, ETL 1976, p.219; CA Paris 25.1.1982, BT 1982, p.123; Tr. gr. inst. Strasbourg 9.11.1966, ETL 1968, p.975; OLG Dusseldorf 18.11.1971, VersR 1973, p.178 citing R. Züchner, VersR 1967, p.1023 and VersR 1968, p.723.

'This means that the carrier, who claims the relief provided in Article 17 paragraph 4 CMR, opening words and under c, can suffice, in case of doubt, by proving that the handling, loading, stowage or unloading of the goods was effected by one or more of those mentioned under c, and that, having regard to the circumstances of the case, the loss or the damage could have been the consequence thereof.'

The court correctly pointed out, somewhat unnecessarily, that with this decision there was no conflict with the circumstance that the carrier had stated that the loading by the sender was incorrect. This last occurs repeatedly, but ought to be placed in the cadre of Article 18(2) CMR and not as an element of Article 17(4)(c) CMR.

The result of this view is that lack of expertise on the part of the sender does not as such need to be proved even though in practice, although not in precisely such terms, that is what it often amounts to.²⁰⁹ In a large number of cases the carrier has successfully invoked this ground of exoneration.²¹⁰ Nevertheless, there is insufficient reason to allow this success to spill over into unbridled optimism.²¹¹ A damper on original success is provided by the question dealt with in § 5.4.3.4 of what is understood to be the duty of inspection by the carrier.

Worthy of mention is the case that led to a judgment of the BGH, in which it was stated that waiver by the carrier of the right to invoke this ground of exoneration is in conflict with Article 41 CMR.²¹²

209. Cf. Hof Amsterdam 13.11.1980, S&S 1981, 49. Cf. also the caselaw cited in the Advocate General's second category (defectiveness as required criterion) in his frequently cited conclusion, to which add:

Rb Amsterdam 28.5.1977, S&S 1976, 16; Rb Kh Antwerp 16.1.1974, ETL 1975, p.98; CA Paris 23.2.1982, BT 1982, p.550. The case of 4.9.1973, S&S 1974, 16, cited by the Advocate General was subsequently quashed by decision of 13.3.1974, S&S 1974, 77. In this (infrequently occurring) case the person entitled to the goods successfully adduced the necessary counterproof.

210. Apart from the cases already cited, also the following:

Rb Kh Antwerp 6.9.1974, ETL 1975, p.253; Rb Kh Namen 22.7.1965, ETL 1966, p.133; Rb Kh Brussels 19.12.1968, ETL 1969, p.953; Rb Kh Liege 3.10.1969, Asser Card System 7906; Rb Kh Brussels 12.4.1972, TPR 1979, p.116; Tr. gr. inst. Albertville 4.3.1975, BT 1975, p.217; CA Paris 24.6.1976, BT 1976, p.378; CA Lyon 5.2.1982, BT 1982, p.154; OLG Munich 17.11.1968, ETL 1971, p.115; OLG Hamburg 14.12.1978, VersR 1980, p.584; OLG Stuttgart 16.1.1980, VersR 1980, p.979.

211. The claim by carriers to Art.17(4)(c) CMR was rejected in the following cases:

Hof van Beroep Brussels 28.6.1965, ETL 1969, p.925; Rb Kh Antwerp 28.3.1966, ETL 1966, p.712; Rb Kh Liege 23.2.1976, JCB 1977, p.441; Rb Kh Liege 20.1.1971, ETL 1971, p.541; Cass. 17.6.1969, ETL 1970, p.57; CA Paris 29.4.1972, BT 1972, p.194; CA Nîmes 5.11.1980, BT 1980, p.600; CA Amiens 6.5.1981, BT 1982, p.271 (despite 15% overloading); CA Besançon 15.12.1982, BT 1983, p.96. Here it is interesting to compare on the one hand Rb Kh Antwerp 30.4.1965, ETL 1966, p.314 which regarded a carrier as relieved of liability despite a criminal conviction and on the other Super Court Zagreb 24.10.1965, Hague-Zagreb Essays 2, p.63 which considered the carrier free of his liability.

212. By this the carrier managed to escape the trap set for him by the sender. Under pain of loss of clientele (or the risk thereof) the carrier had accepted a too highly loaded transport. Acceptance of this risk, as reproduced in the consignment note, was considered by the BGH 27.10.1978, VersR 1979, p.417, to be in conflict with Art.41 CMR.

In conclusion it can be stated that Article 17(4)(c) CMR does not contain the element of 'defect'.²¹³ In practice the carrier will not often be able to avoid, in order to profit from Article 17(4)(c) CMR, via Article 18(2) CMR, presenting so much material that the characterisation 'defective' handling, etc., is at least de facto approximated.²¹⁴

§ 5.4.3.2 *On whom rests the obligation to act as specified in Article 17(4)(c) CMR?*

Here one turns to the question, can it be discerned from Article 17(4)(c) CMR or from any other provision of the CMR which party is obliged to effect the actions specified by this provision. The question is at the same time a preliminary question to the issue to be dealt with below in § 5.4.3.3. There exists a considerable degree of consensus as to the answer to the question posed: the Convention leaves this obligation unregulated.²¹⁵ The parties consequently possess the freedom to regulate the matter themselves. Loewe has correctly stated that the fact of the Convention leaving this obligation unregulated does not mean that therefore national regulations on the matter should be of application.²¹⁶ In the absence of agreement between the parties, which is a frequent situation, one is referred to various sources (of assistance), which can lead to uncertainty. The following may be considered to be such sources: statute,²¹⁷ conditions²¹⁸ and the nature of the agreement.²¹⁹ Leaving this obligation unregulated may be explained by the circumstance that parties often effect the relevant actions together.²²⁰ Thus, it has been judged that

213. Similarly to the HR cited above cf. also: Rb Rotterdam 21.3.1980, S&S 1981, 29; Rb Kh Antwerp 26.5.1971, ETL 1971, p.547; Tr Comm Toulouse 19.4.1978, BT 1978, p.612 approved by Brunat, BT 1980, p.391; CA Lyon 5.2.1982, BT 1982, p.154.

214. Cf. Heuer, pp.110-111 and the caselaw cited there; Rodière, p.292; Nickel-Lanz, no.145.

215. Precht/Endrigkeit, p.92; Muth-Glückner, Art.17, Anm.23; Heuer, pp.61, 66; Rodière, p.230; Loewe, no.161; Dorrestein, no.215; Helm, Frachtrecht, § 429 HGB, Anm.14; Putzeys, no.793; Hill/Messent, p.88.

A sample of the caselaw: OLG Munich 27.11.1968, ETL 1971, p.115; Hof Amsterdam 27.11.1973, S&S 1974, 64; Binding Advice 3.8.1976, S&S 1977, 89; OGH 21.3.1977, ULR 1978, II, p.292. Complete uniformity never exists at law: cf. LG Berlin 12.11.1970, VersR 1971, p.635.

216. Loewe, no.161.

217. Cf. § 17 KVO on which Helm, Frachtrecht, p.329 et seq. For a comparison between the KVO regulation and that of the CMR, see R. Züchner, VersR 1968, pp.723 et seq. There exists no legislation on this point in the Netherlands.

218. In France Art.4 Conditions Générales, cf. Lamy, no.34; L. Brunat, BT 1981, p.298; S. Nossovitch, BT 1982, p.102.

In Germany § 6 AGB, cf. Helm, Frachtrecht, p.539. In the Netherlands the AVC gives no regulation of this matter; cf. Claringbould, p.65.

219. Cf. Dorrestein, no.215.

220. Cf. on this joint venture notion the annotation to HR 19.2.1982, S&S 1982, 57; NJ 1982, 402. Cf. also Muth-Glückner, Art.17, Anm.26: 'Die in der CMR getroffen Regelung ist nicht ganz klar abgegrenzt. Sie kann bei Zusammenwirken von Absender oder Empfänger einerseits mit dem Frachtführer andererseits zu Schwierigkeiten führen.'

besides a duty to load, senders sometimes also have a duty of stowage but that the carrier can give instructions thereon.²²¹ Such instructions are often based on public law regulations concerning traffic safety.²²² In this the specific characteristics of the goods and/or the vehicle can likewise play a role. In particular the borderline between loading by the sender and inspection thereof by the carrier appears to give rise to difficulties in practice.

The absence of clear criteria has led to the result that the courts, in the absence of clear agreement between the parties as to the necessary actions, have laid the obligations of loading and stowage on the carrier.²²³ Writers on the CMR hold another view,²²⁴ as does the Hoge Raad in regard to a national transport contract. Because the decision was concerned not so much with a particular rule of Dutch transport law but rather gave a judgment on a situation which can occur just as well under the CMR, the decision is also of significance for carriage under the CMR. In a case in which the sender claimed compensation from the carrier for damage which occurred as a result of defective storage, the court decided as follows:

‘Circumstances such as those accepted by presumption by the Hof can nevertheless make it difficult for the carrier’s opposing party to claim for mistakes made in the loading or stowage of which he himself has taken care. This will occur in particular where the carrier may assume that the loading and stowage have been effected in a proper manner, to which the fact that for a lengthy period of time it was normally the opposing party who took care of it can contribute. In addition it is also imaginable (...) that from such a customary practice a tacit agreement regarding the responsibility of the carrier can be inferred.’²²⁵

221. This need not always lead to the liability of the carrier: OLG Hamburg 14.12.1978, VersR 1980, p.584.

222. For a case where the carrier of exceptional transport under police escort vainly tried to recover for damage, which occurred upon passage of a viaduct, from the central government, cf. HR 19.11.1982, NJ 1984, 366, note by CJHB.

223. For example, Hof The Hague 14.11.1980, S&S 1981, 42 (for national law). Often one proceeds, at least implicitly, from this view, cf. e.g., HR 19.2.1982, S&S 1982, 57; NJ 1982, 402. For the CMR: Rb Amsterdam 19.1.1978, S&S 1978, 101; Rb Roermond 2.1.1969, ETL 1969, p.1005; Rb Kh Charlerloi 25.7.1975, Asser Card System 9401; Rb Kh Charlerloi 26.7.1977, ETL 1977, p.776; Tr. gr. inst. Charlerloi 1.10.1968, ULC 1969, p.327; Hof van Beroep Ghent 20.11.1975, ETL 1976, p.232; Rb Kh Antwerp 7.3.1980, ETL 1981, p.466; CA Nimes 5.11.1980, BT 1980, p.600; CA Paris 16.5.1969, ETL 1969, p.896; Super Court Zagreb 5.4.1961, Hague-Zagreb Essays 2, p.60; Super Court Zagreb 2.9.1967, Hague-Zagreb Essays 2, p.60; Rb Kh Antwerp 7.3.1980, ETL 1981, p.466.

See further the caselaw cited by Ponet, pp.260-261. The attempt has also been made to attach EEC conditions, cf. Libouton, 1974, p.512; L. Brunat, BT 1972, p.83.

224. Libouton, 1973, p.42; Heuer, p.62; Dorrestein, nos.3 et seq., 215; Lamy, nos.71 et seq.; also OGH 21.3.1977, ULR 1978, II, p.297: ‘Wer zu verladen hat, wird nicht im CMR geregelt; Im Zweifel, wenn also nicht in der Vereinbarung festgelegt, ist die Verladung Sache des Verladers.’

225. HR 18.6.1982, S&S 1982, 85; NJ 1983, 384 note by BW. The Hague decision cited in n.223 above was hereby quashed. In the subsequent case Hof Amsterdam 26.4.1984, S&S 1984, 113 it was held that the carrier was not responsible for the loading. See also Hof Arnhem 27.11.1973, S&S 1974, 64.

The path to be followed is sought by the judge with the help of numerous factual criteria.²²⁶ Thus, on occasion he will seek to distil an agreement of the parties from remarks entered on the consignment note.²²⁷

This uncertainty prompted proposals for amendment on behalf of the IRU and ICC in 1967. With a view to the applicability of Article 17(4)(c) CMR it was proposed that Article 6(1) CMR, which stipulates what is to be or may be included in the consignment note, be extended with the following provision:

If the loading or unloading of the goods is carried out by the carrier, a note to this effect.

If the stowage is not carried out by the carrier, a note to this effect.²²⁸

In conclusion it can be stated that a regulation of the duty as to the actions specified in Article 17(4)(c) CMR is left to the parties by the CMR. The uncertainty in this field is caused by the fact that the parties are insufficiently aware of this freedom, or at least make insufficient use thereof. Upon whom the duty to effect the specified actions will rest will depend upon the concrete circumstances of the case, including the type of carriage, the expertise of the parties, customary practice and reasonableness.

§ 5.4.3.3 *Factual or juridical criterion?*

Here one turns to the question whether a claim to Article 17(4)(c) CMR is restricted to the situation in which the person who performed the actions specified in the provision did so by virtue of the contract. Or can the carrier also invoke Article 17(4)(c) CMR when the person who performed those actions was not under a duty to do so?

The latter, broader, standpoint is denoted as factual criterion, the former as juridical criterion.²²⁹ The distinction has not (yet) won itself a place in caselaw and legal literature. An argument that is advanced on behalf of the factual criterion is that the CMR itself contains no rules on this point. One has

226. Hof Arnhem 27.11.1973, S&S 1974, 64: (no) express agreement as to the obligation to stow, (no) particular experience of the carrier, qualities of the goods, previous legal relationship between the parties.

CA Nîmes 5.11.1980, BT 1980, p.600; experience of one party of carriage to Russia. BGH 22.4.1977, ETL 1978, p.279; although § 6.3 AGNB provides that the carrier is responsible for safe loading, if it clearly transpires that the sender possesses more knowledge of this he must assist in loading operations.

227. Rb Kh Brussels 12.4.1972, ETL 1972, p.1046; Tr Comm Paris 3.11.1970, ETL 1971, p.264; CA Paris 21.3.1973, BT 1973, p.244. In this latter case a condition in the sale contract underpinning the transport was fatal for the carrier; cf. Libouton, 1974, p.512.

228. W/TRANS/SCI/301/Add. 1, 14 November 1967, p.3.

After ample discussion, from which it appeared that the proposal of IRU/ICC was prompted by a mistaken interpretation of Art.17(4)(c) CMR (the provision could certainly create the impression that loading and unloading fell to the responsibility of the carrier), the proposal was withdrawn; W/TRANS/SCI/438, 19 April 1972, p.8. The FIATA Report contained no proposal for amendment of Art.17(4)(c) CMR.

229. Libouton, 1973, p.44; Ponet, p.255.

merely to note therefore whether the actions specified in Article 17(4)(c) CMR are performed by the persons specified therein, namely, the sender, the consignee as well as those persons acting on their behalf. Authoritative writers adopt this standpoint.²³⁰ This view is also voiced in the caselaw.²³¹ A minority of writers hold another view.²³²

In support of the juridical criterion one can point to the rule that each party has to answer for that for which he is under a duty to perform as against the opposite party.

Despite the objections to which the juridical criterion is subject – in particular the uncertainty indicated in the preceding section – in the opinion of the present writer the last argument above is more convincing than those upon which attempts are made to found the factual criterion. The caselaw provides many examples of this view.²³³ This interpretation means that only in a smaller number of cases can the carrier make a claim to this ground of exoneration than when one adopts the factual criterion. This does not mean, however, that the carrier would be denied this claim if he (or his driver) became engaged in activities for which his opposing party is accountable.²³⁴ A broader interpretation based on the factual criterion appears to be difficult to maintain in the case in which a regulation applies, either contractual or legislative. The interpretation advocated here allows full play to the contractual freedom of the parties. Where this contractual freedom is not enjoyed – see the preceding sub-section – and the body called upon to render a legal decision can do nothing other than allow the ‘Norm des Faktische’ to apply, the relevance of the distinction dealt with here declines proportionately. From this angle, the consideration of the Hoge Raad, quoted in the preceding

230. Rodière, p.292; Loewe, no.161; Züchner, VersR 1968, p.729; W. Voigt, DVZ 1975, no.84, p.10; Nickel-Lanz, no.144; Helm, Frachtrecht, Art.17 CMR, Anm.16; Putzeys, no.794.

231. Rb Arnhem 21.10.1971, S&S 1973, 16: ‘that this provision can only be thus understood, that a claim to the thereby intended exoneration possibilities by the carrier is permissible in *all* cases, (...) and consequently – as for such a case neither in the present provision nor elsewhere in the CMR is an exception made – it can make no difference whether the specified activity must actually according to the transport contract have been performed by the carrier.’ In similar vein: Rb Breda 25.3.1980, S&S 1981, 30; Hof van Beroep Brussels 13.1.1972, ETL 1972, p.585; OLG Dusseldorf 13.1.1972, ETL 1973, p.178; cf. also Ponet, pp.255-256.

232. Precht/Endrigkeit, p.92; Heuer, p.100; Dorrestein, no.213. Although also Nickel-Lanz, no.143 endorses this basic rule, that does not prevent her from choosing for a factual criterion.

233. Rb Dordrecht 22.12.1971, S&S 1972, 49; Rb Dordrecht 22.12.1971, S&S 1972, 50; Hof Amsterdam 27.11.1973, S&S 1974, 64; Hof Amsterdam 9.11.1979, S&S 1980, 69; Rb Kh Antwerp 13.1.1972, TPR 1979, p.118; Rb Kh Antwerp 16.1.1974, TPR 1979, p.118; CA Paris 27.2.1970, BT 1970, p.11; CA Paris 3.11.1970, BT 1971, p.213; OGH 25.9.1968, ETL 1973, p.309. That the juridical criterion naturally can lead to other results as a result of factual circumstances is revealed by OLG Dusseldorf 13.1.1972, VersR 1973, p.178 and OLG Cologne 2.2.1972, VersR 1972, p.778 from which it appears that the carriers had during the carriage effected a change in the original load as a result of additional loads.

234. Cf. Rb Dordrecht 21.12.1971, S&S 1972, 49; Rb Kh Antwerp 9.3.1976, TPR 1979, p.118; LG Monchengladbach 18.12.1969, VersR 1971, p.218; Hof Amsterdam 13.11.1980, S&S 1981, 49; in this sense also Heuer, p.100; Dorrestein, no.213; Nickel-Lanz, no.144; Putzeys, no.799; Clarke, no.92. Contra Rb Kh Brussels 26.10.1972, ETL 1973, p.516; OLG Dusseldorf 13.1.1972, VersR 1973, p.178.

sub-section, and from which both a factual and a juridical criterion can be inferred, appears to be justified.

§ 5.4.3.4 *Duty of inspection?*

When the phase of handling, loading and stowage is passed the question arises whether, before commencing the carriage, the carrier should verify the result of those actions in the light of the proposed carriage.

Leaving aside the basis of such duty of inspection, in the majority of cases the sanction for not, or insufficiently, inspecting the load or the loading is finally that the carrier is excluded from the possibility to exonerate himself on the ground of Article 17(4)(c) CMR. In France in particular there is a constant caselaw on this point. If the carrier has safely negotiated the terrain strewn with obstacles discussed above, this caselaw draws a line through the result thus achieved. The consequence of this is that the carrier still remains liable for the whole or greater part of the damage. The Cour de Cassation has reflected this view in various cases, considering thereon:

‘que cette disposition n’exonère pas ledit voiturier de l’obligation, qui lui incombe, de contrôler l’arrimage exécuté par autrui, et de demeurer responsable des avaries survenues lorsqu’il a procédé au transport malgré les vices apparents de cet arrimage’.²³⁵

This duty has been emphasised in various judgments,²³⁶ sometimes expressly denied or recognised, but without attaching fatal consequences thereto for the carrier.²³⁷

235. Cass. 3.5.1976, BT 1976, p.317; ETL 1978, p.106. The commentator at BT 1976, p.33 correctly observed that ‘qui lui incombe’ can in no sense be deduced from the CMR. In a case shortly thereafter of 14.6.1976, BT 1976, p.342, the court reiterated this obligation; moreover, it can be gathered from the decision that this obligation rests upon domestic traffic safety regulations. In the first mentioned case the carrier remained liable because manifest errors in the loading were involved. In the second case, as the court at first instance, the judge of fact, had held that no manifest errors were involved, the carrier was not liable. Cf. also Cass. 8.6.1971, BT 1971, p.319; Cass. 5.7.1977, BT 1977, p.402; Cass. 23.2.1982, BT 1982, p.285; ETL 1983, p.19.

236. CA Paris 16.5.1969, ULC 1970, p.127; Tr Comm Paris 29.2.1972, BT 1972, p.269; CA Colmar 7.11.1973, BT 1974, p.144: ‘attendu que l’arrimage dépend des difficultés du parcours et également de la vitesse du véhicule que le transporteur est seul à même d’apprécier.’ Tr Comm Paris 3.4.1974, BT 1974, p.311: ‘bien que le texte de la CMR soit favorable au transporteur, il incombe à celui-ci de vérifier la bonne exécution du chargement et l’arrimage.’ The enormities to which this view can lead appears from a judgment of Tr Comm Toulouse 19.4.1978, BT 1978, p.291, in which was held that the duty of inspection also extends to covert defects in the loading. Cf. on this the damning commentary of L. Brunat to the cases in BT. Further CA Lyon 30.3.1979, BT 1979, p.423; CA Agen 29.6.1981, BT 1981, p.433; CA Paris 30.9.1981, BT 1981, p.514; CA Paris 22.6.1982, BT 1982, p.432; cf. also BT 1982, p.131, p.142. Super Court Zagreb 5.4.1961, Hague-Zagreb Essays 2, p.60; Super Court Zagreb 2.9.1967, Hague-Zagreb Essays 2, p.60 (both decisions on the ground of traffic safety). OLG Munich 27.6.1979, VersR 1980, p.241; OGH 25.9.1968, ETL 1973, p.309 (took account of winter weather conditions and the experience of the carrier). Super Court Denmark 2.3.1979, ETL 1980, p.208; ULR 1980, p.277. Cf. also Ponet, pp.270 et seq.

237. CA Paris 3.11.1970, BT 1971, p.213; CA Lyon 19.3.1975, BT 1975, p.169 approved by L.

The writers steer cautiously between these currents, which usually amounts to their being predisposed to a reasonable duty of information and warning.²³⁸ Here everything depends on the concrete circumstances of the relevant transport contract. Just as with the question of the duty to load, etc., with which this issue is closely connected, it is impractical to propose general rules on this point.²³⁹ Thus, the carrier remained excluded from a claim to Article 17(4)(c) CMR in a case in which he had done nothing against an excellent loading²⁴⁰ or against overloading;²⁴¹ sometimes he has had to hear that he should have abandoned a carriage; that performance thereof was to be regarded despite the circumstances as his wilful misconduct.²⁴² The failure to enter sufficient reservation against the loading often means that the carrier remains at least partially liable.²⁴³ To the extent that this caselaw is founded on Articles 8 and 9 CMR the fact that they are of an evidentiary nature and do not relate to substantive law is ignored.²⁴⁴ A consideration of the Cour d'Appel Nîmes illustrates how such a duty is improperly piloted into harbour. The court having stated that following Article 18(2) CMR the carrier profited (in principle) from the presumption that he was not accountable for the damage, it considered as follows:

'il n'en demeure pas moins qu'en application de l'article 8 de la CMR, qui fait l'obligation au transporteur de vérifier l'état de la marchandise et de son emballage, le transporteur, qui est un technicien en la matière, a l'obligation de vérifier le

Brunat, loc. cit., p.162; CA Paris 23.12.1975, BT 1976, p.48; Tr Comm Paris 26.6.1982, BT 1983, p.142; OLG Saarbrücken 21.11.1974, VersR 1976, p.276; OLG Düsseldorf 27.3.1980, VersR 1980, p.286 (in reaction to the situation in France); OLG Hamburg 14.12.1978, VersR 1980, p.584 (despite instructions and approval (!) of the sender, yet a carrier need not have an understanding of everything ...); OLG Stuttgart 16.1.1980, VersR 1980, p.979; cf. R. Wijffels, ETL 1976, p.229.

238. Nanassy, p.552; Dorrestein, nos.71, 80. This writer distinguishes the following divisions in the issue: inspection, warning, informing. The line of separation between these categories is nevertheless vague. Nickel-Lanz, nos.39, 151; Putzeys, nos.808, 809; Clarke, nos.93, 94 also expresses his doubts in noticeably careful language.

239. The chance of sharing the liability following Art.17(5) CMR increases in such situations. OLG Saarbrücken 21.11.1974, BT 1976, p.276; Putzeys, no.797. CA Paris 27.1.1979, BT 1980, p.226. Cf. further n.243 below.

240. Hof van Beroep Brussel 12.3.1969, ULC 1970, p.113.

241. Rb Kh Liege 3.10.1969, Asser Card System 7906; Tr Comm Paris 6.4.1979, BT 1979, p.256; BGH 27.10.1978, VersR 1979, p.427; Rb Kh Deurne 21.11.1972, TPR 1979, p.119.

242. Rb Kh Dinant 31.10.1972, TPR 1979, p.116; Rb Kh Brussel 26.10.1972, ETL 1973, p.516; Rb Kh Verviers 18.5.1968, ETL 1968, p.1241; Hof van Beroep Liege 6.5.1970, ETL 1970, p.716; CA Paris 27.1.1970, BT 1970, p.110; CA Corbeil-Essence 18.5.1969, ETL 1969, p.988. Cf. Putzeys, no.809.

243. No or insufficient reservation regarding manifest bad loading: Rb Kh Verviers 18.5.1968, ETL 1968, p.1240, appeal dismissed by Hof van Beroep Liege 6.5.1970, ETL 1970, p.716; CA Lyon 21.10.1976, BT 1976, p.534 (1/3 liable); CA Lyon 21.10.1976, BT 1977, p.110 (1/2 liable); CA Paris 31.3.1977, BT 1977, p.315 (1/3 liable); CA Reims 13.7.1977, BT 1977, p.406 (1/3 liable).

244. R. Züchner, DB 1971, p.517; W. Voigt, DVZ 1973, no.38, p.8; Nickel-Lanz, no.39; also the decision cited in n.246 below. On Artt. 8 and 9 CMR see § 6 below.

chargement et, si la défectuosité du chargement était apparente au départ, sa responsabilité reste engagée'.²⁴⁵

For the carrier, as far as his liability according to the CMR is concerned, it is six of one and half a dozen of the other whether the bill for the insufficient inspection is presented to him via Article 8 CMR or public law regulations.²⁴⁶

Reasonableness dictates that the carrier fulfills his duty to warn to the extent determined by the circumstances of the concrete case. Application of the grounds of exoneration laid down in Article 17(4)(c) CMR should be safeguarded from misplaced restrictions – via the duty to inspect.

§ 5.4.4 *Nature of the goods (Art.17(4)(d) CMR)*

A ground of exoneration which occurs frequently in practice is the category provided by Article 17(4)(d) CMR: in this context the nature of the goods is presented as a risk. Given that goods are not produced with an eye to transport most goods will, in the absence of special precautionary measures, fall within the scope of this provision.²⁴⁷ Loewe observed correctly in this context:

'To what extent is the list in paragraph 4 a list of grounds on which the carrier may be relieved of liability, and not merely a statement of the basis for reserving the burden of proof referred to in Article 18, paragraph 2?'²⁴⁸

A number of thresholds are built into the Convention against the danger signalled in this quotation. An important threshold is raised by the proof required – admittedly lightened – under Article 18(2) CMR: 'having regard to the circumstances of the case'.

In this category *ius in causa positum* justifiably applies.^{248a} Various causes

245. CA Nîmes 5.11.1980, BT 1980, p.600; the carrier had presented himself as an expert in transport to Russia. Also in Cass. 17.4.1980, BT 1980, p.313 was Art.8 CMR incorrectly interwoven with Art.17(4)(c) CMR. Cf. Rodière, Sirey, no.155. For a correct but strict application of Art. 8 CMR in a case of neglecting to make a reservation, cf. CA Paris 5.3.1980, BT 1980, p.187, on which approvingly L. Brunat, loc. cit., p.183.

246. Cf. Tr Comm Paris 11.6.1980, BT 1980, p.399. This court correctly rejected the construction of Art.8 CMR. Further, the court observed with by French standards unusual mercy in favour of the carrier: 'On ne peut, en effet, exiger d'un conducteur de camion qu'il soit un spécialiste en toute matière et que sa responsabilité se trouve engagée du fait des caractéristiques techniques particulières de chaque nature de marchandise qu'il transporte.' On this see L. Brunat, BT 1980, p.390. Cf. for a similar view in Germany: R. Züchner, VersR 1967, p.687.

247. English writers make frequent use of the expression 'difficult travellers': D. Glass, ETL 1979, p.709; Donald, p.23; Clarke, no.95.

248. Loewe, no.165.

248a. A few examples: cauliflowers, Rb Roermond 24.10.1968, ETL 1969, p.1012, followed in 18.11.1971, ETL 1972, p.416; marble, LG Hagen 4.11.1976, VersR 1977, p.910; grape juice, OLG Stuttgart 24.1.1967, NJW 1968, p.1054, approved by R. Züchner, VersR 1969, p.685; bottles, Super Court Zagreb 20.5.1975, Hague-Zagreb Essays 2, p.63; machines, CA Angers 11.6.1977,

of damage are mentioned in Article 17(4)(d) CMR.

A frequently occurring category is decay. This cause of damage arose for discussion in the treatment of inherent vice above (§ 5.2.2). Decay, by contrast to inherent vice, is concerned with an attribute that is fundamental to a particular case and which manifests itself in a negative sense in connection with the relevant carriage.²⁴⁹ While decay is a risk-heightening factor in regard to the carriage, that need not be the case with inherent vice. The distinction between the two categories, of which the present writer is a proponent, can nevertheless be made more difficult as a result of the circumstance that decay can often be (in part) caused by an external circumstance.²⁵⁰ One should here employ the normal circumstances under which a similar carriage takes place as a criterion. It is not always a simple matter to ascribe the damage either to the carriage or to the circumstances which flow from the nature of the goods.²⁵¹ The drafters of the Convention attempted to provide this boundary – and likewise to reduce this ground of exoneration to acceptable proportions – by taking a number of preventive measures. These reside on the one hand in the circumstances which have already risen for discussion, namely, those regarded as special risks to the detriment to the claimant such as packing, handling, loading and stowing of the goods, and, on the other hand, in the circumstance that, in the light of the specific nature of the goods, specially equipped vehicles are to be employed. These preventive measures may consequently also be regarded as a barrier to excessive reliance on Article 17(4)(d) CMR.

The most important restriction on the application of Article 17(4)(d) CMR undoubtedly lies contained in Article 18(4) CMR. For what is in practice an important branch of transport Article 18(4) CMR reduces the field of application of Article 17(4)(d) CMR: transportation that is to be effected by vehicles equipped so as to nullify the influence on the goods of heat, cold, temperature variations or humidity in the air. (It may here again be pointed out that the Convention leaves out of consideration the question whether the use of such a vehicle was agreed or not. This question should not be decided by application of Article 17(4)(d) CMR in conjunction with Article 18(4) CMR but is a matter of interpretation of the substance of the relevant contract.)²⁵² If

BT 1977, p.435; grapes, Rb The Hague 25.6.1980, S&S 1984, 92. Cf. Heuer, p.103; Putzeys, no.826; Clarke, no.95.

249. Cf., e.g., OLG Frankfurt 8.7.1980, VersR 1981, p.85; Putzeys, no.813.

250. Cf. Heuer, p.103; R. Züchner, DB 1971, p.515, with a claim to BGH 10.1.1968, VersR 1968, p.291: 'Die natürliche Beschaffenheit braucht allerdings nicht die einzige Ursache zu sein, sondern in der Regel werden mehrere Ursachen den inneren Verderb bewirken, doch muss die natürliche Beschaffenheit durch einen von ihr selbst ausgehenden Abtrieb bei der Entscheidung des Schades mitwirken.'

251. For example in the case of normal loss of quality, cf. OLG Celle 13.1.1975, VersR 1975, p.250 (beans); Super Court Denmark 5.3.1971, ULC 1971, p.303 (turkeys). For rust, cf. Putzeys, no.817.

252. Cf. on this § 5.3 (defective vehicle), as also § 5.4.1 (use of an open vehicle). Cf. CA Aix-en-Provence 10.11.1976, BT 1977, p.248; CA Venice 3.10.1974, ETL 1975, p.242; Super Court Zagreb 18.12.1970, Hague-Zagreb Essays 2, p.63.

damage occurs during the refrigerated transport²⁵³ the carrier must prove that such damage is not to be ascribed to the choice, maintenance or use of the specially equipped vehicle and even less to the non-compliance with any instructions that may have been given to him by the sender. It depends on the successful discharge or not of this burden of proof whether an appeal to Article 17(4)(d) CMR remains open.²⁵⁴ Analysis of the caselaw reveals that, contrary to what the text of Article 18(4) CMR may suggest, this possibility of appeal does not quickly present itself.²⁵⁵ In particular in countries other than The Netherlands the threshold of Article 18(4) CMR often appears to be too high.²⁵⁶

See for the question whether a carrier by road, like a carrier by sea, is under the obligation to employ a vehicle that is 'roadworthy': Clarke, no.30. It depends on different factors whether this can be required of the carrier. Cf. also Nickel-Lanz, no.140.

253. Installations which strive for a particularly high temperature and humidity are less frequent; one can think of the carriage of plants and flowers (cf. the decisions of Hof The Hague and CA Toulouse in n.255 and n.256 below).

254. This situation was regarded by Rb Den Bosch 17.10.1975, NJ 1977, p.226 as 'an exception in the nth degree.'

255. Appeal to Art.17(4)(d) CMR was not permitted by Hof Amsterdam 31.3.1978, S&S 1978, 82. Due to lack of drive the carrier was not even allowed to adduce the proof required by Art.18(4) CMR and imposed by Rb Amsterdam 15.12.1971, S&S 1972, 92. The Hof The Hague 15.8.1979, S&S 1980, 44; ETL 1980, p.871, as a result of the decisions of Rb Rotterdam 3.5.1974, S&S 1974, 63; NJ 1975, 210 and 17.6.1977, S&S 1980, 44 held that the decay of flowers had to be ascribed to faulty loading and consequently defective use of the cooling apparatus. Rb The Hague 25.6.1980, S&S 1984, 92 held that it was not the nature of the goods (grapes) but the defective vehicle that must be regarded as the cause of the damage. Cf. for an exceptional case Cass. 13.10.1981, BT 1981, p.589. A claim was regarded as possible by Hof Arnhem 11.5.1976, S&S 1976, 89, following Rb Arnhem 18.1.1971 and Hof Arnhem 10.4.1973, S&S 1973, 82. This latter case is regarded by Libouton, 1974, p.511 as 'assez confus,' because the court had become confused with the difference between inherent vice and decay. Cf. also Hof Arnhem 10.2.1981, S&S 1981, 107, confirming Rb Arnhem 29.6.1978 and 11.1.1979, S&S 1980, 45; Rb Den Bosch 17.10.1975, NJ 1977, 26.

A claim to Art.18(4) CMR was likewise permitted (with uncertain results) in, inter alia, the following decisions:

Rb Zutphen 27.3.1975, Asser Card System 9462; Rb Den Bosch 17.10.1975, NJ 1977, 226; Rb Utrecht 26.5.1976, S&S 1978, 9; Rb Amsterdam 24.11.1976, S&S 1977, 90; Rb Arnhem 21.12.1978, S&S 1980, 97, whereupon the carrier did not succeed in discharging his burden of proof: Hof Arnhem 10.4.1984, S&S 1984, 111.

256. *Belgium*: Rb Kh Antwerp 28.3.1966, ETL 1966, p.708 (meat); Rb Kh Antwerp 7.12.1973, ETL 1976, p.295 (meat).

France: CA Toulouse 17.2.1971, BT 1971, p.353; ETL 1971, p.412 (plants); CA Paris 30.5.1973, BT 1973, p.304 (cherries); CA Lyon 27.11.1973, BT 1974, p.46 (meat); Cass. 9.10.1974, BT 1974, p.491 (apricots); CA Paris 28.3.1978, BT 1978, p.320 (meat); CA Paris 20.11.1979, BT 1980, p.190 (poultry), criticised by S. Nossovitch, p.184. Cf. also BT 1978, p.537. Tr Comm Paris 11.6.1980, BT 1980, p.399; Cass. 13.1.1981, BT 1981, p.140 (horseflesh); CA Nancy 20.2.1981, BT 1981, p.330 (pork); Cass. 15.2.1982, BT 1982, p.182 (meat), on which L. Brunat, op. cit., p.174; Cass. 19.4.1982, BT 1982, p.309; ETL 1983, p.3 (nectarines).

Germany: OLG Nurnberg 14.6.1965, ETL 1971, p.247 (mushrooms); OLG Stuttgart 18.12.1968, cited by Heuer, p.219 (gherkins); LG Bremen 14.5.1970, cited by Heuer, p.209 (strawberries); OLG Koblenz 2.7.1976, VersR 1976, p.1115 (meat); OLG Munich 27.6.1979, VersR 1980, p.241 (raspberries); OLG Hamburg 22.7.1982, VersR 1983, p.634; BGH 9.2.1979, VersR 1979, p.466 (cherries).

England: QB 5.5.1975 (Ulster Swift v. Taunton Meat) [1975] 2 Lloyd's Rep 502 (pork) confirmed by CA 16.11.1976 [1977] 1 Lloyd's Rep 346. The carrier was successful in QB 16.5.1984 (Cen-

Together with Züchner the present writer would question whether this caselaw does not indicate a tendency to impose unreasonable conditions on the carrier. On the basis of a judgment of the OLG Stuttgart in which a claim by the carrier to Article 17(4)(d) CMR was rejected because it did not appear that he was able to measure the internal temperature of the specially equipped vehicle with a view to the optimal condition of the goods, that writer commented:

‘Ein Kraftfahrer müsste also, wollte er den Anforderungen, welche das OLG Stuttgart in dieser fatalen Entscheidung an ihm stellt, genügen, zuvor zumindest Botanik, Zoologie, Chemie, Tierheilkunde und am besten auch noch Physik studiert haben.’²⁵⁷

One may question, having regard to the strict conditions that are imposed on the burden of proof of Article 18(4) CMR, what purpose Article 18(2) CMR fulfills. In an extensive and critical consideration of two judicial decisions in England Glass comes to the conclusion that on this approach Article 18(2) CMR has no independent purpose.²⁵⁸ Virtually in full agreement with the caselaw cited here Glass concludes that in regard to refrigerated transport it amounts to the fact that the carrier is deprived of a privileged ground of exoneration and is left to proof of inherent vice of the goods according to Article 17(2) CMR.²⁵⁹ The consequence of such a stringent interpretation of Article 18(4) CMR amounts in fact to equating the specially equipped vehicle occurring under this provision with the vehicle specified in Article 17(3) CMR which, as will appear directly, is not correct.²⁶⁰

In this manner the carrier in practice, instead of standing before a barrier raised by Article 18(4) CMR in the form of a burden of proof, usually comes to stand before a closed door.²⁶¹ The proposition of Helm and Putzeys that, as far as refrigerated transport as that is regulated by Article 18(4) CMR is

trocoop v. British European Transport) [1984] 2 Lloyd’s Rep 618 (meat): the meat was loaded insufficiently cooled.

In a *Spanish* decision (Juzgado de 1^o instancia de Sevilla 10.10.1981, Les transports au fil des revues 1981, no.3, no.135) the damage was shared equally between the parties according to Art.17(5) CMR.

257. R. Züchner, VersR 1969, p.786.

258. D. Glass, ETL 1979, pp.704, 711, 719 following the Ulster-Swift case cited for England in n.256. It concerned the carriage of meat from Ireland to Switzerland, the meat arriving in a spoiled condition. The carrier did not succeed in proving that the cause of the damage lay with the internal condition of the meat. The vehicle was new. Although the carrier had pointed to four real damage causing possibilities, Donaldson J declared himself confronted with a puzzle: ‘Well, the defendants cannot bring themselves within (...) art.17 para.4(d) read with art.18 para.4, because if they did so, the logical conclusion would be that loss never occurred. This is, in short, the classic dilemma of all defendants who seek to prove a safe system’: [1975] 2 Lloyd’s Rep 507.

259. ETL 1979, pp.709, 711, 717. Cf. the caselaw cited by Glass at pp.715 and 716. Glass states incorrectly that the carrier never succeeds in discharging the burden of proof of Art.18(4) CMR; see the caselaw cited in n.255 above as also by Helm, Frachtrecht, Art.17 CMR, Anm.18.

260. Cf. Clarke, nos.80, 81.

261. The lament of R. Züchner: ‘Die Rechtsprechung sollte endlich einmal beginnen “lebensäher” zu werden,’ VersR 1969, p.787; must be interpreted against this background.

concerned, what rests upon the carrier is no more than a 'Haftung für vermutetes Verschulden' or 'due diligence', appears in consequence to be a pious wish that as yet has found no or at best little response in practice.²⁶²

Against this background it is important once again²⁶³ to refer to the possibility of the carrier attempting success via another ground of exoneration, either a general²⁶⁴ or a special ground of exoneration.²⁶⁵ Operating with various grounds of exoneration is relevant having regard to the possibly different burden of proof.

Meanwhile what was concluded by the parties as to the particular carriage plays a role regarding the burden of proof of Article 18(4) CMR, in particular the question what evidentiary value is to be ascribed to any possible information originating from the sender on the consignment note concerning temperature as well as any possible reservation entered by the carrier.²⁶⁶ The question that here arises is whether such information is considered to be concerned with the external condition of the goods, such as is stated in Article 8(2) CMR in conjunction with Article 9(2) CMR.²⁶⁷ This question, posed in such general terms, cannot be answered; factors such as expertise, specialism, previous contracts between the parties, etc., will be relevant here.²⁶⁸ The majority of problems can be avoided by the parties making and registering

262. Helm, *Frachtrecht*, Art.17 CMR, Anm.17; Putzeys, no.820.

263. Cf. what has been established thereon in § 5.4.

264. Claim of inherent vice (Art.17(2) CMR):

Rb Den Bosch 17.10.1975, NJ 1977, 226; Tr Comm Paris 11.6.1980, BT 1980, p.399; OLG Schleswig 30.8.1978, VersR 1978, p.141.

265. Claim of defective packing (Art.17(4)(b) CMR):

Rb Rotterdam 17.6.1977 and Hof The Hague 15.6.1979, S&S 1980, 44.

Claim of loading by the sender (Art.17(4)(c) CMR), with varied success:

Rb Amsterdam 15.12.1971, S&S 1972, 92; Hof Amsterdam 31.3.1978, S&S 1978, 82; Rb Utrecht 26.5.1976, S&S 1978, 9; Rb Arnhem 26.6.1978, S&S 1980, 45; Rb Arnhem 21.12.1978, S&S 1980, 97; Hof Arnhem 10.2.1981, S&S 1981, 107; CA Toulouse 14.1.1981, BT 1981, p.158; CA Agen 29.6.1981, BT 1981, p.433; OLG Munich 27.6.1979, VersR 1980, p.241; OLG Dusseldorf 27.3.1980, VersR 1980, p.286; OLG Hamburg 19.2.1973, VersR 1974, p.28; also the English decisions cited at n.256 above.

266. Cf. Dorrestein, no.133 as also Beursbengel 1978, p.499.

267. On these Articles, cf. § 6.3. Hof Arnhem 10.4.1984, S&S 1984, 111 held that a carrier who bears no responsibility for the stowage of meat in a refrigerated vehicle must make a reservation within the meaning of Art.8(2) CMR, in the absence whereof will be considered to keep the meat in sufficiently cooled conditions. Contra, QB 16.5.1984 (*Centrocoop v. British European Transport*) at n.256 above.

268. Rb Arnhem 28.1.1971, quashed by Hof Arnhem 10.4.1973, S&S 1973, 82, with beneficial consequences for the carrier, followed by Hof Arnhem 11.5.1976, S&S 1976, 89. Rb Arnhem 21.12.1978, S&S 1980, 97.

Cass. 13.1.1981, BT 1981, p.140 regarding Art.103 CCom, even though according to an expert's report that bacteria development was present before the carriage.

An unjustifiable degree of significance was ascribed to the consignment note by OLG Stuttgart 29.3.1968, VersR 1969, p.686 and OLG Schleswig 30.8.1978, VersR 1978, p.141; and subsequently greatly weakened by BGH 9.2.1979, VersR 1979, p.466.

their agreements.²⁶⁹ That does not, however, mean that a specialised carrier who blindly carries out the written instructions of the sender will always be able to base thereon a claim to exoneration of liability.²⁷⁰

Yet another problem deserves attention. This concerns the question of the relationship between Article 17(3) CMR (defective condition of the vehicle) and Article 18(4) CMR (nature of the goods). Is Article 18(4) CMR *lex specialis* in relation to Article 17(3) CMR, with the consequence that a carrier who employs a specially equipped vehicle within the meaning of Article 18(4) CMR does not need to answer for the (latent) defectiveness of the vehicle? Or does the rule of Article 17(3) CMR remain valid also upon the application of Article 18(4) CMR? Nickel-Lanz has pointed out that no good grounds exist for deviating from the rule of Article 17(3) CMR in the case of defects in a specially equipped vehicle.²⁷¹ One encounters this standpoint also in the caselaw.²⁷² To this interpretation one may add the following comments.

In § 5.3 above it was pointed out that the addition of Article 17(3) CMR took place at a later stage of the negotiations and with a view to an inevitable interpretation conflict concerning the general force majeure formula of Article 17(2) CMR. That the addition of Article 17(3) CMR would result in Article 18(4) CMR losing its significance seems in the opinion of the present writer to be historically an untenable standpoint. This does not take away the fact that a relationship has come about between Article 17(3) CMR and Article 18(4) CMR by the adoption of Article 17(3) CMR, the consequences of which are not well thought out. Nickel-Lanz advances the argument in support of her position that discrepancy between the defective condition of an 'ordinary' vehicle and that of specially equipped vehicles within the meaning of Article 18(4) CMR is unfounded. In contrast to this is the view advocated by Züchner which would allow Article 18(4) CMR to derogate in its entirety from Article 17(3) CMR.²⁷³

269. Cf. Art.22(5) WOW (Netherlands Law): 'The special instructions (...) must be given to the carrier before the commencement of the carriage, he must have expressly accepted them and, provided a consignment note is issued for the carriage, they must be entered thereon. A note on the consignment note is for this no proof.' Cf. also the 'Conditions particulières au transport de denrées et produits périssables sous température dirigée,' BT 1982, pp.310, 322, drawn up by the 'Comité nationale routier.'

270. Cf. Cass. 19.4.1982, BT 1982, p.309; ETL 1983, p.13. The carrier of nectarines vainly alleged that he had followed strictly the instruction to set the thermostat at 2 degrees. When the carrier switches the cooling apparatus off for a period this is quickly interpreted against him; Hof Arnhem 10.4.1984, S&S 1984, 111. See also Rb The Hague 26.3.1983, 1.4.1984, S&S 1985, 10.

271. Nickel-Lanz, no.139.

272. Cf. Rb Rotterdam 27.4.1971, S&S 1971, 73; OG Handelsretten (Denmark) 17.11.1968, ULC 1973, p.301; CA Vestre Landsret 8.7.1969, ULC 1973, pp.301-302; CA Paris 8.6.1982, BT 1982, p.654.

273. R. Züchner, DB 1971, p.516. Similarly, Helm, *Frachtrecht*, Art.17 CMR, Anm.18 and the caselaw cited there, to which may be added: Rb Arnhem 11.1.1979, S&S 1980, 45; Hof Arnhem 10.2.1981, S&S 1981, 107; Rb Zutphen 9.8.1984, roll no.800/83; Hof Den Bosch 12.10.1984, roll no.705/82. Cf. also Clarke, no.80: 'It is clear that a refrigeration unit is special equipment, to which Article 17.3 does not apply.'

Although doubt as to the ratio of the provision against the background of Article 17(3) CMR is legitimate²⁷⁴ the following may be advanced against the first standpoint mentioned above, namely, that Article 18(4) CMR should not derogate from Article 17(3) CMR. A meaningful interpretation of Article 18(4) CMR means that Article 18(4) CMR should refer to a defective condition of the specially equipped vehicle which is essential to the agreed carriage.²⁷⁵ Next, one considers that Article 18(4) CMR refers exclusively to the nature of the goods referred to in Article 17(4)(d) CMR as a possible cause of damage and leaves Article 17(3) CMR completely untouched. It follows from this that a carrier within the meaning of Article 18(4) CMR who proves that for his part he has done everything necessary regarding the choice, maintenance and use of the specially equipped vehicle can appeal to Article 17(4)(d) CMR. Does this take him any further? The answer to this is doubtful given that in a following phase (of proof) (Art.18(2) CMR) it will have to be made apparent whether in the given circumstances he can establish that the nature of the goods must be considered as the legally relevant cause of damage. If he fails in this and it is established to the contrary that the damage must be ascribed to the defective condition of the specially equipped vehicle, the carrier, despite his best endeavours concerning the choice, maintenance and use of the vehicle, will not be relieved of his liability.²⁷⁶ As long as no such defective condition is established the carrier should, under the conditions of Article 18(2) CMR, profit from the causality presumptions there mentioned.²⁷⁷

Finally, it may be stated that dangerous goods, with exception for Article 22 CMR, are also covered by this category.²⁷⁸

§ 5.4.5 *Insufficiency or inadequacy of marks or numbers (Art.17(4)(e) CMR)*

In practice this ground of exoneration produces no obvious difficulties.²⁷⁹ The damage that can be caused by these circumstances can constitute either incorrect or late delivery²⁸⁰ as well as incorrect handling of the goods in connection with the nature of such goods.²⁸¹ Certain signs on the packing of the goods often rest upon administrative law regulations. It will often in fact

274. As Glass in his already cited study, 'The Divided Heart of C.M.R.', ETL 1979, pp.687-719 has convincingly demonstrated.

275. A normal hood as also a tarpaulin cannot be designated as such. Cf. Clarke, no.80.

276. Contra Dorrestein, no.232.

277. Cf. Hof Arnhem 11.5.1976, S&S 1976, 89.

278. On dangerous goods, cf. Chapter 2, § 3 as also ULR 1980, II, pp.2 et seq.; J. M. A. Wasserman, *Jaarboek vervoer gevaarlijke stoffen over de weg*, Arnhem 1984; Donald, pp.164-166; Putzeys, nos.824-835 ter; Dorhout Mees, no.8.89a; Lamy, no.521; Hill/Messent, pp.122 et seq.

279. A similar provision to Art.17(4)(e) CMR does not occur in the CIM.

280. Heuer, p.195 is mistaken when he refers to a case that led to delay damage. Such damage is not in fact governed by Art.17(4) CMR. See on damage by delay Chapter 5.

281. Cf. Super Court Zagreb 18.12.1970, Hague-Zagreb Essays 2, p.63.

be the carrier who likewise fears the risk of these circumstances: cf. Articles 7 and 22 CMR. The present ground of exoneration can, as a species of 'wrongful act or neglect of the claimant' within the meaning of Article 17(2) CMR, result in an evidentiary advantage for the carrier.²⁸²

§ 5.4.6 *Carriage of livestock (Art.17(4)(f) CMR)*

The carriage of livestock has not led to any (published) caselaw under the CMR. In principle there does not exist any reason to draw a distinction between this ground of exoneration and that specified in Article 17(4)(d) CMR (nature of the goods). The special risk exists in the apparently incalculable behaviour of animals.²⁸³

Just as with carriage within the meaning of Article 18(4) CMR, so the carrier of livestock must surmount an extra threshold laid down in Article 18(5) CMR before being able to lay a claim to Article 17(4)(f) CMR. Contrary to Nickel-Lanz, in the opinion of the present writer the 'normally' referred to in Article 18(5) CMR has scarcely any meaning.²⁸⁴

The evidence to be adduced by the carrier depends in the first instance on what the parties agreed as well as usage in the particular line of business. Once it is established what is the obligation of the carrier it does not follow on application of Netherlands law that he is freed from his liability upon proof that he has sufficiently fulfilled such obligation. A decision of the Hof Amsterdam²⁸⁵ that a carrier of cows was relieved of liability in such a case was quashed by the Hoge Raad.²⁸⁶

In contrast to what was possible under the former Netherlands law, a carrier under the CMR can lay claim to Article 17(4)(f) CMR.²⁸⁷ Whether such a claim, which furnishes the carrier with an important evidentiary advantage, will finally lead to exoneration of liability depends, according to Article 18(2) CMR, on the other circumstances of the case as well as on any counter evidence of the opposing party.

§ 5.5 *Liability for agents and servants (Art.3 CMR)*

Article 3 CMR was discussed in Chapter 3 in connection with the legal position of the carrier and the sub-carrier.²⁸⁸ As the liability of the carrier is the main issue of the present Chapter it is appropriate to discuss the rule that the carrier is responsible for those of whom he makes use in performance of

282. Cf. Clarke, no.96.

283. Cf. Nanassy, pp.560-561; Dorrestein, Beursbengel 1982, p.263, on which A. Gerritsen, Beursbengel 1982, p.317. See for a new international directive, BT 1983, p.89.

284. Nickel-Lanz, no.147.

285. Hof Amsterdam 16.6.1978, S&S 1979, 58, quashing Rb Haarlem 10.6.1975, S&S 1979, 58, as also Hof Amsterdam 5.12.1980, S&S 1981, 97 (final judgment).

286. HR 19.2.1982, S&S 1982, 57; NJ 1982, 402.

287. Just as now on the ground of the new Netherlands Law.

288. Chapter 3, § 3.

his obligation. In common with other transport regulations the CMR devotes a separate provision to this rule.²⁸⁹ It is justifiable to deal with it as a general rule of the law of obligations with Articles 17 and 18 CMR.²⁹⁰ This is in accordance with the traditional place of this rule in the cadre of force majeure. This is no different because in a later phase of the creation of the Convention this provision was lifted from its natural environment of the traditional liability model and placed in a separate chapter.²⁹¹ The drafters merely wished by this transfer to underline the universal character of the provision.²⁹²

The basis of this provision is the notion that the carrier cannot relieve himself of his liability by a reference to a failure of those whom he himself has involved in the performance of his obligation. The CMR expresses this self-identification notion by means of a fictional mechanism of attribution and pursues the notion further in Articles 28 and 29 CMR, which will be dealt with separately in Chapter 5 below.

Even though one can postulate that this rule is a rule of the general law of obligations and consequently possesses a universal character, this does not mean that there exists unanimity as to the rule. Rather is the opposite true. Anyone who acquaints himself with the different variations of this legal rule in the field of the general law of obligations in the various countries as well as in the area of transport law will be inclined to approve Helm's observation:

'Die Haftung für Gehilfen ist in allen Bereichen des Frachtrechts durch besondere Bestimmungen geregelt, die nur zur Teil inhaltlich übereinstimmen.'²⁹³

Differences of terminology as well as substance parade for examination. This is not the place to elaborate this observation further. This much is clear, however, that there is here sufficient material for a separate monograph.²⁹⁴ In order to obtain a true insight into the material regulated by Article 3 CMR, comparison with a number of related transport regulations, even on a modest scale, is necessary. Thus Heuer observed that in comparison with related

289. Cf. Art.4(2)(q) Brussels Bills of Lading Convention; Art.20 Warsaw Convention; Art. 39 CIM; Art.2 CMN; Art.5(1) Hamburg Rules; Art.15 Convention on International Multimodal Transport.

290. See Art.17(3) CMR. This passage recalls the question during the negotiations whether chartering should be regarded as transport, on which see Chapter 2, § 4. Cf. Loewe, no.62.

291. See § 4 above.

292. Heuer, p.166; Nickel-Lanz, nos.193 et seq.; Dorrestein, no.109. Art.3 CMR is according to the opening words not applicable if according to Art.1 CMR the Convention is not applicable. Consequently it was correctly decided by BGH 9.2.1979, VersR 1979, p.445; ETL 1980, p.84; ULR 1979, II, p.227, that the question whether the carrier can be held liable for the sub-carrier, where due to the latter's bankruptcy the carriage contracted for cannot be performed, must be decided by national law and not by Art.3 CMR.

293. Helm, Haftung, p.112; Dorrestein, no.111.

294. Much comparative research in comparing conventions as well as national (German) regulations in the field of air law has been carried out by R. Schmid, Die Arbeitsteiligkeit im modernen Luftverkehr und ihr Einfluss auf die Haftung des Luftfrachtführers (Der Begriff 'Leute' im sog. Warschauer Abkommen), Frankfurt 1983. Cf. Karl Spiro, Die Haftung für Erfüh-

provisions 'this provision' contains a 'grundlegender systematischer Unterschied.'²⁹⁵ A peculiarity when compared with most related transport provisions is that Article 3 CMR employs two clauses which relate to different aspects. The first, namely, the relative clause, 'of whose services he makes use for the performance of the carriage', indicates the category of person dealing on account of the carrier, while the second, namely, the conditional clause, 'when such agents, servants or other persons are acting within the scope of their employment', attempts to delimit the boundary of the area in which the accountable dealing occurs.

Because of the problem that each of these clauses can raise in turn, and the confusion which can be generated as a result of the juxtaposition of these clauses in the same provision, the question arises first and foremost of what is to be understood by 'agents, servants' and 'other persons' (1). It must then be examined whether the relative clause relates to both categories of person rendering assistance (2). When these questions have been dealt with one must enquire under what conditions are the dealings of such persons to be accounted to the carrier (3).

1. In answering the first question one encounters the problem that the authentic texts are not in complete harmony with each other. Whereas in the French text the term 'préposés' is used, the English text here refers to 'agents and servants'. In coming to the correct interpretation of these concepts one needs to be aware of the fact that the drafters of the CMR did not so much follow the CIM, and certainly not exclusively, as in fact the Warsaw Convention.²⁹⁶ Schmid correctly commented that the English term 'agents and servants' does not cover the concept of 'préposés', which in imitation of the CIM in itself indicates, next to the second category of 'other persons', a restricted category, and that the English term rests upon a conceptual error or in any event a mistaken translation which can be traced back to a broad interpretation of the concept of 'préposés' in Article 20 of the Warsaw Convention. The development that the continental concept of 'préposés' has displayed is perhaps the cause of a somewhat inconsistent translation of that concept in terms of the Common Law.²⁹⁷ Comparison of conventions shows that in the law of air transport, contrary to what is the case with other conventions, the concept of 'préposés' should be interpreted broadly:²⁹⁸ other

lungsgeschilfe, Bern 1984. Elizabeth Weber-Häusermann, Haftung für Hilfspersonen, Zurich 1984. See also Helm, Haftung, pp.12, 22, 37, 44, 60, 87, 111.

295. Heuer, p.162.

296. Cf. Helm, Haftung, p.112; Dorresteijn, no.211. Cf. Art.39(1) CIM and Art.20 Warsaw Convention.

297. R. Schmid, op. cit., pp.52-53. This writer demonstrates (op. cit., p.58) that there is little consistency in England in the translation of the term 'préposés.' In the legislation based on the Warsaw Convention the term is translated by 'agents,' while in the Carriage by Sea Act 'servants' was chosen. To this may be added that the inconsistency goes so far that it occurs within the one and the same Warsaw Convention: Art.20 employs the term 'agents,' Artt.25 and 25A in contrast speak of 'servants or agents.' See also Hill/Messent, p.30.

298. Ibid., p.90. See also Drion, no.137; R. H. Mankiewicz, The Liability Regime of the International Air Carrier, Deventer 1981, no.54. Meanings are divided as to the exact scope of the term 'préposé': cf. Helm, Haftung, p.87; Schmid. op. cit., p.35.

persons than merely servants of the carrier are encompassed. As far as Article 3 CMR is concerned this fact as well as the designation of the second category, 'other persons', argue that the term 'préposés', must be interpreted narrowly in the sense of servant relationship to the carrier.²⁹⁹

2. A possible distinction between both categories of person would not be of significance if both were covered by the relative clause. Although it can be defended that grammatically this is the case, it is usually accepted that such distinction has meaning only when the relative clause has reference exclusively to the category of 'other persons'.³⁰⁰ This view brings with it that the carrier only guarantees the dealings of 'any other persons', in contrast to the situation regarding the category of 'agents and servants', to the extent that those dealings are carried out with a view to the effectuation of the carriage.³⁰¹ The following persons can without more be ascribed to this category: sub-carriers,³⁰² loading experts,³⁰³ stevedores,³⁰⁴ freight forwarders,³⁰⁵ whoever places a manned vehicle at another's disposal or repairs or tows a defective vehicle;³⁰⁶ not those who act in connection with the relevant carriage under a public law regulation.³⁰⁷

3. Whereas a distinction is therefore drawn by the first clause of Article 3 CMR in regard to the categories of person, the second clause lumps both categories together by providing that their dealings are to be ascribed to the carrier only when such persons act within the scope of their employment. Thus, for example, the carrier is liable for the damage caused by his assistant with his vehicle to goods loaded in another vehicle.³⁰⁸

There exists a certain uncertainty as to the precise substance of the concept 'within the scope of their employment'.³⁰⁹ As a criterion the concept 'in re-

299. Contra Heuer, p.163.

300. Precht/Endrigkeit, p.55; Heuer, p.163; Nickel-Lanz, no.194; Dorrestein, no.113; Helm, Frachtrecht, § 431 HGB, Anm.3.

301. Heuer, p.164 here employs the example of a damage assessor dealing for the account of the carrier.

Partly in view of the conditional clause dealt with below, Helm, Haftung, pp.37 and 112 has correctly stated that Art.3 CMR comes somewhere in between § 278 BGB and § 431 HGB. Cf. also Helm, Frachtrecht, § 431 HGB, Anm.3. For a review of the standpoints defended in the legal literature as to the relationship between § 278 BGB and § 431 HGB, see R. Schmid, op. cit., pp. 100-104.

302. See on this Chapter 3, § 3; cf. also Ponet, p.163.

303. Heuer, p.164.

304. Rb Amsterdam 12.4.1972, S&S 1972, 102.

305. OLG Hamburg 6.12.1979, VersR 1980, p.290.

306. Putzeys, no.135.

307. One may think, for example, of the inspection activities of veterinary surgeons according to environmental hygiene regulations. Cf. also Drion, no.201; Dorrestein, no.211; Boudewijnse, p.270.

308. See Heuer, p.165.

309. Here also the authentic texts do not run entirely the same. Whereas the French text speaks of 'agissent dans l'exercice de leur fonctions', one finds in the English text 'acting within the

lation to the carriage' is employed, which is substantively less broad than 'on the occasion of the carriage'. With this one attempts to posit the accountability as being in part dependent on what has been agreed between the carrier and his assistants.³¹⁰ In particular, the area of contact with other than legal dealings is here also in issue such as theft by agents and servants in regard to which it has been stated that, in contrast to provisions which do not know such liability restricting conditions,³¹¹ it can usually not be said that such dealings have a place in the context of the scope of commissioned employment.³¹² This view is not shared by the present writer because theft by agents and servants is not an exonerating circumstance within the meaning of Article 17(2) CMR.³¹³

Proceedings that led to a decision of the Austrian Oberste Gerichtshof illustrate the way in which the present criterion is applied. A vehicle which performed a carriage from Vienna to Hamburg was found at a border control to contain persons originating from the DDR hidden among the goods. This human smuggling was in part punished by order from high authority by confiscation of the vehicle including the goods. When the person entitled to the goods claimed from the carrier for the damage the latter raised the defence of claiming that the smuggling of persons by the driver was an act that did not fall to be regarded as performed within the scope of his employment. The claim was originally rejected but eventually allowed by the supreme court on the ground of the following consideration in conclusion:

'Eigenmächtige Personen – und Güterzuladungen durch der mit der Beförderung von Gütern betrauten Gehilfen des Frachtführers gehören in den Bereich des vom Frachtführer gegenüber seinem Gläubiger aus dem Frachtvertrag zu vertretendes Personalrisikos. Erfolgt daraus direkt oder indirekt, wie hier im Wege der Beschlagnahme, eine Schädigung oder gar der Verlust des Gutes, so hat der Frachtführer für das schuldhaft schädigende Verhalten seines Bediensteten gem Art. 3 CMR einzustehen.'³¹⁴

This case is based upon a broad interpretation of the concept 'scope of their employment'. The interpretation may be such as to satisfy a sense of justice; the act committed resembles more an 'abus de fonction' than performance of the commissioned employment.

scope of 'their employment'. Cf. Heuer, p.166, n.572; Hill/Messent, p.32.

Cf. G. Miller, *Liability in International Air Transport*, Deventer 1977, p.276, n.80: 'It seems that similar difficulties are experienced in civil law and common law countries when it comes to ascertain whether, in a particular case, the servant was acting within the scope of employment.'

310. Cf., e.g., Precht/Endrigkeit, p.55; Loewe, no.64; Nickel-Lanz, no.194; Heuer, p.165; Dorresteiner, no.112; Clarke, no.51.

311. Cf., e.g., Cass. 17.11.1981, BT 1982, p.24; ETL 1982, p.482, in which the carrier was held contractually liable for theft by his driver. See also Rb Dordrecht 18.5.1966, S&S 1966, 89 (driver falling asleep); cf. Cass. 16.6.1966, ETL 1966, p.943.

312. Heuer, p.166. That writer makes an exception for the case where the servant or agent is employed to guard the goods (p.166, n.573).

313. Cf. § 5.2.3.2.

314. OGH 22.11.1977, ÖJZ 1978, p.324 (325); ULR 1979, I, p.284. BGH 27.6.1985, VersR 1985, p.1061 (alcohol smuggling).

§ 6. Period of liability

§ 6.1 Introduction

A characteristic phenomenon that occurs across the entire front of transport law is that it is not the contract in its totality that is governed by the liability regime here being treated but merely the (non-)performance of the principal obligation of the carrier during the period in which the goods are entrusted to the carrier ('Obhutzeit').³¹⁵ For the CMR this means that in conformity with the central liability model the carrier is liable from the moment of taking over the goods to the delivery of those goods (Art.17(1) CMR). Other transport law regulations, with different terminology, usually have the same period in view. The above certainly does not imply that the carrier can in no way be liable for damage occurring outside this period or for damage which manifests itself within the period but which is not regulated by this liability model. Thus the CMR provides some rules concerning liability for damage occurring outside the relevant period,³¹⁶ while it is possible that damage occurring within the period but not regulated by the Convention will nevertheless via conflict of law rules be governed by national law.³¹⁷ Establishment of the relevant period functions at the same time, with exception for those cases mentioned in the preceding sentence which fall outside this enquiry, as the demarcation between the CMR and the national law of road transport. This urges first and foremost a closer consideration of the concepts of taking over and delivery of the goods (§ 6.2).

Inherent in every right to compensation for damage is that the party who claims to have suffered damage is put to the proof thereof. Adducing proof of damage within the relevant period is therefore a matter for the person entitled to the goods. Comparison of the condition of the goods at the commencement and at the termination of the liability period is thus necessary. With a view to the establishment of damage the Convention contains a number of evidentiary provisions. These rules as to proof, which one finds in Articles 8, 9 and 30 CMR, certainly do not sparkle with clarity³¹⁸ (§ 6.3).

The consensual character of the contract of international road transport certainly means that in the case that no consignment note is issued nevertheless the contract can be valid and the Convention applicable (Art.4 CMR), but such a situation brings with it that the person entitled to the goods in par-

315. Helm, Haftung, p.96. Th. H. J. Dorrestein, NJB 1973, p.1118. Cf. also W. Voigt, VersR 1973, p.502.

316. Cf. Artt.7(3), 11(3), 12(7), 21 and 22 CMR.

317. See Heuer, pp.183 et seq.; BGH 27.10.1978, VersR 1979, p.276 (damage as a result of delivery of incorrect goods, on which further Chapter 5). In the opinion of the present writer the decision of CA Besançon 23.6.1982, BT 1983, p.394 is thus incorrect; the carrier was held liable for the full damage following Art.29 CMR where he did not take over the goods (eggs) at the contracted time. That liability not only falls outside the period of Art.17 CMR, with which Art.29 CMR is also concerned, but is not covered at all by the Convention.

318. Rodière, p.208, no.22; Rodière, Sirey, no.590 ('système hybride'); Loewe, no.98; Nickel-Lanz, no.106; Dorrestein, nos.137, 141, 148.

ticular can find himself in serious difficulties of proof.³¹⁹ The number of transports that in practice take place without the consignment note prescribed by administrative law is substantial.³²⁰ In such a case the person entitled to the goods must, without the assistance of the presumption given to him by the Convention in Articles 9 and 30 CMR, prove that the damage which he alleges occurred during the relevant period.³²¹ Yet even in the case where a consignment note is made out it appears that application of the evidentiary rules mentioned above does not proceed without a hitch. Parties are apparently more often than not insufficiently aware of the importance and the consequences of drawing up a consignment note and annotating it or not as needed. The absence of unanimity in the legal literature and caselaw as to the significance of these provisions is perhaps due in part to this.

§ 6.2 *Substance of the concepts of taking over and delivery*

As mentioned above these concepts mark the beginning and end of the period during which the liability of the carrier according to the liability model of Article 17 et seq. is established. The question arises, how are these concepts to be understood.³²² Having regard to the fact that these concepts employed by the Convention are of essential importance for the application of the uniform liability system one must attempt to interpret them autonomously.³²³ It is of importance that the taking over of the goods occurs for the purpose of transportation. Article 27(1) CIM expresses this with the words 'acceptation au transport' ('acceptance for carriage'). The CMR did not adopt the description 'acceptance for carriage'. Adoption would have been, in the opinion of the present writer, superfluous having regard to the fact that Article 1 CMR cogently expresses that one is here exclusively concerned with transportation.³²⁴ With this the preceding, intervening and subsequent periods during which the carrier has care of the goods by virtue of another agreement, for example, storage, are deprived of application of the Convention regime.³²⁵

As far as the juridical importance of the concepts of taking over and delivery are concerned it is usually taught that actual transfer of the goods is not a

319. Cf. Cass. 13.10.1980, BT 1980, p.598, as also Cass. 17.12.1980, BT 1981, p.155; B. Marcadal, *Recueil Dalloz Sirey* 1981, p.545.

320. According to Art.6 Regulation no.11 (1960) Council of the European Communities (Discrimination Regulation) a transport document should be created for every carriage within the Community. Cf. Dorrestein, no.121; Putzeys, nos.320 et seq.

321. Nickel-Lanz, nos.114, 115; Dorrestein, nos.132, 148 and 201.

322. In the authentic text: 'le moment de la prise en charge de la marchandise et celui de la livraison' and 'the time when he takes over the goods and the time of delivery'. Cf. Hill/Messent, p.70.

323. Cf. on this Chapter 1, § 4.

324. Cf. Heuer, p.60. See also Hof Amsterdam 15.6.1979, S&S 1980, 44, on which Chapter 2, § 4.7.

325. Cf. Heuer, pp.63, 64. See further Helm, *Frachtrecht*, § 429 HGB, Anm.16; HR 20.4.1979, S&S 1979, 83; NJ 1980, 518.

requirement thereof but that it can be fulfilled by placing the goods at the disposal of the person entitled to the goods so as to exercise control there-over.³²⁶ There is no reason to suppose that the predominant view is not also applicable to the CMR. The terminology employed by the CMR, 'prise en charge' or 'when he takes over' are here more apposite than the CIM terms, 'acceptation' or 'acceptance'. If this view is correct then the factual transfer of possession is over-emphasised by the advocates of the view that the actual transfer of the goods is required for taking over and delivery. Here it is not so much a matter of the factual (possessory) transfer (the corpus element) as the fact that both taking over and delivery of the goods should be based upon the consensus of the parties (the element of animus), whereby in consequence it is precluded that taking over or delivery is reduced to a matter of merely one of the parties.³²⁷ The law of obligations term, (transfer of) possession, is less relevant in the context of transport law and can give rise to misunderstanding.³²⁸ An added reason to be satisfied with the situation where one is put in the position of actual control of the goods is that national, often rather involved theories regarding transfer of possession are not eminently suited to advance an autonomous interpretation of the liability period.

A judgment of the Bundesgerichtshof concerning the moment of commencement of the relevant period in air law may serve as illustration of the approach proposed here. A machine required to be unloaded from a lorry by means of a forklift truck in order to be through transported by air. Between the moment when the machine cleared the floor of the lorry and the moment when it should have found itself on the forklift truck the machine fell as a result of an error of judgment in the unloading. The question arose whether the air carrier could be held liable for the damage thus occurring. This depended on the interpretation of Article 18(2) Warsaw Convention. On appeal the OLG had dismissed the petition of the claimant on the simple ground that the machine was not placed on the forklift truck and consequently was not taken over by the air carrier. On appeal in cassation the carrier was held liable. The reasoned judgment of the BGH drew a heavy line through the opined requirement of factual transfer:

'Der Begriff der Obhut muss nach dem Sinn und Zweck des Art. 18 Abs. 2 WA bestimmt werden. Dieser geht ersichtlich dahin, die Haftung des Luftfrachtführers auf Schadenfälle auszudehnen, die nicht während der eigentlichen Luftbeförderung, wohl aber in einem Zeitpunkt eintreten, in dem sich das Frachtgut (...) derart im Einwirkungsbereich des Luftfrachtführers befindet, dass dieser – dem Wesen der Obhutspflicht entsprechend – in der Lage ist, es gegen Verlust und Beschädigung zu schützen. Nicht erforderlich ist dazu (...) eine körperliche Inbesitznahme durch den Luft-

326. Wachter, pp.231, 326, 327; Helm, Frachtrecht, § 429 HGB, Anm.12; Heuer, pp.60, 65; Precht/Endrigkeit, p.76. Rodière, Sirey, no.438; Loewe, no.149; Boudewijnse, pp.21, 22, 105 et seq.; Putzeys, nos.373, 508. Contra, Dorrestein, nos.52, 200; Lamy, no.136 (possession effective), no.171 (possession physique).

327. Dorrestein, NJB 1973, p.1117; Dorrestein, nos.52, 199, 200; Helm, Frachtrecht, § 429 HGB, Anm.11; Heuer, p.61; Putzeys, nos.369, 507. Cf. also OGH 4.11.1981, ÖJZ 1982, p.160.

328. Thus Dorrestein characterises the concepts meant here as contracts falling under the law of obligations, NJB 1973, p.1120; Dorrestein, nos.52 and 199; contra, B. Wachter, NJ 1980, 518.

frachtführer. Es kann auch eine Willenseinigung genügen, vorausgesetzt nur, das der Luftfrachtführer durch den Absender oder Anlieferer in die Lage versetzt worden ist, die tatsächliche Gewalt über das Gut auszuüben und Schäden am Gut oder Verluste zu verhindern. Trifft das zu und bringt der Luftfrachtführer den Willen, das Gut in seinen Verantwortungsbereich zu übernehmen, durch sein Verhalten zum Ausdruck dann ist damit die Obhut auf ihn übergegangen.

Das Berufungsgericht stellt demgegenüber zu sehr auf die deutschen Rechtsbegriffe Besitz und Gewahrsam ab. Agesehen davon, das Obhut und Besitz oder Gewahrsam auch vom Wortsinn her nicht ohne weiteres gleichgestellt werden können, ist das schon deshalb bedenklich, weil es sich hier um Auslegung eines internationalen Abkommens handelt, dessen Ziel es ist, ein einheitliches Privatrecht der internationalen Luftbeförderung für die Vertragsstaaten zu schaffen. Bei der Auslegung derartiger Abkommen ist dem Wortlaut besondere Bedeutung beizumessen, aber auch dem logisch-systematischen Zusammenhang und der Entstehungsgeschichte; sie sind aus sich heraus auszulegen und zu ergänzen; innerstaatlich Rechtsbegriffe dürfen dabei nicht unbesehen übernommen werden, weil sonst das Ziel der Rechtsvereinheitlichung gefährdet würde.³²⁹

In this case, in which the emphasis was placed on autonomous interpretation, both the rejection of the factual transfer as criterion and the upholding of the element of consensus were clearly revealed.³³⁰

The fact that parties place each other in the position to exercise factual control over the goods before the taking over and delivery of the goods implies that establishment of the period of liability is dependent above all on an evaluation of the factual situation.³³¹ Hence the attempt on different occasions to shift both the moments of commencement and termination, depending on the interest of the party. One CMR action, which ended in a decision of the Hoge Raad, demonstrated what a thorny matter the evaluation of the factual situation can be.³³²

A carrier under the CMR unloaded goods, and informed the consignee of that fact as well as of the fact that if the goods were not collected by a certain date warehousing charges would commence. When the consignee wished to take delivery of the goods it transpired that by error the goods had been transported further. When they finally arrived at the definitive place of destination the original consignee claimed compensation for damage principally on the ground that the market price of the goods had meanwhile dropped.

329. BGH 27.10.1978, VersR 1979, pp.84-85, on which D. Schoner, Air Law 1979, p.225. For a similar case of delivery in air law, cf. BGH 23.10.1981, NJW 1982, p.1284.

330. This view can also be found in BGH 19.3.1976, VersR 1976, p.778; BGH 14.2.1963, VersR 1963, p.745, cited by Boudewijnse, p.22. For the CMR: LG Frankfurt 14.5.1965, cited by Heuer, p.211; OLG Zweibrücken 23.9.1966, VersR 1967, p.1145; LG Monchengladbach 18.12.1969, VersR 1971, p.218; OLG Hamm 11.3.1976, NJW 1976, p.2077; AG Hamburg 21.6.1977, VersR 1977, p.1048. This caselaw has been continued since: BGH 9.11.1979, VersR 1980, p.181 (regarding § 29 KVO).

331. Cf. Loewe, no.149.

332. For a commentary on this case in another context, cf. Chapter 2, § 4.7.

According to the carrier he had finally discharged his obligation to deliver only at the moment that the person entitled to the goods received actual disposal of the goods. Consequently he invoked the limitation of compensation for damage provided by Article 23(5) CMR (compensation for damage in the case of delay). The Rechtbank Rotterdam dismissed this plea:

‘There is a question of delivery within the meaning of the CMR Convention if the goods have arrived at the place of destination and there are placed at the disposal of the consignee in the sense that the consignee is put in a position to exercise control over the goods.’³³³

The Rechtbank considered the earlier moment in time, when the carrier informed the person entitled to the goods that they could be collected, as the relevant moment in the delivery.

In contrast, the Hof The Hague considered the moment referred to by the Rechtbank not to be the fulfilment of the duty to deliver nor the following moment in time when the consignee wished for the first time to take delivery of the goods having regard to the fact that then the carrier was not in a position to effect actual delivery of the goods.³³⁴ In the grounds of appeal it was pleaded that the Hof had failed to appreciate that the CMR in no way excluded the possibility of the transported goods after arrival at their destination remaining with the carrier by virtue of a contract other than the contract of carriage. This plea was held to lack a factual basis.³³⁵

These proceedings could give rise to the impression that the criterion applied by the Rechtbank (placing in a position to exercise control over the goods) must yield to that of the Hof which required factual delivery of the goods. In the opinion of the present writer this need not be the case. It would seem that the criterion employed by the Rechtbank was applied in a premature stage. The criterion in no way conflicts with the decision of the Hoge Raad.

The above makes clear that the juridical concepts of taking over and delivery are separate from the factual concepts of loading and unloading.³³⁶ Whereas in sea transport the period during which the carrier is liable stretches in principle from the moment of loading to that of unloading and where taking over usually occurs before and delivery generally after that period, in road transport the opposite more often occurs. Having regard to the fact that the carrier, as appeared above,³³⁷ is as a rule not responsible for loading and unloading, the damage that then occurs remains to the account of the person entitled to the goods.³³⁸ This does not take away the fact that the factual

333. Rb Rotterdam 25.5.1976, S&S 1979, 83; NJ 1980, 518.

334. Hof The Hague 10.5.1978, S&S 1979, 83; NJ 1980, 518. On this case, cf. Clarke, no.41.

335. HR 20.4.1979, S&S 1979, 83; NJ 1980, 518.

336. Loewe, no.149; Rodière, Sirey, no.437; Lamy, no.171; Putzeys, nos.378, 508.

337. § 5.4.3.2.

338. Cf. LG Berlin 9.10.1967, cited by Heuer, p.207 (damage resulting from dirty pipe used in tanker transport), as also LG Frankfurt am Main 14.5.1965, cited by Heuer, p.210. Loewe, no.149 incorrectly states that Art.17(4)(c) CMR encourages presuming that unloading falls to the

concepts of loading and unloading can be contemporaneous with the juridical concepts of taking over and delivery.³³⁹ The view of Heuer that the period of liability possibly begins to run even before the conclusion of the contract of carriage would appear to be in conflict with Article 1 CMR.³⁴⁰

Consequently it would seem to be of great weight in the establishment of the liability period of the carrier to distinguish between the moments of conclusion of the contract, loading, taking over, delivery and unloading of the goods. In practice, making such a distinction would appear not always to be easy, as can be deduced from the caselaw discussed below, having regard to differing evaluations of the factual circumstances reckoning increasingly away from the moment of delivery.

Thus, under certain circumstances, it is possible for there to be a question of delivery even before the goods have reached the original place of destination.³⁴¹ The following step is to characterise the arrival of the goods at the place of destination as the moment of delivery. In such a case the damage that is thereupon inflicted on the goods as a result of releasing the tailgate of a lorry would therefore fall outside the period of liability of the carrier.³⁴² Usually it is judged, correctly, that such moment would be prematurely chosen: the goods ought to be unloaded so as to be available to the consignee which implies that the tailgate must be released.³⁴³ If the duty to deliver is once discharged then any stoppage in the unloading activity would effect no change.³⁴⁴ Therefore the decision goes too far in which it is held that the duty to deliver is not discharged when the carrier is requested, after arrival at the place of destination, to allow his vehicle to stand over a weekend on the terrain of the consignee in order to be unloaded thereafter.³⁴⁵ The eventual consequences of the postponement of unloading of a vehicle at the request of the person entitled to the goods ought to be borne by the latter.³⁴⁶

An exceptional situation occurs when, outside the scope of application of

account of the carrier, contra, Heuer, pp.61, 66. As Loewe so also Hof van Beroep Brussels 17.6.1971, ETL 1972, p.595, as well as Rb Rotterdam 12.4.1972, S&S 1972, 102 and perhaps Helm, Frachtrecht, § 429 HGB, Anm.14.

339. Heuer, p.66. See also Helm, Haftung, p.97, last sentence. Hof The Hague 27.5.1983, S&S 1984, 68 regarded the carrier who, without requesting instructions, unloaded a shipment of priplus into an already almost full tanker, as liable for the damage occurring as a result of the overflow from the tanker.

340. Cf. Heuer, p.64.

341. OLG Hamm 11.3.1976, NJW 1976, p.2077: 'Liegt eine solche einverständliche Übernahme vor, kommt es nicht darauf an, ob der eigentliche Empfangsort schon erreicht ist' (p.2078). Because in this case the consignee had given his forwarder instructions to ensure the onward shipment the carrier could regard the carriage on his side as at an end as of the moment that the forwarder took over the goods.

342. OLG Hamburg 13.12.1979, VersR 1981, p.1072 (regarding § 29 KVO).

343. LG Monchengladbach 18.12.1969, VersR 1971, p.218, approved by Heuer, p.93. Equally, AG Hamburg 21.6.1977, VersR 1977, p.1048.

344. Cf. Rb Rotterdam 19.1.1971, S&S 1971, 95.

345. Hof Arnhem 6.12.1978, S&S 1979, 114.

346. Here it ought to be considered that this can be adjudged otherwise when the carrier

Article 12 CMR, there is a question of delivery to someone other than the original consignee. Such is obviously to be regarded as loss if the mistake cannot be rectified.³⁴⁷ The Bundesgerichtshof regarded loss as also possible in a case in which after 'Falschablieferung' the consignee nevertheless tracked down the goods and, without intervention of the carrier, was able to recover them.³⁴⁸ In this case, the extension of the period of liability is due to the carelessness on the part of the carrier.

§ 6.3 Evidentiary rules (Artt.8, 9 and 30 CMR)

As was indicated earlier in § 6.1 above, the person entitled to the goods who pleads that the carrier is liable on the ground of Article 17(1) CMR has the burden of proving that the damage alleged by him occurred during the period indicated by that provision. The Convention assists in this proof both as to the commencement (Artt.8 and 9 CMR) and the termination of the period (Art.30 CMR). These provisions will be treated here in that order.

1. Despite the informal character of the international transport contract the regulation of evidentiary matters is coupled to the existence of the consignment note.³⁴⁹ It is therefore of considerable importance that, while in practice international road transport takes place in great measure without a consignment note, the BGH has deeply underscored the significance of what has just been said by holding that Article 9(2) CMR, which creates an important presumption in favour of the sender, cannot be of application without the issue of a consignment note.³⁵⁰ The evidentiary rules provided by the

was obliged to unload the goods, or that the unfavourable moment of unloading must be ascribed to the carrier. CA Paris 15.6.1984, BT 1984, p.541. For damage for delay see further Chapter 5.

347. OLG Frankfurt am Main 30.3.1977, VersR 1978, p.169, followed by BGH 13.7.1979, VersR 1979, p.1154. The fact that the goods were handed over to the buyer thereof does not take away the fact that from the point of view of transport law non-performance against the consignee was committed because the goods were removed from his power to dispose thereof. The BGH correctly considered thereon: 'Massgeblich ist allein ob das Gut dem Frachtbriefmässigen Empfänger ausgehändigt und damit der Frachtvertrag erfüllt worden ist.'

348. BGH 27.10.1978, VersR 1979, p.276. The fact that the goods have come into the possession of the consignee certainly plays a role in the calculation of the value of the damage. (See on this Chapter 5.) On the arrival of the goods in the hands of the consignee after the loss thereof compare Art.20 CMR on which see further Chapter 5.

349. Dorrestein, nos.141, 142.

350. BGH 9.2.1979, VersR 1979, p.466; ETL 1980, p.215, on which critically Libouton, 1982, p.700. The case concerned the question whether the carrier was under the obligation to measure the temperature of the chilled goods (cherries). The exact temperature remained disputed after expert evidence. According to the OLG measuring the temperature fell under inspection of the apparent state of the goods. In this sense also: Nickel-Lanz, no.34; Libouton, 1982, p.700; Donald, p.207; Rb Amsterdam 15.12.1971, S&S 1972, 92; CA Paris 30.5.1973, BT 1973, p.304. Contra Loewe, no.97; Dorrestein, no.133; Dorrestein, Beursbengel 1978, pp.500, 501. The caselaw on this is disputed. The OLG had held that the absence of a consignment note was in no sense an obstacle to the invocation of the evidentiary presumptions in favour of the sender of Art.9(2) CMR with the result that the temperature should be proved by the carrier. The BGH in contrast held that – leaving aside the question whether the duty of inspection lay upon the carrier – that the absence of a consignment note remained at the (evidentiary) risk of the sender. Cf. also

Convention are in no sense exhaustive and allow considerable scope to the discretion of the court.

Article 8 CMR lays down what may be expected of a carrier prior to commencement of the carriage. Together with Article 9 CMR it tries to ensure that the reality regarding the condition, amount and type of goods is represented as accurately as possible by means of the consignment note. The relationship between the expression or not of certain facts in accordance with Article 8 CMR and the evidentiary force of the consignment note following Article 9 CMR is not completely clear in every respect.³⁵¹ The provisions are simply rules of evidence and not rules of substantive law.³⁵² Statements in a consignment note deriving from only one of the parties involved with the carriage have in principle but minimal force. Nevertheless, these provisions are designed to furnish a certain level of evidentiary force to a number of specific unilateral statements in the consignment note. Article 8 CMR opens with a duty of verification resting upon the carrier in regard to the accuracy of the statements as to the number of packages, their marks and numbers as also the apparent condition of the goods and their packaging. This last does not touch upon the quality of the packaging of the goods,³⁵³ let alone their stowage.³⁵⁴ A possible appeal to Article 17(4)(b) and (c) CMR consequently remains unhindered.³⁵⁵ In addition, the third paragraph of Article 8 CMR specifies a number of matters which at the request of the sender also require verification by the carrier.³⁵⁶

The difference between the two groups is expressed in the possibility to enter a reservation, which is of importance with a view to Article 9(2) CMR. The carrier can enter a reservation in regard to the aspects mentioned by

Binding Advice (Dorrestein) 3.3.1982, S&S 1983, 50, in which it was decided that a document unilaterally issued by the carrier could not be regarded as a consignment note as such within the meaning of the CMR; in consequence thereof Artt.8 and 9 CMR should remain applicable. In regard to the ignorance clause appearing in the document concerned Art.9 CMR was applied analogously! Rb Kh Ghent 15.1.1981, ETL 1981, p.708 (note by M. Godfroid) demonstrates to what unpleasant results for the carrier failure to allow the sender to sign the consignment note can lead. See also Hof Amsterdam 4.1.1985, S&S 1985, 123.

351. Rodière, p.208, no.22; Loewe, no.98; Nickel-Lanz, no.40; Dorrestein, nos.141, 143a.

352. Nickel-Lanz, no.39; Loewe, no.96. Above all in France the temptation exists to confer substantive consequences on these provisions; cf. Cass. 3.2.1982, BT 1982, p.285. See on this § 5.4.3.4.

353. As, e.g., Rb Kh Antwerp 13.1.1972, ETL 1973, p.330; Rb Maastricht 21.2.1974, S&S 1976, 88; CA Aix-en-Provence 9.12.1980, BT 1981, p.143 and the caselaw cited by Ponet, pp.97, 98. See also Clarke, no.25. It must be conceded that the line between apparent condition and quality of the packing is not always sharply to be drawn, cf. CA Paris 21.1.1981, BT 1981, p.221 as also Dorrestein, no.133.

354. CA Lyon 19.3.1975, BT 1975, p.169. That is different in French law, cf. L. Brunat, BT 1975, p.162. Contra, perhaps, Hof Arnhem 10.4.1984, S&S 1984, 111.

355. A. C. Hardingham, (1981) 3 LMCLQ, p.312. Contra, incorrectly, Rb Kh Antwerp 10.10.1980, ETL 1982, p.64; Tr Comm Toulouse 8.3.1982, BT 1982, p.247.

356. Delegates from France, Belgium and Austria vainly attempted to have this group brought into line with the matter regulated in the first paragraph; TRANS/152, TRANS/WP9/32, 10 May 1955, p.5.

Article 8(1) CMR. These reservations, which are specified in the first two sentences of Article 8(2) CMR, have different situations in view. The first sentence concerns the situation in which it cannot reasonably be required of the carrier to proceed to verification having regard to the available means and other factual circumstances. No general judgement can be made as to the soundness of such a reservation; the entire factual and juridical context in which the relevant transport takes place has here to be taken stock of. In practice, particularly when the preparation of the vehicle or container for despatch is effected by the sender, ignorance clauses introduced from the law of the sea have become fashionable. It appears from the Dutch caselaw that these clauses have been employed by the road carrier with success.³⁵⁷ Actual circumstances will be of determinative significance for the question whether the carrier was justified in entering a reservation or not as to the apparent condition of the goods.³⁵⁸ Although the first sentence of Article 8(2) CMR does not say so the result of the verification should be equated with the reservation if and to the extent that this is different to the statements in the consignment note. In this case one may refer to remarks.³⁵⁹ It is correctly stated in the legal literature that such remarks are also covered by Article 8 CMR;³⁶⁰ in regard to this category it follows that the requirement of reasoned motivation does not apply.³⁶¹

The second sentence of Article 8(2) CMR concerns the reservation regarding the apparent condition of the goods and their packaging referred to in Article 8(1)(b) CMR. It follows from this that when making the reservation the reasons therefor shall be specified. Here also it is perhaps more a case of regarding this category as remarks in regard to which no reservation has any purpose.³⁶² The nature of such a remark means that one can suffice by specifying the discrepancies. It is sufficient that there is an expression of shortcomings in the matters specified in Article 8(1)(b) CMR. The primary function of the reasoned reservation created by the Convention as well as the remarks

357. Cf. Rb The Hague 14.1.1981, S&S 1981, 65, as also 6.6.1979, cited by P. Ruitinga, ETL 1982, pp.231 et seq.; Rb Dordrecht 16.12.1981, S&S 1982, 117. On this clause see further Putzeys, nos.410, 415, 416; Clarke, no.24.

358. In the absence of a reservation the presumption may indeed operate that the goods were in good apparent condition at the time of taking over, but that leaves unaffected that by 'apparent' is to be understood 'perceptibly apparent'. According to Dorrestein, nos.148a and 133 et seq. a fairly cursory inspection will generally be sufficient. Cf. Rb Amsterdam 29.11.1978, S&S 1979, 103 for a case where a sender came off worst evidentially against a carrier who disputed that the damage at the time of taking over was perceptibly apparent. In this sense also OLG Dusseldorf 7.2.1974, VersR 1975, p.638 which decided that the carrier rebutted the presumption of Art.9(2) CMR by proving that in casu flagrant damage was not concerned. Cf. CA Paris 17.5.1974, BT 1974, p.297 where the carrier rebutted the presumption of Art.9(2) CMR. The carrier had incorrectly not entered a reservation of the fact that rain had damaged the goods at the time of loading. Rb Arnhem 28.1.1971, S&S 1973, 82.

359. Dorrestein, no.143a; P. Ruitinga, loc. cit., pp.225 et seq.

360. Rodière, pp.207, 208; Nickel-Lanz, no.35; Loewe, no.98 as also the writers cited in the preceding note.

361. Loewe, no.100; Dorrestein, no.143a; Clarke, no.25; P. Ruitinga, loc. cit., p.226.

362. Ruitinga, *ibid.*

indicated above, to the extent contained in the consignment note,³⁶³ is to rebut the presumption created by Article 9(2) CMR that the goods, in conformity with the statements in the consignment note and in an apparent good condition, were entrusted to the carrier by the sender. Acceptance of the reservation by the sender is not a requirement for this.

The third and last sentence of Article 8(2) CMR in particular has created some uncertainty on this point. This sentence, which was added to a draft of Article 8 CMR at a late stage, could suggest that the reservation achieves its intended effect only if it is accepted by the sender.³⁶⁴ This is certainly not the case.³⁶⁵ It goes without saying that a reservation accepted by the sender, even though not reasoned, is evidence although in principle rebuttal is possible.³⁶⁶

The question arises on what grounds can it be justified that a reservation not accepted by the sender can nevertheless abrogate the presumption against the carrier created by Article 9(2) CMR. The following may serve to answer this. According to Article 9(2) CMR reasoned reservations have a neutralising effect on the evidentiary force of the consignment note.³⁶⁷ The juridical consequence is that in such a case there exists between the parties an evidentiary stalemate. As far as both the remarks on the consignment note by the sender regarding the aspects specified in Article 8 CMR and the reservations made by the carrier are concerned,³⁶⁸ these are unilateral statements. Removal of this stalemate is argued for in different ways. Loewe is of the opinion that the neutralising effect of reasoned reservations by the carrier work to the disadvantage of the sender and, at least if he does not wish to accept the reservation made by the carrier, in the absence of other means of proof no other course of action remains open to him but to terminate the contract.³⁶⁹ Helm supports Loewe in his interpretation and calls in aid in addition Article 10 CMR which, given a contrary interpretation of Article 9(2) CMR, would have no purpose.³⁷⁰ In this view the evidentiary rules of the Convention do not help the sender in his evidentiary need. It is considered nevertheless that even in the case where no reservation is made by the carrier this is not to say that the sender/consignee is always free of difficulties of proof.³⁷¹

In contrast to the view developed by Loewe, Nickel-Lanz advances the

363. Super Court Zagreb 2.4.1966, Hague-Zagreb Essays 2, p.59.

364. Thus Rodière, p.208, no.21; Putzeys, no.417.

365. Nickel-Lanz, no.41; Loewe, nos.101, 103; Dorrestein, no.143a; Clarke, no.25; P. Ruitinga, loc. cit., p.228.

366. Nickel-Lanz, no.45; Loewe, no.102. Contra Dorrestein, nos.143a, 201; Putzeys, no.418.

367. The same applies to remarks.

368. The same applies to remarks.

369. Loewe, no.103. The question whether such termination is to be regarded as non-performance must be judged by national law.

370. Helm, *Frachtrecht*, Art.8 CMR, Anm.6; P. Ruitinga, loc. cit., pp.228 et seq.

371. Putzeys, no.423.

following argument.³⁷² Having established that the statements of the sender and the reasoned reservations of the carrier in principle balance each other in evidentiary terms she comes to the conclusion that there are various ways open of dividing the burden of proof amongst the parties. Besides a possible division of the burden of proof based upon reasonableness she refers to Article 17(1) CMR which lays the burden upon the sender/consignee. She rejects both solutions. On the ground of the duty of inspection according to Article 8(1) CMR she is of opinion that the burden of proof must fall upon the carrier. The carrier should take the initiative of effecting further (evidentiary) measures; he has the choice of different possibilities. If he is not successful in this there remains one final possibility: refusal of the carriage. The consequence to which this argument leads is almost as undesirable as the doctrine she opposes and thus is not convincing. Whether Article 8 CMR offers sufficient basis for deriving an initiating duty on the carrier is extremely doubtful.³⁷³ Nickel-Lanz is no clearer as to the basis whereby the carrier would have extra possibilities of proof available. In the opinion of the present writer her approach is at odds with her earlier warning³⁷⁴ not to ascribe to these provisions more than purely evidentiary significance and as a consequence she comes to the same conclusion as that arrived at in France.³⁷⁵

In the opinion of the present writer besides the arguments mentioned by Loewe, it is possible on the ground of Article 17(1) CMR to remain within the system of the Convention by postulating that, upon the extinction of the evidentiary presumption of Article 9(2) CMR, it is in principle the task of the person entitled to the goods to adduce the necessary proof and, as far as the stalemate mentioned above is concerned, to refute the reasoned reservation. A number of judgments of the Rechtbank The Hague and the Rechtbank Dordrecht are in conformity with the view defended here. The former Rechtbank even accepted a pre-printed 'said to contain' clause employed by the carrier as a reservation within the meaning of Article 9(2) CMR as a result of which the person entitled to the goods had to prove the alleged short delivery. The Rechtbank could do this only by an explicit reference to the relationship that existed between the parties.³⁷⁶

From the above it is clear that prevention is better than cure. The carrier in particular should here be very particular.³⁷⁷ The stalemate already established

372. Nickel-Lanz, nos.41-44.

373. Art.8(3) CMR points rather to the opposite. Libouton, 1982, p.700 holds the view that the duty to verify the apparent condition and the packing is autonomous and remains unaffected by the absence of a consignment note.

374. Op. cit., no.39.

375. Cf. § 5.4.3.4.

376. Rb The Hague 14.1.1981, S&S 1981, 65, as also 6.1.1977, cited by P. Ruitinga, loc. cit., p.231; Rb Dordrecht 16.12.1981, S&S 1982, 117.

377. In the opinion of the present writer the decision of Rb Amsterdam 15.12.1971, S&S 1972, 92, in which the burden of proof was imposed on the carrier despite his entered objections against the notification by the sender of the temperature of the goods, is too strict as against the carrier. It is no surprise, therefore, that the same court by decision of 24.12.1976, S&S 1977, 90, in a case where no reservation was entered, likewise burdened the carrier with proof that the

and the associated uncertainty for the parties is to be obviated only by either ensuring a strong evidentiary position in advance³⁷⁸ or by subsequently having sufficient (supplementary) evidentiary material at one's disposal.

As far as the evidentiary force of the consignment note is concerned the question has arisen to what extent Article 8 CMR is covered by Article 9 CMR. Article 9(1) CMR is formulated in general terms while Article 9(2) CMR is exclusively concerned with matters specified in the first two paragraphs of Article 8 CMR.³⁷⁹

It is stated in the legal literature that Article 9 CMR extends over the whole of Article 8 CMR only if the check referred to in paragraph 3, the checking required by the sender, has taken place.³⁸⁰ If no checking of the matters mentioned in Article 8(3) CMR has occurred it could perhaps be held that such statements as to the gross weight or quantity of the goods have evidentiary force following Article 9(1) CMR in the absence of a reservation having been entered.³⁸¹ This view, which is based on an extensive interpretation of Article 9 CMR, is unacceptable in the light of history.³⁸² Although one can agree with Rodière that Article 9 CMR shows a lacuna, this interpretation fails to appreciate the intended relationship between Articles 8 and 9 CMR.³⁸³ A restrictive interpretation of Article 9(1) CMR reduces the consignment note primarily to proof of receipt in addition to being a

damage was present before loading (in casu spoiled meat). This would appear to be at odds with the decision of the same court of 25.6.1975, S&S 1976, 49 in which it was correctly decided that Artt.8 and 9 CMR say nothing about the condition of the packing. Nor can the judgment of Rb Rotterdam 21.3.1980, S&S 1981, 29 be regarded as satisfactory; here it was decided that the failure of the carrier to enter any reservation regarding the apparent condition and packing of living trees and plants meant that it was for the carrier to prove that these were insufficiently watered. Equally, in the opinion of the present writer, it was incorrectly decided by Cass. 15.2.1982, ETL 1983, p.24 that it was for the carrier to prove that the damage had occurred prior to the taking over of the goods. On the strictness of the French and Belgium caselaw cf. also Libouton, 1982, p.700. For a correct application of Art.9(2) CMR see Hof Arnhem 6.12.1978, S&S 1979, 114. For an over-strict application see Hof Arnhem 10.4.1984, S&S 1984, 111.

378. Partly in the light of this the so-called checklist has become fashionable, cf. Putzeys, Appendix VIII, p.444; Claringbould, p.18.

379. The authentic texts of Art.9 CMR display no differences. The Netherlands translation follows the French version. In the English version the phrase 'the making of the contract of carriage' remains from earlier drafts, while the possibility of adducing counter evidence has been moved to the second paragraph. (Cf. TRANS/WP9/11, 8 January 1952, Rev.1, p.12.) The purport of both versions is clear: Art.9 CMR contains a prima facie proof.

380. Nickel-Lanz, no.49, on the ground of historical considerations and in connection with the rule in the Warsaw Convention and the CIM. Cf. also Dorrestein, no.149. Hill/Messent, p.46 refer to a lacuna in the CMR.

381. Cf. Rodière, p.208, no.22 as also L. Brunat, BT 1973, p.162 following Tr Comm Montauban 19.1.1973, BT 1973, p.170. In this line also the following caselaw: CA Paris 17.3.1977, BT 1977, p.196 with approval of Brunat, p.190; Tr Comm Paris 30.5.1979, BT 1979, p.535; CA Paris 2.12.1981, BT 1982, p.73; CA Paris 5.3.1980, BT 1980, p.187, on which Brunat, p.182; cf. also BT 1982, p.227; Putzeys, no.396.

382. Cf. n.356 above. The FIATA Report, p.12 proposed deletion of Art.8(3) CMR.

383. Thus also Loewe, no.105; Nickel-Lanz, no.47; Clarke, no.25.

document in which the elementary conditions of the transport contract are laid down in accordance with Article 6 CMR.³⁸⁴

2. Whereas Articles 8 and 9 CMR are concerned with the moment of commencement of the carriage, Article 30 CMR provides a means of reviewing the situation at the end of the journey. Comparison of these two moments should place the parties involved with the carriage in a position to answer the crucial question whether the damage occurred during the period specified in Article 17(1) CMR.

Article 30 CMR was originally less extensive and also less complicated than the definitive version which was only agreed in the final session of the special working group.³⁸⁵ Following the proposal of the Belgian delegate to introduce into the CMR a system analogous to that of the CIM the present drafting was agreed only after much dissatisfaction.³⁸⁶ This led to modification of the first paragraph and the addition of paragraphs 3 and 4.³⁸⁷ Brunat has correctly pointed out that as a result of this an important difference, whether or not intentional, was created with the CIM. Under the CMR in the case of patent damage if no claim is made at the moment of delivery or in the case of latent damage within seven days the presumption exists that delivery was in conformity with the consignment note although, contrary to what avails according to the CIM,³⁸⁸ evidence in rebuttal remains possible.³⁸⁹ Consequently the right to adduce evidence in rebuttal of the presumption of delivery in conformity with the consignment note on the ground of Article 30 CMR exists as long as the claim is not time-barred according to Article 32 CMR.³⁹⁰ By virtue of this the CMR, when compared with other international conventions, finds itself in an exceptional position.³⁹¹ It follows that in such

384. Cf. Dorrestein, no.142.

385. TRANS/168, TRANS/WP9/35, 6 June 1956, p.21.

386. The system recognised by the CIM deviates fundamentally from Art.30 CMR (cf. Art.46 CIM). A positive reaction to Art.30 CMR is given by Harald de la Motte, *VersR* 1982, p.1037: 'Am mildesten – und vernünftigsten – ist die jüngste Vorschrift, nämlich Art. 30 CMR von 1956.'

387. Cf. TRANS/WP9/11, Rev.1, (1950), p.20; TRANS/152, TRANS/WP9/32, Annex 1, 10 May 1955, p.16.

A practical difference is that the period of seven days was introduced in place of three. Subsequently it was wished to revert to the original period of three days, cf. W/TRANS/SCI/301/Add.1, 14 November 1967, p.11.

388. Cf. Art.46(2)(d) CIM.

389. *Tr Comm Paris* 13.3.1972, *BT* 1972, p.230; *CA Paris* 17.3.1977, p.196 on which critically Brunat, p.190; *Cass.* 2.2.1982, *BT* 1982, p.152 on which Brunat, p.146, as also J. Hémard/B. Bouloc, *Revue trimestrielle de droit commerce et droit économique* 1983, pp.13 et seq., who draw a comparison between the CMR system and the French regulation of Art.105 CComm, the latter being strongly criticised. Cf. also *CA Paris* 26.10.1982, *BT* 1982, p.595.

390. Cf. Clarke, no.62. Critically on that, R. Züchner, *VersR* 1968, pp.824 et seq., following *OLG Zweibrücken* 23.9.1966, *VersR* 1967, p.1145. The *FIATA Report*, p.24, proposed deletion of this possibility to adduce counter evidence.

391. Cf. Art.3(6) *Hamburg Rules*; cf. Nickel-Lanz, no.116. For the *Warsaw Convention* cf.

a case high standards are imposed on the adduced evidence.³⁹²

Just as in the case of Article 9 CMR, so Article 30 CMR also creates a presumption, namely, of delivery of the goods in the condition described in the consignment note. Here also reservations and remarks, with one exception,³⁹³ can rebut that presumption. In comparison with Article 9 CMR, Article 30 CMR appears to contain a broader presumption and consequently to strengthen the evidentiary force of the consignment note in favour of the person entitled to the goods. Whereas the presumption of Article 9(2) CMR, here leaving aside Article 8(3) CMR, concerns only the apparent condition of the goods and their packaging as well as the number of packages, marks and numbers, Article 30 CMR is not restricted to these matters. Despite the defective integration of these provisions, in the opinion of the present writer this different presumption need not lead to juridical distinctions. The presumption of Article 30 CMR cannot reach further than Article 9(2) CMR allows. On the contrary, possible reservations according to Article 30 CMR would rather reduce the evidentiary force of the consignment note in the light of the fact that these are not dependent on expression in the consignment note.³⁹⁴ Article 30 CMR therefore evidences nothing, outside the scope of Article 9(2) CMR, as to the substance or internal condition of the goods.³⁹⁵ The reservation made by the consignee within the meaning of Article 30(1) CMR need not as such be disturbing for the carrier having regard to the fact that this says nothing about his liability.³⁹⁶ The parties ought to be attentive to one aspect in particular, namely, where the consignee in the presence of the carrier checks the condition of the goods, unless it concerns damage and/or loss which is not apparent and in regard to which the consignee has made a written reservation within seven days (Art.30(2) CMR). In such a case the parties are deprived of the possibility to adduce evidence in rebuttal.³⁹⁷ One is here concerned with a

Art.26(4). For the CIM cf. Boudewijnse, p.386. The favourable consequences in the CMR for the consignee was to be found in earlier drafts and survived the attack by IRU/ICC during the revision conference at Geneva (1972), cf. W/TRANS/SCI/438, 19 April 1972, p.4.

392. For example, by means of a customs declaration, cf. CA Nîmes 5.11.1980, BT 1980, p.600, or on the basis of an assessor's statement, cf. Clarke, no.62; Rb Utrecht 1.9.1982, S&S 1983, 40. See also Rb Den Bosch 7.5.1982, S&S 1984, 91.

393. Cf. Art.30(2) CMR on which see the text.

394. See, e.g., Rb Breda 11.1.1977, S&S 1978, 89: 'There is there [in Art.30(1) CMR] no special, never mind exclusive evidentiary force ascribed to the consignment note.'

395. Cf. Dorrestein, no.148a.

396. Cf. in particular Clarke, no.62: 'He [the consignee] has done no more than assert the liability of the carrier and rebut the "prima facie evidence that he has received the goods in the condition described in the consignment note" (Art.30.1). It remains for him to *prove* that there has been "total or partial loss of the goods or damage thereto occurring between the time when the carrier takes over the goods and the time of delivery", which is the basis of liability under Article 17.1.' Cf. Putzeys, no.584.

397. Only exceptionally, as when deceit by the consignee occurs, does the possibility to adduce counter evidence arise, cf. Rodière, p.327, no.105; Putzeys, no.576. The same applies when errors are made in determining the discrepancy between the delivery of the goods and the consignment note, cf. Clarke, no.62.

determination arrived at jointly by the carrier and consignee. This requirement is expressed more clearly in the authentic texts than in the Dutch translation. It is for the consignee to prove that a determination within the meaning of Article 30(2) CMR took place.³⁹⁸ It is generally accepted that such a 'contradicted' determination can also be arrived at with the carrier's driver.³⁹⁹ Just as in the case of loss or damage which is apparent, provided a determination within the meaning of Article 30(1) CMR has taken place, so also in the case of loss or damage which is not apparent, whether or not following a determination within the meaning of Article 30(1) CMR, there is room for reservations and remarks.⁴⁰⁰ In the case of damage which is apparent these should be made not later than the moment of delivery. It applies generally to reservations that they ought broadly to indicate to what they are directed, whereupon it would seem to go without saying that they must be employed against the carrier and not the sender/deliverer.⁴⁰¹ Contrary to the case of damage which is apparent reservations in regard to damage which is not apparent should be communicated in writing within seven days.⁴⁰² This can be done by means of letter, telegram or telex.⁴⁰³ In the case of damage which is apparent a verbal reservation is in principle sufficient,⁴⁰⁴ which does not take away the fact that entering a note on the consignment note is recommended.⁴⁰⁵

Just as with Articles 8 and 9 CMR, so also in the case of Article 30(1)

398. See for a burden of proof so reasoned, Rb Arnhem 14.4.1983, S&S 1984, 94. The opposite can naturally also occur: a carrier is in evidentiary need when a consignee denies the fact of the signature for receipt. This appears to be one of the proven methods in France of 'escroquerie'.

399. Loewe, no.223; Putzeys, no.549; Clarke, no.62. Equally R. Rodière, BT 1978, p.73 in his criticism of the decision of CA Rouen 20.4.1977, BT 1977, p.184: 'Le chauffeur est un mandataire pour tout ce qui touche à la livraison.'

Rb Rotterdam 31.10.1975, S&S 1976, 24; NJ 1977, 227; Rb Breda 11.1.1977, S&S 1978, 89; Rb Arnhem, preceding note; Cass. 27.5.1981, BT 1981, p.407. Contra Dorrestein, no.137a.

400. A number of practical rules regarding the entering of a reservation are given by Harald de la Motte, VersR 1982, pp.1037 et seq. In contrast to Art.8 CMR, Art.30 CMR does not require that these reservations be reasoned, cf. Putzeys, no.553.

401. Hof van Beroep Ghent 17.11.1967, ETL 1969, p.145.

402. Non-apparent damage is, e.g., contamination by chemical products, Rb Kh Antwerp 7.1.1977, ETL 1977, p.420; Rb Utrecht 1.9.1982, S&S 1983, 40 in regard to the transport of polythylene. Putzeys, no.569 distinguishes three possible situations in which partly apparent and partly non-apparent damage occurs. See also Dorrestein, no.148a.

403. See, inter alia, Loewe, no.227; Putzeys, no.551; Clarke, no.62; Rb Kh Kortrijk 4.6.1974, ETL 1974, p.768; OLG Hamburg 6.12.1979, VersR 1980, p.290; Rb Utrecht, preceding note. In CA Aix-en-Provence 26.11.1980, BT 1981, p.185 it was provided that merely a stamp plus the date was insufficient.

404. Rb Kh Antwerp 30.4.1965, ETL 1966, p.744; Rb Dordrecht 10.5.1967, S&S 1967, 70; Rb Kh Verviers 18.5.1968, ETL 1968, p.1240; Hof van Beroep Liege 6.5.1970, ETL 1970, p.716; Rb Kh Brussel 19.3.1974, ETL 1974, p.773; Rb Breda 11.1.1977, S&S 1978, 89; Hof van Beroep Antwerp 21.6.1978, ETL 1978, p.601; CA Paris 14.12.1977, BT 1978, p.289. Cf. also Ponet, pp.103, 104.

405. Cass. 29.4.1975, BT 1975, p.298. Cf. likewise the decision of Hof van Beroep Antwerp, preceding note, in which proof of a reservation by telephone was admitted. See also Rb Arnhem, n.398.

CMR the question arises of what is the legal consequence of entering a valid reservation. Is the situation such that as with Articles 8 and 9 CMR the prima facie evidence that the delivery was in conformity with the consignment note is merely set aside so that once again an evidentiary stalemate exists between the parties or is there substituted another presumption in place thereof based upon the situation as that is described by the reservation? The legal literature⁴⁰⁶ and caselaw⁴⁰⁷ advance the latter view. Rodière derives from this the conclusion that as a result it is thereby established that the damage occurred during the carriage.⁴⁰⁸ This conclusion would appear to be premature. As was established above regarding the relationship between Articles 9 and 30 CMR one must here take into account that opposed to the reservation entered by the consignee is possibly a reservation entered by the carrier according to Article 9(2) CMR. But even in the case where the carrier has entered no reservation within the meaning of Article 9(2) CMR against the sender he still has the possibility to refute the presumption that is then invoked by Article 9(2) CMR.⁴⁰⁹ In the case of damage to the internal condition of the goods or an 'internal shortfall' the carrier has even less to fear in the context of Articles 9 and 30 CMR.⁴¹⁰ It remains therefore a matter for the person entitled to the goods to prove that the damage or the loss occurred during the carriage. Presumptions and reservations are merely aids in this. If the carrier still does not succeed in knocking out the presumption of Article 9(2) CMR or at least in neutralising it, or if he is not able to rebut the evidence adduced by the sender that the damage occurred during the carriage, the general or special grounds of exoneration of Article 17 CMR may perhaps remain open to him.

A number of different (evidentiary) means are available in order to refute the reservation entered by the consignee. Thus in one case a carrier succeeded in refuting a reservation on the basis of a customs declaration showing a shortage.⁴¹¹ On the other hand, neglecting or only incompletely making a reservation does not necessarily signify a disaster for the sender. In this case also the sender can, barring what is provided in Article 30(2) CMR, subsequently adduce evidence in rebuttal.⁴¹² In the interests of obtaining as true a

406. Nickel-Lanz, no.117; Dorrestein, nos.144, 148a, 149a.

407. Thus, inter alia, Hof van Cassatie 7.6.1974, ETL 1975, p.68; TPR 1979, p.119 confirming Hof van Beroep Brussel 19.10.1972, ETL 1974, p.608. Cf. Ponet, p.107.

408. BT 1974, p.328, no.107. As Rodière, so also CA Reims 3.3.1980, BT 1980, p.237; CA Paris 28.5.1980, BT 1980, p.346; Cass. 2.2.1982, BT 1982, p.152 approved by Brunat, BT 1982, pp.146 et seq.

409. OLG Dusseldorf 29.3.1979, VersR 1979, p.651.

410. OLG Dusseldorf 2.12.1982, VersR 1983, p.1055. According to Hof Arnhem 10.4.1984, S&S 1984, 111 the internal condition can in certain circumstances be deduced from the fact of not entering a reservation regarding the apparent condition.

411. Rb Kh Ghent 23.12.1975, TPR 1979, p.119. For a case where such a declaration did not suffice: Rb Kh Antwerp 23.11.1976, cited by Ponet, p.149.

412. For example, by an assessor's report, cf. CA Toulouse 26.3.1969, ETL 1971, p.131; CA Nîmes 5.11.1980, BT 1980, p.600.

picture as possible of the situation following delivery the parties should be of assistance to each other (Art.30(5) CMR).⁴¹³

A written reservation is, as in the case of damage which is not apparent, also required for damage due to delay.⁴¹⁴ Here a period of 21 days after delivery of the goods applies (Art.30(3) CMR).⁴¹⁵ It has been correctly held that having regard to the character of this provision such a reservation may be entered even before the termination of the actual carriage.⁴¹⁶ Whether there is a question of delay must be determined on the basis of Article 19 CMR; an agreed period of time need not necessarily appear from the consignment note (cf. Art.6(2)(f) CMR), but may be proved in any other manner.⁴¹⁷

Article 30(1) and (2) CMR place damage and loss on the same line. Loss is in fact relevant only to the extent that it involves partial loss.⁴¹⁸ In the case of total loss there is nothing to be delivered.⁴¹⁹ This means that in application of Article 30(3) CMR one should enquire whether the delay has not become loss, a question that should be answered on the basis of Article 20 CMR.

In conclusion, attention may be focused on the fact that a provision such as that in paragraph 2, that Sundays and Public Holidays are excepted in determining the period, is absent from Article 30(3) CMR.⁴²⁰

413. Failure to cooperate can easily be interpreted to the disadvantage of the person from whom it was expected; cf. Rb Kh Kortrijk 4.6.1974, ETL 1974, p.768.

414. Tr Comm Verviers 27.4.1972, BRH 1972, I, p.645; Tr Comm Lyon 29.8.1980, BT 1980, p.603. A telex is sufficient: OLG Hamburg 6.12.1979, VersR 1980, p.290. Putzeys, no.567, n.402 correctly points out that Art.30 (3) CMR concerns only damage for delay and not substantive damage created by delay. On this distinction see further Chapter 5, § 5.

415. For a case where a consignee had allowed this period to expire and thereupon had (correctly) in vain turned to the commissionnaire de transport, whose right of recourse against the carrier had naturally likewise expired, cf. CA Paris 30.10.1978, BT 1978, p.555.

416. Rb Utrecht 12.3.1980, S&S 1980, 127. In this case of carriage from Rotterdam to Damman the person entitled to the goods had by telex let it be known that the carrier would be alleged liable for damage that could result from the already foreseeable delay. Cf. Nickel-Lanz, no.120 who adds thereto that this action can likewise be instituted by the sender.

417. LG Osnabruck 27.9.1978, VersR 1979, p.42 (by telex); OLG Dusseldorf 18.1.1979, VersR 1979, p.356; LG Offenburg 4.12.1979, VersR 1980, p.294. Formerly it had been decided otherwise: OLG Stuttgart 24.1.1967, NJW 1968, p.1054. On exceeding time periods see further TD 1972, p.1596; W. Voigt, VersR 1973, p.501.

418. Hof The Hague 26.1.1973, Asser Card System 7794, confirming Rb Rotterdam 3.3.1972. Cf. also Ponet, p.143. For the question whether loss also falls under damage within the meaning of Art.26(2) Warsaw Convention, cf. extensively HL 20.5.1980 [1980] 2 Lloyd's Rep 295 (Fothergill v. Monarch Airlines Ltd); cf. Chapter 1, as also HR 12.2.1982, S&S 1982, 56; NJ 1982, 589.

419. Nickel-Lanz, no.119; Putzeys, no.568. Such a case amounts in substance to delivery of the goods even though that is without any purpose. In this latter case the consignee would probably reject the delivery. On these cases of 'laissé-pour-compte', cf. A. Fourçade, BT 1983, pp.414, 426, as also Cass. 14.3.1983, BT 1983, p.420; Cass. 18.3.1983, BT 1983, p.421.

420. Rodière, p.328, no.110; Nickel-Lanz, no.120.

Compensation

§ 1. Introduction

Once it is established that the carrier is liable according to Article 17 CMR without his being able successfully to invoke any general or special grounds of exoneration, the question arises to what extent the damage occurring as a result of the non-fulfilment of the obligation qualifies for compensation. In answering this question one must restrict oneself to damage to goods that has occurred in the period extending from the time of taking over of the goods to that of delivery thereof. Consequently, the liability of the carrier according to Articles 7(3), 11(3), 12(7) and 21 CMR must here be left out of consideration. Nor is one here concerned with the liability to which the failure to fulfil the obligations other than those here specified can lead. This latter liability is not regulated by the CMR which brings with it that in this respect the carrier can derive no benefit from the limitations on damages adopted in his favour in the Convention. The question in what respect a duty to compensate for damage then exists must be judged by reference to the applicable national law. As an example of such damage one can point to the late arrival of the vehicle at the place of taking over the goods, with the result that goods which by their nature are likely to spoil decline partially or completely in value.¹

Although the restrictions referred to above arise across the entire front of transport law, the current tendency is that only damage resulting from loss and damage to the goods as well as through delay in delivery is to be considered for compensation.² Apart from the cases of damage covered by the Convention, which in principle are governed by national law, consequential damage (*dommages-intérêts, préjudice commercial*) does not in principle arise for compensation: damage for lying idle, decline in a market, the profit-making capability that transported goods normally possess remain, to the extent that they are not caused by delay in delivery, outside the calculation of damages.³ One encounters an exception to this rule with the exceptional

1. Other examples: arriving at the place of taking over with an unsuitable vehicle; delivery of pump or bulk load at the wrong place as a result of which contamination occurs; delivery of excess cement by tanker, Hof Amsterdam 24.12.1981, S&S 1982, 54. For these cases of so-called 'positive Vertragverletzung', see Heuer, pp.183 et seq.; Helm, *Frachtrecht*, Art.17 CMR, Anm.31; Precht/Endrigkeit, p.83; Dorrestein, no.247; Korthals Altes/Wiarda, p.90; H. Roesch, *VersR* 1980, pp.319-320; Claringbould, p.69. OLG Hamburg 30.8.1984, *VersR* 1985, p.832. See also BGH 27.10.1978, *VersR* 1979, p.276: damage occurred as a result of delivery by the carrier of the wrong sowing seed to the recipient who thereupon severed his business relations with the person who had commissioned the delivery. According to the BGH this damage to the latter was governed not by the CMR but by national law. However, the BGH pointed out that the claim for compensation for damage was subject to the periods of limitation of the CMR. Cf. also OLG Dusseldorf 26.10.1978, MDR 1979, p.405; incorrectly perhaps LG Saarbrücken 5.8.1982, *VersR* 1983, p.1074.

2. Heuer, p.116; Korthals Altes/Wiarda, p.88. For the CMR: Art.23.

3. Heuer, p.117; Nickel-Lanz, no.156; Korthals Altes/Wiarda, p.91; Dorrestein/Neervoort, p.221.

provisions regarding the declared value (Art.24 CMR) and the declaration of special interest (Art.26 CMR).

The Convention adds another limitation in Article 23(3) and (5) CMR by, on the one hand, coupling the damages concerning lost⁴ goods to a maximum amount expressed in gold francs (Special Drawing Rights following the Protocol to be mentioned below) per kilogram of gross weight short, and, on the other, by specifying the freight charges as a maximum for damages in case of delay.

The limitations⁵ mentioned above will be dealt with separately below.⁶

Various causes can be referred to as having led to the limitations in the pattern of damages which are so characteristic of transport law. It is tempting but within the scope of this enquiry impracticable, to enquire to what extent the causes formerly signalled by Drion in air law became the vogue for international road carriage.⁷ Here merely one may be touched upon having regard to its practical significance: insurance.⁸ The importance of this aspect finds expression in the limit of liability regulation in Article 23(3) and (5) CMR as well as in the provisions directed at removing the limits (Artt.24 and 26 CMR). This investigation does not allow space for a responsible analysis of the relationship between the amount of the limit and the practical functioning of insurance of goods and liability. Here it must suffice to mention a number of publications that deal with the importance of insurance in the law of transport in general and with reference to the CMR in particular.⁹

4. For damaged goods Art.25(2) CMR refers back to Art.23 CMR. See further hereon §§ 3 and 4.

5. In the legal literature a distinction is drawn between the concepts of limit and limitation. Thus Korthals Altes/Wiarda, p.90 speak of limitation of liability when they mean the compensation regarding damage to goods, while they reserve the term limit for the established maximum amount. This distinction would not appear to be very substantial, particularly when Heuer, p.117 is seen to use the same distinction in precisely the opposite sense.

6. Damage for delay (Art.23(5) CMR): §4; declaration of value (Art.24 CMR) and special interest (Art.26 CMR): § 6; limits: § 3.2.

7. Drion, nos.23 et seq.

8. Unrestricted liability cover by insurers in transport law is an impossibility. It appears from two provisions of the Convention that the drafters thereof were aware of the importance of this aspect: Art.6(2)(e) CMR and Art.41(2) CMR. The relation between the transport contract and the insurance contract emerges in particular from the latter provision in which the so-called 'benefit of insurance' clause cannot be invalidated. Upholding such clause would mean the deathblow for the liability model which is central to the Convention. On the origin and significance of this formula, J. W. Wurfbaun, *Some Insurance Aspects of Carriage of Goods by Road*, Hague-Zagreb Essays 2, pp.133, 134. See also for this clause Hof van Cassatie 9.4.1981, BT 1981, p.455; CA Paris 26.6.1981, BT 1981, p.395.

9. *General*: Drion, nos.23 et seq.; Drion, *Aansprakelijkheid en verzekering*, Deventer, 1955. P. Vergneaud, *Les transports routiers internationaux*, Paris, 1960, pp.52-59, 157-175; J. Ramberg, *Attempts at Harmonization*, Stockholm, 1973, pp.247-249; D. Koole, *Aspecten van verzekering bij export*, Deventer/The Hague, 1979; R. Meier, *Transportversicherung*, Bern, 1976; *International Union of Marine Insurance, The Essential Role of Marine Cargo Insurance in Foreign Trade, 1975*; Korthals Altes/Wiarda, p.10; A. E. Rossmere, *Cargo Insurance and Carriers' Liability*, JMLC 1975, pp.425-434; A. E. Diamond, (1977) 1 LMCLQ, pp.39-52; Helm, *Frachtrecht*, § 425 HGB, Anm.78, § 429 HGB, Anm.100-109.

As was said above, one is here restricted to damages for the liability specified in Article 17(1) CMR. The system of damages is set up in the CMR around the classical trio¹⁰ of damage, loss and delay. After making an initial acquaintance with these concepts (§ 2) there follows further elaboration of the way in which these concepts play a role in the establishment and calculation of the damages, whereby the limits are also dealt with (§§ 3, 5). The limitations mentioned so far can under certain conditions be set aside wholly or in part (§ 6), while Article 27 CMR provides another pair of rules which are of importance both for the claim and the establishment of the damages (§ 7). The result thus arrived at is maintained by Article 28 CMR against extra-contractual claims against the carrier or his agents or servants (§ 8), while a line is drawn through the amount thus calculated where it is established that the damage must be ascribed to wilful misconduct or to default equivalent to wilful misconduct by the carrier or his agents or servants (Art.29 CMR) (§ 9).

§ 2. Substance of the concepts of loss, damage and delay

These concepts form the basis of the system of damages. Although the significance of these concepts scarcely raises any linguistic problems in themselves, it is not always clear where the delimitation between them should lie. Delimitation should occur with a view to the differing legal consequences which are brought about by the type of incidence of damage, such as the period of limitation (Art.32 CMR) and the calculation of the damages (Artt.23 and 25 CMR), as that will appear below in the following sections.¹¹

There is a question of loss when the carrier, whatever might be the cause, is not in a position to deliver the goods. A distinction is to be drawn here between a temporary and a permanent impossibility in delivering the goods.¹² In the first case it is rather a question of delay. In practice many cases of loss which occur are loss of goods through fire, theft, the overturning of vehicles with fluid loads and the delivery of the goods to someone other than the person entitled thereto. This last case is regarded in the legal literature¹³ and

In relation to the CMR:

Aisslinger, pp.116-197; R. Züchner, Rechtsfragen zur CMR-Haftung und CMR-Versicherung, VersR 1969, pp.682-688; H. Roesch, VersR 1977, pp.113-118; J. W. Wurfain, loc. cit., pp.132-153; J. C. Long, Legal Expenses Insurance for the Road Haulier, in: International Road Haulage, London, 1977; Heuer, pp.189-198, pp.224 et seq.; D. Koole, Aansprakelijkheid van de Wegvervoerder, in: Aansprakelijkheid bij transportverzekering, publication of Stichting Vakontwikkeling Verzekeringsbedrijf, Utrecht, 1976, pp.1-23; Andrien/Fagnart, L'assurance de la responsabilité du transporteur, Droit et pratique du droit commerce international, 1975, pp.429-441; Th. H. J. Dorrestein, Aansprakelijkheidsverzekering in het wegvervoer, Beursbengel 1982, pp.205-208; Helm, Frachtrecht, § 429 HGB, Anm.106; Putzeys, nos.950-981; Muth-Glöckner, p.204.

10. Rodière, p.267.

11. Cf. Heuer, p.72; Helm, Frachtrecht, § 429 HGB, Anm.6 and Art.26 CMR, Anm.4; Dorrestein, no.236.

12. Helm, Frachtrecht, § 429 HGB, Anm.4.

13. Nickel-Lanz, no.109 proposes the requirement for loss that it is not known where the goods are.

caselaw¹⁴ as loss. The Bundesgerichtshof, in a case of wrongful delivery, regarded this as a question of loss even when the consignee actually traced the goods. As to this the court considered the following:

‘... es kommt nicht darauf an, ob das Gut körperlich noch vorhanden ist und ob der Absender das Gut nachträglich wieder auffinden konnte und in irgendeiner Weise wieder an sich gebracht hat.’¹⁵

It is also disputed whether there is a question of loss when the goods must be regarded as lost when viewed from an economic point of view. One may think of damage to a machine which renders it worthless or when the costs of repair exceed its value (constructive total loss). And how is one to consider wine affected by chemical residues in the case of tanker carriage? Helm argues that these instances should also be characterised as loss.¹⁶ The present writer, together with the majority of writers, sees no need to extend the concept of loss as long as the carrier remains in a position to deliver, in whatever condition, the goods taken over for carriage.¹⁷ In the light of the cases mentioned here the attempt has been made to find a substantive criterion by which to distinguish the concepts of loss and damage. Thus it has been stated that loss is primarily a matter of quantitative damage as opposed to a qualitative diminution.¹⁸ This criterion does not appear to be the philosopher’s stone in all circumstances. Should there be, for example, delay in the carriage of goods that by their nature are susceptible of spoiling and as a result the value of such goods (e.g., fruit or vegetables) is partially or totally lost then, besides possible volume loss (by drying out, for example), there is certainly a question of loss of quality.¹⁹ The pattern of damage is thus too varied to be able always to apply the rule thus proposed.

By damage one can understand the situation where a substantial change in the condition of the goods has been effected.²⁰ The characterisation will as

14. Cited by Helm, *Frachtrecht*, § 429 HGB, Anm.4.

15. BGH 27.10.1978, *VersR* 1979, p.276 (277), on which critically Libouton, 1982, p.722.

16. Helm, *Frachtrecht*, § 429 HGB, Anm. 4.

17. Rodière, p.268, n.64; Rodière, *Sirey*, no.501; Nickel-Lanz, no.109; Heuer, p.72, who correctly states that these are borderline cases. Cf. on this also QB 20.11.1973 [1974] 1 *Lloyd’s Rep* 203 (*Tatton v. Ferrymasters*), as also Rb Kh Brussels 9.1.1979, cited by Libouton, 1982, p.722.

18. Heuer, p.72; Helm, *Frachtrecht*, § 429 HGB, Anm.6; Nickel-Lanz, no.109. In air law the highest courts struggle with the question of principle whether partial loss can also be brought under the concept of damage. In contrast to the Court of Appeal this question was answered in the affirmative by the House of Lords: *Fothergill v. Monarch Air Lines*, CA 7.6.1979 [1980] 2 *Lloyd’s Rep* 149; HL 20.5.1980 [1980] 2 *Lloyd’s Rep* 295. As to the method of ascertaining the law in these decisions see Chapter 1, § 5. The decision of the highest English court was followed by the Hoge Raad 12.2.1982, S&S 1982, 56; NJ 1982, 589; ETL 1983, p.581.

19. OLG Celle 13.1.1975, *VersR* 1975, p.250; ETL 1975, p.410. For a case in which both damage and loss occurred: OLG Munich 27.2.1981, *VersR* 1982, p.334.

20. Helm, *Frachtrecht*, § 429 HGB, Anm.6; Heuer, p.72; Rodière, p.268: ‘il y a avarie quand une marchandise est présentée dans son intégralité, mais non dans son intégrité’. Cf. Rodière, *Sirey*, no.503.

a rule depend on the interpretation of the factual state of affairs.

This last also applies to the distinction between partial damage and total loss.²¹ Here the question at issue is whether the weight of the short or damaged goods or rather the weight of the entire consignment is to be taken as the starting point for application of the limit in Article 23(3) CMR (which will be further investigated below in § 3.2.3). This distinction is also of importance for the proportional allocation of the damage factors specified in Article 23(4) CMR. Thus the question can arise whether in a case in which merely 5% of the deep freeze load has thawed, the resulting costs to be taken into consideration for compensation are 5% or the entirety. The Bundesgerichtshof decided rightly on the basis of Article 25(2)(a) CMR that the relatively small damage was of such a nature that the parcel in its totality had to be regarded as damaged.²²

Delay in delivery arises again in the treatment of Article 30(3) CMR (Chapter 4, § 6). Article 19 CMR relates the concept of delay to the circumstances if the parties have not agreed a period of time.²³ (The period agreed by the parties need not be specified in the consignment note.)²⁴ In the absence of a clear manageable criterion delay has been established in the following cases: a carrier of sub-tropical fruit could have realised a faster journey from Southern France to West Germany if he had made a second driver available;²⁵ a diligent carrier of fruit requires three days for a distance of 950 km;²⁶ for the distance from the Adriatic Sea to the French Vendée two days are sufficient;²⁷ exceeding the agreed period by one day;²⁸ for the journey from Belgium to the Italian border 35 to 40 hours is too long.²⁹ On the other hand, excess haste is also not always a good thing. One can certainly be too energetic, with all its consequences, as one carrier discovered.³⁰

Contrary to what is the case with loss and damage the duty to compensate for damage in regard to delay is not confined to substantive damage. On the other hand, the amount of damages cannot exceed the freight price. Overlapping of the concept of delay with the concepts of loss and damage is not

21. Cf. Helm, *Frachtrecht*, § 430 HGB, Anm.17, who speaks of 'erhebliche Unklarheit'; Putzeys, nos.857 et seq.

22. BGH 3.7.1974, *VersR* 1974, p.1013 (p.1015). On this case see further § 3.3.

23. The vagueness contained in Art.19 CMR has led to uncertainty, cf. Heuer, p.123.

24. See the caselaw cited in connection with Art.30(3) CMR, Chapter 4, § 6; to which add Heuer, p.133 and Helm, *Frachtrecht*, Art.17 CMR, Anm.26, as also CA Toulouse 4.6.1981, BT 1981, p.381; OLG Dusseldorf 30.12.1982, *VersR* 1983, p.1029.

25. LG Kleve 30.10.1974, *VersR* 1975, p.465.

26. CA Rennes 5.11.1974, BT 1974, p.514.

27. CA Poitiers 3.2.1976, BT 1976, p.185.

28. CA Nîmes 11.2.1981, BT 1982, p.198.

29. CA Venice 31.10.1974, ETL 1975, p.242.

30. Cass. 22.4.1983, BT 1983, p.561. Completing the journey from Moscow to Paris (2900 km) in five days with fragile goods was considered by the court to be a case of 'faute lourde', with the consequence that the carrier was liable without limit for the damage.

excluded. For example, due to vehicle failure a consignment of grapes is delivered after a substantial delay with consequent loss of quality.³¹ Should the damages be calculated according to the rules on loss or damage or alternatively on delay? This question is dealt with in § 5.

In this connection it may be pointed out that a breaking point between the concepts of delay and loss is necessary in the light of the different limits regulated in Article 23(3) and (5) CMR. In Article 20 CMR this point of apportionment is fixed at 30 days following the expiry of the agreed time limit or if there is no such agreed time limit at 60 days after the taking over of the goods by the carrier. The Oberlandesgericht at Frankfurt am Main correctly emphasised that the purport of Article 20 CMR was to provide a lightening of the burden of proof on the claimant and in particular did not aim to create an irrefutable legal presumption of loss.³² Should the goods nevertheless arrive at the place of destination while a claim regarding loss on the basis of Article 20 CMR is pending the legal ground becomes one of delay.³³ This has implications for the applicable limit as well as for the burden of proof of the carrier.³⁴ Following naturally from the problem here under discussion the question arises, what are the rights and duties of the parties if the goods nevertheless re-emerge, for example following a judicial decision on the ground of Article 20(1) CMR. The remaining paragraphs of Article 20 CMR do not throw the desired light on this question.³⁵ It is certainly sufficiently clear that the remaining paragraphs are aimed at the interest of the claimant, who has, under certain circumstances, the right of choice between retaining the damages granted to him under Article 20(1) CMR and requiring delivery of the goods should these nevertheless be found.³⁶ His decision will be dependent on a number of circumstances in the concrete case, such as, for example, if the damages will be less than the property loss suffered by the claimant what is the value of the goods to him? It is evident that the right of choice of the person entitled to the goods involves uncertainty for the carrier and consequently weakens his legal position.³⁷ This right expires after one year. It depends on the then applicable national law what rights available to the carrier

31. Cf. Rb The Hague 25.6.1980, S&S 1984, 92.

32. OLG Frankfurt am Main 20.1.1981, VersR 1981, p.1131; cf. also OLG Frankfurt am Main 30.3.1977, VersR 1978, p.169. In the same sense Heuer, p.79; Dorrestein, no.237; Loewe, no.177. Contra, Helm, Frachtrecht, Art.20 CMR, Anm.1; Nickel-Lanz, no.119; Hill/Messent, p.112.

33. Loewe, no.177. This view is at odds with the above-cited decision of BGH 21.10.1978, VersR 1979, p.276, in which loss remained an issue despite the fact that the claimant (following his own efforts) could still dispose of the goods.

34. Cf. A. C. Hardingham, (1979) 2 LMCLQ, pp.193 et seq.

35. Dorrestein, nos.238 et seq.; A. C. Hardingham, (1979) 2 LMCLQ, p.198.

36. On this extensively, Helm, Frachtrecht, § 430 HGB, Anm.15; Cf. also Loewe, nos.178, 180; Heuer, p.70.

37. What value have the relevant goods for him? Only after the procedure indicated in Art.20(4) CMR has been followed will that emerge.

oppose the right of choice of the claimant.³⁸ Loewe correctly comments that circumstances can occur whereby even after one year the goods nevertheless should be placed at the disposal of the claimant.³⁹

§ 3. Loss

§ 3.1 Calculation of the concept of value (Art.23(1) and (2) CMR)

The concept of loss is central to the system of compensation for damage of the CMR (Art.23 CMR). The thinking behind it is that on the basis of the first two paragraphs first and foremost the value of the goods sent is to be established. The amount determined in consequence of the partial or total loss arises for compensation in so far as the limit stated in Article 23(3) CMR is not exceeded. In addition, and complementary to damages, a number of costs incurred in the context of the carriage and mentioned in Article 23(4) CMR arise for compensation. The division of damage factors in two is inherent in a system that adopts the despatch value of the goods as the starting point.

The existence of these two damage factors has led to various uncertainties. This division into two is of importance because the first group, in contrast to the second, is coupled to a limit and the temptation exists to give an extensive interpretation to the second group. Before proceeding further with an enquiry into the substance of this system it can be stated a fortiori that the uncertainty already mentioned can in part be ascribed to the concept of despatch value chosen as the point of departure by the drafters of the Convention. If this point of departure has led to differences in insight, the system has not been made more understandable by, in the first place, treating loss as such independently (Art.23 CMR) and thereafter coupling the concept of damage almost entirely to the regulation as to loss (Art.25 CMR). The system becomes twisted, which creates confusion. The independent treatment of loss and damage is from a practical point of view scarcely justified.⁴⁰ Certain disadvantages cleave to this structuring of the system of compensation for damage and which transpire in the cases of partial loss and/or damage (see below § 3.2.3).

The application of general rules of transport law to the CMR is thus not as such possible. The differences between the various branches of transport are also great in this field. Consequently, the damage pattern usefully sketched by Korthals Altes/Wiarda⁴¹ and built up of four elements ought to be handled with great care in so far as the applicability of the CMR is concerned. The first gradation made by those writers concerns compensation for damage occasioned to the goods themselves. Included herein, given that one proceeds from the despatch value (as in the case of the CMR), is the second group mentioned

38. It is disputed whether he is automatically the owner of the goods. See on this, on the one side, Loewe, no.181, on the other, Helm, *Frachtrecht*, Art.20 CMR.

39. Loewe, no.181 thinks here of the case of fraud.

40. Putzeys, no.856; Libouton, 1982, p.722.

41. Korthals Altes/Wiarda, p.91: a. loss of or damage to the goods; b. usual, characteristic costs; c. incidental, uncharacteristic costs; d. (remaining) diminution in property.

above and comprising costs incurred in the context of the carriage. It is correctly pointed out by those writers that with the CMR this damage factor does not fall below the limit.⁴² They also further distinguish between characteristic and uncharacteristic costs. It remains unclear how non-performance by the carrier functions as a criterion for the concept of (un)characteristic costs. It is also not clear where in the system of the Convention these costs, which evidently are not understood as falling within the second group for the applicability of the CMR, have a place.⁴³

This section deals with the first damage factor, namely, damage to the transported goods as a result of loss. The value at the moment of taking over of the goods by the carrier, the same moment therefore at which the period of liability commences, serves as a basis for the calculation of the reduced value of the consignment.⁴⁴ In the law of transport one uses the term despatch value in contrast to the destination value which, with the exception of the CIM, occurs in other branches of transport. The difference between these concepts is, amongst other things, that the division mentioned above occurs only in connection with the former concept of value. The split off and in the CMR therefore unlimited damage factor will be dealt with in § 3.3 below. By adopting the despatch value of the goods as the point of departure the liability of the carrier for the remaining damage resulting from loss, and for which the term consequential damage is current, is excluded.⁴⁵ For the sake of completeness this is expressed in Article 23(4) CMR.

As far as possible the despatch value is calculated according to Article 23(2) by reference to objective criteria, which process is termed abstract calculation of damage. The criteria specified in Article 23(2) CMR can in practice give rise to questions in cases in which there appears to be no market or no different market for goods.⁴⁶ It then depends on the concrete circumstances of the case how one is to approach as objectively as possible the purport of this provision.⁴⁷ The purport of Article 23(1) and (2) CMR can best be illustrated on the basis of a dispute that was pursued before three courts.

During the carriage of tyres from a Michelin enterprise in Italy to a sister

42. *Ibid.*, p.92 n.82.

43. The costs indicated by Korthals Altes/Wiarda, p.93 at b. and p.94 at c., however broadly regarded, fall within the limit, cf. *ibid.*, p.95 and p.145; contra, p.92, n.82. This view does not fit into the CMR system, see further § 3.3.

44. See Chapter 4, § 6.

45. Heuer, pp.117, 123; Dorrestein, nos.241, 242, where there is an historical account of the reasons why it was decided in favour of the despatch value prior to the CIM; Nickel-Lanz, no.156; Korthals Altes/Wiarda, p.91; Loewe, no.189, Claringbould, p.65 speak of commercial damage. In France in particular various ways are sought whereby (a part of) the commercial profit (*lucrum cessans*) can be recovered from the carrier. See for award of the so-called *dommages-intérêts*: CA Paris 9.6.1967, ETL 1969, p.911 and CA Poitiers 31.3.1971, BT 1971, p.168, on which critically Libouton, 1973, p.57, as also the caselaw cited by B. Mercadal, *Recueil Dalloz Sirey*, 1981, p.545.

46. Heuer, p.119; Dorrestein, nos.243, 244; Helm, *Frachtrecht*, Art.23 CMR, Anm.3.

47. According to a decision of the Super Court of Denmark 11.11.1968, ULC 1971, p.305 various bodies in The Netherlands were approached with the question what was the usual price of strawberries given that for the relevant type no market was available.

enterprise in France the tyres were stolen. The French enterprise based its claim against the carrier on the price at which it had sold the tyres during the carriage to its agents. The court at Romans decided the claim in the amount of the invoice value which expressed the sale price calculated by the French enterprise.⁴⁸ The court of appeal at Grenoble thereupon determined that according to Article 23 CMR the manufacturer's value was to constitute the despatch value.⁴⁹ This decision implied that, just as the consignee may not calculate his expected profit in his damages, so also the sender could not realise the manufacturing profit. The supreme court correctly quashed this decision and considered that company law relationships in casu did not constitute an obstacle to acceptance of the invoice value.⁵⁰ This would be otherwise only if in a company relationship a certain invoice value was employed purely for administrative reasons.⁵¹

The uncertainty manifested on this point is perhaps ascribable wholly or at least in part to the assumption that the despatch value ought at all times to be equated with the invoice value. Although this will often be the case,⁵² as appears from the just cited Michelin case, here all necessary caution should be exercised. Between the moment of drawing up the invoice, which represents the sale price of the goods, and the moment of taking over of the goods by the carrier a change in the value of the goods could have taken place.⁵³ Furthermore, practice has given some occasion to approach the invoice value with proper mistrust. It is not precluded that, in the interest of an insurance contract concluded in regard to the carriage, there has been calculated into this value an imaginary profit.⁵⁴ But apart from insurance law aspects it has

48. Trib Comm Romans 21.2.1979, BT 1979, p.182. Cf. CA Venice 31.10.1974, ETL 1975, p.242, where the court ignored the value specified in the documents, reduced for tax reasons, and turned to the invoice value.

49. CA Grenoble 19.11.1980, BT 1981, p.23.

50. Cass. 2.2.1982, BT 1982, p.152; ETL 1983, p.43, on which J. Hémard/B. Bouloc, *Revue trimestrielle de droit commercial et de droit économique*, 1983, p.128; CA Chambéry 23.1.1984, BT 1984, p.574. It was emphasised in the decision of the same court of 10.1.1983, BT 1983, p.154, that it was not a matter of a *prix d'amitié* but of an objective value.

51. Rb Amsterdam 19.7.1978, S&S 1979, 104.

52. Dorrestein, no.242. No invoice value in Cass. 7.12.1984, BT 1984, p.538.

53. A similar change in value had occurred in the case decided by Cass. 25.6.1979, BT 1979, p.452. The invoice value agreed with the sale price; in the light of the fact that at the moment of taking over of the goods by the carrier the exchange rate rose immediately after the sale the court correctly decided that it was the latter rate that should apply. Equally: CA Amiens 18.5.1981, BT 1982, p.208, approved by L. Brunat, BT 1982, p.203. Cf. also S. Nossowitch, BT 1982, pp.521 et seq.

54. According to Hoge Raad 6.10.1978, S&S 1979, 24; NJ 1980, 534, realisation of a certain profit percentage is possible on the ground of the damage allowance method to the extent that this remains within the confines of the indemnity principle. Hof The Hague 25.6.1981, S&S 1982, 108, to which the case was referred, nevertheless came to the conclusion that awarding a profit percentage was not justified. In a subsequent decision Hoge Raad 4.2.1983, S&S 1983, 44; NJ 1983, 626, dismissed the appeal in cassation against the decision from the Hague court. The fact that in casu no invoice was drawn up appeared not to be essential to the legal issue. These proceedings shows that the concept of value under insurance law can be regarded more broadly than according to the applicable CMR law.

also been necessary on more than one occasion to guard against using the despatch value as the starting point for calculating the damage.⁵⁵ Having regard to the fact that the CMR system contains mandatory law, an argument between parties in which an amount lower than one in conformity with that prescribed in Article 23(1) and (2) CMR was agreed, was declared void as being in conflict with Article 41 CMR.⁵⁶ Upholding the CMR system has repercussions above all for more or less independent agents who usually settle accounts with their client senders on another basis.⁵⁷

It is tempting to regard the despatch value mentioned in Article 23(1) CMR as a fixed amount in order to designate every head of damage that could occur during the carriage and does not otherwise fall to the account of the claimant as being 'other charges' within the meaning of Article 23(4) CMR.⁵⁸ This notion can however not be maintained because the consequence thereof would be that, to the extent that costs incurred by the claimant are to be considered for compensation, such costs, other than damage resulting from loss or damage, would not fall within the limits of Article 23(3) CMR. Furthermore, such a view ignores the usually adopted view – also in the system of the destination value – that a number of costs incurred with a view to avoiding, restricting or determining (threatening) damage are usually equated with material damage⁵⁹ and consequently come within the category of Article 23(1) CMR with the result that they fall within the limits of Article 23(3) CMR. One exercises care with the question when such is the case. This depends on the factual circumstances. The costs intended here ought to have a direct connection with the damage as such and to have been incurred by the claimant.⁶⁰ It goes without saying that the costs that fall to the account of the claimant are not here under consideration; for example, costs incurred as a result of insufficient packing, whereby extra 'settlement and disposal' costs can be incurred by the carrier following Articles 14 and 16 CMR. These latter costs remain outside any consideration of damages and are reimbursed in full to the carrier.⁶¹ Similarly and self-evidently remaining outside any such consideration are the costs which the carrier incurs as a result of causes for which he remains at risk.

55. Thus the highest French court had to prevent a claimant from obtaining damages calculated by reference to the destination value: Cass. 27.5.1981, BT 1981, p.407, on which B. Mercadal, *Recueil Dalloz Sirey* 1981, p.545. Cf. also CA Toulouse 5.12.1979, BT 1980, p.13; Hof van Beroep Ghent 17.11.1967, ETL 1969, p.145. Sometimes it is unclear which value is intended: OLG Dusseldorf 18.11.1971, ETL 1973, p.510.

56. Cass. 17.5.1983, BT 1983, p.445.

57. For the commissionnaire de transport cf. CA Paris 30.5.1973, BT 1973, p.304 and Cass. 25.6.1979, BT 1979, p.452.

58. Putzeys apparently proceeds from this conception as he deals with all possible costs in the cadre of Art.23(4) CMR; cf. also Ponet, pp.198 et seq.

59. Dorrestein, no.234.

60. Cf. Putzeys, no.870, for an approach with different shades of meaning to the case of storage costs.

61. Putzeys, no.871; Dorrestein/Neervoort, p.223.

Costs that have a direct connection with the damage can include the following: extra costs of packing, safekeeping or storage, extra freight charges, assessment costs, taxes and duties.⁶² On the other hand, the costs specified in Article 23(4) CMR must be incurred not so much directly in connection with the damage but primarily in connection with the carriage as such. This latter category, which the former complements, is dealt with further in § 3.3 below. This distinction, which is fundamental to the system of despatch value, is not always kept fully in view.⁶³ The confusion is completed by differences of opinion as to the interpretation of the costs mentioned in Article 23(4) CMR. It is desirable, in the opinion of the present writer, to raise the above-mentioned costs, incurred with a view to deflect, restrict or determine (threatening) damage, afresh when dealing with the damage factors mentioned in Article 23(4) CMR, which complete the amount that is to be considered for compensation for damage (§ 3.3). With the question whether, and if so, where these costs ought to be accorded a place in the system of the Convention, the legal consequences of applying the limit can be treated at the same time.

§ 3.2. *Limits (Art.23(3) CMR)*

§ 3.2.1 *History*

Having found the amount according to Article 23(1) and (2) CMR which is to be considered for compensation for damage it should be enquired whether it is to be reduced by application of the limits of Article 23(3) CMR. Paragraph 3 provides that the damages shall not exceed 25 gold francs, according to the Protocol being 8.33 SDR, per kilogram of gross weight short. The gold franc

62. Within Art.23(1) CMR the following are *recognised*:

extra loading costs: Rb Amsterdam 12.4.1972, S&S 1972, 102.

storage costs: Rb Rotterdam 20.2.1976, S&S 1977, 67.

assessor's costs: Rb Amsterdam 12.4.1972, S&S 1972, 102; Rb Rotterdam 20.2.1976, S&S 1977, 67; Rb Amsterdam 18.3.1981, S&S 1981, 83; Rb Rotterdam 5.10.1984, S&S 1986, 33. Assessor's costs have always given rise to the vexed question for whose account they should fall, cf. Wachter, pp.300 et seq; Libouton, 1982, p.723. According to Nickel-Lanz, no.165 these remain to the account of the claimant.

Within Art. 23(1) CMR the following are *not recognised*:

dues: CA 15.11.76 [1977] Lloyd's Rep 234; HL 25.7.1977 [1978] Lloyd's Rep 119 (Buchanan v. Babco), on which Hill/Messent, p.128.

dues and V.A.T.: Rb Amsterdam 30.3.1977, S&S 1978, 36.

V.A.T.: Rb Amsterdam 7.6.1978, S&S 1979, 69.

expert's costs: Rb Dordrecht 22.12.1971, S&S 1972, 50; Rb Amsterdam 4.3.1981, S&S 1982, 19; Rb Amsterdam 22.4.1981, S&S 1982, 116; Rb Utrecht 1.9.1982, S&S 1983, 40; Rb Breda 11.1.1977, S&S 1978, 89.

advertising costs: Rb Amsterdam 4.3.1981, S&S 1982, 19.

various other costs: Rb Amsterdam 12.4.1972, S&S 1972, 102; Rb Amsterdam 22.4.1981, S&S 1982, 116.

For the question whether these costs may be awarded under Art.23(4) CMR, see § 3.3.

63. Thus, incorrectly it is thought, under Art.23(4) CMR were awarded: deepfreeze, assessor and return shipment costs: BGH 3.7.1974, VersR 1974, p.1013; grading and loading costs: OLG Munich 27.6.1979, VersR 1980, p.241; packing, storage and return shipment costs as also costs incurred by experts: QB 20.11.1973 [1974] Lloyd's Rep 203 (Tatton v. Ferrymasters). See further the caselaw and writers cited at § 3.3.

meant here is the Germinal franc, a fictional unit of millesimal fineness 900, which is equivalent to 0.290323 of a gramme of fine gold. Having regard to the fact that this limit gave rise to great dissension at the time of drawing up the Convention there is sufficient reason to make some observations on the creation of this limit. This historical enquiry reveals that the dissension just mentioned was based not so much on juridical as on economic-political reasons which – also among lawyers – keep alive the notion that above everything transport is a link in an economic process of trade relations.

The drafters of the Convention originally started with a much broader concept of damages based on the destination value. The Belgian delegate in particular thought that standardisation with the system of damages employed in the CIM, in which since 1933 the Germinal franc was adopted as the unit of calculation, was nevertheless desirable.⁶⁴ It is noteworthy that already at such an early stage the Netherlands delegate appeared to be the only one predisposed towards the low ‘maximum’ of 1 dollar per kilo.⁶⁵ In the report of the Netherlands government concerning the liability of the carrier, which arose in Chapter 4, § 4 above, reference was made to the unjustified differences that application of a limit based on the weight of the load brought with it.⁶⁶ It will appear from the caselaw presented in § 3.3 below that this objection is not unfounded and that this view still persists in practice. Already by 1951 the drafters had taken note of the Belgian suggestion and, although recognising the objections put forward by The Netherlands and which incontestably cleave to such a system, had chosen for that operative system.⁶⁷ As to the exact level of the limit no decision had as yet been pronounced. It was considered necessary to pursue further research on this considering the often diverse national regulations as well as related insurance law.⁶⁸

In the Rüdeshheim draft the limit was calculated per kilo gross weight of the entire load as that was expressed in the consignment note.⁶⁹ In a penetrating analysis of the functioning of the limit Prodromidrès has demonstrated that this leads to different results than when the limit is applied to each *short* kilo gross weight.⁷⁰ It is clear that the person entitled to the goods is better off in the case of partial damage or loss with the former method of calculation; in the case of total loss or complete diminution in the value of the goods the latter method will, by contrast, produce greater benefit.⁷¹ Having regard to

64. E/ECE/TRANS/SCI/79. E/ECE/TRANS/WP9/13, 1 May 1950, pp.15, 16.

65. *Ibid.*

66. TRANS/WP9/16, 22 December 1950, p.8.

67. E/ECE/TRANS/SCI/116, 30 April 1951, p.7.

68. *Ibid.*, p.8.

69. TRANS/WP9/11, Rev.1, 8 January 1952, p.18.

70. Limitation de la responsabilité du transporteur dans le transport international de marchandises par route; W/TRANS/WP9/28; W/TRANS/WP14/13, 28 May 1952.

71. The example given by Prodromidrès is repeated here. Compare a limit of 25 francs calculated across the entire shipment with a limit of 50 francs calculated per undivided kilogram. That leads to the following result.

the fact that in the majority of cases in practice there is a question of partial damage, the person entitled to the goods will have the greatest benefit from the first mentioned method, which may be regarded so to speak as a *premier-risque* for the carrier, even if the limit (as appears from the example given at footnote 71) exceeds half of the limit pertaining to the second system.

These points of departure were of fundamental importance for the disputed issue of determining the level of the limit.⁷² A choice was finally made in conformity with the CIM for calculation following the second model, consequently per *short* kilo gross weight. For a considerable period of time carriers and those entitled to the goods remained divided on the desired level but when finally these parties found themselves in 1955 at 18 gold francs it emerged that a number of national wishes remained unfulfilled.⁷³ The gulf appeared unbridgeable. On the one hand, The Netherlands and England claimed a maximum of 5 to 10 gold francs based on the mean value of the goods to be transported, while on the other, West Germany adhered to an amount of 100 gold francs. The German requirement was prompted principally by the desire not to provide road transport with a competition distorting advantage over the CIM rail transport.⁷⁴ The standpoint of the German government against the limit of 18 francs appeared inflexible and in the result at the final session of the special working group in May 1956 the limit was established at 25 francs.⁷⁵ After so many years of laborious negotiation, of threatening to be shipwrecked within sight of safe harbour, the Convention was saved by this compromise. It was thus understandable that when in 1972 England proposed raising the CMR limit to that of the CIM

a. In the case of total loss of a shipment of 100 kg: of the 8000 franc loss, 2500 francs is compensated in the first case, in the second 5000 francs.

b. In the case of partial loss (e.g., 10, thus a loss of 800 francs): according to the first method the entire loss up to a sum of 2500 francs is compensated, while in contrast according to the second method merely 500 francs is compensated.

72. Thus the suggestions of Prodromiderès for either 50 francs per undivided kilogram gross weight or 25 francs per kilogram of the entire shipment. Other systems are imaginable: per unit (Art.4(5) Hague Rules); the choice between unit and weight (Art.5A Visby Rules) or a percentage of the value of the goods. Here is not the place for further elaboration of the historical background which led to this diversity in transport law, nor for a weighing of the pro's and contra's of the systems mentioned here. Unification of the differing legal systems on this point as well as the divergent amounts is an illusion, cf. Putzeys, no.886 n.701; see also Ramberg, p.227.

73. TRANS/152; TRANS/WP9/32, 10 May 1955, nos.38-50.

74. For other reasons, cf. Heuer, pp.17, 18, who finds the German Government's position evidence of rigidity. Against the background of the possibility, created early on, via Art.24 CMR mutually to agree to raise the limit, the judgement of Heuer is to be regarded as well-founded.

75. TRANS/168. TRANS/WP9/35, 6 June 1956, no.67. The Explanatory Note to the German Implementation Act could not avoid remarking on the compromise reached: 'Damit liegt die Haftungshöchgrenze der CMR immerhin wesentlich höher, als noch bis unmittelbar vor Abschluss der Verhandlungen über die CMR erreichbar erschien' (Drucksache 1144, 1955, p.42). A conspicuous development has since taken place: since 1970 the limit in the CIM has been halved! See also Boudewijnse, p.246. It appears from the settled French caselaw (cf. Cass. 16.6.1981, BT 1982, p.419; CA Paris 9.3.1982, BT 1982, p.245) that Art.23(3) CMR also applies to the relationship of commissionnaire de transport and his client: another argument for regarding this figure as a carrier under the CMR (cf. Chapter 2, § 4.3.2).

which since 1970 had been at 50 gold francs, no-one expected much joy in a renewed discussion of this delicate subject.⁷⁶

§ 3.2.2 *Present and future state of affairs*

No-one present at the lengthy discussions on the limit would have imagined that two decades later that discussion would be overshadowed by a much more drastic issue with which the entire law of transport wrestled as a result of the abolition of gold as the international unit of account. No more than other conventions did the CMR answer the question of how the gold franc was to be converted into national currencies. The reason why the Convention failed to do so was simple: the conversion problematic is in principle of a purely economic nature. While the monetary gold price remained unaffected since the Bretton Woods Agreement (1944) the above issue was to a certain extent unforeseeable. By degrees the value of gold as a stabilising factor in international trade, including the CMR and the other branches of transport, began to relinquish its position.⁷⁷ The uncertainty due to the differing values that since 1968 had been ascribed to gold was magnified in practice by the varying success with which it was attempted to have accepted at international level a new stable unit of account in place of gold. Slowly but surely gold was replaced by an imaginary financial unit of account: the Special Drawing Right. For as long as this unit of account, whose task was to establish once again comparative stability, was not adopted by all conventions and in force the uncertainty signalled by the uncoupling of gold as a trusted measure of value in trade remained.⁷⁸

It is primarily a question of legislative technique how such an interim situation (namely, that between the collapse of the official gold standard and the entry into force of the Special Drawing Right) can be tackled in the most efficient as also the most effective manner.⁷⁹ Others are deemed more competent to describe the economic causes which led to the unusability of gold as a unit of account, all the more so where they have already extensively done

76. W/TRANS/SCI/430, 19 April 1972, nos.60-62. The average value of transported goods according to a communication of the IRU appears to lie between 11 and 12 francs. See also Putzeys, no.888. See on the contrary O. J. Tuma, ETL 1983, p.11. The FIATA Report, p.21 proposes a dramatic reduction in the liability boundary. This proposal is bound up with the criticism of the CMR liability model in its entirety expressed in the Report, p.2.

77. In execution of the Jamaica Accords (1976) the official gold exchange rate was officially abandoned by the International Monetary Fund on 1 April 1978. In The Netherlands the effective date that applies is 1 August 1978; cf. E. W. J. H. de Liagre Böhl, NJB 1978, p.572.

78. A. Tobolewski has correctly remarked: 'For a claimant, the important question is not how many SDRs or other units of account he may receive, but rather to what extent these SDRs converted into national currency will cover the damage,' (1979) 2 LMCLQ, p.175.

79. For the national legislature the situation is particularly confused by the different ways in which international transport and sea law conventions attempt to adapt themselves to economic developments. The path down which the Netherlands government turned with the Law on conversion of units expressed in gold (Law of 15 May 1981, Stb 1981, 295; cf. KB 19 January 1982, Stb 1982, 5), however obvious, is not without objections, on which see further below. See for England, Hill/Messent, pp.129 et seq.

so.⁸⁰ By Protocol of 5 July 1978 the CMR accepted the new unit of account introduced by the IMF. The Protocol entered into force on 28 December 1980⁸¹ and the Netherlands law on conversion of units of account expressed in gold entered into force as of 15 March 1982.⁸² These regulations are substantively in conformity with each other: 25 Germinal gold francs are converted into 8.33 SDR. The discussion here has been confined to what befell Article 23(3) CMR since the rise of the conversion problematic to the moment of the entry into force of the Special Drawing Right either following the Protocol mentioned above or following national legislation. This enquiry has value not merely as legal history but remains relevant while there are Convention States that have spared no pains to accept the new method of accounting.⁸³

In an excellently reasoned decision in the internationally known Hornland case the Hoge Raad had stated that the official price of gold should act as the

80. See on this the literature cited by the Advocate General in his conclusions to the decision of HR 1.5.1981, S&S 1981, 76 (77); NJ 1981, 604 and 605. The following publications can be added thereto: L. Bristow, *Gold Franc – replacement of unit of account*, (1978) 1 LMCLQ, pp.31-38; *ibid.*, in: *International Road Haulage*, London, 1977; A. M. Constabel, *Gold Values in Carriage of Goods Conventions*, (1978) 3 LMCLQ, pp.326-330; R. H. Wijffels, *Gold Value and Special Drawing Right (SDR)*, ETL 1977, pp.195-199; Neil R. McGilchrist, *What is a Poincaré Gold Franc Worth?*, (1982) 2 LMCLQ, pp.164-172; A. Jobolewsky, *The Special Drawing Right in Liability Conventions*, (1979) 2 LMCLQ, pp.169-175; ULR 1978, II, pp.13-28; Boudewijnse, pp.28-36; P. Martin, *Air Law*, 1980, pp.34 et seq.; M. M. C. J. M. de Nerée tot Babberich, *Beursbengel*, 1982, pp.15, 16; M. Allégret, BT 1980, p.377; Muth-Glöckner, pp.159 et seq.; Putzeys, nos.895 et seq.; Donald, pp.113 et seq.; Clarke, no.101. R. J. Martha, NILR 1985, pp.48 et seq.

On the relationship of the developing countries and the IMF, cf. Nikos Skylakakis, AA 1982, pp.370-379, to which may be added that following Roumania, in May 1982 Hungary acceded as the second Warsaw Pact country to the IMF. It is moreover of great importance that Russia has declared its acceptance of use of the Special Drawing Right for international transport law. Since December 1983 Russia has also been a Party to the CMR.

81. The Protocol replaced Art.23(3) CMR with the following provision: 'Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.' For the further elaboration of this provision in paragraphs 7-9 cf. Annexes 4, 5. It entered into force on 28.12.1980 following the ratifications by the Federal Republic Germany, Denmark, Finland, Luxembourg and England; in the meantime France ratified on 24.12.1981, BT 1981, p.405 and BT 1982, p.203 and entry into force there on 13 July 1982, BT 1982, p.374. For France that meant an increase in the limit of 36%. In November 1982 that was already 42%, BT 1982, p.533. For England, see Donald, p.124. For the originally uncertain situation in Belgium, Putzeys, no.892. Belgium ratified on 6 June 1983. The Hof van Beroep Antwerp 23.3.1983, ETL 1983, p.518 applied the Belgium Law of 12 April 1957 to the conversion, which resulted in a limit of 408,25 Bfrancs. See also BT 1981, p.42.

82. Law of 15 May 1981, Stb 1981, 295, in force on 15 March 1982 together with the related Besluit of 19 January 1982, Stb 1982, 5.

83. Cf. also Hill/Messent, p.131. In particular, questions of a legal-political nature occur here. Cf. e.g., the Warsaw proceedings (also an interesting example of prospective overruling) before the US Court of Appeals (Second Circuit) 28.9.1982 [1984] 1 Lloyd's Rep 220 (Franklin Mint v. Trans World Airlines) in which the limits were excluded for the future, on which N. R. McGilchrist (1983) 3 LMCLQ, p.308. The court established a lacuna, as did the Hoge Raad in its above-cited decision of 1.5.1981, NJ 1981, 604, but did not wish to make provision therefore: 'What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.' 'Substitution of a new term is a political question, unfit for judicial resolution.' The Supreme Court decided by decision of 17.4.1984 [1984] 2 Lloyd's Rep 432, that the last official gold price remained effective. Cf. thereover N. R. McGilchrist (1984) 3 LMCLQ, p.499. Cf. Cass. 7.3.1983, BT 1983, p.482; CA Paris 5.10.1984, p.64.

basis for conversion of the gold franc into national currency.⁸⁴ The question of the possible application of the exchange rate for gold on the free market demanded attention to an intense degree since 1978 the basis had fallen out of the rule given by the Hoge Raad. Having regard to the stormy developments in the exchange rate for gold since the beginning of the 1970's the question was extremely delicate.⁸⁵ If one takes stock of the 'lacunary' judicial decisions in CMR cases it becomes apparent how necessary legislative intervention was as a result of the dissension so demonstrated.

The Rechtbank Rotterdam appeared predisposed in favour of the free price of gold. The result thereof was that the limit for damage concerned did not have to be applied.⁸⁶ Unfortunately the Rechtbank gave no reasons for its decision.⁸⁷ The Rotterdam example was followed by the Rechtbank Roermond, also without further reasoning.⁸⁸ A remarkable intermediate position was taken up by the Rechtbank Amsterdam which rejected the free market price. In its place the court considered that in the given circumstances the unofficial spot price was the most appropriate to what at the time of the conclusion of the contract the parties must have intended having regard to the fact that they could not have anticipated the abandonment of the official price of gold.⁸⁹ The first court in The Netherlands, as far as can be ascertained from the law reports, to have applied the SDR as the new unit of account was the Rechtbank Groningen.⁹⁰ It seemed that the die had been cast for good for the SDR by the frequently cited decision of the Hoge Raad of 1 May 1981 in which the court chose in favour of application of the SDR in convincing manner via the autonomous (historical, textual and teleological) interpretation method.⁹¹

The entry into force of the Netherlands Law on conversion was the signal for the Rechtbank Rotterdam to bid farewell to the free market price.⁹² It is

84. HR 14.4.1972, S&S 1972, 45; NJ 1972, 269.

85. See thereon the conclusion of the Advocate General in his conclusions to HR 1.5.1981, S&S 1981, 76 (77); NJ 1981, 604 (605), under 5, for a review of the development, in comparison with the SDR, in the period 1974-1980. See also for the Scandinavian countries, ETL 1982, p.275; for Italy, ETL 1982, p.330.

86. Rb Rotterdam 12.5.1978, S&S 1979, 59.

87. Certainly later by decision of 23.11.1979, S&S 1980, 18 with reasoning derived from De Liagre Böhl, NJB 1978, p.575, who failing any other choice arrived at application of the free market price.

88. Rb Roermond 18.1.1979, S&S 1979, 45.

89. Rb Amsterdam 18.3.1981, S&S 1981, 84. This strategy was earlier chosen by decision of 10.1.1979, S&S 1979, 29, with extensive reasoning.

90. Rb Groningen 9.3.1979, S&S 1979, 90 in a non-CMR case.

91. HR 1.5.1981, S&S 1981, 76; NJ 1981, 604; ETL 1982, p.252 (Blue Hawk). The consequence to this case was that the law on conversion cited earlier came too late to be used.

92. Rb Rotterdam 23.4.1982, S&S 1982, 94, confirmed by Hof The Hague 12.11.1982, S&S 1983, 30; NJ 1984, 656. The proceedings are typical for an interim phase. A claim by the carrier in 1980 for conversion into pound sterling was considered to be in conflict with the regulation affected by the CMR Protocol and the Netherlands Law on Conversion. The reasoning of the Hof that the limitation of liability expressed in pound sterling bore a purely national character ignored the

noteworthy that in its reasoning the court primarily sought a connection with the CMR Protocol that had entered into force at the end of 1980 and thereafter derived support for itself from the entry into force of the Royal Decree of 19 January 1982 based on the new Law. Without this support from the national legislator the courts in West Germany came to the same decision as did the Hoge Raad in The Netherlands in the Blue Hawk case. Restricting the enquiry to the CMR, the decision of the Landgericht Osnabruck may be cited.⁹³ Since the entry into force of the Goldfrankenumrechnungsgesetz of 14 June 1980⁹⁴ and the CMR Protocol ratified by West Germany as of 28 December 1980 there can be no doubt whatsoever as to the applicability of the SDR, but that is not the case as to the moment at which conversion should occur. Just as the conversion problematic prior to the above-mentioned Protocol was not resolved by the Convention, so is that also the case with the moment at which conversion should take place.

This aspect of the conversion problematic deserves separate attention. The decision just mentioned of the Landgericht Osnabruck designated the time of the judgment for that purpose and thereby followed both Loewe and, in anticipation thereof, the CMR Protocol.⁹⁵ Subsequently the OLG Hamburg judged the moment of taking over of the goods by the carrier as being the moment for conversion of the gold franc, thereby seeking connection with Article 23(1) CMR.⁹⁶ In an extensively reasoned decision the Bundesgerichtshof elected for the first-mentioned decision.⁹⁷ With this the BGH dismissed Article 23(1) CMR as a criterion because that paragraph rendered the value in a particular national currency while paragraph 3 had an entirely different purport:

‘Da die Festsetzung in Goldfranken lediglich auf der Erwägung beruht bei der Begrenzung der Haftung auf Höchstsätze einen für alle Vertragsstaaten einheitlichen, international anerkannten Wertmasstab zu verwenden, erscheint es gerechtfertigt, für die Umrechnung einen Zeitpunkt zu wählen, der der tatsächlichen Entschädigungsleistung möglichst nahekommt. Danach ist es sinnvoll, als letzten Zeitpunkt den des Urteils zu bestimmen.’

fact that England had introduced the CMR into its legal system by means of the Carriage of Goods by Road Act 1965 and accepted the CMR Protocol by means of the Carriage by Air and Road Act 1979 (s.4(2)). Cf. for the texts, Donald, pp. 105, 109; Clarke, pp.165, 201.

93. LG Osnabruck 18.5.1979, VersR 1980, p.245; LG Frankfurt am Main 11.8.1980, VersR 1980, p.384.

94. For the text see, Muth-Glöckner, p.195.

95. Loewe, no.208, who thereby applies the rule of Art.27(2) CMR by analogy to Art.23(3) CMR; cf. Rb Roermond 18.1.1979, S&S 1979, 45. In this regard analogy does not seem convincing. Having regard to the fact that the issue of conversion is as such left unregulated by the Convention it is not therefore clear that this one aspect should be regulated. Cf. BGH, n.97 below. The CMR Protocol in Art.2(2) (Art.23(7) new) adopts the date of the judgment besides the date agreed upon by the parties; cf. also Hof The Hague, n.92 above. This aspect of the conversion problematic is not met by the Netherlands Law on Conversion of 1981.

96. OLG Hamburg 29.5.1980, VersR 1980, 950.

97. BGH 5.6.1981, VersR 1981, p.1030; ETL 1982, p.301; ULR 1981, II, p.220. See also § 7 below.

The Convention, no more than it did as to the issue of conversion itself, has nothing to say as to the moment at which conversion should take place: so ran the logical argument of the court. In favour of the time of judgment the BGH advanced the following arguments: that moment is the closest to the duty to make compensation for damage; the BGH had accepted this criterion in regard to the Warsaw Convention and, last but not least, it is the moment chosen by the CMR Protocol.⁹⁸ The arguments employed by the BGH support its judgment. The moment at which the damage-causing fact occurs must consequently be rejected.⁹⁹

Summing up, it can be said that the conversion problematic under CMR law has not passed unnoticed. During the short period when uncertainty existed, short when compared with other international transport regulations and partly due to a failure to tune national legislation to an equally uncertain IMF policy, courts of law reacted differently, as was to be expected, to that situation. It speaks well of the sense of reality that the CMR was quickly brought up to date by the Protocol so that uniformity could quickly be guaranteed at a point which national legislation would have allowed to go by default. Complete certainty is naturally only to be achieved when all Convention States have decided to implement legislatively the Protocol or at least also to bring their national legislation into line with it.¹⁰⁰

§ 3.2.3 *Application*

In the preceding two sub-sections the level of the limit as also the developments that led to abandonment of gold as a unit of account were dealt with. The subject of this part is the way in which the limit ought to be handled. A number of cases have occurred in practice in which it was disputed how the limit had to be applied. There are various aspects involved in this issue, which allow of the following formulation.

How ought the limit to be handled when the damage arises in respect of a consignment of goods comprising different types of goods with corresponding different values? Ought one here to take as a starting point the weight of the whole consignment or should one restrict oneself to the lost and/or damaged goods? (1) Does it make a difference to the answer to that question if there is a question of partial loss? (2)

1. The carriage of loads comprising different types of goods with corresponding different values occurs frequently. When these goods are the subject of a single contract the question arises in the case of total loss whether the limit has to be applied individually to each type of goods or to the weight of the entire consignment. If one pursues the second possibility it produces a levelling effect in regard to goods whose value exceeds the limit when compared with goods which represent a value remaining below that level, as will appear

98. VersR 1981, p.1031. According to Art.23(7) (new) CMR the parties can choose another moment.

99. Contra, Putzeys, no.899; A. M. Constabel (1978) 3 LMCLQ, p.330, has pointed out a third possibility besides the moment of the damage and the date of the judgment, namely, the moment of payment.

100. Cf. Donald, p.125.

directly from an example taken from the caselaw. The Cour d'appel Paris held in favour of the first method in regard to group transport with the argument that with a different solution the senders of goods with a value which remained below the limit would be unjustifiably advantaged.¹⁰¹ This method, which proceeds from the individual goods, is advocated in France with the argument, besides the preceding one, that the limit specified in Article 23(3) CMR should not acquire the character of a 'forfeit'.¹⁰² While conceding the latter point, the argument, in the opinion of the present writer, still remains insufficient. Furthermore, the text of Article 23(3) CMR does not prevent the other method. In favour of this the practical argument can be advanced that the carrier need only concern himself with the transported weight for the purpose of calculating his maximum duty of compensation for damage: the composition of the goods offered to him for carriage can be left out of consideration.¹⁰³ In addition there are yet further arguments that may be referred to as supporting the view that one should take the load in its entirety as the point of departure for the application of the limit and relinquish the individualisation of the load, certainly in the case of total loss. The problem can best be illustrated on the basis of a case which was fought up to the highest court and in which every conceivable argument was put forward.

During the carriage of spare parts for electric fires from Germany to Greece a trailer including its load was completely burnt out. The total weight of the goods was some 9000 kg. From the attached documentation it transpired that goods with differing values were concerned, half of which exceeded the 25 gold francs frontier. The carrier consequently wished to declare the limit applicable to that half. As for the other half the limit, in the view of the carrier, should not enter into consideration. The person entitled to the goods, on the contrary, adopted the position that the standpoint of the carrier, which was based on an individualisation of the goods, was not in conformity with Article 23(3) CMR and that therefore the weight of the entire consignment of goods, irrespective of which goods, ought to be taken as the point of departure for application of the limit. The OLG Stuttgart took the part of the person entitled to the goods.¹⁰⁴ The court referred to the fact that Article 23(3) CMR did not recognise the restriction desired by the carrier.¹⁰⁵ Further, the

101. CA Paris 10.12.1971, BT 1972, p.19. It was observed that it here concerned group transport whereby three separate contracts underlay the relevant carriage.

It has similarly been decided for the CIM, cf. Libouton, 1982, p.723; Putzeys, no.891 bis, no.891 ter; Clarke, no.101; Hill/Messent, p.132. Contra, CA Paris 20.1.1972, BT 1972, p.42 as also CA Paris 23.2.1982, BT 1982, p.550, whereby the entire shipment was taken as the starting point. The numerical example from the latter decision is as follows: of 50 boxes of bottles with a combined weight of 385 kg 12 boxes were damaged. The total possible damage amounted to 17,517.50 Fr francs; 12 boxes consequently to 4,204.20 Fr francs.

102. BT 1979, p.492; cf. also Tr Comm Paris 13.3.1972, BT 1972, p.230; Putzeys, no.891 bis; Clarke, no.101, with appeal to the circumstances that in group transport often more contracts are concealed behind the one consignment note. See also what was remarked above at § 3.2.1 as to the creation of the limit.

103. Cf. Nickel-Lanz, no.158.

104. OLG Stuttgart 22.12.1978, VersR 1979, p.637.

105. In that sense also Loewe, no.202.

court appealed to the fact that the word 'Gut' was understood as a collective concept in a large number of CMR articles, including Article 23 thereof. Whenever the Convention spoke of the goods separately it used the term 'Güter'.¹⁰⁶ Of greater importance is the argument advanced by the OLG of legal certainty: the separate determination of the weight and of the value of each item of damaged goods could prejudice that:

'Die von der Bekl vertretene einschränkende Auslegung würde den Sinn und Zweck der CMR widersprechen. Sie will wie andere nationale und internationale frachtrechtliche Regelungen die Rechtssicherheit fördern, die Risiken überschaubar machen und die rasche Abwicklung von Schäden erleichtern.'¹⁰⁷

Finally, the possibility put forward by the carrier of manipulating the composition of the load to be sent was indeed recognised but regarded as inherent in the system, as to which nothing unlawful attached. On appeal in cassation the carrier emphasised the undesirable consequences to which the standpoint adopted by the OLG could lead. The BGH, adopting virtually all the grounds and emphasising the practical advantage of the view there defended, agreed with the decision of the OLG.¹⁰⁸

The view reflected in these decisions can here be endorsed. The arguments employed therein seem to the present writer to be convincing.¹⁰⁹ Only when different contracts are at the basis of the group transport would this judgement be otherwise. One should be careful with the application of the arguments advanced by the above-mentioned courts to cases where they do not belong. In a case where there was a question of damage as well as loss, the proposition of the sender to the effect that in such a case the weight of the entire consignment should be taken as the starting point for application of the limit was correctly rejected.¹¹⁰ Perhaps superfluously one may here point out that in the case referred to here, as in the question formulated above, goods with differing values were involved. It makes no difference whether the goods are

106. The OLG failed to perceive with the distinction drawn as a result of the German translation that this did not match the authentic texts. In Artt.17 and 23 CMR one encounters 'goods' in the English text, while in the French text in those Articles the word 'la marchandise' is used, but in Art.22 CMR, for example, the term 'des marchandises'.

107. VersR 1979, p.637. At p.638 the court mentioned 'pauschalierende Betrachtung' which underpins Art.23(3) CMR. Cf. J. W. Wurfbain, Hague-Zagreb Essays 2, p.139 who specifies 'the average value of the goods carried' as partly determinative of the premium. This 'collective' standpoint is rejected in France, cf. BT 1979, p.492 (cf. n.102 above).

108. BGH 30.1.1981, VersR 1981, p.473. It did enter a reservation regarding the distinction drawn by the OLG between 'Gut' and 'Güter'; cf. the comment at n.106 above.

109. The result is probably not in harmony with the intention of the drafters of the Convention. See § 3.2.1 above.

110. OLG Munich 27.2.1982, VersR 1982, p.334. A part of a shipment of vests was lost by fire and another part 207% damaged. The OLG correctly decided that there was no good reason to calculate the damage so that the shipment in its entirety must be taken as the starting point having regard to the fact that according to Artt.23 and 25 CMR the system allowed room for separate calculation of loss and damage.

divided between different vehicles and in consequence that perhaps more than one consignment note is made out.¹¹¹

2. The last-mentioned example brings one directly to the second category, namely, those cases of partial loss of goods and/or damage to goods of the same or another type. The same question arises here also, to wit, with a view to application of the limit should one have regard to the weight of the entire consignment? It is clear that the answer to this question rests upon a preliminary question, which is: when is there a question of partial loss or damage? This question was discussed previously in § 2 above where it was concluded that the answer thereto was dependent on the concrete circumstances. It is necessary to draw a distinction. It could be the case that, although merely a part of the goods has suffered loss or damage, nevertheless the load in its entirety has declined in value (cf. Art.25(2)(a) CMR). This view has been approved in the legal literature.¹¹² From the caselaw on this point it is apparent with what difficulty, however, an acceptable solution is arrived at. In answering the question whether it is a matter of partial loss and/or damage one should have regard to the concrete situation, taking the consignment in its entirety as a starting point.¹¹³ If the conclusion is then drawn that there is a question of diminution in value of the entire consignment then the weight of the entire consignment applies as starting point for application of the limit, just as in the case of total loss.¹¹⁴ Should one come, however, to the conclusion that in the concrete case there is a question of partial loss or damage and that the rest of the load has not had its value affected (cf. Art.25(2)(b) CMR), then the limit should be applied exclusively to the lost or damaged goods concerned.¹¹⁵ Whether the goods lost or damaged possess a sufficient degree of separate existence and are thus capable of being substituted will here play a role. When applying these generally formulated rules one should not lose sight of the boundaries of reasonableness. In the opinion of the present writer these were exceeded in the case which follows below and which is examined because it clearly displays the interrelated complications of the problem of partial loss.

Two large machines were transported in unassembled form, for which various contracts were concluded. As a result of the damage that one shipment suffered it was necessary, with a view to restoration of the damaged parts, to reassemble the entire machine. The repair costs amounted to 600,000 Belgian francs while the despatch value of the relevant parts was 400,000 francs. The main issue in the action was whether the entire costs of repair were to be considered for compensation or only to the extent of the despatch value. The

111. Cf. Nickel-Lanz, no.158; Dorrestein, no.236. It is about the contract and not the consignment note.

112. Heuer, p.120; Dorrestein, no.236; Helm, Frachtrecht, Art.25 CMR, Anm.4; Putzeys, nos.857 et seq.; Libouton, 1982, p.723.

113. Cf. Dorrestein, no.236; penetratingly also Helm, Frachtrecht, Art.23 CMR, Anm.6. See also the writers cited in the preceding note.

114. The same applies for the application of Art.23(4) CMR, cf. the case to be dealt with below at § 3.3, BGH 3.7.1974, VersR 1974, p.1013.

115. Cf. BGH 9.10.1981, NJW 1981, p.1820 regarding § 54a ADSp.

court at Lyon adopted the latter position: awarding the higher sum would be in conflict with Article 23(4) CMR.¹¹⁶ On appeal the Cour d'appel Lyon took the former standpoint.¹¹⁷ This court in its reasoning allowed itself to be influenced by the thought that the damaged elements had to be regarded not so much as separate parts but as components of the (unassembled) machine. Further, the court distilled from the negotiations that had taken place between the person entitled to the goods and the carrier's insurer as to the amount of the damages that the carrier had expressed his agreement with the sum stated in the repair bill on condition that it did not exceed the purchase value of the machine.¹¹⁸ In addition, due to the circumstance that the parts, whether or not separate, were subject to different contracts, the judgment of the lower court did not deserve to be followed. Upon establishment of the juridically relevant facts the contract should take precedence as the juridical norm.¹¹⁹

In concluding this part it remains only to turn attention to a related aspect. If it has finally been decided in favour of partial loss or damage to the goods without the rest of the shipment being deleteriously affected, the question arises, according to which yardstick is the limit to be employed. Here the weight of the lost or damaged goods and not the value thereof should be considered.¹²⁰ Another question is whether the weight can likewise serve as criterion when proportionately calculating the damage factors mentioned in Article 23(4) CMR. The answer to this, as appeared at the end of the preceding section, is divided.¹²¹

§ 3.3 Remaining damage factors (Art.23(4) CMR)

Following the above considerations as to the various facets that are attached to the limit, the thread is here once more taken up where it was left aside in § 3.1. It may be recalled that in a system that proceeds from the despatch value of the goods for the calculation of damages a number of charges incurred during the performance of the carriage are of importance. These damage factors are summarised in Article 23(4) CMR and must be seen as comple-

116. Tr Comm Lyon 10.11.1975, BT 1976, p.175. The court was of opinion that there would only be a place for the higher sum if the parties had taken advantage of the possibility offered by Art.26 CMR.

117. CA Lyon 21.1.1977, BT 1977, p.97, on which critically Libouton, 1982, p.724. For a case in which the costs of repair was the only damage to be taken into consideration, cf. Rb Den Bosch 7.5.1982, S&S 1984, 91.

118. The annotator to the case in BT correctly referred to the dubious character of the reasoning employed by the Hof. It is probable that the declaration of agreement mentioned by the court was merely concerned with the new value of the relevant parts instead of the machine as a whole. Furthermore, in the latter case the agreement would be in conflict with Art.41 CMR.

119. Cf. n.111 above.

120. Helm, Frachtrecht, Art.23 CMR, Anm.6.

121. Ibid., and further at § 25 CMR, Anm.5 considers that for application of Art.23(4) CMR the weight is the proper yardstick; equally, Loewe, no.193. The following choose the value of the goods as the yardstick: Dorrestein, no.248; Korthals Althes/Wiarda, p.93; Nickel-Lanz, no.164.

mentary to Article 23(1) and (2) CMR following the application of the limit in Article 23(3) CMR. At the conclusion of § 3.1 it was stated that account is not always fully taken of the division of the damages into two components. In addition, the tendency exists to minimise this distinction by interpreting Article 23(4) CMR extensively whereby it is apparently hoped to ignore the fact that the carrier is liable without limit for the charges incurred following Article 23(4) CMR.¹²² A distinction is to be drawn in the system of compensation for damage employed by the CMR between the natures of different charges. On the one hand, there are charges which may be placed on an equal footing with substantive damage; on the other, damage factors are involved which arise as a result of the carriage as such (cf. § 3.1). It is not without risk to regard the system employed by the CMR as a system of 'consignee' destination value in the sense that only the expected trading profit, following the arrival of the goods at the place of destination, is excluded.¹²³ As was stated in the preceding section, the limit is in any event not applicable to the damage factors specified in Article 23(4) CMR which, when compared with a system based upon the destination value, can be to the advantage of the person entitled to the goods.¹²⁴ The importance of the above distinction becomes even more apparent when one considers that the damage factors specified in Article 23(4) CMR can mount up considerably¹²⁵ and can even be a number of times greater than the substantive damage to the goods.¹²⁶ It is precisely with a view to these consequences, which are inherent in a system of damages based upon the despatch value, that one is compelled to delimit as sharply as possible the damage factors specified in Article 23(4) CMR from other charges.

The damage factors specified in Article 23(4) CMR are charges incurred after the moment when the despatch value has been established. Divergent views have been advanced as to the interpretation of the phrase 'other charges incurred in respect of the carriage of the goods'. However much one may have doubts as to a number of damage factors to be mentioned below, in the interests of clarity it should be postulated first and foremost that one is here not concerned with the injurious consequences of loss or damage to the goods but with charges connected with the carriage as such.¹²⁷ It is noteworthy that

122. Thus the Hof van Beroep Brussels 30.10.1975, ETL 1976, p.238, on which Libouton, 1982, p.723, applied the limit to a number of the damage factors of Art.23(4) CMR. Also CA Paris 30.5.1984, BT 1985, p.75.

123. For the approach concerning the 'consignee' destination value, cf. Dorrestein, nos.151, 242.

124. Cf. Korthals Althes/Wiarda, p.92, n.82.

125. Freight charges are usually calculated on the basis of weight and distance; consequently freight charges for carriage to the Middle East can amount to high sums.

126. Cf. the Buchanan case to be discussed below.

127. Cf. Nickel-Lanz, nos.161, 165: 'Il ne s'agit cependant pas non plus de décharger l'ayant droit de tous les frais consécutifs à la perte: doivent être remboursés les frais qui n'auraient pas été encourus si la marchandise perdue n'avait pas été donnée au transport, et non les frais qui n'auraient pas été encourus si la marchandise n'avait pas été perdue.' Loewe, no.192: 'The charges referred to in paragraph 4 are charges which are incurred in respect of the carriage of goods and not outlays for the purposes of carriage.' Cf. Clarke, no.102; BGH 13.2.1980, VersR 1980, p.522.

the broader interpretation of this latter category was not developed in the first instance by the writers on the subject but by caselaw. A number of damage factors give scarcely any reason for a difference of view. One can include in this category the charges that arise in connection with a carriage that passes off normally and consequently are in a certain sense foreseeable by the parties.¹²⁸ But in regard to two categories there exists certainly no agreement, which is reason to give it some attention here.

The first category which is considered by both courts and writers to fall under Article 23(4) CMR probably does not belong there. By this is meant the group which was dealt with in § 3.1 above and which was classified by nature as costs incurred in preventing, reducing or determining (threatening) damage. Both in the legal literature and caselaw one encounters what are, in the opinion of the present writer, incorrect views as to these charges, as a result of which they did not arise for compensation or were regarded incorrectly as charges within the meaning of Article 23(4) CMR. Furthermore, the practical feasibility of the criterion employed depends to a great extent on the factual judgment of the case in question. Thus one can be of a like mind with Lord Justice Browne that in *casu* transportation and packing charges ought following Article 23(4) CMR to be granted but that return and assessor's charges should remain outside, yet this ignores the question whether the latter could not rather be regarded as charges falling under Article 23(1) CMR.¹²⁹ Following Lord Denning, Lord Justice Neill, by contrast, came to the conclusion that return freight did fall under Article 23(4) CMR.¹³⁰ This standpoint had earlier been adopted by the German supreme court.¹³¹ In that case extra freight and deep freeze charges were necessary in order to bring goods thawed during the carriage back to the desired temperature so as to allow their journey over the frontier to continue: an example thus of charges incurred with a view to maintaining the value of the goods. Here also account was taken of the concrete situation. Assessors' charges are, just as was established above in regard to Article 23(1) CMR, both allowed and rejected fol-

128. In the light of the multi-hued cases which occur in practice in transport law every recital of costs is arbitrary. See on this, also with mutual differences: Dorrestein, no.246; Heuer, p.122; Helm, *Frachtrecht*, Art.23 CMR, Anm.2; Rodière, p.315; Loewe, no.193; Putzeys, nos.869 et seq.; Ponet, pp.198 et seq.; Boudewijnse, p.248; Clarke, no.102.

129. QB 20.11.1973 [1974] 1 Lloyd's Rep 203 (*Tatton v. Ferrymasters*). As a result of damage during the carriage the machines were returned to the place of shipment. Dismissal of the costs of return shipment was based on the fact that these were atypical of the agreed carriage from England to Italy. For criticism hereof see Nickel-Lanz, no.159 n.7.

130. QB 22.9.1980 [1981] 1 Lloyd's Rep 200 (206, 207) (*Thermo Engineers v. Ferrymasters*); Lord Denning in CA 15.11.1976 [1977] 1 Lloyd's Rep 234 (238) (*Buchanan v. Babco*). Already earlier Rb The Hague 18.2.1969, S&S 1969, 58, had thus decided regarding extra freight charges with express reference to the fact that such costs were considered for compensation outside Art.23(4) CMR.

131. BGH 3.7.1974, VersR 1974, p.1013. In similar vein for deep freeze costs Ktg Delft 13.5.1965, NJ 1965, 326. See for storage and assessor's costs in the case of reconditioning after contamination damage, Rb Rotterdam 20.2.1976, S&S 1977, 67. For a differentiated approach to storage costs, cf. Putzeys, no.870.

lowing Article 23(4) CMR.¹³² Extra loading charges are as a rule granted,¹³³ as are charges for destruction¹³⁴ and 'disposal charges'.¹³⁵ Repair charges that exceed the value of the damaged goods should nevertheless remain within the scope of Article 23(4) CMR.¹³⁶ Insurance premiums, to the extent that they are not included in the freight price, ought likewise to be considered for compensation.¹³⁷ The same applies to extra packing charges to the extent that these are not included in the value of the goods.¹³⁸

From these somewhat arbitrary examples it appears that there is a tendency to allow certain charges to arise for compensation under Article 23(4) CMR which by their nature do not belong there. In such a case they should either be transferred to charges in the category of Article 23(1) CMR or left entirely out of consideration.¹³⁹

The latter possibility brings one to the second category about which there is a difference of insight and which is of great importance in general practice. This category concerns taxes that are levied in the context of international carriage of goods such as, in the normal course of events, import and export taxes¹⁴⁰ and duties from which there was originally exemption but which become due following the inability to discharge documents as a result of loss of the goods.¹⁴¹ If these taxes and duties remain due for the importer or exporter as

132. Rejecting: Nickel-Lanz, no.165; Rb Breda 11.1.1977, S&S 1978, 89; Rb Dordrecht 22.12.1971, S&S 1972, 50; Rb Amsterdam 4.3.1981, S&S 1982, 19; Hof van Beroep Antwerp 23.3.1983, ETL 1983, 518. Allowing: Loewe, no.193; Dorrestein, no.234; as also, e.g., Rb Amsterdam 18.3.1981, S&S 1981, 83.

133. Rb Amsterdam 4.3.1981, S&S 1982, 19; Rb The Hague 18.2.1969, S&S 1969, 58 even though outside Art.23(4) CMR; OLG Munich 27.6.1979, VersR 1980, 241; Loewe, no.193.

134. CA Venice 31.10.74, ETL 1975, p.242.

135. Rb Rotterdam 22.4.1981, S&S 1982, 116.

136. BGH 13.2.1980, VersR 1980, p.522: 'Unter Kosten i.S. dieser Bestimmung sind lediglich die mit dem Transport selbst verbunden, nicht aber die durch den Verlust oder Beschädigung entstandenen zusätzlichen Kosten zu verstehen' (p.523).

137. Cf. Heuer, p.122; BGH 3.7.1974, VersR 1974, p.1013; Rb Roermond 18.1.1979, S&S 1979, 45; V. Filipović, Hague-Zagreb Essays 2, p.64. Contra, Nanassy/Wick, p.242; Dorrestein, no.246.

138. QB 20.11.1973 [1974] 1 Lloyd's Rep 203 (Tatton v. Ferrymasters). Therefore not normal costs of packing, Rodière, p.315.

139. Thus, in the opinion of the present writer the view of Nanassy/Wick, p.272, who ascribes the 'Kosten der Erhaltung des Gutes' to Art.23(4) CMR, likewise the generally stated view of Nickel-Lanz, no.159 that 'frais d'entretien' fall under Art.23(4) CMR, are not supportable.

140. Rodière p.314; Loewe, no.197; Nickel-Lanz, no.59; Nanassy/Wick, p.272; Heuer, p.122; Dorrestein, NJB 1979, p.183. Further, CA Paris 30.3.1973, BT 1973, p.195 confirmed by Cass. 28.1.1975, BT 1975, p.442. Here the V.A.T. claimed from the carrier was awarded by these courts although they appeared to allow themselves to be led more by the interpretation of Art.27 bis Code Général des douanes as well as by a ministerial decree based thereon than by the interpretation of Art.23(4) CMR. Cf. also the earlier cited BGH 13.2.1980, VersR 1980, p.522.

141. Cf. Dorrestein, no.193; Dorrestein, NJB 1979, p.183 also in Beursbengel, 1978, p.363; Putzeys, nos.879, 880 bis; M. M. C. J. M. de Nerée tot Babberich, Beursbengel 1983, p.501.

a result of particular tax law regulations¹⁴² the question arises whether finally these sums can be recovered from the carrier as being charges incurred in respect of carriage. In what has become the well-known Buchanan case, which received the international interest it deserved,¹⁴³ the majority of the English court gave a positive answer to the question posed above by deciding that according to Article 23(4) CMR the carrier following the theft of the goods should compensate an exporter of whisky for duty due from the latter according to Article 85 Customs and Excise Act 1952.¹⁴⁴ The cause of the dispute concerned what the court considered to be the highly unclear passage in the formulation of Article 23(4) CMR, 'other charges incurred in respect of the carriage of the goods'.¹⁴⁵ The fundamental question of law in the dispute was, how broad is the relationship required by Article 23(4) CMR in the context of the contract concerned between the damage causing fact (in casu the theft of whisky) and the duties due? By various routes the majority of the court came to the same result, namely, that the relationship required by Article 23(4) CMR was sufficiently broad to encompass the duties due.¹⁴⁶

In France the same standpoint was taken in a virtually identical case. Although the carrier argued that the importer was liable for payment of customs duties in the sum of more than 3 million Italian lira and disputed whether the goods were stolen on Italian territory, the Cour d'appel Paris held him liable for that amount.¹⁴⁷ As the carriage in that case was taken care of by a commissionnaire de transport this decision is not based on the CMR. More striking, therefore, is the decision handed down a month later by the Cour

142. From BT 1980, p.70 it appears that no simple answer is possible to the question when V.A.T. is due in the event of loss or damage. See also Dorrestein, *ibid.*, as well as Putzeys, no.879 n.691.

143. That interest involved primarily the ascertainment of law aspect, on which see Chapter 1. As far as the substantive part was concerned the result caused something of a sensation due to the fact that the additional costs were some four times as great as the substantive damage.

144. CA 15.11.1976 [1977] 1 Lloyd's Rep 234; HL 25.7.1977 [1978] 1 Lloyd's Rep 119 (Buchanan v. Babco). For the facts and reasoning see the present writer, NJB 1979, pp.25 et seq. and the literature there cited to which add Th. H. J. Dorrestein, NJB 1979, pp.181 et seq. with note by the present writer at p.184. Further, Groth, p.72; Donald, p.104; Clarke, no.102; Libouton, 1982, p.723.

145. Besides the judges in these proceedings also A. C. Hardingham, (1978) 1 LMCLQ, p.52 ('loosely drafted'), p.53 ('far from clear'), complained about the obscurity of this disputed passage.

146. The result, as far as the substantive aspect is concerned, was critically received by A. C. Hardingham, (1978) 1 LMCLQ, p.54; see also the writers cited at NJB 1979, p.29 n.36; Th. H. J. Dorrestein, NJB 1979, pp.183; Helm, *Frachtrecht*, Art.23 CMR, Anm.2; Korthals Althes/Wiarda, p.145; Groth, p.75. From the English side the following reacted positively: D. J. Hill, (1977) 2 LMCLQ, p.213; Donald, p.104; Clarke, no.102; Hill/Messent, p.140. In the same vein also Loewe, no.192. See also Putzeys, no.880 bis who likewise accepts the 'English' result regarding dues, but rejects it (no.879) for V.A.T. In the caselaw the reaction was also dismissive: *inter alia*, Rb Amsterdam 7.6.1978, S&S 1979, 69 as also BGH 13.2.1980, VersR 1980, p.522 (p.523). For further Netherlands caselaw see n.150, n.152 and n.153 below.

147. CA Paris 18.5.1981, BT 1981, p.356, on which S. Nossovitch, BT 1981, p.353 who states that the decision is in harmony with a regulation of the Council of the EEC. See on this BT 1981, pp.353-354. Only in the case of force majeure need the importer pay no customs dues. As theft does not fall thereunder (except when combined with violence) this obligation existed. See also n.142 above.

d'appel Douai. During the carriage of coffee from Italy to France the vehicle with its load was stolen in Italy. As in the previous case the Italian customs levied a sizeable amount (142,600 French francs), taking the same position as the tax authorities in the Buchanan case above that the goods had been offered for consumption in Italy. In contrast to the Cour d'appel Paris the court at Douai dismissed the claim.¹⁴⁸ Two arguments were advanced for this. In the first place the Cour d'appel took the position that Article 23(4) CMR had in view normal charges and not those proceeding from theft.¹⁴⁹ Secondly, it appeared from a decision of the Italian supreme court that the fiction employed by the customs authorities was not correct and thus the legal basis of the claim collapsed.

The first argument had earlier been adopted by the Rechtbank Amsterdam.¹⁵⁰ Here also a virtually identical set of facts was involved. Following a theft of cigarettes the sender was thereby not in a position to discharge the relevant export documents as a result of which a bill was presented to him by the tax authorities for more than 300,000 guilders in duties and more than 67,000 guilders in Value Added Tax. Like the claimant in the Buchanan case here also the sender attempted to pass the buck to the carrier, but without success. Having commented on the fact that the damage had occurred otherwise than by border crossing transport (to which the Rechtbank attached fundamental importance) the court considered:

'However broad the interpretation of paragraph 4 that can be accepted, the charges concerned must in any event be incurred directly in connection with the carriage as that would normally be performed.'

Having regard to the fact that the claim rested moreover on a tax fiction the court considered that it was here more a question of an administrative law penalty than of carriage charges.¹⁵¹ Even after becoming aware of the decision of the English House of Lords the Rechtbank persisted with the standpoint it had taken.¹⁵² The Rechtbank Rotterdam added thereto, partly by means of systematic interpretation:

'It grounded that judgment to a great extent upon the context in which the fourth paragraph of Article 23 was concluded, namely, as a component in the delimitation of

148. CA Douai 19.6.1981, BT 1981, p.512.

149. The annotator to the decision rejected this standpoint as too strict. In his opinion Art.23(4) CMR offered sufficient room for such a damage factor.

150. Rb Amsterdam 30.3.1977, S&S 1977, 36, on which the present writer, NJB 1979, p.30.

151. The Amsterdam decision was given a mixed reception in the English House of Lords: cf., on the one hand, Lord Salmon at [1978] 1 Lloyd's Rep 128: 'Unfortunately I find myself quite unable to accept the reasons upon which that judgment was based'; and, on the other, Lord Edmund-Davies (p.133) who expressed his agreement with the decision.

152. Rb Amsterdam 7.6.1978, S&S 1979, 69. Cf also Hof The Hague 6.6.1979, S&S 1980, 42; Arbitral Award 4.10.1979, S&S 1980, 59; Arbitral Award 23.8.1977, 19.9.1978, S&S 1981, 129. Agreement with the 'English' standpoint is to be found, by contrast, in the Arbitral Award 20.4.1982, S&S 1983, 19.

the extent of the damages which following Articles 17 et seq. falls to the account of the carrier.¹⁵³

In a matter so disputed in caselaw and legal literature it is not an easy matter to choose a position. The arguments that lead to recovery from the carrier according to Article 23(4) CMR of the liability of the sender to the tax authorities rest upon a purely grammatical interpretation of the disputed phrase in that provision as well as upon reasonableness. As against this the following arguments can be presented. In the first place reference can be made to the fact that the relationship between the sender and the tax authorities does not in principle take account of the carrier¹⁵⁴ any more than does the tax fiction (without hereby pronouncing judgment on the merits of such fiction which falls outside the competence of the present writer).¹⁵⁵ This standpoint brings with it that damage occurring as a result of theft as in these cases is not regulated by the Convention.¹⁵⁶ This does not of itself mean that the carrier escapes scot-free.¹⁵⁷

As a second argument it can be pointed out that, as was stated above, Article 23(4) CMR has in mind charges which in the context of the carriage are incurred for the account of the person entitled to the goods. As far as the tax fiction regarding the claim to duties including a penalty is concerned, it can be stated that such claim is based exclusively on the loss of the goods and has no relationship with the carriage as such.¹⁵⁸ Moreover, regard should be had to the fact that granting such claims as these would not be in conformity with the intention of the drafters of the Convention,¹⁵⁹ which in the absence of further historical proof is admittedly not an impressive argument. The following has more weight. As was stated above, the present issue was then

153. Rb Rotterdam 25.3.1983, S&S 1983, 88. See also Rb Roermond 1.3.1984, roll no.1502/1984.

154. To the extent that the carrier offers security to the tax authorities he does so on behalf of his principal. That the despatch forwarder wishes, via the documents employed, to place responsibility for the documents upon the carrier is entirely understandable although the way in which that happens is open juridically to criticism; cf. Th. H. J. Dorrestein, *Beursbengel* 1978, p.363.

155. The Italian decision cited above which rejected the fiction was variously regarded by the French courts mentioned in n.147 and n.148. The following may be added thereto. The reasoning of Dorrestein, *NJB* 1979, p.183, that the damage factor under litigation did not arise for compensation on the ground of the concluding phrase of Art.23(4) CMR fails to convince. Dorrestein characterised that damage factor as consequent damage. In the opinion of the present writer that is not supportable. Such damage occurs as a result of the contract underlying the transport contract, such as, e.g., a sales contract. That cannot be said of the present damage.

156. Cf. Lord Denning [1977] 1 *Lloyd's Rep* 237; Korthals Althes/Wiarda, p.145; Donald, p.104; Clarke, no.102.

157. Thus can one state that national law must be applied to this situation unforeseen by the drafters of the Convention.

158. Some, including Clarke, no.102, have stated that in the Buchanan case the concept of carriage was very broadly construed; the theft of the whisky actually took place before the actual carriage had in fact commenced. Cf. likewise the Amsterdam decision cited above, n.150.

159. Donald, p.104; Clarke, no.102.

not contemplated. An argument for a narrow interpretation of the disputed phrase in Article 23(4) CMR can be derived from the system of the Convention. Article 26 CMR offers the possibility of safeguarding certain interests.¹⁶⁰ This possibility can, at least in theory, be realised against an increase in the freight charges. By extension one can refer to another argument to exempt the carrier from the claims pursued here. In the opinion of the present writer, it conflicts with both the juridical and, above all, economic reality that the freight price in general is set off against such a risk – which can exceed with a multiple factor the substantive value of the goods.¹⁶¹ The position thus defended is, finally, in conformity with those transport regulations which employ the system of destination value and in which the claims discussed here do not arise for compensation.

To close this part it remains to turn attention to an aspect that was discussed earlier when Article 23(3) CMR was dealt with. Article 23(4) CMR provides that in the case of partial damage the charges should be proportionately compensated. Referring to what was also stated when dealing with Article 23(3) CMR in § 3.2.3, in the present case the entire shipment should in principle be looked at in order to arrive at a correct calculation of damage. Determination of whether the damage is complete or partial should also here be the guideline. The following case is illustrative.

In a case where 5% of the deep freeze load had thawed the sender, due to a defect in the cooling apparatus of the vehicle, was obliged to incur extra charges (freight, deep freeze and assessor's charges) in order to prevent further damage. Should the carrier be held liable for these incurred charges in the proportion to the substantive damage (thus, 5%) or for the entire amount? The BGH choose for the latter.¹⁶² Given that in the present set of circumstances the substantive damage could not be separated from the consignment in its entirety (due to damage to a small part of the consignment of fish the veterinary inspector forbade the carrier to cross the frontier) the charges had to be apportioned to the entire shipment. The BGH held that such solution conformed to Article 23(4) CMR and Article 25(1) CMR and followed from the aim of the regulation as to damage as provided by the Convention.¹⁶³ This case has justly been followed.¹⁶⁴ If one comes nevertheless to the conclusion in regard to a particular instance of damage that there is a question of partial loss or damage then there is no reason to take the entire shipment as the point of departure. In such a case one should confine the damages to the lost

160. On Art.26 CMR see further § 6.

161. Groth, p.75.

162. BGH 3.7.1974, VersR 1974, p.1013.

163. The result may be satisfactory, cf. Helm, *Frachtrecht*, Art.25 CMR, Anm.2. It seems to be less correct, in the light of the circumstances of the case, to catalogue these costs under Art.23(4) CMR.

164. OLG Munich 27.6.1979, VersR 1980, p.241: 45% of the strawberries had thawed, which constituted a danger for the remainder. The costs expended to maintain the value of the goods correctly arose for consideration for full compensation and not merely for the 45%. The approval and criticism of the present writer (see preceding note) applies also to this decision.

or damaged goods in the light of the proportional approach prescribed by Article 23(4) CMR. Judgment is divided over the question whether in such a case the weight or the value of the goods should be taken as the basis. In the opinion of the present writer the fact that one would keep in step with the application of Article 23(3) CMR argues for choosing the weight as the basis for the damage to be compensated according to Article 23(4) CMR (cf. § 3.2.3).¹⁶⁵

§ 4. Damage (Art.25 CMR)

One was introduced to the substance of the concept of damage in § 2 above. Here attention has to be focused on calculating the damages in the event of damage. To this end Article 25 CMR provides that one must fall back on the regulation regarding loss (Art.23 CMR) with this difference, however, that in determining the value the damage factors specified in Article 23(4) CMR are, in contrast to loss, hereby included (Art.25(1) CMR). In § 3.1 it was already stated that this method can be regarded as a not particularly happy one. This difference with the regulation regarding loss does not lead to different results except when the damage so determined exceeds the amount specified in Article 23(3) CMR.¹⁶⁶ The circumstance that the factors specified in Article 23(4) CMR should be involved in the determination of the damage is of significance for the way in which the diminution in value in the event of damage must be calculated. The Convention does indicate the basis for the determination of the diminution in value but, in contrast to the CIM, is silent on the method by which the calculation of the damages should take place.¹⁶⁷ As the Convention itself does not prescribe a particular method of calculation the question arises, which method best conforms to the starting point expressed in the Convention for the calculation of the damages. Various methods may be envisioned.

(a) Thus, one can attempt to calculate the value of the damaged goods according to the same yardstick as that by which the value of the goods at the moment of taking over is established (Art.23(1) CMR) to which in accordance with Article 25(1) CMR are to be added the charges specified in Article 23(4) CMR.¹⁶⁸ The disadvantage of this method is that the actual damage is normally experienced at the moment of delivery. Calculating in this way the diminution in value with retrospective effect to the moment of taking over of the goods by the carrier is not devoid of its uncertain elements. Opposed to this is the fact that a connection is retained with damage occurring as a result of loss.

(b) A more obvious method is that by which one calculates the diminution

165. In favour of this choice are also Loewe, no.193 as well as Helm, *Frachtrecht*, Art.23 CMR, Anm.6. Contra, Nickel-Lanz, no.164; Dorrestein, no.248; Korthals Althes/Wiarda, p.92.

166. Nickel-Lanz, no.162. See also Putzeys, no.856 in conjunction with no.891 ter; Libouton, 1982, p.722.

167. Art.33 CIM.

168. Helm, *Frachtrecht*, Art.25 CMR, Anm.2.

in value by reducing the value of the goods determined as at the moment of taking over by the value of the damaged goods as at the moment of delivery.¹⁶⁹ There is also a serious objection to this method. Having regard to the fact that under normal economic circumstances the value of goods increases during the carriage – leaving the charges specified in Article 23(4) CMR out of consideration here – it is not to be excluded that the difference between the values calculated by reference to the different moments in time will be less than the damage actually suffered. As a result thereof the claimant would in such cases be able to claim for less damage than he would in fact have suffered. The reason for this possible unfairness is due to the fact that in this manner one is comparing essentially two dissimilar elements. This objection is avoided when one chooses for the third method.

(c) The diminution in value is calculated by comparing the value which the shipment would have had upon arrival and the actual value of the shipment delivered in damaged condition. In this way the inequality attaching to the above-mentioned method is certainly obviated but, just as in the case of the first mentioned method, that is possible only with the assistance of a hypothesis. One must here also estimate the value of the goods in sound condition at the moment of delivery. This uncertain factor manifests itself also with both a system that proceeds from the starting point of despatch value and one that employs the destination value. A more serious objection is that this method comes into conflict with the system of the CMR which chose the despatch value as the point of departure.

(d) A method that accommodates the last-mentioned objection in a satisfactory manner is that which since 1961 has been followed in the CIM. A clear elaboration of the calculation there followed is to be found in Boudewijnse.¹⁷⁰ The diminution in value is calculated by expressing this as a percentage at the place of destination and thereupon applying it to the original despatch value of the goods. Thereafter the same percentage is applied to other damage factors, such as those specified in Article 23(4) CMR. This so-called damage allowance method possesses the advantages of clarity and justice.¹⁷¹

The question which one must now pose is whether the last-mentioned method, which appears the most practical, fits into the system of the CMR. A positive answer to this question is given by Nickel-Lanz.¹⁷² Having considered the earlier methods she comes to the conclusion that this method is the most logical. Without giving any reasons Dorrestein states that the damage allowance method offers sufficient comfort: the percentage of the arrival value of the sound goods should be applied to the despatch value increased with the charges incurred.¹⁷³ Against application of the method followed in the CIM

169. Heuer, p.121.

170. Op. cit., pp.250, 251.

171. Thus Boudewijnse, cited above, who further points out that it took 80 years to arrive at this method.

172. Op. cit., no.163.

173. Op. cit., no.249; cf. also Korthals Althes/Wiarda, p.93.

it can, on the other hand, be advanced that the drafters of the CMR in 1952 expressly rejected the then operative CIM method although it should immediately be added that the CIM version dating from 1952 deserved not to be imitated.¹⁷⁴ Yet at the CMR revision conference in Geneva in 1972 there was insufficient confidence even in the improved version which had entered into force in the law of rail transport in 1962.¹⁷⁵ This last piece of information argues more as evidence of the bad name which the CIM had had for years on this point than against the revised CIM rule as such. Having regard to the fact that this practically feasible method leaves the starting point of the compensation for damage system of the CMR intact and otherwise does not conflict with the Convention preference is here given to this method.

The second paragraph of Article 25 CMR impliedly gives effect to the limit of Article 23(3) CMR. The question how the limit must be applied to the separable cases of Article 25(2)(a) and (b) CMR was dealt with in § 3.2.3 while in § 3.3 above was also discussed the way in which the charges specified in Article 23(4) CMR are given a place within the damages system of the Convention. For those aspects of the problem reference should be made to the relevant sections.

§ 5. Delay (Art.23(5) CMR)

As was stated above in § 2 the question when is there delay is in such general terms unanswerable; in this the concrete circumstances are determinative. The parties can avoid the uncertainty inherent in the regulation of Article 19 CMR by agreeing on a certain period (cf. Art.6(3) CMR). In this section the legal consequences of a delay once determined are examined and in particular the relationship between the rule regarding damage due to delay and that concerning damage and loss. In deviation from Article 23(1)-(4) CMR, Article 23(5) CMR provides that if the claimant proves that delay has caused damage such damage should be compensated to a maximum of the carriage charges.¹⁷⁶ Having regard to the fact that the freight price is normally calculated by reference to distance and weight this can amount to a substantial sum; one may think, for example, of transportation to the Middle East.¹⁷⁷

174. On this Nickel-Lanz, no.163; Boudewijnse, p.250.

175. W/TRANS/SCI/438, 19 April 1972, p.12, no.68.

176. The differences with the CIM are noticeable. Art.34(1) CIM provides that in the event of delay the claimant has a right to a forfeiture sum of 10% of the freight charges. If the claimant proves that nevertheless – just as in Art.23(5) CMR – he has suffered damage as a result of the delay, compensation is awarded to a sum equivalent to twice the freight charges. In the CIM version of 1980 this amount was increased to three times the freight price (Art.43(1) CIM).

177. CA Paris 18.10.1973, BT 1973, p.488 correctly held that the freight charges for the entire journey, and not merely that section of the journey where delay had occurred, served as basis herefore.

Should the freight charges for the return shipment of a machine that was delivered too late for an exhibition be understood as falling under the freight charges specified in Art.23(5) CMR? Together with the writer in TD 1971, pp.1004-1005 one must conclude that this question be answered in the negative.

Thus the carrier can be aware in advance of his maximum obligation to compensate for damage.¹⁷⁸

In contrast to damages as a result of loss or damage, damage due to delay in the broader sense need not remain confined to damage to the transported goods themselves. Compensation for every possible consequential damage in principle arises for consideration.¹⁷⁹ A difference between the two regulations on damages is that a claim to the special risks specified in Article 17(4) CMR can be made exclusively by the carrier in the case of loss and/or damage. An important distinction is also to be found with the delivery of the goods (cf. Art.30(1) and (2), respectively (3) CMR). There are sufficient differences therefore to distinguish sharply between the regulation of damage for, on the one hand, loss and/or damage, and, on the other, delay. The Convention nevertheless does not draw such a distinction.¹⁸⁰ Consequently, both in the case where damage is due to delay as a result of loss or damage and where delay in the carriage has led to loss and/or damage, the question arises which damages rule should be applied. The question is all the more cogent as neither damage rule draws a distinction as to the cause of the damage and overlaps the other in consequence. Heuer and Nickel-Lanz, in particular, have been deeply involved with this issue of 'competition'. Although in principle the rules can be employed cumulatively as the Convention itself draws no distinction in their application, Heuer comes finally to the conclusion that the regulation of Article 23(1)-(4) CMR ought to be applied to both the above-mentioned cases of overlapping. As argument he points to the circumstance that, if the answer were to be otherwise, the rule that in the event of damage and/or loss the damage should remain restricted to the goods themselves would be deprived of force.¹⁸¹ Various other writers adopt the same standpoint.¹⁸²

One encounters a different view with Nickel-Lanz. Although in her view the first case, namely, when damage and/or loss leads to delay, should be regulated by Article 23(1)-(4) CMR,¹⁸³ she defends the view, in imitation of a number of writers on the legal literature of rail transport, that the second case of overlapping, namely, that damage and/or loss is caused by delay, ought to fall under Article 23(5) CMR.¹⁸⁴ She advances the argument that Article 23(5) CMR does not distinguish by reference to the cause of the delay. With this she apparently fails to perceive that such equally pertains to the regulation

178. OLG Hamburg 6.12.1979, VersR 1980, p.290. In this case the freight charges for four shipments amounted to DM 6200. The court correctly remarked that the claimant need not warn the carrier of a possible obligation to compensate in this sum.

179. Cf. Dorrestein, no.255; Dorrestein/Neervoort, p.211; Heuer, p.137; Nickel-Lanz, nos.111, 167; Clarke, no.105. Contra, Hill/Messent, p.141.

180. Heuer, pp.130, 131, 138; Helm, Frachtrecht, Art.23 CMR, Anm.9.

181. Heuer, pp.137-139.

182. Helm, Frachtrecht, Art.23 CMR, Anm.9; Dorrestein, no.255; Korthals Althes/Wiarda, p.147; Putzeys, no.855.

183. Nickel-Lanz, no.112.

184. Ibid., nos.111, 167.

regarding damage and/or loss. In opposition to this view one can also invoke the fact that the division drawn by Nickel-Lanz between the above-mentioned cases of overlapping does not square with the arguments she advances in support of her solution to the second case. In addition, one may advance against her solution, at least from a theoretical point of view, the fact that the carrier can decide more or less for himself under which damage regulation he falls. By delaying the carriage, as a result of which goods are damaged, he would fall under the generally more favourable regime of Article 23(5) CMR than that of Article 23(1)-(4) CMR. Nickel-Lanz perhaps recognises this weak spot in her case and argues as a result for increasing the limit to two or three times the freight price.¹⁸⁵ For the third objection one may refer to the circumstance that Nickel-Lanz follows a particular view which is advocated in the legal literature concerning transport by rail but which has not remained undisputed even for the CIM. Although originally there was much support for the standpoint advocated for that Convention also by Nickel-Lanz, subsequently a transition in the caselaw and legal literature came about in regard to the then operative rail transport. An amendment to the newest version of the Convention (COTIF 1980) appeared to be necessary in order to prescribe clearly the standpoint followed by Nickel-Lanz.¹⁸⁶ In the case of the CMR there is no need for the doubts that have arisen as a result of Article 34 CIM.

The above-mentioned standpoint defended by Heuer was followed *expressis verbis* by the Austrian Oberste Gerichtshof.¹⁸⁷ One may agree without any reservations with Heuer's standpoint and on the basis of the arguments advanced by him.¹⁸⁸ Besides the cases of overlapping described above situations can occur in which both regulations are separately applicable, namely, when damage and/or loss, as well as delay, occurs without there being any indication of the causative relationship between them.¹⁸⁹

§ 6. Special provisions (Artt.24, 26 CMR)

Article 23 CMR, which is the central article in the calculation of the scope of the damages, provides in its final paragraph that compensation above what has so far been established is possible and refers further to Articles 24 and 26

185. *Ibid.*, no.168. Cf. n.176 above.

186. For the historical development and current state of affairs regarding this controversy in the legal literature and caselaw in the law of rail transport one may refer to the clear exposition by Boudewijnse, pp.254-260. See also Libouton, 1982, p.724.

187. OGH 15.2.1979, ULR 1979, II, p.229.

188. The view propounded by Nickel-Lanz is to be found in CA Aix-en-Provence 20.11.1977, BT 1978, p.245. Also Libouton, 1982, p.724 appears to be prejudiced in favour of this view. The view put forward here was approved by Rb The Hague 18.2.1969, S&S 1969, 58; CA Venice 31.10.1974, ETL 1975, p.242; Rb Rotterdam 21.3.1980, S&S 1981, 29; CA Nîmes 29.10.1980, BT 1981, p.256; Rb The Hague 7.12.1983, S&S 1984, 92.

189. Heuer, p.139; Nickel-Lanz, no.112. In this connection the provision proposed by the FIATA Report, p.21, is interesting: 'The aggregate liability of the carrier under this article shall not exceed the limit of liability for either total loss of the goods or the carriage charge, whichever amount is the higher.'

CMR. This section will deal consecutively with 1. the purport, 2. the substance of both regulations and then 3. the conditions upon which application is dependent.

1. These provisions purport to effect a more extensive compensation for damage than is possible on the ground of Article 23 CMR. Although it may be true that the declaration of value or the determination of a special interest has proved its usefulness in practice, this probably applies exclusively to transport by air, for in the other branches of transport law they have scarcely made an appearance. It is for good reason that Wurfain states that the person entitled to the goods gives preference to insuring the goods.¹⁹⁰ Contracts of insurance of the goods have in common with the provisions dealt with here that the compensation for damage in principle does not exceed the damage actually suffered. The provisions of Articles 24 and 26 CMR can therefore not be regarded as a forfeiture payment. The claimant has to prove that the damage actually suffered is in fact equivalent to the declared value or the special interest in the delivery of the goods.¹⁹¹ An important difference with the insurance contract and which will be clearly felt in practice is that the insured under an insurance contract is in the normal course of events certain of reimbursement whereas Articles 24 and 26 CMR offer this certainty only if the carrier is not able to relieve himself of liability on the ground of Articles 17 and 18 CMR.

2. In contrast to the position under other transport regulations¹⁹² the CMR offers in two separate provisions the possibility to deviate from the system of damages which is in principle a matter of mandatory law. The effect of Article 24 CMR is exclusively to raise the limit specified in Article 23(3) CMR. The other paragraphs of Articles 23 and 25 CMR remain untouched by this. It involves, therefore, not a change in the value of the goods but an increase in the limit as a result of which, having regard to the value of the goods, a more realistic reimbursement can be obtained.¹⁹³ A proposal on the part of the IRU and ICC to add a second paragraph to Article 24 CMR whereby this restricted meaning would be stated *expressis verbis* was correctly dismissed as superfluous.¹⁹⁴

Article 24 CMR refers therefore exclusively to a modification in Article 23(3) CMR. If one wishes to deviate from the remaining paragraphs of Articles

190. J. W. Wurfain, *Some Insurance Aspects of Carriage of Goods by Road*, Hague-Zagreb Essays 2, p.137. On the parallels with the institute of insurance, cf. also Heuer, pp.127, 128.

191. Nickel-Lanz, no.172; Heuer, p.125; Putzeys, nos.908, 914. Here the CMR differs significantly from the Warsaw Convention in which Art.22 proceeds from the declared value as the basis for compensation for damage.

192. Cf. Art.36 CIM; Art.22 Warsaw Convention; Art.4.5.a Hague-Visby Rules. Besides these possibilities which offer a broadening of the compensation for damage the CIM also contains in Art.35 a restriction thereon, cf. Boudewijnse, p.263. Under the CMR such is not possible, cf. Nickel-Lanz, no.174.

193. Loewe, no.197; Putzeys, no.908.

194. W/TRANS/SCI/301/Add 1, 14 November 1967, p.10. This proposal was rejected at the revision conference of 14-16 February 1972 at Geneva; W/TRANS/SCI/438, .19 April 1972, nos.66, 67. The FIATA Report, p.22, raised the proposal again.

23 and 25 CMR then one is thrown back on Article 26 CMR. This provision is to the effect that, without prejudice to what would in the normal course of events be compensated according to Articles 23 and 25 CMR (Art.26(2) CMR), also damage other than purely commercial damage to the transported goods can be taken into consideration for compensation. Here one can think in particular of different types of consequential damage.¹⁹⁵ What is disputed is whether every possible type of consequential damage, such as moral damage, falls under the operation of Article 26 CMR.^{196,197} Loewe has correctly observed that the determination of the frontiers of such damage lies outside the reach of the CMR and should be left to the applicable law.¹⁹⁸ In the case of damage for delay Article 26 CMR offers only the possibility of raising the limit which according to Article 23(5) CMR is determined by the freight price. For damage for delay Article 26 CMR consequently has the same significance as Article 24 CMR for damage as a result of loss and damage. The question arises whether by establishing a special interest in delivery, within the meaning of that expression in Article 26 CMR, at the same time the limit stated in Article 23(3) CMR can be altered. On the ground of comparative law and grammatical-systematic interpretation this question has properly been answered in the negative.¹⁹⁹ As Articles 24 and 26 CMR do not overlap both provisions can be applied simultaneously.²⁰⁰

3. The far-reaching legal consequences of these special provisions for the carrier emerge clearly from the above considerations. Under what conditions are Articles 24 and 26 CMR applicable? There is insufficient clarity on this in the legal literature and caselaw. Both Articles provide that the value or the special interest in delivery should be specified in the consignment note. As to these constitutive conditions there is (virtually) complete agreement in the legal literature.²⁰¹ A large degree of unanimity exists likewise as to the answer

195. Nickel-Lanz, no.175; Heuer, p.125; Dorrestein, no.250; Putzeys, no.885 bis. Cf. OLG Düsseldorf 2.12.1982, VersR 1983, p.749; Hill/Messent, p.145.

196. Loewe, no.204 correctly observes that it was not the intention of the drafters of the Convention to compensate every conceivable damage. It is not part of the task of convention drafters, even if it were possible, to become involved in delimiting between all the various forms of different damage recognised in different countries. Contra, Nickel-Lanz, no.177, who does not exclude compensation for moral damage.

197. In 1967 the IRU and ICC proposed adding a clause to Art.26(2) CMR, as follows: 'à l'exclusion du préjudice moral' W/TRANS/SCI/301/Add 1, 14 November 1967, p.10. The proposal was rejected on the ground of Loewe's argument (see preceding note): W/TRANS/SCI/438, 19 April 1972, no.75. See also Putzeys, nos.912, 913.

198. W/TRANS/SCI/438, 19 April 1972, nos.71, 72.

199. Nickel-Lanz, no.177; Heuer, p.125. Contra, Loewe, no.204. Cf. also Hill/Messent, p.146.

200. Nickel-Lanz, no.178.

201. Löewe, nos.196, 203; Nickel-Lanz, nos.173, 176 (on the ground of information concerning the genesis of the Convention); Heuer, p.124; Helm, *Frachtrecht*, Art.24 CMR, Anm.2; Dorrestein, no.250; H. Bisschop, *VersR* 1981, pp.539-540; Putzeys, nos.904, 910; Donald, pp.227, 228; Clarke, no.106. Cf. CA Reims 13.7.1977, *BT* 1977, p.406; CA Paris 9.7.1980, *BT* 1980, p.449. Only Libouton, 1982, p.724, appears to regard the statement of the value respectively the sum as facultative.

to the question whether the statement of an agreed surcharge in the consignment note ought to operate as a constitutive condition. This question is answered in the negative.²⁰²

A difference of opinion nevertheless exists as to the interpretation of the phrase 'against payment of a surcharge to be agreed upon'. This passage is explained by a number of German writers in the sense that in the absence of such a surcharge the regulation cannot produce the desired effect.²⁰³ Other writers are of the opinion that such a requirement may not be demanded.²⁰⁴

In the opinion of the present writer the difference in insight presented above masks the only relevant question in this matter and insufficiently maintains the distinction between the constitutive and consensual elements. Above all else the preliminary question to the above controversy should be posed whether the declaration of value as also the determination of a special interest in delivery is a matter for the parties jointly or instead only for the sender. This question is answered in the legal literature in the former sense.²⁰⁵ The opening words of Articles 24 and 26 CMR ('The sender may ...') are suitable to support the opposite impression which must be dismissed entirely from consideration. That such a misunderstanding can lead easily to an error of judgment appears from a decision of the OLG Hamburg. That court held that Article 24 CMR was applicable given that the consignment note expressly made reference to the enclosed bills from which the value of the goods was clearly discernible. It did not detract therefrom, according to the court, that the surcharge for such reference was not agreed between the parties.²⁰⁶ From this it appears that the court misjudged an essential condition which is necessary for Article 24 CMR (respectively Art.26 CMR) to enter into effect. The view that the sender can apparently decide unilaterally for application of a special regulation with all the consequences thereof does not appear to be correct. The regulations under discussion here can in no way be applicable against the will of the carrier. The carrier need not allow these regulations to be imposed on him; there exists absolutely no obligation on his part to accept a declaration of value or a determination of special interest in delivery.²⁰⁷ An

202. Loewe, no.198; Heuer, p.125; Helm, *Frachtrecht*, Art.24 CMR, Anm.2. Dubious: Dorrestein, no.250. For a differentiated approach, cf. Clarke, no.106.

203. Heuer, pp.124-125; Precht/*Endrigkeit*, p.105. Not entirely clear is Helm, *Frachtrecht*, Art.24 CMR, Anm.2, who states that a duty to accept the increased value exists only against payment of the surcharge. See further the text.

204. Loewe, no.198; Nickel-Lanz, no.173; Putzeys, no.905; OLG Dusseldorf 28.10.1982, *VersR* 1983, p.749.

205. Heuer, pp.123, 125; Loewe, no.198; R. Züchner, *VersR* 1970, p.703; Putzeys, nos.905, 911; Clarke, no.106; Helm, *Frachtrecht*, Art.24 CMR, Anm.2 distinguishes thereby between the situation where a consignment note is issued before conclusion of the contract and that where it is issued afterwards.

206. OLG Hamburg 29.5.1980, *VersR* 1980, p.950.

207. Cf. H. Bisschof, *VersR* 1981, p.541, who severely criticises the decision and correctly remarks that the OLG wrongly based itself upon what is in any event an unclear passage from Helm, *Frachtrecht*, Art.24 CMR, Anm.2. Subsequently LG Darmstadt 23.9.1981, *VersR* 1982, p.1107 note D. Eltermann clearly distanced itself from the Hamburg case as did OLG Dusseldorf, cited

entirely different matter is that the carrier will in all probability, given his agreement to a declaration of value or a determination of a special interest in delivery, demand an appropriately higher freight price, although, in the opinion of the present writer, this would not appear to be absolutely necessary.²⁰⁸ Should such a surcharge be agreed then self-evidently, with a view to possible evidentiary aspects, the same should be entered in the consignment note (cf. Art.6(1)(d) CMR).²⁰⁹

The view defended here that the operation of both regulations is a matter for the parties jointly was also raised at the conference already mentioned several times at Geneva in the course of the discussions on proposals put forward by the IRU and ICC partially to amend the Convention.²¹⁰ A contrary view would bring with it that the coping-stone of the system of damages would be dependent on the will of only one of the parties to the contract. The exclusive character of the regulations dealt with here is in itself sufficient to make every permitted deviation, however limited, a matter for mutual negotiation. This, therefore, is the underlying reason why entering the value (Art.24 CMR) respectively the amount (Art.26 CMR) in the consignment note, which given the informal character of the international contract (Art.4 CMR) is a somewhat exceptional condition, can be justified. This requirement emphasises the exclusiveness of the regulations and serves to warn the parties (in particular the carrier) of the possible legal consequences attaching thereto. This was not appreciated by the Cour d'appel Paris which held that the carrier of goods the value of which, as appeared from the inventories delivered to him, substantially exceeded the limit of Article 23(3) CMR, had failed in his duty to inform the sender as to the existence of the possibility to increase the limit.²¹¹

This error was corrected on appeal in cassation.²¹² There is in the

above at n.204. Cf. equally Nickel-Lanz, no.173. In this respect the decision of Hof van Beroep Brussels 16.11.1977, ETL 1980, p.319 is unclear.

208. Cf. OLG Dusseldorf, cited above at n.204: 'Für die Wirksamkeit der Eintragung des besonderen Interesses kommt auch nicht darauf an, ob ein Frachtzuschlag vereinbart worden ist. Die diesbezügliche Regelung in Art. 26 Abs. 1 CMR stellt lediglich klar, dass der Frachtführer den erhöhten Wert nur dann zu akzeptieren braucht wenn ein entsprechender Frachtzuschlag vereinbart wird; mit anderen Worten er kann sich auch ohne Vereinbarung eines Zuschlags auf die Festlegung eines besonderen Interesses einlassen.'

Contra, Heuer, pp.124-125. Cf. also in this respect the clearer Art.22 Warsaw Convention: '... and had paid a supplementary sum if the case so requires.'

209. Cf. Heuer, p.125.

210. The proposal was to add to the opening words after 'The sender may' the phrase 'in agreement with the carrier'; W/TRANS/SCI/301, Add.1, 14 November 1967, p.10. The meeting dismissed the proposal as superfluous: W/TRANS/SCI/438, 19 April 1972, nos.65, 69. The FIATA Report, p.22 also lay more emphasis on the consensual than on the constitutive aspect.

211. CA Paris 19.9.1979, BT 1979, p.481. The court judged that the statutory limit was laughably low when compared with the value of the goods concerned. This provoked a reprimand from Rodière, BT 1979, p.475: 'J'aurais l'impression que les spécialistes qui ont rédigé cette convention sont plus compétents dans l'appréciation des chiffres convenables que MM les conseillers de la chambre ayant rendu cette décision d'appel.' The decision appears to be in conflict with an earlier decision on this matter, in which it was expressly stated that a unilateral declaration did not bind the carrier: CA Paris 15.12.1977, BT 1978, p.53.

212. Cass. 12.10.1981, BT 1981, p.576; ETL 1982, p.294. The same CA Paris 9.7.1980, BT 1980,

meantime no imaginable reason why the sender himself or his freight forwarder²¹³ instead of the carrier should not take the initiative of using Article 24 CMR and/or Article 26 CMR. The simple statement in the consignment note of the information specified in Article 6(2)(d) CMR is entirely insufficient for this.

The above elaboration is intended to demonstrate that as far as the application of the special regulations of Articles 24 and 26 CMR is concerned this is above all a matter for joint negotiation. The exclusive character of these regulations is underlined by the expression in the consignment note of the declaration of value and the determination of the amount of the special interest in delivery. Agreeing a higher freight price is a matter for the parties. The expression thereof in the consignment note is an issue of an evidentiary nature.

§ 7. Interest and conversion (Art.27 CMR)

As a provisional coping-stone to the calculation of damages Article 27 CMR regulates two different matters to each of which a word may here be addressed. While the first paragraph concerns itself with the claim of the so-called moratorium interest at the request of the claimant for delay in payment of a sum of money, namely, the amount of damages, the second paragraph provides the yardstick against which the conversion of a sum not expressed in the currency of the country in which payment is claimed and on which the claim regarding the damages is based shall take place. From a practical point of view it would perhaps have been more logical if the order of the paragraphs had been inverted.

In contrast to Article 1286 Netherlands BW concerning legal interest, Article 27 CMR is mandatory law.²¹⁴ The low percentage is perhaps the result of attempting to obtain a higher percentage via Article 1286 BW.²¹⁵ The regulation concerns exclusively those sums awarded in regard to loss, damage or delay and not, in particular, the (counter-)claim in regard to the freight price to which in consequence the legal percentage is applicable.²¹⁶

p.449, refused to apply Art.24 CMR in the absence of a statement of the special value in the consignment note. This association would not appear to be definitive (see following note).

213. See CA Paris 6.1.1982, BT 1982, p.84. This case is certainly not a 'hommage à Rodière' being based on the same idea and using the same formulation against which Rodière had fulminated (see n.211 supra), the court holding that in casu the commissionnaire de transport was under a duty as against the sender to induce the latter to increase the limit having regard to the value of the goods in comparison with the limit under Art.23(3) CMR.

214. Rb Breda 11.1.1977, S&S 1978, 89; Hof Leeuwarden 26.10.1977, S&S 1978, 83.

215. Rb Amsterdam 12.4.1972, S&S 1972, 102; Rb Amsterdam 4.2.1976, S&S 1976, 71; Rb Rotterdam 3.9.1976, S&S 1977, 56; Rb Rotterdam 12.5.1978, S&S 1979, 11 and 59; Rb Roermond 18.1.1979, S&S 1979, 45; Rb Amsterdam 18.3.1981, S&S 1981, 83; Rb Amsterdam 18.3.1981, S&S 1981, 84. This percentage is certainly offended against, cf. Libouton, 1982, p.723. The CMR percentage applied in The Netherlands until 1971 and has subsequently been regulated by Royal Decree: KB 18.1.1971, Stb. 1971, no.27 (5%); KB 27.2.1980, Stb. 1980, no.54 (12%); KB 20.12.1982, Stb. 1982, no.695 (9%).

216. Rb Kh Tongeren 22.4.1976, BRH 1976, 1, 365; Rb Rotterdam, cited in Hof The Hague 13.6.1981, S&S 1980, 126 (counter-claim).

As a condition for the claim being received the first paragraph provides that it must be submitted in writing. Should one neglect this the claim can still be made if legal proceedings are instituted.²¹⁷ The claim should concern a clearly described damage causing event as to which the exact damage naturally need not be known.²¹⁸ Capitalisation of the interest claimed (and awarded) does not take place.

The second paragraph of Article 27 CMR lays down which yardstick should be taken into consideration in the event of conversion of the currency that underlies the amount claimed and possibly limited according to Article 23(5) CMR, into that of the country in which the claim was instituted.²¹⁹ This conversion rate of exchange can in principle be chosen as of different moments: the moment of the due date, the default, the writ, the judgment and the payment. The CMR chooses for the latter.²²⁰

The conversion yardstick operates not only for the direct relationship between the claimant and the carrier,²²¹ but also to the insurer who, subrogated to the rights of his client, seeks recourse against the carrier.²²² If a devaluation of the currency in which payment should be effected occurs between the moment of the judgment and that of payment, the claimant has the right to have made up the exchange rate loss thereby suffered.²²³ Application of this notion leads to following the same line of reasoning on behalf of the creditor-claimant if in the course of proceedings in which the claimant converts the amount of his claim into the currency of the country in which he has instituted proceedings a diminution occurs in the value of the foreign currency.²²⁴

It cannot be deduced from the rule provided by Article 27(2) CMR in

217. Cf. for the remaining written requirements: Art.30(3) CMR and Art.32(2) CMR. Cf. Loewe, nos.206, 207.

218. Differing evaluation of the concrete circumstances can easily lead to differences of insight: cf. Hof Amsterdam 13.3.1974, S&S 1974, 77, contra, Dorrestein, no.251. As the Hof so also QB 20.11.1973 [1974] 1 Lloyd's Rep 203 (Tatton v. Ferrymasters).

219. On this see Loewe, no.209.

220. See also Rb Amsterdam 9.1.1977, 7.6.1978, S&S 1979, 69 in which the moment of loss was dismissed as being in conflict with Art.27(2) CMR. Thus was the exchange rate for the day of departure of the transportation rejected by Rb Breda 11.1.1977, S&S 1978, 89 and the day of the issue of the writ by Rb Den Bosch 26.2.1982, NJ 1982, 502. In contrast it was held to be in conflict with Art.27(3) CMR by CA Venice 31.10.1974, ETL 1975, p.242 as also by Tr Comm Lyon 10.11.1975, BT 1976, p.175 to convert by reference to the exchange rate for the day of the judgment.

221. See, e.g., Rb Kh Antwerp 17.2.1974, ETL 1974, p.504; 9.12.1977, ETL 1978, p.110; Rb Roermond 18.1.1979, S&S 1979, 45; Rb Breda 11.1.1977, S&S 1978, 89; Rb Amsterdam 18.3.1981, S&S 1981, 83; 18.3.1981, S&S 1981, 84; Rb Den Bosch 26.2.1982, NJ 1982, 502.

222. Rb Den Bosch 3.6.1977, S&S 1978, 29.

223. Loewe, no.210 who correctly remarks that in the contrary situation (namely, rising rate) the debtor cannot discount against the judgment.

224. Rb Kh Antwerp 29.3.1977, ETL 1977, p.293.

which currency the amount claimed must be expressed. There is insufficient clarity on this point. If, on the one hand, the standpoint is supported that for this purpose the currency in which the transaction underlying the carriage is expressed should be taken into consideration,²²⁵ on the other hand it has been held that for the basis of his claim the claimant is not bound to the currency expressed in the sales invoice but rather by the value as specified in Article 23(1) and (2) CMR.²²⁶ It follows that these different starting points need not necessarily be irreconcilable.²²⁷

The condition specified in Article 27(2) CMR for application of the moment of conversion brings with it that the specified moment of payment need not operate if the amount of damage claimed is expressed in the currency of the country where payment is claimed. In this case there is nothing to convert.²²⁸ It may be recalled that conversion of the gold franc takes place at the moment of the judicial decision.²²⁹ Because the parties can choose another moment for this purpose, according to Article 23(7) CMR (new), it is possible to bring that moment into harmony with Article 27(2) CMR so that a single conversion will suffice.

§ 8. Preserving the regulation (Art.28 CMR)

In this section attention will be paid to 1. the purport, 2. the substance and 3. the scope of Article 28 CMR.

1. This Article is designed to safeguard the liability model described in the previous Chapter as well as the regulation concerning the determination and calculation of the damages described in the preceding sections of this present Chapter. The absence of a protective construction such as that offered by Article 28 CMR against an eventual reduction of the system would have constituted a permanent threat to legal certainty in this field.²³⁰ The regulation laid down in Article 28 CMR consequently results from the aims of the Convention as they are expressed in the Preamble. Various ways are open to achieve the desired effect.²³¹ The drafters of the Convention could have

225. Dorrestein, no.252; Rb Breda 11.1.1977, S&S 1978, 89. In this case the claimant (an insurer subrogated in the rights of the person entitled to the goods) vainly referred to the fact that the seller had expressed the sale price in Italian lire solely for the benefit of the Italian buyer.

226. Rb Kh Antwerp 17.5.1978, confirmed by the Hof van Beroep Antwerp 30.1.1980, cited by Libouton, 1982, p.725. See also Rb Kh Antwerp 17.3.1978, cited by Ponet, p.208.

227. Cf. Rb Amsterdam 7.6.1978, S&S 1979, 69 for a case in which the invoice value was equated with the market value.

228. Cf. the case cited by Ponet, above in n.226.

229. Cf. BGH 5.6.1981, VersR 1981, p.1030, as also Art.23(7) (new) CMR, on which see § 3.2.2.

230. O. J. Tuma, ETL 1983, p.11, correctly commented: 'Würde nunmehr dem Frachtvertragspartner des Frachtführers (...) der Zugang zur parallelen Deliktshaftung unbeschränkt möglich sein, so würde, (...), der einzelne Transport für den Frachtführer zu einem unkalkulierbaren Risiko werden.'

231. Cf. Art.24 Warsaw Convention; Art.40 CIM; Art.4 bis Hague-Visby Rules; the FIATA Report, p.23 proposed replacing Art.28 CMR with the text of Art.7 Hamburg Rules.

declared that extra-contractual claims were to be excluded. The reason why this far-reaching and effective solution was not chosen but instead a less far-reaching albeit perhaps just as conclusive method is without doubt that it was realised that such a standpoint conflicts with a number of legal systems in which joinder of claims is in principle regarded as permissible. The drafters of the Convention consequently did not risk entering upon the terrain of the issue of joinder or concurrence of legal claims ('cumul'). Proceeding from the controversy in the different national legal systems as to the principles of this matter the attempt was made to raise a dam against the eventual damaging consequences of the recognition of joinder. (The issue of joinder revolves broadly speaking between two poles which are formed, on the one hand, by views in France²³² and Belgium,²³³ where no room has been created for joinder, and, on the other, by those in Germany²³⁴ and The Netherlands,²³⁵ in which joinder is in principle accepted.)

2. In the light of the uncertain results to which the problem of joinder can lead in the various countries Article 28 CMR provides that where a claim is instituted on the basis of a national law against the carrier in regard to damage and/or loss as well as for delay, for which the Convention has provided rules, such claim must yield to the extent that the granting thereof would initiate legal consequences inconsistent with the rules provided by the Convention itself. As far as clarity is concerned the provision leaves something to be desired.²³⁶

In the first place it can be inferred from the formulation of Article 28(1) CMR that it concerns exclusively damage to and/or loss of the goods as well as delay. Liability by virtue of other Articles would appear not to be covered by Article 28(1) CMR.²³⁷ A change of formulation should be effected to the extent that broad protection for the carrier is desired.²³⁸ Nor does Article 28(1) CMR offer any protection against claims not covered by the Convention (positive *Vertragverletzung*).²³⁹

232. Rodière, p.316.

233. Putzeys, no.985. In Belgium the issue is in rapid development both in the legal literature and caselaw, cf. Putzeys, nos.987 et seq.

234. In Germany there is a body of settled caselaw that accepts *Anspruchskonkurrenz*, cf. Helm, *Frachtrecht*, § 429 HGB, Anm.89. This caselaw is criticised in particular by Helm, *Frachtrecht*, § 429 HGB, Anm.90-92a and previously even more extensively in Helm, *Haftung*, pp.301 et seq. (The second part of the latter book is entirely devoted to the concurrence problematic between delictual and contractual 'Haftung' in the field of transport law.) Cf. also M. G. Bullinger, *VersR* 1981, pp.1098 et seq.

235. In The Netherlands the leading case is HR 9.12.1955, NJ 1955, 157. For England: Hill/Messent, p.150.

236. Helm, *Haftung*, p.233; Helm, *Frachtrecht*, § 429 HGB, Anm.84.

237. One may think of the liability deriving from Artt.7(3), 11(3), 12(7), 21 CMR.

238. At the revision conference at Geneva in 1972 it was proposed from the rail side (OCTI) to broaden Art.28 CMR in an Art.40 CIM manner; W/TRANS/SCI/438, 19 April 1972, p.13, no.78. This proposal has been supported in the legal literature by Nickel-Lanz, no.182.

239. Cf. on this § 1; Helm, *Frachtrecht*, Art.28 CMR, Anm.5.

The protection offered to the carrier for the purpose of warding off an extra-contractual threat exists in the erection of those provisions that exclude his liability or establish or restrict the damages claimed. One may ask oneself which concrete Convention Articles are here intended. Clearly in any event those Articles that relieve him of liability (Art.17(2),(4) and (5) CMR in conjunction with Art.18 CMR; Art.22 CMR),²⁴⁰ and further, Articles 23-27 CMR which concern the establishment and the amount of the damages (Arts.23(2) and (5) CMR, 24 and 26 CMR). In addition, one presumes that also Article 30 CMR can be raised against an extra-contractual claim instituted against the carrier.²⁴¹ Similarly the regulation of the period of limitation under Article 32 CMR? This question is now answered positively everywhere in the legal literature.²⁴² This standpoint is also adopted in the caselaw.²⁴³

3. A third aspect inherent in this protective structure concerns the issue of the third party effect of exemption clauses, which occurs in the private law of virtually every legal system. A statutorily regulated example of this matter is to be found across the entire front of transport law. In concrete terms the question asks, against whom can the carrier invoke the Convention regulation?

The question arises whether the protection of Article 28 CMR can be invoked against anyone or only against the other party. Loewe has taken the former standpoint, that is to say, that the carrier met with an extra-contractual claim can invoke the Convention regulation also against a person who according to the applicable law has no contractual claim against him (whether or not assigned), as, for example, the non-sending load owner.²⁴⁴ The second answer is given by Nickel-Lanz who thereby restricts the rule to one on joinder.²⁴⁵ This latter standpoint brings with it that the structure offers little or no protection in the case where the transport contract arises as

240. Helm, Frachtrecht, Art.28 CMR, Anm.7 is correctly of the opinion that the evidentiary rule (Art.18 CMR) is inseparably bound up with Art.17 CMR and consequently falls within the scope of Art.28 CMR, notwithstanding that the evidentiary rule, in contrast to Art.29 CMR, is not mentioned *expressis verbis*. Contra, Nickel-Lanz, no.181.

241. Helm, Haftung, p.234; Helm, Frachtrecht, § 429 HGB, Anm.84; Helm, Frachtrecht, Art.28 CMR, Anm.7; Nickel-Lanz, no.181.

242. Originally Helm, Haftung, p.234 stated that, as Art.32 CMR could not be regarded as a liability excluding provision (in this sense also Nickel-Lanz, no.181) and as the formulation of Art.32 opening words CMR did not encompass a delictual claim, the limitation of actions regulation was not covered by Art.28 CMR. Subsequently he abandoned this standpoint, Helm, Frachtrecht, § 429 HGB, Anm.84. Following Loewe, no.213 and the revision conference at Geneva (W/TRANS/SCI/438, 19 April 1972, p.14, no.79), Nickel-Lanz, no.181, n.34, leans to the view that the formulation of Art.32 CMR leads to the same results as when that article falls under the reach of Art.28 CMR. Cf. also O. J. Tuma, ETL 1983, pp.11-12.

243. OGH 27.9.1983, VersR 1984, p.548.

244. Loewe, no.212. As regards the CIM Boudewijnse, p.273, comes to the same conclusion on the ground of the formulation of Art.40 CIM. Third parties who have no juridical or economic connection with the contract concerned should allow the transport regulation to operate against them.

245. Nickel-Lanz, no.183.

a result of indirect representation.²⁴⁶ In the opinion of the present writer the truth of the matter lies somewhere in between. On the one hand it can be stated that as against true outsiders, that is to say, against those who in no way have agreed in the carriage of the lost or damaged goods with which in juridical or economic terms they are connected, to allow the transport regulation to prevail over their legitimate rights of claim does require an exceptional ground of justification. On the other hand, a person whose interests are consensually involved with the agreed carriage ought not to be designated as an outsider.²⁴⁷ From this it follows that by using representatives, whether or not they act in their own name, truly interested parties ought not to be regarded as outsiders.²⁴⁸

For further explanation and justification of this proposition one may refer to the following. In the first place the issue of third party effect may not be separated from the question who is entitled under the CMR to institute a claim.²⁴⁹ As will be elaborated further in the following chapter this right is in no way reserved to those who have contracted with the carrier. Attaching the issue of third party effect to that of actual identification (who is entitled to claim damages?) produces results that are beneficial to legal certainty in international relationships. In the second place reference may be made to the view everywhere accepted that meeting extra-contractual claims cannot be accepted in transport law. This brings with it that Article 28 CMR will have to be interpreted extensively. The legal basis of this provision in fact collapses when the carrier is threatened by an outsider who is in no way consensually involved with the relevant carriage. Comparison of conventions shows that, despite differences in formulation, the third party effect of this rule is not absolute.²⁵⁰

246. Cf. CA Paris 11.6.1974, BT 1974, p.319: '... que, cependant, cette clause, applicable lorsque la législation interne d'un pays autorise les parties à un contrat à se prévaloir des règles de la responsabilité délictuelle, n'a pas pour effet d'étendre aux tiers étrangers au contrat de transport des règles édictées par la CMR.'

In regard to the fact that here the sender, who had used the services of a commissionnaire de transport, was understood in the category of 'tiers étrangers au contrat de transport' the carrier could make no claim in casu against him to Art.23(5) CMR; the sender consequently was 'laughing'! Here again can be seen that the legal figure of the commissionnaire de transport disturbs the actual relationships. The result to which this remarkable decision leads is that, although in France the theory of cumulation of actions is rejected, the carrier receives little protection, or even none, from a regulation such as Art.28 CMR while in countries in which cumulation is in principle regarded as applicable such a sender, being a person involved in the injured interest, must certainly allow the rule to operate against him.

247. The broadly stated view of Helm, Haftung, p.325 (likewise repeated by O. J. Tuma, loc. cit., pp.6-7) that the delictual right of claim of the recipient should not be restricted by the transport contract would not seem to be supportive of the CMR. For three other cases where the extra-contractual claimant was thrown back on a delictual claim, cf. O. J. Tuma, loc. cit., pp.4 et seq.

248. Cf. Helm, Frachtrecht, Art.28 CMR, Anm.6; Helm, Frachtrecht, § 429 HGB, Anm.93; Heuer, p.188. Cf. also OGH, cited above at n.243; Hill/Messent, p.150.

249. Cf. Loewe, no.212.

250. Some involvement with the contract should exist in some manner: R. H. Mankiewicz, The Liability Regime of the International Air Carrier, Deventer 1981, pp.92 et seq.; Miller, pp.233 et seq. Contra in the case of rail transport, Boudewijnse, p.273. The standpoint presented by

For the CMR the above means that only in exceptional circumstances can an appeal to Article 28 CMR by the carrier not be made, namely, when the claim is instituted by someone who is not consensually involved, with whom there is no privity of contract. This conclusion is in harmony with the purport of the regulation as that was indicated above.

Article 28(2) CMR, which provides that also the carrier's agents and servants may benefit by the above-mentioned protection against extra-contractual claims, is a supplement, which is as logical as it is necessary, to the rule laid down in Article 3 CMR (the so-called Himalaya clause):²⁵¹ agents and servants in any event cannot be proceeded against on the basis of the Convention.²⁵² The fact that Article 28 CMR nevertheless affords such persons protection is not primarily in the interest of those persons themselves but rather because it is thereby precluded that the carrier is indirectly confronted with a claim. The agent or servant concerned will usually be able in the context of his relationship with the carrier to bring recourse proceedings against him. Further, it has correctly been pointed out that the claimant is in this way prevented from claiming the balance of the damage following application of the limits (Art.23(3) and (5) CMR) from the agent or servant.²⁵³ In the event that a claimant institutes proceedings for liability against both the carrier and an agent or servant (possibly before different courts) that situation is governed by Article 31(2) CMR.

In conclusion reference may be made to the fact that where an agent or servant acquires the capacity of successive carrier²⁵⁴ he can be proceeded against directly in that capacity by the claimant. In such a case Articles 36 CMR et seq. are applicable. If there is cause to do so the agent or servant who is at the same time successive carrier has the choice of invoking the first or second paragraph of Article 28 CMR.

§ 9. Penetrating the regulation (Art.29 CMR)

Whereas the purport of Article 28 CMR is as it were to afford extra protection to the carrier, Article 29 CMR determines the extent to which that protection

Boudewijnse does not appear to be supportable when one considers that Art.40 CIM was inspired by Art.24 Warsaw Convention.

251. Cf. Art.25A Warsaw Convention. At the final session of the CMR it was proposed to adopt the new Art.25A Warsaw Convention which contained the substance of both Art.28(2) and Art.29(2) CMR. Following the rejection of the proposal the drafting of Art.28(2) CMR was undertaken: TRANS/168, TRANS/WP9/35, 6 June 1956, p.19, no.72. See further Art.40 CIM; Art.4 bis Hague-Visby Rules; Art.7 Hamburg Rules; Art.20 Convention on International Intermodal Transport. For a successful appeal to Art.28(2) CMR, cf. OLG Frankfurt am Main 8.6.1982, VersR 1983, p.141.

252. Cf. Helm, *Frachtrecht*, Art.28 CMR, Anm.8; OGH 25.9.1968, ETL 1973, p.309. See Chapter 3, § 3.

253. Nickel-Lanz, no.180.

254. Cf. Chapter 3, § 3 and § 4.

so conferred can be invoked. When the conditions prescribed by Article 29 CMR are fulfilled the carrier is deprived of the protection of those provisions excluding or restricting his liability. It is evident that this can produce disastrous consequences for the carrier. The justification for this penetration originates in the rule: *fraus omnia corrumpit*. In this section will be investigated how elaboration of this principle in Article 29 CMR has taken place. To this end the following will be dealt with: 1. origin, 2. legal consequences and 3. substance of the regulation.

1. The formulation employed in Article 29(1) CMR is virtually identical with Article 25 (former) Warsaw Convention.²⁵⁵ Although at the time of setting up the CMR that severely disputed formulation was replaced in 1955 for air transport by a provision in which reference to the *lex fori* was deleted,²⁵⁶ a majority of the drafters of the CMR finally favoured adoption of the old formulation. It is not clear why the special working group charged with drafting the final version dismissed the proposal of the English delegate to adopt the revised Warsaw Convention version.²⁵⁷ Just previously the working group had proposed Article 25A Warsaw Convention, which, however, was rejected by a majority of the delegates.²⁵⁸ The explanation of the English delegate that English law did not know the concept of 'faute equivalente au dol' ('such default equivalent to wilful misconduct'), in which much play was made of 'faute lourde', was found to be insufficient reason to relinquish the old Warsaw Convention formulation, whatever was thereunder to be understood. The suggestion of the Austrian delegate to include in the Protocol of Signature a description of both 'dol' and 'faute equivalente au dol' fell on deaf ears, as did the suggestion of the working group to adopt instead the concepts employed in the CIM.^{259,260} A Babylonian confusion of

255. Art.25 (former) Warsaw Convention read as follows:

1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.
2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

256. Art. XIII of the Hague Protocol of 1955 read as follows:

In Article 25 of the Convention paragraphs 1 and 2 shall be deleted and replaced by the following: The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

257. TRANS/168, TRANS/WP9/35, 6 June 1956, p.19, no.73.

258. *Ibid.*, no.72. Art.25A Warsaw Convention contains the substance of both Art.28(2) and Art.29(2) CMR.

259. *Ibid.*, no.73; cf. also Nickel-Lanz, no.187.

260. Art.37 CIM employs the concepts 'dol' and 'faute lourde.' On this, see Becker, pp.145 et seq. Constant attempts have been made, also in regard to rail transport law, to adopt the formula of the Hague Protocol but likewise without success; cf. Boudewijnse, p.25 who states that The Netherlands has constantly supported those attempts. That cannot be said of the CMR in the light of the fact that The Netherlands joined in rejecting the English proposal.

concept and terminology was manifested by what was put forward by various delegates during the final session.²⁶¹

If historical research makes one thing clear it is that the old Warsaw Convention formula was clung to out of pure impotence. What had been achieved in regard to the new CIM formulation of force majeure appeared to be unobtainable with the new formulation of Article 25 Warsaw Convention. The question appeared in the final analysis to be too thorny to be regulated conclusively at the final meeting. The extent to which these historical facts provide indications as to the interpretation of the concepts employed in Article 29 CMR will be dealt with below. From the point of view of uniform law this historical development is to be regretted.²⁶² Even though it should be appreciated that no miracles were to be expected of the new Warsaw Convention formulation, as subsequently emerged in air law,²⁶³ that does not take away the fact that it is from the national legal systems least of all that the philosopher's stone can be expected to be found.²⁶⁴ The setting aside or not of the Convention regime is too serious a matter to be left to national law, in casu the *lex fori*. The version adopted in Article 29 CMR raises the spectre of forum shopping.²⁶⁵

Finally, reference may be made to the fact, naturally after the event, that

261. The French delegate maintained that the concept 'equivalente au dol' as also 'dol' must include the intention to cause damage. The German delegate maintained that by wilful misconduct must be understood conditional wilful misconduct, which the French delegate denied. Thereupon the Belgian delegate declared that according to Belgian law the employed term 'equivalente au dol' did not require the intention to cause damage but could be equated with gross default; cf. TRANS/168, TRANS/WP9/35, 6 June 1956, p.19, no.73.

Previously the Austrian delegate had urged replacement of the clause by 'faute lourde'; TRANS/152, TRANS/WP9/32, 10 May 1955, p.12, no.55. What is remarkable is to compare the standpoints adopted during the conference with those advanced in the respective countries. The result of such comparison is that sometimes they reach diametrically opposed positions!

262. Cf. Kropholler, p.318.

263. The question that was disputed with the interpretation of the new Art.25A Warsaw Convention was whether the awareness required in the new version must be abstract or concrete (the objective as opposed to the subjective doctrine). One presumes that the subjective doctrine governs. Cf. on this the present writer, NJB 1979, pp.25 et seq. and the legal literature and caselaw there cited to which add, R. H. Mankiewicz, *The Liability Regime of the International Air Carrier*, Deventer 1981, nos.158 et seq.; I. H. Ph. Diederiks-Verschuur, *An Introduction to Air Law*, Deventer 1983, pp.71-72; as also – for a review in a nutshell of this detailed question – BGH 12.1.1981, VersR 1982, p.369: ('Art.25 WA n. F. verlange (objektiv) ein grob fahrlässiges Verhalten, das eine auf den Hand liegende Sorgfaltpflicht ausser Betracht lasse; ferner (subjektiv) eine sich dem Handelnden aus seinem leichtfertigen Verhalten aufdrängende Erkenntnis, es werde mit Wahrscheinlichkeit ein Schaden entstehen') and the legal literature and caselaw cited in that judgment. On this case see G. Häbel, VersR 1982, p.468. Cf. also Cass. 15.12.1980, RFDA 1981, p.363; also Federal Court of Canada 22.10.1981, ETL 1983, p.826. See on the concept 'recklessly' (Art.25 Warsaw Convention) also N. R. McGilchrist (1983) 4 LMCLQ p.488.

264. Kropholler, pp.316 et seq. is of the opinion that this matter can only be clarified by cooperation between legislator, court and the literature. A first step in that direction is to describe the concept in words that are not derived from a particular legal system in the hope that the court in interpreting it will be able to distance itself from its own legal system. Cf. also for criticism of the former Warsaw Convention formula, Aisslinger, p.107 as well as Rodière, p.316.

265. Cf. Groth, p.79; Clarke, no.108: 'Although it seeks to achieve uniformity among the nations, the CMR makes, in these words, an open invitation to the courts to apply national and hence divergent rules of law.'

the Hague Protocol version has subsequently been adopted in various sectors of transport.²⁶⁶

2. To which legal consequences does the application of Article 29 CMR lead? The sanction for the wilful misconduct or default equivalent to wilful misconduct of the carrier or his agent or servant consists in the loss of the right to invoke those provisions which exclude or restrict his liability or which reverse the burden of proof.

If the claimant succeeds in demonstrating wilful misconduct on the part of the carrier as well as the causal relationship between the wilful misconduct and the damage suffered (which is in principle a heavy burden of proof) then the carrier finds himself in a difficult position. In such a case the presumption of Article 18(1) CMR in his favour is lost and as a result also the exonerating circumstances specified in Article 17(4) CMR as well as Article 17(2) CMR. Does the formulation of Article 29(1) CMR ('if the damage was caused by his wilful misconduct') bring with it that also Article 17(5) CMR ceases to function? This question is answered affirmatively in the legal literature.²⁶⁷ Wilful misconduct and default equivalent thereto thus appear, in contrast to the normal culpable facts, to act as absorbing *causae*.

The most extensive legal consequence of the application of Article 29 CMR is that the limits specified in Article 23(3) and (5) CMR (whether or not extended as a result of Artt.24 and 26 CMR) cease to have effect. The liability of the carrier becomes unrestricted and extends therefore to all possible damage with all the consequences thereof. In this respect the CMR goes further than the CIM which in the case of gross default leads to a doubling of the limit (Art.137 CIM).²⁶⁸

The question whether also Article 32 CMR falls within the scope of Article 29 CMR (see on this what was remarked in the treatment of Article 28 CMR) is of no interest because Article 32 CMR itself regulates this matter. The period of limitation is extended to three years (Art.32(1) CMR).

Article 29(2) CMR provides in connection with Articles 3 and 28 CMR that the above regulation is likewise of application when the damage is caused by the wilful misconduct, etc., of the persons specified in Article 3 CMR. An attempt by the Netherlands delegate, by means of a memorandum specially devoted thereto, to have this second paragraph deleted received absolutely no support at the final meeting.²⁶⁹ Acceptance of the Dutch view would have seriously depleted the self-identification notion of Article 3 CMR of any substance.²⁷⁰

266. Art.4 bis Hague-Visby Rules; Art.8 Hamburg Rules; Art.21 Convention on International Multimodal Transport.

267. Loewe, no.216; Groth, p.79; Nickel-Lanz, no.191; Helm, *Frachtrecht*, Art.29 CMR, Anm.3.

268. Nickel-Lanz, no.191; Putzeys, nos.938 et seq.

269. TRANS/168; TRANS/WP9/35, 6 June 1956, p.20, no.74.

270. On the question whether Art.32(1) CMR leaves Art.29(2) CMR intact see below Chapter 8. The FIATA Report, p.29 proposed, in harmony with the trend to penetrate as much as possible the limits in transport law, to enter upon the legal consequences of Art.29 CMR merely when wilful misconduct, etc., is committed by the carrier personally.

3. The so carefully constructed system of liability stands or falls with the application or not of Article 29 CMR, a system in which the economic and juridical interests of the parties involved with the carriage are brought into balance with each other. Under which conditions is Article 29 CMR applicable? To this end it is necessary to enquire what is understood by the concept of wilful misconduct and default equivalent thereto.

For the substance of the concepts of wilful misconduct and default equivalent thereto one is referred to the creation of the formula as that is employed in the Warsaw Convention prior to the Hague Protocol of 1955. From the historical information thereon one can deduce that the phrase 'default equivalent to wilful misconduct' was added to the concept of wilful misconduct and 'dol' in order thereby to equate substantively the French concept of dol with that of 'wilful misconduct'.²⁷¹ It is generally accepted that 'wilful misconduct' takes an intermediate position between intention ('dol') and gross default ('faute lourde').²⁷² Viewed thus the added formulation 'default equivalent to wilful misconduct' has merely supplementary significance. The caselaw regarding Article 25 Warsaw Convention has developed in a direction however in which these concepts have been interpreted broadly so that the limits were penetrated more often than the drafters of the Convention had foreseen.²⁷³ The replacement of these concepts in Article 25 Warsaw Convention by the Hague Protocol calls for a halt to this broad interpretation.²⁷⁴ The history of the Warsaw Convention demonstrates that the attempt to dovetail the national concepts of 'dol' and 'wilful misconduct' by means of the clause 'by default equivalent to wilful misconduct' has degenerated in practice into a fiasco.

Does it follow from the above that the drafters of the CMR sought a link with the Warsaw Convention prior to 1955 for the substance of the concepts employed in the CMR? In the light of the above-mentioned confusion of concepts manifested at the end of the negotiations, answering this question is a perilous business. The dilemma which one faces in practice is to ascertain the substance of the term 'default equivalent to wilful misconduct'. As to the reference by Article 29 CMR to the *lex fori* the following difference of meaning exists. Should the reference to the national law be so regarded that one can speak of default equivalent to wilful misconduct within the meaning of Article 29 CMR only where such default according to the *lex fori* can be substituted for wilful misconduct?²⁷⁵ That would mean that only conditional wilful misconduct would arise for consideration. Or is the purpose of the reference to the *lex fori* that it is left to the national law to determine what degree of default, not being wilful misconduct, can be placed on the same footing as

271. For an historical review, see R. H. Mankiewicz, *The Liability Regime of the International Air Carrier*, Deventer 1981, no.163.

272. Kropholler, p.317; Groth, p.80; cf. below under (g) England.

273. Mankiewicz, *op. cit.*, no.163.

274. Cf. the present writer, *NJB* 1979, p.27 and the legal literature and caselaw cited there.

275. In this case the word 'or' in the concept of 'wilful misconduct or default equivalent thereto according to national law' is to be interpreted conjunctively, cf. Putzeys, no.920.

wilful misconduct as far as the legal consequences are concerned?²⁷⁶ Normally it is decided in the latter sense which brings with it that cases of gross default (*faute lourde*, gross negligence, *grobe Fahrlässigkeit*) are brought under the operation of Article 29 CMR.²⁷⁷ With this the cause of the diversity is revealed. Although there exists a considerable degree of unanimity in the different legal systems in regard to the concept 'dol',²⁷⁸ one encounters in contrast a difference of insight regarding default equivalent thereto.²⁷⁹ How the present question is judged in the different Convention States appears from what follows below.

(a) France. In contrast to what was asserted by the French delegate during the final session on drafting the CMR,²⁸⁰ it is now generally maintained in France that '*faute lourde*' differs from 'dol' by virtue of the fact that the intention to cause the damage need not be manifested.²⁸¹ '*L'équipollence de la faute lourde au dol est classique en droit français*' otherwise obtains.²⁸² By '*faute lourde*' is understood '*négligence d'une extrême gravité, équivalente au dol, et dénotant l'inaptitude du transporteur à l'accomplissement de la mission qu'il a acceptée*'.²⁸³ If one proceeds to enquire which cases are brought within the operation of this criterion one finds oneself in a web of casuistry, as to which it may be remarked generally that the judges show a tendency rather quickly to designate a case as '*faute lourde*'.²⁸⁴ The cases in which '*faute lourde*' was established vary from rather innocent mistakes to actual enormities.²⁸⁵ Cases in which in other countries proceedings are still instituted

276. In this case the word 'or' is to be interpreted disjunctively, cf. Putzeys, no.920.

277. Cf. further for this the text.

278. Under 'dol' is understood the conscious infliction of damage. It was stated above that the equally authentic concept of 'wilful misconduct' had a broader content. For criticism of the Dutch translation cf. Dorrestein, no.267, as also Wachter in his note to HR 17.11.1978, NJ 1980, 484.

279. Mankiewicz, op. cit., no.163. Cf. the views in the various countries as to the CMR in the text below.

280. See n.261 above.

281. L. Brunat, BT 1979, p.130; Lamy, no.585.

282. Rodière, BT 1974, p.316; L. Brunat, BT 1979, p.130: '*Traditionnellement, la faute lourde est assimilée au dol quant à ses effets, bien qu'elle s'en distingue par l'absence de toute intention de nuire.*'

283. Cf. recently Cass. .14.12.1981, BT 1982, p.83.

284. L. Brunat, BT 1981, p.131.

285. A n impression. While the driver lay sleeping in the cabin of the vehicle thieves freed a part of the load. Tr Comm Paris 11.1.1980, BT 1980, p.94 stamped the conduct of the driver as '*faute lourde*' in the light of the fact that the vehicle was apparently unguarded ... CA Paris 26.6.1981, BT 1981, p.395, concluded that driving at excessive speed must likewise be regarded as '*faute lourde*'. Thus also Cass. 22.9.1983, BT 1983, p.566, cited above in § 2, at n.30. Tr Comm Flers 6.11.1981, BT 1982, p.292 was apparently of the view that the conduct of a driver who went to a restaurant to eat leaving the key to his vehicle in the ignition must be regarded as a '*faute très lourde*'. A commissionnaire de transport was condemned as against his client for '*faute lourde*' as he had involved a Greek sub-carrier who was involved in smuggling narcotics as a result of which

and it is discussed whether under certain circumstances there is a question of force majeure of the carrier are in France governed by the question whether they should or should not be brought under Article 29 CMR!²⁸⁶ In consequence of this extensive interpretation of Article 29 CMR the carrier is in regard in particular to the frequent cases of theft often held liable without limit for the damage resulting therefrom.²⁸⁷

It is understandable that the judges lay down strict standards regarding the degree of care that the carrier is required to show in regard to the load, but the way in which these standards are applied in France can only be termed capricious with the result that not only does legal certainty suffer but that violence is done to what is reasonable: unquestionably in part a result of the vague description of the concept of 'faute lourde'. The writing is also on the wall in that the Cour de Cassation has held that a halt must be called to this development. In terms that could not be misconstrued the highest French court complained of the unverifiability of the decisions that concluded in favour of 'faute lourde':

'Attendu qu'en statuant ainsi, sans préciser en aucune façon les manquements particulièrement graves à ses obligations qu'aurait commis dame Domus, la Cour d'appel n'a pas mis la Cour de cassation en mesure d'exercer son contrôle sur la gravité de la faute retenue.'²⁸⁸

Although the applicability of Article 29 CMR will be dependent on a number of circumstances, in the case of theft the following are of undeniable importance: frequency of thefts during the journey; the places at which for any length of time the carriage was interrupted; the value of the goods;²⁸⁹ how the vehicle was equipped to prevent theft.²⁹⁰

the shipped goods arrived at the place of destination (Teheran) only after six months; CA Paris 6.4.1981, BT 1981, p.567. See further the conclusion of L. Brunat, BT 1979, pp.130 et seq., as also BT 1981, pp.122 et seq.; Lamy, no.585; Libouton, 1982, p.725; CA Paris 15.3.1983, BT 1983, p.305; Putzeys, nos.930, 931.

286. Illustrative of this is OLG Dusseldorf 25.6.1981, VersR 1982, p.606. A carrier who had done everything required to make his vehicle ready to drive through the night was following theft not relieved of liability, although the threat of Art.29 CMR was not in issue. See rather the decisions of the BGH cited below. In a virtually identical situation the carrier was relieved of liability by Hof Amsterdam 25.3.1982, S&S 1983, 9. In France by contrast the carrier would be more than happy in such a situation if he were not placed in the category 'faute lourde'. Thus a carrier only narrowly escaped application of Art.29 CMR even though he left his vehicle parked for a period of four days in a locked garage of an Italian colleague. There was no mention of force majeure: Tr Comm Grenoble 8.3.1982, BT 1982, p.298.

287. Here also the exception proves the rule: CA Douai 19.6.1981, BT 1981, p.512. Despite the fact that the vehicle was left in Italy on unguarded terrain without anti-theft equipment, the carrier got off scot-free from Art.29 CMR. Nor was Art.29 CMR applied in Cass. 26.2.1985, BT 1985, p.270 and Cass. 26.6.1985, BT 1985, p.436. The commentator in BT regarded these decisions as a brake on a too rapid application of Art.29 CMR.

288. Cass. 13.10.1981, BT 1981, p.589. Cf. for national law, Cass. 26.2.1985, BT 1985, p.270.

289. Cass. 13.1.1981, BT 1981, p.128; ETL 1981, p.686.

290. BT 1982, p.80 following Cass. 14.12.1981, BT 1982, p.83. For these and also other relevant circumstances see the decisions of the BGH cited below.

(b) Belgium. Whereas in France the communis opinio is thus that 'faute lourde' can be equated with 'dol' also in regard to the CMR, under Belgian law that is the very least that can be said. Putzeys has strongly criticised the prevalent view in France and has taken up the standpoint that this view cannot be accepted either for Belgian law or for the CMR.²⁹¹ By invoking above all the historical development of the concept of wilful misconduct or default equivalent thereto in air law, which resulted in the above-mentioned Article 25 Warsaw Convention amended by the Hague Protocol, Putzeys is of the opinion that 'faute lourde' cannot be equated with 'dol' and therefore cannot be covered by Article 29 CMR.²⁹² However, it is not clear what according to Putzeys is understood in Belgium by 'faute lourde'. He himself explains the formula 'by default equivalent to wilful misconduct' in the sense of the amended Article 25 Warsaw Convention.²⁹³

(c) Italy and Switzerland. The same applies for Italian²⁹⁴ and Swiss²⁹⁵ law as for French law.

(d) In Germany the question is disputed. The issue here under discussion is in that country subsumed under the question whether by default equivalent to wilful misconduct not only conditional wilful misconduct but also 'grobe Fahrlässigkeit' can be understood. On the one hand, the latter, broader standpoint is adopted primarily by the caselaw. The majority of writers, by contrast, have taken up the narrow standpoint with an appeal to the history of the genesis of both the CMR and the Warsaw Convention as well as on the ground of the fact that a structural difference exists between 'Vorsatz' and 'Fahrlässigkeit'.²⁹⁶ By 'Fahrlässigkeit' is understood 'das Ausserachtlassen der im Verkehr erforderliche Sorgfalt', while for 'bedingter Vorsatz' it is required that the carrier 'den Schaden billigend in Kauf genommen hat'. In a recent decision the BGH has ranged itself on the side of the minority of writers by considering the following:

291. Putzeys, nos.930 et seq.; previously already Libouton, 1974, p.515. Cf. also Frédéricq, p.359; Ponet, p.334. Cf. above all Hof van Beroep Brussels 30.10.1975, ETL 1976, p.238; Rb Kh Antwerp 3.3.1976, ETL 1976, p.437; Rb Kh Deurne 21.11.1972, TPR 1979, p.119; CA Mons 11.5.1978, ULR 1980, II, p.332. Contra, Hof van Beroep Liege 6.5.1970, ETL 1970, p.716. In that case the gross default of the carrier was assumed on the ground of 'principes généraux du droit' and equated with wilful misconduct because he had adopted a passive attitude to a manifestly inexperienced job of loading by the sender. OLG Munich 27.11.1968, ETL 1971, p.115 came to the same judgment of the carrier in the light of the fact that he had accepted the transport even though aware of an inexperienced job of loading by the sender (in casu there was too much space left between stacked crates of apricots and the tailgate of the vehicle).

292. Putzeys, nos.924, 928-930, 932, 934. See further also the caselaw cited by Libouton, 1982, p.725.

293. Cf. op. cit., no.934.

294. Constanzo, p.29; Corte di Cassazione 16.9.1980, ULR 1980, II, p.341.

295. Aisslinger, p.108; Nickel-Lanz, no.187; Groth, p.81.

296. For a review of the state of affairs in Germany see, Helm, Frachtrecht, Art.29 CMR, Anm.2. In regard to the CMR Helm has himself defended the view that Art.29 CMR allows equation of 'grobe Fahrlässigkeit' with 'Vorsatz'. See also Groth, p.80. Cf. also OLG Munich

'... die Auffassung des Berufungsgerichts, grobe Fahrlässigkeit sei kein dem Vorsatz gleichstehendes Verschulden i.S. des Art. 29 CMR, begegnet rechtlichen Bedenken'.²⁹⁷

After presenting the various standpoints in the legal literature and the case-law in different countries the BGH justified its decision primarily on the basis of the historical interpretation method. Because it was not the new but the former Article 25 Warsaw Convention that had been adopted by the CMR it followed, according to the BGH, that 'grobe Fahrlässigkeit' could be equated with 'Vorsatz'.²⁹⁸ It is further of interest to note the final consideration of the decision as to the significance of the reference to the *lex fori*: Article 29 CMR certainly took account of the differing national gradations of default, but:

'Die Gerichte sind jedoch nicht genötigt, die im deutschen Rechtsbereich bestehenden strukturellen Unterschiede zwischen Vorsatz und (grober) Fahrlässigkeit, wie sie z.B. in § 276 BGB zum Ausdruck kommen und in zahlreichen Gesetzesstellen unterschiedliche Rechtsfolgen auslösen, bei der Auslegung der CMR zu berücksichtigen ...'.²⁹⁹

(e) Austria. Like the BGH, the Austrian supreme court also counted 'grobe Fahrlässigkeit' within the reach of Article 29 CMR.³⁰⁰

(f) The Netherlands. Although a decision of the Hof Den Bosch need not be seen as a trendsetter this decision perhaps explains sufficiently why in The Netherlands Article 29 CMR is hardly ever broached by the claimant. Article 29 CMR was held not to be applicable to a carrier who had allowed his vehicle laden with copper to stand unsupervised for several days in a parking area in Italy. As reasoning hereof, the appeal court advanced, *inter alia*, that up to that time in that place only entire freight haulage vehicles were stolen while in the case in litigation one was concerned with theft from a trailer!³⁰¹ In principle there is no objection in The Netherlands to equating gross default with default equivalent to wilful misconduct if substance is given to that concept such as that was done by the Hoge Raad in the well-known

27.11.1968, ETL 1971, p.115. Contra: Precht/Endrigkeit, p.111; Muth-Glöckner, Art.29 CMR, Anm.2; Heuer, pp.74, 75 and the legal literature and caselaw there cited, in particular OLG Hamm 19.2.1973, VersR 1974, p.28.

297. BGH 14.7.1983, VersR 1984, p.134, approved by J. G. Helm, IPRax 1985, p.10. Cf. OLG Dusseldorf 26.7.1984, VersR 1985, p.1081.

298. Contra, Nickel-Lanz, no.187.

299. VersR 1984, p.136. The BGH confirmed its standpoint by decision of 16.2.1984, VersR 1984, p.551.

300. Cf. Groth, p.80, as also BGH 14.7.1983, VersR 1984, p.135.

301. Hof Den Bosch 2.1.1979, S&S 1979, 115. The contrast with French and German caselaw is noticeable. It is not clear from the decisions of Rb The Hague 26.3.1983 and 1.2.1984, S&S 1985, 10 to what extent a claim by the claimant to Art.29 CMR will be met.

Codam-Merwede case.³⁰² There gross default was classified as a default bordering on reprehensibility.

(g) England. In England, as far as one can see, a large measure of peace reigns in this area. It is assumed that by 'wilful misconduct' is understood 'misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence.'³⁰³ From this it is clear without more ado that 'wilful misconduct' must be regarded broadly but not whether 'gross negligence' is to be equated also with 'wilful misconduct' within the meaning of Article 29 CMR. Nor does this appear from the only decision available on this point to this writer. As the carrier was in breach of the regulations governing driving periods and without identifiable cause had run his vehicle off the road it was presumed that he had fallen asleep at the wheel. This conduct was regarded as 'wilful misconduct':

'In my judgment he [i.e., the driver] appreciated that he was acting wrongfully, persisted in so acting and was wholly indifferent to the consequences.'³⁰⁴

From the above it appears that the prevailing view is that Article 29 CMR is applied in cases of wilful misconduct or gross default of the carrier or his agents or servants. This view is correctly grounded upon the historical position surrounding Article 25 Warsaw Convention and the adoption thereof in Article 29 CMR. The influence allowed to national law on this point as well as the juridical and factual assessment of the concept of gross default have caused unacceptable uncertainty and legal inequality.

The result thus established is in conflict with the most recent developments in this field of transport law. By striving to render the limits penetrable only in extreme cases the CMR, just as the CIM, gets out of step.³⁰⁵ The proposal of FIATA to relate the CMR to the aforementioned development, deserves, in the possible event of revision of the CMR, every support.³⁰⁶

302. HR 12.3.1954, NJ 1955, 386. Cf. Dorrestein, no.267.

303. *Forder v. Great Western Railway Company* (1905) 2 KB 532, cited by Popplewell J, see n.304 below. Cf. also Groth, p.80.

304. QB 13.4.1984 (*Sydney G. Jones v. Martin Bencher Ltd*). In his decision Popplewell J referred strongly to the leading case in air law *Horabin v. British Overseas Airways Corporation* (1952) 2 All ER 1016, on which see Hill/Messent, p.155.

305. Cf. Art.4(4) Hague-Visby Rules; Art.25 Warsaw Convention; Protocol No.4 of Montreal; Art.8 Hamburg Rules; art.21 Convention on International Multimodal Transport.

306. The FIATA Report, p.24 proposed replacing Art.29 CMR with Art.8 Hamburg Rules.

The Claimant

'Angesichts der unklaren Konzeption der CMR ist dem BGH darin zuzustimmen, dass die CMR die Frage der Aktivlegitimation des Schadensersatzberechtigten nicht abschliessend gelöst hat.'¹

§ 1. Introduction

Once it has been established that the carrier is liable following Articles 17-29 CMR, and for which sum, the question arises who can lay legal claim to payment of that sum.² It may rightly be termed amazing that this perfectly normal question, which arises right across the entire front of transport law, has not been clarified. That this is a thorny question appears not only from the way in which the Convention wrestles with it but also from the legal literature.³ An explanation of why in general little attention has been paid to the basis of in particular the right to claim compensation for damage from the carrier perhaps lies in the fact that in the practice of transport law this issue was found to be too theoretical. Whether this is so or not the result of the situation is that there still exists much confusion and uncertainty in this field, which constantly threatens legal certainty. This uncertainty can also appear in matters of procedural law and is clearly illustrated by those actions in The Netherlands and other countries in which the potential claimants as well as their subrogated insurers appear en bloc.⁴

In this introductory section an attempt will be made to unravel the knot of factual and legal questions by splitting up the problem into a number of related issues. A question that in particular plays a role with the CMR is whether the issue (who is entitled in regard to the damage to institute an action against the carrier?) is or is not regulated by the Convention. According to some the Convention leaves this problem unanswered. Others, by contrast, are of the opinion that support for an answer to the question is to be found in the Convention. Thus it is claimed that the right of disposal emanating from

1. I. Koller, *VersR* 1982, p.415.

2. In this Chapter the right to claim compensation for damage on the ground of the transport contract will be termed the right to claim.

3. The general recognition of the problem treated in this Chapter appears from the following quotations: '... this question (...) gives occasion in practice for slipping and sliding': Korthals Altes/Wiarda, p.65; 'La question fort délicate': Loewe, no.147; 'La seule question délicate ...': Rodière, Sirey, no.471 B; '... schwierige Frage, wer im Endergebnis die Ersatzleistung zu erhalten hat ...': Helm, *Frachtrecht*, § 429 HGB, Anm. 36; 'aus der Sicht des beklagten Frachtführers äusserst misslich': I. Koller, *VersR* 1982, p.414. In this sense also D. J. Hill, *Contractual Relationship between Shipper, Forwarder and Carrier by Road*, (1975) 1 *LMCLQ*, pp.137 et seq.

4. On this see the caselaw cited below in sections 3-5. A. C. Hardingham, (1981) 2 *LMCLQ*, p.309, points out also that in the English practice senders, consignees and their insurers claim jointly. Cf. Dorrestein, no.160.

the transport contract (cf. Art.12 CMR) is of signal importance not only for the exercise of the right to claim delivery of the goods (cf. Art.13 CMR) but also for the right in appropriate cases to demand compensation for damage from the carrier. In this Chapter it is the latter situation which is central.

The above questions urge a deeper enquiry as to the nature of the transport contract. The singular characteristic of the contract for the carriage of goods is that normally three persons play a role, namely, the sender, the carrier and the consignee. What rights and duties result from this contract for the sender and the consignee and on what are they founded?

The questions are of importance with a view to explaining the competence of the consignee to derive rights from the contract and to exercise these in his own name. Even if this right is juridically underpinned, this does not mean that the sender thereby loses his rights. It is precisely because of this that reference has been made to the detrimental consequences thereof for the legal position of the carrier. Acceptance of that possibility would expose the carrier to the doubled risk of legal proceedings, which would be intolerable.⁵ If one takes the position that in principle both the sender and consignee are entitled to claim then the question arises as to how the rights of such persons can be realised. On the one hand, it would seem to be sensible to proceed from or at least to take account of the underlying contract.⁶ On the other hand, it can be stated that in principle the transport contract should be abstracted from the underlying contract. This approach is founded on the view that the carrier ought not to be concerned with the relationship between sender and consignee.

The question to whom is the right of claim due is additionally complicated by the frequent appearance of intermediaries, such as despatch and receipt forwarders. Principally when such persons deal in their own name it is of great importance for the legal position of their principals. The solution to this problem is to a great extent dependent on the question whether a person has a formal right to institute an action for damages even though materially no damage has been suffered to his own property interest. In the caselaw and legal literature various paths have been explored, even if not always juridically supportable, in order to arrive at a satisfactory result in such cases.

The above is capable of being summarised in a number of related aspects which will be dealt with in the following sections, but without a strict separation between them being maintained.

Who is the opposing party to the carrier, in other words, a more precise formulation of the concepts of sender and consignee (§ 2).

To which of these persons is the right due to institute an action for compensation for damage against the carrier: the sender, the consignee or both? (§ 3).

To what extent does the answer to the preceding question remain unaffected where the claimant has suffered no damage to his own property interest? (§ 4).

5. I. Koller, *VersR* 1982, p.414.

6. In this Chapter will be understood by 'underlying contract' the contract between sender and consignee (generally a sales contract) that concerns the same goods as does the transport contract.

Does the appearance of intermediaries effect a change in the results already achieved? (§ 5).

§ 2. Concepts of sender and consignee

For a proper understanding of the problem to be dealt with here a concise elaboration of the concepts of sender and consignee under general transport law is necessary. Both in the interest of the potential claimants as amongst themselves as well as on behalf of the carrier it needs to be established who is to be designated as entitled to compensation for damage.

1. As sender must be designated the (contractual) opposite party of the carrier, consequently the party as against whom the carrier has bound himself to transport the goods.⁷ If the carrier fails to perform as against his opposing party, that party is entitled to claim for the damage resulting therefrom. While it is true that the consignee after becoming party to the transport contract derives the right to claim delivery of the goods, which is for him the characteristic right,⁸ this does not take away the fact that he derives that right from the contract concluded by the sender with the carrier. The sender remains in principle entitled to recover for the damage as a result of failure to perform by the carrier. Whether this applies under the CMR, in particular when he loses the right of disposal of the goods and that right, following Article 13(1) CMR, is transferred to the consignee, is looked at more closely in § 3 below.

One must not equate with the concept of sender the person who in actual fact offers the goods for carriage (also called the shipper).⁹ As was stated earlier¹⁰ the temptation exists in transport law under certain circumstances to employ a factual criterion in application of legal rules. This has led to the situation where, instead of the opposing party of the carrier, the actual shipper has been regarded as sender, and therefore as the person entitled to claim. Such an approach induces the situation where either the right of the sender, that is to say, the opposing party of the carrier, is disregarded or it is improperly construed. A Dutch importer bought goods 'ex factory' from a Belgian supplier and gave the commission to transport the goods to a client in The Netherlands. Because it was not the carrier's opposing party who was designated in the consignment note as sender, but the shipper, in casu the

7. The first definition of the concept of sender to be used in the history of the Convention is 'he who in his own name contracts with the carrier': E/ECE/TRANS/SCI/79, E/ECE/TRANS/WP9/13, 1 May 1950, p.2. Cf. Art.8.2.1.1; Korthals Altes/Wiarda, p.49; Helm, *Frachtrecht*, § 425 HGB, Anm.31. Contra, Loewe, no.147. That writer incorrectly keeps open the possibility that the sender is not always the contractual opposite party of the carrier.

8. Dorrestein, no.171; Korthals Altes/Wiarda, p.51.

9. Cf. e.g., Dorrestein, nos.125, 160. Contra, e.g., *Tr Comm Paris* 7.11.1973, BT 1973, p.154, incorrectly. Also Frédéricq, no.1579 even more incorrectly held that by sender must be understood the person who delivers the goods to the carrier. Consequently the person who delivers the goods to the carrier as agent of the consignee should therefore be regarded as shipper, and not as sender; Putzeys, no.1061; Clarke, no.44.

10. Cf. Chapter 3 under Art.34 CMR. Cf. Chapter 4 under Art.17(4)(c) CMR.

Belgian supplier, the claim of the importer against the carrier was dismissed at first instance as without foundation. The Hoge Raad was not in agreement with this and considered:

‘that the Convention provisions, in particular also Artt. 12 and 13, are not opposed to the fact that in this case the person who concluded the transport contract without appearing as sender within the meaning of those Articles can derive a claim against the carrier for compensation for damage suffered by him in regard to loss or damage to the transported goods.’¹¹

Neither the grounds of appeal in cassation nor the decision sufficiently abstracted the transport contract from the factual state of affairs surrounding the underlying contract of sale and purchase. The fact that Articles 6, 8 and 9 CMR proceed from the fact that the sender simultaneously appears as (factual) shipper does not prevent this (cf. Art.4 CMR).

2. At this point one should examine on what the right of the consignee is grounded. In order to offer the right of claim of the consignee juridical substance it has been held, both in The Netherlands¹² and in other countries,¹³ that the transport contract contains a stipulation in favour of a third party. Although conscientious application of this idea would perhaps raise more problems than it solves, it does explain the consignee having an original right to delivery of the goods and in default thereof receiving a substitutionary right to damages.¹⁴ This does not take away the fact that a number of writers label the idea of a third party stipulation as unsound.¹⁵ In the opinion of the present writer Helm touches upon the heart of the matter in his judgement of the idea of a third party stipulation:

‘Es muss bezweifelt werden, ob die Rechtsstellung des Empfängers sich überhaupt in

11. HR 7.12.1973, S&S 1974, 20; NJ 1974, 307; ETL 1974, p.602. The result is satisfying to the extent that the sender was granted rights by the Hoge Raad which were denied him by the lower court. The present writer shares the criticism of Th. H. J. Dorrestein, NJB 1974, pp.1256 et seq., which concerns both the grounds of appeal in cassation brought by the Procurator General and the decision of the HR to the effect that one was here concerned with, having regard to the clear legal relationship between the person giving the commission and the carrier, a simple error in the consignment note. For further criticism: Helm, Frachtrecht, Art.17 CMR, Anm.30. The judgement of Putzeys, no.1059 that the decision is ‘particulièrement clair’ cannot thus be shared, nor can the view of G. Czapski, AWD 1974, p.162 that ‘Sie [the interpretation of Artt. 12 and 13 CMR] ist in sich zweifellos logisch und entspricht dem Zweck der internationalen Vereinbarung.’ Clarke, no.43 interpretes the decision in the sense that the HR ascribes the right to claim to the owner.

12. Cf. Wachter, pp.140, 269; Doorhout Mees, no.8.11; Dorrestein, no.161; Korthals Altes/Wiarda, p.52.

13. Helm, Frachtrecht, § 425 HGB, Anm.53; Heuer, p.45; Edis, p.31; Frédéricq, no.1580; also the German caselaw, see e.g.: BGH 21.10.1973, VersR 1974, p.325 (p.326); BGH 10.9.1974, VersR 1974, p.797 (p.797); OLG Saarbrücken 21.11.1974, NJW 1975, p.500. Cf. also Rodière, Sirey, no.364; Lamy, no.40.

14. Cf. Wachter, pp.264-266.

15. Dorrestein, NJB 1973, p.1122; Dorrestein, no.161; Van Oven, no.123; Korthals Altes/Wiarda, pp.52 et seq.; Rodière, Sirey, no.364; Van Rijn/Heenen, nos.2255-2257.

die üblichen Typen der BGH-Dogmatik widerspruchlos eingliedern lässt. Die Frage, ob der Frachtvertrag wirklich ein echter Vertrag zugunsten Dritter ist, hat vor allem theoretische Bedeutung.¹⁶

Others have concluded in favour of a three party contract¹⁷ without, however, indicating the resultant legal consequences in regard to the rights and obligations of the sender and consignee. In both approaches acceptance of the third party stipulation or respectively of the third party becoming a party to the contract continues to play an important role. It is generally held that even after acceptance or becoming a party the consignee remains a third party; some, by contrast, regard the consignee as an actual party upon joining the contract, whereby Rodière goes a step further and considers the consignee a party from the very outset.¹⁸ Whichever approach one prefers it is indisputable that the consignee, leaving aside whether he must be regarded as a party to the contract or not, upon acceptance of the stipulation or joining the contract, can derive independent rights from the contract and in particular the right to delivery of the goods which in appropriate cases is transformed into a right to damages.

Although it is generally accepted in The Netherlands that the consignee becoming a party to the contract can occur prior to the moment of the goods arriving at the place of destination,¹⁹ as far as the CMR is concerned it is held that for the occurrence of that event the moment of arrival at the destination should operate.²⁰ As an argument herefore one can refer to Article 13(1) CMR in which it is provided that as from the moment of arrival of the goods at the place designated for delivery the consignee can claim from the carrier that the latter deliver the goods to him. At that particular moment the consignee also receives the right of disposal following Article 12(2) CMR except where this is the case from the outset (Art.12(3) CMR).²¹ Furthermore, Article 13(1) second sentence CMR provides that the consignee can also avail himself of his rights as against the carrier in the event that the goods do not arrive (loss) or arrive late (delay). As Article 13 CMR determines the moment from which the consignee can derive rights from the transport contract and Article 12(2) CMR transfers the right of disposal as of that moment from the sender to the consignee it is tempting to conclude that the right of claim is likewise

16. Helm, *Frachtrecht*, § 425 HGB, Anm.53.

17. Rodière, *Sirey*, no.365. He regards this construction as a justifiable deviation from Art.1165 CC. The justification lies in the communal interest of the sender and consignee ('solidarité d'intérêts'). This construction, nevertheless without further elaboration, was introduced into The Netherlands by Van Oven, no.123; see also Korthals Altes/Wiarda, pp.53-54.

18. Rodière, *Sirey*, no.365: 'Dès le début, l'expéditeur, le voiturier et le destinataire y sont parties.'

19. Cf. Wachter, pp.142, 266; Korthals Altes/Wiarda, p.52; Van Oven, no.123. Contra, Th. H. J. Dorrestein, *NJB* 1974, p.1122; Dorrestein, no.176.

20. Cf. Wachter, p.267; Th. H. J. Dorrestein, *NJB* 1974, p.1123.

21. This appears seldom or never to occur in practice, cf. Dorrestein, no.168a. For a critical view of the right of disposal as that is regulated in the CMR, cf. Nickel-Lanz, nos.65 et seq.; Dorrestein, nos.166 et seq.

transferred to the consignee. As will appear from the following section that conclusion is disputed.

The fact that sooner or later the consignee becomes a party to the transport contract or, in the view of the third party stipulation advocates, is regarded as a third party, does not in itself give a decisive answer to the question whether he is exclusively entitled to claim. This would only be the case when – remaining within the cadre of the CMR – that right was inherent in the right of disposal regulated in Articles 12 and 13 CMR. As long as such a relationship does not appear to be essential, on which more in the following section, this proposition continues to deserve no support.

Of great importance is then the question who should be regarded as consignee. As consignee are designated those persons who are specified as such by the sender to the carrier and not the ‘bare’ receiver of the goods.²² As a result of this various problems can arise. Thus the sender can indicate someone other than the original consignee. It happens also that a receiving forwarder is indicated as consignee who is only stated in the consignment note as a contact address, or it happens that upon commencement of the carriage it is not then known who is the consignee; only the place and the address of the destination are then given. It appears that the industry has a need, for differing reasons, of such variants.²³ In these situations the question arises who must be juridically regarded as consignee. Thus, Dorrestein is of the opinion that as a rule the person to whom the goods are finally delivered in accordance with the intention of the parties should be regarded as the final, although not the original consignee. In two cases the *Rechtbank Amsterdam* decided not to uphold these industry needs which deviated from the formalities expressed in the consignment note and held as the consignee in principle entitled to claim the receiving forwarder indicated as consignee in the consignment note.²⁴ It is clear that, just as was stated in regard to the concept of sender, also here the need is felt for a factual criterion and to this end one uses in the first instance the consignment note itself.²⁵ It is also possible that the unnamed person is authorised whether expressly or not by the receiving forwarder dealing in his own name to institute the claim against the carrier.²⁶

22. Th. H. J. Dorrestein, *NJB* 1973, p.1122.

23. For three variants, cf. Dorrestein, no.168a.

24. *Rb Amsterdam* 18.3.1981, *S&S* 1981, 83 and 84.

25. It is thus up to the parties concerned to show that the juridical consignee is different to that signified in the consignment note. Cf. *CA Douai* 25.10.1974, *BT* 1975, p.48. See also next note.

26. Cf. *BGH* 6.5.1981, *VersR* 1981, p.929; *ETL* 1982, p.313. In this interesting case the claim for damages by (the subrogated insurer of) a German principal against a Greek carrier was declared admissible although his forwarder-receiver was designated as consignee in the consignment note. According to the *BGH* this was possible on the ground of the ‘*gewillkurte Prozesstandhaft*’. This procedural law doctrine provides that the principal is authorised to make in law in his own name the claim of his forwarder because his interest exists in this in that he and not the forwarder suffered the damage. The present writer regards it as somewhat ambivalent that the *BGH* also gave it as the basis of the right to claim of the principal, not being the owner, the fact that this principal was (tacitly) authorised by his forwarder to institute proceedings at law.

Contra *OLG Dusseldorf* 13.11.1978, *VersR* 1982, p.89. That court also considered the receiving forwarder as consignee on the ground of the clear wording of the consignment note. Besides this

On the grounds of the above it may be stated that in regard to the concepts of sender and consignee the contractual norm, namely, the transport contract, should prevail over the interests consequently based on the transport contract²⁷ as to which in principle it is irrelevant whether the interest injured by the carrier runs parallel to that of the underlying contract.²⁸ Whether it follows from this that a party with an interest in the underlying contract (e.g., an owner of the goods) who does not have a contractual relationship with the carrier must never be regarded as entitled to claim and that, by contrast, a person who has contracted in his own name with the carrier can claim although he has suffered no damage to his own property interest is examined further in § 4. To the extent that intermediaries are concerned that question is dealt with in § 5.

§ 3. Basis of the right to claim

In the preceding section the issue was dealt with of the way in which the right of the sender and the consignee to claim compensation for damage from a non-performing carrier was construed. In this section the question will be examined whether, and if so in what way, the CMR gives a direct answer to this matter.

Many hold the view that the Convention does not answer this question with the result that the applicable national law must offer a solution.²⁹ Those who adopt this standpoint invoke the fact of an absence of a clear regulation in the Convention. Although others do not deny this they do not draw the same conclusion therefrom. They give as explanation for the absence of an explicit regulation that the Convention proceeds on the assumption that the right to claim is related to the right, which is certainly regulated by the Convention, of disposal of the goods. The person who most tenaciously holds to this standpoint is Helm,³⁰ to whose authority others have bowed.³¹

a bank was also designated as consignee in a through bill of lading with designation of the buyer as contact address. The court judged that the subrogated insurer of the buyer (however much an actual interested party) could derive no legal claim from the transport contract.

27. Cf. Dorrestein, nos. 161, 175; Putzeys, no.1057: 'L'exercice du droit d'action né du contrat de transport est étranger, en principe, aux droits nés du contrat de vente.' See also CA Poitiers 7.2.1983, BT 1983, p.455, in which it was stated expressly that the carrier should remain outside the sale contract. The carrier had vainly claimed that the sender had no further action because the goods travelled at the risk of the buyer/consignee. See in a similar sense Cass. 24.5.1982, DMF 1983, p.145.

28. Hof Leeuwarden 20.2.1974, S&S 1976, 31; NJ 1976, 16: 'that nevertheless the ownership of the goods and the question to whom they belong during the transport are entirely outside the legal relationship which is entered into by the sender, the consignee or whoever is to be equated therewith, with the carrier ...'

For the question to what extent one can act on the basis of a factual criterion (e.g., a tortious act), one is referred to Chapter 5 § 8.

See, for England, Hill/Messent, p.150.

29. Loewe, no.147; Rodière, p.326; Dorrestein, nos.173, 174; Frédéricq, no.1720.

30. Helm, Haftung, pp.37, 46; Helm, Frachtrecht, Art.17 CMR, Anm.30.

31. Heuer, p.178 as also the German caselaw cited below.

'Ersatzberechtigt ist nach der CMR wie nach § 95 EVO stets der Verfügungsrechtige im frachtrechtlichen Sinne. Zwar enthält die CMR keiner entsprechenden allgemeinen Rechtssatz; sie setzt ihn aber voraus.'³²

It is understandable that, besides other provisions,³³ Helm includes also Articles 12 and 13 CMR in his considerations.³⁴ Because this standpoint has been in issue in a number of cases before the BGH it is necessary to present the standpoint adopted by Helm somewhat more extensively.

The proposition that in regard to the CMR, just as in the law of transport by rail, the right of claim is related to the right of disposal is based by Helm on Articles 20 and 27 CMR. In the German translation of the Convention the term 'Verfügungsberechtigte' is indeed employed in those Articles, which term also occurs in Articles 12 and 13 CMR. In support of Helm's argument it may also be pointed out that the term 'Verfügungsberechtigte' is also employed in Article 17(2) CMR and Article 18(2) CMR as translation of 'l'ayant droit' and 'the claimant'. The rights of the consignee commence at the moment that the goods arrive at the place of destination while at the same moment the right of disposal of the sender and with it, according to Helm, the right to claim expire.³⁵ The result of this coupling is that the carrier is safeguarded against the risk of proceedings being instituted against him from different quarters in regard to the same damage. Thus in principle 'Aktivlegitimation' affiliated to the right of disposal consequently prevents 'Doppellegitimation'.³⁶ The CMR also proceeds by implication from this point.³⁷ Via Articles 12 and 13 CMR, in which the right of disposal is regulated, it can be established consequently who is entitled to institute effective claims against the carrier. The view advocated by Helm was followed expressis verbis by the OLG Hamm.³⁸ Two years after the judgment of that

32. Helm, *Haftung*, pp.37; see also in particular pp.155 et seq. Cf. for rail law, Becker, p.148; Boudewijnse, p.370.

33. Artt.20 and 27 CMR.

34. Dutch caselaw which (partly) relies upon Art.13 CMR in solving this problem: Rb Roermond 16.11.1967, S&S 1969, 57; Rb Amsterdam 18.3.1981, S&S 1981, 83 and 84. See also Ponet, pp.376 et seq.; Libouton, 1982, p.703. Those who have criticised caselaw relying on Artt.12 and 13 CMR are: Libouton, 1973, p.30; Rodière, p.326; Dorrestein, no.173; Nickel-Lanz, no.209; Putzeys, no.527: 'Droit de disposition et droit d'action ne peuvent, de même, être confondus.'

35. Helm, *Frachtrecht*, § 429 HGB, Anm.35; Helm, *Frachtrecht*, Art.17 CMR, Anm.30.

36. Helm, *Frachtrecht*, § 429 HGB, Anm.35. This 'Doppellegitimation' is avoided under EVO and KVO law, see Helm, *Frachtrecht*, § 433 HGB, Anm.31. This latter does not appear to be entirely in agreement with what is observed in Anm.30 under Art.17 CMR regarding HGB law; cf. for a differentiated picture, Heuer, pp.178, 179.

37. Helm, *Frachtrecht*, Art.17 CMR, Anm.30.

38. OLG Hamm 4.11.1971, VersR 1973, p.911 basing itself upon Artt.18, 20 and 27 CMR. It is noticeable that in the discussion in Germany no-one refers to OLG Karlsruhe 24.5.1967, ULC 1967, p.289 in which it was held that on the ground of Art.27 CMR the person entitled to dispose is entitled to claim. Cf. Clarke, no.43.

appeal court the BGH was given the opportunity to pronounce upon this matter.³⁹

The case involved the carriage of a shipment of wood from Germany to Sweden. The carrier, who was sued for damages by the Swedish consignee, raised the defence that the right to institute proceedings was, following the CMR supplemented on this point by national law, accorded only to the sender. In opposition to this the claimant consignee argued that he could exercise the right to claim in his own name. The LG and OLG recognised the right of the consignee on the ground of German law (§ 435 HGB). In the grounds of appeal in cassation it was pleaded that the case dismissed by the OLG was in conflict with Article 13(1) second sentence CMR because that provision referred to loss of the goods whereas the instant case concerned an action for damages in regard to damage to the goods. The BGH choose the side of the consignee. As Article 13(1) second sentence CMR (loss) expressly made the consignee entitled to claim, the BGH considered that regulation to be the analogue of application to the case in which there is a question of damage to the goods.⁴⁰ The court reasoned that Article 13(1) CMR was adopted from the law of rail transport (cf. Art.16(4) CIM as also § 75(3) EVO). A difficulty that occurs with this is that both the CIM and EVO also provide in so many words that the right to institute proceedings is based upon the right of disposal (Art.42(3) CIM as also § 95(1) EVO). A similar rule is absent from the CMR. The BGH concluded from this lacuna that therefore two possibilities were open: either the approach indicated by Helm or application of national law. The BGH declined to make a choice as both alternatives led to the same result, namely, conferring upon the consignee an individual right. It has been correctly pointed that as the BGH did not disturb the solution given by the appeal court on the ground of national (German) law, it did in fact choose for the second alternative, in casu application of § 435 HGB.⁴¹

A question that naturally arises following the above case is whether it automatically follows from the circumstance that the consignee has an independent right to compensation for damage that the sender lacks a similar right. For those, such as Helm et al, who defend the link between the right to claim and the right of disposal this question undeniably deserves an affirmative answer. Although the BGH was non-committal the first time, less than half a year later it was again confronted with the question.⁴² This time it was the sender who instituted the action against the carrier.

The case concerned the carriage of cheese from France to Germany. As a result of a defect in the cooling system the consignment of cheese was delivered in a spoiled condition. The French sender, who had indemnified his German client on the basis of the contract of sale, claimed that sum from the carrier

39. BGH 21.12.1973, VersR 1975, p.325.

40. BGH 21.12.1973, VersR 1974, p.325. Cf. Nickel-Lanz, no.209.

41. Groth, RIW/AWD 1977, p.267. This commentator finds this decision regrettable from the point of view of uniform law. The BGH should have applied national law only when it was established that the Convention possessed no regulation and not, as in casu, in a case of doubt. Approving of the decision, W. Voight, DVZ 1974, no.95, p.8.

42. BGH 10.4.1974, VersR 1974, p.796.

on the ground of the transport contract. The carrier rejected the claim on the ground that the sender, according to the CMR, was not entitled to dispose and consequently would be even less entitled to claim. On appeal the sender's claim was allowed as the transfer of the right of disposal to the consignee following arrival of the goods at the place of destination according to the CMR did not bring with it that the sender lost his right to claim, and even less so when, as in the case at hand, the sender is answerable for the transport risks as against the consignee. The grounds of appeal in cassation against this decision pleaded an indissoluble connection between the rights of claim and disposal:

‘Die CMR normiere aus Gründen der Rechtssicherheit und Klarheit im internationalen Güterverkehr die Identität zwischen Verfügungsberechtigung und Aktivlegitimation.’⁴³

This is the view of Helm *optima forma!* The answer of the BGH was short and simple:

‘Dem kann nicht gefolgt werden.’⁴³

The question left open in the previous case (is the consignee according to the CMR entitled to claim compensation for damage in his own name?) here also did not need to be answered. As against what was argued on appeal in cassation that on the ground of Article 13(1) second sentence CMR the right to claim was accorded to the consignee, the BGH held that such an interpretation was incorrect. The court added thereto that, even if the consignee were to be competent, it did not follow therefrom that that party was also exclusively competent.

Nor was the argument accepted that Article 17(2) CMR and Article 18(2) CMR used, in the German translation, the term ‘Verfügungsberechtigte’. In the result, comparison of the CMR and the law of rail transport led as a result of the absence of a regulation in the CMR identical to Article 42(3) CIM to dismissal of the grounds of appeal in cassation. The BGH let pass on this occasion the doubt expressed in so many words as to the conclusion to be drawn from this comparison. Where in the first instance that doubt appeared justified, now it was:

‘Als ausschlaggebend erscheint aber vor allem, dass die CMR, die sich sonst durchaus an die CIM anlehnt, ähnliche Vorschriften nicht enthält.’⁴³

If the BGH had thus rejected the view that according to the CMR the right of disposal is determinative of the right to claim, the question would thereby remain unanswered whether in *casu* the sender was competent. The BGH answered this question in the affirmative on the basis of what the court regarded as the (supplementary) applicable German KVO and HGB law. The BGH further pointed out – which to an extent conflicts with the argument

43. VersR 1974, p.797.

above – that the sender is in any event competent when the consignee, as in casu, does not wish to realise his own right. Helm agrees fully with this latter fact but in his view the rejection on principle of the approach advocated by him and put forward in the first place by the BGH as a meaningful possibility regarding the right to claim based on the right of disposal remains unacceptable.⁴⁴ Further to the criticism of Helm it may for now merely be noted that the result at which the court arrived does not actually deviate from what Helm advocates. In fact, that writer states expressly that when the consignee leaves his claims in abeyance the right of disposal, consequently therefore also the right of claim, remains with the sender.⁴⁵

Despite the rejection on principle by the BGH of the coupling between the right of claim and that of disposal advocated by Helm the OLG Saarbrücken not long after found the courage to side with Helm. The appeal court invoked in this Articles 18(2), 20 and 27(1) CMR as well as the undesirable situation that, when the criterion of competent to dispose is not employed, a division is introduced between an action for damages by the sender and consignee in the event of partial damage and partial loss.⁴⁶ After a period of quiet – and reflection? – the BGH was confronted for the third time with the question, and in fact the saying third time lucky appears to hold good also in the law of transport.

This was a case of carriage of meat from Bulgaria to Germany where the consignee claimed compensation for damage as a result of partial thawing of the meat. The carrier pleaded that it was not the consignee but rather the sender who was thereto competent. The OLG considered the consignee competent:

‘(die CMR) enthalte zwar nicht ausdrücklich den allgemeinen Rechtssatz, wonach der Verfügungsberechtigte, ersatzberechtigt sei, setze diesen Rechtssatz aber voraus.’⁴⁷

In contrast to the earlier cases the BGH, in the absence of a national law declared applicable by the judges of fact, was this time not given the opportunity to avoid the question whether the consignee was accorded the right to claim not only by national law but also by the CMR. The result to which the BGH came is surprising:

‘Dem Berufungsgericht ist zu folgen.’⁴⁸

This volte face was the result of an essentially different approach to the

44. He advances the decision criticised by him at several places in his *Frachtrecht*: § 425 HGB, Anm.53; § 429 HGB, Anm.35, Anm.36; § 433 HGB, Anm.6, Anm.19, Anm.27; Art.1 CMR, Anm.4, Anm.5; Art.12 CMR, Anm.4; Art.13 CMR, Anm.3; Art.17 CMR, Anm.30.

45. Helm, *Frachtrecht*, § 429 HGB, Anm.35.

46. OLG Saarbrücken 21.11.1974, NJW 1975, p.500.

47. *VersR* 1979, p.1106.

48. BGH 6.7.1979, *VersR* 1979, p.1105 (p.1106).

question submitted. Whereas the BGH was originally of the view that it must and could determine the issue on the basis of the applicable national law, on this occasion it had come to realise that the method followed previously was incorrect. On this the BGH stated the following:

‘Zur Auslegung der CMR kann auch nicht der im nationalen deutschen Recht bestehende Grundsatz ohne weiteres herangezogen werden, wonach der Verfügungsberechtigte die Aussprüche aus dem Frachtvertrag geltend machen kann; denn die CMR als internationales Abkommen ist in erster Linie aus sich selbst heraus, evtl. unter Heranziehung von Materialien auszulegen.’⁴⁹

The court pursued the path of autonomous interpretation via grammatical (Art.13 CMR), systematic (Arts.18, 20 and 27 CMR), historical and comparative convention interpretation to the surprising proposition:

‘das der Verfügungsberechtigte nach der CMR auch der Anspruchsberechtigte ist ...’⁵⁰

Upon reading this decision one asks oneself why the BGH, having so emphatically reversed what it had held in 1974, did not at the same time refer to the approach of Helm.⁵¹ The reason therefore is most probably that the BGH did not wish to draw the same conclusions from the standpoint adopted in the last decision, to which the name of Helm is irradicably linked, as Helm himself. The advantage of Helm’s construction is that the right to claim is presented as an exclusive right, which furthers legal certainty in transport law.⁵² Although in its most recent decision the BGH invoked the decisions of the OLG Hamm and OLG Saarbrücken, which followed completely in the footsteps of Helm, including the already mentioned consequences thereof, it appears as clear as day from the concluding considerations that the BGH did not wish that conclusion to be accredited to it.⁵³ At the same time the BGH gave evidence of this by stating on three occasions that in those cases where the right of disposal was accorded to the consignee, the consignee was *also*

49. Ibid., with reference to the decisions treated earlier of 28.2.1975, VersR 1975, p.610 and 16.2.1979, VersR 1979, p.641. Cf. RabelsZ 1981, p.436.

50. VersR 1979, p.1106. The BGH adopted the arguments presented by OLG Saarbrücken, above n.47, without exception. The decision was followed in OLG Vienna 16.3.1982, VersR 1982, p.1082.

51. That went without saying given that the doctrine of Helm was useful in 1973 but incorrect in 1974. Helm’s Frachtrecht appeared in 1979, thus a number of months prior to the decision of the BGH. It was not only the result but also the manner in which the BGH came to its decision in 1974 (namely, basing it on national law) that offended Helm. See for this in particular Helm, Frachtrecht, Art.1 CMR, Anm.4 and 5.

52. See, e.g., Helm, Frachtrecht, Art.17 CMR, Anm.30; also the quotation in the text above from the grounds of appeal in cassation which was dismissed by the BGH in 1974.

53. In those considerations the BGH declared groundless the fear of the carrier that, upon acceptance of the standpoint that also the consignee was competent, he could be sued for a second time for damages. In that case the carrier could repel such a claim by reference to his already fulfilled duty arising under the transport contract to compensate for damage.

entitled to claim.⁵⁴ In other words, the BGH did not wish to adopt the exclusivity aspect of the doctrine of disposal.

Against the background of the caselaw mentioned here it cannot be denied that the BGH has indulged in a certain opportunism having regard to the fact that, on the one hand, the right of disposal as the basis of the right to claim was accepted in essence while, on the other, the consequences thereof deduced by the supporters of the doctrine of disposal were not.

As appears from the above the question which is central to the caselaw is whether according to the CMR it can be stated that the right of disposal can serve as the basis of the right to claim. The present writer agrees with Helm that with an affirmative answer to this question it follows logically that the right of claim is exclusive. In this way it can be determined every time on the basis of a practicably feasible criterion from which side the carrier can expect an action for compensation for damage. Now that the BGH, after an initial rejection, has openly accepted the basis advocated by Helm, albeit without attaching an exclusive character thereto, it would appear desirable to test the soundness of such basis for the CMR. In Helm's vision Articles 12 and 13 CMR play an important role in the question who is entitled to claim. As was stated in § 2 above Article 13 CMR speaks only of the time at which the consignee as a rule has a right to the consignment note and to delivery of the goods. At that moment the sender loses his right of disposal (Art.12(2) CMR), which produces certain legal consequences for the carrier.⁵⁵ Of the right to claim there is no mention in these provisions.⁵⁶ In contrast to the situation in international rail transport law in which via Article 16(4) CIM in combination with Article 42(3) CIM the 'irrefutable'⁵⁷ connection between right of disposal and right of claim is laid down, as a result of which an exclusive character is conferred on the latter, there is no provision in the CMR corresponding to Article 42(3) CIM. The difference with the CIM regulation indicated by the BGH in its decisions can be explained in two ways: non-adoption of Article 42(3) CIM emphasises the difference with the CMR (BGH in 1973 and 1974) or alternatively is superfluous as a result of the model function of the CIM (BGH in 1979).⁵⁸ Historical enquiry reveals that the first conclusion is correct.⁵⁹ From this it follows that Articles 12 and 13 CMR provide no definite

54. VersR 1979, p.1166, right column. Cf. also I. Koller, VersR 1982, p.415.

55. The importance of the consignment note for the carrier emerges yet again for application of Art.13(2) CMR. OLG Hamm 12.11.1973, NJW 1974, p.1056 held that the statement of the amounts to be paid was a constitutive requirement; cf. also emphasised by CA Reims 30.11.1981, BT 1982, p.86.

56. Cf., inter alia, Dorrestein, nos.173, 174.

57. Boudewijnse, p.370.

58. Subsequently confirmed by BGH 6.5.1981, VersR 1981, p.929.

59. Although reference was several times made during the negotiations for the CMR to the system chosen for the CIM, such a connection was not laid, cf. E/ECE/TRANS/SCI/79, E/ECE/TRANS/WP9/13, 1 May 1950, pp.9, 10. From this history it emerges further that besides the rejection of a Swiss proposal to adopt Art.42 CIM (TRANS/WP9/28, 24 January 1955, p.12) – according to the Unidroit Report UDP 1948, Preliminary Study, p.39, see also Nickel-Lanz, no.210, Switzerland appeared at that time to be the only country where the right of disposal

answer for the exercise of the right to claim.⁶⁰

In addition, it follows that those who consider that they can take a stand on this basis must wrestle with the significance of Article 13(1) second sentence CMR. In 1974 the BGH advanced this sentence as an argument against the doctrine of the right of disposal because it would not follow therefrom that the sender would not also be entitled to claim,⁶¹ while in 1979 the court stated that the same sentence argued for the coupling with the right of disposal.⁶²

A weak link in the argument of the BGH is moreover that the central role intended for the right of disposal is underpinned by invoking Articles 17, 18, 20 and 27 CMR in which on each occasion in the German translation the word 'Verfügungsberechtigte' is employed for the Convention concept of 'l'ayant droit' respectively 'the claimant'.⁶³ As to the soundness of this argument one can be brief. It is incomprehensible that both Helm and the BGH, both of whom with a view to maximum uniformity normally give the highest priority to autonomous ascertainment of law, apparently failed to notice this translation error. In this regard more attention appears to have been paid to the German Explanatory Note to the CMR law of implementation than to the authentic text.⁶⁴ One cannot imagine a single reason for restricting the meaning of those terms in the Convention to 'Ver-

functioned as such – several attempts had been made to devise a regulation for this thorny question. Thus it was attempted with the help of definitions of the concepts of forwarder, destinataire, détenteur (the possibility of making a representative consignment note was still desired), bénéficiaire and claimant to clarify the matter, TRANS/WP9/1, 8 January 1952, p.7; TRANS/WP9/22, 21 December 1953, p.2 in which appears the term 'the person entitled to dispose of the goods.' Cf. also Dorrestein, nos.124 and 125. At a later time, as already mentioned, it was decided to dispense with definitions across the board. Although the Convention's history is not entirely clear on this point it is certain that the method followed in the CIM was not regarded as desirable; cf. Dorrestein, no.174. It is therefore no surprise that the Norwegian delegate to the revision conference was informed by the Rapporteur in answer to his question as to the substance of the concept of 'claimant' that no uniform answer could at that time be given; E/ECE/-TRANS/SCI/438, Geneva, 19 April 1972, nos.42, 43. Despite the severely defective regulation of the problem here dealt with (according to Nickel-Lanz, no.223 in fact the greatest defect of the CMR), one finds no comment at all on this in the otherwise highly critical FIATA Report.

60. There is criticism also on the development of the right of disposal in Art.12 CMR, cf. Nickel-Lanz, no.222: 'peu satisfante'; Dorrestein, no.166: 'The regulation is neither well thought through nor "workable".'

61. BGH 10.4.1974, VersR 1974, p.797.

62. BGH 6.7.1979, VersR 1979, p.1106.

63. See Artt.17(2), 18(2), 27(1) CMR. In Art.20 CMR in the English text the word 'claimant' is described – without however detracting from the broadness of the concept – as 'the person entitled to make a claim' (paragraph 1); 'the person entitled as aforesaid' (paragraph 2). Cf. also Art.12(7) CMR. On this see also Nickel-Lanz, no.209. The Dutch translation with the neutral term 'rechthebbende' is correct.

64. Denkschrift Bundestag, 3. Wahlperiode, Druksache 1144, p.33 in particular p.38 under Art.13(1) second sentence CMR: '... Darüber hinaus kann der Empfänger ... im eigenen Namen die Rechte ... insbesondere etwaige Schadenersatz ansprüche, geltend machen.' Verification of the accuracy of the translation was made easy by the German government adding the original text to each page. Both the BGH and Helm were insufficiently aware of the dangers that lie in wait when making a translation of a convention; cf. Kropholler, pp.93, 102, 258, 291.

fügungsberechtigte'. On the contrary, the terms employed by the Convention encompass both the sender and the consignee;⁶⁵ the choice should be determined on the basis of the circumstances.⁶⁶ This argument fundamentally weakens the proposition that in the CMR the right of disposal operates as a basis for the right to claim.

Caselaw and legal literature in The Netherlands and elsewhere have in general rejected the doctrine of disposal as a solution within transport law and instead accept that in transport law there is room for a multiplicity of persons entitled to claim.⁶⁷

The present writer shares the arguments put forward here against application of the doctrine of disposal for the CMR and would add the following arguments thereto. As was already said in § 2 above the juridical involvement of the third party in the transport contract has been construed in differing ways in the legal literature. The Convention (naturally) does not concern itself with this juridical–dogmatic underpinning and merely provides in Articles 12 and 13 CMR at which moment the consignee can derive rights from the contract. Because the right to delivery of the goods, which in § 2 was indicated as the basis of the substitutionary right to claim, arises following arrival of the goods at the place of destination (Art.13(1) first sentence CMR), this is at the same moment that the consignee becomes party to the contract. This is likewise also the only connection that exists between Article 13 CMR and the right to claim. Consequently the proposition that the Convention does not pronounce upon the question who amongst the claimants can exercise the right of claim against the carrier,⁶⁸ or at best only imperfectly, is justified.⁶⁹ If the specified moment in time does not occur because of loss of the goods or alternatively occurs too late due to delay the consignee receives this right in any event (Art.13(1) second sentence CMR).

Following Helm, Heuer has drawn the conclusion from this last fact that in

65. In Germany I. Koller, *VersR* 1982, p.415 came to the same conclusion.

66. See, e.g., Art.17(2) CMR: 'wrongful act or neglect of the claimant.' Koller, *loc. cit.*, gives here the example of the consignee being entitled to dispose according to Art.12(3) CMR, while the sender makes an error in the loading of the goods; cf. also Art.17(4)(c) CMR. Koller points out further that Art.31(2) CMR is therefore meaningful when both sender and consignee can in principle appear as parties.

67. Nickel-Lanz, no.209; Rodière, *BT* 1974, p.326; Loewe, no.147; Dorrestein, no.174; Putzeys, no.1057; I. Koller, *VersR* 1982, pp.414 et seq. Of the Dutch caselaw the following may be mentioned: *Rb Middelburg* 20.6.1963, *S&S* 1964, 30; *NJ* 1963, 436; *Rb Den Bosch* 11.12.1964, *S&S* 1967, 5; *Rb Dordrecht* 10.5.1967, *S&S* 1967, 70; *Rb The Hague* 18.2.1969, *S&S* 1969, 58; *Hof Leeuwarden* 20.2.1974, *S&S* 1976, 31; *NJ* 1976, 16; *Rb Rotterdam* 30.11.1981, 98. Similarly but prior to the entry into force of the Convention: *Hof Amsterdam*, 28.1.1959, *NJ* 1959, 590. Certainly based on the doctrine of disposal is *Rb Roermond* 16.11.1967, *S&S* 1969, 57. Of the caselaw outside The Netherlands reference may be made to: *Rb Kh Brussels* 22.6.1973, *ETL* 1974, p.330; *Rb Kh Antwerp* 7.12.1973, *ETL* 1976, p.295; *Rb Kh Ghent* 14.5.1975 cited by Ponet, p.378; doubtful, *Hof van Beroep Brussels* 5.12.1968, *ETL* 1969, p.958. In the same line as the German caselaw above is the decision of Super Court Zagreb 21.11.1973, *Hague-Zagreb Essays* 2, p.61; *OLG Vienna* 16.3.1982, *VersR* 1982, p.1082. Likewise with a claim to Art.13 CMR *Hof van Cassatie* 13.6.1980, *ETL* 1980, p.851.

68. Dorrestein, no.173.

69. Nickel-Lanz, no.223; Koller, *VersR* 1982, p.415.

the event of damage the consignee is accorded rights even before the arrival of the goods,⁷⁰ which fits only with difficulty into the doctrine of disposal.⁷¹ It is noticeable that this extensive interpretation of Article 13(1) second sentence CMR is advocated by supporters of the doctrine of disposal who apparently conclude therefrom that the consignee can become party to the contract before the arrival of the goods. According to Netherlands law this moment can certainly occur earlier.⁷² Similarly, it is not disputed that in the event also of loss of the goods the right of claim is accorded not only to the sender but also to the consignee. The primary right obtained by the consignee of delivery of the goods is thus transformed into a right to substitutionary damages when the carrier fails to fulfil his primary obligation. According to current views in The Netherlands the right thus acquired by the consignee does no violence to that of the sender.⁷³ In this the system set out above differs from the view founded on the doctrine of disposal. The CMR also does not oppose a system in which both the sender and the consignee can in principle dispose of the right to claim.⁷⁴ The basis of the consignee's right to institute proceedings appears, therefore, according neither to Netherlands law nor to the CMR, to lie in the right to dispose of the goods but in the right arising upon becoming party to the contract to claim delivery of the goods. Whether the oft-repeated fear is well-founded that 'Doppellegitimation' in such a system constitutes a threat to the carrier falls to be seen in the following section. Acceptance of the situation described here which in principle accords both sender and consignee a right to claim obliges one to investigate further in the following section the question what are the consequences of exercising that right. Certainly the consignee, upon becoming party to the transport contract, in principle disposes of his own right beside the sender but one must not be blind to the fact that both derive that right from one and the same contract.

Proceedings which ended with a decision of the highest Belgian court show that in particular in the case of loss of the goods problems can arise in practice in connection with the question regarding the consignee becoming a party to the contract. The Brussels court of appeal had originally held the consignee competent in his action brought as a result of partial loss of the goods. The carrier raised the defence that the consignee was not a party to the transport contract and consequently could raise no action on the transport contract.⁷⁵ (A different claim, namely, that the consignee had suffered no damage at all as a result of the carriage, is discussed in the following section.) The Hof van

70. Heuer, p.179.

71. R b Middelburg 26.6.1963, S&S 1964, 30; NJ 1963, 436; Helm, *Frachtrecht*, Art.13 CMR, Anm.3 considers that in such a case, in which the goods perish halfway through the journey and are 'recalled' by the sender, there is no question of loss.

72. Wachter, p.266; Van Oven, no.254; Korthals Altes/Wiarda, p.251. Contra, Th. H. J. Dorrestein, NJB 1973, p.1122.

73. The new Netherlands Law effects a change in this situation.

74. See also Art.31(2) CMR.

75. Hof van Beroep Brussels 16.11.1977, ETL 1980, p.319.

Cassatie dismissed the grounds of appeal in cassation with the following consideration:

‘Considering that Article 13 first sentence of the CMR Convention accords the right to the consignee, when loss of the goods is established or when at the end of the period intended by Article 19 the goods have not arrived, to make use in his own name against the carrier of the rights which arise from the transport contract even though he has not been able to join the contract by taking over the consignment note and the goods.’⁷⁶

This decision, which expressly bases the right of claim of the consignee on the text of the Convention, leads to the same result that one achieves when one deduces that the consignee becomes a party to the contract from the fact that he institutes the claim against the carrier for non-delivery of the goods in conformity with the consignment note in his own name.

§ 4. Exercise of the right of claim

In the previous section the conclusion was reached that the CMR was not opposed to the view that after the consignee became a party to the transport contract the right to claim is accorded in principle to both the sender and the consignee. A number of questions of a formal-procedural and substantive nature hereby arise.

As for the procedural aspect it can be stated that the legal position of the carrier scarcely appears to be flourishing if he can be ‘attacked’ from different sides.⁷⁷ Are there sufficient guarantees that in respect of the same damage he will not have to pay twice?⁷⁸ A system in which the right to claim is based upon the right of disposal leads to the logical result that there is no place for the problem just indicated of the so-called ‘Doppellegitimation’.⁷⁹ It has been pointed out that the procedural risk that a system of ‘Doppellegitimation’ brings with it must not be covered up.⁸⁰ When one proceeds from the position that the carrier against whom proceedings are instituted by the sender or consignee is in both cases released by payment there is certainly no danger to

76. Hof van Cassatie 13.6.1980, ETL 1980, p.851.

77. Cf. I. Koller, VersR 1982, p.414.

78. Cf. Rb Amsterdam 18.3.1981, S&S 1981, 84.

79. See § 3 above; cf. Helm, Frachtrecht, § 429 HGB, Anm.36. At the same time it was established that the BGH, although choosing for the right of disposal, did not exclude the sender being competent to claim against the carrier in his own name.

80. Cf. BGH 6.7.1979, VersR 1979, p.1106: ‘Für die von der Bekl erhobenen Bedenken, sie werde möglicherweise vom Absender ein zweites Mal in Anspruch genommen, besteht kein Anlass. Hat der Empfänger berechtigterweise Schadenersatzansprüche wegen Beschädigung des Gutes geltend gemacht, dann kann der Frachtführer, wird er vom Vertragspartner – Absender – nochmals in Anspruch genommen, diesem entgegenhalten, dass er seine Verpflichtung zum Schadenersatz aus dem Beförderungsvertrag einem Berechtigten gegenüber erfüllt habe und damit frei sei.’

be feared. One can also attempt to ward off the danger by means of rules of procedural law.⁸¹

The risk that the carrier appears not to have been released by payment nevertheless remains present to a great extent when one stipulates the requirement that the person who institutes the proceedings for compensation for damage must have suffered damage to his own property interest.⁸²

It is for this reason that both proponents and opponents of the doctrine of disposal struggle with another question which is of a substantive nature: is the person who is formally authorised to exercise the right of claim obliged to demonstrate that he has suffered damage to his own property interest? In other words, must he be likewise materially entitled? Ought right and interest to run in parallel?

This requirement is certainly stipulated in regard to the sender in particular.⁸³ As soon as one stipulates this requirement one is likewise obliged to distil the existence of such an interest from the underlying contract,⁸⁴ consequently from without the transport contract.

This standpoint does not, in the view of the present writer, appear to be devoid of all objection under every circumstance. It is in fact but one step further to propose the interest requirement as a general condition for the exercise of the right to claim. Exercise of rights arising from the transport contract ought not to be dependent upon factors lying outside that contract. In this fashion the exercise of one of the rights arising from the transport contract is made dependent on the underlying legal relationship between sender and consignee as to which the carrier has no part or parcel. The undesirability of the requirement of a substantive interest grounded in such manner has been pointed out on several occasions in the legal literature.⁸⁵ It appears likewise from the caselaw that allowed itself to be led in the first instance by this interest criterion that the criterion is not entirely suitable.⁸⁶

81. A suitable institute herefor is the German Streitverkündung inogevolge § 72 ZPO; here the interested parties involve each other in the proceedings. Cf. Loewe, no.147; Putzeys, no.1060; I. Koller, VersR 1982, p.416.

82. Contra, I. Koller, VersR 1982, p.416.

83. Wachter, pp.267-268, 270-271; Korthals Altes/Wiarda, p.66. Contra, perhaps, Dorrestein, no.175, who gives the sender priority before the consignee.

84. See for a description of this concept as it is employed in this Chapter, n.7 above.

85. One may restrict oneself to citing Helm, *Frachtrecht*, § 429 HGB, Anm.36: 'Die u. U. schwierige Frage, wer im Endergebnis die Ersatzleistung zu erhalten hat, ist ohne Beteiligung des Beförderers unter den in Frage kommenden personen zu klären.'

86. Whether or not on the basis of risk clauses in the underlying (sale) contracts it has been attempted to establish the interest in: Rb The Hague 18.2.1969, S&S 1969, 58; Rb Roermond 16.11.1967, S&S 1969, 57; Hof Leeuwarden 20.2.1974, S&S 1976, 31; NJ 1976, 16; Rb Amsterdam 24.11.1976, S&S 1977, 90. The requirement of interest was dismissed by Rb Amsterdam 15.12.1971, S&S 1972, 92; Rb Rotterdam 30.1.1981, S&S 1981, 98. In a non-CMR case it was likewise dismissed by Rb Utrecht 8.5.1974, S&S 1977, 93. See also emphatically Putzeys, no.1057: 'L'exercice du droit d'action né du contrat de transport est étranger, en principe, aux droits nés du contrat de vente (...) Ainsi, le vendeur-expéditeur ne perd pas son droit d'agir contre le transporteur parce que les marchandises voyagent aux risques de l'acheteur, mais l'acheteur pourra agir aussi.' Further CA Poitiers 7.2.1983, BT 1983, p.455; Cass. 24.5.1982, DMF 1983, p.143.

Perhaps refuge was sought in this interest or risk criterion in the Netherlands because the doctrine of 'Drittschadensliquidation' (which term one reserves for the possibility that formally authorised persons are entitled to claim for damage which another has suffered)⁸⁷ is often restricted to cases where intermediaries play a role. It is not apparent why the application of this doctrine could not likewise extend beyond the cases in which an agency relationship is in issue: one could even propose that the purport of this doctrine is aimed precisely at the abstraction of the underlying legal relationship. Acceptance of the application thereof for the issue with which one is here involved would bring with it that the carrier can pay without risk to the person who is entitled to institute the claim against him. He need not investigate the relationship, which does not concern him, between sender and consignee. Nor can he (unjustifiably) profit from a possible absence of interest in the person entitled to claim.⁸⁸

Acceptance of this possibility that a person may institute a claim without himself having suffered damage to his own property interest consequently excludes, with exception for the exceptional case to be mentioned hereafter, the need for an interest or risk criterion. This is even more the case as it appears that the CMR caselaw in different countries has in great measure made use of this doctrine. In particular is this the case in Germany.⁸⁹ In Belgium also the highest court has without any qualification chosen for an abstraction of the underlying contract. A consignee-buyer, to whom the seller had promised to send goods that had been lost during the carriage but who failed to do so, turned his attention, as a result of the bankruptcy of the seller, to the carrier in regard to compensation for damage for partial loss of the goods. The court of appeal awarded the claim. The carrier appealed in cassation on the ground that awarding the claim to the consignee ought not to have occurred because otherwise the carrier could finally be made liable for the consequences of the non-performance of the seller. The Hof van Cassatie correctly rejected this plea by considering, inter alia, that for the exercise of the right of claim the consignee is not obliged to demonstrate that the goods travelled at his risk. The non-performance of the seller does not take away the interest of the consignee in a proper performance of the transport contract.⁹⁰

Having regard to the satisfactory results which were obtained in the caselaw by application of the doctrine of 'Drittschadensliquidation' in comparison

87. Cf. Helm, *Frachtrecht*, § 429 HGB, Anm.36; BGH 10.4.1974, *VersR* 1974, p.796: 'Schadensliquidation im Drittinteresse.'

88. Helm, *Frachtrecht*, § 429 HGB, Anm.36; I. Koller, *VersR* 1982, p.416.

89. Cf. BGH 1.10.1975, *VersR* 1976, p.168. The criticism of Helm, *Frachtrecht*, § 429 HGB, Anm.36 concerns not the doctrine of Drittschadensliquidation, which he applauds, but the fact that the BGH did not speak out against Doppellegitimation. As the BGH so also OLG Munich 27.3.1981, *VersR* 1982, p.264. See also the decision cited in n.80 above of the BGH 6.7.1979, *VersR* 1979, p.1106. Critical thereof regarding this criterion, I. Koller, *VersR* 1982, p.416.

90. Hof van Cassatie 13.6.1980, *ETL* 1980, p.851. See also even earlier Hof van Beroep Brussels 30.10.1975, *ETL* 1976, p.238, in which it was held that following delivery of the goods the consignee can claim compensation for damage against the carrier, without having to demonstrate that he himself has suffered damage. See for another remarkable line of reasoning in this decision regarding the appearance of the consignee, § 3 above.

with those which were achieved by means of the interest criterion it is considered that this method is justified.⁹¹ The carrier may thus not raise as against the formally authorised person the absence of an interest deriving from the transport contract. In exchange for this is that payment is payment.⁹²

Although it can be stated that exercise of the right to claim ought not in principle to be made dependent on external factors there are nevertheless situations imaginable in which for the question who can exercise the right to claim one is obliged to turn to the underlying legal relationship for assistance. This is the case when the parties simultaneously decide on the ground of their underlying legal relationship that they are able to realise their right to claim and consequently 'attack' the carrier from both sides. One finds oneself then in a predicament for which the solution given above (at text to footnote 92) is recommended. As long as one is denied such a possibility one is thrown back on the interest criterion, as was pointed out by the Hof van Beroep Brussels, which considered:

'that the claim to compensation for damage is in principle not bound to the question of the ownership and the risk in the goods; that it is so only when the carrier is alleged to be liable by both the sender and the consignee (...); that the requirement is only acceptable for the person who suffers damage on the basis of the contractual relationships.'⁹³

That leaves now the question whether what has been established thus far remains effective when the transport contract came about through the activity of an intermediary. The following section is concerned with this.

§ 5. Intermediaries

In the practice of transport law it is more the rule than the exception that between the seller of goods and the person for whom those goods are finally destined there occur extra contracts, which together with the transport contract form as it were a chain. In regard to the matter dealt with in this chapter the question presents itself whether in particular the despatch and receiving forwarders possess an independent right to claim in regard to damage they have not themselves suffered (1). If this question is answered in the affirmative then the question arises whether it follows therefrom that their principals, although not contracting parties, can institute a claim against the carrier (2).

91. The argument of I. Koller, *VersR* 1982, pp.414 et seq. in which he supports on practical and procedural grounds the requirement that the formally authorised person likewise must show that he has suffered damage fails to convince.

92. For the case where the parties entitled to claim are from the outset divided on the question who in casu can realise the right to claim, it may be considered requesting the carrier, who will remain outside this conflict, to deposit the amount for which he is alleged to be liable in a separate account or in a fund specially intended therefore.

93. Hof van Beroep Brussels 16.11.1977, *ETL* 1980, p.319. Even earlier had this court come to this position in a decision of 5.12.1968, *ETL* 1969, p.958.

As the CMR does not have anything to say on this problematic one must enquire whether in the law of various countries common elements are to be discovered. For these questions one refers also to the two previously treated related aspects, namely, the concept of party (§ 2) and interest (§ 4). One may begin with the latter.

1. (a) The Netherlands. Caselaw has for many years in The Netherlands been active to accord the intermediary in transport law dealing in his own name an independent right to claim. With acceptance of that right was brought to a close a period in which both the intermediary (because he had suffered no damage to his own property interest) and the principal, being the truly interested party, (because he was not a contracting party to the transport contract), were generally left out in the cold. The first signs of change in the caselaw were therefore greeted with delight.⁹⁴ That period can be regarded as definitely closed in 1977 with the decision of the Hoge Raad in which it was decided:

‘that someone who concludes a contract in his own name but on behalf of a principal can in principle make use also in his own name on behalf of the principal of the rights arising from that contract; that in particular this also applies to a claim such as that instituted in the present proceedings, covering compensation for damage which is suffered as a consequence of termination of the contract for non-performance on the part of the party against whom the non-performance was effected; that it thereby in principle makes no difference – leaving aside the influence of Art. 1283 BW – whether this party suffered damage to his own property interest or instead institutes the claim entirely or jointly on behalf of the principal with a view to obtaining compensation for the damage suffered by him.’⁹⁵

(b) Other countries. Some considerable time before the interesting case above the Hof van Beroep Brussels had come to the same result in a CMR case. Although the freight forwarder dealing in his own name had suffered no damage to his own property interest his action for damages instituted against the carrier was held to be well-founded.⁹⁶ The same result has been reached in France, Germany and England.⁹⁷ One may conclude that intermediaries

94. Hof The Hague 26.1.1967, NJ 1968, 7. In this case it was left undecided whether or not the forwarder had suffered damage to his own property interest.

95. HR 11.3.1977, NJ 1977, 521. For the CMR: Rb Rotterdam 1.10.1976, S&S 1977, 23; Rb Amsterdam 18.3.1981, S&S 1981, 84. In the legal literature various routes were given along which this satisfying result could be attained.

96. Hof van Beroep Brussels 5.12.1968, ETL 1969, p.958. Cf. Frédericq, no.1720; Putzeys, nos.1065 et seq.

97. Cass. 4.5.1982, BT 1982, p.332: a commissionnaire de transport has a direct action against the carrier if he has either indemnified his client or he is prepared to do so and his client is prepared to await the result of the proceedings instituted by the commissionnaire de transport against the carrier. Cf. CA Paris 4.7.1984, BT 1985, p.158; CA Chambéry 27.6.1984, BT 1985, p.159.

For Germany cf. BGH decisions cited in the preceding section; Helm, *Frachtrecht*, § 429 HGB, Anm.36.

For England, see Hill/Messent, p.150.

who deal in their own name may likewise institute legal claims against the carrier. The interest requirement is here no hindrance.

2. The second aspect of this matter concerns the concept of party. Does what has been established above mean that the person whose interest in the performance of the transport contract is injured but who is himself not a party to that contract, is not accorded a right of action?

(a) The Netherlands. In The Netherlands the temptation is discernible in both legal literature and caselaw to accord the right to claim likewise to the principal of the intermediary dealing in his own name, which leads to a widening of the juridical concept of party. The question hereby arises whether that result, having regard to the caselaw mentioned above, is justified.⁹⁸ The Dutch law of contract indicates a widening of the party concept. In the opinion of the present writer it does not necessarily follow from the extract from the decision of the Hoge Raad cited above regarding the right of claim of the intermediary that no action for damages should be accorded to the principal.⁹⁹ Nor does analysis of the caselaw development which found expression in the above case show that a direct action by the principal must be excluded. What was unsatisfactory with the former caselaw was in fact that neither could claim compensation for damage.¹⁰⁰ Moreover, it does not seem unreasonable that the carrier should take into account an action that may be brought against him by the principal of the intermediary having regard to the fact that he must be aware of the current practice of using intermediaries.¹⁰¹

A similar development has become a fact in the practice of transport law, to which the Netherlands legislature has joined. In the CMR caselaw of The Netherlands a tendency in this direction is also to be perceived.¹⁰² Moreover, what has been defended in the previous section regarding the legal relationship between sender and consignee can a fortiori here be applied to the legal relationship between principal and freight forwarder: that relationship does not concern the carrier.

(b) Other countries. In France the person behind the scenes is likewise accorded a direct action.¹⁰³ The condition is, however, attached to this that

98. Rb Rotterdam 30.1.1981, S&S 1981, 98 refused to allow the claim against the forwarder, being the contractual opposite party of the carrier (which is not in agreement with the decision of the HR in 1977 cited above) and admitted the claim to the principal.

99. Contra, Asser-Van der Grinten, I, pp.74, 77.

100. This does not take away the fact that in this respect highly unsatisfactory situations can continue to exist and arise; cf. Hof Leeuwarden 22.5.1974, S&S 1977, 41, where the insurer of the actual shipper, at the same time the principal, could exercise no rights against the carrier once it was established at the hearing that the shipper had no contractual relationship with the (sub-) carrier. This unsatisfactory result could be remedied either by application of the doctrine of *Drittschadensliquidation* or by an assignment of the claim of the forwarder to the principal or by Art.34 CMR which was incorrectly not applied by the Hof.

101. Wachter, p.275, 278. Hill/Messent, p.150.

102. Cf. Rb Rotterdam 30.1.1981, S&S 1981, 98; Rb Amsterdam 18.3.1981, S&S 1981, 83.

103. Art.101 CComm: 'La lettre de voiture forme un contrat entre l'expéditeur et le voiturier, ou

the carrier must be aware of his existence.¹⁰⁴ This does not imply, however, that the intermediary (in *casu* *commissionnaire de transport*) is denied the right to claim.¹⁰⁵ One presumes that the same is true of Swiss, Italian¹⁰⁶ and Belgian¹⁰⁷ law. Even in Germany the highest court has decided in regard to a legal question, which was governed by the CMR, that the person who in actual fact had suffered the damage resulting from the carriage could exercise the right to claim in his own name, although that person could not be regarded juridically as the consignee.¹⁰⁸ In England the possibility exists that the principal/owner of the goods may proceed against the carrier over the head of the forwarder.¹⁰⁹

On the ground of the development here indicated in the law of various Convention States it is here concluded that it would be sensible for the cases that are covered by the CMR in principle to accord the right to claim likewise to the principal whose forwarder concludes a transport contract with the carrier in his own name as sender or who acts as consignee. This conclusion implies an extension to the juridical concept of party as that was established above in § 2. This extension in the interest of the principal does not mean making a concession to the doctrine of interest disputed in the previous section but is a consequence of a gradually widened concept of party. The principal is a contractually related party.

entre l'expéditeur, le commissionnaire et le voiturier.' Cf. Lamy, no.436. See also the CMR caselaw from which emerges that the principal as 'expéditeur réel' has a direct action against the carrier: CA Paris 13.4.1970, BT 1970, p.167; Tr Comm Paris 17.11.1973, BT 1973, p.514; CA Bordeaux 31.10.1973, BT 1975, p.526 and most emphatically also Cass. 27.10.1975, BT 1975, p.526. Cf. in the same sense for national law CA Reims 8.6.1982, BT 1983, p.382.

104. Rodière, Sirey, nos.571 A, 571 B.

105. Cf. CA Paris 10.12.1971, BT 1972, p.19; CA Lyon 5.2.1982, BT 1982, p.154.

106. Cf. § 401 OR; Art.1705 CComm, respectively.

107. Putzeys, nos.1065, 1067.

Remarkable is Rb Kh Turnhout 12.11.1981, ETL 1983, p.105 where it was held that the forwarder in his own name (*commissionnaire de transport*) could not but that a forwarder in the name of his principal (*commissionnaire-expéditeur*) could appear at law against the carrier. See *ibid.* the criticism of the editorial board of ETL.

108. Cf. BGH 6.5.1981, VersR 1981, p.929; ETL 1982, p.313. Contra, OLG Dusseldorf 13.11.1980, VersR 1982, p.89. For an assignment by the sender to his insurer see, BGH 14.3.1985, VersR 1986, p.753, followed in OLG Hamburg 19.12.1985, VersR 1986, p.261.

109. Cf. D. J. Hill, *Contractual Relationship between Shipper, Forwarder and Carrier by Road*, (1975) 2 LMCLQ, p.137; Hill/Messent, p.150.

Just as is the case in France with the *commissionnaire de transport* the English forwarder possesses an entirely individual character which can lead to uncertainty. According to the circumstances of the case this figure can function as principal or agent. Cf. also D. J. Hill, *Auxiliaires*, pp.53 et seq., as also D. J. Hill, *Some Problems of the Undisclosed Principal*, *Journal of Business Law* 1967, pp.122 et seq.

Jurisdiction

'The literature and caselaw show some surprising misunderstandings regarding the significance of the CMR rules on jurisdiction.'¹

§ 1. Introduction (Art.31 CMR)

In order to further and to guarantee substantive legal unity the Convention presents in Articles 31 and 33 CMR a mandatory law regulation of a procedural law nature. This regulation contains diverse matters: international competence of courts and tribunals (Artt.31(1) and 33 CMR), pendency (Art.31(2) CMR), enforceability (Art.31(3) and (4) CMR) and security for costs (Art.31(5) CMR). The jurisdiction provisions regulated in Article 31(1) CMR in particular are of a controversial nature. The courts referred to in Article 31(1)(a) and (b) CMR need not, in contrast to those referred to in the opening words of Article 31(1) CMR, belong to Convention States. It is also possible that the courts referred to in Article 31(1) CMR belong to countries that are in no way involved with the relevant international transport contract.

Application of Article 31(1) CMR has led to divergent views that arise principally from a different approach to the character of the jurisdiction provision. On the one hand, the view is defended that Article 31(1) CMR must be regarded as primarily competence restrictive in the sense that a court is competent only when relative competence is conferred according to the law of that country. In this view consequently the national procedural law decides whether the courts specified by the Convention are to have jurisdiction. This standpoint is founded in The Netherlands principally upon the final phrase of Article 31(1) CMR reading, 'and in no other courts or tribunals'.² The result of this approach is that the aims of the Convention are rendered fruitless whenever the law of the country of the courts referred to in Article 31(1)(a) and (b) CMR are not or insufficiently in tune with the courts specified in Article 31(1) opening words CMR.

The other approach, accepted virtually everywhere, is that Article 31(1) CMR is in fact competence creative in the sense that the courts specified by Article 31(1)(a) and (b) CMR possess jurisdiction which should be further concretised by the national rules concerning relative and absolute competence. To a great extent the controversy amounts to the question to what is one entitled in justice when the national law of procedure gives no substance to the international jurisdiction conferred by virtue of Article 31(1) CMR.

The importance of this issue can be appreciated in particular when, for example, a sender/exporter wishes to institute proceedings against the carrier before the court of the country in which the place of taking over of the goods

1. Loewe, no.236.

2. In their decisions (cited below at § 5) the Rb and Hof Arnhem have followed in the path of Dorrestein, taking the clause cited as the starting point for their considerations.

is situated. When in such a case the law of the court petitioned possesses no rules of competence in tune with Article 31(1)(a) and (b) CMR (which is usually the case)³ and does not know the forum actoris⁴ either, as for example the German Zivilprozessordnung, should the sender be obliged to petition another, generally foreign court. This is perhaps in part the reason why the problem here indicated surfaced in Germany and, due partly to intervention of the highest court, displayed a development with a most remarkable pattern. One will find this issue dealt with in § 5 below.

To that end a number of other matters, equally concerned with jurisdiction, are dealt with. In the light of several judicial decisions in The Netherlands as well as possibilities offered in the legal literature advocating a possible application of provisions of the EEC Convention concerning Jurisdiction and Enforcement of Judicial Decisions in Civil and Commercial Matters (hereafter, Judgments Convention)⁵ in substitution for or at least supplementary to the jurisdiction provision of the CMR, it is necessary to enquire further into the nature of the latter provision (§ 2). Thereupon it is necessary in connection therewith to determine which legal claims are covered by the provision under discussion (§ 3).

Besides the courts specified in Article 31(1)(a) and (b) CMR the parties may also bring a dispute before the court chosen by them (forum prorogatum: Art.31(1) opening words CMR) or submit their dispute to an (arbitral) tribunal (Art.33 CMR). In contrast to the case regarding the courts mentioned previously, the court or tribunal agreed by the parties should belong to a Convention State or it should have been expressly provided that the arbitral tribunal shall apply the CMR. In particular, in regard to the chosen court, which is normally stipulated by means of a jurisdiction clause, the question has arisen whether such a clause possesses an exclusive operation or alternatively has merely an optional character. In other words, despite the choice of a court by the parties, does a party retain the freedom to petition one of the courts indicated by Article 31(1)(a) and (b) CMR? (§ 4).

In § 6 a final word is addressed to the remaining paragraphs of Article 31 CMR in which a number of other aspects of a procedural law character are summarily regulated.

§ 2. Nature of the jurisdiction provision

In the light of existing bilateral and multilateral conventions regarding jurisdiction and also against the background of the caselaw of The Netherlands in particular it is necessary to enquire further as to the nature of this jurisdiction provision. The provision is clearly in the interest of the person entitled to the goods given that as a result he can institute proceedings in the country where the property of the carrier is to be found or in the country of the place where

3. Swedish and Danish law constitute an exception to this; cf. further § 5.

4. Cf. Art.126(3) Rv.

5. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, Trb 1969, 101: entered into effect on 1 February 1973: hereafter Judgments Convention.

the goods were taken over or that of the place designated for delivery of the goods.⁶ The provision is intended in consequence to ensure that courts petitioned following CMR disputes will declare their readiness to hear the dispute whether or not they have jurisdiction on the ground purely of national law.⁷ Just as was established in regard to the scope rule of Article 1 CMR,⁸ the function of Article 31 CMR is to exclude national law including private international law on this point.⁹ This function is again expressed, albeit superfluously, in the concluding phrase of Article 31(1) CMR, 'and in no other courts or tribunals'. The question whether, and if so to what extent, the nature of the CMR jurisdiction provision has been recognised can be tested, other than on the basis of application of national law, by reference to the question of the relationship between this provision and provisions of uniform procedural law. Thus, following the entry into force of the Judgments Convention, the question arose particularly of the eventual application of the former convention beside the CMR. Although Article 57 Judgments Convention at first sight appears clear,¹⁰ the border between that Convention and Article 31 CMR seems insufficiently certain. If, on the one hand, the view exists that the Judgments Convention is in no way applicable to a contract governed by the the CMR,¹¹ others are of the contrary opinion that the Judgments Convention can be applied when the CMR provides no rule for a particular question.¹²

Whatever the case might be, even in the latter view merely a modest supplementary effect for the Judgments Convention is argued for, which, and on this there is no dispute in the legal literature, does not concern judicial competence.¹³ This latter point is expressed most clearly in the French caselaw. Thus the court of appeal at Lyon held that even Article 5 Judgments Conven-

6. Nickel-Lanz, no.217.

7. Loewe, no.235.

8. Chapter 2, § 2.

9. Helm, *Frachtrecht*, Art.31 CMR, Anm.1: 'Die Bestimmungen des Art.31 gelten (...) als selbständige Normen des internationalen Zivilprozessrechts. Sie enthalten ihre eigenen Rechtsanwendungsregeln. Es bedarf daher nicht mehr der Vorschaltung der nationalen Regeln des internationalen Zivilprozessrecht.' Cf. Hill/Messert, p.164.

10. Art.57 Judgments Convention reads: 'This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgments.'

11. Bülow-Bockstiegel, *Der Internationale Rechtsverkehr in Zivil-und Handelssachen*, Munich 1973, pp.606-649; doubtful, Putzeys, no.1086.

12. Helm, *Frachtrecht*, Art.31 CMR, Anm.2; J. Kropholler, *Handbuch IZVR I Kap.III, Rz 406*; Kropholler, *Europäisches Zivilprozessrecht*, Heidelberg 1982, Art.57, Rz.4, considers the Judgments Convention applicable exclusively to the question unregulated by the CMR of the form of the jurisdiction clause, see Art.17 Judgments Convention.

13. Besides Art.17 Judgments Convention also Artt.24 and 34 et seq. could possibly arise for application. On Artt.34 et seq., which concern enforcement, see further § 6. On the difficulties of delimitation between the Judgments Convention and other conventions arising from Art.57 Judgments Convention, cf. Schlosser Report, *Official Journal EEC*, C59, nos.238 et seq.

tion¹⁴ is not applicable between CMR States which are also Parties to the Judgments Convention.¹⁵ The highest court in France has also plainly held that Article 31 CMR derogates from the Judgments Convention, particularly Articles 5 and 6 thereof.¹⁶

An example of what, in the opinion of the present writer, is incorrectly proposed as a supplementary effect of the Judgments Convention is to be found in a judgment of that same French court. These complicated proceedings were based upon the following facts. An Iranian carrier had accepted the obligation as against an Iranian principal to transport goods from Germany to Iran. The Iranian carrier enlisted in this the assistance of a French commissionnaire de transport who in turn sub-contracted the carriage to a German colleague. The carriers, who admitted to being merely commissionnaires de transport, adopted by agreement the application of the CMR. In regard to the damage that occurred during the carriage the Iranian carrier, liable as against his principal, sought redress from the French commissionnaire de transport before a Paris court stipulated by the latter in a jurisdiction clause. Regarding the objection to jurisdiction submitted by the German carrier joined as indemnifier the Cour de Cassation held that the French court was competent on the ground of national procedural law (in casu Art. 333 NCPrC) as well as on the ground of Article 6 Judgments Convention.¹⁷ This last conclusion is incorrect because Article 31(1) opening words CMR concerns all legal proceedings to which carriage under the CMR gives rise.¹⁸

An argument that likewise pleads against supplementary application of the Judgments Convention to contracts regulated by the CMR is the distinction that can thereby arise between CMR States which are, and those which are not, Parties to the Judgments Convention.

That the Judgments Convention should not be applied in regard to the question of competence arising upon a contract subjected to the CMR has been insufficiently discerned in a number of cases in The Netherlands. In two sets of proceedings, which concerned claims for unpaid freight by a Netherlands carrier against a foreigner entitled to the goods, jurisdiction provisions of the Judgments Convention were applied. In the first case the Rechtbank Rotterdam accepted an objection to jurisdiction raised by a German principal

14. Art.5 opening words and (1) Brussels Convention (special jurisdiction) reads: 'A person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to a contract in the courts for the place of performance of the obligation in question.'

15. CA Lyon 21.10.1976, BT 1977, p.110 confirming Tr Comm Lyon 1.8.1975, BT 1975, p.407. Cf. also J. C. Schultsz, n.2 below Hof Arnhem 20.1.1981, NJ 1983, 186.

16. Cass. 3.6.1981, BT 1981, p.431; Recueil Dalloz 1981, p.532. Cf. for Belgium Rb Kh Antwerp 4.1.1977, ETL 1977, p.843 and 5.4.1977, ETL 1978, p.478.

17. Cass. 21.6.1982, BT 1982, p.513. Art.6 opening words and (1) Judgments Convention (special jurisdiction) reads: 'A person domiciled in a Contracting State may also be sued: 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled.'

18. Likewise the fact that the German carrier stated that Art.39(2) CMR, which regulates the recourse action between carriers, does not mention indemnity is in this respect irrelevant. On claims based on the ground of Art.39(2) CMR see further Putzeys, nos.1099, 1100.

of a carrier resident in The Netherlands.¹⁹ The Rechtbank considered that the question as to the place of payment of the freight was not regulated by the CMR. Thereupon the Rechtbank came to the conclusion by way of a legal sphere criterion derived from the conflict of laws that German law, which indicated Hamburg as 'Leistungsort' had to be applied to that legal question, with the result that the German court on the grounds of Articles 2, 3 and 5 Judgments Convention was declared to have jurisdiction. The method employed by the Rechtbank, to the extent that it led to application of Articles 2-5 Judgments Convention via private international law, must be rejected.²⁰

In a virtually identical case the Hof Den Bosch in a more recent decision considered the Netherlands court to have jurisdiction likewise on the ground of Article 5(1) Judgments Convention.²¹ The appeal court came to this conclusion because it declared Netherlands law applicable to the question where payment of the freight charges should take place, in contrast to the Rechtbank Rotterdam above. In contrast to the Rechtbank Breda, which, in a judgment as concise as it was clear, had declared itself competent on the ground of Article 31(1)(b) CMR, as well as, in so far as can be determined from the recital of facts, on the ground of Article 126(3) Rv or Article 127 Rv,²² the court of appeal held that first it must be enquired against the background of Article 5(1) Judgments Convention which court had jurisdiction in casu. By way of the private international law criterion of the characteristic performance this led to application of Netherlands law regarding the question where payment of the freight should take place, from which it followed that the place where the claimant/carrier has his residence is thereby indicated. Consequently this line of thinking, with its starting point at Article 5(1) Judgments Convention, led to the Rechtbank Breda having jurisdiction. In the remaining, complicated considerations the court elaborated why the jurisdiction provisions of Article 31 CMR, which in combination with Article 126(3) Rv rendered the Netherlands court both internationally as well as relatively competent, led to the same result as the 'Judgments Convention method' employed here by the appeal court.

This method of ascertaining the law reveals a clear misconception of the nature of the jurisdiction provision of Article 31 CMR. The danger in the manner of tackling the problem followed by the appeal court remains hidden now that two different routes lead to the same result but reappears clearly were the appeal court, and likewise the previously mentioned Rechtbank Rotterdam, to have referred to the law of the sender (in casu Italian law) in resolution of the litigation, so that the Netherlands court – in the eyes of the appeal court – would have been without jurisdiction. In this way the question of

19. Rb Rotterdam 26.11.1976, S&S 1977, 22; NJ 1978, 321. The Rb conceded that, as the legal claim in dispute concerned matters not regulated by the CMR, the substantive unity of the CMR was in that case not directly concerned in the dispute. See further § 3.

20. It is not possible to judge whether the Rechtbank was competent in concreto as it is not possible to ascertain from the facts where were the places of taking over of the goods and of delivery. If one of the two was situated in The Netherlands then the court had jurisdiction on the ground of Art.31(1)(b) CMR in conjunction with Art.126(3) Rv.

21. Hof Den Bosch 16.8.1983, S&S 1984, 69; NJ 1984, 714.

22. Rb Breda 7.9.1982, S&S 1983, 60.

competence is made dependent on a conflict of laws rule that even in the one country is not definitely established, which is precisely what Article 31 CMR aims to prevent.

§ 3. Scope of the jurisdiction rule (Art.31(1) opening words CMR)

Closely connected with what has been dealt with in the preceding section is the scope of Article 31 CMR which deserves separate attention to be paid to it. Just as the regulation of the period of limitation (Art.32 CMR) (on which see further Chapter 8), Article 31 CMR is concerned with all legal proceedings to which carriage under the Convention gives rise. In general such legal proceedings will be concerned with the liability of the carrier regulated by the Convention. It was pointed out earlier²³ that not all actions for damages against the carrier are regulated by the Convention. Nevertheless, such claims clearly fall within the scope of Article 31 CMR.²⁴ This is equally the case, as appeared in the previous section, with claims instituted by the carrier against the other party for unpaid freight as well as for recourse actions²⁵ and indemnity actions²⁶ against successive or sub-carriers.

Do extra-contractual claims also fall with the above contractual claims under Article 31 CMR? In the opinion of the present writer this question must indisputably be answered in the affirmative.²⁷ Apart from the circumstance that the formulation of Article 31(1) opening words CMR warrants such an answer, reference can also be made to the argument of the system of the Convention. One must differentiate which claims are here involved and by whom they are instituted. One is entering here upon the terrain of the concurrence problematic, which was previously examined.²⁸ It is therefore not surprising that one encounters again with Article 31 CMR the standpoint defended in the legal literature regarding Article 28 CMR.²⁹ The standpoint earlier adopted by the present writer³⁰ brings with it that extra-contractual claims fall under Article 31 CMR unless instituted by persons who in no

23. Chapter 5, § 1.

24. Loewe, no.249; Clarke, no.48.

25. In the case of recourse actions Art.39(2) CMR restricts the competence of the court to the category of Art.31(1)(a) CMR. For a similar procedure see QB 6.5.1981 [1981] 2 Lloyd's Rep 106; CA 16.7.1981 [1981] 2 Lloyd's Rep 402 (Cummins v. Davis Freight); OLG Dusseldorf 23.10.1980, VersR 1981, p.1081.

26. Cf. above § 2, n.17, n.18.

27. Cf. Loewe, no.238; Clarke, no.48 states correctly that a contrary view 'would create a significant gap in the curtain of uniformity sought by the CMR.' Hill/Messent, p.165.

28. Chapter 5, § 8.

29. Loewe, no.239 recognises no claim that does not flow directly from the CMR contract. Putzeys, no.1088 bis recognises no extra-contractual claims because Belgian law does not recognise joinder of claims. Cf. further Helm, Frachtrecht, Art.31 CMR, Anm.3; Clarke, no.48.

30. Chapter 5, § 8.

sense stand in a consensual relationship to the CMR transport. Here one thinks, for example, of damage to vehicles, not being CMR vehicles, and their loads as a result of a traffic accident in which the CMR carrier is involved.³¹

Finally, a difference of opinion has arisen in the legal literature as to the question whether claims regarding damage occurring as a result of the non-performance of the transport contract fall under Article 31 CMR. With Helm³² and Putzeys³³ and in contradistinction to Loewe³⁴ and Hill/Messent³⁵ the present writer is of the opinion that the formulation of that provision justifies an affirmative answer.

§ 4. Choice of court (or tribunal) (Art.31(1) opening words CMR; Art.33 CMR)

Besides the courts indicated as competent by virtue of the connecting factors specified in Article 31(1)(a) and (b) CMR, which will be examined in the following section, the parties are free to petition other courts. Here they have a choice between a court of a Convention State (Art.31(1) opening words CMR) and an arbitral tribunal (Art.33 CMR). Apart from a number of different consequences, these courts have in common, in contrast to the courts to be dealt with in the following section, that application of the CMR is assured.³⁶ Illustrative of this is the case in which the Rechtbank Amsterdam took no account of a jurisdiction clause which declared the court at Thessalonika exclusively competent and thereby left out of consideration the fact that the Greek court would most probably not apply the Convention.³⁷ Due to the many ratifications of the Convention this danger at least in Europe is reduced.

Meanwhile, another delicate question concerning the choice of forum of Article 31(1) CMR and to a lesser extent regarding Article 33 CMR attracted attention. It concerned the question, which occurs in other branches of the

31. Cf. Loewe, no.239; Hill/Messent, p.165.

32. Helm, *Frachtrecht*, Art.33 CMR, Anm.3.

33. Putzeys, no.1088.

34. Loewe, no.239.

35. Hill/Messent, p.165.

36. Art.41 CMR contained in an earlier version the prohibition on evading the Convention law by means of jurisdiction clauses attributing jurisdiction on non-Convention States. Paragraph 2 read: 'In particular ... any clause conferring competence on courts on non-Contracting States (...) shall be null and void, it being understood that a clause conferring competence on an arbitration board shall be admissible if it requires the board in question to apply the present Convention.' TRANS/WP9/22, 21 December 1953, Appendix p.22. The arbitration rule was finally placed separately in Art.33 CMR.

37. Rb Amsterdam 14.9.1977, S&S 1979, 89. Earlier Rb Rotterdam 27.4.1971, S&S 1971, 73; NJ 1972, 482, in an excellently reasoned judgment had thwarted the application of Greek law. Cf. also CA Paris 22.6.1977, BT 1977, p.468.

law of transport, whether the chosen courts take the place of or operate alongside the other competent courts. Has a stipulation in which a choice of a particular court of a Convention State is expressed an exclusive or an optional character? In the legal literature the majority of writers adopt the latter standpoint in regard to the courts specified in Article 31(1) opening words,³⁸ which standpoint one likewise encounters in the caselaw.³⁹ That the text of Article 31(1) CMR allows room for this argues in favour of the view.⁴⁰ In addition, one of the aims of Article 31 CMR is the protection of the position of the person entitled to the goods as against the carrier.⁴¹ Rodière⁴² has pronounced in favour of the exclusive character of the jurisdiction clause basing himself thereby on a decision of the *Rechtbank Dordrecht*.⁴³

The question arises whether the current doctrine ('optional view') likewise applies to arbitration. Most writers do not touch upon this question, possibly be-

38. Loewe, no.240; Helm, *Frachtrecht*, Art.31 CMR, Anm.4; Putzeys, no.1090 on historical grounds; D. Glass (1984) 1 LMCLQ, p.38 n.23; Dorrestein, no.283 but with some reservation; Clarke, no.48 provided the sender has dealt on behalf of the consignee as a full agent. The FIATA Report, p.25 also shared the 'optional view'; Hill/Messent, p.165.

39. Emphatically *Rb Kh Antwerp* 4.1.1977, ETL 1977, p.843: 'The jurisdiction clause in the bill of lading restricts the consignees' possibilities to take action and is thus in conflict with the mandatory provisions of the CMR Convention' (p.846). *Rb Kh Antwerp* 5.4.1977, ETL 1978, p.478: 'That Article 31 of the CMR Convention offers a fourfold possibility as to competence and at the same time Article 41 CMR Convention guarantees the choice from among the four possibilities offered' (p.481). Cf. further for the similar caselaw of this court 23.9.1975, ETL 1976, p.279; 6.9.1978, cited by Ponet, p.389. Further *Rb The Hague* 24.3.1977, S&S 1978, 30; *Rb The Hague* 23.11.1983, S&S 1984, 114.

40. French text: 'en dehors'; English text: 'in addition to.' Cf. also the last decision cited in the preceding note. In this respect Art.21 Hamburg Rules uses clearer language: '... at his option ...'

41. Cf. Nickel-Lanz, no.217; Loewe, Report of the revision conference at Geneva, W/TRANS/SCI/438, 19 April 1972, p.14. There also appears to be an interest in sea law in realising this aim in the interest of the consignee, cf. I. H. Wildeboer, *Recht door Zee* (Festschrift Schadee), Deventer 1981, p.221, where the 'principal place of business' clause stipulated by the carrier is adjudged to be unacceptable. In the meantime situations occur whereby also the carrier can or ought to be able to benefit from such alternative jurisdictions, cf. Dorrestein, no.283; D. Glass, (1984) 1 LMCLQ, pp.38-39 n.23 with reference to the decision regarding *The Hollandia*, which is of interest in this context; equally, I. H. Wildeboer, loc. cit., p.222. On *The Hollandia* see further F. A. Mann, (1983) LQR pp.403 et seq.

42. Rodière, pp.338-339.

43. *Rb Dordrecht* 18.5.1966, S&S 1966, 89; ETL 1968, p.416. The jurisdiction clause in this case was not regarded as exclusive because the court established as fact that that was not sufficiently expressed by the wording used. Likewise tending towards the exclusive character is CA Paris 14.11.1969, BT 1969, p.363; ULC 1970, p.133, to the extent that the consignee was aware of the clause. In this sense also Clarke, no.49. *Rb Arnhem* 24.9.1981, roll no.1981/877, Asser Card System 13.173 declared itself emphatically in favour of the exclusivity of such a clause. The clause adopted by the English carrier in his standard conditions: 'All agreements between the Company and its customers shall be governed by English law and be within the exclusive jurisdiction of the English courts' thus prevented the Dutch principal from petitioning the Netherlands court, despite his claim to Art.41 CMR! This decision is based on the view given above in § 1 and disputed in § 5 that Art.31 CMR does not confer competence.

Contra, correctly, *Rb The Hague* 23.11.1983, S&S 1984, 114, which held that from the fact of acceptance of the consignment notes, which contained the jurisdiction clauses, no consensus ad idem could be inferred with regard to the designation of a particular court.

cause they adopt the position that exclusivity stems from the nature of the arbitral clause. As a result of proceedings brought in England,⁴⁴ in which the person entitled to the goods pleaded likewise for the optional character of an arbitral clause within the meaning of Article 33 CMR, Glass has convincingly adopted the standpoint that such interpretation of Article 33 CMR is not very probable.⁴⁵ When parties wish to include such a clause it would seem, in the opinion of the present writer, that a statement thereof or at least a reference thereto in the CMR consignment note is a primary requirement (cf. Art.6(3) CMR).

Except when a court within the meaning of Article 31(1) opening words CMR is referred to, in which case application of the CMR is ensured,⁴⁶ Article 33 CMR requires that the arbitral clause provide for the application of the CMR. The historical background to this requirement is clear,⁴⁷ yet the question can be posed whether the absence of such provision leads to the arbitral clause being fruitless. This fate has to an extent befallen a number of arbitral clauses. Thus the *Rechtbank Rotterdam* declared invalid a clause in which all disputes between the parties were submitted to arbitration in London because of a failure to stipulate therein that the arbitral tribunal should apply the CMR.⁴⁸ The *Rechtbank* held further that as English law was stipulated as applicable in the conditions and as the carriage in litigation occurred before the accession of England to the Convention it was moreover already determined that the CMR would not be applied.

An interesting question thereby was whether an arbitral clause that did not specify *expressis verbis* the applicability of the CMR but which instead referred to the law of a Convention State was likewise invalid according to Article 33 CMR. In France and England courts have indeed answered this question in the affirmative. In both cases it concerned a clause in which the application of Swedish law by the arbitrators was stipulated.⁴⁹

44. QB 1.12.1981 [1982] 1 Lloyd's Rep 410 (A. B. Bofors-UVA v. A. B. Skandia Transport). The Scandinavian conditions which were referred to in the waybill contained, *inter alia*, the following clause pleaded in the case: 'Arbitration Clause Sweden: Disputes between the freight forwarder and the customer shall with the exclusion of Ordinary Courts of law be referred to arbitration in Stockholm according to the Swedish law on arbitrations and with the application of Swedish law.' On this clause in another context see the text of this section. See also Hill/Messent, p.190.

45. D. Glass, (1984) 1 LMCLQ, p.39 n.24: 'Arbitration is generally seen as an exclusive (as opposed to optional) alternative to the jurisdiction of the courts and such a radical departure seems highly unlikely.' Cf. Loewe, no.273; Dorrestein, no.287. For England the Arbitration Act 1975 must be taken into consideration.

It is noticeable in this context that Art.22 Hamburg Rules confers an optional character on an arbitration clause.

46. The FIATA Report, p.25 would drop this restriction. Because it does not here concern an exclusive forum and the sender is sufficiently protected by the courts specified in Art.31(1)(a) and (b) CMR the Report regards this restriction as unjustified.

47. Cf. n.36 above.

48. Rb Rotterdam 10.11.1970, S&S 1971, 61; ETL 1971, p.273.

49. CA Paris 27.6.1979, BT 1979, p.440; QB 1.12.1981 [1982] 1 Lloyd's Rep 410 (A. B. Bofors-UVA above). The relevant clause (see n.44 above) is encountered in Art.30 of the Scandinavian Forwarders Conditions (1975), reproduced in *Auxiliaires*, pp.311 et seq.

Is this caselaw reasonable? It has been held that this caselaw fails to perceive the fact that the reference to Swedish law brings with it that the CMR, as a part of Swedish law, is indirectly applicable. A court that decided otherwise called down the reproach of nationalism upon its head.⁵⁰ In the opinion of the present writer a certain restraint is called for regarding such a judgement. What is here at issue is not so much a legal question which must be resolved by the CMR but rather a matter of purely factual construction of such a clause.

This question arose clearly in the above-mentioned English decision.⁵¹ The legality of a clause which referred to Swedish law, which – as already said above – had incorporated the CMR, was pleaded by the carrier given that Article 33 CMR did not require that application of the CMR must be ‘expressly provided’. According to the carrier the intention of this clause was unmistakably that the CMR should be applied. In reply his opposing party stated that in the interest of all persons involved in the carriage it must be clear at a glance that the CMR is applicable. With invocation of Article 41 CMR the court concluded for this latter view.⁵² This decision means that the same fate will befall a reference in an arbitral clause to English law. That appeared from the same judgment in which the court established that the CMR is incorporated into English law by the Schedule to the Carriage of Goods by Road Act 1965.⁵³ It follows from the reasoning of the English court that even in those cases in which in all probability CMR law will be applied a clause in which it is not expressly so provided in so many words that the arbitrators shall apply the CMR is invalid.⁵⁴ The present writer concurs with the approach of the English court. The rule here is safety first. The historical background as well as the purport and the formulation of Article 33 CMR reveal that there ought to exist no doubt that arbitrators on the inter-

50. Putzeys, no.110 regards the decision of the Paris court of appeal (see preceding note) as evidence of ‘l’attitude nationaliste.’ He regards that decision as even more painful given that Sweden was the first country to have incorporated the CMR also for its national law of transport. That statement requires some correction: there has been no integral and unchanged incorporation in Sweden, cf. G. Pettersón/J. Wetter, *The Integration of the CMR Rules in Swedish Domestic Road Transportation Regulations*, (1978) 4 LMCLQ, p.567.

51. Cf. n.44 and n.49 above.

52. [1982] 1 Lloyd’s Rep 413: ‘It seems to require a provision which would ordinarily, I think, be taken to mean an express provision that the tribunal shall apply the Convention and I can really see no justification in the language, or indeed in the general purpose of the provision, for watering down what seems on the face of it to be fairly plain.’

53. See on the incorporation of convention law in England, L. Erades, *RM Themis* 1982, p.57. In the light of the interpretation of the Convention it is worth citing in this context what Bingham J in the Queen’s Bench remarked: ‘... it is clear from authority that I am not to approach the matter with the blinkered gaze traditionally attributed to English judges but am both permitted and required to look at the matter in a slightly broader way and to take full account of the international intentions underlying the Convention’ [1982] 1 Lloyd’s Rep 410 at 412 (A. B. Bofors-UVA v. A. B. Skandia Transport). On this see Hill/Messent, pp.190-191.

54. Cf. on this result D. Glass, (1984) 1 LMCLQ, pp.32, 33 who besides the arguments put forward by the parties points out that such a stringent interpretation of the requirement would amount to a repetition of Art.6(1)(k) CMR (paramount clause).

national contract concerned, of which the arbitral clause forms part, must declare the CMR applicable.⁵⁵

In the opinion of the present writer what has been established here ought likewise to apply when the parties have chosen the possibility to submit their dispute to a binding advice.

§ 5. Courts referred to by the Convention (Art.31(1)(a) and (b) CMR)

In addition to the courts chosen by the parties, which were dealt with in the previous section, Article 31(1) CMR confers jurisdiction on the courts of the country within whose territory: a. the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or, b. the place where the goods were taken over by the carrier or the place designated for delivery is situated.⁵⁶ The current doctrine, as that emerges from the legal literature⁵⁷ and caselaw,⁵⁸ is that Article 31 CMR creates international competence in regard to the courts therein specified. Just as for the question of applicability of the Convention Article 1 CMR excludes national law, including national rules on conflict of laws, so Article 31 CMR in the first place fulfils this same function in regard to jurisdiction.⁵⁹ In contrast to the situation concerning the choice of court which was dealt with in the preceding section, in regard to the courts dealt with in this section the danger lurks that legal proceedings will be brought before the courts of non-Convention States, which brings uncertainty with it regarding the application and interpretation of the Convention.⁶⁰ This risk results from the broad scope rule of Article 1 CMR.

Meanwhile, the above could confirm the impression that regarding the question of competence the role of national law is excluded. The contrary is

55. Remarkable is the proposal in the FIATA Report, p.27, that the requirement of Art.33 CMR be scrapped and the article formulated as follows: 'The contract of carriage may by reference to general conditions or otherwise contain a clause conferring competence on an arbitration tribunal.' The Report proposes this amendment without any reasons therefore. Perhaps one can make of this that the drafters thereof thereby demonstrate that, just as in regard to Art.31 CMR so also in respect of the arbitration clause, they are proponents of the optional view, this in imitation of Art.22 Hamburg Rules, which rules the drafters certainly had in mind.

56. In contrast to Loewe, no.244, Putzeys, no.1077 states on good grounds that the place of taking over of the goods – just as that of delivery – need not be an effective place. Cf. in this connection also CA Poitiers 31.3.1971, BT 1971, p.168.

57. Loewe, nos.235, 236; Helm, *Frachtrecht*, Art.31 CMR, Anm.1, Anm.5; Rodière, p.338; Rodière, BT 1977, p.452; Putzeys, no.1096. Contra, Dorrestein, no.282.

58. Cf. the text below.

59. Cf. § 2 above.

60. Cf. Dorrestein, no.284; Rodière, BT 1977, p.452. See also Rb Amsterdam 11.3.1964, NJ 1965, 69; ETL 1968, p.735. A Note of the Swiss government of 15.12.1954 wished for these reasons at that time to have the CMR put on the same footing as the CIM (TRANS/WP9/28 24 January 1955). Art.54 CIM, to the extent relevant, reads: 'Actions brought under this Convention may only be instituted in the competent courts of the State to which the railway belongs ...'

here true. Article 31(1) CMR provides expressly that the courts of countries have jurisdiction within whose territory: a. (...) or b. (...).⁶¹ It appears from that formulation ('... courts or tribunals of a country ...') that it is left to the law of the country concerned to indicate the court that has relative jurisdiction.⁶² This provision produces no (apparent) problems when, which is possible and even desirable, the international jurisdiction conferred by the CMR coincides with the rules on relative jurisdiction of the law of the country concerned; this is less so when the national law of procedure further concretises the jurisdiction in its system or when the parties themselves furnish it.⁶³

The substance and purport of Article 31(1) CMR presented here is found expressly in the caselaw.⁶⁴ Further, there are judicial decisions which create at least the illusion that the distribution of jurisdiction is also to be deduced by implication from Article 31(1) CMR.⁶⁵ Finally, there are judgments that do this explicitly,⁶⁶ while in contrast a number of judgments, albeit extremely limited, deny expressis verbis the international jurisdiction of Article 31(1) CMR.⁶⁷

61. In the French text: 'les juridictions'; in the English text: 'the courts or tribunals.'

62. Cf. Loewe, no.245; Putzeys, no.1096 ter; Lamy, no.615; further the writers cited in n.57 above and to be cited below. Cf. also the caselaw below.

63. Cf. LG Hamburg 16.9.1980, VersR 1981, p.475 with annotation by R. H. Veauthier.

64. *The Netherlands*: Rb Utrecht 12.3.1980, S&S 1980, 127; Rb Breda 7.9.1982, S&S 1983, 60 with – incorrectly – addition of grounds confirmed by Hof Den Bosch 16.8.1983, S&S 1984, 69; NJ 1984, 714, on which § 2 above. Ktg The Hague 10.1.1985, S&S 1986, 54 regarded a clause conferring jurisdiction on the Rotterdam court as in conflict with Art.98a Rv.

France: Tr Comm Clermont Ferrand 10.6.1977, BT 1977, p.366, declaring itself without competence on the grounds of national law of procedure and in contrast Tr Comm Romans which considered itself competent; confirmed by CA Riom 18.11.1977, BT 1977, p.560, with approval of the annotator, as well as Rodière, BT 1977, p.452. Before that also on the ground of Art.14 CC (forum actoris) CA Paris 29.3.1969, BT 1969, p.159; ULC 1970, p.125; CA Paris 14.11.1969, BT 1969, p.159; ULC 1970, p.133, further on the ground of Art.46 NCPrc (place where the obligation must be performed).

Yugoslavia: Super Court Appeal Zagreb 10.2.1969, Hague-Zagreb Essays 2, p.64.

Austria: OLG Vienna 18.1.1978, cited by Groth, p.87.

For the situation in *Germany* see further the text.

65. *The Netherlands*: Rb Amsterdam 14.9.1977, S&S 1979, 89; Rb Dordrecht 31.10.1979, S&S 1981, 64. In this sense also J. C. Schultsz in his note to Rb Rotterdam 16.11.1977, NJ 1978, 321.

France CA Paris 22.6.1977, BT 1977, p.468: '... qu'en conséquence, le tribunal de Paris est bien compétent, comme étant celui de lieu prévu pour la livraison, conformément à l'article 32 de ladite CMR'; Cass. 13.2.1978, BT 1978, p.210.

Belgium: See the caselaw cited in n.41 above, including Rb Kh Antwerp 5.3.1977, ETL 1978, p.478 (p.481): 'that consequently the court at Antwerp is competent as being the court for the place where the goods were taken over and delivered.' Further Vrederegerecht Assé 7.12.1972, confirmed by Rb Kh Brussels 27.6.1977, cited by Ponet, p.390.

As far as *England* is concerned, in the only decision concerned with the issue of competence, other than that dealt with in the preceding section, Mocatta J laconically concluded that: 'I think it follows from this that the goods were taken over at Birmingham by the defendants and that accordingly no problem as to jurisdiction arises'; QB 9.5.1978 [1979] 1 Lloyd's Rep 181 (*Moto Vespa v. Mat Britannia Express Ltd*).

66. Cf. the decisions of German courts cited below.

67. Cf. Rb and Hof Arnhem, cited below.

Quid iuris, if it should appear that the national law of procedure should contain no or insufficient rules concerning relative jurisdiction by means of which the judicial competence conferred by Article 31 CMR is to be further effectuated? This is the case when, for example, a German importer sues the carrier before a German court competent according to Article 31(1)(b) CMR and that court according to German law would not possess relative jurisdiction. In contrast to the situation in other countries an interesting caselaw has developed in Germany in regard to this delicate issue which (provisionally?) has resulted in a curious standpoint being adopted by the BGH. A bird's eye analysis of this caselaw development will be given because various aspects of the application of Article 31 CMR manifest themselves therein.

The problem arose following cases in which the German court, petitioned by German senders on the ground of Article 31(1)(b) CMR, possessed no relative competence according to the German *Zivilprozessordnung*, with the consequence that the court declared it had no jurisdiction in regard to a claim by a German sender against a foreign carrier.⁶⁸ A lacuna in the national legislation means an impediment to the application of the CMR on this point which can result in an unjustified distinction in the legal position of in casu German senders in comparison with their colleagues in other Convention States. This has led to the situation that a number of courts, supported herein by a number of authoritative writers, have in certain circumstances filled this lacuna by an extensive interpretation of Article 31(1) CMR in the sense that, in opposition to the current doctrine already mentioned, distribution of jurisdiction is also thereby conferred. In an extensively reasoned judgment the LG Hamburg established a discrepancy between Article 31(1)(b) CMR and the national law of procedure and although the court recognised that Article 31 CMR in principle confers only international competence on the courts, the court in question considered it as part of its task in a case in which the national law of procedure did not further concretise that competence nevertheless to specify the LG Frankfurt as the competent body, that being the place of delivery of the goods. While the national legislature remains in default the court, in the name of 'Rechtsvereinheitlichung', should itself take the helm: that, somewhat paraphrased, was the view of the LG Hamburg.⁶⁹ This bold

68. One assumes that the procedural law of certain countries, such as Denmark and Sweden, runs parallel with the connecting factors of Art.31(1)(b) CMR. (The German translation of the relevant provisions of the Danish and Swedish laws are provided by K. Wodrich, *VersR* 1981, p.634.) In other countries the petitioners escape to jurisdiction grounds of the national law, such as the *forum actoris* as in Art.126(3) *Rv* in The Netherlands, in France Artt.14 and 15 CC, in Belgium likewise Art.15 CC; alternatively, to the court for the place where the obligation is to be performed, as in France on the ground of Art.46 NCPrc and in Belgium on the ground of Art.624 Code judiciaire, on which Putzeys, no.1096 ter. In a restricted number of cases relief was offered in Germany with § 29 ZPO, namely, when the place designated for delivery of the goods coincided with the place where the obligation must be performed. Cf. on this LG Hamburg, cited below in the text.

69. LG Hamburg 22.1.1979, *VersR* 1979, p.246; *ULR* 1980, p.226, with appeal to LG Aschaffenburg, cited with approval by J. Willenberg, *NJW* 1968, p.1024. In contrast to the opinion of LG Hamburg and Helm, *Frachtrecht*, Art.31 CMR, Anm.5 no support is to be found with OLG Dusseldorf 18.11.1971, *VersR* 1973, p.177 as this court bases the competence of the German court in part on § 29 ZPO; on this see the following footnote.

proposition was rejected by other courts.⁷⁰ The issue was essentially raised afresh by OLG Dusseldorf, which felt that it did not need to go as far as LG Hamburg. The OLG, together with the latter court, recognised that a public international duty resulted from Article 31 CMR for the Convention States to tune their national legislation to the jurisdiction regulation provided in the Convention, but when the legislature remained remiss in this respect the court could not supply the deficiency when the party seeking legal redress had, as in casu, another competent court elsewhere.⁷¹ Reaction to the Hamburg judgment was not long awaited: strong condemnation⁷² beside approbation.⁷³ A decision of the BGH had to come.

When a German claimant/sender sued a carrier resident in Austria of goods from Neurenberg to Kuwait before the Neurenberg court he came away empty handed from two judicial instances because the Neurenberg court had no relative jurisdiction according to German law. The appeal in cassation, in which yet again the reasons were set out why in such cases it was to be considered that distributive competence (relative jurisdiction) was to be derived from the CMR, was also fruitless. The BGH was clearly opposed to the view propogated by LG Hamburg:

‘Der Senat ist der Ansicht, dass Art. 31 Abs. 1 CMR ausschliesslich die internationale gerichtliche Zuständigkeit betrifft und dass sich die Frage der örtliche Zuständigkeit allein nach innerstaatlichem Recht richtet.’

The consequence thereof was that the claimant in Germany could petition no competent court. The BGH did recognise the discrepancy thereby existing between petitioners in different Convention States where some were and others were not compelled to take proceedings abroad but considered as to that:

‘Hier Abhilfe zu schaffen, ist nicht Aufgabe der Rechtsprechung.’⁷⁴

70. Cf. OLG Dusseldorf 1.3.1979, VersR 1979, p.381, in which the court protested against the interpretation of the LG Hamburg in the preceding note: ‘... Aus der Entscheidung des Senats vom 18.11.1971 ergibt sich nichts anderes (...) Eine weiter gehende Bedeutung als Regelung der örtlichen Zuständigkeit des Gerichts des Übernahmeorts had der Senat der Vorschrift des Art. 31 CMR nicht beigemessen.’ Exactly how is here left hanging: ‘Ob die Bejahung der internationalen Zuständigkeit zur Ausbildung einer örtlichen Gerichtsstand nicht zur Verfügung stellt, kann im Ergebnis dahinstehen.’ See further OLG Saarbrücken 21.11.1974, VersR 1976, p.267; LG Frankfurt am Main 24.6.1975; OLG Nurnberg 9.8.1978; LG Bochum 19.12.1978; LG Hagen 29.5.1978, cited by Groth, pp.85, 86. Unclear is OLG Munich 19.7.1979, VersR 1980, p.395.

71. OLG Dusseldorf 23.10.1980, VersR 1981, p.1081. This argument is unsatisfactory because the German principal was referred to the court at Paris. The lacuna in the German legislation is not filled in this fashion and one of the aims of Art.31 CMR (cf. n.43 above) is not realised.

72. D. Gran, VersR 1976, p.664 expects from such a decision the opposite result to that which the court attempts to achieve: ‘Rechtszersplitterung’ in place of ‘Rechtsvereinheitlichung.’

73. A. Sur, VersR 1979, p.830.

74. BGH 6.2.1981, VersR 1981, p.633 (p.634); ETL 1982, p.50. With this decision which is on all fours with that pleaded by Gran, n.72 above, the BGH draws down the criticism of J. Kropholler, NJW 1981, p.1904, who in support of the LG Hamburg states that, as the national legislature is so grossly in default, the court is obliged to fill in the lacuna in the national law. See also Kropholler, Handbuch IZVR I Chapter III, Rz 146 and Rz 403: ‘Soweit das staatliche deutsche

Before revealing the final outcome of the caselaw development in Germany, one may here intersperse a short intermezzo in order to point out that in The Netherlands – albeit in part on another ground – the same standpoint as the one encountered in Germany was adopted by the *Rechtbank* and *Hof Arnhem*. In a case involving the carriage of goods from Barcelona to Veenendaal, The Netherlands, by a Spanish carrier under commission from a sender resident in Geneva the *Rechtbank* declared that it had no jurisdiction because none of the parties were established in The Netherlands and consequently Articles 126 and 127 Rv failed to have effect.⁷⁵ The *Hof* confirmed this decision by emphasising that Article 31 CMR had no other purport than to refer to the national rules on competence.⁷⁶ The *Arnhem* decisions have everywhere been stamped unsatisfactory.⁷⁷

Whoever in the meantime might have thought that the above-mentioned decision of the *BGH* had ended the matter would have been mistaken.⁷⁸ In an identical case *LG Hamburg* – granted that it was prior to the previously mentioned *BGH* decision – had again declared itself to have jurisdiction to take cognisance of a claim instituted by a German sender against an Austrian carrier. *OLG Hamburg* dismissed the appeal. That court recognised that in principle Article 31 CMR only conferred international jurisdiction and that relative competence should be indicated further by rules of national law, but then established that these rules were in the instant case absent (namely, to the extent that they referred to a court at the place of taking over of the goods) and in this way came to the decision:

‘... dass Art. 31 Abs. 1 S. 1b CMR auch die örtliche Zuständigkeit regelt. Damit sei die internationale Zuständigkeit des *LG Hamburg* gegeben.’⁷⁹

This undisguised standpoint is diametrically opposed to that pronounced by the *BGH*. Yet, surprisingly, the appeal in cassation did not succeed. In a short judgment the *BGH* elaborated that relative competence could not be

Recht im Einzelfall keinen örtlichen Gerichtsstand bereitstellt, obwohl die internationale Zuständigkeit der deutschen Gerichte wegen eines deutschen Übernahme – oder Ablieferungsortes nach Art. 31 I Abs.b CMR gegeben ist, besteht auf grund des Übereinkommens eine volkerrechtliche Verpflichtung, einen örtlichen Ersatzgerichtsstand zu eröffnen.’

75. *Rb Arnhem* 24.6.1976, S&S 1977, 11. Cf. likewise the decision of the same court cited at n.43.

76. *Hof Arnhem* 20.1.1981, S&S 1981, 63; *NJ* 1983, 186. Although the approach to Art.31 CMR, on which further n.80 below, is totally different to that of the *BGH*, the view of the task of the court is virtually identical: ‘To the extent that in regard to this ... there is a question of a lacuna in the legislation, it is not for the court to provide.’

77. *Libouton*, 1982, p.734 judges the decision to be ‘avec excès.’ As in this case neither of the parties was established in The Netherlands the factual situation differs from that underlying the issue as that is presented in Germany. The essential difference between the caselaw of the *BGH* and in fact all the German courts on this point and that of *Arnhem* is that according to the German decisions Art.31 CMR is competence creative; cf. on this § 2 above.

78. *K. Wodrich VersR* 1981, p.634 is of opinion in his comment to the decision that a critical review can be dispensed with, in fact: ‘*Roma locuta, causa finita!*’

79. *VersR* 1983, p.282.

dependent on the international jurisdiction of courts based upon the CMR. International jurisdiction was derived directly from Article 31 CMR while, the court reiterated, relative competence should thereafter be determined on the basis of the national law of procedure. Given that it had been established that Hamburg was the place of taking over of the goods it followed therefrom that LG Hamburg consequently possessed international jurisdiction. The central issue could now be answered: was LG Hamburg also 'örtlich zuständig?' (relatively competent?). Against the background of the preceding considerations the BGH declared laconically in regard to the all-important question that both the LG and the OLG had answered that question in the affirmative. That those bodies had done so directly on the ground of Article 31 CMR was nevertheless not mentioned by the court! The BGH considered that it was thus not called upon to review the decisions of the LG and OLG any further. § 549 Abs. 2 ZPO operated in this as a *deus ex machina*:

'Eine Überprüfung dieser Entscheidung findet nach § 549 Abs. 2 ZPO nicht statt.'⁸⁰

In the light of the result, namely, that despite a non-existent national rule of procedural law nevertheless the LG was competent, this judgment can only be regarded as paying lip service to the standpoint earlier adopted by the BGH. The controversy is not resolved by the reasoning thence employed. When however both the court at first instance as well as that at appeal declare themselves as without jurisdiction the opposite result is thus achieved now that the BGH, invoking § 549 ZPO, no longer wishes to review that factual interpretation. The spectre of forum shopping looms. The question arises why the BGH, following its former decisions, came to this indecisive result. It is not unimaginable that the reasons therefor must be sought in the criticism by authoritative writers of the previous judgment.⁸¹

From the above state of the matter in the legal literature and caselaw it appears that the situation surrounding Article 31 CMR is in no way clarified. The solution that lies closest to hand for resolving the controversy would be for the national legislature to yet acknowledge the appeal of Loewe further to concretise the jurisdiction deriving from Article 31 CMR by means of (amending) national legislation.⁸² As a result of acceding to the Convention this is no less than a duty under public international law. In this connection it is noteworthy that the Netherlands government has taken that road in regard to the matters regulated by Article 31(3) and (4) CMR.⁸³ That path is now clearly indicated given that it concerns a lacuna in the national law and not in the Convention. The controversy does not in fact concern the substance and

80. BGH 9.12.1982, VersR 1983, p.282 (p.283). § 549 Abs.2 ZPO reads with effect from 1 July 1977: 'Das Revisionsgericht prüft nicht, ob das Gericht des ersten Rechtzugs sachlich oder örtlich zuständig (...) war.'

81. Cf. J. Kropholler, n.74 above; Groth, p.89. Previously Helm, *Frachtrecht*, Art.31 CMR, Anm.5 had supported the solution adopted by Kropholler and Groth.

82. Loewe, no.240.

83. Cf. § 6 below.

function of Article 31 CMR. Now that the German legislature in particular has had recourse to statutory amendment in regard to the problem of the applicability of the CMR to the Spediteur,⁸⁴ this seems even more evident as, having regard to possible international repercussions, a solution must be found for a problem which is of a national character. As long as the national legislature persists in its dereliction of duty, this writer concurs, as an emergency solution, with the approach of the above-mentioned writers and judicial bodies that in cases in which the national law of procedure of the courts specified in Article 31(1)(a) and (b) CMR does nothing further to concretise the legal competence conferred on those bodies by the Convention, they are justified, perhaps even obliged, despite the fact that Article 31 CMR is in principle restricted to the attribution of jurisdiction, to found thereon also distributive jurisdiction (relative competence). Such a method of ascertainment of law does justice to the nature of the jurisdiction provision regulated by Article 31 CMR (cf. § 2) and conforms to what was observed in Chapter 1 regarding the task of the judge.

§ 6. Other aspects of procedural law (Art.31(2)-(5) CMR)

In this section a brief word will be addressed to the remaining paragraphs of Article 31 CMR which aim at a certain measure of harmonisation of a number of aspects of the law of procedure.

To a certain extent paragraphs 2-5 sit well with the jurisdiction provision treated above in that they attempt to obviate procedural irregularities in the different Convention States.⁸⁵ Thus the rule laid down in Article 31(2) CMR regarding *litis pendency* is intended to obviate the situation that in regard to the same substantive dispute one would be confronted with multiple judgments. The rule applies as between the same parties in litigation. A court petitioned in regard to the same dispute pending elsewhere ought in such a case to order an adjournment of the case.⁸⁶ The *litis pendency* rule is not applicable if it appears that the judgment entered in the country where the claim was first pursued cannot be enforced in the country in which the claim has again been instituted. In this way the possibilities of choice offered in Article 31(1) CMR are in a certain sense reduced to the proportions of practical actuality.⁸⁷

The regulation regarding enforceability (paragraphs 3 and 4) urges the Convention States to attune their national legislation, specifically in regard to a number of formalities, to this regulation. Thus in The Netherlands effect

84. On which critically Chapter 2, § 4.3.6 above.

85. Nickel-Lanz, no.218.

86. Putzeys, no.1101. Pendency must be distinguished from joinder (connection) of different disputes, which occurs more often and does not fall under Art.31(2) CMR. Cf. Dorrestein, no.288; Putzeys, no.1101. Cf. also Hof Brussels 28.2.1975, ETL 1975, p.419.

87. What is a Dutch claimant to do with a judgment obtained in The Netherlands against, e.g., an Iranian carrier? Cf. also Dorrestein, no.289; Hill/Messent, p.171.

was given to the third paragraph by the Law of 14 July 1960.⁸⁸ That statute was shortly thereafter repealed by the Law of 7 October 1964 which provided a general regulation concerning the enforcement in The Netherlands of foreign executive titles.⁸⁹ It did not remain there. The entry into force of the Judgments Convention obliged the introduction of an implementation act which in part set aside the just-mentioned 1964 Law, namely, for cases falling under the Judgments Convention.⁹⁰ Thus the question arises again of the relationship between the CMR and the Judgments Convention. In the light of Article 57 Judgments Convention, do Articles 31 et seq. Judgments Convention in conjunction with the Law of 1972 or alternatively Articles 985-991 Rv apply to the enforcement of judicial decisions? As no pretension to exclusivity appears from the extremely concise CMR regulation it would appear reasonable to allow the claimant the choice between Articles 985 et seq. and the Law of 1972. The rule concerning enforcement applies also to successive carriers (cf. Art.39(3) CMR).⁹¹

Effect was given in The Netherlands to the regulation concerning security for costs (*cautio judicatum solvi*) by Article 988(2) Rv.⁹²

During the CMR revision conference at Geneva in 1972 criticism was directed at the procedural law regulation from various sides. The heart of the objections directed at the CMR regulation concerned the concise character thereof.⁹³ The matters contained in these CMR provisions require extensive analysis and elaboration such as they received in particular in the multilateral Judgments Convention, besides the existing bilateral regulations. With the advent of such regulations the insufficiency and superfluity of the matter regulated in Article 31 CMR becomes apparent. As long as multilateral regulations must rest content with a continuing modest area of application the CMR regulation will clearly continue for some considerable time to remain unimpaired.⁹⁴

88. S. 1960, no.302.

89. S. 1964, no.381. Law on Regulation of the Formalities required for Enforcement of Executive Titles in Civil Matters obtained Abroad (Artt.985-992 Rv.).

90. Law of 4.5.1972, S. 1972, no.240. Art.1 reads: 'In regard to the permission to enforce referred to in article 31 of the Convention, articles 985-991 of the Law on Civil Procedure are not applicable.' On this law, critically, Rodière, BT 1973, p.275. For England see Hill/Messent, p.171.

91. Cf. Putzeys, no.1104. On the entire matter regulated by Art.31(2)-(5) CMR see also Loewe, nos.246-256.

92. Cf. Helm; *Frachtrecht*, Art.31 CMR, Anm.8. Art.31(5) CMR differs from Belgian law, cf. Putzeys, no.1108; Hill/Messent, p.173.

93. Réunion Speciale pour la CMR, Geneva, 14-16 February 1972, W/TRANS/SCI/438, 19 April 1972, pp.14, 15.

94. It is noticeable that the FIATA Report devotes merely a single comment to the matter regulated in paragraphs 2-5, and that to paragraph 4: 'This paragraph merits further consideration.'

Limitation of actions

'For a layman the regulations are very dangerous and pose several traps.'¹

§ 1. Introduction (Art.32 CMR)

This work is concluded with a consideration of the limitation of actions regulation laid down in Article 32 CMR which constitutes a somewhat condensed version of the present Article 47 CIM.²

Article 32 CMR has in the course of the years given occasion for a considerable number of vexed questions. The Swedish lawyer Wetter concluded his consideration of this provision with the judgement that the CIM/CMR system is far from simple and contains many equivocal passages.³ His judgement cited above is fairly damning of the limitation of actions regulation. It will be clear that the uncertainty to which the regulation has given rise stands uneasily with the purport of the institution of limitation of actions with its short-term periods, a tension which is intolerable for practice.⁴ On this point also uniformity across the front of transport law is scarcely to be found.⁵ One is concerned here with limitation of actions and not with extinguishment. This means that Article 32 CMR, in contrast to the expiration period of Article 30(3) CMR cannot be applied *ex officio*.⁶

The institution of limitation of actions comprises different (related) aspects, a number of which are regulated by Article 32 CMR, which for some others refers expressly to national law while finally leaving the remaining issues unregulated. With the application of Article 32 CMR the question unremittingly arises to what extent national law plays a role. In the following sections attention will be paid separately to the various components of this complex limitation of actions regulation on the basis of an analysis of caselaw and legal literature. From this it should appear whether the above-cited judgement of Wetter is justified.

These components will be dealt with as follows: the scope of the regulation (§ 2); the periods specified in paragraph 1 (§ 3); the differing moments according to paragraph 1(a), (b) and (c) at which time begins to run (§ 4); the

1. J. Wetter, *The Time Bar Regulations in the CMR Convention*, (1979) 4 LMCLQ, pp.504 et seq. (p.509).

2. For a comparison of both regulations in the caselaw: Hof Amsterdam 4.6.1974, S&S 1975, 38; NJ 1975, 61; ETL 1975, p.531 as also BGH 28.2.1975, VersR 1975, p.445.

3. Wetter, *loc. cit.*, p.509.

4. The ratio for a short period of limitation is a 'rasche Klärung frachtrechtlicher Verhältnisse': BGH 21.12.1981, VersR 1982, p.649.

5. The differences existing between the various conventions on this point was reason for K. Grönfors, *RabelsZ* 1978, p.702 to state: 'Die Phantasie der Konventionsväter scheint auf diesem Gebiet fast unerschöpflich gewesen zu sien.'

6. Loewe, no.258; Cf. also OGH 14.2.1976, ÖJZ 1976, p.435.

institutions of suspension and interruption referred to in paragraph 3 (§ 5); the special regulation of suspension of the period of limitation of paragraph 2 with which a number of related issues are dealt (§ 6); the counterclaim of paragraph 4 (§ 7) as well as the recourse action of Article 39(4) CMR (§ 8). In a concluding section (§ 9) a balance will be drawn up.

§ 2. Scope (Art.32(1) first sentence CMR)

As with Article 31 CMR, Article 32(1) CMR is broadly drafted in the sense that all legal claims 'arising out of carriage under this Convention' are caught by the limitation of actions regulation.⁷ What claims are here to be considered? Different categories of claim can be distinguished.

Usually it will concern claims which are themselves governed by the Convention. Although the Convention primarily regulates the liability of the carrier (to which this study has been confined) it also contains substantive rules on the basis of which the carrier can institute a claim against the claimant (Artt. 7(1), 10, 11(2), 16(1) and (4), 22(2) CMR). In addition an extra-contractual claim can also be brought under the limitation of actions regulation in so far as this concerns an injured interest falling under the transport contract.⁸ Moreover, those claims which are certainly not governed by the Convention but which are substantially concerned with the transport submitted to the Convention can also be brought thereunder.⁹ Thus, on several occasions it has been correctly decided that claims for repayment of excess freight paid fall under Article 32 CMR.¹⁰ One may have doubts as to claims which while certainly displaying a close connection with the carriage nevertheless arise under a different title.¹¹

The provision gives no occasion to assume that claims instituted by the carrier should be removed from the effect of the limitation of actions regula-

7. For this see the English text: 'The period of limitation for an action arising out of carriage ...' No substantive difference can be established with the French text (Art.31 CMR: tous litiges; Art.32 CMR: les actions auxquelles peuvent donner lieu les transports) and the Dutch translation.

8. See what is remarked on this regarding Art.28 CMR, Chapter 5, § 8. Cf. Rb Kh Mons 11.5.1978, TPR 1982, p.798. Contra, Nickel-Lanz, no.212; cf. also Rb Amsterdam 8.8.1979, S&S 1981, 73.

9. For example, claims regarding damage caused to the vehicle by the shipper. Contra, incorrectly, Rb Kh Antwerp 27.10.1971, TPR 1979, pp.120-121; Hill/Messent, p.175. Rodière, p.339 and Putzeys, no.117 correctly interpreted the term used 'carriage' as 'contract of carriage.'

10. BGH 18.2.1972, VersR 1972, p.873; ETL 1972, p.860 as also two decisions of the highest Austrian court: OGH 14.10.1976, ÖJZ 1976, p.435; ULR 1976, II, p.366; OGH 2.4.1982, ÖJZ 1982, p.521.

11. Thus Rb Den Bosch 3.6.1977, S&S 1978, 29 held that a claim instituted against the carrier regarding import duties was covered by Art.32 CMR. In contrast CA Paris 4.1.1978, BT 1978, p.117 held that a claim regarding freight charges was certainly subject to Art.32 CMR but not a claim regarding pre-paid customs dues liable in the cadre of the particular carriage. The court did not allow this latter obligation, arising from 'mandat distinct de transport' to fall under the CMR. Cf. also CA Paris 28.6.1977, BT 1977, p.422. Contra, OLG Neurenberg 26.11.1974, NJW 1975, p.501.

tion. This view is now generally accepted but before that was achieved, having regard to the extensively reasoned caselaw on that matter, clearly considerable powers of persuasion were necessary. Claims by the carrier can concern all possible matters, such as freight charges,¹² damage resulting from delay ascribable to the claimant,¹³ advances of V.A.T.,¹⁴ for damage resulting from a prohibition on driving¹⁵ or claims against sub-carriers.^{15a}

The courts correctly gave no support to the view that the suspension regulation of Article 32(2) CMR, which is exclusively concerned with claims directed against the carrier, must lead to a diametrically opposed standpoint.¹⁶ This caselaw has found support right through the legal literature. The history, formulation and system of Article 32 CMR are sufficient grounds therefor. Recognition that Article 32 CMR is also applicable to claims instituted by the carrier is of importance in the light of the moment at which the period of limitation for such claim begins to run. In contrast to the claims of the claimant, which will normally fall under Article 32(1)(a) and (b) CMR, the claim of the carrier falls under the 'sweeping-up' clause of Article 32(1)(c) CMR which reads: 'in all other cases, on the expiry of a period of three months after the making of the contract of carriage.'

§ 3. Periods of limitation (Art.32(1) opening words CMR)

In principle the period of limitation, in harmony with a number of other international transport regulations, is fixed at one year.¹⁷ The shortness of the period is justified by reason of the nature of the transportation business.¹⁸

12. Hof Amsterdam 4.6.1974, S&S 1975, 38; NJ 1975, 61; ETL 1975, p.531; BGH 28.2.1975, VersR 1975, p.445; MDR 1975, p.555; AWD 1975, p.291; ETL 1975, p.523; CA Paris 4.1.1978, BT 1978, p.117. Cf. Libouton, 1982, p.734.

13. Ktg Rotterdam 23.6.1971, S&S 1972, 8.

14. OLG Neurenberg 26.11.1974, NJW 1975, p.501.

15. BGH 11.12.1981, VersR 1982, p.649. The carrier had inadequate or incorrect documents with him for a carriage from Germany to Teheran, Iran, whereupon the vehicle was attached for several months.

15a. Hof van Cassatie 25.5.1984, RW 1984/85, p.2273.

16. Of historical interest is the fact that in an earlier version of the CMR limitation of actions regulation no account was taken of mutually opposed claims. At the instigation of representatives of the United States room therefor was subsequently made: E/ECE/TRANS/SCI/79, E/ECE/-TRANS/WP9/13, 1 May 1950, p.18.

L'histoire se répète. The FIATA Report, p.26 proposes reserving Art.32 CMR exclusively for claims against the carrier: 'The period of limitation for all claims against the carrier (...) shall be one year.'

17. Cf. Art.468(7) WvK; Art.47 CIM. Contra, Art.29 Warsaw Convention; Art.20 Hamburg Rules; Art.25 Convention on Multimodal International Transport. The latter regulations provide for a period of two years. In contrast national regulations sometimes provide for a period of six months (cf. Art.95 WvK (former)), on which Rb Rotterdam 1.10.1976, S&S 1977, 17; Art.9 Belgian Law of 1891, on which Rb Kh Antwerp 12.9.1972, ETL 1973, p.640; and sometimes of one year: cf. Art.108 CComm; § 40 KVO.

18. BGH 11.12.1981, VersR 1982, p.649 (p.650).

The only possibility of avoiding the period specified in Article 32 CMR exists in the case of wilful misconduct or default equivalent thereto according to the law of the court or tribunal before whom the claim is pending, in which case the period is converted into three years.¹⁹ The escape offered here has been tested many times, although generally in vain.²⁰ This criterion was derived from Article 29 CMR by the drafters of the Convention.²¹

By reason of the link laid by the drafters of the Convention between Articles 32 and 29 CMR the question has arisen whether it was thereby intended not only to make relevant the wilful misconduct or default equivalent thereto of the carrier personally but also, although not expressly stated, that of his agents and servants and other persons of whose services he makes use for the performance of the carriage, as is the case in Article 29(2) CMR. The question is of importance because given a restrictive interpretation of Article 32 CMR Netherlands law, which in that case would be applicable to agents and servants, does not go so far as Article 29(2) CMR. A restrictive interpretation of this issue is advocated by Dorrestein, who points out that ascribing the wilful misconduct and default equivalent thereto of the agents and servants to the carrier, as regulated in Article 29(2) CMR, was not adopted in Article 32 CMR.²² In opposition to this Hanekroot has stated, *inter alia*, that the general character of Article 3 CMR has direct consequences for the interpretation of Article 32 CMR.²³

In the opinion of the present writer the latter is the correct view.²⁴ One can agree with Dorrestein that the drafters of Article 32 CMR gave no sign of equating Articles 29 and 32 CMR in regard to agents and servants. In contradistinction to that is that Article 3 CMR was included in the Convention at a later stage,²⁵ whereby in principle Article 29(2) first sentence CMR could have been deleted. Further, Article 29(2) second sentence CMR regulates the position of agents and servants, sequentially and together with Article 28 CMR, in the event that they themselves are proceeded against. Article 29(2)

19. On the (absence of a) causal relationship between wilful misconduct and damage, cf. Clarke, no.109.

20. HR 17.11.1978, S&S 1979, 23; NJ 1980, 484; Hof Den Bosch 2.1.1979, 115; BGH 11.12.1981, VersR 1982, p.649; CA Paris 21.11.1972, BT 1973, p.21; CA Lyon 21.1.1977, BT 1977, p.97; Tr Comm Brussels 2.2.1970, ULC 1971, p.278.

It will be clear, having regard to what has been remarked as a result of the French caselaw concerning Art.29 CMR, that one has there the best chance of successfully appealing to wilful misconduct or gross default. See: CA Poitiers 19.4.1972, BT 1972, p.183, confirmed by Cass. 8.1.1974, BT 1974, p.91; ETL 1974, p.314; CA Paris 17.6.1974, BT 1974, p.321; CA Lyon 27.6.1980, BT 1980, p.504. Without success: Cass. 4.10.1982, BT 1982, p.549.

21. Cf. Chapter 4, § 9.

22. Th. H. J. Dorrestein, *Beursbengel* 1978, pp.435 et seq. Dorrestein, no.275 prefers the earlier version.

23. L. Hanekroot, *Beursbengel* 1979, p.57.

24. Libouton, 1982, p.735 doubts the correctness of Dorrestein's view.

25. Cf. Chapter 4, § 6.

first sentence CMR remains meaningful even after adoption of the universal Article 3 CMR in so far as it clearly illuminates the legal consequences of wilful misconduct and default equivalent thereto of both the carrier and his agents and servants. It completes in this respect the pattern of liability.

§ 4. Commencement of the periods (Art.32(1)(a)(b)(c) CMR)

The shorter the period of limitation the more important the question at what moment time begins to run. Article 32(1) CMR distinguishes three categories of period of limitation according to the claim, namely, a) for partial loss, damage or delay, b) for total loss and c) all other cases. In the order thus specified the starting point for the period of limitation begins later. It is clear that these different moments in time oblige the claimants to great attentiveness, all the more so when parties mutually²⁶ and generally at the last moment institute claims which often belong to different categories.

For the person entitled to the goods it amounts to the fact that, having regard to the final sentence of Article 32(1) CMR, the period of limitation begins to run on the day following that of delivery,²⁷ unless as a result of total loss there is no longer any question of delivery,²⁸ or it concerns a claim which falls within category c.²⁹ The delimitation of the categories here specified has, aside from a number of cases where the distinction between damage and loss has been difficult to draw, given rise to a number of controversial matters as to the concept of delivery. Thus it has been held that interruption of the carriage by interim storage of the goods impeded delivery thereof.³⁰ The same can be concluded when the situations described in Article 15(1) CMR³¹ and Article 16(2) CMR³² occur.

The exceptional nature of group transport, whereby the load is comprised

26. On the counter-claim see § 7. below.

27. Ktg Delft 13.5.1965, ETL 1966, p.722; Hof Den Bosch 21.12.1965, S&S 1966, 24; NJ 1965, 326; ETL 1966, p.698. Tr Comm Paris 29.6.1970, BT 1970, p.325; OLG Dusseldorf 18.10.1973, VersR 1974, p.1095.

28. For the distinction between the concepts of (partial) loss, (partial) damage and delay, Chapter 5, § 2. Cf. OLG Celle 13.1.1975, VersR 1975, p.250; ETL 1975, p.410. Cf. Libouton, 1974, p.529. See also the English caselaw cited below.

In the case of delay one must be alive to the fact that the institution of a claim is meaningful only if one has entered a written reservation within the period specified by Art.30(3) CMR; cf. on this Putzeys, no.1031.

29. A claim by the sender based on Art.21 CMR (breach of the obligation of collection of cash on delivery) falls under category c. See for such a case: Supreme Court of Denmark 22.4.1971, ULC 1971, p.307.

30. Hof Den Bosch, cf. n.27 above.

31. Cf. QB 9.5.1978 [1979] 1 Lloyd's Rep 175 (Moto Vespa v. MAT Britannia Express Ltd), on which see further the text.

32. Cf. Wachter in his annotations to HR 20.4.1979, NJ 1980, 518 under 2. Contra, Nickel-Lanz, no.213 who treats unloading according to Art.16(2) CMR identically with delivery. Cf. also Dorrestein, nos.190, 191.

of shipments by different senders, brings with it that claims arising from such transport fall within different categories.³³

In particular, return shipments³⁴ can create complications. Here the question can arise whether a claim instituted by the sender in regard to damage belongs to category a, b or c. Various approaches are here available. Thus one can state that, given that in the case of damage to goods the discharge thereof is wanting, such a situation thereby falls within the broader c category. This solution is proposed by English writers³⁵ and is encountered also in the caselaw.³⁶ Nevertheless, that conclusion was not reached by Mr Justice Mocatta who adopted the standpoint that the words employed in Article 32(1)(c) CMR 'in all other cases' imply that this category excludes those cases in which damage and/or loss occur. Having regard to the fact that in the case to be decided by him there was damage but in his view no delivery as the consignee had rejected the goods on the ground of damage, so that the case consequently fell under Article 15 CMR, Mr Justice Mocatta came to what is in the opinion of the present writer the unhappy conclusion that Article 32 CMR demonstrated a lacuna in this respect and in consequence the applicable national law (in casu English law) had to be applied.³⁷ Hardingham has correctly pointed out that this restrictive interpretation of Article 32(1)(c) CMR is in no way prohibited. On the contrary, the formulation of the provision rather conduces to regarding category c as a 'sweeping-up' provision so that there is more than sufficient place for the present claim.³⁸

A third path was explored in a similar situation by Mr Justice Parker. He concluded that his colleague had failed to perceive a better possibility. Because there was in casu a question of damage as a result of which the goods were returned and thus the intended delivery could not take place, Article 32(1)(a) CMR could not, in his opinion, be of application. This determination did not lead Mr Justice Parker thereupon to the application of Article 32(1)(c) CMR, which in his opinion was possible, but to Article 32(1)(b) CMR. This re-

33. Rb Kh Brussel 28.2.1975, ETL 1975, p.419 (in casu complete loss was involved, and consequently Art.32(1)(b) CMR was applicable), on which extensively Libouton, 1982, p.735. See also Hof van Beroep Brussel 16.11.1977, ETL 1980, p.319 confirmed by Hof van Cassatie 13.6.1980, ETL 1980, p.851.

34. By return shipment is understood those situations where there is no point as a result of damage in continuing with the goods to their place of destination, which are consequently returned to the sender.

35. A. C. Hardingham (1979) 3 LMCLQ, p.364; J. Wetter (1979) 4 LMCLQ, p.505; Clarke, no.46; D. Glass (1984) 1 LMCLQ, pp.43-44. Cf. also Loewe, no.260.

36. Hof van Beroep Brussels 16.6.1969, ETL 1969, p.925; 16.5.1980, ETL 1980, p.1013; BGH 29.11.1984, VersR 1985, p.258.

37. QB 9.5.1978 [1979] 1 Lloyd's Rep 175 (Moto Vespa v. MAT Britannia Express Ltd). Carriage from Birmingham to Madrid. Close to the place of destination the vehicle became involved in an accident whereby the goods were damaged. The goods were, after reloading on another vehicle, returned undelivered. On this decision see Hill/Messent, p.179.

38. A. C. Hardingham (1979) 3 LMCLQ, p.364. This authoritative writer terms the decision 'unfortunate' because English law applied by Mocatta J had a period of limitation of six (!) years, thus five years longer than Art.32 CMR. The decision is also criticised by the English writers cited in n.35 above.

markable decision was supported by a claim to Article 20(1) CMR having regard to the fact that that provision contained a similar formulation to that in the b category.³⁹ Glass has correctly criticised this decision and termed such application of Article 20(1) CMR 'somewhat strained'.⁴⁰

Finally, a fourth possibility is offered, which consists of the fact that in the case of return shipments one can also speak of delivery of the goods and consequently that Article 32(1)(a) CMR ought to apply. The first variant of this approach considers the intended moment at which the goods should have been delivered as the appropriate criterion for this purpose. The second variant looks to the moment at which the goods are delivered again to the sender.⁴¹

In the light of the arguments employed as also the practical aspects of the matter one takes one's stand beside those writers who have pronounced for the application of Article 32(1)(c) CMR in these cases.

Claims by the carrier for freight charges against the person entitled to the goods likewise belong to this category.⁴² Having regard to the fact that it is not always a simple matter to determine exactly the date of the contract, in the absence of concrete facts the despatch date specified by the invoice is for convenience sake taken as the starting point.⁴³ For the situation where there is a question of a series of transport contracts one may base oneself upon whichever contract the claim regarding the freight charges concerns.⁴⁴

The above may perhaps create the impression that the carrier is in a better position as regards the period of limitation than the claimant having regard to the fact that he has an extra three months available to him.⁴⁵ Is this extra period justified? Claims in the c category, in contrast to those in a or b, can arise some considerable time after the moment when the period of limitation begins to run, namely, the day of the conclusion of the contract. It occasions no surprise therefore that on behalf of the carrier it was stated that in a case

39. QB 21.7.1982 [1983] 1 Lloyd's Rep 61 (Worldwide Carriers Ltd v. Ardran International Ltd).

40. D. Glass (1984) 1 LMCLQ, pp.42.

41. A. C. Hardingham (1979) 3 LMCLQ, p.363. The Belgian writers Putzeys, no.532 and Libouton, 1982, p.735 in particular opt for the second variant. Cf. also Parker J in his decision cited at n.39 above. For partial criticism of this approach, D. Glass (1984) 1 LMCLQ, pp.43.

42. See, inter alia, Loewe, no.260 as also Wetter, loc. cit., p.506; CA Paris 7.5.1973, BT 1973, p.231; OLG Dusseldorf 8.3.1976, VersR 1976, p.506. See also n.13-16 above.

43. Rb Dordrecht 21.5.1980, S&S 1982, 8. Cf. Dorrestein, no.274.

44. Rb Kh Brussels 13.9.1968, ETL 1969, p.1153 as also BGH 18.2.1972, VersR 1972, p.873. Cf. Wetter, loc. cit., p.506, who in such a case accepts as criterion the moment of taking over of the goods by the carrier. The question indicated here is likewise of importance with a view to a possible counter-claim: QB 30.3.1981 [1981] 2 Lloyd's Rep 566 (Impex Transport v. Thames Holdings Ltd), on which § 7 below.

45. Claims by persons entitled to the goods otherwise than in respect of loading damage fall under category c. See, e.g., Hof Den Bosch 13.1.1970, S&S 1971, 10; NJ 1970, 741; ETL 1971, p.817 in which a claim was instituted against a carrier on the ground of non-performance which in casu amounted to not having fulfilled the commission not to deliver the transported goods except upon exhibit of a particular described evidence of payment.

where an amendment to the contract occurred the moment of commencement should be that of the moment of change. With an appeal to legal certainty that proposition was convincingly rejected by OLG Dusseldorf.⁴⁶ That court impressed upon the carrier that with a view to such situations he had been given an extra period of three months compared with Article 32(1)(a) and (b) CMR within which the carriage will usually have run its course. Upon encountering this case the question here of interest is whether this proposition remains valid where the circumstances are such that the period between the claim arising and the end of the period is less than a year. This question underlay proceedings culminating in a judgment of the highest German court.

In the context of carriage from Germany to Iran the vehicles were seized upon arrival for a period of several months because the load and documents did not fully correspond. The claim of the carrier regarding the damage due to waiting⁴⁷ consequently arose at the end of a lengthy transport and according to the yardstick of Article 32(1)(c) CMR had expired within a year. Although the BGH gave evidence in its considerations of awareness of this for the carrier most unfortunate consequence it considered that there were no grounds for allowing the period to commence at a later moment (in casu, as was argued by the carrier, at the moment of an amendment effected later by telex). As was the case with the OLG, mentioned above, the BGH was of the view that as compensation for the disadvantage thus indicated the carrier disposed of precisely that extra three months, which, looked at generally, should be more than sufficient:

‘Für eine Verschiebung des Verjährungsbeginns und damit für eine Abweichung von der ausdrücklichen Regelung der CMR besteht deshalb keine Veranlassung.’⁴⁸

The most extreme result of the view adopted by the BGH is that a claim of the carrier can be out of time before it has even arisen, which cannot have been the intention of the drafters of the Convention.⁴⁹

A similar problem occurs in those cases in which damage has already been incurred but the claim thereby arising is not yet subject to the expiration of time. This is so when the damage is incurred in the ‘pre-’ period (for Art.32(1)(b) CMR: 30 or 60 days; for Art.32(1)(c) CMR: 3 months). It is stated in the legal literature that these periods remain outside the period of limitation and consequently cannot in principle be suspended or interrupted;⁵⁰ Loewe has added thereto that a suspensive act done during such ‘pre-’ period

46. OLG Dusseldorf 18.10.1973, VersR 1974, p.1095.

47. On this concept see Dorresteijn, no.181.

48. BGH 11.12.1981; VersR 1982, p.649; ETL 1983, p.63.

49. In this light the proposal in the FIATA Report, p.26 to remove the claims of the carrier entirely from the CMR limitation of actions regulation is understandable.

50. Libouton, 1974, p.66 n.177 regarded as ‘somewhat surprising’ the decision cited below in n.52, which regarded the period specified in Art.32(1)(c) CMR as capable of suspension; cf. also Putzeys, no.1145.

ought in fairness to have effect, with the understanding that it is deemed to have occurred at the moment of the actual commencement of the period of limitation.⁵¹ Wetter goes even further. He argues plausibly that suspension or interruption instituted during the 'pre-' period ought to take effect from the outset.⁵²

§ 5. Suspension and interruption (Art.32(3) CMR)

As was observed in § 1 in passing the limitation of actions regulation of Article 32 CMR is not complete. The drafters were aware of this and, beside the substantive rules of paragraphs 1, 2 and 4 of the Convention, referred in regard to a number of essential elements of the doctrine of limitation of actions, namely, suspension and interruption, to the law of the court or tribunal before whom the claim is pending (*lex fori*: paragraph 3). For the rest one is thrown back upon the *lex causae* in the absence of further instruction or uniform law.⁵³ By referring, beside the special suspension rule of Article 32(2) CMR, the elements of suspension and interruption to the *lex fori*, the organisation and uniformity of the institute of the limitation of actions regulation is not particularly well served, a fact which can lead to legal inequality. Here it suffices to note the most important difference between the legal consequences of suspension and interruption: upon removal of the suspension the period of limitation continues from the point where the suspensive effect occurred while with interruption the period of limitation commences anew from the day of interruption.⁵⁴ Having regard to the often different national regulation of these matters, as also the simple suspension possibility offered by Article 32(2) CMR, it is not surprising that the situation raises questions.⁵⁵

Having regard to the fact that the carrier, in contrast to the claimant, can make no use of the suspension regulation of Article 32(2) CMR⁵⁶ provided by the Convention he is entirely thrown back on the national rules concerning suspension and interruption. In the law of The Netherlands this means that the carrier must satisfy the rules on suspension, such as serving a reminder,

51. Loewe, no.263.

52. Wetter, loc. cit., pp.506-507 refers to the fact that in practice it is often in the 'pre-' period of the b and c categories (30 days and 3 months respectively) that suspension and interruption occur. Cf. Hof van Beroep Brussels 28.6.1969, ETL 1969, p.925.

53. Helm, Frachtrecht, Art.32 CMR, Anm.2 and 9.

54. Cf. Pitlo/Hidma, Bewijs en verjaring, pp.241 et seq., pp.247 et seq.; Asser-Rutten I, pp.484 et seq.; Dorrestein, no.277.

55. Thus the Swedish delegate to the revision conference of 1972 at Geneva reported that problems had arisen in his country with respect to the concepts of 'suspension' and 'interruption' employed in Art.32(2) and (3) CMR; W/TRANS/SCI/438, 19 April 1972, p.15, sub 93.

56. Although the text of Art.32(2) first sentence CMR leaves nothing to be desired as to clarity it is often attempted on the part of the carrier to make something of it; see, e.g., Rb Rotterdam 25.1.1980, S&S 1981, 16; NJ 1980, 598. Libouton 1982, p.736 is correctly of the opinion that the carrier can utilise the remedy of suspension of Art.32(2) CMR against a sub-carrier engaged by him.

issuing a summons and every other act of legal prosecution, which in general possess a strongly formalistic character. The plea of the carrier of admission of his right by the claimant is often a matter of factual evaluation and consequently offers insufficient certainty.⁵⁷

The institution of interruption can also, besides the remedy of suspension, be seized upon by the claimant.⁵⁸ It follows from the nature of these legal remedies that it is not excluded that under certain circumstances both remedies can be applicable in the same legal proceedings.⁵⁹

§ 6. Special suspension rule (Art.32(2) CMR)

Following the CIM the Convention possesses its own suspension rule (Art.32(2) CMR). When discussing the scope of the limitation of actions regulation (§ 2) it was stated that it has been vainly attempted on the basis of paragraph 2 to restrict the scope of Article 32 CMR to actions by the claimant. This nevertheless leaves unaffected that paragraph 2 clearly shows that, also in regard to limitation of actions, in accordance with the Preamble to the Convention it primarily concerns the liability of the carrier. The one-sided character of the provision is expressly confirmed in the caselaw.⁶⁰ This means that as a result the carrier will have to satisfy the national rules on suspension and interruption with all the disadvantages attaching thereto, as was seen in the preceding section. The requirements to effect a suspension or to lift it have led to a great number of proceedings in practice in which various aspects must be distinguished.

57. Cf. BGH 28.2.1975, VersR 1975, p.445; ETL 1975, p.523 in which admission according to § 208 BGB (cf. Art.2019 BW) was considered not to be present. For other proceedings in Germany in which the question was posed whether 'Stillstand des Prozessverfahren' according to § 249 ZPO had occurred in casu so that in consequence suspension was effected according to § 211 BGB, see BGH 17.10.1975, VersR 1976, p.36. Interruption via admission was accepted in Tr Comm Lyon 10.11.1975, BT 1976, p.175.

58. Successfully via admission in CA Lyon 21.1.1977, BT 1977, p.97 on the ground of Art.2248 CC (cf. Art.2019 BW); Cass. 14.12.1981, BT 1982, p.72; ETL 1983, p.59: an offer of compensation for damage by the carrier operates as an act of admission irrespective of whether the claimant accepted the offer. The CMR was in this case incorrectly left out of consideration. Without success in Cass. 31.3.1981, BT 1981, p.279 (national transport). The fact that the carrier took the necessary precautionary measures by engaging a damage assessor was not regarded as an act of admission. Nor was this the case where the carrier requested a statement of loss for the purpose of his insurer 7: CA Paris 10.12.1971, BT 1972, p.19. By summons: CA Paris 15.2.1982, BT 1982, p.141. It emerges clearly from this decision how much the formalities accompanying the rules on interruption can vary according to the applicable national law. Cf. CA Reims 10.10.1984, BT 1985, p.271.

59. Thus, e.g., the case in which a suspension instituted originally by telex is followed by correspondence from which admission by the carrier transpires: CA Paris 24.3.1972, BT 1972, p.205. Hof Amsterdam 11.10.1984, S&S 1985, 76 correctly held that there was no question of suspension or interruption when a carrier, having rejected the allegation of the claimant, passed the claim to his insurer.

60. Rb Amsterdam 24.5.1972, S&S 1972, 78. Hof Amsterdam 4.6.1974, S&S 1975, 38; NJ 1975, 61; ETL 1975, p.531; Rb Rotterdam 25.1.1980, S&S 1981, 16; NJ 1980, 598; BGH 28.2.1975, VersR 1975, p.445; ETL 1975, p.1075; CA Aix-en-Provence 15.2.1979, BT 1979, p.353; CA Paris 23.9.1981, BT 1981, p.538. Nickel-Lanz, no.214 considers the provision unfair given its unilateral character.

The conditions which the claimant (a) and the carrier (b) must observe in order to effect or alternatively to remove a suspension are dealt with in order below. Thereafter it will be seen what role is reserved for intermediaries (c) and, finally, it is enquired whether a period of limitation under the CMR can be extended or shortened by the parties (d).

(a) In the first place one may ask oneself which requirements should the claimant observe in order to bring about a legally effective suspension. For this a written claim by the claimant in which he alleges that the carrier is liable for damage suffered is necessary.⁶¹ It appears from the caselaw hereon that high demands are not made of this.⁶² Often a telex communication will be sufficient.⁶³ It in no way follows from the provision that upon rejection of the written claim the carrier shall return the documents attached thereto (on which more shortly), that sending such documents by the sender is indicated as an extra requirement in addition to the written claim.⁶⁴ Further, it follows from the fact that different parties are concerned with the transport contract that the claimant who effects the suspension need not be the same claimant who finally institutes the claim for damage,⁶⁵ while dismissal of the claim of one in no way means dismissal of the other.⁶⁶ Moreover, it is significant that it can be stated on good grounds that a written claim directed to the one carrier likewise operates as one issued against a successive carrier.⁶⁷ It requires

61. This damage need not be determined precisely, nor more than in the case of Art.27(1) CMR, cf. OLG Dusseldorf 8.5.1969, ETL 1970, p.446; OLG Dusseldorf 13.1.1972, VersR 1973, p.178; OLG Dusseldorf 27.5.1982, VersR 1983, p.62; Hof van Beroep Antwerp 30.5.1979, ETL 1979, p.924, confirmed by Hof van Cassatie 12.12.1980, ETL 1981, p.250; CA Aix-en-Provence 11.3.1969, BT 1969, p.389; CA Reims 3.3.1980, BT 1980, p.237; Rb Kh Liege 25.11.1982, ETL 1982, p.843; Rb Den Bosch 27.3.1981, S&S 1983, 89. For stricter conditions: Rb Rotterdam 5.4.1974, S&S 1975, 53.

62. Rb Kh Antwerp 24.10.1967, ETL 1969, p.1035 (exchange of documents is not necessary). Tr. gr. inst. Toulouse 7.12.1968, ETL 1971, p.139, confirmed by CA Toulouse 26.3.1969, ETL 1971, p.131 (communication of a statement of damage drawn up by a bailiff is sufficient). Cf. also the caselaw cited in the preceding note, to which add Rb Zwolle 2.5.1984, S&S 1984, 131.

63. CA Paris 24.3.1972, BT 1972, p.205; Rb Kh Antwerp 3.3.1976, ETL 1977, p.437, confirmed by Hof van Beroep Antwerp 30.5.1979, ETL 1979, p.924, ULR 1981, II, p.236 and Hof van Cassatie 12.12.1980, ETL 1981, p.250; LG Monchengladbach 16.3.1981, VersR 1982, p.340.

64. Cf. Rb Amsterdam 12.4.1972, S&S 1972, p.102; CA Paris 27.2.1980, BT 1980, p.384 as also the commentator to CA Reims 3.3.1980, BT 1980, p.237. Contra, incorrectly, Rb Rotterdam 5.4.1974, S&S 1975, 53 as also QB 30.3.1981 [1981] 2 Lloyd's Rep 566 (Impex Transport v. Thames Holdings Ltd).

65. OLG Dusseldorf 13.1.1972, VersR 1973, p.178; ETL 1973, p.620: suspensive effect was ascribed to a written claim instituted by the receiver on behalf of the sender. Contra, incorrectly, Tr. gr. inst. Valence 18.11.1982, BT 1982, p.211.

66. OLG Dusseldorf 16.12.1981, VersR 1983, p.1132. In this case it was held that rejection of the written claim of the receiver had no effect as regards the sender even though he was the last to be aware of the rejection.

67. This view is defended by D. Glass, (1984) 1 LMCLQ, pp. 45 et seq. in contrast to QB 21.7.1982 [1983] 1 Lloyd's Rep 61 (Worldwide Carriers Ltd v. Ardtran International Ltd).

no explanation to realise that such a situation is particularly precarious for the carrier.

In the light of the fact that a written claim is often submitted at the extreme edge of the period of limitation the criterion which should operate in regard to the moment at which the claim must be submitted is of importance. The moment of receipt by the carrier arises here for consideration and not that of despatch.⁶⁸ The same should then apply to the written rejection of the claim by the carrier.

(b) Once the claimant has entered a written claim the carrier shall have to do what is necessary to lift as soon as possible any suspension thereby coming into effect. He can do this by rejecting in writing the claim⁶⁹ and returning the documents attached thereto.⁷⁰ This latter phrase has certainly led to uncertainty in practice as to which for the interpretation of these words it has amounted to the question whether by return of the original documents one can suffice by, or alternatively whether this obligation extends to, returning submitted photocopies or Xerox copies. The predominant view to emerge from the caselaw and legal literature is that, having regard to the ratio of the provision, namely, the supportive evidentiary function in any possible legal action, one can suffice by returning formal documents.⁷¹ This view was justified in a practical consideration as follows:

‘Dabei ist es zu berücksichtigen dass die CMR in 1956 vereinbart wurde, zu einem Zeitpunkt also, als die Benutzung von Fotokopiergeräten bei weitem noch nicht so verbreitet war und deshalb häufig Originale übersandt wurden, im Gegensatz zur jetzigen Gepflogenheit.’⁷²

A standpoint that deviates from this is to be found in France where in two sets of proceedings the opposite was decided. In connection herewith the following explanation was given which, in comparison with the just cited pragmatic consideration of the German court, has a more dogmatic tone:

68. Tr Comm Paris 25.6.1979, BT 1979, p.403 with appeal to Art.32(2) third sentence CMR. Equally, L. Brunat, BT 1979, p.136. Contra, Cass. 20.7.1983, BT 1984, p.236. Cf. for the evidentiary perils regarding the receipt of the written claim likewise CA Paris 25.3.1982, BT 1982, p.434.

69. This rejection ought to be made known without ambiguity to the opposite party, Rb Rotterdam 12.5.1978, S&S 1979, 11 quod in casu non. The court judged that the composition of letters was not evidence of a rejection but rather indicated that the discussion as to liability or not was left open.

70. This provision was characterised by Wetter, loc. cit., p.507 as ‘very treacherous.’

71. Rb Roermond 15.10.1970, ETL 1971, p.839; Hof Den Bosch 2.11.1979, S&S 1979, 115; OLG Düsseldorf 2.10.1980, VersR 1981, p.737; CA Paris 22.5.1977, BT 1971, p.320; Maritime and Commercial Court, Denmark 17.6.1982, ETL 1983, p.800. Further, Loewe, no.266; Dorrestein, no.279; Nickel-Lanz, no.214; Putzeys, no.1149; Wetter, loc. cit., p.507; Hill/Messent, p.186. Contra, Libouton, 1982, p.736.

72. LG Monchengladbach 16.3.1981, VersR 1982, p.340, on which positively H. Oeynhausen, VersR 1983, p.312. As LG Monchengladbach so also OLG Hamburg 27.5.1982, VersR 1983, p.90.

'qu'il importe peu que les pièces jointes aient été transmises en original ou en photocopies, car les dispositions de la CMR sont de droit étroit et doivent être interprétées restrictivement et qu'en conséquence il n'est pas permis d'établir les distinctions que le texte lui-même n'a pas faites.'⁷³

It evidences little constancy that the Paris court of appeal in a similar consideration to that cited here abandoned its standpoint adopted earlier.⁷⁴

A formalistic standpoint has also been adopted by the Belgian Hof van Cassatie:

'Considering that on the ground of the text of that provision as to which no question of a distinction between the documents as to their nature or substance may be drawn.'⁷⁵

In the light of the impractical consequences thereof one may, together with the writers and courts mentioned earlier, reject this formalistic standpoint.

Thereupon the question arises whether what is here established likewise applies to the case where the carrier has in part admitted the claim (cf. Art.32(2) second sentence CMR). The Convention leaves this situation unregulated with the result that it may be concluded that the carrier need not return any documents.⁷⁶ For the rest it is not always easy to determine a partial admission or rejection. One must here also pay careful attention on the basis of the concrete circumstances to what is admitted and what is not. Thus one should draw a distinction between, on the one hand, the conditional admission of freight charges to which suspensive effect is conferred⁷⁷ and, on the other, the admission of the fact of liability but not of the extent thereof alleged by the claimant, which is not regarded as a partial admission.⁷⁸ One

73. CA Reims 27.3.1976, BT 1976, p.260. It is not excluded that this court allowed itself to be led by the criticism of the commentator in Bulletin des Transports to the decision of the CA Paris cited in n.71, reading: 'La solution nous paraît radicalement fausse.' The commentator calls in aid thereby, Nanassy, p.730.

74. CA Paris 21.12.1978, BT 1979, p.84: 'Mais considérant que les motifs et les modalités de la suspension de la prescription sont définiés impérativement par la CMR dont les dispositions de droit strict doivent être limitativement appliqués, sans qu'il y ait bien de tenir compte du contenu et de la force probante des pièces communiquées.'

75. Hof van Cassatie 27.9.1984, RW 1984/85, p.2134. The standpoint of the Belgian courts is opposed to the doctrine in Belgium concerning Art.34 CMR (substantive doctrine, see Chapter 2, § 4.2).

76. OLG Celle 13.1.1975, VersR 1975, p.250; ETL 1975, p.410.

77. Rb Kh Mons 9.11.1976, ETL 1977, p.300.

78. Rb Rotterdam 23.4.1982, S&S 1982, 94, confirmed by Hof The Hague 12.11.1982, S&S 1983, 30; NJ 1984, 656. Parties were divided as to the method whereby the maximum amount under Art.23(3) CMR should be calculated (on which Chapter 5, § 3.2.2). Following the written claim by the person entitled to the goods the parties continued to debate this question, which was reason for the court to hold that there was no question of a partial admission of the claim concerned. Contra, perhaps, Swedish Supreme Court 4.6.1971 (sea carriage), cited by Wetter, loc. cit., p.508.

should further distinguish from this latter case, in which the issue of conversion of a sum expressed in gold francs was in dispute, the situation in which following the service of the writ the amount of damages claimed is increased as a result of a fluctuation in the exchange rate. As to this the Belgian supreme court decided that the claim was suspended by the service with the result that applying the last exchange rate development to the claimed sum could be effected without objection.⁷⁹

(c) Another question to which Article 32(2) CMR gives rise is whether, and if so to what extent, competence is ascribed to insurers and insurance brokers to effect a suspension or to lift one. This would seem to be an issue of representation which consequently must be resolved by reference to the criteria of that doctrine. On this there appears to exist in practice a number of misunderstandings. Thus it appeared necessary to decide that a written claim submitted to a cargo insurer instead of to the carrier or his insurer could have no suspensive effect.⁸⁰ It appears that often the answer to the question whether the insurer is subrogated to his client after payment is considered of determinative significance as the criterion for competence to suspend or alternatively to remove a suspension.⁸¹ It certainly need not come to that. It will appear from the circumstances of the case whether insurers are acting on behalf of the insured.⁸² According to the Dutch law of representation the sacred words 'assignee' or 'on behalf of' do not here need to be used.⁸³ Apart from the circumstances of the instant case usage will also play a role in answering the question of the (scope of the) capacity to represent.⁸⁴ Such usage is ascertainable partly on the basis of the widely used clauses in transport policies in which the promotion of the insurer's interests at an early stage is stipulated.⁸⁵ The existence of such usage can, for example, meet the burden of proof of the person who finds his way with a claim to the insurer of his opposing party.⁸⁶ What is here established applies also to other representatives such

79. Hof van Cassatie 9.4.1981, BT 1982, p.455.

80. Rb Kh Antwerp 18.6.1968, ETL 1968, p.1237.

81. CA Aix-en-Provence 8.11.1968, BT 1969, p.18; ETL 1969, p.918, ULC 1970, I, p.122; CA Aix-en-Provence 11.3.1969, BT 1969, p.389, ULC 1970, I, p.119, on which Clarke, no.47. Further, LG Hamburg 2.10.1972, VersR 1973, p.28; Rb Kh Antwerp 17.2.1974, ETL 1974, p.504. Cf. also Hill/Messent, pp.181-182.

82. Hof van Beroep Antwerp 30.6.1982, ETL 1983, p.84. In this case it was correctly held that also where no subrogation has yet taken place there can nevertheless be legally valid promotion of interest by the insurer.

83. Hof The Hague 2.4.1976, S&S 1977, 34.

84. Rb Breda 11.1.1977, S&S 1978, 89 (in which an insurance broker appeared on behalf of load insurers); Rb Utrecht 11.4.1979, S&S 1980, 12.

85. Cf. Tr Comm Paris 23.5.1979, BT 1979, p.522 with criticism by the annotator. Cf. Rodière, p.340; Dorrestein, no.279.

86. Cf. Rb Arnhem 29.6.1978, S&S 1980, 45.

as, for example, a loss adjuster⁸⁷ or a person having an economic interest.⁸⁸

(d) To conclude this section attention may be paid to the question occasionally posed also in the context of application of CMR law whether the period of limitation can be extended or shortened with the mutual agreement of the parties. Does this lie within the power of the parties concerned or is it prevented by Article 41 CMR? It would appear from the answer to a question of the Swedish delegate to the revision conference held at Geneva in 1972 that the leaning was to regard as not possible any extension of the period of limitation within the context of Article 32 CMR as desired by the delegate.⁸⁹ This view is also encountered in the legal literature.⁹⁰ This would apply in particular to a contractually stipulated reduction in the period.⁹¹ The period provided by Article 32 CMR would not apply, however, according to some courts, when the parties have voluntarily declared the CMR applicable to national transport because that would mean a prohibited denial of the national regulation of limitation of actions.⁹²

There are nevertheless other voices discernible. Extension of the period of limitation of Article 32 CMR is recognised in the caselaw, albeit implicitly.⁹³ More emphatically, extension of the period of limitation by the parties was permitted and considered not to be in conflict with mandatory CMR law in a French case.⁹⁴ Such caselaw fits into the approach regarding this issue unfolded by Wetter in which he states that the answer to the question posed here is dependent on the moment at which the parties have agreed upon an extension. If this is after the event giving rise to the claim then he considers extension possible. He defends this view by an appeal to maritime law.⁹⁵ In the Netherlands law of road transport also the extension of the expiry date has received legal support under the influence of maritime law.

The question that may be posed is whether the interpretation proposed by

87. Rb Kh Mons 9.11.1976, ETL 1977, p.300. In CA Lyon 2.3.1978, BT 1978, p.382 as also Cass. 4.10.1982, BT 1982, p.549 a *commissionnaire de transport* as such was regarded as competent to the extent he had already indemnified his client or assumed the obligation of so doing. See also Cass. 4.5.1982, BT 1982, p.329 and p.332; Rb Kh Liege 25.11.1982, ETL 1982, p.843.

88. OLG Dusseldorf 16.12.1982, VersR 1983, p.1028.

89. W/TRANS/SCI/438, 19 April 1972, p.16 no.94. From the reply of the Rapporteur (Loewe) it could appear that he was of the opinion that – contrary to what will appear below – practice had no interest in an extension of the period.

90. Putzeys, no.1123; Boudewijnse, p.393.

91. Cass. 5.6.1972, BT 1972, p.484.

92. Rb Kh Antwerp 12.9.1972, ETL 1973, p.640; Rb Rotterdam 1.10.1976, S&S 1977, 17. Contra for England, Hill/Messent, p.176.

93. Rb Rotterdam 5.4.1974, S&S 1975, 53; Hof van Beroep Antwerp 17.10.1979, ETL 1980, p.314; Rb Arnhem 29.6.1978, S&S 1980, 45; Rb Arnhem 25.11.1982, S&S 1984, 115.

94. CA Nîmes 5.11.1980, BT 1980, p.600.

95. Wetter, loc. cit., p.508. Cf. Art.3(6) Hague-Visby Rules.

Wetter is compatible with mandatory CMR law. If one proceeds on the assumption that an alteration in the period of limitation must be considered to be a stipulation that produces an alteration in the liability model in the sense that extension amounts to increasing the burden and reduction to a lessening thereof,⁹⁶ then Article 41 CMR allows of little uncertainty as to the validity of such a stipulation. In contrast to maritime law and the law of air transport and perhaps certain national road transport systems,⁹⁷ Article 41 CMR does not permit any extension or reduction in the period of limitation.⁹⁸

The result thus arrived at may be regretted from the point of view of uniformity of road transport law as also with regard to the practice thereof to the extent that a need for such stipulations exists in the law of road transport. On the other hand, the desired legal uniformity, although now as between the carriers by road, would be impaired if such stipulations were to find their way over much into international road transport law.⁹⁹ It follows from the above that both extension and reduction in the period of limitation are in conflict with Article 41 CMR.¹⁰⁰

§ 7. Counterclaim (Art.32(4) CMR)

Upon expiration of the period of limitation the claim in law expires. Following Article 47(4) CMR, Article 32(4) CMR provides also that an expired claim can no longer be converted into a counterclaim or set-off.¹⁰¹ Parties should be alert to this rule which deviates from national law.¹⁰² This is all the more

96. Thus the construction of the Netherlands Law.

97. Besides the Netherlands Law, such is perhaps also possible in France, cf. Cass. 3.2.1969, ETL 1969, p.787.

98. Contra, Hill/Messent, p.188: 'Such extensions of time subsequent to the claim arising are, however, widely agreed and acted upon in both maritime disputes and CMR cases, and clearly represent a sensible approach in terms of avoiding needless litigation.' A less inflexible standpoint than that adopted here is possible via the question of leaving the permissibility of extension of the period of limitation, as also suspension and interruption, to the applicable national law. In this vein, H. Libert, TvP 1986, p.715.

99. Cf. Wachter in his annotation to HR 12.2.1982, NJ 1982, 589 sub 5. In contrast the FIATA Report, p.27 argues for allowing extension of the period of limitation: 'The parties may by agreement at any time during the running of the limitation period extend that period by a declaration in writing. This period may be extended by further declarations.' What is noticeable in this proposal is that the extension, in contrast to the position in the law of the sea, is not made dependant on the happening of the event the claim has occasioned.

100. The ratio given by Wetter – the parties can themselves look after their legal position – can likewise apply to reducing the period of limitation. In the opinion of the present writer Art.32 CMR, in contrast to Art.3(6) Hague Rules, regulates not only the claim *against* but also that *by* the carrier.

101. In earlier drafts the counter-claim was allowed, TRANS/WP9/11, 8 January 1952, p.21. This possibility was scrapped in a later phase: TRANS/WP9/22, 21 December 1953, App. p.20.

102. *Germany*: The difference between the national KVO law (§ 40.5) and the CMR emerged clearly in a decision of OLG Dusseldorf 8.11.1979, VersR 1980, p.389. That court judged, following BGH 29.3.1974, NJW 1974, p.1138, that § 390.2 BGB, reading: 'Die Verjährung schliesst

so if one attends to the different moments at which the period of limitation begins to run¹⁰³ and one adds that, as was observed in § 3, it is often at the last moment that legal action is taken.¹⁰⁴ This is of importance as it is not unusual in practice to make use of the remedy of counterclaim.¹⁰⁵ It is the person entitled to the goods in particular who then runs the risk of drawing the short straw by virtue of the fact that his claim under the CMR is subject to a shorter period of limitation than that of the carrier.¹⁰⁶ Particularly when a lengthy (perhaps of several years) series of transport contracts between the parties is concerned it is sometimes a problem to determine exactly which claims as such hold good.¹⁰⁷ This applies equally to the question at what

die Aufrechnung nicht aus, wenn die verjährte Forderung zu der Zeit, zu welchen sie gegen die andere Forderung aufgerechnet werden konnte, noch nicht verjährt war' could not be applied under the force of Art.32 CMR because the Convention at Art.32(2) and (3) drew a clear line for the application of national law. It is not right after the expiration of the period of limitation to breathe new life into a claim via national law. With this judgment the court distanced itself from that advocated by Helm, *Frachtrecht*, Art.32 CMR, Anm.11 who, just as K. Demuth, *VersR* 1980, p.774 considers there to be room with the application of the CMR for national compensation rules to be present. Cf. also LG Cologne 3.12.1982, *VersR* 1983, p.951 regarding § 32 ADSp in conjunction with Art.32 CMR. Cf. P. Csoklich, *VersR* 1985, p.909.

Belgium: According to Belgian law a counter-claim is possible within one month of service, cf. Putzeys, nos.1134, 1135. Rb Kh Antwerp 7.3.1980, ETL 1981, p.466 incorrectly held, with reference to Art.32(3) CMR but ignoring Art.32(4) CMR, that this national provision remained intact for international transport.

England: Section 28 Limitation Act 1939 reads: 'For the purposes of this Act, any claim by way of set-off or counter-claim shall be deemed to be a separate action and to have commenced on the same date as the action in which the set-off or counter-claim is pleaded.' Goff J, QB 30.3.1981 [1981] 2 Lloyd's Rep 566 (*Impex Transport v. Thames Holdings Ltd*), correctly gave precedence to what was for the defendant claimant the inexorable Art.32(4) CMR, albeit that it deviated from English law. As the sworn written statement, the affidavit, could not be regarded as a written claim within the meaning of Art.32(2) CMR, the claim of the petitioner remained fruitless.

France: Just as in Belgium one finds an aversion in France to Art.32(4) CMR; cf. Rodière, p.341. Cf. also n.114 below and Cass. 3.1.1985, BT 1985, p.169.

103. Cf. § 3 above.

104. Putzeys, no.1121.

105. R b Arnhem 29.6.1978, S&S 1980, 45. Cf. Rb Rotterdam 25.1.1980, S&S 1981, 16; NJ 1980, 598; Rb Rotterdam 3.6.1983, S&S 1983, 111. The FIATA Report, p.27 wished to make an end to the bad faith practice of instituting counter-claims by the person entitled to the goods: 'Freight, demurrage and incidental charges shall be paid without deduction. Counter claims of any nature may not be exercised by way of set-off.'

106. The claimant had to experience this in turn in proceedings decided by Tr. gr. inst. Albertville 4.3.1975, BT 1975, p.217, confirmed by CA Chambey 16.6.1976, BT 1976, p.366. Likewise demanding it the claimant in the following cases: CA Paris 24.2.1977, BT 1977, p.326; Cass. 5.12.1977, BT 1977, p.104. In this way the claimant is penalised for being his own judge. This risk is just as great for the claimant as the disadvantage for the carrier stated by Dorresteijn, no.281. Alertness on both sides is called for!

107. OGH 14.1.1976, ÖJZ 1976, p.435; ULR 1976, II, p.366. From the facts underlying this case it appeared from earlier agreements between the parties that the claim of the sender against the payment of excess freight charges was attached to claims by the carrier and consequently subject to the operation of Art.32 CMR. See also the English case regarding the affidavit cited above at n.102.

moment must the counterclaim be considered to have been presented, which must be determined on the basis of national law.¹⁰⁸

§ 8. Recourse action (Art.39(4) CMR)

Finally, attention should be paid to the application of the limitation of action regulation to the mutual relationship between the carriers. This relationship is governed, to the extent that the carriers are to be regarded within the meaning of Article 34 CMR as successive carriers,¹⁰⁹ by Article 39(4) CMR. This latter provision refers to Article 32 CMR with this understanding that the second sentence is a *lex specialis* in regard to the moment at which the period of limitation commences. In place of the otherwise relevant categories of Article 32(1) CMR, Article 39(4) CMR provides that the period of limitation commences either on the date of the final judicial decision fixing the compensation for damage or, in the absence of such decision, from the date of actual payment. In practice this can lead to an unacceptable extension of the original period of limitation, which conflicts with the ratio of short periods of limitation in transport law. For that matter not all possible claims imaginable between carriers are here concerned. Mr Justice May correctly determined on the basis of teleological interpretation that here it must concern pure recourse actions, that is to say, claims in regard to damage that the redress-seeking carrier has himself had to compensate to another. Article 32(1)(c) CMR consequently remains applicable to the claim instituted by the sub-carrier (likewise by the successive carrier) as a result of the non-performance as against him of the principal carrier.¹¹⁰

Here the situation must be distinguished in which carriers deliver return shipments as between each other, a situation which remains below the horizon of the special rule of the second sentence of Article 39(4) CMR.¹¹¹ For the rest the provisions of Article 32 CMR remain applicable following the first sentence of Article 39(4) CMR. From this it follows that, exceptionally, the carrier can make use of the special suspensive rule of Article 32(2) CMR in a recourse action, in contrast to the situation where his opposing party is a

108. In the English decision cited at n.102 above the court, following an extensive review of the concepts of 'set up,' 'make,' 'raise,' 'initiate' (a counter-claim), came to the conclusion that the counter-claim had not been instituted in time. On this decision see Clarke, no.45.

109. See on this Chapter 3, § 4. Cf. Hof van Cassatie 25.5.1984, RW 1984/85, p.2273.

110. QB 1.11.1976 [1977] 1 Lloyd's Rep 411 (Muller v. Laurent Transport). It is not excluded that the claim instituted was based upon the English text of Art.39(4) CMR: 'claims.' The French text more accurately reproduces the intention of the concept: 'recours,' likewise the Dutch translation ('verhaal'). Any other interpretation would reduce Art.39(4) CMR to a pointless provision. See also A. C. Hardingham, (1979) 3 LMCLQ, p.365: '... that decision must be correct, if for no other reason than as a matter of logic.' See also Hill/Messent, pp.230 et seq. For an unacceptable application of Art.39(4) CMR cf. CA Paris 17.11.1983, BT 1984, p.390, correctly regarded by the BT commentator as an 'opération chirurgicale' (p.392).

111. Cf. Rb Rotterdam 25.1.1980, S&S 1981, 16; NJ 1980, 598 for a claim to the amount of the balance of the current account between the parties who each presented the other with return freight charges.

person entitled to the goods.¹¹² It is disputed whether a written claim presented by a person entitled to the goods against a successive carrier also operates against another successive carrier.¹¹³

As was the case with the special suspension rule, here also the importance of the distinction between carrier and commissionnaire de transport emerges in France because the rule of Article 39(4) CMR differs from the national law.¹¹⁴ Here it has also been pointed out that beside the principal claim (Art.32(1) CMR), counterclaim (Art.32(4) CMR) and recourse action (Art.39(4) CMR) the CMR pays no individual attention to the indemnity action.¹¹⁵

§ 9. Conclusions

On the basis of the above considerations as to the related aspects into which the institution of limitation of actions divides it can be concluded that Article 32 CMR is a deficient provision.¹¹⁶

This appears primarily from the structure of the Article. By providing a number of aspects with their own rules and by referring other aspects in so many words to national law, the remaining aspects involved in the limitation of actions remain unregulated and 'unreferred to.' As was demonstrated above this has led to uncertainty in respect of the question to what extent can national law be applied. This question is primarily of importance when the substance of the national law that may possibly be applied differs from the Convention or another national law.¹¹⁷

The provision is also unbalanced. The rule provided by the Convention is sometimes more flexible (the special suspension rule of paragraph 2), at least

112. A. C. Hardingham, (1979) 3 LMCLQ, p.367; thus also Libouton, 1982, p.736.

113. See on this n.67 above.

114. Cf. Art.108(4) CComm. In proceedings which led to Cass. 25.1.1972, BT 1972, p.148 this provision was set aside as a result of application of Art.39(4) CMR. Contra, Tr. gr. inst. Metz 10.11.1981, BT 1982, p.38 and Tr. gr. inst. Valence 18.11.1981, BT 1982, p.211. Art.39 CMR was not applied here because on the basis of the factual criterion (dismissed in Chapter 3, § 4 above) it was established that the principal carrier had not in fact transported and as a result Art.32(1)(c) CMR was applicable in place of Art.39(4) second sentence CMR. See also the French decision cited at n.110 above.

115. Cass. 21.6.1982, BT 1982, p.416.

116. It therefore occasions no surprise that Art.32 CMR was not adopted in the Netherlands Law. The judgement of Groth, p.95 that in his view there exists an amazing degree of agreement in the caselaw regarding Art.32 does not detract from its defectiveness.

117. Following the wish for greater uniformity expressed by the Swedish delegate to the CMR revision conference held at Geneva in 1972 Rapporteur Loewe referred to the activities of UNCITRAL to bring about more unity in the field of international sales law, W/TRANS/SCI/438, 19 April 1972, p.15, sub 93. For the developments intended by Loewe the UNCITRAL Convention on the Limitation Period in the International Sale of Goods, New York 1974. For the text see UNCITRAL Yearbook, Vol.V, 1974, pp.120 et seq. as also the Protocol containing an amendment to that convention, adopted as Annex II to the UN Convention on Contracts for the International Sale of Goods, Vienna 1980. For the text see A/Conf.97/18, Annex II, pp.1 et seq.

for the person entitled to the goods, sometimes stricter (paragraph 4) than the national law. Furthermore, one can point to a wide area of application following the opening words of paragraph 1, on the one hand, with which is contrasted that the special suspension rule of paragraph 2 only serves the interest of the claimant.

Also as to substance the regulation demonstrates a number of uncertain matters, of which one may think of the conditions for an extension of the period of limitation to three years (paragraph 1), the question whether in the 'pre-' period (paragraph 1(b) and (c)) suspension can operate, the effectuation and removal of the suspension by means of the rule of paragraph 2, first sentence and the partial admission of the claim (paragraph 2, second sentence). It would also have been desirable for the Convention to have provided a solution to the frequently arising practical question as to reduction and extension of the period of limitation.

For these reasons the criticism of Wetter given at the beginning of this Chapter is in all respects to be regarded as justified and his wish to submit this limitation of actions regulation to a fundamental revision at any eventual adjustment of the Convention is here underscored.¹¹⁸

118. Wetter, *loc. cit.*, p.509.

La responsabilité du transporteur en vertu de la CMR

(Sommaire)*

L'introduction à cet ouvrage justifie le choix du sujet en général et énumère les sujets qui seront traités en particulier par chapitre. Avant de procéder à l'examen de la teneur de la CMR, le *chapitre premier* fixe l'attention sur la place occupée par la CMR dans le domaine du droit international commercial et s'attarde également à la question de savoir quelle est la signification qu'il faut y attacher (§ 1).

Le droit des transports s'est avéré comme étant par excellence un domaine du droit où une unification pouvait être opérée. La sécurité juridique exige que des relations juridiques internationales, comme les contrats internationaux de transport, soient sujettes à un régime uniforme indépendant du droit national. Le puissant développement du transport international de marchandises a créé la nécessité d'un règlement international dans ce domaine. Les rédacteurs de la Convention ont dû faire face à énormément de difficultés; les travaux préparatoires n'ont pris pas moins de huit ans. Les pierres d'achoppement furent le système de responsabilité ainsi que le montant de la responsabilité limitée du transporteur. Le fait qu'une modification à la convention sur les transports de marchandises par chemin de fer (CIM) se rapportant à la force majeure des transporteurs a été reprise par les rédacteurs de la CMR est d'une importance primordiale (§ 2).

Conformément à la nature et à la teneur du droit uniforme dont fait partie la CMR, la thèse que ce doit être considéré comme un système juridique particulier est défendue et que, partant, ce droit est autonome; ceci présente une importance fondamentale en ce qui concerne son interprétation. Il en résulte que par rapport à l'interprétation du droits des conventions il n'est réservé qu'une place très discrète au droit national, parmi lequel le droit international privé (§ 3).

Une des questions les plus difficiles à résoudre concrètement en pratique réside, aussi pour ceux qui s'érigent en partisan d'une interprétation autonome de la Convention, dans le problème à savoir quelle méthode (spécifique) d'invention de droit mérite la préférence. A cette fin et conformément à la nature du droit uniforme c'est la méthode téléologique qui vient en considération, éventuellement à côté de la méthode grammaticale, systématique et historique. C'est en effet cette méthode téléologique qui impose une comparaison de jurisprudence et de doctrine, indispensable dans le contexte du droit uniforme. Il est examiné à quelles entraves en pratique les juridictions devront faire face en vue de la réalisation des objectifs de la Convention. La nécessité à cet égard de la motivation des décisions judiciaires est soulignée (§ 4).

Le raisonnement suivi jusqu'à présent est contrôlé, du point de vue de sa praticabilité, par les thèses développées à propos de la CMR par la jurisprudence et la doctrine dans différents pays. Il est démontré à la lumière d'arrêts prononcés par les cours suprêmes que la méthode d'interprétation en ce qui concerne la CMR préconisée dans cet ouvrage a été suivie à plusieurs reprises.

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Ce sont surtout les jurisprudences allemande et anglaise qui sont claires à cet égard (§ 5).

Un examen des conceptions des auteurs au sujet de la CMR est de faible rapport en ce qui concerne le problème d'interprétation. Beaucoup d'auteurs ne se sont pas ou se sont à peine rendus compte du problème posé. Ceux qui se sont bien rendus compte du problème font en majorité preuve de l'importance des conceptions comme celles mises en évidence par la jurisprudence et doctrine étrangères (§ 6).

Le *chapitre deux* traite de l'application de la CMR. Différents aspects sont pris en considération.

En premier lieu est examinée la fonction de la règle du champ d'application, sujet de l'article premier. La fonction de cette règle vise essentiellement à soustraire au droit national la question de savoir en quels cas la Convention est d'application (§ 2).

En suite on passe en revue les conditions de l'article premier, dont l'application dépend de la CMR. Les problèmes pouvant surgir à ce sujet concernent l'interprétation de fait du (des) contrat(s) à la base de pareil transport. Les cas où le transport dépassant les frontières est dépecé en différents contrats de transport national sont soumis à critique. Il en est de même de la circonstance que le Convention fait appel à la Convention sur la circulation routière de Vienne de 1949. Vu que la CMR ne définit pas la notion de marchandises cette notion est interprétée d'une manière extensive dans le sens que, par suite des développements dans le transport international, les véhicules remorqués doivent être considérés comme des marchandises ce qui donne lieu à de situations imprévues. Les contrats de transport spéciaux énumérées à l'article premier auxquels la Convention ne s'applique pas sont traités très succinctement (§ 3).

En troisième lieu il est examiné ce qui doit être compris sous la notion du contrat de transport; cet examen présente son utilité en vue de la délimitation d'une part de cette notion essentielle pour l'application de la CMR et d'autre part d'un nombre de contrats apparentés au contrat de transport (§ 4). Attendu que la Convention ne donne non plus une définition de ce qu'est un contrat de transport, il s'agit encore d'aller à la recherche de ces éléments qui sont essentiels à cette notion (§ 4.2). A cette fin un nombre de notions juridiques rencontrées dans le domaine de droit des transports en différents pays est examiné et comparé au contrat de transport. C'est ainsi que viennent en considération le commissionnaire-expéditeur (§ 4.3), le commissionnaire aux transports (§ 4.4), la location de véhicules (§ 4.5) et le contrat de traction (§ 4.6).

Il résulte de cet examen de droit comparé que l'application de la CMR dépend maintes fois de l'interprétation desdites notions juridiques nationales. Une pareille méthode d'interprétation basée uniquement sur des notions juridiques nationales est contestée. Ceci est mis en évidence de la façon la plus claire lorsque deux notions juridiques étrangères sont traitées: le commissionnaire de transport français (§ 4.3.2) et le Spediteur allemand (§ 4.3.6).

Au *chapitre trois* la question est abordée de savoir à quel point la CMR est ou reste applicable, quand celui avec qui l'expéditeur a conclu un contrat de transport fait exécuter le transport par un autre. C'est ainsi que viennent en considération le transport superposé, le transport en sous-traitance et le trans-

port successif. Au sujet de types particuliers de transport plusieurs règles sont comprises dans respectivement les art. 2, 3 et 34 et suivants. En général l'on peut affirmer que c'est l'ayant droit qui bénéficie de l'avantage de ces règles. L'introduction consacre des considérations générales aux notions juridiques susmentionnées: ces notions disposent d'un nombre d'éléments communs mais présentent entre elles néanmoins des différences. L'attention est également attirée sur la question de savoir à quel égard les types de transport, mentionnés dans ce contexte, ressemblent et/ou diffèrent du transport combiné ou multimodal. Cette question est importante en ce qui concerne le transport de conteneurs (§ 1).

Aux paragraphes suivants les articles 2, 3, 34 et suivants sont traités. Tant en ce qui concerne le transport superposé que le transport successif l'élaboration des règles en question (§§ 2.1 et 4.1) est examinée. Plus loin est décrit sous quelles conditions ces règles sont d'application et quelles en sont les conséquences juridiques. Ces conséquences juridiques se rapportent d'une part aux relations juridiques entre l'ayant droit et le transporteur (§§ 2.3 et 4.3) et d'autre part aux relations juridiques entre les transporteurs entre eux (§§ 2.4. et 4.4). Il appert que l'application de l'article 2 ne va pas sans problèmes. La possibilité pour le transporteur routier responsable d'introduire un recours contre le transporteur superposé – possibilité dont la Convention ne fait d'ailleurs pas état – engendre également des problèmes.

Dans ce contexte il y a lieu de consacrer quelque peu l'attention au transporteur en sous-traitance qui intervient d'ailleurs tant en transport superposé qu'en transport successif. À côté de cela la possibilité reste que celui-ci soit transporteur (transporteur en sous-traitance) sans faire l'objet des articles 2 et 34 et suivants. C'est seulement quand le transporteur en sous-traitance est également transporteur successif, qu'en vertu de la Convention une relation contractuelle naît entre l'expéditeur et le transporteur en sous-traitance (§ 3.).

Le doute au sujet de la nécessité de l'acceptation d'une lettre de voiture en ce qui concerne l'article 34 fait entre autres l'objet de quelques considérations. Après avoir pris en considération les différents arguments avancés en doctrine et en jurisprudence, il est opté pour le point de vue que la nécessité de l'acceptation de la lettre de voiture doit être maintenue sans réserve. Comme il a déjà été souligné en parlant de la notion de transport, le problème, maintes fois posé en pratique, de savoir si le transporteur qui n'exécute pas lui-même le transport tombe sous le champ d'application de l'article 34 est examiné ici. La conception est défendue selon laquelle le fait qu'un transporteur (successif) n'a lui-même pas effectivement exécuté le transport ne constitue pas une entrave à l'application de l'article 34 (§ 4.2). Les conséquences juridiques de l'article 34 sont radicales; chacun des transporteurs successifs est en principe solidairement responsable de l'exécution complète de contrat de transport. Différemment de l'article 2, l'article 37 accorde la possibilité aux transporteurs successifs d'exercer un recours l'un contre l'autre. Les problèmes spécifiques pouvant en ce cas surgir, sont traités en conclusion du chapitre trois.

La quintessence de la CMR fait l'objet du *chapitre quatre* notamment la responsabilité du transporteur. Quelques considérations concernant le fondement théorique du type de responsabilité ainsi que la signification des aspects connexes du régime de preuve précèdent l'examen de la teneur de la

responsabilité. Les exposés développés dans des divers pays à l'égard du fondement de la responsabilité du transporteur essayent de faire voir clair, ne fût-ce qu'en termes divergents, dans le rapport existant entre l'obligation incombant au transporteur de livrer intactes et à temps les marchandises au lieu de destination d'une part et les conditions dans lesquelles il est exonéré de la responsabilité découlant de cette obligation d'autre part. Des concepts comme la responsabilité sur base de faute ou de risque semblent y jouer un rôle (§ 2).

Le partage du fardeau de la preuve entre le transporteur et l'ayant droit et la façon dont celui-ci est réalisé dans le système du type de responsabilité sont d'une grande importance (§ 3).

Un examen historique peut en général fournir de données utiles à l'interprétation de ce système. Ceci est par exemple le cas pour la disposition la plus importante qui mène à exonération de responsabilité du transporteur, à savoir 'des circonstances que le transporteur ne pouvait pas éviter et aux conséquences desquelles il ne pouvait pas obvier' (art.17 al.2); cette formulation a remplacé la notion contestée de 'force majeure' dans la Convention sur les transports de marchandises par chemin de fer (CIM). Il est indiqué en suite comment les rédacteurs de la CMR ont décidé à reprendre partiellement le type de responsabilité de la CIM et comment une tentative du côté néerlandais en vue d'éliminer le système traditionnel de responsabilité, basé sur l'opposition d'intérêts entre les parties intéressées au contrat de transport, a dû échouer (§ 4).

La description du système est suivie d'une analyse systématique des dispositions qui contiennent les causes d'exonération de la responsabilité du transporteur. Ces causes sont générales (art.17 al.2, voir § 5.2) ou particulières (art.17 al.4, voir § 5.4); cette distinction a surtout une implication en ce qui concerne le régime des preuves. Dans le cadre des causes d'exonération générales il est entre autres examiné quelle est l'importance de la distinction entre les notions 'vice propre' et 'nature' des marchandises (§ 5.2.2). Il est en outre examiné à quel point un nombre de circonstances génératrices d'avarie fréquentes en pratique comme le vol et l'incendie a, oui ou non, donné lieu à responsabilité de la part du transporteur (§§ 5.2, 3.2 et 3). Le transporteur ne peut se décharger de sa responsabilité pour avarie lorsque celle-ci trouve son origine dans la défectuosité du véhicule (art.17 al.3). Les mérites de différentes argumentations avancées du côté des transporteurs afin d'échapper aux conséquences juridiques de cette disposition sont examinés (§ 5.3). Les six causes d'exonération particulières que l'on retrouve à l'art. 17 al.4 et dont quelques unes sont précisées à l'article 18, al.3, 4 et 5 sont suivies de près. Beaucoup d'attention est prêtée à la cause d'exonération fréquemment invoquée en pratique, consistant en la 'manutention, chargement, arrimage ou déchargement de la marchandise par l'expéditeur ou le destinataire ...' (art.17 al.4c). La question générale de savoir en quelle mesure cette disposition est interprétée en faveur du transporteur ne peut être répondue que lorsqu'on prête séparément attention à ses divers aspects (§ 5.4.3). En examinant la nature des marchandises les problèmes concernant le transport frigorifique sont abordés (art.17 al.4d juncto art.18 al.4). Il résulte de la jurisprudence qu'en matière d'avarie en cas de transport frigorifique le transporteur a toute peine à échapper à sa responsabilité. Cette jurisprudence est critiquée (§ 5.4.4).

En vertu de l'article 3 le transporteur répond des actes et omissions de

toutes personnes aux services desquelles il recourt pour l'exécution du transport. Du point de vue rédactionnel cette disposition semble être compliquée et les textes authentiques à ce sujet ne sont pas entièrement parallèles; c'est pourquoi que sa teneur est établie aussi au moyen d'un examen historique et comparé. A la fois on prête dans ce contexte attention au problème, qui n'est d'ailleurs pas traité par la CMR, concernant la capacité des auxiliaires du transport de commettre de actes juridiques engageant le transporteur et les risques qui en découlent pour le transporteur (§ 5.5).

Vu que les dispositions concernant la responsabilité se rapportent aux pertes et avaries qui se produisent entre le moment de la prise en charge et celui de la livraison de la marchandise (art.17 al.1), les notions de prise en charge et de livraison est examinées de plus près. L'opinion est avancée que, conformément à l'accord de volonté entre parties, il suffit que les parties se soient mises réciproquement à même d'exercer un pouvoir de fait sur les marchandises (§ 6.2). Pour l'ayant droit il importe de pouvoir établir que les pertes et/ou avaries se sont produites pendant le période susmentionnée. Ici aussi des problèmes concernant le régime des preuves peuvent se manifester; la CMR en a dans un certain sens tenu compte aux articles 8, 9 et 30. L'examen desdites dispositions oblige à prendre en considération le force probante de la lettre de voiture tant au commencement qu'à l'expiration de ladite période de responsabilité. Les possibilités existantes d'inscription de réserves et/ou observations sur la lettre de voiture sont prises en considération ainsi que les conséquences en ce qui concerne la force probante de la lettre de voiture. La conclusion est que le régime des preuves qui est à la base de ce système laisse à désirer; en pratique l'insécurité en est la conséquence (§ 6.3).

Le *chapitre cinq* se rapporte au montant des indemnités. Le point de départ sont les notions classiques de perte, avarie et retard. la distinction entre les notions d'avarie et de perte a son importance en vue du calcul du montant des indemnités ainsi qu'en vue du moment où le délai de prescription commence à courir (§ 2).

Le mécanisme du système des indemnités en CMR n'est pas simple. Le montant qui doit être fixé pour être pris en considération comme indemnité est composé de deux facteurs, notamment la perte (art.23 al.1) et un nombre d'éléments additionnels cités à l'article 23 al.4. Le calcul de l'indemnité due en cas d'avarie (art.25) se réfère au système appliqué en cas de perte ce qui peut donner lieu à des problèmes en ce qui concerne l'application de la limite comme il est prévu à l'article 23, al.3 (§ 3.1 et 3.2.3). A l'instar du transport ferroviaire mais contrairement aux autres conventions dans le domaine du droit des transports la CMR prend comme point de départ du calcul de l'indemnité la valeur de la marchandise au lieu et à l'époque de la prise en charge. Cette valeur est fixée au moyen de critères objectifs de sorte qu'une modification éventuelle de la valeur postérieure à la prise en charge de la marchandise par le transporteur n'influe pas sur le calcul des indemnités. Le calcul de l'indemnité comme prévu à l'article 23 al.1 tient compte de frais qui, pour délimiter l'application de l'article 23 al.4, sont assimilés au préjudice matériel pour autant qu'ils se rapportent directement à ce préjudice matériel. Une délimitation entre ces deux groupes a son importance en vue du calcul de la limitation de l'indemnité (§ 3.1). Plusieurs aspects de cette limitation font l'objet de l'exposé. De l'approche historique il appert combien de peine les

rédacteurs de la CMR se sont donnés pour arriver à un compromis acceptable pour tous les pays (§ 3.2.1). Puis sont traités les problèmes posés par la disparition lente mais certaine de l'or comme fondement du système d'indemnité – ce qui est d'ailleurs également le cas pour les autres branches du transport. En supprimant en 1978 le cours officiel de l'or le Fonds Monétaire International semble avoir ébranlé les fondements de la CMR. Aussi longtemps que le Droit de Tirage Spécial qui dorénavant devra faire fonction d'unité de compte n'aura pas encore acquis de statut officiel, une phase d'incertitude commence. Cette phase durera jusqu'à la fin de 1980, moment auquel le Protocole CMR entre en vigueur. Le montant de 25 francs-or Germinal est remplacé par 8 1/3 unités de compte; comme unité de compte le Droit de Tirage Spécial est prise en considération (article 23 al.3 et 7 nouveau). A ce développement le législateur néerlandais n'a pas réagi d'une façon suffisamment adéquate d'où pouvait se maintenir l'incertitude au sujet du montant des indemnités ce qui est à déplorer (§ 3.2.2). Ensuite une description est donnée d'un nombre de situations où l'application de la limitation a posé le juge devant des problèmes. Ainsi l'on songe à des envois qui sont composés de différentes sortes de marchandises (groupage) ou à des envois où une partie des marchandises a été avariée (§ 3.2.3). Les éléments de préjudice mentionnés à l'article 23 al.4 ne sont pas sujets à la limitation. Il en résulte la nécessité d'une attitude critique vis-à-vis d'une interprétation extensive des éléments mentionnés à ladite disposition. La question de savoir en quelle mesure il doit y avoir un lien entre les frais susmentionnés et le transport qui y a donné lieu est contestée. Dans ce cadre une analyse est faite de la jurisprudence qui s'est formée après l'arrêt retentissant de la Chambre des Lords britannique condamnant un transporteur au paiement, non pas seulement de l'indemnité pour préjudice matériel mais également au paiement d'un multiple de ce montant égal aux droits d'accise dûs par l'expéditeur pour n'avoir pas apuré son document d'exportation. La thèse est défendue qu'une interprétation restrictive de l'article 23 al.4 mérite la préférence (§ 3.3).

La notion d'avarie donne l'occasion d'examiner un nombre de méthodes à l'aide desquelles l'indemnité peut être calculée. Des problèmes peuvent surgir à cause du fait que l'avarie est constatée au lieu de destination tandis que la Convention considère comme base de l'indemnité la valeur des marchandises à l'époque de la prise en charge par le transporteur. Il est démontré que la méthode de calcul de la dépréciation appliquée en vertu de la CIM depuis 1961 se rapproche le plus possible de la réalité (§ 4).

A l'occasion de l'indemnité due en cas de retard une position est prise en ce qui concerne la distinction controversée entre la notion de préjudice résultant du retard d'une part et celle de préjudice à la suite de perte et/ou avarie d'autre part. Conformément au point de vue de la majorité de la doctrine, la thèse est avancée que la notion de préjudice résultant du retard au sens de l'article 25 al.5 doit être interprétée restrictivement et que, partant, le 'préjudice résultant du retard' causé à la suite de perte et/ou avarie doit être réglé sur base de l'article 23 al.1-4. Lesdites dispositions restent également applicables lorsque la perte et/ou l'avarie ont été causés par retard (§ 5).

Les articles 24-26 de la CMR offrent la possibilité d'augmenter le montant limité par l'article 23 al.3 ainsi que de fixer un intérêt spécial à la livraison. Les conséquences juridiques et les conditions sous lesquelles elles se produisent

sont mises en évidence. La jurisprudence qui attache trop peu d'importance à l'accord de volonté des parties comme condition pour les conséquences juridiques visées aux articles 24 et 26 est contestée (§ 6).

A l'occasion de l'article 27 qui traite de l'intérêt qui peut être demandée et de la conversion de la monnaie dans celle du pays où le paiement est réclamé, quelques considérations sont consacrées au moment non prévu par la Convention où la conversion du franc-or doit être opérée. Une solution est préconisée en faveur de la prise en considération au moment de la sentence judiciaire au sujet de la demande (§ 7).

Ensuite le fondement, la teneur et l'application de la disposition de l'article 28 concernant le concours de réclamations sont examinés. Le point de vue est avancé que le transporteur peut invoquer la Convention envers quiconque qui d'une façon quelconque est impliqué librement à l'intérêt lésé; les conceptions doctrinales au sujet de l'opposabilité aux tiers des clauses d'exonération ont d'ailleurs contribué à la défense dudit point de vue (§ 8).

Un exposé concernant les cas où le transporteur perd le droit de se prévaloir des dispositions de la Convention concernant la limitation de l'indemnité conclut ce chapitre. Les conditions qui engendrent les conséquences juridiques sont développées. La conclusion des rédacteurs de la conversion de s'en tenir à l'ancienne formulation contestée de la Convention de Varsovie où la *lex fori* prévaut doit être déplorée; ainsi les possibilités d'une uniformisation désirable dans ce domaine juridique sont en effet sensiblement réduites. Ceci est démontré à l'aide de l'interprétation divergente donnée dans les divers pays au dol ou la faute qui d'après la loi nationale doit être considérée comme équivalente au dol; ceci porte d'ailleurs atteinte à l'égalité entre les transporteurs (§ 9).

Au *chapitre six* se pose le problème de savoir qui dispose du droit de réclamer une indemnité au transporteur. A l'introduction (§ 1) un inventaire est établi des différents aspects de ladite question; ensuite les notions d'expéditeur et de destinataire sont examinées de plus près. Le principe est posé que ces notions doivent être conçues d'un point de vue juridique et non d'un point de vue de fait; par après il est examiné de quelle façon le destinataire a en ordre principal le droit à la remise des marchandises et acquiert en ordre subsidiaire le droit à indemnité (§ 2).

En second lieu un examen est consacré au fondement du droit de réclamation; la question de savoir à quel égard la CMR offre à ce sujet des points de contact est sujette à contestation. Une analyse est faite et une critique est émise d'un développement intéressant de la jurisprudence de la Cour suprême en Allemagne; de cette jurisprudence il résulte finalement que le droit de disposer des marchandises (comparez les articles 12 et 13) doit être considéré comme point de départ pour l'exercice du droit de réclamation. Il est en effet porté préjudice à la quintessence de la doctrine concernant la disposition, doctrine qui ne trouve d'autre fondement qu'un appui verbal, lorsqu'on ne désire pas accorder à ladite doctrine un caractère d'exclusivité. A tort les partisans de la doctrine concernant la disposition en Allemagne passent sous silence le fait que le terme 'Verfügungsberechtigte' est une traduction inexacte des notions authentiques de 'claimant' et 'ayant droit'. La conception que le droit de disposer des marchandises devrait en CMR servir de base au droit de réclamation et dès lors rejetée. C'est de premier abord que l'expéditeur dispose du droit de réclamation tandis que ce droit de réclamation revient au des-

tinataire comme droit originaire à la suite de son adhésion au contrat de transport (§ 3).

Cette situation est susceptible de créer des problèmes. L'opinion selon laquelle le droit de réclamation est uniquement reconnu à celui dont l'intérêt, situé en dehors du contrat de transport, est lésé, est rejetée. La jurisprudence dans les divers pays est également caractérisée par une attitude réservée vis-à-vis de la doctrine de l'intérêt (§ 4).

Finalement il est examiné quel est, en l'espèce, le rôle des intermédiaires intervenant dans le domaine du droit des transports. A cet égard il semble se ressentir le besoin d'élargir la notion déjà traitée de partie. Il est démontré qu'aussi un tiers impliqué contractuellement, quoique n'étant pas partie au contrat de transport, peut, sous certaines conditions, exercer le droit de réclamation vis-à-vis du transporteur; cette position est prise en faisant également appel à une jurisprudence développée dans différents pays.

Les règles de procédure, objet des articles 31 et 33, sont traitées au *chapitre sept*. Il s'agit-là entre autres de la question contestée de savoir en quelle mesure l'article 31 crée une compétence ou bien limite cette compétence. A cet effet l'attention est d'abord prêtée à la nature de la règle juridictionnelle de l'article 31 al.1. La teneur de cette disposition est que la question de savoir quelles juridictions sont compétentes pour prendre connaissance d'un litige en matière de la CMR est soustraite aux règles de procédure purement nationales. La Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale (Convention de Bruxelles) est entrée en vigueur après la CMR; dès lors un examen est consacré aux rapports entre l'applicabilité de la CMR et de la Convention de Bruxelles au sujet de la compétence judiciaire. Une discussion critique est consacrée à quelques jugements en matière de litiges CMR où la question de la compétence a été déduite des articles 2-5 de la Convention de Bruxelles (§ 2).

Après avoir fait au § 3 une série de remarques au sujet de la teneur de la disposition concernant la juridiction compétente, il est procédé à l'examen des clauses arbitrales. La possibilité de désigner des collègues arbitraux est offerte par les articles 31 et 33 pourvu qu'il soit établi que le collège arbitral appliquera la CMR. La question s'est posée si pareille clause ne préjudicie pas à la possibilité de saisir les juridictions compétentes en vertu de la CMR. Autrement qu'en matière de clauses arbitrales il est en général confirmé que cette question doit être répondue positivement en ce qui concerne les juridictions citées à l'article 31. Dans ce cadre plusieurs sentences judiciaires soulignant en cas d'arbitrage la nécessité d'une stipulation expresse au sujet de l'application de la CMR sont approuvées (§ 4).

L'article 31 n'attribue aux juridictions qu'une compétence juridictionnelle internationale (attribution) et abandonne aux règles de procédure nationales la compétence relative (distribution); dès lors peut surgir le problème de savoir ce qui doit prévaloir quand le législateur national n'a pas concrétisé la compétence juridictionnelle comme définie par la CMR. En Allemagne ce problème a donné lieu à un développement intéressant de la jurisprudence qui a résulté en une prise de position remarquable par le Bundesgerichtshof. Initialement la Cour suprême allemande a barré la route aux tendances de certains tribunaux qui, aussi longtemps que le législateur national reste en défaut de satisfaire à l'obligation de droit public international créée par la CMR

d'élaborer des règles de procédure plus précises, ont comblé la lacune constatée en ce sens qu'ils empruntent à l'article 31 également la compétence relative. La Cour suprême était en effet d'avis que par cette façon d'invention de droit les tribunaux s'étaient rendus sur un terrain prohibé parce que légiférant. Dans un arrêt subséquent la Cour suprême est revenue à la jurisprudence qui vient d'être contredite. Comme le font d'ailleurs également certains auteurs le point de vue est défendu, que, sous certaines conditions, le juge peut donner pareille interprétation extensive à l'article 31 (§ 5).

Finalement sont énumérés au § 6 un nombre d'aspects d'ordre procédural dont question à l'article 31 alinéas 2-5 comme par exemple la litispendance, l'exécution et la caution *judicatum solvi*.

Un exposé au sujet de la prescription au *chapitre huit* termine cet ouvrage.

Après une série d'observations introductives (§ 1) la teneur du régime de la prescription est examinée (art.32) d'où il résulte qu'aussi des actions non régies par la Convention tombent sous ce régime (§ 2).

Dans le cas de dol ou de faute considérée comme équivalente au dol la prescription d'un an est prolongée à trois ans. Il est avancé que, quoique l'article 32 al.1 ne le prévoit pas expressément, cet effet juridique se produit lorsque le dol ou la faute qui doit y être assimilée est due à la personne aux services de laquelle le transporteur recourt pour l'exécution du transport (§ 3).

L'article 32 al.1 énumère trois catégories de points de départ de la prescription; il s'agit d'être attentif. Tout particulièrement les envois de retour lorsque les marchandises, avariées pendant le transport, sont renvoyées au lieu d'expédition, ont donné lieu à divergence de vue au sujet des catégories applicables. A l'instar des auteurs anglais la thèse est soutenue que des réclamations résultant de pareilles situations sont régies non pas par la catégorie se rapportant à l'avarie ou à la perte mais par la catégorie qui se réfère aux cas résiduels. Cette catégorie qui apparemment offre le délai le plus long peut en certaines circonstances avoir pour le transporteur le résultat inique qu'il sera confronté à une prescription inférieure à un an (§ 4).

Le § 5 consacre un examen à la suspension et l'interruption de la prescription, régies par la loi de la juridiction saisie (art.32 al.2 et 3); l'attention est attirée au régime spécial de suspension prévu à l'article 32 al.2 qui est uniquement d'application en faveur de l'ayant droit. Le maintien stricte de l'exigence de la restitution par le transporteur des pièces jointes à la réclamation introduite par l'ayant droit, estimée absolument nécessaire par la jurisprudence en différents pays, doit être considéré comme non soutenable. Ensuite la nécessité, existant en pratique du droit des transports et confirmée un certain nombre de fois par la jurisprudence, d'une prorogation du délai de prescription est examinée sous l'angle du caractère impératif de la Convention. La thèse est soutenue que la CMR n'autorise pas pareille prorogation (§ 6).

L'article 32 al.4 prévoit que l'action prescrite ne peut plus être exercée même sous forme de demande reconventionnelle ou d'exception. En différents pays il existe en cette matière des règles divergentes: l'attention doit dès lors rester éveillée (§ 7).

Le régime du recours en matière de transport effectué par des transporteurs successifs connaît des règles de prescription distinctes des règles normales (art. 39 al.4). Force est de s'opposer à une prorogation inacceptable du délai de prescription à laquelle la rédaction du texte authentique anglais pourrait

donner lieu; le régime spécial concerne uniquement les recours dont peuvent disposer les transporteurs l'un vis-à-vis de l'autre et non les autres actions (§ 8).

Pour terminer l'exposé sur le régime de la prescription la conclusion s'impose que, à différents regards, ce régime présente des défauts et nécessite par voie de conséquence une révision profonde (§ 9).

Die Haftung des Frachtführers nach der CMR

(Zusammenfassung)*

Nach einer Verantwortung des gewählten Themas in der *Einleitung* dieses Buches und einer kapitelweise Andeutung der (Teil) Probleme wird, bevor eingegangen wird auf den Inhalt des Übereinkommens, in *Kapitel 1* der Standart geschildert den die CMR auf dem Gebiet des internationalen Handelsrechtes einnimmt wobei auch die Frage erörtert wird wieviel Gewicht darauf gelegt werden muss (§ 1).

Es ist klar dass das Transportrecht ein Rechtsgebiet ist das sehr geeignet ist für Vereinheitlichung. Zum Schutz der Rechtssicherheit bedürfen internationale Rechtsbeziehungen wozu internationale Transportübereinkommen gehören einer vom internationale Recht unabhängige einheitliche Regelung. Durch den starken Zuwachs des internationalen Strassengüterverkehrs kam das Bedürfnis auf an eine internationale Regelung auf diesem Gebiet. Die Redaktionskommission des Übereinkommens war nicht auf Rosen gebettet; die 'travaux préparatoires' nahmen nicht weniger als acht Jahre in Anspruch. Engpässe dabei waren das System der Haftung und das Mass der Beschränkung der Haftung des Frachtführers. Von grosser Bedeutung ist der Umstand dass eine Änderung des Eisenbahnübereinkommens (CIM) im Punkt der Höheren Gewalt für den Frachtführer von der Redaktionskommission übernommen wurde (§ 2).

In Übereinstimmung mit der Natur und dem Ziel des uniformen Rechtes wozu die CMR gehört, wird die These verteidigt, dass dieses Recht als ein Sonderrechtssystem betrachtet werden muss und deshalb autonom ist was von prinzipieller Bedeutung ist für deren Auslegung. Daraus wird die Folgerung gezogen, dass hinsichtlich der Auslegung des Übereinkommensrechts dem nationalen Recht, wozu das I.P.R. gehört, nur eine bescheidene Rolle zugeacht wird (§ 3).

Auch für denjenigen der eine Übereinkommensautonome Interpretation befürwortet bleibt in der Praxis eine der schwersten, konkret zu beantwortenden Fragen welche (spezifische) Methoden der Rechtsfindung bevorzugt werden muss. Gemäss dem System und dem Charakter des Uniformen Rechtes kommt dafür ausser möglicherweis der grammatikalischen, systematischen und historischen, namentlich die teleologische Methode in Betracht weil diese Methode zwingt zu einer, im Rahmen des uniformen Rechtes unbedingt notwendigen, Vergleichung der Rechtsprechung und Doktrin. Im Hinblick auf die Realisierung des Zieles des Übereinkommens wird untersucht mit welchen Hindernissen richterliche Kollegien in der Praxis konfrontiert werden können. Gewiesen wird auf die in diesem Zusammenhang notwendige Motivierung der richterlichen Entscheidungen (§ 4).

Der bisher entwickelte Gedankengang wird dann geprüft auf seine Brauchbarkeit am Material das von Richtern und Autoren hinsichtlich der CMR in verschiedenen Ländern vorgelegt worden ist. An einer Anzahl

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höchstrichterlicher Entscheidungen wird gezeigt dass die in dieser Studie befürwortete Interpretationsmethode hinsichtlich der CMR öfters Anwendung gefunden hat. Besonders die deutsche und englische Rechtsprechung ist in dieser Hinsicht eindeutig (§ 5).

Eine Untersuchung der Lehrmeinungen der Autoren die über der CMR geschrieben haben liefert nur wenig Material für die Interpretationsfrage. Viele Autoren haben diese Frage kaum berührt. Der überwiegende Teil derer die sich mit dieser Frage wohl auseinander gesetzt haben, betonen das Gewicht der Auffassungen wie sie in der ausländischen Rechtsprechung und Literatur hervor gehoben wurden (§ 6).

Kapitel 2 behandelt den Anwendungsbereich der CMR. Unterschiedliche Aspekte werden erörtert.

Erstens wird untersucht was die Wirkung der in Art. 1 formulierten Kollisionsnorm ist. Die Funktion dieser Norm ist hauptsächlich zu bewirken, dass die Frage in welchen Fällen das Übereinkommen Anwendung findet dem nationalen Recht entzogen wird (§ 2).

Zweitens werden die Bedingungen des Art. 1 von denen die Anwendung der CMR abhängig gemacht wird, behandelt. Fragen die dabei aufgeworfen werden können beziehen sich u.a. auf die tatsächliche Auslegung des dem diesbezüglichen Transport zugrundeliegenden Vertrages. Fälle in denen der tatsächlich grenzüberschreitende Transport aufgeteilt wird in unterschiedliche nationale Transportverträge werden kritisch beurteilt sowie der Umstand dass das Übereinkommen für den Begriff Fahrzeug anschliesst an das Wiener Abkommen über den Strassenverkehr aus 1949. Weil die CMR keine Definition des Güterbegriffes enthält wird dieser Begriff extensiv ausgelegt in dem Sinne dass anlässlich der Entwicklungen des internationalen Gütertransportes geschleppte Fahrzeuge als Güter betrachtet werden was zu unvorhergesehenen Situationen führt. Ein einziges Wort wird den Sondertransportverträgen gewidmet die in Art. 1 erwähnt werden auf denen das Übereinkommen ausdrücklich keine Anwendung findet (§ 3).

Drittens wird untersucht was der Begriff des Transportvertrages beinhaltet, besonders rücksichtlich der Abgrenzung dieses für die Anwendbarkeit der CMR wesentlichen Begriffes von einer Anzahl dem Transportvertrag verwandter Verträge (§ 4).

Weil das Übereinkommen genauso wenig eine Umschreibung des Transportvertrages enthält, müssen die einzelne Momente gesucht werden die wesentlich sind für diesen Begriff (§ 4.2). Mit dieser Absicht wird eine Anzahl auf dem Gebiete des Transportrechtes vorkommender Rechtsfiguren in verschiedenen Ländern untersucht und mit dem Transportvertrag verglichen. Als solche werden mit Namen Spedition, wozu auch Spedition zu festen Kosten und Sammelladungspedition gerechnet werden (§ 4.3), der Chartervertrag (§ 4.5) und Schlepptvertrag (§ 4.6) behandelt. Aus dieser rechtsvergleichenden Untersuchung wird die Folgerung gezogen dass die Anwendbarkeit der CMR oft abhängig ist von der Auslegung der genannten nationalen Rechtsfiguren. Eine solche nur auf nationale Begriffen ruhende Auslegung wird bestritten. Am klarsten zeigt sich das bei der Behandlung zweier ausländischen Rechtsfiguren: beim französischen Commissionnaire de transport (§ 4.3.2) und beim deutschen Spediteur (§ 4.3.6).

Kapitel 3 behandelt die Frage in wiefern und wie lang die CMR Anwendung findet wenn die Vertragspartei mit dem der Absender einen Transportvertrag geschlossen hat die Beförderung von einem Dritten ausführen lässt. Dabei kommen Huckepackbeförderung, der Unterfrachtführer und aufeinanderfolgende Frachtführer in Betracht. Das Übereinkommen enthält eine Anzahl Bestimmungen über diese besondere Beförderungsformen die beziehungsweise in den Art. 2, 3 und 34 ff. niedergelegt wurden. Im Allgemeinen kann man sagen dass diese Regelungen zum Vorteil des Verfügungsberechtigten gereichen. In der Einleitung wird den obengenannten Rechtsformen die über eine Anzahl gemeinsamer Züge verfügen, aber auch Unterschiede zeigen, eine grundlegende Betrachtung gewidmet. Auch wird die Frage erörtert inwiefern die obengenannten Beförderungsformen Zusammenhang und/oder Unterschiede zeigen mit kombinierter oder multimodaler Beförderung. Das ist wichtig bei Containertransport (§ 1).

In den darauffolgenden Paragraphen findet die Behandlung der Art. 2, 3 und 34 ff. statt. Dabei wird untersucht wie die diesbezüglichen Bestimmungen sowohl die der Huckepackbeförderung als der aufeinanderfolgenden Beförderung zustande gekommen sind (§§ 2.1 und 4.1), wonach jeweils geprüft wird unter welchen Bedingungen diese Bestimmungen Anwendung finden und welche rechtliche Folgen sie nach sich ziehen. Diese rechtliche Folgen beziehen sich einerseits auf die Rechtsbeziehung zwischen dem Verfügungsberechtigten und dem Frachtführer (§§ 2.3 und 4.3), andererseits auf die Rechtsbeziehung zwischen den Frachtführern untereinander (§§ 2.4 und 4.4). Die Anwendung des Art. 2 CMR verläuft aus verschiedenen Gründen nicht ohne Probleme. Die Möglichkeit übrigens vom Übereinkommen nicht bestritten für den haftenden Frachtführer Regress zu nehmen an den Huckepackbeförderer gibt ebenfalls Anlass zu Problemen.

In diesem Zusammenhang muss dem Unterfrachtführer einige Aufmerksamkeit gewidmet werden weil diese Rechtsform sowohl bei der Huckepackbeförderung als bei der aufeinanderfolgenden Beförderung vorkommt. Daneben bleibt die Möglichkeit bestehen dass dieser (Unter) Frachtführer ist ohne dabei unter den Bereich des Art. 2 oder 34 ff. zu fallen. Nur wenn der Unterfrachtführer auch aufeinanderfolgender Frachtführer ist entsteht aus dem Übereinkommen von Rechts wegen ein Vertragsverhältnis zwischen dem Absender und den Unterfrachtführer (§ 3).

Bei der Behandlung des Art. 34 wird unter anderem dem entstandenen Zweifel hinsichtlich der Bedingung der Annahme des Frachtbriefes Aufmerksamkeit gewidmet. Nach Abwägung der unterschiedlichen Argumente die in der Rechtsprechung und in der Literatur vorgelegt worden sind, wird der Standpunkt eingenommen dass die Bedingung der Annahme des Frachtbriefes unbedingt gehandhabt werden soll. Wie schon bei der Behandlung des Beförderungsvertrages angedeutet wurde, wird das in der Praxis oft auftretende Problem behandelt ob auch derjenige Frachtführer der nicht selber tatsächlich befördert unter den Anwendungsbereich des Art. 34 fällt. Es wird die Auffassung verteidigt dass die Tatsache dass ein (aufeinanderfolgender) Frachtführer nicht selber befördert hat kein Hindernis bedeutet für die Anwendung des Art. 34 (§ 4.2). Die rechtlichen Folgen des Art. 34 sind eingreifend: jeder der aufeinanderfolgender Frachtführer haftet im Prinzip solidarisch für die Durchführung des Beförderungsvertrages. Anders als im Art. 2 gibt Art. 37 den haftenden aufeinanderfolgenden Frachtführern die

Möglichkeit an einander Regress zu nehmen. Mit einer Behandlung den spezifischen Problemen, die dabei entstehen können, wird das dritte Kapitel abgeschlossen.

Im *vierten Kapitel* wird das Kernstück der CMR erörtert: die Haftung des Frachtführers. Bevor der Inhalt des Haftungsmodells behandelt wird, werden dessen theoretische Grundlagen und die damit zusammenhängenden beweisrechtlichen Aspekte besprochen. Die Auseinandersetzungen über die Grundlage der Haftung des Frachtführers die in den verschiedenen Vertragsländern signalisiert wurden, versuchen, wenn auch mit Unterschieden hinsichtlich der Terminologie den Zusammenhang zu verdeutlichen der besteht zwischen der Pflicht des Frachtführers die Güter unbeschädigt und rechtzeitig am Bestimmungsort abzuliefern einerseits und den Bedingungen unter denen die aus der genannten Rechtspflicht entstandene Haftung aufgehoben wird andererseits. Der Verschuldens- und Gefährdungshaftungsbegriff spielt dabei offensichtlich eine Rolle (§ 2).

Von grosser Bedeutung ist dabei die Beweislastverteilung zwischen Frachtführer und Verfügungsberechtigtem und die Art und Weise wie diese im System des Haftungsmodells Gestalt annimmt (§ 3).

Für die Auslegung dieses Systems können die 'travaux préparatoires' nützliche Auskunft geben. Das ist zum Beispiel der Fall mit der wichtigen Bestimmung die zur Aufhebung der Haftung des Frachtführers führt nämlich 'Umstände die der Frachtführer nicht vermeiden und deren Folgen er nicht abwenden konnte' (Art.17 abs.2), welche Formulierung den umstrittenen Begriff 'force majeure' im Eisenbahnübereinkommen (CIM) ersetzt hat. Dargelegt wird ferner wie die Redaktionskommission der CMR sich zu einer teilweisen Übernahme des Haftungsmodells der CIM entschlossen hat und wie ein Versuch von niederländischer Seite das traditionelle auf dem Interessengegensatz der Parteien beim Beförderungsvertrag ruhende Haftungssystem zu verwerfen, scheitern musste (§ 4).

Der Beschreibung des Systems folgt eine systematische Analyse der Bestimmungen die die Gründe der Aufhebung der Haftung für den Frachtführer enthalten. Diese Gründe sind allgemeiner (Art.17 Abs.2, darüber im § 5.2) oder besonderer Art. (Art.17 Abs.4, darüber handelt § 5.4) welcher Unterschied hauptsächlich beweisrechtliche Implikationen hat. Im Rahmen der allgemeinen Aufhebungsgründe wird u.a. geprüft wie wichtig der Unterschied ist zwischen den Begriffen 'besondere Mängel' und 'Natur' der Güter (§ 5.2.2); weter inwieweit eine Anzahl schadenverursachender Umstände wie Diebstahl oder Brand die in der Praxis oft vorkommen, wohl oder nicht zu einer Haftung des Frachtführers geführt hat (§§ 5.2.3.2 und 3). Keine Aufhebung der Haftung findet statt wenn die Beschädigung der Güter verursacht wurde durch einen Mangel am Fahrzeug (Art.17 Abs.3). Verschiedene Argumente die von seiten der Frachtführer vorgetragen sind damit sie den rechtlichen Folgen dieser Bestimmung ausweichen könnten werden auf ihre Meriten beurteilt (§ 5.3). Die sechs besonderen Aufhebungsgründe die in Art. 17 Abs.4 erwähnt werden und deren eine Anzahl näher präzisiert wird in Art. 18 Abs.3, 4 und 5, werden nacheinander behandelt (§ 5.4). Viel Aufmerksamkeit wird dem in der Praxis oft angerufen Aufhebungsgrund gewidmet 'Behandlung, Verladen, Verstauen oder Ausladen durch den Absender, den Empfänger ...' (Art.17 Abs.4c). Die generelle Frage in welchem Masse diese Bestimmung zum Vorteil des

Frachtführers ausgelegt wird kann nur beantwortet werden wenn man deren unterschiedlichen Momenten einzeln Aufmerksamkeit widmet (§ 5.4.3). Bei der Behandlung der Natur der Güter wird näher eingegangen auf die Problematik des sogenannten Kühlwagentransportes (Art.17 Abs.4d juncto Art. 18 Abs.4). Die Rechtsprechung zeigt dass dem Frachtführer bei Beschädigung im Rahmen eines Kühlwagentransportes eine kaum zu entweichende Haftung obliegt. Diese Rechtsprechung wird einem kritischen Urteil unterworfen (§ 5.4.4).

Der Frachtführer haftet auf Grund des Art. 3 für denjenigen dessen Dienste er anwendet bei Ausführung der Beförderung. Der Inhalt dieser sehr schwierig redigierten und in den authentischen Texten nicht ganz parallel laufenden Bestimmung wird festgestellt mit den 'travaux préparatoires' und mit einer Vergleichung der anderen Übereinkommen. Ausserdem wird in diesem Zusammenhang die übrigens nicht von der CMR umfasste Frage nach der eventuellen Befugnis der Hilfspersonen behandelt Rechtsgeschäfte zu erledigen die den Frachtführer binden und die daraus für den Frachtführer entstehenden Risiken (§ 5.5).

Weil die untersuchten Bestimmungen hinsichtlich der Haftung sich beziehen auf Beschädigung die entstanden ist zwischen dem Zeitpunkt der Übernahme des Gutes und dem seiner Ablieferung (Art.17 Abs.1) werden die Begriffe Übernahme und Ablieferung einer näheren Untersuchung unterworfen. Behauptet wird dass es gemäss der Willensübereinstimmung zwischen den Vertragsparteien reicht dass die Parteien sich gegenseitig die Möglichkeit darbieten die faktische Macht über die Güter auszuüben (§ 6.2). Für den Verfügungsberechtigten ist es weiter wichtig feststellen zu können dass der Schaden entstanden ist in der oben erwähnten Periode. Auch hier können beweisrechtliche Probleme auftreten weshalb die CMR in den Art. 8, 9 und 30 Vorsorgen trifft. Die Erörterung der genannten Bestimmungen zwingt zu einer Untersuchung der Beweiskraft des Frachtbriefes sowohl am Anfang als am Ende der soeben genannten Haftungsfrist. Dabei wird auch die Möglichkeit bezogen in den Frachtbrief Vorbehalte und/oder Bemerkungen einzutragen oder eintragen zu lassen und werden die Folgen für die Beweiskraft des Frachtbriefes geprüft. Die Konklusion ist dass die den hier erwähnten Beweisregeln zugrundeliegende Systematik zu wünschen übrig lässt, was in der Praxis zu Unsicherheit führen kann (§ 6.3).

Kapitel 5 behandelt den Umfang des Schadenersatzes. Das klassische Trio Verlust, Beschädigung und Überschreitung der Lieferfrist bildet den Ausgangspunkt dieses Kapitels. Der Unterschied zwischen den Begriffen Beschädigung und Verlust ist wichtig im Hinblick auf die Berechnung der Höhe des Schadenersatzes und auch im Hinblick auf den Augenblick wann der Verjährungstermin zu laufen anfängt (§ 2).

Der Aufbau des Schadenersatzsystems wie er in der CMR hantiert wird ist nicht einfach. Die Schadenersatzsumme ist aus zwei Faktoren zusammen gesetzt, dem Verlust (Art.23 Abs.1) und einer Anzahl hinzukommender Elemente, erwähnt in Art. 23 Abs.4. Für die Berechnung des Schuldbetrages im Falle einer Beschädigung (Art.25) wird Anschluss gesucht an die Regelung des Verlustes was bei der Anwendung der Grenze des Höchstbetrages (Art.23 Abs.3) zu Schwierigkeiten Anlass geben kann (§§ 3.1 und 3.2.3). Sowie bei der Beförderung mit der Eisenbahn, aber anders als bei den übrigen Überein-

kommen auf dem Gebiet des Güterverkehrs nimmt die CMR den Wert des Gutes am Ort und zur Zeit der Übernahme zur Beförderung als Ausgangspunkt für die Berechnung des Schadens. Dieser Wert wird an Hand objektiver Kriterien festgestellt sodass eine eventuelle Änderung des Wertes nach der Empfangnahme der Güter vom Frachtführer keinen Einfluss hat auf die Schadenberechnung. Bei Art. 23 Abs.1 ressortieren weiter zur Abgrenzung der im Art. 23 Abs.4 erwähnten Kosten, Kosten die in der Praxis mit materiellem Schaden gleichgesetzt werden insofern diese unmittelbar mit dem Schaden verbunden sind. Abgrenzung dieser beiden Gruppen ist wichtig im Hinblick auf die Limitierung (§ 3.1). Mehrere Facetten dieser Limitierung werden in der Auseinandersetzung beleuchtet. Nach einem geschichtlichen Exposé woraus klar wird wieviel Mühe sich die Redaktionskommission gegeben hat einen für alle Länder akzeptablen Kompromiss zustande zu bringen (§ 3.2.1) wird die Problematik erörtert die genauso wie in den anderen Transportbranchen aufkam indem langsam aber sicher das Gold aufhörte die Grundlage des Schadenersatzsystemes zu bilden. Als der Internationale Währungsfonds in 1978 den offiziellen Goldkurs aufhob sah es aus als ob auch der CMR der Boden entzogen wurde. Solange das Sonderziehungsrecht das als Ersatz des Umrechnungskurses fungieren wird noch keinen offiziellen Status erworben hat, beginnt eine Phase der Unsicherheit. Diese wird dauern bis Ende 1980, bis zum Augenblick worin das CMR-Protokoll in Kraft gesetzt wird das die Limitierung auf 25 Germinalgoldfranken ersetzt durch $8 \frac{1}{3}$ Umrechnungseinheiten wofür als solches das Sonderziehungsrecht angewiesen wurde (Art.23 Abs.3 und 7 neu). Der Umstand dass der niederländische Gesetzgeber nicht hinreichend adäquat auf diese Entwicklung reagiert hat, wodurch die Unsicherheit über die Höhe des Schadenersatzes fort dauern konnte, wird bedauert (§ 3.2.2). Weiter wird eine Anzahl Situationen beschrieben in welchen die Anwendung der Limitierung dem Richter Probleme besorgt hat. Dabei ist zu denken an Sendungen die aus verschiedenen Sorten Güter zusammengesetzt sind (Gruppierungstransport) oder an Sendungen wobei ein Teil der Güter Haverie erlitten hat (§ 3.2.3). Die Schadensfaktoren die in Art. 23 Abs.4 erwähnt werden fallen nicht innerhalb des Bereiches der Limitierung. Das bringt mit sich dass eine kritische Einstellung gegenüber der extensiven Auslegung der Schadensfaktoren die in eben dieser Bestimmung erwähnt werden, notwendig ist. Umstritten ist in welchem Masse Zusammenhang zwischen den dort genannten Kosten und der Beförderung zufolge deren diese Kosten entstanden sind bedingt ist. In diesem Zusammenhang werden die Entscheidungen analysiert die gefällt worden sind nach dem aufsehenerregenden Urteilsspruch des englischen Hohen Hauses wobei ein Transporteur gehalten wurde nicht nur einen Ersatz des materiellen Schadens, sondern auch ein Vielfaches dieser Summe zu bezahlen wegen Zoll den er schuldet weil er sein Exportdokument nicht freigemacht hatte. Es wird die Auffassung verteidigt dass eine einschränkende Interpretation des Art. 23 Abs.4 bevorzugt wird (§ 3.3).

Anlässlich der Beschädigung lassen wir eine Anzahl Methoden Revue passieren nach welchen der Schadenersatz berechnet wird. Probleme können entstehen des Umstandes wegen dass der Schaden festgestellt wird am Bestimmungsort während das Übereinkommen den Wert der Güter am Augenblick der Annahme vom Frachtführer als Grundlage des Schadenersatzes nimmt. Behauptet wird dass die von der CIM seit 1961 gefolgte Methode der Kürzung der Wirklichkeit am meisten nähert (§ 4).

Anlässlich eines Schadenersatzes der wegen Fristüberschreitung geschuldet

wurden, wird Stellung bezogen in dem kontroversiellen Unterschied zwischen den Begriffen Lieferfristschaden einerseits und Schaden zufolge des Verlustes und/oder der Beschädigung andererseits. Mit der Mehrheit der Autoren wird behauptet dass der Begriff Lieferfristschaden im Sinne des Art. 23 Abs.5 restriktiv interpretiert werden soll und dass deshalb 'Lieferfristüberschreitungs-schaden' entstanden zufolge des Verlustes und/oder Beschädigung unter Art. 23 Abs.1-4 fällt. Diese Bestimmungen finden ebenfalls Anwendung wenn Verlust und/oder Beschädigung durch Lieferfristüberschreitung verursacht worden ist (§ 5).

In den Art. 24-26 bietet die CMR die Möglichkeit die in Art. 23 Abs.3 beschränkte Entschädigung zu erhöhen und auch ein besonderes Interesse an der Lieferung fest zu stellen. Die rechtlichen Folgen und die Bedingungen unter denen diese eintreten, werden erörtert. Bestritten wird die Rechtsprechung die der Willensübereinstimmung der Parteien als Bedingung für das Eintreten der intendierten rechtlichen Folgen nicht genügend Rechnung trägt (§ 6).

Anlässlich des Art. 27 der von den geschuldeten Zinsen handelt und von der Umrechnung in die Währung des Landes wo Zahlung beansprucht wird, wird der nicht im Übereinkommen erwähnte Zeitpunkt behandelt worauf Umrechnung des Goldfranken statt finden soll. Plädiert wird dafür den Zeitpunkt der richterlichen Entscheidung hinsichtlich des Anspruches (§ 7) zu nehmen.

Dann wird eingegangen auf die Grundlage, den Inhalt und Bereich der in Art. 28 festgelegten Regelung hinsichtlich der konkurrierenden Ansprüche. Dabei wird anlässlich der in der Literatur hinsichtlich Drittenwirkung von Exonerationsklauseln herrschenden Auffassungen der Standpunkt vertreten dass der Frachtführer sich auf das Übereinkommen berufen kann jedem gegenüber der auf irgendeine Weise freiwillig eine vertragliche Beziehung hat zum lädierten Interesse (§ 8).

Dieses Kapitel wird abgeschlossen mit einer Auseinandersetzung über die Aufhebung des Schutzes, welche vom Übereinkommen dem Frachtführer verliehen wird. Die Entscheidung der Redaktionskommission die alte umstrittene Formulierung des Warschauer Übereinkommens aufzunehmen das ausdrücklich der *lex fori* Spielraum lässt muss bedauert werden weil dadurch die Möglichkeit einer gewünschten Vereinheitlichung auf diesem Gebiete des Rechts in hohem Mass reduziert wird. Das wird gezeigt an Hand der unterschiedlichen Auslegung die dem Begriff Vorsatz oder mit Vorsatz gleichgestellter Schuld in den verschiedenen Ländern gegeben wird, was der Gleichheit der Frachtführer untereinander Abbruch tut (§ 9).

In *Kapitel 6* wird die Frage erörtert wer gerechtfertigt ist vom Frachtführer Schadenersatz zu verlangen.

Nach einer Inventarisierung der unterschiedlichen Aspekte dieser Frage (§ 1) werden die Begriffe Absender und Empfänger näher untersucht. Behauptet wird dass man diese Begriffe im juristischen und nicht im faktischen Sinne auffassen sollte während dann nachgegangen wird wie der Adressat primär das Recht auf Herausgabe der Güter und subsidiär auf Schadenersatz bekommt (§ 2).

Danach wird die Rechtsgrundlage des Claimrechtes untersucht wovon umstritten ist inwiefern die CMR dafür Anknüpfungsmöglichkeiten bietet.

Eine interessante Entwicklung der höchstrichterlichen Rechtsprechung in Deutschland, die schliesslich dazu führte dass das Recht über die Güter zu verfügen (vergleiche die Art.12 und 13), als Ausgangspunkt für die Ausübung des Claimrechts angesehen werden soll, wird analysiert und kritisiert. Doch wird der Quintessenz der mit dem Munde bekannten Verfügungslehre Abbruch getan wenn man der genannten Lehre keinen exklusiven Charakter verliehen will. Zu Unrecht gehen die Befürworter der Verfügungslehre vorbei an der Tatsache dass der Terminus 'Verfügungsberechtigter' eine unrichtige Übersetzung ist der authentischen Begriffe 'claimant'/'l'ayant droit'. Die Auffassung dass das Recht über die Güter zu verfügen in der CMR als Grundlage des Claimrechtes dienen könnte, wird deshalb verworfen. Das Claimrecht steht dem Absender von Anfang an zur Verfügung, während das Claimrecht dem Adressat als ein originäres Recht zukommt durch seinen Zutritt zum Transportvertrag (§ 3). Diese Situation kann zu Problemen Anlass geben. Verworfen wird die Auffassung das Claimrecht ausschliesslich demjenigen zuzuerkennen dessen, ausserhalb des Beförderungsvertrages liegendes, Interesse in Frage steht. Auch die Rechtsprechung in verschiedenen Ländern ist zurückhaltend der Interessenlehre gegenüber (§ 4).

Schliesslich wird nachgegangen welche Rolle die auf dem Gebiet des Transportrechtes tätigen Zwischenpersonen bei diesem Problem spielen. Gerade hier besteht ein Bedürfnis den schon im Vorhergehenden behandelten Parteibegriff auszudehnen. Gerade gestützt auf Rechtsprechung in verschiedenen Ländern wird behauptet dass auch ein vertraglich miteinbezogener Dritter, obwohl keine Vertragspartei beim Beförderungsvertrag, unter Umständen das Claimrecht dem Frachtführer gegenüber ausüben kann (§ 5).

In *Kapitel 7* werden die verfahrensrechtlichen Regeln, niedergelegt in den Art. 31 und 33, erörtert. Namantlich wird dabei die umstrittene Frage behandelt inwiefern Art. 31 Kompetenzkreierend oder Kompetenzeinschränkend ist. Dazu wird erst die Aufmerksamkeit gelenkt auf die Natur der Jurisdiktionregel des Art. 31 Abs.1. Das Ziel dieser Bestimmung ist dass die Frage welche Gerichte zuständig sind eine CMR-Streitigkeit zur Kenntnis zu nehmen dem rein nationalen (Prozess) Recht entzogen wird. Im Zusammenhang mit dem nach der CMR in Kraft getretenen E.G. Gerichtsbarkeit- und Vollstreckungsabkommen wird das Verhältnis zwischen der Anwendbarkeit der CMR und dem EuGVÜ gerade in diesem Punkt der richterlichen Kompetenz untersucht. Einige richterliche Entscheidungen in Sachen CMR-Streitigkeiten wobei die Kompetenzfrage aus den Art. 2-5 EuGVÜ abgeleitet wurde werden kritisch besprochen (§ 2).

Nach einer Anzahl Bemerkungen in § 3 über den Bereich der Jurisdiktionsbestimmung wird zur Behandlung der von den Vertragsparteien vereinbarten (Schieds-)Gerichte übergegangen. Die Möglichkeit Schiedsgerichte anzuweisen wird durch Art. 31 und 33 geboten wenn wenigstens dabei hinsichtlich des Schiedsgerichtes feststeht dass die CMR Anwendung finden wird. Hinsichtlich dieser Bestimmungen ist die Frage aufgekomen ob eine solche Klausel einen Rechtsgang nach einem von wegen des Übereinkommens angewiesenen Gericht unverletzt lässt. Anders als hinsichtlich Arbitrageklauseln wird meistens gelhert dass diese Frage im Hinblick auf die in Art. 31 erwähnten Gerichte bestätigend beantwortet werden muss. In diesem Zusammenhang wird weiter eingestimmt mit einer Anzahl richterlicher

Entscheidungen worin festgestellt wurde dass im Falle einer Arbitrage Anwendung des CMR ausdrücklich klausuliert sein muss (§ 4).

Weil Art. 31 den Gerichten ausschliesslich internationale Rechtsmacht (Attribution) zuerkennt und Angelegenheiten der relativen Kompetenz (Distribution) dem nationalen Prozessrecht überlässt, kann die Frage aufkommen was rechtens gelten soll wenn der nationale Gesetzgeber die durch die CMR verliehene Rechtsmacht nicht näher konkretisiert. Diese Frage hat in Deutschland eine wichtige Entwicklung der Rechtsprechung veranlasst die zu einer merkwürdigen Standpunktbestimmung des Bundesgerichtshofes führte. Richterliche Kollegien die eine festgestellte Lücke zu schliessen wünschten in dem Sinne dass sie aus Art. 31 ebenfalls die relative Kompetenz ableiteten, solange der nationale Gesetzgeber versagte der von der CMR ins Dasein gerufenen völkerrechtlichen Verpflichtung nähere prozessuale Regeln zu kreieren Folge zu leisten, rief das Bundesgerichtshof ursprünglich einen Halt zu, weil dieses Kollegium der Meinung war dass sie sich mit dieser Rechtsfindungsmethode auf – verbotenes – Gebiet der Gesetzgebung begeben hatten, während es in einem darauf folgenden Urteilspruch wieder der vorhin widersprochenen Rechtsprechung Raum schaffte. Mit einer Anzahl Autoren wird die Auffassung verteidigt dass der Richter unter bestimmten Umständen eine solche extensive Auslegung des Art. 31 geben darf (§ 5).

Schliesslich wird in § 6 eine Anzahl in Art. 31 Abs.2-5 geregelter Aspekte prozessualer Natur erwähnt: als solche passieren Institute wie Anhängigkeit, Vollsteckbarkeit und Sicherheitsleistung Revue.

Diese Untersuchung wird in *Kapitel 8* abgeschlossen mit einer Auseinandersetzung der Verjährung. Nach einer Anzahl einleitenden Bemerkungen (§ 1) wird der Bereich der Verjährungsregelung (Art. 32) untersucht; dabei stellt sich heraus dass auch nicht im Übereinkommen geregelte Ansprüche unter den Anwendungsbereich fallen (§ 2).

Wenn von Vorsatz oder damit gleichgestelltem Verschulden die Rede ist wird die einjährige Verjährungsfrist auf drei Jahre verlängert. Befürwortet wird dass diese rechtliche Folge, obwohl Art. 32 Abs.1 das nicht ausdrücklich sagt, ebenfalls eintritt wenn Vorsatz oder damit gleichgestelltes Verschulden demjenigen der vom Frachtführer zur Realisierung der Beförderung eingeschaltet worden ist zuzurechnen ist (§ 3).

Weil Art. 32 Abs.1 drei verschiedene Zeitpunkte nennt wo die Verjährungsfrist anfangen kann, ist grosse Aufmerksamkeit geboten. Besonders haben sogenannte Retournierungen wobei die Güter wegen Beschädigung während des Transportes wieder zum Absendungsort zurückgeschickt wurden zu Streitigkeiten über die Anwendung der Zeitkategorie geführt. In Übereinstimmung mit englischen Autoren wird der Standpunkt eingenommen dass Rechtsansprüche die aus solchen Situation entstehen nicht von der Kategorie Beschädigung oder Verlust sondern von der Kategorie der Restfälle umfasst werden. Diese Kategorie die augenscheinlich die längste Frist bietet, kann für den Frachtführer unter Umständen die unbillige Folge haben dass er konfrontiert wird mit einer Verjährungsfrist die kürzer ist als ein Jahr (§ 4).

Nachdem in § 5 die Institute Hemmung und Unterbrechung die beherrscht werden durch das Recht des Gerichtes wo die Sache anhängig ist, besprochen worden sind (Art.32 Abs.2 und 3), wird die besondere Hemmungsregelung des Art. 32 Abs.2 behandelt die ausschliesslich zum Behuf des Verfügungs-

berechtigten wirkt. Das hartnäckige Beharren der Rechtsprechung in verschiedenen Ländern bei der vom Frachtführer geforderten Rücksendung der Dokumente die der Forderung vom Verfügungsberechtigten beigelegt worden sind, wird abgewiesen. Danach wird das in der Praxis der Transportrechtes gefühlte und manchmal durch die Rechtsprechung erfüllte Bedürfnis an einer Verlängerung der Verjährungsfrist geprüft an den zwingendrechtlichen Charakter des Übereinkommens. Behauptet wird, dass eine derartige Verlängerung unter der CMR nicht erlaubt ist (§ 6).

In Art. 32 Abs.4 wird festgelegt dass ein verjährter Anspruch nicht mehr im Wege der Widerklage oder der Einrede dienen kann. Aufmerksamkeit ist geboten weil in verschiedenen Ländern diesbezüglich andere Regeln gelten (§ 7).

Aufeinanderfolgenden Frachtführern steht ein von der regulären Verjährungsregelung abweichender Regressanspruch zur Verfügung (Art.39 Abs.4). Vor einer unakzeptablen Verlängerung der Frist wozu die Fassung der Bestimmung im authentischen englischen Text Anlass geben könnte, sollte man sich hüten: die Sonderregelung betrifft nur Regressansprüche und nicht die sonstigen Ansprüche die Frachtführer gegenseitig erheben können (§ 8).

Am Ende der Auseinandersetzung mit der Verjährungsregelung wird die Schlussfolgerung gezogen dass diese in mancherlei Hinsicht fehlerhaft ist und deshalb einer gründlichen Revision bedarf (§ 9).

ANNEX 1 English text of the CMR

CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD

PREAMBLE

THE CONTRACTING PARTIES

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

HAVE AGREED AS FOLLOWS:

CHAPTER I

Scope of application

Article 1

1. This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.
2. For the purposes of this Convention, 'vehicles' means motor vehicles, articulated vehicles, trailers and semi-trailers as defined in article 4 of the Convention on Road Traffic dated 19th September 1949.
3. This Convention shall apply also where carriage coming within its scope is carried out by States or by governmental institutions or organizations.
4. This Convention shall not apply:
 - (a) to carriage performed under the terms of any international convention;
 - (b) to funeral consignments;
 - (c) to furniture removal.
5. The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorise the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods.

Article 2

1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by an act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this Convention.
2. If the carrier by road is also himself the carrier by the other means of transport, his liability shall also be determined in accordance with the provisions of paragraph 1 of this article, but as

if, in his capacities as carrier by road and as carrier by the other means of transport, he were two separate persons.

CHAPTER II

Persons for whom the carrier is responsible

Article 3

For the purposes of this Convention the carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servant or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

CHAPTER III

Conclusion and performance of the contract of carriage

Article 4

The contract of carriage shall be confirmed by the making out of a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention.

Article 5

1. The consignment note shall be made out in three original copies signed by the sender and by the carrier. These signatures may be printed or replaced by the stamps of the sender and the carrier if the law of the country in which the consignment note has been made out so permits. The first copy shall be handed to the sender, the second shall accompany the goods and the third shall be retained by the carrier.

2. When the goods which are to be carried have to be loaded in different vehicles, or are of different kinds or are divided into different lots, the sender or the carrier shall have the right to require a separate consignment note to be made out for each vehicle used, or for each kind or lot of goods.

Article 6

1. The consignment note shall contain the following particulars:

- (a) the date of the consignment note and the place at which it is made out;
- (b) the name and address of the sender;
- (c) the name and address of the carrier;
- (d) the date and the place of the taking over of the goods and the place designated for delivery;
- (e) the name and address of the consignee;
- (f) the description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognised description;
- (g) the number of packages and their special marks and numbers;
- (h) the gross weight of the goods or their quantity otherwise expressed;
- (i) charges relating to the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery);
- (j) the requisite instructions for Customs and other formalities;
- (k) a statement that the carriage is subject notwithstanding any clause to the contrary, to the provisions of this Convention.

2. Where applicable, the consignment note shall also contain the following particulars:

- (a) a statement that trans-shipment is not allowed;
- (b) the charges which the sender undertakes to pay;
- (c) the amount of 'cash on delivery' charges;
- (d) a declaration of the value of the goods and the amount representing special interest in delivery;
- (e) the sender's instructions to the carrier regarding insurance of the goods;
- (f) the agreed time-limit within which the carriage is to be carried out;
- (g) a list of the documents handed to the carrier.

3. The parties may enter in the consignment note any other particulars which they may deem useful.

Article 7

1. The sender shall be responsible for all expenses, loss and damage sustained by the carrier by reason of the inaccuracy of:

- (a) the particulars specified in article 6, paragraph 1, (b), (d), (e), (f), (g), (h), and (j);
- (b) the particulars specified in article 6, paragraph 2;
- (c) any other particulars or instructions given by him to enable the consignment note to be made out or for the purpose of their being entered therein.

2. If, at the request of the sender, the carrier enters in the consignment note the particulars referred to in paragraph 1 of this article, he shall be deemed, unless the contrary is proved, to have done so on behalf of the sender.

3. If the consignment note does not contain the statement specified in article 6, paragraph 1 (k), the carrier shall be liable for all expenses, loss and damage sustained through such omission by the person entitled to dispose of the goods.

Article 8

1. On taking over the goods, the carrier shall check:

- (a) the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and
- (b) the apparent condition of the goods and their packaging.

2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the grounds and their packaging. Such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note.

3. The sender shall be entitled to require the carrier to check the gross weight of the goods or their quantity otherwise expressed. He may also require the contents of the packages to be checked. The carrier shall be entitled to claim the cost of such checking. The result of the checks shall be entered in the consignment note.

Article 9

1. The consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.

2. If the consignment note contains no specific reservations by the carrier, it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note.

Article 10

The sender shall be liable to the carrier for damage to persons, equipment or other goods, and for any expenses due to defective packaging of the goods, unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it.

Article 11

1. For the purposes of the Customs or other formalities which have to be completed before delivery of the goods, the sender shall attach the necessary documents to the consignment note or place them at the disposal of the carrier and shall furnish him with all the information which he requires.

2. The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of

such documents and information. The sender shall be liable to the carrier for any damage caused by the absence, inadequacy or irregularity of such documents and information, except in the case of some wrongful act or neglect on the part of the carrier.

3. The liability of the carrier for the consequences arising from the loss or incorrect use of the documents specified in and accompanying the consignment note or deposited with the carrier shall be that of an agent, provided that the compensation payable by the carrier shall not exceed that payable in the event of loss of the goods.

Article 12

1. The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note.

2. This right shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercises his right under article 13, paragraph 1; from that time onwards the carrier shall obey the orders of the consignee.

3. The consignee shall, however, have the right of disposal from the time when the consignment note is drawn up, if the sender makes an entry to that effect in the consignment note.

4. If in exercising his right of disposal the consignee has ordered the delivery of the goods to another person, that other person shall not be entitled to name other consignees.

5. The exercise of the right of disposal shall be subject to the following conditions:

- (a) that the sender or, in the case referred to in paragraph 3 of this article, the consignee who wishes to exercise the right produces the first copy of the consignment note on which the new instructions to the carrier have been entered and indemnifies the carrier against all expenses, loss and damage involved in carrying out such instructions;
- (b) that the carrying out of such instructions is possible at the time when the instructions reach the person who is to carry them out and does not either interfere with the normal working of the carrier's undertaking or prejudice the senders or consignees of the other consignments;
- (c) that the instructions do not result in a division of the consignment.

6. When, by reason of the provisions of paragraph 5 (b) of this article, the carrier cannot carry out the instructions which he receives, he shall immediately notify the person who gave him such instructions.

7. A carrier who has not carried out the instructions given under the conditions provided in this article, or who has carried them out without requiring the first copy of the consignment note to be produced, shall be liable to the person entitled to make a claim for any loss or damage caused thereby.

Article 13

1. After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods is established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

2. The consignee who avails himself of the rights granted to him under paragraph 1 of this article shall pay the charges shown to be due on the consignment note, but in the event of dispute on this matter the carrier shall not be required to deliver the goods unless security has been furnished by the consignee.

Article 14

1. If for any reason it is or becomes impossible to carry out the contract in accordance with the terms laid down in the consignment note before the goods reach the place designated for delivery,

the carrier shall ask for instructions from the person entitled to dispose of the goods in accordance with the provisions of article 12.

2. Nevertheless, if circumstances are such as to allow the carriage to be carried out under conditions differing from those laid down in the consignment note and if the carrier has been unable to obtain instructions in reasonable time from the person entitled to dispose of the goods in accordance with the provisions of article 12, he shall take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods.

Article 15

1. Where circumstances prevent delivery of the goods after their arrival at the place designated for delivery, the carrier shall ask the sender for his instructions. If the consignee refuses the goods the sender shall be entitled to dispose of them without being obliged to produce the first copy of the consignment note.

2. Even if he has refused the goods, the consignee may nevertheless require delivery so long as the carrier has not received instructions to the contrary from the sender.

3. When circumstances preventing delivery of the goods arise after the consignee, in exercise of his rights under article 12, paragraph 3, has given an order for the goods to be delivered to another person, paragraphs 1 and 2 of this article shall apply as if the consignee were the sender and that other person were the consignee.

Article 16

1. The carrier shall be entitled to recover the cost of his request for instructions and any expenses entailed in carrying out such instructions, unless such expenses were caused by the wrongful act or neglect of the carrier.

2. In the cases referred to in article 14, paragraph 1, and in article 15, the carrier may immediately unload the goods for account of the person entitled to dispose of them and thereupon the carriage shall be deemed to be at an end. The carrier shall then hold the goods on behalf of the person so entitled. He may, however, entrust them to a third party, and in that case he shall not be under any liability except for the exercise of reasonable care in the choice of such third party. The charges due under the consignment note and all other expenses shall remain chargeable against the goods.

3. The carrier may sell the goods, without awaiting instructions from the person entitled to dispose of them, if the goods are perishable or their condition warrants such a course, or when the storage expenses would be out of proportion to the value of the goods. He may also proceed to the sale of the goods in other cases if after the expiry of a reasonable period he has not received from the person entitled to dispose of the goods instructions to the contrary which he may reasonably be required to carry out.

4. If the goods have been sold pursuant to this article, the proceeds of sale, after deduction of the expenses chargeable against the goods, shall be placed at the disposal of the person entitled to dispose of the goods. If these charges exceed the proceeds of sale, the carrier shall be entitled to the difference.

5. The procedure in the case of sale shall be determined by the law or custom of the place where the goods are situated.

CHAPTER IV

Liability of the carrier

Article 17

1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by the

wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as a result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

3. The carrier shall not be relieved by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

4. Subject to article 18, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

- (a) use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note;
- (b) the lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or not properly packed;
- (c) handling, loading, stowage or unloading of the goods by the sender, the consignee or persons acting on behalf of the sender or the consignee;
- (d) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, dessication, leakage, normal wastage, or the action of moth or vermin;
- (e) insufficiency or inadequacy of marks or numbers on the packages;
- (f) the carriage of livestock.

5. Where under this article the carrier is not under any liability in respect of some of the factors causing the loss, damage or delay, he shall be liable to the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay.

Article 18

1. The burden of proving that loss, damage or delay was due to one of the causes specified in article 17, paragraph 2, shall rest upon the carrier.

2. When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 17, paragraph 4, it shall be presumed that it was so caused. The claimant shall however be entitled to prove that the loss or damage was not, in fact, attributable wholly or partly to one of these risks.

3. This presumption shall not apply in the circumstances set out in article 17, paragraph 4 (a), if there has been an abnormal shortage, or a loss of any package.

4. If the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature or the humidity of the air, the carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (d), unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him.

5. The carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (f), unless he proves that all steps normally incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him.

Article 19

Delay in delivery shall be said to occur when the goods have not been delivered within the agreed time-limit or when, failing an agreed time-limit, the actual duration of the carriage having regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier.

Article 20

1. The fact that goods have not been delivered within thirty days following the expiry of the agreed time-limit, or if there is no agreed time-limit, within sixty days from the time when the carrier took over the goods, shall be conclusive evidence of the loss of the goods, and the person entitled to make a claim may thereupon treat them as lost.

2. The person so entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation. He shall be given a written acknowledgement of such request.

3. Within thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due on the consignment note and also against refund of the compensation he received less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article 23 and, where applicable, article 26.

4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered until more than one year after the payment of compensation, the carrier shall be entitled to deal with them in accordance with the law of the place where the goods are situated.

Article 21

Should the goods have been delivered to the consignee without collection of the 'cash on delivery' charge which should have been collected by the carrier under the terms of the contract of carriage, the carrier shall be liable to the sender for compensation not exceeding the amount of such charge without prejudice to his right of action against the consignee.

Article 22

1. When the sender hands goods of a dangerous nature to the carrier, he shall inform the carrier of the exact nature of the danger and indicate, if necessary, the precautions to be taken. If this information has not been entered in the consignment note, the burden of proving, by some other means, that the carrier knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the sender or the consignee.

2. Goods of a dangerous nature which, in the circumstances referred to in paragraph 1 of this article, the carrier did not know were dangerous, may, at any time or place, be unloaded, destroyed or rendered harmless by the carrier without compensation; further, the sender shall be liable for all expenses, loss or damage arising out of their handing over for carriage or of their carriage.

Article 23

1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the time and place at which they were accepted for carriage.

2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of the goods of the same kind and quality.

3. Compensation shall not, however, exceed 25 francs per kilogramme of gross weight short. 'Franc' means the gold franc weighing 10/31 of a gramme and being of millesimal fineness 900.

4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damages shall be payable.

5. In the case of delay, if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges.

6. Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been declared in accordance with articles 24 and 26.

Article 24

The sender may, against payment of a surcharge to be agreed upon, declare in the consignment note a value of the goods exceeding the limit laid down in article 23, paragraph 3, and in that case the amount of the declared value shall be substituted for that limit.

Article 25

1. In case of damage, the carrier shall be liable for the amount by which the goods have diminished in value, calculated by reference to the value of the goods fixed in accordance with article 23, paragraphs 1, 2 and 4.

2. The compensation may not, however, exceed:

- (a) if the whole consignment has been damaged, the amount payable in the case of total loss;
- (b) if part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.

Article 26

1. The sender may, against payment of a surcharge to be agreed upon, fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time-limit being exceeded, by entering such amount in the consignment note.

2. If a declaration of a special interest in delivery has been made, compensation for the additional loss or damage proved may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in articles 23, 24 and 25.

Article 27

1. The claimant shall be entitled to claim interest on compensation payable. Such interest, calculated at five per cent per annum, shall accrue from the date on which the claim was sent in writing to the carrier or, if no such claim has been made, from the date on which legal proceedings were instituted.

2. When the amounts on which the calculation of the compensation is based are not expressed in the currency of the country in which payment is claimed, conversion shall be at the rate of exchange applicable on the day and at the place of payment of compensation.

Article 28

1. In cases where, under the law applicable, loss, damage or delay arising out of carriage under this Convention gives rise to an extra contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability or which fix or limit the compensation due.

2. In cases where the extra contractual liability for loss, damage or delay of one of the persons for whom the carrier is responsible under the terms of article 3 is in issue, such person may also avail himself of the provisions of this Convention which exclude the liability of the carrier or which fix or limit the compensation due.

Article 29

1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct.

2. The same provision shall apply if the wilful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1.

CHAPTER V

Claims and actions

Article 30

1. If the consignee takes delivery of the goods without duly checking their condition with the carrier or without sending him reservations giving a general indication of the loss or damage, not later than the time of delivery in the case of apparent loss or damage, and within seven days of delivery, Sundays and Public Holidays excepted, in the case of loss or damage which is not apparent, the fact of this taking delivery shall be *prima facie* evidence that he has received the goods in the condition described in the consignment note. In the case of loss or damage which is not apparent the reservations referred to shall be made in writing.

2. When the condition of the goods has been duly checked by the consignee and the carrier, evidence contradicting the result of this checking shall only be admissible in the case of loss or damage which is not apparent and provided that the consignee has duly sent reservations in writing to the carrier within seven days, Sundays and Public Holidays excepted from the date of checking.

3. No compensation shall be payable for delay in delivery unless a reservation has been sent in writing to the carrier within twenty-one days from the time that the goods were placed at the disposal of the consignee.

4. In calculating the time-limits provided for in this article the date of delivery, or the date of checking or the date when the goods were placed at the disposal of the consignee, as the case may be, shall not be included.

5. The carrier and the consignee shall give each other every reasonable facility for making the requisite investigations and checks.

Article 31

1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated,

and in no other courts or tribunals.

2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgment has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the country in which fresh proceedings are brought.

3. When a judgment entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.

4. The provisions of paragraph 3 of this article shall apply to judgments after trial, judgments by default and settlements confirmed by an order of the court, but shall not apply to interim judgments or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.

5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.

Article 32

1. The period of limitation for an action arising out of carriage under this Convention shall be one year. Nevertheless, in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct, the period of limitation shall be three years. The period of limitation shall begin to run:

- (a) in the case of partial loss, damage or delay in delivery, from the date of delivery;
- (b) in the case of total loss, from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier;
- (c) in all other cases, on the expiry of a period of three months after the making of the contract of carriage.

The day on which the period of limitation begins to run shall not be included in the period.

2. A written claim shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto. If a part of the claim is admitted the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of receipt of the claim, or of the reply and of the return of the documents, shall rest with the party relying upon these facts. The running of the period of limitation shall not be suspended by further claims having the same object.

3. Subject to the provisions of paragraph 2 above, the extension of the period of limitation shall be governed by the law of the court or tribunal seized of the case. That law shall also govern the fresh accrual of the rights of action.

4. A right of action which has become barred by lapse of time may not be exercised by way of counter-claim or set-off.

Article 33

The contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention.

CHAPTER VI

Provisions relating to carriage performed by successive carriers

Article 34

If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.

Article 35

1. A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2.

2. The provisions of article 9 shall apply to the relations between successive carriers.

Article 36

Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.

Article 37

A carrier who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses

incurred by reason of the claim, from the other carriers who have taken part in the carriage, subject to the following provisions:

- (a) the carrier responsible for the loss or damage shall be solely liable for the compensation whether paid by himself or by another carrier;
- (b) when the loss or damage has been caused by the action of two or more carriers, each of them shall pay an amount proportionate to his share of liability; should it be impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him;
- (c) if it cannot be ascertained to which carriers liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in (b) above.

Article 38

If one of the carriers is insolvent, the share of the compensation due from him and unpaid by him shall be divided among the other carriers in proportion to the share of the payment for the carriage due to them.

Article 39

1. No carrier against whom a claim is made under articles 37 and 38 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.

2. A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made. All the carriers concerned may be made defendants in the same action.

3. The provisions of article 31, paragraphs 3 and 4, shall apply to judgments referred to in articles 37 and 38.

4. The provisions of article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the actual date of payment.

Article 40

Carriers shall be free to agree amongst themselves on provisions other than those laid down in articles 37 and 38.

CHAPTER VII

Nullity of stipulations contrary to the Convention

Article 41

1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.

CHAPTER VIII

Final provisions

Article 42

1. This Convention is open for signature or accession by countries members of the Economic Commission for Europe and countries admitted to the Commission in a consultative capacity under paragraph 8 of the Commission's terms of reference.

2. Such countries as may participate in certain activities of the Economic Commission for Europe in accordance with paragraph 11 of the Commission's terms of reference may become Contracting Parties to this Convention by acceding thereto after its entry into force.
3. The Convention shall be open for signature until 31 August 1956 inclusive. Thereafter, it shall be open for accession.
4. This Convention shall be ratified.
5. Ratification or accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

Article 43

1. This Convention shall come into force on the ninetieth day after five of the countries referred to in article 42, paragraph 1, have deposited their instruments of ratification or accession.
2. For any country ratifying or acceding to it after five countries have deposited their instruments of ratification or accession, this Convention shall enter into force on the ninetieth day after the said country has deposited its instrument of ratification or accession.

Article 44

1. Any country may denounce this Convention by so notifying the Secretary-General of the United Nations.
2. Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the notification of denunciation.

Article 45

If, after the entry into force of this Convention, the number of Contracting Parties is reduced, as a result of denunciations, to less than five, the Convention shall cease to be in force from the date on which the last of such denunciations takes effect.

Article 46

1. Any country may, at the time of depositing its instrument of ratification or accession or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. The Convention shall extend to the territory or territories named in the notification as from the ninetieth day after its receipt by the Secretary-General or, if on that day the Convention has not yet entered into force, at the time of its entry into force.
2. Any country which has made a declaration under the preceding paragraph extending this Convention to any territory for whose international relations it is responsible may denounce the Convention separately in respect of that territory in accordance with the provisions of article 44.

Article 47

Any dispute between two or more Contracting Parties relating to the interpretation or application of this Convention, which the parties are unable to settle by negotiation or other means may, at the request of one of the Contracting Parties concerned, be referred for settlement to the International Court of Justice.

Article 48

1. Each Contracting Party may, at the time of signing, ratifying, or acceding to, this Convention, declare that it does not consider itself as bound by article 47 of the Convention. Other Contracting Parties shall not be bound by article 47 in respect of any Contracting Party which has entered such a reservation.
2. Any Contracting Party having entered such a reservation as provided for in paragraph 1 may at any time withdraw such notification by notifying the Secretary-General of the United Nations.

Article 49

1. After this Convention has been in force for three years, any Contracting Party may, by notification to the Secretary-General of the United Nations, request that a conference be convened for the purpose of reviewing the Convention. The Secretary-General shall notify all Contracting Parties of the request and a review conference shall be convened by the Secretary-General if, within a period of four months following the date of notification by the Secretary-General, not less than one-fourth of the Contracting Parties notify him of their concurrence with the request.

2. If a conference is convened in accordance with the preceding paragraph, the Secretary-General shall notify all the Contracting Parties and invite them to submit within a period of three months such proposals as they may wish the Conference to consider. The Secretary-General shall circulate to all Contracting Parties the provisional agenda together with the texts of such proposals at least three months before the date on which the Conference is to meet.

3. The Secretary-General shall invite to any conference convened in accordance with this article all countries referred to in article 42, paragraph 1, and countries which have become Contracting Parties under article 42, paragraph 2.

Article 50

In addition to the notifications provided for in article 49, the Secretary-General of the United Nations shall notify the countries referred to in article 42, paragraph 1, and the countries which have become Contracting Parties under article 42, paragraph 2, of:

- (a) ratifications and accessions under article 42;
- (b) the dates of entry into force of this Convention in accordance with article 43;
- (c) denunciations under article 44;
- (d) the termination of this Convention in accordance with article 45;
- (e) notifications received in accordance with article 46;
- (f) declarations and notifications received in accordance with articles 48, paragraphs 1 and 2.

Article 51

After 31 August 1956, the original of this Convention shall be deposited with the Secretary-General of the United Nations, who shall transmit certified true copies to each of the countries mentioned in article 42, paragraphs 1 and 2.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Geneva, this nineteenth day of May one thousand nine hundred and fifty-six, in a single copy in the English and French languages, each text being equally authentic.

PROTOCOL OF SIGNATURE

ON PROCEEDING TO SIGN the Convention on the Contract for the International Carriage of Goods by Road, the undersigned, being duly authorised, have agreed on the following statement and explanation:

1. This Convention shall not apply to traffic between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland.

2. Ad article 1, paragraph 4

The undersigned undertake to negotiate Conventions governing contracts for furniture removals and combined transport.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto, have signed this Protocol.

DONE at Geneva, this nineteenth day of May one thousand nine hundred and fifty-six, in a single copy in the English and French languages, each text being equally authentic.

ANNEX 2 French text of the CMR

CONVENTION RELATIVE AU CONTRAT DE TRANSPORT INTERNATIONALE DE MARCHANDISES PAR ROUTE (CMR)

PREAMBULE

LES PARTIES CONTRACTANTES,

Ayant Reconnu l'utilité de régler d'une manière uniforme les conditions du contrat de transport international de marchandises par route, particulièrement en ce qui concerne les documents utilisés pour ce transport et la responsabilité du transporteur,

SONT CONVENUES DE CE QUI SUIT:

CHAPITRE PREMIER

Champ d'application

Article premier

1. La présente Convention s'applique à tout contrat de transport de marchandises par route à titre onéreux au moyen de véhicules, lorsque le lieu de la prise en charge de la marchandise et le lieu prévu pour la livraison, tel qu'ils sont indiqués au contrat, sont situés dans deux pays différents dont l'un au moins est un pays contractant. Il en est ainsi quels que soient le domicile et la nationalité des parties.

2. Pour l'application de la présente Convention, il faut entendre par 'véhicules' les automobiles, les véhicules articulés, les remorques et les semi-remorques, tels qu'ils sont définis par l'article 4 de la Convention sur la circulation routière en date du 19 septembre 1949.

3. La présente Convention s'applique même si les transports rentrant dans son champ d'application sont effectués par des Etats ou par des institutions ou organisations gouvernementales.

4. La présente Convention ne s'applique pas:

- (a) aux transports effectués sous l'empire de conventions postales internationales;
- (b) aux transports funéraires;
- (c) aux transports de déménagement.

5. Les parties contractantes s'interdisent d'apporter par voie d'accords particuliers conclus entre deux ou plusieurs d'entre elles toute modification à la présente Convention, sauf pour soustraire à son empire leur trafic frontalier ou pour autoriser dans les transports empruntant exclusivement leur territoire l'emploi de la lettre de voiture représentative de la marchandise.

Article 2

1. Si le véhicule contenant les marchandises est transporté par mer, chemin de fer, voie navigable intérieure ou air sur une partie du parcours, sans rupture de charge sauf, éventuellement, pour l'application des dispositions de l'article 14, la présente Convention s'applique, néanmoins, pour l'ensemble du transport. Cependant, dans la mesure où il est prouvé qu'une perte, une avarie ou un retard à la livraison de la marchandise qui est survenu au cours du transport par l'un des modes de transport autre que la route n'a pas été causé par un acte ou une omission du transporteur routier et qu'il provient d'un fait qui n'a pu se produire qu'au cours et en raison du transport non routier, la responsabilité du transporteur routier est déterminée non par la présente Convention, mais de la façon dont la responsabilité du transporteur non routier eût été déterminée si un contrat de transport avait été conclu entre l'expéditeur et le transporteur non routier pour le seul transport de la marchandise conformément aux dispositions impératives de la loi concernant le transport de marchandises par le mode de transport autre que la route. Toutefois, en l'absence de telles dispositions, la responsabilité du transporteur par route sera déterminée par la présente convention.

2. Si le transporteur routier est en même temps le transporteur non routier, sa responsabilité est également déterminée par le paragraphe 1 comme si sa fonction de transporteur routier et sa fonction de transporteur non routier étaient exercées par deux personnes différentes.

CHAPITRE II

Personnes dont répond le transporteur

Article 3

Pour l'application de la présente Convention, le transporteur répond comme de ses propres actes et omissions, des actes et omissions de ses préposés et de toutes autres personnes aux services desquelles il recourt pour l'exécution du transport lorsque ces préposés ou ces personnes agissent dans l'exercice de leurs fonctions.

CHAPITRE III

Conclusion et exécution du contrat de transport

Article 4

Le contrat de transport est constaté par une lettre de voiture. L'absence, l'irrégularité ou la perte de la lettre de voiture n'affectent ni l'existence ni la validité du contrat de transport qui reste soumis aux dispositions de la présente convention.

Article 5

1. La lettre de voiture est établie en trois exemplaires originaux signés par l'expéditeur et par le transporteur, ces signatures pouvant être imprimées ou remplacées par les timbres de l'expéditeur et du transporteur si la législation du pays où la lettre de voiture est établie le permet. Le premier exemplaire est remis à l'expéditeur, le deuxième accompagne la marchandise et le troisième est retenu par le transporteur.

2. Lorsque la marchandise à transporter doit être chargée dans des véhicules différents, ou lorsqu'il s'agit de différentes espèces de marchandises ou de lots distincts, l'expéditeur ou le transporteur a le droit d'exiger l'établissement d'autant de lettres de voiture qu'il doit être utilisé de véhicules ou qu'il y a d'espèces ou de lots de marchandises.

Article 6

1. La lettre de voiture doit contenir les indications suivantes:

- (a) le lieu et la date de son établissement;
- (b) le nom et l'adresse de l'expéditeur;
- (c) le nom et l'adresse du transporteur;
- (d) le lieu et la date de la prise en charge de la marchandise et le lieu prévu pour la livraison;
- (e) le nom et l'adresse du destinataire;
- (f) la dénomination courante de la nature de la marchandise et le mode d'emballage, et, pour les marchandises dangereuses, leur dénomination généralement reconnue;
- (g) le nombre de colis, leurs marques particulières et leurs numéros;
- (h) le poids brut ou la quantité autrement exprimée de la marchandise;
- (i) les frais afférents au transport (prix de transport, frais accessoires, droits de douane et autres frais survenant à partir de la conclusion du contrat jusqu'à la livraison);
- (j) les instructions requises pour les formalités de douane et autres;
- (k) l'indication que le transport est soumis, nonobstant toute clause contraire, au régime établi par la présente convention.

2. Le cas échéant, la lettre de voiture doit contenir, en outre, les indications suivantes:

- (a) l'interdiction de transbordement;
- (b) les frais que l'expéditeur prend à sa charge;
- (c) le montant du remboursement à percevoir lors de la livraison de la marchandise;
- (d) la valeur déclarée de la marchandise et la somme représentant l'intérêt spécial à la livraison;
- (e) les instructions de l'expéditeur au transporteur en ce qui concerne l'assurance de la marchandise;
- (f) le délai convenu dans lequel le transport doit être effectué;
- (g) la liste des documents remis au transporteur.

3. Les parties peuvent porter sur la lettre de voiture toute autre indication qu'elles jugent utile.

Article 7

1. L'expéditeur répond de tous frais et dommages que supporterait le transporteur en raison de l'inexactitude ou de l'insuffisance;

(a) des indications mentionnées à l'article 6, paragraphe 1, (b), (d), (e), (f), (g), (h), et (i);

(b) des indications mentionnées à l'article 6, paragraphe 2;

(c) de toutes autres indications ou instructions qu'il donne pour l'établissement de la lettre de voiture ou pour y être reportées.

2. Si, à la demande de l'expéditeur, le transporteur inscrit sur la lettre de voiture les mentions visées au paragraphe 1 du présent article, il est considéré, jusqu'à preuve du contraire, comme agissant pour le compte de l'expéditeur.

3. Si la lettre de voiture ne contient pas la mention prévue à l'article 6, paragraphe 1 (k), le transporteur est responsable de tous frais et dommages que subirait l'ayant droit à la marchandise en raison de cette omission.

Article 8

1. Lors de la prise en charge de la marchandise, le transporteur est tenu de vérifier:

(a) l'exactitude des mentions de la lettre de voiture relatives au nombre de colis, ainsi qu'à leurs marques et numéros;

(b) l'état apparent de la marchandise et de son emballage.

2. Si le transporteur n'a pas de moyens raisonnables de vérifier l'exactitude des mentions visées au paragraphe 1 (a), du présent article, il inscrit sur la lettre de voiture des réserves qui doivent être motivées. Il doit de même motiver toutes les réserves qu'il fait au sujet de l'état apparent de la marchandise et de son emballage. Ces réserves n'engagent pas l'expéditeur, si celui-ci ne les a pas expressément acceptées sur la lettre de voiture.

3. L'expéditeur a le droit d'exiger la vérification par le transporteur du poids brut ou de la quantité autrement exprimée de la marchandise. Il peut aussi exiger la vérification du contenu de colis. Le transporteur peut réclamer le paiement des frais de vérification. Le résultat des vérifications est consigné sur la lettre de voiture.

Article 9

1. La lettre de voiture fait foi, jusqu'à preuve du contraire, des conditions du contrat et de la réception de la marchandise par le transporteur.

2. En l'absence d'inscription sur la lettre de voiture de réserves motivées du transporteur, il y a présomption que la marchandise et son emballage étaient en bon état apparent au moment de la prise en charge par le transporteur et que le nombre des colis ainsi que leurs marques et numéros étaient conformes aux énonciations de la lettre de voiture.

Article 10

L'expéditeur est responsable envers le transporteur des dommages aux personnes, au matériel ou à d'autres marchandises, ainsi que des frais, qui auraient pour origine la défectuosité de l'emballage de la marchandise, à moins que, la défectuosité étant apparente ou connue du transporteur au moment de la prise en charge, le transporteur n'ait pas fait de réserves à son sujet.

Article 11

1. En vue de l'accomplissement des formalités de douane et autres à remplir avant la livraison de la marchandise, l'expéditeur doit joindre à la lettre de voiture ou mettre à la disposition du transporteur les documents nécessaires et lui fournir tous renseignements voulus.

2. Le transporteur n'est pas tenu d'examiner si ces documents et renseignements sont exacts ou suffisants. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces documents et renseignements, sauf en cas de faute du transporteur.

3. Le transporteur est responsable au même titre qu'un commissionnaire des conséquences de la perte ou de l'utilisation inexacte des documents mentionnés sur la lettre de voiture et qui accompagnent celle-ci ou qui sont déposés entre ses mains: toutefois, l'indemnité à sa charge ne dépassera pas celle qui serait due en cas de perte de la marchandise.

Article 12

1. L'expéditeur a le droit, de disposer de la marchandise, notamment en demandant au transporteur d'en arrêter le transport, de modifier le lieu prévu pour la livraison ou de livrer la marchandise à un destinataire différent de celui indiqué sur la lettre de voiture.

2. Ce droit s'étend lorsque le deuxième exemplaire de la lettre de voiture est remis au destinataire ou que celui-ci fait valoir le droit prévu à l'article 13, paragraphe 1: à partir de ce moment, le transporteur doit se conformer aux ordres du destinataire.

3. Le droit de disposition appartient toutefois au destinataire dès l'établissement de la lettre de voiture si une mention dans ce sens est faite par l'expéditeur sur cette lettre.

4. Si, en exerçant son droit de disposition, le destinataire ordonne de livrer la marchandise à une autre personne, celle-ci ne peut pas désigner d'autres destinataires.

5. L'exercice du droit de disposition est subordonné aux conditions suivantes:

- (a) l'expéditeur ou, dans le cas visé au paragraphe 3 du présent article, le destinataire qui veut exercer ce droit doit présenter le premier exemplaire de la lettre de voiture, sur lequel doivent être inscrites les nouvelles instructions données au transporteur, et dédommager le transporteur des frais et du préjudice qu'entraîne l'exécution de ces instructions;
- (b) cette exécution doit être possible au moment où les instructions parviennent à la personne qui doit les exécuter et elle ne doit ni entraver l'exploitation normale de l'entreprise du transporteur, ni porter préjudice aux expéditeurs ou destinataires d'autres envois;
- (c) les instructions ne doivent jamais avoir pour effet de diviser l'envoi.

6. Lorsque, en raison des dispositions prévues au paragraphe 5 (b), du présent article, le transporteur ne peut exécuter les instructions qu'il reçoit il doit en aviser immédiatement la personne dont émanent ces instructions.

7. Le transporteur qui n'aura pas exécuté les instructions données dans les conditions prévues au présent article ou qui se sera conformé à de telles instructions sans avoir exigé la présentation du premier exemplaire de la lettre de voiture sera responsable envers l'ayant droit du préjudice causé par ce fait.

Article 13

1. Après l'arrivée de la marchandise au lieu prévu pour la livraison, le destinataire a le droit de demander que le deuxième exemplaire de la lettre de voiture lui soit remis et que la marchandise lui soit livrée, le tout contre décharge. Si la perte de la marchandise est établie, ou si la marchandise n'est pas arrivée à l'expiration du délai prévu à l'article 19, le destinataire est autorisé à faire valoir en son propre nom vis-à-vis du transporteur les droits qui résultent du contrat de transport.

2. Le destinataire qui se prévaut des droits qui lui sont accordés aux termes du paragraphe 1 du présent article est tenu de payer le montant des créances résultant de la lettre de voiture. En cas de contestation à ce sujet, le transporteur n'est obligé d'effectuer la livraison de la marchandise que si une caution lui est fournie par le destinataire.

Article 14

1. Si, pour un motif quelconque, l'exécution du contrat dans les conditions prévues à la lettre de voiture est ou devient impossible avant l'arrivée de la marchandise au lieu prévu pour la livraison, le transporteur est tenu de demander des instructions à la personne qui a le droit de disposer de la marchandise conformément à l'article 12.

2. Toutefois, si les circonstances permettent l'exécution du transport dans des conditions diffé-

entes que celles prévues à la lettre de voiture et si le transporteur n'a pu obtenir en temps utile les instructions de la personne qui a le droit de disposer de la marchandise conformément à l'article 12, il prend les mesures qui lui paraissent les meilleures dans l'intérêt de la personne ayant le droit de disposer de la marchandise.

Article 15

1. Lorsque, après l'arrivée de la marchandise a u lieu de destination, il se présente des empêchements à la livraison, le transporteur demande des instructions à l'expéditeur. Si le destinataire refuse la marchandise, l'expéditeur a le droit de disposer de celle-ci sans avoir à produire le premier exemplaire de la lettre de voiture.

2. Même s'il a refusé la marchandise, le destinataire peut toujours en demander la livraison tant que le transporteur n'a pas reçu d'instructions contraires de l'expéditeur.

3. Si l'empêchement à la livraison se présente après que, conformément au droit qu'il détient en vertu de l'article 12, paragraphe 3, le destinataire a donné l'ordre de livrer la marchandise à une autre personne, le destinataire est substitué à l'expéditeur, et cette autre personne au destinataire, pour l'application des paragraphes 1 et 2 ci-dessus.

Article 16

1. Le transporteur a droit au remboursement des frais que lui cause sa demande d'instructions, ou qu'entraîne pour lui l'exécution des instructions reçues, à moins que ces frais ne soient la conséquence de sa faute.

2. Dans les cas visés à l'article 14, paragraphe 1, et l'article 15, le transporteur peut décharger immédiatement la marchandise pour le compte de l'ayant droit; après ce déchargement, le transport est réputé terminé. Le transporteur assume alors la garde de la marchandise. Il peut toutefois confier la marchandise à un tiers et n'est alors responsable que du choix judicieux de ce tiers. Le marchandise reste grevée des créances résultant de la lettre de voiture et de tous autres frais.

3. Le transporteur peut faire procéder à la vente de la marchandise sans attendre d'instructions de l'ayant droit lorsque la nature périssable ou l'état de la marchandise le justifie ou lorsque les frais de garde sont hors de proportion avec la valeur de la marchandise. Dans les autres cas, il peut également faire procéder à la vente lorsque, dans un délai raisonnable, il n'a pas reçu de l'ayant droit d'instructions contraires dont l'exécution puisse équitablement être exigée.

4. Si la marchandise a été vendue en application du présent article, le produit de la vente doit être mis à la disposition de l'ayant droit, déduction faite des frais grevant la marchandise. Si ces frais sont supérieurs au produit de la vente, le transporteur a droit à la différence.

5. La façon de procéder en cas de vente est déterminée par la loi ou les usages du lieu où se trouve la marchandise.

CHAPITRE IV

Responsabilité du transporteur

Article 17

1. Le transporteur est responsable de la perte totale ou partielle, ou de l'avarie, qui se produit entre le moment de la prise en charge de la marchandise et celui de la livraison, ainsi que du retard à la livraison.

2. Le transporteur est déchargé de cette responsabilité si la perte, l'avarie ou le retard a eu pour cause une faute de l'ayant droit, un ordre de celui-ci ne résultant pas d'une faute du transporteur, un vice propre de la marchandise, ou des circonstances que le transporteur ne pouvait pas éviter et aux conséquences desquelles il ne pouvait pas obvier.

3. Le transporteur ne peut exciper, pour se décharger de sa responsabilité, ni des défauts du véhicule dont il se sert pour effectuer le transport, ni des fautes de la personne dont il aurait loué le véhicule ou des déposés de celle-ci.

4. Compte tenu de l'article 18, paragraphes 2 à 5, le transporteur est déchargé de sa responsabilité lorsque la perte ou l'avarie résulte des risques particuliers inhérents à l'un des faits suivants ou à plusieurs d'entre eux:

- (a) emploi de véhicules ouverts et non bâchés lorsque cet emploi a été convenu d'une manière expresse et mentionné dans la lettre de voiture;
- (b) absence ou défectuosité de l'emballage pour les marchandises exposées par leur nature à des déchets ou avaries quand elles ne sont pas emballées ou sont mal emballées;
- (c) manutention, chargement, arrimage ou déchargement de la marchandise par l'expéditeur ou le destinataire ou des personnes agissant pour le compte de l'expéditeur ou du destinataire;
- (d) nature de certaines marchandises exposées, par des causes inhérentes à cette nature même, soit à perte totale ou partielle, soit à avarie, notamment par bris, rouille, détérioration interne et spontanée, dessiccation, coulage, déchet normal ou action de la vermine et des rongeurs;
- (e) insuffisance ou imperfection des marques ou des numéros de colis;
- (f) transport d'animaux vivants.

5. Si, en vertu du présent article, le transporteur ne répond pas de certains des facteurs qui ont causé le dommage, sa responsabilité n'est engagée que dans la proportion ou les facteurs dont il répond en vertu du présent article ont contribué au dommage.

Article 18

1. La preuve que la perte, l'avarie ou le retard a eu pour cause un des faits prévus à l'article 17, paragraphe 2, incombe au transporteur.

2. Lorsque le transporteur établit que, eu égard aux circonstances de fait, la perte ou l'avarie a pu résulter d'un ou de plusieurs des risques particuliers prévus à l'article 17, paragraphe 4, il y a présomption qu'elle en résulte. L'ayant droit peut toutefois faire la preuve que le dommage n'a pas eu l'un de ces risques pour cause totale ou partielle.

3. La présomption visée ci-dessus n'est pas applicable dans le cas prévu à l'article 17, paragraphe 4, (a), s'il y a manquant d'une importance anormale ou perte de colis.

4. Si le transport est effectué au moyen d'un véhicule aménagé en vue de soustraire les marchandises à l'influence de la chaleur, de froid, des variations de température ou de l'humidité de l'air, le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4 (d), que s'il fournit la preuve que toutes les mesures lui incombant, compte tenu des circonstances ont été prises en ce qui concerne le choix, l'entretien et l'emploi de ces aménagements et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.

5. Le transporteur ne peut invoquer le bénéfice de l'article 17, paragraphe 4 (f), que s'il fournit la preuve que toutes les mesures lui incombant normalement, compte tenu des circonstances ont été prises et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.

Article 19

Il y a retard à la livraison lorsque la marchandise n'a pas été livrée dans le délai convenu ou, s'il n'a pas été convenu de délai, lorsque la durée effective du transport dépasse, compte tenu des circonstances et, notamment, dans le cas d'un chargement partiel, du temps voulu pour assembler un chargement complet dans des conditions normales, le temps qu'il est raisonnable d'allouer à des transporteurs diligents.

Article 20

1. L'ayant droit peut, sans avoir à fournir d'autres preuves, considérer la marchandise comme perdue quand elle n'a pas été livrée dans les trente jours qui suivent l'expiration du délai convenu ou, s'il n'a pas été convenu de délai, dans les soixant jours qui suivent la prise en charge de la marchandise par le transporteur.

2. L'ayant droit peut, en recevant le paiement de l'indemnité pour la marchandise perdue, demander, par écrit, à être avisé immédiatement dans le cas où la marchandise serait retrouvée au cours de l'année qui suivra le paiement de l'indemnité. Il lui est donné par écrit acte de cette demande.

3. Dans les trente jours qui suivent la réception de cet avis, l'ayant droit peut exiger que la marchandise lui soit livrée contre paiement des créances résultant de la lettre de voiture et contre restitution de l'indemnité qu'il a reçue, déduction faite éventuellement des frais qui auraient été compris dans cette indemnité, et sous réserve de tous droits à l'indemnité pour retard à la livraison prévue à l'article 23 et, s'il y a lieu, à l'article 26.

4. A défaut soit de la demande prévue au paragraphe 2, soit d'instructions données dans le délai de trente jours prévu au paragraphe 3, ou encore si la marchandise n'a pas été retrouvée que plus d'un an après le paiement de l'indemnité, le transporteur en dispose conformément à la loi du lieu où se trouve la marchandise.

Article 21

Si la marchandise est livrée au destinataire sans encaissement du remboursement qui aurait dû être perçu par le transporteur en vertu des dispositions du contrat de transport, le transporteur est tenu d'indemniser l'expéditeur à concurrence du montant du remboursement, sauf son recours contre le destinataire.

Article 22

1. Si l'expéditeur remet au transporteur des marchandises dangereuses, il lui signale la nature exacte du danger qu'elles présentent et lui indique éventuellement les précautions à prendre. Au cas où cet avis n'a pas été consigné sur la lettre de voiture, il appartient à l'expéditeur ou au destinataire de faire la preuve, par tous autres moyens, que le transporteur a eu connaissance de la nature exacte du danger que présentait le transport desdites marchandises.

2. Les marchandises dangereuses qui n'auraient pas été connues comme telles par le transporteur dans les conditions prévues au paragraphe 1 du présent article peuvent à tout moment et en tout lieu être déchargées, détruites ou rendues inoffensives par le transporteur et ce sans aucune indemnité; l'expéditeur est en outre responsable de tous frais et dommages résultant de leur remise au transport ou de leur transport.

Article 23

1. Quand, en vertu des dispositions de la présente Convention, une indemnité pour perte totale ou partielle de la marchandise est mise à la charge du transporteur, cette indemnité est calculée d'après la valeur de la marchandise au lieu et à l'époque de la prise en charge.

2. La valeur de la marchandise est déterminée d'après le cours en bourse ou, à défaut, d'après le prix courant sur le marché ou, à défaut de l'un ou l'autre, d'après la valeur usuelle des marchandises de même nature et qualité.

3. Toutefois, l'indemnité ne peut dépasser 25 francs par kilogramme du poids brut manquant. Le franc s'entend du franc-or, d'un poids de 10/31 de gramme au titre de 0,900.

4. Sont et outre remboursés le prix du transport, le droits de douane et les autres frais encourus à l'occasion du transport de la marchandise, en totalité en cas de perte totale, et au prorata en cas de perte partielle; d'autres dommages-intérêts ne sont pas dus.

5. En cas de retard, si l'ayant droit prouve qu'un préjudice en est résulté, le transporteur est tenu de payer pour ce préjudice une indemnité qui ne peut pas dépasser le prix du transport.

6. Des indemnités plus élevées ne peuvent être réclamées qu'en cas de déclaration de la valeur de la marchandise ou de déclaration d'intérêt spécial à la livraison, conformément aux articles 24 et 26.

Article 24

L'expéditeur peut déclarer dans la lettre de voiture, contre paiement d'un supplément de prix à convenir, une valeur de la marchandise excédant le limite mentionnée au paragraphe 3 de l'article 23 et, dans ce cas, le montant déclaré se substitue à cette limite.

Article 25

1. En cas d'avarie, le transporteur paie le montant de la dépréciation calculée d'après la valeur de la marchandise fixée conformément à l'article 23, paragraphes 1, 2 et 4.
2. Toutefois, l'indemnité ne peut dépasser:
 - (a) si la totalité de l'expédition est dépréciée par l'avarie, le chiffre qu'elle aurait atteint en cas de perte totale;
 - (b) si une partie seulement de l'expédition est dépréciée par l'avarie, le chiffre qu'elle aurait atteint en cas de perte de la partie dépréciée.

Article 26

1. L'expéditeur peut fixer, en l'inscrivant à lettre de voiture, et contre paiement d'un supplément de prix à convenir, le montant d'un intérêt spécial à la livraison, pour le cas de perte ou d'avarie et pour celui de dépassement du délai convenu.
2. S'il y a eu déclaration d'intérêt spécial à la livraison, il peut être réclamé, indépendamment des indemnités prévues aux articles 23, 24 et 25, et à concurrence du montant de l'intérêt déclaré, une indemnité égale au dommage supplémentaire dont la preuve est apportée.

Article 27

1. L'ayant droit peut demander les intérêts de l'indemnité. Ces intérêts, calculés à raison de 5 pour 100 l'an, courent du jour de la réclamation adressée par écrit au transporteur ou, s'il n'y a pas eu de réclamation, du jour de la demande en justice.
2. Lorsque les éléments qui servent de base au calcul de l'indemnité ne sont pas exprimés dans la monnaie du pays où le paiement est réclamé, la conversion est faite d'après le cours du jour et du lieu du paiement de l'indemnité.

Article 28

1. Lorsque, d'après la loi applicable, la perte, l'avarie ou le retard survenu au cours d'un transport soumis à la présente Convention peut donner lieu à une réclamation extracontractuelle, le transporteur peut se prévaloir des dispositions de la présente Convention qui excluent sa responsabilité ou qui déterminent ou limitent les indemnités dues.
2. Lorsque la responsabilité extracontractuelle pour perte, avarie ou retard d'une des personnes dont le transporteur répond aux termes de l'article 3 est mise en cause, cette personne peut également se prévaloir des dispositions de la présente Convention qui excluent la responsabilité du transporteur ou qui déterminent ou limitent les indemnités dues.

Article 29

1. Le transporteur n'a pas le droit de se prévaloir des dispositions du présent chapitre qui excluent ou limitent sa responsabilité ou qui renversent le fardeau de la preuve, si le dommage provient de son dol ou d'une faute qui lui est imputable et qui, d'après la loi, de la juridiction saisie, est considérée comme équivalent au dol.
2. Il en est de même si le dol ou la faute est le fait des préposés du transporteur ou de toutes autres personnes aux services desquelles il recourt pour l'exécution du transport lorsque ces préposés ou ces autres personnes agissent dans l'exercice de leurs fonctions. Dans ce cas, ces préposés ou ces autres personnes n'ont pas davantage le droit de se prévaloir, en ce qui concerne leur responsabilité personnelle, des dispositions du présent chapitre visées au paragraphe 1.

CHAPITRE V

Réclamation et actions

Article 30

1. Si le destinataire a pris livraison de la marchandise sans qu'il en ait constaté l'état contradictoirement avec le transporteur ou sans qu'il ait, au plus tard au moment de la livraison s'il s'agit de pertes ou avaries parentes, ou dans les sept jours à dater de la livraison, dimanche et jours fériés non compris, lorsqu'il s'agit de pertes ou avaries non apparentes, adressé des réserves au transporteur indiquant la nature générale de la perte ou de l'avarie, il est présumé, jusqu'à

preuve contraire, avoir reçu la marchandise dans l'état décrit dans la lettre de voiture. Les réserves visées ci-dessus doivent être faites par écrit lorsqu'il s'agit de pertes ou avaries non apparentes.

2. Lorsque l'état de la marchandise a été constaté contradictoirement par le destinataire et le transporteur, la preuve contraire au résultat de cette constatation ne peut être faite que s'il s'agit de pertes ou avaries non apparentes et si le destinataire a adressé des réserves écrites au transporteur dans les sept jours, dimanche et jours fériés non compris, à dater de cette constatation.

3. Un retard à la livraison ne peut donner lieu à indemnité que si une réserve a été adressé par écrit dans le délai de 21 jours à dater de la mise de la marchandise à la disposition du destinataire.

4. La date de livraison ou, selon le cas, celle de la constatation ou celle de la mise à disposition n'est pas comptée dans les délais prévus au présent article.

5. Le transporteur et le destinataire se donnent réciproquement toutes facilité raisonnables pour les constatations et vérifications utiles.

Article 31

1. Pour tous litiges auxquels donnent lieu les transports soumis à la présent Convention le demandeur peut saisir, en dehors des juridictions des pays contractants désignées d'un commun accord par les parties, les juridictions du pays sur le territoire duquel:

- (a) le défendeur a sa résidence habituelle, son siège principal ou la succursale ou l'agence par l'intermédiaire de laquelle le contrat de transport a été conclu, ou
- (b) le lieu de la prise en charge de la marchandise ou celui prévu pour la livraison est situé et ne peut saisir que ces juridictions.

2. Lorsque dans un litige visé au paragraphe 1 du présent article une action est en instance devant une juridiction compétente aux termes de ce paragraphe, ou lorsque dans un tel litige un jugement a été prononcé par une telle juridiction, il ne peut être intenté aucune nouvelle action pour la même cause entre les mêmes parties à moins que la décision de la juridiction devant laquelle la première action a été intentée ne soit pas susceptible d'être exécutée dans le pays où la nouvelle action est intentée.

3. Lorsque dans un litige visé au paragraphe 1 du présent article un jugement rendu par une juridiction d'un pays contractant est devenu exécutoire dans ce pays, il devient également exécutoire dans chacun des autres pays contractants aussitôt après accomplissement des formalités prescrites à cet effet dans le pays intéressé. Ces formalités ne peuvent comporter aucune revision de l'affaire.

4. Les dispositions du paragraphe 3 de présent article s'appliquent aux jugements contradictoires, aux jugements par défaut et aux transactions judiciaires, mais ne s'appliquent ni aux jugements qui ne sont exécutoires que par provision, ni aux condamnations en dommages et intérêts qui seraient prononcés en sus des dépens contre un demandeur en raison du rejet total ou partiel de sa demande.

5. Il ne peut être exigé de caution de ressortissants de pays contractants, ayant leur domicile ou un établissement dans un de ces pays, pour assurer le paiement des dépens à l'occasion des actions en justice auxquelles donnet lieu les transports soumis à la présente convention.

Article 32

1. Les actions auxquelles peuvent donner lieu les transports soumis à la présent Convention sont prescrites dans le délai d'un an. Toutefois, dans le cas de dol ou de faute considérée, d'après la loi de la juridiction saisie, comme équivalente au dol, la prescription est de trois ans. La prescription court:

- (a) dans le cas de perte partielle, d'avarie ou de retard, à partir du jour où la marchandise a été livrée;
- (b) dans le cas de perte totale, à partir du trentième jour après l'expiration du délai convenu ou, s'il n'a pas été convenu de délai, à partir du soixantième jour après la prise en charge de la marchandise par le transporteur;

- (c) dans tous les autres cas, à partir de l'expiration d'un délai de trois mois à dater de la conclusion du contrat de transport.

Le jour indiqué ci-dessus comme point de départ de la prescription n'est pas compris dans le délai.

2. Une réclamation écrite suspend la prescription jusqu'au jour où le transporteur repousse la réclamation par écrit et restitue les pièces qui y étaient jointes. En cas d'acceptation partielle de la réclamation, la prescription ne reprend son cours que pour la partie de la réclamation qui reste litigieuse. Le preuve de la réception de la réclamation ou de la réponse et de la restitution des pièces est à la charge de la partie qui invoque ce fait. Les réclamations ultérieures ayant le même objet ne suspendent pas la prescription.

3. Sous réserve des dispositions du paragraphe 2 ci-dessus, la suspension de la prescription est régie par la loi de la juridiction saisie. Il en est de même en ce qui concerne l'interruption de la prescription.

4. L'action prescrite ne peut plus être exercée, même sous forme de demande reconventionnelle ou d'exception.

Article 33

Le contrat de transport peut contenir une clause attribuant compétence à un tribunal arbitral à condition que cette clause prévoie que le tribunal arbitral appliquera le présente convention.

CHAPITRE VI

Dispositions relatives au transport effectué par transporteurs successifs

Article 34

Si un transport régi par un contrat unique est exécuté par des transporteurs routiers successifs, chacun de ceux-ci assume la responsabilité de l'exécution du transport total, le second transporteur et chacun des transporteurs suivants devenant, de par leur acceptation de la marchandise et de la lettre de voiture, parties au contrat, aux conditions de la lettre de voiture.

Article 35

1. Le transporteur qui accepte la marchandise du transporteur précédent remet à celui-ci un reçu daté et signé. Il doit porter son nom et son adresse sur le deuxième exemplaire de la lettre de voiture. S'il y a lieu, il appose sur cet exemplaire, ainsi que sur le reçu, des réserves analogues à celles qui sont prévues à l'article 8, paragraphe 2.

2. Les dispositions de l'article 9 s'appliquent aux relations entre transporteurs successifs.

Article 36

A moins qu'il ne s'agisse d'une demande reconventionnelle ou d'une exception formulée dans une instance relative à une demande fondée sur le même contrat de transport, l'action en responsabilité pour perte, avarie ou retard ne peut être dirigée que contre le premier transporteur, le dernier transporteur ou le transporteur qui exécutait la partie du transport au cours de laquelle s'est produit le fait ayant causé la perte, l'avarie ou le retard; l'action peut être dirigée à la fois contre plusieurs de ces transporteurs.

Article 37

Le transporteur qui a payé une indemnité en vertu des dispositions de la présente Convention a le droit d'exercer un recours en principal, intérêts et frais contre les transporteurs qui ont participé à l'exécution du contrat de transport, conformément aux dispositions suivantes:

- (a) le transporteur par le fait duquel le dommage a été causé doit seul supporter l'indemnité, qu'il l'ait payée lui-même ou qu'elle ait été payée par un autre transporteur;
- (b) lorsque le dommage a été causé par le fait de deux ou plusieurs transporteurs, chacun d'eux doit payer un montant proportionnel à sa part de responsabilité; si l'évaluation des parts de responsabilité est impossible, chacun d'eux est responsable proportionnellement à la part de rémunération du transport qui lui revient;
- (c) si l'on ne peut déterminer quels sont ceux des transporteurs auxquels la responsabilité est

imputable, la charge de l'indemnité due est répartie, dans la proportion fixée en (b), entre tous les transporteurs.

Article 38

Si l'un des transporteurs est insolvable, la part lui incombant et qu'il n'a pas payée est répartie entre tous les autres transporteurs proportionnellement à leur rémunération.

Article 39

1. Le transporteur contre lequel est exercé un des recours prévus aux articles 37 et 38 n'est pas recevable à contester le bien-fondé du paiement effectué par le transporteur exerçant le recours, lorsque l'indemnité a été fixée par décision de justice, pourvu qu'il ait été dûment informé du procès et qu'il ait été à même d'y intervenir.

2. Le transporteur qui veut exercer son recours peut le former devant le tribunal compétent du pays dans lequel l'un des transporteurs intéressés a sa résidence habituelle, son siège principal ou la succursale ou l'agence par l'entremise de laquelle le contrat de transport a été conclu. Le recours peut être dirigé dans une seule et même instance contre tous les transporteurs intéressés.

3. Les dispositions de l'article 31, paragraphes 3 et 4, s'appliquent aux jugements rendus sur les recours prévus aux articles 37 et 38.

4. Les dispositions de l'article 32 sont applicables aux recours entre transporteurs. La prescription court, toutefois, soit à partir du jour d'une décision de justice définitive fixant l'indemnité à payer en vertu des dispositions de la présente Convention, soit, au cas où il y n'y aurait pas eu de telle décision, à partir du jour du paiement effectif.

Article 40

Les transporteurs sont libres de convenir entre eux de dispositions dérogeant aux articles 37 et 38.

CHAPITRE VII

Nullité des stipulations contraires à la convention

Article 41

1. Sous réserve des dispositions de l'article 40, est nulle et de nul effet toute stipulation qui, directement ou indirectement, dérogerait aux dispositions de la présente convention. La nullité de telles stipulations n'entraîne pas la nullité des autres dispositions du contrat.

2. En particulier, seraient nulles toute clause par laquelle le transporteur se ferait céder la bénéfice de l'assurance de la marchandise ou toute autre clause analogue, ainsi que toute clause déplaçant le fardeau de la preuve.

CHAPITRE VIII

Dispositions finales

Article 42

1. La présente Convention est ouverte à la signature ou à l'adhésion des pays membres de la Commission économique pour l'Europe et des pays admis à la Commission à titre consultatif conformément au paragraphe 8 du mandat de cette Commission.

2. Les pays susceptibles de participer à certains travaux de la Commission économique pour l'Europe en application du paragraphe 11 du mandat de cette Commission peuvent devenir parties contractantes à la présente Convention en y adhérant après son entrée en vigueur.

3. La Convention sera ouverte à la signature jusqu'au 31 août 1965 inclus. Après cette date, elle sera ouverte à l'adhésion.

4. La présente Convention sera ratifiée.

5. La ratification ou l'adhésion sera effectuée par le dépôt d'un instrument auprès du Secrétaire général de l'Organisation des Nations Unies.

Article 43

1. La présente Convention entrera en vigueur le quatre-vingt-dixième jour après que cinq des pays mentionnés au paragraphe 1 de l'article 42 auront déposé leur instrument de ratification ou d'adhésion.

2. Pour chaque pays qui la ratifiera ou y adhérera après que cinq pays auront déposé leur instrument de ratification ou d'adhésion, la présente Convention entrera en vigueur le quatre-vingt-dixième jour qui suivra le dépôt de l'instrument de ratification ou d'adhésion dudit pays.

Article 44

1. Chaque partie contractante pourra dénoncer la présente Convention par notification adressée au Secrétaire général de l'Organisation des Nations Unies.

2. La dénonciation prendra effet douze mois après la date à laquelle le Secrétaire général en aura reçu notification.

Article 45

Si, après l'entrée en vigueur de la présente Convention, le nombre de parties contractantes se trouve, par suite de dénonciations, ramené à moins de cinq, la présente Convention cessera d'être en vigueur à partir de la date à laquelle la dernière de ces dénonciations prendra effet.

Article 46

1. Tout pays pourra, lors du dépôt de son instrument de ratification ou d'adhésion ou à tout moment ultérieur, déclarer, par notification au Secrétaire général de l'Organisation des Nations Unies, que la présente Convention sera applicable à tout ou partie des territoires qu'il représente sur le plan international. La Convention sera applicable au territoire ou territoires mentionnés dans la notification à dater du quatre-vingt-dixième jour après réception de cette notification par le Secrétaire général ou, si à ce jour la Convention n'est pas encore entrée en vigueur, à dater de son entrée en vigueur.

2. Tout pays qui aura fait, conformément au paragraphe précédent, une déclaration ayant pour effet de rendre la présente Convention applicable à un territoire qu'il représente sur le plan international pourra, conformément à l'article 44, dénoncer la Convention en ce qui concerne ledit territoire.

Article 47

Tout différend entre deux ou plusieurs parties contractantes touchant l'interprétation ou l'application de la présente Convention que les parties n'auraient pu régler par voie de négociations ou par un autre mode de règlement pourra être porté, à la requête d'une quelconque des parties contractantes intéressées, devant la Cour internationale de Justice, pour être tranché par elle.

Article 48

1. Chaque partie contractante pourra, au moment où elle signera ou ratifiera la présente Convention ou y adhérera, déclarer qu'elle ne se considère pas liée par l'article 47 de la Convention. Les autres parties contractantes ne seront pas liées par l'article 47 envers toute partie contractante qui aura formulé une telle réserve.

2. Tout partie contractante qui aura formulé une réserve conformément au paragraphe 1 pourra à tout moment lever cette réserve par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

3. Aucune autre réserve à la présente Convention ne sera admise.

Article 49

1. Après que la présente Convention aura été en vigueur pendant trois ans, toute partie contractante pourra, par notification adressée au Secrétaire général de l'Organisation des Nations Unies, demander la convocation d'une conférence à l'effet de réviser la présente convention. Le Secrétaire général notifiera cette demande à toutes les parties contractantes et convoquera une conférence de révision si, dans un délai de quatre mois à dater de la notification adressé par lui, le quart au moins des parties contractantes lui signifient leur assentiment à cette demande.

2. Si une conférence est convoquée conformément au paragraphe précédent, le Secrétaire général en avisera toutes les parties contractantes et les invitera à présenter, dans un délai de trois mois, les propositions qu'elles souhaiteraient voir examiner par la conférence. Le Secrétaire général communiquera à toutes les parties contractantes l'ordre du jour provisoire de la conférence, ainsi que le texte de ces propositions, trois mois au moins avant la date d'ouverture de la conférence.

Le Secrétaire général invitera à toute conférence convoquée conformément au présent article tous les pays visés au paragraphe 1 de l'article 42, ainsi que les pays devenus parties contractantes en application du paragraphe 2 de l'article 42.

Article 50

Outre les notifications prévues à l'article 49, le Secrétaire général de l'Organisation des Nations Unies aux pays visés au paragraphe 1 de l'article 42, ainsi que les pays devenus parties contractantes en application du paragraphe 2 de l'article 42:

- (a) les ratifications et adhésions en vertu de l'article 42;
- (b) les dates auxquelles la présente Convention entrera en vigueur conformément à l'article 43;
- (c) les dénonciations en vertu de l'article 44;
- (d) l'abrogation de la présente Convention conformément à l'article 45;
- (e) les notifications reçues conformément à l'article 46;
- (f) les déclarations et notifications reçues conformément aux paragraphes 1 et 2 de l'article 48.

Article 51

Après le 31 août 1956, l'original de la présente Convention sera déposé auprès du Secrétaire général de l'Organisation des Nations Unies, qui en transmettra des copies certifiées conformes à chacun des pays visés aux paragraphes 1 et 2 de l'article 42.

EN FOI DE QUOI, les soussignés, à ce dûment autorisés, ont signé la présente convention.

FAIT à Genève, le dix-neuf mai mil neuf cent cinquante-six, en un seul exemplaire, en langues anglaise et française, les deux textes faisant également foi.

PROTOCOLE DE SIGNATURE

AU MOMENT DE PROCEDER A LA SIGNATURE de la Convention relative au contrat de transport international de marchandises par route, les soussignés, dûment autorisés, sont convenus des déclarations et précisions suivantes:

1. La présente Convention ne s'applique pas aux transports entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et la République d'Irlande.
2. Ad article premier, paragraphe 4

Les soussignés s'engagent à négocier des conventions sur le contrat de déménagement et le contrat de transport combiné.

EN FOI DE QUOI, les soussignés, à ce dûment autorisés, ont signé le présent Protocole.

FAIT à Genève, le dix-neuf mai mil neuf cent cinquante-six, en un seul exemplaire, en langues anglaise et française, les deux textes faisant également foi.

ANNEX 3 German translation of the CMR

ÜBEREINKOMMEN ÜBER DEN BEFÖRDERUNGSVERTRAG IM INTERNATIONALEN STRASSENGÜTERVERKEHR (CMR)

PRÄAMBEL

DIE VERTRAGSPARTEIEN HABEN

IN DER ERKENNTNIS, dass es sich empfiehlt, die Bedingungen für den Beförderungsvertrag im internationalen Strassengüterverkehr, insbesondere hinsichtlich der in diesem Verkehr verwendeten Urkunden und der Haftung des Frachtführers, einheitlich zu regeln,

FOLGENDES VEREINBART:

KAPITEL I

Geltungsbereich

Artikel 1

1. Dieses Übereinkommen gilt für jeden Vertrag über die entgeltliche Beförderung von Gütern auf der Strasse mittels Fahrzeugen, wenn der Ort der Übernahme des Gutes und der für die Ablieferung vorgesehene Ort, wie sie im Verträge angegeben sind, in zwei verschiedenen Staaten liegen, von denen mindestens einer ein Vertragsstaat ist. Dies gilt ohne Rücksicht auf den Wohnsitz und die Staatsangehörigkeit der Parteien.
2. Im Sinne dieses Übereinkommens bedeuten 'Fahrzeuge' Kraftfahrzeuge, Sattelkraftfahrzeuge, Anhänger und Sattelanhänger, wie sie in Artikel 4 des Abkommens über den Strassenverkehr vom 19. September 1949 umschrieben sind.
3. Dieses Übereinkommen gilt auch dann, wenn in seinen Geltungsbereich fallende Beförderungen von Staaten oder von staatlichen Einrichtungen oder Organisationen durchgeführt werden.
4. Dieses Übereinkommen gilt nicht.
 - (a) für Beförderungen, die nach den Bestimmungen internationaler Postübereinkommen durchgeführt werden;
 - (b) für die Beförderung von Leichen;
 - (c) für die Beförderung von Umzugsgut.
5. Vertragsparteien werden untereinander keine zwei- oder mehrseitigen Sondervereinbarungen schliessen, die Abweichungen von den Bestimmungen dieses Übereinkommens enthalten; ausgenommen sind Sondervereinbarungen unter Vertragsparteien, nach denen dieses Übereinkommen nicht für ihren kleinen Grenzverkehr gilt, oder durch die für Beförderungen, die ausschliesslich auf ihrem Staatsgebiet durchgeführt werden, die Verwendung eines das Gut vertretenden Frachtbriefes zugelassen wird.

Artikel 2

1. Wird das mit dem Gut beladene Fahrzeug auf einem Teil der Strecke zur See, mit der Eisenbahn, auf Binnenwasserstrassen oder auf dem Luftwege befördert und wird das Gut – abgesehen von Fällen des Artikels 14 – nicht umgeladen, so gilt dieses Übereinkommen trotzdem für die gesamte Beförderung. Soweit jedoch bewiesen wird, dass während der Beförderung durch das andere Verkehrsmittel eingetretene Verluste, Beschädigungen oder Überschreitungen der Lieferfrist nicht durch eine Handlung oder Unterlassung des Strassenfrachtführers, sondern durch ein Ereignis verursacht worden sind, das nur während und wegen der Beförderung durch das andere Beförderungsmittel eingetreten sein kann, bestimmt sich die Haftung des Strassenfrachtführers nicht nach diesem Übereinkommen, sondern danach, wie der Frachtführer des anderen Verkehrsmittels gehaftet hätte, wenn ein lediglich das Gut betreffender Be-

förderungsvertrag zwischen dem Absender und dem Frachtführer des anderen Verkehrsmittels nach den zwingenden Vorschriften des für die Beförderung durch das andere Verkehrsmittel geltenden Rechts geschlossen worden wäre. Bestehen jedoch keine solchen Vorschriften, so bestimmt sich die Haftung des Strassenfrachtführers nach diesem Übereinkommen.

2. Ist der Strassenfrachtführer zugleich der Frachtführer des anderen Verkehrsmittels, so haftet er ebenfalls nach Absatz 1, jedoch so, als ob seine Tätigkeit als Strassenfrachtführer und seine Tätigkeit als Frachtführer des anderen Verkehrsmittels von zwei verschiedenen Personen ausgeübt würden.

KAPITEL II

Haftung des Frachtführers für andere Personen

Artikel 3

Der Frachtführer haftet, soweit dieses Übereinkommen anzuwenden ist, für Handlungen und Unterlassungen seiner Bediensteten und aller anderen Personen, deren er sich bei Ausführung der Beförderung bedient, wie für eigene Handlungen und Unterlassungen, wenn diese Bediensteten oder anderen Personen in Ausübung ihrer Verrichtungen handeln.

Kapitel III

Abschluss und Ausführung des Beförderungsvertrages

Artikel 4

Der beförderungsvertrag wird in einem Frachtbrief festgehalten. Das Fehlen, die Mangelhaftigkeit oder Verlust des Frachtbriefes berührt weder den Bestand noch die Gültigkeit des Beförderungsvertrages, der den Bestimmungen dieses Übereinkommens unterworfen bleibt.

Artikel 5

1. Der Frachtbrief wird in drei Originalausfertigungen ausgestellt, die vom Absender und vom Frachtführer unterzeichnet werden. Die Unterschriften können gedruckt oder durch den Stempel des Absenders oder des Frachtführers ersetzt werden, wenn dies nach dem Recht des Staates, in dem der Frachtbrief ausgestellt wird, zulässig ist. Die erste Ausfertigung erhält der Absender, die zweite begleitet das Gut, die dritte behält der Frachtführer.

2. Ist das zu befördernde Gut auf mehrere Fahrzeuge zu verladen oder handelt es sich um verschiedenartige oder um in verschiedene Posten aufgeteilte Güter, können sowohl der Absender als auch der Frachtführer verlangen, dass so viele Frachtbriefe ausgestellt werden, als Fahrzeuge zu verwenden oder Güterarten oder -posten vorhanden sind.

Artikel 6

1. Der Frachtbrief muss folgende Angaben enthalten:

- (a) Ort und Tag der Ausstellung;
- (b) Name und Anschrift des Absenders;
- (c) Name und Anschrift des Frachtführers;
- (d) Stelle und Tag der Übernahme des Gutes sowie die für die Ablieferung vorgesehene Stelle;
- (e) Name und Anschrift des Empfängers;
- (f) die übliche Bezeichnung der Art des Gutes und die Art der Verpackung, bei gefährlichen Gütern ihre allgemein anerkannte Bezeichnung;
- (g) Anzahl, Zeichen und Spezialnummern der Frachtstücke;
- (h) Rohgewicht oder die anders angegebene Menge des Gutes;
- (i) die mit der Beförderung verbundenen Kosten (Fracht, Nebengebühren, Zölle und andere Kosten, die vom Vertragsabschluss bis zur Ablieferung anfallen);
- (j) Weisungen für die Zoll- und sonstige amtliche Behandlung;
- (k) die Angabe, dass die Beförderung trotz einer gegenteiligen Abmachung den Bestimmungen dieses Übereinkommens unterliegt.

2. Zutreffendenfalls muss der Frachtbrief ferner folgende Angaben enthalten:

- (a) das Verbot umzuladen;
- (b) die Kosten, die der Absender übernimmt;
- (c) den Betrag einer bei der Ablieferung des Gutes einzuziehenden Nachnahme;

- (d) die Angabe des Wertes des Gutes und des Betrages des besonderen Interesses an der Lieferung;
- (e) Weisungen des Absenders an den Frachtführer über die Versicherung des Gutes;
- (f) die vereinbarte Frist, in der Beförderung beendet sein muss;
- (g) ein Verzeichnis der dem Frachtführer übergebenen Urkunden.

3. Die Parteien dürfen in den Frachtbrief noch andere Angaben eintragen, die sie für zweckmässig halten.

Artikel 7

1. Der Absender haftet für alle Kosten und Schäden, die dem Frachtführer dadurch entstehen, dass folgende Angaben unrichtig oder unvollständig sind:

- (a) die in Artikel 6 Absatz 1 Buchstabe (b), (d), (e), (f), (g), (h) und (j) bezeichneten Angaben;
- (b) die in Artikel 6 Absatz 2 bezeichneten Angaben;
- (c) alle anderen Angaben oder Weisungen des Absenders für die Ausstellung des Frachtbriefes oder zum Zwecke der Eintragung in diesen.

2. Trägt der Frachtführer auf Verlangen des Absenders die in Absatz 1 bezeichneten Angaben in den Frachtbrief ein, wird bis zum Beweise des Gegenteils vermutet, dass der Frachtführer hierbei im Namen des Absenders gehandelt hat.

3. Enthält der Frachtbrief die in Artikel 6 Absatz 1 Buchstabe (k) bezeichnete Angabe nicht, so haftet der Frachtführer für alle Kosten und Schäden, die dem über das Gut Verfügungsberechtigten infolge dieser Unterlassung entstehen.

Artikel 8

1. Der Frachtführer ist verpflichtet bei der Übernahme des Gutes zu überprüfen:

- (a) die Richtigkeit der Angaben im Frachtbrief über die Anzahl der Frachtstücke und über ihre Zeichen und Nummern;
- (b) den äusseren Zustand des Gutes und seiner Verpackung.

2. Stehen dem Frachtführer keine angemessenen Mittel zur Verfügung, um die Richtigkeit der in Absatz 1 Buchstabe a bezeichneten Angaben zu überprüfen, so trägt er im Frachtbrief Vorbehalte ein, die zu begründen sind. Desgleichen hat er Vorbehalte zu begründen, die er hinsichtlich des äusseren Zustandes des Gutes und seiner Verpackung macht. Die Vorbehalte sind für den Absender nicht verbindlich, es sei denn, dass er sie im Frachtbrief ausdrücklich anerkannt hat.

3. Der Absender kann vom Frachtführer verlangen, dass dieser das Rohgewicht oder die anders angegebene Menge des Gutes überprüft. Er kann auch verlangen, dass Frachtführer den Inhalt der Frachtstücke überprüft. Der Frachtführer hat Anspruch auf Ersatz der Kosten der Überprüfung. Das Ergebnis der Überprüfung ist in den Frachtbrief einzutragen.

Artikel 9

1. Der Frachtbrief dient bis zum Beweise des Gegenteils als Nachweis für den Abschluss und Inhalt des Beförderungsvertrages sowie für die Übernahme des Gutes durch den Frachtführer.

2. Sofern der Frachtbrief keine mit Gründen versehenen Vorbehalte des Frachtführers aufweist, wird bis zum Beweise des Gegenteils vermutet, dass das Gut und seine Verpackung bei der Übernahme durch den Frachtführer äusserlich in gutem Zustande waren und dass die Anzahl der Frachtstücke und ihre Zeichen und Nummern mit den Angaben im Frachtbrief übereinstimmen.

Artikel 10

Der Absender haftet dem Frachtführer für alle durch mangelhafte Verpackung des Gutes verursachten Schäden an Personen, am Betriebsmaterial und an anderen Gütern sowie für alle durch mangelhafte Verpackung verursachten Kosten, es sei denn, dass der Mangel offensichtlich oder dem Frachtführer bei der Übernahme des Gutes bekannt war und er diesbezüglich keine Vorbehalte gemacht hat.

Artikel 11

1. Der Absender hat dem Frachtbrief die Urkunden beizugeben, die für die vor der Ablieferung des Gutes zu erledigende Zolloder sonstige amtliche Behandlung notwendig sind, oder diese Urkunden dem Frachtführer zur Verfügung zu stellen und diesem alle erforderlichen Auskünfte zu erteilen.

2. Der Frachtführer ist nicht verpflichtet zu prüfen, ob diese Urkunden und Auskünfte richtig und ausreichend sind. Der Absender haftet dem Frachtführer für alle aus dem Fehlen, der Unvollständigkeit oder Unrichtigkeit der Urkunden und Angaben entstehenden Schäden, es sei denn, dass den Frachtführer ein Verschulden trifft.

3. Der Frachtführer haftet wie ein Kommissionär für die Folgen des Verlustes oder der unrichtigen Verwendung der im Frachtbrief bezeichneten und diesem beigegebenen oder dem Frachtführer ausgehändigten Urkunden; er hat jedoch keinen höheren Schadenersatz zu leisten als bei Verlust des Gutes.

Artikel 12

1. Der Absender ist berechtigt, über das Gut zu verfügen. Er kann insbesondere verlangen, dass der Frachtführer das Gut nicht weiterbefördert, den für die Ablieferung vorgesehenen Ort ändert oder das Gut einem anderen als dem im Frachtbrief angegebenen Empfänger abliefern.

2. Dieses Recht erlischt, sobald die zweite Ausfertigung des Frachtbriefes dem Empfänger übergeben ist oder dieser sein Recht nach Artikel 13 Absatz 1 geltend macht. Von diesem Zeitpunkt an hat der Frachtführer den Weisungen des Empfängers nachzukommen.

3. Das Verfügungsrecht steht jedoch dem Empfänger bereits von der Ausstellung des Frachtbriefes an zu, wenn der Absender einen entsprechenden Vermerk in den Frachtbrief eingetragen hat.

4. Hat der Empfänger in Ausübung seines Verfügungsrechtes die Ablieferung des Gutes an einen Dritten angeordnet, so ist dieser nicht berechtigt, seinerseits andere Empfänger zu bestimmen.

5. Die Ausübung des Verfügungsrechtes unterliegt folgenden Bestimmungen:

- (a) der Absender oder in dem in Absatz 3 bezeichneten Falle der Empfänger hat, wenn er sein Verfügungsrecht ausüben will, die erste Ausfertigung des Frachtbriefes vorzuweisen, worin die dem Frachtführer erteilten neuen Weisungen eingetragen sein müssen, und dem Frachtführer alle Kosten und Schäden zu ersetzen, die durch die Ausführung der Weisungen entstehen;
- (b) die Ausführung der Weisungen muss zu dem Zeitpunkt, in dem sie die Person erreichen, die sie ausführen soll, möglich sein und darf weder den gewöhnlichen Betrieb des Unternehmens des Frachtführers hemmen noch die Absender oder Empfänger anderer Sendungen schädigen;
- (c) Die Weisungen dürfen nicht zu einer Teilung der Sendung führen.

6. Kann der Frachtführer auf Grund der Bestimmungen des Absatzes 5 Bushstabe (b) die erhaltenen Weisungen nicht durchführen, so hat er unverzüglich denjenigen zu benachrichtigen, der die Weisungen erteilt hat.

7. Ein Frachtführer, der Weisungen nicht ausführt, die ihm unter Beachtung der Bestimmungen dieses Artikels erteilt worden sind, oder der solche Weisungen ausführt, ohne die Vorlage der ersten Ausfertigung des Frachtbriefes verlangt zu haben, haftet dem Berechtigten für den daraus entstehenden Schaden.

Artikel 13

1. Nach Ankunft des Gutes an dem für die Ablieferung vorgesehenen Ort ist der Empfänger berechtigt, vom Frachtführer zu verlangen, dass ihm gegen Empfangsbestätigung die zweite Ausfertigung des Frachtbriefes übergeben und das Gut abgeliefert wird. Ist der Verlust des Gutes festgestellt oder ist das Gut innerhalb der in Artikel 19 vorgesehenen Frist nicht angekommen, so kann der Empfänger die Rechte aus dem Beförderungsvertrage im eigenen Namen gegen den Frachtführer geltend machen.

2. Der Empfänger, der die ihm nach Absatz 1 zustehenden Rechte geltend macht, hat den Gesamtbetrag der aus dem Frachtbrief hervorgehenden Kosten zu zahlen. Bei Streitigkeiten hierüber ist der Frachtführer zur Ablieferung des Gutes nur verpflichtet, wenn ihm der Empfänger Sicherheit leistet.

Artikel 14

1. Wenn aus irgendeinem Grunde vor Anknfte des Gutes an dem für die Ablieferung vorgesehenen Ort die Erfüllung des Vertrages zu den im Frachtbrief festgelegten Bedingungen unmöglich ist oder unmöglich wird, hat der Frachtführer Weisungen des nach Artikel 12 über das Gut Verfügungsberechtigten einzuholen.

2. Gestatten die Umstände jedoch eine von, den im Frachtbrief festgelegten Bedingungen abweichende Ausführung der Beförderung und konnte der Frachtführer Weisungen des nach Artikel 12 über das Gut Verfügungsberechtigten innerhalb angemessener Zeit nicht erhalten, so hat er die Massnahmen zu ergreifen, die ihm im Interesse des über das Gut Verfügungsberechtigten die besten zu sein scheinen.

Artikel 15

1. Treten nach Anknft des Gutes am Bestimmungsort Ablieferungshindernisse ein, so hat der Frachtführer Weisungen des Absenders einzuholen. Wenn der Empfänger die Annahme des Gutes verweigert, ist der Absender berechtigt, über das Gut zu verfügen, ohne die erste Ausfertigung des Frachtbriefes vorweisen zu müssen.

2. Der Empfänger kann, auch wenn er die Annahme des Gutes verweigert hat, dessen Ablieferung noch so lange verlangen, als der Frachtführer keine dem widersprechenden Weisungen des Absenders erhalten hat.

3. Tritt das Ablieferungshindernis ein, nachdem der Empfänger auf Grund seiner Befugnisse nach Artikel 12 Absatz 3 Anweisung erteilt hat, das Gut an einen Dritten abzuliefern, so nimmt bei der Anwendung der Absätze 1 und 2 dieses Artikels der Empfänger die Stelle des Absenders und der Dritte die des Empfängers ein.

Artikel 16

1. Der Frachtführer hat Anspruch auf Erstattung der Kosten, die ihm dadurch entstehen, dass er Weisungen einholt oder ausführt, es sei denn dass er diese Kosten verschuldet hat.

2. In den in Artikel 14 Absatz 1 und in Artikel 15 bezeichneten Fällen kann der Frachtführer das Gut sofort auf Kosten des Verfügungsberechtigten ausladen; nach dem Ausladen gilt die Beförderung als beendet. Der Frachtführer hat sodann das Gut für den Verfügungsberechtigten zu verwahren. Er kann es jedoch auch einem Dritten anvertrauen und haftet dann nur für die sorgfältige Auswahl des Dritten. Das Gut bleibt mit den aus dem Frachtbrief hervorgehenden Ansprüchen sowie mit allen anderen Kosten belastet.

3. Der Frachtführer kann, ohne Weisungen des Verfügungsberechtigten abzuwarten, dem Verkauf des Gutes veranlassen, wenn es sich um verderbliche Waren handelt oder der Zustand des Gutes eine solche Massnahme rechtfertigt oder wenn die Kosten der Verwahrung in keinen Verhältnis zum Wert des Gutes stehen. Er kann auch in anderen Fällen den Verkauf des Gutes veranlassen, wenn er innerhalb einer angemessenen Frist gegenteilige Weisungen des Verfügungsberechtigten, deren Ausführung ihm billigerweise zugemutet werden kann, nicht erhält.

4. Wird das Gut auf Grund der Bestimmungen dieses Artikels verkauft, so ist der Erlös nach Abzug der auf dem Gut lastenden Kosten dem Verfügungsberechtigten zur Verfügung zu stellen. Wenn diese Kosten höher sind als der Erlös, kann der Frachtführer den Unterschied beanspruchen.

5. Art und Weise des Verkaufes bestimmen sich nach den Gesetzen oder Gebräuchen des Ortes, an dem sich das Gut befindet.

KAPITEL IV

Haftung des Frachtführers

Artikel 17

1. Der Frachtführer haftet für gänzlichen oder teilweisen Verlust und für Beschädigung des Gutes, sofern der Verlust oder die Beschädigung zwischen dem Zeitpunkt der Übernahme des Gutes und dem seiner Ablieferung eintritt, sowie für Überschreitung der Lieferfrist.

2. Der Frachtführer ist von dieser Haftung befreit, wenn der Verlust, die Beschädigung oder die Überschreitung der Lieferfrist durch ein Verschulden des Verfügungsberechtigten, durch eine nicht vom Frachtführer verschuldete Weisung des Verfügungsberechtigten, durch besondere Mängel des Gutes oder durch Umstände verursacht worden ist, die der Frachtführer nicht vermeiden und deren Folgen er nicht abwenden konnte.

3. Um sich von seiner Haftung zu befreien, kann sich der Frachtführer weder auf Mängel des für die Beförderung verwendeten Fahrzeuges noch gegebenenfalls auf ein Verschulden des Vermieters des Fahrzeuges oder der Bediensteten des Vermieters berufen.

4. Der Frachtführer ist vorbehaltlich des Artikels 18 Absatz 2 bis 5 von seiner Haftung befreit, wenn der Verlust oder die Beschädigung aus den mit einzelnen oder mehreren Umständen der folgenden Art verbundenen besonderen Gefahren entstanden ist:

- (a) Verwendung von offenen, nicht mit Planen gedeckten Fahrzeugen, wenn diese Verwendung ausdrücklich vereinbart und im Frachtbrief vermerkt worden ist;
- (b) Fehlen oder Mängel der Verpackung, wenn die Güter ihrer Natur nach bei fehlender oder mangelhafter Verpackung Verlusten oder Beschädigungen ausgesetzt sind;
- (c) Behandlung, Verladen, Verstauen oder Ausladen des Gutes durch den Absender, den Empfänger oder Dritte, die für den Absender oder Empfänger handeln;
- (d) natürliche Beschaffenheit gewisser Güter, derzufolge sie gänzlichem oder teilweisem Verlust oder Beschädigung, insbesondere durch Bruch, Rost, inneren Verderb, Austrocknen, Auslaufen, normalen Schwund oder Einwirkung von Ungeziefer oder Nagetieren, ausgesetzt sind;
- (e) ungenügende oder unzulängliche Bezeichnung oder Numerierung der Frackstücke;
- (f) Beförderung von lebenden Tieren.

5. Haftet der Frachtführer auf Grund dieses Artikels für einzelne Umstände, die einen Schaden verursacht haben, nicht, so haftet er nur in dem Umfange, in dem die Umstände, für die er auf Grund dieses Artikels haftet, zu dem Schaden beigetragen haben.

Artikel 18

1. Der Beweis, dass der Verlust, die Beschädigung oder die Überschreitung der Lieferfrist durch einen der in Artikel 17 Absatz 2 bezeichneten Umstände verursacht worden ist, obliegt dem Frachtführer.

2. Wenn der Frachtführer darlegt, dass nach den Umständen des Falles der Verlust oder die Beschädigung aus einer oder mehreren der in Artikel 17 Absatz 4 bezeichneten besonderen Gefahren entstehen konnte, wird vermutet, dass der Schaden hieraus entstanden ist. Der Verfügungsberechtigte kann jedoch beweisen, dass der Schaden nicht oder nicht ausschliesslich aus einer dieser Gefahren entstanden ist.

3. Diese Vermutung gilt im Falle des Artikels 17 Absatz 4 Buchstabe a nicht bei aussergewöhnlich grossem Abgang oder bei Verlust von ganzen Frachtstücken.

4. Bei Beförderung mit einem Fahrzeug, das mit besonderen Einrichtungen zum Schutze des Gutes gegen die Einwirkung von Hitze, Kälte, temperaturschwankungen oder Luftfeuchtigkeit versehen ist, kann sich der Frachtführer auf Artikel 17 Absatz 4 Buchstabe (d) nur berufen, wenn er beweist, dass er alle ihm nach den Umständen obliegenden Massnahmen hinsichtlich der Auswahl, Instandhaltung und Verwendung der besonderen Einrichtungen und ihm erteilte besondere Weisungen beachtet hat.

5. Der Frachtführer kann sich auf Artikel 17 Absatz 4 Buchstabe (f) nur berufen, wenn er

beweist, dass er alle ihm nach den Umständen üblicherweise obliegenden Massnahmen getroffen und ihm erteilte besonderen Weisungen beachtet hat.

Artikel 19

Eine Überschreitung der Lieferfrist liegt vor, wenn das Gut nicht innerhalb der vereinbarten Frist abgeliefert worden ist oder, falls keine Frist vereinbart worden ist, die tatsächliche Beförderungsdauer unter Berücksichtigung der Umstände, bei teilweiser Beladung insbesondere unter Berücksichtigung der unter gewöhnlichen Umständen für die Zusammenstellung von Gütern zwecks vollständiger Beladung benötigten Zeit, die Frist überschreitet, die vernünftigerweise einem sorgfältigen Frachtführer zuzubilligen ist.

Artikel 20

1. Der Verfügungsberechtigte kann das Gut, ohne weitere Beweise erbringen zu müssen, als verloren betrachten, wenn es nicht binnen dreissig Tagen nach Ablauf der Vereinbarten Lieferfrist oder, falls keine Frist vereinbart worden ist, nicht binnen sechzig Tagen nach der Übernahme des Gutes durch den Frachtführer abgeliefert worden ist.

2. Der Verfügungsberechtigte kann bei Empfang der Entschädigung für das verlorene Gut schriftlich verlangen, dass er sofort benachrichtigt wird, wenn das Gut binnen einem Jahr nach Zahlung der Entschädigung wieder aufgefunden wird. Dieses Verlangen ist ihm schriftlich zu bestätigen.

3. Der Verfügungsberechtigte kann binnen dreissig Tagen nach Empfang einer solchen Benachrichtigung fordern, dass ihm das Gut gegen Befriedigung der aus dem Frachtbrief hervorgehenden Ansprüche und gegen Rückzahlung der erhaltenen Entschädigung, gegebenenfalls abzüglich der in der Entschädigung enthaltenen Kosten, abgeliefert wird; seine Ansprüche auf Schadenersatz wegen Überschreitung der Lieferfrist nach Artikel 23 und gegebenenfalls nach Artikel 26 bleiben vorbehalten.

4. Wird das in Absatz 2 bezeichnete Verlangen nicht gestellt oder ist keine Anweisung in der in Absatz 3 bestimmten Frist von dreissig Tagen erteilt worden oder wird das Gut später als ein Jahr nach Zahlung der Entschädigung wieder aufgefunden, so kann der Frachtführer über das Gut nach dem Recht des Ortes verfügen, an dem es sich befindet.

Artikel 21

Wird das Gut dem Empfänger ohne Einziehung der nach dem Beförderungsvertrag vom Frachtführer einzuziehenden Nachnahme abgeliefert, so hat der Frachtführer, vorbehaltlich seines Rückgriffsrechtes gegen den Empfänger, dem Absender bis zur Höhe des Nachnahmebetrages Schadenersatz zu leisten.

Artikel 22

1. Der Absender hat den Frachtführer, wenn er ihm gefährliche Güter übergibt, auf die genaue Art der Gefahr aufmerksam zu machen und ihm gegebenenfalls die zu ergreifenden Vorsichtsmassnahmen anzugeben. Ist diese Mitteilung im Frachtbrief nicht eingetragen worden, so obliegt es dem Absender oder dem Empfänger, mit anderen Mitteln zu beweisen, dass der Frachtführer die genaue Art der mit der Beförderung der Güter verbundenen Gefahren gekannt hat.

2. Gefährliche Güter, deren Gefährlichkeit der Frachtführer nicht im Sinne des Absatzes 1 gekannt hat, kann der Frachtführer jederzeit und überall ohne Schadenersatzpflicht ausladen, vernichten oder unschädlich machen; der Absender haftet darüber hinaus für alle durch die Übergabe dieser Güter zur Beförderung oder durch ihre Beförderung entstehenden Kosten und Schäden.

Artikel 23

1. Hat der Frachtführer auf Grund der Bestimmungen dieses Übereinkommens für gänzlichen oder teilweisen Verlust des Gutes Schadenersatz zu leisten, so wird die Entschädigung nach dem Wert des Gutes am Ort und zur Zeit der Übernahme zur Beförderung berechnet.

2. Der Wert des Gutes bestimmt sich nach dem Börsenpreis, mangels eines solchen nach dem Marktpreis oder mangels beider nach dem gemeinen Wert von Gütern gleicher Art und Beschaffenheit.

3. Die Entschädigung darf jedoch 25 Franken für jedes fehlende Kilogramm des Rohgewichts nicht übersteigen. Unter Franken ist der Goldfranken im Gewicht von 10/31 Gramm und 0,900 Feingehalt zu verstehen.

4. Ausserdem sind – ohne weiteren Schadenersatz – Fracht, Zölle und sonstige aus Anlass der Beförderung des Gutes entstandene Kosten zurückzuerstatten, und zwar im Falle des gänzlichen Verlustes in voller Höhe, im Falle des teilweisen Verlustes anteilig.

5. Wenn die Lieferfrist überschritten ist und der Verfügungsberechtigte beweist, dass daraus ein Schaden entstanden ist, hat der Frachtführer dafür eine Entschädigung nur bis zur Höhe der Fracht zu leisten.

6. Höhere Entschädigungen können nur dann beansprucht werden, wenn der Wert des Gutes oder ein besonderes Interesse an der Lieferung nach den Artikeln 24 und 26 angegeben worden ist.

Artikel 24

Der Absender kann gegen Zahlung eines zu vereinbarenden Zuschlages zur Fracht einen Wert des Gutes im Frachtbrief angeben, der den in Artikel 23 Absatz 3 bestimmten Höchstbetrag übersteigt; in diesem Fall tritt der angegebene Betrag an die Stelle des Höchstbetrages.

Artikel 25

1. Bei Beschädigung hat der Frachtführer den Betrag der Wertverminderung zu zahlen, die unter Zugrundelegung des nach Artikel 23 Absatz 1, 2 und 4 festgestellten Wertes des Gutes berechnet wird.

2. Die Entschädigung darf jedoch nicht übersteigen,

- (a) wenn die ganze Sendung durch die Beschädigung entwertet ist, den Betrag, der bei gänzlichem Verlust zu zahlen wäre;
- (b) wenn nur ein Teil der Sendung durch die Beschädigung entwertet ist, den Betrag, der bei Verlust des entwerteten Teiles zu zahlen wäre.

Artikel 26

1. Der Absender kann gegen Zahlung eines zu vereinbarenden Zuschlages zur Fracht für den Fall des Verlustes oder der Beschädigung und für den Fall der Überschreitung der vereinbarten Lieferfrist durch Eintragung in den Frachtbrief den Betrag eines besonderen Interesses an der Lieferung festlegen.

2. Ist ein besonderes Interesse an der Lieferung angegeben worden, so kann unabhängig von der Entschädigung nach den Artikeln 23, 24 und 25 der Ersatz des weiteren bewiesenen Schadens bis zur Höhe des als Interesse angegebenen Betrages beansprucht werden.

Artikel 27

1. Der Verfügungsberechtigte kann auf die ihm gewährte Entschädigung Zinsen in Höhe von 5 v.H. jährlich verlangen. Die Zinsen laufen von dem Tage der schriftlichen Reklamation gegenüber dem Frachtführer oder, wenn keine Reklamation vorauszugehen, vom Tage der Klageerhebung an.

2. Wird die Entschädigung auf Grund von Rechnungsgrössen ermittelt, die nicht in der Währung des Landes ausgedrückt sind, im dem die Zahlung beansprucht wird, so ist die Umrechnung nach dem Tageskurs am Zahlungsort der Entschädigung vorzunehmen.

Artikel 28

1. Können Verluste, Beschädigungen oder Überschreitungen der Lieferfrist, die bei einer diesem Übereinkommen unterliegenden Beförderung eingetreten sind, nach dem anzuwendenden Recht zur Erhebung ausservertraglicher Ansprüche führen, so kann sich der Frachtführer demgegenüber auf die Bestimmungen dieses Übereinkommens berufen, die seine Haftung ausschliessen oder den Umfang der zu leistenden Entschädigung bestimmen oder begrenzen.

2. Werden Ansprüche aus ausservertraglicher Haftung für Verlust, Beschädigung oder Über-

schreitung der Lieferfrist gegen eine der Personen erhoben, für die der Frachtführer nach Artikel 3 haftet, so kann sich dadurch auch diese Person auf die Bestimmungen dieses Übereinkommens berufen, die die Haftung des Frachtführers ausschliessen oder den Umfang der zu leistenden Entschädigung bestimmen oder begrenzen.

Artikel 29

1. Der Frachtführer kann sich auf die Bestimmungen dieses Kapitels, die seine Haftung ausschliessen oder begrenzen oder die Beweislast umkehren, nicht berufen, wenn er den Schaden vorsätzlich oder durch ein ihm zur Last fallendes Verschulden verursacht hat, das nach dem Recht des angerufenen Gerichtes dem Vorsatz gleichsteht.

2. Das gleiche gilt, wenn Bediensteten des Frachtführers oder sonstigen Personen, deren er sich bei Ausführung der Beförderung bedient, Vorsatz oder ein dem Vorsatz gleichstehendes Verschulden zur Last fällt, wenn diese Bediensteten oder sonstigen Personen in Ausübung ihrer Verrichtungen handeln. In solchen Fällen können sich auch die Bediensteten oder sonstigen Personen hinsichtlich ihrer persönlichen Haftung nicht auf die in Absatz 1 bezeichneten Bestimmungen dieses Kapitel berufen.

KAPITEL V

Reklamationen und Klagen

Artikel 30

1. Nimmt der Empfänger das Gut an, ohne diesen Zustand gemeinsam mit dem Frachtführer zu überprüfen und ohne unter Angaben allgemeiner Art über den Verlust oder die Beschädigung an den Frachtführer Vorbehalte zu richten, so wird bis zum Beweise des gegenteils vermutet, dass der Empfänger das Gut in dem im Frachtbrief beschriebenen Zustand erhalten hat; die Vorbehalte müssen, wenn es sich um äusserlich erkennbare Verluste oder Beschädigungen handelt, spätestens bei der Ablieferung des Gutes oder, wenn es sich um äusserlich nicht erkennbare Verluste oder Beschädigungen handelt, spätestens binnen sieben Tagen, Sonntage und gesetzliche Feiertage nicht mitgerechnet, nach der Ablieferung gemacht werden. Die Vorbehalte müssen schriftlich gemacht werden, wenn es sich um äusserlich nicht erkennbare Verluste oder Beschädigungen handelt.

2. Haben Empfänger und Frachtführer den Zustand des Gutes gemeinsam überprüft, so ist der Gegenbeweis gegen das Ergebnis der Überprüfung nur zulässig, wenn es sich um äusserlich nicht erkennbare Verluste oder Beschädigungen handelt und der Empfänger binnen sieben Tagen, Sonntage und gesetzliche Feiertage nicht mitgerechnet, nach der Überprüfung an den Frachtführer schriftliche Vorbehalte gerichtet hat.

3. Schadersatz wegen Überschreitung der Lieferfrist kann nur gefordert werden, wenn binnen einundzwanzig Tagen nach dem Zeitpunkt, an dem das Gut dem Empfänger zur Verfügung gestellt worden ist, an den Frachtführer ein schriftlicher Vorbehalt gerichtet wird.

4. Bei der Berechnung der in diesem Artikel bestimmten Fristen wird jeweils der Tag der Ablieferung, der Tag der Überprüfung oder der Tag, an dem das Gut dem Empfänger zur Verfügung gestellt worden ist, nicht mitgerechnet.

5. Frachtführer und Empfänger haben sich gegenseitig jede angemessene Erleichterung für alle erforderlichen Feststellungen und Überprüfungen zu gewähren.

Artikel 31

1. Wegen aller Streitigkeit aus einer diesem Übereinkommen unterliegenden Beförderung kann der Kläger, ausser durch Vereinbarung der Parteien bestimmte Gerichte von Vertragsstaaten, die Gerichte eines Staates anrufen, auf dessen Gebiet.

(a) der Beklagte seinen gewöhnlichen Aufenthalt, seine Hauptniederlassung oder Zweigniederlassung oder Geschäftsstelle hat, durch deren Vermittlung der Beförderungsvertrag geschlossen worden ist, oder

(b) der Ort der Übernahme des Gutes oder der für die Ablieferung vorgesehene Ort liegt.
Andere Gerichte können nicht angerufen werden.

2. Ist ein Verfahren bei einem nach Absatz 1 zuständigen Gericht wegen einer Streitigkeit im

Sinne des genannten Absatzes anhängig oder ist durch ein solches Gericht in einer solchen Streitsache ein Urteil erlassen worden, so kann eine neue Klage wegen derselben Sache zwischen denselben Parteien nicht erhoben werden, es sei denn, dass die Entscheidung des Gerichtes, bei dem die erste Klage erhoben worden ist, in dem Staat nicht vollstreckt werden kann, in dem die neue Klage erhoben wird.

3. Ist in einer Streitsache im Sinne des Absatzes 1 ein Urteil eines Gerichtes eines Vertragsstaates in diesem Staat vollstreckbar geworden, so wird es auch in allen anderen Vertragsstaaten vollstreckbar, sobald die in dem jeweils in Betracht kommenden Staat hierfür vorgeschriebenen Formerfordernisse erfüllt sind. Diese Formerfordernisse dürfen zu keiner sachlichen Nachprüfung führen.

4. Die Bestimmungen des Absatzes 3 gelten für Urteile im kontradiktorischen Verfahren, für Versäumnisurteile und für gerichtliche Vergleiche, jedoch nicht für nur vorläufig vollstreckbare Urteile sowie nicht für Verurteilungen, durch die dem Kläger bei vollständiger oder teilweiser Abweisung der Klage neben den Verfahrenskosten Schaderersatz und Zinsen auferlegt werden.

5. Angehörige der Vertragsstaaten, die ihren Wohnsitz oder eine Niederlassung in einem dieser Staaten haben, sind nicht verpflichtet, Sicherheit für die Kosten eines gerichtlichen Verfahrens zu leisten, das wegen einer diesem Übereinkommen unterliegenden Beförderung eingeleitet wird.

Artikel 32

1. Ansprüche aus einer diesem Übereinkommen unterliegenden Beförderung verjähren in einem Jahr. Bei Vorsatz oder bei einem Verschulden, das nach dem Recht des angerufenen Gerichtes dem Vorsatz gleichsteht, beträgt die Verjährungsfrist jedoch drei Jahren. Die Verjährungsfrist beginnt:

- (a) bei teilweisem Verlust, Beschädigung oder Überschreitung der Lieferfrist mit dem Tage der Ablieferung des Gutes;
- (b) bei gänzlichem Verlust mit dem dreissigsten Tage nach Ablauf der vereinbarten Lieferfrist oder, wenn eine Lieferfrist nicht vereinbart worden ist, mit dem sechzigsten Tage nach der Übernahme des Gutes durch den Frachtführer;
- (c) in allen andere Fällen mit dem Ablauf einer Frist von drei Monaten nach dem Abschluss des Beförderungsvertrages.

Der Tag, an dem die Verjährung beginnt, wird bei der Berechnung der frist nicht mitgerechnet.

2. Die Verjährung wird durch eine schriftliche Reklamation bis zu dem Tage gehemmt, an dem der Frachtführer die Reklamation schriftlich zurückweist und die beigefügten Belege zurücksendet. Wird die Reklamation teilweise anerkannt, so läuft die Verjährung nur für den noch streitigen teil der Reklamation weiter. Der Beweis für den Empfang der Reklamation oder der Antwort sowie für die Rückgabe der Belege obliegt demjenigen, der sich darauf beruft. Weitere Reklamationen, die denselben Anspruch zum Gegenstand haben, hemmen die Verjährung nicht.

3. Unbeschadet der Bestimmungen des Absatzes 2 gilt für die Hemmung der Verjährung das Recht des angerufenen Gerichtes. Dieses Recht gilt auch für die Unterbrechung der Verjährung.

4. Verjährte Ansprüche können auch nicht im Wege der Widerklage oder der Einrede geltend gemacht werden.

Artikel 33

Der Beförderungsvertrag kann eine Bestimmung enthalten, durch die die Zuständigkeit eines Schiedsgerichtes begründet wird, jedoch nur, wenn die Bestimmung vorsieht, dass das Schiedsgericht dieses Übereinkommen anzuwenden hat.

KAPITEL VI

Bestimmungen über die Beförderung durch aufeinanderfolgende Frachtführer

Artikel 34

Wird eine Beförderung, die Gegenstand eines einzigen Vertrages ist, von aufeinanderfolgenden Strassenfrachtführern ausgeführt, so haftet jeder von ihnen für die Ausführung der gesamten Beförderung; der zweite und jeder folgende Frachtführer wird durch die Annahme des Gutes und des Frachtbriefes nach Massgabe der Bedingungen des Frachtbriefes Vertragspartei.

Artikel 35

1. Ein Frachtführer, der das Gut von dem vorhergehenden Frachtführer übernimmt, hat diesem eine datierte und unterzeichnete Empfangsbestätigung auszuhändigen. Er hat seinen Namen und seine Anschrift auf der zweiten Ausfertigung des Frachtbriefes einzutragen. Gegebenenfalls trägt er Vorbehalte nach Artikel 8 Absatz 2 auf der zweiten Ausfertigung des Frachtbriefes sowie auf der Empfangsbestätigung ein.

2. Für die Beziehungen zwischen den aufeinanderfolgenden Frachtführern gilt Artikel 9.

Artikel 36

Ersatzansprüche wegen eines Verlustes, einer Beschädigung oder einer Überschreitung der Lieferfrist können, ausser im Wege der Widerklage oder der Eindrede in einem Verfahren wegen eines auf Grund desselben Beförderungsvertrages erhobenen Anspruches, nur gegen den ersten, den letzten oder denjenigen Frachtführer geltend gemacht werden, der den Teil der Beförderung ausgeführt hat, in dessen Verlauf das Ereignis eingetreten ist, das den Verlust, die Beschädigung oder die Überschreitung der Lieferfrist verursacht hat; ein und dieselbe Klage kann gegen mehrere Frachtführer gerichtet sein.

Artikel 37

Einem Frachtführer, der auf Grund der Bestimmungen dieses Übereinkommens eine Entschädigung gezahlt hat, steht der Rückgriff hinsichtlich der Entschädigung, der Zinsen und der Kosten gegen die an der Beförderung beteiligten Frachtführer nach folgenden Bestimmungen zu:

- (a) der Frachtführer, der den Verlust oder die Beschädigung verursacht hat, hat die von ihm oder von einem anderen Frachtführer geleistete Entschädigung allein zu tragen;
- (b) ist der Verlust oder die Beschädigung durch zwei oder mehrere Frachtführer verursacht worden, so hat jeder einen seinem Haftungsanteil entsprechenden Betrag zu zahlen; is die Feststellung der einzelnen Haftungsanteile nicht möglich, so haftet jeder nach dem Verhältnis des ihm zustehenden Anteiles am Beförderungsentgelt;
- (c) kann nicht festgestellt werden, welche der Frachtführer den Schaden zu tragen haben, so ist die zu leistende Entschädigung in dem unter Buchstabe (b) bestimmten Verhältnis zu Lasten aller Frachtführer aufzuteilen.

Artikel 38

Ist ein Frachtführer zahlungsunfähig, so ist der auf ihn entfallende, aber von ihm nicht gezahlte Anteil zu Lasten aller anderen Frachtführer nach dem Verhältnis ihrer Anteile an dem Beförderungsentgelt aufzuteilen.

Artikel 39

1. Ein Frachtführer, gegen den nach den Artikeln 37 und 38 Rückgriff genommen wird, kann nicht einwenden, dass der Rückgriff nehmende Frachtführer zu Unrecht gezahlt hat, wenn die Entschädigung durch eine gerichtliche Entscheidung festgesetzt worden war, sofern der im Wege des Rückgriffs in Anspruch genommene Frachtführer von dem gerichtlichen Verfahren ordnungsgemäss in Kenntnis gesetzt worden war und in der Lage war, sich daran zu beteiligen.

2. Ein Frachtführer, der sein Rückgriffsrecht gerichtlich geltend machen will, seinen Anspruch vor dem zuständigen Gericht des Staates erheben, in dem einer der beteiligten Frachtführer seinen gewöhnlichen Aufenthalt, seine Hauptniederlassung oder die Zweigniederlassung oder Geschäftsstelle hat, durch deren Vermittlung der Beförderungsvertrag abgeschlossen worden ist. Ein und dieselbe Rückgriffsklage kann gegen alle beteiligten Frachtführer gerichtet sein.

3. Die Bestimmungen des Artikels 31 Absatz 3 und 4 gelten auch für Urteile über die Rückgriffsansprüche nach den Artikeln 37 und 38.

4. Die Bestimmungen des Artikels 32 gelten auch für Rückgriffsansprüche zwischen Frachtführern. Die Verjährung beginnt jedoch entweder mit dem Tage des Eintrittes der Rechtskraft eines Urteils über die nach den Bestimmungen dieses Übereinkommens zu zahlende Entschädigung oder, wenn ein solches rechtskräftiges Urteil nicht vorliegt, mit dem Tage der tatsächlichen Zahlung.

Artikel 40

Den Frachtführern steht es frei, untereinander Vereinbarungen zu treffen, die von den Artikeln 37 und 38 abweichen.

KAPITEL VII

Nichtigkeit von dem Übereinkommen widersprechenden Vereinbarungen

Artikel 41

1. Unbeschadet der Bestimmungen des Artikels 40 ist jede Vereinbarung, die unmittelbar oder mittelbar von dem Bestimmungen dieses Übereinkommens abweicht, nichtig und ohne Rechtswirkung. Die Nichtigkeit solcher Vereinbarungen hat nicht die Nichtigkeit der übrigen Vertragsbestimmungen zur Folge.

2. Nichtig ist insbesondere jede Abmachung, durch die sich der Frachtführer die Ansprüche aus der Versicherung des Gutes abtreten lässt, und jede andere ähnliche Abmachung sowie jede Abmachung, durch die die Beweislast verschoben wird.

KAPITEL VIII

Schlussbestimmungen

Artikel 42

1. Dieses Übereinkommen steht den Mitgliedstaaten der Wirtschaftskommission für Europa sowie den nach Absatz 8 des der Kommission erteilten Auftrages in beratender Eigenschaft zu der Kommission zugelassenen Staaten zur Unterzeichnung oder zum Beitritt offen.

2. Die Staaten, die nach Absatz 11 des der Wirtschaftskommission für Europa erteilten Auftrages berechtigt sind, an gewissen Arbeiten der Kommission teilzunehmen, können durch Beitritt Vertragsparteien des Übereinkommens nach seinem Inkrafttreten werden.

3. Das Übereinkommen liegt bis einschliesslich 31. August 1956 zur Unterzeichnung auf. Nach diesem Tage steht es zum Beitritt offen.

4. Dieses Übereinkommen ist zu ratifizieren.

5. Die Ratifikation oder der Beitritt erfolgt durch Hinterlegung einer Urkunde beim Generalsekretär der Vereinten Nationen.

Artikel 43

1. Dieses Übereinkommen tritt am neunzigsten Tage nach Hinterlegung der Ratifikations- oder Beitrittsurkunden durch fünf der in Artikel 42 Absatz 1 bezeichneten Staaten in Kraft.

2. Dieses Übereinkommen tritt für jeden Staat, der nach Hinterlegung der Ratifikations- oder Beitrittsurkunden durch fünf Staaten ratifiziert oder beitrifft, am neunzigsten Tage nach Hinterlegung seiner Ratifikations- oder Beitrittsurkunde in Kraft.

Artikel 44

1. Jede Vertragspartei kann dieses Übereinkommen durch Notifizierung an den Generalsekretär der Vereinten Nationen kündigen.

2. Die Kündigung wird zwölf Monate nach den Eingang der Notifizierung beim Generalsekretär wirksam.

Artikel 45

Sinkt durch Kündigungen die Zahl der Vertragsparteien nach Inkrafttreten dieses Übereinkommens auf weniger als fünf, so tritt das Übereinkommen mit dem Tage ausser Kraft, an dem die letzte dieser Kündigungen wirksam wird.

Artikel 46

1. Jeder Staat kann bei Hinterlegung seiner Ratifikations- oder Beitrittsurkunde oder zu jedem späteren Zeitpunkt durch Notifizierung dem Generalsekretär der Vereinten Nationen gegenüber

erklären, dass dieses Übereinkommen für alle oder für einen Teil der Hoheitsgebiete gelten soll, deren internationale Beziehungen er wahrnimmt. Das Übereinkommen wird für das Hoheitsgebiet oder die Hoheitsgebiete, die in der Notifizierung genannt sind, am neunzigsten Tage nach Eingang der Notifizierung beim Generalsekretär der Vereinten Nationen oder, falls das Übereinkommen noch nicht in Kraft getreten ist, mit seinem Inkrafttreten wirksam.

2. Jeder Staat, der nach Absatz 1 erklärt hat, dass dieses Übereinkommen auf ein Hoheitsgebiet Anwendung findet, dessen internationale Beziehungen er wahrnimmt, kann das Übereinkommen in bezug auf dieses Hoheitsgebiet gemäss Artikel 44 kündigen.

Artikel 47

Jede Meinungsverschiedenheit zwischen zwei oder mehreren Vertragsparteien über die Auslegung oder Anwendung dieses Übereinkommens, die von den Parteien durch Verhandlung oder auf anderem Wege nicht geregelt werden kann, wird auf Antrag einer der beteiligten Vertragsparteien dem Internationalen Gerichtshof zur Entscheidung vorgelegt.

Artikel 48

1. Jede Vertragspartei kann bei der Unterzeichnung, bei der Ratifikation oder bei dem Beitritt zu diesem Übereinkommen erklären, dass sie sich durch den Artikel 47 des Übereinkommens nicht als gebunden betrachtet. Die anderen Vertragsparteien sind gegenüber jeder Vertragspartei, die einen solchen Vorbehalt gemacht hat, durch den Artikel 47 nicht gebunden.

2. Jede Vertragspartei, die einen Vorbehalt nach Absatz 1 gemacht hat, kann diesen Vorbehalt jederzeit durch Notifizierung an den Generalsekretär der Vereinten Nationen zurückziehen.

3. Andere Vorbehalte zu diesem Übereinkommen sind nicht zulässig.

Artikel 49

1. Sobald dieses Übereinkommen drei Jahre lang in Kraft ist, kann jede Vertragspartei durch Notifizierung an den Generalsekretär der Vereinten Nationen die Einberufung einer Konferenz zur Revision des Übereinkommens verlangen. Der Generalsekretär wird dieses Verlangen allen Vertragsparteien mitteilen und eine Revisionskonferenz einberufen, wenn binnen vier Monaten nach seiner Mitteilung mindestens ein Viertel der Vertragsparteien ihm die Zustimmung zu dem Verlangen notifiziert.

2. Wenn eine Konferenz nach Absatz 1 einberufen wird, teilt der Generalsekretär dies allen Vertragsparteien mit und fordert sie auf, binnen drei Monaten die Vorschläge einzureichen, die sie durch die Konferenz geprüft haben wollen. Der Generalsekretär teilt allen Vertragsparteien die vorläufige Tagesordnung der Konferenz sowie den Wortlaut dieser Vorschläge mindestens drei Monate vor der Eröffnung der Konferenz mit.

3. Der Generalsekretär lädt zu jeder nach diesem Artikel einberufenen Konferenz alle in Artikel 42 Absatz 1 bezeichneten Staaten sowie die Staaten ein, die auf Grund des Artikels 42 Absatz 2 Vertragsparteien geworden sind.

Artikel 50

Ausser den in Artikel 49 vorgesehenen Mitteilungen notifiziert der Generalsekretär der Vereinten Nationen den in Artikel 42 Absatz 1 bezeichneten Staaten sowie den Staaten, die auf Grund des Artikels 42 Absatz 2 Vertragsparteien geworden sind.

- (a) die Ratifikationen und Beitritte nach Artikel 42;
- (b) die Zeitpunkte, zu denen dieses Übereinkommen nach Artikel 43 in Kraft tritt;
- (c) die Kündigung nach Artikel 44;
- (d) das Ausserkrafttreten dieses Übereinkommens nach Artikel 45;
- (e) den Eingang der Notifizierungen nach Artikel 46;
- (f) den Eingang der Erklärungen und Notifizierung nach Artikel 48 Absatz 1 und 2.

Artikel 51

Nach dem 31. August 1956 wird die Urschrift dieses Übereinkommens beim Generalsekretär der Vereinten Nationen hinterlegt, der allen in Artikel 42 Absatz 1 und 2 bezeichneten Staaten belaubigte Abschriften übersendet.

ZU URKUND DESSEN haben die hierzu gehörig bevollmächtigten Unterzeichneten dieses Übereinkommen unterschrieben.

GESCHEHEN zu Genf am neunzehnten Mai neunzehnhundertsechsfünfzig in einer einzigen Urschrift in englischer und französischer Sprache, wobei jeder Wortlaut gleichermassen verbindlich ist.

UNTERZEICHNUNGSPROTOKOLL

BEI DER UNTERZEICHNUNG des Übereinkommens über den Beförderungsvertrag im internationalen Strassengüterverkehr haben sich die gehörig bevollmächtigten Unterzeichneten auf folgende Feststellung und Erklärung geeinigt:

1. Dieses Übereinkommen gilt für Beförderungen zwischen dem Vereinigten Königreich von Grossbritannien und Nordirland einerseits und der Republik Irland andererseits.

2. Zu Artikel 1 Absatz 4

Die Unterzeichneten verpflichten sich, über ein Übereinkommen über den Beförderungsvertrag für Umzugsgut und ein Übereinkommen über den Beförderungsvertrag für den kombinierten Verkehr zu handeln.

ZU URKUND DESSEN haben die hierzu gehörig bevollmächtigten Unterzeichneten dieses Protokoll unterschrieben.

GESCHEHEN zu Genf am neunzehnten Mai neunzehnhundertsechsfünfzig in einer einzigen Urschrift in englischer und französischer Sprache, wobei jeder Wortlaut gleichermassen verbindlich ist.

ANNEX 4 English text of the CMR Protocol

PROTOCOL TO THE CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD (CMR)

...
being parties to the Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva on 19 May 1956,
...

Art. 1. For the purpose of the present Protocol 'Convention' means the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Art. 2. Article 23 of the Convention is amended as follows:

(1) Paragraph 3 is replaced by the following text:

'3. Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.'

(2) At the end of this article the following paragraphs 7, 8 and 9 are added:

'7. The unit of account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amount mentioned in paragraph 3 of this article shall be converted into the national currency of the State of the Court seized of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the Parties. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

'8. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 7 of this article may, at the time of ratification or of accession to the Protocol to the CMR or at any time thereafter, declare that the limit of liability provided for in paragraph 3 of this article to be applied in its territory shall be 25 monetary units. The monetary unit referred to in this paragraph corresponds to 10/31 gram of gold of millesimal fineness nine hundred. The conversion of the amount specified in this paragraph into the national currency shall be made according to the law of the State concerned.

'9. The calculation mentioned in the last sentence of paragraph 7 of this article and the conversion mentioned in paragraph 8 of this article shall be made in such a manner as to express in the national currency of the State as far as possible the same real value for the amount in paragraph 3 of this article as is expressed there in units of account. States shall communicate to the Secretary-General of the United Nations the manner of calculation pursuant to paragraph 7 of this article or the result of the conversion in paragraph 8 of this article as the case may be, when depositing an instrument referred to in article 3 of the Protocol to the CMR and whenever there is a change in either.'

Final provisions

Art. 3. 1. This Protocol shall be open for signature by States which are signatories to, or have acceded to the Convention and are either members of the Economic Commission for Europe or have been admitted to that Commission in a consultative capacity under paragraph 8 of that Commission's terms of reference.

2. This Protocol shall remain open for accession by any of the States referred to in paragraph 1 of this article which are Parties to the Convention.

3. Such States as may participate in certain activities of the Economic Commission for Europe in accordance with paragraph 11 of that Commission's terms of reference which have acceded to the Convention may become Contracting Parties to this Protocol by acceding thereto after its entry into force.

4. This Protocol shall be open for signature at Geneva from 1 September 1978 to 31 August 1979 inclusive. Thereafter, it shall be open for accession.

5. This Protocol shall be subject to ratification after the State concerned has ratified or acceded to the Convention.

6. Ratification or accession shall be effected by the deposit of an instrument with the Secretary-General of the United Nations.

7. Any instrument or ratification or accession deposited after the entry into force of an amendment to the present Protocol with respect to all Contracting Parties or after the completion of all measures required for the entry into force of the amendment with respect to all Contracting Parties shall be deemed to apply to the Protocol as modified by the amendment.

Art. 4. 1. This Protocol shall enter into force on the ninetieth day after five of the States referred to in article 3, paragraphs 1 and 2 of this Protocol, have deposited their instruments of ratification or accession.

2. For any State ratifying or acceding to it after five States have deposited their instruments of ratification or accession, this Protocol shall enter into force on the ninetieth day after the said State has deposited its instrument of ratification or accession.

Art. 5. 1. Any Contracting Party may denounce this Protocol by so notifying the Secretary-General of the United Nations.

2. Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the notification of denunciation.

3. Any Contracting Party which ceases to be a Party to the Convention shall on the same date cease to be a Party to this Protocol.

Art. 6. If, after the entry into force of this Protocol, the number of Contracting Parties is reduced, as a result of denunciations, to less than five, this Protocol shall cease to be in force from the date on which the Convention ceases to be in force.

Art. 7. 1. Any State may, at the time of depositing its instrument of ratification or accession or at any time thereafter, declare by a notification addressed to the Secretary-General of the United Nations that this Protocol shall extend to all or any of the territories for whose international relations it is responsible and in respect of which it has made a declaration in accordance with article 46 of the Convention. This Protocol shall extend to the territory or territories named in the notification as from the ninetieth day after its receipt by the Secretary-General or, if on that day the Protocol has not yet entered into force, as from the time of its entry into force.

2. Any State which has made a declaration under the preceding paragraph extending this Protocol to any territory for whose international relations it is responsible may denounce the Protocol separately in respect of that territory in accordance with the provisions of article 5 above.

Art. 8. Any dispute between two or more Contracting Parties relating to the interpretation or application of this Protocol which the Parties are unable to settle by negotiation or other means may, at the request of any one of the Contracting Parties concerned, be referred for settlement to the International Court of Justice.

Art. 9. 1. Each Contracting Party may, at the time of signing, ratifying, or acceding to this Protocol, declare by a notification addressed to the Secretary-General of the United Nations that it does not consider itself bound by article 8 of this Protocol. Other Contracting Parties shall not be bound by article 8 of this Protocol in respect of any Contracting Party which has entered such a reservation.

2. The declaration referred to in paragraph 1 of this article may be withdrawn at any time by a notification addressed to the Secretary-General of the United Nations.

3. No other reservation to this Protocol shall be permitted.

Art. 10. 1. After this Protocol has been in force for three years, any Contracting Party may, by notification to the Secretary-General of the United Nations, request that a conference be convened for the purpose of reviewing this Protocol. The Secretary-General shall notify all Contracting Parties of the request and a review conference shall be convened by the Secretary-General if, within a period of four months following the date of notification by the Secretary-General not less than one-fourth of the Contracting Parties notify him of their concurrence with the request.

2. If a conference is convened in accordance with the preceding paragraph, the Secretary-General shall notify all the Contracting Parties and invite them to submit within a period of three months such proposals as they may wish the Conference to consider. The Secretary-General shall circulate to all Contracting Parties the provisional agenda for the Conference together with the text of such proposals at least three months before the date on which the Conference is to meet.

3. The Secretary-General shall invite to any conference convened in accordance with this article all States referred to in article 3, paragraphs 1 and 2 and States which have become Contracting Parties under article 3, paragraph 3 of this Protocol.

Art. 11. In addition to the notifications provided for in article 10, the Secretary-General of the United Nations shall notify the States referred to in article 3, paragraphs 1 and 2 of this Protocol and the States which have become Contracting Parties under article 3, paragraph 3 of this Protocol, of:

- (a) ratifications and accessions under article 3;
- (b) the dates of entry into force of this Protocol in accordance with article 4;
- (c) communications received under article 2, paragraph (2);
- (d) denunciations under article 5;
- (e) the termination of this Protocol in accordance with article 6;
- (f) notifications received in accordance with article 7;
- (g) declarations and notifications received in accordance with article 9, paragraphs 1 and 2.

Art. 12. After 31 August 1979, the original of this Protocol shall be deposited with the Secretary-General of the United Nations, who shall transmit certified true copies to each of the States mentioned in article 3, paragraphs 1, 2 and 3 of this Protocol.

Done at Geneva, this fifth day of July one thousand nine hundred and seventy-eight, in a single copy in the English and French languages, each text being equally authentic.

in witness whereof the undersigned, being duly authorised thereto, have signed this Protocol in the name of

ANNEX 5 French text of the CMR Protocol

PROTOCOLE A LA CONVENTION RELATIVE AU CONTRAT DE TRANSPORT INTERNATIONAL DE MARCHANDISES PAR ROUTE (CMR)

...
Etant parties à la Convention relative au contrat de transport international de marchandises par route (CMR), en date, à Geneve, du 19 mai 1956,
...

Art. 1. Aux fins du présent Protocole, 'Convention' signifie la Convention relative au contrat de transport international de marchandises par route (CMR).

Art. 2. L'article 23 de la Convention est modifié comme suit:

1) Le paragraphe 3 est remplacé par le texte suivant:

'3. Toutefois, l'indemnité ne peut dépasser 8,33 unités de compte par kilogramme du poids brut manquant.'

2). A la fin de cet article, les paragraphes 7, 8 et 9 suivants son ajoutés:

'7. L'unité de compte mentionnée dans la présente Convention est le Droit de tirage spécial tel que défini par le Fonds monétaire international. Le montant visé au paragraphe 3 de présent article est converti dans la monnaie nationale de l'Etat dont relève le tribunal saisi du litige sur la base de la valeur de cette monnaie à la date du jugement ou à la date adoptée d'un commun accord par les parties. La valeur, en Droit de tirage spécial, de la monnaie nationale d'un Etat qui est membre du Fonds monétaire international, est calculée selon la méthode évaluation appliquée par le Fonds monétaire international à la date en question pour ses propres opérations et transactions. La valeur, en Droit de tirage spécial, de la monnaie nationale d'un Etat qui n'est pas membre du Fonds monétaire international, est calculée de la façon déterminée par cet Etat.

'8. Toutefois, un Etat qui n'est pas membre du Fonds monétaire international et dont la législation ne permet pas d'appliquer les dispositions du paragraphe 7 du présent article peut, au moment de la ratification du Protocole à la CMR ou de l'adhésion à celui-ci, ou à moment ultérieur, déclarer que la limite de la responsabilité prévue au paragraphe 3 du présent article et applicable sur son territoire est fixée à 25 unités monétaires. L'unité monétaire dont il est question dans le présent paragraphe correspond à 10/31 de gramme d'or au titre de neuf cents millièmes de fin. La conversion en monnaie nationale du montant indiqué dans le présent paragraphe s'effectue conformément à la législation de l'Etat concerné.

'9. Le calcul mentionné à la dernière phrase du paragraphe 7, et la conversion mentionnée au paragraphe 8, du présent article doivent être faits de façon à exprimer en monnaie nationale de l'Etat la même valeur réelle, dans la mesure du possible, que celle exprimée en unités de compte au paragraphe 3 du présent article. Lors du dépôt d'un instrument visé à l'article 3 du Protocole à la CMR et chaque fois qu'un changement se produit dans leur méthode de calcul ou dans la valeur de leur monnaie nationale par rapport à l'unité de compte ou à l'unité monétaire, les Etats communiquent au Secrétaire général de l'Organisation des Nations Unies leur méthode de calcul conformément au paragraphe 7, ou les résultats de la conversion conformément au paragraphe 8, du présent article, selon le cas.'

Dispositions finales

Art. 3. 1. Le présent Protocole sera ouvert à la signature des Etats qui sont signataires de la Convention ou y ont adhéré et qui sont soit membres de la Commission économique pour l'Europe, soit admis à cette Commission à titre consultatif conformément au paragraphe 8 du mandat de cette Commission.

2. Le présent Protocole restera ouvert à l'adhésion de tout Etat visé au paragraphe 1 du présent article et qui est Partie à la Convention.

3. Les Etats susceptibles de participer à certains travaux de la Commission économique pour l'Europe en application du paragraphe 11 du mandat de cette Commission et qui ont adhéré à la Convention peuvent devenir Parties contractantes au présent Protocole en y adhérant après son entrée en vigueur.

4. Le présent Protocole sera ouvert à la signature à Genève du 1er septembre 1978 au 31 août 1979 inclus. Après cette date, il sera ouvert à l'adhésion.

5. Le présent Protocole est sujet à ratification après que l'Etat concerné aura ratifié la Convention ou y aura adhéré.

6. La ratification ou l'adhésion sera effectuée par le dépôt d'un instrument auprès du Secrétaire général de l'Organisation des Nations Unies.

7. Tout instrument de ratification ou l'adhésion, déposé après l'entrée en vigueur d'un amendement au présent Protocole à l'égard de toutes les Parties contractantes ou après l'accomplissement de toutes les mesures requises pour l'entrée en vigueur de l'amendement à l'égard desdites Parties, est réputé s'appliquer au Protocole modifié par l'amendement.

Art. 4. 1. Le présent Protocole entrera en vigueur le quatre-vingt-dixième jour après que cinq des Etats mentionnés aux paragraphes 1 et 2 de l'article 31 du présent Protocole auront déposé leur instrument de ratification ou l'adhésion.

2. Pour chaque Etat qui le ratifiera ou y adhérera après que cinq Etats auront déposé leur instrument de ratification ou l'adhésion, le présent Protocole entrera en vigueur le quatre-vingt-dixième jour qui suivra le dépôt de l'instrument de ratification ou l'adhésion dudit Etat.

Art. 5. 1. Chaque Partie contractante pourra dénoncer le présent Protocole par notification adressée au Secrétaire général de l'Organisation des Nations Unies.

2. La dénonciation prendra effet douze mois après la date à laquelle le Secrétaire général en aura reçu notification.

3. Tout Partie contractante qui cessera d'être Partie à la Convention cessera à la même date d'être Partie au présent Protocole.

Art. 6. Si, après l'entrée en vigueur du présent Protocole, le nombre de Parties contractantes se trouve, par suite de dénonciations, ramené à moins de cinq, le présent Protocole cessera d'être en vigueur à partir de la date à laquelle la dernière de ces dénonciations prendra effet. Il cessera également d'être en vigueur à partir de la date à laquelle la Convention elle-même cessera d'être en vigueur.

Art. 7. 1. Tout Etat pourra, lors du dépôt de son instrument de ratification ou l'adhésion ou à tout moment ultérieur, déclarer, par notification adressée au Secrétaire général de l'Organisation des Nations Unies, que le présent Protocole sera applicable à tout ou partie des territoires qu'il représente sur le plan international et pour lesquels il fait une déclaration conformément à l'article 46 de la Convention. Le présent Protocole sera applicable au territoire ou aux territoires mentionnés dans la notification à dater du quatre-vingt-dixième jour après réception de cette notification par le Secrétaire général ou, si à ce jour le Protocole n'est pas encore en vigueur, à dater de son entrée en vigueur.

2. Tout Etat qui aura fait, conformément au paragraphe précédent, une déclaration ayant pour effet de rendre le présent Protocole applicable à un territoire qu'il représente sur le plan international pourra, conformément à l'article 5 ci-dessus, dénoncer le Protocole séparément en ce qui concerne ledit territoire.

Art. 8. Tout différend entre deux ou plusieurs Parties contractantes touchant l'interprétation ou l'application du présent Protocole que les Parties n'auraient pu régler par voie de négociations ou par un autre mode de règlement pourra être porté, à la requête d'une quelconque des Parties contractantes intéressées, devant la Cour internationale de Justice, pour être tranché par elle.

Art. 9. 1. Chaque Partie contractante pourra, au moment où elle signera ou ratifiera le présent Protocole ou y adhérera, déclarer par une notification adressée au Secrétaire général de l'Organisation des Nations Unies, qu'elle ne se considère pas liée par l'article 8 du présent Protocole. Les autres Parties contractantes ne seront pas liées par l'article 8 envers toute Partie contractante qui aura formulé une telle réserve.

2. La déclaration visée au paragraphe 1 du présent article pourra être retirée à tout moment par une notification adressée au Secrétaire général de l'Organisation des Nations Unies.

3. Aucune autre réserve au présent Protocole ne sera admise.

Art. 10. 1. Après que le présent Protocole aura été en vigueur pendant trois ans, toute Partie contractante pourra, par une notification adressée au Secrétaire général de l'Organisation des Nations Unies, demander la convocation d'une conférence à l'effet de réviser le présent Protocole. Le Secrétaire général notifiera cette demande à toutes les Parties contractantes et convoquera une conférence de révision si, dans un délai de quatre mois à dater de la notification adressée par lui, le quart au moins des Parties contractantes lui signifient leur assentiment à cette demande.

2. Si une conférence est convoquée conformément au paragraphe précédent, le Secrétaire général en avisera toutes les Parties contractantes et les invitera à présenter, dans un délai de trois mois, les propositions qu'elles souhaiteront voir examiner par la Conférence. Le Secrétaire général communiquera à toutes les Parties contractantes l'ordre du jour provisoire de la Confé-

ence, ainsi que le texte de ces propositions, trois mois au moins avant la date d'ouverture de la Conférence.

3. Le Secrétaire général invitera à toute conférence convoquée conformément au présent article tous les Etats visés aux paragraphes 1 et 2 de l'article 3, ainsi que les Etats devenus Parties contractantes en application du paragraphe 3 de l'article 3 du présent Protocole.

Art. 11. Outre les notifications prévues à l'article 10, le Secrétaire général de l'Organisation des Nations Unies notifiera aux Etats visés aux paragraphes 1 et 2 de l'article 3, ainsi que les Etats devenus Parties contractantes en application du paragraphe 3 de l'article 3 du présent Protocole:

- (a) les ratifications et adhésions en vertu de l'article 3;
- (b) les dates auxquelles le présent Protocole entrera en vigueur conformément à l'article 4;
- (c) les communications reçues en vertu de l'alinéa 2) de l'article 2;
- (d) les dénonciations en vertu de l'article 5;
- (e) l'abrogation du présent Protocole conformément à l'article 6;
- (f) les notifications reçues conformément à l'article 7;
- (g) les déclarations et notifications reçues conformément aux paragraphes 1 et 2 de l'article 9;

Art. 12. Après le 31 août 1979, l'original du présent Protocole sera déposé du Secrétaire général de l'Organisation des Nations Unies, qui en transmettra des copies certifiées conformes à chacun des Etats paragraphes 1 et 2 de l'article 3 du présent Protocole.

Fait à Genève, le cinq juillet mil neuf cent soixante-dix-huit, en un seul exemplaire, en langues anglaises et française, les deux textes faisant également foi.

En foi de quoi les soussignés, à ce dûment autorisés, ont signé le présent Protocole au nom

TABLE OF CASES

(Numbers refer to page, italicised numbers to footnote. The caselaw of lower courts referred to only in footnotes is not included.)

The Netherlands

HR 12.3.1954, NJ 1955, 386; AA 1954,125.	84, 238; 250, 302
Rb Middelburg 26.6.1963, S&S 1964, 30; NJ 1963, 436.	265, 67; 266, 71
Rb Den Bosch 11.2.1964, S&S 1967, 5.	108, 89
Rb Breda 23.2.1965, S&S 1965, 86.	66, 128, 131, 132
Ktg Delft 13.5.1965, NJ 1965, 326.	220, 131
Hof Den Bosch 21.12.1965, S&S 1966, 24.	66, 131
Hof Amsterdam 6.1.1966, S&S 1968, 83.	66, 131; 67, 142
Rb Dordrecht 18.5.1966, S&S 1966, 89; ETL 1968, p.416.	282, 43
Hof The Hague 26.1.1967, NJ 1968, 7.	271, 94
Rb Rotterdam 31.1.1967, S&S 1967, 56.	55, 75
Hof Amsterdam 22.6.1967, S&S 1968, 81.	67, 136, 142
Rb Roermond 16.11.1967, S&S 1967, 57.	258, 34; 268, 86
Rb The Hague 18.2.1969, S&S 1969, 58.	220, 130; 221, 133
Rb Rotterdam 4.11.1969, S&S 1970, 82.	66, 131
Ktg Rotterdam 17.11.1969, S&S 1970, 98.	66, 131; 105, 72
Hof The Hague 9.1.1970, S&S 1970, 97.	66, 131; 67, 143
Hof Den Bosch 13.1.1970, S&S 1971, 10; NJ 1970, 741; ETL 1971, p.817.	299, 45
Rb Rotterdam 10.11.1970, S&S 1971, 61; ETL 1971, p.273.	283, 48
Rb Arnhem 28.1.1971, S&S 1973, 82.	187, 358
Rb Rotterdam 27.4.1971, S&S 1971, 73; NJ 1972, 482.	281, 37
Ktg Rotterdam 23.6.1971, S&S 1972, 8.	295, 13
Rb Arnhem 21.10.1971, S&S 1973, 16.	164, 231
Rb Amsterdam 15.12.1971, S&S 1972, 92.	189, 377
Rb Dordrecht 22.12.1971, S&S 1972, 50.	130, 50; 207, 62; 221, 132
Rb Amsterdam 8.3.1972, S&S 1973, 9.	66, 132
Rb Amsterdam 12.4.1972, S&S 1972, 102.	207, 62
HR 14.4.1972, S&S 1972, 45; NJ 1972, 269.	212, 84
Hof Amsterdam 15.11.1972, S&S 1973, 25.	68, 144
Rb Amsterdam 15.11.1972, S&S 1973, 53.	83, 234
Rb Amsterdam 13.12.1972, S&S 1973, 40.	149, 138
Rb Rotterdam 13.4.1973, S&S 1973, 93.	109, 98
Hof Arnhem 27.11.1973, S&S 1974, 64.	163, 226
HR 7.12.1973, S&S 1974, 20; NJ 1974, 307; ETL 1974, p.602.	27, 106; 254, 11
Hof Leeuwarden 20.2.1974, S&S 1976, 31; NJ 1976, 16.	257, 28; 272, 100
Rb Rotterdam 5.4.1974, S&S 1975, 53.	115, 132; 303, 61; 307, 93
Rb Rotterdam 3.5.1974, S&S 1974, 63, NJ 1975, 210.	87, 250
Hof Leeuwarden 22.5.1974, S&S 1977, 41.	272, 100
Hof Amsterdam 4.6.1974, S&S 1975, 38; NJ 1975, 61; ETL 1975, p.531.	295, 12; 302, 60
Rb Amsterdam 16.4.1975, S&S 1975, 81.	50, 51; 108, 89
Rb Amsterdam 25.6.1975, S&S 1976, 49.	190, 377
Rb Amsterdam 19.11.1975, S&S 1976, 55.	45, 28
Rb Rotterdam 12.12.1975, S&S 1979, 23; NJ 1980, 484.	79, 211
Rb Rotterdam 4.2.1976, S&S 1976, 56.	78, 207
Rb Rotterdam 20.2.1976, S&S 1978, 67.	207, 62; 220, 131
Hof The Hague 2.4.1976, S&S 1977, 34.	306, 83
Rb Rotterdam 23.4.1976, S&S 1977, 10.	66, 131
Hof Arnhem 11.5.1976, S&S 1976, 89.	169, 255
Rb Rotterdam 21.5.1976, S&S 1979, 83; NJ 1980, 518.	87, 252; 183, 333
Rb Rotterdam 2.6.1976, S&S 1977, 66; NJ 1977, 156.	98, 49
Rb Arnhem 24.6.1976, S&S 1977, 11.	289, 75
Rb Rotterdam 3.9.1976, S&S 1977, 56.	84, 237
Rb Rotterdam 1.10.1976, S&S 1977, 17.	307, 92

Rb Rotterdam 26.11.1976, S&S 1977, 22; NJ 1978, 321.	66, 131; 279, 19
Rb Dordrecht 15.12.1976, S&S 1982, 33.	98, 49
Rb Amsterdam 24.12.1976, S&S 1977, 90.	189, 377
Hof The Hague (undated), S&S 1979, 23; NJ 1980, 484.	80, 212
Rb Breda 11.1.1977, S&S 1978, 89.	192, 394; 207, 62; 221, 132; 237, 225
HR 11.3.1977, NJ 1977, 521.	271, 95
Rb The Hague 24.3.1977, S&S 1978, 30.	98, 49
Rb Amsterdam 30.3.1977, S&S 1978, 36.	207, 62; 223, 150
Rb Den Bosch 3.6.1977, S&S 1978, 29.	145, 120; 294, 11
Rb Amsterdam 14.9.1977, S&S 1979, 89.	281, 37; 286, 65
Hof Amsterdam 14.10.1977, S&S 1978, 15.	45, 29
HR 6.1.1978, S&S 1978, 32; NJ 1978, 450.	27, 107
Rb Rotterdam 9.1.1978, S&S 1979, 18.	102, 60
Rb Amsterdam 18.1.1978, S&S 1978, 101.	101, 58; 103, 67
Hof Amsterdam 31.3.1978, S&S 1978, 82.	169, 255
Hof The Hague 31.3.1978, S&S 1980, 10.	84, 238
Hof The Hague 10.5.1978, S&S 1979, 83; NJ 1980, 518.	87, 253; 183, 334
Rb Rotterdam 12.5.1978, S&S 1979, 11.	304, 69
Rb Rotterdam 12.5.1978, S&S 1979, 59.	212, 86
Rb Amsterdam 7.6.1978, S&S 1979, 69.	207, 62; 223, 152; 237, 227
Hof Amsterdam 16.6.1978, S&S 1979, 58.	122, 10; 174, 285
Rb Arnhem 29.6.1978, S&S 1980, 45.	306, 86; 307, 93; 309, 105
Arbitral Award 23.8.1978, S&S 1981, 129.	223, 152
HR 6.10.1978, S&S 1979, 24; NJ 1980, 534.	205, 54
HR 17.11.1978, S&S 1979, 23; NJ 1980, 484.	44, 23; 80, 213; 296, 20
Rb Amsterdam 29.11.1978, S&S 1979, 103.	187, 358
Hof Arnhem 6.12.1978, S&S 1979, 114.	184, 345
Hof Den Bosch 2.1.1979, S&S 1979, 115.	145, 118; 249, 301
Hof Den Bosch 5.1.1979, NJ 1979, 527.	130, 50
Hof The Hague 5.1.1979, S&S 1980, 10.	79, 210
Rb Amsterdam 10.1.1979, S&S 1979, 29.	212, 89
Rb Roermond 18.1.1979, S&S 1979, 45.	212, 88; 221, 137
Rb Groningen 9.3.1979, S&S 1979, 90.	212, 90
HR 16.3.1979, S&S 1979, 64; NJ 1980, 562.	45, 30
Rb Utrecht 11.4.1979, S&S 1980, 12.	306, 84
HR 20.4.1979, S&S 1979, 83; NJ 1980, 518.	87, 255; 183, 335
HR 18.5.1979, S&S 1979, 73; NJ 1980, 574.	27, 105; 159, 208
Hof The Hague 6.6.1979, S&S 1980, 42.	223, 152
Hof The Hague 15.6.1979, S&S 1980, 44.	87, 251
Hof The Hague 15.8.1979, S&S 1980, 44; ETL 1980, p.871.	169, 255
Rb Almelo 22.8.1979, S&S 1980, 61.	77, 201
Arbitral Award 4.10.1979, S&S 1980, 59.	223, 152
HR 5.10.1979, S&S 1979, 117; NJ 1980, 485.	84, 239
Rb Dordrecht 31.10.1979, S&S 1981, 64.	286, 65
Rb Rotterdam 23.11.1979, S&S 1980, 18.	212, 87
Rb Amsterdam 5.12.1979, S&S 1980, 96.	77, 201
Hof The Hague 19.12.1979, S&S 1980, 33; NJ 1981, 286.	102, 61
Rb Rotterdam 25.1.1980, S&S 1981, 16; NJ 1980, 598.	301, 56; 302, 60; 309, 105; 310, 111
Rb Utrecht 20.2.1980, S&S 1980, 108.	84, 235
Rb Utrecht 12.3.1980, S&S 1980, 127.	195, 416; 286, 64
Rb Rotterdam 21.3.1980, S&S 1981, 29.	190, 377
Rb Dordrecht 21.5.1980, S&S 1982, 8.	299, 43
Rb Roermond 29.5.1980, S&S 1981, 74.	149, 138
Hof The Hague 4.6.1980, S&S 1982, 33; NJ 1981, 179.	98, 49
Rb The Hague 25.6.1980, S&S 1984, 92.	169, 255
Hof Amsterdam 13.11.1980, S&S 1981, 49.	160, 209
Hof Amsterdam 5.12.1980, S&S 1981, 97.	174, 285
Rb Arnhem 8.1.1981, S&S 1982, 75.	116, 139
Rb The Hague 14.1.1981, S&S 1981, 65.	189, 376
Hof Arnhem 20.1.1981, S&S 1981, 63; NJ 1983, 186.	289, 76

Rb Rotterdam 30.1.1981, S&S 1981, 98.	272, 98, 102
Rb Amsterdam 4.3.1981, S&S 1982, 19.	207, 62; 221, 132, 133
Rb Amsterdam 18.3.1981, S&S 1981, 83.	207, 62; 221, 132; 256, 24; 272, 102
Rb Amsterdam 18.3.1981, S&S 1981, 84.	212, 89; 256. 24; 267, 78; 271, 95
Rb Den Bosch 27.3.1981, S&S 1983, 89.	302, 61
Rb Amsterdam 22.4.1981, S&S 1982, 116.	149, 138; 207, 62; 221, 135
HR 1.5.1981, S&S 1981, 76; NJ 1981, 604; ETL 1982, p.252.	212, 91
Rb Dordrecht 16.12.1981, S&S 1982, 117.	189, 376
HR 12.2.1982, S&S 1982, 56; NJ 1982, 589; ETL 1983, p.581.	27, 107; 200, 18
HR 19.2.1982, S&S 1982, 57; NJ 1982, 402.	122, 10; 122, 286
Binding Advice 3.3.1982, S&S 1982, 50.	186, 350
Hof Amsterdam 25.3.1982, S&S 1983, 9.	247, 286
Arbitral Award 20.4.1982, S&S 1983, 19.	67, 136; 223, 152
Rb Rotterdam 23.4.1982, S&S 1982, 94.	212, 92; 305, 78
Rb Den Bosch 7.5.1982, S&S 1984, 91.	218, 117
HR 18.6.1982, S&S 1982, 85; NJ 1982, 384.	84, 239; 162, 225
Rb Utrecht 1.9.1982, S&S 1983, 40.	207, 62; 286, 64
Rb Breda 7.9.1982, S&S 1983, 60.	279, 22; 286, 64
Hof The Hague 12.11.1982, S&S 1983, 30; NJ 1984, 656.	212, 92; 305, 78
Rb Arnhem 25.11.1982, S&S 1984, 115.	149, 138; 307, 93
HR 4.2.1983, S&S 1983, 144; NJ 1983, 626.	205, 54
Rb Rotterdam 23.3.1983, S&S 1983, 88.	24, 153
Rb Arnhem 14.4.1983, S&S 1984, 94.	193, 398
Hof The Hague 27.5.1983, S&S 1984, 68.	184, 339
Rb Rotterdam 3.6.1983, S&S 1983, 111.	47, 35; 309, 105
Rb The Hague 22.6.1983, S&S 1984, 11.	149, 139
Hof Den Bosch 16.8.1983, S&S 1984, 69; NJ 1984, 714.	279, 21; 286, 64
Rb Roermond 29.9.1983, S&S 1984, 93.	100, 54
Rb The Hague 23.11.1983, S&S 1984, 114.	282, 43
Hof The Hague 24.2.1984, S&S 1984, 112.	66, 133
Rb Rotterdam 2.3.1984, S&S 1985, 32.	112, 113
Hof Arnhem 10.4.1984, S&S 1984, 111.	190, 377
Hof Amsterdam 26.4.1984, S&S 1984, 113.	162, 225
Hof The Hague 4.5.1984, S&S 1984, 116.	51, 59
Hof Den Bosch 12.10.1984, Roll no.705/82.	172, 273
Ktg The Hague 10.1.1985, S&S 1986, 54.	286, 64
Rb Rotterdam 21.6.1985, S&S 1986, 56.	102, 60
Hof Amsterdam 11.10.1984, S&S 1985, 76.	302, 59
Hof Amsterdam 4.1.1985, S&S 1985, 123.	186, 350
Hof The Hague 22.3.1985, S&S 1985, 122.	146, 122

Austria

OGH 14.10.1976, ÖJZ 1976, p.435; ULR 1976, II, p.366.	293, 6; 294, 10; 309, 107
OGH 16.3.1977, ÖJZ 1978, p.101; ULR 1978, I, p.370.	25, 96
OGH 21.3.1977, ULR 1978, II, p.297.	162, 224
OGH 22.11.1977, ÖJZ 1978, p.324; ULR 1979, I, p.284.	178, 314
OGH 15.2.1979, ULR 1979, II, p.229.	230, 187
OLG Vienna 16.3.1982, VersR 1982, p.1082.	265, 67
OGH 2.4.1982, ÖJZ 1982, p.521.	294, 10
OGH 8.9.1983, ETL 1985, p.382.	80, 215; 82, 227
OGH 27.9.1983, VersR 1984, p.548.	239, 243

Belgium

Rb Kh Antwerp 28.3.1966, ETL 1966, p.712.	65, 125
Rb Kh Antwerp 24.10.1967, ETL 1969, p.1035.	302, 62
Rb Kh Antwerp 18.6.1968, ETL 1968, p.1237.	306, 80
Hof van Beroep Brussels 5.12.1968, ETL 1969, p.958.	265, 67; 271, 96
Hof van Beroep Brussels 28.6.1969, ETL 1969, p.925.	298, 36; 301, 52

Hof van Beroep Liege 6.5.1970, ETL 1970, p.716.	248, 291
Rb Kh Antwerp 12.9.1972, ETL 1973, p.640.	307, 92
Hof van Beroep Brussels 19.10.1972, ETL 1973, p.503.	65, 125
Rb Kh Antwerp 7.9.1973, ETL 1973, p.754.	98, 49
Rb Kh Antwerp 17.2.1974, ETL 1975, p.511.	110, 105
Rb Kh Brussels 28.2.1975, ETL 1975, p.419.	298, 33
Rb Kh Antwerp 16.4.1975, ETL 1975, p.548.	110, 105
Hof van Beroep Brussels 30.10.1975, ETL 1976, p.238.	219, 122; 248, 291; 269, 90
Hof van Beroep Ghent 20.11.1975, ETL 1976, p.231.	110, 104
Rb Kh Mons 9.11.1976, ETL 1977, p.3	305, 77; 307, 87
Hof van Cassatie 27.1.1977, RW 1978/1979, p.26; ETL 1978, p.126.	25, 97
Rb Kh Antwerp 29.3.1977, ETL 1977, p.293.	236, 224
Rb Kh Antwerp 3.4.1977, ETL 1977, p.411.	110, 105
Rb Kh Ghent 27.9.1977, Ponet, p.403.	110, 102
Hof van Beroep Brussels 16.11.1977, ETL 1980, p.319.	233, 207; 266, 75, 270, 93; 298, 33
Rb Kh Antwerp 9.12.1977, ETL 1978, p.110.	97, 45
Hof van Beroep Antwerp 30.5.1979, ETL 1979, p.924.	303, 61, 63
Hof van Beroep Antwerp 17.10.1979, ETL 1980, p.314.	307, 93
Rb Kh Antwerp 7.3.1980, ETL 1981, p.466.	309, 102
Hof van Beroep Brussels 16.5.1980, ETL 1980, p.1013.	298, 36
Hof van Cassatie 13.6.1980, ETL 1980, 851.	265, 67; 267, 76; 269, 90
Hof van Cassatie 12.12.1980, ETL 1981, 250.	303, 61, 63
Rb Kh Ghent 15.1.1981, ETL 1981, 708.	186, 350
Hof van Cassatie 9.4.1981, BT 1982, p.455.	306, 79
Rb Kh Turnhout 12.11.1981, ETL 1983, p.105.	273, 107
Hof van Beroep Antwerp 30.6.1982, ETL 1983, p.84.	306, 82
Rb Kh Liege 25.11.1982, ETL 1982, p.843.	302, 61
Hof van Beroep Antwerp 23.3.1983, ETL 1983, p.518.	221, 132
Hof van Beroep Brussels 26.4.1983, ETL 1983, p.511.	65, 126
Rb Kh Brussels 6.4.1984, ETL 1984, p.431.	111, 108
Hof van Cassatie 25.5.1984, RW 1984/1985, p.2274.	295, 15a
Hof van Cassatie 27.9.1984, RW 1984/1985, p.2134.	305, 75

Denmark

Supreme Court 11.11.1968, ULC 1971, p.305.	204, 47
CA Vestre Landsret 8.7.1969, ULC 1971, p.295.	76, 190
Supreme Court 22.4.1971, ULC 1971, p.307.	297, 29
Maritime and Commercial Court 17.6.1982, ETL 1983, p.8.	304, 71

England

QB 20.11.1973 [1974] 1 Lloyd's Rep 203; ETL 1974, p.167 (Tatton v. Ferrymasters).	117, 144; 207, 63; 220, 129; 221, 138; 236, 218
QB 5.5.1975 [1975] 2 Lloyd's Rep 502 (Ulster Swift v. Taunton Meat).	114, 125; 169, 256
QB 1.11.1976 [1977] 1 Lloyd's Rep 411 (Muller v. Laurent Transport).	118, 146; 310, 110
CA 15.11.1976 [1977] 1 Lloyd's Rep 234 (Buchanan v. Babco).	29, 109; 207, 62; 222, 144
CA 16.11.1976 [1977] 1 Lloyd's Rep 346 (Ulster Swift v. Taunton Meat).	114, 125; 169, 256
HL 25.7.1977 [1978] 1 Lloyd's Rep 119 (Buchanan v. Babco).	29, 114; 207, 62; 222, 144
QB 20.10.1977 [1978] 1 Lloyd's Rep 281 (SGS - Ates v. Grappo).	114, 125
QB 9.5.1978 [1979] 1 Lloyd's Rep 175 (Moto Vespa v. Mat Britannia Express).	286, 65; 297, 31; 298, 37
QB 10.10.1979 [1981] 1 Lloyd's Rep 192 (Tetroc v. Cross - Con).	75, 185
QB 22.11.1979 [1980] 2 Lloyd's Rep 279 (Walek v. Chapman and Ball).	116, 135, 139
HL 20.5.1980 [1980] 2 Lloyd's Rep 295 (Fothergill v. Monarch Air Lines).	30, 117; 200, 18
QB 22.9.1980 [1981] 1 Lloyd's Rep 200 (Thermo Engineers Ferrymasters).	102, 60; 220, 130
QB 11.3.1981 [1985] 2 Lloyd's Rep 251 (Galley Footwear v. Laboni).	146, 122
QB 30.3.1981 [1981] 2 Lloyd's Rep 566 (Impex Transport v. Thames Holdings).	309, 102

QB 6.5.1981 [1981] 2 Lloyd's Rep 106 (Cummins v. Davis Freight).	116, 137; 117, 142; 280, 25
CA 16.7.1981 [1981] 2 Lloyd's Rep 402 (Cummins v. Davis Freight).	116, 137; 117, 142; 280, 25
QB 1.12.1981 [1982] 1 Lloyd's Rep 410 (A.B. Bofors – UVA v. A.B. Skandia Transport).	283, 44, 49; 284, 53
QB 21.7.1982 [1983] 1 Lloyd's Rep 61 (Worldwide Carriers v. Ardtran International).	299, 39; 303, 67
QB 13.4.1984 (unpublished) (Sidney G. Jones v. Martin Bencher).	250, 304
QB 16.5.1984 [1984] 2 Lloyd's Rep 618 (Centrocoop v. British European Transport).	169, 256
QB 6.11.1984 [1985] 2 Lloyd's Rep 243 (Silber Trading v. Islander Trucking).	146, 122

France

CA Aix-en-Provence 8.11.1968, BT 1969, p.18; ETL 1969, p.918; ULC 1970, p.119.	306, 81
CA Aix-en-Provence 11.3.1969, BT 1969, p.389; ULC 1970, p.122.	306, 81
CA Toulouse 26.3.1969, ETL 1971, p.131.	303, 62
CA Paris 14.11.1969, BT 1969, p.363; ULC 1970, p.133.	282, 43
CA Poitiers 31.3.1971, BT 1971, p.168.	156, 183
CA Paris 10.12.1971, BT 1972, p.19.	215, 101
Cass. 25.1.1972, BT 1972, p.148.	311, 114
CA Paris 24.3.1972, BT 1972, p.205.	302, 59
Cass. 5.6.1972, BT 1972, p.484.	307, 91
CA Paris 21.11.1972, BT 1973, p.21.	296, 20
CA Paris 30.3.1973, BT 1973, p.195.	221, 140
CA Paris 18.10.1973, BT 1973, p.488.	228, 188
CA Colmar 7.11.1973, BT 1974, p.144.	165, 236
Cass. 8.1.1974, BT 1974, p.91; ETL 1974, p.314.	296, 20
Tr Comm Paris 3.4.1974, BT 1974, p.311.	165, 236
CA Paris 11.6.1974, BT 1974, p.319.	240, 246
CA Rennes 5.11.1974, BT 1974, p.514.	201, 26
Cass. 28.1.1975, BT 1975, p.442.	221, 140
Tr. gr. inst. Albertville 4.3.1975, BT 1975, p.217.	309, 106
Cass. 27.10.1975, BT 1975, p.526.	273, 103
Tr Comm Lyon 10.11.1975, BT 1976, p.176.	218, 116; 302, 57
CA Poitiers 3.2.1976, BT 1976, p.185.	201, 27
CA Reims 27.3.1976, BT 1976, p.260.	305, 73
Cass. 3.5.1976, BT 1976, p.317; ETL 1978, p.106.	165, 236
Cass. 14.6.1976, BT 1976, p.342.	165, 236
CA Chambéry 16.6.1976, BT 1976, p.366.	309, 106
CA Lyon 7.10.1976, BT 1977, p.85.	130, 50
CA Lyon 21.10.1976, BT 1977, p.110.	278, 15
CA Riom 18.1.1977, BT 1977, p.560.	286, 64
CA Lyon 21.1.1977, BT 1977, p.97.	218, 117; 302, 58
CA Rouen 20.4.1977, BT 1977, p.184.	193, 399
Tr Comm Clermont Ferrand 10.6.1977, BT 1977, p.366.	286, 64
CA Paris 22.6.1977, BT 1977, p.468.	286, 65
Cass. 5.12.1977, BT 1977, p.104.	309, 106
CA Paris 15.12.1977, BT 1978, p.53.	234, 211
CA Paris 4.1.1978, BT 1978, p.117.	294, 11
Cass. 13.2.1978, BT 1978, p.210.	286, 65
CA Lyon 2.3.1978, BT 1978, p.382.	307, 87
CA Paris 21.12.1978, BT 1979, p.84.	305, 74
Tr Comm Romans 21.2.1979, BT 1979, p.182.	205, 48
CA Paris 27.6.1979, BT 1979, p.440.	283, 49
CA Paris 19.9.1979, BT 1979, p.481.	234, 211
Tr Comm Paris 11.1.1980, BT 1980, p.94.	145, 118; 246, 285
CA Reims 3.3.1980, BT 1980, p.237.	303, 61

Tr Comm Paris 11.6.1980, BT 1980, p.399.	167, 246
CA Paris 9.7.1980, BT 1980, p.449.	234, 212
Cass. 13.10.1980, BT 1980, p.598.	81, 222
CA Nîmes 5.11.1980, BT 1980, p.6.	167, 245; 307, 94
CA Grenoble 19.11.1980, BT 1981, p.23.	205, 49
Cass. 13.1.1981, BT 1981, p.128; ETL 1981, p.686.	145, 118; 247, 289
Cass. 27.1.1981, BT 1981, p.219.	26, 101; 126, 30; 147, 126
CA Nîmes 11.2.1981, BT 1982, p.198.	201, 28
CA Paris 6.4.1981, BT 1981, p.567.	246, 285
CA Paris 18.5.1981, BT 1981, p.356.	222, 147
Cass. 27.5.1981, BT 1981, p.407.	206, 55
Cass. 3.6.1981, BT 1981, p.431.	278, 16
CA Douai 19.6.1981, BT 1981, p.512.	247, 287
Cass. 16.6.1981, BT 1982, p.419.	209, 75
CA Douai 19.6.1981, BT 1981, p.512.	223, 148
CA Paris 26.6.1981, BT 1981, p.395.	246, 285
Cass. 12.10.1981, BT 1981, p.576; ETL 1982, p.294.	234, 212
Cass. 13.10.1981, BT 1981, p.589.	247, 288
CA Nîmes 29.10.1981, BT 1981, p.256.	130, 50
Tr Comm Flers 6.11.1981, BT 1982, p.292.	246, 285
Cass. 14.12.1981, BT 1982, p.72; ETL 1983, p.59.	302, 58
Cass. 14.12.1981, BT 1982, p.83.	246, 283
CA Paris 6.1.1982, BT 1982, p.84.	235, 213
Cass. 2.2.1982, BT 1982, p.152; ETL 1983, p.43.	205, 50
Cass. 15.2.1982, ETL 1983, p.24.	190, 377
CA Paris 15.2.1982, BT 1982, p.141.	302, 58
CA Paris 23.2.1982, BT 1982, p.550.	215, 101
Tr Comm Grenoble 8.3.1982, BT 1982, p.298.	247, 286
Cass. 19.4.1982, BT 1982, p.309; ETL 1983, p.13.	172, 270
Cass. 4.5.1982, BT 1982, p.332.	271, 97; 307, 87
Tr Comm Toulouse 6.5.1982, BT 1982, p. 359.	271, 97
Cass. 21.6.1982, BT 1982, p.416.	311, 115
Cass. 21.6.1982, BT 1982, p.513.	105, 76; 278, 16
CA Besançon 23.6.1982, BT 1983, p.394.	179, 317
Cass. 4.10.1982, BT 1982, p.549.	296, 20; 307, 87
CA Limoges 1.3.1983, BT 1983, p.330.	146, 122
Cass. 22.4.1983, BT 1983, p.561.	201, 30
Cass. 20.7.83, BT 1984, p.236.	304, 68
Cass. 22.9.1983, BT 1983, p.566.	246, 285
CA Paris 17.11.1983, BT 1984, p.390.	310, 110
CA Chambéry 23.1.1984, BT 1984, p.574.	205, 50
CA Paris 10.2.1984, BT 1984, p.558.	157, 197
CA Paris 30.5.1984, BT 1985, p.75.	219, 122
CA Chambéry 27.6.1984, BT 1985, p.159.	271, 97
CA Paris 4.7.1984, BT 1985, p.158.	271, 97
Cass. 7.12.1984, BT 1984, p.538.	205, 52
Cass. 3.1.1985, BT 1985, p.169.	309, 102
CA Versailles 13.1.1985, BT 1986, p.42.	43, 20
Cass. 26.2.1985, BT 1985, p.270.	247, 287
Cass. 25.6.1985, BT 1985, p.436.	247, 287
Cass. 4.2.1986, BT 1986, p.197.	130, 50

Germany, Federal Republic

BGH 21.12.1966, NJW 1967, p.499.	124, 17
OLG Karlsruhe 24.5.1967, ULC 1967, p.289.	258, 38
BGH 10.1.1968, VersR 1968, p.291.	168, 250
LG Duisburg 10.5.1968, ETL 1969, p.979.	104, 71
OLG Munich 27.11.1968, ETL 1971, p.115.	248, 291
OLG Dusseldorf 8.5.1969, ETL 1970, p.446.	302, 61
OLG Hamm 4.11.1971, VersR 1973, p.911.	258, 38

OLG Dusseldorf 18.11.1971, VersR 1973, p.177.	287, 69
OLG Dusseldorf 13.1.1972, VersR 1973, p.178; ETL 1973, p.620.	164, 233; 303, 61, 65
BGH 18.2.1972, VersR 1972, p.873.	69, 153; 299, 44
BGH 3.3.1972, VersR 1972, p.431.	69, 152
OLG Dusseldorf 18.10.1973, VersR 1974, p.1095.	300, 46
BGH 21.12.1973, VersR 1974, p.325.	23, 89; 259, 39, 40
OLG Dusseldorf 7.2.1974, VersR 1975, p.638.	187, 358
BGH 29.3.1974 NJW 1974, p.1138.	308, 102
BGH 10.4.1974, VersR 1974, p.796.	23, 89; 259, 42
BGH 3.7.1974, VersR 1974, p.1013.	201, 22; 207, 63; 220, 131; 221, 137
LG Kleve 30.10.1974, VersR 1975, p.465.	201, 25
OLG Saarbrücken 21.11.1974, NJW 1975, p.5.	261, 46
OLG Neurenberg 26.11.1974, NJW 1975, p.501.	295, 14
OLG Celle 13.1.1975, VersR 1975, p.250; ETL 1975, p.410.	305, 76
BGH 28.2.1975, VersR 1975, p.445; NJW 1975, p.1597; ETL 1975, p.523.	22, 83; 124, 17; 295, 12; 302, 57
BGH 21.11.1975, VersR 1976, p.434.	70, 154; 74, 178
OLG Hamm 11.3.1976, NJW 1976, p.2077.	184, 341
OLG Schleswig 30.8.1978, VersR 1979, p.141.	130, 51
BGH 27.10.1978, VersR 1979, p.83.	24, 94; 182, 329
BGH 27.10.1978, VersR 1979, p.276.	185, 348; 197, 1; 200, 15
BGH 27.10.1979, VersR 1979, p.417.	160, 212
OLG Dusseldorf 13.11.1978, VersR 1982, p.89.	256, 26
OLG Stuttgart 22.12.1978, VersR 1979, p.637.	215, 104
OLG Dusseldorf 18.1.1979, VersR 1979, p.357.	72, 171
LG Hamburg 21.2.1979, VersR 1979, p.246; ULR 1980, p.226.	287, 69
BGH 9.2.1979, VersR 1979, p.445; ETL 1980, p.84.	105, 73
BGH 9.2.1979, VersR 1979, p.466; ETL 1980, p.215.	186, 350
OLG Dusseldorf 1.3.1979, VersR 1979, p.381.	288, 70
OLG Dusseldorf 29.3.1979, VersR 1979, p.651.	194, 409
OLG Munich 4.4.1979, VersR 1979, p.713.	71, 163
OLG Osnabrück 18.5.1979, VersR 1980, p.245.	213, 93
OLG Munich 27.6.1979, VersR 1980, p.241.	207, 63; 221, 133
BGH 6.7.1979, VersR 1979, p.1105.	24, 92; 261, 48; 267, 80
BGH 13.7.1979, VersR 1979, p.1154.	186, 347
OLG Dusseldorf 8.11.1979, VersR 1980, p.389.	308, 102
OLG Hamburg 6.12.1979, VersR 1980, p.290.	72, 166; 195, 414; 229, 178
BGH 13.2.1980, VersR 1980, p.522.	221, 136
OLG Dusseldorf 27.3.1980, VersR 1980, p.826; ETL 1983, p.89.	23, 86; 147, 129
OLG Hamburg 29.5.1980, VersR 1980, p.950.	213, 96; 233, 206
OLG Hamburg 3.7.1980, VersR 1980, p.1095.	51, 59
OLG Frankfurt am Main 8.7.1980, VersR 1981, p.85.	130, 50
LG Hamburg 16.9.1980, VersR 1981, p.475.	286, 64
OLG Dusseldorf 23.10.1980, VersR 1981, p.1081.	288, 71
BGH 12.1.1981, VersR 1982, p.369.	243, 263
OLG Munich 14.1.1981, VersR 1981, p.562.	72, 170
OLG Frankfurt am Main 20.1.1981, VersR 1981, p.1131.	202, 32
BGH 30.1.1981, VersR 1981, p.473; ETL 1981, p.455.	216, 108
BGH 6.2.1981, VersR 1981, p.633; NJW 1981, p.1904.	288, 74
LG Monchengladbach 16.3.1981, VersR 1982, p.340.	304, 72
BGH 6.5.1981, VersR 1981, p.929; ETL 1982, p.313.	256, 26; 273, 108
BGH 5.6.1981, VersR 1981, p.1030; ETL 1982, p.301.	124, 17; 23, 97; 237, 229
OLG Dusseldorf 25.6.1981, VersR 1982, p.606.	247, 286
BGH 11.12.1981, VersR 1982, p.649; ETL 1983, p.63.	295, 15; 296, 20; 300, 48
OLG Dusseldorf 16.12.1981, VersR 1983, p.1132.	303, 66
BGH 10.2.1982, VersR 1982, p.543.	73, 175
OLG Munich 27.2.1982, VersR 1982, p.334.	216, 110
OLG Dusseldorf 27.5.1982, VersR 1983, p.62.	303, 61
OLG Hamburg 27.5.1982, VersR 1983, p.90.	304, 72
OLG Dusseldorf 28.10.1982, VersR 1983, p.749.	233, 204; 234, 208

BGH 9.12.1982, VersR 1983, p.282.	290, 80
OLG Dusseldorf 16.12.1982, VersR 1983, p.1028.	307, 88
BGH 14.7.1983, VersR 1984, p.134.	249, 297
OLG Hamburg 15.9.1983, VersR 1984, p.534.	102, 61
BGH 9.2.1984, VersR 1984, p.578; ETL 1975, p.275.	109, 98
BGH 16.2.1984, VersR 1984, p.551.	249, 299
OLG Dusseldorf 26.7.1984, VersR 1985, p.1081.	249, 297
BGH 4.10.1984, VersR 1985, p.133.	130, 50
BGH 25.10.1984, VersR 1985, p.134; ETL 1985, p.268.	109, 98
BGH 29.11.1984, VersR 1985, p.258.	298, 36
BGH 14.3.1985, VersR 1985, p.753.	273, 108
BGH 28.3.1985, VersR 1985, p.754.	131, 52a
BGH 27.6.1985, VersR 1985, p.1061.	178, 314
OLG Hamburg 19.12.1985, VersR 1986, p.261.	273, 108

Italy

CA Venice 31.10.1974, ETL 1975, p.242.	201, 29; 205, 48; 221, 134
Cass. 28.11.1975, ULR 1975, I, p.246.	43, 18; 44, 22
Cass. 16.9.1980, ULR 1980, II, p.341.	248, 294
Cass. 26.11.1980, ULR 1981, I, p.271; ETL 1983, p.70.	43, 18; 44, 22

United States of America

Court of Appeals 28.9.1982 [1984] 1 Lloyd's Rep 220 (Franklin Mint v. Trans World Airlines).	211, 83
Supreme Court 17.4.1984 [1984] 2 Lloyd's Rep 432 (Franklin Mint v. Trans World Airlines).	211, 83

INDEX

action	
indemnity, for an	311
pending of	291
recourse	310
agent	270, 306
liability for	104, 174
liability of	104, 244
protection of	241
wilful misconduct of	244, 295
applicability of the CMR	39
adoption of	48
conditions for	43
arbitral tribunal	281
arbitration clause	283
autonomy <i>see</i> uniform law	
bailment	86
binding advice	285
burden of proof	65, 86, 140
division of the	129
carrier	
roll-on/roll-off	89, 93
sub-	89, 104
successive-	89, 106
causality, proof of	131, 153
cautio judicatum solvi <i>see</i> security	
chameleon system	100
chartering	57, 78
<i>see</i> contract	
circumstances, privileged	130, 140
claimant	251
fault of the	140
order of the	140
claim	
counter-	308
right to	251
basis of the	257
exercise of the	267
clause	
arbitration	283
benefit of insurance	198
Himalaya	241
ignorance	186, 189
jurisdiction	281
paramount	43, 285
commissionnaire	
de transport	61, 311
-carrier	63
-forwarder	63
condition	186
consignee	253
consignment note	44, 52, 109, 234, 256

contact address	256
container	91
contract	
carriage, of	53, 54
chartering	78
freight forwarding	58
haulage	82, 93
house removals	51
privity of	241, 173
three party	254
transport operator	76
Convention	
EEC Judgments, 1968	276, 292
Road Transport, 1949, 1968	48
conversion	
of the gold franc	214
of currency	236
court	281, 285
currency, conversion of	236
damage	
allowance method	228
compensation for	197
right to	251
due to delay <i>see</i> delay	
decay <i>see</i> goods	
delay	199, 228
damage due to	195, 228
delivery	
of goods <i>see</i> goods	
special interest in	231
value	204, 220
dispatch value	204, 220
disposal	
doctrine of	258, 265
right of	255, 258
dol	242
Drittsschadensliquidation	269
expertise charges	207
fault of the claimant <i>see</i> claimant	
faute lourde	245, 246
feasibility	291
fire	147
force majeure	143
freight forwarder	75
freight forwarding contract <i>see</i> contract	
funeral transport <i>see</i> transport	
Gefährdungshaftung	123
Germinal franc	208
gold franc	208
conversion of	214
goods	54
decay of	168
delivery of	180, 265
handling of	158
inherent vice of	140, 168
nature of	167

goods— <i>continued</i>	
packing of	157
taking over of	180
value of	203
grobe Fahrlässigkeit	248
group transport <i>see</i> transport	
haulage contract <i>see</i> contract	
Himalaya clause	241
house removals contract <i>see</i> contract	
ignorance clause	186, 189
inherent vice	140, 168
injury	199, 226
inspection, duty of	165
insurance	198, 231
interest	235
interest, doctrine of	268
interpretation <i>see</i> uniform law	
interpretation methods	15
invoice value	205
joinder of actions	238
jurisdiction	
attribution of	285
clause	281
distribution of	286
international	285
relative	279, 285
lacuna	18, 28, 212, 225
lex mercatoria	7
liability	
agents and servants, for	104, 174
agents and servants, of	104, 244
restriction of	197, 207
basis of	121
carrier, of the	119
exoneration of	139
period of	179
limitation, period of	293
commencement of	297
duration of	295
extension of	307
reduction of	307
special regulation of	302
suspension of	301
limits	207
application of	214
history	207
increase in	231
present and future situation of	210
litispence <i>see</i> action	
livestock	50, 174
load	158, 183
duty to	161
loss	199, 203
marks, incompleteness or inadequacy of	173
maturity, period of	193

money <i>see</i> currency	
nature <i>see</i> goods	
numbers, incompleteness or inadequacy of	173
obligation	
best effort, of	122
result, to effect a	122
order <i>see</i> claimant	
paramount clause	43, 285
parking	146, 149
period <i>see</i> liability	
postal transport <i>see</i> transport	
présomption de faute	125
présomption de responsabilité	125
private international law	13, 44, 275
privity of contract <i>see</i> contract	
procedural law	275
recipient <i>see</i> consignee	
recourse <i>see</i> action	
refrigerated transport <i>see</i> transport	
representation	306
return of goods <i>see</i> goods	
risks, special	139
scope rule	43, 285
security, provision of	292
sender	253
servants <i>see</i> agents	
set-off	291
Special Drawing Right (SDR)	210
special interest <i>see</i> delivery	
special risks <i>see</i> risks	
Spediteur	69
Sammelladung Spediteur	74
zu festen Kosten	69, 74
Spedizioniere-vettore	63
stowage, duty of	161
taking over <i>see</i> goods	
taxes	221, 286
theft	144, 247
third party clause	254
third party effect	239
three party contract <i>see</i> contract	
transport	
actual	111
combined	91, 97
container	91
group	215, 297
funeral	51
postal	51
refrigerated	170
roll-on/roll-off	89, 93
sub-	89, 104
successive	89, 106
transport operator contract <i>see</i> contract	
unification	7, 10

uniform law	10
autonomy of	10, 15, 22
interpretation of	15
nature of	10
unload, duty to	161
unloading	158, 183
value <i>see</i> goods	
declaration of	231
vehicle	48
condition of, defective	150, 172
open	154
unsuitable	151
Verschuldenshaftung	123
Vorsatz	248
bedingter	248
wilful misconduct	242, 250
conditional	246
default equivalent to	245, 296

