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The Interpretation of Article 2.1. CMR

Cécile Legros, Professor at the University of Rouen Normandie - FRANCE

UNIVERSITÉ DE ROUEN NORMANDIE

CUREJ
CENTRE UNIVERSITAIRE D'ÉTUDES JURIDIQUES

IDIT
INSTITUT DU DROIT INTERNATIONAL DES TRANSPORTS ET DE LA LOGISTIQUE

The Interpretation of Article 2.1. CMR

- Introduction on Art. 2.1. CMR
- Report on the work of the CMR Advisory Council

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Introduction

Introduction

Article 2.1 CMR concerns the situation where the journey is not performed exclusively by road. It governs certain so-called ***piggyback*** transport operations.

Piggyback transport refers to the transport of goods where one transportation unit is carried "on the back" of something else, i.e.. ON / IN another mode of transport.

Issue: liability regime applicable to the non-road stage.

Introduction

<u>Main issue</u>: identification of the liability regime applicable to the non-road stage.

⇔ depends on the stage when the damage occurred.

Art. 2.1 CMR organizes a dual liability

> Distinction : whether it has been possible to **locate the origin of the damage or not.**

- **Main rule:** The **failure to locate the damage leads to the application of the CMR.**

- **Exception: <u>On the contrary</u>, compensation for localized damages may be governed by other instruments than the CMR,** provided that certain conditions are met.

  - the CMR's rules on liability shall not be applied when it is proved that the loss or damage occurred during the carriage by other means of transport was not caused by any act or omission of the carrier by road, but by an event which could only have occurred during and by reason of the carriage by that other means of transport.
  - In such a situation, the liability of the road carrier towards the sender will not be determined by the CMR. Rather, the liability regime of the other means of transport may be applicable.

Introduction

This exception regarding liability applies provided that **various prerequisites/conditions are fulfilled:**

1) There must be a single contract of carriage for the whole journey, subject to the CMR
2) the goods must not be unloaded from the road vehicle
3) the loss, damage or delay must have occurred during the carriage by the other means of transport
4) the loss, damage or delay must not have been caused by an act or omission of the road carrier.
5) the risks that have materialised in the form of loss, damage, or delay must be related to that means

NB : For the purpose of this report, we will consider these conditions to be fulfilled

Introduction

Conseuquence: When these conditions are fulfilled,

- The liability of the road carrier will, in principle, not be assessed in accordance with the provisions of the CMR,
- but in accordance with the provisions of the law governing the non-road carriage in question ("network system").

Example: where the loss or damage occurred during a sea crossing for instance, the road carrier's liability subsists, but it will be assessed in accordance with the provisions of the maritime law applicable to that part of the journey.

Issue: Such a substitution of another regime than the CMR, that is likely to shift the terms of liability one way or the other, raises several questions.

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Report on Art. 2.1. CMR

Issue: Interpretation of Art. 2.1. CMR.

Objective of the CMR-AC: "To promote a uniform interpretation of the CMR, .../... providing independent, impartial and well-informed legal opinions upon interpretation issues arising under CMR." (s ee Bylaws: https://www.cmr-ac.org/bylaws/)

Relevance of the topic: This provision was chosen by the CMR-AC as there are **significant discrepancies in case law** issued from different CMR contacting States to the CMR.

+ **possible discrepancy between French and English versions of the CMR**

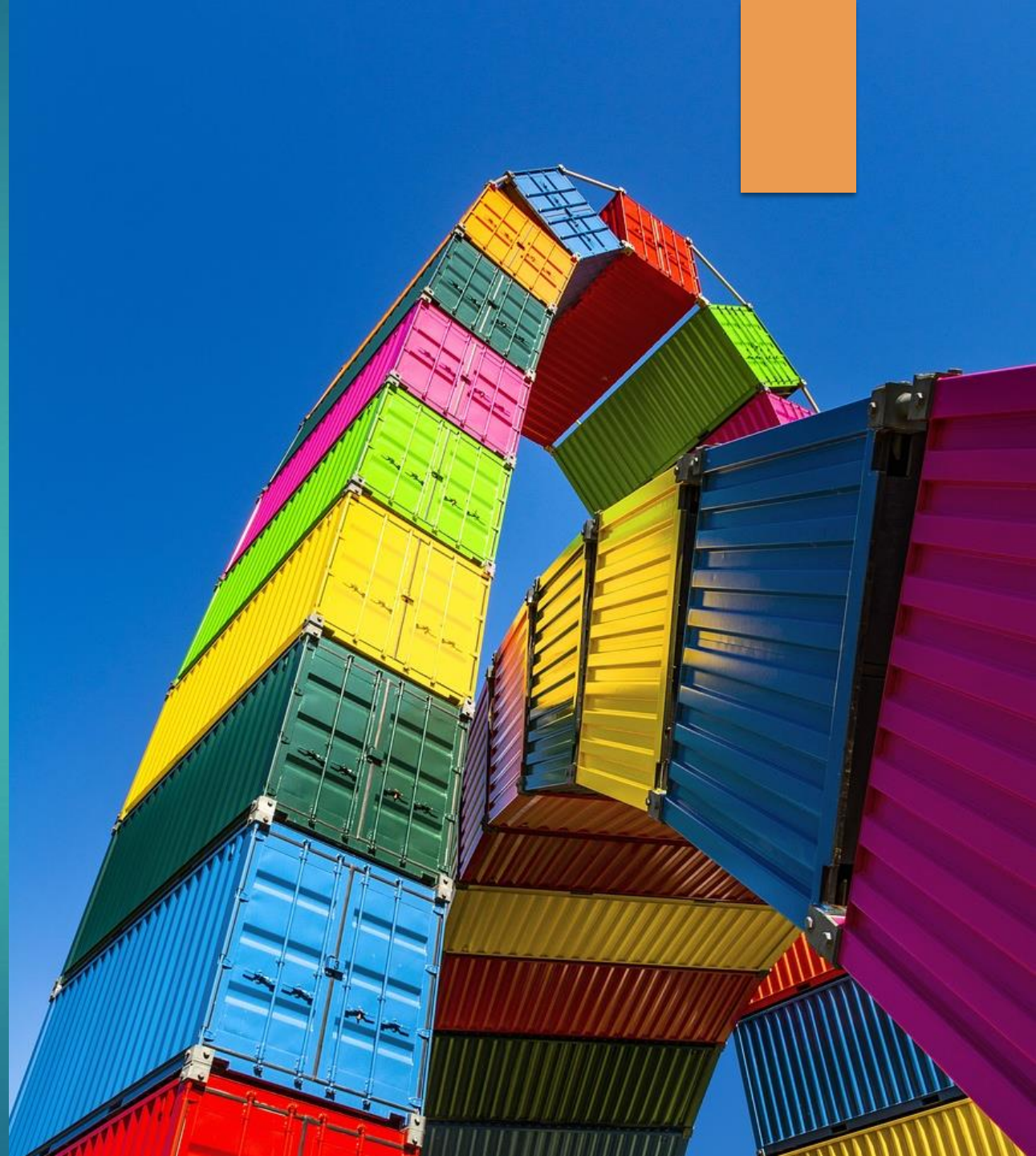
- "conditions prescribed by law" vs. "les dispositions impératives de la loi".

Two main questions were examined by the CMR-AC:

1) **Is the consent of the sender needed for the use of piggyback transport?**
2) **What precise regime is applicable to the non-road leg if the CMR is evicted ?**

NB : Methodology: work background : VTLC and comparative case-law and doctrine

I- Consent of the sender



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Interpretation of Art. 2.1. CMR
Consent of the sender

ISSUE: Is the consent of the sender needed to use piggyback transport ?

WHY ?

The application of a regime different from the CMR to assess the liability of the road carrier may lead to a lower compensation for the sender

> It is then legitimate to ask whether he has consented to this substitution? Is the sender aware of that?

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Interpretation of Art. 2.1. CMR
Consent of the sender

Several situations need to be distinguished :

- **Different itineraries possible** (one including a non-road leg) **BUT carriage by road exclusively agreed**
  - Carrier cannot use piggyback transport > breach of contract > liability governed by CMR

- **Agreement of the sender for a piggyback transport BUT onloading of the goods for performing the non-road leg**
  - Carrier in breach of contract > liability governed by CMR

- **No specification of the itinerary by the sender : choice left to the carrier**

NB: Issue of characterization of the nature of the contract > art. 1. CMR issue

- In case law : the consent of the sender to use piggyback transport is often **considered as presumed**

> Art. 2.1. CMR applies and the CMR liability provisions are evicted

  - When the use of two transport modes is obvious according to the geographical constraints (Ex. transport from Paris to London)
  - When this transport mode corresponds to the the previous practice between the parties, to commercial practice, to the nature of goods, to the time of delivery etc.

Interpretation of Art. 2.1. CMR
Consent of the sender

DRAFT OPINION (provisional version - September 2024)

Under the CMR, the consent of the sender to perform a part of the journey by means of piggyback transport is presumed.

This presumption is rebutted, when it is agreed by the parties that piggyback transport is not allowed. If nevertheless the carrier makes use of piggyback transport, this is a breach of contract, which remains within the scope of application of the CMR.

> Still in discussion. : consequential issues (which regime ?).

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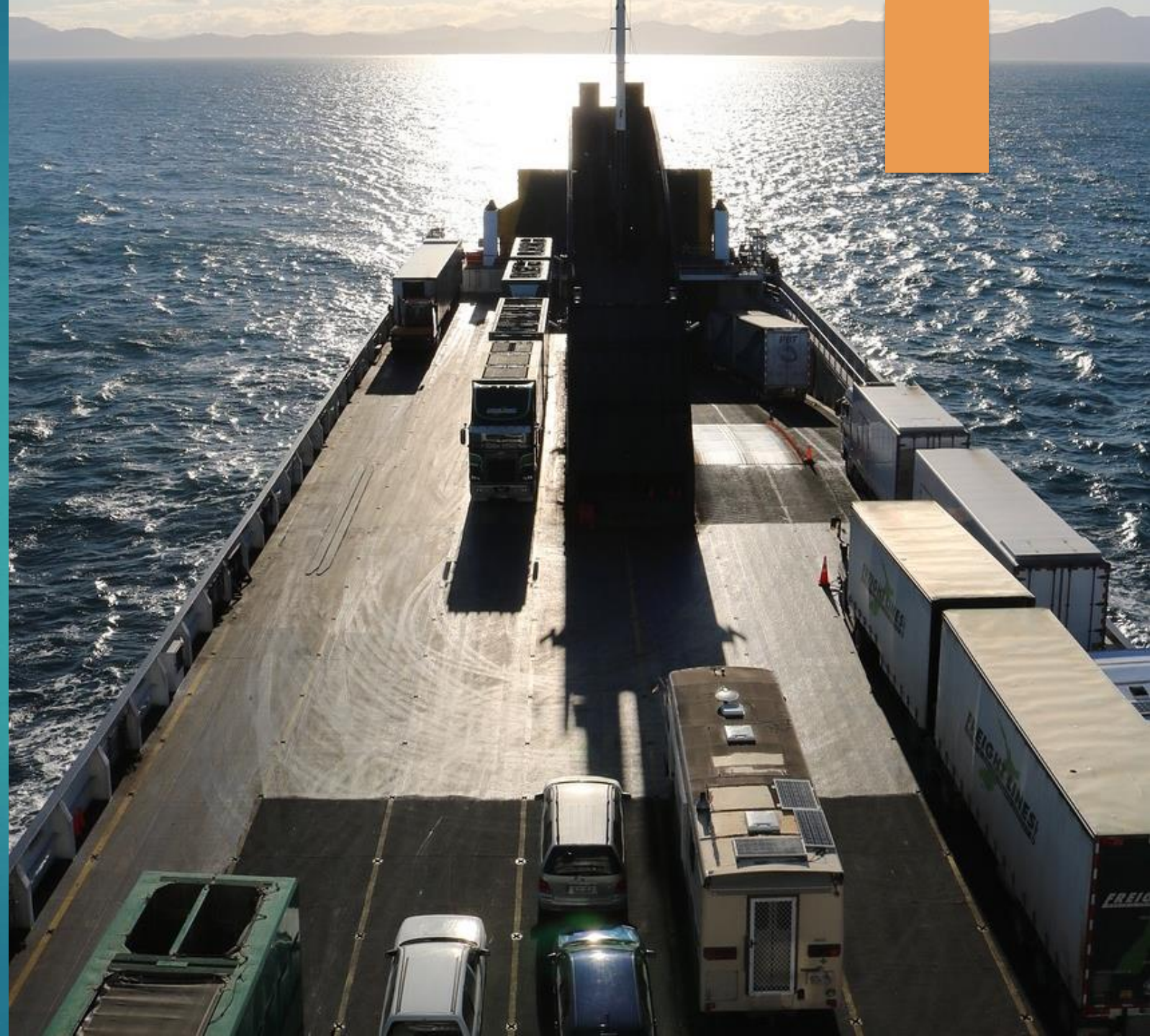
II- Identification of the non-road regime



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« Conditions prescribed by law » vs. « dispositions impératives de la loi »

When the conditions for the eviction of the CMR are fulfilled, the following issue is to identify the applicable liability regime.

ISSUES:

1) Apparent (or actual) discrepancy between the French and English version of the CMR
2) Diverging case law
3) Identification of the regime applicable to the fictitious contract

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1) Apparent (or actual) discrepancy between the French and English version of the CMR

The French version of Art. 2.1. CMR is the following:

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**.

English version of of Art. 2.1. CMR is the following:

- Provided that to the extent 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 act or omission of the carrier by road, but by some event which could only 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 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.**

1) Apparent (or actual) discrepancy between the French and English version of the CMR

Derogatory liability regime : "the liability of the carrier by road shall be determined …/… **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 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."**

- The liability of the road carrier towards the sender is assessed according to the regime applicable to a **fictitious contract** that would have been made directly by the sender and the non-road carrier
- **Issue:**
  - Identification of this regime applicable to the **fictitious contract** that could have been concluded directly between the sender and the non-road carrier
  - Condition: the regime must be "**prescribed by law"/** or conform with the "***dispositions imperatives de la loi***" (otherwise CMR apply).

CSQ: Apparent contradiction between the French & English versions:

- "*les dispositions* ***imperatives*** *de la loi*" may be interpreted as requiring mandatory law (Cf. French case-law: *Cass. com. (France), 5 July 1988, n°87-10566*
- the expression "*conditions* ***prescribed*** *by law*" could be interpreted to mean any statutory rules relevant to the carriage by the other mode and not just mandatory rules (Cf. Ramberg)

1) Apparent (or actual) discrepancy between the French and English version of the CMR

- **VTLC Art. 31.1.** : "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*".

- **The ordinary meaning in French language** of "dipositions impératives" is the following: "A mandatory rule is a rule that cannot be derogated from, particularly by agreement between two parties. It is binding on everyone because it is a rule of public policy. In this sense, it is opposed to a suppletive rule, from which the parties may derogate by agreement".
  - According to the common interpretation of the French version of the CMR, the expression "les dispositions impératives de la loi" imply that the non-road regime will apply (as far are all the other conditions are met) only if the law applicable to the hypothetical contract **is governed by mandatory provisions**.

- **Such a mandatory character does not seem to be included in the English word "prescribed".**
  - *According to the Oxford dictionary of Law* : "to be prescribed by law implies a legal regime governing the interference in question. Moreover, the law must be both adequately accessible (in that citizens must be able to understand whether or not le law applies in a given case) and formulated with sufficient precision to enable citizens to regulate their conduct."
  - Some authors consider that this formula refers to statutory law, which is not necessarily mandatory.

    See: the expression "*conditions **prescribed** by law*" could be interpreted to mean any statutory rules relevant to the carriage by the other mode and not just mandatory rules (Cf. Ramberg)

1) Apparent (or actual) discrepancy between the French and English version of the CMR

- **Apparent contradiction between the French & English versions**

BUT controversy: other authors consider that there is no contradiction

- **The word "prescribed" in English can have a mandatory sense.**

In a legal context 'to prescribe' means *the laying down of a rule* usually in the context of legislation and also usually in a binding sense : "*To write or lay down as a rule or direction* ***to be followed***" *(Oxford English Dictionary Online)*

⇔ In the area of contract law : distinction between ***prescriptive rules*** (binding or enforceable and ***dispositive*** rules.

Origin of the controversy: The Hague Rules seem to be more liberal than CMR in respect of permitted derogations (see: Art 5 of the HR).

But the liability rules are always prescriptive - in the sense that the carrier can never reduce his liability only increase it.

2) Diverging case-law

1. **HVR can apply only by operation of law (art. 10 a & b HVR)**

See: ***Cass. com. (France), 5 July 1988, n°87-10566*** . BL Paramount clause.

This interpretation refers to the French wording of article 2.1. CMR according to which the maritime regime must be mandatory. According to this case, only when the international maritime convention applies by operation of law (art. 10 a&b HVR) (and no through a paramount clause : §c).

Consequently, the maritime regime is excluded and CMR applies when the HVR are only applicable via a Paramount clause included in a bill of lading (by virtue of the consent of the parties and not by virtue of the law).

IDEM when the transport document is not a bill of lading (as HVR are not applicable by operation of the law).

Here the link between prescribed rules and the fictional contract is determined by the contract made between the road carrier and the sea carrier

2) Diverging case-law

2. **The fictitious contract should be governed by uniform international law objectively identified**

See: ***Hoge Raad/Supreme Court, Gabriële Wehr, (Netherlands), 29/06/1990***

HVR applicable to an on-deck carriage ; no bill of lading.

As to the last part of the second sentence of Article 2(1) CMR, the Court held that "the conditions prescribed by law" that governed the supposed contract between the sender and the carrier by the other means of transport were **the objective uniform international law which governed the other means of transport**, i.e. liability for the damage caused during the carriage by sea must be determined according to the Hague-Visby Rules.

The Court held that the **uniform international law had to be applied in abstracto**, without taking into account the particulars of the contract made by the road carrier) with the carrier by the other means of transport (e.g. the Hague-Visby Rules required the issuing of a Bill of Lading. In the present case no Bill of Lading was issued,). The Court based its decision on the fact that the legal construction of "supposed contract" was intended to protect the sender, which had not been able to take part in the negotiations on the contract of the other means of transport.

Criticism : The Hoge Raad seems to ignores the ordinary meaning of the words “conditions prescribed by law” which makes no reference whatever to uniform or international rules.

2) Diverging case-law

3. ***Queen's Bench Division, Thermo Engineers Ltd v Ferrymaster Ltd (UK), 22/09/1980***

In this case a BL was issued.

The Court decided that CMR gave way to the Hague Rules in determining the road carrier's liability.

Moreover, it was accepted that "conditions prescribed by law" extend to what the plaintiff could legally, and would, have agreed with the sea carrier, notably the possibility for a carrier by sea to agree to increase his liability (Art. 5 HVR) beyond the limit (Art. 4.5 HVR) > the case was remitted for calculation of what the plaintiffs could, and would, have agreed.

Criticism : Provisions of these rules which permit agreement were applied without a full explanation of why they are consistent with the concept of "prescribed conditions." Indeed, the judge did not consider what was meant by conditions prescribed by law but simply assumed that the Hague Rules were such conditions.

see, notably: GLASS, D.A., Article 2 of the CMR Convention - A Reappraisal, Journal of Business Law 2000, pp. 562-586.

Provisional conclusion

- The majority of academic writers consider that there is a difference between the French and English versions of the CMR ⇔ provision subject to interpretation
- The case law supports this view
- However, most authors and Courts do consider that the non-road regime must be mandatory.

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3) Identification of the non-road liability regime

- **Nature and content of the non-road regime**

  According to Article 2.1. CMR, the situation will be governed by the rules applicable to a **fictitious contract** that could have been concluded by the sender and the non-road carrier: "*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 the goods alone had been made by THE sender with THE carrier by the other means of transport*".

  - the liability regime should be the **mandatory regime applicable to a fictitious contract** that would have been concluded, directly between the sender and the non-road carrier, to carry the goods alone with this mode of transport.

The difficulty here consists in identifying such a regime. Objective/subjective ?

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3) Identification of the non-road liability regime

- **VTLC**
  - **Ordinary meaning (art. 31.1)**

The analysis of the provision highlights that the fictitious contract is A contract that would have been concluded between THE sender and THE non-road carrier.

- Such a formulation suggests a subjective approach, analyzing what rules would have applied in each particular case, e.g. would the carrier have issued a bill of lading, for instance?
- See: ***Queen's Bench Division, Thermo Enginers Ltd v Ferrymaster Ltd (UK), 22/09/1980***,

However, the provision is frequently interpreted to mean; "as if" a contract had been concluded by the sender and the non-road carrier, which seems more objective.

- **Object and purpose of the convention (art. 31.1)**

It is generally admitted that the purpose of this provision was **to protect both the sender and the road carrier** by:

- Aligning the road carrier's liability on the non-road regime to have a single regime for both contracts contract between the sender and the road carrier; contract between the road carrier and the non-road carrier), which preserves the road carrier's recourse.
- But also to protect the sender from conditions that could have been agreed between the road carrier and the non-road carrier which could possibility undermine liability.

This is why the liability regime is based upon a fictitious contract and not on the actual contract concluded with the non-road carrier. **Consequently, the content of the actual contract is irrelevant.**

3) Identification of the non-road liability regime

Case law

Subjective approach

Some courts admit that the agreement between the parties may be taken into consideration as authorized by the maritime Convention.

- ***Queen's Bench Division, Thermo Enginers Ltd v Ferrymaster Ltd (UK), 22/09/1980:*** The Court authorizes to take into consideration the raise of the limits agreed by the parties to the actual maritime contract (allowed by article 5 HVR).
- ***Cass. com. (France), 5 July 1988***, n°87-10566: The Court considers the paramount clause agreed by the parties to the maritime contract.
- ***District Court of Rotterdam, Duke of Yare (Netherlands), July 1994***: Court hearing ordered by the Court in the Duke of Yare on the fictional contract

Objective approach

- ***Supreme Court/Hoge Raad, Gabriële Wehr, (Netherlands), 29/06/1990.***

According to this case:

- The actual contract made between the road carrier and the sea carrier is irrelevant; the regime depends on a 'fictitious' contract'.
- The conditions prescribed by law are uniform rules identified on objective criteria.
- These rules are those applicable in the port of loading.

- **CA Antwerpen (Belgium), 22/12/1997**.

In this case however there was a Paramount clause. The solution may then be based upon a different ground.

- ***Federal Court of Justice/BGH (Germany), 15 dec. 2011***.

3) Identification of the non-road liability regime

Doctrine

- **AGAINST the objective approach**
  - The Gabriele Wehr solution seems to deprive the words 'conditions prescribed by law' of meaning
  - Uniform laws may be 'in force' but they still need to be implemented through rules of law binding on a court of law. The Court misses the stage of identifying the link between prescribed conditions and the fictitious

- **IN FAVOUR of the objective approach**

There are however serious arguments in favor of the objective approach. One of them is legal certainty and predictability:

- provides the contracting parties with an objective, reliable and protective set of liability rules, internationally recognized.

See Haak: The Liability of the Carrier under the CMR, The Hague, Stichting Vervoeradres, 1986, p.104.

- The Gabriele Wehr solution mostly relies on the purpose of the provision, that is to align the liability of the road carrier and of the non-road carrier. This purpose in achieved by this solution.
- enables Art.2.1. CMR to apply in practical situations. Notably, in the short sea trade (ferry-trade) where bills of lading are never issued, which would mean that the Art 2 CMR never applies to the short sea trade.

Provisional conclusion

1) The prescribed rules **should be mandatory** (in the sense of Art. 2.1. CMR)

- Not fully mandatory
- Rule balancing the interests of both parties: minimum liability standards that cannot be limited/diminished
- **HVR is mandatory in this sense**

2) Nature of the prescribed rules :

- **International convention/uniform law** (when exists & applicable to the route at issue)
  - when several international conventions are likely to apply: Application of the **regime of the country of loading**: Cf. *Gabriëlle Wehr*

- **OR domestic mandatory law** identified through a conflict-of-law rule (but which CLR?)

  > if not possible > CMR applies

Provisional conclusion

Thank you for your attention.

Any questions ?