A few decades of judgements issued by the Luxembourg courts on litigations relating to the application of the Geneva Convention of 19 May 1956, known as the CMR Convention on the Contract for the Carriage of Goods by Road

The purpose of this memorandum is to present judgements relating to the CMR Convention in a brief and clear manner, with the aim of improving prevention for the parties concerned (Part A).

At the end of this memorandum, the author will then draw some lessons to be learned from these various litigious cases (Part B).

A. CHRONOLOGICAL DESCRIPTION OF DECISIONS ISSUED BETWEEN 1981 AND 2021

1. Court of Appeal: 27.01.1981 docket 4893

- The facts: Transport subcontracted in whole by one carrier to another. Subcontracted carrier listed on the consignment note from the beginning, next to the contracting carrier, the subcontractor having agreed to carry the goods.

- The legal issue: **Limitation of action** against carriers? **Liability**?

- Legal basis: Articles 32 and 39 (4) of the CMR Convention, Article 34

- The court judgement: According to Article 39 (4) of the CMR, in the case of recourse between carriers, the limitation period runs either from the day of a final court judgement, establishing the compensation to be paid, or from the day of the actual payment. Although Article 39 (4)of the CMR is included in Chapter VI of the Convention, the court considers that it is applicable to all claims arising between carriers, even if the transport operation is not, strictly speaking, considered to be "successive".

  In cases whereby the transport is subcontracted in whole by one carrier to another carrier, it is not, strictly speaking, a matter of successive carriers under the terms of Article 34 of the CMR, which only covers situations whereby several carriers succeed one another in performing part of the transport operation.

  However, if the subcontractor is listed on the consignment note alongside the original contracting carrier from the outset and has also agreed to carry out the transport operation, the two carriers are thus jointly and severally liable to the sender, as they are both party to a joint venture.

  In the event of damage caused by transport, the carrier must make full reparation even though it is bound by a performance obligation. The mere fact that the damage has been ascertained is sufficient to establish the carrier to be at fault, unless it proves that the damage was caused by an extraneous cause not attributable to it.

2. District Court: 24.01.1985 docket 28000

- The facts: Not available
- The legal question: Notion of **successive transport**? **Damage prior to take over**, **proof**, absence of reservations?
- Legal basis: Articles 9 and 34 of the CMR
- The court judgement: Successive carriage occurs when, with a view to the performance of a single contract for the carriage of goods, several carriers operating with the same mode of transport successively take charge of the same goods, without intermediate acceptance and under the same consignment note.

  There is one and the same contract of carriage if it is concluded between the principal and one of the carriers. If the principal itself has concluded several contracts, the carriers follow one another but are not successive.

  The carrier is only exempt from liability if it proves that the damage occurred either before the goods were taken over or was attributable to a defect in the goods. The presumption established by Article 9 CMR is only simple and only applies until the contrary is proved: The carrier is therefore not liable for damage prior to taking over the goods, even if it has not made any reservations.

3. District Court: 27.03.1985 docket 28593

- The facts: Not available
- The legal issue: The notion of **force majeure** and **exemption from liability**.
- Legal basis: Article 17 (2) of the CMR
- The court judgement: Article 17 (2) of the CMR Convention should not be interpreted in the sense of force majeure, but rather in the sense of an extraneous cause which cannot be imputed to the carrier, which means that the carrier, who is not obliged to be heroic, is exonerated if it establishes that it was materially impossible for him to avoid the occurrence of damage, that it was normally diligent and that it took all the necessary precautions in view of the nature and conditions of the performance of the contract.

4. Court of Appeal: 02.07.1986 docket 8726

- The facts: Theft of a lorry from a locked and guarded enclosure in the compulsory car park of Aosta customs. Lorry was locked and anti-theft system was activated. Customs clearance papers had to be presented in order to leave the car park.

- The legal question: **Discharge of liability** and **fault of a** discharging **third party.**
- Legal basis: Article 17 (2) of the CMR
- The court judgement: The Court of Appeal noted that it was clear (proven elements) in this case that the driver of the stolen lorry in question had parked his vehicle in the locked and guarded enclosure of the compulsory car park of Aosta customs; and that he had locked it and activated the anti-theft system. It was further established that the lorry was stolen between 7.30 pm (19:30) and 11 pm (23:00), i.e., whilst the driver had his evening meal, and despite the fact that the car park in question could not be exited without presenting customs clearance papers. Whereas, for these reasons, the discharge of liability invoked by the respondent should be admitted and the appellant's appeal should be dismissed.

5. District Court: 04.10.1988 dockets 37553 and 38188

- The facts: Not available but clearly related to a stowage issue for which the carrier was not liable.
- The legal issue: Carrier's **liability** and **grounds for exemption.**
- Legal basis: Article 17 (1) of the CMR
- The court judgement: In order to be exonerated from the presumption of liability, the carrier is not required to precisely and fully prove the origin of the damage. It is sufficient for it to establish the factual circumstances of the transport and of the accident. It must then prove that these circumstances give rise to reasonable belief that the damage may have been caused by the cause invoked (in this case, a stowage issue which did not come under its prerogatives).

6. District Court: 24.05.1989 dockets 37459 and 284/89

- The facts: Transport in connection with **removal.**
- The legal issue: Applicability of the CMR Convention
- Legal basis: Article 1 (4) of the CMR
- The court judgement: The court confirmed the very clear terms of Article 1 of the CMR Convention, which expressly excludes removal transport from its scope.

7. District Court: 12.07.1991 docket 292/91

- The facts: The driver was surprised by the irruption of an oncoming vehicle in his lane of traffic, causing the lorry to swerve and fall into the ditch alongside the road.

- The legal issue: **Presumption of liability**. What **proof should be** provided for the **discharge of liability**? The notion of **discharge of liability** is more flexible than the classic notion of force majeure.

- Legal basis: Articles 17 (1) and 17(2) of the CMR

- The court judgement: The court recalled that it is generally accepted in doctrine and in case law that the discharge of liability referred to in Article 17(2) of the CMR Convention is more flexible than the classic notion of force majeure in domestic law, without including the character of unpredictability, the only requirement being that the event must be unavoidable or insurmountable in order for the carrier to be exonerated.

  However, it is up to the trial judge to assess the conduct of the carrier, or more particularly its driver, in each individual case, in order to verify whether the alleged event was insurmountable both in terms of its origin and its consequences. In application of the common law criteria of the burden of proof, the carrier must successively establish the reality of the circumstance invoked and its causal link with the damage; proof which must leave no doubt as to the origin of the damage.

  Finally, the court maintained that due to the configuration of the site (width of the road: 5m to 7.20m, split into two lanes, 1.5 to 2.5 m roadside, flat and dry road with good visibility, vehicle on the opposite side of the road was a small car (Renault 5), the driver should have been able to avoid the collision without going into the ditch alongside the road. The court further maintained that the carrier failed to establish that it could not remedy the consequences of the accident or mitigate them by safeguarding the goods in part or in whole.

8. District Court: 09.12.1994 docket 42954

- Facts: Not available.

- The legal issue: Loss or damage is linked to **particular inherent risks**.

- Legal basis: Articles 17 (4) and 18 of the CMR

- The court judgement: The carrier invoked the defective packaging of the goods, respectively the loading by the sender and the nature of the goods, in an attempt to discharge itself of liability. The court maintained that, in the absence of proof and of any indication in the documents submitted, the particular risk of defect could not be retained any more than that of carelessness or clumsiness on the part of the sender while loading the goods, in the absence of proof of any precise, material elements.

  However, the risk associated with the nature of the goods would be accepted in the case of fragile objects, which may explain the damage.

The court stated that the principal is not required to establish the true cause of the loss or damage and must simply quash the carrier's case by demonstrating that its explanation of the damage does not hold up in court.
If the claimant succeeds in providing this proof, the presumption of origin of the damage is removed and the burden of proof falls on the carrier.

9. District Court: 24.11.2000 docket 48967

- The facts: Transport of cigarettes by tarpaulin-covered lorry. Theft of goods overnight.
- The legal issue: Presumed **liability** of the carrier under Article 17 CMR. **Gross negligence**, bordering onto fraudulent misrepresentation .
- Legal basis: Articles 17 and 29 of the CMR
- The court judgement: Referring to the criteria set out in French case law for determining gross negligence, the court found that the carrier was guilty of gross negligence in the case of coveted goods, transported in a lorry with only a tarpaulin cover, which was parked overnight in an unguarded car park. The fact that the driver was sleeping in the adjacent cabin was not considered to be a sufficient deterrent.

10. District Court: 16.02.2001 docket 49965

- The facts: Transport of an engine by lorry. Damaged engine. The carrier invoked the **nature of the goods** as a cause for discharge.
- The legal issue: What types of goods are considered to be inherently susceptible to loss or damage?
- Legal basis: Articles 17 (4) and 18 (2) CMR
- The court judgement: The question of whether goods are particularly liable to loss or damage by their very nature must be considered without regard to the precautions which may be required of the carrier.

  The concept of "*inherent nature*" refers to goods that are particularly or naturally susceptible or predisposed to certain types of damage. Such goods include fruit, flowers, vegetables, flower bulbs, greenhouse plants, chocolate biscuits, cheese, meat or fish, combustible goods, new goods and glass, but exclude steel machinery, cladding stones or aluminium foil rolls.

  An engine weighing 375 kg, even if it features irregular shapes, is nevertheless a solid piece of equipment, meaning that it does not fall into the category of goods which are exposed by their nature to waste or damage. As a result, Article 17(4) of the CMR is not applicable in this case.

11. Court of Appeal: 17.10.2002 docket 25150

- The facts: Transport of Minocyline HCL from Milan to Luxembourg airport, entrusted to the carrier on 10 September 1996. Grouping and transport by road from Milan to Luxembourg in a trailer lorry. The driver stopped and parked his lorry at about 8 pm (20:00) in summer (i.e. in daylight) in the car park of a supermarket, approximately 100 metres from the offices of one of the companies concerned, which had a guarded indoor car park.

  The driver left for 20 minutes to buy food and when he returned the tractor-trailer had disappeared, even though the doors were locked, and the anti-theft system was activated.

  Theft of all the goods at the Italian-Swiss border.

  The subrogated insurers invoked the carrier's gross negligence in order to claim full compensation for the loss in a document initiating proceedings on 5 October 1999.

  At first instance, the court declared the action inadmissible and quashed by the one-year statute of limitations, considering that the driver had not committed gross negligence in the circumstances. The insurers and the carrier appealed.

- The legal issue: Should the Warsaw Convention on air transport be applied to the road transport section or the CMR Convention? Is the claim **time-barred** after one year or after three years (gross negligence)? Can the carrier be held liable for **gross negligence**?

- Legal basis: Articles 17, 18 (3), 23 (3), 29 and 32 (2) of the CMR

- The court judgement: The Court of Appeal maintained that the CMR Convention applies to the relationship between the parties, insofar as there was no action filed against the air carrier. The court indicated that, in order to interrupt the limitation period, the claim must be addressed to the carrier, although the text of the CMR Convention does not specify who must make this claim.
  It considers that the claim can only be made by the entitled party, the consignor or the consignee, or the qualified agent of either party, such as the freight forwarder.

  It also notes that the shipper's agent sent a letter of claim to the carrier the day after the incident (11 September 1996), which was not rejected by the carrier in accordance with the procedures provided for in the CMR Convention, meaning that the limitation period for the action was interrupted (and did not apply again for the benefit of the carrier).

  Despite a detailed offer of proof of the circumstances in which the theft was committed and, in particular, the fact that the driver was prohibited from parking his tractor-trailer in the enclosed car park equipped with an anti-theft system with motion detection, the Court rejected the offer of proof, considering that the facts offered in proof did not establish that the carrier had taken all necessary precautions to avoid a theft in a place known for this type of incident, and that its offer of proof must be rejected on the grounds of lack of relevance.

The court therefore considered that the carrier had not exonerated itself from the presumption of liability.

However, it would consider that there was no gross negligence on the part of the carrier triggering the exceeding of the compensation cap.

12. District Court: 19.05.2004 docket 83640 and 86163

- The facts: Transport of new computers by tarpaulin-covered lorry. Stopped at an unsupervised area in the early evening after having driven only about 100 km. No stop at the supervised area located 150 km from the chosen location. Possibility of spending the night in the transport company's warehouse and not leaving until the morning.

- The legal issue: **Liability** of the carrier and the issue of **gross** negligence equivalent to fraudulent misrepresentation

- Legal basis: Articles 17 and 29 of the CMR / Chapter IV of the CMR

- The court judgement: Gross negligence is defined by the French Court of Cassation as negligence of extreme gravity, bordering on to fraudulent misrepresentation and indicating the inability of the carrier, which has control over its actions, to fulfil the contractual mission that it has accepted (Cass.com. 17 December 1951; BT 1952, p.234). In the case of the theft of goods transported by road, some criteria have been retained as determining factors by French case law in order to condemn the road carrier:

  - A coveted commodity, provided that the carrier was aware of the nature of the cargo ;
  - Risky parking, e.g., on the public highway or in an unguarded car park,
  - A general lack of diligence.

  In this case, the District Court maintained that all the criteria were met as it was established that the lorry carrying new computers, and therefore the coveted goods, was not locked with a padlock, but was covered by a simple tarpaulin that could easily be cut away if the lorry stopped at an unguarded area, that the driver was aware of the nature of the cargo, and that the lorry was not in a position to stop at an unguarded parking area, that it nevertheless stopped in the early evening and after having travelled only about 100 km to an unguarded parking area, whereas he could have continued on his way to a guarded parking area located 150 km from the chosen location, and could have respectively spent the night in a warehouse owned by the transport company and leave in the early morning.

  The court therefore found a general lack of diligence, with sufficient gravity to amount it to gross negligence, and thus denied the carrier the possibility of invoking the provisions of Chapter IV of the CMR which limit or exclude liability or reverse the burden of proof.

13. Court of Appeal: 29.03.2006 docket 29261

- The facts: Goods transported by two different means of transport: Unloading from a lorry and then reloading into an aircraft.

- The legal issue: **Successive** transport or **combined** transport?

- Legal basis: Article 1, 2 and 34 of the CMR

- The court judgement: Article 2 of the CMR Convention continues to apply if the vehicle containing the goods is carried by sea or air over part of the journey without transhipment.

  In this case, the goods had to be transported by two different means of transport after being unloaded from the road lorry and reloaded onto an aircraft.

  Since there has been a case of transhipment, Article 2 of the Convention does not apply (Jurisclasseur Transport fasc.775).

  Article 34 of the Convention refers to successive carriage, which concerns a service performed by successive road carriers. The court noted the existence of a combined transport operation, carried out by several carriers who are subject to different legal regimes, in order to exclude the application of the CMR in the relationship between the consignor and the air carrier.

14. Court of Appeal: 19.03.2008 docket 31184

- The facts: Chilled transport of sweetcorn cobs (high sugar content) in bulk and in wooden boxes (i.e., box pallets) from Morocco to England. The goods were refused at destination due to damage caused by failure to maintain the regulated temperature, and damage was noted.

  Temperature readings indicated a cooling system shutdown and defrosting issues.

  The carrier invoked a defect in the goods, the inherent nature of the goods, and a defect in the packaging with a view to avoiding liability

- The legal issue: **Liability** of the carrier? Exonerating cause linked to the **defects in the packaging**?

- Legal basis: Articles 17 (1), 17 (2), 17 (4) and 18 (2) of the CMR

- The court judgement: In order to benefit from the presumption that the damage was caused by the defective packaging, the transport company must prove that the packaging was defective and that there was a possibility of causation of the damage.

  Moreover, this possibility cannot be theoretical or hypothetical; it must at least be likely that the damage is the result of defective packaging. Regardless of the likelihood, the possibility is enough, there is no question of requiring proof of causality (Refer to: Jacques Putzeys, “Le contrat de transport routier de marchandises” n°678 et 682).

The expert commissioned by the carrier's insurer had provided a scientific article indicating that sweetcorn should not be processed in bulk unless it is heavily covered with ice, which was not the case during transport.
The Court of Appeal then maintained that (i) the goods had not been arranged in such a way so as to ensure that they were protected against transport risks and that there had been a defect in the packaging, and that (ii) in view of these circumstances, it was likely that the difficulties in maintaining the required temperature in the lorry were due to overheating caused by the defect in the packaging, which was presumed to have caused the damage.

15. District Court: 19.11.2008 docket 110940 and 856/08

- The facts: Transport of portable computers (laptops) between Luxembourg and Sweden. Parking of the lorry containing covetable goods covered with a tarpaulin in an unfenced service station car park with no surveillance system. Theft committed during the night by cutting the tarpaulin whilst the driver was asleep in the cabin. Lorry did not have an anti-theft system.

- The legal issue: What is **gross negligence**?

- Legal basis: Articles 3, 17, 18 and 23 of the CMR

- The court judgement: The driver knew what he was transporting. Even the presence of the sleeping driver in the lorry is not sufficient to discourage, or even prevent, thieves from discreetly identifying the contents of a tarpaulin-covered lorry's cargo and then seizing the goods.

  The court recognises the existence of gross negligence on the part of the carrier, excluding the limitations of liability and compensation.

16. District Court: 04.12.2008 docket 110529 1258/2008

- The facts: Transport of portable computers (laptops) between Luxembourg and Sweden. Part of the cargo entrusted disappeared during transport - namely a pallet containing 56 items.

  Total inability of the carrier to provide any information on the circumstances of the disappearance of the goods. The insurer compensated the victim and took action against the carrier.

- Legal issues: Notion of **gross negligence**?

- The legal bases: Articles 17 and 23 of the CMR

- The court judgement: The court noted that gross negligence is defined by the Court of Cassation as negligence of extreme gravity, bordering on to fraudulent misrepresentation and indicating the carrier's inability to fulfil the contractual mission that it has accepted (Cass.fr.com. 17.12.1951: BT 1952, 234). It is a fault of exceptional gravity that is characterised by the contempt with which the goods are treated (Cass.fr.com. 26.09.2006: Juris-Data n°2006-035180).

  The court found gross negligence on the basis of various elements:
  - Covetable commodities;
  - Total lack of explanation for the circumstances of the disappearance;
  - Lack of regard for its core obligations;
  - Flippancy ;
  - Lack of evidence of special precautions.

17. District Court: 04.12.2008 dockets 112818, 116810; 1259/08

- Facts: Different types of transport without transhipment (road and rail). Theft during transport. Circumstances of the theft and time of the theft not established.

- The legal issue: Which rules to apply: Application of the CMR or application of the CIM (Uniform Rules Concerning the Contract of International Carriage of Goods by Rail) for the related partial transport? Conditions set out in Article 2 of the CMR and presumption.

- Legal basis: Articles 2, 17 (2)and 23 of the CMR

- The court judgement: Finding of a transport operation subject to the CMR because it was carried out continuously without transhipment by a combination of road transport and another mode of transport.

  If it is proved that the damage was not caused by the road transport, but by another means of transport, the liability of the road carrier is determined not by the CMR Convention but rather by the applicable mandatory rules, as if a contract had been concluded specifically between the sender and the non-road carrier for that particular means of transport. In the absence of such rules, the CMR Convention will apply.

  A person invoking this rule must prove the mandatory nature of the liability rules, but it must also rebut the presumption that the loss is presumed to be caused by an event occurring during the road phase of the transport. They can do this by proving that the damage could only have occurred during and as a result of the non-road transport.

  Without proof of the circumstances of the theft and of gross negligence on the part of the carrier, the limitation of the carrier's liability under Article 23 CMR remains valid.

18. Court of Appeal: 27.05.2009 docket 33330

- The facts: Transport performed by Company BB while the contract is concluded between AA and CC. There is no evidence that BB is a party to the transport contract or that it has acceded to it.

- The legal issue: Distinction between **successive transports** and the **Transport Commission**?

- Legal basis: Articles 3 and 34 to 36 of the CMR

- The court judgement: Reminder of the concept of successive carriage With a view to the execution of a single contract for the carriage of goods, several carriers belonging to the same means of transport successively take charge of the same goods, without intermediate receipt and covered by the same consignment note (Refer to: Jacques Putzeys, “Le contrat de transport routier de merchandise”, n°285).

  There is a transport commission when a person undertakes, in return for remuneration, to carry out a transport operation, but has this transport operation carried out in their own name and on their own behalf by another carrier (same author, No. 74).

  BB cannot be held liable on the basis of Articles 34 to 36 of the CMR, as neither its acceptance of the goods nor the consignment note are established, and it is not known which carrier was performing the part of the transport operation during which the damage occurred.

  Had there been a transport commission, only the liability of Company CC could be considered on the basis of Article 3 CMR: "*The carrier shall be responsible, as for its own acts and omissions, for the acts and omissions of his servants and of all other persons whose services it uses for the performance of the transport operation when such servants or persons are acting in the exercise of their functions*".

19. District Court: 07.10.2010 docket 120759; 1082/2010

- The facts: Recourse action by one carrier against the other to whom it has entrusted the performance of the transport operation.

  Carrier A identified as such on the consignment note but who did not materially intervene in the transport operation carried out by K. Consignment note signed by the driver of Company K.

  Theft during transport by Company K.

- Legal issues: Single or **successive** transports? Recourse? Competent court?

- Legal basis: Articles 31 (1), 34 and 39 of the CMR

- The court judgement: According to Article 34 of the CMR, if a carriage governed by a single contract is performed by successive road carriers, each of these carriers assumes responsibility for the performance of the entire carriage, the second and each of the

subsequent carriers becoming, by means of their acceptance of the goods and the consignment note, parties to the contract under the terms of the consignment note.

Although Article 35 of the CMR provides for a certain formalism, requiring the subsequent carrier to be named in the consignment note, case law is flexible: It does not matter that the subsequent carrier does not bear its name on the consignment note (Cass. fr. comm. 11.12.1990 bull. civ. n°232 p.223 and CA Paris 26.09.1996), what is important is its adhesion, which is marked by the fact that it intervenes under a single consignment note. By signing the consignment note, K's driver had signed the transport contract. A single contract has been formed.

In regard to the statements in the consignment note, Company A must be regarded as having been the principal carrier, irrespective of its actual involvement in the transport operation, whilst Defendant K must be regarded as a successive carrier, within the meaning of the CMR Convention.

Claimant A, having compensated the consignee for the loss of the goods, is entitled to file recourse action against the actual carrier, and this action falls under the application of Articles 34 et seq.

In this respect, Article 39 (2) allocates jurisdiction to the court of the country in which one of the carriers concerned has its principal residence, its principal place of business, or its branch or the agency through which the contract of carriage was concluded.

As the defendant is domiciled in Ireland and has no connection with Luxembourg - the place where the goods were taken over - the Luxembourg District Court must declare that it **has no territorial jurisdiction to rule on the claim.**

20. Court of Appeal: 11.07.2012 docket 34166

- The facts: Transport entrusted to one company which then subcontracted it to a second company, which then subcontracted it to a third company.

  Transport by semi-trailer lorry carrying nickel cathodes from Rotterdam via Italy. Arrival at the end of the day and overnight stop in the foreyard of a fenced warehouse (chain and padlock) in an industrial area. The warehouse is guarded by contracted security with random nightly rounds.

  Semi-trailer not equipped with a *king pin locking device*.
  Theft of the trailer at night, after the lock on the gate was broken.

  The carrier claims that it was not informed of the nature and value of the goods and therefore of the risk of theft. The carrier states that it did not receive any special security instructions.

  The insurer first declares that it is acting as a principal shipper, and secondarily that it is acting on the grounds of a transfer of receivables.

The English insurer has compensated the victim for its loss and is filing an action against the carrier on the basis of a transfer of a receivable, subject to German law.

- Legal issues**: Gross negligence**? Influence of the carrier's knowledge of the **nature of the** (covetable) **goods**. Effect of **lack of security instructions**? **Law applicable** to the transfer of the right of action against the carrier?
- Legal basis: Articles 13, 17, 29 (1) and 36 of the CMR

- The court judgement: The Court maintained that the carrier could not be unaware of the nature of the goods given the documents made available to it. It was its responsibility to inquire about this with its client.

  Company A's claim under Article 36 of the CMR as a consignor is declared to be unfounded.

  The subsidiary claim under Article 13 for a transfer of rights and shares is reserved, inviting the parties to conclude under the German law applicable to the transfer and its validity.

21. Court of Appeal: 05.06.2013 docket 34166

- The facts: Same as above.

- Legal issues: Who is entitled to file the action against the carrier? Conditions for the validity of an **transfer of action** under German law. Can **gross negligence** be considered?

- Legal basis: Articles 13, 17, 29 (1) and 36 of the CMR

- The court judgement: The right to file an action against the carrier is also held by the consignee of the goods (Company C), and in this case, the latter has transferred its rights to Company A (insurer). This transfer is governed by German law which provides that the validity of a transfer is subject to two conditions: A valid transfer agreement and a transferrable claim.

  The claim must be:
  - Determined or determinable (here the rights of the consignee provided for in Article 13 paragraph 1of the CMR Convention);
  - Transferrable (under German law all rights can be transferred unless otherwise provided by law or contract),
  - Belong to the transferor.

  The court maintained that the conditions were fulfilled so that the transfer was valid. A (insurer) can therefore file its action against carrier B.

  The Court recalled that the consignee's loss exists in principle insofar as there is damage to the goods, and the consignee is entitled to file action from the moment of the loss of

the goods (Note: In this case, it was a theft / on the basis of Article 13 CMR). The Court then maintained that *"It is therefore irrelevant that Company C never paid for the stolen goods*".

The carrier invokes force majeure as a cause for exoneration: insurmountable and unforeseeable theft (secured lorry, parked in a closed and guarded warehouse).

The court maintained that Article 17 of the CMR requires that the event must have been unavoidable in its cause, and that its effects must have been insurmountable. Unpredictability is not required in order for the event to be deemed exonerating for the international road carrier. It is not the event itself that is to be considered, but rather the conduct observed by the carrier before and after the event.
Unavoidable circumstances must be understood not only at the time when the event causing the damage occurs, but also before it occurs. Failure to take the necessary precautions to avoid the damage excludes the benefit of these grounds for exoneration. It is up to the carrier to prove that it had taken all of the necessary precautions to avoid the harmful consequences of an unavoidable event (Refer to: Court 17.10.2002 docket 25150).

Theft (with assault) of a vehicle in Italy, even if locked, is not considered an unavoidable event (Court 11.02.1998 Pas. 30 p. 481). Thefts of lorries (or their cargo) have become so widespread in Italy that the professional carrier can no longer ignore the risks involved and the recommendations of insurers and the profession to park only in fenced and guarded lots.

The court noted that the driver regularly made the same journeys and that he could therefore not have been unaware of the risks of cargo theft in Northern Italy. By abandoning the semi-trailer, which was not fitted with a "*king pin locking device*" in the warehouse of Company E, which was not sufficiently secured and guarded, the driver did not take all necessary precautions to ensure the immobilisation of the vehicle…. Company B has not exonerated itself from the presumption of liability that it bears.

The court also maintained that the carrier was guilty of gross negligence in order to apply Article 29 of the CMR, and to reject the application of Article 23 (3), which relates to the compensation cap.

22. Court of Appeal: 16.01.2014 docket 37638

- The facts: Transport from Italy to Uzbekistan. Transhipment to Krakow. Damage during transport from Krakow to Uzbekistan.

  The buyer has borne the costs of repairing the goods and is claiming compensation.

  Transport agreement *sui generis* with reference to the CMR Convention. No legible consignment note. Transport commissioner has substituted an actual carrier.

- The legal issue: **Qualification of the contract** between parties? Quality of **contractual carrier**? **Exemption of** the carrier?

- Legal basis: Articles 3, 4, 6, 9.1, 17, 18 and 23 of the CMR

- The court judgement: An agreement entitled "transport agreement", whereby one party is referred to as the sender, implies that the contracting party handling the transport of the goods from the place of collection to the place of delivery must be qualified as a contractual carrier, even if it has subcontracted the entire journey to a contractor.

  The exonerating event invoked by the carrier must be unavoidable in its cause with insurmountable effects. The proof must be provided by the carrier. The court applies the compensation ceilings provided for by the CMR and maintains that transport and customs costs are only compensable in proportion to the loss or damage suffered.

23. Court of Appeal: 23.01.2014 docket 37789 (appeal on points of law)

- The facts: Deliveries of carpet containers from China to Trier via Rotterdam.

- The legal issue: Classification of the relationship between the parties: **Freight forwarder** contract or CMR transport contract? Is **the delay attributable** to the maritime carrier or the road carrier?
  Failure to contest the delay. **Wrongful retention** of two undelivered containers and consequences.

- Legal basis: Articles 1 and 23 (4) of the CMR

- The court judgement: The CMR Convention is not applicable as the delay is due to the maritime transport. The carrier has wrongfully detained two containers and must compensate the commercial loss.

24. Supreme Court: 12.03.2015 docket 3425 (19/15)

- The legal issue: Did the Court of Appeal give the correct reasons for its judgment of 23 January 2014 (see above). Is there a contradiction in the reasoning?
- Legal basis: Article 89 of the Luxembourg Constitution / Article 249 al.1ier of the Luxembourg New Code of Civil Procedure / lack of legal grounds / violation of Article 61 of the Luxembourg New Code of Civil Procedure / Articles 1134-1 and 1134-2 of the Luxembourg Civil Code / Article 1612 of the Luxembourg Civil Code.

- The court judgement : Dismissal of the main appeal and declaration that the cross-appeal filed by the defendant in cassation has been withdrawn.

25. Court of Appeal: 27.05.2015 dockets 39651 and 39673

- The facts: Three parties involved. A contract for services between A and B. Company B commissioned Company A to move its French installations, involving disconnection, dismantling, transport, assembly, and connection in the new Luxembourg plant. A

transport contract was subcontracted by A to C. Four different transport dates were required. A lorry was involved in a road traffic accident in the Grand Duchy of Luxembourg which damaged part of the goods being transported.

Note: B has entrusted A with the dismantling and custody of the goods until loading. B sued Companies A and C in their capacity as carriers (but not as subcontractors of A). B also involved its insurer in the proceedings and finally withdrew its action. B brought D into the proceedings as insurer of undertaking A.

At first instance, in its judgment of 23 November 2012, the District Court maintained that:

- Parties A and B were in a contract for services or industrial contract because the transport was not the essential aspect of the contract. Their relationship is not subject to the CMR, but rather to common law. A is bound to its client by a performance obligation which has not been fulfilled.
- Parties B and C are not bound by a contract of carriage. B's action against C is an action in tort (fault, causal link, and damage).
- The court declared A's action against its subcontractor C as inadmissible.
- B's claim against A's insurer was rejected because A's insurance contract did not cover this type of risk.
- The court found that C was at fault for having made an inappropriate choice of lorry and for the inappropriate speed of the driver when he entered a roundabout, leading to the loss of control of the lorry, and the resulting accident. The court found A and C jointly and severally liable, considering that the combined behaviour of the two companies had contributed to the damage.

Company A appealed and asked to be relieved of all liability, arguing that it was not responsible for the damage, if not exonerated by the fault of C, which had the characteristics of force majeure. As an alternative, it asked that C be ordered to indemnify it, if not to establish shared liability.

C also appealed, claiming that A and B were bound by a contract of carriage. C invoked the one-year limitation period provided for in the CMR.

- The legal issue: Which contracts are binding for the parties? Who has **standing to act**? What **responsibilities**? What is the **limitation period**?

- Legal basis: Articles 1, 32 of the CMR

- The court judgement: The court confirmed that A and B are bound by a contract of enterprise. Since A is not a transport company, it has delegated this part of the contract to C.

  The court also confirms that A and C are bound by a CMR contract of carriage, particularly in regard to the question of the rules applicable to the guarantee claim.

  The court decided that A is the consignor of the goods in regard to the carrier. A is bound by a performance obligation towards B with regard to the carriage. A must answer for the actions of C, which it has substituted for itself for the carriage.

In the basis of the judgment, reference is made to a French Supreme Court decision issued on 22 February 1994, which stated that the consignee (in this case B) has the right to take direct action against Carrier C.

Company A, which had already dismantled the installations and goods located in France, had custody of them until the time of loading and, having had the obligation to transport and reinstall the goods on a production site, must be considered vis-à-vis the carrier as the sender of the goods.

The judgment of first instance is confirmed with regard to A's performance obligation towards B. It is maintained that A is liable for the actions of C, which it has substituted for the transport.

The court noted that the delivery took place on 25.10.2007 and maintained that the limitation period was one year, concluding that the recourse against Carrier C by writ of 17.11.2008 was time-barred, in the absence of any claim or cause for interruption or suspension of the limitation period.

Finally, the court noted that A's claim against C was filed during the pleadings on 17 October 2012, i.e., well beyond the one-year (and three-month) time limit provided for by the CMR.

26. Court of Appeal: 27.05.2015 docket 40045

- The facts: Subcontracting of the contract of carriage. Order to block delivery given by the sender and transmitted to the subcontracted carrier. Delivery notwithstanding the blocking order. Unpaid goods and consignee declared bankrupt in August 2011. Claim for damages against the main carrier for the price of the goods delivered. Summons filed by the subcontracting carrier.

- The legal issue:
  - First instance: The qualification of the **principal carrier** is independent of the question of actual transport. The status of principal carrier is determined by the will of the parties and, in particular, by the information provided in the consignment note for contractual liability. As a third-party company was indicated as the carrier in the consignment note and the presumption of proof attached to this indication had not been overturned, the claimant's action was dismissed and the application to intervene was declared moot.
  - On appeal: The appellant produces documents (request for quotation, price proposal and acceptance, transport invoice) aimed at overturning the statements in the consignment note concerning the identity of the carrier. The company indicated in the consignment note is only responsible for the storage, customs clearance, preparation and provision of the goods for transport. The mention of the third-party company on the consignment note would be a material error.

    The claimant invokes twice **gross negligence**: Delivery despite the blocking order, failure to notify the delivery in due course.

The defendant invoked Article 9 of the CMR and states that the actual carrier would be the one to which the third party subcontracted the transport. The defendant argues that there is no causal link between the damage and the actions of the carrier, the damage being, by its account, linked to the bankruptcy of the consignee.

The defendant contests any wrongdoing, stating that it had sent the blocking order to the actual carrier and invokes Article 23(3) of the CMR with a view to limiting the compensation.

- Legal basis: Articles 3, 4, 6, 9 and 23 (3) of the CMR

- The court judgement: The court analyses the information in the one and only consignment note available, which was never corrected by the sender for an erroneous entry.

  It noted that the defendant is not a principal carrier. It then distinguished between the operations of preparation of the goods, the loading operations and the taking over. Taking over is a material and legal act. The taking over also materialises the transfer of the risks to the actual carrier.

  The court considered that the claimant had not rebutted the presumption that the third company was the principal carrier and dismissed its claim for contractual liability against the actual carrier allegedly qualified as the principal carrier on the basis of Article 3 of the CMR, stating that the claimant was not subject to a contractual relationship with the subcontractor.

27. Court of Appeal: 17 November 2016 docket 41191

- The facts: Use of e-freight exchange to use excess freight space on lorries. Company B transported five metal cylinders from France to the UK for €400, at the request of Company A.

  Customs control in Dunkirk revealed the presence of packets of rolling tobacco worth 115,389 euros, hidden in the cylinders. Customs detention of the driver, lorry and trailer. Probation of the company under threat of a fine of 28,000 euros in case of recidivism. Obligation for the carrier to recover the cargo, repatriate the driver and the tractor at a cost of 20,450 euros.

  A criminal complaint was filed and is being investigated.

- Legal issues: **Liability of the principal**? Qualification of the relationship between parties (**commissioning** or transport contract?)

  Evaluation of the loss and nature of the **compensable loss**?

  Application of the “accepted invoice principle” in the presence of invoices for compensation amounts?

- Legal bases: Articles 11 and 31 of the CMR / Article 3 of the Luxembourg Code of Criminal Procedure (criminal cases take precedence over civil cases)

- The Court of Appeal judgement: Civil proceedings relating to civil actions are dependent on criminal proceedings, as regards their ranking and judgment when they are initiated or judged after the public prosecution has been initiated or judged. This dependence is due to the fact that the civil action is an action for compensation for damage that originated in the offence.

  For the judgment of the civil action to be suspended, it is necessary, on the one hand, that the public action was initiated before or during the exercise of the civil action before the civil court and, on the other hand, that the two actions arise from the same facts. For there to be an identity of fact, there must be a common matter between the two actions that the civil court cannot judge without establishing the offence and, consequently, without risking contradicting the criminal court (Court of Appeal 24.05.2004, Pas.33, p.20).

  It is up to the party raising the dilatory exception (Article 3 C.i.Cr) and intending to obstruct the normal course of civil proceedings to demonstrate that the conditions for its application have been satisfied. It is the responsibility of the party requesting a stay of proceedings to establish that the public action is underway and is not the responsibility of the civil court summoned to inquire into the status of the proceedings (Cass. fr. civ. 30.04.1970, D. 1970, Somm.189; Com.27.11.1978, Gaz. Pal. 1979, I, Panor.138).

  The evidence can only be provided by an introductory indictment from the Public Prosecutor's Office, a complaint with civil party status in the hands of the investigating judge, or a direct summons before the criminal court.

  The court also recalls that the rule that *" criminal cases take precedence over civil cases* " is only applicable when the public action is brought before a court of the same country.

  The court then noted that:
  - Party A did not provide evidence of the initiation of the public prosecution;
  - Assuming that there is a public action in the Grand Duchy, there is no common question that the civil court cannot decide without establishing the offence and, consequently, without the risk of contradicting the criminal court.

  The judgment stated:
  - A's status as a consignor and the application of the CMR Convention to the relationship between the parties ;
  - A's obligation to ensure the regularity and conformity of the goods entrusted to B;

  - The circumstances of A's entry into business relations with the persons from whom the disputed consignment came, and the instructions for arranging delivery to England, were such as to arouse the suspicion of any normally prudent and discerning person;
  - The load of contraband concealed in the metal cylinders was therefore neither unpredictable nor insurmountable.

In regard to the question of the accepted invoice, the court recalled that an invoice is the affirmation by a trader of a claim related to the execution of a contract. It is intended to prove the existence of a commitment and not its non-execution. A claim for damages therefore cannot be subject to an invoice.

In view of the lack of evidence concerning the total damage claimed, which resulted from a detailed analysis of the documents, the Court of Appeal awarded an amount of 10,000 euros *ex aequo et bono* as compensable damage, as well as financial compensation for the transport (400 euros).

28. District Court: 28 October 2018 docket 115022

- The facts: Multiple transports concluded between parties. Claim for payment of invoices.

  Distinction between international and national transport.

- Legal issues: Does the one-year **limitation period** provided for in the CMR apply to **actions for payment** of transport-related invoices?

- Legal basis: Article 32 of the CMR, Articles 108 and 109 of the Luxembourg Commercial Code, Article 2248 of the Luxembourg Civil Code

- The court judgement: The court distinguishes between international transport subject to the CMR and national transport subject to the Luxembourg Commercial Code.

  The CMR Convention provides for a one-year limitation period starting three months after the conclusion of the transport contract. This limitation period may be interrupted by the causes provided for by the law of the court summoned to rule on the litigation (i.e., Luxembourg law). The written claim only suspends the limitation period for actions filed against the carrier and not for actions seeking payment brought by the carrier against its clients.

  The court maintained that the one-year time limit provided for in the CMR applies to all legal actions related in any way to the international carriage of goods, as governed by the CMR. "*It covers both actions filed by the consignor or the consignee against the international road haulier and those filed by the haulier against its client*.

  The court then analysed the dates of the transport orders, and then the dates of payment on account on the invoices, which constituted a simple presumption of acceptance of the invoices (Court of Appeal 07.01.2004 docket 26937).

  On the grounds of Article 109 of the Luxembourg Commercial Code (principle of the accepted invoice) and Article 2248 of the Luxembourg Civil Code (interruption of the statute of limitations by the debtor's acknowledgement of the right), the court maintained that the statute of limitations was interrupted by the acknowledgement of the debts resulting from the unconditional payment of advance payments. In calculating the time limit, however, the court found that the claim was filed late for the CRM transports.

Regarding transport carried out in the Grand Duchy, the court noted that the applicable law was Luxembourg law and that Article 108 paragraph 3 of the Luxembourg Commercial Code provided for a limitation period of two years for actions seeking payment, filed by carriers.

The claim for payment is declared to be partially founded.

29. District Court: 7 March 2019 docket 87574

- The facts: CMR transport of three pallets containing mobile phones.
  Transport entrusted to a freight forwarder who used a transport company. The three pallets were identified as missing when the cargo was checked on arrival.

  During the journey, the driver stopped briefly (for less than 10 minutes) at a garage to collect spare parts.

  Discussion on where the goods were stolen.

  Driver not involved in unloading operations (no access to the premises on arrival, trailer parked against the warehouse entrance dock, no side view of the warehouse from outside).

- Legal issues: Influence of the freight **forwarding** contract? Application of the CMR?
  Role of the **consignment note**?
  Concept of **unloading** and responsibility for unloading?

- Legal basis: Article 1 (1), Article 4 and 6, 17 (2) and 23 (3) of the CMR
  Article 18 of the Warsaw Convention; Article 96 to 102 of the Luxembourg Commercial Code

- The court judgement: The CMR does not apply to the freight forwarding contract, which only means that its provisions do not normally govern the relationship between principal and freight forwarder. However, the principal and freight forwarder can agree to voluntarily submit their contract to the CMR regime. On the other hand, the provisions of the CMR automatically apply to the relationship between the freight forwarder and the road carrier. In this case, the CMR must be applied to determine the question of the carrier's possible liability.

  The consignment note does not form the contract of carriage but only serves to prove its existence. If the contract of carriage is not contested, it is therefore irrelevant to analyse whether the consignment note contains all of the information required by Article 6 of the CMR.

  The driver confirmed that the three pallets were stored in the middle of the lorry. The claimant did not provide evidence that the pallets disappeared during the brief stop on the way. The carrier is presumed responsible for the loss of the goods until delivery.

The Court stated that the arrival of the lorry at the place of destination does not terminate the contract of carriage. The road haulier must still deliver the goods to the consignee. Delivery is the legal act by which the haulier hands over the goods to the consignee who accepts them. It terminates the contract of carriage, and the goods pass into the custody of the consignee. Unloading may be carried out either before delivery, when it is the responsibility of the carrier, or after delivery, when it is to be carried out by the consignee. However, the CMR does not specify who is responsible for this operation. It is therefore the agreement of the parties that will decide on this matter.

In this case, the parties' agreement is silent in regard to the person of the debtor of the discharge obligation.
Given the circumstances, it must be concluded that it was the intention of the parties that the driver should not be involved in the unloading operations at all, so that it was not his responsibility, nor was it under the supervision of the carrier.

The court maintained that the contract of carriage was terminated before unloading, since this was carried out by the consignee, and stated that the fact that the consignee had unilaterally stated that three pallets were missing was of no consequence to the carrier.

The judges then concluded that the claimant had not provided evidence that the pallets had disappeared between the time of pick-up and delivery in order to reject the claim against the carrier.

30. District Court: 17.05.2019 docket 2018-04646

- The facts: Master contract of carriage between parties A (Luxembourg) and B (Austria) with a clause conferring jurisdiction to the Luxembourg courts and compensation obligations that are stricter than those stipulated by the CMR's provisions.

  B subcontracted the transport to a Polish company, Company C.

  Transport of foodstuffs (26 pallets) in refrigerated lorries from Italy to Poland. The temperature indicated on the consignment note is "0 to +4°C". Temperature check at destination established a temperature of 11°C and then 8°C.

  Unable to record temperatures inside the lorry as the temperature recording mechanism was not working.

  The client's insurance company requested a survey. The driver refused to sign the *survey inspection protocol*.
  The drivers reported a 9.5-hour stop but with the refrigeration unit running regularly. They reported a temperature of 4.5°C to 4.8°C.

  The client had the goods destroyed in their entirety and declared the cost of destruction and the value of the goods.

- Legal issues: **Territorial jurisdiction** of Luxembourg courts? Scope of the **report of the expert** delegated by the insurer?

- Legal basis: Articles 17, 17 (5), 18, 18 (4), 23 (3), 23 (4), 25, 27 and 31 (1) of the CMR, otherwise the contract, otherwise Articles 1782 et seq. of the Luxembourg Civil Code, otherwise Article 103 of the Luxembourg Commercial Code.

- The court judgement: The court retained the jurisdiction clause without retaining its exclusivity. With regard to the expert report, the court maintained that "*insofar as a representative of the carrier was present during the inspection and the C&L report was submitted to the free discussion of the parties, it can be taken into consideration as evidence*."

  The court found the carrier liable but applied Article 23 (3) and the related limitation of liability, whilst noting that the cap stipulated by the CMR had not been reached. The court therefore ordered the carrier to pay compensation.

  With regard to the destruction costs, the court maintained, on the basis of Article 23 (4) of the CMR, that the destruction costs were not to be considered as costs incurred in connection with transport. Moreover, the court considered that, by virtue of Article 41 of the CMR, any contractual stipulation derogating directly or indirectly from the provisions of the CMR is null and void, meaning that the principal cannot claim compensation beyond what is provided for in Articles 23 and 25 of the CMR.

  On the matter of default interest, the court took into account interest from the time of a notice of default as a claim (Article 27 CMR).

31. District Court: 10.10.2019 docket 2019-00764

- The facts: Master contract of carriage between parties A (Luxembourg) and B (Austria) with a clause conferring jurisdiction to the Luxembourg courts and compensation obligations that are stricter than the provisions of the CMR.

  B subcontracted the transport to a Polish company, Company C.

  Transport of foodstuffs (32 pallets) in refrigerated lorries from Poland to Albania. The temperature indicated on the consignment note is "+14°C (+/- 2°C)".

  Shortly after departure, the lorry was involved in a road traffic accident on the motorway and was severely damaged. The refrigerated trailer was severely compromised by the impact. The lorry was towed to a garage for the inspection of the lorry and the goods.

  An expert report was requested by the principal's insurance company and was attended by the expert delegated by the insurer of Carrier B.

  The consignee had refused the damaged goods and the principal had the entire consignment destroyed and is claiming the cost of destruction and the value of the goods.

- Legal issues: **Territorial jurisdiction** of Luxembourg courts? **Prescription of the action** against the carrier?

- Legal basis: Articles 17, 23, 25, 27, 31 (1), 32 and 41 of the CMR, otherwise the contract, otherwise Articles 1782 et seq. of the Luxembourg Civil Code, otherwise Article 103 of the Luxembourg Commercial Code.

- The court judgement: The court upheld the jurisdiction clause without retaining its exclusivity by referring to previous decisions between the same parties.

  In order to verify the limitation periods, the court analysed the concepts of damage and total loss, and concluded that there was no case of total loss of the goods, since the client was able to recover part of the goods in order to destroy them. Article 32 (1) CMR was then applied and reference was made to the doctrine which states that the limitation period runs from the day on which the goods were recovered.

  However, the court applied Article 32 (2) and found that the limitation period had been suspended because the documents attached to the claim had not been returned to the principal, meaning that the liability action against the carrier was not time-barred.

  The carrier requested the nullity of certain clauses of the transport contract on the grounds of Article 41 of the CMR. The court noted that "*it should be remembered that the liability regime established by the CMR constitutes a minimum public policy for those involved in international road transport, as certain clauses tending to aggravate the liability of the road carrier or to increase the compensation ceiling are valid" (JurisClasseur Transport; fasc. 776)*, and concluded that the contested clauses of the transport contract were valid, although they aggravated the liability regime provided for by the CMR.

  Whilst recalling that Article 17 (2) of the CMR implies that the carrier must prove fully and definitely that the damage is indeed the result of the cause invoked, by shedding light on the origins of the damage, and highlighting that the cause of exoneration refers to an unusual and extraordinary event which is inevitable in its cause and of which the effects are insurmountable, the court considered that the carrier still failed to clearly establish the exact circumstances of the accident, although it appeared from the report drawn up by the Polish police that the driver of the vehicle which hit the lorry carrying the goods was at fault, it does not follow that the accident was thus inevitable and insurmountable for the lorry driver.

  Faced with the request for partial exoneration on the grounds of the fact that the principal destroyed all of the goods despite only part of them being damaged, the court considered that the damage was caused by the accident and the subsequent non-functioning of the refrigeration unit and not by the decision to destroy it. The carrier would therefore be liable for all factors that caused the damage.

  With regard to the destruction costs, the court maintained, on the basis of Article 23 (4) of the CMR, that the destruction costs were not to be considered as costs incurred in connection with transport. Moreover, the court considered that, by virtue of Article 41 of the CMR, any contractual stipulation derogating, directly or indirectly, from the provisions of the CMR is null and void, meaning that the principal cannot claim compensation beyond that which is provided for in Articles 23 and 25 of the CMR.

In regard to the question of default interest, the court considered the interest from the letter of the principal's representative as a claim (Article 27 CMR).

32. Court of Appeal: 20.04.2021 docket 201-00837 (no. 50/21)

- The facts: A Luxembourg chocolate food manufacturer (A) entrusted an Austrian company (B) with a transport operation to the UK. This transport was part of a master contract between the two companies, which had an ongoing business relationship. The master contract contained an exclusive jurisdiction clause designating only the Luxembourg courts as competent to rule on any disputes between the parties (29(2) of the master contract).

  Carrier B subcontracted the transport to a Lithuanian company (C).

  The cargo was taken over at a German factory. At the British checkpoint in Calais, the police discovered the presence of 14 illegal migrants on-board the lorry (who had consumed some of the lorry's goods). The principal claimed gross negligence on the part of the driver in parking the lorry at night in an unguarded parking area near Dunkirk.

  After this check, the British police sealed the lorry and the driver drove it back to the final destination in the UK. Upon arrival at the destination, the goods were refused at unloading by the consignee and were returned to the German factory, where they were completely destroyed following the instructions of the principal.

  A claim for a total of 60,000 GBP was filed by Carrier B, equivalent to the total loss of the goods, on the grounds that the illegal entry of migrants into the lorry contaminated the cargo and rendered it unfit for human consumption insofar as the quality and hygienic integrity were no longer assured.

  At first instance, the district court maintained that the jurisdiction clause was valid and did not violate the provisions of the CMR, in order to hold the carrier liable on the merits.

  The carrier invoked a total, if not partial, exoneration (Article. 17(2) and Article. 17(5) CMR) and the fact that the refusal to unload without thorough inspection of the goods, and the complete destruction of the goods by its client constituted the sole and exclusive causes of the damage.

  At first instance, the court considered on the contrary that the damage had arisen as a result of the illegal intrusion of the migrants into the lorry, meaning that the destruction of all the goods was necessary on the basis of Regulation 852/2004 and the precautionary principle in regard to foodstuffs. The damage was then set at the value of the goods.

  In the absence of proof of gross negligence, the court accepted the limitations of liability provided for in the CMR.

  The court noted, however, that it was the carrier’s responsibility to request a second opinion on the goods if the conclusions of the report commissioned by the principal were questionable, particularly in regard to the extent of the damage or contamination.

- Legal issues: **Territorial jurisdiction** of Luxembourg courts? Conflict between the CMR provisions and the **master contract** which increases the carrier's liability? Articles 31 and 41 of the CMR.

  Standing of A, as it has been indemnified by its insurer?

- Legal basis: Articles 17, 23, 25, 29, 31 and 41 of the CMR; Article 1782 et seq. of the Luxembourg Civil Code; Article 103 of the Luxembourg Commercial Code

- The Appeal judgement: The CMR is a public policy text which excludes the application of national law except on the points whereby it refers to it, or on those which it does not regulate and which the judge must apply ex officio. The parties cannot derogate from it, except in the cases it provides for (Court of Cass. fr. 30.09.2009, No. of appeal 08-15026)

  The CMR sets out the provisions of international substantive law which replace those of the national law, which would have been declared applicable by the conflict-of-law system of the court summoned…. It constitutes a block which is normally self-sufficient.

  Article 41 declares the absolute nullity of any clause that derogates from it, directly or indirectly. The CMR is binding for both the Contracting States and the parties to the contract of carriage.

  It follows from Article 31 of the CMR that the parties are free to agree on a forum selection clause and that, in such a case, the freely designated forum is additional to, but not superimposed on, the similarly competent courts provided for by the CMR. A jurisdiction clause agreed upon by the parties may only have a suppletive role, the plaintiff always remaining free to file the dispute before one of the courts designated in application of the aforementioned Article 31.

  The question of the validity of a contractual clause conferring exclusive jurisdiction to a court remains unanswered.

  According to the doctrine, a choice of jurisdiction clause that excludes the other courts designated by Article 31 of the CMR would be void under Article 41 of the CMR. The choice of jurisdiction clause is therefore not exclusive of jurisdiction. The Court also refers to a Belgian cassation judgment of 21 January 2010 (No. 08.0246 N) and finds that Article 29(2) of the basic agreement signed between the parties, insofar as it grants exclusive jurisdiction to a court and excludes any choice, is contrary to Article 31 of the CMR.

  The court then asked whether a clause that violates a public policy provision is void in its entirety, or whether it should be reduced by removing only the exclusivity. Can the judge save a clause by limiting its scope in order to keep it from the threshold of reasonableness, as accepted by the legal order?

  After having developed a reasoning in relation to unfair terms (CJEU 14.06.2012 C-618/10, No. 71), the court concluded that, except in the case whereby the legislator expressly authorises the judge to reform or adapt contractual terms which, under the terms of Article 1134 of the Civil Code, take the place of the law to those who have made

them, it is not up to the judge to revise the contract, nor to analyse a contractual term in order to extract what is valid.

The court would maintain that Article 29(2) of the basic agreement constituted a whole and that, as it did not comply with Article 31 CMR, it must be declared null and void in its entirety, pursuant to Article 41 of that Convention in order to conclude that the Luxembourg courts did not have territorial jurisdiction.

B. WHAT LESSONS CAN BE LEARNED FROM THESE LITIGATIONS?

Broadly speaking, the key lessons to be learned from these cases are as follows:

Note: Practice has shown that the transport and logistics sector is highly reactive and interconnected, particularly under the impetus of insurance companies. However, a reminder of the basic principles is always useful.

- Carefully plan the transport of coveted goods (type of lorry, anti-theft, guarded areas, departure and arrival times, rest areas, secure options upon arrival);
- React very quickly in the event of an incident (damage, accident, theft, delay, etc.) with the parties concerned: Driver, insurer, surveyors, expert appraisers, etc ;
- Train your staff to adopt the right behaviour (e.g., reservations to be declared on consignment notes / document evidence to be kept, people to contact in the event of a problem, risk management), respectively to avoid as far as possible prejudicial statements during investigations, in particular by *surveyors* mandated by insurance companies ;
- Train its staff on the management of transport documents (compulsory mentions, role of the parties, reservations on consignment notes, preservation of proof);
- Precisely define the roles of the various participants and their responsibilities in the documents exchanged (stevedore, carrier, handler, commission agent, driver, *surveyor* etc.)
- Provide for written testimonies from drivers and also from external witnesses or responders in the event of an incident to have sufficient evidence on the facts of the case.
- Remember that the lawyers in charge of the cases are not mandated to act as private detectives to find out the details of the case in the presence of multiple operators with distinct roles that are not always clearly defined;
- Remember that judges assess the elements of liability on the basis of the evidence available and the specificities of each case in concrete terms. A poorly prepared case is therefore a case that is quickly lost.

Be vigilant and do not hesitate to provide your staff with regularly training, and consult a legal specialist beforehand!

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