

## The 50<sup>th</sup> Anniversary of the CMR Convention – Future and Perspectives of International Road Transport

Conclusions of the Symposium held at Deauville (France) – 18-19 May 2006

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“If one could consider that, within this huge market extending from Stockholm to Gibraltar and from Dublin to Athens, an identical system governs the issues raised by the movement of goods, what progress would we have made in uniting a great single market.” Those were the words of Professor MERCADAL at a seminar organised by the IRU and the IDIT as early as 14 May 1998 and devoted to the CMR as national legislation.

More than ever, legal standardisation tools are indispensable to a sector which represents a major part of the European economy. Indeed, with all its related sectors, transport contributes up to 10% of the European Union’s Gross Domestic Product and employs a total of over 10 million people. As for road transport, there have been many developments since 2001, in particular due to the fact that the 25 Member State Union is very different from the 15 member Union and that modern transport management is rapidly changing, partly under the impetus of new technologies. The modal shift policy remains unrealistic to date since 85% of all goods carried (in tonnes) travel distances of less than 150 km, 88% travel less than 250 km and only 1-2% travel distances of over 1000 km.<sup>1</sup> Road transport therefore has a bright future ahead of it. Does the same apply to the CMR?

The primary objective of the drafters of the CMR Convention was – as expressed in the Convention preamble – to “standardize the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier’s liability.”

Fifty years after its birth, the Convention has come fully of age and its geographical scope has widened considerably to include 47 signatory States at the present time.<sup>2</sup> Thus the CMR governs international transport operations not only

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Written communication prepared for the Acts of the Symposium on the “50<sup>th</sup> Anniversary of the CMR Convention – Future and Perspectives of International Road Transport”, held at Deauville (France), 18-19 May 2006.

<sup>1</sup> Conference on “Mid-term review of the White Paper on European transport policy”, Brussels, 1 December 2005.

<sup>2</sup> Lebanon having just (22 March 2006) ratified the CMR.



throughout the European territory, but also in Maghreb countries and Asian countries bordering Europe.

What lessons can be drawn from this Symposium? The first is that for decades, the CMR has demonstrated its ability to regulate major civil law issues relating to goods transport by road (I). The second is that everyone agrees that it should continue doing so as long as possible, regardless of all past and future developments on the economic, technical and social planes. What must be done to enable the CMR to pursue this mission? (II).

#### **I. – THE CMR – A SUCCESSFUL CONVENTION**

The CMR Convention owes its success to its remarkable stability (A) and to the quality of its text which has strongly influenced both national and international legislation (B).

##### **A. A remarkably stable international Convention**

The need for legal certainty through the standardisation of laws arose following the establishment of the first rail links in the 19<sup>th</sup> century. The first international Convention for goods transport by rail was thus adopted on 14 October 1890. It was followed by other Conventions, notably for sea<sup>3</sup> and air transport.<sup>4</sup> Although the CMR is not the latest Convention,<sup>5</sup> it is nevertheless more recent than Conventions governing other transport modes which – and this might explain why – have recently (over the past ten years) been or are about to be the subject of in-depth review. This applies to the railways, where the Vilnius rules adopted in 1999 have amended the COTIF Convention by introducing the principle of contractual freedom into a hitherto closed area. It applies equally in air transport law, where the Montreal Convention, in force in the European Union since May 2004, has replaced the Warsaw Convention which had become somewhat outdated. As for sea transport, a major project for an instrument on goods transport partly or fully by sea is currently being discussed under the aegis of UNCITRAL, as Professor Philippe DELEBECQUE has explained.<sup>6</sup>

The CMR's remarkable stability, as pointed out by many speakers, is in part due to the legal certainty afforded to Contracting Parties, but also to its particularly strict

<sup>3</sup> *Convention for the Unification of Certain Rules relating to Bills of Lading*, 25 August 1924 (Brussels Convention).

<sup>4</sup> *Convention for the Unification of Certain Rules relating to International Carriage by Air*, 12 October 1929 (Warsaw Convention).

<sup>5</sup> The latest being the *Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI)* of 3 October 2000.

<sup>6</sup> This is quite an ambitious project in that it aims to encompass all transport operations. Cf. Ph. DELEBECQUE, "La Convention CMR, les transports superposés et multimodaux", reproduced in this *Review*, 569.



revision procedure, as was stressed by Mr José CAPEL FERRER.<sup>7</sup> Indeed, in accordance with Article 49 of the Convention, the latter may only be amended in the framework of a reviewing conference to be requested by a Contracting Party from the Secretary General of the United Nations, who may only convene such a conference provided that 25% of Contracting Parties agree. According to authorised doctrine, a reviewing conference would only destroy this standardisation effort. For instance, the wonderful consensus which had accompanied the inception of the Warsaw Convention broke down completely when amendments had to be made to the text due to developments in air transport. Finally, so as to avoid certain Contracting Parties from being tempted to amend the CMR in transport operations between themselves, the CMR Convention precludes any special agreement between two or more Contracting Parties (Article 1.5), as it prohibits any stipulation which would directly or indirectly derogate from its provisions (Article 41), except for recourse between successive carriers (Article 40).

## **B. The CMR as a legal model**

Several European countries, such as Austria or Denmark, have integrated the CMR into their internal legal orders or have drawn inspiration from it when reforming their legislation (e.g. Germany). Some countries have opted for application “as is” of the CMR Convention rather than reproducing the content of each article, as has been the case in Belgium since 10 July 1999 – as Ms Kathleen SPENIK has explained<sup>8</sup> –, thereby guaranteeing greater uniformity. The same point was made by Mr Peter CSOKLICH who, citing the Austrian experience, made a strong case for incorporation of the CMR into national law.

This standardisation of road transport legislation does make carriers’ lives easier since they no longer have to wonder which legal system governs their contract; it also greatly facilitates cabotage. Indeed, although cabotage has been liberalised since the European Regulation dated 1 January 1993, provision of this service is still subject to the law of the country where it is carried out. This applies in particular to prices and terms governing contracts of carriage and to vehicle weights and dimensions. It is easy, therefore, to appreciate both the practical problems of implementing cabotage and the enthusiasm displayed by the doctrine and some transport professionals to introduce the CMR Convention into Member States’ national legislation.<sup>9</sup> However, as we saw from the presentation given by Ms Marie TILCHE,<sup>10</sup> this is not the case in

<sup>7</sup> Cf. J. CAPEL FERRER, “La Convention CMR – Pilier du transport international par route”, reproduced in this *Review*, 517.

<sup>8</sup> Cf. K. SPENIK, “La CMR comme loi nationale et loi du cabotage en Belgique”, reproduced in this *Review*, 689.

<sup>9</sup> See B. MERCADAL, in: *La CMR peut-elle devenir la loi du transport intérieur français ?*, IDIT Symposium, Rouen (France), 15 May 1995.

<sup>10</sup> Cf. M. TILCHE, “Adoption de la CMR comme loi nationale : pourquoi la France résiste”, reproduced in this *Review*, 693.



France. This French resistance is based, first, on the French Commercial Code which requires, under penalty of lapse of rights, that a reasoned protest be sent within three days of delivery. Although French case law has somewhat relaxed this formalism, the CMR does not require anything of the sort and only sanctions omissions on the consignee's part with a presumption of correct delivery. Second, the damage compensation system contemplated by the CMR is more generous for carriers' customers, which leads to higher insurance premiums.<sup>11</sup> Anyway, this is not the only instance in which France, to quote Ms Guillemette DE FOS, appears as "the bad pupil of the CMR". The same may be said of the well-nigh total ignorance of French judges in respect of the – very useful – concept of "contractual carrier" as contemplated by Article 3 of the CMR, and of the liability mechanism for successive carriers as contemplated by its Articles 34 to 40.

And yet at the same time, the CMR undeniably has an influence on other international instruments. Thus, the CMR served as a model for the *OHADA Uniform Act on Contracts for the Carriage of Goods by Road* which entered into force in 16 African countries on 1 January 2004. As observed by Mr Waldemar CZAPSKI,<sup>12</sup> this may raise some conflicts of jurisdiction if an African country having acceded to the CMR also accedes to the OHADA Uniform Act or vice versa. Similarly, the latest version of the *Uniform Rules Concerning the Contract for International Carriage of Goods by Rail* draws on some provisions of the CMR, whereas railway law had somewhat influenced the drafting of the CMR (the presence of Central Office of International Transport by Rail (OCTI) and International Union of Railways (UIC) members as observers might well explain this), in particular concerning the liability system or transport operations carried out by successive carriers.

Finally, we were pleased to hear from Professor Malcolm CLARKE<sup>13</sup> that English judges are no longer hostile to the CMR and that they now apply it rigorously and have become "good European citizens", whereas Mr Ghislain DE MONTEYNARD<sup>14</sup> noted that the CMR's great qualities make it difficult for a dispute based on any gaps in the CMR to emerge.

<sup>11</sup> Two further arguments are advanced by some of their customers. One is that carriers who operate both nationally and internationally experience little difficulty in dealing with the respective procedures; the other that it would break up the domestic legal regime currently in place for all modes of overland carriage (road / inland waterway / air). See IDIT Symposium *supra* note 7, Results of the meeting presented by Mr Jacques ROBERT, 13 et ss.

<sup>12</sup> Cf. W. CZAPSKI, "Application et interprétation de la Convention CMR à la lumière du droit international", reproduced in this *Review*, 545.

<sup>13</sup> Cf. M. CLARKE, "National Judges Facing Gaps in the CMR: British Case-law", reproduced in this *Review*, 633.

<sup>14</sup> Cf. G. de MONTEYNARD, "Les juges nationaux face aux silences de la CMR: Jurisprudence française", reproduced in this *Review*, 619.



## II. – SAFEGUARD MEASURES

Although the CMR was remarkably well drafted, its text nevertheless shows some signs of ageing, especially in relation to the development of new technologies (A). Moreover, interpretations tend to vary according to national legal susceptibilities, thus impeding the standardisation of rules governing international contracts of carriage. Therefore, it makes sense to promote uniform interpretation of the CMR (B).

### A. Modernisation of the CMR

Which items should be modernised?

Professor Jacques PUTZEYS<sup>15</sup> told us of two notable developments over the past 50 years. The first is a technical one involving new communication tools between trade operators. The second relates to the dissociation currently witnessed between contracting parties and those who actually carry out the transport operation, whereas the CMR was designed with an actual sender of the goods, an actual consignee and an actual carrier connecting these two in mind. Hence, the consignment note no longer only plays the probative and informative role assigned to it by the CMR; the parties to a contract of carriage also see it as a tool to trace both the vehicles and the consignment. It has therefore become necessary – an issue currently taken on by the IRU Commission on Legal Affairs under the leadership of Mr Francisco SANCHEZ GAMBORINO<sup>16</sup> – to work out a new model consignment note to replace the one designed by the IRU in 1976, to serve as a basis for the future drafting of the electronic consignment note (ECN). This should also serve to improve the position of successive carriers.

As to the ECN, while this is technically operational – as was brilliantly demonstrated by Professor Maarten CLARINGBOULD<sup>17</sup> and Mr François LESPAGNON<sup>18</sup> – the problem lies elsewhere. Indeed, contrary to other international Conventions such as the Montreal Convention on air transport which foresees that “Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill” (Article 4.2), the CMR has no similar provision. To introduce an electronic consignment note as possible supporting evidence for the consignment note, two possibilities present themselves. The first is the solution contemplated in CMR Article 49 (revision of the CMR in the framework of a

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<sup>15</sup> Cf. J. PUTZEYS, “L’adaptation de la Convention CMR à l’ère informatique”, reproduced in this Review, 523.

<sup>16</sup> F. SANCHEZ GAMBORINO, “La lettre de voiture CMR ‘IRU 1976’ et le nouveau modèle en projet”, reproduced in this Review, 677.

<sup>17</sup> M. CLARINGBOULD, “The Digital Waybill and the Digital Pen – A Success Story from the Netherlands”, reproduced in this Review, 667.

<sup>18</sup> F. LESPAGNON, “Une expérience réussie: le modèle de lettre de voiture électronique de l’OCIR (France)”, reproduced in this Review, 673.



reviewing conference); however, as we have seen, this is too dangerous. Moreover, the task in hand is merely to add to the CMR, rather than to amend it. Therefore, it seems more reasonable to consider the second possibility, that of an additional protocol such as that adopted on 5 January 1978 to substitute 25 gold francs by 8.33 SDRs.<sup>19</sup> However, as Professor Jacques PUTZEYS has explained, there are currently two competing projects in hand: one authorising and regulating the use of ECN, the other merely authorising their use.

Should there be further amendments to the CMR?

It is acknowledged that the development of container transport has rendered Article 1.2 obsolete and that Article 2 still raises numerous questions regarding multimodal transport. Some also criticise the incomplete nature of the CMR. Indeed, although the CMR settles many issues, it does leave it up to the contracting parties to plan certain operations. Thus the CMR does not explicitly cover ancillary activities to transport such as packing, labelling, loading, securing, stowage or unloading, although it alludes to these in connection with the carrier's proving that damages resulted from one of the risks listed in CMR Article 17.4 so as fully or partly to relieve it of liability. The same applies to defective packing or to faults committed during operations prior to or following transport, if carried out by the sender or consignee or by persons acting on their behalf. This gap is indeed fully justified, since the main operation for which the carrier is liable is transport, where related or ancillary operations may be carried out – according to the wishes of the parties or to certain national regulations<sup>20</sup> – either by the sender, the consignee, the carrier or a third party. Nor does the CMR settle the issue of vehicle immobilisation during loading or unloading operations, and particularly who should bear the financial burden of such waiting time.

Similarly, the CMR has no provisions governing the setting of carriage charges or their terms of payment. As for payment securities, CMR Article 13 does foresee a possessory lien; however, it does not specify whether this guarantees all claims relating to the shipment or only the amounts personally due by the sender. Indeed, this issue is all the more sensitive in France since our carriers have a formidable weapon at their disposal to obtain payment of their claims, in the form of direct action as foreseen in Article L.132-8 of the Commercial Code, a tool which is the envy of their European colleagues. One can only advise carriers, as Mr Frédéric

<sup>19</sup> However, this still leaves the question of how the CMR Convention and the new Protocol will co-exist, in particular in respect of those countries that do not accede to the Protocol, as occurred in the case of the 1978 Protocol introducing SDRs. This problem was raised by Mr Malcolm Evans, former Secretary-General of UNIDROIT, on the occasion of the 30<sup>th</sup> Anniversary of the CMR. See M. EVANS, "Peut-on revoir la Convention CMR ?", in : *Transport International de marchandises par route (CMR)*, IRU (1988), 222.

<sup>20</sup> Such as the French model contracts.



LETACQ<sup>21</sup> has done, to include a provision granting jurisdiction to French courts in their contract. Indeed, as explained by Mr Ghislain DE MONTEYNARD,<sup>22</sup> the Supreme Court of Appeal, in a judgment of 24 March 2004 which attracted much attention, clearly found in favour of the applicability of “direct action” to international transport operations.

Are these gaps of sufficient concern to consider complementing the CMR on these various issues, whereas its drafters deliberately opted for a middle-of-the-road approach so as to reach a delicate balance between State intervention and freedom of trade?

Moreover, is it really so shocking for a legal instrument to be complemented by standard terms emanating from the parties to a contract of carriage?<sup>23</sup> For the sake of the principle of contractual freedom and in a free economy, the answer has to be no. The problem is that, despite the nullity of stipulations that run counter to the Convention, the CMR has no provisions governing the right to invoke of standard terms of carriage against persons entitled to dispose of the goods. Now national legislation varies, some regulations being more restrictive than others by subjecting the right to invoke contractual terms not only to a duty to inform the other contracting party, but also to the latter’s explicit agreement. On the other hand, leaving it up to the parties to settle some stages of the transport operation is not conducive to the looked-for standardisation.

In our opinion, diverging interpretations of certain CMR provisions are the more awkward problem in that they lead to legal uncertainty which weakens the Convention.

## **B. Fostering uniform interpretation**

Sometimes, these divergences are due to the unfortunate wording of some of the CMR’s provisions, including, of course, the famous Article 29, as Mr Otmar TUMA has explained,<sup>24</sup> which leaves national judges free to define the notion of default equivalent to wilful misconduct. Thus, some countries equate unintentional gross negligence to wilful misconduct, provided there is a degree of incompetence involved, whereas others favour a literal and restrictive<sup>25</sup> interpretation of Article 29 whereby the carrier is debarred from availing himself of compensation limits only if it has knowingly and consciously committed gross negligence. It is better therefore for a carrier to be judged by the courts of countries in the latter category, at least on this

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<sup>21</sup> Cf. F. LETACQ, “L’action directe française en paiement du fret: son application au transport international”, reproduced in this *Review*, 660.

<sup>22</sup> Cf. *supra* note 14.

<sup>23</sup> This in fact is how the French system works: the Commercial Code includes some provisions that are then fleshed out by the parties themselves or by means of model contracts. IRU also offers model standard clauses for the contract of carriage of goods.

<sup>24</sup> Cf. O.J. TUMA, “The Degree of Default under Article 29 CMR”, reproduced in this *Review*, 585.

<sup>25</sup> Such as Spain or Portugal.



issue. It is a fact that the CMR does facilitate “forum shopping” by offering a wide choice of competent jurisdictions, as Ms Stéphanie GRIGNON DUMOULIN<sup>26</sup> has explained. Indeed, according to CMR Article 31.1, the competent jurisdiction in case of a dispute may be that designated by the parties<sup>27</sup> and/or<sup>28</sup> that of a country within whose territory the defendant is ordinarily resident or has its principal place of business (a) or that of the place where the goods were taken over by the carrier or of the place designated for delivery (b).<sup>29</sup>

Mr Waldemar CZAPSKI also gave us numerous examples of breaches of the CMR. For my part, I shall refer to a judgment in French case law which requires the carrier to check the consignment, thereby denying it any possibility of being relieved of liability even though it did not perform the operation under the CMR. These loose interpretations and divergences are all the more awkward since it is extremely difficult, even today, to stay abreast of all judgments and doctrinal opinions issued in all Contracting States.

Given that in areas as these, that have considerable economic impact, it is all the more important not only to follow the same rules, but also to ensure their uniform interpretation, are there any means to avoid or mitigate this recurring problem?

First, as some have recalled, there exist uniform interpretation techniques. Thus Article 31 of the Vienna Convention on the Law of Treaties stipulates that 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.” Article 32 of the same Convention provides for supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion. Another solution might be to turn to CMR Article 47 which provides that any dispute relating to the Convention’s interpretation or application may be referred for settlement to the International Court of Justice at the request of the Contracting Parties. However, to date this provision has remained a dead letter. Indeed, it is hard to imagine any State referring a dispute to this jurisdiction merely because the courts of another Member State have issued a judgment which seems contrary to a provision of the CMR Convention.

Should we go further – as some speakers have suggested – and forcibly impose the CMR by means of a Community regulation?

<sup>26</sup> Cf. S. GRIGNON-DUMOULIN, “Forum shopping – Article 31 de la CMR”, reproduced in this *Review*, 609.

<sup>27</sup> Such jurisdiction clause can only be stipulated in respects of the courts of a Contracting State.

<sup>28</sup> The question of whether or not this is an exclusive jurisdiction clause is still being debated today.

<sup>29</sup> This provision actually confers global jurisdiction since it does not say which court in the country concerned will be competent. It accordingly refers to the national procedural rules of the country where the action is brought.



In wishing the CMR a bright future and recalling that the responsibility of political bodies, economic circles and lawyers was to contribute to the implementation of a simple regulatory framework fostering mobility without barriers, Mr Jacques BARROT, Vice President of the European Union and EU Transport Commissioner, did indeed open the debate on the European Union's role in relation to the contract of carriage, whereas until now it had been interested mostly in the operating conditions of carriers' activities. It is also true that the Commission is currently working on a project entitled "Integrated Services in the Intermodal Chain" (ISIC), a project referred to by Professor Delebecque.

Would it be desirable for the European Union to join the IRU and to become a party to the CMR, as it did in the field of air transport?

Will such a strategy to influence international bodies or instruments be sufficient at a time when national legal instruments also require adjustments?

Finally – and this is the last issue, which alone could be the subject of a future Symposium –, despite the subsidiarity principle, is it normal to entrust national authorities with the task of adjusting their private law instruments to European objectives? <sup>30</sup>



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<sup>30</sup> Cf. the article by Professor Ch. PAULIN, "Instruments de droit privé et objectifs européens", in : *L'Europe des transports*, Actes du colloque d'Agen, 7-8 October 2004, *La documentation française*, 123 et ss.