CMR Liability in a Law & Economics Perspective

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1 Introduction

It is a common understanding of that an international convention should be interpreted in the same way by the courts in the countries, which are parties to the convention, in order to promote uniformity. In case of the CMR Convention it is already in the preamble stated that the parties have "recognized the desirability of standardizing the conditions governing the contract for international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability".

However the problem here is that already the English and the French version of the CMR Convention, which are of equal value, seem to differ in details. Certain questions are also to be decided according to the national law of the court or tribunal seized of the case. Another problem is that the preparatory works do not always give any guidance on how certain articles in the CMR Convention are to be interpreted. At the same time they are beginning to get rather old. The market for carriage of goods by road has changed a lot since the 1950's. Over the almost 50 years that have passed since the convention was adopted a considerable amount of case law has developed. This case law is often modern, but at the same time it differs a lot between the countries. In fact regarding the interpretation of certain provisions a lawyer can almost find any solution he wants by looking at the case law from the different CMR countries. Also the proposed solutions in the legal doctrine vary a lot. Different authors are often are influenced by the law of the country they come from in interpreting the provisions of the convention.

All this raises the question which methods should be used in the interpretation of the different provisions of the CMR Convention in a case before a national court. What arguments should be decisive here? Is there for example any point in trying to promote uniformity in the case law in line with the preamble or is it better just to choose the solution that corresponds with the rest of the national legislation?

2 Interpretation of the CMR Convention by Using Traditional Sources of Law

2.1 Primary Sources of Law

The *primary sources* of the CMR Convention consist of the international and national preparatory works and the case law from different CMR countries. There are several problems with the use of the international preparatory works. The first thing is that is has been questioned whether the use of the preparatory works in interpreting the CMR Convention conflicts with the regulation of the Vienna Convention of 1969 on international treatises, at least in cases where the text of the former convention appears to be clear. The reason for this is that in the Vienna Convention the use of the primary sources, i.e. the convention with its text and annexes, and the use of the supplementary sources, such as the preparatory works and commentaries, are regulated in different provisions, i.e. Articles 31 and 32. In Article 32 it is said that if the text is not clear the supp-

lementary sources may be used to interpret the convention. There is a view that the text should here be read *e contrario* with the consequence that if the text appears to be clear a court are only allowed to look at the text of the convention itself and not to make use of the preparatory works at all. However, there are also arguments speaking in favour of that this was not the intention with the regulation in Articles 31 and 32 of the Vienna Convention. One such argument is that if a provision of a convention has to be interpreted, the text cannot possibly be considered as clear. As a consequence of this the courts are in such a situation free to use the preparatory works as a tool in the interpretation of the text of the convention.

Nevertheless, even if the reports from the CMR negotiations are used in the interpretation of the text it is a fact that they give very little guidance. The reason for this is that the delegations from different countries often were of very different views of how the provisions ought to be interpreted. A good illustration of this is the minutes of the discussion of Article 29 on the loss of limitation. The parties were here of different opinions and as a result of this already the English and the French version of the convention text differ from each other. According to the English versions of the text the carrier will lose his right to limitation if he causes the loss by wilful misconduct or by default considered to be equal to wilful misconduct. In the French version it is regulated that he loses his right to limitation if he causes the loss intentionally (*dol*) or with a negligence (*faute*) that is considered to be equal to intent. However, according to the concept "wilful misconduct" in English law the carrier has to be aware of the risk of the loss while according to the concept "negligence" there is no need for that. As a consequence of this English courts have concluded that "negligence" cannot be placed on an equal footing with "wilful misconduct" and therefore the last part of Article 29(1) has no independent meaning in English law.[1] On the other hand French and Swedish courts have found that the concept *gross negligence* (*faute lourde*) is equal to intent and that it is not required that the carrier was aware of the risk at the time when he caused the damage.[2] Therefore it seems that the carrier faces a greater risk of losing his right to limitation in France and Sweden compared to in England.

Another problem is that, even if the preparatory works give guidance regarding the interpretation of a particular provision, the conference reports are rather old today. And as a consequence of this it is uncertain whether the interpretation proposed in the preparatory works should be followed. There is also a risk that the case before the courts has not been foreseen by the originators and that it is not covered by the text of the convention or the preparatory works. As already mentioned the market for carriage of goods by road has changed dramatically over the almost 50 years that have passed since the CMR Convention was adopted. An example this is that neither in the text nor in the

1 Hill & Messent, *CMR: Contracts for the International Carriage of Goods by Road*, 3rd ed., London 2000, p. 233 and Clarke, M. A., *International Carriage of Goods by Road*, 3rd ed., London 1997, pp. 381–382 and p. 390. See also Horobin v. British Overseas Airways Corp. [1952] 2 Lloyd's Rep. 450 Q.B.

2 Cass. 8.1.74, ETL 1974.314, Cass. 29.1.85, BT 1985.345 and ND 1986.27 SH. This is prescribed already in the Swedish national CMR-act that incorporates the CMR Convention into Swedish law.

conference reports the use of contracting and performing carriers is discussed. The convention regulates successive carriage but not sub-carriage. The reason for this is that in the 1950's it was very unusual that the carrier sub-contracted the whole transport to a performing carrier. However today this is a very common way of organizing transports on the market. The fact that this way of organizing transports is not properly reflected in the preparatory works has led to the development of diverging case law in Europe. In the Swedish case NJA 1996.211 the Supreme Court has stated that in order to apply the time bar provision in Article 39 analogous at least the performing carrier must have accepted the goods and the consignment note.[3]

In this case Continex promised to carry a consignment of wool from Sweden to Italy. Continex sub-contracted the whole transport to Walter, which then became the performing carrier. Outside Bologna the goods were damaged due to a road accident. As a consequence this Continex paid compensation to the cargo insurer. Continex then turned to Walter and claimed compensation. Walter, however, alleged that the claim was time-barred according to Article 32 of the CMR Convention due to the fact that one year had passed since the day when the goods were to be delivered. Continex on the other hand was of the meaning that Article 39 was applicable and that the claim would be time-barred one year after that the compensation to the cargo insurer had been paid.

Since the performing carrier had not accepted the original consignment note, but issued its own document, indicating Continex as the sender of the goods, Article 39 was not applicable. Instead the case was to be decided according to Article 32 of the Convention. In Austrian case law the Supreme Court seem to have adopted a more modern attitude to this problem and abandoned the requirement that the sub-carrier must have accepted the consignment note.[4] This means that the moment when a recourse claim against the performing carrier is time-barred will in practice vary between the different parties to the convention.

The last problem here concerns the preparatory works of the national CMR Act — the act that incorporates the convention into Swedish law. What about if statements in the preparatory works to the national CMR Act contradict for example international case law on the CMR Convention? Are the Swedish courts to interpret the provision in dispute in line with the national preparatory works or in line with the international case law? This is an intricate problem because of the fact that in Sweden there is a rather strong tradition that the courts read and follow the preparatory works carefully. Once again the provision on recourse claims in Article 39 can to a certain extent illustrate this. In the preparatory works of the national CMR Act it was stated that the fact that the contracting carrier, i.e. the freight forwarder, never had taken care of the goods did not mean that the provisions of chapter VI were inapplicable.[5] This seem to have been interpreted *e contrario* by the Supreme Court in the so called Continex case as if the this was the only situation in which the provision in Article 39(4) could be

3 NJA 1996.211, at page 219.

4 OGH Wien 20.06.00, ETL 2000.79.

5 SOU 1966:36 p. 91 and prop. 1968:132 p. 57. See also SOU 1972:24 p. 126 and prop. 1974:33 p. 131.

applied analogously.[6] Unlike in for example the Austrian case discussed above it was still required that the performing carrier had accepted both the goods and the consignment note.[7]

2.2 Secondary Sources of Law

In certain CMR countries there is also a national legislation on domestic carriage of goods by road. These national acts on domestic carriage are often built on the CMR Convention. Sweden is a good example of this. In addition to the CMR Act on international carriage of goods by road, that directly incorporates the CMR Convention into the Swedish law, there is also a special act on domestic carriage of goods by road, which to a large extent is based on the Convention. The main differences between the Convention and the domestic act are that there is another limitation level (SEK 150 per kilogramme) and that the provisions on reservation and limitation of actions are adapted to the regulation in the national Sale of Goods Act. For example, instead of 7 days the consignee has to make a reservation within due time. The consequence of the failure of the consignee to make a reservation is that he loses his right to compensation. According to the CMR Convention the consequence of this is normally that the consignee gets the burden of proof for that the goods were damaged during the transport. Despite these differences it is probably possible to use the preparatory works and the case law on the domestic regulation, as a sort of *direct secondary sources of law*, in interpreting the Convention at least in a situation where the provisions of the Convention and the domestic law are the same. However here the same problem will appear as concerning the use of the national preparatory works of the CMR Act. What if the national sources differ from the international preparatory works and case law? Regarding the domestic act the Supreme Court in the so called Excavator Case stated that in order to lose his right of limitation there must be a negligence of a very serious kind on the carrier's side.[8] Even if the driver knew the height of the excavator he was transporting as well as the free height under the bridge he was not considered by the court to have had acted with gross negligence trying to drive under the bridge. In Sweden this case has been interpreted as if it is almost impossible for the carrier to lose his right of limitation. But this conclusion contradicts much of the European case law on Article 29 of the CMR Convention. According to these cases it seems rather easy for the carrier in certain situations to lose his right of limitation. For example, in a Finnish case regarding goods that was lost in a terminal and then found again after three months, the Finnish Supreme Court came to the conclusion that the carrier had to be able to tell the owner where the goods were

6 NJA 1996 p. 211. However what the Supreme Court did not consider was a situation like the one in Ulster-Swift v. Meat Haulage [1977] 1 Lloyd's Rep. 346 C.A. where the performing carrier issued the consignment note and not the contracting carrier. This situation seem not to have been addressed by the Supreme Court in the Continex case. See further Schelin, *Last-skadekravet*, Stockholm 2001, pp. 46–49.

7 OGH Wien 20.06.00, ETL 2000.79. Cf. also the English cases Ulster-Swift v. Meat Haulage [1977] 1 Lloyd's Rep. 346 C.A. and Coggins v. LKW [1999] 1 Lloyd's Rep. 255 C.L.C.C.

8 ND 1986.27 SH.

situated at every moment during the transport in order not to lose his right of limitation.[9] Even if it is possible to criticize this particular expression of the Supreme Court of Finland because of the fact that it imposes a far too severe liability on the carrier, the case shows that regarding the handling of the goods the courts often interprets Article 29 a bit more extensively compared to cases concerning the traffic situations.

Since the CMR Convention to a large extent is built on the CIM Rules from 1952, especially the liability regulation and the provisions on successive carriage, it seems that it would also be possible here to use the preparatory works and the case law concerning carriage of goods by rail. Other parts of the CMR Convention, i.e. Article 29 on loss of limitation, are modelled on the Warsaw Convention on carriage of goods by air from 1929. Perhaps it is possible here to speak of these sources as some sort of *indirect secondary sources*.[10] The problem here is that these regulations concern other modes of transport with different conditions, for example carrying goods by rail is a totally different business compared to carrying goods by road. Another thing is that the original regulations that the provisions of the CMR Convention are based on have been changed because of the fact that they were considered not to represent workable legal solutions. For example the provision on loss of limitation in the Warsaw Convention was replaced by a new regulation already in the Hague Protocol from 1955. One may therefore have doubts about using older case law regarding the concept of "wilful misconduct" from the field of air transportation.

3 Interpreting the CMR Convention by Using Law and Economics Arguments

The fact that the sources of law, especially the case law, differs a lot between various countries that are parties to the CMR Convention makes it often impossible to determine what the position of the law of carriage of goods by road is. A consequence of this is that it becomes hard to advocate a certain solution only by referring to for example certain international cases. If the German *Bundesgerichthof* has interpreted a provision of the CMR Convention in a certain way this does not mean so much to a Swedish court if at the same time the French *Cour de Cassation* or the English *House of Lords* have interpreted the same provision differently. In other words, it is of less significance here that an argument for a certain interpretation origins from a certain authority. Instead the positive arguments, which the different judgements are based on, become more important.[11]

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9 ND 1983.62 FH.

10 Cf. Wetterstein, P., *Grov vårdslöshet vid vägtransporter – än en gång*, JFT 2001, pp. 721–735, especially p. 735, where the author is of the opinion that Art. 29 of the CMR Convention ought to be interpreted in line with the regulation of other transport modes, especially in case of combined transports.

11 Regarding the concept of authority arguments and positive arguments, c.f. Wilhelmsson, T., *Den nordiska rättsgemenskapen och rättskälleläran*,, TfR 1985 p. 181, p. 186.

The question is however what positive arguments should be decisive here. An answer to that question could be that the provisions on liability and compensation are very closely linked with the economics of transports and the system of liability and cargo insurance. The liability provisions of the CMR Convention are actually built on the presumption that the carrier has got a liability insurance and that the goods transported are covered by a cargo insurance. The consequence of this is that the liability regime in the CMR Convention, especially the provisions on limitation of liability, will govern who will in the end — the liability insurer or the cargo insurer — bear the cost for the losses and damages to the goods. At the same time there is a public interest in keeping the costs for the transports as low as possible, because of the fact that this promotes the trade. This speaks in favour of that a court should pay attention to the economic and insurance consequences in interpreting the convention. In other words the provisions of the CMR Convention should be interpreted in a way that minimizes the losses and damages and where they anyway occur distributes them to the party who has the lowest cost for bearing those. According to such a perspective it becomes interesting not only to analyse how the different courts in Europe have interpreted the provisions of the CMR Convention, but also to analyse whether the solutions chosen can be considered to be cost-effective according to the principles of law and economics.

Of course it is possible to question whether there is any point in paying attention to the economic principles the liability regime is based on. For example it could also be argued that the liability regime is based on the presumption that the sender is the weaker party of the transport agreement. As a consequence of this it is probably also possible to say that the provisions of the CMR Convention should always be interpreted in a way that favours the sender or the consignee. And it maybe a better idea to protect the owner of the goods than to try to make the transports as cost-effective as possible, especially since the transport costs is only representing a very small part of the price paid by the consumer for a product, usually less than 10 %. On the other hand it is a fact that the CMR Convention is mandatory in relatoin to both parties. In other words it is likewise impossible for the carrier to take on a stricter liability. And today it is a fact that many senders consist of large industries while the carriers, often are small companies with only one or two trucks. And in such a situation it seems rather odd to speak of the sender as the weaker party. And even if the transport costs are only representing a small part of the price paid by the European consumer for a product this is not a reason for not trying to save these costs if possible.

Another reason against the use of a method based on law and economics could be that it is not possible to verify the economic models. For example there exist no empirical investigations regarding the question whether a right of limitation for the carrier actually leads to a decrease of the premiums for the liability insurance. Of course the fact that it is often impossible to verify the economic models appears as a disadvantage. But at the same time it is possible to ask whether this is the most important reason for using a method based on law and economics. On a free market it is anyway impossible to forsee exactly how an individual party will evaluate different alternatives of actions. Instead the main reason for doing this is that it in a significant way becomes possible to

show how different provision of the liability regulation interact and what are the consequences of a certain interpretation. The use of economic models will also promote an analysis that is focused on the most important reasons for a certain interpretation and where other less important arguments are set aside.

4 Practical Examples

A crucial question of course is how a method based on law and economics can be used in practice to interpret the different provisions on liability in the CMR Convention. A few examples regarding the three most important parts of the liability regulation – the prerequisites for liability, the calculation of compensation, and the provisions on claims and actions – may illustrate this:

4.1 Example no. 1. Article 17 – A Strict or Fault Based Liability?

In the Scandinavian literature it has been disputed whether the liability of the carrier should be considered as a strict one or as a liability based on fault. Some authors, like for example Grönfors and Regnarsen, have argued that the nature of the liability has developed by the case law from originally being a strict liability to become a liability based on fault.[12] Other authors, like Waldersten and Bull, tend to emphasize the relationship with the CIM Rules on carriage of goods by rail, where the liability of the carrier clearly is a strict one.[13]

Different courts in Scandinavia have also interpreted the liability regulation of the CMR Convention differently in this respect. In the Danish case, ND 1997.167 DH the Supreme Court of Denmark reached the conclusion that the liability was a strict one, while in the Norwegian case ND 1998.226 the Supreme Court of Norway considered the liability regulation to be based on fault. The interesting thing here was also that the facts of the cases were almost identical. Both cases concerned the liability for theft of a consignment of fish in northern Italy:

In the first case the carrier promised to carry the fish from Hirtshals in Denmark to Naples in Italy. Seventy kilometres north of Naples the driver parked the trailer at a parking area near the highway. The area was surrounded by a fence and well-lit. The parking area was not guarded by special guards, but the highway was regularly patrolled by the police. The were however video cameras placed out so that the area could be watched from the gas station, that was open 24-hour a day. Despite the existence of the video cameras two men broke into the cabin during the night and hi-jacked the trailer. After that the trailer had been emptied for its goods it was left together with the driver at a road somewhere.

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12 Grönfors, K., *Inledning till transporträtten*, Stockholm 1984, p. 73 and Regnarsen, K., *Lov om fragtaftaler ved internasjonal veitransport*, Copenhagen 1993, p. 143.

13 Waldersten, B., *Köp och försäljning av transporter på väg*, Stockholm 1990, p. 120 and Bull, H. J., *Innføring i veifraktrett*, 2nd ed., Oslo 2000, p. 65. See also Ekelund, P., *Transportaftaler*, 2nd ed., Copenhagen 1997, p. 201.

The cargo insurer here alleged that the robbery could have been avoided if the driver had chosen to stop at a guarded parking area instead of the one in the case. In addition to this the carrier ought to have informed the driver what parking areas he could make use of. In reply the carrier here alleged that he had taken every reasonable step in order to protect the goods. The Supreme Court of Denmark here found that the carrier was liable for the loss of the goods. It motivated its conclusion by saying that carriers had an obligation to use guarded parking areas. Because of the fact that the driver had not done this the carrier was liable for the loss of the goods. In other words the Supreme Court of Denmark here interpreted Article 17 of the CMR Convention as a sort of strict liability. There was no room for considerations regarding if the driver had acted with reasonable care due to the circumstances.

In the latter case a consignment of fish was carried from Svolvær in Norway to Naples in Italy. The driver was instructed to contact a freight forwarder at the Italian border for further instructions regarding where the goods were to be delivered. At the time when the driver arrived to the freight forwarder there was a note on the door that he ought to contact another company. He did so and got the instructions regarding the delivery from what he thought was the consignee. After that he continued his journey towards Naples. On the highway he was followed by a white Mercedes car for a while, but it later disappeared. Seventy kilometres before Rome he stopped at a parking area similar to that in the Danish case. During the night the trailer was high jacked and the goods were stolen.

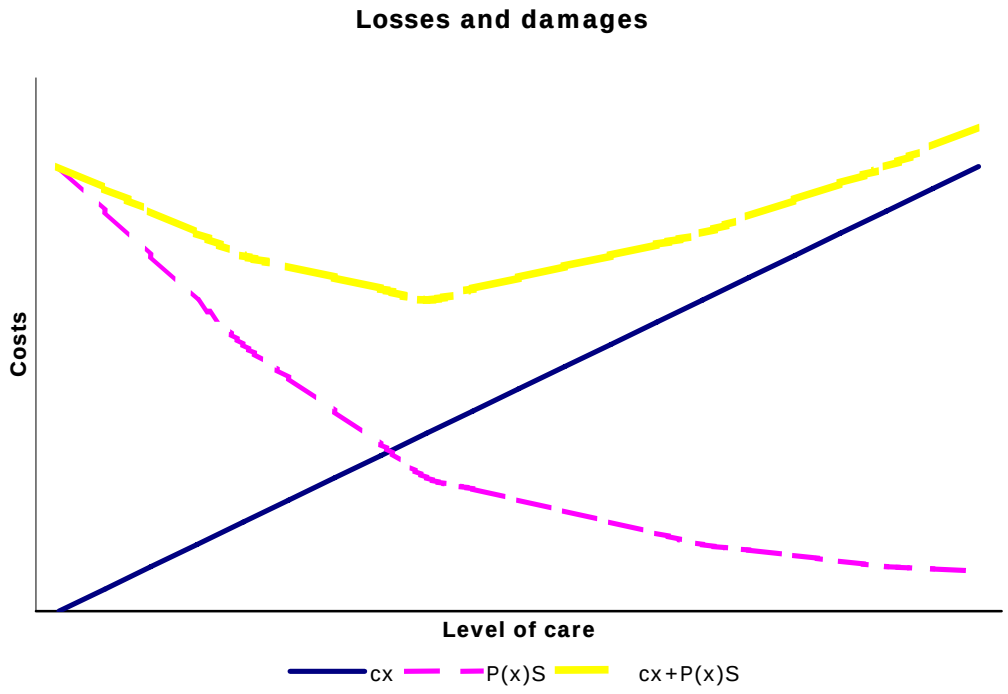
The majority of the Supreme Court of Norway here found that the carrier was not liable for the loss of the goods. Two of the judges that formed the majority was of the opinion that the carrier had taken every reasonable step in order to protect the goods.[14] There existed guarded parking areas in the neighbourhood but those were usually only open for members of the Italian Road Haulage Association. They were also situated along smaller roads and the Norwegian Export Council had recommended Norwegian road carriers not to use the smaller road net because of the danger of robbery. Unlike its Danish counterpart the majority of the Supreme Court of Norway here motivated its conclusion in terms of negligence. The crucial question here was if the carrier had acted in accordance with what could be defined as a reasonable standard of care in relation to the circumstances in the case.

Looking at the general economic models regarding the costs for losses and damages and the prevention of those it is likely that an increased level of care on the carrier's side will reduce the losses and damages to the goods.[15] It is also likely that already a small increase of the costs for such a prevention initially will result in a rather great reduction of the costs for losses and damages. The

14 The third judge that formed the majority was of the opinion that there was no causation between the robbery and the choice of parking area. The fact that the trailer was followed by the white Mercedes car proved that the goods were targeted and stolen to order and consequently the carrier was not liable for the loss.

15 The model is explained in detail by Eide, E. & Stavang, E., *Rettsøkonomi*, Oslo 2001, p. 106–117. For the mathematical reasoning, see pp. 145–157. See also Cooter, R. & Ulen, Th., *Law and Economics*, 3rd. Ed., Reading, Massachusetts, et. al. 2000, pp. 300–302 and Posner, R. A., *Economic Analysis of Law*, 5th. Ed. New York 1998, pp. 179–183.

problem here is that the marginal effect of an increased standard of care will gradually diminish. The consequence of this is that at a certain point the increase of the costs for preventing the losses and damages will become higher than the costs for bearing them. This is illustrated by the following figure where the graph *cx* represents the costs of the carrier for preventing losses and damages to the goods and the graph *P(x)S* the costs for losses and damages that occur. *Cx+P(x)S* shows the total costs, i.e. the costs for avoiding losses and damages and the costs for the losses and damages that anyway occur:



The most wanted and cost-effective situation here is the one where the carrier is acting according to a standard of care which leads to the lowest total costs. In other words the most cost effective point is at the bottom of the graph *cx+P(x)S*. In practice that means that the carrier should act with care but only to the extent this leads to a reduction of the total costs, beyond that point it appears to be desirable to bear the costs for the losses and damages that occur.

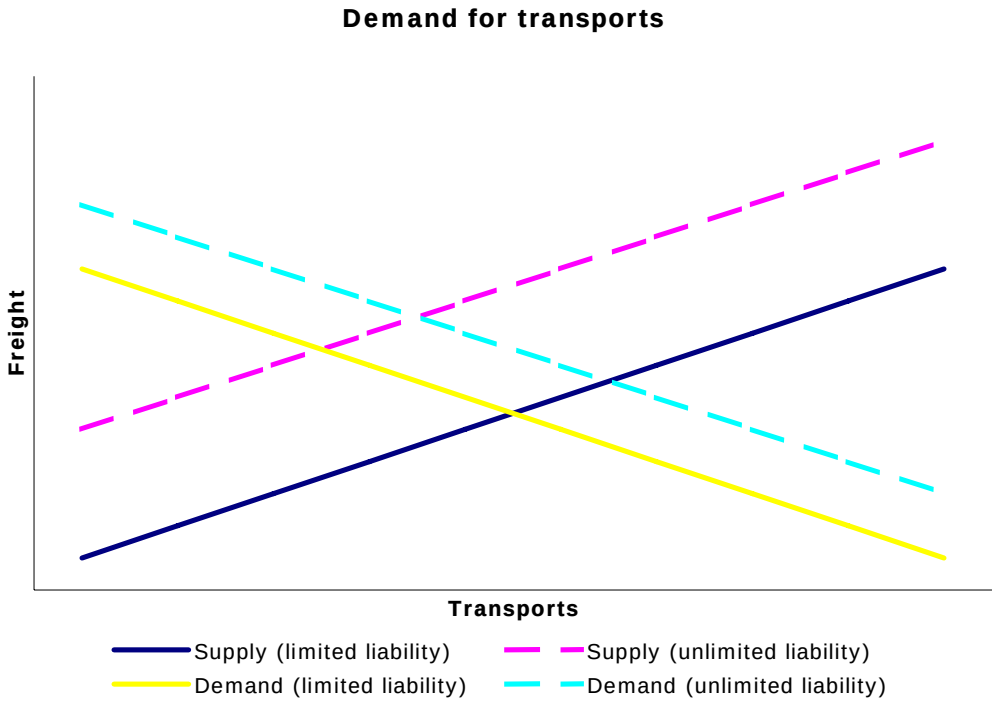
Going back to the cases regarded robbery presented above the crucial question is: does it matter what is the basis of liability? What sort of liability, a strict one or a liability based on fault, leads to the lowest possible total costs in accordance with economic model explained here? The truth is that theoretically it does not matter whether a strict liability or a liability based on fault is chosen. The difference between a strict liability and a liability based on fault is that if there is a strict liability every individual carrier will have the possibility decide at what point it is more favourable for him to pay compensation for the losses and damages that occur than to try to avoid. In other words he will individually have the possibility to decide what the most cost-effective level of care is and as

a consequence of this he will, at least in the long run, minimize the total costs. If on the other there is a liability based on fault the courts will decide what is the desirable level of care and there is a risk that this level will not correspond with that level that leads to the lowest total costs. If the level of care established in practice is too low that will result in that the costs for losses and damages increase to the detriment of the senders and the cargo insurers. If the level of care is too high that will result in that the carriers become too careful. This will also increase the total costs and in the end the freight rates to the detriment of the senders. The risk that the courts establish a level of care that not lead to the most cost-effective result, the lowest possible total costs, speaks in favour of the conclusion that Article 17 of the CMR Convention ought to be interpreted as strict liability with an exception for force majeure rather than a liability based on fault. In other words according to this economic model the interpretation of Article 17 made by the Danish Supreme Court in ND 1997.167 DH seems to be preferable in comparison to the interpretation made by the Supreme Court of Norway in ND 1998.226.

4.2 Example no. 2. Article 23(4) – "Other Charges Incurred in Respect of the Transport"

According to Article 23(3) of the CMR Convention the carrier is granted the right to limit the compensation to the claimant to the amount of 8.33 SDR per kilogramme of the goods lost or damaged. The reason for this is that it is considered to be cost-effective to place a part of the of the losses and damages to the goods that actually occur on the latter, because of the fact that he has a better opportunity to insure the goods at a lower premium. This is due to the fact that the need for margins in calculating the risk for damages and losses is considered to be less for cargo insurers compared to liability insurers. Cargo insurers usually know the value of the goods and the destination, while liability insurers generally are not aware of these facts when they are calculating the premiums. A right to limitation will reduce the need for wide margins because of the fact that the liability insurer then will know what he at a maximum will have to pay at the same time as a part of the loss is transferred to the cargo insurer. This could be illustrated by the following economic model:[16]

16 The model is explained in detail by Eide & Stavang, pp. 178–180.



The supply and demand on the transport market will, provided that the there is an unlimited liability for the carrier, will be equal at the point where the dashed graphs cross. However if there is a limited liability the costs for the carriers will decrease, which will result in lower freight rates. The supply of transports will as a consequence of this increase already at a lower freight rate. At the same time the demand for transport will decrease with a limited liability because of the fact that the senders will have to bear higher costs for the cargo insurance. That will lead to that the demand for transports will decrease already at a rather low level of freight rate. The point here is that the increase of supply of transports will anyway be higher than the decrease of the demand of transports. The total amount of transports produced on the market will therefore as a result of this increase. This is shown by the fact that the continuous supply and demand graphs are crossing at a higher level at the x-axis compared to the dashed graphs.

At the same time it is regulated in Article 23(4) of the CMR Convention that in addition to the compensation for the lost or damaged goods also carriage charges, Customs duties and other charges incurred in respect of the carriage shall be refunded. This seem in many ways quite natural. According to Article 23(1) the compensation are to be calculated according to value of the goods at the place where the carrier received those. That means that for example the cost of the transport is not included in the value of the goods and that the carrier should refund freight paid in advance by the sender. Regarding this type of costs the carrier has no right of limitation.

The problem is however that some courts have interpreted the expression "other charges incurred in respect of the transport" in Article 23(4) extensively. In other words the provision has been given a very wide scope of application. For example in the well-known English Buchanan case the House Lords came to

the conclusion that this expression also included the payment of excise duty.[17] The goods here consisted of Scotch whiskey, which had been sold to a buyer in Iran. Because of the fact that the whiskey was stolen during an overnight stop in England the British tax authorities demanded the sender to pay taxes as if the whiskey had been sold on the domestic market. Ten years later the Danish Supreme Court came to the same conclusion by expressly referring to the Buchanan case.[18] The conclusion of the House of Lords and later the Supreme Court of Denmark contradicts the economic principles that the carrier's right to limitation is built on. This extensive interpretation creates a gap in the system where a higher risk is placed on the carrier and in the end the liability insurer. This may lead to that the carrier's costs for the transport and as a consequence of this the freight rates will increase compared to a situation where Article 23(4) had been interpreted more narrowly. Taken as a whole this appears as a disadvantage also for the sender because of the fact that he would have been better off if he had born this risks on his own by paying higher premium for the cargo insurance compared to paying higher freight rates. In the long run it would therefore have been better if the House of Lords and the Supreme Court of Denmark had reached the opposite conclusion and considered the excise duty as a part of the value of the goods. The reason why the tax authorities in the first run levied the tax on the sender was actually that, despite the intention, the spirits were never exported, but distributed on the domestic market.

4.3 Example no. 3. Article 32 – Period of Limitation for an Action

The regulation of the prerequisites for liability and of the calculation of compensation is however not the only factor of importance. It is also essential to look at the costs for the claims adjustments and for judicial proceedings. Of particular importance here is how the provisions on the period of limitation for an action in Article 32 of the Convention are construed. One of the reasons why the claim for compensation is time barred already after one year compared to ten years according to the general Act of Civil Actions in Sweden is probably that the provision serves as a protection for the carrier and the liability insurer. It can be assumed that a larger amount of the claims will get time barred than if there would have existed a ten year limit. This will also lead to that the carrier's costs for litigation will decrease. Another and probably more important reason is here that a short time limit creates an incentive to the claimant, i.e. the sender or the consignee, to carry out the average adjustment immediately after loss or damage occurred. The consequence of this is that the costs for the investigation could be kept at a rather low level because of the fact that the investigation will be carried out at a time when people still have a fresh memory of what happened and when the relevant documents are still available. This could be illustrated by the economic model used already in example number one:[19]

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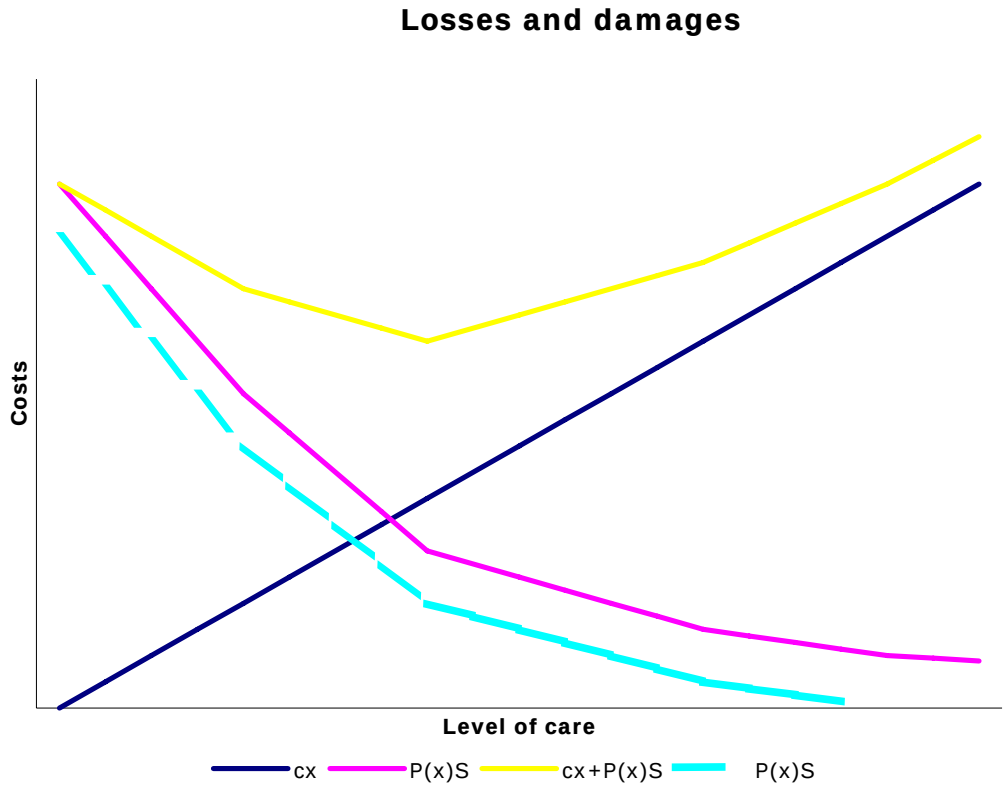
17 James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K) Ltd. [1978] 1 Lloyd's Rep. 119 H.L.

18 ND 1987. 108 DH.

19 Cf. Eide & Stavang, pp. 113–115, regarding causation.



The carrier's cost for litigation and the costs for average adjustments form a part of the costs for losses and damages (*P(x)S*).[20] If these costs are reduced due to the stricter limitation of actions than compared to the general legislation this will lead to that the level of the graph *P(x)S* will be lowered (see the dashed graph). As a result of this the total costs for the damages (*cx+P(x)S*) will be decrease (this is not marked out in the figure). In other words ought the courts to interpret Article 32 of the CMR Convention in a strict way in order to shorten the period under which a sender or a consignee are able sue the carrier.

The problem period is however that in practice the courts often have extended the period of time before the claim for compensation is time barred. The well-known English case Moto Vespa S.A. v. MAT Ltd illustrates the problem:[21] The case concerned a load of laths that were to be carried from Birmingham in England to Madrid in Spain. The laths were however damaged due to a car accident. After the accident the goods were loaded on another truck but at the arrival in Madrid the consignee refused to take delivery of the goods. The laths were then returned to Birmingham. Mr Mocatta J. was of the view that neither of the provisions in Article 32 (a) and (b) were applicable here. The goods were

20 Of course also the costs of the sender and the cargo insurer that are not possible to get compensation for from the carrier will decrease but this is not illustrated by the graph. In the long run the sender and the cargo insurer will also directly benefit from the provisions on limitation of actions.

21 MotoVespa S.A. v. MAT (Britannia Express) Ltd. [1979] 1 Lloyd's Rep. 175 Q.B.

never delivered to the consignee at the same time as this was not a case of total loss but of damage. Nor was Article 32 (c) applicable because of the fact the text must be interpreted as covering other cases than those on losses and damages. The consequence of this was that Mr. Mocatta J. applied the general English law instead where it is regulated that a claim is time barred after three years instead of one. The case has been criticized already in the English literature on the law of carriage of goods by road. A more cost-effective solution would have been to say that the goods were delivered at latest at the time when it was returned to Birmingham. In that case the period of limitation of action would have been shortened, which in the end would have promoted the underlying economic principles of the regulation in Article 32.

5 Concluding Words

One of the fundamental ideas behind a convention such as the CMR is to try to create uniformity. However, it is a fact that already the text of the English and the French versions differs in details. In addition to this the preparatory works to the convention are old and not seldom contradictory. The different provisions of the convention has also been interpreted in many ways by different courts in the various countries that are parties to the CMR Convention. The consequence of this is that it becomes difficult to interpret the different provisions of the convention by using traditional sources of law. In order to overcome this problem the courts may, in a situation where the traditional sources of law are contradictory or do not give any guidance, interpret the provisions of the CMR Convention in accordance with the economic principles that the liability regulation are based on.

In this article I have tried to show, by using three different examples regarding some of the key elements of the liability regulation, how this can be done. The conclusion here is that in order to promote cost effectiveness the provisions regarding the prerequisites for liability in Article 17 should be interpreted as a strict liability. This will lead to that the individual carrier himself minimizes the total costs for losses and damages by balancing the costs for losses and damages against the costs for avoiding those.

Regarding the losses and damages that actually occur it is important to distribute the costs for those in a way that is economically optimal. A way of doing this in the CMR Convention is to grant the carrier the right to limit his liability to a certain amount, i.e. 8.33 SDR per kilogramme of the goods lost or damaged. The effect of this will be that the premiums for the liability insurance will decrease and in the end the same thing will happen to the freight rates. The premium for the cargo insurance will of course increase as a more heavy burden is placed on the cargo insurers, but the decrease of the liability insurance premiums and freight will be larger because of the fact that there is a need for wider margins in calculating the premiums for the liability insurance. In other words both the carrier and the sender will benefit from this regulation. This leads to the conclusion that the provision in Article 23(4) ought to be interpreted in

order not to create a gap in the liability regulation, which contradicts the idea behind the system of limitation of the compensation.

The provisions in Article 32 should to be viewed in a transaction cost perspective. By creating incentives for the parties, especially the sender and the consignee, to bring their claims before the court within a short period of time the costs for the average adjustment and the judicial proceedings can be kept at a low level. This will in the long run lead to that the insurance costs and the freight rates are reduced, something which will be to the benefit for all parties on the market.

The overall conclusion here is that the interpretation of CMR Convention by using law and economics arguments could prove to be a fruitful method in addition to the more traditional method of interpretation by using ordinary sources of law. Of course this method could, as any method, be criticized. Anyway, it is still my belief that not only the parties but also the society will benefit from an interpretation of the CMR Convention in line with the economic principles presented above: if the costs for transports are reduced, the freight rates could be kept at a low level. And in the end the consumer will pay less for the products he is buying in the local shop.