



DOES ARTICLE 23.4 OF THE CMR CONVENTION IMPLEMENT THE REAL LIMITED RECOVERY OF THE LOSSES IDEA?

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SUMMARY

In this paper, it is sought to answer the raised thesis if Article 23.4 of the CMR Convention implements the real limited recovery of the losses idea, depending on the growing popularity of international road cargo transportation and legal scholars' indications that certain Articles of the CMR Convention, including 23.4, are problematic. In the first part of the work, the theoretical analysis of the full recovery of the losses principle is accomplished and its exemptions are provided. The liability can be limited by the contract, law, or decision of the court, usually, the carrier's liability is limited by the legislature. The second part provides a theoretical and practical approach to the carrier's liability, likewise, wording, and commentary of Article 23.4. As a result, linguistic ambiguities that could not provide a clear understanding of the "charges incurred in respect of the carriage" were identified. Subsequently, a case law analysis of 7 countries was executed. The research has shown that 2 approaches – narrow and wide – are spread in jurisprudence. The third part answers the raised thesis of the paper, concluding that the idea of the carrier's liability limitation is not executed. Hence, the idea of a carrier's liability limitation is not realized as, theoretically or in practice, Article 23.4 is not understood uniformly, which constitutes a prerequisite for the emergence of "forum shopping" and the legal uncertainty of the carrier's liability. Unstandardized interpretation of the carrier's liability significantly affects commercial relations, as in certain countries the carrier shall bear more losses, which as well impacts the insurance prices.

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KEY WORDS

Carrier's civil liability, limited liability, CMR Convention.

INTRODUCTION

Nowadays, data shows that cargo carriages by road account for 76,5 percent of the market in Europe.² It can be considered that most plausibly, the physical or legal person will choose delivery by road transport. Not only because of the free movement of goods or people in the European Union but also taking into consideration worldwide globalization, the contracts of international carriage of goods by road may be concluded more often than a decade ago.³ Already on the 19th of May 1956 in Geneva, United Nations had concluded a Convention on the Contract for the International Carriage of Goods by Road (CMR)⁴ (hereinafter – CMR Convention, CMR). At the moment, 58 parties have ratified this convention.⁵ Legal scholars have written that “the CMR was prepared when it was easier than today to draft. ... The text which emerged, therefore, is simple and clear.”⁶ But significant doubts arise if the 66-year-old convention’s established ideas fit nowadays’ tendencies and needs, dictated by the carriage service industry.

It cannot be said that the CMR is an unexamined act. Various legal scholars have analyzed different aspects of the CMR. E.g. W. Verheyen has studied Article 1, already stating that various countries interpret what is to be considered the contract of carriage, including the court’s decision on the national regulation.⁷ Quite a broad analysis was made in the field of Article 29 when the mere definition of wilful misconduct is equivalented, interpreted, or understood differently.⁸

More significant attention should be brought to the established responsibility of the carrier. The carriers are acting at high risk, taking into consideration the wide scope of carrying goods

² Statista research department, “European Road Freight Market Forecasts 2021-2025,” (September 29, 2022) // <https://www.statista.com/statistics/1068472/road-freight-market-size-europe/>.

³ Nota bene: e. g. compared to 2010, in 2021 the road freight market has increased by 27,5 percent (Statista research department, supra note 1).

⁴ Convention on the Contract for the International Carriage of Goods by Road (CMR), Official Gazette (1998, no. 107-2932).

⁵ United Nations, “Participants of the Convention on the Contract for the International Carriage of Goods by Road (CMR),” // https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XI-B-11&chapter=11&clang=_en.

⁶ Rolf Herber, “CMR: UNIDROIT Should Not Let This Child Go!”, *Uniform Law Review* Vol. 2, No. 2-3 (April 1998): 475 // DOI: 10.1093/ulr/3.2-3.475.

⁷ W. Verheyen, “National judges as gatekeepers to the CMR Convention”, *Uniform Law Review* (2016, Vol. 21), p. 443.

⁸ D. Defossez, “CMR: what if the courts got it wrong?”, *Uniform Law Review* (2016.03, Vol. 21(1)), p. 3.

and the high possibility of loss or damage. Thus, Article 23.4 of the CMR establishes the scope of reimbursable damages, making a watershed of what is compensated losses: “in addition [to the cargo loss or damage], the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable.”⁹ D. Defossez has stated that “Article 23 [is where] the age of the CMR Convention is visible.”¹⁰ When M. Antapasis in his article also noted that “Art. 23 is one of the CMR Convention’s problematic articles”¹¹, however, indications of what causes these problems, as well as the case law, were not presented. Hence, it may be thought that either the drafting of this Article may be ambiguous, causing a variety of interpretations of what losses shall be borne by the carrier, or the CMR itself cannot guarantee the standardized and certain implementation of the unilateral understanding of the carrier’s limits of liability.

The CMR’s purpose is “standardizing the conditions governing the contract for the international carriage of goods by road, particularly ... the carrier’s liability.”¹² This aspect, in particular, shall be drawn to greater attention, as the CMR establishes a strict civil liability of the carrier.¹³ Hence, it can be stated that the Articles, regulating the questions, such as limits or liability, special risks, resting the carrier from the responsibility, the burden of proof, period of limitations, and damage reimbursement procedure, shall be interpreted in a standardized matter. Therefore, considering the age of the CMR, and the numerous aspects of the carrier’s liability, the analysis, of whether the CMR still fits its purpose of international carriage of goods by road contracts unification and standardization of limited carrier’s liability shall be executed in a deeper matter.

THE PRINCIPLE OF FULL COMPENSATION

To answer the raised legal issue, it is necessary to establish how the full compensation principle is established and understood in civil law, what are the exceptions of the earlier named principle, accordingly, on what occasions, and due to what reasons, the liability is being limited.

The principle of full compensation

It is worth starting with the description of the full compensation principle (lat. *compensation lucri et damni*), which is known globally.¹⁴ E.g. in the Republic of Lithuania, the basis of the

⁹ CMR Convention, supra note 3, Art. 23.4.

¹⁰ D. Defossez, supra note 7, p. 13.

¹¹ M. Antapasis, “CMR: Have we reached the end of the road?”, *European Journal of Commercial Law* (2017, No. 1/2), p. 55.

¹² CMR Convention, supra note 3, preamble.

¹³ CMR Convention, supra note 3, Article 17.1.

¹⁴ *Nota bene*: e.g. Article 7.4.2. of the UNIDROIT principles of international commercial contracts (2016) also establishes the full compensation principle, that “the aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance [of the contract]”. Source:

principle is already foreseen in the Constitution that the compensation for material and moral damage caused to a person is determined by law,¹⁵ subsequently, the Civil Code of the Republic of Lithuania establishes the full compensation principle – the culprit shall recover the aggrieved party fully for the caused injury.¹⁶ It could be said that the principle of full compensation is implemented widely in other legal systems of European countries as well, not limited to, e.g. Belgium,¹⁷ France,¹⁸ Germany,¹⁹ Latvia,²⁰ and the Netherlands²¹.

Notwithstanding the earlier established explanation of the full compensation principle, the doctrine explained that the principle is bonded with the recovery of the injured party's *status quo*, thus, he shall not occur in a poorer, nor in a better situation than he was before the injury.²² Not only the aggrieved party shall prove what losses he suffered but also shall act prudently to minimize the losses (doctrine of mitigation of harm); thus, if the culprit proves that due to the intended actions of the injured party the amount of the losses has risen, the amount of the compensation shall be proportionally reduced.²³ Therefore, the doctrine of mitigation of harm puts a burden on the claimant not only to prove the amount of the losses²⁴ but also to be interested in loss minimization, “guaranteeing an equilibrium of legal interests of both parties involved.”²⁵

In conclusion, it could be said that the principle of full compensation is considered essential when discussing the recovery of losses in civil relations. However, the full compensation principle is not absolute. On separate occasions, the subject's liability is limited. Thus, these situations will be discussed further.

UNIDROIT, Principles of international commercial contracts (Rome: International Institute for the Unification of Private Law, 2016), 271-274.

¹⁵ The Constitution of the Republic of Lithuania, Official Gazette (1992, no. 33-1014), Article 30.2.

¹⁶ Civil Code of the Republic of Lithuania, Official Gazette (2000, no. 74-2262), Article 6.251, 6.263 clause 2.

¹⁷ See Civil Code of Belgium (1807.09.03, No. 1804032150) Art. 5.237.

¹⁸ See Civil Code of France (Creation Law 1803.03.05 promulgated on March 15, 1803), Art. 1240.

¹⁹ See Commercial Code of Germany (BGB) (1896.08.19, BGBl. I p. 42, 2909; 2003 I p. 738, which was last amended by Article 4 of the law of July 15, 2022 (BGBl. I p. 1146), §823.

²⁰ See Civil Law of Latvia (1937.01.28, Government Gazette, 41, 20.02.1937), Art. 1779.

²¹ See Civil Code of the Netherlands (1992.01.01, No. BWBR0005289) Art. 6:162.

²² Algis Norkūnas, Simona Selelionytė-Drukteinienė, Civilinės atsakomybės praktikumas: Mokomasis leidinys, (Vilnius: MRU, 2008), 43. Remark: Translated from the Lithuanian language by the author of this paper. Until it is written otherwise, it shall be held that translations are made by the author of this paper.

²³ Ibid, p. 44, UNIDROIT, supra note 8, Art. 7.4.8.

²⁴ E.g. see Civil Procedure Code of the Republic of Lithuania, Official Gazette (2002, no. 36-1340), Article 178; Clare Connellan, Elizabeth Oger-Gross, and Angélica André, “Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits”: 10; in: John A. Trenor ed., Global Arbitration Review: The Guide to Damages in International Arbitration, (London: Law Business Research Ltd, 2018).

²⁵ Renata Jankutė, „Visiško nuostolių atlyginimo principo, kilus deliktinei atsakomybei, taikymo išimtys – subjektyvios prigimties faktoriai“, Socialinių mokslų studijos 5 (2013): 294.

Limited civil liability

Even though the principle of full compensation is held “as one of the main rules, in the civil law”²⁶, the doctrine of law also contains exceptions that relief or limit civil liability. The main three grounds that may limit the contractual civil liability are: 1) if it is agreed per contract,²⁷ 2) according to law,²⁸ or 3) by the decision of the court.²⁹

Starting from the first ground – the possibility to limit the contractual party’s liability concluded via agreement is based on the principle of freedom of contract³⁰ if it does not contradict mandatory norms of law. As scholars indicate, that “liability can be limited or eliminated only by mutual agreement between contractual parties.”³¹ However, “the parties cannot agree to the loss limitation if it was caused by the fault or gross negligence of the debtor. Also, it is prohibited to limit or eliminate civil liability for injury to health, loss of life, or non-pecuniary damage.”³² Thus, “the freedom of contract is not absolute”³³ when limiting the liability of contractual parties as well.

The second possibility to restrict the amount of reimbursement are exceptions, established by law. For example, in the jurisprudence it is explained that company’s (entrepreneur’s) liability is strict³⁴. It is limited by the criteria of predictability of the losses – “company (entrepreneur) is liable only for those losses that it anticipated or could have reasonably anticipated at the time of the conclusion of the contract as a probable consequence of non-fulfillment of the obligation.”³⁵ Nevertheless, the Supreme Court of Lithuania has distinguished that “a company (entrepreneur) is a profit-seeking person who, in the course of his activities, enters into commercial transactions that are characterized by a certain risk, as a result of which such a company must assume the risk of negative consequences in its activities – losses to the other party to the contract – and in cases where the proper fulfillment of contractual obligations becomes constrained not for reasons beyond the control of the company itself.”³⁶ Therefore, it could be assumed that for the contained high risk and various possibilities of negative consequences, on the other hand, having a possibility to gain profit from providing activities, the legislator chose to partially limit the company’s/entrepreneur’s liability.

²⁶ Rūta Lazauskaitė, „Susitarimų dėl sutartinės atsakomybės ribojimo teisinė prigimtis“, *Socialinių mokslų studijos* 1 (2010): 170.

²⁷ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.251 clause 1.

²⁸ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.251 clause 1.

²⁹ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.251 clause 2.

³⁰ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.156.

³¹ Rūta Lazauskaitė, supra note 20, p. 179.

³² Civil Code of the Republic of Lithuania, supra note 10, Art. 6.252 clause 1.

³³ *Nota bene*: decision regarding non-absolute freedom of contract was established in the Lithuania case: UAB „Vitradra“ v. AB „SEB lizingas“, Supreme Court of the Republic of Lithuania (2013, Nr. 3K-7-2).

³⁴ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.256 clause 4

³⁵ Nacionalinė mokėjimo agentūra prie Žemės ūkio ministerijos v. UAB „Ernst & Young Baltic“, Supreme Court of the Republic of Lithuania (2018, Nr. e3K-3-190-248).

³⁶ UAB „Eisiga“ v. UAB „Čitas“, Supreme Court of the Republic of Lithuania (2015, Nr. 3K-3-671-248).

The last ground for limiting the culprit's liability is the decision of the court.³⁷ Theoretically, the regulation foresees that “[t]he court, considering the nature of the liability, the financial situation of the parties and their mutual relations, may reduce the extent of the losses if full recovery would result in unacceptable and severe consequences. However, the reduced compensation cannot be lower than the insurance amount with which the debtor's civil liability was or should have been compulsorily insured.”³⁸ The Court of Cassation emphasizes the careful and exceptional application of this legal norm, requiring motivation in the court's decision.³⁹ Court practice shows that severe health conditions, disability, raising a young child, and lack of other real estate may lead to a reduction in incurred losses to prevent severe consequences for the defendant.⁴⁰ The reduction of loss amount is also applicable in tort law.⁴¹ In cases of formal violations where certain procedures were not carried out but do not result in a violation, previous administrative punishment, assistance in investigating the incident, non-malicious offense, etc., the court may limit the culprit's liability.⁴²

All in all, the theoretical analysis of the limitation of civil liability shows that there are 3 general exemptions – contract, mandatory norms of law, and decision of the court – that allow not to imply full compensation principle. It could be assumed that with reduced liability are accomplished principles, such as freedom of contract and *pacta sunt servanda*, for parties to be able to establish other compensation ceilings, depending on peculiarities of the bonded contractual relations. Usually, by law provided limitation of liability is pursued to safeguard the subjects that already bear significant risk, thus the legislator is interested to establish in advance some liability limitation rules. Lastly, the courts may also decide to limit the culprit's liability, considering the material and physical qualities of the responsible party, likewise the nature of liability if full compensation could cause severe consequences.

ART. 23.4 OF THE CMR CONVENTION: THEORETICAL AND PRACTICAL ASPECTS

In this part of the work, it will be started from the general provisions on carrier's liability, and also the cornerstone ideas of the CMR Convention will be introduced. Further, the object of this research – Article 23.4 – will be wholesomely revised, by establishing the wording, ambiguous parts, and definitions of the Article. Finally, the related case law, regarding concerning Article, will be provided and researched seeking to answer the hypothesis of this research.

³⁷ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.251 clause 2.

³⁸ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.251 clause 2.

³⁹ J. B.-W., A. U. W., and R. B. v. A. P., Supreme Court of the Republic of Lithuania (2008, Nr. 3K-3-327).

⁴⁰ AB „Rytų Skirstomieji tinklai“ v. V. K., N. K., Supreme Court of the Republic of Lithuania (2009, No. 3K-3-615).

⁴¹ Lietuvos Aukščiausiojo Teismo Teisės tyrimų ir apibendrinimo departamentas, Teismų praktikos dėl sutartinės civilinės atsakomybės taikymo apžvalga, (October 24, 2018), 4.

⁴² Aplinkos apsaugos departamentas prie Aplinkos ministerijos v. B. M., District Court of Utena (2020, No. E2-1404-477).

General Provisions on Carrier's Liability

Various countries provide carrier's liability exemptions in the national legislation. E.g. the general provisions in the Republic of Lithuania regarding carriage relations are devoted to 21 Articles,⁴³ when special regulations, as well as the liability of the carrier stipulating norms, are established in the Road transport code.⁴⁴ Art. 46.2 states that for damage to the goods, the carrier shall reimburse the depreciation in the value of the cargo.⁴⁵ Additionally, the Road transport code contains a blank legal norm – indicating that the limits of loss of cargo are being calculated by the CMR Convention.⁴⁶ More specifically, Art. 23.3 of the CMR indicates that “[c]ompensation shall not, however, exceed 8,33 units of account per kilogram of gross weight short.”⁴⁷ *Units of account* are also known as Special Drawing Rights (hereinafter – SDR), which value is indicated in the International Monetary Fund,⁴⁸ e.g. currently, for 1 kg of missing cargo no more than 10,94 Eur could be asked⁴⁹. However, the carrier executing domestic haulage in Lithuania is not guaranteed with limitation of loss in case of delay; the claimant may also request covering losses or claim contractual penalties (forfeit) if they were established by a contract.⁵⁰

It is worth establishing that other European countries have implemented limits on the carrier's liability in their national regulation, similar to the ones established in the CMR Convention, e.g. Germany has foreseen the same limits of 8,33 SDR, with possibility to agree from 2 to 40 SDR for every lost or damaged kilogram of goods⁵¹, France uses fix value for every lost kilogram of cargo⁵², while Spain uses national index.⁵³ As well as establishing limits for loss occurred due to delay, usually the claimant cannot request more than the freight rate⁵⁴; but there

⁴³ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.807-6.827.

⁴⁴ Road transport code of the Republic of Lithuania, Official Gazette (1996, no. 119-2772), Art. 42-56.

⁴⁵ Road Transport Code of the Republic of Lithuania, supra note 38, Art. 46.2.

⁴⁶ Road Transport Code of the Republic of Lithuania, supra note 38: Art. 46.5.

⁴⁷ CMR Convention, supra note 3, Art. 23.3, as amended by Protocol adopted 1978.07.05, in force 1980.12.28.

⁴⁸ International Monetary Fund, “SDRs per Currency unit and Currency units per SDR last five days” // https://www.imf.org/external/np/fin/data/rms_five.aspx.

⁴⁹ Calculations are: 8,33 SDR x 1,31297 Eur/SDR x 1 kg = 10,94 Eur/kg, taking SDR value dated 2022.09.30.

⁵⁰ Road Transport Code of the Republic of Lithuania, supra note 38, Art. 47.

⁵¹ Commercial Code of Germany (HGB), (1897.05.10, Federal Law Gazette Part III, classification number 4100-1, published revised version, which was last amended by Article 1 of the law of July 15, 2022 (Federal Law Gazette I p. 1146)), §431.1.

⁵² Code of Transports of France, Annex II, Standard contract applicable to public road transport of goods for which there is no specific standard contract appended to Article D. 3222-1 (Modified by Decree No. 2021-985 of July 26, 2021 - art. 2), Art. 22.1.

⁵³ E.g. IPREM daily in 2022 is 19,60 Eur, thus, 1/3 of an index is 6,53 Eur. Source: IPREM, “Indicador Público de Renta de Efectos Múltiples”, IPREM 2022 // <http://www.iprem.com.es/2022.html>.

⁵⁴ Spanish Law 15/2009 («BOE» no. 273, of 11/12/2009, Ref. BOE-A-2009-18004), Art. 57.1-2.

are exceptions, e.g. in Germany.⁵⁵ However, almost uniformly countries agree, that in case of fraudulent or intentional act of the carrier the limitation of liability is not applicable.⁵⁶

Other means of transport, e.g. international carriers of goods by sea, are limited to 666,67 SDR per package/unit or 2 SDR per kilogram of the gross weight of the goods lost or damaged, whichever is the higher.⁵⁷ Carrying the goods by rail, the carrier is limited by 17 SDR per 1 kilogram of lost cargo.⁵⁸ In addition, the carrier must return the transportation fee, customs duties, and other amounts paid during the transportation of the lost cargo, except for the excise duty for those cargoes that are transported under the regime of temporary suspension of excise duty payment.⁵⁹ COTIF-CIM rules also foresee natural cargo depreciation limits,⁶⁰ which are included in case of cargo loss.⁶¹ When delivering the goods by air, the carrier is entitled to recover loss caused by non-timely delivery, however, no liability limits are provided.⁶² While cargo claims are limited to 250 francs⁶³ per kg⁶⁴.

When briefly analyzing the limitation of the carrier within national regulation, as well as in international agreements, it could be said that the regulations select the carrier's responsibility limitations – ceilings for lost, damaged or delayed to deliver cargo and foreseeing what additional costs can or cannot be recovered. Therefore, it may be assumed that the carrier is considered a high-risk performing entrepreneur – including a possible variety of cargoes, not excluding risks, arising during transportation. Considering the thesis raised, it is worth analyzing what limits on liability are foreseen for international road-cargo carriers.

Prof. R. Loewe stated that “transport law, and particularly the rules of private law which form part of transport law, are among those areas in which the need for security and unification of the law is felt most strongly.”⁶⁵ Thus, taking into consideration that the international private law was only implemented with unifying conventions in the field of rail (1890), sea (1924), and

⁵⁵ HGB, supra note 46, §431.3.

⁵⁶ HGB, supra note 46, §435; Code of Transports of France, supra note 47, Art. 24.3; Spanish Law 15/2009, supra note 49, Art. 46.

⁵⁷ Protocol (SDR Protocol) Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 (the Hague Rules), as Amended by the Protocol of 23 February 1968 (Visby Rules), Official Gazette (2003, no. 91(1)-4124), Art. 6.1.

⁵⁸ CIM Uniform Rules concerning the Contract for International Carriage of Goods by Rail Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, Official Gazette (2008, no. 1-1), Art. 30.2.

⁵⁹ CIM-COTIF, supra note 53, Art. 30.4.

⁶⁰ CIM-COTIF, supra note 53, Art. 31.2.

⁶¹ CIM-COTIF, supra note 53, Art. 31.4.

⁶² Convention for the Unification of Certain Rules for International Carriage by Air signed in Warsaw on 12 October 1929, Official Gazette (1997, no. 19-414), Art. 19.

⁶³ *Nota bene*, for the calculations Swiss francs shall be used.

⁶⁴ Warsaw Convention, supra note 57, Art. 22.2.

⁶⁵ Commentary on the Convention of 19 May 1956 of the Contract for the International Carriage of Goods by Road (CMR), (1975, Geneva), United Nations, No. ECE/TRANS/14, p. 1, par. 1.

air (1929) carriages,⁶⁶ the rules of road carriages were left unregulated internationally-wide. Therefore, the CMR Convention supplemented international private law in 1956.⁶⁷

In the preamble of the CMR Convention, it is declared that one of the main purposes of the convention is to standardize the carrier's liability.⁶⁸ Accordingly, CMR establishes different aspects of carrier liability than usual civil liability. It can be considered that the specifics of international carriage have affected different rules and exceptions for the carrier's liability to be imposed. Starting with, it established a strict liability of the carrier, thus, as the carrier is already presumed liable, the burden of proof shifts to him to dispute his responsibility.⁶⁹ The carrier is entitled to justify that the incurred breaches of contract of carriage have occurred due to obstacles that he could not prevent, or he was wrongly instructed by the claimant, or if the damage occurred due to special risks.⁷⁰ E.g., various case laws show that if the carrier chooses to park at the parking lot without surveillance, he is liable due to lack of care.⁷¹ Even though, if the cargo is stolen when the trailer is parked in the secured parking lot, it is not considered an unavoidable event, because the surveillance cameras do not prevent thefts.⁷² So, in the absolute majority of cases, the carrier is responsible for the consequences incurred to the cargo as it is under the care of the hauler. However, compliance with certain security requirements may be expected from the carrier as a professional in its field.⁷³ The carrier's duty of care can also be based on his inducement avoiding the application of Article 29, which eliminates the limits of his liability. It is worth drawing attention to that certain aspects of the carrier's duty of care can be held also as a contractual obligation with an insurer, affecting the amount of compensation from the insurance, which may be even considered a bigger motion.⁷⁴

As was mentioned earlier, the carrier's liability due to loss or damage of the goods is limited to 8,33 SDR per kilogram of lost/damaged cargo.⁷⁵ So in the international contract of carriage, the full damage recovery principle does not itself apply, contrary to usual civil liability. It is speculated that even though “the CMR Convention establishes a strict liability of the carrier, it also lays down certain safeguards in the form of a limitation on the amount of the damage to be paid by the carrier.”⁹⁰ However, the contrary position specifies that the set limits are “extremely low, reflecting only about a quarter of the original figure set ... when CMR entered into force.”⁷⁶

⁶⁶ Commentary of CMR Convention, *supra* note 60, p. 1, par. 1.

⁶⁷ CMR Convention, *supra* note 3.

⁶⁸ CMR Convention, *supra* note 3, preamble.

⁶⁹ CMR Convention, *supra* note 3, Article 17.1.

⁷⁰ CMR Convention, *supra* note 3, Article 17.2, 17.4.

⁷¹ Kraftverkehr N. S.A.R.L. v. A. R. GmbH & Co. KG, Federal Court of Justice of the Republic of Germany (BGH), (2009, No. I ZR 191/07)

⁷² See Riga City Northern District Court, September 24, 2015 (2015, No. C32252411), in: Aleksandrs Fillers, “The CMR in the practice of Latvian court”, *Uniform Law Review* 25 (2020): 188.

⁷³ See AB “Vilkma” v. UAB “DSV Transport”, UAB “Hofa”, Supreme Court of the Republic of Lithuania (2012, No. 3K-3-347).

⁷⁴ See, Insurance Contract Act of Germany of 23. November 2007 (BGBl. I S. 2631), last amended by Article 4 of the law of July 11, 2021 (Federal Law Gazette I p. 2754), Section 28.2; Law on Insurance of the Republic of Lithuania, Official Gazette (2003, no. 94-4246), Art. 98.8.

⁷⁵ CMR Convention, *supra* note 3, Art. 23.3.

⁷⁶ Rolf Herber, *supra* note 5, 477.

It is also noticeable that compared to other conventions or regulations, the CMR limits of carrier's liability in case of lost or damaged cargo is one of the lowest. R. Herber has drawn attention that “the institute of the carrier's liability limits may induce a contrary reaction from the claimant itself – the tendencies in case law show that claimants would argue and prove that the carrier has acted in wilful misconduct (Art. 29), just to eliminate the possibility to apply established limits of the carrier's liability.”⁷⁷

The CMR Convention establishes that the carrier bears the responsibility for delay in delivery. Article 23.5 regulates that “in the case of delay⁷⁸ if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges.”⁷⁹ The burden of proof presupposes that liquidated damages are forbidden.⁸⁰

The interim conclusion would be that the CMR broadly regulates a carrier's liability. As it is established as strict liability, the carrier will most often be liable for the loss or damage, even if it has acted with a significant care duty. However, it can be considered one of the main business risks that the carrier is facing in the commercial transportation business. Hence, the analysis of the carrier's liability can be an index that as the carrier is facing a lot of risks, thus, its legitimate expectations would be the unambiguous, and certain regulation, guaranteeing uniform interpretation of its limits of responsibility.

One of the clauses, about the carrier's liability limitation, is left unanalyzed, which is Art. 23.4. However, considering the thesis raised, comprehensive research will be provided in the further part of the work.

Article 23.4

Not only the liability of the carrier has more specifics, but also the damage reimbursement procedure in the transport law differs from the usual civil liability. There are not many difficulties to understand, what pure damages shall be recovered by the carrier in case of cargo loss. Article 23.1 regulates that “in case total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.”⁸¹ For damaged cargo, the carrier is liable only for diminishing in value, however, not exceeding the compensation if the whole cargo is damaged – the amount payable for the total loss of goods, and proportionally to partial damage.⁸² However, most notice shall be dedicated to Article 23.4, as D. Defossez states, “Article 23 [is where] the age of the CMR Convention is visible.”⁸³ Article 23.4 itself establishes that:

⁷⁷ Rolf Herber, *supra* note 5, 477.

⁷⁸ *Nota bene*: more precisely, when the late arrival is considered a delay, explains Article 18 of the CMR Convention.

⁷⁹ CMR Convention, *supra* note 3, Article 23.5.

⁸⁰ E. g., UAB „Sibrita“ v. UAB „Kelin“, Vilnius Regional Court (2019, No. e2A-719-661), S.A. v. P.G. & C. -S.p.A., Bundesgerichtshof (BGH), (2019.09.19, No. I ZR 64/18).

⁸¹ CMR Convention, *supra* note 3, Article 23.1.

⁸² CMR Convention, *supra* note 3, Article 25.

⁸³ Delphine Defossez, “CMR: what if the courts got it wrong?”, *Uniform Law Review* 21 (March 2016): 3.

“in addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable.”⁸⁴

As one of the official versions of the CMR, the French version uses the term *frais*,⁸⁵ also meaning expenses, and/or charges.⁸⁶ The mere wording of the Article presupposes that only certain charges shall be recovered – *charges that are incurred in respect of the carriage*; also establishing a limitation – *no further damage shall be recovered*. In Article 6.1 sub. i) it is described that in the consignment note the carriage charges shall be named.⁸⁷ From this Article, it should be clearer what charges can be considered as incurred in relation to the carriage, as the Article gives examples – “carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery.”⁸⁸ The Commentary explains that there are reimbursable charges “which are incurred in respect of the carriage of goods and not outlays for the purpose of carriage.”⁸⁹ So from such an explanation could be considered that *charges incurred in respect of the carriage* bond with the carriage of goods itself, and not related to cargo damage. It could also be added that from the provision of 6.1. sub. i) such charges shall be foreseen in advance.

However, the Commentary introduces some ambiguity and contrary thought that “[t]he charges incurred with respect of carriage also include the costs occasioned by an accident (reloading, valuation, etc.), provided that they have been incurred reasonably.”⁹⁰ More doubts are being brought in when it could be expected that the Commentary would explain Article 23.4 wording. Worth noticing that Article 23.4 talks only about the *charges* incurred in respect of the carriage. *Charges* (*lit.* rinkliavos, apmokestinimai), in the context of transport law, more often fit the purpose of specific collections, such as customs duty, surcharges, or similar charges, occurred during the carriage of the goods that, in a way, can be considered as unavoidable as most commonly they are established by Governments or other regulations,⁹¹ or are simply necessary for the mere execution of the transportation. Using *charge* as a verb usually means to place a financial burden.⁹² On the contrary, using linguistic analysis, *costs* (*lit.* išlaidos) would mean that you shall pay a certain price for a good or service.⁹³ But the burden of obligation between charges and costs differs – charges are usually set by the government and are applied by different authorities, where is no choice as to the application of these charges. Thus, it can be assumed

⁸⁴ CMR Convention, supra note 3, Article 23.4.

⁸⁵ CMR Convention, supra note 3, Article 23.4.

⁸⁶ Cambridge Dictionary by Cambridge University Press, definition of “frais” // <https://dictionary.cambridge.org/dictionary/french-english/frais>.

⁸⁷ CMR Convention, supra note 3, Article 6.1. sub. i).

⁸⁸ CMR Convention, supra note 3, Article 6.1. sub. i).

⁸⁹ Commentary of the CMR Convention, supra note 60, par. 192

⁹⁰ Commentary of the CMR Convention, supra note 60, p. 54, par. 193.

⁹¹ See Agreement on International Railway Freight Transportation (SMGS), (2015.10.04.06, Geneva), United Nations, ECE/TRANS/SC.2/GEURL/2013/6/Rev.1, p. 11.

⁹² Merriam-Webster.com Dictionary, definition of “charge” // <https://www.merriam-webster.com/dictionary/charge#legalDictionary>.

⁹³ Merriam-Webster.com Dictionary.

from the above-established comment of Article 23.4,⁹⁴ costs that occurred because of the incident become a charge. In specifics of international carriage on-road, as well as of different meanings of these terms, it does not give clearance if charges and costs are used as equivalents.

In conclusion, the formulation of Article 23.4 raises doubts about the definition of *charges incurred in respect of the carriage*. The Vienna Convention on the Law of Treaties states that the treaty should be interpreted based on its purpose and ordinary context of the terms used.⁹⁵ The purpose of the CMR suggests unifying aspects of goods carriers on roads, and the wording of the Convention implies limitations on the carrier's responsibility for additional costs due to goods damage. The Commentary does not provide a clear definition of carriage charges, and it is uncertain if this formulation is sufficient for national courts to apply a standard of limited liability and uniformly implement the Convention. Further analysis will examine case law of these countries: Germany, France, Denmark and Belgium, as they have established the biggest logistic companies in Europe, such as Deutsche Post DHL, (Germany), Maersk A/S (Denmark), La Poste Group (France), UPS Europe NV (Belgium).⁹⁶ Additionally, to the research is incorporated case law of the Netherlands, as like previously mentioned countries, the Netherlands are named as one of leading countries in trade logistics.⁹⁷ Accordingly, it could be thought, that formed case law of the named countries may have a significant impact in forming legal landscape on interpreting the CMR Convention. Lastly, Lithuanian cases are included in the comparative analysis, to implement a national understanding of the carrier's liability in the paper's publication country. In addition to that, the tendency for Lithuanian transport companies to have subsidiaries in Poland is seen, which is why the implementation of Poland cases' analysis seems reasonable to understand whether the legal climate in Poland is in any aspects better. The analysis of the chosen countries will be categorized into narrow and wide approaches.

Narrow approach countries

Only two countries have case law that interprets Article 23.4 of the CMR Convention as limiting the carrier's liability. The Federal Court of Justice of Germany (hereinafter – BGH) clarified that charges incurred in relation to the carriage of lost goods under Article 23.4 include expenses that would have arisen in the case of contractual carriage and contributed to the value of the goods at the destination, excluding damages.⁹⁸ BGH provided a list of charges, such as weighing, sealing, cash on delivery fees, cartage, import/export taxes, and transport insurance premiums. This interpretation was based on a comparison with the CIM's Uniform Rules⁹⁹, highlighting a distinction between damage and transport-related costs. Consequential costs, including all damage-related expenses, are not compensated according to Articles 23.1 to 4,

⁹⁴ Commentary of the CMR Convention, supra note 60, p. 54, par. 192.

⁹⁵ Vienna Convention on the Law of Treaties, Official Gazette (2002, no. 13-480), Art. 26.

⁹⁶ Statista Research Department, “Leading logistics companies in Europe in 2020, by revenue”, (June 22, 2023) // <https://www.statista.com/statistics/640120/top-25-logistics-companies-europe/>.

⁹⁷ The World Bank, “Logistics Performance Index (LPI)”, (2023) // <https://lpi.worldbank.org/international/global>.

⁹⁸ M. GmbH v. D. AG, Federal Court of Justice of the Republic of Germany (BGH) (2003.06.13, No. I ZR 206/00).

⁹⁹ COTIF-CIM, supra note 53.

placing the risk on the shipper.¹⁰⁰ However, the shipper can declare a special delivery interest under Article 26.¹⁰¹ For example, the incurred tobacco tax for withdrawing stolen goods from tax suspension was deemed non-recoverable under Article 23.4. Similar judgments were made regarding tax charges due tax suspension¹⁰² or cargo loss during in transit country¹⁰³ and non-refundable survey costs.¹⁰⁴

However, there are also exceptional cases, refunding survey, warehousing, and transportation costs. The decision was based on the argument that as the cargo was delivered with temperature breach, the goods could not be longer held as deep frozen, thus, the total spoilage of the goods could be prevented only by promptly returning them, warehousing, and deep-freezing the goods at the sender. These costs were held incurred as a result of the transport and considered refundable.¹¹⁸ It can be assumed that such a decision fits the explanation established in the Commentary of the CMR recovering reasonably incurred losses.¹⁰⁵

The Supreme Court of the *Netherlands* has interpreted losses incurred due to carriage in a similar way to German courts. It ruled that costs referred to in Article 23.4 of the CMR Convention are directly related to the normal performance of transport. Therefore, tax due to the loss of goods was deemed non-recoverable.¹⁰⁶ The court also considered Articles 23.6, 24, and 26, which provide options for the sender to exclude liability limits by paying a surcharge. It concluded that eligible damage recovery categories include the value of lost cargo and transport-related costs, while other losses, such as consequential loss, are not compensable.¹⁰⁷ Survey costs, extrajudicial collections¹⁰⁸, and excise duty¹⁰⁹ are not eligible for reimbursement.

In a case involving frost-damaged fruits, the claimant sought reimbursement for survey costs as salvage costs. However, the court rejected the claim due to lack of evidence.¹¹⁰ Although the court did not validate expert costs, it suggested that if the claimant could demonstrate that such costs reasonably prevented or minimized losses, they could be considered compliant with the purpose of Article 23.4.

¹⁰⁰ M. GmbH v. D. AG, supra note 91.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Die Klägerin v. Spediteur/ Frachtführer, Federal Court of Justice of the Republic of Germany (BGH) (2009.12.10, No. I ZR 154/07).

¹⁰⁴ Versicherung v. Versicherungsnehmerin AH Maschinenfabrik GmbH & Co. KG in B., Düsseldorf Higher Regional Court (2007.03.14, No. I-18 U 138/06).

¹⁰⁵ Commentary of the CMR Convention, supra note 60, p. 54, par. 193.

¹⁰⁶ Philip Morris Holland Bv, Axa Colonia Versicherungs Aktiengesellschaft, Sun Insurance Company of New York v. [A] BV, Supreme Court of the Netherlands (2006.07.14, No. C04/290HR, ECLI:NL:PHR:2006:AW3041).

¹⁰⁷ Ibid.

¹⁰⁸ Plaintiff v. Bernards Transport BV, Court of Rotterdam (2019.02.13, No. C/10/528092 / HA ZA 17-548, ECLI:NL:RBROT:2019:1823).

¹⁰⁹ Jam De Rijk BV, et. al. v. DSV Solutions (Dordrecht) BV, et. al., Court of Zeeland-West Brabant (2014.12.03, No. C/02/245906 / HA ZA 12-132, ECLI:NL:RBZWB:2014:8526).

¹¹⁰ Cool Fresh International B.V., Achmea Non-Natal Insurance N.V. v. Yeniocak Tasimacilik Ithalat Ihracat Ve Dahili Tic. Ltd. Sti, Court of Rotterdam (2022.02.15, No. 346254 / HA ZA 10-128, ECLI:NL:RBROT:2012:BV9685).

When analyzing the carrier's liability in international road carriage, courts take a professional approach rather than a formal one. In the case of *RTT v. Cargofloor*¹¹¹, the carrier was held liable for damage caused by contaminated goods, even though they were not directly carried by the carrier. The court based the liability on national law regarding unlawful acts.¹¹² In the case of *Schenker BV v. Transfennica Logistics BVBA*, the carrier was held liable for breach of *contractual ancillary obligation*, resulting in demurrages, storage costs, and fines. The court acknowledged that such losses were not covered by the carrier's liability under the CMR, but it emphasized that carriers can still be held liable for damages resulting from breaches of contractual obligations.¹¹³

It shall be also noticed that it could be found single, e.g., Swedish¹¹⁴ and Latvian¹¹⁵, judgments that did not consider excise costs eligible for reimbursement, as derogating the wording of Article 23.4. However, the conclusions shall be made in caution, as singular decisions on unavailability to recover certain costs cannot by default mean that these countries explain Article 23.4 as limiting the carrier's liability. Unfortunately, more broad analysis of the mentioned countries could not be implemented due to a lack of case law.

An interim conclusion can be made that both – German and the Netherlands – courts stick to a narrow interpretation of the CMR Convention. Courts make such an interpretation comparing the wording of costs related to carriage and costs related to cargo damage. Likewise, considering other CMR Convention clauses, such as Art. 23.6, 24, 26, claiming full compensation when certain requirements are fulfilled is allowed.

Wide approach countries

Lithuania's case law provides a broad interpretation regarding Article 23.4. The Supreme Court has decided that to determine whether the amounts claimed are to be regarded as other charges connected with the carriage, a direct causal link must be established between the improper performance of the carriage and the costs necessarily incurred by the claimant, thus, the bailiff's finding of fact was held necessary and reasonable, since it had eliminated any doubt as to the fact, nature, and quantity of the loss of part of the cargo.¹¹⁶ It is important to mention that the Court held the appellant incurred costs are part of the loss as is established in national

¹¹¹ *RTT v. Cargofloor*, Supreme Court of the Netherlands (1994.05.15, No. 15273, NJ 1995, 114, ECLI:NL:HR:1994:ZC1333), in: Michel. Spanjaart, “*Transfennical v. Schenker*, the system of articles 17 and 23 CMR”, *Transportrecht* 39 (2016): 383-384.

¹¹² Michel. Spanjaart, *supra* note 104, p. 384.

¹¹³ *Schenker BV v. Transfennica Logistics BVBA*, Supreme Court of the Netherlands (2015.12.18, No. 14/04430).

¹¹⁴ *H.Z. Logistics B.V. v. Thomsen & Streutker Logistics B.V.*, Supreme Court of Sweden (2022.06.14, No. T 3379-21).

¹¹⁵ Latvia case No. C32252411, *supra* note 67.

¹¹⁶ *UAB “BTSK” v. UAB “Transidra”*, Supreme Court of the Republic of Lithuania (2008, No. 3K-3-296).

legislation.¹¹⁷ In another case, the Supreme Court has noted discrepancies in the Lithuanian translation of Article 23.4, compared to English and French versions.¹¹⁸ “The Lithuanian translation uses the word costs [*lit.* – išlaidos], when compared to English or French, the more precise wording should have been payments [*lit.* – mokėjimai].”¹¹⁹ As the CMR does not specify what constitutes other payments in connection with the carriage, the court has given examples that it may be “the cost of returning damaged goods when they are not accepted by the consignee; excise duty when it is paid because the goods were stolen before they left the country (for example, the judgment of the British House of Lords in *James Buchanan & Co. v. Babco Forwarding and Shipping*¹²⁰); VAT; survey/evaluation costs, disposal costs, etc.”¹²¹ The Supreme Court additionally established the obligation to reimburse other charges connected with carriage applies to actual costs, not hypothetical ones.¹²²

Translation mistakes could be also found in the *Danish* version of the CMR. Earlier-analyzed countries maintained the same structure of the CMR Convention, as the original text. However, in the Danish version of the CMR Convention, the Art. 23.4 is numbered 29.3, and, lacks the end of the original version, indicating that “no further damage shall be payable.”¹²³ In the case *Topdanmark Forsikring A/S v. Freja Transport & Logistics A/S*¹²⁴ the claimant has requested to be compensated with sorting costs, which the carrier has disputed as undocumented and unproven, expert costs and freight compensation. However, the court has affirmed the claim of the claimant and recovered all the claimed costs from the carrier, only reducing the extent of sorting costs, stating that such costs shall be recovered as per Art. 29.3.¹²⁵ Likewise in the temperature breach case, where the cargo was spoiled due to an incorrect temperature settings, the court ruled in favor of the claimant, awarding compensation for survey and sorting.¹²⁶ The Supreme Court of Denmark has also decided that the carrier must reimburse excise duty for stolen goods when the goods did not reach the delivery destination, treating it as if the goods had been sold domestically.¹²⁷

¹¹⁷ Civil Code of the Republic of Lithuania, supra note 10, Art. 6.249, clause 4, sub. 2. Note: this Article foresees that in the composition of losses are included reasonable costs related to the assessment of civil liability and damage.

¹¹⁸ UAB “Trans Group LT” v. BUAB “Glikasta”, Supreme Court of the Republic of Lithuania (2011, No. 3K-3-301).

¹¹⁹ Ibid.

¹²⁰ *James Buchanan and Co. Ltd v. Babco Forwarding and Shipping (UK) Ltd*, England & Wales House of Lords (1976.11.09).

¹²¹ UAB “Trans Group LT” v. BUAB “Glikasta”, supra note 111.

¹²² Ibid.

¹²³ CMR-loven, Lov om fragtaftaler ved international vejtransport // <https://danskelove.dk/cmrloven>.

¹²⁴ *Topdanmark Forsikring A/S v. Freja Transport & Logistics A/S*, Maritime and Commercial Court of Denmark (2020.12.07, No. BS-6509/2020-SHR).

¹²⁵ *Topdanmark Forsikring A/S v. Freja Transport & Logistics A/S*, supra note 117.

¹²⁶ *A/S J. Lauritzens Eftf., Jeka Fish A/S v. Lars L. Christensen, TX Logistik AG*, Maritime and Commercial Court of Denmark (2021.05.25, No. BS-59348/2019-SHR).

¹²⁷ Denmark case No. ND 1987. 108 DH, in: J. Schelin, “CMR Liability in a Law & Economics Perspective”, *Stockholm Institute for Scandianvian Law* (1957-2010): 187.

Court of Cassation of *Belgium* has clarified that Article 23.4 restricts a carrier's liability and does not allow for the recovery of consequential loss. However, the court stated that expenses directly related to the carriage must be borne by the carrier.¹²⁸ The court concluded that VAT costs, resulting from defective execution of the transport, were irrecoverable and considered a normal result of the carrier's negligence, thus recoverable from the carrier.¹²⁹ Although the courts differently explain the recovery of import customs duty and VAT if the suspension of the named charges was applied. Court of Cassation has decided that such costs “do not form the market value of the goods, as per Art. 23.1-2”¹³⁰, even though the claimant “based his plea on the assumption that the taxes due are always a part of the market value.”¹³¹

The Court of Appeal of Ghent followed the broad interpretation of Article 23.4 and allowed for the reimbursement of expertise costs and utilization costs directly related to the transport, as they were necessary and useful for the damage evaluation.¹³² Administration costs were not considered recoverable in the case of frost damage, but repacking costs were included in the compensation.¹³³ Similar decisions were made by the Antwerp Court of Appeal¹³⁴ and the Court of Cassation of Belgium¹³⁵, stating that consequential damage to other goods caused by contamination is not compensable under the CMR Convention, but may be regulated by national law. These decisions align with the *RTT v. Cargofoor* case.¹³⁶

France case law also provides a wide approach to the carrier's liability, e.g. the Court of Appeal of Paris decided transportation costs incurred when selling the depreciated goods to the new buyer as eligible for compensation.¹³⁷ However, the Court of Cassation did not validate a claim for immobilization costs of damaged cargo, stating that such costs exceed the carrier's

¹²⁸ *Transport Van Laer v. Comexas Benelux*, Court of Cassation of Belgium (2002.05.30, No. C990123N, ECLI:BE:CASS:2002:ARR.20020530.11).

¹²⁹ *Ibid.*

¹³⁰ *Hawe Belgium NV v. RJ Reynolds Tobacco International, Security Insurance Company of Hartford, Van Eucken*, Court of Cassation of Belgium (2011.05.27, No. C090618N-C090620N, ECLI:BE:CASS:2011:CONC.20110527.1).

¹³¹ *Ibid.*

¹³² *NV Maenhout Transport v. NV Avero Nail Insurance Benelux, SA AIG Europe, XL Brockbank, et al.*, Court of Appeal of Ghent (2009.02.23, No. 2007/AR/2022, ECLI:BE:HBGNT:2009:ARR.20090223.6).

¹³³ *Leskovac Refrigeration House Emona, NV Crop's, NV Vanden Avenne v. Robert Vanosselaer, Saelens Intertransport, NV European Goods and Travel Baggage Insurance Company*, Court of Appeal of Ghent (2005.03.07, No. 2003/AR/1309).

¹³⁴ *NV De Dijcker v. SA Sonatra, SA AXA Belgium, NV Tiense Sugarraffinaderij, et al.*, Court of Appeal of Antwerpen (2007.02.19, No. 2004AR2510).

¹³⁵ *Tiense Sugarraffinaderij, Belgium Insurance, AIG Europe, Hampden Insurance, Avero Belgium Insurance v. DE Dijcker, Sonatra, AXA Belgium*, Court of Cassation of Belgium (2009.01.16, No. C.07.0300.N).

¹³⁶ *RTT v. Cargofoor*, *supra* note 104.

¹³⁷ *Transportes Jose Carrillo V. CNA Maritime Insurance Co Ltd*, Court of Appeal of Paris (2003.10.02, No. 2001/20695).

liability limits.¹³⁸ Court of Cassation has also considered recoverable VAT of the destructed goods, transport costs to the guarding place, and storing charges of the cargo, as “definite element of the costs of the goods and of the costs incurred during transport.”¹³⁹

As in every of the analyzed countries, regarding the excise duty the Court of Cassation has ruled out that it is not related to the carriage, under Article 23.4, but, contrary rather is linked to cargo damage.¹⁴⁰ The court has established that “since consumption duties are not customs duties *stricto sensu*, even if their recovery is generally entrusted to the customs administration, their amount, when added to the value of the goods, is subject to the limitations of liability of the CMR when these are applicable, ... the court was right to apply the limitations of liability provided for by the CMR.”¹⁴¹ However, the court has stated that as these “duties after the loss of cargo cannot be recovered, they lay on the initial value of the goods, the compensation cannot exceed the limitation of the guarantee provided in Article 23.3.”¹⁴²

The analysis of *Polish* case law on Article 23.4 tends to favor full compensation principle, including expertise, destruction costs, segregation, and storage usually are recovered.¹⁴³ However, there is a case where separate costs, such as downtime expenses, were not validated by the Court of Szczecin. The court considered them as contrary to Article 23.4 and referred to other CMR articles that allow for special interest of delivery.¹⁴⁴ However, critics to such an interpretation could be provided, as if the cargo delivery is delayed, Art. 23.5 comes into force, which requests the losses be justified and not exceed the freight rate. Hence, such losses as downtime should be recovered as long as they comply with the other 2 requirements. The court's decision may be understood due to the disproportionate extent of cargo damage and additional losses. Similarly, the Appeal Court of Krakow ruled that costs for removing cargo from an accident scene and handling were not related to the transport of goods and thus derogated Article 23.4. Compensation for replacement cargo freight was also denied, as it was considered a contractual obligation between the claimant and sender.¹⁴⁵

The analysis of 5 European countries has shown that wide interpretation is more spread than the narrow approach to Art. 23.4. All countries usually share similarities when explaining Art. 23.4, as most commonly the courts refer to the full compensation principle and the causality link of the occurred losses with the carrier's faulty actions. There are, of course, exceptional cases, where the courts decided that some of the costs cannot be reimbursed, such as demurrage costs

¹³⁸ Potain poclair matériel (PPM) v. SCAC Transport international, Court of Cassation of France (1987.02.03, No. 85-13.737).

¹³⁹ Moncassin v. Transports TVG, Court of Cassation of France (2002.10.15, No. 00-20.497).

¹⁴⁰ Generali assurances IARD v. Helvetia, Court of Cassation of France (2010.10.05, No. 09-10.837).

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ A. G., Spółka Akcyjna z siedzibą w W., District Court in Jelenia Góra (2015. 05.28, No. V GC 686/14), B. A. v. J. T, District Court in Łódź (2017.06.12, No. X GC 927/15), Spółka z ograniczoną odpowiedzialnością w G v. Spółka z ograniczoną odpowiedzialnością w S., District Court in Kalisz (2021.10.06, No. V GC 948/17), J. P. v. Spółka Akcyjna w W, District Court in Szczecin (2016.02.19, No. VIII Ga 415/15).

¹⁴⁴ M. Z. v. M. S., Towarzystwo, District Court in Szczecin (2017.03.08, No. VIII Ga 563/16, VIII Ga 564/16).

¹⁴⁵ Z. K. v. S. A., Court of Appeal of Krakow (2013.08.28, No. I Aca 705/13).

of the consignee, administration costs, etc. As narrow and wide interpretations of Art. 23.4 are genuinely contrary to each other, it is worth analyzing as well what impact it causes on the whole integrity of the CMR Convention's regulation and limited carrier's liability idea. The findings will be made in the further part of the work.

DOES ARTICLE 23.4 OF THE CMR CONVENTION IMPLEMENT THE REAL LIMITED RECOVERY OF THE LOSSES IDEA?

This part of the work, based on the earlier established findings, will answer the raised thesis, also taking into consideration the theoretical and practical approach given to the Art. 23.4 of the CMR.

Despite the aim of the CMR to unify carrier liability¹⁴⁶, national courts struggle to provide a consistent interpretation of Article 23.4. Two schools of thought have emerged: the wide interpretation (seen in Lithuania, Denmark, Belgium, France, Poland) and the narrow interpretation (Germany and the Netherlands). This confirms scholars' concerns about the problematic nature of Article 23.4 and its inability to establish a uniform international understanding of carrier responsibility for additional losses. This raises doubts about whether the objective of the CMR Convention is achieved and whether the carrier's interest in limited liability is protected. Factors contributing to the differing jurisprudence include translation errors, the wording of Article 23.4, incorporation of the full compensation principle or national legislation, and the lack of a general uniform practice.

The first insight refers to the Lithuanian case, where the Supreme court noticed that the translation of Art. 23.4 to the Lithuanian language should have been different.¹⁴⁷ And it is not the first translation issue that CMR Convention has faced. E.g., Art. 29 differed in English and French versions when both versions are the main variants of CMR.¹⁴⁸ Worth mentioning that the Danish version of Art. 23.4 is not identical either, as it lacks the part “but no further damage shall be payable” from the original version. Thus, it may be thought that Denmark does not have the restricting part at all, which, can be stated, is reflected in the jurisprudence, as courts usually consider the consequences related to the cargo damage/loss as eligible for reimbursement.

Secondly, as already established in section 2.1, the mere wording causes doubts on how Art. 23.4 shall be interpreted, as legal scholars also consider it “one of the most problematic clauses.”¹⁴⁹ The inconsistent understanding of this article is evident from the analysis of case law. Although in *James Buchanan & Co. v. Babco Forwarding and Shipping* Lord Wilberforce stated: “I cannot detect that this is a case of a gap in the legislation. The question simply is whether this

¹⁴⁶ CMR Convention, supra note 3, preamble.

¹⁴⁷ UAB “Trans Group LT” v. BUAB “Glikasta”, supra note 111.

¹⁴⁸ See Johan Schelin, “CMR Liability in a Law & Economics Perspective”, Stockholm Institute for Scandianvian Law (1957-2010): 177, CMR Convention, supra note 3, Art. 51.

¹⁴⁹ Michael Antapasis, “CMR: Have we reached the end of the road?”, European Journal of Commercial Law 1(2017): 55, also see Maria Henriëttalei, “European Transport Law”, Journal on Law and Economics XXXVII (2002): 484.

loss is to fall on the owner or the carrier.”¹⁵⁰ However, it could be hardly said that the question is simple when after 44 years of the House of the Lords’ decision, the question of whether the excise duty is eligible for recovery to this day varies among countries.¹⁵¹

Another point of discussion among legal scholars is the subjective aspect of carrier liability and the formal approach to determining what is legally established. Some argue that liability should be limited to “reasonably foreseeable, but the liability of the road carrier shall remain insurable”¹⁵², while others refute this argument based on the carrier’s awareness of VAT and the insurability of additional costs or financial capacities of the liable party.¹⁵³

A possible solution to eliminate ambiguous wording of Art. 23.4 is established in Art. 49, establishing that “any Contracting Party may ... request that a conference be convened for the purpose of reviewing the Convention ... [if] not less than one-fourth of the Contracting Parties notify him of their concurrence with the request.”¹⁵⁴ E. g. similar procedure was executed to explain certain formulations in Warsaw Convention.¹⁵⁵ The CMR was amended twice – the Convention was supplemented with the provision of the SDR¹⁵⁶ and protocol regarding the e-consignment note.¹⁷⁷ Therefore, the correction of the CMR is possible, which could solve certain ambiguities regarding the scope of recoverable losses.

The confusion between full compensation and the liability limitation principle is a third reason for the inconsistent interpretation of Article 23.4. Lithuania and Belgium, for example, have applied the full compensation principle in their court decisions, going beyond the restrictions outlined in Article 23.4. This contradicts the notion that Article 23.4 imposes limitations on liability. Among legal scholars, there are also indications that the incorporation of national law by Netherlands courts in cases where damages are not regulated by the CMR Convention also raises concerns about the compatibility with the carrier’s liability limitation.

It could be proposed that ambiguities regarding reimbursable losses, e.g., excise duty and/or VAT, may be excluded via dialogue between the courts, providing arguments for and against in reaching a consensus.¹⁵⁷ However, a bigger issue lies in the deliberate argumentation of Art. 23.4 by the national courts, referring to the full compensation principle. This can lead to forum shopping, where claimants choose jurisdictions that favor full compensation without pre-paying

¹⁵⁰ James Buchanan & Co. v. Babco Forwarding and Shipping, supra note 113, 153

¹⁵¹ Latvia case No. C32252411, supra note 67, Die Klägerin v. Spediteur/ Frachtführer, supra note 96, Jam De Rijk BV, et. al. v. DSV Solutions (Dordrecht) BV, et. al, supra note 102, H.Z. Logistics B.V. v. Thomsen & Streutker Logistics B.V., supra note 107, Denmark case No. ND 1987. 108 DH, supra note 120, Generali assurances IARD v. Helvetia, supra note 133.

¹⁵² Marie Henriëttaei, supra note 142, 484.

¹⁵³ Marie Henriëttaei, supra note 142, 485.

¹⁵⁴ CMR Convention, supra note 2, Art. 49.

¹⁵⁵ Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (1961.09.18, Guadalajara), Official Gazette (1997, no. 19-415).

¹⁵⁶ Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) (1978.07.05, Geneva), Official Gazette (2010, No. 151-7713).

¹⁵⁷ European Court of Human Rights, Council of Europe, “Dialogue between judges 2011: What are the limits to the evolutive interpretation of the Convention?”, (Strasbourg: 2011).

a surcharge. Achieving similar interpretations of Article 23.4 could potentially reduce forum shopping, although other factors such as the legal climate also influence this phenomenon.¹⁵⁸

Lastly, it could be stated that the CMR foresees that “any dispute between Contracting Parties ... be referred for settlement of International Court of Justice”¹⁵⁹, however, this Article is hardly enforceable. The basis for such a stipulation is that only states can appeal to International Court of Justice (hereinafter – ICJ), but not private subjects, therefore, it is very unlikely that any of the Contracting parties would evolve to litigation in ICJ,¹⁶⁰ especially regarding the question of the commercial relation issues between private subjects. Moreover, certain Contracting parties have reserved that for litigation in ICJ, all signing parties shall agree to,¹⁶¹ hence, in separate cases, the appeal to ICJ is even more complicated and discourages litigation. Therefore, it could be assumed that one of the options for the (potential) litigating private parties to ensure their interests regarding limited liability is to agree upon the jurisdictions, which, generally, creates “forum shopping”.

From the earlier provided point derives another factor that *de facto* CMR Convention does not have an institution or authority that would be as a cassation court – guarantee a continuous and uniform interpretation of the CMR Convention, also fitting nowadays tendencies. As today’s practice shows, even if the defence provides arguments based on the practice of other countries that certain costs shall not be considered reimbursable as directly derogating the purpose of Art. 23.4, the court takes a decision that would be continuous to the chosen interpretation policy of the national courts.¹⁶² Even if the legal community organizes conferences and symposiums – e.g. the international conference 60 years of CMR in force,¹⁶³ it is doubtful what results such gatherings give despite sharing national practices between the presenters. It is worth mentioning that the participants of 60 years of the CMR conference were scholars and attorneys, hence, it is debatable whether good practice contained during the conference mirrored the judgments of the national courts, as the example of Belgium shows that courts tend to ignore foreign interpretations. In the addendum to the earlier mentioned possibility to initiate a dialogue between judges,¹⁶⁴ it is worth drawing attention to C. Legros’ suggestion of creating an analogue to the existing private initiative CISG¹⁶⁵ Advisory Council¹⁶⁶ “as a remedy ... to improve the uniform

¹⁵⁸ Franco Ferrari, “‘Forum Shopping’ Despite international uniform Contract law Conventions”, *International and Comparative Law Quarterly* 51 (July 2002): 690.

¹⁵⁹ CMR Convention, *supra* note 3, Art. 47.

¹⁶⁰ Note: to this day there were no cases in ICJ, concerning CMR Convention.

¹⁶¹ E. g. Morocco, Romania, and Russian Federation. *See* Participants of the CMR, *supra* note 4.

¹⁶² *Transport van Laer v. Comexas Benelux*, *supra* note 121.

¹⁶³ International conference 60 years CMR, Future proof or time for a reform?, (International conference, The Netherlands, 6-7 October 2016) // https://www.europalawpublishing.com/nieuws/120-97_International-Conference-60-years-CMR.

¹⁶⁴ European Court of Human Rights, *supra* note 150.

¹⁶⁵ United Nations Convention on Contracts for the International Sale of Goods, (1980.04.11, Geneva), United Nations Publication, Sales No. E.10.V.14.

¹⁶⁶ CISG Advisory Council. Welcome to the CISG Advisory Council (CISG-AC) // <http://www.cisgac.com/home/>.

application of CMR.”¹⁶⁷ In practice, such a council “would issue opinions on a request or by their own initiative, when meeting twice a year.”¹⁶⁸ As it is a private initiative, it raises doubts about how it may promote uniformity. The author argues that the “worldwide reputation of ... experts in the field of international sales’ law has granted the opinions an informal, but nevertheless practical, authority. ... German and Dutch Courts sometimes refers to these opinions.”¹⁶⁹ Hence, it may be a few of the options to consider in seeking uniformity of the CMR.

Therefore, even if the answer to the raised thesis is explicit, the reasons for the non-implemented uniformity of the Convention are not isolated. The idea of the carrier’s liability limitation is not consistently carried out among countries. It is paradoxical that when carrying out commercial activities on an international scale – cargo transportation, which is regulated by a singular legal act, the responsibility of the carrier is interpreted differently. Hence, it may be considered that the carrier becomes dependent on what legal approach is being developed regarding the wording of Art. 23.4 in courts, accordingly, the security of the carrier’s interest to be treated the same is being breached. It could be said that a such legal issue significantly affects commercial relations, as the carrier is either forced to reconcile with the instabilities of its liability and face more financial losses, accordingly increased insurance policy prices, or reconsider cooperating with clients of certain countries.

CONCLUSIONS

Based on the conducted research, it can be concluded that the carrier's liability limitation is not effectively implemented in Article 23.4 of the CMR Convention. Several factors contribute to this:

1. full compensation principle: civil law principles emphasize full compensation but exemptions exist based on contract, mandatory laws, or court decisions. Limitations on liability serve to protect parties already exposed to significant risks, and courts may limit liability when full compensation would cause severe consequences;
2. international agreements and national laws: countries have chosen to limit the commercial carrier's liability based on factors like insurability, foreseeability of losses, and financial protection. CMR limits the carrier’s liability in case of delayed delivery, loss, or damage of the goods. However, the interpretation of Article 23.4 varies among countries, leading to different – narrow or broad – interpretations;
3. lack of uniformity in case law: case law analysis reveals translation errors, unclear wording, incorporation of full compensation principles or national legislation, and a tendency to follow national case law rather than interpreting the CMR Convention in its ordinary meaning. This lack of uniformity undermines the intended purpose of the CMR Convention.

¹⁶⁷ Cécile Legros, “The CISG Advisory Council: A Model to Improve Uniform Application of the CMR?”, *European Journal of Commercial Contract Law* 9 (2 December 2017): 27.

¹⁶⁸ *Ibid*, 27.

¹⁶⁹ *Ibid*, 27.

In conclusion, the lack of uniformity in implementing the carrier's liability limitation affects commercial relations and the carrier's interests. Recommendations for addressing this issue include appealing to the ICJ (although unlikely), amending the CMR's wording through established procedures, initiating a constructive dialogue among judges, and establishing an Advisory Council similar to those in other conventions to provide expert opinions on CMR-related issues. These measures aim to achieve a standardized interpretation and application of the carrier's liability in the CMR Convention.

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SANTRAUKA

AR CMR KONVENCIJOS 23.4 STRAIPSNIS ĮGYVENDINA REALIĄ RIBOTO NUOSTOLIŲ ATLYGINIMO IDĖJĄ?

Šiame darbe yra atsakoma į teisinį klausimą, ar CMR konvencijos 23 straipsnio 4 dalis įgyvendina realių riboto nuostolių atlyginimo idėją. Pats straipsnis numato, jog su krovinio žala ar netektimi turi būti atlyginamos „su krovinio vežimu susijusios išlaidos, ... kiti nuostoliai nekompensuojami“, kas suponuoja, jog teisinė idėja yra riboti nuostolių atlyginimą įvykus krovinio žalai. Tačiau teisininkai pasisako, kad tam tikri CMR Konvencijos straipsniai, įskaitant 23.4, yra problemiški, o konvencijos formuluotės ar idėjos gali būti pasenusios bei neatitikti šiuolaikinių tendencijų ir aktualumo. Todėl vežėjas tampa neužtikrintas dėl savo atsakomybės bei, atitinkamai, jam tenkančių finansinių nuostolių apimties. Iškelti tyrimo tikslai: atskleisti visiško nuostolių atlyginimo principą bei identifikuoti jo išimtis; nagrinėjant teisinę literatūrą ir tarptautinę teismų praktiką atlikti CMR konvencijos teorinę ir praktinę analizę bei išskirti dviprasmiškus jos straipsnius; ištirti, ar yra įgyvendinama vežėjo atsakomybės ribojimo idėja.

Pirmoje darbo dalyje atlikta visiško nuostolių atlyginimo teorinė analizė ir identifikuotos šio principo išimties. Pasitelkus aprašomąjį ir analizės metodus, nustatyta, kad atsakomybė ribojama 3 pagrindais – sutartimi, įstatymu arba teismo sprendimu. Verslininkų ir/ar vežėjo atsakomybę paprastai riboja nacionaliniai įstatymai, kas suponuoja, jog komercinė veikla pasižymi tam tikra rizika, kurią įstatymų leidėjas pasirenka tam tikrais aspektais ar apimtimi apriboti. Antroje darbo dalyje įgyvendinta teorinė ir praktinė vežėjo atsakomybės analizė nacionalinės ir tarptautinės teisės kontekste, taip pat lingvistiškai ištirta 23.4 straipsnio formuluotė ir CMR Konvencijos komentaras. Buvo identifikuoti 23.4 straipsnio formuluotės neaiškumai, dėl kurių formuluotė „kitos su krovinio vežimu susijusios išlaidos“ nėra suprantama vienareikšmiškai – komentaras patikslina, jog ši formuluotė numato, kad turi būti kompensuojamos tokios išlaidos, kurios susijusios su pačiu pervežimu, o ne su krovinio žala. Tuo tarpu, šalia pateikiama prieštaringa mintis, jog gali būti atlyginamos ir išlaidos, susijusios su žala, jei įrodoma, jog jos atsirado pagrįstai. Todėl net ir pasitelkus teleologinį ir lingvistinį metodus, vien tik teoriniu požiūriu atsakyti į tezę klausimą, ar įgyvendinama idėja riboti vežėjo atsakomybę, nebuvo įmanoma, nes pati formuluotė ir straipsnio išaiškinimas turi prieštaringų idėjų. Dėl to siekta išsiaiškinti, ar nacionaliniams teismams pakanka esamos formuluotės, standartizuotam vežėjo atsakomybės aiškinimui žalos atlyginimo procese užtikrinti. 7 šalių teismų jurisprudencijos analizė parodė, kad teismų praktikoje paplitę 2 požiūriai – siauras ir platus – aiškinant CMR Konvencijos 23.4 straipsnį. Tik 2 šalys iš analizuotų 7 siaurai interpretuoja 23.4 straipsnį, aiškindamos, jog su krovinio žala susijusios išlaidos, tokios kaip perpakavimas, pažeisto krovinio transportavimas, utilizavimo, ekspertizės išlaidos ir pan. nėra vežėjui tenkanti finansinė našta. Trečioji dalis skirta atsakyti į iškeltą darbo tezę. Nustatyta, kad realiai vežėjo atsakomybės ribojimo idėja nėra realizuota, nors pats 23.4 suponuoja, jog šis straipsnis turėtų riboti vežėjo atlyginamas išlaidas. Remiantis atlikta teorine ir praktine analize, buvo identifikuoti

šie veiksniai/priežastys: 1) vertimo klaidos; 2) 23.4 straipsnio formuluotės neaiškumai; 3) visiško nuostolių kompensavimo principo/nacionalinių teisės aktų įtraukimas aiškinant 23.4 straipsnį; 4) nėra siekio formuluoti bendrą-vienodą.

Tad atlikus išsikeltos teisinės problemos tyrimą, galima teigti, kad CMR Konvencijos 23.4 straipsnio vežėjo atsakomybės ribojimo idėja yra neįgyvendinta, kas iš esmės sudaro prielaidą „forum shopping“ bei vežėjo atsakomybės teisiniam neužtikrintumui atsirasti. Nevienodas vežėjo atsakomybės interpretavimas reikšmingai paveikia komercinius santykius, nes vežėjas arba turi susitaikyti, jog tam tikrose valstybėse jo atsakomybės ribos yra interpretuojamos plečiamai, kas lemia didesnius finansinius nuostolius ir/arba išaugusias draudimo kainas, arba sumažinti ar riboti tarptautinį bendradarbiavimą su tam tikrų šalių užsakovais.

REIKŠMINIAI ŽODŽIAI

Vežėjo civilinė atsakomybė, ribota atsakomybė, CMR Konvencija.