Erasmus School of Law

CMI Colloquium 2024 Stockholm Uniform Interpretation of the CMR

The limitation amount of Article 23 (3) CMR – its genesis and current problems

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Outline

- Introduction
- Genesis
  - Limitation amount of Article 23 (3) CMR
- Current issues:
  - Monetary depreciation since 1956 not reflected in CMR limit
  - Gold Franc no longer in use as monetary instrument.
  - Revision of CMR limit?

Introduction

- Limited liability carrier under CMR
  - If found liable, the carrier is not obliged to compensate the actual loss suffered. The compensation payable is based on preshipment value plus carriage charges, customs duties and other charges incurred in respect of the carriage of goods "but no further damage shall be payable" (= exclusion of consequential losses).
  - Two limits :
    - Cargo loss or damage: 8.33 SDR per kg
    - Damage due to delay in delivery: carriage charges.
  - N.B. Limited liability
    - Must be applied "Ex oficio" (by operation of law)
    - Is of mandatory nature.
    - N.B. The implication is that only CMR can make exceptions.

Introduction

- Limited liability carrier under CMR
  - …
  - CMR provides three such exceptions
    - (1) Cash on delivery charge (Art. 21 CMR)
    - (2) Declaration of value or special interest in delivery (Art. 24 and 26 CMR)
    - (3) Breaking of the limits (Art. 29 CMR)
  - N.B. Of these three only the last has practical significance and functions as safety valve in cases where there is a great discrepancy between actual loss suffered and limitation amount.
  - N.B. As a result Art. 29 CMR gives rise to serious forumshopping practices.

Introduction

- Limit of liability in Art. 23 (3) CMR
  - 1956: limit of Art. 23 (3) CMR originally set at 25 Gold Francs.
  - 1978: SDR Protocol replaces Gold Franc by Special Drawing Right on 3 GF = 1 SDR basis. Therefore: 25 Gold Francs = 8.33 SDR.
  - 2024: 48 (of 58) Contracting states of CMR are party to SDR Protocol, 10 states have not ratified and do still hold on to Gold Franc. The ten states are:
    - Afghanistan, Azerbaijan, Bulgaria, Kazakhstan, Mongolia, Montenegro, Morocco, Oman, Syria, Tajikistan.

Genesis

- Question: Why did the drafters choose the particular amount of 25 Gold Francs?

- Travaux Préparatoires CMR:
  - Principle of limited liability carrier was never in dispute.

  - Drafters considered three alternative bases for limitation:
    - (1) Package or unit limitation
    - (2) Kilo-limitation based on gross weight of entire consignment (lumpsum)
    - (3) Kilo-limitation based on gross weight short (proportionality)

Genesis

- Travaux Préparatoires CMR:
  - Limitation amount was result of long negotiation process in which the stakeholders and interested governments took an active part.
    - Netherlands en British governments were very supportive of carriers.
    - German and Swiss governments very supportive of cargo interests.
    - Insurers divided between cargo insurers and carrier’s liability insurers.

Genesis

- Travaux Préparatoires CMR
  - Summary of main arguments raised:
    - IRU (on behalf of carriers): limitation amount should reflect average value of goods carried and can therefore be fairly low. If cargo interests want higher compensation they can declare higher value/special interest in delivery.
    - ICC (on behalf of cargo interests): CMR limit should follow CIM limit. Harmonisation of liability law of land transport as rial and road transport compete with each other.
    - IRU: counter that risks of road carrier are not the same as for railways.

Genesis

- Travaux Préparatoires CMR
  - Summary of main arguments raised:
    - IRU: furthermore, road carriers are not in same position as railways, who can self-insure. High limits for road carriers will leads to high premiums and high carriage charges. Therefore, cargo interests better off with cargo insurance cover.
    - ICC: liability premiums are not based upon limits but rather on loss records and therefore on average value of cargo.
    - Cargo insurers: liability limit should be high enough to induce the carrier to take proper care of the goods.

Genesis

Travaux Préparatoires CMR

- Negotiation positions of stakeholders and supporting governments were initially very far apart:
  - Starting point: 1 Gold Dollar per kilo vs. 100 Gold Francs per kilo (CIM-limit).
  - 1952: carriers offer 5 Gold Francs, whereas ICC proposes 50 Gold Francs based upon gross weight loss and 25 Gold Francs based upon gross weight consign-ment.
  - March 1955: Deal struck between ICC and IRU for 18 Gold Francs per kilo gross weight short.

Genesis

- Travaux Préparatoires CMR
  - Negotiation positions of stakeholders and supporting governments were initially very far apart:
    - …
    - March 1955: Deal struck between ICC and IRU for 18 Gold Francs per kilo gross weight short.
    - German government strongly opposes this deal and proposes to give contracting states the right to set higher limits for road carriers domiciled in their own country (= Opt out).
    - Opt out rejected by large majority of states as it jeopardizes unification which is deemed essential in field of international road carriage and constitutes discrimination which will affect competition.
    - May 1956: After long discussions a compromise is found of a limit of 25 Gold Francs per kg of gross weight lost.

Current issues

- (1) Monetary depreciation since 1956 not reflected in CMR limit
- (2) Gold Franc no longer in use as monetary instrument.
- (3) Revision of CMR limit?

Current issues

Inflation

- Problem:
  - Monetary depreciation (inflation) from 1956 to 2024 not reflected in CMR limit of 8.33 SDR (= € 10.11).
  - Calculation of the relevant rate of inflation is a challenge and always to some extent arbitrary. However the following numbers (based upon available data) are indicative:
    - USA: overall rate of inflation: 1,056.40% (average annual rate 3.67%). This means that an amount of $ 10 would increase to $ 115.64.
    - Basket of SDR-currencies (USA, UK, Germany, Japan, France and China): overall rate of inflation: 1,016.30% (average annual rate of 3.80%). This means an amount of € 10 would increase to € 126.30.

Current issues

Inflation

- Problem:
  - Monetary depreciation (inflation) from 1956 to 2024 not reflected in CMR limit of 8.33 SDR (= € 10.11).
  - This is problematic as the pre-shipment values of the cargoes carried under CMR have increased over time in line with the Consumer Prices Index (CPI).
  - Safe to conclude that average value of cargoes has increased as well, but not the CMR limit.
  - Arguably, this implies a decrease of the carrier’s liability in real terms.

Current issues

Gold Franc

- Problem:
  - Gold Franc has no official role any more after Bank of International Settlements (BIS) in Basel replaced it by SDR as unit of account. (01.04.2003)
  - Implication: its value is no longer routinely calculated at financial markets.
  - Courts in ten contracting states of CMR must calculate the countervalue of Gold Francs in their local currency based upon the gold weight of the Gold Frank which is 0,290322 gram of fine gold.
    - N.B. on 09.09.2024 1 gramme of gold had a value of € 72.56.
    - Gold weight of 1 Gold Franc equals: (0,290322 * € 72.56=) € 21.07.
    - Gold Franc limit in Article 23 (3) CMR equals: (25 * € 21.07=) <u>€ 542.50</u> per kg gross weight lost.
  - N.B. Gold Franc limit is clearly more robust against inflationary forces than the SDR.

Current issues

- Revision of CMR?
  - Stakeholders and contracting states are naturally hesitant to consider revision of CMR.
    - Fear of losing the uniformity achieved;
    - No desire to reopen the debate about the liability system and risk
    - Even if this leaves obvious bones of contention in the CMR (e.g. Art. 2 (1) CMR; Art. 23 (4) CMR; or Art. 29 (1) CMR) unresolved.
    - Even if this means that postponed matters like furniture removal remain unregulated.

Current issues

- Revision of CMR?
  - Calls for a substantive review of CMR liability system in the 1960s and 1970s and by Haak (2006) and others have in the past been rejected.
  - There are however two notable exceptions:
    - SDR protocol 1978 (ratified by 48/58)
    - E-CMR protocol 2008 (ratiefied by 38/58)

  - This raises the question why these two protocols succeeded, and all other revision proposals failed?
  - Arguably, this was because of three connected factors, i.e.
    - (1) a pressing need to do something;
    - (2) a workable model to solve the issue; and
    - (3) sufficient consensus on part of stakeholders and contracting states of need to effect a revision.

Current issues

- Revision of CMR?
  - Are these factors present with regard to revision of Art. 23 (3) CMR limit?
    - Ad 1) Pressing need. This is obviously open to debate. Pro:
      - Unfairness of carrier's liability decreasing because of inflation going unchecked may erode support for CMR.
      - Reduced incentive for carrier to take care to preserve the cargo.
      - Breaking of limits by national courts and forumshopping by carriers via negative declaratory proceedings are perhaps signs that limits of liability are considered too low.

Current issues

- Revision of CMR?
  - Are these factors present with regard to revision of Art. 23 (3) CMR limit?
    - Ad 1) Pressing need. This is obviously open to debate. Contra:
      - Lex dura sed lex. This is the deal that was struck. High inflation was a reality already in the 1950s so there is no reason to change the deal now.
      - For many products, e.g. agricultural produce, the limit is still high enough. For other, more expensive products the limit will never be high enough and it is covered by cargo insurance anyway.
      - Increased liability limits will lead to higher insurance premiums and higher carriage charges.
      - Limits should in any case relate to the average value of the cargo.
      - Adjusting limits to inflation would need to be repeated again and again.

Current issues

Revision of CMR?

- Are these factors present with regard to revision of Art. 23 (3) CMR limit?
  - Ad 2) Workable model.
  - Various modern transport law conventions have mechanisms that allow the limit of liability to be changed by a qualified majority of contracting states.
    - Art. 21 LLMC 1996
    - Art. 24 Montreal Convention 1999;
    - Art. 37 CMNI 2001
    - Art. 20 CLNI 2012
  - An increase of the CMR limits could be combined with introducing a mechanism allowing for future further increases.

Current issues

- Revision of CMR?
  - Are these factors present with regard to revision of Art. 23 (3) CMR limit?
    - Ad 3) Sufficient consensus?

    - What may help to achieve concensus is what could happen if no revision is agreed.
    - Unlike before, contracting states may take unilateral action and denounce the SDR protocol (see Art. 7 SDR Protocol) and thus return to the Gold Franc and effectively raise the limit to € 542.50 per kg gross weight lost.
    - That would obviously lead to greater disuniformity.

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Thank you for your attention.