CMR-AC

CMR ADVISORY COUNCIL

CMR Advisory Council Opinion 1 on the interpretation of Art. 2.1 CMR dated June 30 2026

Article 2.1. CMR

Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred[1] in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.

[1] Please note that this language mistake is in the Art. 2.1. official provision; "occur" would be a better wording.

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INTRODUCTION

1. Art. 2.1 CMR governs certain so-called piggyback transport operations.[2] **Piggyback transport** refers to the transport of goods where a road vehicle with its cargo is carried on the back of another means of transport.[3] Piggyback transport gives rise to a preliminary question, i.e. whether the consent of the sender is required to allow for such transport. This topic will be addressed below in Issue No. 1.

1.2. **Conditions of application.** As follows from the wording of Arts. 1.2. and 2.1. CMR, these provisions apply to single contracts of international carriage of goods which include a road stage and a non-road stage, thus raising issues about the liability regime applicable to the non-road stage.[4]

1.3. **Identification of the liability regime.** Article 2.1 CMR provides for a complicated system of rules which depends on the interplay of multiple factors. There is a main rule, an exception to the main rule, and exception(s) to the exception.

1.4. **Main rule** (art. 2.1 CMR, first sentence)**:** If it is impossible to locate the damage, CMR shall govern the liability of the carrier. This main rule presupposes that there is a single contract of carriage[5] and that the goods are not unloaded from the road vehicle for the non-road stage.

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[2] OLG Hamburg/Hamburg Appellate court (Germany) 14.04.2011, n°6 U 47/10, TranspR 2011, 232, 233: (translation) The appeal is admissible; in particular, the German courts have international jurisdiction pursuant to Art. 31 para. 1 sentence 1 b) CMR. Both the place of acceptance of the transported goods in Turkey and the place of delivery in Germany were located in the territory of a contracting state. The contract concluded between the policyholder of the plaintiff and the defendant also concerns the cross-border carriage of goods by road by means of vehicles for a fee (Art. 1 para. 1 CMR). According to Art. 2 para. 1 sentence 1 CMR, the Convention also applies to the entire transport in the case of a piggyback transport. Whether the liability of the defendant is possibly not governed by Art. 17 et seq. of the CMR but by the liability regime of the piggyback leg due to the exception in Art. 2 para. 1 sentence 2 of the CMR is irrelevant in this context. This does not change the fact that, apart for the liability rules, the provisions of the CMR apply and that this is therefore a dispute arising from a transport operation that is subject to the Convention within the meaning of Art. 31 para. 1 CMR.

[3] This expression has been chosen to refer to all forms of transport which refer to carriage within Art.2 CMR whether different words might be used in practice in different contexts. It does not exclusively refer to rail-road transport. It also includes ro-ro ferry transport.
See: R. Loewe, 'Commentary on the Convention of 19 May, 1956, on the Contract for the International Carriage of Goods by Road (CMR)' (1976) 11 E.T.L., 311 at p. 376, par.51: "In the opinion of the authors of the CMR, the situation described in this article does not constitute a combined transport operation, but a transport operation which is performed simultaneously at two different levels and may be described as "piggy-back" carriage. The object of the carriage by road is the goods carried, whereas the object of the carriage by the other means of transport is the road vehicle, including the goods located in or on this vehicle."

[4] The applicability of the CMR to multimodal transports will be the subject matter of a future opinion of the Advisory Council.

[5] Art 1 CMR.

1.4.1. **Exception to the main rule** (art. 2.1 CMR, second sentence)**:** If, on the contrary, the damage can be attributed to the non-road stage, the carrier's liability regime *may* be governed by another regime than the CMR, provided that the exception to the exception does not apply.
For the exception to the main rule to apply the following cumulative preconditions must be met.

1) The loss, damage or delay must have occurred or must have been caused during the non-road stage of the transport.
2) The loss, damage or delay must not have been caused by an act or omission of the road carrier; and
3) The loss, damage, or delay must be caused by an event which could only occur during and by reason of the non-road stage of the transport.

Although much can be said about what these three preconditions entail, for the purpose of this opinion, we will assume these preconditions to be fulfilled.

1.4.2. **Exception to the Exception**: The liability of the carrier for the non-road stage remains governed by the CMR if the law otherwise governing the non-road stage does not meet the further requirement of being: "conditions prescribed by law"/"dispositions impératives".[6]
The main purpose of this opinion is to discuss this latter requirement under issue No.2.

1.5. **Scope of the Opinion:** Such a substitution of another regime than the CMR, that is likely to shift the terms of liability one way or the other, raises several questions.

This report concerns mainly sea-road transport. Indeed, some issues may be common to sea-road, rail-road, or air-road transports. The usual context for the application of Art. 2 CMR are the international conventions in force for other modes of transport.[7] But, whereas rail and inland waterways transport are each governed by a single uniform international regime (rail: COTIF/CIM[8]; inland waterways: CMNI), and air transport is now effectively governed by one prevailing regime (the Montreal Convention), the practical issues concerning the application of Art. 2.1 CMR arise essentially in the context of sea-road transport.[9]

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6 See the discussion on this issue below in Section 3.2.1. Mandatory or not?

7 See below Section 3.2. Evaluation of the applicable regime to the non-road stage, and the discussion on the interpretation of 'conditions prescribed by law'. Indeed, such conditions do not arise exclusively from international conventions, they may be part of domestic laws applicable to the situation.

8 Subject to the application of the SMGS Agreement applicable in several CMR and OTIF countries: Afghanistan, Estonia, Latvia, Lithuania, Bulgaria, Ukraine, Hungary, Slovakia, Albania, Georgia, Azerbaijan. Subject to the application of the Convention on the contract for international carriage of goods by rail, Geneva, 17 November 2023, C.N.511.2023.Treaties-xi.c.8 of 12 January 2024 (contracting States: China, Germany, Netherlands, Togo; No ratifications, Not yet in force).

9 In practice, the application of Article 2 CMR to road-air transport is not an issue, since the goods are not usually loaded together with the road vehicle on aircraft. See Oberster Gerichtshof (OGH)/ Supreme Court of Justice (Austria) 25.02.2015, 9 Ob 42/14p, ECLI:AT: OGH0002:2015:RS0129989, TranspR 2015, 399. Specifically, hovercraft are not aircraft in the sense of the Chicago Convention because machines that can derive support in the atmosphere from reactions of the air against the Earth's surface are expressly excluded from the definition.

Moreover, rail-road transport raises specific issues, especially regarding the Channel tunnel that is not covered by the COTIF UR-CIM.[10] This issue will be dealt with later.

Two issues were addressed by the working group:
- N°1: Sender's consent for the use of piggyback transport
- N°1: Identification of the legal regime applicable to piggyback transport.[11]

[10] The COTIF-UR CIM could in principle apply to road vehicles using the "Shuttle" to cross the Channel by rail, insofar as the rail line linking Coquelles to Cheriton is included in the list kept by OTIF in Berne (see M. Tilche and B. Kerguelen-Neyrolles, 'Le *shuttle,* régime juridique', 1994 Bulletin des transports et de la logistique, p. 504). However, the registration excludes the rail shuttle service transporting roll-on/roll-off road vehicles. Therefore, this route is not covered by the CIM Uniform Rules, this derogation from CIM being permitted under Art. 4.1 UR CIM. See also: C. Legros, 'Transport routier international: Responsabilité du transporteur routier international de marchandises', Fascicule n° 776, in Juris-Classeur Transports, LexisNexis 2022, spec. par. n°223. V. Chrzavzez, 'Combiné rail-route, Un modèle qui tarde à s'imposer', (2025, n°4021) Bulletin des transports et de la logistique, p. 303.

[11] Other issues relating to the consent of the sender can also arise in the context of whether there are applicable prescribed conditions; See below **PART II: Identification of the liability regime applicable to the non-road stage**.

OPINION

1) Consent of the sender for the use of piggyback transportation

Use of piggyback transport as a rule requires the sender's consent.
Whether consent has been given by the sender is not governed by the CMR and shall be assessed in accordance with the applicable domestic law. The sender's consent may be replaced by trade usage if allowed by the applicable law.
If the carrier performs piggyback transport despite the lack of required sender's consent, Art. 2.1. second sentence CMR shall not apply.

2) Identification of the non-road regime

The expressions "conditions prescribed by law" in the English version and "dispositions impératives de la loi [*mandatory provisions of the law*]" in the French version of Article 2.1. CMR both refer to mandatory law. This mandatory law can originate from internationally agreed uniform transport law instruments as well as domestic law.

The liability system established for the mode of transport in question need not be "mandatory" in the sense that it cannot be deviated from in any way.

The CIM, CMNI, Warsaw Convention, Montreal Convention, Hague Rules, Hague-Visby Rules, and Hamburg Rules are all mandatory law in the sense of Art. 2.1. CMR.

The non-road liability regime for the hypothetical contract between the sender and the non-road carrier should be objectively identified based on its scope of application.
In this objective identification no importance is to be given to:
A) the terms of the actual sub-contract for carriage by the other mode of transport, the transport document (not) issued, or any agreements the parties made.
B) the terms the sender and the non-road carrier would have agreed upon, or the transport document possibly issued (or not).

The non-road regime authorized by Art. 2.1. CMR only applies to the liability of the road carrier (chap. IV CMR) for the piggyback transport stage. For other matters the CMR remains applicable.

COMMENTS[12]

PART I: Consent of the sender to the use of piggyback transport

2. ISSUE: Is the consent of the sender needed to use another mode of transport?

The relevance of this issue follows from the fact that if the liability of the carrier is governed by a different regime than the CMR, this may lead to lower compensation for the sender[13] in case of cargo loss or damage. Consequently, it is legitimate to ask whether the sender has consented to this substitution of the mode of transport. Is the sender even aware of that?

2.1. Introduction

There is no doubt that Art. 2 CMR applies in situations where the sender has given consent to piggyback transport. However, the question arises as to the consequences of piggyback transport carried out by the carrier without this consent. This issue becomes relevant in a situation where damage to goods (delay) occurred on a stage other than the road stage. In such a situation, is the carrier liable in accordance with the conditions prescribed by law for the carriage of goods by the other means of transport, despite the lack of the sender's consent? It should be noted that where the carrier's liability is governed by provisions other than the CMR, the amount of compensation payable to the entitled person may be lower[14], higher[15] or the liability of the carrier may even be excluded. The question raised is therefore of great practical importance.

The issue of the sender's consent has been the subject of only a few court judgments.[16] However, it is clearly settled in the literature. There is a consensus among authors that

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12 Such an opinion is consistent with the VTLC, in accordance with the CMR-AC Bylaws that are available at https://www.cmr-ac.org/bylaws/

13 We must note however, that the compensation under maritime regime will not be in any case lower than under the CMR regime. For instance, the two optional calculation methods of the Hague-Visby Rules (Art. 4.5.) may lead to a higher compensation when using the package limitation, provided that the description of the goods contained in the truck can be proven, which is not always the case in practice. Road carriers should be advised to require a precise description of the goods, by any means (e.g. Cargo manifest).

14 This applies in particular to sea carriage, where the limit calculated on the basis of the weight of the goods is significantly lower (Hague-Visby Rules – 2 SDR, Hamburg Rules – 2.5 SDR).

15 This applies to carriage by rail and air. This may also apply to carriage by sea if a package limitation applies.

16 The Landgericht Bochum/Bochum Regional Court (Germany) ruled in favour of the sender's consent requirement in its judgment of 16.02.2006, 14 O 46/05. Conversely, it appears that the Hof van

the consent of the sender is a precondition for the application of Art. 2.1. second sentence CMR, although this view is usually presented without further justification. The discussion is usually limited to stating that Art. 2 CMR does not in itself authorise the carrier to carry out piggyback transport.[17]

2.2. The need for consent

At first glance, the wording of Art. 2 CMR Convention may suggest that the sender's consent to piggyback transport is not a prerequisite for the application of the liability regime governing modes of transport other than road transport. This is because Art. 2 CMR merely refers to the fact that the vehicle containing the goods '**is carried'** by another means of transport and thus seems to emphasise actual transport by sea, rail, inland waterways or air. It does not mention the sender's consent to piggyback transport. However, it should be recalled that, under Art. 31.1. VCLT, a treaty must be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty **in their context**'. When interpreting Art. 2 CMR, particular attention must be paid to Art. 1.1. CMR. The latter article refers to a contract between the parties **providing for carriage by road**. The consensus of the parties therefore covers, in principle, international carriage

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Beroep te Gent/Gent Court of Appeal (Belgium) in its judgment of 30.04.1997 (ETL 1997, nr 5, p. 606; IDIT-CMR (EN) n°40488), held that the carrier has the right, within reasonable limits, to choose the route and may also use piggyback transport. However, it is not entirely clear whether it could be considered in this case that the sender had, even implicitly, consented to piggyback transport. See also: OLG Düsseldorf / Appellate Court Düsseldorf (Germany), 27.07.2011, 18 U 81/08 which seems however to raise a doubt. It discusses whether the carrier did or did not intend to employ a piggyback transport to cross the Channel in a case where the goods had been stolen before they reached the port of origin. However, such a decision, which concerns whether the German courts had jurisdiction or not, may not be invoked to forgo the requirement of consent as carriage exclusively by road was impossible. In fact, I. Koller in *Transportrecht* (11th ed., C.H. BECK 2023) marginal number 3 cites precisely this judgment when he says that "in order to apply Art. 2 CMR, piggyback transport must have been agreed upon, or at least permitted to the carrier", although the court did not make such a clear statement. It was rather a question of determining the applicable legal regime: if piggyback was agreed, the CMR would apply in any case and the German courts would have jurisdiction; on the contrary, if the carrier was allowed to choose the mode or modality of transport (multimodal or piggyback), the actual way of performing the carriage would indeed become important, since according to (at least) German case law, the choice of the carrier influences the applicable law. To conclude, there was no proof that piggyback was intended and besides the decision was reversed on this question on proof, not on merits by BGH, 25.10.2012 – I ZR 167/11, TranspR 2013, 239.

[17] See e.g. K. U. Bahnsen, 'Art. 2 CMR [Huckepacktransport]' in: D. Joost, L. Strohn, D. Poelzig, V. Sander (eds), Ebenroth/Boujong, Handelsgesetzbuch (5th ed., C.H. Beck 2024) par. 4 ; Hartenstein, O. in Thume/Hartenstein (eds.), Kommentar CMR. Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr, 2025, Art. 2, marginal number 44; I. Koller (2023), quoted fn 16, Art. 2 CMR marginal number 2; J. G. Helm, Frachtrecht, Band II. CMR, (2nd ed., Walter de Gruyter 2002), Art. 2 CMR, marginal number 3; F. Reuschle, in Canaris/Habersack/Schäfer, Staub (eds.), Handelsgesetzbuch, Vol. 14, CMR, 6th ed., 2022, Art. 2 CMR, marginal number 8; Jesser-Huß, H., in: Schmidt (ed.), Münchener Kommentar, 5th ed., 2023, Art. 2 CMR, marginal number 5; A. Messent and D.A. Glass, CMR: Contracts for the international carriage of goods by road (5th ed., Informa Law from Routledge 2025) p. 69; A. Emparanza Sobejano, 'El art. 2 CMR: ¿un modelo de regulación del transporte multimodal?', in: Diez años de Derecho Marítimo donostiarra (2003) p. 40; F. Sánchez-Gamborino, El contrato de transporte internacional. CMR (Tecnos 2020) p. 80; K. Wesołowski, Umowa międzynarodowego przewozu drogowego towarów na podstawie CMR, (Wolters Kluwer 2013) p. 135-136.

by road only.[18] The use of a vehicle from another mode of transport (even within piggyback transport) is not covered by such a consensus. According to consistent case law as well as literature, performance by a road carrier using a means of transport other than that agreed (e.g. carriage by rail) does not exclude the application of the CMR Convention to the entire carriage.[19]The same principle should apply to piggyback transport carried out without the sender's consent.[20] The carrier shall then be liable in accordance with the provisions of Art. 17 et seq. CMR, even if the damage or delay occurred during carriage by another means of transport.

It should also be emphasised that by concluding a contract for the carriage of goods by road, the parties (implicitly) agree to a specific distribution of risks related to carriage resulting from the aforementioned Art. 17 et seq. CMR. Art. 2.1. second sentence CMR introduces a derogation from the general rules of the CMR Convention. If the sender does not agree to piggyback transport, he expects his responsibility to be governed by Arts. 17 et seq. CMR.[21] Unilateral use of piggyback transport by the carrier would therefore undermine the principle of predictability of the distribution of risks associated with carriage to an unacceptable extent.

The interpretation of Art. 2.1. CMR must also be consistent with the principle of interpretation in good faith pursuant to Art. 31.1. VCLT. If it were assumed that the carrier could benefit from a more favorable regime despite breaching the contract (especially in a situation where piggyback transport is prohibited), this would be contrary to the principle of good faith and fairness.[22]

2.3. Form of the sender's consent

The CMR Convention does not specify how the sender should express its consent.[23] This is an external matter not governed by the Convention (a so-called external gap). The existence or absence of consent must therefore be determined under the applicable law.

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[18] H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 4; I I. Koller (2023), quoted fn 16, Art. 1 CMR, marginal number 3.

[19] See e.g. O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2 CMR, marginal numbers 14-16; F. Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 7. This is explicitly addressed in air transport in Art. 18(4) third sentence of the Montreal Convention, according to which if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

[20] A. Emparanza Sobejano (2003), quoted fn 17, p. 40; F. Reuschle, Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 8.

[21] Cf. BGH, 13.10.1983 - I ZR 157/81, VersR 1984, 680 ("If a uniform order has been placed to transport the goods by motor vehicle over long distances to a specific location, the sender does not need to expect that the ADSp will be applied due to the choice of a different means of transport and that KVO liability (§ 1 (5) KVO), which may be considered in the event of self-intervention on a partial route, will thus be excluded.")

[22] H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 5. Although this argument concerns a slightly different issue (the carrier's liability in the event of transhipment of goods to a means of transport from another mode of transport), it is also relevant to the problem at hand.

[23] Just as it does not regulate the manner of concluding a contract of carriage subject to the CMR. See, for example, H. Jesser-Huß (2023), quoted fn 17, Art. 1 CMR, marginal number 2.

If the applicable law were to be determined based on the Rome I Regulation, then the law applicable to determining the existence of consent would be the law applicable to the contract of carriage, as provided in Art. 10.1. and Article 12.1. (a) Rome I Regulation. It can be assumed that in most legal systems the sender's consent can be expressed in any manner that sufficiently reveals its intention. Consent does not therefore have to be expressed explicitly but may be implied.[24] The existence of consent may be supported by the previous business practices of the parties,[25] the agreed delivery time, geographical conditions, etc. The applicable law also determines the role of trade usage (if any) in establishing whether consent was given for piggyback transport (see next paragraph).

In accordance with the law applicable to the contract of carriage, the effectiveness of consent to piggyback transport contained in the general terms and conditions of contract used by one or both parties must also be determined.

There is no doubt that consent does not require written form, and such a requirement cannot arise from national law. Since the CMR Convention does not require written form for a contract of carriage (and does not allow its introduction in national law),[26] such a formal requirement cannot be introduced for consent by national law, which is an element of the contract.

2.4. The role of trade usage

As indicated in the preceding paragraph, the applicable law also determines whether the requirement for the sender's consent can be replaced by trade usage. In the national law of many countries, there are explicit statutory provisions stipulating that trade usage influences the content of the legal relationship binding the parties.[27] In many cases, therefore, if such a regulation applies under the applicable law, the carrier is entitled to perform carriage by piggyback, regardless of whether the sender has expressly or imply-citly agreed to this type of transport.[28] Trade usage then replaces the sender's consent.

When justifying the possibility of replacing the sender's consent with usage, attention should be paid to the important role of usage in business transactions, especially those of an international nature. This role is confirmed in soft law instruments. Reference can be made in this regard to, inter alia, the UNIDROIT Principles of International Commercial Contracts 2016[29], which are widely accepted in trade. According to Article 1.9 (2) of these

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[24] H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 5; I. Koller (2023), quoted fn 16, Art. 1 CMR, marginal number 3.

[25] See: First instance Judgement of Rechtbank Amsterdam (The Netherlands) of 18.11.1987: ETL, 2/1990, pp. 251 ff. Gabriëlle Wehr.

[26] See, for example, H. Jesser-Huß (2023), quoted fn 17, Art. 1 CMR, marginal number 2.

[27] See e.g. Art. 1194 French Civil Code, Art. 1258 Spanish Civil Code, Art. 1374 Italian Civil Code, Art. 6 :248 Dutch Civil Code, Art. 56 Polish Civil Code, §346 Austrian Commercial Code, § 346 German Commercial Code.

[28] Norges Høyesterett/Supreme Court (Norway), 14.05.2019, n° *HR-2019-912-A;* J. Schelin, 'Om artikel 2 CMR: "Piggyback operations" i nordiskt ljus', (2019), Nr 4, 8, Sjörättsbiblioteket.8.

[29] UNIDROIT Principles of International Commercial Contracts 2016, available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ (accessed 28.01.2026).

principles, 'The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable'. Article 1:105 of the Principles on European Contract Law[30] has a similar wording.[31]

The existence of a trade usage regarding the admissibility of piggyback transport may be obvious due to the geographical constraints of a specific route. Two cases can be distinguished here. First, sometimes the use of piggyback transport is the only way to perform carriage under the CMR when there is no land connection between the place of taking over the goods for carriage and the place of delivery. In such a case, the carrier's right to use piggyback transport regardless of the sender's consent is obvious, as otherwise the performance of the contract of carriage would not be possible at all. Secondly, geographical constraints sometimes allow carriage to be performed entirely by land or by piggyback transport, but the piggyback transport option is the more convenient (shorter, faster, cheaper, more environmentally friendly) option and is used in practice by reasonable road carriers. It can be assumed that under the national law of most countries, the requirement of the sender's consent will be deemed fulfilled by reference to the trade usage in such cases.

2.5. Effect of performing piggyback transport despite lack of consent (if needed)

The effect of the sender's lack of consent to piggyback transport is therefore that the entire carriage is subject exclusively to the CMR, and that Art. 2.1. second sentence CMR does not apply. It should be emphasised that the sender and the consignee would not be sufficiently protected if it were assumed that Art. 2.1. second sentence CMR could apply even in the case of a lack of the sender's consent, and that the carrier is liable for breach of the contract of carriage (obligation to perform the carriage entirely by road) under the rules of the applicable national law (which could, for example, allow for the recovery of additional compensation up to the limit resulting from the CMR). First, this would lead to a differentiation of the carrier's liability depending on the law applicable to the contract, which would be contrary to the objectives of the CMR. Secondly, the possibility of claiming compensation from the carrier would be doubtful in such a case, due to the difficulty of establishing an adequate causal link or (depending on the system applied) the possibility of foreseeing the damage. Thirdly, in such case the position of the consignee and its right of claim against the carrier for breach of contract is unclear.

If the carrier has performed piggyback transport without the required consent of the sender, the entitled person may not claim compensation under the provisions applicable to the mode of transport used by the carrier, even if this would be more advantageous for

[30] Principles of European Contract Law – PECL, available at https://www.trans-lex.org/400200#head_7. (accessed 28.01.2026)

[31] Article 1:105 Principles on European Contract Law: "The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable".

the entitled person in the given case.[32] This applies, for example, to a situation where damage occurred during the carriage of a lorry with goods by rail.[33] There are no grounds for applying the regime applicable to rail transport in such a situation. The contract remains a contract for the carriage of goods by road even if the carrier performs it improperly. The carrier is therefore liable under the provisions governing that contract.[34] Liability under these provisions is consistent with the distribution of risk implicitly agreed to by the parties at the time of concluding the contract.

2.6. Conclusion

Regarding the above arguments, the CMR-AC believes that a consent to use piggyback transport is needed, and that in the absence of a consent (including situations where a contract prohibits piggyback transport), Art. 2.1. CMR, second sentence is not applicable, and the situation is governed exclusively by the CMR.

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32 Cf. BGH, 30.09.1993 - I ZR 258/91, TranspR 1994, 16 ("The application of the CMR to the section from Russe to Tehran is also not precluded by the fact that the transport from Russe to Istanbul was not carried out by lorry as agreed, but by rail in breach of contract."). Some commentators take a different position with regard to situations where a motor vehicle is unlawfully replaced by another means of transport, allowing in such cases for compensation to be claimed on the basis of the regime applicable to that other means of transport if that regime is more favourable to the entitled person. See, for example H. Jesser-Huß, (2023), quoted fn 17, Art. 1 CMR, marginal number 20; I. Koller (2023), quoted fn 16, Art. 1 CMR, marginal number 5; O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 15; F. Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 7. However, it does not appear that this position is justified by the provisions of law.

33 Cf. BGH, 30.09.1993 - I ZR 258/91, TranspR 1994, 16 ("The application of the CMR to the section from Russe to Tehran is also not precluded by the fact that the transport from Russe to Istanbul was not carried out by lorry as agreed, but by rail in breach of contract.").

34 Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 5.

PART II: Identification of the liability regime applicable to the non-road stage

This topic raises questions of interpretation of Article 2.1.CMR that need to be considered regarding the interpretation provisions of the VCLT.

Two main issues are discussed:

- How to identify the regime applicable to the non-road stage?
- What defines the dividing line between the CMR and the other liability regime?

3. Conditions to apply an alternative liability regime

To apply another liability regime than that of the CMR, several preconditions must be met.

3.1. Preliminary requirements[35]

The loss, damage or delay, must have been caused:

(a) during the non-road stage and

(b) not by fault attributable to the road carrier and

(c) by an event which could only have occurred during and by reason of the non-road stage of the transport.[36]

If all three cumulative preliminary requirements are met, the loss, damage or delay *may be* governed by the liability regime governing the non-road stage. For that to happen also the main requirement set out below must be met. If this main requirement is not met in all its aspects, the CMR liability regime applies after all to the loss, damage or delay that occurred during the non-road stage. It follows that the application of the CMR liability regime is the default position.

3.1.1. Main requirement

Article 2.1 CMR requires evaluation of the liability regime applicable to a hypothetical contract between the sender and the non-road sub-carrier regarding the non-road stage. This gives rise:

- to a preliminary question regarding the hypothetical contract and

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[35] See above Point 1.4.1. Exception to the main rule in INTRODUCTION.

[36] See: *Baltic Ferry*, CA The Hague (Netherlands), 08.04.88 : [1989] Schip & Schade 1 ; K.F. Haak, RO-RO Transport under CMR, Art 2: The Dutch Solution, LMCLQ 2005, 308 ; K.U. Bahnsen, Art. 2 CMR und die UND ADRIYATIK, TranspR 2012, 400: comment on fire on board of ferries whether near the shore or at sea.

- to a substantive question whether the said liability system can be considered as being “prescribed by law”/“dispositions imperatives” (see under §3).

3.1.2. Hypothetical contract

The relevant liability regime is the regime applicable to a hypothetical contract that would have been concluded, directly between the sender and the non-road carrier, to carry the goods solely by this mode of transport.
The preliminary question arises as to how certain characteristics[37] of the said hypothetical contract can be determined. This is relevant because it may depend on these characteristics whether the contract of carriage falls within or outside the mandatory scope of application of a particular convention.

Several approaches are possible:
- Objective vs. subjective approach,[38]
- Abstract vs. concrete approach[39].

As a reminder, Article 31.1 of the VCLT states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The fact that there are different approaches as to what the terms used mean and how they are to be applied shows that it is difficult to identify this ordinary meaning. How the words are to be interpreted may lead to very different results. At this point the case-law can be used to show that either reading is possible and that it is necessary to turn to the remaining elements in Arts. 31-33 of the VCLT to resolve the ambiguity.

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[37] This is primarily relevant for contracts of carriage by sea under the Hague and Hague-Visby Rules because the presence/absence of certain features may bring the contract of carriage within or outside the scope of application of these conventions. Examples are: whether a bill of lading was issued (Art. 1 (b) HVR); whether deck cargo was agreed and a deck cargo exclusion clause was inserted in the bill of lading (Art. 1 (e) HVR); and whether the carriage concerns live animals (Art. 1 (c) HVR).

[38] Objective: focus on scope of application of uniform law convention/domestic law. Subjective: what would this sender and this non-road sub carrier have done?

[39] Abstract/Concrete: what did the road carrier and non-road carrier in fact do. See: *Baltic Ferry*, District Court Rotterdam (The Netherlands), 21.06.1985: [1986] Schip & Schade 56; *Duke of Yare,* S&S 1995, p.99; K.F. Haak (2005), quoted fn 36, 308; IDIT-CMR (EN) n°41997; *Thermo Engineers/Ferrymasters* Queen's Bench Division,n°19057F 40816E, [1981] 1 Lloyd's Rep. 200-207; ETL 1980, p.194; ULR 1982/2, p. 173; IDIT-CMR (FR) n°19057; IDIT-CMR (EN) n°40816. Criticism: arguably the concrete approach is irreconcilable with the idea of a hypothetical contract. OLG Hamburg (Germany), 15.09.1983, 6 U 59/83: VersR 1984, 534; CA Paris (France) 13.10.1986: BT 1986, 689 (quashed by Cour de Cassation 5.07.1988: ETL 1989, 49); *Gabriëlle Wehr*, Amsterdam Court (The Netherlands), 18.11.1987: S&S 1988, 52.

3.1.3. Case law

3.1.3.1. Concrete approach

Some courts admit that the actual agreement between the main carrier and the (piggyback sub-carrier may be taken into consideration as authorized by the maritime Convention.

- **UK - Queen's Bench Division, Thermo Engineers Ltd v Ferrymaster Ltd, 22.09.1980**[40]**:** The Court_authorizes to take into consideration the increase of the limits agreed by the parties to the actual maritime contract (allowed by article 5 HVR). Such a position is subject to criticism as Article 2.1. CMR does not refer to "law subject to any permitted variations".[41]
- **France - Cass. com., 5.07.1988**, n°87-10566[42]: The Court considered the paramount clause agreed by the parties to the maritime contract.
- **Netherlands - District Court of Rotterdam, Duke of Yare, 1.07.1994**[43]: A Court hearing was ordered by the Court to ask the parties how they would have concluded the fictional contract.

3.1.3.2. Objective approach

One of the leading cases in this field is undoubtedly the Gabriëlle Wehr case. This case calls for an objective identification of the regime. On this basis, the Dutch Supreme Court assumes that the words conditions prescribed by law/dispositions imperatives refer to a statutory liability regime based on or derived from internationally agreed uniform transport law.

- **Netherlands - Supreme Court/Hoge Raad, Gabriële Wehr, 29.06.1990.**[44]

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[40] *Thermo Engineers/Ferrymasters* Queen's Bench Division, n°19057F 40816E, [1981] 1 Lloyd's Rep. 200-207; ETL 1980, p.194; ULR 1982/2, p. 173; IDIT-CMR (FR) n°19057; IDIT-CMR (EN) n°40816. See: D.A. Glass, 'Article 2 of the CMR Convention - A Reappraisal', Journal of Business Law 2000, pp. 562-586.
In the *Thermo Engineers v. Ferrymasters* case, "as a preliminary determination, Neill, J., accepted that CMR gave way to the Hague Rules in determining the road carrier's liability. Had he stopped there the road carrier's liability to the plaintiff would have been less than his liability under CMR. He went on, however, to accept that "conditions prescribed by law" extend to what the plaintiff could legally, and would, have agreed with the sea carrier. Since Article 5 of the Hague Rules permits a carrier by sea to agree to increase his liability beyond the limit contained in Article 4, rule 5 of these rules, the case was remitted for calculation of what the plaintiffs could, and would, have agreed. Neill, J., did not indicate what proof, if any, was anticipated as providing the basis for this calculation. Provisions of these rules which permit agreement were applied without a full explanation of why they too fell within the concept of prescribed conditions."

[41] A. Messent, D.A. Glass (2025), quoted fn 17, para. 2.32, p. 77.

[42] JCP 1988.IV.330; ETL 1990, p.221; BT 1989, p.449; ULR 1998/II, p.741; RTD com. 1989, p. 305, obs. B. B.; DMF 1989, p. 219, comm. R. Achard; IDIT-CMR (FR) n°7231; IDIT-CMR (EN) n°41990. *Overruling of:* CA Paris (France), 13.10.1986: BT 1986, p.689; DMF 1988, p.101; IDIT-CMR (FR) n°4561; IDIT-CMR (EN) n°41985.

[43] S&S 1995, p.99; K.F. Haak (2005) quoted fn 36, 308; IDIT-CMR (EN) n°41997.

[44] Nederlandse Jurisprudentie 1992/106, comm. J.C. Schultsz; IDIT-CMR (EN) n°40989. This was confirmed by a later a case: Cf. The Hoge Raad, 14 June 1996, Nederlandse Jurisprudentie 1997/703,

According to this case the actual contract made between the road carrier and the sea carrier is irrelevant as the regime depends on a 'hypothetical' contract.
See abstract [*translation*]*:* Point 3.3. *Under these circumstances, the HR assigns decisive significance to the purpose and purport of Art. 2 para 1 CMR. 3.4.*
Point 3.4. *Art. 2(1) CMR concerns so-called stack transport: the vehicle loaded with the goods is itself transported along part of the route by ship, train or aircraft. In its first sentence, the provision states as the main rule that the CMR continues to apply to this stage of the carriage as well. The second sentence makes an exception to this with regard to the road carrier's liability for loss, damage or delay in delivery of the goods arising during the stack transport, provided certain conditions are met. Subsequently, the third sentence excludes the exception in the absence of 'conditions prescribed by law'/'dispositions imperatives' with regard to the other mode of transport, in which case the main rule of applicability of CMR to the entire carriage also applies with regard to the said liability. The principal rule therefore gives way to another liability regime only under certain conditions. Of these conditions, only the fact that this regime must meet certain requirements is relevant in this case. These requirements are expressed in the words 'conditions prescribed by law'/'dispositions imperatives'.*
For the interpretation of these words, it is important that they specify the content of the contract referred to above under 3.2 (3): given this function, they obviously refer to objective law. This objectivising construction by means of a fictitious contract must be related to the objective apparent from the preamble to the CMR, in particular also to regulate uniformly the liability of the road haulier. The Convention seeks to achieve this objective by a clause of appropriateness (Art. 1(1)) that operates exclusively with objective connecting criteria and by introducing a special degree of mandatory liability (Art. 1(5) and Art. 41). The beneficial effects of uniformity are mainly to safeguard the internationally found balance between the interests of consignors and carriers and to promote legal certainty: the mere conclusion of the road transport contract within the scope of the CMR leads to applicability of uniform liability rules.

In the same line:

- **Germany – Bundesgerichtshof/ Federal Court of Justice, 15.12.2011**[45]. The decision focuses on the protection of the carrier's recourse position. The Court stated in point (3) that (translation) the provision of Art. 2(1) sentence 2 CMR is primarily intended – as the Court of Appeal also assumed – to prevent the road carrier from being exposed to stricter and more extensive liability towards the persons entitled to dispose of the goods than he can himself claim from the sub-carrier of the means of transport (in this case: the carrier) whom he has commissioned. This risk is particularly prevalent in the case of "piggyback transport" by ship, because the carrier's liability under the Hague Rules of 1924 and the maritime liability provisions in the Commercial Code is significantly lower than the liability under the provisions of the CMR. This applies not only to the amount of liability, but also, and above all, to the grounds for liability in the event of nautical fault and fire, if the carrier is not at fault

comm. M.H. Claringbould (St Clair); K.F. Haak, 'St Clair en Stapelverovoer', Tijdschrift Vervoer & Recht 1996, p. 9.

45 BGH/Federal Court of Justice (Germany), 15.12.2011, I ZR 12/11, TranspR 2012, 330; IDIT-CMR (FR) n°41575; IDIT-CMR (EN) n°41576.

(Art. 4 § 2 (a) and (b) of the Hague Rules of 1924, § 607 sentence 2, §§ 658 ff. HGB. See also Bundesgerichtshof/ Federal Court of Justice (Germany), 26.10.2006, I ZR 20/04, BGHZ 169, 281 Rn. 38 ff.).

3.1.3.3. Arguments in favour of the objective/abstract approach

There are serious arguments in favour of the objective approach. One of them is legal certainty and predictability. As Haak concluded in 1986: "On balance it can be said that application of Article 2 CMR encounters several objections of a practical and juridical-technical nature, which produces uncertainty. Besides the complicated formulation and construction of the regulation, it suffers also from the fact that the chameleon system underpinning the regulation is insufficiently developed, with the result that it lacks a solid foundation. Having regard also to the limited contribution to combined transport, the method whereby it is attempted to provide Article 2 CMR with a certain expansion beyond its own scope must be regarded as rather unfortunate".[46]

The *Gabriëlle Wehr* solution mostly relies on a balancing of the conflicting purposes of the provision, which are (1) to align the liability of the main carrier by road to that of the non-road sub-carrier and (2) to protect the sender/consignee against contractual exclusions and limitations of liability agreed between the main carrier and the piggyback carrier.[47] This solution constitutes a compromise and achieves both conflicting purposes to a considerable extent, albeit not perfectly, because the possibility of a recourse gap for the carrier remains.[48]

The objective approach also enables Art.2.1. CMR to apply in practical situations. Notably, in the short sea trade (ferry-trade) bills of lading are never issued, which would mean that Art 2.1. CMR never applies to the short sea trade.[49] Consequently, the application of maritime rules would always be excluded in practice so that " not much would remain of the special rule at issue".[50]

Many authors confirm this approach:

- According to **Bahnsen**, Herber is to be credited with having set the tone for this legal opinion and with having pointed the way for the emerging shift in the prevailing opinion on this issue. This author welcomes the fact that it follows the Hoge Raad

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46 K. F. Haak, *The Liability of the Carrier under the CMR* (Stichting Vervoeradres 1986) p.104.

47 See below: Section 3.1.3.3. Arguments in favour of the objective/abstract approach, and Section 3.2.1.4.3 Objectives of the provision

48 M. Hoeks, Multimodal Transport Law, The law applicable to the multimodal contract for the carriage of goods, (Wolters Kluwer 2010), pp. 210-211.

49 See : Baltic Ferry, District Court Rotterdam (The Netherlands), 21/06/1985, [1986] Schip & Schade 56.

50 Comment J.C. Schultsz to Gabriëlle Wehr, Hoge Raad/ Supreme Court (The Netherlands), 29.06.1990: Nederlandse Jurisprudentie 1992/106. In the same line: W. Czapski, 'Contractual Liability in the Carriage of Road Vehicles by Car Ferry' (1998) 24 IRU Papers, pp. 1-108; Responsabilité du Transporteur routier lors du transroulage et du ferroutage, 1990(2) European Transport Law, p. 172-193.

and thus also takes into account the interest in international decision-making harmony which makes the decision all the more welcome.[51]

- **Fabricius** concludes that the applicability of the exemption provision does not depend on the specific agreement between the road carrier and the sea carrier, nor on the particular transport operation, but instead requires an assessment of which legal rules, viewed in isolation, govern the transport mode in question.[52]
- **Van Beelen** considers that the main rule of Art. 2.1. CMR gives way to a different liability regime only under certain conditions which are expressed in the words 'conditions prescribed by law/dispositions impératives [*mandatory provisions*]'. The author concludes that these words specify the hypothetical contract and therefore evidently refer to objective law. This objectifying construction through a hypothetical contract must be related to the goal of the CMR, in order to uniformly regulate the road carrier's liability. Art. 1 CMR therefore operates exclusively with objective connecting criteria, and CMR is of mandatory law. The author continues by criticising the Court hearing ordered by the Court in the Duke of Yare case considering it as an enquiry into what these, subjective, parties would have done in this subjective, case. She concludes that such an enquiry is not compatible with the said objectifying objective of the fiction.[53]

3.1.3.4. Interim conclusion

The objective analysis of the hypothetical contract must be preferred as it seems to combine best both objectives of Article 2 (1) CMR:
(1) to protect the carrier's recourse position by aligning his own liability to that of the non-road carrier; and
(2) to protect the sender from contractual exclusions and limitations of liability under the non-road liability regime.

3.2. Evaluation of the applicable regime to the non-road stage

The evaluation of the liability regime applicable to a hypothetical contract between the sender and the non-road sub-carrier with regard to the non-road stage gives rise to a second substantive question whether the said liability system can be considered as being "prescribed by law"/"dispositions impératives".
First, it is necessary to decide whether the alternative rules applicable to the non-road stage should be mandatory or not.
Second, provided that the answer to the question below is positive, the extent of the mandatory nature needs to be discussed.

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51 K.U. Bahnsen (2012), quoted fn 17, see p. 407; M. Hoeks (2010), quoted fn 48, pp. 210-211; H.M.B. Brouwer & M.L. Hendrikse, 'Stapelvervoer (art. 2 CMR)', in: M.L. Hendrikse & Ph. H.J.G. van Huizen (eds.), *CMR: Internationaal vervoer van goederen over de weg* (Paris: Zutphen 2005) p. 41 ff.

52 U. Fabricius, Lov om fragtaftaler ved international vejtransport (CMR) (4th ed., Copenhagen 2017) 107.

53 A. van Beelen, 'De aansprakelijkheid van de wegvervoerder bij stapelvervoer conform art. 2 CMR' (1991) 26(n° 6) European Transport Law, pp. 743-761.

3.2.1. Mandatory or not?

The first question arising here is whether the non-road liability regime needs to be mandatory at all or whether it suffices if it applies by default as supplementary, dispositive law that parties can contract out of.

Indeed, the French and English versions of Article 2.1. CMR do not seem to perfectly match on this point. This issue has been identified by numerous courts and authors but is subject to controversy. Some authors believe that there is an actual discrepancy, while others consider that both texts have the same meaning. The controversy concerns the possible discrepancy between the French version of the CMR ("*les dispositions impératives de la loi*") and the English version (*"conditions prescribed by law"*) which are equally official and binding.

3.2.1.1. Doctrine

Many authors have emphasised the ambiguity of the provision:

- **Rodière** speaks of "termes fort indigestes" [*very indigestible terms*][54], "texte, rédigé de façon lourde" [*heavily worded text*][55] and "formule ... assez complexe"' [*a rather complex formula*][56].
- **Putzeys**[57] calls Art.2 CMR "indigested" [*indigestible*].
- **Messent and Glass**: "Article 2 is not a satisfactory provision".[58]
- **Hartenstein:** With a degree of critical distance, it must be said that the norm has thoroughly failed the convention's drafters and cannot fulfil its purpose. It is a provision that was drafted "at the last minute" and hastily inserted shortly before the convention was adopted [...]. It can also be said that no coherent solution can be found for the interpretation of this failed article.[59]

Or on the differences between versions:

- **Theunis**: This difference in concepts is explained by the fact that they represent two diametrically opposed and incomparable systems – the Latino-Continental system and the Anglo-Saxon Common Law system.[60]:
- **Bombeeck et al:** consider that the substitute regime as determined by Article 2 must therefore be mandatory. The authors however acknowledge that the English version of the CMR makes no direct reference to this mandatory character, since

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54 BT 1973, p. 458.

55 BT 1974, p. 184.

56 BT 1973, p. 150.

57 J. Putzeys, *Le contrat de transport routier de marchandises,* Brussels, 1981, n°267 ; See also: M.H. Claringbould in his comment to Hoge Raad 14 June 1996 (St. Clair), NJ 1997/703 who also calls art. 2 (1) CMR "onverteerbaar" (indigestible).

58 A. Messent, D.A. Glass 2025), quoted fn 17, para 2.1, p.63.

59 O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 56.

60 J. Theunis, The liability of a carrier by road in roll on-roll off traffic, in: J. Theunis (ed.), *International Carriage of Goods by Road (C.M.R.)* (Lloyd's of London Press Ltd. 1987) p. 235 ff, 250.

the expression ‘conditions prescribed by law’ is used instead of ‘dispositions impératives de la loi’. .../... They conclude that this is a difficult problem of interpretation of Article 2 CMR. [61]

- **Herber**: Drafting in English does not justify to attribute to the French version of the text a de facto presumption in the interpretation of Art. 2 CMR. that, as a working language, it most closely reflects the will of the delegates.[62]
- **Bahnsen:** The provision of Art. 2 CMR could be rightly described in our country as an obscure standard. He points out that there is a striking difference between the two original versions on the question of what requirements must be laid down with regard to the possibility of derogating from the applicable liability law of the carrying means of transport. Whereas the English version speaks of conditions prescribed by law, i.e. legal provisions that can be completely set aside, the French version requires more extensive mandatory provisions, i.e. a mandatory legal right.[63]

This interpretation issue as well as the next one will be reviewed based on the interpretation rules of Art. 31 et seq. Vienna Convention.[64]

3.2.1.2. Linguistic analysis based on the ordinary meaning of the authentic French and English versions of Article 2.1 CMR

According to Art. 31.1 of the VTLC, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. When interpretation issues arise from the comparison of several authentic versions of the treaty, Art. 33.3 of the VTLC, states that “The terms of the treaty are presumed to have the same meaning in each authentic text”.

The ordinary meaning in French of “dispositions impératives” [*mandatory provisions*] is the following: A mandatory rule is a rule that cannot be derogated from, particularly by agreement between two parties. It is binding on everyone because it is a rule of public policy. In this sense, it is opposed to a suppletive/dispositive rule, from which the parties may derogate by agreement.
According to the common interpretation of the French version of the CMR, the expression "les dispositions impératives de la loi" implies that the non-road regime will apply (as far as all the other conditions are met) only if the law applicable to the hypothetical contract that could have been concluded between the sender and the non-road carrier contains mandatory provisions.[65] Some authors consider that the spirit of the CMR, reflected by

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[61] M. Bombeeck et alii. (1990) quoted fn 57, 123.

[62] R. Herber, TranspR 1994, 375, 379.

[63] K.U. Bahnsen (2012), quoted fn 17, 400; In the same line: BeckOGK/Wurmnest, 15.1.2023, (CMR) Art. 2 Rn 69.

[64] See J. Basedow on autonomous interpretation: art 31 & 32 VTLC codify customary law so apply also to countries that have not ratified (France and USA). J. Basedow, ‘Divergierende Auslegung einheitsrechtlicher Konventionen (CMR) – ein Fall für das Kollisionsrecht? Urteil des Högsta Domstol (Schweden) vom 14. Juni 2022’ (2023) Zeitschrift für Europäisches Privatrecht, pp. 472–485, 480; J. Basedow, ‘Uniform Interpretation of Uniform Private law Conventions: on Treaty law, Global Jurisprudence and procedural safeguards’, (2023) 56(1) New York University Journal of International Law and Politics, pp. 1-28, 5-6.

[65] M. Bombeeck et alii. (1990) quoted fn 57, 123, 124. ; J. Putzeys, ‘Le droit superposé ou les paradoxes de l’article 2 C.M.R.’, European Transport Law, 25 (1990), 107. See also Cass. com. (France), 5 July

Art. 41, can only allow its provisions to be set aside when the applicable other regime is mandatory. As David Glass declared: “CMR should give way only to another regime which is equally compulsory”.[66] Therefore, “The reference to conditions prescribed by law is in fact a reference to compulsory rules, keeping in mind that the Hague Rules (even where incorporated) can be so described”.[67]

Such an interpretation seems however to be in contradiction with the English wording.
For instance, according to Ramberg, the expression *"conditions prescribed by law"* could be interpreted to mean any statutory rules relevant to the carriage by the other mode and not just mandatory rules.[68] In this approach, the English words are seen as neutral. Ramberg considers that “prescribed by law,” if interpreted literally, do not deal with the mandatory or non-mandatory character of the rules which have been “prescribed by law”.[69] This interpretation adopts a wide sense of “prescribed conditions” and suggests a difference between the English version of CMR and the French. It is then suggested that the English version’s wider sense would be closer to the original intention of the drafters, as Art. 2.1. CMR was based upon a proposal in English from the UK delegation and as English was the working language for this particular provision. An alternative view is provided by Bahnsen who suggests that the inclusion of a reference to mandatory law in the French version was an obvious mistake of the French drafter of Article 2 CMR.[70]

This is not our position. We consider that both texts can be reconciled.
Contrary to positions of Ramberg and Bahnsen presented above, other authors consider that the ordinary meaning of “prescribe” in English[71], which means that it is required or allowed according to the rules and regulations set by the law, includes the requirement of mandatory provisions[72]. At the very least, a mandatory sense is clearly one of the ordinary meanings of the word “prescribed” for the purposes. Its use in this sense is supported by David Glass who considers that “it would seem to be odd that such words

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1988, n°87-10566: JCP 1988.IV.330; ETL 1990, p.221; BT 1989, p.449; ULR 1998/II, p. 741; RTD com. 1989, p. 305, obs. B. B.; DMF 1989, p. 219, comm. R. Achard; IDIT-CMR (FR) n°7231; IDIT-CMR (EN) n°41990.

66 D.A. Glass (2000) quoted fn 40, par. 52.; J. Putzeys, ‘L’Article 2, CMR’ (1991) Bulletin des transports (B.T.), p. 87.

67 D.A. Glass, ibid.

68 M. Baranyai, ‘Comment on Rechtbank Gent /Ghent District Court 190690’ (1991) 26 European Transport Law 377. In the same line: R. Herber, ‘Haftung beim Ro/Ro-Verkehr’ (1994) Transportrecht, pp. 375-382, 380.

69 J. Ramberg, ‘Deviation from the Legal Regime of the CMR’, in: Theunis (ed.), *International Carriage of Goods by Road (CMR)*, (LLP Ltd., 1987), pp. 19-30, 29.

70 K.U. Bahnsen (2012), quoted fn 17, 407.

71 See: A. Messent and D.A. Glass 2025), quoted fn 17, p. 77, para. 2.34: “…it cannot be right that permitted variations of the Hague Rules amount to “conditions prescribed by law”; they may be permitted but they are certainly not prescribed”. See also H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 18, and A. Emparanza Sobejano, (2003), quoted fn 17, p. 49, who considers that, according to English legal understanding, “conditions prescribed by law” are mandatory provisions. F. Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 38, noting that the common law has not developed a jus dispositivum and that according „to common law understanding, the so-called "conditions prescribed by law" must be contrasted with the legal concept of implied terms, which are the result of the presumed will of the parties“ (a view shared by Jesser-Huß op.cit).

72 According to the Oxford English Dictionary, one of the meanings of the word “prescribe” is “To write or lay down as a rule or direction to be followed”.

were chosen in the authentic translation in French if a mandatory sense were not intended" in the English wording.[73] As the provision was first drafted in English, and translated afterwards to French, the choice to refer in French to mandatory law is significant. Indeed, it could have been chosen to translate in French the English verb "prescribe" with the French verb "prescrire", which corresponds to the literal translation. But "prescrire" does not imply a mandatory character of the law, and this may be the reason why the French text used instead "dispositions impératives de la loi" [*mandatory provisions of the law*]. In addition, such an interpretation seems consistent with the travaux préparatoires.[74]
In Loewe's commentary,[75] the mandatory character is also clearly stated: "However, this latter condition applies only where the liability of the carrier by the other means of transport vis-a-vis the carrier by road is governed by provisions of **peremptory law."**

Interim conclusion: There is obviously an ambiguity in the interpretation of the authentic English and French language versions of this provision. However, Art 31.4 of the VTLC which states that when no text prevails over another, even though they appear to differ in content, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". It is our view that our interpretation reconciles in the best way two language versions of the provision.

3.2.1.3. Case law

The mandatory character is emphasised by the Cour de cassation in **Cass. com. (France), 5.07.1988**, n°87-10566[76] [translation]: Under Article 2(1) of the CMR, in the absence of mandatory provisions of law concerning the carriage of goods by a mode of transport other than road, the liability of the road carrier is determined by the CMR. This interpretation is based on the French version of the provision.
This view is shared by Courts in Germany, Belgium and The Netherlands.
Germany – BGH (Federal Court of Justice), 15.12.2011[77] [translation]: The mandatory provisions of the law concerning transport by sea should be applied.
This decision clearly highlights the discrepancy between French and English versions:

- §9: it is disputed what is to be understood by mandatory provisions within the meaning of the aforementioned CMR provision.
- §16: The French version of the text was preferable because it was more specific and unambiguous than the English version.

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[73] D.A. Glass (2000) quoted fn 40, par. 52.

[74] UDP 1956 – Note Unidroit 23.7.1956-FR doc ME/265/56 p.3: "If, therefore, the law relating to the carriage of goods by the means of transport used for the carriage of the loaded vehicle does not contain prescribed conditions for the liability of the carrier for loss, damage or delay, liability according to the Road Convention applies."

[75] R. Loewe, (1976), quoted fn 3.

[76] JCP 1988.IV.330; ETL 1990, p.221; BT 1989; ULR 1998/II, p.741; RTD com. 1989, p. 305, obs. B. B.; DMF 1989, p. 219, comm. R. Achard; IDIT-CMR (FR) n°7231; IDIT-CMR (EN) n°41990. Overruling of CA Paris (France), 13 Oct. 1986, BT 1986, p.689; DMF 1988, p.101; IDIT-CMR (FR) n°4561; IDIT-CMR (EN) n°41985.

[77] Bundesgerichtshof/Federal Court of Justice (Germany), 15.02.11, I ZR 12/11, TranspR 2012, 330; IDIT-CMR (FR) n°41575; IDIT-CMR (EN) n°41576.

- §17: The ambiguity results from a clear difference between the two versions of the text that are binding in the same way. Whereas the English wording ("conditions prescribed by law") indicates that dispositive law is sufficient for the application of the exception provision of Art. 2 Para. 1 Sentence 2 CMR, the French wording ("dispositions impératives") suggests that the application of Art. 2 Para. 1 Sentence 2 CMR is only open in the case of the existence of indispensable provisions.

Belgium - CA Antwerpen, 22.11.1997.[78] The court stated that it was only possible to depart from the mandatory provisions of the CMR Convention by means of mandatory legal provisions concerning the carriage of goods in that other country.

Netherlands - Supreme Court/Hoge Raad, Gabriële Wehr, 29.06.1990.[79] The decision discusses the differences between the authentic French and English versions[80]. It considers that both expressions refer to statutory provisions of mandatory law, on the grounds of the purpose and purport of the provision.

3.2.1.4. Drafting history

According to Art 32.1 VTLC, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

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[78] n°JCDI JCDI: ADS113742:1, ETL 1998, p. 399; JPA 1998, p. 114; IDIT-CMR (FR) n°40049; IDIT-CMR (EN) n°40045.

[79] Nederlandse Jurisprudentie 1992/106, comm. J.C. Schultsz; IDIT-CMR (EN) n°40989.

[80] Point 3.2.3. [translation]: The text of the sentence quoted in 3.2 (2) allows for different interpretations. Its ambiguity is closely related to a remarkable difference between the two equally authentic versions: while the English text speaks of "conditions prescribed by law", the French text refers to "dispositions imperatives".
As shown by the case law and literature cited in the [Dutch] Advocate General's conclusion, there is no prevailing view in the circle of CMR contracting states on the correct interpretation of this provision. Nor can this interpretation be based on the genesis of the Convention, because no report or documentation of the preparatory work ('travaux preparatoires') has been published or is otherwise available for public inspection. Also, for this reason, what is known about the genesis of article 2 (1) is insufficient to derive arguments from it (see in particular: K.F. Haak, De aansprakelijkheid van de vervoerder krachtens de CMR (Stichting Vervoeraders 1984) p. 101-104).
Point 4.1.: Art. 33 deals with the interpretation of treaties authenticated in two or more languages and provides, in its fourth paragraph, that when the comparison of the authentic texts reveals a difference in meaning that is not removed by the application of arts. 31 and 32, that meaning should be taken 'which, taking into account the object and purpose of the treaty, best reconciles these texts'. On close reading of both authentic texts - and taking into account what Article 2 was intended to achieve in the preparation of the Convention, as well as considering the object and purpose of the CMR , I would have no hesitation in ruling that the words 'prescribed by law' only make sense when they are understood to refer to provisions of mandatory law.

3.2.1.5. Circumstances of the drafting of the provision

The available preparatory documents show that the provision was drafted at the request[81] of the UK delegation and based upon a UK draft in the context of three existing transport law conventions, the Hague Rules 1924, the Warsaw Convention 1929 and CIM 1952. The drafters of the CMR obviously had the Hague Rules in mind along with other uniform rules.

The BGH explained the role of the British delegation.
See: **Germany – Bundesgerichtshof/Federal Court of Justice, 15.10.2011.**[82]
Para. 19 [translation]: *The text of the provision proposed by Great Britain, which amounted to exempting the road haulier from liability for damage caused by shipping during maritime transport and leaving the liability regime to the law applicable to carrier transport, was rejected by the majority of the States involved.*
The British delegation then revised its proposal, which was then given the content of the final Article 2 of CMR and was adopted by the participants of the conference (cf. on the origin of Article 2 of CMR Herber, TranspR 1994, 375, 378 f.). It follows from this that Art. 2 CMR, in contrast to all the other provisions of the Convention (cf. Herber, TranspR 1994, 375, 379), was not primarily drafted in French, but is based on a draft revised by the special working group for the transport contract and drafted in English.

3.2.1.5.1. Travaux préparatoires

However, it is not possible to conclude from the travaux based on an analysis of the available documents issued what the real intentions of the legislators regarding this issue were.[83]

Interim conclusion: Article 2.1 CMR must be interpreted as requiring that the liability regime of the non-road stage is of a mandatory nature. However, it does not follow from this, how high the bar must be raised regarding this mandatory nature. That will be explored below in Section 3.2.2. How mandatory must the liability regime of the non-road stage be?

3.2.1.5.2. Objectives of the provision

The purposes of this provision are (1) to align the liability of the main carrier for the piggyback stage to that of the piggyback sub-carrier and thus to protect the carrier from a recourse gap and (2) to ~~a~~ protect the sender against contractual exemptions and limitations from liability agreed between the main carrier and the piggyback sub-carrier.

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81 First version: W/TRANS/WP9/41 - 25 April 1955: PRELIMINARY DRAFT CONVENTION Text proposed by the United Kingdom representative (Original: ENGLISH). New version: W/TRANS/210 25 January 1956 (Original: ENGLISH/FRENCH). According to Herber, TranspR 1994, 375 (378 s.)., the current text of Article 2 was only drafted at the Final Conference and is therefore not based on deliberations and drafting as meticulous as those of the other CMR provisions.

82 I ZR 12/11, TranspR 2012, 330; IDIT-CMR (FR) n°41575 ; IDIT-CMR (EN) n°41576.

83 See above the discussion on whether non-road liability regime needs to be mandatory in Section 3.2.1.Mandatory or not? Contrary to Loewe's position: R. Loewe, (1976), quoted fn 3.

It is generally admitted that the purpose of this provision was to protect both the sender and the road carrier by:[84]

- Aligning the road carrier's liability on the non-road regime to have a single regime for both contract, which preserves the road carrier's recourse position.
- But also, to protect the sender from conditions that could have been agreed between the road carrier and the non-road carrier, that could possibility undermine liability.

This is why the liability regime is based upon a hypothetical contract and not on the actual contract concluded with the non-road carrier. Consequently, the content of the actual contract is irrelevant. Such a purpose can only be achieved if the liability regime governing the non-road stage is mandatory.

Following the above discussion, the CMR-AC concluded that:

- Prescribed by law can mean mandatory.
- There is a possible reconciliation between the two language versions: both are pointing to a mandatory regime.

3.2.2. How mandatory must the liability regime of the non-road stage be?

3.2.2.1. Degree of mandatory nature

The second question is to what degree the non-road liability regime must be mandatory in nature to fulfil the requirements of Article 2.1 CMR. The background of this question is that no uniform transport law convention regime exists that is 100% mandatory.

Many examples can be given; we list only a few:

- In general, parties have the freedom to enter a contract of carriage or not. There is no duty to contract.
- Preconditions to the scope, e.g. issuance of a bill of lading.[85]
- Exclusions from the scope, e.g. deck cargo[86], before and after clause[87], carriage of live animals.[88]

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[84] O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 5; K.U. Bahnsen (2012), quoted fn 17, 400; A. Hennebicq, 'Document de la Commission économique pour l'Europe des Nations-Unies,' W/Trans/SCI/355/Add. 6, Geneva, 18.9.1969, p. 3, quoted in Bombeeck, *et al., supra*, fn 65. : "the purpose of placing the sender in no better nor worse position than if he had himself contracted directly, the precise formulation of the fictional contract appears natural." .../... "the second purpose which in turn is directed to the danger that the road carrier might use a freedom to negotiate with the non-road carrier as a means of reducing his CMR liability."
See further : W. Czapski (1990), quoted fn 50, p. 176 ; A. van Beelen (1991), quoted fn 53; and R. Loewe, (1976), quoted fn 3.

[85] Art. I (b) Hague and Hague-Visby Rules.

[86] Art. I (c) Hague and Hague-Visby Rules.

[87] Art. I (e) and VII Hague and Hague-Visby Rules; Art. 16 (2) CMNI.

[88] Art. I (c) Hague and Hague-Visby Rules.

- One-way mandatory regimes that allow the carrier's liability to be increased[89] vs. two-way mandatory liability regimes that do not allow any divergence.
- Declarations of value or special interest in delivery.[90]

Considerations: It follows that if the bar is raised too high no liability regime will qualify, thus turning Article 2.1 CMR into a dead letter and defeating its purpose to protect the carrier against the recourse gap. Neither can the bar be lowered too much as that would defeat the other purpose of Article 2.1 CMR which is to protect the sender from contractual exclusions and limitations of liability that are possible in a non-mandatory liability regime. Consequently, the challenge is to bring the two concurrent objectives of Article 2.1 CMR in harmony with each other.

Mandatory provisions can be derived from conventions and the applicable domestic law. Conventions are discussed in the following paragraphs, whereas conflict of law rules concerning the applicable domestic law is discussed in Section 3.2.4. Absence of applicable uniform law instruments.

Differentiation: Perhaps a differentiation can be made between aspects that are straightforward and those that are truly problematic.

Straightforward: The following aspects seem to be straightforward and unproblematic:

- Clearly, to qualify a convention regime needs to have a provision similar to Art. 41 CMR declaring that derogations from the convention/domestic liability regime are null and void.[91]
- Further, it seems unproblematic if a convention liability regime permits (the limit of) liability of the carrier to be increased. After all, this does not conflict with the two objectives of Article 2.1 CMR, i.e. protecting the sender from contractual exemp-tions (or lower limits) of liability and protecting the carrier from the recourse gap. This aspect should therefore not be considered a disqualifying factor.
- On the other hand, if a convention's liability regime places certain kinds of transport outside its scope of application, that indeed is a disqualifying factor. A good example is offered by the exclusion of carriage of live animals in Article 1 (c) Hague (Visby) Rules. Since animals are not considered "goods" the HVR's mandatory liability regime does not apply to them and the transport will be governed by the CMR.[92] Just because the H(V)R exclude the transport of live animals from its scope

89 Art. III (8) Hague and Hague-Visby Rules; Art. 6 (4) and 23 (2) Hamburg Rules; Art. 79 Rotterdam Rules; Art. 20 (4), 25 (1)(2) CMNI; Art. 34 and 35 CIM; Art. 22 (2) and 23 Warsaw Convention; art. 25 and 26 Montreal Convention.

90 Art. 24 and 26 CMR; art. 34 and 35 CIM.

91 According to: U. Fabricius (2017), quoted fn 52,103, it was implied that such liability regimes would also qualify as mandatory.

92 F. Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 45; H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 21.

of application, does not render the H(V)R "non-mandatory" in the sense of Art 2 CMR for other transports.

- There appears to be no problem if the non-road stage involves sea transport to or from a contracting state of the Hamburg Rules, then the non-road stage is governed in any case by a mandatory liability regime (i.e. that of the Hamburg rules) applicable to the contract of carriage by sea and not dependent upon the issuance of a bill of lading.[93]

3.2.2.2. The following two situations are most problematic

(1) Where a convention or domestic liability regime includes a certain kind of transport or certain aspects of the transport within its material scope of application but allows the parties to contract out of the mandatory liability regime, e.g. by excluding or limiting the carrier's liability.[94]
(2) Where the application of a convention is dependent on a precondition, i.e. the issuance of a bill of lading.[95] A further issue of interpretation is whether the bill of lading must have been issued in fact or whether it suffices if there was a contractual right to demand a bill of lading.[96]

Analysis : What both problematic cases have in common is that the application of the mandatory liability regime has been made dependent on a condition – in the first case a condition subsequent (the possibility of contracting out by the parties) in the second a condition precedent (the (right to) issuance of a bill of lading) – that introduces a subjective element that depends upon the intentions of the parties. But how can the intention of parties be established in case of a hypothetical contract and should that subjective element be considered relevant for the evaluation pursuant to Article 2.1 CMR? Here the issue raised above in Section 3.1.2. Hypothetical contract arises again as to how one should determine the characteristics of the hypothetical contract.

Possible solutions:
In cases where the application of a convention depends on a condition precedent or subsequent, arguably the convention does not apply mandatorily to the hypothetical contract between the sender and the piggyback carrier. In such a case, the piggyback

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93 It is worth noting that under Art. 2.1. CMR the situation may also arise in case of a non-road stage by sea that two mandatory liability regimes are applicable at the same time, e.g. where the piggyback transport concerns sea carriage under bill of lading from Spain (HVR country) to Morocco (Hamburg Rules country). In that case the outcome will depend upon which court is seized to hear the liability case. If that happens to be a HVR country, then presumably the HVR will apply whereas if that court is situated in a Hamburg Rules country the Hamburg Rules will apply.

94 See: Art. 1 (c) Hague (Visby) Rules with regard to deck cargo, Art. VI Hague (Visby) Rules in relation to special cargoes, and Art. VII Hague (Visby) Rules with regard to the period before loading and after discharge. Art. 81 RR regarding volume contracts and carriage of live animals. See also: Art. 25 (2) CMNI which permits contractual exclusion of liability for (a) nautical fault; (b) fire or explosion and (c) for hidden defects in the inland barge not discoverable by exercise of due diligence.

95 As is the case under the Hague and Hague-Visby Rules, see Art. (b) HVR.

96 See: Art. III (3) Hague Rules and Hague Visby Rules and English case law on this.

carriage could be governed by mandatory domestic law after all.[97] Although this would provide a solution in some cases, we do not recommend such a piecemeal approach here as it would create legal uncertainty in the application of Article 2.1. CMR. In this approach, it would depend on which domestic law governs the carriage contract, whether CMR applies or mandatory domestic law, and may lead to unpredictable outcomes. Only in cases where the piggyback transport falls squarely outside the scope of an international convention altogether (e.g. carriage of live animals under Article I (c) HVR), this may be different.[98]

Alternatively, in an objective approach towards the construction of the hypothetical contract,[99] the objective factors of a mandatory carrier's liability regime apply by default and subjective factors such as for example the possible non-issuance of a bill of lading or the contents of general terms and conditions must be disregarded.[100] It has been argued that this solution does not guarantee in all cases that the carrier is protected from the recourse gap as he may find himself liable towards the cargo interests for more than he can take recourse for on the non-road sub-carrier under the contract of carriage by sea under a waybill.[101] However, the situation is still more favourable to the carrier than if Chapter IV CMR were to apply instead. Furthermore, he is himself responsible for contracting out of the mandatory liability regime with the non-road sub-carrier, if he did so. Finally, it seems plausible that the carrier will be able to find insurance cover for the recourse gap.

For the reasons given, we recommend the adoption of the objective approach. This approach strikes a fair balance between the two main objectives or Article 2.1. CMR, i.e. protection of the carrier as much as possible about the recourse gap and protection of the sender against exclusions or limitations of liability as agreed between the main carrier and the piggyback carrier. The objective approach leads to predictable outcomes and provides legal certainty.

Conclusion: Following such an objective approach, we are now able to conclude that the international conventions HR, HVR, CMNI, WC, MC, COTIF can be considered as

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97 Several countries have extended under their domestic law the scope of application of the mandatory regime to contracts of carriage by sea in general. This applies inter alia to the Nordic Countries and Spain. For example: Art. 277 of Spanish Maritime Navigation Act; and Swedish Maritime Code (1994:1009) chapter 13 section 4.

98 See below Section 3.2.4. Absence of applicable uniform law instruments.

99 See: Hoge Raad in *Gabriëlle Wehr*: Hoge Raad/ Supreme Court (The Netherlands), 29.06.1990: Nederlandse Jurisprudentie 1992/106and BGH in UND ADRIYATIK: K.U. Bahnsen (2012), quoted fn 17, 400.

100 O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 103; Jesser-Huß (2023), quoted fn 17*,* Art. 2 CMR marginal number 23; F. Reuschle, in: Staub, Großkomm. HGB, Art. 2 CMR marginal number 45; F. Reuschle (2022) quoted fn 17, Art. 2 CMR, marginal number 45; H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 20.

101 O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 76, 77.

mandatory law in the sense of Art. 2.1. CMR.[102] On the other hand, the UN Convention on the Contract for the International Carriage of Goods by Rail adopted in 2023[103] only applies if the parties choose to apply it,[104] and would thus not qualify as "mandatory".

3.2.3. Identification of the relevant uniform law

However, some issues remain as it may prove difficult to identify the relevant uniform rules. We will therefore analyse the situation where an applicable uniform law instrument exists, and those where such instruments do not apply.

3.2.3.1. Existence of an applicable uniform law instrument

According to most authors and several case, uniform law could apply only if exists for the considered route; otherwise CMR will apply.[105]

Predictability: Only objective connecting criteria are decisive here: the transport route and the agreed mode of transport (by sea, inland waterway, rail or air). Specific details agreed by the parties – in whatever relation – play no role whatsoever. In this view, the hypothetical construction is objectified in the extreme. The parties, sender and road carrier, know exactly what they are facing in advance: they know the route, they know the modality of the piggyback transport and on this basis, they should be able to predict whether, and if so, which uniform treaty regime would be applicable to the hypothetical contract should damage occur or be caused during the piggyback stage.

What remains however is a serious issue when several international conventions are likely to apply, which is mostly the case for sea-road transport.

3.2.3.2. Application of multiple uniform law instruments

A case may arise where – based upon their respective scope of application provisions – multiple transport law conventions are applicable to a piggyback transport stage by sea[106] or rail[107] which takes place as part of an international carriage of goods by road.

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[102] H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 17; O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 79.

[103] Not yet in force; Convention on the Contract for the International Carriage of Goods by Rail adopted in 2023 available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-C-8&chapter=11&clang=_en

[104] Art 1.1(b) HVR.

[105] See: A. van Beelen, (1991), quoted fn 53: [translation]: The hypothetical contract is then deemed to be in conformity with the uniform treaty law – and only if no uniform treaty law qualifies for application because it does not exist for that route, the main rule applies. This gives the fiction a third aspect (cf. Art. 2 CMR): not only the other party and the extent of the cargo is hypothetical, but also the law applicable to that (hypothetical) contract is hypothetical – we assume that this contract was concluded in accordance with the relevant uniform convention on maritime law.

[106] Currently, there is a possible overlap between HVR and HR; and may be later with RR when it comes into force.

[107] Currently, there is a possible overlap between CIM, SMGS and the UN Convention on the Contract for the International Carriage of Goods by Rail adopted in 2023.

This can be illustrated by the example of a road transport of goods from France to Marocco, pursuant to which the truck is carried by ferry over sea from Algeciras, Spain to Tanger in Morocco. France, Spain and Morocco are all parties to the CMR. France and Spain are further a party to the Hague-Visby Rules, which apply to a contract of carriage if the carriage is from a port in a contracting State, see Article X (b) Hague-Visby Rules. Morocco on the other hand is a party to the Hamburg Rules, which apply to a contract of carriage by sea if the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State. See Article 2 (1)(b) Hamburg Rules.

In such case a choice would need to be made between the two Conventions. It is suggested here that the perspective of the court seised of the case will determine the outcome.[108] If a liability claim is brought before the Court in Morocco, this Court as an organ of the Moroccan State will be obliged under international law to fulfil the treaty obligations of Morocco and to give effect to the Hamburg Rules to which Morocco is a party. If instead, the claim is brought before a Court in Spain or France, then the said court will be obliged to fulfil the obligations of Spain,[109] resp. France and give effect to the Hague-Visby Rules to which both France and Spain are a party.

3.2.4. Absence of applicable uniform law instruments

Now that the issues relating to the application of international conventions to the contract of carriage have been resolved, it is necessary to address the situations where no uniform law instrument is likely to apply to the piggyback transport stage. In this case the question arises whether the domestic law governing the contract of carriage may also be considered as "conditions prescribed by law" under Art. 2.1 CMR, if it is of a mandatory nature.

3.2.4.1. Mandatory domestic law as 'conditions prescribed by law'

In cases where an international road transport under CMR includes a piggyback transport stage that involves domestic ferry transport by sea or inland waterways from the mainland of a country to an island or across a river or a lake, no international transport law convention will apply to the piggyback stage. In that case it will depend upon the applicable domestic law whether the piggyback transport stage is governed by mandatory law.

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108 In an obiter reasoning in the *Gabriëlle Wehr*-judgment, the Dutch Supreme Court has suggested that in a case where two or more international conventions are simultaneously applicable, the words "conditions prescribed by law" refer to the statutory provisions of the country where the truck and cargo were loaded on the other means of transport. It is however difficult to see what the legal basis is for this proposed rule and how it could prevail over the duty under international law of the court seised of the case to fulfil the treaty obligations of the state in which it is situated: Hoge Raad/ Supreme Court (The Netherlands), 29.06.1990: Nederlandse Jurisprudentie 1992/106. H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number20; F. Reuschle (2022) quoted fn 17,Art. 2 CMR, marginal number 42; Cf. O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal numbers 71-73 criticizing the determination of the applicable law under the lex fori in a different scenario.

109 Even though Spain is a Contracting State to the Rotterdam Rules, as this Convention is not in force yet, it shall not be considered as mandatory law.

For example, in case of an international road transport from Oslo, Norway, to Visby on the island of Gotland, Sweden, there is a need of domestic ferry transport between the mainland and the island. Under the applicable Swedish domestic law mandatory law applies. In case however of an international road transport from Cologne, Germany to the island of Texel, the Netherlands, the piggyback stage from Den Helder, the Netherlands to Texel will not be governed by mandatory law under the applicable Dutch law.

Does this satisfy the requirement of Article 2.1. CMR?

In **Gabriëlle Wehr**, the Hoge Raad applied a restrictive understanding of the words ‘conditions prescribed by law’ by holding in 3.6 that they refer to a statutory liability regime which is based on or derived from internationally agreed uniform transport law. We do not recommend this narrow interpretation as it excludes without good reason domestic mandatory law that is not derived from an international uniform law instrument.

The starting points are the interpretation rules of Articles 31 and 32 of the VTLC.[110] These rules require to consider the ordinary meaning of the words used in the light of their context and the purpose of the Convention. The words “conditions prescribed by law” appear wide and suggest an ordinary meaning covering any type of mandatory rule not necessarily confined to uniform law. Whilst uniform law must have been in the contemplation of the drafters of CMR it does not follow that they only had such rules in mind.[111] The potential application of domestic mandatory law might well have been in their contemplation given that this was not uncommon at that time.[112]

In Gabriëlle Wehr the court also noted the specific purposes of the provision to both protect the recourse position of the CMR carrier whilst restricting the possibility of having terms agreed with the non-road carrier imposed on the sender.[113] The German **Und Andryatik** decision[114] also referred to the need to protect CMR carriers’ recourse

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[110] Such rules were also accepted in the Opinion of Advocate-General to the Hoge Raad, 22.5.2015, ECLI:NL: PHR:2015:691: para. 2.4.

[111] Following the adoption of the CMR, further discussions were held at the request of the British delegation on the content of Article 2.1. A note from Unidroit clearly states that, in the mind of the drafters, national laws were included in the “conditions prescribed by law”. See ME/265/56, 23 July 1956, Note by the representative of the International Institute for the Unification of Private Law: "The solution thus reached seemed adequate in all cases where the contractual liability of the carrier by the other means of transport in respect of carriage by that means was governed by conditions prescribed· by law: for example, the Brussels Convention, the CIM, the Warsaw Convention, or national laws of a similar character."

[112] E.g. Since the Loi Rabier of 1905 French carriers have been unable to exclude (as opposed to limit) their liability as laid down in the Code de Commerce.

[113] In paras 3.7 and 3.9 stating that it is unfair to hold the road carrier to the CMR regime vis-à-vis the consignor when the haulier is legally not in a position to agree on corresponding conditions with the piggyback carrier. However, the permission granted by Art. V of the Hague Rules for an increase in the sea carrier’s liability to be increased was also noted (para 3.8). However, the drafters may well have been equally aware of the practical difficulty of individual carriers obtaining agreed increases in a shipowner’s liability.

[114] BGH/Federal Court of Justice (Germany), 15.12.2011, I ZR 12/11, TranspR 2012, 330; IDIT-CMR (FR) n°41575; IDIT-CMR (EN) n°41576.

position[115], and stated that when interpreting Article 2.1. the meaning and purpose of the provision are to be accorded decisive importance[116].

Given that the recourse problem can arise equally in respect of mandatory domestic law and that this purpose forms part of the context in the light of which the words are to be read, we consider that the words in Article 2.1. CMR are wide enough to include mandatory national laws and should do so.[117] Coming back to the example of the transport from Norway to Sweden, if the decision of Hoge Raad is to be followed, then the road carrier would be liable based on a limit of 8,33 SDR/kg, whereas he would have a recourse against the sea carrier based on a limit of 2 SDR/kg (or alternatively a package limitation).

Conclusion. We consider that the wording of Article 2.1. CMR is wide enough to include mandatory national laws. The same argument would also apply to international piggy-back transport stages not governed by uniform transport conventions but governed by mandatory national law. Thus, objective mandatory law does not need to derive from uniform law conventions.

3.2.4.2. Identification of the applicable domestic law

In the absence of applicable uniform law conventions,[118] 'conditions prescribed by law' can thus be also derived from national law. This leads to the question of identifying which is the applicable law.

The Munich Commentary on the Commercial Code - CMR art. 2 [Combined transport] suggests that the applicable law should be identified through the application of conflict-of-law rules.[119] The conflict-of-law rules applied will depend on the law of the court seized of the case. In the EU,[120] the default conflict rule of Article 5.1 of the Rome I Regulation will determine the applicable law to the hypothetical contract between the sender and the piggyback subcarrier. In line with the objective approach,[121] we recommend disregarding a possible choice of law made in the actual subcontract between the road carrier and the piggyback carrier. [122]

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115 At paras [21], [26].

116 At para [20].

117 A view which aligns with statements made by some of the earlier writers on CMR: Loewe, fn. 3 above, para 55, Hostie, 'Article 2 of the Convention on the contract for the International Carriage of Goods by Road (CMR)', Note by the representative of the International Institute for the Unification of Private Law UPD, Unidroit 12 July 1956; M.C. Nickel Lanz, *La convention relative au contrat de transport international de marchandises par route* (CMR), Hambourg, 1976, p.22, fn.20.

118 See above Section 3.2.3. Identification of the relevant uniform law

119 H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 19.

120 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 4.7.2008, pp. 6–16. This Regulation, however, only applies in EU member States (except Denmark, including UK, except for ECJ case law).

121 On the objective approach see Section 3.1.3.2. Objective approach.

122 H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 15.

This approach was followed by the German BGH in the **UND ANDRYATIK** case
Germany - Federal Court of Justice/BGH, 15.12.2011.[123]
[translation] : *The status of the hypothetical freight contract between the sender and the 'piggyback carrier' (sea carrier) is determined by Art. 28 (4) EGBGB, [...]. This leads to the applicability of Turkish law in this case because the carrier had its principal place of business in Istanbul and the place of loading was also located there. Art. 17 et seq. CMR are therefore superseded by the liability provisions of Turkish maritime freight law.*
In the case of international maritime transport, the carrier's liability for damage to or loss of cargo is governed directly by Turkish law in accordance with Art. 4 § 2 letter b of the Hague Rules of 1924. This set of rules came into force in Turkey on 4 January 1956 and applies directly there because, unlike Germany, Turkey did not make use of the option to transpose the rules into domestic law (...). According to Art. 4 § 2 letter b of the Hague Rules of 1924, the carrier is not liable for loss or damage to goods caused by fire, unless he has caused the damage through his own fault. There are no concrete indications of fault on the part of the carrier's management. The defendant can therefore successfully invoke the exclusion of liability pursuant to Art. 4 § 2 letter b of the Hague Rules of 1924.So again, the court looked to the applicable national law to determine whether this national law leads to the application of an international convention or the to application of purely national law.

This last issue concerns the situation when no uniform law convention qualifies ipso jure. In such a case the non-road stage should be governed by a domestic law provided that such law is mandatory. Whether that national law is purely national or leads to the application of an "internalised" convention, does not matter. Although the Hoge Raad in the Gabriëlle Wehr case decided that the national law providing 'conditions prescribed by law' should be derived from uniform law, this commentary suggests that such a restriction may not be implied into the text of Article 2.1. CMR.
The CMR-AC refused however to discuss on the method for the identification of such a domestic law.

Interim conclusion: The non-road liability regime may consist in a regime objectively identified, such as an international uniform instrument applicable to the considered route or failing that in a mandatory domestic law.

Once the non-road regime has been identified, the extent of the exclusion of CMR still needs to be specified. Indeed, the application of another regime does not lead, under the terms of Article 2.1 CMR, to the total exclusion of CMR.

3.3. Extent of the non-road regime: hybrid regime resulting in a combination of CMR and other regime's provisions

The application of a non-road regime authorized by Art. 2.1. CMR only concerns the liability of the road carrier (chap. IV CMR) for the piggy-back transport stage.[124]

[123] BGH, 15.12.2011, I ZR 12/11, TranspR 2012, 330 ; IDIT-CMR (FR) n°41575 ; IDIT-CMR (EN) n°41576.
[124] H. Jesser-Huß (2023), quoted fn 17, marginal number 22.

Consequently, the CMR still applies to road stage(s) and all other issues under the contract of carriage, notably the rules relating to the conclusion and performance of the contract (Art. 7-16), the rules of procedure (Art. 31 & 33) and the CMR limitation period (Art. 32), which remain applicable to protect the sender.

Such a combination of the CMR with another transport law regime does not seem to pose any problem. The case law is in this line.

3.3.1. Checking of the goods within a certain period (Art. 30 CMR)

It seems likely to treat the extinction of the action and the ascertainment of the damage in the same way as the prescription, since Article 30 of the CMR, which is devoted to the latter, appears in the same chapter as the limitation period, distinct from that relating to liability. Consequently, in the event of damage caused by sea, the shipper should respect the delay to make his reservations.[125]

3.3.2. Jurisdiction provisions (Art. 31 CMR)

Likewise, the CMR jurisdiction provisions remain applicable when the liability of the carrier is not assessed according to the CMR provisions. Such a situation is illustrated by a German case.
The German Federal Court held that the Court of Appeal had rightly assumed that the German courts have international jurisdiction pursuant to Article 31(1)(a) CMR, which must also be examined ex officio in cassation because the defendant has its registered office in the territory of the Federal Republic of Germany. Consequently, it did apply the rules on jurisdiction in Article 31 CMR to a case where the liability of the CMR carrier was eventually assessed according to the HVR. [126]

3.3.3. Time-bar issues governed by CMR (Art. 32)

The CMR provisions on the limitation period to bring an action before Court, remain applicable.[127]
Such a situation is illustrated by a French case.

- **France - CA Aix-en-Provence, 30.05.1991**[128]: Application of art 32 CMR as the rules on prescription are not “conditions prescribed by law” relating to the liability of the carrier (but HVR applicable / liability).

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125 M. Tilche, Comment on Cass. com. (France), 27.06.2006, n°04-13164 : BTL Nº 3138, 17 July 2006, p.466; See also: La semaine juridique, édition "E", n° 2233 ; Revue Scalpel n°3 2006 p.154; IDIT-CMR (FR) n° 22433 ; IDIT-CMR (EN) n° 41928.

126 BGH 15.12.2011, I ZR 12/11 : TranspR 2012, 330 ; IDIT-CMR (FR) n°41575 ; IDIT-CMR (EN) n°41576 ; See also: BGH, judgment of 9.03.2010, XI ZR 93/09, BGHZ 184, 365 para. 17.

127 H. Jesser-Huß (2023), quoted fn 17, Art. 2 CMR, marginal number 22; I. Koller (2023), quoted fn 16, Art. 1 CMR, marginal number 12a; O. Hartenstein (2025) quoted fn 17 ; I. Koller (2023), quoted fn 17, Art. 2, marginal number 108.

128 Revue Scapel 1991, p.105; DMF 1992, p.194, comm. P. Bonassies ; BTL 1992, p.281; IDIT-CMR (FR) n°10529 ; IDIT-CMR (EN) n°41998.