

Which types of agreements are not prohibited by Art. 41 CMR?

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Topics



- What does Art. 41 CMR say and how to interpret it?
- Which types of agreements are prohibited by Art. 41 CMR?
- Which types of agreements are NOT prohibited by Art. 41 CMR?



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void.



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

[...] any stipulation which would **directly or indirectly** derogate from the provisions of this Convention shall be null and void.



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

[...] any stipulation which would **directly or indirectly** derogate from the provisions of this Convention shall be null and void.



Deviation from the convention not by explicit wording, but by legal/commercial effect; see Art. 41 (2) CMR



What does Art. 41 CMR say and how to interpret it?



Art. 41 (2) CMR

In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.



What does Art. 41 CMR say and how to interpret it?



Examples for: „a benefit of insurance in favour of the carrier or any other similar clause“

- sender agrees to indemnify the carrier against any liability that the carrier might incur to the consignee
- a waiver of the sender's/consignee's right to take recourse against the carrier
- an agreement which hinders the sender's/consignee's insurer from taking recourse against the carrier



What does Art. 41 CMR say and how to interpret it?



Examples for: „any clause shifting the burden of proof“

- clause that imposes an additional burden of proof on the carrier, for instance, to prove that he did not act with gross negligence
- clause that defines a certain behaviour to fall under the scope of ‘wilful misconduct’ in the sense of Art. 29 CMR



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

[...] any stipulation which would directly or indirectly derogate from the provisions of this Convention **shall be null and void.**



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

[...] any stipulation which would directly or indirectly derogate from the provisions of this Convention **shall be null and void.**

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- Completely/utterly without any consequence
 - Strongest form of irrelevance
 - Cannot be fixed



What does Art. 41 CMR say and how to interpret it?



Art. 41 (1) CMR

[...] The nullity of such a stipulation shall **not** involve the nullity of the other provisions of the contract.



- Existence of contract is ensured and contract must be performed
- Null and void clauses are replaced by CMR



Which types of agreements are prohibited by Art. 41 CMR?



- no definite list
- strict interpretation of Art. 41 CMR
- Examples:
 - main carrier accepting liability for loss caused by the sub-carrier in the contract between them
 - contractual penalties triggered by a breach of obligations ruled by the CMR



Which types of agreements are NOT prohibited by Art. 41 CMR?



- In some matters, the CMR explicitly allows a choice by the parties.
- The effect of Art. 41 CMR is limited to the scope of the CMR. Consequently, if something is not covered by the CMR, Art. 41 CMR is of no effect.



Which types of agreements are NOT prohibited by Art. 41 CMR?



CMR explicitly allows a choice by the parties here:

- Increasing liability within the scope of Art. 24 or 26 CMR
- Choice of forum; Art. 31 CMR
- Choice of an arbitral tribunal; Art. 33 CMR
- Agreements between successive carriers; Art. 40, 37, 38 CMR



Which types of agreements are NOT prohibited by Art. 41 CMR?



Matters not covered by the CMR, examples:

- who is obliged to package the goods?
- who is obliged to load or stow the goods?
- carrier's right of retention or his lien on the goods
- prohibition of or limits to set-off
- agreements on how the transport is to be performed



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Such matters are ruled by the applicable national law and/or by agreement between the parties (if national law allows for such agreement and if there actually is such an agreement)



Which types of agreements are NOT prohibited by Art. 41 CMR?



Examples for agreements on how the transport is to be performed:

- agreements on which route is to be taken by the carrier
- use of a driver of a specific nationality
- security arrangements (“Breaks may only be taken in secured, illuminated and guarded parking areas. It is not permitted to stop in ‘simple’ motorway parking areas.”)



Thank you!

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