# Article 17 CMR overview countries

## FRANCE

***How Article 17.2 of the CMR is interpreted by the French courts***

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French courts approach each cause of liability exemption differently. While the claimant's wrongful act or neglect, the claimant's instructions, and the inherent defect of the goods are restrictively construed (1), the courts have a tendency to distort the meaning of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent in that they liken it to their own concept of force majeure (2).

### 1. The strict interpretation of the first three causes of exemption from liability

The first three causes of exemption from liability provided for in Article 17.2 of the Convention are strictly construed by the French courts. They generally find the claimant liable where he failed to forward the required information or documentation to the carrier.

For instance, the following have been found to amount to neglect: the sender's failure to inform the carrier that the goods were liable to self-ignite (Cour de Cassation, Commercial Division, 23 May 1989, case no. 87-17.883) and the ordering party's failure to give any instructions to the carrier as to the goods' value and which vehicles were appropriate (Lyon Court of Appeal, 14 March 2013, case no. 11/07885).

In order for the claimant's wrongful act or neglect to exempt the carrier from liability, there must be a direct and exclusive chain of causation between it and the damage (Cour de Cassation, Commercial Division, 26 November 1996, case no. 89-10.346).

In essence, the courts consider that the claimant's instructions are the instructions given to the carrier, where they are told how to perform the service. For instance, the carrier was exempted from liability when it was established that the damage sustained by the goods was directly caused by the claimant's wrong instructions concerning the required temperature for the carriage of fruit (Cour de Cassation, Commercial Division, 19 April 1982, case no. 79-15.808).

Under French law, an 'inherent defect' is 'the deterioration of the goods because of an internal cause' (Rouen Court of Appeal, 28 June 1990, case no. 2151/88), i.e., the goods have a proclivity to deteriorate on their own. That is how the French courts interpret the concept of inherent vice under the CMR. So for instance, fruit infected with a disease before being moved suffers from such an inherent defect, thus exempting the carrier from liability (Aix-en-Provence Court of Appeal, 21 June 1985, case no. 83/6119).

### 2. The distorted interpretation of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent

French law includes the concept of force majeure. Where force majeure has been established, the debtor is fully exempted from its obligation. In contract law, a force majeure event is an event that prevents the obligation from being performed on condition that it could neither be anticipated upon entering into the contract nor controlled upon its occurrence (Cour de Cassation, Plenary Assembly, 14 April 2006, case no. 02-11.168).

The cause of exemption included in Article 17.2 is less restrictive in that, contrary to the French concept of force majeure, it is immaterial whether the event could have been anticipated or not. Therefore, if the convention applies, the judges should obey the letter of the law and not extend the concept of force majeure.

Although the Cour de Cassation once quashed a ruling in which the judges had required proof that the event could not have been anticipated in a case of theft (Cour de Cassation, Commercial Division, 27 January 1981, case no. 79-13.833), other rulings by the Courts of Appeal and the Cour de Cassation applied the French concept of force majeure when determining whether there was cause to exempt the carrier according to Article 17.2 of the CMR. For instance, the Cour de Cassation once held that the carrier is exempted from liability provided that the cause of the damage is the result of a force majeure event, 'whereby the fact that the wording of Article 17 of the CMR was not cited word for word is immaterial' (Cour de Cassation, Commercial Division, 3 March 1998, case no. 96-11.979).

Therefore, the judges alternately use the French concept of force majeure and the Convention's concept of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent in order to determine whether there is cause to exempt the carrier from liability.

However, the exemption can only apply where the circumstances of the obligation's non-performance are known: where these circumstances cannot be established, the carrier cannot be exempted from liability (Paris Court of Appeal, 17 June 2015, case no. 12/06007).

An example of an event that amounted to circumstances which the carrier could not avoid and the consequences of which he was unable to prevent is aggravated larceny if carried out in such a violent manner that it amounts to a circumstance that could not be either avoided or prevented. The Cour de Cassation ruled in that case that there was no need to determine whether it could have been anticipated, in accordance with Article 17.2 of the CMR (Cour de Cassation, Commercial Division, 09 April 2013, case no. 11-28.360).

Other events deemed to be causes for exemption provided they meet the requirements of Article 17.2 of the Convention: a fire due to a foreign body rubbing against a tyre (Versailles Court of Appeal, 8 April 2010, case no. 09/00315); weather conditions declared to be a natural disaster (Paris Court of Appeal, 2 October 2014, case no. 12/19914); the decision by customs officials to continue with a strike as the carrier is about to cross the border (Orléans Court of Appeal, 12 November 1996, case no. 94/003206); a traffic accident at night (Metz Court of Appeal, 30 October 1990, case no. 88/1313).

## GERMANY

***International Conference 60 years CMR***

**06./07.10.2016**
**Article 17 CMR**

By Dr. Tobias Eckardt

The provisions of Article 17 CMR have brought forward a wealth of case law and commentaries. Decisions between the various alternatives of Article 17.2 CMR are, however, quite unevenly distributed.

### 1. First alternative: wrongful act/negligence of the claimant

The position in Germany is that the claimant might be either the sender or the consignee. It seems to be generally accepted[1] that this is the case as either of these parties may be in a position to claim against the carrier.

The level of care or diligence that needs to be exercised by the 'claimant' is that which could be expected by a diligent sender/consignee.[2] It has, for example, been held that the sender violated his duty in the following case: the sender was obliged to handle the loading of the cargo on to the trailer. He had, however, left this task to the driver and did then not check on whether the cargo was sufficiently secured within the trailer. It was held[3] that the sender thereby violated his duties.

As a near mirror image of this decision it has been held that the sender was not to be blamed if he failed to take steps which should prevent a loss in a case where he had no contractual obligation to take these steps but had simply been requested by the carrier to do so.[4]

### 2. Second alternative: losses caused by instructions given

It is generally accepted that the instruction needs to be binding on the carrier in order to relieve him of liability.[5] There does not seem to be any particular interesting case law on this alternative.

### 3. Third alternative: inherent vice of the goods

Here the relationship to Article 17.4 lit. d CMR is unclear and subject to discussion. The general approach seems to be that cases where the category of the goods generally makes them prone to damage should be covered by Article 17.4 CMR whereas if a cargo that is not usually and generally susceptible to losses (but only this particular consignment), should be covered by Article 17.2 CMR. The line of distinction is drawn between a typical condition of the cargo and a non-typical condition, which is then considered a case of inherent vice. For example if a cargo can be expected to be cooled to a specific temperature and this particular shipment

1. BGH, 15.1.2007, *TranspR* 2007, 314: 'Mit dem Verfügungsberechtigten meint die CMR – wie sich den maßgeblichen englischen und französischen Texten (Art. 51 CMR) entnehmen lässt – den Anspruchsteller ("the claimant") oder Anspruchsinhaber ("l'ayant droit"); das sind der Absender und der Empfänger, die beide als Gläubiger des Ersatzanspruchs in Betracht kommen [references omitted], hier also der Absender.'; Koller, Art. 17 CMR para. 31; MüKo Jesser-Huß, Art. 17 CMR para. 29.
2. BGH, 9.9.2010, *TranspR* 2011, 178: 'Das Verschulden im Sinne von Art. 17 Abs. 2 CMR setzt nicht voraus, dass der Verfügungsberechtigte gegen echte Vertragspflichten verstößt. Es genügt vielmehr, dass er in vorwerfbarer Weise eine Obliegenheit zur Schadensverhinderung verletzt, das heißt die verkehrserforderliche Sorgfalt nicht beachtet hat. Das dem Verfügungsberechtigten anzulastende Verhalten muss zudem kausal geworden sein und kann sowohl den Eintritt als auch die Höhe des Schadens betreffen [references omitted].'; Koller, Art. 17 CMR para. 31a; MüKo Jesser-Huß Art. 17 CMR para. 30.
3. BGH, 15.1.2007, *TranspR* 2007, 314: 'Für die Frage, ob die Haftung des Frachtführers für eine auf fehlerhaftes Verladen zurückzuführende Beschädigung des Gutes (Art. 17 Abs. 1 CMR ) nach Art. 17 Abs. 4 lit. c CMR ausgeschlossen ist, kommt es darauf an, wer das Transportgut tatsächlich verladen hat. Liegen danach die Voraussetzungen eines Haftungsausschlusses nicht vor, ist ein vom Versender verschuldeter Schadensbeitrag – hier: Nichteinschreiten des an sich zur Verladung verpflichteten Versenders bei einer vom Fahrer vorgenommenen unzureichenden Verzurrung des Gutes auf einem Auflieger – im Rahmen der Haftungsabwägung nach Art. 17 Abs. 2 i.V. mit Abs. 5 CMR zu berücksichtigen.'.
4. BGH, 13.7.2000, *TranspR* 2000, 409 ('Hält der Frachtführer, der im allgemeinen für eine ordnungsgemäße Ablieferung des Gutes bei dem bestimmungsgemäßen Empfänger verantwortlich ist, eine Mitwirkung des Versenders bei der Erfüllung seiner Verpflichtung durch Vornahme bestimmter Sicherheitsmaßnahmen für erforderlich, so muß er dies zum Gegenstand des Beförderungsvertrages machen. Die Nichtbefolgung eines einseitigen Verlangens des Frachtführers begründet in der Regel weder ein Verschulden des Versenders i. S. von Art. 17 Abs. 2 CMR noch eine Obliegenheitsverletzung, die grundsätzlich zu einer Mithaftung nach Art. 17 Abs. 5 CMR führen kann.'); BGH, 13.7.2000, *TranspR* 2001, 298 ('Der Frachtführer hat im allgemeinen dafür zu sorgen, daß das Gut sicher bei dem bestimmungsgemäßen Empfänger ankommt und dort ordnungsgemäß abgeliefert wird. Welche Sicherheitsvorkehrungen er zur Erfüllung seiner Verpflichtung ergreift, ist ihm überlassen. Hält der Frachtführer die Mitwirkung des Absenders in einer bestimmten Art und Weise für erforderlich, muß er dies mit ihm grundsätzlich vertraglich vereinbaren. Denn die Vorschriften der CMR enthalten keine Verpflichtung des verfügungsberechtigten Absenders, einem einseitigen Verlangen des Frachtführers nach bestimmten Sicherheitsmaßnahmen nachkommen zu müssen. Demzufolge begründet die Nichtbefolgung eines einseitigen Verlangens des Frachtführers weder ein Verschulden des Versenders i. S. von Art. 17 Abs. 2 CMR noch eine Obliegenheitsverletzung, die grundsätzlich zu einer Mithaftung nach Art. 17 Abs. 5 CMR führen kann. Lehnt der Versender es ab, von ihm verlangte Sicherheitsvorkehrungen zu ergreifen, hat der Frachtführer die Möglichkeit, den Abschluß eines Beförderungsvertrages durch Nichtannahme des Auftrages des Versenders zu verhindern.').
5. Koller, Art. 17 CMR para 32; MüKo Jesser-Huß, Art. 17 CMR para. 35.

is not so cooled this is a non-typical case and might therefore qualify under Article 17.2 CMR.[6]

It should be noted that a further distinction can be drawn in cases where the carrier has been notified the non-typical properties of the cargo. It is discussed that in these cases cargo forms its own category of cargo. In the above example: If the carrier is informed in advance that the cargo is not cooled as it would usually be, the category would be 'insufficiently cooled cargo' and would thus constitute its own category and the fact that the cargo is insufficiently cooled would not be an inherent vice under Article 17.2 CMR, but would fall under Article 17.4 CMR.[7]

**4. Fourth alternative: unavoidable circumstances**

When discussing the law to bring into force the CMR as German law, the legislator considered Article 17.2, fourth alternative CMR, to contain a definition of force majeure. It was thus considered that only external circumstances which were utterly unforeseeable could relieve the carrier from liability. The Federal Supreme Court has repeatedly held that the legislator misunderstood the convention and that the German understanding of force majeure should not be relevant here. Rather, it was established that the carrier has to prove that the loss could not have been prevented even if the utmost care possible under circumstances had been taken. When the Federal Supreme Court says utmost possible care it indeed means just that. Based on the transport requirements set out in the contract of carriage and the perceivable risks of that particular carriage all steps need to be taken up to those which seem (from a commercial perspective) as absurd or borderline absurd to prevent losses.[8]

German courts will consider the transport as a whole and not just the actual loss event. So that – for example – the question will not (just) be whether the driver could withstand the robbers at the truck stop, but whether the carriage should have been organised in such way that the stop would not have been necessary.

Examples:

A robbery of a truck parked at a motorway rest stop in Italy was held to have been avoidable as the truck/trailer should have been parked in secured location or two drivers could have been used, given that Italy is known to be prone to be cargo thefts.[9]

A driver was not provided with a road map or a precise description of how to arrive at his destination and was therefore forced to stop several times after nightfall to ask for directions and was consequently robbed in Sophia/Bulgaria (cargo: six cars with a total value of over USD 84,000) was found to have been avoidable.[10]

The Appellate Court of Hamm[11] considered a case where a sender agreed with a haulier to carry goods from A to B and another consignment from C to D. As the haulier transported the goods from C to D he was too late to deliver the goods from the other shipment at B. The Court held that even though the sender had contracts to cover both carriages the haulier could not rely on Article 17 para 2 CMR as it was the

6. Koller, Art. 17 CMR para. 33; MüKo Jesser-Huß, Art. 17 CMR paras. 37 et seq; Thume, 'Verpackungsmängel und ihre Folgen im allgemeinen deutschen Frachtrecht und im grenzüberschreitenden Straßengüterverkehr', *TranspR* (2013), 8 further differentiates between insufficiently cooled (falling under Art. 17.4) and deep-frozen goods (falling under Art. 17.2); see also Abele, 'Transportrechtliche Haftungs- und Versicherungsfragen anhand von temperaturgeführten Pharmatransporten', *TranspR* (2012), 391.
7. Cf. Koller, Art. 17 CMR para. 33; MüKo Jesser-Huß, Art. 17 CMR paras. 37 et seq.
8. MüKo Jesser-Huß, Art. 17 CMR para. 41; Koller, Art. 17 CMR paras. 20 et seq.
9. BGH, 29.10.2009, I ZR 191/07, *TranspR* 2010, 200: '3. Ohne Erfolg wendet sich die Revision gegen die Annahme des Berufungsgerichts, der Beklagte sei nicht gemäß Art. 17 Abs. 2 CMR von seiner Haftung für den streitgegenständlichen Schaden befreit, da der Raubüberfall – und damit der Verlust des Transportgutes – für ihn nicht unabwendbar im Sinne der genannten Vorschrift gewesen sei.
   a) Das Berufungsgericht ist zutreffend davon ausgegangen, dass Unvermeidbarkeit i.S. von Art. 17 Abs. 2 CMR nur anzunehmen ist, wenn der Frachtführer darlegt und gegebenenfalls beweist, dass der Schaden auch bei Anwendung der äußersten dem Frachtführer möglichen und zumutbaren Sorgfalt nicht hätte vermieden werden können [references omitted]. Diesen Nachweis hat der Beklagte, der nach Art. 3 CMR für das Verhalten seines Fahrers einzustehen hat, nicht erbracht.
   b) Das Berufungsgericht hat angenommen, der Beklagte habe den Verlust des Gutes mit zumindest leichter Fahrlässigkeit verursacht. Bei Italien handele es sich um ein diebstahls- und raubgefährdetes Land für Lkw-Transporte, so dass Veranlassung zu erhöhter Sorgfalt bestanden habe. Dem habe der Beklagte bzw. sein Fahrer nicht genügt. Es könne nicht ausgeschlossen werden, dass der Überfall vermieden worden wäre, wenn der Beklagte und sein Fahrer weitere Sicherheitsvorkehrungen getroffen hätten. Im Streitfall komme noch hinzu, dass der Beklagte gemäß Ziffer 3.3 der zwischen ihm und N. geschlossenen Rahmenvereinbarung verpflichtet gewesen sei, beladene Transportbehältnisse verschlossen auf einem gesicherten Grundstück, bewachten Parkplatz oder sonst beaufsichtigt abzustellen. Der dem Beklagten obliegenden erhöhten Sorgfaltspflicht sei mit einem in der Fahrerkabine schlafenden Fahrer nicht entsprochen worden. Als zusätzliche Sicherungsmaßnahmen wären der Einsatz eines zweiten Fahrers oder die Wahl einer Fahrroute, auf der es bewachte Parkplätze gegeben hätte, in Betracht gekommen.
   c) Entgegen der Auffassung der Revision hat das Berufungsgericht an die vom Frachtführer darzulegende und gegebenenfalls zu beweisende Entlastung gemäß Art. 17 Abs. 2 CMR keine zu hohen Anforderungen gestellt. Die Revision berücksichtigt nicht genügend, dass es sich bei der Haftung nach Art. 17 Abs. 1 CMR um eine verschuldensunabhängige Haftung mit der Möglichkeit des Unabwendbarkeitsbeweises handelt [references omitted]. Dem Frachtführer obliegt es, mit der Gewissenhaftigkeit eines ordentlichen Kaufmanns für eine sichere Ankunft der zu transportierenden Güter beim bestimmungsgemäßen Empfänger zu sorgen. Das Berufungsgericht hat mit Recht angenommen, dass die Anwendung des Art. 17 Abs. 2 CMR im Streitfall daran scheitert, dass der Beklagte mögliche Sicherheitsvorkehrungen zur Vermeidung eines Raubes oder Diebstahls des Transportgutes nicht ergriffen hat.'
10. BGH, 30.4.2000, I ZR 290/97, *TranspR* 2000, 407: 'Der Verlust von – erkennbar besonders wertvollem – Transportgut (hier: sechs PKW) infolge Raubüberfalls im Ausland (hier: Sofia/Bulgarien) ist in der Regel nicht unvermeidbar, wenn der in der Dunkelheit eintreffende Fahrer deshalb gezwungen ist, anzuhalten und Dritte nach dem Weg zu fragen, weil er weder mit einem Stadtplan vom Empfangsort noch zumindest mit einer genauen Wegbeschreibung zur Empfängeradresse ausgestattet ist.'
11. OLG Hamm, 15.9.2008, 18 U 199/07, *TranspR* 2009, 167, see summary of the case in EJCCL 2009, 101: 'Ein Haftungsausschluss gem. Art. 17 Abs. 2 CMR kommt nicht in Betracht. Das Überschreiten der Lieferfrist war für den Beklagten vermeidbar. Es entlastet ihn nicht, dass er das Gut aufgrund eines anderen, ihm von der Klägerin erteilten Auftrages am 24.11.2005 durch seinen Fahrer in N erst nach 20.00 Uhr und nicht zur vereinbarten Zeit um 17.00 Uhr abholen lassen konnte. Die Verantwortung dafür, dass alle übernommenen Transportaufträge fristgerecht erfüllt werden können, liegt beim Frachtführer, der die einzelnen Aufträge entgegennimmt.'

haulier's obligation to ensure that all transport accepted by him could be carried out in a timely fashion.

In cases of traffic accidents or other traffic related cases German courts demand that the driver acted *completely* in accordance with all traffic laws and rules. If a slight violation of the rules played a causative role in the damage/loss, Article 17.2 CMR cannot apply.[12] One of the rare cases where this exception applied was decided by the Appellate Court of Köln:[13] a person had thrown a stone from a bridge and the driver of the truck had to swerve to avoid being hit by that stone, leading to the truck crashing.

## GREECE

### *Interpreting CMR Carrier's defences in Greece (Article 17.2 and 17.4)*

By Michael A. Antapasis[14]

### 1. Introducing the Greek judicial way of thinking

Judicial interpretation of the CMR generally tends to focus in on such areas as the liability of the carrier (Article 17 and particularly what should constitute a defence under Article 17.2) and what constitutes 'wilful misconduct' conduct such as to deprive the carrier from his right to limit liability (Article 29).

A carrier's defences in a nutshell are presented in Article 17.2 and can exonerate a carrier from his *a priori* presumed liability when the loss or damage occurred following a) the wrongful act or negligence of the claimant, b) the instructions of the claimant, c) inherent vice, or finally d) an unavoidable and unpredictable circumstance. A carrier's defences under Article 17.2 are considered to be a key concept for the CMR's liability regime.[15]

Furthermore, Article 17.4 restrictively lists the cases of special risks that can exonerate a carrier's liability.

The basis of liability as set out under Article 17.1 and then re-stated under Article 17.2 created a long and interesting discussion in Greek doctrine and jurisprudence in an effort to identify the exact legal identity of a carrier's liability. In the Greek literature it has been disputed whether the liability of the carrier should be considered as a strict one or as a liability based on fault. It could be said that Greece applies a mixed regime of a subjective presumed basis of liability with a reversed burden of proof. Hence, as a first step, Greek judges will examine a carrier's liability under the scope of a strict liability regime where the carrier faces a presumption of his responsibility once the cargo is damaged. Nevertheless, since the carrier can present the defences of Article 17.2 or 17.4, Greek courts have decided to lighten this basis of liability by introducing a new regime of a 'counterfeit objective liability' (*nothos antikimeniki efthini* – *νόθοςαντικειμενικήευθύνη*).[16]

The burden of proof for the existence of exonerating circumstances always rests upon the carrier. Furthermore, as far as Article 17.2 is concerned, the carrier will have to prove a causal link between the exonerating event and the damage to the cargo and even more prove that this was the only cause of the damage.[17] Nevertheless, when the carrier is seeking to set up a defence under Article 17.4, he will need to prove that the risk actually occurred, though he will not need to prove a causal link between the special risk invoked and the cause of loss or damage. Greek courts accept that it is sufficient for the carrier to prove that the loss or damage could have been caused by a special risk, creating a presumption of non-responsibility and shifting the burden of proof back to the claimant.[18]

12. BGH, 10.4.2003, I ZR 228/00, *TranspR* 2003, 303 ('Das Berufungsgericht ist im rechtlichen Ansatz zutreffend davon ausgegangen, dass Unvermeidbarkeit i.S. des Art. 17 Abs. 2 CMR nur anzunehmen ist, wenn der Frachtführer darlegt und gegebenenfalls beweist, dass der Schaden auch bei Anwendung der äußersten ihm möglichen und zumutbaren Sorgfalt nicht hätte vermieden werden können [references omitted]. Dies setzt bei Verkehrsunfällen voraus, dass sich der Frachtführer völlig verkehrsgerecht verhalten, d.h. der Unfall für ihn ein unabwendbares Ereignis i.S. des § 7 Abs. 2 StVG a.F. dargestellt hat [references omitted]. Ein solches unabwendbares Ereignis liegt immer schon dann nicht vor, wenn ein – sei es auch nur geringfügiges – Verschulden des Fahrers für den Unfall ursächlich gewesen oder ein solcher Ursachenzusammenhang zumindest nicht auszuschließen ist [references omitted].'); OLG Köln, 13.1.2009, 3 U 203/07, ('Unvermeidbarkeit im Sinne des Artikel 17 Abs. 2 CMR ist nur anzunehmen, wenn der Frachtführer darlegt und gegebenenfalls beweist, dass der Schaden auch bei Anwendung der äußersten ihm möglichen und zumutbaren Sorgfalt nicht hätte vermieden werden können. Dies setzt bei Verkehrsunfällen voraus, dass sich der Frachtführer völlig verkehrsgerecht verhalten, das heißt der Unfall für ihn ein unabwendbares Ereignis im Sinne des § 7 Abs. 2 StVG a. F. dargestellt hat; ein solches unabwendbares Ereignis liegt immer schon dann nicht vor, wenn ein – sei es auch nur geringfügiges – Verschulden des Fahrers für den Unfall ursächlich gewesen oder ein solcher Ursachenzusammenhang zumindest nicht auszuschließen ist').
13. Köln, 13.1.2009, 3 U 203/07: 'Der Senat hat sich durch eine erneute Vernehmung des Zeugen O., der für den Subunternehmer der Beklagten den Transport durchgeführt hat, davon überzeugt, dass nach den vorgenannten Grundsätzen der Schadenseintritt für den Zeugen unvermeidbar war. Der Zeuge konnte nach seiner Darstellung nur durch eine abrupte Ausweichbewegung nach links vermeiden, dass der von der Brücke geworfene Stein das Führerhaus seines LKW in dem Bereich traf, in dem er selbst saß. Dass der mit fast 24 t beladene LKW auf Grund dessen ins Schleudern geriet und gegen die linke und rechte Betonleitplanke prallte, war unvermeidbare Folge des Ausweichmanövers.'
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Draft written communication prepared for the Acts of the International Conference on the '60 years CMR. Future proof or time for a reform?', held in Rotterdam (Netherlands), 7-8 October 2016.
15. M. Clarke, *International Carriage of Goods by Road: CMR* (Informa Law, 6th edn, 2014), 225, para. 74.
16. For an extensive analysis see among others I. Rokas, *Civil Liability in Road Transport (especially under the CMR)* (Sakoulas, 1984), 182-183); Karagounidis, 'Wilful Misconduct and Equivalent Fault in International Carriage of Goods by Road', *EpiskED* (1995), 285, not. 4-6; viz. inter alia Thessaloniki CA 1872/1999, *EpiskED* (1999), 1194, Thessaloniki CA 998/1994, *Armenopoulos* (1994), 554; Piraeus CA 1209/1992, *EEmpD* (1993), 42; Athens CA 1379/1987, *EllDik* (1987), 753; for a criticism on this approach see A. Kiantou-Pampouki, 'Legal Nature of the International Road Carrier, especially under Art. 17.2 CMR', *EpiskED* (1999), 995-1007.
17. Piraeus CA 45/1997, *Piraeus Law Review* (1997), 58.
18. Cour Cass. 390/1992, *EllDik* (1993), 1334; Piraeus CA 1261/1997, *EempD* (1998), 777; Athens CA 3362/1991, EMD 5, 56; Athens CA 4926/1988, *EllDik* 30, 144

Greek doctrine and jurisprudence are rich on the subject but tend to be concrete.[19] In a nutshell one could say that Greek courts will examine each case *in concreto* but recognise that excluding a carrier's liability should be dealt with extremely cautiously, identifying a more delicate regime in Article 17.2 defences and a more clear cut regime in Article 17.4 defences. Contractual clauses limiting carrier's liability outside the provisions of Article 17.2 and 17.4 or in case of force majeure are considered to be null and void. Hence a clause limiting carrier's liability in case of theft cannot apply.[20]

### 2. Utmost care v. Unavoidable or unpreventable circumstances

Interpreting Article 17.2 has always been a field of discussion for Greek scholars and judges, especially on issues concerning the nature of the carrier's liability, the extent of his defences, and the nature of the criteria to be considered when deciding what is truly an unavoidable or unpreventable circumstance. Nevertheless, all opinions intersect on one pre-condition and that is the level of care the carrier has shown prior and during the carriage under examination.

One of a carrier's usual defences is that the cause of the damage could not be avoided. Greek courts use a 'competent prudent professional carrier' standard in order to examine the carrier's conduct. The rule is well established in all areas of Greek civil and commercial law and applies subjectively in each case. The carrier will be exonerated only if and when he proves that the cause of damage could not be avoided even if he had presented the 'highest amount of prudence'.[21]

In order to examine the prudence of the carrier's conduct, the court will examine three factors: a) the likelihood of loss or damage,[22] b) the possibility for the carrier to take precautions in order to avoid such loss or damage, and c) the common practice of the industry in similar cases. It is also clear that the carrier will be relieved of his liability if he would be required to break the law in order to avoid the loss or damage or in case of an extensive use of violence.

Dealing with unavoidable or unpreventable circumstances within the Greek legal system, one could say that a new regime of a weakened definition of force majeure is created.[23] This regime, given its vagueness, will be specified by the court according to each case separately.

Greek doctrine and jurisprudence are very demanding when faced with an Article 17.2 defence.

As a result, the carrier has to show an utmost care even when the loss or damage was not caused directly by him but his conduct is found to be the starting point of events that led to the loss or damage. The Court of Appeal applied this rule in a case of CMR transport from Greece to the Netherlands via Italy.[24] When the Italian authorities found illegal immigrants hidden in the truck (without the driver's knowledge), the driver was arrested and the truck and cargo were confiscated and transported to an Italian customs warehouse. After several months, the claimant managed to retake possession of the confiscated goods which were destroyed while in the care of the Italian customs. The carrier was found responsible since the confiscation of the truck and goods could not be considered as unpredictable given that at that time the presence of illegal immigrants trying to enter the country was very common and he did not show utmost care to prevent them from hiding in his truck.

Although this decision may be considered to be extremely far-fetched, creating a severe burden of outmost care on the carrier, it is very characteristic as to how Greek courts interpret carrier's prudence under Article 17.2.

### 3. Traffic Accidents – Mechanical Failures

For loss or damage due to a traffic accident, Greek courts will usually find an element of wilful misconduct. Thus, the carrier will have difficulty invoking a force majeure argument as a defence. His liability will be relieved if, according to Article 17.2, he can prove that the accident occurred 'through circumstances which he could not avoid and was unable to prevent'.[25]

In a very characteristic case as to how Greek judges approach common traffic accidents, the Court of Appeal[26] was asked to examine the case of cargo damage as a result of a truck going off road and hitting the side bars due to slippery conditions caused by a severe blizzard. The carrier's argument of unpredictable and unavoidable weather conditions were denied since the Court considered that the driver should either stop the truck until the weather gets better or lower speed and be extremely cautious. The Court considered as a key element on the merits the fact that prior to the accident a convoy of 40 trucks had passed through the place where the accident happened.

When the damage is caused, directly or indirectly, due to a mechanical failure, the carrier is presumed liable and will be able to defend himself via Article 17.2 only if he proves that the failure was a result of unforeseen events and that he took all the necessary measures to keep the vehicle in good condition. Greek courts are very strict on the meaning of 'all necessary measures' and will rarely rule in favour of the carrier often combining the carrier's behaviour in relation to the cause of the damage with Article 29.[27] Hence, in a case where the cargo was damaged by fire due to overheated or burning tires, the carrier was held liable since it was held that he should have checked the tyres' condition and made sure that the good condition would be maintained throughout the entire voyage.[28] On a similar context, the carrier was denied an Article 17.2 defence and was found liable due to 'wilful misconduct' in a case of fire caused by mechanical error due to the truck's bad maintenance.[29]

19. Zekos, *Contracts of Carriage and the Carrier's Liability according to Greek Law* (Sakoulas, 2002), 55 *et seq*.
20. Athens CA 7332/1988, *EEmpD* (1988), 618.
21. Cour Cass. 1518/2001, *EllDik* 44, 1619; Cour Cass. 826/2004, *EllDik* 45, 1656; Thessaloniki CA 730/2005, *EempD* (2005), 528.
22. This factor is essential especially in the cases of theft or robbery.
23. A. Kiantou-Pampouki, 'Legal Nature of the International Road Carrier' 1999 (n. 15), 1004 *et seq*.
24. Larisa CA 157/2009, *EpiskED* (2010), 506.
25. Piraeus First Instance Multimember Court 2423/1980, EED (1981), 235.
26. Thessaloniki CA 1219/2005, *EpiskED* (2005), 754.
27. Athens Multimember First Instance Court 3749/1980, Arm. (1981), 125.
28. Athens CA 796/2006, *EpiskED* (2006), 807.
29. Cour Cass. 1795/2012, *EpiskED* (2013), 111; Athens CA 3957/2006, D/NH (2008), 901.

The same approach applies in cases of total loss of goods due to inadequate maintenance conditions (cooling) during transport and the carrier will be relieved from liability only if he claims and proves that the loss took place due to unusual circumstances which he could not avoid.[30]

### 4. Theft – Robbery

Theft will not be considered as a *prima facie* Article 17.2 exonerating circumstance, since in most cases the event could be avoided.[31] Robbery on the other hand is more easily considered to fall within Article 17.2's scope of application.

Once theft or robbery takes place, the carrier will always argue that the event was unavoidable irrespective of his reaction asking for the exoneration of his liability. Nevertheless, his behaviour prior to the actual event is of essence and will be examined in combination with the likelihood that the event could or would be attempted.[32]

In case of theft while the truck is parked in a parking lot, Greek courts are very reluctant to grant an Article 17.2 defence. This will happen only in the case where the parking lot is sufficiently guarded. Hence, the carrier will be relieved of liability in a case of theft if he proves that he showed utmost care by parking the truck in a properly fenced parking lot secured by guards.[33] On the other hand, courts have rejected an argument of unpredictable or unavoidable event in cases where the carrier parks the truck in an open unguarded parking lot or in areas where similar events are common.[34]

It should be pointed out that most of the relevant jurisprudence rules in favour of the claimant, going one step further and considering any non-prudent behaviour as a proof of carrier's wilful misconduct.

Following the above, the Supreme Court denied an Article 17.2 defence even in the case of the theft occurring when the driver was forced to park the vehicle in a crowded but unguarded place in order for him to go to hospital for a few hours due to a severe injury he had suffered on the head while leaving the truck. The Court held that his conduct could not be considered as prudent and the circumstances as unavoidable given that he has left the vehicle unguarded and there was no co-driver to be left beside with the truck and goods.[35]

It is clear that a successful defence in relation to theft is rare in Greek jurisprudence. On the other hand, courts are more lenient in cases of robbery, where the element of violence is present and expressed.[36] But even in cases of armed robbery, Greek courts will ask the carrier to show utmost care in relation to all aspects that could lead to the damaging event.

Hence, in a case reaching the Supreme Court,[37] a CMR transport was agreed from Italy to Greece. The carrier, being experienced, decided to park the truck near the town of Cassino in an open parking lot in order to rest. The driver, given his previous experience, knew that the area had no theft history and the parking lot was always crowded. At the time more than 30 trucks were parked alongside. During the night, the driver was attacked by armed robbers and was kidnapped together with the truck and cargo. Several hours later, after being injured, he was abandoned tied and gagged. The Court granted an Article 17.2 defence accepting the presence of unpredictable and unavoidable circumstances, even though, as expressly stated in the decision, the parking lot was not guarded, the truck had no alarm system and there was no co-driver in order to avoid interrupting the voyage.

On a different and stricter approach, the Court of Appeal[38] held that Article 17.2 will not *a priori* apply in cases of robbery, despite the clear presence of the element of violence. Thus, a CMR transport was agreed for the carriage of goods from Germany to Greece. The carrier chose, for cost saving reasons, to pass through Croatia despite the fact that the Yugoslavian civil war was raging. On travelling through Croatia, the driver was immobilised by a group of armed soldiers. The truck and all carried goods were stolen. The carrier invoked Article 17.2 arguing that the loss of cargo was due by an unpredictable and unavoidable event. The Court found the carrier liable, ruling that even if the truck was violently stolen, the armed robbery could not be considered as an unpredictable event when passing through a war zone. Furthermore, the carrier could avoid the event by choosing a different route, namely through Romania and Bulgaria or Italy. The court went one step further and activated Article 29, ruling that the carrier's behaviour was clearly a case of wilful misconduct.

### 5. Inappropriate loading or unloading and defective packing

In cases of inappropriate loading or unloading, the carrier will have to express his reservations prior to accepting delivery of the goods. Should the carrier remain silent, Greek courts have ruled that a presumption as to the good order of the loading or unloading is presumed, creating an even more difficult environment for him to deny his liability.[39] Nevertheless, this silence is considered as a mere presumption and not as a *prima facie* evidence that Article 17.4(c) will not apply. Cases where the carrier was able to invoke and prove this kind of defence even though no written reservations on his part existed are rare but do exist.[40]

30. Cour Cass. (Plenary) 1518/2001, *EempD* (2001), 698.
31. For an analysis of Art. 17.2 defences in theft cases see K. Pampoukis, 'Issues in International Carriage of Goods by Road, Remarks in relation to Thessaloniki CA 230/2002', *EpiskED* (2002), 525 *et seq.*, 542-543.
32. Clarke, *International Carriage of Goods* 2014 (n. 14), 232, par. 75a.
33. Athens CA 2871/2007, EMD (2007), 292; Athens Multimember First Instance Court 7260/2005, EMD (2007), 185
34. Thessaloniki CA 554/2002, *EpiskED* (2002), 745.
35. Cour Cass. 304/2007, Nomos e-Database.
36. Apart from violence, Greek courts have also accepted as an unavoidable circumstance the use of 'unknown means' for the execution of the act of theft or robbery. This vague concept has created reasonable concerns as to the danger of deviating from the true concept of Art. 17.2, see K. Pampoukis, 'The unpreventable conditions in Art. 17.2 as a vague legal conception, Remarks on Thessaloniki CA 1872/1999', *EpiskED* (1999), 1194 *et seq*.
37. Cour Cass. 1518/2001, EMD 4 (2001), 452.
38. Thessaloniki CA 171/2005, DEE (2005), 984.
39. Athens CA 310/1991, EMD 5, 103; Athens CA 10759/1988, EMD 4 (2001), 77.
40. Larisa CA 347/2006, *EpiskED* (2005), 548; Piraeus CA 268/2001, EMD 3 (2001), 327.

Greek courts approach Article 17.4(b) defences based on the same criteria as the above. Furthermore, when the carrier invokes a defective packing special risk he should present before the court what should be the appropriate packing.[41] The same rules apply in the case of bad loading or unloading. The above apply *mutandis mutandis* to the freight forwarder, resulting in a relief of the forwarder's liability when the carrier can defend himself through Article 17.4(b)[42] and (c).[43]

## POLAND

### *Country report on Article 17.2 CMR*

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### 1. Introduction

The Convention on the Contract for the International Carriage of Goods by Road (CMR) as unified international law should stay apart from national legal systems as far as its interpretation is concerned. However, if the CMR does not cover the matter at hand and a solution cannot be found in the Convention itself,[44] a judge will support it with domestic regulations. This is especially important in the light of very general concepts existing in the CMR which are not defined in the Convention's text. This report focuses on Article 17.2 CMR and investigates in particular how Polish courts interpret 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'. The judgments of the Polish Supreme Court and lower courts are taken into consideration. All judgments are selected from the Polish public judgment databases[45] and the legal information service Legalis.pl using the key words: 'article 17.2 CMR'. Analysis of the interpretation of Article 17.2 CMR starts with an overview of regulations which a Polish judge can apply to the international carriage of goods. This is because courts tend to compare similar concepts existing in domestic regulations (2). For the same reason the concepts of force majeure and due diligence present in the Polish legal doctrine are also briefly introduced (3). This is followed by an understanding of the concept of 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent' as this Article 17.2 CMR ground for exoneration is the one the most often invoked by carriers when trying to escape their liability. This is followed by examples of cases decided under Article 17.2 CMR. The analysis ends with conclusions (5).

### 2. Regulations applicable to the international carriage of goods by road

The CMR as a source of universally binding law shall be applied directly and takes precedence over national statutes. However, unless the literal meaning of the Convention provides a solution to the issue at hand, Polish courts apply the domestic regulations – that is the Polish Transport Law Act.[46] That is due to its Article 1§3 which states: 'The provisions of this Act shall apply to international transport, unless an international agreement provides otherwise'.[47] Should the matter not be covered by the Polish Transport Law Act, a judge takes recourse to the Polish Civil Code (PCC).[48]

### 3. Domestic concepts of force majeure and due diligence – Articles 65§2 of the Polish Transport Law Act and 355 PCC

Articles 65§2 of the Polish Transport Law Act and 355 PCC are particular points of reference for consideration of Article 17.2 CMR, as will explained below, circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.
Article 65§2 of the Polish Transport Law Act states that a carrier is not responsible if the loss, depletion, damage or delay in carriage of goods result from causes attributable to the sender or recipient, which are not caused by the fault of the carrier, characteristics of the goods or due to force majeure. Proof that the damage or the delay in transportation resulted from one of the following circumstances lies with the carrier.[49] The doctrine distinguishes three basic categories of force majeure. Natural disasters such as earthquakes, floods, volcanic eruptions, catastrophic storms, heavy snow, hurricanes and tornadoes make up the first category. The second relates to the final acts and decisions of a competent public authority, examples of which include decisions about quarantine or liquidation of the consignment because of environmental protection or a decision to ban certain types of goods. The last involves disturbances to public life in the form of hostilities, actions against public order, riots, strikes

41. Piraeus CA 60/1993, *EEmpD* (1994), 54; Piraeus CA 268/2001, *ibid*.
42. Piraeus CA 1261/1997, *EEmpD* (1998), 777; Athens CA 4136/1990, EMD 5, 14.
43. Athens CA 4136/1990, EMD 5, 14; Athens CA 15886/1988, *EllDik* 32, 184.
44. Art. 31 of the Vienna Convention on the Law of the Treaties from 1969 serves here as a starting point. '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'. This means that even in case a certain issue is not directly addressed in the conventions, the aim of uniform law still requires that the consideration is not given to national rules on interpretation, but the conventions need firstly to be interpreted in the context of the conventions themselves.
45. Orzeczenia Sądów Powszechnych: http://orzeczenia.ms.gov.pl; Sad Najwyższy: http://sn.pl/orzecznictwo/SitePages/Baza%20orzeczeń.aspx
46. Ustawa Prawo Przewozowe z dnia 15.11.1984 (Dz.U.Nr 53, poz. 272) ze zmianami [in this submission referred to as the Polish Transport Law Act].
47. Art. 1§3: Przepisy ustawy stosuje się do przewozów międzynarodowych, jeżeli umowa międzynarodowa nie stanowi inaczej.
48. Ustawa Kodeks Cywilny z dnia 23 kwietnia 1964 r. (Dz.U. Nr 16, poz. 93) ze zmianami.
49. Art. 65§2 of the Polish Transport Law Act: Przewoźnik nie ponosi odpowiedzialności określonej w ust. 1, jeżeli utrata, ubytek lub uszkodzenie albo opóźnienie w przewozie przesyłki powstały z przyczyn występujących po stronie nadawcy lub odbiorcy, niewywołanych winą przewoźnika, z właściwości towaru albo wskutek siły wyższej. Dowód, że szkoda lub przekroczenie terminu przewozu przesyłki wynikło z jednej z wymienionych okoliczności, ciąży na przewoźniku.

or lock-outs.[50] In its judgement of 13 December 2007,[51] the Supreme Court emphasised the objective character of the force majeure concept. Events considered as force majeure should be inevitable, extraordinary, unpredictable and external in relation to the company (carrier) whose activity is considered to be the cause of the damage. At the same time, force majeure cannot constitute a ground for exoneration if it is preceded by an act of a carrier that contributes to the damage.[52]

In order to assess whether in fact the carrier contributed to the damage the judge has to refer to the rules regarding performance of legal obligations. Here Article 355 PCC is decisive. The due diligence of the debtor within the scope of his economic activity shall be assessed with consideration of the professional nature of that activity. If nothing else follows from a special provision of statutory law or the act in law, the debtor shall be liable for the non-observance of due diligence. This requires the carrier to take precautions, including when choosing a parking place or dealing with third parties.

## 4. 'Circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'

In a landmark case of 17 November 1998,[53] the Supreme Court emphasised that the grounds for exoneration under Article 17.2 CMR are regulated differently than under the Transport Law Act. The wording: 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent' is broader than the concept of force majeure presented in the previous section. The CMR allows the carrier to be exonerated from liability for loss or damage to goods and delay in delivery in case of circumstances that the carrier could not avoid and consequences of which he could not prevent, and these do not need to have the character of force majeure. The specification of these circumstances should remain open. In addition, these circumstances are not required to be external in relation to the company (carrier) whose activity is considered to be the cause of damage but need to be both unavoidable and irresistible.

However, the Supreme Court also stated that since the CMR contains no specification of the circumstances that can constitute the grounds for exoneration, the judge is supposed to assess any potential event in the light of national rules regarding performance of obligations and due diligence.[54] The objective understanding of these grounds for exoneration was supported in further decisions of the Supreme Court[55] where it remained of the opinion that even though the notion of 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent' covers a relatively wide range of events, this exception cannot be applicable if the acts of a carrier could, even marginally, contribute to damage, loss or delay. Besides, in the judgment of a Regional Court in Szczecin of 14 November 2014,[56] it was also emphasised that the carrier may be relieved from liability on the grounds of Article 17.2 CMR only if there is a positive proof indicating the specific cause of the damage and the adoption by the carrier of measures aimed at preventing it. The highest degree of care should be exercised when judging these measures.

However, a different opinion was expressed by the Court of Appeal in Kraków in its judgment of 27 September 2012.[57] The Court considered that full analogy exists between the regulation of Article 17.2 CMR and Article 65§2 of the Polish Transport Law Act which contains the exhaustive list of circumstances exempting the carrier from liability. Consequently, the Court expressed the view that the circumstances for which the carrier could not avoid and the consequences of which he was unable to prevent are equal to the understanding of force majeure contained in the Polish legislation.[58]

### *4.1. Article 17.2 CMR in case law*

*a) Armed robbery*

In the abovementioned case of 17 November 1998,[59] the Polish Supreme Court held that armed robbery can be considered as falling under grounds for exoneration expressed in Article 17.2 CMR in particular the 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'. The facts of the case may be summarised as follows. The plaintiff (the sender) entered in the agreement with the defendant (the carrier) for the shipment of goods from Poland to Russia. The goods never arrived at their destination as a result of an armed robbery that happened in transit. The Supreme Court decided that there were no grounds to imply the existence of the obligation to prevent the consequences of the armed robbery with the threat or use of weapons in the international transportation because this would indicate the absolute character of the carrier's liability.

50. See e.g.: Sąd Apelacyjny w Warszawie – VI Wydział Cywilny, 23 February 2013, VI ACa 1057/12, www.orzeczenia.ms.gov.pl.
51. Sąd Najwyższy – Izba Cywilna, 13 December 2007, III CZP 100/07, Legalis no. 90116.
52. For example if the carrier continues with transportation despite the weather alerts regarding hurricane which eventually destroys the car and cargo.
53. Sąd Najwyższy – Izba Cywilna, 17 November 1998, III CKN 23/98, Legalis no 43103.
54. Even though the courts relate to the standard of due diligence which in principle implies fault based liability of the carrier, there is no consensus as to whether carrier's liability under art. 17 is fault or risk based liability. Compare for example the judgment of the Court of Appeal in Kraków of 4 March 2014 where the court supports fault based liability: Sąd Apelacyjny w Krakowie, 4 March 2014, IACa 1631/13, www.orzeczenia.ms.gov.pl; and the judgment of the Court of Appeal in Warsaw of 7 November 1995 supporting risk based liability: Sąd Apelacyjny w Warszawie, 7 November 1995, I ACr 606/95, Legalis no 41679.
55. Sąd Najwyższy – Izba Cywilna, 13 December 2007, III CZP 100/07, Legalis no 90116; Sąd Najwyższy – Izba Cywilna, 22 November 2007, III CSK 150/07, Legalis no 101991.
56. Sąd Okręgowy w Szczecinie, 14 November 2014, VIII GC 162/14, http://orzeczenia.szczecin.so.gov.pl.
57. Sąd Apelacyjny w Krakowie I Wydział Cywilny, 27 September 2012, I Aca 854/12, www.orzeczenia.ms.gov.pl.
58. This approach is supported by Mirosław Stec, *Umowa przewozu w transporcie towarowym* (2005) Zakamycze, to which referred the Court of Appeal in the mentioned case. However, it is questioned by Krzysztof Wesołowski, *Umowa międzynarodowego przewozu towarów na podstawie CMR* (2013) Wolters Kluwer S.A.
59. Sąd Najwyższy – Izba Cywilna, 17 November 1998, III CKN 23/98, Legalis no 43103.

*b) Theft*
The Court of Appeal in Kraków in its judgment of 27 September 2012[60] dealt with the issue of theft resulted from leaving a truck in an unguarded parking lot. The defendant in the appeal argued that his employee (the driver) had to return to the nearest parking lot because of the amount of time allowed for driving. As a secured parking lot was not within the driver's reach he chose another that he had repeatedly used and considered safe. In the opinion of the defendant, he had to comply with the regulation concerning drivers' working time and so it was one of the circumstances that could have not been avoided. The defendant also noted that the sender did not report any objections with regard to how the carriage was performed. Furthermore, according to the defendant there was no way to avoid the situation that took place or even if the costs were disproportionate compared to the value of service performed.
As mentioned earlier, the Court considered the meaning of 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent' from Article 17.2 CMR as equivalent to force majeure and thus did not agree with the defendant. However, it also referred to the standard of due diligence. Even though the sender did not compel the defendant to use guarded parking lots, the defendant pledged in the agreement with his insurer to use only guarded parking lots and exceptionally car parks close to gas stations, hotels or restaurants. Thus, the usage of protected parking lots was in the best interests of the defendant. The Court found that the defendant failed to comply with the contract with his insurer and in the light of that did not show due diligence in performing his obligations. As a result the defendant could not exempt himself from the liability on the basis of Article 17.2 CMR.

*c) Defective tyre*
Interestingly though, the Supreme Court took a more comparative approach when it came to the relation between Article 17.2 and 17.3 CMR as far as the defective condition of a vehicle is concerned. In its judgment of 22 November 2007,[61] the Court concurred with the Austrian and German opinions and held that tyres' defects fall in principle under Article 17.3 CMR. Exceptionally, Article 17.3 CMR is not applicable if a tyre's defect is caused by external circumstances not falling within the sphere of events leading to the liability of the carrier.

*d) Goods stolen by the subcontractor*
In several judgments,[62] courts have discussed whether goods stolen by a carrier's agents can constitute grounds for exoneration under Article 17.2 CMR. It is generally found that theft committed by an agent of a carrier or subcarrier does not fall within the circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. This position is a consequence of analysis of Article 3 CMR, according to which the carrier is responsible for the acts and omissions of his employees and all other persons of whose services he makes use for the performance of the carriage when such agents, servants or other persons act within the scope of their employment.

*e) Insufficient mean of transportation*
In its judgment of 9 May 2013,[63] the Court of Appeal in Szczecin found that not choosing the most suitable means of transportation precludes the applicability of the exoneration clause under Article 17.2 CMR. It was held that a diligent professional carrier, aware of the possibility that illegal immigrants may enter the truck, should choose a means of transportation that can prevent it. Otherwise he actually contributes to the occurrence of the damage.
For the transportation of biscuits from Poland to the United Kingdom, a carrier used a trailer with a tarpaulin. The driver made three stops. On each of them he did not lose sight of the truck as he was aware of the possibility of illegal immigrants entering it. During the last part of the journey the truck was placed on a ferry where the ferry operator's safety regulations meant that the driver had to leave the truck. On arriving at the destination point the tarpaulin was found to be damaged. The guards on the monitoring devices noticed two people cutting through the tarpaulin and escaping from the trailer.
The Court assessed the performance of the contract according to Article 355 PCC focusing in particular on the professional nature of the business and on due diligence. As the safest means of transportation was not used in the circumstances of the case, the carrier was not considered to have exercised due diligence. The Court emphasised that the carrier was aware of the illegal immigrants and could have chosen a more durable means of transport (e.g. a container trailer) or at least provided constant monitoring inside the trailer.

## 5. Conclusion

The presented case law brings to light three issues. First, the threshold for invoking 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent' as the grounds for exoneration in Article 17.2 CMR is relatively high. The carrier has in principle to comply with the standards of due diligence. These must be the highest possible but still achievable. Consequently, exoneration will not be applicable if the acts of a carrier could, even marginally, contribute to damage, loss or delay. Secondly, in order to rely on these grounds for exoneration the circumstances in which loss, damage or delay occurred cannot fall within the scope of other situations leading to the liability of the carrier (for example the abovementioned liability for carrier's agents working within the scope of their employment). Finally, it seems that the Polish Supreme Court takes an exceptional approach concerning armed robbery and considers it as circumstance which the carrier cannot avoid and the consequences of which he is unable to prevent.

60. Sąd Apelacyjny w Krakowie I Wydział Cywilny, 27 September 2012, I Aca 854/12, www.orzeczenia.ms.gov.pl.
61. Sąd Najwyższy – Izba Cywilna, 22 November 2007, III CSK 150/07, Legalis no 101991.
62. E.g. Sąd Okręgowy w Szczecinie, 14 November 2014, VIII GC 162/14, http://orzeczenia.szczecin.so.gov.pl.; Sąd Apelacyjny w Lublinie – I Wydział Cywilny, 26 September 2013, I ACa 351/13, www.orzeczenia.ms.gov.pl; Sąd Apelacyjny w Krakowie I Wydział Cywilny, 4 March 2014, I ACa 1631/13, www.orzeczenia.ms.gov.pl.
63. Sąd Apelacyjny w Szczecinie – I Wydział Cywilny, 9 May 2013, I ACa 111/13, www.orzeczenia.ms.gov.pl.

## LITHUANIA

### *Application of Article 17.2 of the CMR*

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Article 17.2 of the CMR establishes that a carrier is relieved of civil liability for the loss, damage or delay of the cargo when it was not caused by the carrier but due to the wrongful act or neglect of the claimant, by the instructions given by the claimant, other than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. This provision of the exemption from liability is interpreted rather narrowly by the Lithuanian courts, and according to this provision the carrier is relieved of liability only in rare cases.

When applying the provision of the carrier's exemption from civil liability, the courts must determine the existence of all the following conditions: (i) damage occurred due to the circumstances which the carrier could not foresee; (ii) the consequences caused by these circumstances could not be prevented by the carrier; (iii) the carrier proves that he did everything an honest and dutiful carrier would do in order to avoid the damage at a given time and place.

According to the case law only a person capable of ensuring wise (minimum) cargo loss risk may be regarded as an honest carrier. It is not enough for the carrier to prove that the circumstances were unavoidable; the carrier also must prove the causality between the circumstances and the damage. It must be noted that not only the circumstances should be unavoidable, but their consequences as well.[64]

#### Damages in case of fire

In one case the court established that the cargo was lost due to the fire on the truck, which was not caused by the fault of the driver but by the outside source of the fire, and thus the Court decided that the defendant had proved the first condition for the exemption of his liability, i.e. that the carrier could not foresee the fire. The appellate court relieved the carrier of liability.

Lithuanian Supreme Court stated that it must be determined 'whether the employee of the carrier could not prevent the consequences caused by fire, i.e. whether the driver was extremely conscientious and dutiful seeking to avoid the consequences of the fire; or if he made reasonable efforts, and how much if so, in order to save the load from the loss in the fire'. In this case, the final decision has not yet been adopted.[65]

In another case the court determined that the carrier of the cargo had no liability for the loss of the cargo under the carriage contract, because the transported cargo was lost due to its defects – the internal wiring of one of the cars that was being transported caused the fire, which was considered as the defect of the cargo pursuant to Article 17.2 CMR that was applied to the dispute relationships, which eliminated the liability of the carrier.[66]

#### Summary

Under Article 17.2 CMR, in order to be relieved of liability the carrier must prove that he did everything an honest and dutiful carrier would do in order to avoid damages at a given time and place. The burden of proof of the carrier in respect to Article 17.2 CMR is very high and nearly impossible to reach before the courts in Lithuania.

## SWITZERLAND

### *Swiss Country Report*
### *Article 17.2 CMR*

Lars Gerspacher and Roger Thalmann, Zurich/Switzerland[67]

#### Introductory comments

The number of decisions rendered by the Swiss courts, be it at Cantonal or Federal level, is very low because the vast majority of the disputes are settled either prior to or during a court proceeding. Besides that, the scarce number of decisions may be attributed to the cost-intensive litigation proceedings in Switzerland and the associated risk of litigation. That holds true in transport matters as well. As a result, there are no reported judgments on Article 17.2 CMR publicly available.

The purport of Article 17.2 CMR is, however, similar to Article 447(1) of the Swiss Code of Obligations ('CO') which deals with the liability of the carrier in case of a loss or destruction of the goods in transport where Swiss general transport law and no international convention or particular legislation applies.

It reads as follows:[68]

'If the goods are lost or destroyed, the carrier must compensate their full value unless he can prove that the loss or destruction resulted from the nature of the goods or through the fault of the sender or the consignee or occurred as a result of instructions given by either or of circumstances which could not have been prevented even by the diligence of a prudent carrier.'

The article basically covers the same defences of the carrier as Article 17.2 CMR. Both articles deal with questions of causation and negligence by the involved parties. It is, hence,

64. Supreme Court of Lithuania, ruling of 18 February 2015 in civil case no. 3K-3-54-916/2015.
65. Supreme Court of Lithuania, ruling of 18 February 2015 in civil case no. 3K-3-54-916/2015.
66. Supreme Court of Lithuania, ruling of 11 January 2013 in civil case no. 3K-3-97/2013.
67. Lars Gerspacher is a partner and Roger Thalmann is an associate at the law firm of gbf Attorneys-at-law Ltd.
68. The English citations of Swiss provisions are unofficial translations of the German texts. The official languages in Switzerland in which legislative texts are published are German, French and Italian.

likely that Swiss judges refer to case law and the doctrine on Article 447(1) CO if the application of Article 17.2 CMR is at stake. Due to the lack of case law, Swiss courts and commentators usually take authorities from other jurisdictions into account as well. As it is not the purpose of this article to cover other jurisdictions, we will focus on Swiss doctrine and case law.

It is difficult for a defendant carrier to prove the requirements of Article 447(1) CO or Article 17.2 CMR in order to escape liability. The burden of proving the facts under Article 17.2 or Article 447(1) CO is on the carrier.[69] Not surprisingly, there are not many decisions in Switzerland under Article 447(1) CO available either.

**Wrongful act or neglect of the claimant**

Before a wrongful act or neglect of the claimant relieves the carrier of its liability in full, the carrier has to prove that the loss was caused by the claimant's fault. It is commonly understood under Swiss law that, in general contract law, gross negligence of the injured party interrupts causation.[70] The principle is also laid down in Article 56(1) of the Swiss Road Traffic Act. Neither Article 17.2 nor Article 447(1) CO, however, require gross negligence of the sender or the consignee. If the loss was purely caused by a negligent act of the sender or the consignee and the carrier did not also negligently cause the loss, the carrier would be relieved of its liability even if the loss was not caused through gross negligence.

Somewhat different is the case where both claimant and carrier were negligent. In that case, Swiss courts and commentators usually consider this to be a case of contributory negligence where the carrier cannot escape liability in full. Contributory negligence is one of the grounds for reducing compensation.[71] As a generally applicable rule, Article 44 CO provides that the judge may reduce or completely deny any liability for damages if circumstances for which injured party is responsible have caused or aggravated the damage. In the event that both carrier and claimant negligently caused the loss, it is unlikely that a court would consider the slight negligence of the claimant to be enough to relieve the carrier of its liability in full.

The sender is deemed to be at fault if it fails to inform the carrier of any especially valuable freight goods. That is explicitly regulated in Article 447(2) CO and it is likely that a court would also apply this rule in CMR cases. The carrier has to receive other relevant information about the goods to be carried. Under Swiss law, the sender has a duty to provide such information. If he negligently fails to do so, the carrier may be relieved of its liability. As far as wrong information regarding the content of the consignment note is concerned, Articles 6 and 7 CMR provide the specific rules. But a sender may also cause a loss if other information is not provided which may be covered by Article 17.2 CMR.

In the Federal Supreme Court judgment of 14 September 1976,[72] the court had to deal with a case of contributory negligence in relation to Article 447 CO. Valuable watches under a freight forwarding contract were lost and Article 447 CO was indirectly applied. The goods were not carried as valuable cargo although the defendant freight forwarder knew the value of the goods and tried to argue that it was the shipper's contributory negligence not giving sufficient instructions. The Supreme Court came to the conclusion that the shipper was not at fault. It did not have the obligation to give specific instructions as to how the shipment had to be carried out. The claimant shipper informed the freight forwarder about the content of the carriage and its value. These were sufficiently clear instructions by the shipper under Article 447(1) CO and security measures were unavoidable.[73]

**Instructions of the claimant**

The carrier is relieved of liability if the loss, damage or delay was caused by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier. We do not have any authorities in that respect but it can be assumed that the courts in Switzerland apply this part of Article 17.2 CMR only where the claimant gave insufficient or incorrect instructions without being at fault (otherwise it would be considered a wrongful act of the claimant as explained in the paragraph titled 'Wrongful act or neglect of the claimant'). It also requires, however, that the carrier did not negligently cause the (inappropriate) instruction nor the loss (otherwise it would be a case of contributory negligence as discussed above).[74]

**Inherent vice of the goods**

Such a defence is generally accepted under Swiss transportation law irrespective of the mode of transport. Unfortunately, there is no jurisprudence on the differentiation between the 'inherent vice of the goods' under Article 17.2 CMR and the 'nature of certain kinds of goods' under Article 17.4(d) CMR available. It is, again, likely, that Swiss courts would take foreign judgments into account. In German 'inherent vice' translates to '*innewohnender Mangel*' and the German translation of the CMR speaks of '*besonderer Mangel des Gutes*'. It is likely that Swiss courts would consider goods that deviate from their usual quality or nature would fall under Article 17.2 CMR whereas goods having a particular nature of being damaged or destroyed fall under Article 17.4(d) CMR.[75] Goods under Article 17.2 CMR are to some extent defective as they are not in compliance with their

69. Vesna Polić, 'Haftung eines Strassenfrachtführers bei einem Raubüberfall – neuere Gerichtspraxis in einigen Ländern', HAVE (2000), 176 *et seq.*, at 177.
70. Roland Brehm, *Berner Kommentar zum Schweizerischen Privatrecht, Die Entstehung durch unerlaubte Handlungen, Art. 41 – 61 OR* (Bern, 4th edn, 2013), Art. 41 note 139 *et seq.*; Karl Oftinger/Emil W. Stark, *Schweizerisches Haftpflichtrecht*, Vol. I (Zurich, 5th edn, 1995), 152; for the definition of 'gross negligence' under Swiss law, please see our comments on Art. 29.1 CMR.
71. Cf. also Michael Hochstrasser, *Der Beförderungsvertrag* (Zurich, 2015), note 993.
72. *Goth & Co. AG v. Concord Watch Company SA*, reported at BGE 102 II 256.
73. Decision reported at BGE 102 II 262.
74. Christoph Aisslinger, *Die Haftung des Strassenfrachtführers und die Frachtführerhaftpflicht-Versicherung* (Diss., Zurich, 1975), 80.
75. Hochstrasser, *Der Beförderungsvertrag* 2015 (n. 69), note 985.

usual nature.[76] The carrier has to prove the inherent vice and that such inherent vice caused the loss.[77]

**Inevitable event/lack of fault of carrier**

In contracts that are governed by Swiss law there is a general presumption of fault; the burden of proof lies with the party liable to demonstrate that the non-performance or defective performance of his duties was caused by elements independent of its fault.[78] Fault is defined under Swiss law as the culpable breach of a duty of care.[79] Swiss law applies an objective test and compares the acts of the wrongdoing party with the acts of a reasonable man (i.e. the average responsible citizen or, in professional matters, a person with the skill of an average member of his profession).[80] Fault would be the failure of the wrongdoing party to do what a reasonable person would do in the same situation.[81]

Under Swiss law (and it is very likely that the Swiss courts will apply the same principles to Article 17.2 CMR) the carrier is relieved of its liability if it can either prove that it and its auxiliary persons (such as employees and sub-carriers) did fulfil the duty of care of a prudent carrier or that a breach of duty of care was not causative for the loss.[82] The duty of care of the carrier has to be assessed prior to the loss and not with hindsight.[83] The extent of the carrier's duty of care under Article 17.2 CMR may be somewhat higher than Article 447(1) CO.[84] The wording of Article 447(1) ('diligence of a prudent carrier') itself suggests that the duty of the carrier's care is less than under Article 17.2 CMR which requires 'circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'. But there has been no authority rendered on this point yet.

In its judgment of 9 July 1997 in *Stump Bohr AG v. Seppey Fridolin & Michel, Transports S.n.c.*[85] the First Civil Court of the Canton of Valais had to deal with the following facts:

The claimant asked the defendant to move a compressor of about six tons up a hill. While towing the compressor and manoeuvring it uphill with a truck, the welds connecting the coupling device at the truck relented, the compressor got disconnected, rolled down the slope and came to a stop at the bottom of a lake.

The defendant carrier tried to argue that the loss was caused by the sender's negligence by not providing the weight of the compressor and the carrier was not at fault. The Court came to the conclusion that the carrier is not liable if it can prove that the loss is the consequence of the shipper's negligence or, if such is not the case, if the carrier can demonstrate that the circumstances are such that the precautions taken by a diligent carrier could not prevent the loss. The shipper shall take all necessary measures to enable carrier to properly perform its task. Article 441(1) CO states in particular that the shipper must provide the carrier with all necessary information so that it can diligently perform its contractual obligations.

Although the weight of the carried goods is required information in the sense of Article 441(1) CO and needs to be provided by the sender, the court did not find it enough to put the blame on it. In addition, it found that the carrier did not use the appropriate means of carrying the compressor and was therefore unable to prove lack of his own fault.

**Summary**

For want of Swiss case law with respect to Article 17.2 CMR, courts usually resort to foreign jurisprudence or norms under Swiss law that correspond to the provisions in question. An article of similar purport as Article 17.2 CMR is Article 447(1) CO. The case where both claimant and carrier contribute to a damage appears noteworthy. Having regard to Swiss case law, we believe it to be rather unlikely that Swiss courts would relieve the carrier form liability in full under the CMR, if the claimant as well as the carrier acted negligently, particularly if the negligence on the claimant's part was only slight. In case of wrong instructions on the claimant's part, it can be assumed that courts apply this part of Article 17.2 CMR only where the claimant gave insufficient or incorrect instructions without being at fault. In so far as damages relate to a vice of goods in the sense of Article 17.2 and (4) CMR there exists no analogous jurisprudence under Article 447(1) CO. The court will most likely consider foreign, particularly German, case law when ruling on disputes. The liability exemption in case of inevitability as per Article 17.2 CMR is also a requirement which Swiss courts have not yet demarcated against the exemption of a carrier not observing the diligence of a prudent carrier by virtue of Article 447(1) CO. From the wording of the two norms, we would assume that the standard of diligence is set somewhat higher under the CMR than under the CO.[86]

76. E.g. the wiring in an accumulator battery is defective and causes a fire during the carriage.
77. Hochstrasser, *Der Beförderungsvertrag* 2015 (n. 69), note 987.
78. Art. 97 CO.
79. Rolf H. Weber, *Berner Kommentar zum Schweizerischen Privatrecht, Die Folgen der Nichterfüllung, Art. 97 – 109 OR* (Bern, 2000), Art. 99, note 27.
80. Swiss Supreme Court judgments no 4C.158/2006 of 10 November 2006, consid. 4.4.3, and no 4C.45/2007 of 5 April 2007, consid. 3.1; Peter Gauch/Walter R. Schluep/Jörg Schmid/Susan Emmenegger, *Schweizerisches Obligationenrecht Allgemeiner Teil*, Vol. II (Zurich, 10th edn, 2014), 167, notes 2989 *et seq.* in terms of the notion of negligence see also section 2.3.
81. See, amongst many others, Swiss Supreme Court judgment, reported at BGE 116 Ia 162, at p. 169 *et subseq.*
82. Georg Gautschi, *Berner Kommentar, Besondere Auftrags- und Geschäftsführungsverhältnisse sowie Hinterlegung, Art. 425-491 OR* (Bern, 1962), Art. 447 note 4c.
83. Hochstrasser, *Der Beförderungsvertrag* 2015 (n. 69), notes 1010 *et subseq.*
84. *Ibid.*, note 1007 with further references.
85. *Zeitschrift für Walliser Rechtsprechung* (1998), 133 *et seq.*
86. Cf. section entitled 'The notion of (gross) negligence under Swiss Law' as to the standard of diligence required under Swiss law.