The successive carrier: a relic from the past

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Abstract

Chapter VI CMR regulates the international carriage of goods by road performed by successive carriers.[1] The concept was borrowed from the Convention of Berne of 1890, the first international transport convention (on the international carriage of goods by rail). It may indeed have been necessary to regulate the position of the successive carrier in those days, but nowadays it makes little practical sense any more. Besides, the CMR provisions on successive carriage are interpreted differently in the different jurisdictions, and sometimes even mistakenly applied to straightforward contracts of sub-carriage. The 'successive carrier' has become a redundant relic from the past.

I. The origin of successive carriage

The concept of successive carriage is closely linked to the carriage of goods by rail. The first railroads surfaced in the United Kingdom (UK) in the early seventeenth century.[2] These railroads were, without exception, local railroads in mining areas. They covered the few kilometres from the coal mine to the warehouse, production plant, or distribution centre. The rails were made of wood and the wagons were pulled by horses.

This all changed with the invention of the steam engine. The first 'modern' railroad opened to the public in 1825. The track ran between Stockton and Darlington (in north-east England), and the steam engine could pull 21 coal wagons at a speed of almost 15 kilometres per hour. By 1840, most European countries operated their own national railroads. The UK, at that time, still enjoyed its early start; its railroads covered 2,390 kilometres, roughly twice as much as the railroads of Germany, France, Belgium, and the Netherlands combined. By 1860, however, Germany (33,838 kilometres) had already overtaken the

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[1] Convention on the Contract for the International Carriage of Goods by Road (1961) 399 UNTS 189 (CMR).

[2] The Wollaton Wagonway of 1604 was arguably the first. The (wooden) track covered approximately three kilometres between Strelley and Wollaton (near Nottingham).

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UK (25,060 kilometres), and France was closing in (23,089 kilometres).[3] The national networks were thus rapidly expanding, but the international carriage by rail still faced a few challenges.

First, there was the obvious problem of the gauge. Since the carriage (of coal) by rail was initially a local affair, and the engines and wagons were only used on that one local railroad, there was really no need for an alignment of the gauges. This started to change when the British inventor/engineer George Stephenson introduced his 1,435-millimetre gauge in 1830.[4] This 1,435-millimetre gauge became the standard in the UK, and once it had been adopted by several continental European railways, it later became the 'standard international railway gauge'.[5] All the same, several countries did not participate and maintained their domestic gauges.[6]

The technical standards of the material were another issue. The railroads in the nineteenth century were notoriously unsafe. One of the problems was that the couplings and the brakes needed to be operated manually, and casualties and injuries were very common in that process.[7] These problems were discussed at the first European conference on 'technical standards' in Berne in 1882.[8] The agreed standards were later codified in the Convention of Berne of 1907.[9]

Given all of these technical complications, a contract for the carriage of goods from Berlin to Madrid in the nineteenth century simply required several domestic carriers that succeeded each other. A German engine would take the

[3] Paul Halsall, 'Modern History Sourcebook: Spread of Railways in 19th Century' (1997), <http://legacy.fordham.edu/halsall/mod/INDREV6.asp> accessed 11 May 2016.

[4] Irene Anastasiadou, *In Search of a Railway Europe: Transnational Railway Developments in Interwar Europe* (Eindhoven Technische Universiteit Eindhoven 2009) 18.

[5] Article 1 of the Convention of Berne of 1886 allowed for some flexibility, however. It prescribed a minimum gauge of 1435 mm and a maximum gauge of 1463 mm.

[6] Spain, Portugal and Russia are examples. In fact, it is in these days still not possible to enter Russia by rail without switching trains; see, for instance, Rechtbank Midden-Nederland 16 December 2015, S&S 2016/43.

[7] The attention for the safety of couplings and brakes had blown over from the USA. The State of Connecticut was the first to impose safety measures in 1882, and soon afterwards automatic couplings and compressed air brakes were required throughout the USA. See, eg, Mark Aldrich, *Death Rode the Rails: American Railroad Accidents and Safety, 1828–1965* (John Hopkins University Press 2006).

[8] Safety was one issue, practicality was another. In 1886 the delegates also agreed on a standard master key, the so-called 'Berne key', that could open the locks of all the different wagons in use. See Suzanne Lommers, 'The Berne Key: the key to railway harmony' *Inventing Europe* <http://www.inventingeurope.eu/story/the-berne-key-the-key-to-railway-harmony> accessed 11 May 2016.

[9] All the same, Germany and Austria-Hungary decided on different standards—for example, for the brakes—and applied these until 1918. They were forced to abandon their own standards after WWI. Article 370 of the Peace Treaty of Versailles stipulates: 'Germany undertakes that German wagons shall be fitted with apparatus allowing: (1) of their inclusion in goods trains on the lines of such of the Allied and Associated Powers as are parties to the Berne Convention of May 15, 1886, as modified on May 18, 1907, without hampering the action of the continuous brake which may be adopted in such countries within ten years of the coming into force of the present Treaty, and (2) Of the acceptance of wagons of such countries in all goods trains on the German lines. The rolling-stock of the Allied and Associated Powers shall enjoy on the German lines the same treatment as German rolling-stock as regards movement, upkeep, and repairs.'

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goods in German wagons to the French border. The train would have to stop there; it could go no further, as the French railroads operated different systems for the brakes, couplings, and locks, and these were unsuitable for German material. The goods, therefore, had to be trans-shipped into French wagons pulled by a French engine; only then could the journey be continued. Upon arrival at the Spanish border, a new problem surfaced. Whereas France had adopted the Stephenson standard of 1,435 millimetres, the Spanish rails were further apart. As a result, the goods had to be trans-shipped again, and the voyage to Madrid could only be finished by Spanish wagons pulled by a Spanish engine.

However, even if all these railroads and materials had been compatible, there were of course the inevitable political issues. Around the turn of the century, most countries were not very enthusiastic about freedom of trade, let alone European integration.[10] The railroads, engines, and wagons were all state-owned and state-operated, and foreign material did not have access to domestic railroads.[11] In addition, the notion of 'transit' did not exist yet, and the goods needed to be discharged, inspected, and cleared with customs at the crossing of each border.

This led to the need for regulation of successive carriage in the Berne Convention of 1890 (CIM 1890).[12] In order to ensure that the individual, domestic carriers could not hide behind their foreign colleagues if the goods arrived in a damaged condition, Article 26, paragraph 1, of the CIM 1890 stipulated that the first carrier was liable until the delivery of the goods at their final destination.[13] Article 26, paragraph 2, of the CIM 1890 provided that 'each successive carrier, just by taking over the goods together with the initial consignment note, accedes to the contract of carriage evidenced by the consignment note and accepts the obligations following there from'.[14]

[10] The compatibility of railways, engines and wagons became an important issue in the aftermath of WWI however; see the Report of 7 April 1919, presented to the Preliminary Peace Conference by the Commission of the International Régime of Ports, Waterways and Railways. The Commission recommends to deal with the issue in the Peace Treaty 'to secure. . .the free exercise of their rights of equal competition - rights which before the war were encroached upon and menaced by the constant practices of the enemy States',—that is, Austria-Hungary and specifically Germany.

[11] Outside the European Union, most countries actually still have such restrictions; see, for example, Jones Act (46 App USC 883 (2002)) s 27, which reads: 'No merchandise. . .shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise. . .between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States'.

[12] Convention internationale concernant le transport des marchandises par chemin de fer (1890).

[13] Article 30(1) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw in 1929 reads: 'In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.'

[14] The CIM 1890 was drafted in French and German only; this is the author's translation of the provision.

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II. Successive carriage under the CMR

The CIM was amended in 1898, 1906, 1924, 1933, and again in 1952, only four years before the CMR was signed in Geneva in 1956. Not surprisingly, the CMR was therefore modelled on the CIM 1952, including its provisions on successive carriage.[15] Article 34 of the CMR outlines the concept of successive carriage:

> If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.

If the (single) contract indeed qualifies as a contract of successive carriage, Article 36 of the CMR prescribes that claims can 'only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred'.[16]

The carrier sued under Article 36 of the CMR is not necessarily the carrier responsible for the loss, and Article 37 of the CMR deals with recourse actions between the successive carriers. The successive carrier 'who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of the claim, from the other carriers who have taken part in the carriage'.

The decision in the proceedings between the cargo-interested parties and the successive carrier sued under Article 36 of the CMR is binding in these recourse proceedings.[17] Article 39(1) of the CMR prescribes that neither the validity nor the amount of the claim can be disputed in the recourse proceedings. Article 39(2) of the CMR identifies the competent courts for these recourse proceedings.[18] The recovery claim can be brought 'before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made'. The carrier who takes recourse pursuant to Article 37 of the CMR can involve all the other successive carriers in proceedings before one competent court.[19]

[15] ML Hendrikse and Ph HJG van Huizen, *CMR: Internationaal vervoer van goederen over de weg* (Zutphen 2005) 282; Rechtbank Rotterdam (in summary proceedings) 26 September 2006, S&S 2007/90.

[16] CMR (n 1) art 35, then gives additional form formalities: 'A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2. The provisions of article 9 shall apply to the relations between successive carriers.'

[17] Provided that the 'first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance'.

[18] See the contribution of Simone Lamont-Black in this same volume for a discussion of the jurisdiction issues.

[19] CMR (n 1) art 39(4) regulates the time bar for recourse claims. The time bar itself stays the same as for regular claims, but the moment it starts running is different: 'The provisions of article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the

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The optimistic view is that these provisions on successive carriage are rather complicated. The more realistic view, however, is that these provisions have created yet another lawyer's paradise.[20] An analysis of a very recent decision of the Dutch Supreme Court underlines this point.[21]

III. The Dutch Supreme Court decision in *Veldhuizen v Beurskens*

In January 2005, Hewlett Packard (HP) instructed the German carrier Trans-O-Flex to carry a shipment of computer equipment from the Netherlands to Germany. Trans-O-Flex then instructed the Dutch carrier Beurskens for the carriage of the goods, and Beurskens in turn instructed another Dutch carrier, Veldhuizen, to carry the goods from the Netherlands to Germany. These were all separate instructions, yet relating to the same voyage. Veldhuizen was the only 'actual' carrier; Trans-O-Flex and Beurskens were both 'paper' carriers.

Veldhuizen accepted the goods for transport in Amersfoort (the Netherlands) on 21 January 2005. Veldhuizen also issued a consignment note to the consignor at that time.[22] Since the delivery of the goods at the warehouse of Trans-O-Flex in Mülheim was only scheduled for 24 January 2005, Veldhuizen parked the trailer at his own premises for the weekend. Some of the goods were subsequently stolen in the course of the weekend. The damage amounted to €27,448.50. Trans-O-Flex paid HP the full amount and initiated proceedings against Beurskens in Germany. Beurskens relied on the limitation of liability,[23] but the German courts denied him the protection of Article 23(3) of the CMR.[24] Instead, the LG Hanau awarded the claim in full, and its judgment was later affirmed in appeal by the OLG Frankfurt am Main.[25]

Beurskens then initiated proceedings against Veldhuizen before the Court of Utrecht (the Netherlands). Beurskens argued that Veldhuizen was a successive carrier in the sense of Article 34 of the CMR. Relying on Article 37 of the CMR, Beurskens further argued that he was entitled to recover the amount of

date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the actual date of payment.'

[20] For a few other recognized paradises, see CMR (n 1) art 2, art 23(4), art 29.

[21] HR 11 September 2015, NJ 2016, 219 (ann. KF Haak), S&S 2016/1; already applied in Hof Arnhem-Leeuwarden 1 December 2015, S&S 2016/77.

[22] The consignment note (issued to HP's warehouse) mentioned neither a carrier in box 16 nor a successive carrier in box 17. It was only signed by Veldhuizen in box 23. This implies that Beurskens never touched the goods and never touched this consignment note either. In fact, Beurskens probably saw this consignment note for the first time when he was confronted with the damage.

[23] The gross weight of the stolen goods was 795 kg; the limitation of liability of CMR (n 1) art 23(3) amounted to €8,121.75.

[24] CMR (n 1) art 3, jo 29.

[25] The course of these German proceedings follows from the decision in appeal, Hof Amsterdam 4 March 2014, ECLI:NL:HR:2015:2528; also included in HR 11 September 2015, NJ 2016, 219 (ann. KF Haak), S&S 2016/1.

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€27,448.50, which he had paid to Trans-O-Flex, the interest accrued, and all costs incurred from Veldhuizen. Whether his conduct also qualified as the equivalent of wilful misconduct under Dutch law was then no longer relevant;[26] Article 39 (1) of the CMR had already deprived Veldhuizen of this defense.[27]

Conversely, Veldhuizen argued that he was just a sub-carrier and not a successive carrier in the sense of Article 34 of the CMR. He had not become a party to the initial contract of carriage 'by reason of his acceptance of the goods and the consignment note', and his position (as a mere sub-carrier) had not been prejudiced by the proceedings in Germany. If Veldhuizen was, indeed, liable under the contract of (sub) carriage, he could, therefore, still rely on the limitation of liability of Article 23(3) of the CMR.

The Court of Utrecht agreed with Beurskens and awarded his claim in full.[28] In fact, the Court of Appeal in Amsterdam agreed with Beurskens as well,[29] and its decision on appeal was ultimately affirmed by the Supreme Court on 11 September 2015.[30] The Supreme Court held with regard to the question of whether Veldhuizen was a successive carrier that:

> [n]either the text of art. 34 CMR nor that of the other provisions of chapter VI CMR regarding 'Provisions relating to carriage performed by successive carriers' (art. 35-40 CMR) requires the former provisions to be interpreted in such a way that there cannot be successive carriage if the main carrier and other possible carriers are solely 'paper' carriers, i.e. not performing any part of the carriage themselves, but completely outsourcing the carriage. Object and objective of the regulation of chapter VI CMR is—as follows from art. 36-39 CMR—the enhancement of the recovery possibilities of the cargo interested party and the carrier pursuing recovery. Accordingly, art. 34 CMR should be interpreted in such a way that it also covers the situation whereby the main carrier and other possible carriers are solely 'paper' carriers. Such a broad interpretation of art. 34 CMR namely brings the system of art. 36-39 CMR more in line with the intended enhancement of the position of the cargo interested party and the carrier pursuing recovery. Finally, it is of relevance that this broad interpretation of art. 34

[26] The qualification of the equivalent of wilful misconduct varies in the various CMR countries. France, Spain, Italy and, in practice, also Germany, for instance, adopt a more objective approach—that is, really reckless behaviour (often cases whereby the driver parks his truck at an unguarded parking overnight) also qualifies as the domestic equivalent, whereas the (English and) Dutch courts require subjective knowledge of both the risks and the chances that the risks in fact materialize; see eg, *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep 146; HR 5 January 2001, NJ 2001, 391–92, S&S 2001/61-62.

[27] CMR (n 1) art 39 (1) requires that 'the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.' This was indeed the case as Beurskens had issued a so-called 'Streitverkündung'. The Court of Utrecht had established in first instance: 'The compensation in question follows from judicial authority of the German court, and Veldhuizen has not contested that he had been notified of these German proceedings, and has had the opportunity to join or interplead.' The Court of Appeal then held in appeal: 'Article 39 (1) CMR furthermore stipulates in that respect that a carrier who has been given the opportunity to join the (first) instance proceedings or to interplead is bound by the outcome of those proceedings. It is undisputed that Veldhuizen has had that opportunity.'

[28] Rechtbank Utrecht 26 July 2006, S&S 2007/88.

[29] Hof Amsterdam 4 March 2014, ECLI:NL:HR:2015:2528, contra Hof's Hertogenbosch, 10 September 2013, S&S 2015/68.

[30] HR 11 September 2015, NJ 2016, 219 (ann. KF Haak), S&S 2016/1.

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CMR falls in line with the leading interpretation in case law and literature in the contracting states.

It is submitted that this interpretation of successive carriage is wrong.[31] The Supreme Court ignored the requirements of Article 34 of the CMR, overvalued the objective to enhance to position of the claimant, and disregarded the approach in other contracting states to the CMR.

IV. The requirements of Article 34 of the CMR

The rules for successive carriage apply to 'carriage governed by a single contract'. In this particular case, however, there were three contracts of carriage; one between HP and Trans-O-Flex, one between Trans-O-Flex and Beurskens, and one between Beurskens and Veldhuizen. In fact, the LG Hanau held in its judgment of 7 September 2007 that Beurskens was liable for the conduct of its '*Subunternehmer*' (sub-contractor), and thus not its '*aufeinanderfolgenden Frachtführer*' (successive carrier). Veldhuizen cannot have been both a sub-carrier and a successive carrier as Articles 3 and 34 of the CMR exclude each other.[32]

Article 34 of the CMR further prescribes that the carriage must have been 'performed'. The reference to the carriage being 'performed', instead of just 'agreed', implies that each successive carrier within that single contract must actually have carried the goods for a part of the voyage. Obviously, the intentions of the drafters of the CMR have always been difficult to retrieve, but Loewe has been very specific in that respect, saying that 'where a person concludes a contract of carriage as a carrier but does not himself perform any part of the carriage, the provisions of articles 34 et seq. cannot be applied.'[33]

This also follows from the wording of Article 34 of the CMR; the provision explicitly requires the carriage to be 'performed by successive road carriers'. Clearly, the drafters of the convention have chosen the plural ('carriers') for a reason.[34] One successive carrier is not an option; successive carriage in the sense of Article 34 of the CMR requires at least two successive carriers. A successive carrier will, therefore, always precede or succeed another successive carrier.

[31] Obviously, there have also been positive reactions to this decision; for a different view see, for example, MJ Boon *Ontwikkelingen aangaande de CMR* (NTHR, Paris 2016) 68.

[32] The Dutch courts found themselves bound to the German decisions on the cause for liability and the quantum of the compensation, but not to the qualification of Veldhuizen as a (mere) sub-carrier.

[33] Roland Loewe, 'Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)' (1976) European Transport Law 397. The (probably) original German text is even more specific; see *Erläuterungen zum Übereinkommen vom 19. Mai 1956 über den Beförderungsvertrag im internationalen Strassengüterverkehr (CMR)* (1976) European Transport Law 589: 'Schliesst jemand als Frachtführer einen Beförderungsvertrag, befördert er aber selbst nicht einmal auf einer Teilstrecke, sondern lässt er die gesamte Beförderung von einem oder mehreren Frachtführern durchführen, so kommen Artikel 34 ff. nicht zur Anwendung.'

[34] CMR (n 1) ch VI is titled: Provisions relating to carriage performed by successive *carriers*. CMR Chapter IV on the other hand is titled: Liability of the *carrier*.

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Article 34 of the CMR then goes on to say that the successive carrier becomes 'a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note'.[35] In this case, however, Trans-O-Flex never even touched the goods and neither did Beurskens. In fact, the only carrier to have handled the goods was Veldhuizen, and they were given to him directly by the consignor and not by any successive carrier under the same contract.[36]

The reference to 'the terms of the consignment note' in this respect suggests that all successive carriers become a party to the contract evidenced by the initial consignment note, the one that is issued by the first carrier and then descends through the chain of carriers. In this case, however, Veldhuizen was the only carrier to have handled the consignment note. In fact, he had issued the consignment note directly to the consignor on 21 January 2005.

V. The objective of the rule

Bypassing all these different requirements, the Supreme Court leaned heavily on the objective of Chapter VI of the CMR: the 'enhancement of the recovery possibilities of the cargo interested party and the carrier pursuing recovery'. Again, the argument is not very convincing, and certainly not convincing enough to set the wording of Article 34 of the CMR aside.

First, and irrespective of the content of the provision, the wording of Article 34 of the CMR does not really need any interpretation. The Dutch Supreme Court obviously does not agree with the requirements of the provision, but the wording itself is perfectly clear. The court cannot ignore the wording of a conventional rule simply because it disagrees with the outcome in the given circumstances.[37]

Second, the enhancement of the recovery possibilities is arguably one of the objectives of the regulation,[38] but surely not the sole objective. A balanced regime is the paramount objective of any convention, and the drafters of the convention never lost sight of the position of the successive carrier. The required 'acceptance of the goods and the consignment note' ensures not only that the succeeding carrier knows that the CMR applies (even if his part of the voyage were only domestic) but also that his liabilities are governed by the stricter regime of Chapter VI of the CMR. Veldhuizen never had that chance. He accepted the goods directly from the consignor, issued the consignment note, and must

[35] Whereas CMR (n 1) art 4 stipulates that the absence of a valid consignment note does not affect the application of the convention, its absence does affect the application of ch VI.

[36] The sender is the contractual counterpart of the carrier; the consignor is the one actually handing the goods to the carrier—in this case, HP's warehouse in Amersfoort.

[37] The Supreme Court's reference to arts 31 and 32 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331, does not change this. Art 31 (1) stipulates 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.' Again, whatever may be of the content, the wording of CMR (n 1) art 34 does not support such a broad interpretation.

[38] KF Haak, *The Liability of the Carrier under the CMR* (Stichting Vervoeradres 1986) 113.

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have thought, and could, in fact, reasonably have thought, that his liabilities under the Convention were governed by Articles 17, 18, and 23 of the CMR.[39]

Third, it is a misunderstanding that a 'paper' carrier needs extra protection. He is perfectly capable of securing his own position, namely by choosing his own sub-carrier wisely.[40] In the given circumstances, it should really be the other way around. The only party who needed the extra protection was Veldhuizen. He accepted a valuable shipment for transportation, employed the driver, paid for the fuel (all in), and at the end of day charged a total sum of just €290.[41]

VI. The interpretation in other contracting states

The Supreme Court's final argument is a uniformity argument. Following the advice of the Advocate-General, the Supreme Court held 'that this broad interpretation of art. 34 CMR falls in line with the leading interpretation in case law and literature in the contracting states'. In support of this rather bold statement, the Supreme Court (and its Advocate-General) looked at case law in four other countries: Belgium, Germany, Austria, and the UK.[42] Admittedly, the UK courts have, indeed, accepted a broad interpretation of Article 34 of the CMR. With regard to the required acceptance of the goods, the Court of Appeal held in *Ulster-Swift v Taunton* 'that the C.M.R. Convention must have contemplated that for this purpose the company, or individual, with whom the owner of the goods contracts is the first carrier, whether or not he himself takes possession of the goods, and that all subsequent carriers are the successive carriers within the meaning of these provisions'.[43] This 'delegated acceptance of the goods solution' was later extended to the delegated acceptance of the consignment note in *Coggins v LKW*.[44]

The Supreme Court could, in addition, have drawn support from several French decisions.[45] In the recourse proceedings between *Van Vleuten v Frans Maas*, for instance, the Court of Appeal had applied Article 39(4) of the CMR to a contract of sub-carriage. Van Vleuten argued before the Supreme Court:

> that. . .the provisions of article 39 (4). . .CMR necessarily imply the successive involvement of several carriers who personally contributed to the carriage of the goods;

[39] In fact, the German courts also saw Veldhuizen as a sub-carrier and not as a successive carrier.

[40] BS Janssen, *CMR en opvolgend vervoer Een reactie op K.F. Haak, 'Pleidooi voor revisie CMR'* (2011) 3 TVR Tijdschrift voor Vervoerrecht 208.

[41] Counsel for Veldhuizen kindly made a copy of the consignment note and the transport instructions to Veldhuizen available for this contribution.

[42] The CMR (n 1) currently has 55 contracting states. It is as if CNN calls a Republican victory in the presidential elections on the basis of the votes in New York, Texas, South Carolina, and Louisiana.

[43] *Ulster-Swift v Taunton* [1977] 1 Lloyd's Rep. 346.

[44] *Coggins v LKW* [1998] 1 Lloyd's Rep. 255.

[45] Cour de Cassation 11 December 1990, BTL 1990, 223; Cour d'Appel Paris 4 June 2008, BTL 2008, 433. Cour d'Appel Paris 10 October 2012, 11/06530. In this last case, the second carrier (in the middle of the chain) had issued the consignment note, but all the participating carriers, including thus the first carrier, were jointly and severally liable.

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> having established that Maas had delegated the carriage to Van Vleuten and had not made one single contribution to the carriage of the goods, which incidentally followed from its own submissions, the court of appeal could therefore not have allowed Maas to rely on the provisions of article 39 (4) CMR, and in doing so nevertheless, the court of appeal has violated the aforementioned text.[46]

The French Supreme Court, clearly, was not convinced. It dismissed the argument and held that Frans Maas had concluded a contract of carriage with the shipper, that his name featured as carrier on the consignment note, and that the court of appeal had not violated Article 39(4) of the CMR.

The leading case law in Belgium, Germany, and Austria, however, does not support the broad interpretation at all. The Belgian Supreme Court has, in fact, taken a strict approach on successive carriage. It held with regard to the recourse rule in Article 39 of the CMR 'that that rule cannot be invoked by the contractual carrier who fully assigns his instruction to a sub-carrier appointed by him'.[47]

The Austrian Supreme Court has, indeed, accepted a more relaxed interpretation of Article 34 of the CMR, but only with regard to the requirement that a successive carrier should actually have carried the goods for a part of the voyage and not with regard to the role of the consignment note.[48] The Austrian Supreme Court held that 'for the application of article 34 is only required that the international carriage was subject to one single contract and that one single (passing through) consignment note was issued, that each of the successive carriers accepts and passes on'.

The German Supreme Court has also recognized the '*konstitutive Bedeutung*' of the consignment note. The court held that a 'successive carrier in the sense of article 34 CMR is really just that carrier that through the acceptance of the goods and the consignment note as a so-called joint carrier becomes a contractual party to the sender next to the main or sub-carrier that instructed him. . .[a] consignment note in the sense of article 34 CMR is the one issued for the entire contract of carriage between the sender and the main carrier. . .[w]hen such a consignment note was not issued or was not accepted by the sub-carrier or not passed on to him, the sub-carrier is not a successive carrier in the sense of article 34 CMR'.[49]

In addition, there are, of course, several other contracting States, and it is not too difficult to find less forgiving case law in other European countries. The Italian Supreme Court, for instance, adopted a very strict approach on successive carriage in *Fornaro e Azzali v La Lombarda*.[50] Olivetti had engaged Fornaro e Azzali for a transport from Turin, Italy to Paris, France and Fornaro e Azzali, in turn, instructed La Lombarda for the leg from Turin to Milan, Italy. The goods

[46] Cour de Cassation 3 March 1998, BTL 1998, 231.

[47] Hof van Cassatie 30 June 1995, reprinted in (1996) European Transport Law 545 (with a critical note by Sofie Geeroms). See also Luc Keijser, 'Ondervervoer – opvolgend vervoer (artikel 3 – 34 e.v. CMR)' (2007) European Transport Law 331.

[48] BGH 19 April 2007, TranspR 2007, 416; OLG Stuttgart 20 April 2011, TranspR 2011, 340; OGH 9 January 2002, TranspR 2003, 463.

[49] BGH 19 April 2007, TranspR 2007, 416.

[50] Corte di Cassazione, Cass civ Sez III, 17-04-1992, n 4728.

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were stolen in the course of this leg. Olivetti was paid by his insurers; they then sued Fornaro e Azzali, who, in turn, initiated recourse proceedings against La Lombarda but in vain. Since Fornaro e Azzali had sub-contracted the Turin-Milan leg to La Lombarda, who had not entered its name in the consignment note, the Italian Supreme Court did not consider La Lombarda a successive carrier in the sense of Article 34 of the CMR.[51]

The Spanish Supreme Court has held—in line with the wording of Article 34 of the CMR—that the concept of successive carriage requires one single contract, and the successive carriers only assume the responsibility for the entire voyage when they accept the goods and the consignment note.[52] This implies that the internal relation between a contractual carrier and an actual carrier is not regulated by the provisions of Chapter VI.[53] The Spanish Audencia Provencial, for instance, established in 2012 that 'what happened in this case was simply that the initial carrier in turn sub-contracted another carrier. They are therefore not successive carriers but, instead, one carrier instructing the other for the performance of the carriage'.[54] Given these different decisions, it is probably safe to say that there is no leading approach on successive carriage,[55] let alone a leading approach that supports such a broad interpretation of Article 34 of the CMR.

VII. A relic from the past

It is not a very nice thing to say in the year of the Convention's sixtieth anniversary, but the provisions of Chapter VI of the CMR qualify for an early retirement. The successive carrier is a relic from the past, and its regulation has little added value *anno* 2016. In fact, the provisions on successive carriage do more harm than good, as they are applied differently in the different jurisdictions. The royal solution is probably to strike Chapter VI of the CMR at the first revision of the convention. Since the convention has never been revised, and may never be revised at all, the next best solution is to stay close to the wording of Article 34 of the CMR.[56] The provisions on successive carriage are then reserved for those contracts whereby the goods and the consignment note actually pass from one successive carrier to the next, and not for each and every contract of sub-carriage.

[51] This implied that Article 39 (4) of the CMR did not apply either and that the recourse had, meanwhile, become time barred.

[52] Tribunal Supremo 14 July 1987, RJ\1987\5489; Tribunal Supremo 29 June 1998, RJ\1998\5282.

[53] Francisco Sánchez-Gamborino and Alfonso Cabrera Cavonas E; Covenio CMR, 159.

[54] Audencia Provencial 24 July 2012, JUR\2014\155768.

[55] Whereas an international convention should really unify the law, the CMR has not always reached this objective. Sometimes this is the drafters' own fault; see the unfortunate wording of Article 29 of the CMR (n 1). Sometimes the different courts in the contacting states to the CMR simply have different ideas; see, for example, the notorious art 2, the meaning of 'charges' under art 23(4) and, indeed, successive carriage in the sense of art 34 of the CMR.

[56] Haak (n 38) remarked in his annotation of the decision under HR 11 September 2015, NJ 2016, 219 that 'the animus to revise the CMR is nil'.

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