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## **THE CARRIAGE OF GOODS CONVENTION**

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# The Carriage of Goods Convention

*Michiel Spanjaart\**

This article introduces an idea, as the Carriage of Goods Convention does not exist (yet). The objective of the convention is threefold: the harmonization, simplification and modernization of the rules on international carriage of goods. Whereas the existing conventions basically regulate unimodal contracts for the carriage of goods either by rail, sea, air, road or inland waterways, the starting point of the Carriage of Goods Convention is the contract of carriage in general. As the (number of) means of transportation is irrelevant, the convention applies to both unimodal and multimodal contracts of carriage.

Keywords: Carriage, multimodal, convention, liability, transport, international

## 1 Introduction

There are several conventions on the international carriage of goods, all of them essentially unimodal.<sup>1</sup> The Montreal Convention (MC) on carriage by air,<sup>2</sup> the (amended) CIM 1999 on carriage by rail,<sup>3</sup> and the CMNI on inland navigation are relatively young and up to date

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<sup>1</sup> The United Nations Convention on International Multimodal Transport of Goods, signed in Geneva on 24 May 1980, has never entered into force. Only 11 countries have ratified the convention to date. A minimum of 30 ratifications, however, was required for its entry into force.

<sup>2</sup> The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.

<sup>3</sup> The amended uniform rules Concernant le Transport International Ferroviaire des Marchandises, signed in Vilnius on 3 June 1999. The convention is sometimes also referred to as Cotif-CIM as the amendments over the years to the initial Convention of Bern (1890) were brought together under the auspices of the Organisation Intergouvernementale pour les Transport Internationaux Ferroviaire (OTIF) in Cotif 1980. The CIM forms appendix B to this convention, hence the reference to Cotif-CIM.

conventions.<sup>4</sup> The Hague-Visby Rules (HVR) on carriage by sea under a bill of lading,<sup>5</sup> however, could meanwhile use a thorough makeover,<sup>6</sup> and the CMR on carriage by road may well be ready for an early retirement.<sup>7</sup>

The CMR was signed in Geneva in 1956 and the provisions of the convention have not been amended ever since.<sup>8</sup> The general (academic) consensus is that several provisions and the limitation of liability should be revised as soon as possible.<sup>9</sup> Article 1 CMR (scope of application) is currently interpreted in two different ways,<sup>10</sup> article 2 CMR (mode-on-mode transport) is almost incomprehensible, the combination of articles 29 and 31 CMR (wilful misconduct and jurisdiction) triggers forum shopping, and article 34 and further CMR (successive carriage) regulates a relic from the past. Nevertheless, none of the contracting states has felt the need to take the initiative to amend, update or even re-evaluate the convention.

The Hague Rules (HR) were signed in 1924 and (only) amended with the Visby protocol in 1968.<sup>11</sup> Consequently, the limitations of liability have not been revised for half a century now. Besides, the bill of lading has seen some serious competition over the last 50 years. The bill of lading has already given way to the (non-negotiable) sea waybill in some trades,<sup>12</sup> and its traditional paper form will undoubtedly be substituted for an electronic equivalent in due course. Finally, whereas

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<sup>4</sup> The Convention relative au Contrat de transport de Marchandises en Navigation Intérieure, signed in Budapest on 22 June 2001.

<sup>5</sup> The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 as amended by the Visby Protocol of 23 February 1968.

<sup>6</sup> This was tried with the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978 (Hamburg Rules). The convention was ratified by (38) mostly African, South American and land-locked countries, but not by any of the major shipping countries.

<sup>7</sup> The Convention relative au Contrat de Transport International de Marchandises par Route, signed in Genève on 19 May 1956.

<sup>8</sup> The convention was amended twice, though, with the SDR protocol (Geneva, 5 July 1978) and the Electronic Consignment Note protocol (Geneva, 20 February 2008).

<sup>9</sup> The shortcomings of the convention were extensively discussed at seminars in Rouen and Rotterdam in 2016, (ironically) marking its 60<sup>th</sup> anniversary.

<sup>10</sup> The interpretation problem relates to the question of whether the CMR directly applies to an international road leg within a multimodal contract of carriage. Affirmative: *Quantum Corp v Plane Trucking* [2002] 2 Lloyd's Rep 24 and *Datec v UPS* [2007] 2 Lloyd's Rep 114. Negative: BGH 17 July 2008, TranspR 2008, 365 and HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (*Godafoss*).

<sup>11</sup> The SDR protocol of 1980 changed the 'currency', though.

<sup>12</sup> For instance in short sea carriage (to avoid complications with the presentation rule).

the rise of the container has boosted multimodal transportation, the HVR just regulate carriage by sea,<sup>13</sup> and then only within the tackle-to-tackle period.<sup>14</sup>

Clearly, the drafters of the Rotterdam Rules (RR) have recognized these factors,<sup>15</sup> and they have also addressed them in the convention.<sup>16</sup> The rules do not require a bill of lading or any similar document of title for their application. Furthermore, the rules prescribe a limited network system to regulate multimodal contracts of carriage (as long as a sea leg is involved) in article 26 RR.

Still, the requirement of a sea leg implies that the rules will not apply to other multimodal contracts of carriage.<sup>17</sup> Contracts of carriage such as in *Quantum Corp v Plane Trucking* (air/road),<sup>18</sup> *Datec v UPS* (road/air/road),<sup>19</sup> and in fact most multimodal parcel delivery services will not be regulated by the rules.

Furthermore, the RR contain so many provisions on the contract of carriage (wholly or partially by sea) that the rules may have overshot their objective. Apart from the number of provisions (96), and the danger of overregulation, some of these provisions are also very complex and at times difficult to read.

Finally, a rather practical problem is that the rules have managed to secure just three ratifications since the signing ceremony in Rotterdam in 2009. Only Togo, Congo and Spain have ratified the convention at this point, but the major shipping countries, such as Australia, Canada, China, Germany, India, Japan, Singapore, the UK and the US, are not showing much enthusiasm to follow suit.

Given these issues and uncertainties, it makes sense to have a contingency plan in place, an alternative to step in if necessary. In fact, this alternative should ideally remedy the shortcomings

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<sup>13</sup> The HVR, but this really applies to all five conventions, were simply never designed to cover multimodal contracts of carriage.

<sup>14</sup> Article I(e) HVR.

<sup>15</sup> See the Preamble for instance: 'Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents, (...).'

<sup>16</sup> See respectively arts 59, 1 (17/20) and 5 (1) RR.

<sup>17</sup> Article 1(1) RR reads: "'Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.'

<sup>18</sup> *Quantum Corp v Plane Trucking* [2002] 2 Lloyd's Rep 24.

<sup>19</sup> *Datec v UPS* [2007] 2 Lloyd's Rep 114.

of the CMR and the HVR in the process. It is submitted that these two objectives can best be reached by means of an entirely new convention: the Carriage of Goods Convention (CGC).

## 2 The basic principles of the Convention

First, the starting point of the CGC is the contract of carriage in general. Whereas the existing conventions (and the RR for that matter) all depart from a unimodal contract of carriage, the CGC does not discriminate between unimodal and multimodal contracts of carriage. The convention gives uniform rules for all contracts of carriage within its formal scope of application.<sup>20</sup>

Second, the establishment of mandatory rules is not an objective in itself. Any convention should obviously be mandatory to have any effect in the first place,<sup>21</sup> but the CGC gives way to the agreement of the parties whenever this is possible. The convention therefore only aims to cover the necessities, and for the rest it intends to interfere as little as possible. This means, for instance, that the CGC will not regulate jurisdiction. In the commercial practice, the contracting parties will often agree on a competent court to settle their disputes,<sup>22</sup> and they are perfectly free to do so.<sup>23</sup> The parties can also agree on arbitration; the CGC does not intend to restrict party autonomy in this respect either.<sup>24</sup>

Third, and therefore not just a positive side effect of freedom of contract, the convention aims to be consumer friendly. The convention needs to be easily accessible for merchants, carriers, bankers, insurers and claims handlers, not just for trained and specialized legal practitioners.<sup>25</sup>

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<sup>20</sup> This implies that the convention does not need a network system.

<sup>21</sup> A lesson learned from the Liverpool Conference in 1882.

<sup>22</sup> In the absence of a (valid) jurisdiction clause, the provisions of Brussels I or the applicable domestic (private international) law will identify the competent court, and will also deal with enforcement issues.

<sup>23</sup> A forum choice may be null and void, though, if it effectively bypasses the application of the CGC. See in this respect *The Morviken* [1983] 1 Lloyd's Rep 1.

<sup>24</sup> The New York Convention of 1965, and alternatively the applicable domestic law, then provides rules on the validity of the arbitration agreement, and the enforcement of arbitral awards.

<sup>25</sup> See in this respect Lord Mansfield in *Hamilton v Mendes* (1761) 97 ER 787, 795: 'The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.' This is a foreseeable problem of the RR; there are too many rules in general, and too many complex rules in particular.

This means, for instance, that the convention ignores the concept of successive carriage. Instead, the CGC treats contracts of successive carriage, just like contracts of sub-carriage for that matter, as contracts of carriage.<sup>26</sup> It also means that the CGC will not provide any rules on (the operation of) documents of title.<sup>27</sup> The convention covers contracts of carriage, and as such contracts of carriage under a bill of lading or similar document of title,<sup>28</sup> but the ambit of the CGC remains limited to the bill of lading contract and the document of title function is left untouched.<sup>29</sup>

Fourth, the convention is a living instrument. This is quite impossible of course, but it means that its provisions are not carved in stone. The idea is to avoid a status quo as currently with the CMR. Instead of allowing for a revision of the convention (every so many years),<sup>30</sup> the CGC requires the contracting states to reconvene in order to amend or revise the convention at regular intervals.

With these basic principles in mind, a rather concise convention of merely 10 articles remains.

## **1 Definitions**

*1.1 A 'contract of carriage' includes every contract for the carriage of goods between a 'carrier' and a 'shipper'.*

*1.2 The 'consignee', the person to whom the goods must be delivered under the contract of carriage, includes the lawful holder of a bill of lading who takes or demands delivery of the goods.*

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<sup>26</sup> The elimination of successive carriage at the same time solves the problem under the CMR that its regime is in practice sometimes applied too widely, for instance to a simple chain of sub-carriers. See *Ulster-Swift v Taunton* [1977] 1 Lloyd's Rep 346, *Coggins v LKW* [1998] 1 Lloyd's Rep 255; 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 and HR 11 September 2015, NJ 2016, 219 (ann K F Haak), S&S 2016/1 and M Spanjaart 'The successive carrier: a relic from the past' (2016) Unif L Rev 1-12.

<sup>27</sup> To give an example: the presentation rule is observed worldwide for order and bearer bills of lading, and in most jurisdictions also for straight bills of lading. Clearly, a universal approach would be preferable, but this is not something that the CGC will impose.

<sup>28</sup> See art I(b) HVR.

<sup>29</sup> Although the CGC does regulate the right of disposal in bill of lading contracts.

<sup>30</sup> See for instance art 36 CMNI. This is not solution chosen in the CGC, but the objective is the same.

- 1.3 A 'transport document' includes (electronic versions of) a bill of lading, a waybill, a booking note, a consignment note and any other suitable document that evidences the specifications and apparent order and condition of the goods upon their receipt by the carrier.
- 1.4 'Goods' include wares, merchandise and articles of every kind, except funeral consignments and live animals.
- 1.5 The 'right of disposal' includes the right to give and vary the instructions to the carrier with regard to the goods and the transport document during the voyage against the payment of the costs reasonably incurred as a result thereof.

Article 1.1 CGC defines the contract of carriage,<sup>31</sup> but there will probably be little discussion as to its meaning.<sup>32</sup> The definition covers 'every' contract of carriage,<sup>33</sup> irrespective of the (number of) means of transportation. This ensures that the convention regulates both unimodal and multimodal contracts of carriage.

International parcel delivery services also qualify as contracts of carriage.<sup>34</sup> These services may, other than 'regular' commercial contracts of carriage, sometimes involve consumers. With the 20 SDR/kg limitation, however, and the possibility to agree on a higher amount, the consumer does not seem to need further protection than already provided for by the CGC, Brussels I, European directives and national law.

Forwarding contracts do not qualify as contracts of carriage,<sup>35</sup> and neither do contracts whereby means of transportation are merely made available.<sup>36</sup>

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<sup>31</sup> The definitions of art 1 are not really definitions, see the use of the word 'include' instead of 'is'.

<sup>32</sup> The definition does not require freight or another reward, and the (redundant) reference to gratuitous carriage in art 1 MC has also been left out. There really is no such thing as gratuitous carriage of goods in the commercial reality.

<sup>33</sup> The reference to 'every' also ensures the inclusion of volume contracts, umbrella contracts, and in fact all contracts 'the main purpose of which is the carriage of goods'. See *ICF v Balkenende* [2010] 2 Lloyd's Rep 400.

<sup>34</sup> See Hof van Cassatie 8 November 2004, *TNT v Mitsui* [2006] ETL 228.

<sup>35</sup> The criteria to distinguish between carriage and forwarding are discussed in *Aqualon v Vallana* [1994] 1 Lloyd's Rep 669. See in this respect also P M Bugden and S Lamont-Black, *Goods in transit* (3rd edn, Sweet & Maxwell 2013) 374-377.

<sup>36</sup> *ICF v Balkenende* [2010] 2 Lloyd's Rep 400.

The definition of the contract of carriage at the same time defines the carrier and the shipper, and underlines that they are contractual figures. They are the two parties concluding the contract of carriage.<sup>37</sup>

This implies that the carrier is contractually bound to the proper performance of the contract, and (unless of course sub-carriage has been excluded in the contract) that he does not actually have to carry the goods himself.<sup>38</sup> The carrier can instruct a sub-carrier, who may in turn again instruct another sub-carrier and so on.<sup>39</sup> A contract of sub-carriage is a contract of carriage as any other. In the relation between a carrier and a sub-carrier, the carrier then assumes the role of the shipper, and the sub-carrier assumes the role of the carrier.

The shipper is a contractual figure as well. His contractual relation with the carrier is decisive, not any reference on the transport document.<sup>40</sup> The CGC does not cover the position of the party that actually hands the goods to the carrier.<sup>41</sup> That party may of course at the same time be the shipper (or the shipper mentioned on the transport document), but he will in practice often be a stevedore, a warehouse keeper or a freight forwarder acting upon instructions of the shipper.<sup>42</sup> This stevedore, warehouse keeper or freight forwarder is not a party to the contract of carriage.

The consignee is the intended receiver of the goods. The consignee box of a straight bill of lading, waybill or consignment note will mention the name of the consignee, but the mere mention of his name does not give him any rights under the contract of carriage yet.<sup>43</sup>

The identity of the consignee under a (negotiable) bill of lading contract often remains open throughout the voyage. The ultimate consignee only comes forward upon the arrival of the goods

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<sup>37</sup> See also art I(a) HVR. The carrier 'enters into a contract of carriage with a shipper'.

<sup>38</sup> In fact, he does not even need to have any means of transportation at his disposal. This is relevant for the position of a NVO(C)C, a non-vessel operating (common) carrier. The NVO(C)C has no ships yet presents himself as a carrier (and issues bills of lading in the process). The NVO(C)C therefore also assumes the liabilities of a carrier.

<sup>39</sup> Chains of three, four or even five carriers in the international carriage by road, and an exploitation chain with an owner, a bare boat charterer, a time charterer and a voyage charterer in the international carriage by sea are in fact not uncommon.

<sup>40</sup> *The Dithmarschen*, OLG Hamburg 11 September 1986, TranspR 1987, 67; affirmed in BGH 25 April 1988, TranspR 1988, 288. See art 6.2 CGC, however, for the right of disposal.

<sup>41</sup> He may rely on the provisions of the convention, though, see art 9 CGC.

<sup>42</sup> In a purely maritime context, this party would be the 'consignor', but the CIM 1999 and the MC (rather unfortunately) use that term to indicate the shipper.

<sup>43</sup> See art 6.4 CGC.



at their destination, and he identifies himself through the presentation of an original bill of lading. The consignee under a bill of lading contract is the lawful bill of lading holder who either takes or demands delivery of the goods.

The definition of a transport document is very wide. It includes the commonly (and currently) used documents, but it is open to all sorts of suitable (electronic) documents. The transport document may evidence the contract of carriage, but it does not have to evidence the contract of carriage. The transport document must, however, evidence the specifications (number, quantity, weight and the relevant marks, in fact the information listed under art III(3)(a) and (b) HVR) as well as the apparent order and condition of the goods.<sup>44</sup>

The description of 'goods' combines art I(c) HVR and art 1(4)(b) CMR. There is really no good reason to exclude furniture from the definition (art 1(4)(c) CMR), and if the goods in question are actually postal documents carried under the terms of an international postal convention (art 1(4)(a) CMR), article 2.2 CGC ensures that the convention gives way.

The right of disposal is the right under the contract of carriage to redirect the goods, to have the carrier issue new documents or to give (now) instructions in the course of the voyage.<sup>45</sup> The exercise of the right of disposal may lead to additional costs,<sup>46</sup> for instance when the shipper directs the carrier to a different destination. In that case, he shall have to reimburse the carrier for the reasonable costs incurred.<sup>47</sup>

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<sup>44</sup> See art 5 CGC.

<sup>45</sup> The right of disposal is something different than the right of stoppage in transit, the right of the unpaid seller to either stop or redirect the goods underway to their bankrupt buyer. M Bridge (ed), *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell 2010) 908.

<sup>46</sup> The convention does not deal with the question of whether the carrier can ask for security or whether he can exercise a lien on the cargo afterwards.

<sup>47</sup> The reference to 'reasonable' will obviously trigger discussions, but this can hardly be avoided as the quantum will always depend on the circumstances of the case at hand. What is reasonable and what is not, is therefore primarily for the parties themselves, and if necessary for the court to establish.

## 2 Scope of application

- 2.1 *This convention applies to contracts of carriage whereby the place of receipt and the place of delivery are situated in two different countries of which at least one is a contracting state.*
- 2.2 *This convention does not apply to a contract of carriage or an individual leg within that contract of carriage that is governed by an already existing convention.*
- 2.3 *This convention does not apply to the carriage of goods by sea regulated by a charter party.*
- 2.4 *This convention does not apply to the carriage of goods by sea on deck if so agreed between the carrier and the shipper.*
- 2.5 *Within its scope of application, this convention provides for mandatory rules: a clause, stipulation or provision in any way affecting the rights, obligations and liabilities under the convention is null and void.*

Article 2.1 CGC, in combination with art 1.1 CGC, gives the convention's scope of application. The wording resembles the wording of art 1 CMR and art 2 CMNI.<sup>48</sup> The contractual places of receipt and delivery are decisive for the application of the convention.<sup>49</sup> The provision deliberately does not address the return tickets option of art 1(2) MC as this in practice only applies to passenger transportation, and the convention merely deals with the carriage of goods.

Article 2.2 CGC is a negative scope rule. The provision ensures the unaffected operation of all the existing (unimodal) conventions, such as the CIM 1999, HR, HVR, HHR, CMR, MC, CMNI and in due course perhaps the RR without reservation. The CGC is therefore not aggressive at all; it gives way to all existing conventions that touch upon the same issues. Obviously, this limits its immediate reach, but that is a deliberate choice with two major advantages. First, it lifts any

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<sup>48</sup> Article 1 § 1 CIM 1999 requires two different member States, though.

<sup>49</sup> If the contract allows for several places of delivery, the actual one is decisive, see art 2 CMNI.

barriers for countries to accede to the CGC,<sup>50</sup> and second it gives the CGC the chance to gradually prove its added value.

Voyage charters, and probably most time charters, will qualify as contracts of carriage in the sense of this convention, but art 2.3 CGC explicitly excludes them from the scope of application when they 'regulate' the carriage of the goods by sea.<sup>51</sup> In line with well-established case law on this point, a bill of lading (or any other transport document for that matter) issued by the carrier to the shipper/charterer merely operates as a receipt between the two contracting parties.<sup>52</sup> The charterparty then regulates the carriage of the goods by sea, and the relation between the charterer and the owner is not governed by the CGC. This only applies between the initial contracting parties, though, and art 5.3 CGC steps in when a third party consignee becomes involved.<sup>53</sup>

Article 2.4 then excludes the carriage of goods by sea on deck from the scope of application.<sup>54</sup> The requirement of art I(c) HVR to 'state' the deck cargo has been left out, but in light of art 5.3 CGC a prudent carrier will obviously still ensure that the arrangement is reflected in the transport document.<sup>55</sup>

The final provision of art 2 CGC is found in every existing (unimodal) convention on the carriage of goods. The convention takes mandatory effect. The provision specifically refers to 'liability' and not 'the carrier's liability' to ensure that it works both ways.

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<sup>50</sup> Obviously, the CGC has the ambition to cover all contracts of carriage in due course, but it will not require any of the current conventions to make way. Article 89 RR for instance requires the party states to abandon the HR/HVR/HHR. That may very well prove to be a serious hurdle in practice as it could discourage countries to ratify the convention.

<sup>51</sup> The exception only relates to the carriage of goods by sea. The reason is that the relation between the charterer and the owner has always been subject to the provisions of the charterparty, and not to mandatory law, see eg F Berlingieri (ed), *The Travaux Préparatoires of the Hague Rules and the Hague-Visby Rules* (CMI 1997) 639 and further.

<sup>52</sup> *Rodocanachi v Milburn* (1886) 18 QBD 67; *President of India v Metcalfe Shipping* [1969] 2 Lloyd's Rep 476 (*Dunelmia*).

<sup>53</sup> The system is in line with the rule of art I(b) HVR.

<sup>54</sup> The exclusion only relates to sea carriage; it does not cover the use of 'open unsheeted vehicles' in the sense of art 17(4)(a) CMR. This exemption under the CMR really only applies to minor losses in the course of the voyage (see art 18(3) CMR), and it is furthermore just a presumption (so open to counter evidence). See also art 4 CGC.

<sup>55</sup> S D Girvin, *Carriage of goods by sea* (2nd ed, UOP 2011) 269.

### 3 Liability under the contract of carriage

- 3.1 *The carrier is liable for the loss of, damage to or delay in the delivery of the goods in the course of the contract of carriage, irrespective whether the goods were in his own care or in the care of his agents, servants or subcontractors.*
- 3.2 *The carrier and the shipper are free to agree that any storage, handling, loading, stowage and discharge of the goods at the place of receipt and at the place of delivery are performed without any expense and liability for the carrier.*
- 3.3 *The shipper shall inform the carrier about the nature, specifications and other relevant characteristics of the goods, and he is liable for loss or damage suffered by the carrier because of any shortcomings or inadequacies in the information provided.*

Arguably, the convention's main rule follows from art 3.1 CGC. The contract of carriage requires the carrier to deliver the goods, on time, in the same (sound) condition as in which they were received for transportation. The carrier is liable throughout the entire period between receipt and delivery,<sup>56</sup> and he cannot excuse himself for any actions of his agents, servants and subcontractors used in the performance of the contract. The reference to agents, servants and subcontractors is deliberately wide in order to include 'all persons of whose services he makes use for the performance' in the sense of art 3 CMR.

Article 3.2 CGC combines art II HVR, art VII HVR and art 13(2) RR, the codification of *Renton v Palmyra* and *The Jordan II*.<sup>57</sup> The CGC covers the entire period between receipt and delivery, but the convention does allow parties to define the scope of their contract. The parties are therefore free to agree on 'before and after' clauses and FIOS clauses in their contract, and this irrespective of the means of transportation. This freedom only relates to such operations at the place of

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<sup>56</sup> *Barclays Bank v Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81: 'The contract for the carriage of goods by sea (...) is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners.'

<sup>57</sup> *Renton v Palmyra* (1957) AC 149; *The Jordan II* [2005] 1 Lloyd's Rep 57.

receipt and the place of delivery. Interim storage, handling, loading, stowage and discharge operations because of transshipment in the course of the voyage may perhaps be allowed under the (through or multimodal) contract of carriage, but the carrier's liability for these operations remains all the same subject to the mandatory provisions of the CGC.<sup>58</sup>

The convention imposes liabilities on the carrier, but also on the shipper. Ultimately, the shipper is the party with (access to) accurate information on the nature, specifications and other relevant characteristics of the goods. Article 3.3 CGC does not distinguish between 'dangerous' goods and other goods. The shipper's obligation to provide adequate information therefore applies to all goods. Given the wording of the provision, the shipper cannot raise the absence of adequate information as a valid defence. On the other hand, the obligation is not a warranty. The shipper's liability under art 3.3 CGC only relates to loss or damage as a result of any shortcomings or inadequacies in the information provided.

## 4 Exemptions

- 4.1 *The carrier is not liable for loss, damage or delay resulting from an act of the shipper or his agents, servants and subcontractors, an inherent defect, quality or vice of the goods, (attempted) rescue or salvage operations or a cause that could neither be prevented nor avoided.*
- 4.2 *The carrier cannot rely on the exemptions listed in article 4.1 for loss, damage or delay attributable to defects in the means of transportation, including defects in any container supplied by the carrier.*

The 'catalogue of exemptions' in art 4.1 CGC is not a combination of all the exemptions under the different unimodal conventions, but instead just a rather short list. The first two exemptions will hardly raise any questions; they correspond with art IV(2)(i) and (m) HVR, but also with art 18(2)(a) and (b) MC and art 17(4)(b), (c) and (d) CMR.<sup>59</sup> The explicit mention of (attempted)

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<sup>58</sup> *Mayhew Foods v Overseas Containers* [1984] 1 Lloyd's Rep 317.

<sup>59</sup> An 'act of the shipper or his agents, servants and subcontractors' covers the operations mentioned in art 3.2 CGC, but obviously has a wider scope.

rescue or salvage operations is necessary because such operations can of course simply be avoided, but should never be avoided.<sup>60</sup>

The problem with the other events listed in art IV(2) HVR is that it is not always easy to see why they would exempt the carrier. As a contract of carriage requires the carrier to achieve a certain result – the delivery of the goods to the consignee in the same sound condition – he should only be able to escape liability in exceptional circumstances.

An error in navigation, for instance, is always avoidable, and the consequences thereof should therefore remain for the account of the carrier.<sup>61</sup> The occurrence of a ‘fire’ alone should not per definition exempt the carrier from liability. This depends on the question of whether the cause of the fire could be prevented or avoided. The perils of the sea or an act of God will often be unavoidable, but surely not if the master obtains a storm warning in advance.<sup>62</sup> *Mutatis mutandis* the same then applies for the remaining exceptions.<sup>63</sup>

Since these are exceptions to the general rule of art 3.1 CGC, the carrier bears the onus of proof of the occurrence of one of the causes listed in art 4.1 CGC, the causal link between that cause and the loss, damage or delay and, if required, the extent to which the exempted cause contributed to the loss, damage or delay.

If the carrier succeeds, the onus of proof shifts to the shipper/consignee. Article 4.2 CGC stipulates that the carrier remains liable if (and to the extent that) the shipper/consignee proves that the loss, damage or delay is attributable to the use of a defective ship, train, truck, airplane or other means of transportation.<sup>64</sup> These defects also extend to containers. The carrier cannot

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<sup>60</sup> See art IV(2)(l) HVR and art 18(1)(g) CMNI.

<sup>61</sup> There already seems to be a general consensus with regard to the error in navigation, see the CMNI and the RR.

<sup>62</sup> As in *The Bunga Seroja* [1999] 1 Lloyd’s Rep 512. See for the stricter approach, however, HOLG Bremen VersR 1967, 576, BGH Versr 69, 536 (Isarstein) and HR 11 June 1993, NJ 1995, 235 (ann E Japikse), S&S 1993/123 (*Quo Vadis*).

<sup>63</sup> The carrier will not too often be able to prevent or avoid an act of war, an act of public enemies or local authorities or in fact any of the other events listed in arts 23 § 3 CIM 1999, IV(2) HVR, 18(2) MC, 17(4) CMR and 18(1) CMNI, but again it depends on the circumstances.

<sup>64</sup> This is not an overriding obligation, see also the wording of art 17 (6) RR.

escape liability if the loss, damage or delay is attributable to the use of leaking containers or malfunctioning reefer containers that he has supplied.<sup>65</sup>

## **5 The issuance of a transport document**

- 5.1 *The carrier will issue a transport document at the request of the shipper upon the receipt of the goods under the contract of carriage.*
- 5.2 *This transport document provides prima facie evidence of the specifications and the apparent order and condition of the goods, and proof to the contrary shall not be admissible against the consignee acting in good faith.*
- 5.3 *If the transport document contains contractual provisions, these provisions provide prima facie evidence of the contract of carriage, and proof to the contrary shall not be admissible against the consignee acting in good faith.*

The issuance of a bill of lading, waybill, consignment note or other (electronic) document is common practice. It is likely that these documents will more and more often be in an electronic form, probably even in forms that are currently not yet in existence. The parties to the contract of carriage are free to choose any suitable (electronic) document they deem fit, but they are equally free not to choose any document at all (if the shipper does not require one).

The CGC prescribes the issuance of the transport document ‘upon the receipt of the goods under the contract of carriage’. This moment will usually coincide with the receipt of the goods by the carrier, but that may be different if the carrier holds the goods in storage under a separate warehouse agreement pending instructions for their carriage.

Article 5(2) CGC is based on art III(4) HVR. The transport document provides prima facie evidence of the specifications and condition of the goods between the carrier and the shipper. This implies that the initial parties to the contract of carriage may still give counterevidence against the prima

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<sup>65</sup> Articles 14 and 17(5)(a) RR also extend this obligation to ‘any containers supplied by the carrier in or upon which the goods are carried’. Anticipating on the entry into force of the RR, the Dutch Supreme Court held in *The NDS Provider*, HR 1 February 2008, NJ 2008, 505 (ann K F Haak), that the duty also relates to carrier-provided containers.

facie evidence of the transport document. The consignee will often not have been privy to the discussions and negotiations between the carrier and the shipper, and he may rely on the information in the transport document when he is unaware of, and could reasonably not have been aware of any other arrangements.<sup>66</sup>

The key difference between art III(4) HVR and art 5(2) CGC is that the former only covers documents of title, whereas the latter covers all transport documents including documents of title. The justification lies in the function of the transport document, namely a representation by the carrier with the objective to serve as evidence.<sup>67</sup> Given this specific function, it is not so much relevant whether it is a document of title or not, but only whether the consignee in good faith relied on the information in that document.<sup>68</sup>

It matters not, I think, that the bill of lading is not negotiable. For what difference can it make whether the steamship owner issues a document which it may reasonably expect will be acted on to his detriment by a particular man or by many men – by a man whose name it knows or by men whose names it knows not?

This principle, the protection of someone who could reasonably rely on information given by someone else, is also found in § 242 German Civil Code and art 3:36 Dutch Civil Code as well as in the doctrine of estoppel.<sup>69</sup> Article 5 (2) CGC codifies this principle in line with art 41(c) RR.<sup>70</sup>

The ratio behind art 5(3) CGC is really the same, but then related to the contractual provisions in a transport document. Article 5(3) CGC in fact extends the operation of art 5(2) CGC to

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<sup>66</sup> If the consignee is in fact an initial party to the contract, if he was involved in the negotiations, if he is aware of contractual provisions that were validly incorporated, if he has varied the contract in a side agreement with the carrier and so on, he obviously does not meet the requirement of good faith.

<sup>67</sup> *Combe v Combe* (1951) 1 All ER 767.

<sup>68</sup> *The Carso* (1930) 38 Lloyd's Rep 22.

<sup>69</sup> See in this respect also Y Baatz in Y Baatz, C Debattista, F Lorenzon, A Serdy, H Staniland, M Tsimplis, *The Rotterdam Rules: a practical annotation* (Informa 2009): 'It may be argued (...) that – as statements of fact – they may have given rise to an estoppel against the carrier anyway.'

<sup>70</sup> Article 41(c) RR stipulates: '(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record: (i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier; (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and (iii) The contract particulars referred to in article 36, paragraph 2.'



contractual provisions.<sup>71</sup> The mere issuance of a transport document cannot affect the agreement between the contracting parties.<sup>72</sup> Their relation remains governed by the contract of carriage, and the transport document is then a mere receipt.<sup>73</sup>

Again, however, this changes when the transport document comes into the hands of a third party consignee acting in good faith, and again it makes no difference whether the transport document is a document of title or not. The provision is similar to art 11 MC and art 9 CMR, and codifies the rule of *Leduc v Ward*.<sup>74</sup>

## **6 The rights (and obligations) under the contract of carriage**

- 6.1 *The shipper has the right of disposal until such time that the consignee takes or demands delivery of the goods in accordance with article 6.5 or the right of disposal passes in accordance with article 6.3.*
- 6.2 *The party mentioned as the shipper on the transport document is the shipper for the purpose of article 6.1.*
- 6.3 *If the transport document is a bill of lading or similar document of title, the right of disposal passes to the transferee with each transfer of all the originals of that bill of lading or similar document of title.*
- 6.4 *The consignee may take or demand delivery of the goods upon their arrival at the place of delivery against a receipt and payment of all freight due, and from then on exercise all rights and be held to all obligations under the contract of carriage.*

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<sup>71</sup> S D Girvin, *Carriage of goods by sea* (2nd edn, UOP 2011) 194: 'When a bill of lading is endorsed by a charterer to a third party bona fide purchaser, the terms of the bill of lading supplant the charter party and become conclusive evidence of the contract of carriage.' See also art 8:441(2) DCC: 'Against the holder of the bill of lading, who was not the shipper, the carrier under bill of lading is bound to and may rely on the stipulations of this bill of lading.'

<sup>72</sup> *Pyrene v Scindia* (1954) 2 All ER 158, unless of course parties intend to vary their agreement by the issuance of a transport document.

<sup>73</sup> *Rodocanachi v Milburn* (1886) 18 QBD 67; *President of India v Metcalfe Shipping* [1969] 2 Lloyd's Rep 476 (*Dunelmia*).

<sup>74</sup> *Leduc v Ward* (1888) 20 QBD 475.

6.5 *The consignee's acquisition of rights and obligations under the contract of carriage pursuant to article 6.4 does not affect the shipper's rights and obligations under the contract of carriage, other than the right of disposal.*

Apart from the (sole) exception of art 6.3 CGC, the right of disposal rests with the shipper until the consignee takes or demands the delivery of the goods.<sup>75</sup> At that moment, the shipper loses the right of disposal, and the consignee acquires the right of disposal. Article 6.1 CGC so ensures that the right of disposal is exclusive; it either rests with the shipper (or transferee, see art 6.3 CGC) or the consignee, but never with two parties at the same time.

The party mentioned in the shipper's box of the transport document will often indeed be the shipper, but not necessarily. If the contract of carriage is concluded pursuant to an FOB or FCA sale of the goods, the buyer is the contractual shipper, but the seller is commonly mentioned in the shipper's box of the transport document,<sup>76</sup> and the transport document is also issued to the seller.<sup>77</sup>

This practice makes considerable sense given the position of an FOB or FCA seller on the one hand, and the operation of a documentary sale on the other. The seller needs the transport document (proving his compliant delivery under the sale contract) as one of the documents to present to the buyer for 'cash against documents' or to ensure payment under a letter of credit. So long as the seller has not been paid, however, he should be able to exercise his grip on the goods even though they are already underway. The documentary shipper therefore has the right of disposal,<sup>78</sup> and the carrier can safely follow his instructions.

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<sup>75</sup> If the carriage is sub-contracted, the shipper in the first contract of carriage can exercise his right of disposal through the carrier/shipper in the contract of sub-carriage.

<sup>76</sup> He is the 'documentary' shipper. Article 1(9) RR defines the documentary shipper as 'a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.'

<sup>77</sup> In fact, § 513 (1) HGB, the German incorporation of art III(3) HVR, prescribes that the bill of lading is issued to the 'Ablader', ie the one physically handing the goods to the carrier. The objective is to protect the position of the FOB seller: 'Unless otherwise agreed in the contract for the carriage of general cargo, the carrier must issue to the Ablader, at the latter's request, an order bill of lading that – at the choice of the Ablader – is made out "To Order" of the Ablader, "To Order" of the consignee, or simply "To Order" (blank); in the last case, this shall be deemed to mean "To Order" of the Ablader. (...).'

<sup>78</sup> Article 6.2 CGC only relates to the right of disposal; it is not a general rule. Arguably, though, art 5.3 GCG implies that the information in the shipper's box gives prima facie evidence as to the identity of the shipper.

This provision does not violate the shipper's rights under the contract of carriage in any way. As the conclusion of the contract of carriage precedes the issuance of the transport document, the shipper under the contract of carriage can steer the information in the shipper's box.<sup>79</sup> As such, the shipper effectively controls the identity of the documentary shipper.

The convention does not deal with documents of title, but art 6.3 CGC scratches the surface.<sup>80</sup> In the case of a contract of carriage under a bill of lading or similar document of title, the right of disposal attaches to that document, and transfers together with the transfer of that document.<sup>81</sup> This means that the initial shipper loses the right of disposal with the transfer of the bill of lading or similar document of title, and that the transferee then acquires the right of disposal.<sup>82</sup>

The consignee may require the delivery of the goods when they arrive at their destination. This will usually be a form free transaction between a stevedore, a warehouse keeper or a freight forwarder acting on behalf of the consignee on the one hand and the carrier or his agent on the other, although the carrier will of course require a receipt, perhaps payment of the outstanding freight, and if necessary identification before releasing the goods.

When the goods travel under a bill of lading or similar document of title, however, the consignee will have to prove his entitlement to the delivery by presentation of the bill of lading.<sup>83</sup> The CGC deliberately avoids the regulation of the presentation rule (and in fact any document of title function of the bill of lading), and relies on the commercial practice developed over the years,<sup>84</sup> and undoubtedly still to develop in the future.

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<sup>79</sup> This may sometimes require a pro-active approach in contracts of carriage by road. Some drivers simply carry a pile of blank consignment notes in their trucks, and just issue these to anyone handing them the goods for transportation, irrespective whether that is the shipper, an FCA seller or just a warehouse keeper.

<sup>80</sup> Article 6.3 CGC is necessary, though, as the shipper would otherwise have retained the right of disposal under the main rule of art 6.1 CGC.

<sup>81</sup> *Ellis v Hunt* (1789) 100 ER 679.

<sup>82</sup> From that moment on, art 6.1 CGC mutatis mutandis applies to the position of the transferee.

<sup>83</sup> The HVR do not regulate these functions either for that matter.

<sup>84</sup> *The Stettin* [1889] Lloyd's Rep 14 PD 142; *Voss v APL* [2002] 2 Lloyd's Rep 707; *The Rafaela S* [2005] 1 Lloyd's Rep 347; *Carewins v Bright Fortune* [2007] 3 HKLRD 396, but see also USCA § 80110(b) saying that the carrier may deliver the goods to '(1) a person entitled to their possession; (2) the consignee named in a nonnegotiable bill; or (3) a person in possession of a negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.'

The consignee may exercise all rights under the contract of carriage from the moment that he takes or demands the delivery of the goods.<sup>85</sup> All rights obviously include all rights of suit. The objective of this rule is to avoid the discussion on the underlying dogmatism.<sup>86</sup> Article 6.4 CGC simply prescribes that the consignee may exercise all rights under the contract, and can subsequently also be held to all obligations under the contract.

The position of the shipper under the contract of carriage, apart from the right of disposal, remains unchanged. The acquisition of rights by the consignee is not at the expense of the shipper. The shipper is, and stays, a contracting party, and as such he is entitled to exercise all rights (of suit) under the contract of carriage.<sup>87</sup> Other than the right of disposal, the right of suit is thus not an exclusive right.<sup>88</sup>

An accumulative right of suit implies that the carrier may find himself confronted with two (or more) claims for the same loss or damage, in fact sometimes even issued by claimants that did not suffer the financial consequences. This is in practice hardly a problem, though.<sup>89</sup> The goods are generally insured during the voyage, and the (subrogated) insurers will then take the lead in any claim against the carrier. They may indeed bring proceedings against the carrier in their own name, but perhaps (also) in the name of the shipper and/or the consignee at the same time, and often even on different grounds, ie under the contract but at same time in tort or bailment.<sup>90</sup> Still, the carrier will only have to pay once. The carrier, who pays either the shipper or the consignee in good faith,<sup>91</sup> is discharged from further liability in future claims for the same loss or damage.<sup>92</sup>

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<sup>85</sup> The reference to 'takes or demands' is borrowed from s 3(1) COGSA 1992 (UK).

<sup>86</sup> Civil law countries will generally accept that the consignee acquires his rights through a third party stipulation. Common law countries will abide by the privity of contract rule, and then if necessary rely on a statutory or conventional provision.

<sup>87</sup> The position of the shipper is not necessarily the same as the position of the consignee, see art 5 CGC.

<sup>88</sup> M Spanjaart, *Vorderingsrechten uit cognossement* (Paris 2012).

<sup>89</sup> The MC and the CMR already allow for an accumulative right of suit, and it has hardly triggered litigation.

<sup>90</sup> The CGC does not bar any extra-contractual claims against the carrier, but art 9.1 CGC does ensure that all defenses under convention then remain open to the carrier.

<sup>91</sup> In the case of a non-contractual claim, a further requirement is that this party had a proprietary right. *The Aliakmon* [1986] 2 Lloyd's Rep 1.

<sup>92</sup> The German Supreme Court held in BGH 6 July 1979, VersR 1979, 1106: 'If the consignee makes a justified claim for damage to the goods, then the carrier, when he is then again sued for the damage by his contractual counterpart – the shipper – can argue that he has already fulfilled his obligation to pay the damage against one of the parties with a right of suit and that he is therewith discharged.'

## **7 Limitation of liability**

- 7.1 *When the goods are carried in either a 20 foot or a 40 foot container, the carrier's liability is limited to 5,000 SDR or 10,000 SDR respectively per container, unless a higher limit was agreed upon.*
- 7.2 *Otherwise, the carrier's liability is limited to 20 SDR per kilo gross weight, unless a higher limit was agreed upon.*
- 7.3 *The carrier's liability shall never exceed the current market value of the goods at the agreed place of delivery, and any other (consequential or indirect) losses or damages cannot be recovered from the carrier.*
- 7.4 *In the case of delay in the delivery of the goods, the carrier's liability is limited to the amount of the freight.*

Instead of distinguishing between kilos and collos/packages, the CGC distinguishes between goods carried in (20 and 40 foot) containers and goods that are not carried in such containers (either as general cargo or in bulk or in smaller-sized containers).<sup>93</sup> Admittedly, this is an arbitrary distinction, with an arbitrary limitation, but that can probably be said about any distinction in limiting the carrier's liability. Besides, the parties to the contract of carriage are always free to agree on a higher limit of liability.

The kilo limitation may seem rather high for carriage by sea, but this will in practice probably not be such an issue. Most goods are carried by sea in containers, and the sea carrier may then rely on the relatively modest container limitation. Whenever goods are not carried in containers, these will often be commodities in bulk, and as such they will often be worth a lot less than 20 SDR per kilo. The carrier's liability is then limited to the market value in accordance with art 7.3 CGC.

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<sup>93</sup> See for an alternative solution art 20(1) CMNI.

The current CMR limitation has not been amended since 1956. An increased limit here, albeit it with more than 100%, does not really come a moment too soon. Besides, the carriage by road will also often be in containers, allowing the road carrier to rely on the container limitation.

The 20 SDR/kg limit is in line with the current CIM 1999 and MC limits. The 20 foot or 40 foot containers will probably not be carried by air anyhow, and here the 20 SDR limit does not change anything.

When the goods are worth less than the limitation, the carrier's liability will not exceed their market value at the time and at the agreed place of their delivery. This also implies that any costs for excise and customs charges are not recoverable.<sup>94</sup> The CGC does not deal with additional costs, such as survey costs and legal interests. These amounts are recoverable if they are recoverable under the *lex fori*, and their quantum is for the court to decide.<sup>95</sup> Since the CGC does not cover the reimbursement of such costs, the parties are of course also free to address this issue in their contract.

When the goods arrive with a delay, the carrier's liability (if any) is limited to the amount paid or payable for the freight.<sup>96</sup> Where such a delay leads to material damages to the goods, however, for instance in the case of perishable goods, the regular container/kilo limitations apply.

In the absence of an exception for intent, wilful misconduct or any domestic equivalent thereof, these limits are unbreakable. The corresponding provision in the MC has been a great success in this respect, and it has brought proceedings in air cases back to a minimum.<sup>97</sup>

Another success of the MC is its possibility to index the limits, usually because of inflation, but there may also be other reasons to evaluate these amounts. In fact, there may also be a future

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<sup>94</sup> The convention so avoids the discussion that has surfaced under art 23(4) CMR. The courts in most contracting states have refused to award excise duties on the basis of the last part of art 23(4) CMR, ie that 'no further damage shall be payable.' All the same, the House of Lords held in *James Buchanan v Babco* [1978] 1 Lloyd's Rep 119 that excise duties qualify as 'carriage charges, customs duties and other charges incurred in respect of the carriage of the goods'.

<sup>95</sup> These will probably always be relatively small amounts, and they are therefore unlikely to trigger forum shopping.

<sup>96</sup> Obviously, the limitation is not a fixed amount. The cargo-interested parties will have to prove the occurrence of the delay and quantum of the financial loss as a result of the delay.

<sup>97</sup> This measure is particularly relevant for international road carriage. The CMR stipulates that the court seized should apply its own domestic law in order to assess whether the carrier may rely on the limitation, and this has obviously triggered a wave of forum shopping cases, see the discussion under 3.1.

need to limit the liability for the (yet to be invented) 60 foot container. The contracting states have this possibility each time they meet pursuant to art 10.2 CGC.

The carriage of goods by another means of transportation than agreed, for instance because the goods are carried by road instead of by air,<sup>98</sup> remains a problem. The CGC aligns the limitations of liability, but does not give a separate rule for the carrier's breach of contract on this point. Carve-outs in a uniform convention are probably best avoided, especially when the problem is perhaps more academic than practical as the carrier may negotiate the freedom to use more than one means of transportation in the performance of the contract.<sup>99</sup>

## **8 Time bar**

- 8.1 *Any claim expires when proceedings have not been initiated within one (1) year from the date of delivery, unless an extension was agreed upon.*
- 8.2 *When no delivery has taken place, the one (1) year period starts thirty (30) days after the agreed or expected delivery date.*
- 8.3 *When the claim relates to recourse or indemnity for loss, damage or delay, the expiry date is extended with ninety (90) days from the date that these proceedings were initiated against the claimant.*

The HVR and CMR adopt a one-year period; the MC adopts a two-year period, but then in combination with a very short protest period. The CGC stipulates a one-year period, and does not impose any protest periods. The one-year period applies both ways, so also to claims by the carrier against the shipper or the consignee.

The one-year period can only be interrupted by the commencement of proceedings, irrespective whether these are proceedings in a court of law or in arbitration (should the parties have agreed thereto). The period can, however, always be extended by agreement between the parties.

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<sup>98</sup> Article 18(4) MC.

<sup>99</sup> See for instance art 6.3.2 of General Conditions of Carriage KLM Cargo (July 2010).

Since the CGC covers all modes of transport including multimodal transport, it is very likely that a claim under one contract of carriage will often trigger further claims in the chain of (sub) carriers. When proceedings have been initiated against a carrier, he may want to take recourse on his sub-carrier (and so on in the chain). The strict observance of the date of delivery is then sometimes unfair, and the one-year period is therefore extended with an extra 90 days from the moment that the proceedings against the carrier are initiated.<sup>100</sup>

## 9 Extra-contractual claims

9.1 *The provisions of this convention apply irrespective of whether a claim is brought in contract or otherwise.*

9.2 *Agents, servants and sub-contractors employed in the performance of a contract of carriage may rely on the provisions of this convention whenever a claim is brought directly against them.*

This article prevents the circumvention of the convention and it probably channels liability claims in the process. The CGC applies irrespective of the basis of the claim against the carrier, shipper or consignee. The CGC also applies when a claim is brought directly against one of the agents, servants or sub-contractors of the carrier, shipper or consignee.

In practice, the carrier's bill of lading or waybill will often stipulate a Himalaya clause with a similar effect, or an extra effect through the inclusion of a circular clause. Such clauses are less common in consignment notes, though, hence the inclusion of this provision in the CGC. Since the CGC does not regulate jurisdiction, the question of whether a (conventional) Himalaya clause also allows for a jurisdiction defence remains for the court seized to decide.<sup>101</sup>

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<sup>100</sup> See also art 24(4) CMNI.

<sup>101</sup> *The Mahkutai* [1996] 2 Lloyd's Rep 1; *Acciai v M/V Berane* (2002) AMC 528.



## 10 Final provisions

- 10.1 *The government of (...) is the depository of this convention, and it assumes the responsibility for all the communication regarding this convention.*
- 10.2 *Every ten (10) years the depository shall convene a conference to evaluate, and if necessary, revise and amend the convention.*
- 10.3 *The revision and amendment of the convention requires a majority of two thirds of the contracting states.*
- 10.4 *The revision and amendment of the convention binds every contracting state.*
- 10.5 *This convention can be denounced at all times by any contracting state giving one (1) year notice to the depository.*

Every convention needs a depository, and so does the CGC. This depository is not only responsible for the necessary communication, but also for the organization of a conference to deal with the evaluation, revision and amendment of the convention every ten years. The objective of art 10.2 CGC is to avoid that the contracting states remain passive too long.<sup>102</sup>

The threshold of two thirds of the contracting states for the actual revisions and amendments ensures that these are not adopted too lightly.<sup>103</sup> Once an amendment is in place, it binds every contracting state. If a contracting state disagrees with the amendment, or if it is uncomfortable with the convention for any other reason, it can always denounce the convention with a one-year notice period.

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<sup>102</sup> Article 49 CMR allows every contracting state to request a conference on the revision of the convention, but no contracting state ever has.

<sup>103</sup> The conference can also decide on the entry into force of any amendment.