LEGAL ISSUES OF DANGEROUS GOODS TRANSPORTATION UNDER THE INTERNATIONAL CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD

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Abstract

The aim of this paper is to investigate some of the legal issues related to the International Convention on the Contract for the International Carriage of Goods by Road (CMR). The interest in the research is driven by the recognition that road transport of dangerous goods is a dangerous activity that can lead to serious problems if a vehicle onto which hazardous goods are loaded is involved in an accident. The methodological approach adopted takes into consideration existing legislation and case law. The liability regime set out in the CMR is comprised of complex elements. The cases of liability deriving from breach of the duty of custody, from loss or damage, and from delay in delivering the goods to the consignee by the term specified in the contract, are specifically regulated. The findings show that for the transport of dangerous goods, specific obligations rest upon the sender, which lead to specific liabilities in the case of their infringement. It follows that liability does not lie only with a carrier. As a result, it seems more correct to discuss liability deriving from the transport of dangerous goods rather than carriers' liability.

Keywords: Transport, CMR, Dangerous Goods, Liability

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1. INTRODUCTION

Transporting hazardous materials by road is a dangerous activity that can cause serious problems if a vehicle onto which dangerous goods are loaded is involved in an accident. Nonetheless, the perception that the transportation of hazardous materials is entirely legal stems from the harmony between the public interest in safeguarding human life and the environment and the private interest in operating a business. However, for this kind of transportation, specific precautions must be taken to avoid mishaps and to act quickly in the case that one does occur (Miccichè, 2010).

The idea behind this piece of writing is that the first step in learning about this subject and the associated liabilities is to identify the legal resources that govern the transportation of hazardous materials by road. Many laws and rules, both national and European, regulate the issue. While some of them impose technical requirements that must be followed and safety measures that must be taken during carriage, others are related to

liability. They contain specific duties for all persons involved in this kind of transportation. Given the variety of legal sources, it is evident that there is a lack of a single, consistent regulation to determine who bears liability.

It should be emphasized that carrying out the worldwide transportation of hazardous materials, such as chemicals, radioactive materials, and specific forms of trash, would be extremely difficult, if not risky, due to the disparate legislation in so many different nations. Furthermore, standard laws on consumer protection, workplace health and safety, storage guidelines, and environmental preservation also apply to dangerous commodities. Hazardous material transportation can seriously harm both the environment and human health. This is the reason why, in addition to these rules that are more widely applicable, particular regulations on them are required.

The Committee of Experts on Transport of Dangerous Goods (TDG) and General Harmonized System of Classification and Labelling (GHS), which are in charge of drafting the "UN Recommendations on the Transport of Dangerous Goods", also known as the "Orange Book", coordinate all international activities related to the transportation of dangerous goods.

The European Agreement on the Transportation of Dangerous Products by Road (ADR[1]) also applies to the road transportation of dangerous products throughout Europe.

Another legal source is the Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail, and Inland Navigation Vessels (CRTD) (Rodinò, 1995). Article 2 of the CRTD makes the CRTD applicable to 1) damage sustained in the territory of a State Party that is caused by an incident occurring in a State Party and 2) preventive measures, wherever taken, to prevent or minimize such damage.

At an international level, transport by road is ruled by the Convention on the Contract for the International Carriage of Goods by Road (CMR) which was signed on 19 May 1956 and subsequently amended by the Protocol of Geneva on 5 July 1978 (Blasche, 1975). The text of the CMR reflects the law in force in most of the States at the time that they signed it (De Rada, 2007).

The purpose of this article is to focus on the CMR and outline some of the main issues about it, in particular liability. The research is carried out from a legal point of view since some of the legal issues connected to the transportation of dangerous goods by road are unexplored. In fact, there is almost no literature on this topic. As a consequence, the methodological approach adopted takes into consideration both existing legislation and case law and tries to give new solutions to the problems arising out of this kind of transportation. In the next sections it will be made clear that for the transport of dangerous goods, specific obligations rest both upon the carrier and the sender. These obligations lead to specific liabilities in the case of their infringement. Put simply, the findings of the research highlight that liability does not lie only with a carrier.

The rest of the paper is structured as follows. Section 2 presents a literature review and a brief description of the CMR. Section 3 provides the research methodology. Section 4 presents the research results. Section 5 discusses the main findings. Section 6 concludes the paper.

2. LITERATURE REVIEW ON THE CMR

The CMR has brought legal order to road international transports, regulating relations between the carrier and the sender at an international level (Blasche, 1975). It is applicable only if transport: 1) concerns material entities, 2) is carried out by road, and 3) is for reward (Silingardi et al., 1994).

According to Article 1 of the CMR, the CMR itself is applicable where the location of the site where goods are taken over and the location where they are supposed to be delivered are in two separate nations, at least one of which is a Contracting State (Buonocore, 2003; Tincani, 2018). Moreover, the CMR applies also when a part of the transport is not carried out by road, but with some exceptions. The CMR does not apply to 1) carriage performed under the terms of any international postal convention, 2) funeral consignments, and 3) furniture removal. The length of the journey between the place of departure and the border of the Contracting State where the goods will be delivered, or between the border and the place of destination for the goods, is of no importance. So, the territorial scope of the CMR is relatively wide, since it is sufficient that the place of taking over the goods and the place designated for delivery are located in two different countries, at least one of which is a Contracting State. Thus, purely domestic carriage is never subject to the CMR.

Regarding international road haulage, the CMR does not define "dangerous goods", nor does it explain the features goods must have to be considered hazardous. The definition of dangerous goods might be construed only a *contrario* from Article 22.2 of the CMR, according to which "goods of a dangerous nature which, in the circumstance referred to in paragraph 1 of this article, the carrier did not know were dangerous, may, at any time or place, be unloaded, destroyed or rendered harmless by the carrier without compensation" (United Nations, 1956). As a consequence, dangerous goods would be those a carrier has identified and refused to load (de Boer, 2004).

The CMR establishes a rebuttable presumption of liability upon a carrier, in the event of loss of goods transported or damage to them; it must be underlined that loss means both destruction and theft of goods. The principal duty of a carrier is to carefully keep custody of the goods from the moment of receiving them until their delivery to the consignee (Calvo, 2009). The duty of safe custody arises only if goods have been handed over after the conclusion of a contract (Tincani, 2012). When the handover takes place before the conclusion of a contract, carriers' liability is contractual if the parties entered into a contract of storage, otherwise it is tortious (Busti, 2007). Similarly, a duty of custody subsists also when the sender accompanies the goods or has them accompanied since the execution of transport always requires a carrier to supervise a shipment. This liability is

[1] *"Accord europeen relatif au transport international des merchandises dangereuses par route".*

called *ex recepto* and it subsists until the goods are received by the person entitled to do so or by the person in charge of receiving them (Corrado & D'Urso, 2023).

At an international level, the CMR rules road haulage but does not address all issues in relation to the contract of carriage of goods by road. The aspects covered by the CMR concern transport documents and liability of a carrier deriving from loss of, or damage to, the goods, as well as liability deriving from delay (Bon-Garcin, 2006). Loss can be total or partial and consists of non-delivery of the goods entrusted to a carrier or of delivery of a smaller amount of them. Damage can be apparent or non-apparent and cause harm to the goods and, consequently, a reduction in their economic value. The moment from which a carrier may incur liability does not correspond to the beginning of a transport, but with the handover of the goods to them (Messent & Glass, 2018). Furthermore, scholars believe that liability under the CMR also lies with a carrier in the event of non-reimbursement of all the expenses made which potentially must be obtained on delivery (Pesce, 1987). In the same way, a carrier may incur liability even where a harmful event does not result in a loss of, damage to, or delay in the delivery of, the goods (Loewe, 1975).

3. RESEARCH METHODOLOGY: LIABILITY UNDER THE CMR

The starting point of this research, and consequently the method applied, is the analysis of the existing legislation, i.e. the CMR. It must be underlined that for conducting a study like this there seems to be no other suitable method.

The liability regime set out in the CMR is comprised of complex elements. In this sense, as is established by some legislation, such as the Italian one, the cases of liability deriving from breach of the duty of custody, from loss or damage, and from delay in delivering the goods to the consignee by the term specified in the contract, are specifically regulated. On this point, Article 17, paragraph 1, of the CMR, establishes that a carrier is liable for total or partial loss of goods and for damage to them occurring between the time when a carrier takes over the goods and the time of their delivery. A carrier is also legally responsible for any delay in delivery (United Nations, 1956).

The rules contained in the CMR aim to achieve a distribution of the risks related to the transport of goods by road. According to courts, such as the Italian Corte di Cassazione, Article 17 of the CMR establishes that a carrier is liable both for loss and damage involving freight entrusted to it and that the law sets out cases in which liability is excluded, distributing the consequences from certain risks between a sender and a carrier (Cass. civ., Sez. III, Sent., n. 2483, 2009).

Firstly, it is necessary to emphasize that *ex recepto* liability is applicable to situations covered by the CMR, even though there is an attenuation of it (Riguzzi, 1978). The CMR establishes a presumption of liability upon a carrier, diminished by a long list of exceptions (Romanelli, 1978). A presumption of the absence of liability for a carrier favors them whenever loss or damage is caused by inaccurate loading of goods onto a vehicle. Whoever seeks to invoke liability for a carrier must give evidence that the relevant loss or damage is caused by the specific conduct of the carrier or of the persons appointed by the carrier to carry out the transport.

Article 17, paragraph 2, of the CMR, contemplates cases of exemption from liability, while paragraph 4 of that article, sets out specific circumstances of relief from it. The purpose of the legislation is to protect two different needs. On the one hand, carriers' liability has been regulated by applying the principle of receptum. On the other hand, a carrier is allowed to identify specific cases under which liability does not lie with it (Silingardi et al., 1994). In this way, the international legislation distributed the business risk, balancing the interests of road hauliers with those of users of transport services.

The CMR does not define this liability but establishes cases in which it occurs and the exceptions to it. On this point, scholars take different positions, most of which are not supported by any reason. Indeed, those who believe that there is strict liability (Loewe, 1975), without providing any justification for their thesis, are opposed by those who deny such a solution (Messent & Glass, 2018). In this regard, it could be argued that Article 17, paragraph 1, of the CMR, which states that a carrier is liable either for total or partial loss of damage occurring to goods between their handover and delivery, does not refer to negligence. It follows that liability does not rely on a failure to exercise care and it can be characterized as a form of strict liability. Nevertheless, it must be emphasized once more that the CMR contemplates both cases of exemption from liability and special risks which mitigate the burden of proof on a carrier. In this way, carriers' liability is not based on negligence, nor it is strict due to clauses that limit it (Pesce, 1987). As a result, the CMR established a form of attenuated strict liability, which allows a carrier to benefit from a less rigorous burden of proof (Plebani, 2001).

An additional peculiarity of the liability regime in question concerns the burden of proof. The above-mentioned cases do not prevent a carrier from giving evidence of what caused harm to freight. They apply a favored system since a carrier must be able to specify which fact caused damage, among those taken into consideration by Article 17 (Riguzzi, 1978). As a result, it is possible to conclude that international regulation requires a carrier to perform their obligations with a high degree of diligence. They must fulfill their obligations with due diligence, and liability arising from any damage occurring during transport lies with them. The CMR contemplates specific cases of exemption from liability and establishes that a carrier may avoid any consequences by reference to the special risks set out in the CMR (Pesce, 1987). In fact, according to Article 17, paragraph 4 and Article 18, paragraph 2 and paragraph 5 of the CMR, the carrier may be relieved from liability by giving evidence that the harmful event was caused by facts set out under Article 17 of the CMR. This involves a reversal of the burden of proof which forces the sender to prove that damage was caused by a fact attributable to the carrier. Where a carrier is unable to provide such evidence, the principle of receptum will apply.

Furthermore, according to Article 17, paragraph 3 of the CMR, a carrier cannot be released from liability due to a vehicle's substandard state, the wrongdoing or negligence of the person from whom the carrier rented the vehicle, or that person's agents or servants. This is because the means of transportation used by a carrier is part of their business, and a carrier must guarantee that it functions properly (Silingardi et al., 1994). A carrier cannot waive liability by invoking the condition of the vehicle, because they are responsible for the choice of vehicle to carry out the transport (Pesce, 1987). This provision is a counterbalance to those mentioned in the previous paragraph which, as mentioned above, allow a carrier not to incur liability if damage was due to unavoidable circumstances (Messent & Glass, 2018).

Similarly, a carrier cannot invoke the lack of a consignment note to avoid liability, since where no such document exists, it is presumed that the goods were handed over in good state and a carrier is liable for not having delivered them in the same condition (Messent & Glass, 2018). On this point, it is important to underline that Article 4 of the CMR sets out that the contract of carriage must be confirmed by the completion of a consignment note, whose existence is prima facie evidence that the parties entered into it and that the carriage has been carried out exactly as indicated in that document (Jung, 1997). However, the existence and validity of the contract of carriage, which is still governed by the CMR's requirements, are unaffected by the consignment note's absence, irregularity, or loss. (Loewe, 1975). Three original copies of a consignment note must be completed. The first must be handed to the sender, the second must be retained by the carrier and the third must accompany the goods. The consignment note must contain the name and the address of the sender, a description of the nature of the goods and the method by which they were packed, and, for dangerous goods, their generally recognized description (Pesce, 1987).

The CMR does not establish who can bring legal proceedings against a carrier. A solution could be that the person entitled to do so is the one who has the right of disposal of the goods, i.e. the consignee. The consignee has to prove both their right to bring legal proceedings and that damage occurred to the goods deriving either from transport or delay (Pesce, 1987).

A different solution may be that the only person entitled to bring an action against a carrier is the sender (or whoever signed a contract with a carrier), even though they experienced no harm. Consequently, the consignee would be allowed to bring an action only after the freight had been delivered (Loewe, 1975). Similarly, other persons, such as insurance companies, may issue a claim against a carrier, where they have been authorized to do so by the person who has the right of disposal of the goods.

In the absence of any legislative position on this point, it seems that the most preferable solution is that action against a carrier can be taken by whoever has the right of disposal of the goods, considering that this is the only person who may have been damaged. As a consequence, this person may be either the sender or the consignee, depending on the moment in which the harmful event occurred. This stance is endorsed in the Italian case law, according to which a sender of an international road transport is entitled to bring legal proceedings against a carrier until the consignee requests delivery of the goods (Corte d'Appello Milano, 2018; Sez. III, Sent., n. 2710, 2014). Subsequently, the right to bring legal proceedings lies exclusively with the consignee.

4. RESULTS: LIABILITY ARISING FROM TRANSPORT OF DANGEROUS GOODS UNDER THE CMR

It is claimed that the CMR takes express account of the transportation of dangerous goods. As a consequence, it differs from national legislation, such as the Italian law which addresses liability with reference to the consequences arising from a breach of contract and the infringement of the duty of safe custody of the goods handed over to a carrier. Article 22 of the CMR provides for the consequences deriving from the transport of dangerous goods and sets out both the obligations of the sender and the powers bestowed on the carrier. The provision is inspired by maritime law and its nature is special (De Gottrau, 1987).

As mentioned above, the CMR does not give any definition of the transport of dangerous goods, but it deals with the topic through the complex aspect of liability. This is confirmed by the inclusion of the above article in question among provisions that govern carriers' liability. Therefore, what matters to the legislation is not the definition of dangerous goods, but the fact that a transport concerning goods of this type is carried out. In this way, dangerous goods are an objective prerequisite that creates legal responsibility.

The main feature of the regime under the CMR is that its regulation bestows specific duties and liabilities on a sender. On the contrary, the CMR just bestows powers on a carrier. Although the regulations about liability arising from the transport of hazardous goods are to be found among those regarding the carrier, Article 22 of the CMR worsens the position of the sender and lightens that of the carrier. The source of liability is not just the transport of dangerous goods, but the infringement of specific obligations by the sender. A sender is required to inform a carrier of the exact nature of the goods to be transported and also to indicate the precautions to be taken. If a sender does not comply with these duties of information and cooperation when entering into an agreement for the transport of the goods, a carrier may, at any time or place, unload, destroy, or render harmless the goods without the need to provide compensation. The infringement by a sender of its duties does not make the contract void but allows a carrier to end the transport and eliminate the source of danger. In any case, it can be argued that a carrier is required to perform their obligations with the diligence required for the fulfillment of a professional obligation and to adopt necessary precautions for the transport of dangerous goods (Silingardi et al., 1994). Of course, the information a sender must provide to the carrier is not always the same. It must be in writing and be put in a consignment note.

5. DISCUSSION

It is reasonable to state that if a sender does not comply with the duty of cooperation and an accident occurs during transport, they have the burden of proving that a carrier knew the nature of the goods being transported. This onus of proof may be fulfilled in many different ways, such as by producing correspondence or through oral evidence. Moreover, the proof required from a sender is burdensome, as they must prove that a carrier knew the danger constituted by the transport and the degree of knowledge, they must have that which anyone usually operating with those types of goods is supposed to have (De Gottrau, 1984). In this case, provisions under the ADR may help since they give technical indications regarding the way transport must be carried out, which must be followed both by the carrier and the sender. Although the two conventions address different aspects of transport, their provisions are complementary to each other. In this way, the infringement of the regulations that make it possible to identify the substance transported and any danger that can derive from it may be used by a carrier to prove they were not aware of the nature of the shipment so that liability is borne by a sender (Pesce, 1987).

Furthermore, it can be stated that following the last paragraph of Article 22 of the CMR, liability lies fully with the sender. Indeed, should a carrier prove they would have refused goods if they had known their nature, they are not liable for damage arising from their transport. At any rate, a sender has to reimburse a carrier for all expenses in connection with the transport.

On this point, it is necessary to underline that even though the CMR provides that a sender bears all liability, there is no indication of who is entitled to bring legal proceedings. Therefore, the problem arises as to whether a sender may be held liable to a carrier only, because of the contract they entered into, or to third parties too, who may have been damaged by the transportation of dangerous goods. Adhesion to one or the other solution leads to different consequences. If a sender is deemed to be liable to a carrier only, a carrier is entitled to issue a claim for any damage deriving from transport. By contrast, if a sender is deemed to be liable also to third parties, the duty of cooperation gains importance both from a contractual and a non-contractual point of view. Thus, it can be argued that the focal point of liability is shifted.

The wording of the provision leads to the conclusion that a sender is liable both to a carrier and to third parties who have been somehow damaged. a sender's liability to a carrier is contractual, while that to third parties is tortious (Pesce, 1987). Moreover, if a third party decides to bring legal proceedings against a carrier, the action, even though based on Article 22 of the CMR, is subject to ordinary law and not to the provisions set out in the CMR (De Gottrau, 1987). Thus, third parties are entitled to bring legal action against the carrier, who in turn has a right of recourse against the sender (Loewe, 1975).

Regarding the powers bestowed on a carrier, as previously mentioned, according to Article 22, paragraph 2, of the CMR, they may, at any time or place, unload, destroy, or render harmless without compensation, the goods they did not know were dangerous (United Nations, 1956). This provision reflects Article 4, paragraph 6, of the Hague-Visby Rules. This situation is similar to others taken into consideration by the CMR, where a carrier is required to ask their counterparty for instructions, but the nature of the goods and the failure of the sender allow the carrier not to ask for any instruction (Pesce, 1987). The provision bestows on a carrier a power which, if exercised, may have serious economic consequences for the person entitled to dispose of the goods. Of course, it would be wrong to expect too much of a carrier's knowledge in this regard. If the carrier believes in good faith that the goods are more dangerous than they really are, no complaint can be laid against them: the rule will still be applied. This provision seems to govern carriers' liability whenever an accident occurs. In fact, under such circumstances, the carrier must prove the condition of the dangerous goods that they agreed to transport (De Gottrau, 1987).

The provision does not place any limit on the rights of the carrier, so it is necessary to investigate whether compliance with the provisions of the CMR is discretionary. The problem arises especially when a carrier has not been informed of the nature of the freight they are transporting and it does not represent an immediate danger. On this point, it could be argued that the solution which should be endorsed is that the carrier is required to assess whether to continue the journey or not. This is because the CMR does not place a duty on the carrier but simply gives them the power to unload, render harmless, or destroy the goods (Messent & Glass, 2018).

Furthermore, Article 22 of the CMR is not the only provision that deals with the transportation of dangerous goods. Other regulation also plays a leading role in this scenario. In this regard, Article 6, paragraph 1f) and Article 7, paragraph 1a) of the CMR come into consideration, which, as mentioned above, set out that the consignment note must contain the nature of the goods and the method used for their packing, and, in the case of dangerous goods, their generally recognized description (United Nation, 1956). According to these provisions, the sender is liable for all expenses, loss, and damage sustained by the carrier because of the inaccuracy or inadequacy of the information provided (Messent & Glass, 2018). Article 22 of the CMR pays particular attention to the duty of information since it demands that the sender specify the nature of the danger inherent in the goods and any precautions necessary to be taken (De Gottrau, 1987). However, it is necessary to underline once more that the consignment note is prima facie evidence of the contract and of transport being carried out under that consignment note. Therefore, even though there is no information in the consignment note, the sender might be able to prove that the carrier was aware of the nature of the freight being transported (Messent & Glass, 2018).

One more provision that comes into consideration is Article 10 of the CMR, according to which the sender is liable to the carrier for damage to persons, equipment, or other goods, and for any expenses due to defective packing of the goods, unless the defect was apparent or known to the carrier at the time when they took possession of

the freight and they made no reservations regarding it (United Nations, 1956). In this case, the ADR also contains detailed rules concerning the loading and stowage of dangerous goods, and compliance with these provisions may be relevant for the purposes of the CMR. It follows that the two provisions are complementary and that the carrier who fails in their action under Article 22 of the CMR, may succeed under Article 10 of the CMR.

6. CONCLUSION

In this paper, some of the legal issues related to the CMR have been investigated. In more detail, from what has been explained above, it emerges that for the transport of dangerous goods, specific obligations rest upon the sender, which lead to specific liabilities in the case of their infringement. It follows that liability does not lie only with a carrier. As a result, discussing liability deriving from the transport of dangerous goods rather than carriers' liability seems more correct. A problem may arise if a sender's breach of their duties corresponds with an obligation of a carrier to collect information about the goods to be transported. This may be relevant especially if the shipment does not seem to be dangerous. On this point, it must be observed that such an obligation falls outside the CMR since the carrier is not required to verify the nature of the goods to be transported (De Gottrau, 1987). Under these circumstances, a carrier who does not want to run into problems, should in any case refer to the ADR, whose rules demand the identification of the goods which can be transported by road and the way the transport must be executed. If the provisions under the ADR have been complied with, a carrier is able to immediately recognize the freight and choose either to refuse to execute the transport or to take necessary precautions in connection with its transport (Pesce, 1987).

A different issue would occur when, in the absence of any information from the sender, the dangerousness of the goods is so evident that is necessarily recognized by a carrier. In this case, if the instructions regarding the ADR are also lacking, a carrier may be held liable since Article 8, paragraph 1, of the CMR, states that on taking over goods, they are required to check their apparent condition and packaging (United Nations, 1956).

As previously mentioned, this research is important because the theme in consideration has not been studied that much recently, although it is relevant. This means that the investigation of liability deriving from the transport of dangerous goods may be implemented and new conclusions may be reached. As a consequence, it can be the first step for future studies regarding other sorts of transportation too. In addition, the findings and conclusions of this paper are important for future research because they give new insight into a topic where literature is scarce and not recent. Furthermore, in the future, it will be possible to expand the research and deal with another theme. An additional area of investigation will be that of dangerous activities and in particular if the transport of dangerous goods falls within this category. This is because the intrinsic dangerousness of the goods transported leads us to believe that also the activity itself is dangerous. On this point, other international regulations will be analyzed, such as ADR. However, it must be underlined that the marginality of the specific field of research can undoubtedly be a limitation of it. Thus, it will take time to implement it and to provide new results.

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