International conference
60 years CMR

Switzerland

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Introductory comments

- Number of authorities on CMR cases (and transport cases in general) is very low.
  - Fairly high legal costs
  - Courts require the parties to substantiate the facts in great detail.
  - Apart from four Cantons with Commercial Courts (Zurich, Bern, Aargau and St. Gall) other cantonal courts usually lack the necessary expertise.
  - The legal discussion before inexperienced courts is more extensive.
  - The outcome is difficult to predict.
- Result:
  - The majority of disputes are settled either prior to or during court proceedings.
  - The development of Swiss transportation law is very much dependent on foreign judgments and commentators.

Art. 17 (2) CMR
Authorities

- No publicly available authorities on Art. 17 (2) CMR.
- Art. 447 (1) CO on general contracts of carriage has a similar wording:

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

- The burden of proving these facts is on the carrier.

Art. 17 (2) CMR
Wrongful act or neglect of the claimant

- Carrier has to prove negligent conduct of claimant and causation.
- Gross negligence of claimant is usually sufficient under Swiss law to interrupt causation (see e.g. Art. 56 of the Swiss Road Traffic Act).
- Slight negligence is sufficient if carrier did not contribute to the loss by its own negligence.
- If both were negligent, contributory negligence of claimant may reduce compensation (Art. 44 CO).
- Duty of sender to provide the carrier with sufficient information about the goods falls under this defence it the sender negligently breached this obligation.

Art. 17 (2) CMR
Wrongful act or neglect of the claimant

- Federal Supreme Court Judgment of 14 September 1976 (BGE 102 II 262):
  - Two shipments of valuable watches under a freight forwarding conract.
  - Swiss contract law applied.
  - The goods were not carried as valuable cargo by the carrier; freight forwarder did not give such instructions to the carrier although it knew the value of the goods
  - Sender (claimant) sued the defendant freight forwarder for the payment of damages.
  - Defendant argued that sender was contributorily negligent by not having given instructions in relation to the shipment.
  - The Federal Supreme Court held that the sender was not at fault and the freight forwarder remained fully liable. The sender did not have the obligation to give specific instructions as to how the shipments had to be carried out.
  - The sender informed the freight forwarder about the content of these two shipments and its value. That was sufficient.

Art. 17 (2) CMR
Instructions of the claimant

- Carrier has to prove that the loss was caused by the instructions given by the claimant.
- Negligence by claimant not required.
- Carrier did not negligently cause the loss otherwise it would be considered contributory negligence.

Art. 17 (2) CMR
Inherent vice of the goods

- Inherent vice:
  - Goods that deviate from their usual quality or nature;
  - e.g. wiring in an accumulator battery is defective and causes a fire during the carriage.
- Nature of certain kinds of goods (Art. 17 (4) (d)):
  - Goods having a particular nature of being damaged or destroyed;
  - e.g. food (such as fruits, meat, fish, wine, beer) or fragile goods (such as porcelain or glass).
- Carrier has to prove the inherent vice and that it also caused the loss.

Art. 17 (2) CMR
Inevitable event / lack of fault of carrier

- There is a general presumption of fault in contract law (Art. 97 CO).
- Swiss law applies an objective test and compares the acts of the wrongdoing party with the acts of a resonable person.
- Carrier can prove either
  - that it and its auxiliary persons (such as employees and sub-carriers) fulfilled its duty of care; or
  - that the breach of duty of care was not causative for the loss.
- The duty of care is assessed prior to the loss and not at hindsight.
- The extent of the carrier's duty of care ("circumstances which the carrier could not avoid") under Art. 17 (2) is higher than under Art. 447 CO but difficult to achieve in either case.

Art. 17 (2) CMR
Inevitable event / lack of fault of carrier

- First Civil Court of the Canton of Valais Judgment of 9 July 1997 (ZWR 1998 p. 133):
  - Claimant instructed the defendant to move a compressor of about six tons up to a hill (Swiss contract law applied).
  - While towing the compressor and maneuvering it uphill with a truck, the welds connecting the coupling device at the truck relented, the compressor got disconnected, rolled down the slope and came to a stop at the bottom of a lake.
  - The defendant carrier tried to argue that it was not at fault because the loss was caused by the sender's negligence in not providing the weight of the compressor.
  - The court did not find the claimant to at fault. The carrier did not use the appropriate means of carrying the compressor and was therefore unable to prove lack of his own fault.

Art. 29 CMR
Wilful misconduct

- There is no Federal Supreme Court Judgment on this point.
- Judgment of the Court of Appeal of the Canton of Basel-Stadt of 7 December 1989 (BJM 2000 p. 311) in relation to Art. 32 CMR (time bar):
  - Shipment of iron parts for a blast furnace from Chiasso (Switzerland) to Genova (Italy).
  - The driver collected the goods on Thursday evening.
  - Friday was a public holidyay. The driver parked the semi-trailer with the goods loaded on an unattended parking lot at his domicile in Como (Italy).
  - He let the rear tarpauling of the semitrailer open in order to demonstrate to possible thieves that the semitrailer did not contain any goods of interest.
  - During the night the semi-trailer and the goods were stolen.
  - The defendant carrier opposed the claim and argued that it had become time barred due to the one-year prescription period as per Art. 32 CMR.

Art. 29 CMR
Wilful misconduct

- The court held the following:
- Art. 100 CO prohibits the contractual parties to exclude their liability for losses that were caused through gross negligence.
- Article 454 (1) and (3) CO: claims for damages against the carrier prescribe after one year in case of damage, destruction, loss or delay of the goods; if the loss was caused through malice or gross negligence, the prescription period is 10 years.
- Gross negligence of the carrier is sufficient under Swiss law to break the limits of liability.
- Again an objective test is applied; the acts of the wrongdoing party are compared with the acts of a resonable person.
- Wilful misconduct under Hague/Visby Rules and the old Warsaw Convention has a higher requirement in Switzerland.
- The court found that the driver was grossly negligent.

Art. 29 CMR
Wilful misconduct

- Gross negligence under Swiss law:
  - if the most basic security measures that are evident or should be evident for any reasonable person under the prevailing circumstances were disregarded.
  - The behaviour in question must appear utterly unintelligible.
  - Gross negligence is not as easily given as e.g. under German law.

Art. 29 CMR
Wilful misconduct

- Judgment of the Commercial Court of the Canton of Aargau of 7 June 2011 (HOR.2010.47):
  - Claimant ordered a shipment of cosmectics and perfumes from a Swiss vendor.
  - Claimant's freight forwarder instructed a Dutch carrier (defendant).
  - During the night the driver parked the truck on an unattended and unsecured parking lot in France.
  - The goods were stolen while the driver was sleeping in his cabin.
  - The truck had an alarm system that was, however, out of order and the driver did not know how to operate it, anyway.
  - The Commercial Court came to the conclusion that the carrier was grossly negligent.

Thank you very much for your attention!

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