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## Arbitration in cross-border road transport – Plea for a modern understanding of Art. 33 CMR –

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## I. Definition of the Problem

### A. Introductory remarks

This paper is dedicated to my esteemed colleague Jolanta Kren Kostkiewicz. Through her most appreciated papers and lectures, Jolanta has had a great influence in the areas of conflicts of laws and International civil procedure law. I will deal with these two areas of law under the perspective of transportation law. Let me wish Jolanta all the best for her next phase of life.

### B. CMR as a central convention in cross-border road traffic

#### 1. Overview

The Convention on the Contract for the International Carriage of Goods by Road ("CMR") was concluded in Geneva on 19 May 1956 and entered into force in Switzerland on 28 May 1970. The CMR relates to the international transportation of cargo by road. It is applicable where a vehicle delivers (or intends to deliver) the cargo to a country other than that in which it was (or should have been) loaded, if at least one of these countries is a CMR contracting state.<sup>1</sup> In addition, there are other requirements such as the description of the term "vehicle", as well as some special multi-modal cases, or specific freight which are excluded from the scope of the CMR.

Despite these restrictions, the CMR is the central legal source for the road transport contract and for the CMR consignment note. The CMR regulates the most important rights, obligations and the liability of the three main players in road transport: the consignor, the carrier and the consignee.

The CMR is an extremely successful convention. In territorial terms, it applies in 58 countries, covering the whole of Europe, including Russia, Turkey, Ukraine, Georgia, Azerbaijan, Armenia, Albania, Belarus, Cyprus and Malta. It is also used in parts of the Arab region such as Morocco, Tunisia, Jordan, Syria and Lebanon. Despite the remarkable age of 62, the CMR is still considered an attractive convention to which new states have acceded to in recent years.<sup>2</sup> It has shaped a whole series of transport conventions and national legislative projects.

#### 2. Relationship between the contract of carriage and the CMR consignment note

The CMR primarily regulates the form and content of the CMR consignment note and attaches legal consequences to a legally valid consignment note.<sup>3</sup> The CMR also regulates various issues concerning the CMR contract of carriage. Art. 4 CMR states that the contract of carriage should be recorded in a consignment note, the "*absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage*

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<sup>1</sup> Art. 1 para. 1 CMR.

<sup>2</sup> Jordan (2009), Malta and Syria (2008).

<sup>3</sup> See in particular Articles 7 and 11 para. 2 and (3), Article 9; Article 12, Article 13 para. 2; Article 16 (4); Articles 24 and 26 CMR.

*which shall remain subject to the provisions of this Convention". A requirement of validity of the consignment note is "a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention".<sup>4</sup>*

The concept of the contract of carriage remains somewhat ingrained in the CMR, since most rights and obligations are linked to the existence and content of the consignment note. Nevertheless, the term "contract of carriage" is already prominent in the title of the CMR<sup>5</sup> and it is mentioned in the Convention itself in various paragraphs, such as (a) in the field of multi-modal transport,<sup>6</sup> (b) with regards to the conclusion and performance of the contract of carriage,<sup>7</sup> (c) in connection with the function of the consignment note as proof of the conclusion and content of the contract of carriage,<sup>8</sup> (d) with the contractual rights of third parties,<sup>9</sup> (e) with the determination of the contract of carriage as the basis for claims for damages by the sender against the carrier in the case of cash on delivery of shipments,<sup>10</sup> (f) with the determination of the court of jurisdiction,<sup>11</sup> (g) with the limitation of the contractual claims<sup>12</sup> and (h) with the restriction of the passive legitimisation for claims against a first to last carrier subject to the contract of carriage or a carrier demonstrably responsible for the damage<sup>13</sup>.

This overview shows that the CMR presupposes the existence of a contract of carriage without regulating it in detail. However, it is clear and undisputed that the CMR is based on the concept of a consensual contract<sup>14</sup>, i.e. it does neither specify formal requirements (such as the issue of a consignment note) nor does it require a real act (such as, for example, the handing over of the cargo).

### 3. Mandatory design of the CMR

The Convention owes its particular force to Art. 41, according to which "*subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void*". However, this invalidity sequence only refers to the conflicting contractual clause, not to the entire contractual relationship.

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<sup>4</sup> Art. 6 para. 1 lit. k CMR.

<sup>5</sup> French: 'Convention relative au contrat de transport international de marchandises par route (CMR)'.

<sup>6</sup> Art. 2 para. 1 sentence 2 CMR.

<sup>7</sup> Thus Title III of the CMR.

<sup>8</sup> Art. 9 para. 1 CMR.

<sup>9</sup> Art. 13 para. 1 CMR.

<sup>10</sup> Art. 21 CMR.

<sup>11</sup> Art. 31 para. 1 lit. a, Art. 33 and Art. 39 para. 2 CMR.

<sup>12</sup> Art. 32 para. 1 lit. c CMR.

<sup>13</sup> Art. 36 CMR.

<sup>14</sup> See Motte/Temme, CMR, Vor Art. 1 N 24 ff; Koller, TransportR, CMR, Vor Art. 1 N 7; Clarke, p. 21 ff.

#### **4. Importance of national law in the scope of the CMR**

The interaction between the CMR and national legal systems gives rise to concrete contractual leeway<sup>15</sup>. Whereas the legal issues regulated by the CMR are the same in all contracting states, the CMR does not provide any guidance as to the interpretation of the rules regulated on national levels only. Furthermore, in some specific issues, the CMR refers explicitly to the law of the contracting states which opens a wide discretion for interpretation for national courts such as the definition of the concept of "*equivalent to wilful misconduct*" in Art. 29 CMR.

#### **5. Limitation of liability of CMR**

The CMR is characterised by a strictly regulated liability regulation with extensive exclusions and limitations of liability. Accordingly, Art. 17para. 1 CMR states that the carrier is fully liable to pay damages for the total or partial loss of the goods, any destruction caused to the goods as well as any delay in delivery. However, this wide liability is limited by a number of exceptions, which are listed in detail in the following provisions of the CMR. This includes the whole variety of a complete exclusions of liability, the easement of evidence up to a cap on the claim for damages to 8.33 special drawing rights/kilogram<sup>16</sup>. However, this whole system of exclusion and limitation of liability is limited by Art. 29para. 1 of the CMR, according to which the carrier does not rely on these exclusion or limitation of liability provisions in Art. 17 et seq. CMR. The CMR states that "*if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct*"<sup>17</sup>, then the party at fault will be fully liable towards the injured party for the damages caused.

This exception in Art. 29para. 1 CMR has become of central importance in practice because different legal traditions have developed in the various CMR contracting states<sup>18</sup> as a result of the reference to the *lex fori* for the determination of "*equivalent to wilful misconduct*". While courts in some CMR contracting states essentially require proof of intent before holding the carrier fully liable, courts in other states<sup>19</sup> are of the understanding that this concept needs the essential element of gross negligence, although with different characteristics.<sup>20</sup>

#### **6. Procedural determinations**

Art. 31 CMR contains a series of procedural provisions strongly imbued with the spirit of the 1950s. This applies especially to Art. 33 CMR, according to which the parties may agree on the jurisdiction of an arbitral tribunal.

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<sup>15</sup> Furrer, N 506 ff.

<sup>16</sup> Art. 23 para. 3 CMR.

<sup>17</sup> "... if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct"; "... si le dommage provient de".

<sup>18</sup> For example, in the Netherlands, Belgium or Great Britain.

<sup>19</sup> Such as Germany, France, Italy, Austria, Switzerland, the Scandinavian countries and Turkey.

<sup>20</sup> See the overview in Koller, TransportR, CMR, Art. 29 N 3 ff.

Art. 33 CMR contains many special features which to date have ensured that the jurisdiction of arbitration courts is rarely agreed within the scope of the CMR. Art. 33 CMR contains the following wording in the legally binding English and French versions:<sup>21</sup>

*"The contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention."*

*"Le contrat de transport peut contenir une clause attribuant compétence à un tribunal arbitral à condition que cette clause prévoie que le tribunal arbitral appliquera la présente Convention".*

The purpose of the above sentences is to examine whether it is now time to interpret Art. 33 CMR in the light of developments in arbitration over the last 60 years.

Arbitration has changed fundamentally since the 1950s and is now a key element in cross-border trade dispute resolution. It is based on the central pillars of party autonomy, fair due process and the independence and neutrality of the arbitrators. It is shown that these firmly established principles should be taken into account in the interpretation of Art. 33 CMR.

### **C. Arbitration in cross-border road transport**

Arbitration has yet to assert itself in the field of road transport. We can only speculate as to the reasons why. An important reason could be that in many cases the claims for damages from the CMR do not reach the amounts in dispute for which it tends to be worthwhile to conduct arbitration proceedings that are relatively more expensive than state proceedings. As a result, small and medium-sized companies, often found in road transport matters, are sceptical about the arbitration proceedings because they fear that they do not have the liquid funds to finance the enforcement (or defence) of their legal claims.

Nevertheless, the importance of Art. 33 CMR is largely underestimated in practice:

- On the one hand, as it will be shown below, the agreement of an arbitration clause opens up opportunities to better assess the legal consequences of a breach of contract in advance.
- Secondly, contractual obligations relating to road transport matters are regularly laid down in framework agreements, service level agreements, logistics, supply chain, 3PL or 4PL contracts in which arbitration clauses are regularly agreed. In these cases, a review must be taken to see whether the CMR relevant claims are covered by the agreed arbitration clause at all.

### **D. Theses**

This paper shows that, on the basis of the standard arbitration clauses of recognised arbitration institutions such as the International Chamber of Commerce<sup>22</sup>, the Swiss Rules<sup>23</sup> or

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<sup>21</sup> See Art. 51 para. 3 CMR.

<sup>22</sup> <<https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>>.

<sup>23</sup> <<https://www.swissarbitration.org/Arbitration/Arbitration-clauses/Model-Arbitration-Clause>>.

the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce<sup>24</sup>, a legally binding arbitration agreement may also be concluded under the CMR if it is combined with a choice of law clause in favour of a CMR contracting state.

It is also intended to demonstrate that the choice of an arbitration clause allows better contractual control of some of the fundamental problems of the CMR.

## II. State jurisdiction under the CMR

### A. Basis

Art. 31 CMR regulates the central questions of international procedural law, which cannot necessarily deviate from a party agreement (Art. 41 CMR). Art. 31para. 1 CMR regulates international jurisdiction and Art. 31para. 2 CMR the *lis pendens* and *legal validity* of a judgement. Art. 31para. 3 and 4 CMR regulate the enforceability of judgments from contracting states and Art. 31para. 5 CMR the security for the process costs. Finally, reference should be made to Art. 39 of the CMR, which addresses some of the key issues of recourse between successive carriers.

Despite the misleading wording in Art. 31para. 1 of the CMR, which in the first sentence seems to differentiate between "*court or tribunal of a contracting country*" and "*courts or tribunals of a country*" it is undisputed that Art. 31 CMR regulates the jurisdiction as well as the recognition and enforcement of and exclusively between the courts of the contracting states<sup>25</sup>. It is also undisputed that the CMR rules take precedence over the Lugano Convention<sup>26</sup> and the ECJ Regulation<sup>27</sup>.

However, the ECJ has stated that the primacy of the CMR is recognised only to the extent that "*that convention, apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (favor executionis)*"<sup>28</sup>. The ECJ considers that these principles include recitals 6, 11, 12 and 15 to 17 of the ECJ Regulation<sup>29</sup> and the smooth functioning of the internal market referred to in the first recital. Whether these principles would also apply to the Lugano Convention would be desirable, but it is legally doubtful, especially as the Community law principles invoked by the ECJ do not apply outside the EU.

<sup>24</sup> <<http://www.sccinstitute.com/dispute-resolution/model-clauses/english/>>.

<sup>25</sup> Demuth, CMR, Art. 31 N 14.

<sup>26</sup> Art. 67 Abs. 1 LugÜ.

<sup>27</sup> Art. 71 para. 1 EuGVVO, on this in detail Mankowski, TranspR 2014, 129 ff. (130 f.).

<sup>28</sup> European Court of Justice, ECJ C-533/08, judgment of 04 May 2010\_TNT Ex-press Nederland BV vs. AXA Versicherung AG, N 56.

<sup>29</sup> European Court of Justice, ECJ C-533/08, judgment of 4 May 2010\_TNT Ex-press Nederland BV vs. AXA Versicherung AG, N 49: "*Principles of free movement of judgments in civil and commercial matters, predictability of the competent courts and thus legal certainty for citizens, orderly administration of justice, avoiding as far as possible the risk of parallel proceedings and mutual trust in the judiciary within the Union*".

The CMR exclusively regulates international jurisdiction<sup>30</sup> and therefore only the question in which states courts have a jurisdiction. The CMR does not regulate which local court within each specific state actually has jurisdiction (*local jurisdiction*). The local jurisdiction within the respective jurisdiction is determined by the law applicable in that country. As shown below, in Switzerland, this question is not based on the Swiss Code of Civil Procedure but rather on Art. 112 f. IPRG.<sup>31</sup>

## B. Limits of prorogation according to Art. 31 para. 1 CMR

Art. 31 para. 1 CMR provides in principle (and exclusively) three competences of state courts:

- The court that is contractually agreed between the parties (*prorogatio fori*);
- The place where the defendant (a) has his habitual residence, (b) his principal place of business or (c) the branch or agency through which the contract of carriage was concluded; and
- The place where the goods were taken over by the carrier or the designated place of delivery.

The competing competences of Art. 31 para. 1 CMR shall not be discussed here any further.<sup>32</sup> With regards to the *prorogatio fori*, it should be noted that the agreement on the place of jurisdiction differs substantially from the usual agreements on the place of jurisdiction in three respects:

- With the agreement on the place of jurisdiction, the parties merely choose international jurisdiction and thus only a jurisdiction, as can be seen from the French<sup>33</sup> and English<sup>34</sup> (but not the German) wording<sup>35</sup>. If the parties agree on the jurisdiction of a particular court, (only) the jurisdiction of that country is agreed<sup>36</sup>. The court with specific jurisdiction is then determined according to the national law of that country.<sup>37</sup> In Switzerland Art. 112 f. IPRG is applicable, because the local jurisdiction in international matters is always governed by the IPRG<sup>38</sup>. As far as the national IPR allows, the controversial question must be answered in the affirmative as to whether the parties can agree on local jurisdiction within the jurisdiction. This is justified by

<sup>30</sup> MüKoHGB/Jesser-Huß, CMR, Art. 31 N 16.

<sup>31</sup> Statt vieler: Markus, RZ 189.

<sup>32</sup> See MüKoHGB/Jesser-Huß, CMR, Art. 31 N 18 ff.

<sup>33</sup> " ... le demandeur peut saisir, en dehors des juridictions des pays contractants désignées d'un commun accordpara. les parties, les juridictions du pays ..."

<sup>34</sup> " ... the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties ..."

<sup>35</sup> "... kann der Kläger, ausser durch Vereinbarung der Parteien bestimmte Gerichte von Vertragsstaaten, die Gerichte eines Staates anrufen, auf dessen Gebiet ...". For the exclusive binding character of these two languages, see Koller, TransportR, CMR, before Art. 1 N 4.

<sup>36</sup> See Demuth, CMR, Art. 31 N. 29; Koller, TransportR, CMR, Art. 31 N 5; MüKoHGB/Jesser-Huß, CMR, Art. 31 N 24 ff.

<sup>37</sup> Koller, TransportR, CMR, Art. 31 N. 5 f.; MüKoHGB/Jesser-Huß, CMR, Art. 31 N 24.

<sup>38</sup> Walter/Domej, p. 92 f.

the fact that the CMR does not regulate the local competence and this question is therefore not covered by Art. 41 CMR<sup>39</sup>.

- Furthermore, the agreement on the place of jurisdiction does not derogate the statutory jurisdiction(s). Rather, the agreed jurisdiction supplements the jurisdictions<sup>40</sup> provided by the CMR. As a result, the parties cannot contractually determine the forum. As far as the forum law is applicable, the applicable law cannot be controlled by a *prorogatio fori*.<sup>41</sup> This is particularly important for the application of the tightening of liability under Art. 29 CMR, which is shaped by national law.<sup>42</sup>
- The scope of the jurisdiction agreement pursuant to Art. 31 para. 1 CMR is also limited by the fact that the contracting parties cannot agree on the jurisdiction of a court in a CMR third country.<sup>43</sup>

These special features of the jurisdiction clause under Art. 31 para. 1 CMR requires a careful examination of the contractual options, because in the vast majority of cases, no clarifying control of the contractual effect can be achieved, but on the contrary, the options can be extended to a *prorogatio fori* when asserting CMR claims. As a result, the process strategic options to be examined with jurisdiction clauses are extended by a further dimension and thus the pre-litigation effort is increased.

### **III. Arbitration clause under the CMR (Art. 33 CMR)**

#### **A. Special features of the CMR arbitration clause**

According to Art. 33 CMR, the parties may agree on the jurisdiction of an arbitral tribunal "*if the provision stipulates that the arbitral tribunal shall apply this Convention*". The arbitration clause is intended to ensure the application of the CMR by the arbitral tribunal, but its scope is unclear and controversial. The fathers of the CMR apparently wanted to prevent the parties from circumventing the application of the CMR by agreeing an arbitration clause.

This condition for the application of Art. 33 CMR raises various questions how to draft a CMR arbitration clause. This question is of great relevance because, under Art. 41 para. 1 of the CMR, any arbitration clause which does not meet the requirements of Art 33 CMR is null and void. As a consequence, such nullity of an arbitration clause would lead, contrary to the contractual will of the contracting parties, to the jurisdictions of the courts listed in Art. 31 para. 1 CMR.

The linking of the arbitration clause with the applicable law clause is unusual in the field of arbitration. As pointed out, the state competences regulated in Art. 31 para. 1 CMR, does not correspond to the standards that are customary today. The following four controversial questions on the CMR arbitration clause have emerged from literature and case law:

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<sup>39</sup> MüKoHGB/Jesser-Huß, CMR, Art. 31 N 24 with reference to the contradictory jurisdiction and teaching in Austria and Germany. More critical, in particular with regard to Art. 30.2 HS 2 ADSp 2003; Koller, Trans-portR, CMR, Art. 31 N 5, whereby with Art. 30.3 sentence 2 ADSp 2017 the exclusivity in the scope of the CMR was removed.

<sup>40</sup> See Demuth, CMR, Art. 31 N 29

<sup>41</sup> See the following explanations.

<sup>42</sup> See the following explanations.

<sup>43</sup> See Demuth, CMR, Art. 31 N 29.

- Does the agreement of a CMR arbitration clause exclude the jurisdiction of state courts according to Art. 31 para. 1 CMR (derogative effect)?
- Does Art. 33 CMR require an explicit reference to the CMR in the CMR arbitration clause itself?
- Who is bound by the agreed CMR arbitration clauses?
- What are the formal requirements for CMR arbitration clauses?

## **B. Derogative effect of a CMR arbitration clause?**

As pointed out above, a jurisdiction agreement according to the explicit wording of Art. 31 para. 1 CMR does not have any derogative effect; the contractually agreed jurisdiction only adds to the responsibilities defined in the CMR.

Case law<sup>44</sup> and literature<sup>45</sup> argues that this principle of lack of derogative effect also extends to arbitration law. This is justified by the fact that Art. 31para. 1 CMR expressly mentions the terms "Tribunals" as well as "Courts" in the binding English wording of the CMR. Some argue that this should be understood as a reference to Art. 33 of the CMR, which also uses the term "Tribunals".

However, this reading of Art. 33 CMR does not convince. It is a recognized principle and indispensable dogmatic fundament of arbitration law that an arbitration clause does not only opt for an arbitral tribunal but also concurrently derogate national courts. Without such a derogative effect, the arbitral tribunal could not rely on its competence-competence, which is another fundamental principle of modern arbitration. Furthermore, the lack of derogative effect would make the initiation of arbitration proceedings considerably more difficult because the precise point in time of the *lis pendens* would be difficult to determine; the arbitration proceeding would have to be compared to all the possible jurisdictions according to Art. 31 CMR. Finally, all these issues would ultimately jeopardise recognition and enforcement based on the 1958 NY Convention<sup>46</sup>.

There is no need to question all these central elements of international arbitration simply by referring to the English wording in Art. 31para. 1 of the CMR. Firstly, on this point in particular, the French version, which is legally equivalent to the English version, speaks neutrally of "les juridictions du pays". On the other hand, the English term "Tribunal" can also be understood as an indication of the various forms of decision-relevant state institutions in the various CMR contracting states.<sup>47</sup>

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<sup>44</sup> MüKoHGB/Jesser-Huß, CMR, Art. 33 mentions the Austrian Supreme Court Vienna, resolution of 5 May 2010 - 7 Ob 216/09 d, TranspR 2010, p. 387 Peter Csoklich at the symposium on current questions of transport law in Vienna of 16 November 2017, article published in TransportR 2018.

<sup>45</sup> Loewe, in: Helm Johann Georg/Schachtschneider Karl Albrecht (ed.), Trans-port - Wirtschaft - Recht, Gedächtnischrift für Johann Georg Helm, Berlin 2001, p. 181 ff, (185); Demuth, CMR, Art. 33 N 4a.

<sup>46</sup> Convention on the Recognition and Enforcement of Foreign Arbitration Awards (SR 0.277.12).

<sup>47</sup> Vgl. OLG Koblenz 6 U 1162/06, Urteil vom 22. Februar 2017, TranspR 2007, S. 249 ff.

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In summary, it can therefore be stated that Art. 33 CMR, in contrast to the agreement on jurisdiction, permits exclusive jurisdiction of the chosen arbitral tribunal because the arbitration clause has a derogative effect on national jurisdiction.

### **C. Express reference to the CMR in the arbitration clause?**

#### **1. Issue**

Art. 33 CMR creates many ambiguities by formulating that jurisdiction may be agreed, "*but only if the provision stipulates that the arbitral tribunal shall apply this Convention*". This reference to the safeguarding of the application of the CMR by the competent arbitration court is unclear and controversial in its scope. The fathers of the CMR apparently introduced this provision to prevent the application of the CMR from being circumvented by a choosing an arbitration clause. It is therefore important to clarify the scope of this condition, since any arbitration clause that violates Art. 33 CMR is null and void<sup>48</sup> and cannot establish any jurisdiction of the arbitral tribunal.

#### **2. Conventional understanding**

In a conventional interpretation, various courts<sup>49</sup> and authors<sup>50</sup> consider an explicit reference to the CMR in the arbitration clause itself necessary. It is considered that the agreement of the arbitration clause in connection with the choice of law in favour of a CMR state is not sufficient for complying with the prerequisites of Art. 33 CMR.

This narrow interpretation of Art. 33 CMR is justified by the fact that the fathers of the CMR wanted to ensure the application of the CMR, so that the parties cannot circumvent the application of the mandatory CMR law by choosing an arbitral tribunal. It was feared that the recognition and enforcement of arbitration awards in other states could be jeopardised without such a mandatory guarantee of the application of the CMR.

#### **3. Modern understanding of Art. 33 CMR**

The wording of Art. 33 CMR is rather clear and should be interpreted in the light of its mandatory application, Art. 41 CMR. Nevertheless, we will now discuss how this undisputed intention of the CMR's founding members can be implemented today in the light of modern arbitration.

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<sup>48</sup> Art. 41 CMR.

<sup>49</sup> Österreichischer OGH, 7 Ob 216/09d, decision of 5 May 2010; OLG Koblenz, judgment of 22 February 2007 - 6U 1162/06, TranspR 2007, p. 252 ff.; OLG Köln, judgment of 2 August 2005 - 3 U 21/05, TranspR 2005, p. 472 f.

<sup>50</sup> See, for example, Clarke N 47; MüKoHGB/Jesser-Huß, CMR, Art. 33 N 2; Demuth, CMR, Art. 33 N 2, each with further references to jurisdiction and teaching.

Arbitration has developed and consolidated since the mid-fifties.<sup>51</sup> In this context, the following key points of this development should be highlighted, in particular:

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>52</sup> which established the conditions for the recognition and enforcement of arbitral awards and thus the minimum standard for the rule of law of arbitration proceedings worldwide<sup>53</sup>.
- The UNCITRAL Arbitration Rules of 1976, 2010 and 2013<sup>54</sup> and the UNCITRAL Model Law on International Commercial Arbitration of 1985 and 2006,<sup>55</sup> which established international standards on arbitration and its embedding in national legal systems. These rules clarified and harmonised many fundamental issues of dispute such as the implementation and state control of arbitration proceedings worldwide by decisively influencing many procedural rules of arbitration institutions and state laws.
- Further, internationally recognised standards have also developed, such as the corresponding International Bar Association rules and guidelines.<sup>56</sup>
- Last but not least, since the 1950s, extensive jurisprudence has developed in fundamental issues of arbitration. This jurisprudence has been intensively pursued and influenced by academics and by national courts, both within the framework of arbitration itself and on national levels.

In summary, it can thus be stated that within the scope of the CMR there is a recognised minimum standard on the basic principles of arbitration and that these basic principles can be used for a modern interpretation of Art. 33 CMR.

(1) On that basis, it could be argued that the arbitration agreement constitutes, based on the recognised "*separability doctrine*", an independent contract to be distinguished from the other contractual relationship between the parties. This independent contract is not subject to the CMR, so Art. 33 CMR does not apply to the arbitration agreement itself.<sup>57</sup>

However, this view does not convince. The CMR not only regulates the CMR consignment note but also central issues of the contract of carriage. Art. 4 CMR expressly states that defects or loss of the consignment note does not affect the validity of the contract of carriage and the CMR consignment note proves the conclusion and content of the contract of carriage (see Art. 9 para. 1 CMR). This shows that the CMR consignment note and the

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<sup>51</sup> So does Loewe, *Straßenbeförderung*, p. 186.

<sup>52</sup> SR 0.277.12.

<sup>53</sup> The NY Convention applies in 157 states, all CMR contracting states have ratified it.

<sup>54</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html)>.

<sup>55</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)>.

<sup>56</sup> <[https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)>, so etwa die IBA Rules on the Taking of Evidence in International Arbitration (2010) und die Guidelines on Conflicts of Interest in International Arbitration (2014).

<sup>57</sup> Cf. Clarke, No 47, with a reference to an earlier (1997) commentary by Basedow, MüKoHGB, Art. 33 N 1.

contract of carriage are so closely interwoven that the exclusion of the arbitration agreement from the scope of application of the CMR within this contractual network does not appear conclusive, especially as it is expressly mentioned in Art. 33 CMR.

(2) The need for an explicit reference to the CMR in Art. 33 can be explained historically in two respects. Firstly, in the fifties of the last century, it was not clear on which legal basis an arbitral tribunal should make an arbitral award, especially if the parties did not make an explicit choice of law. It was also unclear to what extent the arbitral tribunal was bound by mandatory provisions of the applicable national law. Finally, the recognition and enforcement of arbitral awards was hardly regulated by state treaties. These uncertainties have led the fathers of the CMR to explicitly define the necessity of applying the CMR in Art. 33. Today, however, these questions have been largely resolved.

Art. VII of the European Convention on Arbitration (Geneva Convention)<sup>58</sup> clarifies that an arbitral tribunal must determine the applicable law under conflict of laws rules, considering trade practices. A decision according to the principles of equity is only possible if this is based on a party agreement and this is permissible according to the *lex arbitri*. The Geneva Convention is an important step in the development of commercial arbitration,<sup>59</sup> since it summarises the state of the arbitral tribunal at the time in one legal act. Today, this principle is found both in Art. 28 UNCITRAL Model Law and Art. 35 UNCITRAL Arbitration Rules and thus forms the international standard in arbitration.

#### UNCITRAL Model Law

##### "Article 28. Rules applicable to substance of dispute

(1) *The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.*

(2) *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*

(3) *The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.*

(4) *In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*

#### UNCITRAL Arbitration Rules

##### "Article 35

1. *The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.*

2. *The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so.*

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<sup>58</sup> <<http://www.disarb.org/de/51/materialien/europ%C3%A4isches-uuml;berin-kommen-uuml;ber-die-internationale-handelsschiedsgerichtsbarkeit--61-id19>>; Original: Europäisches Übereinkommen über internationale Handelsschiedsgerichtsbarkeit vom 21. April 1961, <[https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch\\_XXII\\_02p.pdf](https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf)>.

<sup>59</sup> See Berger/Kellerhals, RZ 131 ff.

*3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction".*

However, the question as to which conflict of laws rules are relevant for determining the applicable law has not been conclusively clarified. In his preparations for the UNCITRAL Model Law, MICHAEL H. BONELL referred to the importance of these rules and stressed that "*the problem had been solved either by applying the law of the place of arbitration or the law of the procedure selected by the parties, or by leaving it to the arbitral tribunal to determine the rules of private international law it considered appropriate to the case. Both solutions were unsatisfactory; the first because frequently there was very little connection between the place of arbitration and the substance of the dispute, and the second because uncertainty to which it could give raise*". GARRY BORN is talking about a "*confusion regarding the choice of the applicable law*"<sup>60</sup>. However, he states that arbitration courts must now determine the applicable law based on conflict of laws rules: "*Law is the basis for international arbitration, without which the arbitral process loses both its legitimacy and efficacy, and instead diserves its most fundamental purpose of finally resolving disputes in an adjudicative, legally-binding manner... It is equally wrong, for related reasons, to say that 'traditional' choice-of-law rules are of little relevance to international arbitrators. On the contrary, 'traditional' or otherwise, conflict of laws rules are no less 'law' and no less binding, than other rules of law. Indeed, in international transactions, choice-of-law rules are one of the most fundamental and important elements of the legal framework giving effect to the parties' agreement*"<sup>61</sup>. Based on his broad analysis of various arbitration rules, arbitration decisions and the worldwide academic discussion, GARRY BORN concludes that determining the applicable law on the basis of the conflict of laws rules at the agreed place of arbitration is the simplest, most convincing and most predictable rule.

In recent years, the concept of the closest connection (also laid down in Art. 187 of the IPRG) has established itself in various arbitration constitutions.<sup>62</sup> However, a clear standard has yet to be established internationally. The "Hague Principles on Choice of Law in International Commercial Contracts"<sup>63</sup> is probably the best expression of today's globally recognised state of the debate on the applicable conflict of laws.

In summary, it is therefore undisputed today that an arbitral tribunal must base its decisions on national law and that it must determine this law on comprehensible rules of conflict of law. However, it has not been conclusively clarified which conflict of law rules apply. Today, the conflict of law rules in contract law have converged to some extent, but an internationally recognised standard has yet to be established.

(3) Art. 41 CMR leads to the question of whether an arbitral tribunal is also obliged to apply the corresponding mandatory standards in application of national law. This question has long been discussed controversial<sup>64</sup>, but can be answered in the affirmative today.<sup>65</sup> In the last seventy years, arbitral tribunals around the world have applied national mandatory

<sup>60</sup> See Born, p. 2655 for a detailed overview of the various approaches.

<sup>61</sup> See Born, p. 2656.

<sup>62</sup> See Born, S. 2662.

<sup>63</sup> <<https://www.hcch.net/de/instruments/conventions/full-text/?cid=135>>, vgl. hierzu Girsberger, SRIL, 2014, 545 ff.

<sup>64</sup> Born, p. 2698 et seq. in relation to arbitral awards.

<sup>65</sup> Cf. Girsberger/Voser, RZ 1374; Born, p. 2698 ff.

standards.<sup>66</sup> Today, it is now largely undisputed that the parties cannot contractually exclude the application of such mandatory national standards either at the level of conflict of laws or at the level of substantive law.<sup>67</sup>

Therefore, today, there are no doubts that an arbitral tribunal is obliged to apply the mandatory standards of the CMR. The distrust of arbitration expressed by the fathers of the CMR in Art. 33 CMR is no longer justified in this sense.

Nevertheless, the view in the (German) doctrine still prevails today that a CMR arbitration clause must explicitly refer to the application of the CMR.<sup>68</sup> It is argued that incorrect application of the CMR by a court of arbitration in the context of recognition and enforcement under the NY Convention cannot be invoked. Although this is correct, there is no such difference between the enforcement of arbitral awards and judgments of state courts, since the prohibition on reviewing the content of a judgment in the prohibition on recognition and enforcement is also laid down in Art. 31 para. 3 sentence 2 CMR.

From the introductory remarks it follows that an explicit reference to the CMR in the arbitration clause can only be waived if the arbitral tribunal must apply the CMR even without such an explicit reference to the CMR. Two key findings result from the above explanations:

- It is now a recognised standard in international commercial arbitration that an arbitral tribunal must base its judgment on national law and apply the mandatory provisions of that applicable legal system.
- In contrast, no internationally recognised standard has yet been established on the two questions of which conflict of laws determines the applicable law and how this conflict of laws is structured.

The application of the CMR is therefore only ensured if the uncertainty of the applicable conflict of laws is eliminated. This in turn is only possible if the parties choose the law of a CMR state. The parties may clarify in the choice of law clause that this is to be applied to the exclusion of that state's conflict of laws (substantive reference), but this is not necessary. Without corresponding indications, based on a choice of law rule, it can be assumed that the parties wish to apply a specific substantive law and thus exclude the risk of the application of another law established by the conflict of laws of that specific state.

In summary, it can therefore be stated that the requirement to include the CMR in the arbitration clause is fulfilled if the parties have also made a choice of law in favour of a CMR state in addition to the arbitration clause.

## **D. Who is bound by the arbitration clause?**

### **1. Issue**

The arbitration clause is a private-law agreement between the contracting parties and therefore only creates obligations on these parties.

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<sup>66</sup> Born, p. 2700.

<sup>67</sup> Cf. Girsberger/Voser, RZ 1375; Born, p. 2702 f.

<sup>68</sup> See Loewe, complaints and lawsuits, p. 319.

However, transport law is characterised precisely by the fact that, in addition to the contracting parties (sender and carrier), third parties are also affected. In particular, the consignee as the third-party benefits from the contract of carriage. However, further parties such as the contracting parties of the basic contract triggering the transport (i.e. purchase, work, leasing, rental contracts etc.) are also affected by the contract of carriage. Furthermore, as already mentioned, contracts of carriage are regularly included in higher-level distribution, logistics, 3PL or 4PL contracts or the contracting parties have laid down contractual obligations in such higher-level road framework agreements or quality targets in service level agreements. In practice, many contracts of carriage are also concluded verbally, so that proof of the conclusion of a contract of carriage can be provided solely via the CMR consignment note. Finally, it should be noted that Art. 28 CMR also regulates non-contractual liabilities, although the scope of this provision is not entirely clear even after seventy years of legal practice.

In all such cases, third parties may have an interest in the rights, requirements and obligations arising from the contract of carriage. Some of these are regulated directly in the CMR (e.g. about the recipient in Articles 12, 13, 15, 22, 30 CMR; with regard to the injured third party: Art. 28 CMR), in part the legal status of these third parties is governed by the applicable national law.

The question therefore arises as to whether and to what extent such third parties are bound by an arbitration clause if they wish to assert rights under the CMR.

## 2. Involvement of third parties in an arbitration clause

The question of the scope of arbitration clauses is still not conclusively clarified. In sports arbitration, an extension to third parties can be observed, for which there are good reasons to ask whether this extension can only be justified by the special features of sports law or whether it can be regarded as a modern development of arbitration law. For example, in a decision of the Swiss Federal Court<sup>69</sup>, a licensing dispute between the exclusive supplier of boxing equipment and a worldwide boxing association was subject to the arbitration clause under association law, although this was not directly agreed in the license agreement.

In arbitration practice, many recognised exceptions have developed in which third parties are granted a legal status in arbitration proceedings:<sup>70</sup>

- *Group of Companies Doctrine/companies' spheres of activity:* An arbitration agreement extends to these third parties if it can be demonstrated that they are either legally part of the entity bound by the arbitration clause (e.g. as a branch) or that this company has expressed, directly or indirectly, the will to be bound by this arbitration clause. In Switzerland, the Federal Supreme Court<sup>71</sup> based a corresponding decision on Art. 2 of the Swiss Civil Code and thus acknowledged the legal effect of this principle without, however, expressly confirming this.<sup>72</sup> The applicability of the

<sup>69</sup> BGer 4A\_103/2011, judgment of 20 September 2011.

<sup>70</sup> See Girsberger/Voser, RZ 400 ff.

<sup>71</sup> BGer 4A\_450/2013, judgment of 7 April 2014, E. 3.

<sup>72</sup> See Girsberger/Voser, RZ 410; Berger/Kellerhals, RZ 497 ff.

arbitration clause is also recognised in the case of a genuine recourse to the arbitration clause in the case of incorporated or commercial companies.<sup>73</sup>

- **Assignment:** When assigning a claim, it must be examined whether the rights and obligations under the (independent) arbitration agreement are extended to the cedant. Various criteria can be decisive in this regard; at its core is the cedant's consent to the arbitration agreement.<sup>74</sup>
- **Guarantee:** Similar principles to cession may apply to a guarantee if the guarantor has agreed to the arbitration agreement between the principal debtor and the beneficiary.<sup>75</sup>
- **Third-party contractual beneficiaries:** The extension of an arbitration clause to the beneficiary under a contract is also valid if all three parties have agreed to such an extension. Without the consent of the beneficiary third party, the latter may freely decide whether it wishes to submit to the arbitration clause.<sup>76</sup>

### 3. Integration of the receiver

As mentioned above, the CMR grants the recipient a special legal status. Nevertheless, it must be examined independently of whether the recipient is (or can be) included in the arbitration relationship as a contractual third-party beneficiary. The answer depends on whether the recipient has already expressly or implicitly agreed to the arbitration agreement in advance. Otherwise he is free to decide whether to submit to the arbitration clause.

The recipient's direct or indirect consent to the arbitration clause may be assumed in the following circumstances:

- If the dispute falls under the CMR arbitration clause, the recipient and the sender form a personal union, since this commitment to the arbitration clause is not linked to his function, but rather obligates the person concluding the contract.
- The consignee agrees that the parties to the contract of carriage conclude an arbitration clause.
- As a party to the underlying transaction (e.g. purchase, work, leasing or rental contract etc.), the recipient agrees to the conclusion of an arbitration clause in the contract of carriage to be concluded.

It is questionable whether the reference in a CMR consignment note to the existence of an arbitration clause in the contract of carriage is binding for the consignee if he only receives the CMR consignment note during the transportation of the goods. It is true that an arbitration clause can also be agreed retrospectively, so that a binding contract cannot be denied *per se*. However, the recipient may undoubtedly refuse to be included in the arbitration clause.

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<sup>73</sup> Berger/Kellerhals, RZ 526 ff.

<sup>74</sup> See Girsberger/Voser, RZ 303 ff.

<sup>75</sup> Berger/Kellerhals, RZ 506 ff.

<sup>76</sup> Berger/Kellerhals, RZ 455, 513 ff.

It further remains unclear whether silence after delivery of the CMR consignment note can be interpreted as consent. This question can probably be answered without further review, because arbitration clauses in road transport matters are still rather rare. Such a clause is therefore not to be expected in a CMR consignment note and hence silence cannot be interpreted as consent.

#### 4. Sub-contractors

The carrier is liable according to Art. 3 CMR for the mistakes of his subcontractors as if for his own acts or omissions. Such claims against the carrier may therefore be brought based on the arbitration clause, even if the damage was caused by an accommodation carrier.

There is no direct contractual relationship between the accommodation carrier and the consignor. Therefore, the CMR claims cannot be asserted directly against the carrier of accommodation; thus, an arbitration clause does not extend to such claims.

#### 5. Successive carriers and accommodation carriers within the meaning of Art. 34 to 40 CMR

An exception to the rules mentioned above must be observed if the carriers are successive carriers or accommodation carriers within the meaning of Art. 34 CMR. For this purpose, the entire carriage must have been agreed under a single contract and the corresponding consignment note must have been handed over to the second and each subsequent carrier. In practice, these provisions have become of limited significance, as the subsequent carriers and accommodation carriers usually avoid the increased liability caused by the acceptance of the consignment note and the main carrier does not wish to establish the transparency about the freight required by Art. 37 lit. b CMR.<sup>77</sup>

The following carrier or accommodation carrier within the meaning of Art. 34 CMR becomes a contractual partner of the sender, but only according to the consignment note. He does not know the conditions of the contract of carriage and these terms therefore not binding for him. Under the conditions of Art. 13 CMR, the consignee also has direct claims against the following carrier or accommodation carrier. In Art. 36 CMR, the passive legitimization is limited to the first, the last and the subsequent carrier or carrier responsible for the damage.

These restrictions in relation to the legal effects on the information contained in the consignment note also affect the arbitration clause. As long the arbitration clause is not listed in the consignment note as appropriate information within the meaning of Art. 6para. 3 CMR, this clause does not bind the following carrier/accommodation carrier.

For the validity of the contractually agreed arbitration clause for the subsequent carrier or accommodation carrier, it must therefore be proven that the parties were aware of the arbitration clause (e.g. by a reference in the consignment note). If such proof succeeds, the subsequent carrier or sub-contractor shall be responsible for proving that he has objected to the validity of this arbitration clause.

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<sup>77</sup> See Koller, TransportR, CMR, Vor Art. 34 N 3.

## 6. Arbitration clauses in superordinate contracts

As explained in the introduction, contracts of carriage in modern logistics are regularly integrated into higher-level contracts such as framework agreements, logistics contracts or service level agreements. Arbitration agreements are concluded more frequently in these contracts than in pure contracts of carriage. The question arises as to whether arbitration agreements apply to the underlying CMR contracts of carriage or how it can be ensured that corresponding arbitration agreements can be extended to such CMR contracts of carriage.

In the case of larger logistics projects, in addition to the other obligations arising from the framework agreement (e.g. assembly, labelling, etc.), corresponding rights and obligations relating to road-related transport services are also included. According to the view expressed here, the agreed arbitration clauses are also applicable to the obligations subject to the CMR, insofar as these are supplemented by a choice of law clause in favour of a CMR contracting state. However, it also follows from the above that when using the following carriers and accommodation carriers, there needs to be a review as to how they will be included in the arbitration clause whether this will be through the contract or via the consignment note.

Thus, to the extent that these framework agreements focus on other services and the transport service is promised by one party, which cannot provide it itself and must commission third parties to do so, this CMR transport service provided by third parties is not subject to the arbitration clause *per se*. The contractual performance of the party organising the transport shall be subject to the arbitration clause, but its transport order itself shall be subject to the arbitration clause only if the above conditions for the existence of an independent arbitration clause are fulfilled.

However, it should be noted that the party organising the transport may, within the framework of arbitration proceedings, notify the carrier of the dispute and thus the CMR may indirectly become the subject of the arbitration proceedings.

## E. Formal requirements

The CMR does not contain any specific formal requirements for the arbitration clause. Accordingly, the form depends on the respective law, which is determined by the conflict of laws at the seat of the arbitral tribunal.<sup>78</sup> Usually this is the condition of a written agreement, partly qualified by the requirement of a signature.

If the arbitration clause is contained in a consignment note, the question arises as to whether this fulfils the formal requirement. Although the consignment note must be signed by both parties (sender and carrier),<sup>79</sup> Art. 5 para. 1 sentence 2 CMR refers to national law at the place of issue as to whether a pure stamped signature is legally valid.

This can lead to the validity of the signature for the arbitration clause and for the consignment note being assessed according to different laws. Since an invalid consignment note

<sup>78</sup> See MüKoHGB/Jesser-Huß, CMR, Art. 33 N 3; For agreements on jurisdiction, see Loewe, reclamations and complaints, p. 311.

<sup>79</sup> Art. 5 Abs. 1 Satz 1 CMR.

does not affect the validity of the underlying contract of carriage and arbitration, the validity of the arbitration clause shall be governed solely by the law of the place of arbitration. Accordingly, a consignment note may be invalid, but the arbitration clause may apply. Conversely, an arbitration clause may be invalid if it has been agreed exclusively in a valid consignment note but does not comply with the formal requirements of the law applicable to the arbitration clause.

#### **IV. Advantages and disadvantages of an arbitration clause in CMR relevant contracts**

The above observations have shown that an arbitration clause in CMR contracts of carriage leaves some questions unanswered, but it is important to note that some disputes have been resolved in recent years.

For important questions, the CMR refers to the forum law, for example in Art. 23para. 7 CMR for the conversion of damages from the Special Drawing Rights into the national currency, in Art. 29para. 1 and 32para. 1 CMR for the interpretation of the concept of "*equivalent to wilful misconduct*" and in Art. 32para. 3 CMR for the inhibition of limitation.

It was shown above that the CMR foresees many jurisdictions which cannot be limited by an agreement on jurisdiction, because the choice of jurisdiction does not derogate the other jurisdictions but rather supplement it with the chosen jurisdiction. The questions listed above can therefore neither be contractually determined by a choice of law clause nor by an agreement on jurisdiction. In particular, the open question of "*equivalent to wilful misconduct*" can be of decisive importance in the event of damage, as this is interpreted very differently in the various contracting states as explained above. In practice, this results in the parties seeking to determine these issues by bringing an early legal action in a jurisdiction favourable to them by filing a positive performance or negative declaratory action (*forum running*).

As already explained, the arbitration clause has a derogative effect on the competences laid down in the treaty. In other words, an arbitration clause can create legal certainty already at the time of the conclusion of the contract, because this determines the applicable law in relation to the three important issue of national currency, the concept of "*equivalent to wilful misconduct*", and the suspension of the statute of limitations. This means that there is no longer any reason for a *forum running*, the parties can clarify their process opportunities in peace and seek a negotiated solution.

Other advantages of the arbitration clause also apply:

- With a view to consistency with higher-level logistics or framework agreements, the entire legal relationship can be assigned to one single arbitral tribunal, without the risk that individual issues relating to cross-border road transport could be torn out of the overall contractual context and judged by a national court (which cannot be determined in advance);
- By reducing the arbitration procedure to one instance, the duration of the proceedings and the costs of a procedural dispute can be reduced.
- With the involvement of experienced referees, the procedures can be carried out efficiently in relation to the party and the subject.

- The enforcement of arbitral awards is greatly simplified almost worldwide through the 1958 NY Convention.

The greatest obstacle to the agreement of an arbitral tribunal in CMR matters is the amount in dispute, as Art. 23 para. 3 CMR limits the amount in dispute to 8.33 SDR/kg as a rule. For small disputed amounts, arbitration is generally more expensive than state jurisdiction, especially in countries such as Germany, where the conduct of legal proceedings is extremely favourable.

Arbitration has responded to these challenges and now provides scaled arbitration agreements. For example, in addition to the standard clause<sup>80</sup>, the following types of procedures can be chosen when choosing the Swiss rules:

- *A decision is reached within 6 months*: Sole arbitrator, expedited proceedings;
- *Pure file proceedings*: Sole arbitrator, approval of pure file proceedings, combinable with accelerated proceedings;<sup>81</sup>
- *Shortening of the time limits for the parties and/or the appointment of the arbitral tribunal*: The initial response<sup>82</sup> and the appointment of the arbitral tribunal must take place within 15 instead of 30 days;
- *Determination of the amount in dispute for the change from sole arbitrator to tribunal of three arbitrators*.<sup>83</sup> In principle, a clause would also be conceivable which would only allow arbitration to take effect from a certain amount in dispute, although in these cases partial actions are probably to be ruled out.

To this end, the Swiss Chambers' Arbitration Institution has compiled the "DArb Recommendations" and recommends the appointment of a sole arbitrator for arbitration proceedings of less than CHF 100,000, a duty to initiate the proceedings directly with the statement of claim, and to give the arbitrator a proactive role in the search for an amicable solution. To this end, it has issued recommendations for the drafting of arbitration clauses.<sup>84</sup>

These measures can significantly reduce the costs of arbitration proceedings. The cost calculator of the Swiss Chambers' Arbitration Institution<sup>85</sup> shows surprisingly low costs for small amounts in dispute,<sup>86</sup> but given the low compensation it will be difficult for the parties to find an experienced person to act as arbitrator.

Nowadays there is a trend towards modern logistics concepts that include arbitration clauses. The transport of the goods constitutes a partial service in these contracts, which in future will increasingly lead to points of contact between arbitration and the CMR.

<sup>80</sup> See <<https://www.swissarbitration.org/Arbitration/Arbitration-clauses>>.

<sup>81</sup> Pursuant to Art. 6 para. 4 Swissrules, the accelerated procedure applies in principle to a value in dispute of less than CHF 1,000,000.

<sup>82</sup> Art. 3 para. 7 Swissrules.

<sup>83</sup> As a rule, this limit is set at CHF 1,000,000.

<sup>84</sup> <<https://www.idiproject.com/sites/default/files/documents/Recommendations%20for%20Expedited%20Arbitration%20%282%29.pdf>>.

<sup>85</sup> <<https://www.swissarbitration.org/Arbitration/Cost-of-Arbitration>>.

<sup>86</sup> Amount in dispute CHF 10,000/20,000/50,000/100,000, legal costs (registration, arbitrators' fees and administrative costs): CHF 5,700/6,900/10,500/16,500.

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Therefore, the question of the agreement of an arbitration clause should be carefully considered and deliberately decided in the future for pure CMR contracts of carriage, but also for logistics and framework agreements.

## **V. Conclusions**

To date, arbitration clauses in CMR contracts have gained little importance. This relates to the somewhat unclear wording of Art. 33 CMR. However, this provision must now be interpreted in the light of modern arbitration. Accordingly,

- the arbitration clause excludes state jurisdiction (derogative effect);
- any arbitration clause in favour of an arbitral tribunal in a CMR contracting state combined with a choice of law clause in favour of a CMR contracting state is legally valid;
- the arbitration clause may also extend to third parties who may derive claims from the CMR.

By choosing an arbitration clause, the contracting parties can decide in advance the important question of the carrier's unlimited liability. This gives them the certainty that this question is not ultimately decided by random factors due to a hectic *forum running*.

In particular, when drafting an arbitration clause, the possibility of adapting the procedure to the circumstances of the CMR should also be examined, so that arbitration costs can be kept to a minimum.

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