How article 1 of the CMR convention is interpreted by the French courts

Whereas the concept of “contract of carriage” contained in article 1 subsection 1 of the CMR convention is objectively construed by the courts (1), the other requirements that have to be met for the convention to apply are subject to the courts’ subjective assessment, with case law focussing on the intent of the parties to the contract of carriage (2). When all requirements are met, the CMR convention imperatively applies (3).

1. The objective interpretation of the concept of “contract of carriage”

The CMR convention only applies to operations whose main object is a contract of carriage (Cour de Cassation, commercial division, 18 March 1986, case no. 84-12.306).

Under French law, for a contract to be a contract of carriage, three cumulative requirements must be met:

- goods have to be moved
- by a professional carrier for a consideration
- with the carrier being in control of the operation.

The contract can only be a contract of carriage if moving the goods is the primary purpose of the carrier’s obligation (Paris Court of Appeal, 31 March 2011, case no. 09/10223). This is well-established case law.

In order to determine whether the CMR convention applies to a given dispute, the courts transpose the French conception of what makes a contract of carriage. As a consequence, contracts whose primary purpose is not to move goods are excluded from the scope of the convention.

For instance, logistics contracts are excluded, because moving the goods is not the contract’s primary purpose despite the contract providing for ancillary transport operations as part of the global operation (Cour de Cassation, commercial division, 22 January 2008, case no. 06-18.822).

Under French law, a contract including logistics services whose primary purpose is not the transport element is not a contract of carriage (Colmar Court of Appeal, 19 February 2014, case no. 13/00508).

Likewise, the courts have determined that forwarding contracts do not fall within the scope of the CMR convention (Cour de Cassation, commercial division, 18 September 2007, case no. 06-13.097). Under French law, the purpose of a forwarding contract is to organise the moving of goods, not the moving of the goods per se (Cour de Cassation, commercial division, 16 February 1988, case no. 86-18.309).

It is worth noting that pursuant to article L3224-1 of the French Code of Transport a carrier subcontracting a transport in all or part is liable as a freight forwarder in accordance with articles L132-1 to L132-9 of the French Commercial Code.

2. Subjective assessment of the operation

In order to determine whether the further requirements of article 1 subsection 1 of the CMR convention are met, the Cour de Cassation focusses on the parties’ intent.
According to article 1 of the convention, the place of taking over the goods and the place designated for delivery specified in the contract must be situated in two different countries of which at least one must be a contracting country.

For France’s highest civil court, the parties need only have intended to carry out such an operation. Even where the operation could not be completed and the carrier failed to cross the border, the convention still applies.

The only requirement set by the courts is for the international operation to have been carried out under a single consignment note specifying a place of taking over the goods and a place designated for delivery that are situated in two different countries of which at least one is a contracting country. Even where the goods were taken over to be moved within the borders under a CMR consignment note, still the CMR convention applies (Versailles Court of Appeal, 24 June 2004, case no. 03/00884). On the other hand, where a national carrier uses a domestic consignment note, they are deemed not to have intended for the convention to apply to the transport.

Whether the transport is carried out by one or several successive carriers is immaterial as long as it is carried out under a single contract of carriage. Accordingly, the convention also applies to combined transports provided the parties intended to enter into an international contract of carriage by road.

The Cour de Cassation therefore ruled that the convention should apply to road-rail transport operations provided the operation falls within the scope of the convention as defined in its article 1 (Cour de Cassation, commercial division, 18 March 1986, case no. 84-12.306).

Since the parties' intent effectively prevails over whether the operation has in fact materialised, the parties to a purely domestic contract of carriage may contractually submit the operation to the CMR convention, subject to any French overriding mandatory rules (Cour de Cassation, commercial division, 01 July 1997, case no. 95-12.221).

### 3. The mandatory nature of the convention’s provisions

Provided the CMR convention applies, its provisions are mandatory – the parties may not contractually agree to disregard them unless the convention itself allows it – and the French courts do in fact consider them to be overriding mandatory rules.
How article 17.2 of the CMR convention is interpreted by the French courts

The French courts approach each cause of liability exemption differently. While the claimant’s wrongful act or neglect, the claimant’s instructions, and the inherent defect of the goods are restrictively construed (1), the courts have a tendency to distort the meaning of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent in that they liken it to their own concept of force majeure (2).

1. The strict interpretation of the first three causes of exemption from liability

The first three causes of exemption from liability provided for in article 17.2 of the convention are strictly construed by the French courts. They generally find the claimant liable where the latter failed to forward the required information or documentation to the carrier.

For instance, the following have been found to amount to neglect: the sender’s failure to inform the carrier that the goods was liable to self-ignite (Cour de Cassation, commercial division, 23 May 1989, case no. 87-17.883) and the party ordering’s failure to give any instructions to the carrier as to the goods’ value and which vehicles were appropriate (Lyon Court of Appeal, 14 March 2013, case no. 11/07885).

In order for the claimant’s wrongful act or neglect to exempt the carrier from liability, there must be a direct and exclusive chain of causation between it and the damage (Cour de Cassation, commercial division, 26 November 1996, case no. 89-10.346).

In essence, the courts consider that the claimant’s instructions are the instructions given to the carrier, where they are told how to perform the service. For instance, the carrier was exempted from liability when it was established that the damage sustained by the goods was directly caused by the claimant’s wrong instructions concerning the required temperature for the carriage of fruit (Cour de Cassation, commercial division, 19 April 1982, case no. 79-15.808).

Under French law, an “inherent defect” is “the deterioration of the goods because of an internal cause” (Rouen Court of Appeal, 28 June 1990, case no. 2151/88), i.e., the goods have a proclivity to deteriorate on their own. That is how the French courts interpret the concept of inherent vice under the CMR convention. So for instance, fruit infected with a disease before being moved suffer from such an inherent defect, thus exempting the carrier from liability (Aix-en-Provence Court of Appeal, 21 June 1985, case no. 83/6119).

2. The distorted interpretation of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent

French law includes the concept of force majeure. Where force majeure has been established, the debtor is fully exempted from their obligation. In contract law, a force majeure event is an event that prevents the obligation from being performed on condition that it could neither be anticipated upon entering into the contract nor controlled upon its occurrence (Cour de Cassation, plenary assembly, 14 April 2006, case no. 02-11.168).

The cause of exemption included in article 17.2 is less restrictive in that, contrary to the French concept of force majeure, it is immaterial whether the event could have been anticipated or not. Therefore, if the convention applies, the judges should obey the letter of the law and not extend the concept of force majeure.
Although the Cour de Cassation once quashed a ruling in which the judges had required proof that the event could not have been anticipated in a case of theft (Cour de Cassation, commercial division, 27 January 1981, case no. 79-13.833), other rulings by the courts of appeal and the Cour de Cassation applied the French concept of force majeure when determining whether there was cause to exempt the carrier according to article 17.2 of the CMR convention. For instance, the Cour de Cassation once held that the carrier is exempted from liability provided that the cause of the damage is the result of a force majeure event, “whereby the fact that the wording of article 17 of the CMR convention was not cited word for word is immaterial” (Cour de Cassation, commercial division, 03 March 1998, no. 96-11.979).

Therefore, the judges alternately use the French concept of force majeure and the convention’s concept of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent in order to determine whether there is cause to exempt the carrier from liability.

However, the exemption can only apply where the circumstances of the obligation’s non-performance are known: where these circumstances cannot be established, the carrier cannot be exempted from liability (Paris Court of Appeal, 17 June 2015, no. 12/06007).

Examples of events amounting to circumstances which the carrier could not avoid and the consequences of which he was unable to prevent: Aggravated larceny is a cause of exemption if carried out in such a violent manner that it amounts to a circumstance that could not be either avoided or prevented. The Cour de Cassation ruled in that case that there was no need to determine whether it could have been anticipated, in accordance with article 17.2 of the CMR convention (Cour de Cassation, commercial division, 09 April 2013, case no. 11-28.360).

Other events deemed to be cause for exemption provided they meet the requirements of article 17.2 of the convention: a fire due to a foreign body rubbing against a tyre (Versailles Court of Appeal, 08 April 2010, case no. 09/00315); weather conditions declared to be a natural disaster (Paris Court of Appeal, 02 October 2014, case no. 12/19914); the decision by customs officials to continue with a strike as the carrier is about to cross the border (Orléans Court of Appeal, 12 November 1996, case no. 94/003206); a traffic accident at night (Metz Court of Appeal, 30 October 1990, case no. 88/1313).
How article 29 of the CMR convention is interpreted by the French courts

In France, in the eyes of the courts, wilful misconduct and default equivalent to wilful misconduct are two separate and alternate notions under which a carrier can be deprived of the benefit of limitations. In short, they are two separate causes for ruling out a limitation of liability.

The French courts however apply their own definition of “dol” when assessing wilful misconduct as specified in article 29 of the CMR convention (1). Furthermore, the meaning of “default equivalent to wilful misconduct” evolved in French law from “gross misconduct” up to 2009 to “inexcusable fault” thereafter (2). Contrary to subsection 1, the courts strictly apply subsection 2 of article 29 of the convention (3).

1. Wilful misconduct

The French concept of “dol” was evolved by the courts. According to the Cour de Cassation, “the debtor’s actions amount to wilful misconduct where the debtor deliberately refuses to perform their contractual obligations even though they do not intend to cause their contracting partner harm thereby” (Cour de Cassation, 1st civil division, 04 February 1969, case no. 67-11.387).

Therefore, for the carrier’s actions to amount to wilful misconduct, they must have acted wilfully with the intention to breach the contract, though not necessarily with the intention to cause harm to their contracting partner.

According to article 1150 of the French Civil Code, the debtor whose actions amount to wilful misconduct is deprived of the benefit of any statutory or contractual limitations (for an application of this principle in transport law, see Cour de Cassation, commercial division, 04 March 2008, case no. 07-11.790).

Pursuant to article 1151 of the French Civil Code, the carrier’s wilful misconduct only deprives them of the benefit of the limitation of liability for the immediate and direct consequences of their failure to perform the contract.

When applying article 29 of the CMR convention, the French courts interpret the concept of wilful misconduct as they would under French law.

For instance, the actions of a carrier who diverted a lorry from its planned itinerary for the benefit of thieves were ruled to amount to wilful misconduct in the meaning of article 29 of the convention (Versailles Court of Appeal, 25 June 2013, case no. 11/09237). Likewise, a carrier who failed to comply with the instruction not to subcharter was found guilty of wilful misconduct (Cour de Cassation, commercial division, 04 March 2008, case no. 07-11.790).

2. Default equivalent to wilful misconduct

The French legal definition of default equivalent to wilful misconduct has evolved over time.

Initially, gross misconduct on the carrier’s part amounted to a default equivalent to wilful misconduct in the meaning of article 29 of the CMR convention.

Gross misconduct has been consistently defined by the courts as “extremely serious negligence bordering on wilful misconduct that shows that the carrier, who is in control of their actions, is unable to perform the contractual task they took on” (Cour de Cassation, commercial division, 27 February 2007, case no. 05-17.265).
For instance, a carrier who fails to properly load the entrusted goods (computer hardware) despite being aware of “both the fragility and value thereof” and personally overseeing the loading is guilty of gross misconduct (Paris Court of Appeal, 04 July 2001, case no. 1999/11647), so is a carrier speeding on a slippery road while disregarding running bans (Cour de Cassation, commercial division, 16 October 2012, case no. 11-10.071).

The French Act no. 2009-1503 of 08 December 2009, which came into force on 10 December 2009, inserted article L133-8 into the French Commercial Code, according to which “The only equipollent to wilful misconduct is the carrier’s or the forwarder’s inexcusable fault. An inexcusable fault is deliberate misconduct that implies that the person committing it was aware of the likelihood of the damage which they nonetheless recklessly accepted without any good reason. Any clause to the contrary shall be deemed to be invalid.”

The above article therefore expressly draws a parallel between French law and article 29 of the CMR convention: Only an inexcusable fault can amount to a default equivalent to wilful misconduct in the meaning of article 29 of the convention provided the four cumulative requirements of article L133-8 of the French Commercial Code are met.

For instance, the fact for a carrier to stray from their itinerary for no good reason (for a social call) and to leave the goods unattended is an inexcusable fault amounting to a default equivalent to wilful misconduct in the meaning of article 29 of the convention (Lyon Commercial Court, 13 May 2013, case no. 2011J03109, IDIT issue 41613).

Gross misconduct, which retains its original meaning in French law, can no longer be considered as amounting to wilful misconduct in the meaning of article 29 of the CMR convention, unless the events at issue date back to before article L133-8 of the French Commercial Code came into force (Cour de Cassation, commercial division, 01 April 2014, case no. 12-14.418).

3. Limitation for subcontractors

The French courts enforce a strict interpretation of subsection 2 of article 29 of the CMR convention, applying the liability rules of subsection 1 even where the default equivalent to wilful misconduct was committed by the substitute carrier (Versailles Court of Appeal, 17 June 2010, case no. 09/02778) who then cannot avail themselves of the liability ceilings (see, e.g., the ruling of the Lyon Court of Appeal of 09 September 2011, case no. 08/07104, which was not quashed on that point).