

STUCK BETWEEN CONSUMER PROTECTION AND CARRIER'S LIMITED LIABILITY: THE RECOURSE GAP IN THE CASE OF E-COMMERCE

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This paper compares seller's liability with the carrier's liability and, if a recourse gap exist, looks at ways how the ambit of this gap can be reduced. EU Consumer law is highly protective and mandatory, not allowing derogations from its rules. Since the entry into force of the Consumer Rights Directive 2011 the risk of any loss or damage during delivery rests upon the seller. The Consumer Sales Directive contains the remedies available to the buyer in case of loss or damage during shipment. The priority remedies are reparation or replacement of the damaged package, free of any charge. Also in case of a delay in delivery, the Directive puts the risk with the seller and entitles the buyer to terminate the contract.

Even though the seller can start a recourse action against the carrier, there can be a substantial recourse gap between the seller's liability exposure and personal damage, and the liability exposure of the carrier. European transport law, which is to a large extent equally mandatory, provides only for limited compensation in case of loss or delay.

The paper makes three types of recommendations to reduce the recourse gap or at least to make it more predictable. From a practical point of view, organisational and contractual techniques that allow parties to limit the recourse gap are first suggested. As the e-commerce sector contains a large number of start-ups and micro-entrepreneurs without great legal knowledge, suggestions are also made for an EU legal intervention aimed at preventing this gap from affecting the viability of e-commerce. The EU has not intervened in carrier liability so far. However,

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as the EU states that “[r]ealising the internal market for online services is one of the key factors in the effort to make the European Union the most competitive and dynamic knowledge-based economy in the world”, elimination of obstacles in carriage law to the development of these online services should also be of paramount importance for the EU.

Keywords: liability to deliver, Consumer Rights Directive, recourse gap, damage, loss, and delay,

I INTRODUCTION

According to the European Union (EU) “[e]-commerce is one of the main drivers of a more prosperous and competitive Europe, with a significant potential for contributing to economic growth and employment.”¹ Even though home delivery is a very important competitive advantage for online sales of consumer goods, at the same time, the transport involved might be the Achilles’ heel for sustainable growth of e-commerce. Not only is the consumer entitled to a 14-day right of withdrawal, with the costs of the initial carriage to be covered by the web shop, but the seller also bears the risk of damage during transport under the Consumer Rights Directive.² Under the general law of obligations³, a web shop could try to limit the exposure to this risk by making its carriage contracts back to back with consumer law. However, carriage law is to a large extent mandatory, leaving the web shop with very little contractual freedom.⁴ Moreover, especially in the case of high value consumer goods, carriage law is very carrier-friendly. The web shop seems therefore to be stuck in the middle between consumer-friendly and carrier-friendly liability rules. In this article we inquire into the size of the recourse gap that follows from the applicability of both sets of legislation on the web shop.

¹ Communication from the Commission, A roadmap for completing the single market for parcel delivery Build trust in delivery services and encourage online sales, COM/2013/0886 final, 16 December 2013.

² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *O.J.* L 304/64, 22 November 2011 (Article 20 Consumer Rights Directive).

³ In all countries included in the research, general law of obligations is as a rule non-mandatory.

⁴ See for example Article 41 CMR.

1. Sales contract: mandatory two-tier consumer protection

EU consumer law offers two-tier consumer protection. The first tier consists of the Consumer Rights Directive with, amongst others, rules on market information, the right of withdrawal and the passing of risk. The second tier consists of the Consumer Sales Directive⁵, with rules on the guarantee period in case of a consumer sale. As both instruments are EU Directives, Member States have to implement these rules in their national legislation without, however, being able to lower the level of protection offered by the Directives.⁶ While the Consumer Sales Directive still leaves some playing room to individual Member States, as this is a minimum harmonisation Directive⁷, such playing room is very much narrowed down under the Consumer Rights Directive, imposing maximum harmonisation unless explicitly otherwise provided.⁸

2. Carriage contract: mandatory carriage law

The liability of the air, road and rail carrier is not governed by EU instruments, but by international conventions. In this study the main focus lies with the liability exposure under the CMR⁹, the Convention applicable to road transportation. However, the Montreal Convention,¹⁰ applicable to transport by air, and COTIF-CIM¹¹, applicable to railroad transportation, can also be applicable to parcel delivery contracts. Such applicability is not necessarily

⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, 7 July 1999.

⁶ Article 1 jo. Article 8 Consumer Sales Directive. Under the Consumer Rights Directive any change to the level of protection is in general prohibited, also when it is in favour of the consumer: Article 4 Consumer Rights Directive (“Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.”).

⁷ Article 1.1 and recital 2 Consumer Sales Directive.

⁸ Article 4 and recital 2 Consumer Rights Directive.

⁹ Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956, United Nations, Treaty Series, Vol. 399, p. 189.

¹⁰ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (Montreal Convention), United Nations, Treaty Series, Vol. 2242, p. 309.

¹¹ Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), Appendix B to the Convention concerning International Carriage by Rail (COTIF), Bern, 9 June 1999 (COTIF-CIM), www.otif.org (accessed 10 February 2016).

limited to the air or rail stretch of the contracts. Both COTIF-CIM and the Montreal Convention can be applicable door-to-door in case of parcel deliveries, as COTIF-CIM applies to accessory road transportation in addition to a rail transport contract¹² and the Montreal Convention installs a presumption according to which loss that took place during loading or delivery is considered to have taken place during carriage by air, subject to proof of the contrary.¹³ Contrary to the Consumer Regulations, carriage conventions are only applicable to international transport. As the focus of this article lies with the EU's ambition to establish an internal market for e-commerce, due to length constraints, we will not go into national carriage law.

II SELLER BEARS RISK FOR DELIVERY UNDER THE SALES CONTRACT

EU Consumer law is highly protective and mandatory, not allowing derogations from its rules. Since the Consumer Rights Directive 2011¹⁴ entered into force the risk for any loss or damage during delivery rests upon the seller, except if the consumer has selected the carrier himself provided that this carrier was not an option offered by the web shop.¹⁵ The Consumer Sales Directive contains the remedies available to the buyer in case of loss or damage during shipment.¹⁶ The priority remedies are reparation or replacement of the damaged goods, free of any charge.¹⁷ Also, in case of a delay in delivery, the Directive puts the risk with the seller¹⁸ and entitles the buyer to terminate the contract. Thus, in all situations where loss, damage or delay occurs during

¹² Article 1.3 COTIF-CIM.

¹³ Article 18.4 Montreal Convention.

¹⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *O.J. L* 304/64, 22 November 2011.

¹⁵ Article 20 *in fine* Consumer Rights Directive.

¹⁶ See Article 3.1 Consumer Sales Directive, see on the link between the two Directives (European Commission DG Justice, *DG Justice Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council*, June 2014, p. 58).

¹⁷ Article 3.2 Consumer Sales Directive.

¹⁸ Article 18.1 Consumer Rights Directive.

transport, the seller will have to refund and possibly additionally compensate the buyer (such claim is subject to national law).¹⁹

1. End of the seller's period of responsibility

According to Article 20 of the Consumer Rights Directive, the risk of loss, damage or delay during shipment only passes to the consumer when the consumer, or a third party indicated by the consumer, has acquired physical possession of the goods. Existing practises such as “delivery on driveway” or “delivery next door” do not constitute physical delivery within the meaning of Article 20, except if the neighbour was indicated by the consumer himself as a person entitled to take delivery.²⁰ Consequently, if the goods are delivered on the driveway and they get damaged or lost, the seller still bears the risk. The same is also true if the goods get damaged while in the possession of a non-designated neighbour.

2. Compensation for damage

There is a requirement to deliver conforming goods under the Consumer Sales Directive. Article 5(3) of that Directive stipulates that the burden of proof that the goods were delivered free of defects lies with the seller if a defect appears within six months of delivery.

a. Notification period

Even though the Directive does not provide a notification period, it allows Member States to require consumers to give notice of the damage within the period of 2 months after the damage was noticed.²¹

b. Priority remedies

When the defect appears immediately or within 6 months, the buyer is entitled to reparation or replacement of the defective product, free of any charge²² and within a reasonable time.²³

¹⁹ See for example: Court of Appeal Ghent 19 October 2012, NJW, Vol. 294, 2014, p. 32 (in this case a compensation for moral damage was awarded).

²⁰ Article 20 Consumer Rights Directive.

²¹ Article 5.2 Consumer Sales Directive.

²² Article 3.2 Consumer Sales Directive.

²³ Article 3.3 *in fine* Consumer Sales Directive.

Where the Directive requires the reparation or replacement to be free of charge, this does not only refer to the costs of the reparation itself, but to all the necessary costs incurred by bringing the product into conformity, particularly the cost of postage, labour and materials.

The replacement or reparation has to be performed within a reasonable period, taking account of the nature of the goods and the purpose for which the consumer required the goods.²⁴ The fact that the purpose is to be taken into account to assess the reasonability of the reparation time is of great relevance in case of gifts bought through e-commerce. The purpose of Christmas or Valentine's Day presents is to give them as a gift for Christmas or Valentine's Day. Consequentially, without reparation or replacement in a very short time frame, the seller will not have met these requirements and the buyer will be entitled to the subsidiary remedies.

c. Subsidiary remedies

If reparation or replacement is not possible, or if they are not performed within a reasonable time or without inconvenience for the buyer, he is entitled to an appropriate reduction of the price or, alternatively, he can choose to have the contract rescinded. In addition to these remedies, available under the Consumer Sales Directive, the buyer can claim additional compensation under general contract law.²⁵

3. Compensation for loss or delay

Both in case of loss and delay, the buyer is confronted with a situation where he does not get the parcel delivered at the time agreed upon or, if no time for delivery was agreed upon, within a reasonable time. According to the European Commission, 30% of consumers were confronted with delay in delivery and 8% with packages that were never delivered.²⁶ For this reason, the Directive

²⁴ Article 3.3 *in fine* Consumer Sales Directive.

²⁵ See for example: Article 1649 quinquies § 1 Belgisch Burgerlijk wetboek, www.juridat.be (hereinafter: BW); Court of Appeal Ghent 19 October 2012, NJW, Vol. 294, 2014, p. 32.

²⁶ TNS Political & Social at the request of the European Commission, Directorate-General for Health and Consumers, *Consumer attitudes towards crossborder trade and consumer protection*, flash Eurobarometer 358, 2013, http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf (retrieved 12 February 2016).

puts the risk of loss or delay with the seller.²⁷ Here, however, remedies available to the buyer are much more limited. First of all, if no time for delivery has been agreed upon explicitly, no remedy is available during the first thirty days. Only if delivery is delayed for a longer period, and the seller does not manage to make the delivery within an additional time for delivery provided by the buyer, the buyer is entitled to terminate the contract.²⁸

If, however, delivery within the agreed delivery time is essential, taking into account all the circumstances attending the conclusion of the contract, or if the consumer informs the trader prior to the conclusion of the contract that delivery by or on a specified date is essential, the buyer can terminate the contract if delivery was not made before or on this date.²⁹ Such situations do not only exist in case of explicit notice by the buyer; for example, the seasonal character of presents, such as Christmas gifts or Valentine presents, could be considered by courts as a relevant circumstance allowing the buyer to terminate the contract in case of a late delivery. In such situations even if no delivery time is explicitly agreed upon, a delay of a few days could entitle the buyer to terminate the contract. Moreover, the Directive explicitly provides that in addition to the termination, the buyer can have recourse to remedies that are available in national law.³⁰ However, as general contract law is to a large extent non-mandatory, web shops can include exoneration clauses, exonerating them from liability for further compensation under general contract law.

III. COMPENSATION FOR LOSS/ DAMAGE OR DELAY UNDER THE CARRIAGE CONTRACT

If the damage, delay or loss to the parcel came into existence during the time the goods were in the custody of the carrier, the seller can claim compensation from the carrier. Nonetheless the carrier might be able to escape liability if the web shop cannot successfully establish that the damage was caused within the carrier's period of responsibility or if the carrier can successfully invoke an exoneration ground. Even if the carrier is found to be liable, this compensation will be limited. First of all, not all types of damage are recoverable under the different regimes. Furthermore, under all mandatory carriage conventions

²⁷ Article 18.1 Consumer Rights Directive.

²⁸ Article 18.2 Consumer Rights Directive.

²⁹ Article 18.2 *in fine* Consumer Rights Directive.

³⁰ Article 18.4 Consumer Rights Directive.

compensation is limited to a certain amount per kilogram. Especially in case of high value consumer goods, these limits do not correspond to the actual value of the goods. Consequently, the shipper will often not be compensated in full, but only to a very limited extent. Even though in case of a severe fault of the carrier or his servants or agents, compensation in full is possible, the thresholds for such a claim are so high that this possibility is to a large extent merely virtual.

1. Applicable carriage law

The first question to be answered when inquiring into the liability exposure under the carriage contract concerns the applicable carriage law. Carriage law is very fragmented, with specific conventions applying to different means of transportation. As we saw earlier, CMR, COTIF-CIM and the Montreal Convention might all be applicable to parcel deliveries, depending on the mode of transportation.

The differences between these regimes can be substantial. For example, under CMR compensation amounts to 8.33 SDR per kilo³¹, compared to 19 SDR under the Montreal Convention.³² In practise the difference can be even bigger, as CMR on the one hand offers a wider possibility for exoneration³³ than the Montreal Convention.³⁴ On the other hand, under CMR the limits can be broken through, while they're unbreakable under the Montreal Convention.³⁵ Here three problems exist that prevent the web shop from being able to predict the liability exposure: 1) the applicable regime in case of multimodal transport, 2) the governing rules in case the mode of transportation is left open in the contract (a fleximodal contract) and 3) the applicable regime if part of the transport is performed by bicycle or a pedestrian courier.

a. Uncertainty in case of multimodal carriage

The traditional dominant position both in case law³⁶ but also in the na-

³¹ Article 23.3 CMR.

³² Article 22.3 Montreal Convention.1

³³ Article 17.2 and 17.4 CMR.

³⁴ Article 18.2 Montreal Convention.

³⁵ Article 22.5 Montreal Convention only allows the possibility to break through the limits in case of passenger transportation.

³⁶ CA 27 March 2004, *Quantum t. Air France*, European transport law, Vol. 39, 2004, p. 535; Antwerpen (4e k.) 25 October 2004, 2002/AR/286, European transport

tional multimodal legislation of, for example, Germany³⁷ and Holland³⁸ is to apply the combination doctrine to damage under a multimodal contract. According to this doctrine, the 'natural' regime is to be applied to damage on a specific stretch. This means that damage during the road stretch should be governed by CMR. Two points of uncertainty follow, however, from applying this theory. First of all, for the web shop it is unpredictable what regime will govern the damage, as this depends on the place where the damage occurs. The second problem concerns the situation where the place the damage occurred is non-localised. However, case law traditionally solves this by applying the regime that is the most beneficial for the cargo-interest.³⁹ Again this approach is also taken by the Dutch multimodal legislation.⁴⁰ German legislation instead has a separate regime for unlocalised damage⁴¹, thus making yet another regime potentially applicable.

A problem lies in the fact that parcel distribution, even more than other types of transport, happens behind a curtain, meaning that it is often impossible for the cargo interest to know where the damage took place, while it is fairly easy for the carrier to produce evidence of the place where the damage came into existence.

As mentioned before, COTIF-CIM and the Montreal Convention can be applicable door-to-door and thus they deviate from the general accepted theories on multimodal transport. First of all, COTIF-CIM does apply to national transport by road in addition to international railway transport. Therefore, if carriage by rail was agreed upon, both problems are tackled. Under the Montreal Convention, however, there is no real door-to-door applicability, but merely a presumption that the damage arose during carriage by air, in case of

law, Vol. 41, 2006, p. 79; RHA 2006, 99; Antwerpen 18 January 2005, European transport law, Vol. 41, 2006, p. 543; NJW 2006, 320; Antwerpen 13 September 2010 RHA, 2011, p. 57.

³⁷ § 452, a German Handelsgesetzbuch, Gesetz vom 10.05.1897 (RGBl. I S. 219) zuletzt geändert durch Gesetz vom 22.12.2015 (BGBl. I S. 2565) m.W.v. 31.12.2015, <http://www.gesetze-im-internet.de/hgb/index.html> (accessed 12 February 2016) (hereinafter: HGB).

³⁸ Article 8:41 Dutch Burgerlijk Wetboek Boek 8, <http://wetten.overheid.nl/BWBR0005034/> (accessed 12 February 2016) (hereinafter: NBW).

³⁹ See for example CA Antwerp 13 May 2010, 2009/AR/1079, European transport law, Vol. 46, 2011, p. 223.

⁴⁰ Article 8:43 NBW.

⁴¹ § 452 HGB.

unlocalised damage. Even though this presumption at first sight looks similar to the above discussed non-localised damage rule, this is not entirely true as the applicability of the Montreal Convention is not necessarily beneficial to the cargo-interest as breaking through the limits is impossible under the Montreal Convention. Nonetheless this presumption only plays when the carriage by road is limited to carriage for the loading, unloading or transshipment.⁴² Case law defines such carriage as carriage to the closest airport. In the hubs-and-spokes models that are operated by parcel distribution companies, the airport hub is, however, often not the closest airport. In such case courts might refuse the applicability of the presumption, but instead qualify this contract as a regular multimodal carriage contract, to which the normal rules are to be applied.⁴³

In the recent years there has been an evolution in German⁴⁴ and Dutch⁴⁵ case law, with the Supreme Courts in both countries holding that CMR is not applicable to (stretches of) a multimodal carriage contract. Insofar as the contract is governed by Dutch or German law, this is however not a real problem, because, as mentioned before, though the application of the national multimodal law we would again come to the applicability of CMR. This is, however, not the case if there is a choice of another national law with no such rules.

b. Uncertainty in case of fleximodal contracts

Parcel delivery contracts traditionally contain an option clause, allowing the carrier a free choice of the means of transportation.⁴⁶ The dominant position in most countries is that carriage conventions become applicable when the carrier selects a specific means of transportation for the performance of the contract containing an option clause.⁴⁷ This leaves the applicable liability

⁴² Article 18.4 Montreal Convention.

⁴³ See for an example: OLG Karlsruhe 18 May 2011, 18 U 23/10, <http://www.tis-gdv.de> (accessed 10 February 2016).

⁴⁴ BGH 17 July 2008, IZR181/05, BeckRS, 2008, p. 16669; LSK 2008, 380432; IBRRS 65906; NJW, 2008, p. 2782; VersR, 2009, p. 239.

⁴⁵ HR, 1 June 2013, 10/05322, IF Skadeförsäkring AB en SIF Ltd. / Eimskip EHF, NJ 2012, 516 (note K. F. Haak); RvdW, 2012, p. 767, S&S, 2012, p. 95.

⁴⁶ See on these contracts very extensively: Verheyen, W., *Contractuele aansprakelijkheid van vervoersintegratoren*, Brugge, Die Keure, 2014; see also Verheyen, W., *Freight integration: what is the way forward?*, European transport law, Vol. 49, No. 1, 2014, pp. 31 – 42.

⁴⁷ See for example: BGH 4 March 2004, IZR 200/01, Transport Recht, 2004, p. 460; Hof's Gravenhage 28 November 2007, S&S, 2009, p. 28; Bahnsen, K. U., *CMR art. 1 [Geltungsbereich. Völkerrechtliche Verbindlichkeit]*, in: *Handelsgesetzbuch*, 2nd ed.,

regime and liability exposure unknown to the web shop at the time of the conclusion of the contract.

Nonetheless, there is a threat for the carrier. Belgian courts have ruled on many occasions that a contract without agreement on the means of transportation cannot be considered as a contract for the carriage of goods by road and that therefore CMR is not applicable to this contract.⁴⁸ As a result, the contract will be governed by national carriage law. If Belgian law applies, this means that the carrier is still presumed liable. A big difference with the existing conventions is that the liability of the carrier is unlimited. The carrier can nonetheless include a contractual limitation clause, as national carriage law is not mandatory. This would however still require awareness about the possible non-applicability of these conventions and the potential exposure to liability. There are several examples in Belgian case law⁴⁹ where a limitation clause was lacking or was included in general conditions that were not validly incorporated in the contract, resulting in unlimited liability of the carrier. This often leads to a substantially higher compensation for the cargo-interest.⁵⁰

c. Uncertainty in case of carriage partly performed by bicycle or a pedestrian courier

In last mile logistics in urban regions, pedestrian or bicycle couriers are getting more and more common.⁵¹ The uncertainty that arises with such couriers lies in the fact that Article 1 CMR only applies to contracts for the carri-

München, Beck, 2009, No. 15; Czerwenka, B., *HGB § 407 Frachtvertrag*, in: *Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht*, 2nd ed., München, Beck, 2009, No. 116.

⁴⁸ See for the landmark-case: Brussel 2 September 2011, NV De Post/ gebroeders Lauwe, DAOR, 2012, p. 21; Cass. 8 November 2004, C. 03. 0510. N, TNT/ Mitsui Marine en Sony, Arr. Cass. 2004, p. 1767; European transport law, Vol. 41, 2006, p. 228; Pas., 2004, p. 1741; RHA, 2006, p. 3; RW, 2007-08, p. 1781; TBH, 2005, p. 512. See for later confirmation: Antwerpen 30 January 2012, 2010/AR/1670, TNT express NV/ Alante Europe N. V. e. a, NjW, 2012, p. 510 (first instance: Kh. Hasselt 9 December 2008, AR 07/2102, n. p.); Kh. Brussel 19 August 1999, RHA, 2001, <http://www.idit.asso.fr/documents/40610.pdf?num=40610,242> (accessed 10 February 2016); Kh. Brussel 30 January 2014, TBH, 2014/9, p. 926.

⁴⁹ Brussel 2 september 2011, NV De Post/ gebroeders Lauwe, DAOR, 2012, p. 21 Antwerpen 31 Oktober 2011, 2010/AR/875, N. V. DPD Belgium/ P. J. Timmermans, European transport law, Vol. 48, 2013, p. 82; Antwerpen (4e K) 30 January 2012, NJW, 2012, p. 510, with note by W. Verheyen.

⁵⁰ For examples see *infra*, Limits in case of damage or loss.

⁵¹ Maes, J; Sys, S; Vanelslender, T., *Beleidspaper: Kunnen fietskoeriers een rol spelen in de Vlaamse logistieke sector?*, D/2011/11.528/2, 2011, <http://www.flanderslogistics.be/fietskoeriers/beleidspaper.pdf> (retrieved 12 February 2016).

age of goods by road in vehicles⁵², with vehicles being defined in Article 2 as “motor vehicles, articulated vehicles, trailers and semi-trailers as defined in Article 4 of the Convention on Road Traffic dated 19 September 1949.” Consequently, carriage by bicycle or pedestrian courier falls outside the scope of the Convention. The question is whether a contract where the last mile is performed on foot or by bicycle is to be considered as multimodal transport, with national (road transport) law to be applied to the stage that is not performed by a vehicle within the meaning of Article 2, or rather whether the principle *accessorium sequitur principale* should be applied.⁵³ A consequence of the first interpretation would be that according to Dutch and German case law, CMR should not be applied to the main transport by road by motorised vehicle. However, in case the second position is supported, the inapplicability of CMR to the carriage as a whole could be advocated: even though the *length* of the last mile is obviously accessory to the main transport, studies show that the *cost* of the last mile often exceeds the costs of the main transport – the cost of the last mile is estimated between 13 and 75% of the total cost of the transport.⁵⁴ Even though case law where inapplicability of CMR in such a situation is unknown to us, the tendency to limit the scope of CMR by excluding multimodal and fleximodal contracts (see the two titles above), could be a trigger for case law in this way.

d. Conclusion: potential uncertainty with regards to the extent of the recourse gap

Even before going into the liability rules as such, it becomes apparent that the existing carriage law is not fit for e-commerce. The fragmented legal framework is not appropriate for the parcel delivery sector, which considers transport as a service, and not a specific mode of transportation. This makes the governing liability rules unpredictable. The specific features of parcels, such as the small size of the packages, are advantageous for the parcel delivery company, as it is often impossible for the web shop to establish where the damage occurred.⁵⁵ Finally, classic transport law does not offer an answer to

⁵² Article 1.1 CMR.

⁵³ See pro applying this theory to accessory stretches of transport: Van Beelen, A., *Multimodaal vervoer. Het kameleonsysteem van boek 8 BW*, Zwolle, Tjeenk Willink, 1996, pp. 67 – 71.

⁵⁴ Gevaers, R.; Van de Voorde, E.; Vanelslender, T., *Characteristics and typology of last-mile logistics from an innovative perspective in an urban context*, in: Macharis, C.; Melo, S. (eds.), *City Distribution and Urban Freight Transport*, Cheltenham, Edward Elgar, 2011, pp. 56 and further.

⁵⁵ See for example Antwerpen 31 October 2011, 2010/AR/875, N. V. DPD Belgium/ P. J. Timmermans, *European transport law*, Vol. 48, 2013, p. 82, where both parties were unsuccessful in establishing where a luxury watch got missing.

transportation techniques that are especially fit for parcel distribution, such as pedestrian or bicycle couriers. Because of this, uncertainty exists for both parties with regards to the regime that would be applicable during this stretch. Both for this stretch and for the situation where a fleximodal contract has been concluded, legal certainty is served with a contractual liability regime. The danger for especially smaller web shops lies in the fact that they often lack a bargaining position in their contracts with the parcel distribution contracts and that the parcel distribution companies' general conditions either refer to carriage conventions for situations where conventions are inapplicable, or contain an even further going exoneration.

2. Liability of the parcel delivery company for loss, damage or delay

Carriage Conventions impose a presumed liability on the carrier.⁵⁶ However, multiple defences are available to the carrier. The first possible defence is that the web shop did not notify the carrier in time of the damage, which results in a shift of the burden of proof or even in a loss of action. The second possibility is to establish that the damage only occurred after the delivery of the goods. Even if the damage occurred during the period of responsibility, the carrier is still not necessarily liable. First of all, especially in case of delay, even if the web shop suffers damage as a result of the time of delivery, it still has to establish that the carrier delivered the goods too late. If this is not the case, then the carrier will not be liable for damage resulting from the delivery after the time that was expected by the carrier. Secondly, the carrier is not liable insofar as he can establish the existence of a ground for exoneration. While the possibilities for exoneration under the Montreal Convention are very limited, a much broader possibility for exoneration exists under both CMR and CO-TIF-CIM. It is, however, impossible to escape liability by referring to the fault of servants of agents, as the carrier is also liable for damage caused by them.⁵⁷ This is even the case if the carrier is misled by fraudulent subcontractors.

a. Late notification

Above, we referred to the fact that the Consumer Sales Directive allows Member States to impose a notification period of two months on the consumer. In Carriage Conventions such notification period exists, as well. This pe-

⁵⁶ See Article 17.1 CMR and 18.1 Montreal Convention.

⁵⁷ Article 3 CMR.

riod is, however, much shorter under these Conventions. Under CMR, in case of apparent damage, notice is to be given immediately and within 7 days if the damage is not apparent.⁵⁸ A lack of notification within this time frame results in a shift of the burden of proof, as the web shop will not have to establish that damage occurred during transport. If the condition of the goods was duly checked by the consignee at the time of delivery, such counter evidence is even inadmissible in case of apparent damage.⁵⁹ Under COTIF-CIM, the effect of the lack of notification within said time limits is always the extinction of the action.⁶⁰ This leaves the web shop with a considerable disadvantage: the buyer is under no duty under the sales contract to notify the carrier, and even if the buyer notifies the web shop on the day of arrival of the goods, then still the notification is not made upon delivery. This then already causes the burden of proof to shift, which considerably limits the seller's chances in possible court proceedings.

b. Damage falls outside period of responsibility

The period of responsibility of the carrier ends with the delivery of the goods. As a rule, the mere arrival of the goods at the place of destination does not constitute delivery.⁶¹ Instead, delivery requires a consent between the carrier and the person designated for delivery to discharge the goods at the place designated for delivery.⁶² Therefore, leaving the goods behind on the driveway as a rule does not constitute delivery. As delivery is only possible to the person designated for delivery, likewise delivery to a third person, not designated for delivery, as a rule does not constitute delivery within the meaning of Article 17 CMR and thus the period of responsibility does not come to an end by such delivery.⁶³ Nonetheless, both delivery to a third person as delivery on the driveway can constitute valid deliveries, leaving the seller with none or less possibility to claim damages.

⁵⁸ Article 30 CMR. See for example: Koller, I., *Transportrecht Kommentar*, 8th ed., München, Beck, 2013, pp. 1156 – 1159.

⁵⁹ Article 30.2 CMR.

⁶⁰ Article 47 COTIF-CIM.

⁶¹ Thume, Kh., *Kommentar zur CMR*, 2e ed., Frankfurt am Main, Recht der Internationalen Wirtschaft, 2007, p. 377.

⁶² *Ibid.*

⁶³ *Ibid.*

i. Delivery to a third person

The first exception to the possible liability in case of delivery to a person other than the buyer is obviously the situation where the shipper at the time of the conclusion of the contract, or later through new instructions⁶⁴, entitled the carrier to deliver to a third person. In such a case the carrier cannot be held liable by the seller for any damage that follows from the delivery to a third person. If in such a case the sales contract is not back to back with the carriage contract and does not provide the web shop with the possibility to deliver to a third person, the web shop will be liable vis-a-vis the buyer, while the carrier cannot be held liable. In such a case, the only remedy available to the web shop is an extra-contractual claim against the third party that took delivery of the goods and damaged them.

In case of absence of a contractual possibility for the carrier to make delivery to a third person, it has been held that even if the goods are nonetheless delivered by this third person to the person designated for delivery, the delivery to this third person still constitutes a loss.⁶⁵ This seems contrary to Article 16.2 CMR, according to which, if circumstances prevent delivery⁶⁶, the carrier is entitled to unload the goods and to entrust them to a third party.

This rule can be detrimental to the web shop, as the carrier is in such case only liable for the exercise of reasonable care in the choice of this third party. Thus if the carriage contract provides for only one delivery attempt, the carrier seems entitled to deliver the goods to the neighbours. In this case a very difficult burden of proof rests upon the web shop. Nonetheless, if the web shop succeeds in this burden of proof, the carrier will be liable in full, as Article 16 does not provide for a limit to liability. A contractual limitation of liability for a bad selection of the party to which delivery is being made should be unsuccessful, as this would be contrary to Article 41 CMR.⁶⁷ However, part of the doctrine on this point supports the view that in such a case liability should be governed by national law.⁶⁸ If this perspective is supported, the validity of contractual limitations of liability should be assessed under national law.

⁶⁴ Article 14 and 15 CMR.

⁶⁵ OLG München 23 April 1993, VersR 1994, 1328.

⁶⁶ The absence of the person designated for delivery creates such a circumstance (Thume, *op. cit.*, note 61, p. 328).

⁶⁷ Thume, *op. cit.*, note 61, p. 41.

⁶⁸ Koller, *op. cit.*, note 58, p. 1029.

A question that arises concerning Article 16 is what the standard of care should be when selecting this third party. It is absolutely uncertain whether this standard should be low, taking into account the limited compensation for the carrier under the contract, or on the contrary very high, taking into account the fact that parcels are very sensitive to theft. Part of the required diligence should anyway be the identification of the third party taking delivery.

If multi-delivery attempts are contractually foreseen, the situation is different. In such a case, we would argue that when delivery is being made before the number of attempts has been reached, the third party is to be considered as an agent or servant within the meaning of Article 3 CMR. If damage is caused by this agent before the delivery to the person designated for delivery, the carrier can still be held liable.

ii. Delivery on the driveway

An important difference between delivery on the driveway and delivery with the neighbours lies in the fact that even if the carrier decides to unload the goods, without entrusting them to a third party, he will remain liable for the custody or storage of the goods.⁶⁹ The general opinion about liability in such a case is that this is not be subject to CMR, as the Convention does not specify the consequences of the bad performance of the obligation to keep the goods. According to this dominant view, the carrier's liability is governed by the applicable national law on custody or storage.⁷⁰ It is my view, however, that this duty is accessory to the contract of carriage and that in the absence of specific rules in CMR, the general rules of Article 17 and further CMR should be applied, through the application of the absorption theory. Also, from a practical point of view, i.e. from an insurance point of view, this position seems much more desirable than bringing this period of storage under national law. The different approaches can again have important consequences: while recourse to national law would allow for contractual exoneration clauses, this will not be possible under CMR. Moreover, at least in some countries, leaving a parcel behind on a driveway, could amount to wilful misconduct.

c. *Time of delivery does not constitute a delay*

Even though we saw before that it is not easy for the buyer to invoke a delay in delivery under the sales contract, except when the time of delivery

⁶⁹ Thume, *op. cit.*, note 61, p. 341. See also Koller, *op. cit.*, note 58, p. 1029.

⁷⁰ Thume, *op. cit.*, note 61, p. 341. See also Koller, *op. cit.*, note 58, p. 1029.

has been contractually agreed upon, still many web shops advertise a next day delivery and thus a delay in delivery can create reputation damage to the web shop. Nonetheless, the web shop will only be able to get a compensation for damages following from delay if he can establish that there was a delay in delivery.

The easiest way to establish a delay in delivery is by proving that the contractually agreed upon time for delivery was exceeded. The mere mentioning of a time for delivery does not however constitute an agreed time of delivery.⁷¹ Even if the carrier is aware of the urgency, still this does not constitute an agreed time of delivery. This is evidenced by case law on traditional carriage contracts, where for example no delay was accepted in a case where Christmas trees had to be delivered shortly before Christmas.⁷² Even though this might seem to be a harsh decision, it is in line with the general view that also when the shipper insists on a specific date for delivery, but the carrier merely states that he will do everything that is possible to deliver in time, there is no agreed upon time for delivery.⁷³ On the other hand, the time of delivery does not necessarily need to be mentioned in the consignment note⁷⁴ if the cargo-interest can establish otherwise that there was an agreed upon time of delivery.

Even if no time of delivery has been agreed upon, it is possible to establish a delay in delivery. This is possible under CMR by establishing that delivery has not been made within a reasonable time⁷⁵, taking into account the specific nature of the goods and the voyage.⁷⁶ Such claim is not easily accepted. Under COTIF-CIM it's much easier to establish a delay in delivery⁷⁷, as the Convention itself contains specific rules to determine whether there is a delay in delivery, in the absence of contractual stipulations on this point.

⁷¹ LG Kleve 30 October 1974, VersR 1975, 465. See on this point: Thume, *op. cit.*, note 61, p. 518.

⁷² Hof 's Hertogenbosch 9 September 2003, ECLI:NL:GHSHE:2003:AM7822.

⁷³ Thume, *op. cit.*, note 61, p. 518.

⁷⁴ BGH 30 September 1993, I ZR 258/91, Transport Recht, 1994, p. 16; Kyiv Regional Commercial Court Case 5011-67/3991-2012/7/032-12, Dian Luks Logistik LLC v. Joint venture Dateks LLC, <http://www.reyestr.court.gov.ua/Review/25321195>. See with further references to case law: Thume, *op. cit.*, note 61, p. 517; Clarke, M.A., *International carriage of goods by road: CMR*, 6th ed., London, LLP, 2014, p. 192; Koller, *op. cit.*, note 58, p. 1094.

⁷⁵ Article 19.2 CMR.

⁷⁶ Clarke, *op. cit.*, note 74, p. 193.

⁷⁷ Article 16.2 COTIF-CIM.

d. *Excuses available to the carrier*

Carriage conventions contain long lists with exceptions available to the carrier that go beyond the general *force majeure* concept. Of particular relevance for e-commerce are the exoneration grounds of deficient packaging⁷⁸ and the nature of particular goods which exposes them to loss or damage.⁷⁹ Also the general exception ground referred to in Article 17.2 *in fine* might be relevant to the carrier. Under COTIF-CIM similar exceptions exist.⁸⁰ Under the Montreal Convention, however, the carrier can only invoke deficient packaging or the specific nature of the goods⁸¹, without a general exception ground being available to the carrier.

Even though a wide list of exceptions is available to the carrier, this does not necessarily mean that a successful attempt to escape liability will be easily accepted. An investigation of existing case law shows that it is very difficult to establish one of the exception grounds. This follows both from the high standard that is set by case law and from the burden of proof that is imposed upon the carrier.

i. Loss of parcel

In case of loss of the parcel, the possibilities for exoneration are very limited. Case law on cargo theft indicates that it is very difficult, if not practically impossible, to be relieved from liability in case of loss by referring to the general exception ground.⁸² The carrier has to establish both that the damage occurred through circumstances which he could not avoid and that he was unable to prevent the consequences. For this reason even in case of a theft of the container on the carrier's fenced premises it has been held on many occasions that these conditions were not fulfilled, as the carrier could have taken additional preventive measures. In fact, the theft itself is considered as sufficient proof of the fact that preventive measures were insufficient. Thus, also if parcels get stolen during delivery, recourse to this exoneration ground will probably not be successful. If my view is shared that liability in case of delivery on the

⁷⁸ Article 17.4 b) CMR.

⁷⁹ Article 17.4 d) CMR.

⁸⁰ Article 23.2 and 3 COTIF-CIM.

⁸¹ Article 18.2 a) and b) Montreal Convention.

⁸² For extensive case law on this point see: Rubens, P.; De Wit, R., *Overzicht van rechtspraak vervoersrecht 1976-2012. De overeenkomst van wegvervoer*, Tijdschrift voor Privaatrecht, Vol. 3, 2013, p. 1912; Thume, *op. cit.*, note 61, p. 409.

driveway should be governed by Article 17 and further CMR, in case of theft of the parcel on the driveway, recourse to the general exoneration ground can again by no means be successful. It is 100% foreseeable that a parcel might get stolen on the driveway and it is also very easy to prevent such damage.

A recourse to this exoneration ground might be successful, however, in case of fire to the cargo.⁸³ Nonetheless, if this is the case, this fire cannot follow from a defect to the truck, since Article 17.3 CMR explicitly provides that the carrier cannot exonerate himself by reason of the defective condition of the vehicle.⁸⁴ Moreover, just like in the case of cargo theft, the place where a truck was parked when it caught fire is a decisive element when assessing whether the damage could be avoided.⁸⁵

ii. Damage to parcel

In case of damage to parcels, there are several possibilities for exoneration. First of all, reference to the general exception ground might be successful in case of, for example, damage to cargo in a traffic accident, insofar as this was not reasonably unavoidable for the driver.⁸⁶ In addition, damage can also follow here from inadequate packaging or the specific nature of the goods. In such a case the carrier only needs to establish that the damage can result from the specific cause, while the cargo-interest has to establish that the damage in the specific case was not (solely) caused by the specific nature of the goods or bad packaging.⁸⁷

Bad packaging can contribute to the damage in two ways: first, if the parcel gets damaged during transport and second, if the parcel incurs water damage during a stage of transport by a pedestrian or bicycle courier or after delivery on the driveway. Insofar as these stretches are considered as accessory to the road transport (see *supra*), Article 17.4 CMR might be applicable to such damage as well. In both situations, the carrier will need to establish that the packaging was insufficient taking into account both the specific nature of the goods and the transport agreed upon.⁸⁸ The fact that no accident took place during tran-

⁸³ Antwerp 10 January 2000, RHA 1999, 414; Kh. Luik 12 June 1998, RHA 1998, 461; Rubens, De Wit, *op. cit.*, note 82, p. 1913.

⁸⁴ Thume, *op. cit.*, note 61, pp. 415 and further.

⁸⁵ BGH 5 June 1981, I ZR 92/79, Transport Recht, 1981, p. 1030; Thume, *op. cit.*, note 61, p. 409.

⁸⁶ Rubens, De Wit, *op. cit.*, note 82, p. 1912.

⁸⁷ Article 18.2 CMR.

⁸⁸ Thume, *op. cit.*, note 61, pp. 422 – 423.

sport is not sufficient in itself to establish bad packaging.⁸⁹ It is important to take into account that because of this the carrier will not be able to invoke bad packaging in case of water damage if delivery on the driveway or by bicycle or a pedestrian courier was not contractually agreed upon, as such conditions cannot be considered as conditions that are standard for the transport.⁹⁰ In addition to this first element, the carrier needs to establish that the damage could have resulted from this bad packaging.⁹¹ If the carrier is successful in establishing this, then the web shop will need to establish that the damage was not caused by the bad packaging. Here, the web shop cannot invoke the fact that the parcel delivery company accepted the parcel for transport to establish the good quality of the packaging. The carrier must only check the apparent condition of the goods and their packaging⁹², without having to inquire into the question whether this packaging offers sufficient protection to the parcel.⁹³

A last possible ground that the carrier can invoke to escape liability in case of damage of the goods is the specific nature of the goods. Yet again, the fact that specific goods can be subject to damage does not constitute proof that the nature of these goods particularly exposes them to total or partial loss or to damage. Even in case of breakage of glass, it was held that the mere fact that it concerned glass in itself wasn't sufficient to make it a product subject to breakage, especially if it is decently packed.⁹⁴ This example evidences that the packaging and the nature of the goods will have to be evaluated together.⁹⁵ Similarly to the situation of bad packaging, whether the specific nature of the goods particularly exposes them to damage or loss is to be established taking into account the specific transport agreed upon.⁹⁶ We believe that for this reason the question whether cargo is particularly exposed to damage or loss needs to be examined taking into account the exposure to such damage to average goods that are carried by parcel distribution companies. As consumer electronics or books are often sold through e-commerce, it should not be easily accepted that the specific nature of the goods particularly exposes them to damage.

⁸⁹ BGH 4 October 1984, I ZR 112/82, *Transport Recht*, 1985, p. 125.

⁹⁰ Rubens, De Wit, *op. cit.*, note 82, p. 1924.

⁹¹ Thume, *op. cit.*, note 61, p. 499.

⁹² Article 8.1 b) CMR.

⁹³ See on the question whether the carrier has a notification duty if he notices that the parcel is badly packed: Koller, *op. cit.*, note 58, p. 1065.

⁹⁴ Gent 10 April 2006, *European transport law*, Vol. 41, 2006, p. 829.

⁹⁵ Thume, *op. cit.*, note 61, p. 438.

⁹⁶ Koller, *op. cit.*, note 58, pp. 1074 – 1075.

iii. Delay of parcel

Timely delivery of parcels is often essential, as many web shops advertise 24-hour delivery (see above). Even if the time of delivery has been agreed upon, the carrier can still be exempted from liability. This is obviously the case if the truck is involved in a traffic accident, insofar as the accident was unavoidable and unforeseeable.⁹⁷

Another liberating circumstance in case of delayed delivery of a parcel might be the traffic circumstances: congestions or road blockages can cause a severe delay.⁹⁸ Again, the mere delay caused by the traffic circumstances does not constitute a ground for exoneration as the delay caused by the traffic conditions also needs to be unforeseeable and the damage needs to be unavoidable. For this reason daily congestions do not constitute a *force majeure* situation. Also, in case of unexpected congestions, the required unforeseeability and unavoidability can only be met if the carrier, even with a diligent consultation of traffic information could not have been aware of the traffic situation and could not have avoided the delay. The obligation to avoid the damage includes the obligation to reroute in case the truck gets stuck in a traffic jam.⁹⁹

Finally, also a breakdown of the truck could constitute a *force majeure* situation, but just like in cases of loss of the parcel through fire, only insofar as the cause of this breakdown is external to the vehicle itself.¹⁰⁰ This could for example be the case if bad condition of the road causes a tire blowout. The carrier can however only successfully invoke such defence if the tires were in good condition before the time of the blowout.¹⁰¹

e. Conclusion: carrier is presumed liable but not strictly liable

Without even going into the specific amounts of compensation, from an evaluation of the liability grounds and the exceptions that are available to the carrier it follows that the liability of the carrier is not back to back with that of the web shop. The main cause for this lies in the fact that even though the carrier is presumed liable, this is not objective liability (except if delivery on driveway or with the neighbours has contractually been agreed upon or has later been instructed by the web shop). Many excuses are available to the carrier

⁹⁷ See for examples: *ibid.*, pp. 1046 – 1047.

⁹⁸ See on these events: Thume, *op. cit.*, note 61, pp. 408 and 413.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 411.

¹⁰¹ Koller, *op. cit.*, note 58, p. 1048.

to escape liability. The web shop on the other hand cannot escape liability by invoking the same grounds as the risk only passes at the moment when the buyer takes physical possession of the goods, without there being any exceptions available to the web shop under consumer law. When it comes to damage caused by delay, a second important cause of the recourse gap exists if no time for delivery has been agreed upon with the carrier, but the timely delivery is of the essence under the contract of sale. The last threat to the carrier is the fact that the generous notification period for the consumer under the sales contract makes it very hard, if not impossible for the web shop to bring a successful claim against the carrier, as the burden of proof will have shifted or the right of action might even have disappeared.

3. Recoverable damage

a. The web shop's damage in case of bad performance of the carriage contract

When the carrier does not deliver the goods in time and without any damage, multiple types of damage can arise for the seller: apart from the (total or partial) loss of the value of the goods there will also be loss of profit. Moreover, for some types of goods, the value added tax and/or excise duties might remain due. In addition, the web shop might have paid certain sums itself to service providers, such as freight to the parcel delivery company and a commission to the website through which the sale was concluded, or to the linking page through which the consumer arrived on the website. While such costs are normally included in the sales price, in case of withdrawal from the sale, the seller still has to cover these costs. Finally, especially in case of online purchase of (seasonal) presents, where the buyer needs the present at a specific moment in time, late delivery of an undamaged parcel can create questions as to the reliability of the web shop and can thus lead to severe reputation damage.

b. Limits to recoverable damage

Both under CMR and COTIF-CIM only the market price or normal value of the goods at the time and place where the goods were accepted for carriage is taken into account to calculate the compensation.¹⁰² In addition to this market value, the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods shall be refunded.¹⁰³

¹⁰² Article 23.1 and 2 CMR; Article 30.1 COTIF-CIM.

¹⁰³ Article 23.4 CMR.

However, Article 23.4 CMR explicitly states, “*no further damage shall be payable*”.¹⁰⁴ Consequently, reputation damage, loss of profit or (other) consequential damage is excluded from compensation. On the point of value added tax and excise duties, the question whether compensation for such duties is possible is answered differently in national jurisdictions under CMR. According to, for example, Belgian and UK case law, irrespective of the fact whether these duties were prepaid or rather become due because of the loss, the carrier is to pay compensation.¹⁰⁵ In German and Dutch case law¹⁰⁶, however, Article 23.4 is interpreted narrowly and compensation is only awarded only if these duties were prepaid. The difference between those two perspectives is very relevant as compensation for these value added taxes and excise duties, if due, is due in full and not subject to any limitations (see next title). Under COTIF-CIM uncertainty on this point is no longer possible, as the 1999 Protocol explicitly provides that compensation is only required for “*customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties.*”¹⁰⁷

The aforementioned limitations to recoverable damage do not apply under the Montreal Convention. The same is true for compensation in case of delay under CMR or COTIF-CIM. However, as low limits to compensation also apply here, the extent to which any of these additional types of damage will be recovered is very limited in practise.

4. Limits to compensation

CMR, COTIF-CIM and the Montreal Convention all apply limits to compensation in case of loss, damage or delay. Originally these limits envisaged to protect the shipper, as they prevented the inclusion of exoneration clauses going beyond these limits, while the limits reflected the average value of the goods.¹⁰⁸ Today, however, for a considerable segment of goods sold by web

¹⁰⁴ See also article 30.1 COTIF-CIM.

¹⁰⁵ Cass. Be. 30 May 2002, www.idit.asso.fr (accessed 12 February 2016); CA 11 February 2003, E.T.L. 2004, 697. Article 30.4 COTIF-CIM.

¹⁰⁶ Court Amsterdam 30 March 1977, S&S 1978, 36; BGH 26 June 2003, *Transport Recht*, 2003, p. 453.

¹⁰⁷ Article. 30.4 COTIF-CIM.

¹⁰⁸ For more about this balance see, for example, the preparative works of the Rotterdam Rules: United Nations Commission on International Trade Law, *Report of Working Group III (Transport Law) on the work of its eighteenth session*, 2006, www.uncitral.org.

shops, this is no longer the case. For these goods the limits now instead of constituting protection for the shipper, rather protect the carrier.¹⁰⁹ An important reason for the inadequate level of the limits lies in the fact that most of these limits date back to the pre-electronic age. Nowadays electronic devices have a much higher average value. Moreover, most conventions lack an indexation mechanism¹¹⁰, causing an ongoing decrease of the actual value of compensation.¹¹¹

a. Limits in case of damage or loss

The limits in case of loss or delay are set at 8.33 SDR per kilogram under CMR¹¹², 17 SDR per kilogram under COTIF-CIM¹¹³ and 19 SDR per kilogram

uncitral.org (retrieved 12 February 2016), para. 163 (“[T]he optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet ... provide for a proper allocation of risk between the commercial parties.”) See also in this respect: Lannan, K., *Behind the Numbers: The Limitation on Carrier Liability in the Rotterdam Rules*, Uniform Law Review, Vol. 14, No. 4, 2009, pp. 901 – 930; see also: Ramberg, J., *The Future Law of Transport Operators and Service Providers*, Scandinavian Studies in Law, Vol. 46, 2004, <http://www.scandinavianlaw.se/pdf/46-6.pdf> (retrieved 12 February 2016), p. 139.

¹⁰⁹ See more in depth about the fitness for purpose of the limits in case of parcel distribution: Verheyen, W., *The DPD-case: a case for a parcel-specific liability regime?*, European transport law, Vol. 48, No. 1, 2013, pp. 3 – 12.

¹¹⁰ The Montreal Convention has such a mechanism (Article; 24 Montreal Convention), and here limits were increased already by 12% since the coming into existence of the Convention in 1999.

¹¹¹ For more about this inflation see an earlier study: Verheyen, *op. cit.*, note 109, p. 10. (In this studies we calculated that based on the price evolution of commodities, the limit of 8.33 SDR that was established in 1978, would today correspond to a limit of 17. 3 SDR/kg. If we were to calculate this limit taking into account the 1978 SDR/USD dollar exchange rate and the inflation of USD since then, the limit of 8.33 SDR, would today even correspond to a limit of 29 SDR per kilogram.) See also on this issue for example: Lannan, K., *op. cit.*, note 81, p. 910; Larsen, P. B., *New work in UNCITRAL on stable, inflation-proof liability limits*, The Journal of Air Law and Commerce, Vol. 48, No. 4, 1983-84, pp. 665 – 692; Loewe, R., *La CMR a 40 ans*, Uniform Law Review, Vol. 1, No. 3, 1996, pp. 429 – 441; Herber, R., *Haftungsbegrenzung und deren Durchbrechung im Deutschen und internationalen Transportrecht*, Transportrecht, Vol. 27, 2004, p. 93 (According to the last author, the 1956 limit (the year when CMR was drafted) even corresponded to a compensation of 63 SDR in 2004.).

¹¹² Article 23.3 CMR.

¹¹³ Article 30.2 COTIF-CIM.

under the Montreal Convention.¹¹⁴ As one SDR equals USD 1.411560¹¹⁵, for a considerable share of e-sales of consumer goods¹¹⁶, this compensation will be inadequate. This is for example the case with most consumer electronics and luxury products.

The inadequateness of the limits can be evidenced by some examples. If a web shop sells an Ipad Air 2, and those Ipad is delivered damaged to the consumer, the web shop has to replace or repair the Ipad, in accordance with Article 20 Consumers Rights Directive *juncto* Article 3 Consumer Sales Directive. The web shop itself, however, will, in case the Ipad was delivered by a road carrier, get a compensation of USD 7: the weight of an Ipad is +/- 600 grams including packaging materials¹¹⁷, and 8.33 SDR per kilo amounts to 11.76 USD per kilogram. This leaves the web shop of course with a substantial recourse gap.

While an Ipad of course has a high value to weight ratio, the recent DPD-case of the Court of Appeal of Antwerp offers an even more imaginative example. In the DPD-case¹¹⁸ a Belgian jeweller sold a pocket watch with a value of € 7000 to a Swiss client. The watch needed to be delivered in Switzerland, so the jeweller concluded a contract with a predecessor of DPD. The contract contained no specific provisions as to the mode of transportation. The watch was collected in Belgium by a carrier on December 28, and was supposed to be delivered in Switzerland before January 1. However, delivery never occurred. As the jeweller suspected that the carrier still possessed the watch, he initiated legal proceedings. His main claim was to order DPD to hand over the watch. In addition, he claimed 12 500 euro in damages. DPD invoked the applicability of CMR. Hence, DPD invoked the exemption ground referred to in Article 17.4 b) CMR to avoid liability. In any event, DPD claimed that its liability was limited to 1.79 euro, in accordance with Article 23 CMR. Eventually, the Court of Appeal

¹¹⁴ Art 22.3 Montreal Convention.

¹¹⁵ Exchange rate on February 24 2015, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx.

¹¹⁶ Typical goods sold through e-commerce are electronic equipment, books and clothes, see: Meschi, M.; Irving, T.; Gillespie, M., *Intra-Community cross-border parcel delivery. A study for the European Commission*, London, FTI, 2011, http://ec.europa.eu/internal_market/post/doc/studies/2011-parcel-delivery-study_en.pdf (retrieved 12 February 2016), p. 51.

¹¹⁷ <https://www.apple.com/ipad/compare/> (retrieved 12/02/2016).

¹¹⁸ Antwerpen 31 October 2011, 2010/AR/875, N. V. DPD Belgium/ P. J. Timmermans, *European transport law*, Vol. 48, 2013, p. 82.

held that CMR was not applicable in this case, as the means of transportation was not agreed upon and thus no contract for the carriage of goods by road was concluded (see *supra* 'Uncertainty in case of fleximodal contracts'). Therefore the conditions for the applicability of CMR were not fulfilled. However, if the means of transportation had been agreed upon, the compensation for the 7000 euro watch, would indeed have been limited to euro 1.79.

b. Limits in case of delay

Under the Montreal Convention, the same limit applies to damage caused by a delay in delivery. Under CMR and COTIF-CIM, a separate limit in case of delay applies, which relates to freight (the carriage charges that were paid). Under CMR compensation is limited to freight, while under COTIF-CIM it is limited to four times the freight. As pointed out above, consequential damage such as reputation damage can be claimed in case of delay. However, a compensation *that* is limited to the freight, will by far not be sufficient to cover reputation damage in case of time-critical deliveries, such as seasonal presents. In addition to reputation damage, under the sales contract, the buyer is also entitled to terminate the contract¹¹⁹, causing a loss of profit for the web shop. Moreover, sometimes the loss is not limited to a loss of profit: for example agendas, calendars and to a smaller extent also DVDs, books and consumer electronics, quickly lose value after their release. After mid-January hardly anyone will be interested in buying a calendar, making the calendars coming back after a termination of the contract due to late delivery virtually worthless. However, such damage is also considered as damage of delay instead of damage resulting from loss or damage to the cargo, thus limiting the compensation to the freight that was paid.¹²⁰ This will in case of regional delivery often be limited to a few dollars.¹²¹ In France, for a contract that did not fall

¹¹⁹ See *supra*, Compensation for loss or delay.

¹²⁰ For a far-going example see: Kh. Leuven 7 February 2008, A.R. 2716/05 (n.p.) (in this case the court held that there was merely damage following from delay in a case where Christmas cakes were delivered after Christmas. As they had not expired yet, there was no damage to the goods, even though their commercial value was very low. See further: Claringbould, M. H.; Bedorven Parma-hammen (noot onder Hof Arnhem, 30 augustus 2011, S&S 2012, 33), http://www.vantraa.nl/Kennisbank/Jurisprudentie/_293 (retrieved 12 February 2016); Clarke, *op. cit.*, note 74, p. 194; Haak, K. F., *The Liability of the carrier under the CMR*, Den Haag, Stichting vervoerders, 1986, p. 200; Koller, *op. cit.*, note 58, p. 1119; Loyens, J., *Handboek transportrecht*, Antwerpen, Intersentia, 2011, pp. 220 – 221; Thume, *op. cit.*, note 61, p. 636.

¹²¹ Calculation through Wwwaaps.ups.com (retrieved 12 February 2016).

under CMR, but where parties contractually incorporated the convention, the Supreme Court even held that this limit was in such a case not applicable, as it creates a complete erosion of the express courier's essential obligation to deliver timely.¹²² Of course, due to the priority of international law, in situations falling under CMR, the court could never decide in this way.

5. Breaking the limits

Due to both the limits to the recoverable damage and the limits to compensation, an appealing possibility might be to try to break through the limits to compensation. This is however only possible under CMR and COTIF-CIM. However, the threshold for such breakthrough is very high: under CMR wilful misconduct or a fault that is considered as equivalent to wilful misconduct in the national law of the court seized is required¹²³, and COTIF-CIM requires that *"the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result"*.¹²⁴

The first problem when trying to break through the limits, lies in the fact that the burden of proof rests on the claimant. However, often it will be virtually impossible to get inside information on the circumstances in which the loss came into existence. For example in the aforementioned DPD-case, never was any evidence produced with regards to the circumstances in which the loss took place. Thus, even though for example inside jobs give ground to break through the limits¹²⁵, the evidence to establish that the theft was committed by an employee will often be lacking.

The second problem in case of air-road or air-rail transport lies in the fact that limits are unbreakable¹²⁶ under the Montreal Convention and that also loss or damage at the airport falls within the scope of this Convention.¹²⁷ This can especially be a problem because many parcel delivery companies have their distribution centres within the airport boundaries. Moreover, as was discussed above, in case of non-localised damage, the Montreal Convention installs a

¹²² Cass. fr. 30 May 2006, n° 04-14. 974, Bull, 2006, IV, n° 132, 134.

¹²³ Article 29 CMR.

¹²⁴ Article 36 COTIF-CIM.

¹²⁵ See for example article. 29.2 CMR.

¹²⁶ Article 22.5 Montreal Convention (containing the breaking through rule) only applies to passengers and luggage.

¹²⁷ Article 18.3 jo. 18.4 Montreal Convention.

presumption that damage took place during air transport. Again, this takes away every incentive for the carrier to produce evidence with regards to the actual circumstances in which the loss or damage occurred.

An additional problem that exists especially for CMR is that some countries, such as Belgium, do not recognise a fault that is equivalent to wilful misconduct.¹²⁸ Thus wilful misconduct can only be invoked successfully if the actual wilful misconduct is established. Here, not only the behaviour itself needs to constitute a wilful misconduct, but moreover it is required that the wilful misconduct envisages the loss of or damage to the cargo. The standard for a fault being equivalent to wilful misconduct is also set very high in other countries. For example in Holland, it is required that the carrier was aware of the fact that the possibility that damage would result was substantially higher than the chance that damage would not result.¹²⁹ In case of, for example, delivery on the driveway it can be disputed whether courts would find that this criterion is met.

6. Declaration of value or special interest in delivery

Most conventions do provide the shipper an “escape clause” that allows for compensation in full by declaring the value of the goods¹³⁰, or by declaring a specific interest in the delivery of the goods.¹³¹ This second possibility can be used in order to get a compensation for, for example, reputation damage. If the shipper uses this opportunity, compensation will be available up to the declared value or interest.¹³² The problem with that is that if the web shop lacks bargaining strength, the parcel distribution company might not accept such a declaration (or limit the possibilities for such a declaration through a so-called Datec clause¹³³). Even if the parcel delivery company does allow for a

¹²⁸ Cass. 27 January 1995 Arr. Cass.1995, 93, Pas.,1995, I, p. 92; R.W. 1994-95, 1268, T.B.H., 1995, p. 232.

¹²⁹ HR Holland 5 January 2001, NJ, 2001, p. 391 and NJ, 2001, p. 392.

¹³⁰ Article 24 CMR; Article 34 COTIF-CIM. Koller, *op. cit.*, note 58, pp. 1121 – 1123.

¹³¹ Article 26 CMR; Article 35 COTIF-CIM, Article 22.3 *in fine* Montreal Convention. Koller, *op. cit.*, note 58, pp. 1127 – 1129.

¹³² For example Haak advocates that if a shipper wants to ship goods with a value of over 8.33 SDR/kg, he should simply make use of this possibility to declare the value. See Haak, K. F., *Is het wenselijk/noodzakelijk de CMR te herzien?*, Nederlands Tijdschrift voor Handelsrecht, 2006, p. 75.

¹³³ After the clause in the UPS contracts that was challenged by Datec and that limited the maximum value of the goods to be shipped Courts in different EU countries did not, however, accept this clause. Datec Electronic Holdings Ltd & Incoparts BV v.

declaration, it is questionable whether the parcel delivery company will ask for a compensation for such a declaration that is in line with insurance premiums which would apply to insure the same risk.

7. Conclusion: limits to liability and compensation create the biggest liability exposure for web shops

Even though the above mentioned uncertainty with regards to the actual liability exposure and possibilities that are available to the carrier to escape all liability are indeed detrimental to the web shop, the limits to the liability of the web shop and compensation due by the web shop have the biggest impact on the liability exposure of the web shop. For many consumer goods, even if the carrier is liable, he will still only have to pay a fraction of the total damage incurred by the web shop. However, the web shop can avoid, or at least limit this exposure by making a declaration of a specific interest in delivery or by declaring the value of the goods. The problem is that, again, smaller web shops will, when dealing with a parcel delivery service, very often lack the bargaining position to insist on this value declaration in the contract and a surcharge will have to be paid for this service anyway.

IV. RECOMMENDATIONS

1. Recommendations for web shops

a. Mandatory carriage law and consumer law as an obstacle

Consumer law prevents web shops from shifting the risk of damage during delivery to the consumer. For this reason, there are only two possibilities avai-

United Parcels Service Ltd & Anor [2005] EWHC 221 (Comm); Datec Electronic Holdings Ltd and Another v United Parcels Services Ltd (CA) http://archive.onlinedmc.co.uk/datec_v_ups_cofa.htm (summary) (“in my view there was plainly a contract of carriage, concluded at the latest when the UPS driver accepted the goods. It may be that the UPS driver would have declined to take the goods had he known that they exceeded the value limit, but the fact remains that he accepted them”); Datec Electronic Holdings Ltd and Another v United Parcels Services Ltd (HoL) [2007] UKHL 23 (“the harsh, but clear-cut position will be that, where a carrier contracts unwittingly to carry non-conforming goods and chooses to perform internationally by road, CMR applies with its benefits and burdens, and that the carrier’s restrictions will be relevant only if and in so far as they may assist the carrier to avoid liability under article 17(2)”; OLG Köln 25 May 2004, Transport Recht, p. 359; BGH 17 July 2008, Transport Recht, 2008, p. 365; Hof Amsterdam 28 August 2008 [2011] S&S79.

lable to the web shop: either to exclude (some of) the risks that are connected to e-commerce by developing new operational models or to model the liability of the carrier insofar as possible back to back to the liability of the consumer. Without going into depth on the first option in this article, possible solutions might be to make bigger use of delivery points instead of delivering with the consumer himself or by obliging the consumer to select two or three “safe delivery places” nearby, where the parcel can be delivered in case the consumer is not at home. Such practise could, however, be considered as unfair terms under the Unfair Terms Directive.¹³⁴ This is especially the case if a wide range of alternative delivery places is imposed (for example “safe delivery to people living in the same street”). Such clause can therefore be disregarded by courts.¹³⁵ A way to mitigate this risk is by attaching financial incentives to the selection of a limited number of alternative safe delivery places, as this could prevent the court from finding the clause unbalanced.

An alternative to this is to model the liability of the carrier insofar as possible back to back to the liability of the consumer. This is either possible by exploiting the limited possibilities that carriage law offers to impose higher liability on the carrier to the fullest, as has been discussed in the previous titles. A more far-going option is to circumvent the mandatory carriage law. Modelling liability exposure under the carriage contract obviously requires active contract drafting. Therefore, these possibilities only exist insofar as the web shop possesses an actual bargaining position. Alternatively to these recommendations, but also in addition to them, it is very highly recommended for the web shop to take out adequate cargo-insurance.

b. Circumventing mandatory carriage law

It seems to be a *contradictio in terminis* to circumvent the mandatory law. Nonetheless mandatory carriage law can be circumvented by forum shopping in a court that considers carriage conventions not applicable to parcel distribution contracts. As it was mentioned above, for example in Belgium case law is established in such a way that CMR and COTIF-CIM do not apply to fleximodal carriage contracts. As almost all parcel delivery contracts contain an option clause, a forum clause attributing competence to Belgian courts allows for inapplicability of these conventions. Likewise, in France parcel delivery

¹³⁴ Article 3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *O.J. L 095*, 21 April 1993, pp. 29 – 34.

¹³⁵ Article 6 Unfair Terms Directive.

companies are often qualified as *commissionnaire de transport*¹³⁶, and the subcontracting carrier is even automatically held liable as *commissionnaire de transport*.¹³⁷ A *commissionnaire de transport* is a transport intermediary that is also presumed liable, but without liability limits or any mandatory rules governing his liability. A choice for French courts entails an additional advantage as the French Supreme Court has ruled that a contractual incorporation of CMR by the *commissionnaire* cannot be upheld in case of delay, as this erodes the obligation of the parcel delivery company to deliver timely.

Even though CMR, COTIF-CIM and the Montreal Convention do not allow for an exclusive jurisdiction clause¹³⁸, the Brussels I recast Regulation¹³⁹ can be very helpful for the web shop to circumvent mandatory carriage law.¹⁴⁰ This Regulation provides for an exception to the traditional *lis pendens rule* according to which the court last seized is to await the decision of the court first seized. If the contract contains an exclusive jurisdiction clause, the court named in the Jurisdiction clause can still decide upon the case, even if another court was seized first. Even though carriage conventions containing jurisdiction rules in principle have priority over this Regulation¹⁴¹, Belgian and French courts will not find these Conventions applicable, and can thus apply the exception to the *lis pendens rule*. The threat to this technique is that the court first seized, under the Convention, will not recognise the exclusive jurisdiction

¹³⁶ Bazin-Beust, D.; Vallansan, J., *Commission de transport*, JurisClasseur Transport, Fasc. 612, No. 23, 2013; Delbecq, P., note under Cass. 8 November 2004, RTD Com, 2005, p. 871.

¹³⁷ L 3224-1 Code des transports (“Les responsabilités du transporteur routier qui recourt à la sous-traitance sont celles prévues par le Code de Commerce pour les commissionnaires”); Kerguelen-Neyrolles, N., *Lamy transport, tome 2, commission de transport, mer, fer, air, commerce extérieur*, Paris, Lamy, 2013, p. 11. See for earlier case law in the same sense: Cass. Fr. 17 November 1965, no 61-10. 968, BT 1966, p. 38; Cass. Fr. 22 January 2002, no 98-18, p. 975; Cass. Fr. 5 February 2002, no 00-12, p. 045.

¹³⁸ Article 31 CMR and Article 46 COTIF-CIM only allow for a prerogatory jurisdiction clause, but not for a derogatory jurisdiction clause.

¹³⁹ Council regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *O.J.* L 351/1, 12 December 2012, pp. 1 – 32.

¹⁴⁰ For more in depth on this possibility see: Verheyen, W., *Forum clauses in carriage contracts after the Brussels I (bis) Regulation: procedural (un)certainly?*, The Journal of International Maritime Law, Vol. 21, No. 1, 2015, pp. 23 – 38.

¹⁴¹ But see ECJ 4 May 2010, C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, p. 179, 7-8.

clause and is therefore very likely to continue proceedings as well, which might result in parallel proceedings.¹⁴² In order to solve this problem, first of all, the parties can include an arbitration clause, as CMR and COTIF-CIM do allow for exclusive arbitration clauses.¹⁴³ A problem, however, is that for parcel delivery contracts, arbitration does not seem to be a realistic choice.

If the web shop succeeds in incorporating a competence clause in the contract, of course in addition, contractual liability rules or a choice of law for an existing regime should be included. A balanced regime that could be chosen is that of the Dutch SVA *Koeriersvoorwaarden*¹⁴⁴, as this allows for limits that are much more adequate for parcel distribution, however without, placing an excessive liability exposure on the parcel distribution company (*infra*).

2. Recommendations for (EU) legislators

Increased consumer protection serves the trustworthiness of e-commerce with the general public and, as a consequence, the popularity of online sales, as well. In order for the e-commerce market to be sustainable, a next step is however required. The (European) legislator should now focus on aligning the web shops recourse possibilities in contracts with their service providers with their liability exposure under the sales contract. An important feature of this lies in the creation of a parcel liability regime, which allows for substantial compensation in case of bad performance of the carriage contract. This is especially desirable in cases where a bargaining position is lacking for the web shop.

a. Can the EU create a parcel regime?

The EU has shared competence in the field of transport¹⁴⁵ and with the Green Paper “An integrated parcel delivery market for the growth of e-commerce in the EU”¹⁴⁶, the first step towards such a parcel regime has been taken. The question remains whether such an EU parcel regime would not contradict the

¹⁴² For more on this threat see: Verheyen, W., *EEX(bis) and CMR: the return of parallel proceedings?*, European transport law, Vol. 50, pp. 145 – 170.

¹⁴³ See Article 33 CMR. The lack of an arbitration provision in COTIF-CIM implicitly allows for such an exclusive arbitration clause.

¹⁴⁴ Algemene voorwaarden voor Koeriersdiensten, <https://www.sva.nl/nl/node/2569> (retrieved 12 February 2016).

¹⁴⁵ Article 4.2 h) and 91.1 a) Treaty on the functioning of the European Union, *O.J. C* 326, 26 October 2012, pp. 1 – 390.

¹⁴⁶ COM/2012/0698 final.

obligations of the EU Member States under the existing Conventions. By constructing the parcel contract as a *sui generis* contract¹⁴⁷, the EU could effectively create rules in this field, without potential interference with existing Conventions. Alternatively this regime can at least be considered as a *lex specialis*, in cases where a consumer is the addressee of the cargo, only to be applied in contracts where the place of loading and unloading are both situated in an EU member state, while carriage conventions would remain applicable to other e-commerce contracts.

b. What should a parcel regime look like?

A parcel regime should create a fair balance between the web shop and the parcel distribution company, taking into account 1) the web shop's obligations under the sales contract and 2) specific features of parcels. Therefore, several elements should be taken into account. Based on these elements, but also taking into account existing conventions and general conditions, the following are some suggestions for key features of a parcel regime.

i. Elements to be taken into account

1) A parcel regime should not be mode-specific, as parcel delivery companies operate different means of transportation and often even stipulate the freedom to select the means of transportation.

2) A parcel regime should not contain a per-kilo limit to liability, as especially for consumer goods the weight cannot be considered as a relevant parameter to determine the value of the goods.

3) A parcel regime should take into account the fact that parcel transportation happens behind the curtains and that the cargo-interest is therefore often unable to provide any proof whatsoever with regards to the circumstances in which the loss or damage occurred.

4) A parcel regime should take into account the fact that the actual value of the goods is often totally unknown to the parcel distribution company and that, for example, the size of the parcel cannot be taken into account to esti-

¹⁴⁷ For this position in case law see: Kh. Brussels 30 January 2014, TBH, 2014, p. 926; Vred. Overijse-Zaventem 28 May 2003, AR 01A409 (not published); see also in French and Belgian doctrine: Rodière, R., *Droit des transports terrestres et aériens*, Paris, Dalloz 1977, p. 228; Le Tourneau, P., *Contrat de transport*, Répertoire civil Dalloz, No. 2, 2007; Fredericq, L., *Handboek van het Belgisch Handelsrecht*, Brussels, Bruylant, 1980, p. 174.

mate the value. Compensation in full would therefore impose an unknown exposure to liability on the carrier.

5) It has to be taken into account that if the web shop is required to take up insurance in order to be able to get compensation in full, this creates additional transaction costs and eventually also raises the price for the consumer.

6) A parcel regime needs to take into account the consumers' rights under the sales contract and their effects on the carrier's position. Web shops should not be 'sanctioned' under the carriage contract for complying with consumer law under the sales contract.

ii. Key features of a parcel regime

Based upon the elements mentioned in the previous paragraph, the following key features should be included in a parcel regime.

1. Default rules on delay, in case a contractual stipulation is missing. Here, COTIF-CIM could offer a useful example. An option might be to have one day for picking up the parcel, one day for delivery and one additional day per 800 kilometres, but with the possibility for the parties to agree upon shorter or longer delivery times.¹⁴⁸
2. An explicit rule on the liability in case of delivery on the driveway or with third parties not designated for delivery. In order to avoid moral hazards, it seems possible to impose the liability for this on the parcel delivery company.
3. Compensation should be based upon the consumer's price, as this includes possible commissions paid to other websites.
4. A limit to liability of 100 or 500 euro per package, both in case of loss or damage as in cases of delay. Even though the web shop might not be compensated in full, still with such a rule it can easily predict the liability exposure and, if desirable, take out additional insurance. A similar rule exists for example in the Dutch SVA *Koeriersvoorwaarden*.¹⁴⁹

¹⁴⁸ Compare with Article 22 of the French Décret no 99-269 du 6 avril 1999 portant approbation du contrat type applicable aux transports publics routiers de marchandises pour lesquels il n'existe pas de contrat type spécifique, where even the size of the town where delivery is to be made is taken into account when establishing the time for delivery.

¹⁴⁹ Article 5.2 a) Algemene voorwaarden voor Koeriersdiensten, <https://www.sva.nl/nl/node/2569> (retrieved 12 February 2016). (Here compensation is set at 454 euro per package).

5. The right for the web shop to declare a higher value/interest in delivery against the payment of a surcharge of 1 or 2% of the declared value. With this the parcel delivery companies cannot ask high surcharges for this service, in order to try to push the web shop to insurers or, alternatively, to get a high margin on this service. In addition, such fixed rates would serve the comparability of parcel delivery companies.
6. The exclusion of exoneration grounds or possibilities to break through the limits. Even though this possibility might to some extent create a moral hazard for both parties, there are other, commercial mechanisms available to avoid such hazards. The carrier can refuse to accept the parcel if he considers that it is badly packed. Moreover as parcels are in general more fragile, as an expert specialised in this branch, the parcel delivery company should not be able to rely on the specific nature of the goods. Finally, for both parties possible commercial damage should be a sufficient incentive to limit moral hazards: if a specific web shop has an above average damage record, this will probably result in a refusal by parcel delivery companies to perform further deliveries, or only against payment of higher freight. Vice versa, if a parcel distribution company is frequently confronted with losses, he will be confronted with a decrease of clients and his insurance premiums will go up. The benefit of an objective liability regime with unbreakable limits is the fact that it adds to procedural efficiency. Because of the unbreakable limits and the limited possibility for exoneration under the Montreal Convention, there are only very limited reported cases. Finally, the often limited value of parcels would, even with a breaking-through rule, limit the incentive to go to court.
7. The notification period under the sales contract has to be made back to back with the notification period under the carriage contract, in order to avoid safeguarding the web shop's procedural position.

V. CONCLUSION

E-commerce is growing rapidly in Europe. Even though there is a strong potential, there are also important risks for web shops connected to starting a business in Europe. Mandatory EU consumer law places the risk of damage during transport with the web shops. Of course this protective regime can contribute to the credibility, and thus to the growth of e-commerce in Europe.

The counter side is however, that the web shop stays behind with a great exposure to risk, as possibilities to take redress are very limited and sometimes even completely absent. However, incorporation of contractual clauses might decrease to some extent the exposure to risk. In any event, it is clear that, if the web shop wants to really safeguard its interests, it should not rely on the presumed protection of carriage conventions, but rather take out sufficient insurance coverage. If the EU aims at a sustainable development of e-commerce, it should not only regulate the e-sales contract itself, but also the contracts further along the chain.

Sažetak

Wouter Verheyen *

**IZMEĐU ZAŠTITE POTROŠAČA I OGRANIČENE
ODGOVORNOSTI PRIJEVOZNIKA: RAZLIKA PRI REGRESNOM
POTRAŽIVANJU U E-TRGOVINI**

Jedna od prednosti e-trgovine, mogućnost dostave na kućnu adresu, istovremeno je i njezina bolna točka. Prema podacima Europske komisije 30 % potrošača ima iskustvo kašnjenja isporuke, a 8 % nikad nije primilo naručenu robu. Štoviše, poprilična količina robe oštetiti se tijekom prijevoza. Prema pravu potrošača EU-a rizik štete, gubitka ili kašnjenja preuzima prodavatelj. U ovome ćemo izlaganju usporediti odgovornost prodavatelja s odgovornošću prijevoznika te, ako postoji razlika pri regresnom potraživanju, kako se ona može smanjiti.

Pravo potrošača EU-a nudi visoku razinu zaštite i nalaže stroge obveze te ne dopušta odstupanje od pravila. Od Direktive o pravima potrošača iz 2011. rizik gubitka ili štete tijekom isporuke preuzima prodavatelj. Prema članku 20. Direktive rizik se prebacuje na potrošača tek nakon što potrošač, ili treća osoba koju odredi potrošač, dođe u fizički posjed robe. Direktiva o prodaji robe široke potrošnje propisuje pravne lijekove dostupne kupcu u slučaju gubitka ili štete nastale tijekom prijevoza. Glavni pravni lijekovi su nadoknada štete ili zamjena oštećenog proizvoda, i to besplatno. Isto tako, u slučaju kašnjenja isporuke Direktiva rizik stavlja na prodavatelja, a kupcu daje pravo raskida ugovora. Stoga, u slučaju gubitka, štete ili kašnjenja tijekom prijevoza prodavatelj će morati refundirati cijenu proizvoda, a možda i još neke druge troškove ili štetu kupcu (što ovisi o nacionalnom pravu).

Iako prodavatelj može pokrenuti regresni spor protiv prijevoznika, moguća je oveća razlika u regresnom potraživanju zbog različitosti režima odgovornosti prodavatelja i odgovornosti prijevoznika. Europsko transportno pravo, koje se u velikoj mjeri ujednačeno primjenjuje u državama članicama, propisuje ograničenu odgovornost prijevoznika za štete u slučaju gubitka ili kašnjenja (na primjer Montrealska konvencija predviđa ograničenje od 19 PPV-a po kilogramu izgubljene ili oštećene robe, a CMR 8.33 PPV-a, a ograničenje za zakašnjenje vezuje uz iznos vozarine). Uz to, u većini transportnih režima šteta se izračunava na apstraktan način na temelju tržišne vrijednosti robe. Posljedično, primjerice šteta za ugled, koja može biti iznimno velika u slučaju sezonskih poklona koji su neisporučeni ili kasne, nije pritom uzeta u obzir. Štoviše, odgovornost

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prijevoznika nije samo ograničena već je često nepredvidiva: u slučaju prijevoza s više prijevoznika, bilo da je riječ o viševrskom (multimodalnom) prijevozu ili kojem drugom obliku integriranja prijevoznih operacija, ostaje nejasno koji bi se režim odgovornosti trebao primijeniti, odnosno kolika bi bila odšteta, sve dok se ugovor ne izvrši.

U ovome izlaganju dajemo tri vrste preporuka za smanjenje razlike pri regresnom potraživanju ili za lakše predviđanje te razlike. S praktičnog gledišta najprije se predlažu organizacijske i ugovorne tehnike koje će strankama omogućiti da te razlike smanje. Budući da sektor e-trgovine uključuje velik broj novih i mikro poduzetnika koji najčešće nemaju dovoljno pravnog znanja, dajemo prijedloge kako bi se pravnom intervencijom na razini EU-a mogao spriječiti utjecaj te razlike na opstanak e-trgovine. Dosad EU nije intervenirao u odgovornost prijevoznika. Međutim, budući da sama Unija kaže da je "ostvarenje unutarnjeg tržišta za online usluge jedan od ključnih čimbenika u nastojanju da Europska unija postane jedna od najkonkurentnijih i dinamičnih ekonomija temeljenih na znanju u svijetu", uklanjanje prepreka u transportnom pravu koje koče razvoj mrežnih usluga trebalo bi biti jedan od prioriteta Europske unije.

Ključne riječi: odgovornost u vezi s dostavom, Direktiva o pravima potrošača, nedostatan uređenje pitanja nadoknade, šteta, gubitak i zakašnjenje