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Effects of Willful Misconduct and Equivalent Fault (or Gross Negligence) of Carrier and its Servants in International Transport Conventions: CMR, CVR, CIM, CIV

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Abstract
Although liability under general tort and contract law principles is not limited to a certain amount, liability arising under a carriage contract is limited by the majority of international transport conventions and national legislatures and, there are certain reasons given to justify the "essential departure from the current rules of civil law" and it is common for the liability of the carrier to be limited under the international regimes regarding transportation. The limitation of liability, which is nowadays considered to be a basic right rather than a privilege, is not a matter of justice, but merely a matter of public policy. Naturally, under modern transport law regimes, willful misconduct is not the only situation whereby the carrier or ship-owner loses his right to limit. Conventions regarding means of transportation, particularly road carriage, also employ provisions for breaking the limits. The aim of this paper is to investigate the effects of willful misconduct and gross negligence of road carrier in CMR, CVR, and COTIF 1999 (CIM and CIV) conventions and for this purpose admitted solutions in said convention is discussed.

Key words: *limitation of liability, carrier, willful misconduct, gross negligence*

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Introduction

The most important purpose of tort law or civil liability is restoration of injured party to the first situation (The principle of restoration to the status quo ante) the wrongdoer should restore the aggrieved party to its former state, as if he had not broken the contract or committed a tort (taghizadeh, 2014, p. 31). The damages are to be assessed irrespective of whether the liability is a strict one or a fault-based liability. Similarly, it is also of no importance whether damages were caused by intentional wrongdoing or negligence (damar, 2011, p.6). However 'the principle of full compensation' has some exceptions and is not unconditioned (safaee & rahimi, 2012, p. 328). One of these exceptions is limitation of liability provided for in international transport conventions. with this explanation that liability arising under a carriage contract is limited by the majority of international transport convention . Limitation of liability was first seen in maritime carriage, since carriage by sea was the first means of cargo carriage. Limitation of liability in the carriage other than by sea first appeared with the carriage by rail in the 18th. Carrier's liability limitation in international carriage conventions is a consequence of international trade practice, because all modes of carriage consist of risks which, in order to make international carriage possible/profitable, must be distributed to all members of such business (Daujotas, 2011, p. 2). This system, nowadays, has been adopted by international conventions on the carriage of goods. The limitation of liability, which is nowadays considered to be a basic right rather than a privilege, is not a matter of justice, but merely a matter of public policy.

Every international regime with regard to the carriage of goods and passengers, have regulations on limitation of liability and it is common for the liability of the carrier to be limited under the international regimes regarding transportation. But these regulations are not unlimited and absolute and International transport conventions which adopt a limited liability system also employ provisions regarding how and when those limits may be broken (damar, op.cit, and p. 291). Mostly depending on the time when the conventions have been adopted, the wording employed by the conventions differs: some adopt the unamended Warsaw Convention version, some the definition adopted by the Hague Protocol of 1955 (sometimes with slight changes), and some refer only to specific terms for the necessary degree of fault for breaking the liability limits.

The limitation of liability and the breaking of limits in case of willful misconduct are two components of the regimes set by the international transport conventions. Breaking the liability limits in case of willful misconduct is almost as old as the concept of limitation of liability. Naturally, under modern transport law regimes, willful misconduct is not the only situation whereby the carrier or ship-owner loses his right to limit. For example, Art. 4 (4) of the Warsaw Convention stipulates that an air carrier is not entitled to limit his liability if he does not issue a luggage ticket for every piece of luggage he accepts .There are also some doctrines where unlimited liability has been based on a substantial breach of the carriage contract.

The most important effects of willful misconduct and equivalent fault of carrier under many international transport conventions, especially under land transportation conventions (conventions on carriage by road and rail) are 1) the breaking of limitation of liability and consequently loss of the right to limitation of liability 2) extention of time limitation that provided for in these conventions (clarke, 2014, p. 378-379; amani,, 2007, p. 89). Concerned regulations in these conventions will be discussed and investigated below:

1. Definition of Willful Misconduct and Equivalent Fault (Gross Negligence)

Willful misconduct is a common law term which has been used in carriage by rail and which was literally adopted in the MIA 1906. The first adoption of the term willful miscon-

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duct in an international convention was with the Warsaw Convention regarding carriage of goods and passengers by air in 1929.

Under this convention that was model for CMR, in order to break the air carrier's liability, the carrier should have been guilty of dol, or an equivalent degree of fault (Art. 25). Art. 25 reads as follows: "The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such fault on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to willful misconduct.

The Convention mentions in its official version the cases of dol and the fault which is considered as equivalent to dol. Although the concept of dol has no exact connotation in English legal terminology, faute lourde can be easily translated into English as "gross negligence" or "inadvertent negligence (damar, op.cit, p. 55) in some ideas "Wilful misconduct" is an inaccurate translation of the narrower French concept, dol (Clarke, op.cit, p. 381). First of all, it should be stressed that wilful misconduct is wholly different from negligence and involves a different level of culpability, regardless of how gross the negligence may be. Negligence, e.g. mere forgetfulness, is not sufficient for a finding of willful misconduct. In order to be guilty of willful misconduct, a relevant person must have acted or omitted to act with the intention to cause damage to the goods. The act or omission must be wrong for a finding of "misconduct", and the wrongdoer must be aware that he is committing misconduct. In addition to misconduct, the wrongdoer should foresee and appreciate that damage will likely result; and either with the motive to cause the foreseen damage or with indifference as to whether the damage would result, the wrongdoer should continue committing the misconduct. In some definitions, willful misconduct has been defined as willful, deliberate or conscious performance of the misconduct by the assured with the intention to cause the loss actually occurred. Some courts states that the willful act of an assured together with the intention to cause a specific loss is dolus (damar, op.cit, p. 41). "Dol" often means deliberate breach of duty, by which damage is caused. Dol also been described as conduct outside the terms of the contract or, as the common lawyer might say, outside the four corners of the contract. Any suggestion of an analogy with common law doctrines of deviation or fundamental breach as applied to bailment and carriage of goods, however, would be misleading. Not only are the doctrines of deviation and fundamental breach inapplicable to carriage contracts but also the concept of willful misconduct has developed differently: it has developed subjectively by reference to the mind of the actor, rather than objectively by reference to the purpose of the contract or the consequences of breach. Nonetheless, the idea that the actor has put himself beyond the pale prose of the contract points to conduct to which normal defenses should not or were not intended to apply (Clarke, op.cit, p. 381-382).

Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 ("Hague Protocol") which signed on 28 September 1955 and entering into force in 1 August 1963. This protocol provisions regarding breaking of limitation of liability has been the model for the other other international transport conventions such as COTIF. Art. 25 of this Protocol is in this regard and provides for: "The limits of liability specified in Article 22 of the Convention shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment'.

Under said Art, there are two possibilities in

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order to break the liability limits. These two possibilities correspond to two different degrees of fault.

The first one is intentional wrongdoing (or willful misconduct). To be guilty of intentional wrongdoing, the person needs to have intended to cause specific damage. Moreover, the wrongdoer's act or omission must be unlawful, so cases of necessity are not covered by Art. 25. The second degree of fault "recklessly and with knowledge that damage would probably result" necessitates a reckless act or omission coupled with awareness of the probable results of this act or omission. The main and most important difference of this conduct from intention is the results of the conduct. The wrongdoer, although having foreseen probable results, does not have the desire to cause them.

In order to examine whether one of these degrees of fault is present in a case before court, the court must determine first whether the act or omission was done intentionally. If so, the wrongdoer's intention as to the foreseeable results must be determined. If the wrongdoer had the intention to cause the damage incurred, he is guilty of intentional wrongdoing.

If the act or omission is reckless, then the court must examine the state of mind of the wrongdoer. First, the wrongdoer must have foreseen the results of his act or omission. However, every manner of foresight is not enough to be guilty of this kind of fault. The wrongdoer must have foreseen that the occurrence of the result is more likely than its non-occurrence (damar. op.cit, p. 96).

2. Effects of Willful Misconduct and Equivalent Fault (Gross Negligence)

2.1. CMR

2.1.2. Loss of the Right to Limit

The second convention after the Warsaw Convention which refers to willful misconduct or equivalent fault is the CMR. If willful misconduct occurs, first, by virtue of Article 29 none of the defenses in Chapter IV (Articles 17-29), notably the limits on liability in Article 23, is available to defendant (carrier). This is also true, if the willful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage. Article 29 reads: "1- The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his willful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct. 2- The same provision shall apply if the willful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1" (Clarke, op.cit, 379).

Article 29 (1) has referred to willful misconduct and equivalent fault and has regarded them as causes of unlimited liability of carrier. Under Article 29 (1) the provisions relating to exclusion and limitation of liability provided by the CMR is lost where the damage is caused by the carrier's willful misconduct or default on his part, which according to the law of the court seized of the case, is regarded as equivalent to willful misconduct .This is also the case where willful misconduct or default is committed by the carrier's servants, or agents, or by any other persons whose services he makes use of in the performance of the carriage acting within the scope of their employment (second paragraph of aforesaid Article).

It will be noted that there are two ways in which Articles 28 and 29 differ. First, while Article 28 refers to any provisions of the convention which exclude liability or fix or limit

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compensation, Article 29 only withdraws the protection of the provisions contained in chapter 4. This means, for example, that even if willful misconduct has occurred, the claimant must still give reservation as prescribed by Article 30. Secondly, Article 28 refers to those provisions which "exclude the liability of the carrier or which fix or limit the compensation due" whereas Article 29 refers to provisions which "exclude or limit his liability or which shift the burden of proof".

Willful misconduct or equivalent default may be committed not only by the carrier but also by the sender, for example the sender who consigns highly dangerous goods without alerting the carrier to their nature: the carrier would have longer to sue under Article 32 (1).

Also, Art. 32 (1), which sets the time limits for the claims under the Convention stipulates that the one-year time limitation, although not removed altogether, is increased from one year to three years in case of willful misconduct or such fault, as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct.

It is clear that the wording of both articles was taken directly from the unamend version of the Warsaw Convention. When the CMR was opened for signature in 1956, Art; 25 of the Warsaw Convention had however already been amended by the Hague Protocol of 1955, since the aim of unification was not achieved by the unamended version. In other words, The wording of Art. 25, which make a uniform interpretation almost impossible, led to uncertainties caused by the differences in interpretation as well as the case law developed by common and civil law countries. It was also believed that the. Phrase in Art. 25 referring to local law had been interpreted very liberally by juries and courts in order to break the low liability limits. Since the aim of uniformity could not be realized, it was strongly recommended that Art. 25 should be amended (damar, op.cit, p. 78-79).

As Article 25 in its original forms was thought to produce an unacceptable divergence between the decisions of different jurisdictions, in particular between decisions in civil law countries and decisions in countries of common law; However, agreement on a new formula for the CMR was thought to be unabtainable and the 1929 model was preferred precisely to permit imprecision and to accommodate certain civil law countries which wanted to treat faute lourde and faute grave as equivalent default (Clarke, op.cit, p. 380). Therefore, the CMR was criticized for adopting the same principle which had already caused many problems from a unification point of view. It was said that the aim of the drafters of the CMR was to leave space for the imprecise interpretation in terms of unlimited liability; therefore, without attempting to define the degree of fault, they adopted the 1929 version of the Warsaw Convention. Consequently, it would not be wrong to say that the drafters of the CMR intentionally referred to substantive law by the phrase "by such fault on his part as, in accordance with the law of the court seized of the case, is considered as equivalent to willful misconduct" whereas the drafters of the Warsaw Convention, in contrast, reformulated the same phrase to overcome the terminology problem. Indeed, during the drafting work of the Convention it was suggested that the phrase should be replaced by the term "gross negligence", as was the case in the 1952 version of the CIM Art. 37. However, the suggestion was objected to on the grounds that the common law system is not familiar with the term and that not all national systems make a distinction between different degrees of negligence. Therefore, the suggestion was rejected. This explanation also shows that the drafters anticipated that the liability limits would be broken in cases of gross negligence as well (damar, op.cit, p. 226-227). It was, nevertheless, said that the intention of phrasing "by such fault on his part as, in accordance with the law of the court seized of the case, is considered as equivalent to wil-

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ful misconduct" was not "giving equal status to different degrees of culpability", but was overcoming the problem caused by different legal terms for the same degree of culpability. Since the unamended version of Art. 25 Warsaw Convention has been the model for the CMR Art. 29, the inconsistency and problems encountered under the unamended Warsaw Convention have also been encountered under the CMR (Ibid, p. 227) and for interpretation, case law developments in respect of Art 25 of Warsaw Convention are pertinent and followed as suggested by Jones v Bencher (carr, 2010, p 391). Most of the civil law courts consider gross negligence as fault equivalent to willful misconduct, whereas there is no such an equivalent degree of fault under common law. This leads to the result that a carrier may be entitled to limit his liability before one court, yet he cannot limit his liability under the same conditions before another court since gross negligence is considered as the degree of fault equivalent to wilful misconduct. This situation results, without any doubt, in forum shopping and may be resulted in different consequences depending on the question of which court the case is brought before. The fact that the English and French versions of the CMR are equally authentic also supports such a result. Nevertheless, under both civil and common law interpretations, the carrier will be liable without limitation if damage is caused by his intentional misconduct. Since it has been accepted by many scholars that the term intentional misconduct covers both dolus directus and dolus eventualis, the inconsistency appears only in the degree of fault which is considered as the equivalent of willful misconduct.

As mentioned above "Willful misconduct" is an inaccurate translation of the narrower French concept, dol (Clarke, op.cit, p. 381)"Dol" often means deliberate breach of duty, by which damage is caused. Dol also been described as conduct outside the terms of the contract or, as the common lawyer might say, outside the four corners of the contract. Any suggestion of an analogy with common law doctrines of deviation or fundamental breach as applied to bailment and carriage of goods, however, would be misleading. Not only are the doctrines of deviation and fundamental breach inapplicable to CMR contracts but also the concept of willful misconduct has developed differently: it has developed subjectively by reference to the mind of the actor, rather than objectively by reference to the purpose of the contract or the consequences of breach. Nonetheless, the idea that the actor has put himself beyond the pale prose of the contract points to conduct to which normal defenses should not or were not intended to apply. The meaning of willful misconduct, as understood in the CMR, came before the English court for the first time in Jones v. Bencher and the judge turned to cases on the meaning of the expression, first, in contracts for carriage by rail and, secondly, in contracts for carriage by air governed by the Warsaw Convention (Ibid, p. 381-382).

The carrier of goods by road under the CMR commits willful misconduct, by conduct intended to cause loss or damage to the goods. This much is obvious, except that the carrier will be considered to have intended any loss or damage that is the inevitable consequence of an intentional act or omission. Thus, if a carrier agrees to deliver goods by a certain date but then arranges matters in such a way that the goods cannot be delivered on time, the carrier can be considered to have intended any consequent loss or damage consequent on late delivery. Difficulty, however, arises I the area of recklessness located, as it is, between intention and gross negligence (Ibid, p. 386).

Under CMR Art 29 (2), it is explicitly stated that the carrier will not be entitled to limit his liability when his servants or agents are guilty of willful misconduct or of the equivalent degree of fault. Thus, there is no room for the discussion whether the term carrier refers only to the carrier himself and whether willful misconduct of his servants or agents is sufficient

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to break his liability limits. Nevertheless, in order to deprive the carrier of the liability limits, the servant or agent must have acted or made an omission within the scope of his employment. In this respect, especially criminal activities by servants or agents, such as theft and smuggling, are to be considered as intentional misconduct within the scope of their employment (damar, op.cit, p. 228), provided that it is part of their employment to take care of the goods (clark, op.cit, p. 379).

Article 29 operates if damages were "caused by" willful misconduct or equivalent default. A further difficulty is that Article. 29 mention only a causal connection with damage, which in other parts of the CMR, for example Articles. 23 and 25, is clearly distinguished from loss and delay. The inference might be drawn, therefore, that when willful misconduct causes loss or delay, it has no effect on the carrier's rights. This point has not been taken in the cases (clark, op.cit, p. 388, and fn. 33).

However, Article 32 (1) operates to extend the limitation period "in the case of" willful misconduct or equivalent default. The use of different wording in Article 32 (1) might suggest a looser connection with the misconduct or default, but no obvious reason for any difference has been advanced. Article 32 (1) should be construed neither literally nor in isolation. The apparent difference largely disappears, if "the case" of willful misconduct or equivalent default mentioned in Article 32 (1) is the case mentioned just above in Article 29, that is, the case of willful misconduct or equivalent which has caused damage. Further support for this view lies in the fact that the CMR is modeled on provisions of the Warsaw Convention in which a causal connection was clearly required . The nature of causal connection required is a matter for national law. As described above, The effect of willful misconduct or equivalent default is that under Article 32 (1) the period of limitation is extended from one year to three; and that under Article 29 (1) the carrier is deprived of "provisions of this chapter which exclude or limit his liability or which shift the burden of proof", notably those in Articles 17 and 18, which expressly "relieve" the carrier of liability or speak of presumption s, as well as those in Article 23, which limit the amount of the carrier's liability. In the latter case, however, the liability will still be limited by rules of national law relating to remoteness of damage and causation (clarke, op.cit, p. 388-389).

CMR Art 29 holds the carrier liable without any financial limits if "the damage" is caused by his or his servants' or agents' willful misconduct or equivalent fault. Firstly, foresight of the specific damage occurred is not necessary for the carrier to be deprived of the right to limit; it is sufficient if the carrier or his servants or agents have foreseen that damage to cargo will occur. Nonetheless, "damage to cargo" is a restricted term compared to the "damage, loss or delay in delivery", since the carrier is liable for all these situations under the CMR. It has been argued whether the term "damage" as used in Art. 29 also cover loss and delay in delivery. It was asserted that the problem must be solved in the light of the lex fori or the applicable law. However, it is clear that the term damage under Art. 29 were used in broad sense and covers damage and loss, as well as delay in delivery (damar, op.cit, p. 229, Messent & Hill, 2000, p. 153).

In practice, cases such as, disregard of the risk of theft, defective packing, loading or stowage; road accident, misdelivery, are situations where courts have decided the carrier is grossly negligent (clark, op.cit, p. 394-398). Nevertheless, one of the most common reasons for unlimited liability has been the inadequate organisational structure. For instance, if the driver does not have enough money to buy the necessary amount of fuel for transportation or if the goods are lost and it is impossible to designate the place of loss due to the lack of checkpoints during the redistribution and transportation of the goods, the courts have ruled that these are inadequacies in the organisational structure which can cause unlimited

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liability in terms of CMR Art. 29. However, in this respect, simply taking some precautions is not enough; they must be practically applicable and applied (damar, op.cit, p. 233-234).

2.1.3. Time Limitation

Another point to be emphasised is related to willful misconduct and its effect on time limitation. Art. 32 (1) of the CMR stipulates that the one year time limitation should be extended to three years in case of willful misconduct or equivalent fault. Here, two different interpretations can be considered: (1) the carrier's willful misconduct relates, not to the carriage operation, but to the subsequent claims regulation; (2) the carrier's willful misconduct only refers to the carriage. The question is whether the one year time limitation should be extended to three years in both cases.

It is said that in order to extend the time limitation, the carrier must have intentionally slowed down the commencement of the proceedings. For instance, if a carrier uses a company name on the consignment note which is very similar to the name of another company with the same registered address, this makes it difficult to lodge a claim within a one year time period. In this example, there is intentional deception and, therefore, the time limitation will be three years independent of whether the carrier was also guilty of willful misconduct with regard to the carriage.

Undoubtedly, if the carrier deceives the cargo interest in order to slow down the commencement of a claim against him, there is willful misconduct in terms of the time limitation; and, naturally, the time limitation will be extended to three years. However, extension of the time limitation should not be limited to cases where the carrier is guilty of willful misconduct in delaying claims regulation. If the damage was caused by the carrier's willful misconduct, the time limitation should also be extended to three years.

As a result, if the carrier intended to slow down the proceedings, the time limitation will be extended but since there is no willful misconduct regarding the damage caused, the carrier will continue to be liable only within the liability limits specified under the CMR. However, if there is willful misconduct on the side of the carrier in terms of the damage which has occurred, both the time limitation will be extended and the liability limits will be broken (Ibid, p. 229-230).

The final point to clarify is the lack of any clear provision as to the willful misconduct of the servants and agents of the carrier under Art. 32. Clear reference regarding the issue can be found in Art. 29. Thus, the question is whether acts and omissions of servants or agents are also relevant for the purposes of Art. 32. Considering the approach adopted by the CMR for breaking the liability limits, the question must be answered in the affirmative (glass & cashmore, 1989, p. 128).

2.2. CVR

2.2.1. Loss of the Right to Limit

The unification effort for the carriage of passengers and their luggage by road came later than for the carriage of goods. The Convention on the Contract for the International Carriage of Passengers and Luggage by Road ("CVR") was signed in 1973 and entered into force on 12 April 19947. The Convention is applicable, irrespective of the place of residence and the nationality of the parties to the contract of carriage, when the carriage takes place in the territory of at least two different contracting states (Art. 1). The carrier is liable for the loss or damage resulting from physical injury to or death of passengers during the carriage or total or partial loss of or damage to their luggage (Art. 11, 14), unless he can prove that the loss or damage was caused by circumstances that the carrier could not have avoided and the consequences of which he was unable to prevent by showing "the diligence which the particular facts of the case called for" (Art. 11 (2), 14 (2)). It is clear that the liability of the road carrier for the carriage of passengers under the CVR is also based on presumed fault. The extent of compensation and the limitation

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of liability for personal injuries and for loss of or damage to luggage are regulated under Art. 12, 13 and 16.

In the carriage of passengers and their luggage by road, the carrier is deprived of the right to limit in both willful misconduct and gross negligence cases. Pursuant to the first sentence of Art 18 (2) of the CVR, if the loss or damage resulted from the willful misconduct or gross negligence of the carrier or a person for whom he is responsible under the Convention, the carrier loses the right to limit his liability. The provision clearly states that the willful misconduct or gross negligence of his servants, agents or independent contractors will deprive the carrier of the liability limits. Consequently, there is no room for any debate.

Unlike the CMR, the CVR clearly stipulates that the carrier will be deprived of the liability limits when the damage or loss is caused by willful misconduct or gross negligence. Therefore, it is sufficient for the claimant to show that the damage or loss would not have been caused if the carrier (or his servants or agents) had shown the necessary care, and that the carrier (or his servants or agents) violated the duty of care in a grave manner. The claimant is under no obligation to show that the negligent person has foreseen the probability of the loss or damage incurred.

Finally, the terms "loss or damage" should be understood in the context, as they are used in the provisions of the Convention which set the basis of carrier's liability. Consequently, loss or damage refers to either loss or damage resulting from the death or from any other physical or mental injury of the passenger (Art. 11) or loss or damage resulting from the total or partial loss of luggage and from damage to luggage (Art. 14).

2.2.2. Time Limitation

In this respect, it must be said that in CVR convention there is not any provision in this regard and it seems that willful misconduct and equivalent default of the carrier does not cause to extension of period of limitation for actions.

2.3. COTIF 1999 (CIM and CIV)

2.3.1. Loss of the Right to Limit

Both CIV 1999 and CIM 1999 contain provisions as to the breaking of the carrier's liability limits. According to CIV 1999 Art, 48 and CIM 1999 Art, 36, the limits of liability are not applicable if it is proved that the loss or damage resulted 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. At a first glance, there is a substantial difference between the 1980 and 1999 texts. In their unamended version, CIV 1980 Art. 42 and CIM 1980 Art, 44 deprive the railway of the right to limit if the damage, loss or delay was caused by its willful misconduct. However, if the loss, damage or delay is caused only by its gross negligence, instead of being broken, the amounts of the limits were to be doubled. These provisions have been amended in 1990 and new degrees of fault were adopted in conformity with the Hague Protocol of 1955. According to the amended provisions, limits of liability were not applicable if it is proved that the loss or damage resulted from an act or omission, on the part of the railway, done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage will probably result.

Before addressing the difference between the 1980 and 1999 texts, it must be stressed that, unlike the unamended Warsaw Convention and the CMR, CIV 1980 and CIM 1980 make a clear distinction between willful misconduct and gross negligence. Since the provisions only provided for breaking the limits in case of willful misconduct, there was no discussion as to the equivalent degree of fault. Therefore, the railway lost its right to limit only in case of willful misconduct (dol, Vorsatz), but not in case of gross negligence. As also clearly stated in the provisions, in case of gross negligence (faute lourde, grobe Fahrlässigkeit), the amount of the compensation payable was doubled. Al-

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though decisions have varied from country to country, it has been decided that in cases of loss of the transport document, delivery to an unauthorized person or bad condition of the wagons, the railway is grossly negligent.

Nevertheless, both the original and amended versions of the 1980 text refer to the willful misconduct "on the part of the railway". Thus, it was accepted that the term "on the part of the railway" refers also to the willful misconduct of the servants, agents and independent contractors of the carrier and, therefore, that the railway also loses the right to limit when its servants, agents and independent contractors are guilty of willful misconduct. However, CIV and CIM 1999 clearly refer to the fault of the "carrier". At a first reading, the lack of a clear or implicit reference to the fault of the servants, agents or independent contractors, and the reference to the acts or omission "which the carrier has committed" give the impression that, under the CIV and CIM 1999 regime, the act and omissions of the servants, agents and independent contractors of the carrier cannot deprive the carrier of the limits of liability. However, the change of the term "railway" to the "carrier" has another background. In the last 20 years, the trend has been towards the liberalization of the railway market in Europe. As a result, private companies started to be engaged in the carriage by rail. Existing railways and other infrastructure have been shared by different carriers. This development rendered the term "railway" in the 1980 text inconsistent with the existing factual and legal situation, and therefore the term has been changed throughout the whole text of CIV and CIM to the "carrier". The managers of the railway infrastructure are, nevertheless, to be considered as persons for whom the carrier is liable (CIM 1999 Art. 40, CIV 1999 Art. 51).

Furthermore, when the explanatory reports with regard to the 1999 reform are examined, it is clear that the drafters did not intend to change the existing legal situation under the 1980 text, which is that the acts or omissions of the servants or agents of the carrier can cause the unlimited liability of the carrier. In the reports with regard to CIV Art. 48 and CIM Art; 36, it was stated that the relevant provisions have been taken from the corresponding provisions in the 1980 texts. There is no other explanation. If the drafters would have intended to change the existing legal situation by only changing the terminology, they would have stated their intention in the explanatory reports, as they did with regard to other provisions. Therefore, the conclusion must be reached that, in the carriage of passengers and goods by rail, the acts or omission of the servants or agents of the carrier will deprive the carrier of its right to limit. Another point to be clarified as to the term "carrier" is that, pursuant to Art. 3 (a) of the CIV and CIM 1999, "carrier" means the contractual carrier and pursuant to Art. 3 (b) of both of the texts, any carrier who is entrusted with the performance of the whole or a part of the carriage but who is not the contractual carrier is a "substitute carrier". The question is whether the term "carrier" under CIV 1999 Art. 48 and CIM 1999 Art. 36 also cover the substitute carrier.

CIV 1999 Art. 56 (6) and CIM 1999 Art. 45 (6) state that an action for liability may be brought against the substitute carrier to the extent that the provisions of the Rules are applicable to him. By virtue of CIV 1999 Art. 39 (2) and CIM Art. 27 (2), liability provisions are applicable to the substitute carrier. Therefore, for the part of the carriage performed by the substitute carrier, he will be subject to actions brought against him and, in this case, provisions governing liability will be applied. Provisions regarding loss of the right to limit are adopted in the chapter regarding liability under both instruments. They are, therefore, applicable in a case brought against the substitute carrier. As a result, if an action is bought against the substitute carrier, he will lose his right to limit if it is guilty of willful misconduct. Moreover, the term "loss or damage" refers to the

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"loss or damage" as used in the provisions regarding liability, i.e. loss or damage resulting from death, physical injury, total or partial loss of or damage to the goods etc. Furthermore, the provisions regarding the loss of the right to limit refer to "such" loss or damage, namely the very damage or loss that occurred (damar, op.cit, p. 236-238).

2.3.2. Time Limitation

Finally, in case of willful misconduct as defined in the provisions CIV 1999 Art. 60 (2) and CIM 1999 Art. 48 (1), the time limitation will be extended to two years. Undoubtedly, the time limitation will be extended if there is damage or loss caused by the carrier's willful misconduct. The question is whether the time limitation should also be extended to two years if the carrier intentionally misleads the claimant regarding the commencement of the proceedings. Under the CMR, it was said that the time limitation should also be extended in cases where the carrier intentionally slows down the commencement of the proceedings. However, in contrast to the CMR where only the term "willful misconduct" is used, CIV and CIM use the terms "such loss or damage" in defining willful misconduct; furthermore, it is stated that "loss or damage" should be understood as used in the liability provisions. However, in the context of time limitation, "such loss or damage" should be interpreted broadly, so that the terms also cover the loss or damage

caused by the carrier's willful misconduct intended to slow down the commencement of the proceedings.

2.4. Servant or Agent

2.4.1. Definition and vicarious liability

All the conventions mentioned above regulate the vicarious liability of the carrier explicitly under specific provisions. Pursuant to the relevant provisions the carrier is responsible for the acts and omissions of his servants and agents; furthermore, he is also responsible for the acts and omissions of all other persons of whose services he makes use for the performance of the obligations arising out of the contract of carriage. It is clear that the vicarious liability of the carrier extends not only to his servants and agents but also to independent contractors provided

That the independent contractor has been made employed for the performance of the contract of carriage. When there are special provisions as to the actual or subsequent carriers, the carrier is also liable for the acts and omissions of the actual carrier and his servants and agents according to those special provisions.

However, there is one precondition for the carrier becoming vicariously liable for his servants, agents and independent contractors. The carrier is only liable if they were acting within the "scope of their employment". The carrier will not be vicariously liable for loss of or damage to goods which have occurred as a result of the acts or omissions of any servant, agent or independent contractor when they were not acting within their scope of employment.

2.4.2. Right to limit

The possibility for the servants and agents to be held personally liable under tort law principles for their acts and omissions poses a danger to these individuals' financial situation and to the limited liability system. A claimant can successfully circumvent the limited liability system created by the relevant convention by simply suing the servant or agent in tort. In order to prevent such a result, the conventions adopt specific provisions stating that servants and agents (and also under some conventions, it is provided that servant or agent must prove that he was acting within the scope of his employment.

2.4.3. Loss of the right to limit

Since they are subject to actions and since they have also the right to limit, servants and agents are also subject to provisions breaking the limits. Depending on the regime regarding the loss of the right to limit, the conditions required for breaking the servants' and agents' liability

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limits differ under relevant conventions.

Pursuant to CMR Art. 29 (2), agents, servants, and other persons for whom the carrier is liable are not entitled to avail themselves, with regard to their personal liability, of the liability limits if they are guilty of willful misconduct or of such fault which, in accordance with the law of the court seized of the case, is considered as equivalent to willful misconduct. Consequently, servants and agents will also be deprived of liability limits when the damage is caused by their gross negligence or reckless conduct coupled with knowledge of the probable consequences, whichever is considered as the equivalent to willful misconduct by the court seized of the case. Clearly, the unlimited liability of the servants and agents solely depends on their own conduct.

The situation under the international regime for the carriage of passengers by road iss more clearly regulated than under the CMR. According to the second sentence of CVR Art. 18 (2), servants and agents of the carrier will lose their right to limit when the loss or damage results from their wilful misconduct or gross negligence. Therefore, the claimant does not need to prove the subjective knowledge of the servant or agent; a violation of the duty of care in a grave manner is sufficient to break the limits.

By virtue of CIV 1999 Art. 52 (2) and CIM 1999 Art. 41 (2), the conditions and limitations set by the Rules are applicable to servants and agents in an action brought against them. Thus, CIV 1999 Art. 48 and CIM 1999 Art. 36 are also applicable to the rail carrier's servants and agents; therefore, they will lose their right to limit if they are guilty of intentional or reckless conduct as defined in the provisions (Ibid, p.241-243).

Conclusion

If it is proved that the damage resulted from an act or omission of [the person liable] done with intent to cause damage or recklessly and with knowledge that damage would probably result" a person liable will not be not entitled to limit his liability,. This provision, though sometimes with small but important differences, is an invariable and indispensable part of almost every international regime with regard to the carriage of goods and passengers. It adopts the principle that liability cannot be limited in case of a certain type of faulty conduct, which is known as willful misconduct. Breaking the liability limits in case of willful misconduct is almost as old as the concept of limitation of liability. Limitation of liability has been the most important privilege adopted for carriers. The roots of, and policy behind, the limitation of liability can be found in its historical development.

Principally, under modern transport law regimes, willful misconduct is not the only situation whereby the carrier loses his right to limit. For example, Art. 4 (4) of the Warsaw Convention stipulates that an air carrier is not entitled to limit his liability if he does not issue a luggage ticket for every piece of luggage he accepts. Willful misconduct is a term of common law. The first appearance of the degree of fault with regard to admiralty law can be traced back to the UK's Merchant Shipping Act of 1894. The first adoption of the term willful misconduct in an international convention was with the Warsaw Convention regarding carriage of goods and passengers by air in 1929. The convention in order to break the air carrier's liability, the carrier should have been guilty of dol, or an equivalent degree of fault (Art. 25). The term willful misconduct is used in the provision's English translation. When the Convention was amended by the Hague Protocol in 1955, the provision regarding breaking the liability limits was also amended; and it was decided to define the degree of fault which gives rise to unlimited liability, instead of using national legal terms to refer to certain degrees of fault. Thereby, the definition adopted by almost every transport law convention came into existence and nowadays International transport conventions which adopt a limited liability system also employ provisions

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regarding how and when those limits may be broken. The limited liability system has become, through its historical development, a common feature of international transport regimes; the same is true of the provisions regarding unlimited liability including the case of willful misconduct. The term "willful misconduct" has been defined in the Hague Protocol of 1955 as "intent to cause damage or recklessness with knowledge that damage would probably result". This definition has been employed, with small changes, by almost all international transport conventions.

When the limitation amounts are fixed by international instruments, those amounts may prove insufficient due to changes in the market. Although this problem has partly been overcome by reference to the Special Drawing Right in the international instruments, limitation amounts can be still insufficient due to changes in the economic capacity of the shipping market and the increase in the financial value of the goods carried. The problem of low liability limits was, naturally, an important reason for initiating discussions as to when the carrier or ship-owner is guilty of willful misconduct. Policy considerations for creating almost unbreakable liability limits, i.e. breaking the liability limits only in cases of personal misconduct of the carrier caused additional discussions as to the attribution of the fault of servants and agents to the relevant company.

As noted above the limitation of liability and the breaking of limits in case of willful misconduct are two components of the regimes set by the international transport conventions. However, the main reason for having unlimited liability provisions is not the desire for having unlimited liability cases from time to time. The main rationale of such provisions is that it would be immoral to let the carrier or shipowner limits his liability even when he is guilty of willful misconduct. It is contrary to public policy and also runs counter to the underlying motives for a limited liability system.

It would be, without any doubt, in the advantage of the passengers and cargo interests if the carriers or ship-owners were to be held liable without any financial limits in cases of, for instance, grossly negligent conduct, or for the conduct of their servants and agents. However, it is not possible to extend the scope of application of the relevant provisions and it should never be forgotten that the motives for limitation of liability and the circumstances under which these limits should be broken are two distinct issues. Limitation of liability is a matter of policy, whereas breaking the limits is a matter of law under the relevant regimes although it is true that they cannot always be easily disentangled. Discussing whether the limitation of liability is still necessary is related to lege ferenda, whereas determining and interpreting the rule applicable is related to lege; Most of the issues regarding wilful misconduct have been resolved in the course of the development of international transport law. Nonetheless, there is still an unresolved issue with regard to willful misconduct: To which degree of fault does the term wilful misconduct refer under civil law? There are different answers to this question, which generally refer either to dolus eventualis or advertent gross negligence. additionally because of Art. 29 CMR is modelled on unamended versaw convention (1929) and it is criticizable for adopting the same principle which had already caused many problems from a unification point of view, and the inconsistency and problems encountered under the unamended Warsaw Convention have also been encountered under the CMR ,it is recommended that Art 29 of CMR is amended and adopts regulations of Art. 25 of Hague Protocol on breaking of limitation of liability.

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