The Carriage of Dangerous Goods by Land as One Mode of Combined Transport*

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Introduction

Unlike the common law of carriage by land regarding dangerous goods, the common law duties of carriage by sea in general are strict, and not dependent on negligence. This is not purely historical, because the common law can still apply where the convention or contractual provisions do not. Turning to the liability of the carrier in respect of loss or damage to dangerous goods, his is not an absolute one as it would not be reasonable to require the common carriage of dangerous goods. The position, therefore, seems to be that where there are no special contractual conditions imposed, a carrier will be subject to the normal duty of reasonable care required of a private carrier. If, on the other hand, a carrier contracts subject to contractual conditions, his liability will be limited by the exemption clauses in these contracts which apply for the carriage of normal goods.

Considering on the part of the shipper, the shipper also has duties under the carriage contract among which another important obligation is not to ship dangerous goods without informing the carrier of their nature. Under the contract of normal goods of carriage contract, the carrier (or in the case of warranty of fitness, the shipper) are not obliged under the common law duties but, where the carriage contract contains special provisions adding to normal conditions of the contract, this means that the common law duties of the carrier (or in
the case of warranty of fitness, the shipper) would be liable in respect of loss or damage to
dangerous goods. The provisions under CMR replaces the common law duties so that the
duties of the shipper without letting the carrier know the nature of the goods having been
carried would compensate for the loss or damage to the goods.

1. The Position at Common Law

1.1. Warranty of fitness

At common law the carrier, whether common or private, is not obliged to carry dangerous
goods, without the protection of a compensatory warranty of fitness by the consignor.\(^1\) Under
this warranty the consignor will be liable to compensate the carrier for any damage suffered
by him through carrying goods of whose nature he has not been informed. The consignor must
therefore give notice to the carrier of any dangerous characteristic which the goods may
possess, and if on the surface they are apparently harmless, the consignor will be liable to the
carrier for damage which he has no reason to anticipate.\(^2\) This rule applies to any goods that
are not fit to be carried and is not restricted to dangerous goods in the strict sense of the
word. This right of recovery extends not only to the carrier, but also to the carrier’s servants
who suffer injury through breach of the consignor’s warranty of fitness.\(^3\)

1.2. General Conditions of Contract

Where a shipper forwards goods by British Rail or BRS, he must warrant that all
merchandise is “fit to be carried or stored” unless the forwarder gives written notice to the
contrary to the carrier on delivery.\(^4\) The forwarder will therefore be liable under this clause if
he consigns goods which contravene the common law warranty of fitness. If goods are in fact
dangerous, British Rail and BRS will only carry them subject to special conditions of carriage
laid down in cl. 19 of the conditions. Dangerous goods are here defined by reference to the
Railway Board’s List of Dangerous Goods and goods of "comparable hazard."\(^5\) Clause 19(1)
provides that where a carrier accepts dangerous goods for carriage that they will be carried
subject to the normal conditions of carriage and in addition to the special conditions laid down
in cl. 19(2), the latter to prevail in case of conflict, although if further conditions are added in
the consignment note these in turn will prevail over the special conditions.\(^6\)

\(^{1}\) See Paton, “Bailment in the Common Law,” p.262.
p.563,per Willes,J.
\(^{3}\) ibid.
\(^{4}\) Clause 4(1), BRS Conditions.
\(^{5}\) Clause 1, BRS Conditions; cf. cl. 1(a)(b), RHA Conditions 1967.
\(^{6}\) Clause 19(2)(d), BRS Conditions.
Clause 19(2) requires that previous arrangements shall be made with the carrier for the carriage of the goods, and that when they are tendered to the carrier the sender must supply a written declaration of the nature of the goods. Secondly, the goods must be packed in accordance with any statutory regulations in force applicable to the carriage of goods, and, unless there is written agreement otherwise, also in accordance with the British Rail regulations for the packing, labelling and loading of dangerous goods. Thirdly, the client will be responsible for and indemnify the carrier for loss, damage or injury arising from non-compliance with cl. 19, unless the client can prove that the loss, etc., resulted from the carrier’s wilful misconduct. Road Haulage Association Conditions similarly require a written declaration accompanying dangerous goods as to their nature and contents, correct packing, and give a right of indemnity\(^7\) to the carrier.

1.3. Common law and contractual provisions

One important difference between the common law warranty of fitness and any contractual provision is that, as mentioned above, the former inures for the benefit of the carrier’s servants and the owners of goods which are damaged by dangerous goods while in the carrier’s possession. By contrast, any contractual provision will be subject to privity of contract, and will therefore not benefit the carrier’s servants or any of the latter’s clients whose goods have been damaged, unless some form of agency clause to cover an Adler v. Dickson type of situation is included.\(^8\) The provisions in cl. 2(2), BRS Conditions and cl. 3(3), RHA Conditions 1967, appear to establish such an agency relationship, which will presumably enable third parties to benefit from the principal contract of carriage. It should be noted, however, that in the case of a sub-contracting carrier, the latter will have no need to rely upon any contractual provision in relation to dangerous goods, as the common law warranty of fitness apparently extends to any carrier, not being subject to the doctrine of privity of contract.

Finally, it should be noted that a carrier can recover under the common law warranty in respect of loss to another client’s goods even though he is not contractually liable for the loss or alternatively for its full amount: In such a case he must account to the injured client for the full value and not merely the amount otherwise contractually recoverable by the client for him. However, in the case of the contractual rights of indemnity referred to above, in contrast to the common law rule, the indemnity will only cover the carrier’s actual liability to third parties, which will not necessarily be the full amount of the loss.\(^9\)

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7) Clause 4, RHA Conditions 1967
8) [1955] 1 Q.B. 158
9) cf. art. 22(2), CMR, below. Even if there is an indemnity clause in a contract of carriage exempting the carrier from all loss, etc., “rising out of the carriage of” dangerous goods, the carrier will only recover if the loss results from the carriage of the goods, but not if it results from the carrier’s own the negligence: *Pickfords Ltd. v. Perma Products Ltd.* (1947) 80 L.L.Rep.513
2. The Position under CMR

2.1. Construction of CMR

In the case of the international carriage of goods by road, in addition to CMR, the transit may also be subject to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) 1957, which lays down specific requirements in respect of an extensive range of dangerous goods listed therein.\(^{10}\)

Any discussion of CMR must therefore be subject to the additional requirements of ADR, although most of its provisions are concerned with the carriage and packing of dangerous goods rather than with the relationship between the various parties involved in the contract of carriage.\(^{11}\) As a result CMR and ADR are really complementary in their effect with only a slight overlap. The latter will therefore only be discussed where its provisions in fact overlap with CMR. It should not be forgotten, however, that ADR applies to all international carriage of goods by road whether it falls within CMR or not, and therefore may cover carriage by containers also.

CMR deals with the problem from two aspects. First, it makes provision for dangerous goods as such. Secondly, it makes additional provision in respect of the defective of goods, which in practice will cover the majority of cases where dangerous goods have caused damage or injury to the carrier or to third parties.

These provision therefore replace both the common law implied warranty of fitness and the relevant contractual conditions where international carriage as defined by the Convention is involved. Under the second heading art. 10 provides that:

"The sender shall be liable to the carrier for damage to persons, equipment or other goods and for any expenses due to defective packing of the goods, unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it"

As regards loss or injury resulting from defective packing, art. 10 is wider in scope than both the common law warranty, British Rail/BRS and RIJA Conditions.\(^{12}\) It protects the carrier in respect of any type of goods whether technically dangerous or not.

\(^{10}\) Published by Her Majesty's Stationery Office, latest edition 1976.

\(^{11}\) See the list of requirements for the carrier to fulfil in relation to transport equipment and transport operations in cl. 10,000-10,602, Annexe B, ADR.

\(^{12}\) cf. art. 12, CIM.
The carrier will only lose protection under the Convention if the defect is apparent or
known to him at the time of delivery. This seems to offer him a wider protection than the
common law warranty as he will lose the protection of the latter if the effect is one of which
he ought to have known. The word "apparent" used in the Convention seems to have a
narrower meaning than this, so that carrier’s liability will be more restricted under the
Convention than at common law in this respect. It should also be noted that the Article also
gives the carrier a right to make any reservations he thinks fit in respect of such goods.

Article 22 provides that:

"(1) When the sender hands goods of a dangerous nature to the carrier, he shall inform the
carrier of the exact nature of the danger and indicate, if necessary the precautions to be taken.
If this information has not been entered in the consignment note, the burden of proving, by
some other means, that the carrier knew the exact nature of the danger constituted by the
carrier of the said goods shall rest upon the sender or the consignee.

"(2) Goods of a dangerous nature which, in the circumstances referred to in paragraph 1 of
this article, the carrier did not know were dangerous, may at any time or place, be unloaded,
destroyed or rendered harmless by the carrier without compensation; further, the sender shall
be liable for all expenses, loss or damage arising out of their handing over for carriage or of
their carriage."{13}

Where the goods are "of a dangerous nature", art. 22(1) therefore requires the consignor to
inform the carrier of the exact nature of the danger and of any necessary precautions which
should be taken by the carrier. The Convention also provides that the generally recognised
description of dangerous goods as well as the method of packing must be entered in the
consignment note{14} and that the sender will be liable for "all expenses, loss or damage"
sustained by the carrier through any inaccuracy or inadequacy in such information.{15} If the
carrier enters the particulars in the note at the request of the sender, he will be deemed to
have done so on behalf of the sender unless the contrary is proved.{16} If the sender fails to
enter such information in the consignment note the burden of proof will be either on him or on
the consignee to prove that the carrier knew the "exact nature" of the danger.{17} As in the
case of loss, etc., under art. 7, the sender will similarly be liable for any expenses, loss or
damage arising from the delivery of the goods to the carrier for transit, providing the latter

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13) cf. CIM (RID); art. 7, TCM.
14) Article 6(1)(f), CMR. cf. art. 12, CIM.
15) Article 7(1)(a), CMR. cf. art. 7, CIM.
16) Article 7(2), CMR.
17) Article 22(1), CMR.
was not aware of their dangerous nature. Presumably "dangerous goods" and "goods of a dangerous nature" are one and the same thing, so that it appears that the Articles referred to above can be read conjunctively and not disjunctively. Consequently, although art. 7 renders the sender liable for any loss, etc., through any inaccuracy in the consignment note, as art. 9 expressly provides that it is only prima facie evidence of the terms of the contract, if the sender can prove that the carrier knew "the exact nature of the danger," this can presumably be pleaded as a defence to liability under art. 7, as well as under art. 22.

However, in practice, such a plea is likely to be of limited value as although under CMR a consignment note is not essential, in the case of goods listed in ADR, a "transport document" is mandatory. The normal CMR consignment note will presumably be acceptable as such, provided it contains the information required under ADR. The transport document must accompany the goods, and also, if appropriate, instructions to be carried out in the event of an accident. If the load is to be carried by several transport units, a copy of the documents must accompany each unit. If therefore follows that if the sender fails to declare goods which are subject to ADR and to ensure that they are correctly packed, the carrier will be exonerated from liability in respect of them, and the sender will instead be unrestrictedly liable for them under CMR. Two problems can arise. First, the Convention does not define the meaning of "a dangerous nature," unlike BRS and RHA Conditions which relate it to the Railway Board's list. In practice, however, ADR solves this problem by providing a list which covers the majority of goods which are commonly recognised as being dangerous. Otherwise a dispute could arise as to whether the sender was under a duty to inform the carrier of the "exact nature" of the goods or not. If the goods do not fall within this definition the general rule under art. 10 discussed above will apply which relieves the sender of liability, where the defective packing is "apparent" to the carrier at the time of delivery, otherwise if they are of a "dangerous nature" the claimant must prove that the carrier had actual knowledge thereof.

2.2 Destruction of dangerous goods

Secondly, unlike RHA Conditions, a special provision is made for the dangerous goods to be unloaded, destroyed or rendered harmless by the carrier without any compensation to the owner, provided the carrier did not know of their dangerous nature. However, if there is

18) Article 22(2), CMR.
19) For requirements, see ADR.
20) 2002(3), ADR.
21) 2002(4), ADR.
22) Clause 1(a),(b), RHA Conditions 1967.
23) For the list, see Annexe A to ADR.
24) Article 22(2), CMR. The sender will be liable for the expense.
25) Article 22(1), CMR. cf. cl. 9(b) BRS Conditions.
knowledge, any right of compensation will depend on the particular facts and whether the carrier acted reasonably in the circumstances.\footnote{26} It should also be noted that the distinction between the common law warranty and contractual trading conditions, as to whether servants or agents will have a right of action or not, resulting from the doctrine of privity of contract, disappears under the Convention. Employees and agents of the carrier are specifically subject to the Convention and will therefore have a right of action under it.\footnote{27} In granting such a right to agents of the carrier as well as servants, the Convention gives wider coverage than above, but unlike the warranty of fitness it does not give any direct right of action against the consignor of the dangerous goods to a third party whose goods have been damaged by them. Any right of action will therefore be at common law, although it is not immediately apparent whether the Convention precludes reliance on the common law warranty of fitness to enable the owner of goods damaged to claim direct the consignor of the dangerous goods responsible for it, or whether the carrier would have to claim on the former’s behalf or else assign a right of action to him. If this is in fact done, the assignee will also be subject to the provisions of the Convention.\footnote{28}

The result is that there is considerable variation between the different trading conditions and the Convention as to the definition of dangerous goods, the various requirements as to the duty of the consignor in relation to them, and in particular whether written notice of the dangerous nature of the goods is required. In practice ADR will cover most international transits so that problem is more theoretical than real.

**Conclusion**

The provisions of the various general conditions of carriage, together with the mandatory provisions under CMR/ADR, reveal an astonishing lack of uniformity.

First, there is no common definition of dangerous goods, which means that the respective requirement conditions do not cover an identical range of goods. Secondly, there is no mandatory requirement for the dangerous nature of goods to be entered in a consignment note, the requirements of all the conditions differing on this point, although CMR/ADR seems to offer the most satisfactory procedure in this respect. Thirdly, the fact that servants, agents and third parties often cannot rely on the respective conditions of carriage as a result of the doctrine of privity of contract, is highly undesirable, and seems in need of some statutory regulation, preferably to bring it in line with the Convention.

\footnote{26} Article 22(2) CMR. See also art. 17(4)(b)(d), CMR. The sender will be liable for all expenses loss and damage.

\footnote{27} Carriage of Goods by Road Act 1965, s. 14(2)(b)—also successive carriers(art. 34).

\footnote{28} Carriage of Goods by Road Act 1965, s. 14(2)(e).
Finally, a problem that may occur in the future as containerisation develops more widely will be to define who is the consignor and who is the carrier of goods, so as to establish who will benefit under the common law warranty of fitness where dangerous goods are included in a consolidated shipment shipped in a container, and conversely on whom the corresponding liability as consignor will fall. The difficulty in this respect will arise in deciding whether the container operator, any forwarder shipping consolidated shipments therein, or the actual shipper of the goods, should be liable on the implied warranty or not.

IMCO, however, have largely overcome the difficulty by requiring the container to have a Container Packing Certificate signed by the person responsible for packing the dangerous goods into the container.

It is to be hoped, therefore, that such problems when ultimately resolved in relation to international traffic by the proposed international convention will also be an opportunity to make uniform provisions for inland carriage—a chance regrettably missed in relation to CMR.

References

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