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‘One Belt One Road’, Sub-Regional Transport Agreements and the CMR – a case of mutual dependency?

The Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956 came into force in July 1961, and has been ratified by a majority of European states. Its Preamble states quite explicitly that the signatories ‘having recognized the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier’s liability.’ That drive to standardisation and harmonisation has led to more calls, on its sixtieth anniversary, for better consistency of decisions or interpretations of its provisions between contracting states. That call is undeniably important as concerns about sustainable transport and globalisation of commerce are inevitably becoming more influential in the judicial and legal interpretation of the CMR provisions.

This article does not depart from the general concern that the CMR should continue to evolve for the betterment of international road carriage. However, it argues further that the evolution should not ignore the *global* dimensions of the treaty, especially the slower development of international road carriage law elsewhere in the world, and, as regards this article, the emphasis being on Asia as directed by policy of the People’s Republic of China (hereafter, the PRC). The East, influenced by the PRC, it is argued, is faced with three options – one, as is the current trend, the adoption of sub-regional multilateral agreements with CMR influences; two, the adoption of the CMR principles into domestic law;¹ and three, the adoption of the CMR wholesale.

It has been said that the ‘CMR is something of a vintage Volkswagen that keeps chugging along the arteries of modern commerce blinking with bemusement at the

modern world of electronic data exchange and logistics’.² That must surely be true in Europe – that is however not the state of affairs in Asia where lorries with bales of textiles, drums of oil and pallets of washing machines still ply the many land routes of Asia with not a container³ or an electronic consignment note in sight. This exemplifies the CMR’s dilemma – reform in Europe and leave the rest of the world behind, or strike a compromise? What sort of compromise – a two speed CMR? These are indeed challenging considerations. Using the legal provisions in these sub-regional agreements, notably the Greater Mekong Sub-regional Agreement as a case study, this article will show how the provisions, though possessing a CMR flavour, differ from the CMR. It seeks to explore some of the values prized in the current sub-regional Asian road transport agreements and questions whether and to what extent those values could and should be accommodated in an evolving CMR.

From a theoretical point of view, it might be said that a multilateral treaty which influences the legal development elsewhere is one which serves well its *raison d’être* in creating new international legal norms.⁴ Those international legal norms would arguably in turn become customary international law.⁵ From another perspective, if a multilateral treaty which originally sought global reach is only catering to the needs of a few, an honest reassessment of its role is called for. As regards the CMR, its continued evolution through case law largely (and understandably) directed by European jurisdictions has the potential of alienating itself from other jurisdictions across the globe. That is especially problematic given the current geopolitics – the PRC and Russia occupy large

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1. An option which was mooted in Africa, though without much success. In 2000, the Organisation pour l’Harmonisation du Droit des Affaires en Afrique (OHADA-OHBLA) circulated the text of a Draft Uniform Act on Contracts for the Carriage of Goods by Road for consultation. The instrument is clearly based on the provisions of the CMR but the OHADA did not go so far as to advocate a ratification of the CMR. The draft Uniform Act was intended merely to serve as a template for domestic legislation. There was no purported international reach. See generally F. Ferrari, ‘The OHBLA draft Uniform Act on Contracts for the Carriage of Goods by Road’, *International Business Law Journal* (2001), 898.
2. M. Clarke, ‘The Convention on the Contract for the International Carriage of Goods by Road 1956: wilful misconduct again – and again’, *Journal of Business Law* (2008), 184.
3. See generally *Globalisation, Transport and the Environment* (OECD Publication 2010) (text available at google books <https://books.google.co.uk/>) at 133. In some countries, it is not always a matter of the lack of technology – indeed, in India for example, administrative regulations make it impossible for containerised transport to cross land borders (India-Bangladesh; India-Nepal; India-Pakistan). So all containerised carriage has to be by sea. See A. R. Mohammad/Y. Basnett (eds.), *Regional Integration in South Asia: Trends, Challenges and Prospects* (London: The Commonwealth Secretariat, 2014), 332.
4. M. Akehurst, ‘Custom as a Source of International Law’, *Brit. YB Int’l L.* 47 (1974-75), 1; Richard R. Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’, *Brit. YB Int’l L.* 41 (1965), 275.
5. This position is not without controversy – see J.I. Charney, ‘International Agreements and the Development of Customary International Law’, *Wash. L. Rev.* 61 (1986), 971 who writes: ‘Recently, however, writers, international courts, and statesmen have given support to the

tracts of land mass and thereby should be natural constituents for a convention such as the CMR, but these are also countries with deep mistrust of an international legal order directed by 'Western' values.⁶

Context and Background – the PRC Agenda

It is outside the scope of this article to detail the complete background of the road transport developments in Asia. In this sixtieth year of the CMR, there are however some noteworthy developments to consider. First, the 'one belt one road' project – the PRC government established a steering committee to lead on the 'one belt one road' project in 2014.⁷ The grand scheme, building on a notion of the ancient silk road, has at its core the linking of the PRC to the rest of the world through a number of 'corridors'. These are not physical corridors as such but spatial corridors of economic cooperation and investment. Key to these corridors is land transport. The project has since been linked to other international endeavours from the Asian Development Bank and the Shanghai Cooperation Organisation.

International cooperation in this region on matters relating to the carriage of goods by road and rail is not new. Efforts have attracted various levels of success – at times let down largely by the lack of infrastructure, poor administrative governance and lack of political will.⁸ Those international cooperative efforts are often expressed in sub-regional agreements. The notable ones are:

- ASEAN Agreements on Transport Facilitation;
- Agreements of the Commonwealth of Independent States (CIS), the Eurasian Economic Community (EurAsEC) and the Customs Union of Belarus, Kazakhstan and the Russian Federation related to Transport Facilitation;
- ECO Transit Transport Framework Agreement (TTFA), 1998;
- Basic Multilateral Agreement on International Transport for the Development of the Europe-Caucasus-Asia Corridor (TRACECA), 1998;
- Greater Mekong Sub-regional Agreement for Facilitation of Cross-Border Transport of Goods and People (GMS-CBTA), 1999;
- Agreement on the Cross-Border transport of Persons, Vehicles and Goods within the Framework of

Central Asia Regional Economic Cooperation (CAREC), 2010;

- Agreement between the Governments of the Shanghai Cooperation Organization (SCO) Member States on Facilitation of International Road Transport, 2015.

These sub-regional agreements can certainly be pivotal to the PRC's 'one belt one road' policy. The 'one belt one road' scheme has been seen by a good number of multinational corporate entities as pivotal to the emerging 'China plus one' business strategy.⁹ The 'China plus one' strategy, as readers will appreciate, stems largely from the fact of rising labour cost in the PRC and the perceived business need to reduce the risk of supply chain disruptions, tariff burdens, onerous bureaucracy and currency fluctuations. The essence of the strategy is that businesses would continue to exploit the manufacturing strength and market volume in the PRC whilst moving their dependence on the PRC labour market elsewhere, preferably, with easy access to the PRC.

The Sub-regional Perspective – GMS-CBTA

Against this international business and geo-political backdrop, the UN has urged Asian countries, including the PRC, to sign and ratify seven of the most important road transport treaties.¹⁰ However, there is significant inertia. No south-east Asian country – Indochina, PRC, Korea, India, Pakistan, Bangladesh, etc. – has ratified or signed the CMR. As far as the PRC is concerned, it has ratified only *two* out of the seven: the Customs Convention on Containers, 1972 (ratified in 1972) and more recently, the Customs Convention on the International Transport of Goods under Cover of Transit International Routier (TIR) Carnets (TIR Convention), 1975 (ratified in 2016). The reasons for the inertia are clearly many but it is also imprudent to over-generalise the issue of political will of an entire continent. It suffices for our purposes that there is a lack of acceptance of a global solution or approach by a good number of these countries, despite dulcet diplomatic noises.

The position has not been very much better as regards the sub-regional agreements. It is submitted that ignoring the issue of political will and social development, the sub-regional transport corridors (the so-called 'hardware') in Asia are not always supported by 'software' (trade facil-

view that international agreements, with little more, could give rise to new customary international law that is binding on all states regardless of whether or not they participated in the negotiations or became parties to the agreement. There is even some support for the view that international agreements that are not yet in force could give rise to instant international law. Such developments in the rules for establishing customary international law would have profound implications for the international legal system.' (at 971) (footnotes omitted); see also J.L. Kunz, 'The nature of customary international law', *American Journal of International Law* 47(4) (1953), 662; A. M. Weisburd, 'Customary international law: the problem of treaties.' *Vand. J. Transnat'l L.* 21 (1988), 1.

6. *Infra*.

7. For a detailed geo-economic report of the project including its financial aspects, see the *Financial Times* Special Report at www.ft.com/reports/new-trade-routes-silk-road-corridor.

8. See the Asian Development Bank's Technical Assistance reports on the various countries/regions coming within its remit – notably the more recent reports relating to Georgia (2016) (at www.adb.org/sites/default/files/project-document/185249/47220-001-tacr-01.pdf), Myanmar (2015) (www.adb.org/projects/documents/mya-dev-asset-mgmt-prog-roads-nov-2015-tacr); South East Asia – South Asia (2015) (www.adb.org/publications/regional-transport-infrastructure-mapping-projects).

9. See generally S. Witchell/P. Symington, *China Plus One* (2013) at www.fticonsulting.com/~media/Files/us-files/insights/journal-articles/china-plus-one.pdf.

10. These are the Convention on Road Traffic, 1968; Convention on Road Signs and Signals, 1968; Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), 1975; Customs Convention on the Temporary Importation of Commercial Road Vehicles, 1956; Customs Convention on Containers, 1972; International Convention on the Harmonization of Frontier Controls of Goods, 1982; and Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.

itation policies and processes). Missing infrastructural links in many sub-regions have clearly also reduced the effectiveness of land (road and rail) transport projects underpinned by these sub-regional agreements.

This paper considers the Cross-Border Transport Facilitation Agreement (CBTA) contained in the Greater Mekong Sub-regional (GMS) Agreement as a vital case study in the current somewhat gloomy legal landscape. The umbrella GMS Agreement had initially endured the same lethargy as the other sub-regional agreements. It was initiated in 1992 by the six countries situated along the Mekong River. With the support of the Asian Development Bank (ADB), those six countries agreed to the GMS Economic Cooperation Programme. Cross-border land transport was increasing and it was quickly recognised by the ADB and the constituent countries that trade facilitation and community development would only be brought about through proper legal facilitation of the cross-border traffic. The CBTA was initially signed by Thailand, Vietnam and Laos in 1999, seven years after the launching of the GMS Economic Cooperation Programme. Two years later, in 2001, Cambodia acceded to the agreement. That was followed by the PRC in 2002 and finally, Myanmar in 2003. The accession to the CBTA by the PRC was pivotal. The PRC clearly saw the CBTA as an important plank in its geopolitical and transnational economic policies. Moreover, the PRC's position as a key player in the region meant that progress on full implementation could develop apace. This is arguably an early sign of the PRC's determination to take a lead on implementation of these sub-regional agreements.

The ADB has lauded the CBTA as 'a pioneering landmark accord, which consolidates, in a single legal instrument, all of the key nonphysical measures for efficient cross-border land transport'.¹¹ It is indeed true that the CBTA is particularly ambitious. It includes specific provisions to (i) enable vehicles (on designated open routes), drivers (with mutual recognition of driving licences and visa facilitation), and goods (with regimes for dangerous and perishable goods) to cross national borders through the GMS road transport permit system; (ii) avoid costly transshipment through a customs transit and temporary importation system and a guarantee system for goods, vehicles, and containers; (iii) reduce the time spent at borders, through single-window inspection, single-stop inspection, information and communication equipment and systems for information exchange, risk management, and advance information for clearance; and (iv) increase the number of border checkpoints implementing the CBTA in order to maximise its network effects and economies of scale.¹²

From a CMR point of view, it is especially pertinent that the GMS CBTA contains a truncated and modified version of the CMR.¹³ Of course, the GMS CBTA is not unique in this – other sub-regional agreements have also made such accommodation possible, for example the ASEAN Facilitation Agreement for Multimodal Transport, the ECO TTFA in Article 27 and Annex VI, and more recently, the Shanghai Cooperation Organisation Member States Agreement on Facilitation of International Road Transport. There are distinguishing features of the GMS CBTA which make it relevant to the methodology of the present research. Perhaps this is best explained through the process of elimination.

First, the ASEAN Agreements are essentially multimodal transport agreements – understandably because the volume of trade moving between the ASEAN countries is still largely dominated by sea carriage.

As to the ECO TTFA, the Economic Cooperation Organization (ECO) was established in 1985 by Pakistan, Iran, and Turkey as a trilateral organisation to promote regional cooperation, and was later expanded in 1992 to include seven new members, namely the Islamic Republic of Afghanistan, the Republic of Azerbaijan, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, and the Republic of Uzbekistan.¹⁴ There is no significant capital injection into the land transit scheme – hence, although the aspirations are lofty, they have not been always mirrored in reality. Furthermore, there are significant legal and institutional challenges impeding the full and proper implementation of the ECO TTFA. Take for example, the attempted incorporation of the TIR Convention into the regional cooperation agreement. The TIR provisions operate on the basis that there are maximum axle load requirements. Certain countries in the ECO, Pakistan for example, do not have an adequate system for measuring axle load in the first place.¹⁵ So for an ECO founding country like Pakistan, it needs to accede and ratify the TIR Convention before there can be effective implementation of the ECO TTFA. It should also be highlighted that unlike the GMS CBTA, not all ECO states are signatories to the ECO TTFA.¹⁶

The SCO case is highly interesting as we are currently witnessing political investment from the PRC in the project. However, it is too soon to be used as a template to evaluate the transposition of CMR provisions into the regional scheme. In contrast, despite infrastructural constraints,¹⁷ the GMS countries have not only ratified and acceded to all the annexes and protocols but have actually started to put in place practical implementation of the provisions.

11. Asian Development Bank, *Greater Mekong Subregion Cross-Border Transport Facilitation Agreement: Instruments and drafting history* (Mandaluyong City, Philippines: Asian Development Bank, 2011), 2.

12. *Ibid.*

13. As set out in Art. 24 and Annex 10.

14. 'Sustainable socio-economic development for people of the region', Economic Cooperation Organization, www.ecosecretariat.org/in2.htm.

15. See USAID Trade Project 'Legal & Policy Gap Analysis for Economic Cooperation Organization Transit Transport Framework Agreement' (June 2014), 5 (http://pdf.usaid.gov/pdf_docs/PA00K24J.pdf).

16. Among the 10 ECO member countries Uzbekistan is not signatory to the ECO TTFA, while Turkmenistan has signed, but has not yet ratified the Agreement.

17. Details of achievements and challenges in implementing the CBTA are provided in *Stocktaking of Progress in Achieving the Action Plan of the Second GMS CBTA Joint Committee Meeting*, Report for the Third Joint Committee Meeting, Vientiane, Lao PDR. Part V also provides the implementation status of the CBTA. (www.gms-cbta.org/online-resources).

Last but not least, the GMS CBTA is a highly relevant case study where the role of the PRC is concerned for the reasons stated above.

The GMS Annex 10 – A Baby CMR?

Annex 10 of the GMS CBTA provides for the conditions of carriage by road. The intention is to avoid having to re-invent the wheel; hence, a good number of the provisions are clearly redolent of the CMR. However, a survey of the provisions soon reveals that there are some important differences – and not merely from the technical point of view, but as regards approach and spirit. To what degree that is by design or not is perhaps not especially fundamental. What matters is what those differences are and what they can reveal about the future for international road carriage in the region.

Scope of application

Article 2 is a useful starting point for this evaluation. It provides that the Annex 'shall apply to the contract of carriage of goods for reward by road in a motor vehicle when the place of handing over the goods to the carrier and the place of delivery to the consignee are situated in the territories of different Contracting Parties'. It goes on to state that the Annex would not apply to carriage performed under the terms of any international postal conventions. This provision benefits from simplicity. It does not lay down the jurisdictional restrictions that Article 1 of the CMR does. There, the CMR only applies *if the contract specifies* that the place of taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties. The GMS CBTA Annex does not enter into the definition of the contract – it attempts to leave the matter simply as a question of fact, and perhaps, one might add, common practical sense.¹⁸ This legal manoeuvre avoids the potentially knotty issue of characterisation – what constitutes a contract, how the contract should be interpreted and the role of implied terms and usage. The Annex takes, instead, a pragmatic approach – the matter is largely left to the relevant tribunal. The deliberate avoidance of a legalistic approach to the road carriage scheme will be seen repeated in the Annex.

One aspect which is not left to chance is the issue of 'reward'. Unlike the CMR, which leaves the issue as a question of fact for the tribunal seised with jurisdiction, Article 3 of the Annex sets out explicitly the principles for determining the price of the carriage. It should be said that the word 'reward' is not actually defined but Article 3 lays down some fairly tight rules on how the price should be set. It states:

'(a) The transport price will be freely determined by market forces, but subject to antitrust restrictions, so as to avoid excessively high or low pricing.

(b) Contracting Parties and transport operators shall refrain from any measures, agreements, or practices tending to distort free and fair competition, such as cartels, abuse of dominant position, dumping, and state subsidization. They shall be denied any effect and be null and void. Contracting Parties shall ensure that their respective transport operators conform to this percept.'

It could thus be said that the Annex is more than simply about regulating the carriage of goods but also providing for fair competition between operators within the region. Part of this agenda might be seen to be the influence of the ADB which took a significant interest in promoting the Agreement.¹⁹ Additionally, it was also clear that although during the negotiations of the CBTA, some GMS countries had not yet become members of the World Trade Organization (WTO),²⁰ throughout the drafting of the annexes and protocols in the negotiation meetings, due diligence was taken to ascertain that the CBTA annexes and protocols are aligned with the WTO framework. Hence, the CBTA is broadly consistent with the principles of the WTO including free markets and fair competition.²¹ From a PRC point of view, during their negotiations to become part of the GMS CBTA, they were clearly envisaging WTO membership. Of course it could not be said whether that played a significant role in the negotiations involving the PRC, but at that time there would be no countenance by the PRC of an international political stance which detracted from WTO principles.

The notion of carriage

The Annex should also be examined on the basis of what has not been expressly provided for – there is no mention of multimodalism or successive carriage. The term 'carrier' is defined quite tersely in Article 1 as 'a person who undertakes to carry goods for reward'. It thus places all liability for the transit on the carrier (Article 6). Under Article 5(c) the carrier is vicariously liable for the acts and omissions of his sub-contractors – it remains to be seen if 'sub-contractors' would be construed to include other carriers in successive carriage and/or multimodal transportation. Again, the intention behind Annex 10 (and indeed, other annexes) was to provide a basic framework rather than to prescribe highly technical or conceptual matters for the parties to agree on.

As more mature contracting states to the CMR have found out, multimodalism and successive carriage are not likely to diminish in impact on the road carriage liability regime. Insurers and other stakeholders are only more likely to seek clarity on the allocation of liability between carriers. It is thus argued that in this respect, a review of

18. It does, in Art. 4, provide for a consignment note to evidence the contract of carriage – the terms of that Article are similar to the provisions of Chapter III of the CMR.

19. See the Minutes of the Proceedings involving the ADB in the negotiations leading to the GMS CBTA at www.adb.org/countries/gms/sector-activities/transport.

20. Cambodia became a WTO member on 13 October 2004; Vietnam became a WTO member on 11 January 2007; and Lao PDR, an observer, submitted an application for membership on 16 July 1997.

21. Asian Development Bank, 'Greater Mekong Subregion Cross-Border Transport Facilitation Agreement: Instruments and Drafting History' (2011), 2-3 (www.gms-cbta.org/online-resources).

Annex 10 should be undertaken with a view to aligning it to the jurisprudence which has been incrementally built up around the CMR. That is perhaps an important gap in this region where inland waterways play such a vital role in the carriage of goods.

Liability issues

Here too we see a simplified system – under Article 5, the carrier's liability shall be assessed simply on the basis of the Annex. No regard is to be had whether the claim is actually framed in contract or tort²² and it is not permitted to derogate from the Annex by contract or otherwise. That seeks to remove any shackles of cumbersome pleadings or process documentation when a claim is brought.²³ The carrier is also to be vicariously liable for the acts of his servants, agents, and subcontractors, who will be entitled to avail themselves of the same defences as the carrier under this Annex.²⁴

The Annex might thus be said to be shipper friendly – in its attempt to provide for a simplified liability system. That is further supported by Article 4(b) which provides that if the carrier does not make a remark when checking the goods on acceptance, then goods are presumed to be complete and in good condition. That should be contrasted with Article 9(2) CMR which contains the words 'unless the contrary is proved'; at least giving the carrier an opportunity of rebuttal. A GMS carrier should therefore do proper checking upon receipt of the goods and not rely on an opportunity to produce proof after the event.

The concept of third party protection is recognised as is consistent with modern carriage conventions but unlike the Article 3 of the CMR, the words 'within the scope of their employment' are omitted. The express omission of those words is intended to expedite claims against the carrier (and its insurers) without countenancing any defence they may have about the third parties acting outside the scope of their employment. That said, it is nevertheless not entirely clear whether an argument could be raised on the basis that under general law of the relevant tribunal seised with jurisdiction, the third party could

only benefit from these exemptions and limits if they had acted in good faith.²⁵ And acting in good faith must surely mean operating within the scope of their contractual employment or authority.

Article 9 of the Annex provides that the carrier shall not be entitled to avail himself/herself of the exoneration or limitation of liability if the loss, damage, or delay was caused by his/her, or his/her servants', agents', or subcontractors' wilful misconduct or gross negligence. The words in Article 29 CMR 'in accordance with the law of the court or tribunal seised of the case' are expressly omitted. It thus follows that by not making specific provisions on how these terms are to be defined and avoiding any reference to the law of the court or tribunal seised, the relevant GMS country should not turn to domestic law for assistance. Instead, an autonomous interpretation is to be preferred and, as such, deference to CMR jurisprudence may thus be justifiable. There has been too much unnecessary confusion and tension over the interpretation of these concepts as it is.²⁶

The carrier is liable for the same heads of loss as a CMR carrier – partial loss, total loss, damage and delay in transit. As for constructive loss, Article 6(b) provides that if the goods have not been delivered within 30 days from the expiry of the agreed delivery time, or in the absence of such an agreement within 60 days from the time the carrier takes the goods in charge, the goods will be deemed lost. The consignor/consignee is entitled to claim compensation for loss. The threshold is the same as the CMR.

Both loss and damage are subject to same quantum rules. Under Article 7 of the Annex, the compensation for total or partial loss of or damage to the goods shall be calculated by reference to the commodity exchange price or current market price or else to the normal value of the goods at the place and time they were accepted for carriage.²⁷ The Annex stresses that the compensation scheme under Article 7 is comprehensive and exhaustive. The carrier 'will owe no additional damages',²⁸ other than those which are covered by the Annex.

22. Art. 5(b).

23. That is not to say that it would always be successful given the challenges of corruption, bureaucracy and institutional maladministration in local settings.

24. Art. 5(c).

25. Take Thai law for example – its civil law is borrowed from the Swiss Civil Code; Art. 5 of the Civil and Commercial Code states: 'Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith'. Lao Contract Law (1990) does not contain an express good faith principle but does require the parties to perform the contract with sincerity (Art. 18). The Cambodian Civil Code 2007 provides for a general principle of good faith in all contractual dealings in Art. 5. The Vietnamese Civil Code provides in Art. 389 that 'The entry into a civil contract must adhere to the following principles: 1. Freedom to enter into the contract, provided that it is not contrary to law and social ethics; 2. Voluntariness, equality, goodwill, cooperation, honesty and good faith.' The PRC Contract Law 1999 states in Art. 6 that 'The parties must act in accordance with the principle of good faith, whether exercising rights or performing obligations'. Myanmar Contract Law is contained in its Contract Act 1872 which is largely identical to the Indian Contract Act 1872. The Indian Act in turn might be said to have been influenced by the English common law. There are no provisions on good faith. It should of course be noted that the Act is not a code and it is thus possible to look outside the Act for principles of law (see s. 13(3) Burmese Laws Act 1898 where the judges may apply underpinning principles of 'justice, equity and good conscience' to determine what the law is and should be).

26. See generally and more recently the comments made by F. Sanchez-Gamborino, 'Article 29 of the CMR Convention concerns nothing but wilful misconduct of the carrier', *Unif. L. Rev.* (2016), 1-13.

27. Art. 7 also provides that (i) compensation due by the carrier shall not exceed SDR 8.33 per kilogram gross weight of the goods short delivered or of items damaged. ... (iii) In addition, the carrier shall refund in full in case of total loss and in proportion to the loss sustained in case of partial loss, the carriage charges, customs duties, taxes, and other charges incurred in respect of the carriage of goods.

28. Art. 7(iv).

It will be recalled that under the CMR, different quantum rules apply to a claim for loss and a claim for damage.²⁹ Under the Convention, in the case of damage, the carrier shall be liable for the amount by which the goods *have diminished in value*, calculated by reference to the value of the goods fixed in accordance with Article 23(1)(2) and (4).³⁰ That means under Annex 10, there is no accommodation for deterioration in value.

As to delay, there is no material difference between the quantum rules under the Annex and the CMR. Article 7(b) provides that compensation due by the carrier for damage resulting from delay, other than physical damage affecting the value of the goods, shall be limited to an amount not exceeding the transport price. Force majeure is a recognised defence, especially where delay is concerned³¹ but what is less satisfactory is whether that intervening event occurs after some delay had already been caused by the carrier. Under PRC law, Article 114 of the Contract Law 1999 provides that 'if the force majeure occurs after one party has delayed in performance, the liability *may* not be exempted'.³² Thai law,³³ Vietnamese law,³⁴ Cambodian law,³⁵ Myanmar law³⁶ and Lao law³⁷ do not have a similar provision. As is immediately obvious, there are issues concerning how substantial or effective the delay caused prior to the force majeure event should be and what principles should guide the exercise of that discretion. It is of course not expected that PRC law will guide the interpretation and application of this Article but it is not unusual for national tribunals (also in the context of the CMR and other transport conventions) to disregard the call to interpret the rules in the light of their international character. On the basis of a potential conflict in interpretation, it is submitted that the matter should be resolved as an issue of causation rather than general principle of law. It is clear that Article 7 does not provide exhaustively for the application of the principle of force majeure (especially as regards delay) but the general principle should apply. However, the tribunal needs to ascertain properly that the intervening impossibility had indeed caused the delay. Therein lies the question of fact.

Claims and limitations

The general tenor of the claims and limitation framework is similar to that under the CMR. However, it is again deliberately austere and unadorned. There are no rules on burden of proof³⁸ – leaving the matter entirely to the jurisdiction³⁹ seized concerned.

It suffices to point out that the carrier's defences are similar to Article 17 CMR. The limitation periods⁴⁰ are also similar to those in the CMR; albeit with the omission of the three months from contract rule in Article 32(i)(c) CMR.

Concluding Observations

The GMS CBTA is a good example of a sub-regional transport system which seems to be working – primarily because of the increased trade in the region and the growing influence of the PRC in the region. The CBTA has clearly taken on a new sense of importance with the accession to its terms by the PRC. However, geo-political and macroeconomic factors alone are insufficient to guarantee success of an international transport regime. The legal rules also need to be sufficiently clear, *practicable* and consistent. It is asserted that Annex 10 of the GMS CBTA has passed the thresholds of an adequate piece of regulation for international road carriage – it benefits from borrowing where appropriate from the well-established CMR. However, it is also pragmatic. In order to achieve acceptance from the member countries, the CBTA is structured in three tiers – a primary agreement containing the general principles, which is supplemented by a set of annexes and protocols containing technical details, and various memoranda of understanding (MOUs) detailing the countries' bilateral arrangements for implementation. The annexes are clearly easier to modify as the need arises.

There are however some clear variances between the two instruments. Annex 10 serves more than just the need to regulate the carriage of goods by road even though it is expressed as 'conditions for transport'. It cannot be ignored that it is part of a larger sub-regional agreement which promotes transport integration *and* trade facilitation. As such, we have seen, for example, incorporated in its provisions references to market competition. An important difference between the two regimes is the fact

29. See Arts. 23, 25 CMR respectively.

30. Art. 25(1).

31. Art. 8(a)(i).

32. Emphasis added.

33. See Art. 389 of the Civil and Commercial Code.

34. See Art. 424 of the Civil Code 2005.

35. See Art. 415 of the Civil Code 2007.

36. See s. 56 of the Myanmar Contract Act 1872.

37. See Arts. 36 (general principle of force majeure), 54 (force majeure and bailment) and 62 (force majeure and carriage) Lao Contract Law (1990).

38. Cf. Art. 18 CMR.

39. As to the jurisdiction rules, see Art. 10(c) which states:

'(i) An action for compensation based on this Annex may be brought in the courts of the Contracting Party:

- where the carriage originated from or was destined to;
- where the loss or damage occurred, if localized;
- where the principal place of business of the carrier is located; or
- where the habitual residence of the claimant is located.

(ii) The claim for compensation may also be settled by means of arbitration based on an agreement entered into between parties concerned after the claim has arisen.'

40. Art. 10(b).

the Annex is clearly intended to be rudimentary in its coverage. It tries valiantly to dispense with the legal and technical nuances and complexities found in the CMR as far as possible. At one level, that could be criticised for leading to a less harmonised regulatory system – contracting states will have to fill in the gaps, as has been discussed above. On the other hand, given the small number of member countries and the lead of one or two large countries, and the fact that regard could be had to CMR jurisprudence, perhaps this solution is preferable to a full blown CMR system for the present time. Perhaps this piecemeal approach is a suitable precursor to full implementation of the CMR in the region.

As to whether and to what extent the CMR would be adopted across the 'one belt one road' region depends, it is submitted, on an understanding of the needs and values provided for in these sub-regional agreements. A positive observation is that these sub-regional agreements do seek to borrow from the CMR and thus, a convergence with the CMR or ultimately complete adoption of the CMR is not a remote possibility. However, those in the west seeking to forge ahead with changes to the CMR which do not take into account the less developed road transit systems in the east would find the prospects of the CMR extending eastwards to be quite slim indeed.