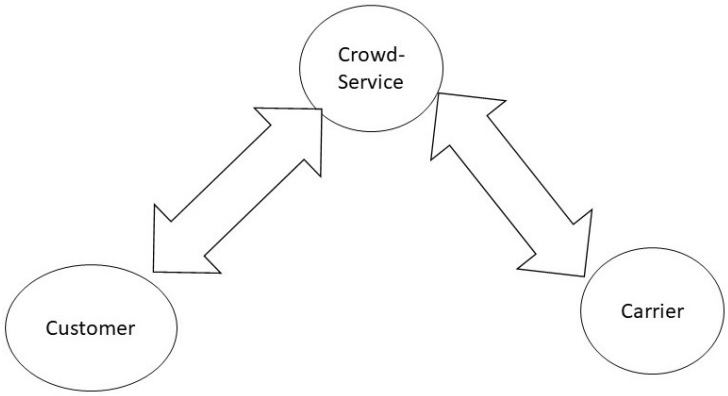
European Transport Conference 2018

CROWD LOGISTICS – FRIENDLY GESTURE WITH BITTER AFTERTASE

Christian Albrecht, LL.M.-Cand.
University of Bayreuth / University of Bristol
Dr. Julia Hörnig
University of Lucerne
Dr. Wouter Verheyen
Erasmus University Rotterdam

1. Crowd Logistic – Explanatory Introduction



The concept of crowd logistic implies complex legal questions. Through the use of a crowd service, a prosumer (a non-professional private individual who provides carriages either as an accessory to his private activities, such as travel, or as a p2p or p2B-service),[1] can agree to carry goods to a customer who likewise uses the crowd service. Given the triangular relation between the customer of the crowd service and the carrier,[2] the authors seek to provide a differentiated perspective on the legal issues divided into a consideration of the internal relationship (crowd service and carrier) and an external relationship (concerning the contractual relations with the customer). Crowd logistics appears to be a long-awaited way to connect the landside with industrial areas, to overcome underdeveloped infrastructure and to enable smaller companies to find an access to the global market. If one considers the legal risks, however, the idea appears fragile. In order to establish a reliable legal frame for the participants of crowd logistics,[3] the following concerns will introduce to the potential risks the participants might face in the area of International Transport Law. The authors consider carriage by road, rail and air to be the transport modes most likely used for the crowd logistics business, which is why the focus will lay on the COTIF-CIM, the CMR and the MC as the predominant international conventions on these areas. The central question is whether those international conventions apply to crowd logistics and the participants.

ISSN 2313-1853

2. The internal relationship: Prosumer as Carrier?

2.1 CMR

The CMR includes a contractual application scope[4]. According to Art. 1(1) CMR the convention applies to an "*international contract of carriage by road for reward".* Given the broad definition of vehicle in Art. 1(2) CMR and the referred Article 4 of the Convention on International Road Traffic of 1949,[5] even cars can meet the requirements and must be deemed vehicle according to the Convention. The additional requirements of Art. 1 CMR remain however vague. Especially the contract of carriage is not clearly defined, nor is the carrier. Participants in crowd logistics could be covered and, therefore, be liable according to the CMR. The exclusive application of the CMR to contracts of carriage for reward could, however, be an argument for a restrictive interpretation of the CMR and, therefore, an exclusion of the prosumer.

2.1.1 Contract of carriage by prosumer?

The carrier as central person under the contract of carriage by road is not defined by the CMR. The convention does not include an express requirement for the carrier to be a businessman although this will likely have been the primary focus of its draftsmen. A prosumer is, thus, not automatically excluded from the mandatory applicability of the CMR expressed in Art. 41 CMR. The classification as carrier is a case-by-case decision.[6] The crucial element of a carrier is that he accepts responsibility for the carriage of goods.[7] If a prosumer undertakes to carry goods to another prosumer, there will be little doubt that he agrees to be responsible for the goods during the time of his custody.

In contrast to carriage by air and rail, which is examined further below, the prosumer will in most cases be driving his own car and will not use a vehicle provided by a third party, e.g. an airline or a rail company. This supports the element of responsibility accepted by the carrier. The triangular relationship between the consignee, the prosumer as contractual carrier and a third party, e.g. an airline or rail company as actual carrier is, thus, limited to the cases where the prosumer uses an international bus service.[8] The carrier's liability regime is, therefore, seemingly more straightforward compared to the other modes of transport. The carrier is liable from the moment in which he takes over the goods until delivery has occurred, Art. 17(1) CMR. Once the claimant established that loss or damage occurred during this period, the carrier will be liable if he cannot rely on one of the defences set out in Art. 17 CMR.[9] Art. 17(2) CMR contains the primary defences for loss or damage caused by wrongful act or neglect of the claimant, claimant's instructions, inherent vice or circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. The carrier can also rely on a range of secondary

ISSN 2313-1853

defences under Art. 17(4). However, the carrier will, with regards to Art. 17(3) CMR, not be relieved from liability in case his car or rental car is defective as the responsibility to carry the goods with a roadworthy vehicle lies on him.[10]

A further crucial aspect under the contract of carriage by road is the issuance of a consignment note. However, the absence of such note does not affect the validity of the contract of carriage or the applicability of the CMR, Art. 4 CMR. Art. 8 CMR requires the carrier to check the accuracy of the statements contained in the consignment note, especially as to the number of packages and the apparent good order and condition of the goods. This is a requirement the prosumer might not be aware of. The lack of an adverse statement as to the number of packages or the apparent good order and condition constitutes *prima facie* evidence for the accuracy of the statements. The prosumer will not, however, be estopped from bringing evidence to the contrary.[11]

2.1.2 A contract for reward – restricted to business?

The carriage of goods by road must be for reward in order to come under the scope of the CMR. The reward itself is not defined by the convention. As it seems that the draftsmen of the CMR aimed to prevent that parties can contract out of the CMR by agreeing to a non-monetary compensation,[12] the scope should not be restricted to money as reward.[13] The purpose of the restriction of the CMR's scope might be seen less in an attempt to provide an exclusive regime for businessmen, but rather in the aim to exclude gratuitous carriages as this might also have consequences on the contractual level.[14] The provision requiring carriage to be for reward has not often been subject to discussions,[15] and it cannot be expected that this will change for the crowd logistics business model.

2.1.3 Carriage by bus

A different situation arises in the case where the prosumer does not use his own car but books a journey on an international bus service. The Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR)[16] might apply to the relationship between the bus company and the prosumer. The fact that the prosumer actually carries goods for somebody else, does not exclude him from the broad passenger's definition contained in Art. 1(2)(c) CVR. The carrier under CVR is liable for the passenger's luggage which has been places in his care, Art. 14(1) CVR. The convention has, however, attracted limited international attention and merely nine states are party to it while two further states signed it. This leads to a limited mechanism of recovery for loss and damage available to bus passengers. If the goods carried for the prosumer are damaged during the custody of the bus company, the prosumer might face liability under the CMR without or with limited chances

ISSN 2313-1853

to claim compensation from the bus company. With regards to the broad definition of vehicles in Art. 1(2) CMR, a bus can be brought under the scope of the CMR. It seems, however, doubtable that the bus company would be classified as successive carrier in terms of Art. 34 CMR as the bus company will not accept the consignment note together with the goods. The prosumer will, thus, be unable to claim directly against the bus company whereas the initial carrier will be liable for the bus company's default by virtue of Art. 3 CMR. In the event of a defective bus, the application of Art. 17(3) CMR could be considered. Whereas the prosumer did evidently not hire the bus, the provision's purpose is comparable to a situation where the carrier relies on the personal use of a third party's vehicle. For the above reasons, the application of CMR on carriage of goods by bus passengers might lead to recourse gaps and a disadvantaging situation for the prosumer as carrier.

2.1.4 Conclusion

It was shown that the prosumer can become liable under CMR when he accepts to carry goods procured by the cloud logistics platform even though he might not be aware of the convention's mandatory application. The carriage of goods can, thus, bear more consequences than the prosumer initially intended to undertake. It must, however, be noted that the prosumer as carrier will be able to rely on the CMR defences in Art. 17 and the package limitation in Art. 23(3). The regime's applicability is, thus, not wholly undesirable.

2.2 COTIF-CIM

International carriage by rail is governed by COTIF whereby it must be distinguished between the carriage of goods and the carriage of passengers by rail. The former is covered by the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (COTIF-CIM)[17] whilst the latter is addressed by COTIF-CIV. According to Art. 1(1) COTIF-CIM, the rules apply to a contract for the carriage of goods for reward when the place of takeover and the designated place of delivery are located in two different member states or, if only one of these locations lies in a member state, when the parties agree that the contract shall be subject to the rules. Although Art. 6(2) COTIF-CIM obliges the carrier to confirm the contract of carriage with the issuance of a consignment note, the absence of such note does, however, not affect the applicability of COTIF-CIM. A contract of carriage by rail can, thus, come under the rules even if the parties themselves are unaware of the regime's applicability. COTIF-CIM aims to achieve harmonisation between the different conventions on carriage applicable on different modes of transport and was drafted with the intention to complement the CMR regime.[18] COTIF-CIM provides for a mandatory regime which is reflected by Art. 5.

ISSN 2313-1853

2.2.1 Who is carrier subject to COTIF-CIM?

In contrast to the conventions examined before, COTIF-CIM defines the carrier as "*contractual carrier with whom the consignor has concluded the contract of carriage pursuant to these Uniform Rules, or a successive carrier who is liable on the basis of this contract*", Art. 3(a) COTIF-CIM. Although these definitions seem to clarify the application scope, COTIF-CIM was presumably not prepared to exclude or include a phenomenon such as crowd logistics. An application to the concept depends on the interpretation of the term "*carrier*" and its connection to the train itself. Art. 3(a) evidences that the approach to define the carrier under COTIF-CIM is rather contractual than factual. This is, further, supported by the fact that Art. 3(c) COTIF-CIM defines a carrier who has not contracted with the consignor but is entrusted with the carriage in part or wholly by the contractual carrier as *"substitute carrier".* The substitute carrier is liable in addition to the contractual carrier, Art. 27(1) COTIF-CIM. The clear distinction between actual carrier and contractual carrier points in the direction that the status of a carrier under COTIF-CIM exclusively depends on the terms of the contract of carriage in conjunction with the conventions scope of application. It, therefore, *prima facie* applies to a prosumer who agreed to carry goods from a location in a member state to another prosumer in a different member state as long as it is not a gratuitous carriage.

2.2.2 Does "carrier" under COTIF include prosumers?

The fact that reward must be provided to bring a contract of carriage by rail under COTIF-CIM could be seen as reason to limit the scope of application to businessmen. However, the reward under COTIF-CIM is not defined by the convention itself. Similar to the situation under the CMR, reward seems to be a broad category which does not prescribe that the reward needs to be in cash. The indented similarities between COTIF-CIM and CMR point to the direction that no distinction should be made between the two conventions. The broad scope of applicability to "*every*" contract of carriage of goods by rail is a further indication. Indeed, the draftsmen of COTIF-CIM will not have thought of the extension to prosumers within crowd logistic business models. However, with the current wording of the convention and the lack of evidence to the contrary, the exclusion of prosumers from the scope of application is a rather awry construction.

A reason to exclude prosumers could, however, be provided by the distinctive development of the railway industries. In comparison to road transport, rail carriage was, respectively is still, characterised by public carriers. Taking a glance at the history COTIF-CIM, it can be seen that the term "*carrier*" was not introduced before the Vilnius Protocol in 1999. 1980 COTIF-CIM spoke of

ISSN 2313-1853

"*railway*" instead. The issue whether prosumers can be carriers would, thus, evidently not arise under the older wording. One reason for reforming the scope of COTIF-CIM was to stay abreast of the increasing privatisation of railway services. The lack of a free market for transport services was previously criticised by the European Court of Justice.[19] In consideration of the change of wording's purpose of liberating the market and in comparison to the CMR-regime, it cannot be seen as suspending factor that a carrier is not a railway company but a prosumer.[20] This is, moreover, supported by the fact that COTIF-CIM does not prescribe a specific mode of transport which is contrasting the CMR-situation in which Art. 1(1) delineates that goods must be carried by "*vehicle*". Whereas this may be due to the reason that transport on railway tracks was traditionally assumed to be inextricably linked to trains,[21] it opens up or at least doesn't expressly exclude carriage on railway tracks but inside a train waggon provided by a party different from the contractual carrier.

The dichotomy of passengers, on the one hand, and carriers, on the other hand could still point in the direction of inapplicability to prosumers, but there is little evidence in support of this thesis. Under the currently applicable legal framework, prosumers could, thus, be classified as contractual carriers.

2.2.3 Carrier's liability and passenger's rights – recourse gaps?

Whereas the carriage of goods by the crowd logistic carrier is subject to COTIF-CIM, the relationship between the rail company is governed by COTIF-CIV respectively, for carriage in the European Union, by the Regulation 1371/2017.[22] The regulation is based on COTIF-CIV but additionally applies to domestic transport.[23] The divergence of the two regimes could lead to recourse gaps for the crowd logistics service.

Despite the classification as carrier under COTIF-CIM, the prosumer will still be a passenger under COTIF-CIV and the Regulation 1371/2007. In the following it will be referred to the latter. The term "*luggage*" remains undefined by the regulation. Whereas under common law luggage must be carried for the passenger's personal use to be subject to the carrier's liability,[24] there is nothing in the regulation's wording or the recitals which would indicate that luggage carried for a person different from the prosumer would be excluded from the scope. Regarding liability for damage to passenger's luggage, it must be distinguished between hand-luggage and registered luggage. Subject to Art. 33(2), the carrier is merely liable for damage to hand-luggage, which includes life animals, if the loss or damage is caused by the fault of the carrier. A different situation arises in the event of the passenger's death or injury in which case the carrier is liable for hand-luggage. For the ordinary situation in which a prosumer carries his luggage with him, it will, thus, be difficult for him to prove the carrier's fault as cause of loss or damage. Interestingly, Art. 34,

ISSN 2313-1853

which limits the carrier's liability to 1 400 SDR per account, merely applies to Art. 33(1) and not Art. 33(2). Once it is established that loss or damage was caused by the fault of the carrier, liability is, thus, not limited.

For registered luggage, however, Art. 36(1) establishes the carrier's liability for loss, damage of delay from the time of taking over until delivery of the goods. Art. 36(2) contains the common primary defences of liability for passenger's fault, inherent vice and circumstances which the carrier could not avoid and the consequences of which he was unable to prevent, also known from Art. 17(2) CMR. The onus to prove the applicability of the primary defences lies on the carrier, Art. 37(1). The secondary defences for insufficient packing, special nature of the goods and goods not acceptable for carriage are contained in Art. 36(3) with a modified burden of proof in Art. 37(2). The regime for registered luggage resembles the provisions on the carrier's liability under COTIF-CIM. Art. 23(1) COTIF-CIM established the basis for liability while Art. 23(2) provides for the primary defences and Art. 23(3) for the secondary defences. The regimes are congruent except for additional secondary defences for open waggons, loading operations by the consignor or the consignee, live animals and attended goods. For apparent reasons, open waggons and live animals will play a minor role in crowd logistics. It is, further, difficult to imagine a situation where the consignor or consignee, takes part in loading operations. When goods are taken with a carrier's luggage, he will automatically attend the goods during the journey. However, this situation will scarcely be covered by Art. 23(3)(f) as the goods need to be attended by virtue of an agreement or applicable provisions. Moreover, there must be causation between the attendance and the loss or damage.

With the rather congruent regimes on liability for registered luggage under the regulation and goods under COTIF-CIM, recourse gaps are more likely to arise for cargo carried as hand-luggage. A further difference lies in the limitation of liability which is 17 SDR per kilogram of gross mass short under Art. 30(2) COTIF-CIM in contrast to 80 SDR per kilogram of gross mass short respectively 1 200 SDR per luggage item for a proved amount of loss or damage under Art. 41(1)(a) of the regulation. Further, even if the amount if loss or damage could not be established, the carrier is liable for liquidated damages of 20 units of account per kilogram of gross mass short or 300 units of account per item of luggage under Art. 41(1)(b). The carrier's liability under the regulation is, thus, more advantageous for the contractual carrier.

A different situation arises in the event of domestic carriage. In this regard, the carrier is not able to rely on COTIF-CIM and liability depends on the contract or the rules of domestic law governing the carriage by rail. However, the rail company as actual carrier will, at least in the European Union, be able to rely on the limitations set out in Regulation 1371/2007 vis-à-vis the contractual

ISSN 2313-1853

carrier. In dependence of the relationship between the contractual carrier and the prosumer to whom delivery is to be made, the prosumer might face liability which goes beyond his rights under the passenger rights regulation.

Subject to Art. 40 COTIF-CIM, the carrier is liable for his servants and other persons whose services he makes use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions. In cases in which it must be distinguished between the contractual carrier, offering the service on the crowd logistics platform, and the railway company as actual carrier, Art. 40 could create a link between the liability of both carriers. The provision was, however, undoubtedly not drafted to deal with crowd logistics. The use of the term "person" *prima facie* contradicts the application to the performing railway company. However, the provision, further, states that the infrastructure operators ("managers of the railway infrastructure") shall be considered as persons whose services the carrier makes use of for the performance of the carriage. This clarification sheds some light on this issue. The express incorporation of the infrastructure operators seems to open up Art. 40 for the extension to any party contributing to the contractual carrier's cause. The infrastructure operator is for the railway company, what the rail company is for the passenger. It seems from Art. 41(2) that a claim can be brought directly against the persons whose services the carrier makes use of for the performance of the carriage. In this case the limitations of COTIF-CIM apply *mutatis mutandis* to this claim. The system apparently follows the system of the Montreal Convention.

2.2.4 Conclusion

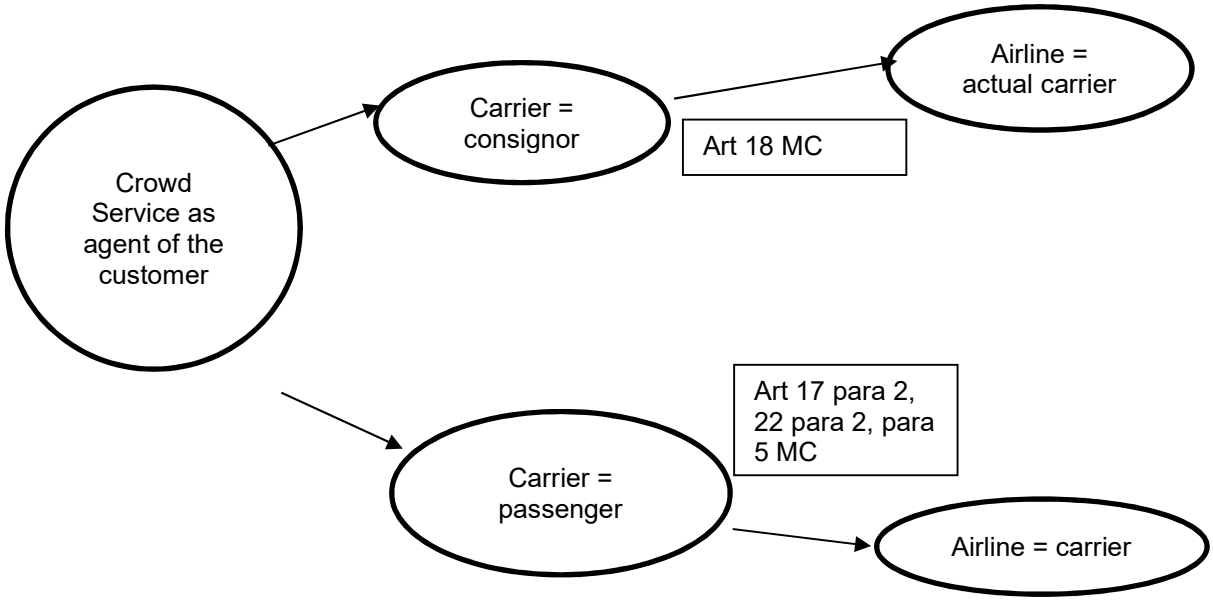
The legal framework applicable to the carriage of goods by rail is not prepared for a phenomenon like crowd logistics. The separation between carriage of passengers and their cargo on the one side and carriage of goods on the other side poses difficulties for reconciling the liability regimes. This is particularly problematic for the distinction between hand-luggage and registered luggage for the carriage of passengers as a similar distinction cannot be found for the carriage of goods. COTIF-CIM is evidently not prepared for passenger-carriers having supervision over their luggage respectively cargo during the journey. The future suitability of the currently applicable framework can, thus, be doubted.

2.3 Montreal Convention

According to Art. 1 para 1 MC the Convention is applicable to the "*international carriage of persons, baggage or cargo performed by an aircraft for reward*". Art. 1 para 4 MC further permits an application to carriage, whereby the person

ISSN 2313-1853

who is actually performing the carriage is not the one, that concluded the contract with the consignor or the passenger.
Since it is also – like the carriage by rail – unlikely that the party agreeing to carry the item to its destination owns an aircraft or is actually flying the item, there are two levels to be considered. First, the relationship between the customer through the crowd service acting as agent and the carrier (2.3.1). Second, how this carrier is contractually related to the airline as actual carrier (2.3.2). The latter question will be answered according to the categorization of the item as cargo or baggage.



2.3.1 Who is a carrier?

Via a crowd service, a party can offer carrying an item. If this party does this by using the transport mode, Art. 1 para 1 MC seems satisfied as it links to the actual circumstances.
The characterisation as carrier is uncertain since the Montreal Convention does not define the term. There is merely a distinction between a contractual carrier and an actual carrier, which will be of interest later on. Which specific obligations a carrier has to perform is, however, not clear. The uncertain term must be interpreted according to the system of the conventions and independent from national approaches. A carrier is – according to the majority of legal scholars and courts – a party that is willing to obtain responsibility for the transport of an item by preserving its unharmed condition.[25] The party, who is willing to take responsibility for a carriage by an order via a crowd service does certainly satisfy this requirement.

ISSN 2313-1853

Whether this party is a prosumer or a businessman is of no relevance since the Montreal Convention even allows an application for gratuitous carriage.[26] As a counter argument, a prosumer acting as carrier must be considered carrier by the convention. The fact, that national laws follow different approaches whereby only commercial transport satisfies the preconditions for a contract of carriage under commercial law[27] does not affect the uniform law as it exists and applies independently from and beside the national law.[28]

The party participating in the crowd logistics and agreeing upon a carriage of an item on its way – maybe due to simple occasion – by an aircraft, does not necessarily have to fly the aircraft. This is due to the distinction between a contractual and an actual carrier. According to Art. 39 MC the contractual carrier is the one concluding the contract of carriage as principal. An actual carrier is the party performing *"by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of"* the Montreal Convention. A party agreeing on a carriage of an item for another party through the crowd service interfaces must be considered contractual carrier as it makes the contract of carriage governed by the Montreal Convention. Since the airline performs the flight, it is the actual carrier.

Further and more importantly, the contractual carrier is responsible for the acts and omissions of the actual carrier according to Art. 41 para 1 MC. Given the possibility that the contractual carrier – in relation to the customer – can be considered passenger or consignor with respect to the contract with the airline as actual carrier. The contractual carrier can therefore appear as a bipolar party. Whether a carrier-actual carrier relation only satisfies Art. 39 MC if the parties remain carriers will be questionable. The airline won't be aware of its position as actual carrier. Art. 39 MC, however, does not require a contract but merely the authority from the contracting carrier, which is why the unliteral consent by the contracting carrier is sufficient.[29] As a consequence, it must be sufficient that the actual carrier merely knows that the baggage is in the hold or on board of the aircraft. According to Art. 45 MC the consignor to whom the contractual carrier is responsible can claim either it or the actual carrier with the quite delicate legal consequences that the one claimed can get recourse of the respective other carrier, Art. 48 MC. For the prosumer who agreed to carry an item this becomes extremely dangerous since the claim against the airline for damaged baggage can be higher than the one for claiming damaged cargo. The following part will consider this in depth.

2.3.2 Baggage of a passenger or cargo of a carrier

A person - regardless whether it is carrying an item or not - in an aircraft on its way home from vacation will be considered a passenger. The item however can

ISSN 2313-1853

be considered baggage or cargo. Considering the legal consequences, this distinction is quite essential given the fact that the carrier's liability and defences vary depending on the qualification as baggage or cargo.

The outcome of this categorisation is also essential if one considers the different legal consequences with regards to the amount of the carrier's liability. According to Art. 17 para 2 MC, the carrier is liable for damages or destruction of the baggage, while it is liable for harmed cargo under Art. 18 MC. Not only are the available exemptions and defences different but also the limitation of this liability according to Art. 22 MC. While the carrier of cargo can rely on a 19 SDR/kg limitation even in the event of wilful misconduct by the carrier, the limitation for a liability concerning damaged baggage is significantly higher – 1131 SDR/kg. Furthermore, Art. 22 para 5 MC totally denies the carrier the limitation of liability if the baggage was harmed due to an intentional or reckless act or omission by the carrier or its agents.
And so, it is possible that the contractual carrier is liable to the customer with a limitation of 19 MC, while the airline that is used by the carrier is liable to a higher amount.

Art. 17 para 4 MC does not define baggage itself but rather clarifies that it does not depend on whether the baggage was checked or unchecked. It does however make a crucial difference with regards to the requirements for the liability of the carrier, whether the item is still within the area of control by the passenger, if it is unchecked, or in case of checked baggage. Art. 17 para 2 MC shows that the closer the passenger is, the more important the proofed fault of a carrier becomes. The line between checked baggage and cargo is however blurred if the item is bulky or considered oversize luggage.[30] In such a case Art. 18 MC would be applicable.

However, applying the maxim of *accessorium non ducit, sed sequitur principale* one must certainly consider items carried in the cabin a baggage as it merely follows the passenger and remains in its superordinate control.[31] The item in charge of the party, hence, the ability to protect the goods from any harm due to a certain status of capacity is, however, not sufficient for distinguishing between luggage and cargo in the hold of the aircraft.

Considering the recourse option according to Art. 48 MC, the airline against which compensation was claimed by the customer or the crowd service directly had to pay a higher amount of damages as the carrier would have to compensate. And although Art. 44 MC seeks to prevent an improper advantage of the claimant by evading the included limitations of liability[32], it does not prohibit to raise a claim against the actual carrier as long as the liability limits in the MC are respected. This is a scenario whereby the contractual carrier can face serious recourse problems.

ISSN 2313-1853

The wonderful idea of combining vacation trips with small carriages and earning money leads to unpredictable consequences for the party that agreed upon carrying the item via crowd service platforms.

3. The external relationship

For the external relationship the contract of carriage itself is the uncertain factor as the crowd service is merely acting as an intermediary between the customer and the carrier. Furthermore, the crowd services do not always make it clear that the contract concluded is a contract between them and the crowd service instead of the carrier. This is mainly due to the fact, that crowd services seek to evade the obligation of being a contracting party.[33]

3.1 Crowd service as contracting party?

One possible option can be, that the crowd service and the customer are contractually related. Within the European Union, the ECJ decided about the position of a platform service and its role for or against a contractual relation. In the case eBay v. L'Oréal the ECJ deemed a platform no longer as neutral party if it plays an active role.[34]
This is the case if the platform operator goes beyond providing information about the independent participants without evaluating them in a technical or administrative way. If this active role enables the operator gaining information and data about the participants and therefore getting in the position to control the data, the platform operator is engaged in the contractual relation.
A crowd service can bring together customer and carrier in different ways, the more the crowd service is assisting the participants, the more likely is its role as contracting party and therefore as party which can be held liable.[35]
The platform can merely inform about the available potential carriers in a specific country. More likely, however, is a broader service office by the crowd service as the customer usually seeks for offers concerning its specific conditions including duration of the transport, price, place and availability.
In the recent judgement of the ECJ in the case Asociación Profesional Élite Taxi v. Uber Systems Spain SL the judges qualified the intermediation service of Uber as service according to Art. 56 TFEU.[36] The judges emphasised how Uber influences the participants through contractual conditions and excluding drivers from the selection in case of unappropriated conduct, safety or driving conditions. The ECJ further qualifies the service offered by Uber as one in the field of transport.
Given the usual possibility in the crowd logistics sector that the customer can evaluate the carriage afterwards which influences the ranking position of the potential carrier for future transports, an influencing factor is given as well. Further, crowd services are intermediation services due to the fact that they list

ISSN 2313-1853

possible matches by using some kind of algorithm that links the conditions of the customer with the available carriers that could satisfy these needs. Since there is a contractual relation between the customer and the crowd service, there is also a way to claim compensation from the crowd services in case anything went wrong.

3.2 Carrier or freight forwarder or broker?

In order to anticipate the amount of damages, the position of the crowd service must be examined. While the international contract of carriage by a certain transport mode is harmonised by uniform conventions, the contract of freight forwarding is not. The distinction between those two types however is a national matter, to be decided before one discusses the satisfaction of the application scopes of one of the transport conventions.
While the freight forwarder merely arranges the carriage of goods,[37] the carrier is responsible for the success of the carriage as the principal.[38] In reality however, the distinction is difficult and calls for a comprehensive examination of the given circumstances.
For a categorisation it is again decisive to what degree the crowd service is assisting the customer and to which extent it assumes responsibility for the successful carriage. Given the peer to peer character of the crowd logistics model, it is quite unlikely and unusual that the crowd service is acting as principal that assumes responsibility for the carriage. The common evaluation system proves the argument, that the success of the carriage should not be in the sphere of responsibility of the crowd service but rather in these of the participants. The customer can choose the carrier which satisfies its criteria, while the carrier can influence the likelihood of getting the job by performing well. The legal examination should not be different if only one carrier meets the requirements of the order of the customer as it is not in the capacity of the crowd service to have independent participants everywhere at any time.
The carriage would, however, not be possible without the crowd service. Given the similarities to the Uber scenario,[39] the pure intermediation commission is in the focus of the business model. The contractual relation between the customer and the crowd service does not go beyond this. The crowd service can be considered as broker or forwarding agent.[40] A forwarding agent mainly agrees to conclude contracts of carriage in the name of the principal, here potentially the customer.[41]
The scope of potential subjects of liability of the crowd service seem small due to its mainly coordinating but not deciding role. It merely provides an algorithm for ranking the potential carriers and distributing them to the parameters of the demanded dispatch. The former criteria usually base on subjective measurement, which should not be base for a liability since at least an arbitrary list can be prevented. As long as the choice-making process belongs to the customer, the crowd service cannot be held liable for bad choices except, where

ISSN 2313-1853

errors of the parameters (recommendations, evaluation algorithms) caused a wrong choice.[42] It could, however, be extremely difficult for the customer to establish a sufficient body of evidence as the customer made the final decision.

3.3 Relation between the customer and the contractual carrier

The quite likely categorisation of the crowd service as forwarding agent means also that a contractual relation, more precisely a contract of carriage, exist between the customer and the contractual carrier. As consignor the customer is usually obliged to provide sufficient information over the item to be carried[43] and even ensure a sufficient package[44]. In case of non-compliance the customer can be held liable and provides the carrier with a defence of its liability. Furthermore, if the customer is an ordinary prosumer it is not necessarily clear to it that the contractual carrier is usually protected by the limitations of liability provided by the conventions nor that the costumer has to proof the damage within the period of responsibility of the carrier.[45] Given the usual circumstances, whereby the distance between the item and the customer might be too far and the dispatch starts anywhere far without clear information, the burden of proof on the customer seems quite heavy. If the customer is a prosumer, it is extraordinary burdened. The protective provisions which were established in the EU could risk running dry.

4. Conflict with protective EU standards?

Crowd logistics aims to establish a logistic network by involving normal persons, thus prosumers without a particular logistic business. Depending on the qualification of the external relationship as either a contract of carriage under international regimes including limitations for liability or contract of freight forwarding with certain possibly lower limitations of liability, the crowd logistic service might go to the expense of either the one or the other prosumer. The EU provided numerous standards in order to protect consumer from abuse of market power, information asymmetries or simply negotiation power by the other party. One of the central goals of the EU according to Art. 169 TFEU is the improvement and strengthening of consumer protection. The concept of crowd logistics provides a possibility to connect prosumers and possibly to enhance their trust in the internal market, but only if the legal risks are predictable and feasible. Applying the Conventions and national law to the crowd logistics as prescribed above leads, however, to severe legal consequences, from which some are not even predictable. Recourse gaps are far away from an acceptable level of legal risks. Member states to the EU and the Transport Conventions are challenged. The following part will show how it might be possible solving the tension in compliance with EU standards.
The EU is member of the MC and the COITF-CIM. According to Art. 216 para 2 TFEU, the member states are bound by the ratification by the EU. Since the

ISSN 2313-1853

Conventions are part of the EU law, the ECJ is the competent court to interpret their provisions with binding force to the member states.[46]
With regards to the CMR, to which the EU is not a member, merely Art. 351 TFEU is of essential importance. In this regard the member states are obliged to respect the principles and standards of the EU by applying international law and fulfilling international obligations.

4.1 Consumer law lex specialis qua ECJ judgements?

The EU adjusted some of their regulations in order to comply with the requirements of the convention.[47] Art. 216 para 2 TFEU permits the EU to become member of an international treaty and conclude them with a binding force to the member states. International treaties whose member states are the EU, the member states of the EU and third, non-EU members are considered mixed agreements[48] by the ECJ. The ECJ assumes the power of interpretation of those agreements with a binding force for the member states without drawing attention to distribution of power between it and the member states.[49]
However, the ECJ also emphasized, that it is willing to interpret the Montreal Convention, by demarcating its scope to EU law, explicitly the passenger rights regulation.[50] In the case IATA and ELFAA the ECJ based its argumentation and the broad interpretation of the regulation on the goals of the Montreal Convention codified in its preamble that refers also to consumer protection.[51] The court raised the consumer to a higher rank then the other goals named in the Preamble in order to broaden the scope of the regulation and diminish the ambit of Art. 19 MC. As it is already set up in the Convention and many special rules on consumer protection exist, it could be considered as a natural step to interpret the Conventions restrictively and give preference to the special rules on consumer protection. The consumer law could thus be considered as lex specialis to the Transport Conventions, that enjoy preference over the uniform law. As a very important example the recourse gaps arising out of Art. 39 ff MC could be prevented by excluding contractual carriers that are passengers with baggage in relation to their actual carriers. The consumer protection as one of the central aims of the Montreal Convention could serve as argument for such an interpretation especially where no special consumer rules or prosumer rules exist at the EU level and different measures are required.

4.2 The force of Art. 351 TFEU – restrictive interpretation as the least

Mainly with regards to the CMR, to which the EU is not a member, a restrictive interpretation of the convention can be obligatory due to Art. 351 TFEU. Art. 351 TFEU imposes a duty on the member states to interpret[52] international treaties that where concluded before the TFEU and the TEU entered into force in compliance with the principles of the EU. Although the CMR is a hybrid construct with elements of international agreements and uniform law, it should

ISSN 2313-1853

be considered as an agreement to which the rules on international treaties apply.[53]
The severe legal risks the CMR provides for the costumer as consignor and the carrier at the other end could be decreased by interpreting the convention restrictively. One option would be to require a carriage for reward within a business and indirectly exclude the consumer from the application scope of the CMR. This, however, would not only provide advantages, as the consumer-carrier is at least protected by the 8,33 SDR-limitation. An unlimited liability according to Art. 29 CMR could then be applied less frequently as it by some national judges.[54] This advantage at the one side goes, however, to the expense of a potential consumer-costumer, who could hardly be released from its burden of proof or the obligations to pack the item and to provide sufficient information given the comprehensive mandatory frame of the CMR. While the provisions in Art. 29 CMR are accessible to an interpretation, Art. 11 CMR is not. Art. 10 CMR, the responsibility for the package grounds at the usual circumstance, that the consignor has the expertise about the nature of the item.[55] Here the Judges may use this as starting point for a restrictive interpretation in order to release the consumer from the duty to pack or at least decrease the standard for a sufficient package.

4.3 Increasing the responsibility of the intermediary

The biggest issue that arises from the crowd logistics concept is that the only commercial party is the intermediary, hence a rather passively acting party that merely brings together two consumer that have to bear the burden of major liabilities. It is only natural that the one who should shoulder more responsibility is the crowd service. The European Commission recently released a proposal on a regulation for promoting inter alia transparency for online intermediation services, unfortunately exclusively for business users.[56] Given the importance of the crowd service provider that enables the contractual relation between the consumers, the information duties imposed on the crowd service should be increased. Considering numerous consumer protective regulations/directives, the informative base for making a decision was always considered as essential for the consumer to develop trust in the internal market.[57]
Art. 14 of the E-Commerce directive[58] includes provisions on hosting in the E-Commerce sector and bases on the concept of “information society service”. The ECJ took this as main incentive to apply the rules on hosting, including severe duties of transparency and information to platform operator.[59] Even clearer were the judges in the case *Sotiris Papasavvas,* the ECJ interpreted Art. 2 lit a of the E-Commerce Directive as based on “information society services” by which also businesses are covered, whose service is not only information.[60] The judgments clarified, that the information society service is a far reaching concept, that affects and covers severe parties and relations even

ISSN 2313-1853

though a remuneration is not given for the specific contractual relation but merely through advertisement. Platform operators are thus obliged to provide sufficient information and transparency.[61]
Applying those thoughts to the crowd logistics the legal examination is not different. The position of the crowd service enables it to control and coordinate data to a large extent. It participates in the information society service. Whether the customer or the carrier pay remuneration for the service the crowd service provides is irrelevant since even data might be considered as remuneration in itself.[62] The E-commerce directive does not directly apply to the crowd logistics concept as it is mainly tailored to a B-C-Business. However, as an argument *"a maiore ad minus"* the duties of the intermediary to provide sufficient transparency must even more exist if the participants are consumers on both sides. The crowd service must thus inform about the limitations of liability, the burden of proof and the legal risks at both sides. Another option would be to provide dispute settlement mechanisms such as mediation or adr-solutions equivalent to the those included in the proposal by the European Commission[63] in Art. 9 and 10.

5. Conclusion

The article could proof that prosumers face severe legal risks by participating in the crowd logistics concept. This is mainly due to the fact that international transport conventions do not distinguish between professionals or non-professionals. They even allow delegating the entire carriage to an actual carrier. As a natural but faithful consequence, prosumers are considered carrier under the conventions, the customer considered consignor. Both sides bear numerous legal duties under the Conventions. Given the lack of experience usual non-professionals have, it is urgently necessary to inform them before they enter in legal relationship with each other. A customer and a potential carrier were brought together trough the crowd service operator merely acting as agent. The costumer and the carrier are independent and face different risks. Although the crowd service operator is only an intermediary it should made more responsible by imposing duties to inform and to offer judicial help on it. Further, for all three considered Conventions the mechanisms under EU law provide help and ensure the protective frame of EU consumer law. While for international carriage by rail or by air the respective conventions became EU law according to Art. 216 TFEU and can therefore be considered lex generalis compared to the consumer protection law, the CMR needs to be interpreted restrictively according to Art. 351 TFEU.

ISSN 2313-1853

Bibliography

Baughen, Simon: *Shipping Law,* 6th Edition, 2015, Oxford (Routledge).

Calliess, Christian/ Ruffert, Matthias, *EUV/AEUV, Kommentar*, 5th Edition, 2016, Munich (C.H.Beck)
Cited as *Author* in Calliess/Ruffert, 5th Ed. 2016, section, m.n.

Carr, Indira / Stone, Peter: *International Trade Law,* 6th Edition, 2018, Oxford (Routledge).

Chitty, Joseph, and Beale, Hugh: *Chitty on Contracts*, 32nd Edition, 2016, London (Sweet & Maxwell).

Clarke, Malcolm A.: *International Carriage of Goods by Roads: CMR*, 6th Edition, 2014, Oxford (Routledge).

Ebenroth, Carsten/ Boujong, Thomas/ Joost, Karlheinz et.al., Handelsgesetzbuh, Kommentar, 3rd Edition, 2015, Munich (C.H. Beck, Franz Vahlen Beck)
Cited as *Author* in Ebenroth/Boujong/Joost/Strohn, 3. Ed. 2015, section, m.n.

Ferrari, Franco/ Kieninger, Eva-Maria/ Mankowski, Peter et. Al., *Internationales Vertragsrecht, Rom I -VO, CISG, CMR, FactÜ, Kommentar,* 3rd Edition, 2018, Munich (C.H. Beck)
Cited as *Author* in Internationales Vertragsrecht, 3rd Ed. 2018, section, m.n.

Guldimann, Werner: *Internationales Lufttransportrecht. Kommentar zum Abkommen von Warschau vom 12. Oktober 1929 in der Fassung des Zusatzprotokolls von Haag vom 28. September 1955 sowie zum Zusatzabkommen von Guadalajara vom 18. September 1961*, 1965, Zurich (Schulthess-Verlag)

Haak, Krijn: "*The CMR – Interpretation"* in *Theunis: International Carriage of goods by road (CMR)*, 1987, London (Lloyd's of London Press)

Hoeks, Marian: *Multimodal Transport Law*, 2010, Alphen aan den Rijn (Kluwer Law International).

Koller, Ingo: *Transportrecht*, 9th Edition, 2016, Munich (C. H. Beck)

Langhanke, Carmen: *Daten als Leistungen*, 2018, Tübingen (Mohr-Siebeck)

ISSN 2313-1853

Reuschle, Fabian: Montrealer Übereinkommen, 2nd Edition, 2011, Berlin (Walter De Gruyter)

Schmidt, Carsten/ Herber, Rolf, *Münchener Kommentar zum HGB*, Vol. 7, 3rd Edition, 2015, Munich (C.H. Beck, Franz Vahlen Beck)
Cited as *Author* in Münchener Kommentar 3rd Ed., 2014, section, m.n.

Smeele, Frank: *Legal Conceptialisations of the freight forwarder: some comparative reflections on the disunified law*, JIML 2015, pp. 445-459.

Verheyen, Wouter: Freight forwarding: new kids on the block?, ETL 2016, pp. 263-273.

Verheyen, Wouter: The carrier as transport architect: liability for bad choices?, TranspR 2017, pp. 204-214.

Wendehorst, Christiane: Platform Intermediary Services and Duties under te E-Commerce Directive and the Consumer Rights Directive, EuCML 2016, 30-33

Cases

Aqualon (UK) Ltd v Vallana Shipping Corp, [1994] 1 Lloyd's Rep 669 (High Ct England & Wales).

C.A. Pisani & Co. v Brown, Jenkinson & Co. Ltd, (1939) 64 Li L Rep 340

Jones v European General Express Co Ltd, (1920) 4 Li L Rep 127

Forthergill v Monarch Airlines Ltd. [1980] 2 Lloyd's Rep. 295

BGH decision of 24 June 1969 - VI ZR 45/67, NJW 1969, 2008 – 2013

BGH decision of 17 April 1997 – I ZR 131/95, TranspR 1998, 25 – 28

BGH decision of 4 May 1995 – I ZR 70/93, NJW 1995, 3117 - 3119

ECJ decision C-13/83, ECLI:EU:C:1985:220

ECJ decision, C-324/09, ECLI:EU:C:2011:474

ECJ decision, C-434/15, ECLI:EU:C:2017:981

ECJ decision, C-581/10 and C-629/10, ECLI:EU:C:2012:657

ISSN 2313-1853

ECJ decision, C-181/73, ECLI:EU:C:1974:41

ECJ decision, C-600/14, ECLI:EU:C:2017:935

ECJ decision, C-344/04, ECLI:EU:C:2006:10

ECJ decision, C-291/13, ECLI:EU:C:2014:2209

[1] Opinion of the Advocate General of the ECJ (Bobek) on 14 November 2017, Case C-498/16, m.n. 49.
[2] Concerning platform contracts in general: Wendehorst, EuCML 2016, 30, p. 31.
[3] Which must be considered one of the key elements for a successful establishment of crowd logistics in general, Mehmann/Frehe/Teuteberg, p. 141.
[4] *Verheyen*, TranspR 2017, 204, p. 206.
[5] "Art. 4(a) of the Convention on International Road Traffic defines motor vehicle as *"any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than vehicles running on rails or connected to electric conductors."*
[6] *Chitty on Contracts*, 32nd Edition, 2016, London (Sweet & Maxwell), para. 36-006.
[7] *Aqualon (UK) Ltd v Vallana Shipping Corp,* [1994] 1 Lloyd's Rep 669, p. 676f. (High Ct England & Wales, per Mance J).
[8] See further below.
[9] Baughen, *Shipping Law,* 6th Edition, 2015, Oxford (Routledge), p. 180.
[10] Carr / Stone, *International Trade Law,* 6th Edition, 2018, Oxford (Routledge), p. 370.
[11] Ibid at p 369.
[12] TRANS/WP9/11, p. 30.
[13] Clarke, *International Carriage of Goods by Roads: CMR*, 6th Edition, 2014, Oxford (Routledge), p. 51.
[14] For example the invalidity of the contract under English law in absence of sufficient consideration.
[15] Clarke, (*supra* n 12), p. 51.
[16] Convention on the Contract for the International Carriage of Passengers and Luggage by Road, signed at Geneva on 1 March 1973, entered into force on 12 April 1994.
[17] Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), Appendix B to the Convention concerning International Carriage by Rail (COTIF), (COTIF-CIM).
[18] Carr / Stone, (*supra* n 9), p. 356f.
[19] ECJ Case C-13/83, *European Parliament v Council of the European Communities,* judgement made on 22 May 1985.
[20] See: Hoeks, 2010, p. 263.
[21] Ibid., p. 264.
[22] Regulation (EC) No 1371/2017 of the European Parliament and of the Council of 23 October 2017 on rail passengers' rights and obligations, OJEU L 315/14.
[23] Recital 6 of the Regulation.
[24] *Chitty on Contracts*, (supra n 5), para. 36-071.
[25] Koller, Transportrecht, 9th Edition 2016, Art. 1 MÜ, m.n. 4; BGH decision of 24 June 1969, NJW 1969, 2008, 2010; Hoeks, 2010, p.36; Reuschle, Montrealer Übereinkommen, Art. 1 MÜ, m.n. 7,13.
[26] Ruhwedel in Münchener Kommentar, 3rd Edition 2014, Art. 1 MÜ, m.n. 15f.
[27] So inter alia § 407 HGB (German Commercial Code), see Koller, Transportrecht 9th Edition 2016, § 407 HGB, m.n. 28.
[28] Haak in Theunis,p. 227.
[29] Reuschle, Montrealer Übereinkommen, Art. 39 MÜ, m.n. 16, Guldimann, p. 212, m.n. 11.
[30] *Ruhwedel* in Münchener Kommentar zum HGB, 3. Ed. 2014, Art. 18 MC, m.n. 27.
[31] Minutes on the Montreal Convention, Doc 9775-DC/2, Vol. I – Minutes, p. 81.
[32] Pokrant in Ebenroth/Boujong/Joost/Strohn, 3. Ed. 2015, Art. 44 MC, m.n. 1.
[33] Verheyen, ETL 2016, 263, 264.
[34] ECJ decision, C-324/09, ECLI:EU:C:2011:474, m.n. 115ff.
[35] Verheyen, ETL 2016, 263, 265.

ISSN 2313-1853

[36] ECJ decision, C-434/15, ECLI:EU:C:2017:981, m.n. 34ff.
[37] Jones v. European General Express Co Ltd, (1920) 4 Li L Rep 127; C.A. Pisani & Co. v. Brown, Jenkinson & Co. Ltd., (1939) 64 Li L Rep 340; § 453 HGB (German Commercial Code), Art. 8:60 BW (Dutch Civil Code); Hill, (1972), m.n. 22.
[38] Jesser-Huß in Münchener Kommentar zum HGB, 3. Ed. 2014, Art. 1 CMR, m.n. 3; Smeele JIML 2015, 445, 456.
[39] ECJ decision, C-434/15, ECLI:EU:C:2017:981, m.n. 35.
[40] Verheyen, ETL, 2016, 263, 265.
[41] Smeele, JIML 2015, 445, 446f.
[42] Verheyen, ETL, 2016, 263, 265.
[43] Art. 9, 10 MC, Art. 11 CMR, Art. 23 para 3 lit. e COTIF-CIM.
[44] Art. 11 CMR, Art. 14 COTIF-CIM not necessarily under MC but possible, see Art. 18 para 2 lit. b MC.
[45] That was especially subject to the decision of ECJ decision, C-581/10 and C-629/10, ECLI:EU:C:2012:657, m.n. 50f.
[46] ECJ decision, C-181/73, ECLI:EU:C:1974:41, m.n.2/6, recently ECJ decision on the COTIF participation C-600/14, ECLI:EU:C:2017:935.
[47] Recital 6 Regulation (EC) Mo 889/2002 of the European Parliament and of the council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.
[48] Opinion 2/91 of the court of 19 March 1993, ECLI:EU:C:1993:106, m.n. 12f.
[49] ECJ, decision C-600/14, ECLI:EU:C:2002:184, m.n. 14.
[50] Inter alia by interpreting the Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, see ECJ, decision C-344/04, ECLI:EU:C:2006:10, m.n. 35ff; decision C-581/10 and C-629/19, ECLI:EU:C:2012:657, m.n. 41ff.
[51] ECJ, decision C-344/04, ECLI:EU:C:2006:10, m.n. 41.
[52] Beside revoking the contract, interpreting the international treaties is another adequate measurement to comply with Art. 351 TFEU, see Schmalenbach in Calliess/Ruffert, 5th Ed. 2016, Art. 351, m.n. 17f.
[53] Forthergill v. Monarch Airlines Ltd. [1980] 2 Lloyd's Rep. 295; Reuschle, Montrealer Übereinkommen, Preamble, m.n. 38, 49.
[54] Especially Germany: see inter alia BGH decision of 17 April 1997, TranspR 1998, 25, p. 27; BGH decision of 4 May 1995, NJW 1995, 3117, p. 3119.
[55] Otte in Internationales Vertragsrecht, 3rd Ed. 2018, Art. 10 CMR, m.n. 1.
[56] COM (2018) 238 final.
[57] COM (2015) 225 final, p. 5f.
[58] Directive 2000/31/EC of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64.
[59] ECJ decision, C-324/09, ECLI:EU:C:2011:474, m.n. 109ff.
[60] ECJ decision C-291/13, ECLI:EU:C:2014:2209.
[61] Wendehorst, EuCML 2016, 30, 31.
[62] Langhanke, Daten als Leistungen (2018).
[63] COM (2018) 238 final, p. 27ff.

ISSN 2313-1853