



Japan-ASEAN Cooperation



## **Sustainable Human Resource Development in logistics services for ASEAN Member States**



---

*The Training Material on “Cross Border Transport Operation” has been produced under Project Sustainable Human Resource Development in Logistic Services for ASEAN Member States with the support from Japan-ASEAN Integration Fund (JAIF). Copyright Association of Southeast Asian Nations (ASEAN) 2014. All rights reserved.*

---



Japan-ASEAN Cooperation



## **Sustainable Human Resource Development in logistics services for ASEAN Member States**

# **Cross Border Transport of Goods**

## **(GMS ANNEX 10: CONDITIONS OF TRANSPORT)**

### **Legal Aspects**

## **In comparison with CMR Convention 1956**



Japan-ASEAN Cooperation



## Sustainable Human Resource Development in logistics services for ASEAN Member States

# GMS – ASEAN Agreement – CMR Convention

**GMS Annex 10**: The Agreement entered by and between Cambodia, China (PRC), Lao PDR, Myanmar, Vietnam and Thailand as technical details of liability regime of liability for international carriage of goods by road in a motored vehicle.

**ASEAN Agreement**: There is no ASEAN Agreement on a similar regime of liability.

**CMR Convention**: Convention on the Contract for the International Carriage of Goods by Road signed at Geneva on 19 May 1956. It is the similar regime of liability of GMS.

### **Questions:**

- What are the position of GMS and CMR?
- Is it correct to say that GMS is a simplified version of CMR?
- Is the simplified version clear?
- What would you have to do if you are drafting a domestic law to adopt GMS Annex 10?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Definitions

**GMS: Art 1.** provides 10 definitions while **CMR** does not have a specific Article to deal with definition.

#### **GMS: Definitions**

- (a) Carrier: a person who undertakes to carry goods for reward.
- (b) Consignee: the person to whom the goods are to be delivered.
- (c) Consignor: the person who concludes the contract of carriage with the carrier and hands over the goods to the carrier.
- (d) Consignment Note: the transport document for the purpose of recording the contract of carriage, its conditions, the taking in charge and delivery of the goods.

#### **Questions:**

- Whether the carrier has to perform the carriage by himself?
- How is the consignee identified?
- What is the function of consignment note? Is it a document of title? (see Art. 4 (a) (i) of GMS and Art. 9.1 of CMR in comparison at p. 9)

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### GMS : Definition (Art. 1 - cont.)

- (e) Delay: delay in delivery when the goods have not been delivered within the agreed period or in the absence of such an agreement, within the normal period of time required for a due diligent carrier in the same circumstances.
- (f) Force Majeure: circumstances resulting in loss, damage, or delay that the carrier could not foresee and avoid, and the consequences of which he/she was unable to prevent or control.
- (g) In-transit: en route, i.e., in the course of the transport operation.

#### Questions:

- When did delay occur?
- Does your domestic law define a different meaning of force majeure?
- How to determine that goods are “in transit”? (Art. 6(a))

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### GMS : Definition (Art. 1- cont.)

- (h) Right of Disposal: the power to decide the destiny of the goods.
- (i) Special Drawing Right (SDR): a unit of account defined by the International Monetary Fund (IMF)—conversion of the sums into national currencies shall be calculated in accordance with the method of valuation applied by the International Monetary Fund.
- (j) Remarks: statements on the condition of the goods upon the taking in charge or delivery of the goods.

#### Questions:

- Who has the power to decide the destiny of the goods and in what situation? (see Art. 4 (c) and its unclear wording).
- Are remarks the same of reservation ? (see Art. 4 (b) (ii))





## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Scope of Application

### **GMS: Art. 2**

- (a) This 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.
- (b) This Annex shall not apply to carriage performed under the terms of any international postal conventions.

**CMR: Art. 1.4** similar to Art. 2 of GMS but not apply to funeral consignments and furniture removal.

### **Questions:**

- Is it correct to say that both GMS and CMR apply to international carriage of goods by road?
- Does GMS still apply in case of combined transport and on what condition? (see Art. 2.1 of CMR in comparison)



Japan-ASEAN Cooperation



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Scope of Application (cont.)

**CMR Art. 2.1** : Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.





## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Scope of Application (cont.)

#### Questions (CMR Art. 2.1)

- Is this concept available in GMS?
- Is it the concept of combined transport?
- Is Art. 2.1 of CMR a multimodal transport? If not, what is the difference between multimodal transport contract and contract of carriage under CMR in case other mode of transport is involved?
- What are the differences in the following matters as between GMS and CMR in case of combined transport, e.g. the carrying truck was loaded on to a ferry for transport to the destination in an island;
  - applicable law,
  - regime of liability,
  - exclusions and limitations,
  - time bar?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Consignment Note

**GMS Art. 4 (a) (i)** : The contract of carriage shall be recorded via the issuance of a consignment note in three original copies signed by the consignor and the carrier. The signatures may be in the form of handwriting, print, perforated, stamped, symbols, or in any other mechanical or electronic forms, not inconsistent with the laws of the Contracting Party where the consignment note is issued. The first copy shall be handed to the consignor, the second copy shall accompany the goods, and the third copy shall be retained by the carrier.

**CMR Art. 9.1:** The consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.

### Questions :

- Now, can you conclude the function of consignment note?
- Is it a document of title?
- How many copy a consignment note is to be issued?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Consignment Note (cont.)

**GMS Art. 4 (a) (ii)** : The consignment note shall conform to the model in the attachment, and contain the following particulars:

- the date of the consignment note and the place at which it is made out;
- the name and address of the consignor;
- the name and address of the carrier;
- the place and the date of taking in charge of the goods and the place designated for delivery;
- the name and address of the consignee;
- the description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their description in accordance with Annex 1 to the Agreement;
- the number of packages and their special marks and numbers;
- the gross weight of the goods or their quantity otherwise expressed;
- charges relating to the carriage (carriage charges, supplementary charges, and other charges incurred from the making of the contract to the time of delivery);

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Consignment Note (cont.)

- value of the goods for customs purposes;
- the requisite instructions for Customs and other formalities; and
- a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Annex.

#### Questions:

- Is the model of the consignment note attached to Annex 10 of GMS mandatory?
- Can the carrier get commission for arranging cargo insurance? (see box 19)
- Who is “Subcontracting actual carrier” in box 17 of the model form?
- Does the consignor have the right to instruct the carrier to separate the consignment note in case of the goods to be loaded in different vehicle or they are of different kinds or divided into different lots? (see CMR Art. 5.2 in comparison)
- What is the effect of the absence, irregularity or loss of the consignment note? (GMS Art. 4 (a) (v): The absence, irregularity, or loss of the consignment note shall not affect the existence or the validity of the contract of carriage, which shall remain subject to the provisions of this Annex.)



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Consignment Note (cont.)

#### CMR

#### Article 5

2. When the goods which are to be carried have to be loaded in different vehicles, or are of different kinds or are divided into different lots, the sender or the carrier shall have the right to require a separate consignment note to be made out for each vehicle used, or for each kind or lot of goods.



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Remarks Upon Taking the Goods in Charge (Art. 4 (b) corresponding to Art. 8.1. & .2 of CMR)

- (i) Upon taking the goods in charge, the carrier shall check the quantity (number and weight) and apparent quality (condition) of the goods and their packaging and make appropriate remarks in the consignment note. In the absence of remarks by the carrier, the cargo is presumed to be complete and in good condition.
- (ii) Where the carrier has no reasonable means of checking the accuracy of the statement made in the consignment note with respect to quantity, quality, and packaging of the goods, he/she shall enter his/her remarks in the consignment note together with the grounds on which they are based. He/she shall likewise specify the grounds for any remarks, which he/she makes with regard to the apparent condition of the goods and their packaging; such remarks shall not bind the consignor unless he/she has expressly agreed to be bound by them in the consignment note.

#### Questions:

- The legal assumption in para (i) is of the benefit to which party? In such case, who has the burden of proof in case of cargo damage?
- Are the terms “shipper’s load and count” and “said to contain” good enough to be considered the remarks?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Right of Disposal (Art. 4 (c))

Unless otherwise agreed in the consignment note:

- (i) The consignor has the right to dispose of the goods, in particular to stop the goods in-transit, to order their return to the place of departure or to redirect them to another destination/consignee.
- (ii) The consignor's right to dispose of the goods shall cease and be transferred to the consignee:
  - when the goods are delivered;
  - when the goods arrive at the place designated for delivery and the consignee required the delivery;
  - when the second copy of the consignment note was received by the consignee at his/her request.

The carrier shall be compensated for any additional expenses arising from exercising the right of disposal in-transit.

#### Questions:

- Is it the right of disposal or the right to instruct the carrier?
- In principle, the right of disposal is vested in which party?
- What is the connection of the second copy of the consignment note with the right of disposal?
- What is the remedy available to the carrier in compliance with the order received?



Japan-ASEAN Cooperation



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Right of Action (Art. 4 (d) & Vicarious Liability & Himalaya Concept (Art. 5 (c))

**Art. 4 (d):** Both the consignor and the consignee shall separately or simultaneously have the right to sue the carrier for compensation for loss of, damage to, or delay in delivery of the goods, but the carrier shall owe compensation only once.

**Art. 5 (c):** Vicarious Liability for Servants, Agents, and Subcontractors  
In connection with his/her tasks, the carrier shall be responsible for acts and/or omissions of his/her servants, agents, and subcontractors, who will be entitled to avail themselves of the same defenses as the carrier under this Annex.

#### Questions:

- In what situation both the consignor and consignee shall have the right to sue the carrier at the same time?
- Do you think that Art. 5 (c) incorporates the Himalaya concept and why?
- What is the meaning of the term “same defences”?
- Does it include only the limitation and exclusion of liability?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Carrier's Liability (Art. 5 & Art. 6)

### Art. 5

#### (a) Mandatory Law

Any clause in the carriage contract, directly or indirectly derogating from the provisions of this Annex, shall be null and void. The nullity of such a stipulation shall however not affect the validity of the other provisions of the contract.

#### (b) In Contract and In Tort

The present liability regime will govern any claim arising out of the performance of the carriage contract under this Annex, however founded, whether in contract or extra-contractually.

### Art. 6

#### (a) General

The carrier shall be liable for the total, or partial loss of, or damage to the goods as well as for the delay in delivery that occurred in the period between the time that the carrier takes the goods in charge and the time of delivery.

### Questions:

- What provisions can be contracted out?
- Is the carrier liable for the loss/damage/delay occurred out of the period of responsibility?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Carrier's Liability (Art. 5 & Art. 6 - cont.)

### Art 6.

#### (b) Constructive Loss

- (i) 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.
- (ii) Upon later recovery of the goods, the carrier shall notify immediately the consignor/consignee, who shall be entitled to opt for delivery of the goods against refund of the compensation already received, but without prejudice to any claim for compensation for partial loss, damage or delay.
- (iii) In the absence of the consignor/consignee's request for delivery of the recovered goods within 30 days from the receipt of notification by the consignor/consignee from the carrier, the carrier shall be entitled to deal with the goods at his/her discretion, subject to the law of the place where the goods are situated.

#### Questions:

- What is the difference between actual loss and constructive loss?
- Does this Article 6 apply to “partial loss” or “total loss” or both?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Liability for Delay (Art. 7 (b))

### Art. 7

#### (b) Delay

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.

#### Questions:

- When did the delay occur? (see its definition)
- What is the transport price?
- Is it the “reward” referred to in Art. 2 (a)?
- Can the cargo owner claim compensation for both damage to cargo and delay in delivery?
- If so, what is the aggregate limitation of liability?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Declaration of Value and/or Special Interest in Delivery (Art. 7 (c))

Via the entry of the following declarations by the consignor in the consignment note prior to the carriage and against payment of a surcharge, higher compensation than mentioned above shall be due by the carrier:

- (i) declaration of the value of the goods:
  - In this case the limit in Article 7(a) (ii) shall be substituted by the amount of that value; and/or
- (ii) declaration of a special interest in delivery:
  - In this case compensation of additional damages shall be due by the carrier, independently from the compensation according to Article 7(a) and (b).

#### Questions:

- Does the carrier has the right to reject the request for such declarations by the consignor?
- If the declarations are accepted against payment of surcharge, what is the effect to the carrier's liability?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Measure of Compensation and Limitation for Loss/Damage

### Art. 7 (a): Loss and Damage

- (i) 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.
- (ii) 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.
- (iv) He/she will owe no additional damages.

### Questions:

- How to apply Art. 7 (a) (i)?
- What is the meaning of the term “carriage charges”? Is the same of “transport price” under Art. 7 (b)?
- Is SDR 8.33 per kg the aggregate limitation of liability for loss of/damage to goods?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Exclusion of Liability

### Art. 8

- (a) The carrier shall be relieved of liability if he/she proves that the loss, damage, or delay in delivery was caused by:
- (i) force majeure;
  - (ii) inherent defect of the goods;
  - (iii) wrongful act or neglect of the consignor/consignee; or
  - (iv) the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier.
- (b) The defective condition of the vehicle used for the performance of the carriage shall not relieve the carrier of his/her liability.

### Question:

- If the defective condition of the vehicle arose from faulty design or technical error of the vehicle manufacturer without privity of the carrier, can it be considered force majeure?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Exclusion of Liability (cont.)

- (c) Subject to counterproof by the consignor/consignee, the carrier shall be relieved of liability if he/she establishes that the loss, damage, or delay in delivery was attributable to:
- (i) use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note, unless there has been an abnormal shortage or a loss of any package;
  - (ii) the lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;
  - (iii) handling, loading, stowage, or unloading of the goods by the consignor, the consignee or person acting on behalf of the consignor or the consignee;

#### Question:

- The burden of proof under this Art. is vested in which party, the carrier or the consignor/consignee?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Exclusion of Liability (cont.)

- (iv) the nature of certain kinds of goods which particularly exposes them to total, or partial loss, or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin; however, if the carriage is performed in vehicles specially equipped to protect the goods from the effect of heat, cold, variations in temperature, or the humidity of the air, the carrier must prove that all steps incumbent on him/her in the circumstances with respect to the choice, maintenance, and use of such equipment were taken and that he/she complied with any special instructions issued to him/her;
- (v) insufficiency or inadequacy of marks or numbers on the packages; or
- (vi) the carriage of livestock, provided the carrier proves that all steps normally incumbent on him/her in the circumstances were taken and that he/she complied with any special instruction issued to him/her.

#### Question:

- What is to be proved by the carrier in case of sub-para (vi) if there is no special instruction?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

# Lifting of the Exoneration or Limitation of Carrier Liability

## Art. 9

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' willful misconduct or gross negligence.

### Questions:

- Can the servants, agents, or subcontractors of the carrier rely on the Himalaya concept under Art. 5 (c) to get the benefit of exclusions and limitation of liability in case of willful misconduct or gross negligence of the carrier himself?
- In what situation other than Art. 9 the carrier cannot rely on the limitation of liability?



## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Remarks on Delivery (Art. 10 (a))

- (i) Upon delivery of the goods, the consignee shall check the quantity (number and weight) and apparent quality (condition) of the goods and their packaging and if shortage or damage is found, make immediately appropriate remarks in writing.
- (ii) For loss or damage that is not apparent, the period for making remarks in writing is extended to seven working days from the date of receipt.
- (iii) In the absence of such remarks by the consignee, the quantity and condition of the goods are presumed to be as described in the consignment note.

#### Questions:

- Are they the same remarks made under Art. 4 (b)?
- What is the effect of no-remark? Is the carrier released from liability?





## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Time Bar (Art. 10 (b))

All claims for compensation for loss of, damage to, and delay of the goods against the carrier shall be time barred unless an action was filed with the court or arbitration initiated within one year:

- (i) in case of partial loss, damage, or delay:
  - after the delivery of the goods; and
- (ii) in case of total loss:
  - after 30 days from the expiry of the agreed delivery period or if no such period was agreed, after 60 days from the receipt of the goods by the carrier.

However, in case of the carrier's or his/her servants', agents', or subcontractors' willful misconduct, the time bar shall be three years.

#### Questions:

- Can the time bar be longer than 3 years?
- Is there any arbitration clause incorporated in the standard form of consignment note attached to Annex 10 of GMS?
- What is the difference between filing an action with the Court and initiating arbitration proceedings?

## Sustainable Human Resource Development in logistics services for ASEAN Member States

### Jurisdiction (Art 10 (c))

- (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.

#### Questions:

- Is settlement of claim by arbitration compulsory?
- Can the parties agree in advance or at the time of concluding the contract to have the dispute/claim settled by arbitration?
- Are foreign judgments and arbitration awards enforceable in your country?