



Breaking the Limits of Liability in the CMR Convention

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FEDERICO FRANCHINA · UNIVERSITY OF MESSINA



Agenda

- 1) The architecture of the limit
- 2) The contractual door — Arts. 24 and 26
- 3) The interpretive door — Art. 23(4)
- 4) The sanctioning door — Art. 29
- 5) The forum dimension
- 6) Critical assessment and proposals
- 7) A theoretical reading
- 8) Conclusions



The bargain behind every carrier limitation

A presumption of liability... Art. 17 makes the road carrier liable for total or partial loss, damage and delay, subject only to the exonerations of Art. 17(2) and (4). This is stricter than the general law of obligations.

...in exchange for a cap. Art. 23 quantifies compensation on the value of the goods at the place and time of acceptance and caps it, since the 1978 Protocol, at 8.33 SDR per kg of gross weight short.

The cap is now modest. For pharmaceuticals, electronics or luxury goods the gap between invoice value and limit may be one or two orders of magnitude.

So litigation is about 'how much'. A large share of European CMR litigation does not ask whether the carrier is liable, but whether the claimant can 'break' the limit.

8.33

SDR per kilogramme of gross weight — Art. 23(3), unchanged since the 1978 Protocol

1956

Geneva, 19 May: the Convention is signed; the threshold for breaking the limit is left to the 'law of the court seised'



Five ways past the ceiling — and the questions they raise



1. Architecture

The CMR contains not one limit but a layered system of ceilings, closed by anti-circumvention rules.



2. Contractual door

Arts. 24 and 26: declarations of value and of special interest — clean in law, marginal in practice.



3. Interpretive door

Art. 23(4) 'other charges': excise duty on stolen goods recovered outside the cap.



4. Sanctioning door

Art. 29: wilful misconduct or 'equivalent default' under the law of the court seised.



5. Forum

Art. 31 and Brussels I bis: jurisdiction becomes a decision about quantum.

Then: a critical assessment with proposals de lege ferenda, and a theoretical reading of the limit as a conditional privilege — an immunity that qualified fault defeats.



1) The architecture of the limit

NOT A SINGLE CEILING, BUT
A LAYERED SYSTEM OF
COMPENSATION RULES





A layered system of ceilings



(a) Measure

Art. 23(1)–(2): value at place and time of acceptance. Excludes destination value, lost profit and consequential loss.



(b) Weight cap

Art. 23(3): 8.33 SDR/kg gross weight short. Favours heavy, low-value cargo; penalises light, high-value cargo.



(c) Damage

Art. 25: diminution in value, capped by what total loss of the whole or the damaged part would yield.



(d) Delay

Art. 23(5): capped at the carriage charges, provided damage from the delay is proved.



(e) Interest

Art. 27: 5% a year from the written claim or, failing that, from the start of proceedings.



(f) Shields

Art. 28: limits apply to tort claims and to servants. Art. 41: any derogation in either direction is void.



Two logics: raising the limit vs breaking it



Consensual raising — Art. 23(6)

“Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been declared in accordance with articles 24 and 26.” Read literally, the declarations are the only way above the ceiling: the sender buys a higher limit, by an entry in the consignment note and a surcharge.



Sanctioning removal — Art. 29

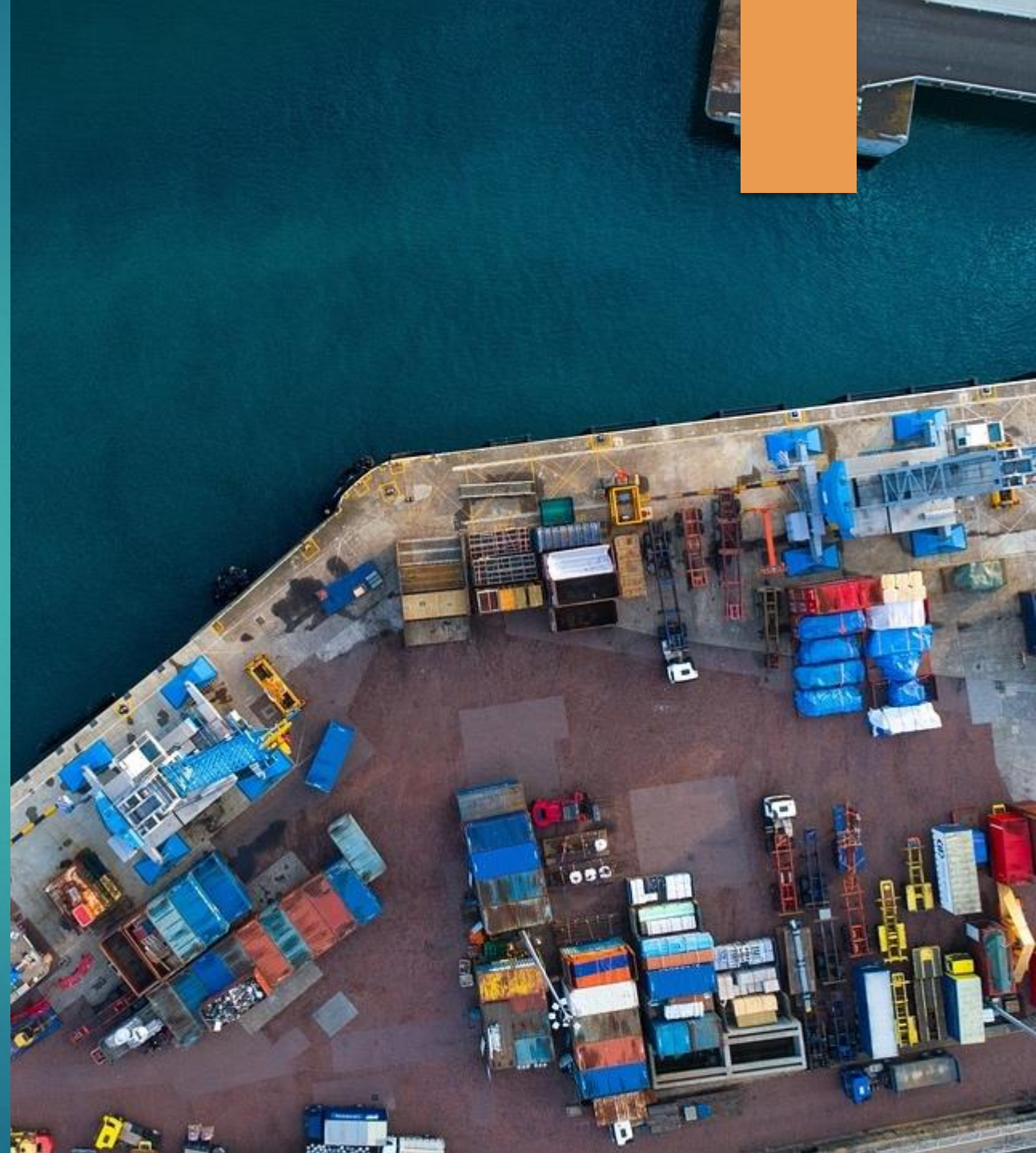
Art. 29 works on a different plane. It does not raise the limit; it disapplies it. Where the damage is caused by wilful misconduct or equivalent default, the carrier loses every provision of Chapter IV that excludes or limits liability or shifts the burden of proof.

The coexistence of these two logics — a ceiling the parties may raise, and a ceiling the law removes as a sanction — structures the whole analysis. They have different holders, different formal requirements and different burdens of proof.



2) The contractual door

ARTS. 24 AND 26: DECLARATIONS OF
VALUE AND OF SPECIAL INTEREST IN
DELIVERY





Declaring value (Art. 24) and special interest (Art. 26)



Art. 24 — declaration of value

A new ceiling, not a liquidated sum: the claimant still proves actual value and recovers the lower figure.

Same heads of loss: the exclusion of 'further damages' in Art. 23(4) still applies.

Form: the value must be entered in the consignment note (see Art. 6(2)(d)).



Art. 26 — special interest in delivery

Stronger: additional proved loss is recoverable up to the declared amount, 'independently' of Arts. 23–25.

The only conventional route to consequential loss — lost profit, production stoppage, penalties owed to the consignee — and to delay damages above the freight.

Burden: the claimant proves the additional loss and the causal link.

Form is constitutive. BGH, 17 Dec. 2020, I ZR 130/19: raising the limit requires entry in the consignment note and express agreement; an agreed transport insurance with a stated insured value is not an agreed increase of the carrier's limit.



Why the contractual door stays shut



Carriers refuse

General conditions frequently exclude high-value goods or refuse declarations altogether.



No price

Surcharges for a higher limit are rarely priced or offered in the market.



Cargo insurance is cheaper

Cargo interests insure the goods rather than buy an enlarged liability from the carrier.

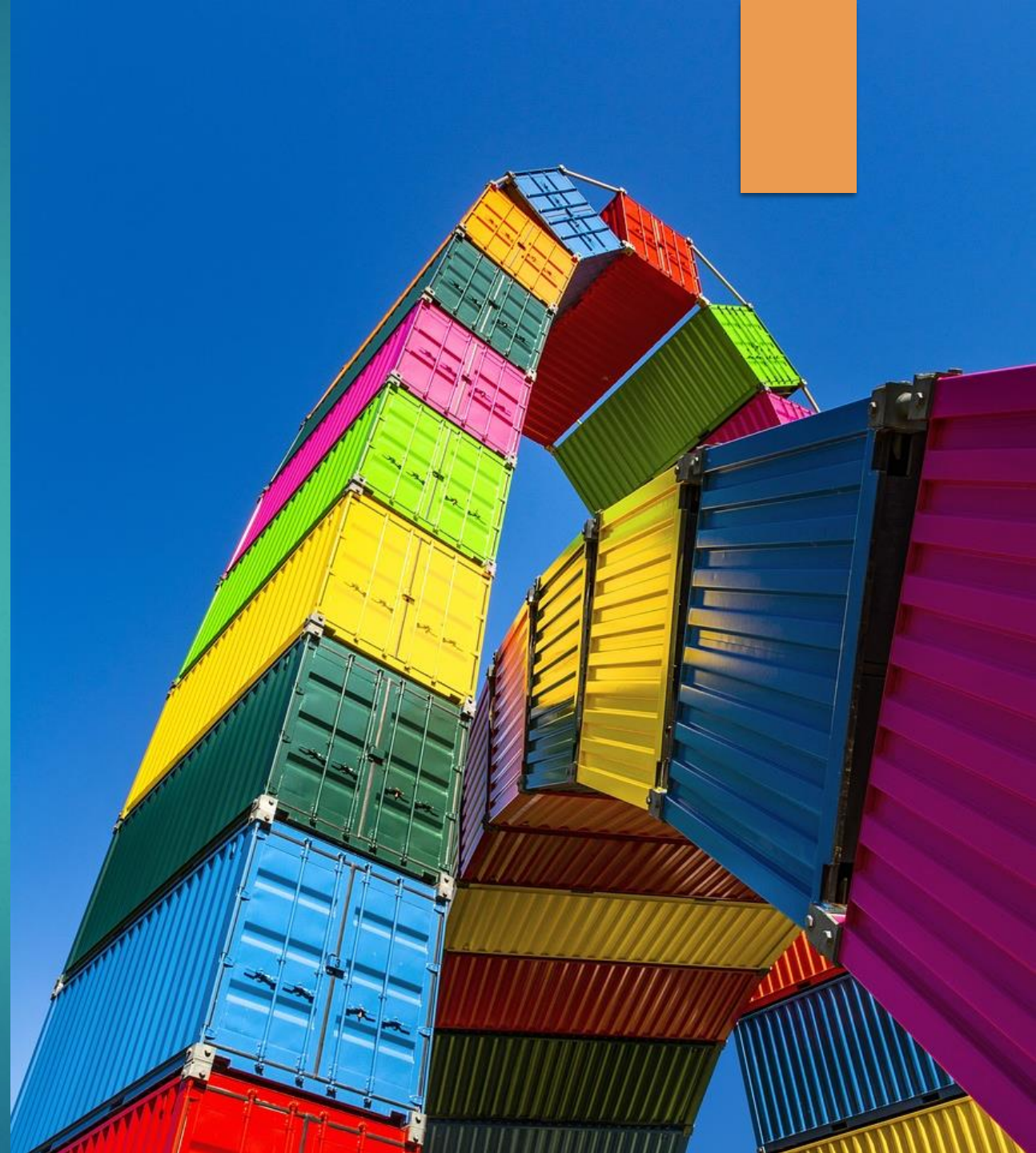


Systemic consequence. Because the consensual route is economically marginal, the pressure to exceed the limit is displaced onto Art. 29 and onto jurisdictional strategy. The weakness of the contractual door is itself a cause of the fragmentation analysed in the rest of this talk.



3) The interpretive door

ART. 23(4): WHAT COUNTS AS 'OTHER CHARGES INCURRED IN RESPECT OF THE CARRIAGE'?





'Other charges': excise duty on stolen goods



Narrow reading

Only charges that would have been incurred on an incident-free carriage: freight, ordinary customs duties, loading costs.



Broad reading

Also charges arising because of the way the goods were carried and lost — paradigmatically excise duty triggered when goods under a duty-suspension regime are stolen. English and French courts.

Buchanan v Babco [1978] AC 141 (HL)

£7,000

whisky in bond, stolen in transit

£30,000

excise duty triggered by the theft — recovered as an 'other charge' (3:2)

JTI Polska v Jakubowski [2023] UKSC 19: the Supreme Court unanimously declined to depart from Buchanan — the travaux show no clear intent, the broad reading is tenable, and there is no international consensus to restore. But the words are self-limiting: only charges 'in respect of the carriage'.

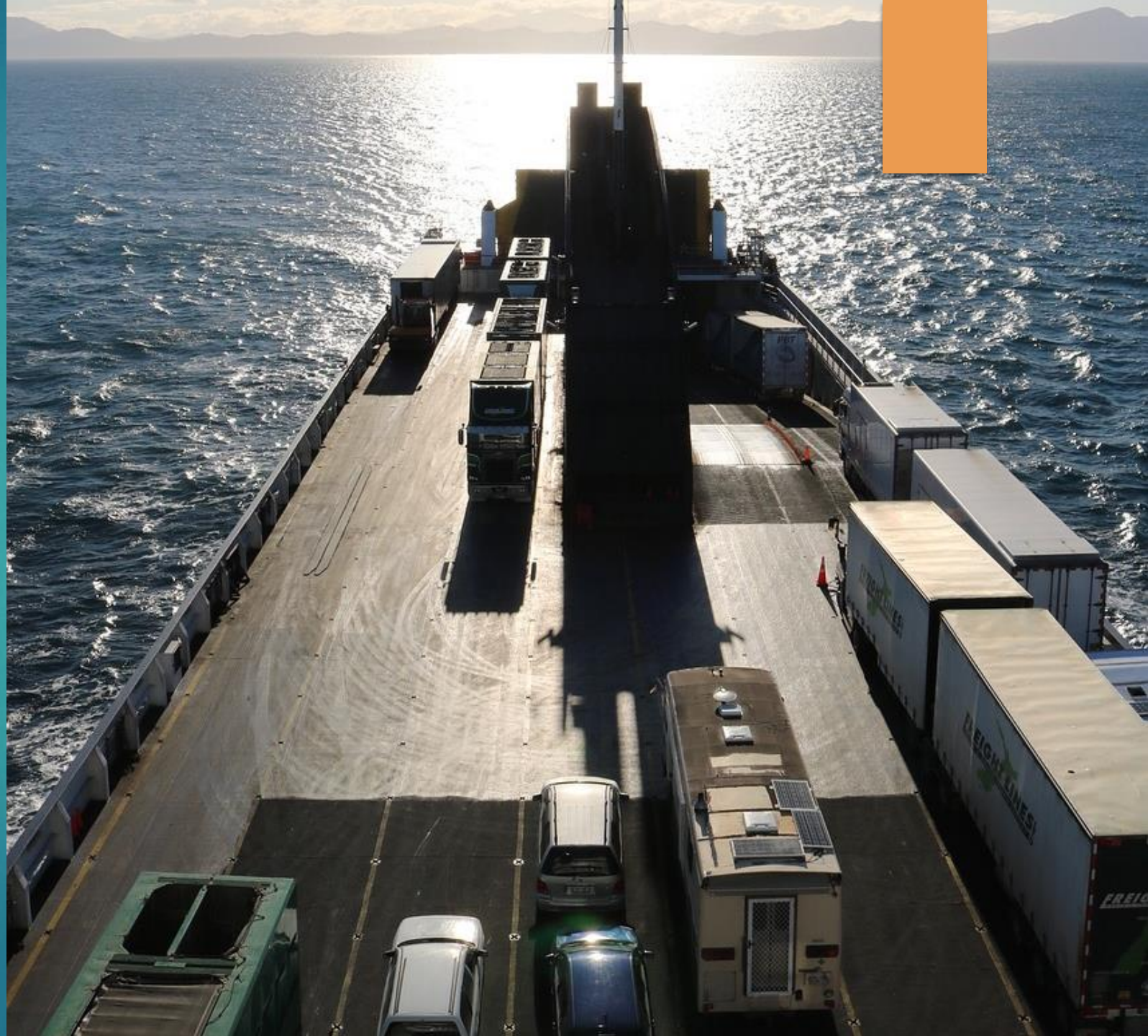
Why it matters: for tobacco, spirits and fuels the duty may exceed the value of the goods several times over — a limit-breaking device without any proof of fault.

And a forum incentive: the broad/narrow split makes England attractive for excisable goods.



4) The sanctioning door: Art. 29

WILFUL MISCONDUCT —
AND 'SUCH DEFAULT AS, IN
ACCORDANCE WITH THE
LAW OF THE COURT SEISED,
IS CONSIDERED AS
EQUIVALENT'





Art. 29: text and three structural features

Art. 29(1): the carrier “shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct”.



The effect is total

Not only the cap falls, but every Chapter IV rule that excludes or limits liability or shifts the burden of proof — on the better view including the Art. 23(1) measure and the ‘no further damages’ rule. Full compensation under the *lex causae*.



Two limbs

Wilful misconduct / *dol* is a treaty concept. ‘Equivalent default’ is an express *renvoi* — to the law of the forum, not to the law governing the contract.



The forum’s own taxonomy

The court asks which degree of fault its own law places on a par with intent. Art. 29(2) extends all this to servants and agents, who also lose the limits personally.



A contested premise: what does 'equivalent' mean?

wider threshold

narrower threshold



Pure renvoi

The forum applies whatever domestic category its law treats alike with intent. Read through the German translation 'dem Vorsatz gleichsteht' — 'treated alike'. Supports gross negligence (Austria, Italy).



Bounded renvoi — our position

The renvoi is real: national law chooses the category. But the treaty fixes the benchmark: a fault of the same gravity as dol / wilful misconduct. National law answers 'which of our categories is as serious as dol?'



Dol only

Art. 29 'concerns nothing but wilful misconduct of the carrier'; no room for a gross-negligence equivalent (Sánchez-Gamborino, (2016)).

Tuma's argument: in the only authentic texts (Art. 51) 'équivalente / equivalent' means 'of equal gravity' (gleichwertig), not 'treated alike' (gleichstehend). The preamble — standardising 'the carrier's liability' — is interpretive context under Art. 31 (2) VCLT.



The comparative map: one rule, seven thresholds

Jurisdiction	Standard applied under Art. 29	Threshold
Austria	Grobe Fahrlässigkeit (gross negligence)	Low
Italy	Dolo or colpa grave (culpa lata dolo aequiparatur)	Moderate, now reined in
Germany	Intent or Leichtfertigkeit with awareness	Moderate in practice
Belgium	Opzet / dol only	High
France	Faute inexcusable only	Very high
Netherlands	Bewuste roekeloosheid (conscious recklessness)	Very high
England & Wales	Wilful misconduct only; no equivalent	Very high

Ordered from the lowest to the highest practical threshold: from gross negligence equated with dol to no equivalent at all.



Italy: colpa grave — and its judicial containment



The starting point

Art. 1229 c.c. (no exemption for dolo o colpa grave) and Art. 1696 c.c. as reformed in 2005 make colpa grave the 'equivalent default'. Prima facie, one of the most claimant-friendly fora in Europe.



Cass. ord. 5052/2026

No automatic inference of colpa grave from an unexplained loss (smarrimento inspiegato). The claimant must prove the prerequisites; the court must assess time and place, value, anomalies at stops, surveillance and security procedures.

The concrete assessment cuts both ways

Cass. ord. 6093/2026: robbery of hardware at a traffic light on the Via Pontina; high-risk route, valuable goods, passenger door unlocked — foreseeable and avoidable, so colpa grave and no limit.

Cass. ord. 942/2026: armed robbery of pharmaceuticals; single driver, previous robberies, ordinary road instead of motorway, faulty anti-robbery devices — colpa grave, and the logistics company co-liaible for its choice of operator.

Cass. 23395/2024: a second robbery of copper wire rod by the same method two months later was foreseeable; no counter-measures — full liability.

Domestic cases under Arts. 1693 and 1696 c.c., but they show the findings that now satisfy the Art. 29 standard.



Germany: qualified fault, softened by procedure



The standard

Before 1998: grobe Fahrlässigkeit (BGH, 14 July 1983, I ZR 128/81 — reasoning, as Tuma notes, from the non-authentic German translation).

Since 1998: § 435 HGB, modelled on the Warsaw-Hague formula — intent, or Leichtfertigkeit with awareness that damage will probably result.

Doctrinally stricter than gross negligence.



The secondary burden

Sekundäre Darlegungslast: once the claimant makes qualified fault plausible, the carrier must explain in detail what happened in its sphere.

Silence counts: failure to explain may justify an inference of qualified fault.

Counterweight: contributory fault (§ 254 BGB) where the sender did not warn of unusually high value.



Two recent cases

(2025): 30,000 bottles of wine handed to strangers in a private car at the wrong warehouse, without seeking instructions (Art. 15) — Art. 29 applies; one-third reduction for the sender's slow reaction.

(2010): overnight parking at an unguarded Belgian rest area — no qualified fault, as only a generic 'theft-prone goods' warning was given.



France: the faute inexcusable lock

Only the carrier's faute inexcusable is équipollente au dol. Four cumulative elements:

1 A deliberate fault

2 Awareness of the probability of damage

3 Reckless acceptance of that risk

4 Without valid reason

Cass. com., 2018: the L. 133-8 definition governs Art. 29 CMR.

Cass. com., 2025: electronics stored in a depot burgled a week earlier, gates unrepaired — quashed: a series of serious negligent acts does not by itself establish deliberate, conscious acceptance of risk.

Cass. com., 2021: even destruction of goods by the carrier after a fire during an attempted burglary is not inexcusable as a matter of principle — it depends on the circumstances.

Cass. com., 2024: whisky trailer stolen from a fenced, guarded, video-monitored airport park — an unavoidable circumstance under Art. 17(2); Art. 29 never reached.



England and the Benelux: the highest thresholds



England & Wales — wilful misconduct only

No 'equivalent default': the second limb of Art. 29 is inert.

TNT v Denfleet [2007] EWCA Civ 405: misconduct; done deliberately knowing it is wrong, or with reckless indifference; awareness of an increased, real and substantial risk.

Laceys v Bowler [1997] 2 Lloyd's Rep 369: the paradigm of success — deliberate disregard of clear delivery instructions.

Knapfield v C.A.R.S. [2022] EWHC 1437 (Comm): two classic cars, valued at about €9.25m and £2.25m, damaged through poor securing — negligence, not wilful misconduct; recovery fixed at SDR 23,490.60.



Belgium — dol only

Cass., 27 Jan. 1995 (C.94.0105.N): dol/opzet is known to Belgian law, so courts must apply it and may not search for an 'equivalent'. Gross negligence no longer suffices.



Netherlands — conscious recklessness

HR 5 Jan. 2001 (Cigna/Overbeek; Van der Graaf/Philip Morris): knowledge that the probability of damage is considerably greater than the probability of its not occurring.



Same theft, different outcome — and a second consequence



The forum lottery

The second limb does not merely tolerate divergence: it delegates the threshold of unlimited liability to domestic legislators, who have moved in opposite directions — France upwards by statute in 2009, Italy historically downwards through the *colpa grave* equation.

The same theft from the same parking area may therefore produce capped liability in Paris or Antwerp, full liability in Milan or Vienna — and in Hamburg only where the carrier knew or had to know the special risk



Art. 32(1): the time bar too

The same *renvoi* decides the limitation period: one year becomes three for wilful misconduct or equivalent default.

(2021): three-year period applied to a direct action against the sub-carrier's liability insurer.

(2023): one year applied where wilful misconduct was not pleaded with concrete facts.

Huawei v DSV [2023] EWHC 1505 (Comm): a Dutch declaration that the claim was time-barred precluded the English action.

The classification of fault decides not only how much is recoverable, but whether the claim is still alive.



5) Forum shopping

JURISDICTION AS A LIMIT-BREAKING — AND LIMIT-PRESERVING — STRATEGY





The jurisdictional menu and the EU overlay



Art. 31 CMR

Agreed courts, and in addition the courts where the defendant resides or has its principal place of business or contracting branch, or where the goods were taken over or are to be delivered.

Typically 2–4 fora for an intra-European carriage.

Art. 31(2): lis pendens. Art. 31 (3): enforcement.



Brussels I bis, Art. 71

Specialised conventions such as the CMR are preserved.

TNT Express Nederland v AXA (C-533/08, 2010): but only insofar as they are highly predictable, serve sound administration of justice, minimise concurrent proceedings and ensure free circulation of judgments — at least as favourably as the Regulation.



After Brexit

Since 1 Jan. 2021 Brussels I bis does not apply in UK courts, and the UK is not party to Lugano 2007.

TNT and Nipponkoa do not govern English proceedings; English courts apply Art. 31 directly.

Huawei v DSV [2023]: a Dutch negative declaration barred a later English action under Art. 31 (2).



Nipponkoa: the race to the courthouse



Theft

Goods stolen overnight from a lorry left at the consignee's unguarded premises in Germany.



Dutch action

The sub-carrier first obtains a Dutch negative declaration: liability limited under Art. 23.



German action

The insurer seeks indemnity in Germany, where courts had held the two actions were not 'the same'.



CJEU, C-452/12

Art. 71 precludes that reading: within the EU, the two actions share the same cause of action.

Forum shopping is symmetrical. Cargo interests seek fora with a low Art. 29 threshold or a broad Art. 23(4); carriers and their insurers pre-empt them with negative declarations in high-threshold fora. The Convention's liability rules become the stake in a procedural contest where speed matters more than merit — hard to reconcile with Art. 41's promise of uniformity. Jurisdiction clauses cannot help: Art. 31 fora are cumulative; only arbitration under Art. 33, applying the Convention, is an alternative.



6) Critical assessment

THE UNIFORMITY DEFICIT, WHAT
INTERPRETATION CAN STILL ACHIEVE,
AND PROPOSALS DE LEGE FERENDA





The uniformity deficit — and a middle position



Half-uniform by design

Art. 41 makes Chapter IV mandatory, but the most consequential rule — when the limit falls — is only half-uniform: the first limb is a treaty concept, the second an express delegation to the lex fori.



Interpretation is not powerless

Art. 31 VCLT reads terms in context — which includes the preamble — and in light of object and purpose; the preamble names the carrier's liability as the object of standardisation.



What interpretation can achieve

Read the first limb autonomously, using the dol / wilful misconduct equivalence accepted since Buchanan.

Read the second limb as a genuine equivalent of intent, not any national category of serious fault — Belgium 1995 and France's faute inexcusable are closer to the Convention's purpose.

The middle position: the renvoi chooses which domestic category; the treaty fixes what it must equal — a fault of the same gravity as dol.

Fallback (Tuma): even under the lex fori, look to the special law of carriage — CIM, Warsaw/Hague, Hamburg, CMNI — not the general law of gross negligence.

Basedow: a duty of 'spontaneous adjustment'; Herber (1992) and Jesser-Huß made similar calls.



The comparative anomaly: the CMR is the outlier

Instrument	When the limit falls	Threshold set by
Hague-Visby Rules, Art. IV(5)(e)	Intent to cause damage, or recklessly and with knowledge that damage would probably result	The convention
CIM Uniform Rules (COTIF 1999), Art. 36	Same formula, in substance	The convention
CMNI, Art. 21	Same formula, in substance	The convention
Montreal Convention 1999 (cargo)	Never — the cargo limit cannot be broken	The convention
CMR 1956, Art. 29	Wilful misconduct or 'equivalent default'	The law of the court seised

Later transport conventions converged on a single formula for loss of the right to limit. The CMR's 1956 text is the only one that still delegates the threshold to national law.



Proposals de lege ferenda



1. A protocol

Replace the second limb of Art. 29(1) with the modern formula — intent, or recklessness with knowledge of probable damage. Converges the CMR with CIM, CMNI and Hague-Visby and reduces forum shopping.



2. Revise the limit

8.33 SDR/kg is unchanged since 1978. A higher cap with periodic review (cf. Montreal, Art. 24) would relieve the pressure on Art. 29 as a corrective for undervaluation.



3. Soft law

Short of amendment: a UNECE interpretive instrument and systematic comparative citation by national courts, as in Buchanan and JTI Polska.



Further options in the literature

An EU special agreement giving the Court of Justice interpretive jurisdiction (Basedow); a revision conference under Art. 49 (risk of split ratification); ICJ referral under Art. 47 (improbable; Art. 48 reservations); a UNIDROIT/IDIT study group (Tuma).



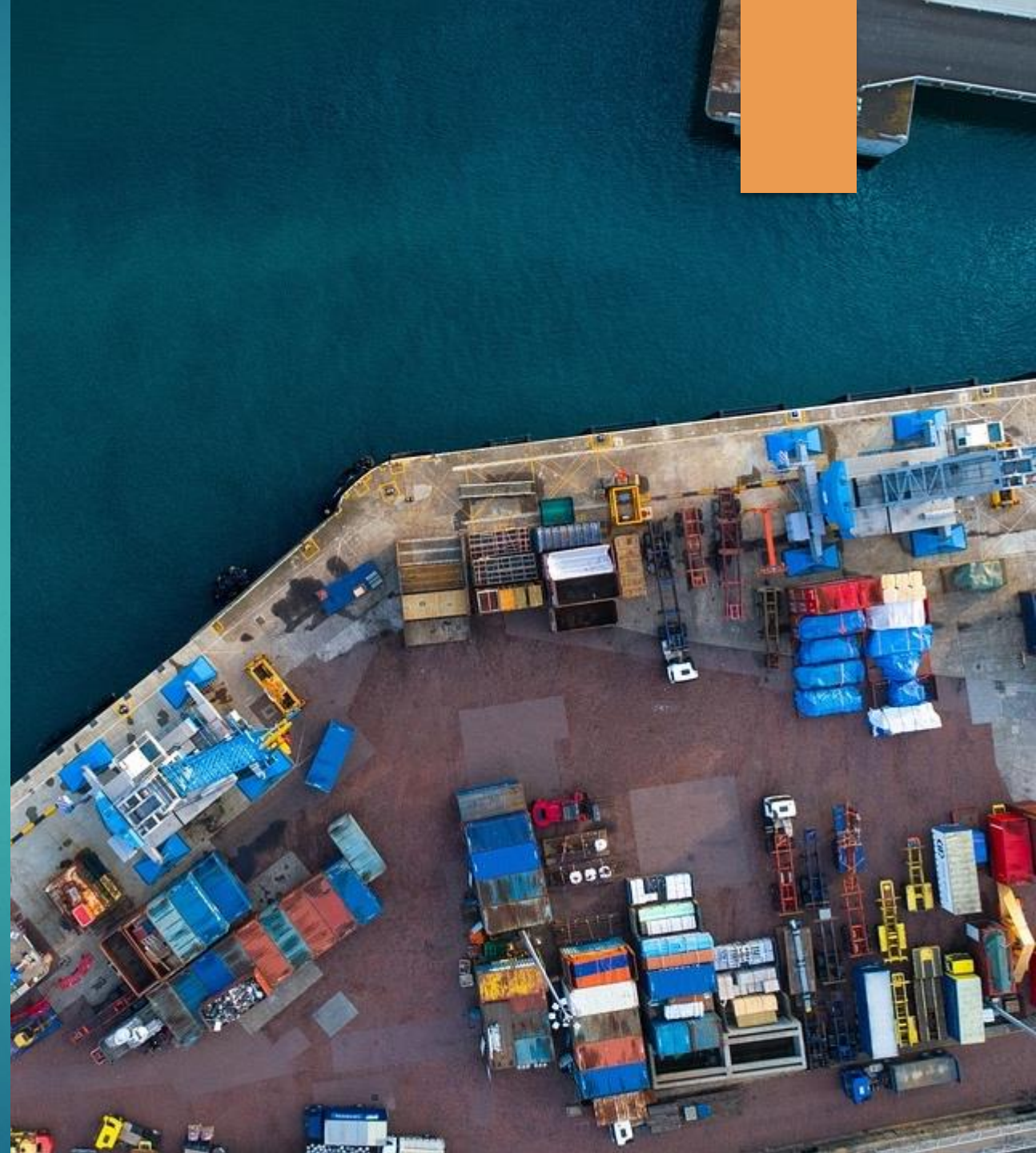
Insurance

Liability policies often cover only up to the CMR limits: small hauliers are left uninsured against the very exposure the forum lottery creates.



7) Wider considerations from legal theory

WHAT KIND OF LEGAL OBJECT IS THE LIMIT — AND WHAT DOES IT MEAN FOR A TREATY TO BE 'UNIFORM'?





Rule, frame and recognition



Rule and standard

The weight cap is a rule (ex ante, cheap, over- and under-inclusive); Art. 29 is a standard (ex post, open-textured). Hybrids are unstable (Kaplow). In Hart's terms, Art. 23 is the core and Art. 29 the penumbra — and a penumbra entrusted to many interpreters will diverge.



Kelsen: the frame

The second limb is an authorising norm (Ermächtigungsnorm): it fixes a frame (Rahmen) within which each forum's choice is an act of will. But the word 'equivalent' narrows the frame to faults of the same gravity as *dol*; choices outside it are misapplications.



Hart: many rules of recognition

One shared text, no shared court. 'Autonomous interpretation' is an attempt to build a transnational convention of adjudication by practice. The CJEU can decide who decides — not what 'equivalent' means.



Equivalence, justice and transplants



Culpa lata dolo aequiparatur

Magna culpa dolus est (D. 50.16.226) does not say gross negligence is intent, only that the law treats them alike. Colpa grave systems use a consequentialist equivalence; the post-1955 formula a cognitive one.



Corrective vs distributive justice

Art. 17 is quasi-strict but capped (distributive); Art. 29 is fault-based and uncapped (corrective). The limit is a privilege, forfeited by conduct incompatible with the premise of the price.



Legal irritants

Teubner: a transplanted concept is re-absorbed and provokes change — France 2009, Germany's § 435 HGB. The attempt to unify generates new divergences.

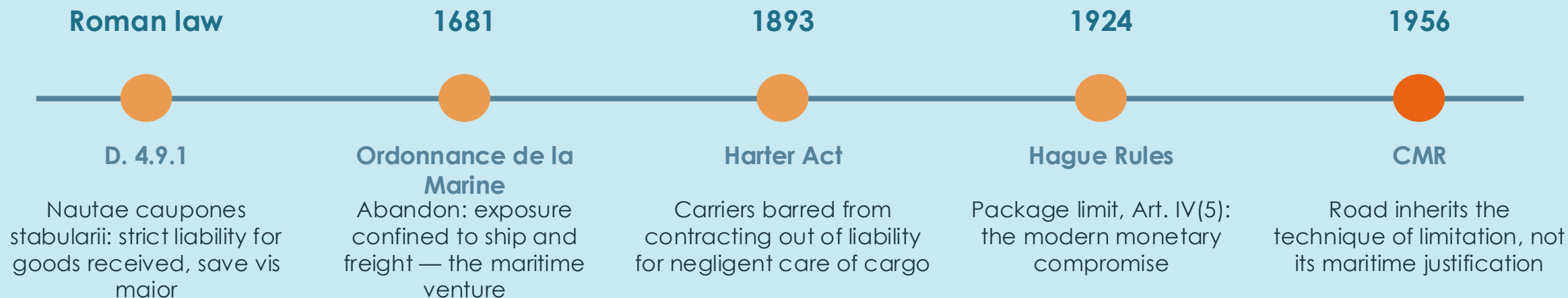


Equality across fora

Uniform law promises that like cases are treated alike across States. When outcome turns on the forum and the speed of a declaration, the architecture itself breaks that promise.



A genealogy: from receptum to privilege



Why the road limit is fragile. A road haulier shares no common venture with the shipper and faces no peril of the sea. Its limit must be justified on its own terms — insurability, standardisation, the price of carriage. A privilege justified by an economic bargain is forfeited when the premise of the bargain — ordinary diligence priced into the freight — fails. Art. 29 is where the Roman strictness of the receptum returns.



The jural anatomy of the limit (Hohfeld)

Art. 17

Duty ↔ right: The carrier must deliver the goods intact; the claimant holds the correlative right.

Art. 23

Immunity ↔ disability: The claimant has no power to extend liability beyond 8.33 SDR/kg.

Arts. 24, 26

Power ↔ liability: The sender can alter the relation by entry and surcharge; the carrier is exposed to that change.

Art. 29

Defeating condition: Not a power of either party: qualified fault extinguishes the immunity by operation of law.

'Raising' is the exercise of a power; 'breaking' is a defeating condition — different holders, formal requirements and burdens of proof. Art. 41 protects immunity and power alike.



A failed default rule — and the meaning of recklessness



Hadley v Baxendale codified

Hadley (1854): no liability for unforeseeable loss — read by Ayres and Gertner as an information-forcing default.

Arts. 23, 24, 26 are a statutory version: the cap is the default; the declarations are the channels of disclosure.

But shippers do not declare: they insure. When the default fails to force information, Art. 29 becomes the substitute for the missing disclosure.

Hence courts' findings track value and the carrier's knowledge of it (BGH I ZR 176/08), and German contributory-fault reductions penalise non-disclosure.



Subjective or objective recklessness?

Criminal law: Cunningham (subjective), Caldwell (objective), back to subjective in R v G [2003] UKHL 50.

Transport law: Goldman v Thai Airways [1983] 1 WLR 1186 — the servant must have known damage would probably result.

Objective camp: Austria, Italy — what the driver should have known. Subjective camp: Germany, France, the Netherlands, England.

Synthesis: secondary burdens and inferences from silence are a subjective test proved through objective indicators.



Time, system and integrity



Systemic integration

Art. 31(3)(c) VCLT and the ILC's 2006 fragmentation study: read Art. 29 with the later transport conventions binding many CMR parties — and their common formula.



Subsequent practice

Art. 31(3)(b) and the ILC 2018 conclusions: judicial decisions can count as practice. The convergence falls short of agreement of all parties — but is relevant under Art. 32.



Integrity (Dworkin)

The court seized writes one chapter of a chain novel begun by courts in other States. 'The law of the court seized' names the next author; it does not license a chapter that ignores the others.

All three converge with Tuma's textual argument: the renvoi survives, but the court seized must classify within a transnational benchmark.



Synthesis: the conditional privilege



A privilege

granted for participation
in a standardised risk-
allocation scheme



An immunity

inherited from the
maritime tradition, justified
by insurable, standardised
risk



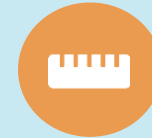
Dependent on disclosure

of value — which the
parties rarely make



Defeated by qualified fault

understood subjectively,
proved objectively



Measured by a treaty benchmark

of gravity, read with the
conventions that followed

The divergences mapped here are not failures of any single court. They arise because each element of the limit was left, in 1956, without a common institution to hold them together.



Conclusions

LESS A QUESTION OF THE
CARRIER'S CONDUCT THAN
OF THE CLAIMANT'S FORUM





What the analysis shows



Routes of unequal weight

Contract is clean but marginal; Art. 23(4) is powerful for excisable goods yet divides jurisdictions; Art. 29 is the principal route — and where uniformity breaks down.



Procedure does not cure substance

The EU overlay (TNT Express, Nipponkoa) disciplines the race but not the divergence. Whether the limit breaks depends on where and how fast the parties litigate.



Courts tighten from within

Cass. 5052/2026 and Cass. com. 24-16.015 (2025) raise the threshold — but judicial tightening cannot produce uniformity.



Part is avoidable now

Read with its authentic texts and preamble, Art. 29 already confines the renvoi to defaults of a gravity equivalent to dol.



The durable solution

A protocol aligning Art. 29 with the formula of the other transport conventions, with a review of the monetary limit.



In theory

A conditional privilege: qualified fault conceived subjectively, proved objectively, measured against a transnational benchmark.



Thank you

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