



Trends in Breaking the CMR Limits in the Contracting States

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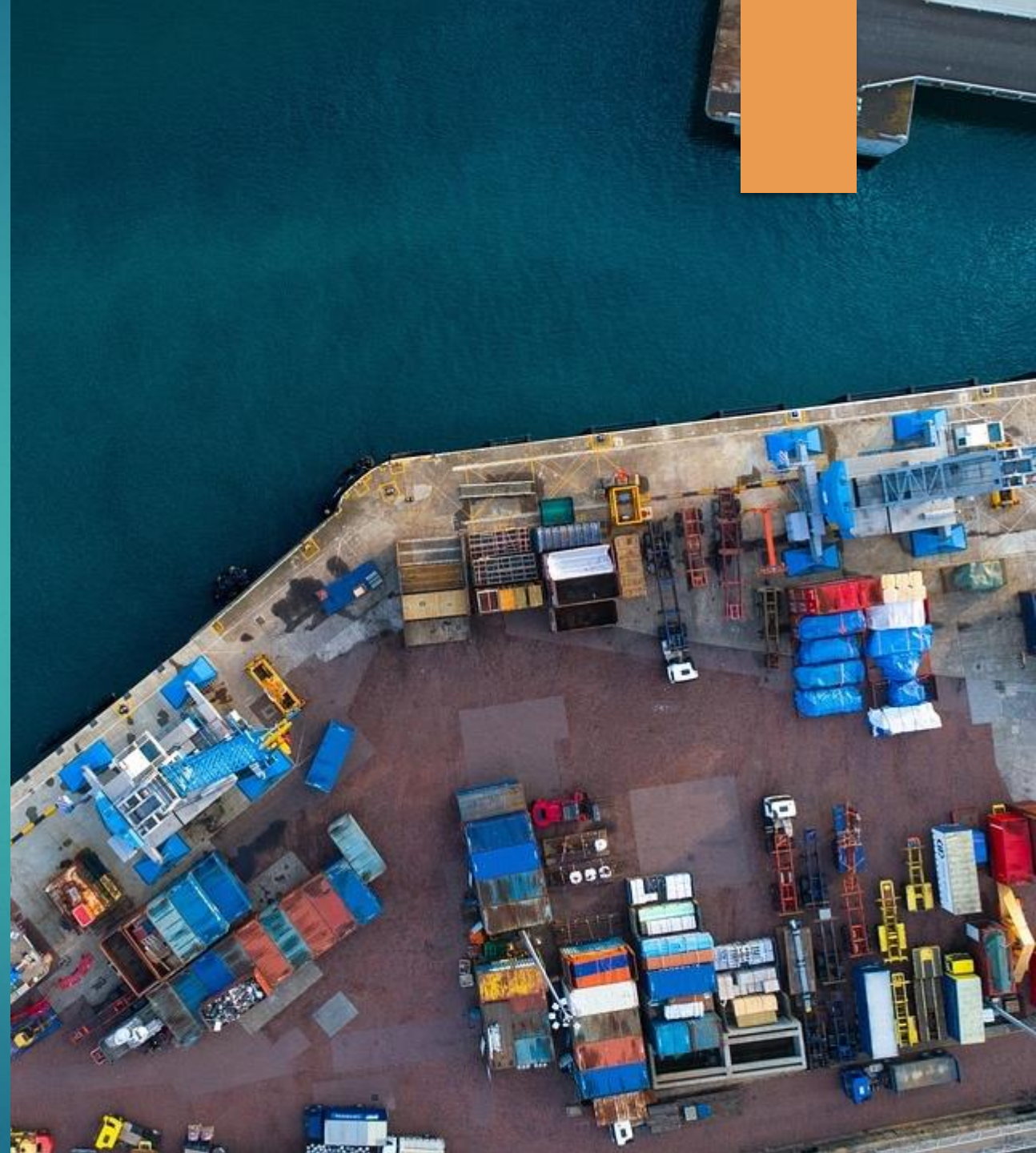
Agenda

- 1) Question and method
- 2) The Contracting States at a glance
- 3) Cross-cutting trends
- 4) A theoretical reading
- 5) Organisational fault: a thesis for convergence
- 6) Divergence and future perspectives
- 7) Conclusions



1) Question and method

SEVENTY YEARS OF ART. 29: WHAT THE COURTS HAVE MADE OF IT





Seventy years on, the limit still decides the case



Organised cargo crime

Theft on European roads has grown and become organised, including 'fictitious pick-ups' arranged through online freight exchanges.



Subcontracting chains

Carriage is increasingly performed by chains of sub-carriers that the shipper never sees.



Value density

Electronics, pharmaceuticals and luxury goods have outgrown a limit of 8.33 SDR/kg that has not changed since 1978.

Two questions. Descriptive: how are the courts of the Contracting States actually applying the limit-breaking devices, and in which direction is their case law moving? Normative: do those movements converge towards a common standard, or deepen the divergence that the renvoi of Art. 29 makes possible?



Baseline, labels and the five variables



Baseline and labels

Baseline: Tuma's comparative study of Art. 29 in seventeen Contracting States (2006). It lets us measure change, not just describe the present.

'Babylonian confusion': *faute lourde*, *grobe Fahrlässigkeit*, *colpa grave*, *rażące niedbalstwo*, *grov uagtsomhed* do not carry identical content.

Method: systems are grouped by the substance of the test — objective or subjective; awareness of a possibility or of a probability of damage — not by the label.

1

Standard. Which domestic category counts as 'equivalent'?

2

Burden and inference. Is qualified fault inferred from unexplained loss or the carrier's silence?

3

Typical facts. Which fact patterns break the limit?

4

Other routes. Art. 23(4) and declarations under Arts. 24/26

5

Direction. Rising, falling or stable threshold



2) The Contracting States at a glance





Common law: England & Wales, Scotland, Ireland



Art. 29: carrier-protective

No 'equivalent default': only wilful misconduct counts — (1997)-(2007).

High threshold: (2022): 'perhaps even grossly negligent', but the limit applied.

Inference, not reversal: (HL 2007) inferred employee theft and disapplied the limit under Art. 29(2).



Art. 23(4): cargo-protective

Broad reading: Buchanan v Babco (HL) — excise duty on stolen whisky is an 'other charge'.

Confirmed: JTI Polska (UKSC 2023) declined to depart from it.

Scotland, Ireland: no leading Art. 29 decision verified.

Split profile, stable. Claims for excisable goods gravitate to England; theft claims move away. After Brexit, English courts apply Art. 31(2) CMR directly — and a Dutch negative declaration can still bar an English claim (Huawei v DSV, 2023).



Germanic systems: Germany and Austria

Germany

Intent or recklessness with awareness. Softened by the secondary burden of explanation limited in chains (2022); contributory fault under § 254 BGB.

→ / ↑ **chains**

Austria

Gross negligence: It keeps the threshold Germany abandoned. Duty to explain organisation.

→ **low**



Romance systems: France, Italy, Spain, Portugal

France

Faute inexcusable since 2009 (Art. L. 133-8 C. com.); four cumulative elements policed strictly.

↑ high

Italy

Colpa grave, now contained on evidence: no automatic inference from unexplained loss (Cass. ord. 5052/2026), but concrete findings cut both ways.

↑ evidence

Spain

Dolo incl. dolo eventual, inferred from objectively reckless custody; triggers the three-year period of Art. 32.

→ (↓ vs 1995)

Portugal

Non-linear: dolo only → any fault (2011) → simple negligence excluded (2025). A permissive appellate line survives.

↓ then ↑



Benelux: Netherlands and Belgium

Netherlands

Conscious recklessness: the danger more likely than not to materialise. Moderated by the aggravated duty to state facts. Narrow Art. 23(4). Preferred forum for negative declarations.

→ very high

Belgium

Dol only: wilful misconduct is a known Belgian concept, so no 'equivalent' is sought. Applies to domestic carriage too.

→ high



Nordic states: a label that misleads



The label: gross negligence

Coordinated statutes: in Denmark, § 37 CMR-loven lifts the limit for intent or grov uagtsomhed.

Danish practice: 'was or should have been aware' of a high theft risk can suffice; ignored temperature alarms (2022).



The content: near intent

Restrictive courts, linked to the split between cargo and liability insurance.

Conduct bordering on intent vs. hard to break for driving faults.

Reclassified. Grov uagtsomhed / grov vårdslöshet sits between gross negligence and intent; outside deliberate breaches the Nordic courts belong to the higher-threshold group. The earlier 'cargo-friendly' characterisation is withdrawn.



Central and Eastern Europe: Poland, Czechia, Lithuania

Poland

Violation of elementary precautions. Sub-carrier theft attributed; attention to causation. Classification provisional.

→

Czechia

Bordering on intent: chosen after surveying German and French case law — rare explicitly comparative reasoning.

→ cargo

Lithuania

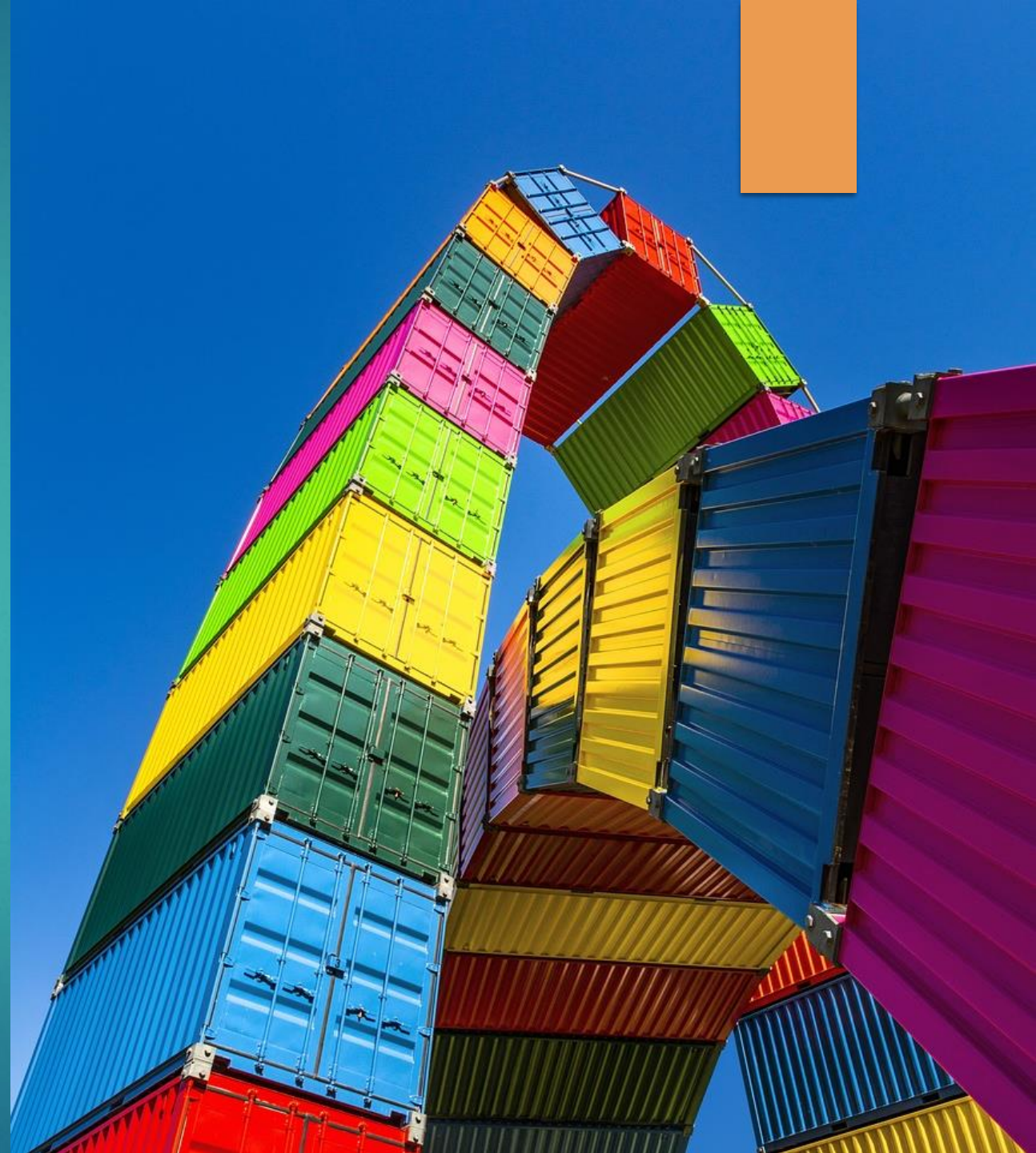
Gross negligence, often found (mixed-up cargoes, false consignment notes, subcontracted takeover), with a move towards the subjective element.

↑ slight



3) Cross-cutting trends

WHAT THE NATIONAL SURVEYS SHOW
WHEN READ TOGETHER





Upward convergence — by three different paths



Domestic codification

Germany, France and Turkey — each followed by its supreme court under Art. 29.



Judicial reinterpretation

Belgium, Greece and the Netherlands.



Supreme-court correction

Portugal (2025) against permissive lower courts; Italy on the evidentiary side (Cass. ord. 5052/2026).

The paradox. The renvoi to national law is producing a slow, bottom-up convergence on the formula of the later conventions (Hague-Visby IV(5)(e); CIM 36; CMNI 21) — the very formula a protocol would have imposed from above.



A programme realised — and a lower threshold that persists



A doctrinal programme realised

Herber (1992): urged courts to read Art. 29 through the Hague Protocol formula.

Basedow: a duty of 'spontaneous adjustment' of national concepts.

Jesser-Huß: the same call to the Austrian courts.

So: the trend is the partial fulfilment of a normative programme grounded in the preamble, not a coincidence of domestic reforms.



The persistence of a lower threshold

Measured by content: Austria and Italy (and Swiss cantons) remain at the level of grobe Fahrlässigkeit.

Similar content: Czechia, Lithuania and — provisionally — Poland.

Comparable results: Spain, via dolo eventual inferred from reckless custody.

Higher despite the label: the Nordic states.

Result: a limit-breaking forum remains available on several major routes.



Procedure is now the real battleground



Inference from silence

Germany: secondary burden of explanation.

Austria: duty to explain the organisation.

Netherlands: aggravated duty to state facts.

Spain: flexibilised burden in theft cases.



No inference from silence

Italy: unexplained loss is not by itself colpa grave (Cass. ord. 5052/2026).

France: no aggregation of negligent acts into faute inexcusable (Cass. com. 2025).

England: ordinary inference on the balance of probabilities.

As substance converges, divergence moves one level down. The practical threshold diverges more than the doctrinal one: whether a court will infer qualified fault from the carrier's silence often decides the case.



Stabilised fact patterns: predictable by type

Fact pattern	Tends to break the limit in	Tends not to in
Overnight stop at unguarded parking, high-value goods	Germany (only with notice of special risk), Austria, Spain, Czechia, Greece	France, Netherlands, England, Nordic states
Deliberate breach of express security or routing instructions	Almost all systems, incl. England (Laceys), Austria (2022)	Germany, where the instruction exceeds duties owed to the sender (2022)
Unexplained loss inside the carrier's network	Germany, Netherlands (via procedure), Austria	Italy (after 2026), France, Portugal
Theft by the carrier's own staff or sub-carrier	Everywhere (Art. 29(2)); England by inference	—
Gross breach of traffic rules	Lithuania, Greece	England, Netherlands



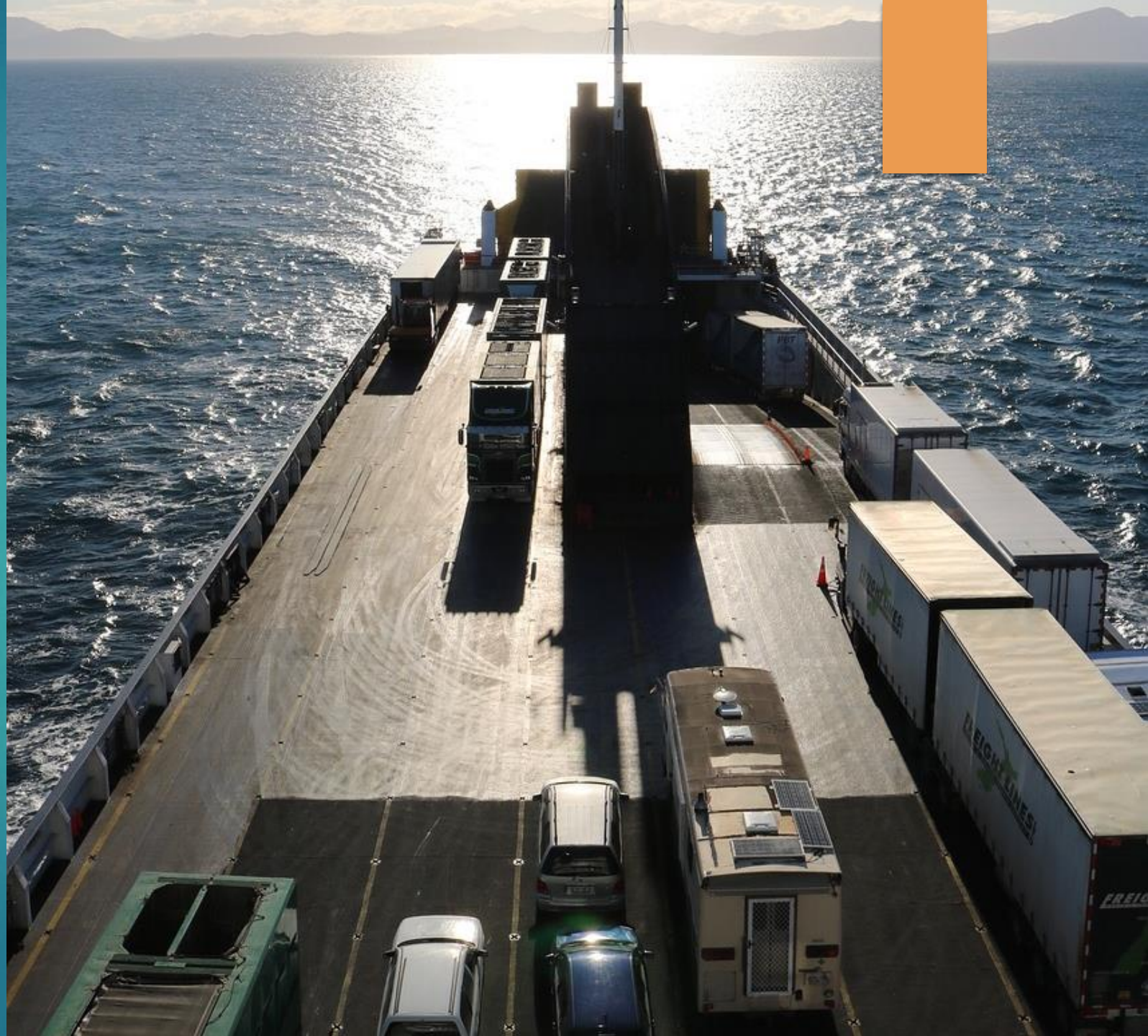
Comparative matrix of the Contracting States

State	Standard applied as 'equivalent default'	Evidentiary technique	Direction
England & Wales	Wilful misconduct only	Ordinary inference	→
Germany	Intent or recklessness with awareness (§ 435 HGB)	Secondary burden of explanation	→ (↑ chains)
Austria	Gross negligence	Duty to explain organisation	→
France	Faute inexcusable (since 2009)	No inference from silence	↑
Italy	Colpa grave	No automatic inference (2026)	↑ (evidence)
Spain	Dolo incl. dolo eventual	Flexibilised burden	→ (↓ vs 1995)
Portugal	Gross negligence; simple negligence excluded (2025)	Burden on claimant	↓ then ↑
Netherlands	Conscious recklessness	Aggravated duty to state facts	→
Belgium	Dol only	—	→
Nordic states	Grov uagtsomhed: between gross negligence and intent	—	→ (restrictive)
Poland · Czechia	Gross negligence (Poland provisional)	Attention to causation (PL)	→
Lithuania	Gross negligence, growing subjective test	—	↑ (slight)
Greece	Intermediate: knowledge of increased risk	—	↑ then →
Turkey	Recklessness with awareness (post-2012)	—	↑



4) A theoretical reading

CONVERGENCE WITHOUT A
CENTRE





Convergence without a centre — within a narrow frame



Convergence without a centre

The second limb is an open frame (Kelsen) that no common court closes (Hart). Yet national systems are not drifting at random: domestic codification imports the knowledge-based formula, which flows back into Art. 29 through the renvoi. The renvoi has become a channel of indirect harmonisation.



A narrower frame

Tuma's reading of the authentic texts and the preamble: national law picks the category, but 'equivalent' fixes the benchmark — a default of the same gravity as *dol*. The upward trend is then a gradual correction of readings, often traceable to the German *gleichstehend*, that fell outside the frame.

Equal treatment across fora. The trend reduces the inequality but does not eliminate it. The CMR remains a system of shared primary rules and plural secondary rules of adjudication: its uniformity is a matter of degree.



From substance to procedure, from moral to epistemic fault



Divergence migrates to procedure

As substantive standards converge, divergence reappears in the law of evidence: German, Austrian and Dutch courts infer qualified fault from silence; Italian and French courts refuse.

A general proposition: unifying substantive rules without unifying procedure displaces divergence rather than eliminating it.

Teubner's legal irritant, second round: the imported recklessness standard is absorbed by each procedural culture and re-emerges with a different practical threshold.



From moral to epistemic fault

Gross negligence (*culpa lata dolo aequiparatur*) is objective and implicitly moral: whoever ignores what everyone understands is treated as if intending harm.

The rising standard is epistemic: what did the carrier know about the probability of loss?

Why it fits: knowledge of probability is exactly what the premium prices. The limit is forfeited when the carrier knowingly takes a risk the price did not include.



5) Organisational fault

A THESIS FOR
CONVERGENCE: FROM THE
DRIVER AT THE WHEEL TO THE
UNDERTAKING





The thesis



Then

Limitation was conceived when the law regulated the carrier as an individual and fault as a fact about a person: the driver at the wheel, the master on the bridge.



Now

EU and international law impose an architecture of organisational duties: quality, security and safety management; establishment and financial standing; insolvency prevention.



So

The paradigm of qualified fault has shifted from the individual to the organisation — demanded by regulators, shippers and insurers alike.

Thesis. Under contemporary regulatory conditions, the fault 'equivalent to wilful misconduct' is primarily organisational: the conscious failure of the carrier's organisation to apply measures it has identified, or is legally required to identify, as necessary to control a known risk. Because organisational benchmarks are transnational, this reading allows convergence across fora without amending the Convention.



(a) The regulatory architecture



Road

Reg. 1071/2009: establishment, good repute, financial standing, transport manager; Mobility Package 2020; secure parking standard (Del. Reg. 2022/1012); AEO criteria; ISO 9001, TAPA TSR.



Maritime

The ISM Code (SOLAS Ch. IX, phased in from 1998) turned the shipowner's diligence into the duty to run a documented safety management system.



Aviation

ICAO Annex 19 and Reg. (EU) 376/2014: 'just culture' separates honest individual error from organisational responsibility.



(Italian) Company law

Art. 2086(2) c.c.: adequate organisational structures; D.Lgs. 231/2001 and the concept of colpa di organizzazione.



(b) The case law already reasons organisationally

Germany: qualified fault found in grave defects of Betriebsorganisation — missing interface checks, procedures ignored in practice, no prompt investigation after a loss.

Austria and the Netherlands: the carrier must explain its organisation (2020).

Italy: concrete assessment of surveillance systems and security procedures (Cass. ord. 5052/2026).

The counter-example.

France: the Cour de cassation refused to aggregate a series of serious negligent acts into a faute inexcusable (Cass. com., 22 Oct. 2025).

It shows why the thesis needs a qualified formulation: an organisational failure is often mere negligence.



(c) The qualified formulation: knowledge that is documented



Not any organisational failure

To avoid reversing the upward trend, the fault must be qualified: a conscious gap between the risk the organisation has identified — or was legally bound to identify — and the measures it actually applies.



A subjective test, proved objectively

A driver's state of mind is hard to prove. An organisation's knowledge is documented: risk assessments, security policies, audit findings, insurance declarations. Identifying a risk and not applying one's own measures is knowing acceptance.

Corporate attribution. Maritime limitation law has met the same problem: under Art. 4 LLMC 1976 the owner loses the right to limit only for its 'personal act or omission', and English courts attribute knowledge through the 'directing mind' and attribution rules.



(d) The sole operator — and the insolvency argument



The objection

Road haulage, unlike shipping or aviation, is largely made up of very small undertakings — often a single operator at the wheel — for which no safety management system is mandatory.



The reply

Reg. 1071/2009 applies establishment, good repute and financial standing to every haulier, company or natural person.

Directive 2019/1023: early-warning tools for debtors.

Italian CCII, Art. 3: even the individual entrepreneur must detect a crisis in time.



The link with Art. 29

Policies often exclude qualified fault, so unlimited liability is often uninsured. One theft of high-value cargo can exceed a small operator's capital. Managing that exposure — insurance, route and parking planning, sub-carrier checks — is part of the crisis-prevention organisation the law already requires.



Two cautions and two safeguards



Protective purpose

Licensing and insolvency rules protect creditors and the market, not cargo as such. Using them to define fault towards the shipper rests on protective purpose: they define the minimum organisation every professional carrier must have, and the risks it is presumed to know.



No circularity

The insolvency risk created by an uninsured loss is not itself evidence of recklessness. It shows only that the duty to control the risk exists, and that its conscious neglect may meet the threshold.



No reward for ignorance

The documentation paradox: those who document most are easiest to condemn. So the absence of a legally required organisation must itself count as organisational fault.



A safe harbour

Demonstrated compliance with a recognised standard (EU secure parking, AEO, TAPA, an audited system) creates a rebuttable presumption against qualified fault — de lege ferenda, a 'safe harbour' for the limit.



(f) Why the thesis promotes convergence

National labels of fault

*colpa grave · faute inexcusable · Leichtfertigkeit ·
bewuste roekeloosheid · grov uagtsomhed · ražqce
niedbalstwo ...*

Fragmented by the renvoi



Common organisational benchmarks

EU regulations directly applicable in 27 Member States
and the EEA · ISM Code · ICAO Annex 19 · ISO · TAPA

Transnational by nature

Fits the bounded renvoi: national law picks the category; the benchmark — a fault of the same gravity as *dol* — is common, and can now be given a common organisational content.

Limits: it does not remove the renvoi, nor forum races driven by procedure.

Ambition: not uniformity, but a substantial reduction in the fragmentation of outcomes — which courts could pursue today.



6) Divergence and future perspectives

WHY DIVERGENCE MATTERS, WHY THE SYSTEM CANNOT CORRECT ITSELF, AND WHAT COMES NEXT





Why divergence matters: five costs



Certainty and pricing

Exposure cannot be priced ex ante; insurers price by forum, not by risk.



Equal treatment

Same carriage, loss and conduct — different extent of liability.



Forum races

After Nipponkoa, speed beats merit; costs rise with no gain in accuracy.



Behavioural signals

Germany, Austria, Italy in one journey: three answers on the same lay-by.



Drift of the text

National versions pull 'dol' towards local taxonomies; the authentic texts are seldom the start.

Not a marginal imperfection. Divergence hits the regime's central economic variable: whether the limit exists at all in a given case.



Why the system cannot correct itself



ICJ (Art. 47)

Never used for a private-law question; excluded by several States' reservations under Art. 48.



CJEU

Cannot interpret the CMR as such; in TNT Express and Nipponkoa it disciplined jurisdiction, not the substance of Art. 29.



Basedow's proposal

An EU special agreement conferring interpretive jurisdiction, on the model of the 1971 Brussels Protocol — compatible with Art. 1(5) CMR.



National supreme courts

May consider foreign decisions (Czechia 2014), but nothing obliges them to.

The result: a convergence without a centre — real, but slow, dependent on domestic legislators borrowing the same formula, and incomplete.



What comes next



Digital data

e-CMR (2008 Protocol), eFTI (Reg. 2020/1056), telematics, GPS and e-seals: when the carrier holds the data, silence becomes a choice. Inference from silence will be harder to refuse — even in Italy and France.



Secure parking

Del. Reg. 2022/1012: as certified areas multiply, an unguarded stop becomes a conscious acceptance of risk, judged against a Europe-wide benchmark.



New forms of loss

Identity fraud in subcontracting, cyber-attacks on transport systems, automated vehicles: who is the 'person whose services the carrier makes use of' (Art. 3) when software drives?



Reform options and the likely trajectory

1

A protocol. Replace the second limb of Art. 29 with the recklessness formula — largely codifying where the case law is going — with a revision of 8.33 SDR and periodic review.

2

A rule on the duty to explain. Substantive uniformity without procedural uniformity will not remove the divergence.

3

Infrastructure without a court. A UNECE multilingual database on the CLOUT model, non-binding interpretive guidance; Tuma's UNIDROIT/IDIT study group funded by IRU and IUMI.

Absent reform: the substantive threshold keeps converging upwards; evidentiary rules diverge further, driven by digital data; forum races continue under *Nipponkoa*. Will the CMR's eighth decade look like its first — or like the conventions it has fallen behind?



Conclusions

A CONVERGENCE THAT IS
REAL, INCOMPLETE — AND
CAN BE HELPED ALONG





Six conclusions



The threshold is rising

Germany, France, Turkey, Greece, Belgium, the Netherlands and Portugal; Italy on evidence. Counter-movements are identifiable.



Bottom-up convergence

On the knowledge-based formula of the later conventions, through national law and the renvoi — not amendment.



Incomplete, partly illusory

A gross-negligence group persists; procedure and Nipponkoa keep the forum decisive.



The gaps are a finding

For most non-EU States, Art. 29 case law is not accessible: any claim of uniformity is partial.



Partly interpretive

Read with its authentic texts and preamble, Art. 29 bounds the renvoi to defaults of the gravity of dol.



Fault is organisational

Licensing, safety, security and insolvency duties make Art. 29 a conscious organisational failure to control a known risk.



The policy conclusion

A **protocol** replacing the second limb of Art. 29 with the conventional recklessness formula would largely codify where the case law is already going. Coupled with a common rule on the carrier's duty to explain unexplained losses, it would address the procedural divergence that substantive convergence leaves behind.



Until then: what courts can do today

Read 'equivalent' as equality of gravity, and measure the carrier's fault against the organisational duties that EU and international law already impose. Not uniformity — but far less fragmentation.



Thank you

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