

Project 'The Modernisation of Passenger and Freight
Transport Regulation: legal regime of the contract of carriage
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Forum shopping under the CMR



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Achim Puetz

Associate Professor of Commercial Law
Director of the Institute of Transport Law
Jaume I-University, Castellon

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How do we do our shopping?



Approach No 1
one-for-all



How do we do our shopping?

Approach No 2 selective approach



1DT



How do we do our shopping?

Approach No 2 selective approach



Why do we shop a forum?



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Why do we shop a forum?



Why do we shop under the CMR?



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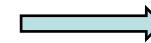
Why do we shop under the CMR?

CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD (CMR)

Preamble

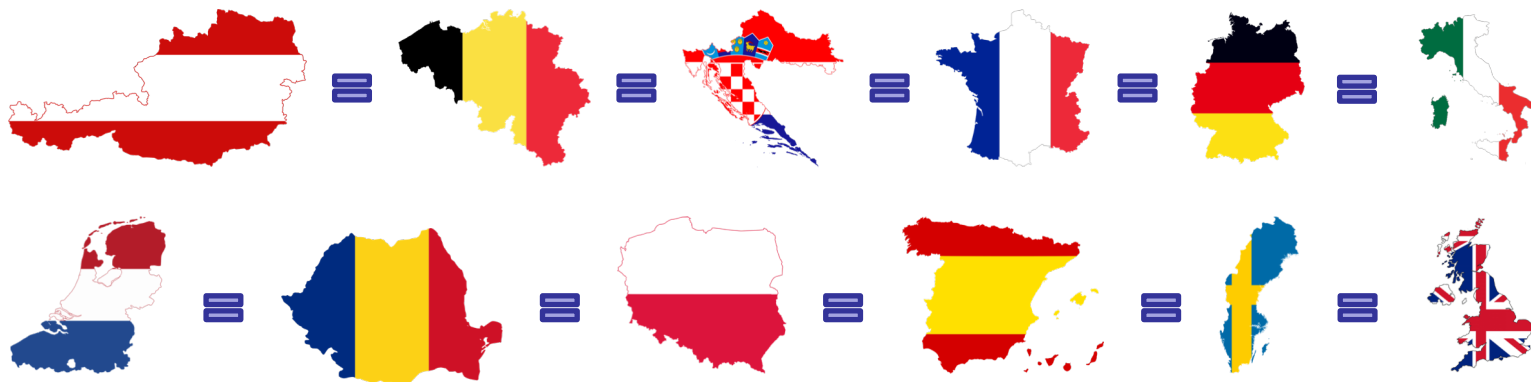
THE CONTRACTING PARTIES,

HAVING RECOGNIZED the desirability of **standardizing the conditions** governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability, (...)



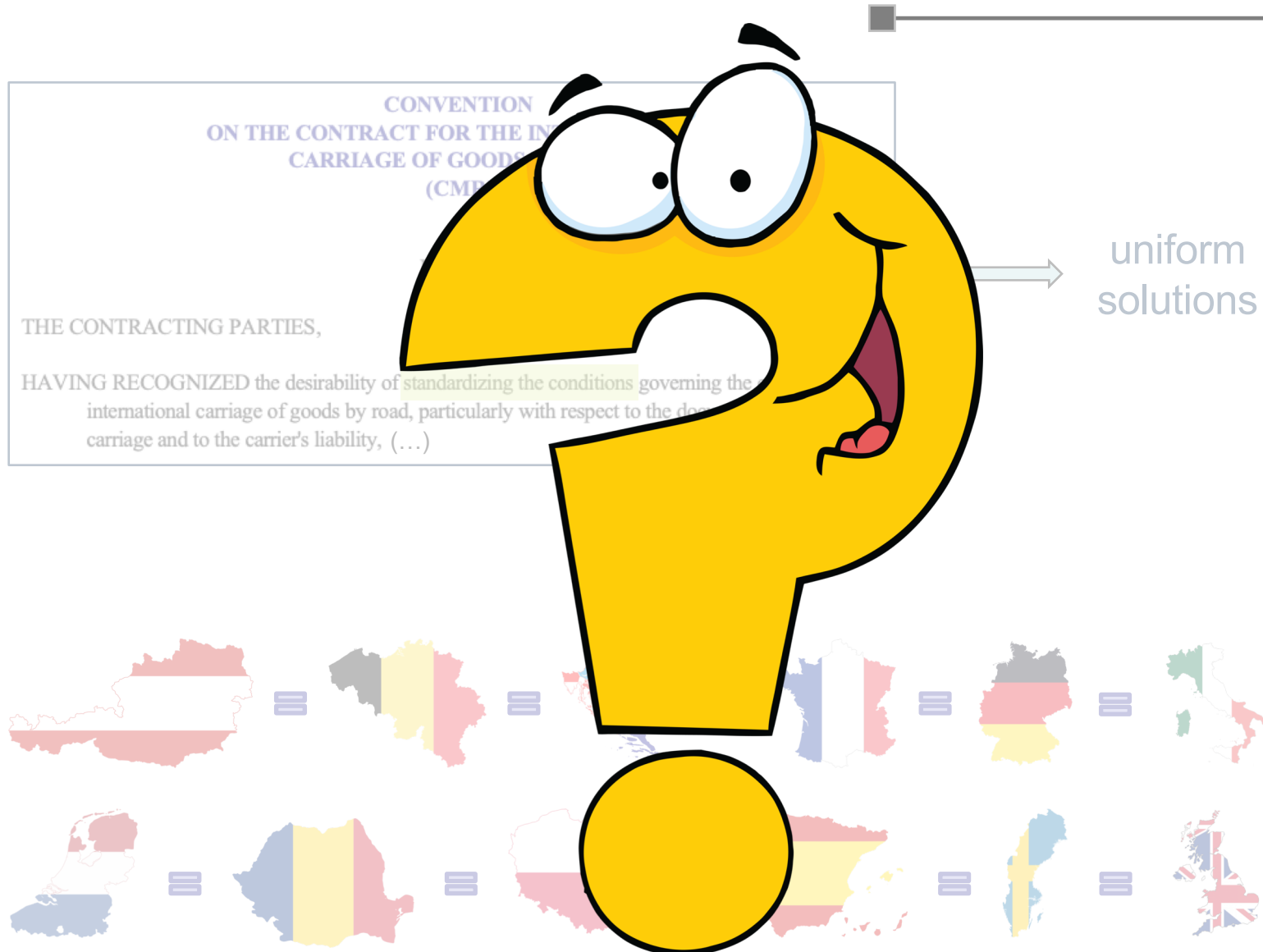
uniform
solutions

ergo



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Why do we shop under the CMR?



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Where can we shop under the CMR?



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Where can we shop under the CMR?

Article 31

1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

- (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or
- (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.

- ⇒ prorogation of jurisdiction
- ⇒ residence of the defendant
- ⇒ place of taking over of the goods

└ place designated for delivery



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What do we shop for?



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What do we shop for?

Article 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 seized of the case**, is considered as equivalent to wilful misconduct.



carrier-friendly



shipper-friendly

‘with the intention of causing that damage or recklessly and with the knowledge that such damage was likely to result’ (Art. 8:1108 BW)



‘wilfully or recklessly and in the knowledge that damage was likely to occur’ (§ 435 HGB)



What do we shop for?

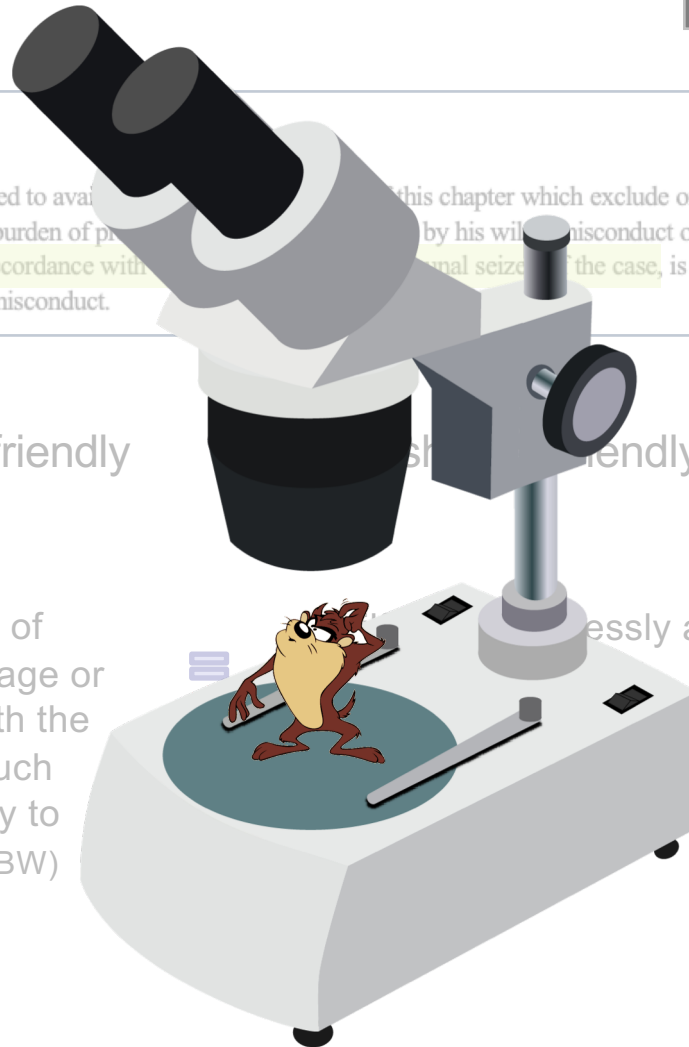
1. The carrier shall not be entitled to avail himself of this chapter which exclude or limit his liability or which shift the burden of proof by his wilful misconduct or by such default on his part as, in accordance with the law of the country of origin, is considered as equivalent to wilful misconduct.



carrier-friendly

shipper-friendly

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carrier-friendly

recklessness: '*awareness of danger and realisation that the likelihood of the danger materialising is considerably greater than the likelihood of it not materialising*'

high standard of proof for the claimant

Hoge Raad 5.1.2001,
10.8.2012



shipper-friendly

also 'conscient
recklessness' *in lieu of*
'gross negligence' (< 1998)

but

- organisational failure ('Organisationsverschulden')
- secondary burden of substantiation ('sekundäre Darlegungslast')

BGH 19.5.2005, 5.6.2003

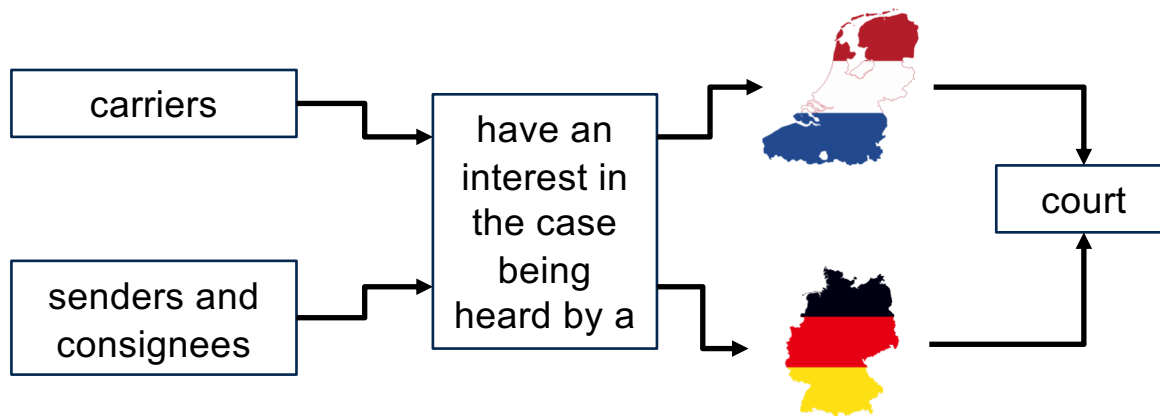


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What do we shop for?

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carriers may want to seek a 'negative declaratory judgment' from a 'friendly' forum in the sense that they are not liable under Article 29 CMR



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if afterwards a German court is seized with an action for damages, does it have to stay the proceedings?

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if afterwards a German court is seized with an action for damages, does it have to stay the proceedings?

yes Article 31(2) CMR may not be interpreted in the sense that an action for a negative declaration does not have the same cause of action as an action for indemnity between the same parties (ECJ 19.12.2013, *Nipponkoa*)

carriers may want to seek a negative declaratory judgment in a 'friendly' forum in the hope that they are not liable under Article 29 CMR

'Der holländische Trick'



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What do we shop for?

Article 23

4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable.

excise duties on certain goods (e.g. tobacco and spirits) are triggered even when the goods are stolen or lost during carriage

excise duties **are**
recoverable as
other charges



UKHL 9.11.1977
(*Buchanan*)

UKSC 14.6.2023
(*JTI Polska*)

Højesteret 1987



excise duties are
not recoverable
as other charges

Hoge Raad
14.7.2006

Högsta Domstolen
14.6.2022



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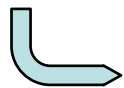
What do we shop for?

Article 23

pre-SDR Protocol

3. Compensation shall not, however, exceed 25 francs per kilogram of gross weight short. "Franc" means the gold franc weighing 10/31 of a gramme and being of millesimal fineness 900.

10 CMR contracting states have not ratified the 1978 SDR Protocol: since gold is (now) traded as a commodity and its price has increased exponentially, the limitation to germinal francs may lead to a *de facto* abrogation of the limit ($\approx$ EUR 900 / kg)



where available, a shipper might want to file a claim in a 'germinal franc'-jurisdiction



Върховен касационен съд 13.4.2022
applies the 8.33 SDR / kg limitation because
national transport law envisages this limit



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What do we shop for?

Article 3

For the purposes of this Convention the carrier shall be responsible for the acts and omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

- although not envisaged by CMR, most jurisdictions allow a direct claim against the performing carrier
 - subcontract of carriage as a contract in favour of a third party (the consignee)
 - 🇩🇪 BGH 13.10.2022: *all* carriers who undertook to deliver to the consignee (not only the last performing carrier)
 - 🇮🇹 Corte di Cassazione 14.7.2015
 - wide(r) interpretation of Art. 34 CMR
 - 🇳🇱 Hoge Raad 11.9.2015
 - 🇬🇧 EWCA 13.1.1977 (*Ulster Swift*), 4.11.2005 (*Rosewood*)
 - claim in tort (e.g. where the claim is brought by the sender)



What do we shop for?

Article 3

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- decision where to bring the claim based on
 - availability of direct action claim
 - contract or tort?
 - substantive matters (wilful misconduct, excise duties, etc.)
- not necessarily all carriers can be sued in the same forum
 - 🇬🇧 no forum at the residence of the contracting carrier if performing / successive carriers are seated elsewhere (UKSC 28.10.2015, *BAT v Exel*)
 - 🇩🇪 the contracting carrier and all performing carriers can be sued at the place of taking over of the goods, even if the claim is in tort and the performing carriers only served a national leg (BGH 31.5.2001, 20.11.2008)



What do we shop for?

- this is not really a question of forum shopping, since the existence of a direct action claim does not (necessarily) depend on the law of the forum State (see Art. 18 Rome II Regulation)
 - 🇪🇸 a direct claim exists where provided for in the law applicable to the insurance contract *or* to the non-contractual obligation (Tribunal Supremo, 17.7.2025)
- but
 - additional fora *might* exist if direct action claims are deemed not to fall under Art. 31(1) CMR
 - 🇩🇪 the BGH has expressly declared that the fora in Art. 31(1) CMR do apply to a direct action claim (claim related to a contract of carriage under the CMR: 29.05.2019)
 - in a negative declaratory action before a carrier-friendly forum, the insurer can join as a co-claimant and bar any future direct action for damages in another forum (*lis pendens*)



What do we shop for?

- some national laws award the carrier who actually performed the transport a direct-action claim against the original sender if they are not paid by the contracting carrier
 - the sender (or, in France, the consignee) may eventually have to pay twice
 - 🇫🇷 Cour de Cassation 4.2.2003
 - 🇪🇸 Tribunal Supremo 24.11.2017
 - the rule applies to CMR transports, if envisaged by the law applicable to the contract of carriage (Rome I Regulation)
 - 🇫🇷 Cour de Cassation 24.3.2004
 - 🇪🇸 Tribunal Supremo 3.6.2025
- this should also *not* be a motive for forum shopping, since jurisdictions that do not envisage direct action should grant it if the law applicable to the contract does, but tribunals in France and Spain are more ready to grant the action



What do we shop for?

Article 32

1. The period of limitation for an action arising out of carriage under this Convention shall be one year. Nevertheless, in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct, the period of limitation shall be three years. The period of limitation shall begin to run: (...)

quid iuris for the recovery claim of a contracting carrier against the actual carrier?

Art. 39(4) not available

OGH 20.6.2000

BGH 19.4.2007

Hof van Cassatie
5.12.2013

(+ 1 month national law)



Art. 39(4) applicable

Tribunal Supremo
26.3.2021

Cass. com.
25.1.1972,
3.3.1998



Hoge Raad
11.9.2015
(successive carriage)



Are there (effective) remedies against forum shopping?

What do we shop for?

NO (???)

Remedies against forum shopping?

- *lis pendens* and *res iudicata*
 - negative declaratory action v action for damages
 - although the ECJ has held that they have the same object and the same cause of action, a non-EU jurisdiction might see this otherwise
- choice-of-jurisdiction clause in the contract of carriage?
 - not a means to avoid forum shopping, but a method of widening the offer: Art. 31(1) CMR only allows to set *additional* fora (an exclusive jurisdiction clause is not only not the rule — ≠ Art. 25 Brussels Ia — but null and void)
 - even if they were exclusive, if another court is seized and does not decline jurisdiction, there still is a *lis pendens* situation (Gjensidige)
- uniform interpretation of the CMR in all contracting States
 - only way to successfully discourage forum shopping, but
 - binding interpretation by a single higher court unavailable (ECJ: *TNT*, *Nipponkoa*) or never tested (International Court of Justice, Art. 47 CMR)
 - unhelpful in cases where CMR itself refers to (non-harmonised) national law (in particular, Art. 29 CMR)

promotion of uniform interpretation by other means: CMR-AC



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**MANY THANKS FOR
YOUR ATTENTION**



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Achim Puetz
putz@uji.es