

# **“Notoriously Difficult...”?**

## **A Travel Guide to CMR and the International Carriage Of Goods By Road**

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# Introduction

- CMR: The International Convention On The Contract For The Carriage Of Goods By Road
- Drawn Up 1956 By U.N. Economic Commission For Europe
- To Standardise Carriage Terms Throughout Signatory States:
- CARMACK Amendment: US Land Transit



# Introduction

*"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, have agreed as follows:"*

## ➤ Problems....

- *"..notoriously difficult.."* Mocatta J. in Cummins Engine Co. v Davies Freight Forwarding
- *"...it's reputation (as notoriously difficult) is intact"* Lord Justice Rix in Andrea Merzario v. Leitner.

## ➤ Why so problematic?



# Aims

- Highlight key parts of the Convention
  - Scope Of Application
  - Identity Of Carrier
  - Notification & Time Limits
  - Limitation Of Liability / Wilful Misconduct
- Show how interpretations vary
- How to get the most out of CMR
- Comparison with US Carmack



# CMR: Signatory States

A world map showing the signatory states of the CMR Convention. The signatory states are highlighted in yellow and include: Iceland, Norway, Sweden, Finland, Estonia, Latvia, Lithuania, Poland, Belarus, Ukraine, Russia, Georgia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Uzbekistan, Turkmenistan, Tajikistan, Iran, Turkey, Greece, Bulgaria, Romania, Hungary, Czech Republic, Slovakia, Austria, Germany, France, Italy, Spain, Portugal, Morocco, Tunisia, Algeria, Libya, Egypt, Syria, Iraq, Saudi Arabia, UAE, Oman, Pakistan, India, Nepal, China, Mongolia, North Korea, South Korea, Japan, Taiwan, Vietnam, Myanmar, and Thailand. Non-signatory states are shown in light gray.

**Signatory States (Yellow):**

- Iceland
- Norway
- Sweden
- Finland
- Estonia
- Latvia
- Lithuania
- Poland
- Belarus
- Ukraine
- Russia
- Georgia
- Armenia
- Azerbaijan
- Kazakhstan
- Kyrgyzstan
- Uzbekistan
- Turkmenistan
- Tajikistan
- Iran
- Turkey
- Greece
- Bulgaria
- Romania
- Hungary
- Czech Republic
- Slovakia
- Austria
- Germany
- France
- Italy
- Spain
- Portugal
- Morocco
- Tunisia
- Algeria
- Libya
- Egypt
- Syria
- Iraq
- Saudi Arabia
- UAE
- Oman
- Pakistan
- India
- Nepal
- China
- Mongolia
- North Korea
- South Korea
- Japan
- Taiwan
- Vietnam
- Myanmar
- Thailand

**Non-Signatory States (Gray):**

- Western Sahara

**Legend:**

- = Signatory State

**Footer:**

- September 2007
- CRAIG/Is Ltd.
- Proprietary & Confidential



# Consistency

- Language
- Different Jurisdictions Apply Different Standards and Terms of Law
- Differences in interpretation
  - Breaking Limitation
  - Recoverability of Customs Duty
  - Circumstances Beyond the Control Of the Carrier
  - Successive Carriage
- Multiple Carriers & Choice of Jurisdiction

# Jurisdiction

- Article 31.
  - Designated By Agreement
  - Defendant's Principal Place Of Business or the Branch or Agency through which the contract was made
  - Place of taking over the goods
  - Place designated for delivery

# Jurisdiction

- Claims may be brought against
  - The First Carrier
  - The Last Carrier
  - The Responsible Carrier
- Multiple Options
  - Maximise Recovery / Minimise Exposure
  - Declaratory Action



# Scope of Application

## ➤ “Goods On Wheels Across A Frontier”

*Alan E Donald*

*Art. 1. This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country, irrespective of the place of residence and the nationality of the parties.*

- Contract
- Place of Delivery/Destination
- Carriage By Road: “On Wheels”

# Scope of Application

- Contract
  - Contract for Reward
  - In any form, even verbal
  - CMR Consignment Note is NOT necessary
  - CMR Automatically applies to every contract

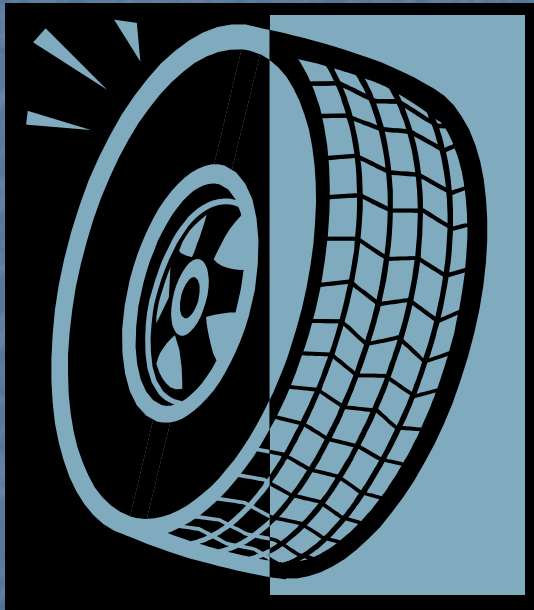


# Scope of Application

- Place of collection/delivery
  - Must be in different countries,
  - At least one of which is a signatory to the convention
  - CMR only applies to International Carriage
  - Nationalities of the sender/receiver/carrier are irrelevant
  - CMR applies by virtue of the contract, not the performance of it

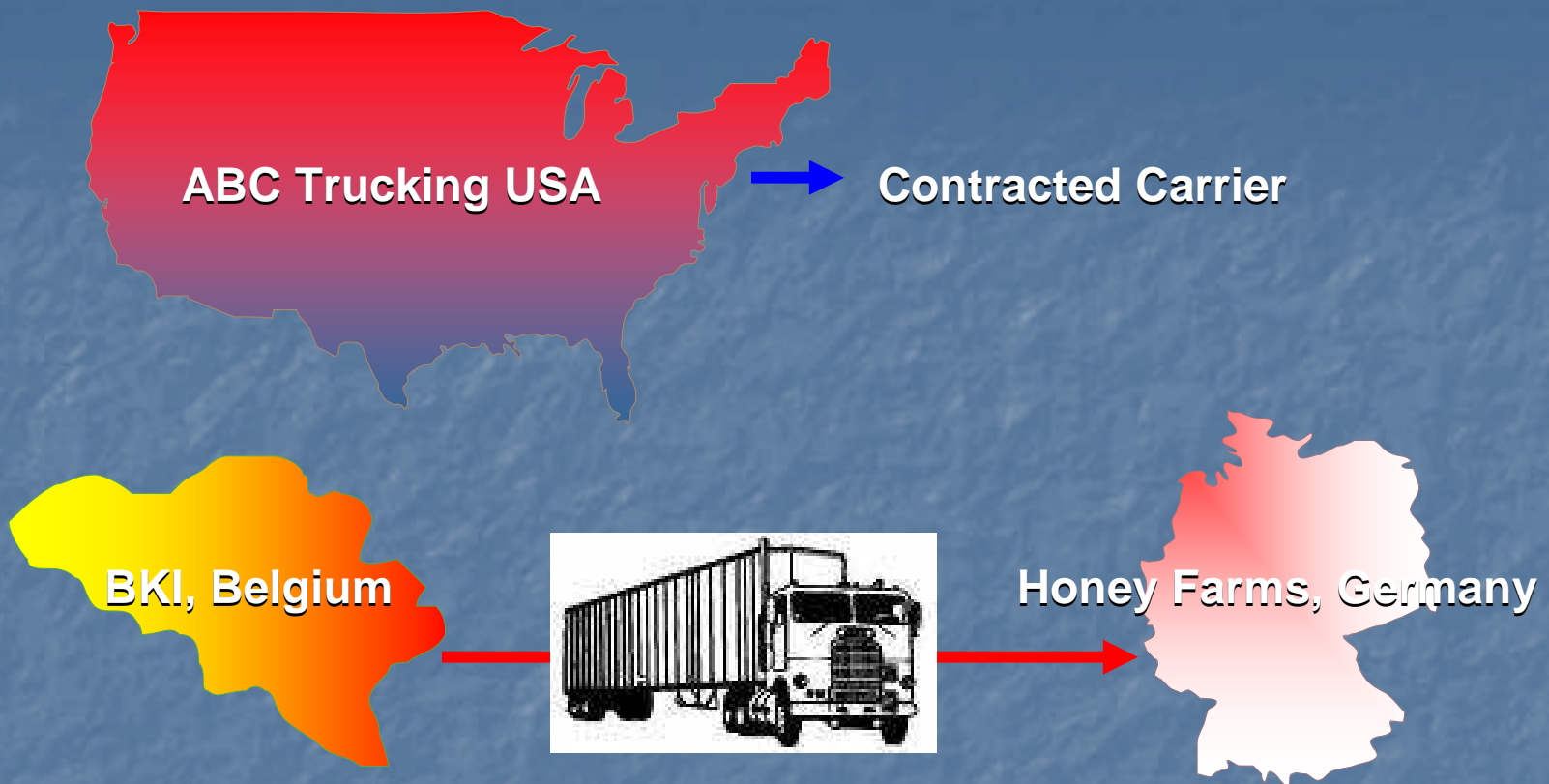
# Scope of Application

- Carriage By Road: "On Wheels"

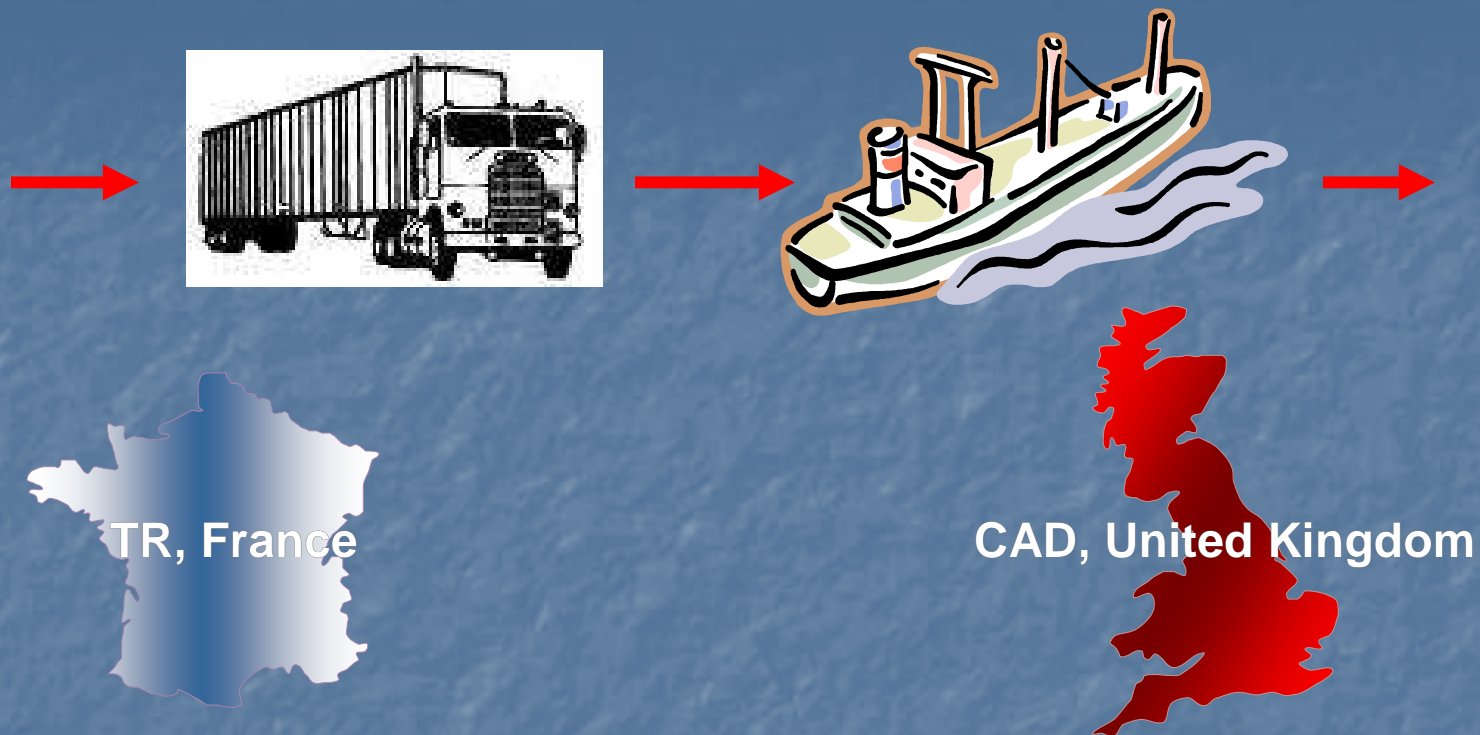


- Goods must remain on wheels
- Combined Transport
  - CMR will apply if goods not unloaded
  - If goods are unloaded CMR will not apply
- Containerised Cargo
- Transshipment as part of normal operations





- Goods Carried By Road Over Frontier Of A Signatory State
- CMR Applies
  - notwithstanding...
  - US Based Carrier
  - No CMR Consignment Note
  - Carrier's Own Terms & Conditions



- Goods Carried By Road Then Unloaded And By Sea:  
Goods Not On Wheels When Crossing Border
  - CMR Does Not Apply
  - No International Carriage By road
- *However, if Goods carried by road and then by Ro-Ro Ferry i.e. not removed from wheels, CMR will apply throughout*



# Scope of Application

- Art. 41. Not possible to derogate from the terms of the convention
- Datec Holdings vs. UPS
  - CMR Contract created by act of carriage
  - Once created, could not derogate from CMR

# Identity of the Carrier

- No definition provided
- Determining factor in deciding where suit may be brought
  - Principal place of business of first, last or responsible carrier
  - Maximise recovery potential
- Art. 6: CMR consignment note to contain the name and address of the carrier.
  - But what if there is no consignment note?





# Identity of the Carrier

- Subcontracting
- Freight Forwarder
  - CMR note naming themselves as carrier
  - No CMR note issued
  - No physical possession of goods

# Identity of the Carrier

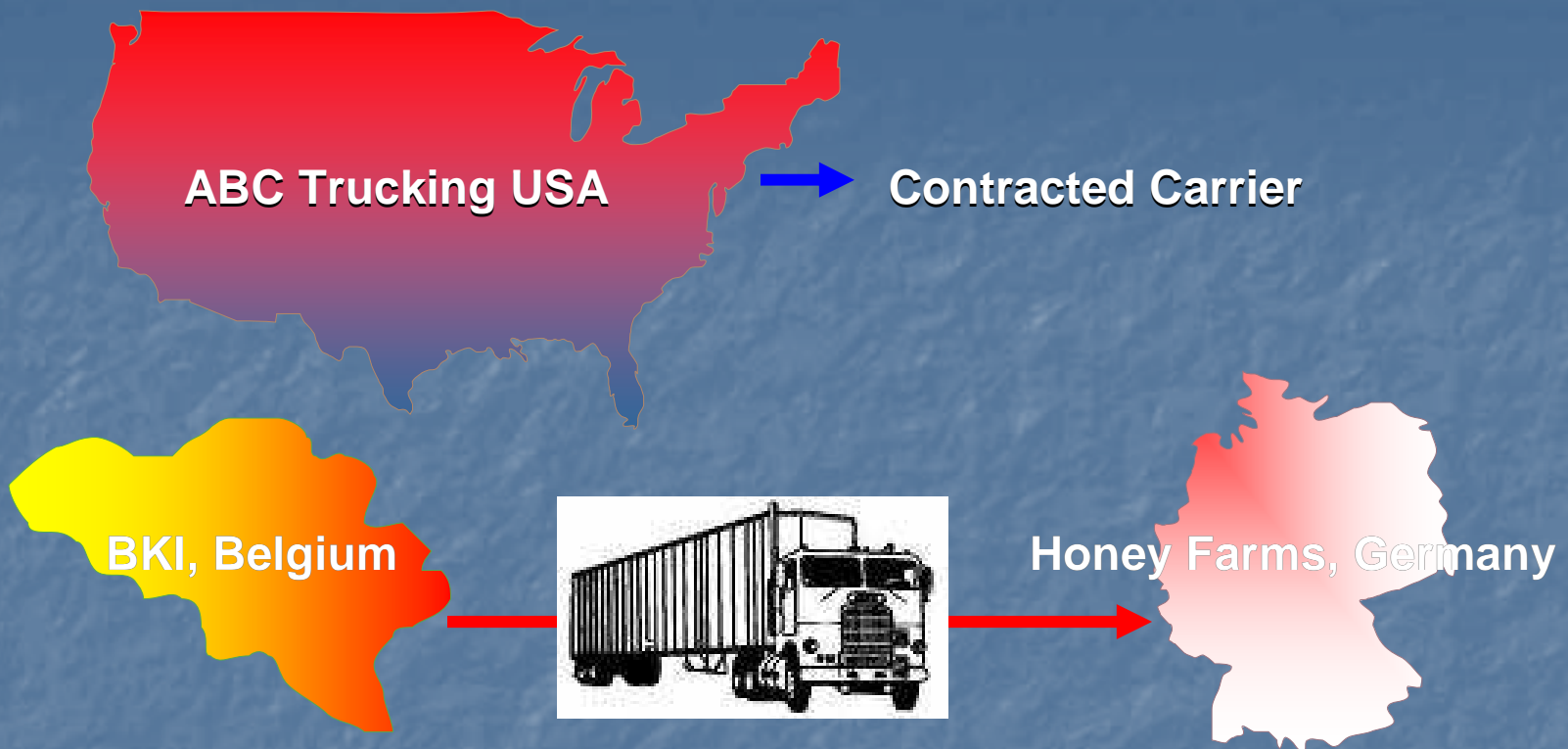
- Freight Forwarder may represent a preferable target for recovery
  - May have better insurance cover
  - Be more financially stable
  - Be based locally or in a preferred jurisdiction
- When is the Freight Forwarder a Carrier?

# Identity of the Carrier

- A contract to undertake the carriage? or
- A contract to arrange the carriage?
- No need to have had physical custody
- Examination of the facts
  - Correspondence between the parties
  - Past practice
  - Services advertised or offered
  - Control of the arrangements
  - Freight invoices







- Did ABC Charge a Flat Rate for Freight or a Declared Commission On The Freight?
  - ABC Trucking may be CMR Carrier even if they own no trucks and have no physical means of completing transport

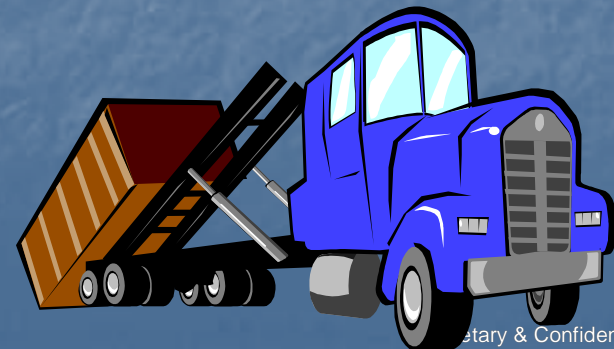
# Liabilities & Defences

- Art. 17(1) "The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."
- Taking Over the Goods
  - Point at which carrier assumes control of the goods
- Delivery
  - Handing over custody and physical control
  - Goods not unloaded are not fully delivered
  - Goods must be accepted
  - Must be to an authorised person



# Liabilities & Defences

- Delivery to authorised persons
  - Beware the “Mile End Shuffle...”
  - Must seek instructions from the shipper before delivering to any other location or person
  - Even if delivery at the original address is physically impossible.





# Liabilities & Defences

- Art. 17(2) “..circumstances which the carrier could not avoid and the consequences of which he was unable to prevent”
- Burden of Proof falls on the Carrier
- Differing Interpretations;
  - France – force majeure/act of God
  - Netherlands – all measures reasonably required in the circumstances
  - Germany – carrier must show the utmost care was taken
  - England – could not avoid even with the utmost care



# Liabilities & Defences

- Could Not Avoid....
  - Appropriate choice of parking place
  - Vehicle left unattended
  - Use of two drivers
  - Exceeding legal driving hours
  - Better Route Planning
  - Use of Security/Anti-theft devices
  - Awareness of risk of theft



# Liabilities & Defences

- Measures to be expected should be proportionate to value of the cargo
  - “Ciciatiello”: 2<sup>nd</sup> driver unrealistic
  - Theft by bogus customs officials
- Burden Of Proof Is Always High

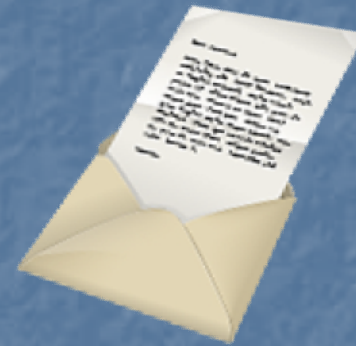


# Liabilities & Defences

- Art. 17(2)
- Well lit, busy service station. Low value cargo parked between other trucks and left unattended for a 5 minute rest stop. Theft devices fitted. ✓
- Cargo left unattended and out of sight whilst driver visits restaurant. ✗
- Medium value load. Parked overnight by side of Motorway. Driver asleep in cab. Off road parking within reach. ✗
- Traffic Accidents

# Notice Of Claim

- Apparent loss/damage:
  - At time of delivery
- Non-apparent loss/damage:
  - Within 7 working days of delivery
- Burden Of Proof
  - Failure to notify is prima facie evidence of goods being delivered in sound condition
- Joint Inspections
  - Evidence contradicting joint inspection is only allowed in cases of non-apparent loss or damage.



# Time Bar



- **Art 32.** *"The period of limitation for an action arising out of carriage under this Convention shall be one year."* running from:
  - **Partial Loss/damage/delay**
    - Date Of Delivery
  - **Total Loss**
    - 30 Days After the Expiry of the agreed time limit for delivery or 60 days from the date the goods were taken over by the carrier
  - **All Other Cases**
    - Expiry of three months after the making of the carriage
  - **Except.... Wilful Misconduct**
    - Three Year Period of Limitation.



# Time Bar



- Art. 32 (2)
- Written claim suspends time bar until such time as claim documents are returned and the claim is rejected in writing.
  - Should All documents be returned?
  - Rejection must be clear and 'meaningful'
- Take Care When Relying On This Provision

# Limitation of Liability

- 8.33 SDR per KG Lost or Damaged
- Up to a Maximum of Value Of The Goods Lost or Damaged
  - Fixed At Value At The Time and Place Accepted For Carriage
- Interest at 5% pa, Carriage Charges (Freight etc.) Also Recoverable
- Delay: Compensation Not Exceeding Carriage Charges

# Higher Compensation

- Art. 24: Sender may declare value
- Art. 26: Sender may declare an amount of "special interest"
  - Must be on consignment note
  - Surcharge must be payable
  - Fixes liability at the limit of the value or special interest declared.





# Wilful Misconduct

- Art 29. *“The carrier shall not be entitled to ..... limit his liability ... if the damage was caused by his wilful misconduct ....”*
  - More than Gross Negligence?
  - Subjective Test: Driver's State Of Mind
  - Must be the cause of loss

# Wilful Misconduct

- England

- Subjective Test

- State of mind may be imputed (Lacey's Footwear)
    - Balance of Probabilities (Datec vs.. UPS)



- Netherlands

- Conscious Recklessness



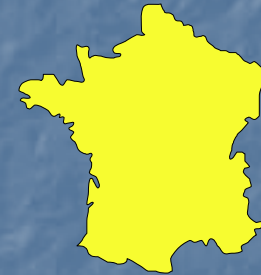
- Belgium

- Conscious Fault



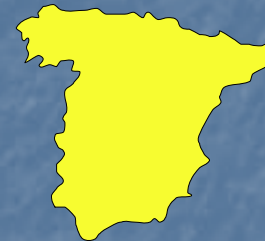
# Wilful Misconduct

- France



- Closer To Gross Negligence
- Less Importance Placed On Subjective Element

- Spain



- Closer to Gross Negligence
- May Shift Burden Of Proof Back Onto Carrier If Circumstances Of Theft Unknown



# Wilful Misconduct

- Germany: Loss With Unknown Cause
  - Carrier must provide full disclosure
    - When, where the loss occurred
    - Steps taken to prevent loss
  - If he cannot, default equivalent to Wilful Misconduct is assumed.



# Wilful Misconduct

- Germany: Damage With An Unknown Cause
  - Due Diligence to Determine Facts of Loss
  - No assumption if Facts not Uncovered

# Wilful Misconduct

- Germany: Loss/Damage With a Known Cause
  - Objective Standards of Behaviour
    - Use of Secure Parking
    - Location of Loss
    - Security Measures Taken
    - Compliance With Handling Instructions
    - Failure To Correct Poor Stowage
- Contributory Negligence



# Wilful Misconduct

- Declaratory Actions
  - Carrier: Issue in England or Netherlands asap.
  - Germany: Does Not Recognise Declaratory Actions By Carriers
    - Unresolved Conflict With EU Law

# Customs/Excise Duties

- *Art 23(4) "carriage charges, Customs duties and other charges incurred in respect of the carriage of goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss"*
- How To Interpret "incurred in respect of the carriage of the goods"?
  - Charge arising from way in which goods were carried?
  - Charge arising from fact that goods were lost?

# Customs/Excise Duties

- England, Belgium, France
  - Such costs are result of the way in which goods were carried, therefore recoverable.
- Netherlands, Germany
  - Such costs are result of goods being lost, not carried, therefore not recoverable.



# How to Live With CMR

- It's not perfect but could be a lot worse...



# Successful Recoveries

- Choice of Carrier
- Clear Instructions To Carrier.
  - Acknowledgement
  - Advise of specific threats and experiences
- Act Quickly In The Event Of Loss
  - Clause Delivery Receipts
  - Place All Parties On Notice
- Notify Insurers As Early As Possible





# Successful Recoveries

- Service Agreements
  - Increased Limits Of Liability
  - Jurisdiction Clauses

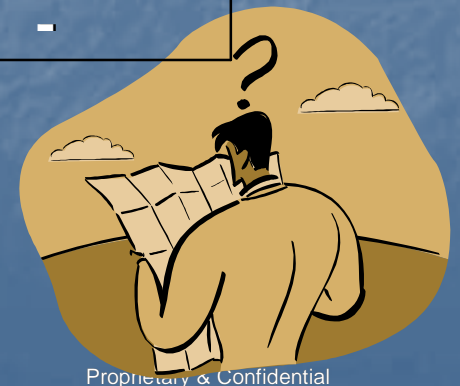




# Successful Recoveries

## ➤ Jurisdiction Clause

	Wilful Misconduct	Customs Duties	Recover Legal Costs
England	-	Y	Y
Netherlands	-	-	-
Germany	Y	-	-



# Successful Recoveries

- Place All Known (or Potential) Carriers On Notice
- Be Aware That Interpretations Differ
- Documentation
  - Instructions to Carriers
  - Freight Invoices
  - Service Agreements
  - Delivery Receipts
- Wilful Misconduct
  - Be Realistic About Chances
  - Be Prepared To Move Quickly When An Opportunity Arises
- Time Bar
  - Assume One Year
  - Caution When Relying Upon Suspension



# Successive Carriage

- Where a Carrier has paid a cargo claim and wishes to pursue a subcontractor;
  - Time Bar
    - One Year From The Date Of Judgment or Payment
  - Jurisdiction
    - Place of Residence Of Actual Carrier



	CMR	Carmack
Applies	Contract for carriage of goods carried on wheels over an international border of at least one signatory state.	Transport by land crossing a state boundary whether from a foreign country or another state.
Carrier	First, Last or Responsible. (All may be held jointly and severally liable.)	Contracting, Performing or other carrier over whose line or route the goods are carried. (All may be held jointly and severally liable.)
	Physical Possession of goods is not a requisite to being held to be a carrier.	Physical Possession of goods is not a requisite to being held to be a carrier.

	CMR	Carmack
Notice	<p>At time of delivery in case of apparent loss or damage.</p> <p>Within 7 days of delivery in case of non apparent loss or damage.</p>	<p>In writing within nine months of delivery. Written notice must contain facts sufficient to identify the shipment; assert that the carrier is liable; make a specified demand for money.</p>
Time Bar	<p>One Year, suspended upon written submission of claim until such time as repudiated in writing and documents returned.</p>	<p>Two years from the date the carrier declines any part of the claim in writing.</p>
Limitation of Liability	<p>8.33 SDR per KG.</p>	<p>Carrier's tariff.</p>

	CMR	Carmack
Option to Declare Higher Value/Obtain Higher Level Of Compensation	Yes. Art 24 & 26.	Mandatory. Shipper must have option for Carrier's standard tariff to apply.
Wilful Misconduct	Removes right to limit.	No equivalent.
Defences	Circumstances beyond the control of the carrier and the consequences of which he was unable to prevent.	Act of God or Public Enemy
	Inherent Vice	Inherent Vice
	Wrongful Act of The Shipper	Act or fault of the Shipper
	Pre-agreed use of unsheeted vehicles	
Derogation	Not Permitted	Not Permitted



# Any Questions?

➤ Thank You!

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