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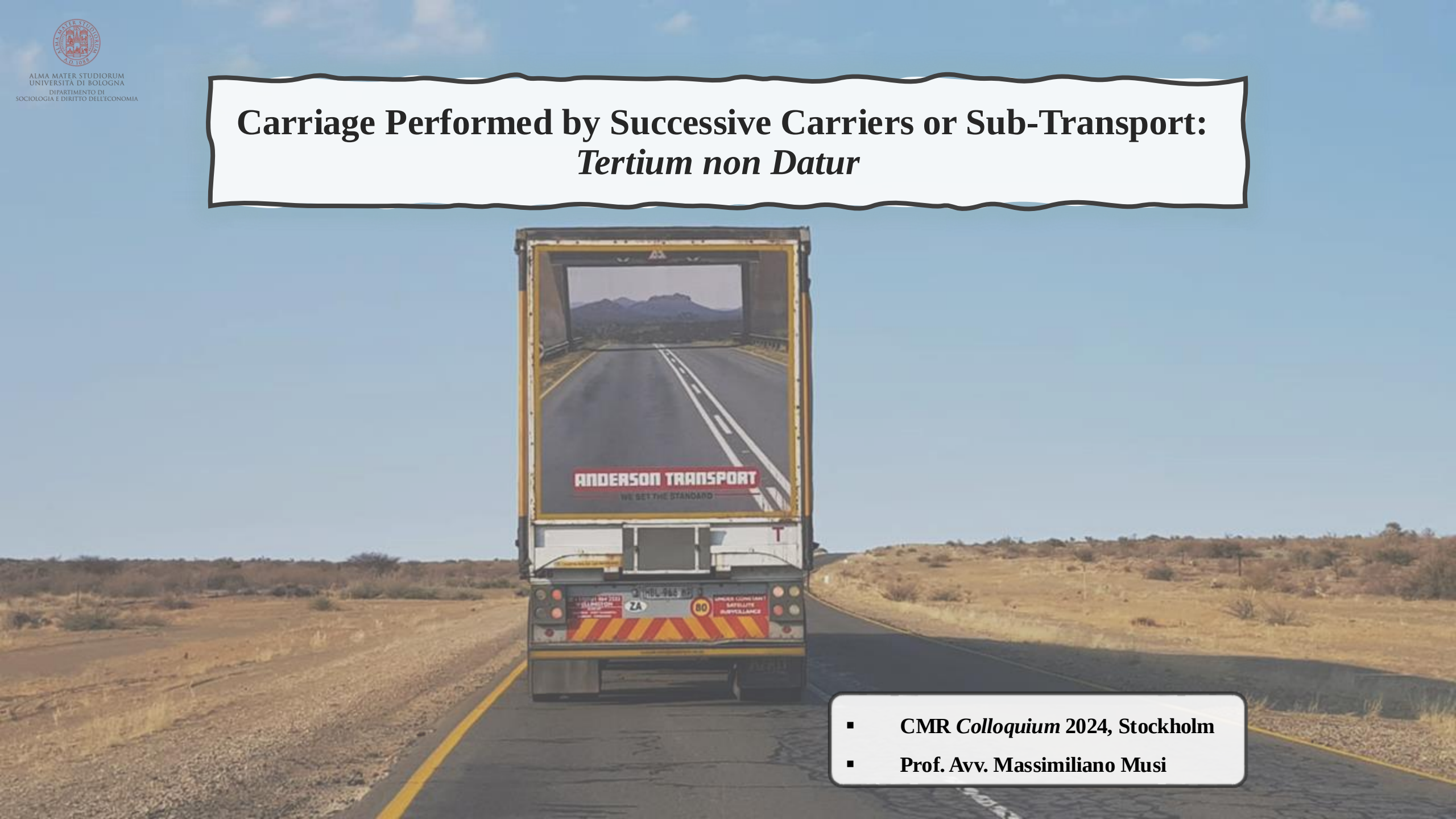
Carriage Performed by Successive Carriers or Sub-Transport: *Tertium non Datur*



- **CMR *Colloquium* 2024, Stockholm**
- **Prof. Avv. Massimiliano Musi**

Various forms of cooperation between carriers in the in the performance of a specific transport

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Transport with reshipment

The carrier is liable for the portion of the route in which he has the quality of carrier, instead, for the legs of transport not directly performed, he acts as a freight forwarder

"Cumulative" transport

The transport, even if governed by a single contract, is performed by successive road carriers – joint and several liability of all carriers, except for the right of recourse between them

Sub-transport

Only the first is liable before the consignor.

The consignor has no relationship with the sub-carrier

«Cumulative» transport in Italian Civil Code

Art. 1700, first paragraph, c.c.: "*In transports that are **assumed cumulatively** by several successive carriers with a **single contract**, the carriers are **jointly and severally liable** for the performance of the contract from the original place of departure to the place of destination*".

Successive Carriers in the C.M.R.

Art. 34 C.M.R.: "*If carriage governed by a single contract is performed by successive road carriers, **each of them shall be responsible** for the performance of the whole operation, the second carrier and each succeeding carrier **becoming a party to the contract** of carriage, under the terms of the consignment note, **by reason of his acceptance of the goods and the consignment note**".*

Common key aspects

- unitariness of the **contract**;
- indivisibility of the **performance** of a plurality of carriers;
- joint and several **liability**.

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Can a mere "carrier on paper" be qualified as successive carrier?

Absence of precise indications regarding the conditions under which the qualification of "successive carrier" can be said to have been acquired → broader application of Art. 34 C.M.R.?

According to part of the Doctrine, the assumption of the status of "*successive carrier*" is conditional on the acceptance of both the goods and the consignment note

Another part of the Doctrine maintains that the uniform international rules would admit the possibility of qualifying as a "*successive carrier"* even a carrier that does not even perform part of the transport itself, but outsources it completely, having the role of mere "*carrier on paper*"

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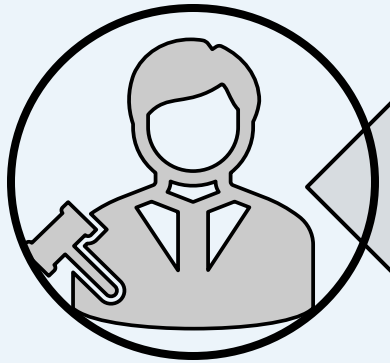
The position of the Dutch Supreme Court in *C&J Veldhuizen Holding BV* v *Beurskens Allround Cargo B.v.*



"neither the text of art. 34 CMR nor that of the other provisions of Chapter VI CMR regarding "Provisions relating to carriage performed by successive carriers" (art. 35-40 CMR) require the former provisions to be interpreted in such a way that there cannot be successive carriage if the main carrier and other possible carriers are solely ***"paper" carriers****, i.e. not performing any part of the carriage themselves, but completely outsourcing the carriage.* ***Object and purpose*** *of the regulation of Chapter VI CMR is, as follows from Artt. 36-39 CMR, the* ***enhancement of the recovery possibilities of the cargo interested party*** *and the carrier pursuing recovery. Accordingly,* ***Art. 34*** *CMR should be interpreted in such a way that it* ***also covers the situation whereby the main carrier and other possible carriers are solely "paper" carriers****".*

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Weaknesses of the Hoge Raad's reasoning

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According to the Hoge Raad, such a broad interpretation of art. 34 C.M.R. brings the system of Artt. 36-39 C.M.R. more in line with the intended enhancement of the position of the cargo interested party and of any carrier acting in recourse

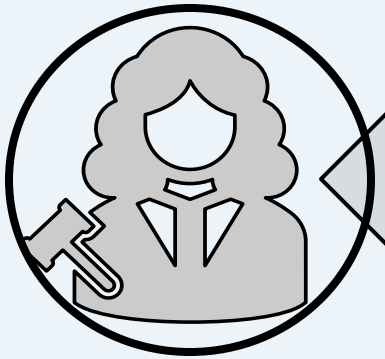
The broadening of the possibility of obtaining compensation for damages is one of the purposes of the norm, but surely not the sole one

Furthermore, it is a misapprehension that a "carrier on paper" needs extra protection. He is perfectly capable of securing his own position, also by choosing his own sub-carrier wisely

The position of the German Federal Court of Justice
BGH 13 October 2022 – I ZR 151/21

- The Court held that **a mere** "***carrier on paper***" **can not be classified as a successive carrier**

- One of the requirements of Art. 34 of the C.M.R. is that **each carrier in the chain must actually perform a part of the transport**



So «*where a person concludes a contract of carriage as a carrier but does not himself perform any part of the carriage,* ***the provisions of Art. 34 et seq. can not be applied***».

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The second guidance note of the German Court's decision

From the BGH's perspective, **regardless of the type of underlying transport contract**, **the consignee can assert the rights deriving from the contract of transport** as a third-party beneficiary in his own name not only against the first carrier and the sub-carrier who delivered the goods, but **also against the sub-carrier who did not perform the transport himself**

two birds with one stone:

1. ensuring compliance with the literal meaning of Art. 34
2. guaranteeing adequate protection to the consignee.

The Court provides a **solution very similar**, also under systematic and substantive justice profiles, **to that offered by the Hoge Raad**, without having to resort to a perhaps unnecessary extensive interpretation of a rule, whose literal formulation is sufficiently clear in itself

Examining the problem in the light of Italian law

Despite the lack of a codified provision regarding the sub-transport, Italian doctrine and case law have taken steps to identify its **distinctive features**

No legal relationship is established **between** the **original consignor** and the **sub-carrier**

There is not a joint and several liability of the various carriers before the consignor. The original consignor has no rights or actions against the sub-carrier (see Cass. civ., Sez. III, 21 October 1991, n. 11108)

Consequently, the action brought against one of the carriers does **not interrupt** the **limitation period**, pursuant to the first paragraph of Art. 1310 of the Italian Civil Code, against another carrier (see Cass. 21 January 1995, n. 698)

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Could the discipline on transport with successive carriers apply to sub-transport in the Italian legal system?

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Considering the differences between cumulative transport and sub-carriage, both in terms of their structural and functional characteristics, **it does not seem possible to apply the discipline on transport with successive carriers to sub-transport**

the rules on successive carriers both in the Italian Civil Code and in the C.M.R. have a **special nature** and must be limited only to the cases in which the transport operation presents the peculiar characteristics described by the law, BUT…

Art. 1689, I para., of the Italian Civil Code attributes to the **consignee** the rights arising from the contract of transport (= German Court findings)

two contractual actions of the consignee:

1. against the first carrier, who is liable for the sub-carrier's acts, as its auxiliary (by virtue of Art. 1228)
2. against the sub-carrier, pursuant to Art. 1689

The **consignee's right** to bring legal action would be **excluded** only if **the contract of sub-transport does not contemplate him as the beneficiary** of the service

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Art. 34 C.M.R. guarantees the right to take action against any of the successive carriers, to **any person** (and therefore it can be the consignee, as well as the consignor) who, depending on the individual specific case, has the active titularity of the action.

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Thanks for Your attention!

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