FACULTAD DE DERECHO

Pax Moot Court 2026

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5º E-3 A

Área de Derecho Internacional Privado

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THE CLAIMANT'S MEMORANDUM

1. STATEMENT OF FACTS

1. About the Parties. The Claimant, Royal Furniture OOD, with domicile in Sofia (Bulgaria), is a designer of furniture for luxurious yachts in Europe and the Middle East. Its main customers are yacht builders and yacht owners. The First Respondent, Tosca Mobili s.r.l., with domicile in Milan (Italy), is a high-end furniture manufacturer with a reputation for providing Italian quality with a modern touch. It has a design team, but also takes customized orders based on designs provided by the customer. It imports materials from all over the world, mainly from Ghana, Brazil, and Thailand. It expressly presented itself to the Claimant as a company able to meet its sustainability and ethical standards. The Second Respondent, Swift, is a transport company domiciled in Gdansk, Poland.

2. On the Negotiations. On May 20th 2025, the Claimant's representative Ivan reached out to Maria, a representative of the First Respondent, to order the following items: six cabinets, six tables, fourteen chairs, and six sofas. The Claimant attached tailor made designs for the cabinets and the tables. The Claimant highlighted its reputation as an eco-friendly and sustainable firm, and expressly requested the materials used to comply with such standards: "it is salient that the furniture complies with the highest sustainable and ethical standards". The email's footer read as follows: "Royal Furniture OOD is a company incorporated under the laws of Bulgaria. We are THE supplier of sustainable and eco-friendly wooden furniture in Europe and the Middle East. Our terms and conditions apply and may be downloaded from our website via this hyperlink. Bulgarian national law applies exclusively to all transactions and the court of Sofia has jurisdiction". Maria opened the hyperlink and, even though it did not immediately lead to the Claimant's terms and conditions, it was possible to download them, and it was reasonable to expect her to be aware of their content. The choice of law included in the terms and conditions explicitly stated that "Bulgarian national law, with the exclusion of the CISG (Vienna Sales Convention 1980), applies to all transactions and the court of Sofia has jurisdiction".

On May 23rd 2025, Maria responded to the email. She quoted a price of 168,000 EUR (including VAT – DAP) for the tables and cabinets and of 192,000 EUR for the chairs and sofas (including VAT – EXW). The tables and cabinets were to be delivered between July 15th and August 15th, while the chairs and sofas were available for pickup at Tosca's

warehouse in Rotterdam. She also explicitly accepted the Claimant's "sustainability mandate": "we will in any case comply with the highest standards in the production of the furniture". She also demanded the Court of Milan or the court at the place of performance to have jurisdiction over the transaction, and included a hyperlink with Tosca's terms and conditions, which Ivan did not check. These terms and conditions included a choice of law which read: "Italian law is exclusively applicable".

On May 24th 2025, Ivan instructed the Claimant's bank to arrange payment. On May 26th 2025, he sent an email saying he accepted Maria's offer of price, payment and delivery under Royal's own terms and conditions, making a counter-offer.

On July 25th 2025, Maria sent an email informing Ivan that the consignment was ready to be picked up by the carrier on July 30th to be delivered to Sofia the following day. On July 30th, following a request from Royal's contractual counterparty, Ivan asked if three cabinets and three tables could be delivered to Rijeka (Croatia) instead of Sofia, to which Maria agreed. On July 31st they were delivered to Rijeka. The rest of the tables and cabinets were delivered to Sofia the same day.

About ten days after delivery and payment had taken place, Ivan found out that it was all over the news that Tosca had been using unethical wood to produce their furniture and expressed the company's desire to avoid the contract and claim damages since the Claimant's contractual counterparty had done the same. Tosca, who had received claims from numerous other counterparties, was not able to reimburse the Claimant. The chairs and sofas were unaffected as they were not made by Tosca but imported from Asian suppliers.

On July 10th, Ivan instructed Swift to transport the chairs and sofas from Tosca's Rotterdam warehouse to Royal's warehouse in Sofia by road. Explicit instructions to not leave the carriage unattended at unsecured parking places were provided. A prorogation clause giving the Court of Sofia exclusive jurisdiction over disputes between Royal and Swift was included in the contract, which both parties signed.

On July 15th, the carriage was left unattended at an unsecured parking place near Graz (Austria). Four chairs and two sofas were stolen, and another four chairs were severely damaged. A surveyor independently contracted by Royal considered the chairs to be a "total loss". The weight of the stolen and damaged chairs was 72 kg, amounting to 48,000 EUR. The weight of the stolen sofas was 300 kg, amounting to 36,000 EUR.

On July 21st, Swift initiated negative declaratory proceedings under the Court of Rotterdam and requested the following: (i) that Swift is declared to be not liable, (ii) that even if Swift were liable, its liability should be limited to 8,33 SDR (~9,74 EUR) under Article 23(3) of the CMR Convention. The Claimant rightfully raised an objection for lack of jurisdiction, citing the prorogation clause in the contract that gave the Court of Sofia exclusive jurisdiction over disputes arising from the obligation.

On August 26th, the Claimant initiated proceedings against Tosca and Swift under the Court of Sofia, requesting the following: (i) that avoidance from the contract with Tosca is granted and full damages for loss of profit are awarded, (ii) that damages suffered as a consequence of Swift's carriage incident are awarded.

2. ON JURISDICTION

The Claimant submits that the Court of Sofia has international jurisdiction over both Respondents pursuant to EU Regulation 1215/2012 (Brussels I Bis). The Claimant asserts that the dispute arising from the contract between the Parties falls under the jurisdiction of the Court of Sofia following the validly established jurisdiction clause and, subsidiarily, through the rules of special jurisdiction.

2.1. Jurisdiction over the First Respondent

The Claimant contends that the Court of Sofia is the exclusive forum for disputes arising from the contract between the Claimant and the First Respondent based on the following legal grounds:

2.1.1. The valid incorporation of the jurisdiction clause

In Article 25(1) of the Brussels I bis Regulation, about the prorogation of jurisdiction, it is established that when the parties agree that the courts of a Member State are to have jurisdiction to hear disputes arising from a particular legal relationship, "that court or those courts shall have jurisdiction". In subparagraph (a) of that Article, "in writing or evidenced in writing" is presented as a valid way to prove the incorporation of a choice of law or choice of jurisdiction to a contract.

In Article 25(2), it is established that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'". In the initial

inquiry email dated 20th May 2025, the Claimant's representative included a hyperlink that provided access to the Terms and Conditions which contained the Claimant's choice of law and jurisdiction clause. Under Article 25(2), this communication by electronic means provides a durable record of the agreement equivalent to writing.

Despite openly admitting to opening the hyperlink, the First Respondent may argue that under Article 25(1)(a), consent was not evidenced in writing. However, this argument fails. In modern European commerce, as established by the Court of Justice of the European Union in *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH* (Case C-322/14, 2015), the provision of terms via a hyperlink constitutes a valid communication and a durable record if the information can be saved and printed.[1] By admitting to opening the hyperlink, the First Respondent cannot argue a lack of written evidence under the standard set in *El Majdoub*. Therefore, the First Respondent's admitted access to the hyperlink along with the Claimant's repeated mention to the jurisdiction of the Court of Sofia in his emails overwhelmingly satisfy the requirements of Article 25(1)(a), validating the jurisdiction clause.

Regarding the question of whether the Claimant's terms or the First Respondent's terms were incorporated into the contract, the Claimant calls for the application of the "last shot" rule, a principle widely used in European commerce to solve the exchange of conflicting Terms and Conditions during contract negotiations. Under said rule, the contract is governed by the last set of terms sent before the contract is formed. By beginning to manufacture the goods without objecting to the Claimant's jurisdiction clause, which were explicitly mentioned in the Claimant's last email before the formation of the contract, the First Respondent's representative consented to the incorporation of the Claimant's jurisdiction clause into the contract. The last email sent by the Claimant during the negotiations read as follows: "We accept your offer of price, payment and delivery terms under our terms and conditions. Please proceed and please let me know when the furniture will be ready for carriage". Since the First Respondent then began to manufacture the goods without any objections to the Claimant's jurisdiction clause, it was the Claimant who essentially fired the 'last shot' during the negotiation phase, and the contract was formed under its terms.

[1] Case C-322/14, *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH*, ECLI:EU:C:2015:334, para. 36.

The fundamental legal basis for the 'last shot' rule is contained in Articles 18 and 19 of the United Nations Convention for the International Sale of Goods (CISG).

In Article 19(1) of the CISG, it is established that "a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer". Subparagraph (3) of the same Article states that terms that refer to "the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially". Since the jurisdiction clause is related to the settlement of disputes, it alters the terms of the offer materially and constitutes a counteroffer. Article 18(1) of the CISG establishes that "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance". By beginning the "intense and time-consuming process" of manufacturing the goods after payment had been made and without objecting to the Claimant's terms and conditions, the First Respondent showed reasonable appearance of consent to said terms. Therefore, under the 'last shot rule', the Claimant's jurisdiction clause was validly incorporated into the contract as the last set of terms to be exchanged between the parties during the negotiation phase and before the formation of the contract.

In conclusion, the contract was validly formed with the Claimant's jurisdiction clause under the CISG's standards for contract formation, and the validity of the jurisdiction clause itself is confirmed by the provisions of the Brussels I bis Regulation.

2.1.2. Special jurisdiction: the place of performance

Should the Court determine that the previously submitted arguments are not sufficient to prove the validity of the jurisdiction clause, the Claimant asserts that jurisdiction nonetheless remains under the Court of Sofia pursuant to the rules of special jurisdiction contained in Article 7(1) of Brussels I bis.

Article 7 introduces an exception to the general rule established in Article 4, which sets the defendant's domicile as the appropriate jurisdictional forum in most cases. Under the provisions of Article 7(1), this exception gives jurisdiction to "the courts for the place of performance" in matters relating to a contract, and splits the rule in two different tracks: one for the 'sale of goods', where jurisdiction goes to the place of delivery, and another

for the ‘provision of services’, where the jurisdiction goes to the place where the service was provided.

The First Respondent may argue that, since they provided “tailor-made designs”, the contract was for the ‘provision of services’ rather than a mere ‘sale of goods’, making Milan the competent jurisdictional forum. The Court of Justice of the European Union, however, ruled in *Car Trim GmbH v. KeySafety Systems Srl* (Case C-381/08, 2010) that a contract for the supply of goods to be manufactured is still classified as a ‘sale of goods’ if two conditions are met: the purchaser did not supply the materials, and the supplier is responsible for the quality of the goods and their compliance with the contract.[2] Since the First Respondent’s representative explicitly stated that they had the required materials available, and that they would “in any case comply with the highest standards in the production of the furniture”, both requirements set by the CJEU to classify a contract as ‘sale of goods’ are met. Additionally, in his Opinion of *Car Trim* (2009), Advocate General Mazák established that the “essential obligation” in such manufacturing contracts remains the delivery of the physical components.[3] Applying this doctrine to the present dispute, the core of the contract for the tables and cabinets is undeniably a sale of goods, keeping the jurisdictional focus firmly on the place of delivery.

Regarding the specific consideration of the ‘place of performance’, Article 7(1)(b) establishes that it shall be “in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered”.

While the initial agreement explicitly established ‘DAP Sofia’ (Delivered-At-Place) incoterms for the transaction, the Claimant acknowledges that a subsequent, last minute accommodation resulted in half of the consignment (three tables and three cabinets) being delivered to the premises of one of his clients in Rijeka, Croatia, while the remaining goods were delivered to Sofia. The First Respondent may argue that this split delivery invalidates the status of Sofia as the place of performance. However, the Claimant asserts that Sofia remains the principal place of performance under the contract, as the posterior diversion of half of the consignment to Rijeka did not alter the core geographical center

[2] Case C-381/08 *Car Trim GmbH v. KeySafety Systems Srl* ECLI:EU:C:2010:90, para. 43.
[3] Opinion of Advocate General Mazák, Case C-381/08, *Car Trim GmbH v. KeySafety Systems Srl*, ECLI:EU:C:2009:577, para. 24.

of the agreement, which was always intended to be the premises of the Bulgarian yacht builder (the Claimant's contractual counterparty) in Sofia.

Furthermore, Recital 16 of the Brussels I bis Regulation emphasizes that alternative grounds of jurisdiction exist to facilitate the sound administration of justice based on a close connection between the court and the action. Because the Claimant seeks avoidance of the entire contract and damages for the non-conformity of the goods, fragmenting the jurisdiction between Sofia and another Member State would create inefficient parallel proceedings and risk irreconcilable judgements, contradicting the Regulation's core tenet of a harmonious administration of justice.

In the *Car Trim* judgment, the Court firmly ruled that the place where the goods were delivered or should have been delivered must be determined first and foremost "on the basis of the provisions of that contract", and clarified that it is only when it is impossible to determine the place of delivery from the contractual provisions that a court should look to the actual physical transfer of the goods as a default rule.[4] In the present case, identifying the contractual place of delivery is unambiguous. The First Respondent expressly offered the delivery terms as 'DAP Sofia', an offer which the Claimant explicitly accepted. Therefore, based strictly on the clear provisions of the contract as mandated by the *Car Trim* precedent, the legally binding place of delivery is Sofia, establishing the requisite close connection to grant the Court of Sofia special jurisdiction over the dispute.

A similar situation to the present dispute can be observed in *Color Drack GmbH v. Lexx International Vertriebs GmbH* (Case C-386/05, 2007). While here the CJEU dealt with fragmented deliveries within a single Member State, its underlying logic regarding the sound administration of justice should apply by analogy. In this case, the CJEU established that, when dealing with different places of delivery within a single Member State, the jurisdiction is of the court of the "principal place of delivery, which must be determined on the basis of economic criteria". If it were impossible to pinpoint the principal place of delivery based on said 'economic criteria', the plaintiff would then have the possibility to sue the defendant in the court of any of the places of delivery of their choice.[5] Since the delivery was economically split equally between Sofia and Rijeka,

[4] Case C-381/08, *Car Trim*, para. 62.
[5] Case C-386/05, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, ECLI:EU:C:2007:262, paras. 40, 42.

applying the criteria of the CJEU by analogy would allow the Claimant to choose the court of Sofia to ensure the sound administration of justice.

The centralization principle of the *Color Drack* ruling (that a single court should have jurisdiction over all claims at the 'principal place of performance' when delivery is split) was later expanded by the CJEU on *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA* (Case C-19/09, 2010) to address the provision of services fragmented across different Member States. Crucially, the Court ruled that this cross-border principle also applies to the sale of goods. To justify this expansion, the CJEU declared that the rules of special jurisdiction for the sale of goods and the provision of services "have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation". Consequently, the Court ruled that a differentiated approach cannot be applied when performance crosses national borders, meaning the 'principal place of delivery' test applies even when goods are delivered in different Member States.[6] The CJEU also stated that "the place of the main provision of services must be deduced, in so far as possible, from the provisions of the contract itself",[7] further legitimating Sofia ('DAP Sofia') as the appropriate jurisdictional forum.

Therefore, the competent forum of jurisdiction for the dispute between the Claimant and the First Respondent shall be the Court of Sofia, based on the jurisdiction clause validly incorporated into the contract and, subsidiarily, in accordance with the rules of special jurisdiction from Brussels I Bis Article 7(1).

2.2. Jurisdiction over the Second Respondent

The jurisdiction of this Court over the dispute arisen between the Claimant and the Second Respondent is indisputable and rests on a clear, bilateral agreement.

2.2.1. The Signed Jurisdiction Clause and the Place of Delivery

Unlike the electronic incorporation of the Claimant's choice of law and jurisdiction to the contract with the First Respondent, the contract between the Claimant and the Second Respondent expressly included a prorogation clause that provided for the jurisdiction of the Court of Sofia, as it explicitly stated that such forum was "to decide all disputes arising out of or in connection with this contract". The contract was signed by Swift, making the

[6] Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*, ECLI:EU:C:2010:137, paras. 26-27.
[7] *Ibid.*, para. 38.

prorogation clause legally binding by the strictest formal requirements found on Article 25(1)(a) Brussels I bis, “in writing or evidenced in writing”.

Even if this Court were to hypothetically disregard the validity of the prorogation clause, the Court of Sofia unequivocally retains jurisdiction over the Second Respondent under the default rules of the CMR Convention. According to Article 31(1)(b) of the CMR Convention, a plaintiff may bring an action in the courts of a country within whose territory the place designated for delivery is situated. The Claimant explicitly instructed the Second Respondent to transport the consignment from Rotterdam to the Claimant's designated location in Sofia. Therefore, as the agreed place of delivery, the Court of Sofia holds unquestionable jurisdiction over the dispute.

2.2.2. The Validity of the Clause under the CMR and the ‘Shield vs Sword’ Argument

The Second Respondent will attempt to use Article 31(1) of the CMR Convention, which contains a list of forums in addition to the mutually agreed, along Article 41(1) of the CMR Convention, which states that any stipulation directly or indirectly modifying the Convention is null and void, to argue that the jurisdiction clause is null and void in its entirety.

The Claimant asserts that the jurisdiction clause remains valid as an alternative forum. Article 41(1) of the CMR explicitly states that “the nullity of such stipulations shall not imply the nullity of the other provisions of the contract”. Additionally, the Claimant affirms that the Second Respondent’s attack on the jurisdiction clause fundamentally perverts the underlying rationale of the Convention. Article 41 of the CMR is designed as a protective shield to safeguard cargo interests (the shippers) from restrictive standard terms unilaterally imposed by carriers. In the present case, the Claimant explicitly instructed the Second Respondent and incorporated the jurisdiction clause into the signed agreement, and the Second Respondent is attempting to use Article 41 not as a shield against unfair terms, but as a sword to invalidate a mutually agreed provision so it can launch a preemptive jurisdictional strike in Rotterdam.

Furthermore, Article 31(1) of the Convention explicitly grants the right to choose the jurisdictional forum among the available options (including a jurisdiction designated by mutual agreement) to ‘the plaintiff’. The Claimant asserts that under a good-faith interpretation of the CMR, the ‘plaintiff’ intended by Article 31(1) is the party seeking substantive compensation for lost or damaged goods. This is unequivocally the Claimant,

who suffered the loss of four chairs and two sofas, and severe damage to four additional chairs. The Second Respondent's initiation of negative declaratory proceedings is a purely artificial maneuver designed to usurp the title of ‘plaintiff’. This preemptive maneuver cannot strip the substantive Claimant of its right to invoke the explicitly and mutually designated Court of Sofia.

3. ON THE STAY OF PROCEEDINGS

The Second Respondent requests this Court to stay its proceedings in favor of the Court of Rotterdam, relying on the *lis pendens* rule contained in Article 31(2) of the CMR Convention. The Claimant submits that this request must be rejected in its entirety, as it relies on an abusive litigation tactic that European law explicitly prohibits.

3.1. The Second Respondent’s Reliance on Article 31(2) CMR

Article 31(2) CMR stipulates that where an action is pending before a competent court, “no new action shall be started between the same parties on the same grounds”. Because the Second Respondent initiated negative declaratory proceedings in the Netherlands prior to the Claimant filing this substantive action for damages, the Second Respondent will argue that the strict chronological priority rule of Article 31(2) CMR mandates that the Court of Sofia must stay its proceedings. By relying on this rule, the Second Respondent will seek to legitimize its preemptive “torpedo” action in Rotterdam, a maneuver designed solely to bypass the explicitly agreed jurisdiction clause in favor of this Court.

While the Claimant acknowledges that the CMR generally governs the underlying transport, the Second Respondent’s attempt to use Article 31(2) of the CMR as an absolute shield for its abusive litigation tactic is fundamentally flawed and directly contradicts the established hierarchy of European law.

3.2. Integration of Brussels I bis Principles to supplement the CMR and prevent Abusive “Torpedo” Actions

The Second Respondent will argue that under Article 71(1) of the Brussels I bis Regulation, which establishes that the Regulation “shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments”, the CMR takes absolute

precedence. While the CMR governs the contract, this Convention does not contain mechanisms to resolve modern, bad-faith "torpedo" actions—situations where a party rushes to a different court seeking a negative declaration solely to preempt the agreed forum. The Claimant's disagreement with the Second Respondent's abusive interpretation of the CMR Convention is supported by the foundational principles of EU law and by European case law.

Even though the Claimant conceded that the clause operates as an alternative forum for the substantive plaintiff under Article 41(1) of the CMR Convention, the signed contract expressly granted "exclusive jurisdiction" to the Court of Sofia. The CMR Convention is designed to protect the injured party by guaranteeing the "plaintiff" a list of jurisdictional options under Article 31(1). However, the Second Respondent is attempting to exploit this protective shield as a sword. By racing to the court in Rotterdam to file a preemptive negative declaratory action, the Second Respondent is artificially usurping the title of 'plaintiff'. This is a bad-faith maneuver designed to abuse the strict chronological *lis pendens* rule of Article 31(2) of the CMR, stripping the true victim—the Claimant who suffered the actual damages—of its right to recover losses in the mutually agreed forum. Therefore, the clause remains procedurally exclusive against the Second Respondent under Article 25(1) of the Brussels I bis Regulation. The Second Respondent cannot weaponize a CMR provision designed to protect plaintiffs in order to escape an exclusive agreement it voluntarily signed, especially when doing so facilitates the exact abusive litigation tactics that European law seeks to prevent.

Indeed, in a consistent line of jurisprudence, the Court of Justice of the European Union has strictly limited the primacy of specialized conventions over EU law. In *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, 2010) the CJEU established that while Article 71(1) allows conventions like the CMR to apply, their application cannot compromise the principles underlying judicial cooperation in the European Union. The CJEU definitively ruled the following regarding the Brussels I Regulation (now recast to Brussels I bis):

> Article 71 of Regulation No 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is part. Accordingly, that Article cannot be interpreted as meaning that, in a field covered by the regulation, such as the carriage of goods by road, a specialised convention, such as the CMR, may

> lead to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation's provisions lead.[8]

Therefore, the provisions of the CMR can only be applied if they ensure results "under conditions at least as favourable as those provided for by the regulation".[9] This principle was explicitly reaffirmed in *Nipponkoa Insurance Co. (Europe) Ltd v. DTC Surhuisterveen BV* (Case C-452/12, 2013), where the CJEU held that Article 71 precludes interpreting an international convention in a manner which fails to ensure that the underlying objectives and principles of the EU Regulation are observed.[10]

To understand the current objectives and principles of European judicial cooperation, one must examine a fundamental difference introduced by the 2012 recast of the Brussels I bis Regulation. Under the predecessor Regulation 44/2001, the general *lis pendens* mechanism relied on a strict chronological priority rule. This rigidity allowed bad-faith actors to weaponize the "first-in-time" rule, launching preemptive negative declaratory actions (or "torpedoes") in unagreed forums to successfully paralyze the mutually designated courts.

In her Opinion in the *TNT Express* case (2010), Advocate General Kokott warned the Court that diverging national interpretations of the CMR's liability rules inevitably trigger "a race by both parties to the court whose interpretation is favourable to each of them". She recognized that this race for a preemptive negative declaratory judgment frequently results in the exact procedural chaos seen in the present dispute: "parallel proceedings before the courts of different States".[11]

Recognizing this severe procedural abuse, the European legislature deliberately amended the existing legal framework. Recital 22 of the new Brussels I bis Regulation introduced a paramount objective: "to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics". To enforce this, the legislature created a strict anti-torpedo exception, codified in Article 31(2) of the Brussels I bis Regulation,

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[8] Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, ECLI:EU:C:2010:243, para. 51.
[9] *Ibid.*, para. 56.
[10] Case C-452/12, *Nipponkoa Insurance Co. (Europe) Ltd v. DTC Surhuisterveen BV,* ECLI:EU:C:2013:858, para. 39.
[11] Opinion of Advocate General Kokott, Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, ECLI:EU:C:2010:50, paras. 22-23.

which mandates that where an agreement confers exclusive jurisdiction, any other court seised must stay its proceedings until the designated court has ruled on its jurisdiction.

Applying the CJEU framework from the *TNT* and *Nipponkoa* cases to the present dispute yields only one legally sound conclusion. Interpreting Article 31(2) of the CMR to permit the Second Respondent to bypass the mutually agreed Court of Sofia via a preemptive torpedo action in Rotterdam would result in a standard of legal certainty significantly less favorable than what Brussels I bis now guarantees, and it would directly violate the core EU objective of preventing "abusive litigation tactics" established in Recital 22. Therefore, following the CJEU's strict mandate, the CMR cannot be applied to circumvent this fundamental principle of the EU legal system. To avoid concurrent proceedings and protect the validity of the exclusive choice of court agreement, the anti-torpedo mechanism of Article 31(2) of Brussels I bis must supplement the CMR, legally requiring the Court of Rotterdam to stay its proceedings.

4. ON THE APPLICABLE LAW

Having established the jurisdiction of the Court of Sofia, the Claimant submits that the merits of the dispute must be ruled exclusively by Bulgarian National law. Because this dispute concerns an international sale of goods, the formation of the contract is governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

4.1. Applicable Law Over the First Respondent

The Claimant contends that the CISG takes precedence over the Rome I Regulation regarding the formation of the contract pursuant to Article 1(1)(a), which states that the Convention applies to contracts for the sale of goods when the parties have their places of business in Contracting States. As affirmed by the Spanish Supreme Court in STS 398/2020, the CISG prevails over the Rome I Regulation because the Regulation's framework respects the application of preexisting international conventions to which Member States are parties.[12] Furthermore, Article 4 of the CISG explicitly dictates that the CISG governs the formation of the contract of sale.

[12] Tribunal Supremo (Sala de lo Civil) [Supreme Court], 6 July 2020, STS 398/2020, ECLI:ES:TS:2020:2282, Fundamento de Derecho Tercero, punto 1 (Spain).

Under the CISG's rules of contract formation, the Claimant's Terms and Conditions were validly incorporated into the agreement. During the negotiations, the formation of the contract was strictly governed by the CISG. As explained in the previous section regarding the validity of the jurisdiction clause under CISG and the 'last shot' rule, the Claimant fired the 'last shot' on May 26th by explicitly stating the contract would be under its own Terms and Conditions. By proceeding to manufacture the goods without objection, the First Respondent accepted the Claimant's terms by conduct under Article 18(3) of the CISG.

Accordingly, the Claimant's terms were validly incorporated into the contract under the formation rules of the CISG. Because the parties' explicit choice of law was validly incorporated into the agreement, this choice must be enforced pursuant to Article 3(1) of the Rome I Regulation (Regulation (EC) No 593/2008), which dictates that "a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case".

The Claimant's Terms and Conditions clearly state: "Bulgarian national law, with the exclusion of the CISG (Vienna Sales Convention 1980), applies to all transactions and the court of Sofia has jurisdiction." The parties did not merely choose a specific law but exercised their right under Article 6 of the CISG ("the parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions") to expressly exclude its application. This dual-layered choice (choosing Bulgarian national law and rejecting the CISG) demonstrates a clear and certain intention under Article 6 of the CISG and Article 3(1) of the Rome I Regulation.

The First Respondent may attempt to invoke Article 10(2) of the Rome I Regulation to argue a lack of consent under Italian law. However, following the standard for electronic communications in European commerce established by the CJEU in the *El Majdoub* case, terms provided via a hyperlink are validly communicated and constitute a durable record if they can be saved and printed.[13] Since the First Respondent admitted to opening the hyperlink, this perfectly satisfies the consent for criteria of Italian law. Under Article 1341 of the Italian Civil Code, a party is bound by general conditions if they should have known them by using ordinary diligence. Therefore, the First Respondent's admitted access to the hyperlink along the Claimant's repeated mention to the exclusive application of

[13] Case C-322/14, *El Majdoub v. CarsOnTheWeb.Deutschland GmbH*, para. 36.

Bulgarian national law on his emails overwhelmingly satisfies the requirements of ordinary commercial diligence, validating the choice of Bulgarian law and unequivocally making it the applicable law over the present dispute.

In conclusion, CISG takes precedence over any other law regarding the formation of the contract. Once formed, the CISG is excluded and Bulgarian law governs the merits of the dispute in accordance with Article 3(1) of the Rome I Regulation.

4.2. Applicable Law Over the Second Respondent

The Claimant submits that the law governing the dispute with the Second Respondent is the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) pursuant to Article 1:

> This Convention shall apply to all contracts for the carriage of goods by road for reward by means of vehicles where the place of loading of the goods and the intended place of delivery, as indicated in the contract, are situated in two different countries, one of which at least is a contracting country, and irrespective of the domicile and nationality of the parties.

Since both the place of loading (the Netherlands) and the place of delivery (Bulgaria) are in contracting nations of the CMR Convention, its applicability is mandatory and automatic. However, the Claimant would like to contest the application of the liability limits of Article 23(3) over the dispute.

During its negative declaratory proceedings under the wrongfully seised Court of Rotterdam, the Second Respondent attempted to deny its liability or, even if it were deemed liable, to limit it to 8.33 Special Drawing Rights (SDR) per kilogram of damaged goods under Articles 23(3) and 23(7). The Claimant invokes the rule of Article 29 of the Convention to lift the limited liability of the Second Respondent.

1. The ‘Willful Misconduct’ of Article 29. Article 29 of the Convention expressly strips the Second Respondent of its right to rely on provisions that exclude or limit their liability when the damage is caused by the carrier’s willful misconduct:

> 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 arises from his willful misconduct or a fault attributable to him which, according

> to the law of the jurisdiction judging the case, is considered equivalent to willful misconduct.

Even though the CMR Convention's application is automatic, the exception contained in Article 29 points to the law of the jurisdiction judging the case (the Court of Sofia) in order to determine the existence of said 'willful misconduct'.

2. The Standard for 'Willful Misconduct' under the Bulgarian Obligations and Contracts Act (OCA). To determine whether the Second Respondent exhibited 'willful misconduct' we must look at the Bulgarian Obligations and Contracts Act (OCA), the applicable Bulgarian law for damage liability and contractual disputes.

2.1. Article 63 and the standard of due diligence. While the OCA does not provide a specific definition for what constitutes 'willful misconduct' or the analog concept of 'gross negligence', we can infer it by looking at the contents of Article 63:

> Each of the parties to the contract must fulfil its obligations arising from it accurately and in good faith, in accordance with the provisions of the law, and must not obstruct the other party from fulfilling its obligations in the same manner. Obligations must be fulfilled with due diligence, except when the law provides for some other degree of diligence.

According to this provision, ignoring the Claimant's explicit instructions to not leave the carriage unattended at night would constitute a great lack of due diligence, which we can reasonably equate to 'gross negligence' or the 'willful misconduct' standard of the CMR Convention.

2.2. Article 82 and Bad Faith. Article 82 OCA reads as follows:

> The damages shall cover the losses suffered and the loss of profit as far as they are a direct and immediate consequence of the non-performance and could have been foreseen upon the arising of the obligation. However, if the debtor has acted in bad faith, he shall be liable for all direct and immediate damages.

Reading the contents of Article 82 one could argue that, by ignoring the Claimant's specific safety and security instructions in an environment where the damages could be easily foreseen and prevented, the driver was not just committing a careless mistake (ordinary negligence) but consciously acting in bad faith.

2.3 Article 94 and the invalidity of liability limits. Article 94 OCA states the following: "arrangements which a priori rule out or reduce the debtor's liability for deliberate actions or gross negligence shall be null and void". Under Bulgarian law, any contractual or conventional limitation of liability (like the 8.33 SDR limit of Article 23(3) CMR) is strictly nullified when the damage is caused by gross negligence. This Article perfectly reflects the spirit of Article 29 of the CMR Convention.

3. The Responsibility of the Second Respondent. The Second Respondent may try to deny or limit the extent of any liability it may incur in by claiming that the driver acted independently and against company policy when he went to have dinner. Needless to say, this is a completely baseless argument and an artificial attempt shift responsibility to the driver, and is easily dismissed by Article 3 of the CMR Convention ("persons for whom the carrier is responsible"), which states that the carrier will be liable for the acts of his servants as if they were his own when committed within the scope of their employment.

Furthermore, Article 17(1) CMR states that "the carrier is liable for total or partial loss or damage that occurs between the time the goods are loaded and the time they are delivered, as well as for delays in delivery". Article 17(2) continues by saying that the carrier shall be released from his liability only when the damage is caused by a fault of the person concerned (the Claimant) or by circumstances that the carrier could not avoid and the consequences of which he could not prevent. Since the Claimant gave specific instructions not to leave the carriage unattended at night, it could be easily foreseen that ignoring said instructions would result in damaged or stolen goods, making the provisions of Article 17(2) inapplicable to the present dispute.

4. Relevant Case Law on 'Willful Misconduct' and Liability Limits. The Second Respondent may attempt to use international case law such as *Mr Paul Knapfield v. C.A.R.S Holdings Limited & Ors* (Case No. CL-2020-000189, 2022) to show restrictive interpretations of the concept of 'willful misconduct'. In this specific case, the UK High Court upheld the liability limits of Article 23 CMR basing their ruling on the fact that, under UK law, 'gross negligence' and 'willful misconduct' are treated as completely different categories.[14] The UK High Court, however, specifically noted that this strict distinction is shared by certain legal systems besides the UK, such as the Netherlands and

[14] *Mr Paul Knapfield v. C.A.R.S Holdings Limited & Ors*, EWHC 1437 (Comm), paras. 100, 128.

Belgium.[15] This implies that such distinction is not universal and is only applied to the case following the contents of Article 29 CMR, which establishes that determining the existence of 'willful misconduct' relies entirely on the laws of the forum seised, which in the present dispute corresponds to Bulgarian national law.

On the contrary, the Spanish Supreme Court ruled in STS 399/2015 that the specific circumstances surrounding the theft of the goods—namely parking in a dangerous, accessible, and unguarded location, the weak protection of goods in a trailer covered only by a tarpaulin, and the absence of supervision by the driver—justified classifying the carrier's conduct within the broad notion of willful misconduct. The Court held that this constituted a breach of the basic duties of custody incumbent upon the carrier,[16] a conclusion reached even without the added factor of the driver explicitly ignoring a Claimant's specific safety instructions.

Even though there is conflicting jurisprudence across European Courts in the interpretation of Article 29 CMR, which comes as a natural consequence of each jurisdiction's individual interpretation of 'willful misconduct', we can affirm that, under Bulgarian law and specifically Articles 63, 82 and 94, the driver's disregard of its basic custody duties, coupled with his disregard of the Claimant's specific security instructions, are more than enough to classify the driver's actions as 'willful misconduct' under Article 29 and lift the liability limits of Article 23.

Therefore, we can arrive at the following conclusions regarding the applicable law over the dispute with the Second Respondent:

1. Because the contract of carriage involves the taking over of goods in the Netherlands and a designated delivery in Bulgaria, the matter of the dispute falls automatically and mandatorily under the scope of the CMR Convention pursuant to Article 1(1), which takes precedence over default national conflict-of-law rules.

2. As stated by Article 29 CMR, the possible presence of 'willful misconduct' on the Second Respondent's behalf points to Bulgarian national law (the Bulgarian OCA, specifically) in order to determine if such misconduct took place and, subsequently, if the party responsible can avail itself with the provisions that limit its liability.

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[15] *Ibid.*, para. 100.

[16] Tribunal Supremo (Sala de lo Civil) [Supreme Court], 10 July 2015, *STS 399/2015*, ECLI:ES:TS:2015:4267, Fundamento de Derecho Segundo, punto 3 (Spain).

3. By consciously choosing to ignore the Claimant's specific safety instructions, the Second Respondent clearly breached the statutory baseline of 'due diligence' and 'good faith' of Articles 63, 82 and 94 of the OCA, exhibiting a grossly negligent behavior analog to 'willful misconduct'. This dismisses any attempt by the Second Respondent to limit the extent of its liability for the damages that took place..

Therefore, the Claimant submits to this Court that the Second Respondent's liability cannot be limited by the provisions of Article 23(3) CMR as established in Article 29 CMR, making him liable for the full amount of damaged goods (84,000 EUR).

THE DEFENDANTS' MEMORANDUM

1. STATEMENT OF FACTS

1. About the Parties. Tosca Mobili s.r.l. ("Tosca" or "the First Respondent") is a highly respected manufacturer of high-end furniture domiciled in Milan, Italy, possessing an impeccable reputation for delivering Italian quality. Swift, "the Second Respondent", is a professional carrier with seat in Gdansk, Poland. Royal Furniture OOD ("Royal" or "the Claimant") is a designer of furniture for numerous luxurious yachts in mainly Europe and the Middle East. Royal is often instructed by yacht builders and owners of yachts. It is domiciled in Sofia, Bulgaria.

2. On the Commercial Relationship and Applicable Terms. On May 20th 2025, Royal's representative Ivan approached Tosca to request the custom manufacture of 6 tables and 6 cabinets, as well as the purchase of 14 chairs and 6 sofas, and provided tailored designs. On May 23rd 2025, Tosca's representative Maria replied and offered to manufacture the custom tables and cabinets for EUR 168,000 (DAP Sofia), warning Ivan that the process would be intense and time-consuming. For the existing chairs and sofas, Tosca offered a price of EUR 192,000 (EXW Rotterdam).

Crucially, Tosca's offer explicitly contained a hyperlink to its terms and conditions, noting that "the court at the place of performance or the court in Milan shall have jurisdiction", along an email header that stated that "Italian law is exclusively applicable". Despite receiving this clear communication and hyperlink, Royal's representative failed to check Tosca's website or review the accessible terms and conditions before proceeding.

On May 24th 2025, Ivan instructed the Bulgarian Trade Bank to issue a Letter of Credit for the amount of EUR 134.400 for the tables and cabinets and paid EUR 192.000 for the chairs and sofas. After the payment had been sent, Ivan sent an email saying that they accepted Tosca's offer "under their own Terms and Conditions", asking Maria to proceed with the transaction.

3. Tosca's Good Faith Performance. On July 25th, Maria informed Ivan that the tables and cabinets were ready to be picked up by the carrier on July 30th and delivered to Sofia the following day. On July 30th 2025, just one day before the scheduled delivery in Sofia, Royal urgently contacted Tosca to alter the delivery location for half of the goods (three

tables and three cabinets) to Rijeka (Croatia) instead of Sofia. Demonstrating utmost flexibility and commitment to client satisfaction, Tosca accommodated this last-minute request and arranged for three tables and three cabinets to be diverted and dropped off at the requested location, with the remainder being delivered to Sofia on July 31st.

4. The Unfounded Contract Avoidance by Royal. Approximately ten days after Tosca had delivered the goods and received payment, Royal sought to avoid the contract. This decision was based solely on the actions of Royal's own client (a Bulgarian yacht builder), who had reacted to unverified news reports alleging that Tosca had been using unethical wood. Tosca received similar claims from various other counterparties and was understandably not in a position to reimburse them based on unsubstantiated online reports.

5. The Carriage Incident and Swift's Proactive Legal Action. Separate from the custom manufacturing, Royal contracted the services of Polish carrier Swift to transport the goods from Tosca's warehouse in Rotterdam to Royal's warehouse in Sofia. On July 15th 2025, during the carriage, the Swift driver parked the truck near Graz, Austria, to have dinner nearby. During this brief period, third parties stole four chairs and two sofas, and damaged four other chairs.

Following this incident, Swift acted promptly and lawfully to resolve the matter. On July 21st 2025, Swift initiated negative declaratory proceedings against Royal in the Netherlands before the court of Rotterdam. Swift requested the court to declare that it is not liable for the damages, or alternatively, that its liability is limited under Article 23(3) of the CMR Convention.

6. The Filing of Royal's Claims. It was not until August 26th 2025, more than a month after Swift had already seised the Rotterdam court, that Royal filed a reactionary and parallel claim against both Swift and Tosca before the court of Sofia.

2. ON JURISDICTION

The First and Second Respondents (Tosca Mobili s.r.l. and Swift) formally contest the jurisdiction of the Court of Sofia. Given the cross-border nature of this civil and commercial dispute, the question of international jurisdiction is governed by Regulation (EU) No 1215/2012 (Brussels I bis), by the Convention on the Contract for the

International Carriage of Goods by Road (CMR Convention), and by the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The CISG governs the formation of the contract between the First Respondent and the Claimant, while Brussels I bis governs the validity of the jurisdiction clause. The CMR governs the jurisdictional framework of the dispute between the Second Respondent and the Claimant.

2.1. Jurisdiction over the First Respondent

The First Respondent contends that the Court of Sofia must decline jurisdiction based on a clear lack of jurisdiction as argued below.

2.1.1. The validity of the prorogation clause and Article 25(1) Brussels I bis

The First Respondent asserts that the prorogation clause that established that "the court at the place of performance or the court in Milan shall have jurisdiction" was validly incorporated into the contract pursuant to Article 25(1) Brussels I bis:

> If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.

Subparagraph (a) of said Article continues to say that, for a forum selection clause to have validity, it must be made either "in writing or evidenced in writing", and subparagraph (c) adds "in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware". As ruled by the Court of Justice of the European Union in *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH* (Case C-322/14, 2015), the landmark case concerning electronic writing requirements for jurisdiction clauses, the mere technical possibility of providing a "durable record" that can be printed or saved by the counterparty is sufficient to be considered "writing" under Article 25's standard for forum selection clause validity.[17] Since the First Respondent made explicit mention to the jurisdiction of the Court of Milan on the main text (not in

[17] Case C-322/14, *Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH*, ECLI:EU:C:2015:334, para. 40.

the footer) of the last email it sent before the formation of the contract, *El Majdoub*'s criteria for providing a durable record is perfectly satisfied.

Additionally, in *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL* (Case C-106/95, 1997) the Court of Justice ruled that, in order to respect the specific practices and requirements of international trade, "a jurisdiction clause may be validly concluded in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware".[18] By including the jurisdiction clause in the main text of the email and not in the footer or in a hidden hyperlink, the First Respondent made it unequivocally clear to the Claimant that the court of Milan shall have exclusive jurisdiction.

The Claimant may rely on older doctrine, such as Advocate General Capotorti´s Opinion of *Estasis Salotti di Colzani Aimo e Gianmario v. RÜWA Polstereimaschinen GmbH* (Case 24/76, 1976), to argue that he did not explicitly consent to the First Respondent's jurisdiction clause. In his Opinion, AG Capotorti said that "there must be proof of a consensus, that the parties are *ad idem*, which is obviously something more than merely knowing or being in a position to know the clauses which the other party has drafted for his own benefit".[19] What AG Capotorti tried to avoid was the use of 'hidden clauses' to trick parties into unknowingly accepting jurisdiction clauses. This strict interpretation of the law, however, has relaxed over the years to accommodate the realities of modern commerce. Advocate General Tesauro, in his Opinion in the *MSG* case (1996), drawing on the Schlosser Report, noted that the amendments made to the Brussels Convention in 1978 were added precisely because international trade heavily relies on standard conditions, and requiring written consent for every one of them would be "unacceptable in international trade".[20]

While Advocate General Capotorti's formal requirements relaxed over the years, the doctrinal imperative to prevent hidden clauses first articulated by AG Capotorti remains fundamental to the law. Relying on the Jenard Report, AG Capotorti emphasized that the law must "render ineffective clauses in contracts which are liable to escape notice".[21] The

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[18] Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, ECLI:EU:C:1997:70, para. 16.
[19] Opinion of Advocate General Capotorti, Case 24/76, *Estasis Salotti di Colzani Aimo e Gianmario v. RÜWA Polstereimaschinen GmbH*, ECLI:EU:C:1976:153, p. 1846.
[20] Opinion of Advocate General Tesauro, Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, ECLI:EU:C:1996:361, para. 23.
[21] Opinion of Advocate General Capotorti, Case 24/76, *Estasis Salotti*, p. 1846.

Court of Justice in *MSG v. Les Gravières Rhénanes* reaffirmed exactly this principle and ruled that the modern relaxation of formal requirements does not eliminate the fundamental need for real consensus between the parties, stressing that "the weaker party to the contract should be protected by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed".[22]

In his Opinion in the *MSG* case, Advocate General Tesauro established that "actual consensus, which was initially essential and guaranteed only by writing or evidence in writing of an oral agreement, now yields in international trade to a presumption of actual consensus".[23] Tesauro confirmed that a jurisdiction clause is validly concluded "by reason of that party's having paid without objection" after receiving the terms, provided that this conduct aligns with practices "followed continuously and generally" in that sector.[24]

By placing the jurisdiction clause explicitly in the email's main text, the First Respondent satisfied Advocate General Capotorti's strict demand for transparency and genuine consensus. Because the clause was impossible to miss, the Claimant's subsequent payment constituted valid consent under Advocate General Tesauro's modern international trade standards. Therefore, both foundational doctrines confirm the Milan jurisdiction clause is indisputably valid.

2.1.2. Contract formation and acceptance by conduct under CISG

The Claimant may allege that the representative of the First Respondent that carried out the negotiations opened a hyperlink that led to the Claimant's own terms and conditions, leading to the contract being formed under the terms and conditions of the Claimant instead of the First Respondent's. While the First Respondent does not contest that it did indeed open the hyperlink, it asserts that it included its forum selection clause in the last email that was exchanged between the parties before the contract was formed, making it the jurisdiction clause to finally be incorporated into the contract.

Under Article 19(1) of the CISG, "a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer." Since the Claimant's email from May 20th included the Claimant's own terms and conditions, the email sent by the First Respondent on May 23rd

[22] Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, para. 17.
[23] Opinion of Advocate General Tesauro, Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, para. 25.
[24] *Ibid.*, para. 33.

with a different jurisdiction clause would effectively constitute a counteroffer. The Claimant may argue that the final email, which they sent on May 26th, explicitly said that they accepted the First Respondent's offer "under their own terms and conditions", constituting the final counteroffer before the First Respondent delivered the goods and therefore incorporating the Claimant's terms and conditions to the contract under the 'last shot' rule.

The First Respondent, however, would like to clarify that the contract had already been formed, making the Claimant's final counteroffer legally void. Because the Claimant proceeded with payment after the First Respondent's counteroffer, but before sending their own counteroffer, the First Respondent's forum selection clause was the one effectively incorporated to the contract. This is consistent with the contents of Article 18(3) of the CISG, which establishes the following:

> However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 18(2) clarifies:

> An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror.

While Article 18(3) CISG clearly states that the contract is formed at the moment the act (payment) is performed, Article 18(2) CISG mentions "within a reasonable time" as the window for the Claimant's assent to reach the First Respondent. Because electronic communications and modern banking transactions are virtually instantaneous, Tosca was aware of the Claimant's assent the minute he executed payment. Therefore, it can be expected by a seller to consider an offer accepted when the buyer executes payment, especially if made without an expression of dissent either before or simultaneously. Because the Claimant executed the payment on May 24th without previously or simultaneously raising an objection to the First Respondent's jurisdiction clause, it was

reasonable for the First Respondent to consider the contract's terms definitive when payment was executed.

Furthermore, Article 7(1) CISG establishes the need to observe good faith in international trade when interpreting the convention. In the context of international trade conducted through electronic means, it is a fundamental principle of good faith that a seller who issues an offer and subsequently receives full payment and a Letter of Credit without immediate objections to contractual terms can rightfully consider the contract unequivocally formed.

Therefore, under Article 18(3) of the CISG performance is instantaneous acceptance, and the moment the Claimant paid without objecting, the contract was sealed on Tosca's terms in good faith. Giving validity to the Claimant's final counter-offer, which was issued two days after the contract had been performed, would be a violation of the principles of good faith mandated by Article 7(1) of the CISG, which precludes a party from using delayed electronic communications to ambush a seller who has already accepted performance in reliance on their own terms.

2.1.3. The fragmentation of delivery places and Article 7(1) Brussels I bis

Even if this Court was to wrongfully disregard the First Respondent's validly incorporated jurisdiction clause in favor of the rules of special jurisdiction, the geographical reality of this dispute would still preclude the courts of Sofia from hearing the consolidated claim.

1. Article 7(1) and the Rules of Special Jurisdiction. Under Brussels I bis' Article 7(1)(b) for special jurisdiction, the place of performance of the obligation shall be, in the case of sale of goods, "the place in a Member State where, under the contract, the goods were delivered or should have been delivered".

Even though the tables and cabinets for which the First Respondent is being sued were to be delivered in Sofia, the Claimant's last-minute request to deliver half of the tables and cabinets to its client's warehouse in Croatia completely altered the terms of the transaction. While the original agreement included 'DAP Sofia' incoterms for the full cabinet and table cargo, the Claimant's last-minute alteration of the contract's terms means that, under the special jurisdiction rules of Article 7(1) Brussels I Bis, the delivery location and thus the 'place of performance' were no longer Sofia and was instead split in half with Rijeka.

Article 7(1), therefore, explicitly ties the court's power to the specific place where the goods were delivered, and establishes that a court inherently lacks this special jurisdiction over any goods that were physically delivered outside its territory.

2. The Requirement of a Close Connection. The reason why a court cannot artificially expand the reach of its jurisdiction is explained in Recital 16:

> In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen.

According to this Recital, rules of special jurisdiction exist precisely so that courts with close physical connection to a dispute can bypass the Regulation's general rule of the defendant's domicile. This Recital, however, sets a limit by saying that the existence of a close connection must ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. Since it is fundamentally unforeseeable for an Italian manufacturer to be sued in a Bulgarian court regarding the conformity of goods physically delivered to a Croatian company in Croatia, the 'close connection' test fails for the portion of the goods that were delivered in Croatia.

3. The Contradiction with the Doctrinal Foundations of Special Jurisdiction. The Claimant's attempt to artificially expand the jurisdiction of the Bulgarian courts over the entirety of the consolidated claim directly contradicts the doctrinal foundation of special jurisdiction. As Advocate General Tesauro emphasized in his Opinion in the *MSG v. Les Gravières Rhénanes* case, the sole justification for granting jurisdiction to the place of performance is the existence of a "direct and, above all, objective connection between the dispute and the courts having jurisdiction to entertain it".[25]

AG Tesauro strictly warns that special jurisdiction is justified exclusively by the "physical proximity of those courts to the relationship at issue".[26] Because the Bulgarian courts entirely lack this objective physical proximity to the half of the consignment physically

[25] Opinion of Advocate General Tesauro, Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, para. 9.
[26] *Id.*

delivered to a Croatian company in Rijeka, the Claimant cannot lawfully use Article 7(1) as anchor for the entirety of the dispute. Attempting to do so, as the Court of Justice noted in the same case, would result in designating a place of performance having "no real connection with the reality of the contract".[27]

Therefore, since the Claimant is bringing a consolidated action under a court that has no jurisdiction over part of such consolidated action, and since the claims against both halves of the consignment must be heard by the same court, the Court of Sofia comprehensively lacks special jurisdiction under Article 7(1) to hear this consolidated claim.

2.1.4. The general rule of Article 4(1) Brussels I bis and the sound administration of justice

Clearly, it is imperative that the dispute regarding both halves of the consignment is heard together in a single forum, as they are part of the same contract and materially refer to the same goods. As we have established, the goods were not delivered in a cohesive manner but were rather split up equally between two locations. The Claimant's attempt to group the entirety of the dispute in Bulgaria is a direct violation of the core principles of predictability and sound administration of justice of the Brussels I bis regulation.

1. The Primacy of Predictability and the Defendant's Domicile. Recital 15 of the Regulation states the following:

> The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor.

This establishes that Article 4(1), which dictates that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State", is the foundational rule. Exceptions to this rule, such as the place of delivery in cases of sale of goods, must be strictly interpreted and only applied when it is unequivocally clear that no other jurisdiction can hear the dispute. Splitting the cargo in two different delivery places located in two different Member States violates the spirit of predictability and unqualifies the Court of Sofia to hear the consolidated dispute, making the general rule of Article 4(1)

[27] Case C-106/95, *MSG v. Les Gravières Rhénanes SARL*, para. 31.

the only viable option left to preserve the Regulation's tenets of predictability and cohesive proceedings.

2. Ensuring the Sound Administration of Justice and Avoiding the Risk of Irreconcilable Judgements. The Claimant may also attempt to justify jurisdiction in Sofia by arguing that the claims against the First Respondent and the Second Respondent are connected. The Claimant will argue that, even if the Court disregards its arguments about special jurisdiction rules pointing to Sofia as the appropriate forum, Recital 21's mandate to avoid concurrent proceedings and ensure the sound administration of justice still points to Sofia as the appropriate forum to rule on the present dispute. This, however, is contradicted by Article 8(1), which clearly states that a person domiciled on a Member State may also be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together", in order to prevent separate proceedings from delivering irreconcilable judgments. The claim that the dispute must be heard by the Court of Sofia in order to ensure the sound administration of justice and avoid the risk of irreconcilable judgments is fundamentally wrong and directly contradicts Article 8(1), which clearly states that at least one of the defendants must be domiciled in Sofia. Since neither the First nor Second Respondent are domiciled in Sofia, the Court of Sofia lacks jurisdiction to hear the dispute.

Therefore, since the Court of Sofia is not competent to hear the dispute about the cargo that was delivered to Croatia, we must defer to the Regulation's general rule of the defendant's domicile and allow the Court of Milan to hear the dispute.

2.2. Jurisdiction over the Second Respondent

The Claimant's attempt to establish jurisdiction over the Second Respondent under the Court of Sofia relies entirely on a forum selection clause contained in the contract of carriage. While such clause was signed by the Second Respondent, the Claimant's argument is fundamentally flawed as it ignores the overriding application of the Convention on the Contract for International Carriage of Goods by Road (CMR Convention) and misinterprets the limits of party autonomy in international transport law.

2.2.1. The primacy of the CMR Convention over the Brussels I bis Regulation

The contract between the Claimant and the Second Respondent is for the international transport of a consignment by road, which unequivocally falls under the scope of the CMR Convention. In Article 1, the Convention clearly establishes its geographical scope of applicability:

> This Convention shall apply to all contracts for the carriage of goods by road for reward by means of vehicles where the place of loading of the goods and the intended place of delivery, as indicated in the contract, are situated in two different countries, one of which at least is a contracting country, and irrespective of the domicile and nationality of the parties.

Since both the Netherlands (place of loading) and Bulgaria (place of delivery) are Contracting Nations of the CMR Convention, it shall apply automatically.

Additionally, under the premises of its own Article 71(1), the Brussels I bis Regulation cannot affect existing conventions of which the Member States are parties of and which govern jurisdiction, among other things. Therefore, the jurisdiction rules of the CMR Convention supersede those of Brussels I bis, including the contents of Article 25 for the incorporation of prorogation clauses in matter of jurisdiction.

2.2.2. The competence of the Court of Rotterdam and Article 31 CMR

Under Article 31(1) of the CMR Convention, a plaintiff may bring an action before the courts of a contracting country designated by mutual agreement, or where the defendant has its habitual residence or principal place of business. Additionally, the Convention also grants jurisdiction to the courts of the country where "the goods are loaded or the place where they are to be delivered is located."

The factual and legal place of loading is established by the incoterms agreed upon in the transaction between the First Respondent and the Claimant. According to the contract, the chairs and sofas were purchased by the Claimant from the First Respondent under 'EXW Rotterdam' (Ex-Works) terms. Under Ex-Works terms, the seller's obligation consists of making the goods available at their own premises, meaning it is the buyer or their designated carrier who takes over the goods, assumes the risk, and executes the loading at the seller's location.

Since the Claimant instructed the Second Respondent to collect the goods at the First Respondent's warehouse in Rotterdam, Rotterdam was the definitive contractual and factual location where the Second Respondent loaded the goods and commenced the carriage. And because the CMR Convention dictates that an agreed forum is 'additional' but not 'exclusive', the Court of Rotterdam is the appropriate jurisdictional forum as it was lawfully chosen by the plaintiff (the Second Respondent) within the provisions of Article 31(1).

2.2.3. The nullity of the 'exclusive' nature of the jurisdiction clause and Article 41 CMR

The Claimant will undoubtedly rely on the fact that the jurisdiction clause willingly agreed to by both parties granted the "exclusive jurisdiction of the Court of Sofia, Bulgaria." The Claimant will argue that, by agreeing to this clause, the Second Respondent waived its right to seise any other court, including the Court of Rotterdam. However, this argument fundamentally ignores the mandatory nature of the CMR Convention.

As previously explained, Article 31(1)(b) of the Convention expressly guarantees that a plaintiff may bring an action in the courts of the place of loading 'in addition' to any jurisdiction designated by mutual agreement of the parties. The Convention specifically designed this rule to ensure that a contractually designated forum serves as an alternative option for the parties, but never as an absolute replacement of the competent courts granted by the Convention itself.

Chapter VII of the Convention, however, prevents parties from contracting out of these jurisdictional protections. Article 41(1) explicitly mandates that "any stipulation which directly or indirectly modifies the provisions of this Convention shall be null and void". By inserting the word 'exclusive' into the forum selection clause, the Claimant attempted to unilaterally strip the Second Respondent of its treaty-given right to bring an action in the place of loading.

Because this exclusivity directly modifies and restricts the jurisdictional options guaranteed by Article 31(1), the 'exclusive' nature of the Sofia clause is unequivocally null and void under the provisions of Article 41(1). Consequently, while the Court of Sofia remains a validly designated alternative forum, it cannot operate exclusively, leaving the Second Respondent perfectly entitled to seise the Court of Rotterdam as the indisputable place of loading.

2.2.4. Relevant case law and doctrinal interpretation of the CMR Convention.

The clash between the CMR Convention and the Brussels I bis Regulation was recently addressed by the CJEU in *'Gjensidige' ADB v 'Rhenus Logistics' UAB* (Case C-90/22, 2024). While the Court focused on the recognition of judgments under Brussels I bis, the underlying dispute confirms the precise application of CMR jurisdictional rules by national courts. In that case, the court that heard the case on first instance correctly declared a similar exclusive jurisdiction clause to be null and void under Article 41(1) of the CMR because it unlawfully restricted the alternative forums guaranteed by Article 31.[28] The CJEU later recognized the Convention's primacy over the Brussels I bis Regulation citing Article 71, although it clarified that "the application of that convention cannot compromise the principles that underlie judicial cooperation in civil and commercial matters in the European Union."[29]

On first instance, the underlying dispute in the *Gjensidige* case was heard by the District Court of Zeeland-West-Brabant in the Netherlands prior to reaching the CJEU. The facts were very similar to the present dispute, as the claimant had seised the Dutch Court citing Article 31(1), despite an existing agreement between the parties that granted exclusive jurisdiction to Lithuanian Courts. When presented with an objection of jurisdiction by the defendant, the Dutch Court dismissed it on grounds that it was "null and void because it had the effect of limiting the ability to choose among the courts that had jurisdiction by virtue of Article 31 of the CMR."[30]

Additionally, Advocate General Emiliou's Opinion in the *Gjensidige* case (2023) explicitly detailed how the Netherlands Court dismissed the objection of jurisdiction citing Article 41(1) of the CMR, and noted that Article 31(1) of the CMR clearly treats jurisdiction clauses as non-exclusive.[31] While he said that the lack of exclusivity for jurisdiction clauses may increase the risk of concurrent proceedings, he clarified that "the authors of a convention governing a particular matter, such as the CMR, may have had good reasons to insist upon the availability of several fora in the light of the specificity of the sector."[32] Advocate General Emiliou concludes by saying that Article 71 Brussels I

[28] Case C-90/22, *'Gjensidige' ADB v. 'Rhenus Logistics' UAB*, ECLI:EU:C:2024:252, para. 19.
[29] *Ibid.,* paras. 41, 45.
[30] *Ibid.*, para. 19.
[31] Opinion of Advocate General Emiliou, Case C-90/22, *'Gjensidige' ADB v. 'Rhenus Logistics' UAB*, ECLI:EU:C:2023:994, para. 23.
[32] *Ibid.*, paras. 135, 137.

bis "does not preclude the interpretation of the jurisdictional rule set out in Article 31(1) of the CMR, pursuant to which a jurisdiction resulting from a choice-of-court agreement cannot be considered to be exclusive."[33]

Therefore, based on the primacy that Article 71(1) Brussels I Bis confers to the CMR Convention, and based on Articles 31(1) and 41(1) of such Convention, which establish the location where the goods were loaded as a valid forum for the parties while nullifying the exclusive nature of the Claimant's jurisdiction clause, the Second Respondent asserts the unequivocal legitimacy of the Court of Rotterdam to rule on the dispute as a lawfully designated alternative forum.

3. ON THE STAY OF PROCEEDINGS

Because the Court of Rotterdam possesses full international jurisdiction as the place of loading under the CMR Convention, the subsequent action brought by the Claimant under the Court of Sofia is procedurally barred.

3.1. The Priority of the Court First Seised under the CMR Convention

On July 21st, the Second Respondent lawfully seised the Court of Rotterdam and initiated negative declaratory proceedings. More than a month later, on August 26th, the Claimant initiated proceedings before the Court of Sofia claiming damages over the exact same incident. This creates a *lis pendens* situation between both courts that has a clear solution.

To resolve concurrent litigation, the Court must apply the *lis pendens* mechanism of Article 31(2) of the CMR Convention:

> Where, in a dispute provided for in paragraph 1 of this Article, an action is pending before a court having jurisdiction under that paragraph, or where that court has given judgment in the dispute, no further action may be brought for the same cause between the same parties unless the judgment of the court before which the first action was brought cannot be enforced in the country where the new action is brought.

[33] *Ibid.*, para. 139.

Since the Court of Rotterdam has not ruled on the dispute yet, Article 31(2) prohibits other courts from hearing the dispute and mandates a stay of proceedings.

The Claimant may rely on Recital 22 of the Brussels I Bis Regulation to argue that the court designated on the jurisdiction clause has priority over the court that was first seised. This argument, however, is inapplicable to the present dispute since the CMR Convention does not give exclusivity to the jurisdiction clause as laid out in the previous section and instead gives absolute primacy to the first seised court. As Advocate General Emiliou clarified in his Opinion in the *Gjensidige* case, unlike the Brussels I bis Regulation, the CMR deliberately treats jurisdiction resulting from agreements as a mere alternative alongside other rules,[34] making the strict chronological priority of the court first seised absolute.

The Claimant may also rely on the *TNT Express Nederland BV v. AXA Versicherung AG* (Case C-533/08, 2010)[35] test to argue that applying the CMR's multiple jurisdictional options compromises the EU principles of predictability and legal certainty. However, the Court of Justice of the European Union explicitly rejected this notion in *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* (Case C-157/13, 2014).[36] In that judgment, the Court reaffirmed that while specialized conventions cannot compromise the principles underlying European judicial cooperation, the jurisdictional choices provided by Article 31(1) of the CMR perfectly respect the criterion of proximity. Furthermore, the Court ruled that the CMR satisfies the requirement of predictability because it allows both the applicant and the defendant to easily identify the courts before which proceedings may be brought.[37] Because the CMR's jurisdictional rules are entirely consistent with the objective of legal certainty, the CJEU concluded that a Member State may lawfully apply the rules concerning jurisdiction laid down in Article 31(1) of the CMR instead of the Brussels I bis Regulation.[38] Therefore, the Second Respondent's choice to seise the Court of Rotterdam was a predictable, legally certain, and fully protected exercise of its rights under European law.

[34] *Ibid.*, para. 138.
[35] Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, ECLI:EU:C:2010:243.
[36] Case C-157/13, *Nickel & Goeldner Spedition GmbH v. "Kintra" UAB*, ECLI:EU:C:2014:2145, para. 41.
[37] *Id.*
[38] *Ibid.*, para. 42.

3.2. The Same "Cause of Action" and Negative Declaratory Proceedings

Although the negative declaratory action initiated by the Second Respondent and the claim for damages presented by the Claimant refer to the exact same situation, the Claimant may try to argue that they are different actions and therefore make the *lis pendens* mechanism of Article 31(2) CMR inapplicable. This, however, is firmly rejected by European doctrine and existing case law. As Advocate General Emiliou explicitly noted in the *Gjensidige v. Rhenus Logistics* case, an action for a negative declaratory judgment and an action for indemnity brought in respect of the same damage are to be considered as having the exact same cause of action for the purposes of applying the *lis pendens* rule.[39] The English High Court ruled in a similar way in *Huawei Technologies (UK) Limited v. DSV Solutions Limited* (EWHC 1505 (Comm), 2023) by citing the Court of Appeal in *Andrea Merzario Ltd v. Internationale Spedition Leitner GmbH* (EWCA Civ 61, 2001): "where an action for a declaration of non-liability and an action for damages for breach arise out of the same contract and raise a mirror-image of the same claim, both actions may properly be said to be on the same grounds".[40]

3.3. The Application of the *Gjensidige* Precedent

The mandatory nature of this stay is perfectly illustrated by the *Gjensidige* case, which dealt with a very similar situation to the present dispute. In this case, cargo was stolen during transport from the Netherlands to Lithuania. The insurer (Gjensidige) initiated proceedings in Lithuania based on a jurisdiction clause between the parties. However, the carrier (Rhenus Logistics) had already initiated negative declaratory proceedings before the District Court of Zeeland-West-Brabant to limit its liability. Consequently, the Lithuanian Court had to stay proceedings.[41]

Following the ruling of the Dutch Court, the Lithuanian Regional Court dismissed the remainder of the action, ruling that was upheld by the Court of Appeal of Lithuania. Gjensidige appealed in cassation to the Supreme Court of Lithuania, arguing that the Dutch Court's disregard of the jurisdiction clause had resulted in a less favorable judgement for Gjensidige than if the dispute had been heard by the Lithuanian Court, and

[39] Opinion of Advocate General Emiliou, Case C-90/22, *Gjensidige*, para. 36, n. 10.
[40] *Huawei Technologies (UK) Ltd v. DSV Solutions Ltd*, EWHC 1505 (Comm), para. 35 (quoting *Andrea Merzario Ltd v. Internationale Spedition Leitner Gesellschaft G.m.b.H.*, EWCA Civ 61, 1 Lloyd's Rep 490).
[41] Case C-90/22, *Gjensidige*, paras. 15-17, 20-21.

cited the Brussels I bis Regulation's strict protection for exclusive jurisdiction clauses. The Supreme Court stayed the proceedings and referred the matter to the Court of Justice of the European Union. Crucially, the CJEU ruled that under Article 45 of the Brussels I bis Regulation, a Member State court cannot refuse to recognise a judgment from another Member State on the ground that the court of origin disregarded an agreement conferring jurisdiction.[42] This definitively establishes that once a court is lawfully seised under the alternative forums of the CMR, a second court has no power to override it or refuse to recognise its judgment by invoking the Brussels I bis Regulation.

While the CJEU resolved the dispute on recognition grounds, Advocate General Emiliou's Opinion provided the definitive analysis on the *lis pendens* mechanism, explaining that because the CMR treats choice-of-court agreements as non-exclusive alternative forums, the strict chronological priority of the first-seised court must prevail.[43] Because the Second Respondent first seised the competent Court of Rotterdam on July 21st, the Court of Sofia is strictly prohibited by Article 31(2) of the CMR from hearing the Claimant's subsequent action and must stay proceedings.

4. ON THE APPLICABLE LAW

The Claimant's attempt to subject the merits of this dispute to its own terms and conditions, and consequently to Bulgarian national law, is fundamentally flawed. The determination of the applicable law for each Respondent rests on two entirely distinct legal frameworks, both of which unequivocally preclude the Claimant's assertions.

First, regarding the dispute with the First Respondent (Tosca), the rules of choice of law and contract formation under the Rome I Regulation and the United Nations Convention on Contracts for the International Sale of Goods (CISG) dictate that the contract was sealed on Tosca's terms, making Italian law and the CISG the governing laws. Second, regarding the dispute with the Second Respondent (Swift), the contract is one for the international carriage of goods by road. This classification automatically triggers the application of the CMR Convention, overriding any contractual attempt to bypass it.

[42] *Ibid.*, paras. 24-27, 71, 76.
[43] Opinion of Advocate General Emiliou, Case C-90/22, *Gjensidige*, paras. 137-139.

Therefore, this Court must assess the substantive merits of the claims under these respective, legally binding regimes.

4.1. Applicable Law Over the First Respondent

The Claimant asserts that Bulgarian national law, excluding the United Nations Convention on Contracts for the International Sale of Goods (CISG), governs the dispute. However, this ignores the established rules of contract formation and choice of law validity under the CISG and the Rome I Regulation.

Pursuant to Article 3(1) of the Rome I Regulation, a contract shall be governed by the law chosen by the parties. However, because both parties exchanged conflicting terms and conditions, the Court must determine which clause was validly incorporated. Article 10(1) of the Rome regulation dictates that the existence and validity of a contractual term must be determined by "the law that would govern it under this Regulation if the contract or term were valid". Since the First Respondent's counteroffer explicitly stipulated that "Italian law is exclusively applicable", the validity of the First Respondent's terms must be analysed under Italian law. Because Italy is a Contracting State to the United Nations Convention on Contracts for the International Sale of Goods (CISG), and the First Respondent did not exclude its application, the CISG governs the analysis as its integrated into Italian law.

On May 20th 2025, the Claimant made an initial offer under its own terms and conditions, which sought to apply Bulgarian law and exclude the CISG. However, on May 23rd 2025, the First Respondent replied with a counteroffer explicitly stating that "Italian law is exclusively applicable". Under Article 19(1) of the CISG, a reply to an offer which contains additions, limitations, or other modifications is a rejection of the offer and constitutes a counteroffer. Therefore, the First Respondent's communication on May 23rd was a valid counteroffer that rejected the Claimant's Bulgarian choice of law clause.

The contract was definitively formed on the First Respondent's terms the following day. Article 18(3) of the CISG expressly provides that an offeree may indicate assent by performing an act, such as the payment of the price, and that "the acceptance is effective at the moment the act is performed". On May 24th, the Claimant instructed its bank to issue a Letter of Credit and executed the payment. By performing this act without previously or simultaneously raising any objections to the First Respondent's

counteroffer, the Claimant validly accepted the First Respondent's terms and the contract was sealed.

While the Claimant sent an email two days later, on May 26th, attempting to accept the offer "under our terms and conditions", this communication was legally void. The contract had already been formed and sealed two days prior through the act of payment. Consequently, Italian law is applicable. Since Italy is a Contracting State to the CISG and the First Respondent's choice of law clause did not expressly exclude it (unlike the Claimant's invalid clause), the CISG governs the substantive sale of goods dispute between the Claimant and the First Respondent.

As established by the English Court of Appeal in *The Armar* case (1981) and highlighted by private international scholar David G. Pierce in an article published in *The Modern Law Review* (1987), a contract must possess a governing law from the very outset of its making. In rejecting the notion of a delayed or retroactive choice of law, Lord Justice Megaw famously said:

> As a matter of legal logic, I find insuperable difficulty in seeing by what system of law you are to decide what, if any, is the legal effect of an event which occurs when a contract is already in existence with no proper law, but, instead, with a 'floating' non-law.[44]

He further emphasized that "the governing law cannot fall to be decided, retrospectively, by reference to an event which was an uncertain event in the future at the time when the obligations under the contract had already been undertaken".[45] Pierce explicitly endorsed this ruling by saying that Judge Megaw was "absolutely right" because a commercial contract cannot be treated as "anarchic" while waiting for a unilateral event to determine its applicable law.[46] Because the contract was sealed on May 24th under the First Respondent's terms, and because a contract cannot be governed by a "'floating' non-law", the governing law at the time the contract was formed is the one included in the First Respondent's terms. Any subsequent attempts to change the governing law would strictly require the agreement of both parties, as mandated by Article 3(2) of the Rome I Regulation. Because the First Respondent never consented to the post formation alteration

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[44] *Armar Shipping Co. Ltd. v. Caisse Algerienne d'Assurance et de Reassurance, The Armar* [1981] 1 W.L.R. 207 (C.A.), 215.
[45] *Ibid.*, paras. 215-216.
[46] David G. Pierce, *Post-Formation Choice of Law in Contract*, 50 Mod. L. Rev. 176, 191 (1987).

of May 26th, the Claimant's unilateral attempt to impose Bulgarian law is wholly ineffective.

Furthermore, and as established in Section 2.1 of this memorandum, the factual timeline of communications and performance unequivocally demonstrates that the contract was formed on the First Respondent's terms. While the previous section analyzed these facts to confirm the formal procedural validity of the jurisdiction agreement under the Brussels I bis Regulation, the validity of the choice of law clause must be assessed independently. Applying the substantive rules of contract formation under the CISG to this exact same factual timeline yields an identical result: the First Respondent's choice of law clause was validly incorporated, and therefore, Italian law together with the CISG governs the merits of the dispute.

4.2. Applicable Law Over the Second Respondent

The Second Respondent contends that the CMR Convention is exclusively applicable to the present dispute and that his liability is limited by the rules of such Convention.

4.2.1. The mandatory application of the CMR Convention

The applicable law governing the dispute between the Claimant and the Second Respondent is unequivocally the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention). Any attempt by the Claimant to subject this specific contract of carriage to its own standard terms and conditions is legally void.

Article 1(1) of the CMR Convention establishes the objective criteria for its application, dictating that the Convention shall apply to every contract for the carriage of goods by road in vehicles for reward when the place of taking over the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting country. The facts of the present dispute perfectly satisfy these criteria, as the goods were taken over by the Second Respondent in Rotterdam, the Netherlands, and the intended place of delivery was Sofia, Bulgaria. Because this constitutes an international carriage of goods between two different Contracting Countries, the CMR Convention applies automatically and mandatorily to the dispute.

Furthermore, Article 41(1) of the Convention establishes that "any stipulation which directly or indirectly modifies the provisions of this Convention shall be null and void." Consequently, the Claimant's standard terms seeking to impose Bulgarian national law

are entirely ineffective, and the substantive merits of the claim are exclusively governed by the provisions of the CMR Convention.

4.2.2. The absolute limitation of liability under Article 23(3)

The Second Respondent asserts that not only is the CMR Convention exclusively applicable to the merits of the dispute, but that its liability is limited by the provisions of such Convention.

Article 23(1) CMR stipulates that, where the carrier is charged with the compensation for total or partial loss of goods, such compensation shall be calculated according to the value of the goods at the place and time when they were accepted for carriage. Additionally, Article 23(3) of the Convention establishes that the compensation "may not exceed 8.33 units of account per kilogram of gross weight missing". Following the CMR's criteria of 8.33 SDR per kilogram of gross weight missing and considering that the weight of the stolen and damaged chairs was 72 kg and the weight of the stolen and damaged sofas was 300 kg, totaling 372 kg, the Second Respondent would be liable for a total compensation of 3098.76 SDR.

The Claimant, however, will inevitably invoke Article 29 of this Convention in an attempt to bypass the cap of Article 23(3) by alleging that the damage arose from willful misconduct on behalf of the Second Respondent. Article 29 establishes that the carrier cannot avail himself with the liability limits if the damage arises from his willful misconduct, or by such default on his part as is considered equivalent to willful misconduct in accordance with the law of the court or tribunal seised of the case. Since Rotterdam is the competent jurisdiction to rule on the dispute, we must look at Dutch civil law in order to establish whether the Second Respondent exhibited 'willful misconduct'.

The Dutch definition of 'willful misconduct' is contained in Book 8 of its Civil Code (*Burgerlijk Wetboek*), specifically in Section IV (Road Transport Law) Title 8.14, which regulates accidents during transport by road. Within this Title, Article 8:1108(1) defines the exact standard for when a carrier loses their right to limit liability, the Dutch equivalent of 'willful misconduct' under Article 29 of the CMR Convention.

According to Article 8:1108(1):

> The carrier may not invoke any limitation of his liability to the extent that the damage has arisen from his own act or omission (neglect), committed either with

the intent to cause such damage or committed recklessly and with the knowledge that such damage would probably result from it.

Therefore, the Dutch Civil Code establishes a two-step process to ensure the carrier cannot invoke any limitation of his liability. First, that the damage has arisen from his own act or omission, and second, that such act or omission happened either with the intent to cause such damage or committed recklessly with the knowledge that such damage would probably result from it.

While the Second Respondent does not contest that the theft and damage of the consignment was a consequence of the driver going to get dinner and leaving the carriage unattended at night, the Claimant cannot prove that the driver intended for the cargo to be stolen, nor can it reasonably expect him to have the knowledge that such damage would take place in such a short window of time. The driver only left the carriage unattended to fulfill a fundamental human need –taking a necessary meal break during a long international journey– and did not abandon the vehicle for leisure or for an extended period. Furthermore, he only went to a location a mere 500 meters away from where the truck was parked. Such standard operational conduct completely fails to meet the exceptionally high burden of 'conscious recklessness' established by Article 8:1108(1) of the Dutch Civil Code. To break the liability cap, the Claimant would have to prove that the driver actually knew that a theft would probably result from him taking a brief dinner break nearby, an impossible burden to meet under the present facts.

4.2.3. On the Specific Instructions given by the Claimant.

The Claimant will try to argue that, by ignoring its safety instructions of not leaving the carriage unattended at night, the driver, on behalf of the Second Respondent, inherently exhibited 'willful misconduct', understood as a willful disobedience of the Claimant's instructions. This argument must be entirely disregarded by the Court as it ignores the specific stipulations of the CMR Convention.

1. Knowledge of the Damage instead of Knowledge of the Rule. Article 29 of the CMR Convention explicitly states that the existence of 'willful misconduct' must be determined "according to the law of the jurisdiction judging the case". Therefore, the existence of such misconduct cannot be determined discretionarily by the Claimant, and instead must be assessed strictly by looking at the legal text of Dutch law.

Under Article 8:1108(1) of the Dutch Civil Code, the carrier only loses his right to limited liability if the act was committed with the intent to cause damage or "recklessly and with the knowledge that such damage would probably result from it". Here we must emphasize that knowing you are breaking a client's instruction does not equal to knowing that the cargo will probably be stolen. According to Dutch civil law, it is not the first but the latter that definitively proves the existence of 'willful misconduct', and since such knowledge of the damage cannot be proven by the Claimant, the driver's conduct does not meet Article 8.1108(1)'s requirements to constitute willful misconduct. Therefore, the limited liability of Article 23(3) CMR shall apply.

2. The Liability Limits of the CMR are explicitly designed for Breaches of Contract.
Breach of contract is not enough to prove the existence of willful misconduct, because if every breach of a client's specific instruction automatically broke the liability limits, the CMR's limitation system would be entirely undermined. The 8.33 SDR limit exists specifically to cap the carrier's liability when they make mistakes or fail to follow transport protocols, and it is only in extreme cases (willful misconduct) that such cap is lifted.

4.2.4. The Precedent of the Gjensidige Case.

The strict interpretation of Article 29 of the CMR under Dutch law is perfectly illustrated in the *Gjensidige* case, which we have already referred to in other sections. This case involved a very similar theft of cargo during international road transport from the Netherlands.[47] In that dispute, the carrier lawfully seised the Dutch court to obtain a negative declaratory judgement limiting its liability, and the District Court of Zeeland-West-Brabant definitively ruled in the carrier's favor by stating that "the liability of Rhenus Logistics to ACC Distribution and Gjensidige was limited and could not exceed the amount of the compensation pursuant to Article 23(3) of the CMR."[48] Neither of the defendants lodged an appeal against that judgement, rendering it final and binding.[49]

As Advocate General Emiliou noted in his Opinion of the *Gjensidige* case, the courts of the contracting parties to the CMR take different views on the conditions under which Article 29 applies.[50] Specifically, he recognized that the position taken by the Netherlands

[47] Case C-90/22, *Gjensidige*, paras. 15-16.
[48] *Ibid.*, para. 22.
[49] *Id.*
[50] Opinion of Advocate General Emiliou, Case C-90/22, *Gjensidige*, para. 42.

courts is highly favorable to carriers, as the conditions triggering unlimited liability are significantly more difficult to meet under their legal standard.[51] Given that the Second Respondent lawfully initiated negative declaratory proceedings in Rotterdam as the court first seised, the stringent Dutch threshold for willful misconduct governs this analysis.

Therefore, after recognizing the mandatory application of the CMR Convention and interpreting Article 8:1108(1) based on the provisions of Article 29 CMR, and in accordance with existing case law, the Second Respondent demands that its liability be limited at the amount of 3098,76 SDR.

[51] *Ibid.*, para. 43.

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2. Jurisprudence

<u>2.1. Jurisprudence of the European Courts</u>

Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, ECLI:EU:C:1997:70.

Case C-386/05, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, ECLI:EU:C:2007:262.

Case C-381/08, *Car Trim GmbH v. KeySafety Systems Srl*, ECLI:EU:C:2010:90.

Case C-19/09, *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA*, ECLI:EU:C:2010:137.

Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung AG*, ECLI:EU:C:2010:243.

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Case C-90/22, *'Gjensidige' ADB v. 'Rhenus Logistics' UAB*, ECLI:EU:C:2024:252.

2.2. Jurisprudence of the Supreme Court of Spain

Tribunal Supremo (Sala de lo Civil) [Supreme Court], 10 July 2015, STS 399/2015, ECLI:ES:TS:2015:4267.

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