Why carriers love the Netherlands and shippers do not…

1. Introduzione

1.1 Prima di tutto vorrei cogliere l'occasione di ringraziare lo studio legale AS&T, Claudio Perrella ed Alessio Totaro, per l'invito di discutere il diritto di trasporto, nella forma in cui questo diritto è applicato nel mio paese piccolissimo al Mare del Nord: il diritto di trasporto olandese.

1.2 Un paese piccolo in cui ci sono tante procedure legali su tutto quello che ha a che fare con la CMR. Tutte queste procedure insieme hanno avuto l'effetto che trasportatori (o meglio: le loro compagnie d'assicurazione) in questo momento preferiscono l'Olanda all'Italia. Ci danno immediatamente istruzioni appena c'è stato un danno durante il trasporto stradale internazionale. Gli spedizionieri, a loro volta, si affrettano a chiederci di mobilitare Claudio, Alessio e i loro colleghi, per cercare di intentare una procedura civile in Italia appena la merce trasportata è danneggiata o andata persa durante il trasporto.

1.3 Ma come mai? C'è pure una convenzione internazionale, la CMR, che è di applicazione coattiva a tutto il trasporto stradale internazionale. Oggi il mio collega Benedict Janssen, in Italiano Benedetto, ed io vi spiegheremo la differenza nell'interpretazione italiana e olandese degli articoli della CMR. E perché Benedict non sa l'italiano, adesso cambierò lingua.

1.4 During this lecture, we will first discuss force majeure and will then continue with discussing wilful misconduct or such default as is considered the equivalent thereof. We will discuss two landmark decisions of which the relevant circumstances surprisingly all took place during the international road carriage from the Netherlands to Italy. Particularly, when discussing breaking the CMR-limitation pursuant to Article 29 CMR, we can safely draw the conclusion that the outcome would have been entirely different, had proceedings been commenced in Italy. We will then briefly discuss the recoverability of excise and duties under Article 23 (4) CMR and we will, lastly, go into the Dutch lawyer's "trick" which I have also come across in Italy recently: the declaratory proceedings.

2. Force majeure

2.1 For the interpretation of force majeure, as provided in Article 17 (2) CMR, we should discuss Mr Hoekmeijer's, driver of the Dutch carrier Gebr. Oegema B.V., unfortunate

voyage to Italy.

2.2 On 16 January 1991, after having loaded some consignments of meat at Brada's Vleeschbedrijf B.V., a Dutch exporter of meat products, in Leeuwarden, he travelled to Italy for delivery to various consignees. The first discharge address was Frattelli Zocche, established in Villaverla, Italy. As the driver knew that he would be arriving late, Hoekmeijer called Zocche to ask them whether he could access the premises in the evening. This actually happened more often. Zocche confirmed that he could access the premises, even if he would be arriving late in the evening. In fact, Zocche needed the consignment urgently, so delivery had to take place that evening.

2.3 On 17 January 1991 at approximately 23.00h, Hoekmeijer finally arrived in Villaverla after having travelled that day for 13 hours. Contrary to what he expected, the gate was closed. He rang the factory door bell: no reply. He rang the door bell of the nearby house: no reply. Having no driving time left under the relevant laws and regulations, Hoekmeijer decided to park his lorry in front of the premises. Shortly thereafter, another (Danish) truck arrived, which was parked next to Mr Hoekmeijer's lorry.

2.4 That night at 01.00u, he was rudely woken from his dreams by three armed and masked men. Hoekmeijer was forced to surrender the documents of the consignment and the keys to his lorry, while being threatened with a gun. He eventually did so, of course, to safe his life! Later that night, he was thrown out of his truck in his underwear…

2.5 Could Hoekmeijer's employer, Oegema B.V., invoke force majeure?

2.6 The First Instance Court said: yes, there was no way that Oegema could reasonably have prevented the theft.

2.7 The Appeal Court said: no, the driver was instructed not to park on secluded unguaded areas. After being faced with the fact that he could not park on the premises, Hoekmeijer, should, at least that is what the Appeal Court held, have driven to a secure parking area. Even if this meant that he would have to break driving time regulations, that he would have to drive another 50 to 60 kilometres and that he would not be able to deliver the goods in time.

2.8 The Supreme Court then rendered the final ruling: no force majeure! The Supreme Court formulated the criterion for force majeure, which is still the leading criterion until

this date: a carrier can only invoke force majeure in case the carrier proves that it took *all* measures that could reasonably be required from him under the circumstances of the matter as a careful carrier to prevent the loss or damage.

2.9 The Supreme Court even put the word “all” in italics to underline that, if the party suffering the loss, in this case Brada’s Vleeschbedrijf or rather its insurer, can mention one measure that Oegema could reasonably have taken to prevent the theft, then the carrier cannot invoke force majeure. In this case, the only measure that Oegema’s driver Hoekmeijer could have taken was to travel to a secure parking area, 50/60 kilometres from Villaverla. As the criterion is that the carrier has to take *all* measures and Hoekmeijer failed to travel to a secure parking area, his employer Oegema could not invoke force majeure.

2.10 A strict, very strict criterion. But a clear one. The conclusion is justified that, in case of damage during the international transport by road of goods subject to the CMR, the carrier will be liable. Only in very, very exceptional cases, the carrier may be able to escape liability. But the burden of proof is very high.

2.11 As a side issue, I wish to stress that in this matter, the relevant legal question was only: does loss of goods as a result of an armed robbery constitute force majeure? Not: did Oegema demonstrate that the driver became a victim of an armed robbery?

2.12 In practice, the second question on evidence has become more relevant than the first question on force majeure. Drivers claim to have become victims of armed robberies every day. Robbed by fake policemen, robbed while standing in front of traffic lights, robbed while sleeping inside the truck etc. Most of the times, the only “witness” of the robbery is the driver himself.

2.13 Under Dutch law, as under Italian law, this is considered insufficient evidence of the occurrence of an armed robbery (unus testis, nullus testis). To prove that an armed robbery actually took place, the carrier must provide additional information, such as: corroborating statements of witnesses (third parties), confessions of arrested criminals, CCTV-recordings etc. In 9 out of 10 cases, the carrier cannot provide such corroborating evidence, which means that his claim for force majeure is rejected already at this stage.

3. Wilful misconduct or such default as is considered the equivalent thereof

3.1 You may now all be thinking: if the carriers can never or almost never invoke force majeure, why would they prefer the Dutch jurisdiction to, for instance, the Italian?

3.2 For that reason, we have to discuss the Dutch interpretation of Article 29 CMR. Pursuant to this provision, a carrier cannot invoke the limitation of Article 23 (3) CMR of approximately € 10,= per lost or damaged kilogram of the goods, in case it acted with wilful misconduct or such default as is considered the equivalent thereof.

3.3 We will not discuss the concept “wilful misconduct”. The Dutch translation of this concept is “opzet” which is equivalent to the Italian “dolo”. What we will discuss is what is considered ‘such default as is considered the equivalent of wilful misconduct’.

3.4 As Article 29 CMR refers to the lex fori for the interpretation of this concept, each jurisdiction is entitled to rule differently. The difference between the Dutch and Italian interpretation of Article 29 CMR can be clearly demonstrated by discussing the decision of the Dutch Supreme Court dated 5 January 2001, which is till date the landmark decision on the interpretation of Article 29 CMR.

3.5 Van der Graaf was one of the primary carriers carrying cigarettes under the instructions of Philip Morris, one of the major cigarette manufacturers with which company I trust you are all familiar. On 15 October 1991, a large consignment of cigarettes (1.800 boxes) had to be carried in two lorries by Van der Graaf. These two lorries were manned by three drivers. On route to Italy and in France, a third lorry joined the two others. Jointly and driving in convoy, they all headed for Italy.

3.6 As they could not arrive at the discharge address in Milan in time, all drivers decided to park at a parking area in Santhia, Italy. This occurred in the evening of 16 October 1991. In breach of specific instructions, which stipulated: “Car shall definitely not be left alone”, the drivers decided to dine together at the restaurant at the parking area. For about 1½ hours, the lorries were left alone. They decided to park their lorries directly behind other lorries to prevent the doors of the trailers being opened. The drivers could not see the lorries from the restaurant.

3.7 After having enjoyed a nice meal, probably – knowing Dutch drivers – pizza’s and spaghetti which forms a nice variety to Dutch mashed potatoes with smoked meat and

gravy, all drivers went back to their lorries. They then discovered that the two lorries loaded with cigarettes had been stolen. It also appeared that the lorries behind which they had parked theirs had already left… The lorries were recovered a few days later, of course, empty.

3.8 When reading the judgment in preparation of today's lecture, I again wondered at the circumstances of this theft. What are the chances that thieves precisely steal two lorries loaded with cigarettes during the limited time that they were left unattended. The taut of the trailers in which the goods were loaded had not been cut, which suggests that the thieves exactly knew which lorries to steal. By coincidence, the lorries were not equipped with any antitheft devices, but the trucks would probably have been locked. The conclusion "inside job" is easily drawn!

3.9 In any case, the drivers were immediately fired. Proceedings that they then commenced against their employer to nullify their dismissal were rejected.

3.10 For us, the relevant question is: do these circumstances justify invoking Article 29 CMR assuming of course that none of the drivers actually was involved in the theft? As explained already, we should consider this question under the national law of the jurisdiction where proceedings are pending, pursuant to the wording of Article 29 CMR.

3.11 Under Italian law, I know the answer would definitely be: YES with capital letters. I think, but Claudio would be the expert on this, that this is due to the fact that "such default as is considered equivalent to wilful misconduct" is interpreted as "colpa grave" in Italy.

3.12 In the Netherlands, pursuant to the provisions of the Dutch Civil Code, a much stricter test should be met. According to Article 8:1108 of the Dutch Civil Code, the limitation is broken in case the damage has been caused by the carrier's acts, committed with wilful misconduct to cause that damage (again: "dolo") or recklessly and with the knowledge that that damage would probably result therefrom. The second part of Article 8:1108 Dutch Civil Code is generally referred to as "conscious recklessness".

3.13 This criterion is then elaborated on by the Dutch Supreme Court. The Dutch Supreme Court ruled that a carrier only acts with conscious recklessness in case all three of the following tests are met:

a. chances that the risk inherent in the act of the carrier will manifest itself are considerably greater than chances that it will not; and
b. the carrier was aware of this risk inherent in his act; and

c. the carrier did not let his awareness stop him from acting as he did.

3.14 The first test should be interpreted objectively. This means that the objective chance of a theft from the elected parking area should, in this case, be 60 or 70%. In other words, from all 100 trucks parking at the Santhia parking area, thefts should have been committed with regard to 60/70 trucks per night!

3.15 As you will appreciate, this test is almost never met. Even if clear safety instructions are seriously breached, as in the subject case, one cannot say that the objective chance that a theft is committed is considerably greater than the chance that no theft is committed.

3.16 Returning to the question at hand: do the circumstances of the theft that I have just described justify invoking Article 29 CMR presuming of course that none of the drivers actually was involved in the theft? Under Dutch law, the answer is: NO! Also, with capital letters.

3.17 Also in the matter which I have just described, the Appeal Court to which the Supreme Court referred the proceedings have setting the above criterion, held in a final judgment that the test was not met in that case. The Appeal Court considered the acts of the drivers careless, but held that this lack of care does not constitute conscious recklessness, i.e. such default as is considered the equivalent of wilful misconduct subject to Article 29 CMR.

3.18 I think you will now understand why it is that carriers love the Netherlands: even though they are almost always liable in case of damage to or loss of carried goods during the international transport by road, they can almost in every case invoke the limitation of Article 23 (3) CMR. With transports of cigarettes, perfumes, electronics and all other valuable goods with relatively limited weights, this is very convenient for carriers.

3.19 I wish to add to the above that the judgment of the Supreme Court that I have just discussed has been repeated many times and is still (one of) the leading judgments on the interpretation of Article 29 CMR.

3.20 In practice, the most realistic option of breaking the limitation lies with arguing that the theft resulted from an inside job. Of that, the burden of proof in principle lies with the cargo interested party. This burden of proof is not easy to meet. Sometimes, cargo interested parties have this very, very strong feeling that a driver is involved, but they

simply cannot prove it. After all, all relevant information on the facts and circumstances of the case are in the hands of the carrier. If the carrier decides not to disclose this information, chances are that the cargo interested party will be left empty-handed.

3.21 To avoid this undesired effect which directly result from evidentiary rules, i.e. with which party does the burden of proof rest, there are some procedural rules that can help the cargo interested party provide proof of dolo:

a. the cargo interested party can initiate disclosure proceedings, requesting the court to disclose certain vital information that is not voluntarily sent by the carrier;
b. the court can use factual/legal assumptions, i.e. “the court assumes that an employee of the carrier leaked information to the thieves and assumes that the limitation is broken, unless the carrier provides evidence of the contrary”;
c. in declaratory proceedings, which we will discuss later, the Appeal Court of The Hague has suggested that the burden of should be placed with the party that started the proceedings, which is in declaratory cases the carrier. The carrier must then prove that it can invoke the limitation.

4. Excise and duties

4.1 The theft of the lorries loaded with cigarettes from the parking area in Santhia has had a great impact on the interpretation of the provisions of the CMR in the Netherlands. Not only has it given the Supreme Court the opportunity to establish the still applicable criterion for “such default as is considered the equivalent of wilful misconduct”, the matter had a sequel in 2005, which is also considered a landmark decision.

4.2 The sequel of the case regarded the interpretation of Article 23 (4) CMR. Pursuant to this provision, the carrier has to indemnify the cargo interested party not only for the cargo damage (or CMR limitation), but also for carriage charges (freight), customs duties and other charges incurred in respect of the carriage of the goods.

4.3 You will understand that, as a result of the theft of the lorries loaded with cigarettes, not only a major cargo damage was suffered by Philip Morris (and its Underwriters), but also that a major excise/duties claim resulted. In fact, the excise/duties claim exceeded the cargo claim. The question rose as to whether such excise/duties could be considered “customs duties” or “other charges incurred in respect of the carriage of the goods”.

4.4 In a second judgment, the Supreme Court held that there is no predominant opinion within CMR Member States on the question whether or not excise and duties are recoverable under Article 23 (4) CMR. Therefore, the Supreme Court, or rather this legal advisor the Advocate General Strikwerda, attributed decisive authority to the purpose and purport of the CMR. The Supreme Court came to the conclusion that the aim of Article 23 (4) CMR is to only allow recovery for those costs which are directly linked to the transport of goods by road. As excise and duties are not directly linked to the transport, but rather to the customs law consequences caused by the loss during the transport and, subsequently, the carrier's failure to comply with his contract, they cannot be considered either customs duties or other charges incurred in respect of the carriage of the goods.

4.5 In short, the carrier is not liable for excise and duties which become due as a result of loss of goods which occurred during the international transport by road.

4.6 This is a second important reason for carriers to be quite fond of the Dutch jurisdiction. Their liability remains limited to the CMR limitation following to the first Supreme Court judgment in the matter Philip Morris/Van der Graaf and excise and duties cannot be recovered from the carrier, following to the second Supreme Court judgment in the same case.

5. How to benefit from carrier friendly Dutch interpretation of the CMR

5.1 The relevant question for you all present today is of course, how to benefit from the discussed interpretation of the CMR?

5.2 The answer to that question lies in the Dutch Civil Code. Article 3:302 Dutch Civil Code stipulates that each party to a legal relationship between parties is entitled to request the court to give a declaration on that relationship. I understand, as I have recently been faced with the same procedural step, that under Italian law the same option is open to parties. Also in Italy, parties can ask the court to 'accettare e dichiarare' something.

5.3 The Dutch Underwriters of carriers involved in the chain of carriage, during which carriage a damage or loss occurred, use this regulation in the Dutch Civil Code to issue proceedings against their principals, i.e. the principal carrier, other carriers in the chain of carriage, the consignor and the consignee. Under Dutch law, parties cannot suffice with issuing proceedings against just the principal carrier or the consignor or the consignee, as the doctrine of the abstract claim right is applied. This means that

both the consignor and the consignee can claim damages from the carrier, independent from the question whether or not they suffered a loss and/or whether the goods had already been delivered or not. To be safe, the carrier commencing declaratory proceedings should, therefore, always summon all parties in the chain of carriage, which may have title to sue under other CMR jurisdictions.

5.4 By issuing such declaratory proceedings, which are accepted by Dutch courts, the carrier seizes the jurisdiction of the Dutch court pursuant to Article 31 (2) CMR. No proceedings can, in principle, be issued in other jurisdictions. I say “in principle”, as the German Bundesgerichtshof, the Supreme Court of Germany, has held in two landmark decisions of 20 November 2003, on which Mr Dreyer of Dabelstein Passehl may comment, that the Dutch declaratory proceedings are not to be considered proceedings which lead to lis pendens under Article 31 CMR. Germany is the only country – so far – to basically set aside the Dutch declaratory proceedings. In other countries, such as Austria and the UK, Dutch declaratory proceedings are accepted.

5.5 By issuing proceedings before the Dutch court, the carrier generally accepts liability, pursuant to the above Supreme Court judgment in the Brada/Oegema-case. However, the carrier is willing to accept this liability, as the liability will remain limited to the CMR limitation pursuant to Article 23 (3) CMR, without excise and duties, pursuant to (among others) the above Supreme Court judgments in the Philip Morris/Van der Graaf-case.

5.6 The insurance market surrounding the Netherlands knows this Dutch lawyer’s “trick”. So it often happens that, before the cargo owner is even aware that a damage or loss occurred during the transport by road, it receives a writ of summons. As stated in our introductory paper, this is real Dutch efficiency: notification of loss and a writ of summons, all in one, carefully described by a swiftly instructed transport lawyer!