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# Why carriers love the Netherlands and shippers do not

Van Traa Advocaten N.V.  
Benedict Janssen and Carina Vollebregt  
31 March 2011

**Van Traa  
Advocaten N.V.**  
Minervahuis II  
Meent 94  
3011 JP Rotterdam  
Nederland  
[www.vantraa.nl](http://www.vantraa.nl)

# La CMR in Olanda

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# Today's agenda

- Article 17.2 CMR – Force majeure – Brada/Oegema
- Article 29 CMR – Wilful misconduct or such default as is considered the equivalent thereof - Philip Morris/Van der Graaf
- Article 23.4 CMR – Excise and duties - Philip Morris/Van der Graaf II
- Article 31 CMR – The Dutch lawyer's trick

# Force majeure

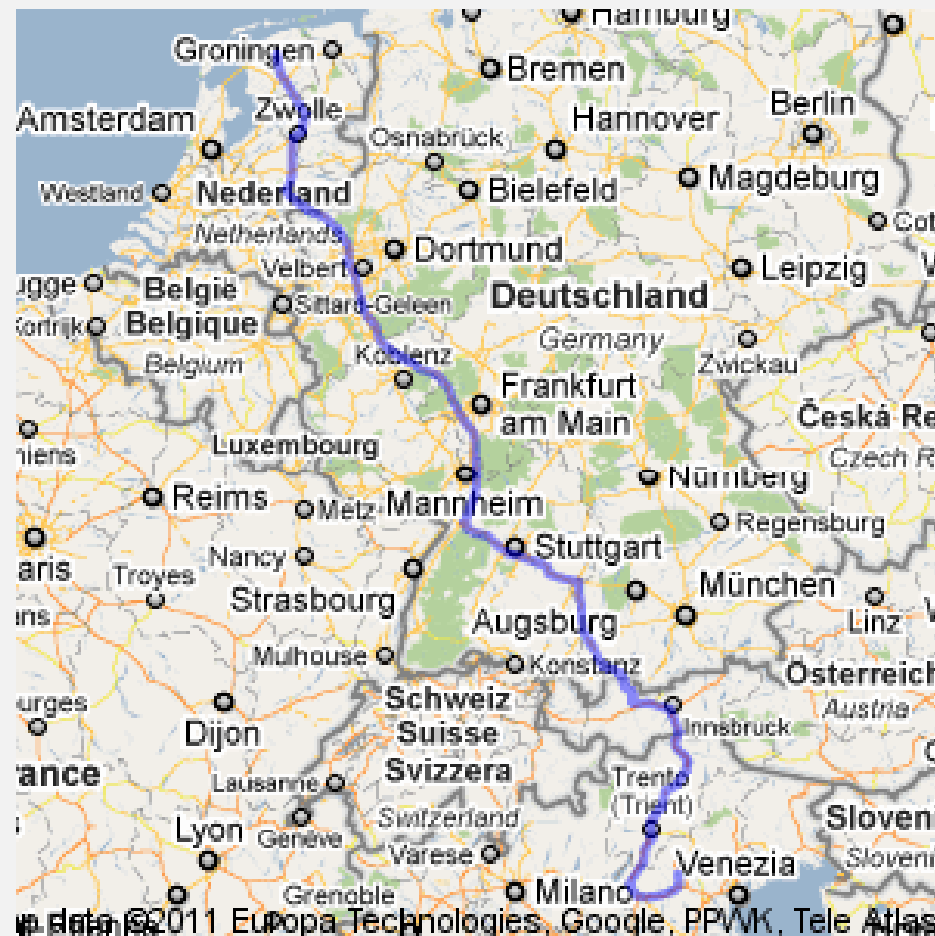
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Meet Mr Hoekmeijer, driver of Gebr. Oegema



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Carriage: Leeuwarden (NL) - Villaverla (It)



# Force majeure

- Relevant facts:
  - consignment of meat was needed urgently on 17/18 January 1991
  - telephone conversation: notification of late arrival and request to leave gate open
  - Zocche said: okay!
  - this happened more often
  - Hoekmeijer arrived at 23.00h

# Force majeure

- Relevant facts
  - surprisingly: no one was present
  - Hoekmeijer checked the house and the gate; no answer
  - no driving time left
  - nearest parking area: 50/60 kilometres
  - Hoekmeijer decided to park in front of gate, together with a Danish driver



# Force majeure

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- There he was, at the Via dell'Artigianato 28 in Villaverla
- At 01.00h, 3 robbers arrived at the scene





# Force majeure

- Force majeure?
- First Instance Court: Yes, robbery could not reasonably have been prevented
- Appeal Court: No:
  - instructions not to park on unguarded secluded area
  - driver could have driven to a secure parking
  - even if this meant breaking the driving time rules
  - even if this meant late delivery

# Force majeure

- Supreme Court 17 April 1998: no force majeure:

"A carrier can only invoke force majeure (Article 17.2 CMR) in case it 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."

# Force majeure

- Did Mr Hoekmeijer take *all* measures that could reasonably be required from him to prevent the robbery?
- No, he could have driven to a secure parking area
- Even if this meant:
  - Breaking driving time regulations
  - Late delivery

# Force majeure

- Burden of proof rests with carrier
- Did the carrier prove that a robbery occurred?
  - Unus testis, nullus testis
  - Further evidence necessary, such as CCTV, witnesses, confessions of robbers etc.
- Most of the cases: not sufficient proof of robbery by carrier

# Article 29 CMR

- No limitation in case of
  - Wilful misconduct (dolo)
  - Such default as is considered the equivalent of wilful misconduct
- Lex fori for interpretation of “such default as is considered the equivalent of wilful misconduct”

# Article 29 CMR

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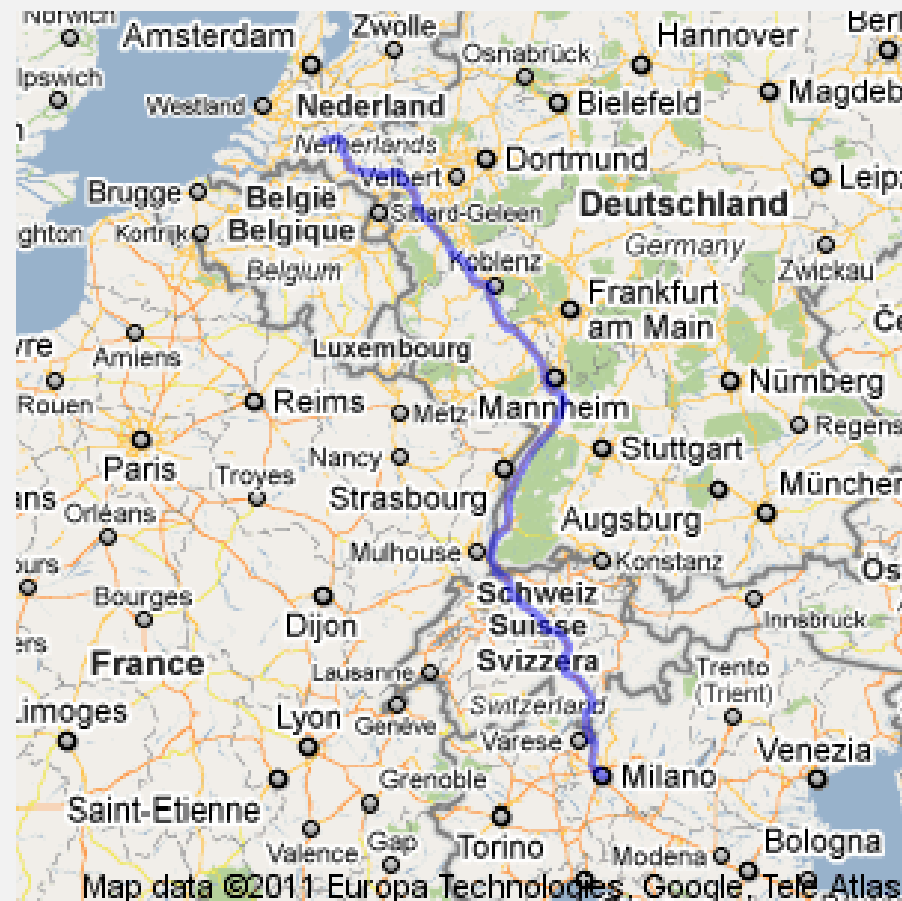
- Van der Graaf Waalwijk, regular carrier for Philip Morris





# Article 29 CMR

- Carriage: Waalwijk to Milan (customs)



# Article 29 CMR

- Relevant facts:
  - 16 October 1991
  - Convoy: 3 lorries: 2 loaded with cigarettes, 1 loaded with other goods
  - 4 Dutch drivers
  - Instructions: "Car shall definitely not be left alone"
  - Arrival in Milan in evening of 16 October 1991 - delivery not possible during evening

# Article 29 CMR

- Relevant facts:
  - Four Dutch drivers
  - Away from their wives
  - Driving all day
  - Arriving at a parking area in Santhia...

# Article 29 CMR

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- Pizza and spaghetti!
- In restaurant on parking area
- No view on lorries
- All drivers together
- 1½ hours

# Article 29 CMR

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- When they returned: precisely 2 lorries with cigarettes stolen
- No antitheft devices on truck
- But, doors were locked
- Drivers immediately fired

# Article 29 CMR

- Assumption: no inside job
- Conscious recklessness in Italy?

YES

- “such default as is considered the equivalent of wilful misconduct” in Italy: colpa grave



# Article 29 CMR

- Conscious recklessness in the Netherlands?
- Supreme Court 5 January 2001
- Article 8:1108 Dutch Civil Code:  
limitation broken in case of  
  
“wilful misconduct intended to cause that  
damage [dolo] or **recklessly and with  
knowledge that that damage would  
probably result therefrom**”
- Conscious recklessness

# Article 29 CMR

- Dutch Supreme Court 5 January 2001
- 3 tests for conscious recklessness:
  - Chances of theft are considerably greater than chances of no theft
  - Awareness of chances
  - Carrier was not influenced by his awareness

# Article 29 CMR

- Conscious recklessness:
  - 3 tests cumulatively
  - First test objective
  - Chance of theft should be 60/70%

- Conscious recklessness in the Netherlands?

**NO**

- Lack of care **yes**  
conscious recklessness **no**
- Carrier liable for limitation

# Article 29 CMR

- In practice, limitation almost never broken
- Only in case of inside job (dolo)
- Burden of proof of dolo with cargo interested party
- Courts sometimes helps cargo interested party

# Article 29 CMR

- How does the Court help the cargo interested party?
  - Disclosure proceedings
  - Factual/legal assumptions, e.g.
    - “the court assumes that an employee of the carrier leaked information to the thieves and assumes that this constitutes ‘dolo’, unless the carrier provides evidence of the contrary”
  - Burden of proof placed with carrier, if carrier starts proceedings himself (declaratory proceedings)



# Excise and duties

- Article 23.4 CMR: Excise and duties recoverable?
- Again, Philip Morris/Van der Graaf - second Supreme Court judgment
- Excise and duties exceeded cargo damage

# Excise and duties

- Excise and duties
  - Customs duties or
  - Other charges incurred in respect of the carriage of the goods

# Excise and duties

- Supreme Court 27 May 2005
  - No predominant position in Member States
  - Advocat-General Strikwerda: decisive authority to
    - Purpose
    - Purport (goal)
  - Aim of 23.4 CMR: only recovery for costs directly linked to carriage
  - Excise and duties are not directly linked, are linked to loss, not to transport itself

# Declaratory proceedings

- How to benefit from carrier-friendly interpretation in the Netherlands?
  - By issuing declaratory proceedings
    - Against all parties involved in chain of carriage
    - As soon as possible
  - Article 31.2 CMR – lis pendens
    - Exception: Germany
  - In Italy also possible: accettare e dichiarare

# Conclusion

- Result of declaratory proceedings in most cases
  - No force majeure
  - No breaking of limitation
  - No liability for excise and duties
- But be swift!