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Marie-Paule SERCK, Doctor iuris

Dutch case law on Art. 29 CMR

Dr F.G.M. SMEELE⁽¹⁾

§ 1. Introduction

1. Like other conventions on transport law, the CMR⁽²⁾ limits the carrier's liability for damage to the cargo⁽³⁾. A correction on this fundamental principle of limited liability is made in Art. 29-1 CMR. If it is proved that the damage was caused by wilful misconduct or an equivalent default on the part of the carrier, his servants or sub-contractors, including the driver⁽⁴⁾, the carrier loses the benefit of the provisions in the Articles 17 to 28 CMR, which exclude or limit his liability or shift the burden of proof in his favour. In addition, not the normal time-bar of one year will then apply, but one of three years (Art. 32 CMR).

2. Unfortunately, the drafters of the CMR were unable to agree on a uniform criterion for the break-through of limited liability. In fact, the concepts used in the equally authentic English and French versions of Art. 29-1 CMR do not even match. Where the French text of the CMR speaks of «dol» (intent), the English text uses the concept of «wilful misconduct», which extends not only to intent to cause damage, but (under English law) also to recklessness with knowledge that such damage would probably result⁽⁵⁾.

3. By its (subjective) nature, the intent to cause damage is difficult to prove. It follows that the practical importance of Art. 29-1 CMR would have been very limited only, if not public policy had required that certain kinds of perhaps unintentional, yet very reprehensible behaviour could also lead to the unlimited liability of the carrier. To achieve this aim, the French version of Art. 29-1 CMR needed – besides «dol» – the additional concept of «default equivalent to dol». And although the English version of Art. 29-1 CMR already covered this aspect by «wilful misconduct», the words «equivalent default» were included in the English text as well.

4. Art. 29-1 CMR not only fails to provide a uniform criterion for the breakthrough of the limitation, it even refers for the interpretation of «equivalent default» to the law of the court seized of the case. This testimonium paupertatis of the drafters of the CMR, clearly opens the door to legal diver-

⁽¹⁾ Van Traa Advocaten, Rotterdam.

⁽²⁾ Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956.

⁽³⁾ Below, the term cargo-damage will be used in relation to damage to and loss of the cargo, as well as for delay in delivery of the cargo.

⁽⁴⁾ Art. 3 CMR.

⁽⁵⁾ M.A. Clarke, *International Carriage of Goods by Road: CMR*, 3rd ed., London: Sweet & Maxwell, 1997, p. 378 ff.

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FINI AND

gence and forum shopping, because the domestic laws of the various states partly to the CMR and the interpretations given by their courts, vary widely.

5. This (unfortunate) development has been criticised by some⁽⁶⁾ as running counter to the proclaimed purpose of the CMR⁽⁷⁾, i.e. to promote uniformity of law in respect of international carriage of goods by road. As a possible solution, it has been advocated by these legal scholars to ignore the reference to domestic law in Art. 29 CMR and to develop a uniform concept for «default equivalent to intent» instead. Although the former suggestion may not directly qualify as a «bona fide interpretation»⁽⁸⁾ of the text of the CMR, the latter suggestion is obviously a worthy cause. Below, an overview of Dutch case law on the application of Art. 29 CMR will be presented as a contribution to the process of unification of law.

§ 2. The Dutch standard: «conscious recklessness»

6. So far, arguments for a uniform interpretation of Art. 29-1 CMR have failed to impress the lower Dutch courts⁽⁹⁾. Instead, in recent years⁽¹⁰⁾ these courts have almost unanimously held that the standard for default equivalent to intent is to be found in Art. 8: 1108-1 Dutch Civil Code (DCC)⁽¹¹⁾, which provision⁽¹²⁾ reads as follows:

Art. 8:1108 DCC:

-1. De vervoerder kan zich niet beroepen op enige beperking van zijn aansprakelijkheid, voor zover de schade is ontstaan uit zijn eigen handelen of nalaten, geschied hetzij met het opzet die schade te veroorzaken, hetzij roekeloos en met de wetenschap dat die schade er waarschijnlijk uit zou voortvloeien.

(-1. The carrier may not invoke any limitation in his liability to the extent that the damage has arisen from his own act or omission, done either with the intent to cause such damage or recklessly and with the knowledge that such damage would probably result therefrom.) (stress added-FS).

7. For the sake of brevity, Dutch transport lawyers tend to refer to the concept contained in Art. 8:1108-1 DCC as that of «bewuste roekeloosheid» or «conscious recklessness». It has been observed⁽¹³⁾ that analytically the above definition consists of four separate requirements, each of which must be fulfilled before the carrier faces unlimited liability. Firstly, it must be possible to qualify the act or the omission of the carrier (or his driver) as reckless. Secondly, it must have been probable at the time that damage would occur. Thirdly, the carrier or driver must have known that damage would result from his act or omission. Fourthly, the carrier or driver must have known that such damage, i.e. the damage for which the carrier is held liable, would occur.

It is noteworthy that the concept of conscious recklessness combines an objective criterion (steps 1 and 2: «was the driver's conduct reckless?») with a subjective one (steps 3 and 4: «did the driver know that such damage would result?»)⁽¹⁴⁾. Both requirements must be met before the carrier will lose the right to limit his liability.

8. Despite this four-step approach provided by the Dutch legislator in Art. 8:1108 DCC it is far from clear whether and if so how this criterion of «conscious recklessness» is applied by the lower Dutch courts. Particularly in cases where the courts have allowed the break-through of the carrier's limited liability, it often does not follow from the reasoning of the decision that the court has actually asked itself the above four questions. Occasionally, one is even left with the impression that in reality the court's decision was primarily based on considerations of equity and public policy, and that the lip-service paid to the concept of «conscious recklessness» served only as a smoke screen to hide these true motives.

9. Below, Dutch case-law on Art. 29-1 and 32 CMR reported in the law reports of *Schip & Schade*, will be grouped along the following lines: The scope of application of Art. 29-1 CMR (§ 3), intentional conduct (§ 4), violation of instructions (§ 4), dangerous driving (§ 6) and theft (§ 7), followed by some final remarks (§ 8).

⁽¹³⁾ Hillebrand, *TVR*, 1999, p. 170. For a more extensive discussion: F. de Vries, *Wettelijke limitering van aansprakelijkheid*, diss. Leyden University, Zwolle: W.E.J. Tjeenk Willink, 1990, p. 165 ff.

⁽¹⁴⁾ Cf. De Vries, *op. cit.*, 1990, p. 165; Haak, *op. cit.*, 2000, p. 15.

⁽⁶⁾ See: Ottmar J. Tuma, 'Art. 29 CMR Bestandaufnahme und Ausblick', *Internationales CMR-Kolloquium*, Viefna, 1-3 July 1993; Tuma, 'The liability of the Inland Road Carrier according to Austrian Private Law', in: K.F. Haak, E.C. Swart (eds.), *Road Carrier's liability in Europe*, The Hague: Stichting Vervoerrecht, 1994, p. 37-44. Cf. Helga Jesser, 'Art. 29 CMR - Welches Verschulden steht dem Vorsatz gleich?', *Transportrecht*, 1997, p. 169-177; K.F. Haak, 'Oprukkende vervoersaansprakelijkheid van overmacht naar grove schuld', *Syllabus Vervoer, verzekering en logistieke dienstverlening*, The Hague: Stichting Vervoerrecht, 2000, p. 10 ff.; N.B. Hillebrand, 'Commentaar, Arco/ Immostrade', *Tijdschrift Vervoer & Recht (TVR)*, 1998, p. 134.

⁽⁷⁾ As stated in the Schedule of the CMR.

⁽⁸⁾ In the sense of Art. 31 United Nations Convention on the Law of Treaties, Vienna, 23 May 1969.

⁽⁹⁾ With the exception of: District Court (DC) 's-Hertogenbosch 15 March 1996, overruled by: Court of Appeal (CA) 's-Hertogenbosch 12 May 1998. Both decisions are reported in *Schip & Schade* (S&S) 1999, 22.

⁽¹⁰⁾ Art. 8:1108-1 DCC only came into force on 1 April 1991. Its predecessor, the slightly different-worded Art. 30 Wet Overeenkomst Wegvervoer came into force on 1 September 1983.

⁽¹¹⁾ DC Amsterdam 10 Dec. 1993, S&S 1994, 59; CA Amsterdam 24 Feb. 1994, S&S 1995, 18; DC 's-Hertogenbosch 20 May 1994, S&S 1994, 125; DC Rotterdam 12 Sept. 1996, S&S 1997, 58; DC 's-Hertogenbosch 27 Sept. 1996 unpublished; CA 's-Hertogenbosch 14 Jan. 1998, S&S 1998, 95; DC Rotterdam 23 April 1998, S&S 2000, 10; CA 's-Hertogenbosch 1 Oct. 1998, unpublished; CA The Hague 26 Jan. 1999, S&S 1999, 66; CA The Hague 29 June 1999, S&S 1999, 125.

⁽¹²⁾ Based on Art. 25A-3 of the Convention for the unification of certain rules relating to international Carriage by Air, Warsaw 12 Oct. 1929, as altered by the 1955 Hague Protocols and as developed further in Art. 13 of the Convention relating to the carriage of passengers and their luggage by sea, Athens, 13 Dec. 1974.

§ 3. The scope of application of Art. 29-1 CMR

10. In a recent decision⁽¹⁵⁾ the Dutch Supreme Court, the *Hoge Raad* has narrowed the scope of application of Art. 29-1 CMR down. The case concerned the question whether or not the fixation of CMR-interests at 5% per annum in Art. 27-1 CMR was a 'provision which excludes or limits the carrier's liability' in the sense of Art. 29-1 CMR. Contrary to the unanimous previous case-law of the lower courts⁽¹⁶⁾ and basing itself on the uniform purpose of the CMR, the *Hoge Raad* held that the rule of Art. 29-1 CMR did not apply to Art. 27-1 CMR.

In this case the cargo was stolen due to intent of the sub-carrier. Cargo-interests brought a claim against the contractual or main carrier. First the *Hoge Raad* notes that the wording of Art. 27 CMR does not provide a definite answer. The provision does not speak of limiting the liability for lost interests, but merely establishes the rate of compensation that can be recovered. Neither do the views expressed by legal scholars and in the case law of other CMR-states offer a solution, since no leading doctrine exists. Nor can the (not freely or publicly accessible) *Travaux Préparatoires* of the CMR offer any clarity here. Under these circumstances the *Hoge Raad* held that decisive importance must be given to the purpose and import of the CMR, which, as appears from its preamble, intends to 'standardise the conditions governing the contract for the international carriage of goods by road, particularly with respect to .. the carrier's liability'. In view of this purpose, the fixed rate for compensation of lost interests was clearly intended, not to limit the carrier's liability, but to deal with this liability in a uniform manner, irrespective of whether or not the lost interest in an individual case were higher or lower than 5% per annum. Therefore, intent in the sense of Art. 29-1 CMR does not preclude the carrier from relying on Art. 27-1 CMR.

§ 4. Intentional conduct

11. Despite the difficulty of proving intent to cause damage, there are a few reported cases where the courts concluded that such intent had indeed been proved.

In one case, the failure to hand over collected cash on delivery-moneys to the consignor was considered intentional conduct by the carrier, because of which the time-bar was extended to 3 years (Art. 32-1 CMR)⁽¹⁷⁾. Similarly, the refusal to deliver the goods at the place of destination until payment was received for certain outstanding invoices, con-

⁽¹⁵⁾ *Hoge Raad* 20 Nov. 1998, S&S 1999, 37; ETL, 1999, 254. Cf. CA The Hague 29 June 1999, S&S 1999, 125.

⁽¹⁶⁾ DC Breda 17 May 1988, S&S 1989, 21; DC Amsterdam 16 Jan. 1991, S&S 1992, 85; CA 's-Hertogenbosch 4 Nov. 1994 and CA 's-Hertogenbosch 23 April 1997, S&S 1998, 125.

⁽¹⁷⁾ DC Utrecht 19 March 1997, S&S 1997, 120.

stituted intentional conduct on the part of the carrier⁽¹⁸⁾. However, contrary to the previous decisions it has also repeatedly been held that the non-payment of freight by the consignor did not constitute intentional conduct to which the 3-year time-bar of Art. 32 CMR applied⁽¹⁹⁾.

§ 5. Violation of instructions

12. If it can be proved that the driver acted contrary to explicit instructions given by the consignor, the Dutch courts have shown some leniency in allowing the break-through of limited liability under Art. 29 CMR. Failing a general rule relating to liability for failure to carry out instructions in the CMR, this can perhaps be explained through an indirect influence of the specific rules for instructions relating to the disposal over the goods (Art. 12-14 CMR) and the collection of cash on delivery-charges (Art. 21 CMR).

13. Following Art. 21 CMR a carrier who despite instructions, fails to collect the cash on delivery-charge from the consignee, is liable to the consignor for compensation up to the amount of the charge (Art. 21 CMR)⁽²⁰⁾. The same applies if the driver fails to obey instructions given by the consignor or the consignee in connection with their right of disposal over the goods (Art. 12-7 CMR)⁽²¹⁾. The above is illustrated by two recent so-called 'Moscow-delivery'-cases.

In the first case⁽²²⁾, the CA held that the drivers had – in flagrant violation of the principal responsibility of the carrier to deliver the goods at the place of destination – delivered the goods at a completely different address on the authority of a man of unknown identity and that in a country where, as is of general knowledge, economy and crime are closely intertwined. In the view of the CA, this warranted the break-through of limited liability under Art. 29 CMR. That the anonymous man had shown stamps with the name of the consignee to the drivers and had proven to be aware of details concerning the transport, did not alter the fact that the goods were delivered to an unknown person at the wrong address. Neither would it be relevant if the wrongful delivery had (in part) been

⁽¹⁸⁾ CA 's-Hertogenbosch 22 Dec. 1993, S&S 1994, 99; DC Rotterdam 24 June 1994, S&S 1995, 80.

⁽¹⁹⁾ DC Rotterdam 26 April 1992, S&S 1992, 112; DC Rotterdam 24 June 1994, S&S 1995, 80.

⁽²⁰⁾ See e.g. CA Amsterdam 23 Feb. 1995, S&S 1997, 16.

⁽²¹⁾ This is illustrated by the decisions: DC Rotterdam 8 Aug. 1996, S&S 1998, 123 and CA The Hague 29 Sept. 1998, S&S 32 in which it was held that the sub-carrier, who was contracted by the main carrier to perform the entire road-transport from Benicassim, Spain to Rotterdam, must be deemed successive carrier in the sense of Art. 34 CMR. Consequently the successive carrier ought not to have listened to the new instructions given by the main carrier, to deliver the goods at a different address as mentioned in the consignment note and was liable to the consignor/consignee for the resulting damage.

⁽²²⁾ DC Breda 27 Feb. 1996, S&S 1997, 30 and CA 's-Hertogenbosch 14 Jan. 1998, S&S 1998, 95, comment: Hillebrand, *TVR*, 1998, p. 131-135. See also: DC Roermond 5 Feb. 1998, S&S 1999, 11.

caused by the inability of the drivers to contact the consignee's business premises at Moscow. Even in that case, the drivers (as they knew or ought to have known) were in no way entitled to hand over the goods to an unknown person at a different address from that mentioned in the consignment note. Finally, the fact that subsequently custom formalities were fulfilled and customs duties were paid in relation to the stolen goods, so that these goods were in fact customs cleared at Moscow, is under the present circumstances irrelevant. Both the drivers and the thieves/receivers might have had a direct and substantial interest in doing this. The drivers in order to be able to leave the country without difficulty and the thieves/receivers in order to make a better price for the legally imported goods.

In the second case⁽²³⁾, the first driver had received written instructions to deliver the goods either at the customs station of Boutovo (Moscow) or at the address mentioned in the consignment note and to hand over the goods and accompanying documents only to a named person after checking his passport. Upon arrival at the customs station Boutovo, the two drivers (who had replaced the first driver in Belarus) called the consignee and were asked to wait for the arrival of the representative of the consignee. After about one hour, a person arrived who mentioned the name and telephone-numbers of the manager of the consignee and the drivers followed him to another address for the carrying out of customs formalities. The transport documents were handed over to the person and were handed back one hour later duly stamped. After this, the drivers went to an address stated by the person, and after breaking the customs seals, unloaded the goods without receiving a delivery receipt.

The court held that the stamp on the consignment note did not prove delivery of the goods to the consignee. Not only had the consignee reported theft of these goods to the police, also the shape and the text of the stamp used by the consignee differed from that on the consignment note. Since the goods were delivered to another address than that stated on the consignment note, the stamp did not create a presumption of receipt by the consignee. Consequently, it had to be concluded that the goods were lost prior to delivery to the consignee. Neither was the carrier relieved from his liability under Art. 17-1 CMR because he had followed instructions of the consignee. Wrongly, the drivers took directions from others than the consignee and thus acted in violation of Art. 12-14 CMR. The loss could have been avoided if further instructions had been asked from the consignor. Not only would this have made sense from a legal point of view, but also from a practical viewpoint, considering the doubts that the drivers already had. In this case the limitation-issue did not arise, because the total damage-amount did not exceed the limit.

⁽²³⁾ DC Rotterdam 23 Oct. 1997, S&S 1998, 52.

Interestingly, it was held in both cases that liability for damage resulting from a failure to deliver the goods to the proper person and/or address, was subject to the system of Chapter 4 of the CMR, more particularly to Art. 23 and 29 CMR. By contrast, in another recent decision it was held, that the limitation of liability of Art. 23 CMR (and therefore Art. 29-1 CMR) did not apply if a special instruction had been violated.

In this case⁽²⁴⁾ the driver had delivered the goods to the proper person at the right address, thus violating the special instruction not to deliver until further notice or approval from the consignor had been received. The goods remained unpaid and the consignor sued the carrier for violation of the express instruction. It was held that because the goods were not damaged or lost prior to delivery to the consignee, (the limitation of liability in) Art. 23 CMR did not apply.

14. Although the Art. 12-14 and 21 CMR deal only with specific instructions, their liability rules seem to exert influence by way of analogy on instructions in connection with international road-transport generally.

In one case⁽²⁵⁾ the cargo-interests claimed that the driver had turned off the cool unit for some 9 hours during the night, because of the noise and in order to get some sleep. The court held that this would have been a violation of the cooling instruction, so that if proven, this would qualify as intent to cause damage or equivalent default on the part of the driver.

In another case the instruction was that «the air circulation over the floor and at the back and front must be possible without obstacles and a temperature of -18°C can be maintained». Nevertheless, the cooltrailer was not fitted with cooling fins and the cargo of raspberries was not carried on pallets, as was stated on the consignment note. Under these circumstances CA The Hague presumed, subject to counter-evidence from the carrier, that the driver's conduct amounted to default equivalent to intent⁽²⁶⁾.

In two other cases, the driver failed to clear customs documentation in relation to the goods. CA The Hague held that because the confirmation of the transport order contained an explicit instruction to clear the customs documents and also in view of the seriousness of the consequences of a failure to do so, the negligence of the driver qualified as default equivalent to intent⁽²⁷⁾.

⁽²⁴⁾ DC Rotterdam 16 April 1998, S&S 1999, 123. See also: DC Rotterdam 23 Oct. 1997, S&S 1998, 52. See also: DC Roermond 5 Feb. 1998, S&S 1999, 11.

⁽²⁵⁾ DC The Hague 26 March 1973 and 1 Feb. 1984, S&S 1985, 10.

⁽²⁶⁾ CA The Hague 19 Feb. 1991 S&S 1992, 119 confirming DC Rotterdam 17 March 1989, S&S 1992, 7.

⁽²⁷⁾ CA The Hague 30 June 1998 S&S 2000, 11, appeal from: DC Rotterdam 18 Dec. 1992, S&S 1993, 97 and 24 March 1995, S&S 2000, 11. See also: DC Roermond 12 June 1986, S&S 1989, 20.

However, there are also examples to the contrary.

In one case a steel construction had to be carried from Tilburg, The Netherlands to Rapperswill, Switzerland within an agreed time-limit mentioned in the consignment-note. The goods arrived two days late. It was alleged by cargo-interests that although the importance of a timely delivery had been pointed out to the carrier, nevertheless he had made a detour to load a part-cargo. According to Court of Appeal 's-Hertogenbosch these circumstances did not qualify as default equivalent to intent⁽²⁸⁾.

In another case⁽²⁹⁾, the carrier failed to pass on the instruction (i.e. «the goods must never be left alone») to the sub-carrier, who was hired to carry a part of the consignment. On arrival of the two trucks at destination in Milan, Italy, the trailer of the sub-carrier was left behind near the customs office, whilst the two drivers went out with the truck to have dinner from 19.00 to 24.00 hours. On their return the drivers found that the trailer was stolen. According to DC Dordrecht, the failure of the carrier to pass on the instruction, as well as the conduct of the driver of the sub-carrier constituted default equivalent to intent in the sense of Art. 29 CMR. This verdict was overturned by CA The Hague which held that the above failure of the carrier in itself, and also seen in conjunction with what is generally known about the risks in Italy and what could be expected from the carrier, was not sufficient to justify the break-through of limited liability.

15. Finally, it is clear that following Art. 11 CMR, any risks inherent to the instructions given, are normally for the account of the consignor⁽³⁰⁾. Consequently, if the instructions were open to confusion or misunderstanding⁽³¹⁾, such can well be considered to be *the* (or at least *a contributing*) cause of the damage, for which the carrier is not (or only in part) liable under Art. 17-2 and 17-5 CMR⁽³²⁾.

In a recent case⁽³³⁾ the instructions given by the consignor violated the Russian customs legislation. It was held that – failing (constructive) knowledge on the part of the carrier that the instruction was necessarily illegal – the carrier could recover his damage resulting from the arrest of the truck by the Russian customs-authorities.

⁽²⁸⁾ CA 's-Hertogenbosch 2 April 1991, S&S 1992, 43.

⁽²⁹⁾ CA The Hague 29 Sept. 1998, S&S 1999, 31. Cf. CA Arnhem 2 Feb. 1999, S&S 2000, 42, comments Hillebrand, TVR, 1999, p. 168 ff.

⁽³⁰⁾ In one case the carrier was instructed to deliver the goods only against collection of a cash on delivery-charge payable by bank-check. When the bank-check bounced due to a false signature, the carrier was not liable. DC Rotterdam 10 Aug. 1990, S&S 1992, 56.

⁽³¹⁾ Hoge Raad 17 Nov. 1978, S&S 1979, 23, DC Rotterdam 16 Jan. 1997, S&S 1998, 50, DC Rotterdam 2 July 1997 and CA The Hague 26 Jan. 1999, both reported in: S&S 1999, 65.

⁽³²⁾ DC Rotterdam 16 April 1998, S&S 1999, 123.

⁽³³⁾ DC Rotterdam 17 Dec. 1998, S&S 1999, 134.

§ 6. Dangerous driving

16. Failure by the driver to obey the locally applicable traffic regulations may also lead to the break-through of the limited liability of the carrier.

During transport of a machine per flat-bed trailer from Rosenheim, Germany through Belgium to Breda, The Netherlands, the combination hit the underside of a fly-over in Belgium. Before departure the driver had measured the combined height of the trailer and machine, which was 4.55 m. Despite knowing that the combination measured 4.55 m, the driver did not apply for the – for such a transport obligatory – permit of the Belgian government. Instead he followed a route through Belgium prescribed under a permit for a previous transport with a maximum height of 4.50 m. In view of these circumstances and the fact that the driver had driven under the fly-over without previously determining its height or decreasing his speed (50 km), DC Breda held that the driver's default was equivalent to intent⁽³⁴⁾.

However, not every breach of traffic regulations will suffice. In a case⁽³⁵⁾ where the truck had toppled over, it was held, that only if the handling of the truck by the driver had been reckless, such as where the driver in view of the local circumstances and driving conditions had seriously violated the traffic regulations in regard of distance-keeping and speed, default equivalent to intent was proven.

§ 7. Theft

17. In the jurisprudence of the Dutch courts, cases of theft hardly ever qualify as «unavoidable circumstances», that can free the carrier from liability under Art. 17-2 CMR. The high standard to be applied here is that the carrier must show that he took *all* the measures which under the given circumstances might reasonably be required from the carrier in order to avoid the loss⁽³⁶⁾.

18. By contrast however, the Dutch courts have long been very restrictive in assuming conscious recklessness in cases of theft⁽³⁷⁾. Even where the driver had left his truck and trailer with valuable cargo alone for the weekend at an unguarded parking place in Italy freely accessible to the public or acted contrary to explicit instructions «not to leave the goods alone»⁽³⁸⁾, the courts did not consider a default equivalent to intent proven. However the courts

⁽³⁴⁾ DC Breda 17 May 1988, S&S 1989, 21.

⁽³⁵⁾ DC Rotterdam 5 Nov. 1998, S&S 1999, 101.

⁽³⁶⁾ Hoge Raad 17 April 1998, S&S 1998, 75, comments: K.F. Haak, TVR, 1997, p. 85-87.

⁽³⁷⁾ Cf. M.A.W. van Maanen, 'Doorbraak van aansprakelijkheid in het internationale wegvervoer', *Beursbengel*, Oct. 1998, p. 16-18. See also: M.J.P.M. Wijngaards, 'Nogmaals de doorbraak van de aansprakelijkheid in het internationale wegvervoer', *Beursbengel*, March 1999, p. 10-14.

⁽³⁸⁾ The Hague 29 Sept. 1998, S&S 1999, 31 (discussed above under no. 16). Cf. CA Arnhem 2 Feb. 1999, S&S 2000, 42.

would not hold either that the theft amounted to «unavoidable circumstances» for the carrier in the sense of Art. 17-2 CMR.

This can be illustrated by the following case⁽³⁹⁾, which concerned carriage of a consignment of copper ingots from Rotterdam to Lambro, Italy. Shortly after the Brenner pass the driver noticed that water was leaking from the motor of his lorry (Thursday). After staying the night in a local hotel, on Friday the driver parked the trailer at a busy, but unguarded parking lot near a local Esso-garage at Bressanone, Italy and drove off to a DAF-garage at Chiusa, also in Italy. When it became apparent that repairs would take at least two further working days, the driver returned home to The Netherlands for the weekend. On the next Tuesday the driver returned to Chiusa to pick up his lorry and drove back to Bressanone for the trailer. On his arrival there, it turned out that most of the copper ingots had disappeared from the trailer. The driver admitted having been concerned about theft of the entire trailer, since that was already common at the time (1974) in Northern Italy. However, the driver had not feared theft of individual ingots from the trailer, because of the sheer weight (120 kg) of each ingot and because of the location of the parking lot near the center of the village and next to an Esso-garage which was open 16 hours a day. CA 's-Hertogenbosch held that it had been negligent of the driver to leave the trailer – loaded with a valuable, yet (without the proper equipment) difficult to handle cargo – behind unprotected for several days. However, it did not amount to a default equivalent to intent⁽⁴⁰⁾.

A rare example where the carrier's liability for theft was unlimited, concerned a driver who had left his truck alone for 10 minutes in North-London, with the ignition key in the lock and the doors unlocked⁽⁴¹⁾.

19. Of course the restrictive approach of the courts applied *a fortiori* in cases where the driver had taken additional care in relation to the goods, such as where the truck had been parked inside a warehouse or within a fenced

area under surveillance of a private security company⁽⁴²⁾. This restrictive approach of the Dutch courts concords well with the four requirements of Art. 8:1108-1 DCC as described above in § 2. The applicable standard is not only whether the driver's conduct was reckless from an objective perspective, but also whether the driver knew and foresaw that the occurrence of damage was probable (subjective). Needless to say, the latter is difficult to prove.

20. However, during the 1990s a development has taken place in Dutch case-law in situations where the driver – without necessity and apparently only because of personal motives – takes the trailer from a well-guarded and fenced area and parks it unprotected at a publicly accessible place for the night.

The first case⁽⁴³⁾ concerned a road transport from Rotterdam to Beveren, Belgium. DC Haarlem held that the driver's fault was equivalent to intent. Also in view of the short distance (100 km), there was no necessity to perform this road transport as it had been done, especially not since the shipper's premises were open from 06.30 o'clock onwards. Instead of leaving the container on the guarded premises of the shipper, the carrier has parked it at an unfenced and unguarded parking lot without taking even the simplest of security measures, such as putting on an extra lock or putting the doors of the containers against those of another container. Neither did the driver respond (not even by radio) when he sensed danger during the night. It was in 1990 already of general knowledge, that in the West of Holland containers and their contents were being stolen by professional burglars at large scale.

This case was followed by two decisions of CA The Hague in 1999, also in relation to unnecessary nightly interruptions of a short-distance transport. In the *Cigna/Overbeek*-case⁽⁴⁴⁾, a container with sports clothing had to be carried from Rotterdam to Aalsmeer both in the Netherlands. The CA took into consideration that (a) the instruction given on Thursday was that the container had to be delivered at Aalsmeer on Monday before 09.00 hours (a distance of 75 km); (b) the driver had picked up the container on Friday-night from the well-guarded terminal of ECT at Rotterdam and parked the truck with closed doorlocks along the public road in the vicinity of an industrial zone at Gouda, about 2 km from his home, and that (c) this was not done for any businesslike reason, but merely to serve the driver's own interests. Consequently, the CA quali-

⁽³⁹⁾ DC Rotterdam 22 Oct. 1993, S&S 1997, 19; CA The Hague 7 Dec. 1993, 25 Oct. 1994, S&S 1995, 38; DC Rotterdam 31 May 1995, S&S 1995, 101; DC Rotterdam 27 June 1996, S&S 1998, 42; DC Rotterdam 23 April 1998, S&S 2000, 10; CA Arnhem 2 Feb. 1999, S&S 2000, 42.

⁽⁴⁰⁾ DC Haarlem 23 Nov. 1993, S&S 1998, 7.

⁽⁴¹⁾ CA The Hague 26 Jan. 1999, S&S 1999, 66.

fied the driver's above acts as reckless and stated that he must have realized that this would probably cause damage. As neither the industrial zone, nor the truck, were secured in any way, and the driver knew that he was carrying cargo specially susceptible to theft, the driver must have understood that the risk of theft was considerable. That was not altered by the alleged facts that more trucks were parked near the industrial zone during the weekend and at night, or that the truck was parked below a street-lantern near a private home or that the area was patrolled by the police and by private security services.

In the *CGM/DJG*-case⁽⁴⁵⁾ the CA reasoned as follows: (a) Now that it concerned transport from Rotterdam to Antwerp (100 km), where the goods can be delivered 24 hours a day, the driver – instead of staying for the night at Stellendam – could have driven to Antwerp directly. (b) Without any necessity, nor for any businesslike reasons and without any other justification than to serve his own interests, the driver has parked the truck with container, which did not have a decent theft-protection system, at an unfenced and unguarded parking lot in his town of residence Stellendam, which may be qualified as reckless. (c) The driver knew in any case when he left the ECT-terminal that he was carrying cargo especially susceptible to theft and must have known, or ought to have known, that under the above circumstances the risk of theft was considerable and therefore probable. (d) The above is not altered by the fact that the driver had not received specific orders to drive without interruption from Rotterdam to Antwerp. (e) It is a fact of common knowledge that to leave behind a truck with a cargo susceptible to theft poses a considerable risk failing any security of the parking lot itself or of the truck and Stellendam is no exception to this rule of experience. (f) The carrier possessed an alternative, less-risky and non-costly way of carrying out the transport, which the driver however willingly and knowingly did not use for personal reasons of his own.

Both decisions of The Hague CA have been criticised⁽⁴⁶⁾ for taking a far too «objective» approach on the requirement of knowledge on the part of the drivers as to the probability of damage occurring. Currently, against both decisions appeal to the Hoge Raad is pending.

21. Both major tendencies in the jurisprudence of the lower Dutch courts – i.e. violation of instructions and the taking of unnecessary risks – come together in the facts of the last decision to be discussed here, the unpublished Philip Morris/Van der Graaf-decision of CA 's-Hertogenbosch of 1 Oct. 1998 (ref. C9700044), against which decision appeal to the Hoge Raad is pending as well.

⁽⁴⁵⁾ CA The Hague 29 June 1999, *S&S* 1999, 125.

⁽⁴⁶⁾ Hillebrand, *TVR*, 1999, p. 172; K.F. Haak, *op. cit.*, 2000, p. 17.

The case concerned road-transport of cigarettes from The Netherlands to Italy. The (four) drivers had explicitly been instructed not to leave the lorries alone. The CA took as its departure point that the question whether the drivers had acted recklessly and with knowledge that such loss would probably occur, must be answered on the basis of what facts are established concerning the circumstances under which the theft occurred. Then the CA mentioned the following relevant facts: the drivers had parked their lorries, which were not fitted with anti-theft or alarm appliances and which carried a very valuable cargo, in a theft-susceptible country at an unguarded parking lot. Hereafter they left their lorries alone for at least one and a half hours and went to have dinner together in a restaurant from where they could see the lorries. On passing the Italian border the drivers could have realised that they would not reach the place of destination in Italy in time, yet they did not decide to spend the night at the border. All of the above was in violation of the general guidelines for transports to Italy and of their specific instructions. The CA concluded that the requirements for conscious recklessness were met. A remarkable feature of the decision is that the CA did not refer to what the drivers did know, but instead relied on what the drivers could and should have known.

§ 8. Final remarks

22. It follows from the above that the Dutch case law in respect of Art. 29 CMR is very diverse and far from united. For a part, this may be unavoidable in view of the complexity of facts leading up to and surrounding damage to cargo in international road transport. For another part however, a lot of uncertainty still exists in the interpretation of the concept of conscious recklessness under Art. 8:1108-1 DCC, not to mention (again) inconsistency in the decisions by the lower Courts. Given the factual nature of qualifications like conscious recklessness, it may be doubted that the Hoge Raad, whose role it is to preserve the unity of law, will be able to bring much light into the darkness in its eagerly awaited decisions in the *Philip Morris/Van der Graaf*, *Cigna/Overbeek*- and *CGM/DJG*-cases. Time will tell.