Ladies and Gentlemen,

Today I will address three topics, that are closely related. Not only to each other and the day to day reality in logistics, but also and quite appropriate with both Italy and the Netherlands.

The Italian-link will immediately emerge when we first will be looking at road haulage and the inevitable CMR convention. You will see that, for those of you who ship cargo from or to the Netherlands, there are things to be much aware of and actions to be taken that can save you a lot of money. That will automatically bring us to the second issue: forum shopping. And thirdly, upon request of our co-hosts of LS LexJus Sinacta, we will look briefly at storage of your goods in the Netherlands and the liability position of the storage companies. In other words, a quick walk down the "logistics supply chain liability road", Dutch style.

Dutch case law on CMR owes much to Philip Morris, the carrier Van der Graaf and their underwriters. These parties gave the Dutch Supreme Court the opportunity to give their interpretation of Article 29 CMR and, in a later judgment, of Article 23 (4) CMR, in their respective rulings of 5 January 2001 and 14 July 2006. I shall now discuss these decisions and their consequences.

The case concerned the theft, in transit, of two truckloads of cigarettes carried by road from the Netherlands to Italy. As a consequence of the theft, the cargo interests suffered a loss of about € 250,000 for the cigarettes, exclusive of excise duties. Because the customs documents could not be cleared the Italian authorities could assume that the cigarettes had been put on the free market in Italy. As a result, an additional levy in excess of € 1,500,000 became due.

Cargo interests tried to recover their complete loss (the cargo damage plus the fiscal damage) from the road haulier in two separate attempts.

Dutch interpretation of Article 29 CMR - the judgment of 5 January 2001

The cargo interests first tried to 'break' the CMR limitation of liability of 8.33 SDR per kilogram, by arguing that Article 29 CMR applied. This article provides that, in case of wilful misconduct or such fault that is considered equivalent to wilful misconduct, the road haulier cannot invoke the liability limitation of Article 23 CMR.

The question whether there is such fault on the part of the carrier, according to Article 29 CMR, must be answered by the lex fori. In this case, Dutch law was therefore to be applied.

Dutch law defines wilful misconduct in Article 8:1108 s.1 of the Dutch Civil Code ("DCC"), which in translation reads as follows:

> "*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 intent to cause such damage or recklessly and with knowledge that such damage would probably result.*"

It therefore follows that wilful misconduct under Dutch transportation law requires that both the damage or loss must have been either caused intentionally or must have resulted from 'conscious recklessness' on the part of the person acting. This definition entails both an objective test (was the act reckless?) as well as a subjective test (did the acting person know – was he conscious – that such damage would probably result?).

Now let us have a closer look at the facts of the Philip Morris/Van der Graaf-case.

The (four) drivers had received explicit written instructions not to leave the trucks unattended. The total value of both cargoes amounted to € 1.7 million, the applicable CMR limit was about € 300,000.

In the opinion of the Court of Appeal of 's-Hertogenbosch the following facts proved that the theft was caused by conscious recklessness on the part of the drivers:

- the drivers had parked their trucks, which were not equipped with any anti-theft protection yet loaded with a high value cargo, at an unguarded parking in a theft-susceptible country (at the time there were many cargo thefts from Italian road-side parking's);
- they left their truck unattended and out of their sight for at least one and a half hours to have dinner in a restaurant;
- when passing the Italian border, they 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 Swiss border.
- all of the above was in breach of not only the general guidelines for transports to Italy at the time, as well as of the specific transport instructions.

I add to this that the drivers, upon return to the Netherlands, were sacked by their employer Van der Graaf.

The Court of Appeal considered and rejected other circumstances, that were submitted by the carrier:

- the drivers had parked the trucks behind other trucks in such a way that it was impossible to drive them away;

- the drivers had frequently visited the parking place without problems and therefore could have reasonably considered it safe even though it was unguarded.
- the parking place was well lit and busy;
- the doors and steering column locks of the trucks had been locked.

This approach, that to a large extent was formerly adopted by the lower courts and was based on awareness of the possibility of damage, came to an end with the rulings of the Supreme Court in 2001 (reconfirmed in 2002). "Conscious recklessness" was defined as follows:

> "*According to Dutch law, the limitation of liability can only be excluded pursuant to Art. 29 CMR where there has been reckless conduct. For conduct to be classified as "reckless in the knowledge that damage would probably result" it is necessary that the party who behaves in such a manner knows the risk associated with such conduct and furthermore is aware that the danger of the risk occurring is much greater than the chance of it not occurring, whilst not allowing either of these possibilities to influence its behaviour.*" and
>
> "*In order to exclude the limitation of liability, it is not decisive, in reply to the question of whether an act or omission was committed in the knowledge that damage would probably result, that the person behaving in that manner knew that the risk of theft was considerable. The limitation of liability can only be excluded, in accordance with the provisions of Art. 29 CMR, if the act or omission was committed in the knowledge that the risk of damage occurring was much greater than the risk of it not occurring, but without either of these possibilities being taken into consideration.*"

It is plain to see that this "awareness of probability" requirement makes high demands on the cargo interest's burden of proof. No wonder, then, that unlimited liability was rejected after the aforementioned decision by the Supreme Court in similar cases.

In summary, to meet the objective threshold for "conscious recklessness" under Article 29 CMR in the Netherlands, the act of the driver must therefore result in a situation in which the chances that damage (here: theft) will occur can be proven to statistically be higher than 50%.

And to meet the subjective threshold for a successful "conscious recklessness" argument under Article 29 CMR in the Netherlands, cargo interests must prove that

the driver acted consciously of that statistical risk in excess of 50%, yet was not stopped from acting despite this knowledge.

Since this judgment, Dutch Courts only accept unlimited liability in very exceptional cases.

Article 23(4) CMR - the judgment of 14 July 2006

Philip Morris had however also raised another point. Even if there was no 'conscious recklessness' on the part of Van der Graaf, they argued that the customs and excise duties fall within the scope of Article 23 (4) CMR and should therefore be recoverable from Van der Graaf in addition to the amount of the weight limitation of Article 23 (3) CMR:

> "*In addition* [to the amount recoverable as per Article 23 (3)]*, the carriage charges, Custom duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss, sustained in case of partial loss, but no further damages shall be payable.*"

The question therefore was now whether the excise duties are recoverable as falling within "the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods"" under Article 23 (4). Differently put: should the carrier pay this damage in addition to the amount of the limited liability (the 'broad interpreation')? This question was "nayed" by the Court of Appeal in Amsterdam. Following this rejection cargo interests decided to appeal, once again, to the Supreme Court.

The question of recoverability of excise duties under Article 23 (4) CMR was answered in 1977 by the House of Lords in 'Babco v. Buchanan[1]' in favour of Philip Morris' broad interpretation. This decision has been followed by other European/CMR Courts (France, Denmark and recently Belgium), but has also been severely criticised. Both in England and in continental Europe. In 'Sandeman/TTI'[2] the English Court of Appeals referred to 'Babco/Buchanan', and mentioned that is critically discussed in the 3rd edition of Clarke's Book on international carriage of goods by road and in the 3rd edition of Hill & Messent on CMR. The Court of Appeal writes (in paragraph 38) that "for our part we do not consider that the decision should be applied any more widely by the courts of this country than respect for the doctrine of precedent requires.", which follows the remarks of the Appeal Court:

[1] *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.* [1978] A.C. 141, 152[1], also: [1978] 1 Lloyd's Rep. 119.
[2] [2003] 2 Lloyd's Rep. 172

> "*In the absence of authority, we would have answered this question in the negative. It seems to us that one object of the CMR is to make a clear apportionment of risk arising in the course of international carriage by road, so as to facilitate insurance and avoid double insurance. A natural reading of Article 23 would seem to us to impose liability on the carrier for the value of the goods when the carriage begins, subject to the Article 23.3 limit, together with charges incidental to the carriage of the goods, including Customs duties. Such charges, typically, are foreseeable and form an increment to the value of the goods. (…). The minority of the House of Lords resolved the issue as we would have done. The majority, however, did not.*"

Several Supreme Courts of CMR countries have also considered 'Babco/Buchanan' and, despite the objective that an autonomous meaning of this treaty provision (Article 23 (4) CMR) should be aimed for, have ruled against it and in line with the criticasters' 'narrow' interpretation.

The Dutch Supreme Court also considered this question and gave much weight to the views of their colleagues at the German BGH[3]. The Supreme Court supports the connection that the BGH made with the COTIF-CIM convention, that in 1956 formed the basis for the liability regime of the CMR convention. The COTIF-CIM supports the 'narrow interpretation'. In particular this was made explicit in the 1999 Vilnius Protocol to the COTIF-CIM, that was drafted to modify this "mother of the CMR Convention". Article 30 (4) COTIF-CIM was amended to end the debate about the excise duties:

> "*§ 4. The carrier must, in addition, refund that carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost <u>except excise duties for goods carried under a procedure suspending those duties</u>.*"

The decision of the Supreme Court painfully shows that the interpretation of – also – Article 23 (4) CMR differs in the CMR signatory states. In England, Denmark, France and Belgium, fiscal damage is recoverable from the CMR carrier under Article 23 (4) CMR, whereas in Germany, Austria and The Netherlands it is not.

Conventions are intended to be interpreted autonomously. This means in a similar way by the courts of the signatory states. Or, to use the words of Lord Wilberforce in, ironically, *Babco v. Buchanan*, that a convention should be interpreted:

> "*Unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptation.*"

[3] BGH 26 June 2003, TranspR. 2003, p. 453

Obviously that is not the case and cargo interests will therefore prefer to bring an action before a court of a jurisdiction where Article 29 CMR is applied relatively "easy" or, in case of excise duties, before courts that support the broad interpretation of Article 23 (4) CMR. The carriers would obviously opt for a jurisdiction where Article 29 CMR is not "easily" applied and where Article 23 (4) CMR is interpreted narrowly. The financial incentive to do so is significant, which is illustrated by the following example:

Theft of a cargo load of cigarettes:

Value: € 110.000

Weight: 3.736 kgs - Article 23 (3) CMR 8,33 SDR/kg limitation: € 40.500

Excises and duties: € 717.000

If Article 29 CMR is applied, carrier liable for:	€ 827.000
If Article 23 CMR is applied with broad interpretation, carrier liable for:	€ 757.500
If Article 23 CMR is applied with strict interpretation, carrier liable for:	€ 40.500

These liability differences give rise to forum shopping, which brings us to our second topic of today:

Forum shopping

Article 31.1 CMR reads:

> "*In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory: (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.*"

This provision applies to <u>all</u> claims in connection with the carriage. Therefore both for claims brought by cargo interests *against* the carrier, as well as actions brought *by* the carrier.

Therefore, the system of the CMR provides a plaintiff with an opportunity to bring the claim in what is the most favourable jurisdiction for him. This provides for an action by the carrier to secure that his liability will be judged by the (very) carrier friendly Courts of the Netherlands.

This works as follows. Under Dutch law a plaintiff may ask for a so called "declaratory judgment". Article 3:302 DCC:

> "*Upon the demand of a person directly involved in a legal relationship the court will render a declaratory judgment in respect of such legal relationship.*"

Article 3:302 DCC in conjunction with Article 31 CMR, therefore makes it possible for the CMR carrier to demand from the court to give a declaratory judgment:

> "*That the CMR carrier is not liable with regard to the transport damage to the defendant beyond the amounts due according to Article 23 CMR (the limit of 8.33 SDR per kilo).*"

Pursuant to Article 31 (2) CMR no new action (concerning the same subject between the same parties) can be brought before another court, if the claim is already pending before a competent CMR court. This is an application of the "lis pendens" principle of 'first come, first served', to prevent that one ends up with different proceedings in different countries resulting in different judgments.

In order to escape cargo friendly jurisdictions, road carriers that apply to the Dutch Courts on the basis of Article 31 CMR, often (and much to our delight) make use of this procedural weapon of the 'declaration proceedings'.

In our above example the financial difference between beating the carrier in the race to a jurisdiction outside of the Netherlands or being forced to litigate the matter in the Dutch Courts may well be in excess of € 750.000. For all of you who have cargo carried to or from the Dutch jurisdiction by road where the difference between the liability limits is significant, I very much recommend that you consider your possibilities to submit your claims against your carriers outside of the Netherlands. And have your lawyers in those jurisdictions on speed dial in your telephones. Because if the carrier beats you in the race to the Dutch Courts you are likely to lose a lot of money. And if you wonder how long it will take a Dutch lawyer to validly commence a declaratory action, the answer is that we have managed to do it within 1,5 hours from the moment that the matter was introduced to us and before the cargo itself even was aware that it had been stolen. It therefore clearly is a very tight race against the clock.

Liability of the storage keeper

The third topic that our hosts of today asked me to address, is the liability of the storage keeper in the Netherlands. Obviously, once your goods are shipped from Italy to the Netherlands and have arrived by truck without problems, they are still exposed to risks such as theft from the storage facility, where they await on-carriage or distribution.

To illustrate the situation under Dutch law, I will use the matter between Geodis and Lexmark. The storage facilities of Geodis were very well secured. Nevertheless, thieves managed to steel 49,000 ink cartridges from the secured storage, with a value in excess of US$ 2 million.

Geodis argued that it was not liable because it had acted in accordance with its contractual obligations, had provided for an extensive electronic security system and had made use of a professional security company. Lexmark had known about these security measures and had agreed with these. What else did Lexmark want?

The Court of Rotterdam[4] ruled differently and decided that Geodis, as professional storage keeper, had the obligation to return the goods in the same condition as in which it had received these for storage. Since Geodis could not meet this obligation, in principle it was liable for the damage. The mere fact that the storage facility was well secured and that Lexmark had agreed to such level of security, did not change this.

However, the fact that Geodis was liable does not say anything (yet) about the level of its liability. Under Dutch law professional contracting parties, in principle, are permitted to contractually exclude their obligation to compensate losses to a far-reaching degree. This also applies to an exclusion of liability. It is established case law that a limitation of liability clause in, for instance general terms & conditions, can usually be relied on by the party invoking such conditions, except in the event of recklessness of the (management of the) company.

I will not go into too much details about application of general conditions under Dutch law, but as a general rule under Dutch law, in conjunction with EU Directive 2006/123, general conditions should be agreed upon when entering into an agreement between the parties. For this purpose it suffices that a party refers to the applicability of its general conditions in pre-contractual email correspondence. For instance by way of a disclaimer with a hyperlink to these general terms & conditions.

[4] Court of Rotterdam, 22 July 2009, S&S 2010, 57.

If both parties refer to their general terms & conditions, the (very) first referral will prevail. In other words, the "battle of forms" is then decided in favour of the first professional party that refers to the applicability of its general terms & conditions.

In respect of international road carriage, we have seen that the Dutch Supreme Court applies a very strict level of "recklessness", creating a threshold that is almost impossible to meet because of both the subjective as well as the objective norm applied.

This is different in respect of storage. In its ruling "Telfort/Scaramea"[5] the Supreme Court gave us some first guidance. From this judgment follows that the applied criterion to decide whether the level of recklessness is such that it removes the right to limit liability on the basis of general conditions, is an objective test only. This seems to be supported by a recent opinion (6 June 2014) by the Advocate General to the Supreme Court (Mr. Van Peursem) who in his advice to the Supreme Court wrote that the subjective "knowledge" criterion must not be applied to evaluate the required level of recklessness.

The threshold that must be met, so it seems, is that "the mere fact of not taking simple measures to prevent a threatening and significant damage, would already constitute sufficient "recklessness". Briefly said, according to Mr. Van Peursem the fact that damage, that was easily foreseeable, could have been equally easily prevented and was not, removes the right to limit liability. This clearly provides for more possibilities to claim damages from a storage keeper. But the million dollar question then regards on what management level this required level of culpability must be proven to remove the storage keeper's right to contractually limit liability.

A second matter, that may be of relevance in this respect, is the matter of the "Azalea"[6]. It here regarded a contamination of stored products at Vopak during loading operations of a barge at the Vopak terminal. The piping-system of the Vopak terminal was not working properly because of a fault in the software and a newly introduced IT-system. The Court of Rotterdam decided (and this decision was later upheld by the Court of Appeal in The Hague) that Vopak and its operational management were aware of the malfunctioning IT-system and the possible damage that this could cause. Yet they had failed to properly instruct the staff to (manually) deal with and prevent situations that could avoid comingling in the piping-system and subsequent contamination of and damage to the goods. This removed the right

[5] Supreme Court 5 September 2008, *NJ* 2008, 480.

[6] Court of Rotterdam 11 February 2009, S&S 2010, 30 and Court of Appeal The Hague, 5 July 2011, S&S 2013,99

of Vopak to invoke the contractual exclusion of liability from its general terms & conditions.

In view of the rulings in the "Telfort/Scaramea" and the "Azalea", read in conjunction with the advice of Mr. Van Peursem, it may be argued that, contrary to the situation in transport law, the threshold for (unlimited) liability of a storage company must be put to an objective rather than also an subjective test.

But of course, all this does not change the fact that very often actions on a non-executive level by its staff or agents, will not prohibit the possibility of the storage keeper to invoke a limitation or even exclusion of liability that generally will have been agreed in the contract with its principal.

Thank you for your attention

Liability in logistics, Dutch style

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Three topics today

- Road haulage and Dutch interpretation Article 29 CMR
- Forum shopping
- Liability position of Dutch storage keepers

Van der Graaf/Philip Morris (2001)

- Theft of two truckloads of cigarettes, carried from the Netherlands to Italy
- Cargo interests suffered loss of € 250,000 for the cigarettes, exclusive of excise duties
- Custom documents could not be cleared wherefore additional levy of excise duties of € 1,500,000 by Italian authorities

Philip Morris – 1st attempt

- Philip Morris argued fault on part of Van der Graaf the equivalent to 'wilful misconduct'
- As a consequence Van der Graaf should not be able to invoke the liability limitation of Article 23 CMR according to Philip Morris
- Was there such fault?: 'Lex fori'

Fault equivalent to wilful misconduct?

- Article 8:1108 DCC:

  "*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 intent to cause such damage or recklessly and with knowledge that such damage would probably result.*"
- Hereafter: "conscious recklessness"

Objective and subjective norm

- Objective test (was the act reckless?), and
- Subjective test (did the acting person know that such damage would probably result?)
- That would lead to "conscious recklessness"

Facts Van de Graaf/Philip Morris case

- Court of Appeal of 's-Hertogenbosch accepted "conscious recklessness" because:
  - Trucks without anti-theft protection, yet loaded with high value cargo, parked at unguarded parking
  - Theft-susceptible country (at the time many thefts from Italian road-side parking's);
  - Trucks unattended and out of their sight for at least one and a half hours to have dinner;

- Drivers should have realised that they would not reach the place of destination in Italy in time and could have spent the night at Swiss border
- Acted in breach of the general guidelines for transports to Italy at the time and their specific transport instructions
- Drivers, upon return to the Netherlands, were sacked by Van der Graaf

Supreme Court

- *"For conduct to be classified as "reckless in the knowledge that damage would probably result" […] the party who behaves in such a manner knows the risk associated with such conduct and furthermore is aware that the danger of the risk occurring is much greater than the chance of it not occurring, whilst not allowing either of these possibilities to influence its behaviour."*

- And: "*[…] it is not decisive, […], that the person […] knew that the risk of theft was considerable. The limitation of liability can only be excluded, […], if the act or omission was committed in the knowledge that the risk of damage occurring was much greater than the risk of it not occurring, but without either of these possibilities being taken into consideration.*"

Two (impossible?) thresholds

- Objective threshold: the act of the driver must result in a situation where the chances that damage will occur can be proven to statistically exceed 50%
- Subjective threshold: cargo interests must prove that the driver acted consciously of that statistical risk in excess of 50%, yet was not stopped from acting despite this knowledge

Theft from parkings

- In principle carrier in the Netherlands only liable up to 8,33 SDR/kg
- Objective "Statistical risk" in excess of 50% of theft from this particular truck from this particular parking impossible to prove
- Driver's "Subjective knowledge" of this risk (even more) impossible to prove

Philip Morris – 2nd attempt (2006)

- Article 23 (3) CMR:

  "*In addition* [to the amount recoverable as per Article 23 (3)]*, the carriage charges, Custom duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss, sustained in case of partial loss, but no further damages shall be payable.*"

Excise duties

- Are the excise duties recoverable as falling within "the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods"" under Article 23 (4)?
- Differently put: should the carrier pay this damage in addition to the amount of the limited liability (the 'broad interpretation')?
- "Nayed" by the Court of Appeal in Amsterdam

1977 – Babco v Buchanan

- House of Lords in 'Babco v. Buchanan' in favour of Philip Morris' broad interpretation
- Broad interpretation followed by French, Danish and Belgian Courts
- However: also heavily criticised, outside UK and by UK Court of Appeals

2003 'Sandeman/TTI'

"*In the absence of authority, we would have answered this question in the negative. It seems to us that one object of the CMR is to make a clear apportionment of risk arising in the course of international carriage by road, so as to facilitate insurance and avoid double insurance.*

A natural reading of Article 23 would seem to us to impose liability on the carrier for the value of the goods when the carriage begins, subject to the Article 23.3 limit, together with charges incidental to the carriage of the goods, including Customs duties. Such charges, typically, are foreseeable and form an increment to the value of the goods. (…). The minority of the House of Lords resolved the issue as we would have done. The majority, however, did not."

Dutch Supreme Court

- Much weight to German BGH ruling (2003)
- Supports the connection with the COTIF-CIM convention ("mother of the CMR")
- The COTIF-CIM supports the 'narrow interpretation'. In particular made explicit in the 1999 Vilnius Protocol to the COTIF-CIM

Cotif-CIM

- 30 (4) COTIF-CIM was amended to end the debate about the excise duties:

  "*§ 4. The carrier must, in addition, refund that carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties.*"

Forum Shopping

- Lord Wilberforce in, ironically, *Babco v. Buchanan*, expressed that a convention should be interpreted:

  "*Unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptation.*"
- The CMR obviously is not: Forum Shopping!

The preferred forums

- Cargo interests will look for a jurisdiction where Article 29 CMR is applied relatively "easy" or, in case of excise duties, in any case supports the 'broad interpretation'
- Carriers obviously opt for a jurisdiction where Article 29 CMR is not "easily" applied and where Article 23 (4) CMR is interpreted 'narrowly'.

Consequences of chosen forum

- Theft of a cargo load of cigarettes
- Value: € 110.000
- Weight: 3.736 kgs - Article 23 (3) CMR 8,33 SDR/kg limitation: € 40.500
- Excises and duties: € 717.000

Consequences of chosen forum (II)

Carrier liable:

- If Article 29 CMR applies € 827.000
- If Article 23 CMR applies, (broad interpretation) € 757.500
- If Article 23 CMR applies, (strict interpretation) € 40.500

Article 31.1 CMR

"[…], the plaintiff may bring an action in any court [..] of a contracting country designated by agreement between the parties and, in addition, in the courts [..] within whose territory:

(a) The defendant is ordinarily resident, […], or
(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated."

Article 3:302 DCC

"Upon the demand of a person directly involved in a legal relationship the court will render a declaratory judgment in respect of such legal relationship."

Declaratory judgment

- 3:302 DCC in conjunction with Article 31 CMR
- The CMR carrier can demand from the court to give a declaratory judgment:

  "That the CMR carrier is not liable with regard to the transport damage to the defendant beyond the amounts due according to Article 23 CMR (the limit of 8.33 SDR per kilo)."

- Road carriers apply to the Dutch Courts on the basis of Article 31 CMR and often (and much to our delight) make use of this procedural weapon of the 'declaration proceedings'
- Consider possibilities for your claims against your carriers outside of the Netherlands
- Have your lawyers there on speed dial because if the carrier beats you in the race to the Dutch Courts you lose a lot of money

Liability of the storagekeeper

- Geodis v. Lexmark (Court of Rotterdam 2009)
- Storage facilities of Geodis were well secured
- Yet thieves managed to steel 49,000 ink cartridges, with a value in excess of US$ 2 million
- Lexmark knew about the security measures and had agreed with these
- Geodis argued that it was therefore not liable

Court of Rotterdam

- Professional storage keeper
- Obligation to return the goods in the same condition as in which it had received these for storage
- Because Geodis could not meet this obligation, in principle it was liable for the damage
- To what extent was Geodis however liable?

Exclusion of liability in GT&C

- Professional parties, in principle, are permitted to contractually exclude liability
- Except in the event of recklessness of the (management of the) company
- Suffices to refer to applicability of general conditions in pre-contractual email correspondence, for instance in a disclaimer with a hyperlink to the GT&C
- 'First shot' rule

"Telfort/Scaramea" and A.-G. V. Peursem

- Supreme Court: Level of recklessness to remove right to limit liability on the basis of GT&C: objective test only
- Mr. Van Peursem: the subjective "knowledge" criterion not to be applied to evaluate the required level of recklessness: "the mere fact of not taking simple measures to prevent a threatening and significant damage, would already constitute sufficient "recklessness".

Million dollar question

- On what management level must this required culpability be proven to remove the right to contractually limit liability?

"Azalea": Court of Appeal The Hague 2011

- Vopak and its operational management was aware of the malfunctioning IT-system
- They had failed to properly instruct the staff to (manually) deal with and prevent situations that could avoid comingling
- This removed the right of Vopak to invoke the contractual exclusion of liability from its GT&C

Summary

- Road carriage: 'objective' statistical test and 'subjective' test of the knowledge of such statistics – i.e. almost impossible to break liability limitation
- Storage: unlimited liability of a storage company in case of theft or damage must be put to an objective test on management level

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