

# MEMORANDUM



TO Organizing Committee

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SUBJECT AIJA Prague Conference 2014 - Questionnaire TLC

## 1. INLAND ROAD TRANSPORT

### 1.1. Which rules govern domestic, i.e. non international, road transport in your jurisdiction? Are the rules mandatory or can be deviated from by contracts?

The Netherlands has a civil law system. Dutch civil law on transport is laid down in Book 8 of the Dutch Civil Code ("Book 8 DCC"). Road transport contracts are governed by articles 1080 - 1201 of Book 8 DCC, if Dutch law applies. All provisions regarding the carrier's liability and the burden of proof resting upon the carrier, apply compulsorily. In principle, deviations from these provisions are null and void, unless the deviation is explicitly agreed upon in a written contract between both parties. Art. 1102 of Book 8 DCC provides: "*Any stipulation whereby the liability or burden of proof resting upon the carrier pursuant to article 1095, is increased or limited in a manner other than that provided for in this section, is null, unless this stipulation has been entered into expressly and otherwise than by a reference to stipulations appearing in another writing, in a contract entered into especially with respect to the intended carriage and consigned in a separate writing.*" So, only under strict conditions, parties may deviate from the liability provisions of Book 8 DCC. All other provisions are non-mandatory.

### 1.2. When is the road carrier liable for loss, damage and delay? Please describe the basis of liability and any liability exceptions available to the carrier.

Pursuant to art. 1095 and 1096 Book 8 DCC, the carrier must deliver the goods which he has received for carriage in time to destination, and in the state in which he has received them. If the carrier does not fulfil this general obligation, he is in principle liable for the damage.

Pursuant to art. 1098 Book 8 DCC, the inland road carrier is not liable for damages caused by a fact which a prudent carrier has not been able to avoid, and to the extent that such a carrier has not been able to prevent the consequences thereof. This means that the carrier is not liable in case of force majeure. The burden of proof of force majeure is on the carrier. It follows from Dutch case law that it is very hard for a carrier to meet this burden of proof.

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The Dutch Supreme Court (*Hoge Raad*) held that a carrier can only successfully invoke the exoneration of art. 1098 Book 8 DCC in the event of loss of the cargo during carriage if he proves that he has taken all measures required in the circumstances of the case from a prudent carrier – including persons of whose services he makes use for the performance of the agreement – to avoid the loss.<sup>1</sup>

**1.3. Is the carrier entitled to limit liability for loss, damage and delay and, in the affirmative, can the limits be broken?**

*a. Limitation of liability*

Pursuant to art. 1105 Book 8 DCC, the liability of the carrier is limited to the amount to be determined by or pursuant to regulation. The Royal Decree of 17 March 1997 (Bulletin of Acts and Decrees 1997, 131) regulated that the amount of this limitation is 7.50 Dutch guilders per kilogram. Pursuant to the Dutch Modification Decree concerning the introduction of the euro (Bulletin of Acts and Decrees 2001, 415) the amount of the limitation was converted to EUR 3.40 per kilogram.

*b. No limitation of liability*

Art. 1108 Book 8 DCC stipulates that the carrier may not invoke any limitation of liability to the extent that the damage has arisen from *his own* act or omission, done either with the intent to cause that damage, or recklessly and with the knowledge that that damage would probably result therefrom.

It shall be noted that this clause only applies in case of wilful misconduct (intent) or gross negligence of the carrier itself. This means that only the own acts and omissions of the carrier fall within the scope of this clause. Acts and omissions of subcontractors or other servants or agents fall outside this scope. If the carrier is a legal entity, then acts or omissions of its employees (e.g. the driver) do not fall within the scope of this clause either. In such case, only acts and omissions of the persons who are to be considered to represent the carrier (i.e. the legal entity) fall within the scope of art. 1108 Book 8 DCC.<sup>2</sup> This means that the limitation of liability can only be broken due to personal acts of the management of the transport company. For breaking the limitation, it must be shown by claimants that the management of the company itself is involved in the incident, or that the management of the company was aware that one of its drivers for example had a habit of stealing goods and that the management did not take any precautions in this respect to avoid any further thefts and/or loss.

Furthermore, art. 1108 Book 8 DCC demands a "*personal act or omission, committed with*

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<sup>1</sup> Supreme Court 17 April 1998, S&S 1998, 75 (Oegema/Amev),

<sup>2</sup> Supreme Court 6 April 1979, NJ 1980, 34 (Kleuterschool Babbel); TS II, Parliamentary History 8, page 1062.

the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." In several judgments since 2001, the Dutch Supreme Court has explained this article and construed the following requirement. "There is conduct which is to be regarded as reckless and with knowledge that the loss would probably result therefrom, if the person conducting himself in this way knew the risk connected to that conduct and was conscious of the fact that the probability that the risk would materialise was considerably greater than that it would not, but all this did not restrain him from behaving in this way".<sup>3</sup> The Supreme Court has made it clear that, in order to determine whether a carrier has acted recklessly and with knowledge that loss would probably result, one should not apply an objective test ("the driver should have known..."), but a subjective test ("the driver knew ..."). Furthermore, the Supreme Court emphasized that it is not sufficient for cargo interests to prove that the carrier knew that the probability that loss would occur was considerable. Cargo interests who wish to break the limitation in Dutch Courts must instead prove that the carrier knew that the probability that the loss would occur was considerably greater than the probability that the loss would not occur. In the case of *Philip Morris v Van der Graaf*,<sup>4</sup> the Supreme Court clearly indicated that even the fact that the carriers acted contrary to specific instructions, is not sufficient to conclude that they were conscious that the probability that the loss would actually result was considerably greater than the probability that it would not. The explanation of the Supreme Court was repeated by the Supreme Court and lower courts in several cases.<sup>5</sup>

It must be noted that the CMR Convention applied to the transports being the basis of the two aforementioned landmark cases of the Supreme Court. Art. 29 CMR, about limitation of liability, reads:

*"The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct."*

The underlined phrase shows that art. 29 CMR refers to national law of the Court for the explanation of gross negligence. In the Netherlands gross negligence is governed by art. 1108 Book 8 DCC. Therefore, the Supreme Court had to explain art. 1108 Book 8 DCC in these landmark cases, although the CMR Convention applied. It must also be noted that it is easier to break the CMR-limitation, since art. 29 CMR does not require personal negligence

<sup>3</sup> Supreme Court 5 January 2001, S&S 2001, 61 (Cigna/Overbeek) and Supreme Court (Hoge Raad) 5 January 2001, S&S 2001, 62 (Van der Graaf/Philip Morris I).

<sup>4</sup> Supreme Court 5 January 2001, S&S 2001, 62 (Van der Graaf/Philip Morris I).

<sup>5</sup> For instance: Supreme Court 22 February 2002, NJ 2002, 388 (De Jong & Grauss/Assuradeuren; Supreme Court 11 October 2002 NJ 2002, 598 (CTV/K. Line); Supreme Court 10 August 2012, NJ 2012, 652 (Maat/Traxys).

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or wilful misconduct of the transport company itself (i.e. the board of directors). Contrary to Dutch law on inland road transport, the limitation could therefore under the CMR Convention also be broken in case of wilful misconduct or negligence of a subcontractor, employee or other servant or agent of the carrier.

Under Dutch inland road transport law, the limitation is not broken in case of wilful misconduct or gross negligence of the subcontractor, employee or other agent or servant of the carrier. The conclusion is that, under Dutch inland road transport law the limitation can only be broken in case clear evidence is provided which shows:

- i) that the carrier itself (i.e. the management of the company) was personally involved in the disappearance of the cargo (wilful misconduct); or
- ii) the clear evidence or the true reckless state of mind within the meaning of the explanation of the Dutch Supreme Court (gross negligence) of the carrier itself (i.e. the management).

It is virtually impossible to meet the burden of proof for the requirement mentioned under ii). Therefore, the limitation of liability under Dutch inland road transport law is almost unbreakable, unless evidence shows that the carrier's management itself was involved in the theft.

**1.4. Are there any deadlines within which the cargo interests shall give notice of claim? In the affirmative, please set out the deadlines and the consequences of non compliance.**

Book 8 Dutch Civil Code does not provide for a notice period with regard to inland road transport. However, to many inland road transports in the Netherlands, the AVC 2002 (*General Transport Conditions 2002*) apply. Art. 15 AVC provides for a clause which is almost similar to article 30 CMR: in the event that these conditions apply, the consignee or shipper must notify the carrier of any obvious damage or loss visible at the moment of delivery. Without such notification, the carrier is presumed to have delivered the goods in the same condition as in which he received them. If the damage or the loss is not externally visible and the consignee or shipper has not, within one week of acceptance of the goods, notified the carrier in writing, specifying the general nature of the damage or the loss, then the carrier is likewise presumed to have delivered the goods in good order.

**1.5. Please describe time bars applicable to claims for loss, damage, delay as well as other claims for breach of contract by the carrier.**

Art. 1711 Book 8 DCC provides that any claim based on an agreement of transport within the meaning of Book 8 DCC (which definition includes the inland road transport agreement) becomes time barred after one year. The term starts at the day after the date of delivery. In case of non-compliance, the defendant can rely upon the time bar towards the claimant.

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The claimant might have an escape under art. 1720 of Book 8 DCC in case its claim can be qualified as a recourse claim. Then, a new time bar of three months – applicable to the recovery claim – starts to run on the date when the initial claimant starts legal proceedings, interrupts the time bar or when the claim has been paid to the initial claimant. Within these three months, recovery proceedings can still be started.

## 2. REGULATORY

The European Union (EU) created 2 directives with the goal to harmonize the rules road carriers have to comply with before they are admitted to the market of road carriage of goods. The directives needed to be transposed into and implemented in Dutch national law. The Netherlands, a country keen on providing excellent conditions for logistics and transportation, started the implementation process immediately.

### 2.1 Which rules road carriers have to comply with in order to be admitted in the market of road carriage of goods?

Directive 1071/09/EC provides the minimum requirements for undertaking the occupation of road transport operator. Each member state appoints their own authority that will act as issuing authority for the necessary licenses and executing any other authority necessary in order to comply with the EU directives. In the Netherlands the authority that exercises this power is "NIWO" (*Stichting Nationale en Internationale - Wegvervoer Organisatie*). NIWO exercises rights under the Dutch Road Carriage Act (*Wet Wegvervoer Goederen*) (the "WWG"). The WWG refers to some Dutch ministerial rulings. The most important ruling is the "*Regeling tot uitvoering van de Wet wegvervoer goederen*" (the "RWG").

The main sources for rules a Dutch road carrier must comply with in order to be admitted, are provided for by the two EC directives, the WWG and RWG:

- Art. 2.5 WWG prohibits undertaking road carriage activities in a professional capacity without a license as meant in directive 1072/09/EC. The license can be applied for with NIWO once the requirements in art. 4 from directive 1072/09/EC are met;
- Art. 4,1 Directive 1072/09/EC states that in order to get a license, every road carrier must be:
  - (a) is established in that Member State in accordance with European legislation and the national legislation of that Member State; and
  - (b) is entitled in the Member State of establishment, in accordance with European legislation and the national legislation of that Member State, to carry out the international carriage of goods by road.
- a) The requirements for engagement in the occupation of road transport operator in accordance with National and European legislation the conditions, stated in art. 3 of

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Directive 1071/09/EC, must be fulfilled:

a): *have an effective and stable establishment in a Member State*

b): *be of good repute*

c): *have appropriate financial standing*

d): *have the requisite professional competence*

**2.2. Do the national rules provide more restrictive requirements than EU Regulation for the admission to the market of domestic road carriage? In the affirmative, is there an issue of conflict between EU and national legislation?**

Not really. The national rules explicitly refer to the European legislation for the admission to the market of domestic road carriage. Pursuant to art. 1.3 WWG, the rules provided for in the WWG are not only applicable to domestic carriers, but also to carriers located outside of the Netherlands carrying goods in the Netherlands. Art. 2.8 sub1a WWG obliges the road carrier to hand over a so-called 'declaration of good behavior' with the application. A declaration of good behavior is an effective way to check the reputation of carriers. The WWG does not give alternatives for this declaration where art. 19 1071/09/EC does.

**2.3. Which are the relevant sanctions in case of breach of EU and/or national legislation regarding the admission to the market of domestic road carriage? And which are the remedies, if any?**

In case of significant breach of European legislation, articles 12 and 13 1072/09/EC are applicable. Art. 12 provides sanctions imposed by the member state in which the carrier is established. These sanctions involve warnings and temporary or permanent withdrawal of licenses or attestations and other administrative measures the member state considers to be suitable in regard of the seriousness of the breach. Pursuant to art. 13, the host member state may impose sanctions in case of a breach. The host member state also has the duty to inform the member state of establishment of the carrier involved. The sanctions consist of a warning, or, if the breach is significant, a temporary ban from cabotage transportation on the territory of the member states where the breach was conducted.

Based on national law, when road carriers do not meet the conditions set out in the European legislation or WWG, administrative enforcement can be used. Wheel clamps can be used to keep a truck in place until the carrier is no longer in breach. Art. 3.2 sub 5 states that NIWO will withdraw or suspend licenses or attestations when carriers no longer meet the requirements stated in directive 1071/09/EC. The 'loss of good repute' is often used as a sanction (art. 6 1071/09/EC sub 1 a or b). A Dutch policy rule called the "*Beleidsregel evenredigheidstoets en sanctionering bij verlies betrouwbaarheid in het goederenvervoer over de weg*" gives a very detailed description of the penalty system used by NIWO to determine which sanctions are deemed appropriate in which situation. In the "*Besluit Wegvervoer goederen*", the criteria used by NIWO to decide on are described.

**2.4. Do the national rules provide more restrictive requirements for the admission to the market of international road carriage? In the affirmative, is there an issue of conflict between EU and national legislation?**

All the requirements for admission to the domestic market as described in the answer on question 2.1 need to be met for admission to the international market as well. For the admission to the international market, the WWG requires the carrier to have either a:

- Conference of European Ministers of Transport (CEMT)-license; or
- one or multiple journey authorizations based on a treaty for international carriage of goods with another state.

CEMT-license holders need to keep a log in accordance with rules provided for in the RWG and send the reports to NIWO. Art. 10 RWG requires that the driver and license holder have the license and log present at all times. The CEMT-license is given by NIWO and can be withdrawn when not used, or when solely used for bilateral transport.

**2.5. Which are the relevant sanctions in case of breach of EU and/or national legislation regarding the admission to the market of international road carriage? And which are the remedies, if any?**

For breach of EU and national regulations regarding transport governed by the directives, the same sanctions and corresponding remedies are available as in case of breach of EU and national regulations regarding the admission to the market of domestic road carriage. CEMT-licenses can be withdrawn when carriers do not have a European license as meant in directive 1072/09/EC. NIWO can also withdraw a license when carriers are in breach with the RWG. Breach of certain rules provided for in the RWG can constitute a criminal offence. Against all decisions based on the WWG/RWG, the carrier can appeal based on art. 8.1 WWG.

**2.6. In case your Country is not an EU member, which are the relevant requirements that law provides in order to admit haulers to run the business of road carriage?**

The Netherlands are an EU member state.

**2.7. Do the road carriers have to comply with particular rules to grant safety and security during trips?**

Drivers must act in accordance with Vo. (EG) nr. 561/2006. This European regulation contains rules for the drivers concerning the allowed time they can spend behind the steering wheel and the mandatory resting periods. Vehicles that entered the market before

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2006 are allowed an analog tachograph. After 2006, a digital tachograph is required. Depending on the weight of the vehicle and the moment when the vehicle entered the market a speed limiter can be obliged as well.

**2.8. Are road carriers entitled to pretend extra costs over the agreed freight for, as example, fuel surcharge and/or other costs?**

I am not aware of any rules or regulations prohibiting fuel surcharges. It is quite common for Dutch road carriers to agree upon the applicability of a fuel surcharge. Furthermore, parties have the freedom to agree that one party shall hold the other party harmless for penalties and fines, for instance with respect to overloading.

**3. MISCELLANEOUS**

**3.1. Are there any other particular aspects, not covered by the above questions, which have to be highlighted (briefly) in your jurisdiction?**

The Netherlands is a very carrier friendly jurisdiction. The interpretation of the CMR Convention, Dutch law on inland road carriage and the standard transport conditions are all pretty much in favour of the carriers. Therefore, it is attractive for road carriers to choose for Dutch law in their contracts. Furthermore, proceedings before the Dutch courts are very attractive because of the nearly unbreakable limitations and the lack of liability for VAT, duties and excises for road carriers. In case of a loss, theft or damage a carrier could initiate proceedings in the Netherlands by asking the Court to declare that the carrier's liability is limited to the applicable limitation. It is very easy to start such proceedings and it sufficiently secures the position towards cargo claimants, since they are not allowed to start proceedings about the same loss before a Court in another jurisdiction later, because of *lis pendens*. The European Court of Justice confirmed this in its recent ruling *Nipponkoa/Inter-Zuid*.<sup>6</sup>

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<sup>6</sup> EU Court of Justice 19 December 2013, C-452/12 (*Nipponkoa/Inter-Zuid*).