
THE NETHERLANDS

The applicability of the CMR Convention from a Dutch perspective

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1. Introduction

The CMR Convention aims to provide uniformity in the field of international carriage of goods by road. Case law in the various member states has shown that this goal has not been achieved; local courts have different views on various topics such as the liability of the carrier for customs duties, the possibilities to break the CMR limitation and the applicability of the CMR Convention.

This article will focus on the applicability of the CMR Convention from a Dutch perspective. The following three situations will be discussed, which are regularly encountered in practice and which give rise to the question of whether the CMR Convention applies autonomously:

1. the carrier and shipper have concluded a multimodal contract for the carriage of goods, including a road leg;
2. the carrier and shipper have concluded a contract of carriage but they have left the means of transport open and the carrier subsequently elected to carry the goods by road;
3. the carrier has undertaken to carry the goods by road, but actually carried the goods by some other means and vice versa.

When this article refers to carriage by road, such carriage is considered to be between two different countries, of which at least one is party to the CMR Convention.

2. Multimodal contract including road leg

Pursuant to Article 1 CMR the CMR Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country.

When road carriage is agreed upon between, for instance, Rotterdam, the Netherlands and Marseille, France, it is clear that the CMR Convention applies. However, it becomes more complicated when a multimodal contract for the carriage of goods, including a road leg, has been agreed upon. Does the CMR Convention autonomously rule the road leg?

The Resolution Bay

In *Resolution Bay*²³ the Rotterdam Court answered this question affirmatively. In this case a container of frozen lamb's meat was carried under a CT document from Lorneville, New Zealand to Port Chalmers, New Zealand, from there by sea on the M/V *Resolution Bay* to Rotterdam and from there by road to Antwerp, Belgium. Rotterdam was mentioned in the CT document as port of discharge and Antwerp was mentioned as place of delivery. The document did not mention the mode of transport to be used between Rotterdam and Antwerp. Upon delivery it was established that the meat had defrosted and had gone bad. Proceedings were brought against the carrier before the Rotterdam Court. The carrier disputed the Court's competence arguing that the CT document contained a jurisdiction clause for the High Court of London. The Rotterdam Court had to determine whether the CMR Convention applied to the road leg. If so, the Rotterdam Court would be competent pursuant to Article 31 CMR, despite the jurisdiction clause.

The Rotterdam Court held that the carrier had chosen to perform the carriage between Rotterdam and Antwerp by road, whilst the contract provided it with the right to do so. According to the Court, the *place of taking over of the goods* in the meaning of Article 1 CMR meant the place where the goods were taken over for the road carriage – being Rotterdam – rather than the place where the transport began as a whole (Lorneville). The Court deemed that the conditions of Article 1 CMR were fulfilled and therefore the CMR Convention applied autonomously to the road carriage between Rotterdam and Antwerp, which was part of a multimodal transport.

The Godafoss

The Rotterdam Court came to a similar decision in *Godafoss*.²⁴ In this case the carrier entered into a multimodal contract for the carriage of a container of salted fish from Reykjavik, Iceland to Naples, Italy. The consignment was carried by the M/V *Godafoss* from Reykjavik to Rotterdam and from there by road to Naples. The goods were stolen during the road leg. Proceedings were brought against the carrier before the Rotterdam Court. The carrier disputed the Court's competence arguing that the CT document contained a jurisdiction clause for the Icelandic courts. The Rotterdam Court had to determine again whether the CMR Convention applied to the road carriage, as, in the affirmative, it would be competent pursuant to Article 31 CMR. The Court repeated its ruling in the *Resolution Bay* and held that the CMR applied autonomously to the road leg of the multimodal transport.

However, the carrier appealed to the Court of Appeal of The Hague, arguing that the CMR Convention does not apply autonomously to (the road leg of) multimodal contracts of carriage. The Court of Appeal agreed with the carrier and declared itself not competent because of the jurisdiction clause for the Icelandic courts.²⁵ In its

23. District Court of Rotterdam, 28 October 1999, S&S 2000/35.

24. District Court of Rotterdam, 11 April 2007, S&S 2009/55.

25. Court of Appeal of The Hague, 22 June 2010, S&S 2010/104.

turn the shipper appealed to the Supreme Court and put forward two questions: (i) does the CMR Convention generally apply to multimodal transport, and (ii) if not, does the CMR Convention apply autonomously if the damage or loss occurred during the road leg?

As to the first question, the Supreme Court took into account that the CMR Protocol of Signature stipulates that the contracting states have agreed to negotiate on a different convention for multimodal transport. This argues against application of the CMR Convention to multimodal transport, as multimodal transport apparently was not meant to fall within the scope of its application. According to the Supreme Court this also follows from Article 2 CMR, which provides for a specific kind of multimodal transport (mode-on-mode) and therefore can be deemed the only agreed extension to the scope of application as set out under Article 1 CMR. Moreover, the Supreme Court took into account the conflicting judgments of the English Court of Appeal²⁶ and Bundesgerichtshof,²⁷ giving more weight to the latter judgment. The Supreme Court thus concluded that in general the CMR Convention does not apply to multimodal transport.²⁸

As to the second question the Supreme Court considered that an indication can be found in the wording of Article 1 CMR that the road leg of a multimodal transport falls within the scope of application. However, the wording is not decisive, as it is only one of the reference points for the interpretation of the CMR Convention.²⁹ According to the Supreme Court difficulties can arise if it is unclear during which leg of a multimodal transport the damage or loss occurred. The competence of the court and the applicable law should not depend on the (in)ability of parties to determine during which stage of the carriage the damage or loss occurred, as this will result in legal uncertainty. In the Supreme Court's view the interests of international trade are best served when the CMR Convention does not apply *autonomously* to the road leg of multimodal contracts of carriage. The Supreme Court thus rejected the view held by the Rotterdam Court in *Resolution Bay and Godafoss*.

Note that under Dutch law this does not mean that the liability regime (Articles 17 to 29) of the CMR Convention cannot apply at all to the road leg of a multimodal contract of carriage. If Dutch law applies to the multimodal contract of carriage, the liability regime of the CMR Convention will in principle govern the road leg pursuant to Articles 8:40 and 8:41 Dutch Civil Code.³⁰ Briefly summarised, these Articles state that in a contract of multimodal carriage of goods, each part of the carriage is governed by the juridical rules applicable to that part. So, if in *Godafoss* Dutch law had governed the multimodal contract of carriage, then the liability of the carrier would have to be determined in accordance with the liability regime of the CMR Convention. The prevailing opinion is that in such cases only the liability regime of the CMR Convention will apply and not also the procedural rules

26. English Court of Appeal, 27 March 2002, *Lloyd's Rep.* 25 (*Quantum Corp. v. Plane Trucking*).

27. BGH, 17 July 2008, *TransportR* 2008, 365.

28. Supreme Court, 1 June 2012, *SeS* 2012/95.

29. Arts. 31 and 32 of the Vienna Convention on the Law of Treaties.

30. *Dutch Parliamentary History*, Book 8 Dutch Civil Code, Deventer: Wolters Kluwer Nederland, 88 and 93.

such as set out in Article 31 CMR, meaning the Dutch Court would still have to declare itself incompetent to consider the case due to the jurisdiction clause for the Icelandic courts.³¹

3. Unspecified and optional contracts of carriage

It is not uncommon that parties agree upon carriage of goods without specifically agreeing on the means of transport. Depending on the places of taking over of the goods and delivery thereof, as well as the amount of freight charged, one can of course usually make an educated guess as to the means of transport to be chosen by the carrier. Nonetheless, if the contracting parties have left the means of transport open and the carrier elects to carry the goods by road, does the CMR apply autonomously?

Hoeks makes a distinction between a contract in which no mode of carriage is indicated, called an 'unspecified contract of carriage' and a contract in which the means of transport has been indicated, but provides the carrier with the right to substitute the mode of transportation originally planned for the carriage with another type, called an 'optional contract of carriage'. According to Hoeks, in both cases, whatever type of carriage is eventually chosen to perform the actual carriage determines which rules apply to the contract.³² Haak agrees with Hoeks. According to Haak, if the carrier and shipper have agreed (implicitly) that the carrier can choose the means of transport and it chooses carriage by road, then that choice is decisive for the question which law/treaty applies.³³ After all, the shipper has agreed that the carrier may make this choice and is thus bound by such choice.

In practice carriers often make use of so-called liberty clauses, such as: 'the Carrier may at any time if necessary without notice to the Merchant: (a) use any means of carriage whatsoever ... for any purpose whatsoever.' Such clauses are helpful when interpreting the contract concluded between the carrier and the shipper.

In *Resolution Bay* and *Godafoss*, both discussed above, parties had not explicitly agreed upon the mode of transport to be used between Rotterdam-Antwerp and Rotterdam-Naples respectively. The Rotterdam Court held in both cases that as the carrier had chosen to perform the carriage by road, whilst the contract provided it with the right to do so, such contract must be deemed a contract for the carriage by road in the meaning of Article 1 CMR. The same decision was rendered by the Rotterdam Court in a matter regarding the carriage of strategic goods from Zoetermeer, the Netherlands to Unterschleisheim, Germany.³⁴ The contract of carriage did not specify the means of transport. According to the Court the carrier was free to choose the means of transport and as it chose to carry the goods by road, the contract therefore was governed by the CMR Convention.

31. M.H. Claringbould, 'Multimodaal vervoer en de CMR: De Hoge Raad heeft gesproken!', *Weg & Wagen* 67 (2012), 10-12; M.A.I.H. Hoeks, 'Vallend water en verdwenen vis', *NTHR* 5 (2012), 248.

32. M.A.I.H. Hoeks, *Multimodal Transport Law* (Kluwer Law International, 2010) 69.

33. K.F. Haak, 'De scope van de CMR: expansief of restrictief?', *NTHR* 2 (2010), 46-59.

34. District Court of Rotterdam, 1 October 2003, *S&S* 2005/22.

Interestingly enough neither Hoeks, nor Haak, nor the Rotterdam Court seek to interpret a 'contract for the carriage of goods by road' in the meaning of Article 1 CMR in a uniform, treaty autonomous way.³⁵ Rather, the Interpretation seems to be based on national law principles.³⁶

The Dutch Supreme Court has not (yet) ruled on the question of whether the CMR applies autonomously in case of an unspecified or optional contract of carriage and the carrier elects to carry the goods by road.³⁷ However, prevailing opinion in Dutch case law and literature, as discussed above, is that the CMR Convention applies autonomously in such cases.

4. Contract of carriage by road executed by other means of carriage

Unlike the unspecified and optional contracts of carriage, the carrier may have undertaken to carry the goods by road, but actually carries the goods by some other means. Does the CMR apply autonomously to such carriage, or do the juridical rules depend on the actual means of transport?

This question was addressed by the Court of Appeal of Den Bosch in 2011.³⁸ A container with 87 boxes of glass was carried under a CMR waybill by road from Lopik, the Netherlands, to Rotterdam, from there by sea to Bergen, Norway, and from there a short distance by road to Kokstad, Norway. Upon delivery it was established that the glass was severely damaged. Proceedings were brought against the carrier. In these proceedings the question arose as to whether the CMR Convention governed the carriage. Parties had not explicitly agreed to road carriage. The Court of Appeal therefore interpreted what parties had apparently agreed to in respect of the applicable liability regime. In view of the fact that a CMR waybill had been issued, parties had agreed that transport would take place under 'CMR conditions'³⁹ and the carriage could have taken place only by road, the Court of Appeal ruled that parties had agreed to international carriage by road (and not to a multimodal contract of carriage). This carriage was therefore governed by the CMR Convention. The fact that the actual carriage took place by other means (for the most part by sea) was deemed irrelevant for the applicability of the CMR Convention.

A similar decision was rendered earlier by the Court of Appeal of The Hague.⁴⁰ In this case the carrier had undertaken to carry two express consignments from the Netherlands to China and one mail consignment from the Netherlands to Germany. The carrier made a mistake and delivered the mail consignment to the consignee in China instead of Germany. The question then arose as to which regime governed the liability of the carrier for the loss suffered as a result of this mistake. According to the Court of Appeal the liability of the carrier is governed by the regime that applies

35. Arts. 31 and 32 of the Vienna Convention on the Law of Treaties.

36. It is questionable whether the CMR Convention provides sufficient guidance in this respect.

37. In *Godafoss* the Court of Appeal and Supreme Court did not rule on this aspect.

38. Court of Appeal of Den Bosch, 15 November 2011, S&S 2012/66.

39. In the daily practice of logistics the CMR Convention is often and wrongfully referred to as CMR conditions.

40. Court of Appeal of The Hague 30 August 2005, S&S 2006/24.

if the carriage would have been performed correctly. Thus, if parties have agreed upon carriage by road, the CMR applies autonomously to such carriage, even if the goods are actually carried by some other means.

Van Beelen is also of the opinion that consensus between shipper and carrier on the means of transport is decisive and not the actual means of transport.⁴¹ According to Van Beelen this means that if parties agreed to carriage by air, but the carriage takes place by road, the Warsaw Convention applies, whilst if parties agreed to road carriage, but the carriage takes place by air, the CMR Convention applies. In support of her position Beelen refers to an old case in which the Supreme Court deemed decisive what parties have agreed upon and not how the carriage has been executed.⁴²

5. Conclusion

Whether or not the CMR Convention applies autonomously to a contract of carriage depends on the interpretation of such contract. If the contract must be interpreted as a multimodal contract of carriage, the CMR Convention does *not* apply autonomously (also not to the road leg). If the contract must be interpreted as a contract for carriage by road, the CMR will apply autonomously, even when the carrier elects to carry the goods by some other means. An unspecified or optional contract of carriage will be interpreted as a contract of carriage by road, if the carrier elects to carry the goods by road.

POLAND

Country report on Article 1 CMR

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1. Introduction

The ratio behind the CMR Convention's mandatory nature is to unify law. The unified law should avoid national legal systems as far as interpretation is concerned. This report focuses on Article 1 CMR and investigates in particular how Polish courts perceive the scope of a contract for carriage of goods by road for reward (carriage contract).

The jurisprudence of the Polish Supreme Court on Article 1 is quite limited and is supported by the judgments of lower courts and literature on the subject. All judgments are selected from the public Polish judgment databases⁴³ and legal in-

41. A. van Beelen, *Multimodaal vervoer* (Zwolle: W.E.J. Tjeenk Willink, 1996), 14, 73 and 74.

42. Dutch Supreme Court 14 March 1940, NJ 1940/932.

43. Orzeczenia Sadow Powszechnych: <http://orzeczenia.ms.gov.pl>; Sad Najwyższy: <http://sn.pl/orzecznictwo/SitePages/Baza%20orzeczeń.aspx>.