Volume guarantees under transport and logistics contracts

27 March 2019 | Contributed by AKD The Netherlands

Shipping & Transport, Netherlands

Introduction

A recent Utrecht District Court decision sends a strong reminder to parties in the transport and logistics industry that they must be precise and clear about what they are agreeing to with their trading partners *(ECLI:NL:RBMNE:2017:4542)*.

Under Dutch law, an agreement is concluded by an offer and its acceptance. There are no formal requirements in this regard. In principle, neither the offer nor the acceptance need be in a prescribed form. Oral agreements are also valid. As a result of this freedom, agreements are often concluded quickly. While less formal requirements seem to benefit the transport industry, the Utrecht District Court decision shows that there are pitfalls to be considered.

Facts

A Dutch trader in dairy products was looking for a new business partner for transportation and warehousing services in Italy. On identification of an intended new partner (Transport SRL), contract negotiations took place within a short timeframe. Among other things, the parties discussed the expected turnover under the agreement. After reaching a consensus on the most important aspects of their partnership, the trader sent a draft written temporary warehousing and transportation agreement (TWTA) to Transport SRL.

Transport SRL agreed to the draft TWTA, but added an attachment setting out the rates for its services. A volume guarantee was connected to these rates, whereby the more products that were shipped, the lower the rate would be. Transport SRL then returned the TWTA, including the attachment, to the trader, accompanied by a notification stating that it had added rates and payment terms to the TWTA. However, Transport SRL failed to refer to the volume guarantee set out in the attachment. Both parties subsequently signed the TWTA.

On the basis of this contract, the parties continued to do business with each other for three years before a dispute arose. The trader terminated the TWTA, giving proper notice and observing the notice period. Transport SRL thereafter claimed compensatory damages for outstanding invoices amounting to €400,000. According to Transport SRL, the trader had failed to comply with the volume guarantee agreed on for the duration of the partnership.

District court decision

The Utrecht District Court found that when the parties had reached a consensus on the key aspects of their agreement, they had discussed only the expected turnover and product volume. This did not amount to a proper volume guarantee, as the parties had expressed only their expectations.

According to the court, this gave rise to the question of whether the parties had agreed a volume guarantee at a later date. This may have been the case, given that the volume guarantee had been included in the attachment to the TWTA.

However, the court found that this was not the case. It held that the trader had neither considered the attachment to be a volume guarantee nor been required to have done so. In the court's opinion, it had been up to Transport SRL to explicitly point out the attachment's content.

The court also held that, since the parties had held earlier negotiations in which they had reached a consensus about the key aspects of their partnership, an oral agreement had already come into effect between them. The TWTA was merely the written elaboration of this oral agreement.

The trader was ordered to pay the outstanding invoices, but Transport SRL's claim for compensatory damages caused by non-compliance with the volume guarantee, was rejected.

Comment

This judgment is of particular relevance to the transport and logistics industry, where volume guarantees regularly form part of the contracts between shippers and carriers.

A few things must be noted in respect of this judgment. Under Dutch law on evidence, a signed document is, in principle, evidence that the parties have actually agreed to the contents of that document. This seems to have been the case in the dispute at hand, given that both parties had signed the TWTA, including the attachment.

Pursuant to Dutch law on evidence, it would have been up to the trader to prove that it did not agree to the attachment's actual contents. This seems to be a difficult position, even more so because both parties were operating in a professional capacity, where a higher standard applies with regard to the signing of documents with legal effect.

What might also be of practical interest is the fact that the court did not consider the TWTA to be the first agreement between the parties. This shows that parties must observe the fact that oral agreements are just as valid as written agreements. A signature is not required.

Assuming that parties agree on a proper volume guarantee in a transport contract, they will be bound by it. However, there have been Dutch cases in which a party has tried to escape the volume guarantee by invoking the legal concept of unforeseen circumstances.

Pursuant to Dutch law, the courts are entitled to intervene in an agreement on the basis of unforeseen circumstances. At the demand of one of the parties, the courts can modify the effects of an agreement or set it aside, but only on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the agreement to be maintained in an unmodified form.

This rule is regularly invoked in the context of volume guarantees in transport contracts – for instance, where a shipper claims that it can no longer be obliged to abide by an agreed volume guarantee agreed with a carrier because of the loss of an important client.

Reliance on unforeseen circumstances is rarely granted. The abovementioned example – the loss of an important client – is generally considered to be a normal business risk. Only in very exceptional cases will it be considered unreasonable to maintain an agreement in an unmodified form.

The defining element in such disputes is not so much the foreseeability of the circumstances at the time that an agreement comes into effect, but rather what the parties had in mind when concluding it.

For further information on this topic please contact Jos van der Meché or Reinier Cobussen at AKD by telephone (+31 88 253 50 00) or email (jvandermeche@akd.nl or rcobussen@akd.nl). The AKD website can be accessed at www.akd.nl.

Jos Van der Meché

Reinier Cobussen