

Shipping & Transport - Netherlands

Supreme Court rules on successive carriage under CMR

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The Supreme Court recently issued a surprising judgment regarding successive carriage within the meaning of Article 34 of the Convention on the Contract for the International Carriage of Goods by Road (CMR). The decision means that cargo interests and carriers seeking recovery are in a stronger position than they were previously under Dutch law, which some have regarded as having adopted a narrow approach to Article 34.

Dispute

In January 2005 Hewlett Packard instructed Trans-O-Flex Schnell Lieferdienst GmbH to carry a consignment of computer parts from the Netherlands to Germany. Trans-O-Flex instructed another logistics service provider (A) to carry out the transport, which in turn instructed the carrier (B) to perform the carriage. While the vehicle was parked on B's premises over the weekend, part of the cargo was stolen.

German court decision

Trans-O-Flex started proceedings against A before the Hanau District Court in Germany in September 2007. The court ordered that A could not invoke the CMR limitation of Article 23(3) because B's actions – for which A was liable under Article 3 of the CMR – qualified as wilful misconduct or gross negligence within the meaning of Article 29.

In appeal proceedings, the Frankfurt Court of Appeal also held that A had to pay the entire damages pursuant to Article 29 of the CMR. A subsequently paid approximately €27,500 plus interest to Trans-O-Flex.

Dutch court decision

A started proceedings before the court in Utrecht, claiming a declaration by the Dutch court that B must indemnify A for all damages that it had incurred due to the theft. A argued that B qualified as a successive carrier within the meaning of Article 34 of the CMR, and that B must compensate A for all costs and expenses incurred pursuant to Article 37. A also argued that – pursuant to Article 39(1) of the CMR – B was not entitled to dispute the validity of the payment which A had made to Trans-O-Flex, as the amount of compensation had been determined by the German courts after B had been given due notice of the German proceedings and had been afforded an opportunity to enter an appearance.

The court held that B qualified as a successive carrier and had to compensate any amount paid by A to Trans-O-Flex. The Court of Appeal subsequently confirmed this decision, holding that the purpose of Article 34 of the CMR is that the cargo-interested party can claim compensation from the carrier which has caused the loss or damages as if it were a party to the first transport agreement (Article 36 of the CMR). The appeal court held that it would therefore be in line with the purpose of the CMR to characterise B as a successive carrier. The fact that only B performed the carriage made no difference. Pursuant to Article 34 of the CMR, the consignment note and goods need not be handed over to each successive carrier.

Further, the appeal court held that – pursuant to Article 37 of the CMR – the judgment in the first-instance proceedings, in which the liability and amount of compensation were established, did not need to be based on successive carriage. According to the appeal court, the purpose of the CMR regarding the available recourse actions in the event of successive carriage is to ensure the quick and straightforward disposal of legal proceedings between the various carriers in the logistics chain.

Supreme Court decision

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B appealed to the Supreme Court, which confirmed the decisions of the lower courts. The Supreme Court held that questions regarding the interpretation of the CMR should be answered on the basis of the Vienna Convention on the Law of Treaties 1969. Pursuant to Article 31(1) of the Vienna Convention, the CMR must be interpreted in line with the usual meaning of the text, considering the context and the CMR's purpose. Pursuant to Article 31(3) of the Vienna Convention, the prevailing doctrine found in the case law and literature of the various CMR states should be one of the principal methods of interpretation.

The Supreme Court held that a broad interpretation of Article 34 of the CMR means that Articles 36 to 39 should be in line with the CMR's purpose (ie, cargo interests and carriers seeking recovery are in a stronger position). According to the Supreme Court, this interpretation of Article 34 is in line with the prevailing opinion in other CMR countries. Further, it does not conflict with the textual interpretation of the CMR's relevant articles.

The Supreme Court also confirmed that the Dutch court could not assess the validity of the payment made pursuant to previous court proceedings between other parties in the chain. In this case, B had been given due notice of the German proceedings between Trans-O-Flex and A. The Supreme Court also emphasised that Article 39(1) of the CMR does not prevent a successive carrier which defends a claim from invoking arguments which are not part of the debate in the proceedings between the parties above them in the logistics chain. The Supreme Court stressed that, pursuant to Article 40 of the CMR, carriers can deviate from Articles 37 and 38 in their contracts.

Comment

The Supreme Court judgment presents various opportunities. It is now clear that a cargo-interested party which suffers damage or loss can file a claim against the first or last carrier, or the carrier which caused the damage, pursuant to Article 36 of the CMR. Further, a carrier which has paid compensation can file its recourse claim directly against the carrier that was responsible for the loss or damage, pursuant to Article 37(a) of the CMR. This also applies in the event that the first carrier pays damages to its principal pursuant to a foreign judgment. In such cases, the Dutch court cannot apply its own rules of interpretation. It must comply with the foreign judgment pursuant to Article 39(1) of the CMR, provided that the carrier has been notified of the foreign proceedings and has been given the opportunity to participate.

Parties should also consider that Article 39(4) of the CMR provides that the limitation period begins to run on the date of the final decision that fixes the amount of compensation, or the date of payment if there is no such decision. Therefore, a claim which would be considered time barred under Article 32(1) of the CMR could still be valid and enforceable under Article 39(4). Parties can deviate from Articles 37 and 38 of the CMR in their contracts, which should be checked before any action is taken.

It is now also possible to rely on a judgment from a cargo-friendly country in proceedings that involve the same damage or loss in the carrier-friendly Dutch jurisdiction, pursuant to Article 39(1) of the CMR. This means that a Dutch court could be forced to break the CMR limitation, which is a very uncommon occurrence.

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