

Court rules that 'fear of loss' does not constitute damage under CMR

08 July 2020 | Contributed by **AKD**

Introduction

Facts

Decision

Comment

Introduction

The Convention on the Contract for the International Carriage of Goods by Road (CMR) is an international agreement covering the rights and obligations of parties involved in road transport. Under the CMR, carriers are liable for the total or partial loss of goods or damage to goods when that damage occurs between the carrier taking charge of the goods and the time of delivery.

However, this raises the question as to what constitutes 'damage' and precisely how this is defined. A recent Amsterdam Court decision held that the word 'damage' in the relevant sections of the CMR presumes a substantial physical change to the state of the goods. It ruled out, in this case, that a broken seal on a container constituted damage.⁽¹⁾

Facts

The case arose following the carriage of dairy products from Germany to France in 2016 on behalf of the shipper Danone. While parking overnight, the driver heard a noise in the trailer, but failed to find anyone after checking. However, the seal on the container had been broken.

On arrival in France, the existence of the broken seal prompted Danone to destroy the goods. Danone subsequently claimed the full value of the cargo plus the cost of its destruction.

In its claim, Danone argued that the carrier had failed to comply with the framework contract with the carrier. This contract stipulated that Danone was entitled to destroy all goods in the case that the presence of persons in the trailer was suspected. In addition, the contract provided that Danone could invoice the full value of the goods plus destruction costs.

Decision

As stated, the Amsterdam Court held that a CMR carrier is liable for the total or partial loss of goods or damage to the goods when that damage occurs between the time that the carrier takes charge of the goods and the time of delivery (Section 17.1 of the CMR).

However, pursuant to national and international literature and earlier court decisions, the court held that the word 'damage' in the relevant sections of the CMR presumed a substantial physical change in the state of the goods. The fact that the seal had been broken, which allegedly caused a decrease in the market value and marketability of the goods, was not characterised as 'damage' within the meaning of the CMR.

The court went on to state that Danone had suffered damages, but these damages were not a result of the affected state of the goods. Instead there had been a 'fear of loss' such that Danone did not want to run the risk that the state of the goods could have been affected, albeit in a manner that was invisible.⁽²⁾

The court stated that such a 'fear of loss' did not fall under the definition of 'damage' within the meaning of Section 17 of the CMR.

The court also rejected Danone's other claims. In terms of compliance with the framework contract, the court held that pursuant to the contract, the carrier would be obliged to pay the full value of the goods plus destruction costs.

AUTHOR

**Annemieke
Spijker**



However, this would be a broader liability than the carrier's liability under the CMR. Hence, the clauses were deemed void pursuant to Section 41 of CMR.

Comment

In recent years, the definition of 'damage to goods' has been developed and better defined in Dutch and foreign court decisions and literature. Claimants must prove a substantial physical change in the state of the goods which occurred during carriage.

The definition formulated in earlier court decisions and literature is also important in cases of 'fear of loss', which has become increasingly relevant in cases where trailers are illegally entered. In such instances, sometimes only a few boxes are damaged, but a full trailer load is destroyed as a result of the unauthorised access.

Many logistics contracts contain clauses similar to those used by Danone. However, the Amsterdam Court held that such clauses are void pursuant to Section 41 of the CMR because they increase the mandatory liability of the carrier under the CMR.

More generally, in order for both parties to be able to establish whether the physical state of the goods has changed substantially during transit, it is important to instruct a surveyor to check the goods on delivery (at the latest).

If the parties wait too long to carry out this survey or if the goods have already been destroyed, it is almost impossible to meet the burden of proof for damage.

For further information on this topic please contact [Annemieke Spijker](#) at AKD by telephone (+31 88 253 5000) or email (aspijker@akd.nl). The AKD website can be accessed at www.akd.nl.

Endnotes

(1) See [here](#).

(2) The court's judgment referred to both national and international literature and earlier court decisions. The defendants referred to the following sources:

- MA Clarke, *International carriage of goods by road: CMR*, London: Informa 2009, p 193:

The principle... is that "damage is characterised by external or internal physical deterioration, which results in diminution of value". Diminution of the value of goods without physical deterioration, however, is not damage; were it otherwise it would be too difficult to distinguish damage from loss of market, for which the carrier is not liable under the CMR.

- Appeal Court Ghent, Belgium 1 June 2015 TBH/RDC 2016/6, pp 564 to 569: "Damage to goods presumes harmful effect on the physical integrity or quality of the goods".
- [Amsterdam Court 22 May 2019, ECLI:NL:RBAMS:2019:3692](#):

It is unclear when, where and how the damage to the goods occurred. The claimant must prove that the damage occurred during transport. The fact that the goods arrived in a state of decay and the submission of the logging data of the reefer unit on the trailer does not necessary form enough evidence. The goods were not available for inspection, so no survey could take place, which does not help claimants either.

- [Rotterdam Court, the Netherlands 15 February 2012, ECLI:NL:RBROT:2012:BV9685](#): evidence showed that the temperature of the goods during transit significantly deviated from the temperature instructions. This was insufficient to prove that all goods had been damaged in transit.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).