Appeal court finds that carrier had strengthened obligation to furnish facts in CMR claim

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Introduction

The Netherlands has historically been a friendly jurisdiction for Convention on the Contract for the International Carriage of Goods by Road (CMR) carriers. The Dutch Supreme Court has set the bar high for breaking the CMR limitation: claimants must prove that damages were caused by the carrier's wilful misconduct or that the carrier acted "recklessly and with the knowledge that loss would probably result from it" (the Dutch fault equivalent of wilful misconduct). Thus, unless evidence is produced to show that a carrier or driver was involved in theft, it is virtually impossible for claimants to meet the burden of proof for the fault equivalent of wilful misconduct.

Further, it is relatively easy and inexpensive for CMR carriers to obtain a (negative) declaratory judgment from a Dutch court establishing that the carrier's liability towards possible claimants is limited (Article 23.3 of the CMR), and that the carrier is not liable for any additional costs, taxes or excise duties (Article 23.4 of CMR).

However, there are some exceptions. Under certain specific circumstances, and usually in the context of parcel transports, the claimant may be able to rely on the so-called 'strengthened obligation to furnish facts' on the part of the carrier.

A recent Den Bosch Appeal Court decision held that a CMR carrier had a strengthened obligation to furnish facts in order to enable the claimant to meet its burden of proof regarding (the fault equivalent of) wilful misconduct.(1)

Facts

RSJ was instructed by parcel carrier DHL to carry 10 pallets of Asus computers from the Netherlands to Portugal. During transport, the truck and trailer were damaged in a single-vehicle accident in France.

After the accident, it was established that only three of the initial 10 pallets were present. Another consignment was found in the trailer's remaining loading space. RSJ could provide no explanation or clarification regarding the seven missing pallets which seemed to have vanished into thin air.

DHL paid the full damage amount to cargo owner Asus and subsequently commenced court proceedings against RSJ in the Netherlands to recover said amount.

Decision

The Den Bosch Appeal Court considered that the burden of proof in respect of RSJ's wilful misconduct, or the fault equivalent thereof, in principle lay with DHL. However, in this case it was not at all clear what had happened to the seven pallets. The other consignment discovered in the trailer after the road accident in France could not have fitted into the trailer together with all 10 pallets of Asus computers. Therefore, it appeared that the seven missing pallets must have been unloaded or transhipped sometime during transport.

The appeal court held that RSJ had a strengthened obligation to furnish facts regarding the course of affairs during the transport and with respect to its efforts to locate the missing goods. After all, the entire transport had taken place within RSJ's control. However, RSJ provided only partial and inconsistent theories about what could have happened to the missing pallets. Hence, DHL could not

produce real evidence of (the fault equivalent of) wilful misconduct, but was in this case able to rely on the carrier's strengthened obligation to furnish facts.

The appeal court held that RSJ did not meet this obligation. The court therefore assumed that the damage was caused by RSJ's wilful misconduct or the fault equivalent thereof and ordered RSJ to pay the full damage amount to DHL.

Comment

The above decision represents a new addition to earlier court decisions in cases of this type. Under specific circumstances, the CMR carrier cannot sit back and watch the claimants struggle to meet the burden of proof for Article 29 of the CMR.

Such specific circumstances can occur if the carrier fails to offer an explanation regarding the loss of goods or clarify the sequence of events during transport.

Based on earlier court decisions in similar matters, such specific circumstances are far more likely to occur in the context of international parcel transports, as it appears more difficult to get an adequate picture of the turn of events during such transport, even for the parcel carrier involved. In cases of loss during 'regular' road transport, the carrier is more likely to provide a plausible explanation for the loss.

The strengthened obligation to furnish facts and the assumption of (the fault equivalent of) wilful misconduct provides opportunities for claimants in cases where:

- it is clear that the loss occurred between the time of taking over the goods and the time of delivery;
- it is unclear how and where this loss occurred; and
- the carrier cannot provide information regarding the course of affairs during the transport and regarding the circumstances of the loss.

However, a CMR carrier can avoid a possible strengthened obligation to furnish facts by obtaining all relevant information surrounding the loss at an early stage, for example, by means of survey reports and driver statements. In these cases, a strengthened obligation to furnish facts will most likely not be imposed, meaning that the (high) burden of proof in respect of the carrier's wilful misconduct or the fault equivalent thereof remains entirely with the claimant.

In general, this shows that thorough investigation and documentation after an incident occurring during road transportation is extremely important – not only for potential claimants, but also for carriers wishing to rely on the carrier-friendly Dutch interpretation of the CMR.

For further information on this topic please contact Jorian Gunst at AKD by telephone (+31 88 253 5000) or email (jgunst@akd.nl). The AKD website can be accessed at www.akd.nl.

Endnotes

(1) 24 March 2020, ECLI:NL:GHSHE:2020:1058.
