

Court of appeal sheds light on position of cargo owners, freight forwarders and CMR carriers

02 June 2021 | Contributed by AKD

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Introduction

Under Dutch law, a freight forwarding agent (or 'freight forwarder') is a party that enters into a contract of carriage on behalf of a principal. When engaging a Convention on the Contract for the International Carriage of Goods by Road (CMR) carrier, a freight forwarder can do so under its own name, meaning that the contract of carriage is concluded between the freight forwarder (as shipper or sender) and the carrier. In such cases, the principal is not a party to the contract.

In principle, freight forwarders are not liable in case of loss, damage or delay in transit. Rather, the principal must attempt to collect any damages directly from the carrier.

The principal obtains a claim right against the carrier once the principal has informed the freight forwarder that it wants to exercise the rights that it would have had at its disposal had it contracted directly with the carrier.⁽¹⁾ The freight forwarder then issues a declaration for the benefit of its principal, stating that there is a freight forwarding contract in place between the principal and freight forwarder.

A recent 's-Hertogenbosch Court of Appeal decision has shed light on this legal principle.⁽²⁾ The court has also clarified that a cargo owner or principal does not have a direct claim against a carrier. As a carrier's contractual counterparty, a freight forwarder should ensure that all rights against the carrier are duly protected. For example, if a time bar is not protected by the freight forwarder, the principal will be left empty handed.

Facts

A freight forwarder contracted with a CMR carrier in respect of the road transport of an airplane engine from the Netherlands to Turkey. A separate freight forwarding contract was in place between the freight forwarder and the principal.

After it was discovered that the engine had been damaged during the road transport, allegedly as a result of poor stowage, the principal filed a court claim for damages against the carrier.⁽³⁾

One of the carrier's defences was that the principal had no right of action as it was not the sender under the contract of carriage. Further, the carrier argued that the principal's claim was time barred because the freight forwarder had not suspended or protected the time bar within the applicable one-year limitation period (in accordance with Article 32 of the CMR); the freight forwarder had never filed a claim against the carrier.

During the proceedings, the principal submitted a declaration by the freight forwarder which confirmed that:

- there was a freight forwarding contract in place between the principal and the freight forwarder in relation to the transport of the airplane engine;
- the freight forwarder had contracted with the carrier for the benefit of the principal; and
- the freight forwarder had transferred all rights to the principal that the latter would have had if it had contracted with the carrier itself.

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District court decision

The first-instance court allowed the principal's claim and dismissed the time-bar defence. The court held that as a result of the freight forwarder's declaration, the principal had obtained a direct claim against the carrier. As the principal had sent a notice of liability to the carrier shortly after the incident in 2013 (which had suspended the period of limitation pursuant to the courts' interpretation of Article 32.3 of the CMR), the district court rejected the carrier's time-bar defence.

Court of appeal decision

The court of appeal took a different approach, addressing two relevant questions.

Did the principal have title to sue?

The court addressed the question of whether the principle had a right of action against the carrier. Of relevance in this respect was Article 63, Book 8.2 of the Civil Code, which reads as follows:

With respect to the person with whom the forwarding agent has contracted, the principal acquires the rights and powers which he would have had, had he himself entered into the contract of carriage as sender, as of the time when he clearly makes it known to the forwarding agent that he wants to exercise these rights. He may act judicially in the matter upon the condition that he submits a declaration to be issued by the forwarding agent..., to the effect that a contract was entered into between the principal and the forwarding agent to forward the goods in question.

The court of appeal indicated that there was no common view on the legal character and effect of the freight forwarder's declaration. When interpreting this, the court looked at Parliament's discussions on and explanatory notes to Article 63, Book 8.2 of the Civil Code. These explanatory notes contain the words "direct action", which seem to indicate that this was an *action directe*.

However, the court found that Article 63, Book 8.2 of the Civil Code contains an *action oblique* – that is to say, a principal has no more rights against a carrier than a freight forwarder has in its capacity as sender. The court of appeal also stated that the explanatory notes indicate that it was the legislature's intention that a freight forwarder's rights would not be transferred to the principal, but rather that the principal would obtain such rights through an operation of law.

Thus, a principal does not have a right of direct action against a carrier engaged by a freight forwarder. Where the principal wishes to obtain damages from the carrier, the principal must present the freight forwarder's declaration. The court of appeal clearly stated that a principal is not required to do so at the start of the proceedings and may do so in the course of the proceedings.

When did the principal obtain claim rights?

The court of appeal clarified that a principal obtains claim rights from the moment that it notifies the freight forwarder that it wishes to exercise such rights against the carrier and this notification has been received and understood by the freight forwarder.

The facts of this case show that the principal obtained the freight forwarder's rights on 28 August 2017. The engine had been delivered in July 2013. However, the freight forwarder had failed to suspend or interrupt the limitation period towards the carrier after the incident. As a result, the period of limitation had expired by the time that the principal had obtained the freight forwarder's rights on 28 August 2017. The principal's notice of liability, sent to the carrier in July 2013, had not suspended the period of limitation because the principal had not had any claim rights against the carrier at that time.

It was also necessary to consider the fact that the principal had requested time-bar extensions from the carrier, to which the carrier had agreed. However, in the appeal proceedings, the carrier successfully argued that the principal had not obtained any sender's rights against the carrier and that there was no claim to suspend or interrupt.

For this reason, the court of appeal rejected the principal's claim for damages against the carrier as the claim was time barred.

Comment

This is the first Dutch appellate court decision to consider:

- at what point a principal obtains a freight forwarder's rights against a carrier; and
- whether a freight forwarder must protect the time bar before its rights against a carrier are obtained by the principal.

With regard to the latter, the court answered in the affirmative.

With respect to the former, the court of appeal was arguably correct in saying that a principal obtains such rights when it notifies the freight forwarder that it wishes to exercise those rights against the carrier. A freight forwarder's declaration in itself is not a constitutive requirement for obtaining such rights. Arguably, this follows from Article 63, Book 8.2 of the Civil Code.

Freight forwarders should protect the limitation period in respect of a claim against a CMR carrier engaged by a freight forwarder. If freight forwarders fail to do so, their principals will be left empty handed.

At the same time, cargo owners and principals should clearly instruct their freight forwarders in respect of the suspension or interruption of the applicable limitation period towards the carrier.

Further, principals may wish to notify their freight forwarders in a timely and clear fashion where they wish to obtain the freight forwarders' rights against a carrier. Without such notification – and without a freight forwarder's declaration in the case of any court proceedings – the principal will have no right of action against the carrier.

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

Endnotes

(1) Article 63, Book 8.2 of the Civil Code.

(2) 's-Hertogenbosch Court of Appeal, 16 March 2021 (ECLI:NL:GHSHE:2021:747). This case was published and anonymised. This article refers to the parties as the 'principal', the 'freight forwarder' and the 'carrier'.

(3) The principal's claim for damages was limited to the CMR limitation amount (Article 23.3 of the CMR).

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