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CMR carrier liable for damage to food products caused by stowaways

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The Oost-Brabant Court recently rendered a decision in a case where damage was caused by stowaways who had climbed on board a vehicle during an international road transport. The Court ruled that the carrier was liable for damage to the entire consignment as the carrier could not demonstrate that it took all measures that could reasonably be expected from a carrier to protect the cargo.

Facts

The case arose following the road transport of a consignment of confectionery from Veghel in the Netherlands to Boigny sur Bionne, France, in January 2018. The transport was subject to the Convention on the Contract for the International Carriage of Goods by Road (CMR). The shipper engaged a carrier for the transport. This carrier in turn instructed Forega, which engaged the actual carrier.

According to the consignment note, there was no damage to the confectionery upon departure in Veghel. However, upon arrival in Boigny, it was established that 14 stowaways had climbed into the vehicle, where they had:

- sat on and trampled the boxes of confectionery;
- eaten part of the cargo; and
- urinated and defecated in the cargo area.

The consignee consequently refused the cargo and the driver returned to Veghel with the consignment. All cargo was subsequently destroyed as the quality and food safety could allegedly no longer be guaranteed.

After paying compensation to its principal, Forega held the actual carrier liable. Forega argued that the actual carrier had not delivered the goods in the same condition in which they had been received. The actual carrier disputed its liability, relying primarily on the principle of force majeure (article 17(2) of the CMR); it also disputed the damage amount. Further, the actual carrier claimed that it did not have to compensate for the "fear of loss" damage.

Decision

In its decision, the Oost-Brabant Court rejected the actual carrier's force majeure defence, stating that the bar for such a successful defence is particularly high. In a 1998 landmark case, the Supreme Court held that a carrier must take all measures a reasonable and careful carrier should take in the same circumstances to prevent damage in order to successfully rely on a force majeure defence.

A guarded car park was located six kilometres away from the car park used during the road transport. The actual carrier argued that the guarded car park was full at the time and offered proof of this claim. In response to Forega's defence, the Court ruled that it could not be assumed that using the guarded car park was impossible at the time of the driver's arrival. In addition, the Court held that the driver could have taken additional measures in order to make sure that a guarded car park was reached in time (eg, by leaving or stopping earlier).

Based on article 17(1) of the CMR, the Court held that the carrier is liable for total or partial loss and for damage during road transport. According to the Court, it follows from article 25 of the CMR that damage must be defined as a (substantial) physical change – visible or invisible – in the condition of the goods, resulting in depreciation. Pursuant to article 25(2)(a) of the CMR, the Court held that such depreciation does not have to be limited to the physically damaged goods, but could also include the other part of the consignment. The Court ruled that a significant part of the cargo (at least one-sixth) was physically damaged.

Considering the fact that the 14 stowaways remained in the cargo hold for a considerable period, it was likely that the entire consignment, including the undamaged part, represented no value, since the buyers would undoubtedly refuse to accept the goods if they knew what had occurred during transit. The fact that European law provides strict rules on the safety of food products intended for human consumption also played a role in the Court's decision. Therefore, the Court ordered the actual carrier to pay Forega's claim in full.

Comment

In this case, the Court ruled that the CMR carrier could not rely on force majeure because the carrier could have taken further measures to prevent the stowaways from entering the vehicle. This is arguably in line with the Dutch courts' strict interpretation of article 17(2) of the CMR.

In recent years, the definition of "damage to goods" within the meaning of articles 17(1) and 25(1) of the CMR has been developed and better defined by both Dutch and foreign courts. The Court reaffirmed that the claimant must prove a "substantial physical change" to the goods between the time of taking over the goods and the time of delivery in order to be able to claim damages. However, although only one-sixth of the cargo was physically damaged, the carrier was also held liable for the remaining five-sixths because these goods represented no value after what had occurred during transit.

This may not always be the case. The ruling contrasts with the "fear of loss" case brought before the Amsterdam Court by Danone in 2020 (for further details please see "Court rules that 'fear of loss' does not constitute damage under CMR"). Here, the Court ruled that a broken seal on a container was not sufficient to constitute "damage to goods". Danone could not prove that substantial physical change had

taken place.

Claimants and carriers are therefore still strongly advised to have their goods properly inspected by a trustworthy surveyor upon delivery or as soon as possible thereafter, before the goods are destroyed, in order to establish if damage occurred during transport. This will prevent lengthy discussions on the existence of damage in accordance with the definition now set by multiple Dutch Courts, that is, the presence of substantial physical change.

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