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Forum shopping under the CMR

This contribution focuses on international road transport under the CMR Convention. Road transport is a risky business. Loss – especially as result of theft – is a matter of course. We will outline the liability system and show how money can be earned and saved.

Area of application
The CMR applies to carriage contracts of goods by road in vehicles for reward if the places of dispatch and designated for delivery are situated in two different countries of which at least one is a contracting country. With approximately 45 signatories, the CMR has an enormous scope.

Liability system
The CMR is compulsory in character and encompasses a clear cut obligation for the carrier: "The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

This is an obligation to guarantee a certain result. Situations which meet the definition of carrier's force majeure laid down in the CMR are extremely rare. It is not easy to avoid liability. The carrier is responsible for the acts and omissions of the employees and subcontractors he uses, as if those were his own. The liability system contains a limit of 8.33 SDR per gross kilo lost or damaged weight (about € 9.50 per kilo). This should be borne in mind. The liability of the carrier is further limited as in case of delay, compensation does not exceed the carriage price. Apart from the carriage charges, customs duties and other charges incurred in respect of the carriage "[...] no further damages shall be payable".

Breaking the limitation
The limitation of 8.33 SDR does not apply if the loss results from wilful misconduct or equivalent default of the carrier or its subordinates.

The Dutch Supreme Court has defined default equivalent to wilful misconduct as: "Personal action or negligence either with the intention of causing the damage/loss or as a result of recklessness with the knowledge that such damage/loss would likely be the result".

This definition is narrowed to: "conduct that the person whose conduct it is knows entails a danger and is aware of the fact that the chance of this danger becoming reality is considerably greater than the chance that it will not occur, but who, though aware of this danger, does not let it dissuade him from the conduct". In the majority of cases, it is nothing short of diabolical to prove default equivalent to wilful misconduct. The criterion is set subjectively. It has to pertain to concrete knowledge and awareness on the part of this carrier or this subordinate. In practice breaking the limitation before Dutch courts is least likely to succeed (apart from intent).

A uniform liability regime?
The CMR is intended as an uniform liability regime, but this intention is departed from on at least one important point. The question whether the carrier has limited or unlimited liability depends in

practice not only on the facts, but often also on the question which court the case is brought before. The same case can end in totally different results depending where the proceedings are conducted. This is due to the fact that the CMR refers to the law of the court seized of the case for the further substantiation of the notion 'equivalent default'. Dutch jurisprudence adheres to the definition of the Dutch Supreme Court. The situation in the neighbouring countries is different. German courts approach the degree of guilt objectively. In Germany, but also in France and Italy, breaking the limit is much easier.

The grass can be simply greener elsewhere. Take the carriage of high-quality electronics with a low weight from The Netherlands to Germany. The goods, which are susceptible to theft, are left unattended in an unguarded parking area. The trailer and its contents are stolen. It will prove a big difference if the loss is litigated before a Dutch of a German court.

Jurisdiction
Jurisdiction is of crucial importance. There are always two, and sometimes more, options in the search for a convenient court. Legal proceedings can be brought either before a court of a contracting country designated by the contract, a court within whose territory the defendant is resident or the place of dispatch or designated for delivery. In our example, the cargo interested party will try to bring the case before the court in the place of delivery (Germany). In this country breaking the limit is much easier. And the carrier? He will not sit idly by.

Declaratory judgement proceedings
Carrier-friendly jurisdictions such as The Netherlands are familiar with the concept of declaratory judgement proceedings. The carrier institutes proceedings at a court more likely to favour him. The relief sought in the writ states that he is not liable or at least only limited liable. That is a tested and generally accepted tool in The Netherlands. Germans have a greater than average aversion to this type of legal proceedings. The German Supreme Court has decided that such proceedings can be ignored. This does however not alter the fact that the Dutch court considers itself competent with respect to the declaratory judgement proceedings of the carrier. There is a risk of conflicting judgements. The enforcement of the German decision is problematic. That creates room for the carrier to negotiate a more satisfactory settlement.

The basic rule is: first come, first served. Where in respect of a claim an action is pending before a competent court no other action can be started between the same parties. In case the difference between limit and actual damage is significant, carriers and their liability insurers do all they can to start proceedings in a jurisdiction such as The Netherlands first. Cargo interested parties and their goods in transit insurers seek salvation elsewhere. This 'forum shopping' is perhaps a somewhat dishonourable concept, but it enables serious money to be made or saved. Timing is essential.

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