The applicability of the CMR to contracts of multimodal transport

For many years courts in various countries have been rendering conflicting judgments on the question of whether or not the jurisdiction rule of the CMR applies directly to (the ‘road leg’ of) a multimodal transport contract.

On 1 June 2012 the DSC in the Godafoss Case decided that the CMR lacked such direct effect on multimodal transport contracts. In this respect the DSC ruling follows the decision of the German Supreme Court dated 17 July 2008 and not the decision of the English Court of Appeal dated 27 March 2002 (Quantum Case).

Moreover, the DSC ruled that the CMR had no direct effect on multimodal contracts at all and consequently that the liability rule of the CMR did not apply, save for the situation of mode on mode transport. This seems to be a rather surprising decision by the Supreme Court of a Member State to the CMR, as the liability rule of the CMR is deemed to have universal effect.

Introduction

Unimodal transport takes place by one transport mode, for instance by road only. Multimodal transport takes place by at least two different modes. A multimodal contract for the carriage of goods not only links modes by combining unimodal transport contracts, but also provides for multimodal transport by one single contract. The multimodal carrier is liable for damage to, or loss of, the goods during the entire transport and not during the road leg only.

Unfortunately, there is no uniform international law on multimodal contracts for the carriage of goods, nor is one expected in the near future. The Rotterdam Rules are not in force yet, and they regard multimodal transport as requiring at least one sea leg. Therefore, some have pleaded for the direct applicability of the CMR to multimodal transport contracts, and they particularly appeal to the text of Article 1 paragraph 1 CMR, which reads as follows:

“This Convention shall apply to every contract of carriage of goods by road in vehicles for reward, when the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country, irrespective of the place of residence and the nationality of the parties. “

Article 1 paragraph 4 CMR further excludes certain transport from the scope of application of the CMR, namely carriage performed under the terms of any international postal convention, funeral consignments, and furniture removal. Multimodal transport contracts are not excluded explicitly.

Godafoss Case (DSC 1 June 2012, published on www.rechtspraak.nl, number LJN: BV3678)

In this case the shipper and the carrier entered into a multimodal contract for the carriage of a containerload of salted fish (worth € 134,628) from Reykjavik (Iceland) to Naples (Italy). The first leg from Reykjavik to Rotterdam (the Netherlands) had to take place by sea (on board the vessel "Godafoss"); further transport mode(s) were at the sole discretion of the carrier. The cargo was stolen during road transport from Rotterdam to Naples.
The non-negotiable sea waybill for combined transport stipulated exclusive jurisdiction of the Icelandic courts, as well as a choice-of-law clause in favour of Icelandic law (Iceland is not a party to the CMR). Nevertheless, the shipper initiated proceedings before the courts of Rotterdam.

Article 31 paragraph 1 CMR stipulates that parties may enter into a jurisdiction clause, but only *in addition to* the jurisdiction rule of the said paragraph, conferring competence to certain countries and courts. Therefore, any exclusive jurisdiction clause is null and void, if and insofar as the CMR applies.

Besides, one can rely upon a jurisdiction clause solely if the designated court or tribunal is situated in a State that is a member of the CMR. In this case the jurisdiction clause would also be null and void on the ground that the designated courts of Iceland are not situated in a Member State, if and insofar as the CMR applies.

According to the shipper, the Rotterdam court was competent based on Article 31 paragraph 1 subsection b CMR, as Rotterdam was the place where the goods were taken over by the carrier to be carried by road. The carrier challenged the jurisdiction of the court. The shipper succeeded at first instance, but not on appeal.

*Dutch Supreme Court*

The shipper appealed to the DSC, in short raising two main questions: (i) does the CMR in general have direct effect on multimodal contracts for the carriage of goods, and (ii) if the CMR does not apply to multimodal contracts in general, does the CMR nevertheless have direct effect on multimodal contracts for the carriage of goods, if the damage or loss occurred during the international road leg?

The DSC answered both questions in the negative. It denied that the CMR had direct effect on multimodal contracts, unless the CMR explicitly stated otherwise.

Pursuant to the wording of Article 1 CMR, multimodal transport contracts are not explicitly excluded from the scope of application of the CMR. The DSC stressed that the wording of Article 1 CMR, however, was not decisive as the wording of the Convention was only one of the references for the interpretation thereof (Article 31 of the Vienna Convention on the Law of Treaties dated 23 May 1969).

The DSC then referred to the CMR Protocol of Signature, which stipulates that all Contracting Countries (Member States) agree to negotiate on a convention on multimodal transport. It held that the CMR could thus be interpreted to the effect that multimodal transport in general was not meant to fall within the scope of its application.

Such a conclusion also seems to be in line with the provision in Article 2 paragraph 1 CMR. The latter, as a matter of exemption, explicitly allows carriage by road to be interrupted by carriage by another mode, as long as the goods are not unloaded from the initial road vehicle at any point (‘mode on mode transport’), excluding all other forms of multimodal contracts (‘mode to mode transport’).

The DSC considered that a negative answer to the first question in suit to be in line with the judgment of the German Supreme Court dated 17 July 2008, in that international commerce would
be served best by a uniform interpretation of the CMR, and that there were no pressing grounds to reject the interpretation of the German Supreme Court.

Moreover, the DSC implicitly confirmed that there was no prevailing opinion in any Member State that the CMR should, nevertheless, autonomously apply to the international road leg of multimodal transport.

The DSC concluded that the ‘place of taking over the goods’ in the meaning of Article 1 CMR and the ‘place where the goods were taken over by the carrier’ in the meaning of Article 31 CMR referred to the initial place of taking over the goods by the multimodal carrier. In this case the place of taking over the goods by the multimodal carrier was Reykjavik, not the place where the goods were taken over for the road leg after the conclusion of the sea leg (Rotterdam). Therefore, an exclusive jurisdiction clause included in multimodal transport contracts, unlike contracts within the scope of the CMR, should be acknowledged. Thus, in this case the Netherlands had no jurisdiction over the claim of the carrier at all.

With regard to the second question in suit the DSC further considered that the place of occurrence of damage or loss during the road leg did not change the above in any respect. The competence of the court and the applicable law should not depend on the ability or inability of parties to determine or agree on the stage of the carriage on which the damage or loss has or could have occurred. Apparently, the DSC did not want to impose the (Dutch) ‘network system’ to multimodal transport contracts on other legal systems, giving way to the so-called ‘limited network system’ onto which the Rotterdam Rules are engrafted.

Comment

In brief, the CMR remains a unimodal transport convention only, except for multimodal transport contracts as described in Article 2 CMR (‘mode on mode transport’). As long as there is no uniform international law on multimodal transport, it is preferable to enter into an exclusive choice-of-law clause, as well as an exclusive jurisdiction clause voluntarily. If parties do not bother to do so proactively, they can expect a tug-of-war!

Esther-A. Zonnenberg-Mellenbergh

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1A transport mode can be by road, air, sea, inland waterways, rail, pipeline etc.