CLUSTER FOR LOGISTICS
LUXEMBOURG
ADDING VALUE IS THE KEY.

MOLITOR
Avocats à la Cour

Litigation related to CMR transport

26 October 2023

1) Court of Appeal: 19.03.2008 docket 31184

➢ **THE FACTS:**

- Chilled transport of sweetcorn cobs (high sugar content) in bulk and in wooden boxes (i.e., box pallets) from Morocco to England. The goods were refused at destination due to damage caused by failure to maintain the regulated temperature, and damage was noted.
- Temperature readings indicated a cooling system shutdown and defrosting issues.
- The carrier invoked a defect in the goods, the inherent nature of the goods, and a defect in the packaging with a view to avoiding liability.

➢ **THE LEGAL ISSUE: Liability** of the carrier? Exonerating cause linked to the **defects in the packaging**?

➢ **LEGAL BASIS:** Articles 17 (1), 17 (2), 17 (4) and 18 (2) of the CMR

The court judgement

- In order to benefit from the presumption that the damage was caused by the defective packaging, the transport company must prove that the packaging was defective and that there was a possibility of causation of the damage.

- Moreover, this possibility cannot be theoretical or hypothetical; it must at least be likely that the damage is the result of defective packaging. Regardless of the likelihood, the possibility is enough, there is no question of requiring proof of causality (Refer to: Jacques Putzeys, le contrat de transport routier de marchandises n°678 et 682).

- The expert commissioned by the carrier's insurer had provided a scientific article indicating that sweetcorn should not be processed in bulk unless it is heavily covered with ice, which was not the case during transport.

- The Court of Appeal then maintained that (i) the goods had not been arranged in such a way so as to ensure that they were protected against transport risks and that there had been a defect in the packaging, and that (ii) in view of these circumstances, it was likely that the difficulties in maintaining the required temperature in the lorry were due to overheating caused by the defect in the packaging, which was presumed to have caused the damage.

2) Court of Appeal: 11.07.2012 docket 34166

➢ **THE FACTS:**

- Transport entrusted to one company which then subcontracted it to a second company, which then subcontracted it to a third company.
- Transport by semi-trailer lorry carrying nickel cathodes from Rotterdam via Italy. Arrival at the end of the day and overnight stop in the foreyard of a fenced warehouse (chain and padlock) in an industrial area. The warehouse is guarded by contracted security with random nightly rounds.
- Semi-trailer not equipped with a king pin locking device.
- Theft of the trailer at night, after the lock on the gate was broken.
- The carrier claims that it was not informed of the nature and value of the goods and therefore of the risk of theft. The carrier states that it did not receive any special security instructions.
- The insurer first declares that it is acting as a principal shipper, and secondarily that it is acting on the grounds of a transfer of receivables.
- The English insurer has compensated the victim for its loss and is filing an action against the carrier on the basis of a transfer of a receivable, subject to German law.

2) Court of Appeal: 11.07.2012 docket 34166

- **LEGAL ISSUES: Gross negligence**? Influence of the carrier's knowledge of the **nature of the** (covetable) **goods**. Effect of **lack of security instructions**? **Law applicable** to the transfer of the right of action against the carrier?

- **LEGAL BASIS:** Articles 13, 17, 29 (1) and 36 of the CMR

The court judgement

- The Court maintained that the carrier could not be unaware of the nature of the goods given the documents made available to it. It was its responsibility to inquire about this with its client.

- Company A's claim under Article 36 of the CMR as a consignor is declared to be unfounded.

- The subsidiary claim under Article 13 for a transfer of rights and shares is reserved, inviting the parties to conclude under the German law applicable to the transfer and its validity.

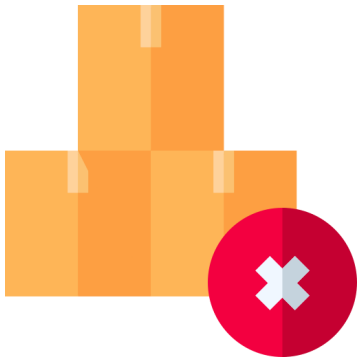
3) Court of Appeal: 05.06.2013 docket 34166

- **THE FACTS:** Same as previously.
- **LEGAL ISSUES:** Who is entitled to file the action against the carrier? Conditions for the validity of a **transfer of action** under German law. Can **gross negligence** be considered?
- **LEGAL BASIS:** Articles 13, 17, 29 (1) and 36 of the CMR

The court judgement (1/3)

- The right to file an action against the carrier is also held by the consignee of the goods (Company C), and in this case, the latter has transferred its rights to Company A (insurer). This transfer is governed by German law which provides that the validity of a transfer is subject to two conditions: A valid transfer agreement and a transferrable claim.

- The claim must be:
  - Determined or determinable (here the rights of the consignee provided for in Article 13 paragraph 1of the CMR Convention);
  - Transferrable (under German law all rights can be transferred unless otherwise provided by law or contract),
  - Belong to the transferor.



- The court maintained that the conditions were fulfilled so that the transfer was valid. A (insurer) can therefore file its action against carrier B.

The court judgement (2/3)

- The Court recalled that the consignee's loss exists in principle insofar as there is damage to the goods, and the consignee is entitled to file action from the moment of the loss of the goods (Note: In this case, it was a theft / on the basis of Article 13 CMR). The Court then maintained that "It is therefore irrelevant that Company C never paid for the stolen goods".

- The carrier invokes force majeure as a cause for exoneration: insurmountable and unforeseeable theft (secured lorry, parked in a closed and guarded warehouse).

- The court maintained that Article 17 of the CMR requires that the event must have been unavoidable in its cause, and that its effects must have been insurmountable. Unpredictability is not required in order for the event to be deemed exonerating for the international road carrier. It is not the event itself that is to be considered, but rather the conduct observed by the carrier before and after the event.

- Unavoidable circumstances must be understood not only at the time when the event causing the damage occurs, but also before it occurs. Failure to take the necessary precautions to avoid the damage excludes the benefit of these grounds for exoneration. It is up to the carrier to prove that it had taken all of the necessary precautions to avoid the harmful consequences of an unavoidable event (Refer to: Court 17.10.2002 docket 25150).

The court judgement (3/3)

- **Theft (with assault) of a vehicle in Italy, even if locked, is not considered an unavoidable event (Court 11.02.1998 Pas. 30 p. 481). Thefts of lorries (or their cargo) have become so widespread in Italy that the professional carrier can no longer ignore the risks involved and the recommendations of insurers and the profession to park only in fenced and guarded lots.**

- **The court noted that the driver regularly made the same journeys and that he could therefore not have been unaware of the risks of cargo theft in Northern Italy. By abandoning the semi-trailer, which was not fitted with a "king pin locking device" in the warehouse of Company E, which was not sufficiently secured and guarded, the driver did not take all necessary precautions to ensure the immobilisation of the vehicle…. Company B has not exonerated itself from the presumption of liability that it bears.**

- **The court also maintained that the carrier was guilty of gross negligence in order to apply Article 29 of the CMR, and to reject the application of Article 23 (3), which relates to the compensation cap.**

4) District Court: 28 October 2008 docket 115022

- **THE FACTS:**
  - Multiple transports concluded between parties. Claim for payment of invoices.
  - Distinction between international and national transport.
- **LEGAL ISSUES:** Does the one-year **limitation period** provided for in the CMR apply to **actions for payment** of transport-related invoices?
- **LEGAL BASIS:** Article 32 of the CMR, Articles 108 and 109 of the Luxembourg Commercial Code, Article 2248 of the Luxembourg Civil Code

The court judgement (1/2)

- The court distinguishes between international transport subject to the CMR and national transport subject to the Luxembourg Commercial Code.

- The CMR Convention provides for a one-year limitation period starting three months after the conclusion of the transport contract. This limitation period may be interrupted by the causes provided for by the law of the court summoned to rule on the litigation (i.e., Luxembourg law). The written claim only suspends the limitation period for actions filed against the carrier and not for actions seeking payment brought by the carrier against its clients.

- The court maintained that the one-year time limit provided for in the CMR applies to all legal actions related in any way to the international carriage of goods, as governed by the CMR. *"It covers both actions filed by the consignor or the consignee against the international road haulier and those filed by the haulier against its client."*

The court judgement

- The court then analysed the dates of the transport orders, and then the dates of payment on account on the invoices, which constituted a simple presumption of acceptance of the invoices (Court of Appeal 07.01.2004 docket 26937).

- On the grounds of Article 109 of the Luxembourg Commercial Code (principle of the accepted invoice) and Article 2248 of the Luxembourg Civil Code (interruption of the statute of limitations by the debtor's acknowledgement of the right), the court maintained that the statute of limitations was interrupted by the acknowledgement of the debts resulting from the unconditional payment of advance payments. In calculating the time limit, however, the court found that the claim was filed late for the CRM transports.

- Regarding transport carried out in the Grand Duchy, the court noted that the applicable law was Luxembourg law and that Article 108 paragraph 3 of the Luxembourg Commercial Code provided for a limitation period of two years for actions seeking payment, filed by carriers.

- The claim for payment is declared to be partially founded.

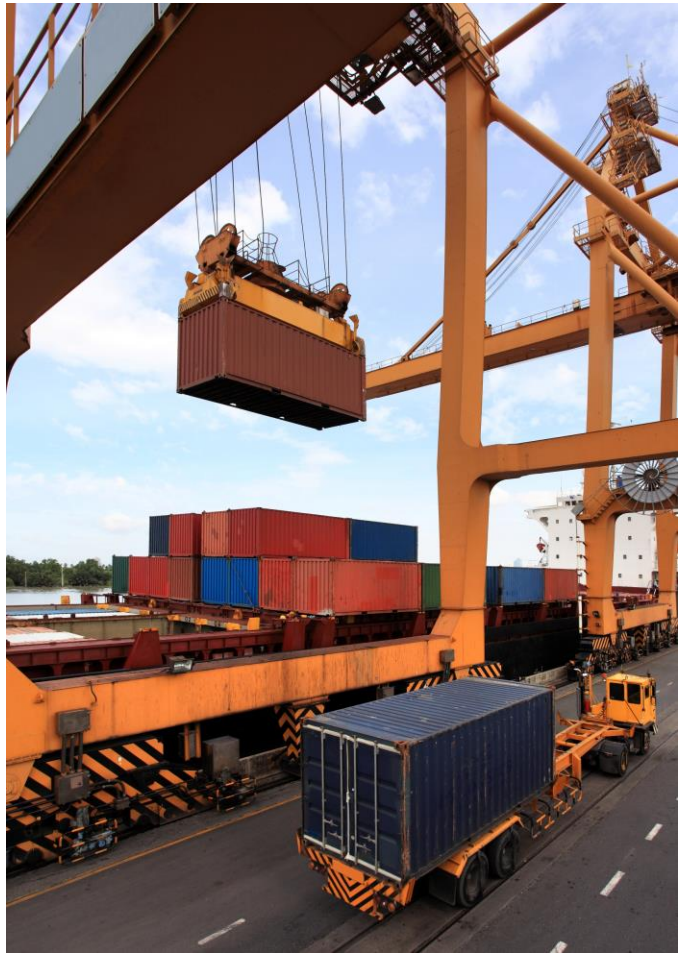
5) Court of Appeal: 20.04.2021 docket 201-00837 (no. 50/21)

➢ **THE FACTS (1/3):**

- A Luxembourg chocolate food manufacturer (A) entrusted an Austrian company (B) with a transport operation to the UK. This transport was part of a master contract between the two companies, which had an ongoing business relationship. The master contract contained an exclusive jurisdiction clause designating only the Luxembourg courts as competent to rule on any disputes between the parties (29(2) of the master contract).

- Carrier B subcontracted the transport to a Lithuanian company (C).

- The cargo was taken over at a German factory. At the British checkpoint in Calais, the police discovered the presence of 14 illegal migrants on-board the lorry (who had consumed/eaten some of the lorry's goods). The principal claimed gross negligence on the part of the driver in parking the lorry at night in an unguarded parking area near Dunkirk.



Court of Appeal: 20.04.2021 docket 201-00837 (no. 50/21)

➢ **THE FACTS (2/3):**

- After this check, the British police sealed the lorry and the driver drove it back to the final destination in the UK. Upon arrival at the destination, the goods were refused at unloading by the consignee and were returned to the German factory, where they were completely destroyed following the instructions of the principal.

- A claim for a total of 60,000 GBP was filed by Carrier B, equivalent to the total loss of the goods, on the grounds that the illegal entry of migrants into the lorry contaminated the cargo and rendered it unfit for human consumption insofar as the quality and hygienic integrity were no longer assured.

- At first instance, the district court maintained that the jurisdiction clause was valid and did not violate the provisions of the CMR, in order to hold the carrier liable on the merits.

- The carrier invoked a total, if not partial, exoneration (Article. 17(2) and Article. 17(5) CMR) and the fact that the refusal to unload without thorough inspection of the goods, and the complete destruction of the goods by its client constituted the sole and exclusive causes of the damage.

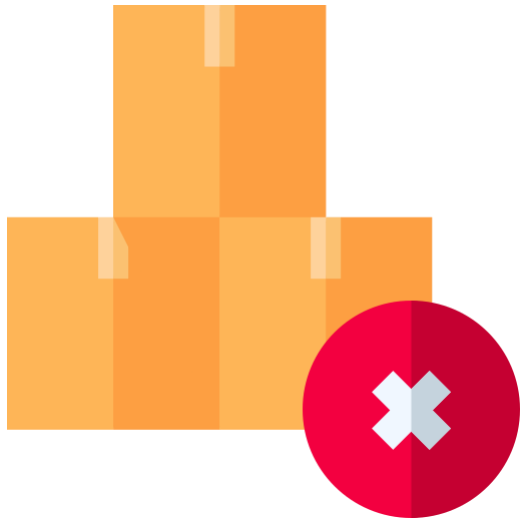
Court of Appeal: 20.04.2021 docket 201-00837 (no. 50/21)

➢ **THE FACTS (3/3):**

- At first instance, the court considered on the contrary that the damage had arisen as a result of the illegal intrusion of the migrants into the lorry, meaning that the destruction of all the goods was necessary on the basis of Regulation 852/2004 and the precautionary principle in regard to foodstuffs. The damage was then set at the value of the goods.

- In the absence of proof of gross negligence, the court accepted the limitations of liability provided for in the CMR.

- The court noted, however, that it was the carrier's responsibility to request a second opinion on the goods if the conclusions of the report commissioned by the principal were questionable, particularly in regard to the extent of the damage or contamination.



Court of Appeal: 20.04.2021 docket 201-00837 (no. 50/21)

➢ **LEGAL ISSUES:**

- **Territorial jurisdiction** of Luxembourg courts? Conflict between the CMR provisions and the **master contract** which increases the carrier's liability? Articles 31 and 41 of the CMR.
- **Situation** of A, as it has been indemnified by its insurer?

➢ **LEGAL BASIS:** Articles 17, 23, 25, 29, 31 and 41 of the CMR; Article 1782 et seq. of the Luxembourg Civil Code; Article 103 of the Luxembourg Commercial Code

The Appeal judgement (1/3)

- The CMR is a public policy text which excludes the application of national law except on the points whereby it refers to it, or on those which it does not regulate and which the judge must apply ex officio. The parties cannot derogate from it, except in the cases it provides for (Court of Cass. fr. 30.09.2009, No. of appeal 08-15026).

- The CMR sets out the provisions of international substantive law which replace those of the national law, which would have been declared applicable by the conflict-of-law system of the court summoned…. It constitutes a block which is normally self-sufficient.

- Article 41 declares the absolute nullity of any clause that derogates from it, directly or indirectly. The CMR is binding for both the Contracting States and the parties to the contract of carriage.

- It follows from Article 31 of the CMR that the parties are free to agree on a forum selection clause and that, in such a case, the freely designated forum is additional to, but not superimposed on, the similarly competent courts provided for by the CMR. A jurisdiction clause agreed upon by the parties may only have a suppletive role, the plaintiff always remaining free to file the dispute before one of the courts designated in application of the aforementioned Article 31 CMR.

The Appeal judgement (2/3)

- The question of the validity of a contractual clause conferring exclusive jurisdiction to a court remains unanswered.

- According to the doctrine, a choice of jurisdiction clause that excludes the other courts designated by Article 31 of the CMR would be void under Article 41 of the CMR. The choice of a jurisdiction clause is therefore not exclusive of jurisdiction. The Court also refers to a Belgian cassation judgment of 21 January 2010 (No. 08.0246 N) and finds that Article 29(2) of the basic agreement signed between the parties, insofar as it grants exclusive jurisdiction to a court and **excludes** any choice, is contrary to Article 31 of the CMR.

The Appeal judgement (3/3)

- The court then asked whether a clause that violates a public policy provision is void in its entirety, or whether it should be reduced by removing only the exclusivity. Can the judge save a clause by limiting its scope in order to keep it from the threshold of reasonableness, as accepted by the legal order?

- After having developed a reasoning in relation to unfair terms (CJEU 14.06.2012 C-618/10, No. 71), the court concluded that, except in the case whereby the legislator expressly authorises the judge to reform or adapt contractual terms which, under the terms of Article 1134 of the Civil Code, take the place of the law to those who have made them, it is not up to the judge to revise the contract, nor to analyse a contractual term in order to extract what is valid.

- The court would maintain that Article 29(2) of the basic agreement constituted a whole and that, as it did not comply with Article 31 CMR, it must be declared null and void in its entirety, pursuant to Article 41 of that Convention in order to conclude that the Luxembourg courts did not have territorial jurisdiction.

What should you take back at work ?

- Carefully plan the transport of **coveted** goods (type of lorry, anti-theft, guarded areas, departure and arrival times, rest areas, secure options upon arrival).
- **React very quickly** in the event of an incident (damage, accident, theft, delay, etc.) with the parties concerned: Driver, insurer, surveyors, expert appraisers, etc.
- **Train your staff** to adopt the right behaviour (e.g., reservations to be declared on consignment notes / document evidence to be kept, people to contact in the event of a problem, risk management), respectively to avoid as far as possible prejudicial statements during investigations, in particular by *surveyors* mandated by insurance companies.
- **Train its staff** on the management of **transport documents** (compulsory mentions, role of the parties, reservations on consignment notes, preservation of proof).
- Precisely **define the roles** of the various participants and their responsibilities in the documents exchanged (stevedore, carrier, handler, commission agent, driver, *surveyor* etc.).
- Provide for **written testimonies from truck drivers** and also from external witnesses or responders in the event of an incident to have sufficient evidence on the facts of the case.
- Remember that the lawyers in charge of the cases are not mandated to act as private detectives to **find out the details of the case** in the presence of multiple operators with distinct roles that are not always clearly defined.
- Remember that judges assess the elements of liability on the basis of the **evidence available** and the specificities of each case in concrete terms. A poorly prepared case is therefore a case that is quickly lost.

MOLITOR

THANK YOU

Vos contacts

François Cautaerts

Partner

francois.cautaerts@molitorlegal.lu

Emilie Probst

Associate

emilie.probst@molitorlegal.lu

MOLITOR

Get in touch

MOLITOR Avocats à la Cour SARL
8, rue Sainte-Zithe
P.O. Box 690
L-2016 Luxembourg

Phone: +352 297 298 1
Fax: +352 297 299
contact@molitorlegal.lu
www.molitorlegal.lu