

# Carrier subject to unlimited liability for theft of products from trailer

20 March 2019 | Contributed by [WSCO Advokatpartnerselskab](#)

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## Facts

A Danish exporter requested that a Danish carrier transport a consignment to a recipient in the United Kingdom. The carrier made the exporter an offer on 11 July 2016. According to the offer, the transportation would be carried out by box trailer at a fixed price of Dkr16,800. When requesting an offer from the carrier, the exporter did not inform it that the consignment was theft sensitive.

The exporter concluded a contract with an English buyer regarding the sale and delivery of PS4 games consoles and booked transportation of the goods with the carrier.

It was set out in the exporter's first four booking orders that the consignment contained "Sony PS4" or "Gaming products", but there was no mention of the goods being theft sensitive. The exporter stressed in the booking orders that the freight totalled Dkr16,800.

The exporter informed the carrier in three subsequent emails regarding additional transportation bookings that the consignments were theft sensitive: "Please be aware that the goods in question are theft sensitive. The carrier must carry out the transportation with this in mind".

According to an invoice of 22 March 2017, the exporter sold 100 PS4 games consoles to the English buyer for €184,072 with delivery to Croydon and St Albans in the United Kingdom. The exporter booked transportation of the consignment with the carrier. Like the three previous booking orders, the booking order set out that:

- the consignment was considered to be theft sensitive;
- the freight totalled Dkr16,800; and
- the consignment was to be loaded into a goods lorry with fixed sides.

It was not set out in the booking order what sort of goods the consignment contained. The consignment was loaded into a box trailer in Flensburg. The trailer was neither locked nor sealed during transportation. The carrier made a stop at a truck stop in Hazeldonk, the Netherlands. Games consoles were stolen from the trailer overnight. The exporter's cargo insurer covered the loss, which was calculated at €116,512. The insurer subsequently brought legal proceedings against the carrier and submitted a claim for unlimited compensation. The insurer referred to the fact that the transportation had been performed in a grossly negligent way, as the carrier had not taken appropriate precautionary measures to avoid theft.

The carrier refused to entertain the claim, arguing that:

- the transportation had been carried out in accordance with the offer made on 11 July 2016;
- the consignments contained goods identical to previous transportations that it had carried for the exporter;
- it had not been instructed to deem the goods theft sensitive; and
- the transportation had been carried by box trailer at a fixed price of Dkr16,800.

The carrier further submitted that the exporter had failed to instruct it to take precautionary measures besides the use of a box trailer and that the fixed price of Dkr16,800 had been regarded as an instruction to take the same precautionary measures as with previous transportations.

## Decision

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The Maritime and Commercial Court ruled in favour of the exporter. It found that the carrier had unlimited liability for the theft due to gross negligence. The court stressed that the carrier had been aware of the fact that the consignment contained gaming products, which were to be considered theft sensitive.

The court reasoned as follows:

*It is unquestionable that the box trailer was not equipped with a lock and therefore the trailer was unlocked during the 20 hours stay at the resting site in Hazeldonk. Having regard to the evidence (partly uncontested), the Court finds that the resting site was neither fenced off nor guarded or attended. While the driver was asleep, goods worth EUR 116.512 were stolen from the trailer. Viewed in the light of these facts, the Court finds that the carrier is liable for the theft, which cannot be attributed to any failure, neglect or instructions from S's side. Thus, the carrier is subjected to liability pursuant to article 17 of the CMR.*

*What the defendant has cited in regards to the fixed price cannot lead to another result. Furthermore, the Court finds that the theft/loss was caused by the carrier's gross neglect.*

## **Comment**

The Supreme Court established in *Widecom* (referred to in the *Danish Law Gazette* 2013, p 1521) that products which are theft sensitive may be transported as general cargo unless the carrier "at the time of entering into the agreement ought to have known that the goods subject to transportation were theft sensitive and the exporter because of this wanted special precautions to be followed".

It follows from the Maritime and Commercial Court's ruling that a carrier may be exposed to unlimited liability for loss resulting from failure to adhere to a shipper's demands regarding special precautions, even when these demands do not follow from the parties overall cooperation agreement and irrespective of the fact that no freight adjustment is agreed in connection with the shipper's demand for special preventive measures which may increase the transportation costs.

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