

EU Brussels I Regulation on *lis pendens* applies to proceedings brought under CMR

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Facts

A wholesaler of electronic goods sold a consignment of LED TVs to a Danish buyer for €134,231.23, for delivery to Taastrup, Denmark.

The wholesaler had a cooperation agreement with a company in the same group (S1) which was domiciled in the Netherlands, and the wholesaler booked transport of the LED TVs to S1, which subcontracted the transport to a logistics services provider (LSP).

The LSP subcontracted the performance of the transport to a Dutch haulier, which undertook to transport the consignment from the Netherlands to Denmark.

On 18 October 2018 the consignment was taken over for transport in the Netherlands. On the same day, the haulier parked the trailer loaded with the LED TVs at a terminal in Deventer, the Netherlands. The terminal was fenced and monitored with cameras, but no alarm system had been installed. The area could be accessed through only two ports and was inspected by a guard once per night. On the night of Friday 18 October 2019, perpetrators accessed the terminal by cutting a hole in the fence and loaded a stolen truck with the trailer, which was later found empty in Eindhoven.

On 22 October 2019 S1 issued proceedings in Rotterdam against the wholesaler, arguing that the latter should acknowledge that S1 was not liable for the loss of the LED TVs.

On 28 October 2019 the haulier issued proceedings in the Netherlands against S1, the LSP and the buyer of the TVs. It argued that the defendants should acknowledge that it was not liable for the theft. On 1 November 2019 the haulier extended the proceedings to also include the wholesaler as a defendant.

On 28 January 2020 the wholesaler initiated legal proceedings against the LSP in Denmark, arguing that the LSP should be found liable to pay unlimited compensation for the loss of €134,231.23 or, alternatively, the limitation amount.

The LSP argued that the proceedings should be dismissed as proceedings were already pending in the Netherlands concerning liability for the loss due to the theft pursuant to the Convention on the Contract for the International Carriage of Goods by Road (CMR). Further, it argued that the new Danish proceedings on loss could not proceed under Article 30 of the EU Brussels I Regulation, which reads as follows:

- 1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*
- 2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*

The LSP argued that Article 20 of the EU Brussels I Regulation applied irrespective of whether the case concerned a CMR transport as the CMR does not cover the issues decided by Article 30. Further, the cases before the Dutch court were related to the Danish case as they all concerned liability for the theft of the LED TVs. The LSP further submitted that there was a risk of conflicting judgments if the proceedings were heard separately by both the Dutch and the Danish courts.

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In response, the wholesaler argued that the Danish proceedings should be heard in their substance on the basis that:

- the CMR takes precedence over the EU Brussels I Regulation (Article 71 of the regulation);
- the Danish proceedings and the Dutch proceedings were not so closely related that there was a basis for dismissing or postponing the Danish proceedings;
- the Danish court was 'first seized' with respect to the question of gross negligence;
- the issue as to whether the loss was due to gross negligence was not an issue in the Dutch proceedings; and
- the parties (ie, the wholesaler and the LSP) had not submitted any claims against each other in the Dutch proceedings.

Decision

On 5 March 2021 the Maritime and Commercial Court held that the Danish proceedings could not proceed and should be dismissed.⁽¹⁾ The court stated as follows:

The court finds [therefore] that the CMR-Convention does not hinder that the provisions of the Brussels I-Regulation on related claims applies, cf. Art. 30 to the dispute in this matter. It stems from Art 30(1) that if related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. It further follows from Art 30(2) that were the action in the court first seized is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction...

It is undisputed that the pending Dutch cases are brought before the case at hand and that the Dutch cases are pending in the first instance. It is further undisputed that the Dutch court is competent to hear the case between the Wholesaler and the LSP.

The Wholesaler and the LSP are both parties to the Dutch proceedings at the court at in Zeeland-West-Brabant where the Haulier, that was the performing carrier, has brought declaratory proceedings against inter alia the Wholesaler and the LSP and submitted that shall be ordered to acknowledge that the Haulier is not liable for the loss of the LED-TV's.

As both the present proceedings and the Dutch proceedings thus concerns the issue of liability of the parties concerned pursuant to the CMR-Convention for the loss of the consignment of the LED-TV's, the court finds that the claims brought are so closely related that there is a risk for conflicting judgments if the cases are heard separately. In this regards it is not decisive that the present case also involves a question as to whether the loss was caused due to gross negligence.

Comment

It follows from this decision that Article 30 of the EU Brussels I Regulation applies to disputes governed by the CMR and that, therefore, negative declaratory proceedings concerning liability for transport damage may imply that subsequent legal proceedings concerning this liability before another court competent under the CMR may be excluded pursuant to Article 30 of the regulation if there is a risk of a conflicting judgment, irrespective of whether the parties to the two sets of proceedings have made claims against each other in both sets of proceedings.

This judgment aligns with the European Court of Justice's judgment in *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* (C452/12), which held that negative declaratory proceedings brought by a CMR carrier against a cargo interest bar subsequent legal proceedings regarding the cargo interest's claim for payment against the CMR carrier. This is because negative declaratory proceedings must be deemed to have the same cause of action as an action for indemnity between the same parties in another EU member state.

The Maritime and Commercial Court's decision underlines the importance of being aware of the relevance of legal steps taken with respect to CMR matters in other jurisdictions.

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Endnotes

(1) Maritime and Commercial Court, BS-4026/2020-SHR.

