

Temperature deviation and gross negligence under CMR

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Facts
Decision
Comment

Facts

A Danish parallel importer of pharmaceuticals purchased batches of pharmaceuticals from various suppliers and booked transport of the products from the suppliers to its storage facility in Germany with a German Convention on the Contract for the International Carriage of Goods by Road (CMR) carrier.

The transport was booked as two separate consolidated consignments pursuant to a comprehensive framework agreement between the parties and included the stipulation that both batches of pharmaceuticals were to be transported at temperatures between 15 and 25 degrees Celsius, while medicines were to be transported at 2 to 8 degrees Celsius.

The carrier used a two-compartment trailer with an insulated separating wall. The medicines were loaded into the front compartment while the other pharmaceuticals were loaded into the second compartment. In accordance with the framework agreement, the trailer was equipped with a GPS temperature surveillance system with an alarm linked to the carrier's traffic planner and the driver's mobile phone if the compartment temperatures varied from the agreed thresholds. A display unit which showed the actual temperature inside the trailer at any given time was also placed on the outside out of the trailer. The performance of carriage was subcontracted to sub-carriers.

An IT error occurred in the trailer's cooling system and the temperature surveillance system at 4:00pm on 21 May 2016 during the performance of carriage. As a result, the cooling system stopped working, but the alarm was not raised with the carrier or driver. At approximately the same time, the driver started his nine-hour rest period. At 4:40pm, the temperature in the front compartment exceeded 8 degrees Celsius. The driver finished his rest period at 1:05am on 22 May 2016, at which time the temperature in the front compartment had risen to 11.4 degrees Celsius without any temperature alarms having been triggered. At 1:30am on 22 May 2016, a technical alarm was signalled for an error in the cooling aggregate's compressor. When the alarm was noted, the carrier decided that the transport should continue to its terminal in Germany for immediate unloading of the pharmaceuticals. The trailer arrived at the terminal at 9:10am on 22 May 2016.

Due to the temperature deviation, the Danish parallel importer submitted a claim of €238,331.04 for the damage to the pharmaceuticals with reference to the fact that certain batches could not be sold.

The second trailer carrying the consolidated pharmaceuticals arrived at the carrier's terminal in Germany for unloading on 29 May 2016. Shortly after, numerous alarms were signalled (ie, at 9:42am, 9:46am and 9:51am) to indicate that the temperature in the front of the trailer had exceeded 8 degrees Celsius. The temperature increase had been caused by a defective cooling aggregate system which had caused the inflow of warm air into the trailer's front compartment. The carrier assumed that the alarms had been triggered by the trailer being unloaded and did not respond to them. The unloading of the trailer started at 10:01am and the unloading of the pharmaceuticals from the front compartment took place at 10:58am, at which time the temperature had risen to 21.4 degrees Celsius.

Due to the temperature deviation, the Danish parallel importer submitted a claim of €125,51.84 for the damage to the pharmaceuticals with reference to certain batches that could not be sold.

The parallel importer submitted that the temperature damage had been caused by gross negligence on the part of the carrier resulting in liability that could not be limited under Article 29 of the CMR.

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The carrier rejected both claims and denied that any loss had been caused due to gross negligence. Further, the carrier submitted that:

- it had met its temperature surveillance obligations; and
- there were no causal links between possible faults on its part and the damage to the pharmaceuticals.

Decision

The Maritime and Commercial Court decided that the carrier was entitled to limit its liability under the CMR to 1,541 special drawing rights for damages in connection with the first transport.⁽¹⁾

The court reasoned as follows:

It must be assumed that the temperature alarm, due to an IT-error, was not signalled, irrespective that the temperature in the cooling-compartment had exceeded 8 °C. Due to this, the driver cannot be blamed for not noticing the temperature increase during his rest period. Further, it follows from the parties' agreement... that the driver was not obliged to monitor the temperate in the cooling compartment manually when the carrier, as in this case, applied an automatic temperature surveillance system to monitor the temperature.

On the basis of a statement given by a witness appearing for the parallel importer, the court also found that the pharmaceutical products appear to have been damaged approximately two hours after 4.40pm on 21 May 2016, when the temperature inside the container exceeded 8 degrees Celsius. On this basis, the court decided that any acts or omissions by the carrier after the rest period (which ended at 1:30am on 22 May 2016) were irrelevant as the damage had already taken place by that time.

However, with respect to the second transport, the court decided that the damages were the result of gross negligence on the part of the carrier, as it had failed to respond to three alarms and therefore could not limit liability for the loss. The court reasoned as follows:

[The parallel importer] has submitted that the temperature damage could have been avoided if the carrier's traffic-planner had responded to the alarm and immediately interrupted the input of warm air into the cooling compartment. No answer to this has been submitted by [the carrier] and it must therefore, be assumed that it had been possible to turn-off the cooling aggregate and thereby hinder further input of warm air.

Comment

The Maritime and Commercial Court's decision underlines that terms and conditions agreed in a framework agreement should be given significant attention when deciding whether a carrier has acted with gross negligence. With regard to the first transport, the court found that the driver had no reason to manually monitor the temperature in the trailer during his rest as no obligation to do so had been set out in the framework agreement.

The fact that the temperature allegedly exceeded 8 degrees Celsius approximately 40 minutes after the driver's rest period had commenced and that a check conducted at the start of the rest period would not have resulted in a discovery of the irregularity also played a role in the court's decision. As the damage to the pharmaceuticals occurred shortly after the temperature in the container exceeded 8 degrees Celsius, the court decided that it irrelevant that the temperature had not been manually checked immediately after the end of the driver's rest period.

With regard to the second transport, the court found that the carrier had been grossly negligent when it did not immediately respond to the alarms nor shut down the cooling aggregate to avoid a further influx of warm air. However, in the parallel importer's opinion, the temperature damage occurred 10 minutes after the alarm had been signalled. The court's judgment signals that carriers must make quick decisions and implement actions to respond to temperature alarms in order to avoid unlimited liability.

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Endnotes

(1) Maritime and Commercial Court decision of 25 November 2019, Case BS-9991/2017-SHR.

