OTIF

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INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

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Supreme Court (Germany)

Ruling of 30 September 2010[1]

Headnote:

If the carrier commits wilful misconduct within the meaning of Article 29, para. 1 of CMR, the injured party may claim compensation in accordance with the applicable national regulations, irrespective of the limits in Article 23 of CMR. In this case also, the injured party retains the right to calculate his loss on the basis of Articles 17 to 28 of CMR. If he chooses this course, the system of liability according to CMR is applicable in full, i.e. including in particular the limitation of liability according to Article 23, para. 3 of CMR.

Cf. Articles 23 and 29 of CMR: Articles 30 and 36 of CIM contain comparable provisions (with variations).

The facts:
(Summary)

The carriage of a large load of laptops with a market value of almost 1 million Euros from Germany to Italy was agreed between the consignor and the defendant. Certain security measures were included in the contract of carriage – in particular, breaks during transport could only be taken at lighted and monitored parking areas and only on certain legs of the journey, and the vehicle was not to remain unsupervised at any time.

A few kilometres before delivery, the vehicle was stolen, along with the load, as the driver was taking a break of around one hour at an unsupervised parking area.

On the basis of assigned rights, the plaintiff, the consignor's transport insurance provider, claims compensation for the full market value of the consignment.

[1] I ZR 39/09; lower courts: Landgericht Regensburg, Oberlandesgericht Nürnberg.

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Decision:
(Summary)

Like the lower courts, the Supreme Court (*Bundesgerichtshof*) affirms the existence of a case of liability, but mostly rejects the claim with respect to the amount.

The Supreme Court shares the assessment of the Court of Appeal, that in connection with the loss of the load, as agents in accordance with Article 3 of CMR, the defendant or her driver must be open to the accusation of wilful negligence. This results from the agreement of special security instructions for the transport operation in connection with the particularly high value of the load, of which the driver was aware.

However, the Court refused the possibility of determining the amount of compensation in accordance with Article 23, paras. 1 and 2 of CMR on the basis of the market price of the goods and, as a consequence of the wilful misconduct within the meaning of Article 29 of CMR, without taking account of the limitations of liability laid down in Article 23, para. 3 of CMR. The Court of Appeal admitted such a possibility, and justified it with the aim of Article 29 of CMR, i.e. to improve the position of the injured party as effectively as possible at the expense of the party causing the loss, who acted wilfully or in a similarly blameworthy manner.

Instead, in the regime of chapter IV of CMR, the Supreme Court recognises a single, coherent framework of liability. The calculation method laid down in **Article 23, paras. 1 and 2 of CMR**, which is potentially more favourable for the beneficiary, is thus justified from the nature of the objective liability of care and **only in conjunction with the limitation of liability referred to in Article 23, para. 3 of CMR**.

In cases of qualified subjective fault, Article 29 of CMR entitles the injured party instead to invoke unlimited liability under national law (which may also lead to compensation for consequential loss or damage). In this case however, he is also referred to the specific calculation of damages governed by general compensation law (i.e. in Germany in §§ 249 et seq. of the Civil Code, *BGB*). He may not invoke the provisions of Article 23, paras. 1 and 2 of CMR (commodity exchange price/market price/normal value of the goods at the place and time at which they were accepted for carriage), irrespective of paragraphs 3 and 7 (8.33 SDR/kg).

Ultimately therefore, if the goods being carried are lost, the qualified fault of the carrier gives the beneficiary the choice between two liability regimes, one of which would otherwise be denied him.

In deciding between the types of calculation method, the best way is therefore to weigh the flat-rate compensation based on the market value, bearing in mind the upper limit of liability and the exclusion of indirect damage (consequential damage to the goods, lost profits) against the actual unlimited and indirect damages, which are usually based on the cost of replacing the goods, and to pursue the more advantageous claim. However, in making this consideration, the rules on the burden of proof for calculation of the damages must also be observed, which may turn a claim of objective liability in accordance with Article 23 of CMR into the more simple settlement of damages.

Application to international rail transport
Remarks by the Secretariat

The rules of the CMR referred to concerning the strict liability of care (in the sense of custody) and the extended liability in the event of wilful misconduct are largely comparable to the CIM. The grounds for the ruling are also likely to be broadly applicable in rail transport[2].

The material question in the context of Article 29 of CMR discussed by the Supreme Court as to what degree of negligence according to the law of the court seized of the matter is equivalent to intent does not arise at all for rail transport: at this point, Article 36 of CIM requires intent to cause such loss or damage, or recklessly and with knowledge "that such loss or damage would probably result". In this respect therefore, it is independent of national law.[3]

The conclusion of this ruling, that both types of liability and calculation of damages represent self-contained regimes that must be kept strictly separate on the one hand, and on the other, that it still remains possible for the injured party alternatively to have recourse to strict liability of care, even if subjective liability is established – but in that case including the limitations – can be transferred to the CIM regime because of the rules being entirely comparable in this respect.

The CIM Uniform Rules are in any case to be considered as a uniform liability and liability limitation system, which is not modified even in the case of wilful misconduct, but is only an option in addition to the fault-based liability in accordance with general compensation law.

So to this extent, there do not appear to be any reasons to differentiate[4]. Just as Article 29, para. 1 of CMR denies the carrier the possibility of invoking certain provisions under liability of care, but in contrast continues to offer the injured party this basis for making a claim, Article 36 of CIM does not exclude Article 30 of CIM in its entirety, only the limitations of liability it lays down. The result of this, also *argumentum e contrario*, is that in any event, the abstract and flat-rate compensation according to Article 30 § 1 and 2 of CIM is available to the injured party. The injured party is likely to invoke this if, in the specific case, this method of calculation enables him to obtain greater compensation than calculating the subjective loss or damage in accordance with general compensation law might achieve.

Conclusion: because the decisive points of breaking through objective liability in rail transport (Article 36 of CIM) are dealt with in the same way as in CMR, this ruling would be transferable to the loss of goods in rail transport.
(Translation)

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[2] Rainer Freise, in the *Münchener Kommentar zum Handelsgesetzbuch (MünchKommHGB)* (Munich Commentary on the Commercial Code), Verlag C.H.Beck/Verlag Vahlen, Munich 2009, 2nd edition, marginal 1 on Article 36 of CIM, urges caution as to whether and to what extent rulings made in connection with other modes of transport are transferable to rail transport.

[3] See also comments on Article 36 of CIM, Kurt Spera, Bulletin 3/2009, p. 38 et seq.

[4] Also according to R. Freise in *MünchKommHGB*, marginal 6 on Article 36, which cites in evidence a similar ruling on the CMR: BGH NJW-RR 2005, 908.