OTIF

ORGANISATION INTERGOUVERNEMENTALE POUR LES TRANSPORTS INTERNATIONAUX FERROVIAIRES

ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

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Bundesgerichtshof (Germany)

Ruling of 26 March 2009

I ZR 120/07[1]

A clause in conditions of carriage governing which type of goods the forwarder/carrier does not wish to carry is not null and void by reason of infringement of the first sentence of paragraph 1, Article 41 CMR.

Cf. Article 41 para. 1 CMR[2]

The facts (summary):

A package containing electronic micro-components to the value of 102,000.- € was handed over for carriage by road from Eindhoven (Netherlands) to Regensburg (Germany). The consigner was a regular customer of the carrier.

Among other things, the General Conditions of Carriage (which, according to the defendant, its customer was aware of), contain a rule saying that the defendant does not carry any packages whose value exceeds the equivalent value of 50,000.- US$ in the respective national currency.

The consignment was lost. The insurance compensated the consignor for the resulting loss and subsequently claimed full compensation for the loss of the goods from the carrier under assigned rights. Referring to the lack of interface checks by the carrier, the insurance requested that no liability limits be applied, as in its view, there was qualified fault on the part of the carrier.

The court of first instance upheld the claim. The appeal was unsuccessful.

Decision (summary/extract)**:**

In response to the defendant's appeal, the ruling by the Nuremberg Oberlandesgericht (Higher Regional Court) of 4 July 2007 was overturned. The matter was referred back to the Court of Appeal for re-examination and decision.

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1 courts of lower instance: Landgericht Regensburg, Oberlandesgericht Nuremberg

2 Article 5 of CIM contains a similar provision.

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Grounds for the ruling (extract):

The Court of Appeal assumed unlimited liability on the part of the carrier in accordance with Article 17, para. 1 and Article 29 of CMR[3]. In the opinion of the Court of Appeal, it could remain open as to whether the defendant's General Conditions of Carriage had been part of the contents of the contract. Even if this were the case, the liability limits they contained would be null and void in accordance with Article 41 of CMR.

It is not entirely clear from the Court of Appeal's explanations whether it considered as null and void the clause on preclusion of carriage because it infringed Article 41, para. 1 of CMR, which says that "any stipulation which would directly or indirectly derogate from the provisions of the Convention shall be null and void". If the Court of Appeal considered that the clause on preclusion of carriage was null and void, the Bundesgerichtshof does not share this view. In so far as the Court of Appeal considered the rule on the prohibited goods to be valid, it should have dealt with this in the grounds for the ruling, which, as the appeal rightly criticised, was not done, which is in contravention of § 286 of the Civil Code.

The clause on the preclusion of carriage contained in the conditions of carriage is not invalid in accordance with Article 41, para. 1, 1st sentence of CMR, as it does not derogate either indirectly or directly from provisions of CMR, especially not from the inapplicability of liability limits governed by Article 29, para. 1 of CMR. The clauses of the conditions of carriage referred to do not govern the extent to which the defendant (if a valid contract of carriage exists) is liable for loss of or damage to goods transported when the loss or damage that has occurred is attributable to qualified fault on the part of the defendant. Instead, the clauses deal more with the conditions under which the defendant is not prepared to accept a transport order. As the litigious clause on the preclusion of carriage only describes the scope of the services to be provided by the defendant and does not govern the defendant's liability for loss of and damage to goods transported, it does not contradict mandatory provisions of CMR (Koller, *Transportrecht* (Transport Law), 6th edition, Art. 41 of CMR, marginal 1; cf. also House of Lords, ruling of 16.5.2007 [2007] UKHL 23 = [2007] 1 WLR 1325 - Datec Electronics Holdings Ltd. v. UPS Ltd., particularly item 30; also Becher, *Transportrecht* 2007, p. 232, 233 et seq.). In the clauses … it is only a matter of the defendant's freedom of contract, which has not been regulated in CMR. Therefore, a clause governing what type of goods the forwarder/carrier does not wish to carry is not invalid because it infringes Article 41, para. 1, 1st sentence of CMR.

As in addition to CMR, Dutch substantive law would also be applicable to a valid contract of carriage between the consignor and the defendant, the question of whether a contract was in fact concluded at all is also to be judged in accordance with this law.

For the re-opened appeal procedure, the *Senat* pointed out the following:

According to Article 29, para. 1 of CMR, the question of whether the carrier is to be charged with qualified fault, the consequence of which is the inapplicability of the exemptions and limits of liability contained in Articles 17 to 28 of CMR, is to be judged in accordance with the law of the adjudicating Court, i.e. German law in this case.

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[3] Article 23 § 1 and Article 36 of CIM contain similar provisions.

If, in the re-opened appeal procedure, the Court of Appeal establishes the valid conclusion of a contract between the consignor and the defendant incorporating the defendant's conditions of carriage, in dealing with the question of the consignor's contributory fault, it will also have to take account of the clause on the preclusion of goods in the conditions of carriage.

The Court of Appeal instructed an expert, Dr. H., to examine whether "in accordance with Dutch law, in the case of loss of a consignment, it can be considered as reducing the amount of the claim if the consignor of the transported goods has not provided the contractor with a possible declaration of the value of the goods, although the contractor has not necessarily asked for such a declaration". The appeal rightly criticised the fact that the Court of Appeal had formulated the question of proof too narrowly. The Court of Appeal should have clarified whether Dutch law provides for reducing the amount of the claim in the event that the consignor has breached a contractually agreed preclusion of carriage.

(The full text of this decision of principle has been published on the website www.bundesgerichtshof.de).

(Translation)