

Senders' disclosure and information duties under CMR

24 February 2021 | Contributed by [ThomannFischer](#)

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Introduction

This article discusses an insightful judgment of the Geneva first-instance court (C/27733/2018-10).

If consignors have CBD hemp transported, they must ensure that the goods comply with the legal framework conditions in all countries that could potentially be accessed. If the applicable THC limits for certain countries are exceeded, the carrier must be informed of this even if they have not asked. Consignors must always expect that their goods will be transported in a groupage consignment and that other countries will be visited in transit in addition to their destination country.

Facts

Swiss-based company U, which specialised in acting as an intermediary platform between producers of legal cannabis (CBD hemp) and carriers, contacted the carrier because three of its consignments were blocked at Italian Customs, even though CBD hemp with a THC content of less than 0.6% was legal in Italy. The carrier took care of the three shipments on behalf of U and processed the shipments to Italy without any further problems. A short time later, a producer looking for a reliable export partner contacted the carrier directly by email concerning a delivery of hemp products to commercial consignees mainly in Italy but also in England, France and Germany. The products would comply with all Swiss and foreign legislation.

The carrier forwarded the email request to U, which subsequently commissioned the carrier with the said transport. There were 10 consignments, nine of which were going to consignees in Italy, while one consignment was destined for Austria. It is undisputed that U had given no instructions regarding the route to be taken or the countries that must not be entered or crossed.

The sub-carrier used by the carrier consolidated the 10 consignments into a groupage shipment. The route went to Germany as its first destination. When crossing the border into Germany, all 10 consignments of hemp were confiscated and destroyed as the THC content ranged between 0.2% and 0.6%, exceeding the concentration permitted in Germany. Criminal proceedings for violation of the Narcotics Act were opened against the driver and sub-carrier's management.

U held the carrier responsible and, at the conciliation stage, claimed damages of Sfr138,000, of which Sfr73,000 represented the value of the confiscated goods and the remaining concerned loss of profits due to sustained disruption of business relations. In the lawsuit, only Sfr73,000 was quantified while an amount to be determined at the court's discretion was claimed for the excess portion.

U claimed gross negligence within the meaning of Article 29 of the Convention on the Contract for the International Carriage of Goods by Road (CMR). On the other hand, the carrier argued mainly that U was at fault under Article 17(2) of the CMR as U had not informed the carrier of the fact that the goods were illegal in Germany; U had violated the duty to inform according to Article 11 of the CMR. In the contingent position, the limitation of liability of Article 23 of the CMR was invoked, which led to a liability of approximately Sfr500.

Decision

The prayer for relief that an amount to be determined at the court's discretion should be awarded was not receivable for formal reasons (Article 84 of the Civil Procedure Code (ZPO)). However, the court stated that

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indirect damage, particularly loss of profit and earnings, cannot be compensated under the CMR.

As far as the carrier's liability was concerned, it was undisputed between the parties that a contract of carriage had been concluded and that the goods to be transported had been seized and destroyed during the custody period. The existence of a total loss within the meaning of Article 17(1) of the CMR was accordingly also undisputed.

However, the carrier took the view that the fact that U had not informed it about the THC content of more than 0.2% constituted a sender's fault within the meaning of Article 17(2) of the CMR. The court agreed. According to statements on U's website homepage, U specialised in the import and export of cannabis to various EU countries and complied with all legal conditions, particularly the critical limit of a 0.2% THC content. Therefore, it was U's duty to check whether the THC content was actually within these legal limits before handing over the goods. If this was not the case, the carrier had to be informed immediately and, if so, it had to be given specific instructions as to which countries it was not allowed to enter. This duty could be derived directly from Article 11 of the CMR, but the same result could be derived from Article 2 of the Civil Code (ZGB) – namely, the duty to always act in good faith.

U countered this argument by stating that it was unexpected that the carrier would head for Germany. The court disagreed. The carrier had had no reason to assume that a route via Germany posed any risk to the goods, which was why U had not been entitled to assume that the carrier would not drive via Germany in the first place. The carrier had never promised a single loading, but rather had mentioned a transport duration of four to five days, which was a clear indication of a groupage shipment. However, in the case of a groupage consignment, U could not simply assume that a direct route between Switzerland and Italy would be taken. Transit through other countries had been an obvious possibility.

In addition, the producer's email enquiry, which was forwarded to U, mentioned that deliveries were made to various EU countries, including Germany, and that it complied with all local laws. For this reason, U should not have assumed that the carrier had any reason to classify Germany as critical.

The court stated for the sake of completeness that the illegality of goods leading to confiscation and destruction had to be considered as a defect of the goods and an unavoidable circumstance in the sense of Article 17(2) of the CMR. This would also prevent the carrier from being liable.

As far as the allegation of serious fault within the meaning of Article 29 of the CMR was concerned, the court rejected this allegation because the carrier had never undertaken to take a direct route. Such an obligation did not arise from the CMR. Rather, the carrier was free to determine the route and did not have to inform the consignor, let alone obtain its consent. Therefore, serious fault was ruled out from the outset. On the contrary, the court considered U's behaviour of not informing the carrier about the goods' THC content (and therefore handing over illegal goods to the carrier) reckless.

Comment

The clarification that consignors are experts on the goods while carriers are experts on transport matters is welcome.⁽¹⁾ Consequently, the conclusion that the goods' legal status is a risk that is to be assigned to the consignor and not the carrier is correct. Scholar Temme also emphasised that carriers must not be exposed to the risk of transporting contraband.⁽²⁾ It is interesting that the court based the duty of information and notification on Article 11 of the CMR, but at the same time added, almost as a safety net, that such a duty can also be derived from the general Swiss law norm of Article 2 of the ZGB.

The finding that loss of profit and earnings cannot be compensated aligns with Federal Supreme Court case law (FSCD 127 III 365).

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Endnotes

(1) Koller, *Transportrecht*, 10th edition (Munich 2020, N1 to Article 11).

(2) Temme in Thume, *Kommentar zur CMR*, 3rd edition (Frankfurt 2013, N11 on Article 11).