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Fire on MV „UND ADRIYATIK"- Problems and solutions the GERMAN way:

Facts

On February 6 2008 the roll-on/roll-off vessel *MV UND ADRIYATIK* caught fire on the way from Turkey to Italy off the coast of Croatia. The vessel, which was carrying 200 trucks, was entirely destroyed by the fire, with a total loss of the consignments onboard. Since the fire, several proceedings have been initiated. The sea carrier was sued at the Marine Court of Istanbul, but some carriers under the Convention on Contracts for the International Carriage of Goods by Road (CMR) were sued in the various jurisdictions of the places designated for the deliveries under Article 31(1)(b) of the CMR.

Decisions

In Germany, various legal proceedings are pending to deal with the questions of jurisdiction and the applicable liability regime. Some German courts (e.g., those of Cologne, Darmstadt, Koblenz and Bueckeburg) have accepted jurisdiction with interim judgments, stating essentially that the places of jurisdiction provided for in Article 31 of the CMR are not influenced by Article 2 of the convention.

Article 2(1)(2) stipulates that:

"*Provided that to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by an act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport*."

Consequently, it should be clear that only the liability of the CMR carrier - and not the relevant jurisdiction - may be affected by Article 2.

The question of whether the CMR carrier is liable due to the CMR or Turkish maritime law – which basically refers to the Hague-Visby-Rules (the latter with the exemption from liability in case of fire unless caused by the actual fault or privity of the carrier) – has been determined differently by German courts. However, all of these decisions are being contested in appeal proceedings and are not yet binding. Some courts (e.g., the Court of Hamburg and the Court of Landshut) have granted claims in line with Article 17 of the CMR. On the other hand, the Court of Moenchengladbach ruled that the CMR was not applicable, but rather the Turkish maritime law applied. As a result, the Moenchengladbach court dismissed the claim because of the liability exclusion for fire onboard.

Comment

The crucial question regarding the liability of the CMR carrier is whether the fire aboard the *MV UND ADRIYATIK* is considered an event which could have occurred only in the course of and by reason of carriage by sea.

No definitive German decision has yet been made on this issue. Some commentators have opined that fire onboard a vessel does not constitute damage which is typical of sea carriage, since fire can also occur, for example, on trucks. Dangers which are typical of sea carriage include collisions, beaching and swell. Other commentators argue that fire onboard a vessel implies a specific danger which is typical of sea carriage only, especially because of the limited opportunity to fight fire while at sea and the special situation on roll-on/roll-off vessels whereby large numbers of trucks – with their flammable wheels, fuel tanks and consignments – cannot be moved out of harm's way.

Ultimately, the circumstances of the specific situation are decisive and it is up to each judge to assess whether the fire was a peril of the sea or rather a peril on the sea. In making such an evaluation, the location at which the fire broke out (e.g., in a truck on board the vessel or in the engine room of the vessel) and the way in which the fire was able to spread to the consignment at the subject of the litigation should be taken into account. Furthermore, the vessel's fire safety systems and the specific circumstances onboard the vessel should be considered.

In this context, it must be ascertained whether the situation could have taken place during carriage by other means of transport. In particular, a similar scenario might occur if fire were to break out in a tunnel, where fighting the fire may also prove difficult.

The criteria for an event which could have occurred only in the course of and by reason of the sea carriage according to the terms of Article 2(1) of the CMR are yet to be determined in Germany. The pending proceedings in Germany will certainly result in some binding judgments, as well as – ideally – a definitive decision from the Federal Court. At present, it is difficult to foresee whether the circumstances of the fire on the *MV UND ADRIYATIK* will finally give rise to the CMR liability of the carrier. However, it is clear from the background to the dispute that the CMR is generally applicable. Moreover the carrier bears the burden of proof that the prerequisites of Article 2(1)(2) of the CMR have been fulfilled and that it is liable not under the terms of the CMR, but rather under a different liability regime.

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