THE CONCEPT OF THE SUCCESSIVE CARRIER ON TRIAL

DR. SIMONE LAMONT-BLACK

60 YEARS CMR, 7TH OCTOBER 2016
ERASMUS UNIVERSITY ROTTERDAM
The Concept of the Successive Carrier on Trial

- **Concept of Successive Carriers – Art 34 - 40**
- **Origin**
  - COTIF-CIM
  - CMR
- **Irony**
  - Supreme Court UK
  - Supreme Court Netherlands
- **Appropriateness**
  - Successive carriage v sub-contracting
  - In-roads by case-law
  - Interests of the carrier – which carrier?
  - Other transport conventions
CHAPTER VI: PROVISIONS RELATING TO CARRIAGE PERFORMED SCCs

ARTS 34 – 40

Art 34 – definition of SCC and joint & several liability
Art 35 – procedure for hand-over of goods & CMR note
Art 36 – which SCC can be sued by cargo
Art 37 & 38:
  • rules on dividing compensation betw. SCC
  • Art 40 – freedom to agree diff. recourse quota
Art 39 – procedural matters for carriers inter se
Chapter VI - Provisions Relating to Carriage Performed by Successive Carriers; arts 34 – 40

Art 34

“If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.”
CHAPTER VI: PROVISIONS RELATING TO CARRIAGE PERFORMED SCCs
ARTS 34 – 40

Art 36

“Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.”
CONSEQUENCES OF SCC CLASSIFICATION

External Consequences:

• All SCC responsible for the performance of whole operation (art 34):
  • 1\textsuperscript{st} = primary carrier under his contract with cargo
  • 2\textsuperscript{nd} & ff. SCC under terms of consignment note
  • Joint & several liability of SCCs
• Art 36 – cargo claimant can sue \textbf{only} first, last & performing carrier at time of damage
• Suit as per art 31.1 requirements
Internal Consequences:

• Art 37 & 38 on division of liability of SCC inter se
  • Liability on carrier who caused loss/damage
  • If not determinable – all deemed liable in proportion to their share in carriage charges
  • If causative carrier insolvent – division of liability in proportion to benefit

• ...
Art 37

“A carrier who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of the claim, from the other carriers who have taken part in the carriage, subject to the following provisions:

(a) the carrier responsible for the loss or damage shall be solely liable for the compensation whether paid by himself or by another carrier;

(b) when the loss or damage has been caused by the action of two or more carriers, each of them shall pay an amount proportionate to his share of liability; should it be impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him;

(c) if it cannot be ascertained to which carriers liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in (b) above.”
CONSEQUENCES OF SCC CLASSIFICATION

Internal Consequences:

• Art 37 & 38 on division of liability of SCC inter se
• Art 39.1 – no right to dispute validity of payment if informed of suit and possibility to enter appearance
• Art 39.4 - extended time for suit betw. SCC
• Art 39.2 - different jurisdictional rules for SCC inter se
  • Place of domicile of other carrier
  • Suit against all carriers in same proceedings
• Joinder by other carriers per art 39 rules
“1. **No carrier** against whom a claim is made under articles 37 and 38 shall **be entitled to dispute the validity of the payment made** by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.

“2. **A carrier** wishing to take proceedings to **enforce his right of recovery** may make his claim **before the competent court** or tribunal of the country **in which one of the carriers concerned** is ordinarily resident, or **has his principal place of business** or the branch or agency through which the contract of carriage was made. All the carriers concerned may be made defendants in the same action.”

“4. The provisions of article 32 shall apply to claims between carriers. The **period of limitation** shall, however, **begin to run either on the date of the final judicial decision fixing the amount** of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the **actual date of payment**.”
Concept of Successive Carrier on Trial

• **COTIF-CIM**
  - Track and line monopoly of nat. railways
  - Performance of intl carriage impossible by one rail carrier

• **CMR**
  - Realities of transportation at time
  - “Staffeltransport” – relay-transport

• **FIATA proposal**
THE CONCEPT OF THE SUCCESSIVE CARRIER ON TRIAL DIRECTION?

• Irony
  • UK Supreme Court – 28 October 2015 - *British American Tobacco v Exel Europe Ltd* [2015] UKSC 65
    • Lord Mance at [13]: wide concept questionable
  • Dutch Supreme Court - 11 September 2015 - *C&V Veldhuizen Holding B.V. v Beurskens Allround Cargo B.V (Case Nr. 14/03211)*, NJB 2015/1635, S&S 2016/1
    • Concept somewhat extended
The Wide Concept of the Successive Carrier

- **Carriage under single CMR contract:**
  - Same overall journey *(Flegg Transport v Brinor [2009] EWHC 3002)*
  - Same CMR consignment note *(Arctic Electronics v McGregor [1985] Lloyd’s Rep 510)*

- **Individual carriage need not be international:**
  - But needs to be under CMR consignment note
  - To ensure risks understood by domestic SCC
The Wide Concept of the Successive Carrier

- **Contracted or performed by several successive carriers?**
  - One carrier preforming is enough: *Ulster-Swift*; Rosewood Trucking [2005] EWCA Civ 1461

- **Taking over goods AND consignment note:**
  - **English law agency principles of undisclosed principal:**
  - CMR consignment note: issued by 1st carrier or for him:
    - by a later carrier for all carriers up the line, *Coggins v LKW Walter* [1999] Lloyd’s Rep 255 (County Ct)
Mischief

- **Enabling of recourse/compensation:**

- **Direction of recourse claim:**

- **Curtailing of recourse:**
  - *Rosewood Trucking v Brian Balaam* [2005] EWCA Civ 1461 – basis of claim
ENGLISH LAW

Rosewood Trucking

S → P → R → A → B

1 ← 2 ← 3
Veldhuizen v Beurskens

HP → TOF → B → V

1 → 2\textsuperscript{(WM)} → 3
The Extended Concept of the Successive Carrier

- Dutch Supreme Court - 11 September 15:
  - “Veldhuizen v Beurskens” Case Nr. 14/03211, NJB 2015/1635, S&S 2016/1
  - “Paper carrier” = no successive carrier – but actual carrier is
    - Extra-wide SCC interpretation rejected, but
    - “Paper carrier” can refer to Ch VI rules for recourse claim – art 39.1
  - Original judgment content (WM) thus also relevant for recourse claim
The Extended Concept of the SCC

• Dutch Supreme Court – Reasoning:
  • Vienna Convention on Law of Treaties (VC) art 31.1: object and purpose
  • VC, art 31.3 - Alignment with international position
  • Purpose to strengthen position of sender and carrier seeking compensation/recourse
Concept of the SCC - Supreme Ct.

- Clarification or Uncertainty?
- True alignment with international position?
- *Result* – *international dis-harmonisation*?
- *See* A.Spijker & R.van Dijk article, *e.g.* in *TransportRecht* 2016/341
APPROPRIATENESS TO DATE?

The Concept of the SCC

• Object and purpose?
  • Compatibility with realities of today’s transport?
  • Successive carriage v sub-contracting:
  • Arts 37(b) & 38 – liability in proportion to share in freight?

• Required to serve carrier interests?
  • Logistics provider, paper carrier or CMR carrier?
  • Recourse enabled v. organisation of finite carriage business
  • Contractual solutions – boundaries: arts 40 & 41
The Concept of the SCC

- Required to serve cargo interests?
  - Suit enabled against contr. and actual carrier(s)
  - Bankruptcy of contr. carrier – choice of partner

- Inspiration from other transport conventions:
  - Concept of actual carrier to secure cargo claimant’s position
  - Short recourse time bar
  - Air, sea and inland waterways
### Appropriateness to Date?

<table>
<thead>
<tr>
<th>Convention</th>
<th>SCC rules</th>
<th>Contractual &amp; actual carrier</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montreal C. - air arts 36, 48 arts 39-48</td>
<td>all carriers part of contract to extent of <strong>their part of carriage only</strong>; liable generally <strong>only for own part of carriage</strong></td>
<td>AND Actual carrier rules 39 – 48</td>
</tr>
<tr>
<td>Hauge-Visby R. art.III r.6 bis</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Hamburg R. arts 10, 20.4</td>
<td>N/A</td>
<td>Joint and several liability of contr. and actual carrier (10.4)</td>
</tr>
<tr>
<td>Rotterdam R. arts 20, 64</td>
<td>N/A</td>
<td>Joint and several liability of contr. carrier and maritime perf. party (20)</td>
</tr>
<tr>
<td>CMNI – inland WW, arts 4, 24.4</td>
<td>N/A</td>
<td>Joint and several liability of contr. and actual carrier (4.5)</td>
</tr>
</tbody>
</table>
Reform: Concept of Multiple Carriers

- If not abolished, narrow, explicit definition of SCC
  - chain of performing carriers only
- Implementation of actual carrier concept
  - In favour or cargo claimants
  - Liability of actual carrier under convention
  - For any breach of his obligations
- Short extension of time bar for recourse claims
  - Protection of interests of perf. and contr. carriers
  - 3 months from payment or service of claim
  - Ordinary rules of liability and jurisdiction
- All within mandatory framework of CMR
Reform: Concept of Multiple Carriers

“The chapter of successive carrier should be deleted and replaced by actual carrier rules with a short time bar for recourse between carriers.”

Yes/No?
Thank you very much for your attention!
The Concept of the Successive Carrier

- Outdated?
- Other solutions? Reform?
  - Clarification of definition of SCC?
  - Abolition of SCC concept?
  - Implementation of actual carrier concept?
  - Implementation of time bar for any carriers inter se?
- Other solutions?
- What is your view?
Concept of the Successive Carrier - Supreme Ct.

- Clarification or Uncertainty?
  - Paper Carrier can use Ch IV for recourse claims – 37, 39.1 and 39.4
  - Uncertain whether Ch IV usable against paper carrier – 37(c), 38, 39.2

- True alignment with international position?
  - English position: Ch VI only for SCC; albeit wide interpretation of SCC
  - Germany, Austria: CMR successive carrier carrier concept based on CIM – lex specialis - narrow interpretation
    - Although at times, art 39.4 used by analogy for recourse claims betw. sub-contracting carriers

- **Result**
  - International harmonisation/dis-harmonisation?
  - Limited fix of only some types of claim/problems for others