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British American Tobacco Denmark A/S and others (Respondents) v Kazemier Transport BV (Appellant) and British American Tobacco Switzerland SA (Respondents) v H Essers Security Logistics BV and another (Appellants)'

Introduction

The law applicable to a contract and the jurisdiction in which disputes are to be decided often have a significant bearing on the outcome of a case. This applies not only to substantive issues (i.e. whether a liability attaches and, if so, to what extent), but also to procedural matters. The latter include the methods of commencing proceedings in order to protect any applicable time limitation, the obligations to disclose documents and other evidence, evidential burdens of proof, the timeline of the litigation (including possible appeals), the costs involved and the extent to which the successful party can recover those costs from the unsuccessful party.

These are extremely important matters and it is common for parties to agree the applicable law and the jurisdiction in which disputes are to be heard. This can either be by way of actual agreement in a specifically negotiated and signed contract, for example, in a terminal handling agreement. It may also be by actual, or – more often – presumed agreement, when the law and jurisdiction is referred to in a party's Standard Trading Conditions (STCs), such as on the reverse side of a multimodal bill of lading.

Where the relevant contract relates to international transport, the contractual law and jurisdiction clause may be set aside in favour of the mandatory regime set out in the applicable international convention. In a recent landmark ruling, the Supreme Court, considered certain issues arising out of two international road transport contracts and the jurisdiction scheme set out in the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR).

Background

This case involved two separate container loads of cigarettes: one allegedly hijacked in Belgium en route between Switzerland and the Netherlands, and the other stolen in part near Copenhagen en route between Hungary and Denmark.

The cargo interests in respect of both containers were British American Tobacco (BAT). In each case BAT contracted the carriage to Exel, an English domiciled company, who in turn sub-contracted one contract of carriage to Essers and the other to Kazemier. Both Essers and Kazemier admitted to being successive carriers and were both Dutch domiciled carriers.

Whilst CMR is an international convention, the courts of the various Contracting countries interpret its provisions in different ways, which often leads to forum shopping and disputes over jurisdiction. The dispute arose out of BAT's attempt to bring proceedings against Essers and Kazemier in England.

England was a favourable jurisdiction to BAT because the English law interpretation of Article 23.4, *"…other charges incurred in respect of the carriage…"* permitted the recovery from the carriers concerned of the significant duties/taxes demanded on the cigarettes. This is in contrast to other Contracting countries where the duties/taxes are not recoverable from the relevant carriers.

Essentially, if BAT could secure English jurisdiction they would make effectively a full recovery, whereas in other jurisdictions, absent a finding of wilful misconduct, the recovery would be significantly less and based almost solely on the value of the goods (or the 8.33 SDR limit if applicable).

In March 2012 the High Court rejected BAT's attempts to bring proceedings in England. The Court of Appeal reached the opposite decision in October 2013. Essers and Kazemier appealed to the Supreme Court.

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The legal position and arguments
Art 31.1 CMR provides for a number of jurisdictions for claims between cargo interests and carriers, namely:

> **Art 31.1**: Any jurisdiction agreed between the parties and, *in addition*;
>
> **Art 31.1 (a)**: The place where the defendant is ordinarily resident, or has its principal place of business, or the branch or agency through which the contract of carriage was made; or
>
> **Art 31.1 (b)**: The place where the goods were taken over or the place designated for delivery

BAT raised four key arguments in favour of English jurisdiction:

1. Where jurisdiction can be established against only one carrier under Art 31.1 (a), the court still has jurisdiction to join the other carriers to those proceedings, even though they are not ordinarily resident etc. in the same place, by virtue of the last sentence of Art 36 namely *"an action may be brought at the same time against several of these carriers"*.

2. Art 31.1 enables BAT to sue Essers and Kazemier by virtue of the English jurisdiction clause in the main contract between BAT and Exel. In other words the English courts were *"designated by agreement"*, even though Essers and Kazemier were unaware of this jurisdiction clause.

3. Essers and Kazemier can be pursued on the basis that *"the branch or agency through which the contract was made"* under Art 31.1 (a), was Exel, and Exel was domiciled in England.

4. The provisions of the Brussels Regulation enable jurisdiction to be established where CMR is inconsistent with the intent of the Brussels Regulation or where there are gaps in CMR.

The judgment
The appeal was unanimously allowed and BAT's English proceedings were set aside. On the four arguments put forward by BAT mentioned above, the Supreme Court made the following findings (in line with the position advanced by Essers and Kazemier):

1. Jurisdiction under Art 31.1 (a) required each defendant to be sued in the place where it is domiciled or has its principal place of business. Article 36 is not concerned with jurisdiction and "certainly does not confer jurisdiction if it does not otherwise exist". Hence, even though Exel was domiciled in England, Art 36 did not act as an anchor enabling Essers and Kazemier to be brought before the English courts. Under Art 31.1 (a) Essers and Kazemier would have to be sued in the Netherlands.

2. Essers and Kazemier did not agree to the English jurisdiction in the main contract between BAT and Exel and therefore the English Courts were not "designated by agreement". Pursuant to article 34, Essers and Kazemier became a party to the contract of carriage only "under the terms of the consignment note, by reason of [their] acceptance of the goods and the consignment note", and as the consignment note did not include the jurisdiction clause Essers and Kazemier could not be said to have agreed to its application. In other words, express notice is required and to suggest anything to the contrary would, according to Lord Mance, "involve an unfamiliar and undesirable invasion of the general principle that contract depends upon agreement".

3. It was incorrect to construe Essers and Kazemier as contracting through the branch or agency of Exel. The relevant "branch or agency" has to relate to the particular defendant, i.e. if Essers or Kazemier had had branch offices in England and Exel had made the contracts of carriage through these offices, then England would have been a potential jurisdiction.

4. The Brussels Regulation was, in these circumstances, of limited relevance as the CMR scheme is "deliberate and comprehensive", it reflects a balance between the interests of all parties concerned, it does not impinge upon any principles of EU law and there is no gap which needs to be filled.

Commentary

Whilst the Supreme Court accepted the commercial logic of BAT's argument in respect of articles 34 and 36, namely the recognition of a jurisdiction to receive all three carriers in one set of proceedings, it was persuaded that the language of CMR, even on a purposive construction, did not permit this result.

It is important to note, however, that the risk of inconsistent judgments can still be avoided, because whilst under Art 31.1 (a) the individual defendants have to be pursued in their own "home" courts, it is still possible for all relevant carriers to be named in one set of proceedings in the place where the goods were taken over or the place designated for delivery per Art 31.1 (b).

The case demonstrates the importance of the CMR consignment note. Historically, the preparation and handling of documentation in the road transport sector might not have been as stringent as it was in the air or sea carriage sectors. That is not necessarily the case today, but parties to a contract of international road transport need to ensure consignment notes are prepared and reviewed carefully.

When preparing the consignment note, cargo interests, or their agents, or first CMR carriers, will want to ensure that all relevant terms, including a jurisdiction clause, if appropriate, are included. Successive carriers, when taking over a consignment note, must carefully review the terms which are recorded on the note, because arguably, once the goods and the note have been taken over, they will be bound by the terms so recorded (even if they did not wish to accept a particular jurisdiction).

It is important, therefore, that companies providing carriage of goods services should ensure safeguards and checks are in place to oversee this process and that, if necessary, adequate training is provided to staff in the drawing up and reviewing of consignment notes, which are, of course, contractual documents that bind those companies.

The CMR provides a complete code on jurisdiction, but Art 31 must be considered carefully to ensure that proceedings are commenced in the appropriate and correct jurisdiction. It is vital that the parties provide timely notice of claims to their insurers, so that a speedy review of the provisions can be made and that lawyers can be instructed quickly to commence legal proceedings in the most favourable jurisdiction. Where there is delay in notification to insurers and prejudice has been caused, it may have an adverse effect on the insurance cover that would otherwise have been available.

This article was jointly authored by Justin Reynolds, TT Club Regional Claims Director, EMEA and Ewelina Andrzejewska an associate at Holman Fenwick Willan, London, the solicitors who represented Essers and Kazemier. Justin was formerly a Partner at HFW and handled this case until shortly after permission to the Supreme Court had been obtained and Ewelina was the associate with conduct of the case.