CARRIER'S LIABILITY FOR DELAYS AND RIGHT TO LIMITATION IN CASE OF NEGLIGENCE – COMMENTS TO THE JUDGMENT OF THE COURT OF APPEAL OF LISBON OF 18.02.2020 (CASE NUMBER 97/12.0TNLSB-7)

Liability for delays under the Hague Rules

Carrier's liability for delays is an issue not specifically regulated under the Hague or Hague-Visby Rules[1], a circumstance which derives from the antiquity of their making and that practically every legal commentator agree requires an updating interpretation for modern-day marine carriage.

The topic has been the object of debate and of different solutions in different jurisdictions, although the dominant one sustains that delays are to be considered as relevant default, triggering the carrier's liability envisaged by the Rules, a result of interpretation which eliminates the gap theory by holding that the lack of a specific reference does not exactly means that the Rules (at least when interpreted in the proper historical context) intend to exempt the modern-day carrier from being liable for delays and to exclude compensation to the aggrieved cargo interests.

An important judgment on this matter was held last year by the Court of Appeal of Lisbon ("Tribunal da Relação de Lisboa"): - Judgment of 18.02.2020 on the case number 97/12.0TNLSB-7.

The case was of a multi-modal shipment from Leixões to Dubai subject to an imperative short time delivery window, since the cargo was composed by a set of equipment specifically sent for exhibition in an industrial fair in Dubai during its few days of duration. The engagement of the contractual carrier with such strict time delivery obligation, and its acknowledgement of the purpose of the carriage, were not disputed. However, for the maritime segment of the carriage, the contractual carrier subcontracted shipping liners and disregarded the time delivery obligation. Shipping liners proceed with the carriage as per their fixed time schedules which would result in a delivery of the cargo many days after the fair, failing completely the time delivery window and turning the carriage useless. Midway on the maritime journey, shippers realized the unavoidability of the failure of delivery in time, requested the returning of the cargo and claimed full compensation against the contractual carrier.

The shipper's claim was for all the amounts paid to the carrier, the expenses incurred with the frustrated presence at the fair and for the economic loss caused by such frustration, this later alleged to amount to €500.000,00, while all the remaining of the claim would be of at around €70.000,00.

[1] In Portugal only the Hague Rules are in force since the country never adhered to the Visby Protocol.

The court easily found that the matter was to be solved under the Hague Rules since the event of delay was caused during the maritime segment of the carriage.

The court proceed to replied affirmatively to the inclusion of delays as a relevant source of liability for default under the Rules.

To substantiate such conclusion, the court first referred to the historical context of the Rules and to the need for a corrective modern-day interpretation:

> *The relative silence of the Rules about the delivery and the absence of regulation of the delay can be explained by two factors: the first lies in the singularity of marine carriage at the time the Rules (…) the delay was not only a possible phenomenon, but often unavoidable, making it extremely difficult to make an accurate estimate of the date of arrival. The second consisted in an option by the Rules's makers not to include in the final wording any reference to the delay in order to allow national judges to freely interpretate them by including, or not including, delays in the causes of liability of the carrier.*

The court then densified the conclusion by pointing several material arguments, ones rooted in the inherent logic of the wording of the Rules and others on domestic law principles.

The court placed substantial emphasis on the importance of a unified and coherent interpretation of the law:

> *The answer (to whether delays cause liability under The Rules) can only be positive, otherwise the unified, coherent and enlarged purpose envisaged by the Rules would be frustrated.*

It further pointed out the fact that the concepts contained in the wording of the Rules themselves, although not expressly mentioning the word "delay", are meant to include it, when properly interpreted:

> *(…) it is indisputable that the carrier's liability (one resulting from a legal presumption) means that the carrier shall indemnify when, as a consequence of its default, it causes damages* ***– whatever they are*** *– to the cargo or to the interests relative to the cargo. On the other hand, the Rules establish the liability for losses or damages to the cargo* ***without specifying the type of damage covered****. In fact, the Rules never refer to physical damages, or damages for loss or breakdown caused to the cargo. Instead,* ***it refers to loss or damage*** *cause to (art. 3, p. 5 and 6, art. 4, p. 1, 2, Introduction, 3 and 4, and art. 7 of the Rules), or in connexion with ((art. 3, p. 8, and art. 4, p. 5, of the Rules), the cargo,* ***therefore contemplating the cases of late delivery,*** *which can also be understood as the violation by the carrier of its obligation to duty to perform the carriage in an appropriate and diligent manner (art. 3, p.2 of the Rules).*

Delays are, however, similarly subject to the limitation of liability

Limitation of liability is a critical issue for marine cargo owners and insurers under Portuguese law because Portugal did not ratify the Visby Protocol and, therefore, the limitation is strictly based on the counting of "units" or "packages" (currently fixed in €498,89 per unit/package), not possessing the "or kilo, if higher" rescue clause brought by the Visby Protocol. This often results in dramatically low amounts of limitation.

On the other hand, delays are clearly one of those factors able to create losses which extensively exceed the values of limitation.

The case under analysis was no exception. The limitation value was of the extremely low amount of €997,00 (two pallets, meaning two packages), while the claim was of at about €570.000,00.

Claimants asked for the non-application of the limitation based on several arguments, the first one being the type of default. On claimants reasoning, a delay caused in the above explained circumstances should be immune to the limitation established in Rules and claim the application of domestic law principles charging the carrier with full liability. Secondly and without prejudice, by a thesis sustaining that, if not the provisions, at least the substance, of the Visby Protocol should be applied and, lastly, that the carrier's action was to be considered wilful and not merely negligent.

The court rejected the first two legal arguments and, in connection with the third, it concluded that carrier's wilfulness was not proven. Therefore, it declared the €997,00 limitation of liability applicable and confirmed the judgment of the first instance court.

About the first of the arguments, the court considered that, once established the conclusion that delays are included in the default concepts contained in the Rules, for an argument of unity and consistency of the legal system, it follows its natural similar submission to the provisions of limitation:

> *(…) the non-submission of the delay to the regime of the Rules – and the consequent application of domestic law – would result in an unreasonable breach on a legal framework already fragmented since the international conventions applicable to railroad carriage and air carriage all discipline the cases of delay (and establish specific possibilities of limitation and exoneration of liability) and would result for the multi-modal carrier in an unjustified increase of its exposure without proper correspondence in its remuneration (freight), generating a contractual unbalance which attempts against "bona-fide"*

The gap caused by the lack of ratification of the Visby Protocol

About the second, the court held that the Visby Protocol, neither on wording, nor in "spirit", was to be applied.

The lack of ratification of the Visby Protocol creates in Portugal another interesting problem which results from the absence of the defeating of limitation formula it introduced in article 4, p. 5, l. (e) of the Rules: (*Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result*).

A consensus was soon established among Portuguese legal authors and courts that, in what relates the first part of this provision - the carrier's wilful conduct (the act or omission done "with intent to cause damages") - called in Portuguese legal language "dolo" – the same solution would result from the general principles of law and, therefore, the absence of the provision has no damaging effect. The principle at stake is the one contemplated on article 334 of the Portuguese Civil Code which states that *It is not legitim the exercise of a right when its holder clearly exceeds the limits imposed by bona-fide, or by customary practices or by the social and economic purpose of the right,* the so-called "abuse of right".

The one who intentionally creates the damage is considered to be in excess of the said limits and in abuse of right should it latter intends to claim a legally foreseen limitation of liability. Based on that argument, the limitation in case of wilful misconduct is set aside by the above quoted provision. The court sustained this thesis without significant doubts.

The question is what to do with the remaining part the said Visby Protocol provision – the recklessness or "gross negligence". The dominant opinion, which the court in this case followed without even debating the matter, is that, unlike a wilful carrier, a grossly negligent carrier (a "reckless carrier") is not in excess of the limits mentioned by the said article 334 of the Portuguese Civil Code when it claims limitation of liability and, therefore, such principle does not invalidate its right to such limitation contrarily to what the Visby Protocol does. Such is, in fact, the part where missing the ratification of the Visby Protocol creates a different solution in Portugal.

The case under reference is a clear example of the effects of this legal gap. The court indeed found that the carrier's conduct, by disregarding the crucial time delivery obligation when it transferred the cargo to shipping liners doomed to fail the delivery time agreed, was to be qualified as "imprudent or even careless[2]" which permits to place it on a high level on the scale of negligence. The court, however, drawn a strict line of separation in between the wilful conduct, which precludes the right to limitation, and negligence, under any of its forms, which does not, leaving the idea that, should the Visby Protocol was in force, the outcome could have been different.

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[2] The Portuguese word used was "desleixo", which, in the context, is a pejorative meaning form of lack of care or of diligence.

Opinion

The first part of the judgment – treating delays as normal causes of liability under the Rules - does not raise any particular comments from our side. Such interpretation is in line with what has been decided worldwide and it is the more suitable to respond to the problems of modern-day carriage.

As to the part about the limitation, our criticism is not against the judgment. The judgment is a solid piece of legal doctrine based on the applicable law and the arguments sustained are sound. We find the judgment particularly welcome when it proclaims the need for unity and consistency in the interpretation of the Rules.

The position of the court in finding this particular carrier as not being in abuse of right is debatable, in the sense that it would be possible to articulate, based on the facts proven, an opposite conclusion. However, we tend to consider that the majority of Portuguese doctrine would agree with the position followed by the court.

The problem is "de jure constituendo". In fact, the lack of ratification by Portugal of the Visby Protocol is not understandable. There was never a substantive explanation for it, and it seems to result purely from law making inertia.

While general principles of civil law (such as the above-mentioned article 334 of the Portuguese Civil Code) can do enough to avoid the gap in relation to the carrier's wilful misconduct, some circumstances of relevant or even severe (gross) negligence will pass unsanctioned. The case in analysis is one of those examples.

Limitation of liability in modern-day carriage requires a much more comprehensive legal approach and authors agree worldwide that not even the Visby Protocol standard is a satisfying solution anymore, much less a legal system's position which stays short of that standard and still in the original version of the Rules.

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