Neutral Citation Number: [2023] EWHC 1505 (Comm)

Case No: LM-2022-00192

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 June 2023

Before :

Simon Tinkler sitting as a Deputy High Court Judge

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Between :

(1) HUAWEI TECHNOLOGIES (UK) LIMITED **(2) CHINA PACIFIC PROPERTY INSURANCE CO LTD.**	**Claimants**
- and -	
DSV SOLUTIONS LIMITED	**Defendant**

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Sam Thomas (instructed by **Azarmi & Company Ltd**) for the **Claimants**
Michael Davey KC (instructed by **Shoreside Law**) for the **Defendant**

Hearing date: 26 April 2023

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 14:00 on Friday 23rd June 2023.

Simon Tinkler sitting as a Deputy High Court Judge:

Background to the applications

1. These applications relate to mobile phones belonging to the First Claimant ("**Huawei**") that the Defendant ("**DSV**") contracted to transport from England to the Netherlands. The Second Claimant ("**China Pacific**") was the insurer of the First Defendant's mobile phones whilst they were being transported. Some 300 of the mobile phones went missing during the course of the transportation. It is presumed by all parties that those goods were stolen whilst they were in transit. It is not known by whom they were stolen.

2. There were two applications before me. The first, and most substantive, application was by the Defendant to strike out the claim, or alternatively to obtain summary judgement against the Claimants. The second application was to clarify the basis on which China Pacific should (or should not) be party to the proceedings. If the first application succeeded, then the second application would be academic. If the first application failed then the parties were in broad agreement that the claim should be brought by either Huawei as principal or, alternatively, by China Pacific having exercised its rights of subrogation but not by both; the parties would seek to agree the correct basis and make appropriate applications in due course to amend the pleadings.

3. I heard full legal argument in relation to the first application and I express my thanks to both counsel for the clarity of their submissions.

Key facts

4. A brief summary of the key facts is as follows:

    i) Huawei and DSV entered into a contract under which DSV were to take phones belonging to Huawei from England to the Netherlands (the "**Contract**").

    ii) The carriage of the phones under the contract was subject to the Convention on the Contract for the International Carriage of Goods by Road (the "**CMR Convention**"). The CMR Convention was given effect in English law by the Carriage of Goods by Road Act 1965 (the "**1965 Act**"). The CMR Convention sets out key terms regarding liability for carriage of goods. It includes limitations and procedural rules.

    iii) DSV took the consignment of Huawei's mobile phones from their warehouse in Feltham, England to the Netherlands. The consignment was delivered in Amsterdam on 24 November 2020 but around 300 of the phones, valued at some £150,000, were missing.

    iv) On 7 June 2022, around 18 months after the delivery of the consignment in which the phones were missing, the Claimants wrote a letter before action to DSV threatening legal proceedings in the English courts.

v) On 5 July 2022 DSV issued and served proceedings in the courts in the Netherlands seeking a declaration that they had no liability to either Huawei or China Pacific.

vi) On 31 August 2022 China Pacific issued a claim in the English courts. On 21 September 2022 Huawei was added to the claim. The claim was served on 22 September 2022.

vii) On 2 November 2022 DSV applied for a declaration that the English courts have no jurisdiction (or should not exercise any jurisdiction they have) and to set aside the claim.

viii) On 22 February 2023 the court in the Netherlands handed down its judgement (the "**Netherlands Decision**"). It held that under the CMR Convention the appropriate limitation period was one year. It did not exercise any discretion it had to extend that period. It also did not conclude that the three year limitation period for claims involving wilful default applied. This was because Huawei and China Pacific said that the case was time barred in the Netherlands and thus by implication the wilful default provision did not apply. The court in the Netherlands held that the underlying claim by Huawei was time barred. It held that the claim by DSV for the declaration was therefore also time barred.

5. DSV says that no claims can be made against it in this court by Huawei or China Pacific because the entire matter has been decided pursuant to the Netherlands Decision. It says that the terms of the CMR Convention therefore preclude any claim being brought in the English courts.

6. Huawei and China Pacific say, however, that they have claims that continue to exist notwithstanding the Netherlands Decision. The Claimants say they have claims pursuant to the Contract and that neither the Netherlands Decision nor the CMR Convention preclude the bringing of those claims (the "**Possible English Contractual Claim**") and (b) they have claims that can be brought in the English courts in tort that similarly are not limited by the Netherlands Decision or the CMR Convention (the "**Possible English Tortious Claim**"). It is convenient to address those two grounds separately. There is no existing English case law to which I was referred that addresses the precise legal issues that arise in relation to the two grounds. There are, however, several cases which provide a useful framework for the analysis.

Possible English Contractual Claim

7. It was common ground that the CMR Convention applied to the Contract. The precise way it applied was not common ground. It is useful, therefore, to start by considering the actual terms of the CMR Convention.

8. Section 1 of the 1965 Act sets out that the CMR Convention has the force of law in the United Kingdom. The CMR Convention itself is set out in the Schedule to the 1965 Act.

9. Article 31 of the CMR Convention ("**Article 31**") provides as follows:

"Article 31

31.1 In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory

(a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated,

and in no other courts or tribunals."

10. Article 31.1 in essence sets out where a party may bring proceedings under the Convention.in relation to the carriage of goods. In other words, Article 31 provides a selection of jurisdictions in whose courts or tribunals a contracting party may bring proceedings.

11. The effect of having brought proceedings in a forum permitted by Article 31.1 is set out in Article 31.2, as follows:

"*31.2 Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgment has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought*."

12. It is common ground that the English courts and the Netherlands courts are both courts in which the parties would be entitled bring claims in relation to the Contract pursuant to Article 31.1. Accordingly, the courts in the Netherlands are "competent" for the purposes of Article 31.2.

13. The Claimants raised three key arguments in relation to Article 31.2 which they say individually or collectively mean that they are not precluded by the Netherlands Decision and CMR Convention from bringing their claim in contract in the English courts:

i) The Netherlands Decision is not a "judgment" for the purposes of Article 31.2 because it was a decision that the courts in the Netherlands did not have jurisdiction over the claim as the limitation period had expired (the "**Judgment Issue**");

ii) The grounds on which they seek to bring a claim in this court are not "the same grounds" as those in the Netherlands Decision (the "**Same Grounds Issue**"); and

iii) The Netherlands Decision is not "enforceable" for the purposes of Article 31.2 (the "**Enforceability Issue**").

The Judgment Issue/Enforceability Issue

14. The Judgment Issue and the Enforceability Issue are in reality two parts of the same issue. Article 31.2 is couched in negative terms in that "no new action shall be started… unless the judgment… is not enforceable". To make this judgment easier to follow I have avoided the use of double negatives contained in Article 31.2 and have phrased the question as whether the "judgment…is enforceable".

15. The original claim in the Netherlands was by the Defendant for a declaration of non-liability. The question of whether a declaration of non-liability is a "judgment… that is enforceable" was considered by Colman J in *Frans Maas Logistics (UK) Ltd v CDR Trucking BV*[1] *("Frans Maas")*. He concluded that it was not. That decision and the underlying question were considered, but not decided, by the Court of Appeal in *Merzario*.[2] The majority (Chadwick LJ and Merritt VC) expressed the view that a declaration of non-liability was a "judgment… that is enforceable" and that *Frans Maas* had been wrongly decided. Rix LJ, on the other hand, concluded that the decision in *Frans Maas* was correct, although for slightly different reasons to those expressed by Colman J. The appeal in *Merzario* had unanimously been rejected on other grounds (namely that the proceedings outside England were not "pending") and so the views of the Court of Appeal are, in any event, explicitly stated not to be a decision of the court. They are, however, expressed as opinions on an important question with a clear expectation that they would be relied upon.

16. The Netherlands Decision in this case was also a decision regarding a declaration of non-liability. It was, however, one step removed from the situation analysed in *Merzario*. The Netherlands Decision was a decision not to grant such a declaration. The substantive matter that was determined by the Netherlands Court was that the limitation period in the CMR Convention applied to any claim by Huawei or China Pacific for loss of their goods. As a consequence, DSV were not entitled to a declaration of non-liability because there was no valid claim to which that declaration could attach.

17. There was no authority to which I was referred that has considered whether such a decision constitutes a judgment that is enforceable for the purposes of Article 31.2. In my view, the principles and discussion in *Merzario* do, however, shed light on the correct interpretation of Article 31.2. They are, therefore, worth considering in detail.

18. Rix LJ set out in *Merzario* the principles to be applied when interpreting the CMR Convention :

"*18. The leading case on the interpretation of CMR in English law is <u>Buchanan v. Babco</u>. The House of Lords there applied the famous statement of Lord Macmillan in*

[1] [1999] 2 Lloyd's Rep 179

[2] [2001] Lloyd's Rep 490

Stag Line Ltd v. Foscolo, Mango & Co Ltd [1932] AC 328 at 350 as to the correct approach to the construction of the Hague Rules. Lord Wilberforce said (at 152E/F):

"I think that the correct approach is to interpret the English text, which after all is likely to be used by many others than British businessmen, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance: Stag Line Ltd. v. Foscolo, Mango and Co. Ltd. [1932] A.C. 328, per Lord Macmillan, at page 350. Moreover, it is perfectly legitimate in my opinion to look for assistance, if assistance is needed, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English text is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids: Carter v. Bradbeer [1975] 1 W.L.R. 1204, 1206. There is no need to impose a preliminary test of ambiguity."

19. Rix LJ summarised the issue in relation the enforceability of judgment as follows:

"15. In substance, therefore, this appeal is really concerned with seeking to displace the construction of article 31(2) favoured by Colman J in another case, reported as Frans Maas Logistics (UK) Ltd v CDR Trucking BV [1999] 2 Lloyd's Rep 179. There Colman J held that a claim for a negative declaration could not give rise to a "pending" action within the meaning of article 31(2), and that in any event an action for a negative declaration and an action for substantive monetary relief were not "on the same grounds". Longmore J [at first instance in Merzario] *was content to follow Colman J's decisions to this effect, in the light of Leitner's counsel's acceptance that on the interpretation of CMR it was important that the Commercial Court speaks with one voice.."*

20. Rix LJ concluded:

"68. *These considerations suggest to my mind that this court should be cautious before holding for the purposes of article 31(2) that a pending action for a negative declaration can bar a subsequent action for substantive relief. It is perhaps not impossible that some solution could be found to the limitation difficulties I have drawn attention to. But if one asks what is the importance of permitting such a bar, the most that can be said is that an action for a negative declaration is a well recognised form of action with the potential virtue of which Advocate General Tesauro spoke in The Tatry. But he said nothing more than that such an action was an "appropriate way of dealing with genuine needs…an interest, where the other party is temporizing, in securing a prompt judicial determination…" Where, however, time limits are short, as under CMR, it may be doubted whether the example of the carrier anxious to bring the goods owner to court, in the absence of a claim from that goods owner, should elicit much interest or sympathy. Much more likely, such a carrier is simply forum shopping. I do not think that the draftsmen of CMR had such a case in mind when they drafted article 31(2). The fact that Löwe spoke rather of the substantive action followed by the action for a negative declaration sufficiently* *demonstrates, in my view, what the draftsmen did have in mind. And the fact that this case is, apart from* *__Frans Maas__*, *the first time that this problem appears to have arisen in the context of CMR, and the fact that no other case from any foreign jurisdiction has been cited on the scope of article 31(2), all suggest that the action for a negative declaration has not been a vital tool to litigation under CMR, and that there will be no great loss to future litigants if such an action cannot by reason of that article gain priority over an action for substantive relief. Such a conclusion has the merit of being consistent with giving to the concept of enforcement its proper, but no more than its proper, scope.*

For these reasons I would for my part be inclined to uphold the conclusion of Colman J in *__Frans Maas__*, *but on the grounds of the partly different reasoning contained in this judgment. Thus I do not think that a second action for a negative declaration can be permitted to proceed in the face of a pending action for substantive relief between the same parties on the same grounds. However, not all of my reasoning was fully explored in argument in this court. I did raise the difficulty under article 32(4) in outline during the hearing, but there was little discussion of it. Therefore, because this appeal can be decided on issue (ii) alone, I would prefer to say that this part of my judgment reflects my opinion rather than my decision."*

21. Rix LJ concluded his analysis as follows:

"*72. I would be inclined, without deciding, to resolve [* the issue of whether the judgement was enforceable] *in favour of Merzario, on the basis that it was not intended that an action for a negative declaration should have priority under article 31(2) on becoming pending: because it cannot be enforced and would lead to limitation difficulties in connection with the canalisation of substantive claims."*

22. Chadwick LJ disagreed with Rix LJ. .The core parts of his reasoning are as follows:

"*93 It must be appreciated, also, that there are four possible categories of case to be considered in relation to Article 31(2). (1) A begins an action against B in country X for substantive relief; and then seeks to start a new action against B in country Y for the same relief. (2) A begins an action against B in country X for substantive relief; and B then seeks to start an action against A in country Y for a declaration of non-liability. (3) A begins an action against B in country X for a declaration of non-liability; and B then seeks to start an action against A in country Y for substantive relief. (4) A begins an action against B in country X for a declaration of non-liability; and then seeks to start a new action against B in country Y for the same relief. Article 31(2) will have no application in any of those cases unless country Y is a contracting country. Nor will it have any application in any of those cases unless the judgment in country X is or will be 'enforceable' in country Y. That latter condition will be satisfied if country X is also a contracting country – see Article 31(3) – and may be satisfied in other cases. Let it be assumed that both country X and country Y are contracting countries. If Mr Justice Colman's reasoning were correct, the only cases in which Article 31(2) would achieve the objective for which it was plainly included –*

that of avoiding duplication of litigation – would be those within category (1). That follows from the sentence in his judgment, already cited, that:

> *" Consequently, in art 31.2 the pending action or the judgment obtained, as the case may be, and the new action contemplated as being started in another jurisdiction must all involve claims for enforceable relief as distinct from a declaration of non-liability, which might be expected to be recognized in such other jurisdiction, but certainly would not be expected to be enforced."*

It is only where the case falls within category (1) that both the pending action (in country X) and the new action (to be started in country Y) satisfy the requirement that "all [must] involve claims for enforceable relief as distinct from a declaration of non-liability.

94. I find it impossible to accept that Article 31(2) was intended to have such a limited effect. I can see no sensible reason, for example, why those who negotiated the Convention should have wished to include cases within category (1) within, but exclude cases within category (2) from, the obvious purpose of Article 31(2) – the avoidance of double litigation. Nor, if category (2) cases are included, can there be any sensible reason for excluding category (3) cases. The only sensible meaning that can be given to the word 'enforceable' in the context of Article 31(2) is 'capable of being given effect'.

95. It follows that I am satisfied that the decision in the Frans Maas case on this point cannot be upheld on the basis of Mr Justice Colman's reasoning.

96. Lord Justice Rix has expressed the provisional view that the conclusion reached by Mr Justice Colman in the Frans Maas case may be capable of being supported on other grounds. I am very conscious that his experience in relation to claims brought under the CMR Convention is much more extensive than my own; but, after considering his judgment (which I have had the advantage of reading in draft form) I remain unconvinced that there is any good reason for restricting the application of Article 31(2) to cases where the claims in both the pending action and the proposed new action are claims for substantive relief. If, as appears to be recognised on all sides, claims for declarations of non-liability are common in continental jurisdictions, it seems to me that Article 31(2) must have been intended to include them."

23. Merritt VC gave his judgment as follows:

"103. The remaining issue…is whether the Austrian action, being a claim for a negative declaration alone, is such an action as would, if it had been pending, have barred the English action, being a further action between the same parties and on the same grounds. This issue involves a consideration of whether the decision of Colman

J in Frans Maas Logistics (UK) Ltd v CDR Trucking BV [1992] 2 Ll.R. 179 to the effect that such an action was not such a bar was correct.

104. As Rix and Chadwick LJJ have pointed out this issue cannot be determinative of the appeal, given that it must be dismissed anyway because of our conclusion on issue (ii). In view of the argument presented to us Rix and Chadwick LJJ have expressed their views on this issue as well. But they reach opposite conclusions. In those circumstances it is incumbent on me to reach a conclusion on this issue notwithstanding that our decision, whatever it may be, will not be binding. I can do so quite shortly as the rival arguments have been comprehensively explored by the other members of the court.

105. The difference between Rix LJ and Chadwick LJ arises from their different interpretations of the word "enforceable" in Article 31(2). (see paras 63 and 94) Whilst having the greatest respect for the views of Rix LJ I prefer the reasoning and conclusion of Chadwick LJ.

106. It is not disputed that actions for a negative declaration are commonly brought in the courts of the other countries party to CMR. It is plain that such proceedings come within the opening words of Article 31(2) because they are "legal proceedings arising out of carriage under this Convention" within Article 31(1). Equally such proceedings are brought on the same grounds as their mirror image of an action for a declaration of liability and a claim for damages. But if such proceedings are to be excluded by force of the concluding words of Article 31(2) then the evident intention of the makers of CMR will be defeated over a wide and obvious area of its potential operation.

107. I appreciate that a similar point may be made in relation to the limitation difficulty to which Rix LJ has drawn attention. But that problem would only arise from a concatenation of special circumstances. I prefer to conclude that the makers of CMR overlooked the consequences of such circumstances (or envisaged the likelihood of an alternative escape) as more probable than intending that actions for negative declarations should be excluded from the operation of Article 31 altogether.

108. Further CMR is an international treaty to which countries with many and diverse legal systems may be parties. To interpret the word "enforceable" in relation to judgments as excluding judgments which are only recognisable is to attribute to the word too limited and technical a meaning. I do not think that this court should do so, not least because the recognition by one court of competent jurisdiction of a negative declaration obtained from another is the only practical method of enforcing it."

24. The guidance from the majority of the Court of Appeal therefore is that a declaration of non-liability would be considered a "judgment…[that is] enforceable" for the purposes of Article 31.2.

25. Where, then, does that leave the question of whether a determination of limitation is a "judgment….that is enforceable"?

26. In my view the core of the Court of Appeal guidance is that Article 31.2 precluded new actions when a competent court has made a decision as to whether or not a party

has liability under the CMR convention. That is the case if there is judgment that a party is liable in damages, or conversely if there is a declaration that there is no such liability. This is because the word "enforceable" was to be construed in the broad sense of meaning "capable of being given effect". The purpose of the word "enforceable" was to cater for the situation where a judgement had been given by a court in a non-contracting country whose judgements, as a matter of law, were not recognised by the country where a party sought to start a new claim on the same grounds.

27. It would, in my view, be consistent with the reasoning in *Merzario* to conclude that a decision of a court that a claim is time barred, and thus should be determined in a party's favour, is a judgment of the same nature as a general judgement of "non liability".

28. In support of this conclusion, I also take note of Article 31.3 of the CMR Convention:

"*When a judgment entered by a court or tribunal…has become enforceable in that country then it shall also become enforceable in each of the other contracting states, as soon as the formalities required in the country concerned have been complied with. The formalities shall not permit the merits of the case to be re-opened*".

29. The effect of Article 31.3 is that if a judgment is enforceable in the Netherlands then it is "enforceable" in England for the purposes of the CMR Convention. Any formalities regarding the enforceability shall not permit the merits to be reopened. That adds to the conclusion in *Merzario* that the purpose of article 31 is to prevent the re-litigation of matters already decided in a competent court.

30. I also note the terms of Article 32.2. That states that "…*the extension of the period of limitation shall be governed by the law of the court or tribunal seised of the case*". That article has two implications. The first is that only one court or tribunal is seised of the case. Once a case has become "pending" in a competent court then that the court is "seised" of the case. The second implication is that a decision as regards limitation is to be made by the court where the claim is pending. It follows that a decision by a competent court to extend, or refuse to extend, a period of limitation is contemplated under the CMR Convention as a decision that can only be made by the competent court which is first seised of the matter, namely the court where the matter first becomes pending.

31. This determination of the applicable limitation period is fundamentally different, in my view, from a situation where a court declares that it has no jurisdiction over a claim. That might arise in a contract governed by the CMR Convention where, for example, a party brings proceedings in a country which is not one permitted under Article 31. Such a court might declare it has no jurisdiction at all over the proceedings. The courts in the Netherlands, however, had jurisdiction over the claim as they were a competent court. They made a decision that the claim was time barred and that decision, in my view, is a "judgment...that is enforceable" for the purposes of Article 31.2.

The Same Grounds Issue

32. The subject matter of the Netherlands Decision was the right of the parties to damages, or not, in relation to the goods that were stolen. It was common ground that the Netherlands Decision arose in relation to the same underlying facts as this claim.

33. The Claimants argued that the Netherlands Decision related, however, to a different legal claim. They say it was not a claim for damages. It was an application for a declaration of non-liability that resulted in a decision on limitation. Accordingly they say that their claim for damages under the CMR Convention does not arise from the "same grounds" and thus is not precluded in these courts by the CMR Convention.

34. This argument was also considered in *Frans Maas* and *Merzario*. In Frans Maas Colman J found that the two legal actions were not "on the same grounds". The Court of Appeal in Merzario unanimously disagreed with that conclusion.

35. Rix LJ said the following in relation to whether the actions in the Austrian and English courts were in any event "on the same grounds"

"70. *Colman J* [in Frans Maas] *held that they were not, but, in my judgment, where an action for a declaration of non-liability and an action for damages for breach arise out of the same contract and raise a mirror-image of the same claim, both actions may properly be said to be on the same grounds. The French translation of "on the same grounds" is "pour la même cause". In article 21 of the Brussels Convention the English text speaks of "the same cause of action" and the French text speaks of "le même objet et la même cause". In Gubisch Maschinenfabrick KG v. Guilio Palumbo (Case 144/86) [1987] ECR 4861 the European Court of Justice (at para 14) referred to objet as standing for "subject-matter" and cause as standing for "cause of action". In The Maciej Rataj (Case C-406/92) [1994] ECR I-5439, [1995] 1 Lloyd's Rep 302, the European Court of Justice further defined cause as comprising "the facts and the rule of law relied on as the basis of the action" (at para 39). In Haji-Ioannou v. Frangos [1999] 2 Lloyd's Rep 337 at 351 the English court of appeal confirmed that "actions have the same cause if they have the same facts and rule of law as their basis". Although these are all cases on the Brussels Convention, it seems to me that the definition of cause, whether as "cause of action" or as "the facts and the rule of law relied on as the basis of the action", is entirely suitable for the English words of article 31(2) – "the same grounds". I note that Löwe in Theunis at 152 and Hill & Messent at para 10.39 both suggest that "the same grounds" only refers to the same facts, but even if that were so, it would catch the mirror-image case of the action for a declaration of non-liability and the action for substantive relief for breach; and for myself I do not see why, whether as a matter of the English ("the same grounds") or as a matter of the French ("la même cause"), the view of the European Court of Justice cannot be applied satisfactorily to article 31(2). Thus The Maciej Rataj was itself a case of such a mirror-image and the European Court of Justice found the requirements of article 21 fulfilled. So also in Haji-Ioannou v. Frangos, where the same plaintiffs brought proceedings on the same agreement and factual basis in Greece and England, Sir Thomas Bingham MR said (at 351) –*

"…Although in England the plaintiffs are asserting that the same underlying agreement gave rise to different legal consequences from

which different obligations and, therefore, different legal remedies flowed, the cause would appear to be the same in both countries."

71. For these reasons, I would conclude, in respectful disagreement with Colman J in Frans Maas*, that the Austrian and English proceedings were brought "on the same grounds".*

36. Chadwick LJ then considered whether the English action was started on "the same grounds"

"97. *In my view, the third issue [*the same grounds*] is subsumed in the second [*the enforceability of the judgment] . *For the reasons to which I have already referred I have no doubt that the English action was started on the same grounds as the action in Austria."*

37. Merritt VC also considered whether the two actions were brought on the same grounds:

i) "*102 ....Lord Justice Rix and Lord Justice Chadwick considered that they were. Again I agree with them and have nothing to add*"

38. I was taken by counsel to the cases of *The Tatry*[3], *Haji-Ioannou and Others v Frangos & Others* [4] in order to assist in analysis of whether the case was brought "on the same grounds", The judgment of Rix LJ in *Merzario* summarises the key principles derived from both those cases and I have nothing to add to his analysis and conclusion as set out above, noting in particular the extract from the judgment of Sir Thomas Bingham in *Haji-Ioannou and others v Frangos.*

39. *Merzario* is authority for the view that this claim which the Claimants seek to bring in the English courts is on the "same grounds" as the Netherlands Claim. The precise legal terminology used to describe claims that arise from loss of or damage to goods may differ from country to country (and there may be several ways in which the legal claim can be phrased even in one country) but fundamentally such a claim has the same legal basis, howsoever described. It seems to me that the claim before this court against DSV for damage caused by loss of the goods should be viewed as having the "same cause of action" and be on the "same grounds" as the claim that was before the courts in the Netherlands.

40. In my judgment therefore:

i) The Netherlands Decision is a "judgment" for the purposes of Article 31.1 of the CMR Convention;

ii) The Netherlands Decision relates to the "same grounds" as this claim; and

[3] [1995] 1 Lloyd's Rep 302
[4] [1999] CLC 1075

iii) The Netherlands Decision is "enforceable" for the purposes of Article 31.1 of the CMR Convention.

41. Accordingly, Huawei and China Pacific are precluded under Article 31.2 of the CMR Convention (and thus the 1965 Act) from bringing a claim in contract in the English courts for damages arising from the loss or theft of the phones

42. If the Claimants had been successful in arguing that the CMR Convention did not preclude the bringing of a claim in contract in this court, then it seems to me that their claim would almost inevitably have been time barred in any event. The Convention sets out the time limits for bringing claims. It is common ground that the claim is brought outside the normal one year time limit. The pleadings in this case refer to the possibility of bringing a claim for wilful default and thus extending that period to three years. There is nothing in the pleadings, however, that sets out the basis for such an assertion. In the proceedings in the Netherlands the Claimants specifically did not make any such allegation of wilful default; if they had done so and the court in the Netherlands had accepted it then there would have been a substantive trial on the declaration of non-liability.

43. A foreign judgment which is final and conclusive on its merits is a good defence to a claim in England for the same matter – see the authorities cited in *Dicey, Morris & Collins "Conflict of Laws"* at p 731 footnotes 148 to 150 (inclusive). The three criteria in *Carl Zeiss Stiftung* are core to the analysis. These require a (a) (i) final and conclusive decision of (ii) a competent court (iii) on the merits (b) involving the same parties and (c) raising identical issues. If those criteria are satisfied the Claimants would be estopped from bringing this claim.

44. A foreign judgment on limitation was previously not a decision on the merits but that position was reversed by Foreign Limitation Periods Act 1984 s3. The Netherlands Court is a competent court, and the case involves the same parties and in my view is on identical grounds. The criteria in *Carl Zeiss Stiftung* would in my judgment therefore be satisfied and the defendant would have a good defence.

Possible English Tortious claim

45. Huawei and China Pacific say that even if they are wrong about the impact of the Netherlands Decision on their ability to bring a claim in this court in contract, they in any event have rights to bring a claim in this court in tort. They say they are not precluded from doing so by the CMR Convention.

46. None of the reported cases to which I was referred have considered that precise question, but I was referred to several cases in which similar matters were considered.

47. In *Shell Chemicals UK Ltd and Shell UK Limited v P & O Roadtanks*[5] Savill J considered whether the CMR Convention was a "*code which exhaustively covered all the rights and obligations that could arise out of the carriage of goods by road or contracts for such carriage*"[6]. He concluded that he could "*find nothing to support this assumption*".[7] This was relied on by Huawei and China Pacific as supporting their

[5] Lloyds Law Reports [1993] Vol 1 p114
[6] p116
[7] p116

contention that they have rights in tort and contract outside the limitations of the CMR Convention which they can rely on to found a claim in this court.

48. Savill J was not, however, considering a claim that arose from the loss of or damage to the goods that were being carried. He was considering a claim that arose from damage caused by the carrier. In *Shell* the carrier was contracted to deliver oil to the claimant's oil refinery. The carrier instead delivered chemicals. Those were piped into the refinery and caused it to shut down completely for a period of time.

49. In *Shell,* Savill J was not therefore considering the question of whether the CMR Convention exhaustively covered rights relating to damage to, or loss of, the goods contracted to be transported. In his judgment, however, Savill J did express a view on this point. He said:

"*I do not see why the provision [of Article 17] should exclude liability for loss of or damage to or delay to something other than the goods,* ***provided of course that this has not resulted from loss of or damage to the goods for in that latter event the Convention does indeed limit or exclude liability****" [my emphasis]*

To the extent that *Shell* is authority on the point under consideration in this claim, it therefore supports the view that a claim for loss or damage to goods is indeed limited or excluded by the CMR Convention, contrary to the Claimants' assertion.

50. The Claimants also sought to rely on *Feest v South West Strategic Health Authority and another*[8]. In that case the defendant sought to claim a contribution from a third party in relation to injuries sustained by the claimant, who was their employee. That case does not relate to claims under the CMR Convention but it does consider the extent to which the Athens Convention might preclude the bringing of claims in the English courts. The claimants sought to rely on an analogous principle applying to claims under the CMR Convention.

51. In *Feest,* Tomlinson LJ held that the time limitations in the Athens Convention only applied to claims by passengers against carriers, as set out in that Convention. The Athens Convention did not impose time limitations on other parties bringing claims that were not within the scope of the Athens Convention. There is nothing in *Feest* which implies that a claim by a passenger against a carrier falls outside the limitation periods in the Athens Convention if it is presented as a claim in tort rather than a claim under the Athens Convention. Tomlinson LJ said the opposite, namely "*the Convention…undoubtedly governs the liability owed by carriers to their passengers*". The analogy which the Claimants in this case seek to draw is therefore misplaced; in *Feest ,* Tomlinson LJ held that the limitations in the Athens Convention which are stated to apply between carriers and passengers do indeed so apply whether a claim is made in contract or in tort.

52. There was a secondary point in *Feest* which was said to be relevant to this case. Huawei and China Pacific said *Feest* made it clear that there is a difference between a provision which extinguishes a right (an "extinguishing provision") and a provision which precludes the bringing of a claim in relation to that right but leaves the right undiminished (a "remedy bar"). There is indeed such a difference, but in this case that

[8] [2016] EWCA Civ 708

does not assist the Claimants. The terms of Article 31 preclude them from bringing a claim in the English courts. It does not matter for the purposes of their claim whether or not they still have an underlying right. Even if the underlying right of the Claimants for loss of their goods still subsists, they are precluded by the CMR Convention from bringing any claim in relation to that right.

53. I further note the specific provisions of Article 28 of the CMR Convention;

"In cases where, under the law applicable, loss damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim the carrier may avail himself of the provisions of this Convention which exclude his liability or which fix or limit the compensation due"

54. That provision is incorporated into English law by the 1965 Act. It seems to me to make it clear that the restrictions in Article 31 are intended to preclude the bringing under English law of claims in tort or contract relating to loss of goods being carried under a contract governed by the CMR Convention.

55. I was referred to *CMR: Contracts For the International Carriage of Goods by Road* by Andrew Messent. This expresses the view at page 307 that the limitation periods in the CMR Convention apply to "any action which arises out of the actual carriage itself whether in contract or in tort".

56. Furthermore *Clarke & Yates on Contracts of Carriage by Land and Air* at paragraph 1.197 again refers to the limitation periods in Article 32 which are said to apply to an "action…arising out of carriage" under the CMR Convention whether the action is based in contract, tort or restitution.

57. The Court of Appeal in *Merzario* recognised the importance of certainty in commercial contractual relationships. That is why they expressed their view on the issues even though the specific case before them had already been decided on other grounds. The academic texts referred to above make it clear that currently commercial certainty lies in the view that all claims relating to loss of or damage to goods carried pursuant to the terms of the CMR Convention are subject to the terms and limitations in that Convention whether in contract or tort. In other words, my decision in this case will preserve that certainty rather than undermine it.

58. In conclusion, it seems to me that the position under English law in relation to carriage of goods governed by the CMR Convention is that claims in tort resulting from the loss of or damage to such goods are limited or excluded by the relevant terms of the CMR Convention. That conclusion is consistent with the authorities of *Shell* and *Feest*.

59. The Claimants also argued that the six year time limit in the Limitation Act 1980 overrides the one year time limit in the 1965 Act. In other words, notwithstanding the wording of the 1965 Act, the correct limitation period in Article 31.2 should be treated as being six years. I have already concluded that the effect of Article 31.2 is that the Netherlands Decision has determined the appropriate limitation period and that under the CMR Convention that decision binds this court. If I am right, then it does not matter whether the Claimants are right about English law on the limitation

period in England. I will, however, address the point in case I am wrong in my primary analysis.

60. The 1965 Act prohibits the bringing of the specific claims governed by the CMR Convention once a one year time period has expired. The Limitation Act 1980 prohibits the bringing of a much broader class of claims once a six year period has expired. Those two Acts are not inconsistent. The Limitation Act 1980 sets out a general limitation period and the 1965 Act sets out a shorter limitation period for claims that arise from a sub-set of the circumstances to which the longer, more general, limitation period applies.

61. There is no provision in the Limitation Act 1980 which removes the restriction in the 1965 Act. If the Limitation Act was intended to remove the time restriction in the 1965 Act then it could have done so. Indeed, Schedule 4 to the Limitation Act 1980 specifically lists numerous acts which are repealed either in whole or in part. The 1965 Act is not listed. Furthermore, the arbitration provisions of the 1965 Act are specifically amended by Schedule 3 paragraph 6 to the Limitation Act 1980. That means that the Parliament specifically considered the effect on the 1965 Act when passing the Limitation Act 1980. I do not consider that the Limitation Act 1980 has amended or repealed the 1965 Act as it relates to the time periods in the CMR Convention.

Conclusion

62. The Defendant invited me to either strike out the claim, or to give summary judgment in its favour. It expressed a preference, for reasons of enforceability and recognition, for summary judgment. I will therefore consider that application first.

63. The test for summary judgment is set out in CPR 24.2. It is that the "*claimant has no real prospect of succeeding on the claim or issue .... and…there is no other compelling reason why the case or issue should be disposed of at a trial*."

64. The Claimants have issued a claim for damages arising from loss of their goods whilst being carried by the Defendant. The effect of the Netherlands Decision is that the Claimants are precluded under the 1965 Act from bringing any claim in contract in this court in relation to the goods that were lost. The Claimants also have no right to bring a claim in the English courts in tort for that loss. It follows that in my judgment the Claimants do not have a claim that has any realistic prospect of success in this court. I have heard full argument in relation to the legal issues in relation to the application for summary judgment and in my view there is, therefore, no compelling reason why the case should be disposed of at trial. The Defendant is, in my view, entitled to summary judgment in its favour.

65. Having made that decision, I do not need to address the question of how the pleadings should be amended to reflect the position of Huawei and China Pacific as the insurer of Huawei.

Judgment ends