SUPREME COURT'S
JUDGMENT

Case no.

delivered in Stockholm on 14 June 2022

T 3379-21

PARTIES

Appellant

H.Z. Logistics B.V.

Burgenmeester van Doornlaan 16

2678 KB De Lier

The Netherlands

Counsel: Attorney AH

Respondent

Thomsen & Streutker Logistics B.V.

Printer 35

7741 ME Coevorden

The Netherlands

Counsel: Attorney OT

THE MATTER

Claim

THE SUPREME COURT
Riddarhustorget 8

Postal address
Box 2066
103 12 Stockholm

Telephone 08-561 666 00
Fax -
E-mail: hogsta.domstolen@dom.se
www.hogstadomstolen.se

Office hours
08:00–12:00
13:15–16:00

RULING APPEALED

Judgment of the Court of Appeal of Skåne and Blekinge of 2021-05-05 in case T 1681-20

_____

JUDGMENT

The Supreme Court finds that a carrier is not obliged to refund the cost for excise duty pursuant to Article 23 (4) of the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR).

The Supreme Court does not grant leave to appeal otherwise in the case. Accordingly, the judgment of the court of appeal is affirmed.

H.Z. Logistics B.V. shall compensate Thomsen & Streutker Logistics B.V. for costs of litigation in the Supreme Court in the amount of SEK 200,000 for counsel fees and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

CLAIMS IN THE SUPREME COURT

H.Z. Logistics B.V. has claimed that the Supreme Court shall order Thomsen & Streutker Logistics B.V. to pay the company EUR 135,325 and interest annually at a rate of five per cent on the amount from and including 8 October 2018 until such time as payment is made. H.Z. Logistics has further claimed that the Supreme Court shall release the company from the obligation to compensate Thomsen & Streutker’s costs of litigation in the district court and the court of appeal and award the company compensation for costs of litigation in those instances.

Thomsen & Streutker has opposed modification of the judgment of the court of appeal.

The parties have claimed compensation for costs of litigation in the Supreme Court.

The Supreme Court has granted the leave to appeal as set forth in paragraph 6.

REASONS FOR THE JUDGMENT

Background

1. Under the auspices of B & S Paul Global International, H.Z. Logistics undertook in October 2018 to transport a quantity of cigarettes from the Netherlands to Malmö. H.Z. Logistics in turn retained Thomsen & Streutker to perform the carriage by road. Between 6 and 8 October 2018, the goods were stored in Helsingborg. Most of the goods were stolen at some point during this period.

2. By reason of the event, B & S Paul Global demanded that H.Z. Logistics compensate the company for the value of the stolen cigarettes and for the excise duty B & S Paul Global was ordered to pay. By virtue of the theft, the cigarettes were deemed to have been released for consumption in Sweden, which triggered the obligation on the part of B & S Paul Global to pay excise duty. As a consequence of the settlement between the parties, H.Z. Logistics was to pay B & S Paul Global EUR 154,565. According to H.Z. Logistics, EUR 19,240 of the settlement amount pertained to compensation for the loss of goods and EUR 135,325 pertained to excise duty.

3. Thereafter, H.Z. Logistics brought an action against Thomsen & Streutker claiming that Thomsen & Streutker was to compensate the amount paid to B & S Paul Global, i.e. a total of EUR 154,565. Thomsen & Streutker paid part of the demand. Of the originally claimed

amount, EUR 135,325 remained. The claim was based upon the liability rules in the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (CMR).

4. The district court concluded that the right to a refund of "other charges incurred in respect of the carriage of the goods" in Article 23 (4) of the CMR could be deemed to encompass such costs as arose as a consequence of the course of the carriage and loss incurred thereby. The obligation to pay excise duty could not, however, be deemed to have arisen as a normal and sufficiently foreseeable consequence of the theft. The cost for the excise duty thus could not be deemed to have been compensable and the district court accordingly rejected H.Z. Logistics' claim.

5. The court of appeal has affirmed the judgment of the district court but has made another assessment regarding the manner in which Article 23 (4) of the CMR is to be interpreted. The court of appeal reached the conclusion that the right to a refund in accordance with the article only covers such costs as would have been incurred had the carriage proceeded in accordance with the contract for carriage and, for this reason, has determined that the obligation to refund does not encompass excise duty.

6. The Supreme Court has granted leave to appeal on the issue of whether compensation for excise duty is payable in accordance with Article 23 (4) of the CMR. The question regarding leave to appeal in the case otherwise has been declared stayed.

7. The parties are agreed that the Convention is applicable in the case. However, they are not in agreement as to whether the case may be decided in accordance with Dutch or Swedish law. H.Z. Logistics has claimed that the parties agreed in the district court that Swedish law would be applied, which has been contested by Thomsen & Streutker.

What is at issue in the Supreme Court

8. The question in the Supreme Court is whether a cost for excise duty arising as a consequence of the fact that the goods liable to excise duty were stolen during carriage is covered by the term "other charges incurred in respect of the carriage of the goods" in accordance with Article 23 (4) of the CMR and is to thereby be paid by the carrier.

9. The case also raises the question regarding which country's law is to be applied in the determination of the issue.

Regulation of the international carriage of goods by road

10. International carriage by road is governed by the CMR which, without transformation, was incorporated in Swedish law in 1969 by virtue of the Swedish International Carriage by Road Act (1969:12). Accordingly, Articles 1–41 of the original texts – in respect of which the original French and English texts are equally valid – shall apply as Swedish law.

11. The Convention regulates the liability of the parties in conjunction with international carriage by road. It is binding on both parties (see Article 41 of the CMR). The Convention is to be applied to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country (see Article 1 (1) of the CMR).

Which country's laws are to be applied

Rules on private international law

12. National law contains rules intended to resolve conflicts of law in which two or more legal systems may be applicable to a legal dispute. There are also general, private international law rules which provide for choice-of-

law. One such rule describes that part of private international law to which the rule pertains and states the legal system to be applied to the legal issues which fall within the description. Since 2009, there have been choice-of-law rules for contractual obligations in the civil and commercial law area in the Rome I Regulation.[1]

13. Within large parts of convention law – which is generally intended to achieve uniform international law rules within the relevant convention's substantive area of application – there is an ambition to avoid the application of one country's choice-of-law rules. This has come to fruition in such a manner that the convention directly states that it is to be applied where certain conditions are fulfilled. This has occurred, for example, in all conventions concerning the carriage of goods.[2] The same applies as the starting point for the international sale of goods.[3]

The meaning of the Rome I Regulation

14. The Rome I Regulation contains choice-of-law rules relating to contractual obligations in civil and commercial matters, i.e. rules regarding which country's law is to be applied to a contract in the event of a legal conflict (*cf.* Article 1). The main principle of the Regulation is that the parties themselves may reach an agreement regarding which country's law is to be

[1] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[2] See Article X of the 1924 Bills of Lading Convention and the amendments made by virtue of the 1968 and 1979 Protocols, the so-called Hague-Visby Rules, Article 1 of the CMR, Article 1 of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, Appendix B (CIM) of the Convention Concerning International Carriage by Rail of 9 May 1980 as worded in accordance with the Protocol of 3 June 1999 for Modification (COTIF 1999) and Article 1 of the Convention of 28 May 1999 for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention).
[3] See Article 1 (1) (a) of the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG).

applied. Normally, there is no requirement that the agreement is connected to the chosen legal system (see Article 3 (1) – (3)).

15. In the event the parties have not chosen the applicable law, the Regulation contains choice-of-law rules for various types of contracts (see Articles 4–8). Article 4 contains a general rule which applies in the event none of Articles 5–8 is applicable. Article 5 contains choice-of-law rules for contracts of carriage.

16. The relationship with existing international conventions entered into by Member States is regulated in Article 25 of the Rome I Regulation. The Regulation shall not prejudice the application of an international convention which lays down conflict-of-law rules relating to contractual obligations to which one or more Member States is a party by 17 June 2009 (*cf.* Articles 26 and 28).

The Convention's implementation regulation

17. According to Article 1 (1) of the CMR, the Convention shall be applied to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country.

18. In conjunction with Sweden's accession to the CMR, the legislature chose not to implement any general choice-of-law rule in the CMR act. This was explained by the fact that Article 1 (1) of the CMR was to be perceived as an international private law rule which would apply before other rules which would have entailed that the law of some other country would become applicable. As a consequence, it has been deemed to follow that Swedish courts are to apply the Convention in accordance with the principle of *lex fori* when the court determines a question which falls within the framework of its

scope of application. (See Government Bill 1968:132, pp. 19 and 24, *cf.* Swedish Government Official Reports 1972:24, p. 43.)

19. The Convention's implementation regulation may be regarded as a unilateral conflict regime in a country which is a party to the Convention. The rules entail that, when the national court is to determine a dispute which falls within the area of implementation of a convention, the convention rules are applied as they have been incorporated in the country of the court. Whether or not such rules are at all covered by the Rome I Regulation or entail that Article 25 (1) of the Rome I Regulation is to be applied is disputed. Irrespective of the same, the regime in the Rome I Regulation entails that the rules of the CMR are in principle to be applied in the country of the court without consideration of the choice-of-law rules there.[4]

20. As follows from Recitals 6, 11, 12 and 16 of the Rome I Regulation, the unilateral conflict rules of a convention regarding its implementation may be accepted in accordance with *lex fori* provided that they are highly predictable as to the outcome of the litigation, increase legal certainty and ensure the objectives of the free movement in civil and commercial matters and mutual trust in the administration of justice in the European Union under conditions at least as favourable as those provided for by the Rome I Regulation (*cf. TNT Express Nederland*, C-533/08, EU:C:2010:243, regarding Article 71 of the Brussels I Regulation[5] which may be said to be a model for Article 25 (1) of the Rome I Regulation).

---

[4] *Cf.* Peter Mankowski in Ulrich Magnus and Peter Mankowski (ed), *European Commentaries on Private International Law, Vol II Rome I Regulation*, 2017, Art. 25, note 20 and Jan D. Lüttringhaus in Franco Ferrari (ed), *Rome I Regulation*, 2015, Article 1, para. 39 and Sebastian Omlor, *ibid*., Art 25, para. 4, all with further references.

[5] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The regulation of liability for international carriage of goods by road

The carrier's liability for loss or damage to the goods

21. The road carrier's liability for total or partial loss and damage to the goods may be described as strict liability with the exception of *force majeure*. The carrier is liable for damage, loss or delay occurring between the time when he takes over the goods and the time of delivery. However, there are certain bases for relief from liability and evidentiary rules which may result in the carrier being relieved of liability (see Articles 17 and 18 of the CMR).

Scope of liability to pay compensation

22. The strict liability for the carrier prescribed by the Convention is mitigated to a certain extent by the Convention's rules regarding the calculation of compensation and limitation of liability. The carrier shall, in conjunction with a total or partial loss of goods, pay compensation for the value of the goods at the time at which they were accepted for carriage at the place they were accepted for carriage calculated in the manner set forth in the article. Compensation shall not, however, exceed 8.33 special drawing rights (SDR) per kilogram of gross weight short (See Article 23 (1) – (3) of the CMR.)

23. In addition to compensation for the value of the goods, the carriage charges, customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss (see Article 23 (4)). No further damages shall be payable, unless the value of the goods or a special interest in delivery has been declared as prescribed in the Convention (see Articles 24 and 26 of the CMR).

24. Loss of profit or consequential losses are thus not compensable. This limitation is explained, *inter alia*, by the fact that it renders it easier for the

carrier to calculate anticipated loss expenses and, in such manner, carriage costs may be kept down. It is normally regarded as easier for the cargo owner to insure the goods at a lower cost relative to the carrier. (*Cf*. Malcom A. Clarke, *International Carriage of Goods by Road: CMR*, 6th ed., 2014, p. 295 and Johan Schelin, *Lastskadeansvaret, En studie av fraktförarens ansvar enligt lagen om inrikes vägtransporter*, 2015, p. 79 f.)

Regarding interpretation of the CMR

25. The CMR regime is an integrated and complicated liability system, and a great many different factors are to be considered in the interpretation. The Supreme Court has in several cases stated factors which are relevant to the interpretation of such an international convention (see Svante O. Johansson, *Svensk rättspraxis: Sjörätt och annan transporträtt 2016–2020*, SvJT 2021 p. 990 ff., with references).

26. In order to establish the proper meaning of a provision in the CMR, as in convention interpretation in general, consideration shall be given to the ordinary meaning of the convention's expressions in their context and in the light of the convention's object and purpose and general principles which may be deemed to be expressed in the convention. The convention's provisions shall, on the other hand, typically not be interpreted in light of national contract and property law principles.

27. Certain rules in the CMR are for the benefit of the carrier, while others provide certain advantages to the cargo owner. Together, the rules achieve a reasonable allocation of risk in respect of the damage and losses which may arise in conjunction with carriage by road. The starting point for the interpretation of the Convention is that the intended allocation of risk should be maintained.

28. The manner in which a certain question has been handled in conventions concerning means of carriage other than carriage by road may be relevant. Since the application and interpretation of international conventions to a significant extent are conducted by national courts, national case law of the contracting states plays a significant role to the extent uniformity may be gleaned therefrom. In addition, the legal literature addressing the CMR is of interest.

Excise duty is not covered by the regime in Article 23 (4) of the CMR

Introduction

29. In addition to the carrier's obligations in accordance with Articles 23 (1) – (3) of the CMR to compensate the cargo owner for the lost value of the goods, the carrier has an obligation to refund certain costs in accordance with Article 23 (4). The amount which the carrier may be obliged to refund in accordance with this rule is not subject to any limitation. The obligation to refund pertains, according to the wording of the Convention, to carriage charges, customs duties and other charges incurred in respect of the carriage of the goods.

30. Carriage charges means only the carriage cost agreed upon by the parties for the carriage in question. However, the term does not include other forms of carriage costs such as, for example, the customer's cost of returning damaged goods. (*Cf.* Clarke, *ibid*., p. 303.)

31. What is meant by customs duties may vary between different countries. The term has generally not been deemed to include, for example, excise duty or value added tax (*cf.* Andrew Messent and David A. Glass, *CMR: Contracts for the International Carriage of Goods by Road*, 4th ed., 2018, para. 9.23).

32. Other charges incurred in respect of the carriage are thus something other than the carriage charges which the parties have agreed upon for the

carriage in question and customs duties but shall be of the same character. The wording thus suggests that only costs which have a direct connection to the carriage as such shall be compensated on the basis of the provision.

Case law in contracting states

33. The national case law which exists concerning the question provides no uniform picture regarding the application of Article 23 (4) of the CMR. Instead, two different lines of interpretation emerge, one broader and the other narrower.

34. The broader line of interpretation entails that the carrier shall compensate costs relating to the manner in which the carriage was actually carried out, which is deemed to include costs for excise duty incurred as a consequence of the fact that the goods have been stolen.

35. The narrower line of interpretation entails that only costs which are directly related to the normal performance of the carriage shall be compensated. What is to be compensated pursuant to the provision, in this view, are such costs which as a consequence of the fact that the goods have been lost have become unnecessary for the cargo owner (*cf.* Clarke, *ibid*., p. 303). Costs for excise duty that have arisen as a result of the goods being stolen are then not considered to be related to the carriage itself and are thus not covered by the carrier's payment obligation in accordance with Article 23 (4) of the CMR.

36. The broader line of interpretation has been applied by courts in, *inter alia*, the United Kingdom and Denmark.[6] On the continent in general, the

[6] See, *inter alia*, *James Buchanan & Co. v. Babco Forwarding & Shipping [UK]* [1978] AC 141, HL, [1978] 1 Lloyd's Rep. 119 and ND 1987 p. 108.

narrower line of interpretation has been advocated in, *inter alia*, the Netherlands, Germany and France.[7]

37. In summary, the case law from other contracting states is not uniform as regards the question of whether a carrier is to pay excise duty pursuant to Article 23 (4) of the CMR even if, in recent years, there has been a development towards more courts being of the position that excise duty is not to be compensated.

The legal literature

38. The legal literature also contains differing views on the question of whether excise duty is to be paid or not in accordance with Article 23 (4) of the CMR. The majority view, however, is that there is cause to interpret the provision such that it only covers costs which are related to the carriage itself as such and not costs which have arisen, for example, as a consequence of the occurrence of a theft.[8]

Other convention-law regimes

39. In this context, attention should be drawn to the fact that the liability rules in the CMR are to a large extent based on the rules applicable at the time of the emergence of the CMR for carriage of goods by rail, currently incorporated in the 1999 CIM. In an earlier wording of the CIM, it was

---

[7] Hoge Raad, judgment of 14 July 2006, C04/290HR, NL:HR:2006:AW3041, BGH 10.12.2009 - I ZR 154/07 and Cour de cassation, judgment of 5 October 2010, 09-10.837, FR:CCASS:2010:CO00952.

[8] See, *inter alia*, Clarke, *ibid*, p. 303 ff., Messent and Glass, *ibid*, para. 9.21 ff., Krijn F. Haak, *The Liability of the Carrier under the CMR*, 1986, p. 224 ff., Schelin, *ibid*, p. 173 f., Rolf Herber and Henning Piper, CMR: *Internationales Straßentransportrecht*, 1996, p. 392 ff., Helga Jesser, *Frachtführerhaftung nach der CMR*, 1992, p. 129 ff., Roland Loewe, *Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road, CMR*, United Nations 1975, p. 54 f., Ulla Fabricius, *Lov om fragtaftaler ved international vejtransport (CMR)*, 4th ed., 2017, p. 480 ff. and Hans Jacob Bull, *Innføring i veifraktrett*, 2nd ed., 2000, p. 104 f.

prescribed that the carrier would refund the carriage charges, customs duties and other amounts incurred in connection with carriage of the lost goods. Doubts arose regarding the interpretation of the provision. Article 30, § 4 of the 1999 CIM expressly excludes excise duties from the carrier's duty to refund. (See Consolidated Explanatory Report CIM UR, OTIF, p. 36, paras. 6 and 7, *cf*. Remarks on the expression "other amounts incurred in connection with the carriage of the lost goods", *Bulletin of International Carriage by Rail* No. 1/2004.)

The Convention's systematics and aims and objects

40. The narrower line of interpretation receives support from the systematics in Article 23 of the CMR. The loss caused to the cargo owner due to the fact that the goods have been lost shall be compensated in accordance with Article 23 (1) – (3) of the CMR. According to Article 23 (4), no compensation shall be paid for additional loss. Limiting the payment obligation to such costs as are connected to the carriage itself is thus most compatible with Article 23 (4) since the provision is not intended to compensate other losses incurred by the cargo owner; only costs that have become unnecessary are reimbursed. In the event the cost for excise duty was covered, this would mean that the cargo owner could receive compensation even for a consequential loss.

41. A narrower interpretation also comports better with the systematics of the Convention in general. The purpose of the regime regarding the carrier's liability and possibilities to limit its liability to pay compensation is to create foreseeability in order to, *inter alia*, keep down carriage prices and facilitate insurance coverage. This purpose is advanced by keeping costs in the form of excise duty which may arise in conjunction with carriage of certain types of goods such as tobacco and alcohol outside the carrier's duty to pay compensation. A cargo owner, furthermore, has the possibility to state a higher value in accordance with Article 24 of the CMR or declare a special interest in

delivery in accordance with Article 26 and thereby receive compensation over and above that which follows from Article 23.

Summary assessment

42. In aggregate, the systematics of the regime and the objects of it specifically indicate that Article 23 (4) of the CMR is to be interpreted in such a manner that the carrier's liability to make payment does not cover costs which pertain to excise duty when the goods have been stolen during carriage. Nor are there any other noteworthy reasons which speak against such an interpretation.

The assessment in this case

43. It has not come to light that H.Z. Logistics and Thomsen & Streutker have reached an agreement according to which Swedish law is to be applied in the case. However, it follows from Article 1 (1) of the CMR that the case is to be determined in accordance with *lex fori*, which entails that the CMR is to be applied in the manner it has been incorporated in Swedish law (see para. 19). There are no other impediments to the application of the CMR (*cf.* para. 20).

44. The question posed in the leave to appeal is to be answered in light of the above in such a manner that a carrier is not obliged to compensate costs for excise duty pursuant to Article 23 (4) of the CMR (see para. 42).

45. There is no cause to grant leave to appeal concerning the case otherwise.

Costs of litigation

46. In light of this outcome, H.Z. Logistics shall compensate Thomsen & Streutker for its costs of litigation incurred in the Supreme Court. Thomsen & Streutker have claimed compensation in the amount of SEK 275,833 for counsel fees. Taking into account the fact that the case in the

Supreme Court has essentially pertained to a limited question,

Thomsen & Streutker are deemed to have an entitlement to a reasonable SEK 200,000.

_____

Justices of the Supreme Court Kerstin Calissendorff, Johnny Herre, Svante O. Johansson (reporting Justice), Stefan Johansson and Johan Danelius participated in the ruling.
Judge Referee: Elin Dalenius