OTIF

ORGANISATION INTERGOUVERNEMENTALE POUR LES TRANSPORTS INTERNATIONAUX FERROVIAIRES

ZWISCHENSTAATLICHE ORGANISATION FÜR DEN INTERNATIONALEN EISENBAHNVERKEHR

INTERGOVERNMENTAL ORGANISATION FOR INTERNATIONAL CARRIAGE BY RAIL

Bundesgerichtshof (Germany)

Ruling of 26 June 2003[1]

"Other amounts incurred in connection with carriage of the lost goods" within the meaning of Article 23 (4) of CMR and Article 40 § 3 of CIM only include such expenses as would also have been incurred to the same extent in carriage according to contract and which would have contributed to the value of the goods at the place of destination, i.e. which have not been incurred as the result of loss.

Cf. Article 40 § 3 of CIM.

The facts:

The plaintiff is the insurer of M. GmbH (hereinafter referred to as the insured party), which manufactures cigarettes in Germany. She is claiming from the defendant, D. AG, under transferred and assigned law, as a result of the loss of duty unpaid cigarettes, the refunding of, inter alia, tobacco duty.

Between 1995 and 1997, the insured party sent duty unpaid cigarettes to a French consignee under the tax suspension procedure. For intra-Community consignments under tax suspension, cigarettes manufactured in Germany are brought from a tax warehouse to undertakings of authorized consignors in other Member States. The tax liability for the tobacco goods comes into being when they are accepted into the undertaking of the authorized consignor, who then becomes the person liable to pay the tax. If the tobacco goods are withdrawn from the tax suspension procedure during transport, the consignor is liable to pay the tax.

In the period between October 1995 and August 1997, cigarettes were stolen eight times during transport to France. The defendant paid part of the tobacco duty the insured party incurred thereby, for reasons of goodwill. The plaintiff reimbursed the outstanding tax to the insured party – with the exception of the excess.

The plaintiff was of the view that the defendant was also obliged, in accordance with Article 40 § 3 of CIM, to reimburse the outstanding tobacco duty incurred by the insured party as a result of the theft of the cigarettes.

The defendant opposed this.

The court of first instance found against the defendant as claimed. The court of appeal dismissed the claim in respect of the tobacco duty.

1 I ZR 206/00; first instances: Landgericht Berlin, ruling of 29 July 1999, and Kammergericht Berlin, ruling of 11 August 2000, see Bulletin 2/2001.

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With the appeal, which the defendant applied to have dismissed, the plaintiff pursued her claim for the defendant to be ordered to reimburse the tobacco duty she had paid, in the sum of 279,889.53 DM plus 947,283 FF and a further 91,523.10 DM, including interest in each case.

Grounds for the ruling:

I. The court of appeal denied the defendant's obligation to reimburse the tobacco duties to the plaintiff imposed on the insured party by the French tax authorities as a result of the removal of the cigarettes from the tax suspension procedure. The court's grounds were as follows:

The tobacco duty was not to be reimbursed in accordance with Article 40 § 3 of the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM). According to this provision, the railway had refund carriage charges, customs duties and other amounts in connection with carriage of the lost goods. Tobacco duty did not form part of the amounts incurred "in connection with carriage of the lost goods", as it had arisen as a result of the cigarettes being stolen. Tobacco duty was part of the consignor's consignment risk. The consignor could protect himself against this either by declaring a special interest in accordance with Article 46 of CIM or by concluding a special insurance policy.

In so doing, the court accepted that the development of the railways' freight liability law away from liability for the full value of the goods at the place of delivery, towards the value of the damaged or lost goods at the place of consignment meant that the objective of reducing the railway's risk of loss or damage could be acknowledged. The consignor then justifiably should have received a claim for reimbursement of those expenses that he had incurred in connection with carriage. Because the aggrieved party did not receive the full value at the place of consignment if he had to pay the carriage charges, customs and other costs himself, as these amounts decreased the value of the goods. Starting out from this position, only those customs duties, carriage charges and other amounts in connection with carriage are refundable which contributed to the goods achieving a higher value at the place of delivery. Expenses due to damage did not therefore have to be reimbursed, because – untypically – they did not increase the delivery value. However, the tobacco duty due as a result of the cigarettes being removed from the tax suspension procedure does in fact constitute costs due to damage. It does not therefore – unlike, for example, an import turnover tax, which has to be paid in every case – form part of the amounts paid "in connection with carriage of the lost goods" within the meaning of Article 40 § 3 of CIM.

II. This ruling holds against the charges of the appeal.

The Court of Appeal denied without legal defect a claim by the plaintiff under Article 40 § 3 of CIM in conjunction with § 67 (1) of the German Insurance Contract Act (VVG), § 398 of the German Civil Code (BGB) for reimbursement of the sums of tobacco duty the insured party incurred from the French tax authorities as a result of the removal of cigarettes from the tax suspension procedure.

1. According to Article 36 § 1 of CIM, the railway is in principle liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of acceptance for carriage and the time of delivery. The losses in this case occurred during this period.

2. The level of compensation to be paid in the event of loss is determined under Article 40 of CIM. According to Article 40 § 1 of CIM, in the event of total or partial loss of the

goods the railway must pay, to the exclusion of all other damages, compensation calculated according to the commodity exchange quotation or, if there is no such quotation, according to the current market price, or if there is neither such quotation nor such price, according to the normal value of goods of the same kind and quality at the time and place at which the goods were accepted for carriage. The contents of this provision therefore correspond broadly to the rules contained in Article 23 (1) and (2) of CMR.

The Court of Appeal denied refundability of the tobacco duty paid by the insured party in accordance with Article 40 § 1 of CIM, because the market price for the cigarettes removed from the tax suspension procedure did not incorporate the tax in question. This means an error in the law cannot be recognized and is also not objected to in the appeal.

3. In addition to the value of the goods, according to Article 40 § 3 of CIM, the contents of which correspond to Article 23 (4) of CMR, the railway must also refund carriage charges, customs duties and other amounts incurred in connection with carriage of the lost goods. In the literature and case law, it is contentious as to which costs fall under the "other amounts incurred in connection with carriage of the lost goods".

   (a) It is broadly agreed that costs incurred before the carrier accepted the goods are in principle not to be refunded, because they have already been reflected in the consignment value of the goods (cf. Koller, *Transportrecht* (Transport Law), 4th edition, Art. 23 of CMR, marginal 10; *Münchener Kommentar Handelsgesetzbuch* (Munich Commentary Commercial Code)/ Basedow, Art. 23 of CMR, marginal 33; *Münchener Kommentar Handelsgesetzbuch* (HGB)/Mutz, Art. 40 of CIM, marginal 8; Herber/Piper, Art. 23 of CMR, marginal 26; Helm, *Frachtrecht* (Freight law) II, CMR, 2nd edition, Art. 23, marginal 19). Thus Article 40 § 3 of CIM/Article 23 (4) of CMR only covers such costs as arise after carriage has begun and which have not yet therefore increased the value of the goods at the place where they are accepted for carriage.

   (b) With regard to the latter costs, the view is held that in accordance with Article 23 (4) of CMR and in accordance with Article 40 § 3 of CIM, as this provision has the same regulatory content as the CMR provision, they are reimbursable if they were closely related to the actual transport operation. It is immaterial as to whether the party to be compensated had paid them in view of the transport operation running according to contract or whether they would only have arisen as a result of the transport operation not running according to contract. This view, which is especially held in France, Great Britain and Denmark, but also in other countries (see evidence in the *Münchener Kommentar HGB*/Basedow, Art. 23 of CMR footnotes 138-141) is substantiated mainly by the imprecise fixing of the correlation (shall, in addition refund carriage charges, customs duties and other amounts incurred in connection with carriage of the goods…) between the costs and the transport operation (cf. *Münchener Kommentar HGB*/Basedow, Art. 23 of CMR, marginal 37).

   (c) According to another (more narrow) view, only such costs in accordance with Article 23 (4) of CMR are to be reimbursed which would likewise have arisen in the event of carriage according to contract and which would have contributed to the value of the goods at the place of destination, i.e. which did not arise as a result of loss or damage (cf. Bundesgerichtshof ruling of 13.2.1980 – IV ZR 39/78, *Versicherungsrecht* (Insurance Law) 1980, p. 522, 523 = *Neue Juristische Wochenschrift* (NJW - New Legal Weekly) 1980, p. 2021; Oberlandesgericht, Munich, *Transportrecht* (Transport Law) 1991, p. 427, 428; Koller, reference as

above, Art. 23 of CMR, marginal 10 with further evidence; Helm, reference as above, Art. 23, marginal 18; *Münchener Kommentar HGB*/Basedow, Art. 23 of CMR, marginal 38; Herber/Piper, reference as above, Art. 23, marginal 26; Piper, *Höchstrichterliche Rechtsprechung zum Speditions- und Frachtrecht* (Supreme Court Case Law on Forwarding and Freight Law), 7th edition, marginal 425).

(d) In principle, the Senate (≈ appeals court) shares the view advocating a narrow interpretation of Article 23 (4) of CMR.

The liability rules of Article 23 (1) to (4) of CMR, like those of Article 40 § 1 to 3 of CIM distinguish between the damage caused by the loss of the goods and the consignor's/consignee's costs in connection with carriage. In accordance with Article 23 (1) and (2) of CMR, Article 40 § 1 of CIM, damage or loss is compensated by refunding the value and – according to the explicit prohibition of Article 23 (4) of CMR and Article 40 § 1 of CIM – nothing else. Above all, consequential costs, which include all charges arising as a result of loss or damage, are not reimbursed. In principle, the loading side of the operation bears the risk for this, including the risk of lost profit or lost output on the part of the consignee (cf. *Münchener Kommentar HGB*/Basedow, Art. 23 of CMR, marginal 38).

This narrow interpretation of Article 23 (4) of CMR (Art. 40 § 3 of CIM) may indeed mean there will be gaps in the payment of compensation, because according to Article 23 (1) and (2) of CMR (Art. 40 § 1 of CIM), only the commodity exchange/ market price/normal value of the lost goods will be reimbursed. However, this interpretation corresponds both to the wording and to the limited purpose of Article 23 (4) of CMR. Only "other amounts incurred in connection with carriage of the lost goods" are refundable. This wording means that these must be costs that would also have been incurred if the transport operation had been carried out according to contract (cf. Helm, reference as above, Art. 23, marginal 18; Herber/Piper, reference as above, Art. 23, marginal 28).

If the consignor of the goods lays emphasis on the carrier's liability for material consequential damages not covered by Article 23 of CMR (Art. 40 of CIM), he has the possibility – as the court of appeal correctly pointed out – in accordance with Article 26 of CMR (Art. 46 of CIM) of declaring an interest in delivery (*Münchener Kommentar HGB*/Basedow, Art. 23 of CMR, marginal 38; Herber/Piper, reference as above, Art. 23, marginal 9).

4. On the basis of this legal starting point, the court of appeal rightly assumed that the tobacco duty paid by the insured party constituted costs incurred as a result of loss, the refundability of which was not covered by Article 40 § 3 of CIM. The cigarettes carried under the tax suspension procedure (§§ 15 to 17 of the *Tabaksteuergesetz* (Tobacco Duty Act)) were put into circulation as a result of theft during transport. According to § 18, paras. 1, 3 and 4 No. 1 of the Tobacco Duty Act, the insured party thereby becomes the taxpayer. If the transport operation had proceeded according to contract, the costs in question would not have been incurred. It is therefore a matter of costs incurred by the loss itself, which in accordance with Article 40 § 3 of CIM (Art. 23 (4) of CMR) are not refundable (Herber/Piper, reference as above, Art. 23, marginal 39 concerning the payment of taxes due to loss of goods carried under the tax suspension procedure and removed from the procedure as a result of theft; also Piper, reference as above, marginal 425).

The appeal cannot be endorsed on the grounds that it was not the theft, but transport itself of the cigarettes under the tax suspension procedure which caused liability to tax, because during transport, the goods had been latently subject to taxation. The appeal does not take sufficient account of the fact that carriage of the goods under the tax suspension procedure does not present a case of tax accrual. In the transport of tobacco goods under the procedure in accordance with §§ 15 to 17 of the Tobacco Duty Act, the tax in accordance with § 8, para. 1 No. 2 of the Tobacco Duty Act is in the first instance suspended and therefore has not yet been incurred. In this case, the cigarettes were consigned in accordance with § 16, para. 1 No. 2 of the Tobacco Duty Act, so that § 8, para. 1 No. 2 of the Tobacco Duty Act applies. In such a case, the tobacco duty does not therefore arise as a result of carriage, but as a result of the fact that the cigarettes were removed from the tax suspension procedure during transport (§ 18, para. 1 of the Tobacco Duty Act).

III. Accordingly, the appeal with the cost conesquence under § 97, para. 1 of the *Zivil-prozessordnung* (Code of Civil Procedure) had to be rejected.

(Direct communication)

(Translation)