Supreme Court ruling brings much-needed clarity on recoverability of excise duty under the CMR

Christopher Chatfield, of Kennedys, reviews a recent UK Supreme Court case with implications for the cargo sector

A haulage company which argued that it should not be responsible for reimbursing cargo owners for excise duty on a stolen load of cigarettes has lost its case in the UK's Supreme Court.

The case of *JTI Polska SP Z o o and Others v Jakubowski and Others* [2023] 2 Lloyd's Rep 64 will have been followed with interest by cargo insurers as well as the carriers and their liability insurers, with many awaiting the outcome before settling what are typically sizable claims. Excise duty on a container of cigarettes or alcohol, for example, can make up the majority of the consignment value. In relation to a container of cigarettes, excise duty can run into millions of euros.

Despite academic and judicial criticism, the Supreme Court upheld a 45-year-old precedent on the grounds that it had not given rise to substantial concern, prejudice or commercial difficulty in the logistics or insurance industries. The judgment also provided useful clarification on the extent to which "charges" can be recovered under article 23.4 of the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR).

Background

Article 23 of the CMR sets out the damages recoverable in the event of a claim for loss or damage to goods. Article 23.3 limits the carrier's liability to 8.33 Special Drawing Rights of the IMF (SDRs) per kilogram of the goods lost or damaged. This limit of liability has remained unchanged since being introduced by the 1979 Carriage by Air and Road Act, but with the impact of inflation and the carriage of more expensive cargo, the limit of liability has become increasingly significant.

Article 23.4 allows the cargo owner to recover certain further losses in addition to the limit of liability, stating: "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, but no further damages shall be payable".

In *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] 1 Lloyd's Rep 119 the House of Lords considered whether "other charges" included excise duty.

When goods such as cigarettes and alcohol are carried across Europe, excise duty may be suspended (according to the relevant tax legislation) until the goods reach the point at which they are to be distributed. If, however, an irregularity occurs in transit, and it is considered that the goods have been released into circulation then the duty may become payable at the place the irregularity occurred.

The House of Lords held (by a majority of three to two) that "other charges" should include excise duty and, as such, it was recoverable in full from carriers under English law, although other jurisdictions remain divided.

The legal argument

Given that excise duty often makes up the largest element of the loss with such cargoes, the question of liability is of great significance to those involved in the carriage of tobacco and alcohol and their insurers.

The House of Lords adopted what is now considered to be the "wide" interpretation of article 23.4, which English courts have since applied to include charges such as return carriage charges in *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep 200 and survey costs in *ICI plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep 354.

The decision has been subject to academic criticism and comment from the outset, including concerns that the wide approach could result in claims for all manner of consequential losses and thereby open the floodgates to losses which would otherwise have been considered too remote under English law. A number of significant jurisdictions including Germany, Holland and, more recently, Sweden decided that a narrower interpretation should be adopted, allowing recovery of only those charges which would have been incurred if the carriage had been properly performed.

However, the position seemed to be settled until criticism from the Court of Appeal in *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113. Lord Phillips MR expressed concerns that the wide approach opened up the possibility of claims for remote consequential losses being pursued against carriers. He was of the view that this gave rise to the risk of double insurance and contractual uncertainty and that *Buchanan* should be limited in application as far as possible.

"For our part we do not consider that the decision should be applied any more widely by the courts of this country than respect for the doctrine of precedent requires," he said.

The *JTI Polska* questions

Against this background, the Supreme Court was asked to consider the position in the *JTI Polska* appeal, another case of cigarettes stolen in transit. The judge at first instance was bound by the *Buchanan* decision but considered it appropriate to allow the appellants to leapfrog the Court of Appeal and refer the matter for review by the Supreme Court.

The starting point of the review was the 1966 Practice Statement which considered the importance of precedence within the law and the circumstances in which the Supreme Court should consider overturning earlier decisions. In particular,

it highlighted the importance of certainty and predictability in commercial matters, which is not achieved if the law is open to frequent review and change, and a particular reluctance to disturb earlier findings on the interpretation of legislation including international conventions such as the CMR.

Lord Hamblen, giving the leading speech (with whom the other six Supreme Court Justices unanimously agreed) explained that it is not enough to show a preference for an alternative interpretation of the legislation.

He concluded that it is only really appropriate to overturn an earlier decision where that decision has created uncertainty or injustice, given rise to results contrary to public policy or where there has been a material change of circumstance.

It could not be said that the *Buchanan* decision was contrary to a uniform body of authority in other jurisdictions. While some jurisdictions preferred the narrow view, others, such as Denmark, Italy and the Czech Republic adopted a similar view to that in *Buchanan.* Indeed, the lack of unity in other jurisprudence is probably greater now than when *Buchanan* was decided.

Academic criticism was muted and not unanimous, highlighting theoretical concerns about the extent of damages recoverable rather than addressing practical issues or real examples. Lord Hamblen reviewed the cases in which *Buchanan* had been applied and noted that none resulted in any surprising or unfair claims.

There was no evidence of substantial concern, prejudice or commercial difficulty in either the logistics or insurance industries. Insurers have to consider a number of uncertainties and possible outcomes, including international vagaries in the interpretation of article 29 and the breaking of limits, and the divergence of views on article 23.4 was just another issue to address. As such, an element of double insurance was inevitable and reversing the *Buchanan* decision would not change that. Liability for excise duty is a recognised risk for both parties and insurers manage the position accordingly.

Lord Hamblen found that it was the *Sandeman* decision, not the *Buchanan* decision, which should be disregarded, adding that the CMR supports the wide view, and this seems to accord with natural justice.

His view was clear: "Any uncertainty thereby created was ... the result of this inappropriate statement by the Court of Appeal rather than the decision in *Buchanan*. That statement should not have been made and should not be followed."

Conclusion

Buchanan has long represented the English interpretation of article 23.4 of the CMR and, while it has been subject to criticism, it has also been relied on in other jurisdictions. The divergence of interpretation does give rise to early forum shopping by parties, but, once jurisdiction is seized, the certainty behind the decision tends to lead to early settlement of claims.

The Supreme Court's decision reintroduces certainty into the English courts' approach to article 23.4 of the CMR. While there are very persuasive arguments for the narrow view of the *Buchanan* decision, it did not consider that such a long-standing precedent should be disturbed without very good reason.

The decision also addressed one of the main criticisms of *Buchanan* by clarifying that the word "charge" should be restrictively interpreted so as to avoid losses which might otherwise be considered as unforeseeable or remote. While a charge for excise duty is clearly a "charge", liability for liquidated damages or a guarantee on tax seals does not fall within the meaning of the word.

Despite this significant judgment there will continue to be criticism of the wide approach of article 23.4. However, it is now clearly one which can be supported not only by the wording of the CMR but by an impressive body of judicial consideration.

- *Chris Chatfield and Sara Askew for Kennedys represented the successful respondent, with Stewart Buckingham KC and Ben Gardner of Quadrant Chambers.* ***MRI***

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