



Is Excise Duty recoverable under Article 23(4) CMR? – The *JTI Polska* decision

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Content of this Presentation

- Purpose of limitation regime in transport
- Excise duty as part of the monetary limitation of liability regime?
- Excise duty in the UK Supreme Court –
 - *JTI Polska v Jakubowski and Buchanan*
 - Conclusions from the UK
- Should excise duty be recoverable?
- Conclusions more broadly



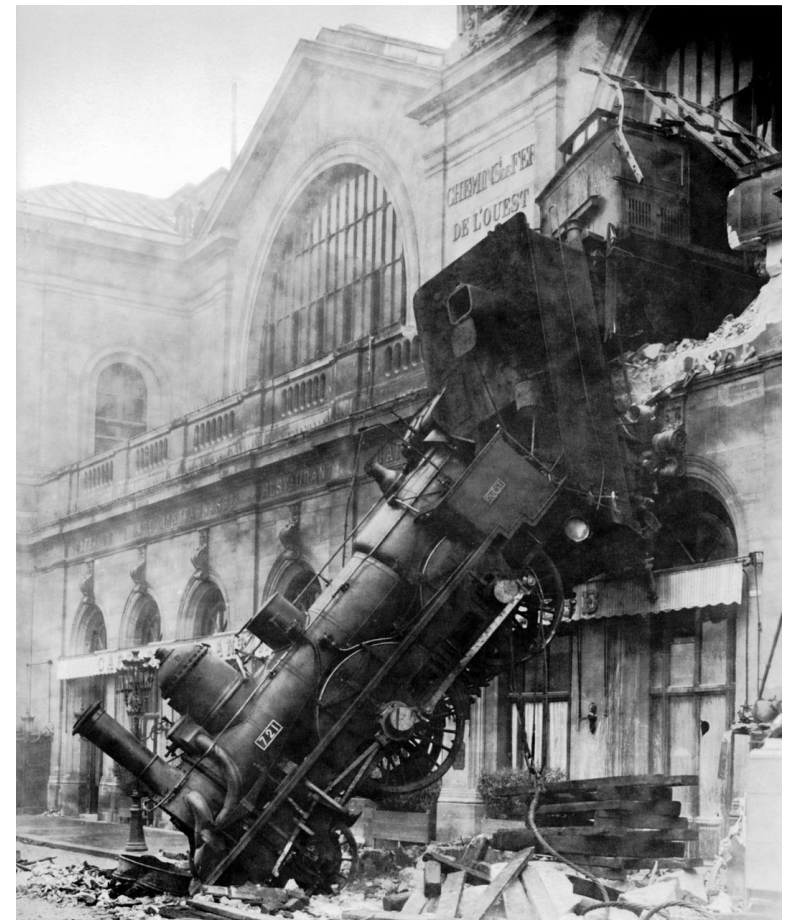
The Purpose of Monetary Limitation in Shipping and Transport?



The Purpose of Monetary Limitation in Shipping and Transport?

Carriers Act 1830, section 1:

- Mail contractors, coach proprietors, and carriers not to be liable for loss of certain [high value] goods above the value of 10 Pounds, unless they are delivered as such, and increased charge accepted.
- Includes list of valuable and tradable items.





The Purpose of Monetary Limitation in Shipping and Transport?

- Shipping as business:
 - Damages, to ensure good care - interest in safe arrival of goods
 - Not insurer – disconnect from any high value of goods
 - Limitation - calculate exposure - allow insurability
- Cargo benefits from goods' value:
 - Declare value - against payment
 - Additional exposure more economically covered by cargo-not liability- insurance





The System of Monetary Limitation in Shipping and Transport

- **Sea and inland waterways - damages:**
 - Goods' value at arrival port – place and time of discharge
 - **Includes** costs of carriage and other charges to reach destination
- **CMR and CIM - damages:**
 - Goods' value of goods at time and place of acceptance for carriage
 - **Needs to add on** carriage and other charges to reach destination
 - **Does this include excise duty? Falling within Art 23(4) CMR?**



The CMR System of Monetary Limitation

Article 23

1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be **calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.**
2. The value of the goods shall be fixed according to the commodity exchange price...
3. Compensation shall not, however, exceed
4. **In addition, 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 damage shall be payable.**
5. In the case of delay ...
6. Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been **declared** in accordance with articles 24 and 26.



JTI Polska v Jakubowski [2023] UKSC 19



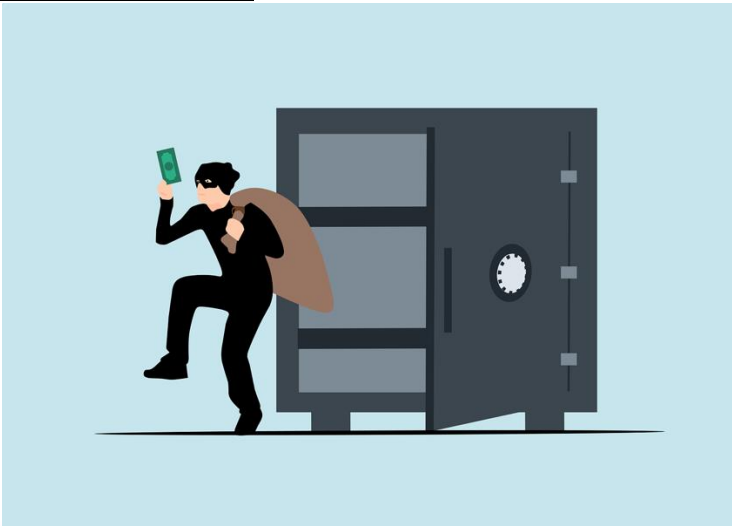
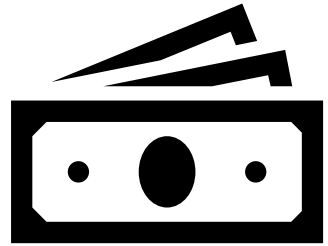
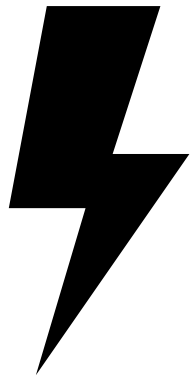


JTI Polska v Jakubowski

Poland



England





JTI Polska Sp Zoo v Jakubowski [EWHC] - The High Court

- CMR, art 23(4) – other charges incurred in respect of the carriage of the goods
 - Bound by House of Lords (1978): *Buchanan v Babco Forwarding and Shipping (UK) Ltd*
 - *Excise Duty payable for whisky in the jurisdiction - recoverable*
- Wrong? Conflicting decisions causing uncertainty:
 - European authorities
 - Court of Appeal (2003): *Sandeman Coprimar SA v Transitos y Transportes Integrales SL*
 - *Guarantee payments due to loss of tax seals - not recoverable*
 - Leapfrog appeal – sufficient public importance



JTI Polska v Jakubowski [UKSC] - The Supreme Court

- A pragmatic decision!
- Not really about Art 23 (4) CMR; instead:
- About the 1966 HL Practice Statement:
 - Very high threshold must be achieved before established authority ought to be overturned
 - Even higher for questions of interpretation
 - Purpose preserve legal certainty and shutting out opportunistic claims
- Preservation of precedent as “indispensable foundation” of the common law



The 1966 Practice Statement

“Their Lordships regard the **use of precedent as an indispensable foundation** upon which to decide what is the law and its application to individual cases. It provides at least **some degree of certainty upon which individuals can rely in the conduct of their affairs**, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while **treating former decisions of this House as normally binding**, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the **danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into** and also the especial need for certainty as to the criminal law.”



JTI Polska [UKSC] - **1966 Practice Statement Threshold**

- Prior decision being **wrong – not enough**
- **Additional elements**; e.g. previous decision must
 - “generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy”
 - “have created uncertainty in the law”
 - Since decision “material change in circumstances”
 - Re trade law convention, “that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results”
- **Even higher for questions of interpretation**
 - Different minds having different opinions – decision must be **untenable or manifestly wrong**
 - Finality of decision to avoid repeat litigation



JTI Polska [UKSC] - Applying the 1966 Practice Statement

To be successful, appellants had to show:

- a) that *Buchanan* (the decision to be departed from) was **untenable or manifestly wrong**; **AND**
 - b) that it was an **appropriate case** for Supreme Court to exercise its power under 1966 Practice Statement
- a) Broad interpretation or “other charges” untenable?
 - No consensus or uniformity across CMR states
 - Albeit, impact of *Buchanan* ignored
 - b) In any event, no appropriate case
 - Market had adjusted
 - Other solutions - change by CMR Protocol
 - Albeit, realism of this solution ignored



Conclusion on *JTI Polska*





The Purpose of Excise Duty?





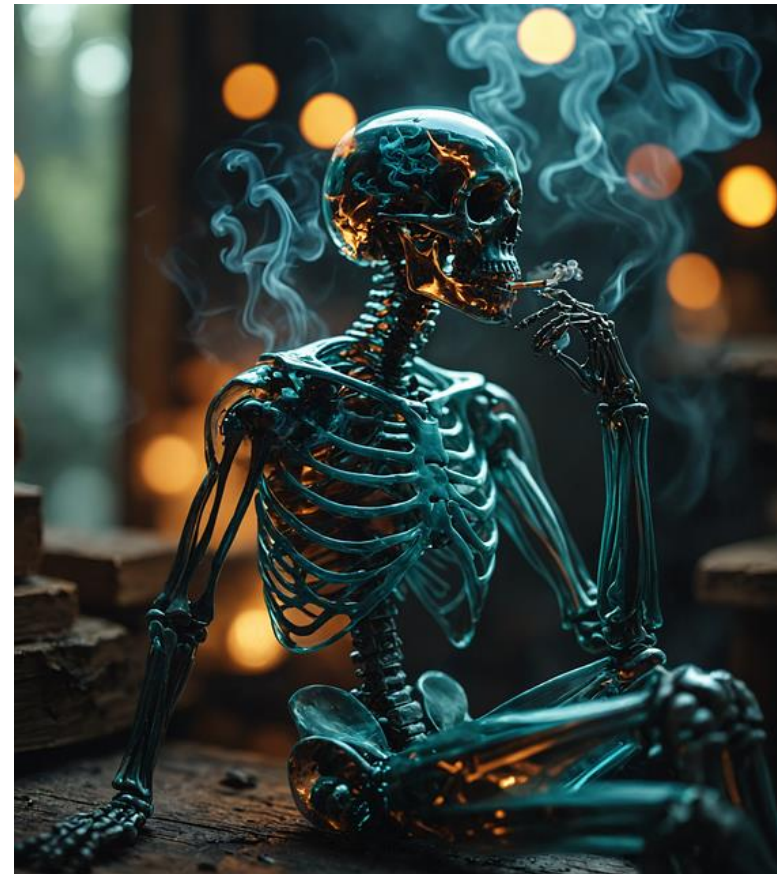
The Purpose of Excise Duty?

- Who should bear the burden of shipping goods, which have detrimental impact on health and public life?
- Whose business model (price) includes the specific characteristics and the high value of the goods (that are subject to transportation)?
- Who is intended to be addressed by excise duty?
- Who should benefit from the limitation of liability provided by shipping laws?

The Purpose of Excise Duty

The World Health Org.:

“Excise taxes are the most effective tax measure for promoting health because they change the price [of] a harmful product relative to other goods and can be easily increased over time.”





Conclusions

Should other courts follow *JTI Polska v Jakubowski*?

- NO – it is NOT a decision on excise duty

Should other courts feel restricted by *Buchanan*?

- NO - if any, *JTI Polska v Jakubowski* underlined that *Buchanan* is a decision subject to valid criticism
- Civil courts (at least) – take as open door for (re)interpretation
- Wait for CMR Protocol? Unrealistic solution!

Should Excise Duty be recoverable?

- NO - this is on cargo!
- Cargo benefits from the characteristics of goods
- There is no gap
- Alignment with CIM – excise duty clearly excluded





The End

