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IN THE NAME OF THE PEOPLE OF FRANCE

COURT OF APPEALS OF PARIS
International Commercial Chamber

Section 5 - Chamber 16

RULING OF DECEMBER 14, 2021

(No. , 22 pages)

Docket number: **20/02758 - Portalis No. 35L7-V-B7E-CBN62**

Decision on appeal before the court: Judgment handed down on October 1, 2019 by the Commercial Court of Meaux - Docket No. XXX

APPELLANT:

[M X] , who does business under the name [XMT]
Dabrowka Warszawska 78, 26-680, Wierzbica, Poland

Represented by [ ], *Esq., Attorney-at-Law from the law firm SCP* [ ] *admitted to the Paris Bar Association (Bar Membership #* [ ]*) and represented by trial attorney* [ ] *Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership #* [ ]

APPELLEES:

Axa Corporate Solutions Assurance
A corporation registered with the Commercial and Companies Registry of Cologne under the number HRB 94266
Having its registered office at Kranhaus 1, Im Zolhafen 18, 506780 Cologne, Germany
Represented by its legal representatives

Allianz Global Corporate & Speciality AG
Having its registered office at Burchardst 8, 20095 Hamburg, Germany
Represented by its legal representatives

Ergo Versicherung AG
Having its registered office at Schmiestrasse 2, 20095 Hamburg, Germany
Represented by its legal representatives

Kravag Logistic Versicherung AG
Heidenkampsweg 100, 20097 Hamburg, Germany
Represented by its legal representatives

Basler Versicherung AG
Having its registered office at Basler Strasse 4, 61345 Bad, 61345 Hamburg, Germany
Represented by its legal representatives

Represented by [ ] *Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership #* [ ] *and represented by trial attorney* [ ] *Esq., Attorney-at-Law admitted to the Paris Bar Association (Bar Membership #* [ ]

Visé NE VARIETUR sous le n° 2022-1058
Fait à PARIS, le 25 avril 2022

SA Compagnie d'Assurances et de Réassurance Warta SA Towarzystwo Ubezpieczen I Reasekuracji Warta SA
A Polish public limited company
85/87 rue Chmielna, 00805 Warsaw, Poland
Represented by its legal representatives

Represented by [...] , Esq., Attorney-at-Law from the law firm Aarpi [...] admitted to the Paris Bar Association (Bar Membership # J125) and represented by trial attorney [...] , Esq., Attorney-at-Law from the law firm Selarl Copernic Avocats, admitted to the Paris Bar Association (Bar Membership # K0187).

MEMBERS OF THE BENCH:

The case was tried on October 19, 2021 at a hearing open to the public before the following panel of justices:

The Honorable François Ancel, Presiding Justice
The Honorable Fabienne Schaller, Associate Justice
The Honorable Laure Aldebert, Associate Justice

who deliberated thereupon.

Clerk: at the appellate hearing: Najma El Farissi.

RULING:

The ruling was handed down by after due process of law and made available at the Administrative Office of the Court, the parties having previously been notified as required by virtue of the second paragraph of article 450 of France's Civil Procedure Rules. The official copy of the ruling was signed by the Honorable François Ancel, Presiding Justice and Najma El Farissi, the clerk to whom the official copy of the ruling was given by the justice who signed it.

I. STATEMENT OF FACTS AND PROCEEDINGS:

1. [MisterX] (hereinafter "**Mr.** [X] ") is an individual entrepreneur in the carriage of goods who does business under the name [XMT] (hereinafter the "[X business] "). He is insured by **Compagnie d'Assurances et de Réassurance Warta SA [Tuir Warta]** (hereinafter the "**Warta**").

2. XL Insurance Company SE (an Irish corporation), successor-in-interest to **Axa Corporate Solutions Assurance**, and **Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG** (hereinafter the "**Insurers**"), are the insurers of Imperial Tobacco Group according to an agreement entered into on December 28, 2010 in Hamburg, Germany.

3. Under an agreement dated 4 March 2009, extended on 4 April 2011, the Germany corporation Reemtsma GmbH, acting both its own behalf and on behalf of Imperial Tobacco Group, and Mr. [X] , entered into a framework agreement for the carriage of goods governed by German law.

4. According to a waybill dated 28 August 2011, the Polish corporation Imperial Tobacco Polska Manufact SA, used the services of the carrier SCS Supply Chain Solutions GmbH to carry 8,641 kg of cigarettes to France.

5. The [X] carriage business, carrying said waybill, had been entrusted with the carriage from Radom, Poland to France. It organized the carriage with two trucks whose registration plates were referenced in the waybill.

6. During the night of August 29-30, 2011, a part of the goods was stolen while the two [X] Business trucks had stopped at a highway rest area in Germany. A criminal complaint was filed with the German authorities.

7. In a letter dated November 10, 2011, Warta refused to cover Mr. [X]

8. On October 8, 2012, the Imperial Tobacco Group Insurers sued the [X] Business and its insurer, Warta, in the Commercial Court of Meaux, in France, to have them order to pay EUR 481,262.46 in principal.

9. On March 4, 2014, the Commercial Court of Meaux issued a stay of proceedings after a claim was filed by the insurance company Warta on grounds that on October 25, 2012 [X] had filed an action in the Warsaw District Court for a finding that the insurance policy number 908200003302 was indeed taken out to cover this carriage agreement and that the coverage was required.

10. In a judgment handed down on June 6, 2014, the Warsaw District Court dismissed the claim of Mr. [X] and held that the provisions of § 4.1, point 2, of the General Terms and Conditions of Insurance of Warta could not be considered as an abusive clause. This judgment was upheld by a ruling from the Warsaw Regional Court on April 23, 2015.

11. In a judgment (number) handed down on October 1, 2019, the Commercial Court of Meaux, in substance:

- Found that the Insurers are validly subrogated to the rights of Imperial Tobacco;
- Found that the claim of Axa Corporate Solutions Assurance against Warta was without merit and dismissed all of its claims against it;
- Ordered Mr. [X] to pay Axa, Allianz, Ergo, Kravag and Basler the sum of EUR 301,415.46 in principal with interest at the rate of 5% per annum in accordance with Article 27 of the CMR Convention[1] starting on October 8, 2012;
- Found that the claims of Mr. [X] are without merit;
- Ordered Mr. [X] to pay Axa, Allianz, Ergo, Kravag and Basler the sum of EUR 15,000.00 by virtue of the provisions of Section 700 of France's Civil Procedure Rules;
- Found that there is no need to grant the claim of Warta by virtue of the provisions of Section 700 of France's Civil Procedure Rules;
- Ordered immediate enforcement, notwithstanding the appeal or pledging a guarantee;
- Ordered Mr. [X] to pay all costs.

12. On February 4, 2020, Mr. [X] filed notice of appeal against the judgment handed down by the Commercial Court of Meaux.

13. Warta filed a cross-appeal against this decision.

14. On June 9, 2020, XL Insurance Company SE joined the proceedings as a third party.

15. The Insurers filed a cross-claim seeking to set aside the judgment in that it dismissed part of their claims concerning the quantum of damages and dismissed their claim seeking to have Warta ordered in solidum with Mr. [X] to compensate them.

[1] The Convention on the Contract for the International Carriage of Goods by Road.

16. In the court of appeal, the parties accepted the procedural protocol of the International Commercial Chamber.

17. The pretrial phase ended on October 12, 2021.

II. CLAIMS OF THE PARTIES

18. In its latest legal brief filed electronically on October 4, 2021, Mr. [X] asked the court to provide the following relief:

Considering Sections 117 et seq. of France's Civil Procedure Rules
Considering the 1956 CMR Convention

- Set aside all the provisions of the October 1, 2019 judgment of the Commercial Court of Meaux;
- Throw out the lawsuit of Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG;
- Find the claims of Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG inadmissible;
- Dismiss all the claims of Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG;
- Rule that, in any case, the amount of damages cannot exceed €15,117.00;
- Order Warta to guarantee the [X] Business against any monetary award against it;
- Order Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG to pay Warta and the [X] Business the sum of €25,000.00 by virtue of Section 700 of France's Civil Procedure Rules and all court costs;

19. In its latest legal brief filed electronically on September 29, 2021, XL Insurance Company SE, Axa Corporate Solutions Assurance, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG asked the court to provide the following relief:

Considering the judgment of the Commercial Court of Meaux dated October 1, 2019
Considering Section L124-1 of France's Insurance Code
Considering §86 of Germany's Insurance Code (§86 Versicherungsvertragsgesetz)
Considering Section §398 of Germany's Civil Code (§398 Bürgerliches Gesetzbuch)
Considering Section L121-12 of France's Insurance Code
Considering the Geneva Convention of May 19, 1956 known as the CMR Convention
Considering Section L133-8 of France's Commercial Code

- Find the third-party application of XL Insurance Company SE, an Irish insurance company with EUR 259,156,875.00 in capital, having its registered office at 8 St. Stephen's Green, Dublin 2, Ireland, company number 641686, authorized and supervised by the Central Bank of Ireland, successor-in-interest to Axa Corporate Solutions Assurance as a result of the merger and transfer of Axa's portfolio publicized in France's Official Bulletin of Civil and Commercial Notices (BODACC) on October 7 & 8, 2019, acting through its German branch having its main place of business at Kranhaus 1, Im Zollhafen 18, 506780 Cologne, registered with the Commercial and Companies Registry of Cologne under the number HRB 94266;

- Dismiss the appeal filed by Mr. [X] against the October 1, 2019 judgment of the Commercial Court of Meaux and all of his claims;
- Dismiss the counter-claim filed by Warta SA [Tuir Warta] against the October 1, 2019 judgment of the Commercial Court of Meaux and all of his claims;
- Set aside the October 1, 2019 judgment of the Commercial Court of Meaux in that it ordered Mr. [X] to pay Axa (now XL Insurance), Allianz, Ergo, Kravag and Basler the sum of EUR 301,415.46 (THREE HUNDRED AND ONE THOUSAND FOUR HUNDRED and FIFTEEN EUROS AND FORTY-SIX CENTS) in principal with interest at the rate of 5% per annum in accordance with Article 27 of the CMR Convention starting on October 8, 2012, the date on which the complaint was served, and with capitalization of interest on the terms of Section 1154 of France's Civil Code, now Section 1343-2 of the same code law;
- Set aside the October 1, 2019 judgment of the Commercial Court of Meaux in that it dismissed all the claims of Axa (now XL Insurance), Allianz, Ergo, Kravag and Basler against Warta SA [Tuir Warta];
- Reform the October 1, 2019 judgment of the Commercial Court of Meaux in that it omitted to rule on the claims of Axa (now XL Insurance), Allianz, Ergo, Kravag and Basler against Warta SA [Tuir Warta];

As a consequence, ruling a new on these points:

- Order in solidum [X] , who does business under the name [XMT]

, and its insurer Warta SA [Tuir Warta] to pay XL Insurance, Allianz, Ergo, Kravag and Basler the sum of EUR 481,262.46 in principal with interest at the rate of 5% per annum in accordance with Article 27 of the CMR Convention starting on October 8, 2012, the date on which the complaint was served, and with capitalization of interest on the terms of the former Section 1154 of France's Civil Code;
- Order in solidum [X] , who does business under the name [XTM]

and its insurer Warta SA [Tuir Warta] to pay them the sum of EUR 33,000.00 by virtue of Section 700 of France's Civil Procedure Rules;
- Order [X] who does business under the name [XTM]

to pay all court costs.

20. In its latest legal brief filed electronically on June 8, 2021, Warta asked the court to provide the following relief:

Considering Sections 30, 31, 32, 117, 119, 120 and 122 of France's Civil Procedure Rules
Considering the CMR Convention and in particular its articles 23, 29 and 32
Considering insurance policy number 908200003302 and its General Terms and Conditions

Set aside the October 1, 2019 judgment of the Commercial Court of Meaux in that it ruled:

- the lawsuit filed on October 8, 2012 by "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" valid;

- the action by XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" admissible;

As a consequent, find and rule that the October 8, 2012 complaint null and void and, at very least, the action of XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" inadmissible;

In the alternative, find and rule the action of XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" without merit and dismiss it;

In any case:

- reaffirm the judgment appealed in that it held that the coverage of Warta SA does not apply and dismissed the claims of XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" and Robert Stepien on this account;
- set aside the judgment appealed in that it refused the application of Section 700 of France's Civil Procedure Rules for the benefit of Warta SA and order in solidum XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" to pay Warta SA the sum of EUR 15,000.00 by virtue of Section 700 of France's Civil Procedure Rules for the lower court case and €15,000.00 on the same account on appeal;
- order in solidum XL Insurance Company SE, successor-in-interest to "*Axa Corporate Solutions Assurance, through its German management, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG, Kravag Logistic Versicherung AG and Basler Versicherung AG, through its German management*" to pay all costs to be paid to [illegible] on the terms of Section 699 of France's Civil Procedure Rules.

III. GROUNDS OF THE DECISION

1) The Procedural Pleas

- **The nullity of the complaint of Axa for lack of standing**

21. Mr. [illegible] and the Warta insurance company maintain that the action of the Insurers was filed by the German branch of Axa Corporate Solutions, which has no legal personality and therefore does not have legal standing, be it under French law or German law.

22. They maintain that as a consequence the complaint is vitiated by a substantive irregularity that can be raised in any case and was not rectified by a new complaint, which results in its nullity.

23. Warta adds that no document was produced in court to justify the legal standing of the other Insurers, given that they were identified only by their addresses and that it would appear they were, once again, branches. They are therefore asking the court find the complaint null and void and the claims of the Insurers inadmissible.

24. In response, the Insurers explains that it was at the behest of Axa Corporations Solutions SA, a French corporation, through its German branch, that the complaint was filed against Mr. [X] since the insurance contract was entered into in Germany. They maintain that "*through its German management*" does not constitute form defect and can result in the nullity of the complaint only after the demonstration of a claim by the appellant, which is not the case here, in particular after nine years of proceedings.

25. In the alternative, if, in an extraordinary turn of events, the Court were to hold that the complaint was served on behalf of the branch of Axa in Germany, it shall find that it does have legal standing. They explain that the address mentioned in the legal document is that of the German branch, which has legal personality under German corporate law and it has legal standing as evidenced by several German decisions recognizing that branches have legal standing.

26. Lastly, they indicate that the complaint was brought by four other insurance companies which are all indicated on the legal document. Therefore, if the action of Axa (now XL Insurance) was inadmissible, that of the other insurance companies (Allianz, Ergo, Kravag and Basler) remain admissible and valid since they have legal standing and therefore the complaint is not null and void as far as they are concerned.

27. The Insurers maintain that the since ground was introduced for the first time six years after the beginning of the lower court case, it is nothing more than a delaying tactic and Mr. [X] should be ordered, pursuant to Section 118 of France's Civil Procedure Rules, to pay EUR 30,000.00 damages and interest to the Insurers.

Wherefore:

28. The principles governing actions in French courts applies to all lawsuits brought in France, irrespective of the law governing the merits of the dispute.

29. However, the international jurisdiction of the law of the forum with respect to procedural questions does not preclude taking into account a foreign law for the determination of legal standing, which depends on the domestic law of the party considered.

30. Under Section 117 of France's Civil Procedure Rules, a lack of legal standing constitutes a substantive irregularity affecting the validity of the legal document, which cannot be covered.

31. In the case in point, the October 8, 2012 complaint mentions, with respect to the insurer Axa "*Axa Corporate Solutions Assurances, through its German management,*" and this reference was followed by an address located in Cologne, Germany.

32. In the absence of any other indication, it should be considered that this complaint was served not by the French company Axa Corporate Solutions SA whose registered office is in France but indeed by one of its branches having its place of business in Cologne.

33. Therefore, in order verify whether the German branch of Axa Corporate Solutions Assurance possessed legal personality and therefore had legal standing at the time of the lawsuit it brought as a result of the October 8, 2012 complaint, German law should be applied.

34. In this regard, based on evidence produced in court and specifically records from the German Commercial and Companies Registry issued in 2018, Axa Corporate Solutions Deutchland is a branch of Axa Corporate Solutions based in Paris and it was registered under number HBR 32367.

35. Based however on a publication provided by Warta prepared by the law firm EPP & Kühl, a German branch can be registered with the commercial registry and not have legal personality.

36. What is more, the case law cited establishes that under German law "*a branch does not have legal personality and cannot be a party to litigation*" (Ruling from the German Supreme Court on November 24, 1951).

37. As a result, the requirements under German law with regard to the legal standing of a German branch, of which the abovementioned case law from the German Supreme Court confirms that they do not have legal personality, are not fulfilled.

38. While, according to the legal opinion produced by the Insurers, prepared by Mr. [...] a German lawyer, "*according to §13d, 13f, 17, paragraph 2, of the German Business Code (HGB), an entity can sue and be sued under the name of the branch even if the latter does not have legal personality,*" it means that a company has legal standing to sue or be sued "*under the name of the branch,*" which would not be acting for itself since it does not have legal standing but it would be acting on behalf of the main company.

39. In this regard, if a branch indicates that it is acting in France in its name and on behalf of an insurer, it must show a special power-of-attorney that meets the requirements of a lawsuit in the French courts and, in the case in point, failing proof of a special power-of-attorney from its principal (Axa France), the German branch could not reply upon it.

40. With respect to the other insurance companies, based on the complaint, the claim was brought by:

- Allianz Global Corporate & Speciality AG, a German company having its registered office at Burchardst 8, 20095 Hamburg, Germany;
- Ergo Versicherung AG, a German company having its registered office at Schmiestrasse 2, 20095 Hamburg, Germany;
- Kravag Logistic Versicherung AG, a German company having its registered office at Heidenkampsweg 100, 20097 Hamburg, Germany;
- Basler Versicherung AG, a German company having its registered office at Basler Strasse 4, 61345 Bad Hamburg vdh.

41. With the exception of Basler Versicherung, which was acting through it "*German management*" and no proof of the legal standing of which, just like the German branch of Axa in Germany, was produced results in the nullity of the complaint with respect to it, the other insurance companies all acting in their own name and on their own behalf and Warta has not produced any evidence to show that they are just branches.

42. Consequently, the decision of the lower court judges on this point should be set aside and the document initiating proceedings brought by Axa Corporate Solutions and Basler Versicherung against Mr. [X] and Warta found to be null and void and, as a consequence, find that their action is inadmissible since the complaint is null and void for the three other insurers who are pursuing the same claim.

43. The Insurers are seeking in the body of their legal briefs to have Mr. [X] ordered to pay them the sum of EUR 30,000.00 for failing to raise this plea of substantive nullity earlier, however, since this claim was not set forth in the prayer for relief in their legal briefs, the Court cannot consider it.

- **The pleas of inadmissibility**

  - ➢ The subrogation of the insurers

44. Mr. [X] explains in the first place that the claim is inadmissible due to a lack of standing since the Insurers have failed to provide proof that the sums sought were paid and that they can benefit from a subrogation.

45. He maintains that French law is applicable by virtue of the Rome I Regulation, in the absence of an express choice of the applicable law by the parties in the agreement that Imperial Tobacco and Axa Corporate Solutions entered into, French law being the law of the registered office of the insurer. He explains, in this regard, that this agreement does not have closer ties to any other question given that it insures the risks of the entire group of Imperial Tobacco companies that are present in numerous countries.

46. With respect to the subrogation, be it statutory or contractual, he considers that under French law its conditions are not fulfilled insofar as the formal conditions under the (former) Section 1250 of France's Civil Code requires the payment to take place at the time of the subrogation, which was not the case.

47. He indicates in effect that the sums of EUR 14,000.80 and EUR 287,411.66 were not paid by Imperial Tobacco based on the insurance contract with Axa Corporate Solutions but were paid by Aon Courtier and he adds that the contractual subrogation took place on May 2, 2012 when the receivable, uncertain by nature, was settled in full by the payment of Aon. He thus maintains that no right could have been subsequently assigned and that the claim is therefore inadmissible based on French law.

48. With respect to the May 2, 2012 assignment of receivables pursuant to which Imperial Tobacco apparently "assigned" to Axa all its rights relating to the stealing of the cigarettes (Exhibit No. 4), he disputes its validity since it was not served as required under French law.

49. Lastly, Mr. [X] maintains that since the carriage agreement was entered into only by Imperial Tobacco and SCS Supply Chain Solutions and not by Mr. [X] ... who was subsequently submandated, Imperial Tobacco could assign only the rights that it had with this first company.

50. In the alternative, Mr. [X] maintains that the claims based on this assignment of receivables are inadmissible on the basis of case law relating to estoppel when the Insurers described the agreement as a subrogation and then as an assignment of receivables. He considers that this ambiguity and these various in the position regarding the very nature of the agreement allegedly forming the basis of the right of Aon Courtier in relation to him can only be a violation of the duty of procedural fairness and that he has legitimate grounds to seek the claim of the opposing party found to be inadmissible.

51. Warta explains that when it involves an international insurance contract, in order to determine the applicable law, reference should be made to Article 7 of the Rome I Regulation the conflict-of-law rules of which designates French law, the law of the registered office of the insurer, no closer connection having been demonstrated.

52. It disputes that there was an assignment of rights, since the document entitled "*assignment rights*" was nothing more than a transfer of rights, corresponding to a subrogation, and it maintains that in any case, be it German law or French law that applies, the insurer is subrogated to the rights and actions of the policyholder up to the amount of the compensation paid and that he cannot seek more than the amount paid to Imperial Tobacco, proof of which has not been produced, the bank account statements

of Imperial Tobacco not having been produced, that the amount allegedly paid being less than the amount sought by the Insurers, the action of the latter must be declared inadmissible.

53. In response, the Insurers (meaning here and hereinafter the insurers to the exclusion of Axa Corporate Solutions, now XL Insurance Company SE, and Basler Versicherung, inadmissible) maintain that the insurance contract taken out by Imperial Tobacco and the other companies is governed by German law. They indicate that the parties chose to subject their insurance contract to German law by making reference to the provisions of German insurance code law in the contract and that the parties are more closely connected to Germany since the contract was entered into by the German branch of Axa Corporate Solutions with the support of a German broker (Aon) and the other insurers (Allianz, Ergo and Kravag) are also German companies. They consider thus that the question of the statutory subrogation of the insurers XL Insurance (previously Axa), Allianz, Ergo, Kravag and Basler to the rights of Imperial Tobacco is indeed governed by German law by virtue Article 15 of the Rome I Regulation relating to the statutory subrogation.

54. They explain that pursuant to Section §86 of Germany's Insurance Code, the insurers XL Insurance (previously Axa), Allianz, Ergo, Kravag and Basler are validly subrogated to the rights of their policyholder Imperial Tobacco, since proof of the reality of the compensation paid to Imperial Tobacco was produced.

55. They add that if, in an extraordinary turn of events, the Court were to hold that the insurance policy is subject to French law, which is disputed, XL Insurance, Ergo, Kravag and Basler are also validly subrogated to the rights of Imperial Tobacco under its influence and by virtue of Section L. 121-12 of France's Insurance Code.

56. Furthermore, the Insurers maintain that Imperial Tobacco assigned all its rights to Axa on May 2, 2012, the assignment of rights being separate from the subrogation since it is not conditional upon the payment of any sum of money, the action of Axa against Mr. [X] for all of the rights that Imperial Tobacco assigned to Axa being admissible, irrespectively of the full transfer of the sums by Axa to Imperial Tobacco. They explain that subsection 9.1 of the framework carriage agreement that Mr. Stepien and Imperial Tobacco entered into provides that it is governed by German law so neither Mr. [X] nor Warta can assert the provisions of French law in order to attempt to challenge to enforceability of this assignment, adding that under German law the assignment of rights of International Tobacco to Axa is enforceable on Mr. [X] .

57. In their prayer for relief, they seek the rejection of the estoppel arguing that throughout the lower court proceedings, the Insurers relied on the subrogation and the assignment of rights and no contradiction can arise as a result thereof. Lastly, the Insurers maintain that Imperial Tobacco is indeed a party to the carriage agreement as a co-contracting party and client and thus has legal standing.

Wherefore:

58. By virtue of Section 31 of France's Civil Procedure Rules, action is available to anyone who has a legitimate interest in the successful outcome or the dismissal of a claim, subject to the cases in which the law gives legal standing only to specified parties to bring or defend claims or to defend a specific interest.

59. Based on Articles 14 and 15 of 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), the subrogation of the insurer to the rights of its policyholder, be it

a statutory or contractual subrogation, or the assignment of receivables enabling it to justify its legal standing, is governed by the law applicable to the insurance contract.

60. According to Article 7.2 of this same regulation applicable to the case in point, failing a choice by the parties of the applicable law, the contract is governed the country where the insurer has its habitual residence. Where, based on all the circumstances, the contract is manifestly more closely connected with another country, the law of said other country shall apply.

61. In the case in point, it is not contested that the insurance contract that Imperial Tobacco Group, Altadis SA, Reemtsma and the Insurers entered into covering the carriage in controversy was entered into in Hamburg on December 28, 2010 does not contain the express choice of the applicable law but refers to the sections of Germany's insurance code law, in particular for the subrogation, and since it was entered into by various companies of different nationalities, including a German company with a group of German insurers, through a German broker, Aon, some of which were represented, according to the contract, by their "*German management*" in Hamburg, the result is that said contract is manifestly more closely connected with Germany.

62. It should therefore be held that this contract is governed by German law, which consequently governs the rules applicable to the subrogation and to the assignation of rights in relations between subrogee or the assignee and the debtor.

63. Under Section §86 of Germany's Insurance Code applicable to the subrogation produced by the Insurers "*in the case where the policyholder has a right of reparation against a third party, such right passes to the insurer to the extent that it has indemnified the loss.*" As a result, proof of the payment of the compensation to validate the subrogation.

64. In the case in point, based on evidence produced in court and specifically exhibit number 6 produced by the Insurers, the compensation was paid to Imperial Tobacco Ltd by the broker, Aon, as evidenced by the bank account statements from Deutsche Bank, in the amount of EUR 287,411.66 on March 23, 2012 and EUR 14,000.80 on June 27, 2012, for a total of EUR 301,412.46.

65. The Insurers were therefore validly subrogated to the rights of Imperial Tobacco Ltd, which was indemnified by the payment made by the insurance broker Aon.

66. With respect to the assignment of rights invoked by the Insurers in their cross-appeal in maintaining their claim for payment of EUR 481,262.46 exceeding the amount of the subrogation, the Insurers produce in court a document entitled Assignment of Rights drafted in English, signed on May 2, 2012, by Imperial Tobacco International Ltd and not by the company signatory of the insurance policy, International Tobacco Group Plc, and for the sole benefit of the Axa branch in Cologne and not the other insurers. This assignment of rights, even assuming that it's valid, since the connections between Imperial Tobacco International Ltd (the seller of the cigarettes) and the insured company, International Tobacco Group Plc, are not spelled out, would only in any case benefit Axa, which is not validly represented in this action and therefore whose action is not admissible since the other cannot rely on it.

67. While there is no need to rule on the alternative claim of Mr. [X] based on the alleged contradiction in the position of the Insurers with regard to the legal basis of their claim, which became moot, and based on the fact that the waybill was not signed by Mr. [X] but by the main carrier SCS (Stepien was only a "successive carrier" carrying a waybill signed by Imperial Tobacco Polska Manufact SA and SCS Supply Chain Solutions GmbH), the lower court judges rightly found that the Insurers were validly subrogated to the rights of Imperial Tobacco Ltd within the limit set forth in the subrogation, which is to say EUR 301,412.40 and not by the assignment of rights.

68. The decision will be reaffirmed on this point.

69. The cross-appeal of the Insurers for their compensation to be set at the sum of EUR 481,262.46 on the basis of the assignment of the receivable to Axa (now XL Insurance) will be found to be without merit.

➢ The action is time-barred

70. Mr. [X] and **Warta** maintain that the action is time-barred after one year by virtue of Article 32 of the Convention on the Contract for the International Carriage of Goods by Road (CMR). They point out that in case of a partial loss, the period of limitation runs from the day on which the goods were delivered, which, in the case in point was September 1, 2011, and the compliant was served on October 8, 2012, which was one year after delivery so the action of the Insurers is therefore time-barred.

71. In response, the Insurers indicate that the one-year period was suspended by the sending of written claim on August 23, 2012 to the ground carrier, as the robbery took place on August 30, 2011 and the date of the partial delivery on September 1, 2001 was not established. The say that Mr. [X] acknowledged receipt of the written claim on August 28, 2012 and transferred the claims to its insurers without rejecting the claim in an unequivocal manner, the suspension of the period of limitation was a given pursuant to Article 32.1 of the CMR Convention.

72. Lastly, they maintain that Mr. [X] committed an inexcusable fault as defined in Section L. 133-8 of France's Business Code, which, by virtue of Article 32.1 of the CMR Convention, increases the period of limitation to three years.

Wherefore:

73. Article 1 of the Convention on the Contract for the International Carriage of Goods by Road (CMR) signed in Geneva on May 19, 1956 provides that it shall apply "*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, irrespective of the place of residence and the nationality of the parties.*"

74. This Convention must necessarily be applied in the case of the international carriage of goods by road (Com. May 25, 1993, Bull. Civ. IV, No. 212). It trumps domestic law except where the Convention expressly makes reference to it on this particular point; or where there is a loophole in conventional law, in case the Convention fails to address a point, domestic law shall then apply.

75. In the case in point, based on the evidence produced in court:

- Imperial Tobacco Group and the [X] Business entered into a framework carriage agreement on March 4, 2009;
- On August 23, 2011, Mr. [X] received a carriage order from SCS Supply Chain Solution GmbH to carry tobacco manufactured by Radom in Poland to Lognes in France;
- Imperial Tobacco signed on September 1, 2011 an international waybill confirming this carriage with SCS Supply Chain Solution GmbH, as the carrier, which had the goods carried by the company of Mr. [X], who himself affreighted two trucks with registration plates WGMAH99 MRA6G01, the place where the goods were loaded was in Poland and the place of delivery in France, both States are party to the CMR Convention.

76. As a consequent, the CMR Convention should be applied to this litigation.

77. Article 32-1 of the CMR Convention states that the period of limitation for an action arising out of carriage under this Convention shall be one year. Nevertheless, in the case of willful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct, the period of limitation shall be three years.

78. Under Article 32-2 of the CMR Convention, applicable to the disputed carriage, the written claim by the party that alleges the loss or damage shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto.

79. In the case in point, based on the evidence produced in court, the letter dated August 23, 2012 that Axa Corporate Solutions to addressed to Mr. [X] by fax and by registered letter with signature confirmation of receipt (dated August 28, 2012), stated the amount of the compensation demanded (EUR 481,262.46) and indicated that should payment not be forthcoming by September 7th, it would take legal action; this letter meets the requirements to be considered a claim as defined in the abovementioned Article 32-2.

80. In a letter dated August 28, 2012, Mr. [X] responded to the demand for compensation by indicating that he had transferred it to his insurance company Warta, tasked with "*determining whether the payment demanded was legitimate.*"

81. In the same letter, he pointed out an "*irregularity in the calculation of the amount notified in the payment demand, namely EUR 481,262.46,*" specifying that "this amount does not correspond to the CMR Convention, specifically its articles 23 and 27, which define the rules to determine the amount of the compensation for damage to physical property," which does not constitute a rejection of the claim or a return of documents. Mr. [X] has not produced any evidence that had rejected such claim.

82. As a result, without any need to seek to determine a default or willful misconduct, in the current state of evidence applicable to the period of limitation, this claim validly suspended the period of limitation, and since it never started up again, the action brought on October 8, 2012 is not time-barred.

83. The Court will therefore reaffirm the decision of the lower court judges on this point.

2) The merits

- **The liability of the carrier**

84. Mr. [X] claims firsts of all the existence of causes to be relieved of liability and invokes the absence of any default on his part. He says that the loss of the goods as a result of robbery is due to "*circumstances which the carrier could not avoid and the consequences of which he was unable to prevent,*" this wording from the CMR Convention refers to unavoidable events with unsurmountable effects without requiring that they be unforeseeable, the relieved liability cause as defined in the CMR Convention being broader than that of force majeure under French law but could however be precluded by the default of the carrier.

85. He maintains that the robbery was unpreventable and outside and that he did not commit any fault.

86. He explains that the drivers looked for a place to park that was consistent with the instructions that they were given but all the parking areas were full because of the return from vacation, they were forced to move by the German police, requiring them to stop elsewhere in order to comply with the regulatory rest time, they were unable to resist the robbers or prevent the robbery which took them by surprise at night due to no fault on their part, the thieves having startled them during their sleep and sprayed the drivers' cabin with an unidentified white product. He maintains that it was a case of force majeure relieving him from any liability.

87. With respect to the alleged faults that he disputes, he indicates that he had taken all steps to protect the vehicles and that the investigation was botched. He explains that the [X] Business and his drivers were not implicated by German law enforcement. He disputes any inexcusable fault as defined in Section L.133-8 of France's Business Code.

88. In the alternative, he maintains that his liability should be limited as per the rules relating to the Special Drawing Rights (SDRs) provided for in the CMR Convention, i.e., 8.33 SDRs per kilo of goods stolen.

89. Warta considers that Mr. [X] violated the terms set forth in the insurance policy by failing to comply with the parking requirements and he cannot claim causes to be relieved of liability and that Mr. [X] was also required to use particular due diligence in fulfilling the waybill, which he failed to comply with, thereby violating §4.1 point 2 of the general terms and conditions of insurance.

90. The insurers hold that Mr. [X] is fully liable as the carrier pursuant to Article 17 of the CMR Convention and they maintain that Mr. [X] cannot claim the case of relieved liability provided for in Article 17.2 of the CMR Convention for he has failed to show the circumstances that he "*could not avoid and the consequences of which he was unable to prevent.*"

Wherefore:

91. Article 17 of the CMR Convention holds that "*the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.*"

92. Under Article 17§2 of the CMR Convention, "*the carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.*"

93. By virtue of Article 18 of the CMR Convention "*the burden of proving that loss, damage or delay was due to one of the specified in article 17, paragraph 2, shall rest upon the carrier.*"

94. As a result, a presumption of liability that falls on the international road carrier, in addition to a presumption of a causal link between the loss of goods and carriage, the sole fact that the goods are lost, damaged or delivered late fall under the negligence of the carrier subjecting it to an enforceable obligation to use sufficient means so as to bring about the contractually agreed-upon outcome unless it can provide proof, if any, of one of the causes to be relieved of liability provided for in Article 17§2 of the CMR Convention. The corollary of this mechanism is to limit the amount of the compensation awarded to amounts the calculation rules and caps of which are spelled out in Article 18 of the CMR Convention.

95. Article 29 of the CMR Convention holds that "*1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his willful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to willful misconduct.*"

96. Article 29§1 of the CMR Convention refers to willful misconduct or a default equivalent to willful misconduct according to domestic law, thereby referring, when the French courts are seized, to the definition to the domestic law provided for in Section L. 133-8 of France's Business Code.

97. In this regard, based on Section L. 133-8 of France's Business Code, "*only the inexcusable fault of a driver or of a freight broker is equivalent to willful misconduct. A deliberate defect that implies awareness of the probability of damage and his reckless acceptance for no valid reason is inexcusable.*"

98. An inexcusable fault, just like circumstances of relieved liability, must be assessed in relation to the contractual obligations actually taken on, which leads to examining the particular terms of the carriage agreement in controversy.

99. In the case in point, it is undisputed that Mr. [X] 1 is a professional carrier who was perfectly aware of the nature and value of the goods carried, namely tobacco, which required, in the case in point, special caution.

100. Based also on evidence produced in this matter and specifically the report issued by UB, independent experts retained by Axa, as well as the affidavits of the drivers, the police investigation, forensic police reports of the circumstances, time and place, while Mr. [X] complied with the obligations concerning the organization of the carriage and the security of the trucks, doubts persisted about the behavior of the drivers during night of August 29, 2011 when the robbery occurred.

101. In effect, based on the circumstances very precisely pointed out by the lower court judges and the flagrant contradictions noted in the statements of the drivers, be it about the alleged poisoning or about the arrival of the police onsite, the drivers not having immediately called them, as well as the explanations about the route taken with no material evidence whatsoever to back it up, the GPS having been disconnected for 11 hours on the day of the theft, though the likelihood of sabotage was not established, negligences were committed.

102. As a result, too, there are doubts about the behavior of the drivers at the time of the noticing of the robbery and the observance of the security instructions, in particular with respect to the imperatives of carriage regulations, such doubts not having been verified or contradicted since the Stepien Business failed to supply the tachograph recordings, which is a clear instance of default, and the police investigation was unable to establish any unlawful conduct.

103. As a result, there is not sufficient proof of a "*deliberate default*" implicating "*awareness of the probability of damage and his reckless acceptance for no valid reason.*"

104. While the driver's statements with respect to his alleged poisoning were not proven forensically, there is not however any certainty that he lied and that he had the deliberate intent to put himself in danger and to allow the damage to have.

105. Likewise, and in the absence of any prosecution by the German authorities of the two drivers, it is not shown that they played any role whatsoever in the commission of the crime. A mere suspicion from a report by experts appointed by the Insurers may not be considered as sufficient to establish a deliberate default providing the alleged inexcusable fault.

106. Lastly, the fact that Polish drivers frequently commit theft at highway rest areas, according to newspaper articles communicated, cannot serve as proof that the two drivers of the [X] Business had taken deliberate and reckless risks warranting them having their shipment stolen during the carriage or that they, as alleged by the Insurers, sabotaged or faked it, all the more so because based on articles produced, attacks truck drivers using anesthetic gas are increasingly common, which leaves doubts about the alleged recklessness of the drivers.

107. For all these reasons, it is unnecessary to hold that the Stepien Business committed an inexcusable fault.

108. Its liability is thus presumed to the extent that it has failed to provide proof of causes to be relieved of liability as defined in the abovementioned Article 17§2. The fact that it was a period when people were returning from vacation is not sufficient, in the absence of any other evidence, to make the search for a secure rest area after the difficult crossing the border to the extent that the carrier could not "prevent" and therefore is not sufficient to constitute one of the causes to be relieved of liability accepted by the CMR Convention.

109. It is therefore established that Mr. [X] committed breaches that do not permit him to benefit from a cause to be relieved of liability under the CMR Convention.

110. The decision of the lower court judges will be set aside, since no inexcusable fault is found, and the [X] Business will be held liable within the limits set forth in the CMR Convention, in the absence of any causes to be relieved of liability.

- **The coverage of Warta**

111. Mr. [X] maintains that Warta cannot deny its coverage. In his prayer for relief, he seeks to have the claims of Warta aimed at rejecting its coverage on the basis of estoppel found inadmissible. He explains that Warta joined him in his arguments until its last legal briefs on the merits where it changed its position wishing then to have the inexcusable fault of the carrier acknowledged. He considers that as this change in position occurred shortly before the end of the lower court case, it threw his defense into disarray.

112. He next maintains that Warta cannot invoke clause number 4 of annex 1 of the police insurance make its coverage subject to a condition of secure parking, the liability waiver clause of the insurance policy must be deemed unwritten as it does aways with the essential obligation of the insurer by virtue of Section 1170 of France's Civil Code on grounds that secure parking areas are rare and overcrowded with carriers.

113. In the alternative, he maintains that this clause was not complied with due to an event of force majeure given the unpredictability of the packed parking in rest areas, the irresistibility linked to the obligation to take a statutorily-required break and that the outside nature of these constraints, since the police forced the drivers to leave the protected highway rest area that was near a Shell gas station.

114. Mr. [X] , adds that Warta cannot claim the absence of reference to the carrier on the waybill provided for in the general terms and conditions of insurance when, according to Article 4 of the CMR Convention, an absence, irregularity or loss of the waybill does not affect this existence or the validity of the carriage agreement.

115. He adds that clause §4.1(2) of the general terms and conditions of insurance do not contain this obligation to mention on the waybill the information about the policyholder in order to prove that the carriage in question actually occurred. He explains that it was never disputed, in the lower court, that the carriage actually took place, the carriage agreement being proven, when, moreover, the registration plates of the successive carriers correspond to vehicles that belong to the [X] Business.

116. In the alternative, if a breach of the formal conditions prescribed by the clause in controversy enabled Warta to deny its coverage, that would deprive it of its essential obligation, the very object of an insurance policy such that clause number 4 of annex 1(sic) of the insurance policy would also be deemed unwritten by virtue of Section 1170 of France's Civil Code.

117. He considers that, in any case, in the event of a disagreement, the insurance contract, which is an adhesion contract, must be interpreted against Warta that in any case must cover its policyholder.

118. In response, Warta asserts in he first place that its claim is not inadmissible insofar as it has always been clear and refused to cover the loss since its decision on November 10, 2011 and this position never varied.

119. It maintains first of all that the liability of Warta is waived in case of gross misconduct and, all the more so, of willful misconduct, which it considers to be established in the case in point, and this by application o §6.1-1 of the general terms and conditions of insurance ("GTCI") governed by Polish law.

120. It points out that this misconduct is the result of the circumstances of the theft recounted in the report of the expert of the Insurers, which indicates that when the truck's GPS signal was lost on August 29n 5:377 pm and restored on August 30, 2011 at 5:00 am, the loss of this signal for 11 hours did not trigger any reaction by either Mr. [X] or by the business in charge of supervising the system and the tachograph recordings were never produced by the carrier.

121. It adds that there is a waiver its liability because of the violations of the insurance policy committed by Mr. [X] . It points out in this regard that it was particularly inappropriate of Mr. [X] 1 to ask a French court to rule that clauses of the general terms and conditions of insurance of Warta are deemed unwritten or to preclude them, which, moreover is based on French law when it involves a contract between Polish entities governed by Polish law.

122. They maintain, on the one hand, that by parking the vehicle at night just in a highway rest area with no protection, the carrier failed to comply with annex 1.4(b) of the insurance policy which provides an obligation, for the carriage of tobacco products, to stop only at a parking area with surveillance or in a place with maximum security, namely a place that is permanently closed, with surveillance and lighting or lit parking lots next to motels, hotels, gas stations open 24/7 or customs office situated near the route, which was not the case here as the carrier stopped for the night at a highway rest area with no protection.

123. They maintain, on the other hand, that its policyholder had failed to comply with the terms set forth in §4.1, point 2, of the general terms and conditions of the insurance contract relating to the waybill. It indicates that the Polish courts permanently validated this clause, since the action brought by Mr. [X] 1 for a declaratory judgment that this provision was unenforceable was dismissed, pointing out moreover that he had no grounds to asset Article 4 of the CMR Convention which relates to the carriage agreement and not the insurance contract.

124. In the alternative, Warta says that, if, in an extraordinary turn of events, the Court were to hold that Warta must cover the loss, it points out that, as per §13, point 7, of the general terms and conditions of the insurance contract, the compensation paid by the insurer cannot exceed the equivalent of 8.33 SDRs per kilogram of gross weight missing (which constitutes an application of Article 23.3 of the CMR Convention.

125. It adds that according to the invoice produced in court, the gross weight of the goods was 8,640.90 kg, corresponding to 6,915,000 cigarettes and that after the theft, 3,260,000 cigarettes were reported missing, which corresponds to 4,073.65 kg.

126. The Insurers maintain that Warta is required to cover Mr. [X] and to compensate them. They explain that the Polish courts did not at all rule on insurance obligation of Warta but that the Warsaw District Court dismissed the claim of Mr. [X] relating to the enforceability of Article 4 of the GTCI of Warta, a decision upheld

by the Warsaw Court of Appeal that indicated in its ruling on April 23, 2015 that it was up to the French courts who were seized first on the merits of the litigation, to rule on the coverage of Warta. They explain that the victim can take direct action against the insurer of the party liable and therefore Warta is required to compensate them.

Wherefore:

- **The inadmissibility of Warta based on grounds of estoppel**

127. Based on the grounds adopted above, the court find not find that Mr. [X] had committed any inexcusable fault. Therefore, the ground of appeal based on estoppel, founded on the late invocation of inexcusable fault by Warta and that invoking it is inadmissible, became devoid of purpose. In any case, it could not be inferred either from the letters from Warta dated 10 November 2011 and 20 September 2012 arguing limitations of its coverage by virtue of Article 23 of the CMR Convention that it would waive its right to invoke the liability waiver for gross misconduct or negligence.

- **The coverage of Warta**

128. For the same reasons, since inexcusable fault was not found, the liability waiver asserted by Warta on the basis of Article §6-1-1 of its GTCI based on the gross misconduct or negligence of the policyholder also became devoid of purpose.

129. With respect to the liability waiver because of the violation of the requirements specific to the carriage of tobacco products and in particular annex 1 of policy number 908200003302, based on the contractual provisions and specifically paragraph 4b of said annex, one of the conditions to cover the carriage tobacco products requires the drivers to take breaks that last more than 60 minutes "*at a parking area with surveillance or in a place with maximum security, namely a place that is permanently closed, with surveillance and lighting or lit parking lots next to motels, hotels, gas stations open 24/7 or customs office situated near the route.*"

130. The possibility offered by this clear and explicit clause of several serious alternatives for a secure parking area in order to take into account the special circumstances related to the transporting of tobacco products does not permit, contrary to which Mr. [X] maintains, the insurance company to deny its coverage "*according to its mood*" basing itself on a failure to comply with the requirements laid down, and in the absence of any other criticism, the character deemed unwritten of the clause is therefore not established.

131. Nor Mr. [X] has not provided any explanation of the reasons for which the drivers could not park their vehicles at a parking area that meets the requirements laid down, merely asserting, without providing any evidence, that his drivers has used basic due diligence by making a detour to go to another secure parking area but that since it was full, they had to go to another unsecure one where the robbery took place. The only explanation proffered was that the drivers were forced to stop in order to comply with the driving time regulation but he provided no tachograph record to corroborate this.

132. He does not dispute that he did not comply with the requirements mandated about which, as a professional carrier, he was fully aware, but he maintains that his drivers were apparently forced by the police, which it not at all established by the evidence produced in court, other than the affidavits of his drivers that have little probative value.

133. While it is not necessary to rule on the other liability waivers invoked by Warta, governed by Polish law, and in particular §4.1(b) of the GTCI, given moreover the fact

that said clause was not abusive in nature, which the courts in Warsaw had found, its claim will be granted and the claims of Mr. [X] and the Insurers for an order against it will be dismissed.

134. The decision of the lower court judges will be reaffirmed on this point.

- **Compensation**

135. Mr. Stepien maintains that the loss estimated by the Insurers is substantially higher than in actual fact, that an extra 60,000 cigarettes missing compared to the Polish police is sought by the Insurers while they provide no proof of this, the actual loss being 3,200,000 cigarettes, or 41.17% of the goods, which equates to an actual loss of EUR 15,117.00, excise duties being excluded under German law.

136. He maintains furthermore that nothing in the casefile proves that Imperial Tobacco had paid excise duties and that no proof of this has been produced and the even insurers verified with their policyholder whether it had really paid those duties.

137. He considers that when untaxed cigarettes are in a regime of suspended excise rights and damage occurs during carriage, the carrier is not responsible for compensating excise duties.

138. He points out that in the absence of proof of the payment of customs duties by Imperial Tobacco, he cannot be required to reimburse them. He cites lastly the case law from the German Supreme Court, which exempts payment of customs duties in certain circumstances spelled out in Article 23.4 of the CMR Convention.

139. Warta maintains that pursuant to §13, point 7, of its general terms and conditions, the compensation that it would have to pay if the Court held that it is required to cover the loss, cannot exceed the equivalent of 8.33 SDRs per kilogram of gross weight missing, as per Article 23.3 of the CMR Convention. Since 3,260,000 cigarettes were stolen, or 4,073.65 kg, the compensation should be limited to 4,073.65 × 8.33 SDRs.

140. In response, the Insurers maintain that their loss totals EUR 481,262.46 based on the market value and the excise duties paid to the German customs on the stolen cigarettes. They point out that the exact number of cigarettes stolen is 3,260,000 and not 3,200,000 as Mr. [X] wrongly argued (this total is confirmed by German customs), and that Mr. [X] must pay the full value of the cigarettes stolen and compensate them for the full amount of the excise duties paid to German customs, even in the absence of an inexcusable fault.

Wherefore:

141. Pursuant to Article 23 of the CMR Convention:

> *"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.*
> ...
>
> *3. Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.*
>
> *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."*

142. As a result, when an international carrier by road is found to be liable for the loss of goods with no inexcusable fault on its part, it is required to pay compensation calculated based on the value of the goods, which is capped at reparation set at 8.33 SDRs per kilogram of gross weight missing, in addition to which there is the price of the carriage, customs duties and other expenses incurred in connection with the carriage.

143. It is accepted that excises (formerly indirect contributions henceforth subjected to European legislation, on tobacco products in particular) do not constitute customs duties and that they must be included in the value of the goods and are therefore subject to the limitation provided for in paragraphs 1 and 3 of Article 23 of the CMR Convention, the excise duties on tobacco being added to the initial value of the goods. In any case, the compensation owed by a carrier that did not commit an inexcusable fault cannot exceed the limitation of liability provided for in the CMR Convention (Com. 5 Oct. 2010, 09-10.837).

144. In the case in point, the value of the goods of cigarettes stolen is EUR 14,000.80, the value to which should be added the excise duties, which were EUR 467,261.66. However, pursuant to the rules recalled above and in the absence of an inexcusable fault, the compensation cannot exceed the limitation provided for in Article 23(3) of the CMR Convention. Therefore, the capped amount of the compensation owed by the Stepien Business, given the number of cigarettes stolen, recalculated by customs corresponding to a weight of 4,073.70 kg can be calculated as follows: 4,073.70 × 8.33 SDRs, the value of the SDR applicable being set on the day of this decision, interest relating thereto at the rate of 5% per annum in accordance with Article 27 of the CMR Convention being due starting from October 8, 2012, the date of the complaint.

145. The decision of the lower court judges will be set aside on this point.

- **Section 700 of France's Civil Procedure Rules**

146. Axa Corporate Solutions Assurance, now XL Insurance Company SE, Basler Versicherung, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG, the parties mostly losing, shall be ordered to pay costs that will be recovered in part in accordance with the provisions of Section 699 of France's Civil Procedure Rules.

147. Furthermore, in this court, Axa Corporate Solutions Assurance, now XL Insurance Company SE, Basler Versicherung, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG losing to Mr. [X] , and Warta, the decision shall be set aside and they will be ordered to pay Mr. [X] the total sum of EUR 20,000.00 and to Warta the total sum of EUR 10,000.00 by virtue of Section 700 of France's Civil Procedure Rules, as well as all costs.

148. Since Mr. [X] is losing to Warta, he shall be ordered to pay it EUR 10,000.00 in this regard.

V) ON THESE GROUNDS:

The Court,

1. Sets aside the decision appealed except in that it:

- held that the action of Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG admissible and not time-barred;
- found in part that their action had merit;
- found the claims of Warta admissible and in part had merit

Ruling anew for the remainder:

2. Finds that the October 8, 2012 complaint null and void with respect to Axa Corporate Solutions Assurance, now XL Insurance Company SE and Basler Versicherung, as they failed to prove that they have legal standing;

3. As a consequence, finds all the claims of Axa Corporate Solutions Assurance, now XL Insurance Company SE and Basler Versicherung inadmissible;

4. Ruling with respect to Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG and to Compagnie d'Assurances et de Réassurance Warta SA [Tuir Warta];

5. Holds that, in the absence of any inexcusable fault, the compensation of the loss is limited under the provisions of Article 23 of the CMR Convention;

6. Dismisses the cross-appeal of Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG;

7. Orders Mr. [X] , to pay Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG the exchange value in euros, on the day of this decision, of:

- 4,073.70 × 8.33 SDRs = 33,933.50 SDRs (the value of the SDR on the day of this decision) with interest at the rate of 5% per annum starting from October 8, 2012, with capitalization of interest in accordance with the provisions prescribed in Section 1154 of France's Civil Code, now Section 1343-2 of France's Civil Code;

8. Finds that Warta is not required to cover the loss under policy number 908200003302 and its annex 1;

9. Dismisses all the claims of Mr. [X] and Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG against Warta;

10. Dismisses all the other claims of Allianz Global Corporate& Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG;

11. Orders Axa Corporate Solutions Assurance, now XL Insurance Company SE, Basler Versicherung, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG to pay Mr. [X] the total sum of EUR 20,000.00 by virtue of Section 700 of France's Civil Procedure Rules;

12. Orders Axa Corporate Solutions Assurance, now XL Insurance Company SE, Basler Versicherung, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG to pay Compagnie d'Assurances et de Réassurance Warta SA [Tuir Warta] the total sum of EUR 10,000.00 by virtue of Section 700 of France's Civil Procedure Rules;

13. Orders Mr. [X] to pay Compagnie d'Assurances et de Réassurance Warta SA [Tuir Warta] the sum of EUR 10,000.00 by virtue of Section 700 of France's Civil Procedure Rules;

14. Dismisses all their other claims;

15. Orders Axa Corporate Solutions Assurance, now XL Insurance Company SE, Basler Versicherung, Allianz Global Corporate & Speciality AG, Ergo Versicherung AG and Kravag Logistic Versicherung AG to pay costs, part of which is to be paid to [...] l on the terms of Section 699 of France's Civil Procedure Rules.

The Clerk **The Presiding Judge**

Najma El Farissi **François Ancel**

I, Granville Wesley Fields,
sworn translator,
French/English, certify that
the preceding is an exact
translation of the original
and of the attached copy
in French

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Signed and stamped *ne varietur* in
Paris, France
on April 25, 2022