SUPREME COURT NORWAY

On 6 February 2019, the Supreme Court composed of the justices Bull, Kallerud, Bergsjø and Høgetveit Berg and acting justice Sæbø gave judgment in

HR-2019-231-A, (case no. 18-051892SIV-HRET), civil case, appeal against judgment:

Genfoot Inc.	(Counsel Tage Brigt Andreassen Skoghøy)
v.	
SCHENKERocean Ltd	(Counsel Hans Peder Bjerke)

(1) Justice **Høgetveit Berg:** The case concerns a claim for damages after a carrier delivered goods to the buyer despite the seller's order that the delivery be stopped.

(2) Genfoot Inc. – Genfoot – is a Canadian company whose activities include sale of Kamik footwear. The shoes are sold on the European market through national distributors.

(3) SCHENKERocean Ltd. – Schenkerocean – is a carrier and logistics company registered in Hong Kong. The company has agents in a number of countries, including Schenker China Ltd. Xiamen Branch in China, Schenker du Canada in Canada and Schenker AS in Norway – from now on referred to as Schenker Kina, Schenker Canada and Schenker AS, respectively.

(4) In December 2011, Genfoot entered into a distribution agreement with the Norwegian company Portland Norge AS – Portland – on the distribution of Kamik footwear to Norwegian dealers. The agreement is governed by "the laws of Quebec". According to the agreement, Portland was to pay the purchase price before the goods were shipped. However, a practice had developed over time between the parties allowing Portland at times to buy on credit.

(5) On 14 May 2014, Portland entered into a frame agreement on "transport of goods and/or services related to transport of goods" with Schenker AS.

(6) In June 2014, Genfoot bought shoes from two factories in China. The shoes were sold on to Portland, and Genfoot accepted that the goods were supplied on credit. The shoes were sold FOB – free on board – which meant that Portland was to organise their carriage. The goods were to be sent from Xiamen in China, via Hamburg in Germany, to Portland's place of business, Oslo.

(7) The shoes were sent in four containers with identity numbers #993, #994, #995 and #049. The handling of them differed to some extent. The case before the Supreme Court is related to the delivery of containers #994 and #995 – and this judgment will deal with the fate of those containers only. Schenker Kina, in the capacity of agent for the carrier Shenkerocean, issued bills of lading for the same containers on 18 June 2014, with Oslo as the point of receipt. Three original sets and two copies were issued.

(8) The relevant bills of lading listed the Chinese manufacturer as the shipper. Genfoot was listed as the consignee, while Portland was listed as the notify party. Schenker AS var listed as the party to contact upon delivery of the goods.

(9) After Genfoot had paid the manufacturer for the goods, the manufacturer sent the bills of lading to Genfoot. On 18 July 2014, Genfoot endorsed the bills of lading in blank before sending them to Schenker Canada.

(10) For containers #993 and #994, Genfoot asked Schenker Canada on 26 August 2014 to send bills of lading directly to the ultimate recipient, Portland. Portland passed the bills of lading on to Schenker AS. Schenker AS currently holds one original set for the relevant containers, while Genfoot holds two.

(11) The containers arrived at the port of Oslo no later than 22 September 2014, at which time Schenker AS held one original copy of the bills of lading received from Portland, as mentioned. The parties disagree as to whether Schenker AS, after the unloading of the containers, retained the goods in the capacity of Schenkerocean's agent or Portland's representative.

(12) On 22 September 2014, Genfoot asked if Schenker Canada had received the original bills of lading, and announced the containers now be released. Later on the same day, Genfoot confirmed that the company had released the containers for delivery to Portland. On the next day, Schenker AS stated that the delivery date would depend on when Portland was able to receive the containers.

(13) Portland's bank – DNB – terminated the engagement on 22 September 2014. The bank had outstanding about NOK 50 million, with a charge over Portland's stock in trading. Portland immediately notified Genfoot of the termination.

(14) On 23 September 2014, Genfoot ordered Schenker Canada to retain the containers until further notice. Schenker Canada passed this order on to Schenker AS on the same day.

(15) On 24 September 2014, Schenker AS replied that Portland had already been there with original bills of lading for the containers, which implied that they now belonged to Portland and could not be retained upon Genfoot's order. Genfoot replied that this was unacceptable and referred to the fact that Schenker Canada had been given a clear order to retain the containers in Oslo. Genfoot asked once again if Schenker AS could at least hold

the containers for 24 hours – "The least you could do is to hold for 24 hours to cross check with us." Genfoot also asked if the relevant containers had already been delivered to Portland's warehouse.

(16) Schenker AS replied that the containers had not yet been delivered to Portland, so that Genfoot had time to cross check. Schenker AS repeated that Portland was now the owner of the containers since Portland had received original bills of lading and passed them on to Schenker AS. The company also wrote that it had received several instructions to deliver the goods to Portland. Finally, Schenker AS wrote that Genfoot in any case had time to cross check it since the containers would not be released that day.

(17) Genfoot replied: "Good. Make sure they do not get delivered". Genfoot also told Schenker AS to call if Portland were to request delivery, and Genfoot would find a solution. Genfoot asked to be sent the bills of lading for the goods in transit from Hamburg to Oslo so that Genfoot could control the load, and referred to Schenker Canada's repeated instruction that Schenker AS pass them on.

(18) Next, still on 24 September 2014, Schenker Canada wrote to Genfoot and Schenker AS that Portland had already requested release of [BH1]the containers, so that Schenker was no longer in a legal posistion to retain them. It was repeated that Genfoot had time to cross check, and Genfoot was requested to state when the stoppage would cease and to come up with a plan.

(19) On 25 September 2014, Schenker AS, also, notified Genfoot and Schenker Canada that the containers had been released to the recipient in Norway, which meant that Schenker AS could not stop them. Schenker AS wrote that Genfoot could be informed whether or not the containers had been delivered, but that Schenker AS would deliver them as soon as Portland was ready to receive them. Schenker AS regretted the situation, but maintained that once the recipient had received the original bills of lading and passed them on to Schenker AS, Portland would become the owner of the containers.

(20) On 25 September 2014, Schenker AS informed Portland that the containers would not be delivered until Portland had paid Schenker AS's claim for duty, VAT, port rent and warehouse rent, including for previously unpaid deliveries. If necessary, Schenker AS would sell the goods under section 14 of the general conditions of *Nordisk speditørforbund* – NSAB 2000. Schenker AS told Portland that for a payment of NOK 2 million, Schenker AS would release five containers of choice. After some discussion, the parties agreed that all containers would be released if Schenker AS recived the mentioned amount, although an amount was still outstanding. Motorcompaniet AS – DNB's intervener under the terminated engagement with Portland – then transferred NOK 2 million directly to Schenker AS.

(21) On Saturday 27 September 2014, the containers in question were delivered to Portland.

(22) Portland became subject to bankruptcy proceedings on 6 October 2014.

(23) On 24 September 2015, after a futile dialogue between the parties, Genfoot brought an action against Schenkerocean. On 8 July 2016, Oslo District Court gave the following judgment:

> **"1. SCHENKERocean Ltd. will within two weeks of the service of the judgment pay to Genfoot Inc. USD 400,000 - fourhundredthousand – with the addition of interest on overdue payment from 18 March 2015 until payment is made.**
>
> **2. SCHENKERocean Ltd. will pay costs to Genfoot of NOK 579,459 – fivehundredandseventyninethousandfourhundredandfiftynine – with the addition of interpretation costs and court fee."**

(24) The district court found that containers #994 and #995 had been delivered contrary to Genfoot's order, and that container #049 had been delivered without a bill of lading being presented. Damages were granted on those grounds.

(25) Schenkerocean appealed the judgment to Borgarting Court of Appeal. On 16 January 2018, the court of appeal gave the following judgment, corrected on 27 April 2018:

> **"1. SCHENKERocean Ltd. will within two weeks of the service of the judgment pay to Genfoot Inc. USD 49 952 – fortyninethousandninehundredandfiftytwo – with the addition of interest on overdue payment from 18 March 2015 until payment is made.**
>
> **2. Costs are not awarded, neither in the district court nor in the court of appeal."**

(26) The court of appeal found that Schenkerocean was only liable for the delivery of one of the containers without presentation of a bill of lading, and granted damages solely on that basis.

(27) Genfoot appealed against the application of the law[1]. […]. Schenkerocean submitted a derivative appeal against the application of the law and the procedure. On 17 April 2018, the Supreme Court agreed to hear Genfoot's appeal and the derivative appeal from Schenkerocean, limited to the issue of procedural errors. On the day before, Schenkerocean had requested correction of the court of appeal's judgment on the same basis as the appeal against the procedure. The court of appeal corrected the judgment on 27 April 2018 in line with Schenkerocean's request. Thus, the derivative appeal was no longer of legal interest, and was closed by the Supreme Court's Appeals Selection Committee in an order of 11 October 2018.

(28) The appellant – *Genfoot Inc.* – contends:

(29) […]

(30) The conditions for Genfoot exercising its right of stoppage towards Portland were met, see Article 71 of the United Nations Convention on Contracts for the International Sale of Goods – CISG – which had been adopted as Canadian law. The goods were sold on credit and had not been paid for. When Portland's bank terminated the engagement, Portland's economy deteriorated, which gave Genfoot a right to stop the delivery. The goods had not yet been delivered to Portland when the stoppage order was given. Any failure to notify the buyer of the stoppage is irrelevant when the seller does not succeed in stopping the delivery. In any case, the legal effect of a failure to notify is not that the right of stoppage is lost. Finally, a possible loss of the right of stoppage would not have occurred until after

[1] This and other parts of the judgment concerning procedural and other questions deemed to be without interest for foreign readers have been omitted from the translation.

Schenkerocean's omission to comply with the stoppage order, and is thus not relevant in the assessment of Schenkerocean's conduct.

(31) As carrier, Schenkerocean had a duty to comply with the stoppage order from Genfoot, although Genfoot was not the principal in the contract of carriage. Schenkerocean was well aware of Portland's failing economy. Due to the negligence of not complying with the order, damages are justified.

(32) The liability for damages has not ceased. It is of no consequence that the right of stoppage had been waived in the contract of carriage between Portland and Schenkerocean, and that Genfoot passed the bills of lading on to Portland. The conditions in section 5-1 of the Compensatory Damages Act are, for the same reason, not met. Schenkerocean must carry the full responsibility for its own ignorance of the law. […].

(33) Genfoot Inc. has submitted this prayer for relief:

> **"1. The appeal from Genfoot Inc. is to be heard.**
>
> **2. SCHENKERocean Ltd. is to pay to Genfoot Inc. USD 350 048 - with the addition of interest on overdue payment from 8 March 2015 until payment is made.**
>
> **3. SCHENKERocean Ltd. is to pay costs in the district court, the court of appeal and the Supreme Court."**

(34) The respondent – *SCHENKERocean Ltd.* – contends:

(35) […]

(36) Genfoot as seller could not exercise a right of stoppage towards the buyer Portland. The conditions for exercising such a right were not met, see CISG Article 71 (2). […]. Thirdly, the goods had already been delivered to Portland, through the company's shipper, when the stoppage order was given. Forthly, the right of stoppage was lost in any case, as Portland had received no written notice of the stoppage, see CISG Article 71 (3) and the agreement between Genfoot and Portland.

(37) Since Genfoot was not in a position towards Portland to order stoppage, Schenkerocean cannot be liable for not having complied with such an order.

(38) Under any circumstances, Schenkerocean had no obligation to comply with an unfounded stoppage order from Genfoot. Genfoot made no attempts to substantiate a right of stoppage towards Schenkerocean.

(39) Regardless of whether or not an obligation existed to assess and possibly comply with the stoppage order, Schenkerocean cannot be held liable.

(40) Firstly, the right of stoppage had been waived under the contract of carriage and in the bills of lading. Genfoot was aware of that. Yet, Genfoot endorsed the bills of lading in blank and passed them on to Portland. Thus, Genfoot surrendered the control over the goods.

(41) Secondly, Genfoot contributed to the delivery of the goods to Portland by handing Portland a bill of lading endorsed in blank instead of presenting original bills of lading to Schenkerocean and thus stopping the delivery, and by not documenting the right of stoppage, see section 5-1 of the Compensatory Damages Act.

(42) […]

(43) SCHENKERocean Ltd. has submitted this prayer for relief:

> **"Principally:**
>
> **1. The appeal is to be dismissed.**
>
> **2. Genfoot Inc. is to pay costs in the Supreme Court with the addition of interest on overdue payment from the due date until payment is made.**
>
> **In the alternative:**
>
> **1. The appeal is to be dismissed.**
>
> **2. Genfoot Inc. is to pay costs in the district court, the court of appeal and the Supreme Court with the addition of interest on overdue payment from the due date until payment is made."**

(44) *I have concluded* that the appeal must succeed.

(45) […]

(46) […]

(47) […]

(48) […]

(49) […]

(50) […]

(51) […]

(52) […]

(53) […]

(54) I will now turn to the alleged right of stoppage between the seller and the buyer. For Genfoot's claim for damages against the carrier Schenkerocean for the non-compliance with Genfoot's stoppage order to succeed, it is a condition that Genfoot as the seller had a right of stoppage towards Portland as the buyer.

(55) Although the claim for damages is governed by Norwegian law since the loss occurred here, the parties agree that the distribution agreement is governed by "the laws of Quebec",

see also section 3 of the Act concerning international private law rules for sales of goods. This also covers the right of stoppage.

(56) CISG applies both as state legislation in Quebec and as national legislation in Canada. CISG Article 71 regulates the right of stoppage:

> **"(1) A party may stop the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:**
> ***(a)*** **a serious deficiency in his ability to perform or in his creditworthiness; or**
> ***(b)*** **his conduct in preparing to perform or in performing the contract.**
>
> **(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.**
>
> **(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."**

(57) CISG Article 7 states that, "[i]n the interpretation of the Convention, regard must be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international trade". Section 61 of the Norwegian Sale of Goods Act generally corresponds to CISG Article 71, see Proposition to the Odelsting No. 80 (1986–1987) page 111.

(58) Schenkerocean has a number of objections to Genfoot's alleged right of stoppage towards Portland.

(59) […]

(60) […]

(61) […]

(62) […]

(63) […]

(64) Thirdly, Schenkerocean has submitted that the goods had already been delivered to Portland when stoppage was ordered, since Schenker AS from the time the goods had been unloaded in Oslo acted as forwarding agent and Portland's representative.

(65) The right of stoppage applies until the goods have been handed over, so that it is no longer possible for the seller to prevent the physical delivery, see CISG Article 71 (2). One cannot generally disregard that an agent for the carrier at a given time becomes a representative for the buyer. However, since this would have affected the right of stoppage, among other things, verifiability considerations strongly suggest that such a transition must be clearly agreed, amplified and documented. No documentation – or other circumstances – exist

suggesting that such a representation had been agreed in the case at hand. Hence, there is no reason to distinguish between the carriage and the warehousing at the port of Oslo before the delivery from Schenker AS to Portland. Moreover, Schenkerocean itself must have found that Portland had not received the goods before Motorcompaniet AS – as the bank's intervener – paid outstanding carriage costs and fees, and the goods were delivered to Portland's warehouse on 27 September 2014. Until that date, Schenkerocean had exercised its right of retention under section 14 NSAB 2000 – which means that Schenkerocean was in legal possession of the goods. In my view, it is thus clear that Schenkerocean's unloading of the goods in Oslo was not delivery to Portland's representative with the result that the right of stoppage was lost.

(66) Fourthly, Schenkerocean has contended that the right of stoppage was lost in any case, as no written stoppage notice had been given, see CISG Article 71 (3) and the purchase agreement between Genfoot and Portland.

(67) CISG Article 71 (3) does not explicitly state the effect of the lack of notice. The use of the words "immediately give notice" suggests that it is not a requirement that notice is given before or simultaneously with the seller ordering stoppage – but immediately after stoppage has been completed. This weighs against notice as a requirement for exercising a right of stoppage. Also the structure of Article 71 – placing the duty to give notice in the third subsection – indicates, as I see it, that notice is not required.

(68) As mentioned, CISG Article 7 (1) establishes that the Convention should be interpreted with regard to uniformity. International case law thus becomes particularly relevant in the interpretation. The respondent has referred to case law mentioned in UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016, page 321. I cannot see that, based on the three judgments referred to – which are not from national supreme courts – it can be concluded that the very right of stoppage is lost if the buyer has not been notified. I add that legal literature expresses different views on this issue.

(69) The purpose of the duty to give notice is that the buyer has a chance to adjust to the stoppage, for instance by guaranteeing its payment ability, alternatively cancelling further carriage and notifying the next sales stage of the delay. If notice is not given, potential damaging effects can be remedied by claiming damages from the seller for any losses sustained by the buyer, see for instance section 61 subsection 3 of the Norwegian Sale of Goods Act. Under Norwegian law, it is clear that notice is not a condition for exercising a right of stoppage, see Proposition to the Odelsting No. 80 (1986–1987) page 112.

(70) Against this background, I conclude that stoppage under CISG Article 71 (2) is not conditional on notice being given to the buyer under CISG Article 71 (3).

(71) For the same reason, it has no relevance that Genfoot and Portland had agreed in the distribution agreement from 2011 that notifications were to be in writing.

(72) Also, the potential liability of the carrier Schenkerocean occurred because the company delivered the goods despite Genfoot's stoppage order. To Schenkerocean, stoppage was out of the question because Portland had handed over the bills of lading. When the goods all the same were retained for a few days, this was due to Schenkerocean's own claim. After Schenkerocean had received payment, the goods were delivered to Portland. The lack of a

stoppage notice from Genfoot to Portland under these circumstances has no relevance to the carrier's liability.

(73) The question is thus whether Schenkerocean as carrier had an obligaton to comply with Genfoot's stoppage order.

(74) This is an issue of duty of care and tort – which is governed by Norwegian law since the loss was sustained in Norway. The parties agree that section 61 of the Sale of Goods Act only applies in their contractual relationship, and not towards the carrier. I concur, see also CISG Article 71 (2) second sentence.

(75) Furthermore, the parties agree that an independent carrier may indeed have an obligation to comply with an stoppage order from a seller that is not a party to the contract of carriage. This is an obligation of a quasi-contractual nature: the carrier has a duty of loyality towards both parties in the underlying purchase-seller relationship. Since the carriage takes place over time, unforeseen events may occur while the goods are being carried. This may affect the contractual relationship between the seller and the buyer. In turn, it may imply that an independent carrier upon request must respect the underlying legal relationship, without consideration for which of the parties is party to the contract of carriage. The right of stoppage in connection with credit purchases is probably the best example of that. The parties to the case at hand, however, disagree in terms of *when* a carrier assumes an obligation to comply with such a stoppage order.

(76) Section 302 subsection 1 of the Maritime Code is a natural starting point when dealing with carriage involving bills of lading:

> **"The person who presents a bill of lading and, through its wording or, in the case of an order bill through a continuous chain of endorsements or through an endorsement in blank, appears as the rightful holder, is prima facie regarded as entitled to take delivery of the goods."**

(77) Hence, the normal situation is any party thus appearing to be rightful holder of a bill of lading is entitled to have the goods delivered by the carrier.

(78) At the same time, section 307 subsection 1 of the Maritime Code sets out that the right of a seller to prevent delivery of the goods to the buyer applies even though he has passed the bill of lading on to the buyer, i.e. the right of stoppage is not lost.

(79) Thus, the carrier may face a dilemma if confronted with a stoppage order that collides with a request for delivery of the goods to the holder of the bill of lading. Erling Selvig writes the following on such a scenario in *Fra kjøpsretten and transportrettens grenseland* [from the borderland between purchase law and transport law] 1975 on 49:

> **"Then, however, it may be difficult for the seller to exercise his right, but if he documents to the carrier that he is entitled to order stoppage, the carrier cannot, by referring to the buyer's right as holder of the bill of lading, deliver the goods to the buyer with a liberating effect."**

(80) I agree with this principle. When a carrier receives an stoppage order from the seller, a duty of care sets in: the carrier must consider whether or not he should comply with the

order. It is not sufficient to refer to the bill of lading presented by the buyer, see section 307 subsection 1 of the Maritime Code.

(81) If the carrier does not possess the knowledge to determine whether the order is legitimate, he must express this to the seller, so the seller has a chance to document its right. This applies in particular if the buyer contends that the conditions for stoppage are not met. Based on the knowledge the carrier thus acquires, he must decide whether to stop or to deliver the goods.

(82) If the carrier receives documentation or otherwise learns that the purchase price will not be paid, which would give the seller a right of stoppage, the carrier must comply with the stoppage order. The manner in which the carrier learned about the circumstances giving the seller a right of stoppage cannot be decisive. Normally, the seller will state the reason for the stoppage order to the carrier as the carrier does not possess that knowlege. However, it cannot be a condition that the seller informs the carrier. The question is whether the carrier demonstrates due care when delivering the goods based on the knowledge he has possessed, has received or ought to have acquired.

(83) The carrier's choice between the various options must in principle be assessed according to traditional standards: is it demonstration of due care – based on the carrier's knowledge – to stop or to deliver the goods? This applies both when a bill of lading has been presented and when it has not.

(84) In this assessment, the time aspect and particularly the carrier's need to unload the goods may be relevant considerations. Furthermore, the potential damaging effects of delivery versus stoppage may differ depending on the type of goods.

(85) When a bill of lading has been prepared for the carriage, this too will be relevant in the assessment of negligence. As pointed out by Svante Johansson, *Stoppningsrätt under godstransport* [right of stoppage during carriage of goods] 2001 pages 377–382, the existence of the rules on legal effect of bills of lading in the Maritime Code – and the use of a bill of lading – indicates that the carrier, to be obliged to comply with the stoppage order, must posess more certain knowledge than is otherwise required of him.

(86) Besides, faced with a choice between complying and not complying with a stoppage order, the carrier may, as an alternative, ask the seller to present a bill of lading – if the seller possesses such a document – and then warehouse the goods in accordance with the principles in section 303 of the Martime Code. That would diminish the relevance of the the right of stoppage.

(87) I will now turn to the individual assessment of the case at hand.

(88) Schenkerocean contends that it is not liable since the right of stoppage was waived in the contract of carriage with Portland, since Genfoot was familiar with this through the bills of lading, and since Genfoot endorsed the bills of lading in blank and passed them on to Portland.

(89) Genfoot has not adopted the contract of carriage or the terms of the bills of lading. The company is thus not bound by a clause in Schenkerocean's contract of carriage with

Portland under which the right of stoppage towards the carrier is waived. Nor is Genfoot bound by the clause in the bills of lading only by having received them.

(90) Furthermore, Genfoot is not bound by its conduct. The waiver of the right of stoppage in the contract of carriage between Portland and Schenkerocean combined with Genfoot, possibly aware of this, endorsing in blank the bills of lading before passing them on to Portland, cannot entail that the right to order Schenkerocean to stop the delivery was lost – or that Schenkerocean's liability automatically lapsed.

(91) It is true that section 292 subsection 3 first sentence of the Maritime Code sets out that the bill of lading governs the conditions for carriage and delivery of goods in the relation between the carrier and a holder of the bill of lading other than the sender, i.e. the party having entered into the contract of carriage with the carrier, see section 251 of the Maritime Code. The party receiving the goods based on the bill of lading thus establishes a contractual relationship with the carrier. If Genfoot had invoked the bills of lading, i.e. demanded the goods delivered on that basis, it would have been bound by the terms therein. But that it not the situation in the case at hand.

(92) Genfoot's claim for damages does not derive from an order of delivery to Genfoot legitimised by bills of lading. Instead, the company's claim derives from the carrier Schenkerocean's duty of loyalty towards the parties to the underlying purchase-sale relationship which gives Genfoot a right to order the delivery to Portland stopped.

(93) Admittedly, the seller will generally be in a position to appreciate the carrier's motivation for waiving his duty to comply with an stoppage order, as the carrier needs to finish his assignment without hindrances and unload the goods upon arrival. The same applies to the carrier's problem with choosing between stoppage and delivery. However, I do not consider such circumstances crucial in the case at hand.

(94) In the case at hand, Schenkerocean – or at least Schenker AS with which Schenkerocean must be identified – was aware of Portland's failing economy. Portland owed Schenker AS large amounts, and the latter retained the goods with a legal basis in NSAB 2000 section 14. The goods were not delivered until after some discussions and after the third party Motorcompaniet AS had paid parts of the outstanding amount. When, in such a situation, a stoppage order was given by Genfoot, and discussions arose as to whether to stop or deliver, Schenkerocean cannot freely ignore the order by referring to its receipt of the bills of lading.

(95) Schenkerocean contends that Genfoot never documented its right of stoppage. Based on what I have said, that cannot be decisive. Schenkerocean did not ask Genfoot for documentation when Genfoot repeatedly ordered the delivery stopped. On the contrary, Schenkerocean took the stand that Portland became the owner once it had passed on the bills of lading – implicitly that the underlying legal relationship between Genfoot and Portland was irrelevant. Whether Genfoot should have corrected Schenkerocean's ignorance of the law, is not a question of documenting conditions for exercising a right of stoppage. As a professional player in the transportation industry, Schenkerocean must clearly carry the risk for its own lack of knowledge of section 307 of the Maritime Code.

(96) In my view, Schenkerocean acted negligently towards Genfoot in this situation by delivering the goods to Portland.

(97) Schenkerocean has contended that it must released from liability since Genfoot contributed to the goods being delivered to Portland by passing on a bill of lading endorsed in blank to Portland, by not presenting original bills of lading and by not documenting its right of stoppage, see section 5-1 of the Compensatory Damages Act.

(98) This cannot succeed either. The use of a bill of lading is ordinary pratice. The unlawful delivery of the goods is a result of Schenkerocean's mistaken belief that it had an unconditional obligation to deliver the goods to the party presenting the bill of lading – in conflict with the basic rule in section 307 subsection 1 of the Maritime Code and the stoppage order. The loss would indeed have been avoided if Genfoot itself had presented a bill of lading instead of exercising its right of stoppage towards Schenkerocean. However, Genfoot ordering stoppage instead of requesting the goods delivered or warehoused by the use of a bill of lading is legitimate. After Genfoot had ordered the stoppage, and Schenkerocean's express opinion was that the goods had already been delivered because Portland had passed on a bill of lading, Genfoot could hardly be expected to have reversed the allegedly completed delivery by presenting a bill of lading itself.

(99) Against this background, release from, or reduction of, liability based on the contention that Genfoot should have documented its right of stoppage cannot succeed either.

(100) Hence, there is no basis for making Genfoot jointly liable for Schenkerocean's negligence.

(101) […]

(102) […]

(103) Schenkerocean has not succeeded with any of its objections. Under this assumption, the parties have agreed on the size of the damages and the due date with respect to interest: USD 350 048 with the addition of interest on overdue payment from 18 March 2015. Thus, judgment will be given to that effect.

(104) The appellant is the successful party, and entitled to full compensation for its costs in all instances, see section 20-2 subsection 1 and section 20-9 subsection 2 of the Dispute Act. I see no reason to deviate from this. In the district court, the appellant claimed NOK 613 602, including legal fees of NOK 559 200. In the court of appeal, the appellant claimed NOK 871 021, including legal fees of NOK 781 050. In the Supreme Court, the appellant has claimed NOK 577 726, including legal fees of NOK 535 500. This equals a total of NOK 2 062 349 kroner. The case has been broadly presented by the respondent. My assessment is that the costs have been necessary, see section 20-5 subsection 1, and the costs are awarded in full.

(105) Against this background, I vote for this

J U D G M E N T :

1. SCHENKERocean Ltd. will pay to Genfoot Inc. USD 350 048 – threehundredandfiftythousandandfortyeight – plus interest on overdue payment from 18 March 2015 until payment is made.

2. SCHENKERocean Ltd. will pay to Genfoot Inc. costs in the district court, the court of appeal and the Supreme Court of NOK 2 062 349 – twomillionsixtytwothousandthreehundredandfortynine within 2 – two – weeks of the service of the judgment.

(106) Acting justice **Sæbø:** I have arrived at a different conclusion than Justice Høgetveit Berg. In my view, the appeal must be dismissed because the waiver of the right of stoppage in the bill of lading implies that Schenkerocean's non-compliance with Genfoot's stoppage order was legitimate.

(107) The bill of lading says the following on the right of stoppage:

> **"Once the Goods have been received by the Carrier for Carriage, the Merchant shall not be entitled either to impede, delay, stop or stop or otherwise interfere with the Carrier's intended manner of performance of the Carriage or the exercise of the liberties conferred by this Bill of Lading …, for any reason whatsoever including but not limited to the exercise of any right of stoppage in transit conferred by the Merchant's contract or sale or otherwise."**

(108) The definition of "Merchant" comprises among others "the consignee", which in our case is Genfoot.

(109) Applied to the case at hand, I interpret the clause to mean that Schenkerocean is not obliged to comply with Genfoot's instruction not to deliver the goods to Portland.

(110) I agree with Justice Høgetveit Berg that there is no basis for considering Genfoot – who is not party to the contract of carriage – as having adopted the clause. As opposed to Justice Høgetveit Berg, I find that section 292 subsection 3 of the Maritime Code implies that Schenkerocean is not obliged to comply with Genfoot's stoppage order. The provision reads:

> **"A bill of lading governs the conditions for carriage and delivery of the goods in the relation between the carrier and a holder of the bill of lading other than the sender. Provisions in the contract of carriage which are not included in the bill of lading cannot be invoked against such a holder unless the bill of lading includes a reference to them."**

(111) Before turning to the interpretation of the provision in section 292 subsection 3 of the Maritime Code, I note that my perception based on the presentation of evidence, is that clauses containing a right of stoppage are not unusual in agreements on cargo transportation. It is likely that the clause would have been part of the contract of carriage also if it had been entered into between Genfoot and Schenkerocean.

(112) I also mention that the waiver will not have direct relevance for the seller's right of stoppage towards the buyer. Since the delivery of the goods to the buyer is conditional on the buyer depositing a bill of lading, see section 304 of the Maritime Code, the seller's right of stoppage towards the buyer will be protected by the seller keeping the bills of lading until payment is received. If the seller, like in our case, has kept only one of several bills of lading, he may prevent delivery to the buyer by presenting his copy so that the carrier can warehouse the goods, see section 303 of the Maritime Code.

(113) I also note that chapter 13 of the Maritime Code does not regulate the right that the seller may have to order the carrier to stop the delivery to the buyer. Hence, waiving this right is not in conflict with a mandatory rule of law, see section 254 subsection 1 of the Maritime Code.

(114) I will now take a closer look at the interpretation of section 292 subsection 3 of the Maritime Code. According to the first sentence, a bill of lading "governs the conditions for carriage and delivery of the goods in the relation between the carrier and a holder of the bill of lading other than the sender". I find that this clause, under which the carrier is not obliged to comply with the seller's stoppage order, falls directly within the scope of "conditions for carriage and delivery of the goods".

(115) Admittedly, the basis for the provision in section 292 subsection 3 is that the negotiable character of the bills of lading entails that clauses in the contract of carriage that are not included or referred to in the bills of lading, cannot be invoked towards a holder of the bill of lading other than the carrier's contractual party, see Norwegian Official Report 1993:36 page 44 second column. However, when the clause *is* included in the bill of lading and it is not in conflict with mandatory rules of law, it must – as long as it concerns the carriage and delivery of the goods – be respected also by the holder of the bill of lading, as if he himself were party to the contract of carriage.

(116) Although the statement does not directly relate to the question whether the holder of the bill of lading is *bound* by the conditions therein on waiving of the right of stoppage, my perception is that the Maritime Code Committee, in Norwegian Official Report 2012:10 – where it discusses ratification and possibly implementation into Norwegian law of the so-called Rotterdam rules from 2008 – generally expresses the same on 42:

> **"The carriage documents states the conditions for the carriage, thus defining the expectation the acquirer of the document (who is not the sender) may have (section 292 subsection 3 of the Maritime Code; section 325 of the bill.)"**

(117) I cannot see that it – as held by Justice Høgetveit Berg – matters whether the holder of the bill of lading invokes the terms therein. According its wording, the bill of lading governs the relationship between – in our case – Genfoot and Schenkerocean as concerns carriage and delivery of the goods. In my view, this is the case regardless of whether the right asserted by Genfoot has a legal basis in the bills of lading or other source of law; what matters is that the clause concerns the carriage and the delivery of the goods. By Genfoot's acquisition of the bills of lading, the clause therein on the waiver of the right of stoppage becomes a part of the legal relationship between Genfoot and Schenkerocean.

(118) Although I find that the interpretation result is justified alone by what has been said, I add that the interest of the carrier implies that it must be possible to make contractual provisions on carriage and delivery of the goods binding also towards parties other than the contractual party, regardless of who enters into the contract of carriage with the carrier. As I see it, this view is supported in section 282 subsection 1 of the Maritime Code, which, admittedly, is not relevant to the issue at hand.

(119) In my view, the waiver of the right of stoppage is effective towards the holder of the bills of lading. Thus, Genfoot is at the outset not entitled to prevent Schenkerocean from delivering the goods to the buyer, although Genfoot holds a right of stoppage. I assume nevertheless that the carrier, despite the right of stoppage being waived, in extraordinary

cases must comply with such a stoppage order. This applies to cases where the carrier *knows* that the conditions for exercising a right of stoppage have been met. Although the wording of the clause comprises such cases, basic loyalty considerations and general views on the scope of waivers in contracts entail that such a limitation must be made to the scope of the clause. The natural objective of the clause is to protect the carrier from being compelled to make inquiries to assess the legitimacy of a stoppage order if it is not evident that the seller holds such a right. In cases like the one at hand, where Schenkerocean had to make inquiries to verify whether Genfoot had right of stoppage, the clause is particularly appropriate. In my view, the intervention payment from Motorcompaniet AS of parts of Portland's debts also did not create a situation that helped Schenkerocean see that the conditions for stoppage were met between Genfoot and Portland. Genfoot could have prevented delivery to the buyer by submitting, on its own, a copy of the bills of lading to the carrier, see section 303 of the Maritime Code.

(120) As I have concluded that the waiver of the right of stoppage in the bills of lading entailed that Schenkerocean did not have an obligation to comply with the order from Genfoot to Portland to stop the delivery, there is no need for me to address other legal issues in the case. Yet, I mention that I agree with Justice Høgetveit Berg, and support his grounds in all material respects in that Genfoot had a right of stoppage towards Portland when the order was given to Schenkerocean, and that the case is not to be dismissed.

(121) Based on my view of the significance of the waiver of the right of stoppage in the bills of lading, I do not consider it necessary to address the implications of Schenkerocean's duty of care in a situation where the right of stoppage has not been waived in the bills of lading.

(122) Justice **Kallerud:** I agree with the justice delivering the leading opinion, Justice Høgetveit Berg, in all material respects and with his conclusion.

(123) Justice **Bergsjø:** Likewise.

(124) Justice **Bull:** Likewise.

(125) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. SCHENKERocean Ltd. will pay to Genfoot Inc. USD 350 048 – threehundredandfiftythousandandfortyeight – plus interest on overdue payment from 18 March 2015 until payment is made.

2. SCHENKERocean Ltd. will pay to Genfoot Inc. costs in the district court, the court of appeal and the Supreme Court of NOK 2 062 349 – twomillionsixtytwothousandthreehundredandfortynine within 2 – two – weeks of the service of the judgment.