Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XV, 2022, no. 1, pp. 357–370
https://doi.org/10.32084/tkp.4477

A TIME RELATION IN CARRIAGE AS A PREMISE FOR CARRIER LIABILITY FOR DAMAGE TO THE GOODS

Dr. habil. Krzysztof Wesołowski, University Professor

Faculty of Law and Administration, University of Szczecin, Poland
e-mail: krzysztof.wesolowski@usz.edu.pl; https://orcid.org/0000-0002-4427-317X

Abstract. The author analyses the premise for carrier liability for damage to the goods, the so-called "time relation in carriage." The author tires to specify the time frame, relevant from the point of view of application of provisions on carrier liability for the condition of the goods to be carried, under national and international legislation that regulates the carriage contract. The author also analyses the problem of the burden of proof in a time relation in carriage under the general rule of the burden of proof in civil law and presumptions in regulations on the carriage contract. The relevant discussion enables conclusions on the legal nature of the time relation in carriage as the case of a non-causal normative relation.

Keywords: carriage of goods, premises of liability, transit period

INTRODUCTORY REMARKS

Provisions of the national and international carriage law do not impose the burden of proving a specific reason of the damage caused by the carrier on the person entitled to seek redress for damage to the goods (total or partial loss of or damage to the goods). Such regulation is fully understandable given that the person entitled to seek redress (consignor or consignee) usually has no way of looking at the process of the shipment's travels. Therefore, the carrier is liable for the condition of the goods (cargo, load) also when the cause for the damage is not explained. Nevertheless, it is crucial to establish that the damage to the goods was made in the period between acceptance for carriage and delivery (Article 65(1) of the Polish Carriage Law,[1] Article 165(1) of the Polish Maritime Code,[2] Article 23(1) UR/CIM[3]). I once called this circumstance

[1] Act of 15 November 1984, Journal of Laws of 2020, item 8 [hereinafter: CL].
[2] Act of 18 September 2001, Journal of Laws of 2018, item 2175 as amended [hereinafter: MC].
[3] Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM) – Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May

ISSN 1899-7694
e-ISSN 2719-7379

"time relation in carriage" [Wesołowski 1995, 26]. It is one of the premises of carrier liability for damage to the goods. This term was accepted in the relevant literature [Szanciło 2008, 292; Idem 2013, 228; Ambrożuk 2011, 92; Stec 2005, 246] and in judicial decisions.[4] We are talking here about damage made to the goods during the broadly understood carriage period.

This time, I would like to attempt to specify precisely the framework of the transit period understood like this, relevant from the point of view of carrier liability in domestic law and under international carriage conventions. The period between accepting the shipment for carriage and its delivery to the consignee does not only mean a period of real movement of the goods, but also the period in which the shipment is in the charge of the carrier.[5] Depending on the transport branch, shipment type (full truck or break bulk load) and other circumstances (including what the parties themselves agree), this period may include the time when the goods are being secured on the means of transport, the time of loading (off-loading) or even periods before the loading and after the off-loading.

This study also aims to specify the legal character of this premise of carrier liability. When preparing this study, I performed a linguistic analysis of the laws in force and a legal comparative analysis that covered domestic legislation (Civil Code,[6] Transport Law and Maritime Code) and international conventions[7] that regulate the carriage contract in individual transport branches. I analyse relevant case law of European courts.

1. APPEPTANCE AND DELIVERY OF THE GOODS AS MEASURABLE MOMENTS FOR SPECIFYING THE TRANSIT PERIOD

Regulations of the carriage law do not define terms "acceptance" and "delivery" of the shipment.[8] They inspire numerous doubts. However, the theory

1980, Journal of Laws of 2007, No. 100 item 674 as amended.

[4] Judgment of the Supreme Court of 29 September 2004, ref. no. II CK 24/04, Lex no. 194133.

[5] The concept of charge is directly referred to in Article 18(3) of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), Journal of Laws of 2007, No. 37, item 235.

[6] Act of 23 April 1964, Journal of Laws of 2020, item 1740 as amended.

[7] The following conventions are meant here: UR CIM; Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Signing Protocol of 19 May 1956, Journal of Laws of 1962, No. 49, item 238 as amended; the Montreal Convention; the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (The Hague Rules) of 25 August 1924, Journal of Laws of 1937, No. 33, item 258 amended by the Protocol of 23 February 1968, Journal of Laws of 1980, No. 14, item 48.

[8] The International Road Transport Union (IRU) has put forward their proposals for such definitions to be applied in CMR. They were as follows, respectively: "handing over of the goods for carriage to the carrier that agrees to it" and "an act by which the carrier hands over the goods

of taking the shipment in one's charge is most commonly accepted [Clarke 2009, 103; Haak 1986, 181; Loewe 1976, 361].[9] According to this concept, the essence of accepting the goods for carriage and of their handing over after the carriage is to take control over these goods, even though it is not done personally but by other persons who act on behalf of the person that takes control over the shipment [Haak 1986, 181]. The real taking possession of the shipment is secondary.[10] Accepting the goods for carriage is a two-way act that requires correlated steps from both parties of the contract. Therefore, if the consignor leaves the goods (even after the contract was executed) without the carrier's acceptance, it does not constitute a situation where carrier liability is based on laws regulating the carriage contract. In such a case we cannot talk about accepting goods for carriage [Heuer 1975, 61; Clarke 2009, 104; Putzeys 1981, 507, 523; Libouton 1987, 79].[11]

Acceptance of the shipment for carriage may be done directly onto the vehicle or in another place (e.g. in a forwarding point or in the carrier's warehouse). This depends on the transport branch and shipment type. For goods carried by rail and by road the rule is to accept shipments directly onto the vehicle. Break bulk cargo is an exception here. For air transport, shipments are as a rule accepted in the carrier's forwarding point. In carriage by sea the rule is to accept the load onto a vessel, though there are many exceptions here too. This question is irrelevant from the point of view of carrier liability. If he accepts the shipment for carriage, then he is liable according to rules laid down in transport law regulations, irrespective of the place of accepting the shipment for carriage (and its delivery after the carriage has been performed). In consequence, in the context of application of laws on carrier liability, it does not matter whether the damage occurred during the very movement of

to the consignee". It seems that including these definitions would not bring much. Apart from being clearly obvious, they are also asymmetric. While carrier's acceptance is mentioned in the context of handing things over for shipment, no such element is mentioned in reference to the consignee who accepts the goods after the carriage.

[9] This concept is particularly clear in the German case law (e.g. Oberlandesgericht (German Court of Appeal) Hamburg in its judgement of 11 March 1976, Neue juristische Wochenschrift – Rechtsprechungsreport 1976, 2077 and in a judgement of 14 May 1996, Transportrecht 1997, 101; in the Austrian case law (judgement of the Obersten Gerichtshof (Austrian Supreme Court) of 28 March 2000, European Transport Law 2003, 23; also in a judgement of 4 November 1981, Transportrecht 1982, 80 and in a judgement of 7 July 1989, Versicherungsrecht 1990, 1180) and in the Italian case law (judgement of the Corte di Cassazione of 10 February 2003, European Transport Law 2003, 776). It is also seen in Belgian judicial decisions (judgment of the Cour d'Appel d'Anvers of 1 March 1999, European Transport Law 2000, 544–551).

[10] See Messent and Glass 1995, 105 also point to this aspect.

[11] However, see judgement of the Austrian Obersten Gerichtshof of 11 December 1986, Strassengüterverkehr 1985, No. 5, 18 in which the court decided that if the carrier receives clear instructions from the consignor to leave the goods in a specific place even without the consignee present, then by doing so the carrier performs delivery of the goods.

the shipment or when it was in the charge of the carrier before the carriage or after the carriage has been performed. This problem is regulated differently only in maritime law under the Hague-Visby Rules.[12] Regulations of this convention that pertain to carrier liability for the load accepted for carriage are only applicable for damage done in the period from the time when the goods are loaded on to the time they are discharged from the ship (Article 1(e)). Therefore, they do not cover the periods of the carrier's having the shipment (load) in their charge before loading it onto the vessel and after it is discharged. Maritime carrier liability for damage done in this period results from provisions other than those laid down in the convention. However, contractual extension of principles of liability resulting from the Hague-Visby Rules for damage caused in these periods is not ruled out.[13] On the other hand, the Polish maritime code, which relies on the Hague-Visby Rules in its regulation of carrier liability for damage to the goods, refers to the moment of accepting the load for carriage and delivering it to the consignee (Article 165(1) MC), with the proviso that if the bill of lading was issued, then pursuant to Article 169(3)(1) MC the parties may stipulate separate rules for carrier liability for the period from accepting the goods for carriage to the beginning of loading them onto the vessel and from finishing the offloading to delivering the goods to the consignee.

It may happen that the goods are handed over to the carrier before the carriage contract is executed. Then we are dealing with the question of the basis of liability for damage that may occur in this period. One view in the literature claims that in such a situation too regulations relevant to a carriage contract will be applied [Helm 1966, 97]. However, this opinion is not substantiated as a rule. Often the carrier is in possession of the goods before the carriage contract is executed for reasons other than movement of goods, and all events that take place in this period should be assessed under laws relevant to such a contract (e.g. storing, warehousing or forwarding). However, even where goods are handed over before the carriage contract is executed only for the purpose of carriage, we cannot talk about failure to perform or improper performance of the carriage contract if said contract has not been executed yet. We may consider as an exception application of carriage laws in a situation where the goods are handed over solely for the purpose of carriage and the very act of handing the goods over is done just before the formal confirmation

[12] This is noted by e.g. Młynarczyk 2002, 173. Later conventions on carriage of goods by sea, that is the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978 (Hamburg Rules) and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 23 September 2009 (Rotterdam Rules which did not enter into force) cover carrier liability also for periods that precede the acceptance of the load onto the vessel and periods after it is discharged.

[13] For application of international carriage conventions at the will of the parties see Wesołowski 2021, 487–99.

of the carriage contract whose terms and conditions do not raise any doubt in the light of the overall circumstances (e.g. due to on-going cooperation between the parties).

The problems with specifying the moment of accepting goods for carriage and, by analogy, of delivering the shipment after the carriage apply largely to full truck loads where the goods are loaded by the consignor. In such a case, the moment of finishing the loading and of arranging the goods on the vehicle with the carrier present is crucial for the start of carrier liability. The time during which the vehicle staff carry out securing steps (fastening, tying, securing with mats, bars, etc.) as a rule falls under the period of carrier liability. When these steps are done by the consignor himself, then the finishing of these steps is crucial here.

The case is similar for delivering the shipment to the consignee. The moment of presenting the goods for the disposal of the consignee at the place stipulated in the contract or at a different place named by a person authorized to handle the shipment and[14] the consignee's taking control over the goods is the moment of delivery by the carrier of a full truck load. The very presentation of the goods to the consignee's disposal is essential for keeping the carriage deadline, though from the point of view of finishing the period of carrier liability it is not sufficient.[15] Therefore, to be able to talk about delivery of the shipment, the consignee's behaviour must at least show an intention to proceed to unload it. We cannot forget that the consignee is not obliged before the carrier to take delivery of the goods and may refuse to accept them even after the vehicle is open (which is actually often the case; it is because only after the vehicle is open that the consignee is able to see that the goods addressed to him are not the goods he ordered or that the condition of the goods

[14] Delivery of the goods to an authorised consignee upon his consent at a different place than the destination of the goods constitutes correct performance of the contract. See Tribunal de Commerce d'Anvers in its judgement of 28 June 1971, Jurisprudence du Port d'Anvers 1971, 162. However, it must be assumed that the consignee who is not authorised to administer the goods is not allowed to make arrangements with the carrier about a different delivery place.

[15] Cf. judgment of the Cour d'Appel d'Anvers of 13 February 1986, European Transport Law 1986, 183, which recognized carrier liability for damage caused after the vehicle carrying the goods arrived and was left on the consignee's premises but before the goods were unloaded. The same court issued quite an unfortunately-worded thesis in its judgment of 1 March 1999, European Transport Law 2000, 544–51, where it held that the delivery of goods to the consignee must not be understood solely in the sense of a physical handing over of the possession of the things, but it rather means a moment of leaving the goods to the consignee's disposal. However, in the case adjudicated, the court held that the delivery did not take place when the consignee accepted the carrier's statement and visually checked the goods. The court emphasized at that that the consignee's signing the consignment note is not necessary to recognize that the delivery took place.

is not appropriate). Undoubtedly, the consignee's proceeding to unload the shipment is a sufficient condition to acknowledge that the shipment has been delivered.[16]

Accepting goods for carriage and their delivery is not conditioned on signing off for them (consignees often refuse to sing off for the shipment at the stage of proceeding unload saying that only after they finish will they know the quantity and condition of the goods). The signing off has solely an evidentiary nature.

Acceptance of goods for carriage or their delivery is not always done in one step. For shipments made up of a greater number of things, these steps are spread in time and specific vehicle manoeuvres may be made in this time, e.g. re-parking the vehicle so that the loading or unloading may be done from a convenient side. Doubts may also arise when these steps are paused (e.g. for the night). The assessment of events that take place while the vehicle is being repositioned or during a break, and in particular an answer to the question whether the carrier is liable under rules specified in laws that regulate the carriage contract for the part of the goods that is on board of his vehicle, requires that all circumstances of the case are examined.[17] Parties' behaviour must be assessed in the light of the rule of interpretation of declarations of intent, especially when it comes to retaining or taking over possession of part of the goods on board of the vehicle. It is crucial whether and by whom the goods were secured (locking the vehicle, turning alarm systems on, etc.). The fact whether the taking over of the shipment or the taking delivery of it has taken place is key here. It must be assumed that the person who sings off for the goods, as a rule expresses their intent to take the physical possession over the goods and thus, they take over the risk that comes with the goods.

The lack of the consignee's acceptance of the goods in the so-called obstacle to delivery that carries consequences specified in decisions that regulate the carriage contract (e.g. Articles 20–22 UR CIM or Articles 15–16 CMR). Therefore, the carrier is still liable for the goods under terms and conditions specified in provisions regulating the carriage contract. However, if he

[16] Cf. position of the Cour d'Appel d'Anvers included in its judgment of 13 February 1985, European Transport Law 1986, 183, in which the court claimed that the carrier is responsible for the damage to the goods for as long as these goods stay on board of his vehicle and where there are not separate contractual provisions the delivery of the goods takes place only after the actual unloading of the goods.

[17] Cf. opinion of the French Cour de Cassation in its judgment of 30 June 2004, European Transport Law 2005, 2, in which it was concluded that delivery of the goods which constitutes performance of the carriage contract means physical handing over of the goods to the consignee or to his representative who takes over the shipment. This is why if the damage to the transported device is done during a manoeuvre suggested by the consignee's employee, it needs to be assumed that this took place before the delivery of the shipment even because it was still on board of the vehicle.

chooses to exercise his right to unload the goods for account of the consignor (e.g. pursuant to Article 22(2) UR CIM or Article 16(2) CMR), the carriage is considered finished. The carrier is not liable for damage to the good caused after this moment under laws that regulate liability for damage done during the carriage. However, he may be liable for the choice of the third party keeper under separate laws.[18]

2. BURDEN OF PROOF FOR THE FACT OF THE TIME RELATION IN CARRIAGE

The distribution of the burden of proof discussed needs an explanation. This problem must be examined under the principle of distribution of the burden of proof in civil law according to which the burden of proving a specific fact rests with the person who draws legal effects from it (in the Polish law – Article 6 of the Civil Code) and must take into account evidentiary measures that result from laws that regulate the carriage contract. Therefore, in general the burden of proof in the context of the time relation in carriage rests with the entitled person, that is the consignor or the consignee, authorised to seek redress against the carrier.[19] The entitled person is most often not able to determine the damage directly after it was done. What is more, the consignee does not know the condition of the goods accepted by the carrier for carriage. The first contact with the goods usually takes place the moment delivery of them is taken from the carrier. On than moment too it is possible to observe apparent damage. Determining concealed damage is only possible later. Of course, in some situations the overall circumstances of the shipment upon its delivery allows a conclusion that the damage had a specific cause and thus had to be occur during the carriage (e.g. in the case of damage caused by traffic accidents). However, it is more often difficult to state with certainty at which point the damage occurred. The circumstances and conditions of the shipment do not rule out that the damage could have occurred even before it was handed over for carriage, e.g. during the loading. The evidence-related situation of the entitled person in such cases would be very difficult if the laws did not stipulate any relevant measures.

This is why laws that regulate the carriage contract lay down ordinary presumptions that act to the benefit of the entitled person,[20] which relate to the condition of the goods accepted for carriage (e.g. Article 781 of the Civil

[18] For the carrier's authorisation to unload the goods for the account of the sender and his liability after this moment see Wesołowski 2013, 289–94.

[19] For legitimacy of seeking redress under carriage law see Ambrożuk 2017, 85–96.

[20] In the case of a presumption that results from the bill of lading, it changes its nature to an irrebuttable presumption where the bill of lading was transferred onto a third party in good will (see Article 3(4) sentence 2 of The Hague Rules, Article 131(2) sentence 2 MC).

Code, Article 131(2) of the Maritime Code, Article 9(2) and (3) UR/CIM, Article 9(2) CMR, Article 11(2) of the Montreal Convention or Article 3(4) of the Hague-Visby Rules) or possibly to their quantity (number of pieces). The measures stipulated in individual acts of carriage law differ quite significantly in their premises and conclusions of the presumptions in question. Some of them are associated with the issuance of a transport document. However, they are similar in essence. The basis of this presumption lies in the carrier's failure to express his reservations as to the condition or possibly the quantity (number of pieces) of the shipment. Thanks to these presumptions, the proof for the circumstance that the damage was done during the carriage in practice boils down to evidencing the fact of the existence of the damage the moment the goods are handed over to the consignee.[21] This, in turn, involves the subject matter of the consignee's acts of diligence.

This term is understood as actions aiming to secure the possibility of efficient redress against the carrier.[22] This securing measures mainly boil down to checking the goods at an appropriate time and expressing one's reservations as to how the contract was performed (condition and quantity of goods) in order to prevent a presumption that the shipment is an appropriate condition after it is handed over after the carriage (Article 148(1) of the Maritime Code, Article 30(1) CMR, Article 30(1) of the Montreal Convention, Article 2(6) of the Hague-Visby Rules) and under certain legislative acts – to prevent the expiry of claims against the carrier – e.g. Article 791(1) of the Civil Code, Article 76 of the Transport Law, Article 47(1) UR CIM). The acts must be performed for partial damage. In the case of a total loss of the goods this fact results from the carrier not having confirmation of receipt by the consignee. Therefore, he does not need to perform any acts of diligence. The laws that regulate the carriage contract introduce evidentiary measures in the form presumption of a loss of shipment in a situation where the carrier is not able to deliver it within a specified time added to the period of carriage (e.g. Article 52 of the Transport Law, Article 29 UR CIM, Article 20(1) CMR).[23]

To bring about a specific effect, acts of diligence must be performed at an appropriate time. When it comes to visible (apparent) damage, the consignee's steps should be performed the latest upon taking delivery of the goods from the carrier. An apparent damage is damage that may be discovered if

[21] The questions of the burden of proof of the fact of damage to the goods during the carriage is presented by the Cour d'Appel de Mons in its judgment of 4 March 2002, Journal des Tribunaux 2003, 159–60.

[22] Cf. Górski 1983, 27ff; see also Ambrożuk 2016, 195–202.

[23] Cf. position of the Corte di Cassazione in its judgment of 26 January 1995, Diritto dei Transporti 1996, 282 and Hoge Raad in its judgment of 4 October 2002, ref. no. CO1/043HR (www.rechtspraak.nl), in which the court recognized that where the goods where delivered before the deadlines specified in Article 20(1) CMR the goods were delivered with delay, not lost, even though the goods had been stolen before that time and then recovered.

due diligence is exercised before the goods are taken delivery of.[24] Where the consignee himself unloads the goods, the damage is understood to be damage that may be discovered if due diligence was exercised before unloading.[25]

Reservations about not apparent defects or damage should be reported to the carrier usually within 7 days (3 days for transport by sea, 14 days for transport by air) from the date of taking delivery of the shipment from the carrier.[26] This basically means damage that could be observed only after the goods were unpacked. When it comes to container freight services, the consignee is not obliged to check the content of the container when he takes delivery of it from the carrier. This is why damage in shipments transported in containers must be as a rule considered as not apparent damage (concealed damage).[27]

The disputed issue is the degree to which the reservations reported are specific and detailed. The dominant view is that reservations should not be limited to words such as "damage" or "partial loss" [Basedow 1997; Clarke 2009, 202; Loewe 1976, 226; Putzeys 1981, 553–53; Rodière 1971, 322]. The reservations aim to allow the carrier to take measures, relatively as soon as possible, to explain the circumstances and reasons for the occurrence of the damage, its type and size, and thus also circumstances other than the time relation in carriage, relevant for carrier liability. This position is confirmed in the case law, especially in decisions of French[28] and Belgian[29] courts. On the other hand, there is also a view that even if the reservation is limited only to pointing

[24] The case is seen differently by the Cour d'Appel de Paris in its judgment of 24 January 2001 Bulletin des Transport et de la Logistique 2001, 192, where it held that the moment of unpacking the goods is the decisive moment for recognizing the damage as apparent or concealed. Such a stance has no grounds as the packaging itself is an element of the shipment and the unpacking of the goods happens usually after the goods are taken delivery of and after the vehicle has left.

[25] A practice of drafting a "protocol at the door of the carriage" has developed in rail transport for damage noticed during the unloading. Such a protocol is written after a formal taking delivery of the shipment, where there is a presumption that the damage identified in the protocol was done after the goods were handed over. Evidentiary force of such a protocol is similar to a protocol drafted before the goods are handed over. Cf. Górski 1983, 282.

[26] These reservations must be reported to the carrier. Presenting reservations to the forwarder is not sufficient. Cf. position of the French Cour d'Appel de Paris in its judgment of 24 January 2001, Bulletin des Transport et de la Logistique 2001, 192. However, it must be assumed that if the forwarder to whom the damage was reported does not pass these reservations to the carrier, he may be liable before the principal for failure to take actions required to secure the rights of the principal or a person named by them to the carrier (in the Polish law – Article 798 of the Civil Code).

[27] Whether the damage is visible (apparent) or concealed would be determined by all circumstances of a given shipment and in particular the nature of the goods and how they are packaged, see Messent and Glass 1995, 218–19 and views quoted there.

[28] Cf. e.g. Judgment of the Cour d'Appel Toulouseof 12 April 1994, Bulletin des Transport 1994, 714; Cour d'Appel Rouen of 9 February 1993, Bulletin des Transport 1993, 201; Cour d'Appel Aix-en-Provence of 22 Februaru 1979, Bulletin des Transport 1979, 387.

[29] Cf. judgment of the Cour de Cassation of 7 June 1974, European Transport Law 1975, 68–74.

to the fact of the damage (that is, it even fails to specify its type generally), but heralds a more detailed identification of its nature and this identification does take place (e.g. in the form of photos or a protocol), then the presumption of agreement of the conditions of the goods with the content of the consignment note does not take place.[30]

As follows from the laws quoted above (Article 148(1) MC, Article 30(1) CMR, Article 31(1) of the Montreal Convention, Article 2(6) of The Hague-Visby Rules), failure to perform acts of diligence causes the emergence of a legal presumption that upon handing the shipment over to the consignee it was in an appropriate condition (or possibly – in a condition described in the transport document). This presumption may be challenged with contrary evidence. This means that even though the consignee failed to perform acts of diligence, the claim in substantive terms does exist, but in order for it to be effectively pursued, it is necessary to take the practically difficult evidence that rebuts the presumption of the good condition of the shipment upon taking delivery of the goods [Messent and Glass 1995, 218; Clarke 2009, 205; Haak 1986, 191].[31] However, some laws prescribe a more far-reaching measure, that is expiry of claims due from the carrier for damage caused to the carried goods (cf. Article 791(1) of the Civil Code, Article 76 of the Transport Law, Article 47(1) UR CIM, see also Article 31(4) of the Montreal Convention).

The question of demonstrating the time relation in carriage gets complicated in a situation where the damage is concealed (it could not be observed when the shipment was being handed over to the consignee despite he exercised due diligence) and is noted only after the goods are taken delivery of from the carrier. While laws that regulate the carriage contract order that reservations about the condition of the shipment be reported in a strictly defined time in such a situation, such a report, done naturally after taking delivery of the goods, is not evidence for the time relation in carriage discussed here. We cannot rule out that the damage was caused after the goods were handed over to the consignee, especially that on reporting the reservation the goods are often at a different place that the place of delivery.[32] The role of reporting

[30] See judgment of the Oberlandesgericht Hamburg of 27 January 2004, Transportrecht 2004, 215–17. Cf. also judgment of the Tribunal de Commerce d'Anvers of 1 April 1980, European Transport Law 1980, 461–71, in which the court declared correct the consignee's behaviour where he made a note in the consignment note on receipt of the goods saying "unable to check now, will inform you later" and then phoned the carrier to inform him about the essence of the damage. However, the court assessed the entire circumstances of the case and assumed the reservations were reported by the consignee in a correct manner as may be seen in the fact that the carrier started to look for the lost parts of the shipment in his warehouses.

[31] See judgment of the Cour d'Appel de Bruxelles of 7 February 1992, European Transport Law 1994, 286 and the earlier judgment of 21 January 1987, European Transport Law 1987, 745.

[32] Cf. position of the French Cour de Cassation included in its judgment of 22 September 1983, Bulletindes arras de la Cour de Cassation, no. 243, 211–12.

reservations is limited solely to preventing the emergence of presumption of the condition of the goods, in agreement with the description included in the consignment note. It does not prejudge the fact that the damage was caused during the carriage.

Therefore, a question about the distribution of the burden of proof for the circumstance discussed arises. It would seem that the only appropriate response to this question, based on a general rule of the burden of proof, is a conclusion that in the case of concealed damage observed sometime after the goods were taken delivery of from the carrier, the authorised person is responsible for proving that the damage was done in the time between accepting the goods for carriage and their delivery. In fact, this is exactly how it is formulated is some provisions (Article 76(4) of the Transport Law or Article 45(2)(d) UR CIM). Nevertheless, not all acts have such a requirement (which in practice is difficult to satisfy). The CMR is an example here. Therefore, in the context of this convention we may encounter a view that reporting reservations referred to in Article 30(1) CMR within seven days equals to admitting that the damage was done during carriage. The burden of proof that concealed damage was caused during carriage was to rest with the person authorised if such damage was not reported within 7 working days from the date of delivering the goods. In this case we are dealing with an ordinary legal presumption that the condition of the goods corresponds to the description placed in the consignment note.[33]

However, this claim does not take into account the essence of the reservations about the condition of the shipment which, as has already been mentioned, do not rebut the presumption of the condition of the shipment as described in the consignment note, but only create the condition which would prevent such presumption. The lack of a presumption of compliance of the goods with the description in the consignment note does not equate – as least with regard to concealed damage – with a conclusion that the damage existed when the goods were handed over to the consignee. It is particularly visible in a situation where the concealed damage is reported within seven days (not counting Sundays and bank holidays) from the date of delivery but after performing other goods-related actions (e.g. further transport). Taking a specific

[33] The judgment of the French Cour de Cassation of 2 February 1982, European Transport Law 1983, 47 may be an example here, in which the court concluded that reporting reservations within 7 days from handing over goods that had a concealed damage means that it must be assumed that the damage was done during carriage. A similar stance was taken by the French Cour d'Appel de Paris in its judgment of 24 January 2001, Bulletin des Transport et de la Logistique 2001, 192. The court concluded that if the consignee reported a written reservation within seven days and the carrier did not "rebut" them, then it must be assumed that the damage was done during carriage and the carrier is liable for it.

presumption that the damage was caused during the carriage by a carrier to whom reservations were reported is groundless.[34]

However, it is easy to see that if we were to apply the general rule of distribution of the burden of proof in the case discussed, the situation of the authorised person would be the same, regardless of whether the reservation about the condition of the goods was reported in the period prescribed or whether such reservations were not brought forward. In the first and second case this person would have to prove that the damage was caused during carriage. While in the first case the proof would intend to rebut the presumption referred to in Article 30(1) CMR and in the second it would result from general rules of the burden of proof, practical consequences would be the same. This is why we should rather assume that creators of this convention intended to leave this question to the assessment of the court who should be guided by life experience and legal intuition so useful in such situations rather than rigorous application of the principle of the burden of proof. The circumstance of reporting the damage in the time period specified in Article 30(1) CMR should be crucial for the taking of evidence discussed.

3. LEGAL NATURE OF THE TIME RELATION IN CARRIAGE

Thanks to the comments above it is possible to determine the nature itself of the time relation in carriage. This relation which is a prerequisite of carrier liability for the damage to the goods is not causal, which means that it cannot be treated as a cause of the damage. It is never an element that is active in the total circumstances of the damage. What is more, it needs to be assumed that the obligation to repair the damage exists whether or not the fact that the shipment was left at a specified time in the charge of the carrier had an effect on the emergence of the damage [Clarke 2009, 198]. The carrier cannot, therefore, free himself from liability by proving that the damage was not done also if the shipment remained in the possession of another person (consignor or consignee in particular).

The civil law literature calls such a relation a normative relation [Koch 1975, 43–48; Dybowski 1981, 271]. It takes place where the law associates the obligation to repair the damage with a specific incident (circumstance) which is not, or at least does not have to be, in a causal link with the damage. The Polish law provides examples of such circumstances that determine passenger liability (Article 422 of the Civil Code), surety's liability (Article 876 of the Civil Code) or liability of a person running a hotel or similar establishment for the loss of or damage to things brought in by hotel guests (Article

[34] This is pointed to by Putzeys 1981, 658; Haak 1986, 194; Clarke 2009, 200; Messent and Glass 1995, 219.

846 of the Civil Code) [Dybowski 1981, 271; Nesterowicz 2006, 109–110]. While causal links are fully objective in a sense that they are independent of the will of the law-making body and the law-applying body, normative relations depend only on the will of the legislator (on the existence of a legal norm) [Koch 1975, 43–48].

The premise of liability discussed cannot be understood literally in reference to damage that constitutes further material consequences of the total or partial loss of or damage to the goods. Therefore, it is enough for the damage to occur directly in the goods during the carriage. On the other hand, specifying the limits of recompensing further damage that is the consequence of the total or partial loss of or damage to the goods should proceed on the basis of a concept of a causal link adopted in domestic law, relevant to a given contract, not a time relation in carriage.[35] In the transport practice such damage is rarely recompensed due to the limitations of the amount of compensation that feature in transport laws which as a rule cannot exceed a regular value of the goods understood in this way or another. Only attributing a qualified fault to the carrier (intentional fault or gross negligence or so-called unforgivable fault) opens the door to seeking full compensation.[36] However, in such a situation it is necessary to prove the specific cause of the damage that is the carrier's fault. This means that recourse must be made to the concept of the causal link in force in a given legal system, also in reference to the damage to the goods itself which may then be recompensed under the full compensation rule, at the level exceeding the limitations of the amount of compensation applicable to carriage law. The questions of the mutual relation between the time relation in carriage and the causal link deserve a separate discussion.

REFERENCES

Ambrożuk, Dorota. 2011. *Ustalenie wysokości odszkodowania w prawie przewozowym w odniesieniu do przewozu przesyłek.* Warszawa: Wolters Kluwer.

Ambrożuk, Dorota. 2016. "Charakter prawny aktów staranności odbiorcy w krajowym i międzynarodowym przewozie towarów." *Problemy Transportu i Logistyki* 4:195–202.

Ambrożuk, Dorota. 2017. "Legitymacja do dochodzenia roszczeń odszkodowawczych z umowy przewozu towarów w transporcie lądowym." In *Prawo transportowe. Ląd. Morze. Powietrze*, edited by Dominika Wetoszka, 85–96. Warszawa: C.H. Beck.

Basedow, Jurgen. 1997. "Übereinkommen internationaler Straβenverkehr." In *Münchener Kommentar zum Handelsgesetzbuch*, vol. 7, edited by Karoten Schmidt, 855–1274. München: C.H. Beck.

Clarke, Malcolm A. 2009. *International Carriage of Goods by Road*: CMR. London: Informa Law from Routledge.

[35] Similar views in Clarke 2009, 198.

[36] The question is discussed in detail in Ambrożuk 2011, 218–34.

Dybowski, Tomasz. 1981. "Naprawienie szkody." In *System Prawa Cywilnego*. Vol. 3. Part 1: *Prawo zobowiązań – cześć ogólna*, edited Zbigniew Radwański, 163–308. Wrocław: Ossolineum.

Górski, Władysław. 1983. *Umowa przewozu*. Warszawa: Wydawnictwo Prawnicze.

Haak, Krijn F. 1986. *The liability of the carrier under CMR.* The Hague: Stichting Vervoeradres.

Helm, Johann G. 1966. *Haftung für Schoen an Frachtgüter.* Karlsruhe: Verlag C.F. Muller.

Heuer, Klaus. 1975. *Die Haftung des Frachtführers nach dem Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr (CMR)*. Hamburg: Deutscher Verkerhrs.

Koch, Andrzej. 1975. *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym.* Warszawa: Państwowe Wydawnictwo Naukowe.

Libouton, Jacques. 1987. "Liability of the CMR Carrier in Belgian Case Law (Arts. 17, 18, 19, 20)." In *International Carriage of Goods by Road (CMR)*, edited by Jan Theunis, 79–96. London–New York–Hamburg–Hong Kong: Lloyd's of London Press.

Loewe, Roland. 1976. "Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)." *European Transport Law* 11:311–61.

Messent, Andrew, and David A. Glass. 1995. *CMR: Contracts for the International Carriage of Goods by Road.* London: Informa.

Młynarczyk, Jerzy. 2002. *Prawo morskie*. Gdańsk: Arche.

Nesterowicz, Mirosław. 2006. *Prawo turystyczne*. Warszawa: Wolters Kluwer.

Putzeys, Jacques. 1981. *Le Contrat de Transport Router de Marchandises*. Brussels: Bruylant.

Rodière, Rene. 1971. "The Convention on Road Transport." *European Transport Law* vol. 1–6, 2–593.

Stec, Mirosław. 2005. *Umowa przewozu w transporcie towarowym.* Kraków: Zakamycze.

Szanciło, Tomasz. 2008. *Prawo przewozowe. Komentarz.* Warszawa: C.H. Beck.

Szanciło, Tomasz. 2013. *Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych*. Warszawa: C.H. Beck.

Wesołowski, Krzysztof. 1995. *Odpowiedzialność przewoźnika za szkody przy przewozie przesyłek w świetle ustawy – Prawo przewozowe.* Zielona Góra: Agencja Rozwoju Regionalnego.

Wesołowski, Krzysztof. 2013. *Umowa międzynarodowego przewozu drogowego towarów na podstawie CMR.* Warszawa: Wolters Kluwer.

Wesołowski, Krzysztof. 2021. "Application of provisions of international conventions which contain uniform rules of private law in relations that are outside the scope of application of these conventions." *Teka Komisji Prawniczej PAN Oddział w Lublinie* 14, no. 1:487–99.