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FULL COMPENSATION FOR DAMAGE IN INTERNATIONAL CARRIAGE LAW WITH REGARD TO THE CARRIAGE OF GOODS – RULE OR EXCEPTION?

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Abstract. The purpose of this article it to outline the legal nature of limitations of the amount of compensation stipulated in international carriage conventions. The paper tries to answer the question whether these limitations in an array of cases of carrier liability allow a conclusion that the principle of limited compensation applies here or whether perhaps the principle of full compensation remains valid and limitation of the amount of compensation is still an exception. Having analysed the legal character of limits to the amount of compensation, having demonstrated derogations from the application of provisions that limit the sum of the compensation and having taken into account the incomplete regulation under international carriage conventions and its lack of autonomy (falling under the civil law), the author points out that limiting the sum of compensation, despite being applied in the majority of cases of carrier liability, is not a rule but an exception from the full compensation principle. An answer to the fundamental question allows appropriate interpretation of provisions on establishing the amount of compensation due from the carrier. If one were to assume that these regulations maintain their exceptional nature, they will need to be interpreted in a restrictive manner, according to the *exceptiones non sunt extendendae* principle, and any doubts will have to be settled according to the full compensation principle.

Keywords: international carriage conventions, compensation for damage to goods, limitation of compensation, full compensation

INTRODUCTORY REMARKS

Provisions of international conventions[1] that regulate the contract for international carriage of goods in individual branches of transport do not have

[1] These are the following conventions: Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May 1956, supplemented by Protocol of 5 July 1978 and supplemented by Protocol of 20 February 2008; Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, Appendix B. Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) – CIM RU; Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 – Montreal Convention; International Convention for the Unification of Certain

general provisions that refer to the principles of carrier liability for failure to perform or improper performance of the carriage contract and to determining the amount of compensation due from him. They regulate individual cases of damages that constitute the most frequent consequences of failure to perform or improper performance of a carriage contract.[2] In such situations the amount of compensation is limited in various ways. When establishing upper limits of compensation due from the carrier, provisions of international carriage conventions refer to the value of the shipment (determined on the basis of different criteria), to limits expressed in figures, to the amount of the carriage charge and its multiplication, to the declaration of the value of the goods, to the declaration of special interest in delivery or to the value of the loss. There are also other derogations from general rules for determining the amount of compensation which put the carrier in a privileged position compared to other debtors. This involves in particular the rule that the value of the lost or damaged goods is determined according to their prices at the place and date of shipment.

Liability for the condition of the goods and for a delay in delivery are the most important titles of carrier liability. Liability for loss or damage to the goods is first limited by their market value, which in practice makes it impossible to claim compensation from the carrier for the damage that resulted from the damage caused directly to the goods.

Under international carriage conventions carrier liability is restricted by limits of the amount of compensation. These limits fundamentally concern compensation for damage to the goods, though air conventions stipulate uniform amounts of limits of compensation to cover both damage to the goods and other damage that results from a delay. In other international carriage conventions, damage other than damage to the goods that results from delay in carriage is limited in a different way, that is by reference to the value of the carriage charges (Article 23(5) CMR) or their multiplicity (e.g. four times the carriage charges – Article 33(1) CIM UR).

The limitation sums of the amount of compensation have been laid down in individual conventions at a varying level. Traditionally the following rules apply in maritime law. The provision of Article 4(5) of The Hague-Visby Rules stipulates that unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of

Rules of Law relating to Bills of Lading of 25 August 1924, as amended by Protocol of 23 February 1968, as amended by Protocol of 21 December 1979 – The Hague-Visby Rules.

[2] See Wesołowski 2013, 315–16; Thume and Riemer 2013, 362; Jesser–Huβ 2009, 976; Stec 2005, 245; Stec 2018, 1104, Szanciło 2013, 160; the scope of regulation in individual conventions is demonstrated in Ambrożuk 2011, 53–55.

666.67 units of account (SDR – Special Drawing Rights) per package or unit or 2 units of account (SDR – Special Drawing Rights) per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Much higher limits apply carriage by road. Pursuant to Article 23(3) CMR, compensation due from the carrier for damage to the goods, which takes the form of total or partial loss of the goods, cannot exceed 8.33 units of account (SDR) per kilogram of gross weight short. Even higher limits of the amount of compensation for damage to goods result from rail carriage law. The provision of Article 30(2) CIM UR lays down that in the case of total or partial loss of goods, compensation shall not exceed 17 units of account (SDR) per kilogramme of gross mass short. The same limit applies in international carriage by air (Article 22(3) of the Montreal Convention).

Given the numerous limits of the amount of compensation, the problem introduced in the title of this study becomes valid. This issue has practical importance from the point of view of interpretation of provisions on determining the amount of compensation. If one were to assume that provisions on establishing the amount of compensation due from the carrier, despite referring to the vast majority of compensation claims, maintain their special character, a restrictive interpretation according to the *exceptiones non sunt extendendae* principle will be necessary [Zieliński 2017, 302] and all doubts will have to be resolved according to the full compensation rule.

1. LEGAL NATURE OF LIMITATION OF THE AMOUNT OF COMPENSATION

Limits of the amount of compensation in international carriage conventions are often called limitation of liability. This applies to legislative acts (such as Article 29 CMR, Article 36 CIM RU, Article 4(5)(e) of The Hague-Visby Rules) and to the views of legal scholars and commentators alike [Dragun 1984; Kwaśniewski 1989, 174; Ogiegło 2013, 966]. Nevertheless, such an approach is criticised by some representatives of the science of the law [Młynarczyk 1983], who indicate that it is not about limiting the possibility of forced recovery of compensation, but about limiting the debt borne by the carrier. Determining the amount of compensation due from the carrier is the next stage, occurring after the carrier's liability has been established. This is because compensation is a derivative of the occurrence of the state of liability [Szanciło 2013, 157] and determination of the legally relevant damage. The distinction between debt and liability – following German legal scholarship – was adopted in the majority of continental legal systems. Debt (German *Schuld*, French *obligation*) expresses the debtor's responsibility, that is it refers to the debtor's obligation itself to pay the performance. Liability (German *Haftung*, French *Responsabilité*), in turn, does not refer to

the debtor's responsibility itself, but to the covering of the debt related to the compulsory execution of the performance. Debt is dependent on the will of the debtor, while liability is not [Radwański and Olejniczak 2020, 19–20].

A distinction between debt and liability in this meaning is practically absent from the Anglo-Saxon legal systems, where the term "limitation of liability" refers to limitation of the premises for liability and to the amount of compensation alike [Dragun 1984, 16]. Moreover, the literature points out that there is a strict relationship between limitation of debt and limitation of liability and its final result is the effect it has on the application of the full compensation principle [Warkałło 1972, 139–40]. The size of the indemnity debt translates directly into the scope of liability [Kaliński 2018, 201]. One cannot forget that the term "liability" has multiple meanings [Kaliński 2021, 3–9]. The understanding of this terms as reference to the compulsory execution of the performance is one of a few of its meanings [Longchamps de Bérier 1948, 21; Warkałło 1972, 77ff; Stelmachowski 1998, 209ff].

In the literature addressing liability for damages the term "liability" refers mostly to the debtor's responsibility, that is the debtor's performance [Kaliński 2021, 1]. In this scope we are dealing with premises of liability, scope of liability and causes that free from liability. Within such understanding of the term "liability," the boundaries of liability are determined by laws which limit the amount of compensation and which specify the scope of the debtor's (carrier's) responsibility, as well as laws that lay down incidents and their effects (legally relevant damage) [Idem 2018, 201–203], that a carrier is liable for. However, this designation is secondary. Original importance lies with the specification of legally relevant damage for which the carrier is liable. None of the analysed international conventions include provisions that limit the scope of damage for which the carrier is liable. It is assumed that even where a provision stipulates liability for the enumerated forms of damage to the goods (total or partial loss, damaging), it in fact relates to further damage that is the consequence of the former.[3] However, in practice it is not covered due to limitations of the amount of compensation itself. Nevertheless, in situations described below they may be covered by carrier liability.

2. MOTIVES BEHIND INTRODUCTION OF LIMITS OF AMOUNT OF COMPENSATION

Limits of the amount of compensation contained in carriage conventions are an expression of the levelling out of strict rules of carrier liability. Determining carrier liability based on presumed fault, or even in the strict

[3] See Wesołowski 2013, 342–43 and the literature quoted there.

liability regime[4] ensures compensation for damages associated with transport activity in the majority of cases. If in the case of most frequent damages carriers had to pay compensation determined on general terms, in force in most countries (see Article 361(2) of the Polish Civil Code, Article 1149 of the French Code civile, sections 249–252 of the German Bürgerliches Gesetzbuch), they could easily fall into disrepair. They would be liable for compensating the damage in full even if the damage occurred for reasons independent of them. Any calculation of the risk associated with transport activity would not be possible. Values of carried goods vary greatly and carriers are often not informed thoroughly as to this value (senders do so to avoid higher carriage charges). Damage not to the goods themselves is even more difficult to predict. In such situations it would also not be possible to ensure full insurance protection. Limits to the amount of compensation allow carriers to estimate the risk of their business activity. They facilitate, or even enable, insurance protection [Lewaszkiewicz–Petrykowska 2005, 1082–83; Damar 2011, 11–20]. Compensation limits also make it easier to claim redress, e.g. by elimination of the furnishing of proof for damage caused not to the goods themselves which is often difficult to capture. Some transport branches, e.g. transport by sea, are an expression of a compromise: in return for depriving carriers of the right to apply exonerating clauses or clauses that limit their liability, administrators of the goods shipped resigned from full compensation for damages [Dragun 1984, 20ff; Konert 2010, 250ff].

3. OPTING OUT AND EXCLUSION OF THE RIGHT TO LIMIT THE AMOUNT OF COMPENSATION

International carriage conventions that stipulate amounts of compensation due from the carrier at the same time stipulate the possibility to opt out of these limitations. The first such method consists in the fact that the sender can declare the value of the goods (declaration of the value of goods). However, the requirements for the application of this measure are different in various conventions. Therefore, in international carriage by road, in line with Article 24 CMR, the sender may declare in the consignment note, subject to an additional agreed charge, the value of the goods that exceeds the amount of compensation specified in Article 23(3) CMR. The declared amount in this case replaces the limit. A similar solution was adopted with regard to international carriage of goods by rail (Article 34 CIM RU).

The declaration of the value of goods under both of the above-mentioned conventions does not lead, however, to the emergence of a presumption of the value of the shipment, nor does it transfer onto the carrier the burden of proof

[4] See more in Ambrożuk, Dąbrowski, and Wesołowski 2019, 99–102.

of a different value of the goods that the value declared. An authorised person must, therefore, prove the value of the shipment despite the value having been previously declared in the consignment note. The amount declared in the consignment note only replaces the limits of the amount of compensation that result from provisions of both conventions. Therefore, it allows one to obtain compensation in the amount that exceeds these limits. In consequence, when determining the amount of compensation for damage to goods whose value was declared, only provisions of Article 23(1) and (2) CMR and Article 30(1) CIM RU apply, which order that the value of the goods be determined at the time and place at which they were accepted for carriage and which refer to commodity exchange quotation or current market prices, and if there is neither of these, according to the usual (utility) value of goods of the same kind and quality. Therefore, the declaration of the value of goods does not allow the amount of compensation to cover the sender's specific liking towards the carried object (the so-called *praetium affectionis*), or even specific use of this object and relations it has with other things belonging to the authorised person [Wesołowski 2013, 564–65; Godlewski 2007, 102].

Apart from the declaration of the value of goods, both of these conventions lay down a separate measure of a declaration of the value of a special interest in delivery. Pursuant to Article 26(1) CMR, the sender may, against payment of a surcharge to be agreed upon, fix the amount of a special interest in delivery in the case of loss or damage or of the agreed time-limit being exceeded, by entering such amount in the consignment note. In turn, Article 26(2) stipulates that if a declaration of a special interest in delivery has been made, compensation for the additional damage proved may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in Articles 23, 24 and 25 CMR (that is compensation to cover the damage caused directly to goods under limits resulting from conventions or under the declaration of the value of goods and compensation for damages caused by a delay within the limit, that is the carriage charge). An analogical solution was adopted in Article 35 CIM UR. This means that as much as the declaration of the value of goods allows one to avoid the amount of compensation for damage to the goods themselves expressed in figures (which results from both conventions), placing the amount of the special interest in delivery in the consignment note allows one to obtain compensation whose value will exceed all limitations to the amount of compensation resulting from these conventions. A declaration of the amount a special interest in delivery allows the compensation to cover further economic consequences of damage caused directly to the goods as well as economic consequences of exceeding the time limit for delivery, if it has been fixed [Messent and Glass 1995, 196], where these consequences are expressed in damage not directly related to the goods themselves. However, legal scholars and commentators present divergent

views on whether on the basis of the declared amount of special interest in delivery compensation applies to all consequences of acts and omissions of the carrier [Hardingham 1979, 197], or only to those that are in a relevant causal relationship with failure to deliver the shipment or its part or with exceeding the time limit for delivery [Loewe 1976, 379; Szanciło 2013, 404]. A compromise view has also been expressed which seems to be the most convincing. It holds that the declaration of a special interest in delivery allows compensation also for damages that are not in a regular causal relationship with these circumstances, provided that the sender that declares the special interest in delivery has foreseen such damages and informed the carrier about them [Wesołowski 2013, 566; Koller 2013, 1129; Thume and Riemer 2013, 711; Messent and Glass 1995, 201–2]. A declaration of a special interest in delivery under CMR and CIM UR does not provide any presumption of the value of the damage sustained either. This damage must be proven by the claimant. The authorised person is entitled to compensation in the amount higher that it results from limits adopted in the conventions, but only when further damage that is in a causal relationship with the damage to the goods or with the delay in delivery is proved. However, the upper limit of compensation is always expressed in the amount of the special interest in delivery declared.

In turn, the Montreal Convention only regulates the declaration of a special interest in delivery (Article 22(3)). However, the literature assumes that this interest must be understood broadly, that is that it includes the possibility to declare a special interest expressed by specifying the value of the shipment itself [Polkowska and Szymajda 2004, 69–70; Stec 2017, 1686]. Such a declaration results in the exclusion of the convention-based limit (expressed in an amount) of air carrier liability for damage related to carriage of goods. If such damage occurs, the carrier will be obliged to pay compensation up to the declared amount, unless he proves that this amount exceeds the sender's real interest [Wyrwińska 2018]. Such a declaration creates a presumption of the value of the interest subject to compensation.

Moreover, some conventions give the parties to the carriage contract the right to raise the limit in the contract, at the same time not allowing the limit to be lowered. Therefore, Article 25 of the Montreal Convention stipulates that limits higher that those laid down in the convention may be introduced in a contract or to no limits of liability whatsoever. Setting the limits at a higher amount is also stipulated in The Hague-Visby Rules (Article 4(5)(g)), which lays down that by agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in Article 4(5)(a) of the convention may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in this provision (that is 666.67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged).

The carrier's qualified fault excludes the possibility of invoking the limits of the amount of compensation due from the carrier stipulated in international carriage conventions. This means an intentional fault and serious unintentional fault (gross negligence or recklessness with the awareness of the probability of causing damage) – based on the Anglo-Saxon concept of wilful misconduct.[5] In such a case the entitled person may claim full compensation from the carrier that covers losses (*damnum emergens*) and lost expected benefits which he could have achieved if the damage had not been done (*lucrum cessans*), where as a rule it is intended to compensate direct damage to the goods and further consequences of this damage.

Irrespective of the above exclusions, the so-called theory of deviance has formed on the basis of maritime law. It includes situations in which the carriage was performed in principle contrary to contractual terms (change of carriage route, carrying the goods on the deck contrary to the contract or custom, deliberate delay in shipment). In line with the theory of deviance, in such situations application of contractual terms is excluded, also those that exclude or limit liability of a sea carrier. Therefore, he is fully liable for damage caused during or as a result of deviance [Dragun 1984, 143].

CONCLUSION

The comments presented above make us realise that limits of the amount of compensation do not lead to a restriction of damage that the carrier is liable for (legally relevant damage). They include all economic consequences that are in a causal relationship with the fact for which the carrier is liable (the question about the concept according to which the adequacy of the causal relationship must be assessed is left to the discretion of domestic law applicable to a given contract). Conventions commonly provide for situations in which limits in the amount of compensation are not applicable. It is determined not only by the will of the parties (approved declarations of the sender), but also situations resulting from the will of the legislator (carrier's qualified fault). Irrespective of the above-mentioned circumstances, the nature of provisions that regulate a carriage contract, included in international conventions, is crucial for settling the question posed at the beginning of this paper. There are no doubts that from the substantive point of view these provisions fall under civil law. Laws that regulate a carriage contract, though often defined as carriage law, are not a separate branch of law [Górski 1983, 8]. Therefore, they must be perceived and interpreted in a broader concept outlined by civil law. Even though they introduce specific measures in relation to rules under general laws

[5] Cf. Pepłowska–Dąbrowska 2017, 56; See also Damar 2011; Jesser–Huβ 2009, 1121ff; Harms 2013, 740–813.

for an array of issues, one cannot talk here about an autonomy of carriage law. The fact that these provisions have at the same time (from the point of view of how they are created) an international law nature does not change their civil law character.

It is also important in this context that provisions on carriage contracts that introduce rules for determining the amount of compensation that are different to general rules do not apply to all types of damage resulting from non-performance (improper performance) of the carriage contract, but only to specifically regulated cases. They do not regulate comprehensively the issues of determining the amount of compensation due from the carrier. Therefore, fall-back on general regulations becomes necessary. This applies, in fact, not only to cases of causing damage not regulated under carriage laws (e.g. as a result of unfounded refusal to accept a shipment or failure to bring a vehicle at the agreed place and time), but also, additionally, to situations that have been regulated. This is about e.g. the application of the *compesatio lucri cum damno* principle, the causal relationship concept adopted and the value measures (save for the damage to the goods themselves). *Ius moderandi* may also be applied here.

It all advocates that we take a stance that provisions on determining the amount of compensation included in international carriage conventions do not create a self-contained autonomous system. They include special rules that refer only to certain situations, and only to some questions resulting from them. This means that the regulations included in provisions of carriage law may be interpreted only as introducing exceptions from general rules and not as providing a principle. Therefore, the principle of full compensation, from which carriage laws stipulate a number of exceptions, applies as a rule also to provisions concerning carrier liability. Such an approach orders that provisions on the determination of the amount of compensation included in laws concerning carriage contracts be interpreted strictly and that questionable issues that surface in the course of their application be resolved according to the principle of full compensation.

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