

# LIABILITY FOR THE PARTICULARS IN THE CONSIGNMENT NOTE

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ABSTRACT This article deals with the liability for the particulars in the consignment note issued during the performance of service of transport of goods. The author considers the regulations in force in Polish domestic law and in convention regulating international road transport (CMR convention). Taking into account the conclusions resulting from the analysis of strenghts and weaknesses of both acts, the author formulates *de lege ferenda* demands concerning possible directions of development of domestic law.

## Introduction

The legal acts governing the contract of carriage contain a number of provisions concerning the most important transport document, namely the consignment note. In addition to the basic regulations regarding the manner in which it is drawn up and the information contained therein, the liability of individual participants of carriage for the content of the document is also provided for. This issue will be analysed within the framework of this article in the

light of the regulations of the Polish domestic law (Transport Law Act<sup>1</sup>), as well as the act regulating international road transport (CMR convention<sup>2</sup>).

## Polish domestic law

Under national law, the matter in question is regulated by Article 72 (1) (1) of the Transport Law Act. This provision stipulates that the sender is liable for damage resulting from providing in the consignment note (or in any other form) indications and statements which are inconsistent with the facts or are inaccurate, insufficient or made elsewhere than in the allotted space. The liability in question is not limited as to the scope of the damage and will therefore cover both *damnum emergens* and *lucrum cessans* (Szancilo, 2008, p. 344; Kolarski, 2002, p. 125). It shall also be regarded as absolute liability (Wesołowski in: Ambrożuk, Dąbrowski, Wesołowski, 2014; p. 336; Kolarski, 1987, p. 237; Kolarski, 2002, p. 126; Stec in: Rajska, 2011, p. 885). This does not mean, however, that the consignor will always be liable to the carrier. Some particulars may originate from the carrier itself and therefore it is clear that the sender will be liable only for the damage caused by his actions, i.e. the particulars originating from him (See also Kolarski, 2002, p. 238; Górski, Wesołowski, 2006, p. 189; Stec, 2005, p. 287). At the same time, the sender will also be able to exonerate himself if he proves that his wrongful act or omission was caused by the carrier, e.g. by providing incorrect information (Kolarski, 1987, p. 238; Górski, Wesołowski, 2006, p. 189; Stec, 2005; p. 287; Kolarski, 2002, p. 126; Szancilo, 2008, p. 344). Nevertheless, the question arises as to the liability of the carrier vis-à-vis the sender for the content of the particulars originating from the former. National law does not provide any regulations in this respect, which is undoubtedly a consequence of the fact that the consignment note is, in this case, a document originating from the sender. Therefore, the entity which is the most exposed to damage due to the incorrect content of the consignment note is the carrier and not the sender. However, in those rare situations where the damage is caused by the sender as a result of the entries made by the carrier (e.g. when the carrier in accordance with Article 69 of the Transport Law Act finds it impossible to deliver the consignment after the deadline specified in Article 52 of the Transport Law Act), the contractual liability on general terms should be referred to.

In the doctrine a dispute arose over the scope of entities to which the liability in question applies. On the one hand, a strict view is presented, limiting it only to the relationship between the sender and the carrier (Górski, Wesołowski, 2006, p. 189; Wesołowski in: Ambrożuk, Dąbrowski, Wesołowski, 2014, p. 336; Górski, Żabski, 1997, p. 247; Kolarski, 1987, p. 237). It is justified by the fact that it is a liability related to the contract of carriage and does not refer to other legal relations, e.g. the contract of sale between the sender and the consignee. In the opinion of the proponents of this view, a different position would lead to the creation of non-contractual liability, unknown to the Polish law. In the opposition there is a liberal view, according to which the liability under Article 72 of the Transport Law Act is applied to all entities. It is emphasized that this is a specific type of non-contractual liability, which is not limited only to the parties to the contract of carriage (Stec, 2005, p. 291; Kolarski, 2002, p. 125). Undoubtedly, it is difficult to dispute the arguments supporting the liberal theory relating to the absence of a personal limitation in Article 72 (1), unlike in Article 72 (2), which introduces the sender's liability for costs of the carrier, or Article 73, which provides for the liability of the sender or the consignee respectively for damage to the carrier's property during the loading or unloading operations (Szancilo, 2008, p. 343).

<sup>1</sup> Ustawa z dnia 15.11.1984 r. Prawo przewozowe. Dz.U. no. 53, item 272.

<sup>2</sup> Convention on the Contract for the International Carriage of Goods by Road signed in Geneva on 19 may 1956.

However, acceptance of the liberal view would mean that the provision at hand is at the same time the basis for non-contractual liability towards third parties and contractual liability towards the carrier, which seems difficult to accept. Moreover, one may have doubts as to the axiological justification for such a broad interpretation. It must not be forgotten that for the third parties the consignment note is a document of equal value to any other private document. It has no particular function, nor is it a security or an official document. There are also no reasons to attribute any particular evidentiary value to the sender's statements contained therein, if they are not addressed to the carrier with whom the sender is bound by a legal relationship. It is therefore difficult to find grounds for attributing such a far-reaching liability for the content of this document towards entities other than the carrier. Although it is possible to imagine a situation in which, as a result of the sender's actions, damage to third party will occur, but in order to settle such disputes, the application of the general principles of tort liability under Article 415 of the Polish Civil Code<sup>3</sup> would be sufficient. However, the current wording of the provisions does not allow for an unambiguous acceptance of the thesis on the impossibility of applying the liability under Article 72 of the Transport Law Act to persons other than the carrier.

## CMR Convention

The provisions of the CMR Convention stipulate that the sender is liable to the carrier for damage caused by inaccuracy or inadequacy of the particulars in the consignment note. Pursuant to Article 7 (1) of the CMR, this applies to the data listed in Article 6 (1) (b), (d), (e), (f), (g), (h), (j),<sup>4</sup> the particulars listed in Article 6 (2)<sup>5</sup> and any other particulars or instructions given by the sender to enable the consignment note to be made out or for the purpose of their being entered therein. Unlike the Polish domestic law, the CMR convention also provides for the liability of the carrier vis-à-vis the consignor, but limits it to the absence of the paramount clause (Article 6 (1) (k)<sup>6</sup>). Under the CMR convention it is also assumed that the liability for the content of the consignment note is absolute and covers both forms of damage (Górski, Wesołowski, 2006, p. 263; Wesołowski, 2013, p. 214; Dąbrowski in: Ambrożuk, Dąbrowski, Wesołowski, 2015, p. 119).

However, it is not clear whether the liability of the consignor applies only to the inaccuracies and insufficiencies, as suggested by the literal wording of the cited provisions, or whether it should be assumed, according to the *a minori ad maius* reasoning, that the consignor is also liable for the complete absence of relevant particulars (Wesołowski, 2013, p. 213). In the author's opinion, the first position is correct. In order to justify this view it is submitted that, in the absence of a specific particular, there is no risk of misleading the carrier, unlike in case of an incorrect particular (Dąbrowski in: Ambrożuk, Dąbrowski, Wesołowski, 2015, p. 118; Koller, 2013, p. 969). In addition to the above

<sup>3</sup> Ustawa z 23.4.1964 r. Kodeks cywilny (tj. z 10.05.2018 r., Dz.U. 2018, item 1025.)

<sup>4</sup> The name and the address of the sender (b), the place and the date of taking over the goods and the place designated for delivery (d), the name and address of the consignee (e), the description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognized description (f), the number of packages and their special marks and numbers (g), the gross weight of the goods or their quantity otherwise expressed (h), the requisite instructions for customs and other formalities (j).

<sup>5</sup> A statement that trans-shipment is not allowed (a), the charges which the sender undertakes to pay (b), the amount of "cash on delivery" charges (c), a declaration of the value of the goods and the amount representing special interest in delivery (d), the sender's instructions to the carrier regarding insurance of the goods (e), the agreed time limit within which the carriage is to be carried out (f), a list of the documents handed to the carrier (g).

<sup>6</sup> A statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of the convention.

argument, account must also be taken of the fact that the sender's liability for the content of the consignment note is selective. It is reflected in the fact that the sender is responsible only for some of the particulars. Some of the indications, e.g. those referred to in Article 6 (1) (a) CMR, are not covered by the liability of either party. The situation is different under Article 11 (2) CMR, according to which the consignor is liable for any damage resulting from the absence, inadequacy or irregularity of the documents required for the custom formalities. In view of the fact that the legislator has limited the liability of the consignor as to the nature of the particulars in the consignment note, it should be assumed that it has not by accident also narrowed the liability with regard to the nature of the irregularity. There is therefore no justification for a broad interpretation.

The analysis of the most typical example of the sender's responsibility for the content of references also supports this view. This is the case where the sender indicates a weight of the goods lower than the actual weight and then the carrier bears the administrative liability for exceeding the maximum permissible laden weight of the vehicle. It is understandable that the sender should be liable to the carrier if it was he who misled him. However, there is no basis for similar position where the consignor has not provided information on the weight of the goods. After all, the sender does not have a general obligation to provide all possible information about the goods, including its weight. At the same time, it does not mean that the carrier is completely helpless when the sender fails to provide him with the necessary information. The carrier is still able to take appropriate acts of diligence, e.g. by requesting information in this respect or by weighing the goods on his own.

Moreover, in the light of the CMR convention, some other problems may arise in connection with the application of the rules of liability. The convention does not specify the entity from which the consignment note originates. It is therefore assumed that it is a joint document created by the sender and the carrier (Clarke, 2009, p. 58; Wesolowski, 2013, p. 176). In spite of this, the act mainly holds the sender liable for the content of the consignment note. It even provides that if, at the sender's request, the carrier enters some particulars referred to the consignment note he shall, in the absence of proof to the contrary, be deemed to have acted on behalf of the sender (Article 7 (2) CMR). The intention of the authors of the convention is understandable. The purpose was to protect the carrier from the consequences of giving inaccurate or false particulars by the sender, even if they are technically entered by the carrier. In most typical case this is justified and may, for example, relate to the consequences of incorrect indication of the address of the consignee, which delays the delivery.

In some situations, however, this provision may lead to unacceptable results. If the sender, pursuant to Article 8 (3) CMR, requests that the weight of the goods or its contents be checked, the actions related thereto will have to be carried out by the carrier and the results of the check will be entered in the consignment note. It should be assumed that even if the carrier makes an entry in the consignment note himself, he will act at the sender's request under Article 8 (3) CMR. Given the presumption provided for in Article 7(3) CMR, this will normally result in their being deemed to have been entered by the sender or by a person acting on behalf of the sender. If reference is made again to the earlier example, in which the carrier is held liable for exceeding the maximum permissible laden weight of the vehicle, the sender might be liable towards the carrier in this respect, despite the fact that the inspection of the goods was carried out by the carrier himself.

The sender could then try to rebut these presumptions or invoke the carrier's contribution to the damage. However, the burden of proof in this respect would remain with the sender. Moreover, with regard to the second argument, it should be borne in mind that under Polish law, pursuant to Article 362 of the Polish Civil Code, it is assumed that the duty to remedy the damage in such a situation is only reduced. The possibility of its total exclusion

is not uniformly perceived (see: Decision..., 2009; Banaszczyk in: Pietrzykowski, 2008, p. 1007). If, in particular case, the court accepts the view as to the inadmissibility of the total exclusion of liability and at the same time the sender could not rebut the presumption from Article 7 (3) CMR, it would lead to the unjustified liability of the sender. This problem may be solved by the interpretation that the Article 7 (1) CMR applies only to the particulars which are given strictly by the sender. However, the linguistic interpretation of the provision does not allow such a conclusion to be drawn unequivocally and this issue can be ruled on differently. If interpreted to the disadvantage of the sender, this will result in the carrier being privileged too far-reachingly and without taking into account the interests of the sender.

### Conclusions

Each of the acts in question contains regulations regarding the liability of the sender. The CMR convention relates mainly to liability for the specific particulars, while Polish domestic law focuses on the personal criterion. The convention also lays down some rules on carrier liability. It can therefore be concluded that in this aspect provisions of CMR are exhaustive, so that the carrier is liable only to the extent indicated therein. Thus, it is not possible to apply general rules on liability at the same time. The national law leaves the question of the carrier's liability unresolved. On the one hand, it opens up the possibility of recourse to the general rules. On the other hand, it is doubtful whether it is sufficient to ensure a balance between the parties, especially in view of the fact that the liability of the carrier will not be absolute, as in the case of the liability of the sender.

In formulating *de lege ferenda* demands with regard to the Polish Transport Law it should be noted that the limitation of the liability only to the entries made by the particular person is correct. It allows to avoid the problems arising under the CMR convention regarding the possible unjustified liability of the sender in some situations. However, in order to balance and clarify the parties' position under domestic law, it is possible to propose a rule according to which each party is liable to the other for the content of the information they put in the consignment note. This type of liability should exist only between the parties to the contract of carriage, while the liability towards the third parties should be covered by general rules. Such a solution would, however, result in significant documentary difficulties, because in practice it can not be easily determined from whom specific particulars come from. Bearing in mind the solution provided in Article 7 (3) CMR, legal presumptions can be used to alleviate these difficulties. The aim of these is to determine the most likely course of events in situations where it is not possible to establish certain circumstances and based on evidence that is easier to carry out than the relevant fact (Radwański, Zieliński in: Safjan, Radwański, 2012, pp. 442–443.). In this case the legal presumption should be based on the assumption that the particulars in the consignment note originate from the sender. This will be the most typical situation, coherent with the general construction of the consignment note adopted under the Transport Law Act. At the same time, it could be a rebuttable presumption. The sender would be able to prove the opposite circumstances and thus it will be possible for the carrier to be held liable on the same conditions as the sender.

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