

LEGAL SITUATION ON THE SO-CALLED “ACTUAL CARRIER” IN INTERNATIONAL CONVENTIONS

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ABSTRACT	The subject matter of this article is to describe the legal situation of the actual carrier on the basis of international conventions governing the contract of carriage in the various branches of transport. After an analysis of the existing provisions contained in the various international conventions, using the methods of interpretation developed in the legal science, the author points out the diversity of this situation. Where the actual carrier is directly liable to the entitled person and this liability has been formed as a joint and several liability or <i>in solidum</i> (together with the contracting carrier) the claim between the carriers is of a recourse nature. On the other hand, if the entitled person from the original contract of carriage cannot pursue claims against the actual carrier (which takes place in the case of claims brought by the sender on the basis of CMR), the claim of the contracting carrier against the subcontractor is of an independent nature. This results in further consequences as indicated in the article.

Introductory remarks

The situation of carriage with the participation of the so-called actual carrier (also called substitute carrier) occurs when the carrier who has assumed the obligation to relocate a person or goods (the so-called contracting carrier) concludes another contract of carriage with another carrier and entrusts to it the carriage of that person or goods for the whole or part of the carriage. For the contracting carrier, the actual carrier is a subcontractor.

In case of carriage of goods the contracting carrier takes the position of the sender of the consignment. The chain of subsequent contracts may, of course, be longer. This includes situations in which several carriers actually participate in transport, as well as situations in which a number of agreements concerning one operation have been concluded, but the whole transport is performed by only one carrier (the so-called actual one).

The subject matter of this article is to describe the legal situation of the actual carrier on the basis of international conventions governing the contract of carriage in the various branches of transport. This situation is not homogeneous, which has significant consequences, including those not explicitly mentioned in the legislation. The purpose of this article is to indicate these consequences. It is also a matter of formulating conclusions *de lege ferenda*.

Scope of regulation

International conventions governing the contract of carriage in the various branches of transport relate to contracts with subcontractors in different degrees. Thus, the CMR Convention does not contain any separate rules for such transport. The exception is a specific type of transport, regulated by the provisions of Article 2 of the CMR (the so-called “piggy – back” transport). In this case, however, the subcontractor of a road haulier is the carrier of another mode of transport, carrying a lorry together with the goods. This issue therefore goes beyond the scope of the article (with regard to “piggy-back” transport – see: Messent, Glass, 1995, p. 41; Hoeks, 2010, p. 165; Bombeeck, Hamer, Verhaegen, 1990, p. 134).

However, there is no doubt that Article 3 of the CMR applies to transport with the participation of the actual carriers (cf. judgment of the Court of Appeal of 10 February 1988). In accordance with that provision the carrier shall be responsible for the acts or omissions of his agents and servants and any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.

The most extensive regulation is contained in the conventions regulating air transport (the Guadalajara Convention supplementing the Warsaw Convention and then the Montreal Convention) and railway conventions (CIV, CIM). These regulations concern both the relationship between the entitled person – contracting carrier, the entitled person – actual carrier, as well as relations between carriers.

In the light of all transport conventions, the contracting carrier is liable for the acts or omissions of its subcontractors as if such acts or omissions were his own (Article 39 CIV, Article 27 § 1 CIM, Article II of the Guadalajara Convention, Article 40 of the Montreal Convention), although the provisions do not always expressly provide for the actual carrier (cf. the above comment on Article 3 of the CMR). The contracting carrier therefore bears the risk of incorrect acts or omissions of its subcontractors. There is no doubt that this rule is not limited solely to the acts or omissions of the subcontractor of its choice, but also to any further subcontractors, even if the entrustment of the carriage to them is beyond the will of the first carrier. It also applies to activities which, in other circumstances, could be treated not as performance of the obligation but “on the occasion” of performance of the obligation (e.g. theft of transported goods – see the judgment of Sąd Apelacyjny in Warsaw of 21 February 2013).

The legal position of the actual carrier in relation to the original contracting party

Conventions concerning the contract of carriage in different ways regulate the situation of the actual carrier in relation to the original party to the contract (passenger, sender of the consignment). Thus, the provisions of the

CMR do not provide for a legal link between actual carrier and these persons, in particular they do not introduce the possibility of direct claims against the actual carrier by a person entitled to compensation. This does not mean that in any circumstances it is not possible to directly claim against the actual carrier (see comments expressed in part 4 of the study). The situation is different in other transport conventions.

For the first time, the situation of the actual carrier in relation to the original party to the contract of carriage was regulated by the Guadalajara Convention, which supplements the Warsaw Convention. That Convention, which is a model for subsequent analogous regulations, provides that in relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against actual carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

In addition, the Guadalajara Convention articulated a number of rules, including that:

- a) the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier;
- b) the acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier; nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention; any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not affect the actual carrier unless agreed to by him;
- c) any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier;
- d) any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Convention or to fix a lower limit than that which is applicable according to this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Convention;
- e) in relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him;
- f) any action for damages must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 28 of the Warsaw Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

Similar solutions were adopted in the Montreal Convention (Articles 39 to 48), partly also in the revised railway conventions (Article 39 of the CIV, Article 27 of the CIM) and in the convention on inland waterway transport (see Article 4 (5) of the Budapest Convention). However, the accepted liability of both carriers is sometimes subject to

certain deviations from the model solutions. Thus, Article 45 (7) of the CIM provides that if the plaintiff has a choice between several carriers, his right of choice shall be extinguished as soon as he brings an action against any one of them; this shall also apply if the plaintiff has a choice between one or more carriers and a substitute carriers.

The solutions adopted under these conventions, which provide for the possibility of pursuing claims against the actual carriers, bring the carriage with subcontractors closer to successive carriage. In the latter case, the person entitled may also directly pursue claims against carriers other than the first carrier (although not, as a rule, against all participating carriers, but against the first carrier, the last carrier or the carrier who was performing that part of the carriage during which the event causing the loss, damage or delay occurred – cf. the different solutions contained in Article 34 of the CMR, Article 45 of the CIM, Article 36 of the Montreal Convention). In both situations there is also the question of mutual claims between carriers. In the case of claims between successive carriers, they are undoubtedly recourse claims. They arise on the basis of settled claims of entitled persons.

The legal nature of the claims between the contracting carrier and the actual carrier

The problem of the nature of the mutual claims between the contracting carrier and the actual carrier is more complicated. It is a consequence of the regulation on the possibility of direct claims against the actual carrier.

There should be no doubt as to the returnable (recourse) nature of claims between carriers in situations where the law provides for joint and several liability of the contracting carrier and the actual carrier, and thus – the possibility of direct enforcement of claims by a person entitled against the actual carrier. The CIM Convention, by regulating claims between carriers participating in the carriage, expressly gives such a character to these claims and applies this regulation to both successive carriage and sub-contracted carriage (Art. 49–50 of the CIM). This is confirmed by the rules of linguistic, purposeful and systemic interpretation (the issue is regulated in a separate title V – “Relations between carriers”. This title indicates, among other things, which of the carriers should ultimately bear the cost of compensation for damage (Article 50 of the CIM), and also regulates procedural issues (Article 51 of the CIM). Similar conclusions should be reached by examining the provisions of the CIV Convention (Article 61 in conjunction with Article 56 (6) of the CIM).

The Montreal Convention, like the previous Guadalajara Convention, contains a provision in Chapter V entitled ‘Carriage by Air Performed by a Person other than the Contracting Carrier’. However, these conventions do not contain rules on the “right of recourse or indemnification”. The provisions of domestic law must be applied thereto (cf. Polkowska, Szymajda, 2004, p. 124).

It would seem that under the CMR Convention, which did not introduce joint and several liability of the actual carrier with the contracting carrier, the claims must in each case be pursued in a chain of contractual relations, i.e. the entitled person towards the contracting carrier, and the latter towards the actual carrier (see Hill, 1976, p. 198; see also the judgments of the Court of Appeal of 15 March 1989 and the Bundesgerichtshof of 24 October 1991, as well as the Corte di Cassazione of 16 May 2006). This is not changed by the fact that the name of the actual carrier has been entered on the consignment note or that the consignment note was signed by the carrier (cf. judgment of the Cour d’Appel d’Anvers of 6 December 1999). Consequently, it should also be assumed that under these provisions, claims between carriers, contrary to the common nomenclature in practice (see e.g. judgment of Sąd Apelacyjny in Poznań of 16 September 2010) are not returnable (recourse) and arise already at the time of damage to the goods. They are independent of the fact whether or not the first carrier has compensated the damage (see

the Austrian Obersten Gerichtshof in the judgment of 20 June 2000, in which the court clarified that the damage in the relationship between the entitled person and the contracting carrier occurs at the same time as the damage in the relationship between that carrier and the actual carrier. The court expressly stressed that the contracting carrier may pursue claims for damages against the actual carrier, regardless of whether or not the carrier has paid for the compensation itself. These rules apply to relations between further sub-contractors).

This is connected with the problem of understanding the concept of damage of the contracting carrier. As in the case of any other sender, there is no need to examine whether the damage occurred in the goods concerns his property. The mere fact that the goods have been lost or damaged is a sufficient condition for the liability of the actual carrier. Introducing a further condition of liability of such a carrier in the form of payment of compensation to the entitled person has no justification. The presented view is a logical consequence of the traditional definition of damage to property according to which it may be expressed not only by a decrease in the assets, but also by an increase in liabilities (Dybowski, 1981, p. 197; Czachórski, 1978, p. 74).

It must be admitted, however, that the view presented here is not universally accepted in the science of law and jurisprudence. Usually only the fact of payment is treated as a damage (cf. Górski, 1993, p. 318; Kolarski, 2002, p. 14).

However, the issue is complicated by the fact that claims against the carrier may be submitted not only by the sender of the shipment as its party, but also by the consignee (see: Wesolowski, 2013, pp. 603–620; Ambrożuk, 2017, pp. 85–96). In both contracts of carriage (i.e. the contract concluded between the sender of the consignment and the contracting carrier and in the contract concluded between this carrier and the actual carrier), the consignee of the consignment is usually the same person (this is especially the case in situations where the actual carrier performs the entire carriage). The consignee, if entitled to claim, therefore has the right to claim against both the contracting carrier and the actual carrier (cf. judgment of Corte di Cassazione of 26 January 1995, judgment of Tribunale di Milano of 9 April 2001).

However, they are both liable for damage on a different basis. This is the non-performance or improper performance of different contracts (the first contract with the contracting carrier and the second contract between the carriers). It should be assumed that the liability of both carriers is not a joint and several liability (no legal basis), but a liability *in solidum*. However, this does not change the essence of the matter, i.e. the possibility to choose between pursuing claims against the contractual carrier and the actual carrier. Obtaining compensation by the entitled person from any of the carriers relieves the other carrier from liability in this respect as well. Of course, this does not resolve the issue of settlements between carriers. Such situation of the actual carrier with regard to the consignee under the CMR convention leads to the conclusion that also in the case of claims between the contractual carrier and the actual carrier under these provisions, these claims should be treated as recourse claims in a situation where the consignee is a person entitled to assert claims.

Conclusions

The above remarks point to a different situation for the actual carriers, depending not only on which convention applies but also on who claims (original consignor or consignee). In a situation where the actual carrier is directly liable to the entitled person and this liability has been formed as a joint and several liability or *in solidum* (together with the contracting carrier) the claim between the carriers is of a recourse nature with consequences thereof.

On the other hand, if, according to the provisions of law, the entitled person from the original contract of carriage cannot pursue claims against the actual carrier (which takes place in the case of claims brought by the sender on the basis of CMR), the claim of the contracting carrier against the subcontractor is of an independent nature.

Such a situation is certainly not desirable, especially in the absence of an explicit regulation of the right to pursue claims under the CMR Convention. In the light of the above, it seems justified to postulate the establishment of joint and several liability of the contracting carrier and the actual carrier for damages caused by the latter, and thus the possibility of direct claims against the latter, also in this convention. The introduction of such a possibility would significantly speed up the compensation of transport damages, reduce the number of proceedings and reduce the risk of different decisions in relation to the same facts. Such a solution would also remove doubts as to the nature of the contracting carrier's claim against the actual carrier as a claim for recourse, and thus prejudice that early compensation by the contractual carrier is a condition for pursuing its claims against the actual carrier.

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