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The carrier's liability for damage to cargo in multimodal transport with special focus on the Rotterdam Rules

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The turn of the 20th and 21st centuries has been the period of increasing importance of multimodal transport in commercial relations. This transport is characterized by using at least two different modes under the contract of carriage of cargo concluded between different countries¹. The development of this mode of transport entails the emergence of numerous problems, not only of technical, but also of legal nature.

These problems include, in particular, the decision on the liability of the carrier in individual modes of transport, where international unimodal conventions are applicable. The most important of them are such conventions as the CMR Convention for the Carriage of Goods by Road², COTIF-CIM Convention for the Carriage of Goods

¹ A. Salomon, *Spedycja w handlu morskim. Procedury i dokumenty*, Gdańsk 2003, p. 187.

² *Convention on the Contract for the International Carriage of Goods by Road* (CMR) and Protocol of signature, Geneva, 19 May 1956 (Journal of Laws [Dz.U.] of 1962, No 49, item 238 as amended).

by Rail³, CMNI Convention for the Carriage of Goods by Inland Waterways⁴ and maritime conventions, particularly the so-called Hague – Visby Rules⁵ (hereinafter referred to as the HVR), or the Hamburg Rules⁶. These conventions by definition govern the liability of the carrier within a given branch of transport. The problem, however, in practice, is frequently to determine at which leg of carriage a damage to the cargo occurred. If the cargo is carried in a container closed at the initial loading place and opened at the place of final discharge, it will be difficult to establish whether this damage occurred e.g. on a road or sea leg. This was one of the issues considered during proceedings carried out by the UNCITRAL⁷ on another convention on carriage by sea, i.e., the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly known as the Rotterdam Rules (RR)⁸. The Convention has not come into effect so far (its validity condition is the ratification, acceptance, approval or accession by at least 20 countries⁹), but even now it does raise some controversies. The

³ Convention for the Carriage of Goods by Rail (COTIF-CIM), Berne, 9 May 1980 (Journal of Laws [Dz.U.] of 1985, No 34, item 158) amended by the Protocol made in Vilnius on 3 June 1999 r. (Journal of Laws [Dz.U.] of 2007, No 100, item 674)

⁴ Convention for the Carriage of Goods by Inland Waterways, Budapest, 22 June 2001 (CMNI). The Convention is to be ratified by Poland which was authorized to do so by decision of the EU Council No 2015/1878 of 8 October 2015 that authorized the Kingdom of Belgium and the republic of Poland to ratify the Convention, and the Republic of Austria to join the Budapest Convention for the Carriage of Goods by Inland Waterways (CMNI; Journal of EU, L s., of 2015, No 276, p. 1.).

⁵ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed in Brussels on 25 August 1924 (Journal of Laws [Dz.U.] of 1937, No 33, item 258) with amendment protocols of 1968 (Journal of Laws [Dz. U.] of 1980, No 14, item 48, referred to as the Visby Rules) and of 1979 (Journal of Laws [Dz. U.] of 1985, No 9, item 26).

⁶ United Nations Convention on the Carriage of Goods by Sea of 1978.

⁷ United Nation Commission on International Trade Law.

⁸ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea signed on 23 September 2009 in Rotterdam.

⁹ See Article 94 Section 1 of the RR. The RR were signed by 24 states, e.g., the USA and Poland, yet they were ratified only by Spain, Togo and Congo;

scope of reforms it has introduced is quite broad and includes issues related to transport documents (including their significant deformalisation), or making written and electronic transport records equivalent. In the light of further considerations, however, the focus of our interest will be mostly on solutions concerning the regime of the carrier's liability on the basis of the RR.

1. The scope of regulations of the carrier's liability in maritime conventions

At the moment, the HVR are the provisions with the widest range of impact in maritime transport. Their primary assumptions, hugely influenced by ideas prevalent in the English-speaking countries, were developed in the late nineteenth century¹⁰. The Convention itself was the result of the proceedings of the International Maritime Committee that was established in 1897. Its task was to prepare draft conventions that subsequently were to be on the agenda of international conferences convened by the Belgian government in Brussels. Conventions adopted at those forums were commonly known as the Brussels Conventions. Among them we can list e.g., the Convention for the Unification of Certain Provisions Relating to Events of Sea, or the Convention for the Unification of Certain Provisions Related to Assistance and Rescue at Sea (both conventions were adopted in 1910). One of the most important conventions was the Convention of 1924 on the Unification of Certain Rules Relating to Bills of Lading, referred to as the Hague Rules (HR)¹¹.

The objectives of regulations of the Convention were, among others, certain issues related to the development of the contract of carriage, or some obligations of the carrier associated with the loading of goods, or the issuance of bills of lading. From the point

<http://www.rotterdamrules.com/content/introduction> (access: 21 March 2016).

¹⁰ J. Łopuski, *Odpowiedzialność za szkodę w żegludze morskiej*, Gdańsk 1969, p. 155.

¹¹ M. Sośniak, *Zarys prawnej problematyki transportu*, Katowice 1972, p. 157.

of view of further considerations, however, the most important is the regulation of the carrier's liability for damages to cargo. This regulation has successfully fulfilled its role for over 40 years, yet technological advancements as well as changes in transport documents (especially in the context of the development of **door-to-door** transport) have given rise to the need for change. What was really important in that context was the containerization of transport and related significant increase in the volume of cargo carried on ships at one time¹².

For these reasons, the HR were later modified by the two protocols of 23 February 1968 (the Visby Rules – VR) and of 21 December 1979. A wider scope of modifications was implemented by the former protocol. These modifications cover changes pertaining to limits of the carrier's liability or specifying the term of a unit of cargo. This issue needed further specification as to whether in container transport individual units of cargo placed in the cargo container should be treated as a unit of account, or rather this would be the cargo in the container as a whole. Therefore, the VR determined that the term “cargo” would be understood as all the goods loaded into one container, unless the number of packages, each of which would be treated as a separate cargo in one container, is declared in the bill of lading¹³. In the 1979 protocol, the changes implemented were related to the introduction of the SDR¹⁴ as a unit of account while determining the limits of the carrier's liability for damage to cargo¹⁵. However, the focus of the HVR was still laid on defining the liability of the sea carrier only from the moment of loading the goods in the port of loading until their unloading in

¹² M. Dragun-Gertner, *Ograniczenie autonomii woli stron morskich kontraktów żeglugowych*, Gdańsk 1996, p. 63.

¹³ Article 2 Subparagraph c of the Brussels protocol of 1968, amending Article 4 of the HR.

¹⁴ *Special Drawing Rights* – supplementary monetary unit being an international unit of account.

¹⁵ Article II Section 2 of the Brussels protocol of 1979, amending Article 4, Section 5 Point d) of the HR. Previously, the unit for determining the limits of the carrier's liability was pound sterling, which resulted from the Anglo-Saxon foundations of the Convention.

the port of discharge. With time, however, this solution proved to be inadequate for the new organization of the transport cycle.

Further on, the HVR were increasingly criticised. Apart from the aforementioned problem, other issues discussed concerned the fact that the Rules did not formally cover carriage relations in shipping that were not based on bills of lading, and that the scope of their obligatory application was too narrow, thus allowing carriers to avoid liability. Even before the amendments introduced by the Brussels Protocol of 1979 criticisms were heard that the provisions on the quota limitations of the carrier's liability were outdated. Hence, during the first meeting of the UNCITRAL in 1968 there was an explicit need to develop a new convention. The UNCTAD Working Group on International Shipping Legislation¹⁶ was included in proceedings in this area. As a result, the aforementioned Hamburg Rules¹⁷ were enacted in 1978.

These rules have introduced numerous changes: the scope of the Convention was extended to cover all contracts of carriage of goods by sea¹⁸ and the regime of the carrier's liability was strengthened by introducing the concept of a presumed fault¹⁹ or the exceptions of liability when compared to the HVR. At that time, a new solution was the introduction of a higher liability level in relation to the HVR that was calculated on the basis of the SDR, or specification of separate limit amounts for liability for any delays determined as a multiplicity of freight²⁰. In view of our further considerations it is essential that the scope of the Convention's application was

¹⁶ United Nations Conference on Trade and Development.

¹⁷ M. Dragun-Gertner, *Ograniczenie autonomii*, p. 81.

¹⁸ Article 1 Section 6 of the Hamburg Rules: „Contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another”.

¹⁹ Article 5 Section 1 of the Hamburg Rules– „The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences”.

²⁰ M. Dragun-Gertner, *Ograniczenie autonomii*, p. 83.

extended to embrace the **port-to-port** relation, in contrast to the HVR regulation that was named **tackle-to-tackle** in this respect. Following this Convention, the carrier is liable for, e.g., goods in the port prior to their loading on the vessel.

The Hamburg Rules came into effect on 1 November 1992 due to their ratification by the twentieth state (Zambia). In practice, however, their coming into force was primarily caused by the states whose role was not very significant in terms of international shipping. Moreover, after the Rules have become effective, some states that were more influential in maritime transport, did sign the HVR. This was related to claims as to the Hamburg Rules; among these claims we can list, e.g., departure from the traditional terminology used in the HVR, on which the case law and legal doctrine were based, or explicit shift of the burden of proof onto the carrier²¹. The advantage of the HVR over the Hamburg Rules is even more explicit that in the case of states that have not formally become a contracting party, and provisions stipulated therein were often adopted in their domestic legislations. The HVR are often applied on the basis of the contract of carriage itself, even if a bill of lading is not issued²². Therefore, the Hamburg rules have not performed a major role in solving the problem discussed.

Due to the huge importance of multimodal transport, including the use of maritime transport as well as the absence of comprehensive regulatory system of the carrier's liability for unlocalized damage, attempts were undertaken to develop a convention that would address this issue. This was further made more complicated by legal fragmentation and diversity on the international arena, especially due to the fact that frequently some states joined, for instance, the Hamburg Rules, yet still being bound with the Hague and Visby Rules. Moreover, the proceedings of the UNCITRAL did not progress fast. It should be also stressed that normative solutions regarding multimodal transport that had been developed earlier did not frequently receive sufficient support. For this reason, the

²¹ M. Czernis, *Reguły rotterdamskie – geneza powstania*, „Prawo Morskie” 2010, vol. 26, p. 267.

²² A. Salomon, *op.cit.*, p. 112.

regulations suggested such as the United Nations Convention on International Multimodal Transportation of Goods of 1980 (which will be discussed later in the paper) usually remained mainly on paper.

On the other hand, we cannot forget that on the global scale individual states devised their own solutions based on existing maritime conventions; those solutions can be collectively defined as the so called “hybrid” legislation. A situation was possible when a state was formally a contracting party to, e.g., the HVR but in its internal regulations it implemented other selected parts or provisions of, for instance, the Hamburg Rules. The most commonly occurring situation is that the substantive law of a given state adopts solutions that are modelled on the HVR, while the scope of regulations is developed similarly to the Hamburg Rules. Frequently there is a departure from the nautical fault exception, characteristic of the HVR, which was not applied in the Hamburg Rules. The limits of the application of regulations are also shifted, and thus they include not only the bill-of-lading transport, but also contracts based on other transport documents. The period of responsibility of the sea carrier to cover port-to-port relation is also extended. The development of similar legislative trends explicitly indicates that the international community has become increasingly less interested in maintaining a “pure” liability regime, whether based on the HVR, or on the Hamburg rules²³. This, to some extent, contributed to the development of efforts aimed at devising another convention regulating the liability of the sea carrier, especially in multimodal transport.

These trends were evident even in arrangements made at the 29th session of the UNCITRAL²⁴, according to which a decision was made to perform a comprehensive analysis of international law and national legislations in order to find a basis for a new multimodal transport convention. During the meeting, specifically huge attention was paid to issues concerning the legal aspects of electronic

²³ M. Czernis, *Reguły rotterdamskie*, p. 273–274.

²⁴ It was held between 28 May–14 June 1996 in New York.

information flow²⁵. At that time, however, these activities were not perceived as particularly important, and it was noted that the development of a potential draft cannot be too much of a burden for the UNCITRAL. The works that have been carried out since then tend to proceed relatively slowly. What was also necessary was the development of a number of compromises while devising new regulations regarding, e.g., limits of the carrier's liability²⁶ as well as arrangements and solutions addressing the period of responsibility which would be subject to the legal regime of the new Convention.

In the course of works proceeding on the new convention, powerful influences of the US delegation were particularly evident. The US legislation had been so far characterized by certain diversities in comparison with the globally predominant trend in the international shipping legislation, determined mainly by the HVR²⁷. For this reason, the USA – when in the 1990s. works were started on a new convention – stopped their works on changes in their legislation that would aim at adjusting the US shipping law to international standards. At the same time far-reaching efforts were undertaken to incorporate American normative solutions into the drafted convention²⁸.

Long-term proceedings on the international arena resulted in the adoption of the abovementioned Rotterdam Rules by the UN General Assembly on 11 December 2008. Numerous changes were suggested that included, for instance, forms of transport documentation and

²⁵ See *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, 28 May–14 June 1996, General Assembly Official Records, Fifty-first Session Supplement No. 17 (A/51/17)*.

²⁶ M.F. Sturley, *Transport law for the twenty first century: an introduction to the preparation, philosophy, and potencial impact of the Rotterdam rules*, in: *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules. An analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, ed. D. R. Thomas, Dawlish UK 2009, p. 20.

²⁷ We should mention the so-called COGSA (*Carriage of Goods by Sea Act*) of 1936 applicable to international carriage of goods by sea to or from the United States.

²⁸ M. Czernis, *Lex americana a reguły rotterdamskie*, „PrawoMorskie” 2011, vol. 27, p. 52.

allowing electronic flow of transport documents. From the point of view of further deliberations, the most important, however, is the fact the Rules provided for a significant extension of the period of responsibility of the carrier under the RR in comparison with previous conventions. It was assumed that the liability for damage to cargo would include **door-to-door** transport. This concerned liability within the entire journey from the initial place of loading to the final place of discharge that was covered by a single contract of carriage if only the cargo was carried by sea on a basic leg²⁹. A significant difference to the existing maritime conventions is the possibility of applying the Rules to a non-sea leg of carriage³⁰.

2. Concepts of “network” and uniform structure of the carrier’s liability

We can distinguish two systems, the objective of which is to define the rules for developing and shaping liability for damage to cargo carried by various transport means in multimodal transport.

The first of them can be described as a network system. In this case, the carrier is assumed to be liable due to the liability regime provided for each leg of cargo carriage, yet in a situation if localizing the damage was impossible, the carrier would be liable only for proven organizational neglect. Thus, for example, if the cargo was carried by a road vehicle and on a sea leg, the carrier would be liable pursuant to the regime of, e.g. the CMR or HVR conventions when it would be possible to prove that the damage occurred specifically on any of these legs. If localizing the damage to the cargo was impossible, yet the carrier cannot be to blame for any organisational neglect, the carrier’s liability would be excluded.

The latter system can be defined as a **uniform system**. It would assume that regardless of whether on the journey between points A and B one or more types of transport would be used, the carrier’s

²⁹ M.F. Sturley, *op.cit.*, p. 15.

³⁰ More detailed considerations of solutions adopted in the Convention are to be found in Sections 5 and 6 of this paper.

liability for the entire journey would be governed by the same regime of civil liability. The major advantage would be that even if localizing the damage to cargo was not possible, there would be no problem in specifying the liability of the carrier³¹. The major disadvantage, however, is that the carrier, being liable always pursuant to the same liability regime, in relation to individual subcarriers will have the right of recourse compliant with relevant unimodal conventions. It has to be borne in mind that the rules and the scope of liability, including its amount limits³², may be different in this case.

The attempts to reconcile the advantages and disadvantages of both solutions seem to incline towards the construction of the so-called “limited” or “modified” network system. In comparison with the “pure” network system, the key difference is that in a situation when localizing the damage is impossible, the carrier will be liable in accordance with a separate specific liability regime. In other respects, the carrier would be liable as it is usually occurs in the network system³³. The Rotterdam Rules are an example of applying this system of regulation of the carrier’s liability.

3. Multimodal normative solutions

In practice, we can specify normative solutions that represent each of the aforementioned systems. Some of these systems have regional coverage. An example thereof would be the agreement on multimodal transport signed on 17 November 2005 and being effective between the Member States of the Association of South-East Asian Nations³⁴. In accordance with Article 7 of the Agreement, this

³¹ Ch. Hancock, *Multimodal transport under the convention*, in: *A New Convention for the Carriage of Goods by Sea*, p. 41.

³² For example, the CMR convention specifies the carrier’s liability limit at 8,33 SDR/kg of cargo, the CIM Convention 17 SDR per 1 kg of cargo, and the Budapest CMNI Convention – 2 SDR per 1kg of cargo or 666,6 SDR for a package, depending on which limit is higher.

³³ M. Dragun-Gertner, *Kwotowe ograniczenie odpowiedzialności przewoźnika w międzynarodowym prawie przewozowym*, Toruń 1984, p. 95.

³⁴ Association of South – East Asian Nations (ASEAN).

regulation covered the liability of the carrier from the moment of having taken the cargo under custody until its delivery³⁵. In other words, in multimodal carriage of cargo, the same liability regime will be applied, regardless of the combination of transport means used between the place of receipt of goods and the place of delivery.

At the international level, numerous attempts were undertaken to draft a convention that would regulate the carrier's liability in multimodal transport. Among these attempts, one can enumerate the UNIDROIT draft³⁶ of 1965, the Tokyo Rules of 1969 (the CMI draft³⁷) as well as the Rome draft of 1970. They were to regulate the agreement on international multimodal transport of goods concluded between the shipper and the carrier that would oblige them to perform carriage on their own or to organise carriage on the entire journey. The solutions offered were based, to a large extent, on different versions of the network system³⁸.

The most significant attempt at a comprehensive solution to the problems of multimodal transport was the United Nations Convention on international multimodal transport of goods, adopted in Geneva on 24 May 1980. The conditions for its application were, for example, that the place of taking goods under custody and the place of delivery were within the territory of the state which was a signatory of the Convention, but also that a transport document was issued in one of these states³⁹. Solutions adopted in the Convention were generally based on the uniform system of the carrier's liability. The Convention also included some elements of the network system. The uniform system of liability is also applied in the case of damage that can be localized without any problems;

³⁵ The responsibility of the multimodal transport operator for the goods under the provisions of this Agreement covers the period from the time the multimodal transport operator has taken the goods in his charge to the time of their delivery.

³⁶ Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law).

³⁷ Comité Maritime International.

³⁸ Z. Kwaśniewski, *Umowa multimodalnego przewozu towarów w obrocie międzynarodowym*, Toruń 1989, p. 39.

³⁹ A. Salomon, *op.cit.*, p. 240.

however, in determining the scope of damage only the limits applicable in compliance with regulations addressing a specific type of transport can be considered as long as they are higher than it would be stipulated in the Convention⁴⁰. Yet, due to the lack of acceptance by a sufficient number of states, the Convention has never entered into force. For the time being, there is no globally binding and valid convention that would decide on the legal regime of the carrier's liability in multimodal transport.

Attempts were made to fill the loophole in the multimodal transport regulation by using sample contracts developed among private international organizations such as the FIAT International Federation of Freight Forwarders Association⁴¹, CMI, and the Baltic International and Maritime Council (BIMCO⁴²). An example here may be, for instance, the so-called "General Conditions for the Combined Transport Document" (UNICOMBILL) developed by the CMI, on the basis of which a uniform regime of the carrier's liability could be adopted by way of contract, even if it was possible to localize the damage. In the same year, i.e. in 1973, the International Commerce Chamber in Paris (ICC) issued Uniform Rules for the Combined Transport Document⁴³ (i.e. the Paris Rules), modified subsequently in 1975. They were based on the so-called TCM draft of 1971 which allowed the use of the uniform system of the carrier's liability⁴⁴. The solutions offered were therefore rather similar to those covered in the Convention of 1980. Similarly as the Convention, they were, however, of minor importance. For this reason a new version of the *Rules for Multimodal Transport Documents* of 1991 was adopted, and this document re-addressed the Hague-Visby Rules' scheme⁴⁵. Currently, multimodal extensions of unimodal conventions dominate. Their examples can be found, among others, in Article 2 of the CMR, Article 1 § and Article 4 of the CIM of Annex B to the COTIF-CIM or Article 2, Section 2 of the CMNI.

⁴⁰ Z. Kwaśniewski, *op.cit.*, p. 150.

⁴¹ International Federation of Freight Forwarders Associations.

⁴² Baltic and International Maritime Council.

⁴³ ICC Rules for a Combined Transport Documents.

⁴⁴ Z. Kwaśniewski, *op.cit.*, p. 46.

⁴⁵ M. Czernis, *Reguły rotterdamkie*, p. 271.

To recapitulate, the international legal order still lacks certain normative solutions that would comprehensively solve the above-mentioned problems of multimodal transport of goods, as the regulations that have been in effect so far are to be considered as fragmentary and incomplete.

4. The decision on the regime of liability for damage to cargo in the context of the Rotterdam Rules

Our considerations shall now be shifted to provisions of the Rotterdam Rules. In accordance with Article 1, Section 1, the regulation of this Convention covers a contract in which the cargo carriage may include further use of means of transport other than maritime transport. However, pursuant to Article 12, the period of responsibility of the carrier governed by the Convention starts from the moment when the carrier receives the cargo to carry, and ends at the moment of its discharge at the place of delivery (i.e., in the door – to – door relation).

Prior to signing the RR, the most far-reaching regulation as regards the length of the period of carriage subject to the Convention regime were the Hamburg Rules; they included the liability of the sea carrier from the moment the cargo was in the port of loading, until the port of discharge. The scope of the Rules covered both damages that occurred in transport as well as damages caused in storage, e.g. in the initial port while waiting for loading.

The extension of the application scope of the sea carrier's liability in relation to the Hamburg Rules or the HVR was preceded by a heated debate that lasted almost until the very end of the proceedings on the Convention. Multimodal provisions of the Rules are still indeed one of the most controversial solutions suggested in this document. The Convention, due to its multimodal normative provisions, is called the **maritime plus** Convention⁴⁶. We must,

⁴⁶ H. Staniland, *Chapter 2: Scope of application*, in: Y. Baatz, Ch. Debatti-

however, bear in mind that the Rotterdam Rules do not constitute a uniform system of the carrier's liability. The RR do not refer to the denunciation notice of all conventions regulating the carrier's liability, irrespective of the means of transport used. The only reservation of a similar nature covers the obligation to denounce the convention governing the sea carrier's liability, i.e. the aforementioned Hague-Visby Rules or the Hamburg Rules. The RR do not result in any obligation to denounce the CMR convention or the COTIF-CIM convention.

In view of the extension of the scope of the RR it was necessary to develop solutions that would decide what legal regime was to be applied to the damage that occurred in the performance of a specific contract of carriage, concluded within the period of the carrier's liability, but before loading the goods or after their discharge from the vessel. In such circumstances, legal regimes of the RR and a relevant unimodal convention might overlap. The authors of the Rules specified certain provisions that were to solve this problem; these were covered in Article 26 of the RR. The Article indicates firstly which provisions of unimodal conventions and in which cases will be given priority of application in reference to a given agreement concluded with the cargo carrier. In particular, a reference was made to hypothetical contracts of carriage which would be concluded for individual legs of the journey. Article 26 stipulates that in a situation where a damage would occur explicitly on another leg than the sea leg of carriage, the RR do not take precedence over international conventions that would instead regulate the legal regime for this abstract and separate contract of carriage. If, in fact, there was no doubt as to on which leg of carriage the damage or an event occurred that resulted in delivery delays, the abovementioned problem with the choice of a legal regime deciding on the carrier's liability would not be considered at all. A relevant unimodal convention must therefore inherently regulate this issue as well as limits of liability. In addition, Article 26 in Subsection b) states that the Convention should also address the issue of limita-

sta, F. Lorenzon, A. Serdy, H. Staniland, M.N. Tsimplis, *The Rotterdam Rules: a practical annotation*, London 2009.

tion of actions. This obviously entails the enforcement of claims made against the carrier, yet still remaining closely connected with the issue of bases of the carrier's liability.

Following reservations of Article 26 of the RR, one of essential requirements is for the regulation of the carrier's liability in a given convention to rely on imperative or at least semi-imperative standards to the benefit of the shipper. This is the last of the requirements specified in Article 26 of the RR as the priority condition of using a relevant unimodal convention. For example, in accordance with Article 41 of the CMR, contractual clauses that directly or indirectly violate its provisions remain ineffective. A similar reservation includes Article 5 of the CIM of Annex B to the COTIF-CIM. Hence, we are dealing with the *ius cogens* rules. The application of these provisions cannot be derogated from by contract. This provision of the RR explicitly stresses the concern of the Convention's authors to recognize legal regimes based on unimodal transport conventions that have been treated as absolutely valid by the international community. It should, however, be borne in mind that the RR provides for the priority of provisions of international nature, which does not include domestic laws of various states⁴⁷. Thus, the RR will not take precedence over conventions that include imperative provisions; they will, however, be applied if they refer to conventions including dispositive norms, or soft law, as well as when a given transport leg is carried out using means of transport other than maritime transport and is subject to internal control of a given state.

We can therefore conclude that the Convention's authors intended for this document to cover within its scope primarily an unlocalized damage (of course, except damage arising explicitly on the sea leg). Article 26 of the Rotterdam Rules explicitly says that priority before applying the RR is ascribed to unimodal conventions when no doubts exist as to on which leg of the carriage the damage occurred and which international document imperatively defines

⁴⁷ D. Dąbrowski, *Reguły rotterdamskie a unimodalne konwencje przewozowe*, „Studia Iuridica Toruniensia” 2013, vol. 12, p. 56, <http://dx.doi.org/10.12775/SIT.2013.003>.

the rules of the carrier's liability. Regulation of liability from the moment of taking cargo for carriage until its delivery to its port of discharge (even if the vessel is not exclusively used as means of transport) is therefore a suggested way to circumvent difficulties in assessing the regime of the carrier's liability that occur in the traditional network system.

5. The relation of the Rotterdam Rules to conventions governing the liability of the carrier in transport by road, rail and inland waterways

Article 26 defines the scope of the RR being applicable to damage occurring prior to loading or after unloading the goods from the vessel. The relation of the RR to conventions governing a specific means of transport other than maritime transport is regulated in Article 82. This provision includes a specific reference to unimodal conventions which apply to specific branches of transport. It determines the way the regime of the carrier's liability for unlocalized damages should be settled, and indicates that the RR will not breach the use of the unimodal convention when it also contains certain multimodal regulations. Quite interesting, however, is the way in which references are made to relevant transport conventions. The authors of the RR did not refer to them by their names; instead, Article 82 is formulated in the manner so as its content is almost a copy of multimodal provisions in relevant conventions. For example, both Article 82 and Article 1 §4 of the CIM of Annex B to the COTIF-CIM condition the priority in the application of the Convention (on transport by rail) to include also a sea leg on transport by sea being only complementary in relation to transport by rail. On the one hand, we should positively assess the fact that the authors of the Convention resigned from indicating the names of specific transport conventions, whose provisions would take precedence over the RR. With the adoption of a new unimodal convention, in any branch of transport a problem would emerge whether priority would be only ascribed to the convention explicitly

indicated in provisions of Article 82, or whether this article should be applied by analogy also to a new regulation. We also have to bear in mind that the adoption of a new transport convention does not automatically invalidate other legal regulations existing so far. Probably the best examples here are the HVR rules and Hamburg Rules as both these conventions apply concurrently in the international legal order. Moreover, there are situations when the same state, being a party to the HVR, joined concurrently the Hamburg Rules. In addition, the situation is even more complicated due to the already mentioned „hybrid” internal legislation in individual states.

On the other hand, a solution applied here cannot be considered as fault-free. Attempts to circumvent this problem, related to adopting successive unimodal conventions, should follow an assumption, in accordance with which provisions of the convention copied in Article 82 of the RR will be adopted intact in successively enacted conventions. If the subsequent conventions include modified provisions, the problem will be repeatedly the same, and this may give rise to the emergence of situations that would be difficult to assess in terms of a relevant liability regime of the carrier. Instead, we must remember that even the problem-free modification of unimodal conventions does not necessarily have to mean that updating Article 82 of the RR will be a conflict-free and fast process. It is hard to forget how much effort was invested into agreeing on the final version of the Rules, and therefore any modifications thereto could lead even to several years of further delay. This situation would largely annihilate legislative efforts of the authors aiming to solve the problems of multimodal transport. Hence, the solution adopted only partially solves the aforementioned problem. In our discussions on the relations with specific conventions we are going to focus on most controversial references, i.e., on references to the unimodal convention on transport by road, rail and inland waterways.

In transport by road, the most common transport convention, especially in Europe, is currently the CMR Convention. In practice, even if a given state is not formally a party to the Convention, for a variety of reasons its provisions are still frequently applied to international transport carried out within this state's territory.

According to Subsection b) of the abovementioned Article 82 of the RR, the priority of application is ascribed to:

“(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship”.

This provision of the RR corresponds to provisions of Article 2, Section 1 of the CMR Convention⁴⁸. By analyzing its content we can conclude that the decisive factor for the applied regime of liability will be potential trans-shipment of goods from the vehicle to the vessel. If the cargo remains on the vehicle during transport, for example, by a seagoing ferry, the CMR Convention will be applied by definition (regardless of other reasons, obviously). But if the cargo is loaded onto the vessel, then even if the same cargo is further transported from the port of trans-shipment using the same vehicle, the carrier will be liable in compliance with the RR regime. According to Section 1 of Article 2 in its further part, the application of the CMR Convention will be excluded when the damage resulted from the fact that could occur only in the course of and as a result of transport other than transport by road. In this particular place a reference is also made to a hypothetical contract that could be concluded by the shipper with the carrier on transport for legs of

⁴⁸ 1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.

carriage of a given cargo different from carriage by road. According to Article 2, the liability of the road carrier would then be governed by the liability regime relevant to the place of the occurrence of damage to cargo, regardless of the fact that this cargo remained on a vehicle parked on the board. The key point was for, firstly, the road carrier to be capable of referring to limits of liability valid in a given mode of transport and, secondly, for the situation of the person entitled to be at least as favourable as it was stipulated in the contract with the carrier representing a branch of transport other than transport by road⁴⁹. If, therefore, it could be proved that the cargo on the vehicle transported by the abovementioned ferry could nevertheless be damaged only and exclusively due to influences of the sea, then despite the fact that that cargo was not re-loaded on the board, the road carrier's liability would comply with the Rotterdam Rules.

A number of issues related to the relationships existing between the RR and unimodal conventions are widely criticized. One of these issues is a mutual relationship of limits of the carrier's liability in various conventions⁵⁰. Another issue is the extent of precedence in the application of relevant unimodal conventions. Article 26 does not provide for the priority use of the unimodal convention in its entirety but rather refers to a specific category of provisions. What may seem problematic is the assessment whether a given provision of the Convention belongs to, e.g., regulation of the carrier's liability or it does not.

An issue of much controversy is that in the context of regulations which do not take precedence in view of Article 26, the RR provisions should in principle apply competitively to corresponding provisions of the unimodal convention⁵¹. Critics of the RR indicate that this may be the source of conflict, because in the case

⁴⁹ K. Wesołowski, *Umowa międzynarodowego przewozu drogowego towarów na podstawie CMR*, LEX 2013.

⁵⁰ F. Berlingieri, *Multimodal Aspects of the Rotterdam Rules*, p. 5, <http://rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf> (access: 1 June 2016).

⁵¹ Ch. Hancock, *op.cit.*, p. 45.

of carriage, whose agreement provides for both maritime carriage and carriage by other means of transport (e.g. transport by road), it may be necessary to duplicate transport documents issued (in this case) on the basis of the RR and the CMR Convention⁵². It may also concern the remaining part of a given convention. In the literature, however, some other voices are presented, according to whom in case of the Rotterdam Rules coming into effect, the contract of carriage which provides for a road leg (still being subject to the RR regime) would be governed entirely by the regime of the Rules, accompanied by a total exclusion of the CMR Convention's application⁵³. This situation would exclude the obligation of issuing transport documents that is provided for in this Convention. This stance, although logical, seems not entirely adjusted to the mutual relationship between the RR provisions and the CMR Convention. The RR indicate that the priority on the road leg of carriage, preceding the provisions of the RR, will be ascribed to the convention "to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship". We have to remember that Article 2 of the CMR Convention does not cover the scope of such multimodal transport in absolutely each and every situation. Article 2 says that in a situation where the load remained on the vehicle while being carried (in this case on board a ship), but the damage would arise as a result of factors which could occur only and exclusively on the sea leg of the carriage, the CMR Convention would not apply. The liability "of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport". Therefore, neither party is capable to explicitly assess which liability regime will apply in the event of

⁵² D. Lost-Siemińska, *Reguły rotterdamskie a inne konwencje przewozowe*, „Prawo Morskie” 2010, vol. 26, p.83.

⁵³ See: D. Dąbrowski, *op.cit.*, p. 64.

the damage occurrence, even if the cargo is not reloaded. Certain confusion in relationships between the CMR Convention and RR results in the fact that adopting such a firm stance seems to be too far-reaching. Quite similar problems of mutual relations in the application of the RR and relevant unimodal conventions can be encountered in the case of liability of the carrier in transport by rail and by inland waterways.

In relation to transport by rail, Article 82, Subparagraph c) indicates that the priority of application is ascribed to:

“(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail”.

Yet, Article 1 § 4 of the CIM of Annex B to the COTIF-CIM Convention says:

“when international carriage being the subject of a single contract of carriage includes carriage by sea or trans-frontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply”

When these two provisions are compared, it can be claimed that the scope of exclusion of the RR application to the benefit of the COTIF-CIM Convention has been specified relatively narrowly. This may concern situations in which the train will be the dominant means of transport for almost the entire length of the journey of multimodal cargo carriage. Carriage by other means of transport would merely be a kind of support. In other words, it would refer to a situation in which transport by ship would be carried out on a relatively short distance in comparison with the length of the journey, on which transport was carried out by train.

The difference in relation to the CMR Convention in this case lies in trans-shipment, the absence of which is an essential condition for the application of the CMR Convention. This is due, indeed, to the very specific nature of transport by rail and by sea. HGV are actually quite frequently transported by seagoing ferries, and it is difficult to imagine a similar situation in the case of trains. Theoretically, the CMR Convention does not limit the time within which a motor vehicle should be on board a ship. In the case of the COTIF-CIM Convention, this time in principle cannot be too

long as regards the railway leg because then it loses its complementary nature.

In practice, however, this difference seems to be losing its importance, because in the case of maritime carriage of cargo remaining on the vehicle it will generally keep its complementary nature. In the case of maritime transport for longer distances, goods are usually trans-shipped as vessels transporting goods over long distances (especially the so-called “containers”) are designed to carry a possibly big cargo, often stacked on the deck. If the goods remained on the vehicle, it would be inherently impossible. Therefore, maritime transport of goods remaining on the vehicle carrying them mainly occurs when there is a sea strait or a channel between the initial port of loading and the final port of unloading, going through which is a condition to reach the destination. Therefore, transport by road will play a dominant role anyway.

The last situation under analysis is a collision of the RR with the convention regulating the transport of cargo in inland navigation. In accordance with Subparagraph d) of Article 82, the RR do not affect the application of international regulations in the event of a collision with:

“(d) any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea”.

It seems that the most relevant solution would be to compare this provision with Article 2, Section 2 of the Budapest CMNI Convention:

“2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless:

(a) a maritime bill of lading has been issued in accordance with the maritime law applicable, or

(b) the distance to be travelled in waters to which maritime regulations apply is the greater”.

As we can see the solution provided for in the CMNI Convention is similar to multimodal regulations of the CMR and COTIF-CIM

conventions. Similarly to the CMR Convention, not transshipping the goods is still a key point. A reservation, in accordance with which the CMNI Convention applies also to the sea leg of carriage as long as the length of the sea leg is not bigger, is functionally equivalent to the COTIF-CIM convention. This, however, does not prejudice whether the sea leg of carriage is to be of a supporting and complementary nature in comparison with the inland navigation. Yet, this section of the inland navigation is to play a dominant role. An element that does not occur in the CMR or COTIF-CIM conventions is a reference to a situation in which a bill of lading has been made in connection with the carriage. In the light of our deliberations it is essential that this is related to subjecting transport to the liability regime of the sea carrier. Therefore, the CMNI Convention directly excludes from its scope of operation the carriage carried out on the basis of the marine bill of lading. A separate issue, however, is the relationship of this reservation with provisions of the RR regulating maritime transport documents. As we have already mentioned, the RR allowed major deformatization of transport documents (even implementing the equivalence of electronic and paper versions). What still remains to be considered is whether the quoted provision of the CMNI convention applies exclusively to the bill of lading in the traditional sense, or whether this concept should be interpreted more broadly.

6. Alterations drafted in the Polish law in view of potential ratification of the RR

Although the RR have not been ratified by Poland, efforts have been undertaken to prepare potential amendments to the Polish Maritime Code⁵⁴ (PMC), whose task would be to adjust the Polish legislation to the new convention. The proposed changes are to specifically concern provisions of the contract of carriage of cargo regulated by the PMC. Most important changes pertain to transport documents.

⁵⁴ Act of 18 September 2001, the Maritime Code (Journal of Laws [Dz.U.] of 2001, No 138, item 1545 as amended).

The current regulation is focused on the essential role of the bill of lading in maritime transport. Its issuance is not obligatory as the parties in the contract of carriage can decide not to issue the bill of lading. This situation tends to occur more frequently in practice⁵⁵. The parties may then agree that a sea waybill (used in daily practice and not regulated in the PMC) is applicable in relation to a given carriage; it performs similar functions as the bill of lading regulated in Article 47 of the Transport Law⁵⁶. It does not constitute a security as the bill of lading and cannot be used to transfer rights to cargo, yet it evidences the conclusion of the contract and acceptance of cargo for carriage⁵⁷. However, if the parties fail to do so, the carrier will be, under the Polish law, obliged to issue a bill of lading at the request of the shipper⁵⁸. Provisions of the PMC focus on the bill of lading as a type of a waybill which is used in relation to contracts of carriage of cargo under the Polish law. Considering the proposed alterations, the introduction of a more general concept of a transport document is recommended; this document is to evidence the acceptance of cargo for carriage by the carrier, but on the other hand, it is a broader concept than the bill of lading. Moreover, the proposed modifications to the Code are to include the possibility to use transport documents in the electronic form.

The drafted amendments also include regulations regarding the carrier's liability in multimodal transport. At the moment, the regime of the carrier's liability in multimodal transport is linked to the regulations regarding the bill of lading itself. The PMC indicates that, in the case when transport is concerned in which a part of

⁵⁵ M. Stec, *Umowa przewozu w transporcie towarowym*, LEX 2015.

⁵⁶ Act of 15 November 1984, Transport Law (Journal of Laws [Dz.U.] of 1984, No 53, item 272 as amended). Article 47 Section 3. The evidence of concluding a contract of carriage is a waybill, confirmed by the carrier, which can be an electronic data transmission, a computer printout or any other document containing the data specified in Article 38. One copy of the document is given to the shipper.

⁵⁷ M. Dragun-Gertner, J. Łopuski, *Art. 129 [Obowiązek wydania] § 47. Dokumenty przewozowe, które nie reprezentują ładunku w przewozie*, in: *Prawo papierów wartościowych*, red. A. Szumański, System Prawa Prywatnego, vol. 18, Warszawa 2016, p. 446.

⁵⁸ Article 129 §1 of the PMC.

the journey is to go differently than by sea, a possibility exists to issue the so-called direct bill of lading, to which relevant regulations pertaining to the bill of lading are applied. The provision regarding the direct bill of lading (otherwise known as the multimodal bill of lading) refers to the bill of lading issued by the main carrier, i.e., the carrier obliged to transport by sea, which is a fundamental part of a transport obligation⁵⁹. On a given leg, which is a non-sea leg, a legal regime relevant to a given type of carriage is to be used. If, however, it is impossible to determine on which leg a damage occurred, provisions of the PMC will apply⁶⁰. The period of the carrier's responsibility regulated by the Code covers the time from the receipt of goods for carriage up to their discharge to the consignee⁶¹. This provision is already different from provisions in the HVR, yet the objective of the proposed changes was to make Polish legal provisions even closer to those stipulated in the RR. As far as this specific issue under discussion is concerned, these trends are prominent in relation to previously discussed Article 26 of the RR. The projected changes include other changes corresponding to the Rotterdam Rules, for instance, those concerning the limits of the carrier's liability for damage to cargo.

7. Concluding remarks

The Rotterdam Rules, despite being signed by a relatively large number of states, have not come into effect so far. Regulations formulated in them, being the result of long-term legislative proceedings, are nevertheless the subject of heated debates.

Controversies related to the way the new regulations were developed as well as significant consolidation of existing maritime conventions (mainly the HVR) in the international legal order result in delaying the RR coming into force, thus generating fears

⁵⁹ M. Dragun-Gertner, J. Łopuski, *Art. 138, § 46 Konosament bezpośredni*, in: *Prawo papierów wartościowych*, p. 444.

⁶⁰ Article 138 of the PMC.

⁶¹ Article 165 § 1 of the PMC.

whether the solutions developed will be ever applied in practice. Extensive criticism concerning problems of conflicting provisions of the RR and the CMR Convention and violation of the law of treaties is pivotal in this case. In the field literature certain voices can be heard that due to the dependence of the carrier's liability on the leg where a damage was to occur, the contracting parties find it difficult to predict which regulations apply in the event of the damage occurrence. As regards the doctrine, concerns are voiced that the extension of the liability of the sea carrier –instead of solving existing problems – could lead to complicating the situation even further and could result in the clash of conflicting attempts to resolve existing conflicts⁶².

Another point of discussion is that in connection with the provision in the RR on the arbitration settlement of disputes (which is not included in the HVR), doubts can arise in practice as to the mode of their consideration. According to Article 78 in relation to Article 91 of the RR, accepting this mode as binding is conditioned on the declaration of the state joining the Convention. This may, therefore, give rise to doubts as to relevant procedures when a dispute arises between the parties from states, one of which accepted this section of the RR to be valid, and the other did not. Another issue are allegations of some authors concerning a general lack of precision and accuracy, and the excessive complexity of the entire regulation⁶³.

The assessment of the RR, especially in comparison with relevant unimodal conventions, is not unambiguous, however it seems that the Rules constitute a progress in solving the problem of selecting the regime of the carrier's liability in multimodal transport. Critics often say that despite the drawbacks outlined above, the RR do not solve explicitly enough all situations where they would be in conflict with relevant unimodal conventions⁶⁴. On the one hand,

⁶² P. Mankowski, *The Rotterdam Rules – Scope of Application and Freedom of Contract*, „European Journal of Commercial Contract Law” 2010, vol. 1–2, p. 18.

⁶³ W. Tetley, *A critique of and the Canadian response to the Rotterdam Rules*, in: *A New Convention for the Carriage of Goods by Sea*, pp. 287, 292, 298.

⁶⁴ D. Lost-Siemińska, *op. cit.*, p. 84–85.

these fears seem to be slightly exaggerated since the authors of the Convention, to a large extent, took into account the multimodal transport regulations of other conventions in developing the RR. On the other hand, the adopted method of regulation may give rise to considerable doubts and risks in the case of potential changes in specific unimodal conventions. Time will tell whether the proposed solutions will eventually be accepted in the international arena as well as whether they will yield expected results.

STRESZCZENIE

Odpowiedzialność przewoźnika za szkodę w ładunku w transporcie multimodalnym, ze szczególnym uwzględnieniem reguł rotterdamskich

Jednym z najbardziej charakterystycznych przejawów rozwoju transportu międzynarodowego jest wzrost znaczenia przewozów multimodalnych. Ich cechą charakterystyczną jest wykorzystanie na jednej trasie przewozu pomiędzy różnymi państwami co najmniej dwóch różnych środków transportu. Jednym z najbardziej charakterystycznych problemów prawnych związanych z tym zjawiskiem jest nakładanie się na siebie reżimów prawnych w zakresie odpowiedzialności przewoźnika, dotyczących różnych rodzajów przewozu, np. morskiego i drogowego. W kwestii transportu morskiego podjęta została próba rozwiązania m.in. tego właśnie problemu w drodze uchwalenia w 2008 r. Konwencji o umowach międzynarodowego przewozu towarów w całości lub częściowo drogą morską, zwanej potocznie regułami rotterdamskimi (RR). W treści artykułu prześlędzona zostanie ewolucja konwencji morskich, jak również unormowań dotyczących w szczególności wskazanego problemu. Istotna pozostaje również relacja RR do konwencji unimodalnych, regulujących odpowiedzialność przewoźnika w innych rodzajach transportu, w szczególności w zakresie transportu drogowego, kolejowego oraz wodnego śródlądowego. Zarysowany zostanie również wpływ RR na polskie ustawodawstwo i jego potencjalne zmiany w razie ratyfikacji RR przez Polskę.

Słowa kluczowe: transport multimodalny; reguły rotterdamskie; konwencje unimodalne; kodeks morski

SUMMARY

The carrier's liability for damage to cargo in multimodal transport, with special focus on the Rotterdam Rules

One of the most striking manifestations of the development of international transport is the increased importance of multimodal transport. Its characteristic feature is the use of at least two different modes of transport on one journey between different countries. One of the most distinctive legal problems in this context is the overlapping of legal regimes of the carrier's liability regarding different types of transport, for example, by sea and by road. In maritime transport, attempts have been undertaken to solve this specific problem by adopting the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly referred to as the Rotterdam Rules (RR), in 2008. This paper focuses on the development of maritime conventions as well as regulations related to the problems indicated. Another essential issue is the relation of the RR to the unimodal conventions governing the carrier's liability in other modes of transport, especially in transport by road, by rail and by inland waterways. The impact of the RR on the Polish legislation and potential changes in the case of the RR's ratification by Poland shall be also outlined.

Keywords: multimodal transport; the Rotterdam Rules; unimodal conventions; Maritime Code

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