Orbeliani Law Review ▸ 2022
Vol. 1, No. 1, 1-17
Received: Apr 9, 2022 | **Accepted:** Sep 3, 2022 | **Published:** Dec 22, 2022

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Liability of the Carrier in the Road Carriage of Goods for Theft and Robbery Under Polish Law and the CMR Convention

RESUME

Carrier's liability in the carriage of goods by road is a fundamental part of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which regulates international transport, and the Polish Act – Transport Law, which regulates domestic transport. Carrier is responsible for total or partial loss of goods or for their damage (that is one of the so-called "damages in the substance of the shipment") that occurred in the time between goods receipt and its delivery as well as for the delay of delivery. The carrier is exempt from this liability if the damage to the shipment resulting from certain events (called exonerating circumstances), including circumstances that the carrier could not avoid and the consequences of which he was unable to prevent (Article 17 paragraph 2 of the CMR Convention) or vis maior (Article 65 paragraph 2 of the PrPrzew). Here appears a significant difference between the Convention and the Polish Act, as these exemption circumstances are not identical. Already at this point it may be pointed out that the Polish act introduced a more far-reaching prerequisite releasing the carrier from liability, as a result of which in the case of application of the Polish act it's much more difficult for the carrier to release himself from the obligation to redress the damage.

Keywords: Carrier, delay, total loss, partial loss, vis maior, exonerating circumstance.

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I. Introduction

Carrier's liability in the carriage of goods by road is a fundamental part of the Convention on the Contract for the International Carriage of Goods by Road (CMR)[1], which, as the title indicates, regulates international transport, so when the place of sending the shipment and the place of receiving it are located in different countries, and the Polish Act[2], which regulates domestic transport, that is when the place of shipment dispatch and the place of its receipt are located in Poland. Carrier is responsible for total or partial loss of goods or for their damage (that is one of the so-called "damages in the substance of the shipment") that occurred in the time between goods receipt and its delivery as well as for the delay of delivery (article 17 paragraph 1 of the CMR Convention, article 65 paragraph 1 of the PrPrzew). In doing so, it's understood that the provisions of the Polish Act governing the rules of carrier's liability are of a mandatory nature. This means that the parties to the contract of carriage cannot change them in the contract.

It's important to note that the carrier is exempt from this liability if the damage to the shipment resulting from certain events (called exonerating circumstances), including circumstances that the carrier could not avoid and the consequences of which he was unable to prevent (Article 17 paragraph 2 of the CMR Convention) or vis maior (Article 65 paragraph 2 of the PrPrzew). Here appears a significant difference between the Convention and the Polish Act, as these exemption circumstances are not identical. Already at this point it may be pointed out that the Polish act introduced a more far-reaching prerequisite releasing the carrier from liability, as a result of which in the case of application of the Polish act it's much more difficult for the carrier to release himself from the obligation to redress the damage.

II. Circumstances Which the Carrier Could Not Avoid and the Consequences of Which He Was Unable to Prevent and Vis Maior

The CMR Convention doesn't expressly provide for an exonerating circumstance for the carrier in the form of vis maior, although it's a classic circumstance releasing the debtor from liability if he is liable on the basis of strict liability, so for

[1] Convention on the Contract for the International Carriage of Goods by Road (CMR) and Protocol of Signature, Geneva, of May 19, 1956 (Journal of Laws of 1962, No 49, item 238 as amended); hereinafter: the CMR Convention.

[2] The Act on Transport Law of November 15, 1984 (Journal of Laws of 2020, item 8); hereinafter: PrPrzew.

the very effect (the so-called objective liability), regardless of whether he is at fault. While in the case of liability based on fault, it's necessary to prove the lack of fault (the so-called exculpation) in order to be released from liability, in the case of objective liability proof of the lack of fault doesn't release the debtor from liability, but only in the case of the existence of strictly defined reasons, called exonerating circumstances (causes). The burden of proving (onus probandi) the lack of fault or the existence of any of the exonerating circumstances lies on the debtor.

Introduction of such a solution to the CMR Convention resulted from a different understanding of the term "vis maior" in various legal systems, in particular between the European continental system and the Anglo-Saxon (common law) system[3]. Moreover, in some countries, particularly those not under the influence of the German legal system, this concept didn't exist at all. For example, according to the Civil Code of Georgia (chapter 12), the carrier shall be released from liability if the loss of or damage to the freight or delayed delivery is caused through the fault of the authorized person and/or because of instructions from that person, for which the carrier is not responsible; also, if the defect of the freight is caused by the circumstances that the carrier couldn't avoid, nor could the carrier avoid the consequences of those circumstances[4].

Consequently "vis maior" and "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent" were treated as identical concepts. This is evidenced by the assumption that force majeure within the meaning of Art. 17 paragraph 2 of the CMR Convention occurs when the carrier proves that he took all reasonable and diligent measures that could have been required of him in order to avoid the damage[5]. However, vis maior (force majeure, höhere Gewalt), a concept derived from Roman law, is an external and elementary force of nature or the behavior of third parties, the consequences of which couldn't be prevented even by taking the most extreme precautions[6].

There are two basic theories of vis maior:

1) Subjective – emphasis is placed on the impossibility of preventing the event even with the exercise of extraordinary diligence, even if the event could have been foreseen, or alternatively the impossibility of foreseeing the event despite the exercise of acts of diligence;

[3] Stec M., Odpowiedzialność cywilna przewoźnika za szkody w przesyłce. Geneza, charakter prawny, granice, Cracow 1993, 66-67.

[4] Georgia is a contracting state of the CMR convention (judgment of chamber for civil cases of Tbilisi City Court of July 26, 2018, No21799-14.

[5] Eckoldt J. P., Die niederländische CMR-Rechtsprechung. Ein Auszug aus der aktuellen CMR-Rechtsprechung in den Niederlanden, Transportrecht 2009, No3, 118-119 and the case law of the Dutch courts cited therein.

[6] Zweigert K., Kötz H., Introduction to Comparative Law, Oxford, 1989, 347-348.

2) Objective – the foreseeability of the event and the related obligation to exercise due diligence are irrelevant, and what matters, in this case, is the extraordinary nature of the event and its overwhelming impact, as well as its externality. In light of the jurisprudence of the Polish Supreme Court[7], it may be assumed that force majeure is an event characterized by the following features (which must occur jointly):
    1. Extraordinary – an event that doesn't normally occur;
    2. Inevitable – an event that cannot be prevented with the use of contemporary technical means;
    3. Unforeseeable with the use of contemporary technical means;
    4. External to the equipment (enterprise) with whose functioning (movement) the liability for damages is connected, which excludes such events as:
        - Jamming of brakes in a vehicle,
        - Engine explosion in the means of transport,
        - Driver's disease, or an epileptic seizure suffered by the driver while driving a motor vehicle, even if the previous state of health and results of medical examination did not allow foreseeing the possibility of occurrence of such a disease[8].

Similarly, in Germany, it's assumed that a vis maior is an unusual event, external to the company, unforeseeable, which can't be avoided even with the greatest possible care, and which shouldn't be taken into account by the party concerned because of its frequency[9]. This definition means that the debtor must foresee the possibility of the occurrence of an event and take steps to prevent its occurrence if such steps are possible given the development of technology and techniques. Undoubtedly, at present, it is possible to predict almost all atmospheric phenomena and in principle hardly any phenomenon constitutes a surprise. The key issue here is the premise of inevitability, as the question must be answered as to what measures the debtor should use to prevent the occurrence of the consequences of the event. In the context of the

[7] Judgment of the Supreme Court of Poland of January 11, 2001, IV CKN 150/00, OSNC 2001, No10, item 153; Judgment of the Supreme Court of Poland of December 18, 2002, I PKN 12/02, OSNAPiUS (Case Law of the Supreme Court Labour and Social Insurance Chamber) 2004, No12, item 206; Judgment of the Supreme Court of Poland of December 16, 2004, II UK 83/04, OSNAPiUS 2005, No14, item 215.

[8] Judgment of the Supreme Court of Poland of July 9, 1962, I CR 54/62, OSNCP 1963, No12, item 262; Judgment of the Supreme Court of Poland of December 16, 2004, II UK 83/04.

[9] Jugement of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of January 16, 1974, ETL 1974, 615.

topic of the article, consider what measures a carrier should use to prevent theft or robbery. Events classified as vis maior[10]:

1) Natural disasters (vis naturalis) – phenomena caused exclusively by forces of nature, without the participation of the human factor, e. g. violent precipitation, volcanic eruptions, earthquakes, floods, storms,
2) Final acts and decisions of the competent public authority of a coercive nature (vis imperium) – acts and decisions to which the persons to whom they are addressed must submit, as they are acts of power, e. g. court decisions, administrative decisions (e. g. on the total or partial – for certain goods or persons – closure of state borders, if they haven't been announced beforehand);
3) All acts of armed violence (vis armata) – disruption of collective life of a society resulting from:
   a. Decisions of state authorities (e. g. warfare, countering internal disturbances);
   b. Acts of human individuals remaining outside the company (e. g. a terrorist attack, strike and lockout in other companies);
   c. Events, which have their source inside the enterprise (e. g. strike, lockout), although in relation to these events it should be questioned whether they constitute vis maior, since they are not "external" events.

Not each of the above events is a manifestation of vis maior, releasing the carrier from liability – such an event will not be, for example, a strike in his own company, because it does not meet the feature of externality in relation to the carrier's company. It should also be noted that the same event may be regarded as vis maior in one situation and not in another, e. g. the same atmospheric phenomenon of the same intensity may be perceived differently in two different places with different climatic conditions.

In this context, reference should be made to the concept of "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent ". It is not the same as vis maior – it is a broader concept. It may be said that vis maior is one of the circumstances referred to in Article 17 paragraph 2 of the CMR Convention. The requirements for considering a particular event as a circumstance that the carrier could not avoid and whose consequences he could not prevent may also be met by an internal event, so one that originates within the carrier's company. Examples include a burst tire on a vehicle, unforeseen vehicle breakdowns not caused by the condition of the vehicle, and a strike of its employ-

[10] Szanciło T., Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych, Warsaw, 2013, 235-236.

ees, which the carrier could not avoid even by making financial promises[11]. Such events do not constitute vis maior.

It's evident that the Polish legislator adopted a narrower possibility of releasing the carrier from liability. While in light of the CMR Convention, a haulier may free himself from the liability by proving the lack of fault, although it has to be taken into account that he runs a professional business activity in the scope of carriage, in light of the Polish Transport Act, the proof of the lack of fault doesn't release the haulier. Therefore, the carrier's liability on the basis of the CMR Convention is not objective (for the very effect), unlike in the Polish act. Generally, as far as Art. 17 paragraph 2 of the CMR Convention is concerned, it is assumed that the provision sets a standard of the carrier's conduct that lies between the demand to take all possible precautions within the limits of the law and the obligation to do more than act reasonably, in line with the practice of being prudent (cautious). The expression "cannot be avoided" must be interpreted as "cannot be avoided even with the greatest diligence"[12], whereby "utmost diligence" is not to be construed as extreme care on the part of the carrier for the shipment, but as acts that are feasible and reasonable within the scope of the carriage to be taken by a reasonable carrier. The carrier need not prove a complete inability to prevent an occurrence, as this would result in the carrier being obligated to undertake heroism in defense of goods[13]. The carrier should do everything in its power to comply with the shipper's requests in good faith[14].

Thus, although the concept of "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent" comes close to vis maior within the meaning of the Polish Act, it remains distinct. Even this conclusion, however, allows us to assume that it is difficult for a carrier to free itself from liability also in an international carriage because in the current state of civilization there are few events that the carrier was not able to foresee, or at least should have been able to foresee.

[11] Loewe R., Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1975, 44.

[12] Clarke M. A., International Carriage of Goods by Road: CMR, London 2009, 232. It is stressed that also in German and Austrian law the liability described in Article 17 CMR convention isn't an objective liability, but a liability for an alleged error, with a duty of care – Helm J. G., Frachtrecht II. CMR, Berlin-New York 2002, 255.

[13] Judgment of the TC de Liege (Tribunal de Commerce – Commercial District Court of Belgium) of December 13, 1977, ULR 1980.

[14] Judgments of the Supreme Court of Georgia of December 23, 2016, No569-544-2016.

III. Theft and Robbery

1. Theft and Robbery and Vis Maior

In this aspect, it is necessary to answer the question of whether the events that release the carrier from liability include theft and robbery, which is important insofar as it usually concerns shipments of considerable value when the vehicle together with transported goods often becomes prey to criminals.

As far as Polish law is concerned, it is impossible to recognize a theft that isn't accompanied by physical (or mental) violence as vis maior within the meaning of Article 65 paragraph 2 of the PrPrzew. It is undoubtedly an event external to the carrier's enterprise, but it is not an extraordinary, inevitable, and unforeseeable event. The carrier who transports goods by road should be aware that the goods transported may become a target for thieves, especially if they are of considerable value and there is no problem with selling them on the market. No special knowledge is necessary to foresee such a possibility. Every reasonable entrepreneur, not only those professionally involved in transport, is able to predict such a possibility.

A different approach should be taken to robbery, that is, a theft committed with the use of a dangerous instrument (usually a firearm) by a criminal group, or even a small number of adequately armed individuals, or just one person who is so armed as to make any effective defense impossible. This is a much more intense (violent) event than in the case of a robbery that is not associated with an action directed directly at the person carrying the goods. It is not just an armed robbery, but also, for example, stopping a vehicle under the guise of a police road check and then using force to seize the consignment. In Polish jurisprudence, however, it is quite uniformly accepted[15], that the loss of the shipment due to robbery is not usually a result of vis maior within the meaning of Article 65 paragraph 2 of the PrPrzew, and thus does not constitute a premise releasing the carrier from liability. The Supreme Court emphasized that since the carrier is entrusted with cargo, often of very high material value, his liability must be tightened and exemption from liability an exception that cannot be interpreted broadly. The carrier is the actual disposer of the transported goods, which for a certain period is beyond the control of the sender and the recipient. The carrier calculates the risk associated with the carriage when setting the charges for the carriage and may offset it by taking out the carrier's liability insurance, which sufficiently protects the carrier from the severe consequences of extending liability beyond the limits of a mere accident.

[15] Resolution of the SN of December 13, 2007, III CZP 100/07, OSNC 2008, No12, item 139; Judgment of the Supreme Court of Poland of March 6, 2009, II CSK 566/08; Judgment of the Supreme Court of Poland of October 7, 2009, III CSK 19/09.

However, as emphasized in the resolution of December 13, 2007, vis maior can be considered as a premise releasing the debtor from liability only if it wasn't preceded by a factor contributing to the occurrence of the damage within the internal operations of the transport company. The mere attack of armed persons on the driver of a car, which resulted in the theft of a transported consignment, does not exempt the carrier, if it was preceded by a factor contributing to the occurrence of the damage, within the sphere of risk of the entity running the transport company. Such a factor is, in particular, stopping by the driver transporting the load in an unguarded and otherwise unsecured place, where he fell victim to a robbery with a firearm.

In Polish legal doctrine, this issue is disputed. M. Stec[16], W. Górski, who spoke against recognizing robbery as vis maior, pointed out that an opposite standpoint would lead to the conclusion that each unexpected, sudden, and overwhelmingly carrier event leading to damage during transport constitutes an exonerating circumstance, and with such an extended interpretation of the notion of "vis maior" the real risk of incurring damage to the shipment to a very high degree, disproportionate to the possibility of influencing the way the transport was performed, would be borne by the sender or the recipient. However, W. Górski and K. Wesołowski[17] have spoken positively on the subject, except that they emphasize that this is a sudden and violent attack by an armed criminal group, making it impossible to take preventive measures.

When considering the issue, it should be emphasized that, the carrier's liability is not absolute, which means that in certain situations it may free itself from liability. Thus, the risk of occurrence of transport-related damage is borne not only by the carrier but also by the other contractual party (the sender), although the distribution of risk is not equal. When determining whether a given event is a circumstance releasing the debtor from liability, it is important whether it meets certain prerequisites, in this case, force majeure. One can imagine a situation where an armed robbery would be classified as vis maior. The Court of Appeals in Katowice (Poland) in a judgment of May 31, 2005[18] indicated that the carrier is exempted from liability (under Art. 65 paragraph 2 of the PrPrzew) for loss of the consignment due to robbery if, exercising due diligence, taking into account the professional character of the activity, the loss could not have been avoided or prevented, also by means of an effective warning against a threatening danger by generally accepted means. While such a formulation is reasonable as far as the CMR Convention is concerned (more on that below), qualifying such an event as vis maior, it should be emphasized that it concerns situations

[16] Stec M., Umowa przewozu w transporcie towarowym, Cracow, 2005, 282-283.

[17] Górski W., Wesołowski K., Komentarz do przepisów o umowie przewozu i spedycji. Kodeks cywilny, prawo przewozowe, CMR, Gdansk, 2006, 160.

[18] I ACa 404/05, OSA (Case Law of the Courts of Appeal) 2006, No3, item 7.

in which an armed robbery is sudden in the sense that it prevents the carrier from taking any steps to prevent the loss of the shipment. This is a completely exceptional situation, but it cannot be said in advance that no such situation can be classified as vis maior. Of course, the carrier should take appropriate precautions to protect the transported goods not only from theft but also from incidents of a much more severe nature. However, this obligation must not lead to absurdity. There are events that can't be foreseen and cannot be prevented in any way, for example when the transport is secured by bodyguards, but they are confronted by a much more numerous and much better-armed group of attackers. Such an event should be classified as force majeure. However, this is a rather theoretical consideration, since such security measures are not used in the carriage of goods by road. It is therefore difficult to imagine an event in the form of a theft or robbery, which in the real circumstances of the case could be qualified as vis maior.

2. Theft and Robbery and Circumstances Which the Carrier Could Not Avoid and the Consequences of Which He Was Unable to Prevent

2.1. Theft

The situation is different if we consider theft and robbery as circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. It's not necessary to refer to the notion of vis maior, which means that both robbery and theft may be considered circumstances referred to in Article 17 paragraph 2 of the CMR Convention.

As far as theft is concerned, the prevailing view in the case law of the European courts seems to be that the carrier is liable if there is a theft of the goods transported by them so that invoking this ground of exemption cannot be effective. For example, the following rulings may be cited, which dealt with facts in which a vehicle with goods was stolen:

1) The vehicle was parked overnight outside the motel's plaza because, according to the carrier, the vehicle was too large to fit in a nearby secure parking lot[19];
2) The carrier didn't have (through his own fault) a set of customs documents and as a result had to park the vehicle for the weekend, which he did, leaving it in a parking lot near the Italian customs office but unattended[20];

[19] Judgment of the Cour d'Appel (Court of Appeal in France) de Aix-en-Provence of March 11, 1969, BT 1969, 389.

[20] Judgment of the TC (Tribunal de Commerce – Commercial District Court of Belgium) te Antwerpen of March 3, 1976, ETL 1977, 437; similarly, the judgment of the Hof van Cass. (Hof van Cassatie van België – Supreme Court of Belgium) of December 12, 1980, ETL 1981, 250, whereby the unscheduled stoppage was caused by the shipper's incorrect completion of customs documents.

3) The driver parked the vehicle on a side street in Milan around the corner from a restaurant where he was eating lunch while waiting for a phone call to Austria for instructions from his employer, but the court found that the call wasn't an urgent matter and the driver should have stayed with the vehicle and eaten a cold meal there[21];
4) The driver was called to collect the load (parcels of clothing) which were on the first floor of the building and after loading, as he was preparing to leave, he was told by an unknown person that there were still parcels to be loaded, as a result of which he returned upstairs to the premises, leaving the dog in the car; this turned out not to be true and on returning downstairs he found that the vehicle had been stolen[22];
5) The carrier left a truck with valuable cargo overnight on a street in Paris, locked but not secured with an anti-theft system[23];
6) The driver parked a vehicle with valuable cargo on a public road in Italy, leaving it activated the anti-theft system[24];
7) While driving in Italy, the driver stopped due to the need to take care of physiological needs, without parking the vehicle in a proper (safe) place[25].

It is evident that in case of "ordinary" theft of goods from the means of transport or the entire means of transport with goods, the carrier is not usually able to exempt itself from liability in international transport, because it is not usually an event that occurred under unavoidable circumstances, the consequences of which couldn't have been prevented. Since the carrier is obliged to exercise due diligence to a higher standard, taking into account the professional nature of its business, it should take all possible measures to prevent theft. This is a basic requirement that should be placed on the carrier.

Therefore, the carrier should be cautious, foresighted, and prudent. It can be assumed that parking a vehicle with a load (especially of considerable value), especially overnight, in a place that does not meet appropriate security standards, will result in the carrier's liability if there is a theft (but also a robbery, as will be discussed below). Nevertheless, European courts have sometimes held that the carrier may successfully invoke this reason for exemption.

[21] Judgment of the OGH (Oberster Gerichtshof – Supreme Court in Austria) of March 16, 1977, Transportrecht 1979, 46.

[22] Judgment of the Cour d'Appel (Court of Appeal in France) de Paris of June 14 1977, BT 1977, 354.

[23] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of January 13, 1981, ETL 1981, 686.

[24] Judgment of the Cour d'Appel (Court of Appeal in France) de Toulouse of March 16, 1981, BT 1981, 318.

[25] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 1, 1988, BT 1988, 103.

1) in Italy, the carrier parked the vehicle in a regular parking lot in a built-up area near a police station, closed the truck cab door, and went to eat[26];
2) the driver parked a locked truck in a public parking lot in France[27];
3) the carrier parked his car in a guarded parking lot in Italy between several other vehicles, locked it on both sides and activated the anti-theft device, and was only absent for a short period to use the toilet[28].

It follows from the above that the position of the European courts isn't uniform. Usually, the courts assume that for the carrier to be free from liability it's not enough to lock and secure the vehicle with an anti-theft device and leave it on the street or in a public parking lot, as well as take care of purely human needs (meals, physiological needs), but they aren't consistent in this matter.

III. 2.2. Robbery

A slightly different approach should be taken to a situation in which the loss of a transported shipment occurs as a result of theft by physical violence (robbery), in particular with the use of dangerous tools (usually weapons). Such action affects the carrier's will and ability to act, which is not the case with theft. The Supreme Court in its judgment of November 17, 1998[29], held that the circumstances exonerating the carrier enumerated in Article 17 paragraph 2 of the CMR Convention might also include robbery committed with the use of a weapon or threat of its use. If it's accepted that such an event may – albeit extremely rarely – be qualified as vis maior, then it may be qualified as a circumstance that the carrier could not avoid and the consequences of which he was unable to prevent. The position of the Supreme Court is correct, because while in the case of vis maior the fault of the carrier is irrelevant (thus, the carrier may not discharge liability by proving the lack of fault), it is significant for the application of Article 17 paragraph 2 of the CMR Convention whether the carrier may not be attributed with fault, so lack of due diligence.

This is not altered by the need to interpret this provision strictly, which means that the interpretation of this exonerating cause should be similar to vis maior. This doesn't mean that these concepts are identical, with the consequence that it isn't excluded to qualify an event that isn't vis maior as a circumstance that the carrier could

[26] Judgment of the TSE (Tribunal Supremo de Espana – Supreme Court of Spain) of December 20, 1985, ULR 1986, 630.

[27] Judgment of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of July 17, 1991, Transportrecht 1991, 427.

[28] Judgment of the RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Tongeren of 27 May 1992, ETL 1992, 853.

[29] III CKN 23/98, OSNC (Case Law of the Supreme Court Civil Chamber) 1999, No4, item 85.

not avoid and the consequences of which it was unable to prevent. In general, it is easier for a carrier to discharge liability for the loss of a shipment as a result of robbery than as a result of theft, although this isn't a circumstance that the carrier may too often successfully invoke.

This is confirmed by the jurisprudence of the European courts, which much more often exempt the carrier from liability in the case of robbery than theft. By way of example, the following rulings may be cited:

1) Transport to Italy, the driver arrived at his destination in the late afternoon and had no opportunity to hand over the goods, parked the truck on the other side of the road, locked the doors from the inside for the night, and at night armed assailants carried out the assault; the court found that parking elsewhere would have made no difference, and, moreover, there were no nearby guarded parking lots for such large trucks, so the driver took the normal precautions that prudence dictates to ensure constant supervision of the goods[30];
2) The driver was stopped by thugs disguised as police officers in such a way that he had no reason to suspect that they were not real police officers[31];
3) The carrier was stopped by assailants driving in a car and giving signs to stop and even if the driver had been aware of the danger of stopping, he couldn't have escaped the assailants, they were moving in a fast car and armed with weapons against which the driver couldn't defend himself[32];
4) The carrier arrived at the destination at lunchtime and, unable to make the delivery, decided to continue the transport to the premises of the consignee located 100 km away and, during this additional drive, had to stop on the highway due to a flat tire and, during the stop, was attacked by armed assailants[33];
5) The driver was asleep in the cab of a truck parked at a service station and then an armed robbery occurred; the court held that the carrier exercised the utmost care in taking care of the goods because, although truck parking lots were available, they didn't provide the necessary security in all situations and the greater risk would have been if the driver had continued to such a parking lot[34].

[30] Judgment of the Cour d'Appel (Court of Appeal in France) de Caen of November 15, 1983, BT 1984, 131.

[31] Judgment of App. (Court of Appeal in France) de Rouen of May 30, 1984, BT 1984, 598.

[32] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of June 21, 1988, ETL 1988, 711.

[33] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of December 10, 1991, ETL 1992, 176.

[34] Judgment of the QBD (Queen's Bench Division High Court of Justice of England and Wales) of February 1, 1994, Lloyd's Rep. 1994, 678.

European courts have also held that a carrier is liable for theft of goods as a result of a robbery – e.g.:

1) The driver stopped overnight by parking the car in an open area, which the court found to be reckless, with the fact that there was no safer parking place in relatively close proximity not absolving the carrier of liability[35];
2) The carrier parked the vehicle at a gas station, and the court ruled that such a location wasn't safe[36];
3) The driver was sleeping in a vehicle parked in an unguarded parking lot near Modena (Italy) when he was attacked by five armed assailants, but the carrier can't rely on Article 17 paragraph 2 of the CMR Convention because it didn't give precise instructions to the driver concerning safe and secured parking places, and the incident occurred in a country where incidents of this kind are common[37];
4) Carriage of goods to Italy, meaning it was high risk and the carrier stopped on the road in a place with poor supervision (unsafe)[38].

The doctrine points out that there is a phenomenon of collusion between representatives of organized crime and transport entrepreneurs, resulting in the loss of goods, e.g. in order to extort compensation. It should be borne in mind, however, that the burden of proof on this point rests with the person pursuing a claim for damages against the carrier (Article 6 of the Civil Code). If the claimant is able to prove this fact, then, of course, the carrier will be liable regardless of the measures taken to prevent the damage. In practice, however, this is very difficult to prove.

IV. Summary

To sum up, it cannot be overlooked that the notion of vis maior is relatively simple to define, in connection with which qualifying a given event as meeting the prerequisites of vis maior or not meeting these prerequisites usually does not raise any problem. This is clearly visible in the case of theft and robbery, about which – with complete exceptions when it comes to the latter category of events – it's impossible to say that they constitute vis maior. The situation is different when it comes to "circumstances which the carrier could not avoid and the consequences of which he was

[35] Judgment of the App. (Court of Appeal in France) de Poitiers, July 2, 1983, BT 1983, 455.

[36] Judgment of the TC (Tribunal de Commerce – Commercial District Court of France) de Paris of September 6, 1983, BT 1983, 457.

[37] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 14, 1991, ETL 1992, 124.

[38] Judgment of RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Turnhout of June 30, 1997, ETL 1998, 139.

unable to prevent", because this concept leaves a lot of room for interpretation. It is not possible to formulate a single definition covering all possible situations that could be qualified as such circumstances. This can be seen clearly against the background of the presented decisions of the European courts concerning the loss of transported goods as a result of theft and robbery. We can only point to a few elements that a trial court should consider in evaluating a particular occurrence, and thus in determining whether a carrier can effectively absolve itself of liability for damages resulting from such an occurrence.

First of all, it should be noted that there are countries and even specific places in Europe where the probability of theft or robbery is much higher than in other countries or places, which is the knowledge that both carriers and insurers have, which is often reflected in the provisions of insurance contracts in which insurance coverage is excluded for transports to specific countries. Particular attention is paid to transports to Eastern Europe and to Italy, where the so-called "Bermuda Triangle" (the area between Rome, Naples, and Bari) is located. This is not to say that transport through such places should be carried out in an armed convoy or assisted by armed security, but the carrier should take all possible and reasonable precautions to minimize the risk of damage. In the age of the Internet, obtaining such knowledge is not a problem.

Secondly, it is important what is being transported. Undoubtedly, the probability of theft or robbery increases significantly if the goods transported are of significant value and, in addition, easily marketable. Goods of lesser value, which are not used by the public, are not as susceptible to such an occurrence, because in this case, criminals must first make a sale for themselves (find a potential buyer).

Thirdly, it is important for the carrier to take adequate measures to avoid the loss of transported goods. These are related to the standard of care that the carrier should exercise over the goods that are being transported. This standard arises from the professional nature of the carrier's business. It should be assumed that in order for a carrier to be exempt from liability on the basis of Art. 17 paragraph 2 of the CMR Convention, it should first of all:

- Install GPS (Global Positioning System) equipment;
- To plan the time of transport properly, which will allow (unless there are unforeseen circumstances) to reach the place of unloading on working days and at such hours when unloading of goods is possible immediately after arrival;
- Minimize the number of stops, taking into account the driver's working hours;
- Park the vehicle in guarded and secured parking lots (if possible);

- Lock the vehicle and secure it with a suitable anti-theft device to prevent unauthorized activation, during any break in the transportation, when leaving the vehicle;
- To change the route of transport for regular services.

This is, of course, only an illustrative list, but it refers to the basic factors which the carrier should take into account in order to minimize the risk of loss of the consignment due to the actions of third parties and which the court should take into account when determining whether the carrier is liable on that account. It has only if the carrier cannot be accused in case of failing to take all necessary measures to prevent the theft of the goods transported that it can be assumed that there was a circumstance which the carrier could not avoid and the consequences of of which he was unable to prevent. It is therefore impossible to agree with the decisions of the European courts that leaving a vehicle, even one that is locked and properly secured, on the street, even in the vicinity of a customs office or police station, is a circumstance that excuses the carrier from liability.

As a consequence, if in the realities of a specific case the court finds that the carrier did everything possible and reasonable to perform the carriage in accordance with the concluded agreement, it may discharge its liability on the basis of Article 17 paragraph 2 CMR (in an international carriage), but usually, it will not discharge it on the basis of Article 65 paragraph 2 PrPrzew (in a domestic carriage). It's evident that the protection afforded to the carrier's contracting party by the Polish act is more far-reaching than the protection under the CMR Convention because it's much more difficult for the carrier to discharge its liability in the case of shipment loss as a result of theft or robbery.

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