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Limitation of Liability of the Rail Carrier Operator Based on CIM Rules

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Abstract

Generally accepted rule of CIM like other conventions about carrier operator is that in case of any damage related to contract of carriage the liability of carrier such as railway or rail transportation institutes will not exceed a certain ceiling except those cases predicted in regulations. The ceiling of carrier liability is payment of seventeen units of account at most for each kilogram of non-net weight of goods.

Keywords: Limitation of Liability, Compensation, Units of Account, COTIF Convention, International Monetary Fund (IMF).

Introduction

The notion of international uniform rules establishment in order to remove differences of national rules led to establishment of the COTIF Convention in 1980. This convention was formed during the integration of two uniform regulations of CIM and CIV which were considered as the oldest international documents of carriage of goods and passengers by rail. The COTIF regulations of modern form were passed in Bern, Switzerland in 1980 and due to its defects it was first corrected in 1982 and some complementary rules were added to it. Then in 1985 it was officially implemented. By implementing the rules, their defects were gradually observed [1-2]. Due to suggestion of some countries it was corrected again in 1992. Due to economic policies aimed at reducing government activities and allowing legal persons to act, private laws of transportation were passed in 1999 in Vilnius City. This Convention includes seven annexes that in transporting by rail have the capability of implementation among those countries which joint it. One of the most important of this Convention is its annex II which is devoted uniform rules about international carriage of goods by rail (CIM). The above rules predict specific regulations about transporting goods by rail which are the most

advanced rules in the field of rail way [3-4]. This Convention is accepted and implemented by 42 countries in the world. This article investigates the amount of compensation which the person in charge of transportation by rail should pay in accordance with CIM rules and it also studies its unit of account and the quality of its assessment.

Amount of Compensation and its Unit of account

Amount of Compensation

The generally accepted rule of CIM (1980/1999) is that the liability of carrier is limited to a certain sum. It means that in case of any damage related to carriage contract such as loss or waste of products and delay in delivery the liability of carrier (such as railway or rail way transportation institute) will not exceed a certain ceiling except those cases predicted in regulations. In fact this matter is not a new subject but it is also observed in other conventions about transportation and the carrier is only liable to compensate a certain amount of damage. Any way based on each two discussed rules the specified sum as the ceiling of carrier limitation is payment of seventeen units of account at most for each kilogram of non-net weight of goods. In

accordance with article 40, 2 of regulations of 1980 "Compensation shall not exceed 17 units of account per kilogram of gross mass short, subject to the limit provided for in article 45." Also according to article 30, 2 of corrected rules of 1999" The compensation should not exceed seventeen units of account of each kilogram." since the maximum damage of goods is that the goods are lost or wasted, then the compensation of loss or waste of goods is the criterion.

Unit of Account

In order to have a scale of assessing time and place for different sums (the maximum compensation, costs and so on) which are predicted in the COTIF Convention, the aforementioned convention with some exceptions has established a general unit of calculation that is Special Drawing Right (SDR) of IMF. This solution which is popular under the title of "London Formula" is accepted by international conventions related to other ways of transportation. In fact in uniform rules, SDR is the determinant of unit of account which is predicted as the criterion of compensation payment. In CIM in 1980 the concept of unit of calculation and SDR are described and defined. In accordance with article 7, 1 the above rules," The value in Special Drawing Right of the national currency of a State which is not a member of the International Monetary Fund shall be calculated by the method determined by that State. The calculation must express in the national currency a real value approximating as closely to that which would result from the application of 1." The Article 9 of COTIF Convention defines unit of account in this way, "Unit of account which is predicted in annexes and defined in IMF is SDR." Now according to above information we should know that what SDR is and how it is evaluated in different countries. In a general definition of SDR it is said that," SDR is in fact an artificial currency and its value is equivalent to the value of basket of currencies in which there are the currencies of five countries as follows: Dollar of America 42%, Mark of Germany 19%, Franc of France 12%, Pound of England 12%, yen of Japan 15%", although before 13/12/1980 this basket of currencies included

sixteen different countries. This unit of account has a general advantage which is since it is assumed that by decreasing the value of one currency the value of others will increase, then the possibility of degradation of SDR is lower than its currencies [5-6].

About methods of calculating SDR in uniform rules, some rules have been predicted as follows:

About those countries which are the members of IMF, SDR, the value of national currency is computed in a way that IMF uses for its special operation and trades which is equivalent with three Francs of gold weighting 100/31 gram and 900% carates fine.

About those countries which are not the members of IMF, SDR is the value of national currency in a way that that country specifies. But it is necessary that the value of national currency is defined in a way that it is near to the value defined by IMF (from Article 7, 2 of 1980 rules and Article 9, 3 of general rules of 1999 Convention).

About those countries which are not the members of IMF and their legal system don't allow implementation of the above matters. The predicted SDR is the equivalent of three Francs of gold weighting 100/31 gram and 900% carates fine. Meanwhile, the exchange of gold Franc to the national currency should be in a way that it is near to real value defined by IMF. (Article 7,3 of 1980 rules and Article 9, 4 general rules of 1999 Convention)

Countries which joint OTIF Organization are responsible to inform OTIF whenever there is a change in their method of computation or the value of national currency to share them with other joint governments. In accordance with 1980 rules the railways should share the rates which usually people need them in printed. These rates are as follows:

The exchange rate with which foreign currency is exchanged to domestic currency of the country.(Exchange Rate)

The rate with which foreign currencies are accepted for paying money.

Payment of Compensation and its Assessment

Compensation Payment in Different Kinds of Damages

Compensation in case of Loss or Wasting of Goods

Before going to details, it is necessary to give an exact definition of the word "LOSS" which is repeated a lot in the Convention text. In the legal system of England the word of "LOSS" is used in two meanings: 1. Damage and Wasting. 2. Losing the Goods. In majority of legal texts of Judgment System of this country this word is used interchangeably of these two meanings. However conceptually they are totally different. In fact when goods are lost, they may not be damaged and wasted but they are unavailable for their owners for a limited or unlimited period of time. Then there is the possibility of finding and restoration of their ownership. Since it has been predicted in CIM regulations (1999/1980) in case of finding the lost goods, the rightful can require the restoration of the property by paying the sum which has been given to them as compensation. The word "wasting" is used in conditions when due to the defects in goods, it couldn't generally be used and it couldn't return to their first phase. Since the liability of the warrantor is the same in both "losing" and "wasting", then because of this these two words are used interchangeably.

Compensation in case of Losing Goods

Losing goods can be assumed really and presumptively. In losing goods presumptively, by expiration of the dead line of delivery and no delivery on behalf of the warrantor it is assumed that the goods are lost. This presumptive losing in different systems of transportation is predicted in C.M.R about transporting international carriage of goods by road and no delivery during thirty or sixty days means their losing. In each both rules when during thirty days the goods are not delivered on the exact time till to the end of this dead line they are supposed to be lost. According to Article 39, 1 of 1980 rules and Article 29, 1 of 1999 rules: " The person entitled may, without being required to furnish further proof, consider the goods lost when they have not been delivered to the consignee or are not

being held at his disposal within thirty days after the expiry of the transit periods."

For measuring goods compensation in case of losing there are three kinds of rates:

1 Index Rate: Prices which are determined on behalf of national or international stock markets for specific goods and are presented to the customers as price list.

Market Price: When the lost goods have not the stock markets and index rate, stock market rate or their market prices are the bases for determining the price. By market price we mean the market price of the country in which the goods have been lost.

Normal and Common Value of Goods: When there are no market prices or market rates, the paid compensation will equal with the normal and common value of goods with the same quality and type in the place and at the time of accepting the goods. In this way their values may be higher or lower from the values in the place where they have been lost. (Article 40, 1 rules of 1980 and Article 30, 1 rules of 1999).

Generally the compensation which is paid based on each above sums shouldn't exceed the authorized ceiling, it means seventeen units of account for per kilogram of non-net weight of goods.

Another subject about compensation of the lost goods which should be discussed is those cases which were added into rules of 1999 while they weren't in the rules of 1980. The subject is that payment of compensation in case of the rail vehicle losing or the railway equipments which are carried as goods. According to Article 30, 3 rules of 1999 of carriage contract there is the rail vehicle moved on their wheels or a combined unit of transportation at first then they would be lost for the compensation the recompense would be the normal value of vehicle or the combined transportation unit or their parts at the day or in a place of being lost and in this case the index rate or market wouldn't be applied. When it is not possible to determine the day and the place of being lost the compensation would be limited to the place and day of the liability acceptance.

Compensation in case of Wasting Goods

As it was mentioned before, wasting the goods happens when they have generally been wasted or they have lost their quality or their usage. Wasting goods may be total or partial. Partial wasting is in fact wasting parts of the goods because of some defects, but the rest of goods can be used (like wasting five gunnies of rice out of one hundred gunnies). In case of wasting goods totally or partially, the maximum compensation which should be paid by the carrier is the same in both rules and it would be similar to what is said in case of being lost and briefly we can say that compensation equals with the general value of goods if it doesn't exceed the authorized maximum (seventeen units of account for per kilogram of non-net weight).

Compensation in case of Damaging Goods

By damaging goods, it means that due to the created defects the goods economic values decreases but they can be used. The compensation which the carrier should pay equals with the devaluation of damaged goods. In another words, the compensation which the carrier should pay equals with the value decreases in result of damaging goods. To calculate this sum, the value of goods is measured based on index rate or market price or the value of such goods in the same place and time of liability acceptance (Article 42, 1 rules of 1980 and Article 30, 1 rules of 1999).

The amount of this sum is determined by determined rates and in accordance with the percentage of decreased value of goods in destination which can't be higher than the compensation paid in case of wasting goods (seventeen units of account per kilogram). The sum should be paid is subtracting of the price of safe goods and price of damaged goods in accordance with determined value in destination. However the compensation shouldn't be higher than the following sums:

a) If due to the damaging goods all of consignments are devaluated, the compensation which would be paid shouldn't be higher than the compensation in case of losing all of them.

b) If only a part of consignment/cargo is devaluated because of damaging, the compensation shouldn't be higher than the compensation of losing a part of it. In another words the amount of compensation will equal with the very part of goods which are devaluated (Article 44, 2 rules of 1980, Article 32, 2 rules of 1999).

According to Article 33, 3 rules of 1999, "In case of damaging vehicle which moves on their wheels and is carried as goods or a combined vehicle or their parts, the amount of compensation except of other damages limits to the cost of repair and the amount of compensation shouldn't be higher than the sum in case of losing. In addition to the above compensation, the carrier should pay the cost of carriage, customs duties and other sums which were got because of goods carriage except of indirect taxes of goods circulated during the above rights suspension (Article 40, 4 rules of 1980, Article 32, 4 rules of 1999).

Compensation in case of Delay in Delivery

If there is a date determined in the contract for goods delivery and if there is not a date, based on predicted legal grace period the carrier should deliver the goods to the person who is determined as a receiver in the bill of landing on deadline. Obviously in case of delay in delivering when damaging happens the carrier should compensate it. But the subject studied here is that only those damages because of delay in delivery could be demanded or only damages which happen because of delay in delivery could be demanded. There is a doubt in Article 43 rules of 1986 which is "In case of damages due to delay in delivery of goods, the railway should pay the compensation. As it is seen the Article has been arranged as if only those damages happen to goods due to delay in delivery could be demanded and other damages wouldn't be included in this article. In order to avoid any misinterpretation, the above article was corrected in the circulation of the Convention verification and was arranged in a way that it obviously mentions that in case of any damages related to delay in delivery, the carrier should compensate it. The maximum compensation due to delay in delivery in the rules is not the same. In rules of

1980, the maximum sum equals with three times of goods agreed rent. According to Article 43, 1," In case of damaging due to delay in delivering of goods, the railway should pay the compensation which is not higher than three times of goods rent." According to Article 23,1 the mentioned rules," In case of damaging due to passage of delivery deadline the carrier should pay the compensation which should not be higher than four times of goods rent.

Measurement of Damages

Measuring damages is presented in all cases when the carrier is responsible for the compensation of loser and in case when the amount of compensation is lower than the defined maximum sum (seventeen units of account) and also in case that the carrier doesn't accept the announcement of goods value more than the sum as certain ceiling. The matter discussed here is that first which damages could be demanded, second how place and time of measuring damages could be determined. In accordance with the first question, we say that in common rules it only refers to this subject when damaging happens and it's not also one of the exemption he is responsible to compensate it. In accordance with this matter it is necessary to refer to general rules of liability about this case which damages could be demanded two conditions: 1) to be direct 2) to be able to predict damages are criteria of actions. Of course it is necessary to mention that the above conditions can be deduced from the Articles related to the carrier's liability (Article 36, 2 rules of 1980 and Article 23,2 rules of 1999). Based on above regulations if the damages are because of events which the carrier couldn't avoid them or prevent their circumstances the carrier will be exempted from the liability. The damages which are not predictable, commonly they are not avoidable. On the other hand, according to third paragraphs of above articles it is understood when damages are not related to the carrier (they are not directly because of their action) if he can prove this matter, they couldn't be demanded. About time of measuring damages, it is necessary to mention that based on general rules of liability time of issuing order is the criterion of action. Because

of this first before issuing order the debtor is responsible to pay the compensation then the judgment sentence get formed these obligations and commitments and change them into monetary debt.

Second, in this case the damage caused by lack of commitment is completely compensated and the status of the loser becomes to the expected status. But in accordance with predictability of damages is one of the conditions of its compensation, this subject is the matter of doubt, because the carrier is not considered as the person who is responsible for price rise of goods or devaluation.

According to Article 40,1 in case of wasting the whole or part of the goods the railway should calculate and pay the compensation based on market exchange rate and in case of lack of exchange rate, based on day market price and in case of neither of them based on common and current value of goods of the same type and quality of the place and time which is accepted. Also Article 30,1 1999 corrected rules mentions," About losing the whole or part of goods, except other damages the carrier should pay the compensation which is calculated based on exchange rate or in case of lack of this criterion, based on market rate and in case of neither of them this criterion common value of goods of the same type and quality in a day and place which are accepted.

As we can see both regulations are determined as measurement criteria of damages in only one situation that goods don't have exchange or market rate and it is," the day when goods are accepted for carriage." As it was mentioned before in arranging rules of 1980, there are a lot of borrowings from C.M.R which is about international transportation by rail. One of these examples is Article 40,1 uniform rules of 1980 which is in fact equal with Article 23, 1 C.M.R regulations. According to Article 23, 1 C.M.R regulation," When the carrier is responsible for paying compensation of the whole or part of goods, this compensation is calculated based on the value of goods in the place and time of acceptance for carriage." The second paragraph of this Article also mentions," The value of goods is determined based on day

market price and if the exchange price and day market is not clear, the common value of goods of the same kind and quality would be considered. In comparison between this Article and Article 40 of uniform rules of 1980 and also Article 30 corrected rules of 1999 we can understand that in fact CIM rules(1999/1980) have both combined each two paragraphs of CMR Article 23 and stated them in one Article. In 1999 CIM regulation it has been predicted another criteria about time of measuring damages which happen to railway vehicles and railway equipments. In case of damaging goods such as railway vehicles moved on their wheels on a combined transportation unit or their parts, there are two criteria for time of damage measurement:

When the time of losing goods is clear and certain, that time will be the criteria of measuring.

When such time can't be determined, the day of liability acceptance will be the criteria of time measurement. (Article 30, 2 1999 rules)

But about those damages due to delay in delivery or delivery date expiry, it can be concluded that when due to delay in delivery some damages happen to goods, the time of damage measurement is the time of liability acceptance but if there aren't any damages, we should refer to the general rules of liability which the court is responsible for that. However the amount of compensation shouldn't be higher than three times of freight based on 1980 rules or four times of freight according to 1999 regulations. At the end, it is necessary to pay attention to some notes:

First, the matters stated about the time of measuring damages are also true about its place. In another words, in any case which damages are measured based on time of liability acceptance, the place of measuring damages is also the place of accepting goods for carriage (Article 40, 1 and Article 30, 1 1999 rules) and also in those cases which goods have been lost, when the place of losing is clear that place is the place of measuring damages (Article 30,3 1999 rules) and if the place is not clear, the place of liability

acceptance of goods would be the place of measuring damages.

Second when the court wants to compensate the damages, usually compensating damages is usually done by paying money. In other words, the most common way of compensating damages is paying money and usually judges prefer to avoid other ways of paying and the two partners prefer to know clearly their right and duty to each other.

In uniform regulations (1999/1980) when it speaks about compensation, its amount is determined with money. But it doesn't mean that the above regulations ignored other ways of compensating damages. One of the ways of compensating is restoration of the exact goods. As it was mentioned when goods are not delivered to the sender or receiver after expiry of deliver day during thirty days, goods are considered being lost and the carrier should compensate damages and money which equals with goods value not higher than seventeen units of account. But the person who is rightful can announce that whenever goods are found during one year, the carrier should deliver them.

Third the last point presented as a question is that due to uniform rules (1980/1999) the carrier such as railway or railway transportation institute) should be condemned the maximum compensation which means seventeen units of account for each kilogram non-net weight of goods. How and when should this amount of currency change to domestic unit of currency?

To answer this question we should say that based on accepted general rules in the most legal systems about compensating damages, time of exchanging foreign currency to domestic currency is the time of pronouncement. In CIM rules (1999/1980) this approach is followed. According to Article 4, 4 1980 regulations, "In calculating compensation if it is necessary to exchange the determined sums, the exchanging of currency would be done based on the day rate in a place which compensation is paid. Then the time of exchanging foreign currency to the domestic currency is the time of payment and that time

is the time of pronouncement, because until the final pronouncement, the committed is not responsible for paying. The place of exchanging is in fact the currency of a country in which the compensation should be paid; then the value of that place currency at the time of pronouncement is the criterion of action.

After signing the contract and carrier's acceptance of the carriage liability of consignment if the consignment is damaged or lost or wasted or delivered in delay, the carrier should compensate the damages to the beneficiary due to the violation of his commitment in the contract and as far as it has mentioned the maximum amount of compensation that the carrier should pay is equivalent with seventeen units of account (SDR) for each kilogram of non-net goods and three or four times carriage cost in case of delay. In this part at first the amount of compensation that the carrier should pay in different matters are discussed, then the method of evaluating and assessing the damages are investigated.

Conclusion

As we understand according to CIM rules, in case of damages the carrier is responsible for per kilogram non-net weight of goods seventeen units of account. However if the amount of damage is lower than this amount the loser is only rightful for receiving compensation as the same proportion. By unit of account, it means special drawing rights. About damages caused by delay in delivery maximum three times of freight is acceptable as compensation which the carrier should pay. In CIM rules it is predicted that when goods won't be delivered to the rightful person during thirty days from the defined date, at the end of this date it is assumed that they are lost.

In this case, the amount of compensation which the carrier should pay is compensation which is equivalent with exchange rate, market rate or common value of goods of the same type and quality of the time and place which the goods liability is accepted. In case of damaging goods the compensation of damaging is equal with the value of goods which shouldn't be higher than the maximum certain ceiling (seventeen units of account for per kilogram non-net weight. Also in case of damaging goods the amount of compensation is equal with decreased value of damaged goods. In these rules in places where the goods don't have exchange or market rate the criterion for measuring damages is: The day when the goods are accepted for carriage if not the criterion for measuring damages is the time of accepting the liability of goods and the place of measuring is also the place that goods are accepted for carriage.

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