**“Polish legislation on road carriage: the liability of the shipper and of the logistics operator”**

SLAJD 1

Ladies and Gentlemen, first of all I would like to thank you for coming and to thank the organizer for inviting me here. I’m really proud to be here Today. I’m a partner in a business minded law firm in Poznań. For several years I’ve been privileged to co-operate with lawyers and their clients from almost all EU countries; mainly but not only in transportation matters.

According to the agenda a title of my presentation is: “Polish legislation on road carriage: the liability of the shipper and of the logistics operator”. I will try to tell you also about other issues. Hopefully you will find it interesting and useful in your practical contacts with Polish carriers or other logistics operators.

SLAJD 2

I would like to start with some general information. As you surely know Poland ratified the Convention on the Contract for the International Carriage of Goods by Road (CMR) ( I will call it "the CMR Convention”) so this convention is a part of the Polish legal system in relation to the international carriage of goods by road. As for domestic transport, there is a separate law. It is an act called the transportation law which is aimed at road and railway transport.

In Polish legal system there is no legal definition of logistics services. Legally defined are such contracts as carriage contract, forwarding contract, storage contract. These contracts altogether usually establish/create the main part of logistics services. However in practice the scope of services is often wider. The practice is faster than changes in the legal system.

SLAJD 3

Now I would like to give you some information related to the CMR Convention but seen from the perspective of Poland.

I would like to start with the question which is probably on top of the list of questions asked me by my colleagues from different EU countries. So, quite frequently my colleagues – lawyers from different European countries ask me the question if Polish jurisprudence in relation to the CMR convention is favourable for carriers or for cargo interests. Last time I was asked about it 3 weeks ago. I have always a problem with that question. I would like to give a sure and firm answer that Polish jurisprudence is pro carriers or pro cargo interests but I can’t. For the last four years my answer has been that Polish jurisprudence in relation to the CMR convention was rather balanced. It was a little easier to answer before the year 2011 because until the year 2011 the calculation of limit of carrier’s liability was based on the gold franc value. This was surely more favourable for carriers than the SDR system we’ve been having since the year 2011. The SDR system is let me say more expensive. It means that the limit is now higher. Something around 15%. I’m saying it because there are still cases concerning the damage which happened before or in the year 2011.

SLAJD 4

One could ask me why I said that in relation to the CMR Convention Polish jurisprudence is favourable neither for carriers nor for cargo interests. There are two reasons. One is that there is still let me say a “discussion” in Polish jurisprudence and between scholars what are the principles of carriers liability according to article 17 of the CMR Convention. According to some court’s decisions it

is a principle of risk limited by a force majeure. It is called an objective liability of the carrier. This point of view is of course less favourable for a carrier. Mainly because of a classic definition of force majeure in Polish jurisprudence. This definition contains inter alia the assumption that the force majeure event must have external character. It means that it originates outside the equipment with the operation of which the liability is connected. However the most classical or let's say conservative part of this definition is that the force majeure event cannot be caused by a human being. So for example a robbery act is not the force majeure event.

The other group of Polish lawyers is claiming that liability of the carrier stipulated in the CMR Convention is based on a principle of guilt. The alleged guilt of the carrier to be precise. It is called a subjective liability of the carrier. This point of view is giving a carrier many more possibilities to be relieved of liability. Even in spite of a preliminary allegation of the carrier's fault. I would risk a statement that a theory of alleged guilt is a little more popular than a principle of risk limited by a force majeure. SLAJD 5 However even the supporters of a reasonably liberal treatment of the carriers' liability do not claim for example that each robbery or each theft should exonerate the carrier from the lost cargo. Truly speaking, both groups agree that circumstances of the event are decisive. Such circumstances would include the carrier's behaviour, the type of cargo and its attractiveness, as well as the place where the transport takes place.

Let me present you the judgment of the Appellate Court in Warsaw dated 7 October 2002 (I ASa 1188/2002), its rationale reads that the hold-up took place when a driver was changing the wheel at a parking lot next to the gas station, which is a place that, according to the Appellate Court, the driver could reasonably consider safe. Some attackers forced the truck driver to their car. The truck driver was driven into the woods where they took his documents and truck keys. In the situation described above, the Appellate Court in Warsaw decided that the shipment was lost in circumstances which could not have been avoided and especially which consequences could not have been avoided. It is impossible to require from the carrier to exercise excessive preventive measures, including additional protection of the cargo against robbery. In the court's opinion, the carrier exercised due prudence when choosing the place to repair the vehicle and there were no sufficient grounds to claim liability of the carrier for the consequences of the robbery. An interesting thing is that when providing rationale for its decision, the Appellate Court referred, among others, to the judgment of the Supreme Court which, theoretically claimed the carrier's liability under risk principle ...

SLAJD 6

The second reason why I said that Polish jurisprudence is favourable neither for carriers nor for cargo interests is that it is still not defined according to what level of diligence the carrier should act. This problem is probably the most important when the matter of gross negligence is discussed. So when I am asked if Polish courts are easily finding gross negligence of the carrier (in order to break the limit of the liability) the answer again is that it is neither easy nor especially difficult. All of that is because, again, there are two counter theories. For one group of Polish lawyers the carrier should act according to the highest level of diligence. Their opinion is based on the interpretation of the CMR Convention's provisions. However the other group is claiming that a domestic law should be used in such circumstances. The civil code states that *The debtor's due diligence within the scope of his economic activity shall be specified while taking into account the professional character of that activity*. These last words "the professional character of that activity" could mean for some judges the highest level of diligence but for others just high but not necessarily the highest.

SLAJD 7The real problem is that there are no real milestones judgments of the Polish Supreme Court in relation to the issues described above. So courts of lower ranks are trying to solve these problems themselves. Sometimes it leads to the counter results. For example in relation to a robbery act committed by a forged policeman I found one judgment where a judge ruled that this is not a fault of a driver ( so a carrier ) and the carrier should be released from any responsibility related to the loss. On the other hand I found a judgment where a judge ruled that a robbery even if committed by a false policeman doesn't relieve carrier automatically of liability. The circumstances of a robbery act should be at first examined. The behaviour of the carrier should be checked too because in some circumstances a driver should be more suspicious. The judge used an example that in the territory of Russia a driver should at least try to verify the ID of a forged policeman before leaving a cabin of the truck.

SLAJD 8Maybe less controversial are judgments related to the matter of gross negligence. I dare say it because when I analysed the judgments of lower ranks courts I realised that it is not so important whether a judge thinks that the carrier should act according to the highest standard or just high/professional standards of diligence. The difference is slight or none. At the end of the day the circumstances of the event are the most important. However the circumstances must prove gross negligence not just negligence. We deal with gross negligence when the carrier may be found guilty of a breach of fundamental principles of prudence, which is a kind of a qualified unintentional fault.

You probably would like to hear some examples. A typical situation of gross negligence according to jurisprudence happens when in spite of the clear instruction of a shipper a carrier changes the route or when carrier is using the stops other than from the safe parking list delivered by a shipper. Please see in a slide a citation from one of the judgments.

*It was gross negligence when the carrier, already delayed, acting at his own discretion and without consultation with the consignor or the forwarder, changed the route and the sequence of deliveries, even though the route had been described in detail in the forwarding order.* (the Appellate Court in Białystok I ACa 48/06 ).

The other significant group of cases is related to a lack of diligence during contacts with consignees. I mean the delivery of goods to the forged consignee or to a forged subcontractor.

I would like to finish my short presentation of some issues related to the CMR Convention with another frequently asked question. I would say that this question is a dizygotic twin of the question if Polish jurisprudence in relation to the CMR convention is favourable for carriers or for cargo interests. SLAJD 9The question is whether the Polish civil procedure is allowing declaratory proceedings such that carriers seeking to seize a favourable jurisdiction can issue proceedings seeking a declaration from the court determining their liability? As you've already realized this question concerns the situation where one party would initiate the negative declaratory proceedings in order to take advantage of article 31 of the CMR Convention and prevent the other party from filing an action in a court of another country. More favourable for the other party.

My answer to this question is YES. The Polish civil procedure is allowing declaratory proceedings. The Polish civil procedure regulations provide for filing a request to the court in order to determine the existence or nonexistence of a legal relationship or a right, if the plaintiff has any legal interest in it. This happens when uncertainty arises regarding the legal state where a direct action for compensation is not possible. So it is possible to seize jurisdiction in relation to the provisions of Article 31.2 of the CMR Convention.

At this moment I would like to give you some information related to the Polish domestic transportation law. SLAJD 10

A problem of carrier's liability on the ground of the domestic transportation law is a little simpler. A principle of risk limited by a force majeure is not questionable. There are of course exceptions similar to those provided in art 17 section 2 and 4 of the CMR Convention. So I wouldn't risk a statement that domestic transportation law is significantly more favourable for cargo interest.

From the practical point of view, surely in favour of carriers are provisions related to the complaints. In Polish domestic transportation law one who would like to file a complaint related to the carriage ( damages related to this carriage ) should follow special rules which define not only the content of the complaint but also what should be attached to the complaint. It is not very complicated but sometimes is giving carriers a chance to postpone the matter. In some circumstances it might be useful because until the complaint procedure is not terminated the claimant has no right to file a lawsuit in court. However this last principle doesn't concern claims between the carriers. A carrier should just demand the payment from another carrier before going to the court. There are no other obligations.

As for a time bar in in the Polish domestic transportation law. The general rule is one year. However it would be good to remember that the time limitation for the claims between carriers is 6 months since a day when a carrier redressed the damage or from the day when a court action was instituted against him. The complaint mentioned above has a power to suspend a time bar but only for maximum 3 months. So this is an important difference in comparison to the CMR Convention. It is not clear if a complaint between carriers also has a power to suspend a time bar.

SLAJD 11According to Polish domestic transportation law, the amount of damages for the loss or shortage of cargo cannot exceed the value established on the base of the following factors and in the following order:

1) price indicated in the supplier's or seller's bill or

2) price resulting from a price-list valid as of a day of dispatching the cargo or

3) value of things of the same type and sort at the time and venue of their dispatch.

In case it is not possible to specify the amount of damages in the way described above, this amount is determined by an expert.

In case of the loss of shipment with a declared value, the damages are due in a declared amount, and in case of shortage - in a relevant part, unless a carrier proves that the declared value exceeds the value specified as described in points 1 to 3 above.

SLAJD 12In case when the cargo is damaged, the damages are specified in the amount corresponding to the proportional decrease of value. The amount of damages as mentioned above cannot exceed however the amount of damages due for:

1) the loss of the entire cargo if its value was decreased due to the damage;

2) the loss of this part of the cargo which value was decreased due to the damage;

As you probably have already guessed in the Polish domestic transportation law there is no limit of the carrier's liability attached to the weight of the cargo. The maximum of liability is usually the price

of lost/injured item indicated in the supplier's or seller's bill. Limitations of the amount of damages prescribed in the domestic transportation law are not applicable, if the damage resulted from the carrier's intentional fault or gross negligence.

Before I tell you about the storage and forwarding contracts, SLAJD 13I would like to pass two pieces of information which are generally related to the issues presented by me earlier. The first important information is that in the Polish legal system, except the maritime law, periods of limitation may not be shortened or prolonged by a juridical act. I'm talking about it because frequently my colleagues from different countries asked me to contact the opponent lawyer in order to reach an agreement related to the postponing of the time limitation in transportation matters. It would be useful but it is not possible in the Polish legal system. However we have in Poland something else that could be easily used in order to break the time bar. It may be done in special, uncomplicated and very inexpensive conciliatory court's proceedings. It could be started even on the last day of time limitation. It is enough to post a letter to the court with a special motion. It is a very good way to win some more time, especially in cases connected with the logistics matters where statutes of limitations are short.

I'm also quite frequently asked if it is possible to start a legal action directly against an insurer of the carrier instead of suing only the carrier or both of them. The answer is Yes. It is possible, but before a lawsuit is filled it has to be checked whether it is worth to do it. So at first it has to be checked what the scope of the carrier's policy was. SLAJD 14The problem is that quite frequently Polish carriers are badly insured. The value of the policy is low or a carrier bought just a standard policy without extra clauses related for example to a robbery or to a theft during a pause at an unguarded parking lot. So this is also advice for those of you who are hiring Polish hauliers. Please check at first how your potential carrier is insured. Ask him not only about the value of the policy but also about the scope of it. Especially if they are allowed by the insurer to make stops at unguarded parking lots. It is crucial because if you don't get money from the insurer of the carrier it would be very difficult to recover money directly from the carrier. Most of the carriers are a part of a small business. So any damages around sixty-eighty thousands euro or sometimes even less start to be a completely abstract sum for them.

Finally I would like to tell you about the last two contracts important for a logistics operator. A forwarding contract and a storage contract. Of course I will focus only on some significant points of both contracts.

Let's start with the storage contract. This contract is defined in the Polish civil code. I will tell you about SLAJD 15the liability of the storage warehouse entrepreneur the limits of his liability and about a time bar.

According to the civil code, the storage warehouse entrepreneur shall be liable for the damage resulting from the loss, decrease or destruction of goods from their acceptance for storage to their release to a person entitled to collect them, unless the former proves that he could not have prevented the damage despite having exercised due diligence.

So the rules of liability of the storage warehouse entrepreneur are based on a principle of guilt. His situation is easier than the carrier's situation. There are also no doubts that nobody expects from him the utmost level of diligence. Just due diligence will be fine.

As for the limits of the liability of the storage warehouse entrepreneur. According to the Polish civil code the damages may not exceed the ordinary value of goods unless the damage results from the

storing party's intentional fault or gross negligence. The key words here are: *the ordinary value of goods*. What does it mean? According to the scholars it means a market price of lost/injured goods. They are claiming that the storage warehouse entrepreneur is liable only for direct losses ( in Latin *damnum emergens )* so not for the profits which one could have obtained, if no damage were inflicted ( not for *lucrum cessans ).* In practice sometimes it is not so easy to establish this *ordinary value*.

Finally I would like to say that claims arising from the contract of storage shall be subject to limitation upon the lapse of a year. This rule concerns claims of both parties to the storage contract.

SLAJD 16 The last defined contract from the group of logistics services' contracts is a forwarding contract. In Poland, a forwarding contract made a big "career". Except the real carriers almost every logistics operator wants to conclude a forwarding contract instead of a carriage contract. All of that is because of one provision of the Polish civil code: a *forwarding agent shall be liable for carriers and for further forwarding agents that he uses at the performance of the mandate* ***unless he has not been at fault in the appointment****.* So if a logistics operator manages to prove that he appointed a professional carrier he would be relieved of liability.

It is a great provision but it is also a trap. Some logistics operators, especially the small ones, are not conscious that the title of the contract does not decide about its legal definition. If an alleged forwarding agent does not take an obligation to organize the carriage but simply to execute the carriage, there is no forwarding contract but a simple carriage contract. So here is a small tip for your practice. If it happens to you to conclude a contract for carriage of goods with the Polish logistics operator, please check the name of this contract. I've said before that the name is not decisive but surely the proper name makes a potential dispute an easier one.

In relation to the limits of the forwarding agent's liability, it is stipulated that damages for the loss, decrease or damage to the consignment in the period from its acceptance until releasing it to a carrier, a further forwarding agent, a principal or a person indicated by him, may not exceed the consignment's ordinary value unless the damage resulted from the forwarding agent's intentional fault or gross negligence.

I explained the meaning of words "the ordinary value of goods" earlier in relation to a storage contract. It is also important that the forwarding agent shall be held liable for the loss, decrease or damage to money, valuables, securities or particularly precious things only when the consignment's characteristics have been indicated at the conclusion of the contract, unless the damage resulted from the forwarding agent's intentional fault or gross negligence.

Claims arising from the forwarding contract shall be subject to limitation upon the lapse of a year. Claims, to which the forwarding agent is entitled against carriers and further forwarding agents that the former has used at the consignment's carriage, shall be subject to limitation upon the lapse of six months from the day when the forwarding agent redressed the damage or from the day when a court action was instituted against him. This provision shall apply accordingly to the above-mentioned claims between the persons that the forwarding agent has used at the consignment's carriage.

SLAJD 17 Finally, a handful of information about the civil procedure in Poland with respect to the proceedings related to the logistics matters. As far as common courts (State courts) are concerned, there are two instances for the proceedings. If the object of a dispute is worth more than the equivalence of twelve thousand five hundred euro, it is possible to file a cassation request to the

Supreme Court against the judgment of the appellate court. However, the Supreme Court accepts only some cases for consideration. Usually these are cases which carry a significant legal problem.

For the sake of disputes between businesses, which are most common disputes in connection with the logistics operators, special business departments called Commercial Departments have been established.

The action fee is flat in principle and amounts to 5% of the value of the disputed object, payable at the time of filing the action in each instance. The losing party reimburses the winner for all official costs of the litigation including attorney's fees (but with some limitations).

As for an average duration of the case in Polish courts. I read a couple days ago on the Internet that it is 160 days in Poland and 270 days in Italy. This is the average of course. However the logistics matters are usually quite complicated so I would rather say twelve to eighteen months altogether in both instances. The bigger city, the longer proceedings.

I would like to tell you also that you shouldn't be afraid of the Polish State courts. They have a lot of defects but they generally keep the standards so at the end one could expect a really fair and square judgment. The exceptions are not worth to mention.

Ladies and Gentlemen, that is all what I wanted to say during this presentation. Thank you for your attention.

# Polish legislation on road carriage: the liability of the shipper and of the logistics operator

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- the Convention on the Contract for the International Carriage of Goods by Road (CMR) ("the CMR Convention") is a part of the Polish legal system in relation to the international carriage of goods by road.
- As for domestic transport, there is a separate law. It is an act called the transportation law which is aimed at road and railway transport.
- In Polish legal system there is no legal definition of logistics services. Legally defined are such contracts as carriage contract, forwarding contract, storage contract.

**Some information related to the CMR Convention but seen from the perspective of Poland**

The question which is probably on top of the list of questions asked in relations to the CMR Convention:

*if Polish jurisprudence in relation to the CMR convention is favourable for carriers or for cargo interests?*

For the last four years my answer has been that Polish jurisprudence in relation to the CMR convention was rather balanced.



There are **two reasons** why in relation to the CMR Convention Polish jurisprudence is favourable neither for carriers nor for cargo interests.

**One is** that there is still a “discussion” in Polish jurisprudence and between scholars what are the principles of carrier’s liability according to article 17 of the CMR Convention.

According to some court’s decisions it is **a principle of risk** limited by a force majeure - which is less favourable for a carrier.

The other group of Polish lawyers is claiming that liability of the carrier stipulated in the CMR Convention is based on **a principle of guilt** - which is more favourable for a carrier.

Even the supporters of a reasonably liberal treatment of the carriers' liability do not claim that each robbery or each theft should exonerate the carrier from the lost cargo.

Both groups agree that circumstances of the event are decisive. Such circumstances would include the carrier's behaviour, the type of cargo and its attractiveness, as well as the place where the transport takes place.



**The second reason** why Polish jurisprudence is favourable neither for carriers nor for cargo interests is that it is still not defined according to what level of diligence the carrier should act.

This problem is probably the most important when **the matter of gross negligence** is discussed. So when I am asked if Polish courts are easily finding gross negligence of the carrier (in order to break the limit of the liability) the answer again is that it is neither easy nor especially difficult.

All of that is because, again, there are two counter theories. For one group of Polish lawyers the carrier should act according to the highest level of diligence.

The other group is claiming that the professional character of activity is decisive what means in practice high but not necessarily the highest level of diligence.

The real problem is that there are no actual milestone judgments of the Polish Supreme Court in relation to the issues mentioned above.

Courts of lower ranks are trying to solve these problems themselves and sometimes it leads to the counter results.

For example in relation to a robbery act committed by a forged policeman I found one judgment where a judge ruled that this is not a fault of a driver and the carrier should be released from any responsibility related to the loss. On the other hand I found a judgment where a judge ruled that a robbery even if committed by a false policeman doesn't relieve carrier automatically of liability.



Less controversial are judgments related to the matter of gross negligence.

*It was gross negligence when the carrier, already delayed, acting at his own discretion and without consultation with the consignor or the forwarder, changed the route and the sequence of deliveries, even though the route had been described in detail in the forwarding order.*

(the Appellate Court in Białystok I ACa 48/06 ).

*Is the Polish civil procedure allowing declaratory proceedings ?*

- This question concerns the situation where one party would initiate the negative declaratory proceedings in order to take advantage of article 31 of the CMR Convention and prevent the other party from filing an action in a court of another country.

- The Polish civil procedure is allowing declaratory proceedings. The Polish civil procedure regulations provide for filing a request to the court in order to determine the existence or nonexistence of a legal relationship or a right, if the plaintiff has any legal interest in it.



**Some information related to the Polish domestic transportation law.**

- A problem of carrier's liability on the ground of the domestic transportation law is a little simpler. A principle of risk limited by a force majeure is not questionable.
- From the practical point of view, surely in favour of carriers are provisions related to the complaints.
- As for a time bar the general rule is one year.
- The time limitation for the claims between carriers is 6 months since a day when a carrier redressed the damage or from the day when a court action was instituted against him.

According to Polish domestic transportation law, the amount of damages for the loss or shortage of cargo cannot exceed the value established on the base of the following factors and in the following order:

1. price indicated in the supplier’s or seller’s bill or
2. price resulting from a price-list valid as of a day of dispatching the cargo or
3. value of things of the same type and sort at the time and venue of their dispatch.



- In case when the cargo is damaged, the damages are specified in the amount corresponding to the proportional decrease of value.
- In the Polish domestic transportation law there is no limit of the carrier’s liability attached to the weight of the cargo.
- The maximum of liability is usually the price of lost/injured item indicated in the supplier’s or seller’s bill.
- Limitations of the amount of damages prescribed in the domestic transportation law are not applicable, if the damage resulted from the carrier's intentional fault or gross negligence.

Some information which is generally related to the issues presented by me earlier.

- The first important information is that in the Polish legal system, except the maritime law, periods of limitation may not be shortened or prolonged by a juridical act.
- We have in Poland something else that could be easily used in order to break the time bar. It may be done in special, uncomplicated and very inexpensive conciliatory court's proceedings.
- It is possible to start a legal action directly against an insurer of the carrier instead of suing only the carrier or both of them.



- The problem is that quite frequently Polish carriers are badly insured. The value of the policy is low or a carrier bought just a standard policy without extra clauses related for example to a robbery or to a theft during a pause at an unguarded parking lot.

- Advice for those of you who are hiring Polish haulers. Please check at first how your potential carrier is insured. Ask him not only about the value of the policy but also about the scope of it. Especially if they are allowed by the insurer to make stops at unguarded parking lots.

- If you don't get money from the insurer of the carrier it would be very difficult to recover money directly from the carrier.

The liability of the storage warehouse entrepreneur, the limits of his liability and a time bar

- The rules of liability of the storage warehouse entrepreneur are based on a principle of guilt.
- As for the limits of the liability of the storage warehouse entrepreneur - the damages may not exceed **the ordinary value of goods** unless the damage results from the storing party's intentional fault or gross negligence.
- Claims arising from the contract of storage shall be subject to limitation upon the lapse of a year. This rule concerns claims of both parties to the storage contract.



## Forwarding contract

- Liability - a forwarding agent shall be liable for carriers and for further forwarding agents that he uses at the performance of the mandate **unless he has not been at fault in the appointment.**
- Damages for the loss, decrease or damage to the consignment in the period from its acceptance until releasing it to a carrier, a further forwarding agent, a principal or a person indicated by him, may not exceed the consignment's ordinary value **unless the damage resulted from the forwarding agent's intentional fault or gross negligence.**
- Claims arising from the forwarding contract shall be subject to limitation **upon the lapse of a year.** Claims, to which the forwarding agent is entitled against carriers and further forwarding agents that the former has used at the consignment's carriage, **shall be subject to limitation upon the lapse of six months.**

A handful of information about the civil procedure in Poland

- As far as common courts (State courts) are concerned, there are two instances for the proceedings.
- For the sake of disputes between businesses, special business departments have been established.
- The action fee is flat and amounts to 5% of the value of the disputed object, in each instance.
- The losing party reimburses the winner for all official costs of the litigation including attorney's fees (but with some limitations).