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Traffic Law
Review
U. D. C.: 656.073:656.08
Accepted: Oct. 15, 2002
Approved: Sep. 30, 2003

ANALYSIS OF ROAD CARRIERS LIABILITY FOR ROBBERY OF CARGO ACCORDING TO CMR CONVENTION

ABSTRACT

Road carriers are increasingly facing the risk of theft and robbery of cargo which they are carrying. CMR Convention allows the carriers to be exonerated from their liability in the case of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. Unfortunately, there is no common interpretation and application in practice at the European courts of this part of CMR Convention. With the analysis of court judgements in case of robbery of the road carrier in Italy it is possible to clarify the interpretation of such events and their connection with the exclusion of liability of the road carriers contained in the CMR Convention.

KEY WORDS

road carriers liability, theft and robbery of cargo, Article 17.2 of CMR Convention, exoneration of liability, Italian and European court judgements

1. INTRODUCTION

Road carriers are constantly exposed to various risks when fulfilling the orders for carriage of cargo from one state to another. Beside the damage to the cargo the main risk to which carriers could be exposed are theft or robbery of the cargo. In the past, criminals were likely to take valuable cargo such as electronic devices, computers, food and alcoholic beverages. But we are increasingly witnessing theft and robbery of metal in bulk such as aluminium coils becoming predominant kind of cargo. The reason for this is because it is easy to sell, it does not have any identification marks or they can be very simply removed. Moreover, the country where this happens most frequently is Italy.

The truth is that Italy is regarded in Europe as a country with increased risk of robbery or theft. In cargo insurance contracts a deductible 30% of the value of the goods was determined in Italy for some regions. All this, with an intention of stimulating greater care while transferring goods across the territory of Italy, in which crime occurs constantly and is a well-known fact in the rest of the world.

The purpose of this paper is not to expose historical and cultural roots of broader criminal phenomenon in the neighbouring country, but rather to show how the carrier, as victim of such associations is treated in the Italian and European legal practice.

2. CMR CONVENTION

Article 17.1. of the CMR Convention states as follows:

"The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

Under this provision the carrier is not liable for loss or damage to the goods only during the carriage. His liability is extended to taking over the goods and delivery of the goods. The moment of trespassing of the liability is limited to the moment of passing the goods from the hands of the sender (when the goods come in the carriers' control) and receiving the goods from the consignee.

Article 17.2. of CMR Convention specifies the circumstances in which the carrier is relieved of his liability. The burden of proof for the exact cause of one of these exclusions is on the carrier's side.

According to the provisions of Art. 17, Pt. 1. of CMR Convention *the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.* The same Article, however, in Pt. 2 (17.2) determines, that *the carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.*

But how could theft and robbery be treated with reference to the above mentioned article of CMR Convention? Clarke regards theft and robbery in Italy as notorious, defining Italy as a whole the "top of the hit-parade" for these acts. There have been very few cases in which the carrier's defence has succeeded on the ground that the theft or robbery was unavoidable [1].

Leaving the lorry unguarded at the frontier during the night is not an event which could fall in the exclusion of liability stated in Article 17.2 of the CMR Convention [2].

3. ITALIAN PRACTICE

The liability of the road carrier is regulated in Italy by the "Codice Civile" (c.c.), Book Four – Obligations, Part VIII, Art. 1678. – 1702.

The carrier's liability is regulated by Art. 1693. c.c., which determines that the carrier is liable for the loss or damage of the goods given to him for carriage from taking over the goods till its delivery to the consignee, unless he proves that loss or damage were commenced due to accidental event (*caso fortuito*), nature (*natura*) or inherent vice (*vizio*) of the goods itself or its package (*imballaggio*) or the actions of consigner (*mittente*) or consignee (*destinatario*). Accidental event (*caso fortuito*) is in Italian legislation regarded as an exclusion of the guilt cause with a consecutive release of liability, whether it is contractual or not. It represents "something" unexpected (*imprevisto*) and unpredictable (*imprevedibile*), which exceeds the limits of human cautiousness (*prudenza*) and attention (*attenzione*) [3].

A respective case happened at the time when the carrier was staying overnight at an unprotected parking lot near Rome. The carrier was robbed of the truck together with the whole cargo by force. The cargo insurer paid out the indemnity to the owner of the goods and in the recourse proceedings claimed the paid amount from the carrier. The carrier refused to pay appealing to »accidental event«. The Court of Genoa (*Tribunale di Genova*) and the High Court of Genoa (*Corte d'appello di Genova*) confirmed the carrier's defence, but the Supreme Court (*Corte di cassazione*) however, annulled the preliminary judgements and returned them to the proceedings of High Court [4].

Until 1982 the Italian judicature distinguished between theft and robbery, treating the latter as »accidental event«. This was because the robbery was to contain the extremes of the accidental event, namely already because of the way of its occurrence. While in theft the elements of unpredictable and inevitable are to be proven, these elements are supposed to be obvious in case of robbery, namely because the action itself is accomplished with violence or threat and is as such

»*damnum fatale*« or »*casus maior cui humana infirmitas resistere non potest*« [5].

In 1982 the Supreme Court (*Corte di cassazione*) decided that judges are in the case of robbery as well obliged to establish the elements of unpredictable and inevitable [6]. This judgement made the everlasting difference between »accidental event« and »Act of God« in case of robbery during the road carriage of goods.

In the case of robbery the carrier can no longer automatically appeal for »accidental event«, especially in case if, e.g.

- the carrier did not perform the carriage with two drivers with intention of continuous drive or protection,
- the carrier stayed overnight at unequipped and unprotected parking places,
- the carrier did not have a built-in and operating alarm devices, etc.

In many cases though, later judgements did not consider the judgement stated above, and the robbery repeatedly remained »accidental event« [7].

I would mention also two totally contradictive judgements, namely one brought by the Court of Verona and the other by the Court of Modena. The first one judged that the carrier was liable for the loss of the goods in the case of robbery which occurred while the vehicle was standing in front of a railway barrier waiting for the train to pass by. The liability was supplementary grounded by fact that drivers were not locked up from within and did therefore not resist the armed robbers [8]. Entirely opposite is the judgement by the Court of Modena, which in case of armed robbery decided that principles of constitution contradict the resistance of unarmed carriers to armed robbers and it can be regarded that robbery includes all the characteristics of an event which is independent of the carriers' will [9].

Statistics show that Italy is becoming a more and more »risky area« regarding robbery and theft. At the same time it is difficult to talk about regions with higher, that is, lower level of risk than the statistics show, and that risk of robbery is high throughout Italy. Thus, it is almost possible to side the robbery risk with the traffic accident risk and in this way talk about normal risk of transportation in Italy [10]. If this theory prevailed, the carrier as a professional for transportation would objectively be liable for robbery as well, and not only for the so-called usual risk of damaging the goods due to traffic accident, etc.

4. HOW ARE ROBBERY AND THEFT IN ITALY TREATED BY EUROPEAN COURTS?

The carrier parked his vehicle outside a fenced and illuminated industrial object. He did not take his vehi-

cle to the nearest secured parking place, because he would have broken the allowed driving hours. An armed robbery took place. The carrier appealed to the excuse of liability, determined in Art. 17.2 of CMR. The Dutch Court judged that the carrier was liable for commenced loss since the breaking of the driving hours would have signified a minor and justified violation [11].

The carrier cannot appeal to be excused of the liability contained in Art. 17.2 of CMR, if he had not planned, even when he was acquainted with the risks of transportation in Italy, the carriage in such a way that he would stop for an anticipated rest in a secured parking place or perform the transport with two drivers and so avoid the stopping. The judgement of the German Court does not exclude gross negligence of the carrier in this case [12]. A similar verdict was also brought by the Danish Court, which in a similar case found the carrier negligent because of not planning the route in such a way as to be able to stop at secured parking places [13].

The carrier would be liable, if his vehicle was stolen on a parking place next to a petrol station. As a professional carrier he could not have been not informed of increased risk of robbery and theft in Italy, since the carriers are informed about this fact both by insurers and by transport associations which recommend the carriers to leave their vehicles only at secured parking places [14]. Similar was also the judgement by the Belgium Court which found the carrier negligent for stopping at an unsecured parking place despite knowing that he was carrying goods of higher theft risk. Armed robbery in this case does not represent a circumstance which could not have been anticipated and avoided by the carrier [15].

According to the provisions of Art. 17.2 of CMR the carrier is excused of liability in case of armed robbery which occurred during driving of the vehicle. The driver did not stop at the secured parking places, but he planned a continuous ride to his destination. At the same time, however, it should be mentioned that robberies and thefts often happen also in secured parking places. For stopping the vehicle during the ride and its further ride an additional »criminal effort« is necessary. The carrier, therefore, did not abandon his duty of obliged carefulness and for this purpose cannot be considered liable for the damage [16].

The carrier is obliged to prove that despite of the handling of the goods carrier the event could not have been avoided or prevented. The event that occurred has to be inevitable. Inevitability of an event can be discussed, if possible, even though handling with obliged carefulness and all professionally appropriate measures do not divert and prevent the consequences by the carrier [17].

5. CONCLUSION

Based on the above it may be concluded that the European Courts in the case of robbery of the carriers in Italy do not make decisions for the excuse of liability. Robbery, except in few exceptional cases, does not possess in Italy the characteristics which are determined for the excuse of carrier's liability. Because of the frequency of such events in our neighbouring country, the robbery is considered to be a normal transportation risk which can be reduced and against which protective measures can be undertaken.

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POVZETEK

ANALIZA ODGOVORNOSTI CESTNEGA PREVOZNIKA ZA ROP BLAGA V SKLADU Z DOLOČILI CMR KONVENCIJE

Cestni prevozniki so vse bolj soočeni z nevarnostjo tatvine ali ropa blaga, ki ga prevažajo. CMR konvencija omogoča, da se prevoznik sklicuje na oprostitev odgovornosti v okoliščinah, ki se jim prevoznik ni mogel izogniti in njihovih posledic ni mogel preprečiti. Žal evropska sodišča različno razlagajo pomen tega dela CMR konvencije oziroma njegove uporabe v praksi. Z analizo razsodb sodišč v primeru ropa cestnega prevoznika v Italiji je razviden način tolmačenja takih dogodkov ter njihova povezava z izključitvijo odgovornosti cestnega prevoznika, vsebovano v CMR konvenciji.

KLJUČNE BESEDE

odgovornost cestnega prevoznika, kraja in rop blaga, 17.2 člen CMR konvencije, izključitev odgovornosti, sodna praksa Italije in Evrope

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