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Right of the consignee to bring an action

According to Article 43 and Article 44 of CIM, either the consignor or consignee is entitled to make a claim or bring an action based on the contract of carriage, depending on the time at which the consignee carried out certain actions relating to the contract of carriage (e.g. asked for delivery). The provisions of Articles 43 and 44 of CIM 1999 correspond largely to those of Articles 53 and 54 of CIM 1980. A new rule following the example of Article 30 of CMR, according to which the right of action would be dependent on the existence of a substantive right, was considered in the last comprehensive revision, but in the end, it was dropped with reference to the advantage of the legal clarity provided by the existing rule (see Explanatory Report on Art. 43 and 44 under www.otif.org, Publications).

Hence the principle that still applies is not only the principle whereby, from a particular point in time, the right of action shifts from the consignor to the consignee, but also the provision relating to their documents evidencing the right to bring an action. For the consignor, the duplicate consignment note he obtains when he hands the goods over for carriage acts as such a document, and for the consignee, it is the original consignment note, which he takes possession of when he has accepted the goods.

However, there are situations where the consignor can enforce his claims by legal action even without producing the duplicate consignment note, i.e. if the consignee agrees, or if there is evidence that the consignee refused to accept the goods. The version of CIM currently in force contains a specific provision on this, as did the earlier versions. According to CIM 1999 – in accordance with the prevailing concept of the contract of carriage as a consensual contract – evidence of the absence or loss of the consignment note can also be taken into consideration.

The following comments are given against the background of a court decision dismissing an action brought by the consignee (in this case, it was the action of a person to whom the consignee had transferred its actions by assignment), because the plaintiff was unable to produce the original of the consignment note (Vrchní soud v Olomouci, Czech Republic, 7 Crno 239/2008-174, 28.7.2009). The facts of the case and the reason for and extent of liability were undisputed.

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As the claim for damages related to a CIM contract of carriage concluded in 2001, the legal provisions of **CIM 1980** were applied. It concerned a consignment of paper rolls from Hungary to Poland via the Czech Republic. After the train derailed, the railway reloaded the consignment onto open wagons, on which it was only protected by covers. When it arrived at its destination, it was ascertained that the consignment had been damaged so much as a result of getting wet that it was of no use to the consignee.

The railway accepted that it was liable. However, in accordance with Article 53 § 3 of CIM 1980, it requested that the original of the consignment note be produced, which the complainant was unable to do. As the claimant assumed that the only purpose of this condition was to prevent the same claim being asserted twice, it instead provided the railway with written acceptance of compensation in case someone else produced the original of the consignment note and demanded compensation.

Neither the railway in the claim procedure, nor the court in the civil law procedure considered this sufficient. They had interpreted the wording "the consignee must produce the consignment note if it has been handed over to him" to mean that producing the original of the consignment note was a *sine qua non* for asserting a claim.

The second sheet of the consignment note (invoice) that was submitted to the court confirmed that the consignee had taken possession of the consignment note and accepted the goods. The court also had before it sheet 4 of the consignment note (duplicate of the consignment note) and the ascertainment of the facts produced immediately after the train derailed.

The court ruling also referred to Article 13 § 4 of CIM 1980[1]. However, this Article is not a suitable argument for the *sine qua non* nature of the consignment note as a document required in order to bring an action, because in accordance with the systematic arrangement of the regulations, this provision related to the conclusion of the contract of carriage (Title II) as a formal contract, as it was then considered to be, and not to the assertion of claims (Title V).

Also in accordance with **CIM 1999**, to make the claim the consignee must produce the consignment note if it has been handed over to him (Art. 43 § 4). Exactly the same is required under Article 44 § 6, which says: "In order to bring an action the consignee must produce the consignment note if it has been handed over to him."

If the consignee (or a person to whom the consignee's actions have been transferred by assignment) brings the action, he must prove that he has carried out one of the acts set out in Article 44 § 1 b) of CIM, as a consequence of which the time is reached at which the right to bring an action has passed from the consignor to the consignee. As a rule, the easiest way of proving that the consignee has taken possession of the consignment note and has therefore acquired the right to bring an action is to produce the original of the consignment note.

In the same way as producing the duplicate of the consignment note in order for the consignor to bring an action is not the only possibility (Art. 44 § 5 of CIM), producing the original of the consignment note in order for the consignee to bring an action (Art. 44 § 6 of CIM) is not the only possibility, i.e. this is not the only proof, not to be substituted by anything else, that can be considered.

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[1] This Article read: "The consignment note shall not be replaced by other documents …"

Even in the days when the CIM contract of carriage was conceived of as a formal contract, the prevailing view was that **there is no formal requirement in CIM to prove the right to bring an action**, see the Commentary by Béla von Nánássy, *Das internationale Eisenbahnfrachtrecht* (International Rail Freight Law) [2]. In connection with this, it must be explained that the version of CIM applicable at that time already contained the wording: "To make the claim, the consignor must produce the duplicate of the consignment note." The further stipulation concerning the document the consignee had to submit to bring an action was added later.

However, it is inconceivable to assume the existence of a formal requirement only in relation to one of two alternative persons entitled to bring an action. Irrespective of whether the consignor or the consignee brings the action, producing the duplicate of the consignment note or the consignment note constitutes a **formal provision, the purpose of which is to provide evidence**.

Detailed explanations of this can be found in the Commentary by Kurt Spera, *Internationales Eisenbahnfrachtrecht* (International Railway Freight Law)[3]. These explanations do relate to CIM 1980, but they are still useful. With regard to CIM 1999, see the *Münchener Kommentar zum Handelsgesetzbuch* (Munich Commentary on the Commercial Code)[4] by Rainer Freise.

As the consignment note (including a consignment note in accordance with CIM 1980), unlike a bill of lading, is not a negotiable instrument, it is not necessary to have it declared invalid if it is lost in order for the court to allow other means of evidence of the right of the parties to the contract of carriage to bring an action.

For CIM – and indeed for CMR, in which the right of disposal, but not explicitly the right to bring an action is dealt with – it is the case that to allow the claim, the consignment note constitutes *prima facie* evidence as to who the consignor and the consignee are, but no more than that[5].

The provisions of Article 44 § 5 and 6 of CIM do not invalidate the **principle of free consideration of evidence**.

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2 GOF-Verlag, Vienna, 1956, p. 688

3 GOF-Verlag, Vienna, 1991

4 Verlag C.H. Beck, Munich 2009, volume 7 – *Transportrecht* (Transport Law), p. 1381/1382 on Art. 43 and p. 1384/1385 on Art. 44 of CIM

5 See Ralpf de Wit "Right of suit against the carrier in CMR" in European Transport Law 4/2007, p. 483-494.