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## Arbitration clause for an arbitral tribunal in Poland based on Art. 33 CMR Convention

**Abstract:** In matters that are subject to the CMR Convention, under the rule of Art. 33 of this Convention, the arbitration court is obliged, first, to apply the CMR Convention and it is not permissible to apply, in place of the scope of the CMR Convention, another legal order or extra-legal principles. Secondly, as far as it results from the CMR Convention, the arbitration court should apply the applicable national law. Thirdly, the arbitration court settles the dispute according to the law applicable to a given relationship, and when the parties have expressly authorized it – in compliance with general principles of law or principles of equity. Fourthly, the arbitral tribunal takes into consideration the provisions of the contract and the established habits applicable to the given legal relationship.

The arbitration agreement regarding the dispute subject to the CMR Convention will therefore be of a complex nature due to the requirement of Art. 33 of the CMR Convention as to the indication that a uniform law applies in arbitration proceedings – the subject of inter-city agreement. The parties should indicate the following in the content of the arbitration clause:

- 1) obligatory CMR convention, as required by Art. 33 CMR Convention
- 2) optional national law to which the CMR Convention refers, and in the absence of such an indication, the arbitration court will apply the law applicable to a given legal relationship, and possibly another national law to which the CMR Convention does not refer, although such a solution would be a source of many complications or general legal principles or rules of equity.

For practical reasons, it is worth taking into account other issues, such as the language of the proceedings, in the arbitration clause.

**Keywords:** INTERNATIONAL CARRIAGE OF GOODS BY ROAD, CMR CONVENTION, ARBITRAL TRIBUNAL

### 1. Preliminary remarks

According to Art. 33 of the Convention on the Contract for the International Carriage of Goods by Road (CMR),<sup>1</sup> approved at Geneva on 19 May 1956,

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<sup>1</sup> M. Sośniak, *Prawo prywatne międzynarodowe*, 3rd edition, Katowice 1991, p. 133; M. Sośniak, *Prawo przewozu lądowego*, Warszawa 1974, p. 9; D. Ambrożuk, Legitymacja do dochodzenia

the contract of carriage may contain a clause conferring jurisdiction on the arbitral tribunal<sup>2</sup> provided that the clause ensures that the arbitral tribunal will apply the CMR Convention.

Arbitration is a better solution for business affairs than state courts.<sup>3</sup> In practice, an arbitration clause included in a contract of carriage subject to the CMR Convention is not frequent. However, such a provision should be recommended even for the reason that Art. 31 sec. 1 CMR provides for a very wide selection of jurisdictions.<sup>4</sup> According to the aforementioned provision, if the parties have not concluded a jurisdiction agreement, the plaintiff may bring the case to courts of the country in whose territory the defendant has the permanent place of residence, headquarters or the branch or agency through which the contract of carriage has been concluded or a place of takeover of goods for transport or a place of delivery. In practice, it may turn out that a dispute before a state court may be conducted between the parties in the state which is not the seat of any of the parties, but in the country in which, for example, the acceptance of goods for transport took place. This is also an important factor because not all countries – the parties to the Convention – have ratified the additional protocol to the Convention, regulating the limitation of the carrier's liability using the SDR unit of account.<sup>5</sup> An arbitration clause basically excludes the risk of an arbitrary choice of the plaintiff as to jurisdiction. Of course, this is not the only advantage of arbitration on the basis of disputes that may arise based on matters regulated by the CMR Convention.

## 2. The legal character of Art. 33 CMR Convention

The provision of Art. 33 of the CMR Convention has the character of a mandatory law (*ius cogens*).<sup>6</sup> According to Art. 41 Para 1 of the CMR Con-

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roszczeń odszkodowawczych z umowy przewozu towarów w transporcie lądowym, in: D. Wetoszka (ed.) *Prawo transportowe. Morze. Ląd. Powietrze*, Warszawa 2017, p. 85; M. Stec, *Umowa przewozu w transporcie towarowym*, Kraków 2005, p. 45; T. Szanciło, *Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych*, Warszawa 2013, p. 51; R. Adamus, *Konwencja CMR w orzecznictwie sądów polskich*, Głosa, no. 2/2010, p. 16; R. Adamus, *Klauzula arbitrażowa w oparciu o Art. 33 konwencji CMR*, Biuletyn Arbitrażowy no. 9/2009, p. 43.

<sup>2</sup> T. Ereciński, K. Weitz, *Sąd arbitrażowy*, Warszawa 2008, p. 35.

<sup>3</sup> T. Szurski, *Uwagi wprowadzające do problematyki krajowego i międzynarodowego arbitrażu handlowego (gospodarczego)*, Przegląd Ustawodawstwa Gospodarczego no. 1/1994, p. 4; A. Kąkolecki, *Zalety arbitrażu instytucjonalnego na przykładach sądów przy ICC i KIG*, Radca Prawny no. 1/2008, p. 79; T. Ereciński, K. Weitz, *Sąd...*, p. 47; R. Adamus, *Arbitraż a problem zbiorowej restrukturyzacji zobowiązań pieniężnych dłużnika*, Biuletyn Arbitrażowy, no. 6/2008, p. 76.

<sup>4</sup> P. Judek, *Aktywna obrona przed roszczeniami z tytułu szkód w międzynarodowym transporcie drogowym*, in: D. Wietoszka (ed.) *Prawo transportowe. Morze. Ląd. Powietrze*, Warszawa 2017, p. 103.

<sup>5</sup> R. Walczak, *Międzynarodowy przewóz drogowy towarów*, Warszawa 2006, p. 112.

<sup>6</sup> R. Walczak, *Międzynarodowy...*, p. 58; H. Goik, in: *Prawo transportowe*, Szczecin 1998, p. 435; K.-H. Thume, *Kommentar zur CMR. Übereinkommen über den Beförderungsvertrag im interna-*

vention, subject to the provisions of Article 40 of this Convention, it is null and void any clause that would directly or indirectly violate the provisions of the Convention. The invalidity of such clauses does not invalidate the remaining provisions of the contract. Therefore, it is not allowed to exclude *ex ante* the provisions of the CMR Convention in arbitration proceedings, even by mutual consent of the parties. The arbitration clause is, in principle, autonomous, which is stressed in the regulation of Art. 1180 § 1 sentence 2 of the (Polish) Civil Procedure Code (hereinafter “CPC”).<sup>7</sup> The arbitration clause excludes the possibility of hearing a dispute by a state court.<sup>8</sup>

### 3. Type of arbitration under the rule of Art. 33 CMR Convention

In the provision of Art. 33 of the CMR Convention, the “arbitration tribunal” (French: *tribunal arbitral*, German: *Schiedsgericht*) is referred to twice. In the common meaning, arbitration is understood as an arbitrator or arbitrators appointed by the parties to resolve a given dispute (the so-called *ad hoc* arbitration), as well as permanent arbitration institutions involved in organizing arbitration proceedings (the so-called institutional arbitration). Additionally, it is possible that an *ad hoc* arbitration court uses the administrative facilities of the institutional arbitration court.<sup>9</sup> In each of the cases mentioned above, the essence of arbitration is the same.<sup>10</sup> In semantic terms, the phrase “arbitral tribunal” may lead to the conclusion that the mentioned provision indicates only institutional arbitration. However, there are no substantive grounds to restrict arbitration within the meaning of Art. 33 CMR Convention, only for institutional arbitration. Consequently, on the power of Art. 33 of the CMR Convention any type of arbitration, including *ad hoc* arbitration, may be selected.

The number of the arbitrators (one, three, etc.) appointed to deal with the case is of no importance. The arbitration tribunal has no “nationality”.

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*tionalen Strassengüterverkehr*, 2 edition, Frankfurt am Mein, p. 872; I. Koller, *Transportrecht. Kommentar*, 6 edition, p. 1460; R. Herber, H. Piper, *CMR. Internationales Strassentransportrecht. Kommentar*, Munchen, p. 1234.

<sup>7</sup> Judgements of the Polish courts: Sąd Apelacyjny in Warszawa 4 August 2006, I ACa 245/06, Sąd Okręgowy in Krosno, 29 November 2006, VIII Ga 73/06, Sąd Rejonowy in Szczecin, 4 April 2007, XI GC 414/06.

<sup>8</sup> D. Ambrożuk, in: *Konwencja...*, p. 421.

<sup>9</sup> K. Szostak, Klauzula arbitrażowa w świetle konwencji o umowie międzynarodowego przewozu drogowego towarów (CMR) – wybrane zagadnienia, e-Przegląd Arbitrażowy no. 3-4/2013, p. 50, D. Ambrożuk, in: K. Wesolowski, D. Ambrożuk, D. Dąbrowski, *Konwencja o umowie międzynarodowego przewozu drogowego towarów (CMR)*, Warszawa 2015, p. 420.

<sup>10</sup> T. Ereciński, K. Weitz, *Sąd ...*, p. 52.

The tribunal can rule in any state. This also applies to the arbitration tribunal in a country whose courts are not indicated by jurisdictional links.<sup>11</sup>

#### 4. The form of the arbitration agreement

*Verba legis* – the source of an arbitration agreement – is a clause in the contract of carriage. The question arises about the proper form<sup>12</sup> of the arbitration clause. The CMR convention does not indicate what the form of the arbitration clause should be. Answers to the question about the form of the arbitration clause should be sought in a uniform law, the source of which are international conventions. In the absence of such options, a conclusive law should indicate the legal system that will allow assessment of the form of the arbitration clause.

According to Art. II of the New York Convention on recognition and enforcement of foreign arbitration rulings, done at New York on 19 June 1958, each of the Contracting States of this convention must recognize a written contract which all the parties undertake to submit to arbitration or some of the disputes arising or likely to arise between them from a specific legal relationship, both contractual and non-contractual, in a matter which may be settled by arbitration. The term “written contract” means both the arbitration clause included in the contract and the compromise – both signed by the parties and included in the exchange of letters or telegrams.

The European Convention on International Commercial Arbitration, done at Geneva on 21 April 1961,<sup>13</sup> in Art. I sec. 2 letter a) stipulates that “arbitration agreement” means an arbitration clause in a written contract or a separate arbitration agreement (registration for arbitration) signed by the parties or included in exchange of letters, telegrams or notices.

Under Art. 40 of the (Polish) private international law Act the form of arbitration agreement shall be governed by the law of the state of the place of arbitration. It is enough, however, to preserve the form provided for by the law of the state to which the arbitration agreement is subject to.<sup>14</sup>

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<sup>11</sup> D. Ambrożuk, in: *Konwencja...*, p. 420.

<sup>12</sup> The formalism of the contract for the carriage of goods (due to the issue of a consignment note) is described – *inter alia* – by M. Sośniak, *Prawo przewozu lądowego*, Warszawa 1974, p. 63, M. Stec, *Umowa przewozu w transporcie towarowym*, Kraków 2005, p. 142.

<sup>13</sup> The Convention applies: to arbitration agreements concluded in order to resolve disputes arising in the course of a transaction of international trade between persons who are both physical and legal persons who, at the time when such agreements are concluded, have their permanent residence or their registered office in different Contracting States (Art. I sec. 1).

<sup>14</sup> According to Art. 39 of the (Polish) private international law Act, the arbitration agreement shall be governed by the law chosen for it by the parties. In the absence of choice of law, the arbitration agreement is governed by the law of the state, where the place of arbitration arranged by the parties is located. Unless such an arrangement has been made, the arbitration agreement

According to Art. 1162 § 1 CPC, an arbitration clause must, for its validity, take the written form (Art. 1162 § 1 CPC). However, pursuant to Art. 1162 § CPC, the requirement regarding the form of an arbitration clause is met also when the record was included in the pages exchanged between the parties letters or statements made by means of communication at a distance that allows capturing their content.<sup>15</sup> Appointment in the contract for a document containing a decision on submission of a dispute to the arbitration court meets the requirements for the form of an arbitration clause if this contract is made in writing, and this reference is of the kind that it does record part of the contract. An arbitration clause may be established by a statement bearing an electronic signature. New technologies in the near future should simplify the form of an arbitration clause.

The problem of the form of arbitration clause under Art. 33 CMR Convention gave rise to academic disputes in the German literature on the subject. According to the first group of views, an oral, non-written form of an arbitration clause is unacceptable. Other authors believe that each time the appropriate national law decides, but there is no unanimity, whether it is the law of the place of filing an arbitration clause or the law of the place of arbitration. At the other end of the scale there is a view allowing full freedom as to the form of the arbitration clause.<sup>16</sup>

In the case of an arbitration dispute in Poland, Art. 1162 CPC indicates the requirement of the written form of an arbitration clause.

According to the literal content of Art. 33 of the CMR Convention, an arbitration clause may be included in the “contract of carriage”.<sup>17</sup> However, one should defend the view that this does not exhaust all possible cases of accepting an arbitration clause. In practice, the arbitration clause may be entered in the consignment letter signed by the parties. The literature also expressed the view that an arbitration clause may be included in a transport order confirmed by the parties. Furthermore, the arbitra-

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is subject to the law applicable to the legal relationship to which the dispute relates; it is enough, however, that the contract is effective under the law of the state in which the proceedings are pending or the arbitration court has issued a decision.

<sup>15</sup> D. Ambrożuk, in: *Konwencja...*, p. 422.

<sup>16</sup> K.-H. Thume, *Kommentar zur CMR ...*, p. 871-872; I. Koller, *Transportrecht...*, p. 1460-1461.

<sup>17</sup> K. Walczak, *Międzynarodowy...*, p. 57. On the other hand, the (Polish) Supreme Court (order of 6 October 1969, I CZ 66/69, not public) assumed that the bill of lading is not a contract and therefore the clauses contained therein do not meet the conditions for submission of a dispute to a foreign arbitration court. The legal nature of a bill of lading as a unilateral legal act does not change the fact that the Bill of Lading will be signed as the bill of lading. Indeed, the mere signing of a declaration without concurring with submitting a dispute to the arbitral tribunal does not give grounds for assuming that the signatory's will was to accept the proprietary clause contained in the bill of lading. If, therefore, the arbitration clause were included in the content of the CMR consignment note, for the avoidance of doubt, signatures should also be signed under the wording of the clause. For more on the subject of arbitration clauses in the bill of lading, see T. Ereciński, K. Weitz, *Sqd ...*, p. 131.

tion clause should be allowed to be included in another agreement (appendix) made by the parties.

### **5. *Ex ante* and *ex post* arbitration clause under Art. 33 of the CMR Convention**

In the German literature, it is aptly assumed that Art. 33 of the CMR Convention does not apply to the arbitration agreement after the dispute arose (*ex post* arbitration clause).<sup>18</sup> This legal view has its justification. With the linguistic interpretation of the provision, one would conclude that it relates to a clause contained in a contract of carriage, or in another act relating to the stage of contracting (determining the content of the rights and obligations of the parties) – *ex ante* arbitration clause. After the dispute arises, if the parties know its subject matter and scope, there is no need to restrict the parties as to the choice of standards that will form the basis for the assessment of claims. Finally, one should opt for the widest possible autonomy of the will of the parties. What are the practical consequences of the above view? The arbitration clause made before the dispute and mandatory CMR convention may be changed after the dispute has arisen. The parties may *ex post* exclude the use of CMR conventions in such cases.

Nevertheless, it is worth noting that as far as the Polish literature is concerned, K. Wesółowski argues that the content of Art. 33 CMR does not preclude the submission of a dispute to arbitration, even where the contracting parties have not made the transport of an arbitration clause, and do so only in an additional agreement in contract work or even after the execution, and the dispute has arisen.<sup>19</sup>

In conclusion, it should be stated that it should be allowed a far-reaching autonomy of the will of both parties as to adopting the arbitration agreement and the time at which such a clause is adopted. The limitation under Art. 33 CMR Convention does not apply to the arbitration agreement which is concluded after the dispute has arisen.

In jurisprudence, it is assumed that it is not allowed to put to the arbitration all disputes between the parties that may arise in the future without marking a particular legal relationship.<sup>20</sup> The arbitration clause should therefore sufficiently individualize the legal relationship from which the dispute will be subject to arbitration.

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<sup>18</sup> K.-H. Thume, *Kommentar zur CMR...*, p. 873.

<sup>19</sup> K. Wesółowski, *Dochodzenie roszczeń według CMR*, Gdańskie Studia Prawnicze, 1999, no. 5, p. 449.

<sup>20</sup> Ruling of the Appellate Court in Białystok of 9 June 1992, I ACz 115/92, *Przegląd Sądowy*, 1994, no. 1, p. 20.

## 6. The scope of binding of *ex-ante* arbitration clause

The *ex ante* arbitration clause binds both parties of the contract for the carriage of goods by road: the shipper and the carrier. This clause does not bind the recipient of the package. The recipient is not a party of the contract of carriage. The recipient of a consignment does not take part in forming the arbitration clause. Acceptance of delivery by the recipient leads to the recipient's acquisition of rights and obligations. He does not become a party of the contract.<sup>21</sup> However, the recipient of the consignment may, by way of an explicit statement, proceed with the *ex ante* arbitration agreement.

The arbitration clause in the consignment letter binds successive transporters. If the successive carrier takes over the consignment and the consignment letter, he becomes the party of the contract of carriage of goods by road.<sup>22</sup>

## 7. Adopting an arbitration clause by a proxy holder

Due to the factual relations in transport contracts it is worth stressing that in accordance with Art. 1167 CPC, power of attorney to perform legal acts issued by the entrepreneur also includes authorization to draw up an arbitration clause in disputes arising from this legal action, unless the power of attorney stipulates otherwise. In previous case-law, it was assumed that for an arbitration clause, a power of attorney is needed.

## 8. The special nature of the arbitration clause pursuant to Art. 33 CMR Convention

The doctrine of law distinguishes the obligatory (constitutive) components of the arbitration clause, which allow the given act to be qualified as an arbitration clause. These include: designating the parties, establishing the jurisdiction of the arbitration court to resolve the dispute, determining the dispute or relationship from which the dispute may arise.<sup>23</sup> Registration for an arbitration court under the government of Art. 33 CMR Convention should meet the above mentioned requirements.

The special nature of the arbitration clause pursuant to Art. 33 of the CMR Convention is related to the fact that submitting the case to the arbitration court is conditioned by the indication in the clause that the arbitral tribunal will apply the CMR convention.

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<sup>21</sup> D. Ambrożuk, in: *Konwencja...*, p. 424.

<sup>22</sup> *Ibidem*

<sup>23</sup> T. Ereciński, K. Weitz, *Sqd ...*, p. 99.

First of all, the provision of Art. 33 of the CMR Convention is therefore a special regulation in relation to the provision of Art. 1161 § 1 CPC, which stipulates that submission of a dispute to the arbitration court shall require a party agreement in which to indicate the subject of the dispute or legal relationship from which the dispute arose or may arise.

Second, the provision of Art. 33 CMR conventions should be qualified as *lex specialis* in relation to the content of Art. 1194 § 1 CPC, according to which the arbitration court settles the dispute according to the law applicable to a given relationship, and when the parties have expressly authorized it – according to general principles of law or principles of equity.

The provision of Art. 33 CMR agreements combine an arbitration clause with a compulsory clause as to the jurisdiction of the uniform law governing the contract of carriage. An arbitration clause that excludes the application of the CMR Convention in its content should be considered null and void (Article 41 sec. 1 of the CMR Convention).

One should defend the view that the arbitral tribunal in Poland can recognize the dispute even if the clause on the obligation to apply the CMR Convention has not been literally indicated in the content of the clause. The Supreme Court<sup>24</sup> and the Poznań Court of Appeal<sup>25</sup> aptly pointed out that an arbitration clause may be subject to the rules of interpretation in accordance with the principles set out in Art. 65 Civil Code. In such a case, the court will be obliged to apply the provisions of this convention, unless the will of the parties states that the arbitration clause adopted by the parties has been made on the condition that the CMR Convention will not be applied in arbitration.

The above issues may be examined as part of arbitration in the mode of Art. 1180 § 1 sentence 1 CPC, because an arbitral tribunal may adjudicate about its jurisdiction, including the existence, validity or effectiveness of an arbitration clause.

In the German literature, however, it is assumed that for the validity of the arbitration agreement it is necessary to clearly indicate the CMR convention. It does not suffice to refer to the national law of that country which is a party to the CMR Convention.<sup>26</sup>

On the other hand, in the Polish literature on the subject, K. Wesolowski expressed the view that if the dispute has been resolved by arbitration despite the defective nature of the entry, consisting in the lack of reservation of the CMR Convention, the above mentioned lack may result in the refusal of a state court to decide as to the enforceability of the arbitration ruling, only when – while issuing the arbitration ruling – the arbitration

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<sup>24</sup> Ruling of 1 March 2000, I CKN 1311/98.

<sup>25</sup> Ruling of 3 July 2007, I ACa 46/06.

<sup>26</sup> K.-H. Thume, *Kommentar zur CMR...*, p. 872, I. Koller, *Transportrecht...*, p. 1460-1461.



court did not apply the provisions of the CMR. The same applies to the reversal of an arbitration ruling by a state court after filing a complaint.<sup>27</sup> This view should be regarded as accurate. In the literature, a different view is presented as well.<sup>28</sup>

What is important is that the regulation of Art. 33 of the CMR Convention applies to all disputes arising from relations subject to the CMR Convention, even if the given issue is not completely regulated in the Convention.<sup>29</sup>

It should be further emphasized that an arbitration clause with simultaneous and optional choice of CMR law can be made by entities that are not subject to its operation if there are relevant points between the regulation of the CMR and the legal dispute (e.g., the arbitration agreement concerns parties from countries which did not ratify the CMR Convention).<sup>30</sup> Through the arbitration, it is possible to widen the scope of the CMR Convention.

There is no *consensus* mentioned in the German literature as to whether the arbitration clause excludes the jurisdiction of common courts set out in Art. 31 CMR Convention. However, one should defend the view that the arbitration clause under the government of Art. 33 CMR Convention excludes the jurisdiction of a common court (this is the so-called negative procedural effect of an arbitration clause).

## **9. The problem of national law governing the contract of carriage in the scope not regulated in the CMR Convention**

As already mentioned, the CMR Convention does not cover all matters related to the carriage of goods by road. In many cases the legal situation of the parties of the contract of carriage depends on the content of the national law governing the contract of carriage.<sup>31</sup>

For example, according to Art. 32 sec. 1 of the CMR Convention, claims that may result from transport subject to the Convention shall expire after one year. However, in the case of bad intent or negligence, which according to the law of the court seized of the case is considered to be synonymous with *dolus*, the limitation period is three years.

In addition, not all the countries – parties to the CMR Convention – ratified the additional protocol to this convention. As an example, the content

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<sup>27</sup> K. Wesółowski, *Dochodzenie...*, p. 449.

<sup>28</sup> D. Ambrożuk, in: *Konwencja...*, p. 423.

<sup>29</sup> K.-H. Thume, *Kommentar zur CMR...*, p. 874.

<sup>30</sup> *Idem*, p. 875.

<sup>31</sup> D. Ambrożuk, Legitymacja do dochodzenia roszczeń odszkodowawczych z umowy przewozu towarów w transporcie lądowym, in: D. Wietoszka (ed.) *Prawo transportowe. Morze. Ląd. Powietrze*, Warszawa 2017, p. 90.

of Art. 23 sec. 3 CMR Convention in the version which is in force in Poland can be mentioned here: "Compensation shall not, however, exceed 25 francs per kilogram of gross weight short. >Franc< means the gold franc weighing 10/31 of a gramme and being of millesimal fineness 900.

Meanwhile, the additional protocol to the CMR Convention (ratified *inter alia* by Germany, but not ratified by Poland) replaced the value measure of a franc. 25 francs was replaced with the equivalent of 8.33 SDRs (Special Drawing Rights). As a consequence, the national law governing the contract of carriage may even fundamentally affect the specific legal position of the parties to the contract of carriage. An arbitration clause, within the meaning of Art. 33 of the CMR Convention – as mentioned – combines a mandatory clause to indicate a uniform law. However, the parties may additionally expand the provisions regarding the subsidiary choice of national substantive law.

The parties may choose the national law to which the CMR Convention refers. In the absence of such a choice, the arbitral tribunal shall apply the relevant national law in accordance with the applicable conflict-of-law rules.

According to Art. 5 sec. 1 of the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) to the extent that the law applicable to a contract for the carriage of goods has not been chosen by the parties, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

Theoretically, the parties may additionally select national law to the extent that it is not referred to by the CMR Convention. However, the indication of two different legal orders would introduce many unnecessary complications.

In the case-law practice, private transport regulations may be of great importance. The so-called *lex contractus* is usually anchored in a specific national legal order.<sup>32</sup>

## 10. The issue of choosing general legal principles or principles of equity

Undoubtedly, to the extent that it does not concern matter regulated by the CMR Convention, the parties may – instead of referring to a spe-

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<sup>32</sup> M. Stec, *Umowa przewozu...*, p. 54; T. Szancilo, *Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych*, Warszawa 2013, p. 58.

cific legal order – make reference to general principles of law or principles of equity.

At the same time, it is necessary to allow co-adoption of the CMR and adjudication *ex quo et bono*, although in this case the margin for adjudicating according to general principles of law or principles of equity will not be significant.

Moreover, reference should be made to general principles of law or principles of equity regarding those matters in which CMR itself refers to the applicable law. Thus, for example, the adoption of an annual or three-year limitation period may be decided by the principles of equity.

## **11. Problems of the arbitration court procedure**

The provision of Art. 33 of the CMR Convention imposes an obligation to apply the CMR Convention. This applies to all matters regulated by this convention. It would be a mistake, however, to state that this obligation applies to the issues of substantive law. Some institutions regulated in the CMR convention in some legal systems have the character of substantive law institutions, and in others they are of the procedural law nature.

To the extent that it is not restricted by the CMR Convention, the parties may determine the rules of proceeding before the arbitral tribunal pursuant to Art. 1184 § 1 CPC, that is, within such limits, in which the provision of the Act does not state otherwise. On the basis of Art. 1184 § 2 CPC, in the absence of a different agreement between the parties, the arbitral tribunal may, subject to the provisions of the CMR Convention and the provisions of the Code of Civil Procedure, conduct proceedings in the manner it deems appropriate. The arbitral tribunal is not bound by the provisions on proceedings before a state court.

## **12. The problem of choosing the language in matters subject to the CMR Convention**

In the case of disputes relating to international transport, it is extremely important to choose the language of the proceedings. In practice, this type of proceedings includes a whole range of multilingual documents such as bill of lading, invoice, loading specification, police note, e.g. from theft of goods or traffic accident, report on the liquidation of experts' injury, insurance policy, check on transport damage, etc. According to Art. 1187 § 1 CPC, the parties may agree on the language or languages in which the proceedings will be conducted. In the absence of such an agreement, the arbitral tribunal decides on the language or languages of the proceedings. The agreement of the parties or the arbitration court's decision, unless stat-

ed otherwise, applies to all written declarations of the parties, the hearing and decisions and notices of the arbitral tribunal. In addition, pursuant to Art. 1187 § 2 CPC, the arbitral tribunal may order that each translation should be accompanied by its translation into the language or languages agreed by the parties or specified by that court.

### **13. The problem of being bound by an arbitration clause in the case of recourse claims**

In the practice of commercial transactions, regressions of insurance companies with regard to liability for transport damage are very frequent. The Supreme Court, in the resolution of 24 February 2005,<sup>33</sup> found that the plea of an arbitration clause regarding the legal relationship between the promissory note issuer and the remitter is effective in relation to the bill of exchange also when the defendant, along with the exhibitor promissory note, is a promissory note voucher who was not a party to the agreement subjecting the dispute to arbitration. In turn, in the judgment of 3 September 1998,<sup>34</sup> the Supreme Court accepted that the arbitration clause also had effect on the assignee.

Therefore, one should defend the view that the arbitration clause on the power of Art. 33 CMR Convention is also effective if the insurance undertaking takes back recourse claims for damage to the shipment.

### **Bibliography**

- Adamus R., Arbitraż a problem zbiorowej restrukturyzacji zobowiązań pieniężnych dłużnika, *Biuletyn Arbitrażowy*, no. 6/2008.
- Adamus R., Konwencja CMR w orzecznictwie sądów polskich, *Glosa*, no. 2/2010.
- Adamus R., Klauzula arbitrażowa w oparciu o art. 33 konwencji CMR, *Biuletyn Arbitrażowy* no. 9/2009.
- Ambrożuk D., in: K. Wesołowski, D. Ambrożuk, D. Dąbrowski, *Konwencja o umowie międzynarodowego przewozu drogowego towarów (CMR)*, Warszawa 2015.
- Ambrożuk D., Legitymacja do dochodzenia roszczeń odszkodowawczych z umowy przewozu towarów w transporcie lądowym, in: D. Wietoszka (editor) *Prawo transportowe. Morze. Ląd. Powietrze*, Warszawa 2017.
- Ereciński T., Weitz K., *Sąd arbitrażowy*, Warszawa 2008.
- Goik H., in: *Prawo transportowe*, Szczecin 1998.
- Herber R., Piper H., *CMR. Internationales Strassentransportrecht. Kommentar*, Munchen.
- Judek P., Aktywna obrona przed roszczeniami z tytułu szkód w międzynarodowym transporcie drogowym, in: D. Wietoszka (editor) *Prawo transportowe. Morze. Ląd. Powietrze*, Warszawa 2017.
- Koller I., *Transportrecht. Kommentar*, 6th edition.

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<sup>33</sup> III CZP 86/04.

<sup>34</sup> I CKN 822/97.

- Kąkolecki A., Zalety arbitrażu instytucjonalnego na przykładach sądów przy ICC i KIG, *Radca Prawny* no. 1/ 2008.
- Sośniak M., *Prawo prywatne międzynarodowe*, 3rd edition, Katowice 1991.
- Sośniak M., *Prawo przewozu lądowego*, Warszawa 1974.
- Stec M., *Umowa przewozu w transporcie towarowym*, Kraków 2005.
- Szanciło T., *Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych*, Warszawa 2013.
- Szostak K., *Klauzula arbitrażowa w świetle konwencji o umowie międzynarodowego przewozu drogowego towarów (CMR) – wybrane zagadnienia*, e-Przegląd Arbitrażowy no. 3–4/2013.
- Szurski T., *Uwagi wprowadzające do problematyki krajowego i międzynarodowego arbitrażu handlowego (gospodarczego)*, *Przegląd Ustawodawstwa Gospodarczego* no. 1/1994.
- Thume K.-H., *Kommentar zur CMR. Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr*, 2nd edition, Frankfurt am Mein.
- Walczak R., *Międzynarodowy przewóz drogowy towarów*, Warszawa 2006.

#### ZAPIS NA SĄD POLUBOWNY W POLSCE NA PODSTAWIE ART. 33 KONWENCJI CMR

**Streszczenie:** W sprawach objętych zakresem regulacji konwencji CMR, na podstawie art. 33 tej konwencji sąd arbitrażowy jest obowiązany, po pierwsze, zastosować konwencję CMR i niedopuszczalne jest wyłączenie konwencji CMR dla stosowania w jej miejsce innego porządku prawnego lub zasad pozaprawnych. Po drugie, o ile wynika to z konwencji CMR, sąd arbitrażowy powinien stosować właściwe prawo krajowe. Po trzecie, sąd arbitrażowy rozstrzyga spór zgodnie z prawem właściwym dla danego stosunku, a gdy strony wyraźnie na to zezwolą – zgodnie z ogólnymi zasadami prawa lub zasadami słuszności. Po czwarte, sąd arbitrażowy bierze pod uwagę postanowienia umowy i ustalone praktyki mające zastosowanie do danego stosunku prawnego. Umowa (klauzula) arbitrażowa dotycząca sporu objętego konwencją CMR będzie zatem miała złożony charakter ze względu na wymóg określony w art. 33 Konwencji CMR. Strony powinny wskazać w treści zapisu na sąd polubowny obowiązkowo konwencję CMR, zgodnie z wymogami art. 33 Konwencji CMR i fakultatywne prawo krajowe. Przy braku takiego wskazania sąd arbitrażowy zastosuje prawo właściwe dla danego stosunku prawnego i ewentualnie inne prawo krajowe, do którego konwencja CMR nie odnosi się, chociaż takie rozwiązanie byłoby źródłem wielu komplikacji albo ogólne zasady prawne lub zasady słuszności. Ze względów praktycznych w klauzuli arbitrażowej warto wziąć pod uwagę inne kwestie, takie jak język postępowania.

**Słowa kluczowe:** MIĘDZYNARODOWY DROGOWY TRANSPORT TOWARÓW, KONWENCJA CMR, TRYBUNAŁ ARBITRAŻOWY