LIABILITY OF THE TRANSPORTATOR IN THE CASE OF THE RAILWAY TRANSPORT CONTRACT

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Abstract

When dealing with rail transport, whether we deal with aspects of domestic or international rail transport, the provisions of GO no. 7/2005 for the approval of the Romanian Railways Regulation and the Romanian Rail Transport Regulations for Internal Transport and the Convention on International Carriage by Rail (COTIF) of 9 May 1980 and Uniform Rules for the International Carriage of Goods Goods (CIM) for international transport.

Keywords: *Contractual transport, rail transport, tort law, illicit nature of the harmful act.*

Introduction

Relationships arising from the transport contract are independent of the relationship between the shipper and the beneficiary, which is based on another contract, which are not opposable to the carrier, and thus the existence of two stand-alone contracts with its own effects.

Carriage of goods is determined by the sale of a buyer from another locality or the rental of equipment for use in another locality than the one in which they are located. The use of purchased or leased goods may take place only by transporting them from the place where they are to be used.

The conclusion of the contract of carriage is determined by the prior conclusion of the sale-purchase, rental contracts without losing its autonomy through this connection. Thus, in practice, the transport contract, being autonomous, is concluded and executed independently of any existing conventions between the shipper or the consignee and third parties. In the same sense, the problem can be raised and vice versa, ie the provisions of the transport contract can not be opposed to the parties to the contract that preceded it. Thus, in a transport contract, if the jurisdiction of the Court of Arbitration in London, in which the jurisdiction of the International Commercial Arbitration Court in Bucharest was established in the event of litigation, was settled in case of litigation between sellers and buyers.

The transport contract is a legal institution with specific characters, which distinguishes it from all other contracts with economic or civil law content or which have as object the provision of services. Represents in legal terms the realization of economic relations of a special nature, such as the displacement of the object of transport, which gives it its own juridical figure with distinct characters. Being entered into between economic agents with regard to the performance of certain services, in order to carry out its tasks, the transport contracts are economic service contracts and are of a special nature.

The contract of carriage is a unitary, autonomous and autonomous contract, in the content of which there are elements that resemble elements specific to other contracts, but which confer on this contract an own legal nature.

But not every move of things from one place to another is the subject of a transport contract but only when the shipment is made on the basis of the assumed obligation of the carrier and which it has taken to the place of loading and will hand them over to place of destination.

The towing contract is of a legal nature different from the legal nature of the transport contract because it does not involve the taking over of the goods in the port of shipment and their handing over to the port of destination but only the offshore or seagoing offshore . The towing contract may be terminated for a certain distance, for a certain length of time or for the execution of a particular operation, in return for a payment. Both Contracting Parties have obligations whose non-compliance entails the contractual liability of the defaulting party, and in the event of damage to property due to third parties by performing the towing operations, the defaulting party shall be liable to them. The contract of carriage is also different from the contract of shipment, which is the contract on the basis of which a person, called expeditionary or commissioner, undertakes to the other contracting party, appointed as the sender or the principal, that by virtue of the empowerment given by the latter to conclude with carriage on own account but on the expedition's behalf a contract for the carriage of goods and to carry out all the ancillary operations for the dispatch of the goods or their arrival at destination and the consignor undertakes to pay him a certain amount of money and the price of ancillary services. The legal relationships established between the parties to the shipment contract are of a complex legal nature.

There are two civil contracts in the relations between the consignor and the consignor: a contract

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without a warrant, under which the sender authorizes the shipper to conclude with a carrier the transport contract and a service contract, on the basis of which the consignor must execute all the operations necessary for transport, such as the taking over of the goods and their loading in the means of transport, the completion of the necessary formalities. The consignor is responsible for the destruction or destruction of the goods from the moment they are received until they are handed over to the carrier, and is only responsible for the proper execution of the specific shipment contract obligations and the choice of the carrier, the means of transport and the route. The sender has the right to terminate the contract, but only until the date of conclusion of the contract of carriage, in which case he is obliged to pay the expedient a sum of money, which represents the equivalent of his activity until the termination and the price of the accessories provided; unpaid, as long as the goods are still in detention, will have the right of retention. By the way it is formed and viewed from the complexity of its constitutive elements and its purpose, the transport contract has its own legal structure and specific physiognomy, being independent of any other civil or commercial contract.

1. Regulation of the transport contract.

The legal provisions applicable to the transport contract come from a series of normative acts that need to be coordinated with each other. The Civil Code refers to the transport contract within the scope of art. 1955 - art. 2008. The transport activity is also regulated by normative acts specific to each transport sector: Government Ordinance no. 19/1997 on transport; The Romanian Railways Regulation approved by Government Ordinance no. 7/2005, Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian National Railway Company, Government Ordinance no. 42/1997 on the maritime and inland waterways, Government Ordinance no. 27/2011 on road transport. Besides the special laws and custom, as provisions that derogate from the legal regime established by the New Civil Code, it is also necessary to consider Art. 140 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, which stipulates that the provisions of the international instruments ratified by Romania in the field of transport prevail over the provisions of the Civil Code.

Art. 193 of the Law no. 71/2011 provides that art. 20 par. (3) of the Government Ordinance no. 19/1997, which regulates the transport contract in general, is modified in order to know the provisions of the New Civil Code as a general rule.

Also in the sense of recognizing the provisions of the New Civil Code as a general norm in the field of transport, art. 194 of Law no. 71/2011 provides for the amendment of para. (7) of art. 1 of Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian Railway Company.

In addition to the common features of any provision of services, the transport contract is distinguished by its own characteristics, such as: an activity consisting in the movement of persons or goods; the exercise of the carrier activity as a self-employed profession; the technical and commercial management of the operation; autonomy of the transport contract against the correlation contracts.

2. Mandatory clauses of the transport contract.

According to art. 1961 par. (2) the transport document is signed by the consignor and must contain, inter alia, particulars of the identity of the consignor, the carrier and the consignee and, where applicable, the person to whom the shipment is due. The transport document also mentions the place and date of receipt of the goods, the point of departure and the destination, the price and timing of the shipment, the nature, quantity, volume or mass and the apparent condition of the goods when handed over for transport, the dangerous nature of the goods, if any, as well as additional documents that have been handed over and accompany the shipment. The Parties may also agree on other entries in the transport document.

The provisions of the special law remain applicable.

The terms of the contract of carriage concern: the date of the contract; the nature of the transport document; the parties concerned; identification of the goods transported; carrier's obligations; payment of the price; the signature of the document.

The date of the contract is important because it determines the day of conclusion of the contract of carriage, as from the normal start of the assumed obligations. In addition, dating is of interest in determining whether or not the sender was a person with an exercise capacity at the time the legal act was finalized.

The nature of the transport document is requested incidentally by art. 1965 of the New Civil Code, which states that when the transport document is on order or at the bearer, the property of the transported goods is transferred by the effect of the transmission of this document. The type of transport document influences the identification of the recipient. The Civil Code requires that the sender, the carrier and the consignee and the person who has to pay for the shipment be identified. The identity of the sender allows the carrier to know the person from whom he or she can validly receive counter-orders, such as changing the destination or replacing the consignee. The carrier, being the main party to the contract, must be nominated, because only the recipient or the rights transferee will know without a doubt who can be held accountable in the event of loss or damage to the displaced property. The mention of the seat serves to

determine the territorial jurisdiction of the jurisdiction that will settle the dispute between the contracting parties, most of the times the defendant being the carrier.

The mention of the addressee is necessary to enable the carrier to determine the person entitled to the cargo at the end of the journey.

The description of the cargo that the shipper handles to the carrier is a mandatory requirement in the contract of carriage, since the nature, quantity, volume or mass and the apparent condition of the goods when delivered for carriage must be specified, the dangerous nature of the goods, if any. If things are in boxes or packages, you must specify their quality, number and seals or marks applied.

The purpose of these mentions is to facilitate the identification of things both by the carrier, who must release them at the end of the journey, as well as the recipient, who will receive them. The load description serves to assess the amount of compensation that the carrier may owe in the event of loss or damage to goods during transport.

Regarding the carrier's obligations, the New Civil Code requires that the point of departure and the destination be mentioned. By knowing only the destination, the carrier will be able to properly guide the means of transport. The term of the shipment must be mentioned, the term of delivery of the items being transported shall be decided by the parties. The time limit for the execution of the contract of carriage starts to run from the date when the work was handed over to the carrier by the consignor.

Payment of the price must be expressed in the document. The cost depends mainly on the type of transport, the distance traveled, the nature, the dimensions and the weight of the work being carried. In addition to the actual price of the transport, its total cost may also include other amounts.

The new Civil Code provides that the transport document is signed by the sender. By signing it, its unconditional adherence to the terms of the transport contract is manifested. The text does not include the carrier's signature. The nominative transport document must be signed by both contracting parties, namely carrier and consignor.

3. Comparative view of transport.

Two obligations are the basis of any legislation on transport, in the general sense of a different carrier according to the rules of common law, in particular the meaning of railway under the various transport regulations.

The imperative nature of these obligations is:

- equality of treatment towards the public wishing to take part in the contracting of a transport, resulting in the publicity of the law or regulation which stipulates the conditions and the price on the means of transport, which become mandatory in the relations between the state or the entrepreneur and the private persons on the basis of the concluded transport contract;
- non-disregard of the general principle that it is not permissible to circumvent the contractual obligation giving rise to the waiver.

Any enterprise of private or private interest violates the principle of fairness in law when it is allowed by law or the regulation which would require it to deviate or diminish its contractual responsibility. Justice, by jurisprudence, has the honor of restoring the violation of this high justice principle.

3.1. France

In France, land transport was governed by the provisions of Art. 1782-1786 Civil Code and Title VI S. III Commercial Code dealing with commissioners for water and land transport in Art. 96-102 and S. IV which contained a series of provisions concerning carriers generally in Art. 103-108, these articles contained general rules applicable to any kind of transport. However, it does not apply to maritime transport as these are regulated separately from the commercial code or from the transports on the roadways to which the laws of 30 May 1851 of 17 July 1908 apply, or the trams and railway undertakings of local interest to which they apply the law of 11 June 1880 and the decree of 16 July 1907.

For a long time after the promulgation of the commercial code, France has envisioned a rich legislation on rail transport, seeking new provisions to satisfy the requirements of this mode of transport.

From the point of view of the legal nature of the transport contract, the French Civil Code regards it as an operating lease and the commercial code as a commission contract. The French Leader did not know to relinquish the transport contract that autonomy that is so logical and necessary to the important economic function it performs. The rule of law translated into law is incomplete and too old that it can no longer solve problems that arise with the development of the transport industry.

As far as the railway transport is concerned under the old laws, whenever the special tariff was applied, this presupposed in the transport contract the existence of a negligence clause on the part of the railway administration and the recipient was the one who had to prove the fault of the roads railways.

The law of March 29, 1905 considers any clause introduced in the consignment note to be void under which the reduction of liability is stipulated.

The provisions of the Code, which did not restrict the parties' freedom of contract, the carrier, to the freedom to contract with the shipper on the terms of the contract, could mitigate the extent of its liability or remove it altogether by stipulating in the contract a non-warranty clause. However, the case-law has saved the general principle of common law that each is responsible for the consequences of his deeds or the non-fulfillment of an obligation.

Through a series of steady decisions, it has defeated the desire of railway companies to work

beyond the boundaries of an elementary contractual liability, being nullified by any clause to the contrary. The legal reasoning which the French courts based in their judgments referred to a clause whereby railways would be sheltered from any liability or diminished the degree of their liability resulting from the breach of contract is equivalent to the right of the railway company to free themselves from the effects of culpability, which would result in the encouragement of all the most damaging crimes and negligence and the deceptive facts. As a consequence, such an irresponsibility clause would be against public order and would not be valid.

3.2. Germany

In Germany, it was easier to regulate the transport contract because there is no legal tradition as it was in France where the commercial code of 1807 drafted the basic principles of transport and created a legal regime that had been put into practice. The German Legislative Commission of 1848, which had been designated to deal with trade and transport business, was able to study this problem and resolve it in a satisfactory manner.

The 1861 code deals with transport through art. 390-421. Damages in the event of damage or loss were calculated according to the value of the goods in the destination city, and when the carrier was guilty of misdemeanors or misdemeanors, it used the principles of common law with regard to damage to the sender. For the amounts due by virtue of transport, the carrier had a pledge on the shipment. All of these provisions, together with the others contained in the old code, have been the basis for the drafting of the Berne international convention, which is largely a true replication of the German principles. In 1900, the new German code was promulgated, which, in transport matters, reproduced exactly the provisions of the Berne Convention, paying particular attention to the conditions under which transport must be carried out and at the same time regulating the responsibility of the carrier.

The German legal system on transport has been adopted by many countries in their transport legislation because the Germans have been the only ones who have been able to adapt to the new requirements emerging with the development of the transport industry, new principles capable of satisfying them.

Transport law is viewed by German doctrine and law as a conventional right of the parties, although their will is limited by some prescriptive rules prescribed by the Code, however, they have some freedom to contract. The principles of railway law refer to a transport of public interest, are imperative and the contractual freedom of the parties is wholly excluded.

3.3. Italy

The Italian Commercial Code of 1865, which was a copy of the French code of 1807, contained in the transport field old provisions because, during the entry into force of the French code, the transport industry was very poorly developed, trafficking in persons or goods was extremely low when, after several decades, the transport companies have expanded, especially the railway companies, and those provisions could no longer meet the new needs due to the multiplication of the means of transport and their intensification.

The Italian code deals with freight and freight forwarders, each with a sphere of activity and distinct responsibility. The Chief Officer was responsible for the way the carrier carried the task of carrying, responding to the damage, the loss or delay of the work, and the carrier responded to the commissioners as to how it had carried out the shipment.

There is no provision in this code on rail transport, and then, in the absence of a special law or regulation, the provisions of the commercial code apply, which is totally inadequate and abusive.

Thus, due to the lack of specific rules that clearly and precisely define the concept of railway administration's reputation, those companies, through their regulations and statutes, which they changed as they pleased, began to restrict their responsibilities in many cases or reserve their right to fix in the consignment note the amount of damages they would have to pay to the entitled party in the event of damage or loss attributable to them. Many times, through an express clause, they were free from any liability. The damages suffered by the public as a result of such abusive treatment, forced in the event of damage or loss, to satisfy what companies wished to indemnify or to give up any compensation when the companies provided the clause of their irresponsibility in the contract.

Following the promulgation of the commercial code in 1885, a number of conventions entered into between the Italian State and the various companies to which the state had conceded the operation of the railways, setting out in detail the conditions under which they were obliged to carry out the transports, and also the extent of their responsibility . The Royal Decree of November 26, 1921 brought many changes to the existing legal regime for rail transport.

The Italian Legislative Commission of 1921, which deals with the reform of the commercial code, has echoed a pressing need. He also deals with the transport of people. The few principles of the commercial code applicable to all modes of transport are insufficient in their content and, with the development of public transport services, their applicability has become increasingly difficult. In this situation it was necessary to intervene in the jurisprudence to supplement these shortcomings and the legislator who by special laws to adapt the old provisions to the new requirements.

3.4. England

The regulation of transport in England is subject to the rules contained in the Railways and Canal Traffic Act of 30 July 1854 where no convention whereby the carrier would derogate from the general principles

underlying its liability is prohibited under the penalty of nullity.

Any carrier is subject to those provisions which have a single purpose, a fair compensation in the event of loss, damage or delay.

3.5. Switzerland

The law of 29 March 1983 governed transport in Switzerland, which contains the same provisions as the Berne international convention. The contract of carriage is treated in Art. 440-457 of the Obligation Code of 30 March 1911.

4. Liability in the contract of carriage.

Failure to comply with the obligations assumed in the contract of transport gives rise to civil liability for the carrier and the consignor. As regards the liability of the consignor or the consignee, the rules that apply are those of ordinary law, whereas special aspects of the common law apply to the carrier.

Regarding the carrier, there is contractual liability and tort liability. Tort liability is subject to the provisions of the civil code, and contractual liability is subject to the provisions of special laws, and only in the absence of specific provisions is it subject to common law.

The legal regime of the carrier's liability is given by the provisions of the civil code by art. 1984-2002.

4.1. Tort liability of the carrier.

Tort law is a sanction specific to civil law, applied for committing an illicit act of causing damage and has a reparatory character.

According to the civil code, any person has the duty to observe the rules of conduct that the law or custom of the place requires that, by his actions or inactions, the rights or legitimate interests of others, are not prejudiced. The person who has discretion violates this obligation is responsible for all the damages caused, being obliged to repair them fully. In certain cases provided by law, a person is obliged to repair the damage caused by the deed of another, the things or animals under his guard, as well as the ruin of the edifice.

The carrier, through the performance of the contract of carriage, assumes responsibility towards its contractor but may also assume liability to third parties in the sense that in the event that third parties have been harmed by acts committed by the carrier in the course of the activity outside the contract of trabsport, the liability of the carrier will be a tort / delict.

4. 2. The contractual liability of the carrier.

When the sender did not notify the carrier of the fault of the work, and he did not check the thing and did not know his vice, if the work deteriorated because of his vice and the things adjoined, the sender will be responsible for the damage caused by his fault. The sender's deed may extend the wholly or partly the civil liability of the carrier. In order for the liability to be wholly excluded, the creditor's deed must fulfill the features of force majeure, ie it is absolutely unpredictable and irresistible, otherwise the rules of common fault will apply. In the case of the transport contract, the following will be attributed to the sender and the consignee: - inappropriate loading or unloading, if these operations were done by the means of the consignor or the consignee or under their supervision; - the sender hid the vice of the work, declaring the contents of the package to be false; - the sender has handed over products which are excluded from the transport by any special law, under a false, inaccurate or incomplete name and confiscated by the authorities; - handing things over to a package with defects that could not be seen from the outside appearance when things were taken to transport; - the consignor did not indicate in the transport documents and on the packaging the particularities of the goods which required special conditions or certain precautions during transport or storage; - the creator designated by the consignor or consignee to accompany the transport has not taken the necessary measures to ensure the integrity of the transported work; - incorrect indications in transport documents; - handing over incomplete transport documents.

4. 3. Liability for non-transport or for delay

The carrier is also liable for the damage caused by not carrying out the transport or by exceeding the transport term, resulting in unlawful acts, such as not carrying out the transport and exceeding the transport time.

The performance of these acts may entail the liability of the carrier and is a manifestation of the non-fulfillment or inadequate execution of the obligation of the transport to carry out the transport within a certain period, determined conventionally or legally.

If it is found that the loss or damage or alteration could have occurred in certain cases, it is presumed that the damage was caused by that cause.

The carrier is relieved of liability if it proves that the total or partial loss or alteration or deterioration occurred due to:

- any other offense committed intentionally or by fault by the sender or consignee or instructions given by one of them;
- the major force or deed of a third party for which the carrier is not required to respond.

Article 1991 The NCC aims to group the exonerating causes of liability that may be encountered in the event of loss, alteration or degradation of the goods carried. The text is not an exhaustive list of excusable causes of liability, but the article refers to other causes provided by special laws and other texts of the new Civil Code, and exonerating causes of liability apply also to the transport contract.

Art. 1991 The NCC establishes two categories of exonerating causes of liability, depending on the legal mechanism of producing the exonerating effect of

liability. The first category is characterized by the following mechanism of producing the exonerating effect of liability: in order to apply the exonerating cause, it must be proven that it is produced and that there is damage. It is not necessary to prove the concrete causal link, that is, the fact that the actual damage is the consequence of the interference of the exculpatory case relied on. Concerning the causal link between the exonerating cause and the prejudice, art. 1991 alin. 2 The NCC requires only an abstract analysis in order to ascertain whether the intervention of the alleged reimbursement case would have the effect of giving rise to the damage suffered. If the vocation of the existence of an abstract causal link has been proved, it is assumed that there is also the concrete causal link.

The second category is characterized by the following mechanism for producing the exonerating liability: for the purpose of applying the exonerating case, it must be proved that it is produced, that there is damage and that there is a concrete causal link to prove that the damage is the consequence of the exculpatory liability .

4. 4. Causes that eliminate the illicit nature of the injurious fact

The causes that remove the unlawful nature of the harmful act are: legitimate defense; the state of necessity; the performance of a legal duty or legal order given by a competent authority; the victim's consent; the exercise of a subjective right.

In the event of intentional or gross negligence on the part of the carrier, the provisions relating to the extinction of the claimant's claims and those relating to the notice period are not applicable.

The clause which removes or limits the liability established by law to the carrier is considered unwritten. The consignor may take the risk of transport in the case of damage caused by packaging or in the case of special consignments which increase the risk of loss or damage to the goods.

Unless otherwise agreed, the carrier who undertakes to transport the goods on its operating lines and those of another carrier shall only be liable for carriage on the other lines as a commission agent.

Conclusions

Unless otherwise provided by law, in the case of successive or combined transport, liability may be brought against the carrier who has concluded the contract of carriage or the last carrier. In their relations, each carrier contributes compensation in proportion to its share of the transport price. If the damage is caused intentionally or by gross negligence on the part of one of the carriers, the full compensation is incumbent upon him. When one of the carriers proves that the damage did not occur during its transport, it is not required to contribute to compensation. Goods are presumed to have been handed over in good condition from one carrier to another if they do not require the transport document to state the state in which the goods were taken over.

In the successive or combined transport, the latter carries the others with regard to the collection of the sums under the contract of carriage and the exercise of the rights. The carrier who fails to fulfill these obligations shall be liable to the previous carriers for the amounts due to them.

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