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Liability of the Carrier in the 2009 Romanian Civil Code and the Convention on the Contract for the International Carriage of Goods by Road, Geneva, 1956

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Abstract:
The contract for the international carriage of goods by road is governed by the International Convention concluded at Geneva in 1956 under the aegis of the United Nations Economic Commission for Europe, which entered into force on 2 July 1961. This convention, like other conventions in the field of international trade law, aims to create uniform substantive rules designed to remove legal obstacles to the development of international trade relations. The regulation of the carrier's liability by the Romanian legislature in the Civil Code of 2009 shows obvious similarities, in its essential aspects, with the regulation of the Convention on the contract for the international carriage of goods by road, Geneva, 1956. There are similarities in the two regulations as regards the establishment of the professional carrier's obligation to accept any transport request, as regards the determination of the contractual liability of the carrier, the imposition of a carrier's presumption of fault in the event of injury, as well as from the perspective of limiting the carrier's liability.

Keywords: *transport contract; international carriage of goods by road; carrier's liability; uniform rules of substantive law; international convention*

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The contract of carriage as regulated in Romanian law

The 2009 Civil Code regulates the contract of carriage in Chapter VIII, Title IX ("Various special contracts"), of Book V ("On obligations").

The chapter regulating the contract of carriage comprises three sections: a section containing general provisions, another section containing rules governing the contract for the carriage of goods and the third section containing rules governing the carriage of passengers and luggage.

Since the new Civil Code has enshrined the monistic conception in the system of private law, both the carriage contracts between simple individuals and the contracts between professionals are subject to its provisions.

The chapter on the contract of carriage has three sections. The first section contains general provisions on the notion and the proof of the contract of carriage, the definition of the carriage modes, the scope and liability of the carrier.

Art. 1995 of the Civil Code defines the contract of carriage as the contract by which "a party, called carrier, undertakes principally to transport a person or property from one place to another in return for a price that the passenger, the sender or the consignee undertakes to pay at the agreed time and in the agreed place." This definition of the contract of carriage contains the elements necessary both for the definition of the contract for the carriage of goods and for the carriage of persons (S. Cercel, Șt Scurtu, 2016a:143).

The status of party to a particular carriage contract is also acquired by the carrier who replaces another carrier for the purpose of performing all or part of his obligation. It is inferred from the text of the law that the carrier replacing the original carrier must be a professional (Stanciu, 2015: 63).

In the case of the replacement of the original carrier but also of subsequent carriers, "the payment made to one of the carriers is liberating in respect of all carriers who have replaced or have been replaced" (art. 1960 of the Civil Code).

As for the proof of the carriage contract, art. 1956 of the Civil Code provides that it can be done by transport documents, such as a consignment note, luggage receipt, driver's log book, bill of lading, a ticket or travel card, or the like, from one case to another. Starting from the clarification made by the legislature (the document is required for the proof of the carriage contract), both in the marginal title of art. 1956 of the Civil Code, and in the content of this article, relating to art. 1174 of the Civil Code, we infer that the contract of carriage is consensual in nature. The consensual character of the contract of carriage also results from the provisions of art. 1967 of the Civil Code, concerning the sender's obligation to deliver the goods under the contract to the carrier, an obligation regulated as an effect of the contract, not as a condition of its validity; thus, the law provides that the failure of the sender to fulfill this obligation in time does not affect the validity of the contract, but merely entails the liability of the sender for the damage caused for delay in the performance of the contract.

Referring to the modes of carriage, art. 1957 of the Civil Code makes a distinction, depending on the number of carriers involved, between single carrier and multi-carrier transports.

Where the carriage is made by several carriers, a distinction is made between successive carriage and combined carriage:

(a) successive carriage is defined as carriage under the following conditions: (i) using the same mode of transport; (ii) by two or more successive carriers; (iii) the delivery

of the goods and luggage from one carrier to another must take place without the intervention of the sender or the passenger;

(b) combined carriage is defined as the carriage performed by several modes of transport by the same carrier or by several successive carriers.

The practical importance of this legal distinction is given by the special rules applicable to these categories of carriage as regards contractual liability and the performance of the carriage contract (see, to that effect, the provisions of articles 1999-2001, 2006 of the Civil Code). With regard to the scope of the provisions in the chapter regulating the contract of carriage, art. 1958 of the Civil Code stipulates that the provisions contained therein apply to all modes of transport (air, rail, water, road).

However, it specifies that the special laws, the established practices between the parties and the transport usages shall apply first. It is clear from that express statement of the legislature that, on the one hand, the rules on the contract of carriage contained in this chapter of the Civil Code are part of the general legal framework (as a consequence of the establishment of the rule that the provisions of the Civil Code are general provisions in the matter of the carriage contract, art. 193 of the implementation law provides that paragraph 3 of art. 20 of GO no. 19/1997 shall be amended and shall read as follows: "The public carriage contract shall be concluded between the carrier and the beneficiary in accordance with the Civil Code and shall be proved, for the carriage of persons, by a transport document handed over to the passenger, and for the carriage of goods, by a specific transport document "), and, on the other hand, those rules are subsidiary; consequently, the provisions contained in the treaties ratified by Romania (see, to that effect, the provisions of art. 140 of the implementation law, which must be read in conjunction with art. 1958 of the Civil Code), the special laws, the established practices between the parties and usages in the field of carriage prevail (By referring to the usages in the matter of the carriage contract, art. 1958 of the Civil Code applies the provisions of art. 1 of the Civil Code states that "In the matters regulated by the law, the usages apply only to the extent that the law expressly refers to them", provisions which establish an exception from the rule laid down by art. 1 of the Civil Code, in accordance with which the usages are a source of law only "The usages shall be applied in the cases not provided by the law, and in the absence thereof, the legal provisions regarding similar situations, and when such provisions do not exist, the general principles of law").

Art. 1958 of the Civil Code implicitly establishes the principle according to which the provisions of the chapter on the contract of carriage apply only to onerous contracts; this principle is deduced from art. 1958(2) of the Civil Code, which provides that the provisions of the chapter on the contract of carriage do not apply to carriage contracts free of charge; this rule exempts carriage free of charge if it is performed by a carrier offering its services to the public in the course of its professional activity.

As to the nature of the carrier's obligation, the legislature states that it has a care and diligence duty when transport is free of charge. Per a contrario, in the case of an onerous contract of carriage, the carrier has a result obligation.

Finally, art. 1958(3) of the Civil Code provides that the carrier providing his services to the public has the obligation to accept for transport any person requesting his services and any goods for which transport is requested, unless he has a valid reason for refusal. It also imposes on the passenger, sender and consignee the obligation to comply with the carrier's instructions regarding the security of the goods or persons transported (With regard to the content of the instructions, see also Ș.A. Stănescu, in Fl.A. Baias, E. Chelaru, A. Constantinovici, I. Macovei (coord.), 2012: pp. 1971-1972).

Observing the provisions of the general theory of civil liability, we find that the rules on the carrier's liability are more restrictive. Thus, in accordance with art. 1355 of the Civil Code, the liability for material damage to another by an intentional or grossly negligent act cannot be excluded or limited by convention (Pursuant to art. 1355 of the Romanian Civil Code, one cannot exclude or limit, by conventions, the liability for material damage to another; in the case of damage caused to physical or mental integrity or health, the liability cannot be removed or diminished except under the law); but the clauses that exclude liability for damage caused to the goods of the victim, by mere recklessness or negligence, are valid.

On the other hand, as regards the liability of the carrier, art. 1559 of the Civil Code provides that it cannot exclude or limit his liability by conventions. The carrier may be relieved of liability for delay in the performance of the transport, under the law, only in case of fortuitous event or force majeure. We have to add to this provision the general provisions of art. 1352 of the Civil Code, which, referring to the cases relieving of liability, provides that both the victim's act and the third party's act remove the liability if they have the characteristics of the fortuitous event, in cases where the fortuitous event relieves of liability. The second section of the chapter on the contract of carriage regulates the contract for the carriage of goods and the third section sets out the rules applicable to the contract for the carriage of persons and luggage.

Regulations on the international carriage of goods by road

The diversity of national laws made it necessary to adopt international conventions in this matter. Some international conventions regulate the contract of carriage with the aim of creating a uniform body of law in the matter (the relevant example being the Convention on the Contract for the International Carriage of Goods by Road, signed in Geneva, 1956), others facilitate this type of transport. To illustrate, we will mention some such conventions (for an exhaustive enumeration of these conventions, see the collective work Repertoriul actelor normative privind relaţiile internaţionale şi cooperarea internaţională a României, 1997: 400 sqq): a) the Customs Convention on the International Transport of Goods under Cover of TIR Carnets, concluded in Geneva in 1959. Romania signed this convention in 1963; b) the Convention on Road Traffic, concluded in Vienna in 1968, supplemented by the Geneva European Agreement of 1971; c) the European Agreement concerning the International Carriage of Dangerous Goods by Road, concluded in 1957, to which Romania became a signatory in 1994; d) the European Agreement on Road Markings, adopted in Geneva in 1957, to which Romania became a signatory in 1963; bilateral international agreements, even if they do not expressly refer to this contract, are important for the contract for the international carriage of goods by road insofar as they contain provisions on some contractual elements such as transport charges, transport authorizations, etc.

The Convention on the Contract for the International Carriage of Goods by Road,
Geneva, 1956

Preliminary issues. The Convention on the Contract for the International Carriage of Goods by Road was concluded in Geneva in 1956 under the aegis of the United Nations Economic Commission for Europe and the International Road Transport Union (references in this paper to various article numbers, without any reference to any rule or international convention, concern the Convention on the Contract for the International

Carriage of Goods by Road, Geneva, 1956). The usual abbreviation of this convention is C.M.R., a logo composed of the initials of its French name - Convention Marchandises Routiers. Romania signed this Convention in 1972. The Convention on the Contract for the International Carriage of Goods by Road, Geneva, 1956, was supplemented by the Protocol of 5 July 1978, which was ratified by Romania in 1981. Pursuant to art. 1(1) of the C.M.R., its provisions are applicable "to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties".

In other words, the provisions of the C.M.R. are applicable to an international contract for the carriage of goods by road as uniform law when the country of delivery of the goods to the carrier or the country of destination of the goods signed this Convention. The Convention is not applicable if the carriage is only in transit through the territory of a State which signed the C.M.R.

If a contract is not subject to the provisions of the C.M.R., the jurisdictional body must determine the national law applicable to that contract, having regard to the conflict rules of the forum.

As a rule, the contract for the international carriage of goods establishes the law governing the substantive conditions and its effects, as the contracting parties, under the lex voluntatis principle, also enshrined in Romanian private international law, may choose the law applicable to their contract.

The nullity of stipulations contrary to the Convention

The Convention declares that any stipulation which, directly or indirectly, would derogate from its provisions, is null and void, it takes no effect. So, the C.M.R. rules are binding; consequently, parties to a contract of carriage governed by the Convention cannot agree on clauses which would derogate from the provisions of the Convention; nor can states, by special agreements between themselves, derogate from the provisions of the Convention.

Pursuant to art. 41, the clauses giving the carrier the benefit of the goods insurance or any other analogous stipulation as well as the clauses changing the burden of proof shall be declared null and void. However, the nullity of provisions contrary to the Convention do not invalidate the other provisions of the contract; therefore, nullity is regulated as a sanction against those effects of the legal act that are contrary to the Convention and not as a sanction against the legal act itself, thereby derogating from the principle quod nullum est nullum efectum producit.

The form of the contract for the carriage of goods

The document drawn up for the conclusion of the contract for the carriage of goods is called a consignment note. In practice, the contracting parties use standardized printouts in order to facilitate the accurate drawing up of the transport document.

With regard to the purpose of drawing up the consignment note, the C.M.R. provides, in art. 4, that "The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage" which remains subject to the uniform rules contained in the Convention. Consequently, the conclusion of the contract of carriage in written form is not required for the validity of the contract but serves as the instrument of proof of the existence of the contract.

The contract of carriage must be drawn up by the sender in three original copies, all signed by the sender and the carrier. The first copy is the sender's, the second accompanies the goods to the destination, and the third is returned to the carrier (art. 5, point 1).

Pursuant to art. 7(2) to ensure that the consignment note is drawn up correctly, at the request of the sender, the carrier must specify in the transport document the particulars deemed mandatory for any carriage.

If the goods are to be loaded in different vehicles or if there are several different types of goods or lots, the sender or the carrier is entitled to request the drawing up of consignment notes for each used vehicle or for each type of goods or lot.

As a matter of principle, the C.M.R. model for the consignment note is not a representative title of the goods; however, the states signatories to the Convention may authorize the use of the consignment note representative of the goods in carriage performed exclusively on their territory.

The sender's liability for deficiencies in the consignment note

Pursuant to art. 7(1), the sender is liable for all expenses and damage caused to the carrier due to the inaccuracy or inadequacy of the instructions given by the former for the issue of the consignment note or for insertion therein (i.e. including when the consignment note has been completed by the carrier).

In practice, such deficiencies in the consignment note cause damage such as: payment of a customs fine, because the goods were not correctly charged in the tariff; damage to the vehicle in the event of overload due to incorrect indication of the weight of the goods; damage to the consignee due to the delay caused by the incorrect indication of his address in the consignment note (Căpăţînă, 1997: 230).

The liability of the carrier is entailed only if the consignment note does not state that the carriage is subject to the C.M.R., in which case the carrier is liable for the damage suffered, as a result of that omission, by the person entitled to dispose of the goods.

Documents attached to the consignment note

In accordance with art. 11(1), for the completion of customs formalities and other administrative formalities to be performed prior to the delivery of the goods, the sender must attach to the consignment note or provide the carrier with the necessary documents and provide him with all the required information. The carrier is under no obligation to examine whether these documents and information are accurate or sufficient.

The sender is liable for the damage which the carrier may have due to the absence, insufficiency or irregularity of documents attached to the consignment note or made available to the carrier and to the information provided to the carrier in order to fulfil customs formalities and other administrative formalities.

The carrier is in turn responsible for the consequences of the loss or misuse of the documents that have been attached to the consignment note, but the compensation to which he may be compelled may not exceed that which would have been due in the event of loss of the goods.

Modification of the contract of carriage

The modification of the contract of carriage by road may take place on the initiative of the sender, consignee or carrier.

Pursuant to art. 12, as the sender has the right to dispose of the goods handed over

for carriage, he may make the following changes to the consignment note: i) stopping the carriage; ii) changing the place provided in the contract for delivery; (iii) delivering the goods to a consignee other than that indicated in the contract of carriage.

The sender's right to change the consignment note appears at the time of conclusion of the contract of carriage and ceases when the second copy of the consignment note is handed over to the consignee; from that moment on the carrier must comply with the orders of the consignee. As a rule, the handing over of the second copy to the consignee is made after the arrival of the goods at destination; from that moment on the consignee has the right to ask for the goods and the accompanying documents to be delivered.

By way of exception to this rule, the C.M.R. provides that the right to dispose belongs to the consignee from the moment of drawing up the consignment note if the sender assigns the right to dispose of the goods by making a reference on the consignment note to that effect. If the consignee, while exercising his right to dispose of the goods, orders the delivery of the goods to another person, that person may no longer designate other consignees.

Where the right to dispose of the goods is exercised by the sender or the consignee, the following formal conditions must be met: (i) the sender (or the consignee) must present the first copy of the consignment note. The carrier who complies with the provision without requesting the first copy of the consignment note is liable to the party prejudiced by this action; (ii) the new provisions of the sender (or consignee) given to the carrier must be entered on the first copy of the consignment note.

The following substantive conditions must also be met: (i) the performance of the new provisions must be possible when the consignment note in which they are entered reaches the carrier; (ii) the carrying out of the instructions must not hinder the normal operation of the carrier and do not harm the senders or consignees of other transports; (iii) the provisions must not have the effect of dividing the transport; for example, one cannot designate more places of destination instead of the one initially established, as this would mean the formation of more than one piece of cargo and a contract of carriage would be required for each transport. The person making amends to the contract of carriage must compensate the carrier for the expenses and damage caused by the performance of these provisions.

If the order of the sender (or the consignee, as the case may be) meets the formal and substantive conditions laid down by the Convention, the carrier has the obligation to execute it exactly; otherwise, he will be liable to the person entitled to claim the remedy of the damage caused by this action.

The change to the contract may also be made on the carrier’s initiative in the following situations: i) when it is determined by certain circumstances which prevent the performance of the carriage under the conditions established by the parties; (ii) where it is determined by circumstances which prevent the delivery of the goods at their destination under the conditions established by the parties.

The contractual liability of the carrier

Pursuant to art. 17 (1), the carrier is liable for the total or partial loss of, or damage to the goods received for carriage, between the time of receiving the goods and the delivery of the goods as well as the delay in the delivery of the goods.

Compensation for the total or partial loss of the goods is calculated depending on the value of the goods in the place and at the time of receiving them for transportation. This value results from the invoice with which the goods were purchased. Art. 23(2)

provides that the value of the goods may be determined on the basis of the commodity exchange price or, in the absence of such a price, on the basis of the current market price or, in the absence of both, on the basis of the usual value of goods of the same kind and of the same quality.

The liability of the carrier is limited in the sense that the compensation cannot exceed 25 francs per kilogram of gross weight short (gross weight includes packing). By the 1968 Hague Protocol, the members of the International Monetary Fund agreed that the compensation owed by the carrier could be established in Special Drawing Rights, converting the gold franc with the XDR of the IMF, in proportion to a special drawing right equal to three gold francs; i.e. the compensation of the carrier is limited to 8.33 units of account per kilogram of gross weight.

Pursuant to art. 25, in the event of goods being damaged, the carrier pays the value of the consignment depreciation, calculated on the basis of the established value as in the case of the loss of the goods. If the goods have been damaged in their entirety, the compensation cannot exceed the amount that should have been paid in the event of total loss of the goods. If only part of the consignment has been damaged, the compensation cannot exceed the amount that should have been paid in case of loss of the part affected.

The carrier is also responsible for the delay in the performance of the carriage. Art. 19 provides that there is a delay in the performance of the carriage in the following cases: i) if a time- limit for carriage has been set, when the goods have not been delivered within the agreed time-limit; and ii) if no time-limit has been set, when the actual carriage exceeds the time reasonably granted to a diligent carrier, taking into account the circumstances.

In the event of delay, if the person entitled proves that the delay results in damage, the carrier will be obliged to pay damages, but they cannot exceed the price of the consignment. Exceeding the delivery time-limit entitles to compensation only if the consignee made a written complaint to the carrier within 21 days from the date of placing the goods at his disposal.

The liability of the carrier for other persons. In accordance with art. (3), in order to perform the obligation to carry the goods to their destination, the carrier is liable for the acts and omissions of his agents and servants and any other persons that he is recruiting for the performance of the carriage, if these agents or other persons act in the performance of their duties. Therefore, the carrier is liable not only for his agents, but also for any other person involved in the transport.

Relieving the carrier of liability

Article 17 divides the causes which relieve the carrier of liability in two categories: a) general causes and b) special causes of non- liability of the carrier.

The general causes of the carrier's liability are the following: i) the fault of the person entitled to dispose of the goods; (ii) the order of the person entitled to dispose of the goods, provided that it does not result in a fault on the part of the carrier; iii) the defect of the goods; (iv) circumstances that the carrier could not avoid and the consequences of which could not have been prevented. In the presence of these causes, the carrier is relieved of liability for the loss of or damage to the goods or delay in the performance of the carriage.

The burden of proving the general causes of non-liability of the carrier. In accordance with art. 18(1), the obligation to prove that the loss, damage or delay in the performance of the carriage has occurred due to a cause relieving of liability, from the

ones listed above, lies with the carrier.

The special causes of non-liability of the carrier. The C.M.R. provides that the carrier is relieved of liability if the loss or damage results from the particular risks inherent in one or more of the following: (i) the use of uncovered vehicles, without tarpaulin, if such use has been expressly agreed and referred to in the consignment note; ii) the lack or defect of the packaging for the goods exposed by their own nature to damage when these goods are not packed or are improperly packed; (iii) handling, loading, stacking or unloading of goods by the sender or consignee or by persons acting on behalf of the sender or consignee; (iv) the nature of the goods exposed, due to causes inherent to their nature, to either total or partial loss or damage, in particular by breakage, rust, internal and spontaneous deterioration, desiccation, leakage, normal wastage or by the action of insects or rodents; v) insufficient or imperfect marking or parcel numbers; (vi) the transport of livestock.

The burden of proving the special causes of non-liability of the carrier. In accordance with art. 18(2), where the carrier proves that, in the light of the factual circumstances, the loss or damage could have attributed to one or more of the particular risks provided by the Convention, it is presumed to have resulted from that cause.

In relation to this presumption laid down by the Convention in favor of the carrier, the following clarifications were made in the doctrine (Scurtu, 2003: 340-341): a) the presumption of relief of liability operates only in the cases exhaustively provided by the Convention; (b) in order to apply the presumption of relief of liability, it is necessary for the carrier to prove that the loss of or damage to the goods could have been caused by one or more of the "particular risks" listed by the Convention; c) the application of the presumption of relief of liability concerns only the damage resulting from the loss of or damage to the goods, not that caused by the delay of the shipment; d) the presumption of innocence of the carrier is of a relative nature, so the person entitled to dispose of the goods can prove that the damage has not been caused by one of the risks invoked by the carrier.

The causes of the carrier's relief of liability imposed by the C.M.R. remove the carrier's guilt. In accordance with the general regulatory framework, the carrier can also benefit, independently of the provisions of the C.M.R., from causes which eliminate the unlawfulness of the harmful act, such as the state of necessity, the order of the law or the consent of the creditor (Căpățînă, 1997: 266-267).

Wilful misconduct or default of the carrier

Pursuant to art. 29(1), the carrier's wilful misconduct and default are considered to be aggravating circumstances of his liability. If the damage was caused by serious wilful misconduct or default, the carrier is not entitled to avail himself of the provisions of the C.M.R. which exclude or limit his liability, or which overturn the burden of proof.

Due to the fact that the C.M.R. does not contain guideline criteria for equalizing a carrier's default with wilful misconduct, the equalizing of the carrier's professional negligence with wilful misconduct must be established by the court in compliance with the law of the country to which the court hearing the matter belongs.

Pursuant to art. 29(2), the rule on the liability of the carrier in the event of wilful misconduct or default is also valid if the acts arising out of serious misconduct or default are committed by the agents or servants of the carrier or any other person that he is recruiting for the performance of the carriage, if they act within the scope of their employment; therefore, in case of wilful misconduct or default, neither the agents nor the

servants or the other persons have the right to avail themselves, with regard to their liability, of the provisions of the C.M.R. which exclude or limit liability or which overturn the burden of proof.

The tort liability of the carrier and the persons for whom he is liable

The liability of the carrier can be both contractual and in tort. For example, "if a loaded truck overturns, killing a pedestrian and the goods fall and are completely destroyed, the transport undertaking shall be held liable for the act of the driver employed, to the victim's heirs and contractually to the consignee for the lost goods" (O. Căpăţînă, Contractul comercial de transport, 1995: 226).

Concerning the carrier's liability in tort, the C.M.R. provides that in the case of extra-contractual damage, the liability of the carrier is governed by the law applicable to the loss, damage or delay in the course of a transport subject to this convention. The referral concerns lex causae, determined according to the conflicting rules of the competent court. The law of the place where the tort was committed is usually applicable. According to this rule, illicit acts are subject to the law of the state in which they occurred. When the adverse consequences of the illicit act occur in a state other than the one in which the tort occurred, the law of that state is applicable.

Pursuant to art. 28(1), the carrier may avail himself, in the context of the claim seeking compensation for extra-contractual damage, of the provisions of the C.M.R. which exclude his liability, or which determine or limit the compensation due.

In the case of loss, damage or delay, the extra-contractual liability of one of the persons for whom the carrier is liable pursuant to the provisions of the Convention, that person may also avail himself of the provisions of the C.M.R. relating to the exclusion of the carrier's liability or causing or limiting the compensation due (art. 28, point 2).

The period of limitation

The usual period of limitation for actions derived from consignments subject to the C.M.R. is one year (art. 32, point 1). It is applicable both to the actions brought by the person entitled against the carrier and to the actions the carrier would bring against the sender or the consignee (about the extinctive prescription in Romanian law, see: Cercel, Scurtu, 2016b: 88-102).

The Convention also regulates an exceptional three-year term, which applies in the case of wilful misconduct or default. The carrier's wilful misconduct or equivalent to it is established in accordance with the law of the country in which the court where the claimant brings the action lie (lex fori).

Pursuant to art. 32(1), the period of limitation runs as follows: (i) in the event of partial loss, damage or delay, from the day on which the goods were delivered; (ii) in the event of total loss, commencing on the 30th day after the expiry of the agreed time-limit or, if no time-limit has been agreed, from the 60th day following the receipt of the goods by the carrier; (iii) in all other cases (for example, the action relating to amounts unduly received by the carrier from the sender as a tax for the carrier's action regarding the payment of carriage expenses) from the expiry of a period of three months from the date of concluding the contract of carriage.

How to calculate the prescription. The day indicated by the Convention as the starting point of the period of limitation is not included within the time-limit, but the day on which the term is reached is taken into account in its calculation (art. 32(1) in fine).

Suspension and interruption of the limitation period. The rule is that, in the matter of the the suspension and interruption of the running of the limitation period, the law of the country in which the court lies is applicable (lex fori).

As a result of the limitation period, the right to action may no longer be used in court, either through an action or by way of a counter-claim or exception.

Successive carriers

In accordance with the C.M.R. (art. 34) successive carriage is considered to be the carriage that meets the following conditions: (i) it is governed by a single contract; (ii) it is performed by several road carriers, each carrying the goods on a certain portion of the itinerary; (iii) each carrier is a party to the single contract of carriage, the second carrier and each of the next carriers becoming parties to the contract, on receipt of the goods and the consignment note, under the conditions set out in the consignment note. Thus each successive carrier's becoming a party to the contract occurs as a result of his receipt of the goods and consignment note.

Each of the successive carriers assumes responsibility for the total carriage operation (art. 34). As a result, the main action regarding liability for loss, damage or delay in carriage may, depending on the claimant, be brought against the first carrier, the last carrier or the carrier who performed that portion of the itinerary during which the event that caused loss, damage or delay occurred. The action may at the same time be brought against several successive carriers (art. 36).

The counterclaim by which the sender or the consignee claims damages from the carrier - claimant must be brought before the court where the carrier introduced the main action. The condition to be met is that both the main action and the counterclaim should be based on the same contract of carriage. And a possible exception raised by the defendant against the main action introduced by the carrier-claimant must be invoked in the court before which the carrier brought the action.

The right of recourse

If one of the successive carriers has been ordered by a court to pay compensation, even if the damage is attributable to another carrier, the carrier who has paid the compensation is entitled to recover the amount paid from the carrier who is guilty of causing the damage, on condition that the former proves the latter's guilt. Art. 37 provides that the carrier who has paid compensation under the Convention has a right of recourse against the carriers who participated in the performance of the contract of carriage for the amount paid, together with the interest and the costs incurred (only these may be the object of the right of recourse).

The repartition of compensation between successive carriers, in accordance with the provisions of the C.M.R. is done according to the following rules (art. 37): (a) if there is only one carrier by the action of which the damage occurred, he must bear the full compensation paid by another carrier. If he himself paid the compensation to the one entitled, he shall not have the right of recourse against another carrier; b) if the damage occurred by the action of two or more carriers, two hypotheses are distinguished: (i) if each carrier's contribution to the damage can be determined, each shall pay an amount proportional to his share of liability; (ii) if the assessment of each carrier's liability is impossible, each of them shall be liable in proportion to his remuneration; c) if it is not possible to determine which of the carriers is liable for the damage, the compensation shall be distributed among all the carriers in proportion to their remuneration;

(d) if one of the carriers is not solvable, it shall be distributed among all other carriers in proportion to their remuneration, whether or not they are liable for having caused the damage (art. 38). Insolvency must be ascertained by the recourse court.

Mixed carriage

Pursuant to art. 2(1), the carriage is mixed when a road vehicle containing goods is carried itself, but only on a portion of the itinerary, in various vehicles - water, rail, road or air, without unloading the goods from the road vehicle in which the goods were originally loaded.

If the goods were transported on a portion of the journey by road, then unloaded and transported by sea to the destination or if they were transhipped and transported on a portion of the road with another road vehicle, the consignment loses its mixed character and the C.M.R. shall apply only for the itinerary covered by the vehicle in which the goods were originally loaded (for this purpose, see Căpăţînă, 1997: 221). The exception concerns the case where the unloading of the goods from the road vehicle in which they were originally loaded is due to the modification of the contract of carriage by the person entitled to dispose of the goods through a counterorder issued under the conditions governed by the Convention.

In accordance with the C.M.R., if the road vehicle containing goods is transported on a portion of the sea, rail, road or air without unloading the goods from the vehicle, the provisions of the Convention (art. 2 point 1) apply throughout the journey.

From this principle, two exceptions are regulated (art. 2, point 2): (a) the liability of the road carrier is not determined by the provisions of the C.M.R., if the following conditions are met concurrently: (i) it has been proved that the loss, damage or delay in the delivery of the goods occurred during carriage by means of transport other than road; ii) the damage was not caused by an act or omission of the road carrier; iii) the damage originates from an event that could only occur during and because of the non-road transport. In such a situation, the liability of the road carrier is determined by the way in which the liability of the carrier by the other means of transport would have been determined if a contract of carriage had been concluded between the sender and the carrier by the other means of transport only for the carriage of the goods in accordance with the legal provisions on the carriage of goods by the other means of transport. In the absence of such provisions, the liability of the road carrier will be determined by the C.M.R.; (b) the liability of the road carrier, which is also a carrier by the other means of transport (on a portion of the itinerary), is determined as if his functions as a road carrier and a carrier by the other means of transport were exercised by two different person. Therefore, for the damage that occurred on a road portion of the itinerary, the carrier will be liable in accordance with the rules laid down by the C.M.R., and for the damage that occurred on a non-road portion, the rules set out in paragraph a) above will apply.

Conclusions

The regulation in the 2009 Romanian Civil Code on the carrier's liability shares many similarities with the regulation under the Convention on the Contract for the International Carriage of Goods by Road, Geneva, 1956.

The causes of the carrier's contractual liability are the same in the two regulations: the carrier is liable for the damage caused by the loss of or damage to the goods, as well as for the damage caused by the delay in the delivery of the goods.

The contractual liability of the carrier starts from the time of the conclusion of the

carriage contract and the time of the performance of the contract. During this period, the carrier has not only the obligation to carry the goods to their destination, but also to guard and preserve them.

Both the 2009 Romanian Civil Code and the Convention on the Contract for the International Carriage of Goods by Road establish the relative presumption of fault of the carrier in the event of damage, considering that the basis of the damage is the non-performance or the inappropriate performance of his contractual obligations.

In both regulations, the carrier's liability is limited in terms of its scope, and the carrier may be required to compensate the beneficiary of the consignment only for the actual damage suffered, not for the unrealized benefit.

The carrier's wilful misconduct and default are considered aggravating circumstances of his liability and, when guilty in such a form, the carrier is not entitled to avail himself of the provisions which exclude or limit his liability or which overturn the burden of proof.

Along the same line, in both regulations, the action for liability, in the case of carriage involving several carriers may be exercised by the person entitled against the carrier who concluded the contract of carriage and took over the goods for transport.

References:

Căpăţînă O. (1995). *Contractul comercial de transport,* Bucharest: Editura Lumina Lex.

Căpăţînă O. (1997). *Dreptul transporturilor. Transporturi rutiere interne şi internaţionale,* Bucharest: Editura Lumina Lex.

Cercel, S., Scurtu, Șt. (2016a). Carrier's liability in the Romanian Civil Code of 2009 and the Convention concerning International Carriage by Rail (COTIF), Berne, 1980, pp. 143-153. Retrieved from: http://fssconference.ro/past-conferences/fss-2016/book-of-proceedings/.

Cercel S, Scurtu, Șt. (2016b). The Extinctive Prescription: the Solutions of the Romanian Civil Code and the UNIDROIT Principles Applicable to International Commercial Contracts. *Revista de Științe Politice. Revue des Sciences Politiques*, 50, pp. 88-102. Retrieved from: http://cis01.central.ucv.ro/revistadestiintepolitice/numarul50_2016.php

Scurtu, Șt. (2003). *Dreptul transporturilor*, Craiova: Editura Universitaria.

Stanciu, C. (2015). *Dreptul transporturilor, Contracte de transport de bunuri*, Bucharest: Universul Juridic.

Stănescu Ș. A. In Baias, Fl. A., Chelaru, E., Constantinovici, A., Macovei, I. (coord.) (2012), Noul Cod civil. Comentariu pe articole, art. 1-2264 (The new Civil Code. Comments on articles, art. 1-2264), Bucharest: C. H. Beck Publishing.

Cojocaru, O., Bejan, F., Frateanu, R. (1997). *Repertoriul actelor normative privind relaţiile internaţionale şi cooperarea internaţională a României (1883-1996),* Lumina Lex Publishing.

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