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Risks Identification and Analysis in the Contract of Carriage of Goods

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Abstract

The issue of risks related to contracts, as well as analyzing and defining risk, in general, was not, in our juridical literature until the adoption of the current Civil Code, a concern that generate a distinct study on it was not done, in this regard , a full analysis of the contractual risks. Changes to the current Romanian Civil Code made the specific literature to focus attention on those legal issues. The current Civil Code lists and defines excused liability cases and the rules for bearing the risk contractually are stipulated as a rule of principle, as well as specific rules applicable to certain types of contracts. In this regard, exempting liability cases are covered in the chapter on civil liability in art. 1351-1356 Civil Code. Also, contractual risk is regulated as general rule applicable in principle to all contracts in art. 1634 Civil Code. Risks terminology has evolved and, today, the doctrine distinguishes between: risk of the good, obligation risk and contractual risk. With reference to the types of contracts, we can conclude that there are three cases that can be taken in view of the contractual risk: res perit debitori, in which case the obligation's debtor bears the risk, res perit creditori, in which case the obligation's creditor bears the risk and res perit domino when the owner bears the risk. The carriage contract is a mutually binding contract and although in principle the contract of carriage should be subjected to the rule res perit debitori, Civil Code solutions are different from this rule in some cases which target assumption of risks.

Keywords: *risk, contract of carriage, Civil Code, risks, analysis*

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The risk in contractual matters, in general

The issue of contracts-related risks as well as the analysis and the definition of the risk, in general, has not been dealt with by our legal literature before the adoption of the New Romanian Civil Code, as a distinct object of study and thus a thourough and complete analysis of the risks related to contracts and more broadely, to private law, has not been done before. The adoption of the New Code represented therefore a good reason for the specialized literature to expressly deal with this legal problem, and not only when dealing with special contracts and their risks, but by developing broad studies of analysis of contractual risks (Ilie, 2012: 16-24) or different articles (Tiţa-Nicolescu, 2012: 248-269) and analyses about this problem. In the context of these kinds of analyses, the contractual risk has been defined as that situation when a contracting party fails to comply with its undertakings for certain reasons, which are considered by law as causes for exemption. In this case, the problem is to identify the party which will bear the consequences provided for by the law for this failure. The doctrine (Pop, Popa, Vidu, 2012: 322) underlines the fact that the problem of identifying the party which will bear the risk arising from a contract has known different solutions in comparative law, especially in cases when the risk of impossibility of performance conjugates with the risk of the fortuitous loss of the good in contracts transferring ownership. *Lato sensu*, the notion of risk deals with several legal aspects related to the occurence or the intervention of certain legal situations which can be assimilated to the risk, but, from a technical perspective, it especially refers to the fortuitous impossibility of performance of the contract (Ilie, 2012: 16-24).

Morover, the current Civil Code enumerates and defines the causes of relief. The causes of contractual risks bearing are stipulated both as a principle rule as well as specific rules applicable to certain types of contracts. In this respect, the causes of liability relief are dealt with under the chapter concerning the civil liability, articles 1351-1356 of the Civil Code. In the same time, the contractual risk is regulated as a general rule applicable in principle to all contracts, as provided for by the article 1634 of the Civil Code, also applicable to contracts transferring ownership. This rule establishes that the risk is supported by the debtor of the impossible obligation. All the more, the current Civil Code's regulations deal also with the remedies for impossibility of performance, in article 1557. The terminology concerning risks has evolved and the current doctrine distinguishes between: the risk of the good – which analyzes the situation of the owernship relation, the risk of the obligation – the risk of failure to perform the obligation for fortuitous causes – and the risk of the contract – which refers to the unilateral and bilateral contractual risk, the risk of the obligation and of the correlative obligation; the faith of the contract, in general.

Speaking of types of contracts, we can conclude that there are three cases of contractual risks: *res perit debitori*, where the risk is supported by the debtor of the impossible obligation (in bilateral contracts, risks are supported by the debtor of the impossible obligation; in this case, the debtor being relieved from its own obligation which ended, will not be able to demand, on its turn, the performance of the corresponding obligation), *res perit creditori*, when the risk is supported by the creditor of the obligation which cannot be executed (as far as unilateral contracts are concerned, risks are supported by the creditor of the obligation which cannot be executed) and *res perit domino*, when the risk is supported by the owner (in contracts transferring ownership, risks are supported by the owner of the good). In other words, the risk in contractual matters has to be

analysed: from the perspective of the fortuitous impossiblity of performance – where the solution of the risk bearing problem is offered by the remedies for failure of performance provided for by the Romanian Civil Code and from the special perspective of contracts transferring onwnership as impossibility of performance is sometimes linked to the fortuitous loss of the good – object of the contract (Pop, Popa, Vidu, 2012: 323-326). With regard to the fortuitous impossibility of performance, the Romanian Civil Code stipulates in articles 1537 and 1634, the following hypotheses and solutions concerning the contractual risk-carrying.

A. *The absolute impossibility of contract performance*. In this hypothesis, the contract is terminated by operation of law, without any formality. According to the article 1557, par. 1 of the Civil Code, the impossibility has to concern an important contractual obligation in the absence of which the other party would not have concluded the contract. The legal consequences for this hypothesis are: the debtor of the non-fulfilled obligation will not be liable for the possible damages caused to the creditor and the termination of the contract is analysed as a sunset clause by the doctrine (Pop, Popa, Vidu, 2012: 324).

B. *The relative impossibility of performance*. This hypothesis deals with both partial impossibility and temporary impossibility of performance. The legal consequences for this hypothesis are provided for by the article 1557 par. 2 Civil Code, as follows: the creditor can suspend the performance, by invoking the non-performance exception; the creditor can invoke the termination of the contract; the creditor can invoke the reduction in benefits, by deducting the party of the contract which is impossible to execute; the creditor shall not be able to invoke the forced performance in nature nor damages for the party which is impossible to execute nor for the party which is temporarily impossible to execute. Regarding the risk arising from contracts transferring ownership, the current Romanian Civil Code opts for the rule *res perit debitori*, meaning that the transfer of risks is separated from the transfer of ownership, and assessed in relation to the moment of the handover.

The interpretation of this matter is comprised in the provisions of the article 1274 of the Civil Code. Therefore, if the good has not been handed over, the risk remains on the debtor of the delivery obligation, the performance of the ownership transfer being irrelevant for the situation when the risk of good loss is supported. If, however, the creditor has been given a formal notice, the risk is transferred to the creditor as of the date of his notification. The current option of the Civil code is a new one and considered by the doctrine to be likely to eliminate a „set of complicated and inequitable rules" (Pop, Popa, Vidu, 2012: 320). The previous Romanian Civil Code opted for the formula *res perit domino* when dealing with the risk in contracts transferring ownership.

The risk in the case of the fortuitous performance impossibility in the contract of carriage of goods

The obligation of the carrier to carry out the carriage of goods is: a contractual obligation, a *to do* obligation, a service obligation, an obligation to achieve a certain result. The carriage contract is a bilateral contract, that is a contract where parties mutually undertake obligations towards each other, and their obligations are interdependent, so that each one is both a debtor and a creditor. In this sense, the article 1711 of the Civil Code stipulates: „the contract is bilateral when the obligations resulted therefrom are mutual and interdependent". The specific feature of bilateral contracts consists of the mutual and interdependent character of the undertaken obligations of contracting parties. Each party has, in the same time, towards the other party, the double quality of debtor and creditor.

The obligation which falls under the responsibility of one of the parties has its legal cause in the corresponding obligation of the other party. This is why, in bilateral contracts, the obligations of the two parties, cannot be conceived one without the other.

Bilateral contracts generate in general the following special effects, applicable in principle to the carriage contract too, which is considered to be a bilateral contract: a) the rule of simultaneous performance – mutual obligations of the parties have to be simultaneously executed. Those contracts which by their nature or by the will of the parties are executed differently make an exception from this rule; b) *exceptio non adimpleti contractus* – any contracting party has the right to refuse the performance of his own obligation, as long as the other party, who claims the performance, does not fulfill his obligations under the same contract; c) the termination of the contract – if one of the parties fails to fulfill their contractual obligations, the other party has the right to unilaterally invoke or to initiate legal proceedings to claim the termination of the contract; d) the theory of risks – if an event independent from his will prevents the party from fulfilling his obligations, the contract ends, the other party being relieved from his obligations too. In this context, there is also the problem of contractual risks-carrying, which means bearing the losses generated by such fortuitous non-performance. In bilateral contracts, the rule is that risks are supported by the debtor of the impossible obligation (*res perit debitori*); in this case, the debtor, being relieved from his own obligation which ended, will not be able, on his turn, to claim the performance of the corresponding obligation.

Identification and bearing of risks in the contract of carriage of goods. The set of situations preventing the perfomance of the carriage, under the Civil Code, regulates two possibilities: the one when the prevention is not imputable to the carrier and the cases when the facts leading to the prevention of the carriage are imputable to the carrier. Also, regarding the situation where the carriage can be continued, there are two possibilities: *a) relative prevention* of the performance of the carriage, where it is possible to continue the carriage and reach the destination but with the change of the route and/or the delay initially agreed and *b) absolute prevention* of the performance of the carriage, where there is no other route of carriage or, by other reasons, the continuation of the carriage is not possible anymore.

In the case of relative prevention of the carriage, the carrier has the right to request instructions from the sender and, in the absence of an answer on his part, the carrier has the right to carry the good to the destination, making the change in the itinerary himself. In this situation, if the fact was not his fault, the carrier is entitled to the *price of the carriage, incidental fees and expenses, incurred on the route he actually made*, as well as to the adequate change in the performance delay of the carriage. In case of absolute prevention, the carrier shall proceed according to the instructions given by the sender in the carriage document for the case of carriage prevention, if such instructions exist. If the carriage document does not comprise such instruction or if such instructions cannot be fulfilled, the prevention shall be notified to the sender without delay, asking him for instructions. The Civil Code regulates in this case only the situation when the sender, being notified about the occurence of the carriage prevention, has the possibility to terminate the contract. In this case, the carrier shall be entitled only to *the expenses incurred and to the price of the carriage according to the length of the route he covered.* In this situation, we can identify two types of risks (Ilie, 2012: 206-213): 1. *The risk of the impossibility to follow the initially established route*. The solution given by the Code in

the article 1971 is the following: if there is not a fact imputable to the carrier, the latter is entitled to the *price of the carriage, incidental fees and expenses, incurred on the route he actually made*, as well as to the adequate change in the performance delay of the carriage. Therefore, the risk of the impossibility to follow the initially established route is supported by the sender (if the fact leading to the impossibility is not imputable to the carrier), not by the carrier, as the latter will receive the price of the carriage for the new possible route. The only inconvenient is the fact that they accept a new route but we cannot speak about a risk *stricto sensu*, but, as the doctrine noted, about „the search of the alternative, the flexibility of the contract. The obligation does not end for it is impossible, but it modifies its physionomy in the view of the final purpose. We are in presence of what we will call the risk of contract modification" (Ilie, 2012: 208). 2. *The risk of the impossibility to deliver the goods at the destination.* In the case of the absolute prevention of the carriage, *the sender is entitled to unitalterally terminate the carriage contract and the carrier is entitled to the payment of the contract price according to the performed route*, if the sender exercises his right. In this case, the risk is shared between the carrier and the sender. One can note that such situations constitute favourable exceptions for the carrier from the general principles concerning the contractual risks in the case of the obligations to achieve a certain result. As we have mentioned before, according to the general principles of law, in the case of the obligations to achieve a certain result, the contractual risks are on the debtor of the obligations to achieve a certain result which cannot be fulfilled anymore and this debtor doesn't have the right anymore to claim that the other contracting party respects their correlative obligation nor to obtain damages, even if he has incurred damages as a result of the fortuitous non-performance (Scurtu, 2003: 64-70).

In the case of the carriage contract, by applying these principles, it would mean that the sender, in the capacity of creditor of the obligation which became impossible to fulfill by non-imputable reasons, bears the resulted damages, without the possibility to claim that the carrier should carry the goods to the destination nor to owe him any price. The carrier, judging according to the rules of bilateral contracts, in the capacity of debtor of the obligation which became impossible to fulfill, bears the risks, in the sense that he loses the compensation to which he would have been entitled to if the goods had reached the destination. The Code's solutions make an exception from the rule *res perit debitori:* in the case of carriage prevention, if the fact is not imputable to the carrier, the latter is entitled to the price of the carriage, incidental fees and expenses, incurred on the route he actually made, as well as to the adequate change in the performance delay of the carriage, and in the case of the absolute prevention of the carriage, the sender is entitled to unilaterally terminate the carriage contract and the carrier has the right to claim the price of the carriage contract according to the route length he covered, if the sender exercises his right.

The bearing of risks resulted from the loss or the damage of goods. In the case of goods loss or damage, we can analyse the following situations: 1. *The risk of fortuitous loss or damage of the good.* The carrier is liable for the total or partial loss of goods, through their alteration or deterioration, occurred during the transportation. This is the rule. There are also situations when the carrier's responsibility is not triggered. The civil liability of the carrier is triggered if the general conditions of the liability are simultaneously fulfilled: the existence of a damage, an illicite fact, a causal link between the illicite act and the damage and the fault of the illcite act perpetrator (Dogaru, I., Drăghici, P., 2014: 297-302). The causes which excuse his guilt can refer to: the absence

of guilt, the victim's action, the act of the third party for which the carrier is not liable, the good's defect. The Code also enumerates a series of situations when the carrier's liability is eliminated. In this sense, the article 1991 stipulates that, in the case when the total or partial loss, the alteration of the damage occurred by reason of: facts in relation to the loading or unloading of the good, if this operation was carried out by the sender or the receiver; the lack or the flaw of the packaging, if the damage could not have been observed at the reception of the good for the carriage, by looking at its exterior aspect; the shipping under a non-adequate, wrong or incomplete name of goods excluded from the carriage or admitted for the carriage only under certain conditions, as well as the failure of the sender to respect the safety measures for these goods; certain natural events inherent to the carriage in open vehicles, if, under special provisions of the contract, the good has to be transported in this manner; the nature of the transported good, if this nature exposes the good to the loss or damage, through crushing, breaking, rusting, internal spontaneous alteration and other of this kind; the loss in weight, irrespective of the distance covered, if the transported good is among those which by their nature commonly suffer due to the mere carriage, such loss as the inherent danger of the living animals carriage; the fact that the servant of the sender, who accompanies the good during the carriage, did not take the necessary measures in order to ensure the preservation of the good; any other circumstance stipulated by special law, the carrier's liability is relieved. Also, the carrier is relieved from his liability if he proves that the total or partial loss or the alteration or damage of the good occurred due to: an act committed with intention or by fault by the sender or the receiver, or to the instructions given by one of them; force majeure or a third party's act for which the carrier is not liable. In other words, in the case of the loss of the good by one of these reasons which do not involve the guilty of the carrier (but are due to the fault of the other party, the good's defect or particular situations specific to the carriage), we cannot talk about contractual risks as contractual civil liability rules have to be applied. (*E. Cristoforeanu*, 1925: 312.). 2. *The risk of the carriage's price in the case of fortuitous loss or damage of the good.* The problem of risks appears when the loss of goods or their alteration/damage occurred fortuitously, meaning it was not imputable to the parties. In this situation, the problem is if the carrier receives or not the initially established payment of the carriage. The law does not provide for in an express way whether, when the good is totally or partially lost, the carrier receives or not the carriage's price or bears the contractual risk or if he shares it with the sender as in the case of the impossibility to follow the initially established route.

Given the fact that the law does not give an express solution to this situation, nor the special provisions in these matters (with one exception, in the matters of air carriage of persons), we think that the common law will apply, with the rule specific to this matter: *res perit debitori* and the article 1557, article which refers to impossibility of performance in the case when impossibility of performance is total or final. In the same time, according to the article 1274 par. 2 of the Civil Code, the notified creditor takes over the risk of the fortuitous loss of the good. He cannot be relieved from this risk even if he had proved that the good would have perished even if the obligation of delivery had been fullfilled in time. By transposing this rule to the contract of carriage of goods, this means that the carrier keeps the price for the distance he actually made until, due to the loss/damage of the good, the contract becames impossible to execute. The doctrine concluded in this matter that „risks are shared as follows: the carrier loses a part of the business, and the sender pays a service which finally does not bring him any benefit whatsoever".

The transfer of ownership and the bearing of risks in the case of goods which are being carried: the carriage contract is an *autonomous* contract. The problem of the carriage contract's autonomy is analysed by the doctrine because the birth of this contract is commonly generated by the existence of another contract or an obligation undertaken under another contract. The circulation of goods can be the result of the conclusion of certain contracts such as: sale, leasing, deposit, etc. and the carriage contract is a consequence of the fulfillment of the obligations undertaken under these contracts. The contract of carriage cannot be analysed by separating it from other similar legal constructions with wich it has inevitable intereference points. For example, the regulation of the sale contract refers also to the obligations of taking over and transportation of the good, when dealing with the sale's expenses, thus, the article 1666 par. 2 of the Civil Code stipulates that the measurement, the weighing and the delivery expenses of the good fall under the responsibility of the seller, and the ones referring to the taking over and carriage from the place where the agreement was carried out fall under the responsibility of the buyer, unless otherwise agreed. Nevertheless, the connection points with different contracts do not transform the contract of carriage into an accessory contract. The contract of carriage is an independent contract, with its own legal physionomy, a result of the complexity of civil and commercial obligations arising from the economic relationships of the parties (Stanciu, 2015: 64-65). The doctrine (Scurtu, 2003: 10-18) underlines the fact that we have to analyse two types of relationships: *a fundamental and legal relationship*, the one which generates the initial relationship which will lead later on to the undertaking of certain obligations for whose fulfillment it will be necessary to conclude a contract of carriage, and *a derived legal relationship*, represented by the contract of carriage itself. Although, from a relational point of view, the two relationsships are related, the contracts which will be concluded will be independent.

The autonomy of the two contracts is supported by a series of arguments: different parties; conclusion and performance of the contract of carriage irrespective of the existence of other conventions between the sender and third parties; in order to claim damages from the carrier it is necessary to prove the capacity of party to the carriage contract and not the ownership over the goods which are transported (Căpăţînă, Stancu, 2000: 54). Morover, practically speaking, the market economy imposed the detachment of the carriage activity from the goods trade as a distinct activity, fulfilled on a commercial basis (Scurtu, 2003: 16-20). The connection between a contract of carriage and a sale contract of a good presents an interest in the case of the fortuitous loss of the good, which can occur at different moments of carriage performance. Then the problem is who the owner of the transported good is at that moment and who bears the risk of the impossibility of performance of the contract transferring ownership. The regulations of the general matters of civil law, as well as those of the sale contract matter stipulate the following: according to the nature of goods, genre goods or individually determined gods, the moment of the transfer is different. In this sense, the article 1273 par. 1 of the Civil Code stipulates that „real rights are constituted and trasnferred through the will agreement of the parties, even if the goods were not delivered, if this agreement concerns determined goods, or, through the individualisation of the goods, if the agreement concerns genre goods".

For the individually determined goods, the ownership is transferred from the seller to the buyer at the moment of the conclusion of the contract, even if the delivery was delayed. The contractual risk will be supported in this case according to the rule *res perit debitori*. In other words, the seller, the sender of the good which diseappeared due

to fortuitous causes or force majeure, bears the risk being the debtor of the obligation of delivery which cannot be executed anymore. In this situation, the sender will not be entitled to the performance of the obligation by the buyer anymore, and if he received the contractual equivalent, he will have to return it (Cotuţiu, 2015: 170-171). The paragraph 2 of the article 1274 of the Civil Code stipulates an exception from this rule: the creditor which has been given formal notice takes over the risk of the fortuitous loss of the good and he cannot be relieved therefrom even if he proved that the good would have perished even if the delivery obligation had been fulfilled in time (Atanasiu, Dimitriu, Dobre, 2011: 480). For genre goods, the ownership is transferred from the seller to the buyer when they are individualised. The individualisation is carried out by counting, weighing, etc. In this case, if the goods fortuitously perished between the moment of the formation of the will agreement and the date established for the individualisation, the risk is supported by the sender owner. Thus, the rule applied is still the same *res perit debitori* (Cotuţiu, 2015: 170-171). The article 1679 of the Civil Code stipulates an exception in this matter concerning the block sale of goods. Thus, if more goods are sold in block and for an unique and global price, the ownership is transferred to the buyer immediately after the conclusion of the contract, even if the goods have not been individualised yet (Baias, Chelaru, Constantinovici, Macovei, 2012: 1755). The aforementioned provisions are supplementary and the parties, through their will, can depart from them.

Therefore, the special literature (Piperea, 2013: 42-43) underlines the fact that in practice the articles 1273 and 1674 of the Civil Code are rarely applied and that parties, through their will, stipulate the moment when the ownership and the risks are transferred. There are actually two ways through which it can be departed from the aforementioned legal provisions: directly, by expressly establishing by the parties, through contractual clauses, the moment when the ownership and the risks are transferred, and indirectly, by referring to uniform trade practices or rules of trade sales, as INCOTERMS Rules. By handing over the goods to the carrier, the possession over the goods is temporarily transferred from the sender to the carrier in order to be transported to the receiver. Accordint to uniform trade practices, such as INCOTERMS Rules, the different clauses concerning the handing over the goods to the carrier are given an essential effect, that is the one of the transfer of the risk of fortuitous loss of goods from the sender seller to the receiver buyer. The manners of delivery and the delivery place differ according to the type of carriage. Thus, the risks transfer will be different, according to the moment when the good is handed over for the carriage. Therefore, if we are dealing with a road carriage, it will be carried out “loco fabrica” or ex works; if the carriage is on rails, the delivery is usually carried out at the closest the railway station; for water carriage, the delivery is carried out on the quay, alongside ship, that is FAS – free alongside ship; or by loading the goods on the board of the ship, that is FOB – free on board (Piperea, 2013: 30).

References:

Atanasiu, A.G., Dimitriu, A.P., Dobre, A.F., (2011). *Noul Cod civil, Note. Corelaţii. Explicaţii*, Bucharest: C.H. Beck Publisher.

Baias, Fl. A., Chelaru, E., Constantinovici, R., Macovei, I. (coordinators), (2012). *Noul cod civil, Comentariu pe articole,* art. 1-2664, Bucharest: C.H. Beck Publisher.

Boroi, G., Stănciulescu, L. (2012). *Instituții de drept civil în reglementarea noului Cod civil,* Bucharest: Hamangiu Publisher.
Căpăţînă, O., Stancu, Gh. (2000). *Dreptul transporturilor. Partea generală*, Bucharest: Lumina Lex Publisher.
Cristoforeanu, E. (1925). *Despre contractul de transport*, Cartea I, Bucharest: „Curierul judiciar" Publisher.
Dogaru, I., Drăghici, P. (2014). *Drept civil. Teoria generală a obligațiilor,* Bucharest: C.H. Beck Publisher.
Cotuțiu, A. (2015). *Contractul de transport*, Bucharest: C.H. Beck Publisher.
Ilie, G.A., (2012) *Riscurile în contracte de la vechiul la noul Cod civil*, Bucharest: Universul Juridic Publisher
Piperea, G. (2013). *Dreptul transporturilor,* 3rd Edition, Bucharest: All Beck Publisher.
Pop, L., Popa, I. F., Vidu, S. I. (2012). *Obligațiile conform noului Cod civil*, Bucharest: Universul Juridic Publisher.
Scurtu, Șt. (2003). *Contracte de transport de mărfuri în trafic intern şi internaţional,* Craiova: Themis Publisher.
Stanciu, C. (2015). *Dreptul transporturilor. Contracte de transport de bunuri*, Bucharest: Universul Juridic Publisher.
Stănescu, A. T. (2015). *Dreptul transporturilor. Contracte specifice activității de transport*, Bucharest: Hamangiu Publisher.
Tiţa-Nicolescu, G. (2012). *Riscul contractual în reglementarea noului Cod civil, Studia Iurisprudentia*, (2).

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