



## The Analysis of the Causes for Exoneration from Liability of the Danubian Carrier in the International Regime

Ion IORGA<sup>1</sup>, Mirela Paula COSTACHE<sup>2</sup>

**Abstract:** In this paper we intend to continue the analysis of the river international contract of carriage of goods on the Danube, in general, and, in particular, to analyze the causes for exoneration from the liability of the Danubian carrier. **Objectives:** The main objective is to argue how, in the event of damage caused during transport, the carrier is presumed to be at fault, as an effect of triggering the presumption of liability, it may rebut the presumption of *juris tantum* by contrary evidence, proving that the real cause of the prejudice is not imputable. **Prior Work:** In the context where also the Romanian and European doctrine analyzes these causes, this paper aims at examining in detail and comparatively their impact, analyzing the legal texts, and also their impact during the trial. **Approach:** We will consider the exemption circumstances, based on the interpretation of international regulation of the contract of carriage of goods by inland waterways, which we will report in detail. **Results:** By comparing the two international conventions, we will demonstrate that these causes of removal of liability have a predetermined scope, in the sense that they affect both contractual relations and in tort liability of the carrier. **Values:** In the article it was used as a research method the analysis of these incidents laws, with direct interpretation of causes for exemption from liability of the Danubian carrier.

**Keywords:** contract of carriage of goods; carrier; causes for exemption; force majeure

### 1. Introduction

We start this analysis as a continuation of previous approaches<sup>3</sup> of the authors on the content of the international river contract of carriage of goods. Thus we reiterate that this analysis will enhance the interpretation of the provisions of two

<sup>1</sup> Senior Lecturer, PhD, Police Academy "Al. I. Cuza", Bucharest, Romania. Address: 1A Privighetorilor Alley, sector 1, 014031, Bucharest, Romania. Tel.: +40213.17.55.23, Fax: +40213.175517. Corresponding author: ioniorgaion@yahoo.com.

<sup>2</sup> Senior Lecturer, PhD, "Danubius" University of Galati, Romania. Address: 3 Galati Boulevard, 800654, Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. E-mail: mirelacostache@univ-danubius.ro.

<sup>3</sup> For details see (Iorga, 2011, pp. 123-148; Iorga, & Costache, 2012, pp. 53-65; Iorga, & Costache, 2015).

international conventions, under which it substantiates the legal regime of the carrier of goods liability on the Danube, namely the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (hereinafter referred to as CNMI)<sup>1</sup> and the Vienna Convention on the General Conditions of Carriage of Goods in International Traffic on the Danube<sup>2</sup> (hereinafter referred to as the Convention).

Also, we have previously concluded that the liability of the Danubian carrier, as configured by the legal depositions as mentioned above, is a liability by the operation of law based on the presumption of liability which means more than a presumption of guilt. The obligations of carriers are relative to the means of transport – the ship and the services which have as object the transported goods (for delivery, travel, preservation, supply) (Iorga, 2011, p. 125). As such, the carrier undertakes the obligation to move goods to their destination in perfect condition, assuming the obligation to preserve the goods in all this time. He will be responsible for perishing or damaging the goods which were committed in any situation unless, the circumstances which are non-imputable, as they have occurred independently of any manifestation of will of the carrier able to draw his fault.

## 2. Classification of Causes for Exemption<sup>3</sup>

In the event of caused damage during transport, the carrier is presumed to be at fault, as effect of triggering the presumption of liability<sup>4</sup>. He can rebut the *juris tantum* presumption by the contrary evidence, proving to be the true cause of the injury. There are, however, certain circumstances or risks envisaged by the two mentioned conventions in the presence of which the carriers do not have to prove the contrary, as we have shown. Of course, they do not depend on carriers. Finding

---

<sup>1</sup> The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) adopted on 3 October 2000 by the representatives of the Danube Commission and the CCNR under the UNECE has been ratified by Romania by Law no. 494/2003 published in the Official Monitor no. 854 of 2 December 2003. The Convention, signed on 22 June 2001, entered into force on 1 April 2005 with its ratification by the 5th state (Croatia) on 7 December 2004 in accordance with art. 34. On that date Romania, Switzerland and Luxembourg had ratified the Convention of Hungary. It was later ratified by Germany, the Netherlands and France last by Law no 2007-300 of 05.03.2007. The CMNI follows the principles contained in other Conventions in the transport sector such as the Hague-Visby Rules in 1968 or Hamburg 1978 or WRC1956, the last being a true source of inspiration.

<sup>2</sup> The Siofok Convention was amended within the Conference in Vienna in 1994 and it is in force from 1 February 1995, at which time the provisions were repealed by the depositions of Bratislava Convention, signed in September 26, 1955.

<sup>3</sup> See (Malaurie, Aynes, & Stoffel-Munck, 2007, pp. 537-542; Bonasies, & Scapel, 2010, p. 732 and the next; Paulin, 2005, pp. 252-258; Orga-Dumitriu, 2008, pp. 167-218)

<sup>4</sup> For detail about the contract of carriage of goods, see (Modiga, 2012).

the circumstances or risks to which we refer has as effect the presumption that the prejudice attempted by the consignee is determined by such a cause and, therefore, **the carrier is exempted from the liability**. In other words, **the presumption of guilt specific to the resulted obligation** unfulfilled by the carrier, in the presence of these circumstances, is transformed **into a favorable presumption of innocence for the carrier**. Therefore, any proof of guilt of the carrier made by those interested annihilates the assumption in question.

There are such two possible situations which are distinguished throughout the trail period. First, when the carrier invokes in his defense a general cause for exemption from liability ("external reasons"), subject to the evidentiary regime of common law, that is the traditional rule "*ei qui dicit incumbit probatio*" (who makes a motion to the court must prove it).

Regarding the latter, the carrier is in a privileged position, given the circumstances or risks, in the sense that if they could cause damage, taking account the facts, then the damage is presumed to be caused by those risks. In this way, the carrier relies on a **presumption of causality between the circumstances or risks and the damage**, which eases his situation for defense.

On the legal nature of the liability of the carrier, it stems from the nature of the obligation of result from the movement of goods and their handing over in the state in which they were received. As a result, only proving that a foreign cause of *bonus mercatores* was able to determine the negative result, it removes the presumption of the carrier's fault.

Referring to the general regime of force majeure, which removes the fault, while the Vienna Convention does not contain express provisions, the one from Budapest subordinates it to the unavoidable causes and consequences which could not be prevented, but they also must be proven. On the other hand, the Vienna Convention deals with certain cases of force majeure (earthquake, hurricane, storm, very dense fog, draining ice, waters, shallow water) in the category of special causes (circumstances or risks), presumed to be the origin of transport failure, able to relieve the carrier. Although the Convention does not mention the grounds of common law, exempting from liability of the carrier does not mean that his ability to defend is limited to the circumstances limitedly provided for by article 12 (6 and 7) (the so-called privileged causes). If the carrier proves that the damage was caused by a foreign cause, he will be exonerated, as the presumption of fault is relative (*juris tantum*) and it is admitted the contrary evidence.

### **3. The Scope of the Causes for Exoneration**

The causes for removing the liability have a predetermined scope, meaning that they affect both the contractual relations and also the tort liability, for that carrier's own act and for the omissions of persons for whom the carrier must respond. On the other hand, the benefit of exemption from liability provided by special reasons due to which the prejudice is put can be invoked by carriers as defendant (debtor of the characteristic performance) against the applicant seeking compensation. It means that the carrier cannot rely on the presumption of causality (which only works in the case of the damage of goods) in a case brought by him as plaintiff.

The presumption that the damage resulted from one of the special cases listed in Article 18 (1) of CMNI rebutted by evidence taken from the victim that at least, such a cause was not exclusively at the origin of the damage - art.18 (2). It is demonstrated, therefore, that the damage did not result, at least partially, from a circumstance or special risk of the special type and as such the causal chain is completed by the unlawful conduct of the carrier. The presence of special causes, non-decisive in the achievement of the damage, it is no longer likely to totally exonerate the carrier. In those circumstances, the carrier is presumed to be guilty and he will have to defend, without availing from the initial presumption.

In conclusion, the special exonerating causes act until proving their total or partial exclusion from the scope of the liability. From that moment, the carrier must invoke another external cause to justify the total or partial non-performance of his obligation, but this time he must prove also the causality relation.

### **4. The Special Exonerating Causes of Liability**

The legal regime of these causes is treated somewhat similar in the two Conventions which we examine, but there are some peculiarities, given their scope (Article 18 of CMNI, Article 12 (6 and 7) of the Vienna Convention).

The carrier is exempted from liability in the presence of some circumstances or risks (the special exonerating cases) expressly provided for by the two acts, considering that they would be found most likely at the origin of the prejudice. It should be noted that the carrier does not contribute with anything to the state of danger caused by these circumstances and they could not be avoided (a-b).

*a) Common special causes under the two Conventions:*

- acts or omissions of the shipper, consignee, persons authorized to dispose of the goods which contravene the provisions of the Convention;

- nature of the goods entirely or partially exposed to loss or damage due to their own characteristics, especially through breakage, rust, internal bleeding, natural decrease in volume or weight or attacked by insects or rodents. It should not be confused with an inherent defect of goods, which manifests under certain exceptional circumstances, requiring the proof from the carrier;
- handling, loading, and unloading by sender, recipient or third parties acting on behalf of the sender or recipient.

According to Article 16 (4) of CMNI, the above obligations are incumbent to the sender or recipient, if the contract does not provide otherwise. The Carrier's obligation is to ensure that the cargo stowage and mounting the goods do not affect the security of the ship. Often, however, these activities are directed and controlled by the carrier and actually executed by the sender or receiver. In those circumstances it is the liable one coordinating the operations, i.e. the carrier. The exonerating cause excused subsists also under the conditions where the carrier has conducted material operations according to the sender's instructions. However, the carrier has the task to determine at the starting point if the loading, stowage and securing the cargo were conducted under apparent normal conditions, being held to make some reserves. If he fails to do so, the benefit of exemption from liability for failure or defective operation in question may be rejected by the body of jurisdiction, except where, the carrier, in his defense, demonstrates that there was no way to observe the deficiencies in the concerned operations.

The same case of exoneration, but in other terms, is found also in the Vienna Convention. Here, however, as the carrier is required to coordinate the handling, cargo stowage and separation, these activities are no longer susceptible circumstances to exonerate him from the liability. Also, when loading and unloading is done with the forces and means of the carrier, the exonerating cause is excluded, in his regard.

- the absence or inadequacy of packaging when the goods are, by their nature, exposed to loss or damage due to the lack of packaging or damaged packaging. The allegation that this cause is the root of the damage is conditioned by the lack or failure of packing achieved by the carrier. It can ease the task of proving by the inclusion of a reserve relating to this aspect in the transport document, thus overturning the presumption that the packaging would be apparently properly achieved - art. 12 (2) CMNI. Otherwise, the carrier should be held to prove a non-apparent (hidden) defect in packaging. The Vienna Convention includes this special issue

exonerating from liability in article 12, point 6.5, among the actions and omissions of the consignor (charterer), which contravene the depositions of the Convention.

- insufficiency or inadequacy of identifying the markings of the goods. This special cause is useful in the transport of goods domain, particularly *in loads* when due to confusion or even straying the goods, the carrier is unable to honor his obligations to the recipients.
- the integrity of containers, holds and seals at the discharge port or place of release, where the transport takes place under these conditions. Of course, it is considered the assumption of applying the seals by other people, other than the carrier or persons responsible for it.

*b) Special causes provided distinctly by the two Conventions*

Apart from the special causes discussed above, found otherwise in the content of both Conventions, they contain separate provisions in this area. CMNI regulates the following additional assumptions where the carrier does not respond until proven guilty:

- aid or rescue operations on waterways courses;
- transport of live animals, unless the carrier has not taken measures or he has not followed the instructions agreed upon in the contract of carriage;
- carriage of goods on deck or in open vessels, if this has been agreed with the shipper or it is according to commercial usage or it is required by the applicable law.

Circumstances eliminating the liability of the carrier until proven otherwise required by the **Vienna Convention - art.12** (6 and 7):

- force majeure and the emergence of dangerous natural phenomena (storm, hurricane, earthquake, dense fog);
- actions or provisions of the authorities (detention, seizure, quarantine);
- acts of war or other fortuitous actions (diversions, riots, piracy, terrorism, etc.);
- actions organized by workers and employees (strikes, passive resistance);
- the goods have been released in the intact package, free of any violation on the road;
- the goods were released in the presence of the attendant.

We note that certain exonerating risks envisaged by the Vienna Convention cannot create a presumption on non-liability in the favor of the carrier after the entry into force of the CMNI. These are special cases of exemption under article 12 (6.1-6.4), shown above, which are not in the exhaustive list of the CMNI. We believe that, with the invocation of these risks, the carrier will not be dispensed by the evidence of the causal relationship with the prejudice. The conclusion emerges from the provisions of article 25 of the CMNI that prohibit changing the task of the evidence under the regime of liability established by its rules. On the other hand, the carrier is able to remove the fault by proving that the damage was caused by a predictable, but inevitable event, which was not allowed under the Vienna Convention.

## **5. The Causes for Exemption from Carrier's Liability under the Provisions of the CMNI**

Liability regime established by the CMNI is based on the **presumption of liability**, improved by the existence of **the legal presumption of causation in relation to certain risks**, as the regime established by CMR for the haulier.

There is a notable difference to the maritime carrier liability regime which is based also on the presumption of fault. In maritime law, the carrier will not have to prove innocence as in common law in order to be acquitted from the liability, but it will invoke the so-called "exemption causes", established in the maritime regulations, which aim at annihilating the presumption of fault. In those circumstances, the transport beneficiary must prove the fault of the carrier in order to obtain compensation, in the case where the cargo was damaged. In other words, the carrier shall prove such an exceptional cause (danger of the sea) and the causation relation with the prejudice in order to be exempted from the liability. To what extent it could have foreseen, avoided the "exception causes" and their consequences, it remains the task of the recipient to prove it.

Returning to the system of liability adopted by the CMNI, the carrier will remove its liability for the damage of the cargo only by proving his innocence in the circumstances which gave rise to the negative outcome. So it is a presumption of guilt. It disappears if the carrier proves that the loss or damage was caused (or could have been caused) by one of the circumstances or risks provided for in article 16 and article 18 of the CMNI, non-imputable to him, while the cargo was in his possession.

We can group the exemption cases in the following categories:

- external circumstances of the vessel and cargo;

- mistakes in nautical management of the vessel or nautical errors;
- a fact having as cause the ship;
- a fact having as cause the load.

## **5.1. External Circumstances of the Ship and Cargo**

### **5.1.1. Unavoidable Circumstances**

According to Article 16 (1), *“The carrier is liable for the resulted prejudice from the loss (or damage) suffered by the cargo since taking over the cargo in order to transport it to the place of delivery, unless he proves that the damage resulting from circumstances which the diligent carrier could not avoid and whose consequences could not be prevented.”*

The features listed by the text show obvious analogies with the notion of force majeure, governed by the Civil Code art. 1351, without being able to speak of identity.

Indeed, the non-liability cause established by the CMNI is relatively more tolerant than the classic notion of force majeure, as it does not require the condition of justification for the obstacle unpredictability for the non-execution of the carrier's obligation. In any case, the carrier in his defense must prove both that the intervention of such circumstances, its innocence in relation to it, and also the causation relation to the prejudice.

We fall into the category of those circumstances under the condition of being unavoidable (i.e. non-imputable) and the act of the third party.<sup>1</sup>

The act of the third party can constitute a cause for exemption, an “unavoidable circumstance” for exemption from liability for the carrier, if he meets the characteristics mentioned above, that is inevitability, relative insurmountability at the event proved as such, and its effects. Without these conditions, the interference of third parties remains inconclusive in the sense that it does not release the carrier from the consequences of the caused prejudice. Thus, the approach does not have the nature of an event of force majeure, if it is determined that the accident could have been avoided by a skillful and experienced captain.

The qualification is necessary, particularly against thefts committed by third parties. These criminal offenses leave mainly to subsist the carrier's liability, as the entrepreneur in question has not taken sufficient measures to avert the theft of

---

<sup>1</sup> The act of the third party for which the carrier is not required to be held liable, is one of the exemption causes from the carrier's liability under art. 1991 of the Civil Code.



goods. In such situations, it is imputed the negligence in conducting the transport. Theft of goods can be assimilated to an event of force majeure, unless it has been committed by armed aggression or in a group, excluding the effective resistance of the carrier (the servants of the carrier). Also the theft conducted in a port where the vessels used to wait a long time, knowing that in that place there were frequent looting, it does not release from liability the carrier, as these events could have been prevented by additional precautions.

### 5.1.2. The Act of the Co-contracting Party

According to Article 18 (1) of CMNI, the carrier and the substitute carrier shall be exonerated from their liability when the loss, damage or delay are the result of one of the circumstances or risks listed below:

- *acts or omissions of the shipper, the consignee or the person entitled to dispose of the goods;*
- *handling, loading, stowage or discharge of the goods by the shipper, the consignee or third parties acting on behalf of the shipper or the consignee;*
- *lack of or defective condition of packaging in the case of goods which, by their nature, are exposed to loss or damage when not packed or when the packaging is defective;*
- *insufficiency or inadequacy of marks identifying the goods;*<sup>1</sup>

These causes of non-liability provided for under Article 18 (1) of the CMNI match by reference to the usual regime of the civil law with the act of the co-contracting partner, who by action or omission impedes efficient achievement of the characteristic service.<sup>2</sup>

---

<sup>1</sup> The Romanian civil law includes similar provisions. According to article 1991, paragraph 1 of the Civil Code, “the carrier is not liable in the case of total or partial loss or, where appropriate, alteration or damage occurred due to: a) acts in connection with loading or unloading goods, if this is done by the sender or recipient; b) lack or failure of the packaging, whether by external appearance could be not be noticed when receiving the goods for transport; c) the name shipment under improper, inaccurate or incomplete denomination of goods excluded from transport or accepted for carriage only under certain conditions and the non-compliance of the sender for the safety measures provided for the latter.

<sup>2</sup> Art. 1534 of the Civil Code: “If his wrongful act or omission, the creditor contributed to the damage, the compensation owed by the debtor will decrease accordingly. This applies when the damage is caused in part by an event whose risk was assumed by the creditor. (2) The debtor owes the creditor no compensation for the damage in the case where it could have been avoided with minimal care.” Art. 1991, par. 3 letter a) of the Civil Code: “The carrier is also relieved of liability if he proves that total or partial loss or spoilage or damage was the result of intentional acts or negligence of the sender or recipient, or the instructions given by one of them.”

The fault of the sender or recipient excludes the right to obtain compensation for the attempted prejudice during transport. The carrier is exempted from liability for total or partial loss, or damage to goods received to be moved, whether those circumstances have occurred at the fault of the sender or recipient, especially in the following situations:

- reasons related to loading or unloading of goods, if such operations were performed by means of the consignor or consignee or under their supervision;
- due to the fact that the companion designated by the consignor or the consignee has not taken the necessary measures to ensure the products' integrity;
- due to packaging defects that could not be observed at their exterior appearance at the receipt of goods for transport;
- due to the fact that the sender has been entrusted to transport excluded products, under false names, inaccurate or incomplete;
- due to the fact that the sender has not indicated in the shipping documents and possibly on the packaging specific features of products claiming special conditions or taking other precautions during transport or storage;

In the case of incorrect declarations of the sender (such as those mentioned) the exoneration of liability of the carrier can take place only if the damage caused by sender is due to the very fact that he has not told the exact nature of the objects in question, which were conditioned only to be admitted to transport, must take these measures for guarding and preserving them, and from failing to detect that the merchandise is lost or damaged.

However these types of circumstances are able to create a presumption of non-liability for the carrier as long as there are fulfilled the features of inevitability and insurmountability reported to the ability to assess of a diligent carrier.

## **5.2. Nautical Errors of the Captain, the Pilot or other Servants of the Carrier**

The carrier may only invoke this exemption concerned given that it has reserved this possibility by means of a contractual stipulation agreed with the shipper. Thus according to article 25 (2) they are allowed clauses stipulating that the carrier or the actual carrier is not liable for damage caused by an act or omission by the captain, pilot or any other person serving the vessel or a pusher or tug during nautical steering or during a convoy training or scrapping, provided that the carrier would comply with its obligations under article 3 (3) related to the crew, unless the act or

omission committed with the intent to cause damage, or recklessness, knowing that such damage will probably occur.

Also, the carrier can invoke the cause of non-liability, even in the absence of contractual arrangements, the conditions in which the displacement of goods is carried out between the ports of two States Parties to the Convention which have agreed to extend the regime of exemption from liability established by it and on such causes, making a statement to that effect.

The nautical error *lato sensu* represents the navigation error (starting maneuver of the ship, despite the bad weather) and, equally, error in steering the vessel.

It is understood equally by nautical error in this sense of error likely to compromise the security of the ship and that of the load, whatever the nature or timing of the error. For example, the ship sank during unloading, from the premature opening of a porthole, a factor generating the accident. The CMNI Convention abandoned this concept limiting the meaning of the nautical error to navigation error.

The nautical error means the error committed during an operation strictly related to the ship, intended to provide moving, even without any cargo on board. In the scope of errors on water there are not covered the aspects of protection and preservation of cargo, that interests exclusively and legally the carrier, as contracting party (owner).

Therefore, wrong maneuver during operations relating to cargo does not represent a nautical error for exemption, even if it is done by servants of the carrier and not by the carrier itself. For example, the faulty fuelling of the ship, where the surplus was spread across the cargo.

It should be highlighted in this regard that it is as exception the handling mistake being in the task of the captain when this would compromise the security of the ship. Stacking fault should not be considered a nautical error, because according to art. 3 (5), the carrier must ensure that the cargo hold and stowage do not affect the security of the ship. It is therefore a personal obligation of the carrier, whatever the person carrying out this obligation for him.

In conclusion, it must distinguish between a commercial error for which the carrier would respond personally and a nautical error committed by his employees.

If the mistake, although linked to navigation, stems from a serious (solid) inability of the Captain, it involves a fault of the carrier himself in choosing his servants to take the general duty of diligence, and it must be "reclassified" as a commercial error.

### 5.3. The Acts which have as Cause the Ship

*a. The fire.* Under the provisions of CMNI, the fire or explosion on board is an exoneration case, even if it is of unknown cause, only if there is a contractual clause to this effect. The sender or receiver will try to prove that the fire was caused either by personal fault of the carrier or non-nautical error of his servants. If he is found guilty, the carrier will be liable under the proven guilt, and therefore not under the presumption of liability.

For example, when the fire was caused by short circuit of a lamp during stacking, this incident demonstrates the non-navigability of the ship in terms of wiring, used for loading and unloading. If in this case it is not proven its reasonable diligence in order to ensure the good state for navigability, he is liable.

*b. Defect of the ship* that could not be discovered before the start of the voyage with all the reasonable diligence, it may be invoked as grounds for non-liability, unless the Contracting Parties agreed to that effect - article 25 (2) CMNI. The carrier cannot rely on that ground for exempting, unless it is the case of a hidden defect in the ship, whose character will be appreciated, however, sternly. Since the defect is not hidden, unless it is overlooked after a close examination; the defect of a pipe is not a hidden defect when the Captain declares that the pipeline was damaged during loading and when the expert notes that the hole was stoppered. Indeed this context of circumstances explains that the damage was visible and that it was discovered.

### 5.4. The Act which has as Cause the Cargo

According to art. 6 (3) *“If the nature of the goods so requires, the shipper shall, bearing in mind the agreed transport operation, pack the goods in such a way as to prevent their loss or damage between the time they are taken over by the carrier and their delivery and so as to ensure that they do not cause damage to the vessel or to other goods.....”*. The shipper *“shall also make provision for appropriate marking in conformity with the applicable international or national regulations”*, art. 6 (4) *“Subject to the obligations to be borne by the carrier, the shipper shall load and stow the goods and secure them in accordance with inland navigation practice unless the contract of carriage specifies otherwise.”* (CMNI).

According to art. 18, CMNI, the carrier is exonerated from his liability by assuming that the damage of the cargo is the result of one of the following causes non-imputable to the carrier:

- carriage of the goods on deck or in open vessels, where such carriage has been agreed with the shipper or is in accordance with the practice of the particular trade;
- the nature of the goods which exposes them to total or partial loss or damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage (in volume or weight), or the action of vermin or rodents;
- the lack of or defective condition of packaging in the case of goods which, by their nature, are liable to loss or damage when not packed or when the packaging is defective;
- carriage of live animals, unless the carrier has not taken the measures or observed the instructions agreed upon in the contract of carriage.

It is therefore about an inherent defect in the goods, the nature of the cargo and finally, more generally, errors of the sender, especially in packaging, wrapping or marking goods. These facts although often have their source in the sender errors or cargo packaging, they may be invoked as an exculpatory causes not only against the shipper but also against the third parties carriers of the bill of lading.

Indeed, on the one hand, it is not about inaccurate statements of the sender on the basis of which the goods were described in the bill of lading and against which, besides the resulted reserves, the carrier is denied the proof to the contrary of the presumption against third parties in the good faith of the bill of lading (article 13, paragraph 4 of the CMNI).

On the other hand the CMNI provisions do not distinguish between people whom the exonerating causes may be opposed.

***a. The nature of the goods exposed to losses due to their traits.*** Its defect is any inherent particularity of the nature entailing its tendency to deteriorate under the effect of any normal external phenomena: any kind of damage, taking into account the nature of the cargo, an original defect.

The nature of goods (inherent defect) represents a particular cause for non-liability which, if it is proven by the carrier, it is presumed to be at the origin of the damage without the need to prove the causal relation.

As we have already pointed out, the victim can abolish the presumption by proving that there is other cause for the created prejudice. The proof of own inherent defect incumbents the carrier, which otherwise falls within the presumption of causation between this particular risk and prejudice.

In the US, the evidence system is different. It is split between the two parts of the process. The carrier must first prove its reasonable diligence in performing the contract of carriage; if he proves it, the burden of proof is shifted to the co-contractor because it is the technician of the transported thing, and because in the US law the task of proving falls to whoever has easier access to the information necessary for debates; but the American judge does not require from the sender, the direct and full proof of the good condition of the goods on departure: it will satisfy still with the presumption.

The absence of reserves does not deprive the carrier the possibility to establish its own inherent defect or the nature of the goods susceptible to losses even when they are apparent.

It is enough for the inherent defect or nature of the goods to be the determining cause of prejudice, even in the presence of other secondary causes. In the assumption that no inherent defect in the goods would occur at their destination in perfect condition, the inherent defect is the sole determining cause and the carrier cannot be held responsible even if during the abnormal duration of the journey or other circumstances relating to it, which could have favored the deterioration of the goods.

b. Finally, there should be no confusion between the natural losses incurred during transport amid the inherent peculiarities of the nature of the goods, and those caused by *the absence or inadequacy of packaging* when goods are by their nature exposed to loss or damage in the absence or in the event of faulty packaging.

This extension is unacceptable, as we see that there is a case for exemption provided as such in Article 18, among the distinct special exemption causes. This cause is rather the sender's error in packing. In this case, the carrier must prove this error and the causal relationship with prejudice is presumed under article 18 (2).

If the errors have made the subject of reservations of the carrier in the transport document (bill of lading) at the moment of receiving the cargo, the proof of the absence of the error, the proof of good quality packaging, for example falls on the damaged one; otherwise the error proof falls on the carrier.

The error in packaging is often combined with the inherent defect of the goods, the nature of its being prone to losses due to its characteristics.

On the other hand, a false statement made by the sender on the cargo's weight as far as causing damage to the goods, undertakes not only the liability of the shipper under article 8 CMNI, but it also constitutes a cause of exemption under article 18, letter a, if this false statement has as consequence the damaging of the goods.

If a false statement is solely a consequence of this *loss* observed on the delivery of the cargo it is opposable to the third party of the bill of lading. If the captain corrected the error of the weight, when taking into custody the cargo goods or along the way, in the bill of lading, the sender's error, cause for exemption in principle has no causal connection with the accident. The damage does not result from the sender's error.

The fact that it was loaded during the rain is an error of the sender, except where the operation was agreed upon or accepted by the carrier.

A poor stacking inside a container is a mistake of the sender. The fault belongs to the sender and for the damage caused by the shock of the goods remained without the safety catch on in the holds.

#### **5.5. Exemption of Liability in case of Inflammable, Explosive or Dangerous Goods**

Article 7 (4) CMNI: *“In the event of immediate danger to life, property or the environment, the carrier shall be entitled to unload the goods, to render them innocuous or, provided that such a measure is not disproportionate to the danger they represent, to destroy them, even if, before they were taken over, he was informed or was apprised by other means of the nature of the danger or the risks of pollution inherent in the goods”*.

On this aspect we highlight a conviction decision of the Dutch Court of Cassation for the carrier. It is about a transport of a mixture of zinc and lead. During transport, the cargo liquefied due to its nature and it slides, which made it loose from the bonds in which it was stowed. The carrier had unloaded the cargo carrier under a bill of lading clauses.

But, in case it is true that the goods have become dangerous for the vessel, it follows a poorly stowed, of the carrier is responsible and it cannot evade from the liability by appealing to the provisions that would have allowed this (the Netherlands Commercial Code). Indeed, the unloading is not the cause for the damage suffered by the sender seller, but the bad stowage of the carrier; the poor stowage produced the result that the goods become dangerous and it was necessary, therefore, to unload it. In reality, the danger of the goods was caused not by its own nature, but by the carrier's error. It is a stowage error, which otherwise should not be considered a nautical error, whether the stowage was carried out by the servants, nor as an error of the sender given that it would perform personally the stowage operation.

Stowage is a personal and commercial obligation of the carrier and the error belongs to him. For identity, for reason the same solution would have been imposed in case of a transport governed by the CMNI, article 3 (5), which states that “the carrier shall ensure that the loading, stowage and securing of the goods does not affect the safety of the vessel.” However, the non-fulfilling of these obligations underlies at the basis of the damage occurred to the sender. On the other hand, the carrier can be exempted from the liability, only by invoking an unavoidable circumstance and whose consequences could not be prevented. The cause of unloading does not meet these requirements, since it is precisely the error of the carrier for stowage.

However, given the conditions where that the sender did not inform the carrier on the peculiarities of the goods, of which he had no way of knowing (the ship security is guaranteed “under the reserve of the obligations which are incumbent to the sender”), the liability of the carrier will be exonerated under art. 18 (1) which provides that a cause is exempted for the “omissions of the shipper”.

## 6. Conclusions

Whether it is the CMNI or the Vienna Convention, once it is presumed that the damage was caused by one of the special causes for exemption, the carrier is not definitively released. He only fell into the presumption of liability.

The beneficiary of the transport (the recipient) can currently provide the proof of carrier’s mistakes and the relationship of cause and effect, partial or total, between error and prejudice - article 12 (6) the provisions of the Vienna Convention, article 18 (2) of CMNI.

For example, the sender will demonstrate on the one hand, that the error that he committed (the inaccurate weight of the cargo) was not the cause of loss of goods, because in reality the Captain corrected the error and then removed the exoneration case; he will demonstrate, on the other hand that the loss of the cargo is due to the errors of the carrier, who used insufficient management means taking into account the weight he knew. Or the sender can demonstrate that the exoneration risk is not the only cause of the prejudice and it is combined with the carrier’s error, a non-nautical error, often coexisting with the inherent defect of the goods. In this case, it will not be the sole responsibility of the carrier, but it will be shared in relation to that of the sender.

Also, when the error of the carrier is combined with force majeure events, his liability may be engaged to some extent, if not completely. In connection with the



combined fault or combined causes, in which case the carrier may be partially attributed to injury, the solution is not uniform, in terms of the extent to which the carrier is required to respond.

In the French law, the doctrine partially accepted by the jurisprudence<sup>1</sup> - states in the event of conflict between the fault of the carrier and the shipper, the solution is that of sharing the liability, according to the *seriousness of the fault*, and when the fault of the carrier is in competition with another cause, other than the fault of the sender, the first will be fully liable.

In *common law*, it retains the idea that the judge will be the one to determine the extent to which it will be liable, for example, the carrier, according to what may be imputed. The allocation criterion will depend on the *causal force of the fault* or of the circumstances which are at the basis of the liability that are at the origin of the liability and not at the seriousness of the fault.

## 7. References

- Bonassies, P. & Scapel, Ch. (2010). *Traite de droit maritime/Treaty of Maritime Law*. 2<sup>nd</sup> edition. Paris: LGDJ.
- Căpățână, O. & Stancu, Gh. (2002). *Dreptul transporturilor. Partea special/Transport Law. Special Part*. Bucharest: Lumina Lex.
- du Pontavice, E. & Cordier, P. (1990). *Transport et affretement maritimes/Maritime transport and chartering*. Paris: Delmas.
- Iorga, I. & Costache, M. (2012). Analysis of Carrier Obligations during Movement of Goods under the Conditions Set in the Dual Perspective of the Budapest Convention and the Rules of the New Civil Code. *Acta Universitatis Danubius. Juridica*, vol. 8, no.2/2012, pp. 53-65.
- Iorga, I. & Costache, M. (2015). The Legal Regime and the Foundation of the Danubian International Carrier's Liability. *Journal of Danubian Studies and Research*, vol. 5, no. 1/2015.
- Iorga, I. (2010). Obligațiile transportatorului la punctul inițial al deplasării mărfurilor. Particularități în transporturile maritime și fluvial/The obligations of the carrier at the initial point of the movement of goods. Peculiarities in Maritime and fluvial transport. *Pro Patria Lex*, vol. IX, no. 2(19)/2011, pp. 123-148.
- Malaurie, Ph.; Aynes, L. & Stoffel-Munck, Ph. (2007). *Droit civil. Les obligations/Civil Law. The obligations*. 3<sup>rd</sup> ed. Paris: Defrenois, Romanian translation coordinator M. Șcheau, translation D. Dănișor, Ed. Wolters Kluwer, pp. 537-542.
- Mercadal, B. (1996). *Droit des transports terrestres et aeriens/The Law of land and air transport*. Paris: Dalloz.
- Modiga, G. (2012). *Dreptul transporturilor/Transport Law*. Galati: Zigotto.

<sup>1</sup> See the decision published in *Droit maritime francais/ French maritime law*, 1998 no 72, p. 111, with the commentary of P. Bonassies.

Orga-Dumitriu, G. (2008). *Răspunderea juridică în contractul comercial de transport de mărfuri/Legal liability in the commercial contract of transport of goods*. Bucharest: C.H. Beck.

Paulin, Ch. (2005). *Droit des transports/The Transport Law*. Paris: Litec.

Piperea, Gh. (2005). *Dreptul transporturilor/The Transport Law*. 2<sup>nd</sup> Edition. Bucharest: All Beck.

Sitaru, Dragoș-Alexandru & Stănescu, Șerban-Alexandru (2007). *Contractul de transport internațional de mărfuri/The contract of international transport of goods*. Bucharest: Lumina Lex.

Stancu, Gh. (2007). *Curs de dreptul transporturilor. Curs universitar/Course of transport law. University course*. Bucharest: Lumina Lex.

\*\*\* The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway.

\*\*\* The Viena Convention on the General Conditions of Carriage of Goods in International Traffic on the Danube.

\*\*\* The decision published in *Droit maritime francais/French maritime law*, 1998 no 72, p. 111, with the commentary of P. Bonassies.