The Legal Regime and the Civil Liability Basis of the Danubian International Carrier

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Abstract: This study continues the author's concerns towards the river transport, with emphasis on the obligation of the carrier's liability and the nature of incident liability. Based on the analysis of international regulation of the contract of carriage of goods by inland waterways, this article examines the legal regime applied on the liability of the carrier of goods on the Danube and, predominantly it makes a point of view on the basis of liability of the Danubian carrier. The article used as a research method the analysis of these incident laws, with interpreting the incident form of liability of the international Danubian carrier, as configured by the laws in force.

Keywords: Danube; transport contract; carrier; liability by operation of law

1. Introduction

The Danube[3], the second largest river which crosses the entire Europe until it flows into the Black Sea creates for the river states, and not only the opportunity of conducting trade international transport, developing a pan-European corridor, namely, pan-European corridor VII[4]. Adding to it the Channel Rhine - Main and Danube - Black Sea, they represent the main artery of the waterway infrastructure of the European Union.[5]

Transport activity on Danube is therefore bound both by the national geographic specific (Stancu, 2007, p. 404), but also the many forms of unitary regulation of all forms of transport on Danube found especially in the execution of contracts of

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[3] The Navigation on the river which crosses currently the territory of 10 European countries is known from ancient times, with different stages of development of river transport, the contemporary vision is one that acquires numerous international conventions concluded by the river states.

[4] This corridor is 2300 km long and it corresponds to the Danube River route namely: Nuremberg - Vienna - Budapest - Bratislava - Budapest - Belgrade - Drobeta Turnu Severin - Vidin / Calafat - Giurgiu / Ruse - Galati - Black Sea.

[5] For details, see http://infrastructura-romania.blogspot.ro/2008/08/coridorul-vii-pan-european.html, accessed on June 5, 2015.

carriage. By concluding such contracts, it is ensured easier the circuit and the international flow of goods, for river transport is one of the most advantageous and efficient forms of transport for large volumes of cargo.[1]

2. The Legal Regime of Danubian Carrier's Liability

The legal framework governing the carriage of goods on the Danube is circumscribed to the presence or international element. Thus, we identify firstly the domestic area of Danubian transport and in the second case, the international area of transport on the Danube, on which this analysis is directed, especially on the form of liability of the Danubian carrier.

From this last circumstance, currently, the contract of the River International Carriage of goods on the Danube, signed by the leading companies of navigation from the neighboring river states[2] enjoys of a constant framework, achieved at a conference in Vienna, in 1994, and entered into force on 1st February 1995, by which there have been modified and added the provisions of the Convention of Siofok (Hungary) 1990.[3]

As for the legal liability regime of the carrier of goods on the Danube, it results from the provisions of the Budapest Convention on the contract of carriage of goods by inland waterway (the CNMI)[4] and the Vienna Convention on the General Conditions of Carriage of goods in international traffic on the Danube (the Convention).

Except for the transport of persons, the Vienna Convention, as amended, applies, according to art. 3 paragraph 1, to the freight traffic that occurs between the Danube ports of loading and unloading. Instead, the scope of the CNMI is much

[1] On the economic roles and importance of transport in promoting the international commercial exchanges see (Modiga, 2012, pp. 27-41; Turtureanu, 2014)

[2] As noted, the Convention was not adopted by states, but by some shipping companies, Romania is represented by NSRF "NAVROM" SA Galati, CNF "GIURGIUNAV" S.A. Giurgiu and NFR "DROBETA" Tr. S.A.

[3] By the entry into force of the Convention in 1990 Siofok, there were repealed the provisions of the Convention in Bratislava, completed on September 26, 1955.

[4] Budapest Convention on the Contract for inland freight (CMNI) adopted on 3 October 2000 by the representatives of the Danube Commission and 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. 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.

broader, in the sense that its provisions are applicable to any type of international freight transport by inland (river or waterway).[1]

Another difference between the two regulations regards the actual object of transport regarding the permitted or prohibited types of goods. Thus, according to the Convention, the provisions of art. 2 and 3, prohibit the transport of the following types of goods:

- those requiring mandatory sending by mail;
- those whose transport is prohibited by the provisions of customs' authorities and other type of support (sanitary, veterinary, etc.);
- the ones that are sources of infectious diseases;
- weapons (except sporting and hunting);
- the transport of explosive, poisonous, toxic, corrosive, flammable, self-igniting goods and other dangerous goods, as in the case of animals, the transport will be subject to the existence of the agreement between the charterer and the carrier.

The Danubian carrier liability as set by the laws mentioned above, as we will conclude, is a liability as of right, based on the presumption of liability, which means more than a mere presumption of guilt.

3. The Basis of the Danubian Carrier's Liability

As a primary obligation (art. 12, par. 1 of the Convention[2]), the carrier undertakes to move the goods to their destination in a perfect condition. The discovery of loss or degradation of goods at the destination leads to a presumption of liability of the carrier. The liability presumption stands up to the evidence submitted by the carrier in the sense that it cannot be criticized for any error, that he ensured that all the necessary conditions for the displacement and conservation of the cargo, that he has taken all necessary measures, taking into account the transport specifics and the nature of the cargo. In other words, the weak feature of the carrier that was caused by an unknown cause is supported by the carrier, activating its objective liability, the subjective attitude is not relevant.

It is a presumption of liability (Piperea, 2005, p. 60; Mercadal, 1996, p. 125; du Pontavice & Cordier, 1990, p. 117), which cedes to the evidence of a case of exemption. On the other hand, despite the legal case for exemption, the applicant can indirectly prove, destroying the presumption, that the carrier made a mistake that makes him at least partly responsible for the damage. This complex system is

[1] For details see also (Sitaru & Stănescu, 2007, pp. 184-224).

[2] According to the same article, the carrier is responsible for the loss of the cargo, its damage or late delivery.

required by the provisions of the two conventions and it needs to be analyzed in detail.

However, there is a legal limitation of carrier's liability that also mitigates the common law liability regime. There are certain circumstances or risks envisaged by the two mentioned conventions, in the presence of carriers which do not have to prove the contrary, as we have shown. Of course, they do not depend on carriers. The finding of the above circumstances or risks has as effect the presumption that the prejudice of the sender or receiver is determined by such a case and, therefore, the carrier is exonerated by the liability. In other words, the presumption of guilt specific to the resulted unfulfilled obligation by the carrier is transformed in the presence of these circumstances into a favorable presumption of carrier's innocence. The Convention establishes in the art. 12 a series of grounds of exemption[1], namely:

- Case of force majeure and the emergence of dangerous natural phenomena;
- Actions or measures of authority;
- Acts of war;
- Organized actions of workers or officials;
- Hidden defects of the goods;
- The natural availability of the cargo of losing its original qualities of the goods in the transport process or the availability of its deterioration by insects, rodents, etc.
- The natural losses under Annex 5 of the Convention;
- Deterioration in the loading / unloading process by the means of the sender.

However it is not possible to say with certainty that the law establishes in the future the responsibility of the carrier as an obligation of means. The carrier is basically responsible, except those listed exhaustively by the CMNI (art. 18) and the Vienna Convention (art. 12). He must prove that the loss or damage arises from unavoidable circumstances. He must prove, on the one hand, the existence of such circumstances and on the other hand, a part of the connection of causation between circumstance and damages. In the absence of the proof that that non-imputable circumstance is at the origin f the damage, the carrier is not exonerated.

The carrier is *a priori* responsible and cannot be exempted unless proving his innocence in relation to the intervention of circumstances "which the carrier diligent could not avoid" proven or presumed being at the origin of the prejudice

[1] The analysis of the causes of exoneration of the carrier will be detailed in future writings of other authors (n.a.).

(the presumption of causality operates strictly only in the presence of certain legal reasons listed exhaustively).

Arguably in the presence of these the circumstances (special cases of non-liability) presumed to be capable of producing such a prejudice, the resulting obligation of the carrier completely turns into an obligation of prudence and diligence? In this context the beneficiary of the transport will be keen to prove the guilt of the carrier? Does that mean the fact that he did not meet the demanding standard required in meeting his obligations to transfer the essential goods?

The carrier has the final obligation to carry cargo in good condition at the port of destination. This **obligation is one of result, determined.** This obligation undertaken by the carrier to provide results, involves its responsibility in addition to the situation when a cause of exoneration proves: force majeure pursuant to art. 1991, paragraph 3 in conjunction with art. 1351 of the Romanian Civil Code, namely article 16 CMNI or a certain circumstance (risk) those provided for in article 18 CMNI and article 12 (6) of the Vienna Convention in the river transport domain. However, the number of special cases of non-liability (special risks) cannot degenerate an obligation of result into an obligation of means.

Sometimes the recipient is interested to prove the non-compliance of the carrier's obligations, namely, the diligence obligation related to the ship being in good state for navigability. This aspect does not change a thing the fate of the outcome, having as objective the displacement of cargo in good condition. The non-achievement of the outcome entails a presumption of fault for the carrier.

He will be the one trying to prove the existence of a foreign cause which could not be avoided and whose consequences could not be prevented, a "responsible", which would exonerate him of the liability. Only then the recipient is concerned to take the initiative in order to destroy the carrier's defense, showing that the non-compliance of the resulted obligations (of removal of the goods) is originated in reality in that the carrier has not dismissed a sufficient diligence for ensuring the good status of navigability of the vessel. Therefore, the recipient will not prove the absence of circumstance that could not be avoided (proven otherwise by the carrier), but the fact that it would not have had the negative result if it had not been favored by the lack of good navigability condition, as evidenced by the recipient. And if the circumstances invoked by the carrier are among those which the provisions of the CMNI assigns a presumption of causation, in relation to the prejudice, the recipient is able to destroy this presumption, by proving the real cause attributable to the carrier, including failure to ensure a good status of navigability of the ship; or simply pointing out that, according to the factual circumstances, it was impossible to produce the negative results, except a possible fault of the carrier.

The victim is not required to bring evidence in supporting of proving the fault of the carrier in relation to the circumstances invoked by him in his defense that would have generated the prejudice. The carrier, who is presumed guilty, will provide evidence in order to prove the existence of a foreign non-imputable cause, respectively to the absence of guilt in relation to the intervention of that exonerating cause. The victim proves that, under the conditions set in the sample plan by the carrier, the guilt of the carrier is elsewhere and that another is the true cause imputable to the carrier, acting either alone or in competition with the very circumstances that would have exonerated the carrier.

4. Conclusions

In conclusion, in the presence of an exoneration risk as set by law, it cannot be said that the carrier has an obligation of means on the completion of the transport in good condition. A veritable diligence obligation of care would mean that the task of proving the carrier's guilt should be upon the creditor (recipient). Or, the consignor or consignee is not bound by this evidence against the carrier's guilt, making it sufficient to show that the particular risk of shipping is not at the origin of the damage. At that moment the carrier is found guilty under the presumption of guilt rather than a proven fault.

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*** Budapest Convention on the Contract for the Carriage of Goods (CMNI)

*** Vienna Convention on the General Conditions of Carriage of goods in international traffic on the Danube.