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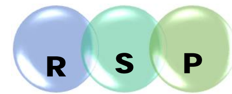

ORIGINAL PAPER

Summary observations about the post-communist coding of the institutions of self-exclusion and self-limitation of the carrier's liability

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Abstract:
The purpose of this paper is to determine as precisely as possible the limits of regulation of the main post-communist law carrier, as by conventional means to self-exclude or to self-limit the liability arising from the various specific operations of its activity.

Keywords: *self-exclude; self-limit; carrier; codification; liability*

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Changing the social relations in Eastern Europe after the disintegration of the legal socialist or communist legal relationships imposed by the totalitarian member states generated profound changes not only in the regulations of the commercial, economic or business segment but also in the general rules, typically secured by the normative complexes of civil codes. Adapting the civil legislation to the new social values adopted by the Romanian has been a necessity since the 1990s when the legislation was more patched than reinvented. In Romania, this much - needed transformation occurred in the second decade of the 2000s (specifically) with a visible delay towards the flow of the legal realities of neighborhood countries. The new civil code, pillar of the organization and functioning of the society comes, among others, with an entire chapter allocated to the transport operations. Naturally, such activities are unbalanced to the person of the carrier, the contractual who knows best the interior of this exercise of profit. To compensate for the shortcomings experienced by the national legislature, the principles and rules of the legal culture of other countries, such as Canada and the Swiss Confederation were taken and transposed into the new civil code (out of a simulated national pride, we use the term "transposed" instead of "copy"). It remains to be seen, from future practice how close they are to the national spirit and how their rate of application will be in the local situation. Finally, we believe that we must be optimistic that the regulations will have been replaced with more comfortable ones for the current status and, as lawyers, we hope that, on the one hand, they will reflect the subjects' expectations of rebalancing, and, on the other hand, that they will streamline the different ratios.

We often find, in the various forms or species of transportation contracts, contractual clauses such as "the carrier's liability for delay in delivery, which is not his fault, is excluded", "our liability for the loss or damage of your package is limited to the amount declared when fetching it, but no more than X lei "," our transport company liability is excluded", etc. Such formulations are found in the carrier's general business conditions posted on the Internet, in the waiting rooms of bus stations, in the counters of courier companies etc. Certainly, the carrier'desideratum, when it is inserted into conventional instruments they draw up such contractual protection clauses, is to minimize as much as possible the risk of losing a dispute in which a disgruntled customer might proceed against him for the failure to or the improper performance of a transport operation. Probably, the original designation of such contactual clauses was somewhat justifiable, the carrier seeking to protect himself against some abusive customers or against some requests for damages with obvious sanctioning nature and not reparatory one. Other purposes of the carrier were also those of taking conventional measures of exemption in the event of damages, and any possible, unpredictable or lost profit. When the carrier discovered (fast) that the risks he had taken, the trip being an experience with dangerous and unanticipated result since the ancient times, the idea that he must protect himself conventionally, including for the circumstances in which he should have taken responsibility for repairs that had to be given by the client, was born or even worse determination of "extensive environmental risks for if we refer to the transport of petroleum and chemical products"(Manolache, 2001:4). The question now is whether, beyond the obvious goal of the demoralization of the passenger whose luggage has been lost, there lies a real legitimacy or not.

Before reaching the liability and the conventional means by which this can be reduced to extinction, we must see who the person using such contractual benefits is. The subject that creates through its own action a real shield is the carrier, i.e. the part of the transport contract who undertakes to carry something from one point to another. The

quality of carrier originates in the act of signing the contract of carriage with the party intending to have his property conveyed to a particular destination. As we were showing above, the limiting or eliminating the liability can be among the clauses foreseen in the contracts of carriage or in special versions of these. This is because you may encounter in practice conventions which, although not expressly referred to as parties of the transportation contracts, still include in their essential elements the obligation to carry. According to the rule of art. 1168 of the Civil Code such conventions will be interpreted in the light of the provisions of the contract of carriage, which is the contract with which it resembles most. The provisions of art. 1168 of the Civil Code are a very useful reference tool in interpreting those conventional instruments which one party try to take it out of the systematic and teleological interpretation to introduce it only in the narrow field of grammar. From this perspective we believe that one party which provides essentially a transport activity but in conjunction with other benefits or secondary duties must be assimilated to a carrier even though he does not arrogate publicly such quality, masking it through subcontracting to a third party.

The two elements of our work title, self-exclusion and self-limiting, seem to be born at the intersection of two spheres of rights: (1) the first, which belongs to the recipient of the transport operation and consists of the compensation which has to be received by him from the carrier if the transport was not carried out in certain conditions and deadlines, failure which affects most the time and the transport recipient’s goods and (2) the second, which belongs to the carrier and allows him to unilaterally influence these conditions and terms in his favour. Both spheres of rights are contractual in nature as they have their sources in the transport agreement concluded between the two parties or in the act of accession of the recipient of the transport operation to the conditions of the carrier’s business through a manifestation of will (buying a ticket, a travel ticket, paying shipping a parcel etc). Such provenance excludes the tortious nature of those sets of rights. The essential difference to our work between the two spheres is in the act of their origin and in the accurate establishment of the dominant party at the time of its conclusion. In other words, if we face a standard contract of accession, a contract concluded with a consumer or neither of these, case in which both parties have concluded it standing on equal or nearly equal positions. Based on this contractual positioning, these may become incidents and other legal provisions than those of the transport contract in the Civil Code.

We set out our approach on the premise that the situations in which the beneficiary of the transport is at least at the same level of knowledge of the transport business as the person who practices it as profession are far less numerous than those in which the so-called beneficiary simply leaves his person and property in the hands of the carrier. This premise does not change the beneficiary of the transport in a consumer privileged by legislation. Another situation that should not be omitted is that, since its formation as a legal entity, the carrier has a difficult task, namely to pay for the damages in their worst forms, the exercise of an enterprise being a circumstance of aggravation. See in this respect the provisions of art. 1358 of the Civil Code. This premise has emerged and evolved in the transport domain when the carrier as individual who was responsible for his deeds with all assets (and possibly his person) has turned into a corporation that offers global services and employs tens of thousands of employees or subcontracts highly complex. The effects of this premise are some the procedural nature, the carrier having the obligation to prove good faith in fulfilling an obligation of result. The carrier's obligation to transfer something from one location to another, should be remembered, is a result, in this respect the provisions of art. 1955 and 1968 of the Civil Code. See in the

same respect that of art. 2044 of the Civil Code of Quebec, too (for example Quebec Court , Judge decision no. 2006 QCCQ 2738 / no. 2016 QCCQ 6843)

It is important to discuss in this paper also the case in which the person contracting with the carrier or with the transport recipient are consumers. In such a situation the two people are under the protection of the law of expense, not only of the Civil Code. Due to the quality of consumer of these parties the contract of carriage will have the valence of the contract closed between the consumer and the professional. And if such contract has such a value, then the provisions of Law 193/2000 on unfair terms intervene in their favor. According to the provisions of art. 1 para. 3 of this law, it is forbidden that the professionals provide unfair terms in consumer contracts. Because the restriction or the cancellation of the consumer's right to claim compensation from a professional if he does not fulfill its contractual obligations required by paragraph 1, letter h list from the annex to this law, membership of a lot of examples expressly chosen by the legislator, which makes it an unfair term, nullity sanction of such a clause is uncertain. If the court decides the cancellation of a clause of restriction (limitation) or cancellation (dissolution) of a transport contract concluded with a consumer, the carrier would face the possibility of responding fo the failure of the obligations to the maximum amount possible. Of course, there would occur such a dispute, the foundation of the Civil Code would only be an excess of zeal, the consumption rules offering the necessary and sufficient protection for the consumer's interest.

At this stage of our work we consider a distinction as being necessary, between not respecting the principle of good faith, to negotiate the contract of carriage or in its written form, whatever that may be, on the one hand, and the influence of its future negative effects by introducing some clauses limiting or excluding liability. At a first and superficial glance, such a distinction may declare false, but such thinking would be based on the confusion between the violation of so-called principle and the protection of their own rights by introducing more favorable contract terms in the contract.

With rare exceptions, Romanian law obliges parties to a certain form of the contract so that they can choose even in the case of the contract of carriage, jointly or unilaterally, the nearest form of their will. However, contractual equilibrium position is rare, probably because the carrier will be the party of the contractual instrument in his direction.

Our research begins with the special rule of law from art. 1984 of the Civil Code, belonging to the chapter on the contract of carriage and its section relating to the contract of carriage of goods. If you go over the wording somewhat different and consider the assumptions and effects, then you can easily compare the provisions of art. 1984 of the Civil Code with those of art. 446 of Part V of the Swiss Civil Code, called Code of Obligations.

Although the rule of law in art. 1984 of the Civil Code contains an exhaustive list, it forces the carrier to respond in a most general way, the text covering complex situations so comprehensive that we can say that the carrier has no chance to dodge to the beneficiary injured. It is normal to be so because this rule establishes the liability of the carrier for the period in which the property is to watch, i.e. during transport. The first two cases listed in this rule, respectively the total or partial loss of goods and their altering or damaging, affect the transported well itself or some of its properties, so it is unfit for its intended recipient or transport interests. The third situation, namely that of the delay in delivery of goods, has no effect on the object or its properties, but on the interests of the parties between which is transported – the sender and the recipient, parties who likely pursue a significant interest, if they decided to send that good from one to another, paying a carrier

for this. We believe that the damage caused in this case is more subtle than in the first two cases, but its effects can be more serious, especially in the current business circumstances, where compliance or failure of an emergency staging in time makes the difference between success and failure. Another remarkable aspect of the three exposed situations is that, although the legislature has used the phrase "arising during transport", deceptively links the good to the path of the carrier from the place of dispatch to the destination. In fact, the connection is between the good and the time in which the event can occur, that causes loss, the alteration or the delay of the transported goods. Although the Romanian legislature has not shown what he intended to include the map or the duration, that of Quebec makes it accordingly to art. 2040 - "Transporting goods extends from the moment the carrier receives the property is responsible for transportation to delivery". From the perspective of Canadian legislation the importance of this connection, when the time factor is essential for the transport contract and the interests of its beneficiary, results easier.

If we return to the provisions of the Swiss Code of Obligations we note that art. 446 only advances the principle of the carrier's liability for what was entrusted to him, the following articles - art. 447 and 448 - secure the various cases in which it intervenes. In Romanian law, all these cases are crowded at art. 1984 of the Civil Code. It is worth noting that the distinction resulting from the text organization of both articles, 447 and 448, makes it impossible, in the case of delays and damage or partial loss, for parties to agree on a compensation bigger or less than the total transport, in advance.

However, the same rule provides the carrier with a backup for his liability. The rule of law in art. 1984 of the Civil Code is also a norm of reference because it draws the benefit application offers to the carrier by art. 1959 of the same codex.

We mention that the provisions of art. 1959 of the Civil Code are the exact copy of those of art. 2034 of the Civil Code applicable in Quebec Canada(for example Quebec Court , Judge decision no.2007QCCQ 14338) . Both rules, the Romanian and the Canadian one, form a legal presumption that the carrier must perform the primary legal obligation of the contract in question, namely to move something from one point to another, any limitation of which is in fact a self-exemption from the damages he may cause by the acts or omissions of the person to which he entrusted the object of transportation or of the person who awaits it at the destination.

In relation to the rule of law in art. 1984 of the Civil Code that of art. 1959 is general, which is placed by the legislature to the general provisions section of the contract of carriage, where there are those that apply to any contract of carriage irrespective of the nature of the object transport activity - goods or people and luggage. This location within the structure of the normative act makes the provisions of art. 1959 of the Civil Code value as a rule for transport contracts and as an exception to those set out in the provisions of art. 1355 of the Civil Code.

This rule establishes that, in the specific domain, the carrier cannot abolish or limit his liability for his own actions towards legal documents concluded with the beneficiaries of his activities. The exception to this rule, given by the same rule, is that, by using the same conventional means, the carrier may restrict or abolish his liability, but only in certain cases provided by law. The national rule is equal to the Swiss one of art. 445 par. Of the Code of Obligations, which we quote translated hereinafter - "carriers operating under state license do not have the power to exclude or limit in advance the application of the provisions governing the liability of the carrier for his own benefit, through agreement or regulations governing their own operations. "

The rule of law in art. 1959 of the Civil Code is a taking over more nuanced and adapted to the context of the contract of carriage from art. 1355 which is general in nature and has an effect on how the subjects of the code can determine their own degree of liability by the concluded agreements. This approach is useful to make a comparison between the two rules of law. We believe that the general rule is specifically written as referring to the conventional means by which one party may limit its liability to the other, that is by contract or unilateral act. The lack of distinction of the special client is somewhat beneficial for the carrier's costumer through the generality of the scope of the conventional means, but only by comparison with the general one can identify the two conventional means which the legislator tried to remove the carrier from. The issue of the avoided injury by clauses limiting or avoiding the debtor liability, the two rules have different treatment. Surprisingly, the general rule is stricter in terminology. This only refers to pecuniary damage, which must be interpreted as leaving out the ban of the non-pecuniary damage. Without this distinction in the special rule, we can only conclude that the carrier cannot limit or restrict his liability according to one type of injury or another, if such a case is not expressly provided by law. Going forward in the general legal standard rule phrasing it is noted that, unlike the special one, the possibility of the parties to depart themselves from the principle of total liability is limited to only two cases - simple carelessness and negligence. On the other two cases under the general rule of law, intentional or gross negligence, the parties are prevented from trading, as in such a way the person causing the injury would be exempt from the payment of compensation.

The phrase "cannot exclude or limit liability" at the beginning of art. 1959 of the Civil Code makes us think that such a limitation or exclusion may be made by agreement or unilateral act, the carrier using his economic power and the state of necessity in which the person who asks for his services to impose him an extremely unbalanced contractual tool in his favor. It results from the cited wording that it is directed against the subject of the carrier and not against his contractual partner or against the recipient of the contracted services, i.e. against that party to which level the concept of self-protection is the most easily born. As were previously showing this concept was designed to protect against dubious situations, difficult to prove, but which, in time, were extended to some common ones, often found in the current activity of a certain carrier who operates his company in a modern world, almost without risk.

In order to clarify the exception to art. 1959 par. 1 of the Civil Code two questions must be asked: (i) which are "the cases provided by law" and (ii) what is meant by the general term "law" used by the legislature in drafting the rules of law? We will try to give answers to these questions starting from the latter to the former.

Firstly, this reference to the general term of law has an express character. By using the word "law" the legislator excluded from applying, for the carrier, those cases of liability disclaimer or its limitation, which may originate in the other two sources of law: customs and general principles of law, both statutory in art. 1 of the Civil Code. If the legal text under examination should be referred to the latter two listed sources of law, the rights of the counterparty of the carrier would have been in danger because, in the case of the usages, the habits and the working practices of the carriers represent a system of rules of law not covered by the state legislature, who takes into account the general interest and not just that of a professional categories, i.e. a system that tends to regulate in favor of those who establish it, and in the case of the principles of law, they would give too much freedom to the preparation of contract of carriage, so much that it would clear the duties of the carrier, including that of result of the transport itself.

Secondly, a way of interpreting the scope of the meaning which the legislature sought to give the term "law" must be set. We believe that just by using this general form of expression the legislature intended to ensure the widest possible scope for the expected effects of the rule of law. So, an excessively strict interpretation would be contrary to the intention of the legislature's will, who, if intended otherwise, would have reduced this area by bringing in the text rules of law of some distinctions which, on the one hand, would have restricted its effects, but which, on the other hand, would have better outlined the intended effects. In interpreting this idea we believe that by "law" as envisaged by the legislator one does not only understand the Civil Code, the legislative monument resident of the reviewed legal provision under but all the rules that form the national law at a time. In this ensemble the provisions of international treaties and conventions and the European Union law, as shown in art. 4 and 5 of the Civil Code, must be included. We also believe that the term "law", by its maximum extending contains the national legislation too, regardless of the landing legislation on which it is placed, if the subject-matter shall regulate legal relations specific to particular types of transport (air, rail, road, etc.).

An overview of the scope of the term "law" comes from the provisions of art. 455 par. 3 of the Swiss Code of Obligations. Indeed the scope of this article, set out in paragraph 1, is narrower than that of a comparable national law, addressing to only owned or licensed by the state carriers, but on the other hand, an insight is useful in the understanding of its effects. The already mentioned art. 3 reads: "The special provisions governing the contracts for the carriage of goods by the providers of postal services, railways and ships are not affected." This implies that special legislation of these species transport, being rules to which general law sends, are part of the broader concept of law.

Regarding the "cases provided by law" for which the carrier can conventionally mitigate his liability, one may ask the question whether a favorable distinction can be made as is that of art. 1355 of the Civil Code, which regulates the general cases where the parties can negotiate their liability. As long as the parties have agreed to conclude a contract of carriage, i.e. to obey the relevant legal provisions of this operation, then it is allowed that the carrier limits his liability of the gravity of guilt, but he will respond in any case, provided or not by the law in his favor.

As the earlier doubt has been set aside we believe that only two cases provided for in the Civil Code, i.e. in the law narrowly, and which remain in question are the fortuitous event and the major force. They are provided as exculpatory especially in case the carrier transport delays to hand over the transportation object to the contractually agreed destination. See the wording of the second paragraph of art. 1959 of the Civil Code. Although the specific mention of the legislature, we believe that these grounds of exemption should be applied to the carrier and in the case of total or partial loss of the transportation object, for example. Indeed, the legal basis would not be the special one of the contract of carriage, but that placed under art. 1351 and the following ones of the Civil Code, the general rules for all types of contracts, but this is not a carrier dishonesty that would include or require the agreement they use in relation to the beneficiaries of its work. Such an insertion in the point of the contract is a great example to understand the difference between the abuse of power when signing the contract, the carrier having a dominant position, and the protection of good faith of their legal rights. Of course, in both cases of exemption, their invocation by the carrier to that which contracted, will be asked. It is not abusive for the transport contract clauses to provide notification of major force and of unforeseeable circumstances, which would hold the carrier harmless.

A special transposition and somewhat stretched as effects of the general provision of art. 1959 of the Civil Code is found in art. 1995 par.1 allocated to the contract of carriage of goods. The first difference highlighted by comparing the two rules is a sanction. Unlike general rule, where the legislature did not give an express penalty, but forbade the carrier to draw up his contracts so as to protect himself against the effect sought, in the special one the sanction is clear and precise - the clauses inserted into contracts to avoid provision shall be deemed unwritten law, so that they remain without the effect sought by the carrier – his own protection. A second more subtle distinction is found in the assumptions of the two rules. Thus, the general rule despite the negation it contains, has a permissive tone, the carrier being entitled to protect his contractual rights in the cases provided by law. Unlike the formulating of the general rule, the special one has a strongly prohibitive meaning, it is forbidden that the goods carrier to draw up his contracts in a form to extract him from the empire of law. In other words, in the case of the contract of carriage general limitation of liability can be done only in cases specified by law, and in the case, the transport of goods the same limitation is absent when seeking to enforce it against specific situation given in law.

A special situation, to which we will lean in this work, but we want to signal, is that in which the person usually making the conventional tool which regulates the legal relations between the carrier and his client, that the carrier himself or a group carriers, or organized in some form, or only involved ad hoc for a consignment leaves the effects of this convention under the rule of Roman law except those who might entail his liability, which will be governed by a foreign law more favorable for the carrier and, why not, by a more easily predictable court, such as those in which the previous is a source of law. In such a situation, if the carrier's customer did not meet the definition of benefit to the consumer, which could attract the protection of a state or supra-state legal release, then it might regret the conclusion of the transport convention, his right to compensation not being only difficult, but even non-existent.

In conclusion, if the carrier's liability is not limited or abolished by a special law, whether derived from the national or international law, then he is fully responsible for damages made to the transportation beneficiary, any contractual clauses to the contrary being void and unenforceable. Moreover, „it results, from per a contrario interpretation of article 1959, pharagraph 1, the conventional worsening of the accountability, by including a penalty clause in the carriage contract" (Atanasiu, 2011) .

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