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# Regulation in Unimodal International Conventions on Land and Air Transport of Exonerating Cases of Carrier Liability

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**Abstract**: Prior to joining the European Union, the trend of domestic transport under the legal regime enshrined in the uniform rules was anticipated by the special regulation in the field of air transport where, taking the model of the French legislator (Article L. 321-3 of the French Civil Aviation Code ), by art. 3 of Law no. 355/3003 established the rule according to which the liability of the Romanian air carrier, whether operating on domestic or international routes, as well as a foreign air carrier that operates flights on routes originating and destined on Romanian territory was established by the provisions of the Convention Montreal. After Romania became a member of the European Union, the law no. 355/2003 was repealed as a consequence of the incidence of Regulation (EC) No Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents and Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

**Keywords:** air and ground transportation; carrier liability; exonerating causes; international regulation

## 1. Introduction

The normative set of the Uniform Rules on the Contract for the International Carriage of Goods by Rail (CHIM)[4], the Convention on the Contract for the International Carriage of Goods by Road (CMR)[5] and the Montreal Convention[6] establish two categories of cases which may lead to exoneration from liability. of the land and air carrier: causes which practically coincide with the circumstances established by the common law in the matter of exoneration from liability and special causes, specific to the contractual relations in question[7].

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[4] It is one of the 3 annexes of the Berne Convention of May 9, 1980 (C.O.T.I.F.) ratified by Romania by Decree no. 100/1983. This is the result of a long process of improving the uniform norms in the matter, the first variant being the one adopted in 1890 which, over time, has undergone several modifications, respectively in 1924, 1952, 1970, 1980 and finally 1999. The protocol signed in Vilnius on June 3, 1999 was ratified by our country by GO no. 69/2001 (Official Monitor no. 538 of September 1, 2001).
[5] The Convention was concluded in Geneva on 19 May 1956, as amended and supplemented by the Protocol drawn up in Geneva on 5 July 1978; Romania ratified it by Decree no. 451/1972, respectively Decree no. 66/1981 by which it adhered to the previously mentioned modifications.
[6] The Convention was ratified by Romania by GO no. 107/2000 (Official Monitor no. 437 of September 3, 2000) approved by Law no. 14/2001 (Official Monitor no. 97 of February 26, 2001).
[7] Lately, it can be seen the proliferation of obviously more complex transport operations, generically called successive or multimodal transports. With regard to the particularities of the legal relations which may arise between the contracting carrier, the substitute carrier, the consignor and the consignee resulting from the analysis of international conventions on international transport law, see (Iorga & Costache, 2010, pp. 127-142)

**1.1. General Causes of Exemption**

According to the provisions of art. 36 point 2 of the C.I.M., art. 17 point 2 of the C.M.R., respectively art. 20 of the Montreal Convention may constitute grounds for exemption the following circumstances:

a) the loss, damage or exceeding of the transport term was determined by the fault or the order of the person entitled to dispose of the goods; from a legal point of view, we can assimilate the hypotheses evoked by the text of the conventions with the circumstance known in common law as the "deed of the contractor". Jurisprudentially, it has been ruled that the culpable attitude of the sender must constitute the main and direct causal event that caused the damage, the way in which the carrier understood to execute its service being treated severely[1]. Thus, the fact imputed to the consignor not to be accompanied by live animals was analysed as a distinct element of the damage caused as a result of a sudden shock of the wagon, consequence of a wrong technical manoeuvre, so that the fault of the transport operator was retained; to the extent that the origin of the damage could not be identified, being in the presence of what the French legal literature calls "hidden damages"[2] and the carrier has not proved the existence of any exonerating situation, he will be held liable[3], which means that "doubt always plays against the carrier". (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 529) Instead, the fault of the shipper who indicated too short a time to tranship the shipment between the two flights mentioned in L.T.A. was liable to exonerate the airline from liability; the sharing of responsibility, permitted by all international regulations and expressly established in the Montreal Convention[4]; applying the said rule, the carrier was partially exonerated for the damage suffered by a passenger who "by placing jewellery of considerable value in his luggage - which necessarily passed through several hands during the journey - favoured their disappearance, the risk being aggravated by the modest standard of living of the landing airport staff".[5]

b) the own defect of the goods defined as "a defect or insufficiency of the goods likely to damage it during transport" or as "the inability of the property to bear without damage the normal risk of a given transport" (Crauciuc & Manolache, 1990, p. 58) differs from the nature of the goods in that the damage does not result from the properties of the goods (fragility, sensitivity to cold, heat, perishability), but from other particular elements likely to affect its structure and functionality. An essential condition necessary to operate the exonerating effect is that the defect in the goods must exist from the date of receipt of the consignment by the carrier.

Finally, in the field of air transport, the 1999 Montreal Convention establishes the possibility of stipulating restrictive or exonerating liability clauses, stating that it is important to establish their legitimate extent, in the sense that their effect should not be permitted to the carrier to exonerate himself for the breaking of fragile objects or the theft of valuables, as long as it has not been committed by violent means. The regime established by the Montreal Convention, which is the last uniform regulation

[1] Thus, it was held that, although the consignor had defective loading of the goods, the railway carrier could not invoke the exemption unless the defect in the loading operations was not visible on normal examination, Cass. com., June 8, 1983, in B.T., 1984, p. 8.

[2] C.A. Paris, January 27, 1984, in B.T. 1984, pp. 584, in the present case, the cause of the spontaneous burning which destroyed the goods could not be established, and in the absence of any evidence showing the existence of an exonerating situation, the carrier was held liable.

[3] Cass., 15 December 1953, in BT1954, p. 134.

[4] See the provisions of art. 20 of the Convention, according to which "if the carrier proves that the damage was caused or favored by the negligence or other wrongful act or omission of the claimant or the person from whom his rights derive, the carrier is exempted in full or in part of liability to the applicant, in so far as such negligence or any other wrongful act or omission has caused or contributed to the damage.

[5] Aix-en-Provence, 3 April 1987, cited after (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 667) (in this case, the partial liability of the passenger was retained, up to 1/6 of the amount of the damage, for which difference the air carrier was obliged to pay damages).

in the matter, likely to favour the carrier, may create some controversy as to the current interpretation we should give to the notion of defective goods, in the sense that it would be a restrictive one, as we have shown before, or an extensive one. The question is pertinent because, depending on the position adopted, we could find ourselves in the presence of a non-unitary treatment, differentiated between the terrestrial and the air carrier and which is not justified. We believe, however, that the notions of the nature of the goods, respectively vice of the goods are different, and the distinction has certain consequences in the probative plan, in the sense that according to art. 17 point, 4 letter d) of the C.M.R. (which gives the nature of the goods an exonerating effect, being one of the special causes of irresponsibility) the carrier enjoys the relative presumption of irresponsibility that does not operate in the case of the provisions of art. 17 point 2 with reference to the defect of the goods.[1]

c) circumstances that the carrier could not avoid and whose consequences he could not prevent, a hypothesis that can be associated with the traditional notion of force majeure not without emphasizing certain particularities. Thus, the requirement of absolute unpredictability or absolute invincibility is not imperative, the judicial practice ruling on the exonerating character of the invoked circumstance according to the particular aspects of the state of fact deduced to the court.

Therefore, the liability of the carrier was not removed in the event of theft which, although committed by violence, could have been avoided if the driver, in compliance with the rules of professional conduct, had not been stationed in an unguarded area[2]. In another case, however, it was held that the carrier could not avoid the aggression of several individuals armed with baseball bats while, at night, he was in a specially arranged parking area and located near of frequented places[3].

In the field of air transport, no exonerating effect was attributed to the fact that the theft of the goods took place in the company's warehouses, which could have ordered additional measures to supervise the maintenance operations, which could have reduced, if not eliminated, any possibility of disappearance of the commodity; in other words, the jurisprudence rarely retains the exemption of the air carrier in litigation concerning damages arising from the theft of goods, all the more so if they are valuables and even if in this case the fault is also retained by the sender (traveller) or the consignee.

Remaining in the sphere of air transport, we remind that it is not obligatory for the invoked event to meet the requirements of force majeure, being necessary, according to art. 19 of the Montreal Convention, for the carrier to prove that "he, his subordinates or his agents have taken all reasonably necessary measures to avoid damage or that it has been impossible for them to take such measures."[4] Although the damage could not be determined, the exonerating effect in favour of the air operator was not retained in the following circumstances: destruction of packages due to a fire in the handling company's warehouses as long as the airline did not provide any information on the circumstances of the event administered any evidence that he had taken all necessary measures to prevent or mitigate the consequences, altering the shipment of perishable goods (fresh lobsters) if the carrier did not prove that his employees had complied with the instructions, mentioned in the consignment note, regarding the

[1] See for more details on the matter (Stancu, 2005, pp. 336-337).
[2] Cass. Com., 2 June 2004: Bull. Civ. IV, no. 115.
[3] Cass. Com., 30 June 2004: Bull. Civ. IV, no. 144.
[4] The text of the Convention takes into account the damages incurred as a result of the delay in delivery as opposed to the concept established by the previous regulation of the Warsaw Convention where it also applies in case of loss or damage. Under the latter convention, taking the necessary measures was defined as the "reasonable diligence" required of the air carrier in the performance of its obligations, being described as "a means obligation included in an obligation to perform", see (Kerguelen-Neyrolles, Chatail, Renard, & Thomas, 2006, p. 666). In the system of the Montreal Convention, reasonable diligence was replaced by the presumption of liability of the air carrier, being sufficient to prove that the event that caused the damage occurred during the air travel.

conditions during transport (5-7°C) or the existence of obstacles that could have been encountered in maintaining the temperature, when unloading the packages presenting temperatures of up to 20°C.

Extending the scope of the exonerating circumstances to the acts of public authority, we specify that the administrative pressure on the railway services, in the sense of draining a tanker transporting dangerous goods or closing the air traffic due to the flight ban decided by the authorities falls within the scope of circumstances inevitable and for which the railway or air carrier cannot be held liable. On the other hand, the conditions for removal of liability are not met in the event that the railway, faced with a striking movement of part of the staff preceded by a notification, still accepts the transport of perishable goods (pasteurized milk) delayed due to the change of initially agreed route; similarly, with regard to a strike by pilots serving a scheduled airline, the exemption effect could not operate unless the air carrier proved that it was unable to distribute the cargo to other aircraft belonging to certain airlines of foreign companies. However, the strike was attributed the character of an irresistible event when, being triggered without notice to the railway, its consequences could not be removed.

On the insurmountable character of the circumstance invoked, the courts, taking into account the concrete circumstances existing from one case to another, have an invocation right of assessment; thus, in the absence of proof that the carrier, due to the state of civil war in Beirut, was unable to deliver the goods to their destination within a reasonable time, the liability could not be removed, however, in a more recent example, the court noted that the "brutal and unpredictable invasion of Kuwait by Iraq" was the size of an irresistible event that could prevent airport services from taking the necessary measures to avoid damage.

**2.2. Special Causes of Exemption**

The originality of the exoneration regime of liability is conferred by the establishment of special cases likely to remove the liability and to form a specific legal framework in which the carrier can invoke in its defence the exonerating effect of certain circumstances expressly and limitingly provided by the text of the conventions. The reason for their regulation was to bring corrective, appreciated as welcome, to the severity with which the debtor is usually treated the characteristic obligation to the dangers inherent in travel. (Stancu, 2005, p. 338)

Known in the legal literature as "privileged causes of liability", and in the etymology of uniform rules entitled "particular risks", it is sufficient for the carrier to prove the existence of any of those circumstances in order to benefit from the exonerating effect. In conclusion, the role of the presumptions established by art. 36 point 3 of the C.I.M., of art. 17 point 4 of the CMR, respectively of art. 18 of the Montreal Convention is to alleviate the liability of the carrier, the doubt acting against the recipient. (Paulin, p. 253)

In the following, we will analyse in particular aspects of the special causes exonerating from liability:

a) the transport performed by using discovered vehicles is characterized by a higher incidence of being exposed to damages compared to shipments in closed means of transport. The presumption of irresponsibility of the transport operator produces its effects if the movement was made in such conditions as a result of the express agreement between the sender and the carrier. The exonerating effect occurs only if the loss or damage is the causal consequence of the fact that the goods were transported in uncovered means of transport, not when the damage occurred and if they were moved in covered means of transport, for example in the case of a theft. The benefit of irresponsibility may be invoked by the carrier who agreed with the sender to transport privately owned cars and the fire caused by flames from an incandescent object destroyed the goods or in the case of corrosion of steel pipes due

to chemicals installed in neighbouring wagons. Even if the goods, by their nature, could be transported only through the use of discovered means of transport, the railway remains entitled to invoke in its defence the particular risk analysed. A special problem, solved differently from judicial practice, is raised by the transport of goods in means of transport covered with tarpaulins (according to the uniform rules there are 4 modes of transport: shipments transported in closed, open means of transport, specially arranged wagons and wagons covered with tarpaulins), in the sense that they can be assimilated or not to closed means of transport? Applying the provisions of art. 36 of the C.I.M. 1980, also reproduced by art. 23 pt. 3 lit. a) C.I.M. 1999, we consider that the interpretation can only be that the wagons covered with tarpaulins are assimilated to the discovered means of transport, so that the carrier can invoke the exonerating effect. In the practice, indeed older, of other courts, the opposite solution had been adopted, which we do not adopt. On the other hand, the goods loaded in intermodal transport units or in means of road transport rolled in wagons are not considered to be under the incidence of art. 23 point 3 letter a) of the uniform norms.

b) the lack or effectiveness of the packaging in the case of goods which, by their nature, are subject to loss or damage. To the extent that the defect of the packaging was not the subject of reservations in the consignment note upon receipt of the shipment, it is assumed that the packaging irregularities did not exist in the shipping station, being the consequence of an event during travel. However, an apparent defect is likely to lead to the exemption of the carrier even if he did not proceed to insert reservations in the transport document; in the event that the defect of the packaging could be notified by the carrier at a regular examination, his liability will be incurred accordingly; it is the case of a car whose weight and height, although they required its proper fixing, were not carried out accordingly, the railway having the objective possibility to ascertain the insufficiency of the way of presenting the goods during transport. Judicial practice, sometimes quite severe, has ruled that the exoneration of the carrier can take place only if the packaging is the only cause of damage and not when the fault of the transport operator contributed to the consequences of the event; Consequently, the expert's findings regarding the "fragility of the packaging of the shipment due to the weight of the contents" were removed and, consequently, the airline was not exonerated, considering that "the traces left on the packages marked" fragile "prove the brutal manipulations airport employees".[1]

c) the loading or unloading operations of the goods have been performed by the consignor or consignee[2]; the fact that a parcel belonging to a group parcel shipment has been lost due to a classification error, given that the responsibility for the handling operations has been assumed by the consignee to whom the railway has made the goods available, will remove its liability. On the contrary, the burning of a wagon carrying crockery after it was made available to the consignee could not be considered a particular risk as long as the cause of the accident could not be established.

d) defective loading of the goods. Applying the provisions of art. 36, point 3 letter d) C.I.M., respectively of art. 17 pt. 4 C.M.R. the carrier may claim the benefit of non-liability for damages which are the consequence of a defective unloading to the extent that the legal liability for carrying out these handling operations has been assumed by the consignor. However, the carrier is required to provide pertinent, precise and unequivocal explanations for the causes of the loss of the goods because if the irregularities during loading could be observed with reasonable diligence, the railway carrier, all the less so in the

[1] C.A. Aix-en-Provence, 7 Januarye 1986, Lamyline.

[2] We specify that this case is no longer found in the enumeration of the special causes of exoneration contained in art. 23 § 3 of the C.I.M. 1999, although in the field of road transport, the uniform rules maintain it (see art. 17 pt. 4 letter c) with reference to "handling, loading, stacking or unloading of goods by the consignor or consignee or by persons acting in at the expense of the consignor or the consignee"). The Montreal Convention does not explicitly refer to the said exonerating case, but we can confine it to the deed of the co - contractor referred to in Article 20 of the Convention.

case of shipments departing from - a railway station, is not entitled to invoke this special cause of exemption.

In another case decision, it was held that the exonerating effect should not produce its effects as long as the report concluded by the carrier is contradicted by the conclusions of the expert report according to which "even if the loading was performed according to professional rules, the damage to which the car was subjected during transport could have caused the damage found on arrival at the destination."[1] The correlation that could be established between the mode of loading and the speed of movement of the means of transport was investigated in another case, noting that a load of goods which cannot withstand normal manoeuvres performed during transport at a speed of not more than 10-12 km/h must be considered defective and, consequently, the damage will be imputed to the consignor.

Finally, since, in fact, the carrier can participate in the performance of the loading operations, the question arises as to who is responsible for the damages caused as a result of its manoeuvres? If the sender has assumed responsibility for the respective service, he will be responsible[2], not being excluded that by the agreement of the parties, the control of the operations will be the responsibility of the sender and the carrier, so that the rules of common fault will become applicable.

e) the fulfilment of customs or administrative formalities was regulated by the C.I.M. 1980, no longer found in the cases listed in the latest version of the C.I.M. since 1999 nor in the text of the C.M.R. or the Montreal Convention, but we can confine it to the general cause of the act of the third party.

f) the particular nature of the goods subject to depreciation by the simple fact of transport; due to their specific properties, certain goods are exposed during travel to loss or damage by "leakage, rust, internal and spontaneous damage, drying, leakage, normal loss or by the action of insects or rodents"[3]. Considering a correct assessment, given that there is goods which normally lose weight during transport, regulated natural permissible percentages known as "perishability" or "inherent special risk" within which the carrier is not liable: 2% by mass for liquid goods and goods delivered for transport in the wet state, respectively 1% of the mass for goods delivered for transport in the dry state (art. 31 pt. 1 of CIM, 1999) In order to remove the liability it is not enough for the carrier to prove the physical condition in which the goods were handed over, but it is necessary to prove that the weight loss e is the causal consequence of the nature of the goods combined with the transport operation.[4]

At the same time, according to art. 41 point 2 of the R.U.C.I.M., respectively art. 18 point 4 of the CMR, the presumption of liability will operate if, depending on the factual circumstances, the carrier proves that it has taken all necessary measures regarding "the choice, maintenance and use of those arrangements and instructions given to it" for protecting the goods against variations in temperature, humidity, heat, etc.

g) the risk resulting from the irregular, inaccurate or incomplete naming of the goods excluded from transport or admitted to transport under special conditions. The provisions of art. 23 pt. 3 lit. e) of the R.U.C.I.M. 1999 refers, in particular, to goods prohibited or admitted for carriage under the conditions laid down by the R.I.D. which prescribes particular conditions for the packaging and loading of

[1] CA Paris, 28 March 1979, in B.T. 1979, p. 318.
[2] See also (Stancu, 2005, p. 339).
[3] It is the case of rusting the cast iron product (see C.A. Paris, November 18, 1942, in B.T.I. 1943, p. 104)) or altering the fresh pork ham (C.A. Paris, March 20, 1966, in B.T.I. 1969, p. 101); In contrast, the benefit of non-liability was not recognized for the transport of shelled hazelnuts packed in bags of vegetable fiber (C.A. Aix-en-Provence, 1 December 1982, Lamyline).
[4] Thus, it was appreciated that wine is not part of the liquid goods that normally lose weight during travel, see T. com. Seine, March 23, 1948, in B.T. 1948, pp. 597.

dangerous goods. Similarly, the provisions of art. 17 pt. 4 lit. e) of the C.M.R. refer to the insufficiency or irregularities of the signs and markings or the labelling of the notebooks.

h) the risk resulting from the transport of live animals to the extent that the transporter has taken all reasonable measures required by the specifics of these movements (existence of vents, ensuring hygiene and animal feed). For the carriage of liability of the carrier, it is sufficient to prove that the damage is due to a cause other than the excluded risk.[1]

i) the risk resulting from the absence of the attendant in case of funeral transports, live animals or other special categories of goods.

## Conclusions

Special exonerating cases have their own mechanism of operation, in the sense that, regardless of the particular risk invoked, the presumption of liability operates only for damages resulting from loss or damage to the goods, not in case of delay as in the case of general causes. The carrier must prove that the damage could be the consequence of one or more of the circumstances expressly and exhaustively listed in the text of the uniform and detailed rules above. Given the relative nature of the presumption, the interested party will be able to provide evidence to the contrary resulting from the carrier's fault for the damage caused. Thus, in a case decision[2], the benefit of irresponsibility initially recognized to the railway for the fire of the goods transported in uncovered wagons was removed, proving that the damage is the consequence of some facts imputable to the carrier: improper adjustment of the locomotive burners, insufficient cleaning steam, the use of tanks without being protected by the fireproof layer and the poor placement of the wagon discovered right behind the locomotive. In the absence of evidence to the contrary by the consignor, the railway operator was not held liable for damage caused as a result of the train derailment, as long as it was considered that the damage was the consequence of a closing defect of the trailer loaded in the wagon during travel.

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[1] Trib. federall suisse, 21 February 1961, in B.T.I.1962, p. 116.
[2] Cass. com., 19 January 1970, in B.T. 1970, p. 166.