

# THE FORWARDER'S RIGHTS AND OBLIGATIONS IN THE TRADING CONTRACT OF MERCHANDISES' TRANSPORTATION

Ph.D Lecturer **Cristina Stanciu**

**Abstract:** *The paper work regards the forwarder's rights and obligations in the trading contract of merchandises' transportation, considering the fact that a lot of specialized works have noticed and pointed out that human life is ruled directly on indirectly, by the contract. It represents a juridical instrument through which the goods' circulation is realized without which the life of a community is inconceivable<sup>1</sup>. Speaking of the importance of goods circulation and of the contract's importance within society, we may state that the transportation contract is important and useful for the ordinary human life.*

**Key words:** *Contract of merchandises transportation, forwarder's rights*

**Preliminaries.** A lot of specialized works have noticed and pointed out that human life is ruled directly on indirectly, by the contract. It represents a juridical instrument through which the goods' circulation is realized without which the life of a community is inconceivable<sup>2</sup>. Speaking of the importance of goods circulation and of the contract's importance within society, we may state that the transportation contract is important and useful for the ordinary human life.

It has a complex juridical physiognomy and, to explain it, we have to sketch some essential elements: the contract' sides, namely the professional carter and the forwarder, the sides' obligations namely: an execution term for the transportation, an adequate transportation mean, an itinerary to be travelled, the recipient, who is not a side of the contract, but is its beneficiary; sometimes, he may even be subject to obligations.

So, the transportation contract is a convention<sup>3</sup> between the professional carter and the forwarder, convention through which the carter obliges himself, in exchange of a remuneration, to transport, with an adequate transportation mean, and in a certain lapse of time, persons or merchandises. For the case of merchandise transportation, the carter obliges himself to handle the goods, at the arrival point, in the recipient's custody.

Art. 3 item 13 Trading Code frames as a trading deed the "transportation enterprises, for persons or things, on water or on dry land". So, the transportation pertains to trading and is carried out under the "enterprise" form, by this meaning an activity that follows certain rules<sup>4</sup> and under a professional title. The feature of being professional is essential in defining the transportation activity and for the transporter<sup>5</sup>.

But the transportation contract might be also a civil one, when transportation is for free or when it is occasional, even remunerated, under the condition, for the latter case, to be performed, randomly, by a non-trader.

The effects of the transportation contract are represented by the totality of rights and obligations issued from the respective contract<sup>6</sup>. They are owned by the sides (the forwarder and the carter) but also by a third side, the recipient, who is not a side of the contract. As we have precised, the transportation contract is regarded as an exception from the principle of effects' relativity for the juridical civil act. It is necessary, in order to point them out, to analyze the rights and obligations issued from the transportation contract, following the execution stages of this type

---

<sup>1</sup> I. Dogaru (coordinator), *Drept civil. Contractele speciale*, Editura All Beck, București, 2004, p. 1-3.

<sup>2</sup> I. Dogaru (coordinator), *Drept civil. Contractele speciale*, Editura All Beck, București, 2004, p. 1-3.

<sup>3</sup> See the analysis of the concepts of contract and convention from I. Dogaru (coordinator), *Drept civil. Contractele speciale*, Editura All Beck, București, 2004, p. 1-2

<sup>4</sup> Șt. Scurtu, *Contracte de transport de mărfuri în trafic intern și internațional*, Ed. Themis, Craiova, 2001, p. 7-8.

<sup>5</sup> The legal ground which sustains the professional title necessary for exerting the transportation activity is also assured by arts. 1476 et 1477 Civil Code

<sup>6</sup> Gh. Piperea, *Dreptul transporturilor*, Ed. All Beck, București, 2003, p. 33.

of contract. It is useful to study them in the 3 important moments of the transportation: at the starting point, during the transportation of merchandises and at the point of arrival.

As we have precised, the sides of the transportation contract are *the forwarder* and *the carter*.

But the beneficiary of this contract is the recipient, though he does not participate in the conclusion of it. The forwarder is also named the transportation's *creditor*, and is the person who concludes, directly or through a representative, the transportation contract<sup>7</sup>. It creates for him a series of rights and obligations which have elements from the general matter of contracts, but also remarkable exceptions from it, such as: the right of a side (the forwarder, in this situation) to renounce to (call off) the contract or to modify it unilaterally.

By analyzing the forwarder's obligations chronologically, *at the starting point*, we might identify the following obligations:

- a) to choose the mean of transportation to be used;
- b) to cooperate at the elaboration of the transportation's document;
- c) to handle to the carter the transportation's accompanying documents and to confide in his trust the merchandises;
- d) to load in the merchandises, if this obligation should pertain to his side, according to the concluded contract;
- e) to pay the transportation's price, if this obligation should pertain to his side.

The forwarder may perform these operations directly or through an expeditionary agent<sup>8</sup>.

*The operation of choosing the mean of transportation.* This operation is realized according to the nature of the transported goods<sup>9</sup>. The forwarder has to verify the transportation mean provided by the carter to see that the vehicle really is adequate for the type of merchandise he intends to transport and to see if the vehicle fulfils its (apparent) functioning requirements<sup>10</sup>. If malfunctions are spotted at the respective transportation mean, the forwarder has to bring them to the carter's attention and to make the appropriate mention in the transportation's document, because if the carter should keep using of the same vehicle, his liability would be engaged in this respect<sup>11</sup>.

*The forwarder's participation in the elaboration of the transportation's document.* This involvement is very important, because the forwarder's statements will constitute the contents of the way bill regarding: the merchandises' type (their quantity and quality, their weight and value, the indication of the itinerary and of the recipient).

The forwarder is liable for the correctness of the statements he makes in the transportation document<sup>12</sup>.

---

<sup>7</sup> He may be the owner of the goods that are going to be transported or a detainer only. The forwarder may conclude personally the transportation contract or through his proxy or mercantile agent. When the transportation contract is concluded through a proxy, the juridical relationships are established directly between the forwarder-mandant and the carter; when the transportation contract is concluded through a forwarder's mercantile agent, since the contract is concluded nominally by the agent (though on behalf of the forwarder), the juridical relationships are established between the carter and the agent.

<sup>8</sup> The expeditionary, also designated as "mercantile dispatcher", or "dispatching house", is a trader, authorized to carry out such an activity by the Ministry of Transportations. Therefore its activity is carried out under the from of an "enterprise", under its own name and for the purpose of obtaining profit. The operation of merchandise dispatching may as well be exerted as an accessory activity by the carter, but the actual trend, especially in the developed countries, is to separate the two activities: the transportation-as the main one from the dispatching which is accessory to the former.

<sup>9</sup> For the transportation of living animals, requiring appropriate conditions, the used transportation means will be duly specialized; for the carrying of perishables, specific transportation means will be used; for oil, tank trucks or tank waggons, etc.

<sup>10</sup> For example, if the closing systems are functional

<sup>11</sup> O. Căpățină, *Dreptul transporturilor*. Partea generală, Ed. Lumina Lex, București, p. 78-80

<sup>12</sup> If he declared that he was transporting a lower quality merchandise, though the real quality was higher, more valuable, in case of loss or damaging of the goods, the indemnifications received will be in conformity with the previously done statements. The declaration of a type of transported goods, though in reality what was transported were other types of merchandises, of higher values, for the purpose of obtaining a lower price for transportation, will also lead to indemnification according to the statements made in the transportation's document.

*The entrusting of documents.* Art. 416 Trading Code stipulates that: "the forwarder is due to entrust to the carter the custom papers or whatever ones might be needed; he is liable for their contents and due regularity".

If the documents should not be exact, the damages suffered by the carter or he would have to receive for this reason would be assumed by the forwarder, unless the cases when the carter's guilt should be attested<sup>13</sup>.

At international transportations, the obligation to fill in the custom documents accompanying the transportation's document might pertain as well to the forwarder or the recipient. This is why the doctrine<sup>14</sup> has stated that the dispositions of art 416 T. C. are not complete, as they impose this obligation to the forwarder only.

*The loading in of the merchandises.* It is the sides who decide to the charge of whom will be the obligation to load in the merchandise into the transportation mean and how will be divided, between carter and forwarder, the obligations regarding accessorially the loading of merchandises into it.

Usually in practice, the charge of installing the merchandises within the transportation vehicle pertains to the forwarder<sup>15</sup>. But the carter is the one who watches over the loading up manoeuvres and for the respect of the technical loading norms, which he is obliged to elaborate and to provide to the forwarder<sup>16</sup>. The end of this operation coincides with the next step, namely the one of applying the seals over the closing system of the transportation means.

The sides also establish, while performing these operations, how long the loading should take, if it is done by the forwarder.

If there is nothing established about it, the local customs would be applied, or either the carter's usual regulations.

If they should lack, the reasonable term for performing this type of operation would be estimated by the court<sup>17</sup>.

If the loading time should be exceeded, the sanction would be the payment, by the forwarder, of some delay penalties, keeping account of the carter's non-attended gain, missed due to the unexpected stillness of the transportation mean.

*The payment of the price.* Usually, the obligation to pay the transportation's price is the forwarder's. As an exception, it could be charged to the recipient through the sent payment clause, which has to be expressed accepted both by the carter and the recipient<sup>18</sup>.

The moment of accomplishing the payment is, generally the one of handling over the merchandises. If the payment should not be done properly, the carter would be entitled to suspend the effective transportation<sup>19</sup>.

The transportation price is formed in respect to the offer and the demand existing on the market and suiting a series of elements like: the nature of the goods to be transported, the distance to be crossed, etc.

The transportation's price is not seen as a validity element for the contract, so its lack does not affect it. Added to the effective price of the transportation, there are other types of expenses, required by the carter: the accessory expenses, issued from the activities performed by the carter and related to the transportation, and the anticipated expenses (provisional), that is to say the commission, if the principal transporter would ensure the displacement by calling in, for a part of the road, a transportation commissioned agent. So, the transportation's price might be paid either by the forwarder or the recipient. It is worthy to mention that it is possible, for the forwarder, to

---

<sup>13</sup> E. Cristoforeanu, *Despre contractul de transport*, Cartea I, Tipografia Curierul Judiciar, București, p. 143.

<sup>14</sup> Șt. Scurtu, *Contracte de transport de mărfuri în trafic intern și internațional*, Ed. Themis, Craiova, 2001, p. 53-54.

<sup>15</sup> For example, in railway transportation, in most of cases the forwarder delivers to the carter the respective waggon, already loaded in and sealed.

<sup>16</sup> On the occasion of the loading in operations, some specific technical activities are realized: wedging, levelling, ropes' tying of merchandises, if necessary, wrapping up, stapling, etc.

<sup>17</sup> O. Căpățînă, *Dreptul transporturilor*. Partea generală, Ed. Lumina Lex, București, p. 77.

<sup>18</sup> Gh. Piperea, op. cit., p. 36.

<sup>19</sup> According to the rule *exceptio non adimpleti contractus*.

temporarily pay the price at the forwarding point, and next the carter should assume the obligation of recovering the price from the recipient at the moment of handling the merchandises, The sum recovered this way will be remitted to the forwarder and the procedure is called cash on delivery.

*The guarantee.* Anyway, in order to guarantee the payment of the transportation's price, arts. 437-438 of the Trading Code grant to the carter a *reservation right* on the merchandise and a *privilege right* upon the price obtained from the sale of transported merchandise in regard to other creditors of the forwarder.

If the price should be paid by the recipient, the clause inserted to the transportation contract would have the juridical nature of a delegation of payment. It should not relieve the forwarder of from the obligation of paying the price but should create, for the carter, the obligation requesting the price of the transportation from the recipient.

If this one should adhere to the contract and should pay the transportation's price, the forwarder would be, consequently, relieved from this obligation.

If the recipient should not adhere to the contract, the transporter would not be entitled to sue the recipient, in order to oblige him to pay transportation's price, but would be entitled to retain the merchandise till the price is paid, to sue the forwarder or to coarsely sell the merchandise in order to realize his claim<sup>20</sup>.

*During the transportation*, the forwarder, being no longer in possession of the goods, in principle, is no more held by obligations. It is the carter who possesses the goods then and he is the one who ought to fulfil the main obligation within the transportation contract, the one to displace the goods to their destination.

Yet, as an exception from the general situation, the forwarder might have the obligation to accompany the merchandise or to designate companions for it, for the displacement's duration<sup>21</sup>, in the case of cargos which require special cares to be provided<sup>22</sup>. When it should be left to the appreciation of the forwarder or of the recipient the escort would be optional, but it would be compulsory when the law expressed states that merchandises have to be accompanied during transportation.

In this latter situation - the legal obligation, related to merchandises, of being escorted, during transportation, by the forwarder or by an employee of his - the fact that the carter does accept to perform the transportation with no escort signifies that the carter does assume the liability for the goods' loss or damaging and, consequently, that he does accept to pay the possible indemnifications.

*At their destination*, the merchandises will be delivered by the carter to the recipient. If the recipient might not be identified by the carter, the forwarder should to be notified about that.

In the case of an unidentified recipient, the carter is not allowed to send back the goods at the starting point without the forwarder's expressed acknowledgement, because this new displacement would cause to the forwarder new expenses that he is not obliged to cover unless he had consented to them.

The T. C. stipulates that, when the recipient could not be identified by the carter on the basis of data provided in the way bill, the carter ought to address to the competent judicial instance and to request for the storage authorization regarding the transported goods, in warehouses or general storehouses, on the recipient's expenditure, so that the transportation mean might be released from duty.

If he should think it necessary, the carter could also request to the juridical court the verification of the goods' general shape at that moment.

To this purpose, the art. 438 par. (1) T. C. stipulates that: "If the recipient should not be found, or if a disagreement should appear about the receipt of the transported things, the president of the respective tribunal, or the district judge, may order these things to be deposited or placed

---

<sup>20</sup> Șt. Scurtu, op. cit., p. 42-45.

<sup>21</sup> For instance, at the transportation of animals alive or of products which could not be delivered for transportation through weighing, piece by piece (one by one) or by volume units.

<sup>22</sup> O. Căpățînă, op. cit., p. 95.

under distraint. He may also order the verification of the shape in which these things are, and then order their sale purchase till the amount owed to the carter should be fulfilled” Yet, trading habits have modified by correction the stipulations of art. 438 par. (1) T. C., in the sense that the carter becomes obliged to, firstly, bring to the forwarder’s knowledge the difficulties occurring at destination, so that the latter could provide him new data, enabling the recipient’s identification. The procedure established by art. 438 par. (1) T. C. could be followed by the carter only if he should have no way how to notify the situation to the forwarder, or if this latter should not respond to the notification within a reasonable time<sup>23</sup>.

### **The forwarder’s right to call off the transportation contract or to modify its stipulations**

*Rules of civil law in the contract’s matter.* Art. 969 Civil Code states: “The legally concluded conventions have the power of a law among the contracting sides”. So, the compulsory force of the contract derives from (issues from) the “power of law” which the law itself recognizes to the contract, in regard to the relationships among the sides. From this value, recognized to the contract, are issued two important rules that are valid for the domain of contracts: the contracts’ irrevocability and the principle of relativity for the contract’s effects<sup>24</sup>.

The contracts’ irrevocability signifies that a contract might be revoked only through the mutual agreement of the sides: *mutuus consensus*, *mutuus dissensus*<sup>25</sup>.

#### *The rule of the contracts’ irrevocability*

The rule of the contracts’ irrevocability does express the idea that a contract could only be revoked through the sides’ agreement.

This is the common rule. As an exception from it, the contract could be cancelled by the will of only one side of the contract, but only for the causes that are authorized by the law<sup>26</sup>.

As we have previously precised, the contract is the sides’ agreement of wills, intervened with the purpose of producing juridical effects, that is to say to give birth to, modify, transmit or extinguish juridical relationships. Right from its definition, it results that it is concluded through the consensus of the sides’ wills – *mutuus consensus* – and it is natural that it could be undone the same way – *mutuus dissensus* – in other words again, with the common mutual agreement of the sides<sup>27</sup>.

The contract could not be revoked by the will of an unique side, unless into the contract’s contents was previously inserted a cause of denial according to which the sides – both or only one of them – could untie themselves from the contract, by paying an indemnity to the other side. In this case, the contract is revoked, but, in fact, this is still done through the wills’ agreement of the sides, because this option was stipulated on the occasion of the contract’s conclusion, when the sides decided together about it.

But, from the rule of the contracts’ irrevocability, there are some exceptions:

---

<sup>23</sup> E. Cristoforeanu, op. cit., p. 189-190; O. Căpățînă, op. cit., p. 120.

<sup>24</sup> According to art. 973 Civil Code: “conventions are effective only among the contracting sides”. Thus the contract produces its effects only inside the contract’s circle, meaning only among the sides who concluded it. The compulsory power of the contract involves other persons as well, like the sides’ cause-holders, the contract being opposable to these latter.

<sup>25</sup> I. Dogaru, T. Sâmbrian, P. Drăghici, A. Oroveanu-Hanțiu, S. Ionescu, *Drept civil român. Teoria generală a obligațiilor*, vol. III, Ed. Europa, Craiova, 1997, p. 121-123.

<sup>26</sup> The regulations concerning the transportation contract, as they figure in the Trading Code, have enforced a derogation from the principle established by the art. 969 par. (2) Civil Code. The forwarder is therefore, authorized to call off the contract or to modify it unilaterally, but then assuming the obligation to pay to the carter the expenses done and the direct and immediate damages resulting from the execution of the forwarder’s dispositions. In this respect, art. 421 par (1) Trading Code stipulates that: “the forwarder is entitled to suspend the transportation and to request the restitution of the transported goods, or their delivery to someone else than the person indicated into the way bill, or either to dispose *how he should think appropriate*, but then he is due to pay to the carter the done expenses and the direct and immediate damages caused as the result of this counter-order’s execution”. We do meet derogations in the civil law too, having as ground the art. 969 par. (2) Civil Code according to which to conventions’ revoking could also be done due to: “causes authorized by the law”. The art. 1365 Civil Code stipulates that the sale purchase may be cancelled for not having paid the price. According to art. 1020 Civil Code, in synallagmatic contracts, the resolutive condition is always tacitly implicit for the case of one side not fulfilling its obligations, etc.

<sup>27</sup> I. Dogaru, S. Cercel, *Drept civil. Partea generală*, Editura C.H. Beck, București, 2007, p. 158-172.

- a) the contracts with an undetermined duration in time could, usually, be cancelled through the unilateral will of any of the sides<sup>28</sup> or through the will of only one of the sides<sup>29</sup>;
- b) contracts could also cease independently from the sides' will, in the circumstance where one of its essential elements would cease to exist<sup>30</sup>;
- c) in the case of contracts with a successive execution, the compulsory power should be suspended due to some circumstances that are considered as *force majeure* and should be restored at the ceasing of the respective situations;
- d) the suspension of the compulsory force might intervene in some contracts if one of the sides should not fulfil its obligations<sup>31</sup>

#### *Relativity of the contracts' effects*

According to art. 973 Civil Code "conventions do have effects only among the contracting sides". The contract produces its effects only within the contract's circle that is to say among the sides who have agreed upon it.

But the compulsory power of the contract concerns as well other persons: the contract is opposable to the sides' cause holders. It is in this respect that we have to look at the "law power" of the contract towards the sides' cause holders and we have to elucidate their connection with the contract<sup>32</sup>.

A side in the contract is the author of an expression of will at its conclusion. If a person would be deprived of her exercise capacity, the expression of her will should be performed through her legal representative – a parent or a tutor.

By third sides we mean the persons who are completely stranger to the contract (*penitus extranei*). As completely strangers to the contract, as a principle, to third sides the contract brings no benefit, but yet no prejudice: *res inter alios acta aliis neque nocere neque prodesse potest*. In other words, the contract is not opposable to third sides. As an exception from this rule there are cases when third sides could not afford to ignore the contract; further more, there are cases when third sides could not be considered as strangers to the contract.

So, if the contract should concern real rights, which are absolute rights, due to their feature of being opposable *erga omnes*, this would mean that, if all the others should respect these rights then, implicitly, the respective contract would be respected.

This way, the third sides become obliged to respect even the debt claims of the sides. To impeach the execution of these rights signifies to be liable for the possible prejudices caused to the sides.

In the cases of the *porte-fort* convention and of the stipulation for another, third sides are considered not to be strangers from the contract<sup>33</sup>.

#### *In the matter of the transportation contract*

The Trading Code derogates from the principle instituted by art. 969 Civil Code par. (2), and grants to the forwarder the right to call off the contract or to modify it unilaterally. But this involves the obligation to pay to the carter the expenses done and the direct and immediate damages that would result from the execution of his given dispositions.

So, according to art. 421 par. (1) Trading Code: "the forwarder has the right to suspend the transportation and to ask for the restitution of the transported goods, or their delivery to another person than the one mentioned in the way bill, or to dispose as he would think convenient, but he is due to pay to the carter the expenses this one had to do and the direct and immediate damages resulting from the execution of this counter – order".

<sup>28</sup> For example, the mandate contract

<sup>29</sup> For example, the deposit contract.

<sup>30</sup> For example, when the contract is concluded *intuitu personae* and one of the sides has died, the contract does lawfully cease.

<sup>31</sup> For example in the insurance contracts if the obliged side should not pay the ensured amounts, the insurance contract would be lawfully suspended.

<sup>32</sup> I. Dogaru, S. Cercel, op. cit., p. 158-172.

<sup>33</sup> I. Dogaru, T. Sâmbrian, P. Drăghici, A. Oroveanu-Hanțiu, S. Ionescu, op. cit., p. 121-123.

Ultimately, the forwarder is granted with: the right to call off the contract<sup>34</sup> and the right to modify certain clauses of the transportation contract<sup>35</sup>.

The reasons for which the forwarder has been granted with this right are economical and juridical: through the enforcement of this right, the forwarder's interests are better satisfied, since he may change the destination, directing the merchandise towards a more profitable market, or may have the interest of stopping the transportation, because the recipient might be dead or bankrupt before the merchandise reaches its destination; if the merchandise should happen to be alienated during transportation, the purchaser, subrogating into all the seller's rights, might have the interest of changing the destination of the merchandise<sup>36</sup>.

The juridical act through which the forwarder modifies, unilaterally, the transportation contract is called a *counter-order*. The forwarder is the one who ought inform the carter about his intention of calling off the transportation contract or of modifying it.

The Trading Code does not stipulate a precise form for the counter order's validity<sup>37</sup>. But practice has instituted the use of elaborating a written document, because this fact would be an advantage in regard of probation.

If the transportation's document would be a negotiable title (a bearer bond or a promissory note), the forwarder who has called off the contract or who has modified it is obliged to handle back to the carter the respective written document in order to avoid a possible ulterior transmission of it, which would enable a third person to claim the respective goods from the carter. According to art. 421 par. (3) Trading Code "if the way bill should be a bearer bond or a promissory note, the right stated in the first part of this article belongs to whom possesses the copy of the way bill that was undersigned by the carter. When receiving the counter-order, the carter is entitled to demand the restitution of the respective copy or, if the destination of the transportable goods should change, to pretend for another way bill".

The orders given by the forwarder are compulsory for the carter, the latter having no possibility to refuse the execution of the counter-order, unless in exceptional situations, namely when its execution would cause troubles in the good functioning of his service.

The correlative obligation exists too: the forwarder is obliged to pay to the carter the done expenses and the direct and immediate damages caused, in other words, to integrally restore the prejudice suffered by the carter due to the execution of the counter-order given by the forwarder.

In the case when the way bill is a promissory note or a bearer bond, the law stipulates that whom transmits the counter-order is obliged to return to the carter, on his demand, the elaborated written document, in order to prevent an ulterior fraudulent transmission of it by the forwarder to a third person who could raise claims from the carter. If by the counter-order the destination initially established should be changed, the carter may require the elaboration of a new transportation document.

If the prime forwarder has previously alienated the way bill and, consequently, he no more owns the right to emit counter orders<sup>38</sup> the counter-order's execution by the carter without requesting the restitution of the transportation document should lead to the engagement of the carter's liability in regard to the recipient or to the gyratory.

If the way bill should be a nominative title, the law does not impose to the carter to request the restitution of the way bill by the forwarder in order to execute the given counter-order because, in this situation it is the forwarder only who could claim the merchandise, until its arrival to the recipient<sup>39</sup>.

---

<sup>34</sup> This cancellation might occur either before the contract's execution has started or during the transportation, that is to say after a partial execution of the contract.

<sup>35</sup> For example, the forwarder's right to designate someone else as recipient.

<sup>36</sup> *Șt. Scurtu*, op. cit., p. 78.

<sup>37</sup> Neither for the validity requirement of the transportation contract, a precise form does not exist.

<sup>38</sup> *Șt. Scurtu*, op. cit., p. 58.

<sup>39</sup> Yet, the restitution of the way bill is advisable, as a precaution taken by the carter, to avoid possible frauds.

### **The forwarder's right to cancel the contract when the transportation would be excessively delayed**

If the transportation would be excessively delayed, the carter is obliged to notify this fact to the forwarder. Art. 420 Trading Code precises: "If, due to an unexpected circumstance or to the *force majeure*, the transportation should be impeached or excessively delayed, the carter would compulsorily notify the forwarder about that on the spot; this latter has the option to cancel the contract, paying only the expenses done by the carter and, if the impeachment should occur during transportation, the carter would still be entitled to his fee, proportionally with the distance crossed. In both cases, the copy of the way bill, as either a bearer bond or a promissory note, undersigned by the carter, would be returned to him".

The Trading Code does not precise the moment when the carter ought notify the forwarder, so it is considered that the carter has this latitude left by the existing customary use. If the transportation could no more be performed, the contract is cancelled, because there is no more interest to maintain a contract which is impossible to be executed.

If the transportation could be executed, but with an "excessive" delay, at the moment he receives the carter's note, the forwarder has two possibilities: either to maintain the contract, accepting its postponed execution, or to declare its cancellation through the unilateral expression of his will.

If the carter could continue the transportation following a different route, with the same expenses and execution term for the contract, he should become obliged to choose this new road and to continue the transportation. If the initial route would require new terms for execution or increased expenses, the carter ought to ask for the forwarder's agreement in order to make the transportation on another itinerary<sup>40</sup>.

At the contract's annulment due to a *force majeure* or to an unexpected situation, the carter is entitled to demand from the forwarder all expenses caused by the transportation's execution. If transportation was partially accomplished, the carter may require its payment in proportion with the road that was fulfilled.

If there is no sides' agreement about the price that the forwarder has to pay to the carter for covering the expenses done for the transport's preparation and, eventually, for the attended portion of the way, it is the court of law which will establish the sum's amount.

The Trading Code rules, by two articles, the forwarder's right to decide upon the fate of the misfitting transportation: arts. 420 and 421.

Though, apparently, the two articles deal with the same juridical situation, between them exists an important difference, concerning the amount of the forwarder ought to grant to the carter.

Art. 421 Trading Code stipulates that, in case he should unilaterally modify the transportation contract, the forwarder would be obliged to pay to the carter the expenses done related to transportation and all the direct and immediate damages<sup>41</sup> issued from the counter-order's execution.

Art. 420 Trading Code precises that the forwarder who cancels the contract due to the transportation's impeachment or delay coming from a fortuitous circumstance or from a *force majeure* is obliged to reimburse the expenses made by the carter for the execution of the contract, when the delay happens before the start of the transportation.

When the impeachment occurs during transportation, the forwarder will also pay the expenses done for the partial execution of the contract, meaning a part of the price that would be proportional to the attended distance.

We also remark that the stipulations of art. 420 Trading Code do constitute an exception, favourable to the carter, from the general principles of law concerning the contractual risks for results' producing obligations. The general principles of law, in the case of results' producing obligations, state that the contract's risks are at the charge of the debtor who could no more fulfil his results' producing obligation.

---

<sup>40</sup> *Șt. Scurtu*, op. cit., p. 54.

<sup>41</sup> Predictable



Thus he could no more require from the other side of the contract the respect of the correlative obligation, and this latter, if the non-execution would be due a fortuitous case, should obtain no indemnifications even if he might have been prejudiced.

To apply these principles to the transportation contract would mean that the forwarder, as the creditor of the deed that has become impossible to execute due to *force majeure*, should suffer the respective damages, without being able to pretend from the carter the transportation of the goods at their destination, but should also not owe to this latter the payment of the price.

As a debtor of the obligation which has become impossible to execute, the carter does assume the risks, in the sense that he loses the equivalent value to which he would have been entitled if the merchandise should have reached its destination.

Art. 420 Trading Code brings to this principle some “equitable corrections”<sup>42</sup>. It precises the forwarder’s obligations in case of annulment of the contract due to a fortuitous cause<sup>43</sup> “the carter is still entitled to the payment of the carrying in proportion of the attended distance”.

When the recipient manifests his will of adhesion to the transportation contract, the forwarder's right of disposition ceases<sup>44</sup>. The fact that the carter requests the handling of merchandises and of the transportation’s document does mean that the recipient has expressed his will of adhesion to the transportation contract.

The recipient may forward his request either when the merchandise has effectively reached its destination or at the moment when it should have reached it. If the forwarder would send to the recipient the duplicate of the way bill, at the moment when the recipient receives it, the forwarder’s right of disposition should cease. From the moment when the recipient adheres to the transportation contract on, he may exert all the rights issued from this contract, as well as to sue for indemnifications, under the condition that he should have to execute all the obligations foreseen into the way bill<sup>45</sup>.

If the recipient would not join the contract, the right issued from the transportation contract should keep belonging to the forwarder, even if the merchandise would have reached its destination.

Yet, there is a period of time when the owner of the right of disposition over the merchandise is not certain. It lies between the moment when the goods effectively arrive to their destination and the one when the recipient effectively accepts the contract. During this period, the goods remain at the forwarder’s disposition, or either the first between the forwarder and the recipient who would give an indication to the carter should gain priority<sup>46</sup>.

## **BIBLIOGRAPHY:**

1. Căpățână, O., Stancu, Gh., *Dreptul transporturilor. Partea generală*, Editura Lumina Lex, București, 2000;
2. Călin, A., *Dreptul transporturilor*, Ed. Evrika, Brăila, 1999;
3. Cotuțiu, A., Sabău, G.V., *Dreptul transporturilor*, Ed. All Beck, București, 2005;
4. Cristoforeanu, E., *Despre contractul de transport*, Cartea I, Tipografia “Curierul judiciar” S.A., București, 1925;
5. Cristoforeanu, E., *Despre contractul de transport*, Cartea II. Transportul de mărfuri pe căile ferate, Atelierele “Curierul judiciar” S.A., București, 1927;
6. Dogaru I., Cercel S., *Drept civil. Partea generală*, Editura C.H. Beck, Bucuresti, 2007;
7. Dogaru I. (coordinator), *Drept civil. Contractele speciale*, Ed. All Beck, București, 2004;
8. Ion Dogaru, Nicolae Popa, Dan Claudiu Dănișor, Sevastian Cercel (coordinators), *Bazele dreptului civil, vol. I, Teoria generală*, Editura C. H. Beck, București, 2008;

---

<sup>42</sup> Șt. Scurtu, op. cit., p. 62- 64.

<sup>43</sup> O.Căpățână, op. cit., p.115-116.

<sup>44</sup> Trading Code, arts. 421 par. (2) and 432.

<sup>45</sup> Trading Code, art. 433

<sup>46</sup> Șt. Scurtu, op. cit., p. 74.

9. Ion Dogaru, Pompil Drăghici (coordinators), *Bazele dreptului civil, vol. III, Teoria generală a obligațiilor*, Editura C. H. Beck, București, 2009;
10. Ion Dogaru, Gabriel Edmond Olteanu, Lucian Bernd Săuleanu (coordinators), *Bazele dreptului civil, vol. IV, Contracte speciale*, Editura C. H. Beck, București, 2009;
11. Ion Dogaru, Vasile Stănescu, Maria Marieta Soreață (coordinators), *Bazele dreptului civil, vol. V, Succesiunile*, Editura C. H. Beck, București, 2009;
12. Dogaru I, Sâmbrian T., Drăghici P., Oroveanu-Hanțiu, A., Ionescu, S., *Drept civil român. Teoria generală a obligațiilor*, vol. III, Ed. Europa, Craiova, 1997;
13. Dogaru I. (coordinator), *Drept civil. Idei producătoare de efecte juridice*, Ed. All Beck, București, 2002;
14. Deak, Fr., Cărpenaru, St., *Contracte civile și comerciale*, Ed. Lumina Lex, București, 1993;
15. Filip, Gh., Roditis, C., Filip, L., *Dreptul transporturilor*, Casa de Editură și Presă „Șansa” SRL, București, 1998;
16. Făiniși, F., *Dreptul transporturilor*, Ed. Pinguin Book, București, 2006;
17. Piperea, Gh., *Dreptul transporturilor*, Editura All Beck, București, 2003;
18. Scurtu, Șt., *Contracte de transport de mărfuri în trafic intern și internațional*, Ed. Universitaria, Craiova, 2003;
19. Stanciu, C., *Dreptul transporturilor, Note de curs*, Editura Universitaria, Craiova, 2006;
20. Stanciu, C., *Dreptul transporturilor*, Ed. C.H.Beck, Bucuresti, 2008;