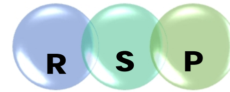

ORIGINAL PAPER

The Theory and Legal Assessements of the Shipping Contract: Enabling the Optimal Solution in High Complexity Shipments

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Abstract
Shipping activity is so widespread and complex that it factually includes transport of goods. It is an absolutely necessary activity which targets movement of goods, through specific operations, in the most inexpensive conditions for the client. Shipping Contract is, in turn, a comprehensive legal structure that involves specific closing conditions, effects and responsibility. Although qualified as a type of commission contract, Shipping Contract is not reducible to it, having its own legal characteristics. Also, Shipping Contract must not be confused with Transport Agreement. The obligation undertaken by the commissioner is to perform legal acts; consequently, it is an obligation *to do*, the consigner being a service provider.

Keywords: *Shipping Contract, consigner, principal, commissioner*

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General aspects of the Shipping Contract

If we analyze transportation of goods, we see that we are dealing, on the one hand, with a broad legal structure and, on the other hand, with a complex practical operation. Transport activity involves not only moving goods from one place to another, from one city to another, but also requires a number of related activities, such as: cargo loading operations, unloading them, cargo insurance, import or export formalities, phytosanitary and port, cargo handling, storing them, etc. No doubt that the main role, the center of these operations is the Forward freight agreement, but precisely in order to streamline it, by streamlining the movement of goods, a new structure of legal was born, with auxiliary role, the Shipping Contract of goods, that targets to intercede the link between client and carrier and to ensure the "legal cloak" for all those transport related operations. The necessity of this operation is that it is the one that facilitates the movement of goods between producers and consumers and that it responds to acute problems of transport with a high degree of complexity, such as international traffic and multimodal transports (Piperea, 2013: 63-65).

Different transport means between two geographic areas, the emergence of a growing number of international regulations in matters of development of imports and exports across different states, the need to provide operations and complex related services to achieve transport of goods in good conditions, have increased the complexity of products' manufacturing on the market. The volume of specific knowledge exceeded, in general, the general trade knowledge and led to the division of labor in the trade sector, defending and developing a new branch with a particular professional singularity: international expedition.

Specifics and varying degrees of complexity for each branch of transport generated the development of specialized shipping companies that deal with the organization of shipments (Budică, Bocean, Popescu, 2005: 334). Therefore, the scope of issues and activities ensured by the shipment contract conclusion is wide: it provides information on means of transport to be used for each type of cargo, on the duration of transportation or the best route to follow; it ensures the monitoring of goods circuit during transport, it deals with the fulfillment of various formalities, cargo handling, loading and unloading operations (Stănescu, 2004: 134-138). At the same time, using the consigner may lead to lower prices, especially when talking of transporting small amounts of goods, having the advantage that he has many customers with the same type of cargo and can use a means of transportation for more customers, which will lead to sharing the costs of transport between them (Stanciu, 2008: 183-185). In practice, in international expedition, sometimes, the first consigner addresses in turn another with relationships in the destination country, and the later a third who knows the local ramifications of transport terminals.

Aspects of the terminology, definition and legal characteristics of the Shipping Contract

Regarding the name used for this type of contract, before it could receive legal regulations in the Civil Code, we note that most authors opted for the collocation *forward freight agreement*. Another version that has been used for this contract, taken from the French doctrine, is that of *commission contract for transport*. In the current regulation, the one from the Romanian Civil Code, the parties of this contract are *the principal and*

the consignor. The principal is the person on whose behalf the Transport Agreement shall be concluded and shall be performed its ancillary operations and the consignor is the person who undertakes to conclude on his own behalf and on behalf of the principal, the transport agreement. The doctrine notes that even regarding this contract the Civil Code makes modifications at terminology level as regards the Contracting Parties. Thus, *the customer* becomes, under the current regulations, *principal*; and *the expeditionary* becomes *consignor* (Baias, Chelaru, Constantinovici, Macovei, 2012: 2065). The Shipping contract is, according to art. 2064 Romanian Civil Code, the contract concluded between a party – principal and another party – consignor, by which the consignor undertakes to conclude, on his behalf and on behalf of the principal, a transport agreement and to fulfill the ancillary operations of the transport, for remuneration called commission.

The shipping contract of goods is a *nominated* contract. If prior to the adoption of Romanian Civil Code, there is no express legal regulation for the shipping contract, the legal framework is made up of two sets of rules: the legal provisions relating to commission and standardized norms by treaty, which in time have become commercial usage, currently the shipping contract has a specific regulation in the Romanian Civil Code, through art. 2064-2071. Shipping contract may be characterized as: a *synallagmatic*, *consensual*, *onerous*, *commutative* contract and a *service provision*. It is also an *autonomous* contract because, on the one hand, within the limits imposed by express instructions of the principal, the consignor has full freedom regarding the means, route and procedure to be followed in the handling and transport of goods, and on the other hand, he is autonomous in relation with the transport agreement or agreements he concludes, because the consigner shall contract the transport *on his behalf* (Dogaru, Drăghici, 2014: 64). Basically, it is a contract concluded *intuitu personae*, because the consignor enjoys, usually, the confidence of his client (Stanciu, 2008: 186-187).

Elements on the legal nature and specificity of the shipping contract

Compared to general features common to those of the commission contract, in transport sector the commission is underlined by the fact that the parties know each other: the carrier knows the name of the principal whose goods it takes for transport, but also the name of the recipient to whom he is to deliver the goods, in such operations there is no interest to keep secret the identity of those concerned, as it happens, for example, with bank commission. Also characteristic for the transport commission is that here arises an imperfect representation: the commissioner remains contractually bound all the time, unlike the mandatory who withdraws as soon as he fulfilled the operation for which he was mandated (Deak, 2002: 260). Also as a specific element of the shipping contract is worth mentioning that, one party, the consignor, carries out his activity on a professional basis, undertaking the obligation to conclude on his behalf and on behalf of the other party, a transport agreement and to perform accessories operations. Therefore, the consignor is a professional and must meet the legal requirements in this regard, i.e. the provisions of art. 3 paragraph 2 and 3 Civil Code. In correlation with the consignor's obligation, the principal has the obligation to pay the consignor a sum of money for his services. If we refer to the mandate, from the idea that it represents the genus in relation to the species – commission, or consignment – we note that remuneration is an essential feature of a goods' transport organizing operation, the mandate being both a gratuitous mandate contract and a gratuitous one. Shipment of goods is a brokerage operation, similar to commission (Căpăţînă, Stancu, 2000: 251).

Article 2043 Civil Code provides: „commission contract is the mandate that covers the sale or purchase of goods or services on the principal's account and on behalf of the commissioner, acting professionally for a remuneration called commission", and art. 2064 Civil Code: "shipping contract is a type of commission contract". From the provisions of the two articles result that, in fact, the commissioner is an intermediary between the principal and third persons, acting in his own name in the contract he concluded with third parties. So, unlike a mandatory who concludes a legal act for and on behalf of the principal, the commissioner is bound directly to the person who contracted with, being a mandatory without representation (Piperea, 2013: 67-68). In the current regulation there is a situation, considered exception to the rule, where, if he expressly assumes, the consignor is required to perform himself the transport of goods subject to the shipping contract. So if in the previous regulation the carrier could be intermediary/expeditionary, in the current regulation of the consignor/expeditionary can assume the quality of carrier, as an exception, becoming consignor-carrier. However, the transport contract shall not be confused with the shipping contract and shall not affect the autonomy they have in relation to one another. Similarly, although a type of commission contract, the shipping contract is not reducible to it, having its own legal characteristics. The obligation assumed by the commissioner is an obligation to perform legal acts; consequently, it is an obligation *to do*, and not an obligation *to give*, the consignor being a service provider.

Legal Regulations

Currently shipping contract has an express regulation in the Romanian Civil Code, through art. 2064-2071. Given that this contract is defined by law as being "a type of commission contract", the regulation shall be completed by art. 2043-2053 Civil Code, i.e. legal texts regulating commission contract and by art. 2039-2042, articles dealing with the mandate without representation and which in turn are common law for the commission contract. Also as common law shall be applied, where appropriate, the rules on the trust mandate which complement legal regulations of non regulatory mandate, i.e. art. 2009-2038 Civil Code (Dogaru, Olteanu, Săuleanu, 2009: 746-750).

Conclusion of the Shipping Contract

The contracting parties of the shipping contract are the principal and the consignor. Although in terms of terminology, our Code's options for formulas such as *principal and consignor* as parties of the shipping contract is one with a clear justification: the name principal in the shipping contract is taken from the commission contract, the shipment being, as legal nature, a type of this kind of contract and the option for the term consignor is explained by the fact that this contracting party is going to conclude a transport agreement, on his behalf, agreement where he shall take the legal position of consignor, and we think it could create confusion when it comes to the liability of the consignor: liability that may arise, on the one hand, from the shipping contract, or on the other hand, from the transport agreement, separate contracts. The term Expeditionary, imposed by practice, was a specific one without the possibility of creating confusion in terminology and with no potential to induce the idea that between the transport agreement of goods and the shipping contract might exist overlaps or accessoriality, the two being independent contracts with distinct legal regimes (Scurtu, 2001: 25-40). However, references in various texts of law, other than those governing transport or expedition, to the concept of consignor, may arise the question: what consignor?, the one from the

contract agreement or the one from the shipping contract? Background conditions for concluding a shipping contract are general valid terms of any agreement: the capacity to contract, valid consent of the party who undertakes, a specific objects and a lawful cause. Being a consensual contract, the written form of the shipping contract is not required as an *ad validitatem* condition.

Specificity notes relating to background conditions are only related to the consent issue, i.e. usually the shipping contract is concluded in the form of standard contracts, which include general business conditions imposed by the consignor. So in this case, we talk about an adhesion contract, the agreement being achieved simply with the customer accepting the conditions (Piperea, 2013: 68). Order made by the client/principal is sufficient to perform the contract.

Shipping Contract Effects

Shipping contract is a mutually binding contract and it shall give rise to reciprocal and interdependent obligations borne by the principal and by the consignor. Shipping contract effects are represented by all these obligations and rights of the parties. With the conclusion of the shipping contract, the principal (customer) undertakes a series of obligations to the commissioner. We mention those expressly arising from regulations in the Civil Code on this matter: *Principal's obligation to pay the price for the expeditionary services*. This price is called commission and is settled through negotiations between the Contracting Parties or, in some instances, it is previously set by the consignor, shipping contract sometimes having the character of an adhesion contract; *Principal's obligations to pay for the ancillary services and expenses incurred to achieve these benefits* (Moțiu, 2011: 263-266). According to art. 2069 Civil Code paragraph 1, the consignor is entitled to the commission provided for in the contract and, in absence, as established by professional charges or usages, and if none, they shall be established by the court depending on the difficulty of the operation and the consignor's endeavors. Interpreting *per a contrario,* if the consignor is entitled to commission, the principal has the obligation to pay commission. Paragraph 2 of the same article states explicitly: the value of ancillary services and expenses are reimbursed by the principal based on invoices or other documents proving their performance. There is a legally stipulated possibility for the parties to predefine a lump sum for the commission, ancillary services and expenses that are carried out.

The contracting parties may give the desired content to the legal act, within the limits imposed by law, and thus there may be other obligations for the principal. However, for the consignor to perform the work undertaken, there are other obligations of the principal, which, although not covered by the Code may be considered implicit for the realization of the transport activity. These are: principal's obligation to place the consignor in possession of the goods and the obligation to hand to the consignor all necessary transport documents, to give full instructions, if so determined by the contract and to ensure accuracy and adequacy of the data submitted to the consignor in order to carry out the transport (Stanciu, 2006: 147-154). The shipping contract comprises a number of rights for the principal. Two of them benefit of legal regulation: the principal's right to unilaterally terminate the shipping contract - revocation (art. 2065 Civil Code) and the principal's right to oblige the consignor to be available to execute the counterorder in the transport agreement/agreements signed by the consignor (art. 2066 Civil Code). According to art. 1270 Civil Code, the concluded valid contract has the force of law between the contracting parties. From the recognized value of the contract as "law of

parties" two important rules arise: contracts' irrevocability and the principle of relativity of contract's effects. The rule on contracts irrevocability expresses the idea that a contract can be revoked only by mutual consents. This is the rule underlined by the provisions of art. 1270 paragraph 2 Civil Code: *the contract is amended or terminated only by agreement of the parties or in cases authorized by law*. So, the rule is that a contract may not be revoked except by agreement of the parties, and the exception is that a contract may be terminated by the will of a single party, but only for cases authorized by law (Stănciulescu, 2012: 496-498). The unilateral termination is possible under art. 1321 Civil Code which establishes the grounds for termination of contract and unilateral termination. Thus, under common law, unilateral termination is possible and revocation from the shipping contract is a unilateral termination by the principal which has as effect the termination of the contract concluded with the consigner. Art. 2065 Civil Code provides that *by the conclusion of the shipping contract, the principal may revoke the shipping order, paying the consignor the expenses and a compensation for the endeavors conducted until the revocation of the shipping order*.

From the legal regulation results the following: the principal is the holder of the right to unilaterally terminate the shipping contract; the deadline within which the right to unilaterally terminate the shipping contract can be exercised is by the conclusion of the shipping contract; the principal revoking a shipping contract supports the effects of such an exercise: pays the consignor the expenses and a compensation for the endeavors conducted by the communication of the termination (Atanasiu, 2011: 756-758). The legal act through which the consignor (as party of the shipping contract) amends, unilaterally, the shipping contract is called *counterorder*. Regarding the content of the right to counterorder, there are two articles of the law that establish it: art. 1970 Civil Code, which refers in general terms to what the consignor may amend and art. 1973 Civil Code, detailing those powers by concrete references to issues that can be amended. Thus, according to Art. 1970 paragraph1 Civil Code, the consignor may suspend the shipment and require: restitution of goods or handing them to a person other than the one mentioned in the transport document or may dispose of the goods as he see fit. According to art. 1973 paragraph 1 Civil Code, the consignor's right to further disposal gives him the following possibilities: to withdraw the goods that were to be transported before departure, to stop the goods during transport, postpone handing the goods to the consignee, to order the return of the goods to their departure place, to change the consignee, to change their destination or have another modification of the transport performance conditions. However, the sender cannot give a further disposal having as effect the division of transport, unless special law provides otherwise. Art. 1970 Civil Code states that the consignor that gives a counterorder shall pay the carrier *expenses and damages* occurred as immediate consequence of this counterorder, and art. 1973 paragraph 2 Civil Code details: consignor who gave a further disposal is required to pay the carrier, according to the modification made: the price of transport part performed, fees due by executing the further disposal, costs caused by implementing the further disposal and compensation for any damage suffered as a result of the counterorder performance. Art. 2066 Civil Code states that "starting with shipping contract conclusion, the consignor is obliged to exercise, at the principal's request, the right to counterorder applicable to the shipping contract". From the legal regulation results the following: the holder of the right to counterorder remains the consignor, as party in the shipping contract; the principal is entitled only to oblige the consignor to be at his disposal regarding the execution of the counterorder, right which shall not be confused with the right to counterorder - the prerogative of the transport

contract and not of the shipping contract; such entitlement coincide not with the time of conclusion of the shipping contract, but with the time of conclusion of the transport contract, to this moment the principal having another right - his right to unilaterally terminate the shipping contract - revocation made under art. 2065 Romanian Civil Code. As stated, in the current legislation there is a situation considered exception to the rule, where if expressly assumes, the consignor is obliged to perform himself the transport of goods stipulated in the shipping contract. Therefore, the consignor may assume the quality of carrier, as an exception, becoming shipper-carrier. In this case, the consignor in the shipping contract being also carrier shall have all rights and obligations of the carrier, including the one to execute the counterorder. Exercising the right to counterorder shall be made under art. 2048 Civil Code concerning the obligation to respect the principal's instructions. Thus, according to legal regulations the commissioner – consignor in shipping contracts – *is obliged to observe the express instructions received from the principal*. Carrier's obligation in the transport contract is an obligation *of result* i.e. to hand the goods to the consignee. This obligation is similar to that of the consignor's, in the shipping contract, he also undertakes and obligation *of result*, and not one *of diligence*: the obligation that the goods shall arrive at destination in the best conditions. Although at first glance the consignor's obligation seems more one *of diligence,* than one *of result,* the reason for which the principal (customer) hires a consignor is not only to relieve himself from a number of formalities, but especially to be certain that the cargo shall arrive at destination in good conditions (Căpăţînă, Stancu, 2000: 268). For a presentation outlining consignor's obligations specificity in the shipping contract, Civil Code regulates in art. 2064, 2066, 2067, 2069, his main obligations: the obligation to conclude a transport contract and to perform ancillary operations; the obligation to exercise counterorder; consignor's obligation to comply with the instructions of the principal in choosing the route, means and modalities of transport, and if there are no such instructions, to act in the interests of the principal; the obligation to ensure goods; the obligation to make sure the goods reach their destination; the obligation to give the principal the prizes, bonuses and reductions of tariffs, obtained by the consignor (Baias, 2012: 2067). The main duty of the consignor is to organize the transport without carrying out himself the movement of the goods. This obligation, to conclude a transport contract is considered the characteristic obligation of the shipping contract and it should not be confused with the actual transport. Doctrine (Baias, 2012: 2065) notes that the obligation to perform ancillary operations, although it is mentioned in the legal regulation of shipping contract, it does not benefit from a legislation to define and to establish its content. Consignor's performance of activities related to the organization of transport we can thus assume that implies activities such as: storing goods, customs declarations, inspection of goods, enforcement of dispositions on the collection of amounts due to the principal, etc.

Consignor may have a number of other obligations to his client: the consignor must have the structures, equipment and resources necessary to carry out the obligation that he undertook, he must provide to his client the necessary consultancy for organizing the requested transport of goods, he may also be obliged to facilitate his client to cash out the value of the goods to be delivered to the consignee, the consignor may also be required to perform the export and import operations based on a special regime document - "provision of transport and customs clearance" (Piperea, 2013: 69-73), taking the necessary measures to preserve judicial or arbitral actions, valuing the customer's entitlements against third parties and registration required. Civil Code regulates, besides obligations and rights considered to be characteristic of the shipping contract. Thus, in art.

2069 par. 1 and 2 are stipulated two right of the consignor as resulting from this contract: *consignor's right to commission and to recover the amounts he advanced in order to achieve ancillary services.*

The consignor has, under the legal regulation, the right to the commission the Parties have established through contract. If the parties have not set a price in the contract, this shall not affect the validity of the contract, the commission is an essential element, but not regarding the validity of the shipping contract. The value of the ancillary services and expenses is reimbursed by the principal based on the invoices or other documents proving their performance. There is also the possibility that the parties to predefine a lump sum for the commission, ancillary services and expenses to be carried out.

Consignor's Liability

Consignor's liability is different from the carrier's liability, the consignor being liable to the principal for his own deed, but also for the carrier because it is he who organizes the transport. Furthermore, the consignor is also responsible for the fact of the person who substituted him. Also, he shall be personally liable towards third parties with whom he contracted in order to organize the transport. Regarding shipping contract, about liability, the provisions of art. 2068 Civil Code are applicable, which governs a segment of consignor's accountability, responsibility for transport delay, destruction, loss, theft or corruption of goods. According to legal regulations, the consignor is responsible for transport delay, destruction, loss, theft or corruption of goods in case of negligence in the performance of the shipment, in particular with regard to the handling and storage of goods, choosing the carrier or using of intermediary consignors. However, when, without reasonable grounds, he deviates from the transport means indicated by the principal, the consignor is responsible for the transport delay, destruction, loss, theft or corruption of goods caused by unforeseeable circumstances, unless he proves that this would have happened even if he did as instructed. In a general context, the liability of the consignor is a broader one, structured on two levels: the consignor's liability for his own deed and the consignor's vicarious liability.

Consignor's Liability for His Own Deed

Consignor's liability for his own deed results from common law rules. Thus, consignor's liability is engaged if: (a) he committed an unlawful act, (b) the act was committed with guilt, (c) damage was caused; (d) there is a causal link between the damage caused and the consignor's deed. The consignor is liable not only for failure or improper fulfillment of obligations resulting from the shipping contract, but also for failing to fulfill tasks not specifically provided in the shipping contract, but arising from the organization of the transport. Consignor's guilt may result from situations such as: he did not provide complete information to the principal (customer); he agreed in the contract concluded with the carrier a price too expensive compared to the financial strength of its customer or he chose an insolvent and uninsured carrier; he disobeyed the instructions of its client (Stănescu, 2015: 74-76).

Consignor's vicarious liability

Such type of liability may arise in situations like: (a) the consignor is responsible to the customer if the carrier's obligations hired by him were not executed or defective; (b) the consignor has substituted a third party in performing his obligations and shall be

liable to the customer (principal) for damages suffered by him (client) due to the improper activity of the third party that replaced him.

Consignor's liability for the carrier's deeds

The legal regulation of the Civil Code regarding consignor's liability is especially related to his liability for the carrier's deeds, than to his liability for his own acts, considered a major contractual liability without specific notes. Thus, according to legal regulation, the consignor is held liable for the carrier in the following situations: when the consignor undertakes to hand the goods at destination; when the consignor proves negligence in the performance of the expedition, especially regarding the handling and storage of the goods, the choice of carrier or intermediary consignors; when the consignor does not observe the principal's indications regarding the transport. The fact that the consignor undertakes responsibility for the actions of the carrier also results from the enumeration of the facts he is liable for, facts related to the shipping contract and failure to comply with the obligations assumed by the carrier: transport delay, destruction, loss, theft or corruption of goods.

Consignor's failure to observe principal's indications on the means of transport is also a form of negligence in the performance of shipping and in this case, the consignor is liable for the fortuitous event, unless he proves that this would have happened even if he did as instructed.

Conclusions

Freight forwarding activity, is now so widespread and complex that, factually, includes transportation of goods. The consigner is an "architect of transport" in both domestic and international traffic, his activity starting before the completion of the transaction, because he must submit to the exporter data on costs related to transport, so that he can conclude the transaction which shall bring the lowest costs, and ends at destination. It is an absolutely necessary activity, which aims the movement of goods in the most inexpensive conditions for the client.

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