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ORIGINAL PAPER

Analysis of the general regulations on cases in which the carrier may limit, exclude or exonerate liability in the contract for the carriage of goods

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Abstract:
The Romanian Civil Code expressly stipulates that the carrier cannot exclude or limit its liability except in the cases provided by special laws or its own provisions.
Regarding the cases of limitation of the carrier's liability, Article 1989 of the Civil Code establishes a general rule: compensation cannot exceed the amount set by special law. Concerning the exclusion of liability, Article 1991 of the Civil Code enumerates several situations in which the liability of the goods carrier for loss, alteration, or damage is excluded: acts related to the loading or unloading of the goods, if carried out by the sender or the recipient; lack or defectiveness of packaging, if it was not observable from the exterior by the carrier; shipment under an inappropriate, inaccurate, or incomplete designation of goods that are excluded from transport or permitted only under certain conditions; natural events inherent in transport in open vehicles; the nature of the transported goods, if it exposes them to loss or deterioration through breakage, cracking, spontaneous internal alteration, and others.
The current Civil Code, through Article 1990, provides for cases where the carrier's liability is aggravated: if the carrier acted with intent or gross negligence, they will be liable for damages without benefiting from the limitations or exemption from liability.
The carrier's civil liability is engaged when the general conditions of liability are cumulatively met. The causes that exclude the carrier's liability may refer to: the unlawful nature of the act, the causal link, or the fault of the author, or equally, both causality and fault. The causes that remove the unlawful nature of the harmful act in the transport contract include: necessity, the fulfilment of a legal duty, or a lawful order given by a competent authority, and the victim's consent. The causes that exclude the existence of a causal link include: force majeure, fortuitous events, the act of a third party, and the act of the victim.

Keywords: *exoneration from liability, aggravation of liability, carrier.*

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Analysis of the general regulations on cases in which the carrier may limit, exclude or exonerate liability in the contract for the carriage of goods

General analysis of the provisions of the Romanian Civil Code on the contract for the carriage of goods concerning the exonerating circumstances applicable to the carrier. Such an analysis, intended to provide an overview of the grounds for exemption from liability available to the carrier, must proceed on two levels: first, *the exonerating circumstances laid down by statute* which establish situations of exemption for the carrier; and second, *the situations in which the carrier may contractually exclude or limit liability* in the contract for the carriage of goods, namely the non-liability clauses that are permitted for the carrier under the current legislative framework.

Exonerating circumstances regulated by statute in the field of the contract for the carriage of goods. In transport law, the grounds for exemption from liability are not addressed exhaustively, in the sense that the Civil Code provisions governing the contract for the carriage of goods deal with the "exclusion of liability" of the carrier (Romanian Civil Code: Article 1991), but do not encompass all situations that release the carrier from liability. The Code itself, through its own clarifications, acknowledges this by referring, for the purpose of supplementing its rules in this area, to special legislation and to exonerating circumstances also provided for in other Civil Code provisions concerning the contract for the carriage of goods. In support of the foregoing, Article 1991(1)(i) of the Civil Code stipulates that the carrier is not liable where the loss or deterioration occurred due to any other circumstance provided for by special legislation than those expressly mentioned in the Code, and Articles 1959 and 1988 of the Civil Code likewise lay down situations in which the carrier is exempt from liability.

If we take stock of the legal norms governing the carrier's exemption from liability as provided in the Romanian Civil Code, we observe that the articles expressly regulating it are: Article 1991 of the Civil Code, Article 1959 (2) of the Civil Code and Article 1988 (2) of the Civil Code. To these are added, by way of exclusion, the situations in which liability lies with the consignor or the consignee, where the latter has adhered to (acceded to) the contract of carriage. Some of these situations are also listed among the cases enumerated in Article 1991 of the Civil Code (loss or deterioration resulting from lack of, or defective, packaging – Article 1966 of the Civil Code; inaccurate or incomplete declarations, omissions in the transport documents, the inherent vice of the goods which led to their deterioration – Article 1961 (3) of the Civil Code), while others are not enumerated in the provisions of that article: the rules on countermand, such as the provisions of Article 1973 (2) of the Civil Code, which state that a consignor who has issued a countermand is obliged to pay the carrier, as the case may be, the price for the part of the carriage performed, the fees due and the expenses caused by complying with the subsequent instruction, and to compensate the carrier for any loss suffered; the provisions of Article 1996 of the Civil Code concerning the carriage of dangerous goods, establishing that a consignor who fails to inform the carrier in advance of the dangerous nature of the goods is liable to compensate the carrier for any damage caused by them and to cover the related costs and risks; the provisions of Article 1997 of the Civil Code regulating the consignor's liability in the carriage of goods, stipulating that the consignor must compensate the carrier for damage caused by the nature or inherent vice of the goods.

Accordingly, the article devoted to the exclusion of the carrier's liability, namely Article 1991 of the Civil Code, provides that the carrier is not liable if the total or partial loss or the deterioration/damage occurred due to:

a) acts related to the loading or unloading of the goods, where such operation was carried out by the consignor or the consignee;

b) the absence of, or defective, packaging, where such defect could not be observed upon receipt of the goods for carriage from their outward appearance;

c) consignments under an inappropriate, inaccurate or incomplete description of goods excluded from carriage or admitted to carriage only under certain conditions, as well as the consignor's failure to comply with the safety measures prescribed for the latter;

d) natural events inherent in carriage in open vehicles, where, under special legislation or the contract, the goods must be carried in that manner;

e) the nature of the goods carried, where this exposes them to loss or damage by crumbling, breaking, rusting, spontaneous internal alteration and the like;

f) loss of weight, regardless of the distance travelled, where, and to the extent that, the goods carried are of a kind which by their nature normally suffer such loss solely by reason of carriage;

g) the inherent risks of carrying live animals;

h) the fact that the consignor's servant or agent accompanying the goods during carriage failed to take the measures necessary to ensure their preservation;

i) any other circumstance provided for by special legislation.

If it is established that the loss, damage or deterioration could have arisen from one of these causes, it is presumed that the damage was caused by that cause. Accordingly, for the exonerating cause to operate, the occurrence of that cause and the existence of damage must be proven. It is not necessary to prove the specific causal link—namely, that the concrete damage was the result of the invoked exonerating cause—because there operates a rebuttable presumption that the damage was produced by that cause.

The same article, at paragraph (3) of the Civil Code, provides that the carrier is exonerated from liability if it proves that the total or partial loss or the deterioration or damage occurred due to: an act committed intentionally or negligently by the consignor or the consignee, or to the instructions given by either of them; force majeure; or the act of a third party for whom the carrier is not liable. Furthermore, Article 1959(2) of the Civil Code, concerning delay, provides that the carrier's liability is excluded if the damage resulted from a fortuitous event or from force majeure.

The Civil Code regulation in this area has been criticised in the legal literature not only because it does not cover the full spectrum of facts leading to exoneration from liability, but also because it is a scattered regulation across different sections on the contract of carriage and because the references it contains in Article 1991 of the Civil Code concern only loss and damage, not delay in carriage. Thus, it has been argued in the literature (Baias, Chelaru, Constantinovici, Macovei, 2012: 1999–2000) that, in fact, the regulation in this article is illustrative in nature and merely groups together exonerating causes that may arise in the event of loss or damage to the goods carried; the statutory text does not constitute a comprehensive enumeration of such causes. Accordingly, there are, in the view of the literature (Cotuțiu, 2015: 145–155), two types of causes that lead to exoneration from liability: causes intrinsic to the contract of carriage, i.e., connected to its performance, and causes extrinsic to the contract, i.e., unconnected with the manner in which the carrier performs the obligations assumed under that contract.

Within the logic of the regulation, the causes intrinsic to the contract of carriage may themselves be distinguished by reference to the author (acts related to loading or unloading the goods, where such operation was carried out by the consignor or the consignee; lack of, or defective, packaging; inaccurate or incomplete declaration of goods

that are excluded from carriage; the consignor's failure to comply with the safety measures prescribed for such goods; instructions given by the consignor or the consignee; other acts committed intentionally by the consignor or the consignee) and by reference to the nature of the goods, which entails risks in carriage (goods carried in open vehicles where, under special legislation or the contract, the goods must be carried in that manner; goods which, by their nature, are exposed to loss or damage by crumbling, breakage, rusting, spontaneous internal alteration and the like; goods which, by their nature, normally suffer such loss solely by reason of carriage; the inherent risk of transporting live animals).

The causes extrinsic to the contract of carriage, mentioned in the Code, are force majeure and the act of a third party for whom the carrier is not liable.

Accordingly, in order to achieve a comprehensive approach, the regulations of civil law—being the common law for transport law—must be taken into account, and it must be analysed whether those exonerating causes "operate" with respect to the contract of carriage of goods. The carrier's liability regime is dual in nature, consisting of a mix of contractual liability and non-contractual (tort/delict) civil liability, given that the carrier has both the status of a professional and that of a party to the contract of carriage of goods. Thus, in civil law, the identification of exonerating causes is made by reference to the conditions required for liability to arise and the manner in which those conditions are affected: the existence of damage, a wrongful (unlawful) act, a causal link between the wrongful act and the damage, and the fault of the author of the wrongful act. From this analytical perspective, exonerating causes may affect: the unlawfulness of the act, the causal link, or the fault of the author—or, equally, both the causal link and fault.

Under the common law of civil liability, the causes that remove the unlawful character of the harmful act are: self-defence, necessity, performance of a legal duty or a lawful order issued by a competent authority, the victim's consent, and the exercise of a subjective right (Stătescu, Bîrsan, 1994: 183).

As regards the contract of carriage, the relevant causes may concern: necessity, performance of a legal duty or a lawful order issued by a competent authority, and the victim's consent.

Under the common law of civil liability, the causes that exclude the existence of the causal link—also referred to in the legal literature as "exonerating causes of civil liability"—are: force majeure, fortuitous event, the act of a third party, and the act of the victim. These likewise apply to the exoneration of the carrier, a party to the contract of carriage of goods.

Force majeure and fortuitous event. Under the previous regulation—prior to the entry into force of the current Civil Code—the notions of *force majeure* and *fortuitous event* were not defined by statutory texts. The current Civil Code determines their content through the provisions of Article 1351. According to these legal provisions, unless the law provides otherwise or the parties agree to the contrary, liability is excluded where the damage is caused by force majeure or by a fortuitous event. Thus, the rationale for regulating and treating the two notions together lies in the fact that their intervention produces the same effect, while what distinguishes them is the mechanism by which the two events occur.

The current Civil Code regulates force majeure and the fortuitous event in the context of civil liability, stipulating—as noted—that, in the absence of other legal or contractual provisions, these events exclude liability if the damage was caused by them. The definition of force majeure establishes that it refers to any event that is external,

unforeseeable, absolutely irresistible and unavoidable, whereas the fortuitous event is an event that is unforeseeable and could not be prevented by the person who would otherwise be liable. A fortuitous event is one that cannot be foreseen or prevented by the person who would have been called upon to answer if the event had not occurred.

The Code also establishes a relationship between these two events, which share the common effect of excluding liability: if the debtor is exonerated from contractual liability for a fortuitous event, the debtor is likewise exonerated in the case of force majeure, pursuant to Article 1351(4).

The structure of the definitions of these two notions sets out the elements that define them, as well as their common coordinates and distinguishing features.

Accordingly, the conditions that must be met in order to invoke force majeure as a ground for excluding liability are:

1. *Externality of the event* in relation to the activity of the person who would be liable—i.e., an event unconnected with that activity (and, for liability for things or animals, unconnected with the thing or animal in question). Examples include large-scale natural disasters (major earthquakes, tornadoes, large-scale floods), extraordinary social events (wars, revolutions, riots) or epidemics such as the COVID-19 pandemic.

2. *Unforeseeability of the event*, which, according to the literature (Pop, Popa, Vidu, 2012: 440–445), has a dual valence: unforeseeability of the occurrence of the event and unforeseeability of its consequences. In Romanian usage, synonyms of "imprevizibil" include sudden, unexpected, unanticipated, unforeseen, abrupt; assessment must be made by reference to what is foreseeable and normal. Thus, the event must fall outside normality or regular frequency; it must be extraordinary from this perspective. Hence, summer cloudbursts, landslides characteristic of certain areas, or floods that recur in particular regions are treated as fortuitous events—they could not be foreseen by a person exercising ordinary, customary diligence—but not as force majeure, because in the general state of human knowledge they have a repetitive character in the relevant area.

In connection with unforeseeability and normality, the legal literature has proposed, by analogy, resort to Article 1480 of the Civil Code to determine the extent of the diligence incumbent on the debtor at the time of the event—the reference criterion being that of the diligent owner. Article 1480 of the Civil Code sets the diligence required in the performance of obligations. It provides that a debtor must act with care as if a good owner in managing his or her own property. This standard may be modified only by law or by contract. The provisions of this article apply to all of the debtor's obligations, and where obligations are performed by a professional, diligence is assessed having regard to the nature of the professional activity. The distinct assessment of a professional's liability is explained by the fact that the activity must be carried out under the specific legal regime applicable to each type of professional, with maximum diligence and as the effect of rigorous training in the relevant field; accordingly, a professional is expected to have the capacity to prevent potential harm or loss to those who benefit from his or her services. The expertise brought to the activity differentiates the professional from a private individual and requires a standard of conduct assessed more strictly than for a private individual. In most cases, the legal regime governing each profession imposes obligations towards the beneficiary of the professional's services through ethical rules, and these obligations are incorporated into the professional's contracts as contractual undertakings towards the client.

Another clarification concerns the relevant moment for assessing unforeseeability: if the event was foreseeable at the time the contract was concluded, there

is no exoneration from liability; rather, the debtor is deemed to have assumed the contractual risk for that obligation (Terzea, 2024: 499).

3. *Absolute irresistibility and inevitability of the event*. If we ground the analysis in the semantics used by the Code, the adjectives "invincible" and "inevitable" do not admit degrees of comparison, as they already express the highest intensity of the quality—i.e., absolute superlatives. In Romanian grammar, certain adjectives that describe an absolute quality (e.g., "invincibil") are not gradable. Thus, the formulations "absolutely invincible and unavoidable" used in the Code may be considered pleonastic. The only pleonasms accepted in Romanian are those by which the author/speaker intends to reinforce or emphasise an idea. This reflects the spirit of the Code, namely to underline the importance of this condition and the parameters within which it operates. The absence of the term "absolute" with respect to unforeseeability is, as scholars have noted (Pop, Popa, Vidu, 2012: 441–442), not accidental.

In the literature (Terzea, 2024: 495–496), it has been argued that to these requirements one more should be added—considered unmentioned in the regulation due to its implicit nature—namely that the event must stand in an indubitable causal connection with the debtor's non-performance of the contractual obligation(s).

Accordingly, force majeure will not exclude the carrier's liability in certain situations: where it intervened after the debtor obliged to perform had been put in default to perform the assumed obligations—that is, after the expiry of the time limit within which, in a contract for the carriage of goods, the carrier was required to deliver the goods to the consignee. The debtor will be exonerated if it is proven that the goods would have perished even if they had been in the creditor's possession, and also where the very delay is due to force majeure, or where, by contractual clause or agreement, the debtor has assumed liability even for certain cases of force majeure—so-called excepted perils (Scurtu, 2003: 96).

There are, in the assessment of force majeure, intermediate situations: the damage may result from the concurrence of force majeure and a fortuitous event, or from the concurrence of force majeure and other circumstances. The solutions will be dictated by the facts and by the applicable regulation. Thus, where the damage results from both force majeure and a fortuitous event, the outcome depends on the legislative solution regarding the fortuitous event: if, in that field, the fortuitous event is exonerating, liability is entirely excluded; if it is not exonerating, then only force majeure exonerates and liability is excluded partially. In the second scenario, the assessment will turn on whether force majeure was determinative, particularly in liability for things or animals: if the thing or animal was merely an instrument that contributed to the damage, exoneration is total; if it concurred alongside a force-majeure event, exoneration is partial (Pop, Popa, Vidu, 2012: 444).

As to procedural aspects, force majeure is invoked by the contractual debtor when damages are sought for non-performance of a contractual obligation; it may be invoked at any time during the proceedings and regardless of the type of obligation—obligation of result or of means. Being a matter of fact, force majeure may be proven by any means of evidence (Terzea, 2024: 502).

In transport law, force majeure exonerates from liability for loss or damage to the goods and for delay in carriage. It is invoked as a ground for excluding liability under Article 1991 (3) of the Civil Code, for loss of or damage to the goods, and under Article 1959 (2) of the Civil Code for delay in carriage.

Fortuitous event. Thus, by reference to the definitions proposed by the Civil Code and to the conditions that must be met in order to invoke force majeure as a ground for excluding liability, the *fortuitous event* differs from force majeure in its mechanism of occurrence, as follows:

1. *Externality of the event* in relation to the activity of the person called to answer is only one possible scenario in which a fortuitous event may intervene. In such a case, the event could not have been foreseen by the person called to answer and could not have been avoided, but the benchmark is that of an ordinarily diligent and prudent person—normal, average—not, as in the case of force majeure, the entirety of human knowledge at that moment. Examples include sudden natural events (low-intensity earthquakes in areas prone to seismic activity; floods during seasons with heavier rainfall; summer cloudbursts, etc.). Unlike force majeure, a fortuitous event may also be *intrinsic*—i.e., connected to the activity of the person called to answer. In cases of liability for things or animals, it may be connected to them. Examples include manufacturing defects, latent defects of a thing, the fright of an animal—thus linked to the nature of the goods or arising in the course of the debtor's activity or that of the debtor's agents—and the like (Pop, Popa, Vidu, 2012: 444–445).

2. *Unforeseeability of the event* is the second condition. This must be assessed in context (considering the entire context and circumstances—time, place, social, economic and political conditions) and by reference to the debtor, as regulated by the Civil Code: *the person who would have been called to answer had the event not occurred*. The literature has stated that, in the case of force majeure, we are dealing with a risk affecting people in general, whereas for the fortuitous event it is the risk of the person called to answer (Scurtu, 2003: 93).

In the fortuitous event, one cannot rely on the *absolute irresistibility and inevitability of the event*, because here, in some situations, extraordinary diligence on the part of the debtor—not merely ordinary diligence (which is presumed and therefore does not exonerate)—may avert the event.

Over time, some authors (Cristoforeanu, 1925: 231; Căpățînă, Stancu, 2000: 232) have argued that the theoretical distinction regarding the mechanism of occurrence of the two events is not significant, that they may be treated as synonyms, because from a practical perspective they have the same effect and are proven similarly.

In transport law, a fortuitous event in the contract for the carriage of persons does not exonerate from liability; for this reason the Civil Code expressly lists two situations that exonerate the carrier and which have the legal nature of a fortuitous event: the passenger's state of health and the act of a third party for whom the carrier is not liable. Thus, the rule in the carriage of persons is that the fortuitous event does not exonerate, and the exceptions are the two situations expressly provided by the Code as derogations from the rule.

As regards the carriage of goods, an analysis of the Code's legal provisions shows that with respect to liability for loss of or damage to goods—where the carrier bears an obligation to preserve the goods—the article devoted to excluding the carrier's liability does not provide for the fortuitous event as an exonerating cause. In our view, the legislator's omission of the fortuitous event is not accidental, but rather a way to enhance the carrier's accountability as a professional who has the technical management of the vehicle, performs a service, and fulfils the obligations assumed under the contract of carriage at its own risk. This legislative intent, noted in the literature (Luntraru, 2017) in several respects concerning the legal regime of the professional's contractual liability, is

to distinguish the professional's liability from that of a private individual, departing from the classical rules of civil and commercial law, and to create an autonomous law of the professional's liability, with original features and special evaluation criteria on the basis of which its legal nature, specific conditions and foundations may be established.

For delay in the carriage of goods, the Civil Code—under Article 1959 (2)—establishes the fortuitous event as a ground for excluding the carrier's liability. Accordingly, only for delay may the fortuitous event be invoked, not for loss of or damage to the goods. Article 1959 forms part of the General Provisions, and thus applies to both the contract for the carriage of goods and the contract for the carriage of persons.

The act of a third party and the act of the victim. Under Article 1352 of the Civil Code, the act of the victim and the act of a third party exclude liability even if they do not exhibit the characteristics of force majeure but only those of a fortuitous event, however only in cases where, under the law or the parties' agreement, the fortuitous event is an exonerating cause.

In transport law, pursuant to Article 1991 (3) of the Civil Code, the carrier is likewise exonerated from liability if it proves that the total or partial loss or the deterioration or damage occurred due to the act of a third party for whom the carrier is not liable. Thus, the solution follows from the rules governing force majeure and the fortuitous event.

In transport law, the act of a third party excludes the carrier's liability for loss of or damage to the goods only where it meets the characteristics of force majeure, the third party's act being assimilated to force majeure. The act of the creditor—the consignor or the consignee—may exclude the carrier's civil liability in whole or in part. Among the causes intrinsic to the contract of carriage, under the author-related category, the Civil Code lists, in Article 1991 (3), the following situation as a cause for excluding liability: the carrier is not liable if it proves that the total or partial loss or the deterioration or damage occurred due to an act committed intentionally or negligently by the consignor or the consignee, or due to the instructions given by either of them.

For delay in carriage, both force majeure and the fortuitous event exclude liability. In line with Article 1352 of the Civil Code, the act of the victim and the act of a third party exclude liability even if they do not exhibit the characteristics of force majeure but only those of a fortuitous event. Accordingly, for delay, we add—alongside the act of a third party—the act of the consignor.

As regards non-performance of the carriage (Cotuțiu, 2015: 158–159), Article 1992 of the Civil Code regulates liability for the non-performance of carriage and, implicitly, for the damage caused by such non-performance. At a general theoretical level, the Code states only the principle—that the carrier is liable—without addressing either the method for calculating the damage or the causes that exclude the carrier's liability. Consequently, the rules of common law will apply to both aspects, and the resulting solution as to exonerating causes is as follows: for non-performance of the carriage (as for delay), liability is excluded by force majeure, fortuitous event, the act of the consignor, and the act of a third party for whom the carrier is not liable.

State of necessity. The notion of state of necessity is regulated by Article 20 of the Romanian Criminal Code as a justifying ground that excludes the criminal nature of an act committed in order to save from imminent danger the life, health, bodily integrity, or an important asset of a person, provided that the consequences of the act are not more

serious than those of the initial danger.

Paragraph (2) of Article 20 of the Criminal Code sets out the conditions for a state of necessity:

a) there is an immediate (imminent) danger;

b) the danger cannot be averted otherwise;

c) the danger concerns the life, bodily integrity or health of the author of the act or of another person, or an important asset of the author or another person, or a public interest;

d) the consequences of the act are not manifestly more serious than those that would have occurred had the danger not been averted.

As regards private law, where a harmful act is committed by a person in a state of necessity, that act lacks the unlawful character required to trigger liability. Article 1361 of the Civil Code regulates the state of necessity, providing that a person who destroys or damages another's property in order to protect himself/herself or his/her property from an imminent danger is obliged to repair the damage caused. Reparation is to be made in accordance with the rules applicable to unjust enrichment. Thus, in this context, there is no total exclusion of liability, but rather liability conditioned by the rules on unjust enrichment. In the same vein, Article 1362 of the Civil Code stipulates that, if the harmful act was committed in the interest of a third party, the injured party may pursue that third party to recover damages, invoking unjust enrichment. The article allows the victim, under certain conditions, to bring an action directly against the third party, in addition to or instead of the author of the act. Accordingly, the action may be brought on the basis of the principle of unjust enrichment, which applies when one person obtains a patrimonial advantage at the expense of another without a legal ground. This principle applies where the harmful act was committed not in the author's direct interest, but in the interest of a third party.

Article 1345 of the Civil Code lays down the principle of unjust enrichment, providing that a person who has been non-culpably enriched to the detriment of another is bound to make restitution up to the limit of his or her enrichment. The conditions that must be met in order to invoke unjust enrichment are: an increase in one person's patrimony; a decrease in another's patrimony; absence of a legal ground for the enrichment; the enrichment must not be the result of a wrongful act by the enriched party; and the action is unavailable where another remedy is open to the injured party (subsidiarity).

Compliance with a legal duty or a lawful order issued by a competent authority. For the purpose of defining the notion of a "lawful order", the Civil Code offers a definition and regulatory approach that has given rise to a series of discussions in the literature. Thus, according to its provisions, namely Article 1364 of the Civil Code, a person is not exonerated from liability for having performed an activity required or permitted by law if he or she could have realised the unlawful character of his or her act. In fact, Article 1364 of the Civil Code establishes that neither a hierarchical superior nor a statute may be relied upon as justification for an unlawful act if the person could have realised the unlawful character of his or her conduct. In other words, one cannot invoke a superior's order to justify an unlawful action.

From a contextual perspective, Article 1364 of the Civil Code forms part of a chapter devoted to civil liability and is defined alongside other provisions such as self-defence and state of necessity.

On the other hand, the same notion is also defined in the Criminal Code, in Article 21(2) on justifying grounds, as an act provided for by criminal law that is considered justified where it results from the exercise of a right recognised by law or from the fulfilment of a duty imposed by law, subject to compliance with the conditions and limits thereof. Likewise, the fulfilment of a duty imposed by a competent authority is justified, provided that it is not manifestly unlawful.

The study carried out on the structure and content of the Civil Code's definition of the notion of "performance of an activity required or permitted by law", as the regulation is titled, and the comparative analysis of the two definitions have led scholars to conclude that the civil provision can only be applied in harmony with the criminal provision, which is much clearer as to the legal consequences produced in such situations. The civil regulation is considered too vague and, first and foremost, requires a distinction to be drawn between two situations that may lead to different solutions:

1. the situation in which the harmful act is committed in fulfilment of a legal obligation or with the express permission of the law, in which case it will have an unlawful character only where fault can be proven on the part of the person who committed it; and

2. the situation in which the harmful act is committed in the execution of an order given by a superior, in which case the act is unlawful only where that order had a manifestly unlawful character or was executed in a manifestly unlawful manner (Pop, Popa, Vidu, 2012: 430–431).

A further criticism levelled at the civil-law definition is that it refers only to the superior's order and not to the competent public authority in a given field (Baias, Chelaru, Constantinovici, Macovei, 2012: 1425). This omission is all the more significant in the field of transport law, where, in most cases, a lawful order issued by a competent authority creates legal consequences for the exclusion of the carrier's liability. One example in this respect is the lawful order concerning "forced wintering" on the Danube, which temporarily halts navigation due to freezing waters, or an embargo, both of which generate consequences for the conduct of transport operations.

Victim's consent. ***Clauses excluding liability.*** In the literature (Buciuman, 2021) it has been argued that clauses excluding or limiting liability may be placed "in the zone of conflict" between the two major principles governing civil contracts: the principle of freedom of contract and the principle of the binding force of contracts. To harmonise and reconcile these principles, the legislature intervenes to filter the freedom to stipulate clauses that diminish liability, taking as benchmarks public order, the preservation of contractual balance, moral considerations, and concerns regarding substantial economic imbalances between the contracting parties.

In the same vein, Article 1995 of the Romanian Civil Code provides that any stipulation excluding or restricting the liability imposed by law on the carrier shall be deemed unwritten.

Clauses deemed unwritten are null *ipso jure*. The literature (Nicolae, 2012: 27–29) has emphasised that such clauses were recognised in our domestic law under the influence and impetus of EU-level regulations, and are found in the domestic laws of several EU Member States, such as France and Belgium. They are clauses inserted in a juridical act which the legislature treats as non-existent because they run counter to the nature and normal legal effects of that act, and they are automatically replaced by mandatory statutory provisions.

The consignor may nevertheless assume the risk of carriage in the case of damage

caused by packaging or in the case of special consignments that increase the risk of loss of or damage to the goods.

Clauses limiting the carrier's liability. In the sphere of contractual liability, as regards modifications that may be brought to the debtor's liability, two categories of clauses may be stipulated in the contract: clauses that limit liability and clauses that exclude liability.

Clauses limiting liability concern the obligation to make reparation from a quantitative perspective, in that they set an upper threshold on the amount of damages owed by the debtor in case of non-performance. Conventional limitation of the debtor's liability may, however, also operate from a qualitative perspective; in such a case, the clause excludes the very obligation to make reparation for certain categories of damage.

According to the literature (Buciuman, 2021), and in line with the aspects they target—quantitative limitation or qualitative limitation—these clauses ought to bear distinct names. Thus, those aimed at the quantitative criterion, since they affect the amount of compensation owed by the person civilly liable and not the obligation to repair the damage, should be termed *clauses of reduction, mitigation or limitation of reparation*; whereas those aimed at the very obligation should be termed partial exoneration clauses, their effect bearing on the existence of the obligation to make reparation, i.e., on liability itself.

Exemption clauses are those that exclude the existence of the obligation to repair the loss caused by the debtor's non-performance, even where that non-performance is otherwise imputable to the debtor. Such a clause affects one of the conditions for the engagement of civil liability: the damage, the fault, the debtor's act, or the causal link.

Under the former regulation, that of the Commercial Code, two limits were expressly provided and any clause contrary to them was regarded as unlawful. Thus, Article 441 provided for the nullity of stipulations that excluded or limited, in railway transport, the obligations and liabilities of the parties established by the provisions of the Commercial Code, even if permitted by general or special regulations; and Article 430(2) of the Commercial Code provided that, in the event of dolus or gross negligence on the part of the carrier, the amount of compensation would be determined under Articles 1084 and 1086 of the former Civil Code, i.e., it would include both *damnum emergens* and *lucrum cessans*. Consequently, a clause exonerating or limiting the carrier's liability for its own fraud (dolus) or gross negligence was null, as such a clause would be contrary to good morals and public order. Nevertheless, the creditor could waive compensation—even for loss caused by gross negligence—if the waiver occurred after the date on which the damage arose, since the holder of a right may always renounce its exercise. Such a waiver could be treated as a liberal act (Scurtu, 2003: 105–107).

Under the current regulation of the contract of carriage, the Civil Code, by Article 1959, expressly provides that the carrier may exclude or limit its liability only in the situations provided by law—situations set out in special legislation as well as in the Code itself, through the establishment of general rules governing the limitation, exclusion or aggravation of the carrier's liability. This regulation is regarded as more restrictive than that found in civil law generally, namely Article 1355 of the Civil Code on clauses concerning liability, which prohibits exoneration or limitation for material damage caused intentionally or by gross negligence, but permits clauses that exclude liability for damage caused by mere imprudence or negligence. A declaration of assumption of risk does not equate to a waiver of compensation.

Limiting the amount of compensation. Furthermore, Article 1989 of the Civil

Code lays down a rule for cases of limitation of the carrier's liability: *compensation may not exceed the amount established by the special law*. The article is therefore an application, in the field of reparation of damage, of the rule of the priority application of special laws; and each mode of transport has, in its specific legislation, its own mechanism for calculating compensation and the limits thereof.

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