

# RIGHT OF SUBSEQUENT DISPOSAL IN CARGO TRANSPORTATION AGREEMENT

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## **Abstract**

*The sender has the right, by subsequent written disposition, to withdraw the property that was to be transported, before its departure, to stop it during transportation, to postpone its handing to the recipient or to order its return to the place of departure, to change the recipient person or place of destination or to dispose other modification to the transportation conditions.*

*The sender who gave a subsequent disposal is required to pay to the carrier, as appropriate, the price for the part of transportation already performed, the due fees and expenses caused by executing the subsequent disposal, and to compensate him for any suffered loss<sup>2</sup>.*

*The sender cannot give a subsequent disposal leading to the splitting of the transport, unless otherwise provided by law.*

**Keywords:** *the sender, subsequent written disposition, property that was to be transported.*

**JEL Classification:** *K12, K33*

## **1. Introduction**

Thus, the sender may modify the transportation agreement through "subsequent orders", usually in any of the stages of the transportation agreement, respectively at the point of departure, during transport and at destination.

The New Civil Code and special transportation laws exhaustively list the causes for changing the transportation agreement, by unilateral will of the sender. It establishes the rule according to which a subsequent disposal may not lead to the splitting of the transport<sup>3</sup>.

## **2. The right of disposal**

From the point of view of civil law, the right of disposal (*jus abutendi, abusus*) is made of the material disposal right and the legal disposal right.

Attribute of property comprising the owner's prerogative to dispose of property or to constitute real rights upon him in favour of another (the legal disposal right) and to consume or destroy, even in vain, the thing that belongs to him, by suppressing its existence or changing its functionality (the material disposal right).

The material disposal right is the owner's possibility to dispose of the real substance of the good, namely to transform, consume or destroy it, in compliance with the regulations in force.

The legal disposal right represents the owner's possibility to alienate the ownership against payment or free of charge, by acts between the living *or mortis causa*, and to encumber it with real derived rights, main or accessories, in favour of other people with observance of the legal regime established by law.

What most strikingly characterizes the right to ownership is the disposal attribute, namely the part related to the legal disposal. The right of disposal is the only attribute whose alienation leads to loss of ownership itself.

The dismemberment of the other ownership attributes will limit this right, but will not be likely to lead to its loss. Therefore, it was said that the right to dispose remains permanently fixed in the power of the property right holder even when the property is dismantled. In legal literature, the

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<sup>2</sup> Is the material injury suffered by a person or made to a person by committing an illegal act.

<sup>3</sup> The collective, *The New Civil Code, Notes, Corelations, Explanations*, C.H. Beck Publishing, Bucharest, 2011, page 725;

property has been defined taking into account its character and attributes as follows: The property is a right on one thing under which the thing is exclusively and perpetually subject to the power of a person or those who acquire it from him, and which is manifested by the faculty to serve, to enjoy and to freely dispose of the thing.

By a subsequent written disposal, the sender has the right, under article 1973 NCC:

- *to withdraw the property that was to be transported, before its departure,*
- *to stop it during transportation,*
- *to postpone its handing over to the recipient or to order its return to the place of departure,*
- *to change the consignee person or the place of destination,*
- *to dispose other modifications in the conditions of the transportation implementation.*

### 3. The International Convention of Berne

In our opinion, the provisions of art. 1973 NCC can be entirely found in the provisions of the International Convention of Berne<sup>4</sup> of February 07.1970 regarding the railway transportation of cargo, in force since December 17.1974, according to which:

#### **Art. 21 - The sender's right to modify the transportation agreement**

1. The sender has the right to modify the transportation agreement by ordering that:

- a) the cargo be withdrawn in the handing station;
- b) the cargo be stopped during transportation;
- c) the handing of the cargo be postponed;
- d) the cargo be released to another person than the addressee indicated in the consignment note;

e) the cargo be released in another station than in the destination indicated on the consignment note or be returned to the handing station; in this case, the sender may order that a transportation started at small speed be continued at high speed or vice versa, provided the station where transportation was stopped is open both for high and low speed; he may also indicate the tariff to apply and the route to follow. The sender must also give a new postage disposal, if he took the responsibility to pay the fees up to a tariff point under art. 17. 2 and if the transportation is no longer guided through this point, as a result of modifying the transportation agreement. The new postage disposal must not determine a modification of the original disposal for the countries already crossed, except for the modification admitted in letter h).

Unless otherwise specified by the railway handing fares, requests to change the transportation agreement are also granted, aiming at;

- f) encumbrance of the transportation with reimbursement;
- g) increase, decrease or cancelling of the reimbursement;
- h) taking over some charges for an unsent transport or increasing the taxes taken upon himself,

under art. 17 2.

Other disposals than the above mentioned ones are not allowed. International tariffs can however give the sender the right to dispose other changes in the transportation agreement, besides those indicated above.

The disposals must never lead to the splitting of the transport.

2. The above mentioned subsequent disposals must be given through a written statement following the model established and published by the railways.

This statement must be reproduced and signed by the deliverer on the duplicate consignment note which will be submitted to the railways together with the statement. The delivery station shall certify the receipt of the subsequent disposal by stamping the date on the duplicate under the deliverer's declaration, then the duplicate will be returned to the deliverer. The railway that followed the deliverer's disposal without asking for the duplicate consignment note will be liable for damages caused to the recipient, to whom the deliverer had sent this duplicate.

<sup>4</sup> Convention of 1961, ratified by the Socialist Republic of Romania in 1974 by Decree 213/31 octombrie 1974

In the event that the deliverer demands the increase, decrease or cancellation of a reimbursement, he must submit the title that was originally released. In case of increase or decrease of a reimbursement, after the rectification, this title shall be returned to the concerned party; in case of reimbursement cancellation the title will be withdrawn from his hands.

Any subsequent disposal, given by the deliverer in other forms than those mentioned above, is null.

**3.** The railway does not give effect to subsequent disposals given by the deliverer, if they are not transmitted through the delivery station.

At the deliverer's request, the delivery station will approve by telegraph, telephone or telex, at the deliverer's expense, the destination station or the stopping station for the transportation, the telegraph or telephone approval being confirmed through a written statement. If the international tariff or other agreements between the concerned railways do not provide otherwise, the destination station or the stopping station must carry out the subsequent disposal without waiting for a confirmation, if the telegram or telephone approval comes from the delivery station, which should be checked in case of doubt.

**4.** The right to modify the transportation agreement is extinguished in one of the following cases, even if the deliverer possesses the consignment note duplicate:

- a) when the consignment note was withdrawn by the recipient;
- b) when the recipient has received the cargo;
- c) when the latter has exploited the right resulting for him from the transportation agreement, under art. 16 4;
- d) when the recipient is authorized under Art. 22, to give subsequent disposals as soon as the carriage entered the customs territory of the country of destination.

Starting from this moment, the railway must comply with the recipient's disposals.

**Art. 22 The recipient's right to change the transportation agreement**

**1.** The recipient has the right to modify the transportation agreement, if the deliverer has not taken the responsibility to pay the transport fees in the country of destination, nor did he add to the consignment note the mention provided in art. 6.7 letter h).

The disposals that the recipient can give have no effect until the moment when the transport has entered the customs territory of the country of destination.

The recipient may provide that:

- a) the cargo be stopped during transportation;
- b) the handing of the cargo be delayed;
- c) the cargo be handed in the country of destination to another person than the recipient indicated in the consignment note;
- d) the formalities required by customs and other administrative authorities be carried out according to one of the ways mentioned in art. 15.1. paragraph 2.

Except as otherwise provided in international tariffs, the recipient can also dispose:

- e) that the cargo be handed in the destination country in a different station than the destination station indicated in the consignment note. In this case, he may order that a transport delivered at low speed be continued at high speed or vice versa, provided the station where the transportation was stopped be open both for high and low speed; he may also indicate the charge to be applied and the route to be followed.

Other disposals than the above mentioned ones are not allowed. International tariffs can however give the recipient the right to dispose other changes in the transportation agreement in addition to those indicated above.

The disposals must never lead to the splitting of the transportation.

**2.** The above mentioned disposals shall be given either at the destination station or at the entrance station in the country of destination, through a written statement in accordance with the model established and published by the railways.

Any subsequent disposal given by the recipient in a form other than the one mentioned above is null.

The recipient may exercise the right to modify the transportation agreement, without the consignment note duplicate.

3. At the recipient's request, the station that received the subsequent disposition forwards it, at his expense, by telegraph, telephone or telex, to the station that must execute the disposal, the telegraph or telephone communication being confirmed through a written statement; this station executes the subsequent disposal without waiting for a confirmation, if the telegram or telephone approval is coming from the competent station, which should be checked in case of doubt.

4. The recipient's right to modify the transportation agreement shall be extinguished in one of the following cases:

a) when he issued the consignment note;

b) when he accepted the cargo;

c) when he asserted the right resulting for him from the transportation agreement, under art. 16 4;

d) when the person indicated by him according to art. 1 letter c) has withdrawn the consignment note or has asserted his rights under art. 16 4.

5. If the recipient has ordered that the cargo be handed to another person, the latter does not have the right to modify the transportation agreement.

**Art. 23 The execution of subsequent disposals**

1. The railway may not refuse the execution of disposals that are given according to art. 21 or 22, or execute them with delay, apart from the following cases:

a) the execution is no longer possible when the disposals have arrived at the station that has to execute them;

b) the execution is likely to disrupt the regular service operation;

c) the execution is contrary to the laws and regulations in force in one of the countries to cross when it comes to changing the destination station, especially in terms of customs and other administrative authorities disposals;

d) the cargo value, when it comes to changing the destination station, does not cover - in all probability - all fees that will encumber this cargo at its arrival at its new destination, unless the amount of such taxes is immediately paid or guaranteed.

In the above mentioned cases, the person who gave subsequent disposals will be notified as soon as possible about the obstacles that oppose the execution of his disposals.

In the event that the railway is not able to predict these obstacles, the person who gave the subsequent disposals bears all consequences resulting from the commencement of the execution of his disposals.

2. If the subsequent disposal prescribes that the cargo be handed in an intermediate station, the transportation fee is calculated from the delivery station until the intermediate station. But if the goods have been transported beyond the intermediate station, the transportation fee is calculated from the delivery station until the stopping station and from this station until the intermediate station.

If the subsequent disposal prescribes that the cargo be transported to another destination station or be returned to the stopping station, the transportation fee is calculated from the delivery station until the stopping station and from this one until the new destination station or until the delivery station.

Applicable tariffs are those in force for each of the routes, on the day of concluding the transportation agreement.

The above provisions are applicable, by analogy, to accessory fees and other charges.

3. Charges arising from the execution of a deliverer's or recipient's disposal, except for those resulting from railway negligence, encumber the cargo.

4. Except as provided in section 1, the railway is liable in the event of negligence on its part, for the consequences of non-execution or incorrect execution of a given disposal under art. 21 or 22. However, the compensation to be paid can in no case be greater than that which would be payable in the case of cargo loss.

#### 4. The contractual liability

Under these conditions, the contractual liability "is adapted to the existence of previous relationships between the injured and damaging party, born through their consent, relationships without which the damage would never have been born"<sup>5</sup>.

The provisions of the Civil Code are applicable to all transportation fields, but only insofar as their acts do not cover certain aspects of the transportation agreement, because in the conflict between the general rule and the special one, the latter prevails and will be applied.

The carrier is responsible for the integrity of the cargo, both quantitatively and qualitatively, since the transport is received and until they hand it over to the recipient. The carrier is liable for the total or partial loss of the goods and for its damage, for exceeding the cargo delivery time limit and for any other event that could be considered a breach of the agreement.

Given the fact that the carrier's liability is based on the idea of his guilt, in order to be exempted from liability, he will have to prove that the improper fulfilment of the obligations is due to causes which exclude his fault.

According to the Civil Code, the debtor may not be liable for penalties if the improper performance of the obligation or the delay in performance is due to a foreign cause that cannot be attributed to him, i.e. the action of the creditor, a fortuitous event or force majeure.

As regards to the carrier's liability, the general rule is the existence of the presumption of guilt, as a result the creditor need not prove the debtor's lack of diligence: namely of the carrier. For the carrier to be exempted from liability, it is incumbent to prove the existence of one of the three foreign cases not imputable: the creditor's deed, a fortuitous event or force majeure, for example default by the carrier due to a third party, atmospheric events, earthquake, floods, snow, etc.

However, once the force majeure ceases, the carrier obligations must be met if this is still possible.

So the detrimental deed results in certain unlawful behaviour, attributable to the contractual debtor, i.e. the carrier. But it is an unlawful act ("*action or inaction that results in the violation of the subjective rights or interests of a person.*"<sup>6</sup>) not only the action, but also the omission, wrongful inaction, failure to fulfil an action or failure to take a measure when that activity or measure should have been taken.

In the transportation law, the carrier's liability usually undertakes from positive actions, i.e. actions, such as speeding, failure to adapt it to the traffic conditions; however, inaction or passivity can also lead to detrimental results, such as failure to inspect the roadworthiness of the vehicle before departure etc.

The unlawful nature of the act may have come either from the carrier's failure to observe certain legal provisions or from the infringement of some private law provision, which will have consequences in terms of tort liability. The unlawful nature materializes in the carrier's lack of fulfilling the benefit that lies with him or in the commitment of actions which prevent or at least delay the fulfilment of the undertaken obligation<sup>7</sup>.

#### 5. Guilt, as an element of civil liability

Guilt, as an element of civil liability, is defined as the attitude that the author had towards the deed and its consequences. Guilt is considered a subjective condition of liability. For the contractual liability to trigger, it is first required that, besides the unlawful act which is in a causal relation with the caused damage, another condition be met, namely that the author had a fault when committing the act.

<sup>5</sup> Mihai Eliescu, *Răspunderea civilă delictuală*, Ed. Academiei R.S.R., 1972., page 63

<sup>6</sup> Liviu Pop, *General theory of obligations*, "Chemarea" Foundation Publishing, Iași, 1994, page 205

<sup>7</sup> Idem, page 219

From the definition of guilt results that it primarily involves the intellectual element which consists in the human conscient representation of social significance of his act and the provision or at least the possibility of providing for the consequences of that act, and then of a volitional element that generates the psychological process of deliberation and making a decision about the conduct taken by the person who commits the deed. In other words it is a process of awareness and willingness.

As to fraud and negligence, the difference between these two forms of guilt lies in the intent. When the deed is committed with intention, it takes the form of fraud and when intent is absent we find ourselves in a situation of guilt by negligence or recklessness.

We will not dwell on these forms of guilt, which are already known, but we will still remember a key issue in the field of transportation law, namely that in the situation of fraud, it may materialize through direct or indirect intent, but in the carrier's activity it is inconceivable that he commits an act with direct intent, i.e. to foresee the consequences of his criminal act and still pursue their procedure.

## 6. Conclusions

With regard to the criteria for assessing guilt, they are necessary for enabling us to assess the existence of the carrier's guilt, whom is accused of a contractual breach, negligence or recklessness. The fraud poses no particular problem, as the actual finding of the direct or indirect intent of the contractual debtor is sufficient enough. In the case of imprudence and negligence there were a number of controversies. However, the rule in this case is expressed by the Civil Code according to which "*the diligence that should be put in fulfilling an obligation is always that of a good owner.*" It takes into account objective criteria with reference to the behaviour of a normal person acting with concern for the interests of the Company and its peers, which would be in the same circumstances external as the perpetrator, but to which we add a number of elements such as: specific time and place conditions, the specific of the work carried out etc.<sup>8</sup>.

By adapting the above mentioned to the matter we are interested in, "the good owner" will find its counterpart, in this case, in a "bonus mercator", namely in a fair and experienced tradesman<sup>9</sup>.

Furthermore every tradesman is a professional. Thus "*if the detrimental act is committed in the exercise of the profession, the comparison term will be an abstract professional model, of the professional category to which the perpetrator also belongs, and the recklessness and negligence will be appreciated considering the rules that governed that profession, as for the existence of due diligence and required provision*"<sup>10</sup>

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<sup>8</sup> See M. Eliescu, quoted work., page188

<sup>9</sup> Octavian Căpățînă, *Dreptul transporturilor*, Lumina Lex Publishing House, Bucharest, 2001, page 218

<sup>10</sup> M. Eliescu, quoted work., page191

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