

THE ESSENTIAL CONDITIONS FOR THE VALIDITY OF THE CONTRACT OF CARRIAGE

Aurelia COTUTIU, Ph.D

"Vasile Goldis" Western University Arad

Abstract: At the conclusion of the transport contract for goods or people, **the carrier** shall make available to the consignor or the passenger his exclusive and special service to travel in space with a suitable means of transport, different from other previous or subsequent transport services. Thus, the transport activity is entirely distinct and independent from the civil or economic transactions concerning the goods transported, which run between the consignor and the recipient, or, taking another example, from the insurance agreement during the transport of goods or persons, imposed by law. At the same time, transport is a service of public interest, which obliges the transport operator to publish permanently his transport offer with all the information needed to access it. This is the source of the organized and uniform periodicity of the carrying trade, performed as a constant preoccupation in order to obtain profit. But, because of the multitude and diversity of displacement interests of the transport beneficiaries, sometimes the transport operator is forced to arrange that the transport of goods or people contracting should be carried out through another carrier. Therefore, whenever the transporter is substituted by another transport operator for total or partial execution of its duty, the latter will be considered part of the transport contract, taking over all obligations of the contracting operator directly with the beneficiary of his service.

Keywords: Contract of carriage, carrier, the object of the transport contract, the validity of contract

1. The ability to contract

1.1 At the conclusion of the transport contract for goods or people, **the carrier** shall make available to the consignor or the passenger his *exclusive and special service* to travel in space with a suitable means of transport, different from other previous or subsequent transport services. Thus, the transport activity is entirely *distinct and independent* from the civil or economic transactions concerning the goods transported, which run between the consignor and the recipient, or, taking another example, from the insurance agreement during the transport of goods or persons, imposed by law. At the same time, transport is a *service of public interest*, which obliges the transport operator to publish permanently his transport offer with all the information needed to access it. This is the source of the *organized and uniform periodicity* of the carrying trade, performed as *a constant preoccupation* in order to obtain profit. But, because of the multitude and diversity of displacement interests of the transport beneficiaries, sometimes the transport operator is forced *to arrange that the transport of goods or people* contracting should be carried out through another carrier. Therefore, whenever the transporter is substituted by

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

another transport operator for total or partial execution of its duty, the latter will be considered part of the transport contract, taking over all obligations of the contracting operator directly with the beneficiary of his service.

1.2. The legal conditionings have determined the Community¹ legislator to define the carrier as an "enterprise," comprising any natural or legal person, with or without lucrative purpose, any association or group of persons without legal personality, with or without lucrative purpose, or any official body, whether it has its own legal personality or it depends on an authority having such legal personality, that *exercises the occupation of passenger transport*, or any natural or legal person, that *exercises the occupation of transport of goods for commercial purposes*.

1.3. Insisting on the legal characteristics which the carrier must fulfill as part of the carriage contract, we conclude the following:

- he must be authorized for activities of public transport of goods and persons, irrespective of its existence as a natural or legal person;
- he must possess adequate means of transport;
- he must perform and provide continuous public transport services, permanently, by routes, lines, hour intervals or other time slots, precise, announced in familiar places, accessible to the public;
- he must accept transportation demands and carry them out without preference or discrimination;
-] - he must carry out the transport activity in order to obtain profit;
- he must present his identification data;
- he must provide the transport applicants with contracts containing clauses that serve the interests of all parties, without being abusive;
- he must be able, if necessary, to substitute himself by another transport operator for the purpose of partial or total execution of the obligations assumed under the contract of carriage.

1.4. Insisting on the need of authorization of the transport activity of people and goods, we underline that the right to carry out this activity arises only after obtaining the authorization issued by the Ministry of Transport and Infrastructure, and the documents and operations exercised without the authorizations required by law are null and void, and the people who have undertaken them, are unlimitedly and jointly liable for all damage caused, irrespective of the application of other penalties provided by law².

1.5. **The traveler** is the beneficiary of displacement with a means of transport provided by the carrier, through his public, ongoing, ordinary offer or of a special trip requested by the traveler or a group of travelers.

As a general rule, Romanian citizens, foreigners and stateless persons, without discrimination, regardless of the place of embarkation, destination, distance and the like have access to public transportation of persons.

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

1.6. The principle known concerning the exercise capacity of a traveler applicable, but out of the concession of the Civil Code³, forced by the necessities of life, low value contracts, which are executed immediately in favor of the minor with limited legal capacity and even the minor that lacks legal exercise capacity, we conclude that these people may conclude in their own name transport contracts for short distances, daily displacements to the educational institutions, sports, culture, family, friends, home, especially by public means of transport.

1.7. The traveler may opt for a single trip or multiple trips, with full payment of the transport fee or with rebates given by the carrier or by law.

1.8. The passenger has the legal right to travel together with his children, for which are provided reductions or exemptions of paying the transport fee.

1.9. He also has the possibility of transporting luggage under the terms of the specific legislation.

1.10. **The consignor** is the party interested in undertaking the displacement of the goods in space, by means of the contract of carriage. When he is the recipient of the transported goods, he is also the sole beneficiary of the transport, the contract having only two parties.

The forwarding agent may be any natural person with full legal capacity, legal persons of public and private law, as well as entities without legal personality, established according to the law, being cited as such in the transport contract.

The sender has the faculty to appoint the recipient in the contract or he may instruct a third party to appoint him.

1.11. The participation of the consignor at the negotiation and conclusion of the transport contract may be direct or mediated by a representative or expeditionary.

1.12. The transport contract being a legal act of disposal, in order to be concluded validly by the representative, requires an express authorization from the principal, being presumed by law to be given also over all necessary documents for its execution, even if not expressly stated⁴.

1.13. The trustee is obliged to negotiate and to conclude the contract of carriage, on behalf of the principal, within the limits established by the mandate with due care of a good owner, in case of the onerous mandate and with the diligence of its own business if the mandate is free. He is not responsible for the fulfillment of obligations contracted by the carrier⁵.

1.14. The expeditionary concludes the carriage contract in his own name, but on behalf of the consignor – principal, being responsible for the transport delay, for the destruction, loss, theft or damage of the goods in the event of negligence in the performance of dispatch, in particular with regard to the taking over and storage of the goods, the election of the carrier or the intermediary consignors.

Also, if without any reasonable grounds, he deviates from the transport mode indicated by the consignor-principal, the expeditionary will be responsible for the transport delay, for the destruction, loss, theft or damage of the goods, caused by

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

the unforeseeable circumstance, unless he proves that it would have been produced even if he would have complied with the instructions received.

1.15. **The consignee**, natural or legal person, indicated in the transport agreement has the right to receive the transported goods at the place of destination. Designation can be done at the conclusion of the transport agreement or later, by having the contract amended by the consignor or by a third party commissioned by the latter. It is included in the Ordinance on transports, in the category of transport users that have equal and non-discriminatory access to the transport infrastructures of public interest and may freely choose the mode of transport by which they exercise their rights; they are able to perform transport on their own or to use the services of a freely elected carrier.

1.16. For the nominative transport contracts it is compulsory to indicate the consignee through the identification data that is specific for the natural or legal person, to indicate the railway station, the airport, the port in order to facilitate the obligation of the transport operator to hand over the transported goods at his home or his office.

1.17. The rights and obligations of the consignee, set out at the conclusion of the transport contract between the consignor and the carrier, produce legal effects only after acceptance of the contract or of the transported goods⁷. In case of acceptance of the contract, the obligations of the consignee are affected by the means, by the suspensive terms represented by the time of arrival of the goods at their destination or by the resolutive condition that involves the intact arrival of goods at destination, by the term settled out in the contract.

2. The consent of the parties to the conclusion of the transport agreement involves the completion of an agreement between the traveler, respectively the consignor and the carrier on the essential elements of the Convention. Usually, the parties also agree on the secondary elements with the same opportunity. We believe that for the transport contract there are some essential elements, without which it cannot be completed, the destination of the passenger or of the goods, the conditions of displacement, the price of transport and for the goods and who pays it, the place and date of embarkation or handing over of the goods, their sort. Between the secondary elements of the contract of carriage we place the term of displacement of the goods, the route to be taken and the penal clause.

2.1. According to the law, the carriers offer their services to the public and they have the obligation to transport any person and any type of good requested. The transport operator may refuse the transport request⁸ only because of a justified reason. In the silence of the law, we consider that the refusal to transport is justified when the transport operator lacks the appropriate, special mean of transport, suitable for the category of goods that are requested to be moved.

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

2.2. The law exempts the carrier of the obligation to carry goods of a great value, as example documents, cash money, securities, jewelries, due to the greater risk of disappearance of this kind of particularly important goods.

However, in order to facilitate such a transport, the liability of the operator that contracts it without being obliged to do so, is legally limited, in case of loss, damage or alteration, only to the declared value of the particularly important goods. Noteworthy is the legal sanctioning of the consignor that declares a different kind of the goods or a higher value, in order to receive a more onerous compensation than would be justified by the nature or real value of the goods, in which case the carrier shall be relieved of any liability⁹.

3. The object of the transport contract, as a defining legal operation, is represented by the obligation of displacement between a place of departure and one of arrival of the goods or persons and must meet the legal requirement to be legitimate and determined. By breaking the two requirements, the transport operation is null¹⁰.

3.1. For the other services as well, as objects of the obligations to which the carrier, the consignor, respectively the traveler engage, the legal requirement is to be determined or at least determinable and entirely legitimate, under penalty of absolute nullity.

The services of the parties are considered to be legal even if they can only be fulfilled in a predetermined future or if they relate to future goods, but which are not excluded from the civil circuit.

31.1. For some categories of goods, as those oversized, the normative acts provide special requirements for transport, both in terms of administrative approvals, as well as in terms of the special means of transport and the personnel that it serves. For the goods that are not in the civil circuit, such as the dangerous ones, there are international transport regulations and the contracts are only validly concluded if they are fully respected. Some categories of goods may only be transported by persons authorized for this purpose, by means of transport that is also authorized¹¹.

4. The cause of the transport contract is different for each party and is represented by the reason which led it to contract. For the carrier, the purpose for providing the service is to obtain an income out of the specific activities and conclusion of each contract in part is the pragmatic manner of fulfillment of its purpose, irrespective if he obliges to transport persons or goods.

For the traveler, the cause of the contract lies in arriving at the chosen destination, at the date and time, which he determines in accordance with his interests.

The consignor concludes the transport contract with the purpose that the goods that he delivered to the carrier reach a destination and to a consignee, designated by him or by a third party, at the time of fulfillment of the operation or later.

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

The consignee does not participate at the negotiation and conclusion of the transport agreement, except where he is also the consignor, so that the reason that makes him accept the contract or the transported goods is not expressed by him at the completion of the legal operation between the consignor and the carrier, but it certainly does exist and must be sought in its interest to enclose the transported goods through fulfillment of the contracted displacement.

4.1. The cause, as a determining purpose at the conclusion of the transport agreement is not unique; it may be complemented by other reasons, subjective considerations, which give this legal concept a complex character. For example, the traveler, besides the major aim of arriving at the planned destination, may propose himself a journey by terrestrial means or belonging to another mode of transport, he may choose an exclusive vehicle or a common one.

As a conclusion to all the above mentioned, the cause understood as the sum of the decisive reason and of all other purposes that lead to the formation of the agreement of the parties, has a purely subjective nature, and in order to give a legal value to the operation, it must be genuine, legitimate and moral.

5. The transport document. The written form of the transport contract is required expressly by law¹², for the proof of the legal transaction and its terms. Without being an exhaustive enumeration, the following types of transport documents are mentioned: waybill, luggage receipt, logbook, bill of lading, ticket or travel card or similar, on a case by case basis.

5.1. In case of the transport of goods, at their remission, the consignor must give the carrier the signed transport document, together with all additional documents on customs, health, taxation and similar, necessary for the transport and has full legal liability for any omission, insufficiency or inaccuracy of the remarks in the transport document or, where applicable, in the additional documents.

5.1.1. The mandatory particulars in the transport document are: the identity of the consignor, of the carrier and the consignee, and possibly of the one who has to pay the transport, the place and date of taking over of the good, the place of departure and arrival, the price and duration of the transport, the sort, the quantity, volume or mass and apparent condition of the goods at the moment of delivery for transport, the dangerous nature of the goods, if applicable, as well as the additional documents that were handed over and which accompany the transport.

5.1.2. The parties may also enter in the document optional terms, such as the route to go, accompanying the transport by a delegate of the consignor or of the consignee, penal clause, as well as instructions of the consignor for the event of circumstances that prevent transport¹³.

5.1.3. The transport document shall be drawn up in at least 3 copies, one for the carrier and for the consignor and another one that is accompanying the transported good to its destination.

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

If the consignor is handing over multiple packages for transport, to the benefit of a single consignee, a single, *collective transport document* may be drawn up, containing the details shown for each package. However, the carrier is entitled to require the consignor a transport document for each package separately and this always happens when packages are sent to multiple recipients or different destinations, *the transport documents being individual* for each package.

In the absence of the transport document, the carrier is obliged to issue, upon request of the consignor, a receipt for receiving the good for transport, that must contain all the compulsory particulars from the transport document.

5.1.4. Both the transport document and the receipt for receiving the goods, stay as a proof that the goods were accepted for transport, their nature, quantity and their apparent condition.

5.2. According to the method of designation of the consignee, the transport contract for goods may be *nominative*, when the consignor appoints the consignee at the moment of handing over the goods to the carrier, through its identification data, first name, surname and domicile, respectively, name, headquarter; *upon disposal*, when the consignee will be indicated *by endorsement*, by a third party, commissioned by the consignor at the same time or after the conclusion of the transport convention. The endorsement is the formula inserted in the transport document by the third party possessing the document, called endorsee, by which ownership on the goods transported will be transferred to another endorsee or to a nominated consignee; Transport document bearer can be transferred by mere delivery, the third receiver by taking the title bearer acquiring ownership of the goods transported. The transport document *of the bearer* may be transferred by its mere remittance, the third receiver acquiring by taking over the title of the bearer, the ownership of the goods transported.

5.2.1. Usually, the transport document of the traveler is a title of the bearer and may be transmitted to a third party before the journey, against payment or for free, by mere remittance by its owner, without notifying the carrier. Along with the material handing over of the document, the acquiring third party ceases all his travel rights deriving from the transport contract¹⁴.

5.2.2. As the transport documents may or may not be transmitted to a third party, they are negotiable or non-negotiable. The rule consecrated by the Civil Code is that the transport document is not negotiable, but the parties have the right to dispose otherwise¹⁵, where the law doesn't stop them.

For the nominative transport document, the rule is the *non-negotiable character* of the rights arisen from the transport contract in person of the contracting parties and the consignee appointed by the consignor.

The transport documents upon request and at the bearer are characterized by negotiability, meaning the right of the one who possesses them, to transfer them to a third party, which, in his turn, may retransmit them. Also in this case, with the

Cotutiu, A., (2015)

The essential conditions for the validity of the contract of carriage

overhanding of the document to the third party, this gets transferred all the rights born by the conclusion of the transport contract.

Bibliography

1. F. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil. Comentarii pe articole. Editia 2*, Ed. C.H. BECK, Bucuresti, 2014
2. O. Capatina, *Dreptul transporturilor*, Ed. Lumina Lex, Bucuresti, 2002
3. Gh. Piperea, *Dreptul transporturilor*, Editia 3, Ed. C.H. BECK, Bucuresti, 2013

Notes:

1. Article 2 paragraph 4 of Regulation (EC) no. 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Directive 96/26 / EC of the Council (Text with EEA relevance)
2. Article 207 paragraph (2) Civil Code.
3. Art. 41 par. (3) and art. 43 par. (3) Civil Code.
4. Art. 2016 par. (2) and (3) Civil Code.
5. See art. 2021 Civil Code, permissive legal norm (device).
6. Art. 1.977 Civil Code.
7. Art. 1.977 Civil Code.
8. Art. 1.958 par. (3) Civil Code.
9. Art. 1.988 Civil Code.
10. Art. 1.225 Civil Code.
11. We exemplify with the transport of arms and ammunition, allowed only to the authorized armorers, by own or rented means of transport, homologated according to the law, regulated by Law no. 295/2004, on the regime of weapons and ammunition, republished in the Official Gazette, Part I no. 814 / 17.11.2011.
12. Art. 1.956 Civil Code.
13. Art. 1.971 par. (2) Civil Code.
14. Art. 2.007 Civil Code
15. Art. 1.964 par. (1) Civil Code.