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ARGUMENT

In the development of international economic relations, enlargement and diversification of trade, an important role is held by the international transport and dispatch of goods.

Shipping practice imposed the development of economic and legal regulations of international nature to facilitate engagement operations of vessels, creating complete shipping and widely circulated documents. This process took place relatively slowly, over several centuries, during which institutions and principles of maritime law received the appearance that we are familiar with today. At the end of the last century, shipowners took over trade routes with superior economic power in relation to shippers. In the international shipping contract, the shipper had to accept the tasks and conditions offered by the shipowner, because there were no other means to get them become adapted to its needs.

The most compelling illustration of this state of things is found in the content of the Hague Rules of 1924. This institutional framework created expresses the supremacy of shipowners. Maritime conference system at that time was a set of practices which imposed express obligations to shippers, without, however, prescribing other equally precise practices to shipowners.

The purpose of the Hague Rules of 1924 was to protect the owners of goods from a widespread exclusion of liability of carriers at sea. This was achieved by incorporating standard clauses in bills of lading, by defining risk which might be suffered by carriers and by specifying maximum protection that carriers could claim.

Within the works for the adoption of the Hamburg Rules in 1978 by the United Nations Conference on the Transport of Goods by Sea, it was established that the carrier's liability is based on the principle of presumed fault or neglect. Under these circumstances, the burden of presenting evidence devolves upon the carrier, but in some cases the provisions of the Convention modify this rule.

Romania joined the Hamburg Rules of 1978 by Decree no. 343 of 28 November 1981. In accordance with article 30 of the Convention, the latter entered into force on the first day of the month following the expiration of a period of one year from the date of the submission of the twentieth instrument of ratification, acceptance, approval or accession.

The need for unified regulations in the field of international shipping contract is required, because there are contradictions due to the application in parallel, by different countries, of the Hamburg Rules of 1978, i.e. the Hague Rules of 1924 or the Hague-Visby Rules of 1968. Thus, if in some states the legal basis of liability is represented by the Hamburg Rules of 1978, most economically developed countries preferred the Hague Rules of 1924 and the Hague-Visby Rules of 1968. Under these circumstances, it is necessary to take measures regarding the unification of rules governing the international shipping activity.

In national law, the Civil Code of 2009 opted for a regulatory monistic conception of private law relations. There has always been the common law in the field of international shipping contract, meaning that its provisions apply to all means of transport, to the extent that it is not otherwise provided by special laws or no practices established between the parties or usages are applicable.

CHAPTER I
GENERAL CONSIDERATIONS

Achieving commercial operations involves moving goods from producers to consumers. Free movement of goods is ensured by the existence of communication networks that involve regulations according to various means of transport.

Internationally, transports represent a system of communication ways, by which traffic of goods from one place to another takes place, and the principles governing them are traffic speed, fluidity and safety.

Chronologically speaking, the first form of the contract of carriage by sea was a charter party whereby the shipowner made available a ship (or part of a ship) for the charterer, for one or several voyages or for a certain period of time, in exchange for a price, called freight. This is the classical definition of the contract of carriage of goods by sea and, at the same time, the only one used until the appearance, in the nineteenth century, of regular shipping lines. Thus, for the moving of goods from one port to another, the solution was the chartering of a ship to transport goods from the port of loading to the port of destination set by the charterer. Shipping, therefore, had no route established previous to the conclusion of the contract, but an irregular itinerary, this being occasionally established by the charterer.

At present, the importance of occasional shipments dropped significantly, their place being taken by organized shipping which takes place regularly, based on schedules and between certain predetermined ports, calls being predetermined as well.

The Romanian Civil Code of 2009 provides, under article 1955, that, *by the contract of carriage, one party called the carrier, undertakes to transport a passenger or a commodity from one place to another in exchange for a price that the passenger, consignor or consignee undertakes to pay, at the time and place agreed*. As it can be seen, both contracts of carriage, for commodities and passengers, benefit from general regulations. In addition, according to article 2002 et seq. of the Civil Code of 2009, the contract of carriage for passengers is called contract of carriage for passengers and baggage.

Towards all the above, given the provisions of article 1168 of the Civil Code of 2009, both the contract of carriage of goods and the contract of carriage for passengers and baggage, can be described as named contracts. Earlier in the Civil Code of l864, only the contract of carriage of goods could be considered a named contract. Its legal regime was the subject of article 413 et seq. of the Commercial Code of 1887, in terms of the contract of carriage for passengers, in the absence of express regulations, the legal rules in the field of the contract of carriage of goods applied to it, by analogy and to the extent that they were consistent with its nature.

International shipping contracts are bilateral, commutative and executed by onerous title.

Besides the common features, international shipping contract has a special nature, i.e. *internationality*.

Its international nature results from the fact that the goods transit through the territory of one or several countries. In case the consignor and the consignee are the same person, the international nature of the contract is maintained, if the place of dispatch and the destination point are located in different states. This objective criterion of internationality is usually adopted in the International Transport Convention. In this respect, please see the provisions of article l section 6 and article 2 of the Hamburg Convention of 1978.

Although there is no unitary concept regarding the carriage of goods, the qualification of a real contract is acknowledged.

The existence of the contract requires the actual delivery of the goods by the carrier. Moving goods to the point of destination is possible only after the carrier forwards possession.

The arguments in favour of supporting the real nature of the international shipping contract are enlightening.

The first argument is that in the case of the international shipping contract, the carrier issues a document called bill of lading, proving cargo loading and, thereby, the contract of carriage. The holder of the bill of lading is considered the owner of the goods. It is obvious that the issuance of the bill of lading is related to the phase of the signing of the contract and not its execution, since the bill of lading is the document that proves the contract of carriage by sea and the taking over or loading of the goods by the carrier and by which the latter undertakes to deliver the goods to the consignee in exchange of the document.

Another argument refers to the fact that the Hamburg Rules of 1978, in article 15 section 2, leave no doubt about the real nature of the international contract of carriage of goods under the bill of lading. According to these rules, the contract of carriage of goods shall be signed before issuing the bill of lading, hence before delivering and loading the cargo onboard.

Transports can be classified according to several criteria, the main criteria that can be held being: object of the transport, usage of one or several means of transport, economic situation and market demand.

According to their object, transports are divided into two categories: *the transport of persons (passengers)* and *the transport of goods (goods, baggage)*.

Depending on the use of one or several means of transport, these means are distinguished as follows: *homogeneous transport (simple or unimodal)* and *mixed transport (combined or multimodal)*.

Given the economic situation and market demand, carriers may organize their work in:
- *occasional transports* that take place on routes, on the date and under the conditions negotiated by the carrier with the interested user, on a case by case basis, and *regular transports* that take place on predetermined routes, distances and weekdays.

CHAPTER II
LEGAL FRAMEWORK OF THE INTERNATIONAL SHIPPING CONTRACT

In conformity with the regulation, the sources of the international shipping contract are domestic and international. They contain material or substantial rules and conflict rules.

Relations with an international element are subject to national law regulations. In recent years, this problem caused an increase and diversity of domestic sources. Statutory regulations are contained by regulatory documents belonging to national law, private international law and other branches of law. They are specific or nonspecific sources of private international law.

The main domestic sources of the international shipping contract are: the Constitution of Romania, the Civil Code of 2009, the Commercial Code of 1887, the Civil Procedure Code of 2010, as well as regulatory documents of special nature.

Consecrating the general principles of the economic and international policy of the Romanian state, the Constitution of Romania contains rules concerning international trade law as well.

The Civil Code of 2009 regulates the contract of carriage under article 1955 et seq. Together with the entry into force of this regulation, both contracts of carriage (goods and people) benefit from a general regulation. The international shipping contract has always included the common law.

Over the years, the Commercial Code has undergone many changes, additions and abrogations through various special laws. In accordance with article 230 c) of Law no. 71/2010, the "Commercial Code of 1887", published in the Official Gazette of Romania, Part I, no. 3l of 10 May 1887, with the exception of articles 64-55, 57, 58 and 907-935, and of Book II "On Maritime Trade and Navigation" ap1icabi1e further on in relations between professionals, is abrogated at the time of the entry into force of Law no. 134/2010 and the Maritime Code.

The rules of procedure for the international shipping contract are provided by the Civil Procedure Code of 2010, regarding conflicts of jurisdiction, the provisions of the Civil Procedure Code constitutes common law in the field which is supplemented by other laws containing regulations with international element.

International sources of the international shipping contract consist of international conventions, customs and international trade usages.

The name of convention is used in a wide embrace, including all international agreements. They contain substantive, uniform and conflicting rules, combining the necessities of cooperation between states with the observance of the fundamental principles of international law.

International conventions are agreements between states or international organizations on the regulation of relations between them. These are the legal means by which the will of states is materialized. In international trade, conventions hold a leading share.

International conventions may be bilateral or multilateral. Establishing the way of expressing rights and obligations is a sovereign right of option. Each state is entitled to decide on the most advantageous and convenient ways for exchanging goods or services or for various forms of cooperation.

In the field of maritime transport, the main international multilateral conventions are: the Hague Rules of 1924, the Hague-Visby Rules of 1968, the Hamburg Rules of 1978 and the Rotterdam Rules of 2009.

The Hague Rules, developed in the years after World War I, are the natural consequence of the dissatisfaction of worldwide insurers and shippers towards the unfair treatment to which they were subjected by the shipowners of large shipping companies in regular line shipping.

Shippers wanted that bills of lading transports be subject to international unified regulations, fact which led to the initiation of international conferences dedicated to this purpose.

The Hague Rules of 1924 were signed on 25 august 1924 by 10 countries, representing two thirds of world tonnage and created, in international law, a set of rules of substantive law that will supersede the various laws regarding the contract of shipping of the states that joined or introduced these rules in their legislation.

The Hague Rules of 1924 were completed and modified in 1968, the new set of rules being known as the Hague-Visby Rules, the only major change being that by which the amount by which the shipowner may limit its liability was increased.

Although not all issues arising from international shipping were settled, the Hague Rules and the Hague-Visby Rules have imposed a minimum standard of duties and responsibilities for shipowners.

Following pressure from the shippers, especially those in underdeveloped countries which felt that the Hague Rules and Hague-Visby Rules were in favour of carriers, the representatives of 78 states adopted the Hamburg Convention of 1978.

Romania joined the Hamburg Rules of 1978 by Decree no. 343 of 28 November 1981, in accordance with article 30 of the Convention, which entered into force on the first day of the month following the expiration of a period of one year from the date of the submission of the twentieth instrument of ratification, acceptance, approval or accession.

The applicability of the Hamburg Rules of 1978 in Romania and the importance of their study results both from the provisions of article 11 (2) of the Constitution of Romania which state that the "treaties ratified by the Parliament, according to the law, are part of the national law", and the provisions of article 30 section 3 of the Hamburg Rules of 1978 according to which each Contracting State shall apply the provisions to the shipping contracts concluded on or after the effective date of these rules with respect to that State.

The importance of clarifying the legal framework offered by the Hamburg Rules of 1978 also results from the provisions of article 31, according to which any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 august 1924, when it becomes a Contracting State to the Hamburg Rules of 1978, shall notify the Belgian Government, as depositary of the Convention of 1924, that it denounces the Convention in question.

Given that the Hamburg Rules of 1978 came into force on 1 November l992, we believe that its provisions legitimately have applicability and legal force in Romania. Our recent case law is in the same direction.

Since the Hague Rules of 1924 and the Hague-Visby of 1968 have a limited scope and are limited to shipping under bills of lading, and the Hamburg Rules of 1978 were relatively successful, for reasons more political than economic, the Rotterdam Rules of 2009, based on compromise and the upgrading of shipping law, is the only alternative to the existing law.

So far, 21 states have signed the Rotterdam Rules of 2009 and only Spain has started the ratification process.

More numerous are the states that remain in expectation, such as those in Europe (great maritime powers such as France, Germany, Italy and others), even if they are aware that the Rotterdam Rules of 2009 will constitute or not the maritime law of the 21st century, depending on the number of ratifications to be made, and a massive ratification will only be possible if these rules would replace the current law.

The common and frequent form of trade agreements is represented by bilateral conventions. Achieving a balance between the requirements of the two countries and maintaining favourable relations for international trade, involves the priority usage of bilateral conventions.

Another distinct source of the international shipping contract is represented by the international custom, as far as it completes the legal standards in this area. Custom means a general practice, relatively prolonged and repeated, accepted by states as binding regulation. Custom combines an objective and a subjective element. Conduct as skill has legal value, implying the consciousness of obligation.

The limited role of custom is determined by the preference of states to materialize their will by international conventions. However, through the specificity of activity, custom is considered especially in the field of shipping.

Unlike custom, usage only involves the objective element, namely conduct as skill. Usage is a practice accepted by the parties in a certain field. Usages are found in the area of transport law, maritime and waterways law, both in national and international relations.

Usages may be applied either as a matter of law, or as conventional clause, in relation to the ground on which it is applied (lex causae, lex fori, international conventions or the will of the parties).

Article 5 of the Civil Code of 2009 shows that the European law rules apply as a priority, regardless of the quality or status of the parties and defines, at the level of fundamental principle, the relationship between the national law of the Member States of the European Union and the European law. The characteristics and effects of the principle of priority of the European law were formulated in the decisions of the Court of Justice in Luxembourg (C.J.E.U.) and subsequently introduced in treaties.

All European rules must prevail over all national rules, including constitutional level.

EU policy in the field of transport is mainly governed by the provisions of articles 90 to 100 of the Treaty on the Functioning of the European Union (TFEU).

The treaty establishes two distinct legal regimes in the field of transports, on the one hand, on rail, road and river transport, and, on the other hand, on air and sea transport. Thus, according to article 100 (1) TFEU, it follows that the provisions of this Treaty shall apply to rail, road and river transport. The European Parliament and Council, acting through ordinary legislative procedure, may lay down appropriate provisions for sea and air transport.

The specialized literature expressed the idea that unequal treatment must be viewed in a historical context related to the concept of common market of home affairs and, by extension, internal transport between the founding states of the Union, and sea and air transport, through its nature, stood much outside this sphere.

Common policy in the EU shipping field is the result of relatively recent regulations compared to other EU policies.

Regulations of European law adopted in this field particularly refer to the following aspects: promoting shipping, shipping safety and the Trans-European Transport Network (TEN).

National application methods of conventions differ from one country to another and sometimes from one stage to another in the same country. If treaties are enforceable by themselves, in some countries they have the force of law only as a result of ratification and are automatically included in national law.

Jurisprudence of international courts, such as the Hague International Court and the Courts of Strasbourg and Luxembourg, constantly state certain principles and rules of interpretation of international conventions, their corollary being their application, therefore the positivist function assertion. The essence and purpose of the principles is the interpretation of Conventions in accordance with their object and purpose, ensuring not only their random application, but uniform and effective.

The specialized doctrine revealed, however, that not once, in practice, the different and even divergent interpretation caused adverse effects to the purpose of the conventions in the States parties to them. Establishing rules and methods of interpretation for them was a subject of research and study for the doctrine, for the international associations and mainly for the Institute of International Law. International Community's efforts have resulted, among others, in the adoption, in 1969, of Vienna Convention on the Law of Treaties, which, according to articles 3l-33, represents the main source of the matter of interpretation of international conventions.

CHAPTER III
CONCLUSION OF THE INTERNATIONAL SHIPPING CONTRACT

Topics of law that hold the quality of Contracting Party to any contract of carriage are both the carrier and the shipper of goods, as well as the consignee, even if the names used to nominate them are partially modified. According to the Hamburg Rules of 1978, article 1 sections l-4, in the sphere of which all international shipping contracts between different states are included, the parties to the contract are the carrier, the shipper and the consignee.

The carrier is the person which or in whose name a contract of carriage of goods by sea is concluded. Under the Convention, the concept of carrier has a special meaning as well. The actual carrier is any person who has been entrusted by the carrier with the partial or full shipping of goods. The bill of lading, within the international shipping contract, must state the name of the carrier or that of the shipping company and its headquarters. Identifying the carrier usually results even from the header of the bill of lading.

In article l4 of the Hamburg Rules of 1978 it is expressly provided that upon the request of the shipper, the carrier or actual carrier must issue a bill of lading. Most often, the issuance of this document certifies the taking over of the goods from the shipper, when all risks and liability in connection therewith go to the carrier. This happens because, in some cases, the bill of lading represents only a promise of loading, which entitles the shipper to request, after the loading of the goods onboard, the change of the bill of lading stating "received for boarding" with a bill of lading stating "loaded", which will prove the dispatch of goods.

The shipper is the person which or by whose authority a contract of carriage by sea was signed with the carrier. Similarly, a shipper is the person which or by whose authority the goods are handed over to the carrier.

The name of the shipper is always mentioned in the bill of lading, because it is the one handing goods over for loading. Instead, the name of the master is only mentioned in the bill of lading in case he is the one who actually takes over the goods and issues a bill of lading "loaded onboard" directly to the shipper.

The consignee is the person entitled to take over the goods. In the same contract, the consignee may also be the shipper.

Article 1179 (l) of the Civil Code of 2009 provides the main conditions for the validity of a contract, namely: capacity to enter a contract; consent of the parties; a lawful and determined object; a legal and moral cause.

The capacity to enter a contract is the prerequisite and basic condition whose content is given by the ability of the subject to gain civil rights and assume civil obligations by way of entering contracts. However, for a contract to be considered validly signed, the consent of the will of two or more natural or legal entities is necessary, entities with the capacity to enter a contract. In the matter of concluding contracts, the rule is the capacity to enter such acts, considered as such against the exception to the rule, consisting in the inability to conclude them.

The contract shall be deemed as concluded, mainly when the agreement between the parties occurs. The mechanism through which the agreement occurs involves, in all cases, meeting an offer to enter a contract with its acceptance.

As defined by the doctrine, the consent is the basic and general condition of the legal act which consists of the decision to enter a legal act shown in the open.

In contract law, the term of consent has two acceptations: a) manifestation of the will of each of the contracting parties to conclude the contract and b) agreement of will, concurrence or conformable meeting of at least two wills, the debtor's will, which binds itself, and the creditor's will, towards which it binds itself.

The Civil Code of 2009 proves consistent terminology, because it holds the first acceptation of the term "consent" for the second using the term "agreement".

In general, the doctrine retains the following conditions of validity of the consent: to come from a person with judgment; to be expressed with the intention of producing legal effects; to be externalized; not to be altered by any vice of consent.

The third essential element of any convention, show in article 1179 (1), section 3 of the Civil Code of 2009 is a determined and lawful object.

The object of the contract is represented by the conduct of the parties established by that civil legal act, i.e. action or omission to which the parties are entitled or by which they are bound. In other words, considered to be the very object of the civil legal relationship to which it gave birth, the object of the civil legal act consists in the obligation arising from it, i.e. the benefit or benefits relating to the transfer of a right and a positive or negative deed of the debtor, as well as in the object covered by these benefits. The Civil Code of 2009 clarifies the concepts and the regime applied to the object of the contract.

In the case of the contract of carriage, the object of the contract of carriage concerns, as well as in common law, the benefits of the contracting parties, i.e. the carrier's obligation to transport the goods under its guard and the obligation of the shipper to pay the price. Therefore, the object of the contract of carriage is subject to the same regulations of the Civil Code of 2009 contained in articles 1225-1226.

But the object of the legal act envisages not only benefits of the parties, but also goods or things to which their conduct refers. Specificity notes relating to the object of the contract of carriage refer to the possibility and legal nature of object to be transported. Thus, the carrier may refuse a shipment if it does not hold adequate transportation means to carry those types of goods. However, the material object must be possible to carry by the transport means held by the carrier and must be legitimate because, sometimes, aspects of public safety or operating conditions of transportation means and infrastructure justify the refusal of the carrier to transport certain categories of goods. Impossibility to transport certain goods must exist at the time of contract conclusion and must be objective.

The Civil Code of 2009 lists the cause among other essential conditions for the validity of the contract, in article 1179 (1) section 4, presenting it in words "a legal and moral cause" and defines it in article 1235 as the reason that causes each party to conclude the contract.

In the concept of the new regulation, at the basis of any contract there must be a sufficient reason, in its absence, as well as in the case of its unlawful or immoral nature, the contract and the obligations of the parties are invalid. In this respect are the provisions of article 1236 of the Civil Code of 2009. Paragraph 1 of the same article lists three conditions of validity of the contract cause: the cause must exist, be legal and moral.

The agreement of the will of the contracting parties once achieved to conclude the contract necessarily involves expressing the consent.

The rules governing the issue of the form conditions of the contract of carriage are dispositional, therefore, the parties or the legislator or the carrier may transform the written form, from an ad probationem condition to an ad validitatem condition.

In general, the contract concluded between the carrier and the passengers or between the former and the cargo shipper is generically called transport document.

However, the Hamburg Rules of 1978 mention the bill of lading as document having the function, among others, to prove the existence of the contract of carriage and the taking over or loading of the cargo.

We must, however, distinguish between the conclusion of the contract and the issuing of the bill of lading.

CHAPTER IV
TRANSPORT DOCUMENTS

The term of transport document designates the type of a specific transport document in which the essential and general remarks are registered for the performance of the carriage. In every branch of transport, the contract concluded with the carrier usually shows some particular features which are briefly reported below. The diversification of the transport document is not limited only to its content but also regards the very names assigned to the evidence document by the legal provisions.

In regard of the passenger transport, the transport document is appointed, in turn, by various names, which does not, however, affect its substance. Current language has generalized the terms ticket or subscription.

It cannot be precisely told when the bills of lading began to be used, although documents were discovered confirming that different types of goods had been loaded onboard for over a thousand years.

In the Middle Ages, traders travelled together with commodities and therefore there was no need for any transport documents.

As traders began not to trust shipowners, they started to require a document from the master, confirming that a certain number or certain quantities of goods were loaded onboard.

This practice generated some problems caused by the fact that in the case of loss of this document issued in a single copy, the trader found himself at the whim of the master, who had the only proof of the cargo loaded onboard.

In the second half of the sixteenth century, the use of the bill of lading expanded rapidly. In modern law, the agreement of will of the parties is sufficient to operate the transfer of ownership. At the time, the document proving that the goods were loaded was the bill of lading.

Initially, the bill of lading was no more than a receipt which was not negotiable. But, by time, together with the development of trade, need was felt for this receipt to reach destination. Hence, the birth of the practice of transferring ownership of the goods by endorsing the bill of lading in the name of the new buyer. Since the eighteenth century, the "negotiable" bill of lading has been in current use. The first bills of lading contained no limitation of liability. The first reserves made consisted either in a general formula like "only except for sea risks" or called "disclaimers" or "negligence clause", the shipowners limiting the contract from stringent responsibilities imposed by maritime law.

The Hamburg Rules 1978 define the bill of lading as a document that proves a contract of carriage by sea and the taking over or loading of the goods by the carrier, by which the carrier undertakes to deliver the goods against presentation of this document.

The bill of lading differs from one kind of goods to another, from relationship to relationship and according to the will of the shipper and the carrier. The content of the bill of lading is determined in the laws of various states, the differences being quite rare, this being due, on the one hand, to the existence of standard forms, and, on the other hand, to unified regulations in the field.

The specialized literature considers that, by the way the bill of lading is governed in the national and international legislation, the existence of a mandatory content and an optional content results.

The mandatory content is determined by the law governing the form and content of the document. Article 1961 (2) of the Civil Code of 2009 stipulates that the transport document shall include, among others, remarks regarding the identity of the consignor, carrier and consignee and, if applicable, of the person which shall pay for the transport. The transport document also states the place and date of the taking over of the goods, the starting point and the destination point, the price and time of the transport, the type, quantity, volume or mass and the apparent condition of the goods upon delivery for transport, the hazardous nature of the goods, if necessary.

The nature and purpose of the bill of lading indicate its compulsory content, i.e. the general nature of goods, the main marks necessary for the identification of goods, an express statement, if any, on the hazardous nature of goods, the number of packages or pieces, and the weight of goods or their quantity otherwise expressed, as these indications were provided by the shipper; the apparent condition of the goods; the name and headquarters of the carrier; the name of the shipper; the consignee, if stated by the shipper; the port of loading stipulated in the shipping contract and the date when the goods were taken over in the port of loading; the name of ship onboard of which the goods are loaded; in case of direct bills of lading, secondary vessels which performed the transport of goods on certain parts of the transport chain may also be recorded; the port of discharge which usually is actually the port where the vessel has discharged its cargo and where the responsibility of the carrier ends; mentioning the freight in the bill of lading is compulsory, especially when it is paid by the consignee or it was indicated that it would be paid by the latter; the date or period for the delivery of goods at the port of discharge (if this was agreed by the parties); the number of negotiable copies signed by the carrier or master (usually a set of 3 originals); the main terms and conditions of carriage; the statement of the shipper, if applicable, that the goods will or may be loaded on deck; the actual date for the loading of the goods on the ship; the name of the conventions or convention governing the bill of lading issued by the carrier (usually the bill of lading indicates the Hague Convention of 1924 and the Hague-Visby Convention of 1968 or the United Nations Convention on the Carriage of Goods by Sea, Hamburg of 1978; the limit or limits of the liability of the carrier agreed between the parties meaning their increase, towards the provisions of the Hamburg Convention of 1978).

The issuance of the bill of lading by the carrier proves, on the one hand, that it recognizes the cargo (goods) received, and on the other hand that the goods correspond to the remarks included in the document.

The shipper is compelled to provide real data to the carrier with regard to the markings, number of packages or pieces, quality or nature and condition of the goods loaded. The carrier has the right and obligation to verify the nature, weight, quantity and condition of the goods loaded on board or received for loading. The law provides the possibility for the carrier not to mention or declare markings, weight, amounts that do not correspond to reality, especially in situations where there are no reasonable means of checking. By doing so, the carrier takes precautions against possible claims. This is because the inaccuracies in the statements of the shipper on the nature of the goods do not exonerate the carrier from responsibility for losses and damages occurred. Thus, in legal practice it was held that the carrier has an absolute, uncensored right to obtain the correct registration of the status and apparent condition of the goods in respect of which the law refuses to admit that the shipper might somehow guarantee the carrier for inaccuracies in the description of the state and

apparent condition of the goods. If there was no remark in the bill of lading about defects of goods or packaging, the bill of lading will be issued as a clean bill of lading, proving that the carrier received the goods in apparent good condition.

By signing the bill of lading without reserves, the carrier takes on the responsibility for all damage that would result from mismatches between what is stated in the bill of lading and the actual state or quantity of the goods loaded. This responsibility may be modified by inserting clauses such as, unknown quality and weight, provided that no fraud or serious fault is imputed to the issuer of the bill of lading, because admitting otherwise means to lessen the probative value of the loading policy. In case there are some reserves from the carrier on the indications regarding the general nature, primary markings, number of packages or pieces, and weight or quantity of goods, the carrier has the obligation to state all inaccuracies on the bill of lading. According to article 1 section 5 of the Hamburg Rules of l973, the term "goods" also includes the goods stored on deck and livestock transport; in the case of goods transported in containers or on pallets or when goods are packed, the term "goods" also includes these means of transport and packaging, if provided by the shipper. A "clean" bill of lading is the only acceptable documentary evidence that the goods (specified and described in the bill of lading) were transported on the date set in "apparent good condition and state".

If, upon the reception of the goods for transport, the carrier knows or has reason to suspect that the goods are not exactly as specified in the bill of lading or if it did not have the means to check the reality of the remarks, it will proceed to make a reserve by showing inaccuracies or the reason of its suspicions or absence of the means of control. In that case the carrier is entitled to express its doubts about the accuracy of the remarks in the bill of lading, being able to insert certain reserves which will exonerate it from liability.

The mandatory remarks on the bill of lading concern the voyage as well. These remarks relate, on the one hand, to the ports of loading and destination, and on the other hand, to the ship that will carry the goods. Thus, the bill of lading must state, according to article 15 section 1 f) and g) of the Hamburg Rules of 1978, the port of loading stipulated in the shipping contract, and the date when the goods were taken over in the port of loading and the port of discharge which, as a rule, should be considered as place of delivery.

Regarding the identification of the transporting ship, it is considered as necessary that her name be stated in the bill of lading, especially in cases where the goods are delivered to the shipping company to be loaded, establishing the name of the ship which will actually load the goods, at a later stage, being quite difficult. This is the reason why, in exchange of the bill of lading "delivered for loading", the shippers request, after loading the goods, a "loaded" bill of lading.

In addition to the mandatory remarks included in the bill of lading, it may also contain some special optional clauses, which complete them.

In turn, the optional content concerns: a) clauses - ways determining the conditions (methods) of the transport to take place, such as: freight payment methods, the procedure for the payment of the fees and expenses incurred by the loading and discharge of goods or en route, the route to be followed, possible calls, etc. (these clauses are also called the conditions of the bill of lading); b) derogatory clauses, called exception clauses in the international language of shipping.

The role and importance of the bill of lading in the shipping of goods is justified by the functions that it performs, but they are not unitarily treated in the doctrine.

In general, the bill of lading is assigned two main functions, namely that of instrument of proof and representative title of the transported goods. In this respect it is considered that a bill of lading has a double function, in that, just as an instrument of proof, it may prove the

conclusion of the contract of carriage between the carrier and the shipper, certifying the loading of goods onboard, but also in that it embodies this cargo, being its representative title.

A bill of lading is a triple purpose document, being both a proof of the contract of carriage, an instrument of proof for the loading of goods, and a representative title of the cargo.

Consequently, by virtue of the functions it accomplishes, we believe that a modern bill of lading can be described as a document representing: the receipt signed by or on behalf of carrier, issued to the shipper, proving that the goods described therein were loaded on a particular ship, for a particular destination or were sent to the shipper for shipment, thus fulfilling a function of evidence; the proof of the existence and content of the contract of carriage by sea; document of title for the goods specified in the bill of lading.

The issuance of the bill of lading proves, on the one hand, the recognition of the cargo, and, on the other hand, that it is as listed in the document. The bill of lading is not only an instrument of proof, a proof of contract of carriage with related clauses, but plays a much more significant role, representing the transported cargo itself. It is a *security*, a document of credit representative for the goods with the purpose of making possible the sale or pledge of the goods during the voyage, without being actually handed over. A representative title represents the cargo written down on it, so that the title, within certain limits, is able to substitute goods, for the purpose of its trading during the entire period when it is in possession of a third party. In other words, a document represents the cargo onboard, if during the sea voyage possession of the document is to be confused with that of the cargo itself.

CHAPTER V
PERFORMANCE OF THE INTERNATIONAL SHIPPING CONTRACT

Chronologically speaking, the performance of the contract of goods consists of three successive operations: loading; voyage at sea; discharge of goods.

In relation to the approximate date of the ship in port, the shipper takes all necessary measures so as the cargo may arrive in port before the ship. In this sense, all equipment is prepared and warehouses bring all necessary manpower. It is well known that goods are not dispatched to port right after their production, but after the ship has already been notified that she will arrive in port for loading, since the storage charges in ports are very high, which causes commodity costs. At the same time, however, the arrival of goods in port for operation may result in exceeding the time allocated for loading or even the payment of dead freight (freight paid for the cargo engaged for transport and unloaded onboard the ship). Notifications are made l0-15 days before the ship's arrival in port. The master makes the final notification by the use of radio-emission installations onboard, 24 to 28 hours before entering the port. In case the ship would first discharge in port, the notification will include some data on the goods loaded (type and quantity of the goods onboard), in order to be able to establish the time when the ship will be ready for loading.

Normally, for the shipments based on bills of lading, the operating port is established by these documents. If the parties have contractually stipulated a specific port, the carrier may not refuse going to that port claiming that it is not safe. Instead, it may claim compensation for all shortcomings caused to the ship due to the fact that the port is not secure (e.g., if the ship is damaged because of this).

A safe port means that the ship, as she is, may reach it and she can permanently stay and discharge afloat. Furthermore, it means that the ship can safely leave that port. Port security must be assessed in relation to a particular ship, properly equipped, led and handled with due care and in accordance with good seamanship. In judicial practice it was shown that a port is secure when it allows a ship to enter and stay, load or discharge, always afloat, and ships are able to enter and exit physically unharmed, being politically safe as well.

On the ship's arrival in the roads, the master must inform port authorities in order to be granted permission to berth. This permission granted is called "free practice" and is granted after being inspected by health, customs and border authorities.

Since the transmission of the notice of readiness, the ship is theoretically available to the shipper and any delay in loading can no longer be charged to the shipowner. The acceptance of the notice of readiness usually represents the start for counting the time allocated for loading.

Upon arrival at the port of loading, the ship receives the list of goods from the shipper, where data is entered with regard to: the name of goods, the total quantity in tons and / or cubic meters, packaging, shape, size and weight of packages (boxes), characteristics of hazardous goods and their stowage conditions, and other factors deemed useful for rational and safe distribution of goods. When there are several ports of discharge, the goods are grouped according to each port separately, in order to provide for the master the ability to distribute goods in warehouses corresponding to the rotation of ports.

The distribution of goods onboard is made by the Loading-plan (or Cargo-plan or Stowage-plan) which is a graphical representation of how the goods onboard are to be loaded and stowed, in warehouses and lots. The master, along with the first officer and chief stevedore prepare a preliminary Cargo-plan, based on the list of goods. Particular attention should be paid to how to load hazardous goods or those that move easily, such as cereals. In these cases, the master must strictly comply with all regulations relating to the loading and transporting of such goods.

During loading-plan preparation, besides the horizontal distribution, the vertical distribution of goods is of particular importance. Special attention will be paid the total quantity of goods, which should not exceed the total capacity of the ship at load line for the respective area and season. Otherwise, the ship's hull will be overloaded and in case of accidents, the ship will be considered as being in unseaworthiness condition.

The Mate's Receipt is a document that the shipper or its representative hands over, upon loading, to the first officer of the ship, before the arrival of the goods onboard. The Receipt is signed by the officer in charge or first officer, after the loading of the goods recorded, by signature certifying their receipt onboard.

The operations of stowing and lashing of goods is one of the most important of those practiced in the carriage of goods by sea. To make a correct stowage, the ship's master, who is always in charge with the supervision of this activity, requests the list of the goods from the shipper, with all their characteristics, according to which he draws up the Cargo-plan. The master has the right and duty to establish the order and place where the goods must be loaded, so as to ensure, firstly, the ship's stability, the performance of the discharge operations according to the order of destination ports, permanent seaworthiness and normal trim throughout the voyage.

The carrier is liable for the damages resulting from an insufficient separation of goods.

The transport on deck is made at the risk of the shipper, which is always recorded in the bill of lading by the shipowner's disclaimer. For goods loaded on deck the ship is obliged to make available the necessary means for cargo security during transport.

The obligations of the contracting parties - shipper, carrier and consignee – are drawn from the interpretation of the Hamburg Convention of 1978.

The main duties of the shipper consist in the obligation to deliver the goods, the marking of hazardous goods, the guarantee of the carrier for the accuracy of the instructions included in the bill of lading, the payment of freight.

Delivering the goods means the material transmission of the goods consisting of acts, facts or processes by which the goods are transferred to the carrier. The shipper is obliged to deliver the goods on the date and at the port stipulated in the contract of carriage. After loading, the name of the port of loading and the date of taking over of the goods by the carrier will be included in the bill of lading.

The marking obligation of hazardous goods, under the Hamburg Rules of 1978, establishes two obligations on the account of the shipper: a marking or label applies properly indicating the hazardous nature of the goods, and upon the delivery of the goods, the carrier is given notice of their hazardous nature and, if necessary, of the precautions to be taken. Failure to comply with these obligations entails the liability of the shipper for the losses caused to the carrier.

The obligation to guarantee the carrier for the accuracy of the indications included in the bill of lading is established by article 17 of the Hamburg Rules of 1978 and may take the form of both a legal guarantee of the shipper for the accuracy of its statements made by inserting the remarks about the general nature of the goods in the contract: marking, number, quantity and weight, and a conventional guarantee (letter of guarantee or agreement) by which the shipper relieves the carrier from making any reserves in the bill of lading, thus the carrying out of any checking when taking over the goods. This conventional guarantee, by which the shipper undertakes to indemnify the carrier for any damages caused to it by the issuance of the bill of lading without reserves, shall take effect only between the shipper and the carrier and only if the failure to make reserves was not intentional, following damage to a third party, including the consignee.

The freight is the price that the charterer pays to the shipowner for moving the goods from one port to another on the most direct route with reasonable diligence.

The freight payment is incumbent to the shipper - as part of the contract of carriage - and it represents its counter-performance for the transport of goods conducted by the carrier. Usually the freight is not included in the bill of lading, because it is paid upon the delivery of the goods, therefore before its issuance.

In principle, the amount of freight is nowadays freely established by the parties. In practice, it is determined by the transport charge, in turn established on the basis of economic calculation aiming at the best profitability of the ship. The freight charge of a carrier discusses a variety of parameters and its application to a given transport is very complex matter. The amount of freight can thus be calculated as weight, volume, per unit, varying or not according to the nature of the goods and / or their value. The basic amount of freight can also be affected by additional tasks. The most famous was the already called "hat money", practiced on all seas of the world and considered as a salary due to the master for his dedication related to goods.

Among all the provisions of the Hamburg Convention of 1978, the following obligations devolve upon the carrier: the obligation to take over the goods, to load and discharge the goods; to carry the goods to the port of destination within the term stipulated;

to preserve the goods; to deliver the goods to the legitimate holder of the bill of lading or another document for the loading of the goods.

The obligation to take over the goods devolves upon the shipper. If the taking over of the goods is not immediately followed by their loading, the carrier shall issue a provisional bill of lading of takeover to the shipper, this being later replaced with another one stating "boarded". The obligation of loading the goods onboard should not be confused with the obligation to take over of the goods by the carrier, as this is a legal operation that marks the start of the carrier's liability, even if the goods have not been loaded yet.

The carrier has the obligation to transport the goods, taken over at the port of loading, to the port of destination mentioned in the bill of lading. Also, in the bill of lading, according to article 15 (1) n) of the Hamburg Rules of 1978, the parties may state the date or period of time when delivery is to take place. If no term or period of delivery was provided, the goods must be delivered within a reasonable period of time.

The obligation to preserve the goods arise from the provisions of article 5 (1) of the Hamburg Rules of l978 and spreads over the entire period during which the goods are in the care of the carrier, i.e. between the time of their takeover from the shipper and their delivery to the consignee.

The delivery obligation is not to be confused with the obligation to discharge the goods, the same way as the obligation of taking over is not to be confused with the obligation of loading. The performance of the delivery obligation has the meaning of passing the goods from the carrier's care to that of the consignee, thus marking the termination of the carrier's liability for the goods.

In the event that the carrier delivers the goods without submitting the bill of lading, it will cover the action of its owner.

The definition given by the Civil Code of 2009 to contract of carriage of goods makes no reference to the carrier's obligation to ensure the security of the goods transported, nor to the obligation to carry the goods in due time. In order to partially fill these gaps of the definition, the authors of the code provided in article 1551 section 1, on the content of the transport document, that it will include the "term within which the transport must be performed". Regarding the obligation to guard and preserve the goods by the carrier, its existence only result implicitly from the regulation of the carrier's liability for loss and damages. However, the definition given by the code has the merit of specifying that the contract of carriage of goods shall be deemed as concluded when the carrier has received the goods for transport.

In the case of the contract for the carriage of passengers, there is an obligation for the shipping company to provide the appropriate ship for the passengers, for a safe transport and in good condition, and a seat for each passenger, as stipulated in the contract. Another obligation of the shipping company is to receive onboard the personal baggage of passengers, which will be transported free of charge, but which remain under the surveillance of the passenger during the entire voyage. The carrier also has the obligation to begin the voyage on the date and at the time mentioned in the ship's voyage itinerary or in the contract of carriage (on the travel ticket). The obligation to perform the voyage transport involves the observance by the carrier of the established route and the time of performance, securing the necessary comfort, life and integrity of the passenger. Also, the carrier is required to make only the calls established, any deviation from the route or stop out of the master's fault entitling the passenger to accommodation and meals or even termination of the contract of carriage.

The contract of carriage of baggage applies the provisions relating to the carriage of goods in terms of reception at transport, transport charges and liability in case of loss or damage of the goods.

Unlike other forms of transport, in the international shipping contract based on the bill of lading, the consignee is any person who is in the legitimate possession of the bill of lading. If no bill of lading was issued, the consignee is the person registered in the document that proves the conclusion of the contract and the taking over of the goods by the carrier. As the owner of the goods, the holder of the bill of lading is entitled to claim their delivery and, if necessary, to hold the carrier liable. The same right falls on the consignee as well, if no bill of lading was issued, although in this situation, the consignment note is not a representative title of the goods.

The consignee of the goods shall mainly have two obligations: taking the goods over from the carrier and pay freight and demurrage upon loading.

CHAPTER VI
PARTIES' LIABILITY IN THE INTERNATIONAL SHIPPING CONTRACT

The Civil Code of 2009 regulates the main features of contractual liability, essentially presenting the aspects retained to this point in our legal doctrine; as well as the French one.

The content of the legal text shows the elements of contractual liability: the debtor committing an unlawful act consisting in the fact that, without justification, it did not fully or only partially fulfil, or did not properly fulfil its obligations under a contract validly concluded, the existence of a prejudice to the creditor's property and the causality link between the act and the damage.

The contractual liability of the carrier under the international shipping contract is determined by the law of the contract. In the national law, according to article 1984 of the Civil Code of 2009, the carrier is liable for the damage caused by the total or partial loss of the goods by their alteration or damage occurred during transportation, subject to the provisions of article 1959, as well as by delaying delivery of goods.

On the other hand, article 12 (1) c) of EC Regulation no. 593/2008 of the European Parliament and of the Council provides that the contract law also applies to the consequences of total or partial failure in the fulfilment of the obligations, including the assessment of the damage to the extent that it is governed by rules of law within the limits of competence conferred to the court by its procedural law.

The contractual law regulates the following elements: the contractual liability conditions; the consequences of non-fulfilment or improper fulfilment of the contract; the statute of force majeure and of the other grounds of exemption from liability; the assessment of the damage caused by the failure or improper fulfilment of the contract.

The engagement of contractual liability requires cumulatively bringing together four conditions: the existence of damage, the committing of an unlawful act, establishing a causality link between them and guilt.

Carrier is liable under article 1984 of the Civil Code of 2009 "for the damage caused by total or partial loss of the goods, through their alteration or damage occurred during transportation, subject to the provisions of article 1959, as well as through delaying delivery of the goods ".

This article regulates three unlawful acts causing damage, acts for which the contractual liability of the carrier may be engaged. On these unlawful acts, the mentioned legal text lists them and sets the time when they must take place in order to entail the engagement of the carrier's liability.

The three unlawful acts, expressly listed in article 1984 of the Civil Code of 2009 are: total or partial loss of goods; alteration or damage of goods; delayed delivery of goods.

The first two are, in fact, specific varieties of the abstract unlawful act represented by the breach of the obligation of conservation. The third is a concrete expression of the abstract unlawful act, consisting of disregarding the obligation to perform the transport within a given term, conventionally or legally determined.

On the total or partial loss of goods, article 1984 of the Civil Code of 2009 expressly stipulates that, in order to be able to lead to engagement of contractual liability of the carrier, it must take place during transport. The mentioned article does not regulate the meaning of "during transport." However, by way of interpretation it can be considered that this phrase covers, in fact, the entire period within which the carrier is bound to preserve the goods subject matter of the transport. Naturally, such an obligation would cover, as a rule, a period between the time when they were taken over by consignees. In support of this statement, the provisions of article 1482 in conjunction with article 1485 of the Civil Code of 2009 might be raised. According to them, the debtor of the obligation to deliver a determined individual property also has the obligation to preserve it until delivery, the debtor being discharged by its delivery in the same condition as it was at the time of the obligation.

As a way to repair the damage, the Civil Code of 2009, in art. 1985 (1), provides that in case of loss of goods, the carrier should cover the real value of the goods lost or of the lost parts of the goods transported. According to its express provisions, article 1985 of the Civil Code of 2009 establishes the principle of repairing the damage to the real value of the goods. The determination of the real value is established by reference to the place and time of their delivery for transport. Such an interpretation is further supported by special regulations and national and international jurisprudence. The recent judicial practice, in proving the price of the goods, in default of the invoice, shall also allow other documents proving the value of the goods, provided that the amount thus determined is corroborated with other evidence (other documents accompanying the goods), e.g. the debit note sent by the supplier to the beneficiary of the transport, the price resulted from it and in the note of delivery of the goods.

The carrier is also liable for the damage to the transported goods. The "damaged goods" means any damage, impairment of the quality of the goods occurred during the movement of the goods, so that when arriving at destination they no longer have the same features and technical-economic attributes when compared to the moment of their delivery.

The damage may consist of distortion, alteration, breakage, thinning, etc. The carrier's liability for damage to the goods is driven as a result of the failure to ensure the integrity of the goods during the period it holds possession of the goods, the carrier being assimilated, in this regard, to a necessary depositary. The obligation of protection and preservation of the goods entrusted for transport is, however, one adjacent to the main obligation, namely the movement of the goods. The extent of damages is calculated similarly to those payable in case of loss, by reference to the price of the goods, which, however, cannot exceed the compensation due in case of loss of the damaged goods.

Article 1992 of the Civil Code of 2009 establishes the rule according to which the carrier is also liable for late transport, leaving special legislation to regulate the specific conditions and limitations of liability. This article reaffirms and completes the provisions of article 1984 of the same code. The extent of the compensation varies depending on the period of delay, meaning that, if the delay is less than twice the length of the period the parties agreed upon for the performance of the transport, the carrier will lose some of its transport charges, in proportion to the time of the delay.

If the delay is twice the agreed period, the carrier is bound to refund the transport charges. In case the transport term is exceeded and the result is the damage of the goods, the compensation for such delay is cumulated with the compensation for the repair of the goods.

The performance of the international shipping contract is achieved over a determined period of time. For this reason, in the case of an action for damages filed based on the international shipping contract, the damage or loss of goods during this period must proven.

The proof that damage occurred during transport is facilitated by the issuance of a clean bill of lading, without reserve and remarks referring to the condition of the goods. The reserves made by the consignee holding a clean bill of lading strengthen the presumption that the goods were damaged during shipping.

An essential element, with significant implications in terms of proper fulfilment of the obligations of the contracting parties, which was the subject of international regulations in the field, is the carrier's liability duration.

According to the Hamburg Rules of 1978, the carrier's liability covers the period while the goods are in its care. The period during which it is considered that the goods shall be in the carrier's care begins when it takes them over from the shipper or a person acting on its behalf or from the authority or a third person to whom, under the law or applicable rules at the port of loading, the goods must be handed over for loading. This period ends the moment when the carrier has delivered the goods by handing them over to the consignee; or, if the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or law or practices that apply at the port of discharge; or by handing the goods over to an authority or other third person to whom, under the law or applicable rules at the port of discharge, the goods must be handed over, as stipulated in article 4 section 2 of the Hamburg Rules of 1978.

The negotiators of the convention put emphasis on a more rigorous regulation of the carrier's liability duration in order to eliminate controversies regarding the beginning and the end of the period when the carrier may be held liable.

The carrier's liability, under the provisions of the convention, is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of presenting evidence devolves upon the carrier, but that in some cases, the provisions of the convention modify this rule.

The carrier currently has a responsibility by right, often referred to in the French legal literature "presumption of liability", since the goods entrusted to it is subject to loss or damage imputable to the carrier. Quite often, the liability by right of the maritime carrier is qualified as "presumption of liability" by the doctrine, but also by the foreign jurisprudence.

Beyond the terminological aspect, the idea is the same: the maritime carrier is fully responsible for damages to goods". The rule is consistent with history, is fully justified and must be applied by the courts.

According to the Hamburg Convention of 1978, the carrier is liable for:

- *Damages resulting from loss or damage to the goods, as well as from delay in delivery*, if the circumstances which caused the loss occurred while the goods were in its care, unless it proves that itself, its servants and agents took all measures that are reasonably required to be taken to avoid the occurrence and consequences of these circumstances (article 5 (1)). Regarding the carrier's liability for delay in delivery of goods, the Hamburg Rules of 1978, article 5 section 2, consider that the goods are delivered with delay when they have not been delivered at the port of discharge within the stipulated term, the term expressly agreed upon or, failing such agreement, within a term that can be reasonably claimed from a diligent carrier.

- *Loss, damage or delay in the carriage of live animals*, but only in case it failed to comply with the special instructions given by the shipper.

- *Goods carried on deck without the agreement of the shipper or, contrary to traffic practices or regulations in force, or in the event it cannot raise an agreement concluded with the shipper regarding the transport on deck.*

- *Carriage performed by the actual carrier effective if the performance of the transport in whole or in part was entrusted to it*, the carrier remaining responsible for the entire transport.

- *For general average*, the basic principle known in shipping from ancient times is that a person, whose property is sacrificed for the public benefit, must recover the loss through the contribution of those who have benefited from the sacrifice made.

In the field of the maritime carrier's liability disclaimers, we find that the liability disclaiming effect may also be raised in a number of circumstances having in common the influence of status quo on the goods transported, as follows: "hidden flaw, special nature or inherent flaw of goods", insufficient or defective packing or marking signs imputable to the shipper.

In international shipping, an important role is played, on the evidence level, by the reserves written down by the carrier in the bill of lading on the occasion of receiving the goods.

The Hamburg Convention of 1978 distinguishes seven cases exempted from liability, namely: fire, danger at sea, acts of war, will of God, acts of public enemy, quarantine restrictions, strikes or lock-outs, civil matters, rescue or attempted rescue.

The sphere of *sea dangers* is large enough, being deemed that sometimes this notion may exceed the traditional boundaries of force majeure (absolute unpredictability and absolute invincibility); however, judicial practice is usually constant in stating that removing the liability of the international maritime carrier may only take place for those phenomena of exceptional violence that exceed the normal dimensions of unfavourable weather conditions which, predictably, a sea voyage may involve.

The existence of any exonerating causes cannot be an obstacle preventing the person entitled to claim and prove the fault of the carrier, assuming that the carrier can be held liable for the damage suffered. Thus, the consequences of inherent flaws of the goods or packaging can be aggravated by improper stowage of the goods performed by the carrier's named representatives. Division of responsibility becomes practically possible: the carrier may be relieved from liability for the part of the damage due to insufficient packing and it may be bound to compensation for the damage subsequent to poor handling of the goods.

The Hamburg Rules of 1978, article l2-13, govern the shipper's liability for the damage suffered by the carrier and its obligations in the case of the carriage of dangerous goods.

As a general rule, according to article 12, the shipper is not liable for loss incurred by the carrier or for damage suffered by the ship, unless such loss or damage was caused by negligence of the shipper, its servants or agents.

According to article l section 7 of the Hamburg Rules of 1978, by issuing the bill of lading the carrier undertakes to deliver the goods against the presentation of this document, such obligation being achieved through the handing over of the goods to the entitled holder (consignee), the delivery of the goods to the legal owner of the bill of lading subsequently being made at the port of discharge stipulated in the bill of lading. Usually, the carrier's liability ceases upon delivery of the goods to the consignee. What will happen, however, in case the consignee either refuses to accept the goods or does not appear in order to take them over? The issue is of special importance, especially if the consignee is also the debtor for the payment of the freight due.

If the consignee refuses the goods, according to article 4 section 2 b) of the Hamburg Rules of 1978, they will be made available by the carrier for the consignee in accordance with the contract or law, or practices that apply to the port of discharge. In case the consignee is not present, the goods will be delivered to an authority or third party, to which, under the law or regulations applicable at the port of discharge, according to article 4 section 2 b), the goods must be delivered. Regarding the recovery of freight payable by the consignee, in the absence of special provisions in the Hamburg Rules of 1978, we deem the provisions of the Civil Code of 2009 as applicable. If the consignee of the goods loaded refuses to receive them, the master, authorized by the law, may sell the required amount for the payment of the freight due, the difference being subsequently recorded as available for the consignee. If the sums thus obtained do not cover the freight due, the master will obtain a claim against the shipper for the difference.

CHAPTER VII
CLAIMS AND ACTIONS

In the procedure of notification of loss, damage or delay, the right of action belongs primarily to the legitimate owner, which can be considered as holder of the right of ownership or of claim over the transported goods. In principle, the legitimate holder is the consignee of the goods, the person mentioned in the bill of lading or the holder of bill of lading to order.

The first obligation imposed to the consignee when it finds loss or damage to the goods received is their notification within the terms and under the sanction of the law. The Hamburg Rules, in article 19, regulate the issue of notices of loss or damage to the goods, establishing a separate treatment, as they are apparent or not.

In accordance with article 19, section 1, if loss or damage is apparent, the consignee is obliged to send the carrier a written notification, specifying the general nature of such loss or damage, no later than the first business day following the day the goods were delivered. Otherwise, it shall be presumed, until proven otherwise, that the goods were delivered by the carrier as described in the transport document, and if such a document was not issued, that they were delivered in good condition.

When loss or damage is not visible, i.e. in the case of hidden flaws, the consignee is able to send the notification within 15 days. The period starts to run, according to article 19, section 2 of the Hamburg Rules of 1978, the day after the goods were delivered to the consignee. The notification is not required if the condition of the goods upon delivery was the subject of a common survey or inspection by the parties.

In case the prejudice suffered by the consignee consists in the delay in delivery of the goods, written notification to the carrier must be sent within 60 consecutive days from the receipt of the goods. In the case of the transport performed by the actual carrier, any notification that was sent to it will have the same effect as if it was sent to the carrier and vice versa.

If the loss or damage to the goods is due to the fault or negligence of the shipper, according to article 19 section 7 of the Hamburg Rules of 1978, the carrier is required to notify the shipper in writing about this loss or damage, specifying the general nature thereof, within 90 days from the date of the circumstances that caused the loss or damage. Otherwise, it is considered that the carrier has not suffered any loss or damage due to the fault or negligence of the shipper.

The jurisdiction to settle a dispute concerning international carriage of goods, under article 21 (1) of the Hamburg Convention of 1978, alternatively devolves – at the plaintiff's option – upon the court under whose jurisdiction is to be found one of the following locations: the headquarters of the defendant or, failing that, its regular place of residence; the place of conclusion of the contract (provided that there is an office, branch or agency of the defendant through which the contract was concluded); the port of loading or port of discharge; another place designated for that purpose in the shipping contract.

Notwithstanding these provisions, the plaintiff may bring an action in the court under whose jurisdiction is to be found the place (on the territory of a contracting state) where the ship was arrested.

At the request of the defendant, who files a sufficient guarantee to ensure payment of damages that could be established on the account of the plaintiff, the latter must defer the action to one of the competent courts mentioned in article 21 (1) of the Hamburg Convention of l978.

A new action may not be brought between the same parties and based on the same cause, unless the judgment delivered by the first instance is not susceptible of enforcement in the country where the new action is inserted.

Within the legal relations arising from the international shipping contract, relations which are essentially patrimonial, the extinctive prescription is a legal institution with a very common application, being almost indispensable, and is regulated not only by national rules, but by international rules of a material or conflicting nature.

The matter of the extinctive prescription is to be found in the Civil Code of 2009, completed by laws mainly establishing specific prescription periods in various matters.

The Civil Code of 2009 systematically treats the matter of extinctive prescription (general provisions, the extinctive prescription period, the extinctive prescription course, the fulfilment of the prescription), followed by rules on the general regime of lapse periods which is a novelty in the Romanian civil law. Within the Civil Code of 2009 we find a new approach on the regulation of the legal status of the extinctive prescription, a vision essentially modified in relation to the provisions of Decree no. l67/1958, abrogated and consistent with the solutions in line with modern European codes. Thus, rigid provisions, required by Decree no. l67/1958 characterized by the inadmissibility of the clauses derogating from the rules governing the extinctive prescription and its application ex officio, were attenuated by the consecration of rules establishing a period of prescription between the parties other than the legal one, the date of the prescription period, the renunciation to prescription fulfilled or the benefit of the time elapsed.

We believe that the solution adopted meets the critiques formulated by some authors, is a logical one and consistent with the dominant principle of civil law, i.e. the availability best matching the binding rules.

However, the extinctive prescription maintains its lawful nature because the legislator, by consecrating binding rules, enlarges the area of movement of the parties. The extension of contractual freedom is not total, this being restricted by some limitations and prohibitions.

As a new element, the legislator emphasizes the principle of the non-application ex officio of the extinctive prescription.

Prescription, as a way of ending contractual obligations, is mentioned in article 12 (1) d) of Regulation (EC) no. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations.

In the field of international shipping contracts, as generally in the contractual field, the prescription of the material right to action is born from the failure to fulfil a contractual obligation and is subject to the law applicable to the ground of the contract.

This is the position of our jurisprudence, a first major change to the Civil Code of 2009 regarding the extinctive prescription being the binding nature of the rules governing it.

Thus, in accordance with article 2515 of the Civil Code of 2009, the extinctive prescription is regulated by law "any clause, by which, either directly or indirectly, an action would be declared as indefeasible, being forbidden, although, according to the law, it is prescriptible or vice versa, an action declared indefeasible by the law would be considered as prescriptible.

By way of exception, within the limits and conditions provided by the law, the parties having full legal capacity, by express agreement, may modify the duration of the prescription periods or alter the prescription course by setting its beginning or by changing its legal causes of suspension or interruption, if necessary. Thus, prescription periods may be reduced or minimized by consent of the parties, but without the new period being less than one year nor more than 10 years, except for the prescription periods of l0 years or longer which may be extended up to 20 years.

The penalty is the absolute nullity of any clause or convention that is contrary to rules above.

The binding nature of extinctive prescription, provided by the Civil Code of 2009, results from the regulation of waiving the prescription. Thus, article 2507 of the Civil Code of 2009 provides that “waiving a prescription is not possible as long as it hasn’t begun to run, but a fulfilled prescription may be waived, as well as the benefit of the period elapsed for the prescription that has begun and is unfulfilled."

According to the provisions of article 2517 of the Civil Code of 2009, the general prescription period is 3 years. Compared to some foreign legislation, the period of 3 years is quite short. Thus, the right to action is prescribed by l0 years in commercial matters, according to Swiss law (article L27 of the Federal Code of Obligations), the French law (art. 189 bis of the Commercial Code) or the Italian law (article 2946 of the Civil Code). The period is 6 years in the English law or 4 years in the American federal law.

A first aspect of the scope is represented by the fact that their object id only the carriage of goods, not the carriage of passengers, given that the provisions of the Civil Code of 2009 refers directly to the action arisen from a contract of carriage of goods by land, air or water.

A second aspect of the scope is represented by the fact that the two conditions that must be met for the applicability of the period of one year, within the meaning that judicial or arbitration action must be entered against the carrier and that it derives from the contract of carriage. Along with the Civil Code of 2009, prescription periods are found in some special rules, namely:

- Government Ordinance no. 42/1997 on civil navigation which, in article 63, provides a prescription period of 3 years regarding the right to action for the payment of damages, expenses or other payments due for the assistance or salvage of a ship or goods.

The beginning of the prescription period is marked by the end of the respective operations.

- Government Ordinance no. 116/1998 on the establishment of the special regime for the international shipping activity, under article 4 section 5, provides a prescription period

for the claims arising from the international shipping activity of 5 years after establishing the payment obligation. In accordance with these legal provisions, the creditors of the operator will equally go against the shipowner for the debts incurred by the operator and unsettled by it.

Among the prescription periods provided for in international conventions, we hereby mention the Hamburg Convention of 1978 which provides a prescription period of two years for the actions against the carrier, the period beginning from the day it delivered the goods or part thereof or, if the goods have not been delivered, beginning on the last day when they had to be delivered.

In the field of international carriage of goods by sea we must distinguish between the extinctive prescription and lapse as penalties occurring in the case of the failure to exercise subjective rights within the terms provided by the law. Unlike prescription, whose effect is represented by cancellation of the material right to action, with the consequences known in the classical theory of extinctive prescription (natural obligations, period interruption and suspension, reinstatement within the prescription period), the lapse results in the very cancellation of the civil subjective right as a whole or, and not only, of the material right to action.

The Civil Code of 2009, in Title II of Book VI, regulates the general regime of lapse periods establishing that, by law or will of the parties, lapse periods may be established for the exercising of a right or committing of unilateral acts, and failure to exercise the subjective right within the established period entails its loss, and in the case of unilateral acts, the prevention, under the law, of committing them.

The lapse periods regime is governed by article 2548 of the Civil Code of 2009, under which the lapse periods are not subject to suspension and interruption, unless the law provides otherwise. However, force majeure prevents, in all cases, the running of the period, even if the period has begun.

CHAPTER VIII
LAW APPLICABLE TO THE INTERNATIONAL SHIPPING CONTRACT

Establishing the law applicable to the legal act is provided under the provisions of the Civil Code. Thus, according to article 2637 (l), the substance of the legal act is set by the law chosen by the parties or, as the case may be, by its author. The substantive issues regard the conclusion of the legal act, the effects, execution, delivery and settlement of the obligations arising from the legal act.

In the absence of a choice of law, under article 2638(l), the law of the state to which the legal act is most closely related applies, and if this particular law cannot be identified, then the applicable law is that of the place where the legal act was signed. The application of this law is subsequent, not alternative.

In terms of private international law, the autonomy principle of the will of the parties is appointed by the expression lex voluntatis. Under this principle, the parties may also determine, besides the content of the legal act, the law applicable to their contract, as lex causae.

This principle has a traditional nature in the Romanian private international law and is supported by the legal literature and consistently applies in judicial practice.

The principle of lex voluntatis has the advantage of taking into account the needs of international trade, because it allows the parties to adapt the contract to the different legal conditions of the various foreign markets. Finally, this principle being common to most

systems of private international law, contributes to the uniformity of the conflict solution in the field of legal acts.

The choice of the law applicable to the contract by the parties is permitted by the Civil Code of 2009. Pursuant to article 2640, the law applicable to contractual obligations is determined according to the regulations of the European Union law.

These regulations are established by Regulation (EC) no. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations ("Rome I"). For the elaboration of the Regulation the solutions proposed by the Rome Convention of 19 June l980 have been taken into consideration.

Article 3 of Regulation (EC) no. 593/2008 consecrated the principle of the autonomy of will in the field of contractual obligations, the contract being governed by the law chosen by the parties.

The will of the parties can be shown within the limits allowed by the law. The parties cannot create legal effects above the law or outside the law, by their will.

The utterance of the will of the parties is achieved by two ways. According to article 3 (1) of the Regulation, "this choice must be express or must result with reasonable certainty from the contractual terms or the circumstances of the case".

For the first way, the express choice can be made by inserting a clause in the main contract or by signing a separate agreement between the parties stipulating the applicable law. The contractual terms or separate convention is called pactum de lege utenda or electio juris clause.

For the second way, the tacit choice by the parties of the law applicable to the international shipping contract results, with a reasonable degree of certainty, from the contractual terms or the circumstances of the case. In this case, the jurisdiction authority will analyze the subjective and objective elements of the contract. The subjective elements are intrinsic to the contract, while the objective ones are related to the nature of the contractual relationships.

The provisions of article 3 (1) of Regulation (EC) no. 593/2008 also refer to the extent the parties' will. Thus, by their choice, the parties may select the law applicable to the whole or only part of the contract.

The wording of the text shows that the parties have the legal opportunity to submit the substantive elements of the contract to certain laws of particular systems of law.

The contract fragmentation solution, known as depeçage or splitting-up, although criticized, because it does not comply with the unit of the act, is required by legal and economic considerations. Thus, complex contractual operations, in the form of a framework contract accompanied by subsequent contracts, may be subject to laws belonging to different countries.

If the parties have not expressed their will, the jurisdiction authority will determine the law applicable to the contract by objective criteria. According to article 4 of Regulation (EC) no. 593/2008, in the absence of choice, the applicable law will be determined by the classification of the contract in one of the specified types.

The objective location of the contract, in relation to the law of the will of the parties, has a subsidiary nature, and the location criteria apply only in the absence of law chosen by the parties. The provisions of Regulation (EC) no. 593/2008 establish a main criterion and several subsidiary criteria to locate the contract.

The recognition of the subsidiary nature of the objective location of the contract is a tradition solution in the Romanian law, being consecrated by the judicial practice, but especially by the arbitral practice for international trade.

In the event that agreement cannot be classified as any of the types specified in article 4 (1) of Regulation (EC) no. 593/2008 or, through its elements, it belongs to several types

defined, the contract will be governed, under article 4 (2) of the same Regulation, by the law of the country of the usual residence of the contracting party carrying out the characteristic performance.

From all the circumstances of the case, it may clearly result that a contract is more closely connected to a country other than that indicated in the first two hypotheses. According to article 4 (3) of Regulation (EC) no. 593/2008, in this case the law of the country with which the contract has a closer connection will apply.

In order to determine this law, it will also be taken into account whether the contract is closely related to another contract or several contracts.

In accordance with article 4 (4) of Regulation (EC) no. 593/2008, if the law applicable cannot be determined by previous criteria, the contract is governed by the law of the country with which it is most closely connected.

Article 5 of Regulation no. 593/2008, governs the law applicable to the contract of carriage, distinguishing between the carriage of goods and the carriage of passengers.

Regulation (EC) no. 593/2008, in article 5 (1), in the case of the contract for the carriage of goods, establishes that, in the absence of a choice of law, special rules apply, i.e. the law of the country where the carrier has its usual residence. Law enforcement is on condition that the place of loading or delivery or the usual residence of the shipper is situated in that country. If these requirements are not met, the applicable law is that of the country where the place of delivery agreed between the parties is situated.

The contract of carriage of passengers and baggage is subject to the principle of autonomy of the will of the parties.

According to article 5 (2) of Regulation no. 593/2008, the parties may choose as the law applicable to the contract of carriage of passengers only the law of the country where: the usual residence of the passenger is located; the carrier's usual residence is located; the headquarters of the central administration of the carrier is located; the place of departure is located, the place of arrival is located.

As far as the law applicable to the contract of carriage of passengers has not been chosen, the law of the country of the usual residence of the passenger will apply, provided that the place of departure or arrival is also located in that country. If neither the place of departure, nor the place of arrival is in the country where the passenger has its usual residence, the law of the country where the carrier has its usual residence applies.

In the case of the contract of carriage, there is an opt-out clause provided by article 5 (3) of Regulation no. 593/2008, which provides that if, in the absence of a choice of applicable law, it clearly appears from all the circumstances of the clause that the contract is clearly more closely connected to a country other than that referred to in article 5 (1) for a contract of carriage of goods or article 5 (2) for a contract of carriage of passengers, the law of the other country applies.

CONCLUSIONS

This paper responds to goals aimed at from a triple perspective, each representing one of the three lines of research: the chronological perspective, the positivist perspective and the comparative perspective.

The main internal sources of the international shipping contract were analyzed, namely the Constitution of Romania, the Civil Code of 2009, the customs, the Commercial Code of 1887, the Code of Civil Procedure of 2010, as well as other regulations of special nature. Regarding the international sources, they are made up of international conventions, custom and international usages. The regular and frequent form of commercial agreements between states is represented by international conventions and agreements.

The liability of the carrier was analyzed in detail, as well as the elimination, respectively the exemption from liability, the causes, the conditions and their effects under the Hamburg Convention of 1978.

Undoubtedly the Hamburg Rules of 1978 represent a remarkable progress in the regulation of the liability of maritime carriers compared to the Hague Rules of 1924, which suffered the lack of regulation of certain matters. Unfortunately, the reluctance of major maritime nations to ratify this international convention will bring their application on a reduced scale. According to the Hamburg Rules of 1978, the liability of the carrier covers the period when the goods are in its care, which begins when the goods are taken over from the shipper or from a person acting on its behalf and ends when the carrier has delivered the goods by handing them over to the consignee. These details have great practical importance because they highlight when the carrier becomes liable and when the liability of the shipper or consignee of the goods starts and when it ends.

A novelty is the analysis of the latest legal regulations in the field of the international shipping contract, namely the Rotterdam Rules of 2009 which are based on and offer a modern alternative to previous conventions governing the international carriage of goods by sea, formally adopted by the United Nations General Assembly in December 2009. The Rotterdam Rules establish a uniform, comprehensive and modern regime in legal terms and govern the rights and obligations of the parties concerned of a single contract, being created in order to regulate the legal relationship between the carrier and the shipper for international carriage by sea.

It is necessary for our country to adapt to market needs and, through the ratification of the Rotterdam Rules of 2009, to create the prerequisites for fair trade and legal and contractual stability through full and unambiguous rules.