



## Research Article

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# The Transport Contract in Albanian Civil Code: A Systemic Analysis

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## Abstract

*The transport legislation in Albania has a character of specialty. Through this paper we aim to offer an analysis of the Albanian legal provisions on transport contract according to the Civil Code. This study will deal with the contract of transport of goods. The analysis of the contract will be in a historical, empiric and doctrinal point of view on the regulation offered by the Civil Code and the similarities to the Italian Civil Code. The actual regulation of the contract of transport in Albania is relatively new and there are only a few claims brought into courts that make very difficult a deep analysis of the implementation the legislation. The lack of causes brought into courts mainly has to be recognized to the arbitration clauses in favor of foreign arbitrators as for the transport of goods by sea or the solution on transaction basis as well as, regarding Civil Code provisions, the camouflage of the contract of transport with other types of contracts.*

**Keywords:** *the contract of transport, transport of passengers, transport of goods, third party, the damage*

## 1. Introduction

The contract of transport in Albania is a typical contract and finds regulation within the Civil Code as Albania is part of the romanistic tradition. Yet, the contract of transport is regulated in the special legislation codes depending on the mode of transport due to the fact that in the Albanian legal system we have a Maritime Code, an Air Code and a Railway Code and the regulation of the road transport is made by law (Gjeta A, 2015)

The legislator did not even opt for a formal meeting of the two disciplines in the same code, unlike other countries with a unitary system in this field, but opted for a complete division between air and maritime transport in separates pieces of legislation.

Indeed, the two realities are not perceived by the Albanian legislator as similar and are not unified under the concept of navigation, even though there is no doubt about the tendency for reciprocal osmosis between maritime law and the aviation at least within uniform law, where to comparable situations are provided similar regulatory choices (Gjeta A, 2015, Zunarelli S, Comenale Pinto M, 2009., Casanova M, Brignardello M, 2011)

Regarding transport regulation the Albanian legislation presents similarities to the Italian legislation. The contract of transport is regulated both in Civil Code as well as in Maritime Code and in the special legislation that accept the international regulation in the field of carriage of goods or persons.

## 2. Historical Evolution of the Contract of Transport in Albanian Legislation

The regulation of transport according to the Roman tradition, after the independence acquired by the Ottoman empire, was sanctioned in the Civil Code of 1929. Articles 1788-1789 regulated the *transmission contract*, understood the last as the contract of transport. (Teliti E, 2015) In Albanian the word "*bartje*" presents similarity with the English notion of *carriage*. The civil code of 1929 was drafted taking care to incorporate the best European regulation of the sector and, undoubtedly, the Italian legislation had a certain influence due to the intense relationship between two States at the period. Specifically, the rule defines that "the person obliged to carry people or things, is obliged to take all necessary measures in order to guarantee the safety of people and the good state of things; but he does not guarantee the risks connected to the means of transport. Furthermore, he is obliged to custody, as a good family man, the things entrusted to him even before the transport begins, and he is responsible for the theft, loss or damage except when he proves that these events are the result of force majeure, defect of the goods or fault of the other contractor" (Omari L, 2005., Teliti E, 2015., Zunarelli S, Musi, M, 2016)

The transport, in its private law dimension, was firstly regulated exhaustively in the Albanian Civil Code of 1981<sup>1</sup>. In reality, the Code is based on the functioning of the socialist economy of the former People's Republic of Albania, where the main economic operator was the State and its economic entities, cooperatives and state industries, while individuals could be part of a private legal transaction only "to fulfill ... material and cultural needs". The Code did not foresee any economic subject operating in the free market and, thus, a center of rights and obligations which can satisfy its economic interests through legal instruments such as the contract.

In the Civil Code of 1981 the juridical notion of the contract is far from the regime of autonomy and free will of the parties. In fact, the article 142 foresaw that "the contract is a legal transaction, through which the duties of the state plan and the material and cultural needs of the citizens are fulfilled. When companies, institutions and agricultural cooperatives must supply or sell to each other products and goods and produce work or services, to implement the state plan, they conclude a contract between them" while the citizens "conclude contracts for the fulfillment of their material and cultural needs and, also, for the enjoyment and disposition of their personal belongings".

The following articles of the code, from 143 to 152, regulate the formation of the will of the parties, the contractual proposal, the cause of the contract, forms and effects<sup>2</sup>. Furthermore the Code

<sup>1</sup> Law no. 6340 adopted in 26.06.1981. The entry into force of the Code explicitly repeals the law no. 2022 adopted in 1955 "On the General Part of the Civil Code", the Decree no. 2083 adopted in 1955 "On the Property", Law no. 2359 adopted in 1956 "On the Legal Transactions and Obligations", the Decree no 1892 adopted in 1954 "On Inheritance", etc.

<sup>2</sup> The dirigistic nature of the regulation of the country's economy is also reflected within the Civil Code. For example, the art. 149 stated that "when a contract is to be stipulated, within the execution of planning acts [of the State Plan], the undertaking, institution, agricultural cooperative or proposing social organization must send the draft contract to the other party in duplicate signed form. The counterparty, where it has no objections, returns one of the copies of the contract duly signed, within the time limit agreed with the proposer, and the contract is deemed to have been stipulated according to the terms provided for in the project. When the company, institution, agricultural cooperative or social organization has objections and has sent a writing counter-proposal to the proposing party, the parties negotiate to resolve the dispute. If this agreement is not reached, the proposing party will submit the dispute before the competent state body within the set term, otherwise the contract will be signed according to the counterproposals made. The terms for the aforementioned transactions are established with provisions of the Council of Ministers". Another example is represented in Article 150 where it states that the Council of Ministers can approve mandatory types of contract to be used by state-owned enterprises, agricultural cooperatives and individuals.

provides for contracts in favor of third parties in article 152, stating that "the contract can be stipulated in favor of a third person. He earns the rights under the contract since he has notified one of the parties that he intends to benefit from these rights. The debtor can oppose to the third person the exceptions deriving from the contract".

### 2.1 *The contract of transport in the Albanian Civil Code of 1981*

Among the various contracts that this code regulates one of the typical contracts is the transport contract governed by articles 234 and following, to which the part on contracts in general set out above is applied. The transport contract, like any contract that can be stipulated by state agencies such as companies, cooperatives and social organizations, is a planned activity (Hiçka V, 1982) Article 234 defines as a transport contract the one in which "the carrier (the company of the automobile, railway, sea and air transport) undertakes to transport from one place to another passenger, goods or luggage, while the passenger, the shipper of the goods or luggage commits to deliver the goods for the purpose of transport and to pay the price of transport". The transport contract is stipulated based on a plan of the transport company and the needs of the shippers calculated on an annual basis. Likewise, in view of the combined transport (rail-road, etc.), the transport companies stipulate a transport contract also between them. The modalities for stipulating the contract and the terms were established by the Council of Ministers. The transport documentation was represented by the bill of lading filled by the shipper, signed by the carrier and delivered to the recipient, which acts as proof of the contract.

Thus, the agreement of the parties and the express will of the parties in concluding a transport contract, which was also a contract in favor of a third party, were pre-arranged within a plan at national level. The terms of stipulation and execution are established not by the will of the parties but by the Council of Ministers. The contractual relationship between the parties was also regulated with regard to the division of liability between the parties of the contract. Of particular interest is article 239 according to which "for the losses and damages of the goods during the journey with the vehicles of other companies on behalf of the contracted transport company, the company that carried the goods responds directly to the shipper. When the goods are transported by two or more carriers the first carrier is liable for the damage caused".

With regard to rights and obligations, they were shared between the parties as follows:

- the carrier must send the vehicle at the place and in the agreed time, to inform the shipper, to transport and to custody the goods from the moment they are taken over until delivery to the recipient. Moreover, he is liable for the loss of the goods for the total of their value, while for the damages suffered by the goods in the measure of the diminished value of the goods (art. 239);
- the shipper is obliged to prepare the packaged cargo according to the technical conditions of the goods or according to their nature, to load the vehicles within the time established with their employees and at their own expense, to pay the transport price in the manner established by decision of the Council of Ministers (art. 240);
- the recipient is obliged to unload the goods with his own employees and means.

The rights and duties of the parties thus distributed also reflect the division and the calculation of the liability between parties regarding delays, damages and loss of the goods. The delay in the delivery of the goods caused the payment of a penalty, always fixed by decision of the Council of Ministers, while the damage to the goods entails the obligation of the carrier to compile a report with the recipient to ascertain the amount of the damage.

The division of responsibility between the carrier, the shipper and the recipient for breach of contract obligations was ascertained and established in a procès-verbal according to a procedure established by the Council of Ministers. Furthermore, article 246 provided that, before starting claims arising from the transport contract against the carrier, the claimant must make a request to the management of the transport company. This request was submitted within 4 months and if this

request had a negative response or the transport company did not respond within 2 months from the notification, the requesting party has a term of 1 month for the claiming in front of the Court (art. 248).

The distribution of rights and duties and of any risk of loss or damage of the goods transported is thus fixed in a way that is directistic and impassable. The autonomy of the parties in establishing the terms of the contract is very limited and the carrier is liable for all the damage suffered once its fault has been ascertained. However, the art. 243 of the Civil Code sets out the cases of exclusion from the liability of the carrier if he can prove that the loss or damage to the goods is attributable to force majeure, to the fault of the shipper or recipient, during load or unloading process for causes to be attributed to the means of the shipper or recipient, when the person appointed by the recipient to accompany the goods has not taken the necessary measures for their custody and because of the natural loss previously evaluated by the parties.

The above picture of transport regulation in the two previous codes is an indication of a non-linear and fragmented regulation of the phenomena of transport before the current civil code in Albania<sup>3</sup>. It is true that the Civil Code of 1981, despite characterized by a total interference of the State noticed from aligning the transport contract regulation in the competences assigned to the Council of Ministers, whom define most of the elements of the transport contract, constitutes a first stone towards the division of transport of goods from transport of passengers and baggage.

Therefore, even if for practical purposes, the supra mentioned Code constitutes a alteration from, albeit rudimentary, Code of 1929, for the purpose of study it is important since it remains the first organic regulation of a private nature of the transport phenomenon. In our opinion, in the law practice this code has led to the delineation of a "non-autonomous" model for developing the phenomenon of transport. On the other hand, it has the importance of, for the first time, dividing and regulated separately the phenomena of the transport of goods from that of passengers.

The 1981 Code remained faithful to its regulatory principles such as democratic centralization, the absence of the abusing classes and the disappearance of private property by defining a restriction in the content of the contracts and in the subjects eligible to stipulate it.

### 3. The Transport Contract in the 1994 Civil Code: Return to the Romanistic Legal System

In the early 1990s the changes in the country's political system made it necessary to adopt new laws to regulate the economic and social life of Albania. Thus, with the law n. 7850 dated 29.07.1994 the current Civil Code was approved. The Civil Code of 1994 is inspired by the legal systems of the Romanic type and regulation is mostly borrowed from the privatistic regulation of European countries.

#### 3.1 Brief notes on the structure of the Albanian Civil Code

The Albanian Civil Code regulates the obligations in part IV by stating that an obligation is "a legal relationship through which a person (the debtor) obliges himself to give or do or not to do a certain action in the benefit of another person (the creditor), who also has the right to request to take something, or to do or not to do an action"<sup>4</sup>. The obligations arise from the contract or from the law, they must have an economic evaluation and respond to the creditor's interests, including non-financial ones. The parties in a relationship of obligation must behave towards each other with correctness, with impartiality and with rationality.

In executing the obligations the parties must show due diligence, be punctual in the execution

<sup>3</sup> Non-linear due to the fact that privatistic regulation had different ideological approaches in the Civil Code of 1929, the laws on obligations of 1954-1958 and, finally, in the Civil Code of 1981.

<sup>4</sup> Art. 419 Albanian Civil Code

according to its content<sup>5</sup> in the place, time, in the manner agreed, in the favor of the creditor.

The pathological phase, the lack of execution is regulated by the code in articles 476 and following. According to article 476 "every failure in the execution of obligations obliges the debtor to compensate for the damage suffered by the creditor, except when he proves that the non execution des not come as a result of his fault. In these cases the creditor has the right: a) to request the execution in kind of the obligation, especially the delivery of the goods or to do a job, as well as the damage deriving from the delay in the execution or b) the compensation of the damage derived from non execution".

Part V of the Civil Code (art. 659 and following) deals with contracts in general and singular typical contracts<sup>6</sup>.

The definition of the contract is contained in article 659 entitled "Content of the contract" where it is stated that "the contract is a legal transaction / legal act through which one or more parties create, modify or terminate a legal relationship. The parties in the contract freely define its content, within the boundaries established by the legislation in force".

The contract can be with bilateral obligations or with unilateral obligations when there is only one part to bear obligations towards the other. The conditions of the contract are: the agreement of the party who accepts the obligation, the lawful cause<sup>7</sup> on which the obligation is based, the object<sup>8</sup> that forms the subject matter of the contract and the form required by law.

The contract, according to article 681 of the Civil Code must be according to the real and common intention of the parties, without stopping at literal interpretation, taking into account and evaluating their behavior in general, before and after the conclusion of the contract according to the principle of good faith. The conditions of the contract are interpreted one through the other, giving each one the sense that comes out from the entire act. In cases of doubt the contract is interpreted in the sense that its clauses can have an effect and not in the opposite one.

In contracts in which a party is disadvantaged in negotiating power, when general contract conditions are dictated, the Code provides in articles 686 and following. In particular, referring to contracts concluded through modules, Article 687 states that "in contracts concluded by signing forms or forms, which tend to regulate uniformly certain contractual relationships, the conditions added to these modules or forms take precedence over the initial conditions of the above mentioned forms or forms when they do not match those, even if they were not repealed".

The contract produces effects on the parties who are obliged to fulfill. The contract according to article 690 has the force of law between the parties and effects third parties in the cases established by law. According to the Albanian legislation, the contract stipulated in favor of a third person is valid when the person who signs it has an interest. Article 694, in its second paragraph, provides that "the person who has accepted a promise in favor of a third party or the third party himself, or the persons who remove rights from him, have the right to request the execution of the contract, except in the cases where there is a different agreement.

The contract cannot be solved or modified after the third person has declared that he wants to take advantage once the contract is stipulated, except when the proposer has reserved this right. In the case of the revocation of the proposal, or of the refusal of the third person to take advantage of that, the obligation remains in benefit of the proposer, except when it results otherwise from the will of the parties or from the nature of the contract".

The doctrine, regarding contracts in general, is firm in recognizing the affinities with the French and the Italian systems regarding the criteria of the formation of the will of the parties, regarding the

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<sup>5</sup> Art. 455 Albanian Civil Code

<sup>6</sup> The title on Contracts in general (art. 659-680) provides on preliminary regulation (art. 659-680), interpretation of the contract (art. 681-689) and the effects of the contract (art.690-704). While the individual contracts that are regulated by the Albanian Civil Code are: the sale, exchange, donation, supply, lease, contract, transport, simple company, franchise, insurance, loan, annuity, deposit, agency, shipping, etc.

<sup>7</sup> According to art. 677 the legal cause is illicit if it is in contradiction with the law, public order, or when the contract constitutes a means to elude the application of a rule.

<sup>8</sup> The subject of the contract according to the art. 678 must be possible, lawful, determined or determinable.

interpretation of the contract, regarding the effects of the contract, with respect to the execution of the contract, regarding the termination of the obligations and in relation to the treatment of specific contracts within the Code (Alishani A, 2002, Dauti N, 2008, Skrame O, 2011, Nuni A, Mustafaj I, Vokshi A, 2012, Semini-Tutulani M, 2006).

### 3.2 *The contract of transport according to the Albanian Civil Code of 1994*

Chapter VIII of the II Title of Part V of the Civil Code in Articles 877 to 900 governs the contract of transport of passengers and goods. While the transport of passengers is regulated only by 3 articles (from 877 to 879) the transport of goods is regulated by articles 880 up to 900 of the Civil Code, regulating the phenomenon of transport in two different sections depending on whether there is transport of passengers or goods. The literal notion that the Albanian civil code uses for goods is the literal Italian translation of goods according to the concept of Article 810 of the Italian Civil Code.

The division in two types of transport, passengers and goods, is implemented since the subjects, the rights, the duties, the responsibility of the carrier and the exclusion from responsibility are different if we compare the two types of transport. (Teliti E, Zunarelli S, Musi M, 2016)

#### 3.2.1 *The definition of the transport of passengers or goods in the Albanian Civil Code*

The approach that the Albanian Civil Code offers of the transport contract is to divide according to whether it concerns the transport of goods or passengers, giving two, although identical, separate definitions in two distinct articles.

Chapter VIII of Part V is divided into two sections: A. The transport of persons and B. The transport of goods.

Article 877 states that "with a contract of transport of passengers the carrier undertakes to transport people from one place to another"<sup>9</sup> (Mustafaj I, 2016, Nuni A, 2007) and, in the same words, article 880 states that "with the contract for the transport of goods, the carrier undertakes to transport goods from one place to another".

A unified reading of the two articles allowed the doctrine to define the transport contract according to the Albanian Civil Code, without prejudice to the separate normative provisions in two sections and two different articles, defining that "through the transport contract, the carrier transports or undertakes to transport passengers or goods, from one place to another, while the passenger or the shipper/recipient is obliged to pay the price"<sup>10</sup>(Semini-Tutulani M, 2006", Hetemi

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<sup>9</sup> *The Albanian Civil Code regulates the transport of passengers in articles 877-879. The regulation in the is enclosed in only two rules that carry the responsibility of the carrier identical to what is provided for by Italian law. Article. 878 states that "Beside the liability for the delay and for the breach in performing the transport, the carrier is liable for the accidents that affect the person of the traveler during the journey and of the loss or damage of the goods that the traveler brings with him, if it does not prove to have taken all appropriate measures to avoid the damage. The clauses limiting the carrier's liability for claims affecting the traveler are void. The provisions of this article are also observed in free transport contracts". The following and last article concerning the transportation of passengers states that "in transport through connected itineraries, each carrier is responsible for its own route. However the damage due to the delay or to the interruption of the journey is determined taking into account the entire journey". The legislator regulates the transport contract of passengers in the Civil Code only with regard to the liability of the carrier, providing that any clause limiting liability is null. The contract for the transport of passengers in doctrine is considered as a consensual and non-formal contract.*

<sup>10</sup> *In giving a definition, the Author emphasizes that the unitary definition of the transport contract cannot disregard the payment of the price and the preparation of passengers, goods or baggage for transport when it provides that "Through the transport contract, the carrier undertakes to transport from one place to another passenger, property and baggage and the passenger, the shipper of the goods or baggage is obliged to prepare the object of the contract ready to be transported and to pay the price". In the same reasoning other doctrine states that "The transport contract is an agreement between the carrier and the shipper of goods, or of the passenger, on the basis of which the carrier is obliged to transport goods or passengers for the set fee".*

M,1998) The doctrine finds the element of the payment of the price in line with what is foreseen in the Italian Civil Code in Article 1678. So, in order for transport to occur, there must be a physical shift in the sense of changing the geographical position of the goods or passengers ( Teliti E, 2016) even if this means returning to the starting point<sup>11</sup>.(Mustafaj I, 2016)

It is useful to make some reflections on the rationality of this regulation within the Civil Code also in the light of what is correctly highlighted by the aforementioned doctrine on a unified reading of the transport phenomenon as for example outlined in article 1678 Italian Civil Code in which is provided that "with the transport contract, the carrier is obliged, in exchange, to transfer people or things from one place to another" ( Iannuzzi M, La Torre U, 2000)

The division into two sections also arise problems with regard to the provision for the closure of the system in regulating the transport contract, such as, for example, article 1680 of the Italian Civil Code, entitled "limits of applicability of the rules" according to which the chapter also applies to transport by water or by air and by rail and post, as they are not derogated from the navigation code and special laws" (La Mattina A,2015)

In the Albanian Civil Code this ending provision is foreseen in article 900, entitled "Reference provision", according to which "for maritime, air, rail and postal transport, when special legislation is not available, the provisions of this contract will applied".

The *quid iuris* that is raised, having regard to the general interpretative criteria of the obligations arising under the Civil Code, is quite obvious from a systematic point of view. If under Chapter VIII "Transport" a division is made regarding the two different types of transport, passengers and goods, and if the closure rule remains under the second section concerning the transport of goods, then the transport of passengers does not fall within the scope of article 900 of the Albanian Civil Code?

However, these considerations on the theoretical level are not raised in cases in front of Albanian courts. In our opinion, the dynamic provision in article 900 of the Albanian Civil Code also extends interpretively to the transport of passengers, regardless of the questions supra raised regarding the definition of the transport contract and its place within the Albanian Civil Code.

Unlike the Italian Civil Code in art. 1679 the Albanian Civil Code does not contain a rule that regulates transport on public scheduled services.

### 3.2.2 *Legal nature of the contract of transport of goods and its characteristics*

The doctrine push towards a unitary and complete treatment of the transport phenomenon as a contract and this doctrinal reconstruction also has repercussions on the classification of the transport contract. The parties must execute the contract according to reasonableness and good faith. The nature of the transport phenomenon makes the transport contract a peculiar contract that presents many similarities with other types of contract as a shipping contract but maintains its own unique characteristics. The phenomenon of transport creates obligations and rights for the various parties that are part of it or benefit from it.

The transport contract is a consensual contract, intended as stipulated at the time the parties' consent was formed. In this sense is interpreted article 884 of the Civil Code according to which "the transport contract is binding from the moment in which the transport document was formed and when the shipper of the goods paid the price, except when in the contract or in the law it is otherwise provided", without giving to the moment of delivery to the carrier any importance in this sense.

Though, in doctrine it is still debated whether the transport contract is a consensual contract, binding the parties from the moment of its formation, or real. Certain doctrine recognizes the nature of a real contract to the contract of transport of goods while it considers the contract of transport of

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<sup>11</sup> The Author remarks that "In the notion of transport it cannot be included the displacement in an insignificant distance nor the virtual transport of documents from one computer to another".

passengers as consensual<sup>12</sup>. However, other doctrine considers the transport contract as a consensual contract. (Semini-Tutulani M, 2016)

The contract of transport of goods is not a formal contract since the form is not required by law. The form of the contract is required only *ad probationem*<sup>13</sup> and does not constitute a reason for the invalidity of the contract. In fact, the contract is stipulated without requiring particular forms but the issue of the transport documents and the freight payment are identified as important moments<sup>14</sup>. Therefore, the moment of the issue of the transport documents can be understood more as a moment in which the consent is formed that as a proof of the existence of the contract itself. In doctrine, in this sense, it was questioned whether the transport contract could be understood as a formal contract although the form is required only *ad probationem* due to the impossibility of proving the existence of the contract through witnesses in the moment in which "the contract is intended as stipulated from the moment of the formation of the transport document". The possibility of proving the contract with a written document, even if it is not the expression of the parties' will to conclude the contract, does not make the contract formal. So regarding the transport contract we can conclude that it is not a formal contract. (Semini-Tutulani M, 2016)

The transport contract is a contract with consideration, to fulfill a work and result (service contract Mustafaj I, 2016), it is a contract with a deadline by which the service must take place and is a contract with the transfer of risk as each party is responsible for its own obligations and its own breaches of contract (Semini-Tutulani M, 2006)

### 3.2.2.1 *The contract for the transport of goods as a contract for the benefit of a third party: the doctrinal debate in Albania*

There is a doctrinal debate if there is a third party within the contract of transport and if the contract of transport is a typical contract with the benefit of a third party (Teliti E, 2016).

First of all, the concept of a contract in favor of a third party is specified by the Albanian legislator in the Civil Code in the art. 694<sup>15</sup>.

In doctrine it is established that the fundamental characteristics for having a contract in favor of a third party are: the third person must be extraneous to the contract, an independent right must be passed to the third party towards the debtor, the third party is not obliged to accept the rights guaranteed by this contract and obtains the rights from the moment in which it notifies one of the parties that it wants to take advantage of these rights, the third person only takes rights in this type of contract.

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<sup>12</sup>The Author Mustafaj I, considers the moment at which the goods are delivered as the moment of formation of the contract. The latter is considered as "the moment in which the transport document was issued" (art. 884) since the author overlaps the time of issue of the documents with the taking in custody of the goods.

<sup>13</sup> Art. 881 states: "if an accompanying document has been issued by the shipper, the carrier must show that to the consignee".

<sup>14</sup> The Supreme Court of Albania, in decision nr. 452 of 09.12.2010 between First Food Shpk. vs. Melida Shipping Ltd., has stated that "the acts produced in court prove that the parties have agreed to transport by sea of goods (melamine and sirotanovic) from Turkey to Albania. This results from the bill of lading, which is a document issued by the carrier (owner of the ship or his agent) to the owner of the goods during the loading procedures on board, it serves as a bill of lading, document of title of the goods and as proof of a valid contract of transport" and, therefore, "the issue of the bill of lading by the carrier under the Congenbill type assumes that the one was issued in respect of a maritime contract (charter-party) ...".

<sup>15</sup> It is "a contract in favor of a third person is valid when the person who signs it has an interest in this regard. The person who has accepted a promise in favor of a third party or the third party himself, or the persons who remove rights from him, have the right to request the execution of the contract, except in cases where there is a different agreement. The contract cannot be dissolved or modified after the third person has declared that he wants to take advantage of his stipulation, except when the proposer has reserved this right. In the case of the revocation of the proposal, or of the refusal of the third person to take advantage of that, the obligation remains for the benefit of the proposer, except when it results otherwise from the will of the parties or from the nature of the contract".



The transport contract is configured as a bilateral contract between the sender and the carrier, although it has particularities due to fact that the recipient is also presented as a subject. In doctrine it was proposed a reading according to which the transport contract is a bilateral contract between the carrier and the sender, with a peculiarity presented by the presence of the recipient, who does not take part in the formation of the contract but, upon delivery of the goods he enters as part of the contract assuming specific obligations and rights. At the time when goods arrives at the destination all rights toward the carrier passes from the sender to the recipient, whom until then is third to the contract but at the time of delivery the recipient no longer remains a passive subject (mere beneficiary) but is activated as a contractual party by replacing the sender, taking on specific obligations. The authors conclude that the transport contract is not a contract in favor of a third party and the recipient is not a mere beneficiary<sup>16</sup> (E. Teliti, 2016)

Another part of the doctrine opens to the possibility of seeing the transport contract as a contract in favor of a third party, identified in the person of the recipient, not part of the transport contract (Hetemi M,1998)

In our opinion, the contract transport of goods falls within the scope of the application of the art. 694 since the consignee is a third party with respect to the contracting parties, he cannot modify or cancel the contract and he cannot give orders to the carrier until the delivery of the goods or the expiry of the term in which they are expected to arrive, remaining the latest subject to the sender's counter-order until the time of delivery. In this sense, remark article 887 according to which "the rights deriving from the transport contract toward the carrier pass to the consignee from the moment in which the goods arrived at their destination or the term in which they had to arrive expired. The recipient requests to the carrier to deliver, he cannot exercise the rights deriving from the contract, except if he pays the carrier the credits that derive from the transport and the invoices that accompany the good transported".

In addition, to confuse the thesis raised in the Albanian doctrine of the substitutive nature of the sender to the figure of the recipient in the contractual relationship of the transport we bring into attention article 888 according to which "the carrier who delivers the goods to the sender without collecting his own credits or invoices accompanying the goods transported, or without asking for the deposit of the disputed amount, is liable to the sender for the value he owes to him and he can not demand him to pay his credits. However, the right to sue the recipient is not harmed". Therefore we are quite far from the possibility that the figure of the sender may be excluded from the obligation relationship of the transport contract. He remains part of the contract until the end.

For this reason we conclude that the contract of transport of goods must be understood as a contract in favor of a third party, even if it presents some peculiarities in respect of the general scheme of the art. 694 of the Civil Code in the part in which it acquires the right to the service not at the time of the stipulation but to that of the arrival of the goods or of the expiration of the term in which they had to arrive.

### 3.2.3 *The subjects of the contract of transport of goods and their contractual obligations*

The transport contract is a obligation relationship between the sender and the carrier. However, as a subject of the contract, although with a special status, the Albanian doctrine also identifies the consignee.

The shipper is the party who, after negotiating with the carrier, places the goods at his disposal for loading. His contractual obligations are specified in articles 882, 883 and 886 of the Albanian Civil Code. The shipper is, thus, obliged by the transport contract to execute in good faith and to act in order to prepare all the documents necessary so that the contract is properly fulfilled. The rights and

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<sup>16</sup> The Author argues that "after the sender passes the ownership to the transporter, he is no more a contractual party. ... Then, the contract is established between the transporter and the receiver. So, the transport contract of goods is a specific one, which divides the role of the parties and their entrance in this legal relation".

duties that the shipper undertakes in the contract are, according to the Albanian doctrine, transferred to the recipient who substitutes him in the relationship with the carrier.

Regarding the obligations of the shipper, these are substantiated: in the preparation of the cargo ready to be load and the documents, the load on time and at his own expense and the payment of the price (Semini-Tutulani M, 2016) In jurisprudence, regarding the transport of goods, payment of the price must be performed when the shipper has duly signed the invoice accompanying the goods<sup>17</sup>.

The carrier is the one who undertakes to transport goods from one place to another, under his own organization and with their own vehicles within a set time<sup>18</sup>. The habilitation as a carrier is taken according to the legislation currently in force in Albania<sup>19</sup>. The obligations of the carrier are set in article 881, 883, 885, 887, 888 and 890. The carrier must execute the contract according to the general rules of good faith. Furthermore, he is obliged to verify the contents of the documents accompanying the goods and is bound by their truthfulness since they are presumed true until the contrary is proven (art. 883). In the established contractual relationship, the average diligence of the good family man must be used, but the carrier is subject to a diligence above average, to professional diligence.

Finally, the third party involved in the transport contract is the consignee. He is considered as a contractual party "with a special status". He becomes part of the transport contract and takes obligations when he declares to receive the goods or at the time when he must have received according to the terms established in the contract. This moment is identified as the moment when the recipient enters as part of the transport contract. (Semini-Tutulani M, 2006, Mustafaj I, 2016) The obligations of the consignee are set in articles 887 and 893. The consignee must receive the service according to the rule of good faith in performance of the contract. In doctrine it is thought that the recipient is also obliged to perform the unloading procedures in his place by using his own resources if it is not otherwise arranged in the contract. (Semini-Tutulani M, 2006, Mustafaj I, 2016)

### 3.2.4 *The liability of the carrier in the contract of transport according to the Albanian Civil Code*

Article 889 and following of the Civil Code regulates the split of liability for loss or damage of the goods during transport. This regulation is subject to the general provision of the civil law but it maintains some peculiarities deriving from the special nature of the phenomenon of transport.

Article 889, regarding the liability of the carrier, states that "the carrier is responsible for the loss or damage of the goods, delivered to him, from the moment he load until the moment when he delivers them to the recipient, except in cases where he proves that the loss or damage derives from the fortuitous event, action of the shipper, recipient or owner of the goods shipped, due to expected losses or due to the nature and defects of the goods. If the carrier accepts the goods to be transported without reservation, it is assumed that the goods do not present apparent packaging irregularities". Once the loss or damage has been verified, the carrier, at the request of the recipient, is obliged to keep a report.

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<sup>17</sup> Decision of the Court of First Instance of Tirana no. 2501 on 27.03.2015. In the present case, "Treos Engineering" shpk against "Copri-Aktor" s.s., the first carried out transport activities for the second during 2013. Such transport activities were not governed by an underlying transport contract. The company "Treos Engineering" shpk proves its contractual relationship with two invoices duly signed by the defendant. Thus, the Court, even if there is no written transport contract, found in the agreed price in the invoice and duly declared in the tax organs (invoice with VAT issued and duly signed by the defendant) evidence of the underlying contract relationship forcing the last to pay the sum requested in fulfillment of the contractual relationship.

<sup>18</sup> The nature of the contractual carrier has been emphasized by the Albanian courts. For example, the Court of Appeal of Tirana with sentence no. 2001 of 10.10.2013 concluded that even if one of the contracting parties, the carrier, does not use its own means to perform the transport, he remains the contractual party and he is responsible for damages deriving from the delay in performing the transport.

<sup>19</sup> L. 8308 of 03.18.1998 "On road transport"; Albanian maritime code; Albanian air code; Albanian railway code. On the basis of the legislation, the qualification of the carrier is subject to the access requirements of the operators and to the requirements of integrity, professionalism and financial stability.

Therefore, the carrier is responsible for the condition of the goods for the entire transport time from taking charge to delivery. There is a presumption that the goods are properly packaged, unless the carrier makes reservations and the presumed truthfulness of the good status of the goods according to the art. 883. The carrier, therefore, only has the right to make reservations in this regard according to its professional diligence and, when it does not evidence the reservations, the burden of proof for the unsuitable state of the goods on transport falls on him. According to the aforementioned article 889 the circle of exonerating circumstances which allow the carrier to exclude liability is limited to:

- a) Prove the force majeure;
- b) Acts of the shipper;
- c) Acts of recipient or of the owner of the goods;
- d) Natural loss of the goods;
- e) Own vices of the goods.

However, as long as the carrier can prove these exonerating circumstances, he must have fulfilled all his obligations according to the modalities of the execution of the contract according to articles 882, 885 and 886 of the Civil Code, proving that he did all the necessary actions to deliver the goods, to safekeeping, store the goods in a warehouse, receive the shipper's instructions, sell it at the best price if it becomes necessary. The fulfillment of these obligations puts the carrier in the position of acting with diligence and according to the professional criteria established in the fulfillment of its contractual obligations. This regulation is very similar to the provisions of the Italian Civil Code.

Transport is a complex process that sometimes requires the use of different means or different carriers to implement the transition from point A to point B. The carrier liability for transport carried out by different carriers is regulated in articles 895, 896 and 899 of the Civil Code. The three articles are identical to articles 1700, 1701, 1702 of the Italian Civil Code.

In the case of cumulative transport in article 895, in the same way as article 1700 of the Italian Civil Code (Zunarelli S, Musi M, 2016) it is stated that "in transports that are cumulatively assumed by several successive carriers with a single contract, the carriers respond mutually for the execution of the contract from the place of departure to the place of destination. The carrier called to respond for an action that it is not alleged to him can act in recourse against the other carriers, individually or cumulatively. If it proven that the harmful event occurred during the transport of one of the carriers, he is required to pay full compensation; otherwise, all carriers are required to pay compensation in parts proportional to the routes, excluding those carriers that prove that the damage has not occurred in their own route". The carriers have the right to receive a declaration, on the bill of lading or in separate document, from the precedent carrier on the status of the goods received and in the absence of such declaration, of the presumption that the goods are in good condition (art. 896).

#### 3.2.4.1 Assessment and calculation of the damage

The rights and obligations of the parties in executing the transport contract are exercised by the parties towards the counterparty held responsible. In establishing the damage, the Albanian Civil Code assigns an active position to the figure of the recipient. Thus, the article 892 states that "the recipient has the right to ensure, at his own expense, prior to the delivery, the identity and status of the transported goods". Therefore, he must act on his own expense otherwise there is a decadence of the damage action toward the carrier<sup>20</sup>. But, nothing is said in the Code about a possible reimbursement from the carrier if the loss or damage exists (as regulated in example by Article 1697 of the Italian Civil Code).

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<sup>20</sup> Furthermore, article 893 states that if the carrier notices "partial loss or damage to the cargo, of the nature that it cannot be noticed at the time of taking charge, on condition that the carrier is informed of the discovery of the damage and no later than 20 days from the date of delivery". The term of 20 days is much longer than the 8-day deadline set by the Italian Civil Code in this regard in art. 1698 "Extinction of the action against the carrier".

In the moment in which the loss or damage of the goods is determined, article 891 states that "the damage is calculated, except in the cases in which it is arranged otherwise by the agreement of the parties, according to their price at the time of loading by the carrier. If goods are damaged, the carrier must compensate the damage to the extent of the difference between the value of goods at the time of loading and the value at the time of unloading". Article 897 regulates the liability of the carrier towards the recipient and of the shipper toward the carrier for delays by providing that "when the delivery of the goods to be transported or the delivery of the goods to the recipient is not carried out within the terms established in the contract, the contractual party who is in delay must compensate the damage".

In the Albanian Civil Code nothing is foreseen regarding the limitation of the carrier's liability. The limitation of liability is provided only in special transport legislation like in the legislation concerning the transport of goods by sea and by air, while on road transport, which remains the mode of prevailing national transport, nothing is foreseen in law no. 8308 of 1998 "On Transports", as amended.

The calculation of the amount of the damage is done according to the general provisions governing the contract in the Civil Code, as nothing is provided, in such a specific and special sector, for a referral to the uses of the sector. In Italy, the damage resulting from loss or damage is calculated according to the price of the goods in the place and time of arrival (art. 1696 Italian Civil Code).

Instead, with regard to the limitation of liability in favor of the carrier, there is no provision in the Albanian Civil Code similar to the 2nd, 3rd and 4th paragraph of the article 1696 Italian Civil Code according to which "the compensation owed by the carrier cannot exceed one euro for each kilogram of gross weight of the goods lost or damaged in national transport and the amount referred to in article 23, paragraph 3, of the Convention for transportation of goods, ratified by law 6 December 1960, no. 1621, and subsequent amendments, in international transport".

The provision in the previous paragraph cannot be derogated in favor of the carrier except in the cases and in the manner prescribed by special laws and applicable international conventions. The carrier cannot avail itself of the limitation of the liability provided in its favor by this article where proof is provided that the loss or damage to the goods have been caused by its intent or gross negligence of the carrier or its employees and supervisors, or of any another subject of which he has availed himself for the execution of the transport, when such subjects have acted in the exercise of their functions"

#### 4. Final Remarks

The regulation of the contract of the transport of goods in the Albanian Civil Code is a fundamental and residual regulation for the phenomenon of transport as a whole, according to the closure regulation referred to in art. 900 according to which, this Code complements and completes the special legislation on land, air, postal and rail transport. In some cases, the Civil Code provisions remains fundamental legislation regarding the integration of the contractual will of the parties such as for example in road transport, given the nature of the law no. 8308 of 1998 "On road transport" in which, beside to the forecasts of a public nature on road haulage, public transport and on the regulation of the transport of dangerous goods, it is not foreseen a regulation regarding the contractual position of the carrier (such as for example a forecast of the limitation of operator liability according to established tariffs) ( Gjeta A, Shtino R, 2012)

A critical reading of the codicist approach according to the analysis in the preceding paragraphs is due in correlation with some conclusions on the regulation of the transport contract in Albania according to the Civil Code.

First, with the definition, although specular, of two types of transport, of persons and of goods divided into two sections, the Albanian Code does not offer a unified reading of the transport contract. In our opinion the definition of transport contract should be reviewed in this sense. The transport industry is instrumental to the business, yet, its specialty and volume places it as an

indispensable and very relevant sector. In this regard, if the normative data is not clarifying or the autonomy of the parties has not intervened, a more frequent reference to the specific uses of the sector would be commendable.

The Albanian Civil Code lacks to provide a rule such as article 1696 of the Italian Civil Code that sets compensation limits in favor of the carrier<sup>21</sup>, leaving this regulation only to sectorial provisions as in Maritime Code or Air Code.

For this purpose we must also mention the few cases in practice regarding the use of transport contracts according to the civil code and few cases regarding the contract for the transport of goods in general brought in front of the Albanian courts.

In our opinion, it would be of interest to the sector that Chapter VIII of the II Title of Part V of the Civil Code, which governs, in articles 877 to 900, the contract for the transport of persons and goods, to be reconsidered and rewritten in order to improve the legislative data.

As we have seen, the transport contract regulated by the Albanian civil code reflects the regulation offered by the Italian Civil Code. Through this paper we do not propose a process of reform copying and pasting the legislation like in 1994, but, on scientific basis and with the current doctrinal production, to try to review the terminology and the fill gaps that the actual regulation offers. In example there are ambiguity raised in practice with regard to the nature of the transport contract as a contract in favor of a third party or not and the omissions regarding public transport or limitation of liability.

Often, the transport contract, as typically outlined by the Civil Code, is camouflaged in another type of contract such as shipping or, more commonly, a procurement contract. The latter is the contractual type currently most used in commercial relations between companies, including transport activity. These confusions are also evident in the jurisprudential interpretation of the first-degree courts in Albania<sup>22</sup>.

Furthermore, many companies have incorporated the transport services inside their business by carrying out transportation on their own. The transport companies resolve the disputes raised in their activity often by means of a transaction or by executing the penalty clause in the contracts of transport /procurement itself, thus avoiding lawsuit in the courts. Another cause is found in the lack of cumulative transport in the Albanian landscape due to the limited road and rail transport network, thus avoiding the distribution of damage caused during transport by two or more operators.

Finally, what is especially noticeable is the lack of a liability limit in favor of the carrier according to the Civil Code. This lack means that there is no additional benefit for the transport companies to resist in court against the recipient or sender, preferring out-of-court amicable solutions of disputes.

Finally, it is our opinion that better regulation would also have practical implications. Renewing the transport contract model and making it more attractive to transport market operators might give to operators a more effective tool to carry out their business through this type of contract and not concealing their activity under other more general contractual instruments such as the contract of procurement in example.

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<sup>21</sup> However, as regards the international transport of goods by road, Albania has ratified the CMR with the law no. 9503 of 04.04.2006 "Per aderimin e Republikës së Shqipërisë në konventën për kontratën e transportit rrugor ndërkombëtar të mallrave (CMR) dhe protokollin e nënshkrimit" and the ADR convention with the law no. 118 of 13.12.2012.

<sup>22</sup> Very interesting is the ruling of the Court of Appeal of Tirana with sentence no. 419 of 01.03.2012 in which the court defines the nature of the transport contract to be unlike that of subordinate employment. A company X had signed a contract "for the transport of workers and goods" with a natural person Y, driver. Driver Y was paid for every kilometer carried out without a fixed monthly payment. The ruling of the Court of First Instance concluded that it was a contract of employment and not a contract of transport. The Court of Appeal concluded on the nature of the contract finding it as a transport contract based on the remuneration received by the party: based on mileage and not as a fixed monthly salary, interpreting the orders given by company X to Y as a transport exercise and not as an effective subordination under the employer's orders.

These considerations must be considered in future reforms of the Civil Code, which in the Albanian system needs a 3/5 majority to be approved. The legislative projects in progress in the field of transport do not provide for a legislative reform, at least with regard to the privatistic regulation of the sector. This lack of attention, as stated above, is also due to the lack of pressure from the categories of carriers.

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