CHARACTERISTICS OF THE CARGO INSURANCE CONTRACT IN CASE OF INTERNATIONAL LAND TRANSPORT

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Abstract

Cargo international transport is an engine for the development of the economic relations between states involving cross-border movement of goods through the crossing of at least one border of a state (international transport) or by crossing at least two border crossing points, in which case we are in the presence of an international cargo transit. During the transit the goods transported may be subject to an insurance.

The object of the cargo insurance is, thus, represented by the goods, the items expressly listed in the insurance policy, within the territorial limits specified in the insurance policy, both during the transport and during the storage, in the latter case, at the express request of the insured and with the acceptance of the insurer.

This paper analyzes the characteristics of the cargo insurance aiming to present the theoretical and practical aspects of interest with regard to the cargo insurance concluded in case of an international land freight transport.

Keywords: *international freight transport, cargo, insurance, risk, land transport of goods*

1. Introduction

For the goods to satisfy the needs for which they were created, it is necessary that they are transported from the production site to the place where they meet the demand, so that, often, their exploitation is carried out on the international market. Therefore, the transport meets the need for movement of goods, their transit being, often, international (from the territory of a state to the place of destination located in another state).

In the field of international cargo transport we find insurance contracts within sale-purchase contracts, with direct implications on the execution of the contract, including on the transport[1]. The transport and insurance costs directly contribute to the formation of the international prices of goods.

The insurance of the goods that are subject to the international trade activity is concluded depending on the conditions included in the sale-purchase contract, respectively the clauses regarding the conditions of delivery of the goods.

The cargo insurance contract for road transport represents the agreement between the insured and the insurer based on which the insured undertakes to pay a premium to the insurer, and the latter takes over the risk of the of the occurrence of the insured event, binding himself to pay to the insured, on its occurrence, a compensation or an amount insured within the agreed limits of the content. The conclusion of the insurance for the period of transport and storage of the goods that are subject to foreign trade sale-purchase operations is optional[2].

1.1. Insurable interest.

The insurance of the cargo transported is mainly depending on the need for the existence of a patrimonial interest, assessable in money[3] with regard to the insured goods and the compensation. Under no circumstances, the insured will receive a compensation greater than the damage suffered.

For the cargo insurance for the damage suffered during transportation using road vehicles, the holder of the interest of the insurance is the forwarder or the owner of the cargo (the recipient, the purchaser) to whom the compensation is paid if the event occurs.

The forwarder is bound by the generic obligation to prepare the legal and material conditions regarding the movement of the freight carried. The forwarder must, among other things, carry out any necessary operations, from the technical and administrative point of view, in order to make possible the intended transport[4], which may include, according to the time of the cargo risk transfer, the conclusion of the cargo insurance. But, the diligence of the cargo insurance may also belong to the recipient of the cargo.

1.2. The risk of the contract.

Since Incoterms Rules become binding upon their acceptance and insertion in the sale-purchase contract[5], they become of great importance, including in terms of the legal relationship arising from the insurance of the goods which are subject to the sale-purchase and international transport contracts.

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[1] A. Butnaru, *Transporturi și asigurări internaționale de mărfuri,* Editura Fundației România de Mâine, București, 2002, p. 227.

[2] A. Butnaru, op. cit. p. 231.

[3] A. Butnaru, op. cit. p. 231.

[4] Ghe. Piperea, *Dreptul Transporturilor*, curs universitar, Ed a 3-a, Ed C.H. Beck., 2013, pag. 29.

[5] C. Alexa, GH. Caraiani, R. Pencea, *Reglementări și uzanțe în comerțul și transportul international de mărfuri,* Scrisul românesc, Craiova, 1986, p.7-19.

In relation to the Incoterms Rules there will be determined the time when the risk is transferred from the seller to the buyer. In this way, each party will be concerned to conclude the insurance when the risk lies with him.

The general rule is that, during the transport, the goods are carried on the purchaser's risk. The international experience has shown that there are periods, during transport, when the risk is either under the liability of the seller or that of the buyer, or that of the insured, depending on those agreed in the sale–purchase contract.

One of the obligations of the forwarder is to deliver the goods to the carrier. The delivery of goods to the carrier means not only the beginning of the hold of the carrier for the cargo but also the transfer of the risk to the buyer of the goods (its owner).

The circumstances of casus fortuitus and of force majeure raise the question of the risk of the contract both in case of the transport contract and also in case of cargo insurance contract for transport.

In the transport contract, the forwarder, creditor of the specific performance, unfulfilled due to fortuitous causes by the carrier, supports the corresponding damages, not having the right to ask for their coverage by the carrier, but neither does he owe the price of the transport. The carrier bears the risk of the contract exclusively from the perspective of the right for the cost of the transport, in the meaning that loses the amount of money representing the contract price of the transport[6].

If within the insurance contract the case of force majeure represents a clause exempting from liability of the insurer, if this risk occurs, the insurer will not indemnify the owner of the goods. By default, the carrier can not be held liable for loss or damage to goods due to this type of causes. What it is being carried is not the cargo of the carrier but the cargo of the forwarder, the carrier being a simple holder of the goods. The liability of the carrier is a contractual liability, which is based on its fault for failure to fulfill its obligations[7].

1.3. The insurance policy.

The proof for the cargo insurance is the insurance policy which is a document that includes, on principle, the following elements: the name and the address of the insurer, the name and the address of the insured, the object insured, the risks insured, the duration of the insurance, the amount insured, the insurance premium.

The cargo insurance policy used to ensure the goods during the road transport and the storage shall be drawn up in a single original document. At the request and on the expense of the insured, the insurer can issue duplicates or copies of the insurance policy.

In international trade, the insurance policy has the value of a credit instrument. It can be "nominal", "bearer" or "registered", when it can be sent or given as security, as appropriate[8].

The cargo insurance policies are of several types:

1. *subscription policy* (to ensure all goods shipped from the insured within a specific period of time),
2. *floating policies or open policies* (policies that establish a certain limit of values that is ensured and that decreases with each transport carried out, until it is finished),
3. *travel policies* (policies for insurance of the goods from the place of their performance to their place of unloading),
4. *reinsurance policies*.

The mandatory elements in the insurance policy and, also, constituent parts of the insurance contract, are the following: the contracting parties, the object and the insured value, the means of transport, the risks insured and the risks excluded, the insurance premium.

1.4. The parties of the contract.

The parties of the insurance contract are *the Insurer*, that is represented by an insurance company and *the Insured*, who can be any person who has an insurable interest, cargo owners, forwarders, creditors, insurers that reinsure.

1.5. The object of the contract.

The object of the contract is represented by any goods transported in international traffic or that is stored for shipment.

1.6. The amount insured.

For cargo insurances, the amount insured includes the following components: the price of the goods (according to the original invoice or to the value of the goods on the market of the place of shipping, at the time of the insurance), the cost of the transport (e.g.: costs for loading and unloading the cargo), the hoped benefit (e.g.: unforeseen expenses at the conclusion of the loss determination contract) and, possibly, customs duties.

The amount insured is the value within whose limits the insurer pays the compensation.

Within the cargo insurance for transport there are also policies that do not include precise specifications regarding the amount insured. Depending on determining the amount insured at the time of the conclusion of the contract, we can distinguish between *assessed policies* and *not assessed policies.* In case of the not assessed policies, when the insured risks occurs and in order to obtain the compensation, the insured will have to prove the

[6] Ghe. Piperea, *Dreptul Transporturilor,* curs universitar, Ed a 3-a, Ed C.H. Beck., 2013, pag. 32 și 33.
[7] Ghe. Filip, *Dreptul transporturilor*, Ed. Șansa București, 1996, p. 66.
[8] According to the provisions of the Law no. 58 of 1934, the legal provisions regarding the form of the endorsement also apply to the endorsement applied to an insurance policy issued by order.

value of the goods affected by the damage by invoices, delivery notes, bill of lading, bank statements, etc. If the insured or the beneficiary of the insurance holds an assessed policy, it will not to have to prove the value of the goods insured because it was established when the contract was concluded[9].

The insured amount determined under the insurable value, respectively, the so-called under-insurance, makes a partial coverage by the insurer, in relation to the actual value of the damages suffered by the goods during transport, the percentage of the under-insurance being applied to the insured value of the goods.

1.7. The insurance premium

Is the amount of money that the insured pays in advance to the insurer, the latter binding himself to take the risk of occurrence of certain event and to pay the beneficiary, who may be the insured or a third person, a compensation within the limits set by the contract.

Among the determining factors in establishing the level of the insurance premiums we specify:

1. *the scope of the risks* covered by the policy conditions, such as the existence of special risks required to be covered by the insured, determined by the nature and characteristics of the goods (e.g. breakage or scattering in case of transporting glass or food),
2. *use of a particular type of packaging* (e.g. use of a cheaper package),
3. *the duration and methods of carrying out the freight transport* (some insurers do not pay compensation for the damage suffered as a result of the delay or the extension of the travel or they increase the insurance premium when there are more transshipments of the goods as a result of increased risk of damage),
4. *the way that the means of transport looks like* (e.g. the age of the means transport can contribute to the risk assessment and, thus, to the establishment of the insurance premium) and
5. *the conjunctural state of the international insurance market*[10].

1.8. The risks insured.

Road transport insurances were influenced by the maritime transport, the latter having a longer tradition.

For the road transport, the cargo insurance can be carried out for general risks and for special risks, the insurance conditions being classified as general conditions of insurance and special conditions of insurance.

The general conditions of insurance cover either a wide range of risks (e.g.: "all risks" insurance) or "named perils". The special risks are insurable separately, in exchange for the payment of additional insurance premiums.

Within the cargo insurance procedure for international road transport the same insurance conditions as in maritime insurance are practiced, namely: conditions A, B and C.

Condition A ("all risks of loss and/or damage") offers the largest coverage but is also the most expensive. Under this condition, risks listed separately as exclusions are not covered.

Condition B covers the losses and/or the damage of the goods during transport, contains a smaller number of covered risks, risks that are expressly mentioned in the content of the insurance condition. By default, the insurance premium is smaller. Among these risks we specify: fire or explosion, overturning, collision of the means of transport with a foreign object, earthquake, volcanic eruption, lightning, water entering the means of transport, container or storage place, total loss of a package lost or dropped whilst loading onto or unloading from the means of transport. Together with these risks, some insurers also include other risks such as: collapse phenomena (bridges, buildings, tunnels), falling trees, breakage of dams, water pipes, avalanches, lightning, floods, earthquakes.

Condition C covers losses and/or damages of the goods during transport and covers fewer risks than those included under Conditions A and B. There have been included: fires and explosions, overturning or crashing of the means of transport, as well as the collision of the means of transport with a foreign object, other than water.

The insurance of the goods through conditions A, B and C covers certain categories of expenses among which we specify: those made by the insured in order to save the freight loading, for the prevention of an imminent danger or to minimize the losses and/or the damages incurred; the ones regarding the determination of losses and/or damages made by the insured, if the damage is suffered due to a cause which is specified in the insurance; rescue expenses, paid by the insured, established according to the provisions of the insurance contract and/or the applicable law; expenses that represent the rate of liability according to the clause "mutual fault in case of collision" if this clause is provided by the contract[11].

The payment of an additional premium may lead to the extension of any of the conditions mentioned above, so that *special risks* are covered, such as: robbery, theft, non-delivery, strike and risks related to the nature of the cargo.

Within the cargo insurance conditions a part is represented by *the risks excluded*, respectively, those for which no compensation is paid, the losses, the damages or the expenses caused by: willful misconduct of the insured or his representatives, as

[9] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed. All Beck, 1999, p. 148.
[10] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed. All Beck, 1999, p. 150-151.
[11] V. Ciurel, Asigurări și reasigurări Abordări teoretice și practici internaționale, Editura, București, 2000, p. 454.

well as the criminal or administrative consequences of this behavior; losses indirectly related to the prohibition of sending or receiving the goods, moral damages, or loss of the profit expected; losses resulting from commercial operations; the usual loss in weight or volume, drying, evaporation, leakage or normal wear and tear of the insured goods; insufficient or improper packing or preparation of the insured goods; inherent defect or the nature of the insured goods; customs or commercial offenses; fines, confiscations, seizure, smuggling, prohibited or clandestine trade; insolvency or failure to fulfill the financial obligations by the owners, managers, or operators of the means of transport.

On principle, these risks are included in the category of uninsurable risks, in the meaning that none of them may be additionally insured.

Furthermore, from the general conditions of insurance are also excluded the risks of war and strikes, these risks could be, however, subject to a special insurance, in exchange for the payment of an additional amount.

Some special goods are subject to special conditions, being possible to conclude a special insurance, considering the nature, the volume, the weight or the value of that cargo (e.g.: transportation of bank bills, securities, coupons, bank notes and coins, precious metals, artworks, dangerous goods, postal parcels, even those with declared value, perishable goods, live animals and others).

Within the transit or combined road transport "the storage risks" condition is also important. This condition covers the losses and the damages of the insured goods, during the storage of the goods, for the following events: fire, explosion, lightning, heavy rain, including its indirect effects, earthquake, hurricane, collapse or landslide, avalanche. The exclusions presented also apply to this condition.

In order for this clause to take effect it is absolutely necessary that the warehouses of the forwarder and the beneficiary are indicated[12]. Romanian arbitration practice takes into consideration the correctness regarding the refusal of payment for the compensation "as long as the warehouses in question, both of the supplier and of the beneficiary, located outside the port of unloading of the goods, were not indicated in the insurance policy"[13].

The special conditions of insurance represent a supplement to the general conditions of insurance of goods, the insured requesting an additional protection for certain risks. The most common *special conditions* are: the risks of war; the risks of strikes; the risks of theft, robbery and non-delivery.

There is also a number of typical risks arising from the nature of the cargo. There are taken into consideration phenomena such as: overheating, spoilage, breakage, scattering, etc.

Unless otherwise provided in the cargo insurance contract, the general exclusions that have been presented are also valid for the special conditions herein mentioned.

Due to the increased incidence of the risks covered, the condition "risks of theft, robbery and non-delivery" need a few specifications.

It covers the losses and the damage for the insured goods caused by theft, robbery and non-delivery of the goods. The compensation is determined starting from the sum insured plus the expenses incurred by the insured on the account of the insurance company aimed at limiting the damage or reconditioning of the goods. Also, one can proceed to some cuts in situations such as: inexact triggering of the risk without bad faith by the insured; causing damages to the insurance company by non-preservation of the right to sue for compensation against those responsible, compensation, possibly, with the premiums remaining to be paid; payment of the deductible, etc. The resulting amount represents the final compensation.

1.9. Interpretation of the contract.

The judge must see the intention of the parties, the meaning and the occurrence of the exclusion clauses of the guarantees or of those regarding the loss of the right (forfeiture) which give the insurer the opportunity to discuss the guarantee itself, emptying the insurance contract of its essence or contents. The interpretative approach of the judge of the case is, currently, extremely complex since the detection of the content of the contractual clauses in order to establish the rights and the obligations of the parties must take into account, besides the regulatory framework conferred by the provisions of the common law, also those of the commercial law and those of the special legal provisions, without ignoring the community law in the field[14].

In addition, the judicial practice has shown that the interpretation of the cargo insurance conditions often presents difficulties, arising from the ambiguity or the lack of information from the insurance conditions or the existence of special conditions, derogating from the general ones. Consequently, we present some of these issues of wide interest:

The cargo insurance contract is the work of the insurer who "thinks it" (conceives it), drafts it and offers it for signing to those who want to be ensured against any sinister or against the event of the occurrence of a risk. The insured usually adheres to the preset contract, without doubting the general and/or special conditions stipulated by it or the content itself of the "prefabricated" legal act.

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[12] C. Iliescu, Contractul de asigurare de bunuri în Romania, Ed All Beck, 1999, p. 153.

[13] Decision no. 139 of the 29th of August 1977 of the Court of Appeal Bucharest quoted by O. Căpățână in Revista română de studii internaționale nr. 3/1980, p. 267.

[14] Mona-Maria Pivniceru, *Efectele juridice ale contractelor aleatorii*, Ed Hamangiu 2009, p. 97.

As a consequence of *the adhesion* character of the insurance contract, the doctrine and the specialized practice stated that clauses that are equivocal, ambiguous or obscure are interpreted in favour of the insured ("*contra proferentem*").

The ambiguity covers two main causes of interpretation/where the interpretation of the contract is required: one is *the lack of information* within the provisions of a contract, a second one is the situation where certain policies are abundant in clauses and documents that provide *excessive information*;

The lack of information found while reading the contract gives it an imprecise and partly ambiguous character; the insufficiency of information may result, for example, from the lack of definitions, the use, by those who write the policies, of generic, inappropriate words or phrases, or that do not circumstantiate the situations and that become inaccurate in a particular context.

In case of lack of information, materialized, for example, by the lack of a definition of the terms used, it appears the problem of resolving differences arising between the "common" meaning of the words and their "legal" or "technical" meanings, meanings absolutely necessary for the courts, for example, when they are called upon to interpret the words or the phrases in a way that should be acceptable and accessible, especially to an ordinary ensured that requested some type of coverage (insurance).

Rules of interpretation. On principle, there are two rules of interpretation that can be applied: *the first* is that, if in doubt, the words of the contract are interpreted to the detriment of the party trying to diminish (or shirk from) their contractual obligations; *the second* establishes that, if in doubt, the words of the contract are interpreted to the detriment of the party who proposed their insertion in the contract (considering that it was its duty that those words/phrases are clear, leave no room for equivocal).

In accordance with the principle (or rule) contra proferentem, if the meaning of a contractual provision is ambiguous, it would be preferred and considered that the meaning is averse to the party that proposed (or imposed) that clause. In the name of fairness, the principle contra proferentem claims not to ever intentionally distort the clear sense of the words used to form the clauses of a contract[15].

An exclusion provided by an insurance contract is formal when it is *express, clear, precise and unequivocal*; it dispels any hesitation between non-insurance and the worsening of the risk insured, i.e. all the uncertainties regarding the intent of exclusion[16].

The exclusion is considered to be clear and precise when it refers to *"precise criteria and assumptions restrictedly listed"*, being desirable that the insurer tries an exhaustive enumeration of the clauses for exclusion from the guarantee.

There are regarded as imprecise the exclusions that relate to approximations or rules (standards) that are unclear, inaccurate, adding more difficulty for the insured when the insurer has the tendency to reduce or even to refuse to grant the guarantee.

The exclusion should also be limited, i.e. to allow the insured to know the exact extent of the guarantee underwritten and to understand the terms of the agreement concluded.

In case an exclusion clause from the guarantee is neither formal nor limited, there are two solutions, both favorable to the insured: either the clause is assessed as lacking validity or it will be considered ambiguous or inaccurate and, consequently, it will be interpreted by the court against the insurer who drafted it[17].

The conflict between the general and special provisions frequently impacts on the object of the insurance contract, especially regarding the extent of the guarantee owed by the insurer;

To be considered as being formal, an exclusion should not only be included in the general conditions of the policy, but also in the particular ones, in view of the fact that *"the clauses of the particular conditions benefit of primacy over the general conditions if they are not compatible with each other".*

2. Conclusions

The distinctiveness of the cargo insurance contract consists of the complement of the technique for taking over the risk by a third party, who, at the same time, does not take part in the operations that he insures, but provides only the performance of the insurance, with the legal aspect concerning the contractual nature of any insurance operation, regardless of the risks covered and the ways of covering.

The presentation led to the finding of the fact that the cargo insurance represents a complex insurance, with multiple characteristics given by its technicality but also by the multitude of legal issues that may arise from the analysis of the general and special conditions, especially when they are drafted inaccurately, equivocally, ambiguously.

[15] Elena-Maria Minea, *Încheierea și interpretarea contractelor de asigurare*, Ed. C.H. Beck., 2006, p. 211.
[16] Elena-Maria Minea, *op cit.* , p. 226.
[17] Elena-Maria Minea, *op cit*., p. 227.

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