

LIABILITY OF THE FREIGHT FORWARDERS ACCORDING TO NATIONAL AND INTERNATIONAL LAW

Abstract

This paper deals with the liability of the freight forwarders according to national and international law. The liability of the freight forwarder is an extremely complex issue for theoretical examination. The latter is especially case considering the process of complete transformation of the freight forwarder position that freight forwarders experienced in the last decade of 21-st century. Considering the fact that process of transformation of freight forwarders position imposed a new terminology determinant - *logistic operators*, in this paper we use the term freight forwarders, and emphasize that the subject of examination is conventional/classical freight forwarders.

Theoretical examination of the freight forwarder status is vital for clarification of many practical dilemmas and disputes in logistic sector. The determination of the freight forwarders liability is aimed at reducing of judicial and arbitral disputes in Macedonian practice, and analysis of the legal regime of the freight forwarder's liability in the context of international shipping, which present the main goal of this paper.

The clarification of the freight forwarders liability is closely related to the determination of the *freight forwarder position towards his principal and the third party in the obligation*. For the purposes of the determination of freight forwarders liability, the position of freight forwarders in front of the customs services, insurance companies, warehouses, companies for control of the quality and quantity of the goods, will be a subject of consideration.

Key words: *freight forwarders, shipping, damage, insurance, storage of goods, customs services.*

¹The author is assistant professor at Faculty of law, University "Goce Delcev" – Shtip.
borka.tusevska@ugd.edu.mk.

Introduction

Study the issue about the liability of the freight forwarders towards the parties with whom he is in charge, contribute to the improvement of the business relations between the logistic sector and export-import sector. Quite often the question of freight forwarder's liability creates numerous theoretical and practical dilemmas. This is not a case merely because of the topic specific, but primarily due to the heterogeneous position even for classical freight forwarder and participation of many subjects in the business operation.

Freight forwarder is liable for his own *negligent behavior* that results in breach of the contract (*culpa levissima*).² Mainly, he is liable due to his negligent in choosing transporter and defining transport route.³ Regarding the issue about the choice of other subjects involved into the transaction, freight forwarder is in charge to act with the care required in legal transaction according to article 11/2 from Law on obligation (*the care of a good businessman, hereafter LOO*). Any avoidance from this legal standard makes him liable to his client.⁴ Although apparently seems that scope of the liability of freight forwarder is quite narrow,⁵ essentially freight forwarder is liable for the easiest degree of liability (*culpa levissima*).

This theoretical viewpoint is also confirmed by the practice. According to LOO, freight forwarder is liable for the selection of the third party which is obliged to ensure certain actions. But, the freight forwarder is also liable for all phases of the business operation as an expert. Namely, he is obliged in the frame of his professional care to advice his client (*the principal*) about the state restrictions that might cause negative repercussions on transport route (*Swiss General terms and conditions about freight forwarders, art. 12/12.2., hereafter SGTF*).

The freight forwarder is obliged to advice his principal about each important fact on which depends the success of the business deal (*SGTF, art. 12/12.2/2*).

The question of the freight forwarder's liability is regulated in national legislations (civil and trade codes), and national general terms and conditions. Internationally, freight forwarder's liability is a subject of "FIATA model rules for freight forwarder services, hereafter *FIATAmrffs*".⁶

National and international legal regimes indicates that beyond his liability, the freight forwarder has a right of limited liability. Namely, some legal resources foreseen maximum

²See: Bloch L., Koch B A., Koziol K., Koziol H., *Compensations for personal injury in a comparative perspective*, UK, 2003, p. 54.

³Freight forwarders (and carriers) use general terms and conditions to reduce their liability towards the principals. Regarding this protection policy they are not on the level of carriers which according to International acts and practice have right to limit their liability. Due to their power in business they do not leave a choice to their clients. Almost all of the transport contracts are concluded on the *concept of take it or leave it*.

⁴Freight forwarder is also liable for the execution of the actions about which he guaranteed for. He's especially liable for the transfer of goods till the finale destination. *In these cases he acts as a carrier*. Performance of the obligations within a reasonable timeframe quite often depends on the actual transporter. So the freight forwarder should avoid the exposure for guaranteeing the time frame for arrival of the goods.

⁵This is a viewpoint of the export-import companies which more than ever stipulate with the freight forwarders that are liable for the whole transport route. In Republic of Macedonia there are numerous freight forwarders which act as a conventional freight forwarders. So the question about their liability has a place. Internationally, freight forwarders in practice are 3PL and 4PL services providers which are liable for all.

⁶ See: International Federation of Freight Forwarders Association Model rules for forwarding services. http://www.transportrecht.org/dokumente/FIATA_ModelRules.pdf.

limit of liability of the freight forwarders (*this solution exist in FIATAmrffs*). Some of these legal acts define freight forwarder status as an agent in the transaction. Others define his position as principal towards the third party in the business operation. Nevertheless, generally the freight forwarder liability is define within the *general terms of freight forwarding conditions* of each state separately. Quite often, the freight forwarder determine his liability in his own bill of lading, emphasizing the scope and the type of damage for which he is liable.

Regardless of the anticipated solutions in domestic and international acts, business practice emphasize that forwarders companies foreseen liability according to *their general terms in conditions*. This is case due to the character of the LOO in the part of the freight forwarder's liability (LOO, art. 890/1).⁷ Business environmental impose different model of liability. More than ever export-import sector wants to stipulate with freight forwarders that are liable for the whole transport route. This practice is due to the emergence of the multimodal transport and participation of numerous subject in transport route, which complicate the question which of this subject has active legitimation to be sued?!

LIABILITY OF FREIGHT FORWARDER FOR HIS ACTIONS AND OMISSIONS (CULPA LEVISSIMA)

1. Liability of freight forwarder in case of injury due to the improperly package of the goods

Freight forwarder is not liable for the injury of the goods that principal suffered due to the improperly package of the goods. However, he is not liable only if he informed his client/principal for the deficiencies of the package. He is not liable if he inform his client on time (reasonable timeframe) about the necessity of elimination of the deficiencies of the package. Freight forwarder is also not liable if he eliminate the shortcomings of the package on the account of the principal, in case when the delay of the removal of the deficiencies pose a risk for the properties of the goods.

Commonly in the practice, freight forwarders arrange third subject/*expert* for the package of the goods. The expert is oblige to pack the goods according to the ISO standards that international acts impose. In this context the question arises: *whether the forwarder is liable for the occurred damage, due to the fact that he retained the goods in order to remove the shortcomings of the package*. More preciously, does the freight forwarder is liable for the damage of the seller in case when the goods did not reach on time because of the repackaging of the goods.

Regarding the issue of packaging of the goods, legal acts and general terms and conditions for forwarders keep quite. But, legal theory emphasize that freight forwarders can't be liable for this type of damage. Considering the nature of the freight forwarder role, and his obligations for packing of the goods, it seems quite illogical that freight forwarder should be liable for this type of damage. What is reasonable concerning the packing of the goods, is the freight forwarder to be liable if his behavior is negligent.

⁷ According to these provisions, the issue of the freight forwarder's liability is regulate with provisions from dispositive character. So, the freight forwarder may foresee different concept of his liability.

2. Liability for vocational freight forwarder performance of customs services

Accomplishment of the activities in front of the customs services is a specific sphere of freight forwarder acting: *representation in customs procedure*. In fact, freight forwarders activities in custom procedure refers to submission of the customs declaration and undertaking the whole requested formalities for customs clearance.⁸ As an expert for customs duty, freight forwarder should perform professional knowledge, advantages and disadvantages from certain procedures in customs services.⁹

Liability of the freight forwarder for the actions of the customs services is identical as his liability about the work of any third party that he hired in the transaction. More precisely, he treats the customs services as any other third party in the transaction, whose assignment is to tariff the goods.¹⁰ Hence, the freight forwarder is not liable for the omissions and defects of the customs procedure during the customs procedure and for incorrect tariff allocation of the goods, erroneously calculation of the customs value, improperly identification of the goods, wrongly allocation of the goods in the part with “*products with non-preferential origin,*” *calculation of duties and taxes on goods which are “subject of full exemption from import duties,” erroneously calculated financial sanction, omissions in levying of the duty* etc. Freight forwarder is not liable for wrongfully calculated transport costs, duties and other public services.

Freight forwarder is not liable for the damage in customs procedure, but he is quite often a subject in the customs procedure (act on his behalf and on the account of the principal), so he is obliged to file a complaint against the custom decisions. Nevertheless, he is obliged to do this only if he has authorization from his principal. For the needs of the appeal, the principal is obliged to submit all required documents necessary for the customs procedure. According to Macedonian general terms and conditions for freight forwarder (*hereafter, mgcfff*), the principal is obliged to do this in the period of three days from the request. This solution is identical in Croatian terms and conditions (*hereafter, cgctff*).

This is very logical solution. Freight forwarders might not be liable for the work of customs services as administrative organs. But, he is liable for the actions and omissions of his own in front of the customs. Freight forwarder is obliged to point out all benefits for his client as: *preferential origin of the client's goods,*¹¹ *preferential countries or territories over which preferential tariff measures are applied, alternatives for simplification of the procedure for declaration or local clearance of the goods, simplified procedures for goods carried by rail or large containers,* etc.

⁸Custom declaration in written form has to be submitted on template titled as ECD according to Regulation on the implementation of the Customs Act. See: <http://www.finance.gov.mk>, [accessed 16 October 2010].

⁹Customs code, Law on customs tariff, Regulation on the implementation of the Customs Act and etc.).

¹⁰Illustrative, freight forwarder is not liable for the tasks of the custom.

¹¹Designation of the origin of the goods is an obligation of the consignor of the goods. The origin of the goods should be marked in the invoice which the consignor submits to the forwarder along with other required documentation. Through the defining of the origin of the goods, custom value is determined. This value is a part of the purchase price and transport costs. In this context, the freight forwarder is liable for any wrongful data in the declaration which are not compatible with data from the consignor.

Freight forwarder's liability for customs actions is restricted. Freight forwarder is solely obliged to retype the data from the consignor correctly. In fact he is liable solely for this technical task.¹²

Freight forwarder is obliged to inform his client about the phase of the custom procedure. This is especially the case when the shipping is related with goods which are subject of sanitary or phytosanitary inspection. At this stage of the procedure the goods are retained the longest. Generally, freight forwarder's liability is related to defective transmission of the data from consignor referring to custom declaration and other documentation. But, the scope of liability of the forwarder in custom procedure depends on the scope of tasks delegated from the principal, and difficulties of the tasks.

All of his actions freight forwarder takes under the previously given authorization. The authorization of the freight forwarder might be direct or indirect. Direct mandate refers to the actions of the freight forwarder which he takes "*on behalf and on account of the principal*". So, as declarant, freight forwarder is entitled on all rights and obligations from the custom procedure. *Declarant is a person that submit custom declaration on his behalf, or, person on whose behalf the declaration is submitted.* When freight forwarder acts on his behalf and on the account of the consignor he is declarant in the procedure (*Custom code, article 4/18, hereafter CC*). In this case the freight forwarder's position is completely changed towards the customs administration.¹³ As declarant freight forwarder has extended liability. He is obliged to pay for the customs duties in the sense of the *article 216/3 from Customs Code*.

As a declarant, freight forwarder is also liable for the additional calculation of the customs duties (CC, article 243). He's also liable in the sense of article 109 from Regulation on the implementation of Customs act.¹⁴ Through the signing of the custom declaration, freight forwarder as declarant or his representative becomes liable for the validity of the submitted documents and all other obligations regarding the goods which are under regular customs procedure. This provision doesn't exclude the possibility of applying criminal provision to declarant or his representative. Nevertheless of the provision for freight forwarder's liability as agent, customs administrations are familiar with the status of the freight forwarder: *on the account of the principal*. In this context we point out the provision that freight forwarder is obliged to inform the customs administration that acts on the account of his principal, that has authorization and finally that he acts as direct or indirect agent (CC, article, 5/3).

The extension of the liability of the freight forwarder in front of the customs administration, doesn't have connection with the scope of his liability towards the principal. The freight forwarder stays liable for the relevant transmission of the data, according to customs formalities.¹⁵

¹²In this context he is signing customs declaration and their amendments, decisions from customs administration, proceedings and all other documents referring to customs formalities.

¹³Freight forwarder in customs procedure quite often and formality is exporter or importer of the goods. In these cases he is acting in his own name and own account. So, there is not representation, and the freight forwarder is declarant in the procedure.

¹⁴Identification of the declarant or agent is achieved by rubric 14 and 54 from ECD.

¹⁵Carić S.: *Međunarodni transport robe, međunarodna špedicija, transportno osiguranje, carine*, Novi Sad, 1977, p. 79.

3. Liability of the freight forwarder for the transport of the goods

According to INCTAD/ICC Rules, Unidroit Draft Convention on Contract of Agency for Forwarding Agent (*hereafter, Draftccafa*), UN Convention for Multimodal Transport of Goods, 1980), General terms and conditions for freight forwarders overall, comparative legal acts and domestic law, there is a possibility for freight forwarder to executing all task from freight forwarder contract, by himself, personally.¹⁶ Execution of these tasks by freight forwarder present independently performance of the obligations under the concept of *self-fulfillment*. This concept of representation should not be detrimental to the principal. Hence, he is obliged to act according to requested attention in any transaction beyond his freight forwarder role. Amongst the many obligations that freight forwarder might do under this concept, the most exploited is his role as transporter. So, the freight forwarder might transfer the goods by his transport vehicle, or by leased vehicle. In the transport route, freight forwarder might perform in the role of agent in one stage, and as transporter in other.¹⁷

Shifting of the freight forwarder position as conventional commissioner, results with changes in the scope of the rights and obligations which belongs to him.¹⁸ Otherwise, extension of the freight forwarder right also reflects on his scope of liability. So, the freight forwarder might accomplish the transport partially or completely, if something different is not stipulated. *LOO*, article, 892/1). If the forwarder accomplish the transfer of goods, he has a status of transporter and has right of reimbursement, beside his fee for forwarding activities (*LOO*, article, 892/2).¹⁹

This solution is also familiar for German civil code – HGB. According to article 412/2 from HGB, the freight forwarder that deliver the goods is carrier in the transaction. This type of liability the freight forwarder has in each cases when he charges a fixed price (*HGB*, article, 413/1).²⁰ In this situation the freight forwarder is not entitled for forwarder compensation. He is a carrier. But the exception exists in case when separately in the contract is stipulated that the freight forwarder is also entitled on forwarding fee. Against this concept, the French trade code anticipate that fixed price is not a reason that entails carrier's liability for freight forwarder.²¹ According to French law, freight forwarder has carrier's liability when he issue *international shipping confirmation/titre de commission de transport international*. Compromise

¹⁶Analyzes conducted in several regions in Germany have displayed that solely 30 % of the demands of the importers/exporters are for transport are accomplished by transport means owned by freight forwarders. In all other cases the transfer of goods is accomplished by engaging third parties in the transaction (*subcontractor/external carrier*). See more about this: Krajewska M.A., Kopfer H., op. cit., p. 741.

¹⁷In this context, quite often in practice freight forwarder transfer the goods in land transport by his own vehicles, but in sea transport they leased vehicles.

¹⁸Defining the freight forwarder's liability is simply in case when the position of the freight forwarder is clear. In case when he acts as carrier he has obligations and liability as transporter. In case when he independently storage the goods, he has a status of warehouse.

¹⁹The freight forwarder has carrier's liability in case when he *de facto* doesn't accomplish the transfer, but in his offer he foreseen forfeit rate payment. See: *mgctcf*, article, 41/2/3).

²⁰Loza B.: Obligationo pravo (posebni dio), Sarajevo, 1971, p. 56.

²¹In this context, charging the fixed price impose carrier's liability for the freight forwarder. This concept is also anticipated in *Draft Convention on Contract of Agency for Forwarding Agent*. This solution present compromise of different concepts accepted in comparative legal systems as German, French, British system and etc. According to *Draftccafa*, article, 23 and 24) *freight forwarder has carrier's liability, if he agree to acts under the fixed price*.

The concept of carrier's liability is in correlation within the principles of French law, in sense of *del credere clause* that determine his liability *vis-à-vis* his client (*système caméléon*), and present the concept of *network liability*. This concept of liability put the freight forwarder in *back-to-back* position that empowers him on compensation/regress from his subcontractors under the same conditions on which is based his connection with his client. According to French legal system, freight forwarders are intermediaries which are characterized by separate liability that equates them with the carriers/*commissionnaire de transport*.

Belgian legal system doesn't accept the concept of *del credere* liability, as *commissionnaire de transport*. Belgian jurisprudence distinguishes *commissionnaire de transport* and *commissionnaire expéditeur*. The first category titled as *commissionnaire de transport* presents the freight forwarders that convey the goods or act as carriers. Belgian law enacts freight forwarder (*commissionnaire de transport*) with liability for the transfer of the goods from the point of loading till the point of unloading. As anticipated in Belgian general terms and conditions for *freight forwarders*, article, 31, hereafter BGTCFF), the freight forwarder is liable as carriers in case foreseen in article 3.2.²²

Italian legal practice and theory distinguish *spedizioniere* and *spedizioniere-vettore*. The last category according to the article 2/b from Italian general terms and conditions for freight forwarders (hereafter, IGTCFF) are entities that are entrusted the shipping of the goods as carriers or explicitly takes carrier's liability. In this case the freight forwarders might act under the concept of limited liability anticipated for carriers (IGTCFF, article, 11/2). In any case, the limit of the freight forwarder liability might not surpass the limit foreseen for the carrier.

Regarding the carrier's liability Spanish legal system foresees that the freight forwarder */la realización del transporte* which accepted to transfer the goods, has a status of carrier. The liability of the Spanish freight forwarder is equal with liability of Italian *spedizioniere – vettore* when he guarantees for the acts of the third parties involved in the transaction.²³

Scandinavian countries do not provide legal provisions for the freight forwarder liability. They regulate this issue with general terms and conditions applicable in Denmark, Finland, Norway and Sweden.²⁴ Precisely, according to the general terms and conditions of Nordic association freight forwarders are charged with carrier's liability solely in the case when they act as distributors of the goods. NSAB from 2000 contains provisions for the liability of the forwarder in case when he acts as intermediary or carrier. In this direction is the solution from the Dccaffa, article 25 according to which carrier's liability of the freight forwarder depends on the character of the bill of lading that he issued during the receiving of the goods.

Internationally, in case when freight forwarder acts as carrier his liability is equal as the liability if the carrier foreseen in international legal act, and it's *Rotterdam Rules/2009*, *Hague Rules/1924*, *Hague-Visby Rules/1968*, *Hamburg Rules/1978*, *Montreal Convention/1999*, (*CMR/1956*) and (*CIM/1999*). According to this, freight forwarders that oblige to convey the goods is liable for the damage or destruction of the goods if the injured party proves that the

²²This article (3.2) refers to the freight forwarder acting as carrier/*commissionnaire de transport*.

²³Ramberg J., Unification of the Law of International Freight Forwarding, Unif. L. Rev. ns, 1998 – Hein Online p.3.

²⁴These general terms and conditions are applicable on the in Latvia and Estonia.

loss, damage (delay), or the event that contributed to the damage occurred during the goods is under carrier's control.

Comparative, all these legal systems contains different provisions for the position of the freight forwarders. This is one of the reason why on the international level there are not legal regime for freight forwarders yet. Considering the newest position of the freight forwarders, affected by the multimodal transport, globalization and other influences, is seem that is not required at all.²⁵

4. Liability of the freight forwarder about the insurance of the goods

Accomplishment of the insurance activities by the freight forwarder depends on the existence of the *insurance clause* in the freight forwarding contract with his principal (*LOO, article, 893/1*). Freight forwarder's obligations for insurance of the goods, refers to the risks and dangers that are stipulated between principal and freight forwarder (*LOO, article, 893/1*).²⁶ In this part of the mandate, freight forwarder is charged with liability solely when he deviate from the stipulated obligation predicted in the mandate/commission order.²⁷

Toward the insurance companies, freight forwarders acts as they acts toward the all other subjects/third parties involved in the business operation (*customs administrations, warehouses, companies for monitoring the quantity and quality of the goods*). According to this solution, freight forwarder is charged with liability solely when he explicitly accept this obligation, or he does this against the interest of the principal, in the absence of the required level of care. Concerning the insurance, the freight forwarder is liable if he has taken the obligation for insuring the goods in subsequent shipment, so he fail to do that on some of the shipment. Insurance of the goods also present freight forwarder obligation even it's not explicitly foreseen in the contract. The applicability of this solution is conditioned by the nature of the goods which impose insurance of the goods as mandatory act.

In the process of stipulation of the insurance contract, freight forwarder on his behalf and on the account of his principal. So, the consequences from the insurance contract are identical with the legal repercussions from other obligations. Namely, he sign the insurance policy in his own behalf, but on the account of the orderer/principal. So, the economic effects from the transaction are directly oriented toward the principal. This is the moment that designate the conclusion of the insurance contract: *signing the insurance policy, LOO, article 957/2*).

The insurance contract symbolize the economic and legal protection of the goods in case of realization of the insured risks. Insurance contract cover all damages and losses of the goods during their transmission (*Law on supervision of the insurance, article, 5/7*). In this part of the transport route the freight forwarder is only liable for the execution of the order from the principal. He is not liable form the choice of the company as in other phase of the shipping. In

²⁵ Clapp N.K., Clapp D.L., The forwarding agent, London, 1975. p. 64.

²⁶ Carić S.: Međunarodni transport robe, međunarodna špedicija, transportno osiguranje, carine, Novi Sad, 1977, p. 92.

²⁷ Zimmermann, R. The New German Law of Obligations, Historical and Comparative Perspectives. Oxford: Oxford University Press. P., 2005, p. 23.

the insurance frame, insurance policy has significant meanings and might be issued as policy on name, order, and bearer (*LOO, article, 958/6*). This alternative is simplifying the position of the forwarder. From the policy very easy the courts can confirm the status of the freight forwarder.

The freight forwarder as subject which in “*principal interest*” undertake insurance activities, is obliged to submit all necessary documentations when the risk has been realized. This part of the transaction doesn’t require a great knowledge and expertise. This is not a case in the stage of the choice of proper transporter require. But, in the case of realization of the risk, the most important question referring to insurance is if the forwarder might abuse his position and execute the policy beyond the will of the principal?! This problem is solve by the *LOO, article 961/1* which state: *in case of insurance for account of third party or for account to whom it refers, the insurance taker is obliged to perform the obligations for premium payment and the other obligations of the contract, but he can’t perform the rights of the insurance, even if he holds a policy, without consent from the person whose interest is insured and to whom they belong.*

5. Liability of the freight forwarder in collective freight forwarding

The process of establishing collective forwarding, impose a different status of the freight forwarder. This new/different status of the freight forwarder reflect on its scope and type of the liability. Namely, in case of collective forwarding, freight forwarders are liable as subjects which have undertook liability as carrier. Legal theory identify this concept of liability as “*legal liability*”. So, in case of collective forwarding, the forwarder is liable for the loss or damage of the goods during transport which would not occurred if there was no collective forwarding (*LOO, article, 901/3*). This scope of freight forwarder liability doesn’t exists in case when there is no collective forwarding. Considering the *LOO, article, 901/3*, the freight forwarder is sorting the goods during the organization of collective forwarding. So, he might accept or reject the order for collective forwarding from his principal.²⁸

Carrier’s liability of the forwarder also generate from the transport document which cover the whole route, and which is issue for the needs of the collective forwarding. In collective forwarding, the freight forwarder is liable as carrier. The whole procedure is implemented through separate templates titled as bolero, and collective list for collective load. Bolero represents a document that contains data from the conveyed census about the shipments/goods.²⁹ The freight forwarder is released from the liability from the moment of the transfer of the goods to his clients. Increase of the scope of liability in collective forwarding is due to the involvement of numerous different shipments of goods. The goods allocated in different shipments differs from his nature, so the risk for their loss or damage is extended. This is a risk that in reality impose the freight forwarder. The last one is unlimited liable for the occurred damage during the transfer. The freight forwarder is liable if the damage or loss occurred in practice, results from the collective transfer of the goods with different features. But, the freight forwarder might get rid of the liability, when he will prove that the damage will be occurred regardless of the fact about collective transport?!

²⁸Choosing and storage of the goods is due to the fact that any separate shipments contains different type of goods.

²⁹Mađarić J.: Međunarodna špedicija, Zagreb, 1991., p. 44.

Considering the complexity of organizing collective transport, as well as the increasement of the forwarder scope of liability, the lawmaker foreseen right on separate compensation (*LOO, article, 901/2*). So, if from the collective forwarding the forwarder achieves freight differences on behalf of the orderer, he has a right as a special additional reimbursement. Finally, according to multimodal transport of goods, freight forwarder quite often is titled as transporter, and acts as transporter.

6. Liability of the freight forwarder for other tasks undertaken by contract

In his status as a commission agent, (*on his behalf and on the account of the third party*) the freight forwarder is liable for the accomplishment of the tasks beyond the conventional circle of tasks (*storage of the goods, customs services, instraditions* and etc. This liability is determine by his position as classical freight forwarder.

In case when the freight forwarder is organizing control of the quantity and quality of the goods, sorting the goods, labelling of the goods and all other *added value services*, his status is shifting and the scope of his liability too. Starting from the idea to offer package of added value services, at the same time to provide his self with work, towards the third parties he acts as principal/orderer and is liable for the work of the third parties (*del credere clause*).³⁰

6.1. Liability of the freight forwarder for the activities undertaken by the third parties

6.1.1. Liability of the freight forwarder for the activities undertaken by the carrier

The freight forwarder liability for the activities of the carrier is equal with his liability about other third parties which he engage in the transaction. So, regarding the carrier's activities, the forwarder is liable for the selection of competent and professional carrier for the transfer of the goods. The freight forwarder is not liable for the damage of the goods that results from the delay in transfer during the period when it is under carrier's control.

Freight forwarder is solely liable for the selection of the third party, except in the case when he stipulated with the third parties that will be liable form the damage (*mgctcff, article, 41/4*). In these cases, the freight forwarder is oblige to take all required measures for the protection of his principal interest. According to article 29 from *bgtcff*, the freight forwarder is not liable for the accomplishment of any contract that is result of his factual actions in the name and on the account of his principal. There is an exception, in case when the third party explicitly emphasize and prove the fact that the damage that he undergone results from the freight forwarders activities.

When the freight forwarder selects carrier for transferring the goods on the account of the principal, he might not privilege a company which is not professional. The execution of the forwarder liability about the work of the third parties, relieve him from the liability for the

³⁰ Lemoine W., Dagnaes L.: Globalization and Network organization of European freight forwarding and logistic providers, Sweden, 2002, p. 92.

damage cause by the delay of the receiving of the shipments.³¹ In this context, the freight forwarder is not liable for the delayed transfer of the goods (mgctff, article, 31/3).³²

From the view point of the comparative law, there is no a legislation that explicitly or implicitly limited the freight forwarders liability on the intradition. Hence, when the damage is cause by the actions from the third parties превозникот (warehouse, transport company, insurance company, banks), the freight forwarder assign to his principal (Austrian general terms and conditions for freight forwarders, *hereafter*, AGTCFF art. 52/a).

Regarding this issue, *article 21 from the GCSFFLA* foreseen that in case when the freight forwarder arrange third party for transfer of the goods (*subcontractor*), he is solely liable for the competant choice of the third parties. In this context is the solution from *article 11/2 of GFFCI* according to which freight forwarder is not liable for the transfer of the goods, but for the execution of the contract.

Internationally, FIATA Rules for freight forwarding services, foreseen that freight forwarder is not liable for the acts and omissions of the third parties (offshore workers, port agents, warehouses), except if in the selection of this subjects deviated from the require attention that he has to pay in the process of selection (*FIATA, article, 6/6.1.2*). Namely, according to article 7/7.2 from the FIATA rules, freight forwarder have liability as principal when packaging, storage, controlling of the goods is in his hands, as in the case when he implicitly undertake the actions, so the liability as the principal is anticipated.

In this direction is the case *Prima U.S. Inc. v. Panalpina Inc.* (233 F.3d 126 (2d Cir. 2000)).³³ Electric company Westinghouse, signed an agreement in writing with Panalpina freight forwarding company, for organizing transfer of one electronic transformer do 3M corporation in Iowa, USA. Meanwhile, Panalpina informed Westinghouse company that it'll provide a reliable shipping of the goods, and the will supervising the transfer during the whole route, *door-to-door*. For the completing of the forwarding services, Westinghouse Company paid \$21,785.00 to Panalpina.

In accordance with the previously established practice, Panalpina did not issue bill of lading for the received goods. Standards terms and conditions set on the back side of the contract, emphasize that Panalpina will pay attention in the selection of the third party which'll execute the tasks. In the general terms and conditions, the limited liability for the freight forwarders of \$50 for shipment was set. According to this conditions, Westinghouse and Panalpina concluded more than 1000 business operations.

³¹The freight forwarder is not liable for the timeframe of the transfer of the goods, except when he explicitly stipulated that (mgctff, article, 30). According to this article, the freight forwarder is liable for the deadline of the execution of the tasks, when he undertake that responsibility. But, we emphasize that in this cases he is liable in the frame of the carrier liability. Preciously, he use the concept of "*limited carrier liability*" and pay compensation in the range in which the third parties are usually oblige to compensate. In this context, *article 11/11.1.2 from British General terms and condition for freight forwarders (hereafter bgctff)*, in the case when special timeframe for loading and unloading of the goods are not stipulated, there is not liability for the damage of the delay.

³²See more about this through the case: *Ulster –Swift v. Taunton Meat Haulage*, [1977] 1 W.L.R. 625, available from: <http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=14&crumb-action=replace&docguid=IDF89B660E42811DA8FC2A0F0355337E9>, [accessed 23 October 2014].

³³Schaffer R., Agusti F., Earle B., p. 215, available from: http://scholar.google.nl/scholar_case?case=878870029561600426&q=Prima+USA+Inc+v+Panalpina+Inc&hl=en&as_sdt=2003.

In order to transfer the electronic transformer to USA, Panalpina engaged offshore worker for loading the transformer. After the organization of the loading of the goods, the freight forwarder did not paid attention on the offshore activities in the port. The offshore agent did not package the goods under the proper conditions. During the transport route, the boat encountered a heavy ocean storm that caused damaged on the transformer. The principal Prima, set an action to Westinghouse and to Panalpina for compensation. The Court accepted the action, and confirm that freight forwarder is liable for the damage of the transformer. Judge McLaughlin, decided on the appeal of the freight forwarder and explained:

“Freight forwarder Panalpina solely contributed to the simplification of the transfer of the transformer by sea. According to the contract, he solely oblige to provide cargo space for the goods/transformer, to manage with the shipments and to organize the delivery of the goods and payment of the letter of credit.³⁴ In concreto, the freight forwarder did not issue a bill of lading, and he is not liable for the damage. Panalpina acted as agent in this case, so there is no space for carrier liability.³⁵

However, judicial practice is familiar with cases in which carrier’s liability is determine for the activities of the freight forwarder. In this context, *General Electric - Kirby Appliance Ltd v Alltrans Freight Ltd & Union Steamship Company of New Zealand Ltd.*,³⁶ in which the court confirm the freight forwarder position as principal relying on *charging method*. On the same level is the decision of the British court in the case *Tetroc v. Cross-Con International Ltd.*³⁷ To the defendant Cross-Con International Ltd lawsuit was addressed for the compensation of the goods. Namely, freight forwarder arranged two carriers for transmission of the goods. During the transfer the goods was lost. Later it was found but rusted. The freight forwarder pointed out the he is not liable for the damage because he acted as an agent. As a proof in the procedure, the freight forwarder submitted letter correspondence in which is outlines: *we’ll organize the goods....*

The court doesn’t pay attention on this proof as a relevant for the determination of the freight forwarder status, and defining the liability in the case. According to the court, unclear communication between the principal and the freight forwarder in neither case should not be a reason for defining freight forwarder liability in case when there is dilemmas about the nature of the liability.

So, the position of the freight forwarder and the scope of his liability beyond the theoretical aspect “*on behalf of whom, and on account of whom,*” require essential judicial analysis of the numerous cases. Many means of determining liability are used in practice. So

³⁴ See more about this in Cohen M.M.: Letters of indemnity in exchange for delivery of marine cargo without production of original bills of lading, [2004], available from: http://www.amac.ca/AMAC_Apr2004.pdf, [accessed 15 March 2014];

³⁵ See more about this in Magnusson J., Conflict of interest in the Ocean Freight Forwarder Profession, 20 Admin. L. Rev. 459 (1967-1968), available from: http://heinonline.org/HOL/Page?handle=hein.journals/admin20&div=49&g_sent=1&collection=journals, [accessed 15 December 2013];

³⁶ *Supreme Court of Victoria, Gray J, 24 October 1979.*

³⁷ [1981] 1 Lloyd's Rep. 192, Queen's Bench Division, available from: http://login.westlaw.co.uk/maf/wluk/app/document?&src=rl&srguid=ia744d05e0000012bbff8951799ede62e&d_oeguid=ICEDC4DA0E42811DA8FC2A0F0355337E9&hitguid=ICEDC4DA0E42811DA8FC2A0F0355337E9&spos=4&epos=4&td=7&crumb-action=append&context=19, [accessed 18 October 2014].

all these cases contribute to precise determination of the freight forwarder liability, internationally, and on national level.

FINAL CONCLUSIONS:

Fundamentally exploration of the freight forwarding contract through the positive/applicable legislation, convince us that the concept of freight forwarder liability in contemporary business law is strictly shifted under the influence of the latest economic processes. Basically studying of the freight forwarder provisions according LOO, and other comparative legal systems, pointed out that the legal ground for freight forwarders acting as a principal towards the third parties, and simultaneously be liable to his principal under the “*del credere clauses*” exists long time ago.

The new category of freight forwarders titled as 3PL and 4PL are results of the export-import sector demands for “*full package of services*,” and multimodal transport of goods. This is typical for the large economies. Small and medium economies are still based on the classical freight forwarding. As we saw in our elaboration, German, Italian, French legal system are foreseen the classical freight forwarders. This legal regime is anticipated in Draft International convention too. The scope of liability and the position of the freight forwarder is conditioned by the economic growth and development.

Anyway in Republic of Macedonia and numerous small economies in the world, the number of classical freight forwarders is not a small number. Their circle of activities contains organization of the transfer of goods, in tradition, so it seems useful to determine his liability in order to reduce the judicial cases. Internationally, except in the *UNIDROIT draft international Convention* there is no other legal source for freight forwarders. Bearing in mind the fact the freight forwarders in great economies nowadays are acting as 3PL and 4PL, I can't see a reason for creating International act for the status of freight forwarders. They act as carriers, they are liable as carriers, so they are under the legal regime for the carriers. But, as we mentioned above, the concept of freight forwarder is conditioned only by the economic process. So, as long as the concept of classical freight forwarder exist in the legislations, we see the necessities for examination of the issue. Determination of the scope of the liability of the freight forwarders is a question on which are based many judicial processes. We have worked on this issue before, but not in the context of the liability of the classical freight forwarder. We thought that the only important question is to determine the liability about 3PL and 4PL. Now we are on the opinion the referring to freight forwarders, first we have to define his status and liability in his conventional form as it is regulate in the domestic, comparative and Draft International convention.

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