Civil Law Versus Common Law Concept of Freight Forwarders

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Abstract

Present research paper is focused on the comparative aspects of freight forwarders. This paper begins with a theoretical analysis of the "representation doctrine," and explores the status of the freight forwarder in Germany, United Kingdom and United Stated of America. We focused our attention on the liability of the freight forwarders towards the principal and the third party in civil and common law systems.

Observing the existing legislation, judicial and arbitration practices, we present the advantages and disadvantages of the two divergent systems of freight forwarders: German legal system versus British and American legal systems/Continental versus Anglo-Saxon legal systems. The main core of this topic is "the concept of representation," where the place of the freight forwarder is important. We also analyze the justification of Anglo-Saxon model of freight forwarder with accent on the non-vessel operating common carrier (hereafter NVOCCs), as the most sophisticated model of freight forwarder in global terms.

This paper also presents the legal repercussions of the unsettled status of the freight forwarders vis-à-vis any third person and his principal. Regarding this issue, economic effects have never been the subject of discussion. Just a superficial examination of this topic is enough to conclude that each type of representation leads to achieving one objective and it is - ***transferring the economic effects of representation toward the principal.***

Disagreements escalate in the field of obligations regarding the questions: which of the three subjects is in the legal relation and with whom? Who can be a plaintiff or defendant in the civil procedure? Is the existence of a uniform concept of representation justified? Finally, is it possible to apply the same legal standards in common and civil law systems for ascertaining the liability of the freight forwarder in particular legal systems?

The responses to all of these questions have a great impact on determination of freight forwarders liability. The impact of globalization definitely changed the position of the freight forwarder. So, which of the two systems offers a more applicable legal regime for freight forwarders? Is it the civil law or common law system, or is it the case that in the field of freight forwarders boundaries between these systems are not as great as in many other segments of law.

Key words: *freight forwarder, representation, disclosed and undisclosed, direct and undirect representation, non-vessel operation common carrier.*

Introduction

For many years the "*doctrine of representation*" was an unknown concept of Roman law. Generally by the end of the seventeenth century until the end of nineteenth century, the Roman principle „*alteri stipulari nemo potest*"was deeply incorporated into the legal systems that are based on Roman law. As an opposition to Roman law, the contemporary *civil law system* implemented and developed the "*concept of representation*." The legal regulation of the "*representation doctrine*," or legal basis for one person to oblige other by his own acts, indicate the beginning of the frame contract (*contract-frame*), and serve as a ground for further *sui generis* contracts of trade (contract) law. In a series of these types of contracts, freight forwarder's contracts have their own place. As a business law institution, freight forwarder contracts present the legal basis for the "*person receiving an order*" to take action in the interest of "*the orderer*." Conceptually, freight forwarders contracts vary in civil and common law systems. This divergence arises from

different concepts of representation accepted in these particular systems. Under this "*concept of representation*", freight forwarders also effectuate their activities. Henceforth, the exploration of the *representation doctrine* is a prerequisite for qualification of freight forwarder status.

Representation doctrine in civil and common law systems underline two separate subsystems: *European continental and Anglo-Saxon systems*. In the European legal system, the "*representation doctrine*" is established on *direct* and *indirect representation*. Indirect representation is expressed by taking actions for another party (*principal*) ***in his own behalf, but for the account of the principal***.[1] In contrast, *direct representation* involves activities **on behalf of and for the account of another party (*principal*)**.[2]

Anglo-Saxon legal system accepted the *doctrine of identification of "the ordered" and the agent* as a fundamental basis for the "*representation doctrine*.[3] The representation in common law system is grounded on the "*uniform concept*" of acting. Based on this concept, the doctrine of *undisclosed principal* is born in the common law system.[4] Essentially in this doctrine lies the fact that the presence of another person (*the principal*) in the transaction at the moment of stipulation is an unknown fact for the third party. The third party knows that he has entered in obligations with the agent personally. Nevertheless of the fact that the agent acts on his behalf (*civil law terminology*), this concept contains the legal basis for direct appeal from "*the orderer*" against third party, and *vice versa*. The last one could sue "*the orderer*" or agent in the transaction.

Legal basis for direct relation between *undisclosed principal* and the third party present **the authorization for creation "*privity of contract*" that "*the orderer*" gives to the agent.** This doctrine equates the *undisclosed with disclosed agency*, whereupon the first one steps out of the contract. In other words, *undisclosed principal* can sue and be sued by the third party.

[1]See: *PECL* (*Lando principles*), *Section 3/art. 3.301/Indirect Representation* (*Intermediaries not acting in the name of a Principal*). available from: http://www.tu-dresden.de/jfoeffl8/gesetzesmat/Lando-Principles.htm#to196, [accessed 17 September 2014].

[2]See: Ladno principles, *Section 2/Direct Representation/art.3.201*.

[3]This doctrine is usually expressed by the principle *qui facit per aterum facit per se*.

[4]See: Lando Principles, Section 2/art. 3.202., 3.201.

Antithesis of this is present in the *common law doctrine of disclosed principal*. According to this doctrine, the existence of the ordered in the transaction is a familiar fact for the third party at the moment the contract is made with the *disclosed agent* who acts on the account of the principal. The disclosed principal may be a *named* or *unnamed* person. *A named principal* exists in situations where the third party is familiar with the identity of the principal at the moment of contract being signed. Otherwise, the orderer has the status of *unnamed principle.* In cases of *disclosed agency,* the orderer has direct obligations from the contract concluded by the agent. So, the agent does not have any type of obligation concerning third party. From a legal aspect, he is not party of the contract any more.

Differences between *disclosed* and *undisclosed agency* is based on the *authority for creation of privity contract*, familiar to the concept of *undisclosed agency.* This concept in civil law countries is an unknown subject. If we compare *direct representation* and *disclose agency* we will find the same legal effects. However, comparing the *undirect representation* and undisclosed *agency* indicate different legal repercussions. Legal consequences from *undisclosed agency* differs from those created from the *indirect representation* in *civil law* system.[5] If the agent acts in his own name and the third party believes that sign a contract with the agent personally, according to *undisclosed agency* there is a legal basis for "*the orderer*" to realize his right from the third party and vice versa.

Differentia speciffica for a common law system is the doctrine of *undisclosed* and *disclosed agency*. Compared with direct and undirect representation, these systems have legal differences. According to the Anglo-American concept of representation, the name of the principal is irrelevant fact for the transaction; the accent is on the account of the person for whom the agent acts. The focus of the Anglo-American concept is on *the economic effect of the obligation*. In contradiction, the theory of separation as antithesis of authorization theory is implemented in the civil law system.[6]

In the field of these contracts, freight forwarders have their own place. *Conditio sine qui non* for exploration of the freight forwarder contract is the

[5] Busch D.: Indirect Representation in European contract law, Netherland, 2005, p. 26.

[6] See more about this issue: Schmitthoff C., Agency in International Trade, A Study in Comperative Law, 117 Rec. Cours 1970-I, 115, available from: http://trans-lex.org/128700, [accessed 15 Octomber 2014].

determination of his legal status vis-à-vis orderer and transporter as a third party in the obligation. The question of the freight forwarder status is correlated with his liability from the contract. Theoretically, there are three systems of freight forwarder status: German, French and Anglo-Saxon. Each of these systems involves freight forwarders according to their own concept. Namely, the German system treats the freight forwarder contract as a particular *sui generis* institute of business law. According to the French perspective, the freight forwarder contract is a type of commission business. Finally, freight forwarders fit in the general concept of agency according to common law system. In terms of *civil law* (the German concept from which the Macedonian system takes its law) the freight forwarder contract is nothing but the classical "order[7]" In the parts where the freight forwarder acts as transporter, he executes his obligations in a practical manner from the "*contract for work.*" The freight forwarder status changes in certain segments of his frame of work and in that position he cannot act in his own name (*customs and any other administrative procedure*).[8]

Studying the freight forwarder concept in the common law countries, also exploring German model of freight forwarder, we will elaborate the justification of Anglo-American concept of freight forwarder and advantages and disadvantages of the common law model of freight forwarders. In order to achieve this aim, we will examine some case study/judgments in common law system. Finally, through the common law status of the freight forwarder, we will define the freight forwarder's liability for his obligations towards the third party and the principal.

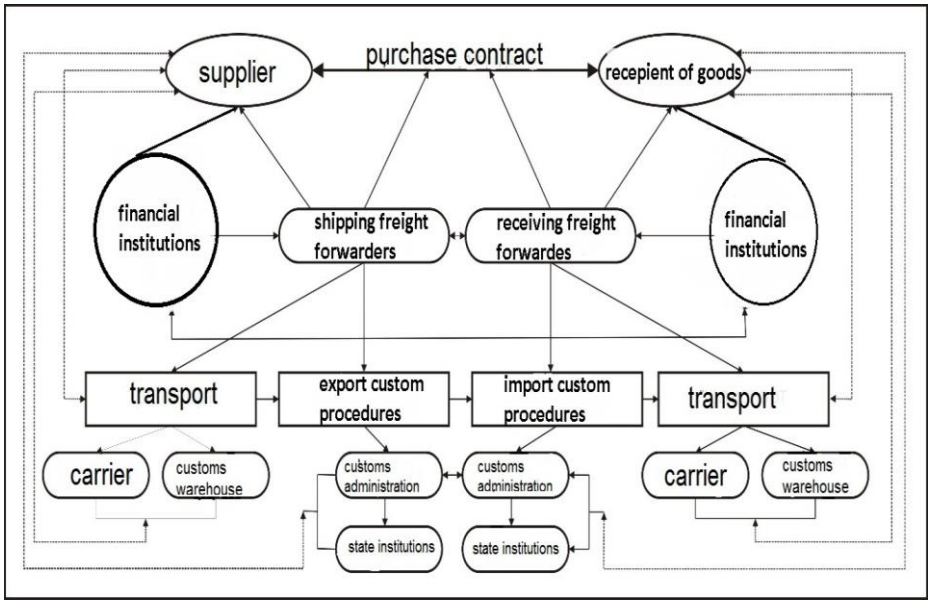
[7] LOO, article, 805.

[8]Schmitthoff C.: Agency in International Trade, A Study in Comperative Law, 117 Rec. Cours 1970-I, 115, available from: http://trans-lex.org/128700, [accessed 15 October 2014];

1. Civil law system of Freight forwarders

1.1. German system of freight forwarders

German legal system perceives the freight forwarder as a *sui generis* institute of business law. In the civil law system the concept of freight forwarders is define in German trade law (HGB),[9] according to which the freight forwarder is a natural or legal person that acts in his own name, and on the account of the orderer.[10] According to German legal system, freight forwarders are obliged to organize transport of the goods.[11] These obligations put the freight forwarder in the field of the classical freight forwarder. Illustratively:



[9](§407 Handelsgesetzbuch – HGB) 1897. These provisions are applicable to freight forwarders in land and sea transport.

[10] Spediteur ist, wer es gewerbsmässig übernimmt Güterversendungen durch Frachtführer oder durch Verfrachter von Seeschiffen für Rechnung eines anderes (des Versenders) in eigenerm Namen zu besorgen.

[11]See more about this matter in: Koller I., CMR und Speditionsrecht, Versr, 1988, p. 556-563.

The role of the Classical freight forwarder in international trade of goods

When the freight forwarder operates *on his own behalf and on the account of the principle* he represents the *undirect concept of representation* applies. This concept is a part of German legislation. According to this legislation, when the freight forwarder (*during the conclusion of the contract of transport of goods*) operates in his own name, he becomes a party of the contract (*principle of commission*). The freight forwarder cannot escape the liability towards the transporter, revealing the identity of the *orderer/principal*. Despite all this, the freight forwarder still remains an interested party in the contract of transport. The freight forwarder has an obligation to give an account to the principal for actions taken and legal effects from the transport of goods. This obligation is in correlation with his right for compensation for all costs done on the account of principal: transport costs, reimbursement and other payment anticipated in the contract of transport of goods. The HGB clarifies that the freight forwarder is not a transporter, even theough sometimes he may act as a transporter. When this situation is predicted in the contract, the freight forwarder act as transported. But, in this situation, he has a right of compensation as a transporter. He also has a right of payments on the basis of the freight forwarder services (HGB, §412/1/2).

According to the HGB, the freight forwarder acts as a transporter when he uses a fixed price for all the activities realized for transport of goods. Based on this fact, the rights and obligations of freight forwarder in contract of transport with fixed prices, are the package of rights and obligations of a transporter ("*Spedition zu festen Spesen*"/"*Sammelladung*) (HBG, §413). In German business practice, this situation is a familiar one for the consolidator of the goods (3PL and 4PL service providers) (*cargo consolidator/*„*spedition zu festen Spesen*"and „*Sammelladung*"). Referring to the liability issue (*настапува и одговора како превозник*), the same situation exists in the moment when freight forwarder organizes a collective shipment of goods.[12]

German jurisprudence fits the concept of freight forwarders in the broadest sense. According to German law, when HGB does not regulate certain aspects of freight forwarders, courts and business practice apply the provisions from the commission contract (*spedition, spediteur*). This point of view is also confirmed by art. 407/2 HGB.

[12]See *supra* in the text in part 4.3.4.

The German legal system has a significant impact on the Italian concept of freight forwarders. According to art. 1737 from ICC, the freight forwarder is an entity which *acts in his own name, on behalf of his client*. These provisions are part of the Belgian legal system too. According to Belgian law, liability of freight forwarders refers only to the intermediation of the transport process (*commissionnaire - expéditeur*). In contrast with this category of freight forwarders, the Belgian system foresees freight forwarders titled as *commissionaire de transporte*, which are charged with expanded liability for damage of the goods during the whole transport route (*providing point-to-point transport*). In these cases freight forwarder act as a principal.[13]

Relying on the type of services that freight forwarders offer in the business sector, there is a difference between freight forwarder as *commissionnaire – expéditeur* and freight forwarders as *commissionnaire de transport.* The first category, *commissionnaire – expéditeur,* always acts on the account of the principal. The second category, *commissionnaire de* transport, is a freight forwarder that a) carries out the transport of goods in his own name using his own transport vehicles, b) issue transport documents in his own name, and, c) when the instructions explicitly indicated that freight forwarder is liable as transporter. (BFFSTC, art. 3/1/2). According to the solution under point a), freight forwarders are liable for occurred damage, regardless who owns the vehicles. Very often, transport vehicles are leased by freight forwarder from the owner.

Italian freight forwarders work on the same basis. The Italian legal system distinguishes *spedizioniere* and *spedizioniere-vettore*. *Spedizioniere* are liable for damage that occurred solely when he contracted in his own name. In contrast, *spedizioniere-vettore* are qualified as freight forwarders who have liability as a carrier. [14]

As in many other legal systems, the Macedonian law on obligations distinguishes direct and undirect representation. This model has been accepted

[13]We use the term *principal* as the most widely used model in world legal literature. But we emphasize the fact that the freight forwarder is principal vis-à-vis the third party. Towards the third party, freight forwarder acts as an orderer of the transaction. In this specific situation, freight forwarder is not liable solely for the organization of the transport. The modified status of the freight forwarder has a direct impact on the extension of his liability as carrier.

[14]See: Ramberg J.: Freight forwarder Law, Vienna, 2007, p. 245.

from the European continental law. The Macedonian freight forwarder has a *sui generis* status of business subject. According to Macedonian law on obligations, freight forwarder might act in his own name and also on the name of a third party (LOO, art. 883/1/2- status of agent in common law system). When he acts in his own name, the freight forwarder is directly related to the third party. His claims towards the principal are protected with *jus retentions right* (*indirect representation*). In this situation, the contract parties are the freight forwarder and the transporter, so, bearing in mind the fact that the concept of *undisclosed agency* (possibility for avoiding the liability by disclosing the identity of the real party of the contract) is unfamiliar for the civil law system, the dilemmas arise concerning the issue: *how does the principal* enforce his right towards the third party, in situations when he is not a contract party? Even more debatable is the question: What is the legal basis/grounds for the freight forwarder to be a plaintiff in the procedure, when he is not damaged. Actually, he is not the owner of the goods (*neither seller nor buyer of the goods*). The answer to the question is found in the German legal science based on the doctrine of *Dogma vom Gläubigerinteresse.* According to this doctrine, the creditor may seek compensation from his debtor concerning the damaged goods. The principal does not emanate from the general rules referred on the scope and nature of the damage, (BGB, art. 249),[15] but from the § 251 (BGB) that clarify the creditor has right of compensation).

But, exceptions are familiar to German jurisprudence and in practice when referring to the principal. [16] These exceptions exist when the debtor is authorized to seek compensation on the name of third party. As a concept, this doctrine is known as "*third party compensation/Drittschadensersata"*. German jurisprudence treats this exceptions as "*shifting from the general concept of compensation*"/*zufällige Schadensverlagerung*. A typical example is undirect representation/*mittelbare Stellvertretung*. Under this rule, a freight forwarder who acts under the concept of *undirect representation* may ask for compensation for his principal. In this context (HGB, art. 392/2), anticipates that in legal relation/obligation between commission agent/freight forwarder,

[15]See: German Civil Code (BGB), available from: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000P407, [accessed 17 August 2014].

[16]See more about this in: Busch D., Indirect Representation in European Contract law: an evaluation of articles 3:301-304 of the Principles of European Contract Law concerning some contractual aspects of indirect representation against the background of Dutch, German and English law, Netherland, 2005, p. 88.

the client and the debtor (*Gläubiger*), the claimants of the commission agent towards the third party are claimants of the principal/client towards the third party. This is possible through the implementation of cession/*abtretung*,[17] but is not applicable in situations where the third party is not a creditor, but a debtor in the transaction/*schuldner* (art.392/2). In cases when the third party will repay the claims that have already been transferred to the client, art 407/1 from HGB is applicable. So, the new obligee must allow performance that the obligor renders to the previous obligee after the assignment, as well as any legal transaction undertaken after assignment between the obligor and the previous obligee in respect of the claim, to be asserted against him, unless the obligor is aware of the assignment upon performance or upon undertaking the legal transaction.

Taking this into account, the new creditor must admit the execution of the claimants as any other legal act taken after the cession between debtor and previous creditor. This principal generates from (BGB §407/2) and the solution: If, in a legal dispute pending in court between the obligor and the previous obligee after the assignment, a final and non-appealable judgment on the claim has been rendered, the new obligee must allow the judgment to be asserted against him, unless the obligor was aware of the assignment when legal proceedings began.

The situation becomes more complicated in case where the third party sues the commission agent. In this case the third party is not just a debtor, but also a creditor in the procedure. The third party is able to bring a claim towards the commission agent, only if they are in legal relation/obligation. More precisely, they should have a relation of debtor-creditor and vice versa. The claimant of the commission agent towards the third party serves as a claimant of the client towards the third party. This is also applicable before the legal act of cession (HGB, §392/2). According to this, the third party and the commission agent/freight forwarder is not inder any obligation. Hereafter, taking legal action for compensation from the freight forwarder is legally impossible. In this situation we discuss the concept of *related counterclaim* that is a result of the personal behavior of the commission agent/freight forwarder. Namely, the third party seeks compensation (at the same time he has authorization of that) because of the late delivery of the goods and the

[17](HGB, art.392/1), Claims arising out of transactions concluded by a commission merchant cannot be enforced by his principal against the debtor until they have been assigned to him.

impact of the price. Based on this, any other different interpretation means breach of basic principles of obligation law. The role of the third party as debtor will be cover by his role of a creditor.[18]

Based on the Macedonian Law on obligations, we think that the third party has an active legitimacy to bring a legal action (to sue) against the commission agent (freight forwarder) for the breach of contract of transport of goods. This kind of damage generates from the behavior of the freight forwarder and does not have any relation with the principal. This issue is disputable according to our legal system too. Namely, as the most disputable issue in this context is also the question about the transfer of rights and obligations from the contract of transport made between the freight forwarder and third party. After the conclusion of the shipping contract, the freight forwarder transmits the full package of economic and legal effects to his principal.[19] Referring to the transmission of economic effects, there is not any dilemma. The insurance contract in this context is the only legal basis for transmission of economic effects. All other issues are connected with the requirement for legal transmission (right for sue, right for compensation etc.). If the insured situation even occurs, the freight forwarder transmits the right from the policy to his orderer/principal by cession. Referring to this topic, our opinion is that in this case the discussion is not connected with cession foreseen in Macedonian Law on Obligation (LOO), even this viewpoint is widely accepted in legal theory. According to legal theory, the freight forwarder transmit the right of sue towards the transporter, insurance company, company for control of the quality of the goods ipso facto, based on the institute law cession.

But this is disputable for us because the legal cession is only foreseen in legal subrogation. Legal cession exists only in the case where the third party

[18]The theory is very familiar from the different standpoints of the applicability of §392/2 when a third party has a will to bring an action. Reichsgericht and Bundesgerichtshof are of the opinion that §392 is not applicable in this situation. In opposite of this, Schmidt proposes that §392 is fully applicable in this situation.

[19]Our opinion is that the freight forwarder contract is not realized at the moment of the dispatch of the goods, but in the moment when the buyer takes possession of the goods (*buyer or authorizes person from the buyer*). This is so because the seller has control on the whole shipment during the transport route.

executes his rights and obligations in his interest.[20] Theoretically we asked: how does the freight forwarder transmit the legal effects to his principal in a situation where other parties breach the contract. Illustratively: the transporter transfers the goods to the wrong destination, and conveys the goods to the person that is not evident in bill of lading. Based on this factual situation the principal has a right to sue. So, how does the freight forwarder transfer the right to sue, when he acts on his own behalf and he is the only person that in obligation with the transporter? Cession is not a proper institute because it is connected with transfer of economic requirements.[21] Hence, we cannot discuss cession based on legal transmission. Cession solely refers to the economic aspects of the requirements. Considering this issue, we realized that this is not a contract concluded in the interest of third party. In the conclusion of the last contract (contract in interest of third party), the approval from the third party is a necessary event.[22] In our case this is not applicable because the transporter does not depend on who will sue.

Finally, our opinion is that the freight forwarder is the only subject who is authorized to sue for failure or breach of the contract. But, the freight forwarder does not have any kind of interest to sue. So the party in the procedure is the seller or buyer as a person who has a legal interest in the case. This issue is in relation with the question of transfer of property rights or goods, the answer to which differs in each legal system.

According to Macedonian LOO, the moment of the transfer of property is equal with the moment of transfer of risk. But this is not case in French law or Swiss law on obligation. So many problems can be born concerning this question. As a most helpful tool in this context we emphasize

[20]Macedonian LOO is familiar with legal subrogation also in case of statutory amendments of the companies: Accession, merger and division of the companies.

[21](LOO, art.424/1) A creditor party may assign its claim to a third party by contract entered into with that third party, except for any claim of transfer that is not permitted by statute, or which is related to the creditor party's person or the nature of which is contrary to the assignment to another party.

[22](LOO, art. 132/1) Each party to a bilateral [two – sided] contract may, provided the other side agrees, assign the contract to a third person, thus making this person a bearer [holder] of all rights and obligations arising from the relevant contract.

United Nation Convention on Contracts for the International sales of goods, ratify almost in any national legal system. [23]

2. Freight forwarders in Common law system

2.1. Britain

British legal system, as is the whole Anglo-American system, is based on a several criteria for defining the freight forwarder status: *contract conditions, the language and communication used in the process of stipulation, payment methods*[24]*, the scope of awareness/informing of the clients concerning the freight forwarder status, business pracice, legalality of the freight forwarder with respect to the real performer of the services, and finally, the legal nature of the issued transport documents and their usage in the banking sector as a document of title with negotiable or non-negotiable character*. [25]

As in many other fields of business, the Anglo-American system emphasizes the practical aspects in the area of transport law. Referring to this issue, maximum attention has been paid on the legal nature of the transport documents. This is the most accepted method for defining freight forwarders status in the world practice as well.

Nonetheless in the theoretical analysis of the common law status of the freight forwarder, we cannot imagine the whole exploration without the practical aspect of this issue. Beginning with this subject of examination, the

[23]Ramberg J.: Law of carriage of goods – Attempts at Harmonization, 17 Scandinavian Stud. L. 211 (1973), available from: Heinonline Collection, [accessed 03 November 2014];

[24] According to the British the general terms and conditions of freight forwarders methods of payment are not foreseen as a criteria to define the liability of freight forwarder, but in practice, there are many court decisions based on this criteria for the status of freight forwarder.

[25]Part of the criteria that are used by the courts to define the status of the freight forwarder are directly oriented to the determining the intention of the parties during the stipulation of the contract. Using the practice as a proper instrument for defining the status of freight forwarder, it is obvious that these criteria are also used to solve more complicated questions such as does the freight forwarder stipulated as principal beyond the liability for the carrier, does he act as agent vis a vis the third party, authorized by the principal?

legal nature of the transport documents is imposed as a necessary field of research. This situation may become very complicated because of the divergent status that the freight forwarder has in the transport route nowadays.

When the freight forwarder issue a *Forwarding bill of lading,* (*FBL*) *combined bill of lading-Throught bill of lading)*, he has carrier's liability. But when he uses/issues a *Forwarder's bill of lading-House bill of lading* as acknowledgment of receipt of goods, he canot be charged concerning the damage of the goods. The *Bentex Fashions Inc. v. Cargonaut Canada Inc* (*1995*) F.T.R. 192,[26] judgement is based on this theorectical viewpoint. The Canadian Court passed a judgment that the freight forwarder that issued a *throught bill of lading* has liability as a carrier in the Bulgaria – Canada route. Court based its decision on many factors including the all-inclusive price for the shipping services. The plaintiff was not familiar with the fact that the freight forwarder engaged a subcontractor, so he sued the freight forwarder directly.[27] Despite this fact, the court also invoked the *throught bill of lading* issued by the freight forwarder. This document confirmed his position as a forwarder who has carrier's liability.[28] This reasoning is also used in the judgment of Australian Federal Court in the case *Comalco Aluminium Ltd v. Mogal Freight Services Ltd* (1993).[29] This case serves as an example of qualifying the consignment note as document of title. [30]

One of the most famous cases defining freight forwarder status through the particular transport document used, is the case *Rafaela S.*[31] In this case, the *House of Lords* ascertained that the issued *straight bill of lading* may be treated as a document of title.[32] This conclusion is based on the fact that the

[26]Tetley, „Canada Maritime Legislation and Decisions, 1996-1997" (1998) L.M.C.L.Q.

[27] Paley W., Lloyd J.H., Dunlap J.A.: A treatise on the law of principal and agent, New York, 1847, p. 63.

[28] Quigley I.: Freight Carrier's liability under CMR Convention 1956, Acta economica Pragensia, Vol. 2006, issue 4, 2006;

[29] Ohling H.: Export, Import, Spedition, Wiesbaden, 1979;

[30] Even though we discuss the British status of freight forwarders in this part of the paper, we elaborate this judgment as a part of common law system, just to compare the criteria for the freight forwarder status.

[31]See: *JI MacWilliam Co Inc –v- Mediterranean Shipping Company SA* [2005] *UK HL 11* („*The Rafaela S*") See: http://www.mondaq.com/article.asp?articleid=32541.

[32] See: Panesar S.: Is a Straight Bill of Lading a Document of Title, Netherland, 2004;

receiving of the goods was conditioned on presentation of the transport document. This judgment is an exception from the general concept of "*document of title*". The role of the "*document of title*" is to be perceived as a legal basis for transferring the property right. Specifically, is there any change to provide the „*straight bill of lading*"*as* a negotiable document of title? The fact that presentation of the bill of lading was foreseen as a *conditio sine qua non* with regards to the receipt of the goods cannot change the whole concept of "*straight bill of lading.*"[33] The clause implemented in the contract that the recipient of the goods must present the bill of lading, may be anticipated as a symbol of the authorization for taking the goods, but, it is not an obligation. This case established a separation of the "document of title" concept, and the applicability of Hague rules, from the basic rules concerning the transport document accepted in the general practice of business.

The judgment in *Troy v. The Eastern Company of Warehouses,* and *Midland Rubber Company v. Robert Park* & *Co.* serve as a confirmation of this exception. The court based its judgment on the issued transport document confirming that the freight forwarder should compensate for the damage. This happened even from the whole communication, the court did not see the intention of the freight forwarder to act as carrier or to take carrier's liability.

These cases convinced us that the liability of the freight forwarder depends on many factors that are not listed. One more argument in favor of the fact that business practice is based on the requirements in the businesses. The whole system of freight forwarders liability is based on the examination of numerous in concerted factors for defining the scope and type of liability. According to the British system, legal nature of the transport documents is the first and usually the most salient factor for defining liability of the freight forwarders. They do not pay too much attention on the question of the name and the account of forwarders who are acting.[34] Forwarders are charged with carrier's liability if they act according to an issued document that proves the status of carrier. It seem that this concept is well-matched with the world trend of logistic as a whole.

[33] Parsons T.: A Treatise on Maritime Law: Including the Law of Shipping, UK, 1859, p. 134.

[34] For the purposes of this article, fifty judgements were subject to examination. In all of them, British courts based its decisions on the legal nature of the transport documents.

2.2. United State of America

Considering the desires for the creation and implementation of unified transport policy, Americans in Interstate commerce act ICA (1887),[35] particularly the fourth part, regulated freight forwarders. The Americans law began from the following viewpoint: when a country creates uniform transport system, freight forwarders must be a part of it.

The regulation of the freight forwarders with the railroads, (part *1 from ICA*), (*part 2 ICA*) and *transporters by sea* (part *3 from ICA*) imposed liability as a carrier on freight forwarders (*ICA refers to public carriers - common carriers*).[36] However, the inclusion of the freight forwarder in ICA, does not mean that they have carrier's liability. Quite identical with this is the solution incorporated in art *49 U.S.C § 13102: US Code-Section 13102*).[37] Beyond the wishes of the American government to develop a uniform transport policy, freight forwarder, according to this act, are not equal with the rest of the subject.[38]

Many years ago, the US legal system has created the most sophisticated system of freight forwarders. That system is now the system used on a global level effected by the globalization and creation of trans-national companies.

The US defines the freight forwarders liability through the legal nature of transport documents. In *Block v. Merchant's Despatch Transportation Co*, boxes of goods were received by the defendant company, Merchant's Despatch Transportation Co in New York, on the basis of the transport contract for transfer of goods to the place of the plaintiff in Clarksville, Tennessee. The goods were damaged so the plaintiff asked for the compensation. A "*Through bill of lading*"was issued. In the procedure court

[35]*Interstate commerce act* (1887), is a result of the USA requirements to prevent monopolization in the area of the rail industry. See more about this on: http://www.ferc.gov/legal/maj-ord-reg/ica.pdf. [accessed 02.02.2013].

[36]See more about this issue in: Ahearn D.J., op. cit., p. 252.

[37]See: http://codes.lp.findlaw.com/uscode/49/IV/B/131/13102. [accessed 29 July 2014].

[38]In this context see *49 U.S.C § 13102*, 8(C), where it is officially emphasized that the freight forwarders are under the legal regime of the transporters from U.S.C.

assessed that the commission agent/freight forwarder is liable on the basis of many other persons. [39]

Judicial practice referring on the carrier's liability of the freight forwarder and generated from the expansion of American sea freight forwarders and non-vessel operating common carrier. This is very logical and functional transport policy. Before elaborating the scope of activities of American freight forwarders, it seems very useful to ascertain the position of the sea freight forwarders. Freight forwarders in sea transport are regulated by federal rules, as opposed to the legal regime for freight forwarder on land. Air transporters and freight forwarders are regulated with (49 U.S.C. § 13102).

Freight forwarders in domestic (inside transporters/*domestic freight forwarders*) transport are part of *Surface Transportation Board* according with *U.S. Department of Transportation*. According to these rules, freight forwarders often act as transporters and are part of this sector. This intention is generated from the general transport policy of the US. But the contemporary practice is familiar with numerous cases about the intermediary position of the freight forwarder as in the *Scholastic Inc. v. MIV Kitano,* (362 F. Supp. 2d 449 (S.D.N.Y. 2005)[40] where the American Federal Court determined the freight forwarder to be the agent. Defining the status of freight forwarder becomes problematical in the cases of NVOCC as the most sophisticated model of freight forwarder proper according to the world trends. In this context, we must emphasize the freight forwarders in US as the whole global economy nowadays operates under "*del credere clause for liaibility*". This is the only acceptable way of operating. Any other smaller form of freight forwarder will disappear due to the increased requirements of businesses for "*full package of services*" Small freight forwarders which doesn't take the responsibility for the acts of the transporter, will not be able achieve the necessities of the export-import sector. In this context, NVOCC's are the only proper form of doing business in logistic sector.

[40]See:http://scholar.google.nl/scholar_case?case=18334993900684474176&q=Scholastic+Inc.+v.+M/V+Kitano&hl=en&as_sdt=2002&as_vis=1. [accessed 01 August 2010].

2.2.1. NVOCCs

The involvement of the intermediaries in the transport sector imposed the requirement for the position of the freight forwarders acting as *non-vessel operating common carrier*.[41] Essentially, the status of freight forwarder move on the line of classical agency role, or principal to NVOOCs. So the freight forwarder may be *transportation by intermediaries: forwarding agent'* and *non-vessel operating common carrier (NVOCCs))*. [42] As a freght forwarder, NVOCCs is define in 46 U.S.C. § 1702 (17) (B),as a carrier who does not have a van or other transport instruments. The concept of NVOCCs recognizes the inclusion in providing door-to-door transport services. NVOCCs means engagement of freight forwarder beyond the property right on the vehicle, but with an obligation to be liable to the orderer about any type of damage on the goods that will occur. In American business practice, the functions of the NVOCCs and freight forwarder are interbred. The provisions from S*hipping Act from 1984 and Export Trade Company Act from 1982* expressed the tendency and potential for collaboration between freight forwarder and NVOCC. This practice generated from the requirement for *one-stop service* and door-to-door services based on the work of one person.

The expansion of the *NVOCCs* in American business practice is connected with the concept of multi-modal transport subjects. *NVOCCs* in the *civil law* system actually presents the multi-modal transport operators. In *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, (547 F.3d 351 (2d Cir. 2008)),[43] Rexroth Hydraudyne concluded a contract with Ocean World Lines (NVOCC) for transfer of 27 packages from Rotterdam to Englewood, Colorado through Houston. In the procedure Rexroth Hydraudyne argued that this case should be cover with Rexroth Hydraudyne. According to Rexroth Hydraudyne, even the damage occurred in the domestic part of the transport

[41]Cargo consolidator who does not own any vessel, but acts as a carrier legally by accepting required responsibilities of a carrier who issues his own bill of lading (or airway bill), which is called House bill of lading under sea shipment and House airway bill under air shipment. See: Glass D., Freight forwarding and Multi modal Transport Contracts, Taylor and Francis, 2013, p. 10.

[42]This institute is creation of the American business practice. This concept is regulated in U.S. code. On the Macedonia theory the concept is accepted from the American business practice.

[43]See:http://scholar.google.nl/scholar_case?case=3920203177909507904&q=Rexroth+Hydraudyne+B.V.+v.+Ocean+World+Lines,+Inc&hl=en&as_sdt=2002. [accessed 01 August 2010].

route, Rexroth Hydraudyne is not applicable on the sea freight forwarders according to Federal Maritime Commission regime. This is because of the status of the freight forwarder only as coordinator of transport route, not as a carrier.

The existence of double legislation for one subject of business created a complex situation in the defining the status of the freight forwarders. The American practice preform that freight forwarder shoud be liable for the carrier. In case *Amdahl Corporation v Profit Freight System Inc.*,[44] the consignor tried to prove that the freight forwarder is liable for the damage on the goods (lasers) that occurred during the transfer from California to Ireland. The freight forwarder had organized the transfer according to the instructions given by the consignor. The freight forwarder used a van and transferred the goods to the port. From the port, the goods were located in a warehouse managed by the NVOCC (Atlas Consolidated Container). The Atlas Condolidated Container was engaged by the freight forwarder to convey the good to Dublin. NVOCC (Atlas Consolidated Container) consolidated the goods in a container with other goods, leased boat space and loaded the goods and issued a bill of lading to the consignor. The goods were delivered to one of the assistants of the freight forwarder in Dublin. He took the goods and delivered them to the business warehouse of the Amdahl Corporation. During the process of unloading, Amdahl Corporation noted that the goods were damaged. So the question is: who is liable for the damaged in legal sense?

The court started from the fact the freight forwarder charged the consignor with the price determine from the NVOCC. In the instructions to Profit Freight System Inc the Amdahl was titled as NVOCC. So the court accepted the liability of the freight forwarder. This is opposite of the *Chicago, Milwaukee, St Paul Pacific RR Co v Acme Fast Freight*,[45] where freight forwarder acted as agent. Nowadays, freight forwarders that operate in the market, have a status of multi-modal transport operator, or NVOCCs. This concept entails liability for the whole transport route. So, the question of representation and the dilemmas for cession are of no practical usefullness. As

[44]65 F. 3d 144, 1995 A.M.C. 2694, 95 Cal. Daily Op. Serv. 7106, 95 Daily Journal D.A.R. 12,142, available from: http://cases.justia.com/us-court-of-appeals/F3/65/144/528971/, [accessed 12 January 2013].

[45]336 US 465 Chicago Milwaukee St Paul Pac Co v. Acme Fast Freight, *No, 65. 1948 (judgment 1949)*, available from: http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?friend=nytimes&navby=case&court=us&vol=336&invol=465, [accessed 11 Octomber 2014].

we mentioned above, Anglo-Saxon system of freight forwarder contribute to avoiding the complex question of liability.

FINAL CONCLUSIONS

Effected by the process of globalization and concentration of capital, the trend of expansion of transnational companies in the global world, the status of forwarders has been changed greatly. Today, not just in economic sense, but also in legal aspect, the new status of the freight forwarders has changed. In modern business, the freight forwarder acts as a provider of services who is liable for the goods through the whole transport route. So, on an international level the question of *direct and undirect representation*, *disclosed and undisclosed* is not that attractive. In modern transport and logistic, the question of on behalf on who is acting and the account of the freight forwarder is not that important as it is on national level. This happened because of the integration of the freight forwarder services and their new status in Europe as non-vessel operating common carriers or multimodal transport operators. European countries accepted this category of freight forwarders from USA. Regardless of this global trend, European theory remains as the law the disputes concerning the justification of the Anglo-Saxon model of freight forwarders. This dilemma is especially focused on the issue of the behalf and the account on which freight forwarder acts.

These theoretical dilemmas are not a subject of interest in the *common law* system. Even the existence of numerous critics from the German jurisprudence concerning the Anglo-American model of freight forwarder, our opinion is that the Anglo-American system has more clarified relations. According to common law, the third party may sue both the freight forwarder and the principal, so the first one, may avoid his liability by disclosing the identity of the principal. According to civil law system, freight forwarder is always a party of the contract, so he can realize his right only by distancing himself from his principal. As we saw in the main text, this complicated the process of transmission, and the issue about active and passive legitimation in front of the courts, is not a dilemma in common law system.

As we saw through the practice and theoretical analysis, our opinion is that Anglo-American system of freight forwarder is fully compatible with the modern concept of freight forwarders. Today, there is no distinction between carrier, freight forwarder, warehouse keeper etc. The basis of this factual

situation lies in the economy. So it is necessary for the legal system to make changes. These changes are implemented in each general term of work typical for the freight forwarders and multimodal transport operators. This trend is answer of the businesses necessitates for "*full packages of services*." This package of services cannot be offered from the classical freight forwarders. So, maybe the law will remain unchanged. But the businesses are asking for the non-vessel operating common carriers and multimodal transport operators. These types of freight forwarders will be the only types that will survive in the global industry of "*Gigants Corporation*". All this changes have to be taking into account from the freight forwarders. So, if they want to exist and work in the area of transport logistic, they must transform their status into a NVOCC's or multimodal transport operators.

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