

Unification of the Law of International Freight Forwarding

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Freight forwarders hold an important position in international trade. Traditionally they were mainly engaged in assisting merchants in connection with preparing and booking the cargo for subsequent carriage. In doing so, they would perform a number of services ancillary to the carriage and also contract for carriage as an agent of the merchant. In some cases, freight forwarders would at the same time act as agents for carriers, particularly liner shipping companies for the carriage of goods by sea. The freight forwarding services would also normally include the clearance of the goods for export in the country of shipment and for import into the country of destination. Also, freight forwarders would have co-operating partners in other countries to whom instructions could be given for the receipt of the cargo at destination and for customs clearance. In some cases, the larger freight forwarding firms would have their own subsidiaries in important trading centres.

The services of the larger freight forwarding firms would also comprise the procurement of various contracts needed for the transportation of the goods from start to finish. The freight forwarder would then assemble parcel cargo from different shippers to different receivers and use the transport capacity which he would have negotiated with the various carriers. This important function is usually referred to as cargo consolidation. Particularly when the freight forwarder acts as a cargo consolidator, difficulties arise in deciding whether he should nevertheless be considered as an agent or rather as a principal in the transaction resulting in a liability for the freight forwarder as carrier. The German HGB § 413 stipulates that the freight forwarder would be responsible as carrier if he offered a fixed price for the carriage or acted as cargo consolidator ("*Spedition zu festen Spesen*" and "*Sammelladung*"), while according to the French *Code de Commerce* Art. 94, the freight forwarder acting as aforesaid would qualify as a so-called "*commissionnaire de transport*." For such a qualification under French law it would suffice that the freight forwarder had undertaken to procure or perform the whole transport from point to point ("*de bout en bout*"). If, on the other hand, the freight

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forwarder had limited his functions to services ancillary to the carriage he would be regarded as a "*transitaire*".¹

With the advent of containerisation, the freight forwarders' cargo consolidation service expanded to include maritime and air carriage as well. The container offered itself as a natural facility for such cargo consolidation. A container packed with parcel cargo from different shippers and intended for different consignees would be referred to as a "less than full container load" (LCL), thus distinguishing it from a container loaded with homogeneous cargo from one shipper to one consignee ("full container load," FCL). Although some liner conferences would impose restrictions preventing the freight forwarder from agreeing with the shipping line on the payment of a lump sum for the container (so-called "flat rate"), such rates would nevertheless to a considerable extent be negotiated by the freight forwarder, enabling him to introduce his own tariff applicable to each individual contract with the shippers. This would then also be reflected in the documents used and explain the particular document for such traffic, namely the 1992 FIATA Multimodal Transport Bill of Lading (FBL, the first version of which was launched as early as 1971).² Where the freight forwarder does not wish to accept liability as the carrier, other documents will be used such as the Forwarder's Certificate of Receipt (FCR) or the Forwarder's Certificate of Transport (FCT).³ In the law of the United States, the regulatory aspects of the service are particularly important and for such purpose freight forwarders have in some cases been regarded as "indirect carriers". With respect to maritime carriage they are in such cases recognised as non-vessel operating common carriers (NVOCs).

Although, in a broad sense, the activity of freight forwarders would fall under the classical Roman contract type of *mandatum*, a distinction would in particular have to be made between his function to act as:

- a mere *agent* on behalf of the customer or the performing carrier,
- the *contracting* carrier assuming carrier liability without performing the carriage himself and
- the *performing* carrier.

In the traditional law of freight forwarding the service has been regarded as agency, which is reflected in the fact that originally reference was made to "freight forwarding agent" rather than "freight forwarder." Thus in the English case of *Jones v. European General Express*⁴ ROWLATT J. described the freight forwarders as persons:

"willing to forward goods for you ... to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by

¹ See for an account of the criteria used for this distinction L. PEYREFITTE, "Le commissionnaire de transport et les autres auxiliaires de transport en droit français", *European Transport Law* 1978, pp. 3-23.

² See J. RAMBERG, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading*, Zürich 1992, published by FIATA.

³ See for a further explanation of these documents J. RAMBERG, *International Commercial Transactions*, Stockholm 1998, p. 170 *et seq.*

⁴ (1920) 4 *Lloyds Law Reports*, 127.

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their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract."

Although at the time of Professor HILL's⁵ impressive study in the early 1970s the freight forwarders' cargo consolidation in containers was only in its infancy, he addressed the difficult matter of the freight forwarder's transition from agent to principal. In his capacity as principal, the freight forwarder would have no possibility to refer his customer to someone else in the event of the cargo being lost or damaged. Instead, he would be subject to carrier liability. In the German HGB § 407, the freight forwarder ("*Spediteur*") is defined in the same manner as a "commission agent" ("*Spediteur ist, wer es gewerbsmäßig übernimmt, Güterversendungen durch Frachtführer oder durch Verfrachter von Seeschiffen für Rechnung eines anderen (des Versenders) in eigenem Namen zu besorgen*"). The same definition appears in the French Code de Commerce Art. 94 ("*Le commissionnaire est celui qui agit en son propre nom ou sous un nom social pour le compte d'un commettant*"). Nevertheless, under German law it would be possible for the freight forwarder in his capacity as a "commission agent" to avoid carrier liability by assigning to his customer his rights under the contract which he has concluded in his own name (the so-called "*Abtretungserklärung*"). This, however, is not possible where the freight forwarder would have qualified as a carrier subject to mandatory carrier liability ("*Frachtführer*"). However, in Anglo-American law the so-called "intermediate stage" between agent and principal known as "commission agent", where the freight forwarder contracts in his own name but on account of his principal, is looked upon differently and would be treated under the concept of "undisclosed principal." Freight forwarders have traditionally avoided carrier liability by declaring that they do not act as common carriers but merely as agents.⁶

As has been seen, the development from the freight forwarder's traditional role as agent towards his voluntary or compulsory role as operator with carrier liability rather adds to than diminishes the difficulties encountered in applying the law of international freight forwarding. I have stated in the foreword to my presentation of "The Law of Freight Forwarding"⁷ that this difficulty to distinguish between the freight forwarder as agent and the freight forwarder as carrier makes it tempting to regard him as a "legal Pimpernel Smith" when – at times – he attempts to avoid the status of carrier, requiring his customer to seek the carrier elsewhere:

They seek him here
They seek him there
Those Frenchies seek him everywhere
Is he in heaven

⁵ D.J. HILL, *Freight forwarders*, London 1972.

⁶ See e.g. J. RAMBERG, *op. cit.* n. 3 referring to the document FCT on p.170 *et seq.* and *ibid.* *Spedition och fraktavtal*, Stockholm 1983 p. 9 and p. 63 *et seq.* referring to § 18 of the 1959 version of the Nordic General Conditions and the introduction in the 1974 version of the General Conditions § 2 of carrier liability based on the freight forwarder quoting his own price for the carriage and with the specific regulation of that liability in §§ 15-22.

⁷ *Op. cit.* n. 2.

Is he in hell
That damned illusive Pimpernel?

Difficulties also arise in connection with documentary credit transactions. Before 1983, the ICC Rules on Documentary Credits (Uniform Customs and Practice, UCP) contained an express stipulation whereby the banks were told to reject bills of lading issued by forwarding agents. The very word "agent" provides an adequate explanation of that practice. However, in UCP 1983, Art. 25 made specific reference to FBL in order to ensure that that document's nature as a carrier document was adequately observed by commercial banks, the more so as it represented a change compared with the earlier version of UCP. In the 1993 version (JCP 500) it is stipulated that banks will only accept documents issued by freight forwarders which show that the freight forwarder has undertaken the carriage in his capacity as carrier or multimodal transport operator (Art. 30). The 1992 FIATA Multimodal Transport Bill of Lading, which is extensively used all over the world, would undoubtedly demonstrate that the freight forwarder had acted in the capacity of contracting carrier with carrier liability under the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publ. 481).

ATTEMPTS AT INTERNATIONAL UNIFICATION

In 1967 UNIDROIT presented a draft international Convention⁸ in an attempt to bridge the different conceptual approaches evidenced particularly in German and French law. In this draft, the freight forwarder's liability as carrier was suggested if he had agreed to accept the carriage at a "flat rate" (Art. 23) and where he had received the goods for a specified transport in his cargo consolidation traffic (Art. 24). In addition, the freight forwarder's liability as carrier resulted from the issuance of an "international forwarding note" (French: "*titre de commission de transport international*," Art. 25). The freight forwarder's liability as carrier followed the principles of French law with a kind of *del credere* - liability for the freight forwarder's subcontractors (*i.e.* the performing carriers) which would thus determine the extent of the freight forwarder's liability vis-à-vis his customer (*système caméléon*) and represent a so-called "network liability." Accordingly, provided loss or damage could be attributed to a particular segment of the carriage, the freight forwarder would enjoy a back-to-back position, enabling him to institute recourse actions against his subcontractors on the same terms as those applied in his relation to his own customer. However, in cases where the loss or damage could be attributed to the freight forwarder himself, he would have to assume liability more or less on the basis of a presumed fault or neglect (Art. 15). The liability formula referred to "non-performance or imperfect performance of the obligations ... unless he proves ... circumstances excluding any wrongful act or default on his part or on the part of persons for whom he is liable under Art. 12." The latter Article declared that the freight forwarder was liable for "agents, servants and representatives when they are acting within the scope of their employment." In assessing the liability of the freight forwarder reference was made to a "diligent forwarding agent" (*cf.* the German notion of "*der*

⁸ Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods; *cf. l'Unification du droit / Unification of Law* 1967, Year-Book 1966, pp. 413 *et seq.*

Sorgfalt eines ordentlichen Kaufmanns," HGB § 408). Furthermore, the freight forwarder in his capacity as agent could avoid liability if he had exercised due diligence in the choice of servants and subcontractors and in the rendering of appropriate instructions (*i.e.* a liability for *culpa in eligendo vel custodiendo*, Art. 13.1).

The UNIDROIT Draft Convention was never submitted to a diplomatic Conference, mainly because of the resistance put up by the freight forwarders' world organisation, FIATA.⁹ The German freight forwarders in particular opposed the proposed liability of the freight forwarder in cases where he had quoted a "flat rate." Moreover, carrier liability in cargo consolidation traffic, and as the result of the issuance of an international consignment note, would entail practical difficulties when the contract included only part of the total carriage. Also, efforts to develop a specific international convention dealing with combined transport, as it was then called, were pending and the freight forwarders had launched their first version of the FIATA Combined Transport Bill of Lading (FBL) back in 1971. It was generally felt at this time that it would be prudent to await further developments within the law of multimodal transport before embarking upon such a difficult task as that of regulating the freight forwarder's liability, the more so as a considerable expansion of freight forwarder services in this type of carriage was expected. The particular problem of basing carrier liability on the freight forwarder's quotation of a flat rate required that a distinction be made between cases where the rate was merely intended as information to the customer and cases where it represented the freight forwarder's own price with no duty on the freight forwarder to disclose how that price had been arrived at.

REGULATION OF THE FREIGHT FORWARDER'S RELATION TO HIS CUSTOMER BY GENERAL CONDITIONS

As has been seen, the freight forwarder – except when subject to mandatory carrier liability – would enjoy freedom of contract. This freedom is invariably used in the various countries either in individual standard trading conditions or, more commonly, in the standard conditions sponsored by the domestic freight forwarders' association. In some countries, such as the Nordic countries, it has long been the tradition to negotiate with organisations representing the customers with a view to drawing up so-called "agreed" standard conditions.¹⁰ Realising the need to avoid a proliferation of liability schemes, FIATA mandated a Working Group in 1994 to develop Model Rules for use not only in countries where no standard conditions as yet exist but also in countries willing to subject themselves to a uniform international regime. In view of the considerable variations with respect to liability, the distinction between the freight forwarder as agent and the freight forwarder as principal, as well as the different stipulations with respect to the basis of and the exceptions to liability, notice of claims, time-bar as well as limitation of liability, I encountered considerable difficulties in my capacity as chairman of the Working Group in reaching a consensus. In particular, it was

⁹ FIATA - Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Forwarding Agents Association).

¹⁰ See for the development of the Nordic Conditions from 1919 up to 1994, J. RAMBERG, NSAB 75 år – *Nordiskt Speditörförbunds Allmänna Bestämmelser*, Stockholm 1994.

impossible to reach agreement on the precise criteria distinguishing the freight forwarder's function as an intermediary from his function as an operator with carrier liability. As the notion of "commission agent" was not used in Common law systems, the Working Group chose simply to focus on the distinction between the freight forwarder as "agent" and the freight forwarder as "principal." Needless to say, in the case of a freight forwarder who expressly agreed to act as principal, thus subjecting him to carrier liability, as evidenced by the issuance of FBL or otherwise, the task was easy. The main problem, then, was to decide what to do in the absence of such express contractual intent. In the end, the Working Group had to give in and confine itself to stating that the freight forwarder should be regarded as a principal in the transaction not only when he had expressly agreed to it, but also when there was only an implied agreement following from the freight forwarder's statements or conduct. In my view, the freight forwarder's quotation of a fixed price without the duty to account to his customer for the composition of that price constitutes such a statement or conduct tantamount to an implied agreement by the freight forwarder to be regarded as principal in the transaction.

Acting on the suggestions put forward by the Working Group, FIATA, at its World Congress in Caracas 1996, adopted the FIATA Model Rules for Freight Forwarding Services.¹¹ The Model Rules follow the *del credere* - liability system of French law mentioned earlier, to the effect that the freight forwarder as principal for carriage and other services is liable according to the same rules which would apply if the customer had entered into a separate contract for such service or carriage. Consequently, the mandatory or other rules and conditions relating to the service or carriage would apply (Art. 7.3). If the freight forwarder performed the service or carriage using his own facilities or means of transport he would, of course, be free to subject the contract to his own specific conditions insofar as these did not depart from any compulsorily applicable regime. With respect to freight forwarding services which do not engage the freight forwarder's liability as carrier, his liability is based on a duty to exercise due diligence and to take reasonable measures in performing the services (Art. 6.1.1). The monetary limit has been set at 2 SDRs per kilo with respect to loss of or damage to the goods (Art. 8.3.1), but for other losses the liability for each incident has been left open for the respective national freight forwarding associations to decide (in the recently adopted Nordic Conditions, "NSAB 2000," the monetary limit of 50,000 SDRs for each contract applicable under the earlier conditions, "NSAB 85," has been retained). There are special exemptions from liability for valuables as well as for delay and consequential loss other than "direct loss" (Art. 8.1). The time-bar for actions against the freight forwarder is nine months from delivery of the goods (Art. 10; *cf.* the same rule in FBL clause 17 and Art. 11 of the UNCTAD/ICC Rules). If the liability relates to something other than loss of or damage to the goods – such as liability for errors or omissions – notice of the claim must be given within fourteen days from the day on which the customer became or should have become aware of any event or occurrence giving rise to

¹¹ See for a brief account of the Model Rules J. RAMBERG, *The FIATA Model Rules for Freight Forwarding Services*, *Il Diritto Marittimo*, 1997, p. 284 *et seq.*

the claim. Failing such notice the claim is barred, unless it can be shown that it was impossible to comply with this time limit (Art. 9.2).

The Model Rules also secure the freight forwarder's right to exercise a general lien on the goods in his possession in order to satisfy his claims not only with respect to such goods but also in respect of claims having arisen from earlier contracts with the customer (Art. 15). There are moreover stipulations to the effect that the customer has to hold the freight forwarder harmless for unexpected costs arising in the performance of the services which would include the customer's liability to reimburse the freight forwarder for general average contributions to the shipowner (Art. 17). The customer is not only responsible for loss incurred by the freight forwarder as a result of the carriage of dangerous goods but also where goods which are not classified as "dangerous" cause damage owing to characteristics of the goods unknown to the freight forwarder (Art. 18).

It remains to be seen to what extent the Model Rules will be voluntarily adopted by freight forwarders world-wide. In any event, the ability of international commerce to strike the right balance between the interests involved through self-regulation should not be underestimated. The 1991 UNCTAD/ICC Rules for Multimodal Transport Documents are a case in point. These rules were the fruit of co-operation between a governmental and a non-governmental organisation and were promptly adopted first by FIATA in its 1992 Multimodal Transport Bill of Lading and, a little later, by BIMCO in "MULTIDOC 95" and "MULTIWAYBILL 95."

WHAT NEXT?

As we have seen, the mandatory regulation proposed by UNIDROIT in the 1960s met with considerable opposition at the time. The 1980 United Nations Convention on International Multimodal Transport of Goods would, if it ever enters into force, to a large extent provide for mandatory regulation in an area where it may be deemed particularly appropriate. Nevertheless, in my view, a complete overhaul of the law regulating the carriage of goods is needed to break the present unfortunate deadlock and in order to harmonise the law of carriage of goods generally.¹² No commercial or public interest can be served by the maritime law "battle" between the Hague and Hamburg systems¹³ and by the continued proliferation of different liability schemes in the various jurisdictions. Admittedly, however, harmonisation of the law does seem utopian. When the subject was discussed at the Håsselby Seminar in the summer of 1997, I nevertheless ventured to suggest an overriding common carrier regime.¹⁴ Aware that mandatory

¹² See for an early suggestion to this effect J. RAMBERG, "The Law of Carriage of Goods, Attempts at Harmonization", *Scandinavian Studies in Law* 1973, pp. 211-252 (also in *European Transport Law* 1974 pp. 1-44).

¹³ The 1924 Brussels Bill of Lading Convention with the 1968 Protocol and the 1978 UN Convention on the Carriage of Goods by Sea. See *The Hamburg Rules: A choice for the E.E.C.?*, Antwerp 1994 and A. VON ZIEGLER, "The Comité Maritime International (CMI): The voyage from 1897 into the Next Millennium", *Uniform Law Review* 1997, p. 728, at p. 748 *et seq.*

¹⁴ "The Feasibility of an Overriding Common Carrier Regime", to be published in the series of publications of the Gothenburg Maritime Law Association recording, as customary, the proceedings of the Håsselby Seminars.

regulation would be rejected out of hand by strong and influential business interests, I instead proposed quite another approach in the belief that competition would induce operators voluntarily to accept non-mandatory regulation at a world-wide level provided it was good enough.¹⁵ Indeed, as regards modern logistic transportation services it would be quite out of character for an operator to reject a cost-effective system which efficiently protected customers against the risk of delay, loss of and damage to goods from point of origin to point of destination. The usual argument that cargo insurance is good enough is unconvincing. First, such insurance does not cover the risk of delay. Second, it invites recourse actions against carriers caught by mandatory liability and results in a peculiar and costly re-shuffling of the costs of incurred losses which benefits no-one except the inhabitants of the "paradise" created by the incoherent and complicated mass of liability, limitation and prescription rules at the domestic and international level. In my view, an overriding common carrier regime could solve this problem by providing a system which in every respect offers better protection to the customer than do any of the underlying unimodal transport conventions.¹⁶ What is important is that the Convention should be non—mandatory, so that it would stand or fall on its own merits. Those who prefer to continue to limit their liability according to existing conventions should be entitled to do so. But those who wish to use the overriding regime should have every opportunity to do so in order to bring their liability into line with their modern and cost-effective services, usually marketed under the name of "transport logistics." Such a Model Law might help to attenuate the present rather chaotic situation regarding the law of carriage of goods and freight forwarding. To this end, it should stipulate that the rules become applicable whenever a party fails to declare that it only accepts to be subject to a particular unimodal or multimodal carrier regime or, alternatively, to a particular law or standard contract regulating its position as freight forwarder when required to procure international carriage.¹⁷

Needless to say, an overriding regime of such nature could not – or in any event should not – cover everything. Recourse actions within the family of carriers would still be possible but, hopefully, limited with a view to ensuring cost-effectiveness. Likewise, some matters peculiar to the operator in question – such as freight and remuneration, currency adjustments, default interest, general liens, jurisdiction, applicable law – would have to be addressed in general conditions of trade as per current practice. Hopefully, the FIATA Model Rules for Freight Forwarding Services may provide some useful examples of such additional matters which should be dealt with to the extent that

¹⁵ See generally on the shortcomings of mandatory regimes both from a juridical-technical angle and from a commercial viewpoint J. RAMBERG, "Freedom of contract in maritime law", [1993] *Lloyd's Maritime and Commercial Law Quarterly*, pp. 178-191.

¹⁶ Unfortunately, however, CMR Art. 41 prohibits any deviation from the liability rules of CMR even when this would provide better protection for the customer. In my view, this cannot be regarded as anything but a blatant infringement of the main principles of EU competition law according to Arts. 85 and 86 of the Rome Treaty.

¹⁷ Also in this respect it may be difficult to avoid the "scope of application provisions" of mandatory international conventions and national law, but this does not matter as it is suggested that the overriding common carrier regime should be rendered more beneficial to the customer in every respect than any of the unimodal transport conventions (but compare *supra* n. 15 with respect to Art. 41 of CMR).

they are not covered by an overriding common carrier regime. It may well be that self-regulation allied to an international instrument of the kind described can solve the present dilemma of the law of carriage of goods and freight forwarding. In my view, it would be appropriate at least to give it a try before embarking, if need be, on the complete international regulation of the law of freight forwarding.



L'UNIFICATION DU DROIT DE LA COMMISSION DE TRANSPORT INTERNATIONAL (Résumé)

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Selon les services qu'il fournit, les droits nationaux attachent au commissionnaire de transport une qualification juridique différente, qui détermine l'étendue de sa responsabilité. Les droits français et allemand, et aussi anglais et américain notamment, diffèrent quant aux critères pertinents, et aussi quant à la possibilité laissée au commissionnaire d'opter pour un régime ou un autre de responsabilité. Son rôle de plus en plus important dans l'organisation et la réalisation du transport justifierait de le traiter comme transporteur, alors qu'il arrive fréquemment qu'il se soustraie à cette qualification. Du moins le connaissance multimodal de la FIATA de 1992 devrait-il apporter quelque certitude à cet égard.

Une tentative d'harmonisation internationale fut entreprise au sein d'Unidroit aboutissant à l'adoption en 1967 d'un projet de Convention; en raison de l'hostilité des associations professionnelles de commissionnaires (notamment à l'égard de l'application du régime de responsabilité lorsque le commissionnaire a usé de prix forfaitaire), et aussi compte tenu des travaux alors en cours de préparation de règles uniformes pour le transport multimodal qui ne manqueraient pas d'influer sur le statut du commissionnaire, le projet ne fut jamais soumis à une conférence diplomatique.

La Fédération Internationale des Associations de Transitaires et Assimilés (FIATA) décidait en 1994 d'élaborer un instrument destiné à harmoniser les conditions générales pratiquées par les professionnels, de façon individuelle ou concertée au sein des associations nationales: en 1996 étaient adoptées au sein de la FIATA les Règles modèles pour les services de commission de transport, visant ainsi avec un instrument non obligatoire une harmonisation dont seul l'avenir pourra dire si elle est réussie.

Considérant le nombre des instruments conventionnels qui réglementent les divers modes de transport et la diversité des régimes de responsabilité qu'ils imposent, l'auteur préconise l'élaboration d'un régime général qui écarterait l'application des régimes particuliers, et dont la mise en oeuvre relèverait strictement de la volonté des parties, seule condition possible pour garantir le soutien des milieux professionnels. Ceux-ci, du reste, ne pourraient que trouver avantage à un système rationalisant les coûts et protégeant les clients contre le retard, le dommage ou la perte de la marchandise du lieu de départ à celui d'arrivée. Il va de soi qu'un tel instrument ne pourrait avoir la prétention de se substituer à l'ensemble de la réglementation existante, mais pourrait – combinée avec les règles modèles de la profession – résoudre les difficultés que l'on connaît aujourd'hui dans le droit du transport de marchandises et de la commission de transport.

