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## Freight Forwarder Law

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### The freight forwarder as service provider

At least one common denominator of the freight forwarder is universally recognized. He could be described as a *service provider*. The difficulty starts when the need arises to distinguish between different types of services. One such service would be assisting the customer with export and import of the goods.<sup>1</sup> The freight forwarder would offer his services to fulfil whatever obligations are imposed on the exporter to declare and clear the goods for export as he could assist the importer in clearance of goods for import and paying duty and other official charges. In some countries, the latter function might require a license to act as a *customs broker*. Traditionally, clearing the goods for import might require taking the goods in charge from the transportation vehicle for transport through Customs or into Customs warehouses. As a result, the freight forwarder would also be engaged in physical handling of the goods.

Additional services might involve loading the goods on transportation vehicles or discharging them from arriving transportation vehicles. If the goods are intended to be carried further inland, then the freight forwarder might undertake to arrange for their reloading on the on-carrying vehicle. Or, where goods are to be stored pending delivery to the consignee, then the freight forwarder might arrange for storage or store the goods in his own storage facility. The services now described are performed domestically and the liability of the freight forwarder for such services will usually fall within the category of obligations to exercise due diligence or best efforts, with liability for failure to do so. In French law, most of the services would be performed by *transitaires* (cf. *commissionnaires expéditeurs* in Belgium) as distinguished from the functions of a *commissionnaire de transport*.

In recent years, services offered by freight forwarders have been considerably extended. Freight forwarders prefer the title of *logistics service providers*, owing to the expansion of their services to perform complete distribution according to the principles of logistics. As the term “logistics” is used in order to describe any rational system for management and distribution of goods, the outsourcing of such functions to freight forwarders would appear under the name of third party logistics (**3PL**).

### Agency and disclaimer of status as carrier<sup>2</sup>

Traditionally, freight forwarders offer their services in connection with international transport by contracting with carriers as agents for the customer. They could also be retained by carriers in soliciting

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<sup>1</sup> This is still in many areas the dominant function of freight forwarders. See, e.g. M.V. Ofobrukwera, *Shipping & Forwarding Practice – Imports*, Lagos 2001, *passim*.

<sup>2</sup> The traditional reluctance of freight forwarders to accept liability as carriers is well explained by J.G. Helm, *Speditonsrecht*, Berlin & New York 1973 p. 77: “Die Anwendung des Frachtrechts auf die Spedition zu festen Kosten erweist sich angesichts seiner starken Zersplitterung als nicht sehr praktikabel“.

cargo for their benefit and as their agents. In ports served by liner shipping companies, freight forwarders are often appointed as liner agents. Consequently, they would have a dual function representing both parties in the contractual relationship that they have arranged as agents.

The activity of freight forwarders in connection with rail and road transport is different. Here, freight forwarders would usually have their own arrangements with the railways, reserving space on railway wagons to be used for consolidating individual shipments from a number of shippers destined for a number of consignees. In these cases, the freight forwarder would offer the customers carriage of the goods according to his own tariffs and issue his own document to each of the customers, with himself retaining the consignment note for the whole wagon. International carriage of goods by road would usually be performed either by the freight forwarder with his own vehicles, alternatively arranging longer periods with owners of such vehicles, reserving the needed capacity for the freight forwarder. In these cases, the freight forwarder would not qualify as an agent as he has his own interest in the freight charged by him. As an agent, he would have had to give an account for the freight actually paid to railways or road hauliers and agree with the customer on an appropriate commission. Nevertheless, as we shall see, freight forwarders, at least traditionally, prefer to disclaim status as carrier in these cases.

### **Regulations of freight forwarder activities in statutory law**

German law has considerably influenced law and practice in the Scandinavian countries and to some extent also in Italy. As was expressed in the German *Handelsgesetzbuch*<sup>3</sup> prior to the 1998 amendments:

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.

This principle is reflected as the main principle in the 1998 amendments<sup>4</sup>, where the freight forwarding contract<sup>5</sup> implies that the freight forwarder is obliged to arrange for dispatch of the goods.<sup>6</sup> A similar definition as in earlier German law appears in the Italian *Codice Civile*<sup>7</sup> describing the Italian *spedizionere*.<sup>8</sup> Concluding the contract with the carrier in his own name would make him a contracting party with the carrier, according to the principles relating to commission agents. He may not escape his liability to the carrier under the contract made with him by later disclosing the name of his customer – unlike the case in English law, under the principles of the undisclosed principal. Nevertheless, his customer remains the interested party in the contract of carriage, so that the freight forwarder would have to account to him for whatever follows from the contract of carriage. Hence, the freight forwarder would have a right to reimbursement for freight and other payments arising under the contract of carriage, in addition to the remuneration agreed in the contract of commission with his customer.

French law differs from the German, Italian, and Belgian law as to the status of the *commissionnaire de transport*. The *Code de Commerce* definition of the commission agent<sup>9</sup> is the same as in the other jurisdictions. However, although the *commissionnaire de transport* falls within the category of intermediaries, he has a particular liability that in effect equals the liability of a carrier. According to *Code de Commerce*<sup>10</sup> he warrants the arrival of the goods at the agreed destination with the exception of *force majeure*. Further<sup>11</sup>, he warrants that the goods will not suffer any loss or damage in transit, again with *force majeure* the only exception. In addition, he is responsible for the acts or omissions by persons engaged for the performance of the contract. Art. 99 is regarded as a rule imposing upon the

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<sup>3</sup> § 407 (1).

<sup>4</sup> In Section 454 (3).

<sup>5</sup> In Section 453.

<sup>6</sup> See I. Koller, *CMR und Speditionsrecht*, *VersR* 1988 pp. 556-563.

<sup>7</sup> Art. 1737.

<sup>8</sup> See A. Dani, *L'intermédiaire ("commissionnaire") de transport en droit italien* [in *Les auxiliaires de transport dans les pays du marché commun*. IDIT, Rouen 1977 pp. 203-214].

<sup>9</sup> Art. 94.

<sup>10</sup> Art. 97.

<sup>11</sup> According to Art. 98.

*commissionnaire de transport* a *del credere* liability for the subcontractors (*une règle légale du croire*). However, the liability incumbent upon the *commissionnaire de transport* according to the *Code de Commerce* may be avoided by contrary stipulations in his contract. So far, the liability of the *commissionnaire de transport* differs from the liability imposed upon carriers, who often fall within mandatory régimes. Following the principles of *del credere* liability, when the *commissionnaire de transport* incurs liability for acts or omissions by persons engaged for the performance of the contract, he will be subject to the same liability as would be imposed on the persons engaged (*le système caméléon*). Thus, the *commissionnaire de transport* will have to respond to his customer but would have a full right of recourse against the persons engaged provided, of course, that he succeeds in proving that loss or damage could be attributed to them. The liability of the *commissionnaire de transport* rests upon a pure network liability system, as not only the liability at law for the persons engaged but also their contractual regulation would apply.<sup>12</sup>

Belgian and Italian law is different in so far that the particular liability of the French *commissionnaire de transport* has not been adopted. Instead, the Belgian *commissionnaire de transport* is regarded as a carrier as distinguished from the *commissionnaire-expéditeur*, whose duty is limited to dispatching the goods, while the *commissionnaire de transport* has undertaken the duty to procure the transport from point to point. It does not matter whether he performs his duty by his own means of transport or by means belonging to persons engaged<sup>13, 14</sup>. Italian law is basically to the same effect in distinguishing between a *spedizioniere* and a *spedizioniere-vettore*. According to the Italian *Codice Civile*<sup>15</sup>, the *spedizioniere* is defined as a person who undertakes the duty to conclude a contract in his own name for the account of his customer and to perform accessory operations, while the *spedizioniere-vettore* undertakes to procure a transport from point to point which, under the *Codice Civile*<sup>16</sup> imposes a liability upon him as a carrier.<sup>17</sup>

In Spanish law, the *comisionista de transporte* traditionally<sup>18</sup> had the same characteristics as the French *commissionnaire de transport*. Nevertheless, according to the present *Código de Comercio*<sup>19</sup>, if the undertaking is not limited only to **arranging** contracts of carriage but amounts to **procuring** the carriage (*la realización del transporte*), it is suggested that the Spanish *comisionista* becomes equivalent to the Italian *spedizioniere-vettore*. The particular regulation of road carriers<sup>20</sup> is restricted to **performing** road carriers but this does not affect the interpretation of the notion of *comisionista*. Although, in principle, the liability of the *comisionista* is non-mandatory, he may be caught by mandatory carrier régimes to safeguard the interests of his customer.<sup>21</sup>

Although the distinctions mentioned in French, Belgian, Italian and Spanish law seem to clarify the position of the freight forwarder, depending upon the duties undertaken, it is not easy to make the distinction in practice. Basically, however, what matters would be the duty to procure transport (*faire transporter*) from point to point (*de bout en bout*) and it is irrelevant whether transport procurement is implemented by the freight forwarder's own means of transport or by using transport subcontracted from somebody else. In determining whether the freight forwarder has limited his duty to **conclude** the contract or contracts needed to take the goods from point to point or whether he has undertaken a duty to **procure**

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<sup>12</sup> See R. Rodière, *Traité Général de Droit Maritime* Vol. III, Paris 1967-70 p. 155 and L. Peyrefitte, *Le commissionnaire de transport et les autres auxiliaires de transport en droit français* [in *Les auxiliaires de transport dans les pays du marché commun*. IDIT, Rouen 1977] (also in ETL 1978 pp. 3-23).

<sup>13</sup> Arts. 91-108 of the Belgian *Code de Commerce*.

<sup>14</sup> See J. Libouton, *L'intermédiaire ("commissionnaire") de transport en droit belge* [in *Les auxiliaires de transport dans les pays du marché commun*. IDIT, Rouen 1977 pp. 87-192].

<sup>15</sup> Art. 1737.

<sup>16</sup> Art. 1741.

<sup>17</sup> See A. Dani, *L'intermédiaire ("commissionnaire") de transport en droit italien* [in *Les auxiliaires de transport dans les pays du marché commun*. IDIT, Rouen 1977 pp. 203-214].

<sup>18</sup> In Art. 232 of the *Código de Comercio* 1829.

<sup>19</sup> Art. 379.

<sup>20</sup> *Ley de ordenación de los Transportes Terrestres* of 1987 (LOTT).

<sup>21</sup> See A. Emperanza Sobejano, *El concepto de porteador en el transporte de mercancías*, Granada 2003, pp. 160-161 and 175-177 and L.M. Piloneta Alonso, *Las agencias de transporte de mercancías*, Barcelona 1997 pp. 57, 77, 114 and 132.

the transport, the fact that he has charged his own price<sup>22</sup> for the whole transit without a duty to give account for what he has paid to his subcontractors would become decisive as would, of course, any express undertaking evidenced by the document issued. Normally, analysis of the document would suggest whether it represents a transport document or merely a receipt for the goods.

When German, Belgian, Italian and Spanish freight forwarders are considered pure intermediaries without carrier or equivalent liability, they may limit such liability in their general conditions. However, this appears not to be possible if they fall under a mandatory carrier liability régime. This is now clarified with the 1998 amendments to the German *Handelsgesetzbuch*<sup>23, 24</sup>. Hence, the most important distinction between the French *commissionnaire de transport* and the commission agents under Belgian, German, Italian and Spanish law seems to be as follows:

- The French *commissionnaire de transport* may avoid carrier liability by contractual stipulations.
- This does not seem to be generally possible for the Belgian *commissionnaire de transport*, the Italian *spedizionere-vettore*, or the Spanish *comisionista del transporte*.
- In any event, it is not possible for the German *Spediteur* in the situations specified in HGB<sup>25, 26</sup>.

### **Regulation of freight forwarder activities in general conditions**

The Scandinavian countries have no statutory law regulating the liability of freight forwarders. Instead, the Nordic Association of Freight Forwarders has since 1919 agreed on General Conditions applicable in Denmark, Finland, Norway and Sweden – and now also in Estonia and Latvia. As of 1959, the General Conditions were drafted in co-operation with organizations representing customers. As they could be regarded as an *agreed document*, they would, in practice, fulfil the same function as statutory law, although they would normally require incorporation into the individual contracts in the same way as other standard form contracts. Until the 1974 version of the Nordic Conditions (**NSAB**), the freight forwarder disclaimed liability as carrier unless he had physically performed the carriage. However, as from the 1974 version the Nordic Conditions recognize the freight forwarder's liability as carrier, in particular where he has quoted his own price for transport without a duty to account for charges paid to subcontractors. Thus, the Nordic Conditions – now NSAB 2000 – contain a separate regulation for the liability of the freight forwarder as an intermediary and a separate carrier liability, which is akin to the liability imposed upon an international carrier by road under the CMR supplemented by a network liability where a particular mode of transport has been agreed or where loss of or damage to the goods could be localized to a particular mode of transport. Thus, the carrier liability of the freight forwarder under NSAB would, in practice, be more or less equivalent to the liability of a French *commissionnaire de transport* according to the provisions of the French *Code de Commerce*.

### **Adoption of liability as contracting carrier**

As we have seen, freight forwarders may themselves clarify the legal position either by avoiding the status of carrier whenever this is possible under the applicable law, alternatively adopting liability as contracting carriers. Provisions on carrier liability could be found in general conditions used in Canada, France, Hong Kong, Indonesia, Kenya, the Netherlands, Poland, Singapore, South Africa, Sri Lanka, Switzerland, the United Kingdom and Vietnam and in the countries where NSAB 2000 are used<sup>27</sup>. Hence,

<sup>22</sup> See, e.g., the French cases DMF 1952.497 and BT 1972.321.

<sup>23</sup> Sections 438-460 compared with Sections 466 and 449.

<sup>24</sup> See R. Herber, *The New German Transport Legislation*, ETL 1998 pp. 591-606. The position under Swiss law seems to be different as carrier liability for freight forwarders seems to be limited to multimodal transport. See Montanaro, *Die Haftung des Spediteurs für Schäden an Gütern*, Zürich 2001 pp. 6-7.

<sup>25</sup> Sections 458-460.

<sup>26</sup> See I. Koller, *Transportrecht. Kommentar zu Spedition und Gütertransport*, Munich 2004 p. 732 regarding § 459 („Fixkostenspediteur“ and § 460 „Sammelladungspediteur“) where the distinction between carrier and freight forwarder becomes unnecessary. Similarly, K-H. Thume [in F. Fremuth and K-H. Thume eds., *Kommentar zum Transportrecht*, Heidelberg 2000] p. 482 and p. 485 adding that the mandatory law of carriage of goods only applies to the carriage as such but not to additional services.

<sup>27</sup> Denmark, Estonia, Finland, Latvia, Norway and Sweden.

most freight forwarders undoubtedly prefer to clarify the position rather than to leave it uncertain and subject to the vagaries of courts of law.

Voluntary adoption of carrier liability has been enhanced by the competition between contracting and performing carriers. In particular, the advent of containerisation in the 1960s forced freight forwarders to properly evidence their contracts of carriage when receiving goods from their customers for containerisation. It would not be a commercially viable option to receive goods from individual shippers, to stuff the goods into containers in the country of shipment, and to arrange break bulk of the containers at destination, while at the same time insisting that the contract of carriage as such was arranged by the freight forwarder for the sole purpose of achieving a contractual relationship between their customer and the performing carrier(s).

This would explain the creation in 1971 of the FIATA Combined Transport Bill of Lading (FBL), as it was then called. This was met with some scepticism by traditionalists who preferred a disclaimer of carrier liability. However, commercial realities made the use of FBL a global success. As FBL is used in relation to each individual shipper, while in the contractual relationship between the freight forwarder and the performing container lines bills of lading covering the whole container would be used, FBLs by far outnumber liner bills of lading in international trade. The FBL, as an international document of transport, is used independently of the freight forwarder's general conditions but the carrier liability under FBL is often used to reflect carrier liability under general conditions as well.<sup>28</sup> Freight forwarders wishing to tender a document to customers evidencing receipt and an obligation to deliver the goods at destination to the consignee, but without incurring liability as carrier, could do so by the FIATA Certificate of Transport (FCT) where carrier liability is expressly excluded.

General conditions for the service of freight forwarders undoubtedly contribute to consistency and transparency. But this does not extend beyond the countries or regions in which such general conditions are used. Thus, international trade would have to suffer from the different approaches and levels of liability following from general conditions. Countries and regions, where organizations representing customers have participated in the deliberations with freight forwarders in the drafting of the general conditions, have succeeded in achieving a better balance between the interests of the parties concerned. Nevertheless, any comparative analysis of general conditions used would demonstrate a considerable and harmful variety.

#### The 1967 UNIDROIT Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods

The law of freight forwarding is not subject to any international convention, because the efforts of UNIDROIT to achieve such a convention have not materialized. The work of achieving an international convention started in the mid-1950s and progressed simultaneously with the work to elaborate a convention on contracts for combined international carriage of goods. In 1963, the Governing Council of UNIDROIT approved the Draft Convention on the Contract of Agency for Forwarding Agents as well as the Draft Convention on the Contract for the Combined International Carriage of Goods. The aim of both these proposed international instruments was to promote international trade. Although general conditions sponsored by the forwarding agents' organizations would have established a certain uniformity, the conditions were considered a poor substitute for uniform legislation. First, as they were issued by private organizations, their validity might be contested. Second, the general conditions varied from one country to another.

It was not an easy task to bridge the different concepts in statutory law relating to freight forwarders. In particular, the French notion of *commissionnaire de transport* created difficulties. With that in mind, one approach to avoiding any difficulty involved replacing reference to *commissionnaires de transport* by the words *contrat de commission en matière de transport international de marchandises*.

Regulating the freight forwarder's liability for incidental services carried out by himself included:

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<sup>28</sup> See regarding the freight forwarder carrier documents FBL and FWB, J. Ramberg, The law of freight forwarding, [publ. by FIATA, Zürich 2002] pp. 42-88.

all operations incumbent upon him before the first stage of carriage, between two stages of carriage or after the last stage, and, in particular, the taking over of the goods at the designated place; their custody, storage, transshipment and moving; that the documents necessary for their export or import are obtained; that the customs and other formalities are complied with; that the duties, dues and other expenses incumbent upon the principal are paid in advance or that security is furnished therefor; that the condition of the goods and of its packing is checked; that the carrier is furnished with data necessary for the making out of the carriage documents; and that assistance is made available for loading and unloading<sup>29</sup>.

In carrying out these functions, the forwarding agent would be liable for the acts and omissions of his agents, servants and representatives when they acted within the scope of their employment<sup>30</sup>. But the freight forwarder would not be liable for the due performance of contracts that he has concluded in order to ensure the carrying out of the international carriage<sup>31</sup>. His liability in this respect was reduced to a liability for proper choice of subcontractors and for the instructions given to them (liability for *culpa in eligendo vel instruendo*). The principle that the forwarding agent avoided liability for the due performance of the contracts that he had concluded would follow naturally from his function only to act as an agent. A monetary limitation of the forwarding agent's liability was contemplated but the amount was left open for later decision. Interestingly, loss of the right to limit liability did not follow the CMR concept of *wilful misconduct* that had been accepted only a few years earlier. Indeed, by the mid-1960s the meaning and scope of the concept of *wilful misconduct* had already been the subject of notable controversy both in doctrine and case law. Instead, the conduct defeating the right to limit liability was expressed as "either a deliberate disregard of the prejudicial consequences that might result from such conduct, or inexcusable lack of awareness of such consequences"<sup>32</sup>.

The particular French concept of a *del credere* liability for the *commissionnaire de transport* was taken care of in a particular chapter on "Forwarding Agency Contract with Special Liability"<sup>33</sup>. Here<sup>34</sup>, it is noted that the parties may agree that the forwarding agent is responsible, from the time when he takes over the goods until he delivers them to the consignee, for the due performance of all contracts made to ensure the carrying out of the international carriage. In case of non-performance of such contracts, the forwarding agent would be responsible according to the rules governing the contract concluded with the respective subcontractor, i.e. the network liability system, which would naturally follow from the *del credere* principle. This would not reduce the liability of the forwarding agent for failure to observe the duties incumbent upon him as an intermediary. Additionally, the forwarding agent would not benefit from any special clauses in his contract with the subcontractor and which would not regularly be used in such contracts<sup>35</sup>. In so far as "special liability" would follow from an express contract, it would not be difficult to accept the system of a *del credere* liability for subcontractors. However, in other cases one would have to resolve much-debated issues. As to situations where the forwarding agent has agreed on a flat rate for the contract of carriage, he would have to accept liability in the same way as would follow from an express agreement<sup>36</sup>. Further, in case of grouping the goods under *one single carriage document* it should be presumed that the forwarding agent has accepted liability<sup>37</sup>.

The draft convention also contains<sup>38</sup> provisions relating to a international forwarding note (Fr. *titre de commission de transport international*). That document might be issued upon request. It would contain the information usually to be found in bills of lading, so that the forwarding agent would have more or

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<sup>29</sup> Art. 1.3.

<sup>30</sup> Art. 12.

<sup>31</sup> Art. 13.

<sup>32</sup> Art. 21.1.

<sup>33</sup> Chapter III.

<sup>34</sup> In Art. 22.

<sup>35</sup> Art. 22.4.

<sup>36</sup> According to Art. 22.

<sup>37</sup> In accordance with the provisions of Art. 22.

<sup>38</sup> In Chapter IV.

less the same duty as a carrier. That is, to check the accuracy of the statements in the international forwarding note as to the description of the goods and their apparent condition including their packaging, and, if found incorrect, enter appropriate reservations. If no reservations were made, it should be presumed that the goods were in good order and condition when taken over unless the contrary is proved. However, it will not be possible for the forwarding agent to disprove the contents of the document against a consignee who has acquired the international forwarding note in good faith. In the same way as under CMR<sup>39</sup>, any stipulation directly or indirectly derogating from the provisions of the convention would be null and void<sup>40</sup>.

As we have seen, the *special liability* of the forwarding agent is not exactly the same as liability of the carrier. However, in practice, the result would be more or less the same as if the forwarding agent had accepted liability as contracting carrier. This, under ordinary principles of law, would include vicarious liability for any persons used in the performance of the contract of carriage. That invites the question whether it would serve any purpose to introduce a *middle category* between the ordinary liability of the forwarding agent and the ordinary liability of a carrier<sup>41</sup>. However, of course, the *special liability* may be explained as acceptance of the particular liability of the French *commissionnaire de transport*, which under the draft convention would be recognized in some circumscribed situations.

When the draft convention was approaching the stage of a diplomatic conference, FIATA had already started to consider the possibility of a particular combined transport bill of lading to be used by freight forwarders in consolidating cargo for container transport. Such a document, it was believed, would be much more appropriate than the international forwarding note contemplated by the draft convention. Additionally, it was considered premature to deal with any special liability for the freight forwarder until his position under the contemplated draft for the combined international carriage of goods had been ascertained. Although, as we have seen, such an international convention is now available for ratification in the form of the 1980 UN Convention on International Multimodal Transport of Goods, it has not yet entered into force and would have to await further development in this field. So, in spite of the shortcomings of rules available for voluntary adoption, such as the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents, there is as yet no other alternative to achieve international uniformity.

In countries where freight-forwarding services have been regulated by statutory law, the conditions follow that law or at least use the law as a point of departure. Where, as in Germany, the law relating to the freight forwarder as contracting carrier is mandatory, to that extent no option is available for him to regulate his liability differently in his general conditions.<sup>42</sup> Instead, the mandatory liability may be absorbed by a more or less sophisticated insurance system.<sup>43</sup> The Austrian General Conditions also replace liability with insurance but in a different way, since no mandatory law exists as in Germany. Among the countries where liability closely follows statutory law we find, i.a., Germany, France, Spain, Portugal, Slovakia and Uzbekistan. However, overall limits of liability differ. For example, French conditions (50.000 EUR) contrast with Spain, which has no overall limit as to loss of or damage to goods but a limit to an amount not exceeding the remuneration for the service as to delay in delivery or any indirect loss or damage. In some countries, such as the Czech Republic and Poland, limitations of liability are allowed only if following from national law or international conventions. Again, in Russia reference is made to the monetary limits of international conventions.

At the other end of the scale we find countries still accepting almost a total freedom of contract which is used by some associations in their disclaimers of liability (e.g., in Australia, Greece, India, New Zealand and Singapore). The traditional disclaimer of liability as carrier appears in Belgium, Bulgaria, the Czech Republic, Egypt, Poland, the Netherlands and Italy. The distinction between the freight forwarder as agent and principal is particularly apparent in the common law jurisdictions, where the lead of the British conditions (**BIFA**) have been followed in Bulgaria, Hong Kong, Ireland, Kenya, South Africa, U.A.E. (**NCFF**) and Vietnam.

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<sup>39</sup> Art. 41.

<sup>40</sup> Art. 42.

<sup>41</sup> See L.M. Piloneta Alonso, *op.cit.* note 21 p.132.

<sup>42</sup> See J. Trappe, The reform of German transport law, [2001] LMCLQ pp. 392-405.

<sup>43</sup> See regarding the system under the German ADSp/SpV 2002 the observations by J. Ramberg, The Law of Freight forwarding [2002] pp. 30-31. The system triggered excessive premiums and was discontinued already in 2003.

In some countries, distinctions are made between the different functions of the freight forwarder, with carrier liability sometimes accepted by reference to FBL, e.g., the Scandinavian and Baltic States using NSAB 2000, France, Switzerland, Greece, Canada (**CIFFA**), Russia, Korea, Indonesia and Ukraine. In the United States, the notions of *indirect carrier* and *non-vessel operating common carrier (NVOCC)* have been launched in the regulatory statutory provisions<sup>44</sup>. However, the private law aspects of the freight forwarder's liability have so far attracted less attention, except in efforts to extend maritime liability to cover multimodal transport by amendments of the Carriage of Goods by Sea Act and the Hague Rules.

#### Impact of an international door-to-door maritime régime on freight forwarder law

The present regulation of freight forwarder law according to different principles in domestic statutory law and various general conditions is confusing and unsatisfactory.

In my view, an extension door-to-door of a maritime international régime on carriage of goods by sea would further aggravate the situation. At worst, such an extension may create additional difficulties for establishing a separate international legal régime for freight forwarders which in my view is desirable, if not unavoidable, in order to create some order and transparency replacing the contemporary disparities within the field of freight forwarder law.

The draft convention on the carriage of goods by sea<sup>45</sup>, in Art. 1.1, defines the contract of carriage and delimits the application of the convention by the requirement that the contract "shall provide" for carriage by sea. It is then added that the contract "may provide" for "carriage by other modes of transport in addition to the sea carriage". Further, in Art. 6.2(b) dealing with "non-liner transportation", the convention applies when a transport document evidences a contract of carriage and the receipt of the goods by the contracting or performing carrier. Thus, the convention applies to a freight forwarder having issued a FBL, provided that it appears from that document that the carriage includes a maritime segment. However, the draft convention does not deal with cases where another mode or modes are added to the maritime segment so that, in essence, the transport becomes non-maritime, e.g. when timber products are carried from northern Sweden to southern Italy and road or rail carriage is added to a short carriage by ferry from Scandinavia to Germany. This makes the application of the convention exceedingly difficult, particularly to freight forwarders when acting as carriers. In the example mentioned, they would normally evidence the contract by a CMR, CIM or FIATA waybill (FWB) but may also elect to use FBL, in particular where the option to use carriage by sea from Swedish to Italian ports is still open. Understandably, FIATA opposes the application of the convention to other modes than maritime carriage. But, in any event, the convention should as clearly as possible define that it does not apply where maritime carriage does not constitute the preponderant part. With such delimitation of the scope of application of the convention, the problem of conflict of conventions would be considerably reduced.

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<sup>44</sup> See W.J. Augello, *Transportation, Logistics and the Law*, Huntington N.Y. 2004 passim and J. Guandolo, *Transportation Law*, Washington 1971 passim.

<sup>45</sup> A/CN.9/WG.III/WP.81.