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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. Starting this paper with theoretical analysis of the “*representation doctrine*,” and exploring 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 inevitable. 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 frames.

This paper also deliberates 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 subject of discussion. Just a superficial examination of this topic is enough to conclude that each type of representation lead to achieving one objective and it’s - ***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*?! *Does the existance of uniform concept of representation is justified?* Finally, *is it possible to apply the same legal standards 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 more applicable legal regime for freight forwarders? Is it the civil law or common law system, or in the field of freight forwarders boundaries between these systems are not as much actual 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:

Many years the "*doctrine of representation*" was unknown concept of Roman law. Generally by the end of the XVII century, partially till the end of XIX century, 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, 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, present commencement of the frame contract (*contract-frame*), and serve as a ground for further *sui generis* contracts of trade (contract) law. In series of these type of contracts, freight forwarders contract has its own place. As a business law institution, freight forwarder contract present legal bases for taking actions by the "*person receiving an order*" in the interest of "*the orderer*." Conceptually, freight forwarders contracts vary in civil and common law systems. This divergence rises from different concepts of representation accepted in these particular systems. Under this "*concept of representation*", freight forwarders also effectuate their activities. Henceforward, 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 European legal system, the "*representation doctrine*" is established on *direct* and *undirect representation*. Undirect representation is expressed by taking actions for other party (*principal*) ***in his own behalf, but for the account of the principal***.[1] In contrast, *direct representation* involve activities **on behalf and for account of another party (*principal*)**.[2]

Anglo-Saxon legal system accepted the *doctrine of identification of "the ordered" and the agent* as a fundamental basic 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 lie the fact that the presence of other person (*the principal*) in the transaction at the moment of stipulation is unknown fact for the third party. The third party knows that enters in obligations with the agent personally. Nevertheless of the fact that the agent acts on his behalf (*civil law terminology*), this concept contains 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 bases 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 step out of the contract. In other words, *undisclosed principal* can sue and be sued from the third party.

Antithesis of this present the *common law doctrine of disclosed principal*. According to this doctrine, the existence of the ordered in the transaction is familiar fact for the third party at the moment of contractions/*disclosed agent* who act on the account of the principal. Disclosed principal may be *named* or *unnamed* person. *Named principal* exists in situations when the third party is familiar with the identity of the principal at the moment of contraction. Otherwise, the orderer has a status of *unnamed principle.* In cases of *disclosed*

[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.

agency, the orderer has direct obligations from the contract concluded by the agent. So, the agent doesn't have any type of obligation concerning third party. From 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 unknown subject. If we compere *direct representation* and *disclose agency* we'll found 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 act in his own name and the third party believes that stipulate with the agent personally, according to *undisclosed agency* there is a legal basis for "*the orderer*" to realize his right form the third party and vice versa.

Differentia speciffica for common law system is the doctrine of *undisclosed* and *disclosed agency*. Compared with direct and undirect representation, these systems have legal differences. According to 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 of which 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 forwardes have their own place. Conditio sine qui non for exploration of the freight forwarder contract is the 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 form the contract. Theoretically, there are three systems of freight forwarder status: German, Franch and Anglo-Saxon systems. Each of these systems involves freight forwarders according to his own concept. Namely, German system treat freight forwarder contract as a particular *sui generis* institute of business law. According to Franch perspective, freight forwarder contract is a type of commission business. Finally, freight forwarder fit in the general concept of agency according to common law system. In terms of *civil law* (German concept where Macedonian system belongs) freight forwarder contract is nothing but the classical "order[7]" In the parts where freight forwarder acts as transporter, he practically execute his obligations from the "*contract for work*." Freight forwarder status is changing in certain segments of his frame of work and in that position he can't act in his own name (*customs and any other administrative procedure*).[8]

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

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[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].

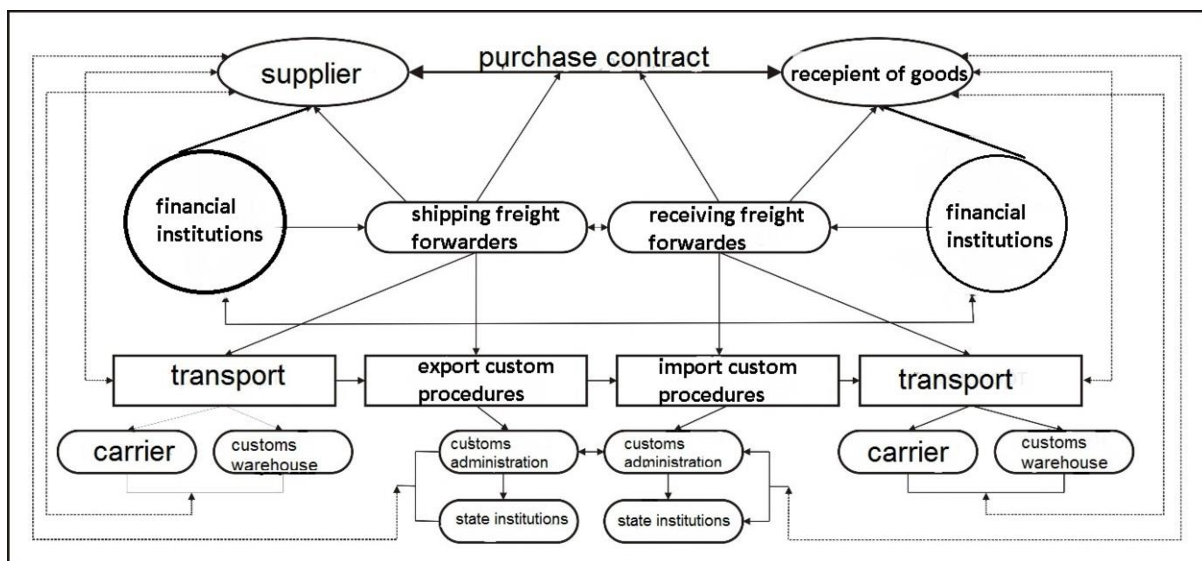
[7] LOO, article, 805.

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



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

When the freight forwarder operate *in his behalf and on the account of the principle* he represent the *undirect concept of representation*. 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, his become a party of the contract (*principle of commission*). The freight forwarder can't escape the liability towards the transporter, revealing the identity of the *orderer/principal*. Despite all this, freight forwarder still remain interested party in the contract of transport. Freight forwarder has an obligation of giving an account to the principal for taken actions 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. HGB clarify that freight forwarder is not a transporter, even sometimes he make 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

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[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.

compensation as a transporter. He also has a right of payments on the base of the freight forwarder services (HGB, §412/1/2).

According to HGB, freight forwarder act as a transporter when he use 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 price, are package of rights and obligations of transporter ("*Spedition zu festen Spesen*"/"*Sammelladung*) (HBG, §413). In German business practice, this situations are familiar for the consolidator of the goods (3PL and 4PL service providers) (*cargo consolidator/„spedition zu festen Spesen*"and „*Sammelladung*"). Referring to the liability issue (*настанува и одговора како превозник*), the same situation exists in the moment when freight forwarder organize collective shipment of goods.[12]

German jurisprudence fit the concept of freight forwarders in the broadest sense. According to German law, when HGB doesn't 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.

German legal system has a significant impact on the Italian concept of freight forwarders. According to art. 1737 from ICC, freight forwarder is an entity which *acts in his own name, on behalf of his client*. These provisions are part of Belgian legal system too. According to Belgian law, liability of freight forwarders refers only to the intermediation of transport process (*commissionnaire - expéditeur*). In contrast with this category of freight forwarders, 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 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 act on the account of the principal. The second category *commissionnaire de* transport, are freight forwarders that a) carries out the transport of goods on his own name and his own transport vehicles, b) issue transport document of 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 from the fact who owns the vehicles. Very often, transport vehicles are leased by freight forwarder from the owner.

On the same bases Italian freight forwarders work. Italian legal system distinguish *spedizioniere* and *spedizioniere-vettore*. *Spedizioniere* are liable for damage occurred solely when he contracted in his own name. Unlike them, *spedizioniere-vettore* are qualified as freight forwarder which have liability as carrier. [14]

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

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

[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 situations, freight forwarder is not liable solely about 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.

name of third party (LOO, art. 883/1/2- status of agent in common law system). When he acts in his own name, freight forwarder is directly related with the third party. His claims towards the principal are protected with *jus retentions right* (*indirect representation*). In this situation contract parties are 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 civil law system, the dilemmas arise about 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 of the question contains the German legal science based on the doctrine of *Dogma vom Gläubigerinteresse.* According to this doctrine, the creditor may seek for compensation from his debtor about the damaged. The principal does not emanate from the general rules referred on the scope and nature of damaged, (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 practice referring to the principal. [16] These exceptions exists when the debtor is authorized to seek for compensation on the name of third party. As a concept this doctrine is known as "*third party compensation/Drittschadensersata"*. German jurisprudence treat this exceptions as "*shifting from the general concept of compensation*"/*zufällige Schadensverlagerung*. Typical example is undirect representation/*mittelbare Stellvertretung*. Under this rule, freight forwarder which act 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, 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 situation when the third party is not creditor, but debtor in the transaction/*schuldner* (art.392/2). In cases when the third party will repay the claims that have been already transferred to the client, the 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 generate from (BGB §407/2) and the solution: If, in a legal dispute that became pending at 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 became pending.

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[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.

[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.

Situation becomes more complicated in case when 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 preciously, they should have 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 are not in any obligation. Hereafter, taking legal action for compensation from the freight forwarder is legally impossible. In this situation we discuss about the concept of *related counterclame* that is 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 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 legitimation to bring a legal action (to sue) against the commission agent (freight forwarder) for the breach of contract of transport f goods. This kind of damage generates from the behavior of the freight forwarder and doesn't 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 kind of dilemmas. Only the insurance contract in this context is the legal basis form transmission of economic effects. All other issues are connected with the requirement form legal transmission (right for sue, right for compensation etc.). If the insured even come true, 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 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 very disputable for us because the legal cession is only foreseen in legal subrogation. Legal cession exists only in the case, when the third party executes his rights and obligations in his interest.[20] Theoretically we asked: how does the freight forwards transmit the legal effects to their principal in situation when other party 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 will transfer the right to sue, when he acts on his 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

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[18]The theory is very familiar with the different standpoints about the applicability of §392/2 when third party has a will to bring an action. Reichsgericht and Bundesgerichtshof are on the opinion that §392 is inapplicable in this situation. Opposite of this and according to Schmidt, §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 will get the goods in his possession (*buyer or authorizes person from the buyer*). This is fact because the seller has control on the whole shipment during the transport route.

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

requirements.[21] Hence, we can't discuss about cession based on legal transmission. Cession solely refers to economic aspects of requirements. Considering this issue, we realized that this is not 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 necessary event.[22] In our case this is not applicable because the transporter doesn't depend from the fact who will sue.

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

According to Macedonian LOO, the moment of transfer of property is equal with the moment of transfer of risk. But this is not case in France law on obligation and Swiss law on obligation. So, many problems can be born concerning this question. As a most helpful tool in this context we emphasize 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 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 process of stipulation, payment methods[24], the scope of смененом-онсегом на awareness/informing of the clients about the freight forwarder status, business pracice, legal concerning of the freight forwarder with the real performer of the services, and finally, the legal nature of the issued transport documents and their usage in bank sector as a document of title with negotiable or non-negotiable character.* [25]

As in many other fields of business, Anglo-American system emphasize the practical aspects in the area of transport law. Referring to this issue, the 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 too.

Nonetheless of the theoretical analyze of the common law status of freight forwarder, we can't image the whole exploration without the practical aspect of this issue. Beginning with this subject of examination, the legal nature of transport documents imposed as a necessary field of research. This situation may become very complicated because of the divergent status that freight forwarder have in the transport route nowadays.

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[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 a claim the transfer of which 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.

[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 British general terms and conditions of freight forwarders methods of payment are not foresees as a criteria for define the liability of freight forwarder, but in practice, there are so many courts 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's obviously that this criteria are also used to solve more complicated questions 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.

When the freight forwarder issue a *FBL combined bill of lading-Throught bill of lading)*, he has carrier's liability. But when he use/issue *Forwarder's bill of lading-House bill of lading* as acknowledgment of receipt of goods, he can't be charged about the damaged of the goods. On this theoretical viewpoints is based the judgment in *Bentex Fashions Inc. v. Cargonaut Canada Inc* (*1995*) F.T.R. 192,[26] where Canadian Court passed a judgment that freight forwarder that issued a *throught bill of lading* has liability as carrier in Bulgaria – Canada route. Court based his decision on many factors including the all-inclusive price for the shipping services. The plaintiff was not familiar with the fact that freight forwarder engaged subcontractor, so he sent direct sue to the freight forwarder.[27] Despite this fact, the court also invoke to the *throught bill of lading* issued by the freight forwarder. This document confirm his position as a forwarder who has carrier's liability.[28]In this sense is the judgment of Australian Federal Court in case *Comalco Aluminium Ltd v. Mogal Freight Services Ltd* (1993).[29] This case serve as an example of qualifying the consignment note as document of title. [30]

One of the most famous case about defining freight forwarder status through the used transport document, is the case *Rafaela S.*[31] In this case, *House of Lord* ascertain that issued *straight bill of lading* may have a treatment of document of title.[32] This conclusion is based on the fact that the receiving of the goods was conditioned with presentation of the transport document. This judgment has a treatment as an exception from the general concept of "*document of title*". The role of the "*document of title*" is to be perceived as a legal bases 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 about the receipt of the goods, can't change the whole concept of "*straight bill of lading.*"[33] The clause implemented in the contract that 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's not an obligation. This case established a separation of the "document of title" concept, and the applicability of Hague rules, from the basic rules about the transport document accepted in business practice.

As a confirmation for this exception serves the judgment in *Troy v. The Eastern Company of Warehouses,* and *Midland Rubber Company v. Robert Park ع Co.* where the court based on the issued transport document confirm that the freight forwarder should compensated 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 listing. One more argument in favor of the fact that business practice is based on the requirements in the practice. The whole system of freight forwarders liability is based on the examination of numerous in concerto 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 eligible factor for defining liability of the freight forwarders. The do not

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[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 we discuss about British status of Freight forwarders in this part of the paper, we elaborate this judgment as a part of common law system, just to compere 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;

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

pay too much attention on the question about the name and the account of forwarders acting.[34] Forwarders are charged with carrier's liability if they act issued a document that prove the status of carrier. It seem that this concept is well-matched with the world trend of logistic in whole.

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] in the fourth part regulated the freight forwarders. The Americans set off from the following viewpoint: when a country create uniform transport system, freight forwarders must be a part of it.

The regulation of the freight forwarders with the railway station, (part *1 from ICA*), (*part 2 ICA*) and *transporters by sea* (part *3 from ICA*) imposed that freight forwarder should be liable as carrier. (*ICA refers to public carriers - common carriers*).[36] Anyway the inclusion of the freight forwarder in ICA, doesn't mean that they have carrier's liability *ICA* 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 developed uniform transport policy, freight forwarder according to this act are not equal with the rest of the subject.[38]

USA legal system have created the most sophisticated system of freight forwarders many years ago. That system is now the actual system that exists on a global lever affected by the globalization and creation of trans-national companies.

USA define 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 bases of transport contract for transfer of goods to the place of the plaintiff in Clarksville, Tennessee. The goods were damaged so the plaintiff ask for the compensation. "*Through bill of lading*"was issued. In the procedure court did assessed that the commission agent/freight forwarder is liable on the bases on many other persons. [39]

Judicial practice referring on the carrier's liability of the freight forwarder and generate 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 with federal rules. Opposite of this is the legal regime for freight forwarder in 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 acts as transporters and are part of this sector. This intention generate from the general transport policy of the USA. 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.

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

[35] *Interstate commerce act* (1887), is a result of the USA requirements to prevent monopolization in the area of 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 is *49 U.S.C § 13102*, 8(C), where officially is emphasize that the freight forwarders are under the legal regime of the transporters from U.S.C.

2005)),[40] where the American Federal Court ascertain the freight forwarder as agent. Defining the status of freight forwarder becomes problematical in the cases of NVOCC as the most sophisticated model of freight forwarder proper with the world trends. In this context, we must emphasize the freight forwarders in USA as in whole global economy nowadays operating under "*del credere clause for liaibility*". This is the only acceptable way of operating. Any other smaller for of freight forwarder will disappear. Under the impact of globalization NVOCC is the proper form of doing business in logistic sector.

2.2.1. NVOCCs

The involvement of the intermediers in transport sector imposed the idea/requirement for the position of the Freight forwarders acting as *non-vessel operating common carrier*. 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' и non-vessel operating common carrier (NVOCCs)).* [41] As a freght forwarder, NVOCCs is define in 46 U.S.C. § 1702 (17) (B),as a carrier ho doesn't have 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 obligation to prevend that, not to support it. In American business practice, the functions of the NVOCCs and freight forwarder are interbreed. The provisions from S*hipping Act from 1984 and Export Trade Company Act from 1982 година* expressed the tendency and potential for collaboration between freight forwarder and NVOCC. This practice generate 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 multimodal transport subjects. *NVOCCs* in *civil law* system actually present the multimodal transport operators. In *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.,* (547 F.3d 351 (2d Cir. 2008)),[42] Rexroth Hydraudyne concluded 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 damaged is occurred in the domestic part of the transport route, Rexroth Hydraudyne are not applicable on the sea freight forwarders according to FMC regime.

The existence of double legislative for one subject of business crated complex situation about defining the status of the freight forwarders. American practice preformed that freight forwarder shoud be liable for the carrier. In case *Amdahl Corporation v Profit Freight System Inc.*,[43] the consignor tried to prove that the freight forwarder is liable for the occurred damage on the goods (lasers) during the transfer from California to Ireland. The freight forwarder had organized the transfer according to the instructions given by the consignor. Freight forwarder used the van and transfer the goods to the port. From the port, the goods was located in the 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 container with

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[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].

[41]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.

[42]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].

[43]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].

other goods, leased boat space and loaded the goods and issued a bill of lading to the consignor. The goods was delivered to one of the assistant of the freight forwarder in Dublin. He took the goods and delivered in business warehouse of the Amdahl Corporation. During the process of unloading Amdahl Corporation noted that the goods is damaged so the imposed question was: who is liable for the damaged in legal sense?

The court start from the fact the freight forwarder charged the consignor with the price determine from the NVOCC. In instruction of 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*,[44] where freight forwarder act as agent. Nowadays, freight forwarders that operates on the market, have a status of multimodal transport operator, or NVOCCs. This concept entails liability for the whole transport route. So, the question of representation and the dilemmas for cession are practically unusfull. As we mentioned above, Anglo-Saxon system of freight forwarder contribute to avoiding the complex question of liability.

FINALE CONCLUSIONS:

Affected by the process of globalization and concentration of capital, trend of expansion of transnational companies in the global world, forwarders status has been changed greatly. Today, not just in economic sense, but also in legal aspect, the new status of the freight forwarders has been changed. In modern business freight forwarder act as provider of services who is liable for the goods through the whole transport route. So, on international level the question about the *direct and undirect representation*, *disclosed and undisclosed* is not that attractive. In modern transport and logistic, the question about the behalf 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 European land as non-vessel operating common carriers or multimodal transport operators. European countries accepted this category of freight forwarders from USA. Nevertheless of this global trends, in European theory remains the disputes around the justification of the Anglo-Saxon model of ff. This dilemmas are specially focused on the issue of the behalf and the account on which freight forwarder act.

These theoretical dilemmas are not subject of interest in *common law* system. Even the existence of numerous critics from the German jurisprudence to Anglo-American model of freight forwarder, our opinion is that the last 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 realized his right only by regress 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, which is not dilemma in common law system.

As we saw through the practice and theoretical analyze, our opinion is that Anglo-American system of freight forwarder is fully compatible with the modern concept of freight forwarders. Today, there is no limit between carrier, freight forwarder, warehouse keeper etc. The base of this factual situation lies in the economy. So it is necessary for the legal system to make a changes. These changes are implemented in each general terms of working that are results of the business requirements. Maybe the law will remain unchanged, but the practice

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[44] 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 October 2014].

is 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*".

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