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Unified Criteria for Differentiating Freight Forwarding and Transportation Contracts in the Context of Legal Liability

Ujednolicone kryteria rozróżniania umów spedycji i przewozu w kontekście odpowiedzialności prawnej

ABSTRACT

Transport law is ambivalent from the methodological point of view. It entails different institutions and legal relations interconnected with each other. A unified document that would cover all the regulations on transport relations does not exist in democratic Western states. For this reason, there is a discourse about the "fragmented" legal substance of the law, which regulates relationships governed by different legislations, yet are closely related and similar. Transport law is divided into several levels. The first is the national, i.e. the first stage of regulation. The core agreements that form the backbone of transport law are regulated within civil and commercial codes, followed by the second level of regulation – supra-national regulations of the European Union. The present article is dedicated, on the one hand, to the study of the generalized qualifying criteria for freight forwarding and transportation contracts based on

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the Unified Act – FIATA, and, on the other hand, to the analysis of the regulatory models of Georgian and German law in the context of their compliance and harmonization with unified standards. Studying the mentioned generalized criteria at the supranational level is of immense practical importance in terms of distinguishing the functions and duties of the carrier and the freight forwarder, as well as the corresponding legal liability regimes. The study also reviews international efforts of the unification of the liability of freight forwarders. It highlights the need to expand contractual autonomy at a unified level in the context of the deregulation of freight forwarder liability.

Keywords: freight forwarder; carrier; FIATA; liability; principal freight forwarder; agent freight forwarder

INTRODUCTION

The contemporary role of freight forwarders becomes increasingly focused on undertaking the role of a carrier.[1] This is caused by a freight forwarder putting efforts to deepen or extend their functions in logistical and transportation processes. The driving force of these changes is such factors as the 1970s revolution of information technologies, the growth of logistics and the increasing demand for shifting all transport processes to freight forwarders.[2]

In this regard, the use of multimodal transportation is reaching unprecedented scales, with this process being carried out and coordinated by a single operator – the Multimodal Transport Operator (MTO).[3] The freight forwarder, as an architect of transportation, is essentially responsible for cargo organization, either entirely or partially, within the logistics chain. Hence, the freight forwarding contract is, inherently, a contract for organizing the movement of cargo. Yet, given the significantly expanded and complex modern understanding of freight forwarding – particularly in the era of widespread multimodal transportation – freight forwarders often directly transport the goods themselves. This should not come as a surprise, as "freight forwarding services are a derivative form of transportation services, and accordingly, in practice, it is common for a forwarder to transport cargo using their resources".[4] As a result, this becomes the cause for the application of the liability regime designated for carriers. In everyday language, a freight forwarder is equated with a cargo carrier. However, its legal and economic characteristics

[1] Đ. Stojanović, M. Veličković, *Freight Forwarding Industry – the Contemporary Role and Development Trends in Serbia*, 2019, https://logic.sf.bg.ac.rs/wp-content/uploads/LOGIC_2019_ID_16.pdf (access: 5.3.2025), pp. 132–141.

[2] P. Cain, *Complexity, Confusion and the Multifaceted Legal Roles of the International Freight Forwarder*, "Macquarie Law Journal" 2014, vol. 14, pp. 25–45.

[3] R. Zelenika, T. Lotric, E. Buzan, *Multimodal Transport Operator Liability Insurance Model*, "Promet-traffic & Transportation" 2011, vol. 23(1), pp. 25–38.

[4] T. Zambakhidze, [in:] *Commentary to Georgian Civil Code*, eds. L. Chanturia, B. Zoidze, T. Ninidze, R. Shengelia, J. Khetsuriani, Book IV, vol. 1, Tbilisi 2001, p. 436 [in Georgian].

typically indicate that the forwarder does not transport goods directly but rather facilitates the execution of the logistics chain, fully or partially. This inherent feature distinguishes it from the carrier, as the latter's status is directly related to the actual transportation of goods. Therefore, the legal basis for liability and the legal regime for its exemption may be regulated differently.

On the one hand, the freight forwarder, as the "organizer of the chain of transfer of goods", is the person who, in turn, enters into physical-technical transportation contracts with third parties. In other words, through the use of practical means to achieve this goal, the forwarder primarily relies on third parties[5] to completely fulfill the obligations imposed on them within the legal relationship between the forwarder and the client and to complete the contractual relationship in due diligence. Primarily, the forwarder is responsible for organizing these physical and technical means properly since the delivery of the cargo to the customer in an unharmed state at the specified address (or without[6]) depends on the fulfillment of their duties by the persons involved in this chain. Here, it is crucial to determine the liability regime of the forwarder and separate it from the liability of the carrier.

The freight forwarding contract typically involves two main parties, and consequently, it focuses on two primary, complementary performances: the forwarder, under the freight forwarding contract, is obliged to ensure the transfer of goods, i.e. (in the broader sense) to transport the cargo, while the client is obligated to pay the agreed fee. Thus, the "species-specific" (in German: *Typusprägende*) obligation consists, on the one hand, of the forwarder's task of moving the cargo and of the client's payment[7] on the other.

However, e.g., Section 454 (1) of the German Commercial Code[8] outlines the obligation of transportation, stating that it includes the organization of transportation.[9] At the same time, commentary literature referencing court practices discusses the meaning of organization of transportation. This is key in assessing the freight forwarder's obligations, potential breaches and resulting liability.

In this context, particular attention is given to selecting the means and the route for transporting the goods, choosing the enterprises (or individuals) that will transport them, determining the content of contracts to be concluded with them, as well as organizing and ensuring the implementation of mechanisms for securing the client's right to claim compensation for damages.[10]

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[5] P. Jung, *Handelsrecht*, München 2023, § 45 Rn. 11.

[6] For instance, when a customer removes property from a warehouse.

[7] C.-W. Canaris, K.-H. Capelle, *Handelsrecht*, München 2000, § 33 Rn. 69.

[8] German Commercial Code, 1861, https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.pdf (access: 5.3.2025).

[9] C.-W. Canaris, K.-H. Capelle, *op. cit.*, § 33 Rn. 69.

[10] I. Koller, [in:] *Handelsgesetzbuch. Kommentar*, eds. I. Koller, P. Kindler, W.-H. Roth, K.-D. Drüen, München 2019, § 453 Rn. 2.

One of the key issues concerning the seamless and unharmed delivery of goods to the consignee is determining who bears responsibility, for what, and to what extent. Applying a complex set of legal norms and provisions regulating various interrelated institutions must delineate the liability framework of the parties involved in this chain, including the freight forwarder. The most significant participant in transport law is the transport enterprise in its broadest sense, which may take on multiple roles. This includes the freight carrier, who is directly responsible for transporting the cargo, as well as the freight forwarder, who assumes responsibility for arranging the transportation of goods on behalf of another party, either in their name or another's, thereby organizing the entire process.[11] Thus, the freight forwarder is fundamentally responsible for organizing transportation, either in full or in part, within the logistical chain. Consequently, a freight forwarding contract is essentially a contract for the organization of transportation. From a legal-dogmatic perspective, distinguishing it from the carrier's functions and obligations is crucial.

Thus, the classification of a traditional freight forwarder versus a carrier forwarder remains a highly relevant issue in determining legal liability. With the continuous development of transport law, both internationally and within domestic legal frameworks, this distinction has become a subject of ongoing and often contradictory discussions.

As the scope of freight forwarding expands alongside the growth of multimodal transport, legal practice has shown a trend toward the assimilation of forwarding and transportation contracts. This process of blurring the boundaries between these two contractual legal relationships is evident. Yet, from the legal dogmatics perspective, such an approach is unjustified, as it leads to a fundamental overlap of liability regimes. Accordingly, this study aims to examine the generalized, universal criteria that, despite the individualistic nature of domestic regulatory frameworks, establish a unified distinction between the roles and responsibilities of carriers and freight forwarders. Ultimately, this differentiation creates the foundation for the proper classification of freight forwarders and carriers as two independent paradigms and for defining the corresponding legal liability regimes that apply to each.

The primary focus of this study is the comparative analysis of the legal institutions of freight transport and freight forwarding, the assessment of their defining legal criteria, the determination of the rights and obligations of the parties involved, the delineation of the scope of contractual freedom, and the correlation of legal liability.

A key emphasis in the research was put on analyzing the "supra-national" soft law instrument – FIATA – which applies supranational approaches to the proper classification of freight forwarders and carriers. In the context of unified approaches, the study also examines the Georgian regulatory model, analyzed through the teleological extension of its parent legal system – German commercial law. Accordingly,

[11] Idem, *Transportrecht*, München 2013, Rn. 4.

the study's methodological foundation relies on the use of historical-dogmatic and comparative legal research methods.

This study is based on doctrinal and dogmatic analysis of legal categories of freight forwarding and carriage of goods. The first part is descriptive and represents a historical analysis of the unification process conducted in the field of transport law and legal assessment of FIATA regulations. The second part, using the comparative method, consists of a legal analysis of Georgian and German legal regimes and focuses on qualifying prerequisites of contracts for freight forwarders and carriage of goods. The comparative method is essential for the appropriate interpretation of legal institutions of Georgian law in the context of soft law uniform regulations and German law.

To fully grasp and better understand the legal nature of the institutions within transport law and the specific norms regulating these relationships, it is essential to thoroughly study the legal framework of the reference jurisdiction – in this case, German law. It is crucial as well to emphasize that understanding an isolated foreign legal norm is insufficient. Instead, a comprehensive and systemic interpretation of the entire body of legal provisions must be applied. This approach ensures an accurate perception of the underlying principles of domestic law, utilizing teleological methods of interpretation to capture its true intent and purpose.

RESEARCH AND DISCUSSION

1. Attempts for unifying the regime of responsibility for forwarding agents

In 1965, the International Institute for the Unification of Private Law – UNIDROIT – presented a Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods. The purpose of the Draft Convention was to unify the conceptual differences between the German and French legal systems on the separation of liability between the "forwarding agent" and the carrier.[12] The draft proposed the liability of the forwarder as a carrier where they agreed to accept the carriage "at a fixed rate" (Article 23) and/or consolidated the accepted cargo for shipment by one or another means of transport (Article 24) and/or issued a transport bill of lading (Article 25).[13]

[12] See M. Poliak, E. Salamakhina, *Comparison of the Multimodal Transport Operator's and a Freight Forwarder's Liability Limit in International Transport: Case Study*, "Scientific Journal on Transport and Logistics" 2023, vol. 14(1), p. 69.

[13] J. Ramberg, *Unification of the Law of International Freight Forwarding*, "Uniform Law Review" 1998, vol. 3(1), p. 8.

According to the proposed draft, where the forwarder was qualified as a carrier under Articles 23, 24 or 25, his liability would already follow the principle of French law, a kind of *del credere*, and would include liability for the forwarder's subcontractors, including the carriers. Thus, the scope of the "carrier forwarder's" liability vis-à-vis the customer would be expanded to include liability for the subcontractors, and this would be called extended "network liability". Hence, if damage occurred in any segment of the shipment, the forwarder would be obliged to pursue claims against the subcontractors in their name, just as the customer would pursue claims against the forwarder.[14]

If the damage was directly attributable to the forwarder or their assistant (Article 12) (and not to the carriers), then the presumption of fault (Article 15) applied and the forwarder had to prove the circumstances excluding their presumed fault (Article 15), while the liability of the forwarder itself, if it was not covered by the carrier's liability, had to be assessed by the standard of conduct of a diligent agent. The forwarder, within the scope of their agent's activity (and not within the scope of the carrier's liability), could avoid liability if they exercised due diligence in the selection of subcontractors and in the issuance of appropriate instructions (i.e. liability *culpa in eligendo vel custodiendo*,[15] Article 13.1).[16]

The UNIDROIT Draft Convention was never presented at a diplomatic conference, and this effort at unification proved unsuccessful and utopian, largely due to the opposition of the International Federation of Freight Forwarders Associations (FIATA[17]).[18]

Freight forwarders particularly objected to the extended ("network") liability regime of the freight forwarder and the criteria for qualifying as a carrier proposed in the UNIDROIT Draft Convention. In particular, the criteria for fixed price and cargo consolidation were not shared at a unified level. It was deemed unacceptable to impose carrier liability on the freight forwarder based on the "fixed price" criterion since the tariff was intended to inform the customer, and freight forwarders

[14] *Ibidem*.

[15] B. Kmieciak, *Selected Elements of Roman Law as an Inspiration for a Modern Psychological and Legal Interpretation Regarding Human Responsibility for a Committed Act*, [in:] *World Conference on Future Innovations and Sustainable Solutions*, eds. Y. Tsekhmister, O. Prokopenko, vol. 1, Lodz 2024, p. 5; F. Smeele, *Legal Conceptualisations of the Freight Forwarder: Some Comparative Reflections on the Disunified Law of Forwarding*, "Journal of International Maritime Law" 2016, vol. 21(4), p. 14. See also Article 6.1.2 of FIATA Model Rules for Freight Forwarding Services, 1996.

[16] J. Ramberg, *Unification…*, p. 9.

[17] FIATA unites representatives of 150 countries in the field of forwarding and logistics. See M. Mindur, L. Mindur, *The Influence of the Selected International Organizations on the Development of Transport*, "Scientific Journal of Silesian University of Technology Series Transport" 2023, vol. 119, pp. 171–187.

[18] M. Poliak, E. Salamakhina, *Ensuring Fair Compensation: Analyzing and Adjusting Freight Forwarder Liability Limits*, "Logistics" 2024, vol. 8(2), p. 4.

were not obliged, based on contractual freedom, to disclose the components of the fixed price for the service. As for the rejection of the cargo consolidation criterion, according to experts, the transformation of the forwarder's liability into the carrier's liability based on cargo consolidation would cause practical difficulties if the contract concluded with the customers/consumers concerned and included only a part of the total shipment – the consolidated cargo.[19]

The reason for not adopting the UNIDROIT Draft Convention was also that the idea of adopting a convention on multimodal, combined transport[20] was on hold, and at the time, it was considered more reasonable to wait for the development of legislation on multimodal (combined transport) shipments before tackling such a complex issue as determining the scope of a forwarder's liability.[21]

It is noteworthy that freight forwarders issued the first version of the FIATA Combined Transport Bill of Lading (FBL) in 1971.[22] According to the FIATA definition, an FBL is a document inherent in transportation, a consignment note,[23] when its issuer assumes a direct obligation to the owner of the cargo for the safe transportation of

[19] J. Ramberg, *Unification…*, pp. 8–9.

[20] Draft Convention on International Combined Transport of Goods (TCM), which was developed in Rome in 1970 within the framework of the Second Round Table, was amended by IMCO/ECE in Rome in 1971 and the Draft Convention has not yet been adopted. See The Development of Combined Transport Documents, Chp., in: C.-J. Cheng, *Clive M. Schmitthoff's Select Essays on International Trade Law*, Dordrecht–Boston–London 1988, p. 369. Due to an insufficient number of ratifying countries, the Convention has not entered into force – United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en (access: 5.3.2025). See M. Poliak, E. Salamakhina, *Comparison…*, p. 69. See also H.R. Parhammehr, I. Zeajeldi, *The Role of FIATA Multimodal Transport Bill of Lading in Business Exchange in International Transport*, "Social Sciences" 2016, vol. 11(12), p. 3151.

[21] J. Ramberg, *Unification…*, p. 9.

[22] C.-J. Cheng, *op. cit.*, p. 372. The most commonly used multimodal transport bill of lading in the world, along with the FIATA FBL, is MULTIDOC 95/2016, which was developed by the Baltic and International Maritime Council (BIMCO) on the basis of the UNCTAD/ICC Multimodal Transport Documents Rules in 1991 (see M. Poliak, E. Salamakhina, *Comparison…*, p. 70). The MTO liability limit specified in the FBL and MULTIDOC 95/2016 standard conditions is identical to the liability limit recommended by the UNCTAD/ICC rules and, therefore, the amount of liability for most MTOs worldwide is uniform. See M. Faghfouri, *International Regulation of Liability for Multimodal Transport*, "WMU Journal of Maritime Affairs" 2006, vol. 5, pp. 95–114; M. Poliak, E. Salamakhina, N. Lakhmetkina, N. Zhuravleva, *Comparison of Freight Forwarder Liability in Selected Countries of the European Union and Selected Countries of the Commonwealth of Independent States (CIS)*, "IOP Conference Series: Materials Science and Engineering" 2022, vol. 1247, p. 80.

[23] Along with FIATA combined transport consignment notes, a CMR consignment notes are also widely used in international practice for road transport. See J. Drevinskaitė, S. Mackevičiūtė, G. Sorakaitė, S. Jankauskaitė, *Peculiarities of CMR Documentation in International Freight*, "Rezekne Academy of Technologies" 2019, pp. 31–32. For international road transport, a CMR consignment note is required, the advantage of which is that it is recognized by all executive officers of the countries party to the CMR agreement. See *ibidem*, p. 28.

the cargo.[24] Thus, an FBL is a combined, multimodal transport document used by international freight forwarders who are multimodal transport agents (in the sense of principal freight forwarders). If the aforementioned document is issued by a freight forwarder, then they are considered a combined transport operator (MTO),[25] assume the responsibility of the carrier for transportation,[26] and lose the status of an agent freight forwarder.[27] In this case, the multimodal transport operator freight forwarder is responsible not only for the delivery of the goods to the destination but also for the actions of all carriers and third parties hired by him to operate the transport.[28]

When the forwarder does not want to assume the responsibility of the carrier, then he issues documents such as a Forwarder's Certificate of Receipt (FCR[29]) or a Forwarder's Certificate of Transport (FCT[30])[31]. Thus, the criterion of the entity issuing the consignment note at a unified level has been determined as the main qualifying sign for the separation of the responsibilities of the forwarder and the carrier.[32]

2. FIATA's unified approach and expansion of the freight forwarder's contractual autonomy in determining the liability regime

In the absence of unification of forwarder liability schemes at the conventional level,[33] the contractual autonomy of the forwarder concerning the issue of determining the liability regime has been expanded, of course, within the framework

[24] FIATA Secretariat Press Release PR70/5, 14 September 1970. Other types of unified bills of lading include the multimodal bill of lading prepared by the ICC in 1973 and the multimodal bill of lading proposed by the Institute of International Transport Law. See H.R. Parhammehr, I. Zeajeldi, *op. cit.*, p. 3150. The bill of lading, along with other important information, indicates from when the multimodal operator assumes responsibility for the cargo. See M.Z. Alireza, *1978 Convention on Sea Transport, Hamburg Laws*, "Journal of Law and Political Science at Tehran University" 1994, vol. 32, pp. 254–281.

[25] M. Poliak, E. Salamakhina, N. Lakhmetkina, N. Zhuravleva, *op. cit.*, p. 89.

[26] J. Drevinskaitė, S. Mackevičiūtė, G. Sorakaitė, S. Jankauskaitė, *op. cit.*, p. 32. See also M. Poliak, E. Salamakhina, *Comparison…*, p. 68.

[27] C.-J. Cheng, *op. cit.*, p. 373.

[28] H.R. Parhammehr, I. Zeajeldi, *op. cit.*, p. 3152.

[29] By filling out the FCR, the forwarder confirms that they have received the goods and, according to the legislative regulations, they are obliged to send them to the individual or company in the country where the document is forwarded. For more information, see *ibidem*. See also J. Drevinskaitė, S. Mackevičiūtė, G. Sorakaitė, S. Jankauskaitė, *op. cit.*, p. 32.

[30] This document was created by FIATA for use by freight forwarders. By issuing this certificate and delivering it to the shipper, the freight forwarder undertakes to deliver the goods to the consignee at the destination through the agent they (i.e. the freight forwarder) use for the carriage. See H.R. Parhammehr, I. Zeajeldi, *op. cit.*, p. 3152.

[31] J. Ramberg, *International Commercial Transactions*, New York 2000, pp. 170 ff., 486–487.

[32] See also L. Zhao, *An Analysis of Transport Documents*, [in:] *Current Issues in Maritime and Transport Law*, San Lazzaro 2016, pp. 1–28.

[33] On the difficulties of unification, see M. Poliak, E. Salamakhina, *Ensuring…*, p. 1.

of the imperative legislative provisions of a separate regulatory system. The above was expressed in the fact that, except for special cases when the forwarder must be subject to the liability of the carrier, they enjoy contractual freedom with the consumer in the part of determining liability. This contractual autonomy is realized by forwarders by defining liability limitation issues in their contracts or by adhering to standard rules developed by freight forwarder associations in a particular country.

Recognizing the need to diversify liability schemes and avoid heterogeneity, the FIATA Working Group initiated the development of model rules in 1994 for use in countries where unified standard conditions did not yet exist and which wished to be subject to a single international regime.[34]

The FIATA Reform Group encountered significant challenges in distinguishing between an agent freight forwarder and a principal freight forwarder, as well as in defining their qualifying characteristics. Since the concept of a "commission agent" was unfamiliar to common law countries, FIATA introduced standardized and generalized terms – agent freight forwarder and principal freight forwarder (i.e. assuming carrier liability).[35] The legal liability regime of a freight forwarder is unequivocal when the forwarder explicitly assumes the obligation to act as a principal under a contract concluded with customers and issues a transport document. In this case, the forwarder effectively joins the liability scheme of a carrier. Similarly, the situation is clear when the freight forwarder explicitly defines in the contract their status as an agent forwarder and explicitly excludes the carrier's and third parties' liability. However, complexity arises when the contract does not explicitly indicate the forwarder's intent to act as a principal, but such an intention may be implicitly derived from the freight forwarding agreement and inferred from specific additional functions and responsibilities undertaken by the forwarder. In such cases, it is necessary to assess whether, under the contract with the customer, the forwarder has implicitly assumed liability for the actions of the carrier and other third parties.

Thus, although in a broad sense, the activities of freight forwarders were subject to the general archetype of the classical Roman contract *mandatum*, a distinction should be made between three prototypes: the agent freight forwarder, which represents the classical,[36] chrestomathic form of transport forwarding;[37] the contracting carrier, when the freight forwarder assumes the responsibility of the carrier

[34] J. Ramberg, *Unification…*, p. 9.

[35] It is noteworthy that the German Freight Forwarders' Standard Terms and Conditions Act also recognizes these unified terms and the right of the forwarder to act in the role of agent or principal. See https://www.dbcargo.com/resource/blob/5635844/8403b6e33030af19b38b08a8e6285161/ADSp-complete-data.pdf (access: 5.3.2025).

[36] M. Poliak, E. Salamakhina, *Comparison…*, p. 68. The term "classical freight forwarder" is used.

[37] For example, see *Jones v European General Express* (1920), 4 Lloyds Law Reports, 127, cited in: J. Ramberg, *Unification…*, pp. 6–7. The term is also used in the UNIDROIT Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods.

without directly carrying out the carriage; the freight forwarder who carries – the performing carrier.[38]

Since the adoption of conventional supranational legislation proved to be utopian, the FIATA World Congress in Caracas in 1996, based on proposals submitted by the FIATA Working Group, adopted the FIATA Model Rules on Freight Forwarding Services. The Model Rules follow the French *del credere* system of liability, which means that the principal forwarder is directly liable to the customer for the contracts of carriage and other services they concluded with third parties. Accordingly, the carrier's liability regime applies to the principal forwarder as provided in Article 7.3 of the FIATA Model Rules: The principal forwarder is liable for the acts and omissions of third parties whom they have engaged in the forwarding process to perform the carriage or other services in the same way as for their acts and omissions.

In this case, the norms of the legislation applicable to this type of transport and service shall apply, as well as direct agreements or, in the absence of such an agreement, the usual rules characteristic of transport or service. In the case of a principal forwarder, Article 396 of the Georgian Civil Code shall apply, according to which the debtor shall be liable for the actions of their legal representative and those persons whom they use to fulfil their obligations to the same extent as for their own wrongful actions. The principal forwarder is responsible for the performance of ancillary obligations. According to Article 7.2 of the FIATA Model Rules, a forwarder is liable as a principal for services other than the carriage of goods such as, but not limited to, storage, processing, packaging or distribution of goods, as well as for other additional services related to the above functions, if (1) such services are performed by them, themselves, using their facilities or employees, or (2) they have undertaken an explicit or implied obligation to act as a principal.

When acting as an agent forwarder, the forwarder's liability is based on the obligation to exercise due diligence and reasonable measures in the performance of the service (Article 6.1.1 of the FIATA Model Rules), which does not extend to him the extended liability of the carrier. In addition, the forwarder's liability is limited to direct damage caused by loss of or damage to the goods.[39] The agent forwarder is not liable for the acts or omissions of third parties, i.a., carriers, warehouse-keepers, port handlers, port authorities, and other freight forwarders, unless they have not exercised due diligence in selecting, instructing or supervising such third parties (Article 6.1.2 of the FIATA Model Rules).

[38] J. Ramberg, *Unification…*, p. 6.

[39] FIATA 8.1. Article (3).

3. Georgian model of freight forwarder liability

Georgian legislators, similar to the German and many other legal systems, allowed for expanding the liability of the forwarder and transforming it into the liability of the carrier, although with certain differences.

The main obligations of the freight forwarder, similar to the German Commercial Code in Georgian legislation, are to organize[40] the transportation of cargo, select the necessary means of transport, conclude necessary transactions with third parties, and ensure the customer's rights to claim compensation for damages.[41] Beyond the basic obligations, other functions and duties may be directly or implicitly agreed upon with the customer within the framework of contractual freedom, such as, e.g., cargo packaging, insurance, purchasing air tickets, arranging customs documentation,[42] organizing the procedure, etc.[43] Within the framework of contractual autonomy, it is also possible to agree on an additional obligation with the customer, such as transporting the cargo by one's means,[44] which does not directly constitute a formal qualifying feature of transport expedition, but unless the agreement of the parties indicates otherwise, direct transportation of the cargo can also be included in the scope of the functions and duties of the forwarder.

According to Article 739 of the Georgian Civil Code ("Right to Transport Cargo by Own Power"), "1. Where there is no other agreement, the forwarder has the right to transport cargo in their own power. The exercise of this right must not contradict the rights and interests of the customer. 2. Where the forwarder exercises this right, then they simultaneously have the rights and obligations of the carrier of the cargo". From the definition of the above-mentioned norm, it is clear that the freight forwarder can carry out the transportation of cargo by their power, where the agreement of the parties does not indicate the opposite will. Thus, the legislator considers the case of transportation of cargo by their own means/forces to be the only option for transforming the freight forwarder's liability into the liability of the carrier. In this constellation, the forwarder's obligation is not to organize the shipment of the cargo but to directly carry out the transportation within its organizational control and order,

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[40] Đ. Stojanović, M. Veličković, *op. cit.*, pp. 132–142.

[41] German Civil Code § 454 (2). See K.-H. Ebenroth, D. Boujong, C. Bahnsen, *Handelsgesetzbuch: HGB Kommentar*, München 2024, § 454, Rn. 5-33.

[42] K.-C. Shang, C.-S. Lu, *Customer Relationship Management and Firm Performance: An Empirical Study of Freight Forwarder Services*, "Journal of Marine Science and Technology" 2012, vol. 20(1), p. 64.

[43] N. Nurwahyudi, E. Rimawan, *Analysis of Customer Satisfaction in Freight Forwarder Industry Using Servqual, IPA and FMEA Methods*, "Pomorstvo. Scientific Journal of Maritime Research" 2021, vol. 35(1), pp. 109–117.

[44] M.A. Krajewska, H. Kopfer, *Collaborating Freight Forwarding Enterprises*, "OR Spectrum" 2006, vol. 28, pp. 301–317.

i.e., within the scope of responsibility. In the case of acting as a forwarder (purely, according to the FIATA concept – agent forwarder), after the cargo is handed over to the carrier by the forwarder, it leaves the scope of control of the forwarder and passes into the scope of responsibility of the carrier. It is at this stage that the forwarder has the right to demand the agreed provision from the customer. In particular, the area of responsibility of the forwarder is well defined by Article 743 of the Civil Code, according to which the provision must be paid after the forwarder hands over the cargo to the transport organization.

Thus, in the Georgian model, in the case of a classic forwarder[45] (agent forwarder), i.e., when the freight forwarder does not directly carry out the transportation (unlike Article 739 of the Civil Code), the limits of the liability of the forwarder and the carrier are clear. This is also clearly confirmed by the fact that, according to Article 18 (1) of the Montreal Convention, the carrier is liable for damage caused in the event of destruction, loss, or damage to the cargo only on condition that the event causing this damage occurred during air transportation. According to para. 3 air transportation, within the meaning of para. 1 of this Article, includes the period during which the cargo is under the protection[46] of the carrier.

Thus, the carrier is considered a third party within the meaning of Article 741 of the Civil Code, for whose actions the forwarder is not liable. More precisely, in the case of acting as an agent forwarder, the forwarder is responsible for the selection of a professional and reputable carrier and other third parties[47] (*culpa in eligendo*),[48] but is not liable for their work unless this is provided for by the contract.[49] "The forwarder has the right to demand compensation for damage caused by their actions from a third party when they are in a contractual relationship with them. The forwarder must transfer the right to claim against the third party to the customer; however, for this, the latter's request for the transfer of the right is required".[50]

Thus, the carrier selected by the forwarder is a third party within the meaning of Article 741 of the Civil Code, unlike the regulated agent under Article 730 of the

[45] M. Poliak, E. Salamakhina, *Comparison…*, p. 67.

[46] See J. Drevinskaitė, S. Mackevičiūtė, G. Sorakaitė, S. Jankauskaitė, *op. cit.*, p. 31.

[47] P.D. Fanam, H. Nguyen, S. Cahoon, *An Empirical Analysis of the Critical Selection Criteria of Liner Operators: The Perspective of Freight Forwarders*, "International Journal of Shipping and Transport Logistics" 2018, vol. 10(5–6), p. 567.

[48] B. Kmieciak, *op. cit.*, p. 5; F. Smeele, *op. cit.*, p. 14. See also Article 6.1.2 of FIATA Model Rules.

[49] R. Brnabic, *Peculiarities of the Forwarding Contract*, [in:] *Economic and Social Development. 16th International Scientific Conference on Economic and Social Development "The Legal Challenges of Modern World"*, eds. Z. Primorac, C. Bussoli, N. Recker, Croatia 2016, p. 138.

[50] S. Gabichvadze, *Some Issues of the Legal Regulation of Transport Expedition*, "Justice and Law" 2014, vol. 3(42), pp. 131–132 [in Georgian]. See also G. Tsertsvadze, *Commentary to Georgian Civil Code*, Tbilisi 2016, Article 74 [in Georgian].

Civil Code, for whose performance the forwarder is not liable.[51] It is noteworthy that the same regime of liability for third parties is provided for carriers under Article 16 of the Convention on the Contract for the International Carriage of Goods by Road.[52] The consignor forwarder is not liable for damage caused by the carrier or the actual carrier, including damage caused by the ship, excluding cases where the loss of or damage to the cargo was caused by the fault of the consignor, their assistants, or their agents. Neither the assistants nor agents of the forwarder are liable for damage for which they are not at fault.[53]

Similarly, according to the FIATA Model Rules, "the freight forwarder shall not be held liable for the acts or omissions of third parties (carriers, warehouse owners and workers, port authorities, other freight forwarders) if the freight forwarder has shown due diligence and responsibility in selecting such third parties, in entrusting them with the task and in supervising the task entrusted to them"[54] (*culpa in eligendo*).[55]

In conclusion, in Georgian law, where the forwarder does not directly transport cargo by their own forces, then they are considered, in the unified sense of FIATA, an agent forwarder, whose liability is strictly separated from the liability of the carrier. The only case in Georgian law when the liability of the forwarder can be extended to the liability of the carrier, i.e. equated with the concept of the principal forwarder defined by FIATA, is the construction of the transportation of cargo by the forwarder by their own forces. Also, in the transnational space, another distinction and qualifying criterion of the carrier's liability operates: the issuance of a consignment note, which is considered an unconditional indicator of the carrier's liability.

CONCLUSIONS

At a unified level, no consensus was reached among the states to consider the criteria for qualifying a carrier as "fixed price" and "consolidation of cargo", which were proposed in Articles 23 and 24 of the UNIDROIT Draft Convention. For this

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[51] K.-H. Ebenroth, D. Boujong, C. Bahnsen, *op. cit.*, § 461 Rn. 1. See also UNCITRAL, *Modern Law for Global Commerce. Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission, Vienna, 9–12 July 2007*, New York 2011, https://cisg-online.org/files/commentFiles/UNCITRAL_Modern-Law-for-Global-Commerce_2011.pdf (access: 5.3.2025), p. 258.

[52] Adopted on 19 May 1956, came into force for Georgia on 2 November 1999.

[53] Article 12 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

[54] P. Kopaleishvili, *Main Constructions of the Transport Expedition Contract*, "Journal of Law" 2018, vol. 1, p. 220 [in Georgian].

[55] F. Smeele, *op. cit.*, p. 14.

reason, FIATA introduced more unified criteria to separate the responsibilities of the forwarder and the carrier, which would be free from national regulatory barriers. The German Commercial Code, unlike many other legal systems, recognized the criteria for fixed price and cargo consolidation at the normative level by regulating them.

In particular, the German Commercial Code provides for three cases when there is a deviation from the classic liability regime of the freight forwarder; these are cases when (1) the freight forwarder carries out the transportation himself[56] (Section 458), (2) if a fixed amount is offered as compensation for the freight forwarder, which also includes transportation costs (i.e. the fixed fee does not include the transportation cost of the shipment (Section 459), (3) if the freight forwarder has consolidated the received cargo to send/transport it by one or another means of transport.[57]

Of the above three normative cases, when the carrier's liability should extend to the forwarder, the Georgian legislator abandoned the criteria of fixed price and cargo consolidation and in domestic legislation (Article 739 of the Civil Code) reinforced the main qualifying feature of the liability of a regulated carrier, Section 458 of the German Commercial Code – the transportation of cargo by their own means.

Thus, the above criteria for determining the carrier's liability can only be used when domestic legislation supports these criteria at the legislative level, since these characteristics are not dogmatic, doctrinal criteria and cannot be unconditionally used to determine the carrier's liability.[58]

Hence, clearly, under Georgian law, the carrier's liability regime may apply to a freight forwarder where the freight forwarder transports the cargo. In addition to the cases directly regulated by Georgian law, according to the broad interpretation of Article 7.2 of the FIATA Model Rules, a freight forwarder can still be considered a carrier under Georgian law, where they have implicitly assumed liability for the actions of the freight forwarder. Although FIATA regulations are recommendatory, their purpose is the function of interpreting the norm and a source of knowledge of the law.[59]

Therefore, the FIATA norms can be addressed substitutionally by the judge in legal reasoning and interpretation of domestic institutions. In addition, in terms of establishing the regime of liability of the forwarder and the carrier in the conditions

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[56] M. Schwonke, [in:] *Der Haftpflichtprozess*, ed. K. Haag, München 2024, chapter 28, para. 205.

[57] See I. Koller, [in:] I. Koller, K.-D. Drüen, P. Kindler, S. Huber, *Handelsgesetzbuch: HGB Kommentar*, München 2023, § 460, Rn. 2; P. Bydlinski, H. Valder, *Münchener Kommentar HGB*, München 2023, § 460, Rn. 1, Rn. 5. German commentary explains that in the case of consolidated or groupage cargo (*Sammelladung*), a hybrid form of forwarding and transportation is present. See I. Koller, [in:] I. Koller, K.-D. Drüen, P. Kindler, S. Huber, *op. cit.*, § 460 Rn. 1.

[58] M. Schwonke, *op. cit.*, chapter 28, para. 205.

[59] On comparative law as a method of independent universal interpretation of norms, see J. Häberle, *Das Konzept der Verfassungsbeschwerde und die Entwicklung der Verfassungsgerichtsbarkeit in Deutschland*, "JuristenZeitung" 1992, p. 1036.

of deregulation of the forwarder's liability at the conventional level, the regulation of the issue of separation of the functions and duties of the forwarder from the liability of the carrier by the subjects of civil turnover within the framework of contractual autonomy has a crucial role. The importance of private autonomy, based on the spirit of the principles of unified and soft law, may be relevant not only in Georgia but in any European legal order as well.

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ABSTRAKT

Prawo transportowe cechuje się metodologiczną ambiwalencją. Obejmuje bowiem różnorodne instytucje i stosunki prawne pozostające ze sobą w ścisłym powiązaniu. W demokratycznych państwach zachodnich nie istnieje jednolity akt prawny, który kompleksowo regulowałby całość relacji transportowych. Z tego względu w doktrynie mówi się o „fragmentarycznym" charakterze tej gałęzi prawa, która reguluje stosunki objęte odmiennymi reżimami prawnymi, aczkolwiek powiązanymi i zbliżonymi co do istoty. Prawo transportowe funkcjonuje na kilku poziomach. Pierwszym z nich jest poziom krajowy. Podstawowe umowy stanowiące fundament prawa transportowego uregulowane są w kodeksach cywilnych i handlowych. Następny poziom stanowią regulacje ponadkrajowe, w szczególności prawo Unii Europejskiej. Artykuł poświęcony jest z jednej strony analizie uogólnionych kryteriów kwalifikujących umowy spedycji i przewozu na podstawie Jednolitego Aktu FIATA, a z drugiej badaniu modeli regulacyjnych prawa gruzińskiego i niemieckiego pod kątem ich zgodności oraz harmonizacji z jednolitymi standardami. Zbadanie wspomnianych kryteriów na poziomie ponadkrajowym ma istotne znaczenie praktyczne dla rozróżnienia funkcji i obowiązków przewoźnika oraz spedytora, a także dla określenia właściwych reżimów odpowiedzialności prawnej. W opracowaniu omówiono również międzynarodowe inicjatywy zmierzające do unifikacji odpowiedzialności spedytorów oraz wskazano na potrzebę poszerzenia autonomii kontraktowej na poziomie ujednoliconym w kontekście deregulacji odpowiedzialności spedytora.

Słowa kluczowe: spedytor; przewoźnik; FIATA; odpowiedzialność; spedytor jako zastępca; spedytor jako zleceniodawca