

# THE COMPARISON OF FORWARDING CONDITIONS IN COUNTRIES WITH A CIVIL LAW SYSTEM

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## Abstract

The issue of creating international legislation capable of regulating the sphere of forwarding has been considered for quite a long time. The actively expanding volume of services provided by freight forwarders and the increasing blurring of its role and area of responsibility create problems in the mutual understanding of the participants in the client– forwarder – third party chain. The main obstacle to the implementation of an international legislative act is the difference in the laws and customs of individual countries. To identify these differences, the authors analyzed such factors as the range of services provided by the forwarder, the conditions of access to the forwarding market, the type of representation used by forwarders in the contract and the definition of the boundaries of the forwarder's responsibility to the client. The analysis was carried out by studying national legal acts regulating the field of forwarding, as well as the general conditions of forwarding applied by members of national associations of forwarding and logistics in countries with a civil law system. The greatest difference was revealed in the field of conditions of access to the forwarding market, while the functionality of the forwarder, the types of representation used and the limits of responsibility of forwarders from different countries did not indicate any big differences. The result of the work is the conclusion that there are no critical differences in the work of freight forwarders of countries with a civil law system that can hinder the unification of forwarding conditions.

**Keywords:** freight forwarding law; freight forwarding conditions; transport law

## 1. Introduction

The traditional role of the freight forwarder is the organization of cargo movement, usually in international trade, and ensuring operations related to cargo movement [18]. However, traditional freight forwarding companies are gradually turning into logistics service providers who work in very tough market conditions, constantly striving to make their work competitive

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and profitable, which means a change in the generally accepted understanding of the role of the forwarder [7].

Unlike the sphere of cargo transportation, forwarding activities are not regulated by general international legislation [13]. The unification attempt carried out in 1967 by UNIDROIT (the International Institute for the Unification of Private Law) was unsuccessful, which left the issue of unification of the forwarder's activities open [16].

The diversity of legislation is an obstacle to trade between countries, which is a reason to consider the possibility of unification of laws. Given that unification implies the replacement of local rules by common ones, local customs and traditions may be eliminated during its implementation [4].

This factor may slow down the implementation of international legislation due to the unwillingness of individual states to radically change their usual foundations. The way to overcome this obstacle can be the creation of an international legislative act that will not be aimed at completely replacing the local rules of different countries, but only at bringing these rules to a common solution and standardization. When it comes to creating common legislation capable of regulating the activities of freight forwarders from different countries, it is necessary to consider all the nuances of forwarding activities and combine them into one legislative act.

The doctrine of representation in civil and common law systems emphasizes two separate subsystems: The European continental and Anglo-Saxon systems. In the European legal system, the "doctrine of representation" is based on direct and indirect representation. Indirect representation is expressed in performing actions on behalf of the other party (the principal) on its own behalf, but at the expense of the principal. On the contrary, direct representation presupposes activity on behalf of and at the expense of the other party (the principal). In addition, there is an undisclosed principal doctrine in the common law system, which is not applied in the civil law system. In essence, this doctrine contains the fact that the presence of another person (principal) in the transaction at the time of negotiation is an unknown fact for a third party [20].

It can be seen that if a general legislative act regulating forwarding is created, one of the parties will be forced to make significant sacrifices – or countries with a common law system will be forced to abandon the role of undisclosed principal, the use of which is prohibited in civil law countries, and in addition will be forced to add an element of indirect representation to their legislative system, or vice versa – countries with civil law will need to change their approach to representation in some way. It is likely that this dilemma will eventually be resolved, but at the moment it is quite a difficult task.

Taking into account this factor, as well as the fact that the authors of this study are working on the problems of combining forwarding conditions primarily in the countries of the European Union, it was decided to devote this article to the analysis of forwarding conditions in countries with a civil law system.

The purpose of the article is to determine the status of the forwarder in the client–forwarder–third party chain in selected countries with a civil law system. To determine this status, an analysis of the functions of the forwarder, access to the forwarding market, the contract of representation of the forwarder used and the range of his responsibility to the client was carried out.

## 2. Freight forwarder's functions

Research specifies that freight forwarding is a service related to the processing of a shipment, packaging, transportation, storage, consolidation. In addition to direct work with the consignment, the forwarder provides services such as customs and tax clearance, work with documentation, etc. The freight forwarder also provides customers with special services, including preparation of documents, reservation of ship / air space, transportation of the consignment from the point of departure to the place of destination, customs process, information related to the applicable regulation, insurance process, letters of credit and others [11].

Reducing the number of delays in the delivery of parcels and the time of transportation in general makes it possible to significantly reduce the cost of transport services. This is also facilitated by the choice of the optimal transport route and commercial discounts on transportation and insurance tariffs provided by the freight forwarder [2].

In order to compete successfully, freight forwarders are increasingly acting as actual or contractual carriers. In this case, in the forwarding contract, the forwarder is indicated as the carrier, regardless of whether he carried out the transportation on his own or with the help of third parties. An example of a contract carrier is a NVOCC (Non-Vessel Operating Common Carrier). NVOCC has become very popular in countries with common law systems. NVOCC operators purchase space from maritime carriers for consolidated shipments from various customers. Their work also includes services such as storage, handling of necessary documents, logistics planning [3]. Occasionally NVOCC owns a fleet of containers and in some situations lease containers as freight forwarders [15].

If the freight forwarder acts as a Multimodal Transport Operator by issuing FBL (Negotiable FIATA Multimodal Transport Bill of Lading) created by the FIATA (International Federation of Freight Forwarders), its status as a carrier in the contract is binding [12].

Based on the provisions of civil law, UNCTAD (The United Nations Conference on Trade and Development) divided all freight forwarders into:

- freight forwarders – principals;
- freight forwarders – commission agents;
- freight forwarders – warehouse owners, cargo custodians;
- freight forwarders – lessors of container–trailer park;
- freight forwarders – carriers [9].

This division allows you to bring the functions of freight forwarders to certain categories, which helps to see the overall picture of the forwarder's activities.

### 3. Access to the freight forwarding market

There is a lot of inconsistency in the field of access to the forwarding market in different countries. In Slovakia, only the forwarder has the right to conclude a forwarding contract on the basis of the commercial register or an extract from the Commercial Register in which the activity of the "forwarder" is indicated. Permission to carry out this activity is granted only after confirmation of professional qualifications determined by the trade Licensing Act of Slovak republic.

In accordance with the trade lock, to confirm professional qualifications, it is necessary to submit a document on:

- higher education in the field; or
- secondary education in the field and one-year experience in the field; or
- certificate of completion of an accredited training program in the field and two years of experience in the field [17].

The example of the French Republic should be referred to in the Transport code, which states that all freight forwarders must be entered in the Register of freight forwarders kept by the competent public services in matters of transport in the region where their company has its head office or, if this is not possible, its main establishment. Registration is announced by the prefect of this region and leads to the issuance of a certificate of registration. The various establishments of the company are listed in the Register of the region in which it is registered, as well as of each region in which its establishments are located. Entry in the Register of freight forwarders shall be subject to conditions of professional competence and professional integrity. Professional competence is justified by a certificate that must be owned by a person who ensures the permanent and effective management of either the company or its activities.

A certificate of professional competence is issued by the regional prefect to persons who meet one of the following conditions:

- possession of a higher education diploma with a certificate of legal, economic, accounting, commercial or technical education, which makes it possible to ensure the management of a forwarding company, or a diploma of education of Technical Education certifying training in transport activities;
- successful completion of the written exam;
- recognition of professional qualifications obtained in a member state of the European Union or in a state party to the agreement on the European Economic Area [10].

However, it should be taken into account that in some countries freight forwarding is not a licensed activity. One of these countries is the Russian Federation, where the law on licensing applies only to carriers. Entry into the forwarding market is completely free, both

legal entities and individual entrepreneurs can engage in this type of activity. Any company or individual entrepreneur can provide services for both domestic and international freight forwarding [8]. In this case, the legal status of the agent will determine only the type of contract and the services specified in it.

## 4. Representation in forwarding

As already mentioned, there is direct and indirect representation in the countries of the civil law system. In the Republic of Poland Article 794 of Act of 23 April 1964 Civil Code defines, that the freight forwarder may perform on his own behalf or on behalf of the commissioner

The PIFFA – Polish International Freight Forwarders Association, defines that the possibility of applying indirect or direct representation is duplicated:

- Freight Forwarder – a subject who professionally, against remuneration, in his own name but on the account of customer, or in the name and on account of customer, covenants to forward or receive goods, to organize partly or wholly the process of translocation of goods, or to render other services related to handling and translocation of goods [14].

The General Conditions of the Association of Freight Forwarders of the Republic of Belarus, developed in accordance with the legislation and international treaties of the Republic of Belarus define the status of the forwarder as follows:

- the freight forwarder as a representative of the client (direct representation), if during the performance of the freight forwarding contract in relations with third parties, he acts on behalf of and at the expense of the client. At the same time, the rights and obligations under the contracts concluded by the freight forwarder and related to the performance of the freight forwarding contract arise for the client.
- the freight forwarder as an independent acting person (indirect representation), if he acts on his own behalf in the performance of the freight forwarding contract in relations with third parties. The freight forwarder, as an independent acting person, is obliged to issue the appropriate forwarding document at the request of the client [19].

However, an exception can be seen in the example of the Republic of Slovakia – in accordance with the current legislation of the republic, the forwarder can only carry out indirect representation.

In accordance with General Freight Forwarder's conditions of Association of Logistics and Freight Forwarding of the Slovak Republic, which duplicate and supplement § 601/1 of the Commercial Code of the Republic of Slovakia, the freight forwarder means an entrepreneur who is holder of a license authorizing him to operate the trade "freight forwarding" based on the required legal qualifications for this profession as stated in the trade law. In operating this trade, he undertakes in the contract of freight forwarding to procure for his customer the transport of goods in his own name but on the customer's account from a certain place to another certain place [6].

## 5. Freight forwarder's liability

The freight forwarder's responsibility to the client may also vary depending on the accepted forwarding conditions.

The Nordic Association of Freight Forwarders (NSAB), whose members are Denmark, Norway, Finland and Sweden, defines the forwarder as a party to the contract (indirect representation). The freight forwarder, as a party to the contract, will be responsible for all the services rendered by him. The freight forwarder is also responsible for other parties to the contract, whom he has engaged in its execution on his behalf.

In addition, the role of the freight forwarder as an intermediary (direct representation) is determined – the freight forwarder as an intermediary is not responsible for participants other than his own employees.

It is separately noted that if an unambiguous agreement was reached on the use of a certain type of transport or if it was proved that the loss, depreciation, damage, or delay occurred during transportation by a certain type of transport, the freight forwarder will be liable in accordance with the legislation on this type of transport and generally accepted conditions of transportation [5].

In Turkey, the Standard Trading Conditions for Freight Forwarding and Logistics Services (UTIKAD) are widely used. They define the forwarder as Logistics Service Provider (LSP). Logistics Service Provider's description: In the field of freight transportation, the Logistics Service Provider (LSP) is the natural or legal person who has received the authorisation certificates or operating permits, in accordance with the applicable legislation, to have the goods transported on its own or its Customer's behalf and account by using the means, capabilities and capacities deriving from the services contracted on behalf of the Customer in the area of transport, storage, packing, labelling, packaging, order management, Customs, insurance, distribution, etc.

LSP's liability is limited as follows:

- the LSP shall perform or procure organisational and logistics services for the transportation of the goods with the necessary and reasonable attention and care.
- the LSP cannot be held responsible for the actions and possible negligence of the contracted suppliers and third parties, except if it is ascertained that the LSP has not selected them with the required diligence [21].

In the Czech Republic, in accordance with the General Conditions of Freight Forwarding of the Association of forwarding and logistics of the Czech Republic, the forwarder carries out only indirect representation. Freight forwarder shall be liable for a damage on the consignment taken over which has arisen in the course of arranging for the carriage, or, as the case may be, in the course of arranging for and/or performing services connected with the carriage, unless he proves that he could not either prevent it by exercising a needed care or minimize its extent. The freight forwarder shall not be responsible for the execution of the carriage

of the consignment arranged by him unless he has executed himself the carriage of the consignment that should have been arranged by him according to the Freight Forwarding Contract or, if appropriate, unless he has taken over contractual responsibility for the execution of the carriage of the consignment on the basis of an explicit agreement with the principal. In such a case, the freight forwarder shall be liable as a carrier in accordance with the relevant provisions [1].

## 6. Conclusions

The analysis showed the main differences in the interaction of the forwarder, the client and third parties.

The lack of unification of access to the forwarding market generates heterogeneity in the quality of services provided – while in some countries the position of a forwarder is available only to highly qualified specialists who can confirm their professional suitability, other countries provide forwarding activities to almost any interested person. In this regard, when creating international forwarding legislation, it is necessary to take into account this aspect.

As for the doctrine of representation, it can be observed that in countries with a civil law system, both direct and indirect representation is used almost everywhere in forwarding, which gives reason to believe that there is no need to change anything in this matter. The actual solution will be to fix both options of representation in the legislative act.

It is possible to observe a pattern in how the responsibility of the forwarder changes, depending on the type of representation – as a rule, indirect representation of the forwarder implies his responsibility for all stages of transportation, including the actions of third parties, whereas direct representation limits the responsibility of the forwarder. In the case of direct representation, the forwarder is responsible only for the actions of his and his employees. However, there is an exception, as in the example of the responsibility of a freight forwarder accepting the general forwarding conditions of the freight forwarders association. In this case, the freight forwarder is not responsible for the actions of third parties, regardless of the type of his representation.

The issue of legislative consolidation of the functions of the forwarder remains open due to its wide range. In addition, it is possible to expand the functions in the future, taking into account the development of technologies and changes in legislation related to the transportation process.

The analysis indicated both the difference and the similarity of the working conditions of freight forwarders of the selected countries with the civil law system. In our opinion, the identified differences are not a critical obstacle to the standardization of forwarding conditions at the international level.

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