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Some Considerations on Flexibility of Carrier's Liability in OHBLA Law

Monkam Cyrille *

ABSTRACT

The article examines the flexibility of carrier's liability under OHBLA Transportation Law. The analysis appears to show that a carrier under strict or presumed liability may enjoy a large number of exemptions that may be classified under classic and modern defences, on the condition that he acts fairly and honestly in performing the contract of carriage. Fairness and honesty are expressed under the good faith principle. A contrary attitude – i.e., performance in bad faith – is sanctioned by excluding the carrier from the benefits of the various exemptions. The assessment of this unscrupulous behaviour on the part of carrier is the responsibility of judges who determine for each individual claim whether the carrier's behaviour constitutes wilful misconduct or gross negligence. As examiners of the carrier's attitude, judges play a major role in establishing security and justice in contracts of carriage. By setting up a flexible liability regime, the OHBLA Uniform Act is seen as a balanced instrument that sets up a compromise between the interests of carriers and cargo.

KEY WORDS

Flexibility, Carrier's Liability, Exemption, Good Faith, OHBLA Law

1. Introduction

In 2003, the OHBLA¹ legislator adopted a Uniform Act on Contracts of Carriage of Goods by Road, also known as AUCTMR.² A considerable part of this instrument is dedicated to carrier liability.³ In fact, as stipulated by Article 16, the carrier is responsible for the delivery of goods and is liable for total or partial loss, for damage of the goods if the loss⁴ or damage arose during transportation, and for the exceedance of the delivery deadline. It appears in principle that the carrier is strictly liable for delay or any damage to or loss of goods that occurs during the period of transport in OHBLA space. The carrier remains responsible for the cargo entrusted to it by the sender throughout the entire duration of the carrier's custody of the goods. He is bound to deliver the cargo.⁵ The OHBLA Uniform Act is, in terms of liability issues, a modernization and clarification of the current and well-known principles under the CMR Convention.⁶ The change in substance is minimal, with the exception of a few well-chosen deletions⁷ or amendments.⁸ This change in the legislating technique is in line with the philosophy of the OHBLA Treaty, which is to deal with the economic wellbeing of its member states and to attract foreign investment. These objectives may be achieved only if the legislator chooses fair and efficient strategies that

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¹ The Organization for the Harmonization of Business Law in Africa (OHBLA) is the English acronym for the OHADA, which stands for l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires. It was created by the Treaty of Port Louis in Mauritius on 17 October 1993. It has 17 members, as follows; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Guinea Conakry and Guinea-Bissau. The OHADA Treaty entered into force on 19 September 1995 in the member states. This historical milestone marked the creation of a uniform legal framework for commercial activities within the contracting states. Since then, the OHADA organization has been further strengthened by the Conference of Heads of State and Government in Québec, which took place on 17 October 2008.

² This Act, which was adopted in Yaoundé (Cameroon), entered into force on 1 January 2004 in the OHBLA member states. This Act, which contains 30 articles, provides rules for the drafting and execution of carriage contracts, the liability of parties and disputes.

³ Articles 16-23, AUCTMR.

⁴ According to Article 16 (3), the designated authority can consider the goods lost without further substantiation if they have not been delivered within 30 days after expiry of the agreed delivery deadline or, in the absence of such an agreement, within 60 days after the takeover of the goods by the carrier.

⁵ This type of obligation is known in the civil law system as an obligation of result, which is different from an obligation of means, where the debtor of the obligation is not required to produce a specific result.

⁶ This is the International Convention on Carriage of Goods by Road. The CMR Convention was signed on 19 May 1956 and entered into force on 2 July 1961.

⁷ For example, the exclusion of the "action of vermin or rodents" from specific defences.

⁸ For example, according to the Treaty, this Act is applicable to the domestic and international carriage of goods by road, contrary to the CMR Convention, which only deals with international road carriage.

will maintain the security and stability of the contract. The search for flexibility was a strategy employed by the legislator in the drafting of the Uniform Act on Contracts of Carriage of Goods by Road. This flexibility consists of balancing the strict or presumed liability system with certain measures able to alleviate the weight of the carrier's liability.

The purpose of this article is to investigate and verify whether OHBLA law recognizes the flexibility of carrier's liability, before exposing how the good faith principle, as a fundamental principle in contract law helps, to control this mechanism. This article will ask two questions. Firstly, given the presumed liability system applicable to carriers in OHBLA law, is there any remedy able to alleviate or balance carrier liability? Secondly, is this remedy automatically applicable without restrictions? In fact, due to its rigorous system of liability, the OHBLA legislator enables the application of the flexibility principle to the carrier in the case of claims filed during/after the performance of the carriage contract by granting defences and limitations of liability. However, the application of this principle is highly controlled by the judge who may, due to the unscrupulous attitude of the carrier, exclude him from that benefit. In its analysis of these two aspects, this paper is of relevance to all transportation actors, in the sense that it helps to highlight the connection between OHBLA transportation law and international practice, a connection which demonstrates the capacity of the said law to attract foreign investment. The paper will then analyse the acceptability of the flexibility principle in the carriage of goods by road (2) and the control of its application by courts in OHBLA space (3).

2. The recognition of exemptions from carrier liability in OHBLA law

In order to alleviate the weight of the presumed liability system, the OHBLA legislator decided to bestow upon the carrier certain defences through the Uniform Act on Contracts of Carriage of Goods by Road. Like all debtors bound by obligations of result, the carrier shall be liable *a priori* in the mere case that the promised result – the safe transport of goods – is not achieved. It follows that the law on contracts of carriage by road under the OHBLA spontaneously turned to a system of strict liability. This damage therefore needs to be repaired based on the sole fact of the non-performance of the carrier's obligation. This presumption cannot be irrefutable, because the carrier may escape liability if he proves that the breach of obligation is due to an unavoidable external factor. It would, however, be wrong to conclude that the carrier, due to the strict liability hanging over

him, remains responsible for the damage caused to the goods in every case.⁹ How can he escape from his responsibility under the AUCTMR? To mitigate the thoroughness of his responsibility, the legislature granted the carrier with possible exemptions. Indeed, Article 17, paragraph 4, states that “*the carrier is not liable [...]*” if he can “positively” demonstrate that the damage comes from general or specific causes of exemption. Exempt means being excused from an obligation to which one has been compelled. Limitation of liability used to be a complex topic, on which there has been a considerable amount of litigations.¹⁰ In fact, one might be tempted to say that if the cause of exemption is purely objective, no assessment of the carrier’s behaviour is required. In reality, and from a critical perspective, the intervention of a fault on the part of the carrier completely neutralizes these defences. A carrier subject to strict liability will be exempted if he proves that the damage incurred comes either from a foreign cause, or from specific risks or transport-related defences. The first category will be termed classic exemptions or defences; the second will be termed modern exemptions.

2.1. Classic exemptions

In a substantial form similar to the CMR, Article 17-1 of the AUCTMR states that: “the carrier is not liable if he proves that the loss, damage or delay was caused by the fault or the order of the claimant, by inherent defect of the goods or through circumstances that were not avoidable or the consequences of which were not avertable by the carrier”. These circumstances that mitigate the obligation of the carrier can also be observed in domestic law, when the law provides that a party will not be considered liable for a breach of obligation if he proves that the damage is due to non-attributable external causes. Indeed, it is clear from the provisions of Articles 1147¹¹ and 1784 of the Cameroon Civil Code that the carrier is responsible for the loss and damage of the cargo entrusted to him for carriage, as well as for exceedance in his performance, if he cannot prove that the non-performance comes from an external cause that cannot be attributed to him.

These apparently mundane exonerating causes or liberating facts are of interest in the study of the liability regime in transportation law. These are circumstances from which

⁹ Pierre Bonassies, Christian Scapel, *Traité de droit maritime* (Paris: LGDJ, 2006), 678.

¹⁰ Marc Huybrechts, *Limitation of liability and of actions*, in *Lloyd’s Maritime and Commercial Law Quarterly*, 2002, 370.

¹¹ This Article lays down the general principle of contractual liability under Cameroonian civil law.

loss, damage or delay may arise and, when proven, “mean that the carrier is not at fault, or that he is not liable or is liable only in part”.¹² Conventionally, according to the law of liability for an obligation of results,¹³ the debtor may avoid his liability by proving that the non-performance comes from an external cause that is not attributable to him. Regarding non-attributable events in road transport, the Uniform Act remains less persuasive; it is the responsibility of case law and, where there is none, of doctrine, to specify the content of these factors. However, this deducted presumption will not be excluded upon the simple proof of the carrier’s diligence; he will also have to demonstrate positively that the damage emanates from a foreign cause, or that the tortfeasor is somebody other than himself.

Bringing this theory to transportation law, the OHBLA legislator vested on the carrier, the guarantor of the goods transported, the role of proving that the damage comes from an “external cause”.¹⁴ This cause can be derived from unavoidable circumstances, or from a man-made cause (victim of damage or a third party). In domestic law, “external cause” was once seen as a force majeure or fortuitous event. Certainly, the term force majeure corresponds to an event external to the debtor, while the term fortuitous event refers to an internal obstacle.¹⁵ However, modern doctrine considers them synonymous and uses them interchangeably.¹⁶ After the CMR, the AUCTMR prefers the notion of “*circumstances which the carrier could not avoid and the consequences of which he could not remedy*”. Therefore, contrary to domestic law, the concept of “circumstances” appears wider than that encompassed by force majeure, since it can overflow several other realities according to which, even if they are external to man-made factors, do not accommodate themselves to the interpretation of force majeure.¹⁷ To get around this vague notion, we intend to view force majeure, like some authors,¹⁸ as a systematic cause of exoneration and defences that are external to force majeure.

¹² Jacques Putzeys, *Le contrat de transport routier de marchandises* (Brussels: Bruylant, 1981), n° 734.

¹³ Alain Sériaux, *Manuel de droit des obligations*, 2nd ed. (Paris: PUF, 1998), 176 ff.

¹⁴ Article 17, AUCTMR.

¹⁵ Jacques Moury, Force majeure: éloge de la sobriété, in *Revue Trimestrielle de Droit Civil*, 2004, 471 ff.

¹⁶ François Terre, Philippe Simler, Yves Lequette, *Droit civil, les obligations*, 9th ed. (Paris: Dalloz, 2005), n° 581.

¹⁷ Cass. Com. 27 January 1984; RTD. Com. 1982, 426; Cass. 2^e Civ., 16 September 2010, Larroche C/Brus and Cass. 2^e Civ., 16 September 2010, Dechen C/Cacheleux.

¹⁸ Victor Emmanuel Bokalli, Dorothé Cossi Sossa, *Droit des contrats de transport de marchandises par route*, (Brussels: Bruylant, 2006), 91.

2.1.1. Force majeure as a systematic cause of exemption

As a systematic cause of exemption, force majeure, which is a “safety lock” for the carrier, can be defined as an event that the carrier could not have foreseen or avoided, both in terms of its cause and its effect, despite the care, attention and diligence paid to the performance of his legal or contractual obligations.¹⁹ The origins of force majeure come from Roman and Roman-Dutch law, which held that the occurrence of events which could be classified as *casus fortuitous*, *damnum fatale* and *vis major* freed the carrier from liability. The term “force majeure” expresses the idea of an irresistible coercion. From the outset, it should be noted that under international law, the authors of this convention had certain motivations for not retaining the concept of force majeure in their text. We do not know if these ideas were also concerns of the OHBLA legislator in the drafting of Article 17-1 when using the term “*circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*”. This is even more embarrassing because cases under the CMR go beyond the simple factors entering into the force majeure: this text has not set out stipulations for its implementation. There is no doubt that the wording of Article 17 of the Uniform Act gives the judge the discretion to withhold any factor constituting force majeure. *In fine*, the OHBLA legislature has opted for caution by using a general formula, without providing an exhaustive list. The formula of “circumstances [...]” is apparently “*a catch-all clause*” provision.²⁰

In OHBLA law, as in international law, it is universally accepted in transport that natural events such as atmospheric conditions are considered as cases of force majeure, especially when they are exceptionally intense and cannot be foreseen due to the location and season. Among these factors are storms (rain or sand), volcanic eruptions, collapses, flooding resulting in the destruction of roads and vehicles, abnormal heat leading to the damage of goods, and fire.²¹ The defence of force majeure shall be refused where it can be shown that the carrier has not taken the necessary precautions to protect the goods and enable them to effectively resist weather conditions. Based on unavoidable circumstances, i.e., circumstances whose consequences are not avertable by the carrier,

¹⁹ Victor Emmanuel Bokalli, Dorothe Cossi Sossa, *ibid*.

²⁰ William Tetley, *Maritime Cargo Claims*, 3rd ed, (Montreal: International Shipping Publications, 1988), 515.

²¹ See, in common law countries, the term “Acts of God”.

one finds inserted into the concept of force majeure a broad panorama of human and social factors indiscriminately accepted by the courts. In fact, the carrier is relieved of liability if the damage sustained by the sender is caused by a third party. This third party may be the state referred to as the deeds of the prince, a private person or even a group of people. It would be interesting to mention here a new phenomenon that has developed in some states known as “traffic bandits”. This phenomenon, which is prevalent in most parts of countries such as Cameroon, Mali and Senegal, can no longer be ignored by carriers; on certain roads, it is considered as a predictable situation that could be avoided by the carrier. It is for this reason that Professors Bokalli and Sossa believe that this phenomenon should not always be exempted, except in areas where an attack might be considered as unpredictable to the carrier.

Courts, under the leadership of legal writers, have systematized those conditions of force majeure that require proof of an irresistible and unforeseeable external event.²² The court’s questioning of the distinction between fundamental and secondary elements comes in the wake of the competition between the different features of force majeure. Initially, the acceptance of force majeure assumed the cumulative requirement of these characteristics, also known as “legal standards”. Nevertheless, there has increasingly been a sort of doctrinal and jurisprudential marginalization of certain characteristics in favour of others, thereby establishing a hierarchy between the features of force majeure.²³ Thus, in France today, the Court of Cassation has made irresistibility the exclusive criterion for force majeure, making it the only objective and permanent feature of force majeure. Indeed, it was primarily through a judgement of 9 March 1994 that the First French Civil Chamber of Cassation stated that “*the irresistibility of the event is itself constitutive of force majeure, when its prediction is not capable of preventing the effects [...]*”.²⁴ Subsequently,

²² Jacques Moury, cit., 471; Paul-Henri Antonmattei, Contribution à l’étude de la force majeure, (Paris: LGDJ, 1998); Jean Carbonnier, Droit civil, les obligations, (PUF, 1998), 280; Alain Bénabent, Droit civil, les obligations, 10th ed. (Paris: Montchrestien, 2005), 290 ff.

²³ One (irresistibility) of the three criteria is highlighted, while the other two (unpredictability and externality) are regarded as mere unnecessary indices. See Cass. Civ. 1st, 6 November 2002; F. Lemaire, La force majeure: un événement irrésistible, in Revue du droit public et de la science politique en France et à l’étranger, 1999, 1723 ff.; Paul Henri Antonmattei, Ouragan sur la force majeure, in La semaine juridique édition générale, 1996, 390 ; Pierre Grosser, Pertinence des critères cumulés pour caractériser la force majeure en matières délictuelle et contractuelle, in La semaine juridique générale, 2006, 10087; Laurent Bloch, Force majeure: le calme après l’ouragan?, in Responsabilité civile et assurances, 2006.

²⁴ Cass. Civ. 1st, 9 March 1994, No. 407: RJDA 8-9/94 No. 910; Cass. Com., 28 April 1998, D. 1999, 469; Civ. 1st 6 November 2002, Bull. civ. I, 258 Adde Civ. 1st, 10 February 1998 Bull. Civ. I, No. 53, D. 1998-539, notes D. Mazeaud, JCP 1998. II. 10124 notes G. Parsing.

the Commercial Chamber, in a judgement made on 1 October 1997 and confirmed in 1998, stated that, “force majeure may be invoked only by the irresistibility of the event [...], aside from grounds relating to its unpredictability”.²⁵ Finally, the Plenary Assembly completed this work through its judgement of 14 April 2006.²⁶ The conclusion arrived at is that irresistibility is the central element and characterizes only force majeure as grounds for exemption. The test of irresistibility remains important and essential for the qualification of force majeure.²⁷

The admission of force majeure as grounds for exemption constitutes a source of inability to perform the contract of carriage. In this respect, force majeure becomes by extension a cause of failure to meet the deadline and modifies certain rules of evidence. The exemption may be total or partial, depending on the case and in the second hypothesis, it may give entitlement to a share of liability. If the liability is total, the cargo interests shall bear the entirety of the damaged occasioned. To soften the impact, some authors propose that the parties simply retain, when drawing up the contract, a more flexible approach close to the Anglo-Saxon “*frustration of purpose*” or a “*relatively or reasonably unforeseeable event*”. In addition to force majeure, the legislature allows the carrier to use other means to diminish his strict liability. These include deficits inherent in the goods and a fault or order of the beneficiary that does not result from a fault of the carrier. In fact, the common point of these two external causes is that their exempted effect is not subject to precise characteristics like those of force majeure.

2.1.2. Defective goods, a probable cause of exemption

As with most of the terms used by the AUCTMR, the notion of inherent deficits has neither a specific definition nor a specific criterion for identifying and distinguishing it from other concepts. Using the interpretation of French law and the opinions of certain writers, we will define the concept of inherent deficits and understand its assessment criterion.

²⁵ Cass. Com., 28 April 1998, Penet - Weiller C/Company Soeximex.

²⁶ Cass. Ass. Plen., 14 April 2006, No. 02-11168 and No. 04-18902, D. 2006, jur. p. 1577 P. Jord; Cass. Civ. 1st, 8 December 1998, Co Casorama C/Co Lid air travel; Cass. Civ. 1st, 20 January 1998, trips du Midi Co. C/Consult Voyages Co.

²⁷ Véronique Dumonceau-Beaune and Caroline Pipard, *Etat de guerre, sort des contrats et force majeure*, in *Petites Affiches*, 2002.

An inherent deficit²⁸ is a special feature or a lack in the structure of the goods that makes them unfit to withstand normal carriage without sustaining damage. Its originality lies in the inherent nature of the transported goods. This is an external cause that must be a result of material observations as opposed to hypothetical deductions. This naturally implies that the inherent defect is designed to encompass material things like a sick animal or products, to the state of maturation such as potatoes, onions or fresh food (tomatoes, orange, lemon, papaw, etc.), from livestock or agricultural areas to areas of mass consumption. The inherent defect comes from a predisposition of the goods, exposing them to damage simply by way of their displacement in normal or agreed conditions. The goods deteriorate solely and exclusively as a result of internal causes.²⁹ Depending on the subject matter of transport, case law reveals various origins of inherent defects. It considers, for example, that an inherent defect may result from the improper preparation of goods for carriage or the insufficient pre-cooling of the goods by the sender.³⁰

According to Rodière, the exculpatory result of inherently defective goods emanates from the fact that “the carrier promises to care for the movement, to perform some service; he does not promise to care for the thing. Any damage that is due to defects of the thing is a risk of ownership; it is not a risk of the contract of carriage”.³¹ He concluded by saying that it is advisable to define the inherent deficit of the goods as part of its nature. If this reflection has the advantage of providing sufficient justification for the exempting aspect of inherent defects, one OHBLA analyst finds it perplexing because of provisions on the duty of care that should be administered to the “goods” and not to the “carriage”, if the carriage is performed with care and attention. One may say that a carrier who has adopted suitable measures to deal with the particular nature of the goods being transported will be permitted to rely on the inherent defect provision during his liability trial. How can we evaluate this care in the case of an inherent defect?

²⁸ For a deeper analysis of this concept in French law, Gérard-Jérôme Nana, *La réparation des dommages causés par les vices d’une chose*, (Paris: LGDJ, 1982). Based on a study of the concept of the defect of a thing, the author deduces its main effects on contracts (of sales, service delivery, etc.).

²⁹ Paris CA, 28 May 1980, BT 1980, p. 346.

³⁰ Dijon CA October 13, 1982, BT 1983, p. 530.

³¹ René Rodière, *Droit des transports terrestres et aériens*, (Paris: Dalloz, 1973), 160.

In principle, the carrier's performance of the duty of care must be carried out according to the extent of his knowledge of the nature or apparent condition of the goods from information received from the sender or contained in the consignment note. Acceptance of carriage should, in principle, depend on this knowledge. If he has not received this information, the carrier has the right to make reservations, even if the absence of said information does not prevent him from invoking the inherent defect of the goods. So to speak, the appreciation of his diligence will be made *a priori* or *in abstracto*, that is to say, with respect to the behaviour of a good professional carrier. A problem may still occur if the inherent defect having caused the damage is invoked during delivery after the carrier's exceedance of deadline has been acknowledged. Several solutions are possible in this case. First, the carrier can prove that the delay played no causal role in the production of damage. That evidence will certainly exonerate him. On the other hand, he will be responsible for damages if the victim can prove that the inherent defect would have had no effect had there been no delay, that is to say, when the cause of the damage occurred after the set date of delivery. Finally, if the delay that caused the damage due to the inherent defects is itself a result of force majeure, a ground for exemption by itself, the proof of the dual existence of these separate causes may exempt the carrier from liability. This evidences a condition for exemption that will also be required to be fully or partially exempt in the case of a fault or due to a fault on the part of the payer.

2.1.3. The fault or the order of the cargo interests, a proportional cause of exemption

As previously noted, the carrier cannot be liable for a factor external to himself. Thus, a fault or the order on the part of the beneficiary completely frees the carrier,³² unless this is due to a fault of his own, without the characteristics of force majeure having to be present. These two situations shall be successively examined, as they do not refer to the same reality. Unlike in French doctrine and case law, OHBLA jurists have appraised that, according to Article 17 (1) of the AUCTMR, "*the concept of fault of the claimant neither includes the absence or inadequacy of the packaging, nor a defect in loading or unloading when performed by the sender, the recipient or persons acting on their behalf, nor the failure*

³² For the carriage of persons, see G enevi eve Viney, Le fait de la victime exon erant totalement le transporteur, in Recueil Dalloz, 2009, 461.

or inadequacy of marks or package number".³³ This is justified by the designation of these notions as special causes of exemption. This exclusion allows an investigation of the nature of fault of the claimant.

It would be superfluous or useless for the OHBLA legislator to speak of fault of the beneficiary, referring to the causes mentioned above, with the idea of obviating one of the two provisions. Physical acts may be caused by the claimant as already mentioned, whereas the fault of the claimant should be more "intellectual" than physical and may reside in the poor drafting of the consignment note, the indication of a bad route, erroneous information regarding the weight of the goods³⁴ or the absence or irregularity of related or complementary transport documentation, such as customs documents. The fault of the recipient is most often located in the unloading of the goods. It may consist of a mistake or an incorrect intervention, or even of a lax attitude. An example of this could be unloading the goods while not responsible for the operation, thereby causing harm to the goods, or not taking measures to ensure the safety of the goods upon arrival against weather conditions, etc.

The sender has an obligation to declare with sincerity the nature and value of the goods, therefore incurring a penalty if "*the statement is knowingly inaccurate*".³⁵ This sanction, moreover, is based on a strict dual foundation: the non-recognition of the nature of the goods may be a source of danger to the transport vehicle on the one hand, while on the other, it could be a source of economic harm to the carrier. Whatever the form it may take, the fault of the claimant must either be the exclusive cause of the injury or one of the causes. If it is the sole cause of damage, the carrier will be exempted from his contractual and extra-contractual liabilities. If it is one of the causes of the damage, then the liability will be, as in civil law, fairly shared proportionate to the degree of involvement of each party. However, what about the order of the sender? The order may take the form of instructions to the carrier, either on a consignment note or during transport in the case of a modification being made to the contract or due to an impediment to transportation or

³³ See Victor Emmanuel Bokalli, Dorothé Cossi Sossa, cit., 90.

³⁴ This is, at least, what was decided by Cameroonian law in a judgement of 6 June 1991, Supreme Court Decision No. 106/CC 6 June 1991, National Board of Railways v OND Mathias. In this case, the sender opposed the penalties imposed by the carrier after the latter found a false statement on the weight of the goods. After the carrier refused to transport the goods, damage ensued, and the sender appeared before the judge for repair. However, in the Court of Cassation, the judge supported the carrier, invoking an exemption due to the fault of the other party.

³⁵ Pierre Bonassies, Christian Scapel, cit., 1041.

delivery. This exemption is due to the consideration of the obligation to dispose of the goods during transportation by the beneficiaries. It is not exculpatory if it is not due to a fault of the carrier. In other words, if the order of the beneficiary comes in the wake of erroneous information from the carrier, then the latter shall remain liable for all damages resulting from his attitude. The fault or the order of the beneficiary not only has the effect of releasing the carrier, but also of engaging the liability of the sender if his actions have caused damage to the carrier, for example, or the vehicle or other goods placed under his responsibility. Once this external cause deriving from the negligence of the sender has been identified and described as such, it is left to the carrier to release himself from liability. It follows that the presence of one of these causes exempts the carrier from liability, unless the victim challenges this presumption by proving that the damage is due to other causes. The benefit of these defences is not spontaneous; the carrier invoking them must prove their existence through reservations, expertise or the provision of a rational and comprehensive explanation for the loss, damage or delay of goods by naming a cause that logically cannot legitimately be attributed to him. However, if the carrier is unable to plead a foreign cause, he may be able to prove specific risks or transport-related defences.

2.2. Modern exemptions

The term particular risk refers to certain circumstances deemed dangerous for the goods. It speaks of situation in which the damage is beyond the carrier's control. These special cases, or "*Preferred causes*",³⁶ establish an original system of protection for the carrier, who may benefit a presumption by showing, on the one hand, that in view of the factual circumstances, damage could be occasioned as a result and, on the other hand, that one of the preferred causes is at play.³⁷ Taken together, specific risks only apply to cases of loss and damage, not delay.³⁸ Like the CMR, the AUCTMR has provided six special transport-

³⁶ Isabelle Bon-Garcin, Maurice Bernadet, Yves Reinhard, *Droit des transports*, 1st ed. (Paris: Dalloz, 2010), 441.

³⁷ Article 17-2 AUCTMR.

³⁸ Article 17-4 AUCTMR, "when the carrier proves that, in view of the factual circumstances, the loss or damage could be attributed to one or more of these risks, it shall be presumed that it was so caused." It is important to note that particular situations raised by the AUCTMR were originally instituted by the Berne Convention on carriage by rail, before being transposed into the CMR. See Marie Tilche, *Conventions terrestres, comparaison CMR/CIM*, in *Bulletin des Transports et de la Logistique* 1995, 421 ff. It is therefore not a novelty introduced by the OHADA legislator, as has been argued by some authors. Joseph Issa-Sayegh, *Présentation générale de l'acte uniforme sur le contrat de transport de marchandises par route*, in *Ohadata*

related defences that are presumed³⁹ causes of damage that exonerate the carrier. These that can be attached to the vehicle, the goods or the beneficiaries of the cargo or, in particular, to the transportation vehicle, the packaging of the goods or the nature of said goods. However, given the “originality”⁴⁰ of the system established by the OHBLA, preference should be given to an explanatory study of these risks. The special cases of exemption provided by the AUCTMR have different origins. Indeed, the AUCTMR states that “*the carrier is exempt from liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances: a) Use of open, un-sheeted vehicles if their use has been expressly agreed and specified in the consignment note; b) Absence or inadequacy of packaging for goods which, by their nature, rot or become damaged when they are improperly packaged or unpackaged; c) Handling, loading, stowage or unloading of goods by the consignor, the consignee or their agents; d) Certain goods which, through causes inherent in their very nature, are exposed to either total or partial loss or to damage, especially through breakage, decay, desiccation, leakage or normal wastage; e) Insufficiency or inadequacy of marks or numbers on the packages; f) Carriage of livestock*”. However, during their assessment, they can be grouped according to their nature around three major poles. We deduce that the risk is agreed, induced or, finally, natural.

2.2.1. The risk agreed between the parties

Of the exempted risks, some come from a mutual acceptance of the cargo between the carrier and the beneficiary. Indeed, the AUCTMR⁴¹ states that “*the carrier is exempt from liability when the loss or damage arises from: a) Use of open, un-sheeted vehicles if their use has been expressly agreed and specified in the consignment note; f) Transportation of livestock*”.

In either case, the risk comes from express will of the parties agreeing on the use of open and un-sheeted vehicles and the particular quality of the subject matter being transported, i.e., livestock. According to legal writers, a vehicle is open when it “is not

D-07-03, referring to specific cases of exemption, believes that the only novelty to have been “created” by the Uniform Act is the exclusion of the “action of vermin or rodents”.

³⁹ This presumption is rebuttable by the cargo interests.

⁴⁰ Victor Emmanuel Bokalli, Dorothé Cossi Sossa, cit., 92.

⁴¹ Article 17-2 AUCTMR.

enclosed on all sides; this is the case for most vehicles. Closure of the vehicle at the rear with a tarpaulin can be considered valid if it does not allow infiltration. A vehicle is not sheeted if, at the time of carriage, it is not covered with a tarp (or any other suitable vehicle coverage). It should not, as are fittings and gears, be a permanent part of the vehicle and may have been added so that for the adequate protection of the goods".⁴² It appears that an open and non-sheeted road vehicle⁴³ is an open vehicle. The carrier shall be exempt because goods carried in these conditions are exposed to risks or hazards resulting from atmospheric conditions, such as cold, heat, rain, wind and even fire hazards. To qualify for this exemption, two conditions are required by OHBLA law: one positive and one negative. The positive condition requires the use of an open vehicle that has been expressly agreed by the sender and the carrier, and this stipulation must be contained in the consignment note. This condition will not, however, be satisfied if, for example, the carrier has provided a covered vehicle but his agent (driver) did not bother to replace the cover after loading.⁴⁴ Similarly, the absence of a tarp, especially during the rainy season when goods are exposed to wet conditions, must have been expressly agreed with the sender. Indeed, it was held that in the absence of said agreement, the carrier could not benefit from the presumption of accountability.⁴⁵ As for the question of who bears the obligation use tarp on a vehicle during carriage by road, the French Court of Cassation concludes irrevocably that "*this is involved in the general care paid to the performance of a carriage, and is therefore the responsibility of the carrier*".

If the parties to the contract must agree upon the condition of the transport vehicle, they should also, in case of the transportation of livestock, agree on the conditions of carriage of that particular subject-matter. Concerning the transportation of livestock, the AUCTMR provides that "*the carrier is exempt from liability when the loss or damage arises [...] from the transportation of livestock*".⁴⁶ It adds that "the carrier cannot rely on paragraph 2-f of this section, unless he proves that all measures normally incumbent on him, considering the circumstances, were taken and that he complied with any special

⁴² Jacques Putzeys, cit., 257 ff.

⁴³ Here, vehicle means any land motor vehicle, trailer, semi-trailer or full trailer built to be towed by a land vehicle for transporting things.

⁴⁴ CA Rennes, 2nd ch. 18 January 1989, la Suisse c/Anjou transports, in Lamy, tome 1, n° 1538 jur.3.

⁴⁵ CA Paris, 18 December 1992, BTL 1993. 52.

⁴⁶ Article 17-2 f AUCTMR.

instructions issued to him”.⁴⁷ The combination of these provisions required to seek justification for such a cause of exemption, and especially to broaden the discussion, given the broad interpretation that can be made of the notion of “livestock”, suggests the exclusion of the concept from the AUCTMR, as in our opinion, it deserves to be governed by an autonomous convention or legislation under the concept of “dangerous goods”.⁴⁸ The carriage of livestock is a particular risk because animals, due to their very nature, cannot be transported as inanimate commodities. They may, among other things, sustain injuries due to falls, kicks or bites, fall sick due to contagion, suffocate, escape, etc. These risks therefore require the carrier to take certain precautions that are sometimes not his responsibility as contractual obligations. It is for this reason that the legislator calls him to take “*measures normally incumbent on him*”. However, this leaves the question open as to the content of standard measures incumbent on a carrier of livestock.

In order to transport livestock, and following the European Convention, the carrier must, before loading, ask for the inspection of the animals by a veterinarian, who ensures their fitness to travel and issues a certificate of competency and identification. The veterinarian must specify the loading conditions that will minimize the risks of travel. During the carriage, the carrier must ensure that the animals can drink to prevent dehydration, that they have enough space to counter asphyxia and that species are literally separated to limit injuries. Generally, the carrier must adopt a positive attitude towards the animals to prevent any potential risks to which they may be exposed. However, in our view, the question of the care needed for the internal maintenance of animals remains debatable. Such care, objectively, should not lie with the carrier.

2.2.2. The risk caused by the beneficiary

In this category of risks, which are caused by a fault on the part of the person entitled to the goods, the AUCTMR mentions certain aspects which are real obligations of the beneficiary. These provoked the following formula for exemption of risk: “*The carrier shall be relieved from liability when the loss or damage arises from: b) absence or inadequacy of packaging for goods which, by their nature, are exposed to wastage or damage when they*

⁴⁷ Article 17-6 AUCTMR.

⁴⁸ The CEMAC community has a convention on the carriage of dangerous goods (see Regulation No. 2/99/UEAC-CM-654, regulating the Carriage of Dangerous Goods by Road in the UDEAC/CEMAC zone, adopted on 25 June 1999 in Malabo (Equatorial Guinea).

are improperly packaged or unpackaged; c) handling, loading, stowage or unloading of goods by the sender or recipient or persons acting on behalf of the sender or recipient; e) insufficiency or inadequacy of marks or numbers on the packages". Each of these risks should be considered separately. As a consequence, the risks arising from the absence or inadequacy of packaging; the handling, loading or unloading of the goods by the claimant; and the insufficiency or inadequacy of marks or numbers on the parcels will be successively examined.

The absence or inadequacy of packaging

To be considered as a cause of exemption to the carrier, it is necessary and sufficient to transport the goods without packaging if this absence constitutes a serious risk for the occurrence of damage. Packaging is necessary if the nature of the goods requires the sender to act in a specific way, especially if this is prescribed by the regulations or required by trade usage law. If it is common, or simply desirable, for the goods to be moved without packaging, this particular exempting risk must be rejected⁴⁹ *vis-à-vis* the carrier. If the defect or defective packaging was not apparent at the point of taking over the goods, the carrier is exempt from this defect.⁵⁰ The carrier raising the need for packaging is not sufficient for him to be exonerated; it is still necessary that the absence of packaging or faulty packaging should represent a serious risk to the goods.

The existence of a serious risk of the occurrence of damage is the second condition for the exemption of the carrier. Indeed, if the packaging defect has caused no damage to the consignor, the evocation of this risk does not exculpate him. It is enough to establish a link between the packaging defect and the incurred damage.

Handling, loading and unloading of the goods by the beneficiaries

In OHBLA law, a motor carrier shall not, in principle, bear the losses caused by the carelessness or clumsiness of the beneficiaries during the execution of loading and/or unloading and/or during transport. This damage may result from defective loading due

⁴⁹ Marie Tilche, CMR: les rigueurs de risques particuliers, in Bulletin des Transports et de la logistique, 1995, 122 ff.

⁵⁰ Laurent Brunat, Le jeu des causes particulières d'exonération du transporteur, in Bulletin des Transports, 1981, 134 ff; see also Victor Emmanuel Bokalli, Dorothé Cossi Sossa, cit., 93. These authors, like others, criticize this situation because it requires the carrier, who is not a packing specialist, to control the activities of the sender.

to the poor arrangement of goods in the vehicle, stalling or inadequate stowage. Although these operations are the claimant's responsibility, the court accepts that the motor carrier, who is the guarantor of the safety of transport, has an obligation to control the loading and unloading of the goods. The carrier should check the loading and stowage of goods and answer for the damaging consequences of apparent defects of these operations.

It must be remembered that the carrier must check the loading and stowage performed by the sender to ensure the safety of his vehicle. He would not be found exempt in the absence of these checks and he would bear full liability for loss or damage to the goods. Nevertheless, is it fair to put all of the responsibility on the carrier, who does not control the loading carried out by the sender?⁵¹ It seems legitimate in these circumstances to opt for shared liability. In all cases, to be released for liability, the carrier must establish that the factual circumstances in which the loading, rigging, stowage or unloading took place suggest that damage comes from defects in these operations. If he cannot demonstrate that these operations have been performed by the sender or the receiver, he will still remain liable.

The lack or inadequacy of marks or numbers on the packages

This risk is important at the time of delivery. Marks or numbers enable the beneficiary to quickly realize the loss of parcels or to identify them after reloading them, for example, in the warehouse where they are to be stored. For this reason, and in line with other conventions,⁵² the AUCTMR has stipulated this as a special cause of exemption. It is therefore essential that the information given on the package be clear and indelible and that it accurately matches the information contained in the consignment note. Therefore, he must check and, if possible, express reservations in order to become eligible for exemption by proving that the damage resulted from a defect or inadequacy in terms of the marks or numbers on the packages, especially in the case of delivery to someone other than the recipient. The absence of this evidence will exclude him from the benefit of the aforementioned exemption. The carrier will also be exempt in the case of a natural hazard damaging the goods.

⁵¹ A. Chao, *Chargement défectueux et imputation des responsabilités dans les transports routiers: le vent tourne-t-il?*, in *Bulletin des Transports*, 1984, 423.

⁵² CMR, Article 17 para. 4-e; Brussels Maritime Convention, article 3 para. 3-c.

2.2.3. The natural risk of the goods

From the outset,⁵³ it should be noted that this particular risk is distinct from that of the inherent defect of goods, in that it is generally applicable to a fault affecting a specific unit within a category of goods, even if the others remain healthy. By contrast, the risk mentioned here occurs when all goods of the same species are all exposed to high risks due to a shared generic feature.⁵⁴ From the perspective of the philosophy of the OHBLA text, it is clear that the legislature intended to make a clear distinction between the concepts of inherent defect and the nature of goods by treating them separately as general and specific causes of exemption. This distinction would make no sense if the legislature had intended to refer to the same concept. It is the opinion of the OHBLA authors that, as a special solution, the carrier must establish that he has taken due care with regard to the cause of injury in order to be exempted.⁵⁵ The carrier must show that there is a causal relationship between the damage or loss and the nature of the goods. In addition, he must also prove that the damage is not due to a fault on his part.

Taking into account the list laid out in Article 17-2 of the Uniform Act, which refers to, among other factors, the risk of breakage of fragile items, spontaneous decay, desiccation and normal waste, and by combining this article with the provisions set out in Article 17-5, the OHBLA legislature actually raises the problem of carriage at a controlled temperature.⁵⁶ In such transportation conditions, the carrier should be able to provide direct evidence of his diligence in keeping and maintaining the vehicle so as to avoid deterioration due to the perishable nature of the transported goods.

The grounds for exemption discussed above are not absolute; they do not even automatically confer irresponsibility on the carrier. However, they still reinforce the idea that the carrier is no longer presumed liable. They confirm the exclusion of his alleged

⁵³ “The carrier is not liable if the loss or damage arises from: d) Certain goods which, due to causes inherent in their very nature, are exposed either to total or partial loss or to damage, especially through breakage, decay, desiccation, leakage or normal wastage”.

⁵⁴ For more details on this differentiation, Jacques Putzeys, Nicole Lacasse, comments on Article 17 of the OHBLA Uniform Act; see also A. Chao, *Notions de “vice propre” et de “nature de la marchandise”*, in *Bulletin des Transports*, 1987, 393-394. This author observes the difference between the two concepts, in contrast with René Rodière, who sees no fundamental difference between them, although he does see a difference in the evidence of the two concepts: in the case of defect, the carrier is relieved from the duty of proof, while in the case of nature, he must show that, in view of the factual circumstances, the injury has resulted from this nature, *La CMR*, in *Bulletin des Transports*, 1974.

⁵⁵ Victor Emmanuel Bokalli, Dorothe Cossi Sossa, *cit.*, 95.

⁵⁶ Christophe Paulin, *Transport sous température dirigée*, in *Revue de droit des transports*, 2009, *comm.* 72.

responsibility. These grounds suffer from many limitations, which allow the claimant to maintain the carrier's liability, except in the case that arrangements for accountability have been made between the parties. The Court of Justice will be there to control the attitude of the beneficiary.

3. Controlling the carrier's behaviour in OHBLA Law

The term control consists of the judge's responsibility to verify whether or not the carrier has satisfied the requirement of good faith in his performance of the contract; in the case of non-satisfaction, he will no longer enjoy the benefit of the exemption from liability.

3.1. The requirement of the good faith principle when carrying out a contract of carriage

In civil law systems, the law of obligations recognizes and enforces the overriding principle that, when formulating and carrying out contracts, the involved parties should act in good faith. The system takes an expansive approach to the obligation of good faith, applying it to both the formation of a contract and to its performance.⁵⁷ The principle of good faith⁵⁸ is based on the concept that contracts are a relationship between two parties; therefore, obligations of good faith are both part of the negotiation process and extend into the performance of the contract, requiring both parties to act reasonably. In principle, carriage must be agreed upon and performed in good faith. In fact, viable carriage requires the carrier and the sender to act in good faith in order to avoid multiple proceedings. What is the significance of good faith?

⁵⁷ In Cameroon, Article 1134 of the Civil Code provides that "Agreements lawfully entered into must be performed in good faith."

⁵⁸ On good faith in general, see Joseph Chitty, *Chitty on Contracts*, vol. 1, 25th ed. (London: Sweet and Maxwell, 1983); James Francis O'Connor, *Good Faith in English Law*, (Aldershot: Dartmouth Publishing, 1990), 102; Roger Brownsword, Geraint G. Howells, Norma J. Hird, (eds.), *Good faith in contract: Concept and context*, (Aldershot: Dartmouth Publishing, 1999); Martha Simo Tumnde née Njikam, *Motor vehicle insurance law in Cameroon*, (Limbe: Design House, 2003), 80 ff.; Jack Beatson, Daniel Friedman, (eds.), *Good faith and fault in contract law*, (Clarendon Press Publication, 1995); William Tetley, *Good faith in contract: Particularly in the contract of arbitration and chartering*, in *Journal of Maritime Law and Commerce*, 2004, 561 ff.; John Klein, *Good faith in international transactions*, in *Liverpool Law Review*, 1993, 115; Howard N. Bennett, *Mapping the doctrine of utmost good faith in insurance contract law*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1999, 165.

The concept of good faith, or *bona fides*, or *bonne foi*,⁵⁹ has existed at least since the development of Roman law, and is believed by some to even have preceded natural law.⁶⁰ In fact, good faith is necessary for all societies, as was aptly mentioned by Aristotle, who set out that “*if good faith has been taken away, all intercourse among men ceases to exist*”.⁶¹ Good faith was defined by Powers as “*an expectation of each party in a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community*”.⁶² For his part, O'Connor describes good faith as “*a fundamental principle derived from the rule *pacta sunt servanda*, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules*”.⁶³ Finally, as Tetley opines, good faith in a contract is defined as the just and honest conduct that should be expected of both parties in their dealings, both with one another and even with third parties who may be implicated or subsequently involved.⁶⁴ As an international doctrine in both civil and common law systems, good faith requires the parties of an international contract to act reasonably, fairly and honestly in negotiations and the performance of contracts in order to protect the justifiable expectations arising from the agreement.

Beyond the legal context, the general principle of good faith is a general ethical obligation compelling parties in a contract of carriage to act honestly and fairly in the performance of their respective obligations. The protection of this ethical obligation is

⁵⁹ François Gorphe, *Le principe de bonne foi*, (Paris: Dalloz, 1928); Alexandre Al. Volansky, *Essai d'une définition expressive du droit basée sur l'idée de la bonne foi*, (Thesis, Paris, 1929); Georges Ripert, *La règle morale dans les obligations civiles*, 4th ed. (Paris: LGDJ, 1936); René Vouin, *La bonne foi, Notion et rôle actuels en droit privé français*, (Paris: LGDJ, 1939); Gérard Lyon-Caen, *De l'évolution de la notion de bonne foi*, in *Revue Trimestrielle de Droit Civil*, 1949, 75; Yves Picod, *L'exigence de bonne foi dans l'exécution du contrat*, colloque IDA Aix-En-Provence, 28 May 1993, (Marseille: PUAM, 1993), 57; Richard Desgorces, *La bonne foi dans le droit des contrats: rôles actuels et perspectives*, (Thesis transcript, Paris II, 1992); Alain Bénabent, *La bonne foi dans l'exécution du contrat, Rapport français*, in *La bonne foi*, Trav. Ass. H. Capitant, (1992, 291 ff.) ; Pascal Ancel, *Les sanctions du manquement à la bonne foi contractuelle en droit français à la lumière du droit québécois*, in *Revue Juridique Thémis*, 2011, 87ff.; Daniel Cohen, *La bonne foi, éclipse et renaissance, in 1804-2004, Le Code civil, un passé, un présent, un avenir*, (Paris: Dalloz, 2004), 517 ff.

⁶⁰ W. I. Tête, *Tort roots and ramifications of the obligations revision*, in 32 *Loy. L. Rev.*, 1986, 47-58, cited by William Tetley, cit. 566.

⁶¹ Cited by William Tetley, cit., 562.

⁶² Paul J. Powers, *Defining the Indefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*, in *Journal of Law and Commerce*, 1999, 352.

⁶³ James Francis O'Connor, cit.

⁶⁴ William Tetley, cit., 563.

vested in the judge. In OHBLA transportation law, the carrier may be excluded from the flexibility principle when it is proven that he has acted unfairly and dishonestly in the performance of his duties.

3.2. Exclusion from the flexibility principle based on the good faith principle

The abovementioned causes lose their value when the actions of the carrier are malicious or performed in bad faith.⁶⁵ Bad faith occurs when one of the parties, without reasonable justification, acts in relation to the contract in such a way that their behaviour would substantially nullify the bargained objective or benefit for which they have been contracted by the other, or would cause significant harm to the other contrary to the original purpose and expectation of the parties.⁶⁶ The practical effects of this are the absence of liability limitation and the extension of the limitation period. We must distinguish wilful misconduct from gross negligence.

3.2.1. Wilful misconduct of the carrier

Regardless of the features characterizing legal regimes, wilful misconduct or deceit, or *faute intentionnelle*, which is punishable under international law,⁶⁷ also exists in domestic law in terms of criminal, delict and contract matters.⁶⁸ Fraud is at the top of the category of heinous faults, marking the ultimate degree of bad faith in the performance of a contract. The contract of carriage, as with contracts in general, is subject to the principle of commutative justice.⁶⁹ This principle necessarily implies that there should be a balance between the interests of the contractors. A willingness to engage, as expressed by the debtor, can and should be supplemented by the individual predictions of the other

⁶⁵ Article 21 AUCTMR.

⁶⁶ Words of Justice Kelly in *Gateway Realty Ltd v. Arton Holding Ltd and LaHave Developments Ltd*, (1991) 106 NSR (2d) 180 (N.S.S.C.T.D); (1992) 112 NSR (2d) 180 (N.S.C.A.).

⁶⁷ C. Cass. Ch. mixte 8 June 2007, BICC n°667 of 15 September 2007.

⁶⁸ François Terre, Philippe Simler, Yves Lequette, *Droit civil, Les obligations*, 5th ed., (Paris: Dalloz, 1993), n° 595; Boris Starck, Henri Roland, Laurent Boyer, *Les obligations: le contrat*, 6th ed. (Paris: Lexis Nexis/Litec, 1998), n° 1624; see also Georges Durry, obs. sous Cass. Civ. 1st, 31 March 1981, RTD Civ. 1981, p. 859.

⁶⁹ Jacques Ghestin, *La notion de contrat*, (Paris: Dalloz Sirey, 1990), 149.

contracting party, i.e., by taking into account their legitimate expectations.⁷⁰ When these expectations, systematized by the expression of will and the articulation of confidence in the other party, are not satisfied, then there exists a contractual dishonesty⁷¹ that is punished severely by the legislator and the courts. In fact, fraud is a direct infringement of the principle of good faith, since it requires the parties to act in the spirit of loyalty and honesty. This notion comes implicitly from Article 21-1 of the AUCTMR⁷², which does not allow for the system of limitation of liability or that of the time bar when it can be proven that the loss, damage or delayed delivery originated from an intentional or grossly negligent act or omission. The carrier carried out the act or omission with the intention of causing the said loss, damage or delay.

Conventionally, fraud is considered as wilful misconduct⁷³ in the proper sense of the term and is defined as a fault committed with the intent to cause injury.⁷⁴ This definition emphasizes the concept of intention, which applies not only to the act, but also to its harmful consequences. Thus, not only must the act have taken place, but it is also necessary for the damage itself to have been sought. This idea underpins English law in the judgement of Justice Barry, who stated in the *Horabin* case that: “...In order to establish wilful misconduct, the Plaintiff must satisfy you [The Jury]...that the person who did the act knew that he was doing something wrong, and knew it at the time, and yet did it just the same, or alternatively that the person who did it quite recklessly not caring whether he was doing the right thing or the wrong thing... That...is something...quite different from negligence or carelessness or errors of judgment, or even incompetence, where the wrongful intention is absent”.⁷⁵

⁷⁰ For a study of this concept, Lord Steyn, *Contract Law: Fulfilling the reasonable expectations of Honest Men*, in *Law Quarterly Review*, 1997, 433; Pascal Nguibe Kante, *La prise en compte des attentes légitimes du cocontractant en droit privé des contrats*, in *Annales de la FSJP de Dschang*, Tome 12, 2008, 32 ff.

⁷¹ Alain Sériaux, *La faute du transporteur*, 2nd ed. (Paris: Economica, 1998), 245 ff.

⁷² For other conventions, see Article 29 CMR, Article 30.1 and 2 CIETMRD.

⁷³ Yet, we must distinguish in this category between subjective and objective misconduct. Wilful misconduct belongs to the second category, according to Sabine Abravanel-Jolly, *Notion de faute intentionnelle en assurance: une nécessaire dualité*, in *Revue numérique en droit des assurances*, 2009; for a contrary view, Geneviève Viney, *Remarques sur la distinction entre faute intentionnelle, faute inexcusable et faute lourde*, in *Revue Dalloz*, 1975, 269.

⁷⁴ Victor Emmanuel Bokalli, Dorothé Cossi Sossa, *cit.*, 109.

⁷⁵ *Horabin v BOAC* [1952]. This summing up of Justice Barry was adopted by the English Court in subsequent cases. See *Sidney G Jones Ltd v Martin Bencher Ltd* [1986]; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991]; *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005 (QBD)/2005 (CA)/2007 (HL)]; *Lacey's Footwear Ltd v Bowler International Freight Ltd* [1997]. The stages of the English approach to wilful misconduct can be seen in this last case by answering four questions: 1- What is the conduct ordinarily

In theory, wilful misconduct⁷⁶ involves a combination of two elements: a voluntary act and the intent to cause damage. Through its requirement of both wilful misconduct and the intention to cause damage,⁷⁷ the Court gives a very narrow interpretation of the concept of wilful misconduct, the direct consequences of which will be evaded to make room for an appreciation of the constituent elements of this concept. In consequence, these elements are perceived differently depending on whether the wilful misconduct lies in its material or intellectual aspects. It appears that, as concerns the carrier, fraud would be a result of the desire to achieve a vicious act and to willingly seek to injure the other party. Wilful misconduct appears to be the inability to perform contractual obligations that should be carried out in good faith. Indeed, the intentional nature of the fault removes from the offending carrier any opportunity to benefit from any mitigation of his liability. At most, it enables his professional liability to be increased.

An act characteristic of fraud may consist of a deliberate refusal to perform the undertaken obligations, or simply the poor performance of said obligations. In fact, when the carrier intentionally fails to comply with the respect of the good faith principle in performing his obligations,⁷⁸ the judges do not hesitate to describe this conduct as wrongful. Indeed, referring to wilful misconduct, the French Court of Cassation holds that it is a “*voluntary breach of contract*”. Earlier, it was held that “*the debtor commits wilful misconduct when he intentionally refuses to perform his contractual obligations, even if this refusal is not dictated by an intention to harm the other party*”.⁷⁹ The Court thus adopted a broad definition of the concept, reclaiming the definition that has been hitherto used in the case of contractual matters whereby the debtor is alleged to have acted with

expected in the circumstances? 2- Was the act or omission of the carrier so far outside ordinary expectations that it should be regarded as misconduct and not merely negligence? 3 - Was there an intention on the part of the carrier to cause loss or damage, or did he act recklessly knowing that loss or damage would be the likely result? 4 - Did the wilful misconduct cause the loss or damage? Compensation should be allowed if the answers are positive.

⁷⁶ It is important to bear in mind that, contrary to other European jurisdictions, there is no concept of “default equivalent to wilful misconduct” under English law; consequently, the second limb of Article 29.1 of the CMR is irrelevant as far as this jurisdiction is concerned.

⁷⁷ Civ. 1st, 2 February 1994, Bull. Civ., I, n°37; see also Civ. 1st, 10 April 1996, Bull. Civ., I, n°172.

⁷⁸ For example, the defect might consist of a failure to perform the takeover obligation through a voluntary refusal to check the cargo, including the number of packages, their marks and numbers, their apparent condition and how they are packaged. It might also involve an intentional failure to properly load and stow the goods or, during transport, an intentional failure to execute instructions received or to comply with the instructions without any precaution.

⁷⁹ Cass. Com., 4 February 1969, JCP 1969 II 16030, note Prieur. Cass. Civ. I, 4 February 1969, D. 1969, p. 601.

“deliberate will”, “a firm intention”, “wilfully” or “knowingly”.⁸⁰ In fact, in England, the judge cannot attribute wilful misconduct to the carrier in the absence of these elements.⁸¹

By adopting wilful misconduct as a cause of disqualification from defences in Article 21 of the AUCTMR, the legislature establishes the classic definition of fraud, i.e., the intent to cause injury, in OHBLA space. The intention here implies, as some authors have opined, “a will directed toward a goal, the fraudulent intent is the desire to occasion injury, because it is related to the will to harm”.⁸² It appears that damage consists of an act or omission intentionally performed by the carrier in order to cause injury, or with the desire of creating the damage as it occurs.⁸³ This implies that the carrier wishes not only to deceive the sender, but also to harm his interests.

3.2.2. The gross negligence of the carrier

Appearing initially in France,⁸⁴ the concept of gross negligence or *faute inexcusable* was adopted in labour law,⁸⁵ as well as in air and maritime transportation law,⁸⁶ where it experienced a resurgence of vitality before being timidly introduced into road transportation law. Indeed, Article 21-1 and 2 of the AUCTMR adopt the terms used by other international conventions, noting that “the carrier shall not be admitted to exemption from the limitation of liability [...] if it is proven that the loss, damage or delay in delivery resulted from an act or omission that was committed [...] recklessly and with knowledge that such loss, damage or delay would be the probable result”.

⁸⁰ Cass. Civ. I, 22 October 1975, D. 1976, p. 151, note H. Mazeaud.

⁸¹ See *Alena v. Harlequin Transport Services* [2002]; *Micro Anvika Ltd v. TNT Express Worldwide (Eurohub) NV* [2006] [QBD].

⁸² Denise Nguyen Thanh-Bourgeois, Contribution à l'étude de la faute contractuelle: La faute dolosive et sa place actuelle dans la gamme des fautes, in *Revue Trimestrielle de Droit Civil*, 1973, 496; see also H. Lalou, La gamme des fautes, in *Dalloz Hebdomadaire*, 1940, Chron.17, in Victor Emmanuel Bokalli, Dorothé Cossi Sossa, cit., 109.

⁸³ Cass. Civ. 2nd, 18 March 2004, n° 03-10.720, RGDA 2004, p. 356, note J. Kullmann; Cass. civ. 2nd, 18 March 2004, n° 03-11.573, RGDA 2004, p. 364, note J. Landel.

⁸⁴ See the 1898 law on compensation for professional accidents.

⁸⁵ Eugène Douard, *La faute inexcusable dans le régime de sécurité sociale*, (Paris: Éditions sociales françaises, 1961). Renée Jaillet, *La faute inexcusable en matière d'accident du travail et de maladie professionnelle*, (Paris: LGDJ, 1980).

⁸⁶ See in this regard Alain Sériaux, *La faute du transporteur*, cit., 256 ff.; see also Article 8 para. 1 of the Hamburg Convention – Article 21-1 of the AUCTMR appears to be an exact copy of this.

However, like in previous texts, the OHBLA merely states the characteristics of gross negligence without giving a specific definition. Initially in France, whereas some authors considered gross negligence as equivalent to wilful misconduct, others defined it as “*wilful misconduct that involves an awareness of the probability of harm and a reckless acceptance of this without good reason*”. This difficulty regarding the international recognition of a universally accepted definition of gross negligence will guide our attempt to explain this concept in OHBLA law. However, before we get to this point, we should seek out a legal qualification of gross negligence in transportation law. The debate about the nature of gross negligence under foreign law made it difficult for judges to assess the elements characterizing the fault. It should be noted that this concept has been in constant evolution since its inception, especially as a result of the courts' interpretation of it.⁸⁷ One thing is certain: only a sufficiently serious fault should deserve the adjectives “gross” or “inexcusable”. It should also be noted that the concept of gross negligence is composed essentially of the psychological terms “*wilful misconduct*”, “*awareness of damage*” and “*recklessness*”.

So, how should we interpret this notion? Better still, should we assess it subjectively based solely on “*the awareness that the carrier has*” or objectively, exploring rather “*the conscience that he should have had*” of the damage? In both cases, the connection to the concept of fraud is obvious. In the first case, the rule equating gross negligence with fraud, as reaffirmed by the French law of 8 December 2009, will apply, at least in relation to the concepts; thus, gross negligence would be nothing other than an expression of bad faith on the part of the carrier. By contrast, in the second case, this connection will only be significant in relation to the consequences of the two concepts; gross misconduct will be seen as an “unspeakable” behaviour of the carrier. The actual wording of Article 21 of the AUCTMR, as well as the other texts mentioned above, requires a subjective assessment of the concept of gross negligence. This assessment reveals the connection between fraud and gross negligence in terms of their nature. Indeed, in the minds of the writers of these laws which implicitly indicate gross negligence, there is no doubt that the words “*with consciousness (or the intent) that damage would probably occur as a result*” imply a specific assessment of the fault of the author of the act or of his reckless omission. This vision

⁸⁷ Civ. 2nd, 27 January 2004, Bull. civ. II, n°25, D. 2004.somm. 2185, note L. Noel; RTD Civ. 2004.296, note P. Jourdain.

reflects the restrictive interpretation that the legislature intended to give to this notion; this assessment involves scrutinizing the mentality of the carrier in order to seek the motivations behind his actions, which seems extremely difficult (if not impossible).

Nevertheless, the equivalence of⁸⁸ gross misconduct with wilful misconduct is visible in the text of the OHBLA. Moreover, it is easy to see that the legislator referred both to faults committed with the intent to cause loss, damage or delay, and to faults committed recklessly, that is to say, with the awareness that loss, damage or delay may occur as a result, within the same sentence and irrespective of nature and degree of the damage.⁸⁹ The finding of this reality would be a simple deduction, but beyond this assimilation, each of the concepts has a specific purpose on the conceptual spectrum.

The concept of gross negligence was motivated by the desire to create a middle ground between fraud and heavy fault, the severity of which would be higher but less severe than wilful misconduct, the first two being committed in bad faith. The latter requires judges to consider the personal qualities and morality of the carrier. In cases where the carrier was not actually aware of the veracity of the injury, he will still be acting in good faith, even if it is uncertainly.

In view of the spirit of the legislature, the courts found in Article 21 of the AUCTMR that negligence arising from reckless behaviour of the carrier should be punished according to the conscience that he should have had (and not that he actually has) of the damage, given the factual circumstances. Thus, in a case scrutinized by the Wouri High Court in session in Douala (Cameroon), the judge decided that "*it has to be concluded that the failure to take security measures is characteristic of a gross misconduct*".⁹⁰ This contrasts sharply with the concrete assessment, which promotes the awareness of the veracity of the injury. Here, the judge opted for an objective assessment, which helps to minimize the benefits granted to the carrier by the legislature to alleviate his responsibility; however, this becomes contractual inequality when held in favour of a person who did not deserve it because of his behaviour. Through such behaviour, the used this punishment to establish

⁸⁸ Sonia Nehache, *La faute inexcusable et le droit des transports*, (Master's thesis, CDMT, Aix-Marseille III, 2005).

⁸⁹ Article 21-1 AUCTMR.

⁹⁰ Wouri High Court, Civil Judgement No. 110 of 16 February 2009, *Société des établissements Monkam (SEM) C/ Le capitaine commandant le M/S Crimmitschau VG E 0601, Armement Safmarine Container Lines N.V, la société Maersk Cameroon SA*, Unpublished; See also Cass. Civ. 2nd, 5 March 1964, JCP 1964, p. 3696, note De Juglart.

a balance in the contract of carriage. According to this objective assessment, it would be sufficient for the applicant to prove that the carrier, in committing the fault, “*would have been aware of the probability of the occurrence of damage and its consequences*”.⁹¹

This solution of an objective evaluation was confirmed and consecrated by a judgement of 5 December 1967,⁹² where the French Court of Cassation supported an abstract assessment when it expressly stated that gross negligence “*must be assessed objectively*” or better still, “*must be assessed in relation to the conduct of a prudent and wise person*”. The judgement, then, merely resides in the certainty that the carrier should have been aware, not in proving for certain that he was actually aware, of the likelihood of injury. This solution was re-appropriated by the trial judges, who argued that “*it must be objectively determined, that is to say compared with a normal, informed and prudent person, whether the author of the act or reckless omission, or the cause of the accident, knew that it would probably result in damage*” or that “*the carrier’s employees have not adopted the ordinarily diligent and prudent behaviour expected of a carrier when handling parcels that have been reported fragile or of a special nature*”.⁹³

The sanction then is justified in these cases due to an absence of the foreseeability of damage. The mere evidence of the consciousness that the carrier should have had is enough to oblige him to pay full compensation for the damage incurred. In all cases, courts require concrete proof that the damaging event was predictable. Foreseeability of damage, which is reflected in some cases⁹⁴ as part of the control, helps to retain a judgement of gross negligence. It is also in this sense that, in agreement with the trial judges, the French Supreme Court refused to consider as gross negligence a weather forecast that predicted that it would be a little cloudy when in reality, the carrier was actually faced with a storm.⁹⁵ Once it has confirmed whether the damaging event could have been predicted, the court notes that the carrier had the opportunity to avoid foreseeable harm. This failure to avoid injury results in the reckless acceptance of unnecessary risk. Recklessness results when the carrier insists on acting in a manner that will result in injury, which, being aware of the probable result, he could have avoided. It

⁹¹ Paris, 27 June 1966, JCP 1967, II, 15261.

⁹² Cass. Civ. 1st, 5 December 1967, JCP 1968, II, 15350; RTD Civ. 1968. 382, note Durry.

⁹³ Versailles, 5 January 1996, BT 1996, 399.

⁹⁴ Cass. Com., 14 March 1995, Bull. No. 86.

⁹⁵ Civ. 1st, 2 May 1979, Bull. Civ. I, n°385.

is therefore an act of unspeakable irresistibility. It appears that, from the moment that the damaging event could be predicted, a carrier or his employee who did nothing to avoid it will be deemed to having taken a recklessly damaging risk.

It appears from this abstract assessment that the carrier is guilty of gross negligence when he does not take appropriate measures to avoid damage that he was aware of. As such, gross negligence has rejoined the ranks of those contractual faults of any kind that are all assessed, in principle, *in abstracto*, although it brings gross negligence to the level of mere negligence, rather than fraud. By equating gross negligence with wilful misconduct, the legislature makes the classification of voluntary faults problematic. One judge of a case made his position clear, stating that gross negligence was “*an act or omission done with intent to cause damage, or an act performed recklessly and with knowledge that damage would probably be the result*”.⁹⁶ This equivalence of gross negligence with wilful misconduct reflects the reluctance that of the courts to develop a definition.

In France, one author⁹⁷ schematically explains the evolution of the judicial position. He argues that the Court of Cassation first equated gross negligence with wilful misconduct by proposing a definition highlighting three elements: the voluntary nature of the act, knowledge of the danger that would probably result and the absence of a supporting apology relating to the need to avoid damage. Thereafter, it took into account any fault the harmful consequences of which the author could have foreseen, bringing together gross negligence and negligence. Finally, it adopted a definition that appears to situate gross negligence as a variant of negligence, thus distancing itself from previous positions. By gross negligence, the court means “*any fault of exceptional gravity derived from an act or deliberate omission whereby the author must have been aware of its danger, in the absence of any supporting reason but with no intentional elements*”.⁹⁸ This definition is based on the knowledge that a normally wise and prudent person ought to have confirmed in an *in abstracto* assessment. From this definition, it appears that several criteria can clearly be used to identify gross negligence. These include the “*exceptional seriousness of the offense*” and the “*awareness of danger*”, the “*voluntary nature of the act*”

⁹⁶ Cass. Com., 2 April 1996, Bull. No. 114.

⁹⁷ G enevi ve Viney, cit., 263.

⁹⁸ Cham. R unies, 15 July 1941, Dalloz 1941, p. 117.

or omission”, the “*lack of intent to cause harm*”⁹⁹ and “*the absence of any supporting justification*”.

The severity of gross negligence is linked nowadays to the nature of an act whereby the author could or should have been aware of the danger to which he has exposed the other party. In this context, gross negligence would undoubtedly come close to serious misconduct and would be distinguishable only by the objective severity of the act or omission. This gravity is judged on the one hand by the courts from the behaviour of the agent who, through serious and gross negligence, has demonstrated his inability to fulfil the mission entrusted to him by committing an offense that a less informed and less foolish individual would not have committed. On the other hand, it comes from the essential or fundamental character of the unperformed obligation. There is, at this level, a reconciliation with common law solutions, which penalize debtors who have breached a fundamental term or who have made a fundamental breach of contract. Several other decisions have confirmed this reconciliation between gross negligence and negligence. Using the same methods described for gross negligence and serious misconduct, the French Court of Cassation implicitly¹⁰⁰ adopts a unique concept: the cause of the forfeiture of the right to limitation of liability. The advantage of this would be that adopting a single concept leaves the courts with the possibility of independently identifying the criteria for defining gross negligence. As evidence for this, in labour law, the courts have developed a new, more flexible definition of the concept of gross negligence by comparing it to the non-performance of a “*safety obligation of result*”. The only question remaining is the proof of gross negligence. In principle, it is up to the creditor of the obligation or cargo interests to prove that the carrier, who should have been aware of the danger to which the goods were exposed, had done nothing to ensure that necessary measures were taken to prevent the occurrence of damage. The burden of proof must be borne by the creditor of the transport obligation.

Finally, we can say that gross negligence is distinct from wilful misconduct. The former can be objectively assessed by comparing the actions of the carrier to those of a hypothetically reasonable carrier. Conversely, the latter involves a subjective assessment,

⁹⁹ In the English *Horabin* case, the judge reveals that, contrary to wilful misconduct, wrongful intent is absent when it comes to negligence.

¹⁰⁰ Isabelle Corbier, *La notion de faute inexcusable et le principe de limitation de responsabilité*, in *Mélanges Bonassies*, éditions Moreux, 2001, 103 ff.

concentrating on the carrier's state of mind at the time of the act or omission that caused the loss or damage.¹⁰¹

4. Conclusion

This paper has examined the questions of exemption from liability or carriage defences, as well as control through the principle of good faith and the sanctioning of bad faith when performing a carriage contract. It has been observed that the flexibility of carrier liability is not only proclaimed, but also controlled, by courts in OHBLA space. It must be noted that a carrier under strict liability can benefit from many exemptions. In order to benefit from these defences, the judges must rule that the carrier has exhibited good behaviour in the performance of the contract. Having summarized the legal devices in place, it has been observed that, in comparison previous international instruments, OHBLA law is modern, capable of attracting foreign investors and able to stand the test of time. However, there is a need on the part of contracting states to enhance the creation of courts and to train judges who will be able to implement the spirit of this legislation in their respective territories. In spite of fact that there is a specific organ in charge of training judges under the OHBLA Treaty, it needs to do more to boost this movement. Contracting states should also embark on a very serious and vigorous legal propaganda campaign in order to acquaint the actors of transport activity with the provisions of this Act as regards their contractual rights and the limitations of their exercise. In sum, we accept that the OHBLA legislator has put in place rules and safeguards to guarantee stability, security and equilibrium in contracts of carriage of goods by road.

¹⁰¹ See the above English cases: *Sidney G Jones Ltd v. Martin Bencher Ltd* [1986]; *Texas Instruments Ltd v. Nason (Europe) Ltd* [1991]; *Lacey's Footwear Ltd v. Bowler International Freight Ltd* [1997].

A Comprehensive Analysis and Assessment of the Content of Business Cooperation Agreements and Contracts of Berth between Marinas and Charter Agencies

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ABSTRACT

The basic aim of this paper is to research business cooperation agreements and contracts of berth between marinas and charter agencies by analysing the rights, obligations and responsibilities of the contracting parties and to assess the various aspects of their content. The data on the number of marinas and registered charter agencies have been determined through an analysis of the business practices of Croatian marinas. The paper refers to the legal framework applicable to this type of legal relationship. Taking into consideration the fact that legal sources mainly allow the contracting parties to independently regulate their mutual relationships, this paper will try to provide answers to the following questions. Should legal sources contain provisions dealing with the legal matters of business cooperation agreements and contracts of berth between marinas and charter agencies? Are there, when entering into business cooperation agreement or a contract of berth between marinas and charter agencies, unspoken rules sufficient to enter into and carry out said agreement/contract? The importance of the analysis set out in the paper can be seen primarily in the role and importance of marinas and charter agencies for nautical tourism in Croatia. The services provided by nautical tourism essentially formulate the core of the business activities carried out by marina and charter agencies. Thus, when these two parties enter into a business cooperation agreement or a contract of berth, all of the core business objectives are met. Therefore, it is logical to give due attention to business cooperation agreements and contracts of berth between marinas and charter agencies. However, an analysis of the existing research has shown that this topic has not been sufficiently studied in the Croatian scientific literature, and that it has been marginalized in legal theory and in the comprehension of legal doctrines and principles.

KEY WORDS

Marinas, Charter Agencies, Business Cooperation Agreements, Contracts of Berth

1. Introduction

The subject matter of our interest in the DELICOMAR¹ Project has been, among other things, the study of the business practices of Croatian marinas in their activities regarding contracts of berth. A content analysis of the contract of berth entered into by marinas has shown different denominations and modes in the content of the same contracts.² When it comes to the terminology used in a contract of berth, it should be emphasized that marinas use different nomenclature/terms in their business practice, e.g., *contract on berth rental* or *contract No _ _ _ on berth rental* (marina operators leave a blank space in which to enter the contract number), *marina services contract*, *berth hire contract*, *contract for using berth*, *berthing accommodation contract*, etc. Apart from this terminological inconsistency, the content of contracts is not uniform and either, i.e., the variety of contractual obligations of marinas indicates the existence and implementation of different models of contracts of berth.³ One such contractual model, in which a marina undertakes the responsibility to allocate a safe berth in which to accommodate a vessel during the contract period, is specific to contracts of berth between marinas and charter agencies. Therefore, charter agencies can be berth users, that is to say, they can be the contracting party in a contract of berth between a marina and a charter agency. This brings up the question of whether there are any content-specific features when regulating the rights and responsibilities of these contracting parties in a contract of berth, i.e., the marina and the charter agency.

By analysing the current business practice of Croatian marinas, we have established that some marinas conclude specific contracts, i.e., business cooperation agreements.

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¹ See RF 1.

² Skorupan Wolff, V.; Padovan, A. V., "Are there any Elements of the Contract of Custody in the Marina Operators' Contracts of Berth?", Book of Proceedings, 2nd International Transport and Insurance Law Conference, Zagreb, 12-13 October 2017, pp 313-351, special attention to be paid to pp 317-322.

³ Ibidem, pp 317-322; also, Skorupan Wolff, V., "Standardization of Marinas' Terms and Conditions as a Way Forward", 22nd International Scientific Conference on Economic and Social Development "Legal Challenges of the Modern World", The Round Table Discussions: Current Legal Challenges of Sustainable Development of the Adriatic Ports of Nautical Tourism, Split, 29-30 June 2017.

Therefore, aside from an analysis of the content of contracts of berth, an illustration of the legal relationship between marinas and charter agencies should also include an analysis of the content of business cooperation agreements between the contracting parties. It should be noted that a list of charter agency crafts, their names, the owners' names and details on their technical specifications form an integral part of the agreement, and that contract of berth is made individually for each and every charter agency craft. Subsequently, it turns out that the contract of berth is a consequence of the business cooperation agreement between a marina and a charter agency.

Only a few Croatian marinas have a practice of entering into agreements with charter agencies, namely with those with a larger fleet. In other words, some marinas offer charter agencies only standard contracts of berth, i.e., they do not offer the possibility of mutually regulating their business cooperation. The indicated autonomous legal sources dealing with the regulation of the legal relationship between marinas and charter agencies have not yet been the subject of interest, nor they have been given due attention in maritime legal theory. Therefore, the need for an individual paper that would clearly define the characteristics of this legal relationship has been raised during work on the DELICOMAR Project.

The aim of this paper is to research business cooperation agreements and contracts of berth between marinas and charter agencies by analysing the rights, obligations and responsibilities of the contracting parties and to assess the various aspects of their content. In addition, the paper refers to the legal framework applicable to these types of legal relationships. Taking into consideration the fact that legal sources mainly allow the contracting parties to independently regulate their mutual relationships, this paper will try to provide answers to the following questions. Should legal sources regulate the legal relationship between marinas and charter agencies? Are there, in the business practice of marinas, unspoken rules sufficient for the regulation of the mutual rights and responsibilities of the contracting parties, i.e., marinas and charter agencies? The results of the analysis presented in this paper are mostly significant because of the role played by and the importance of marinas and charter agencies in nautical tourism in Croatia. In terms of the number of charters and chartered vessels it contains, the Republic of Croatia

is the leading country in the world.⁴ Therefore, the regulation of legal relationships between marinas and charter agencies has an important role to play in the development of nautical tourism in the country.

2. Definition of the terms *marina* and *charter agency* and their basic features

The contracting parties in a contract of berth or a business cooperation agreement, the contents of which have been analysed in this paper, are the marina and the charter agency. In order to identify the usual content of these sources, and to determine the specific rights, obligations and responsibilities inherent in the legal relationships between a marina and a charter agency, it is necessary to provide definitions of the terms *marina* and *charter agency* and to state their basic characteristics.

2.1. Marina – definition, classification, categorization and the performance of business activities in terms of concessions

In Croatian legislation, the term *marina* is defined by The Ordinance on Classification and Categorization of Nautical Ports.⁵ According to this legal source, a marina is a nautical tourism port; ⁶ a nautical tourism port is subsequently defined as a functional business unit in which a legal entity or a natural person operates and provides nautical tourism services as well as other accompanying services to nautical tourists (trading, catering, etc.)⁷ There are different types of nautical ports, and their classification has been determined according to the types of services that they render in the port. In addition to

⁴ Meetings of the Nautical Tourism Association, member association of the Croatian Chamber of Commerce (HGK), held during “The Days of Croatian Nautical Tourism” sponsored by HGK; meeting of the member associations of the HGK, the Association of Croatian Marinas and the Association of Providers of Accommodation on Board – charter at Biograd Boat Show, 19 November 2017.

⁵ Official Gazette, No 72/08. It is specified that the Ordinance on the Classification and Categorization of Nautical Ports was adopted as a subordinate act pursuant to the Act on the Provision of Tourism Services (Official Gazette, No 68/07, 88/10, 30/14, 89/14, 152/14), the implementation of which is under the competence of the Croatian Ministry of Tourism, while the legal status of nautical ports, including marinas and maritime domains with a concessionary contract to provide nautical tourism and services, is primarily regulated by the Maritime Domain and Seaports Act (Official Gazette, No 158/03, 100/04, 141/06, 38/09, 123/11, 56/16). Padovan, A.V. “Arrest of a yacht in a Croatian court for the purpose of securing a marina operator's claim”, Book of Proceedings, 2nd INTRANSLAW, Zagreb, 12-13 October 2017, p 380.

⁶ Article 5 of the Ordinance on the Classification and Categorization of Nautical Ports.

⁷ Article 2, paragraph 1 of the Ordinance on the Classification and Categorization of Nautical Ports.

marinas, nautical ports are classified as anchorages, boat storages and land marinas.⁸ Marinas, which offer the highest level of quality in nautical tourism, are considered to be the most commercially important ports of nautical tourism.⁹ Moreover, the professional literature highlights that marinas are the most developed and most complex types of nautical tourism port, whose berths, equipment and other facilities located in the sheltered basin are employed to render the services of vessel accommodation and recreational sojourns to yachtsmen and boatmen.¹⁰

These interpretations of legal theory are based on the definition of the term marina. Croatian legislation defines a marina as: "a part of the water and shore area specially built and equipped to render the services of berth rental, tourist accommodation on vessels and other nautical tourism services. It can also render catering services pursuant to this Ordinance."¹¹ In addition to these definitions of the term marina as a nautical tourism port and as part of the water and shore area specifically built and equipped for rendering berth rental services, tourist accommodation on vessels, catering services, etc., a marina can be analysed in terms of its different aspects, taking into consideration its facilities, construction type, sea area, ownership and location.¹² Regarding these aspects, there are many classifications of marinas, e.g., standard, luxurious, recreational, Mediterranean, Atlantic, open, enclosed, completely enclosed, private, communal and public, and sea, lake, river and canal marinas.¹³ Moreover, marinas are individually categorized in accordance with the detailed criteria and sub-criteria listed in the table of Annex 1 of the Ordinance on the Classification and Categorization of Nautical Ports under the heading *Terms and conditions for the categorization of marinas*. Pursuant to the Ordinance, marinas are categorized into four categories according to anchors awarded for each category, the

⁸ For the terms anchorage, boat storage and dry marina, see articles 7 and 8 of The Ordinance on the Classification and Categorization of Nautical Ports; for more on their characteristics, see Luković, T. et al., *Nautički turizam Hrvatske*, Redak, Split, 2015, pp 161-164.

⁹ *Ibidem*, p 164.

¹⁰ Hlača, V., Nakić J., "Pravni status marina u Republici Hrvatskoj", *Periodical of the Croatian Academy of Legal Sciences*, vol 1, no 1, 2010, p 175.

¹¹ Article 10, paragraphs 1 and 2, The Ordinance on the Classification and Categorization of Nautical Ports.

¹² Luković, T. et al., RF No 9, op cit, p 165; also see the term marina in *Pomorska enciklopedija*, book IV, *Jugoslavenski leksikografski zavod "Miroslav Krleža"*, Zagreb, 1976, p 367.

¹³ More on each of these types of marina in Luković, T. et al., note RF 9, pp 165-167.

lowest category being a marina with two anchors and the highest category a marina with five.¹⁴

When describing the basic features and characteristics of a marina, it is important to mention that a marina, as a subject of nautical tourism, is granted the concession of performing its activities in accordance with the regulations of the Maritime Domain and Seaports Act.¹⁵ The basic provisions of this legal source state that this concession for the special use and economic exploitation of a part of the maritime domain can be granted to natural persons and legal entities through a legally prescribed process.¹⁶ According to the legal process, the economic exploitation of the maritime domain is based on this concession-granting decision. Contractual and legal relationships, including concession-related rights and liabilities, are established by entering into a concession contract between the grantor and the concessionaire.¹⁷ The concessionaire can be any natural person or legal entity who meets the legal and business requirements and is registered and qualified to perform the business activity for which the concession has been granted.¹⁸ Therefore, a marina is granted a concession based on a concession-granting decision and, as the concessionaire, enters into a concession contract. As the concessionaire, the marina is legally entitled to render nautical tourism services, notably those of berth rental for the accommodation of vessels and the accommodation tourists

¹⁴ Article 22 of the Ordinance on the Classification and Categorization of Nautical Ports.

¹⁵ See *supra*, RF No 6.

¹⁶ Article 7 of the Maritime Domain and Seaports Act.

¹⁷ Concession-granting decisions shall specify the area of the maritime domain being granted for use or economic exploitation; the mode, conditions and period of use or economic exploitation of the maritime domain, the degree of exclusion of general use, the fee paid for the concession, the powers of the grantor, a list of the superstructure and infrastructure located in the maritime domain and being granted for concession, the rights and liabilities of concessionaire, including liability for the maintenance and protection of the maritime domain, as well as the preservation of nature, if the maritime domain is located in a protected part of nature. In compliance with the concession decision, the concession contract regulates the purpose for which the concession has been granted, the conditions that the concessionaire must meet during the concession period, the amount and mode of payment of the concession fee, the concessionaire's guarantees, as well as other rights and liabilities of the grantor and concessionaire. See Articles 24 and 25 of the Maritime Domain and Seaports Act. Also, Luković, T. et al., RF No 9, pp 35-36; Bolanča, D., "Osnovne značajke Zakona o pomorskom dobru i morskim lukama", *Comparative Maritime Law*, vol 43, No 158, 2004, pp 11-42; Đerđa, D., *Upravno-pravni aspekti koncesije*, a doctoral dissertation, Faculty of Law, University of Split, Split, 2005, pp 18-19; Ljubetić, S., "Construction of Buildings and other Infrastructure Objects in the Ports of Nautical Tourism", 2nd INTRANSLAW, Zagreb, 12-13 October 2017, p 293.

¹⁸ Stančić, F., Bogović, M., "Koncesija na pomorskom dobru- odnos zakona o koncesijama i Zakona o pomorskom dobru i morskim lukama", *Pravni vjesnik*, vol 33, No 1, 2017, p 83.

on these vessels, electricity and water connections and the supply of fuel, provisions, spare parts, equipment, etc. to yachtmen.

In a nutshell, maritime domain concession issues are very complex. Therefore, a legal procedure to promulgate new legal act on standards and rules for the awarding of concessions is underway. In this part, we have highlighted only the basic features of concessions in order to explain marina's business activities in terms of the concession granted.¹⁹

2.2. Charter agency - definition, terms and conditions for conducting charter activities

In Croatia, the term *charter agency* is defined by the Ordinance on the Conditions for Conducting the Activity of Chartering of Vessels With or Without Crew and the Provision of Guest Accommodation Services on Vessels (henceforth the 2017 Ordinance).²⁰ This definition states that a charter agency "is a natural person or legal entity being the owner or the user of a vessel, or having, under written contract, assumed responsibility for operating the vessel, and by assuming such responsibility, having assumed authorities and responsibilities as laid down in this Ordinance and in positive law regulations of the Republic of Croatia related to safety of navigation and the protection of the sea from pollution".²¹

The term *charter agency* was introduced instead of the term *charter firm*, which was used in the earlier Ordinance on Conditions that Water Craft, Natural Persons or Legal Entities Carrying Out Charter Activities Must Satisfy²² and which was revoked upon the entry into force of the 2013 Ordinance on the Conditions for Conducting the Activity of Chartering of Vessels With or Without Crew and the Provision of Guest Accommodation

¹⁹ More on the granting of concessions in the maritime domain in RF 17; also, see Mišić, Ž., "Unsolved questions in the application of the Maritime Domain and Seaports Act with suggestions for amendments", *Comparative Maritime Law*, vol 44, No 159, 2005, pp 69-81; Mišić, Ž., "Kritički osvrt u odnosu na važeće propise s prijedlogom mjera za kvalitetnije upravljanje pomorskim dobrom", *Comparative Maritime Law*, vol 51, No 166, 2012, pp 259-333; Staničić, F., Bogović, M., "Koncesije na pomorskom dobru-odnos Zakona o koncesijama i Zakona o pomorskom dobru i morskim lukama", *Pravni vjesnik*, vol 33, No 1, 2017, pp 73-104.

²⁰ Official Gazette, No 42/17.

²¹ Article 5, point 5 of the 2017 Ordinance.

²² Official Gazette, No 41/05, 62/09.

Services on Vessels.²³ The latter was similarly revoked upon the entry into force of the 2017 Ordinance.²⁴ The definition of the term charter firm is basically very similar to that of the term charter agency. The definition states that a charter firm is a "natural person or legal entity registered in the Republic of Croatia to conduct the activity of chartering of vessels."²⁵

The terms and conditions for conducting the activity of chartering of vessels with or without a crew, including guest accommodation services on vessels (charter activity) are also regulated by the 2017 Ordinance.²⁶ First of all, the term *vessel*, as determined in the Ordinance, is a waterborne craft, defined in the Maritime Code²⁷ as a boat or a yacht²⁸ used for charter activities.²⁹ According to the 2017 Ordinance, a charter activity indicates the provision of a vessel to an end user for entertainment purposes, with or without a crew, without guest accommodation services, for an appropriate, pre-established and publicly available fee; while the provision of accommodation services means providing a vessel to an end user, with or without a crew, for a time period during which the passengers remain on the vessel overnight, for an appropriate, pre-established and publicly available fee.³⁰

The 2017 Ordinance specially regulates the terms and conditions referring to the seaworthiness³¹ and technical fitness of a vessel to conduct charter activities.³² It is the responsibility of the charter agency to meet the obligation of submitting a request for the

²³ Official Gazette, No 99/13.

²⁴ Article 36 of the 2017 Ordinance.

²⁵ Article 2 of the Ordinance on Conditions that Water Craft, Natural Persons or Legal Entities Carrying Out Charter Activities Must Satisfy.

²⁶ See supra FN 21, definition of a vessel according to article 2, point 1 of the Ordinance on the Conditions for Conducting the Activity of Chartering of Vessels With or Without Crew and the Provision of Guest Accommodation Services on Vessels.

²⁷ Official Gazette, No 181/04, 76/07, 146/08, 61/11, 56/13, 26/15.

²⁸ For definitions of the terms boat and yacht, see Article 5, paragraph 1, point 20 of the Maritime Code.

²⁹ Definition of the term vessel according Article 2, point 1 of the 2017 Ordinance.

³⁰ Article 2, points 3 and 4 of the 2017 Ordinance.

³¹ When it comes to seaworthiness, the vessel must be registered for economic use in the state of its nationality, technically fit to conduct charter activities in the Republic of Croatia, have the minimum number of adequately qualified crew members, in possession of other valid certificates and books complying with the regulations of the flag state and in possession of a third-party liability insurance policy that also covers harmful events in the internal waters and territorial sea of the Republic of Croatia. Conditions for vessels of third-country nationality have also been added. See Articles 5 and 6 of the 2017 Ordinance.

³² A vessel used for the provision of accommodation services shall be built and equipped in a way that enables the accommodation and stay of the crew and passengers on the vessel for several days. The technical fitness of a vessel to conduct charter activities shall be determined through a technical survey. Articles 5 and 6 of the 2017 Ordinance.

assignment of the user's rights to work on the central database. In accordance with the 2017 Ordinance, prior to chartering a vessel, the charter agency is required to submit a written request to the Ministry for the assignment of the user's rights to work on the central database, in which all registrations of the crews and passenger lists on vessels are recorded.³³ The 2017 Ordinance regulates in detail the obligations of a charter agency and its work on the central database. The charter agency must have the equipment necessary to electronically register the crew and passenger lists, including an Internet connection and equipment to create an advanced electronic signature. The charter agency must report the crew and passenger list to the Ministry's central database prior to any navigation, have a guest reception area and own, be leased or granted a concession.³⁴ Henceforward, there are other provisions of the 2017 Ordinance that regulate the various obligations of the charter agency in light of the above stated conditions.³⁵

One of the most important provisions is that regulating procedures of admitting guests onto premises, that, for instance, a marina has rented to a charter agency. It is the obligation of the charter agency to rent an office or business premises within the marina area for the purposes of performing charter services. Therefore, the definition of rights and responsibilities regarding the lease is an integral part of the business cooperation agreement or the separate property lease agreement.³⁶

2.3. The number and capacity of marinas and the number of active charter agencies in the Republic of Croatia

Today, there are 139 nautical tourism ports in the Republic of Croatia, 71 marinas (of which 13 are land marinas) and 68 other nautical tourism ports. The total number of berths is 17,428. In 2016, there were 13,422 vessels permanently moored in nautical ports and 198,151³⁷ vessels in transit. It is considered that private service marinas

³³ Article 11 of the 2017 Ordinance.

³⁴ Article 12 of the 2017 Ordinance.

³⁵ See more in Article 11 of the 2017 Ordinance.

³⁶ The business practices of Croatian marinas have shown that some marina operators tend to integrate the property lease agreement into The Agreement on Business and Technical Cooperation signed with the charter agencies.

³⁷ Croatian Bureau of Statistics – Release, Nautical Tourism - Capacity and Turnover of Ports in 2016, No 4.3.4. from 24 March 2017; available at https://www.dzs.hr/Hrv_Eng/publication/2016/04-03-04_01_2016.htm (logged in on 15 November 2017).

constitute the majority of marinas and mooring capacity in the Republic of Croatia.³⁸ Marina Dalmacija in Sukošan is the largest marina in Croatia, with 1,200 water moorings. The quality of the berths in this marina allow the reception of mega-yachts up to 80 m in length.³⁹

There are 645 active charter agencies in the Republic of Croatia, but the number of charter agencies registered in the Commercial Court register (the activity of vessel chartering – code '71') reaches 1,906. Around 200 charter agencies have three or more vessels in their fleet. There are 3,305 active charter vessels, which means that the Republic of Croatia makes up 25% of the world's overall charter fleet. These data refer only to the chartering of vessels without a crew.⁴⁰

3. Sources regulating the legal relationship between marinas and charter agencies in Croatian business practice

In order to determine the specific qualities of legal relationships between marinas and charter agencies, we have researched the business practices of Croatian marinas by collecting and analysing business cooperation agreements and contracts of berth between marinas and charter agencies. Since a contract of berth between a marina and a charter agency is in some cases preceded by a business cooperation agreement between the same parties, we will start by analysing the content of the latter.

3.2. Business cooperation agreements between marinas and charter agencies

The results of research into the business practices of Croatian marinas have shown that a business cooperation agreement may contain the following provisions. The basic obligation of the marina, according to a business cooperation agreement, is to provide the charter agency with a sufficient number of free berths for charter vessels for a certain period of time, usually one year with the possibility of prolongation. If one of the parties does not renounce the agreement, it will automatically be prolonged for one more year.

³⁸ Luković, T. et al., RF 9, p 174

³⁹ <https://www.d-marin.com/en/marinas/croatia/dalmacija//about-us.aspx> (logged in on 1 November 2017).

⁴⁰ <http://mint.hr/default.aspx?id=21414> (logged in on 15 November 2017).

Attached to this business cooperation agreement is a list of charter vessels, containing details such as the name and technical characteristics of the vessel (e.g., length/m), as well as the owner's details. The list of vessels shows that the charter agency, i.e., the party in the contract with the marina, does not always own the vessel in question. In other words, the owner of the vessel, according to the details in the list, is usually a *leasing* company or any other company, quite possibly another charter agency, that has rented the vessel to the charter agency, the contracting party in the business cooperation agreement with the marina. Consequently, the charter agency, a party in the agreement with the marina, as the lessee of the vessel in question, is the *beneficiary* of the vessel. Such circumstances, in which the charter agency is either the owner or the beneficiary of a vessel, may become potentially problematic in the context of the payment of marina fees or when attempting to define the debtor of claims from the business cooperation agreement or the contract of berth between the marina and the charter agency (e.g., claims for berth rental fees).⁴¹ However, examples of business practice show that a marina will deal with such questions through the business cooperation agreement or the contract of berth, requiring the charter agency to deliver the owner's power of attorney for the exploitation of the vessel, as well as a statement from the owner expressing that the marina is authorized to arrest the vessel unless the charter agency settles all of its obligations towards the marina regarding said vessel.

From our analysis of the business practices of Croatian marinas, we have been able to determine that certain business cooperation agreements involve the detailed regulation of methods of payments of the annual berth fee. In such cases, the marina approves, and the charter agency accepts, payment in instalments of annual berth fees for the contracts signed by the day of entry into business cooperation agreements or for those that will be signed by the end of the calendar year. According to the business practices of some marinas, the possibility of instalment payments can only be signed with charter agencies with more than 10 vessels in their fleet.

According to the same agreements, for some vessels, the entire annual berth fee has to be paid by 1 April, for some by 1 June and for the rest by 1 August. The total sum of the annual berth fee depends on the length of the vessel. In other words, the annual berth fee

⁴¹ On issues of the implementation of legal measures to ensure the marina's claims see Padovan, A.V., RF No 6, pp 379-406.

for a vessel of measuring 10.75 m in length costs 38,509.20 kn, whereas for a vessel measuring 16.75m in length, it costs 78,298.80 kn, etc.⁴² If the charter agency fails to pay the berth fee via instalment payments as set out in the contract of berth, or during the period defined in the business cooperation agreement, the marina can terminate the agreement. In the case of termination, the charter agency has to pay the annual berth fee in the ways prescribed by the Ordinance on Berth Use Charges and Methods of Payment of the Contract of Berth, which has to be signed for every vessel included in the business cooperation agreement. Upon an examination of the content of contracts of berth and the Ordinance on Berth Use Charges and Methods of Payment, the charter agency is obliged to pay the rental fee no later than seven days after the contract of berth is signed (at the reception desk or via the marina operator's transfer account). However, if the charter agency repeats its failure, either entirely or in part, to pay the berth fee, the marina can terminate the contract of berth and charge the charter agency for a vessel according to the valid marina daily berth price list.⁴³ A daily berth fee is charged from the day that the contract is signed. If the charter agency partially repays the annual berth fee, this money will be used to pay the daily berth fee.

Business cooperation agreements also regulate the charter agency's obligation to deliver a blank promissory note for a determined sum of money to the marina, in order to ensure the payment of the annual berth fee defined in the business cooperation agreement and the contract of berth. This blank promissory note must be solemnized by the notary public. In order to ensure that the payment is made, the marina is allowed to use the promissory note.

Some business cooperation agreements regulate the right of the marina to prevent the charter vessel from leaving if the berth fee or any other fee has not been paid. A written notice, issued by the marina, must precede this action. In addition to this, some business cooperation agreements only regulate the methods permitted to pay the annual berth fee, while others regulate the marina's obligations to supply the charter agency's vessels with

⁴² These amounts for claims have been calculated by analysing business cooperation agreement/s signed in 2017. However, the price lists of marinas are also available on the Internet. For example, see the price list available at: <http://www.aci-marinas.com/wp-content/uploads/2014/04/2017-HR-ACI-cjenik-WEB-FULL.pdf> (logged in on 15 November 2017).

⁴³ The usual practice distinguishes a daily or transit berth from a permanent berth. A daily berth refers only to the use of a berth in the marina, while a permanent berth includes the rent of the berth, the monitoring of the berth and the vessel and, in some cases, the obligation of the custody, maintenance, repairs, etc., of the vessel. Skorupan Wolff, V.; Padova, A. V., op. cit., RF No 3, pp 323-324.

potable water and electricity (including the use of showers and sanitary blocks by the charter guests), as well as the use of the crane and automatic slipway (some agreements even contain details on the size/lifting capacity of the crane and automatic slipway). Fees for the use of the crane and automatic slipway are determined by the marina's pricelist. The marina can also be obliged to provide the charter agency with a free parking space. It can further be obliged to take care of the charter guests' cars, which can be parked in an open parking area or in the marina's hangar. The parking fee must be paid at the reception desk.

Consistently with some business cooperation agreements, the charter agency has the right to choose its representatives and base supervisor, who are obliged to comply with the marina's activity regulations. In the case of a severe violation of these regulations, the marina can terminate the agreement with immediate effect. Technical assistance from the marina, as part of the marina's facilities, will provide priority repair works on the charter agency's vessels at the base supervisor's request. This thus enables the vessel to leave undisturbed. In other words, this is the most frequent type of business cooperation agreement between a marina and a charter agency, the content of which depends entirely on their free will. By applying the general provisions of the Obligations Act (hereafter referred to as the OA),⁴⁴ the parties in the agreement, in this case the marina and the charter agency, regulate their contractual relationship freely but in accordance with the Constitution, mandatory regulations and social morality.⁴⁵ Besides, the marina and the charter agency are obliged to act in accordance with the general provisions of the OA, which refer to obeying the duty of cooperation, the prohibition of abuse of law, the fulfilment of the obligations of the counterparty, etc.⁴⁶ Some marinas and charter agencies sign special agreements regulating the rights and obligations resulting from the business cooperation agreement and the contract of berth. This is why we are going to analyse the content of contracts of berth between marinas and charter agencies. It should be added that, in some cases, business practices favour only a contract of berth between a marina and a charter agency, without the previous signing of a business cooperation agreement.

⁴⁴ Official Gazette, No 33/05, 41/08, 125/11, 75/15.

⁴⁵ Article 2 of the OA.

⁴⁶ Articles 1-15 of the OA.

3.3. Contracts of berth between marinas and charter agencies

In the context of the content analysis of the contract of berth between the marina and the charter agency based on the contracts collected from the business practice of Croatian marinas, the following characteristic and features of their legal relationship may be emphasized. By signing a contract of berth with a charter agency, a marina undertakes the responsibility to provide the charter agency with a secure and safe berth to accommodate a vessel for a specific period of time. The charter agency uses these berths for vessel rental activities; they are allocated solely for the purpose of berthing and not for the employment of the berth. The marina allocates the contracted number of moorings, i.e., berths, to accommodate vessels used by the charter agency for rental activities. The charter agency is not allowed to allocate or rent its berths to third parties, nor to use the berths for any other activity other than the activity of chartering vessels. Due to the features described, a contract between a marina and a charter agency shares many elements with renting/rental agreements.⁴⁷ Therefore, the provision of a berth, i.e., 'the rental of a berthing space', is the basic purpose of a contract of berth between a marina and a charter agency.

It might seem that the scope of a marina's obligations in this contractual relationship is very wide; however, the results of our research have shown that the marina's obligations are very narrow in scope. Namely, the marina is obliged to provide the charter agency with a berth, i.e., the marina is contracted only to 'rent the space occupied by the berth', as well as obliged to ensure that the berth provided is in good order, technically and nautically safe and appropriate for the particular vessel in question in terms of its type, size and other technical specifications.⁴⁸ The subject of a contract of berth is the *vessel* in reference to which the contract is signed. This vessel is specified in detail. Usually, the information specifying the vessel in a contract of berth includes: the name of the vessel, the registration number, the type of vessel, the port of registry, the flag, the overall length,⁴⁹ the beam, the maximum draught, the construction material, the year of

⁴⁷ Padovan, A.V "Odgovornost luke nautičkog turizma iz ugovora o vezu i osiguranje", Comparative Maritime Law, vol 52, No 167, 2013, pp 7-8.

⁴⁸ Skorupan Wolff, V., Padova, A. V., op. cit., RF No 3, p 318.

⁴⁹ Some contracts of berth provide a definition of this term; it refers to the length stated in the vessel's documents, not to the overall length, which includes all equipment and upgrades, such as anchors, bow overhangs, bathing platforms, davits, catwalks, etc.

construction, the type of engine, the power and serial number of the engine, the underwriter, the insurance policy number and the insured value.

As previously stated, a contract of berth between the marina and the charter agency is concluded for a specific period of time.⁵⁰ However, if a new contract of berth is not concluded for the same vessel upon the expiration date, the charter agency is obliged to take over the vessel without delay and leave the marina. If this is not done, once the contract expires, the charter agency will be charged the price applicable for the daily berth of the vessel in accordance with the marina's valid price list. This has been shown by some of the provisions present in certain contracts of berth. In some cases, the contracting parties agree that the contract of berth shall be automatically prolonged for a period of, for example, two years, and if, for example, six months before the contract expires, neither of the contracting parties receives from the other party a written notice of cancellation of the contract.

On the other hand, the contract of berth determines a wide range of obligations on the part of the charter agency. First of all, one of the charter agency's obligations is to pay the fee due for using the berth. One should bear in mind that this particular obligation represents the marina's basic income and that acting in accordance with the contractual obligation to pay the rental fee is of the utmost importance for the existence of the marina.⁵¹ We have already mentioned the standard content of this contractual provision in a contract of berth. Some business cooperation agreements between marinas and charter agencies incorporate provisions on the payment of the berth fee during the contracting period and sanctions in the case of failure to pay the annual berth fee as stated in the agreement. According to the contract of berth, the charter agency is obliged to pay the rent, most frequently, within seven days of the beginning of the accounting period. However, if the charter agency fails to make the payment, either fully or in part, the marina has the right to cancel the contract and to charge the charter agency for the daily berth of the vessel in accordance with the marina's valid price list. Moreover, if the charter agency has only partially paid the annual berth fee, the payment received will be used to settle

⁵⁰ Taking into consideration that the marina is granted the concession to perform its activities for a certain time period, there is no legal basis for signing a permanent contract of berth, i.e., for an indefinite period until the termination of the contract.

⁵¹ Padovan, A. V., op. cit., RF No 6, p 380, as cited in Majstorović, D., "Ovršno pravo – prodaja (napuštenih) plovila", XXIV Svjeto vanje – Aktualnosti hrvatskog zakonodavstva i pravne prakse, Vol 16, Hrvatsko društvo za građanskopravne znanosti i praksu, Zagreb, 2009, pp 841-853.

the charter agency's obligations to pay the price applicable for the daily berth of the vessel. In addition, some contracts of berth contain provisions stipulating that the marina reserves the right to change and update the price list for its services for each calendar year during which the contract of berth is in force. The marina is obliged to promulgate the price list for the next calendar year no later than the due date. Furthermore, contracts of berth separately regulate the obligation to pay for the use of water and electricity installations, etc. As usually stated in the contract, electricity and water are charged according to monthly consumption and payments are made in due time. Otherwise, the marina has the right to charge legal interest rates.

An integral part of a contract of berth between a marina and a charter agency, as stated in each contract, is the marina's internal regulations: General Terms and Conditions and the Marina's House Rules (depending on the marina, sometimes referred to as *General Business Terms and Conditions/General Terms and Conditions of Berthing, Ordinance on the Order of Nautical Tourism Ports/ Ordinance on Order in the Marina* _ _ _). From the contents of some contracts of berth, it can be concluded that the marina's price list is also an integral part of the contract. A charter agency, by signing a contract of berth, confirms that the General Terms and Conditions and the Ordinance on Order have been read, i.e., it is familiar with and agreeable to them.

These sources define the mutual rights and obligations of the marina and service user in detail. Therefore, the charter agency, by entering into an agreement with the marina, must be well-acquainted with the basic provisions of the marina's internal regulations, which is finally confirmed by their signing of the contract of berth. Throughout this process, according to the content of the contract of berth, the marina reserves the right to modify or amend its internal regulations. These amendments enter into force after being displayed on the notice board or another prominent position in the marina. Violation of any of these regulations gives marina the same rights as for violation of the provisions contained in the contract of berth.

Some contracts of berth also contain specific provisions on the contractual liability of the parties, which take priority over the internal regulations. According to the content of the contract of berth, the charter agency undertakes full responsibility for the performance of its activities, and will indemnify the marina against any loss, damage, costs, claims or proceedings caused by it to the marina, its employees or its users.

Furthermore, the provisions state that the marina shall assume no liability, neither in the contract of berth nor in any other documents, for any loss, pilferage or other damage to the property of the charter agency or third parties. This provision in the contract of berth is very important, since it implies that the parties, i.e., the marina and its counterparty, mutually agree on the extent of their contractual liability. However, the legal acts do impose some restrictions, particularly provisions on sanctions for damage, liability for damages caused intentionally or by gross negligence, as well as provisions on conditions that would render the contract void, as defined by the Obligations Act.⁵² The general terms and conditions for marina services define in detail accidents and damage for which the marina is not responsible. The usual exclusion of liabilities present in the general terms and conditions for marina services are damage caused by bad maintenance, neglect or the worn out state of the vessel or equipment, the loss of fenders, anchors, ropes and other equipment, damage resulting from usual wear and tear, etc.⁵³ In the context of liability, it is important to mention that an analysis of the content of contracts of berth with charter agencies has not revealed any provisions on the obligations of marinas regarding custody of vessels. Examples from business practice have shown that the contracting parties in a contract of berth explicitly exclude the application of Section 16 of the Obligations Act, i.e., the application of provisions referring to rights and obligations regulated by the deposit contract. Taking into consideration the provisions in the general terms and conditions for the marina's services, it is necessary to indicate that the contract of berth should clearly state whether or not the marina has any obligations regarding the custody of a vessel. If this information is lacking, it could affect the issue of the contractual liability of the parties.

When it comes to liability for the pilferage of equipment or other items on the vessel, it is the opinion of the parties in the contract of berth that the charter agency should be obliged to fill in and deliver an inventory listing the equipment and items on the vessel and to inform the marina immediately of any changes to the equipment and items during the enforcement period of the contract of berth. According to the contract on berth, the inventory list is signed by both contracting parties, and each party keeps a validated copy of the list. In addition, according to the contract of berth, the charter agency is often obliged to be covered by third-party liability insurance for the agency itself, its guests and

⁵² See Articles 342, 345 and 294 of the OA.

⁵³ More in Padovan, A. V., *op. cit.*, RF No 48, pp 12-13.

its clients. The insurance policy covers any the damage and liabilities that may arise from an accident or other incidents that may occur during charter activities or as a result of said activities. Additionally, the contract of berth outlines specific provisions on environmental protection, as well as on marina security measures. According to these provisions, the charter agency, by signing the contract of berth, accepts legal and material liability for acting in accordance with the rules and regulations of the Republic of Croatia regarding the protection of the environment, occupational safety, firefighting precautions, etc.

For the purposes of applying the protection measures, the charter agency is obliged to open up its premises to inspections authorized by the marina or any other local or state authority. The charter agency must take all possible preventive measures to eliminate the risk of fire on its premises and must comply with legal firefighting measures. The storage and possession of flammable and toxic materials in the marina area is strictly forbidden without certified permission issued by an authorized government agency. Under the terms of the contract of berth, the marina accepts to take the measures necessary to ensure the safety and security of its facilities, while the charter agency undertakes full liability for issues regarding the performance of its activities.

A separate provision in the contract regulates the conditions for cancelling the contract of berth between the marina and the charter agency. Possible reasons for this might be: the violation of the contract regulations, legal acts or the marina's internal regulations by the charter agency; the charter agency is not willing/able to perform its activities in cooperation with other marina users (due to private or business reasons); the charter agency acts in a way that is harmful to the marina's reputation; or the marina cannot operate due to force majeure. This provision in the contract of berth, according to business practice, allows both parties to terminate the contract at any time, in writing, without stating their reasons and adhering to a one-year notice period. If the marina terminates the contract, the charter agency shall remove its equipment and inventory and vacate the marina property. If the charter agency has signed any other contract(s) of berth, such contract(s) shall automatically be considered terminated if the contract of berth is cancelled. The marina is not obliged to refund any fees already paid, regardless of which contracting party has terminated the contract of berth.

Undoubtedly, the content and scope of the rights and obligations contained in a contract of berth between a marina and a charter agency differ according to the varying business practices of Croatian marinas. In some cases, they do not contain many provisions and even are even identical to the content of contracts of berth signed by the marina with other users. On the other hand, in some cases, they are very detailed and contain clearly defined contractual rights and obligations that the parties must adhere to, which is truly commendable. When dealing with issues that have occurred during their business practices, some marinas have incorporated a series of the rights and obligations into their contracts of berth, finding that they are necessary to regulate these mutual rights and obligations.

In our opinion, the lack of legal provisions on the regulation of this contractual relationship fails to meet the needs of the signatory parties in contracts of berth. The rights and obligations of the parties, the marina and the charter agency should not be taken for granted. Therefore, we believe it is necessary to use the abovementioned provisions to assemble an accurate model of legal contractual relationships and to incorporate these into the legal framework. Regardless of the disposition of the content of these provisions, their presence in legislation would affect the content of contracts of berth between marinas and charter agencies, leading to the standardization of rights and obligations, i.e., the standardization of legal relationships between marinas and charter agencies.

4. Conclusion

In order to determine the features of the rights, obligations and responsibilities between marinas and charter agencies, we have analysed the business practices of Croatian marinas and a number of contracts of berth and business cooperation agreements between marinas and charter agencies. We have provided definitions of the terms marina and charter agency, and stated the basic characteristics of the contracting parties according to the provisions of various Croatian legal sources: The Ordinance on the Classification and Categorization of Nautical Ports for the term *marina* and its features; and The Ordinance on the Conditions for Conducting the Activity of Chartering of Vessels With or Without Crew and the Provision of Guest Accommodation Services on Vessels for the term *charter agency* and its features.

By analysing the business practices of Croatian marinas, we have determined that some marinas tend to sign contracts of berth and business cooperation agreements with the charter agency, while others offer a standard contract of berth, which is, in its content, quite often similar to those signed by the marina with other berth users. According to the presented business practices, marinas enter into business cooperation agreements solely with charter agencies with larger fleets (10 or more vessels in the marina).

The basic obligation of a marina in a business cooperation agreement is to provide the charter agency with enough free berths for a given number of vessels and for a certain period of time, usually for one year with the possibility of prolongation. The content of some business cooperation agreements is the detailed regulation of the permissible methods for paying an annual berth fee. In such agreements, the marina offers, and the charter agency accepts, payment of the berth fee in instalments. If the charter agency does not pay the fees, the marina has the right to terminate its legal relationship with the charter agency. Some agreements regulate the right of the marina to prevent the charter agency vessel from leaving the marina unless all fees and other charges (electricity, water consumption, etc.) have been settled. Altogether, the contract of berth is the main source for the regulation of the legal relationship between most marinas and charter agencies. This same contract also regulates the accommodation of the charter agency's vessels. Since it concerns the 'rental of the berthing space', this contract between a marina and a charter agency contains many elements involved in renting/rental agreements. What is specific to this contractual relationship is that the marina is liable only for the technical and nautical validation and safety of the berth. An analysis of the content of contracts of berth between marinas and charter agencies has not revealed any provisions on the marina's obligations regarding the custody of the charter agency's vessels. Examples from the business practices of Croatian marinas have shown that some contracting parties explicitly exclude the application of Section 16 of the Obligations Act, i.e., the application of provisions referring to rights and obligations regulated by the deposit contract. Although it exists, the custody of berthed vessels is not a common feature of contractual relationships between marinas and charter agencies, and it has not been observed in the content of contracts of berth.

The content and scope of the rights and obligations of contracting parties vary according to the business practices of Croatian marinas; in some cases, these provisions

are very narrow/general, or even identical to the content of the legal relationships between marinas and individual berth users. In some cases, on the other hand, they are very detailed, clearly regulating the contractual rights and obligations of the parties.

In our opinion, the lack of legal provisions on the methods of regulation and content of (mainly) contracts of berth does not contribute towards a balanced legal relationship between the parties. Autonomous legal sources that have developed through business practice are not sufficient to regulate the rights and obligations of the parties, i.e., marinas and charter agencies. There the content and scope of the obligations of these parties are not in proportion. So that nothing is left to chance, we believe that it is necessary to assemble provisions for contracts of berth and to incorporate them into the content of legal sources, which would help to regulate the legal relationship between marinas and charter agencies. Regardless of the disposition of such provisions, their presence in legislation would influence the content of this legal relationship and would lead to the standardization of the rights and obligations of both marinas and charter agencies.

Freedom of Transit and the Simplification of Customs Procedures in the European Union

*Alessandro Torello **

ABSTRACT

The European Union internal market is based on the freedom of movement of goods. According to Article 26 of the Treaty on the Functioning of the European Union (TFEU), “the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties”. Thus, the freedom of circulation of goods, as one of the four freedoms of circulation along with the freedom of movement of persons, services and capitals, has always been a pillar inside the EU - and previously inside the former European Community. However, the EU internal market does not (and cannot) work as an autonomous and isolated market, or even worse as an autarchic economic regime: it is fully integrated in global commercial mechanisms. In fact, the World Customs Organization (WCO) has encouraged global customs integration and customs procedures harmonization (i.e. best practises) for decades. In this regard, more than ten years ago, EU Regulations 648/2005 and 1875/2006 introduced important innovations for economic operators, especially in terms of customs procedure simplification and a reduced number of safety-related customs controls - i.e. the Authorized Economic Operator (AEO) status.

KEY WORDS

Freedom of Circulation, Customs Legislation, Customs Union, AEO

1. Freedom of transit and customs-related operations

The crucial international trade axioms of the freedom of transit and the simplification of customs related operations were outlined in the General Agreement on Tariffs and Trade (GATT) in 1947 and later reaffirmed during the Tokyo Round (1973 – 1979). In fact, the Tokyo Round's revision of the GATT in the 1970s underlined the pivotal aspects of international trade, such as: freedom of transit (Article V); anti-dumping and countervailing duties (Article VI); formalities connected with importation and exportation (Article VIII); and elimination of quantitative restrictions (Article XI).

Concerning the freedom of transit, Paragraph 2 of Article V of the GATT highlights that “there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties”. In this regard, it is worth taking into consideration the Convention and Statute on Freedom of Transit, which was signed in Barcelona in 1921 and entered into force in 1922. Specifically, Article 3 of the Convention and Statute on Freedom of Transit states that “traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit”.¹

The FAL Convention² opened up a new “bureaucratic phase” in order to support the improvement of international maritime traffic and to avoid unnecessary delays. The FAL Convention was an attempt to harmonize the procedures implemented in order to manage and control the arrival and departure of ships engaged in international routes. According to Article III of the FAL Convention, “the Contracting Governments undertake to co-operate in securing the highest practicable degree of uniformity in formalities,

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¹ Concerning tariffs, Article 4 of the Convention and Statute on Freedom of Transit underlines that “the Contracting States undertake to apply to traffic in transit on routes operated or administered by the State or under concession, whatever may be the place of departure or destination of the traffic, tariffs which, having regard to the conditions of the traffic and to considerations of commercial competition between routes, are reasonable as regards both their rates and the method of their application. These tariffs shall be so fixed as to facilitate international traffic as much as possible. No charges, facilities or restrictions shall depend, directly or indirectly, on the nationality or ownership of the vessel or other means of transport on which any part of the complete journey has been or is to be accomplished”.

² The Convention on Facilitation of International Maritime Traffic (FAL Convention) was signed in London in 1965 and entered into force in 1967.

documentary requirements and procedures in all matters in which such uniformity will facilitate and improve international maritime traffic and keep to a minimum any alterations in formalities, documentary requirements and procedures necessary to meet special requirements of a domestic nature”.

Furthermore, focusing on the freedom of transit, the case of land-locked States (i.e., States with no access to seacoast) has to be mentioned. In order to guarantee the freedom of transit, as well as the right of free access to land-locked States,³ the principles of Article V of the GATT 1947 were reaffirmed both in the 1958 Convention of the High Seas and in the 1965 New York Convention on Transit Trade of Land-Locked States, which was adopted under the auspices of the United Nations Conference on Trade and Development (UNCTAD). As highlighted by Principle I of the 1965 New York Convention on Transit Trade of Land-Locked States, the right of each land-locked State to free access to the sea is “an essential principle for the expansion of international trade and economic development”.

As far as customs-related operations are concerned, global trade mechanisms and international trade flows have forced economic operators acting at any level of the logistic supply chain to take into consideration features pertaining to customs legislation. On a global scale, the number of stakeholders and international trade players (e.g., import-export operators, international forwarders and customs operators) dealing with customs procedures, as well as customs compliance rules, has increased over the last 30 years.

Moreover, modern customs legislation is no longer based exclusively on fiscal issues, as non-fiscal controls have a significant role.⁴ In fact, the collection of tariffs and duties is closely connected to non-fiscal features, such as counterfeiting prevention, food and health safety, trademark infringement prevention and controls on the commercialization of products endangering plants and animals protected by the Convention of Washington (CITES).⁵

³ During the 656th plenary meeting on 20 February 1957, the General Assembly, through Resolution 1028 (XI) on land-locked countries and the expansion of international trade, underlined “the need of land-locked countries for adequate transit facilities in promoting international trade”.

⁴ Historically, customs institutions mainly operated as fiscal authorities that collected tariffs and duties according to a territorial border (once the goods leave or enter a specific national territory).

⁵ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), also known as the Convention of Washington, is an international agreement that entered into force in 1975. The

In addition, cooperation between enterprises and customs authorities avoids rigid and pervasive fiscal and customs controls. Enterprises are encouraged to cooperate with customs authorities in order to establish an efficient and homogeneous mechanism of collaboration regarding safety and customs duties. In fact, those enterprises, which are able to fulfil both quality and safety criteria and harmonized procedures established by customs authorities, obtain several advantages in terms of simplifying safety control and of lower document-based customs controls. Enterprises - both SMEs (small and medium enterprises) and corporations - are currently expected to adhere to legal disciplines on quality criteria in order to be assessed as safe and reliable international commercial partners, primarily in terms of their proven financial solvency and in-depth knowledge of security standards. This is the formula behind the status of an AEO (Authorized Economic Operator).

2. Customs unions and freedom of circulation in the European Union

Inside the European Union, the freedom of circulation of goods is one of the four freedoms, along with the freedom of movement of persons, services and capital.

According to Paragraph 2 of Article 26 of the Treaty on the Functioning of the European Union (TFEU), the EU internal market is based on the freedom of movement of goods: “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”.⁶ On this point, in order to underline the importance of the internal market, Paragraph 3 of Article 3 of the Treaty on European Union (TEU) states that “the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment [...]”.⁷

principal target of CITES is the regulation of the international trade in all species - wild animals and plants - threatened with extinction.

⁶ Concerning the removal of physical and technical barriers, see the targets indicated in the 1985 White Paper [COM(85) 310] pertaining to the completion of the internal market. See also: PETER-CHRISTIAN MÜLLER-GRAFF, Free Movement of Goods, in CARL BAUDENBACHER, *The Handbook of EEA Law*, Cham, 2016, pp. 415 - 435.

⁷ Article 3.3 of the TEU continues by stating that “it shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality

It is necessary to mention that, in order to guarantee the competitiveness of the internal market, Articles 101 and 102 of the TFEU prohibit: (a) “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [...]” and (b) “any abuse by one or more undertakings of a dominant position within the internal market”.

As far as the EU customs union⁸ is concerned, Article 28 of the TFEU states that “the Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff⁹ in their relations with third countries”.¹⁰

The issue of the prohibition of customs duties and charges having equivalent effect is underlined in Article 30 of the TFEU, as “customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This

between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced”.

⁸ The customs union was established by the six Countries (Benelux, France, West Germany and Italy) that were part of the European Economic Community (EEC) on 1 July 1968 – i.e., 18 months earlier than planned in the Treaty of Rome (1957). Since the EU political territory does not match with the EU customs territory, Article 4 of Regulation 952 of 2013, which lays down the Union Customs Code, identifies the zones of the EU customs territory, including territorial waters, internal waters and airspace.

⁹ In line with Article 31 of the TFEU, “Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission”.

¹⁰ As far as the WTO legislation on customs unions and free trade areas is concerned, Article XXIV of the GATT and the Understanding on the Interpretation of Article XXIV of the GATT examine regional trade agreements and interim agreements leading to the formation of a customs union (CU) or a free trade area (FTA). According to Article XXIV (8a), a customs union “shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce [...] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) [...] substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”. Article XXIV (8b) provides the following definition of free trade area: “a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories”. For details, see for instance: GRÁINNE DE BURCA, *The EU and the WTO: Legal and Constitutional Issues*, Oxford, 2001; MICHAEL J. TREBILCOCK, *Advanced Introduction to International Trade Law*, Cheltenham, 2015; PETER VAN DEN BOSSCHE and WERNER ZDOUC, *The Law and Policy of the World Trade Organization*, Cambridge, 2013.

prohibition shall also apply to customs duties of a fiscal nature”.¹¹ In this respect, it is necessary to examine Article 110 of the TFEU, as the content of this article is connected to the abolition of any customs duty and/or any charge having equivalent effect. In fact, according to Article 110, “no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products”.

The Court of Justice of the EU (ECJ) underlined the importance of the freedom of circulation of goods in a number of sentences. During the 1980s, two of the most important sentences consolidating the freedom of transit of goods were C-266/81 (SIOT)¹² of 16 March 1983 and C-367/89 (Richardt) of 4 October 1991.

With reference to Point 16 of the SIOT sentence, the Court stated that “the Customs Union established by Part Two, Title I, Chapter 1 of the EEC Treaty necessarily implies that the free movement of goods between Member States should be ensured. That freedom could not itself be complete if it were possible for the Member States to impede or interfere in any way with the movement of goods in transit. It is therefore necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community. That principle is, moreover, confirmed by the reference to “transit” in Article 36 of the Treaty”.

In Case C-367/89 (Richardt), the Court, recalling the abovementioned Point 16 of the SIOT sentence, underlined in Point 14 that “it is necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community”.

In Case C-265/95 (Commission v. France), the Court affirmed that “in order to determine whether the Commission's action is well founded, it should be stressed from

¹¹ Regarding the prohibition of customs duties and charges having equivalent effect to customs duties, see for instance: TIMOTHY LYONS, *EC Customs Law*, Oxford, 2001, pp. 62 ff.; STEPHEN WEATHERILL, *Cases and Materials on EU Law*, Oxford, 2014, pp. 267 ff.

¹² *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle finanze, Ministero della marina mercantile, Circonscrizione doganale di Trieste and Ente autonomo del porto di Trieste*.

the outset that the free movement of goods is one of the fundamental principles of the Treaty” (Point 24).

Quoting Point 18 of the ECJ Sentence dated 23 October 2003 (Case C-115/02),¹³ the Court asserted that “[...] the Customs Union established by the EC Treaty necessarily implies that the free movement of goods between Member States should be ensured. That freedom could not itself be complete if it were possible for Member States to impede or interfere in any way with the movement of goods in transit. It is therefore necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community”.

In addition, the Court of Justice has been analysing the problem of the prohibition of customs duties and charges having equivalent effect to customs duties since the 1960s. Regarding the position taken by the Court at the end of the 1960s, Point 24/26 of the Sentence of Joined Cases C-2/69 and C-3/69 (*Sociaal Fonds voor de Diamantarbeiders v Brachfeld and Others*) is unequivocal: “in prohibiting the application of any new pecuniary charge to goods circulating within the Community when they cross a frontier, the Treaty does not distinguish between the nationals of the various Member States. In fact, the Treaty prohibits any pecuniary charge on imports and exports between Member States, irrespective of the nationality of the traders who might be placed at a disadvantage by such measures”.¹⁴

In Case C-78/76 (*Steinike und Weinlig v. Germany*), the Court underlined that “[...] whereas Articles 9 and 12 [of the EEC Treaty] prohibit Member States from introducing between themselves any new customs duties on imports or exports or any charges having

¹³ Case C-115/02: *Administration des douanes et droits indirects v. Rioglass SA and Transremar SL*.

¹⁴ Concerning the Sentences of the ECJ pertaining to the prohibition of customs duties and charges having equivalent effect to customs duties during the 1960s, see in particular: Case C-26/62 (*Van Gend en Loos v. Administratie der Belastingen*); Case C-7/68 (*Commission v. Italy*); and Case C-33/70 (*Sace v Ministero delle finanze*).

equivalent effect, Article 95 [of the EEC Treaty]¹⁵ is limited to prohibiting discrimination against the products of other Member States by means of internal taxation” (Point 27).¹⁶

More recently, Case C-72/03 (*Carbonati Apuani*) dealt with the compatibility with EU law of a charge levied (in terms of local tax) by the Council (“Comune”) of the Italian city of Carrara on marble excavated within its territory and transported across the boundaries of that municipal territory. That tax on marble was applied by the Council of Carrara when the marble left the territory of the Council. The Court stated that “for the purposes of classifying a tax as a charge having effect equivalent to a customs duty, the size of the territorial administrative authority which levied the tax is therefore immaterial, in so far as that tax constitutes an obstacle to trade in the internal market” (Point 28). Thus, the Court (First Chamber) ruled as follows: “a tax proportionate to the weight of goods, levied in one municipality of a Member State only and imposed on one class of goods when those goods are transported beyond the territorial boundaries of that municipality, constitutes a charge having effect equivalent to a customs duty on exports within the meaning of Article 23 EC, despite the fact that it is imposed also on goods the final destination of which is within the Member State concerned”.

3. The World Customs Organization and the simplification of customs procedures

Since the 1970s, the World Customs Organization (WCO) has been developing strategies to promote the implementation of standardized quality and safety procedures. One of the most important steps in the harmonization and simplification of customs procedures was

¹⁵ The Treaty of Rome of 25 March 1957 (i.e., the European Economic Community Treaty, or EEC Treaty). Article 9: “The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries [...]”. Article 12: “Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other”. Article 95: “No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products [...]”.

¹⁶ For details about Case C-78/76, see: LUIGI DANIELE, *Diritto del mercato unico europeo*, Milan, 2016, p. 51.

the Kyoto Convention,¹⁷ which entered into force in 1974 and was later updated and revised. According to Article 2 of the Kyoto Convention, “each Contracting Party undertakes to promote the simplification and harmonization of Customs procedures and, to that end, to conform, in accordance with the provisions of this Convention, to the Standards, Transitional Standards and Recommended Practices in the Annexes to this Convention”.

Furthermore, in order to guarantee the implementation of customs guidelines and the harmonization of customs procedures (i.e., best practices) on a global scale, the WCO Council adopted the revised Kyoto Convention in 1999.¹⁸ In fact, among the main principles of the revised Kyoto Convention, it is necessary to underline the transparency and predictability of customs actions, as well as the standardization and simplification of goods declaration.

In 2005, the WCO Council adopted the SAFE Framework of Standards to Secure and Facilitate Global Trade in order to assure the security of the global supply chain and of the international movement of goods. The SAFE Framework focuses on a group of strategic and fundamental objectives (primarily as a deterrent to international terrorism), which can be summarized as follows: establishing standards that support supply chain security and facilitation at a global level; enabling integrated supply chain management for all modes of transport; and strengthening the cooperation between customs authorities and the business community, especially in terms of the promotion and application of Authorized Economic Operator (AEO) rules.

The SAFE Framework is based on four core elements: 1) harmonizing the advance electronic presentation of cargo information requirements on inbound, outbound and transit shipments; 2) reducing security threats through accurate risk analysis and risk management projects; 3) providing customs authorities with non-intrusive apparatus and equipment¹⁹ for cargo scanning (i.e., X-ray machines and radiation detectors) in order to inspect high-risk containers; and 4) conferring tangible benefits to those business operators able to comply with supply chain security standards and best practices.

¹⁷ The International Convention on the Simplification and Harmonization of Customs Procedures. The European Community concluded the International Convention on the Simplification and Harmonization of Customs Procedures with Council Decision 75/199/EEC of 18 March 1975.

¹⁸ The revised Kyoto Convention entered into force in February 2006.

¹⁹ Non-intrusive inspection instruments (NII).

Furthermore, the SAFE Framework is built on a twin pillars structure: a) customs-to-customs network arrangements, which aim to reinforce cooperation between customs administrations and to facilitate controls on the supply chain and b) customs-to-business partnerships, which are mainly established to reduce “multiple and complex reporting requirements” as well as “risk-targeting assessments and inspections”,²⁰ making use of international standards and globally harmonized rules. Thanks to the AEO-rule mechanism, economic operators and businesses can benefit from reduced numbers of customs authority controls and the more rapid processing of goods.

As noted by Ireland and Mikuriya, since the 9/11 attacks in 2001, customs authorities in several parts of the world have paid attention to any node along the supply chain, especially in the case of containerized cargo, instead of concentrating their controls mainly on the import phase, as had been the case until 2001. After the terrorist attacks of 2001, a new customs supply chain security paradigm emerged.²¹ Referring to cooperation between customs authorities, Mikuriya also stressed the need “to develop mechanisms for mutual recognition of AEO validation/authorisation and customs control results, in order to eliminate or reduce redundant and duplicated efforts”.²² In addition, the simplification of customs formalities and the harmonization of procedures speed up international trade flows by lowering physical inspection rates and reducing customs clearance operation times.

4. The AEO in the European Union

Regulations 648/2005 and 1875/2006,²³ which entered into force in January 2008, introduced important innovations inside the European Union customs legislation, especially in terms of opportunities for economic operators involved in international trade: the possibility to apply for AEO (Authorized Economic Operator) status.

²⁰ See: WCO, SAFE: Framework of Standards to Secure and Facilitate Global Trade, June 2012, pp. 3 ff.

²¹ See ROBERT IRELAND, The WCO SAFE Framework of Standards: Avoiding Excess in Global Supply Chain Security Policy, in *Global Trade and Customs Journal*, Volume 4 (11/12), 2009, pp. 341-352.

²² KUNIO MIKURIYA, Supply Chain Security: The Customs Community's Response, in *World Customs Journal*, Volume 1 (2), 2007, p. 57.

²³ Regulation (EC) No. 648/2005 of the European Parliament of 13 April 2005 amending Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code; Commission Regulation (EC) No. 1875/2006 of 18 December 2006 amending Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

Having AEO status²⁴ allows economic operators to obtain a list of tangible benefits to compete in global markets, such as a lower number of safety-related customs controls and the simplification of customs procedures. Additionally, meeting the AEO criteria means being rated as a reliable player in the worldwide supply chain.

In 2006, Regulation 1875/2006 modified a number of articles of the previous EU customs legislation, such as a list of articles in Regulation 2454/1993.²⁵ For instance, the revised Article 14b (point 4) of Regulation 2454/1993 stated that “the holder of an AEO certificate shall be subject to fewer physical and document-based controls than other economic operators. The customs authorities may decide otherwise in order to take into account a specific threat, or control obligations set out in other Community legislation”.

In this regard, it is necessary to point out that in May 2016, Regulations 2913/1992 and 2454/1993 were fully abrogated. In fact, Regulations 2913 of 1992 (i.e., the former European Community customs code) and 2454 of 1993 were fully replaced by the new EU customs legislation on 1 May 2016: Regulation 952/2013 (i.e., UCC - Union Customs Code) and Regulations for implementing the rules of Regulation 952/2013 (Delegated Regulation 2446/2015 and Regulation 2447/2015).²⁶ Thus, a new AEO discipline can be found in Regulation 952/2013.

The current AEO discipline, in line with Paragraph 2 of Article 38 of the UCC, indicates two types of authorizations: 1) “that of an authorised economic operator for customs simplifications, which shall enable the holder to benefit from certain simplifications in accordance with the customs legislation” (AEO-C);²⁷ and 2) “that of an authorised economic operator for security and safety that shall entitle the holder to facilitations relating to security and safety” (AEO-S).²⁸ In addition, the AEO is recognized as a “status” and no longer as a certification. In fact, Paragraph 1 of Article 38 of the UCC states that “an economic operator who is established in the customs territory of the Union and who

²⁴ Economic operators can apply to the customs authorities in their own countries for AEO status.

²⁵ Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

²⁶ EU customs legislation is also based on an additional Regulation: the Union Customs Code Transitional Delegated Regulation (Reg. 341 of 2016).

²⁷ Article 24 of Regulation 2446/2015 (Paragraph 1) underlines that “an authorised economic operator (AEO) shall be subject to fewer physical and document-based controls than other economic operators”.

²⁸ Before May 2016, three different types of AEO status could be granted: AEO-C (customs simplification), AEO-S (security and safety) or AEO-F (full: customs simplification and security and safety).

meets the criteria set out in Article 39 may apply for the status of authorised economic operator”.

As mentioned in Article 38 of the UCC, Article 39 provides details concerning the criteria for granting authorized economic operator status: the absence of any serious infringement (or repeated infringements) of customs legislation and taxation rules in order to demonstrate a high level of compliance with customs and fiscal legislation; the demonstration of control of the flow of goods and of a satisfactory system of managing commercial and transport records; proven financial solvency (e.g., the applicant must not be subject to bankruptcy proceedings); and appropriate security and safety standards, principally to be met in the case of AEO-S applications.²⁹

Customs authorities have to verify that economic operators are reliable and are able to comply with best practices in the international supply chain, as well as with security requirements. Additionally, in line with Paragraph 5 of Article 38 of the UCC, “customs authorities shall, on the basis of the recognition of the status of authorised economic operator for customs simplifications and provided that the requirements related to a specific type of simplification provided for in the customs legislation are fulfilled, authorise the operator to benefit from that simplification”.

Only economic operators involved in “activities covered by the customs legislation” can apply for AEO status. Specifically, Article 5 (5) of the UCC defines an economic operator as “a person who, in the course of his or her business, is involved in activities covered by the customs legislation”. Therefore, the legal definition of “economic operator” implies that the applicant must meet two conditions: 1) being a “person”;³⁰ 2) being “involved in activities covered by the customs legislation”.

The AEO framework applies to all businesses regardless of their size – small and medium enterprises (SMEs) included. Therefore, AEO status can be obtained by all economic operators and their commercial partners (or subsidiary companies) involved in the international movement of goods and in activities regulated by the customs legislation: manufacturers, exporters and importers, freight forwarders, warehouse

²⁹ Article 28 of Regulation 2447/2015 provides details about security and safety standards.

³⁰ According to Article 5 (4) of the UCC, a person means: “a natural person, a legal person, and any association of persons which is not a legal person but which is recognised under Union or national law as having the capacity to perform legal acts”.

keepers and storage facility operators, customs agents, carriers, logistics and terminal operators, stevedores and cargo packers. Those economic operators are part of worldwide supply chain mechanisms, as every operator follows a specific part of the chain (or chains) and may have more than one role in the chain. For instance, a freight forwarder can also operate as warehouse keeper and customs agent.

It is worth highlighting that AEO compliance criteria may vary considerably according to: the role, functions and responsibilities of each economic operator in the international supply chain, the complexity of the business and the type of goods traded and handled. Nevertheless, it is necessary to bear in mind that AEO status allows economic operators to obtain concrete, direct benefits pertaining to a lower number of safety-related customs controls and the simplification of customs procedures, as well as a list of indirect benefits, such as: improving relations with customs authorities; lessening the risk of delayed shipments thanks to less inspections and customs controls; reducing costs; diminishing the risk of theft and losses; and improving customer services and customer loyalty.

In terms of customs-related operations and activities, the question of the responsibility of every economic operator deserves some attention.³¹ Manufacturers are required to ensure a safe manufacturing process and to fulfil customs legislation pertaining to the rules of origin of the goods. Exporters and importers have to comply with legal export and import formalities in line with EU customs and fiscal rules. Forwarders and carriers must meet with transport formalities and cooperate effectively with customs agents, who are responsible for the correctness of customs declarations. Warehouse keepers have to provide adequate protection against external intrusions. In particular, warehouse keepers operating customs warehouses in harbours are required to meet strict safety obligations.³² In fact, these stakeholders play a delicate role inside the worldwide logistics chain, since international trade is essentially (and increasingly) dependent on maritime transport.

³¹ Regarding the role and responsibilities of economic operators involved in customs-related operations and activities, see: European Commission (DG Taxation and Customs Union), *Authorised Economic Operator: Guidelines*, TAXUD/B2/047/2011-Rev. 6, Brussels, 11 March 2016, pp. 16 ff.

³² Concerning AEO compliance criteria pertaining to security, warehouse keepers have to demonstrate that they are able to provide a satisfactory system of protection, guaranteeing the safety of their own private areas and buildings by installing security devices (e.g., making use of hidden camera surveillance systems and alarm systems) and impeding the access of non-authorized personnel (e.g., by means of gates, fences and secured gangways).

5. A conclusive analysis of mutual recognition with the United States

As emphasized in the SAFE Framework, mutual recognition is a crucial factor in the reinforcement of the security of international supply chains and the avoidance of duplication of safety and compliance controls. The European Union concluded Mutual Recognition Agreements (MRAs) with Norway³³ and Switzerland³⁴ in 2009, with Japan³⁵ in 2010, and lastly with the United States through the Decision of the US-EU Joint Customs Cooperation Committee of 4 May 2012 (the US-EU MRA).³⁶

The US-EU MRA is mainly based on the Agreement between the European Community and the United States of America on Customs Cooperation and Mutual Assistance in Customs Matters (CMAA) of 28 May 1997, as well as on the SAFE Framework, since the C-TPAT programme (Customs-Trade Partnership Against Terrorism)³⁷ and the AEO programme operate within the context of the SAFE Framework.³⁸

As far as the endorsement of comparable standards is concerned, in Section I of the US-EU MRA, the safety standards of the C-TPAT and the AEO are considered compatible: “the trade partnership programmes of the EU and the US are mutually recognised to be compatible and members of each programme are treated in a manner consistent with Section III”.³⁹

³³ Decision of the EEA Joint Committee 76/2009.

³⁴ Council Decision 2009/556/EC.

³⁵ Decision 1/2010 of the Joint Customs Cooperation Committee.

³⁶ Decision of the US-EU Joint Customs Cooperation Committee of 4 May 2012 regarding the mutual recognition of the Customs-Trade Partnership Against Terrorism programme in the United States and the Authorised Economic Operators programme of the European Union (2012/290/EU).

³⁷ The C-TPAT was introduced in November 2001 by the US Department of Homeland Security (DHS) in order to protect the US borders from terrorist attacks and to define a new supply chain security scenario - risk analysis was the basic variable in order to implement and to apply imperative security measures after the tragedy of 9/11.

³⁸ For details, see: *DANILO DESIDERIO and ETTORE SBANDI, Operatore Economico Autorizzato, l'esperienza italiana e quella internazionale in materia di audit doganale e sicurezza dei traffici*, Turin, 2010; *MASSIMO FABIO, Manuale di diritto e pratica doganale*, Milan, 2016, pp. 897 ff.

³⁹ Section III of the US-EU MRA deals with the treatment of its members. In particular, Section III.1 states that “each customs authority treats operators holding a membership status under the other customs authority’s programme in a manner comparable to the way it treats members in its own trade partnership programme, to the extent practicable and possible and consistent with applicable law and policy. This treatment includes, in particular, taking favourably into account in its risk assessment, for the purpose of the conduct of inspections or controls, the respective membership status of an operator authorised by the other customs authority in order to facilitate EU-US trade and encourage the adoption of effective security-related measures”.

It is worth underlining that Article 1 of the CMAA provides the following strategic targets: a) intensifying and broadening customs cooperation and b) improving “the security of sea-container and other shipments from all locations that are imported into, transhipped through, or transiting the European Community and the United States of America”.

Therefore, the purpose of safeguarding global maritime trade by inspecting high-risk containers is a fundamental step. On this subject, it is useful to consider the impact of the SOLAS⁴⁰ Container Weight Verification Requirement (VGM),⁴¹ which became legally effective on 1 July 2016. The amended SOLAS (Chapter VI-A, Regulation 2),⁴² requires packed containers’ gross mass to be verified before they are loaded onto vessels. Therefore, the chief purpose of the VGM regulation is the verification of the weight of packed containers: before loading containers onto vessels, shippers are responsible for verifying the weight of packed containers and for stating it in the shipping documents. Shippers are allowed to use two methods to determine the weight of packed containers: 1) loading and weighing the packed container using certified equipment and 2) weighing the goods and contents (e.g., all packages and cargo items) to be loaded onto the container and adding the tare mass of the container (as indicated on the container doors).⁴³ Avoiding providing any accurate indication of the weight is a violation of the SOLAS VGM regulation.

Furthermore, the European Union and the United States have agreed on a specific matching procedure associating the EORI (Economic Operators Registration and

⁴⁰ The International Convention for the Safety of Life at Sea (SOLAS) was elaborated in 1914 and has been revised four times: in 1929, 1948, 1960 and 1974. The 1974 version of the Convention has been amended and modified several times since it came into force in 1980. The SOLAS Convention is considered one of the main international treaties concerning the safety of merchant vessels. In particular, Chapter VI and VII of the SOLAS Convention provide general obligations for securing any type of cargo (apart from liquids and gases in bulk) and cargo units like containers, as well as for the carriage of hazardous goods.

⁴¹ Verified Gross Mass.

⁴² See: IMO Resolution MSC.380(94), adopted on 21 November 2014.

⁴³ See: IMO, Guidelines Regarding the Verified Gross Mass of a Container Carrying Cargo, MSC.1/Circ. 1475, 9 June 2014. As indicated in Point 2.1.8 of the IMO Guidelines regarding the VGM, a “packed container” is a container “loaded (stuffed or filled) with liquids, gases, solids, packages and cargo items, including pallets, dunnage, and other packing material and securing materials”. Point 2.1.12 provides the definition of “shipper”: “a legal entity or person named on the bill of lading or sea waybill or equivalent multimodal transport document (e.g., “through” bill of lading) as shipper and/or who (or in whose name or on whose behalf) a contract of carriage has been concluded with a shipping company”.

Identification) code,⁴⁴ which is used in the EU, with the Manufacturer's Identification Number (MID), which is applied to manufacturers importing goods into the USA. The American Customs and Border Protection (CBP) has implemented an electronic monitoring system allowing European operators to combine their own EORI codes with MIDs. In fact, the regulation of MIDs imposes strict obligations on manufacturers: if US customs authorities have suspicions that a declared MID code does not correspond to any manufacturer, the goods may be seized at harbour and importers or brokers may incur severe penalties.

⁴⁴ As indicated in Regulation 312/2009, economic operators have to be registered and identified by issuing an EORI number (Economic Operators Registration and Identification number), which is "a number, unique in the European Community, assigned by a Member State customs authority or designated authority or authorities to economic operators and to other persons". The EORI has to be used by traders in all export declarations as well as for the exchange of information between EU customs authorities, or between customs authorities and other institutional bodies (e.g., statistical authorities).

The Theory of Adequate Causality in Maritime Contract Law: The Green Island Case

Luka Veljović *

ABSTRACT

This study presents a brief analysis of the theory of adequate causality. Special focus is placed on its importance and role in determining contractual liability. The first part of the work briefly presents the pivotal elements that determine causality in law. The theory of adequate causality is approached through a discernment and examination of its essential features and mechanisms of functioning. Formal logic, as its foundation, is discussed first. Induction and decision-making are elaborated upon in the context of the preciseness and accuracy present in the natural sciences. The query of adequacy, as the other basic postulate of the theory, is indicated from the criteria of ordinariness, regularity and consistency. Sufficiency, necessity and directness are treated as the inner filters of the theory, balancing between formal logic and the utmost adequacy. The theory of the aim of legal norms is introduced into the part dealing with the technical issues that appear when the theory of adequate causality is applied by the parties or by the court itself. The second part of the work is dedicated to a systematic analysis of a case belonging to the branch of maritime contract law. Maritime law is used as an appropriate field for evaluating the theory's usability and any practical implications that it may have. Finally, the study aspires to contribute to the valorization of the uniqueness and particularities of legal perception and legal logic.

KEY WORDS

Adequate Causality, Contract Law, Formal Logic, Green Island

1. Introduction

Legal reasoning represents an audacious endeavour that defies the strict and rigid categories governing the accustomed and preponderating perception of the outer world. It combines the gestalt logic present in the natural sciences with the innate sense of justice, emotional intelligence and yet curbed individual vision of our surroundings. Legal thinking strikes a balance between stringent reality and the parallel, chimerical vacuum in which justice inexorably and continuously exists without being encrusted with the subjectivity of the human mind.

Causality¹ in law operates the rudder of legal reasoning and determines the course taken by legal deduction. Causality creates a space for justice, fairness and equity to enter the concept of legal reasoning. It relocates the brunt of legal illation from bare historical descriptiveness to the establishment of a utilitarian apparatus reconfirming and protecting the grounds of the initial social contract upon which societies are based. If there were no causality, legal science could never surpass the intrusive clout brought about by the mélange of mathematical operations aiming to place the facts, as established by experts and independent courts, under the scope of corresponding legal norms. Despite its irrefutable significance, causality still remains greatly debated and mostly undefined, which could be the reason or the many perplexities we encounter in legal practice. Different perceptions of causality lead to diverging analyses of the facts, which

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¹ Two terms may be used to refer to the causal relations in law – causality and causation. There is no consistent linguistic convention when it comes to their usage. In accordance with the Oxford Dictionary, the word causality is defined as the relationship between cause and effect or the principle that everything has a cause. The word was created somewhere between 1595 and 1605, and was taken from the French word *causalité* or the Latin term *causalitas*, *causalitatis*, f. According to Lewis & Short's *A Latin Dictionary* (1879) the word *causalitas* appeared somewhere in the 11th century and fully corresponds to the English term causality. It is derived from the Latin term *causa*, *causae*, f, which usually signifies reason, motive, origin, source, responsibility or symptom. On the other hand, the primary definition of the term causation is the action of causing something. Nevertheless, over time it came to be identified with causality and therefore also came to mean the relationship between cause and effect, even though that is not its primary meaning. The word has been in use since the 1640s or 1650s. It derives from the Medieval Latin word *causatio*, *causationis*, f., which translates as apology, disease, plea or pretext. Furthermore, the word *causatio* is related to the word *causāt(us)*, the past participle of the verb *causo*, 1, *causavi*, *causatus*, which was translated as the verb to cause in L. F. Stelten's *Dictionary of Eccles. Latin* (1995). Due to the indisputable need to create a precise and accurate legal vocabulary, the term causality, as it is more precise and narrow in its meaning, is used in this study. (Sources: Oxford Dictionary, available at: <https://en.oxforddictionaries.com> (accessed on 20 July 2017); Online Dictionary – Definitions, available at: <http://www.dictionary.com> (accessed on 20 July 2017); Latdict – Latin Dictionary and Grammar Resource, available at: <http://www.latin-dictionary.net> (accessed on 20 July 2017)).

consequently prompts significant dissimilarities in verdicts, which will finally result in the creation of distinctive concepts of justice and the overall social role of law. This study does not focus on a presentation of all the theories explaining the link between cause and consequence. Neither is it a discussion of the advantages or disadvantages of those theories, as a comparative analysis that intends to seek the best model to explain this legal inquiry is not within its initial scope. Rather, it emphasizes the focal points that render causality idiosyncratic, and explains how they converge into a comprehensive theory aspiring to reach the level of a reliable guide for the accurate establishment of causal links. This theory is known as the theory of adequate² causality.

The theory of adequate causality revamps general logical syllogism, which furthermore coalesces with *the constant and perpetual will to render each his due*.³ It can be used as both an *ex-ante* (forward-looking) and *ex-post* (backward-looking) mechanism for analysing causal legal relations.⁴ The purpose of an *ex-ante* mechanism is to provide a scaffold for the construction of a corpus of legal arguments on which the claim or defence will be based. Simultaneously, it serves as a tool for envisaging the denouement of court proceedings by predicting the concrete correlations and causal links that will be taken into consideration by the judge. An *ex-post* mechanism may be used as a sort of filtering apparatus through which different layers of the decision-making process are differentiated and systematically analysed in the light of the general rules of logic and the statistically empirical criterion known as adequacy. The importance of an *ex-ante* mechanism, as well as the functioning of an *ex-post* apparatus, will be presented in the

² The Oxford Dictionary defines the term adequate as satisfactory or acceptable in quality or quantity. The term appeared in the early 17th century and derives from the Latin word *adaequatus*, which can be translated as made equal to. The word is the past participle of the verb *adaequo*, 1, *adequavi*, *adequatus*, which translates as to be equal, compare (to), equalize, make equal in height or raze. (Sources: Oxford Dictionary, *ibid*; Online Dictionary – Definitions, *ibid*; Latdict – Latin Dictionary and Grammar Resource, *ibid*)

³ *Iustitia est constans et perpetua voluntas ius suum cuique tribueri*. (Source: Corpus Iuris Civilis – Institutiones, Liber 1 Titulus 1, available at: http://www.koeblergerhard.de/Fontes/Novellae_CorpusIurisCivilisSchoell1959.pdf (accessed on 25 July 2017)).

⁴ Besides these two mechanisms, the attributive function is sometimes mentioned as the third important part of every theory dealing with causality. Its purpose is to settle the extent of the liability attached to a particular human action or other event or state of affairs (Source: Honoré Antony (ed.), *Causation in the Law*, 2010, available at: The Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/archives/win2010/entries/causation-law> (accessed on 15 June 2017)). Nevertheless, this function appears to be included in *ex-ante* and *ex-post* mechanisms and is therefore discussed as an integral part of these mechanisms and not as an independent element. Nevertheless, its roles are clearly individualized within the adopted bifunctional structure.

context of a concise and brief case study in the area of maritime contract law. Specific contract formation, performance and dissolution makes maritime contract law a quintessential field for contemplating adequate causality. Firstly, it seems contradictory to discuss state-of-the-art and still not unanimously accepted approaches to legal reasoning by using the fields in which well-acquainted methods have habitually been applied. Therefore, infrequent legal situations should be used in order to induce impartiality among average idle readers and to prevent preconceptions and conjecture from dominating their inferences. Maritime law seems to fall outside the scope of the typical contractual relations that make up our day-to-day lives, making it appear easy to understand. Moreover, it represents an inexhaustible handbook for the legal relations that simultaneously enmesh contractual parties, intermediaries, third parties and even some natural events or situations.

The hypothesis that legal perception and legal logic exist as independent and unique phenomena will be argued throughout the whole study. Law, as a system of legal norms, aberrates from the prevalent ratiocination, veers towards its own subsistence, even when the meeting of reality cannot be appraised except by its innate, intrinsic and impalpable criteria. This premise will serve as the axiom for the ensuing deliberation on causality.

2. The theory of adequate causality

2.1. Causality in law

The core feature of causality is that certain phenomena relate to one another through straightforward links that can be described as laws.⁵ These laws are conspicuously based on the criteria of frequency, regularity and certitude. Nevertheless, they shall not prevail over the righteous requisites of distributive justice, which distinguishes causality from mere logical reasoning or statistical deduction.

The existing relationship between the cause and the effect may be depicted as a one-way asymmetrical channel. The existence of an opposite direction would be a logical paradox going against legal knowledge, since in a judicial context, an effect cannot generate or precede its cause. However, many scholars still argue for the thesis that there

⁵ Hellner Jan, *Causality and Causation in Law*, available at: Stockholm Institute for Scandinavian Law 1957-2009, <http://www.scandinavianlaw.se/pdf/40-4.pdf> (accessed on 5 July 2017), p. 112.

may be phenomena that are symmetrical and therefore causal in both directions. For example, it may be claimed that a disease is causally connected with poverty at the same time that poverty is causally connected with the disease.⁶ In this particular case, I cannot see more than a simple positive correlation; it does not grow into a law in the sense of causality. There is no any relationship of ordinariness, repetitiveness or indubitableness between the state of poverty and the appearance of diseases, i.e., one simply does not necessarily follow the other. Therefore, if we cannot establish a law or a certain rule according to the abovementioned criteria, then neither can we refer to causality. Traditionally, the temporal ingredient⁷ has been the strongest ratiocination for the thesis of asymmetrical causes. In case of the miscellany of two or more occurrences, the one that predates the other shall be deemed to be the cause. Nevertheless, the temporal category is not the only one able to explain the legal mechanism behind the theory of adequate causality, which goes beyond causality that conforms to nothing but general criteria. It must be noted that asymmetrical channels of causality are not consistently required or even relevant in law, as causality may be found even when cannot be substantiated with an appropriate, materially demonstrable link between the cause and the effect. Mental connections and representations, which are interconnected with the concept of lawfulness, may be sufficient for the formation of an admissible causal relationship. This is particularly the case with the concept of diffuse causality, which is considered sufficient for making steady and trustworthy causal links in law.⁸ As established by the *Reichgericht*, the theory of adequate causality follows the basic postulates of diffuse causality.⁹

The asymmetrical channel of causality is supposed to disclose and attribute the burden of liability to the proper cause. That process involves four crucial constituents: the incidence of liability, the grounds of liability, the items between which causality must be proven and all of the relationships that may be exemplified with analytical causal links.¹⁰

⁶ Hellner Jan, *ibid*, p. 113

⁷ Henrik von Wright Georg, *Explanation and Understanding* (London: Routledge and Kegan Paul, 1971), p. 43.

⁸ Hellner Jan, *ibid*, p. 118.

⁹ Initially, the *Reichsgericht* would refuse to grant damages and restricted liability only to those cases where there was a purely external nexus between the accident and the neurotic condition. Nevertheless, this state of affairs was changed by the decision made on 8 July 1953, when an adequate causal connection was established between an accident and the psycho-reaction initiated by it. The decision relied on article § 254 of the German BGB dealing with contributory negligence. (Source: Markesinis B. S., Unberath Hannes, *The German Law of Torts: A Comparative Treaties* (London: Hart Publishing, 2002), p. 666).

¹⁰ Honoré Antony, *ibid*.

Incidence refers to the typical *prestatio* (encompassing *dare, facere* or *nonfacere*) of natural or legal persons leading to the harmful event. Natural events or processes, which preclude responsibility, make the whole liability settlement process senseless and are accordingly left outside of the concept of incidence. In continental legal systems, legislation dealing with general obligations, contracts or extra-contractual law typically prescribes the incidence and its effects.¹¹ The grounds of liability must be approached from two distinct aspects. The legal bases for liability, deriving directly from legislation or contractually created obligation, should primordially be established. Broadly speaking, the criminal law maxim *nullum crimen, nulla poena sine lege praevia, scripta, certa et stricta* may in substance and essence be applied to civil law and non-contractual relations. Verdicts are supposed to be drafted based on both reliable causal links and previously established, written, definite, unambiguous and strict legal provisions.¹² Secondly, we must bear in mind that the person who caused the event to occur is not necessarily the one who we should hold liable. Therefore, further causal links must be determined in order to make a lawful and just decision regarding the compensation for damages. This takes place in cases where the liability is *ex lege* assumed by other person, e.g., responsibility for movable objects, i.e., animals, responsibility of guardians for minors or persons without full contractual capacity, responsibility of insurers for insured, etc. Exceptional circumstances may also relocate the cynosure to additional rules related to liability and damage. These exceptional circumstances include responsibility for handling dangerous objects or performing dangerous activities; manufacturers' responsibility for produced goods; responsibility for the damage caused during terrorist attacks, public demonstrations or manifestations, etc. The items are actions, events, processes or states of affairs which are causally related to one another. While they can be easily defined, they tend to create many difficulties in practice. Even a slight error in their determination may lead to the appearance of completely different causal links, which would consequently rely on different legal provisions and therefore culminate in inaccurate judgements. Issues must be identified within the categories of place and time through the precise determination of the persons involved and their actions. Concurrently, while establishing relevant causal

¹¹ For example, Montenegrin's Law on Obligations dedicates chap. II, sec. 2, subsec. 2-9, art. 152-191 to this issue. (Source: Law on Obligations, Legal Gazette of the Republic of Montenegro, n. 47/2008)

¹² Continental legal practice tends to codify even the most general legal rules that may later be invoked in court (e.g., the principle of *bona fides*).

links, the corresponding legal categories (e.g., negligence, breach of contract) must be invoked.¹³ The relationship between harmful acts and liability is perhaps the core element dealt with by theories discussing causality in law. This relationship concurrently depends on and absorbs all of the previous elements. In the opaque expanse of positive correlations and *near-causal*¹⁴ links, an effective theory of causality is supposed to find the link that matches both the resulting situation and the corresponding legal provisions.

Causal links are immanent to the substratal purpose and validity of the contract. Understanding of how a contract is formed is based on the disclosure of free will as a subjective act with a vigorous tendency to transform into an objective, tangible notion known as an agreement. Therefore, the subjective element becomes an objective criterion encompassing the quintessence of the continental contractual legal tradition- the cause.¹⁵ It may also be claimed that the agreement is actually the originator of the cause, which continues to exist afterwards as an independent force governing the course of the contract's performance. In the common law system, the cause should be understood in the context of reliance, as the main feature leading statements of will into the sphere of enforceable promises. If there is an obstacle serious enough to impede the natural course of the contract's fulfilment, the cause of the contract is rendered meaningless and the contract must be discharged. A number of factors and reasons may stand behind this scenario. Sometimes they even seem to be lined as if on a contour map demonstrating an endless vicious circle of intermittently appearing factors which delete the borders between beginning and end, between causer and consequence. Legal scholars have tried to come up with an exit from this situation in the form of numerous models explaining causality and its link to contractual liability. One of these theories¹⁶ is the theory of

¹³ Honoré Antony, *ibid.*

¹⁴ Honoré Antony, *ibid.*

¹⁵ The cause in this sense is treated as one of the four basic elements that must be met in order for a contract to be valid. These four elements are: legal capacity, mutual consensus, valid subject and cause of the contract.

¹⁶ Theories dealing with causality in law are sometimes divided into two groups. The first group of theories focuses on the specific condition that the alleged cause must meet in relation to the alleged consequence. These theories are known as cause-in-fact theories. The second group of theories primordially deals with a specific feature that the cause must possess in relation to the consequence. Sometimes, an intermediate theory is mentioned called the theory of proximate cause, which is based on a single condition. (See more in: Honoré Antony, *ibid.*) Theories are not necessarily classified into groups. They may be stated as independent and self-sufficient units. For example, some scholars mention the theory of adequate causality, the theory of condition and the theory of proximate causality as the dominant approaches to the issue of causality in law. The theory of condition concentrates on finding the sine qua non condition of the resulting damage. On the other hand, the theory of proximate causality places prominence on the temporal criterion

adequate causality. The theory of adequate causality attacks the breach of contract and disassembles its causes, effects and sanctions into separate units, which will posteriorly be reconstituted into a systematically ordered platform for court deliberation.

2.2. Adequate causality

2.2.1. The nature of adequate causality

Continental and common law systems have significant dissimilarities when it comes to perceiving the theory of adequate causality. Anglo-American law does not distinguish between the proximate and adequate cause. The whole theory is sometimes referred to as the theory of proximate, adequate, direct or even efficient, operative or responsible cause.¹⁷ Placing adequacy among other limiting theories adumbrates the renouncement of the idea that, by erasing the strict categories that restrain our legal deduction, justice can easily be reached. Continental legal systems see a discernible difference between proximate cause and adequate causality. When scrutinizing the importance of the temporal category, adequate causality places prominence on the real cause, even though it may not be strictly temporally linked to the harmful event. Adequacy allows a kind of utilitarian leeway in which the concrete situation creates a suitable gauge for evaluating its particular causal links. Some continental legal systems have even introduced transitional theories aiming to strike a balance between the categories of adequacy and proximity. For example, French legal practice utilized the cause known as the *cause génératrice*. It was based on the concept that an efficient cause is one that, in a classical, yet still tautological, sense, directly generates the occurred damage.¹⁸ The theory came strikingly closer to adequate causality than to proximate cause, and mainly followed the former's line of deduction.

The concept of adequate causality in contract law is a suitably adjusted amalgamation of general logical reasoning on the one hand and adequacy corresponding to the concrete situation that is under consideration. The sole occasion upon which adequate causality is exposed to plain and simplified analysis is when a breach of contract results in its

and the determination of the conditions shortly preceding the effect (See more at: Antić Oliver, *Obligaciono parvo* (Beograd: Pravni fakultet Univerziteta u Beogradu, Dosije studio, 2014), pp. 477-481). This study will follow the line of the second approach.

¹⁷ Honoré Antony, *ibid.*

¹⁸ Le Tourneau Philippe, *La Responsabilité Civile* (Paris: Dalloz, 1982), p. 203.

dissolution. Although this analysis will never reach the scientific domains beyond the practical implications of the theory, it remains an indispensable tool revealing the essential postulates of causality in the light of contract law. In view of establishing subjective responsibility, it is essential to establish a credible connection between the wrongdoer and his *prestation* (cause) on the one side, and the resulting damage (consequence) on the other.¹⁹ Even though this undertaking may seem unambiguous and apparent, in reality it creates numerous challenges. As established in *The Fannis* case, all of the circumstances, especially the nature and effects of the breach, the benefits and losses that resulted, as well as the manner in which they occurred and any pre-existing, intervening or collateral factors which contributed to their occurrence, must be determined, examined and clarified.²⁰ A situation in which there is only one clear and uninfluenced factor that has caused a certain change in the outer space is a result on an artificially constructed, experimental setting. The criterion of directness, as determined in the *Palatine*²¹ and *Hussey-v-Eels*²² cases, in dealing with the causal relationships between the breach of the wrongdoer and the benefits obtained by the injured party, reduces the range of possibly relevant factors merely to those where a direct causal link may be found between the breach and the benefit. This doctrine has recently been reconfirmed in the *New Flamenco*²³ case. Nevertheless, the criterion of directness is just one of the filters present in the system of adequate causality. It is applied synchronously when discussing adequacy and, implies that the benefits that arise, obtained through the compensation for damages, are directly consequential to the harmful event. It is also possible that several factors have concurrently contributed to the damage that occurred; in this case special rules must be applied.²⁴ In elucidating this problem, the theory of adequate causality commences from two successive starting points.

¹⁹ Antić Oliver, *ibid*, p. 477.

²⁰ *Famosa Shipping Co. Ltd. v Armada Bulk Carriers Ltd*, 1 Lloyd's Rep. 633 (1994).

²¹ *Palatine Graphic Arts Co Ltd v Liverpool City Council*, Q.B. 335 CA (1986).

²² *Hussey v EELS*, 2 Q.B. 227 (1990).

²³ *Fulton Shipping Inc. of Panama v Globalia Business Travel S.A.U*, EWHC 1457 Comm. (2014).

²⁴ In situations where several causers may be related to one consequence, we must deal with a phenomenon known as the concurrence of causes. The concurrence of causes can manifest in two main ways. The first appears when the damage is jointly caused by two or more causers. The second situation happens when the damage is linked to only one causer but, due to the specific circumstances, it cannot be clearly distinguished from other influencing or somehow related factors. Within both groups, we may encounter the collective, cumulative (double), alternative and overriding concurrence of causes. Collective concurrence alludes to a situation whereby several causers have simultaneously caused damage in such a way that, if they had done

Primarily, a logical connection between the cause and the consequence must be determined. For this purpose, the principles of formal logic are used. It seems more than rational to utilize the mathematical balance of syllogism in this segment of legal reasoning. Syllogism may be described as a logical argument in which, starting from two or more premises, a conclusion is reached.²⁵ As *the law may be applied only when the appropriate facts are presented*²⁶, evidence should be treated as premises in the legal context. Evidence can be characterized as objects, persons, statements and attitudes that enable the court to learn and observe the facts that must be proven.²⁷ Evidence may be acquired directly or indirectly, individually or in groups. When speaking about groups of evidence, we are actually dealing with a hierarchical order according to which one of the pieces of evidence is the main one, while the others complement it or serve as instruments that lead to the main piece of evidence. In contract law, evidence is a notably neutral category, entrenched mostly by experts. Thus, objectiveness, accuracy and scientific credibility are introduced into the theory of adequate causality. Formal logic may be complemented by and combined with the logic of conditions. The two main components of the logic of conditions are *the sufficient condition (causa efficiens, causa causans)* and *the necessary condition (conditio sine qua non)*.²⁸ The sufficient condition exists in all cases where the consequence regularly appears after the occurrence of events of the same type. The necessary condition is a condition without which the consequence would not appear at all. The logic of conditions may be treated as a *sui generis* regulator that controls the perception of what we will furthermore define as the adequate cause. These conditions represent a line that prevents the creative role of the judge from devolving into arbitrariness and

so separately, the damage would not have resulted. In the case of cumulative concurrence, every causer could independently be responsible for causing the same amount of damage. When several persons have caused damage, but the real wrongdoer cannot be determined, we are dealing with alternative concurrence. Finally, the overriding concurrence of cause occurs when, after the event that caused a certain bit of damage, another event occurs that would have caused the same or bigger damage had it happened first. The legislator has prescribed particular rules for dealing with these situations. (Source: Antić Oliver, *ibid*, pp. 477- 481).

25 Palomino Miguel, *Formal Logic*, (Madrid: Universidad Complutense de Madrid, 2012), available at: <http://maude.sip.ucm.es/~miguelpt/papers/flogic.pdf> (accessed on 2 July 2017).

26 *Da mihi factum, dabo tibi ius*. (Source: Fellmeth Aeron, Horwitz Maurice, *Guide to Latin in International Law* (London: Oxford University Press, 2011)).

27 Đuričin Biljana, Čizmović Milisav, *Građansko procesno pravo* (Podgorica: Pravni fakultet Univerzitet Crne Gore, 1997), pp. 227-241.

28 Hellner Jan, *ibid*, p. 119.

overenthusiasm. The logic of conditions is the area in which Richard Wright's *NESS test*²⁹ approaches adequate causality. Nevertheless, while the *NESS test* has formal, analytical, synthetic and lawful elements which precede the final step, i.e., the determination of the causal relationship, the theory of adequate causality integrates all of the abovementioned components into two separate stages.

Following the establishment of a logical link between the consequence and the cause, the point of interest moves onto the query of adequacy. In fact, adequacy is the turning point at which legal logic deviates from the straightforward acumen present in the natural sciences. As stated in the *Parry v Cleaver* case, this deviation is reflected in the possibility that considerations of justice and public policy may still preclude the defendant's liability, even where the general test of causality has been satisfied.³⁰ The fulfilment of the necessary conditions may not be sufficient for the concurrent establishment of a relevant causal link and the drafting of a responsibility scheme. After the process of gathering and refining the relevant evidence, it is up to the court to decide upon their appositeness and importance in a particular case. The theory of adequate causality does not rely on any formal causality test; each time it is determined by *the court's common sense in interpreting the facts*.³¹ This is in line with the theory of the free evaluation of evidence, which we encounter both in civil and criminal law. While deciding, the court, unlike experts, will not be strictly bound by the rules of formal logic while examining the existence of a certain piece of evidence. The court will primarily consider justice and fairness as the ultimate aspiration of the court proceedings. That consideration will, however, be led by the *id quod plerumque accidit*³² doctrine. Regularity and ordinariness will be the factors determining the link between the cause and the consequence. According to the theory of adequate causality, circumstances may be viewed as causative factors only if our own practical experience tells us that such circumstances could have been expected to produce the outcome in question.³³ Therefore, logical reasoning faces the approval of justice viewed

²⁹ The *NESS test* aims to find the necessary element of an actual set of conditions that are sufficient to cause a certain effect. (Source: Fumerton Richard, Kress Ken, Causation and the Law: Preemptive, Lawful Sufficiency, and Causal Sufficiency, in *Law and Contemporary Problems* vol. 64. no. 4, 2011, available at: <http://www.law.duke.edu/journals/64LCPFumerton> (accessed on 12 August 2017), p. 89).

³⁰ *Parry v Cleaver*, 1 Lloyd's Rep 183 (1969).

³¹ *Monarch Steamship Co Ltd v Karlshamns Oljefabroker (A/B)*, AC 196 (1949).

³² Author's translation: That which ordinary/ generally happens.

³³ *Termium Plus-* The Government of Canada's Terminology and Linguistic Data Bank, available at: <http://www.btb.termiumplus.gc.ca/tpv2alpha/alpha->

through the eyes of non-experts and modified by their subconscious ideas taken from their daily lives. Nevertheless, justice should take priority over statistical truth in cases where the two come into conflict and lead to divergent verdicts. Statistical truth should be treated only as a reflection of the frequency of use or the appearance of certain phenomena, and not as a self-sufficient indicator of just, correct and logical conduct. The primordial and superior role of fairness and justice has been reconfirmed in cases such as *Shearman v Folland* or *Smoker*, where compensation was not considered even though the factual situation indicated that the benefits of compensation were causally linked to the breach, as it would not be just that have been just for the defendant wrongdoer to have appropriated them for his benefit because they arose from something the innocent party had done or acquired for his own benefit.³⁴

The elements of adequate causality may also be treated as two procedural stages or separate levels. The first level is determined by non-normatively factual or empirically based ingredients.³⁵ Formal logic relies on sensations acquired empirically through our senses and is not in any way influenced by normative categories prescribed by the legislator. The second level, corresponding to the test of adequacy, is a fully normative stage. Justice and fairness, which arise from factual truth, are placed into the strict moulds of the relevant legal institutes. This separation between normative and non-normative or moral elements originates from the school of legal positivism. As opposed to legal positivism, which does not see the conceptual link between law and morals,³⁶ the theory of adequate causality is based on the marrow of law, its origin and foundation, and not on its external aspects and manifestations. Therefore, it does not perceive *every law as an infraction of liberty*,³⁷ but rather as the modus of its realization within the general terms and conditions of the social contract establishing the socio-cultural order we are supposed to respect.

eng.html?lang=eng&i=&index=alt&srchtxt=THEORY%20ADEQUATE%20CAUSATION (accessed on 3 July 2017).

³⁴ Dickinson Hill, *New Flamenco – Globalia Business Travel S.A.U. of Spain V Fulton Shipping Inc of Panama*, available at: Lexology, <https://www.lexology.com/library/detail.aspx?g=efe6e1bc-a21e-45a4-a5f1-83b2930cdaba> (accessed on 30 July 2017).

³⁵ Fumerton Richard, Kress Ken, *ibid*, p. 88.

³⁶ Fumerton Richard, Kress Ken, *ibid*.

³⁷ Bentham Jeremy, *The Principles of Morals and Legislation* (London: W Pickering, 1823).

2.2.2. The theory of the aim of legal norms

The fear of arbitrariness and excessive judicial autonomy has led to several adjustments of the theory of adequate causality. First and foremost has been the integration of the creative role of the judge into the narrow sphere of the theory of the aim of legal norms. In compliance with this theoretical variation, a judge is firstly supposed to determine the aim that the lawmaker had in mind when drafting a certain law, or the intent of the contracting parties when drafting a contract. The judge is performing a casual variation of the official interpretation, which is usually not general but only binding on the parties concerned.³⁸ General rules of linguistic, subjective or objective, logical, statistical, evolutionary interpretation, etc., must first be pursued.³⁹ Afterwards, the judge is supposed to integrate the whole concept of adequacy, based on his own experience and limited by the general rules of logic, into the scope of the norm or provision. This unequivocally moves the focus from a merely empirical analysis to a subsumption of general opinion under the appropriate norm. Lawfulness takes priority over the innate sense of justice. Legitimacy and legality are easily converted into the side-effects of the social contract, contravening what, in a socially isolated vision, would be perceived as just and fair.

Nonetheless, the theory of adequate causality and the theory of the aim of legal norms do not always comply. This is particularly evident when it comes to civil trials, where both theories can simultaneously be used by different parties in trial proceedings, with the aspiration of reaching contrasting results. The theory of the aim of legal norms seems to be unambiguous when applied. In its final instance, it always acquiesces to the *dura lex, sed lex maxim*. On the contrary, when applying the theory of adequate causality in its elementary sense, we must deal with the criteria of regularity and ordinariness and try to invoke the *bona fides*⁴⁰ principle and the *bonus pater familias*⁴¹ standard of care in order to override the mere provisions of the law or contract. The practical implication of separating these two paths within the same theory may be found in the predictability of

³⁸ Ignatescu Camelia, Considerations regarding the interpretation of legal norm, in The USV Annals of Economics and Public Administration, vol. 13, 2013, p. 247.

³⁹ Vasić Radmila, Čavoški Kosta, Uvod u pravo (Beograd: Izdavačka kuća Draganić, 1999), pp. 223-283.

⁴⁰ Bona fides (good faith) may be defined as a person's honesty and sincerity of intention. It is the criterion for determining just behaviour in legal subjects.

⁴¹ The term bonus pater familias (good family father) refers to a standard of care, analogous to that of the reasonable man in common law.

the final outcome of the trial proceedings. Notwithstanding the fact that adequate causality is the basis from which both theories arise, it is undisputable that the parties should choose only one of the options and thereafter build the whole concept of their claim or response around the same line of logic. Any transitionally built mélange of the two approaches would lead to discrepancies, inconsequence, levicy and, finally, the failure of the proceedings.

3. Application of the theory

The theory of adequate causality dictates the borders and substance of the framework in which we should place the facts and reasoning behind the concrete legal issues under discussion. I strongly advocate the thesis that both the elemental theory of adequate causality and its modifications should be thoroughly and methodologically examined, evaluated and implemented in order to prepare a consistent and persuasive claim or defence. Case law studies demonstrate that a considerable number of pleas, responses to pleas and, finally, verdicts contain elements of adequate causality. Nevertheless, in cases of maritime law, judges mostly do not refer to these elements as being part of adequate causality. The reason for this conduct may be found in the fact that most international commercial and maritime contracts use English law.⁴² As already stated, common law systems,⁴³ in contrast to continental ones,⁴⁴ remain ambiguous when it comes to a precise differentiation between the concepts of adequacy, directness, effectiveness, etc. Therefore, elements pertaining to adequate causality may be found in cases where the judge does not even mention it at all. Consequently, it is more effective to examine the

⁴² Statistics show that 90% of Protection and Insurance (P&I) cover for the global fleet is handled by 13 major international P&I clubs, all of which have their offices in the United Kingdom. At the same time, 80% of maritime-related cases heard in UK courts involve one or both parties based outside of the UK. (Source: Why choose the UK's Maritime Services, available at: Maritime London, <http://www.maritimelondon.com/why-choose-uk-maritime-services> (accessed 5 September 2017)).

⁴³ Proximate cause in: *Global Process Systems Inc & Anor v Syarikat Takaful Malaysia Berhad* UKSC 5 (2011); *Atlasnavios-Navegacao v Navigators Insurance*, 1 Lloyd's Rep 117 (2015); *Global Process Systems v Syarikat Takaful Malaysia Berhad*, UKSC 5 (2011); etc.

Effective case in: *Saga Cruises BDF Ltd & Anor vs Fincantieri SPA*, EWHC 848 Comm. (2016); *Onego Shipping & Chartering BV v JSC Arcadia Shipping*, EWHC 777 Comm. (2010); *Owners of the ship Front Ace v Owners of the Ship Vicky 1*, EWCA Civ. 101 (2008); etc.

Direct cause in: *Palatine Graphic Arts Co Ltd v Liverpool City Council*, QB 335 (1986); *Hussey v EELS*, 2 QB 227 (1990); *Fulton Shipping Inc. of Panama v Globalia Business Travel S.A.U.*, EWHC 1457 Comm. (2014).

⁴⁴ For example, in the *Kone AG and Others v ÖBB-Infrastruktur AG* case, the European Court of Justice directly invoked the theory of adequate causality. (Source: Judgement of 5 June 2014, *Kone AG and Others v ÖBB-Infrastruktur*, C557/12, EU:C:2014:1317, paragraph 14).

effects of adequate causality on a concrete case, rather than enumerating cases of maritime law that have involved the query of causality. In this study, the *Green Island* case⁴⁵ will be used as an example of how the theory can be applied, as well as a demonstration of the consequences that a wrong line of indictment may originate.

3.1. Facts of the case

In early October 2006, the claimant *Geofizika DD* purchased three Land Rover ambulances on *Incoterms 2000 CIP Tripoli* from the defendant, *MMB International Limited*. MMB was to contract for the carriage of goods *on usual terms and in a customary manner*, and was obliged to *obtain cargo insurance such that the buyer shall be entitled to claim directly from the insurer*.⁴⁶ The sellers made a contract with the freight forwarder company *Greenshields Cowie & Co. Ltd*, who arranged the shipment and insurance to Tripoli with the carrier *Brointermed Lines Ltd*. It was the first time that the freight forwarder had worked with Brointermed. As requested by the sellers, the carriage was procured on an *RO-RO* basis. On 14 November, the carrier sent a booking confirmation to the freight forwarder saying that *all vehicles will be shipped with "on-deck option" that would also be noted on the original Bill of Lading (B/L)*. The ambulances were finally shipped on the vessel *Green Island* from Harwich on 29 November. The B/L, which was issued around 28/29 November, included Brointermed's standard terms printed on the back, including *clause 7*, which granted the carrier the liberty to ship cargo both on and under the deck without notifying the merchant. On-deck shipment was particularly favourable for the carrier, because in this case, *The Hague Rules* do not apply and therefore the carrier is under no liability for loss, damage or delay, howsoever it may arise. The signed copies of the B/L were not sent to the freight forwarder until 4 December 2006. After receiving the B/L, the freight forwarder declared the shipment under the *open cover* with the insurers. The selected cover was *Institute Cargo Clauses (A)* with the additional condition of *warranted shipped under deck*. The freight forwarder selected the under-deck warranty because he assumed

⁴⁵ *Geofizika DD v MMB International LTD and Greenshields Cowie & CO LTD* (third party), EWCA 459 Civ. (2010)

⁴⁶ Farr Jeremy, Hughes Jennifer, UK Deck Carriage: Contracting For The Carriage Of Goods On Usual Terms And Obtaining Appropriate Insurance, available at: Mondaq- connecting knowledge and people, <http://www.mondaq.com/uk/x/92180/Deck+Carriage+Contracting+For+The+Carriage+Of+Goods+On+Usual+Terms+And+Obtaining+Appropriate+Insurance> (accessed on 10 July 2017).

that the ambulances had been shipped under the deck, as the front of the B/L did not contain a clause stating on-deck shipment. Two ambulances were washed overboard en route from England to Libya, in the Bay of Biscay. The buyers hired replacements. First, they claimed against the insurers, who refused to pay, citing the breach of the under-deck shipment warranty. The buyers then sued the carrier in Libya and obtained a settlement. The settlement, however, was insufficient to cover their loss. Afterwards, they started proceedings in the United Kingdom against the sellers, seeking the difference between what they had recovered from the carrier and their actual loss.⁴⁷ They claimed that the sellers were in breach of their obligation to make a contract of carriage on usual terms and to obtain a valid insurance. The sellers then brought third-party proceedings against the freight forwarders.

3.2. The application of the *ex-ante* and *ex-post* mechanisms of the theory

At first, the Court held for the buyers against the sellers in the main action and for the sellers against the freight forwarder in the third-party proceedings. First of all, the Court concluded that the contract of carriage was not on usual terms if it permitted on-deck shipment. Even though the B/L gave the carrier the opportunity of an on-deck shipment without there being any clause to this effect on the front of the Bills, the wording of the booking confirmation was not clear enough to be considered an antecedent agreement. Consequently, the sellers had failed to provide valid insurance and the freight forwarder had negligently procured the contract of carriage and given the warranty without checking whether the ambulances had actually been shipped under the deck.⁴⁸ The sellers and the freight forwarder then appealed.

LJ Thomas, in the second instance, started by concluding that it was the obligation of the sellers to procure a contract of affreightment on terms usual in the trade for the carriage of ambulances. The sellers were also under the obligation to obtain a contract of

⁴⁷ Case note on *Geofizika DD v MMB International Limited & Ors (The "Green Island")*, available at: Collin Biggers & Paisley Lawyers, <http://www.cbp.com.au/Portals/0/Newsletters/090610%20Case%20note%20-%20Geofizika%20DD%20v%20MMB%20020910.pdf> (accessed on 10 July 2017).

⁴⁸ *Geofizika v MMB International - The Green Island, DMC*, available at: David Martin-Clark, http://www.onlinedmc.co.uk/index.php/Geofizika_v_MMB_International_-_The_Green_Island (accessed on 10 July 2017).

insurance on the terms of the ICC (C). These were their absolute obligations under the concluded contract. The obligation of the freight forwarder to the sellers was to exercise all proper care in arranging the contract of carriage and insurance in accordance with the requirements of the CIP terms. It was under no obligation to supervise the carriage or the performance of the insurance contract. If the sellers were in breach, there was no real issue regarding the liability of the freight forwarder to the sellers, subject to an issue as to whether the buyers had suffered a loss in respect of the contract of insurance.⁴⁹

Therefore, the Court had to consider two questions. The first question was whether the contract had been obtained on usual terms. After that, the Court had to determine if the contract of insurance had been obtained as required by the CIP terms. In response to the first issue, LJ Thomas commenced by stating that the initial agreement would be interpreted in such a way that, if the vehicles were to be carried on deck, then it would be noted on the front of the B/L and to that extent, the liberty to ship on deck without notifying the shipper was circumscribed. Nonetheless, the Court concluded that the booking confirmation was an antecedent agreement between the shipper and the carrier overriding the liberty clause in the B/L, and that the booking confirmation, although poorly worded, had to mean that, if the cargo was to be carried on deck, the B/L must contain a clause to this effect. Therefore, the sellers had procured a contract of carriage on the usual terms. The Court concluded that there was no causal link between the loss suffered by *Geofizika* and the question of whether the contract had been concluded on the usual terms. The evidence presented before the Court rebutted the premise proposed by the claimants as the main origin of their loss. In this case, *Geofizika* opted for a claim that followed the theory of adequate causality modified by the theory of the aim of legal norms, which was evidently not the appropriate option. They insisted on the fact that the B/L had not contained a clause and omitted to consider the possibility that the Court might classify the booking confirmation as a valid antecedent agreement *neutralizing* the lack of an auspicious clause on the B/L. In other words, the Court found the booking confirmation to be a relevant record and therefore there was no remaining evidence from which a conclusion favourable to the claimants could be reached. Moreover, the claim was limited only to the question of whether the sellers had fulfilled their obligation in making a contract of carriage on the usual terms. The buyers should rather have persisted with the

⁴⁹ *Geofizika v MMB International - The Green Island, DMC*, *ibid.*

pure theory of adequate causality and should have accentuated the cause, the purpose of concluding the contract and the expectations that they had had when concluding the contract, by invoking the *bona fides* principle. Even LJ Thomas noted that the buyers did not argue that the contract that the consignee would expect to receive and upon which he would rely was a contract contained solely in the B/L. The Court furthermore stated that the initial contract clearly prohibited on-deck carriage. However, because of this omission, it was irrelevant for the Court to consider whether, under the provisions of the *Carriage of Goods by Sea Act 1971*, the contract of carriage that the buyers had actually concluded with the carrier was the one contained in clause 7 of the B/L.⁵⁰

The question of insurance is even more enmeshed in the essence of the theory of adequate causality. The Court of Appeal confirmed that it was the freight forwarder's duty to procure a contract of carriage in accordance with the instructions of the clients and that the freight forwarder was in no way responsible for supervising the carrier's performance of the contract of carriage or for the carrier's failure to perform it. Nevertheless, in this case the freight forwarder was negligent in giving the warranty. Because they had not dealt with the carrier before, they could not rely upon the fact that they had arranged a contract with the carrier that, if performed in accordance with its terms, would have resulted in the matters warranted being true. The warranty should not have been given without due care being taken to check that the cargo had in fact been shipped under the deck. The freight forwarder's arguments, that they had assumed that the cargo was stowed below deck because the service had been described as *RO-RO* and because the B/L did not contain a clause to this effect, were rejected.

At the same time, the sellers were in breach because they had not provided valid insurance, as it contained a warranty that had been immediately broken. In the first instance, HHJ Mackie QC found that the sellers were in breach because they had not provided valid insurance. He justified his decision using two main arguments. Firstly, he claimed that the insurance contract should match the contract of affreightment. LJ Thomas disagreed with this and stated that the sellers' only obligation in this case, according to the express finding made by the judge, was that set out in the *Incoterms CIP Terms*. Therefore, an express obligation existed overriding any implied obligation, which

⁵⁰ The "Green Island"- *Geofizika DD v MMB International LTD and Greenshields Cowie & CO LTD*, 1 Lloyd's Law Reports, Vol 2, Part I, 2010, p. 7 (par. 33).

was accentuated by the HHJ Mackie QC. The second argument of the HHJ Mackie QC was based on the testimony of Mr Milardović, who gave evidence stating that the sellers had assured him that the freight forwarder would make the necessary arrangements for insurance protection based on the usual risk of the voyage to be undertaken. However, in his statement, Mr Milardović did not assert that anything more than the CIP minimum was required, and the buyers did not expressly and consistently pursue this point in their claim. Moreover, no cross-examination took place regarding this part of the statement. In their final submissions, the claimants made it abundantly clear that whether or not the buyers were entitled to cover on all risk (A) terms was no longer an issue. They only stated that it was clear that cover on all risk (A) clauses had always been the intention.

However, the freight forwarder's failure to check before providing the warranty, and the sellers' corresponding failure to procure suitable insurance, were not causative of the loss suffered by the buyers. This was because *Incoterms 2000* only obliged the sellers to procure insurance on *ICC(C)* terms, which did not cover cargo being washed overboard. In other words, even if the insurance procured had been under *ICC(C)* terms without any warranty, the buyers would not have been able to recover their losses from the insurers. Once again, the claimants followed the line of the theory of adequate causality, modified by the theory of the aim of legal norms. Sir Nicholas Wall even said that it never ceases to surprise him that *apparently acute men of business, who are sufficiently affluent to be able to afford good advice and who deal with substantial sums of money, are so careless with language as to require the court to tell them the meaning and effect of critical words in their dealings with each other.*⁵¹ They should have insisted on the cause of the contract and pursued several arguments based on the legal documents on which the contract had been established. This is of note as the LJ Thomas accentuated that the cover on (C) clauses is not suitable for manufactured goods. Furthermore, the documents showed that the price paid by the buyers was calculated with insurance on all risk (A) clauses, which breached one of the fundamental principles of contract law, i.e., equality between the value of the parties' prestations. Although this point may well have been an essential point upon which the

⁵¹ *The "Green Island"- Geofizika DD v MMB International LTD and Greenshields Cowie & CO LTD*, *ibid*, p. 10 (par. 58).

case could have been decided, it did not constitute suitable grounds for the judge's decision due to the lackadaisical attitude of the buyers.⁵²

4. Conclusion

The reality that we observe and try to understand cannot be interpreted using the rules of the logical indoctrination that we acquire through our experience and formal education. Our nous does not permit us the indulgence of having contradicting, simultaneously existing base systems of logical reasoning. Nevertheless, different perceptions of reality may result from not altering our initial logical merit of approach. Theories of causality demonstrate how identical processes and facts may be differently interpreted and therefore have contrasting connotations depending on the crucial element upon which they are based. Concurrently, they are the strongest patrons of legal logic, permitting it sovereignty and independence from the straightforward reasoning that characterizes the natural sciences.

The theory of adequate causality is a commixture of the mathematical accuracy of formal logic and the innate sense of justice moulded by the concept of adequacy and established by independent and uninfluenced courts. The theory resigns from the simple establishment of facts and their self-evident temporal, accustomed and usual interconnections, instead concentrating on the discovery of truth as the ultimate aspiration and purpose of procedural law. Adequacy permeates the essence of contract law and serves as the syndetic mechanism controlling the fulfilment of basic contractual tenets. The *Green Island* case used in this study is an extreme example of how the establishment of causal links can go awry and illustrates its implied consequences. It accentuates the importance of the theory's forward-looking mechanism, as well as the consequences of its inadequate usage.

Adequate causality is the marrow of legal reasoning, the constituent ensuring audacity, tenacity and consistency in attaining a level at which the law emerges as *the art of goodness and equity*⁵³.

⁵² The "Green Island"- *Geofizika DD v MMB International LTD and Greenshields Cowie & CO LTD*, *ibid*, p. 9 (par. 53).

⁵³ *Ius est ars boni et aequi*. (Source: *Corpus Iuris Civilis*, *ibid*).

Comparative Analysis of Public Carriage of Passengers by Road Services: Taxi Services and Rent-a-Car with Driver Services in Switzerland

Rino Siffert *

1. Introduction

Digitization has affected virtually every sector of the economy and changed the world of work. New information and communication technologies (ICT), as well as more powerful computers and network infrastructures, are the technical backbone of this change. While the initial stages of digitization mainly served to automate repetitive business processes with the help of ICT, the digital transformation, which has been progressing rapidly since about 2008, means basically the '*Digitization of Everything*'. Innovative technological developments such as Cloud Computing, Mobile Computing, Big Data and the Internet of Things, facilitate new products, services and business models like the *Sharing Economy*.¹

Uber owns probably one of the most known and controversial ICT-platforms worldwide in the field of the *Sharing Economy*, as it develops, markets and operates car transportation services via a mobile app software in over eighty countries.² Core elements of the *Sharing Economy* are usually platforms that broker direct transactions between users and providers; these transactions include the temporary use of resources and associated services. However, *Sharing Economy* is not a fundamentally new way of doing business. The developments of the *Sharing Economy* are at a first glance positive from an economic point of view because resources are used more efficiently and competition is intensified. However, versatile laws on the Federal as well as on the Cantonal level bedevil

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¹ Executive summary of the report regarding the central framework for the digital economy by the Swiss Federal Council of January 11, 2017 (<https://www.news.admin.ch/news/message/attachments/46897.pdf>, p. 1 [last visited on December 19, 2017]).

² Please consult the following website for the list of countries in which *Uber*-services are available: <https://www.uber.com/de-CH/country-list/> (last visited December 19, 2017).

the analysis of the legal situation with regard to *Sharing Economy* in the field of transportation services in Switzerland.³

2. What is the legal situation of Uber in Switzerland?

2.1. Generally

In Switzerland, transportation services are distinguished as follows:

- (i) transportation from a specific location (e.g. taxi stand),
- (ii) transportation initiated by a hand signal or
- (iii) *transportation based on a special request* (e.g. phone call or via a mobile app software).

Usually, transportation from a specific location or initiated by a hand signal are conducted only by licensed taxis. Whereas transportation based on a special request cannot just be made by a licensed taxi or professional drivers of a limousine service, but also by private individuals. However, the aforementioned limousine services or transportation services provided by private individuals are (contrary to taxi services) very often not regulated in '*Cantonal/Municipal Taxi Regulations*'. Nevertheless, professional transportation services in the category '*Business-to-Customer (B2C)*' are more regulated than the transportation services in the category '*People-to-People (P2P)*'.

In this context, it has to be mentioned that *Uber* offers in Switzerland three types of services, which are not available in every city and are all based on a special request by the client via the *Uber*-mobile app software:

- (i) *UberBlack* uses professional drivers operating high-end sedans;
- (ii) *UberX* uses an intermediate range of cars;
- (iii) *UberGreen* uses electric cars; and
- (iv) *UberPop*, at the lower end of the scale, is operated by any individual with a four-door car who signs up on the company's website.

³ Executive summary of the report regarding the central framework for the digital economy by the Swiss Federal Council of January 11, 2017 (<https://www.news.admin.ch/news/message/attachments/46897.pdf>, p. 3 [last visited on December 19, 2017]).

UberX, *UberBlack* and *UberGreen* are not that different from traditional limousine services and thus they fall in the category of 'B2C'. However, *UberPop* connects clients with non-professional drivers and thus the involved persons fall in the category 'P2P'.

	P2P	B2C
• Transportation based on a special request	UberPOP	Limousine services UberX UberBlack UberGreen
• Transportation from a specific location • Transportation initiated by a hand signal • Transportation based on a special request		Taxi services

Uber declared on December 13, 2017 to stop *UberPop* in the course of the year 2018 in Switzerland and to focus mainly on its services *UberX*, *UberBlack* and *UberGreen*.⁴ *Uber* has made this decision mainly due to the aforementioned legal situation on the Federal level and the specific laws in the various Cantons.

2.2. Road Traffic Regulations and Organization of the Enforcement

Whereas with the traditional offers by taxi and limousine services the vehicles are primarily used for a commercial utilization, private individuals with not labeled private cars usually conduct transportation via *UberPop*.

Having this in mind, it can be referred to the Swiss Federal Ordinance on the Working and Resting Time of Professional Drivers of Automobiles of Mai 6, 1981⁵ that states that transportation services by private individuals are only allowed, if their frequency does not exceed the threshold for '*professional driving services*'. Art. 3, para. 1^{bis} of the aforementioned Ordinance defines the term '*professional driving services*' as follows: the

⁴ <https://www.nzz.ch/wirtschaft/uber-verzichtet-in-der-schweiz-auf-umstrittenen-pop-service-ld.1338911> (last visited on December 19, 2017).

⁵ <https://www.admin.ch/opc/de/classified-compilation/19810081/index.html> (last visited on December 19, 2017).

transportation has to be offered regularly, i.e. at least twice within 16 days, by the driver and targets an economic success, i.e. the fare exceeds the costs of the car and the out-of-pocket expenses.⁶ On a par with this are transports of persons with a rental car including a chauffeur (art. 3, para. 1^{ter} of the aforementioned Ordinance).⁷

If a transportation is not considered as a '*professional driving service*', then simply a Swiss driving license of the category B ('*ordinary car driving license*') is sufficient. However, if a transportation offer is considered as a '*professional driving service*', additional requirements have to be fulfilled by the driver like the necessity to install a special trip recorder (also called 'tachograph'⁸) that chronicles the driving time and rest periods.⁹ Furthermore, drivers need in addition to the Swiss driving license with the category 'B' a special authorization in order to conduct '*professional driving services*' for transporting other persons, which requires an additional practical and theoretical exam.¹⁰

In addition to the Swiss Federal Ordinance on the Admission of Persons and Vehicles for the Traffic of October 27, 1976¹¹ and the Swiss Federal Labor Act of March 13, 1964¹²,

⁶ <https://www.admin.ch/opc/de/classified-compilation/19810081/index.html#a3> (last visited on December 19, 2017).

⁷ <https://www.admin.ch/opc/de/classified-compilation/19810081/index.html#a3> (last visited on December 19, 2017).

⁸ For example, in the EU: https://ec.europa.eu/transport/modes/road/social-provisions/tachograph_en last (visited on December 19, 2017).

⁹ Cf. art. 100, para. 1 let. b-c and para. 2-4 of the Swiss Federal Ordinance of the Technical Requirements of Road Vehicles of June 19, 1995 (<https://www.admin.ch/opc/de/classified-compilation/19950165/index.html> [last visited on December 19, 2017]). These trip recorders have to be verified and repaired by specific licensed legal entities (art. 101, of the aforementioned Ordinance). Furthermore, the vehicles have to be verified once a year (art. 33, para. 2 let. a (1) of the aforementioned Ordinance). If a vehicle is used for professional transportation of persons, then this has to be mentioned in the vehicle registration certificate (art. 80, para. 2 of the aforementioned Ordinance).

¹⁰ Such an authorization is only issued if the following requirements are fulfilled: (i) at least on year of driving practice under the category 'B' without a revocation of the driving license (art. 8, para. 4-6 of the Swiss Federal Ordinance of the Admission of Persons and Vehicles for the Traffic of October 27, 1976; see <https://www.admin.ch/opc/de/classified-compilation/19760247/index.html> [last visited on December 19, 2017]), (ii) higher medical minimum requirements (art. 7, para. 1 and addendum 1, Group 2 of the aforementioned Ordinance), (iii) a medical exam (art. 11b, para. 1, let. a of the aforementioned Ordinance), (iv) the passing of an additional theoretical exam with regard to the driving time and rest periods (art. 25, para. 3, let. a of the aforementioned Ordinance), (v) the passing of an additional practical driving exam (art. 25, para. 3, let. b of the aforementioned Ordinance). Furthermore, it is necessary to redo the medical exam up to the age of 50 every 5 years and after the age of 50 every 3 years (art. 27, para. 1, let. a [2] of the aforementioned Ordinance).

¹¹ <https://www.admin.ch/opc/de/classified-compilation/19760247/index.html> (last visited on December 19, 2017).

¹² <https://www.admin.ch/opc/de/classified-compilation/19640049/index.html> (last visited on December 19, 2017).

the numerous provisions of the Swiss Federal Chauffeur Ordinance of June 19, 1995¹³ with its maximum driving time and minimum resting periods and the special duties of an employer (e.g., quarterly reports of over-timing) have to be taken into account (art. 71, let. a of the Swiss Federal Labor Act). Particularly, the control of the working and driving time and of the rest periods are subject to the Swiss Federal Traffic Control Ordinance of March 28, 2007.¹⁴

Based on art. 106, para. 2 of the Swiss Federal Road Traffic Act of December 19, 1958¹⁵ the compliance of all of the aforementioned provisions has to be verified by the Cantonal authorities (e.g., Cantonal Department of Motor Vehicles, Cantonal and Municipal Police Forces and the Swiss Federal Chauffeur Ordinance Enforcement Authorities). Furthermore, the enforcement is coordinated within Switzerland by the Intercantonal Association of the Swiss Federal Chauffeur Ordinance, the Association of the Cantonal Departments of Motor Vehicles and the Consortium of the Heads of the Traffic Police Forces in Switzerland and Liechtenstein.

However, in practice it is very difficult to check by the aforementioned authorities whether private individuals respect the conditions set by the law as the vehicles, with which the *UberPop*-services are provided, are not specially labeled and it is difficult to prove that an *UberPop*-driver exceeds the legally set threshold for '*professional driving services*'.

2.3. Competition Law

The Swiss Federal Law on Unfair Competition of December 19, 1986¹⁶ has the purpose to ensure fair and undistorted competition in the interest of all concerned. The '*natural*' course of competition has to be respected.¹⁷ Under Swiss law, any behavior or business

¹³ <https://www.admin.ch/opc/de/classified-compilation/19950157/index.html> (last visited on December 19, 2017).

¹⁴ <https://www.admin.ch/opc/de/classified-compilation/20063193/index.html> (last visited on December 19, 2017).

¹⁵ <https://www.admin.ch/opc/de/classified-compilation/19580266/index.html> (last visited on December 19, 2017).

¹⁶ <https://www.admin.ch/opc/de/classified-compilation/19860391/> (last visited on December 19, 2017).

¹⁷ Cf. the decision of the Swiss Supreme Court 4C.139/2003 of September 4, 2003, Consideration 5.1. with additional explanations (see http://www.polyreg.ch/bgeunpub/Jahr_2003/Entscheide_4C_2003/4C.139_2003.html [last visited on December 19, 2017]).

practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and unlawful (art. 2 of the Swiss Federal Law on Unfair Competition). Someone who creates with his innovation a new business model does not act per se in an unfair manner as the Swiss legislation is aiming at an effective competition. Consequently, innovation is encouraged and therefore *Sharing Economy* as a business model like the one used by *Uber* is in line with the unfair competition legislation in Switzerland. Thus, the Swiss Federal Council held in its report of January 17, 2017 that there is no need to change anything in the Swiss legislation on unfair competition with regard to ICT-platforms that broker direct transactions between users and providers.¹⁸

2.4. Law on the Internal Market

According to the Swiss Federal Law on the Internal Market of October 6, 1995¹⁹ it is possible that services can be offered beyond Cantonal and Municipal borders in Switzerland (so-called '*cross-border freedom of services*').²⁰ Thus, a service provider is allowed to render its services elsewhere according to the legal provisions of its '*place of origin*'. However, if the legal provisions with regard to the access to the market at the '*place of origin*' and the destination are not considered as equal, then it is possible to limit the access if it is proportional and necessary in order to ensure a predominant public interest.

With this in mind, it can be held that an *Uber*-driver is generally allowed to provide transportation services in every Swiss Canton if he is allowed to provide the same services at his '*place of origin*'. However, if a Canton or a Municipality wants to limit the market access for nonlocal drivers, it would be necessary to prove that a limitation is proportionate, non-discriminatory and indispensable for ensuring the protection of the predominant public interest.²¹

¹⁸ <https://www.news.admin.ch/news/message/attachments/46892.pdf>, p. 142 (last visited on December 19, 2017).

¹⁹ <https://www.admin.ch/opc/de/classified-compilation/19950280/index.html> (last visited on December 19, 2017).

²⁰ Swiss Federal Competition Commission Recommendation of February 27, 20012 regarding the access to the market for nonlocal taxi service providers, in: RPW 2012/2, p. 438.

²¹ <https://www.news.admin.ch/news/message/attachments/46892.pdf>, p. 143 (last visited on December 19, 2017).

2.5. Employment and Social Security Legislation

In the last months, there was an ongoing discussion in the Swiss news whether *Uber* has to be considered by the Swiss Federal Employment and Social Security Legislation as an employer or simply as an intermediary. Ultimately, it is the question whether or not *Uber*-drivers are self-employed or employed and therefore the answer has quite an impact on the insurance coverage and the duty to pay social security contributions.

The Swiss National Accident Insurance Fund (SUVA)²² qualified on behalf of the Social Security Agency of the Canton of Zurich in May 2016 that drivers, who get hired by a client via the *Uber*-mobile app software, are considered as employees of *Uber* and thus the latter has to pay social security contributions. SUVA justified its assessment as it compared *Uber* with an ordinary taxi dispatch service: the drivers are subordinated to *Uber*, because they depend from a work organization point of view entirely on the latter, they have not to bear a business risk themselves, they have no influence on the price and the way of payment for the service rendered, and if they do not respect the requirements set up by *Uber*, then there will be ramifications.²³ Not surprisingly, *Uber* objected and subsequently SUVA upheld its verdict. However, *Uber* announced that if no solution can be found then it would file for a recourse to the courts.²⁴

About the same time a Swiss union called 'UNIA' hired a Swiss law professor named Kurt Pärli of the University of Basel to write a legal opinion in which he came to the same conclusion. *Uber* as an employer of the *Uber*-drivers is obliged to pay social security contributions and the *Uber*-drivers are subject to the Swiss Federal Labor Act of March 13,

²² 'SUVA' is the abbreviation of 'Schweizerische Unfallversicherungsanstalt', which is a public-sector insurer and leading provider of health care coverage for employees in case of accidents in Switzerland. It was founded 1912 and for a long time held a monopoly for compulsory coverage for employees in high-risk professions.

²³ <https://www.srf.ch/news/schweiz/grosser-druck-auf-uber-suva-und-ahv-bitten-fahrdienst-zur-kasse> (last visited on December 19, 2017).

²⁴ The decision of SUVA from December 29, 2016 can be found under the following hyperlink: <https://www.srf.ch/news/schweiz/uber-blitzt-ab-fahrer-sind-angestellte> (last visited on December 19, 2017); cf. also <https://www.nzz.ch/wirtschaft/rechtsstreit-um-uber-fahrer-sind-angestellte-ld.138163> (last visited on December 19, 2017) and https://www.unia.ch/uploads/tx_news/2017-01-05-Einspracheentscheid_Suva_gegen_Uber_01.pdf (last visited on December 19, 2017)

1964²⁵ and the Swiss Federal Chauffeur Ordinance of June 19, 1995^{26,27} Subsequently, *Uber* mandated also a Swiss law professor, Prof. Bettina Kahil-Wolff of the University of Lausanne, who presented on July 5, 2017 her legal opinion in a media conference. It is not surprising that she came to the opposite conclusion and held that *Uber*-drivers have to be considered as self-employed contractors and thus no social security contributions have to be paid by *Uber*.²⁸

The criteria in order to distinguish a self-employed from an employed activity are slightly different in employment law and social security law. However, the issue of subordination is probably the decisive criterion. Thus, the various Cantonal and Federal administrations perform a case-to-case assessment. In a dispute, a court will have to decide this issue. It seems that at the moment several cases are pending in the Swiss court system.²⁹

2.6. Motor Liability Insurance

The success of these new forms of transportation services, especially of *UberPop*, calls for answers to the questions whether or not the passengers are sufficiently protected by the mandatory vehicle liability insurance.

The Swiss Road Traffic Act of December 19, 1958 stipulates that every vehicle, which is engaged in the public traffic, has to have a vehicle liability insurance.³⁰ The vehicle insurance company has to provide at least a coverage of CHF 5'000'000.00 per incident

²⁵ <https://www.admin.ch/opc/de/classified-compilation/19640049/index.html> (last visited on December 19, 2017).

²⁶ <https://www.admin.ch/opc/de/classified-compilation/19950157/index.html> (last visited on December 19, 2017).

²⁷ The legal opinion of Prof. Kurt Pärli of July 10, 2016 can be found under the following hyperlink: https://www.unia.ch/uploads/tx_news/2016-08-29-Gutachten-Arbeitsrecht-Sozialversicherungsrecht-Uber-Taxifahrer-innen-Professor-Kurt-P%C3%A4rli.pdf (last visited on December 19, 2017).

²⁸ <https://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/uber-schiesst-mit-gutachten-ein-eigentor/story/19335814> (last visited on December 19, 2017). The legal opinion of Prof. Bettina Kahil-Wolff has not been found online.

²⁹ <https://www.news.admin.ch/newsd/message/attachments/46892.pdf>, p.143 (last visited on December 19, 2017).

³⁰ Art. 63, para. 1 of the Swiss Federal Road Traffic Act of December 19, 1958 (see <https://www.admin.ch/opc/de/classified-compilation/19580266/index.html#a63> [last visited on December 19, 2017]).

for physical injuries and damages to property for up to nine passengers.³¹ However, usually an insurance coverage up to CHF 100'000'000.00 is guaranteed on a contractual basis. If the insurance claim by a passenger is justified, then the insurance company has to pay to the injured party.³²

Objections based on the insurance agreement (e.g., the driver of the vehicle does not have a driving license for transporting clients professionally) have no impact on the amount a client can ask.³³ However, the insurance company will try to recover some of the amount that has been paid (so-called '*regress*').³⁴ Even if a vehicle (which is very unlikely if the car has Swiss number plates) is not covered by a vehicle liability insurance, there will be no gap in coverage. In such a case, the Swiss National Guarantee Fund will indemnify the insured third party and try to recover the paid indemnification from the vehicle owner.

Thus, it is recommended that an *Uber*-driver clarifies the car liability insurance coverage before he starts offering transportation services. It is possible that the insurance contract only covers the private use of the vehicle. If so, it is possible that the vehicle owner, who offers transportation services on a professional level, will be facing recovery claims.

However, the Swiss Federal Council held in its report of January 17, 2017 that there is no need to change anything with regard to vehicle liability insurances in the field of transportation services.³⁵

2.7. Tax Law

³¹ Art. 3, para. 1 of the Swiss Federal Traffic Insurance Ordinance of November 20, 1959 (see <https://www.admin.ch/opc/de/classified-compilation/19590239/index.html#a3> [last visited on December 19, 2017]).

³² Art. 65, para. 1 of the Swiss Federal Road Traffic Act of December 19, 1958 (see <https://www.admin.ch/opc/de/classified-compilation/19580266/index.html#a65> [last visited on December 19, 2017]).

³³ See Art. 65, para. 2 of the Swiss Federal Road Traffic Act of December 19, 1958 (see <https://www.admin.ch/opc/de/classified-compilation/19580266/index.html#a65> [last visited on December 19, 2017]).

³⁴ Art. 65, para. 3 of the Swiss Federal Road Traffic Act of December 19, 1958 (see <https://www.admin.ch/opc/de/classified-compilation/19580266/index.html#a65> [last visited on December 19, 2017]).

³⁵ Cf. <https://www.news.admin.ch/newsd/message/attachments/46892.pdf>, p. 142 (last visited on December 19, 2017).

2.7.1. Generally

The business model of *Uber* consists in the development and operating of a mobile app software with which drivers can offer transportation services and clients, who are looking for such services, are brought together. Thus, there are two potential tax subjects: *Uber* and the driver, who offers to drive the client. These tax subjects can be liable to a direct taxation (income and profit tax) as well as an indirect taxation (VAT).

2.7.2. Direct Taxation

Legal entities are subject to taxation based on personal affiliations if their registered office or place of effective management is located in Switzerland or they maintain permanent establishments in Switzerland (art. 50 and 51 of the Swiss Federal Income Tax Act of December 14, 1990³⁶ as well as art. 20 and 21 of the Swiss Federal Cantonal and Communal Income Tax Harmonization Act of December 14, 1990³⁷). If the legal entity in question is not affiliated to Switzerland, then it is not possible to tax its profits. However, if a legal entity like *Uber* is subject to Swiss taxation, then all the profits it generates from its services are subject to taxation (art. 57 of the Swiss Federal Income Tax Act and art. 24, para. 1 of the Swiss Federal Cantonal and Communal Income Tax Harmonization Act).

In order to fix the tax basis of a legal entity like *Uber*, it is necessary to determine the exact status of the drivers: Are they employees of *Uber* or considered as self-employed drivers? In practice, it would be possible to take a similar approach like the one for transportation based on a credit basis by taxi dispatch services. However, due to the tax secrecy in Switzerland it is not possible to comment the exact tax situation of *Uber* by the Swiss Federal, Cantonal and Municipal tax authorities.³⁸

The income that an *Uber*-driver gets from the transportation services is subject to the income tax. These revenues have to be stated in the tax declaration together with possible other income. The way the *Uber*-driver is taxed depends whether the latter is considered as an employee or as self-employed driver (art. 57 of the Swiss Federal Income Tax Act

³⁶ <https://www.admin.ch/opc/de/classified-compilation/19900329/index.html> (last visited on December 19, 2017).

³⁷ <https://www.admin.ch/opc/de/classified-compilation/19900333/index.html> (last visited on December 19, 2017).

³⁸ <https://www.news.admin.ch/news/message/attachments/46892.pdf>, p. 145 (last visited on December 19, 2017).

and art. 24, para. 1 of the Swiss Federal Cantonal and Communal Income Tax Harmonization Act).

2.7.3. Indirect Taxation

There are different ways to tax ICT-platforms abroad, which offer via mobile app software transportation services. Unfortunately, due to the tax secrecy in Switzerland it is not possible to comment the exact tax situation of *Uber* with regard to VAT by the Swiss Federal Tax Administration.³⁹ VAT is a tax that has to be declared by the taxable subjects themselves. This means, that *Uber* and the driver have the duty, to determine themselves their domestic turnover, the VAT that they have to pay and to declare it themselves to the Swiss Federal Tax Administration, which will verify then, if the taxable persons fulfill their duties as taxpayers.

There are four different kind of taxation models possible for a business model like the one of *Uber*:

(i) *Uber* as the operator of the ICT-platform is considered as the sole provider of the transportation services: The *Uber*-drivers are not considered as the providers of the transportation services. Thus, *Uber* as an operator of the ICT-platform is responsible for the provision of the services and is subject to VAT, if the domestic services exceed a turnover of CHF 100'000.00.

(ii) Direct representation: The *Uber*-drivers are considered as the providers of the transportation services. However, *Uber* as an operator of the ICT-platform receives for the '*electronic mediation services*' a fee. In such case, the *Uber*-driver has to pay VAT if the domestic turnover from the transportation services exceeds the amount of CHF 100'000.00. If the driver is taxable in Switzerland, then the operator of the ICT-platform, which is domiciled abroad, is taxable on the fee that he receives from the driver (art. 45, para. 2, let. a or b of the Swiss Federal VAT Act; principle of the so-called '*reverse charge*').

(iii) Indirect representation: *Uber* as an operator of the ICT-platform provides a service for the client, which the latter acquires from the driver, who acts as a self-

³⁹ <https://www.news.admin.ch/news/message/attachments/46892.pdf>, p. 145 (last visited on December 19, 2017).

employed person. In this case, *Uber* has to pay VAT, if the domestic turnover from the rendered services exceeds the amount of CHF 100'000.00. Furthermore, the *Uber*-driver is liable for VAT, if the domestic turnover of his services exceeds the amount of CHF 100'000.00.

(iv) *Uber* as the operator the ICT-platform is only considered as the provider of the 'electronic mediation services': The *Uber*-driver, who is providing the transportation service, has to pay VAT on it, if his domestic turnover exceeds the amount of CHF 100'000.00. *Uber* as an operator of the ICT-platform is also subject to VAT for the 'electronic mediation services' if the domestic turnover exceeds the amount of CHF 100'000.00 on it, even if the *Uber*-drivers are not liable for VAT.

2.8. Cantonal/Municipal Legislation

2.8.1. Generally

In Switzerland, taxi services are subject to many provisions on a Cantonal or Municipal level. Therefore, it is impossible to make a general valid statement about the legal situation for all of Switzerland. Thus, we will have a closer look at the legal situation for transportation services and the enforcement in the Cantons of Geneva and Zurich. However, the following two 'case studies' show that the local authorities observe the changes in the market of transportation services very closely and make adjustments if necessary.

2.8.2. Canton of Geneva

In the last years, there has been quite a turmoil in the '*transportation market*' in the Canton of Geneva *inter alia* because of *Uber*-drivers, which entered into competition with traditional taxi and limousine services.⁴⁰

Already when *Uber* informed the competent Cantonal authority of Geneva ('*Service du commerce de la République et canton de Genève*') in August 2014 about their plan to offer

⁴⁰ Cf. the following article regarding the legal situation in the Canton of Geneva before the new Cantonal Act on Taxis and Vehicles with drivers entered into force on July 1, 2017: Andreas Auer, Taxis genevois : un état des lieux comparatif, constitutionnel et prospectif, in: Jusletter September 15, 2014 (<http://www.rts.ch/emissions/temps-present/6531554.html/BINARY/Taxis%20genevois%20-%20%C3%A9tat%20des%20lieux%20comparatifs.pdf> [last visited on December 19, 2017]).

transportation services in Geneva, the latter told them that they will need to respect the legal requirements of the Cantonal legislation or their activities will be deemed to be illegal. However, *Uber* discarded this and has been active in Geneva since September 2014. Based on the former Cantonal Law on Taxis and Limousines of January 21, 2005, the competent authority of the Canton of Geneva considered *Uber* to be a taxi dispatch center, which had no authorization for providing the dispatch services according to art. 9, para. 1, let. d and art. 13 of the aforementioned law. In order to obtain such an authorization, *Uber* would have to fulfill the following conditions: a fixed address, a general phone number, a 24/7-service, a sufficiently big car pool in order to offer transportation services during the night, on the weekend and on holidays as well as enough parking lots for the drivers. As *Uber* did not meet these requirements, the competent Cantonal Authority prohibited *Uber* on March 30, 2015 with immediate effect to offer professional driving services and ordered them to pay a fine of CHF 35'000.00. *Uber* appealed to the competent Cantonal Court ('*Cour de justice*') and asked for a suspensive effect. Like this, *Uber* would have been allowed to offer its services in the meantime. However, the Cantonal Court awarded only a suspensive effect to the fine, but not to the rest of the judgement. Thereinafter, *Uber* went to the Swiss Federal Supreme Court, which refused on formal grounds to examine the issue of the suspensive effect.⁴¹ In addition, the Cantonal authorities sentenced several *Uber*-drivers to pay a fine as they did not have the proper permits, which they challenged in spring 2015. As the Cantonal administrative court did not judge these cases within a reasonable period of time, the *Uber*-drivers filed legal actions for denial of justice to the Swiss Federal Supreme Court. The latter ruled in March 2017 against the Cantonal authority and ordered the Canton of Geneva to pay to each of the *Uber*-drivers the amount of CHF 500.00.⁴² Regardless of these events, the decisions on the main issues by the competent Cantonal administrative court are still pending.⁴³

In the meantime, the Traffic Commission of the Cantonal Legislative, verified a draft for a Cantonal Act on Taxis and Vehicles with drivers (*Loi sur les taxis et les véhicules de*

⁴¹ Decision of the Swiss Federal Supreme Court 2C.547/2015 of January 1, 2016, Consideration 1.1.-1.3.6. (http://www.servat.unibe.ch/dfr/bger/160107_2C_547-2015.html [last visited on December 19, 2017]).

⁴² <https://www.tdg.ch/geneve/actu-genevoise/tribunal-federal-pointe-lenteurs-justice-genevoise/story/12617208>, p. 149 (last visited on December 19, 2017).

⁴³ <https://www.news.admin.ch/newsd/message/attachments/46892.pdf>, p. 149 (last visited on December 19, 2017).

transport avec chauffeurs [LTVTC]'), which has been published on August 26, 2015.⁴⁴ The main idea of this draft was to settle the differences between the taxis and limousine services and *Uber*. Thus, the so far under the law of 2005 existing two different categories of taxis have been consolidated in order to give them the same privileges like the common use of the taxi stands and the use of bus lines in certain streets. Furthermore, a new category called '*transport vehicles with chauffeur*' has been created for *Uber*-drivers and others. These chauffeurs need to have a special license, have no privileges in traffic and are not allowed to call their vehicles taxis. This draft has been approved by the Great Council of the Canton of Geneva on October 13, 2016⁴⁵ and entered into force on July 1, 2017⁴⁶, after the Administrative Chamber of the Cantonal Court rejected on June 30, 2017 three appeals against the law.⁴⁷ *Uber* informed its' drivers about these changes in law so that they are able to put themselves in conformity with it.⁴⁸

2.8.3. Canton of Zurich

In the Canton of Zurich, there is no Cantonal legislation with regard to taxi services. Thus, the latter is (with the exception of the Swiss Federal Road Traffic Regulations) regulated on the Municipal level. Some Municipalities integrated the provisions on taxi services in their '*Police Ordinances*' (e.g. the city of Kloten) others made specific '*Taxi Ordinances*' (e.g. the city of Zurich). The '*Taxi Ordinance of the City of Zurich*' defines a taxi as a vehicle, which provides transportation services for persons and goods based on tariff without a specific schedule or route. These vehicles need to have a special taxi sign on their roof. Furthermore, the taxi-drivers need not only a taxi permit, but also a special operating approval, which allows the holder to offer taxi services in the city of Zurich. The taxi services are under the control of the police. *UberBlack*, *UberX* and *UberGreen* are not problematic in view of the police as long as the drivers have a license for professional transportation services, they respect the working and driving time as well as the resting

⁴⁴ <https://www.news.admin.ch/news/message/attachments/46892.pdf>, p. 149 (last visited on December 19, 2017).

⁴⁵ <http://ge.ch/grandconseil/data/odj/010308/L11709.pdf> (last visited on December 19, 2017).

⁴⁶ https://www.ge.ch/legislation/rsg/f/s/rsg_H1_31.html (last visited on December 19, 2017).

⁴⁷ <https://dmain.ge.ch/actualite/loi-taxis-vehicules-transport-chauffeurs-ltvtc-tous-recours-sont-rejetes-3-07-2017> (last visited on December 19, 2017).

⁴⁸ <https://www.uber.com/fr-CH/drive/geneva/get-a-license/ltvvc-vtc-geneve/> (last visited on December 19, 2017).

period provisions of the Swiss Federal Chauffeur Ordinance and the vehicles have a trip recorder.

Generally, *UberPop*-drivers do not need to have special license and a trip recorder. However, if the *UberPop*-driver is offering his transportation services on a regular basis (i.e., at last two transports in less than 16 days) and the client has to pay a fee that exceeds the cost for the vehicle and the out-of-pocket-expenses, then these transports aim at obtaining an economic success and thus the *UberPop*-driver has to get a special license in order to offer such professional transportation services.

In 2016, the Cantonal police of Zurich has taken action against 139 *UberPop*-drivers, and the Municipal police of the city Zurich 79 for driving without the appropriate licenses and permits. Fines could be as high as CHF10'000.00.⁴⁹

On June 7, 2017, the Government of the Canton of Zurich published a statement in which it was held that *UberPop*-drivers are operating illegally.⁵⁰ As a result, *Uber* cancelled the *UberPop*-service in Zurich on August 10, 2017 following the controversy over its legality. Zurich *UberPop*-drivers have three months to get the proper permits that will allow them to chauffeur passengers for pay under the more expensive *UberX*, *UberBlack* and *UberGreen* services.⁵¹

⁴⁹ https://www.swissinfo.ch/eng/police-report_over-500-criminal-proceedings-against-uber-drivers/42749606 (last visited on December 19, 2017).

⁵⁰ The Government of the Canton of Zurich stated *inter alia* that *UberPop*-drivers have to meet the requirements, which are mentioned in II.2. 'Road Traffic Regulations and Organization of the Enforcement', in order to be allowed to perform 'professional driving services' in order to perform 'professional driving services' legally. Cf. Excerpt of the protocol of the Government of the Canton of Zurich of June 7, 2017: https://www.zh.ch/bin/ktzh/rrb/beschluss.pdf?rrbNr=510&name=RRB-2017-510&year=2017&_charset_=UTF-8 (last visited on December 19, 2017). Cf. also <https://www.zsz.ch/ueberregional/zuercher-regierungsrat-uberpopfahrer-sind-straefbar/story/19092923> (last visited on December 19, 2017).

⁵¹ https://www.swissinfo.ch/eng/private-transport_uberpop-service-cancelled-in-zurich/43400534 (last visited on December 19, 2017).

General Average and Negotiation Period Expenses in Piracy Cases

Zoumpoulia (Lia) Amaxilati *

Mitsui & Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and another (The Longchamp) [2017] UKSC 68

*The Longchamp*¹ is one of the many cases that came for decision before English Courts following the outbreak of Somali piracy almost ten years ago. The UK Supreme Court held that daily vessel-operating expenses incurred by the shipowner while they were negotiating to reduce the ransom demands of pirates should be allowed in general average.

1. Facts

On 29 January 2009, the *MV Longchamp* was hijacked by Somali pirates in the Gulf of Aden. At the time, the vessel was fully laden with a cargo of 2,728.732 metric tons of Vinyl Chloride Monomer in bulk. The cargo was carried under a bill of lading dated 6 January 2009 which stated on its face that 'General Average, if any, shall be settled in accordance with the York-Antwerp Rules 1974'. On 30 January 2009, the pirates demanded a ransom of US\$ 6 million. On 2 February 2009, an initial offer of US\$373,000 was made to the pirates by the vessel's owners. Negotiations lasted for 51 days. On 22 March 2009, a ransom was agreed in the amount of US\$ 1.85 million. On 27 March 2009, the ransom was paid by being dropped at sea. On 28 March 2009, the pirates disembarked, and the vessel continued her voyage. During the negotiation period the vessel-operating expenses incurred by the vessel's owners amounted to approximately US\$ 160,000. In particular, those sums included: (i) US\$ 75,724.80 for wages paid to the crew; (ii) US\$ 70,058.70 for 'high risk area bonus' paid to the crew; (iii) US\$ 3,315 for crew maintenance; and (iv) US\$

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¹ [2017] UKSC 68.

11,115.45 for bunkers consumed. In the meantime, general average was declared. On 31 August 2011, the adjustment of general average was issued. The average adjuster considered that the US\$ 1.85 million ransom payment itself is allowed under Rule A.² It also considered that the costs and expenses of the negotiator and the costs and expenses of its special advisers are allowable. It finally considered that the negotiation period expenses were allowable under Rule F. The cargo interests had previously made payments on an account of general average but following the publication of a report from the Advisory Committee of the Association of Average Adjusters, which concluded that the negotiation period expenses did not fall within Rule F, they issued proceedings challenging the adjuster's conclusion and requesting repayment.

2. The dispute

The issue for determination was whether the daily vessel-operating expenses incurred by the shipowner while they were negotiating to reduce the ransom demands of pirates should be allowed in general average or whether they must be borne by the shipowner alone.

The vessel's owners first argued that it was rightly common ground that the US\$ 1.85 million ransom paid to the pirates for the release of the vessel were allowable as general average under Rule A.³ They then argued that the negotiation period expenses were incurred in order to reduce the amount of the ransom demanded by the pirates and, accordingly, were incurred in place of another expense which would have been allowable as general average pursuant to Rule A.⁴ They finally argued that those expenses are less

² The York-Antwerp Rules 1974: *Rule A: There is general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.; Rule C: Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.; Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.; Rule F: Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.*

³ [2017] UKSC 68, [14].

⁴ Ibid.

than the general average expense avoided.⁵ Thus, the negotiation period expenses are properly allowable under Rule F.⁶

The cargo interests first argued that the payment of the ransom initially demanded by the pirates would not have been allowable under Rule A because it would not have been reasonable for the vessel's owners to have accepted that demand.⁷ They then argued that the payment of a reduced ransom was not an alternative course of action to the payment of the ransom originally demanded.⁸ They further argued that the negotiation period expenses were not incurred with the necessary intention, were not 'extra expense' within the meaning of that word in Rule F, and would have been incurred even if the vessel's owners had agreed to the pirates' original demand.⁹ They finally argued that the claim must fail pursuant to Rule C or Rule XI.¹⁰

The dispute went all the way through to the Supreme Court. In brief, the Commercial Court judgment delivered by Hofmeyr QC held that the daily-vessel operating expenses incurred by the vessel's owners while they were negotiating to reduce the ransom demands of pirates are recoverable under Rule F.¹¹ This judgment was partly reversed by the Court of Appeal.¹² Hamblen LJ, who delivered the leading judgment, held that the negotiation period expenses had not been incurred in adopting a clear alternative course of action to one where the expense would have been allowable as general average under Rule A.¹³ The vessel's owners appealed.

3. Decision

The Supreme Court (Mance LJ dissenting) came to the same conclusion as Hofmeyr QC in the Commercial Court.¹⁴ Having taken all of the arguments into account, Neuberger LJ

⁵ Ibid.

⁶ Ibid.

⁷ Ibid [15].

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ [2014] EWHC 3445 (Comm).

¹² [2016] EWCA Civ 708.

¹³ Ibid [49].

¹⁴ [2014] EWHC 3445 (Comm).

delivered a concise and compact reasoning by focusing on six points which reflect the arguments raised by the cargo interests.¹⁵

Starting with the first point, namely whether it would have been reasonable for the vessel's owners to accept the initial ransom demand, Neuberger LJ held that Hofmeyr QC and the Court of Appeal were wrong in finding that the vessel's owners had to establish that it would have been reasonable to accept the pirates' initial demand in order to trigger the application of Rule F.¹⁶ Conversely, Neuberger LJ held that the vessel's owners had to establish that the type of expense avoided was of a nature which would have been allowable under Rule A.¹⁷

Considering the second point, namely whether the reduction in ransom was an alternative course of action, Neuberger LJ held that, as a matter of ordinary language, Rule F applies to negotiation period expenses since the incurring of those expenses represents an alternative course of action from the payment of the US\$ 4.14 million by which the initial ransom was reduced.¹⁸ After all, it was explained that the Rules should be interpreted by a United Kingdom court as an international convention or treaty by paying attention to the wording of the Rules.¹⁹

As far as the third point is concerned, namely whether the negotiation period expenses had been consciously and intentionally incurred by the vessel's owners, Neuberger LJ held that the question whether one expense had been incurred 'in place of another expense' had to be assessed objectively.²⁰

Turning to the fourth point, namely whether the negotiation period expenses were an 'extra expense' within the meaning of that word in Rule F, Neuberger LJ held that there was no reason for restrictively interpreting the word 'extra' so as to require an expense to be of nature which would not normally have been incurred in response to the peril

¹⁵ [2017] UKSC 68, [16] to [38].

¹⁶ Ibid [18].

¹⁷ Ibid [19].

¹⁸ [2017] UKSC 68, [26], [29].

¹⁹ Ibid [29].

²⁰ Ibid [34]

threatening the adventure.²¹ Its meaning was simply described as an expense which would not otherwise have been incurred.²²

Regarding the fifth point, namely whether the negotiation period expenses would have been incurred even if the vessel's owners had agreed to the pirates' initial demand, Neuberger LJ held that the Supreme Court should not interfere with Hofmeyr QC's finding that it was likely that the vessel and cargo would have been released promptly if the initial ransom demand had been accepted and paid by the vessel's owners.²³

Moving to the last point, namely that the negotiation period expenses were irrecoverable by virtue of Rule C or Rule XI, Neuberger LJ held that Rule C applies to expenses and other sums claimed by way of general average as a consequence of a general average act as defined under Rule A.²⁴ Rule C did not apply to expenses or sums covered by Rule F. With regard to Rule XI, Neuberger LJ held that merely the fact that vessel-operating expenses were specifically allowed in one specific type of cases did not mean that it should be presumed that they were excluded from every other type of case.²⁵

In dissent, Mance LJ came to the opposite conclusion from Neuberger LJ, albeit for reasons different from those given by the Court of Appeal. Mance LJ held that Hofmeyr QC in the Commercial Court and the Court of Appeal were wrong to accept that it would have been reasonable for the owners to pay the ransom initially demanded by the pirates, and that, had they done so, the total sum of the initial ransom would have been treated as general average.²⁶ In light of the fact that this was the critical issue upon which the case had been argued and decided, Mance LJ decided to dismiss the appeal.²⁷

4. Commentary

In light of the fact that general average cases rarely reach the courts, the significance of the Supreme Court judgment in *The Longchamp*²⁸ becomes apparent. The Supreme Court

²¹ Ibid [35].

²² Ibid.

²³ [2014] EWHC 3445 (Comm); [2017] UKSC 68, [36].

²⁴ [2017] UKSC 68, [37].

²⁵ Ibid [38].

²⁶ Ibid [67].

²⁷ Ibid [68].

²⁸ Ibid.

determined that daily vessel-operating expenses, such as crew wages, high risk area bonus paid to the crew, crew maintenance, and bunker consumption, incurred by the shipowners while they were negotiating to reduce the ransom demands of pirates may well be allowable in general average under Rule F of the York-Antwerp Rules 1974. This was even recognised by Mance LJ, who delivered a dissenting opinion, as the principle that emerges from this litigation.²⁹

Up until now, it has been common practice for average adjusters to disallow recovery of daily vessel-operating expenses during the period of seizure by pirates as general average. Such practice may no longer be appropriate especially if one considers that the Supreme Court's conclusion may be a powerful weapon on the hands of shipowners who are interested in challenging the average adjusters' conclusion. It is thus interesting to see how the Supreme Court judgment in *The Longchamp* will affect commercial practice.

²⁹ [2017] UKSC 68, [68].

The “Star Polaris” and the Consequential Loss Conundrum

Amar Vasani *

1. Introduction

The meaning of the phrase ‘consequential and special losses’ has long been entrenched within Baron Alderson’s landmark judgment in *Hadley v Baxendale*. Nonetheless, the recent High Court ruling in the *Star Polaris* has cast doubt on the synergy between ‘consequential and special losses’ and the principle in *Hadley*. This piece shall accordingly precis the *Star Polaris* decision, before proffering comment on its significance for judges and for the drafting of shipbuilding contracts.

Primarily in place to insulate sellers against disproportionate exposure to liability,¹ it is rare not to see an exclusion of liability clause nestled within a contract guarantee. This is especially commonplace in the world of shipbuilding contracts, where exclusion clauses ‘replace all other obligations and liabilities of the Yard under the contract or at common law’.² Amongst other things, exclusion of liability clauses typically cover consequential losses, a term whose meaning was ascribed by the 19th Century English Contract Law case of *Hadley v Baxendale*.³ As well as defining *direct* losses, or those ‘arising naturally, i.e. according to the usual course of things, from...breach of contract itself’,⁴ the case established *consequential* or *special* losses as a second limb of recoverable loss for breach of contract. Baron Alderson defined such losses in the case as those which ‘may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract’.⁵ Thus, in addition to direct losses, a breaching party is also liable for

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¹ Paul Gerschlick, *No Need to Look Beyond Natural Meaning in Liability Clause Interpretation, Rules High Court*, 2017, available at: *Veale Wasbrough Vizards*, <https://www.vwv.co.uk/news-and-events/blog/pharma-life-sciences-law/high-court-significance-of-consequential-loss-limitation-of-liability-clauses> (accessed on 1 April 2017).

² Aidan Steensma, *Indirect and consequential loss exclusions: a case of change?*, 2016, available at: *CMS Cameron McKenna*, <http://www.cms-lawnow.com/ealerts/2016/11/indirect-and-consequential-loss-exclusions-a-case-for-change> (accessed on 1 April 2017).

³ (1854) 9 Exch 341.

⁴ (1854) 9 Exch 341 (Alderson B), [342].

⁵ (1854) 9 Exch 341 (Alderson B), [342].

those losses which – upon formation of the contract – he could reasonably have foreseen would accrue from breach of that contract.

Until recently, judicial treatment of the phrase ‘consequential and special loss’ has consistently harked back to Baron Alderson’s judgment. However, the November 2016 High Court ruling in the *Star Polaris LLC v HHIC-Phil Inc*⁶ (referred to herein as the ‘*Star Polaris*’) has cast doubt on the reconcilability of the term ‘consequential and special losses’ with the second limb of the rule in *Hadley* – a ruling to be assessed herein.

2. The Facts

The facts of the *Star Polaris* began with a shipbuilder agreeing to build a bulk carrier for a buyer. The agreement was based upon the Shipbuilders’ Association of Japan contract known as ‘SAJ’,⁷ one of a number of standard-form shipbuilding contracts to which appropriate tailoring can be made by parties as required. Article IX of the contract was a guarantee, under which the shipbuilder would be liable for all defects occurring twelve months from the date of delivery – undertaking to make all necessary repairs to remedy them. Subsection (4) of the Article was an exclusion of liability clause, under which the shipbuilder would be exonerated from liability for any ‘consequential or special losses, damages or expenses’.⁸ The foot of the provision added that Article IX operated to ‘replace and exclude any other liability, guarantee, warranty and/or condition imposed or implied by statute, common law, custom or otherwise’.⁹

In November 2011, the ship was duly delivered. In June 2012 however, a mere seven months into its employment, it suffered severe engine failure. On this basis, in September of that year, the buyer took the unenviable decision to have the ship towed to South Korea for repairs. As a result of the palaver that it had endured, the buyer sought remuneration on three grounds – (i) the cost of repairing the engine defect, (ii) the cost of having the defective ship towed to South Korea for repairs, and (iii) the diminution in value which the defects caused to the ship. Nonetheless, the shipbuilder contended that it was

⁶ [2016] EWHC 2941 (Comm).

⁷ Stuart Beare, Graeme Bowtle and Jane Martineau, Shipbuilding contract of the Shipowners Association of Japan (SAJ)1, in Lord Millett (ed.), *Encyclopaedia of Forms and Precedents* (Volume 39(1) Part 1(B)(A) LexisNexis, 2016).

⁸ [2016] EWHC 2941 (Comm), [206].

⁹ [2016] EWHC 2941 (Comm), [206].

excluded from liability for grounds (ii) and (iii) as they were tantamount to ‘consequential or special losses’¹⁰ under Article IX. It is upon this premise that the dispute in the case arose.

3. The Parties’ Arguments

Presumably drawing upon the maxim of *noscitur a sociis* (or ‘a word is known by the company it keeps’),¹¹ the buyers submitted that their deliberate pairing of the words ‘consequential’ with ‘special’ in Article IX subsection 4 was indicative of the parties’ intention for the clause to be reconcilable with the second limb in *Hadley* – a limb which employs the very same terminology.¹² On the basis of this reconcilability, the buyer argued that towage fees and diminution in value were a foreseeable consequence of breach upon formation of the contract, reclaimable as ‘consequential losses’ under *Hadley*’s second limb.

The shipbuilder unsurprisingly took a wholly different view, a view which the court duly accepted. Firstly, by replacing liabilities imposed by statute, common law or custom,¹³ the Article IX guarantee effectively operated as a code. Accordingly, the guarantee was the sole resource upon which to assess the shipbuilder’s obligations, superseding any meaning ascribed to it by surrounding judicial precedent – such as the well-recognised meaning of ‘consequential’ in *Hadley*. By assessing Article IX on its own merits, the clause resembled an exhaustive provision under which the builder was liable only for expressly stipulated losses – namely defects in the ship. In drafting Article IX this way, the intention of the parties was for the shipbuilder to not be liable for losses which were not exhaustively listed, such as those arising as a result of a defect. By holding the shipbuilder liable for defects (i.e. events which *cause* the contract to be breached), whilst excluding liability for the resultant *effects* of a defect (i.e. consequential losses arising out of the breach), Article IX was essentially framed as a ‘cause and effect’ provision.¹⁴ Accordingly, whilst towage fees and the diminution in value of the ship were foreseeable

¹⁰ [2016] EWHC 2941 (Comm), [206].

¹¹ Robert Hickmott, *Words and Meaning*, in *European Lawyer* issue 107, (2011): 50.

¹² [2016] EWHC 2941 (Comm), [207].

¹³ [2016] EWHC 2941 (Comm), [210].

¹⁴ Fiona Beal, *The consequences of excluding consequential loss*, 2017, available at: *Brodies LLP*, <http://www.brodies.com/blog/excluding-consequential-loss/> (accessed on 1 April 2017).

losses, which would ordinarily be reclaimable under the second limb in *Hadley*, the rule in *Hadley* was superseded by the *prima facie* 'cause and effect' meaning attributed to Article IX – a supersession which occurred because of Article IX's status as a code, for which legal interpretation ascribed at common law or by custom are rendered otiose. This 'cause and effect' meaning exempted the builder from liability for both the towage fees and the diminution in value of the ship, on the basis that they were *effects* of the original breach. The buyer was thus only awarded the cost of repairing the original engine defect.¹⁵

4. Significance for legal practice

Given that the principle in *Hadley* was rendered inapplicable in the *Star Polaris*, one might be mistaken for thinking that future cases concerning consequential losses must do the same. However, it is crucial to note that the decision in the *Star Polaris* does not overturn *Hadley* outright, but merely limits the *Hadley* principle to those contracts for which parties intended the principle to apply. Parties' intentions must be ascertained by looking at a clause in the context of the agreement within which it is contained – an approach which does justice to Lord Hoffman's 'factual matrix' tenet¹⁶ in *Investors Compensation Scheme v West Bromwich Building Society*.¹⁷ The consequence of this approach for legal practice is that, if a draftsman was to recycle the wording of an exclusion of liability clause used in a previous contract, it may be interpreted differently to how it was in the previous contract – given the disparity in factual matrices undoubtedly existent between the narratives of individual cases. Accordingly, mere inclusion of use of the words 'consequential' or 'special' losses in an exclusion of liability clause will not necessarily be sufficient to bring the second limb of *Hadley* into play. The factual context of the agreement in which such words are contained will determine whether the intention is for *Hadley* to be admissible or not. And this premise is not limited to *The Star Polaris*. In the 2016 Court of Appeal decision in *Transocean Drilling UK v Providence Resources*,¹⁸ Lord Justice Moore-Bick

¹⁵ [2016] EWHC 2941 (Comm), [211].

¹⁶ This tenet was expressly acknowledged in the *Star Polaris* judgment itself, when it is stated that '[a]ny particular clause fell to be construed on its own wording in the context of the particular agreement as a whole and its particular factual background'. {See: [2016] EWHC 2941 (Comm), [209].}

¹⁷ [1998] 1 WLR 896.

¹⁸ [2016] EWCA 372.

admitted that nowadays ‘courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents’.¹⁹

5. Significance for judicial interpretation

Whilst not necessarily setting a new precedent in the area of commercial contract law – nor even in the more specific area of shipbuilding contract law – the *Star Polaris* arguably ushers in a new breed of judicial interpretation. To this day, contractual clauses have been interpreted ‘legalistically’ on the basis of case precedent – an approach which has no doubt maintained the certainty upon which the law can flourish. Nonetheless, this approach has perhaps occurred at the cost of brushing aside specific meanings of terms intended by the parties. This may well be the case for *commercial* contracts between businessmen, under which industry-specific meanings of terms are commonplace. In the present case for instance, ‘[w]hilst the phrase “indirect and consequential loss” has a fixed meaning in the eyes of the courts, unfortunately this interpretation is at odds with contracting commercial parties who generally understand the phrase to mean all those losses which are not the “normal loss” that would be suffered by any claimant in that position’.²⁰ However, by giving due regard to the commercial intentions of the parties when interpreting the contract in question, the *Star Polaris* is exemplar of a newfound ‘commercialisation’ of judicial attitudes to contract law.

Another reason why shipbuilding contracts may no longer be interpreted ‘legalistically’ (i.e. in light of judicial precedent), is because the governing jurisdiction from which this precedent derives often differs from the jurisdiction which authored the standard-form upon which the contract is actually based. Take the contract in the present case, which contained an English Law jurisdiction clause despite being based upon the Shipowners’ Association of Japan standard-form.²¹ The mere sight of the words ‘English Law’ in the contract no doubt led to a natural reflex on the part of counsel, who in turn set the case’s

¹⁹ [2016] EWCA 372 (Moore-Bick LJ), [15].

²⁰ Annabel Madewell, *The meaning of “consequential loss” reconsidered – Star Polaris LLC v HHIC-Phil Inc*, 2017, available at: *Charles Russell Speechlys*, <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/commercial/2017/the-meaning-of-consequential-loss-reconsidered--star-polaris-llc-v-hhic-phil-inc/> (accessed on 28 March 2017).

²¹ [2016] EWHC 2941 (Comm), [207].

battleground as *Hadley v Baxendale* – the standout *English Law* doctrine on consequential losses. They would no doubt have argued that – to do otherwise – would have infringed the pre-agreed *lex loci* of the contract. Nonetheless, focusing merely on the precedent from a contract’s governing jurisdiction disregards the commercial substrate underlying each clause, a substrate imposed by the association who drafted the standard-form version of the contract (in this case the Japanese shipowners’ association). This is yet another reason for the uniform departure from ‘legalistic’ or precedential interpretation of contracts, in favour of an autonomous interpretation of individual clauses which instead takes into account commercial customs implicit within their standard-form drafting.

CMI Genoa 2017 Assembly and Seminar – Young CMI and Young AIDIM

Lorenzo Fabro

Robert Hoepel *

The session organized by the young CMI and the young group of the Italian MLA was held in the afternoon of 8th September 2017 and included a presentation by the Lt JG Florencia Otero of the Argentine Coast Guard who was awarded with the CMI Charitable Trust Essay prize 2016, as well as two panel discussions.¹

The young session, which was chaired by Professor Francesco Munari of the Genoa University, commenced with the lecture of the CMI prize winner Florencia Otero concerning the dissertation for her LLM degree from IMLI about the Argentina's Claim to an outer continental shelf. Afterwards the first panel discussion focused on the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention) and its implications for the shipping industry.

The Convention, which was due to take effect on that day, was adopted by consensus at a Diplomatic Conference held at IMO Headquarters in London on 13 February 2004, in order to prevent the spread of harmful aquatic organism from one region to another, by establishing standards procedures for the management and control of ships' ballast water and sediments.

After an introduction made by Lorenzo Fabro (Berlingieri Maresca Studio Legale Associato – Italy) on the main contents of the Convention and its area of application, the first speech was held by Carlo Corcione (Legal Counsel and an Executive Director at Fratelli D'Amato Shipowners), who offered a shipowner's perspective on the issues raised by the Convention which implied an abundance of strategic matters, including financial,

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commercial, and compliance issues. Lawrence Dardani (Dardani Studio Legale - Italy) then addressed the impact which the newly introduced legislation can have on contracts of lease, in particular focusing the analysis on the relevant provisions contained in the standard bareboat charterparties and highlighting the lack of regulation under the commonly used forms concerning the implementation of the Convention and the allocation of costs connected to it. Subsequently Kaspar Kielland (Montgomery McCracken – USA) provided an overview of the provisions of the US regulation concerning the water ballast management, United States being not a party to the IMO Convention. He then addressed some issues on the compliance options for vessels navigating in US waters which may be approved by the US Coast Guard.

The first panel was closed by Andrea Marchese (Naval Architect engineer at Cetena – Italy), who dealt with some technical aspects connected to the treating of water ballast on board of vessels and the various technologies now available on the market. Some hints were provided about the different factors that should be taken into account when choosing the right system for treating ballast water, the problems arising from retrofit installations and the most promising new concepts in ship design and alternative modifications to be exempted from BWM Convention.

The second panel discussion addressed the topic of the recognition and enforcement of foreign judgments and arbitration awards. Robert Hoepel (AKD N.V. – the Netherlands) made a brief introduction to the topic touching upon some current development in this regard. In particular he mentions the opportunities under the Brussels I (EU) Regulation (1215/2012) for the enforcement of cross-border attachment orders.

Following the introduction several presentations were held. Blythe Daly (Holland & Knight LLP – USA (New York)) provided an interesting overview of the procedural tools available in the United States to assist in the enforcement and recognition of foreign arbitral awards. It was, amongst others, explained that a Rule B attachment can be used in conjunction with foreign arbitral proceedings.

Marco Mastropasqua (Studio Legale Garbarino Vergani – Italy) focusses on new debates on Recital 12 of the Brussels I (EU) Regulation (1215/2012)) in terms of arbitration, in particular on anti-suit injunction and torpedo actions as well as a mention to the never-ending quarrel concerning the non-enforcement of UK arbitral awards and a pragmatic approach to overcome the issue.

A further presentation was given by Evangeline Quek (Stephenson Harwood – Hong Kong/Singapore) addressing the Hong Kong/Singapore perspective on enforcement and recognition. It was clarified that the Hong Kong Courts take a pro-enforcement approach to arbitration awards, which, with permission of the court, are enforceable in the same manner as a judgment of the court. This is demonstrated in the decision of *TNB Fuel Services Sdn Bhd v China National Coal Group Corporation* [2017] HKCFI 1016.

Mišo Mudrić (Department for Maritime and Transport Law, Faculty of Law, University of Zagreb) examines a case example where the arbitration award issued in Croatia has been annulled in Slovenia. Key questions that arose from the presented case included the prima-facie or subject matter judicial control of arbitration clauses and arbitration state and recognition state coordination.

The session was closed by a presentation by Javier Franco (Franco Abogados Asociados – Colombia) providing an IboAmerican perspective on recognition of local and foreign arbitral awards. As a matter of local law whenever the seat of the tribunal is located in Colombia an international arbitral award so granted will be considered as if it would be a national one and thus no further procedure for recognition is needed. So, as a conclusion, under Colombian law those international arbitral awards are self-executing and the decision contained is enforceable through a collection procedure.

4th Transport Law *de lege ferenda*: Annual Young Academics' Vision on Tomorrow's Transport Law

Peter Unho Lee *

The 4th Conference of Transport Law *de lege ferenda*: Young Academics' Vision on Tomorrow's Transport Law – “*Translawfer* 2016 Seoul” was successfully held at the CJ Law Hall, Korea University School of Law in Seoul, South Korea, on the 27th of November 2016. The conference was hosted by the School of Law and the Maritime Law Research Centre of Korea University.

This young annual conference was inaugurated in 2013 in Leuven, Belgium, as hosted by Catholic University Leuven, with an aim to provide young academics with opportunities to share outcomes of their research and engage in debates with international colleagues and professionals in the field of transport law and practice. This idea has been enshrined in the following years, establishing successful precedents: 2nd *Translawfer* hosted by University of Zagreb (Croatia) in 2014; and 3rd *Translawfer* hosted by University of Elbasan (Albania) in 2015.¹

The 4th conference, *Translawfer* 2016 Seoul, was held outside Europe for the very first time – it was a meaningful attempt to extend the discourse about ongoing transport law issues to Asia and other jurisdictions of the world. Korea is renowned as a leading Asian country for maritime and transport industries that connects Japan, China, and other Asian regions. The Maritime Law Research Centre of Korea University has been working hard to promote the study and advancement of maritime and transport law throughout the Asia, boasting of active research collaborations and expansive network with numerous professionals, corporates, and other maritime institutions. It was discussed as a desirable

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¹ For more information on these previous conferences, see Mišo Mudrić, 2nd Transport Law *de lege ferenda*: Annual Young Academics' Vision on Tomorrow's Transport Law, 1(1) International Transport Law Review 42-4 (2016), and, Arber Gjeta and Artan Spahiu, 3rd Transport Law *de lege ferenda*: Annual Young Academics' Vision on Tomorrow's Transport Law, 1(1) International Transport Law Review 49-51 (2016), which are available at <http://itlr.pravo.unizg.hr/wp-content/uploads/2016/11/1-ITL-Review-1-2016.pdf> (accessed on 20th November 2017).

venue where this young conference could move on and take a significant role of bridging Europe and Asia for the future of transport law.

In this regard, the key goal of the 4th *Translawfer* was to bring together young academics from Europe, Asia and other regions to share their "visions on tomorrow's transport law", while learning from cross-border perspectives of the invited practitioners and scholars.

A welcome speech by the main organizer of *Translawfer 2016* Seoul, Professor and Captain In Hyeon Kim, marked the start of the conference, followed by explanations about *Translawfer* and *International Transport Law Review (ITLR)* by Professors Massimiliano Musi and Mišo Mudrić, respectively. Twelve speakers from more than ten European or Asian institutions presented on topical issues related to transport law, with the audience of academics and practitioners engaging in intense questions and debates over each issue.

The topics presented at *Translawfer 2016* Seoul were divided into four sessions. The first session, moderated by Professor Siniša Petrović, covered **General Transport Law and Policy Issues**: Attorney Marijana Liszt (University of Rijeka) presented on "*SGEI and Transport: The Struggles of the Youngest EU Member State*"; Attorney Leonida Giunta (Ca' Foscari University of Venice) presented on "*Safety in a Liberalized Market for Marine Services: European Cases*"; and Dr. Achim Puetz (Jaume I University) presented on "*Do Airports Hold a Dominant Position in the Market? Recent Developments under EU Competition Law*". The second session, moderated by Professor Massimiliano Musi, covered **Cybersecurity, Technology and Transport**: Professor Mišo Mudrić (University of Zagreb) presented on "*Upcoming UAV Regulations: Global Way Forward*"; Professor Tihomir Katulić (University of Zagreb) presented on "*Current Trends in Information Security and their Impact on Transport Information Systems*"; Attorney M. Bob Kao (Queen Mary University of London) presented on "*Cyber Risks and the Implied Warranty of Seaworthiness*". The third session, moderated by Professor Mišo Mudrić, covered **Carriage Related Issues**: Professor Massimiliano Musi (University of Bologna) presented on "*Successive Carriers in CMR and Italian Law*"; Peter Unho Lee (Kyushu University) presented on "*Is a Non-negotiable Electronic Transport Record Competitive under the Rotterdam Rules?*"; Professor Juan Pablo Rodriguez (CARLOS III UNIVERSITY OF MADRID) presented on "*The Period of Responsibility of the Carrier under the Rotterdam Rules: New Wine into Old Wineskins*"; and Attorney Jeoung Wook Lee (Korea University) presented on

“An Introduction of the Carriage of Goods by Sea Law: Article 791 to Article 816 of the Korean Maritime Law”. The fourth session, moderated by Professor In Hyeon Kim, covered **Other Transport Related Issues**: Professor Chen Gang (Wuhan University of Technology) presented on *“Rethinking Seafarers’ Access to Jurisdictions over Labour Matters”*; and Jang-Hyun Shin (Korea University) presented on *“An introduction of the Korea Maritime Guarantee Insurance Company and its Role in the Korean Shipping Market”*.

It was a great opportunity for the participants to become informed of the current developments of different transport legislation and policies in Europe and Asia, and at the same time, to learn from different perspectives over uniform regimes. This will be able to enrich the quality of participants’ ongoing research, and furthermore, influence transport policy discussions at the national or regional level. Most participants also agreed that advancing technologies and information security are important issues to be universally paid attention to and effectively tackled in international transportation. More proactive and border-crossing discussion or collaboration between practitioners and academics will continue to be the key to the future of transport law as well as the main task of future *Translawfer*.

5th Transport Law de lege ferenda: Annual Young Academics' Vision on Tomorrow's Transport Law

Achim Puetz *

On 11 and 12 September 2017, the 5th Annual Young Academics’ Vision of Tomorrow’s Transport Law Conference (TransLawFer 2017) was held in Spain.² After a first

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² For more information on these previous conferences, see Mišo Mudrić, 2nd Transport Law de lege ferenda: Annual Young Academics' Vision on Tomorrow's Transport Law, 1(1) International Transport Law Review 42-4 (2016), and, Arber Gjeta and Artan Spahiu, 3rd Transport Law de lege ferenda: Annual Young Academics' Vision on Tomorrow's Transport Law, 1(1) International Transport Law Review 49-51 (2016),

conference in 2013 at the Catholic University of Louvain (Belgium), TransLawFer has been organized annually in different countries around the world (Zagreb (Croatia), 2014; Elbasan (Albania), 2015; and Seoul (South Korea), 2016). For the 2017 edition, organized by the Institute for Transport Law of the Jaume I-University of Castellon, the Hotel Palasiet in Benicassim (Spain) was chosen as a venue.

A total of twenty papers were presented by young academics and jurists of different nationality and origin (Bolivia, China, Croatia, Germany, Greece, Italy, Spain, United Kingdom and Venezuela), which were previously selected by an international scientific committee chaired by the Institute's director, Prof. Petit Lavall. As in previous editions, the fundamental idea was to give voice to young academics and professionals who are interested in presenting, discussing and contrasting their recent research; a debate that rarely occurs in traditional conferences, where the protagonism is usually given to renowned specialists in the relevant field. The presentations dealt with different aspects related to transport law, although special attention was awarded to the legal response that should be given to recent initiatives in urban passenger transport, such as Uber, Cabify or BlaBlaCar.

which are available at <http://itlr.pravo.unizg.hr/wp-content/uploads/2016/11/1-ITL-Review-1-2016.pdf> (accessed on 20th November 2017).

Carlo Corcione – Third Party Protection in the Carriage of Goods by Sea: From Bilateral to Multilateral Protection

Book Review

D. Rhidian Thomas *

Carlo Corcione has written a PhD on third party protection in carriage of goods by sea at City, University of London. He successfully passed his viva on the 10th of November 2016 and was awarded a PhD without corrections being necessary. His internal supervisor was Professor Jason Chuah and his external examiner was the author of this contribution.

The chosen research has a long and much debated history. Its roots are to be identified in the commitment of the common law to the doctrine of privity of contract, which has been to a degree eased in recent years by statutory provision. The principle that only a party to a contract may sue or be sued on the contract is logical, but it is not in the interests of intended third party beneficiaries. The doctrine is further entrenched by the refusal of the common law to unify employment and agency relationships so as to represent a single legal status. In the result notwithstanding that an employee or agent may act on behalf of the employer or principal, the legal identity of each continues independently, with the consequence that an employee or agent is not party to any contract that they may have been instrumental in establishing on behalf of the employer or principal, and consequently they will not take the legal benefits conferred by the contract upon the employer or principal.

The potential difficulties have manifested themselves about the contract associated with bills of lading. An early case illustrates the problem. A passenger sailed under the terms of a contract that excluded liability for the negligence of servants. Having suffered accidental injury, the passenger successfully sued the master and boatswain who, although employees, were not party to the contract with the owners. In subsequent cases, when it was clear from the bill of lading that the intention was that the benefits and privileges conferred on the shipper should also be enjoyed by identified third parties, principally stevedores, the courts developed the device of agency to tie the third party into a contractual nexus, and thereby give effect of the commercial intention expressed in

the bill of lading. This mode of analysis strained the facts a little and gave birth to what became known as the Himalaya clause. Although analytically suspect the judicial approach gave effect to commercial policy.

The initial Hague Rules were silent on the position of third parties. It was not until the Visby amendments that international policy became involved with defences and limits of liability conferred on carriers extended to servants and agents, not being independent contractors. A similar provision was carried into the Hamburg Rules and again the Rotterdam Rules, but with a wider application. The scope of the Rotterdam Rules raises many questions of interpretation but the fact that defences and rights of limitation are conferred on maritime performing parties and their employees appears, at least potentially, to be an extension on the preceding conventions, but to what extent remains uncertain.

Against the backdrop of this historical development, which he subjects to critical analysis, Carlo Corcione has sought to establish a new theoretical platform for the future development of third party protection in connection with the international carriage of goods by sea. The research takes into account the fact that the carriage of goods by sea is presently part of the supply chain and third parties, together with the principal parties of the contract, form what he calls a *multilateral common enterprise*. He evaluates the rationale behind the protection of third parties in the carriage of goods by sea in the light of this new theoretical framework.

He advances the opinion that the existing literature on the topic focuses too greatly on the legal framework and fails to consider the fact that third parties can and should be viewed in the different commercial light which he defines. His research is driven by the idea that the topic must be addressed with a deeper understanding of this rationale, thereby adding modern commercial and business theory to long-established practice. Changing the perspective in this fashion provides the means to re-shape the law and make it more appropriate for the modern world of international commerce and trade.

Thus far, in the assessment of Carlo Corcione, third parties have been predominantly considered as a mere risk to be taken into account by the parties to the contract of the carriage of goods by sea. In his research he contends that third parties are much more, namely a factual part of the contractual nexus and should henceforth be treated as such. They should receive contractual or legal protection for the position they occupy in and for

the contribution they make to the shipping industry as of right: not just to the extent that the principal parties to the contract choose to extend the benefits and privileges to them.

The thesis therefore seeks to develop an analysis of a future legal framework of third party protection through the lens of the commercial concept of the supply chain. No longer is the carriage of goods by sea to be viewed as an isolated or independent part of international trade: to the contrary it is to be accepted as a fully integrated part. In its historical development – contractually, internationally and domestically – this fact appears to have been acknowledged, but it has never succeeded in influencing the development of an appropriate system of third party protection.

The aim of the research is to achieve that goal – the development of an appropriate system – and thereby make a significant contribution in the field. The thesis proposes what Carlo Corcione submits to be a sound theory to justify a new scheme of third party protection in the field of carriage of goods by sea. The proposed new foundation involves a conglomerate of contract theory, contract efficiency, economies of scope and the web infrastructure of the supply chain system.

The thesis comprises five main chapters:

The first chapter, titled Foundation, outlines the fundamental basis of the research including background, theoretical framework, research questions and adopted methodology.

Chapter 2 provides an outline of third party protection prevailing in the current contractual system involving bilateral relationships between parties in a two-party scheme. In the latter part of the chapter the concept of a multilateral common enterprise is introduced. Also, the current economic context of shipping is analysed so as to enable the development of a theoretical framework.

In Chapter 3, the focus is redirected to the international community's perspective on the issue, dealing with third party protection in international conventions on the carriage of goods by sea. Although it is recognised that there are in this regard to be observed some interesting developments, such as the introduction of maritime performing parties in the Rotterdam Rules, in their generality it is suggested that the approach adopted in the international regimes does not represent the best way forward.

Chapter 4 addresses the issues in the context of domestic legal systems. The common law tradition receives particular attention because it appears to have experienced most difficulties. The juridical basis for the protection of third party clauses under the common law system is closely analysed. Also, the history of the English law approach to the topic, much influenced by the concepts of privity and consideration, is contrasted to the American approach which is much more pragmatic.

Chapter 5 outlines the possibilities for future research. In particular, the possibility of the development of a concept enabling the channeling of liability through contract management and multilateral insurance is advanced as possible ideas that could be closely considered by future researchers. Further, a case is made for using civil law protection of third parties to assist common law understanding and to give shape to future research.

Finally, it merits mention that Carlo Corcione is to publish a book on the topic of his research which it is hoped will be published in 2019. The publishers are Informa Law from Routledge, international publishers of repute who specialize in shipping and maritime law.

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