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THE LIABILITY OF TRANSPORT INTERMEDIARIES

GENERAL CONDITIONS APPLYING TO SERVICES BY TRANSPORT INTERMEDIARIES

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1. **PRELIMINARY METHODOLOGICAL REMARKS**.

This paper will address the general conditions applying to services by transport intermediaries, that is to say services provided by those who conclude or promote the conclusion of contracts between cargo interests and carriers. It therefore concerns the contractual types which fall under the Roman legal institute of *mandatum*, such as the freight forwarding and ship agency contracts.
This analysis will focus on the general conditions applying to services provided by freight forwarders, whose regime in Europe is inspired –as shall be explained in the following pages- either by the French or by the German model. To this regard, the wording of the topic which I have been requested to address seems particularly appropriate since the choice of the term "transport intermediary" avoids the use of definitions of contractual types such as the freight forwarder, the French *commissionaire*, the Spanish *transitario*, thus respecting the different approaches of the single national laws to transport intermediation.
This paper will not address the general conditions applying to services by transport auxiliaries, which correspond to the Roman contract type of *locatio operis* (such as, for example, the terminal/warehousing, stevedoring and logistic services), given the absence in said contractual types of the function of legal intermediation which defines transport intermediation.
This paper will consider those services only when undertaken by freight forwarders as ancillary services, i.e. services which are accessory to freight forwarding.

2. **SOURCES GOVERNING THE CONTRACT OF FREIGHT FORWARDING AND APPLICABLE RÉGIME (ITALIAN LAW)**.

The transport intermediary is not subjected to any international régime. The attempt made in 1967 by UNIDROIT, by presenting the Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods, met the resistance put up by FIATA, and was never submitted to a diplomatic conference[1].
In order to identify the rules governing the transport intermediary's activities it is therefore necessary to refer to the sources of national law.
Under Italian law the transport intermediary coincides with the freight forwarder, governed by articles 1737 – 1741 c.c.[2], who qualifies as a subtype of agency (*mandato*)[3].
In particular, article 1737 c.c. stipulates that "*the contract of freight forwarding is a contract of agency through which the freight forwarder undertakes the duty to enter into a contract of carriage, in his own name and on behalf of the principal, and to carry out the ancillary operations*".
Articles 1703 – 1730 c.c. governing agency (*mandato*) apply to the freight forwarder who undertakes to enter into a contract of carriage not only on behalf but also in the name of his principal, as expressly permitted to the freight forwarder by the Law governing the freight forwarder's profession (Law 14.11.1941 n. 1442).
The possible gaps of the law governing the contract of freight forwarding may be filled by recurring to the provisions on agency (*mandato*) and, possibly, by analogy, on commission (artt. 1731 – 1736 c.c.), as well as resorting to articles 2761, II para., 2756, II para. and 2951 c.c.[4], governing the freight forwarder's lien and the limitation period of the related claims.
Besides the provisions of law, the General Conditions for freight forwarding issued by the Federazione Nazionale Spedizionieri (Fedespedi, General Conditions for freight forwarding; 2009) are also of significant importance.

[1] RAMBERG, Unification of the Law of International Freight Forwarding, p. 8
[2] C.c. stands for Codice Civile, the Italian Civil Code
[3] The ship agency contract is governed by art. 290 of the *Codice della Navigazione* (Italian Shipping Code), according to which «when the ship's husband undertakes in a stable manner to promote the conclusion of contracts in a given area on behalf of the ship owner or of the carrier, the rules on agency (*agenzia*) apply», namely articles 1712 – 1752 c.c.
[4] ASQUINI, Spedizione (Contratto di) p. 1099; SILINGARDI, Spedizione (Contratto di), p. 114

The importance of the general conditions for freight forwarding is witnessed by their widespread international use, due to the fact that the freight forwarder – except when subject to mandatory carrier liability – enjoys freedom of contract[5]: in the United Kingdom these are the Standard Trading Conditions of the British International Freight Association (BIFA, STC, 2005); in Germany, the Allgemeine Deutsche Spediteur – Bedingungen of the Bundesverband Spedition und Lagerei (ADSp, General Conditions of the German Freight Forwarders, issued by the General Association for Freight Forwarding and Warehousing, 2003); in the Netherlands, the Algemene Voorwaarden der Nederlands Organisatie voor Expeditie en Logistiek (FENEX-voorwaarden, General Conditions of the Dutch Organization for Freight Forwarding and Logistics, 2004); in Belgium, the Conditions Générales de la Confédération des Expéditeurs de Belgique-Algemene Voorwaarden van de Confederatie des Expediteurs van België (General Conditions of the Confederations of Freight Forwarders of Belgium, 2005); in France, the Conditions Générales de la Fédération Française des Organisateurs Commissionaires de Transport (Conditions FFOCT, the General Conditions of the French Federation of Organizers, *commissionaires*, of Transport, 1999)[6]; in Spain, the Condiciones Generales de Expedición of the Federación Española de Transitarios, Expedidores Internacionales y Asimilados (Feteia, General Conditions for freight forwarding of the Spanish Federation of Transitarios, International Freight Forwarders and Similar; 2002)[7].
Realizing the need to avoid a proliferation of liability schemes, FIATA mandated a Working Group in 1994 to develop Model Rules for use not only in countries where no standard conditions as yet exist but also in countries willing to subject themselves to a uniform international regime[8]. Said Model Rules were adopted at the FIATA World Congress in Caracas in 1996.

3. LEGAL NATURE OF THE GENERAL CONDITIONS FOR FREIGHT FORWARDING (ITALIAN LAW).

The legal efficacy of the general conditions for freight forwarding has been the subject of considerable debate in Italy[9].
On the one hand the Scholars agree, even though with distinctions, on their efficacy based on their nature as trade usages (*usi negoziali*), on the other hand case law has asserted their nature as customary law (*usi normativi*).
Let us start by considering the Scholars' position: trade usages – governed in Italy by article 1340 of the Civil Code, which states that «*usual terms of contract* (clausole d'uso) *are to be considered as incorporated into the contract unless otherwise agreed by the parties*» – are «*the terms of contract which are typical of set markets, of set branches of trade, of set professional categories, of set market systems*»[10], and they may occur if two essential requirements are present, i.e. the spontaneous observance of the practice and its prolonged repetition for a long period of time, in a uniform way, in a given market[11].
Hence, according to some, the general conditions issued by freight forwarders are a codification of the usual terms of contract and should be considered as trade usages, i.e. as part of the contract[12].
According to others the abovementioned general conditions constitute usual terms of contract if their articles correspond to a contractual practice which is generally and substantially observed by the parties of certain relationships and which has established itself in time due to all the contracting parties' (i.e. both typical parties) belief that it meets the specific technical requirements of a given

[5] RAMBERG, Unification of the Law of International Freight Forwarding, p. 9
[6] DE WIT, Multimodal transport, p. 24
[7] TOBÍO RIVAS, Los transitarios, p. 344
[8] RAMBERG, Unification of the Law of International Freight Forwarding, p. 9
[9] SILINGARDI, Spedizione, p. 114
[10] ASQUINI, Le clausole, p. 445
[11] ASQUINI, Le clausole, p. 456, GENOVESE, Vessatorietà, p. 246; *contra* BIANCA, Diritto Civile, p. 338 - 339, according to whom the only essential requirement of trade usages consists in their constant and generalized application in a certain place or business sector
[12] ASQUINI, Spedizione (Contratto di) p. 1099; GRIGOLI, La spedizione, p. 225

relationship, while it is general condition *stricto sensu* or rule issued by a trade association (hence governed by article 1341 c.c.) if it is a rule unilaterally established by a contracting party or by its trade association[13].
If it were ascertained that the general conditions could be qualified as usual terms of contract, they would operate by complementing the content of the contract if there were any gaps and if the parties did not intend to exclude the applicability of the general conditions, and would thus prevail over the non mandatory provisions of law[14].
Italian case law, on the contrary, has denied that general conditions issued by freight forwarders are to be qualified as trade usages, making them fall within the scope of customary law. The only three published authorities[15] have in fact agreed on stating that since the general conditions issued by freight forwarders consist in «*customary law, i.e. real provisions of law which the law invokes in order to complement itself*»[16], they may integrate the contents of the contract[17] within the limits provided by article 8 of the so called "Preliminary provisions" (*disposizioni preliminari*) to the civil code[18], that is to say exclusively when the law expressly invokes them.
Having observed that the provision of the general conditions which was invoked in the relevant cases was aimed at the derogation from the carrier's liability régime stipulated by article 1693 c.c. and having observed that said article does not provide any reference to customary law, all the quoted authorities declared the non applicability of the general conditions.
It should however be pointed out that, with regard to freight forwarding, customary law is explicitly invoked in the instances governed by articles 1739 II para. and 1740 I para. c.c. The former indeed provides that, unless he was otherwise ordered and subject to contrary customs, the freight forwarder does not have the obligation to provide for the insurance of the shipped goods; the latter stipulates that the amount of the consideration due to the freight forwarder for the performance of his assignment is determined, if not otherwise agreed, according to professional tariffs or, in the absence thereof, according to the local customs of the place where the goods are shipped.
The dispute over the legal nature of the general conditions issued by freight forwarders does not lack practical implications, particularly if one prefers the solution offered by the Scholars to the one provided by case law.
In fact, should their nature as trade usages be agreed upon, it would then be necessary to establish which régime would govern the unfair clauses possibly contained in the general conditions (such as, by way of example, the clauses concerning exclusion and limitation of liability, time bar for actions, distribution of the burden of proof, lien and pledge over the goods).
To this regard it should be pointed out that article 1341 c.c. stipulates that «*the general conditions of contract drafted by one of the contracting parties are effective against the other contracting party if upon formation of the contract the latter knew about them or should have known about them by using due diligence. In any case the conditions establishing, in favour of the party who drafted them, limitations of liability, rights to rescind the contract or to suspend its performance, or sanctioning, to the detriment of the other contracting party, forfeitures, abridgements of the right to raise objections, restrictions of contractual freedom with third parties, tacit renewal of contract, compromissory*

[13] CHIOMENTI, Spedizione (contratto di), p. 295. *Corte di Cassazione* October 26, 1968, n. 3572 (concerning uniform banking rules) and *Tribunale di Milano* January, 22 1959 emphasized the necessity to provide evidence of the fact that the general conditions drafted by one of the contracting parties have reached constant and uniform acceptance, thus acquiring the nature of usual terms of contracts
[14] GENOVESE, Vessatorietà, p. 246
[15] *Corte di Cassazione*, October 24, 1998 n. 5750, *Corte d'Appello di Milano*, April 9, 1976, *Corte d'Appello di Milano*, May 26, 1981
[16] *Corte d'Appello di Milano*, April 9, 1976, p. 174
[17] pursuant to article 1374 c.c., according to which «*the contracts binds the parties not only to what expressed therein, but also to all consequences deriving from the contract pursuant to the law, or, in their absence, pursuant to custom law or equity*»
[18] Provisions on the law in general (*Disposizioni sulla legge in generale*), approved with the same decree that implemented the civil code (Royal Decree March 16, 1942, n. 262)

clauses or ouster of jurisdiction of the Courts, are not valid if they are not specifically approved in writing».

Italian Scholars and case law have not yet reached an agreement on the subject, even though it seems reasonable to maintain the preponderance of the thesis that unfair clauses possibly contained in general conditions for freight forwarders are subject to the validity rules sanctioned by article 1341 II para. c.c. Among the Scholars there are those who have in fact maintained the necessity of the specific approval of the unfair usual term of contract, hypothesizing that without said approval the relevant clause would be null pursuant to article 1341 II para. c.c., and those who on the contrary have deemed that said specific approval is unnecessary[19].

The first of the two theses is supported by the majority of scholars[20], who have pointed out that the provision of law, even if not mandatory, cannot be overridden by a rule which is burdensome for one of the contracting parties, without the latter's unambiguous acceptance of it[21], and that the absence of the specific approval of the unfair clauses possibly present among the usual terms of contract would be a breach of good faith, in the sense that the benefiting party would implicitly show it had considered its interest and not also the one of the other contracting party, when drafting the contract[22].

It has even been argued that the repeated inclusion of unfair clauses not subjected to specific approval in the general contractual conditions of a trade association would prevent them from becoming trade usage[23] due to the breach of the mandatory provision of article 1341 II para. c.c. and hence due to their unlawfulness.

Those supporting the opposite thesis have argued the inapplicability of article 1341 II para. c.c. to trade usages based on the peculiar integrative function to which they are aimed: if a provision of unilateral origin has turned with the passing of time into trade usage, due to its frequent and widespread application, the origin of the provision becomes a mere historical fact and even if the provision still appears in the general contractual conditions or among the model rules of a trade association, it has changed its legal nature, and its mechanism of incorporation into the contract has therefore altered. That is to say that its incorporation does no longer occur based on the principles set forth by article 1341 c.c., but rather on those stipulated by article 1340 c.c. so that unfair usual terms of contract are incorporated into the contract without the need of a specific written approval even if they are included among the general contractual conditions[24].

Case law is also split on the matter: the thesis of the non subjectability of unfair clauses contained in the general conditions for freight forwarding to the specific approval imposed by article 1341 II para. c.c. has as its first and still today most frequently mentioned reference a 1949 merits decision[25]. Said judgement stated «*the inapplicability of article 1341 c.c., and in particular of the provision contained in its second part, if the subject matter of the reference made in a contract* per relationem *are the usual terms of contract under art. 1340 c.c.*», basing such principle on the belief that «*trade usages, corresponding to the common generally observed trading practice, which has established itself in time due to the belief of those abiding by it that it meets particular technical market requirements, can certainly not be considered as issued by the parties, even if one of the parties has referred to those usages for the further determination of the will of the parties; they are a source of determination which is absolutely unrelated to the subject of the incomplete volition, since having pre-existed out of their will, they may never be considered as unilaterally provided by one of the parties*».

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[19] See GENOVESE, Vessatorietà, p. 247 for a exhaustive analysis of the two theses

[20] See LONGO, Editorial note of case, p. 1327, for a record of the Scholars supporting this thesis, to whom TORRENTE, Sugli usi di vendita, p. 447 shall be added; also see, on this issue, GENOVESE, Vessatorietà, p. 247

[21] ASQUINI, Spedizione (Contratto di) p. 1099

[22] LONGO, Editorial case note, p. 1327

[23] BALOSSINI, Contributi, p. 722

[24] CHIOMENTI, Spedizione (contratto di), p. 295 where some Scholars who have expressed themselves in favour or against CHIOMENTI's position are listed in footnote n. 33

[25] *Tribunale di Genova*, July 25, 1949, concerning cotton yarn sale usages, with critic editorial case note by TORRENTE

Several decisions have confirmed such position[26].
The contrary thesis maintains that «*the specific written approval of the "unfair" clauses* […] *is necessary if said clauses* […] *correspond to the content of a practice or of a trade usage* »[27].

4. TYPICAL CONTENTS OF THE STANDARD TRADING CONDITIONS ADOPTED BY EUROPEAN FREIGHT FORWARDING ASSOCIATIONS.

Given the need to compare some of the general conditions adopted by European transport intermediary Associations, I will limit myself to outlining their essential features.

The British Standard Trading Conditions issued by BIFA state, with concern to their scope of application, that they shall apply to all and any activities performed by the freight forwarder. In case of conflict between any part of the conditions and any legislation, including regulations and directives, compulsorily applicable to any business undertaken, such legislation shall prevail (art. 2).
With concern to freight forwarding services, article 4 stipulates that the freight forwarder shall be entitled to procure any or all of the services as an agent or to provide them as a principal. It shall perform its duties with a reasonable degree of care, diligence, skill and judgment (art. 23).
With concern to the freight forwarder's liability the BIFA Standard Trading Conditions state that the freight forwarder shall be relieved of liability for any loss or damage caused by strike, lock-out, stoppage or restraint of labour, the consequences of which the freight forwarder is unable to avoid by the exercise of reasonable diligence, as well as for any loss or damage caused by any event which the freight forwarder is unable to avoid and the consequences of which the freight forwarder is unable to prevent by the exercise of reasonable diligence (art. 24)
The time bar for actions against the freight forwarder is nine months from the date of the event or occurrence giving rise to the cause of action against the freight forwarder (art. 27.B). Notice of the claim shall be given in writing within 14 days from the date upon which the principal became or should have become aware of the circumstance giving rise to his claim (art. 27.A).
The monetary limit in case of claims for loss or damage to the goods is the value of the loss or damage or a sum at the rate of 2 SDR per kilogram of the gross weight of the goods lost or damaged, whichever the lower. The same limits apply also to claims of different nature, but they refer to the "*goods of the relevant transaction*" between the freight forwarder and the principal, and they cannot exceed 75.000 SDR per transaction (art. 26.A).
In case of an error and/or omission, or a series of errors and/or omissions which are repetitions of or represent the continuation of an original error and/or omission, the liability of the freight forwarder may not exceed the loss occurred or the amount of 75.000 SDR in the aggregate of any one trading year commencing from the time of the making of the original error and/or omission, whichever is the lower (art. 26.A).
The monetary limit for late delivery is twice the amount of the freight forwarder's charges in respect of the relevant contract (26.B)
The BIFA Standard Trading Conditions grant the freight forwarder a general lien on all goods and documents relating to goods in his possession, custody or control for all sums due at any time to the freight forwarder from the principal and/or the owner on any account whatsoever. Upon written notice, the freight forwarder shall be entitled to sell or dispose of or deal with such goods (art. 8).
Article 20 stipulates that the principal shall save harmless and keep the freight forwarder indemnified from and against all liability, loss, damage, costs and expenses whatsoever arising out of the freight

[26] *Corte di Cassazione* March 14 1986, n. 1729, concerning cotton sale usages; *Tribunale di Roma*, December 4, 1989, concerning uniform banking rules
[27] *Corte di Cassazione* May 23, 1994 n. 5024. *Tribunale di Milano* January 22, 1959 is even stronger, since it states that an unfair clause contained in general contract condition drafted by a trade association (Associazione Cotoniera Italiana, in the specific case) although incorporated into contracts in a great number of cases, «*could have never become a "usual term of contract* […]*, given the unlawfulness of the parties' behaviour aimed at pursuing a goal contrary to mandatory provisions (article 1341, II paragraph c.c.; article 808 civil procedure code)*»

forwarder acting in accordance with the principal's instructions, deriving from any liability assumed or incurred by the freight forwarder for the purpose of carrying out the principal's instructions, as well as relating to any claims of a general average nature made on the freight forwarder.
According to article 28, English Law shall apply and any dispute shall be subject to the exclusive jurisdiction of English Courts.

The Dutch General Conditions for freight forwarding issued by Fenex stipulate, with concern to their scope of application, that they shall apply to any form of service which the forwarder shall perform (art. 1.1).
They make it immediately clear that the party instructing the forwarder shall be considered the forwarder's principal, regardless of the agreed mode of payment (1.1).
With respect to freight forwarding services, the Fenex General Conditions state that, failing specific instructions by the principal, the mode and route of transport shall be at the forwarder's option (art. 7).
Freight forwarder's liability is based on negligence, but the burden of proof lies on the principal (art. 11.2) and may be avoided by proving that the event was caused by *force majeure*, i.e. all circumstances which the forwarder could not reasonably avoid and the consequences of which the forwarder could not reasonably prevent (art. 12).
If the freight forwarder performs a contract of transport directly instead of concluding it with a third party, the conditions customary in the transport trade or the conditions stipulated to be applicable to the carriage shall also be applicable in the relation between the principal and the freight forwarder (art. 1.2). In case a damage occurs and the principal notifies the freight forwarder of the relevant occurrence, the freight forwarder is obliged to inform the principal that he carried out the transport directly. If he fails to provide such information to the principal and, as a result thereof, the principal fails to call upon the freight forwarder as a carrier in time, this latter is liable for all damages sustained by the principal as a result thereof and of those the freight forwarder would have to pay, if he had been called upon as a carrier in time (art. 16.1 and 16.2).
The Fenex General Conditions stipulate that all claims shall be barred by the mere lapse of a period of nine months, except those against the freight forwarder, which shall be barred after eighteen months (art.21.1-2).
They further state that the forwarder's liability shall be limited in all case to 10.000 SDR per occurrence or series of occurrences with one and the same cause of damage, on the understanding that in the event of damage, loss of value or loss of the goods comprised in the order, the liability shall be limited to 4 SDR per kilogram damaged or lost gross weight, the maximum being 4.000 SDR per consignment (art. 11.3).
The Fenex General Conditions also secure the freight forwarders' right to exercise a pledge and a lien on the goods, documents and money in his possession in order to satisfy his claims related to the same or previous orders, against the principal and any party requiring their delivery (art. 19.1 and 19.2)
These General Conditions stipulate that the principal shall refund the forwarder all unexpected costs, such as demurrage or expenses of an exceptional nature (art. 4), additional costs caused by *force majeure* (art. 13), any amount to be levied or additionally demanded by any authority in connection with the order (Art. 17.7) or claimed by the freight forwarder in connection with the order as a result of incorrect charged freight rates and costs (art. 17.8).

The French General Conditions issued by FFOCT state, with concern to their scope of application, that they shall apply to the services provided by the organizer of transport, irrespective of whether he acts as agent, transport commissioner, forwarding agent, conveyor, warehouseman or in other capacities (art. 1).
The organizer of transport shall be responsible for the acts or omissions of third parties he has engaged for the performance of the contract, provided that they are made while carrying out the activities they have been entrusted with for the performance of the contract (art. 7).
The FFOCT General Conditions state that the liability of the organizer of transport for loss of or damage to the goods shall be limited to FF 150 per kilogram or FF 4.500 per package, whichever is the higher, and may not exceed FF 50.000 per sending (art. 7).

They further stipulate that the liability in respect of other losses, such as those following from delay, shall be limited to the price for the carriage of the goods, and may not exceed FF 50.000 per sending (art. 7).
According to article 10 the organizer of transport shall have a general lien and a pledge over the goods, valuables and documents in his possession, irrespective of whether the claims are related to the same or to previous orders.

The General Conditions of the German Freight Forwarders (ADSp) issued by the General Association for Freight Forwarding and Warehousing state, with concern to their scope of application, that they apply to all contracts for the transportation of goods, irrespective of whether they concern freight forwarding, carriage, warehousing or other services common to the forwarding trade, including logistic services commonly provided by freight forwarders in connection with the carriage or storage of goods (art. 2.1). Based on article 26, the provisions governing the freight forwarding liability shall also apply to non contractual claims.
With concern to freight forwarding services, which are governed by articles 453 to 466[28] of the German Commercial Law (HGB), article 2.2 stipulates that the freight forwarder is only responsible for arranging the necessary contracts required for the performance of these services, unless other legal provisions take precedence; article 1 further states that the freight forwarder shall act in the interest of his principal and fulfil his duties with due care (art. 1).
The General Conditions stipulate, with concern to the freight forwarder's liability when acting as freight forwarder, that it is limited to the careful choice of the third party service providers (art. 22.2).
Freight forwarder's liability when acting as principal is subject to articles 429 and 430[29] of the German Commercial Law (art. 22.3). If articles 425[30] and 461, section I[31] of the German Commercial Law are not applicable, the freight forwarder is liable for insufficient packaging or marking, agreed or customary outdoor storage, theft or robbery, acts of God, weather conditions, failure of appliances or wiring, influence of other goods, damage by animals and inherent vice, but the principal has to give evidence of "*the freight forwarder being at fault*" (art 22.2.4).
The ADSp General Conditions interfere with the distribution of the burden of proof, to the effect that the principal must provide evidence that goods of a specified quantity and state were handed to the freight forwarder in apparent good order, whilst the freight forwarder must provide evidence that he delivered the goods as he received them (art 25.1).
According to article 25.2 the burden of proof that goods were damaged whilst being transported in the means of transport lies with the party claiming such damage; if the place where the damage occurred is unknown the freight forwarder, if so requested by the principal, must specify the sequence of transportation by documenting the interfaces. In case the freight forwarder cannot provide a clean receipt for one leg of the transport, then it shall be presumed that the damage occurred during such leg (art. 25.2).
Time bar for actions shall be governed by article 438[32] of the German Commercial Law (art. 28)

[28] Articles 453 - 466 set forth the provisions on the freight forwarding contract
[29] Articles 429 - 430 provide the criteria determining the value of the goods in the event the carrier is liable for the total or partial loss of the said goods
[30] Article 425, I paragraph stipulates that the carrier is liable for the damages caused by loss of or damage to the goods from the time of handover to the time of delivery of the goods, as well as for delayed delivery. II paragraph provides that the compensation owed by the carrier shall be reduced if the shipper's or the consignee's behaviour or a vice of the goods have concurred in causing the damage.
[31] Article 461 regulates the freight forwarder's liability. The freight forwarder is liable for the loss or damage of the goods under his custody. Articles 426, 427, 429, 430, 431, I, II and IV, 432, 434 – 436 apply, to the extent they are compatible. Such article further provides cases in which the freight forwarder's liability for damages shall be excluded (II paragraph), and also a reduction of his liabilty when the shipper's behaviour or a vice of the goods have concurred in causing the damage.
[32] Article 438, I paragraph, stipulates that, unless notice of apparent loss or damage to the goods is given by the consignee or the shipper to the carrier not later than the time of delivery of the goods, such delivery is prima facie evidence of the delivery of the goods as described in the contract. Such notice shall describe the damage in a sufficiently clear manner. According to the II paragraph, where the loss or damage is not apparent, the

The ADSp General Conditions state that the liability of the freight forwarder for loss of or damage to the goods shall be limited to a certain amount, to be determined in accordance to three different criteria provided by article 23.1: a general criterion, according to which the liability is limited to € 5 per kilogram of gross weight of the consignment; the second limit, to be applied "*in case of damage occurring to goods whilst being carried*", refers to the network system, and the liability shall be limited to the maximum amount due for the specific type of carriage; a third criterion, to be applied "*in case of a contract of multimodal carriage, including sea transport*", according to which the liability shall be limited "*to 2 SDR per kilogram*".
However, according to article 23.1.4, the liability shall in no case exceed € 1 million or 2 SDR per kilogram per claim, whichever is the higher and, in case the same event gives raise to more than one claim, to € 2 million per event or 2 SDR per kilogram of lost or damaged goods; in the case of more than one claimant the freight forwarder's liability is proportionate to their individual claims (art. 23.4).
Article 24 provides for particular liability limits applying to warehousing upon instructions.
The liability of the freight forwarder for damage other than to goods is limited to three times the amount payable for the loss of the goods, but not more than € 100.000 per event (art. 22.3).
Article 20 secures the right of the freight forwarder to exercise a lien on all goods in his possession, which can be exercised for claims arising out of other contracts with the principal only if they are undisputed or if the financial situation of the debtor puts the claims of the freight forwarder at risk. If the principal is in arrears, the freight forwarder is entitled, after due notice, to sell such a portion of the principal's goods in his possession as is necessary to meet his claims.
Based on article 17, the freight forwarder is entitled to reimbursement for outlays which he could reasonably consider appropriate, and the principal must retrieve the freight forwarder immediately of demands regarding freight, average demands, customs duties, taxes and other dues.
The General Conditions have special provisions to the effect of modifying the ordinary rules on applicable law and jurisdiction (art. 30).

The Italian General Conditions for freight forwarding issued by Fedespedi stipulate, with concern to their scope of application, that they shall apply to all the contractual and non-contractual relationships with the freight forwarder and to all the actions and claims against him (art. 3).
With respect to freight forwarding services, they stipulate that the freight forwarder shall provide for entering into the contract of carriage and for performing the relevant ancillary operations, reserving full liberty of action where necessary, and shall have the faculty to consolidate cargo as groupage (unless otherwise explicitly agreed in writing between the parties), always performing with utmost diligence and acting as freight forwarder and never as freight forwarder acting as carrier (art. 4, I para.).
Freight forwarder's liability when acting as principal and time bar for actions are governed by the network system. When the freight forwarder entrusted with the forwarding of the goods also acts as performing carrier or explicitly undertakes obligations as performing carrier, his liability shall not exceed the limits of liability provided to the freight forwarder and/or the carrier under the relevant International law applicable to each shipment or under the relevant National law applicable to each carriage or shipment, including Italian law, and in any event the limits of liability cannot exceed the limits granted to the actual carrier (art. 11.2).
The Fedespedi General Conditions further state that the freight forwarder may ask for a lump sum payment and in this case he will operate as freight forwarder and not as freight forwarder acting as carrier (art. 4, V para.).
The freight forwarder's liability shall be excluded if he can prove that the loss, damage, delay, wrongful or missed delivery was caused by fortuitous event, by exonerating circumstances as provided by any applicable law as specified under article 11, and in any event caused by circumstances out of his control such as, but not limited to, act of God, wars, incidents/deteriorations to means of transport or embargoes, civil commotions or riots, defects, nature or inherent vice of the goods, acts, breach of contracts, omissions by the shipper, by the consignee or by anyone else who may have an interest in

provisions of paragraph I of the same article apply correspondingly if notice is not given within 7 days from delivery.

the shipment, by the State administration, customs or postal authority or by any other competent authority, strikes, lockouts or work conflicts (art. 16).
With concern to the monetary limit, the Fedespedi General Conditions stipulate that, whenever it is impossible to identify the leg of the carriage when the damage or the loss occurred, as well as in case of damage occurred during warehousing and/or storage performed by the freight forwarder, the maximum limit of 8,33 SDR per kilogram of lost or damaged goods shall apply (art. 12).
With concern to the time bar, the Fedespedi General Conditions stipulate that any claim for loss, wrongful delivery, deterioration and damage shall be submitted in writing and sent to the freight forwarder strictly within the deadlines and time bars set forth by the relevant International law applicable to each shipment or by the relevant National law applicable to each carriage or shipment (art. 14).
The Fedespedi General Conditions also secure the freight forwarder's right to exercise a general lien on the cargo with respect to the goods and on the other detained properties relating to the credit accrued or close to the date of due payment against the principal, the shipper and other third parties. The Fedespedi General Conditions stipulate that the principal shall refund and hold harmless the freight forwarder for all costs he paid in advance (e.g. freight, price of the carriage, freight charges for containers, customs duties) and for the unexpected ones (e.g. taxes, compensations for deterioration of the goods, fines). In particular the principal is responsible for damages and costs occurred by the freight forwarder as a consequence of wrong, incomplete or false information about the nature or value of the goods (art. 4, IV para.).

The Spanish General Conditions issued by FETEIA[33] state, with concern to the transport intermediary services, that, failing different instructions from the principal, the means, mode and route of transport shall be at the *transitario*'s option (art. 1).
With concern to the extension of the *transitario*'s liability the General Conditions stipulate that, regardless whether he acts as principal or as agent, the *transitario* is liable for the damages resulting from loss, damage or delay in the delivery of the goods, if the event which caused the loss, damage or delay took place after the goods were taken in charge by the transport intermediary or before they were delivered (art. 4).
With regard to the limitation of the *transitario*'s liability, the General Conditions distinguish between the *transitario* acting as agent or as principal. If acting as agent, the *transitario* shall be relieved of liability for any loss or damage caused by act or omission of the shipper or of the consignee, by inherent vice of the goods, by strike, lock-out, stoppage or restraint of labour, as well as any other cause which the *transitario* is unable to avoid by the exercise of reasonable diligence (art. 4.1).
The liability of the *transitario* acting as principal shall be construed under the network system rules: therefore his liability towards his principal shall in no case exceed the liability undertaken towards him by the companies he engaged to perform the carriage, in accordance with the International conventions in force (art. 4.4).

This brief analysis clearly shows the non homogeneity of the examined general conditions. The exercise of freedom of contract in the sector of services provided by transport intermediaries has not yet allowed to set the intermediation activities they offer in a uniform regulatory framework.
This may be explained first of all in light of the different approaches statutorily adopted by each country in order to regulate the legal régime of transport intermediaries, which may be summarized in the contraposition between the Napoleonic model of the *commissionaire pour les transport par terre et par eau*, guarantors (pursuant to articles 96 and 97 of the Napoleonic *Code Commerce*) of the correct fulfilment of the obligations undertaken by the carriers with whom they entered into the contract of carriage and therefore subject to the "*del credere*" liability, and the Germanic model, which – underlining the distinction between the assumption of the carriage, i.e. of the risks, and the assumption of the obligation to enter, in his own name and in the shipper's interest, into the contract of

[33] The description of the contents of the General Conditions issued by FETEIA is based on TOBÍO RIVAS, Los transitarios, 345 *et seq.*

carriage, without undertaking any obligation in relation to the transfer of the good – has instead accepted the distinction between *Fracht-führer* and *Spediteur*[34].
As a matter of course the national general conditions, aimed at complementing the domestic mandatory provisions by overriding the non mandatory ones (operational mode which guarantees their success), which reflect either one approach or the other, adhere to either one model or the other to the detriment of the uniformity of the regulatory framework in which transport intermediaries operate.
The domestic provisions which, at certain conditions, impose on the freight forwarder to act as carrier (art. 1741 Italian Civil Code[35]; art. 413 German HGB[36]), rather than simplifying the situation, make it even more difficult, because they create a connection which is only apparent between two models which actually do not seem easily reconcilable.
The persistent absence of a uniform regulatory framework may, furthermore, be explained in light of the difficulty in regulating coherently all the functional models to which transport intermediaries may correspond[37]. In fact, especially after the advent of containerization, transport intermediaries have broadened their services, including air and maritime carriage in their cargo consolidation activities, and it would now be possible for a transport intermediary to act (i) as a mere agent on behalf of the customer or the performing carrier; (ii) as the contracting carrier assuming carrier liability without performing the carriage himself and (iii) as the performing carrier[38]. The emersion of new functional models has, therefore, made the establishment of a uniform regulatory framework more complex.

5. **THE FIATA MODEL RULES FOR FREIGHT FORWARDING SERVICES**.

In order to remedy the absence of a uniform regulatory framework coherently regulating the services performed by transport intermediaries and in view of the failure of the Draft Convention presented in 1967 by UNIDROIT[39], in 1996 FIATA adopted the FIATA Model Rules for Freight Forwarding services[40].
With concern to their scope of application, they stipulate that they apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract by referring to the FIATA Rules for Freight Forwarding Services (art. 1.1), and that they apply to all claims, both founded in contract or in tort, against the freight forwarder (art. 11).
Their main feature consists, therefore, in the fact that their application is voluntary, and this is an aspect which runs the risk of significantly limiting their diffusion.
They regulate the freight forwarder's liability, establishing different régimes according to whether he acts as agent or as principal. If he acts as agent the freight forwarder is liable if he fails to exercise due diligence and take reasonable measures in the performance of the freight forwarding service, in which case he shall compensate the principal for loss of or damage to the goods as well as for direct financial losses resulting from breach of his duty of care (art. 6.1).
When the freight forwarder acts as principal, his liability is governed by the network liability system, i.e. the freight forwarder shall be liable for the non fulfilment of the contract of carriage or other services in accordance with the provisions of the law applicable to the mode of transport or service concerned, as well as with the additional conditions expressly agreed or, failing express agreement, with the usual conditions for such mode of transport or services (art. 7.3).

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[34] For an ample and well documented reconstruction of the historical development of the institute of the transport intermediary see ZUNARELLI, La nozione, 2 *et seq*.
[35] According to which «*the freight forwarder who, with his own or third party's means undertakes the total or partial performance of the carriage, has the duties and rights of the carrier*»
[36] According to which the freight forwarder is liable as carrier when he offers a fixed price for the carriage or acts as a cargo consolidator
[37] See on this issue, RAMBERG, Unification, 6 ss.
[38] RAMBERG, Unification, 6
[39] For a presentation of the essential features of the Draft Convention see RAMBERG, Unification, 8
[40] For a presentation of the essential features of the FIATA Model Rules see RAMBERG, The FIATA Model Rules, 284 *et seq*.

The FIATA Model Rules stipulate that the freight forwarder's liability shall be excluded (i) if the loss concerns valuable or dangerous goods, unless declared to the freight forwarder at the time of the conclusion of the contract, (ii) if the loss follows from delay unless expressly agreed in writing and (iii) for indirect or consequential losses such as, but not limited to, loss of profit and loss of market (art. 8.1).
The monetary limit with respect to loss of or damage to the goods is 2 SDR per kilogram, but for other types of loss the liability limit for each incident has been left open and has to be completed by the respective national freight forwarding association (art. 8.3).
With concern to the time bar, the FIATA Model Rules state that the freight forwarder shall be discharged of all liability unless suit is brought within 9 months from the handing over of the goods (art. 9.1).
The FIATA Model Rules impose on the principal to give the freight forwarder written notice of the loss, modulating terms and effects of the notice according to the type of liability invoked by the principal: if the freight forwarder's liability arises in connection to loss or damage to the goods, failure to give notice when the goods are handed over to the person entitled to receive them (or to give notice within 6 days, if the loss or damage is not apparent), implies that such handing over is *prima facie* evidence of the delivery of the goods in good order and condition (art. 9.1); if the freight forwarder's liability arises in connection to any other type of loss or damage, notice of the claim shall be given in writing within 14 days from the day when the principal became or should have become aware of the circumstance giving rise to his claim. Failing such written notice the claim is barred, except where the principal can show that it was impossible for him to comply with this time limit and that he made the claim as soon as it was reasonably possible for him (art. 9.2).
The Model Rules grant the freight forwarder the right to exercise a general lien on the goods and any documents relating thereto for any amount due at any time to the freight forwarder by the principal and stipulate that he may enforce such lien in any reasonable manner as he may think fit (art. 15).
The FIATA Model Rules impose on the principal a duty to indemnify the freight forwarder for all liabilities incurred by the latter in the performance of the freight forwarding services (with the exemption of those arising from the breach of his duties) and in respect of any claim of a general average nature made on him (art. 17); the FIATA Model Rules further state that the principal shall keep the freight forwarder harmless of all unexpected costs arising in the performance of the services, provided the freight forwarder has acted in the best interest of the principal (art. 13), or by the principal's inaccurate or incomplete information or instructions, or by the dangerous nature of the goods (art. 18).

6. **CONCLUSIONS**.

The analysis of the general conditions adopted by the various European trade associations of transport intermediaries draws attention to the significant diversity of their contents which may cause strong uncertainties in the performance of international traffic and trade and, hence, thwart the effects which the diffusion of such general conditions should pursue.
Their contents differ considerably both because they refer to régimes which are often very diverse, sometimes based on the French model, sometimes on the German one, and because they reflect different safeguard strategies of the interests of transport intermediaries: the different choices made by the national trade associations regarding the extent of liability of transport intermediaries (i.e. whether or not extended to the performance of the carriage), the degree of diligence required from transport intermediaries in the performance of their services and the amount of the monetary limits to the liability are, to this regard, emblematic. The only feature which emerges in a rather homogeneous manner from most of the examined general conditions seems to be the repeated reference to the applicability of the network system in the event the transport intermediary acts as principal[41], a choice which may be explained with the advantage embedded in such system of ensuring the transport intermediary the benefit of the so called back-to-back position, which allows him to seek

[41] See art. 1.2 Fenex; art. 23.1.2 ADSp; artt. 11.2, 14 and 16 Fedespedi; art 4.4 FETEIA

indemnification from those he might have engaged for the services or carriage upon the same conditions as apply in the relation to his own principal[42].
The applicability of some of the most significant provisions of the general conditions seems to be rather uncertain: let us just think about the possible exclusion of their validity, for example in Italy and Spain[43], in relation to their unfair nature and about the connected risk that crucial clauses such as those governing extension, exclusion and limitation of liability, time bar for actions, distribution of the burden of proof, lien and pledge over the goods, may be judicially declared inapplicable, thus significantly altering the balance of the interests of the parties originally pursued in the general conditions.
The non homogeneity of their contents and the objective uncertainty concerning the applicability of some of their most qualifying provisions would urge their harmonization, even more so if we believe that homogenous general conditions, applied in a spontaneous and generalized manner, could be the basis to determine the contents of a future mandatory uniform regime.
If the future adoption of an International Convention governing transport intermediary services, aimed at solving "*the present rather chaotic situation regarding the law of* […] *freight forwarding*"[44] , is considered desirable, it appears therefore indispensible to strive to uniform the contents of the general conditions adopted by the European transport intermediary associations, also by favouring the widest diffusion of the FIATA Model Rules.

[42] RAMBERG, The FIATA Model Rules, 285
[43] TOBÍO RIVAS, Los transitarios, 346
[44] RAMBERG, Unification, 6

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