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CONSTRUING THE TERM "STANDARD RISKS" WITH REGARD TO THE OBLIGATION OF THE WAREHOUSE KEEPER AND FREIGHT FORWARDER TO EFFECT THE INSURANCE CONTRACT IN THE REPUBLIC OF SERBIA

REVIEW ARTICLE

Abstract

Although the Law on Contracts and Torts should have, by its principles and provisions, eliminated any doubt as to the rights and obligations of the contracting parties in the legal affairs governed by it, this this did not fully occur as regards particular contracts. This is especially so in commercial storage and forwarding service contracts in connection with the insurance obligation and the issues of construing and meaning of the "standard risks" term.

In this paper, the author analyses the "standard risks" term, according to positive regulations, selected domestic and foreign sources of autonomous law in the field of freight forwarding and views of legal theory, and makes a number of proposals for improving the text of the provisions of the Law on Contracts and Torts and the Draft Labour Code of the Civil Code of the Republic of Serbia. Regarding the content of the obligation of warehouse keepers and freight forwarders to take out insurance when the contract for the provision of storage and shipping services does not specify the risks that should be covered under the insurance.

***Keywords**: standard risks, customs, fair trade practices, insurance, warehouse keeper, freight forwarder*

I Analysis

Before the formation of national states and the enactment of civil, commercial and other laws, customs were the most important way of regulating attitudes and behaviour in a society. Initially, these were anarchic forms of human behaviour, which over time were pervaded with taboos, polytheism and magic. Informal gestures at events celebration (reaching an agreement, joining the community, birth, etc.) were eventually accepted in a given group and tribe, thus

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creating the first rules about the procedure for performing a ritual or ceremonial way of highlighting an important event. For example, it is well known the only form of marriage with all so-called Barbaric peoples in Europe was an informal marriage, achieved through sexual union.[2] On the other hand, as regards the legal affairs, in Roman law already, some words were uttered or usual gestures applied to determine whether a particular job was effectively concluded. Legal symbolism (a handful of land represents land in court, a hand is a symbol of the power of the owner, etc.) resulted from the primitive conditions of living[3]. Thus, the common law of a nation was created that, according to the construing of the historical law school, lives in the consciousness of people as something of that is spontaneously created and developed and manifests in the belief and conviction of the masses that they are obliged to apply it.[4] Purposeful and desirable behaviour in particular private and social interactions in accordance with morals and customs should have lost its importance by enacting and implementing laws. With the development of law, the sphere of common law regulation of social relations increasingly narrowed, but customs nonetheless still exist and very often, in certain situations, appear as a complement to legal norms.[5]

It has been noted in legal history that the adoption of royal regulations did not stop the need for the application of common law, albeit a subsidiary legal source. Thus, the provisions of the Decree on establishing the Imperial Supreme Court of the German King (later "German-Roman Emperor") Maximilian I of 1495[6] stipulated that trials should be held only in accordance with *local customs* and regulations. However, in the proceedings before the said court, the custom could apply only if the parties could prove that its application would effectively resolve the dispute. The importance of the common law in the German dukes, principalities and free cities as of the 16th century until the creation of the German Empire in 1870/1871 and later on, before the enactment of the German Civil and Commercial Code, reflected in the application of the rules of general German law contained in the Saxon mirror (*Sachsen Spiegel*) and the 13th century and German mirror (*Schwaben Spiegel*), as well as the so-called rules of the Imperial Law (*Kaiser Recht*). Of particular importance was the collection of customs (*Consuetudinaria*), which has been kept for Austria since the 16th century. Legal historians point out that the strengthening of the central government (after the unification of Germany - note by author) gave a strong enough impetus for a firmer political, economic and legal integration of space and elimination of legal particularism arising from different legal traditions[7]. Similarly, Hungarian private law up to 1848 was based on the

[2] Slobodan I. Panov, Family Law, Belgrade, 2016, pp. 76.

[3] Dragomir Stojčević, *Private Roman Law*, Belgrade, 1985, p. 24.

[4] Ibidem, pp. 70.

[5] Jovan Slavnić, *Commercial / Trade Law with the Basics of Civil Law*, Belgrade, 2006, pp. 11.

[6] Reichskammergerichtsordnung

[7] Dušan Nikolić, "Two Centuries of the Austrian Civil Code (1811–2011)", Proceedings of the Matica Srpska for Social Sciences, 135 (2–2011), pp. 314.

16th-century collection of Hungarian common law[8] by Ištvan Verbeci (first edition published in Vienna in 1517), which although never received official confirmation of its implementation, exerted enormous influence and experienced fifty issues in three hundred years.[9]

Although the emergence of Commercial Law is related to the moment when traders established rules applying to dealing with third parties (medieval commercial / common law / *lex mercatoria*), the adoption of civil and commercial codes did not eliminate the need to apply customs. Property fire insurance has largely built its methods and practices, starting with maritime insurance, which by the 17th century was already quite well developed, both in form and regulation, and in clearly defined business practices.[10] In the historical development, this type of insurance was named after the fact that initially only fire risk was insured and the cover afterwards extended to include the explosion and lightning[11], with the industrial and general economic development. Today, there is a whole range of risks covered by the property insurance policy. With these changes, business practices have changed with regard to the scope and conditions of property insurance so that today, laws are more explicitly prescribing the scope of insurance coverage in particular activities.

In our country, after the Second World War and the enactment of the Law on the Invalidity of Legal Regulations enacted before April 6, 1941 and/or during the hostile occupation of the former Yugoslavia, the intention of the new government was to regulate all the relations in the society in a different way. Due to the legal vacuum created by the aforementioned regulation and slow adoption of new regulations before the adoption of Law on Contracts and Torts and its entry into force on October 1, 1978, the General Usage of Goods in Trade of 1954 had a decisive effect to trade law, as well as a number of usages regulating the legal relations in particular activities (1960 Particular Usage of Cereals Trade, 1977 Particular Usage of Construction, 1983 Particular Usage of Catering, etc.)

The Law on Contracts and Torts (hereinafter: the LCT), for the first time since the Second World War, regulated the insurance contract under sixty-eight articles. With its adoption, there was no need to apply the general and particular usages that were adopted before its enactment. However, the application of general and special allowances is still possible in two cases: (1) if the parties to the contract have agreed to their application and (2) if it appears from the circumstances that the parties intended to apply them. The importance of usages for insurance law reflects in the fact that some of them are devoted to a number of rules regarding the legal business of insurance, which is also the subject matter of review in this paper.

[8] "Common law in the three volumes of the restored Kingdom of Hungary" (Opus tripartitum juris consuetudinarii inclyti regni Hungariae).

[9] Robert John Weston Evans, "The Opus Tripartitum" and Hans J. Hillebrand, eds., The Oxford Encyclopedia of the Reformation, Oxford, 1996 (online 2005).

[10] Slobodan Samardžić, Fire Insurance in the Non-Life Insurance System, Belgrade, 2009, pp. 27.

[11] Ibidem, pp. 28.

In addition to the above, although the Law on Contracts and Torts should have, by its principles and provisions, eliminated any doubt as to the rights and obligations of the contracting parties in the legal affairs governed by such law, in relation to particular contracts this did not fully occur. This is especially the case for commercial storage and forwarding service contracts in connection with the insurance obligation and the issues of interpretation and meaning of the term "standard risks".

It is the general rule that the warehouse keeper and freight forwarder are obliged to insure the goods received for safekeeping or shipment only if agreed. However, if the depositor or freight forwarder's consignee do not determine the risks against which the warehouse keeper and the freight forwarder should insure the goods, they are obliged to insure the goods against the standard risks[12]. From the Commentary to the aforementioned LCT provision by Professor Jankovec, it ensues that the standard risks are considered the risks against which insurers provide cover under special conditions for insurance of stored goods and supplies in cold stores[13]. This was one, for the warehousing practice, practical attitude that does not extend the obligation of the warehouse keeper to conclude insurance against risks for which no coverage can be found in the insurance market. In this sense, the liability of the warehouse keeper for the loss or damage to property would attach only if caused by some of the risks for which insurance could be effected.[14] The warehouse keeper, the commissioner and the freight forwarder are also responsible for the loss or damage to the goods in the course of accident if they have not insured against it where they were ordered to do so (LCT, Art. 776, para. 2). In the disposition, the consignee must emphasize all particular requirements as the freight forwarder's secondary liability, not regulated and common, which especially relates to the conclusion of transport insurance or insurance of goods in storage.[15]

In warehousing, since 2009, the Law on Public Warehouses for Agricultural Products has eliminated the concerns regarding the term "common risks" by requiring the public warehouse to provide coverage for the stored goods against fire, flood, earthquake and theft within three days from the date of receipt of the agricultural product.[16] However, the term mentioned, as we see it, does not cover all the standard risks that can cause damage to stored or transported goods. Since this is the obligation to conclude an insurance contract for the goods received in warehouse, we believe that the interest of the depositor is adequately protected, but this law does not contain a provision to inform the depositor of the possibility

[12] LCT Articles 732 and 837.

[13] Ivica Jankovec, Commentary on Art. 732 of the Law on Obligations, Perovic, S. (see editor) in: Commentary on the Law on Contracts and Torts, Volume II, Belgrade, 1995, p. 1268

[14] Ibidem.

[15] Slobodan Jovanović, Freight Forwarder Obligations Regarding Client Protection in Yugoslav and Comparative Law, Novi Sad, 1997, pp. 59.

[16] Law on Public Warehouses for Agricultural Products, Official Gazette of RS, no. 41/2009 and 44/2018 – al. Law, Art. 42, para. 2.

to separately contract the cover for the additional risks in the way as it is done under the Law on Merchant Shipping in the area of navigation insurance (Article 543, paragraph 3 in conjunction with paragraph 4).

According to the LCT, the freight forwarder is not obliged to provide cover for the goods, which he has stored in his warehouse, unless so agreed. If the agreement is signed to insure the stored goods and the risks are not specified, the freight forwarder should ask the consignee to determine the risks for which the insurance needs to be effected[17] (Jovanović, 1997, 73). It is worth noting here that under the Public Warehouses Act of 1930 (Art. 28 (2)), public warehouses were obliged to insure the goods they received to their full value only against fire damage. This again shows the trend of developing awareness of the necessity of extending insurance coverage and the way of its subsequent manifestations through the expansion of the list of risks for which insurance is mandatory according to the law.

Standard risks imply the risks that, as reasonably expected, can cause damage to objects. Reasonable expectations should take into account at least the nature of the object, the type of conveying vehicle and the route. General usage no. 243, para. 3 stipulates that the party obliged to conclude insurance must cover the goods against the risks for which this is customary in the place of performance of the contract for such type of business and goods, taking into account the risks to which the goods are exposed on the route from the place of dispatch to the place of destination.[18] The said usage practically does not limit the obligation to conclude the insurance of goods in terms of the scope of insurance coverage only to the standard risks that arise in certain activities or in certain types of transport. Contrary to the above, Professor Carić, in the comment on Art. 837 of the LCT dedicated to the freight forwarder's obligation to insure shipments states that the term "standard risks" does not include "specific, war and political risks[19], whereby he considers the risks of the properties of things as specific risks. We can certainly agree that war and political risks cannot be considered as standard risks, but, as we can see, the negative attitude to "specific" risks (and other additional perils) seems to be contrary to the rule for the said Usage, which is applied on the basis of explicit or tacit the will of the parties. This means that parties can contract the application of a business custom specifying that the standard risk types shall be deemed to include the risks of particular type of goods s of goods that is the subject matter of the contract. In this respect, a provision is also devoted to the insurance of securing shipments in the French general terms and conditions of freight forwarders operations, under which the standard risks are not only war

[17] Slobodan Jovanović, Freight Forwarder Obligations Regarding Client Protection in Yugoslav and Comparative Law, Novi Sad, 1997, pp. 73.

[18] A similar rule contains the Particular usages of construction of 1977, usage no. 95 which obliges the contractor to insure the works, materials and equipment for installation against the standard risks and at the same time stipulates that the "standard risks" are determined "... especially by the type of work, place where the work is performed, type and properties of the materials and equipment to be installed."

[19] Slavko Carić, Commentary on Art. 837 of the Law on Obligations, Perović, S. (editor in chief) in: Commentary to the Law on Contracts and Torts, Volume II, Belgrade, 1995, pp. 1387.

and political risks.[20] German freight forwarding conditions authorize the freight forwarder to independently assess the type and extent of insurance coverage and to conclude insurance under "normal market conditions", including the inherent risks of the goods, with the obligation to notify the consignee if the insurance cannot be concluded due to the natural properties of the goods or for other reasons.[21]

The reasons why it is of great importance for the owner of the goods being shipped and transported to insure the goods lie in the way other types of insurance function. In legal theory, this claim statement is supported by an example where a consignee may be misled about insuring the goods in transit when the carrier informs him that the goods are "covered" by his professional liability insurance.[22] It is common knowledge that the aforementioned type of insurance does not cover damage to goods resulting from specific and additional risks that could jeopardize the goods.

The Maritime and Inland Navigation Act of 1978 (Art. 748, Para. 1) and the current Merchant Shipping Law of 2015 (Art. 543, Para. 2) have eliminated doubts as to what is considered standard risks in navigation insurance, in the following manner: Unless otherwise specified in the insurance contract, navigation insurance shall cover the risks to which the insured person is exposed during navigation, namely the accident, natural catastrophe, explosion, fire and robbery. This also defines the content of the obligation of a party concluding a contract for navigation for the account of third party regarding the risks to be insured when the owner of the goods - consignor fails to give an explicit and clear order for the conclusion of transport (cargo) insurance. The mentioned provision dispositive, meaning that the parties can agree for the freight forwarder to seek insurance coverage against the inherent risks of the goods handed over for transportation or storage, as well as against any other additional perils: breakage, theft, shortage for any reason, wrongful acts of third parties, etc.

In addition, according to the *CIF* (*Cost, Insurance and Freight*) International Rule for the Interpretation of Trade Terms, when goods are sold and delivered for maritime transport, the seller is obliged to insure the goods with minimum coverage. Bearing in mind the mentioned codified business practice in international trade, if the buyer wishes to have extended coverage insurance (additional and specific risks), he must either explicitly request so in writing from the seller or enter into such a contract for the insurance of goods. In international trade, it is

[20] Conditions Générales de Vente directing les opérations effectu de par les opérateurs de transport et / ou de logistique - Union des Entreprises de transport et logistique de France, 2017, Art. 3.

[21] Allgemeine Deutsche Spediteurbedingungen 2017 - (hereinafter referred to as ADSp 2017), 1 January 2017 empfohlen vom Bundesverband der Deutschen Industrie (BDI), Bundesverband Großhandel, Außenhandel, Dienstleistungen (BGA), Bundesverband Güter- logungstrand und Bundesverband und Bundesbandband und Bundesbandband Möbelspedition und Logistik (AMÖ), Bundesverband Wirtschaft, Verkehr und Logistik (BWVL), Deutschen Industrie- und Handelskammertag (DIHK), Deutschen Speditions- und Logistikverband (DSLV) and Handels-Verband Deutschland (HDE), Art. 21.4 and 21.5.

[22] Slobodan Jovanović, "The Legal Position of Freight Forwarders in Transport Insurance - Contract on Transport Insurance for the Consignee Benefit", Legal Life no. 10, 2003, pp. 1044.

usual to sign the minimum coverage against risk under Clause "C" of the Institute of London Insurers for the insurance of goods in maritime transportation.[2324] , As we have pointed out, the buyer can either conclude the insurance of the goods in transport or give an explicit and clear order to the freight forwarder who arranges the shipment of his goods.

When it comes to insurance of goods in transit, the role of the freight forwarder in business practice is practically reduced to executing an order to conclude a specific type of insurance cover or to agency between a consignee and an insurer (Jovanović, 2003, 1042). Therefore, it is a generally accepted view in legal theory that when concluding a contract to insure a consignee belongings against transportation risks, the freight forwarder acts on behalf and for the account of third party - the client (Zelenika, 1980, 78; Stakić, 1970; Carić, 1995 , 1375; Jovanovic, 2003, 1042). This attitude has also been confirmed in the relevant provisions of the general terms and conditions of business of the freight forwarder (Conditions Générales de Vente, 2017, Art. 3; ADSp, 2017, Art. 21.6). Considering the lack of insurable interest of the freight forwarder on the goods shipped and the conflict of interest of the freight forwarder if he represented the insurer when concluding the contract of insurance of goods in transit, the rules of the contract of trade agency could not apply to the freight forwarder who is obliged to conclude the insurance contract (Jovanovic, 2003, 1042). In this sense, the LCT stipulates a special rule for parties concluding an insurance contract for a third person's account or for the account of the person concerned (Art. 905, Para. 1). According to this rule, the freight forwarder is obliged to fulfil the obligations from the insurance contract (payment of premium and all other obligations), while the rights can be exercised only with the consent of the person who owns the insured interest.

An additional method of determining the scope of transport insurance coverage that the freight forwarder is obliged to conclude in the event that the insurance proposal of the consignee does not contain special risks, has been stipulated under the General Terms and Conditions of International Logistics and Freight Forwarders of the Republic of Serbia[25] (Article 36, paragraph 2) and Particular

[23] Transport risks insurance clauses are abbreviated as "Institute Clauses" after the Institute of London Underwriters (ILU), established in 1884 to standardize and adopt a standard text of insurance terms and conditions in the form of a set of clauses. The clauses are published annually in the Reference Book of Marine Insurance Clauses, published by Witherby & Co. Ltd., London, whose last 79th edition was published in January 2019.

[24] According to Art. 1 of the aforementioned 2009 "C" Clause, goods in maritime transport are insured against the following risks:
1. fire or explosion;
2. abandonment, stranding, sinking or tipping over of a vessel;
3. capsizing or sliding out of the rails of the land vehicle;
4. collision or contact of a vessel, boat or vehicle with an external object other than water;
5. unloading of goods in a temporary port;
6. loss or damage to the subject of insurance caused by the general average sacrifice or cargo overthrow.

[25] Official Gazette of RS, no. 105/2008.

usages of business of freight forwarding companies in the Republic of Serbia[26] from 2018 (Art. 38, Para. 2) stating that, when the insurance proposal does not contain special risks to be covered by insurance, the freight forwarder is only obliged to cover the standard transportation risks. The answer to the question what is covered by the standard transportation risks is given to us by the provision cited in the Law on Merchant Shipping quoted above. Alternative determination of the list of standard transportation risks against which the goods will be insured can be made in the insurance market, according to the available insurance products of goods in transport (from insurance conditions). However, there may be some differences regarding the risks covered by individual insurers under standard transportation risks, so the aforementioned provision neither eliminates the dilemma as to what is considered standard transportation risks. This is simply due to the fact that business practices are characterized by dynamism and a more frequent tendency to make minor or major changes in line with the market adaptation of the insurer's business practices and case law.[27] In this sense, we emphasize that the conditions of maritime cargo insurance under the so-called *Lloyd's Ship and Goods / Sr. G. / Policy* have been replaced by Clauses A, B and C of the Institute of London Insurers in 1963, which were innovated by amended versions in 1982 and, the latest in 2009.

II Conclusion

Although the adoption of the Law on Contracts and Torts has degraded the importance of general and special usages, especially in the area of contractual insurance law, it has remained incomplete in some provisions. We think that, under the provisions on minimum risks against which warehouse keepers and freight forwarders are obliged to conclude insurance for the benefit of the depositor or consignee this issue has not been resolved by the latter themselves, the Law on Contracts and Torts only referred to the application of general conditions of freight forwarders business (as a separate business custom) and, subsidiary, to the rules on insurance from the General usage of trade in goods of 1954 (as a general business custom in relation to the General Terms and Conditions of International Logistics and Forwarders of 2008), whereby both are (autonomous) legal sources of contractual nature. Instead of determining, by positive standardization, the minimum risks that the abovementioned economic service providers are obliged to insure against on behalf and for the account of their client, thus eliminating any doubt as to the certainty of the said obligation, the term used only allowed the situation to remain unresolved. Thus the service providers are left with the option to determine, by their own terms of business (and more amazingly – special

[26] Official Gazette of RS, no. 99/2018

[27] Brown states that the terms of Lloyd's SG insurance policy have changed many times during the implementation, with some amendments expanding the list of insured risks, while other changes retaining the same number of insured risks, but changing the circumstances under which the insured person can file a claim (Robert H. Brown, Marine Insurance - Cargo Practice, London, 1998, p. 155).

usages?!) the content of "standard risks" in accordance with the elements of the General usages of goods in trade no. 243, at their option to conclude an insurance contract in accordance with the conditions available from the insurance market or, nevertheless, to insist on the client to reach a separate written agreement that would cover all the risks in accordance with the client's needs and desires.

The uncertainty of the content of the term used in the LCT is resolved under the Law on Public Warehouses for Agricultural Products by explicitly stating (imperative method) the risks but not for other types of public warehouses, while in the area of navigation insurance the Merchant Shipping Law contains a rebuttable presumption of minimum risks coverage, unless otherwise specified in the insurance contract.

Bearing in mind the solutions under the two mentioned laws, which, in particular as *lex specialist*, regulate the aforementioned issues not having been regulated under the Law on Contracts and Torts, it remains unclear why identical provisions of the LCT were adopted in the Draft Civil Code of May 29, 2015, analysed in this paper. That is why it is possible to improve in several ways the text of the LCT or the future Civil Code of the RS.

When it comes to the provision of the Article 732 (in the cases of attaching duty of the warehouse keeper to take out insurance):

- The first is that, instead of the term "standard risks" under the Article 732, para. 2, the LCT should use the phrase "If the contract does not specify which risks the insurance should cover, the warehouse keeper shall be obliged to insure the goods in accordance with the available conditions of the insurance market of his choice"; or
- Second, to replace the provision of Article 732, paragraph 2 by the following: "If the contract does not specify the risks to be covered by insurance, the warehouse keeper shall be obliged to insure the stored goods against fire, flood, earthquake and theft within three days from the receipt of the goods for storage", or
- Third, that the whole of Article 732 should be replaced by the following wording: "If the contract does not specify the risks to be covered by the insurance, the warehouse shall not be liable for damage or loss of the deposited goods due to circumstances which they could not have prevented, eliminated or avoided."

When it comes to the provision of Article 837 (in the cases of attaching duty of the freight forwarder to take out the insurance for the shipment):

- The first is that, instead of the term "standard risks" under the Article 837, paragraph 2, the LCT should use the phrase " If the contract does not specify which risks the insurance should cover, the freight forwarder shall be obliged to insure the goods in accordance with the available conditions of the insurance market of his choice". This is a solution similar to the 2017 German Freight Forwarder Terms and Conditions; or
- Second, to replace the provision of Article 837, paragraph 2 by the following: "If the contract does not specify the risks to be covered by insurance, the freight forwarder shall be obliged to insure the goods against risks to which it is exposed

during transport, namely: traffic accidents, natural catastrophes, explosion, fire and robbery." This solution is in accordance with the provision of Art. 543, para. 2 of the Merchant Shipping Law, which makes the LCT harmonized with that Law, in this part; or

- Third, that the whole of Article 837 should be replaced by the following wording: "If the contract does not specify the risks to be covered by the insurance, the freight forwarder shall not be liable for damage or loss of the shipment due to circumstances which they could not have prevented, eliminated or avoided."

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