UDK:340.132:781.68:368.025.6:368.073:339.542+ 368.182.31(497.11)

doi:10.5937/tokosig1904021J

Prof. dr Slobodan O. Jovanović¹

TUMAČENJE IZRAZA „UOBIČAJENI RIZICI“ U VEZI SA OBAVEZOM SKLADIŠTARA I ŠPEDITERA DA ZAKLJUČE UGOVOR O OSIGURANJU U REPUBLICI SRBIJI

PREGLEDNI RAD

Apstrakt

Iako je trebalo da Zakon o obligacionim odnosima svojim načelima i odredbama otkloni svaku sumnju u izvesnost u pravima i obavezama ugovornih strana u pravnim poslovima koji su njime regulisani, s nekim ugovorima to se nije desilo u potpunosti. To se naročito odnosi na ugovore o pružanju privrednih usluga skladištenja i špedicije u vezi s obavezom osiguranja i pitanja tumačenja i značenja izraza „uobičajeni rizici“.

U ovom radu autor analizira izraz „uobičajeni rizici“ prema pozitivnim propisima, odabranim domaćim i stranim izvorima autonomnog prava u oblasti špedicije i stavovima pravne teorije, iznoseći određen broj predloga za unapređenje teksta odredaba Zakona o obligacionim odnosima i Radnog teksta Građanskog zakonika Republike Srbije u vezi sa sadržinom obaveze skladištara i špeditera da zaključe osiguranje kada ugovorom o pružanju usluga skladištenja i otpreme nisu određeni rizici koji treba da budu obuhvaćeni osiguranjem.

Ključne reči: uobičajeni rizici, običaji, uzanse, osiguranje, skladištar, špediter

I. Analiza

Pre formiranja nacionalnih država i donošenja građanskih, trgovačkih i ostalih zakona, običaji su bili najvažniji način regulisanja odnosa i ponašanja u društvu. U početku se radilo o anarhičnim oblicima ljudskog ponašanja, koji su bili prožeti tabuima, mnogoboštvom i magijom. Neformalni gestovi prilikom obeležavanja određenih događaja (postizanje sporazuma, stupanje u zajednicu, rođenje i sl.) s vremenom su prihvatani u datoj grupi i plemenu, pa su tako

¹ Visoka škola za poslovnu ekonomiju i preduzetništvo, Beograd

Predsednik Udruženja za pravo osiguranja Srbije, Beograd

E-mail: nsjovanovic@sbb.rs.

Rad je primljen: 3. 10. 2019.

Rad je prihvaćen: 27. 11. 2019.

nastajala i prva pravila o proceduri obavljanja nekog obreda ili svečanom načinu isticanja nekog važnog događaja. Tako na primer, opšte je poznato da je kod svih tzv. varvarskih naroda u Evropi neformalan brak bio jedina forma braka koja se ostvarivala polnim sjedinjavanjem.² S druge strane, prilikom zaključivanja pravnih poslova, već u rimskom pravu, izgovarale su se propisane reči ili činili uobičajeni gestovi po kojima se utvrđivalo da li je konkretan posao punovažno zaključen. Dolazi i do ustanovljavanja pravne simbolike (šaka zemlje predstavlja zemljište na sudu, ruka je simbol vlasti sopstvenika itd.) koja je posledica primitivnih uslova u kojima se život odvijao.³ Na gorenavedeni način stvaralo se običajno pravo jednog naroda koje, prema tumačenju istorijske pravne škole, živi u svesti naroda kao nešto što samo od sebe nastaje i razvija se, a manifestuje se u verovanju i ubeđenju narodnih masa u obaveznost njegove primene.⁴ Svrsishodan i poželjan oblik ponašanja u određenim privatnim i društvenim interakcijama u skladu s moralom i običajima trebalo je da u potpunosti izgubi na važnosti donošenjem i primenom zakona. Razvitkom prava, sfera običajnog regulisanja društvenih odnosa sve više se sužava, ali običaji i pored toga i dalje egzistiraju i veoma često se u izvesnim situacijama pojavljuju kao dopuna pravnim normama.⁵

U pravnoj istoriji zabeleženo je i to da donošenjem kraljevskih propisa nije prestajala potreba za primenom običajnog prava, doduše kao supsidijernog pravnog izvora. Tako je odredbama Uredbe o osnivanju Carskog vrhovnog suda nemačkog kralja (kasnije „nemačko-rimskog cara“) Maksimilijana I iz 1495. godine⁶ bilo propisano da se ima suditi samo u skladu sa *domaćim običajima* i propisima. Međutim, običaj se u postupku pred navedenim sudom mogao primeniti jedino ako su stranke mogle dokazati da će se njegovom primenom efikasno rešiti spor. Značaj običajnog prava u nemačkim vojvodstvima, kneževinama i slobodnim gradovima od 16. veka pa sve do ujedinjenja u Nemačko carstvo 1870/1871. godine i kasnije, do donošenja nemačkog građanskog i trgovačkog zakonika, odražavao se u primeni pravila opšteg nemačkog prava sadržanog u Saksonskom ogledalu (*Sachsen Spiegel*) i Švapskom ogledalu (*Schwaben Spiegel*) iz 13. veka, kao i pravila tzv. Carskog prava (*Kaiser Recht*). Osobit značaj imala je zbirka običaja (*Consuetudinaria*) koja je od 16. veka vođena za Austriju. Pravni istoričari ističu da je jačanje centralne vlasti (posle ujedinjenja Nemačke – prim. aut.) dalo dovoljno snažan podsticaj za čvršću političku, ekonomsku i pravnu integraciju prostora i otklanjanje pravnog partikularizma nastalog iz različitih pravnih tradicija.⁷ Na sličan način, i mađarsko privatno pravo do 1848. godine zasnivalo se na zbirci mađarskog

² Slobodan I. Panov, *Porodično pravo*, Beograd, 2016, str. 76.

³ Dragomir Stojčević, *Rimsko privatno pravo*, Beograd, 1985, str. 24.

⁴ *Ibidem*, str. 70.

⁵ Jovan Slavnić, *Privredno / Trgovinsko pravo sa osnovama Građanskog prava*, Beograd, 2006, str. 11.

⁶ *Reichskammergerichtsordnung*.

⁷ Dušan Nikolić, „Dva veka Austrijskog građanskog zakonika (1811–2011)“, *Zbornik Matice srpske za društvene nauke*, 135 (2–2011), str. 314.

običajnog prava⁸ Ištvana Verbecija iz 16. veka (prvo izdanje objavljeno je 1517. godine u Beču), koja je, iako nikada nije dobila zvaničnu potvrdu za primenu, vršila ogroman uticaj i doživela pedeset izdanja u tri stotine godina.⁹

Iako se nastanak Trgovinskog prava vezuje za trenutak kada su trgovci ustanovili pravila koja su primenjivali na međusobne poslove s drugima (srednjovekovno trgovačko /običajno/ pravo *lex mercatoria*), ni donošenje građanskih i trgovačkih zakonika nije ukinulo potrebu za primenom običaja. Imovinsko požarno osiguranje u velikoj meri gradilo je svoje metode i praksu polazeći od pomorskog osiguranja, koje je do 17. veka već bilo prilično dobro razvijeno, kako po formi i propisima tako i po jasno definisanim poslovnim običajima.¹⁰ U istorijskom razvoju pomenuta vrsta osiguranja naziv je dobila po tome što se u početku osiguravao samo rizik od požara, da bi se pokriće proširivalo sa industrijskim i opšteprivrednim razvojem na rizike od eksplozije i udara groma,¹¹ tako da danas postoji čitava lepeza rizika koji su pokriveni polisom osiguranja imovine. S navedenim promenama, menjali su se i poslovni običaji u pogledu širine i uslova osiguranja imovine, da bi danas zakoni sve češće izričito propisivali širinu osiguravajućeg pokrića u pojedinim delatnostima.

U našoj zemlji, posle Drugog svetskog rata i donošenja Zakona o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije u bivšoj Jugoslaviji, namera nove vlasti bila je da se novim propisima na drugačiji način urede svi odnosi u društvu. Usled svojevrsnog pravnog vakuuma nastalog navedenim propisom, kao i sporosti u donošenju novih propisa, a pre donošenja Zakona o obligacionim odnosima i njegovog stupanja na snagu 1. oktobra 1978. godine, za oblast trgovinskog prava odlučujući značaj imale su Opšte uzanse za promet robom iz 1954. godine, kao i brojne posebne uzanse kojima su regulisani pravni odnosi u pojedinim delatnostima (Posebne uzanse za trgovinu žitaricama iz 1960. godine, Posebne uzanse o građenju iz 1977. godine, Posebne uzanse o ugostiteljstvu iz 1983. godine i dr.).

Zakonom o obligacionom odnosima (dalje u tekstu: ZOO), po prvi put posle Drugog svetskog rata, ugovor o osiguranju regulisan je sa šezdeset osam članova. Njegovim donošenjem prestala je potreba za primenom opštih i posebnih uzansi donetih pre njegovog stupanja na snagu. Primena opštih i posebnih uzansi, međutim, i dalje je moguća u dva slučaja: (1) ako su strane u obligacionim odnosima ugovorile njihovu primenu i (2) ako iz okolnosti proizlazi da su njihovu primenu htele. Značaj uzansi za pravo osiguranja ogleda se u tome što je nekima od njih posvećen određen broj pravila u vezi s pravnim poslom osiguranja, što takođe predstavlja predmet našeg proučavanja u ovom radu.

⁸ „Običajno pravo u tri dela obnovljene Kraljevine Mađarske“ (*Opus tripartitum juris consuetudinarii incltyli regni Hungariae*).

⁹ Robert John Weston Evans, „Opus Tripartitum“ in Hans J. Hillebrand, ed., *The Oxford Encyclopedia of the Reformation*, Oxford, 1996 (online 2005).

¹⁰ Slobodan Samardžić, *Požarno osiguranje u sistemu neživotnog osiguranja*, Beograd, 2009, str. 27.

¹¹ *Ibidem*, str. 28.

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

Iako je Zakon o obligacionim odnosima trebalo da svojim načelima i odredbama otkloni svaku sumnju u izvesnost u pravima i obavezama ugovornih strana u pravnim poslovima koji su njime regulisani, u vezi s nekim ugovorima to se nije desilo u potpunosti. To naročito važi za ugovore o pružanju privrednih usluga skladištenja i špedicije u vezi s obavezom osiguranja i pitanja tumačenja i značenja izraza „uobičajeni rizici“.

Opšte je pravilo da su skladištar i špediter dužni da osiguraju robu primljenu na čuvanje ili otpremu samo ako je to ugovoreno. Međutim, ako ostavodavac ili špediterov komitent ne odrede rizike od kojih skladištar i špediter treba da osiguraju robu, dužni su da robu osiguraju od uobičajenih rizika.¹² Iz Komentara pomenute odredbe ZOO prof. Jankoveca proizlazi da se pod uobičajenim rizicima podrazumevaju rizici za koje osiguravači pružaju pokriće po posebnim uslovima za osiguranje uskladištene robe i zaliha u hladnjačama.¹³ Radilo se o jednom, za poslovnu praksu skladištara praktičnom stavu koji ne proširuje obavezu skladištara da zaključi osiguranje i od rizika za koje na tržištu osiguranja nije moguće pronaći pokriće. U tom smislu, odgovornost skladištara zbog gubitka ili oštećenja stvari postojala bi samo ako bi do toga došlo zbog nekog od rizika za koje je bilo moguće zaključiti osiguranje.¹⁴ Skladištar, komisionar i špediter odgovaraju i za slučajnu propast ili oštećenje robe ako je nisu osigurali, a prema nalogu su bili dužni to učiniti (ZOO, čl. 776, st. 2). U dispoziciji komitent mora posebno naglasiti sve ono što zahteva od špeditera kao njegovu sporednu obavezu, što nije propisano i uobičajeno. To se naročito odnosi na zaključenje transportnog osiguranja ili osiguranja robe u skladištu.¹⁵

U oblasti skladištarske delatnosti, od 2009. godine, Zakon o javnim skladištima za poljoprivredne proizvode otklanja nedoumicu u pogledu izraza „uobičajeni rizici“ tako što je propisana obaveza javnog skladišta da osigura uskladištenu robu od požara, poplave, zemljotresa i krađe u roku od tri dana od dana prijema poljoprivrednog proizvoda.¹⁶ Međutim, pomenuti izraz, kao što vidimo, ne obuhvata sve uobičajene rizike čije ostvarenje može prouzrokovati štetu na uskladištenim ili transportovanim stvarima. S obzirom na to da se radi o obavezi zaključenja ugovora o osiguranju za robu primljenu u skladište, smatramo da je interes ostavodavca adekvatno zaštićen, s tim da ovaj zakon ne sadrži odredbu kojom bi ga upozorio na mogućnost da posebno ugovori i pokriće dopunskih rizika kako je to, u oblasti plovidbenog osiguranja, učinjeno u Zakonu o trgovačkom brodarstvu u oblasti plovidbenog osiguranja (čl. 543, st. 3 u vezi sa st. 4).

Prema ZOO, špediter nije obavezan da osigura robu koju je uskladištio u svom skladištu, izuzev ako je to ugovoreno. Ako je pak ugovoreno da se sprovede osiguranje uskladištene robe, a nisu određeni rizici od kojih robu treba osigurati,

¹² ZOO, čl. 732 i čl. 837.

¹³ Ivica Jankovec, Komentar uz čl. 732 Zakona o obligacionim odnosima, Perović, S. (gl. redaktor) u: *Komentar Zakona o obligacionim odnosima*, knjiga II, Beograd, 1995, str. 1268.

¹⁴ *Ibidem*.

¹⁵ Slobodan Jovanović, *Obaveze špeditera u vezi zaštite komitenta u jugoslovenskom i uporednom pravu*, Novi Sad, 1997, str. 59.

¹⁶ Zakon o javnim skladištima za poljoprivredne proizvode, *Službeni glasnik RS*, br. 41/2009 i 44/2018 – dr. Zakon, čl. 42, st. 2.

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

špediter bi trebalo da zatraži od komitenta da utvrdi rizike za koje treba sprovesti osiguranje¹⁷ (Jovanović, 1997, 73). Ovde vredi istaći da su, prema Zakonu o javnim skladištima iz 1930. godine (čl. 28, st. 2), javna skladišta bila dužna da robu koju prime osiguraju na njenu punu vrednost samo za štete od požara. I po ovome se vidi kako se razvijala svest o neophodnosti proširenja osiguravajućeg pokrića i kako se ona kasnije ispoljavala širenjem spiska rizika za koje se propisuje zakonska obaveza osiguranja.

Uobičajeni rizici referiraju na one rizike koji, prema razumnom očekivanju, mogu prouzrokovati štetu na stvari. Razumna očekivanja bi u najmanju ruku trebalo da uzimaju u obzir prirodu stvari, vrstu prevoznog sredstva i puta. Opšta uzansa br. 243, st. 3 određuje da stranka koja ima obavezu da zaključi osiguranje robu mora osigurati od rizika za koje je to uobičajeno u mestu ispunjenja ugovora za tu vrstu poslova i robe, vodeći računa o rizicima kojima je roba izložena na putu od mesta otpreme do mesta opredeljenja.¹⁸ Pomenuta uzansa praktično ne ograničava obavezu zaključenja osiguranja robe u pogledu obima osiguravajućeg pokrića samo na osnovne rizike koji se javljaju u pojedinim delatnostima ili kod određenih vrsta prevoza. Suprotno navedenom, prof. Carić u komentaru čl. 837 ZOO posvećenog obavezi špeditera da osiguraju pošiljke navodi da izraz „uobičajeni rizici“ ne obuhvata „specifične, ratne i političke rizike“¹⁹, pri čemu on pod specifičnim rizicima podrazumeva rizike svojstva stvari. Svakako se možemo složiti da se pod uobičajenim rizicima ne mogu podrazumevati ratni i politički rizici ali, kao što vidimo, negativan stav u pogledu „specifičnih“ rizika (a i ostalih dopunskih) čini se suprotnim pravilu iz pomenute uzanse koja se primenjuje na osnovu izričite ili prećutne volje ugovornih strana. To znači da ugovarači mogu ugovoriti primenu poslovnog običaja koji određuje da se pod uobičajenim rizicima podrazumevaju i rizici konkretne vrste robe koja je predmet ugovora. U tom smislu je i odgovarajuća odredba posvećena osiguranju pošiljki u francuskim opštim uslovima poslovanja špeditera, po kojima se pod uobičajenim rizicima ne smatraju samo ratni i politički rizici.²⁰ Nemački uslovi poslovanja špeditera ovlašćuju špeditera da samostalno proceni vrstu i obim osiguravajućeg pokrića i zaključi osiguranje prema „uobičajenim tržišnim uslovima“, uključujući i rizike prirodnih svojstava robe, pri čemu ima obavezu da komitenta obavesti ako osiguranje ne može zaključiti zbog prirodnih svojstava robe ili iz drugih razloga.²¹

¹⁷ Slobodan Jovanović, *Obaveze špeditera u vezi zaštite komitenta u jugoslovenskom i uporednom pravu*, Novi Sad, 1997, str. 73.

¹⁸ Slično pravilo sadrži i Posebne uzanse o građenju iz 1977. godine, uzansa br. 95 koja obavezuje izvođača građevinskih radova da osigura radove, materijal i opremu za ugrađivanje od uobičajenih rizika i istovremeno određuje da se „uobičajeni rizici“ određuju „(...) naročito prema vrsti radova, mestu na kome se radovi izvode, vrsti i svojstvima materijala i opreme koji se ugrađuju.“

¹⁹ Slavko Carić, Komentar uz čl. 837 Zakona o obligacionim odnosima, Perović, S. (gl. redaktor) u: *Komentar Zakona o obligacionim odnosima*, knjiga II, Beograd, 1995, str. 1387.

²⁰ *Conditions Générales de Vente régissant les opérations effectuées par les opérateurs de transport et/ou de logistique* – Union des entreprises de transport et logistique de France, 2017, čl. 3.

²¹ *Allgemeine Deutsche Spediteurbedingungen 2017* – (dalje u tekstu: ADSp 2017), 1. Januar 2017 empfohlen vom Bundesverband der Deutschen Industrie (BDI), Bundesverband Großhandel, Außenhandel, Dienstleistungen (BGA), Bundesverband Güter- kraftverkehr Logistik und Entsorgung (BGL), Bundesverband Möbelspedition und Logistik (AMÖ), Bundesverband Wirtschaft, Verkehr und Logistik (BWVL), Deutschen Industrie- und Handelskammertag (DIHK), Deutschen Speditions- und Logistikverband (DSLV) und Handels- verband Deutschland (HDE), čl. 21.4 i 21.5.

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

Razlozi iz kojih je za vlasnika robe koja se otprema i prevozi od velike važnosti osiguranje robe leže u načinu na koji funkcionišu druge vrste osiguranja. U pravnoj teoriji za ovu tvrdnju navođen je primer u kojem komitent može doći u zabludu u pogledu osiguranja robe u transportu, kada ga prevoznik obaveštava da je roba pokrivena njegovim osiguranjem od odgovornosti iz delatnosti.²² Opšte je poznato da pomenuta vrsta osiguranja ne pokriva štetu na robi koja nastaje ostvarenjem specifičnih i dopunskih rizika od kojih ona može biti ugrožena.

Zakonom o pomorskoj i unutrašnjoj plovidbi iz 1978. godine (čl. 748, st. 1) i danas važećim Zakonom o trgovačkom brodarstvu iz 2015. godine (čl. 543, st. 2) otklonjena je sumnja u vezi s tim šta se smatra uobičajenim rizicima u plovidbenim osiguranjima na sledeći način: ako u ugovoru o osiguranju nije drukčije određeno, plovidbenim osiguranjem pokrivaju se rizici kojima je osigurani predmeta za vreme plovidbe izložen: plovidbena nezgoda, elementarna nepogoda, eksplozija, požar i razbojništvo. Time je takođe određena sadržina obaveze lica koje zaključuje ugovor o plovidbenom prevozu za račun drugog lica u pogledu rizika koje treba osigurati kada vlasnik robe, pošiljalac, ne dâ izričit i jasan nalog za zaključenje transportnog (kargo) osiguranja. Navedena odredba je dispozitivne prirode, što znači da se ugovarači mogu sporazumeti i o tome da špediter potraži osiguravajuće pokriće i od karakterističnih rizika prema prirodi stvari koje se daju na prevoz ili na skladištenje, kao i sve druge dopunske rizike: lom, krađa, manjak iz bilo kojeg razloga, namerne radnje trećih lica itd.

Osim toga, prema Međunarodnom pravilu za tumačenje trgovačkih termina CIF (cena sa osiguranjem i vozarinom – *Cost, Insurance and Freight*), kada se roba prodaje i predaje na pomorski prevoz, prodavac je dužan da robu osigura prema minimalnom pokriću. Imajući u vidu navedeni kodifikovani poslovni običaj u međunarodnoj trgovini, ako kupac želi da ima osiguranje s proširenim pokrićem (dopunski i specifični rizici), onda to izričito pismenim putem mora da zahteva od prodavca ili da sam zaključi takav ugovor o osiguranju robe. U međunarodnoj trgovini uobičajeno minimalno pokriće podrazumeva osiguranje od rizika prema Klauzuli „C“ Instituta londonskih osiguravača za osiguranje robe u pomorskom transportu.^{23, 24}

²² Slobodan Jovanović, „Pravni položaj špeditera u transportnom osiguranju – Ugovor o transportnom osiguranju u korist komitenta“, *Pravni život*, br. 10, 2003, str. 1044.

²³ Klauzule za osiguranje transportnih rizika dobile se skraćeni naziv „Institutske klauzule“ po Institutu (Udruženju) londonskih osiguvača (*Institute of London Underwriters – ILU*), osnovanog 1884. godine, koji vrši standardizaciju i donošenje standardnog teksta uslova osiguranja u vidu kompleta klauzula. Klauzule se godišnje objavljuju u knjizi *Reference Book of Marine Insurance Clauses*, u izdanju Witherby & Co. Ltd., London, čije je poslednje, 79. izdanje objavljeno u januaru 2019. godine.

²⁴ Prema čl. 1 pomenute klauzule „C“ iz 2009. godine, roba je u pomorskom transportu osigurana od sledećih rizika:

1. požara ili eksplozije;
2. napuštanja, nasukanja, potonuća ili prevrtanja plovila;
3. prevrtanja ili iskliznuća iz šina kopnenog prevoznog sredstva;
4. sudara ili kontakta plovila, plovnog objekta ili prevoznog sredstva sa spoljnim objektom, osim sa vodom;
5. iskrcaja robe u pribežišnoj luci;
6. gubitka ili štete na predmetu osiguranja izazvanog žrtvovanjem u zajedničkoj havariji ili izbacivanjem tereta.

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

Kao što smo istakli, kupac sâm može zaključiti osiguranje robe u transportu ili o tome dati izričit i jasan nalog špediteru koji organizuje otpremu njegove robe.

Kada se radi o osiguranju robe u transportu, u poslovnoj praksi uloga špeditera se praktično svodi na izvršavanje naloga za zaključenje tačno određene vrste osiguravajućeg pokrića ili na posredovanje između komitenta i osiguravača (Jovanović, 2003, 1042). Zato je u pravnoj teoriji opšteprihvaćen stav da prilikom zaključivanja ugovora o osiguranju stvari komitenta od transportnih rizika špediter istupa u tuđe ime i za tuđ račun, odnosno u ime i za račun komitenta (Zelenika, 1980, 78; Stakić, 1970; Carić, 1995, 1375; Jovanović, 2003, 1042). Pomenuti stav potvrđen je i u odgovarajućim odredbama opštih uslova poslovanja špeditera (Conditions Générales de Vente, 2017, čl. 3; ADSp, 2017, čl. 21.6). Imajući u vidu to da zbog nepostojanja osigurljivog interesa špeditera na robu koju otprema i sukoba interesa špeditera ako bi zastupao osiguravača prilikom zaključenja ugovora o osiguranju robe u transportu, pravila ugovora o trgovinskom zastupanju ne bi se mogla primeniti na špeditera koji ima obavezu zaključenja ugovora o osiguranju (Jovanović, 2003, 1042). U tom smislu, ZOO propisuje posebno pravilo za lica koja ugovor o osiguranju zaključuju za tuđ račun ili račun lica koga se tiče (čl. 905, st. 1). Prema tom pravilu, špediter je dužan da ispunjava obaveze iz ugovora o osiguranju (plaćanje premije i sve druge obaveze), dok prava može ostvarivati samo s pristankom lica koje je vlasnik osiguranog interesa.

Dodatni način za određivanje širine pokrića transportnog osiguranja koje špediter ima obavezu da zaključi u slučaju da nalog komitenta za osiguranje ne sadrži posebne rizike propisali su Opšti uslovi poslovanja međunarodnih logističara i špeditera Republike Srbije²⁵ (čl. 36, st. 2) i Posebne uzanse u poslovanju špediterskih društava u Republici Srbiji²⁶ iz 2018. godine (čl. 38, st. 2), tako da je špediter, kad nalog za osiguranje ne sadrži posebne rizike koje treba pokriti osiguranjem, dužan pokriti samo osnovne transportne rizike. Odgovor na pitanje šta je obuhvaćeno osnovnim transportnim rizicima daje nam gorecitirana odredba iz Zakona o trgovačkom brodarstvu. Alternativno određivanje spiska osnovnih transportnih rizika od kojih će roba biti osigurana može se izvršiti na tržištu osiguranja, prema raspoloživim uslugama osiguranja robe u prevozu (iz uslova osiguranja). Ali i tu mogu postojati razlike u vezi s rizicima koje pokrivaju pojedini osiguravači pod osnovnim transportnim rizicima, tako da dilema u vezi s tim šta se smatra pod osnovnim transportnim rizicima ni pomenutom odredbom nije u potpunosti otklonjena. To je jednostavno posledica činjenice da poslovne običaje odlikuje dinamičnost i češća sklonost ka manjim ili većim promenama u skladu s tržišnim prilagođavanjem poslovne prakse osiguravača i sudskom praksom.²⁷ U tom smislu ističemo da su uslovi pomorskog kargo osiguranja iz tzv. Lojdove polise

²⁵ Službeni glasnik RS, br. 105/2008.

²⁶ Službeni glasnik RS, br. 99/2018.

²⁷ Braun navodi da su se uslovi osiguranja Lojdove polise S. G. menjali mnogo puta tokom njene primene, pri čemu je nekim izmenama proširivan spisak osiguranih rizika, dok je drugim izmenama zadržavan isti broj osiguranih rizika, ali su se menjale okolnosti pod kojima je osiguranik mogao da podnese odštetni zahtev (Robert H. Brown, *Marine Insurance – Cargo Practice*, London, 1998, str. 155).

osiguranja broda i robe (*Ship and Goods /S. G./ Lloyd's Policy*) zamenjeni klauzulama A, B i C Instituta londonskih osiguravača 1963. godine, koje su inovirane verzijama 1982. i poslednjom iz 2009. godine.

II. Zaključak

Iako je donošenje Zakona o obligacionim odnosima degradiralo značaj opštih i posebnih uzansi, pogotovo u oblasti ugovornog prava osiguranja, on je i dalje u nekim odredbama ostao nepotpun. Odredbama o minimumu rizika od kojih su skladištari i špediteri dužni da zaključe osiguranje u korist ostavodavca ili komitenta u situacijama kada oni sami to pitanje nisu odredili u ugovoru ili nalogu, upotrebom neodređenog izraza „uobičajeni rizici“ smatramo da je ZOO time samo uputio na primenu opštih uslova poslovanja špeditera (kao posebnom poslovnom običaju) i, supsidijerno, na pravila o osiguranju iz Opštih uzansi za promet robom iz 1954. godine (kao opštem poslovnom običaju u odnosu na Opšte uslove poslovanja međunarodnih logističara i špeditera iz 2008. godine), pri čemu su i jedan i drugi (autonomni) pravni izvor ugovorne prirode. I umesto da pozitivnim normiranjem odredi minimum rizika koje su gorenavedeni pružaoci privrednih usluga dužni da osiguraju u ime i za račun njihovog klijenta i time otkloni svaku sumnju u pogledu izvesnosti navedene obaveze, upotrebljeni izraz je spornu situaciju samo ostavio nerešenom. Time je pružaocima usluga prepušteno da sami svojim uslovima poslovanja (i još neverovatnije – posebnim uzansama?!) određuju sadržinu „uobičajenih rizika“, da sadržinu „uobičajenih rizika“ određuju u skladu s elementima iz Opšte uzanse za promet robe br. 243, da po svom izboru zaključe ugovor o osiguranju u skladu s dostupnim uslovima sa tržišta osiguranja ili da, ipak, kod klijenta insistiraju da postignu poseban pismeni sporazum koji bi obuhvatio sve rizike u skladu s potrebama i željama klijenta.

Neizvesnost sadržine upotrebljenog izraza u ZOO razrešena je Zakonom o javnim skladištima za poljoprivredne proizvode izričitim navođenjem (imperativnim metodom) koji su to rizici, ali ne i za ostale tipove javnih skladišta, dok u oblasti plovidbenih osiguranja Zakon o trgovačkom brodarstvu sadrži oborivu pretpostavku o minimumu pokrivenih rizika, pod uslovom da u ugovoru o osiguranju nije drukčije određeno.

Imajući u vidu rešenja iz dva navedena zakona, koja posebno kao *lex specialis* uređuju pomenuta pitanja neregulisana Zakonom o obligacionim odnosima, ostaje nejasno zbog čega su i u Radnom tekstu Građanskog zakonika Republike Srbije od 29. maja 2015. godine preuzete identične odredbe iz ZOO, koje su analizirane u ovom radu. Zato je moguće na nekoliko načina unaprediti tekst ZOO, odnosno budućeg Građanskog zakonika RS.

Kada se radi o odredbi čl. 732 (kad postoji dužnost skladištara da zaključi osiguranje):

- Prvi je da se umesto izraza „uobičajeni rizici“ u čl. 732, st. 2 ZOO upotrebi izraz „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje,

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

skladištar je dužan da osigura robu u skladu s dostupnim uslovima tržišta osiguranja po svom izboru“; ili

- Drugi da se odredba čl. 732, st. 2 zameni sledećom: „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje, skladištar je dužan osigurati uskladištenu robu od požara, poplave, zemljotresa i krađe u roku od tri dana od dana prijema stvari na čuvanje“; ili
- Treći, da se ceo čl. 732 zameni sledećim: „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje, skladištar ne snosi odgovornost za oštećenje ili gubitak deponovane stvari usled okolnosti koje nije mogao sprečiti, otkloniti ili izbeći.“

Kada se radi o odredbi čl. 837 (kad postoji dužnost otpremnika da osigura pošiljku):

- Prvi je da se umesto izraza „uobičajeni rizici“ u čl. 837, st. 2 ZOO upotrebi izraz „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje, otpremnik je dužan da osigura robu u skladu s dostupnim uslovima tržišta osiguranja po svom izboru“. Ovo je rešenje po ugledu na nemačke Opšte uslove poslovanja špeditera iz 2017. godine; ili
- Drugi, da se odredba čl. 837, st. 2 zameni sledećom: „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje, otpremnik je dužan osigurati stvari od rizika kojima je ona izložena za vreme transporta: od saobraćajne nezgode, elementarne nepogode, eksplozije, požara i razbojništva.“ Ovo je rešenje po ugledu na odredbu čl. 543, st. 2 Zakona o trgovačkom brodarstvu, čime bi ZOO u tom delu bio usklađen sa tim zakonom; ili
- Treći, da se ceo čl. 837 zameni sledećim: „Ako ugovorom nije određeno koje rizike treba da obuhvati osiguranje, otpremnik ne snosi odgovornost za oštećenje ili gubitak pošiljke usled okolnosti koje nije mogao sprečiti, otkloniti ili izbeći.“

Literatura

- *Allgemeine Deutsche Spediteurbedingungen 2017 – ADSp2017*, 1. Januar 2017 empfohlen vom Bundesverband der Deutschen Industrie (BDI), Bundesverband Großhandel, Außenhandel, Dienstleistungen (BGA), Bundesverband Güterkraftverkehr Logistik und Entsorgung (BGL), Bundesverband Möbelspedition und Logistik (AMÖ), Bundesverband Wirtschaft, Verkehr und Logistik (BWVL), Deutschen Industrie- und Handelskammertag (DIHK), Deutschen Speditions- und Logistikverband (DSLV) und Handels- verband Deutschland (HDE).
- Brown, H. R. *Marine Insurance – Cargo Practice*, London, 1998.
- Carić, S. Komentar uz čl. 837 Zakona o obligacionim odnosima, Perović, S. (gl. redaktor) u: *Komentar Zakona o obligacionim odnosima*, knjiga II, Beograd, 1995, str. 1385–1387.
- *Conditions Générales de Vente régissant les opérations effectuées par les opérateurs de transport et/ou de logistique* – Union des entreprises de transport et logistique de France, 1.1.2017.
- Evans, R. J. W. “Opus Tripartitum” in Hans J. Hillebrand, ed., *The Oxford Encyclopedia of the Reformation*, Oxford, 1996 (online 2005).

S: Jovanović: Tumačenje izraza „uobičajeni rizici“ u vezi sa obavezom skladištara i špeditera da zaključe ugovor o osiguranju u Republici Srbiji

- Jankovec, I. Komentar uz čl. 732 Zakona o obligacionim odnosima, Perović, S. (gl. redaktor) u: *Komentar Zakona o obligacionim odnosima*, knjiga II, Beograd, 1995, str. 1268.
- Jovanović, S. „Pravni položaj špeditera u transportnom osiguranju – Ugovor o transportnom osiguranju u korist komitenta“, *Pravni život*, br. 10, godina LII, 2003, str. 1041–1049.
- Jovanović, S. *Obaveze špeditera u vezi zaštite komitenta u jugoslovenskom i uporednom pravu*, Novi Sad, 1997.
- Nikolić, D. „Dva veka Austrijskog građanskog zakonika (1811–2011)“, *Zbornik Matice srpske za društvene nauke*, 135 (2), 2011, str. 313–327.
- Opšti uslovi poslovanja međunarodnih logističara i špeditera, *Službeni glasnik RS*, br. 105/2008.
- Opšte uzanse za promet robe, *Službeni list FNRJ*, br. 15/1954.
- Panov, I. S. *Porodično pravo*, Beograd, 2016.
- Posebne uzanse o građenju, *Službeni list SFRJ*, br. 18/1977.
- Posebne uzanse u poslovanju špediterskih društava u Republici Srbiji, *Službeni glasnik RS*, br. 99/2018.
- Samardžić, S. *Požarno osiguranje u sistemu neživotnog osiguranja*, Beograd, 2009.
- Slavnić, J. *Privredno / Trgovinsko pravo sa osnovama Građanskog prava*, Beograd, 2006.
- Stakić, M. *Međunarodni transport i špedicija*, Beograd, 1970.
- Stojčević, D. *Rimsko privatno pravo*, Beograd, 1985.
- Zakon o javnim skladištima za poljoprivredne proizvode, *Službeni glasnik RS*, br. 41/2009 i 44/2018 – dr. Zakon.
- Zakon o obligacionim odnosima – ZOO, *Službeni list SFRJ*, br. 29/1978, 39/1985, 45/1989 – USJ, 57/1989, *Službeni list SRJ*, broj 31/1993.
- Zakon o pomorskoj i unutrašnjoj plovidbi, *Službeni list SRJ*, br. 12/98, 44/99, 74/99 i 73/2000 i *Službeni glasnik RS*, br. 101/2005 – dr. zakon i 85/2005 – dr. zakon.
- Zakon o trgovačkom brodarstvu, *Službeni glasnik RS*, br. 96/2015 i 113/2017 – dr. Zakon.
- Zelenika, R. *Pravno reguliranje špediterske djelatnosti u Jugoslaviji*, Rijeka, 1980.

UDK: 340.132:781.68:368.025.6:368.073:339.542+ 368.182.31(497.11)
doi:10.5937/tokosig1904021J

Professor Slobodan O. Jovanović, PhD¹

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 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

¹ Faculty of Business Economics and Entrepreneurship, Belgrade
President of the Serbian Insurance Law Association, Belgrade
E-mail: nsjovanovic@sbb.rs
Paper received on: October 10, 2019
Paper admitted on: November 27, 2019

S. Jovanović: 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

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 living³. 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 1495⁶ 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 traditions⁷. 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.

**S. Jovanović: 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**

16th-century collection of Hungarian common law⁸ 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 lightning¹¹, 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.

S. Jovanović: 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

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 risks¹². 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 stores¹³. 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.

***S. Jovanović: 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***

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 effected¹⁷ (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 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 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.

S. Jovanović: 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

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 effectués 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 (DSLVL) 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.

***S. Jovanović: 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***

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.^{23,24} 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 Serbia²⁵ (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.

S. Jovanović: 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

usages of business of freight forwarding companies in the Republic of Serbia²⁶ 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).

**S. Jovanović: 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**

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

S. Jovanović: 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

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.”

Literature

- *Allgemeine Deutsche Spediteurbedingungen 2017 – ADSp2017*, 1. January 2017 empfohlen vom Bundesverband der Deutschen Industrie (BDI), Bundesverband Großhandel, Außenhandel, Dienstleistungen (BGA), Bundesverband Güterkraftverkehr Logistik und Entsorgung (BGL), Bundesverband Möbelspedition und Logistik (AMÖ), Bundesverband Wirtschaft, Verkehr und Logistik (BWVL), Deutschen Industrie- und Handelskammertag (DIHK), Deutschen Speditions- und Logistikverband (DSL) und Handels- verband Deutschland (HDE).
- Brown, H. R. *Marine Insurance – Cargo Practice*, London, 1998.
- Carić, S. Comment to the Article 837 of the Law of Contracts and Torts, Perović, S. (editor in chief) in the: *Commentary to the Law on Contracts and Torts*, volume II, Beograd, 1995, pp. 1385–1387.
- *Conditions Générales de Vente régissant les opérations effectuées par les opérateurs de transport et/ou de logistique* – Union des entreprises de transport et logistique de France, 1.1.2017.
- Evans, R. J. W. “Opus Tripartitum” in Hans J. Hillebrand, ed., *The Oxford Encyclopedia of the Reformation*, Oxford, 1996 (online 2005).
- Jankovec, I. Comment to the Article 732 of the Law of Contracts and Torts, Perović, S. (editor in chief) in: *Commentary to the Law on Contracts and Torts*, volume II, Beograd, 1995, pp. 1268.
- Jovanović, S. “Pravni položaj špeditera u transportnom osiguranju – Ugovor o transportnom osiguranju u korist komitenta”, *Legal Life*, no. 10, LII, 2003, pp. 1041–1049.
- Jovanović, S. *Obaveze špeditera u vezi zaštite komitenta u jugoslovenskom i uporednom pravu*, Novi Sad, 1997.
- Nikolić, D. “Dva veka Austrijskog građanskog zakonika (1811–2011)”, *Proceedings of Matica srpska for Social Sciences*, 135 (2), 2011, pp. 313–327.
- General Terms and Conditions of International Logistics and Freight Forwarders, *RS Official Gazette*, no. 105/2008.
- General Usage of Goods in Trade, *FNRJ Official Gazette*, no. 15/1954.
- Panov, I. S. *Family Law*, Beograd, 2016.
- Particular Usage of Construction, *RS Official Gazette*, no. 18/1977.
- Particular Usage of Freight Forwarding Business in the Republic of Serbia, *RS Official Gazette* no. 99/2018.
- Samardžić, S. *Požarno osiguranje u sistemu neživotnog osiguranja*, Beograd, 2009.
- Slavnić, J. *Privredno / Trgovinsko pravo sa osnovama Građanskog prava*, Beograd, 2006.
- Stakić, M. *Međunarodni transport i špedicija*, Beograd, 1970.

***S. Jovanović: 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***

- Stojčević, D. *Rimsko privatno pravo*, Beograd, 1985.
- Law on Public Warehouses for Agricultural Products, *RS Official Gazette*, nos. 41/2009 and 44/2018 – al. Law.
- Law on Contracts and Torts – ZOO, *SFRJ Official Gazette* nos. 29/1978, 39/1985, 45/1989 – USJ, 57/1989, *SRJ Official Gazette*, no. 31/1993.
- Law on Maritime and Inland Navigation, *SFRJ Official Gazette* nos. 12/98, 44/99, 74/99 and 73/2000 and *RS Official Gazette* nos. 101/2005 – al. Law and 85/2005 – al. Law.
- Law on Merchant Shipping, *RS Official Gazette* nos. 96/2015 and 113/2017 - al. Law.
- Zelenika, R. *Pravno reguliranje špeditorske djelatnosti u Jugoslaviji*, Rijeka, 1980.

*Translated by: **Bojana Papović***