SOME ECONOMIC VIEWPOINTS ON THE LIMITATION OF LIABILITY IN TRANSPORT

1. INTRODUCTION

The limitation of liability is a legal institute that can be found in international conventions as well as in local regulations in different countries. It means a deviation from the classical principle of law of obligation neminem laedere and full compensation of damages. A lot has already been written on reasons for the limitation of liability in transport. One of the few arguments pro limitation of liability that does not regard naphthalene today, is insurability. If I avoid the question whether the limitation of liability is an economic or legal question (which calls to mind the question whether the chicken or the egg came first), I can say that the institute has been too few times enlightened from the economic side. In the end, the figures are those that provide the answer to the questions of relations among the participants in transport. The article is divided into three separate questions that together compose a section of the answers on some economic viewpoints on the limitation of liability in transport (cargo owners and carriers). The carriers with their liability insurance and the cargo owners with cargo insurance are calculating by taking in consideration the limitation of liability. The limitation of liability in the last thirty years has been planned precisely in relation to insurance in transport. The second important economic viewpoint on the limitation of liability is the problem of preserving the value of the amounts of the limitation of liability. The fall of the real currency value is their constant companion. Because of this fact the carrier is perpetually in a position of advantage. The third question, which is also problematic
regarding the limitation of liability in transport, presents the question of different cargo values as related to the uniform limitation of liability.

2. THE LIMITATION OF LIABILITY AND INSURANCE

Passengers and cargo are exposed to numerous dangers during transport. With cargo transport, it is important from an economic point of view that the damage be reduced to the minimal possible measure, and that at the same time insurance for damage that exceeds the commercially acceptable danger for transport users is available. Transport insurance is closely connected to the limitation of liability system. The liability insurance is an important part of the cost of the carrier. On the other side, there is the cargo insurance or accident insurance that is an important part of the cost that is charged to the cargo owner or the passenger. So when the carrier charges the cargo owner or passenger the freight or fare, the insurance premium for the liability insurance is an important parameter in the cost. On the other hand, the liability of the carrier is an important parameter in the cargo transport for the cargo insurance company. The freight or fare in transport can be relatively lower since the costs of the liability insurance are relatively lower-because of the limitation of liability. Insurance policies in maritime transport are arranged on the premise that the owner of the ship can limit his liability. Insurance companies that offer liability insurance adapt their insurance regimes to the fact that in the payment of the insurance premium for the insurance cases they are indirectly part of the same benefits as the owner of the ship. Buglass says that the insurance premiums would be raised by 25 to 30 percent if the ship owners no longer had protection in the form of limitation of liability. When in 1970 in the USA the Water Quality Improvement Act was passed, which among other things

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regulates the liability regarding the pollution of water; it limited the liability to fourteen million American dollars. That should have been the amount that the insurance market could bear at that moment. Regarding the height of the amounts of the limitation of liability, two concepts\(^3\) collided in the 70’s. The first one was the concept of \textit{fortune de mer}. This concept tries to tie together the limitation amount and the ship value. The defenders of the second concept believed that it is necessary to withdraw from that, that the liability is bound \textit{in rem} and that it is necessary to take insurability as a lead in defining the amounts of the limitation of liability. The latter concept has prevailed. This can be seen from two points in the 1976 LLMC\(^4\). The amounts of the limitation of liability have increased essentially and the cases where the person responsible has no right to limit are rare. The defenders of the limitation of liability affirm that it is possible to insures the liability only for a realistic insurance limit (the insurance that is accessible at reasonable prices or expenses). Insurance companies today assert that the limitation of liability is a necessity because it ensures economic safety and foresight\(^5\).

Limited liability does not render compensation for the entire damage possible for the cargo owners. It is clear that the cargo owners urgently need better protection from economic consequences of cargo loss and damage. Greater economic safety\(^6\) is offered by the cargo insurance that plays a leading role in “compensation of the damage” in cargo transport. In cargo insurance the principle holds true that the insurance company compensates


\(^4\) \textit{Convention on Limitation of Liability for Maritime Claims} was adopted in London in 1976.


for the damage (it would be right to say: pays insurance benefits) even or especially if the carrier is responsible for the damage. This has to be understood so that the insurance company compensates for the damage first to the insured person, the cargo owners and then in the recourse process it demands the reimbursement of the paid amount of the compensation from the carrier. Because it would be too hard for the carriers to pay the damages caused, they insure their liability. The maritime carriers insure their liability in P&I insurance companies (special mutual insurance companies). This is a particularity in maritime transport because carriers in other transport branches do not insure the liability in special insurance companies but in classical insurance companies in the open insurance market\(^7\). Irrespective of this particularity, we can talk about the overlap of cargo insurances and liability insurance in transport. Where it comes to such an overlap, a question immediately emerges - to what extent will the insurance company that has taken the cargo insurance with the cargo owner cover the damage to the cargo and to what extent will the P&I club (or the other insurance company that insures the liability). Several parameters influence this relation. The decision whether the insurance company of the cargo insurance will pay the insurance benefit for the damage to the cargo, which will generally happen, the decision for an eventual recourse procedure against the carrier (or his insurance company), the success in recourse procedures and cases where the damages to cargo emerge but the carrier can’t be held responsible for such damages. In the latter, we can count cases of damage to cargo for which the carrier for an indefinite reason is not responsible (e.g. Act of God, if the transport is one where there is a strict liability of the carrier, as also cases that are known only to maritime transport: error in navigation or management of the ship and the fire statute). In cargo insurance it has to be kept in mind that also numerous cases of damage to cargo exist that are not covered by the insurance and the particularity of short distance

transports. In other words, over a short distance the cargo owners very rarely conclude cargo insurance.

A very important aspect of transport insurance is also the extent of the cover. Usually insurance in transport does not cover all of the damages that can originate from the transport of cargo. The extents of insurance coverages that are offered by the insurance companies can be very different, besides the fact that the content of the insurance contract is also in the autonomy of the parties of the contract. The consequence is that there are many cases of damage that cargo owners suffer in which the insurance company is not bound to pay out the insurance benefit. Usually the insurance company pays out the insurance benefit for physical damage, for cargo damage and loss of cargo. Insurance usually does not cover different indirect damage (e.g., loss of market share) or damages due to delay in the delivery. Even if it is damage to the cargo or a loss of cargo it often happens that the insurance company does not cover all of the damage incurred. For such states there are more reasons. Usually the cargo insurance does not cover damages that are a consequence of war risks but only that damage that is a consequence of civil risks. War risks are included only by a special agreement. The same goes for risks such as authority measures, civil commotions, strikes and the like. The insurance companies offer covering extents that represent different levels of protection. The clients decide by themselves the extent of the coverage when estimating the eventual level of risk and premium height that is available on the insurance market.

Cargo owners in maritime transport decide very often for minimal insurance coverage in cargo insurance. Namely, the price of such insurance is 1/3 or even less of the premium for all coverages that are usually offered by the insurance companies. In maritime transport this was the free from particular average (FPA) clause in accordance with the old S.G. policy that today is almost never used. Today instead of the FPA, the MAR policy along with In-
stitute Cargo Clauses is used. Institute Cargo Clauses (C)\(^\text{11}\) offer coverage for the same risks as the FPA once did. It regards the loss of or damage to the subject-matter insured reasonably attributable to fire or explosion, vessel or craft being stranded grounded sunk or capsized, overturning or derailment of land conveyance, collision or contact of vessel craft or conveyance with any external object other than water, discharge of cargo at a port of distress or the loss of or damage to the subject-matter insured caused by general average sacrifice and jettison. Such insurance offers covering only for risks that derive from a severe accident of the ship. Damages that originate from other reasons (e.g. theft, handling of the goods), are not taken into consideration. Also on parity CIF\(^\text{12}\) it suffices if the vendor insures such (the lowest) coverage of risks. Therefore, as the cargo owners usually decide for the narrowest covering of risks, the liability and the limitation of liability of the carrier is very important for them.

The liability regime of the carrier greatly influences the relation between the burden that in the balancing of the risks in transport on one side carry the insurance companies that offer cargo insur-

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9 The policy was developed in England where it has been used by Lloyd’s from 1779 until recently. With the policy S. G. (Ship and Goods) the ship and the cargo were insured. The use of this policy has died away recently. It was replaced by the modern MAR policy - its own model was also made within the UNCTAD. Pirs A., Transportno zavarovanje, Fakulteta za pomorstvo on promet, Portoroz, 2000, p. 108.

10 MAR is an abbreviation for New Marine Policy Form. In comparison with the S. G., the MAR policy does not contain insurance general terms and conditions that are entirely comprised in the Institute Clauses. Taking into account that from the field of transport insurance no convention was accepted, the UNCTAD went on with its attempt. It has prepared two samples of clause sets, namely two versions for hull insurance and three versions for cargo insurance. The Institute of London Underwrites has quickly reacted to the UNCTAD action and exchanged the old S. G. policy with the modern MAR policy so that it would not lose the world primacy in marine insurances. Pirs A., Transportno zavarovanje, Supra 9, pp. 109 and 131.

11 The Institute Clauses are named after the Institute of London Underwrites which was founded in 1884. Institute of London Underwrites has a very important role in the standardization of the insurance terms and conditions for marine insurances. Ibidem, pp. 109 and 131.

ance and on the other the insurance companies that offer liability insurance. This antagonism is especially felt in maritime transport where the cargo insurance and the liability insurance markets are divided. In property insurances (non-marine) the right of the insurance company to recourse against the party that caused the damage or his insurance company is usually very limited. But this is not the case in transport insurances and for the recourse of cargo insurance companies against liability insurance companies. Selvig\textsuperscript{13} says that the reason for this condition is that in marine insurance the insurance companies regularly sue in recourse procedures. Recourse actions play an important role in transport insurance because the loss ratio of each maritime carrier is the basis of defining his P&I premium. The arrangement of the burden between the cargo insurance companies and the insurance companies that insure liability is mostly dependent on the success in recourse actions of cargo insurance companies. In maritime transport the English and partially also the Scandinavian P&I clubs have practically closed (incapacitated the access of other insurance companies) the market of liability insurance of maritime carriers.

The relation between cargo insurance and liability insurance is defined by the liability and limitation of liability so that the height of the premiums of the cargo insurance companies and the insurance companies that insure the liability depends on the attribution of the damage burden on the cargo. This is most obvious in the case of the error in navigation or management of the ship and the fire statute along with which one could also transfer the same rule to a higher or lower limitation of liability of the carrier. Most of the damages to the cargo that are the result of an error in navigation or management of the ship and the fire statute are born by the cargo insurance companies. The cargo insurance company cannot refund the paid insurance benefit from the liable person (carrier) in recourse actions because of Hague or Hague Visby rules. At the moment when the cargo insurance companies would have the possibility to raise part of the return of the paid insurance ben-

\textsuperscript{13} Selvig E., \textit{supra} 1, p. 311.
efits in recourse procedures, they could lower the premiums for insurance. The opposite would come to raising the P&I premiums because the P&I clubs would have to carry a greater burden in paying out for the liability insurance as they have it now. Selvig says that out of the liability insurance the P&I clubs in Europe cover approximately 10 per cent of the aggregated paid out insurance benefits for damages on cargo (in the USA that share should be 20 per cent). The remaining share burdens the cargo insurance companies. Each stricter relation towards the liability of the carrier will show up in an increased percentage of the burden for the insurance companies. To what change it will come to is hard to calculate because the distribution of the burden is influenced by numerous parameters of which many are subjective. One such, which is dependent on the will of the cargo insurance companies, is deciding on recourse actions (i.e. whether the cargo insurance company will sue the carrier).

The relation between cargo insurance and liability insurance has an additional extension in that there are different interests between developed countries and countries of the third world. This is true in spite of the fact that cargo insurance companies as liability insurance companies own the capital in developed countries. The insurance market is complaining that the liability of the carriers is more and more rigorous. The developed countries are complaining that in the United Nations non-maritime countries that defend only the interest of cargo owners overrule traditional maritime countries. The consequence of such overrules were the Hamburg rules (United Nations Convention on the Carriage of Goods by Sea, 1978) that precisely for this reason never really began to shine in full splendor. As this was not enough, the developed countries warn that it would seem that also the courts of law are more and more disinclined to honor the institute of limitation

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14 The paid out insurance benefits for the liability for the damage caused on the cargo usually represents from 1/3 to 2/5 of all insurance benefits that the P&I clubs pay out.

15 Buglass L. J., supra 2, p. 1365.
of liability. This is especially true for courts of law in the United States of America. Every time the relation towards the liability of the carrier becomes more rigorous or when the liability limits rise, the insurance companies have to calculate the figures, namely the coverage that they can offer as the amount of the premiums for the coverage.

When we speak of reasons for preserving the system of limitation of liability in transport, it is often said that each change of the liability regime influences the insurance expenses in transport and the height of the freight and fare. Such arguments have also been used by the opponents while accepting the Hamburg rules.\textsuperscript{16} They were against higher amounts of limited liability and the revocation of the error in navigation or management of the ship and the changes in fire statute. Selvig\textsuperscript{17} says that the debate has proceeded without even slightly indicative information on the extent and meaning of separate expense items, devolving into a mere exchange of opinions that were based upon preconceptions and beliefs, and neither side has succeeded in convincing the other. Undoubtedly the liability of the carriers, the height of the insurance benefits and height of the freights are mutually connected. The mechanism of mutual influence has to be judged taking into account what has been written on the relation between cargo insurance and liability insurance. The defenders of conserving the limitation of liability say that the premiums for the liability insurance would raise more than the cargo insurance premiums would fall. The reason is that we have to count on expenses of recourse procedures of cargo insurance companies against insurance companies that insure liability. These expenses would be higher than now because there would be more recourse procedures and the net effect would be smaller than the increase of the sums that the liability insurance companies would pay. Because the insurance companies that insure liability would have to pay frequently and


\textsuperscript{17} Selvig E., \textit{supra} 1, p. 315.
more than they do now, there would be a rise of premiums, meaning that the carriers would charge more. The final effect would be a higher rise of freight costs than the reduction of premiums for cargo insurance. From this one could assume that the transport for the cargo owners with a higher liability would be more expensive than it is today.

Given that conclusion the expenses of the insurance with the smallest coverage (clause 1 in connection of the Institute clauses C) would represents the usual 0.3 per cent value of the cargo which corresponds to 5 per cent on average of liner freights, assuming that the liner freights usually amount to 6 per cent of the cargo value. Selvig\textsuperscript{18} is sure that the increase of the liability limits would influence these relations, but it should be clear already from the figures that this effect is reduced to a relatively small part of the freight. The next important finding is that although the cargo insurance companies work in an exceptionally competitive environment, 75 per cent of paid-in premiums are meant for paying out the insurance benefits, 20 per cent for operation expenses and 5 per cent is profit (in the USA this relation is worse: 50 per cent of the premiums go for paying out insurance benefits, 33 per cent for the operation expenses and 17 per cent is profit)\textsuperscript{19}. In P&I clubs there is a difference, they operate as mutual insurance companies with relatively low expenses and they spend 85–90 per cent of all of the paid-in premiums for the paying out of the insurance benefits. Because of these findings Selvig’s\textsuperscript{20} opinion on the judgment, if a more rigorous regime of Hamburg rules from the one of the Hague rules would make the transport of goods by sea more expensive, is that this would not happen or that the rise would be modest\textsuperscript{21}. The P&I clubs insure different risks for shipowners; liability is just one of them (it includes from 1/3 to 2/5 of all the claims for the payment). The rise of the payment to cargo insur-

\textsuperscript{18} Ibidem, p. 316.
ance companies in recourse procedures would not necessarily mean a rise of premiums. It is being established that between the raising of the liability, raising of the P&I premiums and freights there is nothing automatic. The value of his statement from 1981 has only an academic value today because the majority of goods transported by sea are still being transported on the basis of the Hague and Hague Visby rules. His appraisals must be even more critically judged in connection with an eventual unlimited liability of the carrier. With an unlimited liability of the carrier the insurance benefits would rise much more than they should in view of somewhat higher limits in the Hamburg rules compared with the Hague and Hague Visby rules.

Each change of liability of the carrier is connected with a changed allocation of risk and the payment of the expenses in form of insurance for these risks. The insurance market is much intertwined and as cargo insurance companies as P&I clubs are fighting a ruthless battle for changing the existent state. The insurance market functions on the basis of stabilized relations in which it is known how many risks each of the participants in transport bears. In particular, the relations in maritime transport seem fixed. It is a fact that the maritime carriers are a coherent group when it comes to their interests. At the same time we have to see the fact that the eternal antagonism between carriers and cargo owners is also the antagonism between the developed countries and the traditional transport countries on one side and the countries that are merely the cargo owners, i.e. the countries of the third world, on the other. The countries of the third world are in this relation particularly in an uncomfortable position because they do not have influence in liner conferences that decide prices of the transport in liners and are not even owners of important insurance companies. Their influence and power are actually shown only through the

20 Selvig E., supra 1, p. 316.
21 Selvig’s evaluations have been made with the introduction of the Hamburg rules and when questions appeared about what the influence of raising the amount of limited liability will be.
hope that the new regulation of carriage of goods by sea, which is being prepared by the UNCITRAL and CMI, will tilt the scales of burden allocation of expenses and risks somewhat away from them, away from the transport users. The second part of this hope is connected with the hope that the developed countries will accept a new system of carriage of goods by sea. Till then insurance is one of the most firm “concrete” binding relations between transport users and carriers. For an average evaluation of the changed relations between transport users and carriers it would be necessary to make an extended economic analysis; otherwise the discussions on unlimited liability in transport are of an academic nature. It would seem preposterous that the present arrangement would be adequate for carriers as well as transport users. The first pay low insurance benefits for liability insurance, the second with a relatively small number of accidents in comparison to all the goods shipped, pay lower aggregated freights as they would if the liability was unlimited.

3. THE PROBLEM OF CONSERVING THE VALUE OF THE LIMITATION OF LIABILITY AMOUNTS

A special problem in connection with the limitation of liability has always been the amounts to which the liability is limited or the conservation of the value of these amounts. There is no super national currency in which the amount of the limited liability could be expressed in conventions. Almost every country has its own national currency. Currencies are based on different fiscal philosophies. That is why it is urgent that a unit in which the amounts of the limitations are expressed has the characteristics that can effectively perform its function. The unit should be widely accepted, stable on international markets, easy to convert into local currencies and, most important, it should have a unified and universally accepted internal value and stability. The unit should be as immune as possible to fluctuations. It is impossible, of course,

to create a unit immune to all “illnesses” that beset currencies, but it is essential that it be as stable as possible and that its changes can be anticipated.

Devaluation necessarily influences the collapse of the relations between the participants in transport businesses. The drop of currency value always redounds to the carriers’ benefit. Selvig warned in 1981 that the amounts of the limitation from the Hague rules in that year are 1/10 of those from 1924 and 2/5 of those from the Hague Visby rules. The Hamburg rules contained, already at their acceptance, amounts of limited liability that represented 60 per cent of the limit value of the Hague Visby rules, calculated in real value. With time the amounts in real numbers were becoming lower and lower. Support for this can be found in numerous protocols to conventions that tried to balance the collapsed relations between participants in transport. The quandary of such protocols is in that they have to be ratified by the countries in order to enter into force. Especially in such dispersed users of transport as passengers are there is no cognizance that the relation has collapsed and so there is also no pressure on local authorities to ratify some protocol. The authorities in their bureaucratic circumstances many times simply do not perform the procedure of ratification and so low amounts of limited liability are conserved as some natural injustice. When they defined the limits in English pounds while preparing the Hague rules, many countries were not content. That is why Article 9 of the Hague rules provides that the countries in which the pound is not a monetary unit have the right of translating the sums indicated in pounds into those of their own monetary system. Although the English pound was bound to gold in the Hague rules, it came to very different amounts of lim-

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23 The number of currencies has diminished on a global scale with the introduction of the Euro but only a decade before the introduction of the Euro, as a consequence of the collapse of some of the federal countries (SFY, USSR, CSSR); numerous new national currencies were introduced.

24 Selvig E., supra 1, p. 301.

ition in the countries that were parties to the Hague rules. Some countries that have defined the amounts in the local currency have bound the latter to gold; the others did not do that. Tetley says that the meaning of 100 English pounds in the Hague rules is not clear. The United Kingdom left the gold standard in 1926. In 1950, with the so called *Gold Clause Agreement* that was accepted by the British maritime law association, they have raised this amount to 200 English pounds if some conditions were fulfilled. One of these was that the action was brought in the United Kingdom. The amount was raised once more with the agreement in 1977, to 400 English pounds.

To the introduction of the gold franc Poincaré in conventions as a way of defining the amount of the limitation of liability came naturally. The gold franc Poincaré is a currency that was introduced in France on the 25th of June, 1928. It got its name after the French financial minister and later first minister Raymond Poincaré and has stabilized French currency with the gold franc Poincaré.

Gold has prevailed over silver in financial transactions only in the period after the 19th century. The years from 1900 to 1914 are known as “the golden years of the gold standard” (the same goes also for the years 1925 to 1931). The gold standard has functioned on the basis of two premises, namely the currency of each country was the equivalent of a quantity of gold and financial authority of the country have bound themselves to exchange the paper currency for gold whenever on a fixed exchange relation. So through gold also exchange relations were defined between individual currencies of different countries. When they defined the amounts of the limitation in pounds in the Hague rules that was an adequate way for defining the quantities of gold as values for the amounts of the limitation of liability.

Selvig has written already (1980) that the amounts of the limitation of liability for the transport of goods by sea were very low and has warned of the problem that the amounts of the limitation of liability are very different from the lowest in Spain (65 American dollars) to the highest in Switzerland (1.455 American dollars). The reason was that the countries have defined the amounts in national currencies and that the different level of inflation has lead to such high differences. Most of the countries have the limitations of liability defined in limits between 300 and 600 American dollars. Selvig E., *supra 1*, pp. 301 and 326.


caré. The former Germinal francs (silver coins) were exchanged for coins of an aluminous-bronze alloy. Precisely because of the introduction of the gold franc Poincaré, France better survived the great recession at the end of the twenties of the last century. The value is 65.5 milligrams of gold of 900/1000 fineness. It seemed that the definition of the amounts of the limitation of liability in the gold equivalent would be an excellent decision. Even if certain currency lost its value, it has lost it in relation to the gold that has conserved its value. Nevertheless gold was not a super national currency that would be immune to economic law and could be dealt independently of other economic happenings. Economic lines of force are different in countries and the buying power of the currency and gold is dependent on numerous factors that are not of merely economic nature but also political and psychological. Defining the amounts in gold has not meant only inflation but also disproportion between countries because the buying power of gold in countries is different and varies a lot through time. A special quandary was caused by the so called double-track gold market. Till 1971 the relation of 35 American dollars for an ounce of gold was valid. This falsely maintained value was surpassed by far by the market value of gold. This problem was not perceived on accepting the CLC 1969 when it was not sure which value of the gold to take to calculate the amounts of the limitations. The interpretation of the conventions that contained amounts of limitations in units bound to the gold was unpredictable. The courts were in doubt as to which value of the gold to use: the official or market.

30 See also Tobolewski A., supra 22, p. 170, note 5.
31 Tetley W., Marine Cargo Claims, supra 29, p. 878.
34 We come upon an interesting finding if we look at the changing of the buying power of gold in separate countries from 1929 to 1949. The calculation is made taking into account the buying power of 125,000 gold francs Poincaré. In some countries it has increased: Australia + 49.8 per cent, United Kingdom + 38.7 per cent, South Africa + 31.4 per cent, Norway + 27.7 per cent and Argentina + 25.6 per cent, in some the buying power has decreased: Belgium - 74.6 per cent, France - 72.5 per cent, Brazil - 23.5 per cent, ex CSSR - 20.7 per cent. Tobolewski A., p. 175, 176.
value. The judges began to search the ratio legis of the limitation of liability, which did not provide the answer. They began reading the travaux preparatoires of the conventions and the conclusions to which they came were not uniform. The misty horizons were cleared by the IMF decision which has officially left the value of gold as a relevant factor in international relations or transactions in 1978.

After the breakdown of the Brettonwood system a search has begun to find a new way of defining the amounts of the limitation of liability. The gold franc Poincaré was replaced by the modern SDR. IMF established SDR\(^\text{39}\) (special drawing rights) in 1969. It was thought up as a support for the Brettonwood systems fixed exchange rate when gold and the dollar could no longer perform the function of reserves successfully. Because of the relatively slower production of gold and the low confidence in the American dollar there were problems of international liquidity\(^\text{40}\). The SDR should become the new mean for reserves under the patronage of the IMF. Only a few years later there was a breakdown of the Brettonwood system and most of the currencies have gone to the sliding exchange rate. This change and some other happenings on international capital markets have reduced the necessity to use SDR, so it never actually fulfilled the historic function that some predicted for it. The role of SDR today is very limited. Besides being the unit of account of the IMF and an international mean for reserves it serves also as binding for some local currencies for the exchange rate and as unit of account in transport conventions.

At first the value of the SDR was defined as the equivalent of

\(^{35}\) Ibidem, pp. 178, 179.

\(^{36}\) Ibidem, pp. 180, 181.

\(^{37}\) In the case S. S. Horland v President Angot the court has used the official price of gold. More about this in Asser T. M. C., p. 645.

\(^{38}\) In the case Olympic Airways v Zacopoulos (IATA ACLR No. 461) the court has used the market price of gold.


0.888671 grams of gold of 900/1000 fineness, which was at that time the equivalent of one American dollar. After the Brettonwood system breakdown in 1973, the IMF redefined the value of the SDR in 1974 as the basket of sixteen currencies. Sixteen currencies have been reduced to five as of 1981: the American dollar, the German mark, the English pound, the Japanese yen and the French franc. The German mark and the French franc were replaced by the euro on 1 January, 1999, and today the SDR is composed of currencies in the following relation:\(^{41}\):

- American dollar (44 per cent),
- Euro (34 per cent),
- Japanese yen (11 per cent),
- English pound (11 per cent).

These currencies and relations will be valid till the end of 2010. Considering the value of these four currencies, the value of the SDR is calculated daily regarding the value of the currencies in the London foreign currency market at 12.00\(^{42}\). If the London market is closed, New York is used and if also the latter does not work it is calculated by comparison with the Frankfurt foreign currency market.

For the countries that are not members of the IMF or for which regulations do not allow use of the SDR, the gold franc Poincaré is still used, although the conventions (for instance, Article 23 of the Montreal convention) do not actually name it, rather speak only of the monetary unit that is worth 65.5 milligram of gold of 900/1000 fineness. The relation between the SDR and the gold franc Poincaré is defined in the rate of one SDR to fifteen gold franc Poincaré.

One currency must be mentioned that is used only in road transport (CMR and CVR) and inland navigation (CLN and CVN) – the gold Germinal franc, the value of which is 10/31 of gram of

\(^{41}\) The currencies and relations were last revised on 1\(^{st}\) January 2006, with validity for the next 5 years. http://www.imf.org/external/np/sec/pr/2005/pr05309.htm.

\(^{42}\) The SDR value was 1.207800 euro at the beginning of the year 2006. http://www.imf.org/external/np/fin/rates/rms mth.cfm?SelectDate=01%2F01%2F2006&reportType=CVSDR&arch=1.
gold of 900/1000 fineness. The Germinal franc was used in France from 1803 to 1914\(^43\). The protocols from 1978 have defined the amounts of the limitation of liability of the CMR and CVR in SDR. The legislation in the Republic of Slovenia has also defined the amounts of the limitation of liability in SDR.

The SDR also did not successfully perform its task. Although it successfully amortizes the change of value between singular currencies, it is not immune to general inflation\(^44\). An elegant and modern solution to the problem of the amounts of the limitation of liability has been delivered by the Montreal convention. A check of the amounts of the limitation of liability is made every 5 years. If it is ascertained that the inflation factor is higher than 10 per cent, the depositary officially notifies the contractual countries on the change of the limitation of liability (the measure for the level of inflation that is used in defining the factor of the inflation is a balanced average of the yearly levels of increasing and decreasing indexes of movement of the retail trade prices of the countries whose currencies compose the SDR). Each such variation begins to be valid for 6 months notification of the contractual countries. If the majority of the contractual countries do not agree with the change in three months, the change is not valid and the depositary presents the matter to the contractual countries at a meeting. One third of the member countries can propose a change of amounts before the 5 years if the inflation factor exceeds 30 per cent of the precedent change of amounts or beginning of the validation of the convention. The depository notifies the member countries of the beginning of the validation of each variation. In such a way it will be significantly easier to change and adjust the amounts with inflation. No active treatment will be demanded from the countries for the enforcement of the adjustment but active treatment will be demanded if a country will want to prevent the adjustment. The mere


\(^{44}\) The study on the influence of inflation on the Athens convention was prepared by Erik Rosag: http://folk.uio.no/erikro/WWW/corrgr/insurance/inflatio.doc.
fact that it will be an adjustment will exceptionally limit the cases in which the countries will be against the raising of the amounts of the limitation of liability.

4. DIFFERENT VALUES OF CARGO AND UNIFIED LIMITATION OF LIABILITY

In the limitation of liability the fact that the values of the cargos that are transported are very different has to be considered. The limitation of liability is valid (non)discriminatory, regardless of the value of the cargo. The objections are that the sender can declare the value but this is shameless ignorance. The declaration of value was relatively rare historically because the senders were afraid of high customs duties, luxury tax or other taxes. The transport users today do not decide on the declaration of value mainly because of the higher freight. The fact that the transport conventions define a unified limitation of liability for different cargo values can be criticized for at least two reasons. The first is that only the shipowner business interest is taken into account, the second is that the limitation burden goes primarily to those senders that suffer cargo damage that exceeds the limits. Those who do not exceed these points, in other words, get their damage entirely compensated (or because their cargo is less valuable, or because it is less damaged).

Regarding the amounts of the general limitation of liability in maritime transport they originate out of French system (abandonment) or the English system that has taken the average value of the ship for the amount of the limitation of liability upon the acceptance of the Merchant Shipping Act in England. A totally different story involves the amounts of limitation of liability for the damage to the cargo regarding the package or unit limitation. The amounts of the limited liability are not a result of a deep economic-juridical analysis. If we read the travaux préparatoires of different conventions we find that the amounts are a consequence of practice,

spiced with negotiations at codification conferences. At codification conferences we traditionally avoid economic analyses that would provide an answer to the question as to what adequate limits are. Is the reason that the question is juridical and not economic or perhaps that both sides (carriers and cargo owners) are “afraid” of the result?

5. INSTEAD OF THE CONCLUSION

The present discussion is actually a call for the judgment of the limitation of liability in transport with the inclusion of economic parameters. It would be interesting to see what would happen if, while accepting a new instrument on carriage of goods by sea that proceeds under the patronage of UNCITRAL and CMI in defining the amounts for package or unit or kilo limitation, we would dispose with an economic study of influences of different amounts on relations between participants in transport. Regarding the decrease of the real value of the currencies, the Montreal convention has provided a good solution by which taking into account those countries that are against the amounts increase will at least to some extent decrease the negative effect of the decrease of value of the currencies and thereby improve the position of the carrier in relation to the transport users (all of this of course to the loss of the consumer).

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