



Platform Intermediaries in the Sharing
Economy: Questions of Liability and
Remedy

Kim Østergaard* and Søren Sandfeld Jakobsen**

* Professor, PhD, Copenhagen Business School

** Professor, PhD, Aalborg University

ABSTRACT

National and international characteristics of sharing economy imply that a platform intermediary may hold a dominant legal and economic position between a debtor and a creditor. Legally, such an agent¹ will be the commercial link between the performance debtor and the performance creditor. Hence, the platform intermediary's contractual obligations do not appertain to the performance creditor by default but to the economic and legal nexus between the committed and legitimate contractors. Yet recent legal practice in Danish substantive law, along with a series of court rulings, indicates that a platform intermediary may under certain circumstances be considered duty subject in relation to the performance creditor. In such cases, the platform intermediary—though originally deemed an agent—is contractually obliged to the performance debtor. This creates two interesting legal issues which are analysed in our article. First, we address the requirements and circumstances which may lead to the platform intermediary being directly liable to the performance creditor in case of non-performance of the sharing economy service in question. Secondly, we analyse which remedies the performance creditor can impose on the intermediary in a situation where the intermediary is considered contractually obliged to the performance debtor.

1. INTRODUCTION

The Danish law of obligations would usually consider intermediaries under the laws covering agency. This stems from the fact that an intermediary acts as a commercial link between the performance creditor and the performance debtor in a contractual relationship (by fulfilling such roles as commission agent, commercial agent, property or insurance broker). The deciding factor is that the intermediary acts on behalf of the principal—typically the performance debtor in this case—committing this entity to a third party (the performance creditor). Yet the intermediary does not become a party to the contract and thus undertakes no obligations toward the third party.² It should be noted that under Danish law, retailers are not legally regarded as intermediaries because retailers act in their own name and at their own risk and are therefore directly liable to the performance creditor.

A boom-period in electronic communication and the sharing economy has seen intermediaries assume a very central role not afforded to them previously. The provider of an electronic sharing economy service (hereinafter: “the platform intermediary” or simply “the intermediary”)

¹ In accordance with Danish law, the notion of an agent or intermediary is considered a subcategory of the overall concept of *intermediaries*. Another subcategory includes commission agents and various brokers.

² Regarding the law of intermediaries, see for instance Lennart Lyngge Andersen and Palle Bo Madsen, *Aftaler og mellemmand*, (7.th edn, Karnov Group 2017.), chapter 4, especially p. 274 ff.

acts in practice as the electronic and commercial link between a performance creditor of the said service (often a consumer) and the performance debtor (often a business entity, such as trivago.com). The performance debtor can also be a private individual, as witnessed in cases involving Airbnb.com or Gomore.dk. From a Danish law perspective, this article focuses on the legal role of platform intermediaries which provide access to a sharing economy service. It investigates the details determining when an intermediary is no longer just an intermediary facilitating a relationship between the contractual parties, but rather an obligated party to the contract. In such instances, we also explore which remedies the performance creditor can impose on the intermediary if a contract has been breached.

In Danish legislation pertaining to agency, the platform intermediary is undoubtedly an ‘agent’ according to the general use of the term.³ This covers a set of rules stating that an intermediary - who is serving a principal - can conclude an agreement with a third party who then also commits itself to the principal.⁴ Nevertheless, it is uncertain whether the platform intermediary is also an agent in line with the more specific meaning under which the term is also used, namely as one acting in the name and at the expense of the principal, according to section 10, para 1, of the Contracts Act⁵. The answer will depend on a specific assessment of the setup and structure of the individual sharing economy service. A feature of these new services is that there is no personal contact between the parties involved—including the platform intermediary and performance debtor (the presumed principal of the platform intermediary). All contact is exclusively conducted electronically via the platform (online service). This applies to both the intention of the performance debtor to deliver the service in question under the agreed terms and conditions, and to the intention of the performance creditor to purchase the service under the outlined terms. Since all contact between the parties, as well as the actual agreement conclusion, takes place electronically via the platform, it is probable that by simply using the platform service, the performance debtor has equipped the platform intermediary with the mandate to act on their behalf. If so, the relationship can be interpreted as a relationship between a principal and an agent, where the platform intermediary acts in the name and at the expense of the performance debtor.

In the situation outlined above, the rules stipulated in Chapter 2 of the Contracts Act shall apply. However, these rules - primarily relating to the relationship between a principal and a third party (the external

³ Lennart Lyngge Andersen and Palle Bo Madsen, *Aftaler og mellemmand*, (7.th edn Karnov Group 2017), p. 282 f.

⁴ A commercial agent can act solely as the commercial link between the vendor and the purchaser. Moreover, it can even have power of attorney to conclude the contract with a third party.

⁵ Consolidated Act no. 193 of March 2nd 2016.

relationship) - are not directly relevant to the main issue of this article: whether the platform intermediary under certain conditions can in fact be regarded as a party to the contract with the performance creditor, thus incurring liability to the performance creditor in the event of default by the performance debtor. Section 25 of the Contracts Act concerning an agent's liability to third parties relates to situations in which an agent claims to possess the mandate of a third party but in fact does not. This provision is also irrelevant in the present context where, as mentioned, the possible liability of the intermediary is in focus in the event of default by the performance debtor.

It is characteristic of sharing economy services that the performance debtor does not transfer ownership of the asset in question to the performance creditor. Rather, a temporary right to use the asset is granted—as is the case with Airbnb, where the performance service consists of providing housing for a very short term. With carpooling services such as Gomore, the performance consists of the owner/driver of the car allowing for the carriage of passengers for a certain distance. As a result, the contract is central in determining the time and usage made available to the performance creditor by the service.⁶

Hence, depending on the *lex causae* of the contract, in a sharing economy setting a performance creditor usually gets a usage right for a certain period. This means it is not possible to apply national purchasing legislation to the legal relationship;⁷ nor is there a ready recourse to any existing international purchasing legislation.⁸ Instead, the contracts concluded in conjunction with sharing economy services generally take the form of various types of service agreements that are rarely statute-regulated and are therefore not subject to any *lex specialis* in the relationship between the performance debtor and the performance creditor.

Consequently, the contractual basis used by the intermediary to underpin its dealings with the performance debtor and the performance creditor is crucial when determining the legal position, as is the contractual basis between the performance debtor and the performance creditor. The latter contract is often drafted by the platform intermediary as part of the entire standardized contractual setup of the platform service. It is

⁶ In view of this concept of sharing economy services, a commercial platform such as amazon.com or ebay.com is not considered within the scope of the sharing economy since the performance debtor acts as a professional. In most transactions of this kind, there is a transfer of the property right of the goods in question—which in our view is not characteristic of sharing economy services. Hence, such commercial platforms are not considered further in this article.

⁷ In accordance with Danish Sales of Goods Act, Consolidated Act no. 140 of February 17 2014.

⁸ CISG does not apply to international consumer purchases, cf. CISG art. 2 (a). Thus, a choice of law is necessary, which in Danish jurisdiction should take place in accordance with the Rome Convention. In the other EU Member States, it should take place in accordance with Rome I. CISG is applicable to international civil purchases.

important to assess these contracts in relation to any relevant statutory provisions under the contract *lex causae*. This includes assessing whether there are restrictions on the contractual freedom and, if so, making contractual supplementation based on the general and/or special part of the law of obligations to determine the legal relationship between the respective counterparties.

In this context, a performance creditor will clearly wish to identify the party against whom prospective claims must be raised in case of a breach of contract. Will it be the platform intermediary or the performance debtor?⁹ And on what legal basis? Subsequently, it is essential to determine which remedies may be applied by the performance creditor.

Our article presents a sequenced response to these questions, beginning with a brief introduction to the platform intermediary's position under Danish law of obligations, where the premise is that the intermediary acts on behalf of another and therefore is not considered a party to the contract with the performance creditor. However, the assumption in the present context is that this premise cannot always be upheld in regard to sharing economy services. Consequently, we analyse the requirements and circumstances which may lead to the platform intermediary being directly liable to the performance creditor in case of non-performance of the sharing economy service in question based on Danish substantive law. We then examine which remedies the performance creditor can impose on the intermediary in a situation where the intermediary may be regarded as a duty subject.

2. THE CONCEPT OF INTERMEDIARIES

As noted above, the law of intermediaries rests on an agent/principal relation (agent used in a broad sense) where it is not the intermediary but the principal who is bound by the contract and thus the principal is liable to the third party. Consequently, any legal claims or remedies in the case of non-performance must be directed against the principal and not against the intermediary.

Electronic platform intermediaries are not covered by the sort of *lex specialis* regulation applied to other intermediaries such as commercial agents (who are regulated by an EU directive)¹⁰ or commissioners (who are regulated by a national Danish statute based on a Nordic law cooperation).¹¹ Article 3, No. 9 of the Package Travel Directive¹² does

⁹ The possibility of making joint remedies toward the platform intermediary and the performance debtor will not be discussed in this article.

¹⁰ COUNCIL DIRECTIVE (EEC) 653/1986 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986].

¹¹ In accordance with Danish law Consolidated Act no. 332, 31 March 2014.

¹² DIRECTIVE (EU) 2302/2015 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of

contain a definition of an intermediary: “retailer’ means a trader other than the organizer who sells or offers for sale packages combined by an organizer.” Yet while the directive contains this definition, it does not constitute a separate and general EU law intermediary concept within or outside the directive.

Consequently, the content and legal effects of the intermediary concept, including platform intermediaries, must be determined outside the scope of the Package Travel Directive according to the *lex causae* contract. This means that the intermediary concept must be clarified in accordance with the national legal order, resulting from a governing law clause in the contract. If such parameters are absent, clarification must be sought according to international private law rules applicable in the country in which a case is brought. In the case of a purely national relationship, it is not relevant to determine the choice of law as it must therefore be the national understanding of the concept of intermediaries that should be directly assumed.

Danish law contains a number of so-called facilitation rules which are applied when the performance creditor acts as a consumer. These facilitation rules establish that when a contract is concluded between two parties where one of which acts a trader, the contract must be considered as a consumer contract. Consequently, the other party can rely on certain consumer protection rules. The significance of these facilitation rules extends as far as to cover platform intermediaries in the sharing economy where the intermediary facilitates the conclusion of a contract between a performance creditor and a performance debtor via the digital platform, and in which the performance creditor is often a consumer. The Contracts Act, section 38 a, para 3 contains such a facilitation rule, which was added into the Act in the context of implementing the Unfair Contracts Directive in Consumer Agreements.¹³ However, the Directive itself does not contain a provision similar to section 38 a, para 3. The Danish provision can therefore be regarded as a further protection and extension of the consumer concept, which is not problematic, since the Directive is a minimum directive. Similarly, the Consumer Contracts Act contains a facilitation rule in section 3, para 3. The Danish Consumer Rights Act¹⁴ is an implementation of the Consumer Rights Directive. However, as with the Unfair Contracts Directive, the Consumer Rights Directive does not contain a rule of dissemination, meaning that the Danish provision can also be considered as a further protection of the consumer.¹⁵ Whereas the Contracts Act is a *lex generalis* that the consumer can invoke regardless of

the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015].

¹³ COUNCIL DIRECTIVE (EEC) 93/1993 on unfair terms in consumer contracts [1993].

¹⁴ Act no. 1457 17 December 2013.

¹⁵ The authors have not conducted systematic research to establish whether the other EU Member States have enacted similar rules of intermediaries in any acts.

the agreement situation, the focus of the Consumer Agreement Act¹⁶ and the underlying directive are distance selling agreements (and agreements concluded outside the trader's business location) and thus *lex specialis* in relation to agreements in general. Both acts and the underlying consumer agreement directive are therefore relevant in the field of sharing economy services.¹⁷ The Sale of Goods Act contains a corresponding facilitation rule in section 4 a, paragraph 1, though as described in the introduction, the Sale of Goods Act will most often have no particular relevance in relation to sharing economy services, because it only applies where there is a transfer of ownership of the movable property in question, which is rarely the case in relation to sharing economy services. The same applies to the facilitation rule in section 1, para 1 of the Credit Contracts Act.¹⁸ Credit agreements relating to sharing economy services do not appear to be relevant to the current development stage of the services. Hence, neither the Sale of Goods Act nor the Credit Contracts Act will be mentioned further in this context.

3. THE INTERMEDIARY CONCEPT IN DANISH LAW

As clarified above, there is no *lex specialis* in Danish law that regulates how the intermediary concept is to be determined in relation to sharing economy services. Hence, this must be done on the basis of case law and legal theory.

Based on the special facilitation rules in section 38 a, para 3 of the Contracts Act; on section 2, para 3 of the Consumer Agreement Act; and on section 4 a, para 2 of the Sales of Goods Act, it appears that three cumulative conditions need to be fulfilled for a party to be regarded as a facilitator subject to these set of rules.¹⁹ While the Sales of Goods Act will rarely apply to sharing economy services, both the Contracts Act and Consumer Contracts Act can prove relevant to services of this type. Moreover, the conditions deriving from these rules in terms of defining the notion of a facilitator also appear relevant in relation to sharing economy services where the platform intermediary facilitates the agreement between a performance debtor and a performance creditor.

The three requisite cumulative conditions are that the intermediary must: 1) be a trader, 2) perform an activity in connection with the

¹⁶ Act no. 1457 17 December 2013 about consumer agreements.

¹⁷ DIRECTIVE 83/2011/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011].

¹⁸ Consolidated Act no. 1336 26 November 2015.

¹⁹ Marie Jull Sørensen, "Digitale formidlingsplatforme – formidlingsreglen i dansk forbrugerrret", (2017) Ugeskrift for Retsvæsen, U.2017B.119.

conclusion of the contract between the creditor and the debtor, and 3) not be the performing debtor.²⁰

First, the condition of the intermediary being a trader is entirely in line with what is applicable according to the law of agency in general (except where a general authority in an employment relationship exists). The condition will probably always be met by platform intermediaries providing sharing economy services, as these are primarily commercial businesses selling services and advertisement space on the platform.

Second, the condition that the intermediary must play an active role in the conclusion of an agreement between the two contracting parties, the performing debtor and the performing creditor, will also most likely be fulfilled for platform intermediaries. The active role of the intermediaries stems from the mere fact that they have developed and provided the digital platform through which the agreement between the performance debtor and the performance creditor is concluded and through which all the steps in the transaction process have taken place. In other words: if there were no platform service, there would be no contract between the parties and no platform in cyberspace for the parties to even establish contact with each other in an easy way. It is important that the activity is aimed at the conclusion of the agreement between the parties.²¹ The activity consisting of making advertising space available on the intermediary's online platform (which is usually a very important source of income for the intermediary), is not *per se* deemed to fulfil the requirement for activity.²²

Thirdly, the intermediary must not be the performance debtor (direct contracting party of the performance creditor) and thereby obligated to fulfil the performance obligations according to the contract.²³ As described, it inheres to the nature of the intermediary relationship that this entity does not act on their own behalf but on behalf of a third party (the principal) who is thus bound by the agreement. Therefore, if the intermediary has no intention of being bound by the contract as a direct contracting party, the intermediary cannot act as an agent and at the same time be a performance debtor.

4. WHEN IS AN AGENT RESERVATION VALID?

As noted, the basis of Danish law regarding intermediaries (and thus also platform intermediaries) is that they are only acting on behalf of another party, typically the performance debtor who offers a service via the digital platform. Hence, the intermediary is therefore not regarded as a liability subject to the performance debtor, and claims resulting from a

²⁰ Ibid p. 120 f.

²¹ See also Marie Jull Sørensen, *Digitale formidlingsplatforme – formidlingsreglen i dansk forbrugerret*, Ugeskrift for Retsvæsen, U.2017B.119 with reference to case law.

²² Ibid p. 121.

²³ Ibid.

breach of contract must be directed by the performance creditor against the performance debtor and not against the intermediary in accordance with the general principle of contractual relativity.

However, this starting point has been challenged by a court decision concerning the online platform GoLeif.dk²⁴ which acts as an intermediary where you can find airline tickets to locations all over the world. Via the platform, customers can compare prices from multiple airlines and proceed to ticket purchasing immediately. In its ruling, the Danish Eastern High Court, contrary to the ruling of the District Court of Roskilde, stated that the GoLeif.dk platform was directly liable to a person who in a consumer capacity had bought two flights from Copenhagen to Nice, only to experience that the airline went bankrupt during the consumer's stay in France. GoLeif.dk's general terms and conditions contained a reservation stating that the platform provider only acts an intermediary between the consumer and the airline carriers and therefore is not the consumer's contract party. Hence, the judgment raises questions about whether it is possible to ascertain which cumulative requirements a platform intermediary must meet to have a contractually valid intermediary reservation so that possible claims must be addressed to the performance debtor in accordance with the general rule regarding the liability of intermediaries towards third parties.

In its decision, the Eastern High Court initially concluded that there is no doubt that the underlying agreement between the subsequently bankrupted airline and GoLeif.dk (the internal relationship) meant that GoLeif.dk only acted as an intermediary between the airline as seller and the consumer as buyer. However, the appellant (the consumer) claimed that he had formed the impression that the contract was entered into with GoLeif.dk via the platform website, thereby contending that GoLeif.dk—along with the airline—must be regarded as the consumer's direct contract party (the external relationship). The consumer stressed that his sole contact had been with GoLeif.dk, which also received the payment and to which he electronically submitted a request for the tickets.

One of the key premises in the judgment is that although it seems clear that travel agents generally do not act in their own name when selling flights but act only as an intermediary for the airline carriers, this relationship cannot be regarded as widely known by the consumers. Having made a general assessment of the website of GoLeif.dk, the High Court therefore found that the consumer could assume they were dealing with GoLeif.dk. This was affirmed despite the fact that the website makes it possible to choose between flights from multiple airlines.

Based on this premise, we can conclude that the level of knowledge expected of a consumer is different and lower compared with what is expected when a contracting party acts as a professional. In this regard,

²⁴ *Forbrugerombudsmanden som mandatar for Martin Windfeld Velin v Den Danske Rejsegruppe filial af Svenska Resegruppen AB* U.2016.1062 Ø.

the consumer bears no professional risk. The court emphasised the general impression of the website and the fact that the consumer was under the impression that he contracted directly with GoLeif.dk, which thus had to be regarded as the consumer's contracting party.

A second key premise is that the GoLeif.dk website did not make it sufficiently clear that customers were not trading with GoLeif.dk, but instead with the airline delivering the flight. Intermediary status was signalled via the booking flow on the website, as well as in the terms and conditions beneath the heading "responsibility for the implementation of the journey" which stated that GoLeif.dk acted as "intermediary" and that GoLeif.dk did not "sell" trips in their own name. However, the court found that it could not be assumed that a general consumer could determine his legal position in relation to GoLeif.dk solely on basis of this information. In addition, GoLeif.dk was described in the travel conditions as "technical organizer" without this term being described in detail. Furthermore, both the booking flow on the website and the terms and conditions described an opportunity for the consumer to purchase "bankruptcy coverage" from the travel agency.

This premise speaks to whether GoLeif.dk can be deemed to have achieved a valid agent reservation both contractually and from the information on their website. In this regard, the High Court attaches decisive importance to the reservation not being explicitly stated, since the consumer acting as an agreement reader is not able to correctly decode the implications associated with the wording of the contract. Hence, for an agent reservation to be valid it must be written in plain, clear and intelligible language. These requirements are the cumulative conditions for intermediary reservations to be considered validly agreed *inter partes* in consumer contracts.

In a decision from 2018, the Western High Court concluded that the accommodation platform Booking.com exhibited a valid intermediary reservation when they provided accommodation at a farm hotel in Sweden. The appellant in Denmark, acting as a consumer, argued that Booking.com must be regarded as the contracting party and therefore be subject to the contractual obligations. The consumer claimed that the accommodation service suffered from actual deficiencies as the farm hotel was under renovation during the stay.

The High Court stated:

The booking confirmation contains the name and address of the specific accommodation that is reserved, as well as the duration and price of the stay. It also appears that payment is made at the place of residence during the stay, that cancellation and change fees are determined by the place of residence, and that you can contact the place of residence if you need help with the reservation. From Booking.com's terms and conditions, which [the appellant] has accepted, it appears that he entered into a direct contractual

relationship with the place of residence, and that Booking.com acted exclusively as a link between him and his place of residence. Accordingly, [the appellant] should have understood that he entered into an overnight stay with the place of residence, and that Booking.com alone acted as an intermediary of the agreement.

The first two sentences of the judgment concern identifying, on a contractual basis, the contracting party of the consumer. The contract leaves no doubt as to who is performing the service and that the remuneration shall be paid directly to the place of residence. The main contractual terms in relation to the performance of the contract are also agreed directly with the place of residence. It is therefore clear in this case that the place of residence is the performance debtor, and that this role does not fall to the intermediary platform, Booking.com. It is also clear that the place of residence must be regarded as the consumer's contracting party, since the contract makes evident that Booking.com is purely an intermediary platform and that the consumer is contracting directly with the place of residence.

Though not directly determined by the High Court, we must nevertheless regard it as central that the contractual criteria regarding adoption, clarity and clearness are met. In this regard, the High Court assumes that the applicant as a consumer should have understood that the place of accommodation constitutes a party to the agreement, not Booking.com. Thus, the Western High Court, like the Eastern High Court in the GoLeif judgment, developed a functional definition of what can be expected of a consumer in terms of linguistically decoding the contract and its related legal implications. In contrast to the GoLeif judgment, the cumulative requirements for the adoption of a valid intermediary reservation were met in the Booking.com case because of the contract conclusion process and informative language. Consequently, it was easier in this instance for the consumer to correctly decode his legal position and the implications of the respective roles and obligations of the performance debtor and the intermediary platform.

Regarding the validity of intermediary reservations, a central feature of the two judgments is that an assessment of the consumer as the agreement reader is included. As a result, notions about the qualities a composite consumer 'figure' might possess substantially affect the demands that can be made upon the consumer when contracting with a trader.²⁵ In EU law, a concept of the consumer denoted as "the average consumer" has been developed, and this concept has been applied in cases

²⁵ In the judgment published in the Danish Weekly Law Reports U.2018.1374 S, the principle was established that between two professional parties there is no enhanced requirement to conclude an agent reservation.

such as *Gut Springenheide*.²⁶ Accordingly, the average consumer is defined as a reasonably well-informed and reasonably observant and circumspect consumer - an assessment reached without ordering an expert report or commissioning a consumer research poll.²⁷ Thus this far, the precise meaning of the concept has not been outlined by the European Court of Justice, but it objectifies the notion of the average consumer and thereby differs from current perceptions of a consumer. Consequently, it can be argued that the average consumer currently exists as a legal fiction. Professional literature has suggested using alternate terms such as the normal consumer or the typical consumer. Questions persist though as to whether such alternative conceptual formulations are based on a corresponding legal fiction.²⁸ For now, in any case, we must acknowledge the issue but place it beyond the scope of this article.

Concerning the functional delimitation of consumer agreements, various consumer characteristics have been posited to be contrasted with those of the trader :

- the relatively low degree of professionalization,
- the relatively modest economic strength,
- the lack of economies of scale, and
- (other missing) cost advantages.²⁹

A trader is supposed to act as a professional. This includes among other things necessary knowledge of their industry as well as the capacity to spread financial risk across several transactions—characterized as diversification in an economic sense, and pulverization in a legal sense. The functional demarcation of the consumer concept implies that consumers act outside their profession and are therefore assumed to have limited or perhaps no knowledge of the service or product type to be contracted. An obvious next step, then, is to note one of the assumptions on which the new institutional economic theory is based, namely that the individual actor is limited rationally and acts without pertinent information to be found in legal acts such as the Package Travel Directive. Intermediaries may try to compensate for this via a set of disclosure requirements for the contractual basis, but the consumer is unable to

²⁶ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* (1998) and references to case law in paragraph 30. See for instance C-126/91 (*Yves Rocher*) and C-315/92 (*Clinique*).

²⁷ *Ibid*, paragraph 31.

²⁸ *Ibid* with references.

²⁹ Peter Møgelvang-Hansen, *Forbrugerrollen som retligt begreb*, in *Hyldestskrift til Jørgen Nørgaard*, (1st edn, Jurist- Og Økonomforbundets Forlag 2003), p. 528. This is a rather early development regarding notions of what characterizes a consumer.

process and translate all relevant information as a result of cognitive constraints.³⁰

In relation to the current case-law, cited above, the assessment of the court includes consideration of the performance creditor acting as a consumer, thereby placing less demand on his knowledge of the market. The degree of involvement from the performance debtor is also important in terms of how the consumer must logically understand the contractual situation. In the Booking.com case, it seems very difficult to avoid the conclusion that the place of residence must be deemed the consumer's contracting party and thus the obligor under the contract. Finally, it appears that if a valid intermediary reservation is to be achieved, it must be clear, precise, easily intelligible, and written in a shared language.

5. CAN THE PLATFORM INTERMEDIARY BE HELD LIABLE? IF SO, ON WHAT BASIS?

Thus far, our study of agent reservations has shown that the clear starting point in Danish law of obligations is that the intermediary does not incur any liability to the performance creditor, who must instead adhere to their contracting party (the performance debtor). However, we must also consider whether there is a basis for deviating from this starting point in relation to sharing economy services where the intermediary often plays an active and facilitating role throughout the course of the contract. This prompts a dual line of inquiry. First, we must examine the legal basis for holding an intermediary responsible where appropriate. Second, in instances where a liability for the performance debtor's defaults can be imposed on the intermediary, we must ask what breach of contract remedies the performance creditor can claim against the platform intermediary. This would include examining whether the performance creditor may have the same remedies against the intermediary as against the performance debtor.

In relation to the first line of inquiry, it appears that various law of obligation arguments can be considered in support of this:

5.1. THE PLATFORM INTERMEDIARY AS THE DIRECT CONTRACTING PARTY

A liability may arise from the fact that an intermediary construction is overridden or invalidated. This would void an intermediary's contractual

³⁰ In this sense, economic theory could contribute to qualifying the legal requirements to the contract in order to solve the problem of imperfect and asymmetric information between the parties. Thus, law and economics could contribute to qualifying the concept of the consumer. However, cognitive limitations attached to each individual cannot be solved, although the problem of imperfect and asymmetric information can to some extent be solved by applying extensive information requirements in the pre-contractual phase and to the content of the contract.

agent reservation so that the intermediary is effectively regarded as a direct contractor and thus directly liable to the performance creditor. This was the case in the above-mentioned GoLeif judgment in which the High Court (contrary to the district court) concluded that GoLeif did not make it sufficiently clear to the consumer that it only acted as an intermediary for the performance debtor (the airline). Hence, GoLeif was deemed the consumer's direct contractual party and thus liable for the loss sustained by the customer due to the airline's bankruptcy. The sparse *ratio decidendi* may be taken to mean that when GoLeif was legally regarded as the consumer's direct contracting party, the airline had to be considered as a subcontractor to GoLeif. In accordance with the general law of obligations principle stating that a contract party is liable for its subcontractors, GoLeif could be charged with the loss suffered by the bankruptcy of the airline carrier.³¹

It is not surprising that the intermediary construction can be contractually overruled based on an overall assessment of the circumstances of the case. It is the real relationship behind the contractual construction which is crucial, not whether the intermediary formally denotes itself as an intermediary.³² In consumer relations, the intermediary must act as the professional party and make an extra effort to clarify to the consumer that the intermediary platform only serves as an intermediary for the actual contracting party—as illustrated by the GoLeif judgment.

However, the fact that the intermediary, GoLeif, asserted liability in the case is more surprising, as a claim for compensation fundamentally requires a basis of liability, which does not appear to exist in this case. A strict liability—liability without fault—requires a clear legal basis, as in section 24 of the Sales of Goods Act.³³ If no legal basis for strict liability is present, as in this case, the basis shifts toward liability negligence.³⁴ However, it is not in itself negligent to go bankrupt. Hence, the subcontractor, the airline, had not been negligent. Nor had GoLeif's actions created grounds for incurring liability toward the consumer. Consequently, there does not seem to be any *culpa* in the contract chain and therefore no immediate basis for compensation.³⁵ As a result, the decision of the High Court seems questionable regarding this point.

³¹ Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i Obligationsret I*, (4th edn, Karnov Group 2015), p. 256.

³² See also the ruling of the ECJ in C-149/15.

³³ Pursuant to section 24 of the Danish Sales of Goods Act the vendor of generic goods incurs a reserved strict liability.

³⁴ Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i Obligationsret I*, (4th edn, Karnov Group 2015), p. 249.

³⁵ Compare the ruling of the ECJ in C-402/03, *Skov Eg*.

5.2. LIABILITY FOR BREACH OF WARRANTY

Another situation where the intermediary may incur liability to the performance creditor is if the intermediary can be said to have issued a warranty to the performance creditor for the fulfilment of the contract by the performance debtor. A warranty liability implies that the intermediary incurs a strict liability for the default of the performance debtor. Hence, it is not necessary to document negligence.³⁶

Whether the intermediary can be said to have given an implied warranty of the performance debtor's proper fulfilment of the contract must rely on an interpretation of the contractual relationship. However, this will rarely be the case, as the intermediary will usually be clear and emphatic about their intermediary status, stating in various ways that they can in no way vouch for the performance debtor's fulfilment of the agreement. In particular, this must apply in relation to sharing economy services where the intermediary has neither a commercial nor a legal interest in issuing a warranty. Moreover, unlike a manufacturer, the platform intermediary is not in any way involved in the manufacturing process and will therefore in practice have difficulties meeting a warranty obligation or providing specific performance (see below regarding remedies in case of a breach of contract). However, as both the *GoLeif* judgment and the judgment by the European Court of Justice in C-149/15, *Wathelet* indicate, it is largely the consumer's point of view that is adopted in the interpretation of the contractual basis by the courts. Hence, it may not require much before a declaration from the intermediary regarding the fulfilment of the contract will be interpreted as an actual warranty.

5.3. SECONDARY LIABILITY

If the intermediary construction cannot be set aside from a contractual perspective, the intermediary can conceivably incur a secondary liability, either via considerations of identification or the principle on vicarious liability laid down in the Danish Law of King Christian V 3-19-2 (hereinafter Danish Law). A claim based on identification is well-known from company law through instances where the director and sole proprietor of a small company manages the operation and incurs loss of third parties under circumstances where there has been a breach of law (see for example U 2003.1264 H and U 1999.326 Ø). Exceptionally, this could also be the case if identification is held regarding a group of companies who otherwise are viewed as independent legal entities (see for example, U 1997.1642 H and U 1968.766 H).³⁷

³⁶ Bernhard Gomard, *Obligationsret, 1. del*, (5th edn., Jurist- Og Økonomforbundets Forlag 2016) p. 239 ff.

³⁷ For more detail, see Erik Werlauff, *Selskabsret*, (8th revised edn, Karnov Group 2010), p. 532 f. and p. 581 ff.

In relation to sharing economy services, it is probably very rare that such personal or corporate coincidences between the performance debtor and the intermediary platform exist and thereby trigger liability based on company law identification considerations. In principle, the different legal entities that appear in digital sharing economy services must also be regarded as independent legal persons from a consumer point of view.

However, identity views are not unknown in the law of obligations. The decisive consideration here is whether the debtor lets another person enter their control sphere, whereby this other person then acts in a way that gives rise to a liability (see for example, U 1999.892 V).³⁸ It would be untenable for the performance creditor if the debtor could not be held responsible simply because they had left the performance of the contract to another.³⁹

The same mindset underpins the principle of vicarious liability (liability of employer).⁴⁰ Based on the principle found in Danish Law 3-19-2, an employer is liable for the damages caused by an employee's negligent action during work performed for the employer as part of their employment.⁴¹ The employer thus assumes responsibility for the employee's negligent acts, regardless of whether the employer has acted negligently. Hence, the employer holds a strict (secondary) liability in relation to the employee. Vicarious liability covers all employees of a company or organization and applies to both public and private companies. It further applies both in and outside of contract, and the employee's own liability (in relation to claims from an injured party or recourse from the employer) is limited in both respects pursuant to section 23 of the Liability Act.⁴² Vicarious liability includes actions performed by the employee as part of the employment relationship. However, in the case of non-contractual liability (torts), liability does not apply to unusual (abnormal) actions by the employee.⁴³

³⁸ Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i obligationsret I*, (4th edn, Karnov Group 2015)p. 201. The case in U 1999.892 Ø involves a rather different situation to any instances that one might expect to arise in conjunction with the exchange of services in sharing economy. However, the case might support the notion that the more the platform intermediary is able to control the services and effect the performance debtor's ability to provide the service in question, the more likely it becomes that the platform intermediary can incur liability for the breach of contract by the performance debtor.

³⁹ See Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i Obligationsret I*, (4th edn, Karnov Group 2015)p. 201, and Henry Ussing, *Obligationsret*, p. 114.

⁴⁰ Henry Ussing (p. 114) argues that a general liability for assistants is to a certain extent already within the scope of DL 3-19-2. However, such a general extension of vicarious liability has so far found no support in case law.

⁴¹ Regarding vicarious liability in general, see Bo von Eyben & Helle Isager, *Lærebog i erstatningsret*, (8th edn, Jurist- og Økonomforbundets Forlag 2015), chapter 6.

⁴² *Ibid*, p. 164 ff.

⁴³ See Bo von Eyben & Helle Isager, *Lærebog i erstatningsret*, (8th edn., Jurist- og Økonomforbundets Forlag 2015), p. 155 f., as well as, for instance, U 1994.215 Ø

In sharing economy services where the contractual relationship between the intermediary platform and the performance debtor may in fact constitute an employer/employee relationship, the rules regarding vicarious liability will lead the intermediary to be liable for the negligent actions of the performance debtor, irrespective of whether the intermediary itself has acted culpably. A very prominent example of this may turn out to be the Uber platform, where Uber's position is that the private drivers who transport customers throughout the world are self-employed and not employees under Uber's control. According to Uber, the platform service only connects these self-employed drivers with the customers. However, this has been challenged in a number of litigations in the US and various other countries where the claim is that Uber exercises such control over the drivers that in a legal sense an employment relationship exists.⁴⁴ This would also mean that Uber holds a vicarious liability for the driver's culpable actions in accordance with the principle laid down in DL 3-19-2. Corresponding litigations are also pending regarding other platform services resembling Uber.⁴⁵

In December 2017, the European Court of Justice ruled that the Uber service is inextricably linked to being a physical transport service and cannot be regarded as an information society service where other (and less strict) rules apply under EU law.⁴⁶ Whether this judgment is of importance to the relationship between Uber and the performance debtors (the drivers) and the performance creditors (the customers) is still unknown.

5.4. ACCOUNTABILITY AND RISK CONSIDERATIONS IN GENERAL

Finally, based on more general liability and risk considerations, we should examine whether there may be situations where the intermediary is deemed closest to bearing the risk of the performance debtor's breach of contract. If so, it must be assumed that the intermediary has undertaken a professional risk. However, the obligation law-based point of departure is the opposite, namely that it is the contracting party which is liable for any circumstances resulting in a breach.⁴⁷ In the GoLeif judgment, the intermediary was only held liable for the consumer's claim for damages because GoLeif in the specific legal relationship was considered directly bound by the contract with the consumer.

concerning sexual harassment on behalf of the employee. In accordance with the principle of freedom of contract, the parties are entitled to make the employer liable for even abnormal actions conducted by the employee.

⁴⁴ See www.classaction.com for cases pending in the USA, and <https://www.ft.com/content/84de88bc-c5ee-11e7-a1d2-6786f39ef675> for cases pending in Great Britain (links accessed at the latest on January 2019)

⁴⁵ Ibid.

⁴⁶ Case C-434/15, Asociación Profesional Elite Taxi.

⁴⁷ Mads Bryde Andersen & Josph Lookofsky, *Lærebog i obligationsret I*, (4th edn, Karnov Group 2015), p. 201 and Bernhard Gomard, *Obligationsret, 2. del*, (5th edn, Jurist- og Økonomforbundets Forlag 2016), p. 55 ff.

Outside such cases, in instances where the intermediary cannot be held liable based on an issued warranty or an employment relationship, the general presumption must oppose the intermediary being liable based on general risk considerations. Such liability must in any case assume that the sharing economy service in question establishes such a close relationship between the platform intermediary and the performance debtor that the default of the performance debtor is within the immediate control of the intermediary, according to the comments above regarding identity consideration. It is difficult to say when a situation like this may arise; yet it can hardly be excluded entirely given the current multitude of sharing economy services, as well as the frequently close involvement of the platform intermediary in the contractual set-up and in the performance debtor's performance itself.

6. REMEDIES

If intermediary liability is possible as per the above considerations, then we must inquire as to which specific remedies can be imposed on the intermediary. Initially, it is essential to note that neither the Unfair Contracts Directive nor the Distance Sales Directive contain provisions regarding intermediary liability. They include no stipulations as to what remedies—if any—the performance creditor may claim against the intermediary if the contractual basis does not decide this.

Thus, there are no specialized rules on contractual liability for platform intermediaries. In the absence of a *lex specialis*, this implies that the injured party can rely on the general rules and principles of the law of obligations, as well as more specialized principles developed for certain types of contracts, such as sales of goods contracts or rental contracts. At the current stage of the sharing economy, there are probably no specialized principles that will apply to this new type of contractual relationship. Thus, if the issue is not contractually regulated, the performance creditor must invoke the remedies resulting from the general part of the law of obligations.

In a situation where the platform intermediary can in fact be held liable, according to part 5 above, the starting point is that the performance creditor can invoke the same remedies against the intermediary as against the performance debtor. This is immediately evident in a situation such as the GoLeif judgment described above, where the intermediary is considered to be the performance creditor's direct contracting party and thus immediately obliged under the agreement.⁴⁸ The consumer could therefore invoke the right for compensation directly against GoLeif. In a situation where the intermediary cannot be regarded as a direct contractual party but nevertheless can be held primarily or secondarily liable based on the views discussed above under section 5, the question is whether the

⁴⁸ See also Mads Bryde Andersen & Joseph Lookofsky, *Lærebog i obligationsret I*, (4th edn, Karnov Group 2015), p. 201.

performance creditor can invoke all ordinary contractual remedies against the intermediary. In the absence of specific rules in the field, this should be assumed to be the case. As a matter of principle, once it has been established that the intermediary is liable on one basis or another, the interest of the performance creditor speaks in favour of having equal access to making remedies applicable to the intermediary just as against the performance debtor. However, this starting point may be modified in practice (see below).

The general contractual remedies include: (1) the right to claim compensation, the liability basis being negligence, and meeting the other cumulative compensation conditions; (2) the right to claim specific performance (which does not preclude a compensation claim); (3) cancellation if the breach of contract must be deemed material; (4) replacement delivery reallocation in contracts regarding generic goods if the defect is material; and (5) a proportionate reduction of the price if the product suffers from a depreciating defect.

On the other hand, there is no general right to claim remedy to the lack of conformity by repair in Danish law of obligations.⁴⁹ In consumer purchases covered by the Sales of Goods Act, the consumer has a right to redress, according to section 78(1), but this is of little relevance in this case since, as noted, most of the sharing economy services relate to services that fall outside the scope of the Sales of Goods Act section 78(1). Of course, a right to claim remedy to the lack of conformity by repair can be derived from the contract. In contracts for the provision of ongoing services, a right for the performance creditor to claim redress is more obvious and will often follow from or be interpreted by the contractual terms. Contracts for sharing economy services such as short-term housing rental, storage, or rental of various types of movable property, often exhibit this explicitness. For services where the performance debtor is obliged to make continuous improvements or maintenance (such as leasing of machinery or IT equipment), a remedy will to an even greater extent follow from the contract or an interpretation thereof.

The right to compensation is probably in practice the remedy that will be claimed most often in relation to a platform intermediary. It is also the remedy claimed in the GoLeif judgment, where the High Court states that the intermediary is liable to pay damages to the consumer to cover the purchase of replacement tickets to return to Copenhagen from Nice. As discussed above, the result is surprising insofar as neither the intermediary nor the airline acted culpably in the case, meaning that there seems to be no basis for a damage liability at all.

As discussed above, it is central to the definition of the platform intermediary concept that platform intermediaries may not also fulfil the role of performance debtor. They must be strictly an intermediary who

⁴⁹ Ibid, p. 209 ff. See also Bernhard Gomard, *Obligationsret, 2. del*, (4th edn, Jurist- og Økonomforbundets Forlag 2011), p. 86 ff. See however U.2012.950 H.

operates a digital platform through which the performance debtor and the customer can connect and contract with each other. This must imply—as per the GoLeif judgment—that in practice it will not be possible for a platform intermediary to perform specific performance in connection with sharing economy services, as the platform does not control accommodation, cars, flight tickets, or whatever the subject-matter of the contract may be. For this reason, the injured party will very often be denied any claim to specific performance or replacement delivery, which is why these remedies cannot be regarded as particularly relevant in the sharing economy. In practice, the performance creditor can very often only exercise the right to compensation to recover the loss that may be incurred.

The right of injured parties to demand cancellation in the event of material default is more relevant in the sharing economy—unless, of course, a service (such as accommodation provision) has already been performed, in which case the possibility of returning the services due to the cancellation is no longer present. In practice, the cancellation right is therefore often primarily of significance where there is an anticipatory breach of contract.

However, if the performed service suffered from actual and impaired deficiency, a proportional reduction in the purchase price could become a remedy which is relevant and in practice probably quite central (at least where the right to damages is not present because the conditions are not met). This may be obvious if, for example, the apartment in a platform-based short-term rental service has not been cleaned at the time of the rental, but will be somewhat harder if, for instance, the driver in a platform-based car-pooling service is perceived as unpleasant and offensive.

Overall, in sharing economy cases where the platform intermediary is deemed to be liable to the consumer, the fact that the intermediary conceptually does not coincide with the performance debtor means that the consumer will be restricted concerning the remedies that may be relied on under the general law of obligations. Most likely to prove relevant, then, will be the right to claim compensation or a proportionate reduction in the price, namely the economic remedies.

7. CONCLUSION

Sharing economy services are characterized by the existence of a tripartite relationship between the performance debtor (the provider of the service concerned), the performance creditor (the buyer of the service) and the platform intermediary operating the online platform service through which the contact between the parties is communicated and the contract between them is concluded. Thus, the platform intermediary acts as an intermediary and agent for the performance debtor, who is bound to the performance creditor by the legal transactions that are concluded electronically through the platform service. This article has explored the

question of whether the platform intermediary may incur liability to the performance creditor in the event of breach of contract by the performance debtor. We have also asked, where applicable, what contractual remedies may be available to the performance creditor.

Sharing economy services are not specially regulated. Yet a few statutory rules in contract law and consumer contract law are also relevant to these new types of service where the contract concluded via the platform service is a consumer contract. Since sharing economy services are usually services and thus not covered by the Sale of Goods Act (notably, they do not fall under the intermediary provision in section 4(a), para 2), the general rules of obligations law will serve as supplementary and facultative rules for the legal relationships of the parties.

From the few and scattered rules regarding intermediary services we can deduce that three cumulative conditions must be fulfilled before a service is an intermediary service. The intermediary must: 1) be a trader, 2) perform an activity in connection with the conclusion of the contract between the creditor and the debtor, and 3) not be the performing debtor. These three conditions will generally be met with regard to part-finance services.

The main rule under Danish law is that it is not the intermediary but the principal (the performance debtor) who is bound by the intermediary's dispositions and thus liable to the performance creditor. Case law, in particular in the case of the GoLeif judgment, shows that the main rule may be waived if the intermediary does not apply a clear, understandable, and common language (both in the course of the agreement and subsequently). This must enable the consumer to correctly decode the performance creditor and the platform intermediary's respective roles and obligations.

Considerations issuing from the law of obligations mean that the intermediary may be considered liable to the performance creditor. This may transpire if the intermediary is deemed to be—in reality—the direct contracting party of the performance debtor. In this respect, the degree of involvement by the intermediary in the contractual process and fulfilment is central. A liability may also be imposed based on identification considerations, although this must be regarded as a distant prospect, at least in the present development stage of the sharing economy. Finally, platform intermediary liability may be based on secondary liability considerations. In this respect, a power of directions from the platform intermediary towards the performance debtor may be decisive to state a liability.

In the absence of a contract regulation or *lex specialis* rules, the use of defaulting remedies directed at the intermediary should be supported on the general part of the law of obligations. However, the remedies will in practice most likely be limited to the financial remedies of compensation and proportional reduction.

The sharing economy holds some clear potential in terms of using resources in a better and more environmentally sustainable manner; especially when an individual's use of a resource is too infrequent to make buying or renting it an obvious choice. As a result, the sharing economy is very likely here to stay and will no doubt grow rapidly in the years to come. Nevertheless, a number of unresolved legal issues persist. However, these issues are relatively complex, which reduces the extent to which we can draw a simple or settled picture of the legal position within this contemporary and interesting area of the law.