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The inclusion of arbitration clauses in carriage of goods contracts a choice or a necessity

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Abstract
This paper aims at understanding the underlying policies behind the inclusion of an arbitration clause in a carriage of goods contract. The inclusion of an arbitration clause helps to prevent to a large extent, the existence of a long pending dispute with regards to jurisdiction but the problem of having the upper hand in determining the applicable arbitration law still exists since various arbitration laws exist side by side, One can say that arbitration is a consensual dispute method and an arbitration clause is commonly placed in contract to eliminate the threat of court action in the event of disputes. Such a clause normally outlines the terms of arbitration and binds the parties to the final decision. An arbitration agreement/clause does not stand on its own; it arises out of existing relationship between parties. This simply means that the parties must have agreed prior to the dispute in a written form or otherwise, that any dispute that arises from this existing relationship be settled by arbitration. A lot of times international trade cannot function without carriage of goods by sea. This is so because, no other means of transport would effectively transport goods proficiently at also very reasonable charges. In the contract of carriage of goods by sea there is an inherent struggle which arises between the interests of the carrier more or less known as the ship owner and the shipper also known as the cargo owner, this inherent struggle between the various interests always expected, what both parties should be concerned about is the effective performance of contract by both parties involved. This paper explores the need for an inclusion of an Arbitration clause as a necessity instead of a choice, because by the inclusion of the clause, parties are allowed to choose beforehand the Laws that govern their transaction. This will help resolve business dispute in definite and enforceable manner.

Keywords: arbitration, carriage of goods, jurisdiction

1. Introduction

From a legal perspective, Jurisdiction is one of the fundamental issues in any litigious matter. It is particularly important in the area of cases related to the carriage of goods since in this environment, almost without exception suits must be brought within a very specific and sometimes very short time limit in order to safeguard claimants' rights against the carrier [1].

There is no gain saying that maritime commercial contracts more often than not cuts across boundaries. This is largely attributable to the parties involved who are usually of different nationalities or the movement of goods via waterways present in various countries. The result of this is that at various times different laws are applicable to a particular contracts, especially where the parties have failed to or neglected to include in the terms of contract the particular law that applies in the case of conflict/ dispute. To this end, the party with a better bargaining power is able to influence the particular law that prevails to the detriment of the weaker party [2]. The above suggests that the inclusion of an arbitration clause helps to prevent to a large extent, the existence of a long pending dispute with regards to jurisdiction but the problem of having the upper hand in determining the applicable arbitration law still exists since various arbitration laws exist side by side.

Arbitration is established on common agreement, this is what the 1996 Act thrives to identify by investing the parties with powers over arbitration proceedings. In general parties are permitted to determine such matters as the size, composition of the panel, procedure to be followed [3].

Arbitration Clauses are no doubt necessary nonetheless a uniform Law which is applicable in all countries is important for it to be effective. Again, owing to the peculiarity of Carriage of Goods and the existence of various types of Carriage of Goods, it is clear that the proper drafting of the clause is also as important as having the clause included in the Contract. This work therefore addresses the following key issues:

1. The importance of including arbitration clauses and any law to apply as the parties may deem it fit.
2. The importance of having a unified law and the resultant effect to commercial situations.

[1] E.g. Article 3 Para. 6 of the International Convention for the Unification of Certain rules of Law Relating to Bills of Lading, Brussels 1924 (Hague Rules), Article 3 Para. 6 of the Hague/Visby Rules, Brussels 1968; Article 20 of the United Nations Convention on the Carriage of Good by Sea (the Hamburg Rules), Hamburg 1978; Article 32 of the Convention on the Contract for the International Carriage of Good by Road (CMR), Geneva, 19 May 1956); Article 47 of the Convention concerning International Carriage by Rail (COTIF/CIM 1999); Article 24 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest 2000 (CMNI); Article 29 Convention for the Unification of Certain Rules for International Carriage by Air, Warsaw 1929 (as amended by the Protocol of 1955), Warsaw Convention (WA); Article 35 Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 1999, Montreal Convention (MA).

[2] Ibid

[3] Sec15- 41 1996 Arbitration Act.

2. Arbitration clauses and its essence

Arbitration as a means of settling dispute has been existence over the years dating back to 17th century medieval Roman Empire. It has become the principal way of resolving disputes between states, individuals and corporations in almost every aspect of international trade, commerce and investment [4]. Arbitration is an agreement between two or more parties with the resolve to settling a dispute without recourse to the traditional court of law. Once parties submit themselves to arbitration it is expected that they intend for the decision arising from there will be binding on all the parties. There is usually no standard set of rules as to how arbitration is conducted. It is typically left to the agreement of the parties. To facilitate the process though the parties will oftentimes agree to use the rules of the country where either party is domiciled or at the seat of the arbitration [5]. The procedure for deciding your claim can, if you insist, be almost as formal as if you had gone to court. But it is much more likely to be in a relaxed and informal procedure; the arbitrator is likely to be very experienced in deciding this kind of dispute. A very important point to note is the *Scot v. Avery Clause;* this is where a clause provides that no right of action shall arise unless and until an award has been made. It precludes the parties from filing an action before the court except arbitration has been resorted to and a final award delivered. In delivering its judgment the House of Lords decided that though it is a principle of law that parties cannot by contract oust the jurisdiction of the courts, any person may covenant that no right of action shall accrue till arbitration has decided on any difference that may arise between the two parties to covenant. Finally it is very important that an arbitration agreement is clear precise and satisfactory to all parties involved.

3. The General nature of Carriage of Goods by Sea Contract

When a shipowner directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose, the arrangement is known as a contract of affreightment [6]. These kinds of contracts take a variety of forms, although the traditional division is between those embodied in charter parties and those evidenced by bills of lading [7]. Where the shipowner agrees to make available the entire carrying capacity of his vessel for either a particular voyage or a specified period of time, the arrangement normally takes the form of a charter party [8]. On the other hand, if he employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship cargo, then the resulting contract of carriage will usually be evidenced by a bill of lading [9]. These two categories of charter party and bill of lading are not however mutually exclusive since most often than not the party chartering a vessel for a specific period may operate it as a general carrier [10]. A charter party is a contract which is negotiated in a free market, subject only to the laws of supply and demand [11]. While the relative bargaining strengths of the parties will depend on the current state of market, shipowner and charter are otherwise able to negotiate their own terms free from any statutory interference [12]. In practice however they will invariably select a standard form of charter party as the basis of their agreement to which they would probably attach additional clauses to suit their requirement [13]. The main types of the charter party are the Bareboat Charter Party (normally called the Demise Charter) and Time Charter. The main distinctions between the two forms of voyage and time charter stem from their basic difference in function [14]. While in both cases the shipowner remains responsible for the running of his own vessel and is basically only providing a carrying service, the voyage charter is undertaking to transport a specified cargo between designated ports, whereas in the time charter he is placing his vessel for an agreed time at the disposal of the charterer who is free to employ it for his own purpose within the permitted contractual limits [15]. Another important issue to consider in a Charter party is the Demurrage Clause. This clause states that if the charter fails to complete loading or discharging within in the stipulated days given by the charter party he must pay for the delay at the agreed price per day [16]. It is important to state that all days are counted irrespective of if the cargo is worked, this means that Sundays, Public Holidays and also days that no work was carried out due to poor weather, in essence once a ship or vessel has encountered demurrage, it run consecutively except differently stated in the Charter Party. Generally most contracts of affreightment have a clause that provides that any dispute that arises should be referred to Arbitration. This invariably is the case in relation to charter parties, though arbitration clauses are less frequently found in bills of lading except where the bill incorporates an arbitration clause in the charter party under which it is issued [17].

4. Examining the laws of Carriage of Goods Contract

1. Hague/Hague Visby Rule

At common law parties to a contract of affreightment covered by a bill of lading or similar document had complete freedom to negotiate their own terms as had the parties to a charter party [18]. An abuse of the carrier's stronger bargaining stand during the nineteenth century however resulted in the curtailment of this freedom and the formulation in 1924 of the Hague Rules [19]. The Hague/Hague Visby Rules was to protect cargo owners from widespread exclusion of liability by sea carriers [20]. This was achieved by requiring standard clauses to be incorporated into bills of lading, defining the risks which must be borne by the carrier and specifying the maximum protection he could claim from exclusion and limitation of liability clauses [21]. The Hague/ Hague Visby rules accordingly helped portray a basic and mandatory frame work of contractual clauses for incorporation in a contract outside of which the parties are free to negotiate additional

[4] Redfern and Hunter on International Arbitration 5th Edition (Oxford University Press 2009)pg 1
[5] ibid
[6] John f. Wilson Carriage of Goods by Sea(7th Edition Pearson Longman 2008)pg3
[7] ibid
[8] ibid
[9] ibid
[10] ibid
[11] ibid
[12] ibid
[13] Ibid.
[14] Ibid pg4
[15] Ibid pg5
[16] ibid
[17] Ibid pg 355.
[18] Ibid pg 174
[19] ibid
[20] ibid

terms of their own [21]. On the other hand also the Visby Protocol also had two competing issues, which needed to be addressed.

a. There was proposal to a rule by which the courts of a contracting state could exercise jurisdiction notwithstanding the fact that the bill of lading contains a jurisdiction clause, which if allowed to stand, would bring the action outside the scope of the convention or before some court where the convention would be respected [22]. (This position would have been the interpretation of caused Art 3(8) [23].

The second issue raised in the Visby Rules would have been able to overrule the provisions of Art 3(8) is to the effect that

b. There is a rule by which the contracting states would be obliged to accept as binding jurisdiction clauses in bill of lading which seemed reasonable especially if by such clauses jurisdiction would be given to a court in a contracting state [24].

The above two raised did not see the light of day, as it was seen that the liability regime should instead focus on the substantive rules governing the liability of the parties. It was felt that a liability regime was not the necessary vehicle for the special provisions about conflicts of law laying down what jurisdiction is acceptable [25]. In essence the Hague/Hague Visby did not have any stand as regards arbitration and jurisdiction but left all issues to be addressed to National law.

2. Hamburg Rules

The modifications to the Hague Rules effected by the protocol in 1968 did not gain universal approval, they were regarded by many cargo-owning countries as constituting merely a temporary expedient and there was a growing demand for a proper reappraisal of carrier liability designed to produce a comprehensive code covering all aspects of the contract of carriage [26]. This brought into the existence of a new convention which was adopted at an international conference sponsored by the United Nations in Hamburg in March 1978. The convention known as the Hamburg rules became effective on the 1st of November 1992 [27].

The Hamburg Rules apply to contract of carriage by sea which is defined as any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another [28].

The Hamburg Rules became the first international regime to regulate jurisdiction and arbitration, the essence was to guard against the risk where in carriers would take advantage of their market power to force cargo claimants to pursue their claims in comfortable forums (or to abandon their claims entirely) two new provisions guaranteed the plaintiff [29]. (In the litigation context) and the claimant [30]. (in the arbitration context) the right to bring proceedings in a reasonable forum, in essence plaintiffs and claimants were permitted to choose from a list of forums that had a significant connection with the transaction or the carrier, including the carrier's principal place of business, the ports of loading and discharge and any forum specified in the contract of loading [31]. The Hamburg rules which contains provisions as to jurisdiction and arbitration as seen in other conventions in relation to goods by air, road and rail, but not inland waterways [32]. These kinds of provisions limit the effect of arbitration agreements, despite this it is important to state that the Hamburg Rules have really not been accepted internationally, suffice to say these countries like Canada and some other Nordic countries have introduced their own legislation similar to the Hamburg Rules which also border of Jurisdiction.

Sec 46 [33]. Has a similar proviso to Art 21 [34]. the exception here is that the Canadian legislation shows is more favorable to the cargo claimants as it permits an action to be brought if the defendant has a place of business, branch or agency in Canada, rather the principal place of business or the habitual residence of the carrier provided for by the Hamburg Rules [35]. The rationale for Sec 46 included giving Canadian importers and exporters the righto pursue cargo claims in Canada and an attack on what was perceived to be a monopoly of the British courts over such claims [36].

Nations, industry group sympathetic to carrier interests, along with nations commonly selected in choice-of-court and arbitration agreements argued that there should be no provision on jurisdiction or arbitration except perhaps one that routinely enforced choice of court and arbitration agreements [37]. Not Surprisingly the United Kingdom was a prominent member of this coalition [38]. At the other extreme, nations and industry groups sympathetic to cargo interests, along with nations that regulate jurisdiction and arbitration domestically [39]. Or as parties to the Hamburg rules [40]. Insisted that the convention should follow the example of the Hamburg Rules to protect a cargo claimant's ability to seek recovery in reasonable forum of its choice not withstanding an inconsistent choice –of-court or arbitration agreement [41]. Between these two extremes, a number of nations sought a more balanced compromise position between cargo and carrier interests [42]. Because United States had been forced to forge a compromise position

[21] ibid
[22] CMI Stockholm Conference Report 1963 @101 (report of the sub-committee on Bills of Lading)
[23] Op.cit 24
[24] Op.cit 27@102 report of the sub-committee on Bills of Lading.
[25] Ibid.
[26] Op.cit5 @ pg215
[27] ibid
[28] Art 1.6 Hamburg Rules
[29] Art 21(1) Hamburg Rules
[30] Art 22(3) ibid
[31] Art 21(1);22(3) ibid
[32] R Herber Jurisdiction and Arbitration-should the new convention contain rules on these subjects?(2002)LMCLQ 405 for a comparison of the provisions of those conventions
[33] Canadian Marine Liability Act 2001
[34] Hamburg Rules
[35] Professor Yvonne Baatz Jurisdiction and Arbitration (A new convention for the carriage of goods by sea-Rotterdam rules) law text publishing 2003 pg259
[36] ibid
[37] Op.cit26@pg 327
[38] Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration, U,N doc no A/CN.9/WGIII/WP.59(18th November 2005)
[39] Op.cit @ 328
[40] Art 21-22 Hamburg Rules
[41] Some of the Discussion in favour of a Hamburg –style approach in the jurisdiction context is reported at 9th session report para 61;14th session report para 132 15th session report para 158 18th session report para 254. For arbitration context see eg 14th session report para 155;16th session report para 89
[42] Some of the discussion in favour of a compromise approach in the jurisdiction context is reported at 14th session report para 135,15th session para157;16th session report para21.For the arbitration context see eg 14th session para 156 16th session report para 85,90

among its domestic interests, it was a leading advocate to the compromise approach during the UNCITRAL [43]. Negotiations [44]. The UNCITRAL may finally be able to address the upcoming uproar which would have made America part of the compromise, the supreme court in Vimar Seguros y Reasegurous, S.A v. M/V Sky Reefer [45]. Over ruled Indussa [46]. And declared that subsection 3(8) [47]. Does not apply to forum selection clauses, although Sky Reefer involved an arbitration clause, there can be little doubt that its broad ruling applied equally to all forum selection clause [48]. Based on the Sky Reefer case, it was realized that issues that would be raised based on Arbitration should have reference to the New York Convention [49].

The contrast with the Hamburg rules, in which UNCITRAL managed to obtain agreement on articles 21 and 22, is very striking; on the other hand it could be the drafters of the Hamburg Rules who could be said to be a bit ambitious [50]. This dissatisfaction with Articles 21 and 22 was probably one of the major reasons for the failure of the Hamburg Rules, thereby causing it not to achieve major acceptance, it is commonly agreed that it is better to harmonize ten percent of the law governing forum selection and arbitration clauses and in the process to achieve much higher levels of harmonization in other aspects of transport law, than to fail entirely by trying to force too much harmonization on parties that are unwilling to accept it [51].

It is worth considering whether a country with mixed objectives such as United states, would be better able to obtain goals under national law, the United states sought to have a rule that would protect cargo claimants access to a convenient forum in any country that has a defined connection to the carriage of the damaged cargo except when the volume contract applies [52]. The present compromise ensures only in those countries that do not chose Article 76(4) [53]. Option, but presumably many countries including the United States and China will make that choice [54]. Domestic legislation could ensure access only in the United States; also the United States sought a rule that would bind third parties on notice of forum selection agreement under a volume contract. The present compromise binds only those third parties that appear in courts whose national law provides for the desired result, but there will presumably be many such countries including the United States and the United Kingdom [55].

3. Rotterdam rules.

In an attempt to stop further disintegration, a new international initiative was launched, this was at the request of UNCITRAL, and the CMI produced a draft instrument on transport law which is submitted to the UNCITRAL Secretariat in 2001 [56]. The detailed examination of this draft was delegated examination of this draft was delegated to a UNCITRAL working group, which after extensive study and discussion completed its third and final review in January 2008 [57]. There was no diplomatic conference on this occasion but the convention to be known as The Rotterdam Rules was opened for signature in Rotterdam 23rd September 2009. Twenty ratifications, or their equivalent will be required for implementation and the Convention will enter into force one year after the date of deposit of the 20th instrument of ratification, acceptance, approval or accession [58].

Although the provisions in the Rotterdam Rules on jurisdiction and arbitration are influenced by the jurisdictions provisions of Hamburg Rules, there are significant differences [59]. Articles 21.1 and 22.3 Hamburg Rules give the cargo claimant a choice as to where to bring court or arbitration proceedings, the choice includes principal place of business or in the absence of the habitual place of residence of the defendant, the place where the contract was made, as long as the defendant has a place of business, branch or agency there through which the contract was made, or the port of loading or the port of discharge, or any additional place designated in the contract [60]. This means that the choice of jurisdiction or place of arbitration was relegated to an option which was never exclusive, unless concluded after the claims had arisen [61]. Between the Rotterdam Rules and Hamburg Rules, the Rotterdam Rules allow for party autonomy this is fixed on the fact that the jurisdiction clause or the arbitration clause is made effective, this is unlike the Hamburg Rules which has more complex and demanding provisions.

Furthermore the Rotterdam rules differentiate between those contracts to which the parties are deemed to be in need of mandatory protection and those contracts called volume contracts [62]. Where the parties have greater, although still

43 The United Nations Commission on International Trade Law.
44 Proposal by the United States of America,U.N doc noA/CN.9/WG.III/WP.34(7th August 2003)
45 515 U.S 528,1995 AMC 1817(1995)
46 377 F.2d 200,1967 AMC 589(2d Cir.1967)(en banc)
47 Carriage of goods by Sea Act (COGSA), "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence ,fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.
48 Micheal F. Sturley; Over Ruling Sky Reefer in the International Arena: A preliminary assessment of forum selection and arbitration clauses in the new uncitral transport law convention. (37 J Mar. L&Com1) Jan 2006.
49 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10,1958,21 U.N.S.T 2518,330 U.N.T.S 38
50 ibid
51 ibid
52 ibid
53 Rotterdam Rules
54 During the discussions, it was assumed that Japan and European Community would take discussions of this option, at least to the extent that Japanese law and Brussels Regulation 1 provide for the enforcement of forum selection clauses. It was also assumed that the United states and China would not take advantage of Articles 76(4) option. The validity of these assumptions will obviously affect the practical impact of the proposal.
55 Op.cit 53.
56 John f. Wilson Carriage of Goods by Sea(7th Edition Pearson Longman 2008)pg 230
57 ibid
58 To date (23rd March 2010) states have signed the convention but there is not yet any ratification. The signatories include France, the Netherlands, Nigeria, Norway, Spain, and the United states. For an analysis of the rules see The Rotterdam rules: A practical annotation (institute of maritime law, university of Southampton), Thomas Dr(ed) a new convention for the carriage of goods by sea- the Rotterdam rules.an analysis of the UN convention on contracts for the international carriage of goods wholly or partly by sea Diamond A, the next sea convention (2008) LMCLQ135.
59 Op.cit 40@ 263
60 ibid
61 Art 21.5 and 22.6 Hamburg Rules.
62 A volume contract is defined in art 12 as a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipment during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range'.See R Asariots UNCITRAL Draft Convention on contract for the Carriage of Goods Wholly or Partly by Sea: Mandatory Rules and Freedom of contract in A

limited freedom of contract. Article 80 provides that the parties to a volume of contract can to a certain extent [63]. Derogate from the Rotterdam Rules, provided certain requirements are met [64]. Article 80.2 seeks to establish that the shipper is given proper notice of the derogation and has opportunity to conclude terms that have no business which such derogation, further requirements are placed by art 80.5 which states that if a third party is subject to those derogations to make sure that there is express consent by the third party to derogations [65].

The Rotterdam Rules do not define "timely and adequate notice," nor did

UNCITRAL Working Group III discusses a definition of those terms. A prominent Statement on the face of a transport document or electronic record was thought by many involved in the UNCITRAL negotiations to constitute "timely and adequate" Notice. The drafters realized that the purchaser of cargo often does not receive the

Transport document or electronic record until after it pays for the cargo. Thus, the Cargo buyer may not learn of the choice of forum or arbitration provision until after it has paid for the cargo, but either the cargo seller or buyer will probably be a party to the volume contract and will know of the clause.

If a purchaser of cargo does not want the carrier to choose the Article 66 place to litigate or the Article 75 place to arbitrate, the purchaser should specify in a contract of sale or letter of credit that such clauses in the transport document or electronic records are not acceptable.

The Rotterdam Rules will restore to a great extent the holding of the en banc Opinion authored by Judge Friendly in the case of Indussa Corp. v.S.S. Ranborg, [66]. It will provide the transportation industry with a clearer understanding of the place where claims for loss or damage may be resolved [67]. The understanding will give a better expectedness than forum non conveniens concepts or the reasonableness standard announced by the Supreme Court in M/S Bremen, et al. v Zapata off-Shore Co [68]. "[f]orum-selection clauses . . . are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'Unreasonable' under the circumstances [69].

This vague "reasonable" standard was also used in both Wm. H. Muller & Co., Inc. v. Swedish America Line, Ltd [70]. And Indussa [71]. The Wm. H. Muller the court took into consideration whether a clause requiring suit in Sweden was reasonable for a suit involving the loss of cargo when a Swedish built, owned involving the loss of cargo when a Swedish built owned and crewed ship was lost at sea during a voyage from Gothenburg, Sweden to Philadelphia, Pennsylvania, The court noted as if it were deciding a motion for forum non conveniens, that most of the evidence would be available in Sweden [72].

The Rotterdam Rules are silent on the effect, if any, of the jurisdiction and arbitration Provisions on the doctrine of forum non conveniens [73]. Any of the five places at which The Rotterdam Rules will permit cargo plaintiffs to bring suit would likely be considered a convenient forum, the jurisdiction of which would probably not be declined on the grounds of forum non conveniens [74].

From the American perspective it is important to state that The Jurisdiction and Arbitration chapters the Rotterdam Rules are a significant improvement on the present law of the United States [75].

Cargo interests generally will be able to commence suit or arbitration in a place convenient for them [76].

However the Canadian Maritime, was a strong critique of the Opt-in measure, the had a strong resolution not to adopt the Rotterdam Rules on the basis Chapter 6 Sec 46 [77]. Gives room for a claimant to opt in for suit or arbitration in any of the five situations contemplated by Articles 21 and 22 of the Hamburg Rules [78]. in areas where the Hamburg Rules do have relevance. If Canada ratifies the Rotterdam rules and opts for its jurisdiction and arbitration provisions, the Marine Liability will likely have to be modified to include the provisions; the Marine Liability Act will likely have to be modified to have the provisos as regards the Hamburg Rules [79]. Whether Canada opts in or opts out a contract for the international carriage of goods between a Canadian party and a party of a state that has not opted for the jurisdiction and arbitration provisions will have to be governed by the Canadian national legislation if the requirements of the Marine Liability Act Section 46(1) are met, It would be of no gain for Canada to be bound by the provisions on jurisdiction and arbitration [80].

This means therefore that if Canada ratifies the Rotterdam Rules and opts to be bound by its chapters on jurisdiction and arbitration, no international uniformity will be achieved except Canada's major trading partners do the same, this invariably means that chapter 14 and 15 of the Rotterdam Rules, not many would be likely bound by them and the international uniformity on matters of jurisdiction and arbitration of international carriage of goods will basically

Antapassis,L Athanassiou and E Rosaeg(eds) Competition and Regulation in Shipping and Shipping Related Industries(Martinus Nijhoff2009); A Diamond 'The Next Sea Carriage Convention ? (2008)LMCLQ 135 at 146-48, Chapter 3(above pp52-88 at 82,83)

[63] Pursuant to Art80.4 the parties do not have freedom to alter the rights and obligations to provide information to the carrier and 32 (shippers obligations in relation to dangerous goods)or to liability arising from an act or omission which would break the limits under Art 61

[64] Op.cit 40@ 264

[65] ibid

[66] Ranborg 377 F.2d.200(2d.cir.1967)

[67] Op.cit 79

[68] 407 U.S 1 9-10(1972)

[69] Ibid

[70] 224 F.2d 806,808

[71] 224 F.2d 200

[72] 224 F.2d @808

[73] Op.cit 79

[74] Op.cit 79

[75] ibid

[76] ibid

[77] Canadian Marine Liability Act 2001

[78] See Marine Liability Act s 46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where (*a*) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or(*c*) the contract was made in Canada.

Agreement to designate

(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.

[79] Professor William Tetley, A critique of the Canadian response to the Rotterdam Rules(A new convention for the Carriage of Goods by Sea- The Rotterdam Rules) law text 2009@ pg288

[80] ibid

not be achieved [81].

5. The peculiarities associated with carriage of goods contract by sea: are arbitration clauses suitable for them?

Before light is thrown into the peculiarities of the carriage of goods by sea contract, it is important to state that there are multimodal means of transportation all over the world.

Article 1 (1) [82]. ''International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country [83].

Multimodal transport came into lime light as a result of the divers' means of transportation, which are Sea, Road, Rail and Air.

The carriage of goods by sea system has evolved over times, with the various regimes, from the Hague/Hague Visby Regime to the Hamburg Regime and also the Rotterdam Regime. These regimes have in various tried to ensure the smooth running of the carriage of goods system.

The Hague Rules were internationally accepted, but later on achieving uniformity became a challenge, The Hague Rules were later on expanded which brought forth the Hague/Hague Visby Rules.

The Hague/Hague Visby Rules where further rewritten, despite the rewrite Hamburg Rules approach was in many ways similar to The Hague and Hague- Visby rules [84]. Many criticized the Hamburg Rules as the product of a political process in which a majority of those negotiating the convention were more concerned about achieving political goals than meeting commercial needs [85]. The Hamburg Rules evolved into The Rotterdam Rules, the Rotterdam rules draw largely on the Hague/Hague Visby and Hamburg incorporating significant elements for each; because the Rotterdam Rules are built on existing foundations, very little about them is completely new.

The Hague/Hague –Visby Rules made little or no recognition to Arbitration or jurisdiction, the Hamburg Rules and The Rotterdam Rules included Arbitration clauses but did not achieve Harmonization because it tends to be uncertain which may lead to injustice.

These peculiarities to the carriage of good contract has given the affreightment of goods a sense of uniqueness, therefore the inclusion of arbitration clauses is very important to an extent that the most and essential reason for an arbitration clause in an agreement is that it directs how the parties will resolve any issue(s) that arises. The inclusion of the clause is that parties have agreed to do so, so as to displace the court of law and they must accept the award for going such cases, the discretion of the court will not be readily exercised and will strictly confined to the specific grounds such as misconduct of the arbitrator, fraud to name but a few.

The wordings of the clause are very important in the sense that it generally outlines most or all of the terms surrounding the arbitration process. This should include the types of disputes that will be handled in this way. Many clauses state that all contractual issues are subject to arbitration. Others, however, limit arbitration to minor matters, while reserving the right to dispute major issues in court. When only certain matters will be handled by arbitration, they should be explicitly stated to eliminate confusion or disagreement. The inclusion of arbitration in the contract of carriage of goods by sea could serve as an alternative to resolve dispute but only when there is a consensus by the parties.

6. Conclusions

A contract of carriage specifies concerns which relate to the safe passage of goods from one specified place to another specified place. The essence of the contract is to safeguard that the goods are carried in a safety and also in a timely manner by the carrier.

In essence the parties have to agree on the time and place of shipment and delivery, the direction of voyage, the payment of freight, the obligations of the parties in carrying the necessary task of transmitting the goods from the specified place to their destination; the choice of law, choice of arbitration and also the incorporation of charter party clauses (if necessary) and any other matters that might affect the rights and also the liability of the parties.

The contracts for the carriage of goods by sea has been seen to be very enterprising but the legal framework that governs it is both complex, rigid and unpredictable, the life saver to this is when the laws are being harmonized to bring stability and certainty to the laws governing the contract for the carriage of goods by sea, it neutralizes laws and makes it flexible for it to fit into civil and common law. It assumes efficiency in the global allocation of laws that will govern and unify the carriage of goods by sea for less complexity and uncertainty in the arbitration clauses.

A convincing and achievable solution might involve the development of a new model law along the lines of the UNCITRAL Model Laws on Arbitration, which can provide a general standard framework liability regime for adoption by jurisdictions. Within this universal framework, allowances should be made for frequent apprising of the detailed substantive provisions this would ensure that the regime does not fall behind developments. This concept of reform, if properly executed, can help achieve the useful advantages required in adopting hybrid carriage regimes, without losing international uniformity or coherence.

In essence in the inclusion of Arbitration should be a necessity instead of an option, because as a result of the inclusion of the clause, parties are allowed to choose beforehand the Laws that govern their transaction. In the event of disputes they can determine the place of arbitration, necessary laws, and the number of people that would arbitrate over the issue, if all these are stated in the contract, it becomes easier for parties to settle disputes easier and both parties are relatively comfortable with the outcome of the arbitration. Due to the intricacies that are surrounded by carriage of goods the inclusion of the arbitration clauses, would help reduce and sort out the various intricacies that evolve in the transaction. It is also important that arbitration clauses should be clear and precise, because if not clear and precise it has not solved the problem, because the parties would have to first faced with the issue to tackle what

[81] ibid
[82] The United Nations convention on international multimodal transport of goods 1980.
[83] Ibid
[84] Prof M. Sturley Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam rules(A new convention for the carriage of goods by sea the Rotterdam rules)law text 2003 pg 8
[85] ibid@24

exactly the arbitration clause is talking about before going into the crux of the matter, this further delays the dispute settlement and there by negating the inclusion of the arbitration agreement.

The inclusion of the clause should be a necessity because it shows clearly that parties have consented to resolve their disputes by arbitration, this consent is very important because it validates the Arbitration.

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