CARRIAGE OF GOODS BY AIR AND SEA : A RELATIVE AND DIAGNOSTIC ASSESSMENT OF THE PREVAILING REGIMES

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I. Introduction

International trade law, which is invariably extensive and all-inclusive in nature, entangles a number of inter-related activities, the most quintessential of them being exchange of goods from one country to another. The conveyance of such goods is effectuated by various modes, of which air and sea being the most important ones occupies a central role in international commercial transactions. Both the modes of carriage of goods are guided by specific set of rules which have been developed through various Conventions over the period of time. Carriage of goods by air is governed by the Warsaw Convention of 1929 and the Montreal Convention of 1999, whereas, the carriage of goods by sea is governed by the Hague Rules of 1924, Hamburg Rules of 1978 and the more recent Rotterdam Rules of 2008. These conventions encompass the main liability regimes of the carrier while carrying goods from one country to another. Both the modes of carriage have their own advantages and problems and hence, one cannot straightaway be declared to be more convenient or beneficial than the other. The article is an endeavor to locate the substantial and important issues in those regimes governing the carriage of goods and subsequently follow it up with a comparative and critical analysis which will ultimately lead to opt for a considerably better, superior and efficient mode of carriage of goods.

II. The Initial Divergence

While drawing analogy between the two modes one cannot help noticing the diverse manner of progress of the two modes. The law on the carriage of goods by air dates back to the early Twentieth Century when aerial navigation began the transition from myth to reality. [2]Air carriage rules were since its inception an international activity and quite naturally, the development of the unifications of air laws initially manifest its entrance in the international platform by way of international Convention, i.e., the Warsaw Convention of 1929[3], and subsequently the national laws developed according to the international Conventions. On the contrary, in case of carriage of goods by sea, domestic laws of the Unites States of America (hereinafter referred to as USA) were frontrunners from the very beginning. As such, it was the provisions of Harter Act, 1893 of the USA that finally led to the formation of Hague Rules of 1924, which was granted the status of International Convention afterwards with some modifications.[4]

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2 Hailegabriel G. Feyissa, Ethiopian Law Of International Carriage By Air: An Overview, Mizan Law Review, Vol 5 No 2, 2011, http://www.ajol.info/index.php/mlr/article/viewFile/72959/61850

3 Convention for the Unification of Certain Rules relating to International Carriage by Air

4 Stephen Zamora, Carrier Liability for Damage or Loss to Cargo in International Transport, The American Journal of Comparative Law, Vol. 23, No. 3 (Summer, 1975), pp. 391-450

III. Negotiability of Documents

Initial point of difference between the two modes of transport starts with the documents that evidence the contract of carriage by the two modes. The eminent document which is involved in the carriage of goods from one country to another country by air is called the air waybill or air consignment note.[5] It evidences the contract or agreement of international carriage between the parties. The evidentiary value of the air way bill is provided both under the Warsaw[6] and the Montreal Convention. On the other hand, Charter Party and Bill of Lading are the primary documents evidencing carriage of goods by sea. Among these two, Bill of Lading is of more importance and deserves a special discussion. According to Halsbury's Laws of England, A bill of lading is a document signed by the ship-owner, or by the master or other agent of the ship-owner, which states that certain specified goods have been shipped in a particular ship, and which purports to set out the terms on which the goods have been delivered to and received by the ship.[7] The primary disparity between the air waybills and bills of lading is that bills of lading unlike air waybills are negotiable in nature. Negotiable bills of lading are a common practice in international trade, designed to protect the seller by allowing them to consign the document to their "order," instead of the consignee, or buyer. In this case, the seller may transfer the document to or through a third party, usually a bank, who then would collect the funds from the buyer before returning the documents over to them. The transit time in ocean freight may allow the bill of lading to be bought and resold. A negotiable bill of lading is most often used when a letter of credit is the payment mechanism. In other cases, bills of lading may be consigned to the buyer's bank, if not negotiable, in order to control title to the goods. An air waybill per contra is not negotiable, and is mostly consigned directly to the consignee. It has been argued that it is not negotiable or transferable because of the rather limited transit time[8]. Negotiability of bill of lading in a way gives it a considerable flexibility and a distinct value than an air waybill. Moreover neither the amended Warsaw Convention nor the Montreal Convention imposes an obligation on the carrier to issue an air waybill and there are no consequences to the air carrier if the air waybill is not issued or fails to contain the required particulars.[9]

IV. Liability Regime

In context of carriage of goods by air and sea, the liability of the carrier is one issue which needs to be highlighted. The most important aspect which was not sheltered by The Hague Rules

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5 The term "air consignment note" is only used in the Warsaw Convention 1929. The other international air Conventions use the more modern term "air waybill".

6 Article 11 of the Warsaw Convention, 1929.

7 Lawandsea.net, Bill of Lading, http://www.lawandsea.net/COG/COG_Bill_of_Lading1.html (last visited December 10, 2012)

8 Weglobalize.biz, Bill of Lading, International Airway Bill, http://www.weglobalize.biz/bill_of_lading.htm (last visited December 12, 2012)

9 Article 9 of the Warsaw Convention, 1929

was the liability of the cargo for delay in delivery of goods, which was covered by the air law in Warsaw Convention.[10] On the other hand the catalogue of exceptions covered under the Hague Rules is much longer than those which appear in the other conventions. In Hague Rules, there are sixteen specific causes for exoneration as per Article 4 of the Rules. Perils, dangers and accidents of the sea or other navigable waters, act of God, act of war, act of public enemies, arrest or restraint of princes, rulers, quarantine restrictions, riots and civil commotions, insufficiency or inadequacy of marks are of just a few of them. In addition to the sixteen exceptions, the Hague Rules provided a final exception for "any other cause arising without the actual fault or privity of the carrier".[11] This clause in effect preserved the remaining contractual exceptions then in common use among ocean carriers. Except a few the recent Rotterdam Rules reinforces the exceptions as provided by the Hague Rules. The stupendous variety of exceptions covered by the Hague Rules and the Rotterdam Rules in case of carrier's liability are only indicative of the fact that they are more lenient towards the carriers. In this respect it ought to be commemorated that more the number of exception more is the possibility of the accused to escape the liability. The regime relating to carriage of goods by sea has always criticized for failing fully to achieve its true purpose, but that would be too wide-ranging of an opinion. Hague Rules clearly have established sufficient uniformity of liability to insure the relative certainty required in international finance and sale of goods like that of Warsaw and Montreal Convention. However, the fact remains that the liability regime, though uniform, is too favourable to carriers and does not reflect present day realities of international ocean transport.[12]

Another point which deserves a special mention here is that though the liability of air carrier carrying goods has remained the same in all the Conventions starting from Warsaw i.e., 17 SDR. However, it is found to be profoundly lofty when compared to the liability of 3 SDR per kilogram for the loss, damage or delay to the goods as provided in the latest Rotterdam Rules of 2008 dealing with the liability of the carrier for carrying goods through sea.

V. A Case For A Comprehensive Multimodal Transport Regime

One must bear in mind that there a considerable number of different international legal regimes co-existing at the international level. This state of affairs in fact creates a challenge, for policy-makers and legislators charged with developing appropriate national legislation, for judges and arbitrators involved in applying and interpreting the relevant law and for private parties engaged in such transportations. In cases where more than one of the international Conventions has been adopted by a State, particular care is required to ensure effective implementation of each of the international air and sea Conventions at the national level. The relevant national legislation needs to ensure the application of each international agreement in relation to trade

[10] Article 19 of the Warsaw Convention, 1929.

[11] Article 4(2) (q) of the Hague Rules, 1924

[12] Stephen, supra note iii

involving Contracting States to that particular Convention. This is vital in order to avoid unnecessary confusion among traders and to ensure the application of the relevant international Convention in respect of carriage between different trading partners. The need of the hour is the harmonization of various regimes dealing with modes of transfer into one comprehensive piece of document and thereby develops a multimodal transport system which might reduce the prevailing legal indistinctiveness and construal concerns. This in turn will help in reducing the befuddlements created by the array of provision ministered by various Conventions.

VI. Scope For Further Research

The long and short of it is that both the systems have merits as well as substantial flaws. Apart from the discussed differences there is hardly any dissimilarity between the two modes of carriage of goods. The scope of application, the jurisdictional limits, the limits on liability are approximately similar in both the cases. Thus, although the regime for carriage of goods by air seems to have various benefits when compared to the regime of carriage of goods by sea one cannot say that it's free from all the vices.

However, there are certain steps which need to be taken to make the existing liability regime more responsible and positive. Mandatory requirement of the issuance of air waybill and bill of lading, increase in the amount of compensation, removing the caps on liability, minimizing the number of exceptions are some of those essential changes which must be affected without further delay. This will result in a more comprehensive and well organized liability regime covering various essential aspects. The Rotterdam Rules can be considered as a step ahead in this perspective as it conjointly shields carriage of goods by other modes of transport in addition to carriage by sea. United Nations Commission on International Trade Law (UNCITRAL) has also been working towards this venture, but still, a lot remains to be done in the days ahead.