

A REAPPRAISAL OF THE CONTRACT FOR CARRIAGE OF GOODS BY SEA APPLICABLE TO NIGERIA AND THE GLOBAL COMMERCIAL COMMUNITY*

Abstract

The concept of international trade is not new to man. It has evolved over time and takes place through several routes; it is the transportation of goods that makes trading a continuous activity without which there would be no movement of the goods concerned. It is necessary that the transportation or carriage of goods by whatever mode adopted must be done in a safe and efficient manner if the parties to the transaction are to be satisfied and retain their trade relations. The focus of this paper is directed on the transportation or carriage of goods by sea which represents nearly 80% of the mode of transportation of goods across continents, counties and even individual states. To this end it is therefore paramount to have in place binding agreements between the parties involved in the carriage contract as well as relevant laws that regulates the contract and sets out the rights and obligations of the parties in order to create a safe and smooth business environment.

Keywords: *Reappraisal, Carriage of Goods by Sea, Shipper, Carrier.*

1. Introduction:

Before the advent of railway, the most prominent mode of transportation of goods was by the waterways. Transportation of goods by land was relatively slow, costly and previous. Thus, the laws governing carriage of goods by sea was developed much earlier than inland transportation as most traders and business men took advantage of this mode of transportation thereby giving it opportunity to expend¹. To get a proper understanding of the paper, it will be important to define the term. A few definitions will be considered. The contract of carriage of goods by sea is one made between a shipper and a carrier by which the carrier will for a charge undertake to transport the shipper's cargo to a destination and deliver to a designated person². According to R.M Goode, a contract of carriage is one involving two parties the shipper to whom the carrier undertakes the duty of transporting the goods.³ In a more vivid term, Schmitt off described it as a contract of carriage that entails a situation where an exporter concludes with a ship owner to carry goods in his ship from one port to another, usually overseas, such contract is known as the contract of carriage by sea⁴. Looking at the above definitions, for this kind of contract to exist, there must be a carrier and a shipper and often than not, there is a verbal agreement between the parties further to which a bill of loading will be issued by the carrier upon shipment of the cargo⁵. The Bill of loading will therefore record the goods as having been loaded on board the ship and as such serve the function of a receipt for such goods,⁶ a document of title to such goods and an-evidence the contract of carriage between parties⁷.

Furthermore, a contract for the carriage of goods by sea is one which is made for the transportation of a bulk or general cargo between the shipper (also known as the seller or buyer) and a carrier (also known as the ship owner or charterer) of the cargo. The contract may be embodied in a charter party (where the shipper of goods charters a ship from the ship owner) or evidenced by a bill of loading (where the shipper procures a space in the ship from the ship owner. In other words where the ship-owner makes his entire vessel or ship available for a period of time or by demise to carry goods, the contract of carriage is termed 'a charter party' and generally governed by common law principles which allow the parties to negotiate freely without statutory interference⁸. Alternatively, where the shipper merely acquire some space on the vessel in order to ship a general cargo, the contract is evidenced by and may be termed a 'bill of lading' and as such certain regulatory restrictions are imposed on the parties⁹.

At common law, carriers were strictly liable for the safe transportation and delivery of a cargo to the designated place, prior to 1924, carriers could avoid this liability by including disclaimers in the bills of loading. This resulted in shippers bearing all the risks of shipment. In the U.K despite the apparent inequality in the bargaining power of the parties the courts on the authority of the principles of freedom of contract prevalent at that time, interpreted

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¹ A.N Yannopoulies, carriage of goods law average at [<https://Britannica.com>] Topice Accessed 30/09/2019

² See Indra Can, and Peter Stone, note 2 at page 224

³ Goode, *Commercial Law*. London penguin Books (1982)

⁴ Schmittoff C.M. *Schmittoff's Export Trade, the Law and Practice of International Trade*, 9th Edition. London: Stevens and sons (1990).

⁵ John E. Wilson, note 6 at Page 5.

⁶ Art III R.4 of the Hague – Visby Rules

⁷ Bernard Eder et al, (eds) *scuttron on charterparties and Bills of lading* (23rd Ed, Sweet and Maxwell, 2015) at pages 9-10.

⁸ Jason Chuah, note 5, at pages 243, 247-248.

⁹ Ngator Solomon. Y; critical analysis of the contracts of carriage of goods by sea by reference to international instruments. Available at <https://m.grin.com> 2017 accessed 29th August, 2019.

such clauses in favour of carriers and exempted from liability for loss or damage arising from perils of the sea or sea unworthiness and even negligence. However, 1924 witnessed the first international convention on carriage of the sea which is the Hague Rules that prescribed the minimum level of liability binding on a carrier which could not be lessened by agreement of parties. These rules were adopted and incorporated in the United Kingdom and American Laws similarly Nigeria has also adopted these rules in her laws as the Carriage of Goods by Sea Act 2004 (COASA).

In recent times nearly every contract of a carriage covered by bill of lading is governed by an international convention. And as stated above, these conventions basically define and set minimum contractual obligations for the parties and further make it unlawful for them to by agreement avoid or lessen such obligations. The carrier may however undertake responsibilities which are higher than the minimum. It is worthy of note that advancement in technology has strongly influenced the dematerialization of transport documents. Although not effectively achieved, efforts are continually being made to shift from the traditional paper Bills of lading to Electronic Bills of Lading (e.BL): This is as a result of the need to speed up transactions thereby reducing the problems created by late arrivals of transport document at ports of discharge, save cost, enhance payment arrangements and security. The e.BL must however reflect the above stated functions of a paper bill of lading: unlike the Hague, Hague visby and Hamburg rules, the Rotterdam rules recognize the need for the use of electronic transport documents and accordingly provides for the use of eBL in contracts of carriage:

2. International Conventions on the Carriage of Goods by Sea

(a) The Hague Rules of 1924 (International convention for the unification of certain Rules of Law relating to bills of lading and protocol signature. Water modified to the Hague – visby rules in 1982. (b) The Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea 1992. (c) Rotterdam Rules Convention on contracts for the international carriage of Goods wholly or partly by sea.

3. Carriage of Goods by Sea in Nigeria

In Nigeria, the Hague Rules of 1924 and the Hamburg Rules of 1978 are concurrently in force. The Carriage of Goods by Sea Act 2004 (COGSA) domesticated the Hague Rules. COGSA basically covers only outgoing cargo and excludes import. Accordingly, before the existence of the uncertainty surrounding the determination of the legal regime, imports were governed by the contractually agreed carriage regime usually contained in the bill of lading. Thereafter, Nigeria domesticated the Hamburg rule as the UN convention on the carriage of Goods by sea (Ratification and enforcement) Act 2005 without a formal repeal of COGSA. The Hamburg Rules attempted to form a uniform legal base for transportation of goods by sea and applied to all carriage by sea contract between two states provided the ports of loading and discharge or the place where the bills of lading or other transport document was issued are in a contracting state, thus the Hamburg Rules covers both inward and outward shipments of cargo.

It is worthy of note that the Rotterdam rules is yet to get the required number of signatories hence it is not yet in force.

4. Parties to a Contract of Carriage

(a) The Shipper: This is the party who contracts for the carriage of his goods by sea and delivers the goods into the care of the ship owner. (i.e he could be the seller or buyers of the goods). (b) The Carrier: This is the party who contracts with the shipper for the transport of goods by sea. He undertakes to ship the goods for the owner of the goods. Other Parties Include: (a) The Consignee: The party to whom the goods are consigned or sent by the shipper, he may be the buyer or an agent for the buyer. (b) Freight Forwarder: The clearing agent that assists in preparing customs document and clearance papers.

5. Rights and Duties of Carriers

- Right of Reward: where the carrier has charged for his services, he must get paid for the job.
- Right to Retain the Goods: where he is not paid his charges, he can refuse to deliver the goods.
- Right of Advance payment: He can demand for advance payment before accepting to carry the goods
- Right to Recover Damages: where the goods are of a dangerous nature and causes damage to him he can claim damages against the owner of the goods.
- Right to Refusal: he can Decline to carry the goods on some special circumstances.

Duties of Carrier include:

- To Provide a seaworthy ship
- To issue a bill of lading
- To properly and carefully load, handle carry and discharge the goods
- To proceed with the reasonable dispatch.

- To follow the agreed route and not deviate from it.¹⁰

6. Cargo Claims Available to the Shipper

Where the party (owner of goods) wishes to make a cargo claim because the goods are damaged or lost at sea, he has the following options. To sue the carrier and claim from their insurance policy, in the listed instance (a) where there is damage due to improper packaging, he can claim against the carrier. (b) Where the goods got damage on board the ship. He can also sue the seller if the seller has insufficient little or supplied substandard goods.

7. Limitation of Time to Bring an Action under Hague Rules

Pursuant TO Article 3 rules 6 of the Hague Rules, a notice of loss organs must be given in writing to the carrier or his agent at the port of his charge before or at the time of the removal of the goods into custody of the person entitled to delivery or, in the case where the loss is not apparent within three days. Where the cargo is removed such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. Article 3 rule 6 paragraph 4 further states that a ship shall be discharged from all liability in respect of loss or damage unless the suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. This is evidenced in the judgment delivered by karibi Whyte JSC. In *Kaycee Nigeria Ltd V. Prompt shipping corporation* where the court held that the Hague rules provided for a one-year limitation only to claims which the notice of damage was brought within the 3 days stated under the rules.

8. Limitation to Bring an Action under the Hamburg Rules

Article 20 rule 1 of the convention states ‘Any action relating to carriage of good under this convention is time-barred if judiciary or arbitral proceedings have not been instituted within a period of two years. Just like the Hague rules, the Hamburg rules makes this limitation subject to a notice of damage made in writing to the carrier, However the Hamburg rules gives a shorter notice time which one working day under Article 19 Rule 1 of the Rules.

9. Conflict on the Applicable Rules in Nigeria

The continued co-existence between the Hamburg Rules and Hague Rules have led to confusion amongst ship owners, carriers, cargo owners and shippers accordingly regarding which Rule is to apply. Art 25, Rule 5 of the Hamburg Rule states that the convention applies mandatorily to contracts of carriage in force as at the date of this convention. Also, Article 25, Rules 5 of the same Rule state that

Upon becoming a contracting state to this convention, any state party to the International convention for the unification of certain Rules relating to Bills of lading Signed at Brussels on 25 August, 1924 (1924, convention) must notify the Government of Belgium as the depository of the 1924 convention of its denunciation of the said convention of its declaration that the denunciation is to take effect as from the date when this convention enters into force in respect of that state.

The above formal notification to the Government of Belgium of the denunciation has been done by Nigeria, neither has the Hague Rules been repealed by the House of Assembly hence the continued uncertainty regarding the true position of both Rules. In the Case of *Ibidapo v Lufthansa Airlines* the Supreme Court held inter alia: ‘...The Court will not imply a repeal unless two Acts are so plainly repugnant to each other that effect cannot be given to each other at the same time’....

From the above, an express repeal is necessary between the two Rules. Also the Court in *Mega Plastics Ind v MV Kota Halus*, The Court questioned the applicability of both Rules on the ground that they have not been denounced.

10. Conclusion and Recommendations

In Conclusion, while the current position in the uncertainty of the applicability of both rules persists, it behooves the national law making body (that is the National Assembly/the Legislators in Nigeria and other nations of the world) whose responsibility is making laws and repealing same when necessary to go back and do the following. There is need to review the relevant laws and repeal the Hague Rules. There is also need to ensure that the required notification of denunciation to the Government of Belgium with a declaration of the Hamburg Rules taking effect from the date it entered into force is made. By doing or undertaking to do the above, the persisting confusion raging in the jurisprudence and practices in contracts of carriage of goods by sea will be resolved.

¹⁰ Hague-Visby Rules Article III Rule 2.