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The Legal Barriers to International Movement of Goods and their Impact on the Administration of Small Scale Organisations in the United Kingdom

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Abstract

The carriage of goods across international boundaries involves bulk and sometimes complex transportation and therefore requires planning and the deployment of resources and logistics. In most cases, the use of sea transportation is commonly preferred. The legal issues surrounding the carriage of goods have informed the development of trade laws and international commercial law including the law of contract. Carriage of Goods by Sea, land and air are comprehensive yet dynamic body of law which continues to develop through statute and case laws, both domestic and foreign. The objective of the paper is to discuss some of the fundamental legal hurdles which confront small scale firms engaging in export and import businesses in the United Kingdom; to discuss some of the problems of the current international trade laws; and, to address the possible implications of failing to comply with the legal requirements of international trade.

Keywords: International trade, Trade laws, Organisational management

1. INTRODUCTION

We begin by acknowledging that every mode of international transport is governed by international conventions, for this reason, the legal aspects covering the international shipment of goods are essentially governed by international conventions namely:

- (i) The Hague Visby Rules as Amended by the Brussels Protocol 1968 (identified in the Carriage of Goods by Sea Act 1971);
- (ii) Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956) (identified in the Carriage of Goods by Road Act of 1965);
- (iii) Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 (Warsaw Convention as amended at the Hague, 1955 and By Protocol No. 4 of Montreal, 1975.) (identified in the Carriage by Air Act 1961);
- (iv) Uniform Rules concerning the Contract for International Carriage of Goods by Rail (COTIF/CIM Convention) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980; and,
- (v) In the United Kingdom, the national laws in conjunction with the European Union laws are mandatory in addition to the aforementioned international laws

2. The Functions of the Laws

The underlying principle for the legal regulations of the movement of goods across national frontiers are directed towards a uniform and balanced control of carrier's liability; liability for sub-contractors; justifiable documentary requirements; reasonable time-scales for carrier's liability; limits of financial liability; well defined consignors' liabilities; time limits for legal claims and the control of the movement of hazardous goods across frontiers. For clarity, it is vital to discuss the provisions of each of the current rules, laws and conventions as follows.

2.1 Hague Visby Rules (HVR)

The rules regulate all bills of lading and all documents of title of equivalent effect. Accordingly, all bills of lading must describe the main marks as indicated on the cargo; the apparent condition of the goods; and the number of packages, the quantity and weight of the goods being shipped. It is mandatory for all goods exported from the United Kingdom to comply with the Hague Visby Rules even though some goods imported to the United Kingdom may not have to comply the HVR, particularly where the goods originates from the countries that are not party to the Hague Visby Rules.

The HVR provides legal protection to the parties involved in international trade transactions by creating the rights of compensation based on the value of the goods at the time of transaction. The compensation procedure under the HVR is based either on a per-package, if specified on the bill of lading or per kilogram of gross weight basis. However, where disputes arise, for compensation to be granted by the court, the Hague Visby Rules are often construed based on the degree of certainty of the contents and wordings of the bill of lading otherwise, a breach of the terms cannot be established. For instance, in *Timberwest Forest Ltd. v Gearbulk Pool Ltd. et al.*, 2003 BCCA 39, the claimant argued that the 86% - 14% description of the stowage on bill of lading was not a satisfactory description of the deck cargo and not precise in respect of the individual bills of lading. The court of first instance and the court of Appeal agreed with the claimant; it was therefore held that the uncertainty in the description of the deck cargo was analogous to an absence of information concerning deck carriage.

2.2 CMR

The Convention on the Contract for the International Carriage of Goods by Road (CMR) came to force in Geneva on 19 May 1956. Article 1 (1) specifically indicate that all contracts involving goods conveyed by road can attract compensations and damages for breach of the implied terms. It also provide that it does not matter whether the delivery point is in a different country from where the contract of carriage was made and the difference in the nationalities and residents of the contracting parties is irrelevant. Article 1(2) defines "vehicles" as motor vehicles, articulated vehicles, trailers and semi-trailers as defined in article 4 of the Convention on Road Traffic dated 19 September 1949. Article 1(3) expands the scope of CMR to cover carriage carried out by States or by governmental institutions or organizations. Article 1(4) provides limitations to the scope of coverage of the CMR. Therefore, the convention cannot be enforced where: (a) the carriage of goods is conducted under the terms of any international postal convention; (b) the consignment is related to funeral items including dead human body; and, (c) the consignment is furniture.

Article 1(5) prevent the contracting parties from modifying any of the provisions of the Convention directly or indirectly by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorize the use in

transport operations entirely confined to their territory of consignment notes representing a title to the goods.

The defence of *non est factum* is difficult to invoke under the CMR in that Article 8 require that it is the duty of the carrier of the goods to inspect and check the accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and the apparent condition of the goods and their packaging. Hence,

“the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery” (Article 17(1)).

However Article 17(2) provides that;

“The carrier shall ... be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent”.

Alternatively;

“The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter” (Article 17(3)).

Even though a comprehensive list of possible defences are contained in Article 17(4) and Article 18, the carrier can lose the rights of limiting liability and or excluding liability where it is proved on the balance of probability that the carrier is unreasonably negligent.

The CMR is somewhat vague in certain respect in that whilst it provide protection to parties involved in the contract of carriage of consignment by road and by vehicles without making provision for the protection of the parties against damages that could occur where the vehicles use ferry to cross from one point to another, for example, if a vehicle conveying consignment from London to Paris use the ferry at Dover and accidentally the ferry sink, the parties will to the contract of carriage may have difficulties in handling the matter under the provisions of the CMR.

2.3 Warsaw Convention

The objective of the Warsaw Convention of 1929 was to provide legal support for airlines to be able to limit liabilities against claims arising from "accidents" on international flights. As of 1966, the highest limit of liability was \$75,000. However, this limit is not applicable to claims bordering on negligent misconduct of airliners. The provisions of the Warsaw Convention cover all aircraft related international carriage of persons, luggage, and goods including gratuitous carriage by aircrafts performed by an air transport undertaking (Article 1(1)). The definition of “international carriage” is contained in Article 1(2) inter alia:

“Any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place

within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention”.

The major problem with the 1929 Warsaw Convention is that the Courts have been finding it difficult to interpret some of the provisions more particularly, the concept of “wilful misconduct” and how the claim for damages for mental injuries are allowed. In line with Warsaw Convention, courts have often excluded mental, psychological, and emotional injuries from the meaning of “bodily injury” to such degree that sexual molestation, defamation, slander, discrimination against disable passengers and racial discrimination by airline Staff was not actionable in court.

A little modification of the Warsaw Convention was made in the case of *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991) where the Supreme Court in the United States of America held that mental injury that resulting from bodily injury is recoverable. In 1999, 121 states’ representatives met Montreal, Canada (“the Montreal Convention”) to modernise and replace the 1929 Warsaw Convention. Top of the discourse was the issue of the recovery for “mental injury in the absence of accompanying physical injury”. Unfortunate, the Montreal Convention retained the Warsaw Convention provision on “bodily injury”. In the same direction, the International Civil Aviation Organization (ICAO) attempted to replace the 1929 Warsaw Convention, however, it is outside the scope of this paper to conduct intensive discussion on matters unrelated to the movement of goods across national frontiers.

2.4 COTIF/CIM Conventions

The Convention concerning International Carriage by Rail (COTIF) and Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) 1980 provide as follows:

“Subject to the exceptions provided for in Article 2, the Uniform Rules shall apply to all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two States and exclusively over lines and services included in the list provided for in Articles 3 and 10 of the Convention, as well as, where appropriate, to carriage treated as carriage over a line in accordance with Article 2(2) second sub-paragraph of the Convention”(Article 1(1)).

The COTIF was revised in 1999 by the protocol of Vilnius and was active from 1st July 2006 containing many schedules on international rail transport. In the same way, Appendix B of the Uniform Rules regarding the Contract for International Carriage of Goods by Rail (CIM), provide regulations for contract for the carriage of goods, including the calculation of the freight and the use of the CIM consignment note or the uniform CIM consignment notes. The COTIF and CIM are fairly straightforward and protect the rights of contracting parties.

2.5 United Kingdom and European Union Laws

Firms within the United Kingdom have to comply with both the international laws, national laws and the European Union laws regarding the movement of consignments. The European Council Regulation (EC) No. 1383/2003 permit the owners

of patent rights to apply to the relevant Customs and Excise authorities in order to prohibit the entry into the Community and export or re-export from the Community of relevant goods.

In the United Kingdom, the Customs and Excise Management Act 1979 governs the movement of goods. When applicable, the United Kingdom amend the national laws to be compatible the changes in the European Union laws. For instance, the *Goods Infringing Intellectual Property Rights (Customs) Regulations* were implemented to align the current laws with the European Union laws.

Articles 28 to 30 of the EC Treaty establish the principle of free movement of goods under which Member States may not maintain or impose barriers to trade. However, Article 28 EC is inapplicable to selling arrangements made in the Member States; therefore, the Article does not interfere with inter-member trade regime. Though the restrictions on exports can be in breach of Article 29 where the objective or the effect of the transaction causes any restriction of patterns of exports which unduly provide advantages to the home products and home market. However, pursuant to Article 30 to 34 EC States can disallow imports, exports or goods in transit if there are justification on the grounds of “public morality, public policy or public security; the protection of life or health of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property”. Where prohibitions are imposed, care should be taken to ensure that it does not amount to arbitrary discrimination or “a disguised restriction on trade between Member States”.

In the UK amongst other regulations, the carriage of dangerous Goods such as explosives and certain chemicals are regulated. It requires dangerous goods declaration by the carrier. Dangerous goods declaration requires a certificate or declaration in writing, signed by the person making it that the goods offered for carriage is properly classified, packaged, marked, labelled as appropriate, in accordance with the relevant regulation Code and is in a proper condition for such carriage (Sherlock and Reuvid, 2005).

3. The Implications of the Laws

Firms cannot conduct effective export and import business without giving adequate attention to the aforementioned laws governing the movement of goods. To strike the right balance, the firms need to conduct routine reviews of their export procedures to ensure that relevant documents such as export licence are obtained and renewed. They should monitor and review the procedures for export in conjunction with the dynamics of the international legal environment.

It is imperative for firms to be conscious of the time scale in the processing of any claims for loss or damage of goods pursuant to Hague Visby Rules thus; such claims should be made within the time limit of three days. Where legal action is to be pursued it must be undertaken within the limitation period of one year.

Claims under the Warsaw Convention must be made within 14 days or any claim for delay within 21 days. If there is any need for court action, it must be pursued within two years.

Firms should be conscious of the significance of bill of lading, it must be properly drafted without the use of vague words, it should at all times show the main marks as indicated on the cargo; the apparent condition of the goods; and the number of packages, the quantity and weight of the goods being shipped.

The Warsaw Convention specifically require that firms must take reason steps to ensure that the carrier or the forwarder prepares the waybill making sure that a minimum

of three original copies are inspected against the quantity and condition of the goods. In addition, the bill of lading should contain the protective clauses, *inter alia*:

“All Bills of Lading under this Charter Party shall contain the following clauses:

- a) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 (“the Hague Rules”) as amended by the Protocol signed at Brussels on 23 February 1968 (“the Hague-Visby Rules”) and as enacted in the country of shipment shall apply to this Contract.
- b) When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.
- c) When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.
- d) The Protocol signed at Brussels on 21 December 1979 (“the SDR Protocol 1979”) shall apply where the Hague-Visby Rules apply, whether mandatory or by this Contract.
- e) The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.
- f) General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 or any subsequent modification thereof, in London unless another place is agreed in the Charter.
- g) Cargo’s contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew.
- h) If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her Owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her Owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against the carrying Vessel or Carrier. The foregoing provisions shall also apply where the Owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact” (Eva Hope & Co. Ltd, 2006).

4. Conclusion

The laws, conventions and rules governing the conveying of consignments are very useful but have major weaknesses. For instance, there is very little or no provision in international laws that covers certain events such as demurrage and liens even though various national laws provides protection. There is serious lack of uniformity among the Conventions.

The legal and commercial considerations also vary according to country which presents huge challenges, typical example is the Hague Visby Rules which have been ratified by some countries to such an extent that it creates confusion; In *Barzelex v The "EBN Al Waleed"*, 2001 FCA 111, the country of shipment was Turkey. Turkey had enacted the Hague Rules twice into its legislation. This enactment gave a limitation of 100 pounds sterling gold value per package or unit. Later the Rules became part of Turkey's Commercial Code allowing a limitation of 100,000 Turkish Lire (approximately \$2.31) per package or unit. The fact in issue of *Barzelex* case was to determine which of these limitations applied. It was held that it was the result of a contractual provision which the *Barzelex* could have avoided by declaring a value for the goods.

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