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JUSTIFICATION OF LIABILITY LIMITATION IN INTERNATIONAL CARRIAGE OF GOODS

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Abstract

Carrier's liability limitation in international carriage conventions is a consequence of international trade practice, because all modes of carriage consist of risks which, in order to make international carriage possible/profitable, must be distributed to all members of such business. In addition, an observation can be made that international rules which regulate the carriage of goods are historically self adjusting so that fairness and equality can be retained. However, liability limitation for the recovery of loss arising out of the loss of or damage to goods remains an arguable issue. Therefore, in order to answer if limitation of the recovery of economic loss arising out of the loss of or damage to goods incurred during on the occasion of their carriage can be justified - reasons, current regulation and legal problems will be analysed.

Key words

Liability limitation; international carriage of goods; recovery of economic loss; damage to the goods; risks; sea carriage, road; rail; air; multimodal transport;

Introduction

All major transport conventions which regulate the international carriage of goods consist of liability limitation clauses. In some views of practitioners, limitation of liability can be treated as a strange and improper clause or it can even

be treated as illegal, because it causes inequality and injustice between parties to a contract. However, when it comes to an international carriage of goods, situation is quite different. First of all, it must be noted that international carriage of goods is regulated by international transport conventions, which are enacted into legal system or signed by a large number of countries around the globe. An international convention is a result of many years of deliberations and debate by all commercially active countries which delegate and express various opinions of their own commercial and financial subjects, institutions and trade associations. Secondly, states which sign or enact such international conventions into their legal system, do it voluntarily and, thirdly, laws, practice and customs of international carriage of goods evolved, is evolving and will evolve in accordance with the needs and reality of commercial trade. For these same reasons, liability limitation clauses were not implied by some kind of independent authority, but brought up and agreed by commercial world. Consequently, it can be presumed that limitation of carrier's liability in international transport conventions is what the current commercial trade requires. So in order to answer if limitation of the recovery of economic loss arising out of the loss of or damage to goods incurred during on the occasion of their carriage can be justified - reasons, current regulation and legal problems should be analysed.

Reasons of liability limitation

One of the main questions in liability limitation of economic loss topic is the reasons of such clauses. First of all, commercial practice is always trying to avoid loss and is pursuing profits. For the same reasons, in practice of international carriage of goods, all participants are aware of dangers of international carriage, whether it is a carriage by sea, air, road or rail. Economic interests forced participants of such

business to find a solution which could be advantageous for all parties. The beginning of carriage of goods business in inland waterways and evolution of such business practice brought rather simple but practical agreements – such as taking precautions and care of goods shipped. Shipper was liable to pack goods or take other actions to avoid any loss or damage to the goods and the carrier was liable to take proper care of goods while in transit. The shipper who knew the carrier and value of his goods was liable for loss or damage due to their inherent vice or improper packing; the carrier who knew the risks of carriage was liable for their loss of damage while in his custody, unless it was solely caused by Act of god or King's enemies[1].

However, such practice was not economically effective for international trade. Longer distances meant greater risks of loss or damage for a carrier which led to significant freight amounts and insurance costs. Higher freight and insurance costs led to an increase in prices of goods and stagnation of import or export business. A situation like this was not suitable for any of participants in international trade. It was obvious that the main issue was the allocation of risks and mainly all risk was carried by the carrier. In order to distribute the risk and to dispose of such inequality, there was a logical and rational conclusion that carrier's liability should be limited. Such limitation led to lower freight which consequently led to lower insurance costs and lower prices of goods. Whereas it was an issue of international trade, such an objective could only be achieved by international conventions.

There are four main international transport conventions which deal with carriage of goods and sets liability limits for the recovery of loss arising out of the loss of or

[1] Lord Diplock, Conventions and Morals - Limitation Clauses in International Maritime Conventions, 1 J. Maritime L. & Commerce;

damage to goods incurred during the occasion of their carriage. However, it should be noted that all transport conventions set different liability limits and reflect different communities of interest among different transport modes. In addition, all countries have their own interests while drafting international agreements and, not surprisingly, intense debate and conflict of interests always exists between countries which have economical advantage or commercial intensions in shipping, or insurance or import and export markets. For these reasons it can be argued that liability limits can be an indicator of current situation and the distribution of economic powers in international trade market.

Carriage of goods by sea and *package/unit* limitation issues

Main form of transportation in international trade market is the carriage of goods by sea[2]. There are four main international conventions which regulate international carriage of goods by sea – the Hague rules[3] of 1924 and the updated version, known as the Hague-Visby rules[4] (updated and amended in 1968 and 1979), the Hamburg rules[5] of 1978 and the Rotterdam rules[6] of 2008 (however not yet in force and will come into force one year after ratification by the 20th UN Member state). Albeit all of these conventions set different liability regimes, the Hague-Visby rules are most widely used in international carriage of goods by sea, not only because standard forms of charterparties and bills of lading often incorporate the Hague-Visby rules but also because of well established case law which means consistency and

[2] International trade law 4th ed. Indira Carr,Peter Stone; 2009 p. 159
[3] International Convention for the Unification of Certain Rules relating to the Bill of Lading 1924 (the "Hague Rules");
[4] The Hague Rules as Amended by the Brussels Protocol 1968;
[5] United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules") 1978;
[6] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("The Rotterdam Rules") 2008;

predictability – an issue which is of great importance to commercial trade.

Limitation of the recovery of economic loss is found in all of these conventions. First of all, above mentioned conventions (except Hague rules) state that a carrier is prevented from limiting its liability if it is proved that "the loss or damage resulted from its act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result"[7]. However, if a party, claiming the recovery of economic loss arising out of the loss of or damage to goods, could not prove the carriers intent to cause damage or recklessness - carrier's liability would be limited. Liability limits in aforementioned conventions are expressed in *per-package/unit* or *per-kilogramme* figures. Hague rules limit carrier's liability to 100 Pounds Sterling per *package/unit* for loss or damage. In addition, the U. S. Carriage of Goods by Sea Act ("COGSA") which is based on Hague rules and had never enacted the Hague-Visby amendments still limits carrier's liability to US $ 500 per package. *Package/unit* wording and exclusion of *per-kilogramme* figures (enacted by Hague-Visby rules) brought a lot of legal problems and a fertile soil for carriers to limit their liability. One of the famous cases under COGSA *package/unit* limitation issue, where Circuit Judge McLaughlin accurately defined the dispute as "the latest skirmish in the age old war between shippers and carriers over their respective rights and liabilities" was the *Monica*[8] case. In the aforementioned case, a container which held 76 bales of cotton cloth was shipped from Africa to Savannah, Georgia by Monica (the shipper). While in transit, goods were damaged and the shipper brought a claim to District Court claiming the loss. Not surprisingly, carriers argued that the their liability was

[7] Article IV(5)(e) of Hague-Visby rules; article 8 of Hamburg rules; article 61 of Rotterdam rules;
[8] Monica Textile Corporation v. S.S. Tana (1991) 952 F.2d 636;

limited to US $500 as stated in COGSA article 1305.5 - "*Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding US $500 per package*". The issue was whether containers were ordinarily considered as "packages", because the "description of goods" column of the bill of lading stated that the contents of the container consisted of 76 bales of cotton cloth, the "No. of Pkgs." column of the bill of lading had the number "1" typed in, and a line labelled "Total Number of Packages or Units in Words" had the word "one" typed in. However, court stated that, notwithstanding parties' intensions, court must "take a critical look" at clauses purporting to define the container as the COGSA package[9] and carriers have failed to persuade the court that the container is intended to be the "package"[10]. Finally, court held that each of the 76 bales of cloth stowed inside the container was a separate package for COGSA purposes.

A problem of *package/unit* limitation was tried to avoid in other international conventions which dealt with carriage of goods by sea. Under Hague-Visby rules, Hamburg rules and Rotterdam rules limitations of liability are expressed not only by *per-package/unit* but also *per-kilogramme* figures (whichever gives the higher result) and unlike Hague rules a unit of account (as changed by SDR Protocol[11]) is not a national currency but the Special Drawing Right as defined by the International Monetary Fund. Hague-Visby rules sets limits of liability to 666.67 SDR's per package or unit, or 2 SDR's per kilogram of gross weight of goods lost or damaged. In addition, under Hamburg rules there are higher limits up to 835 SDR's

[9] *Monica* para 29;
[10] *Monica* para 40;
[11] Protocol (SDR Protocol) amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (The Hague Rules), as amended by the Protocol of 23 February 1968 (Visby Rules) 1979

per package or unit, or 2,5 SDR's per kilogram of gross weight and under Rotterdam rules figures are even higher – 875 SDR's per package or unit or 3 SDR's per kilogram of gross weight. Therefore, a substantial increase of liability amounts can be observed under these conventions and 666.67 SDR's per package under Hague-Visby rules with comparison with 875 SDR's per package under Rotterdam rules could be explained as a result of composition of SDR which changes over time because of inflation adjustments in world's main trading currencies. However, the limit of whether it is 100 Pounds or US $500 set in Hague rules could be questionable, because the purchasing power of US $1 today is of the order of one twelfth of what it was in 1936. Thus a simple conversion of the 1936 COGSA limit of US $500 to today's values would indicate a figure of the order of US $6,000 or SDR's of 4,656[12].

Furthermore, although it is often argued that aforementioned liability limits are too low and unfair to shippers, SDR limits are made in accordance with average cargo values and a rate of probable loss or damage to cargo. A rate of loss is very important when deciding what liability limits there should be in international carriage of goods by sea, and an example can be made by a survey of selected EU shippers by which most reporting shippers (> 75%) indicated a rate of loss of less than 0.1% and only a small handful (< 5%) of shippers reported a loss of more than 1%[13]. Thereby, it can be argued that such a small rate of loss in international carriage of goods by sea can justify the SDR limits. In addition, while in sea carriage, a cargo value may differ according to type of goods, but *per-package/unit* and *per-kilogramme* limitation figures set in international conventions are designed to cover

[12] Report to the OECD's Maritime Transport Committee. Cargo liability regimes. Roger Clarke 2001.
[13] The economic impact of carrier liability on intermodal freight transport. Executive Summary. European Commission 2001;

the probable loss, notwithstanding the type or price of cargo. Moreover, international rules also set the obligation to declare the nature and value of goods if they are of expensive nature.

Another worth mentioning regulative body which works in addition to aforementioned international rules on liability limitation in sea carriage industry is the London convention[14]. This convention generally limits claims that may arise in commercial use of a ship and covers a multitude of claims that may arise in a course of operating ship. It permits ship-owners and salvors to limit their liability by establishing a limitation fund or by raising a defence[15].

Interpretation of a term "goods lost or damaged"

Interpretation of aforementioned conventions differs from one state to another. However, another important issue related to limitation of liability under sea carriage arose in "*The Limnos*"[16] case in the High Court of Justice in England. Article IV Rule 5(a) of the Hague-Visby rules states that "*unless the nature and value of goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 SDR's* (...)". A cargo of corn was shipped from Louisiana US to Aqaba in Jordan by Serena Navigation (the carrier) and the bill of lading incorporated the Hague-Visby Rules. While in transit, a cargo was damaged and quantity of wet damaged cargo (7 or 12 tons) was segregated and disposed of. However, the owner of the cargo claimed that some wet damaged kernels were not

[14] Convention on Limitation of Liability for Maritime Claims, 1976 (London convention)
[15] Third-party liability of classification societies: a comparative perspective. Jürgen Basedow, Wolfgang Wurmnest, International Max Planck Research School for Maritime Affairs; 2005 p.54;
[16] Serena Navigation Ltd v Dera Commercial Establishment - "The Limnos" [2008] EWHC 1036;

segregated, and were discharged along with the apparently sound cargo. In addition, the owner alleged that up to 250 tons of cargo had to be discharged by bulldozers, and, as a result, suffered an increased number of broken kernels. Consequently, an issue arose whether the quantity of cargo which was physically damaged prior to or at the time of the discharge of the cargo from the vessel would fall within the definition of "goods lost or damaged" under Hague-Visby rules. This issue of definition was of a great importance to the outcome of the case and the limitation of liability. Two possible interpretations were brought by litigants. Owners of the cargo claimed that 'lost or damaged' should be interpreted with consistency with other parts of the Hague-Visby Rules and stated that "damaged" included and meant economically damaged and "goods lost or damaged" were to be construed as meaning the goods in respect of or in connection with which the loss and damage was suffered[17], so consequently, the limit provided by Article IV 5(a) was to be calculated on the whole cargo. Carrier on his part, argued that the limit should be calculated by reference to the gross weight of the goods lost or damaged at the date of discharge or delivery and that "goods lost or damaged" means those goods physically lost or damaged and the limit provided by Article IV 5(a) was to be calculated only on the cargo actually damaged. The Court stated that goods "lost or damaged " means two categories of goods, those that are lost in the sense of gone or destroyed, and goods that are damaged in the sense of not being lost but surviving in damaged form[18]. So court therefore decided in favour of the carrier and stated that a claim for consequential loss was not a claim in respect of economically damaged goods and Article IV 5(a) is suitable for claim in respect of lost or damaged goods, and a claim for loss or damage in connection with those lost or

[17] "*The Limnos*" para 40;
[18] "*The Limnos*" para 37;

damaged goods, but in the second part of the clause the weight of those lost or damaged goods is then taken as the limit.

Although it could be argued that this case is another example of carrier's liability limitation, however, court took a rational approach to this issue, because claims for economic loss, without actual physical loss would severely increase carriers liability and amount receivable under such claims. In addition, limits of liability would be unpredictable and would cause uncertainty in commercial carriage market. Also, Court's decision pointed out accurately that "many, if not all, provisions, particularly ones arrived at after very considerable international negotiation and compromise, would have unusual or unwanted effects"[19].

Therefore an observation can be made that international carriage of goods by sea is constantly evolving and legislative body of rules, (sometimes controversial) conventions makes their legal framework rather problematic[20]. However, international rules that limit sea carrier's liability are not as severe as it can be argued from the first impression. In addition, it can be stated that there would always exist interpretational issues, because it would be naive to expect the shippers and carriers to abide the rules as they are and not to try to shift the liability limits in one way or another.

Carriage of goods by land transport and the wilful misconduct rule

Liability limits also apply to carriage of goods by road and rail. CIM[21] and CMR[22] conventions set substantially

[19] *The Limnos*" para 43;
[20] Jean Claude Mutiganda. International Rules Applicable to Contracts of International Transport of Goods: Are Shippers Better Off? In 2009 Uganda Proceedings Papers: 10th Annual International Conference on Repositioning African business and development for the 21st century, 2009
[21] Uniform Rules Concerning the Contract for International Carriage of Goods by Rail 1999

higher liability limits than sea carriage conventions – 17 SDR/kg in CIM rules and 8.33 SDR/kg in CMR rules, where in sea carriage conventions liability limits vary from 2 SDR/kg to 3 SDR/kg. Such a big difference in figures may be explained by the difference in nature of goods transported by sea and land, where in sea carriage, for example, a kilo of commodity goods costs very little compared with TV sets or computers carried on land transport. Nevertheless, there is a unit limitation in sea carriage which could sometimes lead to much higher liabilities than in other modes of transport[23]. In addition, the average cargo value of freight seems low relative to the limitation of liability. For example, in intra-EU market the road freight of average cargo value is about 1.6 Euro/kg whereas the CMR limitation of liability is about 11.4 Euro/kg[24].

An important question of when the carrier can not limit his liability arises constantly in all modes of carriage. The wilful misconduct rule in one form or another is found in a majority of rules which regulate the carriage of goods. However, is should be noted that interpretation of such rule should be in accordance with the law of the court or tribunal which seized the case[25]. An example can by made by *TNT Global SpA v Denfleet International Ltd*[26] case, where a driver of a loaded truck fell asleep at the wheel in Italy and crashed the truck causing damage to the cargo. A question arose before the court whether felling a sleep while driving is a wilful misconduct, because there should be also an intention or a failure or an omission proved. The Mercantile Court judge

[22] Convention on the Contract for the International Carriage of Goods by Road 1956
[23] Conflicts of conventions in the Rotterdam rules. Prof. Eric Rosaeg. The journal of international maritime law vol 15, 2009;
[24] The economic impact of carrier liability on intermodal freight transport. Executive Summary. European Commission 2001
[25] Road transport. Malcolm Clarke; Journal of Business Law 2006
[26] TNT Global SpA v Denfleet International Ltd [2007] EWCA Civ 405; [2007] 1 C.L.C. 710.

stated that a driver who fell asleep at the wheel must have appreciated that he was sleepy (before actually falling asleep) and that his decision to continue to drive in such circumstances was reckless and constituted wilful misconduct. However, the Court of Appeal regarded the bare fact of the driver's admission that he fell asleep was insufficient to justify the conclusion that he must have known that his ability to drive was significantly impaired and a decision to continue to drive, may be grossly negligent, but does not constitute wilful misconduct[27].

Argumentation made in aforementioned case can be of great importance in similar cases not only in carriage of goods on road, but also in other cases concerning different modes of carriage, because the wilful misconduct rule can have a significant role in the outcome of the case and the assessment of liability limits.

Differences in carriage of goods by air

Carriage of goods by air is regulated by a complex body of international rules. However, most important are the Warsaw Convention[28] (with a lot of amendments) and the Montreal Convention[29]. The Montreal Convention is essentially a tidying up exercise which consolidates and modernises, where needed, the Warsaw Convention and related instruments[30]. Liability limits set in aforementioned conventions limits carrier's liability to a sum of 250 gold francs or 19 SDR's/kg. Albeit it can be observed that 19 SDR's/kg limitation is higher than limitation set in CIM rules, however, a nature of cargo often differs in air carriage of goods. Lost or damaged luggage (a special liability limit of 1000 SDR's

[27] *TNT Global SpA v Denfleet International Ltd* para 16;
[28] Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929
[29] The Convention for the Unification of Certain Rules for International Carriage 1999
[30] The Montreal Convention 1999: an increase in the limits of liability. Alex Losy, Nicholas Grief. Journal of Business Law 2010

applies) is probably the main cause of claims in air carriage cases. In addition, specific cargo like luggage also brought up specific issues concerning the loss of or damage to it. In *Walz v Clickair*[31] case, court decided that air carrier's liability for the damage resulting, inter alia, from the loss of baggage, must be interpreted as including both material and non-material damage. Non-material damage could not be claimed under other conventions of international carriage.

Furthermore, another significance in air carriage, different from other modes of carriage, is that the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is not only the total weight of the package or packages lost, damaged, or delayed, but also the weight of those other packages whose value has been affected as a result[32] - a totally different approach compared with international sea carriage rules. For example, in a case of *Siemens v. Schenker*[33], which had brought a lot of discussion among practitioners, a cargo consisted of two packages containing integrated electronic components and because of a total loss of the contents of one package, the other also was valueless, so the court assessed the damages to the full value of the equipment and refused to allow the carrier to limit its liability, but, luckily, after the appeal, court decided that the limits should be based upon the weight of the whole shipment.

Aforementioned case can also be a great example of the argument stating that limitation of liability is necessary to international carriage of goods because of the viability

[31] Walz v Clickair SA (C-63/09), 2010;
[32] Carriage of goods by air: a guide to the international legal framework. UNCTAD/SDTE/TLB/2006, Report by the UNCTAD secretariat 2006;
[33] Siemens Ltd v Schenker International (Australia) Pty Ltd [HCA]

brought to the carrier, who can be aware of its exposure without having to open boxes or parcels[34].

Multimodal carriage and the future

Since the production of international carriage conventions, trading countries discussed the idea of one uniform carriage convention which could regulate multimodal carriage of goods. Containerization and a notable increase of door-to-door carriage in the last few decades[35] was one of the main causes of such debate. However, notwithstanding numerous attempts to make such convention available, there are no such regulative body. The UNCTAD/ICC Rules[36] could be mentioned as an example of regulation of multimodal carriage of goods, though it has a legal effect only by its incorporation into the multimodal transport contract.

Furthermore, there is no uniform liability regime in multimodal carriage and, as mentioned above, all transport conventions set different liability limitations. In addition, there are no consensus among practitioners and members of international trade in whether such uniform liability is in need and would it benefit the process of international trade. A single system with one uniform limit of liability would serve shippers' need towards a transparent, simple and cost-effective regime. However, such a system should solve the questions of burden of proof and exemption clauses[37].

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[34] International carriage of goods by rail: CIM 1999 in Force. Malcolm Clarke. Journal of Business Law; Legislative Comment 2007;

[35] Haak, Krijn F. and Hoeks, Marian, Arrangements of Intermodal Transport in the Field of Conflicting Conventions (2004). Available at SSRN: http://ssrn.com/abstract=1508376 (20.12.2010);

[36] UNCTAD/ICC Rules for Multimodal Transport Documents. ICC Pub. No. 481;

[37] Possibilities for reconciliation and harmonisation of civil liability regimes governing combined transport, 2000; Results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport Note by the UN/ECE secretariat;

In recent years, the "network principle" in multimodal carriage was the one on which the shippers relied. Principle states that if loss or damage can be localised to one particular stage of the multimodal transport where, according to an applicable international convention or national law, another limit of liability would apply, then such loss or damage shall be determined by reference to such convention or national law. Therefore, shippers could rely on greater liability amounts in various transport conventions. However, this principle also did not avoid criticisms among practitioners, who argued that it is therefore not capable of providing legal certainty and predictability, because parties have to opt-in such clause and there is no harmonised regime on which parties can rely in the absence of an express agreement. Consequently, problems stemming from the mandatory nature of international conventions covering multimodal transport to a lesser or greater extent remain unsolved[38].

Conclusion

Finally, it can be stated that carrier's liability limitation is a consequence of international trade practice, because all modes of carriage consist of risks which, in order to make international carriage possible/profitable, must be distributed to all members of such business. In addition, an observation can be made that international rules which regulate the carriage of goods are historically self adjusting so that fairness and equality can be retained.

However, liability limitation for the recovery of loss arising out of the loss of or damage to goods remains an

[38] Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard, to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests. EU commission, final report. 2005;

arguable issue and since the international trade figures are increasing every year, the debate on liability limits would probably continue. In addition, various rules concerning ecological and social impacts of international carriage should be also taken into account, which will have an enormous impact on carrier's liability and since a carrier is a substantial part of international trade, such an impact will have consequences to all members in international carriage. Consequently, even higher liability limits could evolve.

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