JURISPRUDENCE

ASYMMETRIC POLARIZATION OF CONTRA PROFERENTEM RULE

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https://doi.org/10.5281/zenodo.10246622

Abstract

In international trade the essence of the sale of goods is mainly based upon the legal control over the goods within the whole transit. An absence of such control may lead to a range of disputes caused by legal mistakes made by parties of the contract. To this point, such kind of control may be realized through specific legal documents. However, the process of drafting legal documents should be the integral part of or at be in the compliance with the legal intentions that parties pursue.

The primary objective of the following study is based upon the indication of major functions of the interpretative ratios, aspects and angles under the legal control over the goods within the whole transit where the standards exist with no standards for that interpretational space of each statement under the contract law has its roots and developing edges for subjectivism and objectivism depending on what is prioritized to be evaluated. The evaluation of any statement shall exclude the ambiguity first. But the complexity lies in that such exclusion may be hard to apply into the intentions and motives of parties concluding the contract.

Keywords: Contra proferentem, International trade, Contract law, Sale of goods, Bill of lading

Contra Proferentem in Contracts and Equivalent Documents

“There are many substantive rules which are not supposed to enforce the parties’ intentions, actual or hypothetical, rather they set limits to freedom of contract. Similarly, while contract interpretation has the parties’ bargain at least as its ultimate goal, in some cases the purpose of contract interpretation is not to find and give effect to the intentions of the parties but to achieve other goals.” [8]

This is where the narrow concept gives asymmetric polarization in a broader sense of the doctrine.

Trade among various nations and the essential link between the concept of “trade” and one of “economic growth” are not novel developments.

Harmonisation of international commerce has, to some extent, been achieved through various international conventions, adoption of international standard forms formulated by different trade associations and incorporation of certain rules formulated by organisations such as the ICC. Furthermore, the harmonisation is far from complete. In these circumstances, it is common for sale contracts and other associated contracts, such as the carriage contract or the letter of credit arrangement, to contain clauses in respect of the law that is to be applied to the contract and jurisdiction. As part of the drive toward harmonising the law relating to the international sales, the 1970s witnessed the drafting of the Convention on the International Sale of Goods by the United Nations Commission of the International Trade Law (UNCINTRAL). Although the United Kingdom has not ratified it yet, its wide acceptance in the world trade and the resulting database of cases make the study of the Vienna Convention not only academically interesting, but also relevant and essential in practical basis.[1] [6]

In global mercantile, particularly in sale of goods, one of the most important and dominant roles is devoted to the documents relating to those goods. The reason is that the documents characterize the essence of goods and even the essence of the commercial process, and therefore are served as a major contributing drive in trade process. One of those significant documents, particularly in international sea-borne commerce, is regarded to be the contract and the bill of lading. This is true for at least three reasons. Apparently, each term under the contract plays its role. But that role will not be at the sufficient extent if the underlines existing in those terms will be based on ambiguity. The more concrete the term, the higher is quality of the reflection for the intention of the parties which will, subsequently, minimize the risks of getting onto disputes and turning to court processes. The same importance is given to the certainty of the bill of lading that may from many angles be construed as the integral part of the contract, or at least the trade spectrum itself. First, rather than leaving the goods inert in the hold of a ship, traders make valuable use of goods in transit by selling documents, central role of which is the bill of lading, representing the goods. Secondly, the bill of lading plays important part in letters of credit. Finally, the bill of lading is itself the document that guards the buyer on shipment terms against the loss or any caused damage in transit by giving him a range of legal rights against the carrier.[2] [2] In other words, bill of lading has vital power in terms of the control over the goods. What mainly makes it as

[1] Indira Carr; International Trade Law; 5th edition; Routledge; New York; 2014; p. 6

[2] Charles Debatista; Bills of Lading in Export Trade; 3rd edition; Tottel Publsihing; Sussex; 2009; p.25

a "controller" of goods is that it is considered as a document of title, such that the possession of a bill of lading is deemed as constructive possession of goods. The general idea is based upon the fact that *only* the holder of a document of title is entitled to the possession of the goods. According to that, only the lawful holder possesses the right to claim the goods when they are discharged from the vessel. And by obtaining symbolic possession, the transferee appears to obtain the same rights as a possessor of the goods themselves would possess. Today, the functions of the bill of lading includes not only one concerning entitlement. In its primitive sense, the bill of lading is also a receipt of goods stating mainly the quantity as well as the condition of goods received. The third feature of bill of lading is based upon that, it in the hands of the shipper, it is construed as evidence of the contract of carriage; however, the view of this statement is correct in so far as the holder of the bill is the shipper. This is mentioned so because on endorsement to a third party (consignee or endorsee) in the hands of that exact party, the bill of lading is a contract of carriage.[3] [6]

The other essential factor in sea trade is also the implied requirement for irrevocable credit. The courts presume a requirement needed for an irrevocable credit where the contract provides for sale by documentary credit. The courts recognise that such credit is more than simply a means of paying the price. The dominant reason for that statement is that the seller may be relying on it to finance the transactions. For opening a credit, the need of tendering documents, especially the *clean* bill of lading, is required.[4] [7] It also is seen as a contributing drive for the efficient trade process. Thus, one of the main factors in international trade generally is the legal control. The central functions for that control are based upon the accurate documentary bundle, where the role is "granted" to a bill of lading. If in such contracts or the documents being deemed as equivalent to the contracts (such as the bill of lading for sea-related trade), the ambiguity leads to some sort of interpretative chaos, the burden of liability shall be on the initiator of the clauses involving the given uncertainty.

It has oftentimes been specified that a bill of lading may either contain or simply be evidence of the carriage contract. In the greater part of cases, the issue of bill of lading is generated after the formation of the carriage contract. Where a bill is issued after the making of an informal antecedent contract, there is some contention between the carrier and shipper. [5] [9] In *Sewell v Burdick*, Lord Bramwell battered the legal terminology pointed out in the Bills of Lading Act 1855 in the sense of the made expression "Contract contained in the Bill of Lading". The essence of his claim stated that "There is no contract in it. It is a receipt for the goods stating the terms on which they were delivered to and received by the ship and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given."[6] [10] The solemn declaration such that the bill of lading between the carrier and shipper does not contain any contract of carriage, must be contrasted and compared with others which refer to the bill of lading as the contract of carriage, or to the contract of carriage contained in the bill of lading. Those phrases generally go over in the contractual relationship scope which is said to "develop" on the exchange of the bill between the carrier and a transferee who, accordingly, acquires specific rights against, and may get to be obligated to, the carrier in concordance with the carriage contract. [7] [5]

The issue here is that the bill of lading is considered as a contract of carriage between those parties; that means it is not mere evidence of its terms; or that it is likely the main and the only evidence[8] [4] of the contract existed between them; or that the contract between them comprises only the terms of the bill. In this way, in the hands of the purchaser, the bill of lading will under usual conditions be construed as a carriage contract; and its terms will "preponderate" over the terms made in any prior contractual agreements relating to the carriage of the cargo - made between the shipowner and the shipper, or one who acts on the shipper`s behalf. [9] [2]

It is prioritizable to state that the doctrine of contra-proferentem adds substantive responsibility on framer. Here comes out the essence of theories of intention and expression. Surely, the contractual interpretation arises when a down-deep gap arises between the line of what parties intends and what parties write down in the contract as reflection of intent. The first criteria to evaluate such may be rooted to the biblical doctrine of free will. In other words, the parties first give birth to their intention, which then proceed with evolution from mere will to expressed reflection. During such evolution process, the importance relates to external expression within the framework of such intention which will upmost exclude the communicated ambiguity. The parties shall determine each clause to the contract or the document equivalent to the contract as understandable and exactly perceptive in the correct manner. If this does not happen, the ambiguity components arise and the interpretational space may be amounted to distorted. Getting across this, the party that promoted the clause resulted in such misunderstanding grounded with uncertainty shall in the eyes of courts be the one with responsibility with a potential to grow into liability, including but not limited to one claiming equitable reimbursement of expenses/costs incurred by the innocent party as a result of such uncertainty, which, on its turn, may be qualified as one derived from the fault (either direct or indirect) caused by the other party. In international trade over sea, the same importance applies to the bill of lading where the main terms are reflected.

[3] Indira Carr; International Trade Law; 5th edition; Routledge; New York; 2014; p.167
[4] Paul Todd; Bills of Lading and Banker`s Documentary Credits; 4th edition; Informa; London 2007; p.183
[5] Richard Aikens, Richard Lord, Michael Bools, Bills of Lading, Informa; London 2010; p.124
[6] (1884) 10 App. Cas. 74 at 105
[7] Guenter Treitel; Carver on Bill of lading, 3rd edition; Sweet & Maxwell; London; 2012; p. 102-103
[8] George Kallis (Manufacturers) Ltd v Success Insurance Ltd [1985] 2 Llyod`s Rep. 8 at 11
[9] Charles Debatista; Bills of Lading in Export Trade; 3rd edition; Tottel Publsihing; Sussex; 2009; p.152

However, the accompanying contract enumerating broader scope of terms and conditions are also essential to avoid of non-regulated and non-agreed cases or situations that may potentially arise within the whole process of trade. One of the worst outcomes of ambiguity is that there might arise an intellectual battle by and between the parties where each may interpret the uncertainty with its own baggage and mental reservoir. This can result in interpretational absurdism. While if the party who insists on clause specification onto the contract prior knows that it shall incur the burden of liability for the essence of the clause generated, the ambiguity volume will be overall minimized. It shall be noted that accurate construction of information and related clauses in the bill of lading as an equivalent document to the contract in international trade over sea is highly important for many reasons; inter alia, for the reason that the bill of lading incurs the status of a document of title. "Negotiable" bills of lading were begotten in sea trade for the reason that voyages were generally lengthy and slow. And thence, the cargo owners felt the necessity of "stronger" document that will be deemed to be a document of title with an eye to raise credit for international sales or to take advantage of a chance to sell the goods in transit. The transfer of a bill of lading is capable of transferring to the transferee the symbolic possession of the goods. It is the type of capacity that makes a distinguish in power between the bill of lading and other documents which contain or evidence contracts of carriage; and other documents which operating as a receipt of goods. [10] [5] The delivery of the bill of lading functions by way of "symbolical delivery" of the goods referred to in it;[11] [1] and such kind of feature of a bill of lading that provides its holder symbolic possession of the goods derives from three influential factors: [12] [9]

Firstly, the bill of lading holds a very consequential and significant undertaking by the carrier that is the delivery of the cargo only to its "holder". The bill provides adequate control over the goods for its holder given the same legal rights as a person with actual custody of the goods. Furthermore, it evidences the carrier`s intention not to meddle with the presenter of the bill`s ability to get actual custody of the goods on arrival.

Secondly, the transfer of the bill gives birth to such presumption that the transferor *no longer* intends to implement any actions of supervision relating to the cargo; or to interfere with the transferee`s capacity for obtaining rights regarding the actual possession on them.

Thirdly, the transfer of the bill of lading brings up a counter presumption, namely, the transferee intends to implement proper control over the goods and to exclude others from doing so.

For this point, Sir Frederick Pollock gives an explanation in terms of the meaning of the capacity of bills of lading to grant their lawful holders symbolic possession of goods, in the following manner:

"The key [and the bill of lading] is not a symbol in the sense of representing the goods, but the delivery of the key [and of a bill of lading] gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which being by manual act, instead of words, may be called symbolic) that the transferor intends no longer to meddle with the goods."[13] [3]

Conclusion

The contra proferentem maxim is an aftereffect of the principle of good faith giving out the concept of that a party should not be able to misuse or misapply its position as the drafter by perceptively unscreening into the contractual content a clause over which the other party to the contract reasonably had no opportunity to negotiate, agree or oppose. Especially, in the international trade over sea this doctrinal principle shall not be deemed as a means of contradiction to the principle of interpretation according to common intent, but shall be fairly considered as an instrument of its implementation with a purpose of maintain the legal reasonableness inclusive the aspect of extreme fairness in the view-field of adopted legitimacy. The examination of the rule in a broader sense can be applicable also as a cognitively protective legal ideology resulting in multivolume comprehension.

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[11] Burgos v Nascimento; McKeand (1908) 100 L.T. 71, 73, per Eve J.
[12] Richard Aikens, Richard Lord, Michael Bools, Bills of Lading, Informa; London 2010; p.107
[13] Frederick Pollock & Samuel Wright, Possession in the Common Law; Clarendon Press; Oxford; 1888; p.68