Rise and Fall of Freedom of Contract under Bills of Lading – with special reference to the development of the International legislation and to a special issue under the Chinese law[1]

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As a document normally issued by the carrier to the shipper after his receiving of the goods for carriage on board of his provided ship, the bill of lading has for a long time accomplished the transition from the mere receipt of the goods to the full-blown documentary of title as well as the evidence of the contract of carriage. It is the last function, that is, as an evidence of the contract of carriage that has caught the intensive attention of the international legislation in the last century. Compared with the other two functions of bills of lading, that is, the receipt of the goods and documentary of titles, the function of a bill of lading as an evidence of contract has been the focus of the international legislation, mainly contained in the Hague Rules, Hague Visby Rules as well as the Hamburg rules, though the Rotterdam rules , the result of the UNCITRAL's recent efforts in unifying the international carriage of goods by sea law has deviated a bit from the tradition in this respect to devote more spaces to the other two functions especially that of the documentary of title in terms of the negotiability of the bills of lading and the bills of lading's function of transferring it's conferred rights. The reasons for this focus could be largely explained as the side effect of the development level of the technology of the shipping, in terms of ensuring the safety of the ships at sea, of the time.

About more than one century ago, navigation at sea was very much a risky adventure, so was the shipping business which was obviously more dangerous than that at the modern time. So at that time, to put investment into the shipping business would take a real courage. Because of the scarcity of the financial investment, the ships available for enforcing the transportation and delivery of the goods largely resulting from the international trade in goods are very few. As a result, the carrier was in a very strong bargaining position in relation to the cargo interests. As normally the provider of the standard form of contract of bills of lading, the carrier often took full advantage of such strong bargaining position by using to the full of the freedom available to him at the time to contract out as much of his liability towards the cargo interests as possible. So in many of the bills of lading at that time , one can often find the lengthy exception clauses which virtually exclude any liability of the carrier for the cargo damages or losses occurring during the voyage, a typical unfair contract term at modern times. This practice of the virtual abuse of the freedom of the contract would certainly cause many hardships to the cargo interests, thus adversely affecting the international trade. When it comes to the early years of the last century, the international business circle no longer wished to let this develop further but to take action to

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impose legislative control of such an abuse. The result of such efforts is the birth of the Hague Rules, the earliest one of this kind at international level in regulating the contract of carriage of goods by sea as evidenced by the bills of lading.

But how the Hague Rules manage to exercise such a control? The following is a brief account.
This first international convention regulating the contract evidenced by the bill of lading is mainly based on some well-used standard form of bills of lading, and succeeded in establishing a minimum liability basis of the carrier which can not be reduced or excluded contractually. These minimum obligation mainly consists of the following three obligations imposed on the carrier, that is , care of goods , exercise of due diligence in providing a seaworthy ship and not to deviate in the prosecution of the voyage. These three obligations should then be mainly qualified by the following three kinds of exception clauses: first, total exclusion of liability clause as embodied in Art 4, rule 2, second. limitation of liability clause as mainly embodied in art. 4 r.5, and third, the limitation of action clause as embodied in art. 3, r. 6. Besides, the provision related to the carriage of dangerous goods as provided for under art. 4, r. 6 could also be treated belonging to the first kind as above mentioned as a further qualification of the carrier‘s above mentioned three kinds of express obligations. On the other hand, art. 3, r. 8 mainly serves as a main controlling provision in the sense that it by its own wording would strike down any bill of lading clause aiming at reducing or contracting out the above mentioned minimum liability as provided for under the Hague Rules. So in the light of Art. 3, r. 8 alone, one can say that the abuse of the freedom of contract has been controlled to some extent. However, if the parties so agree, they can increase, also by reason of the same art. 3, r, 8, the liability of the carrier from the basis of the minimum liability. So in the light of only this, one may say that freedom of contract can still be practiced under the Hague Rules in some limited scope. That said, still the outcome of this first international convention- the Hague Rules- can be said to be tilted towards or in a bit favor of the shipowners. The reason for this is mainly because the three kinds of exception clauses as mentioned above has largely provided shelter for some infamous excepted perils such as the negligence of the employees of the carrier or that of the third party in the navigation and management of the ship. In the presence of these exception clauses under the Hague Rules, the carrier need not take the trouble to embody them into his pre-prepared standard form of the bill of lading as they would be implied into the contract governed by the Hague Rules as part of such a contract anyway. So in this sense, the carrier’s right of enjoying the freedom of the contract is still largely preserved or in other words, one of the products of the use or abuse of the freedom of contract in the pre-Hague Rules period has in fact been acknowledged and retained under the Hague Rules. That is why there were further needs for the evolution, if not the revolution, to the interests of the international trade if not to the interests of the cargo only, of The Hague Rules which will be discussed in the following

The Hague –Visibly Rules, completed in 1968, can not be said to tilt the balance further towards the cargo interests even in terms of the increasing of the limitation amounts for cargo damages which is mainly caused by inflation compared with its predecessor . The reason for this is mainly because that the framework under the Hague Visby Rules is not much different from that under the Hague Rules. In fact , by incorporating partly the Himalaya clause into the Hague Visby rules through art.IV, r.2 , bis , the cargo interests have been virtually prevented by such a provision

from choosing to sue the employees of the carrier in tort. To make the idea under the Himalaya clause statutory partly at least is an open endorsement of the doctrine of freedom of contract in the sense that the Himalaya clause is a product of the freedom of contract though it is in fact not so legitimate in front of the well respected doctrine of privity of contract in those days.. However, the fact that such a statutory Himalaya clause as embodied under art.IV, rule 2 bis excludes the independent third party from the list of beneficiaries who is otherwise a beneficiary under the conventional Himalaya clause and can enjoy the benefits of the exception clauses available to the carrier is obviously another obstacle to the freedom of contract in this area. In the similar vein, art.IV, r. 2 bis also makes it unnecessary for the cargo interest to make a choice of cause of action between contract and tort or something else such as bailment in order to evade the exception clauses embodied in Art. 4 rule 2. That is because it makes the exception clauses embodied under The Hague Visby Rules available to the carrier no matter on whatever cause of action the cargo plaintiff would choose to base his claim. Such a provision to exclude the self- same liability at different levels of cause of action could be regarded as a blessing to the contractual intention which is the foundation of the freedom of contract doctrine. With the mixed blessings added by the Hague Visby Rules, the fortune of the freedom of contract remains almost the same under the Hague Visby rules as under The Hague Rules.

When the Hamburg Rules was completed in 1978, the pendulum has been drastically swung further towards the cargo interests, that is, the framework of setting out the mandatory minimum liability of the carrier to be limited by the exception clauses has been changed dramatically into that of blending the basic liability and exception clauses into one single provision. Under such a provision, the exception for the carriers' liability for the negligence of his employees and some of his engaged third parties in the navigation and management of the ship which could be found under art 4, r.2 of The Hague or Hague Visby Rules has disappeared. So under the Hamburg Rules the carrier's minimum compulsory liabilities increased drastically, which is certainly an increased restriction on the freedom of contract on the part of the carrier. Consistent with this is the prolongation of the compulsory duration of the voyages from the tackle-to-tackle to the warehouse- to- warehouse under the convention, plus the added regulation of the document called the letter of indemnity which is made only valid between the carrier and the shipper under the Hamburg Rules. Besides, the peril of delay in the prosecution of the voyage has been regulated expressly for the first time under this kind of international convention as under the Hamburg Rules. All these new provisions introduced by the Hamburg Rules are further restrictions on the freedom of contract. That said, to have brought the deck cargo as well as life animals within the coverage of the Hamburg Rules under certain circumstances also has shrunken the scope of the operation of the freedom of contract. However, to add the third party engaged by the carrier as another beneficiary of the statutory Himalaya clause under the Hamburg rules could be regarded as adding credit to the product of the freedom of the contract -- the conventional contractual Himalaya clause. The increase of the compulsory time limit for action from one year under the Hague and Hague Visby Rules to two years under the Hamburg Rules could be said to restrict the freedom further on the part of the carrier who would very much hope to reduce such time limit to as short as possible a length. Nonetheless, The same controlling provision to the effect of prohibiting the reducing and contracting out of the minimum liability of the carrier can also be found under Art 23 of the Hamburg Rules, which is an obvious restriction on the freedom of the contract, though like

under the Hague or Hague Visby Rules, the increasing of the carriers' liability from such statutory minimum liability by agreement is allowed. Like that under the Hague Visby Rules, the fact that the Hamburg Rules also took the chance to increase the limitation amount to compensate for the loss of value for the remedy caused by the inflation over the years can not be said to allow more scope for the operation of freedom of contract as its effect has been mainly set off by the inflation. In all, it could be said that the enlargement of the scope of the regulation and the deletion of some important excepted perils in favor of the carrier evidence a drastic fall of the freedom of contract under the Hamburg Rules. That notwithstanding, though the members to the Hamburg Rules has increased steadily, many maritime powerful states refuse to endorse the rules thus reducing largely their practical effect.

The fact of the co-existing of the three conventions, that is, the co-existence of The Hague, Hague Visby and Hamburg Rules, obviously affect adversely the mission of international uniformity in this area. Additionally, there are many unsatisfactory areas in the conventions which need to be reformed and updated. Thus a new convention intended to replace the above three had been under drafting for some years and such a drafting had finally come to a conclusion on the 11th of December of 2008 when the General Assembly of the United Nations voted through the convention now called The Rotterdam Rules. Though how long would it take for it to take effect is still unknown, as up to recently this writer only found from the website of the UNCITRAL[3] that twenty three states had signed the convention, but none of them had ratified and etc. the convention yet as it is so required by Art.94, rule 1 of the Rotterdam Rules for the Rules to take effect[4]. Nevertheless, it is still worth giving it a brief account in the context of my paper here.

Although how generally the Rotterdam Rules would affect the shipping practice is still to be seen during its exposure to the reality after its eventual coming into force, the following obvious changes affecting the contractual freedom can be observed. First, the warehouse –to – warehouse duration of the voyage has been prolonged further to the door-to-door one, thus reducing the space for the operation of freedom of contract. That is in despite of the fact that under art.12.3, contractual parties are allowed the freedom to agree on the time and location of the receipt and delivery of the goods for determining the carriers' period of responsibility though such freedom is provided for under the same provision to be subject to two specific limits. Second, much more scope is given to the regulation of the shippers' liability and in fact the Rotterdam Rules has for the first time in this area set out the compulsory minimum liability for the shippers, which obviously restrict the freedom of contract in this area further. The reason for such a new area of regulation may be due to the fact that at modern times many shippers are in fact big companies and are no longer in a weak position as in the old days when the Hague Rules was drafted. Third, electronic documents also receive intensive regulation under this Rotterdam Rules so that freedom of contract has been denied of the chance of or limited to a smaller scope of playing an important

[3] See http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (last visit on October 20, 2010)

[4] According to this art. 94(1), the convention will comes into force only "on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession."

role on this relatively new front. Fourth, the volume contract, service contract by another name, was introduced for the first time into this kind of convention. But unlike the general contract of carriage as evidenced by the bills of lading, paper or electronic, the volume contract is exempted from the mandatory application of the minimum liability as provided for under art 80 of the Rotterdam Rules. In other words, although the minimum liability as found under this new convention could be applied to the volume contract by default, they nevertheless can be contracted out or contractually modified. Besides, that some new terminology or concept such " controlling parties" and " contract performing parties " have been introduced in this new convention also signals the widening of the scope of the regulation of this new convention. This is obviously a result from the increased awareness of the growing complication of the shipping business. On the other hand, some old mechanisms as exiting in the older convention or conventions are generally retained or slightly modified. So the negligence of the employees of the carrier in the navigation and management of the shippers are also absent in the liability regime under the Rotterdam Rules as in the Hamburg Rules; and the seaworthiness obligation on the part of the carrier has been extended beyond the beginning of the voyage which is actually similar in effect to that under the Hamburg Rules though under the Hamburg Rules the seaworthiness obligation is taken care of by the general provision related to the carriers ' liability and the word seaworthiness has disappeared altogether. Besides, the provision making the minimum liability compulsory as could be found in art. 79 of the Rotterdam Rules , which can be found in the previous three key conventions, has been retained , though it now applies also to the newly founded minimum liability of the shippers but not to the volume contract compulsorily as mentioned above. Moreover, the minimum liability as safeguarded by art. 79 can not be applied to the life animals as carried on board, as such minimum liability can be reduced in relation to the carriage of such life animals as provided for in art. 81 unless such reduction is proved to be motivated by the willful misconduct of the carrier or any other parties for whose acts or omissions the carrier is liable as Art. 18 of the Rotterdam Rules so expressly provide for. This, though, seems to enlarge a bit the scope for the operation of freedom of contract compared with that for the same matter under the Hamburg Rules, it is certain that it provides less freedom of contract in the same area than that under either The Hague or Hague Visby Rules.

Before the conclusion, a few words are added here for discussing briefly how the freedom of contract doctrine fares under the law of Chinese Mainland with respect to one particular issue. Chapter 4 of the Maritime code of China is well-known as a mixture of the three existing international conventions concerned. However, there are still many differences between the Chinese law and those international conventions. Apart from many other differences, one of the major differences indicating the falling down further of the doctrine of freedom of contract under the Chinese law compared with the existing three international conventions is that the parties to the contract of carriage of goods by sea can not by agreement prolong the time limit for action as that provided for under art. 257 of the Maritime Code of China. It should be noted that art 44 and 45 of the maritime code of China virtually incorporate the spirit of art 3, rule 8 of the Hague Visby Rules in that any contractual provisions can not effectively delete or modify the minimum liability of the carrier as provided for under Chapter 4 of the Maritime code of China, yet the provision about the time limit for action under the contract of carriage of goods by sea as evidenced by the

bill of lading is set out in art.257 under chapter 13 thus excluding it from the scope of the application of the above mentioned art. 44 and 45. Such a legislation, which should be intentional rather than by accident or negligence, is in fact an endorsement of the doctrine under the Chinese law that the time limit for action should be statutory and thus should not be subject to the modification of the contract. Such a doctrine has been reinforced by art. 2 of "the Regulation of some of the problems concerned with the time limit for action in relation to civil cases" issued by the supreme court of China on the 21st of August of 2008[5](which came into operation from September the first of 2008) in relation to the time limit for action generally.

To conclude, the historical development of the international legislation in relation to the carriage of goods by sea witnesses an ever widening of the scope of regulation and particularly an enlargement of the mandatory minimum liability of the carrier, as well as a newly imposed minimum mandatory liability on the shippers under the Rotterdam Rules. In the light of the above, it could be said that the scope of the operation of the freedom of contract has been reduced further. Above all, it seems likely that the trend that the freedom of contract is falling will continue under the bills of lading and the pendulum will not swing back to the interests of the carrier in this sense for years to come. This, accidentally, is in line with the trend in the current business finance world. That is, in the wake of recent world-wide financial crisis, the accusation of over- regulation in the financial sector would not have much market in the near future to say the least.

Reference:

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[5] See Legal Explanation (2008) No.11, as issued by the Supreme Court of China , http://www.civillaw.com.cn/jszx/lawcentre/default.asp (visited on October 19, 2010)