THE LIMITATION OF CARRIER'S LIABILITY FOR DELAY IN DELIVERY UNDER THE CONTRACT OF CARRIAGE OF GOODS BY SEA

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ABSTRACT:

This Article is dedicated to determine the limits of carrier's liability for delay of the cargo in delivery while carrying it from one destination to another. The Article deals with the circumstances that the carrier can refer in order to limit his liability and the circumstances that cause the loss of right to limit liability. The limitation of carrier's liability for delay in delivery is analyzed on the basis of proper national and international documents including, Merchant Shipping Code of the Republic of Azerbaijan, Hague and Hague-Visby Rules, Hamburg and Rotterdam Rules and other international legal acts.

KEY WORDS:

Contract of carriage of goods, carrier, limitation of liability, delay in delivery, intentional or reckless action or inaction.

XÜLASƏ:

Bu məqalə dəniz daşımalarında çatdırılma zamanı yükün gecikdirilməsinə görə daşıyıcının məsuliyyətinin hədlərinin müəyyən olunmasına həsr olunmuşdur. Belə ki, məqalə dəniz daşımalarında daşıyıcının məsuliyyətinin əsas xüsusiyyətlərindən biri kimi çatdırılmada gecikmə zamanı məsuliyyətin məhdudlaşdırılması qaydası, daşıyıcının məsuliyyətini məhdudlaşdırmaq üçün istinad edə biləcəyi hallar və məsuliyyətin məhdudlaşdırılması hüququnun itirilməsindən bəhs edir. Qeyd olunan məsələlər başda Azərbaycan Respublikasının Ticarət Gəmiçiliyi Məcəlləsi, Haqa, Hamburq və Rotterdam qaydaları olmaqla, yerli və beynəlxalq qanunvericilik əsasında təhlil edilmişdir.

AÇAR SÖZLƏR:

Dənizlə daşıma müqaviləsi, daşıyıcı, məsuliyyətin məhdudlaşdırılması, çatdırılmada gecikmə, daşıyıcının qəsdən və ehtiyyatsız hərəkəti və ya hərəkətsizliyi.

АННОТАЦИЯ:

Эта статья посвящена определению пределов ответственности перевозчика за задержку доставки груза при его перевозке из одного пункта назначения в другой. В статье рассматриваются обстоятельства, на которые может ссылаться перевозчик для ограничения своей ответственности, и обстоятельства, которые вызывают потерю права на ограничение ответственности. Ограничение ответственности перевозчика за задержку доставки анализируется на основе соответствующих национальных и международных документов, в том числе Кодекса торгового судоходства Азербайджанской Республики, Гаагских и Гаагско-Висбийских правил, Гамбургских и Роттердамских правил и других международно-правовых актов.

КЛЮЧЕВЫЕ СЛОВА:

Договор перевозки груза, перевозчик, ограничение ответственности, задержка доставки, умышленное или безрассудное действие или бездействие.

INTRODUCTION:

The principle of limitation of liability is one of the distinguishing and unique characteristics of the maritime law and other transportation laws. If the carrier does not fulfill its obligations on the basis of the contract of carriage of cargo by sea and if no exception is applicable he will be liable to pay compensation to the cargo owner. Nevertheless, the liability is based on limitations, in some circumstances. Limitation of liability is kept because it is deemed to be benefit of both shippers and carriers since it makes carriers able to calculate their risk in advance and establish uniform and cheaper

freight rates .The main consideration point is that what circumstances enable the carrier to refer to the limitation of liability for delay.

Clearly, where a shipper makes a claim based on delay, courts look to the general maritime law, which is based on common-law rules relating to delay by common carriers if there is no provision in the governing law [10].

In this Article, limitation of liability for delay shall be analyzed in comparison with the proper rules of Hague, Hamburg and Rotterdam Conventions. Because of the lack of any provision in relation to delay in delivery, neither Hague nor Hague-Visby Rules emphasizes any explanation deals with the limitation of liability of the carrier's delay in delivery [3]. Hague or Hague Visby Rules only stipulates the general limitation of liability without providing any statement in respect of delay in delivery. The applicability of Hague or Hague-Visby Rules related to delay is discussing and depends on the domestic law of the contracting parties and the final decision of the Court. Because of it, proper articles of Hamburg and Rotterdam Conventions will be discussed below. As a main part of the carrier's whole liability the limitation of liability for delay firstly, was utilized in text of United Nations Convention on Carriage of Goods by Sea in 1978, hereinafter Hamburg Rules. The reason was that the limitation levels in the Hague rules were deemed to be too low. Article 6 of the Rule is dedicated to this issue and called limits of liability. Due to the 1(b) of the above mentioned article, the liability of the carrier for delay in delivery is limited to an amount equivalent to two and a half times the freight payable for the goods which was delayed [5]. Obviously, the convention determines the limits of freight which should be paid for delay in delivery. This clause also adds such a condition that the amount for delay in delivery shouldn't exceed the total freight which is determined to be paid under the contract of carriage of goods by sea [5]. 1(c) of the article again affirms an undoubted, definite character of the noted provision and stipulates that no case shall exceed the limitation.

The position of Article 7 of the Hamburg Rules is also noteworthy. Under article 7 the Rules pronounce that the limitation of liability of the carrier can apply in any action against him in respect of delay in delivery whether that action derives from the contract, tort or otherwise. A main question arises about whether the servants or other employees of the vessel can refer to the current rules or not? This question can be answered completely under the Article 7.2 of the Rules. The article stipulates that if such an action is asserted against the servant, agent of the carrier, the servant or agent is entitled to refer to limitation of liability which is the carrier is entitled to refer. From this point of view, the servant or agent is required to prove he acted within the scope and period of his employment. This provision is called Himalaya Clause under transportation law and from this point of view, we see that the Himalaya clause is applicable and characteristic for the Himalaya clause, too.

How is the limitation of liability for delay regulated under the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- hereinafter, Rotterdam Rules? In order to remove all drawbacks and missing statements related to the carriage of goods by sea and other means, Rotterdam Rules try to regulate everything clearer and in detail [13]. This step is also observed in accordance with delay in delivery. Unlike other international conventions, including Hamburg Rules, Rotterdam Rules doesn't regulate the limitation of liability for delay with loss of or damage to cargo together. From this point of view, after the article 59 which defines the general limitation of liability, article 60 of the mentioned Rules is dedicated to the limitation of liability caused by delay. While analyzing the text of the article we meet the same understanding and the same meaning with the relevant article of Hamburg rules. The amount also is the same as equivalent to two and one-half times the freight payable on the goods delayed. In order to understand the accurate amount of compensation we should refer to the Article 59 of the Rules which is the most decisive one. Under this, the liability of the carrier for breaching his obligations under the contract of carriage is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute [6]. The Convention notes 2 main exceptions from the general rule of the calculation of compensation:

1. In case of the declaration of the value of the goods by the shipper under the contract of carriage of goods by sea;

2. In case of determination of a higher amount than the amount of limitation of liability set out in this article has been agreed between the carrier and the shipper.

From this point of view, the term of units of account needs to be clarified. The next clause of the article gives the explanation itself. It states that the units of account are the Special Drawing Right as defined by the International Monetary Fund. The amounts are to be converted into the national currency of a State according to the value of such currency at the date of judgment or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State [6].

Moreover, this article requires referring to Article 22 of the Rotterdam Rules in its text. Article 22 deals with the calculation of compensation for damage or loss of cargo. Obviously, it doesn't specify any opinion related to compensation for delay. Convention neither offers a formula as to how compensation for damage due to delay has to be proven by claimants nor specifies to what extent the carrier is to be liable for all possible financial consequences of a particular delay. Nevertheless, for the sake of clarity and consistency, considering that Article 60 is named as limitation of liability for loss caused by delay, we can come to such a conclusion that, Article 22 is also applicable to calculation of compensation for delay in delivery, if the delay of the carrier cause and damage or loss of the cargo. It stipulates that such compensation is calculated by reference to the value of such goods at the place and time of delivery. The rules also clarify the notion of the value of the goods and define that the value of the goods is fixed according to the commodity exchange price, if there is no such price, according to their market price. Notwithstanding these facts, if there is neither commodity exchange price, nor market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery. Under the next provision of the Rotterdam Rules In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner. By adding this statement, the main purpose of the Rules is to prevent any misunderstanding about the calculation between the shipper and the carrier in the future.

A main question arises about the relation between delay and damage to or loss of the cargo in respect of the limitation of liability. The arguable point is that how the limitation of liability issue should be solved in case of delay in delivery causes loss of or damage to the carrier goods? According to the practice and the position of the international conventions and domestic legislation, in this case, the limitation of liability is defined on the basis of damage to or loss of the cargo. That's why, the limitation of liability for delay in deliver and the limitation of liability for damage to or loss of the cargo are regulated separately- within different paragraphs.

Another noteworthy point is the possibility of the increase or decrease of the amount of the limitation of the liability of the carrier. As a general rule, the amount of the carrier's limitation of liability can not be changed in a side of decreasing [8]. It means, the limitation of liability can not be reduced. Notwithstanding this fact, the Hamburg Rules allow to increase the amount of the limitation of liability. In this sense, the increase shall be based on the agreement of the contracting parties. It is stated under Article 23.2 of the Rules that notwithstanding the provisions of the proper article a carrier may increase his responsibilities and obligations under this Convention. On the other hand, paragraph 4 of the Rules provides that by agreement between the carrier and the shipper, limits of liability can increase.

The Rotterdam rules provide this statement within the determination of the explanation of the limitation of liability using this opinion – "the higher amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper". Both of the conventions support the idea of higher amount of carrier's limitation of liability.

LOSS OF RIGHT TO LIMIT LIABILITY

The limitation of liability of the carrier is always discussed along with the loss of right to limit liability. Because it is the inseparable part of the carrier's position in order to be based on the limitation of his liability for loss, damage, delay. Under both the Hague-Visby Rules and the Hamburg Rules the carrier is not entitled to the benefit of the limitation of liability if loss, dam-

age or delay is caused actions intentionally or recklessly, and with knowledge that such loss, damage or delay would probably result. Because of the lack of provision under Hague Rules in respect of delay in delivery only the statements of Hamburg and Rotterdam Rules will be discussed and analyzed below.

Under Article 8 of the Hamburg Rules it is clearly stated that, the carrier is not entitled to refer to the limitation of liability, if it is proved that… and the delay in delivery resulted from an action or omission of the carrier- if it is done intentionally to cause such delay. In conclusion the international convention differentiates 2 main reasons for the loss of the benefit of right to limitation of liability. Firstly, the carrier's intentional actions or omissions. Second, if the carrier is aware of the probability of delay in delivery (knowledge) beforehand. For the sake of clarity, it should be mentioned that the Convention requires, both active and inactive behavior of the carrier as actions and omissions. In short, the claimant has an initial burden to show that the damage happened during the carrier's period of responsibility, then, the burden of proof switches to the carrier who has to show that the damage was not caused by his fault or negligence [12].

On the other hand, the details of the above – mentioned statement gives us to come to such a conclusion that, if the carrier does something wrong, carelessly which results the delay of cargo in delivery, it cannot be a ground for the loss of right to limit liability. The main point is to have knowledge about this event or to predict it beforehand. [7]

The Rules also clarify the scope of the persons to whom the loss of right to limit liability is applicable. As the application of the limitation of liability rules to the servant or agent of the carrier's in a same way as the carrier, the next clause of the noted article provides the applicability of the loss of right to limit responsibility for the agents or servants of the carrier's, as well as the carrier. The problem is regulated by article 61 of the Rotterdam Convention, namely, loss of the benefit of limitation of liability. While taking into consideration to this article, we come to such a conclusion that the Convention repeats the position of the Hamburg Rules word by word. The Rotterdam rules also require the carrier not to intentionally breach his obligation under the contract of carriage of goods by sea. He can't utilize the limitation of his liability if the claimant proves that it was the personal act or omission of the carrier.

FROM THE LEGAL POINT OF VIEW OF THE AZERBAIJAN LEGISLATION

What is the position of the legislation of the Republic of Azerbaijan in relation to the limitation of liability for delay in delivery? As an answer to this question the Merchant Shipping Code of the AR solves the problem of limitation of liability under Article 132. The Code's position is completely similar to the Hamburg and Rotterdam Rules related to delay in delivery. It declares liability of the carrier for delay of delivery of the cargo, can not exceed the sum of freight, taken into account for payment by the contract on transportation of cargo by the sea [1]. In other words, the Code stipulates that the total sum which should be paid by the carrier cannot exceed the limitation of liability which is determined for the complete loss of the cargo. On the other hand, the Merchant Shipping Code tries to conserve the rights and interests of the agents and servants of the carrier under Article 133. In this point, we meet the applicability of Himalaya clause which supports that the third persons as agents, servants , stevedores who are not parties of the contract of carriage of goods by sea can freely refer to the limitation of liability. Apparently, the legislation of Azerbaijan doesn't contain any specific and different provision in accordance with limitation of liability for delay, unlike the above –mentioned international conventions. In other words, he should be unwilling in relation to the reason of this obstacle.

In relation to some points we can meet different positions unlike Rotterdam Convention , too. Under the Article 132 Merchant Shipping Code of Azerbaijan the liability of the carrier for loss or damage to cargo is determined not exceeding 666.77 units of account for one place or other figure of dispatch, or calculating two calculation figures for one kilogram of gross weight of the lost or damaged cargo [1]. The Code avoids to apply 835 Units of account as compensation. This idea makes it closer to Hague, Hague- Visby Rules.

The next Article of the Code deals with the loss of tight of limitation of liability and the problem again is regulated with the loss of or damage to the cargo under this article. The meaning of the first paragraph of above-mentioned article is completely similar to the positions of Hamburg and Rotterdam Conventions. The only discrepancy is that the Code uses the notions of 'premeditated action' instead of 'intentional action'

and 'carelessness' instead of recklessness. And regularly, in the next paragraph the Code deals with the admissibility of this rule for the servants and agents of the carrier's, as well. Apparently, the Code doesn't mean any special, additional or various rule from the international conventions in respect of limitation of liability within delay of the goods in delivery.

CONCLUSION:

Summarizing all above-mentioned, the final destiny of the carrier's liability and determination of the limits of his liability completely depends on the reason of his delay, the reason of his action or inaction that causes delay in delivery. If the cases beyond the carrier's control causes delay the carrier may refer to limitation of liability, even may fully relieve from liability, otherwise, anyway, he is liable for his intentional or reckless action or inaction

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