

Breakthrough in the Relativity of Traditional Contract Subjects: The Case of the International Contract for the Carriage of Goods

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ABSTRACT

The contract of carriage of goods is a typical agreement commonly encountered in both domestic and international trade. Relevant legislation pertaining to this matter can be found dispersed across civil codes, commercial codes, and specialized transport laws in various countries. According to the relativity of traditional contracts, the contracts are only binding on the contracting parties. However, with the development of the economy and the sophistication of the social division of labor, the behavior of goods transportation often involves the interests of third parties other than the contractual counterparts. Hence, the practice has required the breakthrough of the relativity of the contract of carriage of goods. From the views of the subjects, the groups of the shipper, the carrier, and the consignee have emerged. This paper studies the above three subjects, from the perspective of comparative law to recognize the legal phenomenon of the breakthrough in the relativity of the subject of the contract of carriage of goods.

KEYWORDS

Contract of carriage of goods; The relativity of contract subject; Breakthrough in the relativity of the contract

1. INTRODUCTION

In accordance with Article 809 of the Civil Code of the People's Republic of China (the "Civil Code"), a contract of carriage refers to an agreement in which the carrier undertakes to transport passengers or cargo from the point of origin to the designated destination, and the passenger, shipper, or consignee remunerates for the ticket-fare or freight. The contract of carriage of goods, on the other hand, is a sub-classification arising from the criterion of the object of transportation, i.e., the object of transportation is cargoes, as opposed to the transportation of passengers. The so-called relativity of the contract subject means that the contractual relationship can only occur between specific subjects, only one party to the contract can be to the other party to the contract based on the contract to make a request or litigation. The main subjects of a contract of carriages are carriers and shippers, however, the actual performance often involves the interests of the parties outside the contract, especially in international cargo transportation. Along with the international trade and the extension of the chain of the contract of carriages, the beneficial third parties and legal third parties have entered into the legal relationship of the contract of carriages, together weaving an exceptionally complex web of legal dynamics [1].

Taking the carriage of goods by sea as an example, as the division of labor in the maritime service industry has been continuously refined, the entire transport process has been broken down into

specific links such as loading, moving, storage, delivery, customs clearance, care and unloading, and many of these links are operated by specific professionals, who have professional skills, tools, and venues. The contract of carriage of goods by sea was originally between the shippers and the carriers, but now deriving the patterns encompassing two groups, one is the group of ship side which the carrier as the core, including the actual carrier, the carrier, the actual carrier's employees and their agents; the other one is the group of cargo side which the shippers as the core, including the shipper. Originally, the consignee is the third party of the contract of carriage, but due to relying solely on the bill of lading endorsement for the sale of goods, the scope of the consignee will be extended to the holder of the bill of lading. Consequently, whether it is the actual carrier or the bill of lading holder, in essence, the relativity of the contract subject has been broken through. The following will study the breakthrough of the relativity of the contract subject from the perspective of shipper, carrier and consignee, and understand the legal phenomenon of the breakthrough of the relativity of contract subject in contract of carriage of goods from the perspective of comparative law.

2. BREAKTHROUGH IN THE CARRIER'S SIDE: THE ACTUAL CARRIER

The actual carrier system applies broadly to international air and sea carriage and is fundamental to successive carriage and multimodal transport. The separation of the term "actual carrier" from the concept of "carrier" dates back to the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier in 1961 (the "Guadalajara Convention") [2]. The first appearance of the concept of the actual carrier in the carriage of goods by sea was in the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) [3]. Article 10, paragraph 4, of the Hamburg Rules provides, "Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several." This joint and several liability, not from the carrier and the actual carrier of the contract of carriage, but the Hamburg Rules, so its nature is a legal responsibility. The actual carrier and the carrier can not be circumvented. The actual carrier is not the subject of the contract of carriage but is statutorily assigned responsibility, which is a reflection of the breakthrough in the relativity of the contract.

There also exists a precedent in German law that treats transportation performed by the actual carrier as a contract for the benefit of third parties (the "Charter Case") [4]. German civil law scholar Dieter Medicus cites this jurisprudence as an example of a "contract purely for the benefit of a third party" in his book, "Gesetz zur Handelsgesetz. This case is an example of a "purely third-party contract" [5]. Although this case is a passenger contract of carriage dispute, it is also a significant reference for the actual carrier system in freight contracts of carriages.

Articles 42 and 61 of Maritime Law in China also provide for the actual carrier [6]. In the field of air transportation, our Civil Aviation Law has absorbed the regime of the actual carrier in the Guadalajara Convention, which can be found in articles 140 and 143 of the Civil Aviation Law [7].

The actual carrier system not only safeguards the interests of the ship side under the legalization of the Himalaya clause but also takes into account the rights and liabilities of the cargo side. In terms of the rights and responsibilities of the carrier's employees, agents, or independent contractors (sub-contractor), that is, the carrier's indirect rights and responsibilities, the integration and balance of the interests of the ship and cargo are basically achieved [8]. According to the relevant international conventions and regulations of our country, the actual carrier liability refers to the carrier's liability. Thus, in the contract of carriage, the actual carrier also bears the statutory responsibility towards the shipper. Certainly, in the case of the actual carrier's act causing the tort liability concurrence, it does not prevent the shipper from claiming tort liability. However, this is no longer the case where reference is made to the carrier's responsibility. The contractual liability of the actual carrier to the shipper is not only stipulated in the Guadalajara Convention, the Montreal Convention, the Hamburg Rules, the Civil Aviation Law, and the Maritime Law but also recognized by the judgments of our

courts. The non-parties to the contract of carriage bear the liability of the contract to the shipper, which is the reason for the special legal status of the actual carrier, and also the embodiment of the breakthrough in the relativity of the contract subjects.

3. BREAKTHROUGH IN THE SHIPPER'S SIDE: THE DOCUMENTARY SHIPPER

Article 1 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") defines the shipper and the documentary shipper [9]. From the definition of the documentary shipper, in order to become the documentary shipper under the Rotterdam Rules, two conditions must be met: firstly, people do not belong to the shipper under the Convention, in other words, is not a person who has entered into a contract of carriage with the carrier; and secondly, they accept to be named as "shipper" in the transport document or electronic transport record. Under FOB trade conditions, the seller originally did not have any legal relationship with the carrier. However, in order to be able to control the goods in transit until payment is cleared, and to obtain a guarantee to collect payment from the buyer or the bank (payment by letter of credit), the seller will usually claim to obtain some of the rights of the shipper. The concept of the documentary shipper emerged to regulate or clarify this situation at the legal level.

The emergence of the documentary shipper is mainly due to the provisions of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the "Hague Rules") and the Protocol to it (the "Visby Rules"), which "value the carrier but overlook the shipper", so that the interests of the cargo side are not well protected. In the international sale of goods, the Incoterm FOB means "Free On Board (FOB) at the port of shipment". Among other obligations, the seller shall deliver the goods under the contract to the vessel designated by the buyer at the time and place agreed upon in the contract of sale of goods between the seller and the buyer (the risk transfers once it crosses the ship's rail), and it assumes no obligation for the transportation and freight of the goods. FOB buyer must enter into a contract of carriage with the shipping company (the carrier), based on the agreement of the contract of sale, arrange for means of transportation, chartering, and booking of cargo space, receive the goods at the time and port specified in the contract of sale and bear all costs associated with the goods and the risk of loss or damage to the goods. However, in practice, the shipper's column on the bill of lading is usually filled in by the seller, so that there is an inconsistency between legislation and practice. Based on practical considerations, the Rotterdam Rules created the concept of "documentary shipper". The documentary shipper system is a new system created by the Rotterdam Rules to clarify the rights, obligations, and responsibilities of the seller under the FOB (the FOB seller) under the contract of carriage [10].

Under the principle of reciprocity of rights and obligations, the documentary shipper is entitled to the shipper's rights and defenses [11]. The emergence of this concept is conducive to clarifying the situation under Incoterms FOB, where the shipper and the cargo side are different subjects, solving the problem that the cargo side does not have the status of a party to the contract of carriage, which can effectively protect the interests of the cargo side (the seller), and at the same time perfecting the shipper's legal system.

The documentary shipper enters the field of transport law by relying on the negotiation of the contract of sale with the shipper, which is not itself a party to the contract of carriage, but enjoys the rights under transportation law through the possession of a transport document, and has the right to obtain a transport document issued by the carrier with the consent of the shipper. Under the Rotterdam Rules, the FOB seller must become a "documentary shipper" to obtain legal status and protection. The creation of the concept of "documentary shipper" in the Rotterdam Rules is also a breakthrough in the relativity of contracts.

The emergence of the concept of the documentary shipper is catering to practical needs and is not a fabrication out of thin air. Moreover, the documentary shipper is a further refinement of the shipper system. Clarifying the rights and obligations of both parties is conducive to protecting the legitimate rights and interests of each subject. This design idea is that the documentary shipper is equivalent to the "consignor" from the previous concept of the shipper because the documentary shipper is not a party to the contract of carriage. This setup is not only more in line with the principle of relativity of contract but also avoids the carrier in the practice of being overly entangled in the identification of the shipper. Moreover, the documentary shipper is not subordinate to the shipper. It has its rights and obligations. But it is not isolated, it can replace the shipper, and cooperate with the carrier. For example, when the carrier cannot obtain the information address of the consignee and cannot determine the shipper, the carrier can notify the documentary shipper to perform the relevant obligations. It is conducive to ensuring the smooth completion of the transportation of goods, improving work efficiency, and reducing the risk of cargo transportation.

4. BREAKTHROUGH IN THE CONSIGNEE'S SIDE: THE BILL OF LADING HOLDER

The bill of lading is issued for the carriage of goods by sea, originally only as a document for the carriage of goods by sea. The bill of lading is the proof of the contract of carriage between the carrier and the shipper. The contract of carriage itself has relativity, which can only bind the carrier and the shipper, but not the third party outside the contract. But with the Merchant Shipping Act 1855 to make the bill of lading negotiable, the bill began to be separated from the transportation link, into the international trade, financial security, and other areas independent of the transportation link. "The information reflected in the bill of lading truly reflects the rights and obligations of the parties conferred by the contract of carriage of goods by sea" [12].

The bill of lading facilitates the transformation of international trade from physical to documentary transactions. The buyer is likely to transfer the bill of lading to a third party upon receipt of the bill of lading issued by the carrier. At this time, the transferee has no prior understanding of the contract of carriage, only because the circulation of the bill of lading makes it in practice with the carrier. Therefore, how to interpret the legal relationship between the holder of the bill of lading and the carrier is crucial. The legal nature of the bill of lading and the creation of legal relations are controversial in the academic world. At present, there are five main doctrines, respectively, including the theory of contract for the benefit of the third party, the theory of contract transfer, the theory of securities relations, the theory of transfer, and the theory of legal provisions. No matter what kind of doctrine, its essence is to solve how the holder of the bill of lading outside the contract of carriage is related to the legal network of the contract of carriage.

As a result of the issuance of the bill of lading, the shipper's right of delivery is separated from the original contract of carriage of goods by sea, takes the bill of lading as the carrier of the right, and runs according to the legal relationship of the bill of lading. For the carrier, the behavior of issuing means that he agrees to separate the claim for delivery from the contract of carriage of goods by sea and enter it into the bill of lading, and accepts the assignment of the bill of lading. In other words, when the carrier issues the bill of lading, he is faced with two creditors, the shipper and the holder of the bill of lading.

When the holder of the bill of lading obtains the bill of lading, the shipper is not in possession of the entire bill of lading and its rights under the contract of carriage are in a "state of repose". However, the shipper still has contractual obligations to the carrier, such as providing information, instructions, or documents related to the goods to the carrier or performing party and bearing with the carrier to negotiate changes in the contract after the obligation to incur additional costs. The rights of the holder of the bill of lading are mainly embodied in the right to take delivery of the goods against the bill of lading. The carrier must and in principle only be responsible to the holder of the bill of lading for the

carriage of the goods, and the relationship between other holders of rights in the goods, including the owner, and the carrier is, in a sense, impeded by the bill of lading.

As part of the performance of the contract of carriage, the carrier issues and delivers the bill of lading to the shipper at the request of the shipper. And it is the shipper that has the right of control over the carrier at this time. When a bill of lading is transferred by the shipper (which may be a complete bill of lading transfer or only a single bill of lading transfer) to the holder of the bill of lading, the shipper's control is blocked by the loss of the complete bill of lading, the holder of the bill of lading has a claim for delivery because of the ownership of the bill of lading, and the shipper's rights are restored when the complete bill of lading is returned to the shipper's possession if the goods are rejected or otherwise [13].

The Merchant Shipping Act 1855 and the Carriage of Goods by Sea Act 1924 adopt the doctrine of contractual assignment, which holds that the contract for the carriage of goods by sea evidenced by a bill of lading is transferred when it is transferred or assigned from the shipper to a third-party consignee/holder of the bill of lading. The transfer of the bill of lading makes a "contractual assignment" between the shipper and the consignee, and the consignee becomes a new subject under the contract of carriage as a result of the assignment, thus acquiring the corresponding rights and obligations [14].

In China, most scholars believe that the legal relationship of the bill of lading is the legal debt. Consent firstly manifests in the contract of carriage which is signed by the carrier and the shipper in the stage of transportation. The bill of lading is issued on the premise of the contract of carriage, and the contents of the bill of lading may also reflect the agreement between the carrier and the shipper. However, when the bill of lading is circulated and the bill of lading is transferred to a third party, as long as the transfer is made, the rights and obligations under the bill of lading are automatically obtained by the third party. The reason why the bill of lading holder obtains these rights and obligations is because of the provisions of Article 78 of China's Maritime Law, "The relationship between the carrier and the holder of the bill of lading concerning their rights and obligations shall be defined by the clauses of the bill of lading. [15]" In addition to our country, Germany also supports the theory of legal debt.

5. CONCLUSION

The breakthrough of contract relativity is not arbitrary. And the application of contract relativity must have certain conditions. The base is to meet the provisions in laws and regulations. The purpose of contract relativity is to ensure the security and efficiency of the transactions. For the situation involving the third party, the application of contract relativity can reduce the harm to the contract interests caused by the third parties' participation from the perspective of maintaining the stability of the contract. In the carriage of goods by sea with the precise labor division and complicated expertise, the cargo side is often in a weak position. It can hardly ever get hold of the relevant evidence on the causes of cargo damage, the cargo handling records, and the loading and unloading operations. Therefore, the relativity of the contract should be broken under certain circumstances, to better protect the interests of all parties and promote the development of the cargo transportation industry. In practice, the relativity of contract shall be taken as the norm and the breakthrough of it as the exception.

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Article 1:
(a) "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague, 1955, according to whether the carriage under the agreement referred to in paragraph (b) is governed by the one or by the other;
(b) "contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or shipper or with a person acting on behalf of the passenger or shipper;
(c) "actual carrier" means a person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.
- [3] The Hamburg Rules:
Article 1:
(2) "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.
- [4] In that case, the defendant airline (the actual carrier) leased seats on a flight to Company T (the charterer who issued the air tickets), which subcontracted a portion of the seats to Travel Agent O. Passenger Ms. H booked a seat on the defendant's flight with Company O. When passenger H boarded the flight, the defendant refused to allow her to board the flight on the grounds that Company T (the charterer) had not paid for the air tickets. The Court of Second Instance held that the air tickets were issued from Company T and not the Defendant, and that the charter contract did not contain any agency clause, so Company T was not an agent of the Defendant, and that the charter contract entered into between Company T and the Defendant was an altruistic contract for the benefit of a third party, the traveler. altruistic contract for the benefit of a third party - the passenger. The charter contract did not expressly give passenger H a direct performance claim against the defendant, and it was left to the judge's direct discretion for Ms. H to obtain such a direct performance claim in relation to the purpose of the charter contract, in accordance with section 328, paragraph 2, of the German Civil Code (BGB).
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- [6] Maritime Law of the People's Republic of China:
Article 42:
(2) "Actual carrier" means the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract
Article 61:
The provisions with respect to the responsibility of the carrier contained in this Chapter shall be applicable to the actual carrier. Where an action is brought against the servant or agent of the actual carrier, the provisions contained in paragraph 2 of Article 58 and paragraph 2 of Article 59 of this law shall apply.
- [7] Civil Aviation Law of the People's Republic of China:
Article 140:
The claims for damages or instructions issued in conformity with provisions of this chapter, whether they are issued to the signatory or actual carrier, have equal effect. But the instructions specified in Article 119 are effective only when they are issued to the signatory carrier.
Article 143:
A legal action over the shipment performed by an actual carrier according to contract can be taken either against the actual carrier or the signatory carrier, or against them both at the same time. The indicted carrier has the right to ask the other carrier to jointly respond to the suit.
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- [9] The Rotterdam Rules:
Article 1:

(8) “Shipper” means a person that enters into a contract of carriage with a carrier.

(9) “Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

[10] D.Y Ma: Study on Seller's Risk under FOB Conditions--Taking Shipper's System as a Perspective, Law and Business Research, (2008) No.4, p. 104.

[11] The Rotterdam Rules:

Article 33:

A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper’s rights and defences provided by this chapter and by chapter 13.

Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

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