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Modern Trends in Proving the Maritime Transport Contract in Light of Federal Decree No. (43) of 2023 Regarding Maritime Law and the 2008 Rotterdam Convention

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Abstract

This research discusses the developments in the maritime transport industry, and one of the most prominent features of these developments is the reliance on electronic media in concluding and proving the maritime transport contract, and issuing electronic bills of lading, given the speed these means provide that is compatible with the nature of commercial transactions and reduces disputes. Although Federal Decree Law No. (43) of 2023 was issued, after long anticipation, it addressed the issue of electronic bills of lading only in Article (163) of the same decree, and this, in our opinion, is not compatible with the recent developments taking place in the United Arab Emirates specifically. In the field of maritime transport. For this reason, we believe that the UAE Maritime Law Decree is still in urgent need of regulating the legal framework for electronic bills of lading in a more detailed manner, as the Rotterdam Convention of 2008 did.

Keywords: *electronic bill of lading, traditional bill of lading.*

1. Introduction

The world has become more aware than ever of the importance of digital technology in the field of commercial transactions and the communications sector, which has spread worldwide today and left a clear impact, especially in the field of maritime transport. It has become imperative for companies (Samiha Al-Qalyoubi, 1987). operating in this field to deal with these modern technologies due to their many advantages related to speed and cost reduction for the parties to the contract of carriage by sea. Some studies conducted in industrially advanced countries indicate that 60% to 80% of human welfare improvement is due to technological progress (Adli Amir, 1996).

2. Research Problem

The problem of the subject of the research revolves around the fact that electronic bills of lading play a major role in proving the contract of carriage, and are even considered the only means of proving that contract. However, the UAE legislator, Maritime Law Decree No. (43) of 2023, did not explicitly stipulate electronic bills of lading as a means of proving a contract. Maritime transport, as is the case with traditional bills of lading, which are no longer appropriate and the developments taking place in the field of maritime transport, as well as the

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negatives surrounding traditional bonds. Therefore, this research aims to identify the position of the UAE legislator on the electronic bill of lading as a means of evidencing contracts of carriage by sea, as well as the Rotterdam Convention.

3. Research Questions

In light of the above, the research raises several questions, which we will try to answer in this research, as follows:

- What is meant by electronic bill of lading, and what are the challenges facing the use of electronic bills of lading in evidencing contracts of carriage by sea?
- Can contracts of carriage by sea be evidenced by electronic bills of lading in light of UAE law and the Rotterdam Rules?

4. Research Methodology

The researcher uses the analytical and comparative method, the analytical method, by analyzing the texts contained in Decree Law No. (43) of 2023 AD regarding the maritime law of the United Arab Emirates, and comparing them with the United Nations Convention regarding contracts for the international carriage of goods by sea, in whole or in part, of 2008, which Known as the Rotterdam Convention of 2008.

First Section - The Traditional Approach to Evidencing Contracts of Carriage by Sea

Definition of the traditional bill of lading in jurisprudence

Article 1 of Federal Decree Law No. 43 of 2023 defines the sea freight bill as “a document proving the contract for the sea carriage of goods and the carrier’s receipt of the goods and shipping them, and the carrier undertakes to deliver the goods in exchange for the recovery of the original document,” while there is no definition of the bill of lading in the Rotterdam Convention, and it has been defined Some jurists have defined the bill of lading in general as being the instrument proving the master’s receipt of the goods (Mohamed Kamal Hamdi, 1988), and others have also defined it as “an undertaking from the carrier that he possesses, through the captain, the aforementioned goods for the account of the one who holds the bill (Mohamed Fareed Al-Arini, Mohamed Al-Sayed Al-Fiqi, 2002).

However, others have defined the bill of lading as “the contract by which one of the parties to a contract of carriage by sea entrusts a specialized contractor with the loading or unloading of goods on the ship” (Yas et al., 2022).

Negatives of the Traditional Bill of Lading

1. Slow Transfer Process of the Traditional Bill of Lading

Time is a crucial factor for traders, as prices may fluctuate from time to time. Additionally, delayed delivery can result in damage to the goods. In fact, traders may resort to selling the goods they purchased during transportation before they are delivered in order to make a profit (Rashid Al-Ghazrawi, 2013). The delayed arrival of the traditional marine bill of lading to the consignee may cause the opportunity for them to sell or dispose of the goods to be missed.

Furthermore, delayed receipt of the bill of lading may allow someone other than the legitimate consignee who is supposed to receive the goods, to present a letter of guarantee to the carrier to receive the goods, thus reducing the fees paid at the port in the event that the buyer is delayed in delivering the bill of lading to the carrier.

The UAE legislator has specified the person entitled to receive the goods upon arrival, as Article 267, Clause 1, of the Maritime Commercial Law states that “The master must deliver the goods to the consignee or his representative...”. Consequently, the legitimate recipient of the goods is the person whose name is mentioned on a named bill of lading, the last endorsee on a bill of lading to order, and the person presenting the bill on arrival if the bill is in favor of the bearer.

Therefore, the goods cannot be delivered to anyone other than the person whose name is mentioned in the bill of lading, even if their name is mentioned in the bill of lading but not as the consignee.

2. Difficult Storage of Traditional Bills of Lading

The use of (traditional) paper bills of lading leads to storage difficulty, as the quantity of bills is sometimes estimated by weight, not by number (Hani Dawidar, 2002), due to the large number of papers used.

3. Forgery of Traditional Bills of Lading

A bill of lading is a means of evidencing contract of carriage by sea pursuant to Article (157/1) of the Maritime Commercial Law, which states that “The contract of carriage by sea shall be evidenced by a bill of lading...”. It is determined by the Abu Dhabi Court of Cassation that “the bill of lading is evidence of the contract because it includes all its terms, on the basis of which the carrier's obligations and responsibilities are defined. The bill of lading governs the relationship between the shipper, to which information and limits shall be referred for determining their rights and obligations before each other” (Hani Dawidar, 2002).

It is worth noting that the order bill of lading and the bearer bill of lading are the most vulnerable to tampering and forgery. The person who commits forgery can enter information related to the goods, which later turns out to be inconsistent with the shipped goods. For example, mentioning in the bill of lading that the goods are manufactured by a certain company, and it turns out that the company is not the manufacturer, or mentioning that the goods consist of 100,000 Toshiba computers, and it turns out that the number is 60,000 HP computers.

In order to address such a situation, the UAE legislator⁹ allows the carrier to make reservations on the bill of lading in certain cases, which naturally weakens the value of the bill of lading⁽¹⁰⁾ in the event of trading. Therefore, the shipper requests from the carrier a clean bill of lading, i.e., free of reservations, in exchange for the shipper issuing a letter of guarantee, in which the shipper undertakes to indemnify the carrier if the goods do not conform to the information and specifications stated in the bill of lading (Khudhair, H. Y et al., 2019).

Another form of tampering in the bill of lading is to mention a ship suitable for transportation, and then it turns out that the goods were shipped on another ship in order to save on the ship's fee (Hussain Mohammad Al-Mahdi, 2007). In conclusion, the traditional bill of lading has become more vulnerable to forgery and is no longer the optimal means of evidencing contract of carriage by sea for the reasons mentioned above.

Second Section - The Modern Approach to Evidencing Contracts of Carriage by Sea

The development resulting from the information and communication revolution has brought about a fundamental change in society and in legal thought in particular, where electronic commerce, which has brought about significant changes in civil and commercial transactions, has emerged, accompanied by changes in the system of evidence to adapt to modern developments in the field of electronic transactions (Hussain Mohammad Al-Mahdi, 2007). It is worth mentioning that the International Maritime Committee has developed rules related to electronic bills of lading, and these rules are not mandatory unless agreed upon by the parties. These rules include eleven articles (Yas et al., 2023).

First - Definition of Electronic Bill of Lading in UAE Law and the Rotterdam Convention

Maritime Law Decree No. 43 of 2023 did not include a definition of the electronic bill of lading. It merely defined the traditional bill of lading as a document proving the contract for the maritime carriage of goods and the carrier's receipt of the goods and shipping them, and the carrier undertakes to deliver the goods in exchange for recovering the original document. We have some observations on this definition, which we summarize as follows: As follows:

- 1- Despite the recent date of Federal Decree Law No. 43 of 2023 regarding maritime law, which we hoped would establish a comprehensive regulation of the electronic bill of lading, it provided some texts that are not sufficient, from our point of view at least, to regulate the subject of the electronic bill of lading. For this reason, we hope that the legislator will regulate the electronic bill of lading in terms of its definition, conditions, and course in proving the maritime transport contract in an accurate manner that prevents the emergence of disputes.
- 2- The UAE legislator defined the traditional bill of lading as a document that proves the contract for the maritime carriage of goods and the carrier's receipt of the goods and their shipment. The definition came in clarifying the functions of the traditional bill of lading more than explaining its nature. In this context, we suggest that the definition of the maritime bill of lading be as follows: "A document written using supports." A paper or electronic document that shows data related to the goods and confirms the maritime carriage contract and the carrier's receipt of the goods and his shipment of them.

It should be noted that the legislator permitted the issuance of a bill of lading by any electronic means in accordance with the text of Article (163) of the same decree. As for the Rotterdam Convention, it is notable that it did not use the term 'bill of lading', but rather used the term 'transport document'. The Rotterdam Convention adopted both paper transport documents and electronic transport records. An electronic transport record is defined as the information contained in one or more messages, issued by the carrier through electronic means in accordance with the contract of carriage, which evidences the carrier's receipt of the goods, as well as the existence of the contract of carriage itself (Khudhair, 2020). It can be observed from the above definition of the electronic transport document in the Rotterdam Convention that it performs the functions of the traditional bill of lading, including proving the receipt of the goods and the existence of the contract of carriage (Abdullah Obaid Al-Huwaishe, 2010).

Second - Functions and Challenges of Electronic Bill of Lading

- Functions of Electronic Bill of Lading

1. Electronic Bill of Lading is a Tool for Evidencing the Contract of Carriage by Sea

Article 1 of the Maritime Law Decree stipulates that the bill of lading is a document proving the contract for the maritime carriage of goods.

The second paragraph of Article (163) of the same decree also stipulates that “an electronic bill of lading shall have the same validity as a paper bill of lading.”

The UAE legislator has stipulated the following to recognize the validity of an electronic bill of lading:

The first condition - that the means of issuing or trading the bond be one that allows the designation of its legal holder.

The second condition is that the means of issuing or trading the bond guarantees its safety.

The third condition - that the means of issuing or trading the bond must guarantee the holder how to prove his possession of the bond.

Some jurists believe that the bill of lading is the only means of evidencing the contract of carriage by sea, while other jurists believe that the bill of lading is not the only means of evidencing the contract of carriage by sea, but it is the primary means of evidencing the contract (Susan Ali Hassan, 2010). It is to be understood from Article (157/1) of the Maritime Commercial Law, which states that “The contract of carriage by sea shall be evidenced by a bill of lading...”, that the bill of lading is not the only means of evidencing the contract, but there are other means of proof in case the bill of lading is not available, such as declaration and oath (Samiha Al-Qalyoubi, 2021).

For our part, we support the second opinion, which states that the electronic bill of lading is not the only means of evidencing the contract of carriage by sea, but it is the primary means. As we mentioned earlier, the contract of carriage by sea is a consensual contract, meaning that it is sufficient to have consent, subject matter, and cause to conclude it, and does not require the expression of will in a specific form. Therefore, writing is not a pillar of the contract, but it is a means of evidencing the existence of the contract of carriage.

It is determined by the Federal Supreme Court ⁽¹⁸⁾ that “In case the contract of carriage by sea is not included, the bill of lading is considered as evidence of the contract, because it includes all its conditions, on which the carrier's obligations are based, and it regulates the relationship between the two parties, and therefore it is their law, the basis on which any dispute between them should be based, and evidence for proving the information contained therein...”. It should be noted that, commercial acts can be evidenced by all means of proof, including commercial books, and trader's correspondences and invoices, whether traditional or electronic. This was confirmed by Article (94) of the UAE Commercial Transactions Law, which states that “Unless otherwise provided by law or stipulated in the agreement, commercial obligations of any amount whatsoever may be evidenced by all means of proof”.

It is also determined by the Federal Supreme Court ⁽¹⁹⁾ that “A third party can prove the company's contract or any amendment made to it by all means of proof”. Also, the principle of freedom of evidence in commercial transactions is not absolute ⁽²⁰⁾.

The Rotterdam Rules also confirms this, where paragraph (14) of Article (1) stipulates that the transport document evidences a contract of carriage

2. Electronic Bill of Lading is a Tool for Evidencing the Receipt and Shipment of Goods

The role of the electronic bill of lading is not limited to evidencing the contract of carriage by sea, but it extends to evidencing the receipt of the goods by the carrier. This is stipulated by Article (264) of the UAE Maritime Law, as it states that “It shall be permissible for the carrier to give the shipper a receipt for the delivery of the goods before they are loaded on board the vessel which shall be substituted for the bill of lading upon the request of the shipper after the goods have been placed on board the ship and the receipt shall have the same effect as the bill of lading if it contains the particulars...”. The Rotterdam Convention also referred to this in paragraph (14) of Article (1) when defining the transport document as “a document issued under a contract of carriage by the carrier that evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage

- Challenges Facing the use of Electronic Bills of Lading

1. Error that the Electronic Bill of Lading may Face

Although many advances have been made in the solidity of maritime transport in practice, there are some challenges to its use as a tool to prove maritime transport in practice, which are explained as follows:

There are various forms of errors that the electronic bill of lading may face. It may be a human error where data entry is carried out by people, referred to as programmers. It may also result from errors in the program's design. In addition to technical errors such as a malfunction in the computer system for any reason (Khadija Kabalt, 2005).

2. Cyberattacks on the Electronic Bill of Lading

Electronic data can be vulnerable to hacking due to the existence of specialized individuals in the field of computer science. Hackers can access the information related to the electronic bill of lading and breach privacy and confidential data.

Despite all the previous challenges facing electronic bills of lading in practical reality, there are methods to confront these challenges that protect data and ensure its confidentiality from cyberattacks, such as using encryption technology, which involves making modifications to the data when sending it to a party or converting it into specific codes that can only be understood by authorized individuals. In other words, encryption involves using an encryption key, which is a set of mathematical values agreed upon between the sender and recipient, so that the recipient uses the key to decrypt the data and return it to readable texts (Marwa Mohamed Al-Eisawi, 2018).

Conclusion

First - Results

- 1- The role of the electronic bill of lading does not stop at proving the contract of maritime carriage, but rather goes beyond that to prove the fact that the carrier received the goods.
- 2-It is noted that the Rotterdam Convention did not use the term "bill of lading" but rather used the term "transport documents". The Rotterdam Convention adopted paper transport documents and electronic transport records. An electronic transport record means the information contained in one or more messages issued by the carrier

electronically, under a contract of carriage, and it evidences the receipt of the goods by the carrier, as well as the existence of the contract of carriage itself.

Second - Recommendations

- 1- Despite the recent date of Federal Decree Law No. 43 of 2023 regarding maritime law, which we hoped would establish a comprehensive regulation of the electronic bill of lading, it included some texts that are not sufficient from our point of view to regulate an important subject such as the electronic bill of lading. For this reason, we hope that the legislator will regulate the electronic bill of lading in terms of its definition, conditions, and course in proving the maritime transport contract in a comprehensive manner.
- 2- The Emirati legislator defined the traditional bill of lading as a document that proves the contract for the maritime transport of goods and the carrier's receipt of the goods and their shipment. The definition stated the functions of the traditional bill of lading more than explaining its nature. In addition, it did not refer to the electronic bill of lading. Accordingly, we propose in this context to amend the text of Article One. From the decree, the definition of a sea bill of lading becomes as follows: "A written document using paper or electronic supports that shows data related to the goods and confirms the sea transport contract and the carrier's receipt of the goods and his shipment of them."

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