

FORMULATING A STATUTORY FRAMEWORK
FOR CARRIAGE OF GOODS BY SEA IN MALAYSIA

BY

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ABSTRACT

The Malaysian legal framework concerning carriage of goods by sea suffers from some shortcomings. The Hague Rules adopted by Malaysia is known for its defects, as pointed out by the UK Supreme Court in *Volcafe v CSAV*. There is no domestic legislation to regulate transfer of contractual rights like the UK Carriage of Goods by Sea Act 1924. The importation of English laws of different dates to different provinces in Malaysia, by the outdated ss. 3(1) and 5 of the Civil Law Act 1956, produces an anomalous result. The Sale of Goods Act 1957 does not permit transfer of property in part of bulk cargo. This limits merchant's ability to trade in bulk cargo carried ship's delivery order, unlike the position in the UK. Various problems caused by bills issued by non-vessel owning common carriers (NVOCCs), difficulty in identifying the carrier in the bill, etc have not been legally addressed, not only in Malaysia but globally. None of the studies on international conventions on this subject has attempted to formulate and draft a model statutory framework that facilitates adopting a convention with necessary modifications and making provision for a fully-fledged regulatory framework. This is what this thesis, in essence, attempts. The thesis compares the Hague group of Rules, Hamburg Rules and Rotterdam Rules to propose the convention that should be adopted for Malaysia. It proposes the Hague-Visby Rules (as amended by the SDR Protocol) [the Rules] subject to some essential modifications, eg. modifying Art. III(3) the Rules to require the bill to be given to the shipper rather than the consignor. The thesis formulates a consolidated Carriage of Goods by Sea Act for Malaysia that will give effect to the Rules with modifications, provide for transfer of contractual rights, facilitate passing of property and risk in a part of bulk cargo, regulate NVOCC bills, and require prominent display of the carrier's identity in the bill for the carrier to enjoy the short-period time limit, etc. The thesis suggests amendments to ss. 3(1) and 5 of the 1956 Act, if not repealed in entirety, to render the current English laws uniformly applicable throughout Malaysia in case of gaps in the Malaysian legislation subject to safeguards. It is argued that it is a misnomer to call a bill of lading as a document of title, which is indeed a document of constructive possession. It is also argued that bills issued by NVOCCs are not true bills of lading and hence not transferable, as the NVOCC does not have the actual possession to give constructive possession. The thesis discusses the controversies over the status of 'received for shipment' bills of lading. It is argued that such bills, when issued by a shipowner, are bills of lading because they embed the constructive possession function, though it is a matter of contract between the parties whether they allow such bills. The methodology adopted is largely doctrinal research. Interviews were also conducted with local and Singapore experts and practitioners to get their insight. In the last chapter, proposed drafts of the Rules with modifications, the said consolidated statute, the amendments suggested for the ss. 3(1) and 5 of the 1956 Act are included. The draft can generally serve as a model law on the subject.

خلاصة البحث

يشوب الإطار القانوني الماليزي المتعلق بنقل البضائع بجزراً بعض النواقص. وكانت قواعد لاهاي التي اعتمدها ماليزيا معروفة بعيوبها، كما أوضحت المحكمة العليا في المملكة المتحدة في قضية Volcafe ضد CSAV. لا يوجد تشريع محلي لتنظيم نقل الحقوق التعاقدية مثل قانون النقل البحري للبضائع في المملكة المتحدة لعام 1992. استيراد القوانين الإنجليزية ذات التواريخ المختلفة إلى مقاطعات مختلفة في ماليزيا، من خلال القوانين القديمة 3 SS (1) و 5 من قانون القانون المدني لعام 1956، ينتج عنهما نتيجة غير طبيعية. ولا يسمح قانون بيع البضائع لعام 1957 بنقل الممتلكات في جزء من البضائع السائبة. هذا يحد من قدرة التاجر على التجارة في البضائع السائبة بأمر تسليم السفينة، على عكس الوضع في المملكة المتحدة. كانت المشاكل المختلفة الناجمة عن الفواتير الصادرة عن غير السفن التي تمتلك ناقلات عامة (NVOCCs)، وصعوبة تحديد الناقل في الفاتورة، وما إلى ذلك لم تتم معالجتها بشكل قانوني، ليس فقط في ماليزيا ولكن على المستوى العالمي. ولم تحاول أي من الدراسات المتعلقة بالاتفاقيات الدولية حول هذا الموضوع تصميم وصياغة إطار تشريعي نموذجي يسهل اعتماد اتفاقية مع التعديلات اللازمة وتوفير إطار تنظيمي كامل الأهلية. هذا ما تحاول هذه الأطروحة في جوهره. تقارن الأطروحة بين مجموعة قواعد لاهاي وقواعد هامبورغ وقواعد روتردام لاقتراح الاتفاقية التي ينبغي اعتمادها لماليزيا. تقترح قواعد لاهاي-فيسي (بصيغتها المعدلة بروتوكول حقوق السحب الخاصة) [القواعد] مع مراعاة بعض التعديلات الأساسية، على سبيل المثال. تعديل الفن. ثالثاً (3) القواعد التي تتطلب تسليم الكمبيالة إلى الشاحن بدلاً من المرسل. تصيغ الأطروحة قانوناً موحداً لنقل البضائع عن طريق البحر لماليزيا والذي من شأنه أن ينفذ القواعد مع التعديلات، وينص على نقل الحقوق التعاقدية، ويسهل نقل الممتلكات والمخاطر في جزء من البضائع السائبة، وينظم فواتير NVOCC، ويتطلب بارزاً عرض هوية الناقل في الفاتورة للناقل للاستمتاع بالمهلة القصيرة، وما إلى ذلك. تقترح الأطروحة تعديلات على 3 SS (1) و 5 من قانون عام 1956، إذا لم يتم إلغاؤها بالكامل، لجعل القوانين الإنجليزية الحالية قابلة للتطبيق بشكل موحد في جميع أنحاء ماليزيا في حالة وجود ثغرات في التشريع

الماليزي خاضعة للضمانات. يُقال إنه من الخطأ تسمية سند الشحن باعتباره مستند ملكية، وهو في الواقع مستند ملكية بناءة. يُقال أيضًا أن الفواتير الصادرة عن NVOCCs ليست سندات شحن حقيقية وبالتالي فهي غير قابلة للتحويل، حيث لا تمتلك NVOCC الحيابة الفعلية لمنح الملكية البناءة. تناقش الرسالة الخلافات حول حالة بوالص الشحن "المستلمة للشحن". يُقال أن مثل هذه الفواتير، عندما يصدرها مالك السفينة، هي سندات شحن لأنها تتضمن وظيفة الحيابة البناءة، على الرغم من أنها مسألة عقد بين الطرفين فيما إذا كانوا يسمحون بمثل هذه الفواتير. وكانت المنهجية المعتمدة هي إلى حد كبير البحث العقائدي. كما تم إجراء المقابلات أيضًا مع الخبراء والممارسين المحليين وسنغافورة للحصول على رؤيتهم. في الفصل الأخير، تكون المسودات المقترحة للقواعد مع التعديلات، والتمثال الموحد المذكور، والتعديلات المقترحة للقواعد. وتم تضمين 3 SS (1) و 5 من قانون 1956. كما يمكن أن تكون المسودة بمثابة قانون نموذجي حول هذا الموضوع.

APPROVAL PAGE

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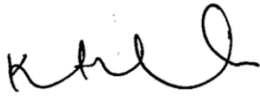
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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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02/06/2021

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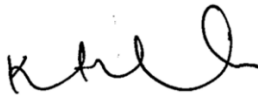
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**FORMULATING A STATUTORY FRAMEWORK FOR CARRIAGE OF
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This thesis is dedicated to my dear parents, Mr Kasi Arunachalam Chettiar and Mrs Manomani Kupusamy, only by blessings, guidance and teaching of whom I am today where I am.

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