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**CRITICAL ANALYSIS ON THE LEGALITY OF THE
ELECTRONIC BILLS OF LADING ACROSS COMMON LAW
NATIONS****MS. NAYAN VARMA***LLM Student, Symbiosis Law School, Pune***INTRODUCTION**

Achieving functional equivalence is not the case for electronic bills of lading in today's times and neither is the replication of the three immediate functions of the paper bill of lading. The precise need of the hour is for the eB/L to be legally and commercially effective, while simultaneously being unique and secure. A Bill of lading, is a legal document between a shipper and a carrier, and the electronic document is the digital equivalent of an ordinary B/L. In simpler terms, the eB/L is the soft copy. A contention that arises alongside along with the eB/L is that of the validity and legality of the electronic signature which is used to authenticate the record. Currently, the Hague-Visby rules and its archaic framework govern the carriage of goods by sea and that doesn't involve any aspect of eB/L, neither has the Rotterdam convention received its appropriate number of ratifications to involve the Electronic Transport Record which means that there is no uniform international framework governing the eB/L. Even the CMI rules¹ and the UNCITRAL haven't been adopted by nations which further elaborates that national legislators are individually working on their own laws to

¹ Comité Maritime International in 1990 adopted rules for eB/L.

develop and initiate eB/L as a staple, but the only question is when? The lacuna that exists in international law is the restriction of the open acceptance of the eB/L. This research paper, therefore makes an attempt to cover a primal question revolving around the legal status of the eB/L by presenting a Comparative Analysis on the eB/L's legality and its adoption in the common law countries of USA, UK, Singapore and India.

UNITED STATES OF AMERICA

eB/L under electronic documents of commercial agreements and transactions under the law of UCC² in the state of New York are recognised as being legally effective, enforceable and valid. The ESIGN Commerce Act³ offers a “general rule validity” where it explicitly mentions the enforceability and effectiveness for electronic contracts and other kind of records by stating that “Notwithstanding any statute, regulation, or other rule of law, with respect to any transaction in or affecting interstate or foreign commerce – 1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and 2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.”.

In USA, in case the UETA⁴(except states of New York, Illinois and Washington) state law is prevalent or any other law is prevalent for the establishment of an alternative process for the usage and the acceptance of electronic records/signatures, making them legally valid and enforceable being consistent with the ESIGN Commerce Act, only then will they sustain otherwise they stand to get pre-empted.

The ESRA⁵, gives an electronic record the same effect, status and force as that of a record which hasn't been produced by electronic means⁶. The UETA and the ESIGN Commerce Act (ratified by 47 states) are very similar in nature, they only differ slightly when it comes to a provision on electronic signatures⁷

Courts in New York do an exponential job when it comes to dispute resolution because they actively recognize the sole need for the parties to mutually reach an agreement on their own terms which also includes which law provision needs to be chosen⁸. Instead of any contract disputes on any aspect by looking at the interpretation and the contract's validity, the law prevalent in the area the contract was made/performed will be applicable⁹.

² Uniform Commercial Code, Article 7, provides for an electronic system of transfer for electronic documents of title.

³ Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 et seq. (2009).

⁴Uniform Electronic Transactions Act establishes the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce.

⁵ The Electronic Signatures and Records Act NYCRR 540.7

⁶ State Tech. Law §305(3).

⁷ Refer UETA §11, UETA §5(b) & 15 U.S.C. §7001(b)(2).

⁸ " Van Wie Chevrolet, Inc. v. General Motors, LLC, 145 A.D.3d 1, 38 N.Y.S.3d 662, 668-69.

⁹ " Prince of Peace Enterprises, Inc. v. Top Quality Food Market, LLC, 760 F.Supp.2d 384, 396 (S.D.N.Y. 2011).

In conclusion the USA is the only country to legislate and enforce the eB/L as of today and that to while considering it a legal document by making it valid and legally enforceable. The UCC in its respective definitions of record, sign and document of title are evidence enough that eB/L is on the same footing as a paper B/L and moreover so, the definition of "holder"¹⁰ under the UCC showcases the recognition of an eB/L.

UNITED KINGDOM

In England, and particularly in English law, there is no specific format for contracts and they aren't required to be in writing either. So, coming to the position of electronic documents and more specifically that of the eB/L, or any kind of contracts based on the EDI¹¹, there is no issue regarding the same. For further clarity if we refer to the definition of the term document¹², we find that this term also covers under its ambit electronic documents, meaning that they are completely recognised under the CPR¹³.

More importantly, the EIDAS¹⁴ recognised in the EU the validity of electronic signatures and all provisions relevant to those were implemented into the law of the UK¹⁵ which established a novel binding legal structure which identifies thoroughly all electronic documentations, seals and signs all across the EU. So, basically the ECA¹⁶ is the parent act which provides a framework to make electronic signatures admissible as evidence in the legal proceedings.

In the case of eB/L, we refer to Section 1(5) of the COGSA 1992¹⁷ which deals with the authorisation given to the secretary of the state for extension of the said Act, to all paperless transaction (impliedly including the electronic documentation). Unfortunately, in the current climate there is no such regulation in force. Additionally, in case of absence of provisions in a contract in systems like Bolero/essDocs¹⁸, the law in the UK does not recognise the eB/L as a title document nor can it be accepted under the COGSA in case of discrepancies.

In the case law of *Glencore International v MSC Mediterranean Shipping Company*¹⁹, Lord Justice Clarke issued a statement saying that the advantages of using modern technology instead of paper are many but there need to be the requisite number of provisions or any form of statutory impositions to regulate it. The reason

¹⁰ A "holder" can be "the person in control of a negotiable electronic document of title." UCC §1-201(b)(21)(C).

¹¹ Electronic data interchange is a technology using two computers to exchange between themselves information without any human interference, and is used for formulating the eB/L and its requisite shipping documents.

¹² A document is anything in which information of any description is recorded, under the English Civil procedure rules.

¹³ Civil Procedure Rules, enacted in 1998, http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm.

¹⁴ Electronic Identification and Trust Services Regulation (910/2014/EC).

¹⁵ Electronic Identification and Trust Services for Electronic Transactions Regulation 2016 (No. 696).

¹⁶ The Electronic Communications Act 2000.

¹⁷ The Carriage of Goods by Sea Act 1992.

¹⁸ Club system software for transferring electronic documents on the same platform.

¹⁹ [2017] EWCA Civ 365.

why it was stated in this case was because owing to the usage of an electronic release system, it was presumed that this ERS would be the equivalent for the option of delivery, after which even the liability of the loss of two containers would be on the owner of the ERS. This raised some very important questions in relation to the eB/L because of the ERS, as it was noted that even though it was an electronic system still all delivery obligations were complied under the standard B/L contract.

Lastly, it is significant to note that, the UK has not adopted the UNCITRAL²⁰ MLETR²¹, that is said to replace provisions in a way so that eB/L and other transferable documents are covered extensively and in conclusion UK does not recognise eB/L as having the same legal status as the paper B/L.

SINGAPORE

Legal recognition to electronic records is provided by the ETA Act²², which states that electronic information/records will not be denied legal effect/validity/enforceability on any grounds. More importantly, Singapore was the first country to implement the model law on electronic commerce by the UNCITRAL wherein the ETA after this was repealed and re-enacted to be in alignment with the model law. Just like India, Singapore's Evidence Act was also amended to include electronic documents. Under this very provision, we find that legal recognition is not applicable to transferable records but B/L are covered under the BLA Act²³ which unfortunately do not address the presence of eB/L and neither are there any regulations on it. But speculations have been made that Singapore may amend the ETA Act to encompass the UNCITRAL MLETR to include legal recognition to the eB/L.

The courts in Singapore have also been asked to comment on the legitimacy and legality of the eB/L. comprehending this, we understand that the position of Singapore is same as the UK where is no recognition for the eB/L being a legal document and neither does it have the same status as a paper B/L. Thus, it can be said that the ETA does not apply to eB/L but in case of an ETS²⁴ when there is already a pre-existing contractual matrix between the parties' electronic documents can be transferred and traded between them.

INDIA

Indian law surrounding documentation has always been revolving around paper-based documentation and signature bearing. Even the Evidence Act²⁵ recognises paper records and oral say as evidence. Subsequently,

²⁰ The United Nations Commission on International Trade Law is a core legal body of the united nations dealing with trade law and commercial law internationally.

²¹ Model Law on Electronic Transferable Records 2017 deals with enabling the legal use of the B/L.

²² The Electronic Transactions Act (Cap. 88).

²³ The Bills of Lading Act (Cap. 384).

²⁴ Electronic Trading System.

²⁵The Indian Evidence Act, 1872.

the Indian government took into consideration the UNCITRAL model law on formulated the IT Act²⁶ to fulfil the main aim of facilitating faster exchanges through electronic medium. Owing to the IT Act, due position and recognition has been given to electronic documentation and signatures. Here the question arises, as to whether the eB/L is an electronic document? If yes, then like other documents can it be recognised as evidence? If further yes then, after being recognised as an evidence, would it be considered as a legal document, with a genuine legal status and footing same as other evidences, paper/oral?

To answer these questions, one needs to delve into the IT Act. Here, the Act states that a contract expressed via electronic modes of communication during trade/commerce will have the same legal validity and enforceability as other contracts. But here, the Act is silent about the eB/L, in a sense that its admissibility in a legal proceeding without proper proof in the paper format would be required. There is no precedent in Indian courts to gauge the situation and comment about the same as well.

Section 2 (t) of the IT Act defines “electronic record” wherein the eB/L also falls within its ambit and Section 4 confers legal recognition to electronic records. So, it can be assumed that the eB/L is a legal document according to the definition clauses and that unless otherwise agreed, a contract expressed in electronic form will receive acceptance as being legally valid and enforceable, which is what the Supreme court held in the case law of *Trimex International FZE Limited, Dubai v. Vedanta Aluminium Limited, India*²⁷ focussing on email exchanges between parties being a legally enforceable contract. After an amendment in 2009 to the Act, Section 5 deals with electronic signatures and gives it a status of being legally enforceable, and this could definitely indicate that India would be ready for the eB/L but all of this would reply on the compliance with Section 65B²⁸ of the Act.

The uncertainty regarding the eB/L is perplexing in India because it is surrounded by ambiguity. The archaic legislations governing the B/L in India which are the Indian Bills of Lading Act, 1856 and the Indian Carriage of Goods by Sea Act, 1925 are so old and obsolete that they don't deal with the electronic aspect nor any other similar documents. Before conferring legal recognition, these uncertainties need to be cleared out because it is affecting the carriage of goods by sea in India.

CONCLUSION

The eB/L is a true game changer in the world of shipping because it brings forth with it reduced costs, quick and efficient transactions and increased security but its implementation and adoption are coming across as a big concern. USA is the only country equipped with legal and technical know-how when it comes to dealing

²⁶ The Information Technology Act, 2000.

²⁷ (2010) 3 SCC 1.

²⁸ Admissibility of electronic records.

with the eB/L and its legal recognition. The parent Act, COGSA has no express contractual aspect covering the eB/L and different legislations in various countries are only equipped with handling electronic documents and their legalities, not explicitly the eB/L. The task of switching to a new mode is not easy but in the current global trade setup, taking into account the pandemic, the clarity on the eB/L will bring hope. Many countries have still not adopted the UNCITRAL's enabling instrument MLETR (adopted only by Bahrain and Singapore), which can resolve the issues of the rights and liabilities of the eB/L. Moreover, the question of the legality of the eB/L stands in murky waters, as there is no clarity nor any specific stance except what national legislations have enacted. Overall, the only thing left in this circumstance is that owing to the COVID-19 crisis, the urgent need for the recognition of eB/L takes place. Every country with a flourishing shipping industry has the need to implement the eB/L and it stands as a prerequisite in today's times and the legislation governing the current provision is not sufficient to handle a new technological advancement.



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