The Legal Significance and Evidentiary Effect of the "Weight and Quantity Unknown" Clauses in Bills of Lading under the Rotterdam Rules

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Abstract

The objectives of this article are (1) to point out the legal uncertainty and unfair situation where "weight and quantity unknown" clause is inserted in bills of lading; (2) to explore the Rotterdam Rules' which is new regulatory regime that aims to minimise the unfair use of "weight and quantity unknown" clause; and (3) to analyse whether this new Rotterdam Rules framework can address the problems of uncertainty and unfairness. "Weight and quantity unknown" clauses exist in the context of goods loaded on a vessel with no reservation stated on the face of the bill of lading. In such cases, the contract particulars stated in the bill have an evidentiary effect against the carrier. In order to protect against being bound by the evidentiary effect for cargo lost or damaged during transit, carriers often insert a "weight and quantity unknown" clause on the face of the bill of lading. It has been questionable whether such clause is considered as a valid reservation that can destroy the evidentiary value of the information stated in the bill of lading. This research found that the new provisions of the Rotterdam Rules constitute an optimal paradigm to limit the use of "weight and quantity unknown" clause in order to efficiently address unfairness without an undue burden on the carrier, and to provide a more comprehensive, but not overly rigid criteria for the evidentiary effect. Additionally, the legal status of this

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problematic clause should be clarified at both national and international levels to create universal uniformity and enhance legal certainty amongst stakeholders in the international trade and shipping industry.

Keywords: Bill of Lading, "Weight and Quantity Unknown" Clauses and Reservation, Evidentiary Effect, Rotterdam Rules, Uncertainty

1. Introduction

In shipping practice, after the goods have been put on board the vessel, the carrier commonly issues a bill of lading[2] to the shipper. This bill serves three essential functions: as a receipt of goods, evidence of the contract, and a document of title enabling the consignee the right to demand cargo at the port of destination as well as trade such a cargo in transit.[3]

As a receipt of goods, a bill of lading contains the important details of the goods shipped such as the number of packages, the weight or quantity and the condition of the goods. The information shown on the bill of lading is considered as *prima facie* evidence against the carrier and likely as the conclusive evidence if the bills of lading have been transferred to a third party acting in good faith. As a result, if the carrier discovers or suspects that the number, weight, or quantity of the goods does not tally to the information provided by the shipper, or if there is no means of checking, a reservation or a qualification inserted in the bills of lading is the way to protect the carrier from the burden of proof if any damage, shortage, or loss of cargo is discovered at the port of discharge.

In order to avoid being bound by the evidentiary rules, it is common for the carrier,[4] who is normally in the stronger bargaining position, to protect himself by inserting, "weight and quantity unknown" or "shipper's load and count". It is undeniable that the shipper, who lacks the bargaining power in this circumstance, rarely has the opportunity to prevent the carrier from adding this kind of wording.[5]

This article aims to point out the legal uncertainty and unfair situation where an "weight and quantity unknown" clause is inserted in bills of lading and to analyse whether the regulatory regime under the Rotterdam Rules relating to the "weight and quantity unknown" clause can cope with the legal uncertainty and unfair circumstances. This article

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[2] In case of 'shipped bill of lading', the issue of 'received for shipment bill of lading' will not be discussed here since it does not serve the function of a receipt of goods shipped, which is the main focus of this article.

[3] Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading*, 4th ed. (London: Sweet and Maxwell, 2017), 1.

[4] In fact, the person who inserts the "unknown clause" is the carrier's agent (normally the master of the ship, loading broker or sometimes the charterer) acting on behalf of the carrier.

[5] John F. Wilson, *Carriage of Goods by Sea*, 7th ed. (Essex: Pearson Education Limited, 2010), 118.

is divided into 5 parts. After the introduction, the common situation where the "weight and quantity unknown" clause is practically used is demonstrated. Then, an overview of the Rotterdam Rules, the legal and evidentiary effect of the contract particulars under the Rotterdam Rules, and an analysis of the regulatory regime under the Rotterdam Rules are provided, respectively. In the end, the conclusion and recommendations are proposed.

2. Bills of lading containing a "weight and quantity unknown" clause in practical usage

Practically, a "weight and quantity unknown" clause can often be found in the printed conditions of standard forms of bill of lading such as Conlinebill, Congenbill, Nuvoybill.

For instance, on the face of the BIMCO Liner Bill of Lading Code Name: "CONLINEBILL 2000", there is a statement regarding "weight and quantity unknown" as follows;

"SHIPPED on board in apparent good order and condition (unless otherwise stated herein) the total number of Containers/Packages or Units indicated in the Box opposite entitled "Total number of Containers/Packages or Units received by the Carrier" and the cargo as specified above, weight, measure, marks, numbers, quality, contents and value unknown, …"

Regarding the BIMCO Bill of Lading Code Name: "NUVOYBILL-84", an unknown clause also exists. It is stated that;

"SHIPPED on board at the port of loading in apparent good order and condition for carriage to the port of discharge, or so near thereto as the vessel may safely get.

Weight, measure, quality, condition, contents and value unknown…"

Therefore, it is questionable whether in cases that this practice is still widely used without any concrete limitations, the *prima facie* evidence and conclusive evidence rules established to protect the right of the shipper and the third party acting in good faith as well as the commercial value of the bills of lading can possibly be jeopardised.

3. The Rotterdam Rules

At present, a new transportation method based on door-to-door delivery, which combines various forms of transportation to one responsible transport operator under one contract known as multimodal transport was introduced.[6] The UN General Assembly discovered that there was a concern regarding the lack of uniformity amongst the current carriage of goods by sea conventions, including the Hague/Visby Rules and the Hamburg Rules, as well as the failure to take into consideration modern shipping practices, such as containerisation, door-to-door transport contracts and the use of electronic transport documents.[7] Thus, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as "The Rotterdam Rules") aims to provide an up-to-date and integrated legal structure covering the door-to-door delivery that includes the carriage of goods involving a sea leg. As a consequence, in common colloquialism, this convention is regarded as the "Maritime Plus" or "Wet Multi-modal Transport" Convention.[8]

Moreover, the Rotterdam Rules are purposed as the next step to attain harmonisation and unification of the law of international trade, which the UN considers as a requisite for serving the trade needs of all states, particularly developing countries.[9] Moreover, the main goal of the Rotterdam Rules is to provide a scheme with a modern structure, which is effective in as many countries as possible. Furthermore, the Rules also serve a more balanced regime, which takes the interests of both the carrier and the shipper into account in order to encourage the operation of the carriage contracts involving several modes of transport.[10]

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[6] Francesco Berlingieri, "A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?," *Uniform Law Review,* 8 no. 1-2 (2003): 266.

[7] Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, 6th ed. (London: Sweet & Maxwell, 2019), 400.

[8] M. Fehmi Ulgener, "Obligations and Liabilities of the Carrier", in *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"*, ed. Meltem Deniz Guner-Ozbek (Heidelberg: Springer, 2011), 140.

[9] Ulgener, "Obligations and Liabilities of the Carrier," 140.

[10] Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, 400.

4. Legal significance and evidentiary effect of the contract particulars in transport documents under the Rotterdam Rules

4.1 Contract particulars under Article 36

Even though the shipper and the carrier are independent to insert any information in the transport document, pursuant to Article 36 of the Rotterdam Rules, the particulars, which must be included in the transport document are divided into three categories. The first category is the particulars to be furnished by the shipper, secondly, the particulars to be supplied by the carrier and, lastly, other particulars that may or may not be inserted according to the circumstances and are supplied in part by the shipper e.g. the name and address of the consignee, or in part by the carrier e.g. the name of the vessel, places of receipt and delivery, ports of loading and of discharge.[11] However, It can be noticed that the absence of the required particulars cannot generate a different effect on the validity of the transport document.[12]

4.2 Evidentiary effect of the contract particulars (Article 41)

Regarding the evidentiary effect of the contract particulars provided in Article 41 of the Rotterdam Rules, the traditional distinction between the evidentiary effect between the parties (the carrier and the shipper) and that between the carrier and the third party remains. Some novelties, however, have been added especially in respect of the rules of conclusive evidence.[13]

4.2.1 Where the transport document is in the possession of the shipper (Article 41 (a))

To begin with Article 41 (a), in the circumstance that the transport document is in possession of the shipper, who is an original party to the carriage contract, Article 41 (a) follows the same traditional rule of *prima facie* evidence. Put differently, the contract

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[11] Ibid.

[12] Article 39 of the Rotterdam Rules. Please note that this outcome may not be applied in case of "signature" which is one of the contract particulars listed in Article 1.23 because, under the national law, signature possibly affects the validity of transport document. (Belma Bulut, "The Evidentiary Effect of the Contract Particulars under the Rotterdam Rules." *Ankara Bar Review,* 2012/1 (2012) : 29.)

[13] Bulut, "The Evidentiary Effect of the Contract Particulars under the Rotterdam Rules," 27.

particulars provided in the bill of lading can be rebutted by the carrier, if the carrier can prove the contrary. There are two conditions to be eligible to apply the evidentiary effect under Article 41 (a). First, the particular must not be qualified by the carrier according to Article 40 and the second condition is that such a transport document must be in the possession of the shipper.[14]

4.2.2 Where the transport document is in the possession of the third party (Article 41 (b))

The Rotterdam Rules pursue to protect the right of the bona fide transferee[15] of the transport document by providing that the information stated in the document is deemed as conclusive evidence against the carrier. In other words, the carrier is not entitled to prove contrary to the information indicated in transport document, even though that information is, in fact, incorrect.

In accordance with Article 41 of the Rotterdam Rules, where the transport document is in possession of the third party, the evidentiary effect of the contract particulars varies depending on the type of the transport documents.

Regarding negotiable documents, both those requiring and not requiring surrender, Article 41 (b) (i) provides that the carrier is prohibited to prove against any particulars, in the event that the negotiable transport document is already endorsed or assigned to the *bona fide* third party.[16] According to the *chapeau* of Article 41 and also Article 42 (b) (i), there are four prerequisites that must be completed in order to benefit from the evidentiary rule of conclusive evidence.[17] Those four prerequisites are (1) the contract particulars have not been qualified by the carrier in accordance with Article 40; (2) the transport document must be negotiable pursuant to Article 1.15; (3) the transport

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[14] Ibid. 30.

[15] In the Working Group, there is a suggestion that the FOB buyer, whose name is identified as the shipper, should obtain the same protection as the third party because although he is identified as the shipper, the person who actually arranged the carriage contract and also delivered the goods to the carrier is the FOB seller. However, this suggestion was not approved. (Bulut, "The Evidentiary Effect of the Contract Particulars under the Rotterdam Rules," 33.)

[16] Ibid.

[17] Ibid.

document must have been already transferred to a third party and (4) the person to whom the transport document has been transferred must act in good faith. Concisely, when all of these requirements are fulfilled, the contract particulars are considered as conclusive evidence or irrefutable evidence.

In the situation that non-negotiable transport document was issued, to begin with Article 41 (b) (ii) applying to the case of non-negotiable document requiring surrender, the same requisitions as Article 41 (b) (i) will apply. However, the only difference is about the wording used. In Article 41 (b) (ii) the phrase "the consignee" replaces "a third party" in Article 41 (b) (i) since the transport documents concerned are non-negotiable, so that there is no the third party or transferee in this circumstance.[18]

The next provision to be considered is Article 41 (c) regarding the non-negotiable transport document not requiring surrender. The preconditions of this Article are more than Article 41 (a) and (b) mentioned above. In addition, the consignee must be a third party acting in good faith as well as in reliance of the details provided in the transport document. In addition, under Article 41 (i), the particulars listed in Article 36 paragraph 1 which will be treated as conclusive evidence must be furnished by the carrier. It is common that those particulars are furnished by the shipper. Thus, this provision is provided to thwart the consignee, who is, at the same time, the shipper putting such information in the transport document, from taking advantage from the evidentiary rule of conclusive evidence.[19] However, in Article 41 (c) (ii) and (iii), the person who provides the information is not significant. In other words, although the shipper is the one who furnishes such information, the evidentiary rule of conclusive evidence applies in the event that all preconditions have been fulfilled.[20]

4.3 Qualifications of information stated in the transport document (Article 40) and the "weight and quantity unknown" clause

In relation to Article 40 involving the qualification of the information relating to the goods in the contract particulars, the circumstances can be divided into two scenarios:

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[18] Ibid.

[19] Bulut, "The Evidentiary Effect of the Contract Particulars under the Rotterdam Rules," 36.

[20] Ibid., 37.

the first is cases in which the goods are not handed over to the carrier in a closed container, the second is the situation in which the cargo is delivered in a closed container. In the latter case, the condition varies based on the types of information related to the description, the marks or the number or quantity of the goods or their weight.[21] It should be pointed out that, since Article 40 aims to control the use of reservations or qualifications, the carrier is able to qualify only the information listed in Article 36.1 which includes the description of the goods, the necessary leading marks, the quantity of the goods, and the weight of such goods.[22]

However, in accordance with Article 40.1, the carrier is bound to qualify the particulars listed in Article 36.1 with the statement expressing that the carrier does not assume responsibility for the accuracy of the information provided by the shipper in the event that either the carrier has actual knowledge that the any material statement in the transport document or electronic transport record is false or misleading[23] or the carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.[24]

In relation to the wording that is required to be inserted as a qualification pursuant to Article 40.1, there is a possibility that the carrier who actually knows that the particulars furnished by the shipper is inaccurate or has reasonable grounds to believe so could qualify such particulars with the phrases such as “shipper’s load and count” or other phrases expressing a similar meaning.[25] Under Article 40.1 of the Rotterdam Rules, in the situation that the carrier knows that the information provided by the shipper is inaccurate or has reasonable grounds to believe so, he has the duty to qualify such information. Even though the Rotterdam Rules do not provide a penalty for the failure to abide by the

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[21] Francesco Berlingieri, “A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules,” accessed January 27, 2020, http://www.uncitral.org/pdf/english/workinggroups/wg_3 /Berlingieri_paper_comparing_RR_Hamb_HVR.pdf., 25.

[22] Filippo Lorenzon, “Transport Documents and Electronic Transport Records, “ in *The Rotterdam Rules: A Practical Annotation*, ed. Yvonne Baatz (London: Informa, 2009), 114.

[23] Article 41.1 (a); The word “misleading” seems to create the difficulty of interpretation. (ibid. 115.)

[24] Article 41.1 (b)

[25] Lorenzon, “Transport Documents and Electronic Transport Records,” 114.

duty under Article 41.1, the consequence of such failure is that the carrier cannot escape from the evidentiary effect of the contract particulars stated in the transport document.[26]

Regarding Article 40.2, the carrier is free to choose whether he will qualify the particulars listed in Article 36.1, in the circumstances described either in Article 40.3 *vis-à-vis* goods which are not delivered in a closed container or are delivered in a closed container, but the carrier does inspect them, or in Article 40.4 with regard to cargo which is handed over in a closed container or vehicle and the carrier does not inspect it. In the latter case, it must be noted that, regarding the weight of the goods, the criteria for the qualification, which is different from the qualification of other types of particulars, will apply instead, under Article 40.4 (b). The details of Article 40.3 and Article 40.4 will be examined in turn below.

Regarding Article 40.3, in the circumstance that either the cargo is not delivered in a closed container (or vehicle) or it is actually delivered in a closed container for carriage, yet the carrier (or a performing party) does inspect it, the carrier may qualify the details listed in Article 36.1 if the carrier had no "physically practicable or commercially reasonable" methods of checking such details provided by the shipper. In this case the carrier may indicate which details they were unable to check.[27] Another ground for the qualification in this situation is that "the carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information".[28]

Relating to Article 40.4 (a), in case the goods are delivered for carriage in a closed container or vehicle (the so-called "FCL cargo"[29]), the carrier is free to qualify the particulars in Article 36.1 including the description of the goods,[30] their leading mark[31] and numbers or quantity of such goods,[32] except their weight,[33] when it can be prove that

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[26] Ibid., 115.

[27] Article 40.3 (a)

[28] Article 40.3 (b)

[29] Lorenzon, "Transport Documents and Electronic Transport Records," 116.

[30] Article 36.1 (a)

[31] Article 36.1 (b)

[32] Article 36.1 (c)

[33] Article 36.1 (d)

the goods inside the container have never been inspected by the carrier (or a performing party)[34] and neither the carrier nor a performing party actually knows about the content of the cargo before issuing the transport document or the electronic transport record.[35]

Further, in Article 40.4 (b) concerning the qualification of the particular stating the weight of the goods, the carrier may qualify it if one of the two conditions provided in Article 40.4 (b) (i) and (ii) is met. The first condition is that "neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars".[36] The other basis that gives the carrier a freedom to qualify the information regarding the weight of the goods is that there was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.[37]

5. Is the regulatory regime under the Rotterdam Rules able to cope with the legal uncertainty and unfair circumstances?

Although the Rotterdam Rules aim to make it clear on the issue of how to qualify contract particulars, some questions have arisen. First, since the explanation of the phrase "to qualify" is not provided anywhere, what are the exact qualifying words that the carrier should state in the transport document?[38] Specifically, regarding the phrase "weight and quantity unknown" - is this clause acceptable? And what will be the evidentiary effect of such clause under the Rotterdam Rules?

Regarding the "weight and quantity unknown" clause commonly used as a reservation or a qualification to escape from the evidentiary rules on the statement in the transport document, under Article 40.1 of the Rotterdam Rules, specific wording to qualify

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[34] Article 40.4 (a) (i)

[35] Article 40.4 (a) (ii)

[36] Article 40.4 (b) (i)

[37] Article 40.4 (b) (ii)

[38] Stephen Girwin, "Evidentiary Aspects of Transport Documents and Electronic Transport Records under the Rotterdam Rules," *European Journal of Commercial Contract Law,* no. 1/2 (2010): 109.

the particulars is not required. Article 40.3 (a) states that the carrier *may* indicate "which information it was unable to check", and Article 40.3 (b) provides that the carrier *may* include "a clause providing what it reasonably considers accurate information". It can be seen that, according to Article 40, there is no mandatory requirement as to the wording that must be use to qualify the particulars.[39] This perspective is supported by the CMI International Working Group on the Rotterdam Rules which suggests that, the Rotterdam Rules do not specifically restrict the wording of qualifying clauses, the carrier is therefore entitled to carry on with the traditional use of standard forms of qualifications such as "weight and quantity unknown", "said to contain", "contents unknown", or "accuracy not guaranteed", etc.[40] However, the Rotterdam Rules provide that such qualifications are acceptable only if the carrier follows the instruction of Article 40.

It can be assumed that the carrier can qualify the particulars under Article 40 by inserting a clause that directly expresses that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper, such as the unknown clause.[41]

After the carrier has already qualified the particulars listed in Article 36.1, according to Article 40, the result is that such qualified information will not be treated as *prima facie* evidence against the carrier anymore, provided that the transport document is in the hands of the shipper under Article 41 (a). Furthermore, the carrier will not be bound by the statutory estoppel provided in Article 41 (b) and (c), when the document is in the possession of the *bona fide* third party.[42]

Regarding the evidentiary effect of the "weight and quantity unknown" clause, it can be seen that a goal of Article 40 is to create a clear scope of control to limit the practical use of disclaimers.[43] Thus, the unknown clauses, such as "shipper's load and count"

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[39] P. Neels, "The Rotterdam Rules and Modern Transport Practices: A Succesful Marriage?," *Tijdschrift Vervoer & Recht,* 1 (2011): 16.

[40] The CMI International Working Group on the Rotterdam Rules (CMI), "Questions and Answers on the Rotterdam Rules," accessed February 19, 2020, http://www.comitemaritime.org/Uploads/Rotterdam% 20Rules/Questions%20and%20Answers%20on%20The%20Rotterdam%20Rules.pdf.

[41] Neels, "The Rotterdam Rules and Modern Transport Practices: A Succesful Marriage?," 16.

[42] Lorenzon, "Transport Documents and Electronic Transport Records," 117.

[43] Treitel and Reynolds, *Carver on Bills of Lading*, 806.

and “weight and quantity unknown”, are possibly not valid unless the carrier qualifies the contract particulars in certain situations in accordance with the prescription indicated in Article 40.

6. Conclusion and recommendations

With regard to the Rotterdam Rules, many novelties were introduced since, as time goes by, the shipping practice has consistently evolved and a modern international convention on carriage of goods by sea is needed in order to be consistent with such advanced practice. Article 40 absolutely provides a more unequivocal and complete solution to deal with the specific circumstances, both for containerised cargo and for non-containerised cargo, where the weight or quantity of the goods is not accurate or cannot be confirmed by the carrier or there is no reasonable means of checking. It can be seen that the Working Group of the Rotterdam Rules brought the current practice of containerisation into account and provided clear guidelines to clarify the right of the carrier to qualify the particulars when the goods are handed over in a closed container.[44]

According to Article 40, even though the detailed instruction for the qualifying clause provided in this article cannot thoroughly eliminate the use of the “weight and quantity unknown” clause, the unambiguous scope of control applying to the use of such a clause has been proposed under the Rotterdam Rules.

That is to say, the “weight and quantity unknown” clause, which is commonly used in the shipping practice in order to protect the carrier from the evidentiary effect of the information stated in the transport document, is valid since there is no mandatory wording required under the Rotterdam Rules. In addition, the CMI International Working Group on the Rotterdam Rules also supports this conclusion.[45]

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[44] Francesco Berlingieri, “The History of the Rotterdam Rules,” in *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”*, ed. Meltem Deniz Guner-Ozbek (Heidelberg: Springer, 2011), 40.

[45] The CMI International Working Group on the Rotterdam (CMI), “Questions and Answers on the Rotterdam Rules,” 20.

However, the “weight and quantity unknown” and other phrases having similar implications such as “shipper’s load and count” or “said to contain” are acceptable only if the carrier follows the instructions of Article 40. It is noticeable that even though the unknown clause could be valid under the Rotterdam Rules, Article 40 also aims to control the practical use of the “weight and quantity unknown” or “said to contain” since the carrier is solely able to qualify the information in the transport document when the prerequisites under Article 40 have been met, otherwise, such qualification is invalid and cannot destroy the evidentiary effect provided in Article 41.

It can be summarised that this approach can probably spotlight the grey areas of the validity and evidentiary effect of the “weight and quantity unknown” clause and provide a more appropriate scheme for the use of such a clause without placing too much burden on the carrier. As the detailed instructions are provided in Article 40, it shows that the Rotterdam Rules attempt to unify the variation of national laws amongst difference jurisdictions *vis-à-vis* the interpretation of the validity of the reservations as well as the legal consequences in terms of evidentiary effect.

Last but not least, up to now, a clear answer to the validity of the use of “weight and quantity unknown” clause is still varied from one jurisdiction to another. Inevitably, the national courts’ action to interpret the validity and legal effect of such clause is needed. It is suggested that the international conventions and national laws should clearly provide a provision stating whether the “weight and quantity unknown” clause and similar phrases with the same meaning are valid qualifications or not in order to clarify the right of the carrier, his employees and his agents i.e. sub-contractors regarding the insertion of a “weight and quantity unknown” clause as well as enhancing legal certainty and predictability amongst stakeholders in the international trade and shipping industry.

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