EXAMININING THE RELATIONSHIP BETWEEN PARTY AUTONOMY, IMPLIED TERMS AND INCOTERMS IN A CONTRACT OF CARRIAGE OF GOODS BY SEA

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Abstract

This paper explores the interplay between party autonomy, implied terms, and Incoterms in international commercial contracts. Party autonomy is a fundamental principle of contract law that refers to the freedom of the parties to determine the terms of their agreement. Implied terms, on the other hand, are terms that are not expressly stated in the contract but are presumed to be part of the agreement based on the parties' intentions or the nature of the transaction. Incoterms are standardized terms developed by the International Chamber of Commerce to facilitate international trade and provide clarity on the rights and obligations of the parties. The paper examines how party autonomy can impact the determination of implied terms in international contracts, particularly in cases where the parties have not explicitly addressed certain aspects of the transaction. It also analyzes the role of Incoterms in clarifying the allocation of risks and costs between the parties and reducing the need for implied terms. Additionally, the paper highlights the importance of considering both party autonomy and Incoterms when negotiating and drafting international contracts. Overall, the paper concludes that party autonomy, implied terms, and Incoterms are interrelated concepts that must be carefully considered in international commercial contracts. While party autonomy allows the parties to tailor their agreement to their specific needs and circumstances, the use of implied terms and Incoterms can provide clarity and certainty to the contractual relationship. Understanding the relationship between these concepts can help parties effectively negotiate and draft international contracts that meet their business objectives and minimize the risk of disputes.

Keywords: *Implied Terms, Party Autonomy, Incoterms.*

1.0 Introduction

In examining the relationship between party autonomy, implied terms and incoterms, it is pertinent to understand the operative terms in this question which are Party Autonomy, Implied Terms and Incoterms. In a nutshell, Party Autonomy refers to the freedom of parties to an international contract to determine the law that shall govern the disputes that may arise between the contracting parties in carriage of goods by sea. Implied Terms refers to some presumptions under which contracts are often concluded. Incoterms, these are international commercial terms that have been standardized and accepted internationally to aid and clarify the tasks, risk and responsibilities to be borne by each party in an international contract. One key feature amongst these three important factors is that they aid international trade and assist buyers and sellers to transact with understanding of their obligations. This essay shall look at these factors exclusively and thereafter examine how they relate with each other in a carriage of goods by sea.

1.1 Party Autonomy

In a contract for carriage of good by sea, dispute between the parties is inevitable. Hence the contract documents especially the Bill of Laden, most often, contains the law that should govern the dispute that may arise in the event of a breach by either party. This freedom to choose the law that governs the transaction in the event of dispute is what is called Party Autonomy. The principle of party autonomy is recognized under UNCITRAL Model Law, which has been adopted by several countries, including Nigeria,

either holistically or with modification.[1] Hence the Nigerian Supreme Court while describing the principle of party autonomy in the case of MV Lupex v Nigeria Overseas Chartering & Shipping Ltd[2] held inter alia that *"an arbitration clause is a written submission agreed by the parties to the contract and, like other written submissions, it must be construed according to its language and in the light of the circumstances in which it is made. A very important aspect of Party autonomy is that it enables parties to agree on the various issues that will aid in dispute resolution such as the forms of arbitration, the procedure to be followed by the arbitral tribunal, place of arbitration and the governing law, etc. The parties are also free to choose the arbitrators, the venue of arbitration, the language to be used during arbitration proceeding and almost everything regarding the resolution of the dispute. All these are expressed in the exercise of Party Autonomy. More importantly, since the judgment of the arbitrator known as the award is final and binding on the parties, it safeguards the parties against the long and uncertain period of litigation which is most likely to affect further business transaction*

1.2 Implied Terms

Implied terms refer to terms that are not explicitly stated in a contract, but are instead inferred from the surrounding circumstances and the intent of the parties. In every contract of carriage of goods by sea, the rights and responsibilities of each party is expressly spelt out in the contractual document. Article iii of the Carriage of Goods by Sea Act, Cap 44 LFN 1990 (now Carriage of Goods by Sea Act 2004),[3] expressly provides for the responsibilities and liabilities of the Shipper and the Charterer. These responsibilities and liabilities form the terms of the contract and thus parties are aware of what is expected of them. Moreso, Section 13-16 of Sale of Goods Act 1893,[4] makes provisions for implied undertaking with regards to the goods as to title, description, quality or fitness of goods and sale by sample. All these statutory provisions assist the parties in the conduct of their business relations.

However, it is not every contractual relation that these statutory provisions cover and it is not in every contractual relation that parties will remember to express all the terms which they intended to govern their contractual relation. This is where the implied terms under common law, comes to play a very crucial role. The implied terms under the common law is so crucial that even though these terms are not stated expressly in the contract agreement, parties would still be bound by them. The essence of the implied terms is to preserve business efficacy and allow the contract to reflect the intentions of the parties in the event of a dispute.

2.0 Implied Obligations of the Shipper/Charterer Under the Common Law

2.1 Implied Obligations of the Charterer/ Shipper to nominate a safe port for the carriage of goods:

Where the charterer has been given the right to nominate a port for the carriage of goods, the charterer must

1 See the UNCITRAL Model Law, art 19 (1), which provides thus: "Subject to the provision of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings:" see also s 1 (b) of the UK. Arbitration Act 1996.
2 [2003] 10 SCM 71 at 79; [2003] 15 NWLR (Pt. 844) 569.
3 Article iii Carriage of Goods by Sea Act, 2004
4 Section 13-16 of the Sale of Goods Act (SOGA)1893,

nominate that port which is safe for all the time mentioned in the contract which will include the time of entry in port to the departure. See The Marinicki,[5] *the owners chartered the vessel for one time charter trip via safe port from Vancouver to Indonesia. The charterers ordered the vessel to proceed to Jakarta. Prior to the vessel's arrival at her discharge berth in Jakarta she sustained serious bottom damage. The defendants "charterers" argued that the damage occurred when the vessel ran over her own anchor on some occasion prior to entry into the port of Jakarta. But the court found out that there was no proper system in place to investigate reports of obstacles in the channel. Therefore, it was held that the port of Jakarta was unsafe at that time.*

This nomination also includes that when loading and discharging is complete the vessel must be able to leave the port safely. Thus Political risk may render the port unsafe. In Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia),[6] the vessel was chartered under a time charterparty where the charterers nominated Basrah (Iraq) as the port of delivery. The vessel was trapped at Basrah in Shatt al Arab waterway after the outbreak of the Iran-Iraq war. The likelihood of war was imminent at that time but the charterers did not order the vessel to leave, which she could have done. The House of Lords decided that the charterers were in breach of the implied obligation to nominate a safe port. The charterers became liable for damages incurred by the ship owner.

2.2 The Shipper/Charterer must not take to Ship Those Goods which are Dangerous without notifying the Peculiarities of those goods to the Carrier: Whenever goods are shipped without giving notice to the shipper that these good are harmful then the shipper will be accountable for any damage which will be caused to the ship or cargo. In the case of The Giannis NK[7] *a cargo of groundnuts extraction meal pellets had been shipped in Dakar for carriage to the Dominican Republic under a bill of lading incorporating the Hague-Visby Rules. On arrival at the port of destination, the cargo was found to be infested with Khapra beetle, although the infection had not spread to a cargo of wheat in an adjacent hold. The authorities in the Dominican Republic and in neighboring US ports decided that the infestation was such that the ship owner would have to jettison both cargoes at sea. Having complied with these instructions, the ship owner then commenced proceedings against the shippers of the groundnuts cargo under Article IV rule 6 of the Hague-Visby Rules for damages, delays and other costs. Article IV (6) of both The Hague and Hague-Visby Rules provides that "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any".*[8]

5 The Marinicki [2003] 2 Lloyd"s Rep 655. 82
6 [1982] 2 Lloyd"s Rep 307. 83,
7. [1998] 1 Lloyd"s Rep 337. 84
8 International Convention for the Unification of Certain Rules Relating to Bills of Loading, Brussels, (The Hague Rules 1924);

(General Average in this context is a principle of maritime law that essentially establishes that all sea cargo stakeholders such as owner, shipper, etc, evenly share any damage or losses that may occur as a result of voluntary sacrifice of part of the vessel or cargo to save the whole in an emergency).

Under both the common law and the Hague-Visby Rules, "The liability of a shipper for shipping dangerous goods at common law, when it arises, does not depend on his knowledge or means of knowledge that the goods are dangerous. The Giannis NK case supra.

2.3 Shipowners Obligation to Provide A Ship that is Reasonably Fit to Navigate the High Sea. The ship provided by the shipowner, must be fit for sailing and must be able to withhold all the dangers of sea of which she will witness during the sea journey.[9] This duty of the shipowner to provide a searworthy ship attaches only at the time when the voyage commences and does not carry on after the ship has set sail.[10] The Ship must be fit in design and structure and be able to deal with the ordinary perils of the sea. This the problem in the pumping equipment in the ship, rendered the ship unseaworthy.[11] Also, where the cargo needs refrigeration like meat for instance the ship owner must make sure that the refrigeration system is working properly. Insufficient and inefficiency of crew can render a ship unseaworthy.[12]

In "Star Sea" Manifest Shipping & Co. Ltd. v Uni-Polaris Insurance Co. Ltd. (Star Sea Case).[13] The ship was held to be unseaworthy where the master of the ship was unable to make use of the CO2 fire extinguisher fitted in the boat, to extinguish the fire which razed the boat. Also, a ship setting sail with insufficient fuel, have been held to render the Ship unseaworthy.[14] it is also implied that the ship owner also undertakes to provide all necessary legal documentation requirements. Thus where the ship is unable to sail without these documents, have been held to render the vessel unseaworthy.[15]

It is noteworthy that the duty to provide sea worthy Ship is a warranty and not a condition. Thus the breach of the warranty as to seaworthiness does not allow the cargo owner to repudiate the contract of carriage immediately. The claimant may treat the contract as repudiated where the unseaworthy vessel causes serious damages and frustrates the commercial purpose of the contract of affreightment. On the other hand where the breach is minor the plaintiffs are entitled to damages and the repudiation may not be exercised.[16]

2.4 Shipowners Obligation to Proceed with Due Dispatch: The duty to proceed with due dispatch is usually expressly stipulated in the contract of carriage of goods specifying when the vessel is "expected ready" to load. When no time has been expressly given in the terms of contract the dispatch must be done in a reasonable time. In Freeman v Taylor,[17] *the ship was delayed by seven weeks before arriving at the loading*

Brussels Protocol Amending the Hague Rules Relating to Bills of Loading (The Hague-Visby Rules 1968
9J.C.T. Chuah (2005) Law of International Trade: 3rd edition, at p. 233. 87
10 McFadden v blue Star Line [1905] 1 K.B. 697.
11 Stanton v Richardson 14 13. (1875) L.R. 9 C.P. 390
12 Hongkong fire Shipping Co. Ltd v. Kawasaki Jisen Kaisha Ltd (1962) 2 Q.B. 26
13 (1997) 1 Loyd's Rep. 360
14 McIver co. Ltd v Tate Steamers Ltd [1903] 1 KB 362 (CA).
15 The Madeleine [1967] 2 Lloyd"s Rep 224.
16 Hong Kong Fire Shipping Company Supra.
17 (1831) 8 Bing 124

port, the Court held that the charterer was entitled to refuse to load the cargo in that the delay of seven weeks was sufficient to frustrate the commercial purpose of the adventure. However, in MacAndrew v Chapple[18] where the delay was not too long and did not go to the root of the whole matter, it was held that the injured party will be restricted to a claim for damages only. Thus the legal consequences of a breach of the duty to proceed with due dispatch is similar to those for the seaworthiness. If the reason for delay is due to natural causes such as rain, storm or any conditions beyond human control then no damage can be claimed by the party.

Implied obligation of the Shipowner to deliver the goods to the right person at the port of discharge: It is an implied term that the ship owner is required to transfer the goods to the right person (the consignee) named in the contract of carriage of goods at the port of discharge. Thus upon arrival at the port of discharge, the carrier must wait a reasonable time to enable the consignee to receive the goods and to arrange for delivery and acceptance. Therefore the carrier will be in breach of their duty regarding proper delivery of the cargo if they were, to leave the cargo by the quayside.[19]

2.5 Implied Obligation not to Deviate from the Proper Route without Lawful Justification: It does not necessarily mean that every time the ship ventures off course, it is a deviation. As such, there are exceptions to this obligation such as other intervening factors like storm, illness of ship's officers or reliance on defective navigational equipment.[20] The usual route is to be the direct geographical route.[21] However this presumption can be rebutted by evidence of usual customary course, a shipping line, trade route, usual bunkering locations or a commercial custom. In *Reardon Smith Line v Black Sea and Baltic General Insurance.*[22] Where the ship deviated for bunkering, the deviation was not held to be unjustified. It should be noted that the primary reason for the existence of the deviation doctrine lies in marine insurance. See *Lavabre v Wilson*[23] where the court held if an insured ship quit the course described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course, and in the shortest time, otherwise the underwriters will be discharged.

2.6 Force majure and Frustration: these are well known implied term in a contract of carriage of goods by sea where they are not specifically stated in the terms of contract. When the contract cannot be completed or materialized without the fault of any party it is called frustration. There are various kinds of frustration; An instance is frustration that happens when the ship that is chartered is lost or becomes constructive total loss. Delay also cause frustration as a delay may result in not achieving the objectives of the contract. The burden of proving frustration will be on that party who will be alleging it; He must satisfy the court that the event has made the contract useless or the performance of the contract has become illegal.

18 (1866) LR 1 CP 643. 89
19 Bourne v Gatliffe (1841) 133 E.R. 1298. 90
20 Rio Tinto v Seed Shipping (1926) 24 Lloyd's Rep 316.
21 Achille Lauro v Total [1968] 2 Lloyd's Rep. 247, 251.
22 Reardon Smith Line v Black Sea and Baltic General Insurance (1939) 64 LI.L REP.229
23 Lavabre v Wilson (1779) 1 Doug 284

3.0 INCOTERMS is an acronym derived from the phrase, International Commercial Terms. Incoterms refers to a set of globally recognized standardized terminology developed and registered by international chamber of commerce (ICC) that applies to international business relations to help facilitate trade. These rules clearly outline the roles and responsibilities of buyers and sellers in any international transaction with regards to contractual issues such as freight, who insures the goods, passage of risk, how property is passed, and delivery of goods at the port of delivery. All these clearly set out rules is to prevent confusion in foreign trade contracts. There are several incoterms that have been developed over the years by I C C. for the focus of this paper, the following terms of FOB, CIF and FAS shall be briefly looked at.

3.1 **FOB (Free On Board):** A free on board (FOB) contract is a type of contract used in international trade where the seller of goods agrees to deliver the goods to a carrier or shipping agent nominated by the buyer, at the destined port, prepared and ready for international transport. The buyer is responsible for the cost of the goods, as well as the transportation, insurance, customs clearance, and responsibility of getting the goods to their final destination.

3.2 CIF (Cost Insurance and Freight): Cost Insurance and Freight (CIF) is a type of international trade contract where the seller is responsible for delivering the goods to the buyer's port of destination along with the cost of transportation to that destination and insurance. Under this contract, the seller bears the risk of loss or damage to the goods during transportation until they are delivered to the destination port.

Once the goods have been shipped, the seller provides the buyer with the necessary documents such as the Bill of Lading which acknowledges receipt of the goods by the carrier and an insurance policy which covers the goods during transportation. Once the goods have arrived at the buyer's port of destination, the buyer then assumes responsibility to arrange for customs clearance, pay any additional taxes or duties that may be levied on the goods and bears the risk of loss or damage thereafter.

3.3 FAS (Free Along Ship): Is a type of international trade contract where the buyer is responsible for contracting and paying for the transportation of the goods from the seller's premises to the port of shipment, as well as for arranging and paying for any necessary export documentation. Under FAS, the seller is only responsible for delivering the goods to a specific location at the designated port of shipment. Once the goods are loaded onto the transportation vessel, the buyer assumes all responsibility for the shipment, including any risk of damage or loss. the buyer bears all the transportation costs and the risk of loss of goods on board the designated ship. The responsibility of the seller is to at the cost of the buyer, deliver the goods into the designated ship.

4.0 The Relationship Between Party Autonomy, Implied Terms and Incoterms

Although INCOTERMS are used for most aspects connected to the contract of sale of goods by sea, they have a limited scope of regulation by its focus on providing clarification on certain duties of a seller and buyer pertaining to delivery of the goods, transfer of risk, the allocation of costs, procurement of the necessary transportation and insurance documents, as well as other obligations incidental to the export and

import of goods, such as packaging and marking of the goods. As a result of their limited scope, in terms of regulating defined aspects of the contract of sale of goods, they cannot operate as the governing substantive law of the contract of carriage of goods by sea. These aspects will still be regulated by means of contractual stipulations or other forms of contractual agreement.

It should be noted that INCOTERMS cover the relationship between the seller and the buyer, Implied Terms, cover the relationship between the shipowner and the charterer. Both contractual terms and obligation are not the same and are limited in their area of coverage, but they play very important roles in the carriage of goods by sea. As earlier stated, INCOTERMS of FOB, CIF or FAS are of a limited scope and do not cover obligations of seaworthiness of vessel, obligation of reasonable dispatch, non-deviation from agreed route, nomination of safe port, obligation not to ship dangerous goods, frustration and *force majeure.* Which are contractual obligations between the shipowner and the charterer where they are not expressly stated in the contract agreement. The bottom line is that INCOTERMS function in conjunction with Implied Terms to the extent that they mutually supplement and support each other.

Since both commercial instruments have limited scope and are unable to regulate all aspects of a sales contract, in order to be effective, INCOTERMS is supplemented by implied terms in that in a complete carriage of goods by sea, INCOTERMS AND IMPLIED TERMS, come into play. While the seller under FAS, ensures that the goods are placed on the ship, the buyer ensures that he hires a ship for the carriage of the goods. However, the charterer must ensure that the ship is sea worthy and fit to carry the goods.

The doctrine of Party Autonomy is a very central component of international commerce. As earlier said, the parties to an international contract have the freedom to determine the applicable law to govern their dispute in the course of the contract. Thus, the relationship between Party Autonomy, Implied Terms and INCOTERMS is to the effect that the contracting parties are at liberty to expressly incorporate into their contract the law that they agree to have impact on their contract in the event of dispute. Where the parties have chosen the law to govern the dispute that may arise in the course of their transaction, they are most likely to abide by it. To this extent, Party Autonomy helps the contracting parties to bind their intention. It also provides the best safeguard for protecting the parties' expectations and creates a legal certainty in contract of sale of goods by sea. These terms are employed for easy disposal of conflict so as not to affect free flow of trade relations, parties incorporate in their contract agreements, the freedom to determine the law or jurisdiction any dispute will be resolved.

5.0 Conclusion

Party autonomy refers to the principle that parties to a contract are free to choose the terms and conditions of their agreement. In other words, they have the freedom to determine how their contractual relationship

will operate, subject to any mandatory legal rules or regulations.[24] This includes the choice of the applicable law, jurisdiction, and dispute resolution mechanism.

Implied terms, on the other hand, are terms that are not expressly stated in a contract but are implied by law, custom, or the intentions of the parties. Implied terms are commonly used to fill gaps or ambiguities in a contract and to give effect to the parties' presumed intentions.[25]

Incoterms are a set of standardized trade terms issued by the International Chamber of Commerce (ICC) that specify the responsibilities of the buyer and seller in an international sales transaction, including the transfer of risks, costs, and obligations. The use of Incoterms can help to reduce misunderstandings and disputes between parties, as they provide a clear and uniform framework for international trade.[26]

The relationship between party autonomy, implied terms, and Incoterms is that they all play a role in shaping the contractual relationship between the parties. The parties have the freedom to choose the applicable Incoterm as part of their agreement, which will determine the allocation of risks and responsibilities between them. The Incoterm chosen may also imply certain terms or conditions that are not expressly stated in the contract.

Likewise, the parties may also agree to include or exclude certain implied terms in their contract. For example, they may agree to exclude the implied warranty of merchantability or fitness for a particular purpose, or they may agree to include specific provisions on product quality, delivery times, or payment terms.

In summary, party autonomy, implied terms, and Incoterms are interrelated concepts that are essential to creating a clear and effective contract in international trade.

24 United Nations Commission on International Trade Law (UNCITRAL). (2012). UNCITRAL Model Law on International Commercial Arbitration. New York: United Nations
25 Treitel, G. (2011). The Law of Contract (13th ed.). London: Sweet & Maxwell.
26 International Chamber of Commerce. (2020). ICC Guide to Incoterms 2020. Paris: International Chamber of Commerce