

Vicarious Liability in contracts of international carriage of goods by sea

A comparative study of the evolution of liability through the main
international conventions and market practice

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1 Introduction

Recent statistics¹ show that roughly 90% of the traded goods were moved by sea through the operation of over 50.000 vessels, contributing for over \$ 380 billion to the global economy and employing over 1.2 million of people. The evolution of the contracts that regulate the legal relationships in the business, it is easy to imagine, had and still has a great influence not only on the subjects who took part to the agreement, but also on a vast number of people. This led to the necessity of balancing and compressing the freedom of contracting, typical of private law, in the light of the public interests directly or indirectly affected by them.

The parties involved in a contract of carriage are mainly two: the carrier and the shipper. Their duties are normally disciplined by the contract which represent the expression of their wills, despite nowadays the use of standard agreements has grown to become the normal choice, leaving the role of the parties a very marginal position in the decisional process. Other than the mentioned contractual parties, there is a multitude of other subjects involved in the transportation of goods by sea: the carrier, *ça va sans dire*, cannot perform the work alone and he obviously will recruit and rely on other people, his employees or other workers hired for specific scopes.

Many different issues and questions arise from this: do rights and duty in the agreement extend to those subjects? If that is to some extent understandable and reasonable for the parties' employees who are in fact chosen or act under the control of their employer, the same cannot be said for the parties who are third to a contract and who never have been party to it. Multiple examples can be made such as port pilots or stevedores: these subjects perform work in direct service of the ship and the cargo, therefore in the interest of the contractual parties, but are no part of the agreement. How should they be regarded as? Their legal state and position have been changing through the last century mainly influenced by

¹ Kraska J., Pedrozo R., *International Maritime Security Law*, 2013. P.125

domestic legislation and international conventions.

1.1 Scope, Method and Structure of the Thesis

The aim of this thesis is to examine the evolution of liability rules and the consequential changing approach to the position of parties third to the contract of carriage, hired by the carrier, and whom he is vicariously liable for. This work analyses and describes the relevant instruments provided by the international conventional sources with a particular focus on the ones that regulate the basis of the carrier liability and his defences against it. Said analysis is performed in a comparative way in order to fully understand the multiple changes and remedies brought to the table by the international conventions and the private operators' practice in the market. Especially the latter have, through the creation of *ad hoc* contractual terms, indeed heavily influenced the discipline of vicarious liability.

The thesis is structured in five chapters followed by the concluding remarks. After this brief introduction, in the second chapter, the first step consists in giving a necessary historical introduction of the economic and legal conditions of the market before the introduction of internationally bounding regulation in order to explain what needs moved the Maritime Committee to the creation of said set of rules. An analysis of the International Convention of the unification of certain rules of law relating to bills of lading (also known as Hague Rules) and the following protocols (which turned it into what is commonly known as Hague-Visby Rules) is then offered. The study focuses on the not-amendable duties imposed on the carrier and on the innovative exclusion of liability conditions brought about by the convention. The second part of this chapter is dedicated to the solutions created by the subjects involved in the maritime transportation business, particularly the creation of *ad hoc* contractual terms, in order to solve the technical limits of the Hague-Visby Rules. More specifically the following topics are discussed: the creation of the so-called Himalaya Clause, the controversy it raised, its acceptance and origins in the English common law system, and finally its interaction with the international conventional sources of law.

The third chapter introduces the Hamburg Rules, the economic reasons behind its introductions and the different changes to the structure of carrier's liability such as the abolishment

of certain traditional exoneration causes. The second part of this chapter presents the “Scandinavian solution” with a particular focus on the Norwegian Maritime Code showing how the Hamburg Rules, despite not having been ratified by the Nordic States², still have influenced their legislative choices on the matter.

The fourth chapter presents a brief overview of the United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (commonly referred as Rotterdam Rules) is given. Despite the fact it has been ratified by only three countries among the very few that signed it, the importance of this conventional set of rules is remarkable. It represents the first attempt of creating a worldwide regulation on the matter of carriage of goods performed in different parts/means of transport, and a solid attempt to resolve the various issues emerged from the technical limits of its predecessors.

The fifth and final chapter presents the findings and the conclusions of the thesis.

² Norway, Finland, Sweden and Denmark are referred to as “Nordic States”

2 The advent of the first International regulation and the market solutions to liability issues raising in contracts of maritime carriage of goods: the Hague-Visby Rules and the Himalaya clause.

During the transport of goods at sea, there are many different subjects involved in the operations. Most of them are unlikely to be part of the contract of carriage that disciplines the performance of the service (e.g. pilots or stevedores), but their conduct can expose them to liability, which in most of cases, they cannot be economically able to deal with, especially considering they would normally have no access to the defences granted to their employer. This therefore, constitutes an issue for both the parties of the contract: for the cargo interests, as they would unlikely get their credit satisfied, for the carrier, because not protecting the servants from the risk of unlimited claims would require the stipulation of highly expensive insurance policies, which would likely have a negative impact on the business cost. In the maritime industry the bill of lading is a document issued by a carrier which contains details, such as number or quality, of a shipment of goods and gives title of that cargo to a specified party. Its use has been a common practice since the ancient Romans time, the document was invented to serve for the shipper as both receipt and as evidence of a certain quantity and quality of the goods loaded on the vessel³, but its use has deeply changed through the centuries. Nowadays, it is not just used as mere receipt, but also as "document of title" that can be negotiated, and possibly sold, to an undetermined number of new holders, also known as endorsees.

The document used to present the conditions established by the parties for the performance of the contract of carriage but, by the end of the 19th century and the consequent increasing of the volume and importance of the maritime shipping market, they faced legal relevant changes. The bills of lading became very complex as different legal prescriptions were introduced into them: the average user involved in the shipping business was not able to cope

³ H. J. Bull, *Scandinavian maritime law, The Norwegian Prospective 3rd Ed.* 2011, P. 276

with the language and the complexity anymore as they turned into real contracts. During this period, civil law regulations set the parties entirely free to stipulate agreements to regulate their wills but, for obvious reason, the big operators in the market had a dominant position advantage: shipowners increased then their level of protection from liabilities by introducing different kinds of limitation and exclusion of liability clauses. Only one side of the contractual relationship had this advantage and soon enough Cargo Owners were not able to opposing them. The United States were at the time holding the dominant position among Cargo Holders interests⁴: Courts of law tried to defend them against "negligence clauses" but the expedient to overcome this used by European carriers, pretty effective and relatively simple, merely consisted on designating English law the law of choice through inserting a specific clause in the bill of lading. An internationally orchestrated solution was then felt necessary: in 1912, the United States Maritime Law Association suggested to the International Maritime Committee⁵ the necessity of an international frame of regulation⁶. The first step though was only taken in 1921 when the Committee presented and proposed a set of rules in a conference at Hague, thereby creating the embryonal form of what are now commonly known as the Hague Rules. Other important maritime States at the time intervened and cooperated: the Rules needed to be introduced and harmonised with the various domestic legislations in order to produce effective results. The most important contribution came from English Empire, which tried to protect the interests of its fleets that held then a consistent share of the market⁷: the more States aligned with the Rules through their adoption, the less possible disadvantages for the British shipowners. It was finally in 1924 that the Rules were inserted into an International Convention⁸ and signed in Brussels, leaving to the signatory States the last step to bring them into force. It is important to notice that, despite the revolutionary and important role that they played, the Rules showed different is-

⁴ *Ibidem*, P. 277

⁵ Also known in French as Comite Maritime International, it consists in a private organization of main actors of the maritime market with the scope of harmonizing worldwide binding maritime rules.

⁶ A. Rodriguez Palacios, *A comparative analysis of the Hague/Hague-Visby Rules and the Hamburg Rules*, 1990. P. 2

⁷ *Ibidem*, P. 4

⁸ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and Protocol of Signature. Brussels, 1924.

sues: the Committee brought different amendments resulting in 1968 in what is now widely known as Hague-Visby Rules.

The market practice also contributed to bring remarkable solutions to the table: even though it did not solve every issue, it significantly valued and protected the positions of the subjects involved.

2.1 The Hague/Hague-Visby Rules: the first conventional set of international rules

The Hague rules were not a product of English proposals but originated, and partially compromised with, from the American Harter Act of 1893. It indeed consisted in a compromise between the opposite interests of protection from any form of liabilities for the carrier on one hand, and those who had desire of establish a limit basing it on the negligent performance of the contract on the other. Many have considered this statute, because of its importance, “one of the most remarkable statutes ever enacted in the field of shipping law”⁹. The Hague Rules did not differentiate from English common law when approaching the matter: the principle, by which the carrier cannot claim any exemption or limitation in case of negligent conduct, has been established in many cases before. The concept of negligence was bound to any violation of express contractual terms¹⁰ and the definition of “terms” and, following that, a firm prohibition to exclusion of liability clauses operating in case of negligence, was established¹¹.

The Rules, as emended by the Visby protocol in 1968, established a set of norms to disci-

⁹ A. Rodriguez Palacios, *Op. cit.*, P. 6

¹⁰ In *Hamilton Fraser & Co v Pandorf & Co* (1887), Lord Halsbury stated: “In the class of contract where the shipowner’s negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different [...] because in those cases an additional term exists in the contract, which makes the negligence of the shipowner, or of those whom he is responsible, a material element”.

¹¹ In *Smith Hogg & Co v Black Sea & Baltic General Insurance Co Ltd*, Lord Wright stated: “The shipowner will in absence of valid and sufficient exceptions be liable for a loss occasioned by negligence. Apart from express exceptions, the carrier’s contract is to deliver the goods safely. But when the practice of having express exceptions limiting that obligation became common, it was laid down that there were fundamental obligations, which were not affected by the specific exceptions, unless that was made clear by express words. Thus an exception of peril of the sea does not qualify the duty to furnish a seaworthy ship or to carry the goods without negligence”.

pline the Carrier's duties and, therefore, constitute the basis for his liability. They can be briefly summarized as follow: duty of provide and maintain a vessel in condition of seaworthiness, duty to no deviate from the route established by the parties and, last but not least, duty to take care of the cargo¹².

In addition, being the convention meant to rule contracts with an issued bill of lading, the Rules, obviously, also establish a duty on the carrier to issue the document¹³.

It is important to notice that the provisions expressly require the carrier to act diligently¹⁴ which obviously caused a consistent number of interpretation by different Courts of law. The parameter has to be analysed with a bendy mindset, basing the interpretation on the concrete facts, the different level of knowledge/technology available at the time and any other factor that might have had an influence on the case¹⁵.

2.1.1 The Carrier's main duties established by the Hague-Visby Rules

In the next paragraphs, we will briefly go through the duties established by the Hague-Visby Rules.

2.1.1.1 The duty to provide a Seaworthy ship

The first prescription of art. III of the Rules requires the Carrier to provide a seaworthy ship for the performance of the contract. The meaning of seaworthiness is described in English common law as follow: "The vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it [...]"¹⁶. It is important to no-

¹² See the Hague-Visby Rules, art. III, 1-2: "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to [...]"

¹³ Art. III (3) states: "the shipper can demand the carrier to issue a bill of lading showing the leading marks, the quantity of the goods and apparent order and condition of the goods".

¹⁴ See *Supra Note 12*

¹⁵ J. Richardson, *The Hague and Hague-Visby Rules, Lloyd's Practical Shipping Guides, 4th Ed*, 1998. P. 19

¹⁶ See Channel J. opinion, in *Mc Fadden v Blue Star Line* (1905).

tice that the qualities of the ship are to be considered with specific regard of the cargo and the route established by the contract of carriage. This is not limited to the material equipment but it extends to the manning of the ship if specific competences are required by the case. It follows that specific necessary arrangement might consist in something that goes beyond the general accepted qualities of a ship¹⁷.

With regard of the cargo, we might then speak of cargoworthiness: the bottom line is that the ship has to be equipped with the proper gear to grant that the goods arrive safely and with their qualities unaltered to the port of destination. As far as the route of the trip is concerned, the weather and possible particular perils must come into consideration.

The importance of such prescription is clear when we analyse the legal systems that preceded the Rules. Before then, the parties were free to agree specific clauses in order to dismiss liability even in case of unseaworthiness which, given the preponderant position of the Shipping industry, represented a problem for cargo interests, often forced to accept said conditions.

The compromise brought by the Rules is self-evident: between the clauses of liability exemption and the rule of absolute liability for unseaworthiness, the solution has been the introduction of a rule of absolute unseaworthiness based on the carrier's negligence. It follows that the mere condition of the vessel is not sufficient to trigger the liability, it is also necessary that the carrier acted negligently while performing his duties. No limit is established for contractual clauses that imply duties that are more stringent for the carrier.

Another issue raised by the practice of the market consist on the so-called vicarious liability: it refers to the liability of the carrier for the work performed by third people in service of the ship. Many are the possible examples: the agents, the master of the ship or the repair yard workers. In English common law, the solution came in 1961 with the Muncaster Castle case¹⁸. In the case *de quo*, the cargo had been damaged by the penetration of seawater due to a faulty inspection manhole improperly fastened by repair yard worker. The personnel on board could not possibly discover the faulty condition; the question was therefore

¹⁷ A. H. Kassem, *The Legal Aspects of Seaworthiness: Current Law and Development*, 2006. P.24.

¹⁸ *Riverstone Meat Co.Pty. Ltd. V. Lancashire Shipping Co* (1961). See H. J. Bull, *Op Cit.* P. 183

whether the carrier should be held liable for the damage occurred. The answer of the House of Lords was affirmative. It follows that the fact the carrier delegates his duty to a third party does not free him from any possible liability arising. Lastly, it is worth notice that according to the Hague-Visby Rules, the duty to make a vessel seaworthy ends at the start of the voyage. It follows that conditions arose after the commencement do not lead to liability for the carrier¹⁹.

2.1.1.2 The duty to not operate Deviations

As far as the duty of not operating deviations, it must be noticed that in common shipping practice, the route to be followed is not specified in the contract. The information included in the agreement usually include the port of loading/departure and the one of discharging/destination. The bottom line, unless otherwise agreed by the parties, is that the route to be followed is the one between the two ports²⁰ established in the contract. Deviations are seen with serious regards especially in common law systems: they may lead the carrier to being unable to limit or exclude liability. The reason behind this position lay on the extra and not pondered risks to which the cargo is exposed. The owner could not possibly take them into account and therefore evaluating the convenience of the contract or proper measures to prevent the damage from occurring²¹. The Rules do not explicitly forbid deviations, but the wording of art. IV (4)²² clearly establish that reasonable deviations are allowed and do not constitute a breach of the rule: it self-implies that any other deviation must be considered as such.

¹⁹ R. Force, *A comparison of the Hague, Hague-Visby, and Hamburg rules: Much Ado About?*, in *Tulane Law Review*, vol. 70,1996. P. 2063,

²⁰ J.F. Wilson, *Carriage of Goods by Sea, 7th Ed.*,2010. P. 232

²¹ H. J. Bull, *Op Cit.*, P. 315

²² Hague-Visby Rules, Art. 4 (4) states: “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.

2.1.1.3 The duty of Good Care of the cargo transported

Along with the other duties, the carrier has a duty of care of the cargo²³. Few things can be said about the wording chosen. Whilst the word “carefully” can be interpreted with the general meaning of an action performed with care, the second word, “properly” adds a certain degree of skill, and expertise, to the quality required for the performance itself²⁴. Other part of the doctrine refused this interpretation and stood by the opinion that no particular difference or meaning is intended by the authors of the Rules by the use of the two different words²⁵. The duty, due to its intrinsic nature, persists as long as the carrier is in physical possession of the goods to be transported: it follows that it starts when loaded on board and ends at the moment of delivery to the consignee.

The Rules do not discipline the damage arising from delay in delivery of the goods but, if the physical damage suffered is a consequence of it, it can be assumed that it can be recovered as the delay constituted a breach of “proper and careful” handling of the cargo. For example, if the goods are characterized by short durability, delivering them after the agreed time, therefore damaging them, cannot be judging as “proper” or “careful” acting by the carrier. It must finally be added that any breach of the duty of good care cannot be excused by the carrier by arguing that the fault lays on a third party, a contractor, who performed work in his service²⁶.

2.1.2 Exclusion and Limitation of liability rights of the Carrier

Firstly, it is very important to highlight that, along with the duties described above, the

²³ Hague-Visby rules, Art. III (2) states: “[...] the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried”.

²⁴ P. Delebecque, *Obligations of the Carrier*, in *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea*, 2010. P. 83. In his reasoning, the author highlights the necessity of a sound system for the performance required by the contract.

²⁵ See, among the others, J. Richardson, *Op Cit.* P. 19

²⁶ W. Tetley, *Properly carry, keep and care for Cargo - art. 3(2) of the Hague/Visby Rules*, 2001. Chapter V. Available at <http://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2> , last accessed on 31/10/2015.

Rules set a specific prohibition for the parties to reach an agreement capable of overcoming the duties prescribed. The wording is pretty clear: “Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from **negligence, fault, or failure in the duties** and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, **shall be null and void and of no effect**”²⁷.

As part of a compromise between the cargo owners and the liners interests, the Rules also establish certain causes of exemption of liability²⁸, precisely 17, which are commonly referred as “expected perils”: they include acts of war, acts of God, riots or civil commotions and other unpredictable and unavoidable possible situations that do not depend on the carrier’s conduct. The catalogue of exemptions, which is the result of the historical development of shipping practice, protects the carrier from possible treats that have always represented a danger for maritime expeditions. The perils at sea are multiple and historical evolution of the market practices has brought these different kinds of immunities to the table in order to compensate and, to a certain extent, protect the carrier from risks that would make performing his tasks unreasonably burdensome. The convention simply followed these practices and allowed shielded the carrier position.

We will now proceed to briefly analyse the two exemptions disciplined by the letter A and be of art. IV (2) of the Hague-Visby Rules.

2.1.2.1 The Nautical Fault and Management of the Ship exemption

The letter A of art. IV (2) establishes that liability is excluded for the carrier or the ship in case of “Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship”. What is the meaning of “navigation”? An extensive jurisprudence led to consider any manoeuvre and steering of the vessel²⁹: this

²⁷ Hague-Visby Rules, Art. III (8)

²⁸ Hague-Visby Rules, Art IV (2) from let. A to let. Q

²⁹ H. J. Bull, *Op Cit.*, P. 293

include the use of lanterns and other navigational equipment. Another very important aspect is the protection of the carrier for acts committed by people performing work in service of the ship: the Rules clearly indicate the carrier's employees (mariner, master or servants) but also the pilot, a person who is usually working for the port authority. It appears logical that, despite being very unlikely in practice, the exclusion does not operate for errors committed by the carrier in person as not mentioned in the wording.

As far as "management of the ship" is concerned, the concept reunites many different activities connected with the operation of the vessel. It is not limited to the mere navigational operations, but it also has regards for those activities that influence the ship's conditions and its equipment³⁰. This does not include any activity related to the good care of the cargo transported: any breach of the duty described above will result in liability for the carrier. In case the error involves consequences for both the ship and the cargo, the solution will have to be decided on a case-by-case basis having particular care for the events³¹: the goal is determine whether the conduct had effect on the ship and consequentially on the cargo or directly and primarily on the cargo.

2.1.2.2 The Fire damage exemption

As far as letter B is concerned, it provides the carrier with protection for loss and damages caused by fire "unless caused by the actual fault or privity of the carrier". It follows that any accident caused directly by the carrier's personal negligence does not allow the benefit of the exemption. It also follows that any measure direct to extinguish the fire that might accidentally cause damage to the goods transported, do not trigger liability either unless poorly and recklessly executed³².

³⁰ *Ibidem*

³¹ J. Richardson, *Op Cit.*, P. 33

³² *Ibidem*. P. 34

2.1.3 Concluding Remarks

Practice in the shipping industry clearly showed how the contractual carrier is rarely involved on the actual performance of the contract. His duty and almost every single act toward the result is indeed undertaken by a various number of employees: the master, the crew or his agents both on board and ashore. It follows that is normally one of them, through misacting, to lead to triggering of liability³³. The channelling of liability toward the carrier, what we call vicarious liability, is the only possible remedy. On top of that, we need to consider the results of the conducts of those who perform a work in service of the ship, so called third parties to the contract: shipyard workers, stevedores and pilots to name a few examples. These subjects have been left in some kind of limbo by the Hague rules: not being part of the contract means they cannot benefit from extensions of protections of liability offered to the carrier and his personnel. Their interests have not been taken into account and, as a result, said parties resulted deprived of any defence, which resulted into tortious lawsuits against them. A solution was necessary and the market practice has the merit of having brought a remarkable one to the table, the creation of specific contractual clauses that, even though did not solve every issue, contributed significantly to value and protect the positions of the subjects involved in the carriage of goods.

2.2 The Himalaya Clause: an innovative change on the field of third parties and vicarious liability systems.

The Himalaya clause consists in a highly controversial contractual term that has raised a vast number of discussions ever since its very creation. As discussed above, during the actual transportation of goods at sea, most of the subjects involved in the performance of contractual obligations are unlikely parties of the contract of carriage. This leaves them exposed to liability without the benefit of limitation or exclusions rights. The market practice

³³ J. H. Bull, *Op Cit.*, P. 169

has the merit of having brought a remarkable solution to the table: even though it did not solve every issue, it contributed significantly to value and protect the positions of the subjects involved. It is normally inserted in a charter party or in a bill of lading and its effect is to extend the carrier protections to parties who did not take part to the contract and who, through negligent conduct while performing directly or indirectly their obligations connected to the carriage of goods, might cause damages or losses to the cargo.

2.2.1 Main Issues Raised by the use Himalaya clauses in English Common law legal systems

The main issue arising from the introduction of the Himalaya clause in common law systems is due to the absence of the principle of “stipulation for another”³⁴ in such legal traditions. Therefore, can a person, which has never been part of a specific contract, benefit from its terms? The inclusion of Himalaya clauses to a bill of lading extends the terms’ benefits granted to the contractual carrier, such as the limitation and exclusion of liability disciplined by the Hague-Visby Rules, to these subjects.

to parties who are third to the contract of carriage (e.g. stevedores or terminal operators). What emerges from a reading of the modern version of the clause³⁵ is an agreement between the two contractual parts, the carrier and the shipper, that establishes complete protection from “*any liability whatsoever*” to an undefined number of subjects involved (anyone, “*including every independent contractor from time to time employed by the carrier*”). *It is worth mentioning that said protection is limited to any loss “[...] arising or resulting directly or indirectly from any act [...] while acting or in connection with his employment*”. Every protection, meaning “*[...] exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier [...]*”, is extended “*[...] to protect every such servant or*

³⁴ W. Tetley, *The Himalaya Clause – Revisited*, 2003. P. 3

³⁵ This is the version that can be found in *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd* (1974), also known as *The Eurymedon*.

agent of the carrier [...]”.

A very extensive literature on the matter can be found. For reason of simplicity, and given the aim of this work, it is not possible here to debate extensively about privity of contract discipline in common law. It is sufficient to mention that in English Law, no enforcement of a contract is granted to parties who have not provided consideration to it. It follows that a third party to a contract may not enforce the benefits received by a contract stipulated by others³⁶.

We will then limit the analysis to a brief historical introduction of the Himalaya clause, its acceptance in English law and its relationship with the protections disciplined by the international sources described in the previous chapter.

2.2.2 The historical origins of the Himalaya Clause

The origin of the Himalaya clause deeps its roots in an English Court of Appeal case of 1954, *Adler v Dickson*. The facts can be briefly described as follow: during the performing of a contract of carriage of passengers an accident happened, a gangway fell down injuring Mrs. Adler who was then traveling on board of the ship. The ticket she bought explicitly contained a non-responsibility clause that exempted the carrier entirely for the damage she suffered. She then decided to sue the master of the ship, Mr. Dickson, and his senior crew-member in charge for the components of the hull.

The Court established then one important principle: in contracts involving the carriage of goods as well as people, the contractual carrier can agree liability exemptions other than for himself, also for those who he employed to carry out the performance established by the contract. The stipulation can be either express or implied. In the case *de quo* though, it was held by the court that the contract did not extend any of the rights to the defendants as no stipulation could be revealed: this consequentially led to exclude any benefits for the carri-

³⁶ For a more extensive analysis of Privity of Contract in English law, see: M. Chen-Wishart, *Contract Law*, 2012. P. 166

er's employees.

Right after the decision, the creation and use of Himalaya clauses in bills of lading started to spread. In 1955, the technique was adopted by the Hague Protocol³⁷ that modified, in the field of aviation law, the Warsaw Convention of 1929. Its first appearance on the maritime field coincided with the Visby Protocol of 1968 which modified the Hague Rules through the introduction of art. 4-bis (2) and (3). It is important to observe that the Himalaya clause shields the subjects involved from any kind of liability, which includes both contractual and tortious, thus eliminating, in this field only, the differences between the two. Before this change, despite the difficulties brought about by the tortious liability system³⁸, the choice was stimulated by the absence or lower limitations of the damage recoverable. Being the protections extended equally, the result has been the loss of incentive for the cargo owner to sue third parties through extra-contractual actions.

2.2.3 The Acceptance of the Clause in English Law: a long due change to the privity of contract principle

The innovative decision in the United Kingdom for the acceptance of the Himalaya clause can be traced back to a decision of the Privy Council in 1974³⁹. The facts of the case involved the shipping of a drilling machinery from Liverpool to Wellington, New Zealand. The bill of lading contained a specific clause that limited the liability of the carrier and that such protection is extended to his servants, agents and independent contractor involved in the performance of the contract. The problem arose when the stevedores damaged the ma-

³⁷ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at The Hague On 28 September 1955

³⁸ Briefly: any action in tort requires the claimant to prove the damage existence and its nexus between a faulty conduct of the defendant. On the other hand, in contractual claims, all the claimant is required to prove is the existence of the damage and its occurrence during the time the cargo was under the carrier custody. The burden of proof is then reverted to the defendant who has to prove he acted diligently to prevent any damage to the cargo transported.

³⁹ *Supra note 35*

chinery during the discharging operation. They obviously claimed protection on the basis of the clause inserted in the bills of lading.

The Privy Council, in the person of Lord Wilberforce, held that the elements known as “Lord Reid test”⁴⁰ were present in the case and, therefore, the stevedores were to be considered protected by the clause.

In 1980, another very important case⁴¹ concerning the shipment of razor blades from Canada to Australia put the clause under exam. After the discharge was performed, the cargo was delivered to the wrong person who did not retrieve it. The consignee sued the company for the negligent acting and the defendant replied by relying on the Himalaya clause. The consignee rebutted that, even if the protections were to be expanded to the stevedores, the immunity clause does not protect for liability for loss of cargo once it has been discharged from the ship. The Privy Council, in the person of Lord Wilberforce, disagreed and held that the immunities extend over the period following the discharge as, according to common practice on the field, the contract of carriage ends when the goods are delivered to the consignee. The outcome is the protection of the stevedores by the same exemption of liability granted to the carrier and contained in the bill of lading.

It is worth noticing that “the practicality of the clause depends on the practicality of the contractual relationship at the moment the damage arose”⁴². Following case law confirmed this view. For instance, few years later on a case⁴³ concerning the shipping of a container of motorcycles, the stevedores could not invoke the liability protection from the bill of lading. The cargo was stored in a container park while awaiting the vessel and was then damaged by an employee of Mersey Docks & Harbour Co. The Court deemed the contract as “not in

⁴⁰ Said rule has been established in a previous case, *Scruttons Ltd v Midland Silicones Ltd* (1961). The importance of such case, other than originating from the House of Lords, is due to the fact it overcomes the privity rule creating an exception for employees seeking for protection in their employer’s contract. In the judgment Lord Reid stated that in order to trigger the exception, four elements were necessary: 1) The third parties must be clearly protected by the contractual clause; 2) The carrier makes clear that while contracting, he is also doing so on behalf of the third parties and the result shall apply to them; 3) The carrier has been given authority to do so (even a late ratification should be considered sufficient); 4) Any difficulty concerning consideration must have been overcome.

⁴¹ *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon Australia Pty Ltd* (1980), also known as *The New York Star*

⁴² A. Antonini, *Manuale breve di Diritto della Navigazione*, 2008. P. 196

⁴³ *Burke Motors v Mersey Docks* (1986)

existence” when the damage occurred, therefore the defendant could not rely on the Himalaya clause.

Criticism to the privity rule came from both academics and judges. As far as the first ones are concerned, few examples are Jack Beatson⁴⁴ and Andrew Burrows⁴⁵. The latest highlighted how a change was necessary and the fact it had been “called for” ever since 1937⁴⁶. As for the jurisdictional circle, one of the most relevant criticism came from Lord Diplock who, in a case from 1983, described the rule as “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law”⁴⁷. Lord Justice Steyn in 1995 advocated for a change on the rule of privity as it collides with business interests and the principles of law. In his reasoning, he analysed the role of law as protector of the parties will and, if it true that imposing a duty to someone without his consideration and consent would be unreasonable, the same cannot be said for allowing a right as no negative implication might arise from it⁴⁸.

The Law commission of the English Parliament presented a new draft bill in 1991 and completed its report in 1996. Three years after, the new law received the Royal assent: the Contracts (Rights of Third Parties) Act was promulgated and came immediately into force. The change was huge: a third party was finally allowed to enforce a term of a contract where it is expressly provided that he may do so⁴⁹. Such right is also extended to subjects not personally named in the contract but part of a class to whom the benefit has been grant-

⁴⁴ J. Batson, *Reforming the Law of Contracts for the Benefit of Third Parties: a Second Bite at the Cherry*, 45 CLP 1, 1992. Cited by W. Tetley, *Op Cit.*, P.14 and J. Poole, *Casebook on Contract Law 12th Edition*, 2014, P. 488

⁴⁵ A. Burrows, *The Contracts (Rights of Third Parties Act) 1999 and its implications for commercial contracts*, in Lloyd’s Maritime and Commercial Law Quarterly, 2000.

⁴⁶ A. Burrows refers to the sixth interim report of The Law Revision Committee of 1937, chaired by Lord Wright.

⁴⁷ *Swain v The Law Society* (1983)

⁴⁸ *Darlington Borough Council v Wilshire Northern Ltd* (1995). L.J. Steyn stated: “The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third parties without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract”.

⁴⁹ Contract (Rights of Third Parties) Act of 1999, Sect. 1(1), Lett. A.

ed⁵⁰. A typical example are stevedores or port pilots. Another fundamental change regarding the use of Himalaya clauses is the one concerning negative rights. These includes exclusion and limitation clauses and could now benefits third parties too⁵¹.

The Act also dedicates an entire section to the exceptions to the right of third parties. Particularly, a third party to a contract has no right to enforce a beneficial term in case the contract concerns carriage of good by sea⁵². Such category of contracts is defined by the Act as “a contract contained in or evidenced by a bill of lading, sea waybill⁵³ or a corresponding electronic transaction”⁵⁴. The second part also adds to the description any contract “under or for the purposes of which there is given an undertaking which is contained in a ship’s delivery order or a corresponding electronic transaction”⁵⁵. By the reading of the text, it may seem at first glance that the Himalaya clause would be in fact useless as third parties cannot enforce such benefit due to the exceptions contained in the Act. The solution to the riddle comes from the reading of the Act’s Explanatory Notes⁵⁶. About Section 6(5), the Act “[...] does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process, to be enforced by those servants, agents or independent contractors (so called “Himalaya” clauses)”.

It follows that the theory brought about by Lord Reid is no longer necessary, the Act simplifies the requirements for third parties to enforce beneficial clauses as long as they are identified, expressly or referred to by class.

⁵⁰ *Ibidem*, Sect. 1(1), Let. B

⁵¹ *Ibidem*, Sect. 1(6)

⁵² *Ibidem*, Sect. 6(5), Let. A

⁵³ *Ibidem*, Sect. 6(7), Let. A specifies that for the purpose of this subsection “bill of lading”, “sea waybill” and “ship’s delivery order” have the same meaning as in the Carriage of Goods by Sea Act 1992.

⁵⁴ *Ibidem*, Sect. 6(6), Let. A.

⁵⁵ *Ibidem*, Sect, 6(6), Let. B

⁵⁶ *Explanatory Notes to: Contract (Rights of Third Parties) Act 1999*. Available at <http://www.publications.parliament.uk/pa/cm199899/cmbills/118/en/99118x--.htm> Last accessed 31/10/2015.

2.2.4 The Clause interaction with the main conventional international sources of Maritime Law

Once the characteristic of the Himalaya clause have been framed, the naturally following question concerns how its interaction with sources of international law works. Among the many people involved in the shipping business, the subjects with higher chance of causing damage or loss to the cargo are the one physically involved in the handling of it. It is important therefore understanding their position with regards of the international conventions.

As far as the Hague-Visby Rules are concerned, the changes introduced in 1968 implemented a protection system for servants and agents of the carrier by extending to them the same defences allowed to the carrier⁵⁷. When identifying the beneficiaries of said extension, an interpretative problem originated from the reading of the text in both its official languages⁵⁸. The French text mentions the *preposés* whilst the English one talks about servants and agents other than expressly excluding independent contractors⁵⁹. The doctrine normally consider part of the servants/agents category any worker in a contractual relationship with the carrier and those who, despite not being contractually bound to the carrier, are still part of his structure. Typical examples are the master and the crew: often they are hired by the shipowner who does not necessarily coincide with the person of the carrier⁶⁰. One possible issue arising when interpreting the text comes from the definition of “agents”: In some countries, agents are by definition an independent contractor⁶¹ therefore the application of said rule might produce broadly different outcomes depending on the jurisdiction where the action has been introduced. Insofar, there is no telling or bounding case law on how to interpret the categories mentioned by the English version.

⁵⁷ Hague-Visby Rules, Art. 4-bis (4). The benefit applies to the third parties only as far as they acted in performance of their duty and the conduct has not been grossly negligent or wilfully aimed to cause the damage.

⁵⁸ English and French are the official languages of the amendments.

⁵⁹ Hague-Visby Rules, Art. 4-bis (2)

⁶⁰ This represents a normal situation in case of time charters

⁶¹ G. Treitel & F. Reynolds, *Carver on Bills of Lading 3rd Ed.*, 2012. P. 758

Another important parameter to take under consideration is the period of responsibility: the actions covered by the extended benefits must have a connection with the performing of the contractual obligations therefore they must take place in said time-frame. The Hague-Visby Rules system consists on the above discussed “tackle-to-tackle” period: the discipline excludes any liability protection for damage arising before the loading of the cargo and its discharge from the vessel and the same limit applying for the carrier must be extended to third parties. The parties also have the possibility of adopting a more stringent liability regime: it follows that the freedom of contract allows the parties to approve anything they find suitable having regard only to the national legislation⁶².

An interesting Italian case⁶³ provided a great example of importance of the period of responsibility in connection of the triggering of the benefits granted by the Himalaya clause. The case dealt with an international sale from Genova (Italy) to Montreal (Canada). A Canadian carrier was then appointed for the transport of the goods. The bill of lading included a specific clause that made the Hague Rules applicable to the shipping. It also specified that “the carrier shall be under no liability whatsoever for loss of or damage to the goods, howsoever occurring, when such loss or damage arises prior to loading on or subsequently to discharging from the vessel”. Another important fact is that, under specific request of the Shipper, the parties agreed so that the booking of the dock for the loading and the handling of the cargo had to be considered part of the fee paid to the carrier. The first instance judge, the Tribunale di Genova, considering the said operations were included in the carrier’s contractual obligations and, having him delegated a stevedoring company for the performance, considering it a sub-contractor, allowed the latter to benefit of the protections granted by the Himalaya clause⁶⁴. The Court of Appeal, moving from the material reference to the Hague Rules discipline, defined the period of responsibility as tackle-to-tackle therefore excluding the applicability of the Himalaya clause to protect the terminal operator company since the damage caused by its activities, arose before the loading of the goods, therefore before the starting of the contract.

⁶² Hague-Visby Rules, Art. 5

⁶³ Corte D’Appello di Genova (2003), *Zurich International v Terminal Contenitori*

⁶⁴ A. Antonini, *La Responsabilità degli operatori del trasporto Case history and case law*, 2008. P. 116

National legislations can bring to the table specific sets of rules to discipline the position of third parties. A typical example is the French Act that protects stevedores by granting them complete immunity against cargo interests claims.

3 A new international conventional source of law, the Hamburg Rules: the changes to liability in carriage of goods by sea and the influence on Scandinavian Maritime Law.

3.1 The Hamburg Rules: a new conventional discipline for the international maritime shipping market.

During the end of the 70s, emerging countries started campaigning for a change on the discipline established by the Hague-Visby Rules: the third world countries united and intervened in order to increase the protection of the shippers interests⁶⁵: the Harter Act compromise, clear characterizing trait of the Hague Rules, was considered insufficient to protect them.

In 1970 the UNCTAD⁶⁶ a study of Bill of Lading was made and the following year, the UNICTRAL⁶⁷ was established. The goal was to harmonise the international rules of trading in order to facilitate, and therefore increase, the volume of exchanges between the two sides of the world. Five years after, in 1976, the draft of the Hamburg Rules was finally ready and in 1978, during a conference, The UN Convention on the Carriage of Goods by Sea was then settled. As XXX points out: it finally dealt with the problems in terms of “economic warfare” between cargo and carrier and between traditional maritime States and developing world⁶⁸.

3.1.1 The changes on the Carrier’s duties from the Hague-Visby Rules regime

Despite the best intentions of the parties involved in solving the problems brought about by the Hague Rules, the results has been seen by many negatively as the changes exacerbated

⁶⁵ A. Rodriguez Palacios, *Op Cit.*, P. 28

⁶⁶ United Nations Commission for Trade and Development

⁶⁷ United Nations Commission for International Trade Law

⁶⁸ S. R. Mandelbaum. *Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions*, in University of Denver Transportation Law Journal, 1996. P. 482

the problems creating conflicts between the two sets of rules⁶⁹. The first that has to be pointed out is the change brought about by the Hamburg rules on the period of responsibility of the contractual carrier. In the Hague Rules, as discussed above, the period of responsibility for the carrier coincides with the physical possession of the goods: the so-called “tackle to tackle rule”⁷⁰. Based on this system, the carrier is not liable for damage that occurs before and after the goods crossed the vessel’s side⁷¹. The Visby amendments have brought no substantial change to this discipline⁷².

The Hamburg Rules introduced a major change: the period resulted expanded⁷³ as it did not just start with the crossing of the vessel but with a more generic moment of “taking over the goods”⁷⁴. On the other end of the voyage, the mere discharge did not end it: the carrier liberates himself by risks only with the delivery of the goods to different possible recipients⁷⁵.

In the following paragraphs, we briefly analyse the main changes occurred to the Carrier’s main duties.

3.1.1.1.1 The duty to provide a Seaworthy ship

The Hague/Hague-Visby Rules, as presented above, expressly set the duty for the carrier to provide a seaworthy vessel to execute the contractual performance⁷⁶. The Hamburg Rules do not dedicate a specific provision for the duty of seaworthiness but instead, they establish a general duty not to negligently damage the goods. It follows that, based on the principle

⁶⁹ A. Rodriguez Palacios, *Op Cit.*, P.32

⁷⁰ Hague-Visby Rules, Art. I (e) states: “carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship”.

⁷¹ A. Rodriguez Palacios, *Op Cit.*, P. 49

⁷² Hague-Visby Rules, Art. 1 (e) states that: “Carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship”.

⁷³ S. R. Mandelbaum, *Op Cit.*, P. 496

⁷⁴ Hamburg Rules, Art. 4 (1)

⁷⁵ *Ibidem*, Art. 4 (2), presents different possible scenarios such as the handing over to a designated consignee or to third parties designated by applicable law or regulations.

⁷⁶ Hague-Visby Rules, Art. III (1), let. A

of diligence, providing an unseaworthy vessel would represent a breach of the carrier's duty therefore capable of triggering the liability unless, of course, the carrier can prove that he acted diligently⁷⁷.

Another important consequence of this change is that the duty of diligence is not limited to the time before the starting of the voyage⁷⁸ but it operates for the whole period of responsibility.

3.1.1.1.2 The duty to not Operate Deviations

As described above, the Hague-Visby Rules were allowing the carrier to take a deviation only if considered reasonable (e.g. saving human lives). The Hamburg Rules do not take position on the matter but, basing the judgment on the general principle of diligent acting, it logically follows that any deviation based on a reasonable choice should not be considered to integrate the requirements of negligence and, therefore, the carrier should be excused and protected from liability⁷⁹. It is also worth noticing that, despite not directly mentioning deviations, the Hamburg Rules provide protection for the carrier in cases where "loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea"⁸⁰.

3.1.1.1.3 The duty of Good Care of the cargo transported

No major changes occurred on the taking care of cargo aspect: the carrier is reliable for any loss unless he proves that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences"⁸¹. As for the duration of the

⁷⁷ P. Delebecque, *Op Cit.*, P. 87

⁷⁸ Hague-Visby Rules, Art. III (1)

⁷⁹ R. Force, *Op Cit.*, P. 2069

⁸⁰ Hamburg Rules, Art.5 (6)

⁸¹ *Ibidem*, Art 5 (1)

responsibility, as described above, it has furtherly been extended compared to the previously adopted tackle-to-tackle principle. One big difference between the two regimes lay on the liability for delay disciplines. The Hague-Visby Rules, not expressly providing an ad hoc norm, solved the issue by holding the carrier liable for all the damage occurred for the unjustified delay on delivery. There is no trace of remedies to recover economic loss merely due to the delay itself: as discussed above, only if the delay caused a damage on the goods it could have been considered a breach on the duty of “carefully and properly” handle them.

The Hamburg rules tackle the issue. A new norm is introduced in order to define what delay constitutes: the situation in which “the goods have not been delivered at the port of discharge provided [...] within the time expressly agreed upon or [...], within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case”⁸².

3.1.2 Changes on Exclusion and Limitation of liability rights of the Carrier

Major changes occurred to the limitation and exclusion of liability system in the Hamburg rules. Unlike the Hague-Visby Rules, the new convention does not possess a list of exceptions⁸³ such as act of God or act of War etc. The Hamburg rules, instead, rotates entirely around the duty of diligence: after a specific evaluation of the factual events, liability is deemed triggered only in case the carrier did not take every reasonable measures to avoid the damage⁸⁴. Despite the lack of a dedicated catalogue of exceptions, the carrier is not deprived of defences in comparison with the Hague-Visby Rules as long as he acts diligently and he is capable of proving it.

In the next paragraphs the exemptions for faulty navigational management and fire changes will be briefly analysed.

⁸² Hamburg Rules, Art 5 (2)

⁸³ Hague-Visby Rules, Art. IV (2)

⁸⁴ Sze Ping Fat, *Carrier's Liability Under the Hague, Hague-Visby and Hamburg Rules*, 2002. P. 99

3.1.2.1 The Nautical Fault and Management of the Ship exemption

The change occurred to the managerial and nautical exemptions introduced by the Hague-Visby Rules⁸⁵ is the most relevant modification brought about by the Hamburg Rules. This specific exception, just like the entire catalogue present on the document signed in Brussels in 1924, has been removed: no trace is left. The liability is therefore, just like mentioned in the previous paragraph, established on the basis of diligence. Every event caused by the carrier, his servant or agents negligence will trigger liability unless he can prove that he, or whom he is responsible for, has taken, as art. 5 (1) states, “all measures that could reasonably be required to avoid the occurrence and its consequences”.

3.1.2.2 The Fire damage exemption

Similarly to the general prescriptions for liability, the rule for fire has been changed and based on diligence. Unlike the other exceptions, removed from the convention, the one for damage caused by fire is expressly disciplined by the Hamburg rules. The main difference with the other liability regimes lays on the burden of proof: in case of fire, liability is triggered if “[...] the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents”⁸⁶. Therefore, it is the cargo owner that has to claim and prove the lack of diligence on the carrier’s (and those whom he is responsible for) acting. The damage might not only be due to the fire but also by the “measures that could reasonably be required to put out the fire and avoid or mitigate its consequence”⁸⁷. Lastly, the Rules give right to any of the two parties to ask and obtain “a survey in accordance with shipping practices [...]” in order to determine “[...] the cause and circumstances of the fire”⁸⁸.

⁸⁵ Hague-Visby Rules, Art. 4 (2) A

⁸⁶ Hamburg Rules, Art. 5 (4) A (I)

⁸⁷ *Ibidem*, Art. 5 (4) A (II)

⁸⁸ *Ibidem*, Art. 5 (4) B

3.1.3 Concluding Remarks: The Hamburg Rules limits and their interaction with the Himalaya clause.

The Hamburg rules, like discussed above, moved from the necessity of the developing countries to grant more protection to the shippers' interests. The changes on the limitation and exclusion of liability system have therefore been extensive: the carrier is no longer granted the privilege of the protection but, instead, the inversion of burden of proof forced him to prove that he always acted in a responsible and diligent way, which often is a very hard, if not impossible, task. He does not only answer for his personal conduct but as mentioned, also for the one of people performing work at his service. The only exception standing is the exception for damage caused by fire and the wrongful execution of measures to put it out.

The outcome of these changes does not play in favour of the developing countries as, insofar, only 34 countries ratified the conventions and among those, the absence of great maritime shipping countries is easily noticeable: United States, United Kingdom to exemplify, have not ratified it nor had shown any interest on doing so. The main consequence of this division is the conflicts of laws applicable that can potentially cause several problems on all the parties involved in the shipping: the cargo interests, the carrier and the insurers. As John C. Moore observes⁸⁹, there is no apparent reason for the United States or England to become a party to the Hamburg Rules. It may happen in case of the adhesion of a consistently large number of their trading partners generating a need for uniformity of rules.

As far as the relationship with the Himalaya clause is concerned, few changes are introduced in comparison with the Hague-Visby regime. Firstly, express exclusion of independent contractors leaves place to a different requirement: if the subject can prove that he was "working within the scope of its employment"⁹⁰, he then receives the same protection granted to the carrier. It is worth mentioning that the French version of this article includes the word "*mandataires*", which can be translated in English as

⁸⁹ J. C. Moore, *Hamburg Rules*, in *Journal of Maritime Law and Commerce*, 1978. P. 11

⁹⁰ Hamburg Rules, Art. 7(2)

“representative” of the carrier. The issues with establishing the extent of the agents category is rendered harder not only the existence by of six different version in as many different languages of the text, but mostly because of the different meaning that the word assumes in civil law systems in comparison with common law ones. Secondly, a new category of subjects, the “actual carrier”, has been introduced⁹¹: It consists on a subject who was entrusted the performance of the contract by the pcontractual carrier⁹². It must be highlighted that in any case, the original carrier remains responsible for the entire carriage and a vicarious liability system is triggered “for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment”⁹³.

As far as the period of responsibility is regarded, the system in the Hamburg Rules differs from the tackle-to-tackle to a considerable degree. As discussed in the previous chapter it includes the phases that precede the loading and the ones following the discharge: this constitutes the so-called port-to-port period⁹⁴. The main requirement is that the operations, in order to be considered pursuant to the contract, take place in the port area. It follows that the protections brought about by the Hamburg Rules cannot generally be extended to independent contractors as the performing of their obligations usually takes place outside of the said area⁹⁵.

3.2 The Scandinavian solution: a compromise between the previous conventional rules.

The Nordic countries, since 1973, adopted very similar legal solutions in the field of maritime law. Norway, just like the other Scandinavian countries, did not ratify the Hamburg

⁹¹ *Ibidem*, Art. 10(1)

⁹² *Ibidem*, Art. 1(2)

⁹³ *Ibidem*

⁹⁴ *Ibidem*, Art. 1(6) defines a Contract of carriage by sea as “any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another [...]”.

⁹⁵ Different scenario in Sze Ping-fat, *Op Cit.*, P. 29. The author explains how, in case the independent contractor’s activities take place in the port area and he can prove he was “working within the scope of its employment” pursuant to Art. 7(2), he can then benefits of the protections granted to the carrier.

Rules although, substantially, the rules did have a big impact in the Norwegian legal system. The choice was, rather than accepting to introduce entirely the changes brought about by the Hamburg Rules, which could have led to countless conflicts of laws in a system that ratified the Hague-Visby Rules, to introduce the principles of the Hamburg Rules in the Nordic Maritime Code, “aligning as far as possible without having to derogate from the Hague-Visby Convention”⁹⁶.

It is worth mentioning that Norway, during the preparatory works in 1994, has decided to differentiate itself from the other Nordic partners creating the so-called “two track system”: the conventional rules apply only on international carriage, leaving domestic transports free to be differently regulated.

3.2.1 The Basis of liability in Norwegian Maritime Law

During the transportation of goods by sea different kinds of damage may arise: the cargo can be lost, damaged or simply delivered with delay, causing therefore an economic loss to the shipper. It is interesting to observe how the conventions described above have heavily influenced the Norwegian Maritime Code.

The starting point for the liability rules is sect. 275: it imposes liability for any damage caused to the cargo by the carrier or the people whom he is responsible for. The burden of proof, like in the Hamburg Rules, lays on the carrier who has to prove that he, and the subjects whom he is responsible for, acted in a reasonable way.

The period of responsibility is disciplined by sect. 274 and follows the port-to-port system designed by the Hamburg Rules: it starts when the carrier receives the goods from the shipper and ends at the port of destination only after he has delivered or stored them according to the applicable rule⁹⁷.

⁹⁶ H. J. Bull, *Op Cit.*, P. 281

⁹⁷ NMC, Sect. 274, 3rd paragraph, n. 1-2-3

As far as exclusions of liability are concerned, section 276 of the NMC follows the structure introduced by the Hague-Visby Rules⁹⁸ providing two exceptions related to neglect in the navigation or management of the ship or fire. The only prerequisite consists in the “initial seaworthiness”: it appears clear from the wording of the section that, in case of initial unseaworthiness, the carrier loses the right to shielding himself against liability, regardless whether the causes that led to damage are connected with neglect on nautical operation and management of the ship or fire. Eliminating them was one of the goal of the creators of the Hamburg Rules but despite that, as the other Nordic States wished otherwise, the exemptions have been maintained for international trades. Norway though, reserved different rules for Norwegian internal trade⁹⁹ eliminating such exemptions.

The action in order to recover the damage suffered is based on the contract of carriage: the cargo owner only needs to prove that the damage occurred during the period in which the goods were in the carrier’s custody. In order to do so, the normal procedure consists in comparing the state of the goods at delivery with the conditions described in the bill of lading. If a damage occurred, the burden of proof is then reverted: it will be on the carrier to prove that he and his servants acted reasonably¹⁰⁰.

3.2.2 Vicarious Liability in the Norwegian Maritime Code

As described above, the people materially involved in the damage occurred to the cargo can hardly be identified with the carrier or his senior employees. Most frequently, the damage occurs on the field, during the actual transport or the loading and discharging of the goods. It follows that, without specific legal principles, the position of the carrier would result untouchable by the cargo interests’ claims. The NMC bases its solution of the problem on

⁹⁸ Hague-Visby Rules, Art. 4.2 Let. A and B. See above, Paragraph 2.1.2

⁹⁹ NMC, Sect. 276, 3rd paragraph states “The present section shall not apply to contracts for carriage by sea in domestic trade in Norway”.

¹⁰⁰ An authoritative case confirming this is ND 1987.160 NCS NY DOLSØY: the Supreme Court established that, given the carrier was not capable of proving that the damage did not originate because of his servants’ fault, despite the claimant counterparty could not prove the opposite, he had to be held liable for the damage occurred.

sect. 151: “*The Reder*¹⁰¹ shall be liable to compensate damage caused in the service by fault or neglect of the master, crew, pilot, thug or others performing work in service of the ship”.

The peculiarity of this section is its open catalogue: on the first part, the norm states a list of employees for which the shipowner can be held liable, thereafter, it extends the liability for any negligent conduct made by anyone performing work in service of the ship. This leaves the interpreters with a problematic situation when it comes to apply the rule to a concrete case. Three different parameters were identified by the doctrine¹⁰² in order to solve the said difficulties: a brief analysis will follow in the next paragraphs.

3.2.2.1 The legal relationship between the carrier and the person performing the work

The first thing to be looked at when discussing vicarious liability is the existence of a contract of employment between the shipowner and the person who actually performed the work. It is important to remind that the duration and the quality of the contractual performances are not relevant for this scope. A first issue arises when the work performed does not have its basis on employment but, for example, consists on a performance obtained by an independent contractor. The examples can be multiple: towing, loading and discharging of the ship are the most common. This is the peculiarity of sect. 151: the shipowner can result liable for the work of people he has not direct control on. A typical example are the stevedores. The workers who physically perform the task of loading or discharging the goods from the vessel are usually hired by a stevedore company, which entered in a contractual relationship with the carrier. It follows that there is no contractual relationship between the worker and the shipowner but according to sect. 151, being the worker “perform-

¹⁰¹ The word Reder does not have an English equivalent. It refers to, according to the NMC preface, “the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charterer. Time charterers and voyage charterers are not considered “reders”.

¹⁰² H. J. Bull, *Op Cit.*, P. 177. The author refers to the work of the Norwegian jurist Sjur Braekhus

ing in service of the ship”, the shipowner is to be held liable for the results of his misconduct.

It is interesting to notice how the clause is as open as including the consequences of voluntary work if accepted by the shipowner despite the complete absence of any contractual or economically valuable relationship whatsoever. A good example is the case¹⁰³ of a father who allowed his underage son to operate his boat: following a negligent accident, a third party was killed. Despite the young man was navigating entirely on his own, the father was nevertheless held liable.

Lastly, it is important to highlight that liability goes as far as including personnel not even selected by the shipowner. Let us consider for example the compulsory port pilot. The shipowner has no say on the choice and has to accept the person sent by the authority in charge. Few examples from case law: the first, following an accident in 1963¹⁰⁴, resulted in the State set free from liability for the grounding occurred as follow up of the pilot faulty performance. Another case¹⁰⁵ in 1984 concerned a vessel that collided during a storm with a moored seaplane. The port authorities wrongfully disposed the anchor positioning causing the collision but the Court held unanimously that, being mooring performed in service of the vessel and being an element of maritime activities, the shipowner had to be held liable as the port authority must be considered among the subjects covered by sect. 151.

3.2.2.2 The nature of the service performed

Not any work or action can trigger liability: the performance must indeed have a connection with a particular ship and be in its service. Being part of an employment contract, as we could see above, is not a necessary condition but, at the same time, it would not constitute a sufficient condition to trigger the liability just by itself either. A common example often used by the doctrine is the employed seaman on board but off-duty: his acting cannot

¹⁰³ ND 1973.334 NSC

¹⁰⁴ ND 1963.34 NSC PRINCE CHARLES

¹⁰⁵ ND 1984.122 NSC

be considered in direct performance of a service for the ship therefore, it follows that the damage he may cause would not trigger vicarious liability.

The most famous used exemplification on the matter comes from a case¹⁰⁶ of 1914: during the celebration of the New Year's Eve, the first mate decided to fire a rocket but it accidentally caused a fire on a nearby building. The Shipowner escaped liability as the acting of the officer was clearly outside of the scope of his service for the vessel. The bottom line is that the shipowner must respond for damages caused by his employees within the limits of ordinary negligence: any extraordinary act, such the firing of a rocket, cannot possibly be foreseen and, therefore, should not lead to consequences for the employer.

3.2.2.3 Different categories of assistants covered by vicarious liability

Along with the subjects expressly named by sect. 151, the master, the crew, the pilot and thugs, other typical subjects under the shipowner liability are the longshoremen and other assistants working while the ship is in port¹⁰⁷. Among those, any subject involved in the loading, discharging and weighting of the goods. Shipyards, repairers, consultants misconducts may trigger the shipowner liability too: the decisive parameter is always the nature of the work performed by the said subjects and its relationship with the vessel.

¹⁰⁶ ND 1914.159 NCC SARDINIA

¹⁰⁷ H. J. Bull, *Op Cit.*, P. 182

4 Rotterdam Rules

The Rotterdam Rules¹⁰⁸ represents the latest international convention on carriage of goods. The most important difference when compared with the previous Rules is that, unlike the Hamburg or Hague-Visby ones, this catalogue of norms aims to discipline multimodal transport¹⁰⁹. The changes brought about are designed to discipline new duties and liability for the carrier in line with the new kind of carriage and its door-to-door system¹¹⁰.

4.1 The changes on the Carrier's Duty from the Hague-Visby Rules regime

There are multiple differences between the Rotterdam Rules and the Hague-Visby Rules. After a brief analysis of the two regimes, it is easy to observe how the new rules, rather than radically change the pre-existent ones, introduced new additional duties. In the next paragraphs, a specific analysis of the modifications will be provided. It is important to underline that, despite the innovative character of the convention and the interesting new features brought such as the discipline for the electronic alternatives to transport documents, the Rotterdam Rules did not achieve the desired success: the convention will only enter into force a year after the 20th State ratified it. As for now, 24 countries signed it, but only three¹¹¹ of them ratified it.

4.1.1 The duty to provide a Seaworthy ship

¹⁰⁸ United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008

¹⁰⁹ With Multimodal carriage of goods we refer to a contract of carriage performed with at least two means of transport.

¹¹⁰ T. Nikaki, *The carrier's duties under the Rotterdam rules: Better the Devil You Know?*, in Tulane Maritime Law Vol-35 N.1, 2010. P. 7

¹¹¹ Congo, Spain and Togo. Official source UNCITRAL http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html last accessed 31/10/2015

As discussed in the first chapter, under the Hague-Visby Rules regime the carrier is obliged to provide a seaworthy ship for the performance of the contract of carriage. Whilst the Hamburg Rules did not expressly mention a specific duty on the carrier providing instead a general obligation to perform the contract obligations with due diligence, the Rotterdam Rules, bring back the express imposition of said duty¹¹². Instead of a general duty, art. 14 provides a detailed catalogue of obligations¹¹³:

- 1) The ship must be made seaworthy.
- 2) The ship must be equipped, supplied and manned not only at the start of the voyage, but throughout the end of the performance of the contract of carriage.
- 3) The ship must also be cargo-worthy, this means the holds must be rendered clean and safe for receiving, keeping and transporting the goods object of the contract until their final delivery.

Said requirements are not to be viewed in a static way: the needed conditions change accordingly with the contract of carriage, the route to be followed and the goods to be transported. It follows that the requirements will be fulfilled if the structure of the vessel, her equipment, the crew and her holds are capable to overcome the perils and conditions that are reasonably expectable from the voyage in question.

It is important to highlight the fact that said duties are not applicable to the entire duration of the multimodal transport, but exclusively to the maritime part of it.

As far as the period of responsibility is concerned, art. 14 clearly extends it in comparison with the Hague-Visby Rules that prescribed only a duty of “initial” seaworthiness. The letter of the norm does not leave space for interpretative doubts: “*The carrier is bound before, at the beginning of, and during the voyage by sea*“, it follows that the obligation under this new regime has to be considered continuous¹¹⁴ during the transport by sea. In

¹¹² Rotterdam Rules, Art. 14

¹¹³ T. Nikaki, *The obligations of carriers to provide seaworthy ships and exercise care*, in A New convention for the carriage of goods by sea – the Rotterdam Rules, 2009. P. 102

¹¹⁴ *Ibidem*, P. 105. The Author underlines how without this change, the regime would not be compatible with the new modern safety regulations introduced after the implementation of the Hague-Visby Rules, such as the ISM Code, that impose the duty of adopting maintenance procedures for the vessel.

case the required condition changes during the performing of the contractual obligation for whatsoever reason, the duty persists and the carrier will be obliged to restore of the initial seaworthiness. Different critiques arose on how this duty would represent a massive increasing of burden for the carrier, which would have likely caused a consequential increase of fees. In addition, granting the needed repair in certain situation, for example while sailing in the middle of the ocean, would be physically impossible. The solution lays on the right interpretation of the norm: it does not impose an absolute duty, but it obliges the carrier to take any reasonable measure in order to solve the arisen issue¹¹⁵.

As a final note, it is worth mentioning the difference between English common law systems (and the Scandinavian system, specifically the Norwegian Maritime Code, discussed in the previous chapter) and the rule concerning the consequences of unseaworthiness. In English Law, just like in Norwegian Law¹¹⁶, the lack of seaworthiness renders the damage imputable on the carrier, preventing him from to excluding or limiting his liability. In the Rotterdam Rules regime¹¹⁷, the cargo interests must prove the nexus between the unseaworthiness and the damage arisen to the goods, the carrier is offered the change to avoid liability by proving that he exercised due diligence to comply with his obligations.

4.1.2 The duty to not operate Deviations

The regime of liability, as far as deviations are concerned, has been deeply modified due to the massive improvements achieved by navigational instruments implemented in modern vessels. Unlike the previous regimes, which allowed only reasonable deviations, art. 24 of the Rotterdam Rules expressly establishes that operating a change of the route, even if pursuant to the applicable law it constitutes a contractual breach, it does not negate the

¹¹⁵ *Ibidem*, P. 106

¹¹⁶ NMC, Sect. 276, 2nd paragraph

¹¹⁷ Rotterdam Rules, Art. 17, (5), Let. A

carrier his exclusion and limitation of liability rights¹¹⁸. The only exceptions presented by the norm itself are the cases pursuant to art. 61 of the Convention: said norm refers to breaches caused by wilful or grossly negligent acting committed by the person claiming exclusion or limitation of liability.

4.1.3 The duty of Good Care of the cargo transported

The Rotterdam Rules provide a quite extensive catalogue of specific obligations of the carrier relating to the cargo: he is obliged to “*properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods*”¹¹⁹. The main difference between art. III r2 of the Hague-Visby rules and the above quoted Art. 13 consists on the addition of two new duties: the carrier is indeed obliged to receive and to deliver them to the contractual consignee. The main consequence of this change consists in the extension of the period of responsibility concerning the goods from the tackle-to-tackle to door-to-door system: the cargo has to reach the established place of delivery rather than the place of destination. The reasoning behind this extension is to include every parts of the carriage which form the multimodal transport: it follows that unlike the duty of providing a seaworthy vessel, the duty of care of the cargo is not limited to the maritime part of the carriage. It is important to highlight that the duty only applies to the cargo operation the carrier undertook to perform under the contract in question¹²⁰.

As far as clauses such as Fio or Fios¹²¹ are concerned, the only precondition prescribed by the Rotterdam Rules consists in having the agreement inserted or referred to in the contract of carriage.

¹¹⁸ D. Rhidian Thomas, *An analysis of the liability regime of carriers and maritime performing partners*, in A New convention for the carriage of goods by sea – the Rotterdam Rules, 2009. P. 68

¹¹⁹ Rotterdam Rules, Art. 13, 1st paragraph

¹²⁰ T. Nikaki, *The obligations of carriers to provide seaworthy ships and exercise care*. P. 93

¹²¹ They consist in typical contractual clauses through which the parties of the contract modify the standard responsibilities and costs for the handling of the cargo. The first consists in Free in and Out, the second Free in and out stowed, and both cause the risks and costs of the operations to the cargo interests.

Finally, it is interesting to note that according to art 12, 1st paragraph of the Rules, the Convention will be applied only if the carrier receives the goods from the shipper with the purpose of initiating the carriage. Any other purposes, such as storage of the goods awaiting for further instructions, will not trigger the Rotterdam Rules but, instead, the relevant provisions of the applicable national law.

4.2 The changes on the exclusion and limitation of liability rights of the Carrier and the period of responsibility

As discussed in the previous chapters, the catalogue of exceptions introduced by the Hague-Visby Rules have been sensibly modified by the Hamburg Rules. The Rotterdam Rules inverted the trade and presented a list of exceptions¹²² that resembles the one in the Hague-Visby catalogue. The revolutionary aspect of the 1968 Convention though, consisting in eliminating the exemption for liability arising as consequence of navigational errors of the master and crew, has been confirmed by the Rotterdam Rules.

As far as the fire exemption is concerned¹²³, an interesting change occurred: pursuant to art. 17, 3rd paragraph, let. F, the carrier is released wholly or partly from liability if he proves alternatively either that the damage occurred despite the absence of fault on his behalf, or if fire on the ship was the cause or contributed to create the damage *de quo*. The 5th paragraph of the same article also underlines that “*the carrier is also liable [...] for all or part of the loss, damage, or delay if [...] the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier*”. The privity of the carrier on the causation of damage is no longer required.

¹²² Rotterdam Rules, Art. 17 (3), Let. A - O

¹²³ *Ibidem*, Art. 17 (3), Let. F

The Rules are based on a door-to-door system that disciplines the multimodal carriage of goods in which at least one of the means of transport has to be maritime¹²⁴, it follows that the period of responsibility starts when the carrier, or a performing party, receives the goods and ends when the delivery takes place¹²⁵. As we deal with a multimodal carriage, it may happen that the port of discharge does not coincide with the place of delivery because an additional transport might then be required. As far as the party involved in the carriage by sea, the period of responsibility is limited between the arrival of the cargo at the established loading port and the discharging at the agreed destination¹²⁶. It is worth mentioning that in order to the convention to apply, the port of loading or discharge must be a signatory State¹²⁷.

4.3 Rotterdam Rules and Himalaya clause: how do they relate ?

One very important innovation of the Rotterdam Rules consists in abandonment of the servant/agent and independent contractor categories through the introduction of the “performing party”¹²⁸. It consists on a person, other than the contractual carrier, who performs the obligations connected to the contract of carriage. Among these subjects, a specific legal regime is reserved for the maritime operator who is defined as a person who performs contractual obligations “during the period between the arrival of the goods at the port of loading [...] and their departure from the port of discharge”.¹²⁹ The most important consequence is that, unlike other performing parties, their activity must take place within the ports and their liability is disciplined by art. 19, which means they are entitled the benefit of the same rights of excluding or limiting their liabilities granted to the carrier. The main consequence of this new rule is that terminal operators position is now covered by the con-

¹²⁴ *Ibidem*, Art. 1, 1st paragraph

¹²⁵ Rotterdam Rules, Art. 12, 1st paragraph

¹²⁶ *Ibidem*, Art. 19, 1st paragraph, Let. B

¹²⁷ *Ibidem*, Art. 19, 1st paragraph, Let. A

¹²⁸ *Ibidem*, Art. 1, 6th paragraph

¹²⁹ *Ibidem*, Art. 1, 7th paragraph. See D. Rhidian Thomas, *Op Cit.*, P. 57

ventional rules without the need of an *ad hoc* clause such as the Himalaya one. It is important to highlight that the aggregated liability of all the sued subjects, carrier and various maritime performing parties, “*shall not exceed the overall limits of liability under this Convention*”¹³⁰, therefore establishing a joint and several liability among them: it clearly differs from the previous regimes that only extended to other subjects the defences granted to the carrier.

The carrier liability extends to any breach of contractual obligations due to fault or neglect, by act or omission, of any performing parties and their employees, the vessel crew and master and any person who acts upon request of the carrier or under his supervision¹³¹.

Very different is the position of non-maritime performing parties as the Rotterdam Rules do not provide specific defences and direct claims can be brought against them, their position is very simimalar to the one of independent contractors under the Hague-Visby Rules and the regime to be applied is the one governed by relevant national or international norms. It is important to observe though, that nothing is established against the possibility of limiting their liability through contractual terms agreed by the parties such as the Himalaya clause: the provisions pursuant art. 79 do not mention the land performing parties among the subjects beneficiaries of contractual terms to restrict/increase liability that have to be considered void.

¹³⁰ *Ibidem*, Art. 20, 2nd paragraph

¹³¹ *Ibidem*, Art. 18

5 Concluding Remarks

The main scope of the rules analysed is to ensure that the economic burden caused by the perils of the voyage at sea are fairly distributed between the cargo interests and the carrier. The evolution of the liability system has been continuous and very adaptive: it started from a “strict liability” regime, whereas liability is triggered despite the quality of the conduct of the carrier, to eventually reach a complicated and detailed set of rules based entirely on fault or neglect. As discussed above, the change started within the private market practice context where the carriers started incorporating specific contractual terms in order to limit or exclude their liabilities. The use and abuse of these clauses led to a clear unbalance between the two parties at the end and an orchestrated international intervention to obtain clear and fair rules was then felt necessary. The swinging between the two sides of the spectrum then eventually resulted into the first international convention signed in Bruxelles in 1924 which established the first set of internationally bounding rules for contracts of carriage by sea evidenced by the emission of a bill of lading.

The main aspects of the new liability regime consist in the introduction of a catalogue of not-amendable duties and a liability for fault that is triggered by a conduct that constitutes their breach. The core duties consist in providing a seaworthy ship before the start of the contractual voyage, care of the cargo transported and no deviations from the established route. It is worth reminding that the fault on the carrier behalf is presumed, all the cargo interests has to prove is that the damage occurred while the goods were in custody of the carrier: he then bears the burden of proving he acted reasonably in respect of his contractual duties.

Along with this catalogue, another one including normally expectable perils at sea has been created thus establishing a list of possible events that exclude the triggering of liability for the carrier. The *ratio*, once again, is to equally share the venture risks between the two parties of the contract of carriage.

Relevant issues and challenges remained unsolved. Among all, the most important ones concerned certain aspects of vicarious liability, therefore the liability triggered by damages caused by the conduct of parties third to the contract of carriage. The most typical example

is the liability triggered by the dock operators hired to perform the handling of the cargo, but also the position of contractual parties who perform in service of the ship like shipyard workers engaged in repairing the vessel, represented an unsolved issue. The market practice came to a solution through the so-called Himalaya clause: the scope was to protect the third parties to a contract from the cargo interests tortious claims establishing a direct channelling of liability toward the carrier/employer. Courts enforced such clauses and their use widely spread among the market operators.

The Hamburg Rules, created as result of the developing countries pressure, brought about a more cargo interests friendly system trying to eliminate outdated privileges on behalf of the carriers established by the Hague-Visby Rules such as the exclusion of liability for navigational and ship management errors. It is interesting to observe and analyse how different legal systems, such as the Norwegian one, have adopted a set of rules which represent the compromise between the various rules established by international conventional sources and the contractual terms invented by the market practice.

Finally, as far as the Rotterdam Rules are concerned, it is possible to see how they clearly represent the most advanced attempt to uniform the rules of the market with a special regard to the technological changes that occurred. It cannot be ignored that the Hague-Visby Rules, which still are the main source of regulation in the shipping by sea business, despite their amendments, are very outdated. The rules are indeed based on a level of technology which made voyages far more dangerous than how they are nowadays. That justified the favourable conditions set for the carrier but certain benefits appear outdated and unfair in light of the changes and developments reached by the nautical industry. A clear example is the discipline on deviations: nowadays, changing route or simply deviating from it does not appear to be such a dangerous choice for the carrier thanks to the navigational instruments employed on board. The new rules also regulated the positions of subjects for whom the carrier is vicariously liable for, in fact eliminating the need, as far as maritime transport is concerned, for contractual terms such as the Himalaya clause. The new system does not regulate the mere transport by sea but, inspired by the new means of carriage of goods, it regulates the entire venture: this mean starting from the delivery from the shipper, and concluding with the final delivery to the consignee, no matter how many different segments of

different nature of transport are involved. The aim, when discussing *de jure condendo*, should be the harmonization of the multimodal transport rules established with the Rotterdam Convention with the other rules established for other unimodal conventions. Another obstacle to be tackled is the requirement of the sea leg of transport in order to trigger the applicability of the rules. Despite these facts, having the Rotterdam Rules ratified and therefore coming into force would be a tremendous innovation, as they would represent the first and only international set of regulations on the matter of multimodal transport.

As far as vicarious liability is concerned, the regime of the Rotterdam Rules only leaves a loophole in its otherwise very well designed structure: the liability for non-maritime performing parties. A loophole that can easily be fixed through the adoption of specific contractual terms similar to the Himalaya clause, use of which is not forbidden by the rules themselves.

The evolution of vicarious liability has seen different changes. Protecting the position of those subjects hired and working under direct control of the carrier is a necessity for the market. This work has shown how the absence of a detailed discipline and the technical limits showed by the Hague-Visby Rules has caused the spreading of private contractual solutions whilst the scarce success of the following conventional rules has failed the expectations for widely accepted rules on the matter.

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