# Maritime Performing Party under the Rotterdam Rules 2009

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This paper explores the provisions of the *Rotterdam Rules 2009* relating to the performing party in general and the maritime performing party in particular. Performing party means a person who performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. Maritime performing party means a performing party who performs or undertakes to perform any of the carrier's obligations during the period between the arrival of goods at the port of loading and their departure from the port of discharge of a ship. The maritime performing party is a new concept introduced by the *Rotterdam Rules*. The central intention of this paper is to study and analyse the concept, legal standing and liability of a maritime performing party under the *Rotterdam Rules*. A comparative analysis of the legal standing of persons analogous to the performing party in conventions regulating the carriage of goods by sea is also provided.

**KEY WORDS**

~ Carrier
~ Performing party
~ Maritime performing party
~ Actual carrier
~ Carriage of goods by sea
~ Rotterdam Rules

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## 1. INTRODUCTION

At the international level, carriage of goods by sea is regulated by several international conventions none of which are universally acknowledged. The fact that multiple international convention legal norm systems are currently being used throughout the world to regulate the relations pertaining to the carriage of goods by sea is unsatisfactory and fails to contribute to the uniformity of the maritime carriage law, as such systems were originally intended to do.

*The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* from 1924, also referred to as the *Hague Rules*, is widely acknowledged and undoubtedly a successful international instrument which managed to hold out to this day. Since the application of the *Hague Rules* has proved them to have certain shortcomings, demands have been made for their modernisation. The *Hague Rules* were amended by the adoption of the two *Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, first in 1968, better known as the Visby Rules, which together with the text of the *Hague Rules* constitutes the Hague-Visby Rules, and then in 1979 by what is known as the *SDR Protocol*. The 1978 *United Nations Convention on the Carriage of Goods by Sea*, known as the *Hamburg Rules*, was adopted to additionally improve the position of the users of carriage relative to the then current conventions. Although the *Hamburg Rules* offer a number of interesting modern solutions, they are not widely accepted.

Changes in relations between parties to maritime contracts of carriage, containerisation, internetisation and the rise of electronic communication have changed the manner business is conducted in the carriage of goods by sea. None of the extant conventions adequately resolves the issue of the regulation of modern carriage practice. These circumstances have led the

United Nations Commission on International Trade Law to launch an initiative for the adoption of a new international convention. Exhaustive discussions and negotiations on the text of the new convention lasted from 2001 to 2008, during which period several drafts of the text were devised. Following the finalization of the discussions and the harmonization of the text, the new convention titled the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, also known as the *Rotterdam Rules*, was finally adopted in 2008, and officially signed in Rotterdam in 2009. The *Rotterdam Rules* have been signed by 25, but ratified by only three countries[1]. The *Rotterdam Rules* were envisaged to enter into force and effect after being ratified by a minimum of 20 countries, and have been open for ratification since the day of their signing.

The *Rotterdam Rules* were intended to replace the current conventions some time in the future to ensure the uniform regulation of carriage of goods by sea. Although the *Rotterdam Rules* are characterized by a plethora of new, modern solutions, some attempts have also been made to integrate the traditional solutions from the *Hague-Visby Rules* and the *Hamburg Rules*. However, the *Rotterdam Rules* did not enter into force yet and it is still uncertain whether they ever will.

In contrast to other conventions currently in force, the *Rotterdam Rules* regulate not only carriage by sea, but multimodal transport (i.e. door to door transportation) as well. Consequently, the *Rotterdam Rules* apply both if carriage is performed entirely by sea and if a part of carriage is performed by forms of transportation other than carriage by sea. This solution was also intended to resolve the open issue of international regulation of multimodal transport, since the 1980 *United Nations Convention on International Multimodal Transport of Goods* has still not entered into force and most likely never will.

## 2. THE CONCEPT OF CARRIER

In maritime legal conventions the carrier is defined as any person who concludes a contract of carriage of goods with a shipper. The generally accepted position is that the carrier may be any person who enters into a contract of carriage of goods by sea in its own name. An analysis of the definition of the carrier in the *Hague-Visby Rules* and the *Hamburg Rules* reveals certain differences in the scope of the concept of carrier. Pursuant to Article 1, paragraph 1, subparagraph a) of the *Hague-Visby Rules*, the concept of carrier includes the owner or charterer who enters into a contract of carriage with a shipper. This convention definition of the concept of carrier implies that a person other than the shipowner may be a carrier, and specifically makes mention of the charterer from the charter contract. Pursuant to Article 1, paragraph 1, subparagraph 1 of the *Hamburg Rules*, a carrier is any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper. The definition of the carrier in the *Hamburg Rules* is wider than that found in the *Hague-Visby Rules* since the concept of carrier includes any person who enters into a contract of carriage of goods by sea with a shipper, be it a shipowner, charterer from a charter contract or any other person.

Pursuant to Article 1, paragraph 1, subparagraph 5 of the *Rotterdam Rules* the carrier is defined as any person who enters into a contract of carriage with a shipper. In comparison with the *Hague-Visby Rules* and the *Hamburg Rules*, the concept of carrier finds its most general definition in the *Rotterdam Rules*. Given such a broad definition, the *Rotterdam Rules* allow any number of different entities to act as carriers, since the person of the carrier is primarily defined as a party to a contract of carriage, regardless of its relation to the ship. Consequently, under the provisions of the *Rotterdam Rules*, a shipowner, ship operator, charterer from the charter contract, freight forwarder and multimodal transport operator (including carriers using other modes of transportation, etc.) may all act as carriers, providing partial or full carriage by sea is contracted. Although a carrier may perform entire carriage by itself, in practice, especially in case of multimodal transport, the likelihood of it actually doing so is very low and the carrier needs to include third persons in the process.

Therefore, under the *Rotterdam Rules*, any person who enters into a contract of carriage with a shipper is a carrier, regardless of whether it performs carriage by itself or entrusts all or some of the actions from the contract of carriage to another person, e.g. other carrier, agent, freight forwarder, etc. To facilitate the identification of the person of the carrier, Article 37, paragraph 1 of the *Rotterdam Rules* stipulates that if a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier have no effect to the extent that they are inconsistent with that identification. If no person is identified in the contract particulars as the carrier, Article 37, paragraph 2 of the *Rotterdam Rules* stipulates iuris tantum that the registered owner of that ship shall be presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and identifies the bareboat charterer, in which case such bareboat charterer shall be presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner. Nothing prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to Article 37, paragraph 2 of the *Rotterdam Rules* is the carrier.

The analysis of the concept of carrier across all current conventions regulating the carriage of goods by sea has shown that a carrier undertakes to perform transport prestation, without

1. They are: Congo, Spain and Togo; www.uncitral.org [accessed 25 January 2015].

necessarily undertaking to personally execute transportation. In fact, in modern commercial and maritime practice, the (contractual) carrier as a rule never personally executes all the obligations from the contract of carriage. The majority of carriers are corporations acting exclusively through their agents, and it is worth noting that nowadays all carriers subcontract the performance of particular aspects or parts of transportation with other companies. The issue of the so called actual carriers or performing parties, in the sense of their precise identification and the regulation of their rules, obligations and, most importantly, liabilities, is exceptionally important for the functioning of the institute of liability for damage stemming from the legal transaction of carriage of goods by sea.

The issue of defining and regulating the status of persons who are not parties to a contract of carriage, but perform any of the obligations of the carrier under such contract, exists not only in the carriage of goods by sea, but is also present in all other forms of transportation. However, the lack of its uniform regulation by different instruments represents one of the major issues indicative of the lack of uniformity in the legal regulation of not only carriage of goods by sea, but carriage in other forms of transportation as well.

## 3. THE CONCEPT OF THE PERFORMING PARTY AND THE MARITIME PERFORMING PARTY

The first drafts of the new convention envisaged a very broad definition of the concept of the carrier-performing party. The term carrier-performing party was widely criticised since a number of independent persons execute the obligations of the carrier from the contract of carriage, and if linguistic interpretation is applied, such persons do not carry goods. E.g. stevedores and port terminal operators can not be considered carriers, but perform tasks inseparably related to carriage. This resulted in the introduction of a new concept of the performing party. The drafters of the *Rotterdam Rules* likewise considered the concept of the actual carrier from the *Hamburg Rules* inappropriate, i.e. believed it to be confusing due to it implying that a (contractual) carrier is not the actual carrier in spite of being referred to as the carrier throughout the text of the instrument. During the drafting of the *Rotterdam Rules* the stylization of the provision defining the performing party was widely discussed, to the extent that it was considered if the definition of the performing party should even be included in the text of the convention and the provisions of the draft convention were changed on multiple occasions.

Pursuant to Article 1, paragraph 1, subparagraph 6 of the *Rotterdam Rules* (a) a performing party means a person other than the carrier who performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision; (b) performing party is not a person who, instead of acting on behalf of the carrier, acts, directly or indirectly, on behalf of the shipper, the documentary shipper, the controlling party or the consignee.

Under the *Rotterdam Rules,* for a person to have the qualities of the performing party, it must meet the following requirements:

– perform or undertake to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of goods,

– act, directly or indirectly, at the carrier's request or under the carrier's supervision,

– not act, directly or indirectly, on behalf of the shipper, the documentary shipper, the controlling party or the consignee.

Due to such a broad definition, under the *Rotterdam Rules*, the concept of the performing party covers any person performing the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of goods, who could be sued based on extra-contractual relations (offence relations).

According to the definition, the performing party is a person participating in the execution of essential carrier's obligations from a contract of carriage. It may be, e.g. a maritime carrier, a carrier providing land-based transportation services, a stevedor, a terminal operator. This definition of the person of the performing party was directly influenced by the fact that the *Rotterdam Rules* do not regulate exclusively carriage by sea, but multimodal transport as well. By contrast, e.g. persons executing jobs at the container terminal and in a specific period, are responsible only for the preparation of certain documentation for the carrier, while shipyard employees repairing a ship (to make it seaworthy) all for the account of the carrier, are not covered by the definition of a performing party.

The concept of the performing party does not only include carrier's subcontractors, but other helpers executing the contract as well (e.g. subcontractor's subcontractors), the key condition being that such persons must execute or undertake to execute an essential carrier's obligation from a contract of carriage.

Apart from the general definition of the performing party, Article 1, paragraph 1, subparagraph 7 of the *Rotterdam Rules* also provides a definition of the maritime performing party. The said provision stipulates that a maritime performing party is a performing party who performs or undertakes to perform any of the carrier's obligations during the period between the arrival of goods at the port of loading and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it provides or undertakes to provide its services exclusively within a port area. By analogy, a non-maritime performing party is a performing party who performs or undertakes to perform any of the carrier's obligations after

the arrival of goods at the port of loading or after their departure from the port of discharge of a ship.

Accordingly, under the *Rotterdam Rules*, a maritime performing party must meet the following conditions:

– be a performing party, i.e. not be a carrier in the sense of a person entering into a contract of carriage with a shipper, or more accurately, a carrier and a maritime performing party may not be one and the same person;

– perform or undertake to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision - the phrase perform or undertake to perform is used in the *Rotterdam Rules* implying that a maritime performing party need not necessarily physically perform any obligation of the carrier, but rather that the very fact of having undertaken to perform any of the carrier's obligations suffices for such a person to be considered a maritime performing party in the sense of Article 1, paragraph 1, subparagraph 7;

– perform any of the carrier's obligations during the period between the arrival of goods at the port of loading and their departure from the port of discharge of a ship, i.e. in the port-to-port period. The meaning and scope of the phrase period between the arrival of goods at the port of loading and their departure from the port of discharge of a ship are of crucial importance for resolving the issue of whether a particular person is considered a maritime performing party or not; although the term port is crucial for determining whether a particular actor is a maritime performing party or not, the *Rotterdam Rules* do not provide a definition.

## 4. LIABILITY OF THE MARITIME PERFORMING PARTY

The *Rotterdam Rules* contain provisions on the liability of the performing party. The scope of liability of a performing party envisaged in the *Rotterdam Rules* is different for maritime and non-maritime performing parties. In case of a maritime performing party, the same scope of liability applicable to the carrier is applied, while in the case of a non-maritime performing party, under certain conditions, the Rules proscribe the applicability of unimodal conventions applicable to mode of transportation other than by sea.

Distinguishing the liability of the performing party from the liability of the carrier is crucial. The carrier is liable both under the provisions of the *Rotterdam Rules* and the contract of carriage in the period of responsibility as defined by Article 12 - from the receipt of goods for carriage until the delivery of such goods. On the contrary, a performing party is not liable under a contract of carriage and has no extra-contractual liability under the *Rotterdam Rules*. In other words, to avoid extra-contractual liability, under the *Rotterdam Rules*, a performing party is liable while the goods are under its control, or if it otherwise participates in the transportation.

The sidestepping of the *Rotterdam Rules* by filing a suit against the performing party for extra-contractual liability is thus thwarted. This also protects the (contractual) carrier, since if the respondent were successful in the extra-contractual liability proceedings instigated against a performing party, the damaged party could otherwise be awarded compensation for damage even if the carrier could be exempted from liability pursuant to the provisions of the *Rotterdam Rules*.

Although the *Rotterdam Rules* are a maritime convention, they also regulate multimodal transport in the period prior to the loading of goods onto a ship and after their unloading from the ship. The *Rotterdam Rules* establish a set of rules on liability which are to an extent harmonized with the network system, but pretty limited in comparison with the full network system. In a full network system the rules on liability for each part of the transportation route are determined by the rules which would otherwise apply to that part of the transportation route, with the same rules being applied to all performing parties and (contractual) carriers.

As stated, the *Rotterdam Rules* do not provide for a full network system. Article 26 of the *Rotterdam Rules* regulates the issue of transportation preceding or succeeding carriage by sea, i.e. resolves the issue of the conflict of conventions (unimodal applicable to other, non-maritime forms of transportation and the *Rotterdam Rules*). It stipulates that when loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the period of carrier's responsibility but exclusively before their loading onto the ship or after their unloading from the ship, the provisions of the *Rotterdam Rules* shall not prevail over the provisions of another international instrument, at the time of such loss, damage or event or circumstance causing delay: (a) if the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier with respect to a particular stage of carriage in which the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred; (b) if such instrument specially provides for the carrier's liability, limitation of liability, or deadline for suit; and (c) if no withdrawal or withdrawal to the detriment of the shipper is allowed under that instrument.

In case of unknown place of occurrence of an adverse event and the non-existence of coercive provisions of a unimodal convention, if the adverse event occurs during the maritime part of transportation, the *Rotterdam Rules* are applied door-to-door.

Article 82 of the *Rotterdam Rules* regulates the application of international conventions regulating the carriage of goods by other forms of transportation. It stipulates that no provision of the *Rotterdam Rules* affects the application of any of the

following international conventions in force at the time of entry of the *Rotterdam Rules* into force, including any future amendment to such conventions, regulating the liability of the carrier for the loss of or damage to the goods: (a) any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage; (b) any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship; (c) any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or (d) any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea. To illustrate, let us take a look at two hypothetical situations. In the first hypothetical case, a container is reloaded from a truck and loaded onto a ship and in the second, a container is loaded onto a ship together with the truck for purposes of further carriage by sea. The analysis of Article 82 of the *Rotterdam Rules* and Article 2 of the *Convention on the Contract for the International Carriage of Goods by Road* is not only illustrative, but very interesting from the legal standpoint. In the first hypothetical situation, if a container is reloaded from a truck and loaded onto a ship, the *Rotterdam Rules* would apply since the provisions of the *Convention on the Contract for the International Carriage of Goods by Road* stipulate that the convention is applicable only to the transportation of goods loaded onto a road cargo vehicle carried on board a ship, and in the described case, the road cargo vehicle is not carried on board a ship, but merely the container. By contrast, in the second hypothetical situation, if a vehicle (truck) carrying a container is loaded on board a ship for purposes of further carriage by sea, in accordance with Article 82 of the *Rotterdam Rules* and by the application of Article 2 of the *Convention on the Contract for the International Carriage of Goods by Road*, in the described case, the provisions of the *Convention on the Contract for the International Carriage of Goods by Road* would apply to the entire route. However, if loss, damage or delayed delivery of goods are proved to have occurred during carriage by sea, the liability of the carrier, i.e. the performing party will not be established in accordance with the *Convention on the Contract for the International Carriage of Goods by Road* but in accordance with the *Rotterdam Rules*.

As previously stated, the *Rotterdam Rules* separately regulate the liability of the maritime performing party and stipulate the same scope of liability as applied to the carrier. Article 19 of the *Rotterdam Rules* regulating the liability of the maritime performing party in paragraph 1, stipulates that a maritime performing party is subject to the obligations and liabilities imposed on the carrier under that Convention and is entitled to the carrier's privileges and limits of liability as provided for in that Convention if: (a) the maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and (b) if the occurrence which caused loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either (ii) while the maritime performing party had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage. Accordingly, under the described conditions, the maritime performing party has the same obligations and liabilities as imposed on the carrier, and can simultaneously benefit from the carrier's privileges and limitations of liability contemplated by the *Rotterdam Rules*.

Article 19, paragraph 2 of the *Rotterdam Rules* stipulates that if the carrier agrees to assume obligations other than those imposed on the carrier under that Convention, or agrees that the limits of its liability are higher than the limits specified under the same Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to assume such obligations or such higher limitations.

There have been cases of a (contractual) carrier agreeing to depart from the limitations of liability in favour of a shipper or a consignee. A classic example is that of agreeing to higher limitations of liability than those stipulated in Article 59, paragraph 1 of the *Rotterdam Rules*. When such contractual privileges are agreed between a (contractual) carrier and a shipper, applying such higher limitations to the maritime performing party who did not participate in that business decision and in a majority of cases would not necessarily benefit from the favourable conditions or counter services agreed in exchange for such privileges, would be unfair.

That is why Article 19, paragraph 2 of the *Rotterdam Rules* stipulates that a maritime performing party is not bound by such special agreements, unless it expressly agrees to assume such obligations or higher limitations of liability. The maritime performing party contracts limitations of liability higher than those envisaged by the Convention with the carrier as its contractual counterpart. In practice, to facilitate the process of proving the existence of an agreement on acceptance of greater obligations between a carrier and a maritime performing party, the shippers may make it conditional that upon the conclusion of a contract of carriage the carrier undertakes to ensure that its performing parties (subcontractors) also enter into such a contract with it. Since the existence of such an agreement benefits the claimant, the burden of proof naturally rests on the claimant. Article 19, paragraph 3 of the *Rotterdam Rules* stipulates that a maritime performing party is liable for the breach of its obligations under that Convention caused by the acts or omissions of any person

to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of that Article.

In other words, the liability of a maritime performing party extends to cover its own non-fulfilment of obligations imposed by the Convention on such party or any person to which it has entrusted the performance of any of the carrier's obligations under a contract of carriage. Consequently, a maritime performing party is liable for the actions and oversights of its dependent and independent assisting parties, provided that they act at the request of such maritime performing party in the fulfilment of any of the carrier's obligations.

Article 19, paragraph 4 of the *Rotterdam Rules* stipulates that nothing in the Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

This provision of the *Rotterdam Rules* explains that neither the master or crew of the ship or an employee of the carrier or of the maritime performing party are liable under the Convention. In contrast to the classic *Himalaya Clause*, under which such persons were jointly protected on the same bases as the carrier, the *Rotterdam Rules* rescind the direct liability of the master of crew, the crew or employees.

Article 20 of the *Rotterdam Rules* envisages the joint liability of the carrier and one or more maritime performing parties. Pursuant to paragraph 1 of that same Article, if the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in the delivery of goods, their liability is joint but only up to the limits provided for in the Convention, while paragraph 2 of that Article stipulates that without prejudice to Article 61, proscribing the loss of the privilege of limitation of liability, the aggregate liability of all such persons shall not exceed the overall limitation of liability under the Convention.

Therefore, if the carrier and one or more maritime performing parties are liable for damage to goods, they are jointly liable up to the limitations proscribed by the *Rotterdam Rules*. Such joint liability may not exceed the overall limitation of liability under the *Rotterdam Rules*.

Article 20 actually provides an additional opportunity for claimants because the *Rotterdam Rules* proscribe the joint liability of the carrier and maritime performing parties. This allows the claimant to request full compensation from any (or all) of them, leaving the respondents the option to claim reimbursement, refund or compensation for damage, depending on their mutual internal arrangements and legal relations. The limitations of such joint liability are those provided for in Articles 59 and 60 of the *Rotterdam Rules*.

Therefore, if a claimant collects indemnification from one solidary debtor, the obligation is fulfilled and all other debtors are exempted. The very term "joint (solidary) liability" derives from the authority of any creditor (in this case user of transportation services - damaged party) to request the fulfilment of an obligation in full, in solidum, from any co-debtor. Although paragraph 2 stipulates that the joint liability of all such persons shall not exceed the overall limitation of liability under the *Rotterdam Rules*, there are exceptions. The classic example is that of a (contractual) carrier agreeing to higher limitation of liability.

## 5. THE CONCEPT AND STATUS OF PERSONS ANALOGOUS TO THE MARITIME PERFORMING PARTY IN OTHER CONVENTIONS REGULATING THE CARRIAGE OF GOODS BY SEA

Under the *Hague Rules*, the regime of liability for damage targets exclusively the carrier as a contracting party, while the issue of subcontracting and possible liability of a person actually performing an obligation from a contract of carriage is mentioned nowhere in the Convention. The *Hague Rules* regulate merely the carrier-shipper relationship, without regulating the relationships between (actual) carriers and shippers. Therefore, if a user of transportation files a suit against persons who the (contractual) carrier entrusted with the execution of transportation on certain parts of the transportation route, they may not invoke the stipulations of the main contract, nor limitations of liability and exemptions from liability applicable under the *Hague Rules*.

Carriers are interested in having the conditions of the contracts of carriage applied to the persons they cooperate with and other subcontractors, since this would allow such persons to obtain the right to the same scope of liability as proscribed for the carrier, a one-year period of limitation and the possibility to invoke exemptions from liability applicable to the carrier. In the maritime business practice, the legal effect of having the conditions applicable to carriers, i.e. conditions from the contract of carriage, also applied to the carrier's subcontractors is ensured by including special contractual provisions known as the *Himalaya Clause*[2] into bills of lading. Under the Clause, the effect of the exemption clauses from the bills of lading is extended to include the carrier's subcontractors as well. It is worth noting that the Clause includes not only the employees and representatives of the carrier, but independent entrepreneurs like e.g. stevedores as well, if such persons are hired by the carrier or when acting in relation to and within the scope of their work tasks. The *Himalaya Clause* has become a regular component of every bill of lading. Since its legal validity has been affirmed in a number of court cases, its application is recommended by P&I clubs. In maritime-legal practice, when contracting a clause of this type, the carrier acts as an agent, i.e. on behalf of and for the account of the, e.g.

2. The Himalaya Clause owes its name to the 1955 judicial award in "The Himalaya" case adjudicated by the English Appellate Court (Adler v. Dickson), when the right of the master of crew to invoke the conditions of the contract of carriage first came under discussion in an extra-contractual suit of a passenger.

subcontractor. This requires the following conditions to be met: (a) the provisions of the bill of lading must clearly indicate the intention to protect the subcontractor, (b) the carrier must act as an agent of the subcontractor, with its prior or subsequent consent. That being done, the subcontractor may successfully invoke the provisions of the *Himalaya Clause* in case of liability for damage relating to the performance of a work task entrusted to the subcontractor by the carrier to execute a contract of carriage, providing such damage may not be ascribed to the qualified culpability of the subcontractor.

The *Hague-Visby Rules* started resolving the issue of the liability of persons used by the carrier in its operation by attempting to resolve the Himalaya issue. However, that merely began to tackle the issue of the liability of actual carriers or performing parties and other persons used by the carrier in the execution of the main contract. The *Hague-Visby Rules* stipulate that the carrier's employees may invoke the exemptions and limitations of liability invokable by the carrier within the meaning of that Convention if a suit is lodged against them. It should be noted that this provision pertains solely to the carrier's employees and proxies, while expressly excluding independent contractors. A clear distinction between the carrier's employees and proxies on the one hand and independent contractors on the other is thus drawn. Due to such wording, independent contractors (stevedores, terminal operators and similar) are considered to be expressly excluded from the benefits at the disposal of the carrier's employees and representatives.

Following the example of air law, the *Hamburg Rules*, i.e. the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier adopted in Guadalajara in 1961, introduce the concept of the actual carrier into their regime of liability. This is the first real attempt to resolve the issue of liability of persons on the side of the ship, i.e. persons who are not contractual carriers but perform contractual prestation from the main contract.

Article 1, paragraph 2 of the *Hamburg Rules* defines the actual carrier as any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted. Article 10 of the *Hamburg Rules* regulates the issue of the liability of the carrier and of the actual carrier. It stipulates that the carrier is responsible for carriage performed by the actual carrier, for actions and oversights of the actual carrier and its employees or proxies who acted within the scope of their work task. All provisions of the *Hamburg Rules* pertaining to the liability of the carrier are likewise applicable to the liability of the actual carrier for any carriage performed by such actual carrier. Within the scope of liability of the carrier and the actual carrier, their liability is joint.

Article 15 of the *United Nations Convention on International Multimodal Transport of Goods* regulates the liability of the multimodal transport operator for its employees, representatives and other persons. A multimodal transport operator is liable for the actions and oversights of its employees and proxies if such employees or proxies act within the scope of their work tasks. The operator is likewise responsible for any other person whose services it uses in the performance of a multimodal transport contract when such person acts in the performance of such contract. The operator is liable for the acts and omissions of above persons as if they were the actions and omissions of the operator. In other words, under the *United Nations Convention on International Multimodal Transport of Goods* the operator's liability for persons includes, i.e. covers independent contractors as well. There is a noticeable broadening of the circle of persons the operator is responsible for in comparison with the *Hague-Visby Rules* and the *Hamburg Rules*. This wide phrasing also includes all persons whose services the operator uses in the performance of a multimodal transport contract when such persons act in the performance of such contract. Independent contractors are thus also included, as well as the operator's subcontractors and persons the operator contracts services in the organization of multimodal transport with (e.g. carriers).

## 6. CONCLUSIONS

During the adoption of the *Rotterdam Rules*, the intention to modernize the international transport law was clearly stated. In that sense, the *Rotterdam Rules*, among other things, introduce new entities with specific rights and obligations relating to the performance of the contract of carriage into transport law. Similar to other modern conventions on transport law, the *Rotterdam Rules*, apart from the contractual carrier as a person entering into a contract of carriage, also distinguish and define the person actually performing transportation. The *Rotterdam Rules* refer to this person as the performing party. The term performing party may be concluded to be derived from the concept of the actual carrier from the *Hamburg Rules*.

The scope of liability of a performing party envisaged by the *Rotterdam Rules* is different for maritime and non-maritime performing parties. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under the *Rotterdam Rules* and is authorized to invoke the same exemptions and limitations of liability invokable by the carrier. By contrast, since non-maritime performing parties do not have such privileges at disposal, their liability is for the most part regulated by the regime of liability applicable to the relevant, non-maritime form of transportation. The liability of the carrier will always be governed by the *Rotterdam Rules*, and the liability of non-maritime performing parties either by the *Rotterdam*

*Rules* or any of a number of unimodal conventions. The legal standing of non-maritime performing parties has undergone a partial change when compared to the *Hague Rules*, the *Hague-Visby Rules* and the *Hamburg Rules*.

Namely, the *Rotterdam Rules* apply to contracts of carriage contemplating both carriage by sea and carriage by another form of transportation, under the conditions proscribed by Article 26 of the *Rotterdam Rules*. If a shipper is unable to identify the place of occurrence of damage, the provisions on liability for damage from the *Rotterdam Rules* will also apply to carriage by other forms of transportation. Likewise, the provision of Article 26 of the *Rotterdam Rules* stipulates that if damage to goods occurs prior to the loading of goods on board a ship and/or after unloading, but the adverse event occurs during the maritime part of transportation, the provisions of the *Rotterdam Rules* have precedence over the provisions of another international instrument, since the damage to goods did not occur exclusively prior to their loading onto the ship or exclusively after their unloading from the ship.

While the *Rotterdam Rules* give the maritime performing party protection from third party extra-contractual claims, they also impose on the maritime performing party obligations towards third parties stemming from the fact of it having concluded a contract with the carrier. If the carrier contracts obligations greater than those imposed by the *Rotterdam Rules,* the performing party is not liable for such obligations to the user of transportation, unless expressly agreed to by the performing party. The liability of a maritime performing party also extends to cover its own non-fulfilment of obligations imposed by the *Rotterdam Rules* on such party or any person to whom it has entrusted the performance of any of the carrier's obligations under a contract of carriage.

The *Rotterdam Rules* envisage the joint liability of the carrier and one or more maritime performing parties, providing that such joint liability may not exceed the overall limitation of liability. This provision provides the claimants an additional opportunity since it allows the claimant to request full compensation from any respondent, leaving the respondents the option to claim reimbursement, refund or compensation for damage, depending on their mutual internal arrangements and legal relations.

If the solutions contained in the instruments regulating the carriage of goods by sea are compared, the *Rotterdam Rules* may be observed to treat the issue of the definition and standardization of the liability of persons other than the (contractual) carrier, who participate in the execution of transport prestation in the widest sense, most comprehensively. With regard to the regulation of the issue of the circle of persons who may be liable for damage for loss, damage or delay under the Convention, the *Rotterdam Rules* envisage the widest circle of persons and proscribe their liability most exhaustively, while also specially regulating the issue of relations with other conventions. The stylization of the *Rotterdam Rules* is distinctive and differs from the stylization encountered in other conventions.

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