

THE CARRIER'S LIABILITY FOR SUB-CARRIERS AND THE SUB-CARRIER'S LIABILITY

A comparative study between Scandinavian and English law and the
Rotterdam Rules



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1 Introduction

1.2 The aims of the thesis -problems

Today it is common practice for the carrier to sub-contract the contracted carriage of goods. For the carrier to perform the carriage himself is now more of an exception. That the carrier will use only one type of transport is also uncommon, as the contracts of carriage today normally will cover the whole carriage, compelling the carrier to use different modes of transportation. When the carriage is sub-contracted, the carrier will use other carriers to perform the contractual obligations for him. This means that there will be a second, and sometimes a third, contractual layer involved. A common feature is a carrier who does not have the capability to perform the carriage at all. These “paper carriers” or non-vessel operating common carriers (NVOCC) will thus sub-contract all parts of the carriage.¹

This thesis will mainly examine the responsibility for and liability of the sub-carrier. The basis will be the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”), and Protocol of Signature (Brussels, 25 August 1924) and the Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968 (“Hague-Visby Rules”), as the countries compared in this study have all signed and ratified these rules. The thesis will start with a background to the problems posed by these rules with regards to sub-carriers, which are mainly the identity of the carrier, to ascertain who your contractual carrier and sub-carrier is, and the problem with suing the sub-carrier in tort; thereby possible avoiding the defences and limitations available to the carrier.

First the solution in the United Kingdom will be presented, as they have stayed true to the Hague-Visby Rules. Secondly the solution in Norway, Denmark, Sweden and Finland (“Scandinavian countries”), with main focus on the Norwegian legislation will be presented. The

¹ Carr, Indira, *International Trade Law*, (Routledge-Cavendish) 2010, 4th ed., pp. 7.

Scandinavian countries have tried to align their legislation as far as possible with the United Nations Convention on the Carriage of Goods by Sea, 1978 (“Hamburg Rules”) without having to derogate from the Hague-Visby Rules.² As a third part of this thesis, the United Nations Convention Rules for the International Carriage of Goods Wholly or Partly by Sea, 2008 (“Rotterdam Rules”) will be presented as an alternative solution. The Rotterdam Rules have been signed by Norway, Sweden and Denmark, but has not been ratified by any of the countries described in this thesis.³

The thesis is a dogmatic, international study, comparing two different legal systems and a new international convention. Focus will also be on the historical development of the carrier's liability for the sub-carrier and the sub-carrier's liability towards third parties. The legislation regarding the sub-carrier has gradually increased, which is visibly just by looking at the amount of text regarding the issue.

The sub-carrier's role in transportation law is an interesting contractual issue, because normally the sub-carrier does not have a contractual relationship with the owner of the goods. The owner of the goods might have contracted with someone he considers reliable and does not want his good to be transported by anyone else. Due to this the use of a sub-carrier without the consent of the shipper was for a long time considered a major breach of contract, e.g. in Scandinavian legislation where it was treated in the same manner as deviation. The shipper will expect the goods to be carried according to the contract and the carrier should not expose the goods to any risks outside of the scope of that contract.⁴ The carrier was strictly liable for any damage and delay that occurred while the cargo was in the custody of the sub-carrier. The same situation would probably not occur today as the use of sub-carriers is wide spread and the whole sea adventure is rarely endangered because of another party performing the carriage instead of the contracted carrier.⁵

2 Falkanger, Thor, Bull, Hans Jacob, Brautaset, Lasse, *Scandinavian Maritime Law – the Norwegian perspective*, 3rd ed., 2011, p. 281.

3 http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html, accessed 30.08.2011.

4 Sejerstad, Fredrik, *Haag reglene (Konossementskonvensjonen)*, (Universitetsforlaget), 1976, 3rd ed. (by Ivar Kleiven and Jens Voght-Eriksen), pp. 84.

5 Falkanger, p. 355.

1.2 The structure and limits of the thesis

The following chapters will describe the English and the Scandinavian legal systems with focus on the carrier's liability for the sub-carrier and the sub-carrier's liability towards third parties. Both systems are based on the Hague-Visby Rules, but the Scandinavian system has tried to align itself more to the Hamburg Rules. The English solution has however stayed with the Hague-Visby Rules, but through case law and clauses constructed by the market tried to solve the problems described above. In the Rotterdam Rules a new system has been introduced, although for sub-carriers, similar to the Hamburg Rules.

The English solution will be presented first, secondly the Scandinavian solution. Thirdly, a presentation of the Rotterdam Rules will follow. All chapters are defining the relevant concepts and terms. The identity of the carrier will also be touched upon here, as to determine who shall be considered carrier and sub-carrier for liability issues. Then carrier's liability for the sub-carrier will follow. After, the sub-carrier's liability and possible defences will be presented, concluding with the joint and several liability with the carrier. Last, a conclusion describing the similarities and differences, addressing the possible solutions and difficulties the Scandinavian and the English system might face with the introduction of the Rotterdam Rules.

As these questions are not outlined in the same way under English law, Scandinavian law and the Rotterdam Rules, the structure and the presentation of the questions may vary between them. An example is the question of identity of the carrier which is heavily discussed under English law, item 3.3, but more included in the general discussion under the other systems.

The thesis will presume that the carrier pursuant to the contract is entitled to use a sub-carrier to perform the transport. This may be done in various ways. The signed booking note may indicate that the cargo will be carried on a ship on time charter. The contract of carriage may also contain a reservation, where as a starting point, the carrier will himself transport the cargo, but he retains the right to use a ship of another party. These clauses are called “liberty clauses” and can be more or less detailed.⁶ An example of this is provided in the Conlinebill clause 6:

“Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels

⁶ Falkanger, p. 354.

either belonging to the Carrier or others, or by other means of transport...”

The problems arising should the carrier not be entitled to use sub-carriers will be left out of this thesis.

This thesis will focus on international trade between countries part of the Hague Rules and the Hague-Visby Rules. It will not comment on the rules specific for domestic trade.

2 Problems posed by the Hague-Visby Rules

This chapter will shortly present the background to the Hague-Visby Rules, which are incorporated both in English and Scandinavian law. The main issues left unsolved with regards to this thesis will also be presented.

In the 19th century, tension between shipowners and cargo interests increased due to the fact that shipowners imposed one-sided contractual terms upon the cargo interests. Common law practice freedom of contract and carriers could thus in carefully drafted bills of lading exempt themselves from all liability. In the United States, where cargo interests always have been more powerful than shipowners, the Harter Act was passed in 1893 to clearly define the rights and liabilities between the cargo interests and the shipowners.⁷ Similar legislation was adopted in other countries as well. As a response to the need for regulating liabilities of carriers, and also to facilitate international trade, the Hague Rules were presented in 1924. The Rules were adopted by many countries, but were however criticized.⁸

With the introduction of the Hague Rules some questions were left unanswered with regards to sub-carriers. One main issue was the uncertainty of the identity of the carrier: who is your contractual party? The shipowner carrying the goods, is he your contractual carrier or sub-carrier? This question may not be always be easy to answer. Instead of the shipowner, the carrier could be a charterer or a “paper carrier” who assumes the carrier's responsibilities and the bill of lading contains contradictory or insufficient information about who the carrier is. A third party may encounter problems when trying to enforce his claim, especially if he is not entitled to a maritime lien on the vessel although he otherwise has a valid claim. Since this problem was not addressed properly in the Hague Rules, many legal systems found their own ways of dealing with this to protect the cargo interests, either by national legislative measures or left it for the courts to handle.

⁷ Aikens, Sir Richard, Lord, Richard, Bools, Michael, *Bills of Lading*, 2006, 1st ed., paragraph 1.46-1.48 and 1.50-51.

⁸ Carver, Thomas Gilbert, Treitel, G.H., Reynolds, F.M.B., *Carver on Bills of Lading*, (Sweet & Maxwell) 2005, paragraph 9-062-9-063.

This resulted in a vast legal diversity, where the incentive for forum shopping was strong.⁹

Another problem arises when the cargo interests tries to avoid the defences and limitations of the mandatory rules by suing in tort rather than under the contract. This could be done either against the carrier or against someone to whom the carrier has delegated the whole or part of the carriage; servants or independent contractors. The burden of proof is generally higher under tort claims, but this can be compensated by the fact that the cargo interest now may avoid any defences or limitations. It may also be possible for him to recover the amount from more than one liable person.¹⁰

Whether or not the liability in the Hague Rules applied to the tort claims was not answered. The international maritime society agreed that the tort based claims should not be encouraged and preferably excluded. But there was no unity reached by the countries as to who should be protected with such rules and what they would look like.¹¹

The solutions to the above mentioned problems were solved differently by the legislators around the world. Two of them will be discussed in this thesis; the Scandinavian and the English solution. The tendency was however to differentiate between the different persons and parties to whom the carrier delegated his obligations, i.e. making a difference between agents and servants and independent contractors. In the Hague-Visby Rules article 4*bis*(2) a difference was made between the servants and agents on one side and the independent contractors on the other. Servants and agents are covered by the Rules, while independent contractors has to find other ways to make the limitations and defences available to themselves. Many countries have also made a difference within the group of independent contractors, i.e. sub-carriers, stevedores and pilots.¹²

The Scandinavian countries however did not use this method.¹³ The Norwegian Maritime Code 1994 no 39 (NMC) section 282 makes the defences and liabilities of the carrier available to all servants, agents and independent contractors, for whom the carrier is vicariously liable. Sub-carriers are also liable by law, section 286. The Scandinavian countries has thus solved many of the problems presented, but although the solution may seem simple, difficulties may still arise.

⁹ Smeele, Frank, *The Maritime Performing Party in the Rotterdam Rules 2009*, EJCL 2010-1/2 (2010), pp. 73.

¹⁰ Smeele, pp. 73-74.

¹¹ Smeele, pp. 74.

¹² Smeele, pp. 74. For further examples see Smeele, pp. 74-75.

¹³ Smeele, footnote 27.

An independent contractor is a third party who is contracted to perform a particular task. Contrary to a person working under a contract of employment, the independent contractor is his own master and may have the discretion to perform the work in his own manner. Generally, this also means that the person who engages an independent contractor will not be vicariously liable for the independent contractor for torts committed by him.¹⁴ A difficult distinction may be between an agent and an independent contractor. Should the term agent be given a broad interpretation to include anyone performing carrier's functions, several independent contractors may be considered agents, even stevedores. *Carver on Bills of lading* however concludes that the term agent was “meant” to cover a group of employees of independent contractors, who are not themselves employees of the carrier nor independent contractors.¹⁵ A sub-carrier is thus considered an independent contractor.

The intention with article 4bis(2) was to extend the protection of the carrier to other parties. English courts had earlier held employees of the carrier personally liable in tort for injuries caused by their negligence.¹⁶ There had also been cases where stevedore companies had been held liable for damages caused by negligence, but they were unable to use the limitation and the time-bars in the Hague Rules. With the introduction of the Himalaya clause, see item 3.4.3, these problems were avoided. The proposal put forth was to give more direct protection to employees (servants), agents and independent contractors.¹⁷ Had the last group been included, the Himalaya clause might be considered unnecessary. Independent contractors were however not included. One of the major reasons were that some countries consider that local stevedores, despite the existent of Himalaya clauses, should not be entitled to the limitation system in the Rules. Another reason stated in *Carver on Bills of Lading* is that some of the defences in the Rules are not suitable for stevedore activities, such as negligence in navigation and management. The rules regarding limitation would however still be relevant.¹⁸

The exclusion of independent contractors has however lead to many other who falls into that

14 Martin, Elizabeth A, Law, Jonathan, *Oxford Dictionary of Law*, (Oxford University Press), 2006, 6th ed., *independent contractor*.

15 Carver, paragraph 9-294.

16 *Adler v Dickson* [1951] 1 Q.B. 158 and see item 3.4.3.

17 Carver, paragraph 9-286.

18 Carver, paragraph 9-287.

category are excluded from the Rules and miss out on the exceptions and limitations, although they are still relevant for them. Most importantly for this thesis is the exclusion of sub-carriers, such as the actual carrier when the contracting carrier is a “paper carrier” and carriers on feeder ships and on-carriers. In addition to the Himalaya clause, the sub-carriers are usually bailees (or sub-bailees), as they take possession of the goods, and can rely on the terms in the contract on which the goods were bailed (or sub-bailed) to them.¹⁹ Rules providing a more direct protection might have been useful.²⁰ This solution was provided for in the Hamburg Rule and now in the Rotterdam Rules.

¹⁹ See item 3.2.

²⁰ Carver, paragraph 9-288.

3. The English solution

3.1 Introduction

England has always been a shipping nation where shipowners interests have been powerful and in the first half of the 19th century, the protection provided to the cargo interests in the bill of lading was weak. In 1855 the Bills of Lading Act was passed, with focus on giving the holder of the bill of lading lawful possession of the goods and a cause of action against the carrier in contract. The 1855 Act was however only concerned with who could sue whom, rules were also needed to regulate the substantive rights of those who could sue. At the same time as the Hague Rules were drafted, a bill was introduced to the parliament to enact the Hague Rules; the Carriage of Goods by Sea Act (COGSA) 1924.²¹

COGSA 1992 replaced the Bills of Lading Act and is the legislation now regulating bills of lading. In section section 5(5) it is stated that the provisions of the act shall have effect without prejudice to the application of the Hague-Visby Rules, having the force of law through COGSA 1971 section 1(1) and (2). This means that the United Kingdom must apply the Rules to a bill of lading on international carriages, if it relates to a shipment from a contracting state to the Rules or otherwise stated in article 10,²² stating when the Rules shall apply to the bill of lading. The substantive rights of the parties are however still only regulated in the Hague-Visby Rules and case law, which defines the different concepts and outlines the scope of the sections. The English system will thus differ from the Scandinavian by not having any legislation regulating the carrier's liability for the sub-carrier and the sub-carrier's liability, as this is not dealt with as wide in the Hague-Visby Rules as it is in the NMC.

In English law there are concepts and requirements, such as consideration and privity of contract, that does not impose the same problems under Scandinavian law as they do under English

21 Aikens, paragraph 1.34, 1.42, 1.44-1.46 and 1.50-52.

22 Carver, paragraph 9-076.

law. As the sub-carrier normally is not a party of the contract of carriage, this may impose problems under English law, which may not be familiar to those with a Scandinavian legal background. Therefore will this chapter start with a short introduction to English contract and tort law and other relevant concepts.

Secondly, the identity of the carrier will be discussed, followed by carrier's and the sub-carrier's liability. As these questions are not regulated in the maritime legislation, case law and clauses provided by the market have been important for sub-carriers; the Himalaya clause being one of the most important.

3.2 Concepts in English contract and tort law

For a contract to be legally binding under English law there are five requirements that must be met. First, there must be an intention to contract, it cannot be merely a moral matter. Secondly, the parties must have legal capacity to contract. Thirdly, certain formalities might have to be fulfilled, but normally an oral, written or even a contract inferred from conduct will be sufficient. Fourthly, usually there must be consideration, which will be explained below. Lastly, the object of the contract must not be illegal.²³

English law supports bargains and not gratuitous promises. Therefore a promise which one seeks to enforce must either be contained in a deed (originally a document made under seal, to indicate that the promise is serious) or supported by consideration. Consideration is a compensation for something promised or done. It must not be adequate to the promise given, but it must be of some value and thus sufficient for the promise given. An example of this can be found in the case *Thomas v Thomas*,²⁴ where a widow was granted a house for the cost of £1 per annum and a promise to maintain the house in good and tenantable repairs, was considered as sufficient consideration. Consideration must not be past, it cannot be given before the agreement was made. Without consideration there is no binding contract between the parties.²⁵ For this thesis it is relevant for Himalaya clauses, see item 3.4.3.

23 James, Philip S, Shears, Peter, Stephenson, Graham, *James' Introduction to English Law*, (Butterwoths) 1996, 13th ed., p. 224.

24 *Thomas v Thomas* (1842) 2 QB 851.

25 Poole, Jill, *Textbook on Contract Law*, (Oxford University Press) 2008, 9th ed., pp. 128-129.

One of the major notions that English contract law rests upon is privity of contract. The parties, “privity”, under a contract have a special legal relationship, hence only the parties will be subject to the obligations and confer the rights under the contract. That no rights can be assigned to third parties has led to several problems for the courts, e.g. with Himalaya clauses. This part of the privity of contract has been criticized for many decades. In order to avoid the problem a number of devices and exceptions were invented. These were however at times so artificial and complex that a reform was needed. With the introduction of the Contract (Rights of Third Parties) Act 1999, third parties in certain circumstances may now enforce a contract to obtain a benefit under it, such as the ability to rely on an exemption or a limitation. Pursuant to the act, only such third parties who can be expressly identified in the contract by name, description or particular class, such as independent contractors, may satisfy the test of enforceability.²⁶ However, the 1999 Act has not wholly abolished the doctrine of privity of contract, and some cases might not be covered by the 1999 Act. Also, it might be to the third party's advantage to rely upon the principles developed under the years, rather than to be limited by the 1999 Act.²⁷

There are three ways in which a cargo owner may sue a party with whom he has no contract; in tort, bailment and conversion. The carrier may defend himself with the general rules of causation, remoteness and time-limitation applicable by law, and if the parties have a contractual relationship the carrier is also protected by the special terms in the contract.²⁸

If the carrier through negligence has damaged the goods not belonging to him, the owner of the goods may sue the carrier in tort. The cargo owner must prove that the carrier negligently caused the damage. Should there be a contract between the parties, the injured party may sue either for tort of negligence or for breach of contract.²⁹

When a carrier takes custody of the goods from the shipper to transport them, the carrier is not only liable under contract, but also under bailment. The goods are delivered by one person, the bailor, to another, the bailee, to whom the goods are entrusted, for some purpose, under an agreement. Such a reason may be hiring of the goods, repairs, safe custody or delivery for carriage

26 Poole, pp. 443.

27 Carver, paragraph 7-001.

28 Baatz, Yvonne [*et al.*], [a], *Southampton on Shipping Law*, Institute of Maritime Law, (Informa), 2008, pp. 95-96.

29 Martin, *tort*.

of the goods. When the purpose has been fulfilled the goods are either to be redelivered to the bailor, or dealt with according to the bailors instructions, or kept by the bailee until the are reclaimed. There is no need for a contract between the bailor and bailee. Bailment has thus commonly been used by cargo owners who want to sue the actual carrier with whom he does not have a contractual relationship. Bailment may be both for payment (bailment for reward) or for no reward (gratuitous bailment).³⁰

If a carrier has failed to deliver the goods to which the claimant have certain rights, the carrier may also be liable in conversion.³¹ Conversion is the tort of wrongfully dealing with a persons goods in a way which deny the owner his rights to the goods, e.g. destroying them.³² This concept will however not be dealt with under this thesis.

3.3 The identity of the carrier

This chapter will present the problem of the carrier's identity; is the shipowner the carrier or sub-carrier? The carrier is defined in article 1(a) of the Hague-Visby Rules and "...includes the owner or the charterer who enters into a contract of carriage with a shipper". The contract of carriage must be covered by a bill of lading or similar document of title, cf. article 1(b). Charter-parties normally require the shipowner to sign the bill of lading on behalf of the owner of the vessel. Such bill are normally called "owner's bills". There are also "charterer's bills", which are signed by the charterer himself. The party signing will then be the contractual carrier and the actual carrier will be the owner of the vessel.³³

Sometimes however, it might be difficult for the cargo owner to identify precisely who the contractual party is and whether the bill of lading was signed by the owners or by the charterers. This is mostly due to the many layers of charter-parties that may be involved and the way that bills of lading are signed. This might not always be seen as a problem; the cargo owner has multiple defendants to turn to with his claim. However, the choice of the claimant will be based on a commercial decision to get to the claimant with the most money and most accessible and litigation-

30 Martin, *bailment*.

31 Baatz, [a], pp. 95.

32 Martin, *conversion*.

33 Carver, paragraph 9-100.

efficient jurisdiction. It is important to get the right defendant; if the cargo owner picks up the wrong trail he might after a costly litigation end up with the wrong defendant and then the claim might be barred against the rightful defendant. One solution to this problem is the bill of lading, although it was also part of the problem.³⁴

Identity of carrier clauses are commonly used in charter parties. They have been used, as the name indicates, to identify who the carrier is. An example of such a clause can be found in Conlinebill clause 17:

“The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness.”

An important judgment regarding the identity of the carrier is *The Starsin*³⁵ where the question of the carrier's identity was thoroughly dealt with. The vessel was on a time charter to Continental Pacific Shipping (CPS) and carried timber on the relevant voyage. Several bills of lading were issued and signed by the signing party “As agents” for carrier CPS. On the front of the document the logo and printed words of CPS were visible. The bills of lading also contained an identity of carrier-clause on the reverse, stating that the contract was between the merchant and the owner of the vessel. During the voyage the timber was damaged, allegedly caused by bad stowage. One of the questions in the case was thus if the bills of lading could be considered owner's bills, where the shipowner is considered the carrier, or charterer's bills, where the charterer is the carrier, as article 1(a) in the Hague-Visby Rules states that both the charterer and the shipowner may be the carrier.³⁶ When the bill of lading is unclear, who of them is considered the carrier?

The bills of lading were considered to be charterer's bills of lading for a number of reasons. First, the Court concluded that the language on the front simply spoke of the charterer being the carrier and the words written by the parties took priority from the pre-printed clauses on the

34 Baatz, [a], pp. 104-105.

35 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep 571.

36 Girvin, Stephen, *Carriage of goods by sea*, Oxford University Press, 2011. paragraph 12.09, 12.11 and 19.14.

reverse. Secondly, the bank market had adopted the Uniform Customs and Practice for Documentary Credits (UCP), which were widely used in the business. The UCP are written by a private international organization, not a governmental body, and they try to establish a uniform market practice.³⁷

The UCP were first issued in UCP 500 in 1993 and are now superseded by UCP 600 as of 2007. The rules are prepared by the International Chamber of Commerce (ICC) and are mainly used by bankers and commercial parties in trade financing.³⁸ Pursuant to article 20 of the UCP 600, the bill of lading must indicate the name of the carrier and be signed either by the carrier or master or an agent acting on behalf of one of them. Bills of lading are commonly used by bankers as a security for non-payment by the buyer of the goods as applicant under a letter of credit. Therefore the bank has an interest in who has the physical possession of the goods.³⁹ The use of the UCP to identify the signature in the bill of lading was thus recognized by the House of Lords in *The Starsin*.⁴⁰ The conclusion was that what could be considered good enough for a banker should be good enough for a cargo claimant when he wants to identify the contracting carrier.^{41 42}

In *Southampton on Shipping Law*, Professor Charles Debattista concludes that there are however three things to keep in mind with regards to the identification of the carrier. First, should the vessel be on a bareboat charter-party, then the owner of the vessel will be not be visible to anyone but the bareboat charterer; as the charterer will act as the owner of the vessel. Secondly, as this is a matter of contract; any clause on the front of the bill of lading clearly indicating that the logo or signature are wrong will override them. Thirdly, should there be a situation where the Courts are not successful in identifying the carrier from the logo or signature; there are a number of presumptions that the Court may fall back upon, one of the most important being that the master

37 UCP 600, Foreword by Guy Sebban, Secretary General, International Chamber of Commerce, 2007, pp. 1.

38 http://en.wikipedia.org/wiki/Uniform_Customs_and_Practice_for_Documentary_Credits, accessed 26.05.2011.

39 Baatz, [a], pp. 106.

40 In *The Starsin* the UCP 500 article 23 was used, where it was specifically stated that "...banks will[...]accept a document, however named, which: (i) appears on its face to indicate the name of the carrier...". Lord Bingham of Cornhill stated on page 578 that "it is plain that banks will not examine terms and conditions on the back of the bill of lading". With the introduction of UCP 600 this specific requirement has been removed, but the rules are still important as they require the name of the carrier to be indicated on the bill of lading and in several ways detailing who and in what capacity the bill of lading is signed.

41 Baatz, [a], pp. 106.

42 Some of the speeches made in *The Starsin* may however be disputed, see Aikens, paragraph 7.69.

is deemed to have signed the bill of lading on behalf of the shipowner, rather than the charterer.⁴³

If the vessel carrying the goods is not chartered out, but the goods are trans-shipped on another vessel, the cargo claimant can still sue his contractual party because of the contract. He may also sue the owner of the vessel on which his goods were carried when they were damaged. This can be done either in tort, if the claimant can establish negligence, or if the shipowner has breached his duties as a bailee.⁴⁴ This issue will be further described below in item 3.4.2.

3.4 The liability of the carrier and the sub-carrier

This chapter will present the carrier's liability for the sub-carrier and the sub-carrier's liability. The possible defences will also be presented, with special focus on the Himalaya clause, as this has been the most important tool for sub-carriers to limit their liability under the Hague-Visby Rules. Lastly the question of joint and several liability of the carrier and sub-carrier will be presented.

3.4.1 The carrier's liability for the sub-carrier

For a third party who has suffered a damage, he must prove that the loss was a result of the carriers' breach of his obligations, either under contract, tort or bailment.⁴⁵ Should the relationship between the parties be governed by a bill of lading incorporating the Hague-Visby Rules, the third party must either establish that the carrier has breached the rules relating to the vessel, article 3(1), or the rules relating to the custody of the goods, article 3(2).⁴⁶ If the damage thus is caused by a sub-carrier employed by the carrier, will the carrier be liable for the faults and omissions by the sub-carrier?

Pursuant to article 3(1) must the carrier before and at the beginning of a voyage exercise due diligence to make the vessel seaworthy, properly man and equip the vessel and make the holds cargoworthy. If the third party can establish unseaworthiness, the burden of proof shifts to the carrier, who must prove that he has exercised due diligence. In *The Muncaster Castle*⁴⁷ the House of Lords concluded that a carrier is liable for any servant, agent and independent contractor, to

43 Baatz, [a], pp. 106.

44 Baatz, [a], pp. 106.

45 Baatz, [a], pp. 114.

46 Baatz, [a], pp. 119.

47 *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. (The Muncaster Castle)* [1961]1 Lloyd's Rep. 57.

whom he assigns his obligations under the contract of carriage, that they have exercised due diligence in making the vessel seaworthy. In this case, goods were damaged due to seawater entering the cargo hold. It was found that the vessel was unseaworthy, because a fitter employed by a yard, had negligently failed to secure the nuts on the inspection covers evenly or sufficiently. The carrier is thus not exempted from liability on the ground that he himself has showed due diligence when selecting a competent independent contractor who was to make the vessel seaworthy.⁴⁸

Article 3(2) of the Hague-Visby Rules requires the carrier to properly care for the goods while in his custody. This duty, same as with making the vessel seaworthy, is not delegable.⁴⁹ The carrier will thus be liable for the omissions by the sub-carrier.

3.4.2 The sub-carrier's liability and defences and limitations

Under English law may the cargo interest always claim against the sub-carrier with whom he has no contract, if the claimant can establish either a tort committed by the sub-carrier or a breach of the sub-carrier's duties as a bailee. The cargo interest may thus sue either in tort or bailment of the sub-carrier has failed in his duty of care.⁵⁰

This solution is not remarkable in English law, the big questions is instead what kind of defences the sub-carrier may use. Will he be able to use the defences and limitations set out in the bill of lading?⁵¹

One of the first cases to deal with this question was *The Elder Dempster*,⁵² where a shipment of palm oil had been damaged during a carriage, allegedly by bad stowage. The contracting carrier normally used his own ships for these carriages for this trade, but this time the goods were carried on a time-chartered vessel. The bill of lading however was still the same as when the company used their own ships. The House of Lords touch upon the point that the shipowners were to be equally protected by the bill of lading although not a part of the contract, but this is not their main concern (which was whether it was bad stowage or unseaworthiness). Despite this, their reasoning

48 Baatz, [a], pp. 119.

49 Carver, paragraph 9-147.

50 Baatz, [a], pp. 106.

51 Baatz, [a], pp. 106-107.

52 *Elder Dempster & Co v Paterson Zochonis & Co* [1923] A.C. 522.

has been a source to controversy many years after the judgment.⁵³ The House of Lords looked at many different views to solve the problem. One of them was to see if the contracting carrier acted as an agent for the shipowner to create a contract between the shipowner and the cargo interests.⁵⁴ It was also argued that an implied contract existed between the parties, without the help of an agent, based on the principle of the shipper presenting the goods for carriage and the master accepts them.⁵⁵ Other views presented were the doctrine of vicarious immunity (which since then has been rejected),⁵⁶ restrictions on duty of care⁵⁷ and bailment.⁵⁸

A final answer was given in *The K H Enterprise*,⁵⁹ where it was concluded that the actual carrier could avail himself the defences and limitations in the terms in the bill of lading issued between the carrier and the shipper. The claimants were owners of goods shipped on board the defendants' vessel *K H Enterprise*. The goods were shipped under bills of lading governed by Chinese law, and provided for dispute resolution in Taiwan and a clause entitling the carrier to sub-contract the carriage "on any terms". Following a collision with another vessel, the *K H Enterprise* sank with all its cargo. The claimants commenced proceedings in Hong Kong against the shipowners as bailees. The defendants claimed that the proceedings should be stayed, as any dispute should be settled in Taiwan in accordance with the bills of lading. The question was, among others, whether the terms in the bill of lading from the contracting carrier (bailee) to the actual carrier (sub-bailee) were wide enough to authorize consent to the application of the exclusive jurisdiction clause to the sub-bailment. The Court assumed on the facts in the case that there was no contractual relationship between the parties, only the contract between the bailee and the sub-bailee, and stated:

"... if the effect of the sub-bailment is that the sub-bailee voluntarily receives the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner it can

53 Carver, paragraph 7-005.

54 Carver, paragraph 7-006 *et seq.*

55 Carver, paragraph 7-010.

56 Carver, paragraph 7-015-7-016.

57 Carver, paragraph 7-023 *et seq.*

58 Carver, paragraph 7-027 *et seq.*

59 *Owners of cargo lately laden on board the KH Enterprise v Owners of the Pioneer Container (The K H Enterprise)* [1994] 1 Lloyd's Rep 593.

properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee, but also towards the owner."⁶⁰

3.4.3 The Himalaya clause

This chapter will present one of the solutions provided by the industry to enable servants, agents and independent contractors to enforce limitations and defences protecting the carrier. The introduction of Contract (Rights of Third Parties) Act 1999 has not eliminated the need for the Himalaya clause, although many cases will now be subject to legislation. A further discussion regarding independent contractors and the 1999 Act can be found in item 3.2.

The Himalaya clause derives from the decision in *Adler v Dickson*. In the case a passenger on board the vessel the Himalaya brought an action in tort against the master and the boatswain following a fall due to an improperly secured gangway. On the backside of the ticket it was stated that the company would not be liable for any damage or injury whatsoever. The defendants tried to use this statement in their own defence, but the Court of Appeal concluded that the statement did not extend to include the company's servants or agents. The case led to the innovation of the Himalaya clause, extending the defences of the carrier to his servants, agents and independent contractors.⁶¹

Himalaya clauses are drafted differently, but an example can be found in *Conlinebill* clause 18:

"It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, negligence or default on his part while acting in the course of or in connection with his employment and[...]every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature

⁶⁰ *The K H Enterprise*, pp. 600.

⁶¹ Girvin, paragraph 9.34.

applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting aforesaid...”

Himalaya clauses are normally combined with circular indemnity clauses, where cargo owners promise that no claim shall be made against the carrier's servants, agents or independent contractors and if such a claim is made, they will indemnify the carrier.⁶² These clauses will not be further discussed in this thesis.

In *Scruttons Ltd v Midland Silicones Ltd*⁶³ where a drum was damaged by stevedores, who tried to limit their liability through a Himalaya clause in the bill of lading. They claimed, among other things, that through the agency of the carrier they were brought into a contractual relationship with the cargo interests, making the limitation rules available to them. Although the House of Lords concluded that the stevedores could not avail themselves the same limitations as the carrier, Lord Reid suggested that the agency argument could succeed provided that: (i) the bill of lading must make clear that the stevedores were intended to be protected by the limitation rules; (ii) that the carrier was contracting as a principal and agent of stevedores regarding the limitation rules; (iii) that the carrier had authority to from the stevedores; and (iv) that the difficulties about consideration moving from the stevedores were overcome.⁶⁴ Following *Midland Silicones* clearer, more carefully drafted Himalaya clauses were devised.⁶⁵

*The Eurymedon*⁶⁶ dealt with the third and fourth issues from *Midland Silicones*. A drilling machine was transported from Liverpool to Wellington under a bill of lading, which incorporated the Hague Rules and contained a Himalaya clause. During discharge in August 1964 the drilling machine was damaged due to negligence on behalf of the stevedores. In 1967 the claimant sued the stevedores for the repair costs for the damaged drill. The Hague Rules article 3(6) states that unless any action is brought within 1 year after delivery, the carrier is discharged from all liability for loss

62 Nikaki, Theodora, [a] *Himalaya Clauses and the Rotterdam Rules*, Journal of International Maritime Law, (2011) 17, pp. 22.

63 *Scruttons Ltd v Midland Silicones Ltd* [1961] 2 Lloyd's Rep. 365.

64 *Midland Silicones*, pp. 374.

65 Nikaki, [a], pp. 24-25.

66 *New Zealand Shipping Co Ltd v AM Satterhwaite & Co Ltd (The Eurymedon)* [1975] AC 154 (PC).

or damages. The stevedores sought to rely upon the clause in the bill of lading exempting them from all liability if the claim is not brought within a year. Lord Wilberforce gave the majority's opinion and stated:

*“to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions...”*⁶⁷

It was found that the continuous relationship between the carrier and the stevedores gave the carrier authority to contract on behalf of the stevedores.⁶⁸ As to whether there could be any consideration⁶⁹ between the stevedores and the shipper to make the bill of lading valid between the parties, Lord Wilberforce concluded that:

*“the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the appellants, made through the carrier as agent. This became a full contract when the appellant performed the services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading...”*⁷⁰

The conclusion has been criticized and arguments have been that it is artificial as the wording in the clause seems to create an immediate contract between the parties, not an offer of a unilateral contract by the stevedores. With the drafting of the Hague-Visby Rules, the criticism was not met as article 4bis(1) and (2) only provide servants and agents “not being an independent contractor” the benefit of the exemptions and limitations, as stevedores are normally considered to be just that.⁷¹

With the introduction of the Contracts (Rights of Third Parties) Act 1999, Himalaya clauses

67 *The Eurymedon*, pp. 540.

68 *The Eurymedon*, pp. 539.

69 See item 3.2.

70 *The Eurymedon*, pp. 539.

71 Girvin, paragraph 9.35-9.36.

were now more easily applicable, as there is no need to try to argue for an unilateral or implied contract or anything similar. The impact and scope of the 1999 Act has been further explained above in item 3.2.

How wide is then the Himalaya clause? This was elaborated in *The Mahkutai*,⁷² where the ship was arrested, because the cargo had been damaged during the voyage. The ship was on a voyage charter-party and the bill of lading contained a Himalaya clause, stating “all exceptions, limitations, provisions, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit”, and a jurisdiction and choice of law clause naming Indonesian jurisdiction and law. When the ship was arrested in Hong Kong, the shipowner issued a stay of jurisdiction. The Committee reviewed the case on two alternatives, either they were entitled to a change of jurisdiction under the Himalaya clause or on the principle of bailment on terms. Lord Goff gave the judgment and noted that the shipowner was not trying to invoke an exemption or limitation, but an exclusive jurisdiction clause, which would “involve a significantly wider application of the relevant principles...”.⁷³ He concluded that an exclusive jurisdiction clause could not be an exception, limitation, provision, condition or liberty on the basis of the function of the Himalaya clause, which is to “prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf”.⁷⁴ As the Himalaya clause did not include the jurisdiction clause, the shipowners could thus not be subject to the jurisdiction clause under bailment, as this would be inconsistent with the terms of the bill of lading.

The interpretation of Himalaya clauses may cause problems over who may invoke them. In *The Starsin*, facts in item 3.3. one of the main issues was whether the Himalaya clause included shipowners. The clause in question read that “no servant or agent of the carrier including every independent contractor[...]shall in any circumstances whatsoever be under any liability whatsoever...”. The House of Lords concluded that shipowners must be included as independent

72 *The Mahkutai* (P.C.) [1996] 2 Lloyd's Rep. 1.

73 *The Mahkutai*, pp. 4.

74 *The Mahkutai*, pp. 9

contractors.⁷⁵

In the literature, there are also discussions regarding Himalaya clauses exempting servants, agents and independent contractors from liability and whether this may be void under the Hague-Visby Rules article 3(8). Article 3(8) states that any clause relieving or lessening the carrier's liability provided in the article 3 shall be null and void. This will not be commented on in this thesis.⁷⁶

3.4.4 Joint and several liability?

There is no article in the Hague-Visby Rules that provides a clear message whether carrier and the sub-carrier will be jointly and severally liable for damages occurred to third party cargo interests. *Carver on Bills of Lading* states that such a view however exist, but that it is much clearer dealt with under the Hamburg Rules article 10(4). It has been suggested that the contracting carrier and the actual carrier may be regarded as a joint venture and therefore are jointly and severally liable. However, it is also stated that this may be a controversial application of the agency reasoning and is more a suggestion for a law reform.⁷⁷ This area does not appear to have been satisfactory put into statute and a reform here might be welcome.

3.5 Summary

The problems posed by the Hague-Visby Rules have been solved in English law through case law and contract drafting. The identity of the carrier has within the last ten years seen a solution, making identity of carrier-clauses invalid, should the bill of lading indicate another carrier. Where the sub-carrier is sued in tort, case law has made it clear that he may still avail himself the same defences as the carrier. Here the Himalaya clause was, and is, an important tool, as independent contractors are excluded from the protection of the Hague-Visby Rules article 4*bis*(2). The Contracts (Rights of Third Parties) Act 1999 has made the applicability of the Himalaya clause easier.

⁷⁵ See also Nikaki, [a], pp. 38.

⁷⁶ See Carver, paragraph 9-191 *et seq.* and *The Starsin*.

⁷⁷ Carver, paragraph 9-101 and footnote 78-82.

4 The Scandinavian solution

4.1 Introduction

The Scandinavian countries have adopted similar maritime legislation and this thesis will have the main focus on the Norwegian legislation, the NMC. The Hague-Visby Rules were incorporated into the legislation in 1973. In section 251 the Hague-Visby Rules are defined as the Convention and a Convention state is a state bound by the Hague-Visby Rules. A state does not have to have accepted the protocol of 1979 to be considered a Convention state as the protocol only regulates the calculation unit. Although Norway signed the Hamburg Rules in 1978, they have never ratified the rules and neither have the other Scandinavian countries. The Hamburg Rules are not in force as of today, but the Scandinavian legislation is influenced by them.⁷⁸

The Hamburg Rules were designed to replace the Hague-Visby Rules and to give a solution to the problem when more than one carrier is involved. First, whether the carrier remains liable while the goods are in the custody with another carrier and secondly, the question of the responsibility of a carrier with no contractual relationship with the shipper.⁷⁹ Article 10(1) states that when an actual carrier performs part of the carriage, the carrier remains responsible. The actual carrier will be responsible for the part of the carriage that he performs under the same provisions as the carrier pursuant to article 10(2). An actual carrier is the person to whom the performance or part of the performance has been entrusted by the carrier according to article 1(2).

The rules regarding the carrier's and sub-carrier's liability is regulated in chapter 13 of the NMC, which is more or less based on the Hamburg Rules. The chapter is almost entirely mandatory according to section 254 and contractual provisions deviating from the chapter will not be valid. The contract will however remain valid.

This chapter will start with defining relevant concepts. Secondly the liability of the carrier for

⁷⁸ NOU 1993:36, pp. 14-15.

⁷⁹ Selvig, Erling, *Through-carriage and on-carriage of goods by sea*, The American journal of Comparative Law, 27/1979, pp. 369.

the sub-carrier and the sub-carrier's liability will be discussed. As an example of the problems imposed in Scandinavian law, ND 2003:83 will be presented.

4.2 Definitions of the relevant concepts

The carrier is defined in NMC section 251 as “the person who enters into a contract with a sender for the carriage of general cargo by sea”. Who the carrier really is must be decided by ordinary contract rules and the carrier will normally be considered to have signed the bill of lading, unless otherwise proved.⁸⁰ Normally bills of lading may contain identity of carrier clauses⁸¹ to identify the carrier. These may be void as it contradicts NMC section 285, as they do not fulfil the requirements for exemption of liability given in the second paragraph. Pursuant to section 252 and 254 will section 285 in most cases be mandatory.⁸² *Scandinavian Maritime Law* also states that identity of carrier clauses also raises questions regarding interpretation and asks the question how clear the language on the front of the bill of lading must be to override the clause on the reverse.⁸³ Should the master sign the bill of lading NMC section 295 states that a bill of lading signed by the master of the ship carrying the goods is regarded as having been signed by the carrier, making a time charterer bound by the master's signature.⁸⁴ Under Norwegian Maritime Code 1893 no 01 (NMC 1893), the identity of the carrier could be more difficult to ascertain. In ND 1997. 302 the bills of lading indicated one carrier, who was not the carrier, making the claimants choose the wrong defendant. The Norwegian Supreme Court attributed this to the wrong defendant and made him liable, as the ownership structure of the vessel was complicated and easily could lead to misunderstandings.

The transport contract is not defined in the NMC. The term does however have the same meaning as in the Hamburg Rules article 1(6), pursuant to the NOU 1993:36.⁸⁵ The carrier undertakes against payment of freight to transport the goods by sea from one port to another. Should the contract include more than only a sea carriage, the NMC will only be applicable to the

⁸⁰ NOU 1993:36, pp. 19.

⁸¹ See item 3.3.

⁸² Falkanger, p. 357.

⁸³ Falkanger, p. 357.

⁸⁴ Falkanger, p. 358.

⁸⁵ NOU 1993:36, pp. 19-20.

the sea leg of the voyage.

The sub-carrier is also defined in section 251 as “the person who, pursuant to an assignment by the carrier, performs the carriage or part of it”. The NMC 1893 did not define such a sub-carrier; the definition was taken from the Hamburg Rules article 1(2) “actual carrier”. The sub-carrier is part of the second chain of the contract.⁸⁶ The sub-carrier may perform the whole carriage, for example when a “paper carrier” has signed the transport document.⁸⁷ He may also just take part of the transport, whilst the contractual carrier takes the rest. The definition may also include several sub-carriers contracted by the carrier. This does not mean, however, that all of them will be liable, see item 4.3.2.

4.3 The liability of the carrier and the sub-carrier

In this chapter the carrier's liability for the sub-carrier will be presented, starting with a historical overview of how the liability has developed. Secondly, the sub-carrier's liability will be discussed, followed by an example with the case ND 2003.83 to show that although the rules regarding the sub-carrier's liability may seem simple, they can still impose problems. Fourthly, a discussion about the sub-carrier's possibility to limit his liability will be presented, concluding with the carrier's and sub-carrier's several and joint liability.

4.3.1 The carrier's liability for the sub-carrier

The carrier's liability has become more onerous during the past century. The allocation of liability between the carrier and the sub-carrier was not solved in NMC 1893 until the incorporation of the Hague-Visby Rules in 1973 with section 123.⁸⁸ Before 1973, case law was the primary legal source to solve the problems arising when the master of the ship signed the bill of lading. Already in ND 1903.331 the Supreme Court decided that if the master signed the bill of lading he could only bind the performing carrier, not the contracting carrier, as the master only signed on behalf of his employer. This meant that the carrier never would be liable unless he signed a bill of lading himself. A similar question was raised in ND 1955.81 and ND 1960.349, where the principle was

86 NOU 1993:36, pp. 20.

87 Lover og kommentarer, Gyldendal Rettsdata, www.rettsdata.no printed 05.19.2011, *Sjøloven § 251 Note (426)*.

88 Lov 8 juni 1973 nr. 38.

upheld.

In the Norwegian case ND 1955.81 the question was whether the carrier, who had time chartered the vessel *Lysaker*, could be considered to be responsible under the bill of lading for the cargo. The question was answered negatively, as the bill of lading was signed by the owner of *Lysaker*. The Supreme Court stated that for the carrier to become liable he must in the particular case have acted in a way which can be considered as he takes over the responsibility under the bill of lading. That the bill of lading was a standard form with the carrier's logos and that the ship was a part of the carrier's line trade could not lead to such a result. The Supreme Court also notes that it could be considered reasonable if the result would be the contrary, but the Court does not elaborate this sentence further. In the Swedish case ND 1960.349 the bill of lading, which contained some distinctive marks of the carrier, was signed by the broker "for the master". The Supreme Court concluded that, although the circumstances, the agent could not be considered to have signed the bill of lading on behalf of the carrier. Neither did the bill of lading mention anything which could make the cargo owner believe that the ship was owned by the carrier. The carrier could thus not be considered to be liable under the bill of lading.

These cases were however not followed in Denmark. In ND 1966.352 was the claimant successful in pursuing the contractual carrier, although time chartered ships were used and the bill of lading did not mention the contractual carrier. The contractual carrier was considered as having accepted liability also for goods shipped on chartered vessels and the bill of lading was considered in favour of the third party, the cargo interest.⁸⁹

With these cases a new presumption rule was established, which could be only rebutted depending on the circumstances in each case. If it was clear that the bill of lading was signed on behalf of the carrier he could be liable. This could be for example if the carrier's bills of lading were used or if the name of the ship indicated that it belonged to the carrier. One example of this could be found in ND 1973.15, where the carrier was identified with the performing carrier. The presumption was however heavily debated. Critics asked why there should be a difference in the carrier's liability depending on whether he used his own or chartered ships; and if it is reasonable

⁸⁹ The case was appealed, but the parties reconciled days before the proceedings in the Danish Supreme Court, Grönfors, Kurt, *Sjölagens bestämmelser om godsbefordran*, (under medverkan av Lars Gorton), PA Norstedt & Söners förlag, Stockholm, 1982, pp. 185.

for the cargo owner to have to relate to a third party.⁹⁰ This third party could be totally unknown to the cargo owner and with a foreign ship and performing carrier.⁹¹

With the incorporation of the Hague-Visby Rules this position was made statutory. In NMC 1893 section 123 it was concluded that if the “carriage was wholly or partly performed by another than the carrier; the carrier remains liable pursuant to the rules in this chapter, as far as possible, as if he had himself performed the carriage; this also applies after the bill of lading has been signed.” (my translation). The preparatory works NOU 1973:11 concluded that it was unreasonable that the carrier, by using third party tonnage, could avoid the contractual liability towards the cargo owner. The Scandinavian countries agreed that this was a position that ought to be prevented. It was also pointed out that there was no uniformity between the countries which also should be avoided⁹² and the rule should be statutory as to avoid any misunderstandings.⁹³ As the Hague-Visby Rules did not regulate this question; this was a special Scandinavian invention, which strongly influenced the Hamburg Rules in 1978.⁹⁴

Today, the carrier is liable for the sub-carrier towards a contracting party “as if the carrier had performed the entire carriage him- or herself” pursuant to NMC section 285. This means that the owner of the goods always can pursue the carrier, although the damage might have occurred while the goods were in the custody of the sub-carrier. The carrier is liable for the sub-carrier under all the rules in chapter 13. This means that the carrier is also liable for the sub-carrier's possible great liability regarding e.g. deck loading in section 284 and wrongful delivery to a person without production of a bill of lading.⁹⁵ The carrier will also be liable for the sub-carrier when he wilfully or recklessly with intent damages or loses the goods, and the carrier will also lose his right to limit his liability pursuant to section 283.

The carrier may only exempt himself from the liability if he expressly name the sub-carrier liable for any losses occurring on that particular part of the voyage, according to section 285 second paragraph. In the preparatory works NOU 1993:36 it was pointed out that the cargo owner

90 Sejerstad, pp. 28-29 and footnote 45.

91 Falkanger, p. 357.

92 NOU 1972:11, pp. 19.

93 Ot.prp.nr. 28, 1972-73, pp. 13.

94 Grönfors, pp. 185.

95 Falkanger, pp. 356.

must know to what extent sub-carriers are used and who he will hold liable, in case of a loss. If these requirements are not met, the carrier will still be liable for any losses caused by the sub-carrier.⁹⁶ The burden of proving that the loss is attributable to the sub-carrier rests on the carrier. The reservation is not valid if the sub-carrier cannot be brought before a court in section 310, section 285 third paragraph.

4.3.2 The sub-carrier's liability

The sub-carrier's liability is covered under NMC section 286 where it is stated that he is only liable for the “part of the carriage that he or she performs” and under the same rules as the carrier. This includes both the rights and the liabilities. The liability cannot be lessened by contract.⁹⁷ As stated in ND 2003.83, item 4.3.3, the carrier cannot be relieved of his liability by sub-contracting with another sub-carrier, indirect possession of the goods should be enough. Section 282 and 283 of the NMC are applicable also on someone the sub-carrier is responsible for. Through section 286 the injured party will have the possibility of a direct action against the sub-carrier, as long as he can prove that the good were in the custody of the sub-carrier when the damage or delay occurred.⁹⁸ If several sub-carriers are involved will only the sub-carrier who “has the goods in his custody” (my translation) be liable under section 286 during the part of the carriage that he performs.⁹⁹

NMC 1893 stated that the sub-carrier was liable for his part of the carriage under the same rules as the carrier. The preparatory works pointed out that “intermediate time-charterers” (my translation) or time-charterers who themselves did not perform nor contract for the carriage could not be liable as sub-carriers.¹⁰⁰

Pursuant to section 286, second paragraph the sub-carrier will not be liable for any increased liability that the carrier might have taken on. The same occurs when the carrier has disclaimed any rights. The sub-carrier will only be liable if he in writing has given his consent.

96 NOU 1993:36, pp. 40.

97 NOU 1993:36, pp. 40.

98 Lover og kommentarer Gyldendal Rettsdata www.rettsdata.no printed 05.19.2011, *Sjøloven § 286 note (530)*.

99 NOU 1993:36, pp. 40.

100NOU 1972:11, pp. 19.

4.3.3 An example: ND 2003.83 (FH Linda)

In the Finnish Supreme Court case ND 2003:83 the rules regarding the sub-carrier's liability were discussed. This case shows that although the Scandinavian system has tried to simplify the sub-carrier's liability, difficulties in determining who can be considered a sub-carrier and his liability may still arise. The case was treated differently by all three instances and their judgments also differed. The case has been criticized by Peter Wetterstein in an article in *Tidsskrift utgiven av Juridiska Föreningen i Finland*.¹⁰¹ Some of his comments will follow at the end of the chapter. In the case the Norwegian term “reder” is used as there is no equivalent English term. The “reder” is the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charterer and will often typically be the sub-carrier or performing party. Time charterers and voyage charterers are not considered to be a “reder”.¹⁰² As both parties were involved in the running of the vessel, this was one of the questions discussed in the case.

Engship and Langh Ship, had signed a time charter party Baltime 1939 as carriers, with the formulation “REDERI AB ENGLISHIP, Turku, and jointly OY LANGH SHIP, Piikkiö”, with Jit-Trans as charterer. Jit-Trans had a contract of affreightment with Rautaruukki Oy, who had sold steel wares to a buyer in Germany under CIF-terms. During the disputed voyage, the vessel Linda had been used, which was owned by Langh Ship and managed by Engship. The master of the vessel signed several bills of lading with the text “Bill of lading to be used with charter-parties” and “All terms and conditions, liberties and exceptions of the Charter party, dated as overleaf, are herewith incorporated”, relating to the above-mentioned charter party. At the port of destination, damages were found on the cargo and it was ascertained that they came about during the sea voyage. The cargo owner was compensated through his insurance, and the insurer, Sampo, sued Engship for compensation.

The important question in the case was whether Engship could be held liable for the damages as a performing carrier, section 123, second paragraph, Finnish Maritime Code (167/1939) or sub-carrier, with today's terminology in chapter 13, section 1, point 2 Finnish Maritime Code

¹⁰¹Wetterstein, Peter, *Den svängiga dansen med Linda – HD 2003:98*, JFT 4-5/2005 s. 676-689.

¹⁰²The Norwegian Maritime Code 24 June 1994 no. 39 with later amendments up to and including Act 26 March 2010 no. 10, Unofficial Student Edition, Edition for the courses JUR 1401/5401 Maritime Law, Sjørettsfondet 2010.

(674/1994). In this case the old Finnish Maritime Code was applicable, but as only linguistic and editorial changes were intended,¹⁰³ both sections were used by the Finnish Supreme Court to illustrate the current legal situation.

Sampo claimed that Engship were liable as a sub-carrier through the charter party, where they had accepted, together with Langh Ship, to be liable for all ships used under the charter party, not only their own. Secondly, Sampo claimed that Engship were liable reder of the vessel, because of the managing functions they had. Furthermore, Sampo claimed that whether or not Engship were in physical possession of the goods was irrelevant to the question of whether or not he could be considered a sub-carrier.

Engship on the other hand claimed that they could not be considered to be liable as sub-carrier and that they were the wrong defendant. They had not entered into any contract with neither Jit-Trans nor Langh Ship, hence, they were not bound by the bill of lading or the charter party for the disputed voyage. Moreover, Engship claimed that the responsible sub-carrier is the reder of the vessel, and as Engship were not the reder they could not be considered the responsible sub-carrier. Finally, Engship claimed that they could not be considered liable as sub-carrier, as they had did not have physical possession of the goods, neither did they actually performed the disputed voyage.

The Finnish District Court concluded that Engship not could be considered a contracting carrier and asked whether he could be seen as reder or performing carrier for the vessel. With reference to the circumstances in the case, the managing functions and the economic risks, Engship were considered the correct defendant in the case.¹⁰⁴

The case was appealed to the Finnish Court of Appeal,¹⁰⁵ which took a different approach to the case. Contrary to the District Court, they concluded that Langh Ship and not Engship were to be seen as the reder, since they manned and equipped the vessel, as well as taking the economical risks. They further concluded that Engship not could be seen as the performing carrier as they never had physical possession of the goods. Neither could they be seen as contracting carrier as the bill of lading was signed by the master of the vessel, who was employed by Langh Ship. Regarding

¹⁰³Quoted from Wetterstein, pp. 681 “Finnish preparatory works of the new Maritime Code. Reg.prop. 1994:62 till Riksdagen med förslag till sjölag och ändringar därtill hörande lager s. 49.”

¹⁰⁴Wetterstein, pp. 677.

¹⁰⁵ND 2000.169.

the writing in the charter party “REDERI AB ENGSHIP, Turku, and jointly OY LANGH SHIP, Piikkiö”, the Court of Appeal discussed the meaning of the word “jointly”. This was done after listening to witnesses from the parties, describing their intentions with the wording. The conclusion was that the two carriers intended to be jointly liable to secure the charterer with sufficient transportation capacity. The Court of Appeal concluded that although the wording in itself could be seen as they were to be jointly liable; as this was a wording in a charter party, a third party was not entitled to draw such conclusions from it.¹⁰⁶ The Court of Appeal thus reached the contrary conclusion to what the District Court did.

The case was appealed and the Finnish Supreme Court took it up. It started by stating that Engship could not be seen as the contracting carrier, with reference to the bill of lading. Jit-Trans was the contracting carrier. Nor was he bound by the master's signature, who was employed by Langh Ship. The Supreme Court then conclude that a sub-carrier according to the legislation does not have a contractual relationship with the cargo owner, but all liability arises from law.

The Supreme Court then deals with the question of what a sub-carrier is. They conclude that the sub-carrier only is liable for his part of the carriage when the goods are in his custody. When a sub-carrier never received the goods for his part of the carriage, he cannot be responsible for them. Neither can he be responsible when the damage already had occurred or if the damage occurred after he had delivered the goods in a contractual condition.

With regards to whether Engship was sub-carrier or not, the Supreme Court drew the following conclusion. The sub-carrier cannot be relieved from his responsibilities by contracting with another sub-carrier. Hence, the sub-carrier does not need to have direct possession of the goods, indirect possession is sufficient. The rules are there to canalize the liability, with the result of lesser recourse claims. This makes it easier for the cargo owner to direct his claim against the liable party. How the involved carriers and sub-carriers choose to organize their internal contractual relations should not affect the cargo owner. The Supreme Court concludes that Engship were liable for the transport and that Langh Ship's liability also can be attributed to Engship. The parties intentions with the wording in the charter party was not decisive against a third party.

¹⁰⁶One judge was dissenting and concluded that Engship was to be seen as performing party, and that the third parties' belief were most important. See ND 2000.176 *et seq.*

In his article, Peter Wetterstein discuss the Supreme Court's judgment. With regards to the physical possession of the goods he interprets the old and the new Finnish Maritime Code and presumes that the goods have to be in the physical possession of the sub-carrier for him to be liable. Here the Supreme Court discuss whether this also is true when the sub-carrier himself has sub-contracted his part of the voyage. Wetterstein finds this puzzling and asks whether the Supreme Court suggests that Engship has given an assignment to Langh Ship, who did have the goods in their possession? Or if Langh Ship possessed the goods on behalf of Engship?¹⁰⁷ Wetterstein also discuss the advantage for the cargo owner, having a direct action against both the carrier and the sub-carrier. In this case there was a named contracting party and a specific promise of carriage from the master of the vessel. Should not that be enough? By ignoring the intentions of the parties, the Supreme Court creates more recourse rounds. More legal insecurity is created for different charterers, who together have committed themselves to supply a client with sufficient transportation capacity. Shall they then be liable for cargo damages on other carriers' vessels?¹⁰⁸

There were also a number of questions that the Supreme Court did not go into, which Wetterstein thought should have been discussed. For example the discussion on Sampo's good faith in believing that Engship was the correct defendant and the possible misleading behaviour from Engship, when accepting a time extension.¹⁰⁹

This case shows that although the sub-carrier's liability is regulated, the application of the rules may still be difficult. The most important notion coming from the case is that the sub-carrier cannot escape liability by contracting away his duty to another party. As the court concludes, indirect possession will be sufficient. One may then ask why the preparatory works of the NMC focuses intently on possession, whilst the law text gives more weight to the part of the carriage that the sub-carrier performs. Here indirect performance must be meant as well. To see whether Engship performed any part of the voyage is difficult, the Supreme Court concluded that it was Langh Ship who was reder. They also conclude that Jit-Trans was contractual carrier. However, by writing the charter party in the way they did, Engship were assumed to have accepted liability. The Supreme Court's reasoning seems reasonable, but the application of it to the specific case is

¹⁰⁷Wetterstein, pp. 682.

¹⁰⁸Wetterstein, pp. 683 and footnote 14.

¹⁰⁹Wetterstein, pp. 686-687.

somewhat strange, which was also pointed out by Wetterstein, to which I agree. Engship did not perform any part of the carriage nor did they assign any part of the performance to Langh Ship. How they can be liable as sub-carrier is thus hard to see.

4.3.4 Defences and limitations

Pursuant to NMC section 286 will the sub-carrier be liable under the same rules as the carrier, section 282 and 283 applying correspondingly. Section 282 states that all defences and limits of liability apply to those for whom the carrier is responsible, as long as they can show that they acted to fulfil their duties in the carrier's service or to fulfil the assignment. The sub-carrier can thus avail himself the same exemptions in section 275 and 276 and the unit limitation rules in section 280 and 281 as the carrier may. Should the liable person wilfully or recklessly and with knowledge damage the goods, the right to limit liability will lapse, section 283.

Himalaya clauses¹¹⁰ are used in Scandinavian countries, although not as important for sub-carriers as they are already protected by law. The scope of the clause may still be disputed. In ND 2007.447, a carrier undertook to transport a container under a bill of lading governed by English law, containing a Himalaya clause stating that "...no servant or agent, including independent sub-contractor[...]be under any liability whatsoever[...]every exception, limitation, condition and liberty herein contained[...]shall also be available and shall extend to protect every such servant...". The last part of the carriage was performed by a sub-carrier on a vessel owned by a third party. At the port of destination, the vessel capsized and the content of the container was stolen. The cargo interests claimed damages from the sub-carrier and the owner of the vessel in Denmark. The defendants claimed that the matter should be dismissed with reference to the Himalaya clause and the jurisdiction clause stating English law in the bill of lading. The Danish Supreme Court concluded that the defendants were not parties of the bill of lading and could only claim English law and jurisdiction, if the Himalaya clause stated so, and that the clause gave the defendants right to claim all rights that the carrier had. However, the jurisdiction clause was not considered to be included in the scope of the Himalaya clause and the case was referred back to the lower courts. The cargo interests could thus go to court in Denmark, regardless of the jurisdiction clause in the

¹¹⁰See item 3.4.3.

bill of lading.

4.3.5 Joint and several liability

The carrier and the sub-carrier are jointly and severally liable under NMC section 287 for the part of the voyage the sub-carrier performs, unless the carrier has exempted himself pursuant to section 285 second paragraph. Likewise the sub-carrier will not be liable for parts of the carriage that he has not himself performed nor where the carrier has increased his liability.¹¹¹

The total liability will however not exceed the limit of liability set out in section 280, according to section 287, second paragraph, unless the contrary follows from section 283. This means that one of the parties loses his right to limit his liability if the loss was caused wilfully or through gross negligence and with knowledge that the loss would occur. Should the sub-carrier commit such an act the carrier will also lose his right to limit his liability.¹¹²

The third paragraph of section 287 concludes that the carrier and the sub-carrier may conclude a recourse agreements between themselves. This is superfluous according to NOU 1993:36 as this agreement will not be covered by NMC chapter 13.¹¹³

4.4 Summary

The identity of the carrier has been solved by statutory legislation. The Scandinavian rules have also given the sub-carrier statutory protection and liability, providing a solution to the problems posed in the Hague-Visby Rules. Although the rules may seem simple, the application of them may still be somewhat complicated, which can be seen in ND 2003.83.

¹¹¹Lover og kommentarer Gyldendal Rettsdata www.rettsdata.no printed 05.19.2011, *Sjøloven § 286 note (533)*.

¹¹²NOU 1993:36, pp. 40.

¹¹³NOU 1993:36, pp. 40.

5 The solution in the Rotterdam Rules

5.1 Introduction

There has been a great development from the Hague Rules to the Rotterdam Rules. The Rotterdam Rules does not only cover the sea leg of a carriage of goods, but the whole chain, from door-to-door, pursuant to article 1(1) defining the contract of carriage. The rules are a result of inter-governmental negotiations which took place between 2002-2009. The negotiations were held by the United Nations Commission for International Trade Law (UNCITRAL) and their Working Group III 2002-2008: Transport Law¹¹⁴ and the preparatory works and a preliminary draft of the rules were presented by the Comité Maritime International (CMI).¹¹⁵

As the Rotterdam Rules covers the whole carriage, conflicts with other international transport conventions are possible. These other convention may prevail over the Rules where they apply to multimodal transport, cf. article 82. Where the Rotterdam Rules are applicable to liability issues, other conventions might however solve the issue due to the “limited network system”¹¹⁶ or “modified network liability system”, which will apply if no other liability system is applicable, or if the occurrence of the damage cannot be decided, cf. article 26.¹¹⁷ These rules are complicated and this thesis will not discuss them any further, but will deal with the sub-carrier's liability as if the Rotterdam Rules are applicable.¹¹⁸

This chapter will start with relevant definitions, with focus on the maritime performing parties, followed by the liability issues.

114http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html, accessed 27.05.2011.

115<http://www.rotterdamrules2009.com/cms/index.php?page=general-information>, accessed 27.05.2011.

116Berlingieri, Francesco, [b], *Revisiting the Rotterdam Rules*, [2010] LMCLQ 583, pp. 586.

117Eftestøl-Wilhelmsson, Ellen, *The Rotterdam Rules in a Multimodal Context*, Journal of International Maritime Law, (2010) 16, pp. 276.

118For a further discussion regarding conflicting conventions, see Berlingieri, Francesco, [b], pp. 585-589 and Diamond, Anthony QC, *The Rotterdam Rules*, [2009] LMCLQ 445, pp. 453-457.

5.2 Definitions in the Rotterdam Rules

First, the concepts of carrier and contract of carriage will be examined, as these are important for the definition of performing party and maritime performing party. Secondly a discussion on performing party and maritime performing party will follow. Due to the possible difficulties with the interpretation of these new terms, some countries might think twice before ratifying the Rotterdam Rules. On the other hand, these definitions can be considered as required since the Rotterdam Rules concerns multimodal transport, which is a difference compared to the earlier conventions.¹¹⁹

5.2.1 Definition of carrier and contract of carriage

To be able to define the concept of maritime performing party one must first look at the concepts of carrier and contract of carriage. A carrier is defined in article 1(5) as a person who enters into a contract of carriage with a shipper. A contract of carriage according to article 1(1) is a contract where a carrier against payment undertakes to transport goods from one place to another. The contract may include different modes of transportation in addition to the sea carriage. The carrier is thus responsible according to the door-to-door-principle.¹²⁰ Two things are important to note; first that the Rotterdam Rules does not only cover sea carriage, but also covers carriages where other types of transportation are used. A sea carriage must however be included, although it does not have to be the dominant leg.¹²¹ Secondly, the term bill of lading is nowhere to be found in the Rotterdam Rules, as the wider concept of transport document is used in article 1(14), which includes an electronic transport record.¹²²

5.2.2 Definition of performing party and maritime performing party

Three principles were to be considered by the Working Group while drafting the definition of performing party in article 1(6). First, that carriers and sub-contractors should have joint and several liability. Secondly, both the carrier and sub-contractors should be vicariously liable for their employees and thirdly, that the protection of the Himalaya clause should apply to the

¹¹⁹Carr, pp. 307.

¹²⁰Carr, pp. 306.

¹²¹Falkanger, pp. 285.

¹²²Baatz, Yvonne, [et al.], [b] *The Rotterdam Rules: A practical annotation*, London, (Informa Law) 2009, pp. 1.

employees as well as the employers. It was also important for the definition to function with the other articles in the Rotterdam Rules.¹²³

The term performing party is subordinate in the Rotterdam Rules and its major function is to help to define the narrow term maritime performing party. The performing party is broadly defined and includes all other carriers such as road, rail and air. Should these other transport modes be included in the definition of maritime performing party, this would lead to conflicts with other transport law conventions such as the Convention on the Contract for the International Carriage of Goods by Road¹²⁴ and Convention on the Contract for the Carriage of Goods by Inland Waterway.^{125 126} A performing party is defined in article 1(6)(a) as a person other than the carrier who performs or undertakes to perform the carrier's obligations under a contract of carriage. It is important to separate the two, as other conventions will prevail over the Rules outside of the sea carriage, cf. article 26 and 82 and item 5.1.

The terms performing party and maritime performing party both depends upon the definition of the carrier, as they must be “a person other than the carrier”. This presupposes an independent contractor or an agent. Any employee, master or crew of the carrier or the performing party does not create a separate performing party.¹²⁷ During the drafting this was explicitly stated in the definition of the performing party,¹²⁸ but this was subject to discussion and was later removed. The reason for using the broad definition was to avoid the privity of contract problem,¹²⁹ where the Himalaya Clause only could be used by sub-contractors, not by parties further down the contract chain. But the inclusion of the employee in the term performing party, and not in the maritime performing party, could lead to that those employees would be liable under the Rotterdam Rules. The Working Group however stated that it was unlikely that the cargo interests would sue an employee.¹³⁰ However, to avoid to put the liability issues directly into the definitions the notion of the employees was removed. Instead this is dealt with in specific articles. The definition could still

123A/CN.9/621, pp. 29.

124(CMR) - (Geneva, 19 May 1956) United Nations.

125(CMNI) - (Budapest, from 25 September to 3 October 2000) United Nations.

126Smeele, pp. 80-81 and footnote no 84.

127Smeele, pp. 81 and footnote no 90.

128For example A/CN.9/WG.III/WP.81, pp. 7.

129See item 3.2.

130A/CN.9/621, pp. 28.

be seen as ambiguous as nothing is said about employees and they do perform the carrier's obligations under the contract of carriage, making them performing parties. Hence, they would also be considered maritime performing parties and liable under the Rotterdam Rules.¹³¹

The phrase “undertakes to perform” was included to explicitly state that the carrier always is liable for performing parties and the exclusion of said term could break the linkage of contracts between the parties.¹³² Both sub-contractors that actually perform the obligation and sub-contractors who only undertakes to perform, but then delegates the performance to another, are thus included.¹³³ Persons acting upon request of the shipper are explicitly excluded according to article 1(6)(b).

The performing party must perform any of the carrier's obligations under the contract of carriage, which means that the activities must be directly related to the cargo-handling or the carriage under the contract. Different activities are listed in article 1(6)(a): “the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods”, to the extent that it is done at the carrier's request or under his supervision. The list is probably not meant to be exhaustive, as the Working Group considered to include the phrase “among others” or “inter alia”.¹³⁴ The definition should include different actors such as stevedores, warehouse providers and other transport operators.¹³⁵ The definition does not, however, include such activities that only indirectly related to the carriage, for example repairs and packing of the goods or their documentation.¹³⁶ In his article *The Maritime Performing Party in the Rotterdam Rules 2009*, Smeele writes that contractors who only assist in the obligations undertaken by others seems to be excluded, such as port pilots and tugs assisting with the mooring of the vessel. Should these sub-contractors have anything to do with the cargo worthiness, which is the carrier's obligation, then they should fall within article 1(6)(a).¹³⁷

131Fujita, Tomotaka, *The comprehensive coverage of the new convention: performing parties and the multimodal implications*, Texas International Law Journal 44 (2009), pp. 370.

132A/CN.9/544, pp. 13.

133Smeele, pp. 81 and A/CN.9/WG.III/WP.21, pp. 14.

134A/CN.9/544, pp. 13.

135Carr, pp. 309.

136Berlingieri, Francesco, [c] *The Rotterdam Rules: the “the Maritime Plus” Approach to Uniformity*, EJCCL 2009-2 (2009), pp. 54-55.

137Smeele, pp. 81-82 and footnote 99.

A maritime performing party is defined in article 1(7). The Rotterdam Rules provides the cargo interests with a right to direct action against the maritime performing party, but not against any other performing party, who are not liable under the Rules, nor can they avail themselves the defences or limits of liability under the Rules. They will thus be dealt with under the applicable national law.¹³⁸ Claims against the performing parties must be made in tort as no contract between the parties exist, if the cargo interests wants to sue the them instead of the carrier.¹³⁹

A person who performs or undertakes to perform the carrier's obligations “during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship” is a maritime performing party. Also in-land carriers can be included here as long as they perform their services exclusively in the port area. The in-land carrier must have been involved during the maritime stage of the carriage.¹⁴⁰ This confirms that carriers frequently performs parts of their obligations under a contract of carriage through third parties and that this may be done with a “pure” maritime party or other parties, since different modes of transportation may be used.¹⁴¹

One issue during the drafting was how the inclusion of rail carriers in the maritime performing party definition should be handled. The United States of America, by request of the Association of the American Railroads, expressed direct concern that while performing services within a port area, the ultimate purpose for this would always be to transport the goods in or out of the port. They were afraid that they despite of this might be considered a maritime performing party and therefore suggested an inclusion of a sentence specifically excluding rail carriers from the definition, considering them to be a non-maritime performing party.¹⁴² This was considered by the Working Group in its 19th session and they stated that this would be unnecessary since “such inland carriers were almost invariably classified as such and not covered by the definition of maritime performing party, thus falling outside of the scope of the draft convention.”¹⁴³ In response to this it was stated that the courts in that case still had to make a case-to-case analysis and that the express

138Diamond, pp. 489-490.

139Berlingieri, Francesco, [b], pp. 612.

140Smeele, pp. 82.

141Batz,[b], pp. 3.

142A/CN.9/WG.III/WP.84.

143A/CN.9/621, pp. 29.

exemption would clarify the situation and hence reduce litigation in that matter. The Working Group then raised concerns that if the rail carriers were to be granted an express exemption, others might want the same. A similar suggestion also came from the International Road Transport Union to include road transport in the same exemption.¹⁴⁴ There were fears of the exemptions being drafted too broadly as to cover carriers that should be considered maritime performing parties.¹⁴⁵ These proposals were not included in the finalization of the Rotterdam Rules, it is merely stated that an in-land carrier is considered a maritime performing party as long as he performs his duties exclusively within the port area.

The concept of port was also under discussion as an in-land carrier can be considered a maritime performing party under article 1(7), if he performs his services inside the port area. There were two different approaches to the concept, the functional and the geographical. The latter was chosen because it is easier to use. It was noted that the term port was not defined in the Hamburg Rules, where the responsibility is based on the port-to-port-principle through article 4, which states that the carrier is liable for the goods from the port of loading to the port of discharge. The term port can still however impose difficulties, but the Working Group decided that national courts and administration should define the term, since the definition differs from different geographical areas, noting that this in some cases might lead to costly litigation. The term was thus not defined in the Rotterdam Rules.¹⁴⁶

5.3 The liability of the carrier and the maritime performing party

This chapter will cover the liability issues for the carrier and the maritime performing party in article 17-19 and the defences provided in article 4. First the carrier's liability will be examined, followed by the maritime performing party's liability and defences. Lastly the parties joint and several liability will be presented.

5.3.1 The carrier's liability for performing parties and maritime performing parties

The vicarious liability of the carrier in article 18 includes liability for all performing parties, both

¹⁴⁴See A/CN.9/WG.III/WP.90.

¹⁴⁵A/CN.9/621, pp. 29-30.

¹⁴⁶A/CN.9/544, pp. 9-11 and A/CN.9/621, pp. 33-34.

maritime and others, and the performing parties' employees. To prove this a contract of employment would be appropriate. If the performing party has sub-contracted the work for the carrier, then it would be important to clarify whether this party would fall within article 18(d) as indirectly acting upon the carrier's request. If this cannot be resolved then the carrier would not be liable for this sub-contracted performing party.¹⁴⁷ The list of persons for whom the carrier is liable is wide and it has been discussed by scholars whether it is possible to limit it or not, for example by requiring that the person is acting within his scope of employment.¹⁴⁸ The carrier is however only responsible for performing parties directly or indirectly working at his request. If they are not, the carrier is not liable for them, unless he was to supervise or control the performing parties, then he would still be liable.¹⁴⁹

5.3.2 The maritime performing party's liability and actions against him

In the Rotterdam Rules article 19(1) it is directly stated that the maritime performing party is subject to the obligations and liabilities imposed on the carrier, as long as two requirements are fulfilled. The liability of the maritime performing party thus depends upon the definition of the concept of carrier and the period of the carrier's responsibility. Any other performing party would not face the same liabilities as the maritime performing party.¹⁵⁰

First, the maritime performing party must have received or delivered the goods in a contracting state or performed any of its activities with respect to the goods in a port in a contracting state pursuant to article 19(1)(a). The latter can be fulfilled without the former being so, for example to include the work of stevedores. This shows that there has to be some connection between the maritime performing party and the contracting state. Any sub-contractor in a non-contracting state does not have to worry about any direct action under the Rotterdam Rules. Compared to the general scope of application in article 5 the place of performance is also listed in article 19(1)(a), which is important to include those who are not sub-carriers but still engage in activities regarding the goods. Article 19(1)(a) only lists maritime parts of the stage, whereas the

147Baatz, [b], pp. 62 and footnote 68.

148Diamond, pp. 489 and Berlingieri, [b], pp. 612.

149Baatz, [b], pp. 62.

150Baatz, [b], pp. 64.

general scope obviously also includes in-land places for delivery and receipt. Most importantly article 19(1)(a) deals with the places where the maritime performing party received and delivered the goods. Focus is where the service actually was performed, compared to article 5 where the focus is on the contract, where the carrier is to receive or deliver the goods. In some cases these places might overlap but in some they do not. This has the effect that although the contract of carriage as a whole is governed by the Rotterdam Rules, any maritime performing party performing any of the carrier's obligations under the contract will not be liable under the Rules; when they perform their services in non-contracting states national law will be applicable instead.¹⁵¹

Secondly, in article 19(1)(b), the occurrence that caused the loss, damage or delay must have taken place either; (i) during the period of arrival and departure of the goods at port; or (ii) while in the custody of the maritime performing party; or (iii) any other time to the extent that the maritime performing party was participating in the performance of any of the activities contemplated by the contract of carriage. The first alternative is preferably used against sub-carriers, which focuses on the maritime stage of the transport. The second alternative is aimed at storage keepers, but can also be used against sub-carriers who take over the goods prior to the arrival at the port. The last alternative is aimed at those who never take custody of the goods, but assist in the handling of the cargo.¹⁵²

If the requirements in article 1(7), 19(1)(a) and 19(1)(b) are fulfilled it gives the cargo interest the right for direct action towards the maritime performing party. The maritime performing party has the same obligations and liabilities as the carrier does under the Rotterdam Rules. He can also avail himself the same defences and limitations. Their legal position is, however, not the same. First, the maritime performing party does not have a contractual relationship with the cargo claimant, the liabilities are imposed by mandatory law. Secondly, the period of responsibilities tends to differ significantly, unless the carrier has delegated the whole carriage.¹⁵³ Thirdly, if the carrier has increased his obligations towards the cargo interests, the maritime performing party is not bound by this pursuant to article 19(2), unless he expressly agrees to do so. The form

¹⁵¹Smeele, pp. 82-83.

¹⁵²Smeele, pp. 84 and footnote 134.

¹⁵³Smeele, pp. 84.

requirements in article 3 must then be fulfilled, the acknowledgement must be either in writing or electronic communication.¹⁵⁴

The burden of proof is on the cargo claimant as he must show that the damage was caused during the period of liability of the maritime performing party pursuant to article 19(1)(b) and article 17(1), which makes the maritime performing party *prima facie* liable. If the maritime performing party wants to relieve himself of this he must prove that the damage was not attributable to his fault during the period of responsibility. To prove that the goods were undamaged at the commencement of the carriage is hard both for the cargo interest and the maritime performing party. It can be difficult for the cargo interest to show that the goods were damaged during the period of responsibility of the maritime performing party, on the other hand it might be equally difficult for the maritime performing party to prove that the goods were undamaged when they were received by him, as goods normally are containerized and it would be practically and economically imprudent to inspect the goods closer. The cargo interest however always have the right to sue the carrier, as he is liable for the whole journey, according to article 18.¹⁵⁵

For a direct action against the maritime performing party, the cargo interests are given additional four jurisdiction pursuant to article 68 as well as the possibility to a binding choice of court agreement in article 72.¹⁵⁶ This will not be further discussed in this thesis.

5.3.3 Defences and limits of liability

According to article 4 of the Rotterdam Rules the defences and limits of liability which are available to the carrier are also available to the maritime performing party and his employees, article 4(1)(a) and (c). The defences and the limits are available in any judicial or arbitral proceeding whether founded in contract, tort or otherwise. This article has derived from two different places, the Hague-Viby Rules and the Himalaya clause. In article 4*bis*(2) of the Hague-Visby Rules the servants and agents of the carrier are entitled to avail the same defences as the carrier. Independent contractors, although employed by the carrier, are however explicitly

154Baatz, [b], pp. 65-66.

155Smeele, pp. 84-85.

156Smeele, pp. 83-84.

excluded. The scope of the Hague-Visby Rules only extends from the commencement of loading until the completion of discharge. All activities taking place in the port are thus excluded from the scope, making the range of people included in the concept of servants and agents slim, but crew belonging to a time charterer would be included.¹⁵⁷ The cargo owner could then avoid the defences and limits of liability by bringing an action in tort against the independent contractor instead,¹⁵⁸ which is one of the major problems in the thesis.

The Himalaya clause, see item 3.4.3, was a mechanism worked out by the market trying to avoid the above mentioned problem and extending the defences and limits also to the independent contractors.¹⁵⁹ The clause normally consists of three elements. First, the cargo owner agrees that only the carrier is responsible for any loss or damage to the goods. Secondly, persons other than the carrier shall be entitled to the same terms that the carrier would have been under the contract; and lastly, the carrier acts as agent for these persons.¹⁶⁰

Article 4(1) of the Rotterdam Rules does not exclude independent contractors, but instead makes the defences available to several third parties; maritime performing parties, the employees of the carrier and maritime performing parties and any other person that performs services on board the ship, which would include independent engineers and surveyors of machinery and cargo.¹⁶¹ The protection is thus given the force of law instead of resting upon the Himalaya clause, which may in some jurisdictions be disputed. This protection is thus wider than the protection granted in the Hague-Visby Rules.¹⁶²

Article 19(1) also states that the maritime performing party is entitled to the carrier's defences and limits of liability. This might be seen as superfluous with regards to article 4, but the entitlement to the defences is important as a counterbalance to their liability under article 17.¹⁶³ Both articles are also important to include in the Rules so that all groups intended to be covered are

¹⁵⁷Berlingieri, Francesco, [a] *A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, Paper delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009, pp. 13.

¹⁵⁸Baatz, [b], pp. 12.

¹⁵⁹Also see Diamond, pp. 490 and Berlingieri, [b] pp. 612.

¹⁶⁰Baatz, [b], pp. 12-13.

¹⁶¹Baatz, [b], pp. 13-14.

¹⁶²Berlingieri, [b] pp. 612-613. Also see item 3.4.3, as the English system now approves of the Himalaya clause, but it has not been without problems.

¹⁶³Nikaki, Theodora, [b] *The statutory Himalaya-type protection under the Rotterdam Rules – capable of filling the gaps?*, [2009] *Journal of Business Law* 403-421, pp. 411.

protected at all times.¹⁶⁴

The carrier is pursuant to article 12(1) responsible for the cargo when he himself or a performing party receives the goods for carriage until the goods are delivered. If law or regulations require the goods to be handed over to or from an authority or a third party, the carriers responsibilities ends there, according to article 12(2). This third person should not however include any performing party under the contract of carriage.¹⁶⁵

In *Himalaya clauses and the Rotterdam Rules* Nikaki concludes that although the Rotterdam Rules will provide protection to numerous sub-carriers and sub-contractors; the Rules will not eliminate the need for the clause. For example will independent contractors performing inland legs of the carriage not be protected by the Rules.¹⁶⁶

5.3.4 Joint and several liability

If a loss or damage should occur, the carrier's and the maritime performing party's liability is joint and several according to article 20. The cargo interest may then choose which one to sue, but can also choose both parties. Pursuant to article 20(2) should the aggregate liability of the liable persons not exceed the overall limits under the Rotterdam Rules. However, where one of the sides could lose their right of limitation, the source of recovery would be more favourable from one party. For example if one party has the right to use the global limitation regime, which the Rotterdam Rules will not affect according to article 83, and the other party cannot. It does not matter whether the global limitation regime is based on a convention or a national law.¹⁶⁷

Recourse claims between the carrier and the maritime performing party are implied in article 20. A clear risk allocation between the parties can normally be found in e.g. a charter-party, but where the contractual chain is difficult to follow and no contractual link exists between the carrier and the maritime performing party problems of jurisdiction and applicable law might arise. This is not dealt with in the Rotterdam Rules, but must be solved by national law.¹⁶⁸

164Nikaki, [a], pp. 35.

165Baatz, [b], pp. 33-34.

166Nikaki, [a], pp. 37-40.

167Baatz, [b], pp. 66-67 and 258-259.

168Smeele, pp. 85-86.

5.4 Summary

The question of the identity of the carrier has not been dealt with explicitly in the literature regarding the Rotterdam Rules, only indirectly. A difference has been made between performing parties and maritime performing parties, as the limited network system in the Rules provides for other conventions to be applicable should the damage occur outside of the sea leg of the carriage, cf. article 26. In articles 4 and 19 will the sub-carrier receive statutory defences and liability, regardless of the contractual relationship between the parties.

6. Conclusion

Normally a sub-carrier will not have a contractual relationship with the cargo interest. Earlier this led to the sub-carrier being sued in tort, without the possibility to avail himself the limitations and defences available to the contractual carrier through the bill of lading. This thesis outlines the different solutions to this problem under the English and Scandinavian legal systems, the former based on the Hague-Visby Rules and the latter on the Hamburg Rules, and the Rotterdam Rules.

One of the first questions that needs to be answered is the identity of the carrier, to see who the contractual partner is. Are the bills of lading owner's bills or charterer's bills? In England, the face of the bill of lading is important, what logos and statements are made there? The NMC section 295 states that bills of lading signed by the master are considered to be signed by the carrier. The literature regarding the Rotterdam Rules only deals with this indirectly and should the Rules come into force, this question may arise again. One may however conclude that identity of carrier clauses inserted in bills of lading may not be valid.

The carrier's liability for the sub-carrier seems to be similarly dealt with under all three solutions, only the means are different. Both Scandinavian law and the Rotterdam Rules have made it statutory, while cargo interests in England have to rely on case law to keep the carrier liable for the sub-carrier.

Sub-carriers are included in the group independent contractors, which are explicitly excluded from cover in the Hague-Visby Rules, and this has led to difficulties. The group contains a vast variety of players, more or less suited for the protection under the Hague-Visby Rules. In the past cargo interests have sued the sub-carrier in tort to avoid the defences and limitations provided in the Hague-Visby Rules. Under English law, the sub-carrier will be liable in tort or bailment, given the same protection as the carrier under the bill of lading through the case *The KH Enterprise*. In the Scandinavian system sub-carriers have been given liability and protection under section 286 and 282. The Rotterdam Rules make every maritime performing party liable under the Rules and given the same defences as the carrier, article 4 and 19. Himalaya clauses, used in both legal

systems, will however still be necessary as there still are groups who are covered by the clause but not by the Rules.

Both in the Scandinavian system and in the Rotterdam Rules, the sub-carrier is given statutory protection. In England this may be a welcome solution as no written legislation is present and there might be situations where a sub-carrier will not benefit from the defences or limitations, which can be relevant for them.¹⁶⁹

The introduction of the Rotterdam Rules with regards to the sub-carrier will not affect the situation in Scandinavia, as the NMC already provides legislation here. The situation will neither be better nor worse. However, the Rotterdam Rules will not clarify the problems posed by the case ND 2003.83, as the scope of the rules are very similar to each other. For the English system the rules may be the solution to provide sub-carriers with sufficient protection, especially by making them statutory.

However, whether it will be the Rotterdam Rules providing this change is not certain. The Rules are disputed and not yet in force, lacking signatures and ratifications. The solution with maritime performing parties is however a step forward, ensuring sub-carriers statutory protection and ensuring cargo interests with a direct action against them.¹⁷⁰ The definition is however wide, including groups which earlier has been debated whether or not they should be protected under the same rules as the carrier. Also there may be difficulties drawing the line between performing parties and maritime performing parties and the definitions may lead to further litigation costs in national courts, for example regarding the concept of port. The Rotterdam Rules may thus not be the solution to all of the problems, but it will certainly make the situation for sub-carriers and their relationship with the cargo interests clear.

¹⁶⁹English scholars seem to welcome a change in giving sub-carriers statutory liability and protection, but the solution in the Hamburg Rules is not seen as sufficient, see Carver, paragraph 9-101 and 9-288.

¹⁷⁰See also Smeele, pp. 86 of the same opinion.

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