HISTORICAL AND CONTEMPORARY DEVELOPMENTS OF THE MARITIME CARRIER'S LIABILITY AND ITS APPLICATION TO THIRD PARTIES WHO ARE NOT PARTIES TO THE CONTRACT OF CARRIAGE

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This article examines the development of the maritime carrier's liability in the carriage of goods by sea and its extension to third parties who are not parties to the contract of carriage by sea. The focus is on examining the basis of the maritime carrier's liability as it has developed throughout history. The analysis begins with the period of Ancient Rome, where transportation was regulated by the contractual type of locatio conductio, which was based on fault liability. However, under the Praetorian edict, the maritime carrier's liability began to be assessed based on strict liability. This liability remained unchanged until the 19th century, when advancements in shipping technology increased the maritime carriers' bargaining power. They began, on the basis of the principle of contractual freedom, to insert provisions into the bill of lading by which they exempted themselves from any liability. For this reason, regulations were introduced at the national and international levels requiring the maritime carrier to make the ship seaworthy with due diligence. Mentioned obligation could not be excluded by contractual provisions. This resulted in the maritime carrier becoming liable on the basis of fault-based liability. Trends in maritime transport liability continue to move away from the basic postulates of civil and common law, namely that contracts bind only the parties. Under the Himalaya Clause doctrine, other participants in maritime transport and in certain cases also in inland transport, which is related to maritime transport, began to invoke

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the liability provisions applicable to the maritime carriers, although they were not parties to the contracts that they concluded with their customers.

Key words: locatio navis*;* locatio rerum vehendarum*; Harter Act; Hague Rules; Hamburg Rules; Rotterdam Rules; seaworthiness; Himalaya Clause*

1. INTRODUCTION

Every economic activity creating mutual relations eventually leads to the conclusion of contractual relationships and their regulation. As long as contracts are fulfilled, there are no problems, but if contractual obligations are breached, the question of liability arises. Maritime law is one of the oldest laws, so it is not surprising that it has developed many instruments, including liability. To understand the maritime carrier's liability in the carriage of goods by sea it is necessary to go back at least to the age of ancient Rome, when the carrier's liability as we know it today, began to develop, purely by general institutions of civil law, although maritime law predates the Roman Empire, as clearly evidenced by certain legal sources, such as the Rhodian laws.[1]

2. HISTORICAL DEVELOPMENT

2.1. Ancient Rome

The strict liability of a maritime carrier, which originates from the period of ancient Rome, lasted until the 19th century and has been preserved in other types of transport to this day.[2] A specific contract regulating transport did not develop in ancient Rome; instead, the *locatio conductio* was used to govern the relationships between the carriers and their customers. The Romans treated this contract as a single framework with different forms of performance: *locatio conductio rei* (hire and letting of a thing), *locatio conductio operarum* (hire and letting

[1] "The Rhodian laws are a code of maritime laws adopted by the people of the island of Rhodes, the commercial and naval super power of that time. The exact age of the text is hard to determine, but it is believed to be around 900 B.C. No fragments of the original law survived, but it was mentioned in the Roman collections or Pandects as the Rhodian Sea-Law on Jettison (*Lex Rhodia de Iactu*) providing the right of ratable contribution if the goods of an owner are thrown overboard for the safety of the ship or the property of other owners." – Black, C., H.; Nolan, R., J.; Nolan-Haley, M., J., *Black's Law Dictionary,* 6th ed., West, St. Paul. Minn, 1990, p. 1323.

[2] Pejović, Č., *The Basis of Carrier's Liability: From Roman Law to the Rotterdam Rules*, Asian Business Lawyer, *vol. 20*, no. 15, 2017, p. 21.

of services), and *locatio conductio operis* (hire and letting of work), without seeing any contradiction in this arrangement.[3] The unity of the contract is manifested in various ways, among which two in particular should be highlighted. From a procedural point of view, this is evident by the fact that for all three subtypes of the contract, there were two available lawsuits: *actio locati* and *actio conducti*.[4] On the other hand, *locatio conductio* can also be justified from the substantive perspective. When considering this perspective, the existence of a thing *(res*) is placed at disposal and then returned (for example, the handing over of goods for the purpose of transport, which are returned after the transport has been completed).[5] The substantive aspect of *locatio conductio* can also be inferred from the expression itself, which is composed of *locare*, meaning to give, to place at disposal, or to deliver, while *conducere* means to carry along or take with oneself. The lessor places a thing at the lessee's disposal so that it can be used; the lessee takes control of it and, in this sense, "carries it with him". The employee places its services at the disposal of the employer, who then "takes them over" for the purpose of using them. In the case of letting and hiring work, the customer commissions a specific task to be performed, and the contractor takes over the object with respect to which "the work must be carried out".[6] *Locatio conductio* is a consensual and synallagmatic contract, in which the *locator* undertakes to pay the *conductor* a specified amount (*merces, pensio*), while the latter commits to allowing the former the use of a particular item or its workforce, or to perform certain work.[7]

Because no specific contracts for transport services were developed, specific situations were addressed in contracts based on *locatio conductio*, such as *locatio navis* and *locatio rerum vehendarum or locatio conductio mercium vehendarum*, which represent subtypes of *locatio conductio*. *Locatio navis* can be classified under *locatio*

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3 Dannenbirng, R., *Kaser's Roman Private Law*, 4th ed., University of South Africa, Pretoria, 1984, pp. 219 – 220; Fiori, R., *La definizione della »Locatio conductio«. Giurisprudenza romana e tradizione romanistica*, Jovene editore, Napoli, 1999, p. 1 – 2; Kranjc, J., *Rimsko pravo*, 2nd ed., GV Založba, Ljubljana, 2010, pp. 618 – 619; Zimmerman, R., *The Law of Obligations. Roman Foundation of the Civilian Tradition*, Juta & Co. Ltd, Capetown, Wetton, Johanesburg, 1990, p. 338.

4 Fiori, R., *op. cit.* (fn. 3), p. 2.

5 *Ibid.*, p. 2.

6 Zimmerman examines in detail the meaning of the terms *locare* and *conducere* and the implications that these two terms carry for each type of *locatio conductio*. – See Zimmerman, R., *op. cit.* (fn. 3), p. 339.

7 Benke, N.; Meissel, F. S., *Roman Law of Obligations*, MANZ, Wien 2021, p. 177 – 178; Korošec, V., *Rimsko pravo*, I. part, 2nd ed., Uradni list Republike Slovenije, Ljubljana, 2005, p. 284.

conductio rei, while *locatio conductio rerum vehendarum* or *locatio conductio mercium vehendarum* falls under *locatio conductio operis*. Most of the literature concerning maritime transport does not highlight examples of *locatio conductio* based on *locatio conductio operarum*; however, such examples can also be found but will not be the subject of detailed examination in this article, as they were not decisive for the development of contracts concerning the exploitation of ships. These are cases where the maritime carrier employed free sailors on the ship; there were also possible cases where slaves were engaged on the ship, but in that case it was *locatio conductio rei*, since the slaves were treated as objects.[8]

Within *locatio navis*, two situations arise: one in which the maritime carrier acts as the *conductor*, and another in which the maritime carrier serves as the *locator*. In the first case, the locator, i.e. the owner, handed over the vessel to the conductor for lease, who accepted it for exploitation and assumed its management. This is a true and genuine hire of a thing, and its correspondence with a modern bareboat charter contract would be complete, if we did not also consider the nuances of the Roman legal perspective here. From today's perspective, the locator's main obligation would be to enable the use and enjoyment of the ship. However, from the viewpoint of Roman jurists, the primary obligation was the delivery of the ship and its return after the completed voyage, while the use and enjoyment of the ship itself was considered secondary, though still relevant to the extent that it allowed the locator to charge for its use.[9] In the second case, the situation was more complex because the ship was not handed over to the *conductor*; instead, the maritime carrier remained the *locator*. In this case, the *locator* retains actual possession of the thing, that is, its full possession, while the conductor becomes an indirect possessor. This realizes a kind of *constitutum possessorium*, whereby the possessory situation indirectly established in favour of the acquirer is not possession, but detention.[10]

The other type of transport contracts in the Ancient Rome was *locatio rerum vehendarum* or *locatio conductio mercium vehendarum*, with *locator* entrusting the cargo to the maritime carrier (*conductor*) and paying for delivery to a certain location.[11]

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8 Cerami, P.; Petrucci, A., *Diritto comerciale romano, Profilo storico*, Terza edizione, G. Giappichelli editore, Torino, 2010, p. 250.

9 See Tullio, L., *Contratto di noleggio*, Giuffrè Editore, Milano, 2006, pp. 216 and 228.

10 *Ibid.*, pp. 220 – 221.

11 For the mentioned type of transport contract, two terms can be found in the literature, namely: *locatio rerum vehendarum* and *locatio conductio mercium vehendarum*. See *ibid*, p. 209. Also see: Fiori, R *op. cit.* (fn. 3), p. 148; Kordasiewicz, S., *Receptum nautarum and »Custodiam praestare« revisited*, Revue internationale des droits de l'Antiquité, *vol.* 58, no.1, 2011, p. 198.

From the perspective of a modern contract for the carriage of goods, Roman jurists treated the maritime carrier's obligations in this contract differently, because the maritime carrier's primary duty was not the transfer of goods, but rather the delivery of the goods to their final destination.[12] Regardless of how Roman jurists treated the maritime carrier's main obligations in *locatio rerum vehendarum* or *locatio conductio mercium vehendarum*, it was a case of *locatio operis*, with the maritime carrier bearing full responsibility for the transport of the goods. This was also reflected in the fact that the customer was obliged to pay for the transport only if the cargo arrived at its final destination; if it failed to arrive, the conductor lost the right to payment, and if the failure of the cargo to reach its final destination was due to its own fault, it was also liable for the damage.[13]

The *locatio conductio,* as developed in ancient Rome, was characterized by fault liability, and in the case of persons professionally engaged in a certain activity, such as carriers, the standard of their liability for fault was even higher (care of a *diligentissimus*).[14]

Transport was crucial for the existence of the Roman Empire, which is why the State regulated the position of the entrepreneurs who carried it out as well.[15] For this purpose, the praetor issued the *Edictum Nautae Caupones Stabularii ut recepta restituant*, under which maritime carriers, innkeepers, and stable keepers

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12 Tullio, L., *op. cit.* (fn. 9), pp. 209 – 211.

13 Fiori, R., *Forme e regole dei contratti di trasporto marittimo in diritto romano*, Rivista del diritto della navigazione, Rivista del diritto della navigazione, *vol*. 39, no. 1, 2010, p. 174.

14 Regarding the liability of the *locators*, it is based on the type of liability normally applied to them, namely *culpa*. In this context, the applicable standards depend on the specific case, particularly when negligence is in question. With respect to the standard of *diligentia* (care) expected from the lessors, in the case of *locatio rei*, in certain situations it is expected that they know the characteristics of the object they are leasing (and if they did not, this generally constituted *culpa*), while in other situations such knowledge is not required, meaning that they did not fail to exercise due care. - See Zimmerman, R., *op. cit.* (fn. 3), pp. 365 – 366. As far as transport as an example of *locatio operis* is concerned, it is worth mentioning the view of Gaius (D. 19.2.25.7) in the case where the carrier had agreed with the customer to transport a column, which cracked while it was being handled by the contractor. In this context, Gaius emphasized that the carrier is responsible for any fault of his/her own as well as that of his/her assistants, noting that fault arises from any conduct in which all measures that a particularly diligent person would have taken were not observed. Thus, he argued that the carrier must exercise the degree of care of a *diligentissimus*.

15 Kragić, P.; Jerolimov, D. A., *Modern Lex Mercatoria for Carriage of Goods by Sea*, Croatian Maritime Law Association, Rijeka, 2022, p. 11.

became strictly liable for the goods and items they received from their customers in the course of providing services.[16] On the basis of such strict liability, maritime carriers, innkeepers, and stable keepers were liable if a customer filed a claim for lost or damaged goods, regardless of whether they were guilty of negligence or fault.[17] In fact, they acted like insurers. Initially, their guarantee for the items was absolute and covered all kinds of force majeure, while later exceptions began to be introduced. Labeo, in favor of the maritime carriers, introduced an exception in cases of shipwreck or pirate violence *(naufragio aut per vim piratarum)*, which was then extended also to other forms of force majeure.[18] In order to protect the customer, the praetor granted an action, named *actio de recepto*, which defined: "*Nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo* (I will bring a judgment against maritime carriers, innkeepers, and stablekeepers who have undertaken that each person's property would be safe, if they do not restore it)".[19] This action was justified as a protective measure against the above mentioned group of entrepreneurs (maritime carriers, innkeepers, and stablekeepers), intended to counter their exceptional dishonesty.[20] Since liability *ex recepto* represented strict liability, the maritime carriers could absolve themselves of responsibility only in cases of force majeure that constituted exculpation under such liability. If in these cases an *actio de recepto* was brought against the maritime carriers or other contracting parties who were liable *ex recepto*, they could exculpate themselves with the *exceptio doli*.[21]

2.2. Medieval times

On the basis of strict liability, the maritime carrier was responsible even after the end of the Roman Empire. One of the reasons for this was that, despite the collapse of the Empire, there was still continuity of Roman law, as the eastern part of the Roman Empire continued as the Byzantium. The codification of Roman law within the framework of Justinian's Code was an important element in this process.

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16 *Ibid.*, pp. 11 – 12.

17 Benke, N.; Meissel, F. S., *op. cit.* (fn. 7), p. 191; Zimmerman, R., *op. cit.* (fn. 3), p. 1121.

18 Zimmerman, R., *op. cit.* (fn. 3), p. 515.

19 See *ibid.*

20 Benke, N.; Meissel, F. S., *op. cit.* (fn. 7), p. 191.

21 Cf. Ulpian (Labeo) D. 4.9.3.1.

Over time, the Byzantine state began to weaken leading to the formation of city-states in the Mediterranean and development of the *lex mercatoria*. Despite preserving key institutions of Roman law, this was a departure in concept. Roman law was based on maintaining relationships or enabling the enjoyment of goods, and not on creating opportunities for accumulating profitor doing business on the basis of speculation, as widely accepted among merchants of the city-states.[22] Their relations were governed by the *lex mercatoria*, which consisted of the law and customs that international traders developed in Europe and used regardless of where they traded.[23]

Although the continuity of Roman law was preserved in the Middle Ages, the very clear distinction between *locatio rerum vehendarum* and *locatio navis* became blurred. The blending of the two contractual forms arose and persisted over the centuries for essentially practical reasons. Firstly, as mentioned, due to the unification of the carrier's liability regime through the *receptum* institute, whereby the maritime carrier was equally liable for the transported goods, whether he entered into a *locatio navis* contract (while retaining its status as maritime carrier) or a *locatio rerum vehendarum* contract. Secondly, because in medieval commercial practice, the person interested in the cargo almost always embarked on the ship together with their goods, thus being able to directly supervise the performance of the contract. It is probably for this reason that, amid the confusion that arose between the two Roman contractual forms, practical attention was predominantly focused on *locatio navis* rather than on *locatio rerum vehendarum*.[24] In view of the above, it is undeniable that the merchants' control over navigation in the Middle Ages went far beyond mere supervision of the commercial aspect of the voyage and extended into the navigation itself. As a result, it was difficult to maintain the contractual forms that had developed during the Roman period when defining the relationships between the maritime carrier and the merchants.

The courts in the Mediterranean heard maritime matters on the basis of the *lex mercatoria*, which regulated conflicts in freight, maritime contracts, the liability of the maritime carrier in case of damage or loss of goods, sailors' wages, and so on. The liability of the maritime carrier was strict, as is evident from Article XVII of the Ordinance of Trani, under which the maritime carrier could be exempted from liability only in cases of bad weather or capture by pirates.[25]

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[22] Galgano, F., *Lex Mercatoria*, Il Mulino, Milano, 2001, pp. 39 – 40..

[23] Grilc, P., *Lex mercatoria in mednarodno gospodarsko pravo*, Podjetje in delo, *vol.* 24, no. 6-7, 1998, p. 690.

[24] Tullio, L, *op. cit.* (fn. 9), pp. 251 – 252.

[25] Pejović, Č., *op. cit.* (fn. 2), p. 20.

In general, strict liability was preserved even though medieval codifications of maritime transport included numerous exceptions under which a maritime carrier was not held liable, that went beyond the classical grounds for exemption from strict liability, such as force majeure and piracy, as developed in ancient Rome. At the same time, it was preserved even though medieval codifications contain some instances where the carrier is held liable on the basis of fault liability. The most important medieval codifications in this respect are the Rules of Oleron and the Consulate of the Sea.

The Rules of Oleron originated at the end of the 12th century on the Isle of Oléron in France and later spread to Northern Europe. The rules of Oleron were not rules in the true sense of the word. "They consisted of twenty-four judgments copied later into the Black Book of English Admiralty showing how the maritime court of Oleron would decide the cases."[26] In order to define the type of liability in the Oleron Rules, an in-depth analysis is needed, before any conclusions could be made, since the document did not reflect the systematic approach. However, from Rules X and XI addressing breaches of contract for damage or loss of cargo, it is possible to somewhat extract the standards of responsibility imposed by the rules. Rule X requires the maritime carrier to equip the ship with good equipment before the voyage, especially ropes. Today, such an obligation could be compared to the obligation of a maritime carrier to ensure that a ship is seaworthy, although today this obligation of the maritime carrier is not absolute, he is liable only if it can be proved that he failed to make the ship seaworthy with due diligence. Rule XI governs cases of damage resulting from the movement or shaking of the main yard during bad weather. Bad weather constitutes an "act of good" that usually exculpates the maritime carrier from liability, but this does not apply in the case where the damage is caused by lack of proper trim that exposed the cargo during such weather. This example demonstrates that the Rules of Oleron contained strict liability.

When determining liability, the Oleron rules emphasized whether there were merchants present on the ship that personally took care of the goods loaded onto the ship and were directly consulted by the maritime carrier. In such circumstances, the goods were not in total *custodia* of the maritime carrier, and the duties as well as liabilities were also shared between the merchants and the maritime carrier, depending on the case.[27] This indicates that the Oleron rules established the division of liability, when merchants were aboard, but not

[26] Chacón, V. H., *The Due Diligence in Maritime Transportation in the Technologica*, Springer International Publishing AG, Cham, 2017, p. 37.

[27] *Ibid.*, p. 40.

otherwise. If maritime carriers had sole control over the goods, they could not share responsibility for their damage and loss with the merchants, since they were solely responsible for cargo. This principle resembles the carrier's liability *ex recepto*, as introduced by Roman law, thereby establishing the carrier's strict liability.

The Consulate of the Sea was a set of rules that originated in the Kingdom of Aragon and later spread throughout the Mediterranean. The term may also refer to a collection of maritime customs and ordinances in Catalan language. The Consulate of the Sea contained rules determining ship's seaworthiness, particularly its watertightness. Provisions of maritime carriers' liability are stipulated in chapters 63, 64, 65, 66, 67 and 68 of the Consulate of the Sea, respectively. The provisions of Chapter 63 obligate the maritime carrier to pay for any damage arising from water seepage. This rule was quite strict, because if a maritime carrier failed to pay the damage suffered by the merchant due to water leakage, the ship was sold to pay off the claims. However, the maritime carrier could be exculpated from mentioned liability for two reasons. First was defined in Chapter 65, when the damage was caused by bad weather corresponding to an act of Good as widely accepted exemption from liability in the case of strict liability. In Chapter 66, the second exception can be found, which exonerates the maritime carrier for damage caused by water seeping through the vessel's bottom, even in cases where it is well caulked. However, this exception is based on the assumption that the merchant checked the ship's watertightness before hiring it. If the merchant noticed insufficient caulking but failed to report it to the maritime carrier, he assumed the risk. In any case, the Consulate of the Sea allowed fault-based liability of the maritime carrier in at least one instance related to the ship's caulking, as evidenced in Chapter 66, which states that if the ship was tarred up to or above the deck rail and up to or above the openings for the anchor chains, the maritime carrier was exonerated from liability for damage caused by the wetting of the goods, even in cases of water seeping onto the deck. Chapter 67 of the Consulate of the Sea defines the maritime carrier's liability for damages caused by rats due to the absence of cats on the ship. Hower, this liability could be refuted according to Chapter 68, if a maritime carrier could prove that cats were onboard before the voyage and died before arrival at port where new cats could be procured. This determines the maritime carrier's liability arising from fault. In Chapter 67, the Consulate of the Sea established a strict rule making the maritime carrier liable for all goods loaded aboard the ship and entered in the ship's register if they are later lost. The aforementioned represents the absolute liability of the maritime carrier for goods accepted for carriage, which resembles the *ex recepto* liability from ancient Rome.

All of the above clearly demonstrates that, even though cases based on fault liability existed in the Middle Ages, one cannot categorically claim that the concept of strict liability introduced in ancient Rome, based on the maritime carrier's *ex recepto* liability, was abandoned.

Even though the Rules of Oleron were employed in admiralty courts in England, carriers' liability was based on bailment law, not on transport law.[28] "Bailment is a delivery of goods or personal property, by one person (bailor) to another person (bailee), in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, expressed or implied, to perform and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust."[29] In this respect, a cargo owner is a bailor and carrier is a bailee.[30] At that time in England, bailee was held liable within the framework of strict liability for goods delivered. This liability arose from the possessory remedies granted to bailees, enabling them to pursue claims against third parties; consequently, they remained strictly liable to the bailor for any loss of goods.[31] Nowadays, bailees are free of their liability if they manage to prove that the loss occurred without their negligence. However, they are liable for losses caused by ordinary negligence on their part or on the part of their servants.[32] Development of a carrier, the so-called common carrier[33], also helped to maintain strict liability. A common carrier is obliged to deliver the goods in the condition in which they were received; otherwise, it is liable as the insurer.[34] Such position of a common carrier is similar to strict liability of a carrier in ancient Rome and was greatly influenced by the case *Coggs v. Bernhard*.[35] The reasons that dictated such a decision by the court stemmed from the danger that the carrier might collude with thieves in a way that could not be detected.

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28 *Ibid.*, p. 46.

29 Black, C. H. *et. al.*, *op. cit.* (fn. 1), p. 141.

30 Chacón, V. H., *op. cit.* (fn. 26), p. 46.

31 *Ibid.*

32 See Tetley, W., *Marine Cargo Claims*, 3rd ed., Les Èditions Yvon, Blais, Montreal, 1988, p. 561; Beatson, J., *Anson's Law of Contract*, 28the ed., Oxford University Press, Oxford, New York, 2002, p. 182.

33 "According to Common Law, the common carrier is any carrier required by law to convey passengers or freight without refusal if the approved fare or charge is paid in contrast to private or contract carrier." See Black, C. H. *et. al.*, *op. cit.* (fn. 1), p. 275.

34 Nugent v. Smith (1976) I C.P.D. 19.

35 (1703) 2 Ld Raym 909.

While English legal system retained strict liability of a maritime carrier, exemptions from liability were also provided either dating back to ancient Rome or originating from Common law. Two mostly used terms are "'the act of Good", which is similar to the institution *vis maior* in Roman Law, and the exception of loss or damage by "the King's enemies", against which a carrier had not legal remedy, as they were not capable of being a party to the proceedings, so it would be unfair to expect him to sue them.[36]

The Middle Ages are important for the development of the maritime carrier's liability also because, during this period, the institution of limitation of liability emerged. In the era of ancient Rome, there is no evidence that any specific institution of limitation of liability, as we know it today, had developed. This institution arose in Italy between the fall of the Roman Empire and the Crusades and later spread to Spain and France.[37] The earliest known legal source regulating the limitation of a maritime carrier's liability was the Tables of Amalfi, a commercial code of the Republic of Amalfi from the 11th century. In relation to the limitation of liability, the Consolato del Mare of Barcelona from the late 14th century shall be mentioned, under which maritime carriers were liable for debts arising from damage to cargo due to improper loading or the unseaworthiness of the vessel, up to the value of their shares in the ship.

The right of a maritime carrier to limit liability was strengthened by the commercial revolution, which took place after the end of the Middle Ages in the sixteenth and seventeenth centuries, during which the institution of limitation of liability spread from the Mediterranean to the Atlantic countries and Northern Europe. In this regard, the Hanseatic Ordinance of 1614 and 1644 should be noted, which limited the maritime carrier's liability to the value of his ship and stipulated that the proceeds from the sale of the ship constituted full settlement of all claims.[38]

In common law, the limitation of a maritime carrier's liability did not develop as early. The Rules of Oleron, which originated in the 12th century and formed an important foundation of English maritime law, contain no provisions on the limitation of a maritime carrier's liability. One of the pivotal moments when the English legislature enacted limitation of a maritime carrier's liability occurred in 1733 as a result of an incident in which English maritime carriers were held

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[36] Boyd, S. C.; Berry, S.; Burrows, A. S.; Eder, B.; Foxton, D.; Smith, C. F., *Scrutton on Charterparties and Bills of Lading*, Sweet & Maxwell, London, 2008, p. 187.

[37] Donovan, J. J., *The Origins and Development of Limitation of Shipowners' Liability*, Tulane Law Review, *vol.* 53, no. 4, 1979, p. 1001.

[38] *Ibid.*, pp. 1002 – 1003.

personally liable for the entire value of a cargo of precious metal that had been stolen by the ship's master after loading in Portugal. They then submitted a petition to Parliament seeking release from the liability imposed on them due to the master's embezzlement, explaining that without appropriate protection, maritime trade would be severely impeded and exposed to destruction. At their initiative, Parliament adopted, in 1734, a statute relieving maritime carriers from liability for acts of the master or crew committed without the "privity of knowledge" of the owner, which resulted in the loss of goods, but only up to the value of the ship and its equipment.[39] All of the above indicates that the concept of a carrier's limitation of liability for the loss or damage of goods began to develop on the principle that the carrier could not be held liable for more than the value of his ship and the equipment on it, meaning that his liability was greater in proportion to the higher value of the ship and its equipment. This represents a different concept from the one we know today, where the maritime carrier's liability is limited to the predetermined value of the cargo unit or package, which is always the same regardless of the value of the ship, as explained in more detail below. If we set aside the different concepts of liability limitation, one of the main reasons for the development of limitations on a maritime carrier's liability was the interest of states in developing their merchant navies. Strict treatment of maritime carriers, to the extent that they would have to compensate for all damage caused, would not have contributed to this goal.

2.3. Nineteenth century

The 19th century was important in the development of shipping contracts as well as maritime carrier's liability. While legislation related to ship exploitation in a way returned to the basic principles of Roman law drawing clear boundaries between different types of contracts, maritime carrier's liability made a major departure from strict liability to fault liability. In the second half of the 18th century, carrier's obligation to transport goods to their destination for payment as part of *locatio operis* or a contract of service was separated from a category of lease and became an autonomus maritime carrier's obligation limited to the transfer of goods. This means the revival of *locatio rerum vehemendarum* of Roman law, with the only difference that the transfer of goods from a place of origin to a place of destination has now become the main obligation, and the actual delivery of goods at the place of destination has become a secondary

[39] *Ibid.*, p. 1007.

obligation.[40] This has also become the basic form of a contract of carriage. On the other hand, the lease as stipulated in *locatio navis* regained the elements it had in Roman law, with enabling use of becoming primary obligation and the delivery becoming secondary obligation, respectively.[41]

The 19th century was characterized by codifications of national civil laws, of which the *Code Napoleon* in 1804 was the first. All codifications maintained strict liability of a carrier as stipulated in Roman law. According to the Art. 1782 of the Code Napoleon, carriers had the same obligations of depositories as innkeepers referred to under the title "Of Deposit and Sequestration" and were responsible for the protection and preservation of articles confided to them.[42]

In the beginning of the 19th century, neither maritime carriers nor shippers sought to eliminate strict liability for damage caused by a maritime carrier. Nevertheless, the end of the 18th and the whole 19th century were characterized by major advancements in ship building, accelerated by the invention of a steam engine that strengthened the position of maritime carriers. In this way, maritime carriers gained a stronger bargaining position and inserted unfair terms into the bill of lading by shippers, thus weakening their position.[43] The strict liability of maritime carriers intended to protect shippers began to lose its importance due to the institution of freedom of contracts, which was widely proclaimed during the 19th century. All of the above allowed maritime carriers to start including clauses in the bill of lading relieving them of liability. This phenomenon could not be detected in mediaeval bills of lading, but is certainly present since the 18th century, when rather simple exemptions from liability began to appear.[44] Clauses providing relief from liability to maritime carriers led to a situation that allowed maritime carriers to transform a strict liability system into a system with virtually no liability.[45]

This situation forced the legislator to take legislative action to protect other participants in maritime transport who were in an inferior economic position in relation to maritime carriers. In this regard, it is important to highlight the

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40 Tullio, L., *op. cit.* (fn. 9), p. 262.

41 *Ibid*.

42 Pejović, Č., *op. cit.* (fn. 2), p. 21.

43 Booyseen, H., *The liability of the international carrier of goods in international law*, Comparative and International Law Journal of Southern Africa, *vol.* 25, no. 3, 1992, p. 297.

44 Kragić, P.; Jerolimov, D. A., *op. cit.* (fn. 15), p. 19.

45 Pejović, Č., *op. cit.* (fn. 2), p. 22.

case of *The New Jersey Steam Navigation Co. v. Merchant's Bank*[46], in which, in 1848, the Supreme Court held the maritime carrier responsible for the loss of cargo due to a fire on board the ship, obligating him to pay 18,000 US dollars in gold. This ruling signalled that US courts would not follow English law, which had favoured maritime carriers. The decision sparked an uproar in the business community, prompting maritime carriers to exert pressure on Congress, which led to the adoption of the Limited Liability Act 1851.[47]

A decisive breakthrough in preventing a maritime carrier to avoid liability by inserting exclusion clauses in a bill of lading as permissible in English law was adoption of the "Harter Act" in 1893. This act replaced Limited Liability Act 1851. "It was a compromise between carriers' and shippers' interests by mitigating the strict nature of the common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list."[48] The adoption of the act, which later had an impact on the Hague Rules, meant the transition from strict liability of a maritime carrier to liability based on fault. The Harter Act introduced a system of fault liability allowing a maritime carrier to avoid liability, even if it turned out that the ship was unseaworthy, if the maritime carrier could establish that due diligence was exercised to render the vessel seaworthy. Provisions in a bill of lading could not operate to exempt the maritime carrier from the obligation to provide a seaworthy vessel.

3. MODERN FOUNDATIONS OF MARITIME CARRIER'S LIABILITY

The modern concept of maritime carrier's liability is based on seaworthiness. As will be seen below, a complex system of burden of proof was developed based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules)[49], as modified by the Protocol to

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46 47 U.S. (6 How.), 344 (1848).

47 The Limited Liability Act 1851 exempts, among other things, the vessel owner from liability for loss or damage to goods in the event of fire, unless such fire is caused by the design or negligence of the owner (§4281). It also contains a provision limiting the liability of a vessel owner for loss or damage to goods incurred without the privity or knowledge of the owner; such liability shall not exceed the amount or value of the owner's interest in the vessel and her freight then pending (§4283).

48 Shivakhanli, Z., *Nautical Fault Exemption: No Country for Old men*, Baku State University Law Review, *vol.* 6, no. 1, 2020, pp. 5-6.

49 The convention was adopted on 24. August 1924 in Brussels. It originated from a draft initially adopted by the International Law Association in The Hague in 1921, later amended during a diplomatic conference in Brussels in 1922. It came into force

Amend the International Convention for the Unification of Law Relating to Bills of Lading (Visby Rules)[50], with all the exceptions in which the maritime carrier can exculpate its liability, provided it proves that it exercised due diligence to ensure the ship's seaworthiness.[51] Complexity created by the Hague Rules is one of the reasons for attempts to simplify maritime carrier's liability, as seen in the United Nations Convention on the Carriage of Goody by Sea (Hamburg Rules).[52] These rules introduced a presumed fault liability for maritime carriers in cases of damage. However, despite being in force, they hold little significance in regulating maritime carrier's liability at the global level, as they were not ratified by countries with developed merchant fleets.[53] The problem was addressed by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)[54], which aimed to reach a compromise between the Hague Rules on one hand, and the Hamburg Rules on the other, regarding liability. However, the convention never came into force, and there is little sign that it ever will.[55]

on 2. June 1931, https://verdragenbank.overheid.nl/en/Verdrag/Details/004127 (15 October 2025).

50 The protocol was adopted on 23 February 1968 and entered into force on 23 June 1977, https://verdragenbank.overheid.nl/en/Verdrag/Details/003112 (15 October 2025).

51 According to the Article 3(1) of Hague Rules, a maritime carrier must prepare a ship to be seaworthy. Nevertheless, a maritime carrier may exculpate himself of all or part of its liability if he proves that that he acted with due diligence to make the ship seaworthy and the loss or damage or delay arose from the events defined in Article 4(2)(a) to (q) of Hague Rules.

52 The Convention was adopted on 31. March 1978, in the United Nation Conference held in Hamburg, and it came into force on 1. November 1992, https://uncitral.un.org/en/texts/transportgoods/conventions/hamburg_rules (15 October 2025).

53 To date, 36 countries have ratified the Hamburg Rules: Albania, Austria, Barbados, Bostwana, Burkina Faso, Burundi, Cameroon, Chile, Czechia, Democratic Republic of Congo, Dominican Republic, Ecuador, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Marocco, Nigeria, Paraguay, Peru, Romania, Saint Vincent and Grenadies, Senegal, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania, Zambia.

54 The Convention was adopted on 11. December 2008 at a session of the United Nations General Assembly, https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules (15 October 2025).

55 In accordance with the provisions of the first paragraph of Article 94 of the Rotterdam Rules, they shall enter into force on the first day of the following month after the expiration of one year after the date of deposit of the twentieth instrument

The conventions developed at the international level concerning the liability of the maritime carrier for the loss of or damage to goods, i.e., from the Hague Rules onwards, introduce a different concept of limitation of liability, which is no longer tied to the value of the ship and its equipment but to a predetermined value of the cargo unit (package or kilogramme of gross weight of the goods), which is always the same, with the additional condition that the loss or damage did not result from a qualified form of fault.[56] This led to the establishment of a concept of a uniform limitation of liability, which is more predictable for participants in maritime transport. Limitation of liability based on the value of the cargo unit, as introduced by international conventions, represents a significant innovation in the entire history of liability limitation. Even the Limited Liability Act of 1851, which governed the limitation of a vessel owner's liability in the United States, contained the provision that the liability of a vessel owner for loss or damage to goods, incurred without the privity or knowledge

of ratification, approval or accession. So far, only five countries have ratified them, i.e. Congo, Spain, Togo, Cameroon and Benin. *Ibid*.

[56] The limitation of liability per unit of cargo was introduced at the international level by the Hague Rules, adopted in 1924, by the Hague-Visby Rules, adopted in 1968, and by the Hamburg Rules, adopted in 1978. The Rotterdam Rules, adopted in 2008, which have not yet entered into force, also provide for a limitation of liability. Under Article 4(5) of the Hague Rules, a maritime carrier cannot be held liable for lost or damaged goods for more than 100 pounds sterling per package. The Hague-Visby Rules, together with the 1979 Protocol, increased the limitation of liability under Article 4(5) to 666.67 Special Drawing Rights (SDR) per package or 2 SDR per kilogramme of the gross weight of the lost or damaged goods, whichever is higher. According to the Hamburg Rules, Article 6(1), the carrier's liability is limited to 835 SDR per package or other shipping unit, or 2.5 SDR per kilogramme of the gross weight of the lost or damaged goods, whichever is higher. Under the Rotterdam Rules, Article 59(1), the carrier's liability is limited to 875 SDR per package or 3 SDR per kilogramme of the gross weight of the goods that are the subject of the claim or dispute, whichever is higher. Unlike the Hague and Hague-Visby Rules, the Hamburg and Rotterdam Rules also regulate liability for delay. Under the Hamburg Rules, Article 6(1), the carrier's liability for delay is limited to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea. Under the Rotterdam Rules, Article 60, economic loss due to delay is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but in no case may it exceed the limitation of liability provided for total loss of the goods under the Rules. Regardless of the above, a maritime carrier cannot invoke the limitation of liability if the loss, damage, or delay in delivery of the goods is caused intentionally or recklessly, with knowledge that such loss, damage, or delay would occur, as established in Article 4(5) of the Hague-Visby Rules, Article 8 of the Hamburg Rules, and Article 61 of the Rotterdam Rules.

of the owner, shall not exceed the amount or value of the owner's interest in the vessel and its freight then pending. The method of limiting liability based on the cargo unit was not introduced even by the Harter Act of 1893, which had a significant influence on the Hague Rules. In any case, the international conventions that introduced limitations of a maritime carrier's liability, which cannot be reduced to the detriment of the cargo owner, have prevented them from exploiting the institution of contractual freedom.

3.1. Development of maritime carriers' liability based on the Hague Rules and seaworthiness

Seaworthiness, on which the maritime carriers' responsibility in the modern era is based, began to develop immediately after the Middle Ages, or perhaps even earlier.[57] It is the condition that makes a ship suitable for navigation, but this very simple definition also includes many questions regarding the term of seaworthiness, some of which are not easy to answer.

If discussed detailly, some of basic characteristics of seaworthiness are that it is a state of the vessel with such equipment, under the command of a competent master and crew, the cargo will, as a rule, be properly loaded, transported, maintained, and discharged safely on the intended voyage.[58] However, seaworthiness is a very relative concept since it refers to a ship with certain characteristics and standards, intended for a particular voyage and stages of that voyage, at a certain time of year, for a certain cargo and for certain standards for the carrying of cargoes at the applicable time.[59] All this means that a ship deemed seaworthy for a particular voyage and for a particular cargo is not necessarily seaworthy for other voyage or cargo.

Concerning the maritime carrier's duty to ensure the vessel is seaworthy, knowledge of the elements of seaworthiness alone is insufficient; the maritime

[57] In England, the obligation of the martime carrier to render the ship seaworthy is reflected in bills of lading. A very early example of such a bill of lading was the Charter Party of the ship Cheritie from 1531, which imposed specific duties on the maritime carrier regarding its seaworthiness. The bill of lading stated: "stronge stanche well and sufficyentlye vitalled and apparellyd with mastys sayles sayle yerds ancors cables ropes and all other thyngs nedefull and necessarie to and for the sayd shype during this presentt viage And the sayd owner shall ffynd the sayd shippe xj good and able maryners."

[58] Tetley, W., *op. cit.* (fn. 32), p. 370.

[59] Girvin, S., *The Carrier's Fundamental Duties to Cargo under the Hague and Hague-Visby rules*, The Journal of International Maritime Law, *vol.* 25, no. 6, 2019, p. 445.

carrier must also know the criteria evidencing the exercise of due diligence in making the ship to be seaworthy. Modern concept of seaworthiness established in common as well as in in civil law is based on a maritime carrier's due diligence. This implies that the duty to provide a seaworthy ship is not absolute. The Harter Act as well as the Hague Rules introduced the scope of exemption from fault-based liability if maritime carriers exercised due care.[60]

Pursuant to the Hague Rules, the maritime carrier's duty to maintain the vessel in a seaworthy condition exists solely before and at the outset of the voyage.[61] This was tried to be justified by the fact that once the ship starts its journey, the maritime carrier no longer has control over it, or it is very limited. However, the reasons for such a regulation as well as for the introduction of maritime carrier's fault liability are that Hague Rules is a compromise between commercial interest of carriers and cargo-owners. This was due to the United Kingdom, which dominated the shipping industry at the start of the 20th century with a substantial fleet of sailing vessels and steamships exceeding 100 tons, representing over half of the world's tonnage, favouring carriers on one hand and United States of America, Canada and Australia favouring cargo owners on the other hand, respectively.[62]

With respect to the maritime carrier's obligation to ensure the vessel's seaworthiness, the issue arises as to which party bears the burden of proof in cases where damage is attributable to unseaworthiness. Is the burden of proof upon the cargo interest, which means that we have fault-based liability, or does the maritime carrier have to prove that the damage occurred without its fault or privity. In other words, presumed fault liability is applied. The provisions of Hague Rules are not completely clear on this issue and are interpreted in either way.

Under Article 4(1) of the Hague Rules, neither the carrier nor the ship is liable for loss or damage stemming from unseaworthiness, unless the carrier failed to exercise due diligence to ensure the ship was seaworthy. The expression "neither the carrier nor the ship shall be liable" means that the carrier is only responsible if the cargo owner demonstrates that the carrier, or its agents or servants, contributed to the loss, reflecting a proved fault-based liability approach.[63]

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60 Defossez, D. A. L., *Seaworthiness: The Adequacy of the Rotterdam Rules Approach*, University of San Francisco Maritime Law Journal, *vol.* 28, no. 2, 2015, p. 241.

61 Article 3(1) Hague Rules.

62 Yilmaz, M., *The Evolution of the Obligation of Seaworthiness from the Hague Rules to the Rotterdam Rules*, Selcuk Univeritesi Hukuk Fakultesi Dergisi, *vol.* 29, no. 2, 2021, p. 885.

63 Kassem, A. K., *The Legal Aspects of Seaworthiness: Current Law and Development*, Doctoral Dissertation, Swansea University, Swansea, 2006, p. 143.

"Furthermore, this type of liability is reflected in the wording of part of Article 4(1) of the Hague Rules, which concludes with the words: "Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article". The entire phraseology of this article led to general assumption that no onus falls on the carrier in relation of proof of due diligence until the other party has first established that the vessel was unseaworthy and that the loss was attributable to that fact."[64]

Tetley disagrees with this view for several reasons that demonstrate his commitment to presumed fault liability within the framework of the Hague Rules. He emphasizes that according to Article 3(1) of the Hague Rules, a maritime carrier is primarily responsible for making the ship seaworthy[65] and that placing the initial burden of proving unseaworthiness on the cargo claimant is illogical for several reasons: "(i) the facts regarding unseaworthiness are not available to the cargo claimant, (ii) the carrier must prove the cause of the damage, which will entail proving the unseaworthiness, if it was the cause, (iii) the carrier has the burden of proving due diligence to make the vessel seaworthy which entails evidence as to the seaworthiness."[66] According to Tetley, the burden of proof in proving loss or damage is in the following order: "the cargo owner must first prove that the loss or damage occurred while the goods were in the possession of the maritime carrier. The maritime carrier must then prove (i) the cause of the loss or damage, (ii) that he used due care to prepare the ship for seaworthiness, and (iii) that the cause of the loss or damage to the goods falls within one of the exceptions from indents (a) to (q) of Article 4 (2) of the Hague Rules. The burden of proof then shifts back to the cargo owners, who must rebut the maritime carrier's evidence, including proof of the ship's seaworthiness and his due diligence."[67]

Tetley's concept has certain foundations; however, it is rarely encountered in case law. In the Farrandoc case[68] highlighting the "orthodox view" regarding the burden of proof, the court defined the steps that cargo owners must take if they want to succeed with their claim for damages. It is clear from the mentioned steps that the burden of proof regarding liability for damages is not transferred

64 Wilson, F. J., *Carriage of Goods by Sea*, Longman, London, 2001, pp. 193 – 194.

65 See Tetley, W., *op. cit.* (fn. 32), p. 376.

66 *Ibid*.

67 Tetley, W., *The Burden and Order of Proof in Marine Cargo Claims*, pp. 31 – 32, https://www.arbitrage-maritime.org/CAMP-V3/fr/Gazette/G37complement/burden.pdf, (26 January 2025).

68 Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc), [1967] 2 Lloyd's Rep. 276.

to the maritime carrier. Therefore, the cargo owner must take an active role if it wishes to succeed with its claim, even more so than the maritime carrier. The aforementioned case establishes the following order in proving the maritime carrier's responsibility or lack thereof:

- it is on the cargo owner to establish the occurrence of loss or damage to the goods,
- after the cargo owner proves that the goods have suffered loss or damage, the burden shifts to the maritime carrier to prove that such damage is attributable to one of the exceptions listed in Article 4(2) of the Hague Rules.
- should the maritime carrier establish one of the cited exceptions, the cargo owner must subsequently prove that the damage results from a cause outside the scope of those exceptions, with unseaworthiness among them,
- if the cargo owner succeeds in this, the maritime carrier has two possible ways to exonerate himself from liability and compensation: (i) by proving that it exercised due diligence in preparing the ship's seaworthiness, or (ii) by proving that unseaworthiness did not contribute to the damage.[69]

The court ruled similarly in a known case of The Hellenic Dolphin[70], where water entered the ship's holds containing asbestos, resulting in damage to the cargo. There was no evidence as to whether the ship was in a defective condition before or after loading the cargo. The maritime carrier relied on the Article 4(2) Hague Rules exception for peril of the sea. Because the cargo owner presented no evidence of unseaworthiness, the claim was rejected.

3.2. Hamburg Rules

The Hamburg Rules were enacted to strike an equitable balance between the interests of cargo owners and carriers. The Hamburg Rules were adopted to establish a balance between the interests of cargo owners and carriers. This task was entrusted to the United Nations Commission on International Trade Law. As the Hague and Visby Rules placed a significant burden of proof on shippers, the Hamburg Rules sought to establish presumed fault liability for all cases of loss or damage to goods, thereby creating a uniform burden of proof

[69] See also Girvin, S., *op. cit.* (fn. 59), p. 448; Kassem, A. K., *op. cit.* (fn. 63), pp. 143 – 144; Yilmaz, M., *op. cit.* (fn. 62), p. 895.

[70] (1978) 2 Lloyd's Report, p. 336.

for carriers.[71] According to Article 5 (1) of the Hamburg Rules, basic liability of a carrier becomes presumed fault liability and a maritime carrier is liable if he fails to prove that he took all measures that could reasonably be required to avoid the occurrence and its consequences.

The above indicates that maritime carrier's responsibility is not assessed in terms of seaworthiness, but in accordance with general provisions of Article 5(1) of the Hamburg Rules.[72] Unlike the Hague Rules, under which martime carrier are protected by the concept of due diligence to ensure the ship's seaworthiness, along with specified exceptions from liability, the Hamburg Rules regime exposes maritime carriers to greater liability risks by replacing these safeguards with a less favorable principle of presumed liability for both loss or damage to cargo and for delays in the execution of transport.[73] If a maritime carrier intends to be relieved of liability, it must prove that it, its employees, and any other persons working for it took all reasonable measures to prevent the damage. In practice, this means that it must state the facts and provide evidence as to how the damage occurred, and if it wants to be relieved of liability for damage, it must also prove that the damage occurred despite all reasonable measures being taken to prevent it. Such a provision is not favourable for maritime carriers because technical progress imposes more and more duties on maritime carriers to prevent damage events.[74] Compared with the Hague Rules, the Hamburg Rules lengthened the duration of maritime carriers' liability. According to the Hamburg Rules, a maritime carrier is liable for damage to the cargo during the entire time that the cargo is in its possession, including during the voyage and when located at the port of disembarkation. The Hamburg Rules also abolished fault in navigation as one of the reasons for the exculpation of a maritime carrier from liability.

The purpose of the Hamburg Rules was to eliminate confusion regarding the burden of proof for liability for damage resulting from the loss or damage of goods by transferring the burden of proof to the maritime carrier, as they possess the most facts related to the damage event.[75] In any case, by introducing a presumed fault-based liability regime into maritime law, the Hamburg Rules brought about such a significant shift that the diplomatic conference

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71 Wilson, F. J., *op. cit.* (fn. 64), pp. 214 – 215.

72 Defossez, D. A. L., *op. cit.* (fn. 60), p. 243.

73 Pejović, Č., *op. cit.* (fn. 2), p. 27.

74 Polić Ćurćić, V., *Stupanje na snagu Hamburških pravila i njihov utjecaj na pomorsku privredu*, Uporedno pomorsko pravo, *vol.* 34, no. 133-134, 1992, p. 40.

75 Wilson, F. J., *op. cit.* (fn. 64), p. 216.

at which the Rules had been adopted included, at the end of the text of the Rules, a "Common Understanding adopted by the United Nations Conference on the Carriage of Goods by Sea" as an annex, which serves an interpretative purpose.[76] The provision of Article 5(1) in the Hamburg Rules does reflect the concept of presumed fault-based liability; however, during the discussions on the adoption of the Rules, many conflicting opinions were expressed regarding whether the principle of presumed fault-based liability was adequately captured in it.[77] The text of Article 5(1) of the Hamburg Rules represents the minimal consensus regarding presumed fault-based liability that the drafters of the Rules could achieve. Precisely with the aim of preventing misunderstandings of the text of Article 5(1) of the Hamburg Rules, the "Common Understanding" text was adopted, as described above. This text emphasizes that the nature of the carrier's liability under the Rules is based on presumed fault or negligence, and that the burden of proof lies with the carrier, unless the provisions of the Rules provide otherwise. It should be noted that not all of the Hamburg Rules are based on presumed fault-based liability of the carrier, since in the case of damage resulting from the loss or damage of goods due to fire, the carrier liability is a clear example of the proved fault based aproach.[78]

3.3. Rotterdam Rules

The creation of the Rotterdam Rules was prompted by the fact that the Hamburg Rules, despite coming into force, never really took effect, as they were adopted mainly by developing countries with an only 5% share in world maritime trade[79], and also by the fact that the Hague Rules have regulated a position of maritime carriers in a relatively archaic manner.[80]

The Rotterdam Rules impose an obligation on the maritime carrier to make the ship seaworthy, but in contrast to the provisions of the Hague Rules, this

[76] The provision of the said annex reads: "It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule."

[77] Kačić, H., *The provisions regarding the carriers, liability under the Hamburg Rules*, *vol*. 31., no. 122-124, 1989, p. 194.

[78] Hamburg Rules, Article 5(4).

[79] Yilmaz, M., *op. cit.* (fn. 62), pp. 901 – 902.

[80] See Pavliha, M., *First Centenary of the Good Old Hague Rules and Their (In)capable Descendants*, European Transport Law, *vol. 59*, no. 4, 2024, p. 407.

obligation is permanent, i.e. the maritime carrier must ensure that the ship is seaworthy before, at the start of and during the voyage.[81]

As in the Hague Rules, the carrier's liability in the Rotterdam rules is based on fault. The Rotterdam Rules intertwine elements of the Hague Rules and Hamburg Rules, which is evident in a rather long Article 17, which combines elements of presumed fault and proven fault liability. The aforementioned article also indicates which party carries the burden of proof when establishing liability.[82]

In accordance with the Rotterdam Rules, the carrier is liable if the claimant proves that the damage occurred at the time he was responsible for the goods.[83] If the claimant succeeds in this action, the carrier has two options. It can begin to prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of the persons who worked for it.[84] By this, the Rotterdam Rules introduced presumed fault liability[85], which is otherwise typical of the Hamburg Rules. However, the carrier may invoke exemptions from its liability, which is typical of the Hague Rules.[86]

Even if the carrier proves one of the exceptions to its liability, it is still liable if the claimant proves that the carrier's fault or persons who worked for it contributed to the event or circumstance on which carrier relies.[87] The carrier is also liable for loss, damage, or delay if the claimant proves that it arises from an event or circumstance which does not constitute an exception to its liability as stated in the Rotterdam Rules, and the carrier fails to prove that this event or circumstance is not due to its own fault or the fault of persons acting on its behalf.[88] The carrier remains liable if the claimant can prove that the ship was unseaworthy, meaning that under the Rotterdam Rules, the burden of proof

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81 Rotterdam rules, Article 14.

82 See Berlingeri, F.; Zunarelli, S.; Alvisi, C., *La nuova convenzione Uncitral sul trasporto internazionale di merci »Wholly or partly by sea« (Regole di Rotterdam)*, Il dirittto maritimo, no. 4, 2008, pp. 1176 – 1178.

83 Rotterdam rules, Article 17(1).

84 Rotterdam rules, Article 17(2).

85 Ivošević, I., *Roterdamska pravila – novi pokušaj međunarodnog uređenja odgovornosti za pomorski prijevoz stvari i s njime povezanih drugih grana transporta*, Poredbeno pomorsko pravo, *vol. 52*, no. 167, 2013, p. 116.

86 The grounds for exemption of liability are set out in the provisions of Article 17(3) (a) to (o) of the Rotterdam Rules.

87 Article 17(4)(a).

88 Article 17(4)(b).

for establishing unseaworthiness lies with the claimant or cargo owner.[89] If the unseaworthiness is proven by the claimant, the maritime carrier may then prove that the unseaworthiness did not contribute to the loss, damage, or delay, or that the loss, damage, or delay occurred despite all due care having been taken to make the ship seaworthy.[90]

Based on the above, it is clear from the Article 17 of the Rotterdam Rules that with respect to the burden of proof, they incorporate, on the one hand, elements of the Hamburg Rules and elements of the Hague Rules on the other. They combine the maritime carrier's presumed fault liability and at the same time its obligation to exercise due diligence in making the ship seaworthy, with the cargo owner's duty to prove that the vessel is unseaworthy, but also extensive exceptions to the maritime carrier's liability. In any case, it is a compromise accepted in the hope that countries with a strong merchant fleet will also ratify the convention. The Hague Rules are much less defined than the Rotterdam Rules in terms of burden of proof and operate in a different way.[91] However, an extensive body of case law has developed on their basis, which makes them predictable. Case law based on the Rotterdam Rules has yet to be established, but this is unlikely as there is no prospect of their entering into force.

4. RECENT DEVELOPMENTS IN THE AREA OF STAKEHOLDERS' LIABILITY IN MARITIME TRANSPORT AND BEYOND

4.1. General

Classical debates regarding liability in the field of maritime law mainly refer to the type and limitation of liability as well as the burden of proof, but recently

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89 Article 17(5)(a).

90 Article 17(5)(b).

91 Under the Hague Rules, the claimant bears the burden of proving both the loss and the breach of contract that caused it. Once this is established, it is essential to determine whether the maritime carrier exercised due diligence to ensure the ship's seaworthiness prior to and at the commencement of the voyage. If this duty of care is breached, the exceptions do not shield the maritime carrier from liability for any resulting damage. Conversely, if there is no breach of Article 3(1) of the Hague Rules, the exceptions do provide protection, as the maritime carrier's obligations regarding loading, handling, stowage, and related activities are explicitly subject to the exemptions set out in Article 4 of the Hague Rules. – See Baatz, Y.; Debettista, C.; Lorenzon, F.; Serdy, A.; Staniland, H.; Tsimplis, M., *The Rotterdam Rules: A Practical Annotation*, Informa Law Mortimer House, London, 2009, pp. 49-50.

there have been major shifts that even interfere with fundamental postulates of civil and common law, especially the rule that contracts bind only their parties.

In civil law, this postulate has its origins in Roman law, which did not allow contractual rights and obligations to extend to third parties.[92] Therefore, there were rare cases where persons who were not parties to the contract were granted their rights. One of such contracts is a contract in favour of a third party. Under this type of contract, one party (the promisor) undertakes to the other party (the promisee) to perform the contract for the benefit of a third party (the beneficiary).[93] In common law, the rule is that the beneficiaries of the contract are its parties. This principle is called privity of contract.[94] This very rigid concept prevents any widening of the contractual sphere created between parties.[95] The doctrine of privity of contract is related to the doctrine of consideration which requires that every contract must be supported by some form of consideration.[96] This is well illustrated in *Curie v. Misa*[97] clearly defining the term "consideration" as an individual right, interest, profit or benefit that belongs to an individual party, or an omission, damage, loss, liability suffered by another party. The party to whom the benefit accrues is the promisor; the party who has to suffer some disadvantage is the promisee. The consideration does not necessarily correspond to the value that one party receives from the other, which means that it may be the fulfilment of two parties that are not proportionate in value.[98]

4.2. Reasons for departing from the principle that only parties to contract are bound

In the 20th century, various activities are becoming increasingly specialized and maritime transport is no exception. In the past, it was typical that ships did not carry a lot of cargo, but, on the other hand, they were operated by numerous crews who carried out loading and unloading of cargo in ports. Everything changed with development of ship technology and large ships that could no

92 Diener, C. M., *Il contratto in generale*, Giuffrè Editore, Milano, 2002, p. 681.

93 Cigoj, S., *Komentar obligacijskih razmerij*, I. Part, Časopisni zavod Uradni list RS Slovenije, Ljubljana, 1984, p. 491.

94 Beatson, J., *op. cit.* (fn. 32), p. 421.

95 Beale, N.; Hartkamp, A.; Kötz, H.; Tallon, D., *Contract Law*, Hart Publishing, Oxford University Press, Oxford, New York, 2002, p. 49.

96 Beatson, J., *op. cit.* (fn. 32), p. 423.

97 (1875) L.R.10 Ex. 153.

98 Major, W. T., *Law of Contract*, 7th ed., Pitman Publishing, London, 1988, p. 39.

longer be loaded or unloaded by crews, which became smaller and smaller. In this respect, specialized service providers appeared that were not parties to the transport contract, among which the most important were stevedores. Since they have similar risks to carriers in ports, they soon started claiming the same liability limits and other benefits as carriers, including the limit of liability which is the highest among all transport industries. They had every reason to do so, as shippers as well as consignees in many cases filed claims against stevedores to get full compensation, but the way to the point when stevedores managed to achieve the same limitation of liability as maritime carriers was very long.

In *Great Britain, Elder, Dempster & Co. Ltd v. Paterson, Zochonis & Co*[99] an important question was raised as to whether a maritime carrier, in the event of a tort claim by the shipper for damage resulting from negligent loading of the cargo, can invoke the liability exclusion provisions of the bill of lading, even if the contract was concluded between the shipper and the charterer. The court answered affirmatively, relying on the principle of vicarious immunity, under which an agent performing a contractual obligation on behalf of a principal is entitled to the same protections as the principal, including any liability exclusions applicable to the charterer. The court noted that although the maritime carrier was not party to the contract, his possession of the goods on the charterer's behalf subjected him to the same liability limitations as the charterer. The court further endorsed the maritime carrier's position that such responsibility arose under the principles of privity of contract.

United States courts were relatively late, compared with United Kingdom, in recognizing the same benefits to persons not parties to contract of carriage as enjoyed by maritime carriers. In the 1950s, the court in the case of *A.M. Collins & Co. v. Panama R.R. & Co*[100] took the position that the carrier's agents and employees are covered by the liability limitations in the bill of lading, as they operate as part of the carrier's enterprise. Also important is the case of Coffee *Growers of Columbia v. Ishrandtsen Co.*[101], where the court held that the one-year time bar period extends to the port terminal operator in its capacity as the maritime carrier's agent, despite the lack of an explicit provision in the bill of lading conferring these rights. Similarly, in the case of *South Star*[102], the court ruled that the one-year time limit for bringing a claim extends to the ship's agent and the stevedore in a charter party case.

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99 (1924) AC 522.

100 (1952) AMC 2054.

101 (1957) AMC 1571.

102 (1954) AMC 418.

4.3. The emergence and development of the Himalaya Clause

All of the above led to the Himalaya clause, an instrument of maritime law that has recently expanded even to include the land part of transport, as long as the main transport is carried out by ship. In this regard, it is necessary to mention the case *Adler v. Dickson*[103], where, while boarding the ship Himalaya in Trieste, Ms. Adler fell from the ship's bridge. Her ticket contained a provision exempting the maritime carrier from liability for passenger injuries, prompting her to sue the ship's master and the boatswain. The Court of Appeal found that, in the carriage of passengers and cargo, the maritime carrier contracts not only on his own behalf but also on behalf of those acting for him. The court held that the passenger ticket conferred no express or implied benefit on the crew, and therefore Dickson, the ship's boatswain, was held liable. As a result of this judgment, bills of lading began to include specially formulated Himalaya Clauses providing benefits to stevedores and other workers.[104]

Despite the fact that the court in the Himalaya case took the position that the benefits enjoyed by the maritime carrier could also be relied upon by persons working for him, there was still a dilemma how to justify the consideration in relation to the Himalaya clause which is in common law referred to as a benefit that one party gives to another in order to obtain a return benefit. The case of *Midland Silicones Ltd. v. Scruttons Ltd.* was crucial in this regard[105], in which Justice Lord Reid developed the agency theory.[106] According to this theory stevedores may rely on the provisions of the bill of lading as agents of the carrier. To do so, four conditions need to be satisfied: (i) the bill of lading must indicate that its provisions apply to the stevedore, (ii) it must be evident that the maritime carrier negotiated the contract also as the stevedore's agent, (iii) the maritime carrier must have the stevedore's authority to act on its behalf, and (iv) there are no issues concerning consideration. Although Lord Reid's theory marked significant progress, it did not resolve the question of what constitutes valid consideration. This was resolved by the case of *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite*[107], where the court defined consideration in such a way that when the bill of lading is issued as an unilateral act of the maritime carrier, where he also acts as an agent of the stevedore, he also activates the rights of

[103] (1954) 2 Lloyd's Rep. 267.

[104] Tetley, W., *op. cit.* (fn. 32), p. 758.

[105] (1961) 2 Lloyd's Rep. 365.

[106] For Lord Reid's theory of agency, see also Tetley, W., *op. cit.* (fn. 32), pp. 762 – 763.

[107] (1974) 1 Lloyd's Rep. 534.

the shipper that arise when he performs services for the benefit of the shipper, thereby legitimizing the right to claim benefits from the bill of lading.

This demonstrates how the Himalaya Clause as we know it today was incorporated in common law. The Himalaya Clause also developed in civil law, but more in legislative than in case law. Thus the Supreme Court of Belgium in the case of *Sibyline*[108] took the position that an *agent d'exécution*, whether an employee or an independent contractor engaged by the carrier to undertake the performance of the contract, in whole or in part, on its behalf, is not considered a third party with respect to the performance of the contract and in relation to the other contracting party. In this sense, a stevedore may incur tort liability under the same conditions as the contracting parties.

First legislative regulation regarding Himalaya Clause was conducted in France, with the adoption of the Law on contracts of affreightment and maritime transport (*Fr. Loi sur le contrats d'affrètement et de transport maritimes – LCTAM*), where Article 54 stipulates that the shipper cannot in any case be liable more than what is defined in Articles 28 and 43 of the same law.[109]

Slovenia is one of the few countries that have incorporated the Himalaya Clause in its legislation. The Maritime Code (Slo. *Pomorski zakonik*), which entered into force in 2001, also regulates stevedoring contract. According to it, the stevedore is not liable for damage, deficiency or loss of more than 2.75 SDR per kilogramme of gross weight of damaged, missing or lost goods.[110] In the event of a delay in performing services, the responsibility of the stevedore is limited to two and a half times the amount of the client's payment for shipping services.[111] It is more than clear that provisions of the Slovenian Maritime Code on the responsibility of stevedores are based on the United Nations Convention on the

[108] Cass. B., 7. December 1973, A.C., 1974, p. 395.

[109] Article 54. of LCTAM (Official Gazette of the Republic of France, no. 0145 dated 14/06/1966 as amended) defines that liability of stevedore cannot in any case overpass the sum defined in Articles 28 and 43 of LCTAM. These articles regulate the liability of the carrier. Article 28 establishes the limitation of liablitiy for the cargo which is based on limitation of liability valid fot the carrier. In the first text of the LCTAM, the limitation of liability was defined by the decree. As amended by the Law number 86 from 23 December 1986, the limitation of the liability is based on International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed in 25 August 1924, and the Protocol of 21 December 1979.

[110] Article 674(1) of the Maritime Code, Official Gazette of the Republic of Slovenia, no. 62/16 - official consolidated text (as amended).

[111] Article 674(2) ot the Maritime Code.

Liability of Operators of Transport Terminals in International Trade, which, however, never entered into force.[112]

4.4. Extending the Himalaya Clause to participants in other modes of transport

The reason for development of the Himalaya Clause was that contractors providing services directly to maritime carriers or in maritime transport could also claim the benefits enjoyed by maritime carriers. Since maritime transport is only one of the modes of transport, even if in many cases the main transport, its performance does not complete the transport, when it is necessary to carry out other transports to complete the transport as a whole. In this respect, it was only a matter of time when the Himalaya Clause would have to be extended to other modes of transport, especially land transport. One of the first such cases was *Taisho Marine & Fire Ins. v. Maersk Line Inc.*[113], in which a road carrier performed the transport of machinery after it had been unloaded from the vessel. The court held that the road carrier could invoke the Himalaya clause, as it was evident that the maritime carrier intended for its subcontractors to benefit from the clause, even if they were not expressly named. In the case of *Fruit of the Loom v. Arawak Caribbean Line Ltd.*[114], the cargo was transported under an ocean bill of lading issued as an intermodal or through bill of lading with Himalaya Clause coverage. Following the completion of the sea leg, the ocean carrier contracted a trucking company for onward transport; however, the truck was hijacked before departing Florida. The court ruled that, even in the absence of privity with the shipper, the trucker was entitled to the protections afforded by the ocean bill of lading, given that the shipper had previously transported cargo with the same ocean carrier on multiple occasions.

Far more important is the case of the *Norfolk Southern Railway Co. v. James N. Kyrby, Pty Ltd (Kirby)*[115], where the forwarder, in the context of multimodal trans-

[112] Pursuant to Article 22 (1) the Convention enters into force on the first day of the month following the expiration of one year after the deposit of the fifth ratification by a State that has acceded to the Convention, which has not occurred. So far, it has only been ratified by Egypt, Gabon, Georgia, and Paraguay, https://uncitral.un.org/en/texts/transportgoods/conventions/liability_of_operators_of_transport_terminals (15. October 2025).

[113] (1993) AMC 705 (N.D.III.1992).

[114] (2000) AMC 387 (S.D. Fla. 1998).

[115] (2004) AMC 2705.

port, entered into a contract as principal (carrier) with an Australian shipper by issuing a bill of lading for the shipment of machinery from Sydney to the United States. The provisions of this bill of lading included a Himalaya clause, which applied to all persons involved in the performance of the transport, including those who did not act on behalf of the forwarder (independent contractors). Subsequently, the forwarder concluded a contract for the carriage of the cargo with the ocean carrier, based on a bill of lading issued to it by the carrier. The mentioned bill of lading incorporated another Himalaya clause, providing protection to all agents and servants, as well as independent contractors, and also including a limitation of liability. The ocean carrier proceeded to contract with a railway carrier, whose train derailed and damaged the goods.

The Supreme Court of the United States of America held that the bill of lading constituted a maritime contract, even though it involved the performance of transport by rail deep inland. In reaching its decision, the court considered that maritime transport, which in its performing includes a much shorter rail segment, is still maritime transport. For this reason, although the transport was a combination of maritime and rail carriage, the bill of lading retained its 'maritime character', making the dispute subject to federal law rather than the law of individual states. Applying state law to the land segment would have been contrary to the goals of unifying maritime law. Based on this reasoning, the court concluded that all persons performing tasks necessary for the execution of the transport, even if they were not in a contractual relationship with the forwarder, could benefit from the contract. The court considered the beneficiaries' lack of privity with the freight forwarder irrelevant, since the broad terms of the forwarder's bill of lading did not impose any privity requirement.

A further important step in the development of the Himalaya Clause was the case of *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*[116] In this case, the shipper in China entrusted the goods to Kawasaki Kisen and its K-Line agent, the latter issuing four through bills of lading to cover the entire shipment from China to the United States. These bills incorporated a Himalaya Clause extending protections to all subcontractors, as well as a Paramount Clause applying the Carriage of Goods by the Sea Act (COGSA) even during periods of inland transport. The bills also specified that any disputes were to be resolved by the Tokyo District Court. While the goods were being transported inland toward the United States, the train carrying them derailed. This incident raised the

[116] (2010) AMC 1521.

question of whether the Carmack Amendment[117] or COGSA should be applied to liability for damages that occurred.

The question is not without significance, since according to the Carmack amendment the railway carrier is liable for "actual loss or injury". The amendment also circumscribes the potential venues in which suit may be brought, very likely rendering foreign forum selection clauses in bills of lading meaningless, and finally the notice of claim requirements and statute of limitation under Carmack are more liberal than those in COGSA.[118]

The court took the position that K-Line was not obliged to issue a waybill because it received the goods in China as a shipper, which means that it did not act as a receiving rail carrier. Application of the Carmack provisions requires that the journey start with a receiving rail carrier, as the shipments originated in China, not the United States, and the ocean carrier does not meet the definition of a receiving rail carrier. Accordingly, the court decided that the relationship is considered on the basis of the provisions of COGSA and that the Japanese forum is competent to resolve dispute. In its decision, the court also came out from the fact that it is necessary to proceed from the policy of commercial efficiency, which would not be present if the relationship of multimodal transport were regulated on the basis of two legal regimes, one of which would originate from the bill of lading issued in maritime transport, and the other from the waybill issued in rail transport. Such a regime would be particularly disadvantageous when determining the location of damage, which is difficult to determine in the case of transport with containers that do not open during transport.

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[117] The Carmack Amendment was adopted in the United States in 1906 amending the Interstate Commerce Act of 1887 with the aim to relieve cargo owners of the burden of finding one negligent party when multiple carriers are involved. The Carmack Amendment requires road or rail carriers to issue a way bill for each load they receive for transportation. The said amendment is favorable to cargo owners because every carrier is liable for "actual loss or damage to property". To put it differently, any damage to the cargo falls under the responsibility of the "receiving carrier". – See Stando, M., *Clause for Concern? The Flawed Expansion of the Himalaya Clause and the Rise of the Circular Indemnity Clause in the United States*, Tulane Maritime Law Journal, *vol. 44*, no. 2, 2020, pp. 325 – 326.

[118] Adler, Y., U., *Regal-Beloit Revisited in the Reverse*, Tulane Maritime Law Journal, *vol. 39*, no. 1, 2014, p. 199.

4.5. New Himalaya Clause

The use of increasingly complex transport including multimodal transport has helped to transform the classic Himalaya Clause providing subcontractors of the maritime carrier to enjoy the same benefits as he, into a new type of Himalaya clause: "Under this type of clause, a cargo owner agrees to indemnify a carrier for any amounts that the carrier must pay to his subcontractor as a result of the cargo owner's action against the subcontractor."[119] For such provision term "circular indemnity clause" was introduced and is included in bills of lading, because in many cases carriers include provisions in their contractual relations with subcontractors stipulating that, in the event the cargo owner files a claim against them and they are required to make a payment, such payment shall be reimbursed by the carrier. This clause is beneficial to a carrier and his subcontractors but also discourages the cargo owner from filing actions against the subcontractors. This can be a problem in cases of complex multimodal transport relationships, as it is sometimes difficult to determine carrier's subcontractors.

One of the examples of a circular indemnity clause is the judgment of the United States Court of Appeals for the Fifth Circuit in *Royal SMIT Transformers BV v. Onego Shipping & Chartering BV*[120], where the carrier Central Oceans USA, LLC contracted with the Dutch transformer manufacturer Royal SMIT Transformers to transport three transformers from the Netherlands to Louisiana. The bill of lading contained a Himalaya Clause, which precluded the cargo owner from filing claims against any of the carrier's subcontractors.[121] Upon handover, it was found that the transformers were damaged on the way. For this reason, the cargo owner sued the carrier and three of its subcontractors. Court of appeal pointed out that since a Himalaya Clause that protects downstream carriers that they will not be sued does not restrict cargo owners from recovering damages, reference to the cases of Kirby and Regal-Beloit is admissible. On

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[119] Stando, M., *op. cit.* (fn. 117), p. 331.

[120] 898 F.3d 543 (5th Cir. 2018).

[121] The Himalaya Clause in the bill of lading contained the following text:
"(b) [Royal] undertakes that no claim shall be made against any servant, agent, or other persons whose services [Central Oceans] has used in order to perform the Multimodal Transport Contract and if any claim should nevertheless be made, to indemnify [Central Oceans] against all consequences thereof.
(c) However, the provisions of this Contract apply wherever claims relating to the performance of the Multimodal Transport contract are made against any servant, agent or other person whose services [Central Oceans] has used in order to perform the Multimodal Transport Contract, whether such claims are founded in contract or tort."

the other hand, the court pointed out that the circular indemnity clause is an ordering mechanism that excludes individual parties from liability for damage and can therefore not be considered as a Himalaya clause. The latter gives the maritime carrier's contractors or the persons working for the maritime carrier only the same protections as enjoyed by him. For this reason, the complete extension of a circular indemnity clause to the Kirby and Regal-Beloite cases is not appropriate, since a circular indemnity clause prevents cargo owners from recovering damages from the maritime carrier's contractors or from persons working for maritime carrier, respectively.

5. CONCLUSION

Since ancient Rome, liability of a maritime carrier has developed within general institutions of civil law, adapting to the situations faced by parties to contract of carriage. In ancient Rome, customers entering into transport contracts with carriers were highly protected. This protection did not develop within maritime law, but rather as a measure of the Roman state authority, specifically a measure of a praetor to protect the position of certain groups, i.e. of persons who handed over their things to carriers, innkeepers or stable owners, thus losing control over their possession. Even if in Roman law the contractual form of *locatio conductio* based on fault liability was used to regulate relations between a carrier and its customers, the carrier was responsible for the goods received on the basis of strict liability based on the praetorian edict. It had to ensure the goods were returned in the same quantity and quality as originally received and was released from liability for any loss, destruction, or deterioration of the goods arising only from force majeure or piracy.

In Middle Ages, differences between very pure contractual forms from the Roman period became blurred because merchants began to board ships and assume some control over the execution of the voyage, thus enabling carriers to often exculpate themselves from their liability. Nonetheless, the carriers' strict liability was not eliminated. This happened as late as 18th and 19th century, after the position of maritime carriers greatly increased due to their increasing bargaining power. While strict liability was still maintained, carriers, on the basis of contractual freedom, began to include exemption clauses in bills of lading making themselves practically not responsible for anything. After two thousand years, the intervention of the legislator was again necessary, and maritime carriers were obliged, first by national and then international legislations, to exercise due diligence in making the vessel seaworthy. This obligation could not be avoided with an exemption clause in a bill of lading. All this meant that

fault liability was introduced for maritime carriers while strict liability still remained in other types of transport.

The question of liability is not limited only to maritime carriers, which in time have gained more and more benefits. Because other participants in transport did not enjoy the same benefits, it is not surprising that they wanted to obtain them for themselves. However, an essential obstacle was the fundamental postulate since ancient Rome that a contract binds only its parties. Nevertheless, it was maritime law that first developed many new instruments extending the benefits enjoyed by maritime carriers to other participants in maritime transport. The most known of them is the Himalaya Clause, with benefits of the maritime carrier later extended to other participants in maritime transport and even participants in land transport. We may conclude that the development of maritime carriers' liability and its extension to other participants in transport that were not parties to the contract of maritime carriage was more influenced by actual circumstances in the transport industry than by legal theoretical issues. The latter merely attempt to regulate the relationships arising from commercial needs for new modes of transport performance.

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Sažetak

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POVIJESNI I SUVREMENI RAZVOJ ODGOVORNOSTI POMORSKOG PRIJEVOZNIKA I NJEZINA PRIMJENA NA TREĆE OSOBE KOJE NISU STRANKE UGOVORA O PRIJEVOZU

Ovaj članak obrađuje razvoj odgovornosti pomorskog prijevoznika pri prijevozu stvari morem te njezino proširenje na treće osobe koje nisu stranke ugovora o prijevozu morem. Fokus je na proučavanju osnova odgovornosti pomorskog prijevoznika i njihovu razvoju tijekom povijesti. Analiza počinje u razdoblju antičkoga Rima, kada je prijevoz bio uređen u okviru ugovora locatio conductio (operis)*, koji se temeljio na odgovornosti prema kriteriju krivnje. Međutim, pretorskim ediktom odgovornost pomorskog prijevoznika postrožena je te je uvedena njegova objektivna odgovornost. Ta se odgovornost uglavnom zadržala do 19. stoljeća, kada je, zbog napretka u brodskoj tehnologiji, porasla pregovaračka moć pomorskih prijevoznika, koji su u okviru ugovorne slobode počeli u teretnice unositi klauzule kojima su zapravo isključivali gotovo svaku svoju odgovornost. Iz tog su razloga na nacionalnoj i međunarodnoj razini uvedeni propisi kojima se od pomorskog prijevoznika zahtijevalo da s dužnom pažnjom osposobi brod za plovidbu, a tu svoju obvezu nije mogao isključiti ugovornim odredbama. Time je pomorski prijevoznik ponovno postao odgovoran na temelju krivnje. Trendovi u području odgovornosti u pomorskom prijevozu nastavljaju se udaljavati od osnovnih postulata građanskog i anglosaskog prava, odnosno od načela da ugovori obvezuju samo njihove stranke. Prema doktrini Himalaya-klauzule, i drugi sudionici u pomorskom prijevozu, a u određenim slučajevima i u kopnenome prijevozu koji je povezan s pomorskim, počeli su se pozivati na odredbe o odgovornosti koje se primjenjuju na pomorskog prijevoznika, iako nisu bili stranke ugovora koje je on sklapao sa svojim klijentima.*

Ključne riječi: locatio navis*,* locatio rerum vehendarum*, Harter Act, Haška pravila, Hamburška pravila, Rotterdamska pravila, sposobnost broda za plovidbu, Himalaya-klauzula*

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