

Interpreting Himalaya Clauses Under Multimodal Carriage: A Comparative Study of International Conventions, English Law and New UAE Maritime Law

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This paper is an insightful exploration of the intricate relationship between applicable law and the scope of Himalaya Clauses in the context of the carriage of goods by sea, particularly in their application to specific third parties engaged in the multimodal carriage of goods. Himalaya Clauses are provisions that are commonly found in contracts of carriage for goods transported by sea. These clauses are specifically designed to extend the limitation of liability benefits accorded to contracting maritime carriers to third parties involved in the transportation process. This arrangement guarantees that all parties potentially affected by the carrier's actions can also avail themselves of the liability protections specified in the contract. This paper adopts a qualitative legal and black letter approaches, applying a critical analysis to the pertinent provisions of the newly enacted UAE Maritime Law 2023 (UAEML), English law, and key international conventions and instruments that govern the contractual relationships between parties to contracts of carriage of goods by sea. Additionally, it examines relevant case law and precedents that address the scope of applicability of Himalaya Clauses. By shedding light on the discrepancies between these legal frameworks, this study emphasizes the challenges encountered in the evolution and practical application of Himalaya Clauses, whether concerning contracting parties, their agents, their servants, or independent contractors. The paper outlines the inconsistency in the provisions of the Rotterdam Rules 2008 and the UAEML with respect to the primary objective behind the innovation of Himalaya Clauses in shipping. With a commitment to fostering clarity and cohesion, the paper proposes thoughtful recommendations designed to bridge these gaps. Such efforts are not merely academic; they aspire to promote harmonization within the shipping industry and enhance the efficiency of the multimodal carriage of goods, ultimately contributing to a more streamlined and effective transportation landscape.

KEY WORDS

- ~ Himalaya clauses
- ~ Multimodal carriage
- ~ Liability of maritime carrier
- ~ UAE maritime law
- ~ Limitation of liability
- ~ Rotterdam rules

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1. INTRODUCTION

Himalaya Clauses are provisions included in contracts of carriage for goods transported by sea, designed to allow third parties to benefit from the limitation of liability afforded to contracting maritime carriers. Although Himalaya Clauses were created to address challenges posed by the principle of privity of contract, this principle remains a significant obstacle to enforcing these clauses. It can negatively affect the extension of liability limitations to third parties, such as agents, servants, and independent contractors, in relation to damage to, loss of, or delays in the delivery of transported goods.

The liability of these third parties is typically determined under tort law, as there is no contractual relationship between the third parties and the cargo owner, who holds legal ownership or possessory title over the goods at the time of risk occurrence. The importance of Himalaya Clauses is particularly evident in the context of multimodal carriage, where performing parties may also benefit from the limitation of liability. However, the application and extent of Himalaya Clauses are subject to the provisions of applicable law, which may include international conventions or national statutes.

This paper examines the interpretation of Himalaya Clauses under the new UAE Maritime Law 2023, English law, and various international instruments, which are often mutually inconsistent with respect to the scope and implications of these clauses on the limitation of liability for non-contracting parties. Consequently, this study critically analyzes the pertinent legal instruments and case law to make recommendations aimed at fostering consistency between the intended purpose of Himalaya Clauses and the interpretations found in the aforementioned legal instruments and statutes. This endeavor will ultimately support the shipping industry's overarching objective of safeguarding the interests of agents, employees of maritime carriers, and other parties involved in multimodal transport.

2. HIMALAYA CLAUSES

The Himalaya Clauses represent an innovative solution developed within English law to address the challenges that arise from the principle of privity of contract. This principle typically limits contractual rights and obligations to the parties directly involved, leading to complications in various legal contexts. The introduction of Himalaya Clauses aims to resolve these issues effectively (Song, 2018), i.e., as the provision specifies that third parties shall not have the right to bring an action based on a contract concluded between two other parties. Specifically, Himalaya Clauses aim to protect third parties in the context of contracts for the carriage of goods by sea. These clauses seek to grant third parties the benefit of any defences or limitations of liability arising from such contracts. They are regarded as contractual terms that confer upon third parties the right to enjoy the rights established under the contract of carriage between the maritime carrier and the shipper, despite the fact that such third parties are not contracting parties.

The incorporation of Himalaya Clauses into contracts of carriage began following the decision in *Adler v Dickson* (Zhu and Ding, 2016). The case concerned an injured passenger onboard a steamship the *Himalaya* who was prevented from bringing a claim against the owner of the vessel due to specific exempting clauses incorporated into the contract of carriage. The injured party subsequently brought a claim against both the shipmaster and the boatswain. However, the court dismissed the claim on the grounds that the defendants were not entitled to rely on the exempting clauses, as they were not parties to the contract of carriage (Tetley, 2003).

The decision rendered in this case motivated stakeholders in the shipping industry to avoid such outcomes by extending protection from liability through explicit clauses incorporated into contracts of carriage to cover the carrier's servants and agents (Chuah, 2010). However, the House of Lords in *Midland Silicones Ltd v Scruttons Ltd* recognized that stevedores could avail themselves of the protection available under Himalaya Clauses as agents of the contracting carrier (Sweeney, 2005). This decision provided further incentive to extend protection from liability to the servants, agents, and other independent contractors contributing to the fulfilment of contracting carrier's transportation obligations. Such an extension can be achieved through the incorporation of Himalaya Clauses into contracts of carriage (Zhu and Ding, 2016).

In *Midland Silicones*, it was decided that stevedores could not benefit from the limitation of liability to which a maritime carrier is entitled as a contracting party under the principle of privity of contract in contracts for the carriage of goods by sea (Todd, 2016). For this reason, an implied agreement was assumed to exist between the consignee and the stevedores under Himalaya Clauses, in order to resolve the issue of privity of contract (*New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*, 1975; *Cock v Taylor*, 1811; *Yong v Moller*, 1855; *Allen v Coltart*, 1883; *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd.* [1924] 1 KB 575 (CA); *The Aramis*, 1989). However, some perspectives have contested the notion that such an implied agreement is always conceivable under the Himalaya Clauses, arguing that this assumption may result in vagueness regarding their scope of applicability (Enge, 2010; Todd, 2016; *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* (The Eurymedon), 1975).

The importance of Himalaya Clauses, particularly those incorporated into bills of lading, has prompted the International Group of P&I Clubs and BIMCO to undertake their revision. Accordingly, the first review of the draft 2010 clause was disseminated to all members of the International Group of P&I Clubs. The amendments introduced in the 2010 Clause had the following outcomes (Song, 2018):

(1) Judicial construction became the fundamental basis for determining whether a third party may be exempted from liability under a contract of carriage.

(2) Third parties were conferred all the rights, defences, limitations, and exemptions from liability that the carrier may invoke under the contract of carriage.

(3) Cargo interests were banned from bringing claims against third parties and required to indemnify the maritime carrier if they breach this obligation.

(4) The maritime carrier was presumed to act as an agent for the third party and the third party was deemed to be a contracting party to the contract of carriage.

(5) Protection was extended to third parties performing duties before loading or after unloading a vessel under multimodal transportation arrangements.

These clauses were further amended in the 2014 version to eliminate the ambiguity concerning the meaning of term “ship managers,” expressly including the carrier’s servants and agents within that definition (Clauses 1 and 4.2. of Himalaya Clauses, 2014). A new feature of the 2014 version is the clarification of the essence of the term “servant”, which stipulates that the servants of the maritime carrier include ship-owners, managers, and operators, as well as performing carriers, stevedores and terminal operators. The definition further encompasses any direct or indirect servant, agents, or subcontractors and their subcontractors, or any other party employed by or acting on behalf of the maritime carrier, or whose services or equipment have been provided for the purpose of performing the contract of carriage whether through direct contractual relationship or otherwise (Himalaya Clauses, 2014). This addition was intended to avoid complications under U.S. law regarding whether “ship managers” qualify as “servants” or “agents” of the maritime carrier (Song, 2018; *Steel Coils Inc v M/V Captain Nicholas I*, 2002; *Fortis Corporate Insurance SA v Viken Ship Management*, 2008). It also addresses issues raised in *The Mahkutai*, where shippers argued that subcontractors should not be considered shipowners under the Himalaya Clauses.

The BIMCO standard form bill of lading adopted the revised Himalaya Clauses in 2016. Under these clauses, the Himalaya Clauses stipulate (International Group of P&I Clubs, 2014): “Every employee, agent and independent contractor of the Carrier, and the owner, operator, manager, charterer, master, officers and crew members of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services shall be beneficiaries of this Bill of Lading and shall be entitled to all defences, exemptions, and immunities from the limitations of liability which the Carrier has under the provisions of this Bill of Lading”.

3. APPLICABILITY OF HIMALAYA CLAUSES IN THE CONTEXT OF THE LIMITATION OF LIABILITY UNDER MULTIMODAL CARRIAGE

3.1. English Law Approach

The rules governing the limitation of maritime carrier’s liability are inconsistent, particularly with respect to the applicability of these rules to servants and agents of the maritime carrier and to third parties who have no contractual relationship under a contract of carriage of goods by sea.

It is widely acknowledged that the decision rendered by the House of Lords in *Midland Silicones Ltd v Scruttons Ltd*, led to the development of Himalaya Clauses. The innovation introduced by Himalaya Clauses is that third parties now benefit from the protective features available to maritime carriers under contracts of carriage of goods by sea, including limitations of liability (Todd, 2016). According to this case, stevedores were considered third parties to the contract of carriage, and this characterization deprived them of the opportunity to avail themselves of the limitation of liability provided to maritime carriers under U.S. law.

It is noteworthy that the U.S. law in that case was inspired by the Hague Rules, which was a significant incentive for the amendment of the Hague Rules through the Hague-Visby Rules. Article IV *bis* stipulates: “The defenses and limits of liability provided for in these Rules shall apply in any action against the carrier regarding loss or damage to goods covered

by a contract of carriage whether the action be founded in contract or in tort. 2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under these Rules.”

This amendment mitigates the impact of the House of Lords' ruling in *Midland Silicones Ltd v Scruttons Ltd*. However, in practical terms, the effect of that ruling still applies unless the Hague Visby Rules are incorporated into the contract of carriage as voluntarily applicable rules (Sweeney, 2005). A further lacuna arises from the fact that the entitlement to limitation of liability does not extend to independent contractors, such as stevedores or performing carriers. This issue, however, was avoided in sections 1 and 6 of the UK Contract (Rights of Third Parties) Act 1999.

It can be inferred from the approach adopted in the UK Contract (Rights of Third Parties) Act 1999 that non-contracting parties may not avail themselves of the limitation of liability unless they rely on a clause already included in the bill of lading (Todd, 2016; Girvin, 1997). The enactment of this piece of legislation is significant because it does not require a contractual relationship between third parties and a contracting party to the contract of carriage, recognizing that it is not always feasible to imply such an agreement (*The Mahkutai*, 1996; *Raymond Burke Motors Ltd v The Mersey Docks and Harbour Co.*, 1986; Beale, 2015). Accordingly, it has been suggested that the principle of estoppel might eliminate the impediment posed by the doctrine of the privity of contract, as it may justify extending the limitation of liability to third parties who invoke Himalaya Clauses against claims brought by cargo owners (Ppasiou, 2024).

However, in *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)*, the Supreme Court extended the protection under the Himalaya Clause to include even the subcontractors' subcontractors. According to this ruling, the charterers further down the contractual chain are to be treated as “agents” of the initial charterer, notwithstanding the absence of the privity of contract between those charterers.

Due to the ambiguity of Himalaya Clauses in terms of their extension to non-contracting parties, it has been suggested that in order to limit the liability of third parties, various requirements need to be met:

1. The third party must accept that the contract between the shipper and the contracting carrier incorporates the Himalaya Clauses.
2. The identity of the third party and the duties they perform must be clearly ascertained (*Timberwest Forest Corp. v. Pacific Link Ocean Services Corp*, 2008).
3. The acts or omissions by the third party in respect of which they would be entitled to benefit from the limitation of liability under the Himalaya Clauses, must be specified in the contract.
4. A separate contract should exist between the contracting carrier and the third party, governing their relationship.

3.2. Perspective of International Conventions

It is worth noting that the Hague-Visby Rules do not address multimodal carriage. However, the Hamburg Rules attempted to bridge this gap by regulating such carriage. They sought to establish a legal framework governing the rights and obligations of the parties involved in multimodal carriage. This can be seen in Article 1(6) of the Hamburg Rules 1978, which defines the contract of carriage by sea: “*Any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. However, the contract which involves carriage by sea and carriage by some other means is deemed to be a contract of carriage of goods by sea for this Convention only in so far as it relates to the carriage by sea*”.

The Article clearly shows that modes of carriage other than the sea leg are also considered part of maritime carriage, provided their purpose is to fulfill a contract of carriage of goods by sea. In other words, carriage undertaken by other means of transportation under this scenario is subject to the provisions of the carriage of goods by sea, i.e., governed by the Hamburg Rules 1978, even though it may involve transport modes other than the vessel.

Accordingly, Article 10(1) of the Hamburg Rules 1978 addresses the liability of the contracting carrier in terms of the act of the actual carrier: “*Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, concerning the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and his servants and agents acting within the scope of their employment*”.

This Article stipulates that the contracting carrier is liable to the shipper for the acts and negligence of the actual carrier and its agents, servants, or employees, with such liability subject to the provisions of the contract of carriage of goods

by sea, i.e., the Hamburg Rules 1978 (Schmeltzer & Peavy, 1970). However, Article 11(1) of the Hamburg Rules 1978 allows for exemption from such liability: *“Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which, takes place while the goods are in charge of the actual carrier during such part of the carriage”*.

One can infer from this Article that a contracting carrier may be exempted from liability arising from the acts of the performing carrier, provided that this exemption is expressly included in the contract of carriage of goods by sea. The Hamburg Rules 1978 also regulate the limitation of maritime carriers' liability and extend such protection to their agents and servants. Article 7(2) of the Hamburg Rules 1978 stipulates (Al-Daboubi, 2020): *“If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under this Convention.”*

Unlike the Hague Visby Rules, this Article does not mention independent contractors. Instead, it specifies that servants or agents of the contracting carrier are protected by the limitation of liability for damage to or loss of goods, or for delays delivery (Sweeney, 2005). The definition of an independent contractor depends on the law applicable to the contract of carriage of goods by sea, which is relatively inconsistent regarding its scope. Even under The Hamburg Rules, the liability of the maritime carrier extends to the time during which the goods are under the custody of the carrier at the port of shipment and the destination port. It is therefore considered that the carrier's limitation of liability might also cover servants or agents performing loading and unloading at inland legs (Chuah, 2010; Baughen, 2023). However, despite the Hamburg Rules 1978 attempting to extend the limitation of liability to third parties other than contracting carriers, the shipping industry generally relies on the Himalaya Clauses rather than on conventions (Chuah, 2010).

The Rotterdam Rules similarly extend limitation of liability to third parties, as explicitly indicated in Article 4(1): *“Any provision of this Convention that may provide a defense for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against: (a) The carrier or a maritime performing party; (b) The master, crew or any other person that performs services on board the ship; or (c) Employees of the carrier or a maritime performing party.”*

This Article clarifies the approach adopted in the Rotterdam Rules to eliminate the ambiguity regarding which maritime performing parties, and their employees can invoke limitation of liability. Non-maritime carriers, however, have no such entitlement. Another significant aspect of Rotterdam Rules 2008 with respect to extending limitation of liability to third parties is that they do not preclude the contractual inclusion of Himalaya Clauses (Nikaki, 2009).

Interestingly, Rotterdam Rules 2008 extend the duration of maritime carriers' liability, which significantly affects the extension of the limitation of liability to third parties. Article 12(1) of Rotterdam Rules 2008 stipulates: *“The carrier's period of responsibility for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.”*

This Article specifies the duration of maritime carrier's liability for damages to, loss of, or delay in delivery, reflecting a door-to-door approach. Namely, this Article extends the liability of the maritime carrier beyond the period goods are held in shipping and destination ports (Singh, 2011; Al-Daboubi, 2021). To provide flexibility, the Rotterdam Rules allow contracting parties to agree on when liability begins and ends, unlike the Hague-Visby Rules (CMI's Questions and Answers on the Rotterdam Rules, 2009). The duration and flexibility of the Himalaya Clauses have implications for the extent of liability, as the servants and agents of the maritime carrier, or the performing maritime carrier, along with any other relevant parties, can only invoke limitation of liability if the liability falls within the maritime carrier's liability period.

It is important to note that while Rotterdam Rules 2008 align with the intent of the Himalaya Clauses to broaden the scope of liability limitations to third parties, they also impose certain restrictions on who can benefit from such protection. These restrictions consequently affect both maritime carriers and third parties involved in carriage operations in two significant ways:

1. They prevent the third party from enjoying the limitation of liability available to the contracting carrier.
2. They create inconsistencies with the overarching goal of maintaining a balanced relationship between the interests of maritime carriers and shippers as contracting parties in the carriage of goods by sea.

This is evident in Article 26 of Rotterdam Rules 2008, which stipulates: *“When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay: (b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit.*

This Article explicitly excludes loss or damage to goods, as well as delays in their delivery, from the limitations of a maritime carrier’s liability as outlined in Rotterdam Rules 2008, provided that such loss, damage, or delay occurs during a leg of the journey other than the sea leg. Furthermore, it states that the provisions of the relevant convention will apply to the limitation of liability for any loss, damage, or delay that occurs during that specific leg of carriage (Treitel and Reynolds, 2017).

However, one can argue that applying a legal framework other than Rotterdam Rules 2008 could affect the balance between the interests of maritime carriers and shippers, which is considered one of the main goals of the international approach adopted in conventions regulating the contract of carriage of goods by sea. Applying a different set of rules on a non-sea leg of carriage undertaken in the context of multimodal carriage, may adversely affect the interests of the maritime carrier, maritime performing parties, as well agents and servants of both, as such alternative legal instrument may not entitle the carrier or third parties to a specific limit of liability, or it might provide a level of protection lower than that provided under Article 26(c) of Rotterdam Rules 2008. In particular, it is permissible for the contracting parties to depart from the applicable international instrument to the detriment of the shipper under such an instrument.

Moreover, applying an alternative set of rules could provide greater protection to the maritime carrier than Rotterdam Rules 2008, disrupting the intended balance between the maritime carrier’s interests and those of the shipper. For example, if the Convention on the Contract for the International Carriage of Goods by Road (CMR) was applied, it would permit a maritime carrier to benefit from a package limitation of 8.33 Special Drawing Units (SDRs) per kilogram of gross weight (Baughen, 2023). The specified amount is significantly higher than the limit of liability established in Article 59(1) of Rotterdam Rules 2008, which set the amount at three units of account per kilogram of the goods’ gross weight. This limit has been determined in accordance with the rigorous standards of the shipping industry. Not only that, but such an excessive limitation would also contradict the imperative rule adopted by Rotterdam Rules 2008 which does not allow an agreement on a limitation of liability to the detriment of the shipper. This is expressly provided in Article 26 (c) of Rotterdam Rules 2008: *“It cannot be departed from by contract at all or to the detriment of the shipper under that instrument.”*

It is evident from this Article that contracting parties do not have the authority to establish a period of limitation of liability lower than that specified in Article 59(1) of Rotterdam Rules 2008. However, they may agree to a longer limitation of liability, which would provide greater protection for the shipper’s interests. Accordingly, Rotterdam Rules 2008 have clarified the international conventions that should govern the carriage of goods by other means of carriage as follows (Hoeks, 2010; Girvin, 2011; Shukri, 2012).

1. Any convention governing the carriage of goods by air, insofar as it applies to any aspect of the contract of carriage, according to its provisions.
2. Any convention governing the carriage of goods by road, to the extent that it applies to goods remaining on a road cargo vehicle taken on board a ship.
3. Any convention governing the carriage of goods by rail, insofar as it applies to the maritime carriage of goods as a supplement to rail transport.
4. Any convention governing the carriage of goods by inland waterways, to the extent it applies to transporting goods without transshipment, using both inland waterways and the sea.

3.3. The New Approach of the UAE Maritime Law

The approach adopted in Federal Decree-Law No. 43/2023 on Maritime Law (UAEML), in terms of the applicability of liability limitation to a third party to a contract of carriage of goods by sea, can be derived from Article 186(2) of the said law: *“Both the contracting carrier and the actual carrier shall have the right to stick to the determination of liability outlined in this Decree-Law, and what shall be obtained by the compensation applicant from the contracting carrier and the actual carrier may not exceed the maximum limit outlined in this Decree-Law.”*

The Article indicates that the UAEML closely aligns with the principles established by the Rotterdam Rules, particularly in granting the actual carrier the right to benefit from the limitation of liability available to the contracting maritime carrier. This alignment eliminates any ambiguity regarding the liability of the actual carrier, as a third party, to contest the limitation above against cargo owners.

However, the Article does not address the entitlement of other third parties, such as stevedores or agents and servants of the contracting maritime carrier, to the same rights. It exclusively grants this right to the contracting carrier and the actual carrier without clarifying the status of other parties who may have a contractual relationship with the contracting maritime carrier but are not directly party to the contract of carriage of goods by sea between the maritime carrier and the shipper.

Consequently, it can be argued that, in the absence of a Himalaya Clause within the contract of carriage, the only parties entitled to benefit from the limitation of liability are the contracting maritime carrier and the actual carrier. This raises concerns for stevedores, who may not be able to contest the limitation in dealings with cargo owners. Likewise, this limitation would not protect agents and servants associated with the contracting and actual carriers.

To address this gap, it may be worthwhile for the UAEML to consider adopting a similar approach to that of the Rotterdam Rules, which expressly extend the right to limitation of liability to the master and crew of the vessel, as well as to the employees of both the contracting carrier and any performing party, or any individual undertaking obligations on behalf of the maritime carrier under the contract of carriage of goods by sea (Articles 18 & 61 of Rotterdam Rules 2008).

It is acknowledged that the limitation of liability for maritime carriers serves as a privilege designed to maintain a balanced relationship between maritime carriers and cargo owners, a concept enshrined in both international and national legal frameworks. However, it is essential to note that the new UAEML diverges from this established approach, as it prevents maritime carriers from contesting the limitation of liability in specific scenarios that may arise within the context of multimodal transportation of goods. This contradiction can be inferred from Article 197(2) of the UAEM: *“Suppose the loss of or damage to the goods or delay in their delivery arises outside maritime stages of multimodal transport. In that case, the carrier’s liability provisions shall apply according to the type of transport from which the damage arose”*.

It can be inferred from this Article that different sets of rules govern the liability of the maritime carrier if the risk to the goods occurs during a leg of transport other than the maritime segment. In other words, the rules limiting the liability of the maritime carrier do not apply where damage to, loss of, or delays occur due to non-maritime transport. Consequently, the maritime carrier would not benefit from the protections provided by the relevant maritime rules of limitation in such scenarios. This means the maritime carrier would be liable for compensation based on the actual value of the damage incurred rather than the cap established by the relevant maritime regulations. This situation could disrupt the balance between the contracting parties in the carriage agreement and contradict the international framework designed to limit the liability of maritime carriers according to defined criteria and standards. Therefore, it may be beneficial for the UAEML to address this gap by amending the Article above. Specifically, it would be advantageous for the UAEML to include a clause that ensures the limitation of the maritime carrier’s liability is not governed by the legal frameworks applicable to other modes of transport within the multimodal carriage.

4. CONCLUSION

The preceding analysis indicates that the Himalaya Clauses represent a critical aspect of transactions within the shipping industry. The essential function of Himalaya Clauses in multimodal carriage has encouraged stakeholders in this sector to continuously develop and broaden the scope of these clauses to safeguard the interests of parties involved in the contract for the carriage of goods executed through multimodal transportation. Both international and national regulations have focused on expanding the limitations of liability for maritime carriers to protect the rights of their agents, employees, and other third parties lacking a contractual relationship with cargo owners.

This extension of liability limitations seeks to mitigate the effects of the principle of privity of contract. The Hague and Hague-Visby Rules did not address multimodal carriage; however, subsequent amendments in the Visby Rules expanded the limitations of liability to include the agents and servants of maritime carriers. By contrast, the Hamburg Rules of 1978 acknowledge the concept of multimodal carriage but restrict the limitation of liability exclusively to the contracting maritime carrier and its servants and agents. The clarity of these rules with respect to performing parties, subcontractors, sub-subcontractors, and their agents and servants is notably lacking.

Conversely, Rotterdam Rules 2008 aim to provide a more explicit delineation of third parties’ liability without contractual relationships with cargo owners or shippers. Article 4(1) of these rules offers a list of parties entitled to benefit from the limitation of liability, including third parties such as the maritime performing party, the master, crew members, any individuals providing services on board the vessel, as well as employees of the maritime carrier or a maritime performing party. Nonetheless, this Article restricts the limitation solely to parties engaged in the sea leg of the carriage and does not cover other performing parties. It has been suggested that it would be advantageous for the rules to encompass performing parties beyond those classified as maritime performing parties.

Although the Rotterdam Rules of 2008 extend the limitation of liability protections to the designated third parties specified in Article 4(1), and allow for this protection to commence before the loading of goods onto the vessel and after unloading at the destination port, Article 26 is a matter of concern for both the maritime carrier and third parties involved in the carriage operations. It excludes losses, damages, or delays in delivery that occur during leg segments other than the maritime leg, thereby subjecting such issues to other applicable conventions. This exclusion could potentially undermine the ability of contracting carriers and third parties to limit their liability, as those conventions may provide less protection than the Rotterdam Rules of 2008.

It is worth noting that contracting parties are not permitted to deviate from applicable international instruments unless such deviation would be to the detriment of the shipper. This may result in enhanced protection for maritime carriers at the expense of maintaining a balance of interests between the maritime carrier and shipper, similar to the scenario under CMR rules. This situation contradicts the imperative principle prohibiting reductions in liability limits established by Rotterdam Rules 2008.

The New UAE Maritime Law also reflects the deficiencies identified in Article 26 of Rotterdam Rules 2008. It is proposed that amendments be made to both sets of rules to ensure that contracts of carriage by sea govern all forms of carriage executed under multimodal arrangements, thereby enabling maritime carriers, third parties, and their employees to limit their liability effectively. Another significant gap in the new UAE maritime law lies in limiting the applicability of Himalaya Clauses solely to actual carriers, without addressing the status of their agents, servants, and third parties. Therefore, it may be argued that the optimal solution would involve adopting Article 4(1) of the Rotterdam Rules of 2008 with the modification of substituting the term "maritime performing parties" with "performing parties" to extend protection to all parties involved in multimodal carriage.

CONFLICT OF INTEREST

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