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**THIRD PARTY PROTECTION
IN THE CARRIAGE OF GOODS BY SEA:
FROM BILATERAL TO MULTILATERAL PROTECTION**

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ABSTRACT

This doctoral research critically analyses third party protection in the carriage of goods by sea. The author is motivated to evaluate the rationale behind the protection of third parties in the carriage of goods by sea in the light of a new theoretical framework. The research takes into account the fact that the carriage of goods by sea is presently part of the supply chain and third parties, together with the parties of the contract, form what the author calls a multilateral common enterprise.

The existing literature in the area focuses on the legal framework of the topic but fails to consider the fact that third parties can and should be seen under a different light. This work is driven by the idea that such a topic must be tackled with a deeper understanding of the rationale and by adding modern theory to a long-established practice. Changing the perspective will provide the necessary scope to make the law more appropriate for present times.

Thus far, third parties have been considered merely a risk for the parties to the contract of the carriage of goods by sea; this research contends that they are a factual part of it and should henceforth be treated as such. They should receive protection for what they represent in the shipping industry, not just for what the main parties to the contract choose to extend to them.

The thesis analyses the legal framework of third party protection through the lens of the supply chain. No longer is the carriage of goods by sea an isolated part of the trade; it is fully integrated within it. To date, the law – contractually, internationally and domestically – has acknowledged this issue, but it has not addressed it in an appropriate manner regarding third party protection. The aim of this thesis is to do just that and, in doing so, to make a significant contribution in the field.

CHAPTER 1

Foundation

Everyone who has a part, large or small, to play in the evolution of commercial law must surely always have regard to two principles as paramount. First, that law should be certain. Second, whilst being certain it must be adaptable to the changing needs of the particular period. Those two principles are not contradictory. On the contrary, they are complementary.¹

¹ Lord Roskill, 'Half a Century of Commercial Law 1930–1980' (1982) 7 HLR 1.

This chapter outlines the fundamental basis of this research. This will delineate the issues subsequently analysed, establish why these issues are worth exploring, and explain how they are addressed in the study. The first section of the chapter presents the background to the research; the second section examines the justification for the research; the third explores the methodology behind it, including a theoretical framework, the research question, limitations and delimitations of the research, and a legal framework; the final section is dedicated to the structure of the thesis.

1.1 Research background

This research revolves around the protection of third parties in the carriage of goods by sea.² The crucial question – frequently asked by both the shipping industry and the research community – is as follows: Is someone who is not party to the contract allowed to benefit from the protection of the contract? More specifically, for the purposes of this research: Is someone who is neither the carrier nor the shipper entitled to benefit from a protection provision in a carriage of goods by sea contract?

By way of an example, consider the following scenario. The shipper (X) contracts with the carrier (Y), a shipowner or a charterer. Y then carries X's goods from port A to port B. In the contract, there is a provision that Z (someone who is not X or Y and who could, for instance, work at port A or B) will not be liable and will benefit from a limitation of liability if sued. The problem is that, strictly speaking, Z has a contract only with Y and has nothing to do with X. Moreover, in the carriage of goods by sea, Z does not fall into only one category; there are usually different categories of parties that, although in the same commercial position as Z, are not mentioned specifically in the contract. Are they entitled to the same protection enjoyed by Z?

The issue of third party protection has been present for a long time in maritime law. Originally, this problem centred on certain categories of third party (for instance, the shipowner in the *Elder Dempster* case,³ and the master and boatswain in *The Himalaya* case).⁴ Over time, however, the issue has expanded to include other categories of third party such as independent contractors.⁵ Furthermore, the situation has recently become more complex with

² The author also uses the term 'shipping' to refer to the carriage of goods by sea in this thesis.

³ *Elder, Dempster & Co. Ltd v Paterson, Zochonis & Co. Ltd (Elder Demspster)* (1924) AC 522 (HL).

⁴ *Adler v Dickson (The Himalaya)* (1954) 2 Lloyd's Rep 267; (1955) 1 QB 158.

⁵ *Scruttons Ltd v Midland Silicones Ltd (Scruttons)* (1961) 2 Lloyd's Rep 365.

vessels being sued as a third parties⁶ and relying on protection clauses in a contract or third parties completely outside the maritime world (such as the inland carrier in the *Kirby* case).⁷ This frequently happens because it is in the interest of one of the parties to the contract to avoid the limitation of liability that the other party has under the contract; third party therefore becomes the target of a suit. Though it seems unfair, this is what actually happens in practice. The claimant cannot sue the carrier in tort to circumvent the contract, since the carrier will be able to rely on a contract and on its legal protection. As Viscount Finlay stated in *Elder Dempster*:

*When the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort.*⁸

The target of the suit who, a century ago, might have been a shipowner or a master or boatswain, could nowadays be literally anyone involved in the relevant supply chain. The real, factual context of the shipping industry has changed, creating what the author calls a ‘multilateral common enterprise’.

A variety of solutions to the problem have been proposed, but as yet there is a great deal of disparity and very little uniformity. Carriage has changed dramatically over the last century; its status in the trade has been altered, and boundaries have been eroded. On the occasions when third party protection has been allowed, the rationale behind the decision to do so has invariably been different. Vicarious liability, for instance, has in some cases been used to justify the protection of certain categories of third party (such as employees), while in others it has provided the basis for commercial or insurance advantages or merely autonomy of parties. From an international perspective, the latest convention on the carriage of goods by sea – the Rotterdam Rules⁹ – although not yet ratified, takes into consideration the fact that it is currently not only a carrier who performs the job but also several other parties, referred to as ‘performing parties’. The convention defines a performing party as any person who performs

⁶ *Mazda Motors of America, Inc. v M/V Cougar Ace (Mazda Motors)* (2009) 565 E3d 573; 2009 AMC 1220 (9th Cir. 2009).

⁷ *Norfolk Southern Ry. v James N. Kirby, Pty Ltd. (Kirby)* (2004) 543 US 14.

⁸ *Elder Dempster* (n 3)

⁹ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008).

or undertakes to perform any of the carrier's responsibilities under a contract of carriage and acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.¹⁰ Although in principle the approach of the Rotterdam Rules is in line with the concept of multilateral common enterprise, the convention still considers a third party to be an appendix party to a contract.¹¹ Moreover, the Rotterdam Rules set geographic boundaries for such protection. Conversely, the United States Supreme Court's decision in the aforementioned case of *Kirby*¹² has defined and advanced a commercial approach to the problem. It is believed that this approach represents a sturdy pillar on which to construct a new way forward.

The thesis argues that the carriage of goods by sea – especially the segment specifically related to the container sector – is currently part of a more expanded enterprise where all the parties perform their obligations not exclusively depending on one principal party, but rather in accordance with a more extensive factual framework. This factual framework is created by the integration of the carriage of goods by sea with the whole supply chain. In this context, the research considers the supply chain as not only a process but also and especially a network; a common enterprise between different participants. Therefore third party protection should be considered from a supply chain perspective, not solely from a transport perspective. This work evaluates the rationale beyond this outlook and offers a new framework that does not rely merely on freedom of contract, autonomy of party and commercial convenience. This thesis proposes an original academic scheme using the factual context as a theoretical framework. Referring to the scenario outlined above, this thesis argues that, in the carriage of goods by sea, protection should now move from the willingness of the parties (X and Y) to the consideration that not only Z (but all the other parties that participate in the multilateral common enterprise) should rely on the protection as they are part of the common enterprise. This thesis suggests giving default protection to parties who help to move the cargo, regardless of their relationship with the main formal parties to the contract, the nature of their business, or the geographic area where they perform the business.

The thesis will identify some of these categories of third party that could benefit from such protection. However, the list is not intended to be exhaustive; instead it should serve to add practical instances to the default position.

¹⁰ Article 1 (6). See also generally Tomotaka Fujita, 'Performing Parties and Himalaya Protection' (2009) Colloquium on the Rotterdam Rules 21 September 2009.

¹¹ The explanation of 'performing party' under the Rotterdam Rules, for instance, states that they perform any of the carrier's obligations under the contract of carriage.

¹² *Kirby* (n.7)

1.2 Lack of theory and justification for a new research

Although third party protection in the carriage of goods by sea is not a new topic, there is insufficient investigation regarding the rationale underpinning current thinking. As this chapter will show, third party protection has been written about extensively in the context of contract clauses, international conventions and domestic approaches, but an exhaustive explanation has not yet been given. The primary reason seems to be the very concept of a ‘third party’, which is unusual and unstable, and has evolved continuously and simultaneously with developments in commerce and transport.

As explained by Tseng, Yuen and Taylor, in the past half century the role of transportation has been increasingly linked with logistics chain management. Consequently there has been considerable research in the area.¹³ The problem however has traditionally been viewed more from an economic perspective less from a legal perspective. Furthermore, examination of the literature from the perspective of the supply chain integration (with the shipping trade considered a substantial component of this) shows that this type of research has traditionally been focused on the bilateral relationships between two players in this chain. In particular, research into the issue has tended to lean towards the perspective of the carrier and the port, particularly where economic concerns are prioritised; scant research has been undertaken that considers the system as a network.¹⁴ This chapter seeks to identify gaps in this research and, in doing so, provide a theoretical basis for developing the research methodology.

In terms of doctorate research in law, the concept of multilateralism is mentioned by Hoeks¹⁵ with reference to the law applicable to a multimodal carriage context, and by Besong¹⁶ regarding the modern role of liability in transport law. In contrast, this thesis looks at the problem from a supply chain perspective rather than a multimodal perspective.

From a purely legal standpoint, third party protection is a grey area, not well-defined or easily definable. Its nuanced character and the descriptive nature of so much of the relevant

¹³ Yung-Yu Tseng, Wen Long Yue and Michael A P Taylor, ‘The Role of Transportation in the Logistic Chain’ (2005) 5 Proceedings of the Eastern Asia Society for Transportation Studies 1657.

¹⁴ Shang-Min Lin, Andrew Potter, Stephen Pettit and Rawindaran Nair, ‘A Systems View Of Supply Network Integration In Maritime Logistics’ (2014) 19th Logistics Research Network Conference (Huddersfield, UK, 3–5 September 2014).

¹⁵ Marian Hoeks, *The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International 2010).

¹⁶ Christine Besong, ‘Towards a Modern Role for Liability in Multimodal Transport Law’ (PhD thesis, University College London, 2007).

research provided sufficient impetus for the author to undertake this research.

Thus far, the problem has been examined according to exculpatory and limitation of liability clauses,¹⁷ commenting on specific cases,¹⁸ specific categories of third party,¹⁹ international conventions,²⁰ and problems that different jurisdictions have in accepting third party protection.²¹ There is not, however, any research that conceptualises the protection of third parties, considering and linking all the aspects mentioned above in order to ask whether there is a sound, current theory to justify the protection. This thesis does not merely describe the problem but also analyses validity as a solid protection for third parties, using the theoretical framework as a reference. It has been noted that although there is material on this topic, there is insufficient rationale to date.

De Vellis, quoted by Woo states: “to conceptualise a concept or phenomenon by identifying components of the concept or phenomenon is crucial when they are, in nature, abstract, or hard to define, or in lack of definition”.²² Third parties are not an easily definable category and this sentence has therefore served as a constant source of inspiration throughout this research. There is a lack of definition regarding third parties and where definitions exist there is an even greater lack of consensus. Thus, conceptualising as outlined by De Vellis has been necessary. Third party issues in the carriage of goods by sea have been a focus of general research since the 1950s and 1960s. In this period, the two leading cases were *Adler v Dixon* (a British case from which the Himalaya clause takes its name) and the United States case of

¹⁷ Among others: Chen Liang, ‘Benefits and Burdens of Third Parties Under Exception Clauses in Bills of Lading’ (1999) 24 *Tulane Maritime Law Journal* 225; J.C. Sweeney, ‘Crossing the Himalayas: Exculpatory Clauses in Global Transport – Norfolk Southern Railway Co. v James N. Kirby’ (2005) 36 *Journal of Maritime Law and Commerce*, 155.

¹⁸ Among others: Haylin Low, ‘Shipowners’ Liabilities: *Elder Dempster* Revisited’ (1998) 13 *Maritime Law Association of Australia and New Zealand Journal*, 42. (1998) 13 *MLAANZ Journal – Part 1*; William H Theis, ‘Third-Party Beneficiaries in Multimodal Contracts of Carriage. Norfolk Southern Railway Co. v James N. Kirby, Pty Ltd., 125 S. Ct. 385, 2004 AMC 2705 (2004)’ (2005) 36 *Journal of Maritime Law and Commerce* 201.

¹⁹ Per Zerman, ‘Liability for Stevedore Damage Claims’ (*Skuld Copenhagen*, 13 February 2012) <<http://www.skuld.com/topics/legal/defence/liability-for-stevedore-damage-claims/>> Accessed 10 March 2014; D R Owen, R B Acomb Jr and J J Donovan, *The MLA Report* (The Maritime Law Association of the United States, 1984) Report Document 652 (The MLA Report); Edwin Anderson III, ‘The Status and Associated Liability of Ocean Freight Forwarders’ (2009) 36 *Transportation Law Journal* 121.

²⁰ Francesco Berlingieri, ‘A Comparative Analysis Of The Hague-Visby Rules, The Hamburg Rules And The Rotterdam Rules’ (Paper delivered at the General Assembly of the AMD, Marrakesh, 5–6 November 2009); Fujita (n 10); The CMI International Working Group on the Rotterdam Rules, ‘Questions and Answers on The Rotterdam Rules’ (Ver. 2009.10.10); Anomi Wanigasekera ‘Comparison of Hague-Visby and Hamburg Rules’ (Messrs Julius & Creasy, 1 November 1992) <http://www.juliusandcreasy.com/inpages/publications/pdf/comparison_of_hague_and_hamburg-AW.pdf> Accessed 13 April 2014.

²¹ Tan Pei Meng, ‘Circumventing the Privity Rule in Malaysia’ (2009) 4 *International Journal of Information Technology and Decision Making* 262; Fernanda Ruiz, ‘Legal Study of Sea Carrier Limitation of Liability According to Brazilian Law in Comparison to the Hague-Visby Regime’ (2010) 1 *Lawinter Review* 1, 144.

²² Su-Han Woo, ‘Seaport Supply Chain Integration and Orientation, And Their Impact on Performance’ (PhD thesis, Cardiff University, 2010).

Herd v Krawill. As a starting point for the advancement and development of the role of third parties in the carriage of goods by sea, this area makes for engaging investigation.²³

The concept of the carriage of goods by sea as an expanded network of interests – rather than as a bilateral relationship – has been explored according to the position of shipowner and charterer²⁴ by Tetley, who has been one of the major exponents in the theory of third party protection. In his work *Marine Cargo Claims*, Tetley explains that the carriage of goods by sea is a ‘joint venture’ between shipowner and charterer with regard to cargo interests.

*Carriage of goods by sea can be characterised as a joint venture between the shipowners and the charterers, because they share the responsibilities of a carrier under the HVR, which cannot be contracted out of in virtue of Article 3(8) HVR. As a result of the shared responsibilities, the carrier and the charterer should be held jointly and severally responsible as carriers.*²⁵

It is often reaffirmed that Courts should consider charterers and shipowners as both the carrier.²⁶ This thesis accepts this concept and seeks to develop it through the assertion that, in the current state of carriage of goods by sea, the common enterprise exists amongst a variety of different players and not only between shipowner and charterer. Tetley is among the scholars who have written most about the concept of third parties. His works include serious

²³ This research commenced in 2011 and the signing of the Rotterdam Rules only two years before demonstrated the willingness of the international community to accept the carriage of goods by sea as a multilateral system (performing parties). The *Kirby* case (n 7) was decided in 2004, opening the door to the commercial approach in identifying third party protection and outlining the carriage of goods by sea as a complex network of interests reaching beyond the sea’s boundaries. In the 1999, the UK (which has historically always been involved in shipping law and is relatively the most reluctant to accept third party protection) enacted the Contract (Right of Third Parties) Act 1999. On the basis of these three developments, which represent a significant change in the law relating to third parties (respectively from case law, statutory law and international law), the author decided to link these aspects with a theoretical argument.

²⁴ The problems between shipowner and charterer have been the subject of long and protracted discussion in the carriage of goods by sea field. It is one of the first examples of third parties seeking protection (as stated in *Elder, Dempster* (n 3)). The issue is that under the charter party, only one of the two parties is a carrier. Therefore, the other (namely the shipowner) has to be treated as a third party in order to enjoy protection. In order to understand this topic, some background on charterparties may be useful. As Spurin describes, “a charterparty is a contract for the hire of a vessel. The vessel may be hired for a voyage (Voyage Charterparty) or for a period of time (Time Charterparty). The hire may be simple, that is, the shipowner remains in control of the vessel and retains responsibility for it, or the hire may be by demise or bare boat, whereby the charterer becomes the temporary owner of the vessel and thus responsible for it”. Corbet Spurin, ‘The Law of International Trade and Carriage of Goods’ (Ch 1, Nationwide Mediation Academy for NADR UK Ltd 2004) <<http://www.nadr.co.uk/articles/published/shipping/001CHAPTERONETRADE.pdf>> Accessed 17 March 2013.

²⁵ William Tetley, *Marine Cargo Claims* (Ch 10, 4th ed. Editions Yvon Blais 2007). According to this thesis the concept of joint venture, as expressed by Tetley, is expanding to other participants.

²⁶ William Tetley, Case Comment: The House of Lords decision in *The Starsin* (2004) 35 JMLC 121-139.

attempts to propound the concept of third party protection enshrined by the Hamburg Rules, as well as numerous articles on Himalaya clauses in contracts. Tetley defines the Himalaya clause as, “an ingenious, short-term solution to a difficult problem, but ... a solution which raises infinitely more problems than it solves”.²⁷

Regarding the protection of third parties from international conventions of the carriage of goods by sea, Fujita, amongst the others, has outlined the substantial distinction between maritime and non-maritime performing parties and the legal consequences that flow from such a distinction.²⁸ Furthermore, Chuah advances the concept that third parties should be now seen in the context of a broader and integrated framework, examining the specific complex position of the Terminal Operators in the Rotterdam Rules.²⁹ Additionally, in support of the concept of multilateral common enterprise, Merkin explains that:

*The law of contract as perfected in the nineteenth century was based on a model of bilateral transactions. The reality is, and to some extent was at the time, that many commercial contracts form part of a wider set of arrangements or chain of relationships.*³⁰

The same author asserts that contracting is about allocating risks between parties of the contract.³¹ It follows, therefore, that once third parties are considered to perform part of the contract, then the allocation of risks must also consider third parties. As this thesis explains, third party protection therefore falls into a broader discussion of risk allocation between parties to the contract, and whether a third party is factually an outsider or actually part of such a contract.

This work acknowledges that the law in this respect is already moving towards sectoral regulation, and that multilaterality is not a completely unexplored topic in academia. Recognising this, it is reaffirmed that the role of third parties is central and cannot be left to the will of the two main contracting parties. The originality of this research lies in its rationalisation and explanation of the significance of the role of third parties in the carriage of

²⁷ William Tetley, ‘The Himalaya clause – Revisited’ (2003) 9 Journal of International Maritime Law 40. The same concept is also expressed in William Tetley, “The Himalaya clause: Heresy or Genius?” (2003) 9 Journal of Maritime Law and Commerce 111, 113.

²⁸ Fujita (n 10).

²⁹ Jason Chuah, ‘Impact of the Rotterdam Rules on the Himalaya clause: the Port terminal Operators’ Case’ in D Rhidian Thomas (ed), *The Carriage of Goods by Sea Under the Rotterdam Rules* (Informa 2010).

³⁰ Robert Merkin, *Privity of Contract, Privity of Contract: The Impact of the Contracts (Right of Third Parties) Act 1999* (Oxford, Taylor & Francis 2013) 67.

³¹ *Ibid.*

goods by sea through the lens of the supply chain as a whole.

This new approach towards the nature of third party protection is more up-to-date and thus better suited to considering the contemporary nature of the carriage of goods by sea. Therefore, the premises of this research are as follows:

- 1) The factual context of the shipping industry has been reshaped.
- 2) As a result, third parties are part of the enterprise and not someone outside it.
- 3) The law (although moving towards a more contemporary sectoral approach) is still related to an outdated approach.

Under the innovative light of the multilateral common enterprise, and using the rationale of third parties in the carriage of goods by sea as a conceptual thread, this research provides a more current rationale for the protection. The research question at the heart of this thesis is the result of a consideration that third parties should – at least in the carriage of goods by sea – be a norm of a contract. It follows that third parties should not, therefore, be a party sitting outside the contract, but rather a third party *to* the contract.

It seems appropriate here to highlight the lack of uniform definition of a third party, both in domestic law and in international conventions. The Oxford dictionary states that a third party is, “a person or group besides the two primarily involved in a situation”.³² For the purposes of this thesis, the definition provided by the Contract (Right of Third Parties) Act 1999 shall be used. The Act defines a third party as anyone outside the contract.³³ In this specific research, delimitation has narrowed this definition to contracts, international conventions and domestic and international law related to the carriage of goods by sea.

As a conceptual construct of the author’s making, there is currently not an existing or widely-held understanding of the term ‘multilateral common enterprise’. A full description will thus be provided later in the thesis.

The idea for this research emerged while the author was researching the electronic bill of lading. Through that research, it became apparent that, in a bill of lading, third parties are still not considered part of the contract. Instead they are seen as an outsider, although they perform most of the carrier’s duties. It also became clear that, even when the industry makes significant technical or logistical progress – as in the development of the electronic bill of lading – the law is often not able to keep up. This sparked a desire to test the assumption of the

³² Oxford Dictionary, ‘Third Party’ (2015) <<http://www.oxforddictionaries.com/definition/english/third-party>> Accessed 27 April 2015.

³³ Precisely, Article 1(1) of the Act defines a ‘third party’ as a person who is not a party to a contract.

traditional rationale behind third party protection in the carriage of goods by sea, particularly since it appeared not to have been fully addressed. The author also believes that the nature of the shipping industry itself is responsible for the discrepancy between the factual context of the carriage of goods by sea and the rationale behind third party protection within it. The shipping industry tends to be a very practical field, generally averse to change and more focused on simply finding a solution to a problem rather than providing a justification for that solution as well. However, the author strongly believes that this is something that can be undertaken by the academic research community in order, ultimately, to provide implementation of an accepted practice. As such, throughout the thesis, the rationale behind the protection of third parties in the carriage of goods by sea is stressed and the originality of a sound current theory why they should be protected is demonstrated.

1.3 Methodology

It is strongly believed that the solution to third party protection in the carriage of goods by sea lies in addressing the lack of theoretical framework, the lack of a multilateral approach, and the lack of rationale.

The methodology applied to this research is based on the interrelation of distinct factors assembled in order to support the validity and the innovation of the research question. The methodology is explained in this chapter as follows: First, this chapter will construct the fundamentals of the theoretical framework and research question; second, it will comply with delimitations; third, the legal framework on which, during the thesis, the theoretical framework is applied, will be delineated.

1.3.1 Theoretical framework and research question

The theoretical framework of this thesis starts with the assumption that the role of third parties has changed as a result of the integration of the carriage of goods by sea with the supply chain more broadly. It is argued that currently the protection of third parties should derive more from a factual context than autonomy of party. More precisely, this research argues that the trend of autonomy of parties in the carriage of goods by sea should be the result of the factual context defined as multilateral common enterprise.

It is based on the idea that, although related to the carriage of goods by sea, its role should be considered within a macro perspective of the supply chain, where third parties are to

be accepted as part of the whole structure. Thus, the concept of third parties should no longer exist solely as defined by the traditions and legalities of the carriage of goods by sea in isolation.

Within the traditional frameworks that govern thinking about the carriage of goods by sea (i.e., tackle-to-tackle³⁴ and port-to-port³⁵) it is easy to understand who is part of the process (carrier and shipper) and who is outside (third parties). With the more recent door-to-door framework, the circle of actors has become bigger, but still possible to define. Within the wider picture of the supply chain – with transport being part and parcel of – third parties have lost their role as third parties and have become stakeholders in the chain.

The fact that modes and processes of carriage are continuously evolving represents the first peculiarity and difficulty in the issue of third parties in the carriage of goods by sea. National and international legal instruments are not always fast enough to deal with such evolutions. In recent decades, containerisation and technological developments have facilitated multimodal carriage requiring uniformity and harmonisation in terms of legal framework. Such carriage evolution from tackle-to-tackle to door-to-door has exposed the inadequacy of previous regulatory instruments, leaving the trade with some uncertainties.³⁶ The ‘status’ of third parties is a prime example; it has changed considerably since the time when carriage was tackle-to-tackle or port-to-port. As a matter of fact, with the lengthening of the transport chain and the complex of interests involved, the position of third parties in the carriage of goods by sea is presently highly ambiguous and complicated in definition. The lack of uniformity and ensuing confusion raised by the many and substantially different conventions on the carriage of goods by different modes do little to encourage possible solutions.

Though insufficiently modern from a commercial perspective, tackle-to-tackle and port-to-port systems solve innumerable problems, covering detectable specifics of carriage and providing better-defined roles.

³⁴ J. Bes and N. Lopez, *Bes' Chartering And Shipping Terms* (11th edn, Barker & Howard Ltd 1992) defines tackle-to-tackle as “when the loading commences, that is, when the vessel’s cargo-handling equipment is attached to the goods, and ends when the goods have been discharged from the vessel or removed from its cargo-handling equipment”.

³⁵ Port-to-port means from loading port to discharging port. Bes defines port to port transport as “the traditional form of carriage of goods by sea where one carrier carried the goods from one port to another port” (ibid.) However, there are no official definitions of ports and interpretation of the meaning is left to national legislations, which often creates problems.

³⁶ See generally, Renato Midoro and Francesco Parola, *Le Strategie delle Imprese di Linea nello Shipping ed Intermodalita: Dinamiche Competitive e Forme di Cooperazione* (Franco Angeli, Italy 2013), who in this regard explains that the world economy has changed dramatically. The open market and globalisation have affected the transport sector and containerisation has engendered a complete transformation through the introduction of multimodalism as a new concept. Ports have had to change from being locations of mere loading and discharging to becoming an integrated system network of transport.

Although it matches the new transport requirements from a commercial point of view, the fact that the carriage of goods by sea is part of a broader supply chain creates problems such as mandatory liability systems to be applied to the different stages involved in the transport of goods, as well as expanded periods for which each carrier is responsible. These can clash with other liability systems that might be applied to the carriage of goods by other means.³⁷ Today, because contracts rarely operate on a tackle-to-tackle basis, the types of people for whom the carrier is responsible are considerably more numerous than they were in the middle of the last century. Goods being traded internationally are usually handled by multiple carriers, using a variety of forms of transport.

Considering such inconsistencies between commercial demand on the one hand and legal frameworks on the other, this research evaluates the lack of certainty as to the law applicable to the position of third parties in the carriage of goods by sea. The matter will be addressed by means of analysis of the current legal framework in relation to third parties and an evaluation of how, within this framework, the law applicable to a third party may be uncovered.

It is appropriate to mention here that, although in the past the roles of ‘carrier’ and ‘shipper’ were easily identified and defined, the same is no longer true. The carrier used to be someone who entered into a contract of carriage with a shipper. The definition has since been gradually expanded to comprehend (according to contract and international conventions) first the actual carrier, performing carrier and performing party. Nowadays, the job of carrier is often arranged by a freight forwarder or a non-vessel operating common carrier (NVOCC). The situation is the same for the concept of the shipper. In the past, the shipper was defined as “an owner or person for whose account the ocean transportation is provided or the person to whom delivery is to be made”.³⁸ In recent years a variety of entities emerged as intermediaries between the shipper of the goods and the provider of the transport services, taken in this case to be the ocean carrier, including shippers’ associations, NVOCCs, transportation brokers, freight forwarders and export trading companies. Identifying the shippers in modern-day supply chains is not always straightforward; many service providers and suppliers contribute to the process of transporting cargo across international borders. Historically, the distinction between shipper and consignee was more easily drawn; buyers and sellers would handle shipments directly, with the assistance of, for example, a port terminal and the carrier. Invariably, trade

³⁷ Tomotaka Fujita, ‘The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implication’ (2009) 44 *Texas International Law Journal* 3, 349.

³⁸ For the definition of carrier and shipper see Bes & N. Lopez (n 34).

today is far more complex; identification of the actual manufacturer, shipper, and final consignee is less clear-cut. Changes in payment methods and the various means of transportation have also expanded the liability and risk factors, as logistics services (particularly multimodal transportation) are central to effective supply chain management.³⁹

In the past, the carrier and the shipper were the most economically and legally powerful parties. Presently, after much commercial and economic evolution, revolution and market cycles, the circumstances are totally different. The industry is much more capital intensive rather than labour intensive. In particular, in the carriage of goods by sea, the carrier cannot perform all of the activities concerned with the carriage but it nonetheless assumes responsibility for the whole leg.⁴⁰ Moreover, with longer contracts, parties to the contract request higher and more specific levels of protection. The problem therefore hinges on the conflict between the commercial need for the parties to contract with third parties in order to carry out their duties and the fact that, once involved, the third party will require a certain legal protection.

The higher speed which nowadays allows cargo to move more quickly from one port to another and consequently from one jurisdiction to the other, has alarmed the Chamber of Shipping that has stated that the applicable law should be the same and that the international community needs certainty and uniformity in order to reduce confusion and avoid increasing insurance and legal costs.⁴¹

The impact of electronic solutions and information technology on the shipping industry have also had their effects. The electronic platforms created from companies working at the electronic solutions and the general automatization of the shipping industry increase the

³⁹ R. Masakorala (2012) 'Who is a 'shipper' on a bill of lading?', *Daily FT*, ><http://www.ft.lk/article/99753/Who-is-a-%E2%80%98shipper--on-a-bill-of-lading?>>, Accessed 5 April 2016.

⁴⁰ See Chuah (n 29) referring to the Australian case of *Chapman Marine Pty Ltd v Wilhelmsen Lines* (1999) FCA 178 at para 67. Midoro and Parola (n 36) argue that, in general, carriers moved away from using labour contractors such as stevedores. Instead, these carriers became highly capital-intensive parties who wielded serious sway in negotiations. Before the end of the 1960s, private capital did not have any kind of role in the port sector; only a few nations permitted it. Over the last 20 years, however, this has changed substantially. Several capital investment entities warrant mention here: AIG Highstair Capital – a combined venture of five private equity funds – is responsible for more than 50 ports across the United States and South America (the Ports America Group); Goldman Sachs Infrastructure Partners own 49% of SSA Marine and 23% of Associated British Ports; Macquaire, the Australian banking group boast a total throughput of 4.8 million TEU; Deutsche Bank holds shares different ports such as of New York, Prince Rupert, Liverpool and Clydeport (with a throughput of 3.2 million TEU). Also relevant here is the fact that cargo owners now require Value Added Services (i.e., transport and logistics) in addition to multimodal transport. Moreover, this move towards capital-intensity has been accompanied by a growth in information intensity. The whole sector is now much more reliant upon – and affected by – electronic data interchange (EDI).

⁴¹ FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The "Rotterdam Rules")', (UNCITRAL 11, Doc. MTI/507 Annex II August 2009) <http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/FIATApaper.pdf> Accessed 1 September 2011.

integration of the shipping sector in the supply chain.⁴²

The port community system must be taken into account. The various participants in the carriage of goods by sea look to ports as physical centres of integrated infrastructure, providing loading and unloading, land access, quays, facilities for storage, physical security, and so on. Ports continually invest in this infrastructure to improve efficiency and remain competitive, and, as such, these factors have been key drivers in deciding where and how to inject such investments. Ports also function as centres of ‘infostructure’ integration; computer and information systems connecting players across the logistics community help to improve the monitoring of operational processes, from start to finish.⁴³ This does little, however, to help the protection of third parties in the carriage of goods by sea.

Taking the above into account, this research does not analyse simply the protection of third parties in the carriage of goods by sea. It also analyses and justifies its argument by demonstrating that it is inappropriate to consider a third party in the carriage of goods by sea to be any party ‘outside’ the legal framework. Instead, the research shows, it is now appropriate to consider third parties as an integral third part of the system. Consequently the legal protection in this regard should not simply emerge as an extension of the main parties’ protection but should instead be considered and justified as a protection to which third parties are entitled by virtue of their part in the multilateral common enterprise.

It is argued that third party protection is significant for the future of the trade. As will be shown in detail, determination of the available protection is currently left to the contractual clauses and party autonomy. The problem must be tackled and understood from the roots upward, and not allowed to be subject to the instability of contract clauses.

As already discussed, the carriage of goods by sea is already moving to a sectoral regulation. However, this research argues that the boundaries of this sectoral regulation regarding third parties are not adequately defined in order to justify the role that third parties currently have in the carriage scenario. In particular:

- 1) The carriage of goods by sea (as per contracts) is still broadly regulated bilaterally.

⁴² As Martin Christopher explains, “the whole nature of logistics management has been dramatically changed by the information technology revolution.” Martin Christopher, M., *Logistics and Supply Chain Management* (2nd edn, Prentice Hall 2011) 231.

⁴³ On the topic see generally International Port Community Systems Association, ‘Port Community Systems’ (2014) <<http://www.epcsa.eu/pcs>> Accessed 3rd December 2015; Alan Long, ‘Port Community Systems’ (2009) 3 *World Customs Journal*; United Nations Economic Commission for Europe, ‘How to develop a Port Community System’ (2011) <https://www.unece.org/fileadmin/DAM/trade/Trade_Facilitation_Forum/BkgrdDocs/HowToDevelopPortCommunitySystem-EPCSAGuide.pdf> Accessed 3 December 2015.

The multilateral approach has not been introduced as it has in other fields.⁴⁴

- 2) International Conventions (specifically the Rotterdam Rules) acknowledge multilateralism. However, the Rotterdam Rules have not been ratified and in any case this thesis argues that their geographic approach is not appropriate; the conventions currently in use (Hague/Hague Visby Rules⁴⁵ and Hamburg Rules⁴⁶) approach the issue mainly from a bilateral perspective as it will be detailed in Chapter 3.
- 3) Domestic law (both case and statutory law) from major shipping jurisdictions (that this thesis will analyse) show a disparity of decisions and lack of uniformity. As reported by Sweeney, the rationale for approval and limitation of Himalaya clauses in England now differs from the rationale in the United States provided by the *Kirby* decision and this divergence demonstrates the need for an international solution to this major trade problem.⁴⁷ The *Kirby* decision in the United States appears to be a first step towards some harmonization, (for example, deciding to allow the train company the benefit of the bill of lading in question) giving justice to a commercial approach.

It is believed that the solution has to go beyond mere contractual and insurance considerations. The global nature of the business must be taken into account, not only from a geographical perspective but also from a chain perspective; from manufacturer to consumer.

This research therefore attempts to redraft the boundaries of this multilateralism. This research is invaluable as it raises concerns and clarifies certain aspects in order to find a more adequate protection for the *lege ferenda* of the transport.

1.3.2 Limitations and delimitations

The limitations of this research derive mainly from the fact that it borrows an economic theoretical framework to be applied to the law of the carriage of goods by sea. The intention is not to enter into economic discussion regarding supply chains or economies of scope and scale. Instead the thesis applies existing economic literature on the topic as a foundation for the theoretical framework.

⁴⁴ This is not considered as an anomaly. However, as it will be shown later on in the thesis, there are other systems showing a more network approach towards contracts.

⁴⁵ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924); First Protocol (1968); Second Protocol (1979).

⁴⁶ United Nations Convention on the Carriage of Goods by Sea (1978).

⁴⁷ Sweeney (n 17).

The research is also limited by certain identified factors. For example, there is lack of clear definition for the term ‘third party’, which, as previously stated, it is not a term of art. Moreover, it is very difficult to find a solution provided by law since the supply chain, in contrast to carriage, is not currently seen as a formal structure. Though controlled by many regulations, there is no single law regarding supply chains.

Further limitations also arise from the application of doctrinal legal research to an innovative theoretical framework mainly based on a factual context, and the difficulty of delineating a framework of legal protection in an industry that is constantly evolving.

The thesis focuses specifically on the legal protection of third parties in a bilateral relationship between carrier and shipper in the carriage of goods by sea. It does not consider the protection that third parties provide for themselves but only the protection currently extended to them by the carrier and shipper under current legal framework.⁴⁸

Particular attention has been paid to the relationship with the carrier’s third parties because it is this relationship that seems to raise the most issues. The shipper’s position is not outside the scope of this thesis,⁴⁹ but it is of lesser concern. This is primarily because, in recent decades, the advent of multimodalism and the consequent vertical integration of supply chains have completely changed the roles of third parties, but the protection offered to them has remained substantively the same. Recently, innovations in this sector have centered around the vertical expansion of carriers and their involvement in port activities and logistic functions affecting the relationship between carrier and third parties.

The research herein is focused on both breaking bulk and multimodal/containerised types of transport. Recently, however, problems have tended to relate more to the latter due to the type of carriage; there is a closer relationship between carrier and third parties and more conflict between sea and land operators. Although the issue of third party protection in the carriage of goods by sea is tackled as a whole, this thesis acknowledges that the problem occurs more in the container market and therefore has a greater effect on this portion of the shipping industry.⁵⁰

⁴⁸ In this context, as reported in W. David Angus (‘Legal Implications of “The Container Revolution” in International Carriage of Goods’ (1968) 14 McGill Law Journal 395), there are highly evolved insurance scheme for instance in order to legally protect the interests of categories of parties such as stevedores, freight forwarders and terminal operators. However, this thesis deals only with the protection that third parties have from the main parties to the contract.

⁴⁹ Chuah (n 29) explains that the protection of third parties is important for both carrier and shipper. In a tackle-to-tackle type of arrangement, it is probable that the port terminal operator is actually the shipper’s independent contractor.

⁵⁰ In this regard, data compiled by Clarkson Research Services (reported in Shipping Review and Outlook (2015) 108–109 <<http://www.crsi.com/acatalog/shipping-review-and-outlook.html>> Accessed 12 June 2015 show that as of 1 January 2015, the world fleet of container ships totalled 5,106 ships with a deadweight capacity of 227.9

Furthermore, work has been restricted to private law. The public aspect of third party protection has been left outside the scope of the research. The reason is that the factual current rationale of the theoretical framework relies on the private nature of the relationship between carrier, cargo interests and third parties.

The research is not looking at the problem from a multimodal perspective but from a perspective of the carriage of goods by sea and its current role in the supply chain. This thesis acknowledges multimodalism, but does not take it as a benchmark. This is because multimodal/door-to-door carriage is considered a natural evolution of the carriage of goods by sea. In fact despite the expansion of the multimodal framework, it is still between two parties (the multimodal carrier and the shipper), even though third parties exist. On the other hand, the integration of the transport with the supply chain, seen from the network of parties performing it, is considered a revolution.⁵¹ Accordingly, this thesis analyses the gap between the fact-based outline where the carriage of goods by sea is part of the supply chain, and the impossibility (at least for the foreseeable future) of changing the legal instrument scenario.

Analogies with civil law will be drawn, but this work addresses common law jurisdictions primarily, because of the difficult approach to third party protection in the carriage of goods by sea. Although this research is based mainly on a doctrinal approach, work based on the collection of statistical data has also been carried out.⁵²

In the final chapter, recommendations will be made for areas that are rich with possibility for future research. The research has drawn a methodological delimitation on the topic mentioned for future investigation. These topics have been analysed and evaluated for what is the main research question in this thesis.⁵³ The thesis applies these analogies to supplement the theory herein, and although delving deeper into each argument might prove interesting, it lies beyond the scope of this examination.

million deadweight tonnes (DWT). Container ships are usually expressed in TEU (twenty-foot equivalent unit) capacity but for the purposes of comparison with the world fleet of all ships of all types, deadweight is used as this is the common measurement for the other ship types. The entire world fleet of all commercial merchant ships on 1 January 2015 amounted to 89,426 ships of 1746.6m DWT. Therefore, the container ship fleet's deadweight capacity comprised only 13% of the entire world fleet's deadweight capacity.

⁵¹ It obviously has to be acknowledged that containerisation and multimodalism are among the main causes of the expansion of carriage into part of a broader scheme.

⁵² The thesis provides an original empirical and comparative study of courts and judicial decisions in United States so as to understand which third party was involved, for which protection and if there are any reference to the concept of multilateral common enterprise. The statistical table attached is not intended to be exhaustive, especially given the vast number of cases on the topic. Rather, it aims to add a more detailed outlook of the cases mentioned in the United States section of Chapter 4.

⁵³ Amongst the others, multilateral protection from a different industry as well as multilateral insurance and the perspective of civil law will be suggested.

This thesis does not aim to impact on discussions of the carriage of goods by sea as a whole. Instead, it offers a different alternative regarding specific cases where parties (carrier, cargo interests and third parties) wish to regulate their positions in a different way.

The research boundaries of this study consider the economic and risk reallocation linked to transport and, in turn, their impact on third party protection. This issue is dealt with in the next chapter. It is appropriate, however, to re-iterate the fact that the major impact stems from the integration of the carriage of goods by sea with the broader supply chain.⁵⁴

As Heaver states, the global sourcing and outsourcing of logistics functions have required the transportation industry to provide integrated logistics services covering wider geographical extension.⁵⁵ These challenges have moved and integrated the transport industry into global supply chains.⁵⁶ In this context, there have been different processes of integration (both vertically and horizontally).⁵⁷ It is widely held that, in this commercial factual revolution, third parties have the most complicated position. Analysis of third parties is thus particularly engaging because their locus has shifted from the peripheries of the carriage of goods by sea to an integral part. The issue is to what extent third parties should be allowed the same protection as the traditional contract parties. Such allowances are bounded by several factors that will be deeper analysed during the work. Such as the fact that third parties have to be mentioned somewhere (e.g., contracts, international conventions, or statutory law), and, specifically from the perspective of the carriage of goods by sea, they have to perform one of the carrier's duties under the contract and often the duty has to be of "maritime nature".

The problem emerges because the sphere of the carriage of goods by sea has expanded but the regulations have not. Accordingly, this research argues that third parties today need legal protection because they are a *de facto* part of the enterprise, even if formally they still reside outside it. The underlying problem of the existing legal system is that for too long it has been linked to the mode-by-mode basis and considered transport as a separate entity from the supply chain; something that is no longer the case.⁵⁸

The problem of limiting the protection only to specific categories has been taken into account. The author has firstly considered 'the third party beneficiary rule' (otherwise known

⁵⁴ Woo (n 22).

⁵⁵ T. Heaver, H. Meersman and E. Van de Voorde, 'Co-Operation and Competition in International Container Transport: Strategies for Ports' (2001) 28 *Maritime Policy and Management* 3, 293.

⁵⁶ Woo (n 22).

⁵⁷ Heaver et al. (n 55).

⁵⁸ As stated by Paul Stephen Dempsey, 'The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be' (2000) 27 *Transportation Law Journal* 367.

as Melvin Eisenberg's approach). As specifically reported by Hevia, according to this approach third-party beneficiaries should be allowed to enforce a contract only if:

- 1) *“Allowing the beneficiary to enforce the contract is a necessary or important means of effectuating the contracting parties’ performance objectives, as manifested in the contract read in the light of surrounding circumstances.*
- 2) *Allowing the beneficiary to enforce the contract is supported by reasons of policy or morality independent of contract law and would not conflict with the contracting parties’ performance objectives”.*⁵⁹

As Eisenberg sees it, the former helps parties to pursue their own interests. Permitting a third party to enforce a contract guarantees that contracting parties’ objectives are prioritised, rather than simply affording them such benefit.⁶⁰ The research takes into account this concept but extends it from the benefit of the main parties to the benefit of all the parties in need.

In doing this, the thesis could be exposed to the following question: what is the limit of the protection? The Neighbour principle states that:

*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*⁶¹

‘Who is my neighbour’ is a test within tort law that essentially attempts to understand to whom a principle can apply. In this context, someone could ask: who is then in the multilateral common enterprise my neighbour? However, in applying the neighbour principle, there is a risk of repeating the mistakes made so far in the carriage of goods by sea, i.e., attempting to force definitions and draw lines. This thesis does not seek to understand ‘who is my neighbour’⁶² in the context of third party protection in the multilateral common enterprise. Instead, this thesis is based more on substance than label and the aim is to extend the protection

⁵⁹ M Hevia, *Reasonableness and Responsibility: A Theory of Contract Law* (Springer Science & Business Media 2012).

⁶⁰ Ibid.

⁶¹ *Donoghue v Stevenson* (1932) AC 562, 580 per Lord Atkin (HL(Sc)).

⁶² Ibid.

to whoever is ‘in need.’ In this respect, a general causal connection between the claimant’s claim and the defendant/third party (sufficient for a claim to exist) will allow protection to be extended to the defendant/third party.

1.3.3 Legal framework

Once the boundaries of the theoretical framework have been defined, it will be applied to the existing legal framework for the purposes of analysis and rationalisation. This thesis will analyse the legal efficiency of the status of third party protection in contracts, international conventions and domestic laws, rationalising the protection in relation to the argument of the research and making the consequent conclusions for each chapter.

The objective is to engage the legal framework (i.e., what does the law say about third party protection) with the theoretical framework based on factual context (i.e., the current adequate rationale behind the protection). In particular, different theoretical aspects will be applied to the existing legal framework of contracts, international conventions and domestic law.

Regarding contracts specifically, the thesis investigates whether the contract of the carriage of goods by sea protects third parties and to what extent the contract of the carriage of goods by sea is ready to receive protection as a multilateral system.

Regarding international conventions, this thesis argues that they should follow the commercial approach rather than a geographic one. This will be analysed especially with regard to the maritime performing parties and the problem with the geographic approach of the Rotterdam Rules.

On a domestic front, this thesis evaluates both the statutory law and case law of the two countries that have the greatest impact on the law governing the carriage of goods by sea: England⁶³ and the United States.⁶⁴ Investigations are made into the role and the importance of the substantive law in third party protection in shipping, despite the increasing dependence on private remedies and international solutions. This aspect is of crucial importance because it depicts the substantive framework of shipping today, and shows how this can affect third party protection at present.

⁶³ The thesis supplements the English legal framework with an original theoretical approach on contract theory, designed to enhance third party protection in the carriage of goods by sea, and using the factual economic and risk contexts of the shipping industry as ballast for the argument. Moreover, a modern bailment approach on carriage of goods by sea will be advanced.

⁶⁴ As anticipated, the United States’ vast case law on the topic will be scrutinized through statistical work.

1.4 Structure

Chapter 2 provides an outline of third party protection extant within the current contractual system and bilateral relationship between the parties of a two-party scheme. Specifically, third party protection is considered with respect to the allocation of risk between parties of a contract. The chapter also aims to familiarise the reader with precisely who is considered to be a third party under a contract of carriage of goods by sea, and to provide an outline of legal framework of the third party protection stated in clauses in contracts. An overview of how this protection has been regulated under clauses in contract of carriage of goods by sea will be given.⁶⁵ In the second part of the chapter, the concept of multilateral common enterprise will be introduced and more fully explored. The current economic context of shipping is analysed in order to develop the theoretical framework of this research as a justification for the future of third party protection in the carriage of goods by sea. In particular, examination of the supply chain and the forms of shipping integration (both vertical and horizontal) will be undertaken. Furthermore, an overview of third parties, their role and importance in the carriage of goods by sea, and the significance of third parties (terminal operators, stevedores, freight forwarders, etc.) will be given.

In Chapter 3, focus will turn to the international community's perspective on the issue, i.e., dealing with third party protection in international conventions on the carriage of goods by sea. Starting with the history of the Harter Act, the chapter assesses the evolution of this perspective, noting that, at the time of the Act, there was no mention of third parties in the context of the carriage of goods by sea. Following the passing of the Harter Act, protection has become increasingly detailed and widespread with the introduction of the Hague Rules and the Visby Protocol, and even more so with emergence of the Hamburg Rules and the Multimodal Convention.⁶⁶ Last but not the least, the Rotterdam Rules (not yet ratified) will be scrutinised. Specifically, these Rules show an innovative and highly criticised approach to the problem of third party protection, preferring a geographic rather than commercial approach.⁶⁷ Chapter 3 will also deal with the types of defences and limits accrued by the carrier, which third parties usually seek to acquire themselves through protection clauses from the Harter Act to the

⁶⁵ Limitation and exculpatory provisions in contracts specify to whom the legal protection of liability extends, as well as representing – together with provisions in international conventions and domestic laws – the core of legal protection. In the context of the carriage of goods by sea, these identify various parties in addition to the carrier who may be expected to take part in the completion of the contract and who will thus benefit from the same protection.

⁶⁶ The United Nations Convention on International Multimodal Transport of Goods 1980 has never been ratified.

⁶⁷ This thesis differs in opinion.

Rotterdam Rules. Moreover, there will be further explanation of the rationale for recognition of third parties in international conventions on the carriage of goods by sea and what effects multimodal and containerisation have had on third parties.

Chapter 4 will address the issue in the context of domestic legal systems. The common law tradition receives particular attention because it seems to have suffered the most problems. The juridical basis for the protection clauses under the common law system will also be analysed. This chapter considers the evolution of statutory and case law in recognising the growing importance of third parties. Furthermore, attention is paid to the change of emphasis within English law from consideration to consent, and whether the Contract (Rights of Third Parties) Act 1999 is comprehensive, or if there is still the need for an implied contract. Third party protection in United States law will be analysed with specific reference to the evolution of domestic case law on the topic.

Chapter 5 provides remarks and an outline for possible future research. In particular, the concept of channelling liability, multilateral insurance will be advanced as possible solutions and the various pros and cons framed for putative researchers. Moreover, a case is made for using civil law protection of third parties to assist with common law understanding and to shape future research.

Chapter conclusion

This chapter establishes the foundation for a profound and much needed evaluation of the third party protection framework. It further highlights the importance of perceiving third party protection through a modern, commercial lens, appropriate to the industry today. In turn, it is useful to understand how the shipping industry will be affected in years to come as the role of third parties continues to change significantly.

Once the theoretical aspects have been set and the issue framed from a conceptual perspective, all the players in the shipping industry could benefit from it.

Furthermore, this chapter contends that, in contrast to current approaches, the framework of third party protection should not be based on the central role of the carrier and shipper in the carriage of goods by sea. This thesis argues instead that the position of third parties is constantly changing. Their role in the carriage of goods by sea is currently very different from the past, but the protection afforded them by the law has not changed commensurately. This lack of understanding creates inefficiency and calls for a replacement of the bilateral approach of protection with a multilateral approach.

CHAPTER 2

The role and the evolution of third party protection in the carriage of goods by sea: From the bilateral to the multilateral system

The completed transaction from seller's warehouse to buyer's warehouse now involves other participants in the processing and movement of the goods-participants who are land based and whose services were either unnoticed or unused in the past, and it is these new non-maritime participants for whom the protections of the ocean carrier are sought to be extended by Himalaya clauses.⁶⁸

⁶⁸ Sweeney (n 17).

2.1 Chapter background

The theoretical framework of this thesis is built on a fundamental notion; that the role of third parties in the carriage of goods has changed substantially. This change is due to the carriage of goods by sea (and carriage in general) being subsumed within a broader, common, factual system. The purpose of this chapter is to clarify and redefine the role of third parties in the carriage of goods by sea and, in particular, in the environment within which transportation currently resides in the aforementioned system.⁶⁹

This chapter will introduce the reader to the concept of third party protection in the carriage of goods by sea. It will also continue the theoretical thread and further develop the research question of this thesis. To support this argument, the rationale behind third party protection in the carriage of goods by sea is appropriately elaborated.

The difficulty of this research – and thence its originality and validity – lies in the fact that, in reality, a supply chain is a *de facto* scenario that, at the moment, does not merit or demand proper regulation. In this chapter, the research considers the position of third parties in the carriage of goods by sea; previously at the edge of the traditional structure, third parties are now a fully integral part of the contemporary structure. The concept of ‘multilateral common enterprise’ is therefore proposed to develop a current and more adequate approach to third party protection in the carriage of goods by sea. This proposal derives from an analysis of the current shipping economic context and allocation of risk.

The chapter is divided into two parts. Part A explains the role of the protection of third parties in the carriage of goods by sea when viewed as a bilateral system, as has been the case to date. Specifically:

- An introduction to the limitation of liability;
- its importance in the carriage of goods by sea;
- how it has been extended to third parties as a tool to implement the allocation of legal and economic risk between the two parties of a contract;
- how the risk of third parties has been managed;
- the contractual legal framework.

⁶⁹ To achieve it, this chapter will link the practical aspects of the shipping industry in order to explain the new factual context within third party protection should be enhanced.

Part B outlines the current factual context and how the role of third parties has changed as a result of its development. This part will, from a macro perspective, analyse how carriage has changed within the context of the supply chain as a result of integration, and how the role of third parties has changed accordingly.

Here, it is appropriate to make an important distinction. On one hand, there are categories of third party that relate to the carrier and the vessel because they function as employees or servants of the carrier. These were already part of the problem surrounding third party protection when the issue first arose, between the beginning and the middle of the last century. On the other hand, contemporary third parties have emerged over recent years such as freight forwarders, terminal operators, non-vessel common carriers and inland carriers (these are mainly independent contractors). This thesis argues that the first group is now essentially incorporated within the position of carrier, and therefore no longer constitute third parties. The role of parties within the second group is not subsidiary to the carrier but is rather a proper, defined, specific role in the chain. Thus, this role cannot be defined as a third party anymore either.⁷⁰

This thesis defines third parties as ‘the third part of the enterprise’ to reflect the fact that they do not fit the classic perception of third parties.⁷¹ That is to say, they are not, in carriage of goods by sea, “a person or group besides the two primarily involved in a situation”.⁷²

⁷⁰ The Rotterdam Rules, as will be explained in the next chapter, apply a proper division of employees of the parties (including Master and Agents, who were previously considered third parties) and performing parties. Thus indicating that, strictly in this regards, the rules represent an improvement; see Carlo Corcione, ‘*The Evolution of Third party protection in Carriage of Goods by Sea: From the Himalaya clause to the Himalaya Protection*’ (2014) 49 *European Transport Law Journal* 3, 271.

⁷¹ As it has been elaborated in the past.

⁷² Oxford Dictionary (n 32).

CHAPTER 2 PART A

Third party protection in the carriage of goods by sea: risk allocation and management in the bilateral system

2.2 Background of the concept of legal protection in the carriage of goods by sea (i.e. limitation of liability and exclusion clauses)

Even though, in terms of the parties involved, carriage is very complex business, the ‘official’ perspective is that there are still only two main parties to a carriage contract. First, the carrier, who is the party that offers to transport goods in exchange for a price.⁷³ Second, the owner of the cargo being transported.

Shipping goods from one country to another involves risk of damaging goods.⁷⁴ The carriage of goods by sea has always been an allocation of risks between carriers and cargo interests.⁷⁵ As Sweeney explains, this bilateral scheme has now lost its clarity.⁷⁶ A crucial premise of this thesis is that, factually, the carriage of goods by sea has changed from a simple bilateral operation to an unequivocally multilateral operation. Particularly from the perspective of the carrier, the structure has changed from a single category of participants performing the work (i.e., the carrier), to a multi-faceted group of participants.

Protection clauses in international contracts are essential for the risk allocation between parties. As argued by Rajski, protection clauses have increasingly become tools for establishing how risk inherent in international operations (including specific legal risks) should be divided amongst the parties.⁷⁷

⁷³ Under bills of lading is, ‘freight’; under charter parties, ‘hire’. See also Sweeney (n 17).

⁷⁴ This thesis will deal with the allocation of liability between carrier and shipper in international conventions in the next chapter.

⁷⁵ This allocation has changed, as will be explained later in the chapter.

⁷⁶ According to Sweeney, ‘slot charters’ (a type of agreement covering vessel-sharing) prevent shippers from ever contracting with actual shipowners, let alone with the owner of the carrying vessel. Ocean carriage by sub-contract is now performed for non-vessel-owning common carriers as well as traditional ocean carriers. As an entity, a non-vessel-owning common carrier is likely to function as a shipper to shipowners or a carrier to cargo owners. By the same token, many (if not all) operations traditionally carried out as part of ocean carriage – weighing, measuring, documentation, pre-loading, loading, fumigation, stowage on board, unloading, examination, warehousing, storage – are likely to be carried out, even if not entirely, by the carrier’s sub-contractors. As a result, the notion of “carrier” on which modal frameworks have historically been based has “lost most of its traditional meaning” (n 17), 171–72).

⁷⁷ Jerzy Rajski, ‘Limitation of Liability and Exclusion Clauses in International Contracts’ (2002) 3 International Business Law Journal 4, 321.

It is common knowledge that an international transaction typically involves different parties.⁷⁸ The carriage of goods by sea, however, has not always been seen as part of this enterprise. There was a time when the shipowner was also the carrier of the vessel,⁷⁹ the cargo owner, the captain and his own insurer. There were not any banks and there were not any lenders. Law was not elaborate in this sense and therefore there was no regulatory regime.⁸⁰ Stevedores and port terminals were not structured companies. The field was mainly labour and not capital intensive. Nowadays, each transaction requires the involvement of many interests. Limitation and exculpatory clauses help these transactions to go smoothly.

Understanding how the limitation of liability in the carriage of goods by sea started and evolved is essential in introducing the concept of third parties. As Wyatt reports: “Under general maritime law, the ocean carrier was liable as an insurer of the goods; excused from cargo loss or damage only by an act of God, the shipper, public enemy, or by an exception in the contract of carriage”.⁸¹ Additionally, it is important to understand the significance of the evolution of the relationship between the carrier and third parties.

Liability protection is an essential part of the trade and, in the carriage of goods by sea, has a substantial impact between the carrier and the shipper. As Besong appropriately reports, the questions that invariably come up in carriage cases are: How much am I liable for? What is my exposure and limit? Who pays for what damage?⁸²

Contractually, these clauses are referred to differently: limitation clauses, exculpatory clauses, exception clauses, and so on. For ease, this thesis refers to them as ‘protection clauses’. Allocation of liability is essential and ancillary for trade operations. Without limitation of liability, there would probably not be any trade, or at least there would not be trade, as it is known today. According to Brunner: “No trade, no goods, no shipping, no ships”.⁸³ This thesis goes one step further: *no limitation of liability*, no trade, no goods, no shipping, no ships.

⁷⁸ Buyers, sellers, forwarders, carriers, bankers, lenders, insurers and various regulatory authorities amongst the others.

⁷⁹ This goes back to medieval times when merchants generally opted to sail with their goods. In the nineteenth century, specialisation changed everything. The all-purpose merchant disappeared and opposing interests of the corporate shipowner and the cargo owner emerged. Raphael Brunner, ‘Electronic Transport Documents and Shipping Practice Not Yet a Married Couple’ (PhD thesis, University of Capetown, 2007); Sik Kwan Tai, Ownen Tang, Peter Wong, ‘Note and Comments on the first decision based on the Chinese Regulations on International Maritime Transportation Concerning Terminal Handling Charges’, (2007) 38 J. Mar. L. & Com. 111.

⁸⁰ The first regime in the field was the Harter Act 1893.

⁸¹ Marva Jo Wyatt, ‘Contract Terms in Intermodal Transport: COGSA Comes Ashore’ (1991–1992) 16 Tulane Maritime Law Journal 177.

⁸² Besong (n 16).

⁸³ Brunner (n 79).

Providing an essential framework, Raisky acknowledges that there are a number of ways in which liability can be limited:

- 1) *Applying financial caps on liability regarding the maximum amount recoverable.*
- 2) *Imposing time limitation.*
- 3) *Procedural or other restriction on a party's grounds to claim.*
- 4) *Exclusion of certain categories of loss such as indirect loss, unforeseeable loss or consequential loss.*⁸⁴

When analysing this protection in relation to contracts regarding the carriage of goods by sea, there is one immediate doubt that should be clarified: the main convention on the carriage of goods by sea currently in operation is the Hague-Visby Rules. Article 3(8) of the Hague Visby Rules invalidates any clause that “purports to relieve or lessen the responsibilities of the carrier and the ship as they are set out in the Rules”.⁸⁵

As the Article states, the Hague-Visby Rules have in themselves limitation provisions for the carrier and for the carrier's third parties. Therefore the Hague-Visby Rules do not allow any other limitation provision other than what they expressly provide. In other words, they do not allow the carrier to limit their liability in a different way.

Another immediate distinction that should be pointed out is that there is a difference between limitation and exemption. The difference between these two provisions appears here to be fundamental; while exclusion clauses are often considered contrary to the policy of international trade and unusually employed,⁸⁶ limitation clauses are nonetheless a way to make contracts and relationships easy. The word ‘crucial’ has been used by The Ninth Circuit of the United States in *Tessler Bros. (B.C.) v Italcific Line*, to define the difference between the two:

The distinction between a limitation on liability and an exemption from liability is crucial because if on one hand is true that the carrier (and consequently third parties)

⁸⁴ Rajski (n 77). On the topic see also Patson Wilbroad Arinatiwe, *Risk Allocation in Oil and Gas Service Contracts* (Lambert Academic Publishing 2014) 24.

⁸⁵ William Tetley, ‘Limitation, Non-Responsibility and Disclaimer Clauses’ (1986) 11 *Maritime Law* 203. Specifically Article 3(8) states, “Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability”.

⁸⁶ Rajski (n 77).

*cannot immunise himself from responsibility, he can on the other hand, limit his liability.*⁸⁷

In *Bisso*, the Supreme Court offered the following explanation for its disapproval of exculpatory provisions:

*The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains.*⁸⁸

Limitation of liability and general protection clauses have been essential for the relationship between the two parties of the contract. However, as stated in the chapter's preamble, the parties of the carriage have immediately felt the need to protect their contractors and auxiliaries as well.

2.3 Third parties risk for the bilateral system

Protection clauses and their extension to third parties are addressed in this first part of the chapter in relation to their involvement in the allocation of risks in the carriage of goods by sea. The thesis discusses their importance in supporting the risk allocation between the two parties of the contract. Specifically in this context, it discusses how their protection has been managed as part of the allocation of risk between carrier and shipper.

Starting with the definition of risk, in business risk is: “a probability or threat of damage, injury, liability, loss, or any other negative occurrence that is caused by external or internal vulnerabilities, and that may be avoided through pre-emptive action”.⁸⁹

Additionally, Megens defines a risk as, “hazard, exposure to mischance or chances of bad consequences or the probability of an event occurring coupled with the consequences if it

⁸⁷ *Tessler Brothers (BC) Ltd. v Italpacific Line and Matson Terminals, Inc.* 494 F 2d 438 para 18. For a similar analysis see Thomas R Denniston, Carter T Gunn and Alfred E Yudes, ‘Liabilities of Multimodal Operators and Parties other than Carriers and Shippers’ (1989–1990) 64 Tulane Law Review 517.

⁸⁸ Sweeney (n 17).

⁸⁹ Anon., ‘Risk’ (*Business Dictionary*, 2014) <<http://www.businessdictionary.com/definition/risk.html>> Accessed 8 January 2014.

does occur”.⁹⁰ In the carriage of goods by sea, risk has always been between carrier and shipper. In the context of this thesis it is referred to economic and liability risks.

Hallebeek has defined the protection of third parties in the carriage of goods by sea as a natural way to give justice to the economic and risk allocation of a contract between cargo interests and carrier. The *ratio decidendi* can be summarised thus:

*It would have been unfair if the cargo, once agreed on terms and took into account economic and liability risks, could just ignore all of it suing someone who is commercially related to the carrier and for whom the carrier is (in one way or another) responsible.*⁹¹

Their protection has so far been viewed as part of a risk allocation and management between the two parties of the shipping operations.

Risk is an essential part of shipping life; it cannot be avoided but instead has to be managed.⁹² There is not any business without risk but there would not be any business without managing the risk. Risk management is the systematic process of understanding, evaluating and addressing these risks in order to maximise the chances of achieving objectives.⁹³

The major forms of risk management strategies are summarised as follows:

- 1) Risk avoidance.
- 2) Risk control.
- 3) Risk retention.
- 4) Risk transfer.⁹⁴

Risk avoidance means the avoidance of risk by not engaging in any activity with risk. Risk retention as its name clearly indicates, is when risk is contained and born by only one individual or company.⁹⁵

⁹⁰ Peter Megens, ‘Different Perspectives of Construction Risk: How Should it be Allocated?’ (1996) 15 *Ampla Bulletin* 179, 179–180.

⁹¹ Jan Hallebeek and Harry Dondorp, *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Martinus Nijhoff Publishers 2008) 121.

⁹² Anon., ‘About Risk Management’ (*Institute of Risk Management*, 2015) <<https://www.theirm.org/about/risk-management/>> Accessed 4 May 2015.

⁹³ *Ibid*, Accessed 8 January 2014.

⁹⁴ Muhammad Masum Billah, *Effects of Insurance on Maritime Liability Law A Legal and Economic Analysis* (Springer Science & Business Media 2014).

⁹⁵ David Frederick Ross, *Distribution Planning And Control; Managing In The Era Of Supply Chain Management* (3rd edn, Springer 2015).

Naturally, risk avoidance and risk retention are not relevant to this study. What is of pertinence and are analysed for this thesis are the concepts of risk control and risk transfer. Billah argues convincingly that no degree of precaution measures can entirely and consistently preclude serious and unpredictable losses and thus avoidance and retention enjoy a close relationship. Risk control cannot be the sole complete risk management strategy.⁹⁶

In shipping, risk management is very common and vital for shipping companies and participants. Risk control is the first step but alone it is not enough. Therefore, risk transfer is essential. The main risk transfer is insurance.⁹⁷ In essence, and again quoting Billah, anything we do now to avoid a future risk is a risk management strategy.⁹⁸ Focusing on the context of the carriage of goods by sea, risk allocation has been defined as a problem as old as maritime law itself.⁹⁹

In accord with this research, risk management comprises several elements. First, those who would seek to manage risk should evaluate identifiable risks. Second, they should determine the best method of mitigating each risk as far as is possible. Third, they should identify which party is in the best position to implement mitigating strategies. A party's readiness to take on a transfer of risk is likely to be contingent upon the degree of control they can exert over said risk, and also the ability to offset potential risk against potential gain.¹⁰⁰

David Lowe explains that today's risk management strategies emerged almost half century ago as a way of responding to systemic economic changes. He contends that the party who is best positioned economically to control, manage or insure against any such consequences should bear the cost of risk¹⁰¹ and handle the risk associated with commercial relationships between venturing parties.¹⁰² The parties of a carriage of goods by sea contract rely on limitation clauses in contracts to mitigate their respective risks.¹⁰³

⁹⁶ Billah Ch 2 (n 94).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Jan Lopuski, 'Liability for Damage in Maritime Shipping under the Aspect of Risk Allocation' (1979–80) 10 Polish Yearbook of International Law 177. The idea of spreading the risk of maritime adventure lies in the roots of ancient Greek and Roman concepts of Maritime Law, such as *foenus nauticum* or *lex Rhodia de iactu* and various forms of 'community of interests' in medieval shipping. It also lies in the roots of limitation of shipowners' liability deriving from the latter period. See also Lord Diplock (in 'Conventions and Morals: Limitation Clauses in International Maritime Conventions' (1969–1970) 1 Journal of Maritime Law and Commerce 525).

¹⁰⁰ Arinatiwe (n 84) 19.

¹⁰¹ David Lowe, *Commercial Management: Theory and Practice* (Wiley-Blackwell 2013).

¹⁰² Ibid.

¹⁰³ Rajska (n 77).

This work argues that, in the carriage of goods by sea, third party protection has been seen as a tool to allocate the transportation of risk between the parties involved in the operation.¹⁰⁴

Taking the above into consideration, there are two main approaches to managing risk in shipping. The first is controlling it through the mechanism of contract; with the limitation of liability as a tool of allocating the risk.¹⁰⁵ The second is transferring the risk to an insurance provider. Regarding the first, third parties can affect the result of a contract since they are a risk for the contractual party responsible for them. According to Arinatiwe, contracts are still the primary means of forestalling negative outcomes, even though other risk allocation mechanisms (such as insurance) still exist. The lower the degree of precision offered by a contract, the greater the level of risk to which contracting parties are exposed.¹⁰⁶ Contractual risk allocation is actually considered part of risk management and one of its primary aims.¹⁰⁷

The contract is the foundation of risk control. Additionally, the allocation of risk from a contractual perspective has been considered as one of the most essential characteristics of a contract, together with the definition of the responsibilities of the parties, and the determination of the effective payment terms.¹⁰⁸

As will be explored later in the chapter, shipping has been heavily dependent upon the contract mechanism to allocate risks, not only between the parties of it but also between parties not formally part of the contract.

Downie extensively lists the way of allocating the risk in an agreement, in the following way:

- *The obligation undertaken by the parties.*
- *The warranties given by the parties.*
- *The extent to which the parties exclude or limit the damage that would otherwise be recoverable for breaching the agreement.*
- *Indemnities given with respect to particular events.*
- *Requiring one or more parties to take out specified levels and types of insurance.*¹⁰⁹

¹⁰⁴ José Vicente Guzmán, 'The Limitation of Liability of the Carrier from an Allocation of Risks Point of View' (Comité Maritime International 2012) <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Jose%20Vicente%20Guzman.pdf> Accessed 24 March 2014.

¹⁰⁵ Contract management is a way of monitoring the allocation and making sure nothing untoward happens.

¹⁰⁶ Arinatiwe (n 84) 15.

¹⁰⁷ Ibid. 19.

¹⁰⁸ Lowe (n 101).

¹⁰⁹ See David Downie, *Contractual Risk Allocation* (Inter Alia Publishing, 2012). If an agreement is silent on liability then each party's liability under the agreement is considered to be subject to the law of the agreement.

Regarding the second component of managing risk (i.e. transferring to insurance), Buglass deems it “unnecessary” to say that the principle of limitation of liability is important to marine insurance and that marine insurance industry relies on it. Underwriters stipulate insurance contracts with shipowners relying on the right that the shipowners have to limit their liability benefiting the underwriters. The same author points out that liability insurance premiums might increase almost by one third if shipowners – and in turn underwriters – were deprived of this protection.¹¹⁰ The aforementioned right to limit affects the P&I Club and shipowners’ relationship¹¹¹ as well as shipowners coverage and related costs under the Hull and Machinery market.¹¹² Essentially, limitation clauses help the assured in obtaining its policy in a more easily and more cheaply way.¹¹³

Regarding an analysis of the limitation of liability in relation to the insurance, the first consideration is the ‘cost argument’ that insurers usually attribute only to shipowners, rather than those who, through negligence or sheer bad luck, have caused an accident.¹¹⁴

Billah highlights a negative aspect of limitation of liability, explaining that “lower liability leads to lower precaution. Limitation of liability thus encourages negligent navigation”.¹¹⁵ Billah also defines limitation of liability as the opposite concept of full liability; the existence of one would reduce the effect of the other. If full liability is necessary to create optimal deterrence, such deterrence would be so effective that the extent of liability would be reduced due to a limitation of liability.¹¹⁶ From a specific degree, limitation of liability is also seen as a cause of social loss because it does not induce to have the proper care.¹¹⁷

Tetley’s view on the matter is clear: “it is a fundamental principle of good business practice and of efficient, fair and low-cost insurance that persons who are responsible for losses should be held accountable, in some way, for those losses”.¹¹⁸ On the other hand the concept of limited liability may encourage settlements and save in litigation costs while without it, parties to a lawsuit may wait for the trial outcome.¹¹⁹

¹¹⁰ Leslie J Buglass, ‘Limitation of Liability from a Marine Insurance Viewpoint’ (1979) 53 *Tulane Law Review* 1364.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Rajski (n 77).

¹¹⁴ Erik Roseg, *The Impact of Insurance Practices on Liability Conventions*, originally published in legislative approaches in maritime law. Proceedings from the European Colloquium on Maritime Law: Lysebu, Oslo, 7-8 December 2000. *Marlus* No 283.

¹¹⁵ Billah Ch 3 (n 94).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ William Tetley (n 26).

¹¹⁹ Billah Ch 3 (n 94).

The importance of limitation of liability for the insurers is aptly given by de la Mare, who explains the commercial mechanism of the limitation:

*Without limitation of liability, ocean carriers and insurers would face enormous claims for damages in cases where goods are damaged. In order to bear these risks, the carrier will increase the rate of the carriage. In other words, shippers allow carriers to have limitation and in exchange receive more affordable shipping rates.*¹²⁰

The position of the insurance in the role of limitation of liability in the carriage of goods by sea is crucial. An example is in a contract between the carrier and the shipper. The shipper carries cargo insurance for the event that cargo is damaged. Should the cargo be damaged, the shipper recovers from their insurer. The insurer is then subrogated to the rights of the shipper and would proceed to sue the carrier. The carrier has the protection and indemnity insurers (P&I) cover which (if the carrier is liable) will pay (under deductible) on behalf of the carrier.

According to Lord Diplock, the allocation of liability is “eventually an allocation of liability between cargo insurers, P&I for a loss incurred through neither’s fault”.¹²¹ As Hellawell summarises: “What superficially may be regarded as an allocation of risk between the Carrier and Shipper is in reality between the carrier’s insurers and the shipper’s insurers”.¹²²

However and taking into account the above, the shipping industry has gradually taken into consideration the risk of parties ‘outside’ the bilateral relationship and therefore the necessity of extending them their legal protection.

¹²⁰ William T.J. de la Mare, ‘Jurisprudential Problems of Attribution of Liability in the Area of Admiralty Contracts for Carriage Following *Norfolk Southern Railway v Kirby*’ (2007) 22 Connecticut Journal of International Law 203.

¹²¹ Lord Diplock (n 99).

¹²² Robert Hellawell, ‘Allocation of Risk Between Cargo Owner and Carrier’ (1979) 27 American Journal Of Comparative Law 357.

2.4 The extension of the protection to third parties (i.e. vicarious liability, commercial convenience and autonomy of party)

As expressed by Sturley, whoever is involved in the contract of carriage but is not a party to the contract can be sued. As we have seen, bringing an action against them instead of suing the contractual parties can have an economic benefit.¹²³

Currently, third parties are protected by the main parties to a contract because they affect them. The justifications for this have been vicarious liability, commercial convenience or simply autonomy of parties. Tetley, in one of his main article states that:

*The basic problem is to find a way to permit third parties who are neither agents nor servants to limit their liability; specifically, to find a way to allow stevedores and terminal operators, whom the carrier declares are not his agents or servants but independent contractors, to nevertheless benefit under the contract of carriage.*¹²⁴

This clearly helps to define the problem of finding a way to make a third party benefit from a contract.¹²⁵ The purpose of third party protection clauses is to extend the carrier's legal defences to independent contractors such as stevedores.¹²⁶

With carriage expanding, the protection from the carriage of goods by sea (as further explained in Chapter 4) has also been sought by third parties outside the carriage of goods by sea. This is a particularly pertinent issue, the best-known recent example of which derives from the *Kirby*¹²⁷ case. In *Kirby*, the essential question was whether a contract, to which the maritime shipper was not a party, nevertheless limited the rights of the shipper against a land carrier, namely, a railroad. The Supreme Court, in a unanimous opinion, protected the railroad (this case is analysed in greater detail in Chapter 4).¹²⁸

Sweeney further expresses the concept of expansion of the carrier's job:

¹²³ Michael F Sturley, 'An Overview of the Considerations Involved in Handling the Cargo Case' (1996–1997) 21 Tulane Maritime Law Journal 263.

¹²⁴ William Tetley (n 26).

¹²⁵ However, for the sake of clarity, it has to be said that the problem is not only one of finding a way for third parties to benefit from the contract but also understanding how this could be permitted within international conventions (this is covered in Chapter 3) and, domestic law (this is covered in Chapter 4).

¹²⁶ When the Himalaya clause was first drafted, employees of the carrier also had to be protected. With time, these categories of third parties have been automatically included in the international conventions regulating carriage of goods by sea (as discussed in the next chapters), leaving only the difference between employees and independent contractors.

¹²⁷ *Kirby* (n 7).

¹²⁸ Sweeney (n 17).

*The completed transaction from seller's warehouse to buyer's warehouse now involves other participants in the processing and movement of the goods-participants who are land based and whose services were either unnoticed or unused in the past, and it is these new non-maritime participants for whom the protections of the ocean carrier are sought to be extended by Himalaya clauses. Today, road or rail carriage from the seller's warehouse to the buyer's warehouse are necessary parts of foreign trade and competition is forcing traditional ocean carriers to be involved in services outside their familiar areas of maritime operations. The sub-contracting of cargo-related services has developed to such an extent that the traditional ocean carrier is now sub-contracting even the ocean carriage itself.*¹²⁹

As explained, the carrier contracts with the shipper but then has to delegate all or part of this job to other parties (being an employer or independent contractor). As previously mentioned, with the evolution of carriage, more persons are now involved and consequently the carrier responsible for them.¹³⁰ The reason often lies in the concept of vicarious liability for which the carrier is responsible for any fault committed by its servants or agents during the performance of the contract,¹³¹ or for commercial agreements between the carrier and third parties. In this regard Liang expands the concept of the carrier's interests in protecting third parties:

*Even if there is an exception clause that excludes the vicarious liability of the carrier, he may face the same situation when the cargo owner brings a direct action in tort against its servants or agents for their personal fault in the performance of the contract. If the carrier's servants or agents lose the legal battle, the carrier may ultimately have to compensate them for the loss as a matter of business practice or of good labor relations. Same result if a direct action is brought against an independent contractor with whom the carrier has contracted.*¹³²

The concept of vicarious liability, (specifically regarding a carrier and third parties), has been discussed by Viscount Cave in *Elder Dempster*.¹³³ His theory states that an agent is

¹²⁹ Ibid.

¹³⁰ Liang (n 17).

¹³¹ Vicarious liability: legal responsibility and liability of an employer for the wrongful acts of its employees. Definition in Spurin (n 24) 10.

¹³² Liang (n 17).

¹³³ *Elder Dempster* (n 3).

entitled, while performing the contract, to any immunity conferred on his principal. This is known more commonly as vicarious immunity. This theory was later much criticised because it was considered “a departure from a fundamental principle in English Law namely, one who is not party to a contract cannot acquire rights under it”.¹³⁴

As Chapter 4 addresses in detail, this protection has always found obstacles in a principle of English law (that states a stranger to a contract cannot enjoy the benefit of an exception clause embodied in the contract) originated in *Tweddle v Atkinson*¹³⁵ and confirmed by the House of Lords in *Dunlop Pneumatic Tyre Co. v Selfridge and Co.*¹³⁶

As far as the contract of the carriage of goods by sea is concerned, a third party is not simply the crew (including, as Liang says, the master and the stevedores) but can include many other categories of participant.¹³⁷ The vicarious liability concept affects the difference between employees and independent contractors. According to Sweeney:

*Actual employees of carriers and agents of carriers create liability for carriers because of ‘respondeat superior’, without eliminating the personal liability of such employee or agent, although the recovery of money damages from uninsured crew members, including officers (as in The Himalaya, supra), may prove futile. Consequently, cargo plaintiffs usually disregard the crew members or agents despite their personal fault. The general maritime law, like the common law, assumed the liability of shipowner employers for the damage-causing faults of employees.*¹³⁸

However, for what it concerns the position of independent contractors they seem not to have a strong justification on why they have to be protected from the parties of the contract. Mankabady’s assessment is as follows:

In their view a contractor who is independent of the carrier should not, by the mere fact that he performs duties which the carrier himself might have performed, become entitled to the limitation and exceptions of the Rules. Therefore, a distinction should

¹³⁴ Samir Mankabady, *The Hamburg Rules on Carriage of Goods by Sea* (Brill Archive, London 1978) 66.

¹³⁵ (1861) EWHC QB J57.

¹³⁶ (*Dunlop*) (1915) AC 847.

¹³⁷ Liang (n 17).

¹³⁸ Sweeney (n 17).

*be drawn between, on the one hand, the carrier, his servants or agents and, on the other, the independent contractor.*¹³⁹

Before entering into details of distinct categories, a further specification has to be drawn between servants and agents on one hand and independent contractors on the other. The background of this is crucial in understanding the evolution of the protection that as previously stated at first was limited to master, servant and agent but now extended to independent contractors.

As reported by Mankabady, referring to the Hague Rules: “The servants and agents should be protected for social reasons and should have the benefits of the Rules whereas these reasons do not apply to the independent contractor, who should thus not have this benefit”.¹⁴⁰

According to Burnett, the distinction between an employee and an independent contractor often lies in a difference of contract. On the one hand, a contract *of* service, made between employer and employee. On the other, a contract *for* services, made between principal and independent contractor. Traditionally, this contractual difference emerged from a difference in control; independent contractors were typically instructed to generate an end result but given a degree of self-determination when carrying out the work, whereas employees were usually told what to do and exactly how to do it.¹⁴¹

In the book, *The International Law of the Shipmaster*, Carter, Fiske, and Leiter give an explanation for the reason behind the division:

The Visby protocol to the Hague Rules added a provision whereby the carrier’s servants or agents shall be entitled to avail themselves of the defences and limits of liability available to the carrier in respect of damage to goods covered by a contract of carriage whether the action be founded in contract or tort. However, the servants or agents lose the benefice of such defences or limits of liability if it is proved that the damage resulted from an act or omission of the servant or agent done with the intent to cause damage or recklessly and with knowledge that damage would probably result. These provisions were added into the original Convention as a result of the many problems generated by suits based on negligence against the master and agents

¹³⁹ Samir Mankabady, ‘Rights and Immunities of the Carrier’s Servants or Agents’ (1973–1974) 5 *Journal of Maritime Law and Commerce* 111.

¹⁴⁰ *Ibid.*

¹⁴¹ Jonathan Burnett, ‘Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*’ (2007) 29 *Sydney Law Review* 163.

*of the carrier to bypass the carrier's limitation of liability based on the privity of contract. Following the Adler case, carriers inserted Himalaya clauses extending the benefice of the carrier's defence and limitations of liability to their servants, agents and independent contractors, such as the stevedores. Although the independent contractors have been left out of the orbit of the protection afforded by the Hague-Visby Rules and therefore need to rely on Himalaya clauses, the masters, as a servant of the carrier, are liable towards third parties within the same limitations and with the same defences as their principals. The Hamburg rules have adopted a similar provision.*¹⁴²

The topic has also been addressed from a case law perspective (see Chapter 4). As reported by Smeele quoting Denning judgment in *The Himalaya* case, there is a distinction between a carrier's servants and agents (both categories in fact are protected by the mandatory liability regime of the Hague-Visby Rules) and independent contractors (left from the same protocol to their own devise).¹⁴³ Minichello defines a sub-contractor as:

- 1) *One who takes a portion of a contract from the principal contractor or another sub-contractor.*
- 2) *One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance.*
- 3) *One who takes from the principal or prime contractor a specific part of the work undertaken by the principal contractor.*¹⁴⁴

The above analysis is essential in addressing the evolution of the protection of the categories of third parties. At the beginning of the last century parties to be protected were mainly carrier's servants, and the master. Some categories of third parties were not even well distinguished:

In the first American case in which a terminal operator claimed the protection of a Himalaya clause, the court of appeals struggled with the differences between

¹⁴² John Carter, Richard Fiske and Tara Leiter: *The International Law of the Shipmaster* (2009) Informa Law from Routledge.

¹⁴³ Frank Smeele, 'The Maritime Performing Party in the Rotterdam Rules 2009' (2011) *European Journal of Commercial Contract Law* 1.

¹⁴⁴ Quoting Black Dictionary, Dennis Minichello, 'Who and What Are You Insuring? Cargo Transportation Liability Exposures Are Changing' (2008–09) 21 *University of San Francisco Maritime Law Journal* 2, 167.

*stevedores and terminal operators, but eventually came down in favour of protecting a stevedore who was acting as terminal operator at the time the goods were lost.*¹⁴⁵

In summary, third parties have often received protection in the past for the commercial convenience of doing so. This has been supported by principles such as *respondeat superior* and vicarious immunity.¹⁴⁶

With an explanation of the orthodox reasons behind third party protection firmly secured, the next section provides an overview of the contractual framework necessary to extend carrier protection to third parties.

2.5 Contractual framework to extend the carrier protection to third parties

This contextual framework is achieved through clauses in contracts. It gives protection to third parties but it is also important for carriers because, as explained by the MLA report:

*While carriers are free to decide whether or not to extend their defences limitation and immunities under COGSA to stevedore, terminal operators and other parties, the use of these particular clauses to accomplish that purpose should substantially reduce third party litigation between carriers and their independent contractors in cargo damage cases. Moreover the widespread use of these clauses will help to promote certainty and uniformity in the law of carriage of goods – a goal sought by shippers, carriers, stevedores and terminal operators alike.*¹⁴⁷

The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the carrier in relation to the goods.¹⁴⁸

The Himalaya clause is the most frequent aiming to dissuade cargo owners from imposing any liability upon a stevedore or terminal operator for damage to the goods greater than the liability which the carrier has under the terms of the bill of lading.

Literature on cases involving Himalaya clauses is vast, but the essential principles stated by courts regarding Himalaya clauses can be summarised thus:

¹⁴⁵ Sweeney (n 17).

¹⁴⁶ See Corcione (n 70).

¹⁴⁷ The MLA Report (n 19).

¹⁴⁸ *Instel Corp. v M/V Antonia Johnson (Antonia Johnson)* 1983 A M C 1153 (W D Wash 1982).

- The parties to a bill of lading may extend a contractual benefit to a third party only by clearly expressing their intent to do so.
- The benefits may be extended to agents and sub-contractors only with respect to their actions in the performance and fulfilment of the principal contract.

The Himalaya clause for servants and agents of the carrier, was accepted by the international community in the Hague Visby Rules of 1968. The same result of Himalaya clauses, as explained by Hooper, relates to bailment law (see Chapter 4).¹⁴⁹ Generally, the intent of the parties, as expressed through the clarity of the language used in the provision, controls the determination of whether a third party is an intended beneficiary.¹⁵⁰

Additionally, the International Group of P&I Clubs (IGP&I)¹⁵¹ and The Baltic and International Maritime Council (BIMCO)¹⁵² recognise not only that Himalaya clauses are complicated, but also that it is extremely difficult to outline a clause that works on every situation and in every jurisdiction. Therefore the IGP&I and the BIMCO have been working to produce a clause which should be recognised and effective at least in most major shipping jurisdictions.¹⁵³

The Himalaya clauses are numerous and different in contents. The following points however represent their fundamentals:

- Exempt the carrier and the identified third party from liability under a contract.
- To confer on such third party all the rights, limits, defences and exemptions from liability enjoyed by the carrier under the contract.
- Impose on the other party to the contract, the obligation not to sue the third party in tort, bailment or otherwise.
- Making the carrier an agent or trustee for the third party in relation to the contract, and that such third party is deemed to be a party to such contract.

¹⁴⁹ Chester D Hooper, 'Legal Relationships: Terminal Owners, Operators, and Users' (1989–1990) 64 *Tulane Law Review* 595.

¹⁵⁰ Minichello (n 144). This (as Chapter 4 will detail) mainly depends on different jurisdictions and on courts approaches.

¹⁵¹ International Group of P&I Club (2015) <www.igpandi.org/> Accessed 11 November 2014.

¹⁵² Baltic International Maritime Council (BIMCO) (2015) <<https://www.bimco.org/>> Accessed 11 November 2014.

¹⁵³ BIMCO, 'Revised Himalaya clause for Bills of Lading and other Contracts' (Special Circular No. 6, 17 September 2010) <https://www.bimco.org/~/_media/Chartering/Special_Circulars/SC2010_06.ashx> Accessed 11 November 2015.

- To provide protection in respect of operations related to the carriage of goods but which are not necessarily carried out on board the ship, for example operations which take place before loading or after discharge from the vessel.

The Himalaya clauses, even if often similar to each other, show a degree of diversity. Listing them would neither be possible nor add anything to the argument here. It is worth mentioning, however, that the search for a good practice in Himalaya clauses pushed the Maritime Law Association of the United States in 1983 to create a sub-committee regarding Himalaya clauses. As a result, it provided a report in which experts tried to draft the ‘perfect’ Himalaya clause, which (according to the report) states:

- 1) *The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the carrier in relation to the goods.*
- 2) *The terms of this bill of lading constitute the contract of carriage, which is between the shipper, consignee, holder of the bill of lading and authorised owner of the goods and the carrier, shipowner or demise charterer of the vessel designated to carry the shipment. It is understood and agreed that no claim or allegation shall be made by the shipper, consignee holder of the bill of lading or authorised owner of the goods against any servant, agent, sub-contractor or independent contractor (including but not limited to the master, officers and crew of the vessel, all employees and representatives, all terminal operators, warehousemen, stevedores, watchmen and all other sub-contractors and independent contractors whatsoever) used or employed by the carrier from time to time in connection with the performance of any of the carrier’s obligations under the bill of lading, which imposes or attempts to impose upon any of them any liability in connection with the goods greater than that of the carrier under this bill of lading, but if any such claim or allegation should nevertheless be made party making such claim or allegation agrees to indemnify the carrier against all consequences thereof.*
- 3) *Without prejudice to any other provision hereof, it is hereby expressly agreed that any and all servants, agents and independent contractors (including but not limited to, the master, officers and crew of the vessel, all employees and*

representatives, all terminal operators, warehousemen, stevedores, watchmen and all other sub-contractors and independent contractors whatsoever) used or employed by the Carrier in connection with the performance of any of the Carrier's obligations under this Bill of Lading, in consideration of their agreement to be so used or employed, shall be express beneficiaries under this Bill of Lading or by Law, so that in no circumstances shall any servant, agent or independent contractor of the Carrier be under any liability, in contract or tort, greater than that of the Carrier hereunder. It is further expressly agreed that for the purposes of this provision, the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all who are or may be its servants, agents or independent contractors from time to time in connection with the performance of any of the Carrier's obligations under this Bill of Lading, and that all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidenced by this Bill of Lading.

- 4) *It is further agreed that the expression "servant, agent or independent contractor" in this Bill of Lading shall include direct and indirect servants, agents and independent contractors of the Carrier, as well as their respective servants, sub-agents or sub-contractors.*¹⁵⁴

There has been, as always, an evolution in the way the Himalaya clauses are drafted.¹⁵⁵

Although the Himalaya clause is the core of the third party protection clauses in the carriage of goods by sea, other clauses are necessary in order to apply full protection to third parties. The 'circular indemnity' clause, for instance, is often used together with the Himalaya clause. The indemnity clause requires the cargo owner to compensate the carrier for any claim, made by shipper interests outside the bill of lading. In other words, under indemnity clause, the cargo owner cannot bring any claim against any carrier contractor or sub-contractor and in case such claim is brought the cargo owner has to indemnify the carrier against any loss incurred by

¹⁵⁴ The MLA Report (n 19).

¹⁵⁵ For instance, in United States law, the importance of the language in the Himalaya clause has been pointed out in *Herd & Co. v Krawill Machinery Corp.* 359 US 297, 1959 AMC 879 (1959) (see Chapter 4). In being so specific, the court provided a significant opportunity to broaden the categories of third parties. If the criterion for protecting or not protecting a third party is merely whether or not they are mentioned in the clause, also sub-categories such as sub-agents and sub-contractors of the carrier's agents, for instance, could be included in a Himalaya clause.

the latest.¹⁵⁶ However, it must be acknowledged that a circular indemnity clause has the same problem as a Himalaya clause concerning Article 3(8) of the Hague-Visby Rules.¹⁵⁷

The ‘demise’ clause is also relevant here.¹⁵⁸ As Tetley explains, the demise clause regulates the liability between shipowner and charterer in the charter party. This is because the shipowner and the charterer share responsibilities in loading, carrying, caring for, and discharging cargo. In respect of third parties, they should both be the carrier. Tetley strongly comments that allowing them to stipulate that one of them is not the carrier is the most opprobrious of non-responsibility clauses.¹⁵⁹

The liability and the apportionment of risks between shipowner and charterer in a charter party has been also developed with the influence of the P&I clubs, under the Inter-Club New York Produce Exchange Agreement (NYPE). It is an agreement between the shipowners and the charterers that exists to help with apportioning the liability for cargo claims, mainly for NYPE signatories, but also for use with other charter parties.¹⁶⁰

Other relevant clauses necessary for an appropriate legal contractual framework for third parties are:

- 1) The opportunity to declare a higher value clause.¹⁶¹
- 2) One year suit limitation clause.¹⁶²
- 3) The choice of law clause.¹⁶³
- 4) The separability clause.¹⁶⁴

¹⁵⁶ Freight Transport Association, ‘Himalaya and other warranty and indemnity clauses’ (*Freight Transport Association*, 2015) <http://www.fta.co.uk/policy_and_compliance/sea/long_guide/himalaya.html> Accessed 13 October 2015. See also “*Elbe Maru*” (1978) 1 Lloyd’s Rep. 206.

¹⁵⁷ Tetley (n 26).

¹⁵⁸ A demise clause usually states: “If the ship is not owned or chartered by demise to the company or line by whom the bill of lading is issued the bill of lading shall take effect as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agent only and shall be under no personal liability whatsoever in respect thereof”.

¹⁵⁹ William Tetley, ‘Case Note: *Homburg Houtimport B.Vv Agrosin Private Ltd. (The Starsin)* (2003) 1 Lloyd’s 571, 2003 AMC 913 (HL) 121 (Bills of Lading)’ (2004) 35 Journal of Maritime Law and Commerce 1.

¹⁶⁰ Draft Charterparty Clause Promoting the Use of the Inter-Club New York Produce Exchange Agreement 1996 (As Amended September 2011) <http://www.shipownersclub.com/media/2016/05/Draft-Charterparty-Clause-promoting-Inter-Club-New-York-Produce-Exchange.pdf> accessed 21 June 2016; Stefan Bjarnelöf-Sovtic, ‘The Inter-Club Agreement: Certain Aspects’ (Master’s Thesis, University of Lund 2006).

¹⁶¹ The MLA Report (n 19). This clause originated in *Tessler Brothers* (n 74) where the Court held that in order to take advantage of the USD 500 package limitation, the carrier has to give the shipper notice of the limitation and a fair opportunity to declare a higher value for its good.

¹⁶² “In any event, the carrier and the ship are discharged from all liability for loss or damage to the goods unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. It is hereby agreed that suit shall not be deemed brought until jurisdiction have Suit shall not be deemed “brought” unless jurisdiction is obtained over the Carrier by service of process or by an agreement to appear”.

¹⁶³ “It is hereby agreed that this Bill of Lading shall be construed, and the rights of the parties thereunder determined, wherever possible, according to the law of the United States of America”.

On one hand, the contractual scheme of third party protection can be considered pragmatic and essentially functional in practice. On the other, it leaves the protection of third parties subject to the willingness of the two main parties and to the interpretation of the clauses wording.

Summary of Part A

This part of the chapter has introduced the concept and importance of legal protection between two parties of a commercial relationship as well as presenting the traditional view of the carriage of goods by sea as a bilateral relationship and allocation of risks between the two parties with third parties serving a risk. Furthermore, this section has explained why and how this risk has been managed so far. It is believed that, generally speaking, the contractual framework for third party protection in the carriage of goods by sea is acceptable mainly because contracts are an easy and practical way to deal with protection. The intention of the parties is precisely stated in clauses such as a Himalaya clause, where the parties to the contract essentially list all the other parties to whom they wish to extend their limitation of liability.

It can be concluded that contract, is a very common mechanism for risk control in today's shipping industry.¹⁶⁵ Contract's role, however, has changed dramatically, passing from being a purely legal necessity for protecting against possible mishaps, to becoming tools for optimising ongoing business relationships.¹⁶⁶ Most pertinently for this discussion, contract serves to manage the risk of third parties and their contracts. Contracts have become central in international transactions.¹⁶⁷ Indeed, the number of contracts drawn has increased dramatically. Additionally, contracts have become particularly interdependent – especially in complex, integrated systems – and can therefore be of the utmost assistance.

Lowe says that contracts put forth the rights and obligations of the parties to the contract and describe the responsibilities and procedural roles of those named within the

¹⁶⁴ “If any provision of this Bill of Lading is, or is held to be, invalid under the Carriage of Goods by Sea Act of the United States, or any law that is compulsory applicable, such provision shall, to the extent of such invalidity, but no further, be null and void. The terms and conditions of this Bill of Lading are separable, and if any term or condition is, or is held to be, invalid, null and void, or unenforceable, such holding shall not affect in any way the validity or enforceability of any other term or condition of this Bill of Lading”.

¹⁶⁵ National Contract Management Association (2013) 11 Journal of Contract Management <www.ncmahq.org> Accessed 3 January 2015.

¹⁶⁶ PWC, ‘Contract Management, Control Value and Minimise Risks’ (2015) <<http://www.idii.com/wp/MembaPwContractMgmt.pdf>> Accessed 18 January 2015.

¹⁶⁷ Lorenz Kahler, ‘Contract-Management Duties As A New Regulatory Device’ (2013) 76 Law and Contemporary Problems 89.

contract, asserting that a common awareness of the distribution of risk within a contract is a key feature of, “harmonious, effective and efficient projects”.¹⁶⁸

As stated however, a contract alone is not enough to limit risk. Insurance helps by transferring risk. In comparison with insurance of the past, the structure of risks covered by insurance today has expanded substantially. In marine insurance, the risks covered were mostly external in relation to the assured: perils of the sea, wars, pirates, robbers, and so forth. Currently the risks are of a different nature and internal to the carriage structure and the relationship between the parties performing the carriage.¹⁶⁹

Minichello likens insurance to grease; it lubricates the entire system to ensure it operates in a smooth manner. Transferring risks of liabilities, which can potentially arise out of a contract of carriage, is crucial.¹⁷⁰

Rather than simply finding a solution in a contract between the parties or between the parties and their insurers, this thesis goes further; finding a rationale for the new protection of third parties. The current issue is that, for the expansion of carriage in a new dimension, third parties are part of a common enterprise and they now bear their own risk rather than being dependent on the parties contracted.

The next part of this chapter advances the concept of the multilateral common enterprise, and shows that the way risk has been managed so far is now inadequate.

¹⁶⁸ Lowe (n 101).

¹⁶⁹ Lopuski (n 99).

¹⁷⁰ Minichello (n 144).

CHAPTER 2 PART B

The factual context of the shipping industry: the establishment of the multilateral common enterprise

Part A of this chapter explains how third party protection in the carriage of goods by sea has been regulated so far. This is a crucial step in describing the existing framework on which this thesis applies the factual context of the multilateral common enterprise.

Part B defines multilateral common enterprise and its position in reference to the carriage of goods by sea. For the subsequent discussion to make sense, it is necessary to understand the mechanism of an enterprise, the factual context of the shipping industry and combine them in order to construct the framework within which third parties operate.

The thesis provides an explanation of the factual context that has led to the creation of this common enterprise, and an overview of how the carriage of goods by sea became part of this. Consideration is given to – and a brief introduction provided for – the changes that have influenced the carriage of goods by sea, rendering it a multilateral common enterprise (amongst the others containerisation, multimodalism, logistic, and integration). This is crucial in order to introduce and precisely identify the concept of the supply chain. Finally, this part will provide an outline of current models of integration in the shipping industry, and introduce the main categories of third parties who are now part of the multilateral system and should thus no longer be considered third parties.

2.6 Multilateral common enterprise

For the purposes of this thesis, the term ‘multilateral common enterprise’ is used to describe an informal venture between more than two parties. In order to better assess the issue, the definitions of joint venture and joint enterprise have to be addressed as a foundation.

Both derive from partnership law and agency law. The term joint venture refers to an established limited company, a partnership or an unincorporated contractual association for a given purpose.¹⁷¹ A helpful definition of joint venture is provided by Hewitt:

Joint venture refers to a range of collaborative business arrangements, the fundamental characteristics of a joint venture being collaboration between the

¹⁷¹ Greg Gordon, John Paterson and Emre Üşenmez, *Oil and Gas Law: Current Practice and Emerging Trends* (2nd edn, Edinburgh University Press 2007).

*participants involving a significant degree of integration between the joint ventures. The key element to be considered and agreed by the joint venturers is the degree and nature of that collaboration. Joint ventures may take the form of a contractual alliance, a partnership or a corporate joint venture.*¹⁷²

A joint enterprise, on the other hand, is an informal joint venture that does not need an express business agreement nor an evidence of sharing profit and losses.¹⁷³ This research borrows the concepts of joint venture and joint enterprise in order to better define common enterprise as featuring a collaboration between parties. The words common enterprise have been selected because, in order to have a proper joint venture (or joint enterprise) there has to be a clear intention to carry out activities together. While all members of the multilateral common enterprise cooperate with each other on a factual basis, they do not necessarily consider themselves to be part of the same project.

As anticipated in Chapter one, a similar use of the term joint venture to express a factual partnership in the context of the carriage of goods by sea has already been given by Tetley in the context of charterparty between the shipowner and the charterer. This thesis expands the concept to include the whole network that nowadays constitutes the carriage of goods by sea.

The thesis elaborates upon an original definition, considering the common enterprise as a factual alliance or more precisely, a loose collaboration between different parties.

2.7 The factual context of the shipping industry: the common enterprise amongst its stakeholders

Analysing the factual context of an industry – especially one as volatile and continuously evolving as shipping – is a very complicated process, especially if economic factors are to be taken into account. The economic factual context of the shipping industry currently takes into consideration variables that were not necessary to consider only a few decades ago, such as containerisation and multimodal operations, logistics, and supply chains. The key to the relationships between these processes is integration; not simply formal integration (as discussed later in the chapter), but above all *informal, factual* integration.

¹⁷² Hewitt, *Joint Ventures*, (2005) 3rd ed. Sweet & Maxwell.

¹⁷³ United States Legal Inc., ‘Distinction Between Joint Venture and Joint Enterprise’ (2014) <<http://jointventures.uslegal.com/distinction-between-joint-venture-and-joint-enterprise/>> Accessed 10 November 2015.

According to Panayides (quoting O’Leary-Kelly and Flores), “integration refers to the extent to which separate parties work together in a cooperative manner to arrive at mutually acceptable outcomes. Accordingly this definition encompasses constructs pertaining to the degree of cooperation, coordination, interaction and collaboration”.¹⁷⁴

The integration of transport with the rest of the chain essentially started with the containerisation and multimodalism that also helped the transformation of shipping from a labour-intensive industry to a capital-intensive industry.¹⁷⁵ As a result of this integration, the carriage of goods by sea can no longer be construed as a single, well-defined leg of a multi-leg journey.¹⁷⁶ Instead, it must be taken rather as a part of the journey, where third parties are not only vital in linking the journey’s stages of transport together, they are also stakeholders of this integrated system.¹⁷⁷

Today, transportation is the thread that runs through the whole tapestry of production; from manufacturing, through delivery to the final consumers, and even returns. Careful coordination across the whole process is essential in maximising the benefit to all parties.¹⁷⁸

As Christopher explains, current business enterprises are changing strategies, eroding internal boundaries and creating what Christopher calls the extended enterprise, which has changed competition between organisations.¹⁷⁹ Christopher defines a virtual enterprise as a series of relationships between partners, becoming a confederation of organisations that agree common goals.¹⁸⁰ Fremont explains why this is so highly applicable to the shipping industry; most crucial for the shipping companies is the logistics of the cargo. They therefore have interests in expanding their area of business, looking for integrated services. Taking this concept further, and again as Fremont suggests, the role of shipping related to port-to-port

¹⁷⁴ Dong–Wook Song and Photis M Panayides, ‘Global Supply Chain and Port/Terminal: Integration and Competitiveness’ (2008) 35 *Maritime Policy and Management* 1, 73. Also from a governance perspective, it has been reported that due to rapid changes in technology, the competitive environment, firm strategies and other pressures are prompting many firms to seek continuing cooperative relationships with other firms. Peter Smith Ring, Andrew H Van De Ven, *Structuring Cooperative Relationships Between Organizations*, *Strategic Management Journal*, Vol. 13, 483-498 (1992).

¹⁷⁵ Richard W Palmer and Frank P Degiulio, ‘Admiralty Law Institute Symposium: Terminal Operations and Multimodalism Terminal Operations and Multimodal Carriage: History and Prognosis’ (1989–1990) 64 *Tulane Law Review* 281.

¹⁷⁶ As it was carriage of goods by sea in the tackle-to-tackle structure.

¹⁷⁷ A stakeholder is “any group or individual who can affect or is affected by the achievement of the organization’s objectives”. R.Eduard Freeman, John McVea; *A Stakeholder Approach to Strategic Management* (2001), Darden Business School working paper No 01-02. It is worth mentioning here the stakeholder theory which, since the beginning of the 1980s, has supported the idea that organizations should recognise the interests not only of shareholders, but also of stakeholders. In fact, this theory sees the support of the stakeholders as key to the success of the organization.

¹⁷⁸ G.Santosh Kumar, P.Shirisha, ‘Transportation The Key Player In Logistics Management’ (2014) 3 *Journal of Business Management & Social Sciences Research* 1.

¹⁷⁹ Christopher (n 42) 265.

¹⁸⁰ *Ibid.* 266.

business is nowadays probably only secondary to the business of the whole chain.¹⁸¹ Logistics and supply chains rely heavily on transportation. Approximately 33% of logistical costs are transport-related, and thus it is central to how logistics systems perform.¹⁸² It is agreed that this is a crucial point of discussion and that transport alone is not essential anymore. Hence, this thesis does not explore the problem from a multimodal perspective.

A carrier's focus on integration is likely to impact on his relationship with land operators. In the past, shipowners and ports used to compete with one another; now the competition is amongst players in the field of logistics. Van De Voorde contends that, today, the standalone competitiveness of these players is much less important than whether or not they are part of a high-performing logistics chain.¹⁸³

As previously stated, the need of integration would probably not have become so central without the container revolution that allowed transported of one container along the whole chain, thus reducing costs.¹⁸⁴ Containerisation has created a chain of interests amongst the operators that handle the containers, i.e., logistics. "Logistics involves a series of activities, including storage, inventory management, materials handling and order processing, and comprises physical activities (e.g., transport, storage, etc.) as well as non-physical activities (e.g., supply chain design, selection of contractors, freightage negotiations)".¹⁸⁵

Furthermore, logistics management is an integrative process that seeks to optimise the flow of materials and supplies from the organisation to the customer.¹⁸⁶ It is reasonable to assert, therefore, that the parties of a chain aim to optimise their logistical system. When a logistics chain comprises parties that do not belong to the same structure and that differ in nature, it can be problematic. Therefore, a common strategy is often absent when attempts to improve individual yet interdependent logistical systems are made.¹⁸⁷

Logistical activities are utterly dependent upon a solid transportation system. A good system will ease implementation, shrink costs, and increase quality.¹⁸⁸

¹⁸¹ Antoine Frémont, 'Empirical Evidence for Integration and Disintegration of Maritime Shipping, Port and Logistics Activities' (2008) (OECD/ITF Joint Transport Research Centre Discussion Paper, No. 2009-1).

¹⁸² Tseng, Yue and Taylor (n 13).

¹⁸³ Eddy Van de Voorde and Thierry Vanelander, 'Market Power and Vertical and Horizontal Integration in the Maritime Shipping and Port Industry' (2008) (OECD/ITF Joint Transport Research Centre Discussion Paper, No. 2009-2).

¹⁸⁴ David Hummels, 'Transportation Costs and International Trade in the Second Era of Globalization' (2007) 21 *The Journal of Economic Perspectives* 3, 131.

¹⁸⁵ *Ibid.*

¹⁸⁶ Thomas R Leinbach and Cristina Capineri, *Globalised Freight Transport: Intermodality, E-Commerce, Logistics and Sustainability* (Edward Elgar, 2007) 142.

¹⁸⁷ *Ibid.*

¹⁸⁸ As stated by Tseng, Yue and Taylor (n 13), transportation is key for the efficiency in business logistics and it expands other functions within the logistics network.

Transportation is also central to the activities of logistics management. Transportation represents the greatest cost in logistics systems, and so the overall performance of a logistics system can be deeply affected by the efficiency of its transport system. Even a powerful logistics strategy will not reach its full potential without careful linking of transportation.¹⁸⁹

In order to achieve a fully integrated system, parties in a logistics chain have to share inventory levels, product characteristics, and available resources.¹⁹⁰ Once the integration between transport and logistics has been addressed, the logistic must also be considered from a broader perspective of supply chain and supply chain management.¹⁹¹ Logistics is, in fact, only one part of the supply chain process that “plans, implements, and controls the efficient, effective forward and reverse flow and storage of goods, services, and related information between the point of origin and the point of consumption in order to meet customers’ requirements”.¹⁹² Woo defines a supply chain as “a connected series of activities which are concerned with planning, coordinating and controlling materials, parts, and finished goods from supplier to customer”.¹⁹³ In the context of shipping, Woo then specifies that a maritime supply chain is a “connected series of activities pertaining to shipping services which is concerned with planning, coordinating and controlling containerised cargoes from the point of origin to the point of destination”.¹⁹⁴

This thesis uses these definitions to create new boundaries within and without which third parties currently operate, arguing that the carriage of goods by sea is not an isolated business but instead integrated into a broader supply chain. Legal protection should consequently have the same rationale for all the parties involved and should be seen as part of the management of the supply chain. To that end, it should be part of what is called supply chain management.

Supply chain management is a systems-based approach to viewing the channel as a whole rather than as a set of fragmented parts.¹⁹⁵ Parties within the management of a single supply chain in fact share the same mutual risk.¹⁹⁶

¹⁸⁹ Ibid.

¹⁹⁰ Scott J Mason, P Mauricio Ribera, Jennifer A Farris and Randall G Kirk, ‘Integrating the Warehousing and Transportation Functions of the Supply Chain’ (2003) 39 *Transportation Research Part E* 141.

¹⁹¹ Ibid.: Mason details that every industry can be described by the combination of one or more supply chains.

¹⁹² Tseng, Yue and Taylor (n 13).

¹⁹³ Woo (n 22).

¹⁹⁴ Ibid.

¹⁹⁵ Lisa M Ellram and Martha C Cooper, ‘Supply Chain Management, Partnership, and the Shipper - Third Party Relationship’ (1990) 1 *The International Journal of Logistics Management*, 2. 1, 2.

¹⁹⁶ Woo (n 22) lists the following as a feature for a supply chain management: integrated behaviour, “mutually sharing information, mutually sharing risks and rewards, cooperation, the same goal and the same focus on serving customers, integration of processes and partners to build and maintain long-term relationships” 58.

Christopher enhances this concept of network integration and reports that it is managed as a system:

A firm is at the centre of an interdependent network – a confederation of mutually complementary competencies and capabilities – which competes as an integrated supply chain against other supply chain. To manage in a such radically revised competitive structure clearly requires different skills and priorities to those employed in the traditional model. To achieve market leadership in the world of network competition necessitates a focus on network management as well as upon internal processes. Of the many issues and challenges facing organisations as they make the transition to this new competitive environment, the following is perhaps most significant: traditionally members of a supply chain have never considered themselves to be part of a marketing network and so have not shared with each other their strategic thinking. For network competition to be truly effective requires a significantly higher level of joint strategy development. This means that network members must collectively agree strategic goal s for the network and the means of attaining them.¹⁹⁷

The analysis above clearly shows the concepts of network and common interests but also confirms the concern that parties of the supply chain in reality do not consider themselves to be part of the network. Essential to this network is the concept of sharing, in particular the sharing of information and plans necessary to make the channel more efficient and competitive.¹⁹⁸ Electronic commerce has played a crucial role in supporting and enhancing this sharing.¹⁹⁹ Chuah agrees that cargo management has become highly computerised, and that the parties involved in the chain share responsibility for it.²⁰⁰

Given how closely aligned the various parties in the ‘whole’ channels have now become – particularly in the context of third parties in the carriage of goods by sea – affording them different legal protection according to historical differentiations seems an outdated approach. This research does not aim to identify all third parties entitled to legal protection, but instead seeks to create a conceptual framework within which protection can be analysed in relation to all the parties involved. The default position ought to give protection to “all the

¹⁹⁷ Christopher (n 42) 217.

¹⁹⁸ Ibid. See also Lin et al. (n 14).

¹⁹⁹ Lin, *ibid.*

²⁰⁰ Chuah (n 29).

service providers who help the cargoes move”, from the starting point to the final consumer.²⁰¹ This is the concept of multilateral common enterprise.

Globalisation itself had a profound impact on the formation of global chain that goes beyond maritime barriers. It is important, in fact, according to Stopford, to look beyond maritime operations to a broader, comprehensive perspective. The aim of the shipper is now to obtain better and cheaper transport over the whole distance, from origin to destination; not only for the sea leg.²⁰²

Global supply chains allow people to move products to and from every corner of the world. As Drake reports, it is possible for a fish to be caught in the Mediterranean Sea and served in Japan several days later. A product manufactured deep in the interior of China can be delivered direct to a consumer in the American heartland within a week. This is the state of world-class supply chain management in the twenty-first century.²⁰³ Even consumers, constitute part of the supply chain management. Every time a consumer rates or comments on their recent service from a company such as Amazon, for example, they are helping to improve supply chain management.

As mentioned previously, this thesis considers the supply chain from a network-centric perspective. This thesis looks at the supply chain not as a process but as a factual cooperation and therefore from the perspective of the participants of the chain rather than the abstract procedure. In this respect, a supply chain is in essence a common enterprise, even if it is not legally identified as such. As Jephson and Morgen define it, a supply chain is a “network involved in the provision of product and service packages to a customer”.²⁰⁴ The most important aspect is the inter-organisational element of the network, which this thesis has already identified as supply chain management. The synergy between and with suppliers and customers are especially important in this context, in order to properly meet the end customer’s needs.²⁰⁵

By way of explanation, consider the example of the supply chain for a basic t-shirt sold in the United States. As Drake has shown, the t-shirt is made with cotton grown in the United States and transported to China, where it is spun into thread. This thread is then turned into fabric, which is cut and sewn to make t-shirts. The finished articles are then sent back to the United States, where they are (usually) printed with a logo and finally sold. Before landing

²⁰¹ Lin et al. (n 14). Again however it is worth to mention that this thesis does not aim to label this protection to specific third parties.

²⁰² Martin Stopford, *Maritime Economics*, (Routledge 1997).

²⁰³ Matt Drake, *Global Supply Chain Management*, (2012) Business Expert Press at 1.

²⁰⁴ Chris Jephson, Hanning Morgen, *Creating Global Opportunities, Maersk Line in Containerization 1973-2013*.

²⁰⁵ Drake (n 203) 3.

on the shelves of consumer stores or e-commerce warehouses, the t-shirts essentially make two trips across the world. In order for this to be the preferred way making and selling t-shirts, it must be viable and financially attractive. That this happens at all implies not only that the cost of labour in China is substantially lower than in the United States (and potentially elsewhere), but also that the transportation of materials and products in both directions is reliable, cheap and efficient.²⁰⁶

This is by no means a fully representative case, but it illustrates neatly the idea that, in a supply chain, what matters most is management of involved parties; if this is done well, there are no geographical barriers. To cite another example, consider the complex supply chains of a tennis ball used at the Wimbledon tournament in England, for example:

- Clay from United States, silica from Greece, magnesium carbonate from Japan, zinc oxide from Thailand, sulphur from South Korea and rubber from Malaysia are all shipped to Philippines, where the rubber is vulcanised;
- wool from New Zealand is sent England, where it is turned into felt before being sent back to the Philippines;
- petroleum naphthalene from China is shipped to the Philippines where the balls are manufactured;
- tins for the balls come from Indonesia, and once the balls have been packaged they are sent to Wimbledon.²⁰⁷

Supply chains usually start with an exporter-producer such as a mine, a refinery, a farm, or a manufacturer. After that, there is usually a storage phase and from there a land transportation (e.g., a train a conveyor or pipeline), then another storage phase such as a warehouse, a tank, or something more specialised. Next, there is typically a cargo-handling phase (often using gantry cranes or a continuous loader) followed by the shipping portion of the journey. After the shipping comes the discharging, storage again, and then more land transport until the goods arrive at the importer.

As Stopford explains, a supply chain usually consists of a sea voyage and two land journeys. Storage takes place in four locations: the point of origin, the loading port, the unloading port, and the destination. To put it more simply, the cargo is handled eight times as it

²⁰⁶ Drake (n 203) 21.

²⁰⁷ 'The 50,000 mile journey of Wimbledon's tennis balls' (*Warwick Business School*,) <<http://www.wbs.ac.uk/news/the-50000-mile-journey-of-wimbledons-tennis-balls/>> Accessed 13 February 2016.

makes its way through the four storage areas. Moreover, there are four overland loading-unloading operations – between the vehicles carrying – as well as loading and unloading of the cargo onto and from the ship. Thus, between production and consumption, the cargo is handled 14 times.²⁰⁸

According to Stopford, the cargo handling phase in a supply chain is so important that it affects the strategies of big manufacturing companies. He reports that it is not unusual for a manufacturer to relocate – or at least consider relocating – a processing plant (such as a steel mill) to a coastal site in order to avoid land transport of raw material. This is yet another example of companies belonging to the same multilateral common enterprise working together but without a common strategy; they are not officially part of the same corporation. Similarly, the cargo terminal – also without sharing in a common strategy with the other participants of the supply chain – tries to be as suitable as possible for the needs of its users.²⁰⁹ Stopford says that the key word is *integration* and that what matters is that the transport system is designed as a whole.²¹⁰ It is argued that the whole supply chain not only transport has to be seen as a whole.

Crude oil provides another helpful example:

- After being extracted from an oil field, it is transported by pipeline to the coast;
- small diameter pipes are connected to each producing well, and these pipes form a network that ultimately connects to bulk collecting stations;
- these stations feed into large terminal areas with storage tanks capable of holding hundreds of thousands of barrels;
- the oil is then loaded into tankers and taken to its destination where it is offloaded into another bulk terminal;
- a dedicated port infrastructure is required for these tanker vessels, and the terminals – usually comprising an oil tank ‘farm’ for temporary storage and a jetty or single-buoy mooring projecting into deep water that allows large tankers to load cargo – are often in remote locations.²¹¹

²⁰⁸ Stopford (n 202) 297.

²⁰⁹ Ibid., 297.

²¹⁰ Ibid.

²¹¹ Ibid., 309.

The supply chain of a product can, as we have seen, be very complicated. Without a high level of coordination between parties, such supply chains would be at best, financially unappealing, and, at worst, totally impractical.

Companies exist that specialise in the creation and streamlining of supply chain management, and these are known as network orchestrators. They usually work for companies that are seeking to outsource the management of their own supply chains to a specialist. Perhaps the most famous of these network orchestrators is the Hong Kong-based company Li & Fung.²¹²

Today, giant corporations (such as Amazon) often seek to create what they call a global supply chain, allowing one-click shipping for seamless international trade. This is a global shipping and logistics operation that, in terms of scale will compete with United Parcel Service Inc. and the FedEx Corporation.

In fact, Amazon has already registered in the United States as an ocean-freight forwarding business. The aim of the project – named Dragon Boat – is to create a global delivery network that controls the flow of goods from factories in China and India to customer in the States and Europe. Amazon’s aim is to circumvent established gatekeepers, pulling together products from sellers around the world and then securing transit for these goods – whether by sea, road, or air – at substantially lower cost. Amazon will allow sellers to ship their products by booking online (even using phones and tablets), to create what Amazon hop will be a “one-click-ship for seamless international trade and shipping”. Third-party carriers will constitute and organize this global network in the first instance, but once there is sufficient volume – and once Amazon is able to run operations unassisted – Amazon will attempt to displace them.²¹³

Once the concept of integration and factual integration of transport with the supply chain have been addressed, this thesis illustrates two formal shipping integration models. One influenced by economies of scope and the other by economies of scale.

Palmer and Degiulio have convincingly explained that, in the last decade, there has been a trend towards vertical and horizontal diversification of existing operators in the

²¹² Drake (n 203) 58.

²¹³ Spencer Soper, ‘Amazon Building Global Delivery Business To Take On Alibaba’ (*Bloomberg*, 9 February 2016) <<http://www.bloomberg.com/news/articles/2016-02-09/amazon-is-building-global-delivery-business-to-take-on-alibaba-ikfhpyes>> Accessed 29 February 2016.

traditional industry sectors of rail, truck, barge, and vessel, resulting in the formation of ‘total transportation companies’.²¹⁴

Fremont, quoting Panayides, suggests that such integration models permit shippers to focus on their primary business – and benefit from a door-to-door service – by outsourcing logistics. This is the core of the ‘one-stop shop’ notion: clients offered a whole range of services to meet their logistical needs through the worldwide network of a single container operator, carrier, or logistics provider.²¹⁵ Furthermore, such an arrangement offers the carrier greater contractual bargaining power with the shipper.²¹⁶

This thesis takes advantage of existing research regarding vertical and horizontal integration. Vertical and horizontal integration are formal examples of venture between companies. They are fundamental samples of dyadic integration, very common nowadays in the shipping industry.

2.8 Vertical integration between stakeholders of the multilateral common enterprise

Recently, carriers have conducted extensive research into economies of scope.²¹⁷ Economies of scope in the carriage of goods by sea are translated to vertical integration between different operators of the same chain.

Vertical integration describes the expansion of a firm’s business activities into upstream or downstream activities. Accordingly, examples of vertical integration in transport are:

- 1) Connections established between traditional forwarders and road hauliers.

²¹⁴ See Palmer and Degiulio (n 175): “The expansion of a company’s operations to include additional modes of transportation, has been the most common phenomenon, as shipping companies diversify into railroading and trucking, and railroads diversify into ocean shipping and trucking”.

²¹⁵ Frémont (n 181); City of London Law Society, Insurance Law Committee, ‘Insurable Interest’ (Response to the English and Scottish Law Commissions’ Issues Paper 4 on Insurance Contract Law 2008) <<http://www.citysolicitors.org.uk/attachments/article/117/Insurable-interest.pdf>> Accessed 8 February 2015.

²¹⁶ The higher the level of integration, the more influence the carrier has. See Michael Porter, *Competitive Strategy* (Free Press 1980).

²¹⁷ See David J Teece, ‘Economies of Scope and the Scope of the Enterprise’ (1980) 1 *Journal of Economic Behavior and Organization* 3, 223. According to Teece, economies of scope are conceptually similar to economies of scale. Although economies of scale for a firm primarily refer to reductions in the average cost (cost per unit) associated with increasing the scale of production for a single product type, economies of scope refers to lowering the average cost for a firm in producing two or more products. The term and the concept’s development are attributed to John C Panzar and Robert D Willig, ‘Free Entry and the Sustainability of Natural Monopoly’ (1977) 8 *Bell Journal of Economics* 1, 1; John C Panzar and Robert D Willig, ‘Economies of Scope’ (1981) 71 *American Economic Review* (Papers and Proceedings) 268.

- 2) Semi-trailer operators and swap-body operators owning the load units and buying the haulage services from small hauliers.
- 3) Container shipping lines and the shipping agencies.
- 4) Intermodal transport services organised by road transport companies, operating either in cooperation with other hauliers or independently.²¹⁸

When referring to carrier and third parties vertical integration happens in shipping in four different ways:

- 1) Special contractual berthing or volume agreements between a third party stevedore and the shipping line (e.g., virtual dedication).
- 2) Minority shareholding of the shipping line in a terminal (typically below 20%).
- 3) Joint ventures between the shipping line and a third party stevedore often linked to the dedicated use of the terminal by the shipping line.
- 4) A dedicated terminal with at least a 51% shareholding by the shipping line or its terminal operating sister.²¹⁹

Matzuka identifies the reasons for vertical integrations as increasing market share entering in market related to the core one.²²⁰ Fremont adds that this could also happen in order to reduce costs, exploiting better economies of scale,²²¹ or for a better relationship with the counterpart.²²² Panayides completes the concept stating that the operational integration of sea and inland transport was initiated by the need for greater efficiency and became feasible due to containerisation and technological developments.²²³

The gargantuan manufacturing firms of the late-nineteenth century were the first to implement vertical integration. At the time, it was not unusual for big corporations to own most if not all stages of production; from raw materials to the finished product. In many cases, they would also own at least some segment of the distribution channel. The Ford Motor Company is perhaps the best-known proponent of such an approach. Even in the 1920s, Ford owned and

²¹⁸ Leinbach and Capineri (n 186). An example is the International Union for Road-Rail Combined Transport (UIRR).

²¹⁹ Theo Notteboom and Jean-Paul Rodrigue, 'The Corporate Geography of Global Terminal Operators' (2011) 39 (2012) *Maritime Policy and Management* 3, 249.

²²⁰ John Matsusaka, 'Takeover Motives During the Conglomerate Merger Wave' (1993) 24 *RAND Journal of Economics*, 3, 357; Cong Wang and Fei Xie, 'Corporate Governance Transfer and Synergistic Gains from Mergers and Acquisitions' (2007) 22 *Review of Financial Studies* 829.

²²¹ Frémont (n 181).

²²² *Ibid.*

²²³ Photis M Panayides, 'Economic Organization of Intermodal Transport' (2002) 22 *Transport Reviews* 4, 401.

operated a variety of industries – glassworks, rubber plantations, forest and timber operations, railroads, coal and iron mines, and ocean carriers – in addition to its primary production facility in Michigan.²²⁴

Narrowing to the shipping sector, vertical integration in terminal operations occurs in the dry bulk and general cargo markets as well as the container market.²²⁵ The tanker market is a notable exception; here, vertical integration has taken place to a much lesser extent, probably as a result of the nature of the operations involved. Invariably, transfer superstructures are not required, save for pipeline connections with refineries and so forth; handling and production are usually taken care of by the same party.²²⁶

Frequently, the level of integration is sufficient for the dividing line between once separate markets for logistics services to have been blurred or entirely eroded.²²⁷ The advantages of vertically integrating systems were acknowledged in the early 1980s; sizeable investments were made in different modes and service capabilities, primarily by ocean carriers. Panayides identifies potential benefits for both carriers and shippers. For the former, this includes:

- 1) Increased business and market share.
- 2) Survival in the competitive international environment: facilitation of management and coordination.
- 3) Economies of scale and scope that can lead to lower cost structures and higher profits
Shared creativity along all stages of the logistical process.
- 4) Capitalising on the relative advantages of the various transport modes and greater routing flexibility.

For the latter, this includes:

- 1) Improvements in service quality.
- 2) Ease in transacting the business dealings.
- 3) Simplified claims settlements.

²²⁴ Drake (n 203) 6. As it can be deduced from this example, the main benefit of having a complete vertical integration system is the level of control that can be exercised over it.

²²⁵ Study on the Analysis and Evolution of International and EU Shipping. Department of Transport and Regional Economics, September 2015.

²²⁶ Ibid.

²²⁷ Heaver, T., H. Meersman and E. Van de Voorde, 'Co-Operation And Competition In International Container Transport: Strategies For Ports' (2001) 28 Maritime Policy & Management 3, 293.

- 4) Filing, tracing of shipment and paperwork needed for shipment.
- 5) Increased control over shipment.²²⁸

It is relevant to note that eight of the top 15 terminal operating companies are subsidiaries of shipping companies. Maersk provides an appropriate illustration of a total transportation company highly involved with vertical integration through all the steps of a supply chain.²²⁹ Maersk is also active in road and rail and was also active (until 2005) in the air transport business. As the concept of supply chain management began to mature, Maersk became a pioneer in the development of containerisation in a broader context.²³⁰

Towards the end of 1988, Maersk began evaluating a concept known as Maersk Materials Management (3M). The proposal was a computer-supported logistics system that would allow Maersk Line to broaden its role in transportation and logistics chains from supplier to ultimate receiver. The hope was that such a system would allow Maersk to actively participate on a profitable basis in all aspects of the land-based logistics and distribution: “The industries of the 1990s will demand and force the integration of the various links in the transportation chain, and the time when shipping lines, land transport organizations and ports could work independently will be gone”.²³¹

Maersk Logistics, formerly called Mercantile and now Damco, expanded the integrated logistics services business. Damco currently offers:

- 1) Air Freight Management.
- 2) Ocean Freight Management.
- 3) Inland Transportation services.
- 4) Warehousing and distribution services.
- 5) Supply Chain Development.
- 6) Supply Chain Management.²³²

²²⁸ Ibid. This article is about intermodal transport, this thesis brings this forward.

²²⁹ See generally ITF Round Table, *Integration and Competition Between Transport and Logistic Business* (OECD Publishing, 2010).

²³⁰ Chris Jephson, Henning Morgen “Creating Global Opportunities: Maersk Line in Containerisation 1973-2013,” Cambridge University Press at 179.

²³¹ Ibid., 195.

²³² Ibid.

Maersk is just the main total transportation company, being also a precursor of it. However, the other main European carriers, – MSC, CMA, and CGM – have also entered the stevedore business quite recently.²³³

It has to be said that vertical integration in the shipping industry is realised mainly by integration between shipping companies and terminal operations.²³⁴ Vertical integrations, however, are only the latest attempt by liner carriers to pursue scope economies and network economies, on both the demand and the supply sides. Recently, the innovations in this sector have concerned the vertical expansion of carriers and their involvement in port activities and logistic functions.²³⁵ Additionally, shippers ask for uniformity in the carriage in order to maintain high quality without causing delay or defect.²³⁶

From the perspective of vertical integration, what has traditionally been considered a separate third party, is now often linked with the carrier or the shipper from a corporate perspective. This again illustrates the importance that shipping companies attach to being involved in the terminal operating business, not so much for the sake of diversification, but rather to ensure that sufficient port capacity is available.

The introduction of terminal handling charges represent the primary means through which vertical integration affects costs in shipping. The cost of sea freight includes the handling charges of terminal operators. More and more frequently, shippers will seek to secure ‘all-in’ rates that cover three basic elements; sea freight, surcharges and terminal handling charges.²³⁷ Such comprehensive rates allow the shipper to pay the carriers directly without necessarily being acquainted with the third parties involved. In the container market, therefore, the carrier’s costs take into account the cost of third party involvement. This sheds some light on the reasons for certain market participants attempting to secure control over these chains, whether through mergers, acquisitions, or vertical and horizontal integration.²³⁸

Lin et al. report that, in addition, those operators who choose to integrate vertically tend to include only the aspects that are relevant and easily incorporated. Sometimes, the operator will seek to take advantage of the resources (or acquire the services of their members) in the chain. By way of example, leading shipping carriers often invest in their terminal

²³³ Claudio Ferrari, Francesco Parola and Marco Benacchio, ‘Network Economies in Liner Shipping: The Role of Home Markets’ (2008) 35 *Maritime Policy and Management* 2, 127.

²³⁴ Palmer and Degiulio (n 175).

²³⁵ Ferrari et al. (n 233).

²³⁶ Midoro and Parola (n 36).

²³⁷ European Commission, ‘Terminal Handling Charges During and After the Liner Conference Era’ (Competition Reports, produced by Ben Hackett on behalf of Raven Trading Limited, European Commission, Brussels 2009).

²³⁸ Van de Voorde and Vanelander (n 183).

operators to secure long-term benefits.²³⁹ Lin et al. also assert that freight forwarders are interested in owning and managing their own warehouses if needed, but tend not to own land transport fleets as they are harder to manage.²⁴⁰

Once links are forged between these various operational strands, they are usually strengthened to maximise productivity and minimise costs. The shipping company is thus in a position to improve the entire chain's productivity. Where vertical control has not been achieved by a shipping company, the efficacy of each action is dependent upon the relationship between shipping lines and terminal operators. Shipping companies will try, as a rule, to maximise control over the generalised cost of a given port call. If this proves hard to do, the most appropriate solutions would be sought, such as using a different port that will reduce the generalised cost.²⁴¹

Apart from the aforementioned, in some sectors where the hire rates are impossible to control because they are part of fixed tariffs – such as the liner/container sector – apart from economies of scope through vertical integrations – the only way to make a profit is by reducing costs with economies of scales.²⁴²

The next part deals with economies of scale and the high position in the chain that certain categories of third parties acquire as a result, and more specifically the role of ports and its stakeholders.

2.9 The modern role of ports and horizontal integration amongst its stakeholders

A paper on shipping analysis prepared by PWC for the European Commission reports that ports and the maritime industry compete as part of the supply chains to which they belong. Some of these alliances are formal, as in the case of the vertical integration of shipping companies with port terminals. The same report shows that:

- 1) *The forms of control of the maritime industry and ports however, are likely to become increasingly flexible as in addition to mergers, recent developments include as well alliances, joint ventures and dedicated handling activities.*
- 2) *Cooperation may involve carriers, terminal operating companies, port authorities, hinterland operators, and hinterland terminal operators.*

²³⁹ Lin et al. (n 14)

²⁴⁰ Lin et al. (n 14).

²⁴¹ Ibid.

²⁴² Midoro and Parola (n 36).

3) *As can be seen, 14 out of the top 20 container shipping companies have integrated vertically with port terminal operations, sometimes under an "own brand" name.*²⁴³

As mentioned previously, the integration into the supply chain of the carriage of goods by sea is made possible by the nature of modern ports. Within international logistics chains – and the networks associated with them – these ports serve as vital nodes. In isolation, a port's remote location means little; what matters today is the network that connects ports to consumers.²⁴⁴

The greater the number and depth of long-term, co-operative relationships that a port has, the higher its level of integration in the supply chain.²⁴⁵ On a smaller scale, a port can itself be viewed as a series of links – ship unloading, storage transport, storage, loading, and so forth – constituting a miniature supply chain of its own. The industry and marketplace now require that ports function as integrated nodes in the supply chain, bridging the gap between land and sea, not just sites to load and discharge cargo.²⁴⁶ This evolution has built new relationships among operators on sea and on land.²⁴⁷

A logistics chain's success is contingent upon the competitive strength of that chain's seaports. The reverse is also true. The same logic is applicable to other players in maritime transport, such as shipowners, hinterland transport providers, and port undertakings; each is a stakeholder in the same venture.²⁴⁸

It is known that stakeholders, as part of the supply chain, have a direct interest; port and terminal integration in supply chains impacts on stakeholder operations and the satisfaction of their customers.²⁴⁹ According to Van de Voorde, this shift began in the middle of the twentieth century. Ports were considered prime locations for various industrial activities. As a

²⁴³ Study on the Analysis and Evolution of International and EU Shipping Final report September 2015. Department of Transport and Regional Economics, University of Antwerp.

²⁴⁴ Kevin P Coyne and Renée Dye, 'The Competitive Dynamics of Network-based Businesses' January – February 1998 Harvard Business Review, 99.

²⁴⁵ Song and Panayides (n 174).

²⁴⁶ Ibid.

²⁴⁷ Some of these changes are as follows: i) Carriers previously dealt with local companies or public ports, but now tend to deal with vast corporations with commensurately hefty negotiating power; ii) Ports and their facilities have evolved in order to accommodate bigger vessels, and are now more technologically advanced; iii) There is a distinction between "pure" terminal function (e.g., stevedores) and shipping companies that entered the port industry. In this sense, the container has precipitated a change; cargo loading and discharging previously needed a labour force but now it requires a high level and extensive amount of technology, machinery. Accordingly, the carriage flow has to be a ruthlessly efficient process.

²⁴⁸ Van de Voorde and Vanelslander (n 183).

²⁴⁹ Song and Panayides (n 174).

result, they became significant links in the industrial chain as well as playing a role in trade and transport chains.²⁵⁰

Ports now occupy a new position as centres for loading, and serve as links between sea and land transport. This change allows carriers to select ports with the best facilities and most competitive costs, even if they are not the closest port to the cargo's ultimate destination.²⁵¹ Furthermore, the United Nations Conference for Trade and Development (UNCTAD) reports that the point at which the shipper considers the cargo delivered has changed.²⁵² Traditionally, this point was deemed to be at the port; on the dock, below the ship's hook. On this understanding, carriers were not responsible for or involved with the cargo prior to it being loaded on board his ship or after it was discharged. This point has now moved ashore. Shippers deliver goods to the carrier's container freight station for consolidation and loading into the carrier's container (in the event that the shipper has not already loaded the goods into a container beforehand). Then, either the shipper delivers the container to the carrier's container yard (usually close to the port) or sometimes the carrier will take delivery of the container at the shipper's factory.²⁵³ Liu, referencing Drewry, points out that:

*The competition between container ports was for a long time not very intensive because ports are location specific. However, with the increasing proportion of transshipment traffic within the total container port traffic the geopolitically-sensitive nature of container ports has been altered, and competition among ports has intensified. Ports are now not only competing with nearby ports, but also with ports relatively far away. For example, the Port of Gioia Tauro (South Italy, Mediterranean Sea) competes with the Port of Rotterdam (West Netherlands, North Sea) for the continental European market.*²⁵⁴

This factual context facilitates the integration between players. Example of port integration is the role of carrier-operated terminals (also known as dedicated terminals). These terminals are often used by ocean carriers as a way of securing and controlling terminal

²⁵⁰ Van de Voorde and Vanelslander (n 183).

²⁵¹ Midoro and Parola (n 36).

²⁵² Report by the UNCTAD "The economic and commercial implications of the entry into force of the Hamburg Rules and Multimodal Convention" (1991) New York <http://unctad.org/en/Docs/tdbc4315rev1_en.pdf> Accessed 23 September 2013.

²⁵³ Ibid.

²⁵⁴ Qianwen Liu, 'Efficiency Analysis of Container Ports and Terminals' (PhD Thesis, University College London 2010).

capacity in order to improve their service reliability.²⁵⁵ Ports and their terminal operators are thus required to offer facilities that permit efficient, economic interface between vessels and inland transportation; without them, ports and terminals would struggle to compete in the containerised cargo market.²⁵⁶

Carriers tend to focus their primary operations within a small number of ports as a result of their integration.²⁵⁷ This integration also involves the shipper; they are all linked by customer-supplier relationships.²⁵⁸

Ports play an expanded role in the new era of logistics in that they function as components of integrated global supply chain systems.²⁵⁹ As far as container transport is concerned, the most significant port-related expenses tend to be the terminal handling charges and time-related costs.²⁶⁰ Market participants are thus encouraged to strive for greater control over these chains.²⁶¹

Van de Voorde explains these structural evolutions within ports. Traditional stevedore firms have evolved into more complex terminal operator companies. Shipping companies, many of which have established their own terminal operating branch, often provide the external capital to do this. The shipping company can use these terminal operating companies as dedicated terminals, or they can take a more independent tack, e.g. acting as a multi-user terminal in order to improve utilisation rate.²⁶²

In this sense, there are also alliances between different stevedores and terminal operators. For example, in their April/May 2015 issue, the specialised magazine *Container Management* (CM) reports that Rotterdam's stevedores, APM Terminal Maasvlakte II (APMTM), APM Terminals Rotterdam (APMTR), European Container Terminals (ECT) and Rotterdam World Gateway (RWG), have made agreements with each other on transporting containers between their facilities at the port's expanding Maasvlakte terminals. The purpose is to organise inter-terminal transport as efficiently as possible, in the interests of all links in the supply chain. As the port authority stated, with two new container terminals going into

²⁵⁵ Palmer and Degiulio (n 175).

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Wayne K Talley, 'Maritime Transport Chains: Carrier, Port and Shipper Choice Effects' (2014) *International Journal of Production Economics* 151, 174.

²⁵⁹ Song and Panayides (n 174).

²⁶⁰ Barry Zondag, Pietro Bucci, Padideh Gützkow and Gerard de Jong, 'Port Competition Modeling Including Maritime, Port, and Hinterland Characteristics' (2010) 37 *Maritime Policy and Management: The Flagship Journal of International Shipping and Port Research* 3, 179.

²⁶¹ Van de Voorde and Vanelslander (n 183).

²⁶² Van de Voorde and Vanelslander (n 183).

operation at Maasvlakte, a large number of containers are expected to be exchanged in the coming years.²⁶³

Another relevant article from the same magazine issue raises the question of port automation. The example reported by the magazine is in the port of Rotterdam where, in a few years' time, the container transport in the port will be carried out by unmanned vehicles.²⁶⁴

This scenario impacts on the bargaining position of ports and terminals. Nowadays, terminal operators can be represented by states. As reported by CM, Chinese state companies are investing in ports in Sri Lanka.²⁶⁵ In addition to state investment, there are also corporations investing in ports,²⁶⁶ and some are likely to become public companies.²⁶⁷

It is not enough anymore simply to have control of a port. Because players are aiming to take over the entire supply chain, the distinction between where the hinterland starts and ends has been blurred. The result, according to Degiulio, is that proximity of a port to shippers and receivers is much less important than it has been in the past.²⁶⁸

Ports have been described as bi-directional logistics systems; Ships deliver goods for distribution via land and inland waterways that carry the goods along the subsequent legs of the journey. At the same time, ports accept cargo delivered by land and water-based modes and convey them to ships for the ocean part of the journey.²⁶⁹

Terminal operators are likely to be increasingly active in the supply chain in the future, and thus increasingly important.²⁷⁰

The flow of freight is regulated primarily by transport terminals, who influence considerably the nature of supply chains in terms of location, capacity and reliability.²⁷¹ Moreover, logistics service providers and shippers have begun to use terminals as facilities to store consignments cheaply.²⁷² Of particular relevance, according to Rodrigue and Notteboom, is the fact that terminals (rather than ports) are competitors in the struggle between ports.

²⁶³ Container Management (April–May 2015) <<http://container-mag.com/>> Accessed January 2016.

²⁶⁴ Ibid., 12. Automation is threatening 50% of the workforce in the West Coast of the United States. At the port of Los Angeles, Terminal Operator TraPac Inc. hopes to complete a large scale automation project by 2016, making it the first fully automated port terminal on the West Coast.

²⁶⁵ Container Management (November 2014) <<http://container-mag.com/>> 14 Accessed January 2015.

²⁶⁶ Banks, investments funds and public company as previously detailed in the thesis.

²⁶⁷ For instance TradeWinds reports that Vietnam's Saigon Port Company has announced plans for an initial public offering (IPO) on the Ho Chi Minh Stock Exchange. See TradeWinds, 'Saigon Port eyes IPO' (*TradeWinds*, 5 June 2015) <<http://www.tradewindsnews.com/finance/361525/saigon-port-eyes-ipo>>, Accessed 5 June 2015.

²⁶⁸ Palmer and Degiulio (n 175).

²⁶⁹ Song and Panayides (n 174).

²⁷⁰ Jean-Paul Rodrigue and Theo Notteboom, 'The Terminalization of Supply Chains: Reassessing The Role of Terminals in Port/Hinterland Logistical Relationships' (2009) 36 *Maritime Policy and Management: The Flagship Journal of International Shipping and Port Research* 2, 165.

²⁷¹ Ibid.

²⁷² Ibid.

Though terminals are certainly in competition with one another, this competition is not exclusively for tangible assets, such as port infrastructure. Instead, terminals are competing mainly through their offer of services adding value to their users within the supply chains.²⁷³ Also relevant here is the concept of the ‘terminalisation’ of supply chains; this captures the changing role of terminals as through-locations in supply chains.²⁷⁴ For instance, a new trend defined “warehousing-derived terminalisation”, has emerged. Essentially it concerns the fact that the role of warehousing is transferred to the terminal. Thus, a terminal is nowadays part a of the supply chain also as a depository.²⁷⁵

After five decades of container-based shipping, ports and terminals are no longer simply passive players prone to restricting capacity, reliability and efficiency. As markets, customers, and the needs of both evolve, the widening gap between supply chains and related logistics network structures is promoting a more intimate relationship between inland terminals and ports. Accordingly, logistics providers and terminal operators are revisiting their models for generating revenue, securing profits, and providing value to their customers, all of which is being done without neglecting the operational considerations of the terminals. In some cases, shippers and logistics providers use terminals to augment their distribution processes. This has given rise to the creation of extended distribution centres. Increasingly, inland terminals are being considered as the extended gates of seaport terminals; by moving cargo inland they often reduce the time at seaport terminals.²⁷⁶

Having set the new boundaries of the carriage of goods by sea within the supply chain that forms the multilateral common enterprise, and having reported the formal models of integrations, the next section is dedicated to the parties that perform their job within these boundaries. The list of third parties is by no means exhaustive, but it is nevertheless important for understanding the involvement of third parties in the multilateral common enterprise.

2.10 Illustrations of third parties categories involved in the multilateral common enterprise

2.10.1 Terminal operators

²⁷³ Ibid.

²⁷⁴ Daniel Olivier and Brian Slack, ‘Rethinking the Port’ (2006) 38 Environment and Planning A, 8, 1409.

²⁷⁵ Notteboom and Rodrigue (n 270).

²⁷⁶ Ibid.

Terminal operators have been defined as the matching point between sea and land. The following definition assesses its importance:

*In the eyes of the law, the terminal is the chameleon of the maritime industry. The law treats the terminal at various times, and occasionally at the same time, as an ocean carrier, an Interstate Commerce Commission (ICC) common carrier, a warehouse, a common-law bailee, an agent of an ocean carrier, an agent of an ICC common carrier, an agent of a cargo shipper, and an agent of a cargo consignee.*²⁷⁷

They can have liability and consequently protection as carrier, bailee, or as a third party. This makes them a crucial category in the multilateral common enterprise. As explained, terminal operators and shipping firms are currently closely related by vertical integration and therefore from an economic perspective (especially in the container market), it is very difficult to differentiate this category of third party from the carrier.

A Convention on the Liability of Terminal Operators in International Trade was produced by UNCITRAL in April 1991. The convention applies to loss or damage to goods, identified objectively as involved in international carriage, when the goods are in the charge of the terminal operator for transport-related services.²⁷⁸

There has also been a convention on Terminal Operators Liability after a project started half century ago by UNIDROIT on warehousing contracts that had been concerned only with the safe-keeping aspects of the industry. Wide divergences in liability regimes were noted in the study, ranging from a strict and unlimited liability to total exculpation and non-liability.

According to this convention, the definition of terminal operator excludes carriers.²⁷⁹ Terminal operators have a delicate role in the chain, being very connected with maritime activities but substantially a land job. Before deciding to establish uniformity, Hooper suggests that we ask: "In relation to what does terminal liability need uniformity?"²⁸⁰

Hooper considers two aspects of uniformity: first, uniformity in relation to other terminals; second, uniformity in relation to other modes of transportation.²⁸¹ He also defines the different features of the job of terminal operators as follows:

²⁷⁷ Hooper (n 149), 595.

²⁷⁸ Ibid.

²⁷⁹ Sweeney (n 17).

²⁸⁰ Hooper (n 149).

²⁸¹ Ibid.

- 1) As agent of an ocean carrier;
- 2) as a common carrier or freight forwarder;
- 3) as a warehouse;
- 4) as an agent of an ICC common carrier.²⁸²

Hooper suggests that terminal operators need not look solely to the carrier's bill of lading to limit their liability for loss or damage to cargo.²⁸³

The position of terminal operators is quite difficult to determine within the international legal framework, for the aforementioned reasons. As discussed in Chapter 4, terminal operators are also protected by domestic law. In the United States, for example, they are protected by the Federal Maritime Commission (FMC), which controls the tariff of wharfage, dockage, warehouse and other terminal facilities. They are also protected by the Uniform Commercial Code.²⁸⁴ However, it should be restated here that this thesis does not look at the legal protection that third parties (as terminal operators in this case) can provide for themselves.

As anticipated – and as will be further detailed – terminal operators can also face liability under bailment terms. The liability of the terminal operator as bailee is a matter of local law, which varies greatly by jurisdiction.²⁸⁵

An article from the law firm Holman Fenwick and Willan observes that, currently, there is no international convention or national legislation which applies to traditional port services. Operators are free to govern their liabilities using contractual terms of their own negotiation. By comparison, terminal operators expanding into international distribution must accept the possibility that a convention will be applied; the Hague Rules or Hague-Visby Rules if by sea, the CMR if by road, the Montreal/Warsaw Rules if by air, or the CIM if by rail. These conventions contain time bars, limits of liability and defences that will probably be different to the contractual terms negotiated by terminal operators and, if any of the conventions are applicable by operation of law, it is not possible to contract outside of them.²⁸⁶

This is accentuated by the fact that, presently, container terminals compete for more traffic with each other than do container ports. The emergence of global terminal operators

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Denniston, Gunn and Yudes (n 87).

²⁸⁵ Ibid.

²⁸⁶ HFW Ports & Terminals Group, 'Expansion Into Logistics – A Risky Business' (*HFW Ports & Terminals Group*, January 2010) (Article first appeared in the December 2009 issue of *Port Strategy: Port strategy 'A Risky Business'* <http://www.portstrategy.com/news101/administration/legal-and-insurance/expansion_into_logistics_-_a_risky_business> Accessed February 2014.

means that the market share is now concentrated in the hands of a few global terminal operators; for example, PSA, APM, P&O.²⁸⁷ This makes them vast corporations not only by means of horizontal integration but also through vertical integration with the carrier. There are several reasons for the flourishing of terminal operators:

- 1) Port privatization
- 2) Increase in stevedoring costs.
- 3) Increasing transshipment traffic.
- 4) Horizontal integration.²⁸⁸

2.10.2 Freight forwarders

As previously discussed, the orthodox notion of the carriage of goods by sea is usually restricted to relationships between carrier and shipper. However, the contract is sometimes arranged by a freight forwarder, who can act as an intermediary between carrier and shipper. Freight forwarders, therefore, sit in a tricky position; depending on the facts, they can be intermediaries, independent contractors, agents, and even principals or carriers in a contract for the carriage of goods partly or totally by sea.²⁸⁹

That freight forwarders can be appointed by both the carrier and the shipper complicates matters further. In these cases, freight forwarders might seek to avoid the carrier's liability but, on the other hand, without appropriate protection they can be sued in tort. Freight forwarders can act as the agent of the carrier signing or issuing the bill of lading to the shipper and they can also act on behalf of the shipper when arranging the shipment of goods.²⁹⁰

²⁸⁷ Daniel Olivier, Francesco Parola, Brian Slack and James Wang, 'The Time Scale of Internationalisation: The Case of the Container Port Industry' (2007) 9 *Maritime Economics and Logistics* 1, 1.

²⁸⁸ Jean-Paul Rodrigue, 'Intermodal Transportation and Integrated Transport Systems: Spaces, Networks and Flows' (The "Flowpolis: The Form of Nodal Space" Conference, Las Palmas de Gran Canaria, Spain, November 2–4 2006). Rodrigue explains that, "(a)s of 2005, global port operators accounted for over 58% of container port capacity and 67% of global containerised throughput. A horizontal integration structure is being set up as port holdings acquire the management of transport terminals in a wide array of markets. The main rationale behind the emergence of large port holdings includes: Financial assets ... Managerial expertise ... Gateway access ... (and) Leverage". As mentioned previously, increased market power and reduction in costs are amongst the most important advantages of the horizontal integration.

²⁸⁹ H. Edwin Anderson, 'The Status and Associated Liability of Ocean Freight Forwarders' (2009) 36 *Transportation Law Journal* 121.

²⁹⁰ *Ibid.* See also *Kirby* (n 7). These are known as the main activities of a freight forwarder: (1) ordering cargo to port; (2) preparing and/or processing export declarations; (3) booking, arranging or confirming cargo space; (4) preparing or processing delivery orders or dock receipts; (5) preparing and/or processing ocean bills of lading; (6) preparing and/or processing consular documents or arranging for their certification; (7) arranging for warehouse storage; (8) arranging for cargo insurance; (9) clearing shipments in accordance with United States Government export regulations; (10) preparing and/or sending advance notifications of shipments or other documents to banks,

Although they sometimes fulfil a role similar to a non-vessel terminal operator, their legal status regarding the liability to the shipper is different.

The case of *Scholastic Inc. et al. v M/V Kitano et al.* explored the main differences:

*[A freight forwarder] simply facilitates the movement of cargo to the ocean vessel. The freight forwarder secures cargo space [...] gives advice on governmental licensing requirements [and] proper port of exit and letter of credit intricacies, and arranges to have the cargo reach the seaboard in time to meet the designated vessel. An usual discussion is on the difference between a freight forwarder and an NVOCC, which, in contrast, does not merely arrange for transportation of goods, but takes on the responsibility of delivering the goods. The most fundamental difference between a freight forwarder and an NVOCC is that an NVOCC issues a bill of lading.*²⁹¹

The case of *Scholastic Inc.* also offers another interesting insight:

*When the status of an intermediary as NVOCC or freight forwarder is disputed, the intermediary argues for freight forwarder status and its limited liability, while the plaintiff argues for NVOCC status and increased liability arising from the bill of lading.*²⁹²

In order to better clarify the differences, the position of the NVOCC has to be addressed.

2.10.3 Non-vessel operating common carriers (NVOCC)

‘Non-vessel-operating common carrier’ (NVOCC) is a carrier who enters into contracts to carry goods but who does not operate or own the vessels providing the carriage. A multimodal freight forwarder can also be considered an NVOCC because, although using the

shippers, or consignees as required; (11) handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments; (12) coordinating the movement of shipments from origin to vessel; and (13) giving expert advice to exporters concerning letters of credit, other documents, licences or inspections, or on problems germane to the cargoes’ dispatch. Title 46 Shipping Part 500 to End (Revised as of October 1, 2013): 46-CFR-Vol-9.

²⁹¹ *Scholastic Inc. v M/V Kitano (Kitano)*, 362 F Supp 2d 449 Dist Court SD New York 2005;

²⁹² *Ibid.*, 458.

services of sub-carriers, it is the ‘principal’ in the performance of the contract of carriage of goods.²⁹³

In fact, Title 46 of the United States Code that contains the Shipping Act of 1984/6, as amended by the Ocean Shipping Reform Act of 1998/7, regulates ocean carriers and intermediaries and defines two kinds of ocean transportation intermediaries (OTIs): NVOCCs and ocean freight forwarders. The NVOCC has been defined as “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier”.²⁹⁴

In order to clarify the difference with freight forwarder, Title 46 OTI states that:

*[A] person that (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) processes the documentation or performs related activities incident to those shipments.*²⁹⁵

The Ninth Circuit has given the following general description of what NVOCCs do: “an NVOCC is an intermediary between the shipper of goods and the operator of the vessel that will carry the goods”. NVOCCs will typically combine various shippers’ goods into a single shipment, contract with the vessel for the transportation of the goods, and deliver the goods to the vessel, normally in a sealed container. In this respect, NVOCCs perform a not dissimilar function to freight forwarders; both consolidate small shipments from multiple shippers into large, standardised units of cargo that can be loaded on and off ships and lorries or other types of transportation with relative ease.²⁹⁶

2.10.4 Stevedores

Although they mainly operate as land workers, stevedores are one of the main groups in the carriage of goods by sea to function as third parties.²⁹⁷ The stevedore is a person who loads and discharges goods from vessels. In the past they were known also as dockers or longshoremen.

²⁹³ Bes (n 34).

²⁹⁴ 46 United States Code of Federal Regulations (CFR) 530.3 (f) (1).

²⁹⁵ 46 CFR 515.2 (o)(1)(ii).

²⁹⁶ *AllPacific Trading, Inc. v Vessel M/V Hanjin Yosu* 7 F 3d 1427 (9th Cir. 1993) para 3.

²⁹⁷ Wyatt (n 81).

A stevedore contract has been defined as maritime in nature and within admiralty jurisdiction to the extent that it relates to maritime activities. However, when a stevedore acts as a terminal operator, they may be exposed to land-based principles of negligence. It has also been reported that, if storage of cargo is merely incidental to the loading or unloading of a vessel, admiralty law will control. Many claims between owner and charterer refer to stevedore damage. Stevedore damage to vessels is commonplace when loading or discharging cargo.²⁹⁸

Stevedores, along with terminal operators, fall into the category of independent contractors. The stevedore's position is arguably already rather delicate; from the 'venture' between shipowner and charterer in the charterparty, the stevedores, according to the contract, could be appointed by the shipowner or the charterer. In this respects, it has been reported that the stevedore position is crucial because without a proper regulation between shipowner and charterer, the liability consequent a damage could create confusion between the parties.²⁹⁹

In the contract *Shelltime 4*, for example, there is a specific clause titled Stevedores, Pilots, Tugs.³⁰⁰ Another example comes from the NYPE 1946 form of time charter, which has a clause called Stevedore Damage.³⁰¹

Stevedore is a category of third party that has been involved extensively in claims regarding the carriage of goods by sea involving protection clauses. In this sense, they may be the category posing the highest risk.

²⁹⁸ See generally <<http://www.ukpandi.com/knowledge/article/stevedore-damage-1915/>> Accessed 3 January 2016, <<http://www.nepia.com/media/72637/LP-Briefing-Stevedores.PDF>> Accessed 4 April 2014, <https://www.steamshipmutual.com/publications/Articles/Articles/Liability_Stevedores> Accessed 18 March 2013.

²⁹⁹ The Swedish Club, 'Slot Charter Insurance' (*The Swedish Club*, 2 September 2007) <<http://www.swedishclub.com/upload/174/02.slot-charterer-insurance.pdf>> Accessed 11 October 2014.

³⁰⁰ "Stevedores when required shall be employed and paid by charterers, but this shall not relieve Owners from responsibility at all times for proper stowage, which must be controlled by the Master who shall keep a strict account of all cargo loaded and discharged. Owners hereby indemnify Charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tugboats or stevedores, who although employed by charterers shall be deemed to be the servants of and in the service of owners and under their instructions (even if such pilots, tugboat personnel or stevedores are in fact the servants of Charterers their agents or any affiliated company); provided, however, that 1) The forgoing indemnity shall not exceed the amount to which Owners would have been entitled to limit their liability if they had themselves employed such pilots, tugboats or stevedores, and 2) Charterers shall be liable for any damage to the vessel caused by or arising out of the use of stevedores, fair wear and tear excepted, to the extent that Owners are unable by the exercise of due diligence to obtain redress therefore from stevedores". Available to view at <<https://shippingforum.files.wordpress.com/2012/08/shelltime-4-as-revised-20031.pdf>> Accessed 14 December 2015.

³⁰¹ New York Produce Exchange Form (NYPE 46), "A) The charterers shall be responsible for damage (fair wear and tear excepted) to any part of the sue Owners caused by stevedores. The Charterer shall be liable for all costs for repairing such damage and for any time lost. B) The Master or the Owners shall notify the Charterers or their agents and stevedores of any damage within 24 hours, failing which the Charterers shall not be responsible. C) Stevedore damage affecting seaworthiness shall be repaired without any delay before the vessel sails from the port where such damage was caused or discovered. Stevedore damage affecting the vessel's trading capabilities shall be repaired prior to redelivery, failing which the Charterers shall be liable for resulting losses. All other damage which is not repaired prior to redelivery shall be repaired by the Owners and settled by the Charterers on receipt of Owners' supported invoice".

There is a long history of American cases of stevedores acting as third parties (as the table of this thesis will show), the first being *Carle & Montanari, Inc. v American Export Isbrandtsen Lines, Inc.*. This is the first United States case in which the stevedore was afforded the defence of a bill of lading's protection clause. Incidentally, Chapter 4 presents a long line of American cases where judges did not extend the protection clause.³⁰²

In support of this thesis's main arguments, it seems that the role of stevedores is currently highly integrated with other categories of parties working at the port.³⁰³

2.10.5 Inland carriers

The problem of inland carriers and protection in the carriage of goods by sea is that in order to receive the protection of the carrier in the carriage of goods by sea, a third party has to carry out some of the carrier's duties or contract with the carrier. Prior to *Kirby*, the case law on the protection of rail and truck carriers by Himalaya clauses was conflicted.³⁰⁴ The current position of an inland carrier is that they have protection if mentioned in the protection clause.

As will be explained in the next two chapters, the position of inland carriers is very complicated. Although fully involved in the multilateral common enterprise, the maritime community does not recognise them as a 'party' to be protected by the maritime regulations. This is particularly clear in the *travaux preparatoire* of the three major conventions on the topic; in all of them they have been deliberately left outside the protection of the convention. As it will be further detailed in the next chapter.

Summary of Part B

Part B of this chapter establishes the basis for the multilateral position with regard to third party protection in the carriage of goods by sea. In this sense, the protection is viewed in light of the integration of the shipping with the supply chain.

The fact that they are part of the supply chain is not formally proved. Instead, it is a loose affiliation, not an official one. Hence the author's perception of the need to create the definition of a multilateral common enterprise. It is essentially a multilateral system of legal and commercial interests. Some of them, as explained above, are formal, as in the cases of

³⁰² Sweeney (n 17).

³⁰³ Ibid.

³⁰⁴ Ibid. In *Taisho Marine & Fire Ins. Co. v Maersk Line, Inc.*, 796 F. Supp. 336 (1992) a road haulier was afforded such protection.

vertical and horizontal integrations. Vertical integration is a form of dyadic formal enterprise, while horizontal integration is pivotal to the understanding that third parties are now likely to be big corporations rather than weak parties. This reflects the fact that, over the years, there has been substantial involvement in the shipping industry of third parties who were not previously mentioned, yet have ‘factually’ a specific role and do not depend on carrier or shipper. In certain circumstances – e.g., as freight forwarders and NVOCCs – they can even be the primary ‘character’ in the whole chain.

Chapter conclusion

In this chapter, limitation of liability and protection clauses have been explained as a tool to facilitate the transactions and negotiations between two parties of a business. The extension to third parties together with other forms of legal protection have been necessary since third parties have been substantially utilised to circumvent the agreement between the parties. Protection clauses can be criticised because they allow negligent third parties to have the same protection as the parties of the contract.

It is believed that the protection of third parties from contract works and achieves its aim. However, it could be very different from what it is (at the moment) considered the commercial integrated system that nowadays constitutes the framework in which parties operate. Additionally, the corporate reality intensifies the need for a scheme of partnership, outsourcing agreement, and corporate management separated by ownership. The today’s system is much more complex than those of the past, in which it was easy to picture the divisions between companies working on the same project. In this situation the distinction of liabilities is also difficult to mark.³⁰⁵

In the second part of the chapter, the carriage as a network was introduced. One must consider essential the advent of supply chain management in regulating a network of companies whose relationships have changed from adversarial to cooperative in order to meet the needs of the global market.³⁰⁶

An essential part of these changes should be the uniformity and harmonization of the legal tutelage of the parties involved in the carriage. In order to achieve this, however, barriers

³⁰⁵ Lord Diplock (n 99).

³⁰⁶ Ellram and Cooper (n 195).

of different national laws, different requirements and different local approaches have to be overcome.³⁰⁷ This is explained in more depth over the next two chapters.

This chapter provides fuel for subsequent chapters – which deal with international conventions and domestic law – and represents the next stone in the foundation begun in the first chapter. It proves two essential premises of this research: first, that the factual context of the carriage of goods by sea has changed; second, as a result the role of third parties has changed. This theoretical thread continues to weave its way through the next chapters, which evaluate the law regulating the carriage of goods by sea and, though acknowledging this change, argue that said change is still inadequate.

³⁰⁷ Photis Panayides, 'Economic Organisation of Intermodal Transport' (2002) 22 *Transport Reviews* 4, 401.

CHAPTER 3

Third parties under international conventions regarding the carriage of goods by sea: from the bilateral to the multilateral geographic approach

*No one could possibly argue that your servants or domestic staff are not your preposés, but when you come to build a house you employ in the loose sense of the word a contractor to build it and you pay him for it. No one could say that he is a servant, he is an independent contractor. Like the elephant it is very difficult to define, but you know it when you see it.*³⁰⁸

³⁰⁸ Delegation of the United Kingdom, Hague Visby Rules *Travaux Préparatoire* 614.

3.1 Chapter background

Before discussing the protection that third parties receive from international conventions, an excursus and explanation of the evolution of the role of third party protection in major international conventions regarding the carriage of goods by sea must be provided. This demonstrates that, from the international community's perspective, third party protection has changed from being completely related to carrier and shipper to take into consideration the expansion of a network of parties. Therefore as the title of this chapter suggests the approach of the international community on the topic has moved from a bilateral to a multilateral one. In this sense, the Rotterdam Rules – the latest attempt to regulate the maritime venture – have indeed taken into consideration the multilateral nature of operators. However, this chapter argues that, for a more adequate protection of the multilateral common enterprise, a commercial rather than geographic approach should be adopted.

This chapter therefore evaluates the Harter Act and the relating three major conventions: the Hague/Hague-Visby Rules, the Hamburg Rules, and Rotterdam Rules (not yet ratified).

Continues the theoretical thread that started at the outset of this thesis, this chapter explains the expansion of protection from carrier and shipper to third parties. The chapter argues that there is a constant expansion in third party protection in conventions on the carriage of goods by sea, starting with the Harter Act and running through to the recent Rotterdam Rules. The thesis will give an explanation of the rationale behind certain provisions, whilst methodically examining the *travaux preparatoire* of the various conventions.

As stated in the introduction, the fact that categories of third parties can find their own protection and are against the Rotterdam Rules will, of course, be taken into account for the methodology of this thesis. However, the alternative considered will be only the one offered by the carriage of goods by sea, and not any from other modes of carriage. As already stated, this thesis is trying to create a standard position for the carriage of goods by sea without entering into exhaustive listing of single categories of third parties. Therefore, this research does not take the United Nations' (U.N.) conventions regarding terminal operators as a benchmark to improve the protection for terminal operators. Similarly, the U.N. conventions addressing the Liability of Operators of Transport Terminals in International Trade never entered into force;

they failed to attract the required ratifications.³⁰⁹ Neither does the thesis give much weight to any conventions other than those concerned with the carriage of goods by sea. These conventions, together with the multimodal convention and conventions on carriage of goods other than by sea, will be taken into account but only in order to address specific issues and for possible analogies.

This chapter provides evidence for certain assertions and premises on which this research undertaking is based. The first is that the carriage of goods by sea has fundamentally lost its boundaries. Apart from geographical boundaries (the issue is not just simply moving from tackle-to-tackle, and port-to-port to door-to-door), there are also conceptual boundaries to be taken into account. Conversely, the problem is a result of specific changes in the way in which international trade has been structured. Carriage is now part of a chain of commercial interests. The position of third parties has changed and it is therefore appropriate to consider how international legislation has tackled this topic.

This chapter is divided into two parts. First, the bilateral system – from the Harter Act to the Hamburg rules – is analysed. In this part, it is demonstrated that the aim of these conventions is essentially to protect its parties (carrier and shipper). Additionally, in the bilateral approach, the protection of third parties (if any) is viewed in light of the protection of the main parties; the rationale is the dependency between the parties and the vicarious liability of the parties for them as well as the commercial convenience. The second part deals with the Rotterdam Rules. It is here that the thesis argues that the protection has changed from benefiting only the carrier and shipper to now defending also third parties. Moreover, the justification has changed from only the dependency of the parties of the convention to a broader concept that sees third parties as part of the convention. The third parties therefore need the same protection as carrier and shipper. However, the Rotterdam Rules assign the protection, looking at the problem merely from a transport perspective. It is argued that protection of these third parties should be seen from a multilateral common enterprise perspective and not relegated to geographic areas.

³⁰⁹ Theodora Nikaki, ‘The Statutory Himalaya-Type Protection under the Rotterdam Rules: Capable of Filling the Gaps?’ (2009) *Journal of Business Law*, 1.

CHAPTER 3 PART A

The bilateral approach (from 1893 to the 1970s): origins and evolution

3.2 Third parties in the Harter Act: the historical context of the beginning of the allocation of liability in the carriage of goods by sea

The Harter Act³¹⁰ has been selected for this analysis even though it is not an international convention and is applicable only to carriage of goods from or between ports in the United States and foreign ports.³¹¹ The reason for this is that the contemporary story of regulating the relationship between the parties interested in the venture and liabilities for cargo starts with the Harter Act. The act was the first attempt to draw a compromise between carriage and cargo interests.³¹²

The Harter Act is the predecessor of all modern international conventions regarding the carriage of goods by sea. The bilateralism of the shipping industry at that time is clearly reflected in the Act itself. It emerged from a peculiar factual context that existed between the shipowners and the cargo interests. Shipowners were financially solid and with such a high bargaining power were able to decrease liability against the cargo owners. They were able to insert substantial exculpatory clauses in the bill of lading, limiting their liability as much as possible. Tetley, quoting Scrutton, notes that the exemption clauses became “all encompassing, so much so that it inspired one commentator to remark that ‘there seems to be no other obligation on a shipowner than to receive the freight’”.³¹³

Thus, the balance between the parties was substantially in favor of the carrier. As detailed by Reynolds in 1889, the Annual Report of the West of England P&I Club reported that “the Committee congratulates the members on the absence in recent years of cargo claims which has been brought about by the now general adoption of the negligence clause; the premium reduction for use of this clause is therefore discontinued”.³¹⁴

As Knaught points out, in certain areas and especially the North Atlantic, some

³¹⁰ 1983. As stated by the Hague-Visby Rules, *Travaux Préparatoires* at 16, the first attempts to draft a uniform bill of lading were made by the ILA’s Affreightment and International Bill of Lading Committee in 1882.

³¹¹ 46 USC para 190.

³¹² The Harter Act 1893 was followed by other Common Law countries directly afterwards (Australia in 1904 with the Carriage of Goods Act, New Zealand in 1903 with the Shipping and Seamen Act and Canada with the Water-Carriage of Goods Act 1910).

³¹³ Tetley (n 26). See also Vanessa Rochester, ‘The Lone “Carrier”: An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable’ (PhD thesis, University of Cape Town, 2014).

³¹⁴ Francis Reynolds, *The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules*, (1990) 7 *MLAANZ Journal*.

shipowners were apparently excluding virtually all – or at any rate, a great deal – of their liability when carrying goods, “when he liked, as he liked, and wherever he liked”.³¹⁵

Cargo and related interests (including trade, financial and insurance concerns) worked to improve the situation, and won passage of the Harter Act in 1893.³¹⁶ The act strikes a balance between the fact that the carrier was not allowed to contract out of liability for due diligence as regards seaworthiness and care of cargo, but was not liable for negligence in navigation and management of the ship.³¹⁷

The main aim of the Act was equalising the bargaining power of the two parties and allocating the risk.³¹⁸ As Evans points out, the Harter Act was the solution to the issue of the common law rules of liability in the United States that effectively held carriers strictly liable for any damage to cargo that occurred during shipment.³¹⁹

After a brief overview of the Act, an analysis of the provision about third parties has to follow. It must be noted that almost nothing in the Harter Act concerns third parties and this is because – as this chapter and the thesis as a whole argues – at that time the only parties entitled to have relevance to the carriage were the carrier and the shipper. At that time, the shipping was a bilateral activity.

The Act defines a carrier as follows: “The term ‘carrier’ includes the owner or the charterer who enters into a contract of carriage with a shipper”.³²⁰ This definition does not include any other party who may play one of the carrier’s duties under the contract for the carriage of goods by sea.

The problem arises because in the Harter Act there is nothing that extends limitation and liability from the carrier to a third party (even though warehousemen or stevedores often enter in a contract with the carrier for that period).³²¹ In fact, while the carrier in that period was responsible for the goods, a cargo owner could have sued a carrier’s sub-contractor or servant.³²² Apart from the owner/manager of the vessel, the only category of third party inserted in the Harter Act is the agent and the master of the vessel and their responsibility is restricted to loading, stowage custody, care and delivery. Nothing outside the strict role of the ship and the people involved was mentioned.

³¹⁵ Arnold Knauth, *The American Law of Ocean Bills of Lading 116* (4th ed. Baltimore 1953).

³¹⁶ Harter Act 1893, 27 Stat 445 (codified at 46 USC Appendix 190–196).

³¹⁷ Wyatt (n 81).

³¹⁸ See Grant Gilmore and Charles Black, *The Law of Admiralty* (2nd ed The Foundation Press 1975).

³¹⁹ See I. L. Evans, ‘The Harter Act and Its Limitations’ (1910) 8 Michigan Law Review 8, 637.

³²⁰ Harter Act, 46 U.S.C. § 190.

³²¹ William Tetley, ‘Chapter 1, Application of the Rules Generally’ (*Euro Marine*, no date) <<http://www.euro-marine.eu/hague-VisbyRules.html>> Accessed 29 June 2014.

³²² As per, amongst the others, *The Himalaya* (n 4), *Scrutton* (n 5)

3.3 Third parties in the Hague, Hague-Visby Rules and the Carriage of Goods By Sea Act of the United States (1924 to 1968)

After the Harter Act, the need to allocate the risk and balance in the relationship between carrier and shipper has been accentuated.³²³ The result was in 1924, with the birth of the Hague Rules.³²⁴ Enacted in the United States as the Carriage of Goods by Sea Act, or COGSA³²⁵ and subsequently the Visby Protocol,³²⁶ the Hague Rules were the first international regimes regarding the topic and remain the primary international tools for risk allocation between the Harter Act and the as yet unratified Rotterdam Rules.³²⁷

Within the Hague Rules (as within the Harter Act), the protection of third parties in the carriage of goods by sea concerned only the carrier and shipper. The basic relationship between vessel interests and cargo interests is clearly stated in the *travaux préparatoire*, where the carriage of goods by sea law was mainly considered by the committee to be, “the law governing the relations of shipowners and cargo owners with regard to carriage by sea under bills of lading”.³²⁸

Narrowing the focus to third parties, the provisions of the Hague Rules are even more ‘ship-related’, being concerned only with tackle-to-tackle approaches; literally, from loading onto the ship to unloading from the ship. Article 1 stipulates that the contract of carriage (to whom the rules apply) only applies to bill of lading³²⁹ and regulates the relationship between the carrier and the holder of the bill of lading.³³⁰ Article 1 (e) regulates the tackle-to-tackle provision by saying that “carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship”.³³¹

This provision is very controversial and unclear. This could create problems for the carrier and then for any other category of third parties working for said carrier. Although the Rules are expansive enough to cover the period from “when the goods are loaded on, to the

³²³ In this respect, as per Lord Diplock (n 99), the role of the conventions is essentially defining and limiting the liabilities of parties.

³²⁴ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924.

³²⁵ USC, Title 46a, Ch 28, Carriage Of Goods By Sea <http://www.law.cornell.edu/uscode/html/uscode46a/usc_su_p_05_46_10_28.html> Accessed 1 August 2015.

³²⁶ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 23 February 1968, 1977 Great Britain.

³²⁷ With the exception of the Hamburg Rules adopted in 1978, but less travelled by major shipping countries.

³²⁸ *Travaux Préparatoires* (n 308) 23.

³²⁹ Or any similar and also included in a charterparty.

³³⁰ Article 1(b).

³³¹ Article 1(e).

time they are discharged”, a limitation is then created in the wording “to and from the ship”. This is a problem because goods are usually managed by the carrier or one of his auxiliaries before and after what is called the hook-to-hook phase.

In the time that elapsed between the ratification of the Hague Rules and the emergence of the Visby Protocol, carriage started to evolve³³² but third parties outside the scope of the bill of lading could only rely on domestic protection.³³³ However, the fact that shipping was moving ashore was already clear from the *travaux*, where it appears that shipping companies at that time were much more focused on their activities at sea and wanted to limit their liability only to the sea leg.³³⁴ Furthermore, the problem of the restricted scope of application was noted in the *travaux préparatoire*, as follow:

*It is true that the shipowner can negotiate his own terms as every other trader, on the other hand it is true that if not regulated, all the responsibilities (included third parties) will be regulated randomly. The next point, and it is one to which the British shipowner attaches the greatest importance, is that the Rules control only the actual sea carriage. They are applicable only from the time the goods reach the ship's tackle. The shipowner is left as free as, but no freer than, every other trader, to make his own terms in regard to all other services he renders as collecting, receiving, distributing, and as forwarding agent, or in any other capacity.*³³⁵

Between the coming into force of the Hague Rules and, later, the Visby Protocol, case law regarding third parties underwent an impressive evolution; the cases of *Adler v Dixon*,³³⁶ *Scrutton*,³³⁷ and *The Eurymedon* in the United Kingdom,³³⁸ and the case of *Herd*³³⁹ in the United States. These cases had an undeniable impact on the Visby Protocol.³⁴⁰

Although the analysis of the cases and their relationship with the Himalaya clause will be provided in the next chapter, it is appropriate to highlight here that these cases evince that

³³² Containerisation started in the 1960s.

³³³ See the concept of bailment in *Elder Dempster* (n 3).

³³⁴ In the *Travaux Préparatoires* (n 308) at 33 it is stated, “Speaking quite broadly, I take it that as the liners extended their shore organisations and undertook many duties beyond those of carrying by sea, they found it absolutely necessary to limit the responsibilities they assumed as against the freights they charged”.

³³⁵ *Travaux Préparatoires* (n 308) 37.

³³⁶ *The Himalaya* (n 4).

³³⁷ *Midland Silicones* (n 5).

³³⁸ (1975) AC 154,169.

³³⁹ *Herd & Co. v Krawill* (n 155).

³⁴⁰ Reynolds (n 314) explains that the Hague-Visby Rules arose from defects in the Hague Rules. Out of the five main defects, three were a result of English cases, one in particular from *Midland Silicones* (n 5) and this is dealt with in the scope of this thesis.

the Hague Rules did not protect any party independent from the carrier, leaving the cargo interests able to circumvent the limitation of liability with the carrier in tort or suing someone else.

During the *travaux* of the Hague Rules, the sub-committee was aware that attempts had been made, often successfully, to avoid the limitations and exemptions of the bill of lading Convention in different ways. Thus, in some countries a contracting party may sue not only in accord to contract but also tort. If sued in tort, the carrier may therefore find themselves deprived of the benefit of limitation and of the one year prescription period, etc.. Alternatively, the plaintiff may prosper by suing under tort those other than the carrier (e.g., the master, the agent, a member of the crew etc.).

In order to avoid the possibility of bypassing the contract and legislation based on the convention, the sub-committee to the Comité Maritime International recommended that the following new Article be adopted:

- 1) *Any action for damages against the carrier, whether founded in contract or in tort, can only be brought subject to the conditions and limits provided for in this Convention.*
- 2) *If such an action is brought against a servant or agent of the carrier or against an independent contractor employed by him in the carriage of goods, such servant, agent or independent contractor shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention. The aggregate of the amounts recoverable from the carrier, his servants, agents and independent contractors in the employment of the carrier, in that case, shall not exceed the limit provided for in this Convention.*³⁴¹

Taking into account this suggestion, the Visby protocol inserted Article 4 bis, which regulates third party protection. The Article states that if an action is brought against a servant or agent of the carrier (they specify that this does not have to be an independent contractor) the servant or the agent is entitled to the same defence and limits of liability of the carrier.³⁴²

³⁴¹ *Travaux Préparatoires* (n 308) 596.

³⁴² Art 4 bis. This concerns the limitation of liability and time bar that third parties (through the carrier) wish to achieve. They are specified in Article 4, which states that the limits under the Hague-Visby Rules are 666,67 SDR per package or unit and 2 SDR per kilogram. Regarding the time bar, the Hague-Visby rules discharge carrier and ship from all liability in respect of the good unless suit is brought within one year (Art 3).

This is in line with the period of application that does not cover loading or discharging. Naturally, the carrier's liability for third parties is confined to master, crew, servants and agents.³⁴³ As noted, the Article clearly excludes independent contractors from the provision.³⁴⁴ As first stated by Carver and later reported by Chuah:

*It is difficult to be satisfied that the self-contradictory words servant or agent of the carrier (such servant or agent not being an independent contractor) mean anything but a servant who does not work on a self-employed basis. If one acts on another's behalf as an agent, not being a servant, under contract, one must be an independent contractor.*³⁴⁵

In order to explain the rationale behind the exclusion of independent contractors, vicarious liability of the carrier for their auxiliaries has to be further explored. The concept of the shipowner as vicariously responsible for their servant and agents comes from the early days of the preparatory work of the Hague Rules. It is quite impressive in this respect to note that the second paragraph of the first preparatory work available for research of an international convention on the carriage of goods by sea should state the concept of the shipowner being liable for his servants:

*The shipowner, should be liable for the faults of his servants in all matters relating to the ordinary course of the voyage, such as the stowage, the right delivery of the cargo, and other matters of this kind; The shipowner shall be responsible that his vessel is properly equipped, manned, provisioned, and fitted out, and in all respects seaworthy and capable of performing her intended voyage, and for the stowage and right delivery of the goods. He shall also be responsible for the barratry, faults and negligence, but not for errors in judgment, of the master, officers and crew.*³⁴⁶

Taking into account that the rationale is the carrier's vicarious liability for his master, officers and crew and their benefit, the Hague / Hague-Visby Rules (during their preparation) often differentiated who is employed by the carrier and who is not.

³⁴³ Art 4bis (2). See Corcione (n 70)

³⁴⁴ This is because the rules were meant to be only for the benefit of the parties and as such also the protection of third parties is related to their benefit.

³⁴⁵ Chuah (n 29).

³⁴⁶ *Travaux Préparatoires* (n 308) 611.

In these regards, the terms ‘agent’ and ‘servant’ have been discussed in the *travaux* and the idea of mentioning each singular category of third parties was put emphatically forward by Tetley, representing Canada:

The term ‘agents’ is extremely broad, whilst the term ‘servants’ could mean almost any one, including a surveyor who certainly is providing service. In other words, this par. (2) is a source of innumerable log cases and confusion. I think this Committee or the Committee formed for redrafting must very carefully decide which persons in particular are being included. Do you include the stevedores? Do you include stevedores who are actually employees of the line? Let us suppose the French Line takes a cargo to Montreal and the crew does not see to the discharging but the stevedores, who are not independent contractors but actually employees of the French Line. Are those stevedores covered? Do you intend to cover stevedores? That is the problem. There will be another disadvantage to a company which does not use independent stevedores but its own stevedores in certain ports which is quite possible, incidentally, in many ports of Canada and many ports of the world. Therefore, I do not know if it is the duty of this Committee or of the minor Committee which has been formed to do the drafting but they must, I think, disregard this word “servant”, disregard this word “agent”, these words “independent contractor” and say exactly who you mean. Do you mean the Master, do you mean the Mate, all the officers, all the crew? Do you mean the pilot? Do you mean any stevedores? Or do you mean independent stevedores? Whom do you mean? Otherwise this will be a perfect cause and source of litigation.³⁴⁷

The answer to Tetley’s concern is given in another passage of the *travaux* that shows the intention and the need to protect only the parties related to the carrier, since they were the only ones carrying the responsibility of the job:

While the general principles set out above meet with the approval of the full Sub-Committee a minority wishes to put on record that they cannot adhere to these provisions as far as independent contractors are concerned. In their view a contractor who is independent of the carrier should not, by the mere fact that he performs duties which might have been performed by the carrier himself, become entitled to avail

³⁴⁷ Ibid.

*himself of the limitation and exceptions of the Convention. A distinction should be drawn between, on the one hand the carrier, his servants or agents and on the other, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Convention whereas, in the view of the minority, these reasons do not apply to the independent contractor who should thus not have this benefit.*³⁴⁸

In order to make matters even more clear, the United Kingdom delegation answering to Tetley during the *travaux*, stated that “agent” and “servant” are exactly the right words to separate parties who are employed by the carrier, and parties who are appointed for a specific job. In the words of Mr Miller:

*The suggestion is that we suppress the words ‘servant or agent’ and instead of them substitute a list of the servants or agents whom we mean by that. I am very much afraid that if this is put to the vote we shall have to be opposed to it. The phrase ‘servants and agents’ has been used in many, many conventions. It has been used in the Limitation of Liability Convention, it is used, if I remember rightly, in the Nuclear Ship Convention. It is the way we designate persons who are employed by the shipowner, distinguishing persons employed regularly by the shipowner in contradistinction to those employed as independent contractors to do one particular job. No one could possibly argue that your servants or domestic staff are not your preposés, but when you come to build a house you employ in the loose sense of the word a contractor to build it and you pay him for it. No one could say that he is a servant, he is an independent contractor. Like the elephant it is very difficult to define, but you know it when you see it.*³⁴⁹

This again shows the difference between those employed by the carrier and those not employed by the carrier. Since the carrier was vicariously liable for his assistant and was therefore vulnerable, the protection of third parties must be viewed from their perspective. The rationale for third party protection being fully linked to the parties’ interests is explained in the comment of the British Maritime Law association during the *travaux*:

³⁴⁸ Ibid. 598.

³⁴⁹ Ibid. 609.

It has been said by some of the National Associations why should a cargo owner not be able to pursue his action against the man who has been negligent, such as the Chief officers: the officer in charge of the cargo, or the officer of the watch in case of a collision, the officer of the watch who gave a wrong order? To those who put forward this argument, it is from a practical point of view nonsense.

What does the carrier want? What he thinks he can get, but I doubt very much whether he thinks he can get £100,000 worth out of the chief officer in charge of the cargo, or the chief engineer who is negligent. He knows them well not to be rich and he knows very well that unless the carrier stands behind the unfortunate officer, he will not get his shipment's worth. That is the practical reason for these actions and there is no injustice in saying to the cargo owner: 'we have made a bargain with you which is now embodied in the Hague Rules whereby we agree, we the carrier agree only for you to be allowed certain exemptions. But you, the cargo owner are not to get round that by saying: my chief officer is responsible and making me pay through him'. That is what anybody engaged in the shipping agency business knows. there are numerous cases in which that has been done and the result of this is that the shipowner has had to pay far beyond the limit to the cargo owner because the action was taken again. the carrier, servants or agents should be protected for the reasons that I have given. Actions brought against servants or agents are, in practical effect, against the carrier himself. We do not, however, support that this should include independent practice for the reason that the carrier can protect himself by contract. The action was against the carrier and therefore he had to be protected. But we do ask that the carrier be protected from or against his own servants or agents which, in practice, really is confined to actions against his sea-going servants, that is officers serving in his ship and we also think that if there could possibly arise a case in which loss or damage to cargo was caused by the owners' own agents on shore – and I personally cannot think of such a case arising – that should be covered also. It is mainly the officers serving in his ship.³⁵⁰

Shipping has changed in the meantime and what was not considered as possible by the British association began to be possible in the practice.

³⁵⁰ Ibid. 600.

As previously mentioned, in the Hague Rules, the only party performing the carriage was the carrier. In the Hague Rules there are no provisions relating to the consequences of performance of the whole (or a part of the carriage) by a sub-carrier. As a consequence, the cargo claimant may sue the sub-carrier only in tort. The same applies with the Hague-Visby Rules. Article 4*bis* rule 2 of the Hague-Visby Rules provides that the defences and limits of liability provided for in the Rules shall extend to a servant or agent of the carrier as long as the servant or agent is not an independent contractor; i.e., sub-carrier.³⁵¹

Since the passage of COGSA,³⁵² however, the shipping industry has evolved; carriers are not the only ones exposed to such differences in liability law related to the carriage of goods at sea.³⁵³

The Visby Protocol sought to be up-to-date with the contemporary evolutions, through consideration of the commencement of the utilization of containers in international carriage of goods.³⁵⁴ This movement of transport ashore has disclosed that what may be considered a third party in one international convention (e.g., a maritime related one) might in reality be a carrier in a different sector (e.g., road, rail or air).³⁵⁵ Hence, the need perceived by the industry to expand the legislative framework in light of the movement ashore.

3.4 Third parties and the advent of multimodalism and the Hamburg Rules

When the Hamburg Rules were drafted, the factual context of the shipping industry was different from those of the Hague Rules.³⁵⁶ In particular, the advent of containers has to be underlined as having an impact on the whole trade. The carriage of goods by sea has been revolutionised by this invention. As this thesis explains in Chapter 2, the new shape of the shipping industry started with the container revolution. As Wyatt states, with the container travelling through different modes of transport, the relationship between shippers and all the parties performing the multimodalism became further complicated.³⁵⁷ Containers can result in more problems, especially when the cargo is damaged or lost. Determining not only who is

³⁵¹ The Warsaw Convention also applies only to contractual carriers, as well as the CMR and COTIF-CIM.

³⁵² As anticipated, the Carriage of Goods by Sea Act ('COGSA') is the United States enactment of the International Convention Regarding Bills of Lading, commonly known as the 'Hague Rules'.

³⁵³ Notteboom and Rodrigue (n 270).

³⁵⁴ Ruiz (n 21).

³⁵⁵ Wyatt (n 81).

³⁵⁶ Adopted in Hamburg on 31 March 1978, the Hamburg Rules were drafted largely as an answer to the concerns of developing nations that The Hague rules were not adequate.

³⁵⁷ Wyatt (n 81).

liable, but also during which leg of the multimodal chain³⁵⁸ the cargo was damaged or lost and, consequently, which liability scheme is applicable are now difficult tasks.³⁵⁹

It was time for a new convention. In the twelve years between 1968 and 1980, two conventions and one protocol had been drafted. Considering that the international community was quite silent for the 44 years between the Hague rules and the Protocol, this relative level of activity can be reasonably construed as a demand from the international community for clarification and updates. Haak lists the failures of trying to solve the issue of multimodalism:

- Conventions drafted by the CMI;
- 1967 Genoa Rules and 1969 Tokyo Rules;
- 1972 TCM drafted by ECE/IMCO;
- 1980 MT Convention by the United Nations.³⁶⁰

The Hamburg Rules, although not having received full support, came into force on 1 November 1992 and were nevertheless ratified. To date, 34 states have ratified the rules; an important level of support but not sufficient backing to give uniformity.³⁶¹

The states that have ratified the Hamburg Rules are principally small developing countries that had never formally had an interest in the carriage. It is relevant to mention that of the twenty states that signed the Hamburg Rules, Barbados and Kenya were the only two to have signed either the Hague or the Hague-Visby Rules.³⁶²

A significant development within the Hamburg Rules is the period of responsibility from tackle-to-tackle to port-to-port. The aim of the UNCITRAL on this point was essentially to overcome the problem that shipping in the meantime had become port-to-port and therefore the responsibility during cargo handling was left unsolved. Under tackle-to-tackle conventions, Wyatt explains, the parameters of the carrier's liability under the contract of carriage were easier to establish. However, carriers in that period were often engaged with multimodal

³⁵⁸ Multimodal shipment is defined as the movement of cargo from point to point by various transportation modes on a single bill of lading, referred to as a through bill of lading.

³⁵⁹ See generally Wyatt (n 81); Denniston, Gunn and Yudes (n 87).

³⁶⁰ Krijn Haak and Marian Hoeks, 'Intermodal Transport In The Field Of Conflicting Conventions' (2004) 10 *Journal of International Maritime Law* 5.

³⁶¹ Berlingieri (n 20).

³⁶² Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominica Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and The Grenadines, Senegal, Sierra Leone, Syria, Tunisia, Uganda, Tanzania, Zambia.

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html

Updated as of August 17, 2016.

activities. For the purposes of this thesis, this will leave categories such as stevedores and terminal operators uncovered.³⁶³

The scope of application of the Hamburg Rules and consequently the period of carrier responsibility³⁶⁴ under the Hamburg Rules has been therefore extended from tackle-to-tackle to port-to-port. The extension has been defined in line with modern cargo transport, where shippers were normally not located immediately opposite the quay.³⁶⁵

In relation to the carriage of goods by sea, the reference to multimodal contracts present in article 1(6) of the Hamburg Rules merits discussion. This article essentially states that, when there is a multimodal contract of carriage, the Hamburg Rules apply only to the sea leg. The convention is the only sea carriage instrument that takes the possibility of multimodal carriage into account, thus recognising that a multimodal contract does not exclude the sea contract. The application of the liability regime of the Hamburg Rules covers the period during which the carrier is in charge of the goods at the port of loading and ending at the port of discharge.³⁶⁶

3.5 Third party protection and the Hamburg Rules

The Hamburg Rules make provision for the contract of carriage by sea as being when the carrier undertakes to carry goods by sea from one port to another.³⁶⁷ Additionally, under the Hamburg Rules the responsibility of the carrier is more expansive than in the Hague-Visby Rules, but nonetheless confined to when the carrier is in charge of the goods at the port of loading, during the carriage, and at the port of discharge.

³⁶³ Wyatt (n 81).

³⁶⁴ Art 4, Period of Responsibility, “The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge”.

³⁶⁵ UNCTAD, ‘The Economic and Commercial Implication of the Entry into Force of the Hamburg Rules and Multimodal Convention’ 1991 TD/B/C.4/315/Rev 1 (‘the UNCTAD Report’). In the same period another Convention was drafted, mainly dedicated to multilateral transport. In this Convention (which, for comparison some analogies are made in this thesis) the same period of responsibility is stated as follows, “Under the MTO instead, the period of responsibility has been extended to cover the entire period during which the goods are in the change of the MTO. The convention simply brings the legal regime into line with current commercial practice”.

³⁶⁶ Iara Costa Conrado, ‘Multimodal Aspect of the Rotterdam Rules: A Critical Analysis of the Liability of the MTO’ (PhD Thesis, Lund University 2011).

³⁶⁷ As specified in the previous paragraph, art 1(6) also specifies that, “a contract which involves carriage by sea and also involves carriage by sea and carriage by some other mean is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea”.

In terms of action to be considered, the Hamburg Rules introduce a new element not present in the Hague-Visby Rules. The carrier (and consequently his third parties) is liable not only for loss or damage but also for delay.³⁶⁸

Furthermore, the Hamburg Rules introduce the concept of an ‘actual carrier’.³⁶⁹ This in turn introduces the concept of multilaterally performing the carriage; the article states that, in a case where the performance³⁷⁰ has been assigned to an actual carrier, the carrier is still responsible for the all carriage (including for the part performed by the actual carrier). Both the carrier and actual carrier are liable and their liability is joint and several.³⁷¹

Article 10 of the Hamburg Rules is in practice a precursor of the performing parties (and maritime performing parties) provisions of the Rotterdam Rules. However, the article does not precisely state that the defences and limitations of the carrier are extended to the actual carrier. As per the proposal of the United States mentioned in the *travaux preparatoires*:

*The United States (para. 38) notes that the ‘carrier’ and the ‘actual carrier’ are distinguished under article 10 of the draft Convention. Further, paragraph 2 of this article, which imposes responsibility on the actual carrier, does not state that the latter is entitled to the same benefits and limitations of liability to which the carrier is entitled under the draft Convention. Nor is such an entitlement referred to in any other article of the draft Convention. In order to clarify that the actual carrier has the same entitlement as the carrier, the United States proposes (para. 38) that the following words be added at the end of the first sentence of this paragraph: ‘and the defences and limitations of liability provided to the carrier according to the provisions of this Convention shall also be applicable to the actual carrier for the carriage performed by him’.*³⁷²

Regarding the limitation of liability, the Hamburg Rules increase the Hague-Visby Rules’ limitation to 835 SDR per package or unit and 2.5 per kilogram.³⁷³ As previously stated, the Hamburg Rules regulate (for the first time) the delay in delivery; in accord to Article 6 (b), this is limited to an amount equivalent to two and half times the freight payable for the goods

³⁶⁸ Art 5(1).

³⁶⁹ Art 10, liability of the carrier and actual carrier.

³⁷⁰ Or part of it.

³⁷¹ Art 10(4).

³⁷² Hamburg Rules, *Travaux Preparatoire* at 55.

³⁷³ Art 6(1).

delayed, but does not exceed the total freight payable under the contract of the carriage of goods by sea. The time bar in the Hamburg Rules is two years.³⁷⁴

Fujita explains that the Warsaw Convention, 1929³⁷⁵ (replaced by the Montreal Convention in 1999) also imposes liability for air carriage on contractual carriers. The same applies to the Convention on the Contract for the International Carriage of Goods by Road (CMR), 1956.³⁷⁶

In the Hamburg Rules the carrier is responsible for the action of his servants or agent.³⁷⁷ In contrast to the Hague-Visby Rules, independent contractors are not mentioned in the Hamburg Rules. This leaves room for misinterpretation and, in doing so, actually creates complicity. As per the previous paragraph regarding the Hague Rules – and as shown in the next chapter – the decades before the Hamburg Rules case law saw an increase of cases where cargo owners sued independent contractors instead of the carrier, and the independent contractors subsequently requested a Himalaya clause. Third party protection is regulated by Article 7(2), which states that:

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 defences and limits of liability which the carrier is entitled to invoke under this Convention.

The UNCTAD report on the economic and commercial implications of the multimodal convention and of bringing the Hamburg Rules into force suggests that this rule aims to protect the carrier. The ratio is that shippers could sue agents and servants of the carrier under domestic laws. As it often happens in the commercial world the carrier might be bound under his contract with the agents or servants to hold them harmless from claims by the cargo interests. Therefore, without Article 7 (2), the carrier could be, although not in a direct way, subject to liabilities beyond those incorporated in the Convention.³⁷⁸

The rationale behind Article 7(2) is given by Berlingieri in being related again to the benefit of the carrier:

³⁷⁴ Art 20.

³⁷⁵ Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, quoted in Fujita (n 10).

³⁷⁶ Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956) quoted in Fujita, *ibid.*

³⁷⁷ Art 5(1).

³⁷⁸ The UNCTAD Report (n 365) 187.

*Claims against servants and agents of the carrier are normally actions in tort because the servants and agents are not parties to the contract. This rule is intended to protect the carrier. Without such a provision, cargo interests could be entitled to claim compensation under national law from agents and servants of the carrier in cases where the carrier would be able to disclaim liability owing to his ability to invoke defences under the Hamburg Rules; or, the cargo interests might be able to claim higher amounts of compensation than could be recovered from the carrier under the Hamburg Rules. The carrier might be bound under his contract with agents or servants to hold them harmless from claims by the cargo interests. Thus, without a provision such as that in Article 7 (2) the carrier could be indirectly subject to liabilities beyond those contained in the Hamburg Rules.*³⁷⁹

The Hamburg Rules do not specifically exclude independent contractors; to do so was regarded as superfluous, even ambiguous. ‘Independent contractor’ is primarily a common law term. In the common law system, however, servants and agents are never independent contractors. Chuah specifies that:

*The Hamburg Rules attempt to improve on the Hague-Visby Rules by specifically deleting the reference to independent contractors. Article 7 rule 2 provides that if an action is brought against a servant or agent of the carrier in respect of damage, loss or delay, that third party shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under the Rules. The question should not be perceived as a matter of fact but of law; the concept of an independent contractor will be evaluated on the basis of the applicable law of the contract.*³⁸⁰

According to Liang, any third parties under the Hamburg Rules – whether they be servants, agents, or independent contractors – are on the same footing. They are able to enjoy the same defences and limitations as the carrier. Likewise, there can be no dispute as to whether the servants of an independent contractor can enjoy the same defences and limitations

³⁷⁹ Berlingieri (n 20).

³⁸⁰ Chuah (n 29).

as the carrier under the Hamburg Rules. As a result, Liang argues that the Himalaya clause is not needed under the Hamburg Rules.³⁸¹

This is seen as imprecise. Failing to address the term ‘independent contractors’ leaves a degree of uncertainty. Case law on the topic (as detailed in Chapter 4) has shown that, with some exceptions, courts have placed enormous emphasis on exactly who the provision aims to protect. The word independent contractor has frequently been judged as too generic.

Summary of Part A

The first part of this chapter outlined the approach of international conventions from the last century in dealing with third parties. It also showed that this approach is weighted towards bilateralism. The issue, however, has now evolved.

This evolution started with the need to regulate the relationship between carrier and shipper, beginning with the Harter Act and followed by the Hague Rules and their various protocols. Further developments occurred with the arrival of multimodalism in the 1970s and an ensuing acknowledgement from the industry that regulation of this area was in need of updating.

Up to that point, the reason for protection of third parties so far was simply protecting the carrier because those third parties were related to him. They were protected for practical reason and for vicarious liability. The Hamburg Rules improved the situation by citing the actual carrier. Additionally, the various categories of third parties have also evolved. Previously, the problem was for third parties such as first officer and captain.

The Hamburg Rules, although not ratified by many countries, may improve third party protection. They take into consideration the position of the actual carrier, providing that all the provisions of the Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by them.³⁸²

Similar provisions have been adopted by other international conventions related to carriage.³⁸³ The Hamburg Rules, which provide that the period of responsibility of the carrier covers the period during which the carrier is in charge of the goods at the port of loading,

³⁸¹ Liang (n 17).

³⁸² Art 10(2).

³⁸³ Art 270 of the Uniform Rules Concerning International Carriage of Goods by Rail 1980; Appendix to the Convention Concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 COTIF-CIM; Budapest Convention on the Contract for the International Carriage of Goods by Inland Waterway, 2000 CMNI (Art 4); Art 39 of The Convention for the Unification of Certain Rules for the International Carriage by Air 1999; The Montreal Convention 1999.

during the carriage and at the port of discharge. Nevertheless, the situation was still far from resolved:

*None of the existing instruments applies to the whole contract period when the carrier undertakes to take the goods in charge at the door of the shipper and to deliver them at the door of the consignee, as gradually has become more and more frequent with the advent of containers.*³⁸⁴

Thus, the need for a new convention; the Rotterdam Rules.

³⁸⁴ Berlingieri (n 20).

CHAPTER 3 PART B

The Rotterdam Rules and the multilateral geographic approach

3.6 Geographic vs commercial approaches: the shore is no longer the place at which the line is drawn; should it be the port?

The previous part of this chapter explained the evolution and the problems of the bilateral approach of the conventions in the carriage of goods by sea. These international conventions are inadequate primarily because they only address the problem from the perspective of the main parties. Even the protection of third parties is cast in the light of the benefit to the main parties.

It is anticipated that the Rotterdam Rules will still emerge as a convention focusing largely on the relationship between carrier and shipper. The performing party is simply someone who performs any of the carrier's obligations.³⁸⁵ The thesis argues that the geographic approach proposed by the Rotterdam Rules does not give justice to the concept of the multilateral common enterprise and thus a more conceptual approach should be taken.

3.7 Historical and factual context: the shadow of multimodalism

At the point that the Rotterdam Rules were first drafted, the matrix of society different substantially to when previous papers had been drafted; most of the problems encountered in the Hague, Hague-Visby and Hamburg Rules had been solved. During the time of the Rotterdam Rules, however, new issues needed to be addressed by the international maritime community.³⁸⁶ The issue most relevant to this research is the fact that, as a result of the container revolution and the new factual context of the shipping industry (as explained in Chapter 2), there are currently parties involved in the carriage that were not involved

³⁸⁵ With the respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of goods.

³⁸⁶ In United States, a draft text for an amended COGSA had already been made. In this context in fact, the International Chamber of Shipping outlines that: *"It will be recalled that this lacuna led to the initiative in the US in the early nineties to modernise the US COGSA of 1936, resulting in a draft text for an amended US COGSA. This caused great concern, because it represented regionalism which would have caused chaos to international trade and the Industry. The US was ultimately dissuaded from pursuing this initiative in favour of the proposal to develop an international, and uniform, solution under the aegis of UNCITRAL and since then, the US has been fully engaged in the successful negotiation of a new Convention."* Reported by the position paper of Chamber of Shipping: "THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE "ROTTERDAM RULES")" https://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf accessed 4 April 2013.

previously. These parties are not secondary to the carrier and the shipper but are nevertheless primary actors.

Furthermore, there is no longer only one category of third parties performing carriage but rather a variety of categories. Hence, the creation of a general definition (i.e. ‘performing parties’) in the Rotterdam Rules. This actually acknowledges and enforces through an international regulation one of the arguments of this research: that carriage is ‘performed’ by many parties and not only by the carrier.

The Rotterdam Rules *travaux preparatoire* involved not only carrier, shipper and insurances of both parties but, for the first time, representatives of third parties as well.³⁸⁷

Compared to previous conventions, a greater number of states and institutions were interested in the drafting of the Rotterdam Rules.³⁸⁸ Other associations such as the International Federation of Freight Forwarders Associations (FIATA), the International Shipowners’ Association (ISA) and the IGP&I bear significant influence over international maritime circles. These organizations can affect maritime legislation on both a national and international level where the parties that they seek to protect are concerned.

The need for a new convention was felt as early as 1996. At its twenty-ninth session, the UNCITRAL considered a proposal for its work program to include a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed, and with a view to achieving greater uniformity of laws.³⁸⁹

In the same session, the Commission decided on the involvement of the international organizations representing the commercial sectors involved in the carriage of goods by sea; including the Comité Maritime International (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the aforementioned FIATA, the International Chamber of Shipping (ICS) and the International Association of Ports and Harbours.³⁹⁰

³⁸⁷ Amongst the others, FIATA (n 41) and CLECAT. CLECAT represents European freight forwarders, logistics service providers and customs agents. CLECAT, position paper ‘RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the “Rotterdam Rules”’ Brussels, 11 May 2009.

³⁸⁸ When the Hague, Hague-Visby and Hamburg Rules were drafted, completed and ratified, the European Union did not even exist.

³⁸⁹ United Nations Commission on International Trade Law, ‘Report of the Working Group on Transport Law, 9th session’ (New York, 15–26 April 2002) A/CN.9/510.

³⁹⁰ Ibid.

In the thirty-second session of the Commission, 1999, it was stated that the aim of the convention was uniformity and harmonization.³⁹¹ The commission resolved that:

*The purpose of its work was to end any multiplicity of the regimes of liability applying to the carriage of goods by sea and to adjust maritime transport law in order to better meet the needs and realities of international maritime transport practices.*³⁹²

As the title of this section suggests, the Rotterdam Rules emerged from the ashes of failed multimodal conventions. In doing so, it represented an acceptance of sorts that a real solution to multimodalism had not been found. In this way, the Rotterdam Rules are a compromise between the need of a pure multimodal convention, the failure of the precedents, and the intention of parties and delegations to have their scope of application and limitation limited to the sea.

The expansion of door-to-door operations has not gone uncontested. The CMI argued that an earlier efforts at a multimodal legislative convention – namely the United Nations Convention on International Multimodal Transport of Goods (1980) – were not successful; their concern was that including multimodal transport in the draft instrument might compromise the acceptability of the new instrument.³⁹³

In the same period, a study of the feasibility of the multimodal carriage was prepared by the United States.³⁹⁴ As a result it was noted that the legislative regime applicable to maritime export-import operations should not treat the maritime leg in isolation and disregard the broader door-to-door transport operation. Moreover, the report stated that a new convention should respond to the reality of containerisation and multimodalism, technological instruments, and improvement of logistics.³⁹⁵

Echoing this support for a new convention, organizations such as BIMCO and IGP&I argued that there would be little value added by developing another unimodal regime; it would, they argued, be remiss to ignore door-to-door transport. Providing that carriage by sea is

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ UNCTAD Secretariat, 'Review of Maritime Transport, 2003' (United Nations Conference on Trade and Development, Geneva UNCTAD/RMT/2003).

³⁹⁵ United Nations Commission on International Trade Law, 'Report of the Working Group on Transport Law' (n 389).

contemplated at some stage, the provisions of the instrument should apply to the full scope of the carriage.³⁹⁶

The representatives of P&I therefore declared that adoption of “a network system approach in the context of door-to-door carriage [is] an approach that respects the unimodal regimes and with which we agree”.³⁹⁷

The result is a highly compromised wet multimodal regime. The Rotterdam Rules govern door-to-door transport and what is already called ‘wet multimodal transport’, i.e., any multimodal transport that includes a maritime leg.

As previously stated, the convention acknowledges that the simple bilateral concept of carriage had expanded. The expression “under a contract of carriage” should be replaced with “in the context of transport operations” or “in performing the transport operations”, in order to more clearly indicate the relation of different performing parties to the “contract of carriage”. It was specified, however, that the performing party was not a party to the contract of carriage between the shipper and the contracting carrier.³⁹⁸

The CMI discussion also highlights the need for a regime that includes a carriage of goods by sea stage, regardless the other modes of transport:

*Since much sea transportation in the containerised field involves movement by more than one mode of transport, it is often difficult, if not impossible, to see whether the movement on land is subsidiary to that by sea. It is therefore considered by many that any future instrument should contain provisions applicable to the full scope of carriage irrespective of whether or not the movement on land may be deemed subsidiary to that by sea, providing carriage by sea is contemplated at some stage.*³⁹⁹

The Rotterdam Rules involve compromise, the extent and significance of which has been cited as a concern during the preparatory work. The *travaux préparatoire* from Germany’s delegates on 29 July 2008 states that:

³⁹⁶ United Nations Commission on International Trade Law, ‘Report of Working Group III (Transport Law) on the work of its tenth session: Comments from the representative of the International Chamber of Shipping and the Baltic and International Maritime Council on the scope of the draft instrument’ (Thirty-sixth session Vienna, 30 June–11 July 2003 A/CN.9/525) Annex 1, 36.

³⁹⁷ Ibid. Comments from the representative of the International Group of Protection & Indemnity Clubs’ Annex 2, 37.

³⁹⁸ United Nations Commission on International Trade Law ‘Report of the Working Group on Transport Law’ (n 388).

³⁹⁹ Comité Maritime International (CMI) Yearbook 2000 <<http://comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf>> Accessed 24 January 2014, 113.

*[The delegation has] serious concerns about the broad scope of the draft convention and, in particular, the establishment of special rules applying to multimodal transport contracts that provided for carriage by sea, which would lead to a fragmentation of the laws on multimodal transport contracts. To avoid that outcome, her delegation wished to see the draft convention applied solely to maritime transport contracts.*⁴⁰⁰

From a different view, the delegation of the United States argued that the ‘maritime plus’ approach was best suited to the manner in which the business community operated.⁴⁰¹ As explained by representatives of UNECE: “The extension of the liability coverage from the tackle-to-tackle carriage under the Hague-Visby Rules or port-to-port carriage under the Hamburg Rules to door-to-door carriage is said to respond to the reality of containerised transport of goods”.⁴⁰²

However, the merits of an approach such as this are debatable because the instrument does not take into account the views of the parties involved in modes of transport other than sea, nor those of the shippers, who create the initial demand for the transport. Instead, it only reflects the view of the maritime transport related interests.⁴⁰³

To date, 25 nations⁴⁰⁴ have signed the rules, and there have only been three ratifications.⁴⁰⁵

3.8 Third party protection under the Rotterdam Rules

The Rotterdam Rules have a more expanded scope of work and the contract of carriage is considered as a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another.⁴⁰⁶

⁴⁰⁰ United Nations Commission on International Trade Law, ‘Summary Record of the 865th Meeting’ (Forty-first session 2008A/CN.9/SR.865).

⁴⁰¹ Ibid. Only transport by sea.

⁴⁰² United Nations Economic Commission for Europe, Inland Transport Committee, ‘Possibilities for Reconciliation and Harmonisation of Civil Liability Regimes Governing Combined Transport’ (Thirty-seventh session, 18 and 19 April 2002 TRANS/WP.24/2002/5).

⁴⁰³ Ibid.

⁴⁰⁴ Armenia, Cameroon, Congo, Democratic Republic of Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo, United States of America.

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

Updated as of August 17, 2016.

⁴⁰⁵ Spain in 2011, Togo in 2012 and Congo in 2014. Ibid

⁴⁰⁶ The Art 1 definition also specifies that it is compulsory for the contract to provide for a sea leg and that it may have a leg by another mode of carriage.

The multilateral aspect of the convention and the involvement of third parties is shown immediately; as Article 12⁴⁰⁷ states, the period of responsibility of the carrier 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.

Moreover, having affirmed that the carrier is liable for the breach of its obligation under this convention, Article 18 of the Rules⁴⁰⁸ specify that this breach can be caused by an act or an omission by three different categories of party: first, any performing party (thus delineating the concept of network of people working together);⁴⁰⁹ second, the master and the crew of the ship;⁴¹⁰ third, employees of the carrier or a performing party.⁴¹¹ Lastly, it addresses any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage.⁴¹² This provision is residual, as it does not place any party performing the job beyond the carrier's responsibility. However, this provision states that the central party of the convention is the carrier. As the last sentence of the article states: "to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control". Therefore, it recognises an enterprise of parties but nevertheless operating under the carrier's direction.

Like the Hamburg Rules, the Rotterdam Rules also regulate (together with loss or damage) liability for delay.⁴¹³ Regarding the limitation of liability, the Rotterdam Rules increase it to 875 SDR per package or unit and 3 SDR per kilogram. The time bar is two years.⁴¹⁴

In terms of third parties, the Rotterdam Rules expand the concept of actual carrier with performing parties. A performing party is a person, other than the carrier, who performs or undertakes to perform any of the carrier's obligations under a contract of carriage. The obligations are in respect to specific actions that have been listed as follows: receipt, loading, handling, stowage, carriage, keeping, care, unloading and/or delivery of the goods.

⁴⁰⁷ Period of responsibility of the carrier.

⁴⁰⁸ Liability of the carrier for other persons.

⁴⁰⁹ Art 18(a).

⁴¹⁰ Art 18(b) in line with The Hague and Hamburg Rules where the carrier is responsible for his immediate employees.

⁴¹¹ Art 18(c), extending vicarious liability to all the employees of the performing parties and eliminating the difference between the party itself and its employees.

⁴¹² Art 18(d).

⁴¹³ Art 17. While Art 60 specifies that, "Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned".

⁴¹⁴ Art 62.

In order to be qualified as a performing party such a person has to act either directly or indirectly at the carrier's request or under the carrier's supervision or control.⁴¹⁵ The Working Group noted that the purpose of the definition of 'performing party' was to regulate three different issues:

- 1) Governing parties that performed the carrier's activities under a contract of carriage, usually sub-contractors, and their joint and several liability with the contracting carrier.
- 2) Regulating the vicarious liability of the performing party for its employees or others working in its service.
- 3) In conjunction with drafted Articles 4 and 19, protecting the so-called 'Himalaya clause' for such employees, agents or sub-contractors.⁴¹⁶

The transformation from actual carrier to performing party⁴¹⁷ has been a work in progress, beginning with the CMI's preparatory work and continuing with the UNCITRAL work. During the first draft prepared by the CMI, the definition was of a performing carrier and not a performing party, defined as:

*A person who performs, undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage, to the extent that the person acts, either directly or indirectly, at the request of, or under the supervision or control of, the contracting carrier, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.*⁴¹⁸

The *Comité* states that the term 'performing carrier' does not include any person (other than the contracting carrier) who is retained by a shipper or consignee, or is an employee, servant, agent, contractor, or sub-contractor of a person (other than the contracting

⁴¹⁵ Art 6 (b) 'Performing party' does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

⁴¹⁶ United Nations Commission on International Trade Law, 'Report of Working Group III (Transport Law) on the work of its nineteenth session' (Fortieth session Vienna, 25 June–12 July 2007) A/CN.9/621.

⁴¹⁷ For the definition of 'performing party' it is useful to follow some of the reasoning from the CMI (CMI Yearbook 2001 <http://www.comitemaritime.org/uploads/yearbooks/ybk_2001.pdf> Accessed 4 January 2014, 539) as follows, The 'performing party' definition is limited to those who are involved in the carrier's core responsibilities of carriage, handling, custody, or storage of the goods. Thus, ocean carriers, inland carriers, stevedores and terminal operators, for example, would be included under either 'performing party' definition. In contrast, a security company that guards a container yard, an intermediary responsible only for preparing documents on the carrier's behalf and a ship yard that repairs a vessel (thus ensuring seaworthiness) on the carrier's behalf would not be included.

⁴¹⁸ CMI Yearbook 2000 (n 399) 117.

carrier) who is retained by a shipper or consignee.⁴¹⁹

In comparison to the Hamburg Rules, the class of ‘performing carriers’ not only includes the contracting carrier’s sub-contractors but also the entire line of subsidiary persons; parties who perform the contract (i.e., the sub-contractor’s sub-contractors, that party’s sub-contractors and so on, indefinitely).⁴²⁰

The definition immediately provides an important clarification; that ‘performing carriers’ are only those who work, directly or indirectly, for the contracting carrier. If the cargo’s interests have a servant or agent performing a task that would otherwise be the contracting carrier’s responsibility under the contract of carriage, that servant or agent does not thereby become a performing carrier.⁴²¹

After having established the general concept of performing party, it should be noted that only a specific category of a performing party is liable under the convention, namely, a ‘maritime performing party’.⁴²²

Article 19 of the Rules explains that the maritime performing party – in essence, a performing party⁴²³ that operates exclusively between port of loading and port of discharging – is liable while in custody of the goods and at any time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.⁴²⁴ This article specifically excludes from the provision master, crew of the ship and employees of the carrier or of maritime performing parties.⁴²⁵

Traditional transport conventions have focused on the liability of the carrier.⁴²⁶ On the contrary, according to the Rotterdam Rules (pursuant to Article 19)⁴²⁷ a maritime performing party is subject to the obligations and liabilities imposed on the carrier’s defences and limits of liability as provided for in this Convention. However, the Rotterdam Rules limit this liability to the port of loading and the port of discharge.⁴²⁸ It was noted that the definition of ‘maritime performing party’ referred back to the definition of ‘performing party’ and thus also includes employees, agents and sub-contractors. It was suggested that, as formulated, the definition could have the unintended effect of allowing any possible contractual liability of a maritime

⁴¹⁹ Ibid.

⁴²⁰ Ibid. 118. Probably one of the first definitions of performing party.

⁴²¹ Ibid. 119.

⁴²² Which is essentially a concept similar to the actual carrier of the Hamburg Rules.

⁴²³ ‘Maritime performing party’ means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship.

⁴²⁴ Art 19(h)(iii).

⁴²⁵ Art 19(4).

⁴²⁶ Fujita (n 10).

⁴²⁷ Liability of a maritime performing party.

⁴²⁸ Art 19(b).

performing party under the contract of carriage to be imposed directly on an employee, agent or sub-contractor. Similarly, it was held that the definition of ‘performing party’ should be reconsidered in order to avoid such an unintended consequence.

In response, it was explained that the reason that the definition had been framed so broadly was in order to avoid the privity of contract problem that had arisen in the jurisprudence with respect to Himalaya clauses. This allowed for such protection under the clause only for sub-contractors, but not for those further down the chain of contracts.⁴²⁹

In exchange for their liability under the convention and pursuant to Article 4, the maritime performing party receives the same defence and limitation of liability of the carrier (whether in contract, tort or otherwise).

During the draft, the committee supported the provision establishing that the general policy behind Paragraph 4 was to afford employees, agents and sub-contractors of the carrier and maritime performing parties the full protection of the rights, defences and limits of liability available to the carrier under the drafted convention for any breach of contractual obligations or duties. In the event that an action under the draft convention was made directly against it, a protection, which was often sought through the insertion of ‘Himalaya’ clauses in transport documents, would be offered.⁴³⁰

It is evident that the Rules wish to draw a clear geographic distinction between someone who works at the port and someone who does not. In one of the first drafts of the conventions, the notion of ‘non-maritime performing party’ was also drafted in order to make the difference even clearer: “Non-maritime performing party’ means a performing party who performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge”.⁴³¹

In contrast to previous conventions where the rationale for the protection of third parties was the carrier’s vicarious liability and the carrier’s benefit, the rationale for third party protection under the Rotterdam Rules has changed from benefiting the carrier to benefiting third parties. The reason is that specific categories of performing parties (maritime) have the same liability of the carrier. In this case, the rationale for the protection of the maritime performing party is that they have the same liability as the carrier and they therefore must have the same limitation. The second category defined by the Rotterdam Rules includes employees of the carrier and maritime performing parties, together with master, crew and people working

⁴²⁹ United Nations Commission on International Trade Law ‘Report of Working Group III’ (n 389).

⁴³⁰ Ibid.

⁴³¹ United Nations Commission on International Trade Law, Working Group III (Transport Law)’ (13th session New York, 3–14 May 2004 A/CN.9/WG.III/WP.36).

onboard. As Fujita states, they need a different justification because they are not liable under the convention. In this case the justification is purely economic; they depend on the carrier or maritime performing party and therefore it would mean that the cargo owner could still null the provision, suing the employee of the carrier instead of the carrier.⁴³² This feature supports an important argument made in Chapter 2; specific categories of third parties are freed from carrier dependency and become part of the business.

Berlingieri explains that, when considering whether and to what extent the sub-contractors of the carrier (called ‘performing parties’) should be subject to the Rotterdam Rules and liable to be sued by the shipper or consignee, it was decided that it would be convenient to do so only in respect of services rendered at sea or in the ports. Therefore, the notion of a ‘maritime performing party’ was created, thereby incorporating in the Rotterdam Rules the principles on which the Himalaya clause is based.⁴³³ It is important to note that the parties under the convention, pursuant to Article 20 are jointly and severally liable.⁴³⁴

In the Rotterdam Rules different categories of third parties (grouped into the general category of maritime performing party) are, for the first time, protected. This confirms not only the Rotterdam Rules’ acceptance of the concept of multilateralism, but also how integrated and sophisticated the world of trade has become. Strictly speaking, the role of the shipper lies beyond the scope of this thesis, but it should be acknowledged that also the role and responsibility of a shipper are completely different from that stated in the Harter Act or Hague Rules, wherein it was limited only to someone who entered into a contract with the carrier. The role of shipper is now much more involved, in accordance with the fact that carriage is now a network of interests.⁴³⁵

Article 4, paragraph 2 of the Rotterdam Rules (applicability of defences and limits of liability) states that:

⁴³² See generally Fujita (n 10).

⁴³³ Berlingieri (n 20).

⁴³⁴ Art 20 states that, “1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention. 2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention”.

⁴³⁵ Art 34 also regulates liability of the shipper for its third parties as follows, “The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and sub-contractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations”. Chuah (n 29) further enhances the role of the shipper in the Rotterdam Rules and its involvement in the carriage operations: “In a tackle-to-tackle type of arrangement, it is probable that the port terminal operator actually is the *shipper’s* independent contractor. Under the Rotterdam Rules, the shipper is indebted to the carrier a number of significant duties including the duty to deliver cargo packed in an appropriate manner, the duty to cooperate with the Carrier and the duty to provide relevant handling instructions. The shipper will be liable for breaches caused by the acts or omissions of any person, including employees, agents and sub-contractors, to which it has entrusted the performance of any of its obligations”.

*Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their sub-contractors, agents or employees.*⁴³⁶

In this context, Smeele explains that the independent contractor is not a maritime performing party, even though the Rotterdam Rules enable parties to the contract of carriage to agree that cargo loading, discharging, handling and stowing is to be performed by the parties interested in the cargo – and therefore that the cargo owners may delegate the performance of these duties to an independent contractor.⁴³⁷

3.9 Problems regarding third party protection

As Fujita clearly explains in the colloquium on the Rotterdam Rules: “There are many people other than the carrier who are involved in transport of goods”.⁴³⁸ This is acknowledged by the Rotterdam Rules but, as previously stated, the Rules have given rise to two categories, distinguished according to where they perform their services. If services are performed in the port area and/or during the voyage between the ports of loading and discharge, protection is granted by the Rotterdam Rules. If services are performed outside of the port area or sea voyage, no protection is granted by the Rules, but provisions of other international unimodal conventions or national law will still apply.⁴³⁹

As Baldwin notes, through Article 4 (1), the Rotterdam Rules extend the scope of the carrier’s protection to maritime performing parties, the master, crew, and other categories performing services on board the ship. These however may not be servants or agents of the carrier, for instance when the carrier is a time charterer and to employees of the carrier or of a maritime performing party.⁴⁴⁰

⁴³⁶ Article 4 para 2.

⁴³⁷ Smeele (n 143). Chuah (n 29) specifies that “In the circumstances, the Rotterdam Rules leave it to the shipper and his employee agent or independent contractor to make provisions for a Himalaya clause”.

⁴³⁸ Fujita (n 10).

⁴³⁹ See David Moran Bovio, ‘Ocean Carriers’ Duty of Care to Cargo in Port: The Rotterdam Rules of 2009’ (2008) 32 Fordham International Law Journal 4, 1160. Many legal systems have differentiated further within the group of independent contractors of the carrier and have created separate categories and protective rules for sub-carriers, stevedores, pilots and other independent contractors.

⁴⁴⁰ Kevin Baldwin, ‘COGSA Carriers’ (2010–2011) 35 Tulane Maritime Law Journal 391.

Article 1(7)(d) and Article 19(1)(b) state that the definition and liability of an MPP apply only “during the period between the arrival of the goods at the port of loading [...] and their departure from the port of discharge”.

Therefore it is clear that the definition of port, its boundaries and delimitation become crucial in the Rotterdam Rules. Atamer suggests that cargo owners will now focus on investigating where the landside limits of the port are to be drawn.⁴⁴¹

The concept of a ‘port’ has changed since the Harter Act. As explained in Chapter 2, logistics have connected ports with inland infrastructure. Numerous ports are nowadays in the process of being privatised. Two considerations arise considering these changes: first, owing to the port’s logistics, a geographical dimension of the port can be expanded in the future; second, the privatization of ports is likely to give rise to the adoption of a commercial view, rather than a geographical one based on state or territory.

Today, the private sector plays an important role in port management. As explained in Chapter 2, the concept of a port is evolving from what was once a specific area under state control into something more akin to a managed company.⁴⁴² Private investments play an increasingly important role in helping ports operate at maximum efficiency.⁴⁴³ The Rotterdam Rules leave boundary regulation up to the relevant national law. So, as far as the Rotterdam Rules are concerned, the ‘port phase’ of the goods is one of many identifiable during the transport process. Determination of the limits of each transport section is possible only on a case-by-case basis. The geography of the port in question, the modality of the goods, other details of the contract, and, most importantly, the law regulating the port will all affect any arbitration.⁴⁴⁴ Chuah is concerned that:

*The word ‘port’ is not explicitly defined. This lack of a definition would seem to be intentional but problematic. A question is whether cargo consolidation areas would also count as the port area. In the light of the increasing need for cargo consolidation near a port, it seems unrealistic to make an artificial distinction between inland and port without looking at the logistic chain.*⁴⁴⁵

⁴⁴¹ Kerim Atamer, ‘Construction Problems in the Rotterdam Rules Regarding the Performing and Maritime Performing Parties,’ (2010) 41 *Journal of Maritime Law and Commerce*, 4.

⁴⁴² Holman Fenwick Willan, ‘Global Investment in Ports and Terminals’ (June 2011).

⁴⁴³ *Ibid.*

⁴⁴⁴ Bovio (n 439).

⁴⁴⁵ Chuah (n 29).

The difficulty in defining the port area emerged also during the working group that in fact shows:

*Concerns were raised, however, that in the case of very large or geographically proximate ports, or different ports that were administered under a single authority, it would be very difficult to determine whether a performing party were performing its services 'exclusively within a port area', and thus very difficult to determine who qualified as 'maritime performing parties.' Support was expressed for those concerns, including some support for the suggestion that the Working Group might wish to consider excluding altogether inland carriers from operation of the draft convention. In response, it was noted that the Working Group had previously agreed to leave the determination of what constituted a 'port' to local authorities and the judiciary, since views on that topic differed widely according to geographic conditions.*⁴⁴⁶

In their final version, the Rotterdam Rules therefore incorrectly rely on the geographic approach. Analysis of the Working Group clearly shows, however, that another “functional” approach was considered in creating the definitions of maritime performing party.⁴⁴⁷ There are no specific references to this functional approach but, going back to the first draft of the CMI, a more conceptual approach to deal with the issue can be identified. At that time, the CMI expressed the concept that a performing carrier (original definition for performing party) should be generally entitled (without differentiating the categories according to the geographic aspect of their job) to the same rights as the contracting carrier. The CMI continues, stating that this gives performing carriers the benefits of a broad Himalaya clause without the need to include a Himalaya clause in the contract of carriage or the transport document.⁴⁴⁸ It is clear that, in this sense, the geographic line was not supposed to be included in the Rules at that time.

⁴⁴⁶ United Nations Commission on International Trade Law ‘Report of Working Group III’ (n 389).

⁴⁴⁷ According to the Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6–17 October 2003) A/CN.9/544 in fact at para 30 states “By way of presentation, the Working Group heard that two approaches had been envisaged in creating the definitions, namely, a functional approach and a geographical approach. The geographical approach had been chosen as the simpler of the two. It was proposed that the geographical area for the definition could be the “port”, although it was conceded that a definition of “port” could pose considerable difficulties, and would likely be defined with reference to national law”. And at para 31 states “There was general agreement in the Working Group that these definitions were a good basis for continuing the discussion on how to define maritime and non maritime performing parties. There was general agreement that a geographical approach to the definition was appropriate, and there was support for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, as, for example, in the case of a movement by truck from one dock to the next”.

⁴⁴⁸ CMI Yearbook 2000 (n 399) 135.

Another solution proposed during the preparatory work (and one that could be commercially viable) was channeling the liability to only the main party of the convention. Here, it is relevant to report the position of the International Chamber of Shipping. In the CMI *travaux préparatoire*:

*The ICS proposes that the convention should only deal with the liability of the contracting carrier. Whether or not the carrier in some cases sub-contracts part of the transportation to another carrier and in another cases performs the whole carriage should not change the legal position of the shipper. The ICS argues that channeling the liability only to one party will avoid multiparty suits that are usually very protracted and difficult to settle. The ICS then suggests that the contracting carrier will then decide whether exercise his right of recourse against its contractors. Finally ICS reports that also the shippers representatives expressed the preference for the convention to deal only with the liability of the contracting party.*⁴⁴⁹

In this respect, the proposal had the support of the IGP&I that reinstated the concept:

*The IG reiterates its belief that liability under the DOI should be ‘channelled’ to the contracting carrier alone and that the liability and protection of performing parties should be addressed through contractual indemnities. The concept of providing for the liability of performing parties as defined, seems to be an unnecessary complication of a regime the objective of which should be to simplify in so far as possible the carriage of goods involving a sea leg.*⁴⁵⁰

The International group also reported the example of the International Conventions on Civil liability for Oil Pollution Damage (CLC) where the concept of channeling liability to a single party in international convention has proved to be successful.⁴⁵¹ The NitLeague and the World Shipping Council follow the same rationale:

The Instrument should not provide a right to sue a party performing the obligations of

⁴⁴⁹ CMI Yearbook 2001 http://www.comitemaritime.org/uploads/yearbooks/ybk_2001.pdf Accessed 8 January 2014 139). The International Chamber of Shipping aims to have only the contracting carrier in the instrument and not the performing carriers.

⁴⁵⁰ Ibid. 459.

⁴⁵¹ Ibid. 459.

*the carrier (see CMI Draft Articles 6.3.2(a)(i) and (ii). The right of suit for cargo claims should be solely against the carrier issuing the contract of carriage. Agreement to a higher liability limit or greater responsibilities by the contracting carrier should not be binding on a performing party, unless the performing party agrees to such higher limit or responsibility. Supplemental Submission Performing Parties. – The parties agreed that the Instrument should not provide a right to bring an action for cargo loss or damage against a party that performs the obligations of the contracting carrier. Rather, all such actions must be commenced against the contracting carrier. The contracting carrier is responsible for the acts and omissions of any party that performs the duties of the carrier (including sub-contractors and agents of performing parties).*⁴⁵²

Though the channeling of responsibility represents an interesting alternative, its lack of implementation renders it only theoretical. Instead, the less desirable geographic approach has been adopted. Chuah contends that favouring a geographic test of what constitutes the maritime side of its coverage is contrary to how the shipping industry views cargo logistics.⁴⁵³

Furthermore, also the definitions of performing parties and maritime performing parties hide technical problems raised by Atamer regarding wording:

- The first is hidden in Article 1(6)(a)(i) for performing parties and 1(7)(a)(i) for maritime performing parties as they refer to them as any *person* other than the carrier. This leaves doubt as whether this includes also legal entity apart from humans.⁴⁵⁴
- The second is the fact that if a person as described in Article 12(2) does not act under the “carrier’s request, supervision or control”. Therefore, such a person is excluded from the carrier’s vicarious liability, and could not be held liable under Art. 19 as a Maritime Performing Party.⁴⁵⁵
- The third one is the omission to keep (custody). In fact, on a literal construction a person that is involved exclusively in ‘keeping’ the goods can neither be qualified as a Performing Party nor as a Maritime Performing Party.⁴⁵⁶

⁴⁵² Same for NITL and WSC. CMI Yearbook 2001 Ibid. 139.

⁴⁵³ Chuah (n 29).

⁴⁵⁴ Atamer (n 441).

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

Smeele is concerned about the exclusion of an independent contractor who merely assists in the performance of carriage or cargo-related obligations by others, without performing any of these carrier's obligations themselves. Likewise, independent contractors undertake other duties of the carrier under the contract of carriage. These include exercising due diligence to make and maintain the ship in a seaworthy state, as well as crewing, equipping and supplying the ship, or arranging and issuing transport documentation. Such obligations are related to cargo-handling or carriage only indirectly.⁴⁵⁷

Smeele also highlights the ambiguous position of other parties within the Rules. These parties might include: a ship repair yard; a container supplier; a repairer who performs the carrier's duty to exercise due diligence to make and maintain the cargo holds in which the cargo is to be carried.⁴⁵⁸

The confusion regarding the definitions of port and the different positions of maritime or non-maritime performing party has also influenced the approval of various categories of third parties. Without aiming to provide an exhaustive list, it is helpful here to provide examples in the form of inland carriers, port terminals and freight forwarders.

3.9.1 The position of inland carriers

The position of the inland carrier⁴⁵⁹ is one of the most controversial. The proposal of the United States regarding the definition of 'maritime performing party' during the Working Group helps to better understand the position. The proposal states that:

*It has been suggested that the definition of 'maritime performing party' (draft article 1 (7) of the draft convention) should be edited to clarify that a rail carrier, even if it performs services that might be considered the carrier's responsibilities after the arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge, should be considered a non-maritime performing party.*⁴⁶⁰

⁴⁵⁷ Smeele (n 143).

⁴⁵⁸ Ibid.

⁴⁵⁹ During the preparatory work the term 'inland performing party' was also proposed as alternative for the word inland carrier. United Nations Commission on International Trade Law Thirty-seventh session (New York, 14 June-2 July 2004) A/CN.9/544.

⁴⁶⁰ United Nations Commission on International Trade Law, 'Transport Law: Preparation of a draft convention on the carriage of goods (wholly or partly) (by sea): Proposal of the United States of America on the definition of "maritime performing party"' (Nineteenth session New York, 16-27 April 2007).

From this suggestion some understanding can be drawn. Countries with a strong tradition of carriage of goods by rail – the United States, for instance – do not want a rail carrier to fall into the category of maritime performing party even if performing carrier’s responsibilities.⁴⁶¹ In the final version, this suggestion is slightly different: “An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area”.⁴⁶² Conceptually, it is very difficult not to include an inland carrier in the definition of “performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship”. In a door-to-door contract, an inland carrier can go beyond the line of a port and, if goods are damaged, the fact that they have exceeded a line makes the difference in terms of protection that they can rely on. This test is purely geographical and not commercial.

As previously stated, it is currently a very complicated matter to establish what does and what does not constitute a port area. Thanks to multimodal carriage, logistics, and new needs within the industry, the meaning of the term ‘port’ is in flux. In a few years, today’s inland carrier could be a maritime performing party as a result of the geographic expansion of ports.⁴⁶³

Moreover, amid such confusion, the inland carrier might prefer to keep its position as a non-maritime performing party and keep the protection that the CMR allows.

As Clarke has stated, “CMR, it has been said, works well enough ... There is little evidence that road carriers, their customers or trade organizations that represent them today want change”.⁴⁶⁴

Conversely – and without engaging in debates about a single category of third party protection that lie beyond the scope of this research – many inland carriers, if sued directly in tort, are likely to benefit from an international convention governing transport, such as the CMR. There are countries, however, to which no international convention applies, and in which national law may not provide protection against a claim in tort to an inland carrier. Therefore, third parties might need contractual protection – i.e. the Himalaya clause – that

⁴⁶¹ It is also interesting to know that the United States signed the Rotterdam Rules on the first day, indicating their support (no ratification has been made though).

⁴⁶² Art 1(7) Rotterdam Rules.

⁴⁶³ See Holman Fenwick Willan, ‘What Impact Will the Rotterdam Rules Have on Shipowners?’ July 2010. This article first appeared in the July 2010 issue of *Britannia News Conventions Supplement* and is reproduced with their kind permission, <www.britannia.co.uk>.

⁴⁶⁴ Bevan Marten, ‘Multimodal Transport Reform and the European Union: A Treaty Change Approach’ (2011–2012) 36 *Tulane Maritime Law Journal* 741.

avoids significant liability for a rail carrier, as in *Kirby*.⁴⁶⁵ Thus, in this instance, any attempts to replace the Himalaya clause with what has been called ‘Himalaya Protection’ under the Rotterdam Rules will surely fail.

The decision to exclude the inland carrier from the Rotterdam Rules appears to have emerged from the Working Group. According to their report, it was proposed that rail carriers should be excluded from the definition of ‘maritime performing party’ even when performing services within a port. In support of this, certain quarters suggested that such an exemption was warranted given the practical reality; though rail carriers might appear similar to other inland carriers – in that they collect cargo or deliver it for carriage within a port area – rail carriers differ dramatically from other inland carriers. Ultimately, their services exist almost solely for the purpose of moving goods great distances into or out of a port, not simply moving goods from one place to another within a port.⁴⁶⁶

This explains the intention of excluding only the rail carrier and it is seen as fundamentally wrong because it excludes a category of third party solely because they overrun the port boundaries.

3.9.2 The position of terminal operators

Another controversial category is that of the terminal operator. A terminal operator falls within the definition of a ‘maritime performing party’ and is thus jointly and severally liable with the carrier under the Rules for loss or damage insofar as the occurrence causing such loss or damage meets the requirements of Article 19(1)(b). Terminal operators have no liability under the Hague, Hague-Visby and Hamburg Rules (a terminal operator is not an ‘actual carrier’) and they have expressed concern at being brought within the scope of a mandatory regime.⁴⁶⁷

The Rotterdam Rules have substantial impact on terminal operators; their risk profile will change as a result of them being liable under the new convention. Port terminal operators are likely to be approached more frequently with insurance claims from shippers and cargo interests under the yet-to-be-ratified Rotterdam Rules cargo liability convention.

⁴⁶⁵ Peter Jones, ‘The Utility of Himalaya clauses under the Rotterdam Rules’ (*Paterson MacDougall LLP*, 2009) <http://www.forwarderlaw.com/library/view.php?article_id=587> Accessed 15 August 2015.

⁴⁶⁶ United Nations Commission on International Trade Law (n 389).

⁴⁶⁷ The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991 is not yet in force.

It has been reported that, for global terminal operators who do not have a contractual relationship with cargo interests, the implementation of the Rules would result in a substantially different claim scenario: “That funnel will disappear. Instead of the carriers being the front line of claims, it will be the terminal operators themselves”.⁴⁶⁸

Holman Fenwick and Willan reports that, a legal counsel for Hutchison Ports UK, characterised the current legal position – in which cargo interests have no direct contract with port operators – as “a situation we very much like”, adding that there were very few claims coming directly from cargo interests.⁴⁶⁹ Following the Rotterdam Rules, terminal operators nevertheless become a ‘maritime performing party’, having joint and several liability.⁴⁷⁰ “It means that the cargo interests can cherry-pick who they want to bring their claim against,” states the legal counsel: “Our view is that they will like to bring their claim against Hutchison, a major terminal operator. Our ability to limit our liability is fettered”.⁴⁷¹

Equally concerning is the fact that cargo interests bringing a claim have no contractual relationship with the port terminal operator. As a result, they have little or no interest in settling the cases quickly for the sake of preserving a commercial relationship.⁴⁷² Should the Rotterdam Rules be enforced, the terminal operators will be for the first time subject to a mandatory convention.⁴⁷³

Finally, as Chuah reports, in contrast to the Himalaya clause, Articles 4 and 19 do not provide for an indemnity but merely the extension of the carrier’s defences and limitations of liability rights to the maritime performing party. Therefore, port terminal operators (as well as all the other third parties) may therefore still ask for an indemnity through a protection clause in the contract.⁴⁷⁴ Given all of the above, it is easy enough to see why terminal operators have shown little support for the Rules.

3.9.3 The position of freight forwarders

⁴⁶⁸ The National Association of Marine Surveyors, Inc. ‘President’s Message’ (*NAMSGlobal*, 2010) <<http://www.namsglobal.org/assets/92/20100127webnews.htm>> Accessed 15 December 2014.

⁴⁶⁹ Holman Fenwick Willan, ‘Terminal Operators Face Claims ‘Front Line’ in Rotterdam Rules’ February 2010. This article first appeared in the February 2010 issue of the *Lloyd’s List* and is reproduced with their kind permission <www.lloydslist.com>.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ Chuah (n 29).

As stated in Chapter 2, freight forwarders are frequently engaged in various capacities in seaports. They will rely, therefore, according to their specific activity, on the protection afforded to them as a maritime performing party.

In answer to this question (i.e. whether freight forwarders fall within the definition of ‘maritime performing party’) the CMI stated that the Rotterdam Rules apply to some of these and not to others:

- *If, for instance, freight forwarder undertakes to carry the goods to its customer, it is a carrier under the Rotterdam Rules.*
- *If a freight forwarder enters into a contract with a sub-carrier in its own name, it is a shipper under the Rotterdam Rules.*
- *If a freight forwarder enters into a contract with a carrier on behalf of a customer (as an agent), it is not the carrier or the shipper under the Rotterdam Rules and is not liable as such.*
- *When freight forwarder provides services as a stevedore, for instance. As regards the contractual relationship between the freight forwarders (acting as stevedores) and the carrier, the contractual relationship is not affected by the Rotterdam Rules because they do not apply to the contract between the carrier and the maritime performing party, unless that contract satisfies the definition of ‘contract of carriage’ (article 1(1)) (this is apparently not the case here).*
- *As regards the forwarder’s relationship with the shipper or consignee, the Rotterdam Rules make the carrier and the maritime performing party jointly liable towards the shipper and consignee.*⁴⁷⁵

The CMI continues saying that the fact that the freight forwarder, acting as a maritime performing party, is subject to the Rotterdam Rules would probably constitute an advantage rather than a disadvantage, because it guarantees that the freight forwarders enjoy defences including the short time-bar and the right of limitation of its liability. At present, in cases where it may be sued in tort, it would be liable without limitation irrespective of the contractual terms.⁴⁷⁶

The view from FIATA is somewhat different. FIATA has stated that freight forwarders “are adversely affected by the liability regime applicable to maritime performing

⁴⁷⁵ The CMI International Working Group (n 399).

⁴⁷⁶ *Ibid.*

parties”. More precisely, three specific complaints are made: a) those freight forwarders acting as warehousemen and stevedores – and who are entitled to freedom of contract while under the Rotterdam Rules – will then be considered performing parties and thus be subject to the liability regime of carriers; b) in those countries where warehouse and stevedore interests are state-owned or state-controlled, steps towards ratification are likely to be met with resistance; and c) multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection. FIATA concludes its report by stating that any entering into force of the Rotterdam Rules would greatly increase the administrative burden of freight forwarders.⁴⁷⁷

In support of this, the Freight Forwarders association CLECAT has provided a strong view on the Rotterdam Rules, as explained in the following report:

*While neutral towards all transport modes, our Members are amongst the main users of maritime transport (or shipping) services, they would thus be directly affected by the possible entry into force of the above mentioned international conventions, which we will refer to as ‘Rotterdam Rules’ (RR) hereinafter.*⁴⁷⁸

CLECAT states that the Rotterdam Rules will not provide any benefit for their members, arguing that the situation would be too complex and that the insurance and protection under this regime would become more expensive. They therefore suggest that nations and EU institutions – especially those where stevedores and warehousing enterprises are owned by the governments – do not ratify the Rotterdam Rules.⁴⁷⁹ They will be exposed in their place in respect of tort claims, and consideration should be given to this fact. In nature these claims are unlimited and they are likely to be devoid of the background that the Convention offers in relation to the contractual carrier and potentially other maritime entities party to the occurrence and ensuing claims.

The limitations of the Rotterdam Rules are relatively low. However, due to the package limitation – which is usually relevant for multimodal carriage of containers – the limitation figures for the Rules are often higher. The Rotterdam Rules, by contrast with the CMR, are more convenient for the cargo claimant, but only if the package weighs less than 109

⁴⁷⁷ FIATA (n 41).

⁴⁷⁸ CLECAT (n 387)

⁴⁷⁹ Ibid.

kilograms. Furthermore, any shipper may be able to multiply the ‘per package’ factor simply by adding the content of the container into the transport document.⁴⁸⁰

Until category associations such as CLECAT and FIATA are persuaded of their advantages, the Rotterdam Rules will face a strong opposition in terms of approval from freight forwarders.

Summary of Part B

In the Rotterdam Rules, the carrier is responsible for different third parties. However, while the carrier is responsible for a substantial chain of third parties, not all of them receive the same protection.

The Rotterdam Rules have provisions similar to those of the Hague-Visby Rules and the Hamburg Rules in respect of the servants and agents of the carrier. However, with the adoption of the notion of maritime performing party they have widened the category of persons to whom they apply and clearly provide that all such persons are also subject to the obligations and liabilities of the carrier. The action against them is, therefore, clearly in contract. This provision shows one of the most controversial aspects of the Rotterdam Rules; the fact that only the maritime performing parties have the same obligation as the carrier. Therefore, some categories of party involved in the carriage of goods by sea might hope that the Rotterdam Rules will not be ratified, because they wish to avoid this liability. This supports a crucial premise of this chapter; the Rotterdam Rules, in one way or another do not approach third party protection in an adequate way.⁴⁸¹

Chapter conclusion

The international conventions on the carriage of goods by sea regulate the particular contract that incorporates them. They are themselves a contract, in essence, with the difference that while in a contract, autonomy lies between the parties, in this case the freedom to negotiate has moved to a macro level, i.e., the international community, with all the restriction that the international community has and with all the parties that have an interest in it. It was therefore

⁴⁸⁰ FIATA (n 41).

⁴⁸¹ Not only third parties categories are completely different nowadays. Furthermore also their protection is given with different reasons. For example the employees of the carrier receive protection according to their status while the performing parties for their area of work. Therefore the rationale of the protection has been different between performing parties on the one hand and employees of carrier on the other.

essential for this research, which demonstrates that carriage has moved to a multilateral system and as a result the rationale to protect third parties has to change, to show also that this change has been appreciated by the international community.

From the perspective of international conventions, the support for the new role of third parties in the supply chain is not adequate. The Hague Rules and Hamburg Rules – both currently in force – are conventions highly focused on shipping and, as such, do not offer broad protection. Furthermore, the geographic approach proposed by the Rotterdam Rules does not do justice to the concept of the multilateral common enterprise. Thus, the current situation, with all its different regimes and analyses, is riddled with confusion.

This chapter started with the assumption that, at beginning of the nineteenth century – when for the first time the transport industry felt the need to allocate loss and protect parties involved in the carriage of goods by sea – there were only two parties involved and all the efforts were focused on them.

This is the rationale behind the Harter Act and the Hague Rules, and the reason why little reference is made in either to third parties. When the Harter Act and Hague Rules were written there was no representative of third parties at the table of the negotiations. In the intervening years, the industry and the world more broadly, have changed dramatically.

Third parties who, at the beginning of the period considered, were carrier or shipper's protected, are becoming bigger and more powerful; their role is no longer marginal. During the *travaux préparatoires* of the Rotterdam Rules, the participants included different third party associations on the one side but also international intergovernmental organizations on the other.

For some, the Hamburg Rules function satisfactorily. According to Tetley Article 4 solves the problem of the Himalaya clause by extending the responsibility of the carrier from port-to-port, while Article 10 holds the carrier responsible for the acts of the actual carrier, who, by the definition in Article 1(2), would include the stevedore and the terminal agent.⁴⁸²

The Rotterdam Rules do not assess the trade in a proper way because they still look at it only from the maritime/geographic perspective and not from the maritime/commercial perspective.

Some corners of the academic community believe that the Rotterdam Rules do not represent a retrograde move, primarily because they were never intended to replace the United Nations Convention on International Multimodal Transport of Goods, nor the UNCTAD/ICC Rules for Multimodal Transport Documents. Instead, they were created to replace the Hague

⁴⁸² Tetley (n 26).

and Hague-Visby or the Hamburg Rules. Thus, they feel it is inappropriate to view the Rotterdam Rules as an ‘imperfect’ multimodal transport law convention.⁴⁸³

Although international conventions can make new provisions on third parties, nothing prevents the industry from adding provision contractually. As it has been shown already, in some cases, parties (under the Rotterdam Rules) can agree on a Himalaya clause for the benefit of non-maritime performing parties or other persons who are not covered by article 4(1).⁴⁸⁴

Adding a contractual provision is also significant because the Rotterdam Rules imposes responsibility and protection only to the narrow category of maritime performing parties and not all the performing parties. The reasoning behind this is that the convention does not seek to interfere with the other conventions in case of multimodal transport.⁴⁸⁵ Although this approach is highly respectable, it seems to exclude certain categories of third parties (for example the inland carrier) who can be sued in tort by the shipper, and thus it can create confusion.

The difference between the bilateral approach of the Hague, Hague-Visby, Hamburg Rules and Rotterdam Rules lies in the rationale for extending carrier protection to third parties. In the bilateral approach, the rationale was to avoid cargo owners circumventing the bill of lading and to protect the carrier because the third parties were related to him. In the Rotterdam Rules, the primary motivation is protection of the performing parties. Thus, the idea of protection is changing. The Rotterdam Rules reflect the fact that shipping has become a network and many parties are now involved.

As a solution, however, the Rotterdam Rules pose too much of a compromise, and room for improvement certainly exists.⁴⁸⁶ In this respect, the exchange between CLECAT and CMI is particularly pertinent. CLECAT argues that the Rotterdam Rules are not appropriate for the evolution of modern logistics. In fact, CLECAT states that the evolution of modern logistics “would have been better served by a convention that focused on the intermodal nature of containerisation”.⁴⁸⁷ The CMI answered by saying that this has been precisely what the

⁴⁸³ Manuel Alba, Francesco Berlingieri, Philippe Delebecque, Tomotaka Fujita, Hannu Honka, Rafael Illescas, Anders Moellmann, Michael Sturley And Alexander Von Ziegler ‘Montevideo Declaration The Facts’ (2010) <<https://asadip.files.wordpress.com/2010/10/rr-answer-to-montevideo-declaration-eng.pdf>> 1 January 2013.

⁴⁸⁴ The CMI International Working Group (n 398).

⁴⁸⁵ Ibid.

⁴⁸⁶ United Nations Commission on International Trade Law, ‘Report of the Working Group on Transport Law on the work of its ninth session (New York, 15–26 April 2002) A/CN.9/510. “The current definition of performing party was a compromise as shown by below: “Some favoured including any party that performs any of the carrier’s responsibilities under a contract of carriage if that party is working, directly or indirectly, for the carrier. Others advocated excluding the “performing party” definition entirely. The relatively restrictive definition in the current text was presented as a compromise (for further comments about the definition of the performing carrier (‘performing party’) see paras 14 to 21.

⁴⁸⁷ CLECAT (n 387).

Rotterdam Rules have done, by providing door-to-door application if the parties choose so to do.⁴⁸⁸ This thesis argues and has demonstrated that this is not the case in terms of third party protection; the Rules do not do justice to modern logistics nor therefore to the multilateral common enterprise.

The International Multimodal Transport Association (IMMTA) holds a similar view. The IMMTA believes that existing transport liability regimes are not adequate, fragmented, and expensive, and also that a more efficient system is needed. The IMMTA calls for a new, comprehensive approach to cover all modes of transport in a uniform manner.⁴⁸⁹

The same association recognises, however, that this proposal could be too forward-thinking for the transportation industry. They propose, therefore, as an alternative, working towards achieving coherence at least in the movement of goods from door-to-door, regardless of the individual modes being used. This should not, however, simply be a maritime convention extended beyond the port, but rather a truly multimodal instrument.⁴⁹⁰

The IMMTA also offers guidance on how to go about developing a globally satisfactory regime. It believes that such a regime cannot be achieved without involvement from representatives from all interested modes and users participating in the work.⁴⁹¹

The UNECE Secretariat believes that, if and when a clear mandate is acquired on the elaboration of a multimodal convention, it is right – given the process towards a global logistic chain – that the new regime should apply to all possible combinations of transport; it must not be restricted to the presence of a maritime leg. It is also crucial that representatives from all modes involved in multimodal transport – as well as from shippers and from other interested parties – be consulted and participate in the drafting process.⁴⁹²

As far as the analysis of the difference between maritime and non-maritime performing parties is concerned, Berlingieri believes there is a marginal doubt as to whether the maritime performing party is an innovation with respect to the Hamburg Rules.⁴⁹³ This thesis argues that this could be considered more an extension than a proper conceptual improvement.

⁴⁸⁸ CMI, 'The Rotterdam Rules: An Attempt to Clarify Certain Concerns that have Emerged' (2009) <<http://comitemaritime.org/Uploads/Rotterdam%20Rules/5RRULES.pdf>> Accessed 13 December 2013.

⁴⁸⁹ United Nations Commission on International Trade Law, 'Preparation of a draft instrument on the carriage of goods (by sea) Addendum to compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organisations on the scope of the draft instrument (Working Group III (Transport Law) 12th session Vienna, 6 – 17 October 2003) A/CN.9/WG.III/WP.28/Add.1.

⁴⁹⁰ *Ibid.* The association states that in a contrary case, it would surely fail.

⁴⁹¹ *Ibid.*

⁴⁹² United Nations Commission on International Trade Law, 'Transport Law Preliminary Draft Instrument on the Carriage of Goods by Sea (Working Group III (Transport Law) Ninth session New York, 15–26 April 2002 A/CN.9/WG.III/WP.21/Add.1).

⁴⁹³ Berlingieri (n 20).

Debattista has said that the Rotterdam Rules are not perfect, but nevertheless better than the alternatives against which they are updated.⁴⁹⁴ Although this might be correct, it is not sufficient argument for the international maritime community to rest on its laurels in the future. The Rotterdam Rules are surely the best effort that can be made in a ‘maritime plus’ scenario. However, trade requires a more modern and pragmatic solution and in this sense – as will be explained in the next chapter – the commercial approach proposed by *Kirby* is superior.

The Shippers Association has also argued that the Rotterdam Rules is not the only option for the future.⁴⁹⁵ The author agrees and believes that either a ‘single convention’ including the multilateral common enterprise concept will be created, or continuing to favor the contract, in order to best protect third parties, will come to be the most pragmatic solution.

As Sturley states, the Rotterdam Rules are deliberately evolutionary and not revolutionary.⁴⁹⁶ It is not unreasonable to argue, however, that the shipping industry in recent times has undergone a revolution; therefore a revolutionary convention would be more appropriate than an evolutionary convention.

This chapter provides evidence to support the central argument of this thesis; that the concept of multilateral common enterprise is a key consideration in developing an approach to deal with third party protection in the carriage of goods by sea. It demonstrates that the current international regulatory framework provides inadequate protection for third parties in the carriage of goods by sea. Although the Rotterdam Rules acknowledge this and consider the integrated role of third parties in the industry, it cannot be denied that the geographic approach of the Rotterdam Rules does not allow the problem to be tackled from the correct perspective. By way of evidence in support of this argument, some categories of third parties do not even seek the protection from the rules. This research aims to set a default position for the carriage of goods by sea and does not consider all the variables provided by other forms of protection that third parties can implement for themselves.

The chapter shows that, as a result of an increase in the scope of work and the responsibilities of the carrier, parties other than the carrier (especially auxiliaries who are not employed by the carrier) now have a major role to play. Furthermore, the shape of the carrier’s

⁴⁹⁴ Charles Debattista, ‘UNCITRAL Colloquium on Rotterdam Rules: The Goods Carried – Who gets them and who controls them?’ (*Stone Chambers*, 2009) <<http://www.rotterdamrules2009.com/cms/uploads/Def%20%20tekst%20Charles%20Debattista%2031%20Okt29.pdf>> Accessed 18 September 2013.

⁴⁹⁵ European Shippers’ Council, ‘View of the European Shippers’ Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the ‘Rotterdam Rules’ (2009) <https://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.pdf> Accessed 18 May 2013.

⁴⁹⁶ Michael F Sturley, ‘Modernising and Reforming United States Maritime Law: The Impact of the Rotterdam Rules in the United States’ (2008–2009) 44 *Texas International Law Journal* 427.

area of operation, in contrast with the areas of other third parties, have become blurred, proving that carriage is now a multilateral common enterprise.

As a consequence, carriers now need to protect external third parties. Evidence of evolution in international regulation lies in the fact that the seminal Harter Act does not address any third parties, but the subsequent Rotterdam Rules acknowledge that the project is now performed by a conglomerate of parties. This shows a steady movement in international conventions from the bilateral structure of carrier and shipper to a multilateral network of parties. Despite these advances, the Rotterdam Rules inappropriately define limitations along geographical lines.

The main concern is that international conventions recognise the evolution and the integration of shipping with the chain but focus only on a partial aspect, i.e., the multimodalism of transport and the geographical aspect instead than commercial.

The Rotterdam Rules are essentially a door-to-door regime (if there is a sea leg) and, as such, they are found lacking. This thesis does not say that this is because of third party protection but it does maintain that in regards of third party protection they fail.

CHAPTER 4

Third party protection in the carriage of goods by sea under the legal traditions of England and the United States

The difficulties created in international trade by the doctrines of privity of contract and consideration had to be overcome. Those doctrines obstructed the process of giving effect to the reasonable expectations of parties.⁴⁹⁷

⁴⁹⁷ Homburg Houtimport BV -v- Agrosin Private Ltd (the 'Starsin') 2003 UKHL 12.

4.1 Chapter Background

A primary argument of this thesis is that the carriage of goods by sea has recently become an unequivocally multilateral common enterprise. However, only the main party (the carrier) has a contract with the cargo owners.⁴⁹⁸ All the other third parties participating in the project are exposed to full liability in tort. This is especially because the cargo owner has an interest in suing the third party instead of the carrier, knowing that he can rely on limitation under international conventions. Should this occur, the third parties would seek to show that they are privy to the contract of carriage and can rely on the carrier's limitation. This chapter demonstrates the evolution of the protection under domestic systems – in particular those of the England and United States – and how the carriage of goods by sea has influenced such evolution. The aim is to demonstrate that, considering the multilateral and common nature of the enterprise, the major legal regimes regulating the shipping sector do not deal with protection of third parties in a suitable manner.

This study focuses on countries that have a specific impact on international carriage of goods by sea law. As it happens, the practice of international contract on the carriage of goods by sea mainly follows English and United States law. A majority of contracts of the carriage of goods by sea have jurisdiction clauses under English law and United States law. BIMCO, a major international association in shipping, draws up its contracts with arbitration clauses from English and United States law.⁴⁹⁹ Therefore, an analysis of how these two countries deal with the topic is vital to this research.

A third party is generally outside the contract and thus any issues that arise are often addressed by local jurisdictions (usually the jurisdiction of the port where the damage took place). In turn, this requires consideration of the acceptance of protection clauses and their evolution. Consequently, this chapter will discuss exculpatory clauses under English and United States laws and how these countries' courts have changed their views whilst considering national law and statutory law.

England attempted to address the issue with the Contract (Right of Third Parties) Act 1999. This chapter analyses the process that led to the enactment of this legislation.

⁴⁹⁸ Being the consignee, seller/shipper or the buyer/endorsee of the bill of lading.

⁴⁹⁹ Singapore has also been introduced as arbitration center. Singapore has a legal system substantially similar to the English law.

Regarding case law, this thesis provides a statistic table that shows cases concerning third party protection in United States law. In particular, the table shows the case, the year, the decision, the protection been asked, the legal devise that has been used (e.g. Himalaya clause or Bailment law) and if any reference has been made or not to the multilateral common enterprise.

This chapter is therefore divided in two parts. The first is dedicated to English Law and the second to United States Law.

CHAPTER 4 PART A

Third party protection under English law

As one of the leading English cases has expressed and many others commentators already corroborated: “Denying validity to the clause would be to encourage action against servants, agents, and independent contractors in order to get round exemptions”.⁵⁰⁰ As cargo owners can also sue parties other than contracting parties in tort.⁵⁰¹ Third party protection has, however, been a contentious issue in English law in general as well as in maritime law.

The majority of shipping contracts are governed by English Law. Under this, a person that has not entered into a contract cannot benefit from it.⁵⁰² As reported by Spurin (referring to *White v Jones*⁵⁰³ and *Henderson v Merrett Syndicates*⁵⁰⁴): “The mere fact that a contractual relationship exists does not prevent a litigant suing in either contract or in tort and selecting the course of action which provides the best procedural advantages or the most appropriate remedies”. At the same time, however, Spurin suggests that “the terms of a contract can exclude a tortious duty of care, preventing such an action. This is most likely to happen where a contract contains exclusion clauses and limitation clauses”.⁵⁰⁵

English law has for a long time been reluctant to accept that parties outside the contract (i.e., third parties) can receive protection from it.⁵⁰⁶ However, in the shipping world there is the need to extend this protection. Therefore, for many years the industry has used different ‘tools’⁵⁰⁷ to allow this protection.⁵⁰⁸

This part of the chapter frames the problem of privity and consideration in relation to the difficulties of accepting third party protection, and explores how English law has addressed the situation to date.

⁵⁰⁰ *The Eurymedon* (n 338); Jill Poole, *Contract Law* (12th ed Oxford University Press 2014); Merkin (n 30).

⁵⁰¹ Tort is not based on the existence of contractual rights and relationships; rather it is based on the existence of a duty owed by one party to another.

⁵⁰² This is related to the concepts of privity and consideration.

⁵⁰³ *White v Jones* (1995) UKHL 5.

⁵⁰⁴ *Henderson v Merrett Syndicates* (1994) 3 All ER 506.

⁵⁰⁵ Corbett Spurin, ‘The Liability of Carriers to Cargo Owners’ (Ch 5, The Nationwide Academy for Dispute Resolution (UK) Ltd. 2004) <[http://www.nadr.co.uk/articles/published/shipping/005CHAPTERFIVE TRADE4.pdf](http://www.nadr.co.uk/articles/published/shipping/005CHAPTERFIVETRADE4.pdf)> Accessed 27 March 2014.

⁵⁰⁶ English Courts have been less inclined than the United States Court to extend protection to parties outside the contract. As it will be further detailed, however, not always.

⁵⁰⁷ Such as protection clauses.

⁵⁰⁸ The mechanism is explained in the foundation of the thesis. However for easy reference it is here reported, as detailed by Macmillan, “A and B contract and A excludes or limits the liability that would otherwise arise on the part of B. A extends the benefit of this exclusion or limitation term to C, who is usually the agent, employee or sub-contractor of B. Should A sue C, C can avail himself of the exclusion or limitation of liability clause found in the A-B contract where this clause covers the liability in question”, Catharine MacMillan, ‘A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999’ (2000) 63 *The Modern Law Review* 5, 721–738, 726.

4.2 Third party protection and the obstacle of privity and consideration

The extension of protection from the two parties of a contract to a third party has been an endless and evolutionary work in progress, especially in the carriage of goods by sea.

The main conceptual problem is finding the justification for the protection.⁵⁰⁹ The problem is – especially for common law and even more so English Law – dealing with the old principles of privity and consideration. As a matter of reference, privity is an obstacle because according to privity, “an agreement is only enforceable as between the parties to the agreement. Third parties to an agreement cannot legally enforce benefits accruing to them from the agreement, nor can they have burdens thrust upon them by others”.⁵¹⁰ More specifically, “an agreement must be supported by consideration, so that both parties provide or promise to provide something valuable in money or services, benefit or detriment in exchange for the like consideration of the other party”.⁵¹¹

What has been defined as the ‘third party rule’ in the English system was established in 1861 in the case of *Tweddle v Atkinson*.⁵¹² In *Drive Yourself Hire Co. (London) Ltd v Strutt*,⁵¹³ Lord Denning commented:

*It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed, it said quite the contrary. For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract.*⁵¹⁴

⁵⁰⁹ It is argued that the lack of rationale, although being a conceptual problem, has also affected the shipping industry in practice.

⁵¹⁰ On the topic of privity the leading case is *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (n 136).

⁵¹¹ On the topic of consideration leading cases are *Thomas v Thomas* [1842] 2 QB 851, and *Tweddle v Atkinson* [1861] EWHC QB J57.

⁵¹² *Tweddle v Atkinson* (n 511).

⁵¹³ *Drive Yourself Hire Co. (London) Ltd. V Strutt* (1954) 1 QB 250.

⁵¹⁴ *Ibid.* 272.

The thrust of Lord Denning's comment is that third parties to a contract do not derive any right from that agreement. *Dunlop Pneumatic*⁵¹⁵ is a leading case in determining the contemporary meaning of the concepts of privity and consideration. In it, Lord Haldane states:

*My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.*⁵¹⁶

Consideration is an old and well-established concept in English Law.⁵¹⁷ Lord Denning famously described the doctrine of consideration as “too firmly fixed to be overthrown by a side-wind”.⁵¹⁸ The following statement is also of relevance here:

*A person wishing to enforce an agreement must show that they have brought something to the bargain which has ‘something of value in the eyes of the law’, either by conferring a benefit on another person or incurring a detriment at their request.*⁵¹⁹

Lord Somervell, in the case *Chappel & Co*, stated that:

*Even though the bargain is selling a house for as little as a peppercorn and the seller ‘does not like pepper and will throw away the corn’.*⁵²⁰

⁵¹⁵ *Dunlop* (n 136) 853.

⁵¹⁶ *Ibid.*

⁵¹⁷ In *Dunlop Pneumatic* Lord Dunedin questioning consideration said that is: “possible for a person to snap his fingers at a bargain deliberately made...not in itself unfair and which the person seeking to enforce it has a legitimate interest to enforce”, *Dunlop* (n 136) 853.

⁵¹⁸ *Central London Property Trust Ltd. v High Trees House Ltd.* (1947) KB 130.

⁵¹⁹ See *Thomas v Thomas* (n 511) and *Currie v Misa* (1875) LR 10 Ex 153 (Lush LJ) 162: “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”.

⁵²⁰ *Chappell & Co. Ltd v Nestle Co. Ltd* (1960) AC 87 (Lord Somervell).

What is brought to the bargain can be anything of value, that the parties of the agreement consider adequate for the contract to be valid. If only one party offers consideration, the agreement is not legally a binding contract. Consideration in its fundamental form, expresses the concept of *quid pro quo*. Only one who gives something to the contract can enforce a promise and therefore only a person who has provided consideration can enforce a contract. It is said that, in order to be enforceable, a contract must be ‘met with’ or ‘supported by’ consideration.

Although undeniably important, Hallebeek reports that “the rule of consideration has not been a significant restriction given the willingness of courts to recognise nominal consideration as sufficient and to infer the existence of consideration on relatively flimsy evidence”.⁵²¹ Hallebeek goes on to say that the real problem stems from the ‘parties only’ rule, where only parties to a contract have rights in it. As he explains, and as this thesis contends, the rule does not adequately sustain the realities of complex commercial transactions. Looking at the contract as a “single transaction between two individuals” does not work in an industry such as shipping, interaction are seldom binary, and usually involve a network of actors.⁵²² In bringing the two concepts of privity and consideration, the former restricts who can enforce an agreement to those have brought the latter to the bargain.

Consideration for a promise can be the performance of a contractual duty owed to someone other than the promisor.⁵²³ Contextualising it in the carriage of goods by sea, it can be argued that it has to be a duty of the carrier performed by the third party who would like to rely on the exclusion clause.

The relationship between employer and employee is an important aspect of the relation between privity and consideration. In most cases, even if the employer is the contractual party, the employee is usually the one performing most of the obligations arising under the contract.⁵²⁴ This was the case in the now famous example of the employees and the crew of the carrier in *Adler v Dixon: The S.S. Himalaya*.⁵²⁵ This type of situation has often involved indicating in the contract which categories of people could be accepted, a task usually achieved using a protection clause. According to Tetley, a protection clause can only affect the rights and responsibilities of the parties if its underlying contract is operative. In the case of

⁵²¹ Hallebeek and Dondorp (n 91) 116.

⁵²² Ibid.

⁵²³ See *Shadwell v Shadwell* (1860) EWHC CP J88, confirmed by *The Eurymedon* (n 338).

⁵²⁴ Robert E Forbes, ‘Practical Approaches to Privity of Contract Problems’ (2002) 37 *Canada Business Law Journal* 357.

⁵²⁵ *The Himalaya* (n 4). It should be noted that under UCTA 1977 and the Athens Convention 1974 it is not possible to exclude liability for death or personal injury under English Law.

Himalaya clause, the underlying contract only becomes active to protect the stevedore and terminal operator when the latter begins to perform obligations as referred in the contract of carriage.⁵²⁶

Since third parties in the carriage of goods by sea are not privy to the contract of carriage, they have typically encountered difficulties in benefiting from such exclusion clauses. This was the case in *Scruttons v Midland Silicones*.⁵²⁷

Privity and consideration have never sat comfortably in the commercial world. In *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board*, Lord Denning stated that a third party can enforce a promise made for his benefit “provided that he has a sufficient interest to enforce it”.⁵²⁸ The need for a promise to provide consideration in order to enforce a promise was firmly established by the beginning of the eighteenth century. Lord Mansfield, as outlined by Merkin, severely criticised it, arguing that the role of law should be that of facilitator rather than inhibitor of commercial practice.⁵²⁹

The history of the doctrine of privity of contract in twentieth-century English Law has been defined as “one of fluctuation between the doctrine and pragmatism”⁵³⁰ and has always been fought on different grounds. Under English law, and with the exception of clauses in contract as *a device* and international conventions, privity and consideration in the carriage of goods by sea has often been circumvented using the concept of bailment and the concept of agency – as a tool for accepting the protection clause – and also more recently the Contract (Right of Third Parties) Act 1999.

4.3 Bailment

Apart from the mechanism of protection clauses in contract, an alternative manner in which to afford protection to third parties is bailment law. Bailment occurs when there is a delivery or transfer of a chattel (or item of personal property) by one person (the bailor) to another (the bailee) with a specific mandate which requires the identical item to be delivered up to the bailor or to be dealt in a particular way by the bailee.⁵³¹ The concept of agency is

⁵²⁶ Tetley (n 85).

⁵²⁷ *Midland Silicones* (n 5).

⁵²⁸ (1949) 2 KB 500.

⁵²⁹ Merkin (n 30) at 9.

⁵³⁰ Merkin (n 30) at 10 The ruling of Devlin J in *Pyrene v Scindia Navigation Co. Ltd* (1954) 2 QB 402 also provides support for the condemnation of privity.

⁵³¹ L S Sealy and R J A Hooley, *Commercial Law: Text Cases and Materials* (4th ed. Butterworths 1999).

expressed in the next paragraph but for an immediate distinction, bailment is different from agency as:

- 1) *The bailee merely exercises, with leave of the bailor, certain powers over the bailed property but, unlike the agent, the bailee does not represent the bailor; and*
- 2) *the bailee cannot enter into contracts on the bailor's behalf, although he may have the power to do things which are reasonably incidental to his use of the goods which he holds (e.g. to have the property repaired) and thereby make the bailor liable to a third party.*⁵³²

With this immediate difference appropriately framed, the focus can shift to the concepts of bailment, bailment on terms and sub-bailment relevant to third party protection in the carriage of goods by sea. In particular, attention is given to the relationship between the cargo owner (bailor) the carrier of the vessel (the bailee) and the shipowner of the vessel under a charterparty (the sub-bailee), in receiving the goods under the terms of the bill of lading or any other third parties in the position of sub-bailee.

It is argued here that an analysis of bailment and bailment on terms are topics of paramount importance for the protection of third parties in the carriage of goods by sea under statutory law systems. This is due to the fact that, with protection clauses, the relationship that bailment creates has been applied to protect third parties (including but not limited to shipowners).⁵³³ Moreover, bailment has two things in common with the protection clauses: first, the same difficulty in dealing with the concepts of privity and consideration; second, the same commercial approach towards the law, i.e. meeting the expectation of the parties.

Sub-bailment on terms is explained by Lord Denning in *Morris v C. W. Martin & Sons Ltd.*⁵³⁴ However, it must be noted that this case does not relate to shipping. As Lord Denning explains, the principle of sub-bailment of terms is when A, the owner of the goods bails his goods to B, the bailee, who then sub-bails the goods to C, the sub-bailee, under a contract containing exemption clauses limiting or excluding C's liability. Thus in an action by A against C for the loss or damage to the goods, A will be bound by the exemption clauses contained in the contract between B and C even though A was not a party to that contract. Regarding *Morris v Martin*, Lord Denning said:

⁵³² Ibid.

⁵³³ A famous and current example is *The Mahkutai* (1996) AC 650, where the shipowners sought to rely on both the Himalaya clause and the principle of bailment on terms.

⁵³⁴ (1966) 1 QB 716.

*If the owner of the ship accepts goods for carriage on a bill of lading contained exemption condition...the owner of the goods is bound by those conditions if he impliedly consented to them as being in the known and contemplated form.*⁵³⁵

Although *Morris* was an ‘inland’ case of fur, Lord Denning creates through this example an important authority for the carriage of goods by sea. The doctrine of sub-bailment on terms as stated by Denning in *Morris v C. W. Martin & Sons Ltd.* has later been recognised by various subsequent authorities⁵³⁶ and academics.⁵³⁷

4.4 The Elder Dempster case

The case of *Elder Dempster* is the precursor to all contemporary cases revolving around the aforementioned issue. Before the advent of the Himalaya clause, the only remedy available for a third party – in the case of *Elder Dempster*, shipowners – was appealing on bailment on terms. An examination on bailment and the carriage of goods by sea cannot be completed without considering *Elder Dempster*. In this case, the shipowners tried to rely on a clause in a bill of lading to which they were not privy. Both the Court of Appeal and the House of Lords allowed the shipowner to rely on carrier limitation of liability. However, the reasons provided differed. In the Court of Appeal, Scrutton L.J. qualified the shipowner as agent of the charterer and therefore entitled to the same protection of the charterer against the cargo owner.⁵³⁸

The main issue reading the judgment in this case was whether the fault was due to unseaworthiness or bad stowage. Given the vast amount of literature regarding the concept of unseaworthiness, it is perhaps unsurprising that the decision became long and somewhat

⁵³⁵ Ibid.

⁵³⁶ *China Pacific S.A. v Food Corporation of India* (1982) AC 939, 957–958; *Compania Portoraffi Commerciale S.A. v Ultramar Panama Inc. (No. 2)* (1990) 2 Lloyd’s Rep 395; *Dresser U.K. Ltd. v Falcongate Freight Management Ltd.* (1992) QB 502; *Hispanica de Petroleos S.A. v Vencedora Oceanica Navegacion S.A. (No. 2)* (Note) (1987) 2 Lloyd’s Rep 321; *JohnsonMatthey & Co. Ltd. v Constantine Terminals Ltd.* (1976) 2 Lloyd’s Rep.215; *Singer Co. (U.K.) Ltd. v Tees and Hartlepool Port Authority* (1988) 2 Lloyd’s Rep. 164; and by the Privy Council in *Gilchrist Watt and Sanderson Pty. Ltd. v York Products Pty. Ltd.* (1970) 1 WLR 1262 and *Port Swettenham Authority v T W Wu and Co. (M) Sdn. Bhd.* (1979) AC 580.

⁵³⁷ Joseph Chitty, *Chitty on Contracts* (26th ed. vol 2 Sweet and Maxwell 1989) 115, para. 2653; Sir Guenter Treitel QC, *Treitel on Contract* (8th ed. Sweet and Maxwell 1991) 558–560; N Palmer, ‘Sub-Bailment on Terms’ (1989) Lloyd’s Maritime and Commercial Law Quarterly 466; A P Bell, *Modern Law of Personal Property in England and Ireland* (Butterworths 1988) and A P Bell, ‘Sub-Bailment on Terms’ in N E Palmer and E McKendrick (eds), *Interests in Goods* (Ch 6, LLP 1993) 178–180.

⁵³⁸ *Elder Dempster* (n 3).

controversial. Of particular interest for this research, however, is the issue which the Lords addressed last; “a further question” as defined by Viscount Cave⁵³⁹ or even more explicitly by Lord Sumner,⁵⁴⁰ “a final argument”.

Lord Sumner led the speech, agreeing that the shipowners had received the goods as bailees on the terms of the bill of lading.⁵⁴¹ Both judges of the Court of Appeal and the House of Lords shared the view that the reason for protecting the shipowner is to give justice to the commercial expectation of the bill of lading:

*Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading expectations, though he had contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.*⁵⁴²

In the opinion of Viscount Finlay, “it would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading...by suing the owner of the ship in tort”.⁵⁴³

In *Elder Dempster*, the House of Lords held that the damage was to be attributed to bad stowage and as a result, the time charterers were protected by the bill of lading exception.⁵⁴⁴ However, the cargo owners had also sued the shipowners in tort. Consequently, the question arose as to whether the shipowners were also protected by the exception contained in the bill of lading, to which they were not parties. Essentially, the case illustrates the following concept:

If a cargo owner (bailor) places the goods on a chartered vessel under a bill of lading issued by a carrier (bailee), the shipowner of the vessel receives the goods under the terms of the bill of lading (sub-bailee). If the cargo owner sues the shipowner for a breach of duty in tort or bailment, the shipowner can rely on the exemptions set out in the bill of lading. Therefore,

⁵³⁹ Ibid. 533.

⁵⁴⁰ Ibid. 564.

⁵⁴¹ Ibid. As stated by Lord Sumner, “(i)t may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the expectations and limitations of liability stipulated in the known and contemplated for of bill of lading” 564–565.

⁵⁴² Ibid 441, 442 (Scrutton L.J.).

⁵⁴³ Ibid. 548.

⁵⁴⁴ On this point differing from a majority of the Court of Appeal.

as stated in *Elder Dempster*, the reception of goods by the shipowner under the terms of the contract between the cargo owner and the carrier may be referred to as “bailment on terms”.⁵⁴⁵

Although the decision in *Elder Dempster* seems to be commercially friendly and therefore attractive for the development of the concept, as anticipated it had to deal with strict concepts of common law such as privity and consideration.

The authority of *Elder Dempster* has rarely been followed and received much criticism. Fullagar J. for instance explains, in the Australian case of *Wilson v Darling Island Stevedoring & Lighterage Co.*:

*In my opinion, what the Elder Dempster case decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is necessary to consider any such question.*⁵⁴⁶

Fullagar J. seems to disagree entirely with the rationale in *Elder Dempster*, placing more importance upon the simple fact that he who damages pays, “a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence”.⁵⁴⁷

This concept was fully appreciated by Viscount Simonds in the concluding sentence of his speech in the *Midland Silicones* case⁵⁴⁸ and further detailed by Tetley more recently in his article, ‘The Himalaya clause revisited’.⁵⁴⁹ Conversely, however, the decision in *Elder Dempster* was appreciated by Bingham L.J., in *Dresser U.K. Ltd. v Falcongate Freight Management Ltd.* as “a pragmatic legal recognition of commercial reality”.⁵⁵⁰

The reason that the shipowner in *Elder Dempster* could be considered a sub-bailee lies in the concept of vicarious immunity. As also analysed in the previous chapter, the rationale behind *Elder Dempster* and, in particular, Scrutton L.J.’s doctrine of vicarious immunity, can

⁵⁴⁵ *Elder Dempster* (n 3).

⁵⁴⁶ (1956) 1 Lloyd’s Rep 346, 365 (Aust HCt).

⁵⁴⁷ *Ibid.* *Elder, Dempster* (n 3) has been also criticised by Carver, *Carriage by Sea* (13th ed Stevens & Sons Ltd 2005) paras 717–19; Thomas Edward Scrutton, *Scrutton on Charterparties and Bills of Lading* (19th ed Sweet & Maxwell 1984) 251, n 36, 458, n 47 and Paul Todd, *Modern Bills of Lading* (2nd ed Blackwell Law 1990) 99.

⁵⁴⁸ *Midland Silicones* (n 5); also in *The Mahkutai* (n 533).

⁵⁴⁹ Tetley (n 27).

⁵⁵⁰ (1992) QB 502, 511.

be found in the expression of the conventions on the carriage of goods by sea regarding the relationship between carrier and his servant, agents and sub-contractors.⁵⁵¹

In the Court of Appeal,⁵⁵² Scrutton L.J.⁵⁵³ rejected the claim against the shipowners on a suggested principle of vicarious immunity. This principle was relied on by the shipowners in argument before the House of Lords⁵⁵⁴ and was accepted⁵⁵⁵ by Viscount Cave,⁵⁵⁶ Viscount Finlay,⁵⁵⁷ and Lord Sumner.⁵⁵⁸

4.5 Agency Law

As previously discussed, in order to circumvent the problem of privity and consideration and in order to provide full justice to contractual clauses,⁵⁵⁹ parties in the carriage of goods by sea require tools such as agency. The concept of agency has been defined as an exception to the doctrine of privity, where an agent may contract on behalf of his principal with a third party and form a binding contract between the principal and third party.⁵⁶⁰ Agency allows one to move consideration from a third party (sub-contractor of one of the two parties of the contract) to a contractual party.

In law there are many definitions of agency. What is of immediate importance for this research is the concept of ‘representation’. As Fridman states:

*Agency is the relationship between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal’s legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.*⁵⁶¹

⁵⁵¹ For instance, Art 4bis of the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.

⁵⁵² (1923) 1 KB 420, 441–442.

⁵⁵³ Who alone considered the damage was to be attributed to bad stowage rather than unseaworthiness.

⁵⁵⁴ (1924) AC 522.

⁵⁵⁵ Ibid. 534.

⁵⁵⁶ With whom Lord Dunedin ibid 548, Lord Carson ibid. 565 agreed.

⁵⁵⁷ Ibid. 548.

⁵⁵⁸ Ibid. 564. “in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading”. (Lord Dunedin, 548 and Lord Carson, 565 agreed).

⁵⁵⁹ The fact is that contracts often provide for a benefit to be conferred upon a third party as a primary or secondary intention of the agreement. Such benefits can be financial or other, or an exclusion of liability and/or an indemnity in favour of a third party, such as a director, officer or employee of a contracting party.

⁵⁶⁰ *Midland Silicones* (n 5).

⁵⁶¹ Gerald Henry Louis Fridman, *The Law of Agency* (7th ed Butterworths 1996) 11.

It is pertinent to mention that, as reported by Bowstead and Reynolds, such assent can be expressly stated or implied:

*Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.*⁵⁶²

Summarising, agency is the relationship that exists between two persons, one of whom consents that the other should act on his behalf. In other words, agency enables one person to enter a contract on behalf of another.⁵⁶³

Fundamentals of agency law demonstrate lack of consistency with any doctrine of privity. The idea of a principal enforcing a contract between the agent and a third party made for the principal's benefit does not sit comfortably with the assertion that a contract between two parties cannot confer rights or liabilities on a third party, even if the third party is the intended beneficiary. It is particularly at odds with the rule that the agents may themselves incur liabilities and obtain rights under the contract with the third party if the agent has signed the contract in a manner that indicates personal liability.⁵⁶⁴

Agency is essential for modern trade. Contracts are often drawn up by intermediaries; a practice that is even more common in shipping.⁵⁶⁵ Agency is an important exception to the doctrine of the privity of contract. It is argued that the agency rule in English law was also expressed in the leading case of *Dunlop Pneumatic*: "English law knows nothing of a *ius quaesitum tertio*". Lord Haldane refers to agency in the last part of his summary of the concept of privity and consideration.⁵⁶⁶ Agency is Haldane's third fundamental principle (privity and consideration being the first and second, respectively):

⁵⁶² Francis Martin Baillie Reynolds and William Bowstead, *Bowstead and Reynolds on Agency* (18th ed Sweet & Maxwell 2006) Art 1(1).

⁵⁶³ See *Municipal Council v Prabhu Narain*, AIR 1968 Raj 297; P. Ramanatha Aiyar, *The Major Law Lexicon* (Wadhwa and Company 2010); Cane Conaghan, *The New Oxford Companion to Law* (Oxford University Press 2008); Roger Billins, *Agency Law* (Longman 1993); A C Pritchard, 'United States v O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading' (1998) 78 Boston University Law Review 13; Randy E Barnett, 'Squaring Undisclosed Agency Law with Contract Theory' (1987) 75 California Law Review 1969.

⁵⁶⁴ Merkin (n 30) at 32.

⁵⁶⁵ There are a wide variety of circumstances in international trade where agents are involved. In particular, import and export agents make contracts of carriage, stevedoring and storage on behalf of clients and carriers may act as agents for stevedores, as in *The Eurymedon* case (n 338).

⁵⁶⁶ Reported in paragraph 4.2 related to third party protection and the obstacle of privity and consideration.

*A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promise, acting as his agent in giving it.*⁵⁶⁷

However, Haldane refers only to third parties who wish to sue and not third parties who seek protection.

The reason for the development of the concept of agency lies in commercial convenience and therefore the thesis refers to it as a tool to allow third party protection.

An agent may be either a servant or an independent contractor.⁵⁶⁸ As reported by Forbes, a general principle of the law of agency is that an agent may contract with another party on behalf of his or her principal. As a result the principal, not the agent, is liable to perform the contract and is entitled to the benefit of the contract. This is also the case where the other party does not know that the agent is representing the undisclosed principal.⁵⁶⁹

According to Forbes, agency seems to function best when a set of relationships already extant precipitate a need for the creation of third party rights. This scenario might take place as a result of previous agreements between the contracting party and the third party, or where contracting parties aim for rights under the contract to be transferred on to the third party and the contracting parties make precise provision for how to achieve it.⁵⁷⁰

Before continuing, it is important to understand how agency works and who is an agent in the carriage of goods by sea. In order to fully perceive the appliance of agency on third party protection in the carriage of goods by sea, therefore, the mechanism of the agency theory as formulated by the combined authorities of *Scrutton* and *The Eurymedon* should be addressed.

4.6 The cases of *Scrutton* and *The Eurymedon*

⁵⁶⁷ *Dunlop* (n 136) 753.

⁵⁶⁸ As it has been discussed, essentially, a servant is one who gives his service to another and there is a contract of employment between the two parties (e.g., in the maritime context a master is a servant). An independent contractor provides services for another. In this respect it is reported that a very recent decision of the Supreme Court of the United Kingdom expanded the definition of charterer's agent. *NYK Bulkship (Atlantic) NV (Respondent) v Cargill International SA* (Appellant) [2016] UKSC 20. In this case the word agent has been extended to persons or subcontractors to whom the charterers' rights are made available downstream in the carriage chain or to whom perform the charterers' obligations. To the extent that they are "availing themselves of the facility contractually derived either directly or indirectly from the charterers" such subcontractors are the "agents". <https://www.supremecourt.uk/cases/docs/uksc-2014-0143-press-summary.pdf>

⁵⁶⁹ Forbes (n 524).

⁵⁷⁰ *Ibid.*

Agency in the carriage of goods by sea has been stated and substantially elaborated by two cases: *Midland Silicones Ltd v Scruttons Ltd* and *The Eurymedon*. In both cases, the principle now known as ‘agency theory’ was enunciated.

In 1961, in *Midland Silicones v Scruttons Ltd.*, the English House of Lords turned away from the facts of the *Elder Dempster* case and reestablished the classic view on privity. The Lords argued that to do away with a fundamental and elemental principle of law such as privity requires an Act of Parliament following due consideration of its merits and demerits. Almost 40 years later, their argument will soon be accepted by the English parliament as it will be shown later in this thesis.⁵⁷¹

A question raised by the case of *Scrutton* was, according to Viscount Simonds, whether the Appellants – stevedores who admitted their negligence caused damage to certain cargo (consigned to the Respondents under a bill of lading, 26th March, 1957) – could take advantage of a provision for limitation of liability contained in that document.⁵⁷²

In the *Scrutton* case, the answer was positive providing that four conditions, as set by Lord Reid, were met:

*I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of lading Act, 1855, apply.*⁵⁷³

Lord Reid’s speech, although refusing the allowance of protection to third parties in that specific instance, allowed the Himalaya clause to extend the defences of the carrier to servants, agents and independent contractors engaged in the loading and unloading process.⁵⁷⁴

In particular, and referring to *Elder Dempster*, Lord Reid stated:

⁵⁷¹ *Midland Silicones* (n 5).

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.* The Bill of Lading Act 1855 is an Act regulating the bill of lading.

⁵⁷⁴ *Midland Silicones* (n 5) 376.

*It can be hardly be denied that the ratio decidendi of the Elder Dempster decision is very obscure. A number of eminent judges have tried to discover it, hardly any two have reached the same result, and none of the explanation hitherto given seems to me very convincing [...] I must treat the decision as an anomalous and unexplained exception to the general principal that a stranger cannot rely for his protection on provisions in a contract to which is not a party.*⁵⁷⁵

The main problem of Lord Reid's agency theory is to find "consideration" passing from the stevedore to the shipper. The answer was given a few years later in *The Eurymedon* case.⁵⁷⁶ The Privy Council held that the consideration was the discharge of the goods by the stevedore for the benefit of the shipper: "The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading".⁵⁷⁷

Though similiar to *Scrutton*, *The Eurymedon* case was not the same. The facts of the case are briefly summarised here:

- There was a contract of carriage incorporating HVR.
- There was a Himalaya clause drafted, essentially with the intent to avoid the outcome of *Scrutton*.
- The clause claimed to afford protection for the carrier and agents and independent contractors of the carrier and those who engaged by him.
- The stevedores were expressly included.
- The cargo was damaged during unloading.
- Consignee sued the stevedores.
- The stevedores won because the court held that the stevedores were entitled to the benefit of limitation clauses.

The distinction between *Scrutton* and *The Eurymedon* lies in the fact that the stevedores in *Scrutton* were not clearly included in the contract of carriage and the bill of lading as they were in *The Eurymedon* case. In *Scrutton*, there was no agency relationship

⁵⁷⁵ Ibid. 377.

⁵⁷⁶ *The Eurymedon* (n 338).

⁵⁷⁷ Ibid. 154–155.

because the carriers did not know at time of contract who the stevedores were to be. The shipowners in *The Eurymedon* made two separate contracts with the shipper and the stevedore company, which entitles the latter to rely on protection by the exclusion clause in respect of damage to cargo. Since the shipowners were agents of the stevedores, the stevedores were principal parties to the stevedore part of the contract with the shipper. Furthermore, the Court held in *The Eurymedon* that there was valid consideration.

On one hand, *The Eurymedon* reinforced the dicta of Lord Reid in *Scrutton*, establishing four requirements that must be met in order for a stevedore to benefit from the clauses of limitation that apply to the carrier against the shipper:

- 1) The bill of lading must make clear the carrier's intention to protect the stevedore.
- 2) The carrier makes clear that he is contracting for the stevedores protection as well as for its own.
- 3) The authority of the carrier to act for the stevedore, whether antecedent or by ratification, must be declared.
- 4) There should be consideration from the stevedore.

On the other hand, in doing it, it completed the contractual procedure to give full protection to third parties.

The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading. The Privy Council concluded that the stevedores provided consideration for the benefit conveyed by the clause simply by discharging the cargo from the vessel.

According to Tetley, Lord Reid did not solve the problem; there was no consideration passing from the stevedore to the shipper:

In my view, the consideration found by Lord Wilberforce for Lord Reid's agency theory and the presumed benefit to society and commerce are doubtful. It is my view that, only if the carrier himself also undertakes to discharge the goods and care for them after discharge, may he be able to benefit his servants or independent contractors by his contract with the shipper. Nor can anyone entitled to benefit under

*a Himalaya clause receive greater exemptions than those to which an original party to the contract is entitled.*⁵⁷⁸

In *The Eurymedon*, the court “upheld the efficacy of a Himalaya clause to confer upon the stevedores the benefit of defences and immunities contained in the bill of lading”.⁵⁷⁹ By wrestling with established contract law – namely the doctrines of consideration and privity – the case established *The Eurymedon* principle: “the carrier acts as agent for independent contractors in contracting liability exemptions”. The necessary bilateral contract between the stevedore and the cargo-owner is created by the stevedore performing the stevedoring services.

The court in *The Eurymedon* held that the discharging of cargo by the stevedore could be deemed consideration for the artificial contract between the consignor and the stevedore. However, the discharging was requested for the execution of a separate contract; the stevedoring contract between the carrier and the stevedore.⁵⁸⁰

It is argued that the commercial reasons to back up the justification of the Himalaya clause in this case⁵⁸¹ was similar to that of Lord Wilberforce in *Elder Dempster*, almost 50 years earlier:

*In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get around exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence.*⁵⁸²

⁵⁷⁸ Tetley (n 26).

⁵⁷⁹ This would be subsequently reaffirmed by the Privy Council in the case called *Port Jackson Stevedoring Pty. Ltd. v Salmond and Spraggon (Australia) Pty. Ltd. (The New York Star)* (1981) 1 WLR 138. In *The New York Star* the Court had to deal with an Australian decision where the court did not allow the stevedoring contractor of the protection because the act took place after discharge. The Privy Council reversed with a very functional approach towards the contract of carriage and held that the contract ends not when the carrier ends his responsibility but where the goods are delivered to the consignee and therefore allowed the protection to the stevedore.

⁵⁸⁰ See Liang (n 17) for an example of an implied contract.

⁵⁸¹ Criticised by Tetley (n 26) 11.

⁵⁸² *The Eurymedon* (n 338).

The Eurymedon makes clear that, in many cases, the bill of lading issued by the carrier includes a Himalaya clause conferring to the carrier's sub-contractors the benefit of all terms benefiting the carrier by providing that in accord to such terms, the carrier enters into the bill of lading contract not only on his own behalf but also as agent for the sub-contractors. Such a clause protects a sub-contractor in certain circumstances by giving rise to a contract between the owner of the goods and the sub-contractor whereby the sub-contractor receives the benefit of clauses contained in the carrier's bill of lading.⁵⁸³

From *Elder Dempster* to *The Eurymedon*, it became clear that there was a need to extend protection to third parties, and the principles of bailment (*Elder Dempster*) and agency (*Scrutton* and *The Eurymedon*) were used in order to achieve it. However, the concept of protection clauses through agency from the carrier and bailment were further enhanced in the 1990s when two famous cases regarding the carriage of goods by sea addressed the concept of bailment and protection clauses of third parties (in these cases, shipowners).⁵⁸⁴ *The Mahkutai* and the *The Pioneer Container*⁵⁸⁵ cases asked again whether a third party is entitled to receive protection from a contract that he is not part of. Once more the courts took completely different routes.

4.7 The cases of *The Mahkutai* and *The Pioneer Container*

The Mahkutai and *The Pioneer Container* have several features in common.

- 1) In both cases the defendant was a shipowner of a cargo vessel. The *Mahkutai* in the homonym case and the KH Enterprise in *The Pioneer Container* (which was the sister vessel of the KH Enterprise);
- 2) both of these cases deal with concepts of bailment and protection clauses as raised by the respective shipowners;
- 3) in both cases the type of protection was an exclusive jurisdiction clause set out in the bill of lading;
- 4) lastly, both cases were appealed to the Privy Council with Lord Goff of Chieveley delivering the judgment.

⁵⁸³ Ibid.

⁵⁸⁴ In a different way.

⁵⁸⁵ Interestingly, Lord Chievely was present in both.

What is substantially different, is the outcome that sees the shipowners of KH Enterprise, in *The Pioneer Container*, being held entitled to rely on the exclusive jurisdiction clause. The opposite outcome was reached in *The Mahkutai* with the Privy Council dismissing the shipowner's appeal.

Without delving too much into the facts of the two cases, it is worth mentioning that in *The Pioneer Container* case, the cargo owners had engaged carriers to ship goods by sea under bills of lading that gave the carriers authority to sub-contract the whole or part of the carriage of the goods on 'any terms'. The carrier sub-bailed the goods to the shipowners for carriage on board their vessel for part of the voyage.⁵⁸⁶

*The Mahkutai*⁵⁸⁷ was a case in which the shipowners carrying cargo shipped under charterers' bills of lading sought to claim the benefit of a Himalaya clause in the time charterers' bills of lading or to invoke the principle of bailment on terms.⁵⁸⁸ The question was whether a shipowner on a chartered vessel could share the same rights and liabilities of the carrier.⁵⁸⁹ Cargo owners instituted proceedings in the High Court of Hong Kong against the shipowners, who were claiming damages for breach of contract, breach of duty, or negligence. On application by the shipowners, the judges declared that the shipowners – although not parties to the bill of lading – were entitled to invoke the exclusive jurisdiction clause either as a contractual term or as one of the terms on which the goods had been bailed to them.

At the Court of Appeal, the cargo owner argued that the shipowners were not party to the bill of lading and therefore could not rely on the exclusive jurisdiction clause contained in the bill of lading. The only parties privy to the bill of lading were the cargo owner and the carriers (i.e. charterers). The cargo owner specified that they brought an action against the respondents in bailment and negligence and therefore the jurisdiction clause under the bill of lading did not apply.⁵⁹⁰ The Court of Appeal of Hong Kong reversed the decision of the High Court by a majority.⁵⁹¹

The judges of the Court of Appeal based their decision on the assumption that the goods had been shipped on board the shipowner's vessel pursuant to a bill of lading containing a Himalaya clause whereby the shipowners, if sub-contractors, were expressly to be entitled to

⁵⁸⁶ *KH Enterprise v Pioneer Container (The Pioneer Container)* (1994) 2 AC 324.

⁵⁸⁷ *The Mahkutai* (533).

⁵⁸⁸ However, by these means they were seeking to invoke not an exception or limitation in the ordinary sense of those words, but the benefit of an exclusive jurisdiction clause.

⁵⁸⁹ In this respect, this thesis will advance a critical proposition in paragraph 4.9.1.

⁵⁹⁰ See also on the same point, *Gadsen v VCSC* (1977) 1 NSWLR 575 and *Air New Zealand Ltd v The Ship Contship Americana* (1992) 1 NZLR 425. In both cases the Court of New South Wales and New Zealand declared the shipowners liable in negligence.

⁵⁹¹ *The Mahkutai* (n 533).

the benefit of some of the terms in the bill of lading but not of the exclusive jurisdiction clause. Therefore, that clause was not an implied term on which they had taken the goods into their custody because a bailment on terms, which included such point, would be contrary to the express provisions of the bill of lading.⁵⁹²

The rationale of the shipowner's argument is illuminated by their legal representatives Peter Gross Q.C. and Duncan Matthews:

*Given the adherence of English law to the doctrine of considerations and privity of contracts, the problem is: whether A contracts with B on terms which purports to protect C, and in circumstances where C voluntarily takes into his custody A's goods, C can take the benefit of those terms when sued in tort by A. The shipowners are entitled to rely on the terms of the bill of lading, including the exclusive jurisdiction clause, because they received the cargo as bailees (sub-bailees) on those terms.*⁵⁹³

According to the shipowners' representatives, the shipowners' rights and liabilities against the shippers and their assigns are those to which the shippers have consented in the bill of lading contract with the carrier. That contract includes the exclusive jurisdiction clause.⁵⁹⁴ Moreover, according to their representatives', the shipowners are entitled to rely on the terms of the bill of lading by operation of the Himalaya clause, because the four requirements presented by Lord Reid in the *Scrutton* case had been met.⁵⁹⁵

Moving to *The Pioneer Container* appeal, Sydney Kentridge QC and George Legatt argued on behalf of the cargo owner that the doctrine of bailment and sub-bailment are contrary to the principle of law that a person cannot be bound by the terms of a contract to which they are not party⁵⁹⁶ thus raising the same debate of privity and consideration against commercial expectation.⁵⁹⁷

Therefore they concluded: "There is no need to stretch principles of law to give protection to a sub-bailee when he can protect himself, if not by insurance then by contracting an indemnity with the intermediate bailee".⁵⁹⁸

Conversely, as expressed by Michael Thomas Q.C. and Anthony Dicks on behalf of

⁵⁹² Ibid.

⁵⁹³ Ibid 730.

⁵⁹⁴ Ibid. 652.

⁵⁹⁵ Ibid. 653.

⁵⁹⁶ Such as the case of *Midland Silicones* (n 5).

⁵⁹⁷ *The Pioneer Container* (n 586).

⁵⁹⁸ Ibid. 329. See also *Gillespie Bros. & Co. Ltd. v Roy Bowles Transport Ltd.* (1973) Q.B. 400.

the shipowners:

*Two relationships are governed by the terms of the bill of lading, namely, the agreed contractual provisions as between the defendants and the shipowners and the terms of the sub-bailment of the plaintiffs goods. A contract is formed by agreement. A bailment is formed by a transfer of possession independently of contract. Upon accepting possession of another's goods, a bailee may stipulate the terms affecting his liabilities, those terms will bind not only the immediate bailor, but also those who are privy to the bailment, including those with superior rights to possession who have consented to the bailment.*⁵⁹⁹

In both case, the two principles invoked by the shipowners – bailment on terms and third parties benefiting by a term in a contract – are products of developments in English law during the present century.⁶⁰⁰ According to *The Mahkutai* judgment, the two principles seem to have a common aim:

*Recognising some form of modification of, or exception to, the strict doctrine of privity of contract to accommodate situations which arise in the context of carriage of goods by sea, in which it appears to be in accordance with commercial expectations that the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties of the contract.*⁶⁰¹

In *The Mahkutai* case, the cargo owners argued that shipowners were not entitled to the benefit of the exclusive jurisdiction clause in the bill of lading through the agency of the carrier, nor could they rely on the Himalaya clause because they were not servants, agents or sub-contractors of the carrier.⁶⁰²

Regarding bailment, they considered consent an essential element of bailment on terms. An owner of goods is bound by the conditions of a sub-bailment only if he or she has expressly or impliedly consented to the bailee making a sub-bailment on those terms. The

⁵⁹⁹ Ibid. See also *Morris* (n 534) 729 and Norman Palmer, 'Ambulatory Bailments' (1983) 36 Current Legal Problems 1, 91.

⁶⁰⁰ Ibid.

⁶⁰¹ *Midland Silicones* (n 5); *The Eurymedon* (n 338) and *The New York Star* (n 579).

⁶⁰² *The Mahkutai* (n 533) Richard Aikens QC and Alan Roxburgh.

cargo owners in *The Makhutai* case did not consent to the bailment to the shipowners due to the terms of the bill of lading.⁶⁰³

In *The Pioneer Container* case, Lord Goff of Chieveley followed the doctrine of sub-bailment on terms as stated by Denning in *Morris*. He affirmed that, as far as English law and the law of Hong Kong are concerned, a technical problem arises for shipowners who carry goods in situations where there is no contractual relationship between the shipowners and certain cargo owners. This is because English law still adheres strictly to the principles of privity of contract and consideration. Lord Goff asks whether this adherence should continue with the same strictness, highlighting the opinions of judges of great authority and distinction who were in no doubt that it should be so maintained. Goff concludes, however, by pointing out that, in the present case, the question is whether the law of bailment can be invoked by the shipowners to circumvent this difficulty.⁶⁰⁴

This begs a question raised in *The Pioneer Container* case: should it be a prerequisite of a bailment that the bailor should have consented to the bailee's possession of the goods? Bell, cited in *The Pioneer Container* judgment, argues that it should:

*If the owner seeks to hold a sub-bailee responsible to him as bailee, he has to accept all the terms of the sub-bailment, warts and all; for either he will have consented to the sub-bailment on those terms or, if not, he will (by holding the sub-bailee liable to him as bailee) be held to have ratified all the terms of the sub-bailment.*⁶⁰⁵

Palmer⁶⁰⁶ and Tay⁶⁰⁷ disagree, arguing that a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner), and that they can only invoke, for example, terms of a sub-bailment under which the goods were received from an intermediate bailee as qualifying or otherwise affecting responsibility to the owner if the owner consented. As explained by their Lordships, it is the latter approach that has been adopted by English law and, in turn, the law of Hong Kong.⁶⁰⁸

⁶⁰³ Ibid.

⁶⁰⁴ Ibid. 335.

⁶⁰⁵ A P Bell, *Modern Law of Personal Property in England and Ireland* (n 537) 88–89.

⁶⁰⁶ N Palmer, 'Sub-Bailment on Terms' (n 537) 31 et seq.

⁶⁰⁷ Alice Erh-Soon Tay, 'The Essence of Bailment: Contract, Agreement or Possession?' (1966) *Sydney Law Review* 239.

⁶⁰⁸ *The Pioneer Container* (n 586) 341, 342.

The Mahkutai decision has received criticism from scholars. Commenting on the judgment, Nossal felt that:

*The majority of the Court of Appeal (Litton J.A. and Mayo J., Bokhary J.A. dissenting) squandered an opportunity to harmonise the correlation between the legitimate commercial expectations of the parties and the law relating to carriage of goods by sea.*⁶⁰⁹

The rationale of *The Mahkutai*⁶¹⁰ decision and the interpretation that the judges gave to the bailment on terms are neatly summarised by the words of Lord Goff of Chieveley:

*In the light of the principle stated by Lord Sumner in the Elder Dempster case as interpreted by Fullagar J. of Darling Island, the next question for consideration is whether the shipowners can establish that they received the goods into their possession on the terms of the bill of lading, including the exclusive jurisdiction clause (clause 19), i.e., whether the shipowners' obligations as bailees were effectively subjected to the clause as a term upon which the shipowners implicitly received the goods into their possession. This was the ground upon which Bokhary J.A. expressed the opinion, in his dissenting judgment that the shipowners were entitled to succeed.*⁶¹¹

The Court in *The Mahkutai* found what they called “an insuperable objection” to the argument of the shipowners. The bill of lading under which the goods were shipped on board contained a Himalaya clause under which the shipowners, as sub-contractors, were to be entitled to the benefit of certain terms in the bill of lading. However, as their Lordships held, those terms did not include the exclusive jurisdiction clause.⁶¹² The Court held that by receiving the goods pursuant to the bill of lading, the shipowners’ obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession.⁶¹³

As anticipated, another question in *The Pioneer Container* was whether the sub-

⁶⁰⁹ S Nossal, *Bailments on Terms and the carriage of Goods by Sea: The Mahkutai*, Hong Kong Law Journal, 1994, v24 n. 1, p. 19-28.

⁶¹⁰ Referring to *The Pioneer Container* (n 586) case.

⁶¹¹ *The Mahkutai* (n 533).

⁶¹² As this thesis explains in Chapter 1, there are certain carrier exceptions that a third party can rely on and others cannot.

⁶¹³ *The Mahkutai* (n 533).

bailees could invoke any of the terms on which the goods were sub-bailed to them, and in particular the exclusive jurisdiction clause. Lord Denning contended that "the answer to the problem lies, I think, in this: the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise".⁶¹⁴

The cargo owners also argued that the shipowners' bill of lading contained a Himalaya clause which, following *The Eurymedon* case, would allow a third party the same protection of the carrier under the bill of lading, if the four rules laid out by Lord Reid are respected.⁶¹⁵ As reported in *The Pioneer Container* case, the Himalaya clause alone is not sufficient to exclude a sub-bailee from relying on the terms of his own contract with the bailee. Contrary to the statements of the cargo representatives, this is necessary in cases where Himalaya clauses are not mentioned in the contract, for instance, where a third party in need can rely on the terms of bailment and sub-bailment. In the judges' words:

*If it should transpire that there are consequently two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods.*⁶¹⁶

The judges went on to say that, even if a Himalaya clause is applicable and is satisfied, it does not defeat the shipowners' reliance on bailment.⁶¹⁷

In case of *The Mahkutai*, the shipowner argument was unsuccessful both in bailment and in tort. Since the Himalaya clause does not include a jurisdiction clause in the bill of lading, the Court decided that bailment should not succeed on the bill of lading terms. In this case, the application of judgments from the *Elder Dempster* case were precluded by special circumstances.⁶¹⁸ As in *Scrutton, The Mahkutai* – although failing the request of third parties to be protected – improved the mechanism of the protection in reality:

So long as the principle continues to be understood to rest upon an enforceable contract as between cargo owners and the stevedores entered into through the agency

⁶¹⁴ In *Morris* (n 534) 729.

⁶¹⁵ *The Eurymedon* (n 338).

⁶¹⁶ See Bell, 'Sub-Bailment on Terms' (n 537).

⁶¹⁷ *The Pioneer Container* (n 586) 344.

⁶¹⁸ Liang (n 17).

*of the shipowners, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against the stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract.*⁶¹⁹

Lord Goff's criticisms of *The Eurymedon* do not run counter to the principle of protection of a third party. Nonetheless, he expresses concern that the mechanism used to extend such protection is wrong. For Goff, the importance lies in discovering the factual basis from which the rendering of the bailment subject to such provision can be properly influenced.⁶²⁰

The Mahkutai re-established the orthodox view on third party protection in English law. In contrast to the court in *The Mahkutai*, the court in *The Pioneer Container* emphasise the importance of commerce in deciding whether to rule in favour of the third party asking for legal protection.⁶²¹ The same commercial sense and commercial unreasonableness of the contrary seems to be also the foundation behind the Contract (Right of Third Parties) Act 1999.

4.8 The Contract (Right of Third Parties) Act 1999: protection clauses on a statutory footing

The shipping industry has tried to circumvent privity and consideration and allow protection to those who are not part of the contract. Because English law has always had theoretical difficulties with this, the industry has not hesitated in its attempts to circumvent it. Reading between the lines, however, it is evident that privity and consideration have been an uncomfortable obstacle for the pragmatism of English Law. This is also apparent in a debate that forms part of the preparatory work to the Hague and Hague-Visby Rules, regarding the insertion of Article 4 bis. The discussion focused on whether or not carrier protection should be extended to third parties and whether there had to be a difference between servant and agent on one hand and independent contractors on the other. The delegation from the Netherlands criticised the United Kingdom delegation, who were on that occasion happy to allow a broader protection to third parties (but only servant and agents and not independent contractors). The delegation from Netherland stated: "We should be very glad if you make that amendment in

⁶¹⁹ Tetley (n 26).

⁶²⁰ *The Mahkutai* (n 533).

⁶²¹ *Ibid.* (Lord Goff). The submission of the plaintiffs in the present case was that the "Himalaya" clause gives sufficient effect to the commercial expectations of the parties.

your own domestic law, but we pray you humbly leave the Hague Rules alone”.⁶²² The United Kingdom delegation answered that, as a matter of fact:

A problem arises because of the fundamental problem of the English law of contract which is that a person who is not a party to a contract can derive no benefit from it.

The delegation continues saying that:

*it would be impossible to put the matter right by proposing this to the Parliament because an amendment of this general principle of law of contract would require an Act of Parliament asking them to provide by statute that a person who is not a party to a contract can derive benefit from it because the answer would be that the only people hampered by that principle would only be a very small section, though a very important class of people, an important class of traders, those who carry goods by sea.*⁶²³

At the time, the English delegation rationalized that a state should not alter a fundamental principle of its own law just because a somewhat narrow domestic difficulty arises. Instead, they argued, it is better to alter the international law of convention. At this point, it is worth noting the following:

- 1) Although English law had a problem ‘at home’ they were willing to open the door to a broader protection in an international environment.
- 2) At that time, the reluctance to propose an action of that nature to the British Parliament was based on the assessment that it would represent a major upheaval and administrative undertaking that was not proportionate to the very small number of people who demanded it or who would benefit from it.
- 3) It was considered an unalterable fundamental principle of English Law.

Despite all of this, in 1999 the United Kingdom adopted the Contract (Right of third parties) Act 1999.⁶²⁴ The judgment in *Dunlop Pneumatic* has now been reversed:

⁶²² *Travaux Préparatoires* (n 308) 603 in favor, amongst the other, Sweden, Italy and Canada.

⁶²³ *Ibid.*

⁶²⁴ Law Commission, ‘Privity of Contract: Contracts for the Benefit of Third Parties: The Legal Systems of Most Member States of the European Union Allow Third Parties to Enforce Contracts’ (1996) Law Com 242 para 8. A

*My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract.*⁶²⁵

As previously stated, there has always been a battle against the privity and consideration rule. They were seen as barrier and in response, as reported by the Law Commission in 1996, the Contract (Right of Third Parties) Act 1999 was enacted.⁶²⁶

The Act essentially allows a third party to benefit from the Contract. Section 1 (1) grants a third party the right to enforce a term of the agreement if either the contract expressly provides he may or, under Section 1(1) (b) “the term purports to confer a benefit upon him”. In relation to a clause excluding or limiting liability, Section 1(6) provides: “Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to availing himself of the exclusion or limitation”.

Section 6 of the statute addresses exceptions to the right of a third party under Section 1 to enforce a benefiting contractual term. In particular, under Section 6(5)(a), a third party has no right to enforce such a term for his benefit, in the case of a contract for the carriage of goods by sea. A contract for the carriage of goods by sea is defined as a contract either: i) “contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction” according to Section 6(6)(a)i) or ii) “under or for the purposes of which there is given an undertaking which is contained in a ship’s delivery order or a corresponding electronic transaction”, according to Section 6(6)(b).

However, there is one fundamental exception, permitting the third party beneficiary, in reliance on Section 1, to “avail himself of an exclusion or limitation of liability in such a contract” (Section 6(5)(a)). It is this exception to an exception in the Contracts (Rights of Third

further factor in support of reforming the third party rule in English law is the fact that the legal systems of most of the member states of the European Union recognise and enforce the rights of third party beneficiaries under contracts.

⁶²⁵ *Dunlop* (n 136).

⁶²⁶ Its full title which states, “An Act to make provision for the enforcement of contractual terms by third parties”. Interestingly, this reform started long before 1999, in 1937. In the Recommendation (The Editorial Committee of the Modern Law Review, ‘The Law Revision Committee’s Sixth Interim Report’ (1937) 1 The Modern Law Review 2) it says: “The rule that a stranger to a contract cannot maintain an action upon it has been one of the most unsatisfactory features of the law relating to consideration. It has been tenaciously adhered to in all but a few cases, which were of minor importance. The rule is completely out of harmony with the conditions of modern commerce and industry”.

Parties) Act 1999 that places the Himalaya clause on a statutory footing in the U.K. As the Explanatory Note to Section 6(5) states:

Subsection (5), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by the sea to servants, agents and independent contractors engaged in the loading and unloading process to be enforced by those servants, agents or independent contractors (so called 'Himalaya' clauses).

Analysing the Contracts (Rights of Third Parties) Act 1999, it appears first that the Act expressly provides that the contract has to explicitly confer a benefit to a third party. As Stevens states, it seems that the third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered. This is substantially the equivalent of the Himalaya clause but in a statutory guise. Rather than abolishing the need to satisfy privity and consideration, the Contracts (Rights of Third Parties) Act 1999 has created another exception to each of them.⁶²⁷ Had it been utilised in *Scrutton*, the Act would have had limited application. In his article, 'A Birthday Present for Lord Denning', Macmillan explains the following:

Here, the relevant contract was the bill of lading which contained a limitation of liability clause. The contract was initially between the shipper and the carrier; after the sale of the goods it was between the shipper and the consignee. In order for the new Act to have allowed the stevedores to avail themselves of the limitation clause in this contract, the contract would have needed to contain a term which purported to benefit them (s 1(1)(b), (2) & (6)). It is by no means clear that it did. The Law Lords, including Lord Denning, did not believe that the bill of lading was intended to protect the stevedores. However, the Law Lords were considering a different issue: whether the carriers had acted as agents of the stevedores and not whether the contract extended an enforceable benefit to the stevedores. The bill of lading did seek to allow a bailee of the goods to avail himself of the limitation of liability and on this basis it is at least arguable that the new Act would have allowed the stevedores to raise the

⁶²⁷ R Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) Law Quarterly Review 120.

*limitation of liability in their defence. This last example serves to illustrate that difficult cases are bound to arise even after the new Act.*⁶²⁸

Smith outlines the rationale behind the Act: “If the contracting parties intend to benefit a third party then the law should support this intention by allowing the third party to enforce the contract”.⁶²⁹ However, although the Act confers rights to third parties and a Himalaya clause has a statutory footing, it still needs a juridical justification. It requires consideration for an implied contract. This consideration – as in *The Eurymedon*, for example – could be performing one of the carrier activities. However, it is difficult to define accurately the activities of modern carriers. In the past such definitions were easier; the activities were related only to the sea-side of operations (see Hague-Visby Rules and Hamburg Rules). But, with the Rotterdam Rules, and with the carrier taking responsibilities for the whole carriage, it is very difficult to differentiate categories of third parties.⁶³⁰

An article by Clifford Chance’s International Maritime Trade & Insurance Group states:

*One of the clear benefits of the Act is to render virtually obsolete Himalaya-type provisions. The new Act effectively dispenses with all but one of the four conditions that were set out in *Scruttons Ltd v Midlands Silicones Ltd*. The remaining condition is the two-fold test in Section 1(1) of the Act. For this reason, while the new Act greatly alleviates the previous problem and largely replaces the need for Himalaya clauses, it does not automatically follow that Himalaya provisions are completely obsolete or no longer necessary.*⁶³¹

Lord noted that Section 7 (1) of the Contract (Right of Third Parties) Act 1999 maintains any right or remedy of a third party that exists outside the Act. Article IV bis (2) of the Hague-Visby Rules allows servants and agents of the carriers to rely on the protection to which the carrier is entitled under the rules. This is unaffected by the Contract (Right of Third Parties) Act 1999. The protection granted by the rules does not extend to independent

⁶²⁸ Macmillan (n 508).

⁶²⁹ Stephen A Smith, ‘Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule’ (1997) 17 Oxford Journal of Legal Studies 643.

⁶³⁰ Ibid.

⁶³¹ Tony Vlasto and Julian Clark, ‘The Effect of the Contracts (Rights of Third Parties) Act 1999 on Voyage and Time Charter Parties’ (2000–2001) 25 Tulane Maritime Law Journal 519.

contractors, whose position is therefore greatly improved by the Contract (Right of Third Parties) Act 1999.⁶³²

In general terms and as far as this thesis concerns, under the Contract (Right of Third Parties) Act 1999 tools such as protection clauses and agency might no longer be needed⁶³³ as the consent of the parties could be adequate to extend the protection.

Tetley contends that the 1999 statute provides a less complex foundation for applying a standard limitation of liability clause. The statute requires merely that the third party beneficiaries be identified with sufficient clarity; expressly (Section 1(1)(a)), or by class, name or description (Section 1(1)(b) and 1(3)). The carrier's permission from the third party to stipulate the clause, the third party's ratification of the benefit conferred by the clause, and the passing of consideration are no longer a concern.⁶³⁴

This undeniably confirms that third parties in the carriage of goods by sea cannot be left stranded without proper protection. However, introducing a Himalaya clause on a statutory footing does not equate to provision of the clause with full effect. It simply states that in some circumstances, under the Act, a third party can rely on an exclusion clause of a contract of which they are not part. If the bilateral perspective is still adopted to judge the carriage of goods by sea, the Contract (Right of Third Parties) Act 1999 surely is a step forward. If the multilateral perspective is adopted is not that sufficient.

From the explanatory notes it is clear that the activities of the third parties are related to the loading and unloading process. Since the Act was drafted in 1999, commerce has changed a great deal. Convincing arguments have been made that, as a result of these changes, the Act has been rendered almost obsolete. Restricting reliance on this clause to only third parties involved in the loading and unloading processes means leaving outside the law all the others involved in the multilateral common enterprise.

Summary of Part A

In summary, English law and third party protection are not comfortable with each other. Consideration may indeed be "too firmly fixed to be overthrown by a side-wind", but, it has nonetheless been circumvented.

⁶³² David Lord, 'Insurable Interest: Is There a Rule?' (3 *Stone Buildings*, 2005), 159 <http://clients.squareeye.net/uploads/3sb/events/121005_lord.pdf> Accessed 5 May 2013.

⁶³³ In case the carriage of goods by sea contract in question is under English law.

⁶³⁴ Tetley (n 26).

Bailment, agency, protection clauses, and the Contract (Right of Third Parties) Act 1999 have all been geared towards attaining the same objective, but none of them provide third parties with adequate, up-to-date, and juridically justified protection.

These concepts have created various difficulties in the aforementioned cases: from *Elder Dempster to Scrutton* and *The Eurymedon*, and more recently *The Pioneer Container* and *The Mahkutai*.⁶³⁵

The Eurymedon case warrants particular mention here. In it, the House of Lords accepted that a promise by A could enforce separate contracts with B and with C.⁶³⁶ The Privy Council's view on *The Eurymedon* demonstrated that the unnecessary complexities which emerge in the event of a digression from the doctrine and giving effect to the parties' intention. Since the *The Eurymedon* decision of the Privy Council, the extension of rights to third parties by virtue of the Himalaya clause has been acknowledged in the United Kingdom. *The Pioneer Container* case developed this further:

- 1) The Privy Council was attracted to a solution which accorded with commercial convenience and practical good sense.
- 2) The Himalaya clause route and the doctrine of bailment on terms are cumulative rather than alternative solutions.⁶³⁷

The difference between the cases of *The Pioneer Container* and *The Mahkutai* is that the former has been decided in a very commercial way, whilst the latter took a very conservative approach to third party protection.

Finally, although the Contract (Right of Third Parties) Act 1999 improves the situation of third party protection, it still relies on the presence of an implied contract to function. Moreover, the Act substantially only moves the third party protection on a statutory level. As the full title of the Act implies, it is concerned with the rights of third parties. However, as demonstrated by arguments contained in this thesis, the situation of third party protection in the carriage of goods by sea differs from the one envisaged by the Act. Not only that, but it is seventeen years since the Act was passed, and its drafting began many years earlier. The Act seems to have placed the Himalaya clause on a statutory footing but the four criteria outlined Lord Reid must still be satisfied. It is argued that, in the carriage of goods by

⁶³⁵ Merkin (n 30) 18.

⁶³⁶ Merkin (n 30) 18.

⁶³⁷ *The Pioneer Container* (n 586).

sea, these criteria are now not adequate; third parties should, as an integral part of the enterprise, receive their own protection.

Taking into account Nossal's criticisms of the *The Mahkutai* case – and considering that carriage has evolved into a multilateral sector – it is believed that the strict application of concepts of law such as privity and consideration fail to do justice to a fundamental commercial principle: namely, that if a party performing the carriage enterprise is sued by the cargo owner (who aims to circumvent the limitation of liability in the contract) the party sued in tort has to rely on that clause.⁶³⁸ Denying it is fundamentally wrong because it fails to respect not only the parties' wishes, but also the reliance that the third party has on that principle. Once established, bailment, agency and protection clauses become mere instruments in applying that principle.

4.9 Critical propositions

Once the English position has been stated the thesis advances two critical propositions for a default position under English law. The first takes into account the evolution of the theoretical thread that culminated in the involuntary bailment in *The Pioneer Container* case, using this concept to extend the protection under bailment to anyone in the position of the shipowner of the vessel. The second considers the importance of adopting a reliance-focused perspective of contract theory – rather than a classical one.⁶³⁹

4.9.1 The application of involuntary bailment in the carriage of goods by sea

The Pioneer Container case highlighted the concept of voluntary bailment. Taking that into account, it has been observed that, in the carriage of goods by sea, third parties in certain circumstances – such as the owner of the vessel in a demise charter – the vessel itself (when considered a third party defendant) or any other third party in that situation can rely on

⁶³⁸ S. Nossal (n 609).

⁶³⁹ This proposition is inspired by the observations of Lord Steyn in the *Darlington* case *Darlington Borough Council v Wiltshier Northern Ltd* (1994) EWCA Civ 6. In this case Lord Steyn said: “*The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties*”. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract”.

bailment on terms. As already mentioned in paragraph 4.3, in *Morris v Martin*, Lord Denning stated:

*If the owner of the ship accepts goods for carriage on a bill of lading contained exemption condition...the owner of the goods is bound by those conditions if he impliedly consented to them as being in the known and contemplated form.*⁶⁴⁰

Quoting again *Wilson v Darling Island Stevedoring & Lighterage Co.*, Fullagar J. in the last part of his statement on *Elder Dempster* said that “the same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is necessary to consider any such question”.⁶⁴¹

Through his comment, Fullagar raised the possibility of the shipowner enjoying entitlement under bailment on terms even if the master were not to sign the bill of lading but instead the charterer or carrier did. Fullagar draws his conclusion from the modern version of bailment, which provides that the possession of goods is sufficient to consider a person bailee or sub-bailee. Acknowledging this, one could extend the concept to a shipowner, who under bareboat charter, would be equally entitled along with the vessel or any other third party in such position.

In order to forward this proposition, one must first define the term *bailee*. According to Pollock and Wright, a bailee is:

*...any person [who] is to be considered as a bailee who otherwise than as servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to (convey and) apply the specific thing accordingly to the directions antecedent or future of the other person.*⁶⁴²

A common perception of bailment, as specified by Sealy and Hooley, holds that possession alone is not enough to create bailment.⁶⁴³ Two other conditions must also be fulfilled. Firstly, the bailor must retain a superior interest in the chattel, which is subordinate to

⁶⁴⁰ *Morris* (n 534) 730.

⁶⁴¹ *Wilson* (n 546).

⁶⁴² Sir Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Clarendon Press 1888) 163.

⁶⁴³ Sealy and Hooley (n 531).

the bailor's interest. This is reflected in the fact that at the end of the bailment, the bailee must redeliver the chattel to the bailor or deal with it according to the bailor's instructions.⁶⁴⁴ Secondly, the bailee must consent to take possession of the chattel for there to be a bailment. On the other hand, involuntary bailments arise where a person is in control of a chattel belonging to another person, without consenting to act as a bailee, (e.g., when goods are sent to the bailee's premises by mistake).

Traditionally, bailment has been explained on the basis of mutual consent.⁶⁴⁵ However, in recent years the consensual theory of bailment has been challenged. It has been argued that it is the bailee's, not the bailor's, consent which matters. As Palmer argued, furthermore, it is believed that any person who voluntarily assumes possession of goods belonging to another will be held to owe at least the principal duties of the bailee at English law.⁶⁴⁶ This new theory has now been endorsed by the Privy Council, with *The Pioneer Container* case.

A progressive definition of bailment has been given by Mance L.J., in the case of *East West Corporation v Dksb 1912*: "what is fundamental is not contract, but bailee's consent...the essence of bailment is the bailee's voluntary possession of another goods".⁶⁴⁷

Bell⁶⁴⁸ compliments this by stating, "In rejecting consensus as the basis of bailments, *The Pioneer Container* clearly moves the law of bailment away from the law of contract and towards the law of tort".⁶⁴⁹

The main issue of bailment in the carriage of goods by sea is whether a shipowner on a chartered vessel can share the same rights and liabilities as the carrier.⁶⁵⁰ Should the answer be affirmative,⁶⁵¹ then one must ask whether it is applicable to all the charterparties, or is there a difference between time and voyage on the one hand, and bareboat charter on the other.⁶⁵² Likewise, would it be applicable should vessel or another third party be in the same situation? In *The Pioneer Container* case, for instance:

⁶⁴⁴ *The Mahkutai* (n 533).

⁶⁴⁵ Palmer, 'Sub-Bailment on Terms' (n 537).

⁶⁴⁶ *Ibid.*

⁶⁴⁷ (2003) EWCA Civ 83; (2003) QB 1509, paras 24 and 26.

⁶⁴⁸ A P Bell, 'The Place of Bailment in the Modern Law of Obligations' in N Palmer and E McKendrick (eds) *Interest in Goods* (Ch 19, 2nd edn 1998) 471.

⁶⁴⁹ Claims in Bailment are considered as tortious and not contractual for the purposes of founding jurisdiction under the Civil Procedure Rules (CPR) 6.20.

⁶⁵⁰ As a protection for third parties, in this case the shipowner.

⁶⁵¹ In *Elder, Dempster* (n 3) and *The Pioneer Container* (n 586) but not *The Mahkutai* (n 533).

⁶⁵² In a bareboat charter, the shipowner leases the vessel to the charterer and usually provides no other services. The charterer becomes in effect the owner of the vessel and the master and crew become his servants (Scrutton, *Scrutton on Charterparties and Bills of Lading* (n 575) 47; Todd (n 575) 10).

*Where goods had been sub-bailed with the authority of the owner, the obligation of the sub-bailee towards the owner was that of a bailee for reward and the owner could proceed directly against the sub-bailee under the law of bailment without having to rely on the contract of sub-bailment between the bailee and the sub-bailee; that a sub-bailee who voluntarily took the goods into his custody could invoke terms of the sub-bailments qualifying or otherwise affecting his responsibility to the owner if the owner had expressly or impliedly consented to those terms or had ostensibly authorised them.*⁶⁵³

Bareboat agreements can also affect the parties' *in personam* and *in rem* liabilities. In any other charter agreement where possession and control are not transferred, the charterer is neither liable *in rem* nor *in personam* for injuries resulting from unseaworthiness, for example. Though bareboat charter agreements generally allow owners to shield themselves from *in personam* liability, the vessel and therefore the owner can still be liable *in rem* for damages not exceeding the vessel's value.⁶⁵⁴ This in turn leads them to be liable for the cargo.

For a bareboat charter position, the test carried out in *The Pioneer Container* case appears successful because a shipowner in the bareboat charter, although not involved in the commercial life of the ship, "involuntarily" takes the goods on his ship and therefore into possession. This may not be so in the terms of the bill of lading but is under the terms of bailment.

Once confirmed that the shipowner can be considered as a sub-bailee under bareboat charterparty, it is worth exploring the possibility of having the vessel itself as responsible and therefore being able to seek protection *in rem*.⁶⁵⁵ In this respect if the vessel is found in the same causal position as a defendant because she had been sued *in rem* also the vessel can rely on the same protection. Setting this default position also other categories of third parties in the same position could rely on it.

4.9.2 The reliance perspective

⁶⁵³ *The Pioneer Container* (n 586) 325.

⁶⁵⁴ John W Chitty, 'Bareboat Charters: Can a Shipowner Limit Liability to Third Parties? Answers for Owners Attempting to Navigate the Unsettled Waters in the Eleventh Circuit' (2008) 25 Georgia State University Law Review, 2, Art 2, 477.

⁶⁵⁵ In the recent American case of *Mazda Motors* (n 6) this was tested with regard to the Himalaya clause for the first time.

With the exception of bailment, agency and the Contract (Right of Third Parties) Act 1999, if a multilateral perspective on the carriage of goods by sea is accepted, then privity and consideration can be severed from their theoretical roots and beaten on a theoretical ground using a reliance (rather than classical) approach to contract theory.

Over the last century or so, privity and consideration have represented a serious and extensive issue for the shipping community, precisely because they have prevented a total justification for third party protection. While this has not remained unsolved in practice – the industry has elaborated many tools to get around it – it remains conceptually problematic. The bulk of this obstacle is derived from a classical approach to contract theory, which views the contract as a bilateral promise between its parties. Against the backdrop of the modern factual context of the shipping industry – where third parties are the pivots of the business – it is more fruitful to consider adopting the reliance-based approach to contract theory.

Neither classical contract theory nor reliance contract theory are modern theories, but the application of reliance contract theory to support justification for the protection of third parties undoubtedly shows elements of originality. This thesis advances the possibility that the reliance perspective could supplement the multilateral common enterprise and the third party protection in a theoretical perspective.⁶⁵⁶

As previously stated, under common law, the difficulty has always lain in finding a conceptual solution for privity and consideration in the context of third party protection. This is largely because, according to contract theory, the contract is a promise only between its parties. This thesis shapes a new justification for the protection of third parties in the carriage of goods by sea. Consequently, in relation to the contract theory, the thesis suggests a different theoretical perspective. The thesis does not aim to compare the two theories but instead approach third party protection via these theories. Consequently, the thesis argues that overall the reliance theory perspective provides a more adequate theoretical solution.

As being argued, from a factual perspective, third parties are part of the enterprise. Yet, in the perspective of contract law, third parties are still protected by the main parties to the contract.⁶⁵⁷

The protection afforded to third parties, however is undergoing a transformation, the trend of which is to move away from a pure, bilateral freedom of contract (where only the

⁶⁵⁶ Which could better match the factual current shipping scenario.

⁶⁵⁷ Peter Jaffey, 'A New Version of the Reliance Theory' (1998) 49 Northern Ireland Legal Quarterly 107. As a premise, the classical theory leans towards freedom of contract and the reliance theory towards limited autonomy of contract.

parties to the contract are considered) toward a multilateral freedom of contract.⁶⁵⁸ In the sense that the position and needs of who may be formally considered a third party has to be taken into consideration. Although efforts of national and international communities regarding international trade have allowed the protection of third parties, classical contract theory has always been an obstacle.⁶⁵⁹ Classical contract theory is based on promise and when put simply, states: "I promise to do this if you promise to do that".⁶⁶⁰ As previously discussed, if only one party offers consideration, the agreement is not legally a binding contract. Reliance contract theory, by contrast, is based on an assumption of responsibilities:

*We will proceed on the assumption that I am to do this and you are to do that, and although I do not promise that I will do this, I accept responsibility for your reliance on the assumption that I will, and you will accept responsibility for my reliance in the same way.*⁶⁶¹

For example, A makes a contract with B where they agree a benefit for C. A makes an agreement with C to assume responsibility for C's reliance on the performance that B has contracted. In terms of shipping, the carrier contracts with the shipper and it is agreed that a third party would benefit. The carrier then makes an agreement with the third party to assume responsibility for the third party's reliance on the performance for which the shipper has been contracted.

Taking the above analysis into account, this research advances the reliance contract theory as approach for third party protection in the carriage of goods by sea supporting the concept of multilateral common enterprise. In *The Himalaya* case over 60 years ago, Lord Denning, referring to *Smith & Snipes*, stated:

⁶⁵⁸ Here the meaning assigned to freedom of contract is different from the meaning usually found in the literature; especially on the carriage of goods by sea (i.e. choice of law doctrine that permits parties to choose the law of a particular country or sovereignty to govern their contract where it involves two or more jurisdictions). The meaning conferred to freedom of contract is that a person entering into contract can do it on terms of his or her choice. In this regards according to Oxford legal dictionary, freedom of contract means: "A person's freedom to enter a binding agreement on terms of his or her choice". <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095833975> Accessed 21 April 2014.

⁶⁵⁹ Both the classical and reliance theory derive from the contract theory, the study of how individuals and businesses construct and develop legal agreements. It draws upon principles of financial and economic behaviour. See generally, Schwartz, Alan and Scott, Robert E., "Contract Theory and the Limits of Contract Law" (2003). *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers*. Paper 275. http://digitalcommons.law.yale.edu/lepp_papers/275 Accessed 24 February 2014; Eigen, Zev J., "Empirical Studies of Contract" (2012). *Faculty Working Papers*. Paper 204. <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/204> Accessed 5 March 2014.

⁶⁶⁰ Joseph Raz, 'Promises and Obligations' in P M S Hacker and J Raz (eds) *Law Morality, and Society* (OUP 1977); United States Restatement (Second) of Contracts, para 2(1) (1981).

⁶⁶¹ Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979).

*The truth is that there was only one contract, namely, the contract evidenced by the bill of lading; and the reason why the stevedores and others are protected because, although they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was made for their benefit whilst they were performing it. The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication, which is just as good: and they have a sufficient interest to entitle them to enforce it. Their interest lies in this: they participated in so far as it affected them and can take those benefits of it, which appertain to their interest therein. It is one of those cases – by no means rare – where a third person is entitled to enforce a contract made for his benefit.*⁶⁶²

Lord Denning explained, in dicta that all defences in the contract of carriage would extend to all participants in its performance.⁶⁶³ Hooper adds that:

*... The master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract.’ Relying on the case law of England, Australia, and the United States. Lord Denning stressed that the participants are protected by the contract even though they are not parties to it; they could rely on the contract even though they might be guilty of negligence and are sued in tort.*⁶⁶⁴

Smith, then, says that anyone who relies on a promise has a potential claim in contract, subject only to the usual tort limitations of proximity, foreseeability, and so on.⁶⁶⁵ This thesis extends this concept stating that, if contract law is seen from the reliance perspective, who relies on a contract has a potential right to benefit from that contract.

Once more it is fundamental to recall that this research grounds the limitation of the appliance of its propositions on a causal level. Therefore the criterion is that in the multilateral enterprise whoever party is involved in a claim can be entitled to receive that protection.

⁶⁶² *The Himalaya* (n 4).

⁶⁶³ Hooper (n 149). See also *The Himalaya*, Ibid. 183 (Lord Denning).

⁶⁶⁴ Hooper, *ibid.*

⁶⁶⁵ Smith (n 629).

CHAPTER 4 PART B

Third party protection under United States law

Courtesy of its deep involvement with multimodalism, the political role of transportation in the United States has been identified as differing substantially from its political role in England.⁶⁶⁶ What is called the United States intermodal system is a system of transport that links the transfer of cargo from one side of the United States to the other.⁶⁶⁷

Currently, the United States intermodal system has the shortest ocean navigation time; 18.5 days from Asia to the east coast of the United States.⁶⁶⁸ As explained by the United States ministry of agriculture, this is an ideal scenario. However, labour problems at ports can slow down the system. Improvement and new investments in ports and links between sea and land legs are therefore sought. Another main problem of the United States intermodal system – compared to a unimodal system, such as the Panama Canal – is that although the intermodal system is in principle faster, the unimodal system is cheaper. The aim of the intermodal system is therefore to reduce costs as much as possible. To do this, the intermodal system requires economies of scale (for terminal operators) and economies of scope (for carriers and port workers).⁶⁶⁹ This places the United States in a different footing in terms of context.

United States law approaches third parties in a manner rather different to English law, and shows a correspondingly different willingness to grant them protection.⁶⁷⁰ The United States has a completely different historical background to England in the carriage of goods by sea. Curiously, as Sturley states, “England is a leading carrier nation, but the House of Lords’ initial response to the ‘Himalaya clause’ problem was strongly pro-cargo. The United States is

⁶⁶⁶ The geographical extension of the United States and its geographical position as a link between east and west is another main difference between the two countries and is one of the main reasons why the multimodality has been developed in this country.

⁶⁶⁷ The terms multimodal and intermodal are variously defined. They are sometimes considered different from each other and some other time considered as a synonym. It is safe to say that both are linked with the involvement of different modes of transport. Martin Stopford for instance, in the book *Maritime Economics* refer to intermodalism and define it as: “system concerned with the transfer of cargo from one mode to another”. Bes chartering definition is that: “*intermodalism (or multimodalism) which is carriage of goods by a mixture of modes of transport*”. This thesis recognises that they can be essentially used interchangeably but prefer to use the term multimodalism. However, in United States literature is frequent to find the term intermodalism and the system that this chapter refer to is formally called “United States Intermodal System”.

⁶⁶⁸ 12.3 days from Asia to the United States West Coast and 6 days from the United States West to East Coast, via land routes. For means of comparison, the same route from the Panama Canal takes 3 days more.

⁶⁶⁹ Delmy L. Salin, *IMPACT OF PANAMA CANAL EXPANSION ON THE U.S. INTERMODAL SYSTEM* United States, United States Department of Agriculture Marketing and Regulatory Programs Agricultural Marketing Service Transportation and Marketing Programs January 2010.

⁶⁷⁰ Michael F Sturley, ‘International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation’ (1986–1987) 27 *Virginia Journal of International Law* 729.

a cargo nation, but its Himalaya clause jurisprudence favours the carrier”.⁶⁷¹ Apart from Himalaya clauses, in general Courts in the United States are also usually more open to third party protection.⁶⁷²

United States law has two unique features that impact on the carriage of goods by sea:

- 1) The conflicts between COGSA and state law, and the enactment of the Harter Act.
- 2) United States law is federal in nature; third party protection varies from state to state. According to Zawitosky, the laws of some states provide that an agent of the carrier acting within the scope of its authority is entitled to the benefit of any contractual limit upon the liability of its principal, including any limitation under COGSA or the bill of lading.⁶⁷³

Zawitosky also reports that two other sources of authority under state law for the extension to stevedores and terminal operators of limitation provisions in the carrier’s bill of lading exist: sections 7-20429 and 7-3093 of the Uniform Commercial Code (U.C.C.), which together allow contractual limitation of liability under specific conditions for warehousemen and carriers.⁶⁷⁴

Under Section 7- 204(2) of the UCC, a warehouseman may validly contract to limit their liability to a specific amount per package. This section states:

Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to the lawful limitation of liability contained in the warehouseman’s tariff, if any. No such

⁶⁷¹ Ibid., 742.

⁶⁷² The modern third party beneficiary rule in the United States has started with the case of *Lawrence v Fox* (1859) 20 NY 268 (NYCA).

⁶⁷³ Joanne Zawitoski, ‘Limitation of Liability for Stevedores and Terminal Operators Under the Carrier’s Bill of Lading and COGSA’ (1985) 16 *Journal of Maritime Law and Commerce* 3, 337.

⁶⁷⁴ Ibid.

*limitation is effective with respect to the warehouseman's liability for conversion to his own use.*⁶⁷⁵

In general terms, it is clear that multilateral transport in the United States faces a problem of jurisdiction (i.e., Admiralty and federal regulation of railroads).⁶⁷⁶

Having framed the factual and general legal context of transportation in the United States, this part of the chapter deals with third parties under United States law. The concept of bailment and agency under United States law will be analysed, and a review of the most relevant authorities on the topic will be provided.

4.10 Agency and bailment in United States law

Agency and bailment held great importance under United States law up to a certain point. After the case of *Herd*, however, the Courts' approach changed.⁶⁷⁷

According to American Restatement,⁶⁷⁸ an agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act.⁶⁷⁹

Also under United States law, agency is strictly connected with bailment. A treatise from over a hundred years ago on the law of bailment and carrier reports that most contracts could be entered into by an agent of the contractor;⁶⁸⁰ the principles of agency apply to bailment. In the same treatise, Elliot refers to his statement as especially true in reference to the law of carriers, since today most carriers are great corporations, which can contract only by and via their agent.⁶⁸¹ This statement is extremely contemporary and relevant for the proposition of the multilateral common enterprise.

⁶⁷⁵ Denniston, Gunn and Yudes (n 87).

⁶⁷⁶ The issue of the conflict between Admiralty law and federal law in the United States is outside the scope of this thesis. However, it is worth to specify that, as reported by Sweeney (n 17), the approach of admiralty jurisdiction has most probably been adapted after Kirby decision. In Kirby, Justice O'Connor defined the case as a "maritime case about a train wreck" therefore under Admiralty jurisdiction. Sweeney aptly point it out that this definition is shocking "only" for those who are not familiar with modern transport. For who is part of modern transport instead it should be a natural consequence of the current factual context.

⁶⁷⁷ *Herd* (n 155).

⁶⁷⁸ American Law Institute, *Restatement of the Law of Agency* (3rd ed American Law Institute 2006) para 1.01.

⁶⁷⁹ *Ibid.* Agency under US law also affects the relationship between employer and employee under United States law is dealt with the concept of the *respondeat* that states that an employer is subject to liability for torts committed by employees while acting within the scope of their employment.

⁶⁸⁰ William F Elliot, *A treatise on the law of bailment and carriers* (Bobbs-Merrill Company 1914) 266.

⁶⁸¹ *Ibid.*

Bailment in the United States is dealt with by the UCC,⁶⁸² which defines a bailee as “a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them”.⁶⁸³ As explained by the Uniform Law Commission:

*The storage and shipment of tangible goods for commercial purposes has been going on for centuries. The physical side of the business is carried on by entities that provide warehouses (warehousemen) and entities that carry the goods from place of origin to destination (common carriers). These are tangible, visible businesses. What is not tangible and visible is the transfer of rights in the goods while they are stored and/or shipped. The common law provided the rules of bailment.*⁶⁸⁴

In order to underline the originality of this analysis it should be observed, and acknowledged here that, as Helmholtz said in 1992 but valid more than two decades later, in more than sixty years, there has been no systematic treatise devoted to the United States law of bailment in the United States law.⁶⁸⁵

Street stresses that possession is severed from ownership.⁶⁸⁶ Decisions under United States regarding bailment have tended to swing, pendulum-like, between possess and contract. In his article “The definition of a bailment”, Cullen actually specifies that although it is usually created by a contract, this is not always so.⁶⁸⁷

Laidlaw explained in 1932 that the courts of the nineteenth century gave a great deal of attention to contract, and frequently stipulating its requirement where in Laidlaw’s opinion none should have been needed.⁶⁸⁸ In a variety of American cases, bailment was not found because no contract existed.⁶⁸⁹ Other courts have nonetheless contradicted this approach; for

⁶⁸² The Uniform Commercial Code (UCC or ‘the Code’), first published in 1952, is one of a number of Uniform Acts that have been promulgated in conjunction with efforts to harmonise the Law of Sales and other commercial transactions in all 50 American states. The goal of harmonising State Law is important because of the prevalence of commercial transactions that extend beyond one state.

⁶⁸³ Section 7–102(1). Therefore, it is acknowledged that according to the UCC it has to be under a document and not just possession.

⁶⁸⁴ Uniform Law Commission, ‘UCC Article 7, Documents of Title (2003) Summary’ (*Uniform Law Commission*, 2015) <[http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20\(2003\)](http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%207,%20Documents%20of%20Title%20(2003))> Accessed 9 February 2014.

⁶⁸⁵ Richard H Helmholtz, ‘Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care’ (1992) 41 *University of Kansas Law Review* 97.

⁶⁸⁶ Thomas Atkin Street, 2 *Foundations of Legal Liability* (1906) New York at 232

⁶⁸⁷ (1926) 11 *St. Louis Law Review* 257, 264.

⁶⁸⁸ William King Laidlaw, ‘Principles of Bailment’ (1932) 37 *Commercial Law Journal* 134.

⁶⁸⁹ *Berting v Norman* 101 Ark 75, 141 SW 201 (1911); *Bohannon v Springfield* Ala 789 (1846); *Cowen v Pressprich* 202 App Div 796, 196 NY Supp 921.

example, that bailment does not always depend upon a contractual relation. It is an element of lawful possession no matter how it is created and duty to account for it as the property of another that creates bailment, regardless of whether such possession is based upon contract in the ordinary sense.⁶⁹⁰ According to Laidlaw,⁶⁹¹ if there is a bailment whenever there is possession of the chattel every possessor who is not an owner is a bailee.

As in England, also in the United States, third parties have historically sought legal protection under agency and bailment law.

4.11 Third parties in United States case law prior to *Herd & Co.*

The United States's willingness to allow protection to third parties seems to have varied throughout different periods of history. As Zawitosky points out, in the middle of last century, a United States Court would have held a third party employed by the carrier to receive a benefit from the contract, by virtue of that employment relationship alone, under the principles of agency law.⁶⁹² In contrast to the English law, the United States has not had problems with the English concept of privity and consideration.⁶⁹³

Early judgments in the United States extended bill of lading exceptions even where the bill of lading clauses in question were far from specific. It is safe to say that, until middle of the twentieth century, a terminal operator or a stevedore could rely on the protection from the bill of lading even without specific clauses in the bill of lading.⁶⁹⁴

Citing *Reid v Fargo*, Healy argues that the extraordinary lack of litigation on this question in the years between 1913 and 1952 is responsible for the denial of extension of liability limitation to the stevedore; a time when the case of *Collins & Co. v Panama Railway Co.* was appealed to the Court of Appeal for the Fifth Circuit.⁶⁹⁵

The concepts of bailment and agency have been cornerstones of the protection afforded during this period, giving the effect of limitation clauses (such as the Himalaya clause) and the concept of vicarious liability. On the issue of whether or not a stevedore might

⁶⁹⁰ *Foulke v New York Consolidated R.R.* 228 NY 269, 127 NE 237 (1920).

⁶⁹¹ Laidlaw (n 688).

⁶⁹² Zawitoski (n 673).

⁶⁹³ The Restatement (Second) Contracts 1981, Section 304, which provides, "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty". Comment (b) to Section 304 states, "This Section reflects the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person".

⁶⁹⁴ *National Federation of Coffee Growers of Colombia v Isbrandtsen Co.* (1957) AMC 1571 (Sup Ct NY). *United States v The South Star* 210 F 2d 44 (2d Cir 1954).

⁶⁹⁵ Marie Healy, 'Carriage of Goods by Sea: Application of the Himalaya clause to Sub-delees of the Carrier' (1977) 2 *The Maritime Lawyer* 91.

vicariously have the benefit of a contractual limitation of liability as an agent of the named carrier in the bill of lading, a leading authority in this period emerged with the case of *Collins*.⁶⁹⁶ In it, the Court of Appeals for the Fifth Circuit had held that where the provisions of the Carriage of Goods by Sea Act was expressly incorporated into the bill of lading, the stevedore had equal benefit with the carrier of Section 4(5) of the Act which states that:

*Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.*⁶⁹⁷

The court provided a staunchly commercial rationale, summarised below:

- Ships are usually unloaded by stevedores.
- Carriage of goods by sea covers the period from the time of loading to discharging.
- The stevedore was contracted by the carrier to carry out the carrier’s obligations to discharge cargo.
- The goods went damage during this period.

Therefore the stevedores were entitled to the same limitation of liability of the carrier. The court in *Collins* applied the principle of the Restatement of agency (Paragraph 347), which states that “an agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal”.⁶⁹⁸

Almost a decade later, this scenario in the United States has been changed by the Supreme Court in *Herd*. This case disregarded the nature of the relationship between the third party and the main party of the contract and therefore the concepts of bailment and agency. On the contrary, the discussions in *Herd* focused on how Courts would have construed the clauses.

⁶⁹⁶ *A.M. Collins & Co v Panama R. Co* (1952) 197 F 2d.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ *Ibid.*

The Court passed over bailment and agency, taking the protection of third parties to a purely contractual level and thus highlighting the autonomy of the parties of a contract. Analysis of the *Herd* case is important because it defines the modern way in which clauses have to be construed in order to do justice to the intention of the parties. The rest of this chapter, therefore, addresses first the *Herd* case, followed by its influence over cases in the carriage of goods by sea, and then how this has been changed by *Kirby*, in which it is stated that the intent of a maritime contract goes beyond any barrier. *Herd* has been the watershed of the United States' approach to the law governing third party protection.

4.12 The case of *Herd & Co.*

Herd case involved stevedores, contracted verbally by the carrier, who, while loading the cargo, dropped it into the water. The stevedore attempted to rely on the bill of lading and to take advantage of the \$500 per package limitation. The district court refused to extend the package limitation to the stevedores holding that:

Contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."⁶⁹⁹

The case reached the Supreme Court of the United States which also refused to extend the \$500 per package limitation to stevedores who had been contracted orally by the carrier. In the *Herd* case, the Court changed its approach towards third party protection stating that:

- 1) The language of the Himalaya clause must be very specific as to who it protects.
- 2) Courts will not interpret bills of lading to benefit third parties not mentioned in any way whatsoever.

In 1959, the United States Supreme Court, in deciding *Herd* made it difficult for third parties to benefit from exculpatory clauses in bills of lading to which they were not a party. The result was that, in order to be viewed as protected by an exculpatory clause in a contract

⁶⁹⁹ *Herd* (n 155)

for carriage, a third-party contractor would have to be named with some degree of specificity. However, in the case, the court did not establish a rule regarding how specific the identification of a party must be.

It became perceptible in the United States that, after *Herd*, a simple agency relationship between stevedore and carrier would be insufficient to extend the carrier's bill of lading protections to the stevedore. By contrast, to facilitate the application of the protection, the clause must reflect the intention of the parties to protect the third party. In the period following *Herd*, American Courts further specified the Supreme Court's request for precision in the wording of clauses to be extended to third parties.⁷⁰⁰

In the *Herd* case, the Court commented in detail on the text of the Hague Rules and their adoption by the United States Congress:

*The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents. There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence.*⁷⁰¹

In the *Herd* case, the Supreme Court stated that “no statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract”.⁷⁰²

After *Herd*, the shipping industry started to comply with its requirement in order to allow protection to parties outside the contract. As a matter of fact, the Himalaya clause benefiting the stevedore and the terminal operator is valid in the United States in virtue of *Herd*, but certain conditions must be complied:

There must be a contractual relationship between the contracting party and anyone who purports to claim the benefit of any clause in that contract. Furthermore, the party claiming the benefits bestowed by a Himalaya clause must be performing part of the contract that actually contains the clause. As said before, in case of independent

⁷⁰⁰ Zawitoski (n 673).

⁷⁰¹ *Herd* (n 155) 358.

⁷⁰² *Ibid.*, 359.

*contractors, some courts have required that the operation being performed be of a “maritime nature”.*⁷⁰³

As Tetley points out, the *Herd* case also impacted upon the relationship between independent contractor and employer. Generally speaking, the employer of an independent contractor is not held liable vicariously for any tortious acts and omissions of the contractor; the control and supervision existing in an employer-employee or principal-agent relationship is absent. However, vicarious liability will be imposed only if the clause is sufficiently clear and drafted narrowly enough to cover only the intended beneficiaries.⁷⁰⁴

It has been observed that, what *Scrutton* achieved in England, *Herd* achieved in the United States. These two cases, in denying third parties the ability to benefit from a limitation of liability, in reality opened the door for third party protection.

4.13 From *Herd & Co.* to *Kirby*

In the period between *Herd* and *Kirby*, United States case law established various limits for third party protection, such as the maritime nature of the service, the clarity of the language of the protection clause and the relationship that the third party has to have with the main party.

There are several cases demonstrating this, but one in particular summarises the criteria quite well; the 1998 case known as *Akiyama Corporation of America*. The court, in allowing the stevedores and terminal operators to receive protection under the bill of lading, formally summarised that there are three factors to consider in determining the intent of the contracting parties:

- 1) Nature of the service performed.
- 2) Clarity of language to extend to third party.
- 3) Contractual relation between third party and main party.⁷⁰⁵

The amount of cases in that period is substantial and the analysis below does not attempt to cover all of them – data analysis will be expanded in the table attached – but instead refer to the most relevant cases to support the argument of this thesis.

⁷⁰³ *Taisho Marine & Fire Insurance Co. v The Vessel Gladiolus* 762 F 2d 1364 (2d Cir 1985).

⁷⁰⁴ Tetley (n 26).

⁷⁰⁵ *Akiyama Corporation Of America v M.V Hanjin Marseilles* (1998) 162 F.3d 571.

An example of limiting the nature of the service to geographical boundary is the case of *Virgin Island Corp. v Merwin Lighterage Co., Inc.*. As Healey reports, this was the first case to rely on the *Herd* mandate. The court stated that the carrier's \$500 per package limitation of liability was not intended to be extended to the carrier's negligent lighterman, where the bill of lading expressly included protection for the carrier or bailee only before the goods left the ship's tackle, and where it expressly provided that lighterage was at the "risk of the goods".⁷⁰⁶

In a case known as *The Vessel Gladiolus*, a trucking company was not allowed to benefit from a Himalaya clause because it was not performing a "maritime function".⁷⁰⁷

In 1991, the case of *Caterpillar Overseas* reinstated the concept that the operation being performed be of a maritime nature. In the words of the Court:

*In determining the meaning of the term independent contractor in the application of the Himalaya clause the court is to take into consideration the nature of the services performed compared to the carrier's responsibilities under the carriage contract and that if the independent contractor is performing a non-maritime service, that is another factor to be given weight in ascertaining whether the third party qualifies for the Himalaya limitation.*⁷⁰⁸

In the same period, the Court of Maryland in the case *Herr-Voss Corporation* case allowed the Himalaya clause to cover a trucking services company because it was judged that "while in truth non-maritime, the trucking company was performing a service crucial for the maritime services".⁷⁰⁹

Another case on the same line is *Acciai Speciali* where the Court stated that the Himalaya clause could be extended to third parties only "while acting in the course of or in connection with their employment".⁷¹⁰ Such clauses, following *Herd*, must be strictly construed and limited to intended beneficiaries.

As explained in Chapter 3, maritime boundaries also seem to have been adopted a few years later, in the preparation of the Rotterdam Rules where the United States delegation

⁷⁰⁶ Healy (n 695).

⁷⁰⁷ *The Vessels Gladiolus* (n 703).

⁷⁰⁸ *Caterpillar Overseas, S.A. v Marine Transports, Inc.* 900 F 2d 714, 724, 1991 AMC 75, 92–93 (4 Cir 1990); *Herr-Voss Corporation v Columbus Line (Herr-Voss)* 1994 AMC 77, 81 (D Md 1992).

⁷⁰⁹ *Herr-Voss*, *ibid.*

⁷¹⁰ *Acciai Speciali Terni v M/V Berance, et al., Defendants* (181 F.Supp.2d 458).

insisted on putting forward a geographic approach.⁷¹¹

However, an opposing and more conceptual view (even though strictly related to the specificity of the clause) is the interpretation of *Carle & Montanari*, where the court stated:

*It is understood and agreed that, other than said shipowner or demise charterer, no person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, all agents and all stevedores and other independent contractors whatsoever) is, or shall be deemed to be liable with respect to the goods as carrier, bailee or otherwise howsoever, in contract or in tort. If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other.*⁷¹²

In *Carle Montanari* therefore the Court acknowledged the authority of *Herd* and the fact that a bill of lading can extend the legal protection to a third party but only if there is a clear and expressed intention to do so. In this case the court considered that was such intention and extended the \$500 liability to the stevedores. The Court in *Middle East Export Co. v Concordia Line* – where the \$500 per package limitation was extended by the bill of lading to “any other legal entity whatsoever”, including “all agents and independent contractors” – were of the same opinion.⁷¹³

⁷¹¹ As set out in footnote 9 of the ‘Transport Law Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea) Note by the Secretariat’ (United Nations Commission on International Trade Law Working Group III (Transport Law) Nineteenth session (New York, 16–27 April 2007 A/CN.9/WG.III/WP.81)), *the definition of ‘maritime performing party’ (Draft Art 1(7) of the Draft Convention) should be edited to clarify that a rail carrier, even if it performs services that might be considered the carrier’s responsibilities after the arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge, should be considered a non-maritime performing party. 2. The Convention applies to actions against the carrier or a maritime performing party (Draft Art 4) but not to actions against a non-maritime performing party. The suggestion outlined in para 1 was made at the behest of the Association of American Railroads (AAR) (representing the United States, Canadian, and Mexican railroads). The AAR made it known to the United States from the beginning of the negotiation that it is concerned it might inadvertently be deemed to be a maritime performing party when it performs services within a port area, even though the ultimate purpose of those services will virtually always be to move goods into or out of a port and not to move goods from one place to another within a port. Therefore, the United States supports the suggestion reflected in para 1. 3. The United States proposes the following sentence be added at the end of Draft Art 1(7) of A/CN.9/WG.III/WP.81 (the definition of ‘maritime performing party’), “A rail carrier, even if it performs services that are the carrier’s responsibilities after arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge, is a non-maritime performing party”.*

⁷¹² *Carle & Montanari, Inc. v American Export Isbrandtsen Lines, Inc.*, 275 F Supp 76, 1967 A M C 1637 (S D N Y), aff’d 386 F 2d 839, 1967 A M C 2529 (2d Cir 1967).

⁷¹³ 64 Misc 2d 270, 314 NYS 2d 390 (NYC Civ Ct 1970) aff’d 71 Misc 2d 365, 336 NYS 2d 217 (Sup Ct App Term 1st Dept 1972).

By contrast, in the case of *Cabot Corp. v S. S. Mormacsan*,⁷¹⁴ the language in the bill of lading was found to be insufficiently precise to meet the standards of clarity demanded by *Herd*. In *Cabot Corporation* the idea that the parties have to be expressly mentioned is extremely stressed. In particular, the judges commented that:

*The failure to include similar language here would lead one to believe that the protection of stevedores against liability was not intended. In any case such an intention was not expressed with sufficient clarity of language. We will not stretch the language when the party drafting such a form contract has not included a provision it easily might have.*⁷¹⁵

During this period, clarity of language was essential in order to extend the carrier's COGSA benefits to 'independent contractors'. Zawitoski reports that the mere presence of the term 'independent contractor' in the Himalaya clause was sufficient to encompass stevedores, terminal operators and other non-enumerated third parties.⁷¹⁶ However federal courts in the United States started to distinguish between an independent contractor employed by the carrier and one employed by a party other than the carrier in determining the scope of protection offered by the simple term 'independent contractor' in the carrier's Himalaya clause. In *Toyomenka, Inc. v S.S. Tosaharu Maru*,⁷¹⁷ the Second Circuit held that a security service company hired by the carrier's stevedore, was not entitled to limit its liability under a Himalaya clause covering "all servants, agents and independent contractors ... used or employed by the carrier", since the security service company had not been employed by the carrier.⁷¹⁸

In the already reported case of *Carle Montanari*, instead one of the early leading cases, the bill of lading extended "all limitations of and exonerations from liability" to "all agents and all stevedores and other independent contractors whatsoever".⁷¹⁹ In this period the courts allowed protection only in cases where the third party meant to be protected was precisely mentioned and as independent contractor was considered not sufficient to protect a specific category of third party, conversely they held that the term agent was adequate to protect stevedores.⁷²⁰ As well as describing third parties merely as "bailees" or as "all persons

⁷¹⁴ 441 F 2d 476 (2 Cir 1971).

⁷¹⁵ *Ibid*.

⁷¹⁶ Zawitoski (n 673).

⁷¹⁷ *Toyomenka Inc. v Tosaharu Maru (Tosaharu Maru)* 523 F2d 518, 1975 AMC 1820 (2 Cir 1975).

⁷¹⁸ Zawitoski (n 673).

⁷¹⁹ *Carle & Montanari* (n 712).

⁷²⁰ Sturley, (n 123).

rendering services in connection with the performance of this contract” did not meet the test of specificity in the past.⁷²¹ Differently, in a case of 1990⁷²² it was stated that the term ‘bailee’ as used in a bill of lading is sufficiently clear in expressing intent to extend limitation benefits to stevedores or other non-carriers.

Other cases, in this period recognise that the description ‘independent contractors’ was considered sufficiently specific until the 1970s, around which time it came to be viewed as imprecise.⁷²³

The importance of the relationship with the carrier is highlighted in *Assicurazioni Generali v D’Amico*, where the Himalaya clause had been extended to a bailee and the judges interpreted the situation in favour of the bailee explaining that it was the clear intention of the carrier, “to extend limitation of liability benefits to those who may be engaged by, and on behalf of the carrier to handle the subject cargo during the time in which the carrier was responsible for that cargo”.⁷²⁴

In the aforementioned case *Toyomenka, Inc. v S.S. Tosaharu Maru*, for instance, the security company hired by the stevedores was not allowed the benefit of the clause.⁷²⁵ In *Mikinberg v Baltic Steamship Co.*, the United States Court of Appeals for the Second Circuit explained its rationale for this approach:

*There must be a contractual relationship between [the stevedore] and [the carrier] in order for the provisions in the ‘Himalaya clause’ to apply. It is not enough that [the stevedore] merely handled the cargo shipped by [the carrier]. Otherwise, any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its contractual privity with the shipper or carrier. We decline to extend COGSA protections through the ‘Himalaya clause’ to indefinite and unforeseeable defendants who may have only an attenuated connection to the ‘carriage of goods by sea’.*⁷²⁶

⁷²¹ *De Laval Turbine v West India Industries* 502 F.2d 259 (3d Cir. 1974); *Rupp v I.T.O. Co.* 479 F.2d 674, 1973 AMC 1093 (2 Cir. 1973); *Cabot Corp v Mormacscan* 441 F.2d 476, 1971 AMC 1130 (2 Cir 1971), cert. denied 404 United States. 855, 1971 AMC 565 (1971); *Royal Embassy v Ioannis Martinos* 1986 AMC 790, 801 (ED NC 1984).

⁷²² *Barretto Peat, Inc. v Luis Ayala Colon Sucrs. Inc.*, (1990) 896 F.2d 656.

⁷²³ *Tosaharu Maru* (n 717); *Schiess-Froriep Corp. v Finnsailor* 574 F.2d 123, 127, 1978 AMC 1101, 1107 (2 Cir 1975), See also *LaSalle Machine Tool v Maker Terminals* 611 F.2d 56, 60, 1978 AMC 1374, 1380 (4 Cir 1979).

⁷²⁴ 766, F.2d 485 (11th Cir 1985).

⁷²⁵ *Tosaharu Maru* (n 717).

⁷²⁶ (1993) 988 F.2d 327 246.

In a similar vein, the *Vessel Gladiolus* court ruled that a trucker was not an independent contractor “used or employed” by the ocean carrier as required by the Himalaya clause because it contracted with the consignee. Consequently, he was not entitled to the COGSA protection.⁷²⁷ In the case of *Taisho Marine v Maersk Line*, the defendant trucker contracted directly with the ocean carrier, and a separate bill of lading was not issued. Analysing the ‘nature’ of the services provided by trucker, the court held that his portion of the trip was within the scope of the carrier through bill of lading that required land transportation. The court held, therefore, that the trucker was an intended beneficiary of the bill of lading.⁷²⁸

In the case of *Bellmer v Terminal Service Houston* it was argued by Bellmer (the shipper) that stevedores cannot claim the benefit of the clause because that clause is limited to independent contractors “engaged by the carrier”. In this case the stevedores were hired by the carrier’s agents. The explanation of the court is found very relevant and helpful in understanding the concept of a multilateral common enterprise.

The District Court explained that it was true that the carrier’s agent hired the stevedores. However, the stevedores and the agents have ownership in common, occupying the same office and telephone number. The personnel conducting the unloading operation were a mixture of the stevedores and the agent. The orders to the stevedores’ drivers were usually given by the agent’s employees. The evidence also revealed that the owners represent various steamship lines and stevedoring companies in the Houston Ship Channel area.⁷²⁹ Therefore the court allowed the limitation of liability concluding that a contrary conclusion would be unrealistic under the facts of the case. This proves a very important point of this thesis; factual context is incredibly relevant for deciding the law.

In summary, in the period between *Herd* and *Kirby*, the courts were in accord that a bill of lading may extend its benefits to third parties through a Himalaya clause if the bill’s language clearly expresses the intent to do so. Other cases, however, have yielded inconsistent results. Generally, the more specific the language designating the third party as entitled to the bill’s benefits, the better the chance that the courts had allowed, in this period, the third party’s protection.

4.14 The case of Kirby: ‘a maritime case about a train wreck’

⁷²⁷ Sturley, ‘An Overview of the Considerations Involved in Handling the Cargo Case’ (n 109).

⁷²⁸ Charles S Donovan and Jill M Haley, ‘Who Done It and Who’s Gonna Pay? Rights of Shippers and Consignees against Non-Ocean Carriers Performing Part of a Contract of Carriage Covered by a Through Bill of Lading’ (1998) 7 Journal of International Law and Practice 415.

⁷²⁹ *Gebr. Bellmer KG v Terminal Services Houston Inc.* (1983) 711 F.2d 622.

The question in *Norfolk Southern Railway Company v James N. Kirby* was: can a train company rely on a Himalaya clause if participating in a multimodal carriage of goods? In the *Kirby* case, there were two bills of lading issued. Both contained a Himalaya clause. The train company was not a party to both bills of lading. The court allowed the train company to benefit from the exclusion in the bill of lading. The facts are as follows:

- The parties were Kirby, a manufacturer from Australia and ICC, a freight-forwarder;
- the scope of the contract was transporting ten packages of machinery;
- the port of loading was Sidney, Australia;
- the port of unloading was Savannah, Georgia, United States;
- the place of delivery was an inland city in Alabama;
- two bills of lading were issued, one by the freight forwarder, ICC, to the shipper, Kirby, and one by the carrier, Hamburg Sud, to ICC. Both bills extended “beyond the tackles”, and included both sea and land leg. The two bills included provisions limiting the liability of the freight forwarder and carrier respectively, as well as other parties assisting in the performance of the contract of carriage;
- the train involved in the land leg derailed causing \$1.5 million of damages. Consequently, Kirby sued the Railway (Norfolk), who claimed coverage under the limitations of liability in both the ICC and Hamburg Sud bills of lading.

The Eleventh Circuit held that Norfolk could not claim protection under the Himalaya clause in the first contract, the ICC bill. They excluded from the protection parties such as Norfolk that had not been in privity with ICC. The Court confirmed that “a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier”.⁷³⁰ The eleventh circuit strictly followed the route set by the *Herd* case.

The case went to the Supreme Court, who held that contracts for the carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties.⁷³¹ The court had to address two different problems. The first regarded Admiralty jurisdiction and the second the attribution of liability. The second problem is of immediate interest for this thesis.

The Court’s reasoning rested on three grounds. First, the need for the parties involved

⁷³⁰ *Kirby* (n 7).

⁷³¹ *De la Mare* (n 120).

in the carriage contracts to be able to rely on their contracts. Second, the need to retain a structure of interaction in this area that is consistent with the statutory and decisional law promoting non-discrimination in common carriage is necessary. Third, for equitable reasons, the shipper should be allowed, in cases such as *Kirby*, to sue the forwarder for any loss that exceeds the liability limitation they agreed upon.⁷³² As Costabel states:

*Answering in the positive, the Kirby Court announced three rules. First, the land segments of multimodal transports fall under admiralty jurisdiction unless the ocean segment is 'insubstantial' (the 'Jurisdiction Rule') Second, Himalaya clauses, properly drafted, extend downstream to all sub-carriers, because the contemplation of various modes of transport means that the parties must have anticipated that a land carrier's services would be necessary in performing the contract (the 'Beneficiary Rule'). Third, Himalaya clauses extend upstream to the shipper (not party to a sub-carrier's bill of lading) only as far as limitations of liability are concerned". For anything else, there is no relation of agency between the shipper and the carrier (the 'Agency Rule').*⁷³³

Before the *Kirby* case, the law considered an intermodal contract to be a mixed contract where part was maritime and therefore governed by maritime law and part was land (involving inland carriers) governed by land law. However, the *Kirby* case changed the legal approach towards intermodal contracts in cases where a bill of lading issued by the carriers is involved. The *Kirby* case holds that if there is a bill of lading governing a maritime leg, the contract also requires a land leg so the contract has to be considered maritime as a whole. As stated by the Court regarding the case:

The conceptual approach vindicates that interest by focusing the Court's inquiry on whether the principal objective of a contract is maritime commerce. While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (i.e., from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry has moved into a new era, in which cargo

⁷³² Ibid.

⁷³³ Attilio M. Costabel 'Himalaya Strain?: A Forensic Examination of *Norfolk Southern Railway Co. v James N Kirby, Pty Ltd* and *Doe v Celebrity Cruises, Inc.*' 29 Tul. Mar. L.J. 217 2004–2005.

*owners can contract for transportation across oceans and to inland destinations in a single transaction. The popularity of an efficient choice, to assimilate land legs into international ocean bills of lading, should not render bills for ocean carriage non-maritime contracts. Lower court cases that appear to have depended solely on geography in fashioning a rule for identifying maritime contracts are inconsistent with the conceptual approach required by this Court's precedent.*⁷³⁴

In this case, the United States Supreme Court took a significant step forward in third party protection making clear that the maritime nature of the bill of lading cannot be altered by multimodal element. Kirby express the concept that

*The Kirby Court's decision made it clear that the maritime character of an ocean bill of lading is not altered by multimodal components ... The maritime 'nature and character' of the bill of lading contract was a preeminent consideration in Kirby ... The lesson of Kirby is that geography has no place in the maritime contract analysis, because that analysis must be conceptual, not spatial.*⁷³⁵

The conceptual approach articulated by the Court in this case focuses upon the purpose of the contract and mandates if that “purpose” is to “effectuate maritime commerce”, it is a maritime contract.⁷³⁶ In Kirby, the judges stated:

*We recognise that our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated. It is not, of course, this court's task to structure the international shipping industry. Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate.*⁷³⁷

It is believed that Kirby authority will go much further than the Court had anticipated. Kirby did indeed create a new, modern structure for the international shipping future. The case

⁷³⁴ Kirby (n 7). As shown by Carl R Neil, ‘Maritime Contract Law Moves Inland: The Kirby Decision’ (Lindsay, Hart, Neil & Weigler LLP, 2011) <http://lindsayhart.com/wp-content/uploads/2010/10/Neil_Maritime-Contract-Law.pdf> Accessed 3 September 2014.

⁷³⁵ Wyatt (n 81)

⁷³⁶ Ibid.

⁷³⁷ Sweeney (n 17).

also changed the way of evaluating third party protection (as discussed previously in Chapter 2), and introduced the idea of *substantial* carriage of goods by sea.⁷³⁸

Gurley contends that prior to *Kirby*, the general principle was “parties may benefit when properly described, even when not specifically listed in the clause, provided that they at least belong to a readily-identifiable class of beneficiaries”.⁷³⁹ *Kirby* expanded Himalaya clause coverage for pragmatic reasons. If the language of the Himalaya clause is plain, and if it extends to anyone whose services contribute to the performance of the contract, and the contract clearly contemplates more than ocean carriage, the terms of the bill of lading may be extended.⁷⁴⁰ Justice O’Connor shrewdly noted that, after *Kirby*, drawing a line at the shore is essentially artificial.

Therefore, accepting that, as *Kirby* states, drawing distinctions at the shoreline is somehow artificial, then the same must be said for the legal implications and protection that follow. *Kirby* looks at the problem from multimodal perspective, and this work extends it to a supply chain perspective. It is believed that, although *Kirby* is a good foundation, the conceptual reason to extend the protection has to go even further accepting that the international transportation industry has indeed moved into a new era. (i.e. the multilateral common enterprise).

4.15 Mazda Motors: the vessel as a third party

One case following *Kirby* that deserves particular mention in this context is the case of *Mazda Motors*.⁷⁴¹

In this case, the United States Court of Appeals for the Ninth Circuit had to decide whether the defendant ocean vessel could invoke a forum selection clause in the bills of lading governing the contract. The action was brought by Mazda’s subrogated insurer against the vessel *in rem*. There was a Himalaya clause in the bill of lading. The clause stated:

The Merchant undertakes that no claim or allegation shall be made against any servant, agent or Sub-Contractor of the Carrier which imposes or attempts to impose upon any of them, or upon any vessel owned or operated by any of them, any liability whatsoever in

⁷³⁸ Ibid.

⁷³⁹ G Gurley, ‘The Ninth Circuit Breathes Life into a Vessel as a Himalaya Beneficiary: *Mazda Motors of America, Inc. v MV Cougar Ace*’ (2009–2010) 34 Tulane Maritime Law Journal 619.

⁷⁴⁰ Ibid.

⁷⁴¹ *Mazda Motors* (n 6). In 2010 another case that was, to a certain extent, similar to *Kirby* and therefore worth mentioning was *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (2010) 561 U.S.

*connection with the Goods, and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing, every such servant, agent and Sub-Contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit; and in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents and Sub-Contractors.*⁷⁴²

Mazda Motors is a particularly relevant case not only because the court has found that a Himalaya clause covered a defendant vessel *in rem*. But also because of the reasoning of the court. Until *Mazda Motors*, the action *in rem* was not so strictly related to the concept of third party protection. When the counsel from Mazda stressed the lack of authorities supporting the thesis that the vessel sued *in rem* was a Himalaya beneficiary, the court stated that this was due to the function of the recent case of *Kirby*. In fact, the court stated that “refusing to apply the Himalaya clause to the defendant vessel because the otherwise unambiguous clause does not specifically name the vessel would contravene *Kirby*’s rule that Himalaya clauses need not be drafted with ‘linguistic specificity’”.⁷⁴³

In *Mazda Motors*, the court held that because the vessel helped performing the contract of carriage, it was a Himalaya clause beneficiary and was thus entitled to rely on the forum selection clause.⁷⁴⁴ The court held that, like a terminal operator fall under the Himalaya clause as a subcontractor (because his services are the same services of the carrier), the term subcontractor in *Mazda Motor* is broadly enough to include the vessel.⁷⁴⁵

The court applied general principles of contract interpretation to decide whether or not the vessel was covered by the Himalaya clause, and defined the bill of lading as “a contract like any other”. The court also took a broad interpretation of the term ‘subcontractor’, extending coverage to: “anyone assisting the performance of the carriage”. Since the vessel assisted the performance of the carriage, the court found her to be a sub-contractor within the meaning of the Himalaya clause.⁷⁴⁶

The cases of *Mazda* and *Kirby* were decided a several years apart, highlighting the new modern perspective that United States courts have towards a broader approach regarding

⁷⁴² Ibid

⁷⁴³ Ibid.

⁷⁴⁴ Ibid. In *Mazda Motors* the Judges stated that in order to decide whether an entity benefits from a Himalaya clause “the proper test is to consider the nature of the service performed compared to the carrier’s responsibility under the carriage contract”.

⁷⁴⁵ Ibid.

⁷⁴⁶ Ibid; see also Gurley (n 739).

third party protection.

Summary of Part B

As Chuah stated: “The law, for better or worse, in many jurisdictions continues to maintain a distinction between carrier and terminal operator though the reality is that the dividing line between actual carrier and terminal operator has become blurred.”⁷⁴⁷

The decision in *Kirby* – although referring to a train company and not a terminal operator – has given credence to the idea that the line between the ocean carrier and other parties is now blurred.⁷⁴⁸

United States law has generally been more willing to allow protection to third parties outside the contract. Cases against it, however, (such as *Herd*) have been useful for future construction of clauses and relationship, showing that the industry, regardless of what the law says, will always attempt to find a way to circumvent it. Furthermore, the industry uses court decisions and suggestions to improve their protection clause – as happened in the United States after *Herd* – until *Kirby* that moved the concept of protection to a new era (i.e. the conceptual era).

Chapter conclusion

The United States and England are the jurisdictions where third party protection has perhaps raised the most concerns.

As a jurisdiction, England has had the most problems with protection clauses as a device used for commerce. By contrast, the system in the United States has always been more flexible on these matters.

It seems reasonable to assert here that the issues and controversies emerging within these two countries regarding third party protection have contributed to the creation of the third party protection position as it is known today.

⁷⁴⁷ Chuah (n 29).

⁷⁴⁸ Following cases on the same matter have partially followed the ratio in *Kirby*. *Delphi-Delco Electronics Syst. v M/V Nedlloyd Europa*, 324 F Supp 2d 403, 419–420, 2004 AMC 1217 (SDNY 2004); *Green Fire & Marine Insurance, Co. v. M/V Hyundai Liberty* 125 S.Ct. 494 (2004), *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1 (1st Cir. 2004). *American Home Assurance Co. v. TGL Container Lines*, 347 F. Supp. 2d 749 (N.D. Cal. 2004).

Furthermore, because these two jurisdictions are the most influential in terms of shipping law – and because they have had upheavals in accepting third party protection – they have been uniquely placed to experience first the dilemma of whether or not to allow protection of third parties. Despite sharing a similar primary rationale for third party protection (preventing the cargo owner to get around the contract suing someone else and the benefit to the carrier) each jurisdiction has treated the subject differently and the resultant status of third party protection in each system is different.

On the one hand, in England, since the decision in *Elder Dempster*, approaches based on concepts such as bailment, agency, vicarious liability, carrier’s commercial benefit, public policy have been proposed, but no systematic approach to apply these remedies has derived from these concepts. The concept of agency has been applied by English judges – from *Scrutton* to *The Eurymedon* – in order to give protection to third parties. The concept of bailment instead has been decided in two different ways in the cases of *The Mahkutai* and *The Pioneer Container*.

English authorities have been shown to adopt a different approach to their American counterparts when dealing with third party protection. Notably, the fact that a specific approach has not been developed does not necessarily mean that third party protection is allowed or not allowed. As stated by Lord Roskill:

*The importance of these various decisions is this: They show a fundamental change in the attitude of our courts and a welcome determination to give effect to the intention of the parties where that intention has been clearly expressed in their contract and not to allow technical rules like the doctrine of consideration to stand in the way of so doing.*⁷⁴⁹

The Privy Council in *The Mahkutai* described the English approach to exculpatory clauses as a “pendulum of judicial opinion”.⁷⁵⁰ Nevertheless it has been noted that there has been an increasing willingness from courts in the United Kingdom to extend this protection. Although in some cases this has been denied, in following cases the *ratio decidendi* for denying it has been used in order to allow this protection to an even greater extent.⁷⁵¹ *The Starsin* represented a retrograde step, with the House of Lords restricting the expansion of Himalaya clause jurisprudence. The Lords not only held contractual clauses extending liability

⁷⁴⁹ Lord Roskill (n 1) 11.

⁷⁵⁰ *The Mahkutai* (n 533) 658. See generally De la Mare (n 120).

⁷⁵¹ See, for example, how the four criteria of Lord Reid in *Scrutton* were used in *The Eurymedon* (n 338).

beyond those allowed by the Hague Rules to be null and void, but also that carriers could not claim immunity through Himalaya clauses, and that “non-carrier owners may not rely on the independent contractor language of a Himalaya clause to shield themselves from liability to shippers for damage to cargo”.⁷⁵²

In addition, English law has implemented a statutory remedy for the first time, after many calls to do so: the Contract (Rights of Third Parties) Act 1999. The Act does not solve all the problems and it seems that an implied contract by means of bailment, agency or protection clauses has still to be provided. However, the Act surely shows the willingness of the English legislature to change its approach to third party protection.

Thus, a means of looking at the topic more broadly has been proposed, adopting the concept of bailment to extend protection outside the contract (shipowner under bareboat – vessel – other third parties). Moreover, new light has been shed on third party protection under the reliance perspective of contract theory.

On the other side of the Atlantic Ocean, the United States has since the early days of the third party protection been more amenable to extending protection to third parties. The doctrines of privity and consideration simply did not hold the same weight as they did in England. Thus, allowing third party protection has been an easier task for judges in the United States.

The approach of the United States to third party protection is, relatively speaking, new and advanced; to wit, the *Kirby* rule. Additionally, in this case there is a new justification for third party protection: the reality of shipping and global trade more broadly. The *Kirby* case showed that the carriage of goods by sea has extended inland, not only geographically but also conceptually.⁷⁵³

This research argues that today’s supply chain must be viewed a whole. Even though the *Kirby* case still indicates that the contract has to have a maritime objective, this research furthers this concept by stating that the contract has to have the facade of the multilateral common enterprise when dealing with a maritime contract. The attached table clearly shows that, although there has been an improvement in acknowledging third party protection in the carriage of goods by sea, reference to the concept of multilateral common enterprise and supply chain is almost negligible. Reliance, bailment, vessel as a third party, conceptual approach, all support the concept of multimodal common enterprise.

⁷⁵² See generally De la Mare (n 120). See also Tetley (n 26).

⁷⁵³ This has been further enhanced by the *Mazda Motors* (n 6) case, “The parties agree that, by transporting the cargo, the vessel ratified the bills of lading otherwise Mazda would have no basis for holding the vessel liable in rem”.

The thesis shows that substantive law in shipping still plays a key role in third party protection, despite the increasing dependence on private remedies and international solutions. It also shows that, given the concept of the multilateral common enterprise, a more multilateral approach to contract law could be given to third party protection in the carriage of goods by sea. In this case, this work suggests supplementing it with the involuntary bailment applied in third party protection and the reliance perspective contract theory.

Case law regarding third party protection contains a diversity of opinions regarding the subject. However the pragmatic approach of case law seems to function better at doing justice to the multilateral common enterprise.

It is also believed that a commercial rather than geographic approach has more relevance in the United States than elsewhere; a country that is willing to improve its multimodal network cannot establish its law on a geographical mode.

Having drawn this framework, this thesis highlights the need to stop giving justice only to the intention of the two parties of a contract (in the carriage of goods by sea) and move to focusing on the intention of *all* the parties that participate (even if only in a factual way) in the common enterprise.

CHAPTER 5

Remarks and areas of recommended future research

The law is developed by the application of old principles to new circumstances.

Therein lies its genius.⁷⁵⁴

⁷⁵⁴ *Midland Silicones* (n 5).

5.1 Remarks

The late Professor Tetley once asked whether a person without entering into a contract could benefit from its terms (in particular a third party from a bill of lading). He replied that, under common law, it is not possible unless the third party carries out one of the carriers' duties. He then explained that carriers' duties are to carry, discharge and deliver the goods. Only then can the third party benefit from the protection and only if cargo is damaged during the carrier's stage of operation.⁷⁵⁵

The fact that the carrier cannot carry out the whole job alone and that he needs a network of other parties at hand it is undebated. The issue raised is that in the past the meaning of carriage was clearly defined; now it is more ample and thus blurred. As Chuah explains, the distinction between sea and land is at present commercially artificial.⁷⁵⁶ In the context of a supply chain, the difference between what is and is not considered carriage no longer exists, rendering each party's role very complicated.

This research has focused on third party protection in the carriage of goods by sea, with an objective to rationalise it in the light of the changes as explained above. The methodology of the thesis has outlined the difference between bilateral risk allocation, upon which the law of third parties still relies, and the current factual context of the carriage of goods by sea that in turn places it in a bigger scenario, comprehensive of multilateral transport and supply chains. However, this depiction presents a theoretical problem that is, in fact, the foundation of the conceptual thread of the thesis. The boundaries of third party protection have therefore become inadequately defined. This thesis therefore argues that, for the better protection of third party's legitimate interests, an approach should be put forward that takes into consideration the role of the mentioned factual enterprise. Third parties should be regarded as part of the multilateral common enterprise, and it should be ascertained whether or not they should still receive protection based on the bilateral relationship between carrier and shipper, a question currently decided by contractual autonomy of the party and geographically limited by the international community.

Since third parties constitute a link between the carriage of goods by sea and the supply chain, any attempts to geographically draw a line would not be prudent. On the contrary, the protection should be understood and conceptualised regarding the involvement of

⁷⁵⁵ Tetley (n 27).

⁷⁵⁶ Chuah (n 29).

third parties and their role in the chain in order to create a sturdy foundation for their future protection.

Therefore, this thesis focused on third parties being an integral part of the enterprise and only under this light it is possible to define any new protection. It proposes that third parties have become an integral part of the new carriage structure, therefore becoming ‘primary parties’, instead of ‘third parties’ existing outside of the enterprise and thus the contract as in accordance with the Contract (Right of Third Parties) 1999. This work claims that this answer should be conceptually grounded and not sterilised by a simple line.

If third party protection continues to be analysed from a traditional perspective, the whole sector runs the risk of not finding a proper or satisfactory solution. If, however, it is conceptualised and analysed from the roots up, and rendered with the modern industry in mind, future legislations could be implemented.

Currently, the shipping industry views the role of third parties in an inappropriate way; it considers them an appendix to the enterprise, rather than an essential part of it. This misinterpretation creates obstacles along the route to a solution. Consequently, it is necessary to change the perceived position of third parties from appendices to central parts of the enterprise.

Throughout this thesis, the author explores the reasons on which the current understanding of third party protection has been developed.

First, the economic factual context of the shipping industry has indisputably changed, moving the industry to a wider framework. Consequently, this structure should be taken into account when addressing third party issues. A lack uniform and consistent solutions to the problem brings further complexity. The result is an arbitrary protection, left to the will of the parties via contract clauses. Uniformity has to be a prime consideration, especially in a field such as maritime law, which transcends national barriers. As reported by Margetson, in the 1874 case of *Lottowanna*, the United States Supreme Court held:

*The maritime law is part of the law of nations, one of the great beauties of which is its universality. Uniformity has been declared to be its essence. The worst maritime code would be one which should be dictated by the separate interest and influenced by the peculiar manner of only one people.*⁷⁵⁷

⁷⁵⁷ N J Margetson, ‘The system of liability of articles III and IV of the Hague (Visby) Rules’ (PhD thesis, University of Amsterdam 2008).

With this in mind, this work has looked at the uniformity of third party protection in order to create a stable default approach for their legal defence. In a leading case regarding exclusion clauses,⁷⁵⁸ Lord Diplock provided a somewhat more practical and commercially orientated approach:

*In commercial contracts negotiated between business men capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clauses.*⁷⁵⁹

He then followed on to say:

*In commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said...for leaving the parties free to apportion the risks as they think fit and for respecting their decision.*⁷⁶⁰

This thesis takes this into consideration but argues that it is now time in carriage of goods by sea to expand the apportionment of risk to a multilateral common enterprise and not only to the two included parties.

The freedom of contract that Sir Norman Hill mentions in the preparatory work of the Hague Rules should be extended to numerous categories: “Now surely the only possible basis of freedom in international commerce is freedom to the individual to make such contracts as he thinks will best help him in the conduct of his trade”.⁷⁶¹

More support for the aforementioned comes from an old proposal made by a delegation from the Netherlands:

The difficulty is this. Here in paragraph 3 it is clearly shown that an amount up to the maximum provided for in the Convention may be claimed against the carrier, his

⁷⁵⁸ *Photo Production Ltd v Securicor Transport Ltd.* (1980) AC 827, 851.

⁷⁵⁹ *Ibid.* 851.

⁷⁶⁰ *Ibid.* 843.

⁷⁶¹ *Travaux Préparatoires* (n 308) 32 (in 1921 at a Conference attended by representatives of the shipowning industry of fourteen maritime countries, its main purpose being to consider the adoption of the Hague Rules).

*servants, agents and independent contractors, in all against three or four classes of persons and it may be ten, fifteen or twenty persons. Now the only question I want to put before this Committee is would it not be equitable to have provisions allowing a man who under these provisions has to pay the full maximum to ask for contributions from the other people who are liable to the same maximum? Would it not be a good thing if either in this meeting or in the Maritime Committee something was said on that question?*⁷⁶²

Although this was presented last century, it gives an idea that the apportionment of risk was already becoming to be considered multilaterally. Today, this concept is a reality. Also the institute of unification of private law (UNIDROIT) in its body of principle in 2010, restating the importance of freedom of contract in today's international trade,⁷⁶³ extended it (although with certain limitations and specifying that the main parties are conferring the right) to third parties.⁷⁶⁴

So far the protection has been mainly regulated by autonomy of parties through contract clauses. In the case that elaborated the agency theory and upon which the Himalaya clause has now effect in the United Kingdom, Viscount Simonds commented:

For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of

⁷⁶² *Travaux Préparatoires* (n 308) 618.

⁷⁶³ In fact at Art 1 (ibid.) they state, "Freedom of contract is a basic and paramount principle in the context of international trade. The possibility for parties freely to agree on the terms of individual transactions, are the cornerstone of an open, market orientated and competitive international economic order. If the parties to a contract wish to extend benefit to a third party they can. The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary".

⁷⁶⁴ Even more specifically at section 2 called 'Third parties rights' they state:

"ARTICLE 5.2.1 (Contracts in favour of third parties) (1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary"). (2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

ARTICLE 5.2.2 (Third party identifiable) The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

ARTICLE 5.2.3 (Exclusion and limitation clauses) The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

ARTICLE 5.2.4 (Defences) The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee."

*Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius.*⁷⁶⁵

As anticipated in the foundation, Tetley commented that the Himalaya clause is “an ingenious, short-term solution to a difficult problem, but is a solution which raises infinitely more problems than it solves”.⁷⁶⁶

If this sentence were contextualised in 1961, when the *Scrutton* case was decided in England – and, in the same period, *Herd* in the United States – and when one could view the context around such case, it would be seen as a heterodoxy and heresy.

On the other hand with today’s shipping context, it appears the only practical solution offered. It nonetheless remains unsatisfactory because it leaves third party protection to the unmethodical will of the parties to the contract.

Moving from the micro level of autonomy of party to the macro level of the international legislation, UNCITRAL has made a substantial effort in order to find a more adequate solution and, as this thesis has argued, the approach of the Rotterdam Rules is not completely wrong. The Rotterdam Rules are bold and ambitious, as Thomas has defined them,⁷⁶⁷ but their shortcomings stem from the fact that they rely on the drawing of a geographical line. If the concern is whether or not they are appropriate for the current shipping industry, this thesis states they are a reasonable but unworkable compromise. The shipping industry is evolving very fast and the Rotterdam Rules arise from the failure of the multimodal conventions of the 1980s; something that gave birth to the Rules’ main rationale of ‘maritime plus’ compromise.

In favour of the Rotterdam Rules, Berlingieri states that, in many jurisdictions, the freedom of contract for third parties is restricted, thus affording them a high level of protection from the Rules, which also ensure uniformity.⁷⁶⁸ However, overwhelming evidence shows that many third parties are against this convention for many reasons, such as but not limited to, the fact it confuses their area of operation.

As previously mentioned, the Rotterdam Rules have rightly addressed part of the issue. The approach of viewing the carriage of goods by sea as being part of something broader is considered as being correct. Undeniably, it is hard for an international convention to deal

⁷⁶⁵ *Midland Silicones* (n 5).

⁷⁶⁶ Tetley, (n 27).

⁷⁶⁷ D. Rhidian Thomas “And then there were the Rotterdam Rules” Editorial of the Journal of International Maritime Law (JIML) (2008) 14 JIML 189-190;

⁷⁶⁸ Berlingieri (n 20).

with such matter; realistically a convention that deals with supply chains is not easily obtainable. Therefore, the Rotterdam Rules had to draw a line somewhere, and in general terms it was probably wise (especially after the failure of the multimodal convention) to produce a door-to-door convention, with port-to-port geographic protection. In order to do this, however, the Rotterdam Rules wrongly decided to extend the Himalaya protection only to maritime-related third parties. Furthermore, the swiftness with which the Rotterdam Rules were ratified suggests they may not be suitable as the legislative future of the carriage of goods by sea. Therefore, this work suggests that the international community should focus on a new regime with different approaches or to amend the existing one with a protocol, approaching third party protection in a less geographic but more commercial way. Resuming the not travelled by functional approach mentioned in the *travaux préparatoire* that this thesis considered in Chapter 3.

Moving to the common law domestic tradition analysed, England and the United States present considerable issues. First, they hold a considerable sway over shipping law. Second, there are provisions in their respective domestic laws that make the potential protection hard to achieve.

The shipping industry relies on these jurisdictions and third party protection has become an important issue to tackle. Law is not always in harmony with trade. Consequently, some authorities in these jurisdictions have been considering the evolution of the role of third parties and the need for the shipping industry to have its third party protection progressively expanded. This thesis demonstrates that a change in the economic factual context of the shipping industry has produced a legal need in the context of third party protection, suggesting that it is time to take this protection to a multilateral level.

This thesis has emphasised that third party protection cannot be viewed only as a remedy but has to be understood from the origin of the issue in order to be adapted to better serve our times. Third party protection should be drawn from principles of need and, at this moment, the need is for a multilateral rather than bilateral approach to the protection of third parties.

As previously mentioned, England and the United States are both countries with common law traditions.⁷⁶⁹ They have the flexibility of the common law jurisdiction, which perhaps explains why so many major commercial contracts – especially shipping contracts – are drawn up under these jurisdictions. English law in particular, however, has had problems in accepting the principle that someone outside a contract should benefit from it. This has not

⁷⁶⁹ With one major difference: in the US maritime law is a matter of federal law.

always been the case. Before 1900, in fact, the situation was different. It has changed as a result of the context and consequently the law has altered in step. Nevertheless, change is now required again.

That England and the United States share the same legal system does not mean they approach third party protection in a similar way. After a century of problems, England has now put third party protection on a statutory footing with the Contract (Right of Third Parties) Act, 1999.⁷⁷⁰

In the case of the carriage of goods by sea, however, the Act alone might not be enough. Of further interest is how the courts have responded to the need for multilateral protection. English courts have established (through a series of decisions) a path for third party protection through the potential pitfalls of Himalaya clauses, Lord Reid's agency theory, and so on. With the *Kirby* case, United States courts have probably fully recognised the commercial, practical approach that has to be given to this protection; an encouraging first step towards the future. The *Kirby* decision is substantially different from the geographic protection that the international community proposes with the Rotterdam Rules. However, as the annex table of this thesis shows, references to the multilateral protection resulting on the supply chain are very limited.

The industry's legal needs derive from the context of the moment. Factual context influences the development of a protection such as third party protection due to the interest in that protection. The concept of third party protection is not an absolute and unchangeable concept and the protection changes according to the interest of the moment. This thesis argues that current third party protection does not meet the legal needs of the industry. This thesis also argues that legal protection is used as a way to better allocate risks between parties and nowadays the risk of the shipping industry has to be seen as a multilateral risk and can no longer be allocated between two parties.

For example, third party protection in the United States is influenced by the country's multilateral factual context. The legal protection of categories such as third parties cannot be separated from the economic factual context. Doing so would be to underestimate the potential benefit that good protection could bring to the industry as a whole. Each jurisdiction is influenced in a different way by its own factual context, and tends to address third party protection and define the legal route to achieve it differently as well.

⁷⁷⁰ Merkin (n 30) reports that the majority of members of the European Union are favourable to the recognition of the rights of third party beneficiaries under contracts.

Third party protection in the law of England and the United States has been challenged in this thesis on the ground that autonomy of parties is very much considered to be the easiest way to solve the problem; in certain circumstances the will of the contracted parties is normally achieved. However, in the context of third party protection in the carriage of goods by sea, it is dangerous to leave the regulation of the topic solely to the will of the contracted parties; by the very nature of the contract, they are the first and second party and the third party is thus not represented. On the contrary, sovereignty law should interfere and make sure that the problem is tackled in a correct manner.

The protection of third parties has been encouraged by different aspects of law. Specifically:

- From case law, this thesis shows that there is a line of authority starting with the *Elder Dempster* case⁷⁷¹ to the notable *The Himalaya* case.⁷⁷² Furthermore, from the *Scrutton* case⁷⁷³ where the problem of consideration was formally declared, to the *The Eurymedon* case,⁷⁷⁴ where how to deal with consideration for third parties was explained. The same has been done in the United States from *Herd* to *Kirby* and then implemented by subsequent cases. However, there is still high dependence on having clauses very precisely written on who can be protected and the intention of the parties has to be precisely expressed with nothing left to interpretation.⁷⁷⁵
- Drawing one's attention to statutory law⁷⁷⁶ (as explained in Chapter 4), a significant example is the Contract (Right of Third Parties) Act, 1999, changing the attitude towards third party protection and presenting another way around the concept of privity and consideration. It is arguable that the Act completely removed the concept of Privity and Consideration but its significance is well expressed by Vlasto and Clark in their article

⁷⁷¹ *Elder, Dempster* (n 3).

⁷⁷² *The Himalaya* (n 4).

⁷⁷³ In *Midland Silicones* (n 5) Lord Reid raised the problem of consideration in order to permit protection of third parties.

⁷⁷⁴ The answer was supplied in *The Eurymedon* (n 338). The Privy Council held that the consideration was the discharging of the goods by the stevedore for the benefit of the shipper.

⁷⁷⁵ Even the *Kirby* (n 7) case amongst them.

⁷⁷⁶ It might be worth restating that Civil Law has always had less problems with third party protection. Reference has to be made to, amongst others, Ralph De Wit, *Multimodal Transport Carrier Liability and Documentation*, 1995, Lloyds of London Press Ltd 1995, MacMillan (n 506); Tetley (n 26) and William Tetley, "The Himalaya clause, "stipulation pour autrui" Non-Responsibility Clauses and Gross Negligence under the Civil Code" (1979) 20 *Le Cahiers de Droit* 3, 449–483.

‘The Effect of the Contracts (Rights of Third Parties) Act 1999 on Voyage and Time Charter Parties’.⁷⁷⁷

Theoretically, this thesis also suggests that the reliance perspective could supplement third party protection in the carriage of goods by sea. The reliance perspective could be an alternative method to deal with the problem, instead of the classical perspective that sees the parties as a foundation of a legal relationship. The reliance perspective could be used as a way to accept that whoever is in need and therefore relies on that specific protection can benefit from it even if the contract does not include them.

This thesis has proved following premises:

- 1) The factual context of the shipping industry has changed.
- 2) As a result, the third party is part of the enterprise yet not outside the enterprise.
- 3) The law is still based on an outdated system.

In a final analysis, it is believed that third party protection can indeed be approached from a multilateral perspective. This, of course, requires a different framework.⁷⁷⁸ This thesis demonstrates that, at the current state, from a purely contractual perspective, third parties receive a random level of protection linked to the willingness of the two main parties. Contractually, Himalaya clauses and similar clauses could provide protection for a broader category of third parties. When the parties to a contract wish to extend their contractual protection to a non-contractual claim brought against a third party by the owner of goods, the mechanism provided by a Himalaya clause gives adequate effect to the commercial expectation of the parties. This thesis contends that international conventions should follow a commercial rather than geographic approach. Among these conventions and their drafters, there has been a growing interest in protecting third party interests, from the first attempt in the Harter Act that merely considers anyone outside the relationship, to the Rotterdam Rules that (arguably)

⁷⁷⁷ Vlasto and Clark (n 631). “It is rare that a single piece of legislation removes a principle of English law hitherto considered an essential foundation. The Contracts (Rights of Third Parties) Act 1999’ (Act) did just that by removing the English law principle of privity of contract which had been established law since the early nineteenth century, albeit a concept which had attracted criticism from the judiciary on a number of occasions”.

⁷⁷⁸ Alternatively, following the example of other industries that already work as a network, a multilateral approach could be adopted where the party with the greatest interest at stake shoulders the risk for its chain of contractors, channelling full liabilities towards itself. Or with a multilateral insurance framework. The thesis will deal with both on the future recommended research section.

dedicate an extensive part of the convention to third parties.⁷⁷⁹ The relevant international community should focus on a new approach that takes into account the above or amending the Hague/Hague-Visby Rules.

Regarding domestic law, substantive law still plays an important role in third party protection, despite the increasing dependence on private remedies and international solutions. The pragmatism of case law in common law countries could surely match the reality of the multilateral common enterprise.

Returning to the first ‘contemporary’ decision regarding the topic – that of *Elder Dempster – Hallebeek and Dundorp*,⁷⁸⁰ argue that the decision to allow a shipowner to be protected by a bill of lading to which he was not part reflected the general belief in the commercial world at the time; it was right to protect him for commercial reasons. Digging a little deeper, Hallebeek and Dundorp explain that the reasoning was more likely to have been dictated by the commercial absurdity of the contrary than by any doctrinal nicety.

Today, almost 100 years later, the position – at least in terms of a theoretical answer – has not yet been given. Many decisions regarding the field have been influenced more by practical reasons (and still from the absurdity of the contrary) than by a desire for clarification.

Throughout this thesis, it has been proved (given the multilateral argument) that a third party should now be entitled to protection according to their role, not their commercial relationship with the main parties.

It seems inarguable that, in order to achieve any changes, parties (carriers, shippers, third parties, and insurers) must acknowledge and allocate their risks accordingly. This thesis provides a theoretical starting point, from which different options are available to the shipping community and international legislators. It does not seek to change the whole industry, particularly given the obstacles that any implementation is likely to face:

Concluding these remarks on liability for damage and allocation of risks in maritime shipping one must be aware of difficulties which may stand in way of a reform of maritime law of damages. In view of the acceleration of change, to which we are generally ill-adapted, we face the crisis of consciousness, which is a very serious crisis of farreaching consequences. It is manifested by a seemingly irrational

⁷⁷⁹ On the topic, amongst the others see Reynolds, (n 314). The latest attempt, the Rotterdam Rules are far from being ratified and have been criticised extensively. See generally Stefano Zunarelli, ‘Elementi Di Novita’ E Di Continuita’ Della Regolamentazione Della Responsabilita’ Del Vettore Marittimo Di Cose Nell’attivita’ Del Gruppo Di Lavoro Dell’ UNCITRAL’ (UNCITRAL 2008) <http://www.aidim.org/pdf/rel_zunarelli.pdf> Accessed 7 September 2013; Chuah (n 29); Corcione (n 70).

⁷⁸⁰ Hallebeek and Dondorp (n 91).

*resistance to change. In international shipping relationships the resistance to change has traditionally been strong; in this sphere of intertwined conflicting interests considerable efforts are needed to disturb the established balance of interests.*⁷⁸¹

The shipping industry has a seemingly irrational resistance to change but the established ‘balance of interests’ should be revised and adapted to the current climate.

In a final consideration, Maitland argues that legal history should enable every age to be the master of its own law and not the slave of its past.⁷⁸² The shipping industry should accordingly focus on an alternative, innovative solution, rather than doggedly persevering with existing measures.

5.2 Areas of recommended future research: solutions or new issues?

Over two decades ago, the historian Maury Klein identified a paradox of academic research that, while aimed at his fellow historians, is pertinent to scholars of all stripes: “... the more we do, the more remains to be done. The more we learn about a subject, the less we really know about it. For every question answered a dozen more spring up”.⁷⁸³ This has particular relevance for PhD researches where boundaries are not just important; they are essential.

It is appropriate, then, that this thesis should finish with a discussion of its delimitations. From the outset, the aim was not to offer a watertight solution to a problem, even though – after careful research – this is a tempting proposition. Instead it sought to scrutinise the problem in question, and cast it in a new light under which solutions should be investigated in the future.

There is a fine line between the necessary boundaries of this research and the tempting ground of proposed solutions. In an effort to tread this line, a framework of possible solutions, informed by five years’ worth of research, are outlined below. The hope is that this framework will provide a springboard or, at least, a starting point for others who may choose to shoulder the burden of doing the research necessary to arrive at an appropriate solution.

5.2.1 Risk management

⁷⁸¹ Lopuski (n 99).

⁷⁸² Quoted in K O Shatwell, ‘The Doctrine of Consideration in the Modern Law’ (1953–1955) 1 Sydney Law Review 289.

⁷⁸³ Maury Klein, *Unfinished Business: The Railroad in American Life*, (1st edn, University Press of New England 1994)

As explained in Chapter 2, there are two ways of managing risks: controlling it, and transferring it. These two concepts are central to the foundation of the solutions and the framework for future researches.

5.2.1.1 Control: channelling of liability

This thesis has essentially defined the concept of multilateral common enterprise as a network – although not a formal one – with a common goal. Furthermore, it is argued that, when issues of protection arise amongst participants in this multilateral common enterprise, perspectives should be adjusted to encompass and give consideration to networked aspects of the enterprise, rather than focusing solely on single, individual relationships.

Adams and Brownsword define a network of contracts as a set of contracts where there is a principal contract giving the set an overall objective, and secondary contracts that contribute – directly or indirectly – to the attainment of the overall objective. They go on to explain that the network of contractors expands until a sufficiency of contractors are obligated, whether to the parties to the principal contract or to other contractors within the set, in order to attain the overall objective.⁷⁸⁴

Following such assertions, it seems reasonable to consider how this theoretical definition operates in practice. There are many such fields where this concept is in play, and future research could, therefore, be usefully undertaken to evaluate the definition's accuracy, efficacy, and potential impact on the carriage of goods by sea. This thesis selected the offshore oil and gas industry.

The offshore oil and gas market is closely aligned with shipping, and can almost be considered two parts of the same industry; offshore being the upstream, shipping being the downstream. For instance, they share similar features as the role of the shipowner, the insurance (P&I Clubs) and the Baltic International Maritime Council (BIMCO).

In the offshore oil and gas industry, the legal protection schemes in place operate under a rationale that assumes the party in the best position should bear the risk.

Future research could use the offshore system as a lens through which to consider the future of third party protection, and as a model for implementing third party protection in the carriage of goods by sea. While doing this, consideration should be given to the channeling

⁷⁸⁴ John Adams and Roger Brownsword, 'Privity and the concept of a network contract' (1990) 10 Legal Stud. 12.

protection already referred to in this thesis, and its efficiency in the new carriage of goods by sea scenario should be tested.⁷⁸⁵

Offshore protection uses a scheme called ‘knock-for-knock’ that has previously been defined as a “crude and workable” structure.⁷⁸⁶ The Pooling Agreement of P&I Clubs explains and endorses knock-for-knock with a provision that stipulates:

*Each party to a contract shall be similarly responsible for loss of or damage to, and/or death of or injury to any of its own property or personnel and/or the property or personnel of its contractors and/or of its and their sub-contractors and/or of other third parties; and that (ii) such responsibility shall be without recourse to the other party, and arise notwithstanding any fault or neglect of any party; and that (iii) each party shall, in respect of those losses, damages or other liabilities for which It has assumed responsibility, correspondingly indemnify the other against any liability that that party shall incur in relation thereto.*⁷⁸⁷

Slater, Ballew and Sartain aptly describe the offshore industry as a highly risky and complex field involving multiple parties, each with their own risk profile and capacity for assumption of risks (bargaining power, market power, financial possibility, and so on).⁷⁸⁸

The fine detail present in the drafting and managing of contracts between its parties bears witness to the complexity of the sector.⁷⁸⁹ Typically, offshore projects rely on complex networks of contracts to govern the relationship between the many parties involved.⁷⁹⁰

The same complexity led to the industry’s use of the knock-for-knock; an almost unique⁷⁹¹ system of allocating liabilities.⁷⁹²

⁷⁸⁵ For example as reported in chapter 3, channeling of liability was proposed by ICS, IG of P&I during the Rotterdam Rules *Travaux Préparatoire*. In any case, it must be said that there are other systems working as such for example construction system/construction Law. Most recently the Knock-for-Knock has been applied also to charters servicing wind farms (WINDTIME).

⁷⁸⁶ Chidi Egbochue, ‘Reviewing ‘knock for knock’ indemnities following the Macondo Well blowout’ (2013) 7 *Construction Law International* 4.

⁷⁸⁷ Pooling Agreement at page 4. The pooling agreement has the only definition of K4K according to Fabien Lerede, (Chapter 9: Knock-For-Knock: The P&I Perspective) in Baris Soyer and Andrew Tettenborn, *Offshore Contracts and Liabilities* (Informa Law from Routledge 2014).

⁷⁸⁸ Robert Slater, J. Wayne Ballew, Y Charles W. Sartain, ‘Our Fault, My Fault, Their Fault ... Does It Even Matter? Indemnification And Exculpatory Agreements In The Oil Patch’ (2013) AAPL Southwest Land Institute – Dallas April 30, 2013.

⁷⁸⁹ Standard P&I Club Bulletin, November 2008.

⁷⁹⁰ operators, joint ventures, contractors, sub-contractors, and service providers. *Ibid*.

⁷⁹¹ Save for other fields such as construction law, even though they are not exactly the same. Under the traditional construction contracting system, the person who carries out this work is the main contractor. The contractor sub-contracts or sub-lets parts of his work to one or more sub-contractors. Uff reports that most of the larger

In the House of Lords, Lord Bingham has given his approval to the basis of the knock-for-knock. Apart from cases where negligence or breach of statutory duty of the party seeking indemnity is the sole cause of death or injury, he concurs that no limits should exist to the rule that, regardless of fault, each primary party⁷⁹³ assumes responsibility for compensating its own employees.⁷⁹⁴

The notion of the ‘group’ warrants special attention. For the purpose of liability allocation, both primary party to the knock-for-knock agreement and all their contractors and sub-contractors represent a specific group. The loss, damage or injury suffered by a primary party – or by any member of that primary party’s group – is to be shouldered by that primary party alone. This still holds even if the negligence of the other primary party or any member of that party’s group has caused the loss, damage or injury.⁷⁹⁵

Offshore projects will tend to involve one or more main contracts, such as the contract between an oil-rig operator and a contractor (e.g., the shipowner of a platform supply vessel). Their group will identify all the other parties that are involved in that project but do not have a contractual relationship with the other primary party.⁷⁹⁶ In the aforementioned example, the contract regulating the relationship between the owner of the supply vessel and the oil-rig operator is a BIMCO Supply Time contract. This contractual template defines an owner’s group as:

*Owners, their contractors and sub-contractors, and employees of any of the foregoing and charterers group as charterers, their contractors, sub-contractors, co-ventures and customers (having a contractual relationship with the Charterers, always with respect to the job or project on which the Vessel is employed) and employees of the foregoing.*⁷⁹⁷

As explained by Taylor, one effect of adopting the group approach is that, in practice, there may be relatively few true ‘third parties’ for the purpose of indemnity between the

contracting companies now see their role as being managers of the sub-contractors who will perform the physical work. (See generally Construction Law, John Uff, Eleventh Edition, 138).

⁷⁹² Tim Taylor, ‘Offshore Energy Construction Insurance: Allocation of Risk Issues’ (2013) 87 Tul. L. Rev 1165.

⁷⁹³ For example, the operator of an oil rig and the contractors.

⁷⁹⁴ In *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2002] UKHL 4. As also detailed by Soyer and Tettenborn, (n 787).

⁷⁹⁵ Soyer and Tettenborn Ibid.

⁷⁹⁶ Specifically, this group might include the contractor’s employees, affiliates, agents, and sub-contractors. In the case of the company, its group would normally include the company’s employees, affiliates, co-venturers, and other contractors engaged by the company to provide related services.

⁷⁹⁷ BIMCO SUPPLYTIME 2005 Time charter for Offshore Service Vessels clause 14, Liabilities and Indemnities. In many cases, oil-rig operators will propose their own contract with its own terms.

operator and the contractor.⁷⁹⁸ For example, according to a similar agreement drawn up by BP: “A third party shall mean any person not included in the charterers group or owners group”.⁷⁹⁹

Usually, the scope of the group definition is very broad and, consequently, it is unlikely that a party will be excluded. As a result, the instances in which it is necessary to determine actual fault – in the sense of negligence or breach of contract – are very rare.⁸⁰⁰

Knock-for-knock agreements in some ways translate the concept of multilateral common enterprise into the concept of a group. The primary difference is that while the concept of ‘group’ is formally accepted by the industry, the notion of multilateral common enterprise has been put forward by this research.

It has been aptly reported that contracting under terms of the knock-for-knock agreement is, in the offshore market, vital for securing insurance coverage from the P&I Clubs.⁸⁰¹

An obvious advantage of this is the ability to channel claims to one sole party. This party will be obliged, therefore, to ensure adequate insurance is taken out to protect the interests of the various parties to the knock-for-knock agreement. The advantages of such a scheme are varied and much debated. Amongst others, such a scheme reduces the cost of inquiry and litigation, strips away layers of insurance, minimizes disruption of the primary activity, facilitates settlements, and encourages co-operation in the establishment of good and safe work practices.⁸⁰²

That entities such as BIMCO and insurance P&I clubs play common roles in both fields (i.e. shipping and offshore) offers an encouraging starting point for the implementation of such a scheme in the sphere of the carriage of goods by sea.

Nonetheless, in some respects the two businesses differ substantially in nature, and this brings its own ramifications. In the shipping sector, the cargo is sold continuously and the parties involved enter and exit the business continuously. Offshore projects are, on the other hand, much more stable and the relevant knock-for-knock group is fairly easy to identify. Furthermore, it is clear in most offshore agreements that the oil-rig operator is the party assuming the most risk. This is in stark contrast with agreements covering the carriage of goods by sea, in which the risk and commercial balance is much more evenly distributed, making it harder to establish which party would bear the risk in a knock-for-knock agreement.

⁷⁹⁸ Taylor (n 792).

⁷⁹⁹ Clause 48.12 definition BP charterparty BPSUPPLYTIME3 TIME CHARTERPARTY,

⁸⁰⁰ Taylor (n 792)

⁸⁰¹ Soyer and Tettenborn (n 787).

⁸⁰² Ibid.

Future research could evaluate the knock-for-knock model in the context of multilateral common enterprise, and examine to what extent such a model – particularly the ‘group’ concept – could be used in the implementation of third party protection.

5.2.1.2 Transfer: multilateral marine insurance

Risk transfer is the other side of the risk management coin. Within a multilateral common enterprise, the allocation of risk can be complicated. There are many different aspects to consider, including which party should insure the risk and the idea that the risk to insure must surely extend beyond maritime boundaries. As reported by Lemon it is not only marine-related parties such as shipowners, ship operators, charterers, terminal operators, wharfingers, and stevedores that require insurance to protect them against such risks; parties involved at any point in the cargo chain need insurance, regardless of their position or sphere of operation.⁸⁰³

Support for multilateral insurance has also been given by the International Union of Marine Insurance (IUMI).⁸⁰⁴ IUMI that represents insurers of both carriers and cargo interests, supports the creation of a modern uniform, treaty for the carriage of goods by sea that would be fair, balanced and reasonable for all parties involved.⁸⁰⁵

At the moment, the general scheme that could give coverage to a multilateral common enterprise offers the following framework:

— P&I cover:

P&I clubs currently insure shipowners beyond their liability under international conventions. The P&I clubs’ standard terms, however, do not always cover the specialized needs of shipowners engaged in multimodal transportation. Liability for cargo ought to be limited to the period during which the carrier has responsibility for the cargo. In any contract governed by the Hague and Hague-Visby rules, for instance, it should be limited to tackle-to-

⁸⁰³ Robert T Lemon II, ‘Allocation of Marine Risks: An Overview of the Marine Insurance Package’ (2006–2007) 81 *Tulane Law Review* 1467.

⁸⁰⁴ IUMI was founded in 1874 and represents 53 national marine insurance associations from markets all over the world. IUMI members cover 80 per cent of the world premium in marine insurance, totaling approximately USD 10.5 billion (2001).

⁸⁰⁵ United Nations Commission on International Trade Law, ‘Preparation of a draft instrument on the carriage of goods’ (n 489).

tackle.⁸⁰⁶ However, extending on a door to door basis the operation of a containership, the clubs cover shipowners liabilities for cargo arising in connection with the operation of the ship. If, on the other hand, the claims are brought directly by the third party in tort, there is no cover for them.⁸⁰⁷

— Through Transport Insurances:

What the P&I clubs do not cover, has traditionally been supplemented by insurers such as the TT Club. ‘TT’ stands for ‘through transport’, reflecting the door-to-door nature of this approach. They are a club in the sense of mutuality (like the P&I clubs), and the TT Club aims and claims to be an insurer for all the operators involved in a specific supply chain process.⁸⁰⁸ The TT club insures risks for NVOCCs, freight forwarders, port terminals, and so on.

The TT Club was created to fill the gap left by the P&I clubs when multimodalism became prevalent throughout the industry, i.e., when the P&I clubs wanted to remain ‘water-borne’ insurers. TT insurance covers five main areas:

- 1) Container risks for ship operators and others.
- 2) Transport and logistics operator liabilities.
- 3) Cargo handling facility liabilities and assets.
- 4) Port authority liabilities and assets.
- 5) Forwarders’ cargo all risks.

The aim of P&I and TT clubs is to operate in concert to minimise the likelihood of gaps between covers, or overlapping covers.⁸⁰⁹

⁸⁰⁶ Amongst others: Gold, E., *Gard Handbook on P&I Insurance* (5th ed., Arendal: Gard Assuranceforeningen, 2002); Hazelwood, Steven J., *P&I Clubs: Law and Practice* (3rd ed, London: Lloyd’s of London Press, 2000); The London P&I Club 2016-2017 Rules <https://www.londonpandi.com/_common/updateable/downloads/documents/5rules2016.pdf> Accessed 20 February 2016; Understanding P&I Club, A Presentation by Gillian Musgrave – Regional Claims Director, Standard Asia & David Heaselden – Loss Prevention Director, Shipowners’ Mutual. <http://www.gia.org.sg/pdfs/Industry/Marine/MKSS/SS18_Presentation.pdf> Accessed 14 March 2015.

⁸⁰⁷ Ibid.

⁸⁰⁸ Anon., ‘Supply Chain Claims – The Same Old Story’ (*TT Club*, 16 September 2015) <<http://www.ttclub.com/news-events/articles/article/supply-chain-claims-the-same-old-story-133454/>> Accessed 9 January 2016.

⁸⁰⁹ Anon., ‘Ship Operator Cover Liability, equipment and property insurance for ship operators’ (*TT Club Bulletin*, 2015) <http://www.ttclub.com/fileadmin/uploads/tt-club/Publications___Resources/New_Document_Store_2015/Ship_Operator_Cover.pdf> Accessed 11 February 2015.

Future research should take this framework as a foundation but also consider its problems. First, the fact that a club should ensure, so far as possible, that the insured owner preserves his rights of recourse against others involved in the performance of the contract of carriage. This will be of particular importance in the case of a combined transport bill of lading, where the insured owner issuing the bill of lading must preserve his rights of recourse against his sub-carriers, even if the sub-carrier is a subsidiary or associated company of the insured owner. This, however, runs counter to the concept of multilateral common enterprise.

Other problems include: that this extension is not poolable and therefore the insurance costs are increased; that a similar coverage is not available for breaking bulk cargo; that in this case parties are not protected from tort claims; and that, although the TT Club claims to cover the whole supply chain, it is not an easily identifiable branch and, in reality, it seems they are more focused on a classic multimodal/door-to-door journey.

The key issue is that, if a network of parties – such as the multilateral common enterprise – is not formally recognised as such, and companies still work on their own risks, each party will be accountable for its own insurance and therefore the general cost and level of insurance would certainly increase.

Thus, motivation and scope exist to research explore the concept of multilateral insurance. Consider Lemon's suggestion for insurance that could integrate commercial general liability, marine P&I policy, stevedores, terminal operators' liability and contractual liability. This would be insurance covering all categories of participant (including those performing both sea and land-based activities), focusing mainly on the commercial rather than geographical aspect of the job, and could be taken out by a single party.⁸¹⁰

A maritime insurance that takes into consideration not only different phases of the carriage but also ancillary services and the network of parties as a whole is, at the time of writing, currently unexplored. In this respect, the outcome of the *Feseay* case, which reviewed the concept of insurable interest, might be of use.⁸¹¹ In it, the Court of Appeal stressed two things relevant for this study. First, in modern insurance, particular attention must be paid to commercial relations. Second that the concept of insurable interest probably ought to be abolished or at least reviewed.⁸¹² The idea of an insurable interest has changed dramatically

⁸¹⁰ Robert T Lemon II (n 803).

⁸¹¹ *Feasey v Sun Life Assurance Company of Canada and another; Steamship Mutual Underwriting Association (Bermuda) Ltd v Feasey* (2003) EWCA Civ 885.

⁸¹² David Lord, 'Insurable Interest: Is There a Rule?' (3 *Stone Buildings*, 12 October 2005) 159 <http://clients.squareeye.net/uploads/3sb/events/121005_lord.pdf> Accessed 5 May 2013.

over the years – in line with a changing market – and the Court of Appeal has considerably reconsidered the definition.⁸¹³

Once again, the offshore sector – particularly the construction phases⁸¹⁴ – could provide valuable input here. Oil and gas companies (known as principals) often maintain in contractual negotiations that any Contractors’ All Risks (CAR) cover provided will adequately protect the majority of contractors’ and sub-contractors’ insurable risks, based on the main policy outlined in WELCAR 2001. However as many offshore contractors and service providers will have experienced, the coverage provided by the principal is often not able or adequate to protect these risks to the extent desired by the contractor.⁸¹⁵

In a general coverage (such as that provided by WELCAR 2001), the principal assured is defined as:

- 1) *Company and/or joint venturers as they may now or subsequently exist.*
- 2) *Parent and/or subsidiary and/or affiliated and/or associated and/or inter-related companies of the above as they are now or may hereafter be constituted and their directors, officers and employees, while acting in their capacities as such.*

While other assureds are defined as:

*Project managers and any other company, firm, person or party (including contractors and/or sub-contractors and/or manufacturers and/or suppliers) with whom the Assured(s) named in i, ii, iii and iv have entered into written contract(s) directly in connection with the Project.*⁸¹⁶

Taking these problems into consideration, future research could evaluate the gaps in the framework covering all of the transportation means, as well as all the accompanying

⁸¹³ Robert Merkin, *Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform* (London, UK, Edinburgh, Scotland, Law Commission/Scottish Law Commission 2006).

⁸¹⁴ Standard Bulletin, February 2013, reports that: From the club’s perspective, offshore construction operations typically fall into three categories: A. Fixed platform construction and associated sub-sea field development (including float-over, lift-on, pipe- or cable-lay operations, sub-sea installation and windfarm construction). B. FPSO navigation from yard to field (whether under own steam, wet tow or dry tow), including hook-up, installation and pre-production testing up to point of delivery to the ultimate client. C. Maintenance or servicing of oil field infrastructure (including maintenance, sub-sea and ROV operations).

⁸¹⁵ Gayner Warner, ‘Suitability of CAR cover for offshore contractors’ (*Marine and Offshore Contractors Group*, October 2012) <<http://standard-club.com/media/1557668/suitability-of-car-cover-for-offshore-contractors.pdf>> Accessed 2 March 2016.

⁸¹⁶ WELCAR 2001 OFFSHORE CONSTRUCTION PROJECT POLICY.

activities with a single insurance policy. Ultimately, this could lead to fruitful suggestions for a new insurance model for the multimodal common enterprise.

5.2.2 Civil law perspective

An analysis of specific civil law countries has been intentionally left outside the thesis; civil law traditions do not have specific issues with recognising that a third party can be protected by a contract.⁸¹⁷ Nevertheless, the provisions of civil law countries in favour of third parties have been part of the research. The author puts them forward as an example for implementation of the protection of third parties in the carriage of goods by sea.⁸¹⁸ In particular this section advances the provisions of certain specific countries which disclose the theoretical pillars of this thesis. Specifically: the concept that since the carriage of goods by sea has become a multilateral common enterprise, protection of third parties should follow this structure; the idea of channeling the claims to only one party; and finally the idea of using a material factor borrowed from the factual context to allow third party protection.

As Tetley states, not only common jurisdictions but also civil one held that only the parties to a contract are to be affected by it.⁸¹⁹ The same Tetley however details their exceptions.⁸²⁰

Some legal systems grant servants and independent contractors of the carrier immunity from liability towards third parties – including cargo interests – except in case of willful misconduct.⁸²¹

Under Belgian law, servants and ‘performance agents’ of the carrier (e.g., stevedores) benefit from such immunity from liability.⁸²² As De With says, Belgian law recognises that carriage by sea involves complex contract networks and the Belgian provision avoids, the difficulties with identity of carrier clauses, which attempt to single out one particular party in

⁸¹⁷ Canada represents an interesting jurisdiction in this respect. In Canada, under Common Law there is a problem of linking a limitation clause to someone who is not part of the contract. Conversely, under the Civil Law tradition of the state of Quebec, contracts in favor of a third party, and Himalaya clauses are accepted.

⁸¹⁸ One must acknowledge that the essence of this research is not comparative law.

⁸¹⁹ Tetley (n 27) mentions the following article for each jurisdiction: Art 1440 cc (Québec 1994); Art 1165 cc (France); Art. 1165 cc (Belgium); Arts 1983 and 1985 cc (Louisiana); Art 1372 cc (Italy) and Art 1257 cc (Spain).

⁸²⁰ Arts 1444–1452 cc (Québec 1994); Arts 1119–1122 cc (France); Arts 1119–1122 cc (Belgium); Arts 1985 and 1978–1982 cc (Louisiana); Art 1411–1413 cc (Italy); Art 1257 cc (Spain) and Art 328 BGB (Germany).

⁸²¹ Massimo Piras, *La clausola Himalaya, trattato breve di diritto marittimo* (capitol xiii) Giuffrè 2008 281–292 Under Italian law, for instance, there is no a specific rule for this kind of contract apart from the general rule that states willful misconduct is not allowed. For clauses such as the Himalaya clause, these have to be approved by the shipper in writing according to what is called “*clausole vessatorie*”, Articles 1341 and 1342 c.c.

⁸²² Cécile Legros, ‘Relations Between the Rotterdam Rules and the Convention on the Carriage of Goods by Road’ (2011–2012) 36 *Tulane Maritime Law Journal* 725. As Vasto and Clark report (n 631) in Belgium stevedores have a full immunity under National Law.

the network as carrier against whom an action should be brought, to the exclusion of all others.⁸²³ A rule to the effect that all persons for whom the carrier is vicariously liable can invoke the same protection allowed to the carrier has been adopted by Scandinavian countries.⁸²⁴ In French law, contracts only have effect between the parties to them. Parties may, however, expressly or impliedly confer rights in contracts for the benefit of a third party in such a way that the third party may enforce those rights by suing the promisor under the contract.⁸²⁵

The most relevant positions are those of Germany and the Netherlands. Under German law, the protection for third parties derives from economic and risk efficiency, applying what is called the ‘material factor’. Germany recognises contracts for the benefit of third parties and applies more liberal rules of contract construction. Due to these differences in domestic law, the German courts have inferred enforceable Himalaya clauses even when the bills of lading did not contain them.

Under German statutory law, therefore, the logic of a protection clause is not at issue. Stevedores can rely on a protection clause that extends the carrier’s legal protection to third parties. Contracts for the benefit of a third party are expressly permitted by the German Civil Code. Carrier and shipper can extend to stevedores the benefits of the contract. Even when there is no protection clause, German law also allows for a third party to claim the benefit of the carrier’s limitations on liability.

The rationale behind third party protection under German case law, according to Sturley, includes:

- 1) *The shipper’s knowledge that people such as the master would perform the contract.*
- 2) *The fact that the shipper’s interest, is the same no matter who performed the contract.*
- 3) *The purpose of the exclusionary clause is to establish the carrier’s risk, which was a factor in setting the freight rate. A risk of higher liability would result in a higher freight rate. Since the purpose of the clause rather than its wording is the material factor, the court would not allow the shipper to evade the exclusion after paying the lower rate.*⁸²⁶

⁸²³ De Wit (n 776)

⁸²⁴ Ibid.

⁸²⁵ Vlasto and Clark (n 631). This is made possible by operation of the concept of *stipulation pour autrui* (stipulation for another). See generally Art 1444 cc (Québec 1994); Art 1121 cc (France); Art 1121 cc (Belgium); Art 1978 cc (Louisiana); Art 1411 cc (Italy); Art 1257 cc (Spain); Art 328 BGB (Germany); Art 6:253–256 cc (Netherlands 1991).

⁸²⁶ Sturley (n 670).

Furthermore, Sturley reports, more recent decisions have extended the principle beyond the carrier's employees. In a case of forty years ago in which the shipper tried to sue a carrier contractor, the Court allowed the protection stating that it was implicit in the carrier interests in limiting its liability and implicit in the fact that carrier offered lower rates to the shipper in return.⁸²⁷

Hallebeek and Dondorp point out that, under German law, future persons can be named as beneficiaries of a third party benefit contract. Generically definitions can also be constructed for members of a class of persons; that the third party is ascertainable, for example, is sufficient. Third party rights come into existence as and when the third party is determined.

The Netherlands adopt a similar approach. Third parties do not have to be designated specifically, nor is it necessary that they exist at the time of contracting. Dutch law goes a step further – following the contract's acceptance – as part of the contract. In situations with only one third party, a three-party contract comes into existence. This contract is governed by the rules of multiparty contracts.⁸²⁸

According to De Wit, under Dutch law a sub-contractor can rely on the terms and conditions of his contract with his principal in order to defend himself against a claimant with whom he had no contract and who had sued him in tort. In other words, a protection provision in the subcontractor defendant's contract provides the defence against an action in tort.⁸²⁹ A claimant who has accepted that his contracting party may rely on certain protection clauses must be prepared to let these clauses operate to the benefit of other parties to the contract network.

Following this concept, in any contract network for the carriage of goods, parties who are member of the contract network (De Wit says created by the multimodal transport operator – this thesis says by the multilateral common enterprise) would be protected by the rule. The same system applies to all servants of third parties. They might rely on the contract on which their principal would rely.⁸³⁰

As already demonstrated, civil law traditions do not have problems with the extension of protection to a party who is not part of a contract. Some countries (such as Belgium) narrow this provision to cover only some categories of third parties. Scandinavian countries still rely on the carrier's vicarious liability. *Stipulation pur autri* is a pillar in the French system and in

⁸²⁷ Sturley (n 670).

⁸²⁸ Hallebeek and Dondorp (n 91) 132, 156.

⁸²⁹ De Wit (n 776)

⁸³⁰ De Wit, *ibid.*

civil law traditions more generally. The most relevant approach seems to be that of the German system, which relies on the fact that, in reality, it is not the carrier who performs the job but third parties and they should be protected as such. The Dutch approach also recognises the network of interests.

Future research could look at these aspects in relation to third parties. There is scope for applying the civil law concepts of third party protection and evaluating the extent to which it could implement the multilateral common enterprise.

Chapter conclusion

This thesis seeks to make an original and significant contribution to research by offering a network/systemic tool with which to analyse the legal aspects of the carriage of goods by sea within supply chain networks. The research framework could also apply to other modes within international transport. It also provides a foundation for players in the industry, permitting and encouraging a deeper understanding of the carriage of goods by sea within the supply chain network structure.

This research establishes a new theoretical framework around third party protection in the carriage of goods by sea. The author has worked extensively towards understanding other aspects of this research. This has contributed to the comprehension and development of the theoretical framework, methodology and research question. This thesis has highlighted a number of areas in which further research would be worthwhile. Whilst some of these were addressed by the research in this thesis, others are as yet unexplored.

This research encourages future research to be undertaken either by extending this argument further, or by considering the issues from a new and different perspective. To that end, the author felt it appropriate to delineate the boundaries of specific topics in order to create a framework for recommended areas of investigation.

The main difficulties in this research have been contract theory, the application of economic concepts and, above all, the concept of bailment. As a final remark it seems right, therefore, to quote *Coggs v Bernard*:

I have said thus much in this case, because it is of great consequence that the law should be settled on this point; but I do not know whether I may have settled it, or may

*not rather have unsettled it. But however that may happen, I have stirred these points which wiser head in time may settle.*⁸³¹

By building a new theoretical framework for third party protection, this research has cast new light on future issues ripe for debate. The author truly hopes that, as is so often the case, this ending will represent a new beginning for someone else.

⁸³¹ (1703) 2 Ld Raym 909.

TABLE OF UNITED STATES CASE LAW

The table below provides an overview of US cases to support Chapter 4. The list of cases covers, in a statistic way, the US cases cited in Chapter 4.

In particular:

In the first column it is reported the name of the case.

In the second, the category of third party asking for legal protection.

In particular:

- Carrier's Agent
- Charterers
- Crane Operator
- Dry Dock Operator (DDO)
- Inland Carrier
- Lighterman
- Overland Carrier (OC)
- Port Captain
- Pre-Carrier
- Railroad Company (RC)
- Shipowners
- Stevedores
- Terminal Operators (TO)
- Trucker

In the third column the type of protection. In particular:

- 1 year statute limitation (1YSL)
- Economic Limitation of Liability (\$)
- Error in navigation (EIN)
- Forum Selection Clause (FSC)

In the forth the decision. In particular:

- Allowed (A)
- Denied (D)

The year is shown in the fifth. In following column, the devise which was used by the third party is listed.

In particular:

- Bailment (B)
- Himalaya Clause (H)
- Others (O)

Finally, the last column shows whether in these cases, some sort of reference to the Multilateral Common Enterprise has been found.

Case	Third party	Protection	Decision	Year	Device	MCE Reference
Acciai Speciali Terni USA Inc v. M/V Berane	Stevedores	FSC	A	2002	H	No
Akiyama Corp. Of America v. M.V. Hanjin Marseilles	Stevedores TO	\$	A	1998	H	No
Almacen Boyaca Cia. v. Gran Golfo Express	Pre-carrier	\$	D	1991	H	No
Assicurazioni Generali v D'Amico	Stevedores	\$	A	1995	B	No
B. Elliott (Canada) Ltd. v. John T. Clark & Son	Stevedores	1YSL	A	1983	O	No
Barretto Peat, Inc. v. Luis Ayala Colon Sucrs, Inc.	Carrier's agent	1YSL	A	1990	H	No
Bernard Screen Printing Corp. v. Meyer Line.	Stevedores	\$	A	1972	O	No
Birdsall, Inc. v. Tramore Trading Co	Carrier's agent	1YSL	D	1991	H	No
Breda Costruzioni Ferroviarie, S.p.A. v. M/V American	Stevedores TO	\$	A	1992	H	No
Brown & Root v. M/V Peisander	Stevedores	\$	A	1981	H	No
Cabot Corp. v. S. S. Mormacsan	Stevedores	\$	D	1971	O	No
Carle & Montanari, Inc.	Stevedores	\$	A	1967	O	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
v. American Export Isbrandtsen Lines, Inc						
Caterpillar Overseas S.A. v. Marine Transport Inc	Trucker	\$	D	1990	H	No
Certain Underwriters at Lloyds v. Barber Blue Sea Line	Agent	\$	A	1982	H	No
Colgate Palmolive Co. v. S.S. Dart Canada	TO	\$	D	1983	O	No
Collins & Co. v. Panama Railway Co.,	Stevedores	\$	A	1952	O	No
Cosa Export Co., Inc. v. Transamerican Freight Lines	TO	\$	D	1963	H	No
Croft & Skully v. MV Skulptor Vuchetich	Stevedores	\$	A	1982	H	No
De Laval Turbine Co v. West India Industries	Stevedores OC	\$	D	1974	O	No
Dorsid Trading Corp. v. S.S. Fletero	Stevedores	1YSL	A	1972	O	No
Elgin Nat'l Indus. v. S.S. Weser Express	Stevedores	\$	A	1973	H	No
EM Chemicals v. S.S. Sloman Najade	TO	\$	A	1987	O	No
Ford Motor Co.	Stevedores	\$	A	1954	O	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
v. Jarka Corp						
Gebr. Bellmer KG v. Terminal Services Houston, Inc.	Stevedores	\$	A	1983	H	Yes
General Elec. Co. v. Inter-Ocean Shipping	Stevedores Port Captain	1YSL/\$	A	1994	H	No
Grace Line v. Todd Shipyards Corp	DDO	1YSL	A	1974	H	No
Granite State Ins Co v. Hanjin shipping	RC	1YSL	A	1994	H	No
Herd & Co. v. Krawill Machinery Corp	Stevedores	\$	D	1959	O	No
Herr-Voss Corporation v. Columbus Line	Trucker	\$	A	1992	H	No
Hoechst Celanese Corp. v. M/V Trident Amber	NVOCC	\$	A	1992	H	No
Indemnity insurance Co. Of North America v. Schneider Freigh USA	Stevedores TO	FSC	A	2001	H	No
Instel Corp. v. M/V Antonia Johnson	Stevedores Agent	1YSL	A	1982	H	No
Institute of London Underwriters v. Sea-Land Servs.	Stevedores	\$	A	1989	H	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
Jagenberg, Inc. v. Georgia Ports Auth	Port Authority	\$	D	1995	H	No
Jenkins v. M/V Ever Greet,	TO	\$	A	1990	H	No
Jockey Int'l, Inc v. M/V Leverkusen express	NVOCC	FSC	A	2002	O	No
Koppers Co., Inc. v. S/S Defiance	Stevedores TO	\$	A	1983	O	No
LaSalle Machine Tool, Inc. v. Maker Terminals, Inc.,	Stevedores TO	\$	D	1979	O	No
Certain Underwriters at Lloyds v. Barber Blue Sea Line,	Stevedores	\$	A	1982	H	No
Lucky- Goldstar Int'l (America), Inc. v. S.S. California Mercury	RC	\$	D	1990	H	No
Machine Corp. v. S.S. Tiber,	Shipowners Stevedores	\$	A	1971	O	No
Mazda Motors of America, Inc. v. M/V Cougar Ace	Vessel	FSC	A	2009	H	No
Mediterranean Marine Lines v. John T. Clark	Stevedores FF	\$	*	1980	H	No
Middle East Export Co. v. Concordia Line	Stevedores	\$/1YSL	A	1970	B	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
Miehle Co. v. Hapag-Lloyd	Stevedores	\$	A	1974	H	No
Mikinberg v. Baltic Steamship Co	Stevedores	\$/1YSL	D	1993	H	No
Miller Yacht Sales, Inc. v. M/V Visva Shobha	Stevedores Crane Operators	\$	A	1980	O	No
Mori Seiki USA, Inc. v. M/V Alligator Triumph	Vessels Charterers TO Stevedores	\$	A	1993	H	No
Mori Seiki USA, Inc. v. M/V Shin Kashu Maru,	Shipowners RC	\$	D	1988	O	No
National Federation of Coffee Growers of Colombia v. Isbrandtsen Co.	TO	1YSL	A	1957	O	No
Norfolk Southern Railway v. James N. Kirby, Pty ltd	RC	\$	A	2004	H	No
Prebena Wire Bending Machinery Co. v. Transit Worldwide Corp	Stevedores	1YSL	D	1999	H	No
Rockwell Int'l Corp. v. M/V Incotrans Spirit,	Stevedores	\$	A	1993	O	No
Royal Embassy v. Ioannis Martinos	Stevedores	\$	D	1986	B	No
Royal Ins. Co. v. Westwood Transpacific Serv	RC	\$	A	1993	H	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
Rupp v. I.t.O. Co	Stevedores	\$	D	1973	O	No
Schiess-Froriep Corp v. Finnsailor	Stevedores	1YSL	D	1978	O	No
Secrest Machine Corporation v. S.S. Tiber	Stevedores	\$	A	1971	O	No
SPM Corp. v. M/V Ming Moon	Stevedores	\$	D	1994	H	No
Steel Coils, Inc v. M/V Lake Merion	Shipowner	FCP	D	2002	O	No
Stolk Tank Containers, Inc v. Evergreen Marine Corp	Shipowner	\$	D	1992	B	No
Sumitomo Shoji America, Inc. v. S.S. Aurora H	Stevedores TO	1YSL	D	1972	O	No
Taisho Marine v. Maersk Line	Trucker	\$	A	1992	H	No
Taisho Marine & Fire Insurance Co v. The Vessel Gladiolus	Trucker	1YSL	D	1985	H	No
Tessler Brother v. Italpacific Line	Stevedores	\$	A	1974	H	No
Toyomenka, Inc. v. S.S. Tosaharu Maru	Security Service	\$	D	1975	O	No

Case	Third party	Protection	Decision	Year	Device	MCE Reference
Toyomenka, Inc. v. Toko Kaiun Kabushiki Kaisha	Stevedores	1YSL	D	1972	O	No
United States Fire Insurance Company v. Lions Gate Bridge	Stevedores TO	\$	D	1997	H	No
United States v. The South Star	Ship's agent Stevedores	1YSL	A	1954	O	No
Virgin Island Corp. v. Merwin Lighterage Co., Inc.	Lighterman	\$	A	1958	B	No
Vistar, S.A. v. M/V Sea Land Express	Inland carrier	\$	A	1986	O	No
Warta Ins. Co. v. Calumet Harbor Terminals	Stevedores	\$	D	1978	H	No
Wemhoener Pressen v. Ceres Marine Terminals	TO	\$	A	1999	H	No

*Affirmed for Stevedores and denied for Freight Forwarders

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