



**Legal study of sea carrier limitation of liability according to
Brazilian law in comparison to the Hague-Visby regime**



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1. Introduction

Since the fourteenth century the utilisation of sea carriage has traditionally enabled the exchange of goods across international borders has been constantly rising and nowadays there are no geographical barriers to international trade, due to the modernisation and improvement of vessels as well as introduction of the containerised transport of goods.

Nonetheless, goods which are subject to a sale transaction have to be carried from the place of dispatch to that of destination, which invariably has an international character and affects parties which are subjected to the application of different laws.

Thus, in order to enable uniformity within the legal regulation of international carriage of goods, several international conventions were developed and adopted by the international community.

However, some nations simply did not adopted none of these conventions, instead they just applied their national legislation to regulate any dispute arise out of an international carriage of goods before their jurisdictions.

The present dissertation thus aims to initially provide a comprehensive explanation of the international instruments currently governing the international carriage of goods by sea, especially regarding the sea carrier limitation of liability.

But the main focus of the discussion will be a critical analysis of the Brazilian legal provisions and how this jurisdiction regulates the sea carrier liability as well as how the national Courts decisions and the relevant literature faces the limitation of liability proposed by the international conventions, considering that such instruments were not adopted by Brazil.

To this extent, the choice of such topic is justified by the fact that Brazil currently occupies a prominent position amongst the largest trading nations as it is a major producer of several commodities, a considerable volume of these is exported utilising sea carriage.

In this sense, considering that international carriage by sea is widely utilised by Brazilian exporters or importers, the conflict of laws faced between the international conventions applied to this matter and the national provisions is a recurrent legal issue.

Despite being such an important matter, until recent years it was not extensively explored by the national literature or even by academic researches, which has been changing lately with some important works being published, mainly written by practitioners whose are used to deal with practical issues related to this specific area of law.

Thus, through a critical analysis between both international and national provisions regarding the sea carrier limitation of liability, it is intended to evaluate and possibly answer what are the consequences for the Brazilian legal system to be left out of the international regime of liability applied to the sea carrier and set out by the international conventions.

As a complement, it will be also assessed whether there are advantages and disadvantages for the parties to have national legal provisions

applied to their disputes involving international sea carriage, as well as the effects that a national solution can have in an international context, as the variety of different laws could lead into a fragmented regime of liability.

Therefore, the present discussion will analyse initially the legal provisions contained in the international conventions, which are represented by Hague, Hague-Visby and Hamburg Rules.

Additionally, the relevant Brazilian legal provisions concerning this topic will also be analysed, jointly with national literature and case law on this topic.

Thus, in order to provide a comprehensive description, some basic and introductory features of Brazilian legal system will be presented, as well as some definitions related to shipping industry, which is a very specific area, as to supply enough and necessary information and consequently enable further discussions when comparing it with the international conventions.

Chapter 2. The contract of carriage of goods by sea from a general perspective

This chapter aims to present a general background concerning the contract of carriage of goods by sea, by firstly setting out the development of the international conventions applicable to bills of lading as well as the reasons which led the establishment of uniform rules.

Secondly, this chapter will also introduce some basic and general definitions regarding the shipping business since it is a very specific area with its

own particularities, aiming to provide a clear technical background as a basis for the legal discussion.

2.1 Background on historical development of the international rules concerning carrier's liability

In order to better comprehend the particularities of the current regime of liability being applied to the international carriage of goods by sea, it is essential to look back on the reasons which based the first documents produced and see how it evolved according to the transformations occurred along the years in the transport industry, as an attempt to follow such changes and produce and updated convention to fit the shipping practice.

Initially, it should be considered that at the very first beginning, carriage was conducted by wooden ships, propelled by sails or oars, which were extremely vulnerable to maritime risks and perils, completely opposed to nowadays reality of giant vessels supplied with navigation equipments of high technology.

Thus, following such evolution in the ship building technology, during nineteenth century the ship owners became more economically powerful to the extent that their fleet of vessels became larger and more efficient.

By the early twentieth century, England was indeed a powerful nation and it was then a major ship owner nation, as it possessed the largest

merchant fleet in the world. At that time, there was no freedom of contract in the bills of lading whose terms were usually dictated by the ship owners.¹

As a consequence, English ship owners were entailed in such a stronger position that they were able to profit from such a privileged situation which enabled the increasingly introduction of exemption clauses in its bills of lading.

In this sense, the economical imbalance situation between carriers and shippers was so absurd that only the exact words used by this author were able to well describe the situation, as 'in the course of time, the number of exemption clauses increased so much that he had almost no duty other than the collection of freight.'²

Besides, the English shipping companies also started to insert English choice-of-law and choice-of-forum clauses in their bill of lading, as to ensure that the English courts would be the competent ones to decide any dispute arising out of the bill of lading, consequently English law and its provisions in favour of ship owners would be applied.

The American shippers extremely revolted with the unfair situation established due to the abusive control exercised by the English carriers then produced the US Harter Act, a national statute passed in 1893 by the US Senate, after several amendments.

As an eminent example of law regarding the carrier's limitation of liability, it constituted an agreement that properly suited both carriers and

¹ A Diamond, 'The Hague-Visby Rules', (1978) LMCLQ 225, 227

² H Karan, *The carrier's liability under international maritime conventions: the Hague, Hague-Visby and Hamburg Rules* (Edwin Mellen Press, Lewiston 2004) 13

shippers' interests by limiting the list of exemptions of liability as well as by declaring as null any unreasonable clause.³

The US initiative influenced several other countries to adopt a national legislation based on the Harter Act. In this sense, Canada passed in 1910 the Canadian Water Carriage of Goods Act which was drafted in accordance with the style of the American act, followed by other countries such as Australia, Morocco and New Zealand, Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain and Sweden which also contemplated Harter-style legislation.

However, as different statutes about carriage of goods by sea were spreading all over the world, there was a need of uniformity in order to avoid different outcomes in claims as local rules had local effects and applied only to domestic and outward shipments, whilst inward shipments were governed by English law in favour of the carrier.

With this regard, between May and June 1921, the Maritime Law Committee of the International Law Association, prepared a draft of what it could become an international convention on the carriage of goods by sea matter, which was based on the US Harter Act and also on the Canadian Carriage of Goods by Sea Act, despite the express objections from English carriers as to these laws being utilised as a model.

Thereafter, this same draft was accepted by the members of the International Law Association in a Conference held at The Hague, in Netherlands, in September 1921, hence the reason why this document was then registered under the name of the 'pre-Hague Rules 1921'.

³ Ibid 20

Afterwards, in October 1922, the London Conference of the Maritime Law Committee of the International Law Association prepared a draft based on the final changes introduced to the pre-Hague Rules, and turned it into the shape of a mandatory legislation that could be consequently accepted by a diplomatic conference.

To this effect, the 'International Convention for the Unification of Certain Rules of Law relating to Bills of Lading' were thus signed in 25th of August 1924, in a diplomatic conference at Brussels and came into effect in June, 1931.

Curiously, although they are normally called the Hague Rules, such instrument is also referred to as the Brussels Convention 1924 as they were adopted by a diplomatic convention held at Brussels.

Thus, the Hague Rules represented the first attempt by the international community to find a workable and uniform means of dealing with the problem of ship owners regularly excluding themselves from all liability for loss or damage of cargo. The objective of the Hague Rules has to establish a minimum mandatory liability of carriers which could be derogated from.

Additionally, it is considered that the Hague Rules currently form the basis of national legislation in almost all of the world's major trading nations, and probably cover more than ninety per cent of world trade. The Hague Rules have been updated by two protocols, but neither of them readdressed the basic liability provisions originally settled, which remain unchanged.

Amongst one of the main purposes for the creation of the Hague Rules was to guarantee that, by establishing a minimum amount of limitation of liability per package or unit, the shipowners would be prevented of inserting

clauses in their bills of lading purporting to limit liability to ridiculously low figures.⁴

But it was also developed within the aim to create rules of general application, so that the rights and liabilities of ship owners and the rights of the cargo owners respectively would be subjected to standard rules in different jurisdictions, before which a dispute related to the contract of carriage could possibly arise.⁵

The Hague Rules, although proudly enacted into English law, was mainly based on the previous of the Harter Act of 1893. Whatever its sources were, the truth is that Hague Rules are a remarkable document for two main reasons, firstly for standardising important terms of bills of lading, secondly because it was able to solve the issue of imbalance which had been claimed between ship and cargo owners relating to the losses or damages to cargo during the voyage.

It was through the Hague Rules provisions that the limitation of liability per package was firstly ever introduced. Thus, for each damaged or lost packaged carried, the amount equivalent to one hundred sterling pounds, to be calculated according to the gold value, should be paid as compensation.

However, the Hague Rules provisions only mentioned the amount to be calculated by package, which resulted in problems of interpretation arisen of what should be the correct definition of package and unit for this purpose.

⁴ Ibid 228

⁵ W Payne and E R H Ivamy, *Payne & Ivamy's Carriage of goods by sea* (13th ed, Butterworths, London 1989)

As a result of such confusion and controversy, as it was recognised that the Rules caused such problems due to its insufficient language, added to the evolution in the shipping industry with the introduction of the container to transport goods, there was a need to update and improve the Hague Rules provisions.

In this sense, approximately thirty years after the Hague Rules were signed, the revisions over the original provisions were ratified at Brussels under the name of the 'Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to bills of lading signed at Brussels on 25th August 1924', which was called the Visby Protocol.

This Protocol and the Hague Rules would be read together as one single instrument, consequently the so called Hague-Visby Rules was brought into force on June, 1977 after the tenth state acceded to it.

It is worth to emphasize that the Visby Amendment added two main elements to the Hague Rules. Firstly, it increased the limitation amounts previously established. Secondly, it brought two alternative limits, the first being the traditional limit "per package or unit" which was maintained, but a new formula was introduced based on amount to be calculated per kilo or per gross weight.

Another remarkable innovation was also a specific provision of limitation relating to containers, stated in its provisions. As said before, this Protocol aimed to be up to date to the current evolutions at that time, by considering the commencement of the utilisation of containers in international carriage of goods.

Afterwards, other innovations were also introduced, such as the new monetary limits which were adopted, now expressed in “Poincaré Francs”, which was not a currency but a unit of measure consisting of 65.5 milligrammes of gold of millesimal fineness 900, stated in article IV, rule 5 (d).⁶

Thereafter, the Poincaré Francs were then replaced by the Special Drawing Rights (known as SDR) as defined by the International Monetary Fund, which is a unit based on a basket of currencies and possibly subjected to a more realistic value than the fluctuating market price of gold.⁷

However, the international regime of liability in force at that time was still subjected to changes, as the modifications to the Hague Rules effected by the Brussels Protocol in 1968 did not gain universal approval.⁸

As a result, a new Convention started to be drafted and consequently adopted at an international conference sponsored by the United Nations in Hamburg, in March 1978.⁹

The new convention was then referred to as ‘Hamburg Rules’ was drafted based on arguments raised by cargo interests and amongst all their claims were one of the most important, which is the request for the carrier’s liability to be based exclusively on fault as well as he should be liable without exception for losses or damages resulting of his fault or from his servants.

In this sense, the Hamburg Rules introduced several changes in the previous international regime of liability established by Hague and Hague-Visby Rules. A strict liability was then imposed to the carrier and the long list of

⁶ n 1 above, 237

⁷ J F Wilson, *Carriage of Goods by Sea* (6th ed, Pearson, London 2008) 200

⁸ Ibid 214

⁹ Ibid 214

exceptions contained in Hague and Hague-Visby Rules was excluded from these rules' provisions. Moreover, it was included a new kind of liability, which relates to any loss caused due to the delay in delivery the cargo, and a considerable increase of twenty five per cent on the carrier's liability considering that the new limitation amount is equivalent to 835 units of account per package or 2,5 units of account per kilo.

Finally, all the above presented international conventions contain provisions as to the sea carrier limitation of liability which constitutes the current international regime of liability applied to the international carriage of goods.¹⁰

The relevant provisions as to the limitation of liability shall be applicable either by statute, when the international convention is duly adopted and enacted into a national law, or by the terms of the contract, which incorporates such rules to be the governing law of the contract of transport.

Thus, in order to better evaluate the legal aspects involved in a contract of carriage of goods by sea, it is essential to previously understand some particulars about the shipping industry.

¹⁰ There is a new international convention regarding the same topic, still to be signed, which is being called as the 'Rotterdam Rules'. However, this new convention will be mentioned in a later chapter in due course within the present dissertation.

2.2 General concepts of shipping

2.2.1 The Liner Carrier

Shipping has always been an essential activity as it made possible the trade of goods between distant nations and its importance dates back to ancient times when sailing boats were utilised to as a means of transporting.

Thus, provided that the increase in the volume of international trade over the years demanded an equivalent growth in the sea carriage services, the shipowners foresaw the possibility of rendering regular services between the busiest ports in the world.

Consequently, those services were later expanded in order to attend a wider variety of ports and by 1960, the container ships began to provide transoceanic services which currently can be found in all trade routes. As this activity became a very profitable one, several shipping companies commenced to operate in this business as well.

Just as a matter of information, the shipping market was previously operate by British ship owners in its majority, which was considerably changed over the years as currently the shipping market is shared by European companies, amongst which are the biggest ones with the largest fleet of vessels, and Asian companies, which have demonstrated a steady growth in its sharing within this market.

Initially, it might be worth clarifying that there are two major types of shipping services, which are defined according to the cargo to be carried. Thus, the affreightment contract (or shipload services) will be utilised to move goods

in bulk for one or a few shippers as it will involve the use of the whole or part of the vessel's capacity for the carriage of the goods, and it can be contracted for a specific voyage or for a certain period of time. This type of contract is generally utilised to transport goods such as crude oil, grains, etc. On the other hand, the liner services are more commonly utilised by shippers when sending general cargo (also referred as dry cargo) usually packed and loaded in a container. This kind of service can be contracted either by small exporters as well as by large retailer companies, as it fits for relatively small shipments but also for a significant amount of cargo.

Thus, a liner carrier can be described as a company which provides sea carriage through cargo vessels running to a previously established schedule of dates and set routes with a certain frequency.

This particular business activity was perfectly described by the following author, as can be found below:

In Liner Service, the sailings are regular and repeated from and to designated ports on a trade route, at intervals established in response to the quantity of cargo generated along that route. True liner service is distinguished by the repetition of voyages and the consistent advertising of such voyages. Once the service is established, the operator must conform, within narrow time limits, to the published schedule. Although the frequency of sailings is related directly to the amount of business available, it is general practice to dispatch at least one ship each month. Vessels engaged in liner service may be owned or chartered; it is the regularity and

repetitious nature of the operation, rather than the proprietorship, which is crucial.¹¹

Besides, another important distinction to be made between chartered or chartered vessels and liner carriers is that the freight rates in the liner services are stabilised and previously fixed, by setting identical charges for all shippers. Rates may vary, however, from one sailing to another, but increases are usually announced in advance.¹²

The vessels utilised for this sort of transport range in size but some of them are able to carry about eleven thousand containers (considering the twenty foot sized ones) in one unique voyage.

It might be worth to mention that the transport of goods loaded into containers are closely related to the liner carrier's activity, as the freight price include not only the carriage but also a container to be supplied by the carrier.

The utilisation of metal boxes measuring twenty or forty feet, which are commonly known as containers, was introduced in the shipping business around early 1970, as an easier and faster way to transport goods. This recent technique made a revolution in the transport industry as a whole and it is claimed to be the beginning of the so called the "container revolution", as all the ports worldwide had to be modified and adapted to load and unload the standard sized metal containers, as well as the rail and road transport were changed to better suit the containers.¹³

¹¹ M Dockray, *Cases and materials on the carriage of goods by sea* (3rd ed, Cavendish, London 2004) 8

¹² *Ibid* 9

¹³ M Levinson, *The box* (Princeton University Press, Princeton 2006)

Thus, the container revolution contributed to what is called nowadays as the intermodal transport, which can be described as the integration of different means of transport aiming to provide an effective door-to-door transport, from the exporter facilities until the final destination at the importer's location. Thus, the development of the intermodal freight transport could only be possible with the adoption of standard sized containers that could be carried either by road, rail or sea.

Therefore, the containerisation technique also enabled an economical revolution to the extent that it helped to promote globalisation by reducing the cost of shipping goods so sharply that manufacturers could afford to search the world for factories where costs were lowest.¹⁴

With regards to the legal definition of carrier, the related international conventions such as Hague Rules and Hamburg Rules describe the necessary elements that legally characterise a sea carrier.

The Hague Rules sets out a narrower description by requiring that the carrier shall be the owner or the charterer of a vessel, according to the below provision:

Article 1: In this Convention the following words are employed with the meanings set out below:

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

¹⁴ 'Sea of Trouble' *The Economist* (London 30 July 2009) <http://www.economist.com/businessfinance/displaystory.cfm?story_id=14133794> accessed 01 August 2009

In contrast to that, the Hamburg Rules provides a wider definition which does not set out any specific requirement, as it states that any person can be considered a carrier, as follows below:

Article 1: In this Convention:

1. 'Carrier' means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

However, both provisions have in common the requirement of a contract of carriage to be duly signed between the carrier and the shipper, which is definitely the most important element to be taken into consideration.

Before Brazilian law, the carrier can be considered as the legal entity or individual which under its own responsibility provide a ship properly equipped to carry out commercial activities, which can sail the vessel on its own behalf or charter it to a third party, according to article 2, III of Federal Law number 9.537, 1997.

Additionally, to be considered as a Brazilian carrier, a legal entity or individual shall be domiciled in Brazil and legally constituted according to national legislation, apart from complying with the previously described requirements, as stated by article 2, IV of Federal Law number 9.4329, 1997.

2.2.2 The standard contracts of transport and the Paramount clause

Once a merchant decides to utilise the overseas transport services provided by a liner carrier, parties will then enter into a contract of carriage, where the shipper is required to pay the freight price whereas the carrier must

transport the goods and delivery them at destination in the same conditions as received.

Therefore, when the goods are delivered by the shipper to the carrier, a receipt shall be issued which shall contain a full description of the goods, including the quantity and its value. Such a receipt is represented by the bill of lading document and it is considered to be the evidence of the contract of carriage agreed between the carrier and the cargo owner, as the terms and conditions of carriage are usually printed on the bill of lading's back side.¹⁵

In this sense, the bill of lading accordingly fulfils its three important functions of serving as a receipt of the goods delivered to the carrier and its conditions, being the evidence of the contract of carriage, as explained above, as well as representing a document of title over the goods therein described.

With regards to the clauses contained in the bill of lading, the incorporation into this document of the terms of the contract of carriage was done with the aim of attempting to resolve the disputes that frequently arose between cargo owners and carrier, by previously clarifying the content of the clauses to govern that obligation.¹⁶

Differently from the charter contracts where the contractual clauses are usually negotiated between the parties¹⁷, the liner carrier is simply not able to also enter into contracts individually negotiated, considering the massive

¹⁵ Although there is a rich discussion within the Contract Law field whether the bill of lading can be considered as the contract of carriage or if it is a mere evidence of the contract, such debate will not be further discussed to the extent that it lies out of the scope of the topic being hereby presented.

¹⁶ n 7 above

¹⁷ Despite the fact that standard templates are commonly utilised as charter contracts, such as the Barecon 2001 Charter and the Gencon 94 Charter, for example.

volume of freight contracted daily with several different shippers sending a diversity of goods.

Consequently, since late 19th century, there was an attempt to create standard clauses which could be inserted into the bill of lading, not only as a way to previously define and clarify the terms and conditions under which the contract would be governed, but also as a way to protect the interests of the cargo owners by preventing the shipowners to insert clauses which would completely exempt them from any liability.

Hence, in 1882 the first model of bill of lading was drafted by the International Law Association at its Liverpool Conference. This draft was created with the aim to standardise the clauses to be inserted into bill of ladings and to provide a compromise between cargo and ship interests.¹⁸

Afterwards, other models of bills of lading clauses were drafted by different institutions and association. For instance, it is worth mentioning the important work that has been done in this area by the Baltic and International Maritime Council, commonly referred to as "BIMCO", which is an independent international shipping association, composed my members directly participants in the shipping industry, such as ship owners, managers, brokers, agents and many others. BIMCO was created with the purpose of promoting and discussing regulatory matters and other policies according to the interests of its members.

Thus, BIMCO has been producing not only standard forms of charter parties and liner bills of lading but also other shipping documents and clauses, always taking into consideration a fair and equitable balance between the parties. It was explained that, by drafting such documents in legally sound

¹⁸ n 2 above, 15.

language which shall be readily understood by both parties, the likelihood of contractual disputes arising out of this contractual relationship would be minimised. Possibly that is the reason why it has been estimated that over three quarters of transactions within the shipping industry take place using BIMCO approved forms.¹⁹

Therefore, it is a common practice amongst the liner company to issue a standard (or uniform) contract of carriage or bill of lading, irrespective of the size of the shipment, or the number of different commodities or items comprising a given lot of cargo, since the provisions contained in the contract will be equally applicable to all shippers who contract those services.

Amongst those clauses some examples can be mentioned, such as the lien clause, the general average and salvage clause, the both-to-blame collision clause, followed by the jurisdiction and applicable law clause.

However, the clauses and terms of a bill of lading may vary from a shipping company to other, but usually there are provisions which are always included, such as a clause incorporating the Hague-Visby Rules or a national law which enacted such rules, with the aim to incorporate those provisions to the contract in case they are not mandatorily applicable.²⁰

This is the so called “Paramount Clause”, which usually refers to the Hague-Visby Rules or any other national law which enacted or adopted such regime (as English law, for example) as the applicable law to govern the contract of carriage.

¹⁹ Documents available at <<https://www.bimco.org/Corporate%20Area/Documents/About.aspx>> accessed on 05 August 2009

²⁰ n 5 above, 110

The purpose of the Paramount clause is to ensure that Hague Rules are enforced in jurisdictions which did not ratify or enact it by means of applying the terms of the contract, in accordance with the provisions contained in its Article X (c), as follows:

Article X

Application. The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

... (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Apart from making effective the application of the Rules, the Paramount clause was also drafted to be included in the bill of lading standard clauses to prevent the carriers of escaping from the regime of liability established by the Rules once the standard form was adopted.²¹

In order to better illustrate how the Paramount clause is exercised in practice, follows below an example of a clause which applies Hague-Visby Rules, contained in the Clause 2 of the Bimco Liner Bill of lading form (referred to as Conlinebill), in its previous version issued in 1978:

²¹ E Selvig, 'The Paramount Clause' (1961) 10 Am. J. Comp. L. 205, 208

Paramount Clause. The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation in the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.²²

Alternatively, the bill of lading utilised by the Danish sea carrier Maersk Line, for instance, contains a Paramount clause which refers to national laws which enacted the Rules, both American and English, which content is described below:

Law and jurisdiction. Whenever clause 6.2(d) and/or whenever US COGSA applies, whether by virtue of Carriage of the Goods to or from the United States of America or otherwise, that that stage of the carriage is to be governed by United States law and the United States Federal Court of the Southern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English Court of Justice in London to the exclusion of the jurisdiction of the courts of another country.²³

²² Ibid 208

²³ n 7 above, 488.

In this sense, it is evident that the paramount clause was created as an attempt to eliminate the weaknesses resulting from the limitations on the geographical coverage of the different national legislations which enacted Hague Rules, as well as from the fact that some countries simply did not adhere to the Convention and consequently have not enacted its provisions.

In fact, such clause is aligned with the provision contained in the Article X of the Hague-Visby Rules, as previously described, which wisely predicted the necessity of enforcing the Rules through a contractual provision as the acceptance and adoption of the Rules could not be reached within a majority of nations, despite all the efforts done at that time for its adoption.

However, it is also important to emphasize that, before certain jurisdictions, the Paramount clause might sometimes be held invalid due to the fact that it contravenes specific provisions of the related national legislation. Yet is rarely seen a national statute which regime of liability exceeds that under the Hague Rules.²⁴

Chapter 3. The contract of carriage of goods by sea according to the Brazilian legislation

3.1 Brazilian legal background

The purpose of this chapter is to describe how the Brazilian legislation regulates the contract of carriage as well as to set out the regime of liability applied to the carrier.

²⁴ n 21 above, 212

Besides the legal provisions, some Brazilian court decisions concerning the limitation of liability will be also examined with the aim to better illustrate how the national courts interpret this topic, additionally to some Brazilian literature on this matter which will be either presented.

Thus, considering that some particularities concerning Brazilian legal system are especially worthy of notice, some basic and introductory features of Brazilian legal system will be presented, as to supply a foundation which will enable further and proper discussions.

Initially, it shall be mentioned that Brazilian judicial system is predominantly derived from the civil law tradition, which follows the codified Roman law and it is widely known as a highly systematized and structured system.²⁵

In this sense, the first Brazilian Civil Code came into force in 1917 and it was the basis for the substantive civil law during eighty six years, when it was finally replaced by a new Civil Code in January 2003.

Yet the Brazilian Commercial Code, which originally dealt with Maritime law matters, was promulgated in 1850 and remained in force until 2003, when it was partially revoked by the new Brazilian Civil Code. Therefore, the part concerning company and commercial matters in general was revoked and duly replaced, whereas the part related to maritime matters was maintained effective.

²⁵ W Tetley, 'Mixed jurisdictions: common law vs civil law (codified and uncoded)' (1999) 4 Unif. L. Rev. 596

However, considering that the Brazilian Commercial Code dates back to 19th century, its provisions are completely outdated and did not follow the shipping industry progress over the years. Consequently some of its articles are not even applicable anymore. As an example of such obsolete provisions, the Brazilian state is referred in some articles as an Empire due to the fact that at that time the country was still under the Portuguese colonialist influence.

With regards to contract of carriage, it is basically ruled by Brazilian Civil Code within its Chapter XIV, Section III, although these provisions are not specific about se carriage, as it governs transport of goods in general irrespective of the means of transportation to be utilised.

In this sense, the article 730 describes the obligation entailed in this sort of contract (although in a very simplistic way), which provisions follow below:

Article 730. By the contract of carriage one agrees, against payment, to transport from one place to another, goods or persons.²⁶ (author's translation)

In this way, the article 743 requires certain details to be described in the contract of carriage as to correctly identify the characteristics and quantity of goods delivered by the shipper to the carrier, which is essential to assess the amount of compensation to be paid in case of loss or damages occurred during the transport, according to the provision presented below:

²⁶ Artigo 730. Pelo contrato de transporte alguém se obriga, mediante retribuição, a transportar, de um lugar para outro, pessoas ou coisas.

Article 743. The goods, delivered to the carrier, shall be described as to its nature, value, weight and quantity, and what else needed to distinguish it from the others, and at least the recipient's name and address shall be appointed.²⁷ (author's translation)

In addition, the following article also mentions that the bill of lading shall be issued with a full description of the goods, considering that one of the bill of lading's main functions is to be a receipt of the goods delivered to the carrier, as stated below:

Article 744. Once goods are received, the carrier shall issue a bill of lading containing a description as to identify the goods, in accordance with specific legal provision.²⁸

With reference to the relevant provisions which specifically deal and regulate the bill of lading, the article 575 of Brazilian Commercial Code initially confirms the need of a proper description of the goods to be included in such document, following which is also stated by the Brazilian Civil Code, as above explained. In this respect, the article 575 enumerates a list of items to be inserted in the bill of lading, as follows:

Article 575. The bill of lading shall be dated and describe:

²⁷ Artigo 743. A coisa, entregue ao transportador, deve estar caracterizada pela sua natureza, valor, peso e quantidade, e o mais que for necessário para que não se confunda com outras, devendo o destinatário ser indicado ao menos pelo nome e endereço.

²⁸ Artigo 744. Ao receber a coisa, o transportador emitirá conhecimento com a menção dos dados que a identifiquem, obedecido o disposto em lei especial.

- 1 - the name of the captain, the carrier and the consignee (whose name can be omitted if the document is to order), and the name and capacity of the vessel;
- 2 - the quality and quantity of the goods, its marks and numbers, to be registered aside;
- 3 - the place of departure and destination, also the ports of call in case these are scheduled;
- 4 - the price of the freight and fees, in case it is stated, the place and method of payment;
- 5 - the signature of the captain (article nr. 577) and of the carrier.²⁹
(author's translation)

Moreover, the same requirements are also set out in Article 1 of Decree nr. 19.473, 1990, which provides that:

Article 1: The original bill of lading, issued by sea, road or air carrier companies, proves the receipt of the goods and the obligation to deliver it at place of destination.

... Paragraph 1st: The sea bill of lading shall contain the requirements determined by article 575 of the Commercial Code.³⁰ (author's translation)

²⁹ Artigo 575. O conhecimento deve ser datado, e declarar:

- 1 - o nome do capitão, e o do carregador e consignatário (podendo omitir-se o nome deste se for à ordem), e o nome e porte do navio;
- 2 - a qualidade e a quantidade dos objetos da carga, suas marcas e números, anotados à margem;
- 3 - o lugar da partida e o do destino, com declaração das escalas, havendo-as;
- 4 - o preço do frete e primagem, se esta for estipulada, e o lugar e forma do pagamento;
- 5 - a assinatura do capitão (artigo nº. 577), e a do carregador.

³⁰ Decreto n. 19.473 de 1990:

In fact, such legal requirements must be duly described in the bill of lading, otherwise it might be considered as an irregular document, mainly for customs clearance purposes, and consequently not valid to prove the shipment and the condition of the goods.³¹

Moreover, considering that the bill of lading is also a document of title, it is indeed essential that it must contain accurate and detailed information as to represent the exact value of the goods when transferred to a third party by endorsement or whether presented before a bank issuing a letter of credit to cover the international sell of goods.

With respect to the carrier's liability and the limitation of liability clauses commonly contained in the bill of lading, considering that this topic is the focus of the present dissertation, it will be exposed and discussed in a separate section as to provide a more comprehensive explanation.

3.2 The carrier civil liability

Before entering into the analysis of the Brazilian legal provisions regarding the carrier's liability, it is important to initially clarify the status of Brazilian law towards the adoption of the international conventions regarding this topic, i.e. the Hague-Visby and the Hamburg Rules.

Artigo 1: O conhecimento de frete original, emitido por empresas de transporte por água, terra ou ar, prova o recebimento da mercadoria e a obrigação de entregá-la no lugar do destino.

[...] Parágrafo 1º: O conhecimento de frete marítimo conterà os requisitos determinados pelo artigo 575 do Código Comercial.

³¹ D B Coimbra, *O conhecimento de carga no transporte marítimo* (3rd ed, Aduaneiras, São Paulo 2004)

In this sense, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading from 1924, commonly referred to as Hague Rules, were neither ratified nor even signed, consequently the Hague-Visby regime of liability was never introduced or adopted by Brazilian legislation.

The United Nations Convention on the carriage of goods by sea from 1978, known as Hamburg Rules, was signed but it was never ratified by Brazilian senate, thus it never came into force.

As a result, the carrier's liability in Brazil does not follow the international regime worldwide adopted, yet it is regulated by national provisions contained in both Brazilian Commercial and Civil Code, as well as by spare laws, as previously described.

To this effect, the article 732 of Brazilian Civil Code states that its provisions shall be applied to the contract but still recognises that other laws or even international conventions can be additionally applied to regulate these obligations, as follows below:

Article 732. It is applicable to the contracts of carriage in general, whenever possible, since it does not contradict the provisions hereby stated, the rules stated by specific legislation and by international treaties and conventions.³² (author's translation)

³² Artigo 732. Aos contratos de transporte, em geral, são aplicáveis, quando couber, desde que não contrariem as disposições deste Código, os preceitos constantes da legislação especial e de tratados e convenções internacionais.

Thus, irrespective of the means of transportation utilised, the carrier's civil liability before Brazilian law will be determined in accordance with such provisions.

With regards to civil liability, it is imposed to the carrier a strict liability³³, which does not depend on the occurrence of negligence to be enforced and is a result of the contractual obligation assigned between the parties.

As a matter of clarification, it can be argued that the definition of strict liability before civil law is similar or even the same as in common law, as according to Black's Law Dictionary, the strict liability before common law is a liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe³⁴, in comparison to what was mentioned on the above paragraph.

In this sense, if the carrier fails to accomplish its duty to deliver the shipment in goods conditions, irrespective of negligence or any other cause for the breach of contract by the carrier, he will be liable for it and shall pay a compensation regarding the damaged or lost goods.

In view of that, once the carrier receives the goods from the shipper, he is considered as a bailee in relation to the goods, which requires that he shall act with reasonable care whilst in its possession. Only by delivering the shipment in a good condition is that the carrier effectively complies with his obligations, consequently he is then discharged from any liability.

³³ A Wald, *Obrigações e Contratos* (13rd ed, Revista dos Tribunais, São Paulo 1998) 521

³⁴ B A Garner (Ed), *Black's Law Dictionary* (8th ed, West, St. Paul 2004)

Article 750. The carriers' liability, limited to the value declared in the bill of lading, commences when he or his employees receive the goods; it ceases when the goods are delivered to the receiver or set under judicial custody in case the receiver could not be found.³⁵
(author's translation)

Thus, if there is any damage or loss of goods, there will be a presumption of negligence incurred by the carrier, irrespective of any evidence or proof in this regard, due to the fact that the liability arises from a contractual breach or fault but not from negligence.

There are two legal provisions which determine the strict liability of the carriers and shall be interpreted jointly. The first one is the article 927 of the Brazilian Civil Code, which states that a strict liability will only be applied when specifically determined by the law, as follows:

Art. 927. If a party, through an unlawful act (articles 186 and 187), causes a damage to another party, he is obliged to pay compensation.

Sole paragraph. There will be a duty to compensate, irrespective of negligence, when specifically stated by the law, or when the activity performed by the party who caused the damage implies, by its nature, a certain risk to third parties.³⁶

³⁵ Artigo 750. A responsabilidade do transportador, limitada ao valor constante do conhecimento, começa no momento em que ele, ou seus prepostos, recebem a coisa; termina quando é entregue ao destinatário, ou depositada em juízo, se aquele não for encontrado.

³⁶ Artigo 927. Aquele que, por ato ilícito (arts. 186 e 187), causar dano a outrem, fica obrigado a repará-lo.

Secondly, the specific law regarding rail transport, but which principles are applied to all other means of carriage in general³⁷, is in accordance with the Civil Code provisions above by specifically stating that it is imposed a strict liability to the carriers:

Article 1. The rail companies shall be liable for any total or partial loss, theft or damage in relation to the received goods to be carried.

The negligence will be always presumed and against such presumption will be only admitted some of the following proofs:

1st. Force Majeure.³⁸ (author's translation)

Thus, the carrier will only be discharged from this legal presumption regarding its negligence if he is able to prove the existence of any of the causes for exemption of liability, as provided by Brazilian Civil Code:

Article 393. A party shall not be liable for the damages and losses resulting from force majeure, if he previously declared himself as not responsible in the occurrence of such causes.³⁹ (author's translation)

Parágrafo único. Haverá obrigação de reparar o dano, independentemente de culpa, nos casos especificados em lei, ou quando a atividade normalmente desenvolvida pelo autor do dano implicar, por sua natureza, risco para os direitos de outrem.

³⁷ P Cremonese, 'A *responsabilidade civil do transportador marítimo de cargas*' at <http://www.mclg.adv.br/artigos_integra.asp?codigo=21> accessed 27 June 2009

³⁸ Artigo 1. As estradas de ferro serão responsáveis pela perda total ou parcial, furto ou avaria das mercadorias que receberem para transportar.

Será sempre presumida a culpa e contra esta presunção só se admitirá alguma das seguintes provas:

1a. Caso fortuito e força maior.

³⁹ Artigo. 393. O devedor não responde pelos prejuízos resultantes de caso fortuito ou força maior, se expressamente não se houver por eles responsabilizado.

In the sake of clarity, the definition of force majeure before Brazilian legislation comprises an extraordinary event or circumstance beyond the control of the parties such as a war, riot or strike, or any event such as a natural disaster, which is known as act of god. Thus, these are the only circumstances under which a party is entitled to be exempted from liability.⁴⁰

In order to illustrate such provision, it is worth mentioning a court decision which held the carrier liable regarding a damaged shipment where the goods were found wet when received at destination and salt was found in the humidity, which consists in a clear breach of the carrier's duty to deliver intact goods at destination. In this case, it was also decided that there was no cause of force majeure which could exempt the carrier from its liability.⁴¹

Considering the above explained and also taking into consideration the strict liability applied to the carrier, both legislation and courts decisions have completely rejected the applicability of liability exemption clauses.

In view of that, it is expressly stated by the law that any clause inserted in bills of lading aiming to exempt the carrier from any liability shall be considered as null and void, as provided by the Article 1 of the Decree nr. 19.473, 1930:

⁴⁰ Differently from the long list of exemptions presented by the Hague/Hague-Visby Rules, before Brazilian law only causes of force majeure entitles a carrier to be exempted, which could be conflicting with those rules in case they were adopted. Such contradiction will be analysed and discussed in a separate chapter.

⁴¹ Appeal nr. 1997.001.06715 (1998) (High Court of Rio de Janeiro, Brazil)

Article 1. The original bill of lading, issued by sea, road or air carrier companies, proves the receipt of the goods and the obligation to deliver it at place of destination.

It shall be deemed as unwritten any clause which restricts or modifies, regarding such proof, or obligation.⁴² (author's translation)

Furthermore, the Supreme Court of Justice issued an authority decision which is a precedent⁴³ to be applied to similar cases, stating that any exemption clause shall be held as inoperative, which content is reported below:

Supreme Court of Justice precedent nr. 161. In a contract of transport, an exemption clause is inoperative.

In accordance with the referred precedent, the High Court of São Paulo state granted a decision affirming that any exemption can relieve the carrier to perform its duty, which shall be deemed as unwritten as stated in article 1 of Decree 19.473,1930, as when the goods are received the carrier assumes the responsibility for any risks that it might be subjected to and such responsibility only ceases when the goods are finally delivered to the receiver.⁴⁴

⁴² Art. 1º O conhecimento de frete original, emitido por empresas de transporte por água, terra ou ar, prova o recebimento da mercadoria e a obrigação de entregá-la no lugar do destino.

Reputa-se não escrita qualquer cláusula restritiva, ou modificativa, dessa prova, ou obrigação.

⁴³The precedent decision (known as "súmula") is a consolidated position in the courts about a specific legal issue and it needs to be approved by more than half of the Brazilian Supreme Court of Justice judges. Until 2006, such decisions did not have binding force, which was changed recently.

⁴⁴ Appeal nr. 347.031 (1985) (High Court of São Paulo, Brazil)

Nevertheless, despite of the exemption clauses are completely rejected before Brazilian legal system, clauses which limit carrier's liability are usually accepted.

Hence, a limitation of liability clause is considered legally valid and binding between the parties before Brazilian legislation as such as by the courts, which accepts such provisions when included in a contract of carriage if the shipper did not declared the exact value of the goods and in consequence was allowed to pay a lower freight rate.

The optional reduction in the freight rate with the consequent (and concurrent) limitation of liability is provided by article 12 of Decree nr. 2.681, 1912 which, as previously mentioned, is known as the 'Railway Law' due to the fact that its provisions specifically regulate the transport of goods via railway services.

Thus, such legal provision states that the carrier is only allowed to limit its liability in the contract of carriage if a counter offer as to reduce the freight was made available to the shipper.

In this sense, the below mentioned decision issued by the Brazilian Superior Court of Justice clearly illustrate such matter when it states that:

The exemption clause must be rejected as it is not in accordance with legal provisions, but the limitation of liability clause shall not be prohibited, on the contrary, as it is legally admitted by a specific provision contained in the Decree nr. 2.682, 1912, known as the Railway Law: 'Article 12. The clause of non guarantee over the goods, as well as the pre determination of a maximum amount to be paid as compensation, if goods are lost or damaged, shall not be established

by the railway companies unless as an option and correspondent to a reduction on the rates. It shall be considered null any other clause which reduces the railway companies' liabilities established hereby in this law.'⁴⁵

The option was still left open for the shipper to obtain full cover by declaring the full value of the cargo to the carrier before shipment, and having this amount entered on the bill of lading. Evidence has shown, however, that this option is rarely used since declaration of the cargo's value invariably attracts an ad valorem increase in freight rates which is normally more expensive than the cost to the cargo owner of obtaining his own insurance cover.

Regarding the characteristic of adhesion contract, with standard clauses which are imposed by the carrier and must be simply accepted by the shipper, without room for negotiating or discussion, the Brazilian legal point of view is that such contract and its standard clause shall be interpreted according to some principles established by the case law as well as by the specialized literature, such as good faith and economic balance between parties.

⁴⁵ Appeal (Recurso Especial) nr. 29,121 (1992) (Superior Court of Justice, Brazil). Deve ser repudiada a cláusula de não indenizar posto que não encontra amparo no direito mas não deve ser vedada a cláusula limitativa, ao contrário, admitida, no seguinte dispositivo da Lei das Estradas de Ferro (Decreto Legislativo n. 2.682 de 1912): 'Artigo 12. A cláusula de não garantia das mercadorias, bem como a prévia determinação do máximo de indenização a pagar, nos casos de perda ou avaria, não poderão ser estabelecidas pelas estradas de ferro senão de modo facultativo e correspondendo a uma diminuição de tarifa. Serão nulas quaisquer outras cláusulas diminuindo a responsabilidade das estradas de ferro estabelecida na presente lei.'

3.3 Legal provisions regulating the limitation of liability clause

According to what was mentioned in the previous chapter, the contracts of carriage in general have been adopting standard clauses to establish carriers' and shippers' duties and obligations.

Amongst such clauses, it can be found a limitation of liability clause which establishes a previously fixed amount to be paid as compensation for damage or loss of goods, usually based on the Hague-Visby provisions or any other national law which enacted such rules, as the US Carriage of Goods by Sea Act 1936, for instance.

In parallel with Paramount clause, the limitation of liability clause also aims to apply the regime of liability provided by Hague-Visby rules and ensure that the carrier will be able to apply such limitation, irrespective of the jurisdiction before which a dispute might arise.

Thus, considering that Brazilian law did not adopt the Hague-Visby regime, then the limitation of liability clause shall be applied to any dispute arisen before Brazilian jurisdiction.

In this sense, such clauses are considered as valid and consequently duly applied by Brazilian Courts, as they are in accordance with the national law which accepts the limitation of liability.

With this regard, the Brazilian law, pursuant to Article 750 of the Brazilian Civil Code, limits the carrier's liability to the amount declared by the

shipper and duly entered in the bill of lading as being the value of the goods for compensation purposes.⁴⁶

However, if the shipper decides not to declare the value of the goods in the bill of lading, he will be subjected to the limited amount pre fixed in the clause.

This is an option granted to the shipper, whether he should declare the value of the goods and consequently obtain full cover in case of loss or damages, or just omit the value of goods and accept the limited amount imposed. In practice, rarely shipper declare the full amount of the goods since it would entail an ad valorem increase in freight rates, which can be even more expensive than the cost of obtaining an insurance cover for this shipment.⁴⁷

Following the provisions contained in Hague-Visby rules, the Brazilian law also allows the parties to increase the limited amount of compensation through agreement, but at the same time, the law also prevent them to reduce the amount of any compensation to be paid by the carrier to a lower amount than declared, which could be interpreted as an exemption clause.

In this respect, it is worth mentioning an eminent opinion amongst national literature. Aguiar Dias stated that despite the acceptance amongst national literature and case law, we have no doubt in support its invalidity when the fixed amount result in a real damage to the creditor, especially in the case of transport, which contract is usually likely to exclude the freedom of discussion between the parties. The author accepts the limitation of liability clauses since it

⁴⁶ See reference number 32, which deals with the same mentioned article.

⁴⁷ n 7 above, 194

meet the legal requirements, as it is part inherent of the business activity to mitigate the burdens and costs arising from losses and damages.⁴⁸

The same opinion is shared by another author, which states that the validity of limitation of liability clause has been accepted and recognised by national and international case law, since it is not covering an exemption clause in the carrier's favour. Furthermore, it was also emphasized that such clauses must be distinguished, as its purpose is to limit but not to waive carrier's liability, consequently there should not be reasons to discuss its legal effect and validity, as the case law have been accepting such clauses limiting the liability do not mean or imply an exemption or waive to indemnify and both things shall be duly distinguished.⁴⁹

With regards to the case law, both Higher Brazilian Courts of Justice⁵⁰ have been lately accepting and applying the limitation of liability clause in favour of the carrier, although this understanding was only reached by early 90s. Previously to that, its validity and enforceability was still under discussion and some decisions which did not accept the limitation of liability clause could be even found, as the limitation clause was considered equivalent as to the exemption clauses.

⁴⁸ J A Dias, *Cláusula de não indenizar* (Forense, Rio de Janeiro 1947) 110-113

⁴⁹ C A C Gilbertoni, *Teoria e Prática do Direito Marítimo* (2nd ed, Renovar, São Paulo 2005) 377

⁵⁰ It is important to clarify that although there are two High Courts of Justice in Brazil, each one of them have different functions. The Supreme Court of Justice is in charge of ruling cases related to constitutional matters, following the German, French and other judicial systems which have a Constitutional Court, whereas the Superior Court of Justice is the highest Appeal Court and is able to rule any other matters not related to constitutional issues.

In order to better illustrate such controversy, firstly some decisions in favour of the limitation of liability clause will be presented, followed by a recent decision which surprisingly denies its application.

In this sense, the ruling issued by the Superior Court of Justice, related to the appeal number 39.082-6⁵¹, must be reported due to its importance in two different aspects. Firstly, its relevance is due to the description of all the controversy within the courts. Besides, it also mentioned some decisions where the limitation of liability clause was held as inoperative in the same way as the exemption clause. However, such ruling ended up upholding the validity and consequent applicability of such clause, by arguing that.

Secondly, it stated that there should be no reason to prohibit the limitation of liability clause to be inserted in a contract of transport, which aims only to impose a maximum compensation cap, as long as it is not prejudicial and can be justified considering the particularities of each case.

Thus in the present case, two particularities enabled the limitation clause to be applied. First, the shipper had the option to declare the value of the goods as to pay the full freight rate or not declare the value as to pay a lower freight price, where the chosen one was the latter alternative. Besides, the plaintiff, an insurance company which reimbursed its insured client according to the limitation amount established in the contract of transport, could not be reimbursed in a higher amount claimed from the shipping company as a subrogation right.

⁵¹ Appeal (Recurso Especial) nr. 39.082-6 (1994) (Superior Court of Justice, Brazil)

Afterwards, the Superior Court of Justice issued several decisions accepting and applying the limitation of liability clause, as this is the prevailing understanding of this Court in relation to this matter since it is in accordance with the above mentioned legislation and it does not imply a very low amount to be paid as compensation.

Amongst one of the most important decisions in this topic, the Appeal number 233.023 confirms the majority understanding of this Court concerning such clause, which upheld as valid the limitation of carrier's liability clause, inserted in the bill of lading, when the shipper does not declare the value of goods and consequently benefits from a lower freight rate.⁵²

In the same direction goes the decision granted in the Appeal number 153.787, by declaring in that relevant case that there were no restrictions that could prevent the limitation of liability to be enforced. The amount of compensation was not too low as to be considered prejudicial, with the additional fact that of the choice left to the shipper to pay the freight based on the declared value of the goods or pay a reduced freight and then accepting the limit of compensation in an amount defined in the contract.⁵³

Also the Appeal number 27580-7, which decision was granted by the Superior Court of Justice as well, stated that if the shipper paid the regular freight price, correspondent to the price shown in the bill of lading, without declaring the real value of the goods to be carried, as to pay a lower freight rate, the limitation of liability is thus applicable as there is no obligation imposed to the carrier to pay compensate the shipper in an amount beyond the limit

⁵² Appeal (Recurso Especial) nr. 233.023 (2008) (Superior Court of Justice, Brazil)

⁵³ Appeal (Recurso Especial) nr. 153.787 (1997) (Superior Court of Justice, Brazil)

previously agreed (according to the bill of lading clauses) due to the loss of goods in transit.

The same understanding is been applied by the High Courts of each state member of Brazilian federation, in accordance with the interpretation that have been applied by the Superior Court of Justice.

Thus, the High Court of Rio de Janeiro state, in a decision issued in 1997 ruled that once the goods were received, the carrier has the duty to transport them and deliver it intact at destination. In this case, the goods were found wet when delivered at destination and salt was found in the humidity, which caused the consequent damages. Despite the defence presented by the defendant alleging force majeure, the Court rejected such argument and did not exempt the carrier from its liability, as the goods were simply damaged for lack of reasonable care and for any force majeure case.⁵⁴

In very recent decisions, the High Court of São Paulo state has decided in two different way, firstly aligned to the application of the limitation of liability clause, but secondly against it.

In a very recent decision regarding the Appeal number 1.044.427-0, the High Court of São Paulo state decided that the contractual liability of the carrier should prevail, in accordance with its responsibility to carry and deliver the goods intact, and only causes of force majeure could be able to deviate such liability, which cannot be applied to the present case considering the lack of evidence in this regard. Thus, the carrier was condemned to reimburse the

⁵⁴ Appeal nr. 1997.001.06715 (1998) (High Court of Rio de Janeiro, Brazil)

shipper's insurance company the same amount previously paid due to the damage caused to the goods.⁵⁵

However, although the limitation of liability is accepted, there is still uncertainty regarding the amount to be paid as compensation, as there is no uniformity as to what should be considered as a diminished amount.

As an eminent author and practitioner in the Maritime Law field, Martins explains that some Brazilian court decisions have been interpreting that when the limitation implies the compensation to be set into a very insignificant amount, it could be considered as if it was an exemption situation. In this case, the limitation clause will be held as null and void. However, the author also stress that although the courts interpret a low compensation amount as an exemption clause, they do not set a fixed criterion to be considered as a low amount, as in one decision the compensation equivalent to one fifth of the value was not considered too low, whereas in another ruling, a compensation equivalent to forty per cent of the goods' value was held as diminished and derisive.⁵⁶

Consequently, in some decisions the limitation of liability was simply rejected as the Court considered as the amount resulting of the limitation so diminished that it was equivalent to an exemption.

In a very recent decision, the Court ruled exactly in this way, as to reject the limitation of liability clause and compel the carrier to pay the amount equivalent to the full value of goods, as it was held that the amount resulting

⁵⁵ Appeal nr. 1.044.427-0 (2009) (High Court of São Paulo, Brazil)

⁵⁶ E O Martins, *Curso de Direito Marítimo* (3rd ed, Manole, São Paulo 2007) 546

from the limitation clause equivalent to US\$ 500 was too low and it would not serve to duly compensate the shipper.⁵⁷

Finally, it is important to emphasize that, although one could affirm that currently there is a majority of decisions which accepts the limitation of liability clause as being valid before Brazilian Courts, it is still possible to face rulings which can consider such clause as equivalent to an exemption clause, hence null and void.

Thus, even if the prevailing understanding is in favour of the limitation of liability clause, which have been confirmed by several precedent decisions, there is still an uncertainty as to facing controversial decisions in this matter.

Chapter 4. Discussion

Most countries that have a maritime commerce of any importance have now enacted or at least ratified the Hague-Visby Rules, (Bill of Lading Convention of 1924 and its amendments) or at any rate have used it as a pattern for national legislation⁵⁸

Thus, considering the importance of international trade for the Brazilian domestic economy, which exports rates are about 150 million dollars per year, such an effective participation in the international commerce should lead this country to adopt international regulations specifically drafted to suit this activity.

⁵⁷ Appeal nr. 1.066.152-2 (2009) (High Court of São Paulo, Brazil)

⁵⁸ n 21 above, 205

However, for reasons unknown to the author, Brazil did not sign, neither ratified nor enacted any of the relevant international conventions (i.e. Hague, Hague-Visby and Hamburg Rules).

This could maybe be explained by the existence of certain inertia amongst national governments when it comes to ratifying or acceding to international conventions, probably due to a combination of many factors such as availability of legislative time, availability of lawyers capable of drafting the necessary national legislation, discovery of national opposition to a particular instrument, amongst others.⁵⁹

It may also be that, in certain respects, the international conventions could be conflicting with the national law, which would likely happen when considering Brazilian law.

For instance, the long list of immunities enumerated in the Hague-Visby Rules, to be alleged as a defence by the carrier and consequent exempt him of any liability, would be a considerable issue before the Brazilian law, as only causes of force majeure or exclusive fault of the shipper are allowed before the Brazilian Civil Code to completely exempt a carrier from its liability.

On the other hand, the international conventions could also still guarantee some degree of protection to the parties which are not entirely provided by the national law, as the international instruments were extensively discussed and carefully drafted aiming to provide the most complete solution as possible for the disputes arising from international carriage of goods by sea.

⁵⁹ P J S Griggs, 'Obstacles to Uniformity of Maritime Law' (2003) 34 J. Mar. Law and Comm. 191

As an example, it could be seen that when it comes to limitation of liability, the Brazilian courts are at least not too distant from what has been established by the international regime of liability.

Nonetheless, some matters are still not clearly settled and defined by Brazilian Courts, as it could be seen that the decisions so far issued were not able to provide a satisfactory level of certainty as to what should be considered as a reasonable amount to be paid as compensation.

In this sense, as shown in the previous chapter, in some of the rulings mentioned it was considered that the amount of US\$ 500 (five hundred dollars) per unit established in some of the standard clauses of the bill of lading was extremely low as to duly compensate the shipper for its losses, whereas in some other decisions the Court held such amount as reasonable enough and upheld the application of the limitation clause by the same amount.

Possibly, if the criteria established by the Hague-Visby rules were applied, maybe there would be no room for discussion concerning the amount, as it would be previously established by the international conventions.

Besides, in Brazil the discussion concerning sea carrier's liability goes in a different and maybe even opposite way as to the other jurisdictions already used with the Rules, whilst in other countries this and other matters are already well defined and established.

In this sense, it could be taken as an example the period of liability of the carrier, which is considered in general as being from 'tackle to tackle' in jurisdictions which adopted the Hague-Visby Rules, but which is still under an ongoing discussion amongst Brazilian authors and Court decisions which claim

that it should be from the time when goods are delivered to the carrier until the moment the carrier deliver them to the receiver.

Additionally, as it could be seen from previous chapters, the Brazilian legislations is confusing, too old and does not provide all the required solutions as to duly regulate the limitation of liability.

The national legislation thus cannot be considered as able to provide the solutions required by the parties involved in a dispute regarding international carriage of goods by sea, hence some changes shall be considered within Brazilian law.

Moreover, it could also be taken into consideration that there is no doubt that a beneficial legal regime can always attract foreign business and therefore foreign currency as well.

In any event, even if the solutions applied by the Brazilian legislation were satisfactory, anyway they would not be aligned with the international objective of creating uniformity in an international level as to the law applicable to international carriage of goods by sea.

Currently, about thirty states have so far formally adopted the Hague-Visby Rules as well as its provisions have been also incorporated into the maritime codes of several other states, hence they tend to be applied in international trade on a reciprocal basis, which helped to promote the desirable uniformity and harmonisation in international law.

However, considering that currently there are at least three different conventions regarding the rules applicable to the international carriage of goods by sea, apart from each national legislation which deals with the topic separately, the necessary and desirable uniformity was not still reached.

Otherwise, the consequence is just as brilliantly explained by J Wilson
as:

the overall international situation with regard to contracts of carriage by sea exhibits a certain degree of complexity. While many states still remain loyal to the original Hague Rules, thirty have adopted the Hague/Visby amendments, a further thirty two have adopted the Hamburg code, while a fourth group has implemented, or is in the course of implementing, hybrid systems based on a combination of provisions drawn from both the Hague/Visby and Hamburg regimes. The position is further complicated by the application of varying conflict of laws principles with the result that a decision as to which Convention is applicable may well depend on the choice of country in which the action is brought. Such legal complexity hardly encourages the development of international trade and a greater degree of uniformity would be desirable.⁶⁰

Furthermore, the international uniformity in this area is not only about harmonisation, it goes beyond this. It should provide a sound, clear and uniform liability regime which allocates the risk of loss as to enable the parties involved in the international trade to know what to expect as a recover for any losses. For instance, the carrier shall determine its level of care depending on its potential liability, which consequently will influence the types of coverage to be provided by the insurer, as well as bankers financing a transaction shall be able

⁶⁰ n 7 above, 115

to evaluate whether they can depend on a security against the goods in transit.⁶¹

In this sense, if the law is uniform, all the parties involved in a transaction will know that its liability (or recovery) will be the same wherever a dispute is resolved. Consequently, the results will be more predictable, litigation will be less necessary, and the parties will be able to make their underlying business decisions with confidence, knowing what law will be applied if loss or damage occurs.⁶²

To this effect, considering the several changes and technological developments, as well as the constant updating needed as to keep the legal provisions suitable for the current reality, a new carriage of cargo liability regime was drafted and it may eventually replace the Hague-Visby and Hamburg Rules.

Thus, after six years being discussed within the Working Group on Transport Law of Uncitral, the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea', also known as 'The Rotterdam Rules', will be firstly signed in a ceremony on September of the current year and will come into force one year after signature by the twentieth member state.

Such convention brings several changes in some of the most important provisions regarding carrier's liability, such as an extended period of

⁶¹ M F Sturley, 'Uniformity in the law governing the carriage of goods by sea' (1995) 26 J. Mar. Law and Comm. 553

⁶² Ibid

responsibility which is now ‘door to door’, as well as an increased limit of liability, amongst other significant innovations also introduced.

Furthermore, as mentioned before, one of the main goals to produce a new convention was also to update the law in order to facilitate the electronic commerce, which explains the widely list of subjects covered by Rotterdam Rules. This is because ‘the current law fails to furnish a framework that provides an adequate basis for e-commerce’⁶³, requiring thus an adjusted legal regulation.

Although it is too early to predict whether this new convention will be successfully adopted and will come into force within expected date, what can be said is that it can bring benefits especially to cargo owners, as well as it can potentially simplify certain elements as to reduce disputes.

However, this new convention has also been extensively criticised, with some authors even claiming that it should be opposed and neither signed nor adopted⁶⁴, because instead of promoting a greater degree of harmony, it could just became one further source of disharmony if it is not widely adopted by a majority of countries.⁶⁵

Anyhow, after a careful legal analysis, this new convention shall be considered by Brazilian authorities as a solution to introduce the needed degree of certainty regarding the regulation of carriage of goods by sea goods, as well as it could be adopted as a first step towards the Brazilian support of international law harmonisation.

⁶³ M F Sturley, ‘The preparation, philosophy, and potential impact of the Rotterdam Rules’ (2008) 14 JIML 479

⁶⁴ W Tetley, ‘Some general criticisms of the Rotterdam Rules’ (2008) 14 JIML 625

⁶⁵ A Diamond, ‘The next sea carriage Convention?’ (2008) LMCLQ 135

5. Conclusion

In general, what could be seen through the Brazilian legal provisions and case law presented along the discussion is that the national provisions are nearly close to what is provided by the Hague-Visby regime with regards to the limitation of liability of the sea carrier.

In this sense, the Brazilian legal framework could be considered as a reasonable alternative solution to the Hague-Visby Rules, although it is not exactly complete and clear, as several issues are still pending on a definitive decision, such as the issue concerning the reasonable amount to be paid as compensation, which still need to be further discussed.

Furthermore, considering the lack of specialised literature regarding shipping law in Brazil, this study suggests that it shall be promoted a further discussions and research on this topic as to prepare practitioners and also academics to face the differences between the international conventions and the national law with more clarity.

Overall, the study acknowledge that the domestic law does not fit the needs of cargo owners and ship owners as to establish the regime of liability and, as a consequence of the non adoption of the international rules, the Brazilian provisions are not detailed and specifically drafted to support an international carriage, but mainly focused on national contracts, besides it is rather old and obsolete, thus it does not follows the latest developments of international trade neither the growth of e-commerce.

Moreover, it is a disadvantage to a major exporter country such as Brazil not to provide a sound legal system, when it could put in place an effective and complete legislation as to ensure legal certainty to foreign entities parties when doing business with Brazilian parties.

In this sense, the adoption of the new Uncitral Convention, the so called Rotterdam Rules, could be considered as a solution to improve the Brazilian legal framework and consequently introduce the needed changes to align the domestic legislation with the international law.

Notwithstanding, it is suggested that a further research regarding a possible conflict of laws between the new Rotterdam Rules provisions and the national law be carried out, before signing it, as this convention cannot be signed with reservations by a member state.

The adoption of this new international convention is also supported by the fact that it is not satisfactory that each different country or trade areas, such as the European Union, find its own solution to issues arising out of international transactions, as history has shown that uniformity in international law is simply essential.

Currently there are several different regimes of liability which are indeed effective, with the forthcoming possibility of another one coming into force with the Rotterdam Rules signature in September later this year.

Unfortunately, it is difficult to determine at this time if this new Convention really suits the needs of all the parties involved in the international trade, whether it will be able to bring solutions to the current issues faced with the current international regime of liability.

It may not contain though the most accurate provisions and it may not fit to the interests of all the parties involved in international trade, but it is unquestionable that it means an improvement to the international carriage of goods by sea law as well as it contains up to date provisions.

However, if a majority of signatures by the main trading nations cannot be reached, the situation can be even more chaotic than it is nowadays, as uniformity in international carriage of goods by sea law will become even more far reaching and distant.

Thus, if this new international convention is not successful to attract countries' adoption, there will be a risk of facing a real chaos amongst the regulation of international carriage of goods, with four different conventions in force, signed and ratified by different nations.

This seems to be the best, and probably the last, chance of restoring international uniformity in this area.

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