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Paramount Clause and Codification of International Shipping Law

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This article analyses the voluntary inclusion in a charterparty or its incorporation into a bill of lading by the contracting parties of protective clauses such as the Paramount or Himalaya Clauses. The Clauses provide for the application of the Hague-Visby Rules or other international instruments for the limitation of responsibility of the carrier and its servants, agents, and subcontractors. However, the interaction between forum and ius may lead to additional consequences. The validity of the agreement on the applicable law altogether with the choice of seat to solve future disputes between the parties can be limited by public policy and overriding mandatory rules of the forum.

I
INTRODUCTION

The limitation of liability regime for the sea-carrier is of great importance, when negotiating charterparty terms. The incorporation of the Hague–Visby Rules[1] entitles a shipowner to

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[1]International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924 ('the Hague Rules') 51 Stat 223, vol. 120 LNTS, 155, amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 23 February 1968 ('the Visby rules') vol. 1412 UNTS, 121, and the last

rely on the defences available to him arising out of cargo claims under the charterparty. The absence of doctrinal studies, from a conflict of laws perspective, stresses the importance of considering the varied typology of clauses, including a reflection on the consequences of their inclusion in the maritime transport contracts by analysing their functionality, legal nature and practical implementation problems. Therefore, this analysis is focused on the applicable law,[2] and the most frequently used and the most important clause, the *Paramount Clause*. The Paramount Clause allows the incorporation of the Hague, the Hague-Visby, or the Hamburg Rules[3] where in force, by incorporation in the charterparty or the bill of lading of the national legislation that gives them effect.

This article formulates overall conclusions that, from our perspective of study, provide certain benchmarks for the legal operator regarding the nature and function of protective clauses, which are not always easy to point to due to the great variety in business practices.

Any reflection on the scope of such clauses should consider the autonomy of the parties in identifying the law regulating an international contract in general, and a shipping contract in particular.[4] It is necessary to determine the limits on the right to choose under the *lex contractus* and to specify the scope of the

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Protocol amending the Hague–Visby Rules signed at Brussels on 21 December 1979 ('SDR Visby Protocol') vol. 1412 UNTS, 146.

[2]M. de Juglart, Droit Commun Et Droit Maritime, Droit Maritime Français, no. 449, 259 et seq. This book analyses the modulation of doctrinal constructions and traditional institutions of private law in its application to the field of maritime law, as well as possible interactions between the two sectors.

[3]The United Nations Convention on the Carriage of Goods by Sea ('The Hamburg Rules') approved in Hamburg, 30 March 1978 that entered into force on 1 November 1992.

[4]S. Brækhus, Choice of Law Problems in International Shipping (Recent Developments, Martinus Nijhoff, 1979, 261. The author cites two factors that determine the enormous practical importance of issues related to choice of law in the field of maritime law: "The large number of international contracts, i.e. contracts entered into by parties from different countries, and the central position of the ship in all maritime legal relations in conjunction with the frequent voyages of the ship from one State to another."

possible voluntary *renvoi* that parties may make through Paramount Clauses to the uniform conventional law system (thereby extending its scope of application) in particular. This operates against the presence of mandatory internal rules that can invalidate such agreements by reference to 'public order.'[5]

In this context, the impact of the Convention on the Law Applicable to Contractual Obligations, the 1980 Rome Convention and the latter Rome I Regulation will be analysed.

To understand the true meaning of Paramount Clauses, and without ignoring the existence of the already analysed mixed or complex contracts, the varied contractual phenomenology[6] reflected in the bill of lading has to be considered, comprising the time charter, the voyage charter and the liner charter. No clear need has existed in the past to establish rules restricting the contractual freedom of parties involved in the maritime transport sector under the charterparty regime. Instead, liner transport under the bill of lading has been characterised by the effect of coercive rules on the liability of the carrier, embodied in the Hague–Visby

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[5]J. F. Hostie, Le Transport des Marchandises en Droit International, Recueil des Cours, vol. 78, 1951, 211–324. The author points to the different scope or impact of the Paramount Clause as containing the following: "Une référence aux règles qui forment la substance de la Convention en tant que telles ou au droit national dont ces règles font partie. En faveur de la seconde solution l'on pourrait faire valoir que, si le tribunal reconnaît la validité du choix de la loi applicable par les parties, il y a plus de chances qu'il n'applique pas, à l'encontre de cette loi, celles des dispositions de sa propre loi qui, tout en étant d'ordre public, ne sont pas d'ordre public sensu stricto. En faveur de la première solution, l'on pourrait faire valoir qu'il se peut qu'un tribunal ne reconnaisse pas la validité du choix par les parties de la loi applicable, mais n'annule pas les règles conventionnelles en tant que clauses du contrat."

[6]The theoretical treatment of this complex reality reveals, on a comparative level, the existence of two models. The first introduces a sharp split between chartering and transport, considering that the obligations assumed by the shipper are different in both cases: navigating in the first and transporting cargo in the second (examples of this position can be seen in the new Spanish Act 14/2014 of 24 July 2013, on maritime navigation, Official State Gazette No 125 of 26 May 2015; the Italian Codice della Navigazione of 1942, the Argentinian Navigation Law of 2 March 1973 and, with some clarifications, the French law of 18 June 1966). In contrast, the second model has a unitary conception of the nature of affreightment and liner transport contracts, based on the contract for carriage (legislative manifestations of this unitary treatment can be seen in Greek and Norwegian legislation or in the 1897 German HGB).

Rules, the Hamburg Rules and finally, the Rotterdam Rules[7] (not yet in force).

A first question will be introduced before analysing Paramount Clauses: why are both English jurisdiction and law preferred, even over United States (U.S.) jurisdiction and law, to resolve maritime disputes? English judges may have rejected economically unsound doctrines, such as unconscionability, not because they were economically unsound but because they were new. This can be best understood by assuming counterfactually that the judges, often with reference to classic English cases in torts and contracts, were trying to maximise economic efficiency. There is even a theoretical reason, unrelated to the law and economics movement, which is that, as Posner states, modern English judges are less political than are American ones.[8]

The practice of inserting *renvoi*, or references to certain national legislation,[9] in charterparties or bills of lading has its origin in the situation of maritime traffic in the U.S. during the late 19th century. In this period, all U.S. exports were virtually controlled by British shipping companies, which exercised a genuine monopoly position in the sector. This contractual position of absolute market dominance led to the frequent inclusion of clauses in contract documents excluding the liability of

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[7]The 2008 Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted in New York on 11 December 2008.

[8] From a quantitative point of view, the performance of the systems demonstrates that the English system is disproportionately smaller, as there are less expected gains from suing, yet suing is more difficult to finance because of the absence of the contingency fee; the English have fewer judicially enforceable rights; English law is clearer. It is impossible to say which of the two legal systems is better on balance. English law is clearer and, hence, more predictable, which is a bonus—but one possibly offset by a lack of flexibility. According to Business Environment Risk Intelligence SA (BERI)'s rankings, the United Kingdom and U.S. rank after Switzerland; R. A. Posner, "Enforceability of Contracts," in Law and Legal Theory in England and America, Oxford University Press, 1996, 59–95.

[9]Vid. P. Celle, La Paramount Clause Nell'evoluzione della Normativa Internazionale in Tema di Polizza di Carico, Il Diritto Marittimo, 1988, 11–36 (hereafter "Celle").

shipowner-carriers, who received support for their validity from English courts on the basis of freedom of contract.[10]

In contrast to this jurisprudential orientation, the U.S. courts restricted the validity of such clauses, adducing the public policy doctrine that such allegedly agreed on limitations of liability could always be valid unless they were qualified as 'unreasonable.'[11] This conflict between the two orientations revealed the presence of conflicting interests within the sector. This resulted in a particularly favourable situation for shipowners, who were able to impose on shippers, under the cover of an alleged contractual negotiation, abusive or unfair terms designed to limit or exclude the shipowner's liability.[12] In reaction, several rules governing carriers' liability were introduced to eliminate abuses arising out of the alleged absolute or unlimited contractual freedom, beginning with the Harter Act (Federal Law of the U.S. of 13 February 1893),[13] and followed by other countries having predominant shipper interests, such as Australia (COGSA of

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[10]W. E. Astle, The Clause Paramount. An Appreciation of its Effect and Incorporation in Bills of Lading and Charter-Parties in Relation to the Hague Rules, in International Cargo Carriers' Liabilities: The Determination of Some Current Contractual Problems Arising from the International Carriage of Goods, Fairplay, 1983, 39, in which he points out that "historically the purpose of the Clause Paramount was to make the shipowner or other carrier liable for cargo loss or damage on the basis of certain minimum responsibilities and liabilities and to give immunity from liability in certain circumstances."

[11]To the extent that certain contractual obligations had to be performed in the United States, the eventual remission contained therein in favour of the application of national legislation did not preclude a possible declaration of the nullity of such clause by U.S. courts. Interesting, analysis of this debate is contained in P. E. Herzog, Constitutional Limits on Choice of Law, Martinus Nijhoff, 1992.

[12]As highlighted by J. L. Iriarte Angel, "Transporte Marítimo Internacional de Mercancías y Terceros Estados, Revista General de Legislación y Jurisprudencia, 1989, 7–28, that situation was particularly serious in line traffic, as the shipper could only adhere to the conditions offered by shipping companies that exploited the line, and lacking any bargaining power, the shipper was left to the mercy of the other party and the exclusion of liability clauses it had unilaterally introduced into the bill of lading.

[13]46 U.S.C. App., § 190–196.

1904), Canada (Water Carriage Act of 1910) and New Zealand (Shipping and Seaman Act of 1908).[14]

Soon, other global reforms were addressed, but the States that favoured shipowners believed that imposing new obligations on carriers would entail an increase in freight rates due to the adoption of isolated and individual measures by each State affecting competition in the shipping sector. Then, efforts were oriented to achieve international unification of this liability regime through an agreement aimed at addressing the international character of maritime traffic. This was initially done through the 1924 Brussels Convention.

The objective of clarifying the legal nature and typology of Paramount Clauses requires a study of the developments in relation to the scope of the 1924 Brussels Convention, regulated by its Article 10 as amended by the Protocol of 23 February 1968 (substantially expanding this area and expressly allowing the possibility of determining the application of such conventional rules by virtue of Paramount Clauses) and regulated in similar terms by the 1978 Hamburg Convention.

This possibility of extending the scope of application of international uniform rules through Paramount Clauses focuses the debate on the possible effect of peremptory norms of third States on a contract for the international carriage of goods,[15] as well as the practical relevance of the public policy exception.[16]

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[14]Regarding its content, see the criticism of the 'nationalism' of the national legislator, calling such autonomous rules 'imperialisme de mauvais gout;' I. K. Diallo, Les Conflits de Lois en Matière de Transport International de Marchandises par Mer, Droit Maritime Français, vol. 40, (1988) 643.

[15]J. Ramberg, Charter Parties: Freedom of Contract or Mandatory Legislation?, Il Diritto Marittimo, (1992) no. 4, 1069–1082.

[16]J. J. Álvarez Rubio, Las Cláusulas Paramount: Autonomía de la Voluntad y Selección del Derecho Aplicable en el Transporte Marítimo Internacional, Eurolex, (1997) (hereafter "Álvarez Rubio").

II
STANDARD TYPE-CLAUSES IN CONTRACT PRACTICE

The recourse to standard type-clauses was motivated by pressure from shippers operating in the U.S. because, in the context of the market that determined the promulgation of the 1893 Harter Act, their aims had not been fully achieved since the English courts continued to maintain the validity of exonerating carriers through liability clauses contained in the bill of lading. Therefore, and in order to ensure the applicability of the provisions in force in U.S. regulations (including contractual provisions covered by foreign domestic law), American shippers generalised the practice of inserting a clause with the following wording:[17]

> It is also mutually agreed that this bill of lading is subject to all terms and provisions of and exemption from liability contained in the Act of Congress of the United States entitled 'An Act relating to Navigation of Vessels . . . (Harter Act)' approved on the 13th day of February 1893 and the Statutes amendatory thereof and supplements thereto.

These type-clauses, known as 'Harter Act clauses,' were followed by the approval of the Hague Rules. Subsequently, with the approval of the 1924 Brussels Convention, the different national systems developed similar clauses for the reception and incorporation of such conventional rules in order to ensure, to the greatest extent possible, that they could regulate contractual relations under their scope of application. This was achieved through express *renvoi* or referencing, through the autonomy of the parties, of these domestic laws incorporating conventional

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[17]E. Selvig, The Paramount Clause, Am. J. of Comp. L., vol. 10, no. 3, 205–226 (hereafter "Selvig").

rules.[18] An example, section 3 of the English 1924 COGSA (and similarly, section 13 of the 1936 U.S. COGSA) sets out that:

> Every bill of lading . . . issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

The U.S. COGSA "applies tackle-to-tackle," i.e. from the time goods are loaded until they are discharged from a ship. The Hague Rules were drafted considering "that claims arising outside the tackle-to-tackle period should be governed by domestic law or by contractual agreement between the parties."[19] The U.S. COGSA allows the parties to extend its application; "[i]f the parties do not extend the application by agreement, the Harter Act applies to the period before loading and after discharge." The Harter Act thus "governs contracts of carriage between ports of the U.S. and inland water carriage."[20] As Sparka points out, "a comprehensive code for the transportation of goods by sea does not exist" under U.S. law.[21] He points out that the "U.S. admiralty law" framework is mainly composed by "statutes on individual subjects," by "general maritime law" and, to a "limited extent, on State law." The U.S. "maritime law is relatively uniform."[22]

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[18]Thus, the configuration of the legal Paramount Clauses took place, cioè quelle clausole ormai standardizzate, da inserire in tutte le polizze di carico documentati un trasporto soggetto ad un determinato Hague Rules Act e studiate in funzione dell'Act cui si riferiscono; vid. Celle, (note 9), 11–36.

[19]M. E. Crowley, Admiralty Law Institute Symposium: The Uniqueness of Admiralty and Maritime Law: The Limited Scope of the Cargo Liability Regime Covering Carriage by Sea: The Multimodal Problem, 79 Tul. L. Rev., 1461–1503, at 1471 (2005) (hereafter "Crowley"); in L. Zhu, M. D. Güner-Özbek and H. Yan, Carrier's Liability in Multimodal Carriage Contracts in China and Its Comparison with US and EU, IFSPA, (2011) 103 (hereafter "Zhu").

[20]Id. Zhu, 103 et seq.

[21]F. Sparka, The Legal Framework for Choice of Forum Clauses in Maritime Transport Documents, in J. Basedow et al. (eds.), Jurisdiction and Arbitration Clauses in Maritime Transport Documents, 19 Hamburg Studies on Maritime Affairs, Springer, (2010) 19–38, at 21 (hereafter "Sparka").

[22] R. Force, An Essay on Federal Common Law and Admiralty, 43 St. Louis L. J., 1368, at 1376 (1999); ibidem Sparka, 19–38, at 22.

Jurisdiction clauses[23] are only "directly addressed by some statutes on the State level. Federal law pre-empts the application of these rules in admiralty cases. However, some statutes of maritime or procedural origin may affect jurisdiction clauses."[24] The problems concerning the ratification process of the Rotterdam Rules are raised by the connection between the *forum* and the *ius* in countries such as the United States. The selection of a foreign court that would apply lower compensation or protective standards leads to decisions such as in *The Morviken* case.[25] The Rotterdam Rules aim to restore a doctrine previously followed in U.S. case law[26] and in other countries that provides more certainty about where claims for cargo loss or damage must be disputed. The need for "greater predictability" may overcome the *forum non conveniens* doctrine or the "reasonableness standard" originating in *M/S Bremen v. Zapata Off-Shore Co.*, a U.S. Supreme Court case in which the Court stated that "forum-selection clauses . . . are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[27]

U.S. case law had approved the use of the *forum non conveniens*[28] and the unreasonable judgment[29] doctrines before the

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[23]Montana Code Ann., § 28–2–708 (1985); Idaho Code, S 29–110 (2003). Under New York law, jurisdiction agreements are mandatorily enforced if non-residents submit to New York jurisdiction and the transaction involves not less than $1 million, N.Y. Gen. Oblig. Law., § 5–1402 (1984). The doctrine of forum *non conveniens* is not applicable to actions to which this section applies, N.Y. CLPR Rule 327(b), ibid. Sparka, 19–38, at 22.

[24]Ibidem Sparka, 19–38, at 22.

[25]Owners of Cargo on Board the Morviken v. Owners of the Hollandia ('The Hollandia and the Morviken') [1983] 1 AC 565; [1983] 1 Lloyd's Rep 1.

[26]Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (en banc) (2d Cir. 1967); C. D. Hooper, Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the Definition of Fora Conveniens Set Forth in the Rotterdam Rules, 44 Tex Int'l L. J., 417–426, at 422 (2008) (hereafter "Hooper").

[27]407 U.S. 1, 9–10 (1972); ibidem Hooper, at 422.

[28]Wm. H. Muller & Co., Inc. v. Swedish American Line Ltd. and Transatlantic S.S. Co., Ltd., 224 F.2d 806 (2d Cir. 1955), in which the cargo was lost by a Swedish ship owner and carrier while travelling from Gothenburg (Sweden) to Philadelphia (Pennsylvania), showing the judge's leanings with regard to the *forum non conveniens*

Sky Reefer judgment that upheld a foreign arbitration agreement included in the bill of lading.[30] There, the idea was reinforced that choice of forum legislation depends on domestic law, following the U.S. Carriage of Goods by Sea Act (U.S. COGSA) of 1936 and the Hague Rules. Since U.S. COGSA Section 3(8) was silent on the validity of an arbitration agreement included in a charterparty or a bill of lading, the U.S. Supreme Court stated that the liability that may not be lessened is the "liability for loss or damage . . . arising from negligence, fault, or failure in the duties or obligations provided in this section."[31]

There is no reference in the U.S. COGSA to the transactional cost of enforcing such liability or distinguishing when choice of forum clauses would be suitable regardless of their submission to national or foreign forums. The friendliest jurisdictions for the plaintiff cargo interest would certainly not diminish liability standards. The Hague Rules that inspired the U.S. COGSA do not prevent the claimant from choosing a foreign forum selection clause.

As Hooper indicates, since then, many cases have been decided under the *Sky Reefer* test, leading to many cases that could not have been resolved in the U.S. before that judgment.[32] Cargo claimants did not choose the U.S. courts in these cases, and would

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doctrine, since the main evidence would thus be found in Sweden; ibidem Hooper, 417–426, at 422.

[29]Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir 1967). In this case, an action for cargo damage taking place between Antwerp (Belgium) and San Francisco (U.S.) was brought for $2,600 against a Norwegian ship owner, realising that liability would be reduced since it would be a violation of § 3(8) of the U.S. Carriage of Goods by Sea Act (COGSA). An unreasonably low settlement would be imposed on the plaintiff by staying the action and requiring him to sue the ship owner in Norway for such a low sum; ibid. Hooper, at 422–423.

[30]Vimar Seguros y Reaseguros SA v. M/V Sky Reefer, 1994 AMC 2513 (1st Cir. 1994), aff'd 515 U.S. 528 (1995).

[31]49 Stat. 1207, 46 U.S.C. App. §§1300–1315; in Hooper (note 26), at 422–423.

[32]In favour of Croatia in Pasztory v. Croatia Line, 918 F. Supp. 961 (E.D. Va. 1996); England in Kelso Enterprises, Ltd. v. M/V Wisida Frost, 8 F. Supp. 2d 1197, 1204 (C.D. Cal. 1998); China in Jewel Seafoods Ltd. v. M/V Peace River, 39 F. Supp. 2d 628, 632 (D.S.C. 1999); Germany in Chisso America, Inc. v. M/V Hanjin Osaka, 307 F. Supp. 2d 621 (D.N.J. 2003); London arbitration in Ventura Maritime Co., Ltd. v. ADM Export Co., 44 F. Supp. 2d 804 (E.D. La. 1999); ibid. Hooper, at 424–425.

have probably preferred "low settlements" rather than bringing actions there.[33] Hence, COGSA acts as a *loi de police* or international mandatory provision regarding the chosen forum.[34]

Force and Davies conclude "that plaintiffs settle at a considerable discount (concerning the claimed amount) after dismissal (or stay of the proceedings) from a court in the U.S."[35] A *forum non conveniens* motion would prevent inequitable results when actions are time-barred and the carrier does not disclose to the plaintiff the forum chosen in the charterparty and incorporated into the bill of lading, allowing the cargo plaintiff to file a claim in another forum if the action has not expired. This would clash with the higher predictability provided by choosing "any of the five places" where the Rotterdam Rules would allow cargo plaintiffs to start proceedings, overcoming any forum declination caused by the *forum non conveniens* doctrine.[36]

The most important statute regarding the carriage of goods by sea in the U.S. is the 1936 U.S. COGSA,[37] which contributed to bringing the Hague Rules into effect. As noted above, the Harter Act supplements the U.S. COGSA.[38] "Both acts set forth mandatory liability standards and limitations for bills of lading, including non-negotiable bills of ladings."[39] "The enactment of the U.S. COGSA" restricted the scope of application of the Harter Act to domestic trade primarily, and to a limited extent, to international trade "to the point when goods are loaded on board

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[33]Id. Hooper, at 425.

[34]H. Muir Watt, Party Autonomy in International Contracts: From the Makings of a Myth to the Requirements of Global Governance, 6 European Review of Contract Law, no. 3, 250 (2010).

[35]R. Force and M. Davies, Forum Selection Clauses in International Maritime Contracts, in M. Davies (ed.), Jurisdiction and Forum Selection in International Maritime Law, 32 (Wolters Kluwer 2005); Hooper (note 26), at 425.

[36]Id. Hooper, at 425.

[37]46 U.S.C. § 30701 note; in Sparka (note 21), at 22.

[38]46 U.S.C. §§ 30701–30707 (2006) repealed the Harter Act in its previous form, 46 U.S.C. App, §§ 190–196 (1893). However, changes were made only to clarify the law, and they were not intended to alter the substance of the previous law; HR Rep No 109–170 at 48 (2005); Sparka (note 21), at 22.

[39]Sea waybills are considered as non-negotiable bills of lading according to U.S. law; Sparka, at 22.

and to the time between discharge from the vessel and delivery" since "the enactment of the U.S. COGSA."[40]

Contracting parties usually agree on applying the U.S. COGSA beyond these periods under the contract and to inland transportation when this is included as part of a multimodal contract.[41] The U.S. COGSA normally applies to bills of lading in outbound and inbound maritime transportation while the Federal Bills of Lading Act governs "the transfer of bills of lading" (and thus the transfer of choice of forum clauses) as well as "the rights of consignees and endorsees."[42]

The validity of jurisdiction clauses is never affected by Federal rules on judicial procedure unless "the venue is changed" since these cover the issues related to conflict of laws.[43] The U.S. case law varies between applying the *lex fori*[44] or the *lex causae*[45] to the enforcement of choice of forum clauses. The latter is the preferred option by the U.S. Supreme Court.[46] "The reasonableness test" applied to determine their validity and their procedural effects follows the *lex fori*.[47]

The original wording of Article 10 of the 1924 Brussels Convention led to the proliferation of the aforementioned clauses, as the scope of such conventional rules was limited to those

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[40]R. Force, A. N. Yiannopoulos and M. Davies, 1 Admiralty and Maritime Law, 20 (Beard Books, 2008); W. Tetley, Marine Cargo Claims, 62–3, (Thomson Carswell, 2008), (hereafter "Tetley"); Sparka, at 22.

[41]See Norfolk Southern R.R. Co. v. Kirby, 543 U.S. 14, 28–29 (2004); in Sparka (note 21), at 22.

[42]Federal Bills of Lading Act ('Pomerene Act'), 49 U.S.C., §§ 80101–80116 (1994), replaced by the Bills of Lading Act of 5 July 1994, Pub. L. No. 103–272, § 1(e), 108 Stat 1346; Sparka, at 22.

[43]T. J. Schoenbaum, Admiralty and Maritime Law, vol. 1, 265–8 (Thomson/West, 2004) (hereafter "Schoenbaum"); Sparka, at 22–23.

[44]Intermetals Corp. v. Hanover Int'l Aktiengesellschaft fur Industrieversicherungen, 188 F. Supp. 2d, 454, at 457–8 (D.N.J. 2001); Sparka, at 23.

[45]Dunne v. Libbra, 330 F.3d 1062, 1064 (8th Cir. 2003) applying *lex causae* to the interpretation of a jurisdiction agreement; Sparka, at 22–23.

[46]See M. Gruson, Forum-Selection Clauses in International and Interstate Commercial Agreements, 133 Ill. L. Rev., 186 (1982); Sparka, at 23–24.

[47]For instance, 28 U.S.C., § 1404(a); Sparka, at 23–24.

contractual situations characterised by the fact that the bill of lading had been formalised or issued in a Contracting State.

The requirement for certainty to know, *a priori*, the applicable rules on the liability of the carrier led to the wide dissemination of Paramount Clauses in practice:[48] the Clause is incorporated into a bill of lading that, because of the circumstances arising out of the transport contract, is framed under the scope of the 1924 Brussels Convention or a domestic law that incorporates a similar conventional instrument. The presence of a Paramount Clause does not provide anything new in terms of determining the law applicable to the bill of lading. Thus, an express reference to the conventional text (or to a given autonomous norm that incorporates the Hague Rules) is inserted in the contractually agreed to clauses by reference. In these cases, such incorporation by reference has a declaratory value, as it merely reiterates its applicability, although the material scope is covered by the convention *per se*. The bill of lading serves "as a receipt," "as evidence of the contract and as a document of title," and "the intent of the parties must be properly and clearly expressed in the bill of lading."[49]

Second, it is common that, contracts with a different subject matter falling outside the scope of a Paramount Clause designate the 1924 Brussels Convention as the applicable conventional rule without making any reference to autonomous legislation. In these cases, the aforementioned method of incorporation by reference would have a constitutive value since it ascribes within the scope of the alleged conventional rule a case that would otherwise remain outside it.

Third, a Paramount Clause may be accompanied by a choice of law clause selecting the State to which the rules designated by the Paramount Clause belong as the *lex contractus*.

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[48]In relation to the contracting parties, the importance of achieving, in this way, the necessary legal certainty regarding the determination of the law applicable to the contractual relationship is highlighted by J.C. Pommier, Principe d'Autonomie et Loi du Contrat en Droit International Privé Conventionnel (Economica 1992).

[49]Zhu (note 19), 103 et seq.

Fourth, the Paramount Clause may designate the Brussels Convention 1924 as the applicable incorporated domestic legislation (generically known in the industry as COGSA) without specifying the law applicable to the contract elsewhere in the bill of lading.[50]

The Paramount Clause may entail an incorporation by reference not just of a convention *strictu sensu* but of the national legislation that enacts such an international instrument. The Clause may be merely declarative if, given the circumstances of the case, the convention to which the parties have been remitted is already applicable. If the Paramount Clause displays substantial effects the convention will be applicable only if the reference allows it according to the *lex fori* or, otherwise, if the incorporation by reference is effective by virtue of the substantial or material party autonomy.[51]

In the U.S., "the COGSA and Hague Rules specifically allow parties of a carriage contract to extend U.S. COGSA, the Harter Act or any other limitation of liability regime to shore-side contractors, such as stevedores, terminal operators, warehousemen and inland carriers."[52] This is achieved by choosing between a Paramount Clause, "which extends application of U.S. COGSA beyond the time goods are on the vessel," and a *Himalaya Clause*, "which extends the benefits of the carrier's defences and liability limits to shore-side third parties."[53] The *Himalaya Clause* fosters the indirect protection of a third party to the contract for the carriage of goods by sea by

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[50]As highlighted by I. Guardans Cambó, Contrato Internacional Y Derecho Imperativo Extranjero, 479 (Arazandi, 1992), in both cases it may be that the law designated by the Paramount Clause does not include the bill of lading in its spatial scope of application, raising a question of respect for the foreign law self-limitation.

[51]J. C. Fernández Rozas, Teoría y praxis en la codificación del derecho de los negocios internacionales, in Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz/Vitoria-Gasteizko nazioarteko zuzenbide eta nazioarteko herremanen ikastaroak, 81–215, at 137 (2002); Álvarez Rubio (note 16), at 183 et seq.

[52]COGSA § 1307 Agreement as to liability prior to loading or after discharge; Crowley (note 19), 1471; in Zhu (note 19), 103 et seq.

[53]Crowley (note 19), at 1471; Zhu (note 19), 103 et seq.

providing protection for both the servants and agents, including independent contractors who perform the real carriage.[54]

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[54]An example of the Clause is provided by the International Group of P&I Clubs (IG) and BIMCO for use in any bill of lading and other contracts, in BIMCO, Revised Himalaya Clause for Bills of Lading and other Contracts (17 September 2010) Special Circular No 6:

> (a) For the purposes of this contract, the term "Servant" shall include the owners, managers, and operators of vessels (other than the Carrier); underlying carriers; stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.
>
> (b) It is hereby expressly agreed that no Servant shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver, holder, or other party to this contract (hereinafter termed "Merchant") for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Servant's part while acting in the course of or in connection with the performance of this contract.
>
> (c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein (other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein) and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available and shall extend to every such Servant of the carrier, who shall be entitled to enforce the same against the Merchant.
>
> (d) –
>
> (i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant of the carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with this contract whether or not arising out of negligence on the part of such Servant. The Servant shall also be entitled to enforce the foregoing covenant against the Merchant; and
>
> (ii) The Merchant undertakes that if any such claim or allegation should nevertheless be made, he will indemnify the carrier against all consequences thereof.
>
> (e) For the purpose of sub-paragraphs (a)-(d) of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract.

The *Himalaya Clause* extends the limitations, exemptions and immunities provided in Rule IV bis(2) of the Hague–Visby Rules that excludes the servants and independent contractors of the contractual carrier from its scope of application in case of cargo claims in tort or in bailment. The *Himalaya Clause* emerged following the *Adler v. Dickson* decision[55] and extends the limitations, exemptions and immunities of Rule IV bis(2) of the Hague–Visby Rules under a *wider principle*.[56] The *wider principle* allows them, through a separate contract of agency, to benefit from the same limitation as the principal. This clause benefits the agents and servants of the non-carrier party through separate contracts, allowing them to rely on the exemption clauses of the bill of lading.[57]

A potential risk for shipowners is letting the charterer independently negotiate the bill of lading terms, since it may expose the first to any potential liability in case of poor drafting of the bill of lading clauses by the latter. The *Adler v. Dickson* decision was reversed by the Privy Council in *Midland Silicones*[58] through the application of the privity of contracts doctrine, but it was confirmed in *The Mahkutai* case.[59] In *The Mahkutai* case, Sentosa, the charterer, shipped plywood belonging to PTJ, a Jakarta (Indonesia) based company, to Shantou (China).[60] Through a charterer's bill of lading, Sentosa incorporated his own terms. After the cargo was damaged during discharge due to sea conditions, PTJ sued the shipowner for tortious negligence and for breach of contract. After PTJ arrested the vessel and the vessel

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[55]Adler v Dickson [1954] 2 Lloyd's Rep 267.

[56]G. H. Treitel, chapter 17 The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Seas, in F. M. B. Reynolds and F. D. Rose, Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds, 345, at 360 (Informa Law, 2000); G. D. Theocharidis, Mechanisms of Protection from Non-Contractual Modes of Recovery in Sea Carriage: A Comparison between Common Law and Civil Law Systems, 44 J. Mar. L. & Com., 219–265, at 239 (2013) (hereafter "Theocharidis").

[57]Theocharidis, at 239.

[58]Scruttons Ltd v Midland Silicones Ltd [1962] AC 446, 473.

[59]The Mahkutai [1996] 2 Lloyd's Rep. 1.

[60]C. H. Spurin, The Importance of Seaworthiness, Nationwide Mediation Academy for NADR UK Ltd, 1–16, at 5 (1996) (hereafter "Spurin").

was released upon payment of security, the shipowners wanted a stay of the actions based on clause 19, an exclusive jurisdiction clause for any contractual or non-contractual dispute. The clause stated the following:[61]

> The contract evidenced by the bill of lading shall be governed by the Law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian Courts according to that law to the exclusion of the jurisdiction of the Courts of any other Country.

However, the Privy Council ruled that clause 4(ii) of the bill of lading, containing a *Himalaya Clause*, did not succeed in incorporating the jurisdiction clause, stating, "[e]very . . . servant, agent and subcontractor (of the carrier) shall have the benefit of all exceptions limitations, provisions, conditions and liberties herein benefiting the carrier as if such provision were expressly made for their benefit."[62]

The common law "imposes a seaworthiness condition on carriers dealing with cargo owners." When a shipowner tries to exclude his own "liability for unseaworthiness in relation to the charterer," it is still liable to the cargo interests. The way to protect the shipowner is by negotiating a Demise Clause with the charterer. Then, the latter can negotiate in its own name a bill of lading obliging the cargo owners to enter into any "suit against the charterer and not the shipowner."[63] An effective clause must be inserted into the charterparty to shift that liability by incorporating the terms into the bill of lading. If the charterer does not fulfil the obligation to issue the agreed on bill of lading under

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[61]Spurin, at 5.

[62]Id., at 5.

[63]Demise Clauses occur more often in time charterparties. See e.g. The Caspiana [1957] AC 149; The Berkshire [1974] 1 Lloyd's Rep. 185; The Boston City [1895] 2 QB 282; Aries Tanker Corp v Total Transport Ltd [1977] 1 WLR 185, [1977] 1 All ER 398; Elder Dempster v Patterson, Zochonis & Co [1924] AC 522; The Okehampton [1913] P 173; Spurin, at 5.

the charterparty terms, the shipowner will be able to recover any monies paid out in damages from the charterer to cargo owners.[64]

It is a common practice to insert into the bill of lading a Circular Indemnity Clause along with a *Himalaya Clause*. The Circular Indemnity Clause constitutes a complicated and unattractive solution originating in a leading English judgment.[65] A typical example of the Clause reads as follows:[66]

> 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 any vessel owned by any of them any liability whatsoever in connection with the goods, and if any such claim or allegation should nevertheless be made to indemnify the carrier against all consequences thereof.

The shipper cannot directly sue the carrier's sub-contractors or the carrier for an amount higher than he or she would be entitled to recover under a breach of contract penalty in the case of initiating a legal action and having to face the carrier's actions. The applicant then has to "convince the court that the enforcement of the clause would result in a financial loss."[67] This would be the only relief for the applicant,[68] allowing the staying of the proceedings if the forum allows it,[69] according to Theocharidis.[70]

The shipowner's party autonomy is limited by the non-contractual action. As in *The Mahkutai* judgment, it is very unlikely that the rights and contractual defences available to a shipowner will also incorporate a New York City arbitration clause or any jurisdiction clause when the Paramount, *Himalaya*

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[64]A Demise Clause was not correctly inserted into the bill of lading in The Boston City [1895] 2 QB 282; Spurin, at 5.

[65]Scruttons Ltd v Midland Silicones Ltd [1962] AC 446, 473.

[66]R. Newell, Privity Fundamentalism and the Circular Indemnity Clause, Lloyd's Mar. & Comm. L. Q., 97 et seq. (1992).

[67]Theocharidis (note 56), at 264.

[68]As stated in the judgment Nippon Yusen Kaisha v Int'l Import & Export Co Ltd (The Elbe Maru) [1978] 1 Lloyd's Rep. 206; Theocharidis, at 264.

[69]British Airways Board v Laker Airways Ltd [1985] AC 58, in which the injured party was granted an anti-suit injunction; Theocharidis, at 264.

[70]Theocharidis, at 264.

or Circular Indemnity Clauses are explicitly inserted into the bill of lading by incorporation or by reference to the charterparty. The shipowner does, however, reserve its rights to sue the charterer and recover the monies paid out as compensation for the damage to the grain transported as part of a sale of bulk cargo from a seller to a buyer. This may be the case when the obligations and responsibilities, such as stevedoring, loading and discharging the goods, for instance, correspond to the charterer according to the terms and conditions contained in the charterparty.[71]

Among the more common contractual forms, it should be noted that the second paragraph of the Paramount Clause General of the BIMCO CONLINEBILL liner bill of lading form[72] declares the Hague Rules applicable even in the absence of relevant national law to incorporate at ports of origin and destination.[73] The Clause states the following:

> 2. General 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 of 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.
>
> Trades where Hague-Visby Rules apply.
>
> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23rd February, 1968—The Hague-Visby Rules—apply compulsorily, the

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[71]Theocharidis, at 264.

[72]CONLINEBILL liner terms approved by BIMCO amended on 1 January 1950, 1 August 1952, 1 January 1973, 1 July 1974, 1 August 1976 and 1 January 1978.

[73]According to D. C. Jackson, The Hague–Visby Rules and Forum Arbitration and Choice of Law Clauses, Lloyd's Mar. & Comm. L. Q., 159 (1980), the effect of these clauses depends upon the law of the place where suit is brought.

> provisions of the respective legislation shall be considered incorporated in this bill of lading. The carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another carrier, and to deck cargo and live animals.

The first paragraph of the aforementioned Paramount Clause leading to the incorporation of the Hague Rules into the bill of lading was found in *The Superior Pescadores* judgment[74] of the English High Court. The various cargo claimants sued the shipowner 'cherry-picking' between the different limitation regimes offered by the Hague Rules and the Hague-Visby Rules. "Mr. Justice Males, influenced by obiter statements of the Court of Appeal in *The Happy Ranger*,[75] concluded that the wording of the Paramount Clause was not apt to incorporate the Hague-Visby Rules as a matter of construction. Instead it incorporated only the Hague Rules."[76] Nevertheless, the Hague-Visby Rules were compulsory applicable according to Article X of the COGSA 1971.

However, the wording of the BIMCO CONLINEBILL 2016 line bill of lading Paramount General Clause provides that the Hague-Visby Rules will apply unless the Hague Rules are enacted in the country of shipment or in its absence in the country of destination. The wording of the Clause provides the following:

> Liability for Carriage Between the Port of Loading and Port of Discharge.

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[74]Yemgas Fzco & Ors v Superior Pescadores S.A. Panama, (The Superior Pescadores) [2014] EWHC 971 (Comm).

[75]Parsons Corporation v. CV Scheepvaartonderneming 'Happy Ranger' (The Happy Ranger) [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357.

[76]A. Allan on behalf of A. Sandiforth and N. Datta, Commercial Court considers the effect of a Paramount Clause where the Hague-Visby Rules were compulsorily applicable under English law, Ship Law Log, Reed Smith, (22 April 2014) available at: <www.shiplawlog.com/2014/04/22/commercial-court-considers-the-effect-of-a-paramount-clause-where-the-hague-visby-rules-were-compulsorily-applicable-under-english-law> (last accessed on 18 September 2017).

(a) The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 (the Hague Rules) as amended by the Protocol signed at Brussels on 23 February 1968 (the Hague-Visby Rules) and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments.

When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract.

The Protocol signed at Brussels on 21 December 1979 (the SDR Protocol 1979) shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(b) If the Carrier is held liable in respect of delay, consequential loss or damage other than loss of or damage to the cargo, the liability of the. Carrier shall be limited to the freight for the carriage covered by this Bill of Lading, or to the limitation amount as determined in sub-clause 3(a), whichever is the lesser.

(c) The aggregate liability of the Carrier and/or any of his servants, agents or independent contractors under this Contract shall, in no circumstances, exceed the limits of liability for the total loss of the cargo under sub-clause 3(a) or, if applicable, the Additional Clause.

Identical wording is used in the second paragraph of the Paramount General Clause of the CONLINEBOOKING 2016 liner booking note, which is widely distributed in industry practice. In the U.S., the wording given in 1993 to the so-called

USA Paramount Clause contained in clause 29 of the Mitsui OSK Lines Combined Transport Bill incorporates a direct reference to U.S. domestic law, against the provisions of conventional uniform law, stating as follows:

> In the carriage covered by this bill of lading includes carriage to or from a port or place in the United States of America, this bill of lading shall be subject to the United States Carriage of Goods by Sea Act 1936 (US COGSA), the terms of which are incorporated herein and shall govern throughout the entire Carriage set forth in this bill of lading. Neither Clause 5(1)(a),(b), the Hamburg Rules nor the Visby Amendments shall apply to the carriage to or from the United States. The carrier shall be entitled to the benefits of the defences and limitations in US COGSA, whether the loss or damage to the goods occurs at sea or not.

The entry into force of the 1978 Hamburg Convention led to the simultaneous effect of two different maritime carriers' liability regimes and, in practice, the development of different negotiable practices in view of the applicable law.

A particularly revealing analysis of Paramount Clauses was proposed by the London International Group of P&I Clubs, suggesting in a circular of September 1992 and before the entry into force of the Hamburg Convention, two different types of Paramount Clauses: the first formula used for those members who wish to prioritise the implementation of the Hague Rules against the Hamburg Rules,[77] providing as follows:[78]

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[77]The Circular 5:172 stresses: "The Hamburg Rules are of wide scope and, where they are applicable, they have altered a number of the fundamental assumptions which underlie the drafting of existing shipping documents. This circular does not attempt to address these wider considerations, because for the majority of members the Hamburg Rules will be of limited application. However, members whose trade will involve them extensively with the Hamburg Rules may wish to consider a more fundamental reappraisal of their documents."

[78]The aforementioned Circular added that "for the majority of Members, it is probably sufficient at present to consider using the Clause Paramount set out in Form A and the attached form of over stamping for cargo to be carried on deck with the agreement of the shipper under the Hamburg Rules."

(1) This bill of lading shall have effect subject to any national law making the International Convention for the Unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924 (The Hague Rules) or the Hague Rules as amended by the Protocol signed at Brussels on 23rd February 1968 (The Hague/Visby Rules) compulsorily applicable to this bill of lading. If any term of this bill of lading be repugnant to that legislation to any extent, such term shall be void to that extent but no further[.]

(2) Save where the Hague or Hague/Visby Rules apply by reason of (1) above, this bill of lading shall take zeffect subject to any national law in force at the port of shipment or place of issue of the bill of lading making the United Nations Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) compulsorily applicable to this bill of lading in which case this bill of lading shall have effect subject to the Hamburg Rules which shall nullify any stipulation derogating therefrom to the detriment of the shipper or consignee.

(3) Where the Hague, Hague/Visby or Hamburg Rules are not compulsorily applicable to this bill of lading, the carrier shall be entitled to the benefits of all privileges, rights and immunities combined in Article I to VIII of the Hague Rules, save the limitation sum for the purposes of Article IV rule 5 of the Hague Rules shall be 100 sterling.

The second formula proposed is intended, in principle, to be applied to transport between Contracting States of the Hamburg Rules, noting in view of Article 23 of the Convention:

(1) This bill of lading shall have effect subject to any legislation making the United Nations Convention on the Carriage of Goods by Sea 1978 (the Hamburg Rules) compulsorily applicable to this bill of lading and in such circumstances the said Rules nullify any stipulation derogating therefrom to the detriment of the shipper or consignee. If any term of this bill of lading be repugnant to the legislation to any extent, such term shall be void to that extent but no further.

(2) Save where the Hamburg Rules apply by reason of (1) above, this bill of lading shall have effect subject to any national law making the International Convention for the Unification of certain

> rules of law relating to bills of lading signed at Brussels on 25th August 1924 (the Hague Rules) or the Hague Rules as amended by the Protocol signed at Brussels on the 23rd February 1968 (the Hague/Visby Rules) compulsorily applicable to this bill of lading. If any term of this bill of lading be repugnant to that legislation to any extent, such term shall be void to that extent but no further (. . .)
>
> (3) Where the Hague, Hague/Visby or Hamburg Rules are not compulsorily applicable to this bill of lading, the carrier shall be entitled to the benefits of all privileges, rights and immunities contained in Articles I to VIII of the Hague Rules, save that the limitation sum for the purposes of Article IV Rule 5 of the Hague Rules shall be 100 sterling.

Finally, quite often, Paramount Clauses are incorporated into a charterparty and are directly applicable to them or indicate that all the bills of lading issued shall contain such a clause, aiming to make the Hague Rules applicable to the charterparty and the bill of lading. In this way, the shipowner and the carrier shall be subject to the liability regime provided for in such uniform rules, thus avoiding having several liability regimes for the same shipped goods. This raises a number of specific problems arising from the wording of the clause, as well as the complicated integration of a legal regime designed for the charterparty into a bill of lading. These technical and legal difficulties deserve attention.[79]

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[79]The UNCTAD Commission on Maritime Transport established the Working Group on international shipping legislation and recommended that the group include in its program the issue of charterparties. In this context, the UNCTAD secretariat prepared a report or comparative analysis of these, dated 27 June 1990 (document TD/B/C4/ISL/55), which, along with studying effectiveness of Paramount Clauses in the maritime transport sector, concluded that, to effectively introduce to charterparties a liability system similar to that in the Hague Rules, a set of mandatory standards tailored and applied specifically to them would be necessary; J. L. Gabaldón García, El Marco Jurídico de las Pólizas de Fletamento, Cuadernos Jurídicos, 32 et seq., (April 1995).

Among the more commonly used charterparties are BARECON A and BARECON B (standard bareboat charter), which state in clause 20:

> The charterers are to procure that all bills of lading issued for carriage of goods under this Charter shall contain a Paramount Clause incorporating any legislation relating to carrier's liability for cargo compulsorily applicable in the trade; if no such legislation exists, the Bills of lading shall incorporate the British Carriage of Goods by Sea Act (. . .).[80]

Regarding voyage charterparties, the most frequently used type-forms incorporate a Paramount Clause having different content. Thus, the GRAINVOY charterparty inserts a typical USA Paramount Clause by establishing the following in its paragraph 36:

> This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any extent, such terms shall be void to that extent, but no further.[81]

III
CODIFICATION OF THE PARAMOUNT CLAUSE IN INTERNATIONAL LAW

The analysis of the content of the conventional rules in the international maritime freight sector and the need to clarify relations among the various legal frameworks motivates the

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[80]The charterparty incorporates as clause 25 a reference to English law as the *lex contractus,* stating "[T]his Charter shall be governed by the law of the country agreed in Box 33 (if Box 33 not filled in, English Law shall apply)."

[81]Sometimes the clause concerning the loading port is replaced by another clause with the same wording except for declaring Canadian regulations applicable through the 1936 Water Carriage of Goods Act.

following material analysis of the legal nature and functions of the Paramount Clause from a conflict of laws perspective.

As already indicated, it is not possible to formulate a reflection on the scope of such clauses without taking into account the conventional norm or, as the case may be, the domestic legislation that incorporates it, since the effects of that inclusion vary depending on the existence of the rule that enables such a possibility. At present, and in relation to the maritime transport of goods, it is worth noting the simultaneous existence of different liability regimes for maritime carriers contained in the Brussels Convention of 1924 on Knowledge (as amended by the Brussels Protocols of 23 of February 1968 and of 21 December 1979) and the 1978 Hamburg Convention on the carriage of goods by sea, together with the abovementioned internal incorporating legislation of such conventions.

The Brussels Convention of 1924, whose origin and process of elaboration has already been discussed, regulates the liability regime for maritime carriers, including the causes of liability and exemption, taking into account its narrowed material scope of application, since it is not shaped by the nature of the traffic, but by the document incorporating the rights of the parties. That is, it only applicable to a bill of lading or to a similar document of title.

Under Article 10 of the Hague Rules, "the provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States." This narrowed scope motivated the development of the 1968 Protocol, which amended the wording of the provision to expressly incorporate the possibility of determining the application of such conventional rules under a Paramount Clause. The 1979 Protocol introduced another modification in the conventional text on the form of expression and calculation of limits of liability, referring to the International Monetary Fund's special drawing rights (SDR).

Not all States parties to the 1924 Brussels Convention have ratified the abovementioned Protocols.[82] This creates problems

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[82]R. Clerici, Sull'Entrata in Vigore delle Nuove Regole Uniformi Relative alla Polizza di Carico, Riv. Dir. Internaz. Priv. e Proc., 21 et seq., (1986).

arising from a concurrence of conventions on the same subject, aggravated by a mistaken interpretation made regarding the 1968 Protocol, which has led to the proliferation of national laws that are not limited to introducing or incorporating the Convention into the respective domestic law, but incorporate changes to the content and often to the scope of its application. A large number of such domestic rules declare their imperative or mandatory application within a specific area and establish the invalidity of contractual clauses violating their provisions or impose an obligation to include a clause declaring the application of such mandatory rule in the bill of lading. Among them are Article 91 of the Belgian Maritime Law and the following Article 16 of the French Law of 18 June 1966:

> Le prèsent titre est applicable aux transports effectués au dèpart ou à destination d'un port français, qui ne sont pas soumis à une Convention Internationale à laquelle la France est partie, et en tous cas aux opèrations de transport qui sont hors du champ d'application d'une telle Convention.

With the concurrence of conventional rules and those of autonomous origin on the same subject, conflicts of law in this sector of international maritime traffic have been frequent with the addition of the Hamburg Rules, and they will be with the Rotterdam Rules if they finally enter into force. It is therefore necessary to determine the role to be accorded to private autonomy to operate as a criterion or connection point on conflicts of law, as well as to evaluate this in view of the particular evolution of the international maritime transport discipline, which is relevant to the purposes of having uniform applicable law and its role in determining the scope of that law.

A. The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) 1924

In order to determine the scope of application of the Hague Rules, the initial wording of the original version of Article 10 delimits the scope in response to the view that the bill of lading has been formalised in the territory of a Contracting State. Article

10 provides that: "The provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States."

Thus, the element or connecting criterion provided for in the Convention to determine its scope was not the nationality of the ship or stakeholders in the transport, but the place of the creation or issuance of the bill of lading. Since the inception of these Rules, such vagueness has raised major problems of interpretation; indeed, first and foremost, a literal understanding of it would require the application of the Convention not only to international transport but also to internal maritime transport.[83] Clarity in its scope of application was provided through the second reservation contained in the 1968 Protocol, authorising Contracting States not to apply the Convention to internal coastal trade.

The narrow scope defined in Article 10 was the result of a territorial conception determining that bills of lading were subject to the law of the place of issuance. Difficulties in interpreting the provision ultimately led to a review, culminating in the 1968 Protocol. In particular, the difficulties arising from Article 10 in its original version arose when trying to define the international character of the convention.[84]

One doctrinal sector referred to the need to appreciate the existence of such *objective internationality* in each transport in question to determine whether it fell within the scope of the Convention.[85] On the other hand, another doctrinal sector

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[83]R. Jambu-Merlin, Les Conflits de Lois en Matière de Transports Maritimes, Comité français de droit international privé, Travaux 21–23, 89–103, at 98.

E Du Pontavice, Droit Maritime, Éditions Dalloz, 309, (1991) concerning the underlying precept: "La Convention n'opère que dans les rapports internationaux. Mais il ne suffit pas d'introduire un élément international quelconque dans un contrat de transport pour qu'il soit régi par la Convention de Bruxelles. Ainsi, un transport entre deux pays non signataires de la Convention, exécuté en vertu d'un connaissement émis dans un pays non signataire, n'y est pas soumis."

[85]S. M. Carbone, Contratto di Trasporto Marittimo di Cose, 55 (Giuffrè Editore 1988) (hereafter "Carbone"); P. Ivaldi, Diritto Uniforme dei trasporti e Diritto Internazionale Privato, 92 (Giuffrè Editore, 1990) (hereafter "Ivaldi"), confirms: "l'opinione secondo la quale sarebbe riduttivo assegnare alla normativa convenzionale l'intento esclusivo di fornire una regolamentazione giuridica di rapporti la cui

defended the application of the Convention even in purely internal situations.[86] The problem posed by identifying the requirements of internationality that should characterise a transport in order for it to fall within the scope of the Hague Rules, led to the development of different internal jurisprudential orientations.[87] The orientations were generally in favour of objective internationality as a requirement to apply the convention. This approach was fully confirmed after the amendment made by the 1968 Protocol.

In particular, in this first chronological stage of application of the Hague Rules, the terse wording of Article 10 posed specific problems for determining the conflict of contract laws function of a Paramount Clause in a bill of lading. The Hague Rules are characterised by remaining silent on the relevance and operation of private autonomy to determine the scope of the uniform rules.

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disciplina, a causa della diversa nazionalità delle parti, necessariamente presuppone la soluzione di un problema di diritto internazionale privato."

[86]M. Remond-Gouilloud, Droit Maritime, 296 et seq., (Pédone, 1988) (hereafter "Remond-Gouilloud") stresses the following: "La Convention ne mentionne pas que les transports visés doivent avoir un caractère international: Elle se voulait applicable en toutes circonstances, quelles que fusent les nationalités des parties, du navire et des ports de départ et de destination. Ainsi, un transport du Havre à Bordeaux devoit y être soumis. Mais les Etats, soucieux de préserver un rôle à leur loi nationale ont bientôt cherché à restreindre la portée de la Convention aux seules relations internationales. L'interprétation du texte n'y suffisant pas, il fallut le modifier."

[87]P. Ivaldi, La Volonta delle Parti nel Contratto di Trasporto Marittimo: Note sulla Paramount Clause, vol. IV, Riv. dir. intern. priv. proc., 1985, 800, states that, regarding such uniform discipline:

> In quanto dotada di una disposizione che autonomamente ne determina la sfera di operativitá, avrebbe dovuto essere applicata indipendentemente e prima del funzionamento della norma di diritto internazionale privato relativa ai contratti di utilizzazione di navi: il carattere di specialitá ad essa inerente avrebbe infatti comportato l'inapplicabilitá di ogni altra norma dell' ordinamento statale e, conseguentemente, una deroga ad ogni disposizione di diritto internazionale privato.

B. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Rules) 1968

Article 5 of the 1968 Protocol on the 1924 Brussels Convention amended Article 10 concerning the scope of application of the convention in order to resolve the problems of interpretation, and it incorporated into the convention some common contractual practices of the sector, such as the insertion of Paramount Clauses in documents issued in connection with the carriage of goods. Thus, it was established that Article 10 was deleted and replaced by the following provision:

> 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:
>
> (a) the bill of lading is issued in a Contracting State, or
>
> (b) the carriage is from a port in a Contracting State, or
>
> (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.

The finally adopted text directly and immediately assigned relevance to private autonomy in determining the scope of the convention. Indeed, a *renvoi* or reference operated under such autonomy will be sufficient to guarantee, in principle, the implementation and operation of the uniform rules in the case of an objectively international transport. The provision also includes a specific definition of 'internationality' by referring to 'carriage of goods between ports in two different States.'

The will of the parties in the new text is a limiting criterion on the scope of the uniform rules. The remaining criteria set out in the precept, along with the autonomy of the parties, have an alternative character, each by itself being sufficient to determine the application of the conventional rule, provided that the requirement of internationality is met.

The role of private autonomy in relation to such a uniform discipline has a different scope following the revisions of the 1968 Protocol and adds two key factors to our analysis: the alternative character contained in the provision and the consequent autonomy, or self-relevance, recognised by each of them in determining the applicability or validity of the Convention.

Regarding the possibility of conflict between the two standards (Convention and Protocol), two assumptions can be distinguished in their practical application. First are those situations in which the implementation of the Protocol is optional, as it would be with regard to States not party to the 1924 Convention or the 1968 Protocol, or only to the Convention. The first hypothesis is foreseen in Article 5, in fine, as a Contracting State is authorised to apply the provisions of the Convention to a transport under a bill of lading for which the application is not mandatory. The courts of that Contracting State could apply its provisions rather than the Convention.

The second hypothesis addresses the relations between a State party only to the 1924 Convention and a State party to the Convention and Protocol of 1968, when the bill of lading was issued in the State party only to the Brussels Convention of 1924. In this case, the State party to both norms may apply the Protocol: it is a right, not an obligation, as set out in Article 6(2) of the Protocol of 1968, pursuant to which '[a] Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.'

Second, there are situations where the application of such a conventional standard becomes mandatory. The 1968 Protocol should be applied imperatively if the bill of lading has been issued in a State party to it, regardless of the port of shipment or destination. Similarly, such an application is required if transport is carried out from the port of a State party to the Protocol, although the bill of lading was issued in a Contracting State.

C. The United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) 1978

The 1978 Hamburg Convention came into force on 1 November 1992. The drafting of the convention was improved and it introduced a better protection to the shipper than the carrier in contrast to the Hague Rules.[88] Regarding this study subject, it is interesting to emphasise that the scope of the Hamburg Rules is determined depending on the freight contract itself and not the document in which it is formalised. Pursuant to Article 2 of the Rules, its scope of application is defined as follows:

> 1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:
>
> (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
>
> (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
>
> (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
>
> (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
>
> (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

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[88] P. Bonassies, La Responsabilité du Transporteur Maritime dans les Règles de la Haye et dans les Règles de Hambourg, Il Diritto Marittimo, 949–978 (1989); S. Turci, Riflessioni in Tema di Responsabilitá Vettoriale Secondo le Convenzioni di Bruxelles–Visby e di Amburgo, 1 Il Diritto Marittimo, 33–46 (1990); J. O. Honnold, Porteadores transoceánicos y carga; claridad y equidad: ¿La Haya o Hamburgo?, Derecho de los negocios, no. 53, 1–15.

> 2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.
>
> 3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.
>
> 4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this Article apply.

The Hamburg Rules confirm the recognised role of private autonomy in the 1968 Protocol concerning the delimitation of the scope of application of the conventional norm, and Article 2 expressly states that the will of the parties is alone relevant for the purposes of determining whether the contract of carriage is subject to conventional rules—and not only when there is a mediating or indirect *renvoi* or reference to the uniform rules (through the designation of a particular State law), but also when the will of the parties is expressed through direct referral to the Convention.

The Convention's provisions are mandatory, so that Article 23 (contractual stipulations) of Hamburg Rules sanctions by nullity any contractual provision contrary to its provisions. Article 23 (1) of Hamburg Rule's terms are formulated in a more precise manner than those of Article 3(8) of the Brussels Convention of 1924, stating as follows:

> Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

The foundation of such imperative provisions, which are set as a minimum standard by allowing the carrier to take greater responsibility than is envisaged in the Convention, lies in the objective of ensuring a uniform international liability regime for sea carriers and avoiding the imposition of any reduction or exemption from liability under these contractual clauses on the weakest part of the contractual relationship. Nevertheless, the invalidity of such a contractual provision "shall not affect the validity of the" remaining "provisions of the contract."[89] Thus, the Convention clarifies one of the many contentious issues that the wording of the Hague Rules had raised. The function and meaning assigned to Article 23 of the Hamburg Rules is most clearly reflected in the wording of the third paragraph:

> Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.[90]

This provision has two objectives: first, to inform the parties and, in particular, the shipper that a transport contract is governed by the Hamburg Rules; and second, to facilitate the application of the rules to non-Contracting States against corrective measures of the forum, such as public order. Do the Hamburg Rules contribute to the goal of achieving a uniform international regulation of contracts for the carriage of goods? Berlingieri[91] raises two interesting reflections on the subject: first, if it were not ratified by a significant number of States that make up the great maritime powers of the world market, this would mean that having uniform law was not deemed to be a positive, and consequently, its entry into force would not favour the effective uniformity of law but

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[89]A. Mitchelhill, Bills of Lading: Law and Practice, 69 (Springer, 2013).

[90]W. E. Astle, The Hamburg Rules: an Appreciation of the Cause and Effect of the Amendments to the Hague Rules and the Hague-Visby Rules, 143 et seq. Fairplay (1981).

[91]F. Berlingieri, Uniformité du Droit Maritime. Quelques problèmes, *Il Diritto Marittimo*, 796–854 (1992, no. 3).

would pose an obstacle to this objective. Second, if there was already a certain degree of uniformity reflected in a broad international consensus, caution would be required before promoting a new international convention.

After the entry into force of the Hamburg Rules, the problem of coexistence between different legal systems within the sector intensified. Indeed, in its attempt to establish a more rational and equitable balance between shippers and carriers and adapt conventional regulation to the new international economic order, the Convention has created two large conventional regulatory frameworks having an impact on the freight market, insurance, etc..[92] After its entry into force, the two systems coexist and, although the transport subject to the Hamburg Rules has great economic significance,[93] the competition between the Hamburg Rules and Hague Rules regimes raises various problems, such as the liability of the carrier's insurance.

The London International Group of P&I Clubs examined the consequences of the entry into force of the Convention[94] in a Circular of 1992 and clarified the scope of Paramount Clauses with regard to the validity of the insurance coverage, saying that if the application of the 1978 Hamburg Rules is objectively mandatory, coverage would be valid, whereas if the implementation of the Convention is voluntary and comes from a

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[92]J. Lopuski, Les Principales Lignes d'Évolution du Droit Maritime Privé: l'Influence Exercée par la Pression des Pays en Développement, Droit Maritime Français, 217 et seq. (1987); R. G. Bauer, Conflicting Liability Regimes: Hague–Visby v. Hamburg Rules. A Case by Case Analysis, 24 J. Mar. L. & Comm., 53–74 (1993); C. W. H. Goldie, Effect of the Hamburg Rules on Shipowers' Liability Insurance, 24 Lloyds Mar. & Comm. L. Q., 111 et seq. (1993, Part I); J. Bonnaud, Les Reformes Apportées par les Règles de Hambourg aux Exonerations de Responsabilité et Limitations de Reparation du Transporteur Maritime, Il Diritto Marittimo, 301–20 (1993); C. Scapel, Les Reformes Apportés par les Règles de Hambourg a la Responsabilité du Transporteur Maritime, Il Diritto Marittimo, 321–39 (1993, no. 2).

[93]F. Berlingieri, Coexistence entre la Convention de Bruxelles et la Convention de Hambourg, Il Diritto Marittimo, 351–7 (1993, no. 2).

[94]J. P. Honour, The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978, in S. Mankabady (ed.) et al, The Hamburg Rules on the Carriage of Goods by Sea, 239 et seq. (Sijthoff and Leyden, 1978) (hereafter "Mankabady").

Paramount Clause contained in the bill of lading, this contractual relationship falls outside the scope of coverage.

Similarly, the International Maritime and Baltic Sea Conference (BIMCO), a non-governmental organization for shipping guidance, reacted to the international entry into force of the 1978 Hamburg Convention by issuing two Circulars. The first (Circular No 2 of 24 February 1993) established two optional clauses for bill of lading, Form A and Form B, issued as a voyage charter. The close linking of voyage chartering with an international maritime transport contract makes it advisable to lay down certain provisions on liability for damage to goods for transport connected with countries that have ratified the 1978 Hamburg Convention. However, not only that modality is affected; the time charter is exposed to the scope of application of the Convention. Therefore, it is evident that the shipper can become responsible to the cargo interest, a reason for the traditional inclusion of a Paramount Clause in the main standard forms. In the absence of mandatory rules concerning the charter contract, there is nothing to prevent the liability of the charterer from being subject to the new uniform regulation, either by the voluntary incorporation of the Hamburg Rules into the bill of lading issued under the charter or because it is mandatorily applicable by virtue of the specific contractual relationship of transport in question.

In this context, the second Circular No 1 of 26 January 1994[95] was framed, and it provides for a clause on the 1978 Hamburg Rules for time charterparties. The clause imposes the obligation on charterers not to voluntarily submit the bill of lading or issued

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[95]Its content can be seen in Notiziario, Il Diritto Marittimo, 614–621, at 618 (1994, no. 2), suggesting incorporation of the following clause in time charterparties: "Neither the charterers nor their agents shall permit the issue of any bill of lading or waybill or other document evidencing a contract of carriage (whether or not signed on behalf of the owners or on the charterers' behalf or on behalf of any sub-charterers) incorporating, where not compulsorily applicable, the Hamburg Rules or any other legislation giving effect to the Hamburg Rules or any other legislation imposing liabilities in excess of Hague or Hague/Visby Rules. The charterers shall indemnify the owners against any liability, loss or damage which may result from any breach of the foregoing provisions of this clause."

transport document to the abovementioned Convention or to any legislation incorporating it, and expressly establishes an indemnifying sanction in case of non-compliance with that obligation. In any case, the Circular has in mind the possible incompatibility of the clause in question with the normally employed charterparty, for which reason it refers to the shipping company's insurer P&I Club for requests for additional information.

In relation to the scope conferred to Paramount Clauses, the Hamburg Rules radically innovate in comparison with The Hague Rules. Indeed, Article 2(1)(e) of the Hamburg Rules enshrines a recognition of the direct and immediate relevance of the *renvoi* operated by the private autonomy of the parties, as well as the suitability of such *renvoi* to ensure, *per se*, the applicability of the Rules in the presence of an objectively international transport, regardless of any other connection.[96] Thus, the reform initiated in the 1968 Visby Protocol is confirmed regarding the extension of the scope of these clauses.[97]

The connection between *forum* and *ius* is manifested due to the current disparity among regulations contained in the various regulatory frameworks,[98] pending the ratification of the Rotterdam Rules. If a dispute arises before the court of a State party to the Hamburg Convention, the judge will decide whether to apply the

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[96]S. M. Carbone considers that this is a confirmation of the power of private autonomy: "di delocalizzare i rapporti contrattuali relativi al trasporto marittimo internazionale dalla disciplina degli specifici ordinamenti statali, con i quali pur presenta effettivi elementi oggettivi di collegamento, a favore dell'operativitè di standars normativi internazionalmente accettati nell' ambito della Convenzione di Amburgo." He estimates that it also emphasises the need to assess such factors of private autonomy for the purposes of determining the scope of uniform rules of law from a different perspective than the traditional conflict of laws one; Carbone (note 85), at 71, Ivaldi (note 85), at 92.

[97]Mankabady (note 94), at 44, states: "In the case of contract subject to the provisions of paragraphs a, b, c, or d, The Rules will apply as a matter of statute law, while under para. (e) The Rules apply as a matter of contract."

[98]P. Bonassies, Le Domaine d'Application des Règles de Hambourg" Il Diritto Marittimo, at 272 (1993, no. 2), adds the following: "Il en est de même selon que le litige sera soumis au Tribunal d'un Etat contractant, qui aura signé et ratifié les Règles, ou au Tribunal d'un Etat non contractant."

Convention in accordance with its provisions. In view of the unilateral approach adopted in the 1924 Brussels Convention (i.e. its application to a bill of lading issued in a Contracting State—a criterion subsequently extended in the 1968 Protocol and also unilaterally to all transport originating in a port of a Contracting State), the 1978 Hamburg Convention adopts a bilateral approach and includes the port of discharge as a condition allowing its application,[99] as already had been done for the carriage of goods by road through the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention), made in Geneva on 19 May 1956, which reproduces the solution contained in the U.S. 1893 Harter Act.

The scope of application of the rules is also greatly extended: all contracts for the international maritime transport of goods are included, regardless of the issuance or not of a bill of lading. The Convention provides for a Paramount Clause, together with a series of alternative connection criteria, of an objective nature (including the port of discharge), which guarantees an undeniable extension in scope. Together with having the same scope of operability, it reaffirms the role of private autonomy in determining the application of uniform rules. The advantage of such a legislative forecast is that it achieves the necessary certainty and predictability of the law regulating contracts of transport.

To the Convention's bilateral criterion other complementary criteria are added: following the rule incorporated in the 1968 Protocol, the 1978 Hamburg Convention will apply to transport that contains a Paramount Clause in the signed document. However, the following question remains to be resolved: is a carrier incorporating a Paramount Clause into a bill of lading in relation to a transport that, in the absence of such a clause would not be subject to the 1978 Hamburg Convention, free to annul some of its provisions, for example, to state that its liability is

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[99]For instance, for a court in Morocco (a State party to the Convention), it would be applicable to a transport from Marseilles to Casablanca and also from Casablanca to Marseilles.

limited to the amount provided for in the 1924 Brussels Convention?

IV
THE 'CONFLICT OF CONTRACT LAWS' FUNCTION AND EFFECTS OF PARAMOUNT CLAUSE

The core of this article is the study of the *characterisation* and *effects* of the formal and material aspects of Paramount Clauses, as these clauses are being widely used by industry operators.[100] The relative nature of international uniformity achieved through the so-called Hague Rules system resulting from differences between the Convention and domestic rules of incorporation highlights the functional approach to conflict of contract laws performed by Paramount Clauses.

To determine the law applicable to a contract of carriage, the typology of Paramount Clauses can be divided into two broad categories. The first are those clauses that implement the mandate contained in a domestic law to apply such legislation only if and when it is applicable *per se*;[101] that is, when a warning is articulated concerning any bill of lading issued in the State in question, ensuring the application of such clauses even when the eventual dispute arising from the transport is raised before the courts of other States. The second are Paramount Clauses aimed at ensuring a uniform application of such provisions, although the transport exceeds the scope of the Convention or the domestic law of incorporation.

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[100]Remond-Gouilloud (note 86), at 297, considers that "il faut souligner la téndance des agents du commerce maritime à élire dès qu'ils le peuvent, la loi appelée à les régis: L'usage habituel dans le transport maritime de la Clause Paramount est significatif de cette tendance."

[101]For instance, Article 13 of the U.S. COGSA stipulates: "This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." Similarly, Article 1 of the English COGSA points out: "The Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland."

An interesting distinction must be highlighted between the scope of the autonomy of the parties, the choice of law clauses, and the aforementioned Articles of incorporation by reference. As highlighted by Virgós Soriano,[102] the first assumes the exercise of party autonomy in conflict of contract laws (derived from the conflict of laws norm) and allows for attributing *in totum* the regulation of the substance of the contract to a particular national law; the second (which can, in turn, be distinguished in view of its constitutive or merely declaratory value) involves the exercise of material party autonomy under the national applicable law to the contract, and it functions to integrate the contract substance, making up for what is not expressly provided by the parties.

The key questions are how such incorporation is qualified and whether the applicable rules really keep their legal or regulatory nature of origin or should be classified as contractual provisions with the conclusions derived more from one or another of the options above.[103]

The starting point for assessing the scope and functional approach to conflict of contract laws of the Paramount Clause is that the courts of each Contracting State must attend to the provisions of Article 10 of the Convention; the judge of a non-State party obviously has no obligation to apply it and will look to his or her internal conflict of laws system to determine the law applicable to the contract of carriage in question.

If a typical negligence clause or a liberty clause is inserted in the bill of lading, under which a more favourable treatment for the carrier is incorporated, controversy is resolved by recognising the primacy of the Paramount Clause, considering that the intention

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[102]M. Virgós Soriano, Artículo 10. Apartado 5, in M. Albaladejo and S. Diaz Alabart (eds.), Comentarios al Código civil y compilaciones forales, 634 (2d. ed., vol. I, Edersa, 1995, no. 2).

[103]Selvig (note 17), 205–226, at 206, in particular, notes: "It is not entirely clear what is the legal character of the Hague Rules Acts when they are applicable outside their normal coverage by virtue of contractual provisions. Are the consequences of such application the same as if the Rules were applicable *ex propio vigore*? Shall the provisions be considered as regular contract clauses? A third solution is to be found somewhere between these extreme points of view."

of the parties will prevail in case of conflict against any other clauses of the contract.

According to Article 10 of the Hague Rules, the primacy of the Convention over domestic international law of the State derives from the nature of specialty, which determines the unenforceability of any other provision of State law and, consequently, is a derogation from other provisions of conflict of laws. This specialty is predetermined autonomously in the Convention itself. Indeed, Article 10 is configured as a standard that individualises the scope of the Convention, articulated as a boundary rule.[104]

Article 10 of the Hague Rules incorporates an applicability criterion that has the specific characteristics of the necessary implementation rules. According to Celle,[105] that provision, which defines the scope or operation of conventional rules, is established as a boundary provision and not a conflict rule. This plurality of Article 10 interpretations will have the character not of a conflict rule character but of a boundary provision.[106]

The character of the conflict rule is appreciated, for example, in Article 91 of the Belgian Maritime Act, which incorporates the Brussels Convention of 1924, and according to which the provisions on bill of ladings provided for in the Act shall apply to

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[104]T. M. C. Asser, Choice of Law in Bills of Lading, 5 J. Mar. L. & Comm., 355–405 (1974) (hereafter "Asser"). This author states, "[T]his is a comparatively simple boundary rule delimiting the scope of the Hague Rules by reference to a connecting factor which should nearly always be easily determined, the place of issue being specified in most bills of lading." In similar terms, D. C. Jackson, The Hamburg Rules and Conflict of Law in Mankabady (note 94), at 227, states that this is "a boundary provision which, however unclearly, indicates the scope of the Convention."

[105]Celle, (note 9), at 17.

[106]Asser (note 104), at 361, states the following: "Whereas a boundary rule designates only a group of local law provisions, a conflict rule refers to a broad system of legal provisions leaving the designation of a particular law or regulation included in that system to the internal rules of reference of that system. Whereas the reference of a boundary rule is particular and limited, the reference of a conflict rule is general in nature. In respect of a bill of lading, the Hague Rules boundary norm designates only the Hague Rules of a certain domestic law; the reference of a conflict rule, however, covers the entire domestic law but also other substantive law provisions not contained in the Rules. The Hague Rules include only some of the law which may apply to a contract of carriage."

the carriage performed by any vessel '*au départ ou à destination d'un port du Royaume.*' Thus, these provisions of Belgian domestic substantive law shall apply, considering their content and the protected interests, apart from the general rule of conflict.[107]

The choice of the so-called proper law of contract determines its application to the entire individualised legal system. The Paramount Clause, under the force of the Brussels Convention of 1924, would in effect be considered incorporated into the contract wording of the uniform rules contained in a State's domestic law.[108]

The liability of the carrier may not be lessened subject to negotiations or adhesion contracts imposed on the shipper or cargo owner as the weaker parties in the contractual relationship.[109] The Paramount Clause in a bill of lading shall be considered a simple *privatistico strumento*, in Italian legal terminology, in those States that have not ratified the 1968 Protocol. It shall have the character of an authentic criterion for the application of uniform rules for those States that have ratified it. In both cases, in one way or another, the objective of uniformity and predictability or certainty that such legislation

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[107]According to P. Mayer, Les Lois de Police Étrangères," Journal de droit international, vol. II, 277 et seq., at 300 (1981): "Lorsque cette condition est remplie, on doit donc appliquer non seulement les dispositions de la loi de 1966 qui protègent le chargeur ou le destinataire, mais encore les dispositions de la loi qui seraient en l'espèce moins protectrices que celles de la loi d'autonomie, et aussi les dispositions françaises relatives au régime général des contrats et non comprises formellement dans la loi de 1966."

[108]Celle, (note 9), at 25, states: "La sua operativitá era quindi quella di una normale, anche se importante, clausola contrattuale, che andova inquadrata a priori in un sistema normativo di riferimento (proper law);" Ivaldi (note 87), at 810, qualifies the adaptation or incorporation standards of the Hague Rules as a necessary application "escludono de possa essere attribuita una qualsiasi rilevanza alle manifestazioni di volontá espresse dalle parti nell'ambito dell'autonomia loro riconosciuta nella scelta della legge regolatrice dei rapporti contrattuali."

[109]J. C. Fernández Rozas and S. Sánchez Lorenzo, Curso de Derecho Internacional Privado, Civitas, 386 (1993).

seeks to achieve it is accomplished (albeit with varying degrees of practical effectiveness).[110]

In short, relations between private autonomy and uniform law take on a different connotation after the entry into force of the 1968 Protocol and the Hamburg Rules. The proper, alternative nature of the draft criteria and the independent, consequent relevance of each in determining the sphere or scope of the uniform rules has the effect of extending each to an objectively international transport only by the presence of a claim or designation made by the parties—even if such a claim is formulated as individualising an internal law that, as indicated by the 1968 Protocol, 'applies or gives effect' to the provisions of the Convention.

The operability of such a function assigned to the autonomy of the parties through the Paramount Clause therefore reaches those cases in which the particular discipline of uniform law under the Convention is not just different but contrary to provisions of the competent internal domestic order regulating such contractual relationships under the normal application of domestic conflict of laws rules.[111]

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[110]W. Müller, Problèmes du Champ d'Application des Règles de La Haye et des Règles de Visby" Droit Maritime Français, 325 (1978), states: "Tout transporteur maritime est bien conseillé s'il prévoit dans ses connaissements expressement la législation nationale ou internationale applicable et simultanément la juridiction compétente, en particulier en se servant de la Clause Paramount en faveur des Règles de La Haye et de Visby. Ainsi, il pourra contribuer à l'unité du régime juridique sans attendre le jour où tous les Etats contractants de la Convention de 1924 seront également devenus Parties contractantes du Protocole de 1968."

[111]Carbone (note 85), at 67. These authors share the latter's view: "Si deve ritenere che, quanto meno nell'ambito degli ordenamenti giuridici degli Stati contraenti del Protocollo di Visby, il combinato effetto, da un lato, della prevalenza e della priorità di applicazzione delle norme di diritto materiale uniforme sulle norme di diritto internazionale privato (e quindi sulla disciplina degli ordenamenti statali da esse richiamati), e, dall'altro, della rilevanza assegnata(. . .) al diretto rinvio ad essa effettuato dalle parti interessate ad un trasporto.;" Ivaldi (note 85), at 76.

V
FINAL REMARKS

The characterisation of Paramount Clauses varies after the 1968 Protocol, which, like the Hamburg Rules, assigns relevance to the autonomy of the parties to ensure, as an autonomous application and fully valid criterion *per se*, the operability of such uniform rules. The purpose and function of such a clause may be either to incorporate such legislation to the contract (with a limited scope derived from the wording of Article 10 of the Hague Rules) or to designate such law as applicable, applying its mandatory provisions to the contractual relationship.

The main consequence of the enactment of the Visby Protocol of 1968 is that it assigns, with similar effects to the Hamburg Rules of 1978, a direct and immediate relevance to party autonomy. The validity of a Paramount Clause does not depend on the proximity or link required between the contractual relationship and the applicable law designated by virtue of the Paramount Clause. It is understood, however, that the contractual parties may have chosen an international instrument by indirect referral as the applicable law to the contract, i.e. a national law that incorporates or gives effect to the Hague-Visby Rules or the Hamburg Rules.

The designation of such conventional rules as the *regulatory law* of the contract is further reinforced by the impact of the 1980 Rome Convention and the Rome I Regulation as the conflict of contract laws applicable in this sector by the judges of States parties, and together with other provisions already analysed and in Article 3 of the Rome I Regulation, enshrining the primacy of the party autonomy as a limiting criterion applicable law to contractual relations, not a mere *contractualisation* of the law designated by the parties.

Similarly, Article 23 of the Rome I Regulation operates as a compatibility clause that guarantees the validity and preferred application of the provisions contained therein in the conventional rules specifically developed in this sector.

However, when a contractual relationship falls outside the scope of application of an international convention that would be only applicable in the presence of a Paramount Clause, such

international instrument would not exercise its hierarchical primacy over national law in the absence of a choice of law, or would be subject to imperative provisions of such internal norm since it only constitutes a mere contractual incorporation. Article 10 of the Hague Rules cedes to the imperative nature of the 1968 Protocol by the presence of a Paramount Clause acting as a valid and autonomous criterion to determine their application over any objective criteria provided by domestic law.

A comparative analysis of the case law of the leading seaborne trade nations shows that the amendments made by the 1968 Protocol and confirmed in the Hamburg Rules have not gone unnoticed by courts, with regard to the characterisation and different effects attributed to Paramount Clauses and, in particular, the conventional text applicable to each contractual relationship.

Analysing Paramount Clauses from an overall perspective, it should be noted that they can be extended to third-party auxiliary contracts. If there is an instrumental link, it can protect them, meaning that the stowage contract or auxiliary contract for operation of the vessel is subject to acceptance of the main clause. In summary, the findings of this article are that mandatory regulations are extended to third parties. This function is fulfilled by including a *Himalaya Clause* vis-á-vis employees, agents, stevedores, pilots, and so on.