Collana Ravenna Capitale

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Ravenna Capitale

From International Treaties to the Binding Nature of Contract. A Historical and Comparative Study

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Indice

Party autonomy and its effects on the International Maritime Law: the role of the Paramount Clause

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1. Introduction

Party autonomy underpins the international trade and the commercial contracts adopted by the shipping industry,[1] in terms of predictability and legal certainty. This allows the parties to determine the solutions available in the event of future disputes and to mitigate risks in cross-border transactions.[2]

As shown by the doctrine,[3] the role of the principle of party autonomy not only corresponds to the practical function of choosing the law governing the international commercial transactions, but it also increasingly plays the role of «material justice»,[4] through the preparation of specific and suitable clauses to regulate their contractual relationship.

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[1] J. Liang, *Party autonomy in contractual choice of law in China*, Cambridge University Press, Cambridge, 2018, 26 – 49.

[2] On the principle of party autonomy see J.J. Álvarez Rubio, *Las Cláusulas Paramount: Autonomia de la voluntad y selección del derecho aplicable en el transporte marítimo internacional*, Madrid, 1997; E. Castellanos Ruiz, *Autonomía de la voluntad y Derecho uniforme en la compraventa internacional*, Granada, 1999; T.C. Hartley, *International Commercial Litigation. Text, Cases and Materials on Private International Law*, Cambridge, 2009, 566-598.

[3] S.M. Carbone, *Autonomia privata e forza "espansiva" del diritto uniforme dei trasporti*, in *Il Diritto marittimo*, 2006, 1053 ff.

[4] *Idem*. See, also, on this point, F. Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, in *Law and Contemporary Problems*, 2013, 57-70. Available at: https://scholarship.law.duke.edu/lcp/vol76/iss2/5.

The strength of party autonomy is evident in the progressive «de-localization» of the contract with respect to the national legal system, as well as in the extension of the effects of the uniform law beyond its own normal scope of application.[5]

From this perspective, with specific reference to maritime law, the Paramount Clause, which is often incorporated in a bill of lading or in a charter party, represents a manifestation of the expansive force of the autonomy of the parties in identifying the law governing the contract.

This article is aimed at analysing the scope of the Paramount Clause and the limits on the parties' right to choose the *lex contractus* in the maritime sector, in the light of a comparative case-law study.

2. The Paramount Clause

Generally speaking, "*something that is paramount or of paramount importance is more important than anything else*".[6]

Over the years, this meaning has influenced the approach of the Courts in the interpretation of the clause and of the actual will of the parties in determining the law applicable to their contract.

In the maritime sector, this term is associated with a clause that has a specific function: the Paramount Clause[7] generally allows the incorporation in the bill of lading of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules") signed in Brussels on 25 August

[5] Carbone, *Autonomia privata e forza "espansiva" del diritto uniforme dei trasporti ...*, 1053 ff.

[6] Collins - COBUILD Advanced English Dictionary.

[7] F. Berlingieri, *Paramount clauses e limite del debito del vettore*, in *Il Diritto marittimo*, 2004, 637-639; D. Bocchese, *Un bis in idem non proprio convincente della Corte di cassazione francese sulla paramount clause*, in *Diritto dei trasporti*, 2001, 851-865; F. Berlingieri, *Charter-party e Paramount Clause*, in *Il Diritto marittimo*, 1997, 1010-1024; F. Berlingieri, *Contratto di noleggio a tempo*, in *Il Diritto marittimo*, 1994, 590-613; P. Ivaldi, *Ancora sulla Paramount clause*, in *Il Diritto marittimo*, 1988, 530-532; P. Celle, *La Paramount Clause nell'evoluzione della normativa internazionale in tema di polizza di carico*, in *Il Diritto marittimo*, 1988, 11-36; Berlingieri, *Note sulla "Paramount Clause",* in *Il Diritto marittimo*, 1987, 938-939; Ivaldi, *La volontà delle parti nel contratto di trasporto marittimo: note sulla Paramount Clause*, in *Rivista di diritto internazionale privato e processuale*, 1985, 799-812; F. Berlingieri, *Note sull'Inter-Club Produce Exchange Agreement*, in *Il Diritto marittimo*, 1983, 856-858; *Id*., *Note sulla "paramount clause"*, in *Il Diritto marittimo*, 1979, 216-219.

1924,[8] or of the amended Rules, known as "Hague-Visby Rules"[9] (or the Hamburg Rules,[10] where in force) on the international carriage of goods by sea, or the national legislation that gives them effect.

An example of a paramount clause is found in the form CONGENBILL 2016:[11]

«*General Paramount Clause: …* "*The Hague-Visby Rules" ... 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*

[8] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules") signed in Brussels on 25 August 1924.

The Hague Rules were amended by the Brussels Protocols in 1968 and 1979, as the Hague-Visby Rules. See Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (The Hague Rules) and of the Protocols of 23 February 1968 and 21 December 1979 (The Hague-Visby Rules),* available at https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf. See also: S. Zunarelli, *Trasporto (contratto di) - Trasporto marittimo*, in *Enciclopedia del diritto*, XLIV, Milano, 1992; S. Zunarelli - M.M. Comenale Pinto, *Manuale di diritto della navigazione e dei trasporti*, Milano, 2020.

The protocols of 1968 and 1979 (Hague-Visby Rules) were ratified in Italy respectively by laws 12 June 1984, no. 243 and 244.

Meanwhile the Rules were completely rewritten in 1978 in a new treaty known as the Hamburg Rules. It should be noted that Italy has not ratified the Hamburg Rules. However, they have not yet been generally adopted: it is estimated that they govern less than 5% of world maritime trade. See: P. Manca, *Commento alle Convenzioni internazionali marittime*, Milano, 1975; Berlingieri, *Diritto marittimo uniforme e attuazione delle convenzioni internazionali*, in *L'unificazione del diritto internazionale privato e processuale* (T. Treves, F. Pocar, T. Scovazzi, R. Clerici a cura di), in *Studi in memoria di Mario Giuliano*, Padova, 1989; F.A. Querci, *Diritto della navigazione*, Padova, 1989; Ivaldi, *Diritto uniforme dei trasporti e diritto internazionale privato*, Milano, 1990; T. Ballarino, *La limitazione del debito del vettore marittimo ed aereo*, in *Il cinquantenario del Codice della navigazione* (L. Tullio- M. Deiana a cura di), Cagliari, 1993; Carbone, *Contratto di trasporto marittimo di cose*, Milano, 2010.

[9] The Hague-Visby Rules consist of the Hague Rules as amended by the Protocols signed in Brussels on 23 February 1968 and on 21 December 1979. See L. Tullio, *Vigenza internazionale (ed adozione interna) delle «Regole di Visby»*, in *Trasporti*, 1978, 91 ff.; P. Manca, *Le Regole di Visby*, in *Il Diritto marittimo*, 1967, 108 ff.; A. Diamond QC, *The Hague-Visby Rules*, in *Lloyd's Maritime & Commercial Law Quarterly,* 1978, 225 ff.

[10] United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the "Hamburg Rules"), adopted on 31 March 1978. The Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. For a comparative analysis between the Hague Rules and the Hamburg Rules, see P. Bonassies, *La responsabilité du transporteur maritime dans les Règles de La Haye et dans les Règles de Hambourg*, in *Il Diritto marittimo*, 1989, 949 ff.

[11] The CONGENBILL form is a type of charter party bill of lading for shipments of general cargo under the GENCON charter party, which is widely used in international trade. The latest edition of this bill of lading is CONGENBILL 2016.

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…».[12]

This clause represents a clear example of how party autonomy manifests its "expansive force" regarding the scope of application of the uniform maritime law.

However, it should be considered that many difficulties may arise regarding the correct identification of the Rules that the parties intended to apply, due to the unclear wording that is often used in drafting the clause.

This is an issue that would have important practical effects as it can have wide-ranging consequences when considering the transport operators' liability.

Indeed, there are significant differences between the original Hague Rules and the Hague-Visby Rules that owners and charterers should consider when deciding which clause paramount to agree to, referring specifically to the limitation regime of the carrier's liability, which is fundamentally critical in cargo claims.

Indeed, the package limitation regime of the liability of the carrier contained in Article IV Rule 5 of the Hague-Visby Rules differs from the equivalent Hague Rules regime in several aspects. It is sufficient to mention that the previous limit of £100 (gold value) "*per package or unit*"[13] was replaced, under the Hague-Visby Rules, by a limit calculated by reference to the International Monetary Fund's special drawing rights.[14]

In particular, Hague-Visby Rules provide for "*the equivalent of 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher*".[15]

Namely, Article IV Rule 5(a) of the Hague-Visby Rules limits carriers' liability for loss or damage to goods carried, providing as follows:

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account [SDR – Special

[12] Available at https://www.bimco.org/contracts-and-clauses/bimco-contracts/congenbill-2016.

[13] The original Hague Rules, article IV (5). See on this point J.F. Wilson, *Carriage of Goods by Sea*, 2008, 195 ff; *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (C. Mitchell, S. Watterson eds.), London, 2020, 50.

[14] The Special Drawing Right (SDR) is based on a basket of five currencies: the U.S. dollar, Japanese yen, euro, pound sterling and Chinese renminbi. The value of the SDR is set daily by the IMF on the basis of fixed currency amounts of the currencies included in the SDR basket and the daily market exchange rates between the currencies included in the SDR basket.

[15] Art. IV, 5 (a).

Drawing Rights] *per package or unit or 2 units of account* [SDR] *per kilogramme of gross weight of the goods lost or damaged, whichever is the higher*".[16]

Article IV (5), paragraph (d), specifies that "*The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund*".

Article IV (5), paragraph (a), spells out that it is the higher of the two figures, calculated by reference to the number of packages or the weight of the goods respectively, which constitutes the relevant limit.[17] Paragraph (g),[18] however, permits agreement on a higher maximum amount than those mentioned in paragraph (a).

3. The Paramount clause: its historical background

Before dealing with the core areas of the Paramount Clause, it is important to underline that, historically, its purpose was to give immunity to shipowners from liability in certain circumstances.

The practice of inserting references to certain national legislation in charter parties or bills of lading has its origin in the context of maritime traffic in the U.S. during the late 19th century.[19]

At that time, all U.S. exports were in the hands of British shipping companies who exercised absolute market dominance, frequently incorporating clauses in bills of lading that excluded the liability of shipowners-carriers.

These clauses were considered valid by the English Courts on the basis of the principle of freedom of contract.

Contrary to this approach, most American courts restricted the validity of such clauses, claiming that clauses limiting liability – within bills of lading issued by these shipping lines – "*were invalid as against public policy*".[20]

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[16] About the definition of "goods lost or damaged" under Article IV Rule 5(a), see *The Limnos* [2008] 1 Lloyd's Rep.50.

[17] Moreover, paragraph (b) of Article IV Rule 5 is new, providing for the method by which damages are to be calculated; paragraph (c), dealing with containerisation, is new. Paragraph (e) provides for the circumstances in which the carrier may lose the benefit of limitation.

[18] Paragraph (g) of Article IV Rule 5 provides as follows: "*By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph*".

[19] J.E. Fernandez, *Paramount Clause and Codification of International Shipping Law*, in *Journal of Maritime Law and Commerce*, 2019, no. 1, 45-90.

[20] E. Selvig, *The Paramount Clause*, in *The American Journal of Comparative Law*, 1961, Vol. 10, No. 3, 206.

3.1. *The American Harter Act (1893) and the Harter Act Clauses*

In order to create legal uniformity and to reconcile the conflicting views and interests of the parties involved (shipowners and shippers), in 1893 the U.S. Congress adopted the *Harter Act*,[21] which made unlawful the insertion of any clause, covenant, or agreement by a carrier into a bill of lading or shipping document that relieved the carrier of "*liability for loss or damage arising from negligence, fault or failure in properly loading, stowage, custody, care or proper delivery of any and all merchandise or property committed to its or their charge*".[22]

Furthermore, the Act made unlawful the insertion of any clause or agreement in the bill of lading or another shipping document that would lessen, weaken, or avoid (a) the obligation of the owner of the vessel to use due diligence in providing a seaworthy vessel and (b) the obligation of the master, officers, agents, and servants to handle, stow, and deliver cargo properly and with care.[23]

The Harter Act was designed to be applicable in carriages "*from or between ports of the United States and foreign ports*".[24]

However, at an international level, the Harter Clause was not able to provide sufficient protection for American shippers before foreign courts.

Therefore, American shippers provided that bills of lading should contain a reference to that Act as governing law and adopted the practice of inserting a clause (the *Harter Act Clause*) with the following wording:

"*It is also mutually agreed that this Bill of Lading is subject to all terms and provisions of and all exemptions from liability contained in the Act of Congress of the United States entitled 'An Act Relating to Navigation of Vessels etc' approved on the 13th day of February 1893 and of the Statutes amendatory thereof and supplements thereto*".[25]

It should be noted that, however, "*when the question of interpretation of such clauses was brought before English Courts, … the Harter Act was not considered having statutory character, but construed* '*simply as words occurring in the bill of lading*' ".[26]

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[21] The Harter Act, 1893, 27 Stat. 445; 46 U.S.C. Sections 190-192. See G. Riccardelli, *Harter Act*, in *Enciclopedia del diritto*, XIX, Milano, 1970, 946 ff.

[22] G.J. Mangone, *United States Admirality Law*, The Hague-Boston, 1997, 78.

[23] *Ibidem*.

[24] Selvig, *The Paramount Clause* ..., 206 ff.

[25] Washington Coal Form, July 1919, clause 10.

[26] Selvig, *The Paramount Clause* ..., 206. See Dobell v. Rossmore S.S. Co. [1895] 2 QB 408 CA.

3.2. *The Hague Rules and the Hague-Visby Rules*

The *Harter Act clauses* were followed by the approval of the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* ("Hague Rules") signed in Brussels on 25 August 1924.[27]

Subsequently, once the Hague Rules came into force, the different national systems developed similar clauses for the reception and incorporation of such conventional rules, in order to ensure that contractual relations be regulated under their scope of application to the greatest extent possible.

The purpose of clarifying the function of Paramount Clauses requires a preliminary and brief analysis of the developments in relation to the scope of the 1924 Brussels Convention. As already mentioned, the Hague Rules were revised by the Brussels Protocols of 23 February 1968 and 21 December 1979: the revised Rules are known as the Hague-Visby Rules.[28]

The scope of the Brussels Convention, regulated by its Article 10, was substantially extended by the Protocol of 1968, expressly allowing the possibility of determining the application of such conventional rules by means of Paramount Clauses.

Pursuant to Article 10 of the Hague Rules, concerning the scope of application of the Convention, "*the provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States*".

In other words, the original version of Article 10 delimited the scope of application of the Convention to international maritime transports in respect of which a bill of lading had been issued within a contracting State.

Therefore, the link for the application of the Convention was the place of issuance of the bill of lading.

The amended version of the Rules extended the scope of application of the Convention, definitively resolving some interpretative issues that had arisen under the previous regime.

Indeed, Art. 10.1 of the Hague-Visby Rules states that the Convention applies 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

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[27] See fn. 9.

[28] Then amended by the Brussels Protocols of 23 of February 1968 and of 21 December 1979. For an extensive comparative law study of English, American and Dutch law concerning the construction of the Hague Rules and Hague-Visby Rules, see M.L. Hendrikse, *Aspects of Maritime Law: Claims Under Bills of Lading* (N. H. Margetson, N. J. Margetson eds.), Kluwer Law International, 2008.

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".

Therefore, the amendments have given importance to the commercial practice of including an expressed will aimed at incorporating the Hague-Visby Rules in the contract of carriage.

The Hague-Visby Rules, pursuant to Article 1(b), apply only to contracts of carriage "covered" by a bill of lading or similar document of title; therefore, charter parties are excluded from the scope of these Rules.[29]

In this regard, it should be noted that the Rules can be contractually incorporated into a charter party through a paramount clause.

It is, therefore, necessary to investigate the real reasons that led to the creation of these contractual clauses, called – in an all-inclusive term – Paramount Clauses and their interpretation by the courts, at both international and national level.

4. The effect of the incorporation of Paramount Clauses

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.

By means of Art. 10 of the Hague-Visby Rules (see also of art. 2, par. 1, lett. e), of the Hamburg Rules[30]), the reference to the Rules is suitable to grant the application of the uniform legislation in case of an international carriage of goods by sea, even in the absence of any connection with at least one contracting State.[31]

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[29] See Art. V of the Rules.

[30] Art. 2 (1), Hamburg Rules, reads as follows: "*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".

[31] Carbone, *Autonomia privata e forza "espansiva" del diritto uniforme dei trasporti ...*, 1053 ff.

Another manifestation of the party autonomy's strength is seen when the parties voluntarily extend the uniform law to contracts excluded from the scope of application of the Convention.

This happens when the contracting parties of a charter party adopt specific paramount clauses by virtue of which the provisions of the Brussels Convention are extended to this contract.[32]

Indeed, under Article V, the Hague Visby Rules are not applicable to charter parties, but if bills of lading are issued in the event of a ship under a charter party, they must comply with the Rules.

Once incorporated, the paramount clause may conflict with other clauses in the contract and, in these circumstances, it is especially important to pay attention to the precise wording of the clauses.

4.1. *The approach of the Courts in the interpretation of Paramount Clauses: Hague or Hague-Visby Rules?*

The paramount clause was defined by Lord Denning in *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd*:[33] *"When a paramount clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy, and so forth".*

In the *Agios Lazaros*,[34] Lord Denning M.R. held that "*when the 'Paramount Clause' is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the Rules (for example Article IV), or only so far as compulsorily applicable, they say so. In the absence of any such qualification, it seems to me that a "Clause*

[32] Carbone, *Contratto di trasporto marittimo di cose*, Milano, 2010, 150 ff. For an overview of the different clauses incorporated in *charter parties* see Berlingieri, *Charter-Party e Paramount Clause*, in *Il Diritto marittimo*, 1997, 1010 ff; L. Tullio, *Contratto di noleggio*, Milano, 2006, 130 ff. See also N. Gaskell, R. Asariotis, Y. Baatz, *Bills of Lading: Law and Contracts*, London, 2000, 706 ff.; R. Aikens, R. Lord, M.D. Bools, *Bills of Lading*, London, 2006, 220-221; W. Tetley, *Marine Cargo Claims*, Cowansville, 2007, 79-82; J.F. Wilson, *Carriage of Goods by Sea*, Harlow, 2010, 210-211; J. Cooke, *Voyage Charters*, Abingdon, 2014, 998-999.

[33] Decision of the Court of Appeal [1957] 2 Q.B. at page 266.

[34] *Nea Agrex S.A. V. Baltic Shipping Co. Ltd. and Intership*ping *Charter Co.* (*The Agios Lazaros*), [1976] 2 *Lloyd's Rep* 47.

Paramount" is a clause which incorporates all the Hague Rules. I mean, of course, the accepted Hague Rules, not the Hague-Visby Rules, which are of later date".[35]

In the case *"Marinor"*,[36] regarding a paramount clause included in a *time charter-party*, the English Commercial Court had to interpret a Canadian clause incorporating "*the provisions of the carriage of Goods by Water Act […] as amended, enacted by the Parliament of Canada*". At that time, Canada had repealed its original *Carriage of Goods by Water* Act enacting the Hague Rules and had passed new legislation enacting the Hague-Visby Rules. The defense of the charterers was based on the fact that since the original Canadian Act was repealed and not "amended" in 1993, the clause did not incorporate the Hague-Visby Rules. The Court was not impressed by this distinction and held that the words *"as amended"* into the paramount clause was most likely referred to the Hague-Visby Rules.

In particular, the Court ruled that: "*The words 'as amended' in Rider A are, in my view, intended to provide for legislative changes which may subsequently be made in respect of the subject-matter of the existing Act identified in the clause paramount. Whether those changes were effected by a subsequent Act which introduced amendments into the Act specified or by a subsequent Act which repealed the specified Act and replaced it with an Act containing amended provisions in respect of the same subject-matter would be wholly irrelevant to the owners and charterers of Marinor. The obvious purpose of incorporating the rider is to make sure that throughout the period of the time charter the current Canadian Carriage of Goods by Sea legislation is contractually incorporated. I therefore hold that the 1993 Canadian Act came to be incorporated and with it the Hague-Visby Rules*".

In the case *Bukhta Russkaya* [1997],[37] the issue was whether the original Hague Rules or the Hague-Visby Rules were incorporated by a BIMCO general paramount clause[38] included in a charter party.

The issue was treated simply as a question of construction of the phrase "the general paramount clause" with reference to the meaning that a shipping man could give to that phrase.

That question was answered by reference to a BIMCO general paramount clause which provided as follows:

"(a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels 25th August 1924, as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding

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[35] This was a charter party case; *The Agios Lazaros*.

[36] *Noranda Inc & Ors v Barton (Time Charter) Ltd & Anor* [1996] *CLC* 337; [1996] 1 *Lloyd's Rep* 301.

[37] *Lauritzen Reefers v Ocean Reef Transport Ltd SA* [1997] 2 Lloyd's L.Rep. 744 (Q.B.).

[38] Published by BIMCO in 1994.

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.

(b) Trades where Hague-Visby Rules apply: in trades where the International Brussels Convention 1924 as amended by the protocol signed at Brussels on February 23rd, 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of respective legislation shall apply to this Bill of Lading.

(c) The carrier shall in no case be responsible for loss of or damage to cargo howsoever arising prior to the loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

In this case, Thomas J decided what is meant by the phrase "*general paramount clause*", identifying the essential features of such a clause. Thomas J's statement as to the essential features of a "*general paramount clause*" was made in the context of standard clauses which expressly draw a distinction between the Hague Rules and trades where the Hague-Visby Rules apply.

Thomas J observed that, according to the first paragraph of the clause:

(1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted;

(2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply;

(3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies.

The conclusion reached by Thomas J was that there is a general understanding that the first part of the clause indicates the appropriacy of applying the original Hague Rules.[39]

In *The Happy Ranger*,[40] the paramount clause was similar to the standard BIMCO clause considered by the Court in the case *Bukhta Russkaya*.[41] The coun-

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[39] [1997] 2 *Lloyd's Rep* 744, 746-747.

[40] *Parsons Corporation and Others v CV Scheepvaartonderneming Happy Ranger and Others (The Happy Ranger)* [2001] 2 *Lloyd's Rep* 530. See G.H. Treitel, F.M.B. Reynolds, T.G. Carver, *Carver on Bills of Lading*, London, 2011, 536-537.

[41] The contract of carriage contained a general paramount clause which provided as follows:

"*GENERAL PARAMOUNT CLAUSE. The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25 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, Articles I to VIII of the Hague Rules shall apply. In such case the liability of the Carrier shall be limited to 100.- sterling per package. […] In trades where the International Brussels Convention 1924 as amended by the Protocol signed at*

try of shipment was Italy, which enacted the Hague-Visby Rules. At trial level, Tomlinson J refused to apply the Hague-Visby Rules to the contract of carriage. He further opined that the contract was not evidenced by a bill of lading or similar document of title within the ambit of the 1971 Act.

At the appeal,[42] Tomlinson J's decision was unanimously reversed on the ground that the contract was evidenced by a bill of lading or a similar document of title within the meaning of the 1971 Act, thus the Hague-Visby Rules would apply compulsorily.

In *Yemgas Fzco & Ors v Superior Pescadores S.A. Panama* (The Superior Pescadores),[43] the English Commercial Court had to decide whether a Paramount Clause providing for the Hague Rules "*as enacted in the country of shipment […]*" meant the Hague Rules or the Hague-Visby Rules.[44]

On examination of the factual background behind that judgment, machinery and equipment were loaded on the vessel *Superior Pescadores* at the port of Antwerp in Belgium in January 2008 to Balhalf (Yemen) for the construction of a liquid natural gas facility. The cargo shifted during the carriage and was significantly damaged, causing a loss of more than USD 3.6 million.

In that case, the Court was asked to consider the effect of a paramount clause in circumstances where the Hague-Visby Rules were compulsorily applicable as a matter of English law (the law governing the contracts evidenced by the terms of the bill of lading).

The shipowners issued six bills of lading for the cargo that contained a paramount clause as follows:

"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".

The Paramount Clause identified the Hague Rules contained in the International Convention of 25th August 1924, but at the same time provided that those Rules

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Brussels on 23 February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading […]".

[42] [2002] *EWCA Civ* 694; [2003] 1 *CLC* 122; [2002] 2 *Lloyd's Rep* 357.

[43] *The Superior Pescadores* [2014] 1 *CLC* 496; [2014] *EWHC* 971 (Comm).

[44] It should be noted that the Hague Rules were incorporated into English law by the Carriage of Goods by Sea Act 1924. The 1924 Act was repealed by the Carriage of Goods by Sea Act 1971 (which came into force in 1977), giving effect to the Brussels Protocol amending the Hague Rules, thereby giving Hague-Visby Rules force of law in the United Kingdom.

"*as enacted in the country of shipment*" were to apply to the carriage contract. The country of shipment was Belgium, which adhered to the Hague-Visby Rules on 6th December 1978.

However, the parties then agreed that the claims would be subject to English law and jurisdiction. Under the Carriage of Goods by Sea Act [1971], the Hague Visby Rules applied compulsorily, given that the carriage was from a contracting state (Belgium).

Shipowners admitted liability for the cargo damages and paid according to the Hague Visby Rules package limit.

However, cargo owners, while acknowledging that the Hague-Visby Rules would also compulsorily apply by the virtue of the Carriage of Goods by Sea Act 1971,[45] contended that as a matter of construction, the effect of the paramount clause was such that the parties contractually agreed on a higher package limitation figure than that for which the Hague-Visby Rules provide (in circumstances where the Hague Rules allowed for a higher figure to be claimed).

They calculated their claims interchangeably referring to the package limits under both the Hague and Hague-Visby Rules, preferring to use whichever regime resulted in them being able to claim a higher figure.[46] In particular, they argued that the paramount clause enabled them to recover the higher limit under the Hague Rules, since Art IV, Rule 5 (g) of the Hague-Visby Rules allows the parties to agree on a higher limit than provided by its own rules.[47]

Conversely, the carriers argued that the bills of lading were only governed by the Hague-Visby Rules, on the ground that the paramount clause (*"the Hague Rules ... as enacted in the country of shipment"*) incorporated the Hague-Visby

[45] It was common ground between the parties that by virtue of section 1(2)/Article X of the Carriage of Goods by Sea Act 1971 as the port of loading was Antwerp, the Hague-Visby Rules compulsorily applied to the contract evidenced by the terms of the bill of lading notwithstanding the paramount clause.

[46] Mr Thomas, for the claimant cargo interests, argued, in summary, as follows: "*There is nothing to prevent the parties from agreeing on a limit which may sometimes be higher than the limit provided for by Article IV Rule 5(a) and sometimes lower*". For the majority of bills of lading, cargo-owners relied on the Hague Rules package limitation figure since it was higher than the limit provided by the Hague-Visby rules. For the remaining bills of lading, which contained six packages of the cargo, they, however, picked the Hague-Visby limitation for the two packages which provided a higher limit than the Hague Rules. For the other four packages, they claimed the original Hague Rules package limitation figure.

[47] As already said, Article IV, Rule 5, of the Hague Rules (1924) contains a provision entitling a carrier to limit its liability to £100 (gold value) per package or unit. Article IV Rule 5(a) of the Hague-Visby Rules contains a provision entitling a carrier to limit its liability by reference to units of account known as special drawing rights as defined by the International Monetary Fund. This limit is sometimes higher than the limit provided for in the Hague Rules.

Rules, given that the country of shipment, which was Belgium, enacted the amended version of the Hague Rules (the Hague-Visby).

Therefore, in this case, according to the carriers, only the package limit under the Hague-Visby Rules was applicable, contending that the cargo owners could not "*pick and choose*" between limits.

In the first instance,[48] Judge Males J referred (amongst others) to the case *The Happy Ranger*[49] as authority, arguing that a Paramount Clause stating "*The Hague Rules…dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract*" incorporated the Hague Rules and not the Hague-Visby Rules.[50] The Judge added that it did not operate as an agreement for a higher limit pursuant to Article IV rule 5(g) of the Hague-Visby Rule,[51] holding that a paramount clause contractually incorporating the Hague Rules did not have the effect of altering the package limitation under the Hague-Visby Rules.

In the appeal, the Court re-examined the case and held that, in the present day, the expression *"the Hague Rules as enacted in the country of shipment"* should be deemed as a reference to the Hague-Visby Rules.

In particular, Lord Justice Longmore, at the start of his judgment, posed the question: *"Can it really be the case that a Paramount Clause in a contract made over 30 years later* [i.e. from when the Hague-Visby Rules came into force] *in 2008 is still to be taken as incorporating the 1924 rather than the 1968 Rules?".*

The Court of Appeal said that in any ordinary and sensible view of English law, the Hague Rules "*as enacted*" by England are the Hague Rules as enacted by the schedule to the 1971 Act, which in its title refers to the Hague Rules "*as amended*". According to the Court, the wording of the paramount clause contractually incorporated the Hague-Visby Rules, not the Hague Rules.

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[48] Commercial Court (2014, EWHC 971 (Comm)).

[49] [2001] 2 Lloyd's Rep. 530 and [2002] 2 Lloyd's Rep.356 (Court of Appeal).

[50] Mr Justice Males held that, because of authorities which bound the Court, the Paramount Clause was a contractual agreement that the Hague Rules would apply – notwithstanding that it might be largely ineffective in these circumstances where English law applied (and therefore the Hague-Visby Rules). However, he held that, had the point been free from authority, he would have been inclined to hold that a Clause Paramount referring to the Hague Rules "*as enacted in the country of shipment*" could refer to the Hague-Visby Rules in the absence of any contrary indication in the clause.

On the second issue, Mr Justice Males held that parties could theoretically agree different package limitations even if that different package limitation was not specified (as long as the figure did not turn out to be less than the limits provided for by the Hague-Visby Rules).

However, in the circumstances of this case, it would not apply because he considered that it could not have been the parties' intention here.

[51] Article IV Rule 5(g) of the Hague-Visby Rule provides that the parties to a bill of lading contract may agree other maximum limits provided that no maximum amount so fixed is less than the limit provided for in Article IV Rule 5(a).

The analysis above shows the need to draft the paramount clause in such a way to avoid ambiguity or uncertainty, in order to identify the set of rules to be applied, not forgetting the consequences in terms of limits of carrier's liability. The related insurance implications also need to be taken into account in drafting the clauses.

4.2. *The Italian Courts' approach to the Paramount Clause*

The Italian Courts have tried to address the nature and function of the paramount clause and to ascertain whether the uniform discipline referred to therein finds application with the value of the law governing the contract or with contractual value.

From the early stages, the Italian Courts adopted a «rigid» approach in determining the role of paramount clauses, under the Hague Rules regime.

In 1969, the Supreme Court (Corte di Cassazione)[52] stated that where the Brussels Convention *"is not applicable as a regulation of the carriage, by the provision of its art. 10, since the bill of lading has been issued in a State not adhering to the Convention itself, it cannot be taken into consideration as the law regulating the contract based on the will of the contracting parties (pursuant to Article 10 of the Italian navigation code)".*

According to the Court, the exception to this is when the will of the parties acts as a connecting criterion for identifying the regulating law: this occurs when the parties declare a foreign law applicable to the contract that incorporates the provisions of the Convention.[53]

In this regard, it was pointed out that paramount clauses often refer to the law of the State of departure or destination that has enacted the Brussels Convention. Thus, the recall to this law could act as a link under the private international law.[54]

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[52] Cass, 24 July 1969, no. 2798, in *Rivista di diritto della navigazione*, 1971, 80. The case refers to the Hague Rules regime.

[53] The Italian Supreme Court stated that "*ove la Convenzione ... non risulti applicabile quale norma regolatrice del trasporto di per sé, in virtù della disposizione di cui all'art. 10, per essere la polizza di carico stata emessa ...in uno Stato non aderente alla Convenzione medesima, la stessa non può venir in considerazione quale legge regolatrice del contratto in base alla volontà delle parti contraenti (ex art. 10 c. nav.) se non quando tale volontà funga da criterio di collegamento per l'individuazione della legge regolatrice: il che si verifica allorché le parti dichiarino applicabile al rapporto una legge straniera che incorpori le disposizioni della Convenzione, non anche quando ... si limitano invece a richiamarla nel contratto come tale".*

[54] L. Tullio, *La clausola paramount prima dell'entrata in vigore delle Regole di Visby*, in *Diritto dei trasporti*, 1992, 855.

However, when the Convention is recalled without any reference to a national legal regime, it should be applicable in contractual terms.[55]

In the judgment n. 4905 of 10 August 1988,[56] the Italian Supreme Court followed a different approach, according to which the reference in the bill of lading to the Brussels Convention, "*as enacted*" in the state law of the port of destination, does not act as a connecting criterion under the private international law, as the law designated by the will of the parties is not applicable outside the limits of the scope of application.

In particular, in that judgment, the Court held that the rules of the Brussels Convention are to be applied, with their regulatory value, under the conditions set out in the Convention itself; however, when these rules are incorporated by virtue of a paramount clause, they have contractual value and, of course, they cannot derogate from mandatory rules.

In the aforementioned judgment, the contractual transposition of the rules of the Convention was considered admissible, through the Paramount clause, in the event that one of the contracting parties was not a signatory of the Convention itself.

This narrow approach was also confirmed by the Court in the judgment n. 12191/1990:[57] it stated that, even if the parties recall a foreign law enacting the Convention, the will of the parties does not act as a connection criterion where their relationship falls outside the scope of application of the Convention itself.

However, this approach would empty the paramount clause of meaning since when the bill of lading is issued in one of the contracting countries the Convention applies *ex proprio vigore* and not by virtue of a paramount clause[58].

The interpretation adopted by the Court appears to be more flexible in the judgment 13018/1995,[59] according to which: "*The inclusion of the paramount clause in a "charter-party" involves the contractual implementation of the rules of the Brussels Convention of 25 August 1924 – as applicable – in the relationship between the original parties to the contract, despite the fact that article 5 of the Brussels Convention contains the express exclusion of its application to "charter parties*".[60]

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[55] See Ivaldi, *La volontà delle parti nel contratto di trasporto marittimo: note sulla Paramount Clause*, in *Rivista di diritto internazionale privato e processuale*, 1985, p. 806 ff.

[56] See G. Lallini, *Paramount clause: la Cassazione muta orientamento*, in *Diritto dei trasporti*, 1990, 143.

[57] Cass., 28 December 1990, n. 12191.

[58] Tullio, *La clausola paramount prima dell'entrata in vigore delle Regole di Visby* …, 856.

[59] Cass., 20 December 1995, n. 13018.

[60] In *Il Diritto marittimo*, 1997, 1010, commented on by Berlingieri; in *Giustizia civile*, 1996, I, 689, commented on by M. Grigoli, *Rilevanza dell'autonomia privata nella realtà normativa del trasporto marittimo internazionale di merci.*

It is worth bearing in mind, given the minimal number of cases presented to the Italian courts regarding the paramount clause, the courts appear to have maintained a conservative even rigid position[61] on the actual effects of the paramount clauses.

5. Concluding remarks

Party autonomy has always been regarded as one of the basic axioms that is at the very heart of the legal system.

As suggested by the above analysis, the Hague-Visby Rules and the Hamburg Rules had an important impact on increasing party autonomy in identifying the law regulating an international maritime contract.

As shown by the doctrine,[62] on the one hand, the expansive force of the principle of contractual freedom results in the progressive "de-localization" of the contract with respect to the state legal systems and, on the other hand, with specific regard to maritime law, in the extension of effects of the uniform law regulations beyond its normal scope of application.

Therefore, according to this position, party autonomy can legitimately act as a source of extension of the international uniform maritime law to codify relationships otherwise excluded from its scope.

However, the above case-law comparative study shows that sometimes the Courts still take a restrictive position on the effects of the incorporation of a paramount clause, limiting the active role of the parties.

Despite the narrow approach that Courts tend to adhere to, it should be considered that the extension of party autonomy in determining the law governing cross-border contracts seems to be in line with the evolving trend of international maritime law.

From this point of view, implementing party autonomy would require new approaches and responses when revisiting the traditional legal institutes and principles to build a global perspective of maritime law.

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[61] Especially before the entry into force of the Hague-Visby Rules.

[62] Carbone, *Autonomia privata e forza "espansiva" del diritto uniforme dei trasporti* ..., 1053 ff.