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Electronic and variorum jurisprudence
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JUDICIAL REGIME OF THE BILL OF LADING IN CONTRACTS OF INTERNATIONAL CARRIAGE OF GOODS BY SEA
(Synthesis)

Key Words: *Transferability, negotiability, property, evidence document, transport title, commercial title of value, types of Bills of Lading, Electronic Bill of Lading, Electronic Bill of Lading Systems, interpretation of Bills of Lading, parties' liability, liability exemptions, jurisdiction, arbitrage, carrier, dangerous goods.*

ARGUMENTUM

The rapid development of commercial changes worldwide imposed another approach of international commercial relations and international economic reports, which generated development in an intense rhythm of electronic means of communication, of transports, especially naval ones, requiring a major revision of rules in the international commercial practice.

According to the two phenomena, that of globalisation and that of international judicial integration, promotion of rules and principles of a civilised trading, satisfying the interests of individuals and human communities and improvement of maritime transport document which are used, unanimously accepted desires, which the present stage of development worldwide imposes to international organisms in order to standardize the forms and rules governing international trading.

The adoption of uniform rules for governing international contracts for carriage of goods by sea will also promote judicial security, improving efficiency of the international transport of goods and facilitating new opportunities of access for parties and markets which were previously remote, playing a fundamental part in promoting trading and economic development, both internally and internationally.

In practice, maritime international transports are usually used as standard contracts, based on pre-established clauses, which are the essence of systematic customs in that particular field. Judicial instruments, proving the existence of maritime transport contracts of goods are transport documents, the most important one being the Bill of Lading. The Bill of Lading is the most important document of transport of goods by sea, due to the fact that it represents at the same time the merchandise which is transported and the transport agreement. If carriage of goods is performed without a previous existence of a contract of carriage of goods by sea – particular case of liner voyages – the Bill of Lading represent the contract of carriage in itself.

The Bill of Lading is a title for the right which is incorporated in it and at the same time, an evidence title regarding the Charter Party. The essential characteristic of this type of document is negotiability or transferability, a characteristic which provided an important part for the Bill of Lading regarding international trading and documentary credit.

Generally speaking the Bill of Lading received three main functions: that of an

evidence document, that of a title of transport and that of a representative title for the merchandise which is carried.

One of the traditional functions of the Bill of Lading, that of evidence document, is that of presenting the precise quantity and apparent condition of merchandise at the moment of taking the cargo from the sender and getting it on board the ship including in the content declarations of the exporter regarding the quantity and description of goods loaded and the condition in which they were received by the carrier.

The Bill of Lading which will be issued, after taking the merchandise for transport by the carrier or after the goods will be loaded on board the ship should be in strict conformity with the terms of this agreement, representing a memorandum by stating the conditions of the contract of transport which is almost always accomplished before signing the document. Due to the fact that the issuance of the Bill of Lading is subsequent to the agreement between the charterer and the ship owner, from a legal point of view, the Bill of Lading is an evidence of the existence of the contract of transport.

The Bill of Lading, as a representative title of the merchandise, it represent a document of payment, acquiring this characteristic due to the clause “document of payment” or “document of acceptance” written in the contract of international trading, therefore being the document which provides to the bank institution, respectively to the buyer, the best guarantees regarding the fulfilment by the seller of his contractual obligations.

The three functions of this document of transport are extremely important in the development of the entire process of selling-buying in the international maritime trading; being compulsorily necessary legislation modern modifications which are meant to correlate and standardize the judicial regime of documents of the international transport of goods by sea.

This doctorate thesis approaches a specially important subject in the private international law, with countless theoretical implications and a vast practical applicability, more precisely, an analysis of the present situation of the international transport of goods by sea and it anticipates the natural evolution in this field, in the context of contradictions and deficiencies demonstrated by the jurisprudence in the field.

Theoretical fundament of the chosen subject derived from the necessity of a clarification, through the analysis of an internal law, but also of a comparative law, of countless judicial aspects which this subject arises, due to the existence related to the rich and varied legislation, as well as a complex jurisprudence, conveying a vast field of analysis and imposing the performance of correlations and systematisations.

Theoretical importance is strengthened by the fact that this paper has a monographic character, in the sense that the subject wasn’t until now the object of a scientific dedicated work, this subject being covered, at least in the Romanian law, only by some limited synthesis analysis included in some speciality treaties, as well as by divers articles published in specialized magazines, which only cover restricted aspects of this field.

From a practical point of view, the importance of the chosen subject is given by the fact that it doesn’t have a vast application in the jurisprudence and legislation, analysing contracts for the maritime international transport and especially document for carriage of goods by sea, Romania being a country with an important part in the field of maritime transport due to the direct access to the Black Sea.

CHAPTER I
General Considerations regarding the Bill of Lading

The evolution of the Bill of Lading was marked in time by the spectacular evolution of maritime transport and commercial trading, with a continuous improvement and adapting to necessities or interests of cargo owners and carriers.

Around the fourteenth century, the Bill of Lading represented a document of reception, a receipt issued by the carrier, non negotiable, for the cargo received from a trader. Back then, this document contained declarations regarding the type and quantity of good loaded and the condition in which they were received.

Previous experience led to the introduction in the document of terms of the contract of transport in order to solve disputes which appeared inevitably between owners of the cargo and the carrier. In the eighteenth century, the Bill of Lading obtained the characteristic of being negotiable by endorsement in order to cover the needs of those traders who wanted to dispose of the their good before the ship reached the destination. When traders wanted to create a judicial mechanism through which actions over the cargo could be undertaken before it reaches the destination, the Bill of Lading acquired the characteristic of representative credit title.

The necessity for a coherent legislation in the field was solved for the first time by adopting the Harter Law, legislated in the United States in 1893. Harter Law solved the problem of the carrier's liability by making a clear distinction between errors in navigation and management of the ship and errors in the care and maintenance of the cargo.

Reform and unification of legislation focussed on the creation of an international model of Bill of Lading which should establish particular minimum standards regarding the ship owner's liability. This was later possible in Brussels on the 25th of august 1924, by adopting the International Convention for the unification of certain rules regarding the Bills of Lading known as the Hague Rules. Brussels Convention was not conceived as a code to regulate transport of goods by sea, the intention being to unify certain rules regarding the Bill of Lading, establishing minimum obligations for the carrier, maximum immunities and the limit of his liability.

For the first time in the evolution of legislation related to maritime transports of goods, the carrier's obligations have been regulated, clauses of exemption of the carrier's liability, limitation of the carrier's liability, overcoming limits of the carrier's liability, types of transport covered by rules, carriage of cargo on deck, the notion of deviation, dangerous cargo as well as cargoes exempted from the provisions of these rules.

After 40 years of usage, while the dissatisfaction of senders regarding the allocation of responsibility for the loss or damage of goods in maritime transport continued to be expressed by private trading organisations in several countries, revision of these rules was supported internationally.

In this context the conclusion was that The Hague Rules should be amended through a Protocol, in such a way as not to disturb the general scheme of the Convention. In February 1968, an agreement was reached regarding the final text of amendments to Hague Rules, called the Amending protocol of the International Convention for the

unification of certain rules regarding Bills of Lading and known under the name of Hague-Visby Rules.

The Harter Law (in USA-1893), Hague Rules (1924) and later Hague-Visby Rules (1968) tried, as much as possible, to be fair for both parties, but none of them satisfied the interests of the cargo owners even if after the Protocol in 1968, actions against the carrier could have been based not only on contractual liability but also on criminal one.

Due to the fact that Hague and Hague-Visby Rules were mostly favourable for ship owners and not fair for cargo owners, it was decided to introduce an equitable system to govern carriage of goods by sea, adopted under the name of "Convention of the United Nations for carriage of goods by sea" known as the Hamburg Rules.

Hamburg Rules extend applicability of provisions regulated by the Hague and Hague-Visby Rules and they also regulate new aspects imposed by the development of maritime transports, respectively carriage of cargo on deck and live stocks and, very important, the problem of jurisdiction and arbitrage, judicial regime of the Bill of Lading in international contracts of carriage of goods by sea being properly modified.

Due to the fact that following the apparition and application of the Hamburg Rules, and also the apparition and development of multimodal transport and of electronic documents of transport, a number of states adopted unilaterally a hybrid regime Hague – Hague-Visby – Hamburg, details of which differ from one stat to another, worldwide situation of maritime transport of cargo complicated a lot. In an attempt to prevent further fragmentation of the judicial regimes, but also for international standardisation of these, the General Assembly of the United Nations disposed the signing in Rotterdam, on the 23rd September 2009, "The Convention regarding contracts for international transport of goods totally or partially by sea", known under the name of Rotterdam Rules.

Rotterdam Rules approach in a complex way the problem of international transport of goods, being emphasised by the extension of the applicability of provisions regulated by the Hague, Hague-Visby respectively Hamburg Rules, but also by regulating some new aspects imposed by the development worldwide of maritime transports, also, that of the usage of the electronic Bill of Lading and regulation of the multimodal transport, representing the object of research in this thesis.

CHAPTER II
Judicial Regime concerning International Maritime Transport of Cargo based on Bills of Lading

For a correct understanding of the judicial regime regarding the international maritime transport of cargo based on Bills of Lading, chapter II of the doctorate thesis, analyses, through comparison, basic regulations on the subject, from International Conventions and Protocols, as it follows:

- International Convention for unification of certain rules regarding Bills of Lading adopted at Brussels, on the 25th of august 1924, known under the name of Hague Rules;

- Amending Protocol of the international convention for the unification of certain rules regarding Bills of Lading adopted on the 23rd of February 1968 in Brussels, known under the name of Hague-Visby Rules;

- United Nations Convention regarding carriage of goods by sea, adopted on the 30th of March 1978 in Hamburg, known under the name of Hamburg Rules;

The object of The Hague and Hague-Visby Rules was to protect the cargo owners and to unify the multitude of existent regulations which contained varied clauses of exemption and limitation of liability of maritime carriers, which gave to Bills of Lading the character of a non liability contract.

According to provisions in The Hague and Hague-Visby Rules, the carrier will be obliged before and at the beginning of the voyage to try to bring the ship in a seaworthy condition, to be manned with a crew, equipments and proper provisions for the ship and the properly maintain holds, refrigerating rooms and cooling chambers and all other parts of the ship in which goods are carried, making that safe for the reception, carriage and care for the goods.

Application of Hague and Hague-Visby Rules has as a basis the Bill of Lading, the document which covers the contract of transport. Therefore, article I (b) stipulates that the Rules apply “only to contracts of carriage covered by a Bill of Lading or similar title of value, if such a document makes reference to carriage of goods by sea, including any Bill of Lading of similar document as previously mentioned, issued under or according to a Charter Party, from the moment when that Bill of Lading of similar title of value regulates relations between the carrier or the owner of those.”

The apparition in March 1978 of the United Nations Convention regarding the carriage of goods by sea, known under the name of “Hamburg Rules”, determined a few major changes of the judicial regime of the Bill of Lading.

Within the Rules there is a notion of “effective transport”, which is defined as “any person to which performance of the carriage of goods was entrusted, or at least part of it, by the carrier and includes any other person to which such an activity was entrusted”.

While The Hague and Hague-Visby Rules apply only “from tackle to tackle”, the Hamburg Rules are meant to operate on the whole period “during which the carrier is in charge of the goods from the loading port, during transport and up to the port of discharge”.

Hamburg Rules adopted an affirmative rule of responsibility based on the argument that the carrier’s liability must be based exclusively on mistake, annulling in this way the list of exceptions from The Hague and Hague-Visby Rules.

Another new element is eliminating the exemption of the maritime fault, from The Hague and Hague-Visby Rules, referring to the error in navigation or management of the ship, this exception and the obligation of prudency for the carrier about the cargo creating many claims during the application of the two mentioned rules.

The problem of jurisdiction and arbitrage, nonexistent in the Hague-Visby Rules, is treated properly in the Hamburg Rules, the claimant having a vast range of courts to choose from in order to initiate judicial procedures or arbitrage ones.

CHAPTER III
Judicial nature of the Bill of Lading and its Functions

Judicial nature of the Bill of Lading and its functions are analysed in detail in chapter III of the doctorate thesis, having as a base a thorough research of the specialised literature in the field as well as a complex jurisprudence. According to the specific doctrine, the Bill of Lading is the most important document for carriage of goods by sea, by the fact that it represents at the same time the cargo which is being transported as well as the transport agreement. The fact that it represents even the cargo which is transported, conveys to the Bill of Lading the name of "representative title of credit", by this a judicial mechanism being created so that cargo documents may be issued, before it reaches the destination.

The Bill of lading represents a title which concerns the right incorporated in it and, at the same time, an evidence title regarding the Charter Party. As a title of circulation, the Bill of Lading is an autonomous title and literally only in the report with the obligation of releasing the cargo and disposal over it. As a title of value, the doctrine assimilates the Bill of Lading to the effects of commerce and especially bill of exchange. It represents the cargo described in it, the regime of its transfer between people being a common regime of titles, and rights which derive from it are autonomous and literal. As a literal title, the Bill of Lading issued and signed by the carrier conveys him with the quality of debtor for the obligations comprised in the title.

Regarding the autonomy of rights which derive from the Bill of Lading, this, as opposed to the bill of exchange which is an abstract title of credit, is a causal title of credit. The carrier obliges himself to carry cargo according with provisions of the contract of carriage and with the law governing this contract.

The essential characteristic of this document is negotiability and character of transfer, characteristic which conveyed to the Bill of Lading an important role concerning international sells and documentary credit. The Bill of Lading is not negotiable, in the same way as other titles of value, such as a bill of exchange, in case of which the guarantor possessor in good faith requires a better title than that of the guarantee. The guarantee of a bill of exchange assumes to the guarantor a real obligation, even if his right is affected by vices, in exchange, the possessor of the Bill of Lading, by its endorsement cannot transfer to the endorsee a better title than his own.

The Bill of Lading represent a symbol of the carried goods, becoming special as opposed to the bill of exchange especially by the fact that it is a representative writing of the goods, and its transmission has the same effect as physical delivery of cargoes and even if the transfer of merchandise is performed directly of by endorsement of the Bill of Lading, the buyer in good faith cannot obtain property over those with no available title of the seller.

The Bill of Lading is not a title of property, the right which are transferred by the Bill of Lading are credential rights and their owner cannot pretend the plenitude of attributes which characterize property but only the particular transmitted right.

Generally to the Bill of Lading are attributed three main functions: that of evidence document, that of title of transport, and that of representative title of the carried

goods.

As an evidence document, the declarations made by the sender, regarding quantity and description of the loaded goods and the stat in which they were received by the carrier, are especially important for commercial transactions because they can form the basis of any cargo claim made by the receiver in case this is represented by the shortage in cargo or if the goods were deteriorated when discharged.

Even if these characteristics from a Bill of Lading are ”prima facie” proof against the carrier, they become permanent in favour of an assignee in good faith of the Bill of Lading if this “was based on the description of goods in the document”. This function of the Bill of Lading has implications highly important in the international maritime transport.

The Bill of Lading allows to the seller to cash the value of the delivered cargoes only if this is in full compliance with the imposed requirements by acridities or documentary letter of credit. From here it resides also the importance which it has, for the loader, obtaining a Bill of Lading which should not contain remarks regarding the quantity and apparent condition of the merchandise.

This function of the Bill of Lading is as important for the buyer of cargo who wishes to have full confidence in the content of the Bill of Lading because on its basis he pays the price for the goods before receiving the cargo. In this context, the carrier looses the right to demonstrate in front of a possessor of the Bill of Lading, other than the shipper, that goods were not received for loading in the quantity and apparent condition mentioned in the Bill of Lading.

Usually, before loading goods on board the ship, there are negotiations between the charterer and ship owner, negotiations which could be finalized with the closure of a contract (either a Charter Party or a booking-note) or only a verbal understanding. The Bill of Lading which shall be issued, after taking goods for carriage by the carrier or after they will be loaded on board the ship, it constitutes a memorandum which takes the conditions of the contract of transport being always closed before signing the Bill of Lading.

Given that the issuance of the Bill of Lading is following to the agreement between the charterer and the ship owner, it is said that from a legal point of view the bill of lading is an evidence for the existence of the contract of transport. Because the Bill of Lading, in some cases, replaces the Charter Party, and in others establishes and demonstrates the clauses, the quality of title of maritime transport can be also attributed to it. The Bill of Lading, marking the moment of reception of goods, having a series of clauses and conditions for transport, fulfils the function of title of maritime transport.

As a representative title of the carried goods, the Bill of Lading favours the sell, because possession of the Bill of Lading provides a symbolic possession of the carried goods. The transfer of the Bill of Lading is a method to transfer the merchandise which is sold.

Transferring the title, the seller transmits to the buyer the rights provided by the document, respectively the right to pretend cargo in the port of destination and to dispose of it during the voyage. The owner of the rights has the cargo in his power and possession, which this one is on board the ship. These rights are materialised in the Bill of Lading, in such a way that transmission of the title represents a way to transmit the cargo sold, imposed by the specific conditions in which the object of the selling is situated.

If we admit that transmission of the Bill of Lading means transmission of the cargo sold, implicitly we should admit that this attires eligibility of the price. Transmission of the Bill of Lading is equivalent with the transmission of the cargo which is sold in such a way that the seller has the possibility to ask for the price in the moment of reissuing the document. The clause in the contracts of international sells "payment against the document" should be understood in this way, the document being the Bill of Lading.

Besides other compulsory mentions, the Bill of Lading should contain the date of the effective termination of the loading of cargoes written in it and to be freed only after the termination of the loading. This mention is important, because it conditions the documentary credit.

In the acridities there are always conditions regarding the date of the Bill of Lading. The term of delivery established by the parties to the contract will be found in the acridities as a limit term up to which Bills of Lading may be dated. International practice in maritime transports condemns the issuance of predated or anticipated Bills of Lading, generally considering that this practice represents a fraud which involves carrier's liability.

CHAPTER IV
Compulsory Content of the Bills of Lading

Compulsory form and content of the Bills of Lading are very important elements on which the judicial regime applicable to those depends. The form of the issued Bill of Lading is of a special interest for ship owners, establishing the terms in which carriage of goods is agreed upon, carrier's liability to its owners, the method for solving claims, etc., but also for cargo owners who may ask for the Bill of Lading to be in a particular form in accordance with the purpose of their selling or buying contract or with the terms of a letter of credit.

The traditional rule for the carrier to issue the Bill of Lading, and the owner of the cargo to accept the usual form of the Bill of Lading of the carrier, is not updated anymore, the Charter Party under which the ship is operating establishes usually who has the right to control the form of the Bill of Lading which should be used. Usually, where the Charter Party mentions exactly what form of Bill of Lading should be used, any attempt of the charterers to present a Bill of Lading in a different form will be considered as an illegal instruction which the ship owner may reject.

When the Charter Party does not specify a particular form but it mentions the obligation of the Master to sign a Bill of Lading "as presented", the charterer decides the form of the Bill of Lading. The Master is not forced to sign Bills of Lading "as presented" if those particular Bills of Lading contain unusual terms or which are not in accordance with the Charter Party. Issuance of a Bill of Lading in a particular form could be vital for charterers' business, issuance of the Bills of Lading with a prepaid freight being essential for maintaining the business.

In the international maritime transport of goods there is an enormous variety of Bills of Lading. The great majority of Bills of Lading receive a "Code Name" often creating confusion regarding the name given to different Bills of Lading. Several times

the same Bill of Lading has a different name, or, the same name is given to different Bills of Lading which needs a special attention during negotiations.

The type of Bill of Lading is mainly characterized by the traffic and type of goods which are carried. Forms of Bill of Lading are issued by different authorities such as: BIMCO (Baltic and International Maritime Council), maritime transport companies, loaders, charterers, senders, etc.

Usually, standard forms of Bills of Lading have a "first page" content in which compulsory mentions are specified which should be contained by the Bill of Lading and a "verso" content which contains conditions of the Bill of Lading (means which should be used in order to perform transport) as well as derogatory clauses (exemption) by which the liability of the contracting parties is exempted or limited. Any Bill of Lading has written on it in the upper part the name of the code which it represents, such as: Liner bill of lading; Congebill Bill of lading.

The Bill of Lading, in its nature, represents a circular title, a title of value, by the nature and its purpose indicating its compulsory content. Lack of any compulsory mentions in the content of the Bill of Lading could have as a consequence the impossibility of administration of the evidence, or, even more serious, the inefficiency of the document, making it possible to result even in the annulment of the Bill of Lading.

According to the information mentioned above, forms used by the majority of carriers and also the doctrine on the issue, this document must contain: the name of the shipper; consignee if he is named by the shipper; address of notification; name of the ship; port of loading mentioned in the contract of maritime transport; description of goods by the shipper; marking of goods; number of parcels; volume and weight of goods; state and apparent condition of goods; declaration, if it's the case, that goods will be or could be transported on deck; the freight paid in advance or payable at destination; time used for loading; number of original copies of the Bill of Lading; place and date of issuance of the Bill of Lading; signature of the carrier or person acting in his own behalf.

Content of the Bill of Lading differs according to the means of transport, (in the "tramp" system, with liner ships or multimodal transport) on the type of the goods which are carried (oil products, agricultural products, etc.) and last but not least on the ship owners. One of the most used and issued Bills of Lading in the international carriage of goods by sea is Congebill 2007, issued by B.I.M.C.O. for transports in the "tramp" system.

In order to fill in data in the Bill of Lading, several sources of information are available such as: the shipper, inspections report on the cargo, origin/quality certificate, reports for determining the quantity of cargo and the embarco order which could be used both by the carrier and by the buyer in order to verify compliance of the data written in it with reality.

CHAPTER V
Optional Content of the Bills of Lading

The same as for the Charter Party, there is a compulsory content and an optional content of Bills of Lading, the former governed by the law which determines the form and content of the document, the latter having the role of completing compulsory

assertions.

If data regarding the goods, freight, destination, etc. resemble in almost all types of Bills of Lading and they are mentioned on their first page, conditions of transport contains in those differ in case of transport in „tramp" system from those from the liner ships transport, multimodal transport or mixed transport.

A Congebill 2007 Bill of Lading, used in international carriage of goods by sea in the „tramp" system contains on the verso the following conditions and clauses of transport: incorporation clause, general Paramount clause, general average, New Jason clause and collision clause with both parties' fault.

Unlike the Bill of Lading used in case of international carriage of goods by sea in the "tramp" system containing only 5 clauses regarding transport conditions, in case of transport with liner ships the CONLINEBILL 2000 type Bill of Lading, the most used type of Bill of Lading, contains 19 clauses, presented in detail in the doctorate thesis, with the mention that these clauses represent specificity in the liner transport and especially of the containerized transport.

Among the most significant clauses we could mention liability for transport between the port of loading and port of discharge, transport field, liability for pre-transportation or consecutive transportation, loading and discharge, retention right and stowage.

The Bill of Lading used in the international combined transport and multimodal transport of goods by sea, type MULTIDOC 95, one of the most used negotiable Bills of Lading in the international combined or multimodal transport of goods, contains 25 optional clauses, and among these, 11 clauses are common with those in the BIMCO liner CONLINEBILL 2000 Bill of Lading, the other 14 clauses specific for the multimodal international transport of goods, presented and explained also in the content of this doctorate thesis.

CHAPTER VI
Types of Bills of Lading

In order to clarify correctly and objectively the problems which arise from the existence of an important diversity of types of Bills of Lading, some supplementary explanations are necessary related to these.

Therefore, the charterer, respectively the shipper of the goods, has the contractual obligation to indicate or not a particular person who should receive the cargo, having the quality of a consignee. From this obligation to "indicate or not" the consignee, resides the fact that we may be dealing with several types of Bills of Lading.

According to the way of transmission of property the document could take the form of nominative titles, at order or to bearer, each of these ways providing different ways of transfer, determining in the same time obligations or characteristics allowing a differentiation of the type of the document issued.

Nominal Bills of Lading represent nominal titles of credit in maritime transport of goods, which are issued by the ship owner, the master of the ship or the ship owner's agent, in all cases at the request of the charterer, in favour of a certain nominated person. On the other part this type of Bill of Lading present the disadvantage that negotiation and

transfer of the property written in it cannot be performed but through an act of transferring the credit, act which should be communicated to the master of the ship, if not, he holds the cargo on board the ship for the person indicated in the Bill of Lading.

The Order Bill of Lading represents the type of Bill of Lading most often used in maritime transport of goods, he presents the title of credit issued by the ship owner, the master of the ship or the ship owner's agent, upon the request of the charterer, upon the order of a certain person (either the consignee of the goods, or even upon the request of the shipper), which gives then the possibility to be backed and endorsed in favour of another person than the one indicated in the Bill of Lading. In order to be considered a title at order transferable by guarantee, the Bill of Lading must expressly provide the clause "at order", this mention giving to the Bill of Lading the commercial and judicial characteristic of property conveyed by the different countries legislation. Order Bills of Lading may be "endorsed in full" and then they carry the name of the person empowered to cash it, or "endorsed in white" and then the person to which the acting Bill of Lading should be transmitted is not indicated, in this way, as a title to bearer.

The Bill of Lading to bearer represents a title of credit issued by the ship owner, the master of the ship of the ship owner's agent, upon the request of the charterer, in favour of a person who is not nominated in the Bill of Lading. The Bill of Lading to the bearer is negotiable by excellence but it presents the disadvantage that it entitles any one of its bearers no matter the way which let to its possession, loss or theft, to claim possession of the goods, and the master is hold to surrender cargo to the person who presents the document, without an obligation to verify if the possessor of the Bill of Lading is the legal one or not. This disadvantage makes this type of Bill of Lading to be rarely met in the practice of maritime transport.

According to the moment of loading on the ship the speciality doctrine identifies two types of Bills of Lading, respectively Bill of Lading for Cargoes received for loading and Bill of Lading "loaded" on board.

One disadvantage of the Bill of Lading for cargoes received for loading stands in the fact that, unlike the Bill of Lading for cargoes loaded, it does not represent cargo loaded on board the ship, but the cargo stowed on shore and waiting to be loaded on a ship. This type of Bill of Lading only makes proof that the goods were delivered to the carrier in order to be loaded on the ship.

The "loaded" onboard Bill of Lading is required as a document of payment in the majority of selling/buying contracts and letters of credit because there is a certainty that the cargo written in the Bill of Lading was loaded on the designated ship. It will indicate the number, marks, weight, port of destination as well as the place on the ship where the cargo is loaded, any inconsistency regarding the quantity of cargo written in the embarco order, improper condition of cargo, or of packages could cause prejudices to the carrier, by completing a "clean" Bill of Lading, with no mentions, according to which it will respond to the acquirers of this representative title.

According to the way in which the Bill of Lading is written, in current practice there are four types of Bills of Lading which appear in current practice: the Bill of Lading signed under protest, Direct Bill of Lading, Multimodal Bill of Lading or combined and fractioned Bill of Lading.

In case of Bill of Lading signed under protest, the master of the ship, in the situation in which there are irregularities at loading regarding the cargo or its package,

irregularities which should make the object of issuing a dirty Bill of Lading and the shipper refuses to take delivery of such a Bill of Lading, they may issue a clean Bill of Lading signed under protest. In order to eliminate his responsibility, after signing the Bill of Lading, he will write a protest regarding to the state of the goods and packages which he would deliver to the local notary, case in which responsibility will belong to the sender.

A direct Bill of Lading is issued in the situation when goods are carried successively with several ships or in case of a combined transport and it covers the whole distance of transport from the place of loading to the place of discharge.

The multimodal Bill of Lading advantageous for the shipper, because his relation is only with one carrier, the main one, who is responsible for the carriage and delivery of cargo to the final consignee, in conditions of quality and quantity according to those mentioned in the Bill of Lading. This means of direct transport implies responsibilities for the carrier, because it deals with hiring intermediary means of transport on his own account and risk, fact which ship owners avoid as much as possible such transports.

In commercial practice there may be situations in which loaded cargo is to be delivered to more consignees, because from the moment of loading and up to the arrival of the ship to destination, the owner of the goods negotiated the sell with several buyers, case in which delivery to those is made difficult by the fact that there is only one Bill of Lading, making reference to only one quantity of cargo. In order to facilitate selling and cashing prices before the buyer receives the goods, commercial practice created the fractioned Bill of Lading.

Just like the main Bill of Lading, the fractioned Bill of Lading is a title of value (of credit, receipt of value) negotiable and which it may be nominal, to order or to bearer.

According to the continuity of transport, types of Bills of Lading used are Bills of Lading without trans-boarding and Bills of Lading with trans-boarding.

According to the person who issues the Bill of Lading, in practice Bills of Lading issued by carriers are used, also Bills of Lading issued by agents of the carrier and Bills of Lading issued by multimodal operators and international houses of expedition. Bills of Lading issued by the international houses of expedition or multimodal operators cover the entire chain of transport, respectively the whole distance from door to door, being issued either in one's own name or on behalf of some ship owners. When it is issued on one's own behalf, the house of expeditions should be a member FIATA and the Bill of Lading should be approved by it. This type of Bill of Lading is called "FIATA Bill of Lading". Only these types of Bills of Lading are negotiated by banks. Bills of Lading issued by the houses of expeditions which are not members FIATA – house bill of lading – cannot be negotiated if this is not expressly mentioned in the letter of credit.

According to the state of goods, two types of Bills of Lading are used, respectively the Clean Bill of Lading (no reserves) and the Dirty Bill of Lading, both especially important in commercial transactions in international maritime carriage of goods. If in the Bill of Lading goods were identified according to indications given in written by the shipper, leads to no reserve over the state and condition of the goods, the Bill of Lading makes proof up to contrary, that loaded goods have been as they were identified in the document, the clause "loaded in good state and conditions" printed on the document characterizing the Bill of Lading as a (clean bill of lading).

Knowing the serious consequences which may result from signing a Bill of Lading in which cargo is identified according to the data provided by the shipper, ships' masters, usually insert in the Bills of Lading, reserves concerning goods' specifications (nature and their type, number of parcels, weight, content, marks, quality, type and stat of the package, etc.), reserves which became clauses of style being continuously present in Bills of Lading.

According to the way of performing maritime transport, in practice the conventional Bill of Lading is used for mass goods which are carried with the ships exploited in the "tramp" system, the Line Bill of Lading and Multimodal Bill of Lading in case of containerised maritime transport.

Development of informatics systems and their massive usage in the act of international commerce, but also the celebrity which does not wish to perform commercial transactions, created the necessity for use in commercial practice of a new type of Bills of Lading, electronic bill of lading.

There have been numerous efforts to find the electronic form of the bill of lading, in order to introduce the electronic bill of lading as an instrument having all functions which are found also in the document and which should be in an acceptable for traders, bankers and those who provide guaranteed loans, carriers and cargo senders but without having succeeded for now to eliminate all risks of fraud.

Attempts made in present to create an electronic bill of lading brought problems such as the arguable status of creditors, level of acceptability according to the letter of credit, transparency and high costs for users.

As it was mentioned in chapter III, the bill of lading fulfils three functions: it is a contract of transport, a proof of receipt of goods and title of property. All three functions must be shown in the electronic form for the bill of lading to be accepted as a substitute of the paper document.

Functions of confirmation of receipt and an evidence document of a contract of carriage may be easily fulfilled by electronic means because these are an essential transfer of information.

The function of title of property which the bill of lading has is the last function which must be shown electronically and it denotes three usages of bills of lading.

Laws referring to transport may regulate the first two functions, but the last one falls into the sphere of laws regarding guaranteed transactions. If laws referring to guaranteed transactions do not offer sufficient rules of safety to guide the bank or other possible loaner during the process of creation and improvement of a guarantee for an electronic title of property, showing a document of property in an electronic format would not be possible.

CHAPTER VII
Rules of Interpretation of Bills of Lading in Maritime Jurisprudence

Among the numerous rules of interpretation used in the analysis of Bills of Lading the following eight rules presented in this chapter, frequently encountered in maritime jurisprudence, are especially pertinent for Bills of Lading and they apply only if bills of lading are ambiguous.

There are: “contra proferentem” rule, “ejusdem generis” clause, clauses of the strict construction of the exception, priority of the terms which are written by hand as opposed to those which are printed, reference to the usage and custom, consideration for circumstances, opposition to imposing provisions which appear with a very little typing, and validation of terms which must be analysed.

According to the “contra proferentem” rule in case it is unclear, clauses of a contract are interpreted, usually against the party who proposed them. In the situation in which the sender uses his own form of Bill of Lading, its interpretation will be against him.

Ambiguity in a bill of lading is sometimes solved by applying the “ejusdem generis” rule of the contractual construction, by which when more words preceding a general word in a limited understanding, the general word will not extend the effect beyond “ejusdem generis” subjects (belonging to the same class).

Exception clauses in bills of lading which exclude negligence should be strictly interpreted. The clear meaning of the exception, nature or object of the contract will be interpreted as a whole and they will be all taken into the interpretation of such clauses.

Contractual limitation exceptions from responsibility for negligence are especially emphasised in the interpretation of clauses with the intention to exonerate contractors for their own negligence and for that of their service providers and their agents.

Where principles are fulfilled, the clause will enter into use based on the fact that by exonerating the contractor of the liability for negligence, it should have been within the reasonable limits of the agreement of the parties when they included the clause into their contract.

Hand written clauses or typed clauses on a bill of lading have priority as opposed to printed clauses for two reasons:

- written clauses are following the printed ones;
- written words are the immediate language selected by the parties themselves in order to express their meaning while printed words are a general formula applicable to all parties which could use the form of the bill of lading.

Where the rule does not apply, the special clause will dominate the printed clause, the special clause in the bill of lading having priority only when it comes into direct contradiction with the printed clause.

In commercial transactions, the external proof of habits (customs) and usage is admissible in solving the ambiguity. Therefore, habits and practices before loading and after discharging in ports of discharge may be taken into consideration by the court as part of the contract of transport even if it does not make reference to them especially in the bill of lading.

Validation rule of all terms in the bill of lading is associated to article 4.5. in UNIDROIT 1994/2004 Principles for International Trading Contracts. Contractual terms will be interpreted in such a way to validate all terms, more than to privatize some of them from the effect. Instances take into consideration in case of bills of lading a general principle of contractual interpretation, referring to the necessity of focusing all efforts possible to validate every term of the agreement, better than to adopt a construction which would deprive one or more terms from any meaning and effect.

Dominant clauses (known also as integration clauses, fusion or replacement) in

bills of lading have the purpose to transform the bill of lading into an exclusive embodiment of the agreement of the parties. Factors such as: the degree of knowledge and acceptance of the clause by the sender, the "contra proferentem" rule and the previous course of transactions between the parties, it plays an important part in judicial analysis of such provisions.

A typical dominant clause mentions the following: "All agreements or employments regarding the payment of the freight for sending the goods are prevailed by this bill of lading, and all its written terms, typed, stamped or printed are accepted and agreed by the sender to be compulsory as if they were signed by the sender, any contrary local habit or privilege having no value, and the consignee, owner of the goods or the bearer of the bill of lading are hold completely as if it was signed by them".

The dominant clause actions in both directions and could be a real disadvantage for the carrier. In order to prevent the carrier from making reference to his announcement or to the possible changes of the freight rate or its tariffs which could announce regarding the changes of a route of the voyage or could exonerate the carrier from liability for delays or changes in programmes.

CHAPTER VIII
Parties' Liability in performance of contracts of carriage of goods by sea based on Bills of Lading

Bills of Lading by their content have a determining regime in parties' liability in performance of contracts of carriage of goods by sea. In a Charter Party contract based on a bill of lading, judicial reports between parties are established between the ship's owner, charterer, carrier, shipper and consignee according to legal provisions concerning responsibilities and obligations of parties for this type of contract.

Parties to the contract of maritime transport performed with liner ships in which carriage is performed only based on bills of lading, are "the carrier", on one hand liable to the ship owner in the Charter Party contract which assumes performance of carriage of goods, and "shipper" on the other hand, corresponding to the charterer in the Charter Party contract assuming to provide the cargo and to pay for the freight.

From a nautical point of view, performance of carriage of goods by sea is compiled of three successive operations, respectively loading of cargoes, their transport and their discharge.

Reported to the three operations mentioned above, parties' liability in performing the contract of carriage of goods by sea may be classified in three main categories:

- Parties' liability before loading as well as during the loading of cargo onboard the ship
- Parties' liability during the voyage at sea
- Parties' liability at loading and delivery of cargo.

Parties' liability before loading as well as for loading cargo onboard the ship included the shipper's (charterer's) and carrier's liability.

Shipper's (charterer's) liability before loading as well as during loading of cargo onboard ship, has as an object preparing material and judicial necessary conditions

for performing transport, respectively the choice of the means of transport, surrender of cargo, loading cargo, judicial action for conceiving and issuance of the document of transport and payment of the corresponding price.

The shipper has the obligation to verify the means of transport available and in case he notices any failures or malfunctions of such means, these must be notified to the carrier before starting loading the cargo. In case the carrier maintains the means of transport of refuses its replacement, it is compulsory for the shipper to make the necessary mentions about this in the bill of lading, inserting mentions having as a judicial effect inclusion of carrier's liability.

Date and time mentioned in the contract between parties for surrender of cargo must be strictly obeyed, any delay being able to bring penalties, pecuniary sanction having the name of lay days. The quantity of cargo, weight, volume, and number of pieces as well as any other specific elements are very important elements in choosing the type and capacity of the ship, in order to calculate the freight and taxes corresponding to the carriage etc.

The manner of presentation of the package is especially important because a non corresponding package gives the right to the carrier to refuse delivery of cargo, or if he accepts it to mention all deficiencies noted in the bill of lading, and this form a judicial point of view leads to exoneration of liability of the carrier for losses or deteriorations of cargo during transport. In case of particular goods, such as, dangerous goods, for which provisions provide loading on deck, or cargoes which, according to usages in maritime trading, are usually loaded on deck and shippers' approval is not necessary, it is enough for the words "loaded on deck" to be written clearly and distinctly on the bill of lading.

Another important obligation of the shipper (charterer) is that of collaboration with the carrier in order to fulfil the document of transport, respectively the bill of lading. Declaration of the shipper must mention exactly the type of cargo, quantity, quality, weight, value, specifying the route, identification of the consignee and his address. He also has the obligation to attach to the bill of lading the necessary writings for the identification of cargo or fulfilment of some formalities such as the delivery papers, necessary specifying lists for an easy quantity and/or quality determination in the port of discharge, custom declarations, etc. Omissions, error, mentions incomplete or lack of sincerity of the shipper will result in sanctions usually represented by corresponding damages due to the carrier or accordingly to the consignee generated by the fault (negligence) of the shipper.

Payment of freight is an obligation which according to the general regime of the shipper from the moment of fulfilling the bill of lading and surrender of cargo in the carrier's detention. Payment of freight by derogation of those mentioned above may be put partially or totally in the carrier's responsibility by an explicit clause inserted in the bill of lading, changing the debtor being opposable to the carrier only with his acceptance. Also, inserting a clause in the bill of lading is conditioned by the correlated agreement of the shipper, if not being opposable to it.

Once the cargo is loaded onboard the ship and the bill of lading is issued, the charterer's liability during carriage by sea stops, liability from the moment when the ship leaves from port belonging to the ship owner (carrier) and his representatives.

Carrier's liabilities before loading the cargo onboard the ship and during the loading of cargo onboard the ship are bringing the ship into a seaworthy condition,

manning the ship with a crew, equipments and proper provisions and all due diligence necessary for the holds, refrigeration rooms and cooling chambers, as well as all the other parties of the ship in which goods are carried, to be proper and safe for the reception, carriage and keeping them safe.

Hamburg Rules extend the obligation of the carrier, this one being liable for “all measures” required “reasonable to be taken in order to avoid occurrence and consequences” of damages’ production.

As a general rule, the ship presented must be seaworthy. The obligation of the ship owner to have a seaworthy ship is stated by all legislations and is mentioned in all Charter Parties. When the ship loses her seaworthiness as a result of some risks excepted by clauses in the bill of lading or Charter Party, the ship owner is at fault for breaking the guarantee of the seaworthiness, if the ship begins a new stage of the voyage without providing a solution for the malfunctions. If only a part of the cargo was deteriorated by the ship’s unseaworthy condition due to a non-exemption cause, and the other part of the cargo was damaged by the unseaworthy condition due to sea perils, exempted from liability, the ship owner is liable only for the first category of damages (non-exempted causes).

The carrier has the obligation to load, manoeuvre, stow properly and carefully the goods carried and he may be forced to pay compensations for the damages caused to the charterer, if his employees stow the cargo improperly, so that the ship cannot be completely loaded.

The law imposes to the carrier the obligation to provide due diligence and to determine which are the nature and characteristics of the goods to be loaded, as well as to proceed with proper attention for their handling, notifying the shippers about any defect of the goods.

After bringing the ship to the place of loading and preparing the ship to take the goods for loading the ship’s availability is notified, by a written document issued by the master by whom it notifies the shippers that the ship is ready in all respects to load the cargo according the contract of transport.

Liability of the parties during the voyage at sea

The essence of the Charter Party contract is represented by the obligation of the ship owners to carry the loaded goods at destination. From this essential obligation several duties result for the ship owner which should be fulfilled during the voyage.

Some of the duties mentioned above are the personal obligations of the ship owner, and non fulfilment of these results in liability for these actions. Other duties are fulfilled by the master or other representatives of the ship owner, for the non performance of which the ship owner has, with some exceptions, a limited liability.

Liability of the carrier concerning the voyage

During the voyage the liability of the carrier is manifested in maintaining the ship in seaworthy condition, payment and maintenance of the crew, carriage of goods to destination in safe conditions, providing trans-shipment and fulfilling directly contractual obligations.

Maintaining the ship in seaworthy condition

Navigability of a ship could be “legal navigability” and “contractual navigability”.

The ship fulfils legal navigability conditions if she satisfies particular

requirements established according to international regulations regarding her construction and her equipment and which, if not satisfied, make it possible for the ship to be seaworthy considering both her normal usage during her voyage at sea, and the inherent risks which such a voyage implies.

In practice, it is not enough for a ship to fulfil legal navigability conditions, she needs to satisfy also requirement related to navigability imposed by the contract, meaning to be seaworthy to the port of navigation with the load provided in the Charter Party Contract.

Contractual seaworthiness is not appreciated "*in abstracto*", but "*in concreto*", meaning in report with that particular voyage required in the contract. Contractual navigability is determined according to the fulfilment of fixed conditions by particular technical norms.

Payment and maintenance of the crew

The ship may not carry goods without the contribution of those who are part of the crew. Payment of salaries and maintenance of the crew is a personal and unlimited obligation of the ship owner, directly assumed by him and he is a mandatory of him by fulfilling and signing the enrolment contract.

Providing trans-shipment performance

This obligation of the ship owner is encountered in case of direct bills of lading when goods are to be carried successively by several ship, with several carriers, to which, by contract, the ship owner – carrier assume the obligation to provide trans-shipment of goods on other ships and to support correspondent expenses. The ship owner who issued a direct bill of lading is liable for the whole carriage not only carriage with his own ship but also carriage by successive ships, if in the bill of lading was not mentioned otherwise.

Compliance with directly contracted obligations

During the voyage, special circumstances may hold the ship for the payment of some large sums of money. All obligations which the ship owner assumes in this way are personal obligations, for which is responsible with his own fortune, according to common right norms. For his personal obligations, the ship owner, respectively the carrier has an unlimited liability.

Liability of parties to the discharge and delivery of goods

The voyage ends through the arrival of the ship in port of place of destination mentioned in the contract or bill of lading, from this moment being able to speak about the ship owner's liability, charterer's respectively consignee's regarding the loading and delivery of goods.

Carrier's liability

For the ship owner (respectively the carrier) to exempt himself from the obligation that he assumed, he should be ready to unload and surrender cargo according to provisions in the bill of lading made by the person who will present this document. When the ship carries several types of cargo, the master must discharge in the place chosen by the receivers for the entire cargo. If, in the port there are several berths to which discharging may be properly performed, the master may choose any of these berths, when in the bill of lading was not mentioned a particular berth, but he is going to consider the consignees' best interests.

When the receiver does not come to take delivery of goods, the carrier may deposit them in the port of destination, from where they can be further on taken by their

owner. The carrier continues to be liable for the safety of goods, within the limit of obligations which belong to him according to the bill of lading, during the storage, payment of storage belonging to the owner of goods.

Consignee's liability

The consignee has the obligation to move the goods away from the ship as they are discharged on the quay in order to avoid their pilling up which would affect the normal rhythm of discharge. In case the receiver of goods does not fulfil this obligation, the carrier has the right to make himself these operations on behalf and risk of the receiver, having the right to ask "compensation for arrest", or "lay days", if these were established for the time lost in their performance. By clauses written in the bill of lading the owner may also reserve a right of retention over goods for all expenses and loss caused by non fulfilment of the consignee's obligations.

Characteristic elements of parties' liability in carriage performed by liner ships

In case of international carriage of goods with liner ships, loading, discharge and delivery of goods is provided by the ship's agents, and storage and delivery are performed on account of the cargo.

Liner ships may also load goods for ports other than those mentioned in the itinerary, providing trans-shipment, their carriage to the ports of discharge by using other ships, using direct bills of lading.

CHAPTER IX
Limitations and waivers of carrier's liability in the international carriage of goods by sea

Chapter IX, limitations and exemptions of carrier's liability in international carriage of goods by sea, is analysed in the doctorate thesis by using judicial regimes applicable in legal regulations' conditions in use.

Rules regarding contractual liability are according to the speciality doctrine, suppliant rules from which parties can derogate, in the sense of limitation or increasing the liability by contractual clauses. Introducing in the contract the limitation of liability clauses it produces before the prejudice for the creditor, further introduction, after producing the prejudice for the creditor, acquiring a different judicial interpretation, acquiring a different judicial interpretation, such as re-issuance of the debt from the creditor.

The Hague Rules limited the carrier's liability for loss or damage of cargo to 100 pounds value in gold per parcel or unit. Problems arose in many countries for the interpretation of terms such as "parcel" and "unit" as they are used in the convention. It was meant for the term "unit" to make reference to a unit of cargo, such as a crate, parcel or container, or to apply equally to unit freight, meaning the unit of measure used to calculate the freight. A supplementary issue arose in the application of the formula for parcels from the Hague Rules to containers, pallets and other devices of consolidation of goods, courts considering that where the content of a container is listed as separate article in the bill of lading, then each article must be treated as an individual parcel regarding limitation.

According to Hague-Visby Rules the carrier has a maximum limit of liability of

666.67 DST / parcel or unit or two DST / kilogram of gross weight carried, any sum is higher. This limitation sum is not compulsory if the shipper declares the nature and value of goods and it includes the declaration in the bill of lading. If such a declaration is made, the shipper gets a complete compensation except when the carrier proves that the evaluation is not real. In the member state of the International Monetary Fund, conversion of units DST in the corresponding national currency will be made according the rules of the Fund but, in case they are not members, the method of calculus will be determined by the state at cause.

According to Hague/Hague-Visby Rules, limitation of liability is for the loss or damage of goods. Hamburg Rules provide limitation of liability to “loss or damage” of goods as wee as to “delay in delivery”. The level of limitation from the Hamburg Rules are 835 DST per unit of expedition or parcel or 2,5 DST per kg, respectively 2.5 times the freight payable for the delayed goods, with the condition for this not to overpass the total freight payable based on the contract of carriage.

The carrier and the sender are free to agree upon superior levels of limitation as compared to those provided for the Hamburg Rules. After researching the decisions in litigations regarding the liability of contractors and especially of carriers, but also from reasoning of judicial accuracy, exempting clauses analysed are those referring to the ship, cargo and those due to other circumstances.

Exemption from liability clauses, both in Hague and Hague-Visby Rules, provide the number of 17 exemption clauses. The Hamburg Rules restrain the catalogue of exempted cases in Hague and Hague-Visby Rules to a number of four exempted situations which deny carrier’s liability totally or partially, conditioned by the non existence of the fault or negligence of the carrier, his agents or representatives.

The main exemption clauses regarding the ship, denying the liability of the carrier totally or partially are:

Clause regarding the guarantee for ship’s seaworthiness

As it was previously mentioned, as a general rule, the ship presented by the owner should be in seaworthy condition, proof of being unseaworthy should be administered by the claimant of compensations for damage, the ship owner should be force to make proof of due diligence for the ship to be in seaworthy condition. The exempting effect is conditioned by the fact that the carrier is held to make proof of the fortuity character of the way in which the ship lost seaworthiness, courts searching especially strict conditions in which denying liability may be considered to be legit.

Clause regarding “hidden vices” of the ship

Exemption of liability is possible, conditioned under the proving situation of fulfilling two conditions, respectively existence of hidden vice, the carrier having the obligation to make proof that its existence was impossible to detect and existence of proof that the hidden vice of the ship represents direct cause and necessary of damages suffered by the goods.

Clause regarding error in navigation or management

Exemption of liability is produced only regarding to damages resulted following errors in improper navigation of the ship, of the ship’s master or his agents as well as loading and failure in handling the cargo by the carrier’s agents which could affect the ship’s stability, errors in nature to endanger ship’s security. In all cases, the carrier’s fault concerning the cargo will be circumscribed to the term of commercial fault.

Error in navigation or management of the ship according to The Hague and Hague-Visby Rules is a concept which could lead to difficult interpretation problems. Error in navigation of the ship is a mistake, or negligence, or his agents endangering the ship's safety and/or her crew, leading to loss or damage of cargo. Error in management of the ship is a failure in daily operation of the ship independent of the carrier's obligation to maintain cargo accordingly and carefully and it should be interpreted in the light of circumstances of every case. When there are two errors in cause separated, one in the ship's management and one in the care for cargo, the carriers may be responsible only for the damage caused by failure to care for the cargo.

Clause regarding exemption of liability regarding "perils of the sea"

This clause makes reference to any damage or loss resulted during the voyage by the direct violent action and immediate action of the wind and sea waves or from the contact with those, events which may neither be mentioned nor prevented by due diligence, normally.

Exemption from liability comprises accidents which could happen at sea, groundings, collision, boarding, movement of the cargo stowed, fires or explosions onboard, goods situated on deck taken by the waves, intrusion of water in the ships' holds etc. generated by storm, grounding, collision with a large obstruction or between ships, jettisoning cargo over board, faulty manoeuvring. Exception does not cover losses or damages in direct relation to an action or negligence of the ship owner (respectively carrier) or people in their service. When proof is made that damages have been caused by the fault of carrier's representative (respectively carrier's) this may go into the incidence of clauses of exemption regarding perils of the sea if "negligence clause" was inserted in the document of transport.

Exemption of liability clause regarding negligence

This clause has as a purpose carrier's exemption from loss or damage caused to cargoes by the master's mistakes, the crew's or other people in the service of the carrier and it produces the desired effect only if it's clearly edited for each exemption case separately.

Exemption of liability clause regarding fire at sea

According to Hague, Hague-Visby and Hamburg Rules, the carrier and the ship may be totally exempted by any liability for the loss of goods or damage cause by the fire if this was not caused by the mistake or actual fault of the carrier. The carrier is not liable when the mistake caused by the fire belongs to the shipper and is unknown to the carrier and beyond his control.

Exemption clauses regarding cargo

The most important clauses of exemption from total or partial liability of the carrier to cargo are: exemption from liability clause referring to "leakage", "breakage", "rust" or "inflammation" and exemption clause from liability regarding vices and/or special nature of cargo.

In order to invoke exemption from liability, vice should exist even from the moment of taking the cargo by the carrier from the sender, a special part in the evidence plan having reserves written in the bill of lading by the carrier in the moment of receiving the cargo. Exemption clause from liability related to "leakage", "breakage", "rust" or "inflammation" does not free the carrier from liability in case when facts are caused by the carrier's fault or his agents, either in stowing, either during the voyage.

Exemption of liability clauses due to other causes

Charter Parties may contain a clause having as an effect ceasing the obligations of the charter immediately after ending loading operations. This clause is inserted in contracts in conditions in which the owner has the right of arrest over goods for payment of demurrage and dead freight. Validity of this clause by which the ship owner is exempted from liability is dependent on the existence of the right of arrest over cargoes being a previous condition for exemption of the charterer's liability. If, by the charterer's fault, the bill of lading does not contain a clause by which the ship owner receives the right of arrest over goods then the ship owner has the right to act against the charterer for non inclusion in the bill of lading of such a clause.

CHAPTER X
Law Conflicts regarding Bills of Lading

By their nature, contracts which are used in international trading contain external elements, which could attract application of two or more national laws. Law Conflicts born in this way are solved by using conflict norms, having the role to choose from national legislations which are competing, applicable legislation.

The main conflict norm in this area is "lex voluntatis", according to which basic conditions, excluding capacity of parties and compulsory effects of contract are subjected to the law designated by the contracting parties. Unlike the principle of contractual liberty, applying only in the supplementary and interpretation norms in the field, the principle "lex voluntatis" provides parties with the possibility to choose the contract law regarding the imperative and prohibiting norms.

Solving judicial problems implying an international trading contract imposes first of all determination of the law of contract and then, determination of judicial imperative or suppliant norms from applicable law. Not always does the contract make reference explicitly to the applicable law, more often the parties' intention not being so clearly expressed. If there is no formal clause, courts will appreciate parties' will in report with other elements from which it results implicitly their will to subject the contract to a particular law.

Implicit will of the parties to subject the contract to a determined law may result also from different circumstances, such as the attitude of parties after signing the contract by making reference during the process to the law of a particular state, in a particular place, with particular payment instruments etc. Establishing implicit will of the parties rests upon the sovereign decision of the court of law. Autonomy law of will allows parties in a contract with international character or which contains external elements, to determine applicable law to the contract, which means not only the material law legislation, but also the entire system of law in that particular country, in such a way that, if the law chosen has not enough dispositions to govern the contract, they are completed by general dispositions or fundamental principles of the law system chosen as "lex causae".

The majority of the standard forms of bill of lading contain express clauses nominating the applicable law and competent instance to solution possible claims. If there is no express clause regarding the applicable law of the bill of lading, this is to be

governed by that legislation to which parties had the intention to subject it or, when this intention cannot be deduced from the cause circumstances, by the system of norms with which the Convention has the closest connections. It is considered also that there are such connections with the law of state in which the debtor of the characteristic action has, on the date of signing the contract, according to the case, the domicile or, if not, residence, or commercial fund or statutory headquarters. For contracts of transport, expeditions and other similar situation, if there is no agreed law by the parties then the law of the carrier's or sender's headquarters is applied.

A different admissible rule in maritime law says that to liability actions the law of flag is applied if in the bill of lading the clause "any litigation under this bill of lading will be solved according to the law of the flag of the ship" is inserted. Also the law of the flag is applied to actions and judicial acts happening on board, if, according to their nature, these are imposed to the law of the place where they happened. Maritime collisions happening at free sea are subjected to the law of the flag common to both ships, if the ships have the same flag. If the ships have not the same flag the law of the flag of the damaged ship is applied, and if both ships are damaged than the law of the flag of one of the damaged ships is applied according the agreement between the two parties. The law of the flag will not be applied in the situation when the collision happens in territorial waters, liability in this case being governed by the law of the place of collision.

In the international private law, distinction is made between jurisdiction competency and legislation competency (applicable law). Jurisdiction competency of a particular country does not impose automatically the application of its law, as well as, application of the law of a state does not impose also the jurisdiction competency of that state, all these being independent, the court of law responsible for an international litigation applying either "lex fori", or the foreign law, established by the parties and applicable according to conflict norms of the forum. Parties to litigation may opt for solving the cause to be made by a particular court of law, competent and experienced, usually choosing a neuter court of law.

Hague Rules did not predict the possibility of inserting in the bills of lading an attribute clause of jurisdiction, by which the parties establish, anticipated the competent court of law to solve possible claims. Unlike previous conventions, in the Hamburg Rules there are dispositions regarding competent jurisdictions to solve claims, parties to the contract of transport having the liberty to choose the competent court of law. Still, the Convention does not regulate basic conditions of the attribute clause of jurisdiction, the way in which the consent of the parties should be expressed and the atypical situation of the consignee in the contract of maritime transport, which had as a result a non unitary practice in the field.

Position of the consignee in the contract of transport led to vast discussions in the speciality literature, generally considering that it could be explained by the institution of the stipulation for another, being a specific application of this institution, the rights of the consignee being born from the moment of signing the contract between the stipulated and promissory sender, no matter if the third party beneficiary, the consignee, accepted or not the stipulated right on his behalf. The exercise of these rights is suspended through the effect of the law up to the moment of the cargo's arrival at destination, the sender having the possibility to revoke the rights of the consignee, replacing him with another

consignee during transportation. No matter which the explanation is the result cannot be contested.

According to the judicial position of the consignee in the maritime transport contract, in practice different solutions have be compiled regarding the opposition of the clause of jurisdiction from the bill of lading to the shipper and consignee. Therefore, it was considered that the acceptance by the shipper of a clause of jurisdiction which appears in the bill of lading is not sufficient to consider this clause opposable also to the consignee, if it was not expressly accepted.

In other cases, it was considered to be opposable to the consignee the attribute clause of jurisdiction from the bill of lading, if this one signed or stamped the title without any reserve. Acceptance of a clause by the consignee should intervene, still, no later than the moment of receiving the goods.

Also, a distinction should be made between acceptance of goods by the consignee and acceptance of the clause. In this way, in practice it was considered that even though the cargo was effectively accepted by the consignee and following the discovery of damages he did not receive compensation from his insurer, it does not result that the consignee accepted also the jurisdiction clause from the bill of lading, because he did not express his acceptance by an autonomous and independent action.

CHAPTER XI
Conventions for the 21st century concerning International Carriage of Goods

Conventions for the 21st century concerning International Carriage of Goods respectively United Nations Convention regarding contracts for international carriage of goods totally or partially by sea (Rotterdam Rules) and United Nations Convention regarding multimodal transport of goods are the object of research of a separate chapter, chapter XI.

Rotterdam Rules approach in a complex manner the problem of international carriage of goods, being noticed by the extension of the applicability of provisions regulated by the Hague Rules, Hague-Visby respectively Hamburg, but also by regulation of new imposed aspects by the development to a worldwide level of maritime transports, especially those regarding the use of electronic documents of transport and multimodal transport, which made the object of research in this thesis.

Hague-Visby Rules and Hamburg Rules exclude from the field of application the contracts for which the basic document is the Charter Party. Rotterdam Rules are applied to contracts of carriage providing international carriage by sea. The field was extended in report with Hague-Visby Rules meaning that the Rotterdam Rules apply both in the interior and exterior, as well as in report to the Hamburg Rules, in the sense that the Rotterdam Rules may be applied to "door to door" contracts providing multimodal transports. Rotterdam Rules apply to a liner transport regarding to which the contract is included or evidenced by a document of transport, and does not apply to liner transport concerning to which normally the contract is evidenced by the Charter Party. Rotterdam Rules take into consideration an applicable "door to door" regime as opposed to the "port to port" one from the previous conventions, transport including a big section implying cross boarder transport.

The most significant characteristic of provisions regarding the field of application is guaranteed protection of third parties. According to Rotterdam Rules in all situations excluded from the field of application, Rules' provisions concerning the parties, other than the original contracting party, apply, in spite of the negotiable document of transport (such as the bill of lading) or an electronic registration which is issued or not, as well as in spite of the document which is issued or not.

The carrier is defined as a person fulfilling a contract of transport with a shipper. This vast definition may be compared with the definition of Hamburg Rules, including contractual carriers, ship owners and charterers in opposition to the restricted definition of the Hague-Visby Rules, making no reference but to the ship owner or charterer signing a contract of transport with a shipper. Rotterdam Rules due to the vast field of application, the multimodal one, instead of using the term "real carrier" as in the Hamburg Rules, introduced the term of performing maritime parties and performing non maritime parties, having as a purpose, inclusion of all parties possible next to the carrier as performing parties.

The performing maritime party is defined as a performing party if the carrier's obligations are mentioned in the "port to port" stage of the voyage and it may be compared with the application field of the Hamburg Rules.

Regarding seaworthiness condition there is a major difference opposed to the Hague-Visby Rules that is that the obligation was made permanent in the Rotterdam Rules. The obligation is not only to elicit due diligence necessary to make the ship seaworthy before starting the voyage and also to maintain it in seaworthy condition during the voyage.

One new characteristic is the carrier's liability much more extended in the Rotterdam Rules regarding mistakes of service providers or agents. Categories of people for which the carrier is liable increase according to the Rotterdam Rules. They include actually the parties involved both maritime (sub-carriers performing totally or partially the carriage regarding the maritime party and all independent contractors which provide services in a port area) and non-maritime (sub-carriers performing road, railway, air line carriage) as well as the master and the crew of the ship and the carrier's employees and of any performing party.

A much extended regulation by the Rotterdam Rules is the one regarding the shipper's liability. Rotterdam Rules regulate obligations and liability of the shipper in more details. According to provisions of the Rules, the shipper must deliver goods in such conditions as to support carriage, including handling, loading, lashing and discharge. The shipper is also forced to provide information, instructions and documents regarding the goods, which are not otherwise available to the carrier, necessary for proper handling, carriage of goods and fulfilling the bill of lading.

Rotterdam Rules also regulate rules for carriage of dangerous goods. Liability for breaking the obligations established regarding the carriage of dangerous goods and providing information is strict, the one for breaking established obligations regarding delivery of goods in such conditions as to support transport, including handling, loading, lashing and discharge and respectively deliver goods in such conditions as to support transport, including handling, loading, lashing and discharge based on mistake.

A different provision entirely new is the one regarding the carrier's identity, provision which will prove helpful for claimants. According to this, if the carrier is

identified by name in the contract's particularities, and if no other person is identified as a carrier and the document of transport indicates the name of the ship, the registered ship owner will be compiled to the carrier, if he does not prove that the ship is under "bareboat" Charter Party contract indicating the address. Alternatively, the registered ship owner may identify the carrier indicating his address, the "bareboat" charterer being able to the same.

Another non regulated area by previous systems is the one regarding the rights and obligations of the parties related to delivery of goods after arriving to destination, the problem being regulated by the Rotterdam Rules containing provisions regarding the rights and obligations of the parties. The obligation of the carrier to deliver goods is different, is a negotiable transport document (or electronic register) was or not issued. In case it was issued, the document or register is subjected to the presentation by the consignee. If it was not issued, it is subjected to the proper identification of the consignee. In the first case, as a sequence of the provision in article 46, the carrier, for the protection of the holder of the document or register, has the right not to deliver goods and at the same time the obligation to refuse delivery is the document is not presented except for the case when the document of transport clearly states that the goods may not be delivered without presenting the document.

Another new element is the one related to rights and obligations of the carrier in the case when goods remain non-delivered because the consignee does not accept delivery, the person having the right of delivery cannot be found or the carrier has the right to refuse delivery. Rules establish the methods by which in such a situation one could dispose of the goods and conditions which one should obey.

CONCLUSIONS

Nowadays, international economic reports, from a judicial point of view, overpasses the field of transactions performed on the basis of some classic selling-buying contracts, including the entire range of economic, banking, financial operations and at the same time expressing through complex business which cannot be regulated any more by using traditional instruments, elaboration of some special judicial instruments being necessary, arising from the national law systems field.

From the perspective of the two phenomena, the one involving globalisation and the one belonging to international judicial integration, governing and promoting the rules and principles of civilised trading, respecting interest of individuals and human communities, improving documents for maritime transport used is not a unanimously accepted desire, existing requirements which the present stage of development of trading exchanges worldwide imposes to international organisms in order to standardize forms and rules governing international trading.

Nowadays international legislation governing international carriage of goods by sea is not standardized and does not succeed to adequately take into consideration modern practices of transport, including containerisation, contracts of "door to door" transport and usage of electronic documents of transport. Existent contradictions due to the application of different laws, regulations and usages and customs on the level of the whole system of international carriage of goods and international trade generally are

incompatible with the present development and explosive development of the international maritime carriage of goods.

Many aspects emphasised in practice were left without being regulated by the Hague-Visby Rules, this one being a reason for which the judicial regime of those came to be over passed during the 20th century. For example, the Hague-Visby Rules do not contain any provision regarding jurisdiction, do not cover liability for delay, do not apply only "from tackle to tackle" in such a way that what happens before and after loading remains more or less non regulated, does not contain provisions regarding carriage of cargo on deck and live stocks, lacks a regulation more extended of the rights and obligations of the sender and does not regulate electronic alternatives of the traditional bill of lading.

Even though it was largely attempted and partially succeeded to create a judicial regulation closer to nowadays reality, Hamburg Rules have been ratified by only 38 states (none of the most important maritime nations) not having in consequence a largely extended acceptance. There are several reasons behind the refusal of the most important maritime nations to ratify Hamburg Rules.

Critics brought or directed on the levels of liability imposed to the carriers, and changes regarding the duty of making proof which exporters see as unreasonable in their opinion will lead to increased freight tariffs. Moreover critics from this part have been removed and against the exclusion of exception of naval fault (which could lead to increasing freight tariffs) and changes to the exception of fire which are going to make it even more difficult to use.

Increased costs of litigations caused the rejection reaction of the carriers' representatives because the duty of the carrier to make proof of the supposed fault could make senders more willing to try their causes in court. Carriers' representatives argued that Hague Rules have been well tested and that litigations could be therefore avoided in many cases because the result cannot be predicted.

In any case, it is impossible for incertitude not to interfere in any new convention and to argument on this basis against the Hamburg Rules means arguing against any new conventions and trials to modernize and to standardize any rules of transport.

Failure of the Hamburg Rules is a result of lack of political will on the part of occidental states to become parties to the convention due to a combination of reasons previously discussed. Absence of ratifications and vices existing together with the fact that new aspects which should have been regulated due to the most recent technological evolutions, are not regulated (such as electronic bills of lading and multimodal transport) made this convention to be caduceus and seen as a failure. This is why it is certain that the Hamburg Rules are not the ones able to provide a solution for regulating carriage of goods in the future.

In spite of the lack of largely extended ratifications, Hamburg Rules had a considerable impact because many nations (among which some important maritime nations) implemented parts of the rules into their national legislation regarding carriage of goods by sea. These so called hybrid systems played an important part in evolutions which led to the Rotterdam Rules.

From the research provided by this thesis, it clearly results that nowadays systems are overwhelmed due to the age of the conventions which are not in use any more, a lack of uniformity regarding the rules governing international carriage of goods by sea being noticed. Electronic documents of transport and multimodal transport which are not regulated by legislation systems in use on an international level as well as lack of provisions applicable to the containerised carriage represent the signs of this lack of adaptation.

Regarding electronic documents of transport, there are problems of acceptability because the Hague and Hague-Visby Rules require a bill of lading or a document of title (property) similar in order to be applicable, a requirement which is somehow and anachronism, because maritime seaway bills (and similar documents of transport such as nominal bills of lading) are frequently used today.

A different major theme says that previous systems are, as presented before, applicable only to "from tackle to tackle" way (Hague-Visby) or "from port to port" (Hamburg). Keeping in mind that transports today are generally multimodal due to the use of containers, the necessity of a regulation which should reflect this arose. Nowadays, multimodal transport is regulated by a mosaic of judicial instruments and there is no multimodal convention in use.

Bothe the Visby Protocol and the Hamburg Rules contain articles referring to containers, but not in a much extended way and they are not applicable in the "door to door" system and they do not discuss issues related to multimodal transport. This is why a law was considered to be necessary in order to discuss modern practices of transport such as containerized and multimodal transport.

Adopting standard rules for modernizing and harmonising rules governing international carriage of goods implies a maritime section in order to increase judicial safety, it would improve efficiency and commercial predictability in the international carriage of goods and it would reduce legal obstacles away from the flow of commercial trade between states.

Also, adopting uniform rules for governing international contracts of carriage of goods by sea will promote judicial security, it will improve efficiency of international carriage of goods and it will facilitate new opportunities of access for parties and markets which were distant before, therefore playing a fundamental part in promoting commercial and economic development, both internally and internationally.

Response to all these reasons which are behind the need of reform was the creation and adoption of a new convention, of Rotterdam Rules, in order to promote standardization and modernisation of rules governing carriage of goods by sea in the 21st century conditions. As a result of focusing on a more practical approach, Rotterdam Rules may be considered a pragmatic convention. Some academic analysts criticized the Regulation as being "non elegant and complex", a commentary otherwise correct, but not also a fair critique. The purpose of the Convention has never been to touch elegance and simplicity but also efficiency.

One critique everyone agrees on is that the Rules are complex, they have 96 articles and they are considerably more extensive than previous systems. One can imagine that the Rules could become interpreted as different as possible in different jurisdictions due to their complexity. Still, regarding this problem I consider that complex issues need complex solutions. I do consider that it is better to have one single complex

convention to cover the majority of the legal issues related to contracts of carriage of goods by sea than having a multitude of rules which considered all together may be much more complex than the Rotterdam Rules.

Rotterdam Rules are a pretty equilibrated system even though from the carrier's perspective, eliminating the naval fault and extension of obligation for seaworthiness up to permanency, sums of majored limitation, change of the fire exemption and introduction of liability for delay are disadvantages even if these changes are according to the modern approach of the regulation of the carriage of cargo. The majority of these changes for the carrier were met also in the Hamburg Rules, which had no success, partly due to their character "friendly with the shipper". On the other hand the carrier must also analyse the benefits part, such as: revoking "Vallescura" rule, exemption of the contract of volume and increased regulation of the shipper's obligations, compensating completely the above mentioned disadvantages.

The problem related to provisions in the volume contracts is between the regulated markets against the non regulated market with a mention that it was tried before to use non regulation in other areas with negative results (effects of the non regulated financial market in the worldwide economy).

It should be also considered that the rules contain provisions which mean benefits for both parties such as: integrating all documents of transport, adapting to electronic commerce, and the new multimodal field. They are all adaptations to complex requirements of the transport industry representing for this reason necessary trials for modernisation. One thing is sure and that is that the moment has really arrived for the multimodal transport, adapting to electronic commerce and electronic documents of transport to be governed by a global judicial solution, uniformity being the most important purpose of these Rules and something which could be accomplished nowadays only by sufficient ratifications and acceptance of Rotterdam Rules.

In order to see if Rotterdam Rules will receive plenty ratifications and will succeed to harmonise and to update the law regarding carriage of goods by sea we must take into consideration different factors. An important factor is the support of the important trading countries, on support which lacked to the Hamburg Rules. Rotterdam Rules have a better situation in this regard, giving the impression that they have a substantial support from the United States, fact which had a great impact in their creation.

Other important countries are BRICS, two of these countries, India and China deciding "to wait and see". Probably a ratification of the United States would lead to ratifications from these countries too and then a similar evolution would be possible as that of The Hague Rules to their time with a consequence of some extended ratifications. In spite of critics, the majority of specialists express their need for uniform solutions and arguing that now the Rules effectively exist, the best choice being ratification, benefits and uniformity which they could bring being much higher than their possible minuses.

Even if the Rules could increase disparities on a short term, nowadays situation is not sustainable, and alternative national and regional solutions, having in view that carriage of goods is a global one. Rotterdam Rules exist, and they represent the only global alternative for now and if they represent the solution which could bring uniformity in the judicial field in the future, than ratification is with no doubt a necessary thing.

For previously mentioned reasons, therefore, I support as a PROPOSAL OF LAW FERENDA the necessity for Romania to sign and ratify the Rotterdam Rules as a

priority solution.

Romania as a member state of the European Union should align permanently to conditions and realities regarding international transports not only from a legislation point of view, but also as contractual practice, to create the premises of an equitable commerce and a legislation and contractual stability through precise and unequivocal regulations.

Nowadays, Romanian maritime legislation is extended in a multitude of laws, orders, decisions, methodological norms etc., and covering distance in time between norms and easily finding the necessary regulations representing a true dilemma.

It is time that just like traditional countries in the field, (which under the influence of international regulations modernized their legislation, including norms of maritime commercial law in independent codes) in Romania there should be imposed that the maritime code project should not remain endlessly a simple project, but it should be adopted, and all judicial institutions specific for the maritime commercial law to be modernised to nowadays standards most highly included in the new Maritime Code.

Taking into consideration the extremely fast development of multimodal transports, a daring idea perfectly possible, would be modernizing the legislation of the whole system of transports in Romania by the apparition of the Code of Transports which should harmonise international legislation with the national one in the field on the four main groups respectively maritime, railway, road and air way transport. Only political will is necessary.

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