

JUS399

Master's dissertation

Spring term 2016

Candidate number: 75

Word count: 14,963 words¹

Thesis name: “Changing the Rules – An evaluation of whether the Norwegian Maritime Code should implement the Rotterdam Rules’ approach to transferring obligations and rights through the trading of bills of lading”

Research question: “How does the current Norwegian Maritime Code regulate the transferral of the obligation to pay freight and the right of control through the trading of bills of lading, and should the Rotterdam Rules be ratified to further develop these rights and obligations?”



UNIVERSITETET I BERGEN

¹ Including footnotes, but excluding the front page, table of contents, bibliography and appendix

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Chapter 1: Introduction

1.1 Theme, research question and limitations

The theme of this dissertation is the bill of lading, a legal document in maritime law and carriage of goods by sea. It has undergone a number of changes during its millennia long existence, and will undoubtedly continue to adapt with changes in shipping business in the future. The bill of lading will be further explained in chapter 1.2.

The Rotterdam Rules (RR) is a relatively recent convention concerning carriage of goods. It contains detailed and cohesive provisions that grant holders of a bill of lading not only multiple rights, but also liabilities. Whether the scope of RR is too extensive or too limited is debatable. However, it is the hypothesis of this thesis that, relative to Norway's current legislation, these new provisions are a substantial development for Norwegian maritime law.

Given the limiting word count of this dissertation, it is necessary to narrow the scope to focus on a certain aspect of the bill of lading. Furthermore, this dissertation is focusing on private law, both in a domestic and an international context. Therefore, the areas of domestic public law, and general rules and principles of international law² will go largely unaddressed.

The primary research question is therefore "how does the current Norwegian Maritime Code (NMC) regulate the transferral of the obligation to pay freight and the right of control through the trading of bills of lading, and should the Rotterdam Rules be ratified to further develop these rights and obligations?"

The research question will focus on a specific scenario, which concerns situations where the bill of lading is owned by a third-party *not* privy to the original contract of carriage between the sender of goods and the carrier of goods. As a result, the third-party does not necessarily have any contractual rights or obligations. In such a circumstance one should ask two questions. Firstly, "what actions will trigger the obligation to pay freight for a third-party, as specified in the bill of lading?" Secondly, "can third-parties obtain the right of control from the shipper through the acquisition of bills of lading?"

² International public law at sea is generally referred to as "the international law of the sea". This system has traditionally existed through customary practice between states, but has since 1994 been enacted through the UN Convention on the Law of the Sea

1.2 Third-parties and bills of lading in sea carriage arrangements

Carriage of goods by sea deals with questions relating to contractual law, and the rights and obligations of third parties³. The purpose behind such laws is to insure predictability and legal security for parties partaking in carriage arrangements. For example, this means that a person can assume that his goods “will arrive [at the place destination], at or about a certain time in the ordinary course of a voyage” so they may be sold or be otherwise managed.⁴

In carriage arrangements, third-party conflicts arise relatively frequently. A *buyer* contacts a *seller*, and agrees to pay an increased fee to avoid having to organise transport himself. Thus the seller becomes both an *exporter*, as well as a *shipper* of the goods in question. The buyer will be the original *consignee* (i.e. the receiver) of the goods, and in most cases also the *importer*.

The shipper then identifies a vessel that agrees to undertake the shipment, which is controlled by either a *ship-owner* or a *charterer*. When the agreement is officially sealed by a contract of carriage, the controller of the vessel becomes the *carrier* of the goods.

The cargo is then delivered and loaded aboard the ship. Once complete, the ship’s master, acting on behalf of the carrier, will usually issue a bill of lading which confirms the cargo has been loaded in good order and condition.⁵ The ship then sails according to the agreed carriage schedule.

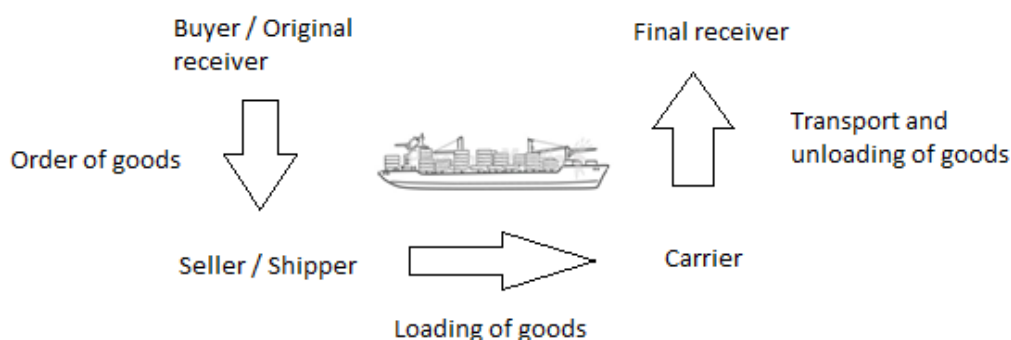


Figure 1: How the goods are bought, transported and delivered

The carriage dynamic becomes further complicated if the buyer sells the goods while still under transit by endorsing the bill of lading to other third-persons. This leads to the role of

³ In Norwegian jurisprudence third-party dilemmas are categorised as “dynamic property law” (dynamisk tingsrett)

⁴ Lord Esher M.R. in *Leduc & Co v Ward* (1888) 20 QBD 475 at page 481

⁵ Lilleholt, Kåre (2009). *Knophs Oversikt over Norges Rett* – 13. utgave. Universitetsforlaget, Oslo, page 450

consignee being passed on to multiple different third-parties in relation to the original contract between the shipper and carrier.

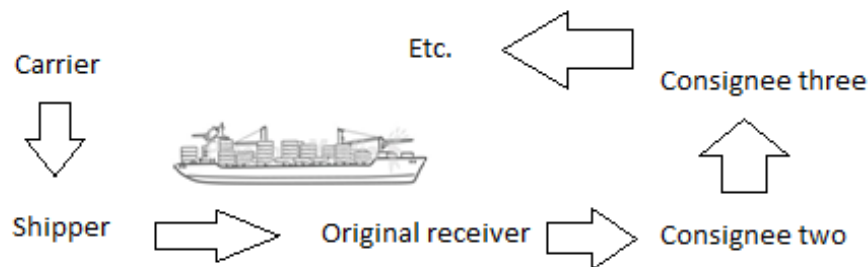


Figure 2: How the bill of lading changes hands between parties when it is traded multiple times during transit

When the vessel arrives at its destination, assuming payment for the freight has been made, the consignee takes delivery of the goods. If freight payment is still outstanding, the carrier has a lien entitling him to keep possession of the goods until payment is made.⁶ The consignee presents an original bill of lading to the master of the ship who stamps it as accomplished. At this point all other existing original bills of lading, which are usually made in sets of three, become void.⁷

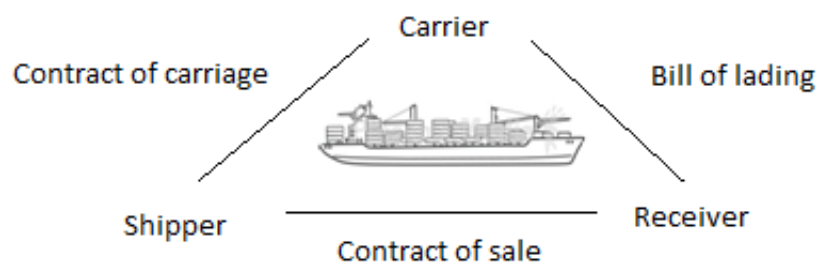


Figure 3: The legal connections between parties at the unloading stage of a carriage of goods arrangement, assuming the final receiver was the original buyer.

The bill of lading is the cornerstone of effective international trade.⁸ Its existence has primarily been a tool of mercantile convenience as it allowed third-parties “not party to the original contract of carriage (...) [to] acquire rights and liabilities”.⁹ However, through the development of law, the legal principles that embody its uses and functions have extended far

⁶ Falkanger, Thor (2012). *Delivery of sea borne cargo – distribution of risk and liability in liner trade*. SIMPLY 2012 page 29-54, Nordisk institutt for sjørett, Oslo, page 31

⁷ Hare, John (2009). *Shipping Law & Admiralty Jurisdiction in South Africa – Second Edition*. JUTA & Company Ltd, Kenwyn, page 573

⁸ Ibid. page 688

⁹ Eftestøl-Wilhelmsson, Ellen [masters’ thesis supervisor] (2006). *The Transfer of Rights and Liabilities in Relation to Carriage of Goods by Sea – An analysis of the English approach*. Nordisk institutt for sjørett, Oslo, page 1

beyond contemporaneous conceptual limits. As a result, bills of lading have become a legal institution that courts recognise as *documents of dignity*, and their integrity demands judicial protection.¹⁰

The bill of lading has three primary functions. Firstly, they are receipts for goods that have been shipped, and might contain details of the goods as to their quantity, quality, and condition at the time of issue.¹¹

Secondly, bills of lading are considered evidence of contracts of carriage. Between the original parties of contract, this evidence is considered *prima facie*, but if bills of lading have been transferred to third parties, its contents become conclusive evidence.¹²

Thirdly, bills of lading are documents through which *title* may be passed, arguable their most important and unique property. This is crucial, as it allows the holder of a bill of lading to trade with the goods while they are still in transit. When bills of lading are traded from one person to another, it becomes a “symbol of constructive possession”, as the possession of the goods they represent is also considered to have transferred, likened to a “key to the warehouse”.¹³ This is underlined by the fact that carriers can hand over transported goods to holders of original bills of lading without fear of becoming liable.¹⁴ Thus, the possession of a bill of lading grants cargo-owners full rights to use the goods in financial arrangements.

However, there are disputes in legal theory and practice regarding the extent of rights and obligations that are included when trading bills of lading. For example, it is generally agreed that the right to sue is granted to the new cargo-owner along with the bill of lading, even though it is not the actual contract of carriage.¹⁵ Whether or not the transfer of bills of lading also grants the holder the right of control over the goods in transit (instructing the carrier to change the port of destination, or manipulate storage conditions etc.), and at what point they are *obliged* to pay freight to the carrier, are questions which will be discussed.

¹⁰ *The Carso* (1930) AMC 1753 at 1758

¹¹ *Hare op cit* note 7, page 692-697

¹² *Ibid.* page 697-698

¹³ *The Delfini* [1990] 1 Lloyds Report 252

¹⁴ Selvig, Erling (1997). *Utleveringsansvaret*. In ”Kommentarer 1994-5 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

¹⁵ Falkanger, Thor (2010). *Cargo damage – who is entitled to sue the maritime carrier?* SIMPLY 2010 s 47-64, Nordisk institutt for sjørett, page 60-63

1.3 The international context of maritime law

While some consider the classification of law into *subject areas* as arbitrary, it certainly has advantages. This is especially the case when certain subjects are riddled with tradition, and few areas of law are as heavily laden with tradition as maritime law.¹⁶ The term maritime law encompasses the legal rules utilised in shipping, and usually includes the topics of admiralty and marine insurance. Maritime law includes both private and public law, and has both domestic and international aspects. To a certain extent, international law of the sea¹⁷ is also relevant, with the regulations governing the *right of innocent passage* and *flag-ship jurisdiction* being central examples.¹⁸ As the legal areas utilised in maritime sectors are wide-ranging, including fundamental practices of general contractual law, tort law and legal interpretation, it is usual to negatively define maritime law by excluding rules that are not *unique* to shipping.¹⁹

During the 20th century, international maritime law shifted from individual states seeking dominance and influence, to an idea of how it can mutually benefit all parties through cooperation. The goal was to “[broaden] partnerships for enhancing port security, as well as coastal and in-shore safety, extending maritime domain awareness, and countering threats at sea”.²⁰ This would establish safe and lucrative trade routes, as well as increase the legal protection and predictability for merchants and businesses.²¹ While history demonstrates that this is by no means a unique development²², one could argue that peaceful co-existence and trade has become more important than ever before.

Historically, international trade has been heavily based on cargo-shipping. Today, it is considered the lifeblood of the world economy standing for 90% of all goods transported.²³ The execution and regulation of cargo transportation has been subjected to some major changes over time, and the very nature of shipping means that these progressions have

¹⁶ Falkanger, Thor & Bull, Hans Jacob & Brautaset, Lasse (2011). *Scandinavian maritime law: The Norwegian perspective – third edition*. Universitetsforlaget, Oslo, page 23

¹⁷ Op cit note 2

¹⁸ Kraska, James (2009). "Grasping the Influence of Law on Sea Power." *Naval War College Review*, Vol. 62, No. 3, page 113

¹⁹ Lilleholt op cit note 5, page 446

²⁰ Kraska op cit note 18

²¹ Hare op cit note 7, page 624

²² The development of “Lex Rhodia de Jactu As” during the Antiquity marks one of histories first successful attempts at an international agreement to encourage peaceful trade

²³ International Maritime Organisation. *IMO Profile – Overview*. URL: <https://business.un.org/en/entities/13> [Last accessed 17.5.2016 at 14:30]

usually come about through international influence.²⁴ It is interesting to note two international factors which have had profound influence on Norwegian maritime law, as they will be discussed later. Firstly, there is the influence of English law, as Great Britain's former naval power, policies, and trade practice have had far reaching consequences for maritime law for both former colonies, and the rest of the world.²⁵ Another factor is the Scandinavian tradition for legal cooperation, a fact that led to the development of practically identical Maritime Codes.²⁶

Norway has a long shipping history and has a considerable market share in the international carriage of goods by sea.²⁷ Norway has also been an active participant in the development of maritime conventions. For example, the Hauge Rules²⁸ represent the first attempt at an international carriage of goods by sea convention designed to deal with the issue of complicated third-party dilemmas.²⁹ This convention was further updated to the currently ratified sea carriage convention called the Hague-Visby rules³⁰. Norway has traditionally been loyal to ratified convention, as Norwegian law is "presumed to be in harmony with international obligations (...) to avoid conflicts (...) between a convention and domestic law".³¹ Keeping in mind the fact that Norway has been in the forefront of ratifying the new RR³², it is essential for Norwegian jurists to be prepared for the potential consequences this may have for NMC.

On the other hand, some scholars are in doubt over RR's future. The convention was finalised eight years ago and has, to date, only gained three of the necessary twenty ratifications required for enforcement.³³ Some legal authorities have stated that there is "widespread

²⁴ Falkanger, Bull & Brautaset op cit note 16, page 23-24

²⁵ Grewe, Wilhelm G. (2000). *The Epochs of International Law*. De Gruyter, Berlin, page 540

²⁶ Falkanger, Bull & Brautaset op cit note 16

²⁷ Norwegian Shipowners' Association. *History*. URL: <https://www.rederi.no/en/about/history/> [Last accessed 12.3.2016 at 17:32]

²⁸ The Hague rules. *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature*. URL: <http://www.admiraltylawguide.com/conven/haguerules1924.html> [Last accessed 16.3.2016 at 13:11]

²⁹ Hare op cit note 7, page 624

³⁰ *The Hague-Visby rules – The Hague Rules as Amended by the Brussels Protocol 1968*. URL: <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> [Last accessed 16.3.2016 at 13:13]

³¹ Falkanger, Bull & Brautaset op cit note 16, page 33

³² The Rotterdam rules. *United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea*. URL: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html [Last accessed 16.3.2016 at 13:15]

³³ Wilhelmssen, Trine-Lise (2010). *Transport Liability Regimes and Economic Efficiency*. Law and Economics: Essays in Honour of Erling Eide page 257-275, Cappelen Damm AS, page 258

support for the Convention, [but] the expectation is that it may be some time before the Rotterdam Rules enter into force”.³⁴

1.4 Dissertation structure

The dissertation is divided into six chapters. Chapter two will discuss relevant legal sources and the necessary legal methods that must be utilised to highlight how the current legal regime functions in practice, and how RR could be interpreted and theoretically implemented.

Chapter three introduces NMC § 269 that deals with the obligation to pay freight and attempts, through a comparison with English law, to establish a desirable utilisation of this provision. Concerning the right of control, the dissertation illustrates how it currently does not exist in Norwegian law, and that only sellers of goods may influence the carrier mid-voyage through the right of *stoppage in transitu*.

Chapter four evaluates RR generally, followed by an interpretation of the relevant articles concerning the obligation to pay freight (found primarily in article 58), and the right of control dealt with in RR’s chapter ten.

Chapter five contains a comparative analysis based upon the previous two chapters. The primary focus is to assess the advantages and disadvantages of the different regimes, thus ascertaining whether or not RR is a welcome development for Norwegian law.

Chapter six concludes the dissertation with a summary of its contents, as well as presenting the final answers to the research question.

Chapter 2: Legal sources and methodology

2.1 Contracts and their interpretation

As the carriage of goods by sea is primarily an area of contractual law, it is important to consider how to utilise and interpret contracts. However, it is important to keep in mind that the thesis scenario focuses on third-parties with bills of lading that were *not* covered by the original transport contract. Furthermore, this dissertation is focusing on rights and obligations that will apply regardless of contractual details, as the relevant provisions in NMC and RR

³⁴ The Rotterdam Rules. *Introduction*. URL: <http://www.rotterdamrules.com/content/introduction> [Last accessed 10.5.2016 at 04:23]

are *obligatory* rights and provisions. In cases where shippers and carriers have contractual clauses limiting obligatory provisions, courts would reject these clauses.

Although there are many examples of mandatory legislation in Norwegian contractual law, Norway is still a strong adherent to the freedom of contract. This means that the parties in question are largely free to decide among themselves the nature of their business venture. However, whenever the contract is silent, it is necessary to look to statutory provisions as subsidiary sources.³⁵

With regard to Norwegian traditions for interpreting contracts, the subjective intent is central. Through examinations of negotiations and past actions, courts will try to identify proof of the subjective intent. However, when this is not possible, contracts need to be interpreted *objectively*. This means that they should be in accordance with everyday usage, but not necessarily by a test of an “ordinary reasonable person”.³⁶ The test is to focus on a reasonable person within the particular sector in question. This means that terms and expressions used in the contract can have a more technical, precise and legal meaning. The principle of “*contra stipulorem*”³⁷ exists as the final principle to assist courts in cases where doubt still remains. It dictates that whenever there is uncertainty in a contract, it must be the author of the contract that must suffer the consequences.

2.2 Domestic law – the Norwegian Maritime Code

To resolve maritime legal disputes in Norway, one first consults NMC.³⁸ Traditionally, the Nordic countries have partaken in legal cooperative efforts in synchronising legislature.³⁹ During the course of the 20th century these codes were amended on a number of occasions, culminating in a “comprehensive Scandinavian drive to modernise the rules applying to *contracts of affreightment* in 1994”.⁴⁰

Norwegian law, following the legal principle of dualism⁴¹, demands that any convention must be ratified through the enactment of statutes before it is legally binding in Norway.⁴² Dualism

³⁵ Falkanger, Bull & Brautaset op cit note 16, page 29

³⁶ Ibid. page 30

³⁷ In Norwegian jurisprudence it is called “uklarhets-“ and “forfatterregelen”

³⁸ Falkanger, Bull & Brautaset op cit note 16, page 26

³⁹ Røsæg, Erik (2009). *Implementing Conventions – Scandinavian Style*. SIMPLY 2009 s. 167-199, Nordisk Institutt for Sjørett, page 169

⁴⁰ Falkanger, Bull & Brautaset op cit note 16, page 26

⁴¹ Arnesen, Finn & Stenvik, Are (2009). *Internasjonalisering og juridisk metode – Særlig om EØS-rettens betydning i norsk rett*. Universitetsforlaget, Oslo, page 49

⁴² Røsæg op cit note 39, page 169-170

is based on the principle that international law is a separate legal system from the domestic law of individual countries.⁴³ It was through NMC of 1994 that the Hauge-Visby rules were enacted, which implements minimum obligations upon carriers, thus creating more protection for shippers.⁴⁴ A primary motivation was to take into account the development of containerisation of goods, a technological and logistical revolution that could not be underestimated. Technically, the Hague-Visby rules, and part IV of the Code, need not apply to purely domestic shipments, as it has an international focus. However, Norway has traditionally followed the “presumption principle”⁴⁵, meaning that legislation should be utilised similarly in both a national and international context.⁴⁶ It is also important to note the mandatory nature of part IV, as emphasised in § 254 cf. § 252.⁴⁷

When interpreting law codes and statutes, Norwegian legal method bases itself on objective interpretation, meaning that terms should be interpreted as they are *normally understood in everyday situations*. This is often easier said than done as context is essential, and finding an answer to what constitutes as “normal” is not always obvious. For example, certain legal terms, which can be unclear for the “layman”, can have very specific meaning in the shipping business. Considering that most citizens rarely have to deal with laws regulating business practices, Norwegian legislators deemed it preferable to interpret business laws in a professional context, thus increasing predictability and efficiency for business interests.⁴⁸

A central complimentary source in Norwegian jurisprudence is the legislative preparatory work, which can help bring clarity to vague provisions.⁴⁹ It can provide insight into the goals and motivations of provisions in question, or explain how legal terms are to be interpreted. In this case, there are three documents of relevance, namely NOU-1993:36, Ot.prp.nr.55 (1993-1994), and Innst.O.nr.50 (1993-1994). However, while these documents explain the fundamental considerations behind NMC, they give no direct commentary to sections of relevance for this dissertation. For example, the preparatory work cannot help identify § 269

⁴³ Ruud, Morten & Ulfstein, Geir (2011). *Innføring i folkerett – Fjerde utgave*. Universitetsforlaget, Oslo, page 52

⁴⁴ Hare op cit note 7, page 624-625

⁴⁵ Freely translated from “presumsjonsprinsippet”

⁴⁶ Lilleholt op cit note 5, page 452

⁴⁷ Ibid.

⁴⁸ Falkanger, Bull & Brautaset op cit note 16, page 28

⁴⁹ The Norwegian legal term is “forarbeider”

exact interpretation of when goods are considered delivered, or if other actions can trigger the obligation to pay freight.⁵⁰

2.3 International conventions

For a long time, the international community has attempted to minimise the legal gaps between national and regional legal traditions, a process called harmonisation, thereby creating a more unified carriage of goods regime. By means of international treaties, there have been attempts to harmonise carriage of goods law through the standardisation of contracts and legal frameworks. The harmonization of international commercial law “has been acknowledged as one of the major legal goals in the late nineteenth and twentieth centuries”.⁵¹ Since the implementation of Hague-Visby Rules, further technological developments have become primary motivations for the changes and additions found in the RR. Examples are advancements in information technology, faster and larger ships, and the ever increasing use of multimodal transport by air, road and rail. These innovations have become so central for legal development that even the EU has gone far in considering implementation of RR at the supranational level.⁵²

Conventions are generally implemented domestically through legislation, and then enforced by state courts, an essential practice for the decoding and utilisation of the complex nature of RR.⁵³ However, due to the number of overlapping, and often colliding, conventions and domestic legislation, such implementations can be complicated.⁵⁴ Problems also arise when domestic legal customs require laws to be in an official language other than the official UN languages.⁵⁵ As a result, even though the conventions go far in synchronising national carriage of goods laws, every ratifying state will have “local dialects”.

RR is far more ambitious with regard to size and complexity, when compared to previous carriage conventions. This is likely to reduce the allowances for flexible domestic implementations. RR also attempts to regulate other means of transport other than purely maritime ventures, and these details have led to the approach being referred to as a

⁵⁰ Falkanger, Bull & Brautaset op cit note 16, page 7

⁵¹ Myburgh, Paul (2000). *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* In “31st issue of Victoria University of Wellington Law Review”, page 355

⁵² Eftestøl-Wilhelmsson, Ellen (2016). *European Sustainable Carriage of Goods – The role of contract law*. Routledge, Abingdon, page 61-62

⁵³ Harakis, Michael (2010). *From Treaty to Trial: the Implementation of the Rotterdam Rules*. In D. Rhidian Thomas (editor), “Carriage of Goods by Sea under the Rotterdam Rules, Lloyd’s List, London

⁵⁴ Røsæg, Erik (2013). *Soft law in the Conventions for the Unification of Maritime Law*. Scandinavian Studies in Law Volume 58 2013, page 270

⁵⁵ Røsæg op cit note 39, page 170

“maritime-plus” convention. Many maritime nations have expressed scepticism to this development, as they consider RR to limit national sovereignty far more than previous conventions. As a result, some claim that “despite being a positive development, the so-called maritime-plus application of the Rotterdam Rules is likely to upset the desired uniformity”.⁵⁶

In a Norwegian context, the conventions themselves, as well as the preparatory work behind them, may be used by courts to identify the correct application of NMC. Furthermore, in cases where the relevant convention and domestic law come in direct conflict, Norway will “presume [them] to be in harmony”.⁵⁷ However, once a convention has been enacted domestically, national courts will primarily utilise Norwegian legal methodology. When comparing NMC with RR, it is essential to adhere to the interpretational rules emphasised in the Vienna Convention on the Law of Treaties.⁵⁸ Article 31 states that conventions are to be “interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.”⁵⁹

2.4 Case law – including arbitration awards

Norwegian court decisions are essential, and usually treated by later judges with considerable respect. Case rulings may decide “how a statute or a contractual provision is to be understood, or what rule shall apply where a statute or contract is silent”.⁶⁰ The legal weight of rulings increase with the hierarchical rank of the court passing judgement, and rulings by the Norwegian Supreme Court (NSC) are often treated with equal weight as Norwegian statutes.

It is important to note that Norwegian courts are generally reluctant to participate in shaping business practices. This is demonstrated by the relatively few cases of maritime dispute that have been handled by NSC. Instead, most disputes are resolved before parties consider taking the case to court and, if parties want state involvement, the disputes will be resolved through arbitration rather than a court decision.⁶¹ While more difficult to identify than regular court

⁵⁶ Bokareva, Olena (2015). *Multimodal Transportation under the Rotterdam Rules: Legal Implications for European Carriage of Goods and the Quest for Uniformity*. Media Tryck, Lund University, page 193

⁵⁷ Falkanger, Bull & Brautaset op cit note 16, page 33

⁵⁸ Rainey, Simon (2010). *Interpreting the International Sea-Carriage Conventions: Old and New*. In D. Rhidian Thomas (editor), “Carriage of Goods by Sea under the Rotterdam Rules, Lloyd’s List, London, page 38

⁵⁹ *The Vienna Convention on the law of treaties (with annex)*. URL:

<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [Last accessed 16.3.2016 at 13:09]

⁶⁰ Falkanger, Bull & Brautaset op cit note 16, page 31

⁶¹ Ibid.

rulings, important arbitration cases are published.⁶² Furthermore, while such rulings should, in theory, fall outside the regular Norwegian principles concerning case law, these arbitration awards may create precedents granting the same legal weight as ordinary courts.⁶³

In the context of maritime law, there is also a somewhat unique situation where Scandinavian courts may freely utilise each other's rulings, if it is found to lend support to a particular interpretation. This practice is made possible due to a long lasting common compilation (since 1900) of maritime rulings called Scandinavian Maritime Decisions.⁶⁴ Similarly, Swedish and Danish jurisprudence on maritime law can be used with equal weight as Norwegian legal literature. Legal literature and case law from other countries can also, at times, be used as inspiration when dealing with questions that have not been handled in a Norwegian context. This might also become a legal necessity when dealing with cases that involve foreign parties not necessarily subject to Norwegian law.⁶⁵

Chapter 3: The Norwegian legal regime under the Hague-Visby rules

3.1 The obligation to pay freight

3.1.1 The domestic foundation

Norway's primary legislation regarding the payment of freight, when bill of lading are involved, is found in NMC § 269(1) (see appendix). It states that "if the goods are delivered against a bill of lading, the *receiver* becomes liable on *receiving* the goods for *freight* (...) due to the carrier *pursuant* to the bill of lading" (emphasis added).⁶⁶ The ordinary meaning of the sentence has an obvious trade-off where the individual claiming the goods must pay for the freight of these goods, assuming the obligation is stated in the bill of lading. In what is often a complicated web of business parties, the law attempts to find a compromise based upon reasonability, responsibility and contractual principles. However, the provision serves primarily to increase security for the *carrier's* claims. In short, the natural understanding of the provision indicates that the party that owns, benefits from, or possesses the goods, should also bare the risk and liabilities that comes with these goods.

⁶² *Nordiske Domme i Sjøfartsanliggender*. Nordisk Defence Club (previously Northern Shipowners' Defence Club)

⁶³ Falkanger, Bull & Brautaset op cit note 16, page 31

⁶⁴ *Nordiske Domme i Sjøfartsanliggender* op cit note 62

⁶⁵ Falkanger, Bull & Brautaset op cit note 16, page 32

⁶⁶ Se translation at <http://folk.uio.no/erikro/WWW/NNMC.pdf> [Last accessed 26.4.2016 at 13:43]

Furthermore, the section helps avoid conflicts when third-parties with negotiable bill of lading are involved. Keep in mind that a receiver of goods is not necessarily privy to the original contract of carriage, a relationship defined in § 251 of NMC as between the *shipper* and *carrier*. An important limitation to the obligation to pay freight for a third-party is found in NMC § 268 (see appendix), which states that the carrier has a responsibility to deliver the goods in the manner which was promised. Assuming that the goods have arrived at the correct port, and at the right time, a receiver may still refuse the goods if they fail to meet the quantity and quality that was promised in the bill of lading. Under such circumstances, the “carrier is liable for any loss suffered because goods are lost, damaged or delayed while in his custody”.⁶⁷

However, if the third-party refuses to accept the goods, the original agreement between shipper and carrier is still relevant as the carrier may withhold the goods as security until the shipper has paid freight, as emphasised in § 270.⁶⁸ The right of a carrier to withhold goods is fundamental in Nordic maritime law⁶⁹, although at times it can be difficult to utilise as it demands the possession of the goods, as underlined in ND-1991-176.⁷⁰ For example, a carrier might be obliged to deliver goods to a third-party, but no freight details were included in the bill of lading. As a result, the third-party has a right to the goods, and no obligation to pay freight. In such cases, the carrier still has a right to receive freight from the shipper, but, if delivery has occurred, has no goods to withhold for security.

The shipper’s liability, having endorsed the bill of lading to a third-party, was treated in the ruling of ND-2003-83, where the principle that “a contractual party remains liable after the contract even if he has granted a third-party the prospect to fulfil its rights and obligations” was implied.⁷¹ However, the carrier’s right to withhold the goods cannot be used against a third-party to secure freight owed by the shipper. The principle that a third-party is not bound by the details of a carriage contract, unless these details are also included in the bill of lading,

⁶⁷ Wilhelmsen, Trine-Lise (2007). *Developments in Norwegian and Scandinavian maritime law*. SIMPLY 2007 page 2-55, Nordisk institutt for sjørett, Oslo, page 34

⁶⁸ Falkanger, Thor (2002). *Maritime lines on cargo: A survey of the provisions in the Norwegian Maritime Code*. Simply 2002 page 83-113, Nordisk institutt for sjørett, Oslo, page 93

⁶⁹ Selvig, Erling (1993). *Tilbakeholdsrett*. In ”Kommentarer 1990-1991 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

⁷⁰ Selvig, Erling (1993). *Avbrutt besittelse*. In ”Kommentarer 1990-1991 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

⁷¹ Selvig, Erling (2005). *Forvareransvar og kontraktsansvar*. In ”Kommentarer 2002-2003 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

is codified in NMC § 292(3).⁷² The fact that “a third-parties rights to the goods stand above” the contractual arrangement between the shipper and carrier, was also emphasised in the court ruling of ND-1999-4.⁷³

However, it is important to note that the wording of § 269 was “developed and shaped for *legal use*”.⁷⁴ It is clear that the legislator opted to avoid using too many technical phrases used in the shipping business and instead utilised a natural wording that is seemingly simple. However, the provision is somewhat imprecise, meaning it can have both a wider or narrower meaning. On the one hand, as the term “received” dictates the point of which the holder of a bill of lading becomes liable for freight, it becomes necessary to determine at what point the goods are deemed to be *received*, as the unloading of ships can take hours, if not days. Conversely, another relevant question concerns whether or not the holder of a bill of lading can become liable *before* receiving the goods.

Nonetheless, before considering the complicated conditions in § 269, it makes sense to shortly consider the less problematic areas. Firstly, “freight” is the fee due to the carrier for taking on and accomplishing the sea carriage of the goods in question. Usually, the size of the fee, the currency, and timing of payment is agreed upon beforehand. If freight is to be paid upon delivery, these details are usually included in the bill of lading. In this way, it is possible for third-parties to be aware of such obligations when acquiring bill of lading. In cases where freight is not agreed upon beforehand, it is possible to go to NMC § 260 to establish what the carrier is owed.

The second condition is that the payment of freight must be “pursuant to the bill of lading”. In other words, if the obligation to pay freight is to be transferred from the shipper to a third-party, this information has to be clearly indicated in the bill of lading.⁷⁵ This is rarely problematic, as this formality is commonplace in regular business practice since it ensures the interest of both the shipper and the carrier. However, the writers of such documents are rarely jurists, and mistakes can happen. Therefore, it is essential to establish rules that protect third-parties who might only have access to the information contained in the bill of lading. If a

⁷² Selvig, Erling (1997). *Befrakters rett etter konnossementet*. In ”Kommentarer 1994-5 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

⁷³ Selvig, Erling (2001). ”Koblet” tilbakeholdsrett i konnossement. In ”Kommentarer 1998-1999 til Nordiske domme i sjøfartsanliggender”. Nordisk skibsrederforening

⁷⁴ Bull, Hans Jacob [masters’ thesis supervisor] (2006). *Mottakers plikt til å dekke krav etter konnossement – En fremstilling av sjølovens § 269 første ledd, bygget på engelsk rettspraksis*. Nordisk institutt for sjørett, Oslo, page 21

⁷⁵ Falkanger, Bull & Brautaset op cit note 16, page 264

mistake has been made, it follows that the party responsible for the mistake must carry the loss, assuming that the third-party has acted in good faith. As it is the carrier that issues the bill of lading it is natural to place the risk on him, assuming that the shipper is also considered to be in good faith.⁷⁶

Finally, it is necessary to determine when the goods are considered *received*. This action is characterised by the carrier unloading and transferring the goods to the consignee in exchange for the bill of lading. It is at this point in time that the consignee is deemed to have received the goods, and the obligation to pay freight enters into force. In most cases, this is usually a non-issue, in particular when the goods being transported are limited in number and relatively small in size.⁷⁷ As a result, the unloading and transfer stage is quickly concluded. However, for the type of transactions containing significant value, sizeable goods, and large quantities, the unloading stage of a carriage operation can take hours, if not days. In such cases, § 269 makes it difficult to precisely estimate at what point in time the carrier has the right to claim payment for freight from the consignee. Whether the crucial point in time is the delivery of a) the first container, b) the majority of containers or c) the final container, is not regulated by the wording of § 269 alone. Furthermore, with reference to chapter 2.2, the legal preparatory work gives no indication of how to interpret § 269, instead focusing on more fundamental considerations behind NMC. Considering the obviousness of this practical problem, it is curious that the legislator did not provide a clearer picture.

By interpreting § 269 in the context of other sections of the NMC, it could lead to a more sensible approach that creates a predictable and advantageous business environment. For example, § 268 has a provision that places an obligation on the carrier to see that the goods are “delivered in such a manner that they can be conveniently and safely received”. This could be interpreted to mean that goods are considered *safely received* once they are all in the possession of the consignee. This would further indicate that the crucial point in time is when *all* of the goods are unloaded. However, the provision could also be interpreted to indicate an obligation to show *due diligence* during the unloading process rather than an obligation to achieve a specific result. As there is no case law or legal opinion concerning the interpretation of this provision, the question is still open.

⁷⁶ Lilleholt op cit note 5, page 452

⁷⁷ Bull op cit note 74, page 36

Furthermore, goods are packaged and transported in numerous different ways. Certain ships allow for vehicles to drive aboard the carrier vessel, others transport bulk goods which require cranes, pumps, and grapples, and others carry huge quantities of containers. As a result, it should be necessary to take into account different means of loading and unloading, but NMC has no provision that differentiates between types of cargo.

In the end, it seems reasonable to base the solution on an evaluation of who should bare the risk. While the carrier still has possession of the goods, he bears the risk of any damages or loss, and the consignee can withhold any freight owed until he is sure that the delivery is made satisfactorily. At that point, he is obliged to pay freight, while also acquiring the risk for the goods. Such a rule would allow for a certain amount of flexibility with regard to each specific circumstance, while also being clear cut and simple enough to grant high predictability for all parties. Finally, such a solution would also fall within the natural wording of § 269 with regard to the consignee's action of "receiving" the goods.

3.1.2 The English perspective

Scandinavian case law and jurisprudence is severely lacking on this topic, but it is possible to look to English law. Like Norway, English carriage of goods legislation is based upon the Hauge-Visby rules. Furthermore, while English case law cannot be utilised as an official legal source in Norway, their "common sense" approach generates arguments of persuasive value that can be reproduced in a Norwegian context to achieve equitable and fair rulings. In addition, within the context of international trade, English common law, jurisdiction, and language is the most dominant and influential legal system being freely used as a basis for contracts.⁷⁸

The Carriage of Goods by Sea Act 1924 (COGSA) section 3(1) (see appendix) has a far wider application than NMC § 269, since it addresses how holders of bills of lading become liable in general, not just the obligation to pay freight. It emphasises that the liabilities gained are "the same liabilities under contract as if he had been a party to the contract". This means that persons wanting to acquire bills of lading would be wise to also consider the contractual details of the original contract of carriage. Furthermore, the provision states that a holder "become[s] liable under the contract of carriage [when] taking certain steps".⁷⁹

⁷⁸ Ibid. page 9-10

⁷⁹ Eftestøl-Wilhelmsson op cit note 9, page 41

The case of *Smurthwaite v Wilkins and Another* (1862),⁸⁰ effectively demonstrates the often-complicated network of parties when a negotiable bill of lading is involved. The bill of lading in question changed hands on multiple occasions, and the ship was scheduled to unload at multiple destinations. While the case deals with a number of issues, the issue of freight is of particular relevance. The carrier was suing a former owner of a bill of lading, based upon a law at the time, stating that a former consignee was still liable after endorsing the bill of lading to someone else. However, it was the courts opinion that such a conclusion would be “so monstrous, so manifestly unjust”, that they instead based their conclusion on common law. They stated that when bills of lading are transferred to third-parties, who thus gains the advantages this entails, the liabilities follows the document. In other words, the carrier may only claim freight from the final consignee, and his security lies in his right to withhold the goods until this fee has been paid in full. This conclusion was unanimous, and was further approved in the later case of *Sewell v. Burdick*, which also limited the term of “property” in bill of ladings to refer to “the legal title to the goods as is transferred by a sale” only.⁸¹

This shows that English law is similar to NMC regarding the obligation pay freight, as it places it solely on the actual receiver of the goods. Furthermore, it laid the foundation for the development of more general provisions, as well as establishing important preconceptions for transferring liabilities via bills of lading.

The cases of *Berge Sisar*⁸², *Agean Sea*⁸³, and *The Ythan*⁸⁴ further illustrate important principles concerning a receiver’s obligation to pay freight. In the *Ythan*, the cargo was lost at sea and, as a result, the holder of the bill of lading lost both his right to the goods, as well as the obligation to pay freight. The court quotes Lord Hobhouse from *Berge Sisar*, stating that COGSA “is concerned solely with contractual obligations created in a bill of lading in relation to the carriage and delivery up of the goods. [Hobhouse] emphasises that the Act is not dealing with proprietary rights of anyone who becomes a holder of the bill of lading”.

In the *Agean Sea*, most of the cargo of oil went lost, but what little remained was received by the holder of the bill of lading. It is possible for the carrier to claim freight, but only for a reasonable amount that is relative for the amount of delivered goods. However, the case for

⁸⁰ *Smurthwaite v Wilkins and Another*, (1862) 11 C.B. (N.S.) 842

⁸¹ *Sewell v Burdick* (1884) 10 AC 74

⁸² *Berge Sisar* – Commercial Court [1997] 1 Lloyd’s Rep. 642, Court of Appeal [1998] 2 Lloyd’s Rep. 475 & House of Lords [2001] 1 Lloyd’s Rep 663

⁸³ *Agean Sea* (1998) 2 Lloyd’s Rep. 39

⁸⁴ *The Ythan* – *Primetrade A.G. v. Ythan Limited* (2005) 58 WL 2999762

the consignee in *Agean Sea* was that the accident had taken place before he had acquired the bill of lading. Therefore, even though the consignee got part of the delivery, the carrier could only claim payment from the holder of bill of lading at the time the accident happened.

COGSA states that liability falls on the consignee who “takes (...) delivery from the carrier”, but gives no indication of when goods are deemed delivered.⁸⁵ However, it is possible to notice an overall tendency in English law, namely that obligations and risk should lie with the party that has the clearer advantage due to the carriage agreement or due to having possession of the goods.⁸⁶ This indicates that whoever has the goods *physically* in their possession also carries the risk. If this is the case, the carrier assumes both the risk and the liabilities associated with the goods until most, if not all, of the cargo has been transferred to the consignee.

The next question is if the consignee can become liable for freight *before* receiving the goods. It is difficult to establish any Scandinavian legal grounds for such a rule. This is due to the non-existence of any formal provision, nor any relevant case law or legal theory. Looking again to COGSA section 3(1), it is important to note that emphasis is not only on *taking delivery*, but also the actions of *making claims* under the carriage contract.

The action of making a claim according to section 3(1)(b) of COGSA, unlike that of receiving the goods according to section 3(1)(a), has no equivalent in NMC § 269. Rather than being a claim to receive the actual goods, this provision states that a holder of a bill of lading may make other business claims, or issue the carrier specific instructions. Claims could be monetary in nature, similar to claiming tort for damages or other payment due, while the issuing of instructions to the carrier concerns the care of the goods, or demanding a change of port of destination mid-voyage. By taking such an action, the consignee makes his presence known to the carrier and formally enters into the contractual arrangement as a party. This new status also transfers the liabilities previously owned by the shipper.⁸⁷

In the *Borealis*, Lord Hobhouse evaluates what sort of phrase constitutes *a claim*, and he emphasises that it should be understood as a recognized claim asserting the carriers liabilities in the contract of carriage in regards to the holder of the bill of lading.⁸⁸ In *The Ythan* the

⁸⁵ Bull op cit note 74, page 83

⁸⁶ Ibid. page 84

⁸⁷ Bull op cit note 74, page 64

⁸⁸ *Borealis AB v. Stargas Ltd* – Commercial Court [1997] 1 Lloyd’s Rep. 642, Court of Appeal [1998] 2 Lloyd’s Rep. 475 & House of Lords [2001] 1 Lloyd’s Rep 663

court begins by stating that “any discussion about the proper interpretation of the scope and effect of section 3(1)(b) of COGSA must begin with Lord Hobhouse’s speech in the *Berge Sisar*”. They then confirm that making a claim refers to the issuing of a formal claim. In this case the holder requested a letter of undertaking from the carrier, but this was not deemed sufficient to trigger section 3(1)(b).

While these arguments seem reasonable, and could play an advantageous role in Norwegian maritime law, there is a difference between leaning on English law with regard to the issue of “when the goods are deemed delivered”, in comparison to the “obligation triggering due to making a claim”. In the first case we have a clear condition that is utilised in NMC § 269, COGSA section 3(1), and English case law. This justifies the use of English law to defend an expansive interpretation of “receiving” goods. However, the question of triggering the obligation to pay freight before receiving the goods, i.e. making a claim, is complicated. Norwegian legal culture places emphasis on the separation of powers, thus the law-making power lies with the legislator. It guarantees democratic principles, while also upholding the ideals of legal security and predictability for business entities. While Norwegian law encourages courts to help develop outdated laws and practices, their primary function is to interpret and apply law made by the legislator. There is no wording in § 269, nor any secondary Scandinavian legal sources, that comes close to justifying an interpretation which would trigger the obligation to pay freight through means other than receiving the goods, as this would require the creation of a whole new rule.

3.2 The right of control

In contrast to the payment of freight, Scandinavia has *no* legislation regarding the right of control. This is emphasised in both Norwegian⁸⁹ and Danish⁹⁰ legal preparatory work regarding the implementation of the Rotterdam Rules. As with the general shipping business, there was a clear tendency for Nordic shipping interests to base their contracts on English jurisdiction and law. Being the most utilised system in the international shipping sector, English maritime law became ever more sophisticated. In contrast, the necessity for developing carriage law in the Nordic countries became comparatively small, with most developments coming from the harmonisation efforts of international carriage conventions.

⁸⁹ NOU-2012-10 – *Gjennomføring av Rotterdamreglene i sjøloven*. Justis- og beredskapsdepartementet og Sjølovkomiteen. Chapter 15.1.12

⁹⁰ KBET-2013-Nr-1536 – *Transport af gods helt eller delvist til søs (Rotterdam-reglene)*, Kommissionsbetænkninger til det danske Folketinget

As the right of control has gone unaddressed until RR, no such provisions have been implemented. However, there are similar rights, an example being *stoppage in transitu*.

Stoppage in transitu and the right of control are fundamentally different rights. Stoppage in transitu was developed to address the risk of selling and transporting goods over especially long distances, for example the length of the Norwegian coastline.⁹¹ Furthermore, stoppage in transitu is an expansion of the fundamental right of a seller of goods to withhold his goods until the agreed price has been paid.⁹² The right of control concerns the right of a cargo-owner to have influence over his goods. Despite the difference, the lack of any right of control in Norwegian law makes it prudent to consider stoppage in transitu as the only non-contractual means of influencing the carrier and cargo while the voyage is underway.

The right of *stoppage in transitu*, is found in § 61 of the Sale of Goods Act⁹³ (SGA), and § 7-2 of the Satisfaction of Claims Act⁹⁴ (SCA) (see appendix).⁹⁵ Both of these laws concern a seller's right to halt goods being transported to a buyer due to the discovery of said buyer's insolvency.⁹⁶ It is the carrier's *obligation* to deliver goods to any legal holder of an original bill of lading that makes this right of stoppage so important.⁹⁷ Naturally, having multiple laws regulating the same phenomena can be problematic. While SGA § 61 is a more specific rule, § 7-2 of SCA is more recent and, arguably, more refined.

Andenæs describes SCA § 7-2 as the most general expression of *stoppage in transitu* in Norwegian property law, allowing its application to any contractual agreement, regardless of the reasons behind the buyer's insolvency.⁹⁸ While he acknowledges the existence of more specialised legislation in Norwegian law for stoppage in transitu⁹⁹, a point which would justify the *lex specialis* principle, he claims there is little difference in the actual application of these rules.¹⁰⁰ He goes on to assert that it is typical to interpret these provisions relative to each other, so that a detail in one can be utilised in the other.

⁹¹ Johansson, Svante O. (2001). *Stoppningsrätt under godstransport*. Norstedts Juridik, Stockholm. page 99

⁹² Andenæs, Mads Henry (2009). *Konkurs – Third Edition*. Published by himself, Oslo, page 188

⁹³ Kjøpsloven in Norwegian

⁹⁴ Dekningsloven in Norwegian

⁹⁵ Similar legislation can also be found in Sweden and Denmark

⁹⁶ Johansson op cit note 91, page 101

⁹⁷ Selvig op cit note 14

⁹⁸ Andenæs op cit note 92, page 187

⁹⁹ There are multiple other examples besides SGA § 61

¹⁰⁰ Andenæs op cit note 92, page 188

Considering the number of different specialised stoppage provisions, such an interpretation can be problematic. On the one hand, it could be an advantage to harmonise the provisions of stoppage, thus creating similar results in all situations where stoppage is utilised. However, demanding such a systematic interpretation, that crosses provisions across multiple laws, makes the utilisation legally more complicated. This could lead to reduced predictability due to business entities not necessarily knowing that all stoppage provisions need to be employed similarly.

Andenæs' interpretation has not been universally accepted. According to Marthinussen, "Andenæs gives § 7-2 of SCA too wide an area of application, at the cost of the more specialised rules found in SGA".¹⁰¹ Jurists sharing this point of view prefer a restrained approach when mixing various provisions of stoppage in transitu, and instead embrace the value of their individual advantages. Swedish legal theory further supports a restrained approach, explaining that SCA § 7-2 differs from its predecessors by no longer having to be applied next to the other stoppage rules, especially SGA § 61.¹⁰²

Based upon the evaluation above, and the *lex specialis* principle, this thesis will henceforth focus on SGA § 61(2). This is due to the crucial wording used in the provisions final sentence that clearly states that the seller's right to stop the transport is *not* impeded by the transfer of "transport documents". This also includes bill of lading.¹⁰³ This indicates that stoppage is prioritised in situations where different rights conflict. For example, if the carrier is receiving orders from the consignee, and the shipper is enacting stoppage in transitu, the latter's right would be prioritised.

SGA § 61(2) grants the right for sellers to stop goods already in transit to the buyer.¹⁰⁴ This is only acceptable in cases where there is sufficient reason for the seller to suspect that the buyer no longer has the means to fulfil his part of the agreement.¹⁰⁵ However, due to the fundamental principle that all deals *should* be completed to as far a degree as possible¹⁰⁶, there is a high threshold for using stoppage. It places the burden of proof on the seller,

¹⁰¹ Marthinussen, Hans Fredrik (2010). *Bokanmeldelse: Konkurs av Mads Henry Andenæs*. Lov og Rett, page 439-442 [English translation by the author of this dissertation]

¹⁰² Johansson op cit note 91, page 101

¹⁰³ Andenæs op cit note 92, page 191

¹⁰⁴ Ibid. page 187

¹⁰⁵ Ibid.

¹⁰⁶ "Oppgjørshensynet" in Norwegian

meaning he has to provide sufficient evidence to defend his use of right of stoppage, and failing to do so leave him liable for damages.

Upon the discovery of a buyer's insolvency, the detail that decides the successful use of stoppage is the location of goods at the exact time that the right is exercised. If the goods are already delivered, then the risk has gone over to the buyer, and it is too late to use stoppage. In short, similarly to the discussion regarding a receiver's obligation to pay freight, the point-of-no-return is dependent on whether the goods are deemed *delivered*.

The preparatory work of SCA § 7-2 and SGA § 61 gives no indication of the point-of-no-return for the goods.¹⁰⁷ On the other hand, NSC concluded in Rt-1971-549 that the deciding factor of whether goods were deemed delivered or not, was if the goods were stored in a manner that gave the buyer *exclusive* control over these goods. In cases where a buyer personally takes delivery, stoppage becomes impossible when the goods are on his person or in his vehicle. However, when the goods are transported by a carrier, the situation becomes more complicated. If the buyer organises transport, the point-of-no-return is undoubtedly when the carrier, as a representative of the buyer, has taken possession of the goods. When the seller organises transport, which is the most typical scenario, it becomes necessary to consider each individual case separately. For example, if the buyer is not at the port of delivery to receive the goods when unloaded, it is unlikely that the seller's right of stoppage is cut off. On the other hand, if the goods are stored in a port warehouse, and the buyer has sole access, the criterion of "exclusivity" after Rt-1971-549 is fulfilled.

It is clear that, in its current state, stoppage in transitu it is not an acceptable alternative to a general right of control. The next step is to look for guidance in English law. While there is no English legislation that deals with stoppage in transitu and the right of control, their common law system has been the leading developer of the modern usage of both.¹⁰⁸ However, with reference to the end of chapter 3.1.2, Norway's legal system does not allow its courts the same degree of flexibility as English *common law*. In the case of stoppage in transitu, one could justify allowing arguments found in English law to support widening interpretations that may lead to positive business practices, due to pre-existing Norwegian provisions. In the case of the right of control, there is *no* Norwegian legal source that can justify courts introducing of a completely new set of rights.

¹⁰⁷ Truyen, Filip (1990). *Overgivelseskriteriet ved selgerens stansingsrett*. Tidsskrift for rettsvitenskap, Universitetsforlaget, page 347

¹⁰⁸ Johansson op cit note 91, page 103

Chapter 4: The new regime under the Rotterdam rules

4.1 The obligation to pay freight

It is first necessary to consider RR's article one, which lists a number of important definitions. While similar to Hauge-Visby rules, the list found in RR is "dramatically more extensive".¹⁰⁹

RR does not include the phrase "bill of lading".¹¹⁰ Instead, it utilises the broader notion of "transport document", as stated in article one's first paragraph when defining "contract of carriage". RR defines "transport document" in paragraph 14 by describing it as a "receipt for goods" and "evidence of a contract", but leaving out the most important property as a document of title.

However, in paragraph 15, RR defines the term "negotiable transport document" to include the property of a document of title, thus the bill of lading will undoubtedly continue to be the predominant document in shipping arrangements. In addition, paragraph 15 allows for the inclusion of other documents that were previously "left out in the cold or were, at the very least, of dubious legal pedigree".¹¹¹

RR article 10(a) defines a "holder" as the person that is "in possession of a negotiable transport document". It goes on to describe two variations of "holder" depending on whether or not the document is an "order document" or "blank". For the purposes of this thesis, the scenario envisioned sees third parties in possession of a bill of lading, and their right to that document is not disputed, regardless if it is an order or blank document.

Unlike NMC § 269, RR is not immediately clear on which provisions concern the obligation to pay freight. For example, while article 42 (see appendix) has the title of "freight prepaid", it is not the main article concerning the obligation to pay freight. It merely states that when the "contract particulars contain the statement 'freight prepaid' (...) the carrier cannot assert against the holder (...) the fact that the freight has not been paid", although the following sentence makes an exception when the holder is also the shipper. This rule exists to protect

¹⁰⁹ von Ziegler, Alexander & Schelin, Johan & Zunarelli, Stefano [editors] (2010). *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. Wolters Kluwer Law & Business, Alphen aan den Rijn, page 31

¹¹⁰ Eftestøl-Wilhelmsson op cit note 9, page 50

¹¹¹ Baatz, Yvonne & Debattista, Charles & Lorenzon, Filippo & Serdy, Andrew & Staniland, Hilton & Tsimplis, Michael (2009). *The Rotterdam Rules: A Practical Annotation*. Informa Law from Routledge, London, page 6

third-parties from the obligation to pay freight under this specific circumstance, but is not a general rule.

Article 58 (see appendix) concerns the general liability mechanisms that effect *holders*, and the obligation to pay freight is undoubtedly one such liability. The first paragraph protects third-parties to a carriage contract by emphasising that holders who are “not the shipper” will not assume any liabilities under the contract, unless the holder has “exercise[d] any right”. The second paragraph goes on to state that if such a holder *has* exercised any right relevant to his status as holder, he assumes all liabilities that are “incorporated in or ascertainable from the negotiated transport document”. This is similar to NMC’s § 269 emphasis that any obligation to pay freight needs to be incorporated into the bill of lading for the obligation to transfer. In short, while the issue of freight is touched upon in other articles, “the issue as to whether (...) the carrier can claim freight against a holder is governed by article 58(2)”.¹¹²

Before going into the general details of article 58, it is prudent to shortly summarise how this provision will work specifically with regard to the payment of freight. It is not sufficient that the new holder merely has the document in his possession. Article 58 states three conditions that must be fulfilled before the liability of paying freight can be transferred through the transfer of a bill of lading. Two of the conditions are formalities and demand that the obligation to pay freight is (1) included in the bill of lading, and (2) that it is *specified* that this obligation is meant for the holder of the document. The last condition demands that the holder exercises a right gained through the possession of the bill of lading. For example, this could mean utilising his right of control, or the right of demanding retrieval of the goods.

The thesis will now consider article 58 in more detail. The three conditions of the article are (1) the holder must *exercise* “any right under the contract of carriage”, (2) the wording of “any liabilities imposed *on it*” (emphasis added) is a reference to the holder, and must be understood to mean that the liabilities in question must have been *meant* to be imposed specifically on the holder, and (3) the liabilities being transferred must be “incorporated in or ascertainable from” the negotiable transport document.

The condition of a holder exercising “any right” is codified in § 58(2). This is a very general phrase, stating that if a holder exercises *any* right entitled to him through the bill of lading, he becomes liable to all obligations attached to the bill of lading. This makes the provision

¹¹² von Ziegler et. al. op cit note 109, page 188

extremely clear, leaving little room for misinterpretation. For example, article 50 of the RR concerns the right of control, and if utilised would undoubtedly lead to the holder becoming liable. However, two exceptions are emphasised in § 58(3) that slightly limits the broad foundation. Article 58(3)(a) states that if a holder exchanges a transport document for an electronic record, or vice versa, it does not cause the holder to become liable. Article 58(3)(b) further states that a holder does not become liable if exercising rights “pursuant to article 57”, namely the transferral of the transport document from himself to a *new* holder.

Arguably, the most problematic of the conditions, from a carriers point-of-view, is the requirement that any relevant liabilities he seeks to impose on a holder must be specifically imposed “on it”, i.e. on the holder. In current shipping practice, bill of lading will “rarely impose obligations *expressly* on the holder”,¹¹³ and as a result, this condition could effectively limit carrier’s rights to only those with the foresight to take this into account. However, while the situation could be problematic in the short-term, business practice would quickly adapt to pick up in this development and adjust accordingly. For example, a possible solution would be for carriers, when issuing bill of lading, to make sure to include a clause that defines “merchants” in wider terms to include the shipper, the holder, and others. This would make it clear that obligations imposed on a shipper *will* be transferred to holders as well, thus satisfying the condition of imposing the document “on it”.

Assuming the first two conditions are met, the third condition is, arguably, nothing more than a general principle stating that “where rights under the contract of carriage [are] exercised by the holder under the contract of carriage, corresponding liabilities will be imposed on the holder under the contract of carriage to the extent that such liabilities are incorporated in the negotiable electronic transport record”.¹¹⁴ While the reference concerns electronic documents, the same principle would undoubtedly also apply to regular documents like bill of lading. In short, all liabilities that are to be transferred must be included within the bill of lading itself.

¹¹³ Baatz et. al. op cit note 111, page 178

¹¹⁴ Goldy, Miriam (2007). *The Performance of the Bill of Lading’s Functions under the UNCITRAL Draft Convention on the Carriage of Goods: Unequivocal Legal Recognition of Electronic Equivalents*. Journal of International Maritime 13, no. 3, page 169

4.2 The right of control

4.2.1 The holder's rights

Chapter ten is *solely* dedicated to the right of control. Internationally, while some argue that “the rights given to the controlling party by chapter 10 represents only a modest extension of existing rights”¹¹⁵, the fact that enough attention is given the topic to justify its own chapter is an unprecedented development in the history of international maritime law. The concepts of “holder”, “controlling party” and “right of control” are most relevant for this part of the thesis, and what the concepts allow, with regard to the right of control, are primarily covered in articles 50 and 51 (see appendix).¹¹⁶

Article 51 contains the method of identifying who in the carriage agreement has the right of control. For example, assuming none of the following paragraphs are valid, the first paragraph establishes that the shipper has the right of control. Furthermore, rather than in article one, “Controlling party” is defined in article 51 as it “depends in essence on what type of document or record is used”.¹¹⁷ It is article 51(3) that is of relevance to this thesis, which clearly states that when negotiable transport documents are in play, it is the *holder* of such a document that gains the right of control. In other words, RR is effectively removing any uncertainty regarding the general transferral of the right of control when trading bills of lading.

While article 51(3) establishes the rules for transferring the right of control, article 50(1) states the three rights gained when becoming the controlling party. Paragraph (a) grants holders the right to “give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage“. Paragraph (b) concerns the right to “obtain delivery of the goods at a scheduled port of call“. Finally, paragraph (c) is the “right to replace the consignee by any other person including the controlling party”.

Paragraph (a) concerns the right to instruct the carrier in how to take care of the cargo in-transit rather than the particulars of the delivery itself. This rights is central as it ensures that the shipped goods with arrive well-preserved at the final destination. Examples are instructing the carrier to “keep the goods at certain and uniform temperature[s] or to check

¹¹⁵ Diamond, Anthony (2008). *The Next Sea Carriage Convention?* Lloyd's Maritime and Commercial Law Quarterly, URL: <https://www.i-law.com/ilaw/doc/view.htm?id=165211> [Last accessed 3.5.2016 at 17:12]

¹¹⁶ Baatz et. al. op cit note 111, page 5

¹¹⁷ Ibid.

that the level of humidity does not exceed a certain level”.¹¹⁸ The wording effectively makes the right both “wider and narrower than the second two rights”.¹¹⁹ It is wider in so far as it does not solely concern delivery instructions, while it is narrower as it places a specific limitation of not allowing changes to the original agreement. As long as there are no explicit details concerning the treatment of the cargo in the contract, the controlling party may instruct the carrier to take any action, assuming the request is reasonable, and the carrier has the means to execute the order.

The provisions found in (b) and (c) concern the *delivery* of the goods. Unlike paragraph (a), these rights can lead to deviations from the original contract of carriage. This is necessary as such changes would inevitably lead to variations. The rights contained in these provisions are *not* to be confused with “the so-called right of stoppage *in transitu*”.¹²⁰ While stoppage *in transitu* is a right that comes in addition to the more general right of control, the significant difference lies in the fact that its utilisation is restricted to very specific circumstances, such as insolvency issues. The rights contained in article 50 can be exploited at any time at the whim of the controlling party, assuming relevant limitations do not come into play. Combined, provisions (b) and (c), together with stoppage *in transitu*, make a formidable defence for a seller who has yet to be paid for his goods. He can stop the delivery all together (stoppage *in transitu*), change the port of delivery to avoid the risk of the goods being seized (provision (b)), or make the carrier deliver the goods to a new consignee (provision (c)) at either the original or a new port (combining (b) and (c)).

4.2.2 Central limitations

It should be noted that provision (b) has an essential limitation through the emphasis that the new port of delivery must be “a scheduled port of call”. This is in contrast to that which the same provision allows with regard to “inland carriage”, where the controlling party is entitled to request delivery at “any place en route”. This limitation will be easily implemented in most cases as it is “the position adopted by the majority of courts, both in civil law and common law countries, in identifying the limits to the rights of the controlling party”.¹²¹ Naturally, Scandinavia is an exception due to the complete lack of any right of control in their carriage of goods legislation.

¹¹⁸ von Ziegler et. al. op cit note 109, page 221

¹¹⁹ Baatz et. al. op cit note 111, page 152

¹²⁰ von Ziegler et. al. op cit note 109, page 222

¹²¹ Ibid.

It is now necessary to consider article 52 (see appendix), as it contains provisions that describe an assortment of different limitations, exceptions and indemnities that serve to protect the carrier when right of control is utilised. The provision in 52(1) opens by emphasising that the carrier is obliged to execute his instructions given by the controlling party according to article 50. Article 52(1)'s sub-provisions underline three necessary criteria for the obligation of executing instructions after article 50 to occur. Provision (a) merely concerns the carrier's duty to check that the person issuing instructions actually has the right of control. On the other hand, provision (b) highlights that the carrier must be able to execute the instructions in a *reasonable* manner and, provision (c) maintains that the instructions cannot interfere with the carrier's regular operations.

It is important to note that article 52 does open for an interpretational dilemma through its repeated use of the term "instruction". This could mean that it is only relevant for provision 50(1)(a), as no other part of article 50 uses the term. However, by interpreting the provision in good faith, it is clear that article 52 is intended to be applicable to any request from the controlling party to the carrier under article 50. Other than the clear rationality of this, as this would encourage positive shipping practises, it becomes obvious when considering the term "delivery practices" found in article 54(1)(c). This use of phrase "recalls expressly on of the activities that can be involved in the request by the controlling party to the carrier according to article 50(1)(b)".¹²²

Furthermore, it is important to question the precise meaning behind "reasonable" in provision (b). The primary function is to make it plain that a carrier need not adapt his transport schedule to accommodate the controlling party's new instructions. The accommodation should take place "according to their [carrier's] terms". While a carrier is obliged to take action in "good faith", as emphasised in article two, it becomes apparent that this rule leaves room for disagreement between the parties. For example, since the instructions are to be reasonable "at the moment that they reach the carrier", it is hard to say if "reasonable" is to be interpreted such that the obligation falls away if the instructions are unreasonable at that very moment, or if carriers are obliged to act "as soon as reasonably possible".¹²³ Keeping in mind "good faith", general shipping interests, and with reference to article 52(2), it seems more likely that it is the latter interpretation that should be utilised.

¹²² Ibid. page 230

¹²³ Baatz et. al. op cit note 111, page 164

Provision (c) brings further possibilities for disagreements through its use of the terms “normal” and “delivery practices”. As an extreme example one might question whether a carrier can deny a request by a controlling party to not deliver goods as originally intended, through article 50(1)(b), by claiming that the carriers *normal delivery practice* is to always deliver the goods to the original port of destination. This interpretation seems unlikely, however, as it effectively means that a controlling party can *only* change the delivery by replacing the consignee after article 50(1)(c).¹²⁴

Finally, the last resort of a carrier to refuse a controlling party’s new instructions is found in article 52(3). Assuming that a carrier is obliged to execute a new instruction, and no other exception can be utilised, a carrier is “entitled to obtain security from the controlling party” for any economic loss as covered in 52(2) (see next paragraph for details). Given the wording “*reasonably* expects will arise”, it is clear that any security requested by the carrier must be proportionate. This is to ensure that carriers do not inflate or speculate estimates and cause a situation that might deter controlling parties from using their right of control. However, although the wording of this provision is quite clear, “it is easy to anticipate disputes regarding the precise quantum of security sought”.¹²⁵

Provision 52(2) offers no further exceptions, but it contains rights for the carrier to limit the extent of which the instructions will affect them economically in cases where they are obliged to comply. For example, the provision in 52(2) imposes an indemnity on the controlling party to cover any “reasonable additional expense”, and to cover any “loss or damage that the carrier may suffer as a result of diligently executing any instruction”.

Ultimately, while it is interesting to note that article 52 is full of language that, arguably, can lead to disagreements, it also creates “an adequate level of flexibility” for both business and judicial proceedings to handle the special needs of carriage operations and contracts.¹²⁶

¹²⁴ Ibid. page 165

¹²⁵ Ibid.

¹²⁶ von Ziegler et. al. op cit note 109, page 230

Chapter 5: Comparative analysis

It is important to underline the fact that RR's provisions concerning the delivery of goods, rights of the controlling party, and the transfer of rights "are not special to particular types of contracts of carriage".¹²⁷ As a result, the provisions can be considered as general models of law, rather than more specific and practical rules. This potential development could lead to an interesting situation as RR is very clear concerning the obligations imposed on both parties of carriage contracts, as well as third-parties. The concentrated nature of RR has made some jurists question whether it can end up limiting parties' "freedom of contract". For example, some studies have analysed typical clauses found in bills of lading, and claim that "their effectiveness may be in doubt apart from where they can be said to merely declare the same obligations in the Rules and in the same way".¹²⁸ Its complexity and size has also made some jurists question whether the convention will ever be ratified by the required 20 states due to their reluctance to give up sovereignty and legal flexibility. At this moment in time, eight years after RR's completion, only three countries have ratified the Rules.

Other jurists disagree with the issues of interpretation, referring to the obligation of interpreting RR "in good faith" as required by article two.¹²⁹ For example, while article 58 refrains from consistently using the terms *negotiable transport document*, "the point is nonetheless clear".¹³⁰ When the provisions frequently refer to "holder", a quick look at the definition in article 1(10) emphasises that a holder *must* be in possession of such a document. With this in mind, RR follows the same principle as NMC in keeping transfers of liability tied to circumstances where negotiable bills of lading are involved. On the other hand, this differs from English law which allows for the transfer of liabilities also in cases where sea waybills or non-negotiable bill of lading are used.¹³¹

Article 58 of RR encourages the shipping business to incorporate both rights *and* liabilities into negotiable transport documents, thus insuring that potential holders know what obligations and rights are attached. It is interesting to note that the practice of including

¹²⁷ Diamond op cit note 115, page 138

¹²⁸ Soyer, Baris & Tettenborn, Andrew [editors] (2014). *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21st Century*. Informa law from Routledge, Abingdon, page 175

¹²⁹ Bokareva op cit note 56, page 107

¹³⁰ Baatz et. al. op cit note 111, page 176

¹³¹ Ibid.

liabilities in negotiable transport documents “does not exist in all legal systems”, and as such the working-group for RR were unsure about including such a requirement.¹³²

The next question is whether there is potential conflict between NMC § 269 and RR article 58. In broad terms, it is arguable that the values and purposes behind these two provisions are the same. Both conclude that simply possessing a bill of lading is not sufficient to make a holder liable under a contract of carriage. However, article 58 differs slightly where it opens with “without prejudice to article 55”. This concerns the obligation that a controlling party must provide “information, instructions or documents relating to the goods”. This obligation clearly pre-dates the assumption of liabilities, meaning that a carrier can demand additional information *before* a holder of a bill of lading has taken any action to make a formal claim of the goods.

Concerning RR’s first condition, there is a substantial difference between NMC (i.e. obligation upon “*receiving*” the goods) and RR (i.e. obligation upon exercising “*any right*”) when attempting to interpret them according to their natural wording. The question of what will cause the holder to assume liabilities through the acquisition of a bill of lading is seemingly simple in both cases. NMC requires the goods do have been *received* by the holder of the bill of lading, while after RR holders becomes liable upon the execution of *any right*. In fact, when strictly interpreting the wording found in NMC, it could be understood that utilising rights bears *no* consequence. Even when the holder presents the bill of lading to the carrier at the point of delivery, this does not make him liable. It is only upon the retrieval of the goods that the freight *must* be paid. In short, the two provisions have an opposite approach in determining what actions trigger the transferral of liability to the holder. NMC specifies a single circumstance. In contrast, RR opens with a wide-ranging provision, but goes on to list two exceptions. Ultimately, it seems safe to assume that the far roomier approach of RR article 58 will make it easier for carriers to take legal action against hesitant holders.

However, as discussed earlier, there is good reason to believe that § 269 is not as simple as the phrasing indicates. This in itself is problematic considering that NMC regulates both national and international shipping practice. When developing law affecting business practices, one of the most fundamental ideals to uphold is predictability. This encourages investors and entrepreneurs to operate in a safe and predictable business environment.

¹³² Diamond op cit note 115, page 242

RR's second condition, that liability in a bill of lading must be *specified* to concern the holder (i.e. "on it"), has no equivalent in the NMC.¹³³ It is not immediately clear what inspired RR's work-group to include this criterion, as such practice is rarely found in the shipping business. Although the shipping business will have to adapt to this change, it can quickly be remedied with simple clauses in bill of ladings. Assuming RR becomes a success, such clauses are likely to persist, but the question can still be asked whether or not it was really necessary or beneficial.

Regarding RR's third condition, there is little difference between RR and NMC, as both specify the need for the liability (RR) or the payment of freight (NMC) to be included in the bill of lading. Even English law developed this requirement through common law.¹³⁴

It is clear that the implementation of RR would bring about significant changes to the current Norwegian carriage regime. Currently, there is only one *certain* action that causes a consignee to bear responsibility to pay freight, namely receiving of goods, although at what exact point this happens is debatable. There are also indications that certain other actions *might*, or should, trigger the event at an earlier stage. However, until legislation or a Scandinavian court deals with the issue, the outcome remains unclear. With the introduction of RR this will change. NMC will have to expand its current scope to include a wider ranging general liability provision, which would also have a wider range of actions that clearly transfers liabilities.

The most important development would be the increased predictability for Norwegian business interests and citizens in general. It is clear that, should RR be codified into an updated NMC, § 269 would need to become more precise regarding when and how liabilities become relevant for holders. The current Norwegian regime leaves too much room for uncertainty, primarily because there is no clear indication for *when* or *how* the liabilities are fully transferred.

RR's chapter ten would be an unprecedented development, as there has been surprisingly little development in Scandinavia around the topic of the *right of control*. In Scandinavia it has become standard procedure that shippers keep a substantial amount of rights through the contract of carriage, while third-party holders of a bill of lading gain few such rights. On the other hand, these issues are generally avoided due to the consistency of Scandinavian carriage

¹³³ Baatz et. al. op cit note 111, page 178

¹³⁴ Ibid.

contracts to include clauses where the parties agree to let the endeavour fall under English jurisdiction. This is the primary reason that the right of control does not exist in Scandinavian law.

The closest comparable right to the right of control is stoppage in transitu. However, such rights are generally considered to be very different in principle, primarily due to its limited applicability to circumstances involving the sale of goods and insolvency. The general idea behind right of control is to give *holders* more general control of the goods over which they have legal “possession” through the bill of lading in their care. Furthermore, the rules regulating stoppage are difficult for non-lawyers to access, understand, and utilise. The fact that provisions concerning stoppage are spread out across several different legal codes, and all differ to varying degrees, causes unnecessary confusion and unpredictability.

In contrast, RR has developed a detailed and cohesive chapter that grant holders of bills of lading the right of control, while also balancing it with provisions that protect carriers. While it is debateable whether the scope developed by RR’s work-group is too extensive or, conversely, is too limited, the fact remains that these new provisions would mean a substantial development for Norwegian carriage law. Furthermore, the advantages of granting such rights are plentiful. First and foremost, it provides third-parties with much needed legal security. As non-parties to the original contract of carriage, they have relatively little security in cases where conditions do not develop according to the agreement with the seller of the bill of lading. Not only does the *right of control* give them the much needed right to ensure that the goods are stored according to their wishes, but they also gain a limited opportunity to change the port of destination, and who can receive the goods.

Considering solely the *obligation to pay freight* and *right of control*, it becomes increasingly clear that RR “is much more than an instrument that is simply designed to regulate the core contract of carriage”.¹³⁵ On the contrary, it can justly be called a representation of an international maritime and commercial code.¹³⁶ However, when taking into account its complexity, some scholars have observed that “[t]here is much to analyse, digest, ponder and assess”.¹³⁷ Furthermore, eight years has passed since its creation, and considering only three

¹³⁵ Bokareva op cit note 56, page 107

¹³⁶ Thomas, D. Rhidian (2010). *Preface*. In D. Rhidian Thomas (editor), “Carriage of Goods by Sea under the Rotterdam Rules, Lloyd’s List, London

¹³⁷ Thomas, D. Rhidian (2008). *Editorial*. In “14th Issue of the Journal of International Maritime Law Volume 6”

countries, of the required 20, have ratified RR it becomes increasingly difficult to say if it will ever enter into force. Thus, it is not inconceivable that RR could share the same fate as the Hamburg Rules, an earlier attempt to modernise carriage conventions.¹³⁸

Coastal states differ with regard to which maritime business parties they are most interested in protecting. Some nations have considerable tonnage in merchant fleets and a multitude of *carriers* to facilitate. Others might have economies mostly reliant on export, thus having *shippers*, or importers, with a greater number of *consignees*. While RR tries to find a fair balance between all of these parties, differing opinions claim that RR has a tendency to favour carriers, shippers, or consignees. Such opinions can be detrimental for states considering ratification of RR, in particular if the state in question feels their business interests are not taken sufficiently into account.

Assuming that RR never meets the implementation requirements, it does not necessarily mean a stop for Norwegian legal development in these areas. In fact, RR's provisions concerning the obligation to pay freight and the right of control could instead be realised domestically. It is the opinion of this thesis that the advances which RR's provisions could bring to Scandinavian maritime law are so central that Norway should seriously consider implementing them on their own. Keeping in line with legal development traditions, it would naturally mean that Denmark and Sweden would also have to be brought on board, but considering that all three are signatories of RR this seems unlikely to become an issue.

Chapter 6: Conclusion

In summary, the thesis began by briefly introducing the assumed scenario where third-parties, in sea carriage arrangements, are holders of bills of lading, but not privy to the contract of carriage. The thesis investigates what third-parties could, and should, expect with regard to assuming the obligation to pay freight and the right of control under Norwegian law. The thesis also explained the function of bills of lading in the context of international trade and private law, as well as demonstrating the utilisation of relevant legal sources and associated methodologies which were necessary to answer the research question. The dissertation then evaluated the current legal regime in Norway, showing that, while there are provisions regulating the payment of freight, there exists no right of control in current Scandinavian

¹³⁸ Selvig, Erling (1995). *Transportøransvaret*. In "Kommentarer 1992-3 til Nordiske domme i sjøfartsanliggender". Nordisk skibsrederforening

maritime law. Relevant provisions in RR were also assessed, demonstrating a level of sophistication comparable to English law, but far beyond that of Scandinavia. Chapter five contained the primary analysis that compared the two regimes in an attempt to answer the overall question of whether Norway should implement RR's provisions.

While it is the opinion of this dissertation that the implementation of RR's provisions concerning payment of freight and right of control is a desirable outcome, successful implementation of the convention is not guaranteed. There is a very clear danger that RR's work-group was over ambitious, and by creating such a complicated convention they have managed to create scepticism toward the possibility of ratification in many states.

The extent of which the trading of bills of lading transfers rights is severely limited in Norwegian law, especially in relation to the transfer of liabilities. NMC § 269 exists primarily to protect the interests of carriers and to guarantee that they are paid the freight agreed upon. While NMC § 269 initially appears somewhat simple and limiting, there are grounds to assume that it may be interpreted to incorporate the more mature rules found in English law. However, the ability of Norwegian courts to go outside of the basic wording of provisions is limited. As a result, care must be taken when using English case law to justify the transfer of liability to a third-party through means other than receiving the goods.

No legislation exists in Norway that allows a third-party, in possession of bills of lading, to actively instruct carriers to control the environment of their goods, change their course, or grant permission for the goods to be delivered to someone else. The only right that may instruct carriers is *stoppage in transitu*, but this right is reserved for the seller of goods, and serves fundamentally different principles. Stoppage does not transfer with bills of lading, as emphasised in SGA § 61.

Should RR be implemented in Norway, it is clear that significant changes will have to be made to the current NMC. With regard to the payment of freight, the changes are relatively small, although the manner in which one can become obliged to pay freight is expanded. This will primarily be regulated by RR § 58, a provision regulating general liability transferral, not just the obligation to pay freight. It must be noted that this expansion of liability transfer is a development that favours the carrier.

However, while § 58 could be considered disadvantageous for consignees, it is made up for by the number of new rights granted through RR's chapter ten. It states that the holder of a

bill of lading may instruct the carrier in a number of different ways, all of which are unprecedented in a Norwegian context for carriage of goods. Certain limitations also exist to protect the carrier and give a reasonable balance to the right of control. The primary limitations are in article 52, which protects the carrier financially in cases where he is obliged to follow instructions that could lead to increased costs.

Scandinavian carriage laws lack sophistication when compared to the UK. This is due to Scandinavia historically experiencing slow convention-based development, while the UK has been pioneering most maritime trade laws through regular trade and legal practice. It is clear that the implementation of RR would go a long way in bridging this gap. Furthermore, such development would mean huge advantages in support of principles such as predictability and sound business practices.

The overall advantages of implementing the relevant RR provisions in Norway far outweigh the disadvantages. However, this is not necessarily the case for other states with more advanced maritime law. The overall nature of this convention demonstrates its ambition of being an international code, rather than a maritime guideline with limited scope. Combining this with its considerable size and complexity, there exists a risk that the convention may never be ratified by a sufficient number of states, due to the over ambitious strategy of the RR work-group. States are often reluctant to give up sovereignty, and guidelines are generally easier to adopt than international codes. Committing to RR would severely limit the opportunity for some states to develop maritime law in a direction that serves their individual interests. This is especially sensitive when taking into account individual states' priorities regarding the protection of specific carriage parties (i.e. carriers, shippers, or consignees).

However, assuming that RR is never formally ratified by the necessary number of twenty states, Norway would benefit from implementing these provisions through their own legislature. Given that Sweden and Denmark are also signatories to RR, it would be safe to assume that the continuation of Scandinavia's tradition of synchronising maritime codes would continue as usual.

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Appendix

Central provisions in Norwegian law

The Norwegian Maritime Code § 268

Section 268¹ The carrier's² delivery of the goods

At the port of destination, the receiver shall receive the goods at the place and within the period of time indicated by the carrier.² The goods shall be delivered in such a manner that they can be conveniently and safely received.

A person who appears to be entitled to receive the goods may inspect them before reception.³

The Norwegian Maritime Code § 269

Section 269¹ Duty of the receiver to pay freight, etc.

If the goods are delivered against a bill of lading,² the receiver becomes liable on receiving the goods for freight and other claims due to the carrier³ pursuant to the bill of lading.⁴

If the goods were delivered otherwise than against a bill of lading,² the receiver is only liable to pay freight and other claims according to the contract of carriage if the receiver had notice of the claims at the time of delivery or was aware or ought to have been aware that the carrier³ had not received payment.

The Norwegian Sales of Goods Act § 61(2)

§ 61 - Anticipatory breach of contract

(2) if the seller has already dispatched the goods and the circumstances on the part of the buyer as mentioned in the preceding paragraph become apparent the seller may prevent the goods from being handed over to the buyer or his creditors. This is so whether or not the buyer or his creditors have received the transport document.

The Norwegian Satisfaction of Claims Act § 7-2

§ 7-2. Retten til å holde tilbake egen ytelse.

Viser det seg at skyldneren mangler midler til å oppfylle sin del av en gjensidig tyngende avtale i rett tid, kan den annen part holde sin ytelse tilbake, eller når ytelsen er avsendt fra leveringsstedet, hindre at den blir overgitt til skyldneren eller dennes bo inntil sikkerhet blir stilt for motytelsen. Dette gjelder selv om tidspunktet for skyldnerens ytelse ikke er kommet.

Central provisions in the Rotterdam Rules

Article 42 *“Freight prepaid”*

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

Article 50 *Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

Article 51 *Identity of the controlling party and transfer of the right of control*

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

Article 52
Carrier's execution of instructions

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

Article 58
Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

Central provisions in English law

The Carriage of Goods by Sea Act 1992 Section 3(1)

3 Liabilities under shipping documents.

- (1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—
- (a) takes or demands delivery from the carrier of any of the goods to which the document relates;
 - (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
 - (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.