THE HIMALAYA CLAUSE REVISITED

Introduction

Ever since 1954 with *Adler* v. *Dickson*[1] where the Court of Appeal held that the master and boatswain of the "Himalaya" could not take advantage of an exclusion clause in a passenger ticket evidencing the contract of carriage between the plaintiff and the shipowner, attempts were made to circumvent its effects in a shipping context. Although the ground for the decision was flatly stated by Denning L.J. (as he then was) to be the absence of privity of contract between the third party and the plaintiff,[2] it may have been felt that the lack of a clear indication in the contract that the master and boatswain were to be granted the benefit of the exclusion clause made the difference. Consequently, the practice grew of expressly stipulating in a "Himalaya clause" *(i.e. a* clause designed to get around *Adler* v. *Dickson*) that firstly, such a benefit was intended to be conferred on all servants or agents (including independent contractors) of the carrier, and secondly, that the carrier was contracting as agent or trustee for such servants or agents, who must thus be considered contracting parties. However, in reasserting the rigours of the doctrine of privity of contract, the House of Lords held in 1961 that stevedores engaged in unloading a drum of chemicals from a vessel could not limit their liability under a bill of lading when sued by the consignees, even though the carrier could have done so on the basis of its contract with the consignees.[3] Nonetheless, Lord Reid in that case did not altogether preclude the possibility that a stevedore engaged by the carrier might successfully raise the terms of a contract of carriage entered into between the carrier and the shipper, and laid down four conditions for this to happen:[4]

1. the bill of lading must make it clear that the stevedore is intended to be protected by the provisions in it limiting liability;
2. the bill of lading must make it clear that the carrier, in addition to contracting for those provisions on his own behalf, is also contracting as agent for the stevedore that the provisions should also apply to the stevedore;

[1] [1955] 1 Q.B. 158.
[2] *Ibid*., at 182: "The goods owner makes one contract only, namely his contract with the carrier. He makes no contract with anyone else. In particular, he makes no contract with the stevedores or with the master or crew."
[3] *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446. Admittedly, the stevedores were not expressly mentioned in the contract, which in its terms conferred the benefit of the limitation figure only on "the carrier", but the court specifically held there was no rule of vicarious immunity, in accordance with which the stevedore could shelter behind hte carrier's liability, nor was there any contractual nexus between the stevedore and the consignee.
[4] *Ibid*., at 474.

3. the carrier must have authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice; and

4. any difficulties about consideration moving from the stevedore must be overcome.

American courts have been more prepared to permit third parties to claim benefits as long as there is a clearly expressed intention in the contract to do so. Although the stevedore in *Robert C. Herd & Inc.* v. *Krawill Machinery Corporation*[5] was held by the Supreme Court to be unable to claim the privilege of limitation of liability set out in a bill of lading, Whittaker J. based the decision of the court on the fact that the bill of lading did not purport to extend such a privilege to the stevedore, which consequently "was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier":[6] exclusion or limitation clauses should be available only to "intended beneficiaries" and must not be taken to alter familiar rules visiting liability upon a tortfeasor "unless the clarity of the language used expresses such to be the understanding of the contracting parties."[7] Thus, where the Himalaya clause in the bill of lading conferred the benefit of its provisions limiting liability to US$500 per package or shipping unit on any

> person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, all agents and all stevedores and other independent contractors whatsoever)

the U.S. District Court allowed stevedores who damaged the plaintiff's chocolate roller refiner during unloading operations to limit their liability to US$500.[8] Similarly, where the bill of lading extended its immunities and limitations to "contractors... used, engaged or employed by the carrier in the performance of such work or services [undertaken in this contract]," dry dock owners responsible for damage to a vessel and its cargo were held to be "contractors" and entitled to the benefit of the one-year limitation period incorporated in the bill of lading.[9] Nevertheless, both by legislative enactment[10] and practice, Singapore law follows English rather than American law in this area, with the result that the obstacles posed by the twin doctrines of privity of contract and consideration have generally proved more difficult to surmount.

It is proposed here to draw attention principally to the recent unanimous decision of the Privy Council in *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spraggon (Aust.) Pty. Ltd. (The New York Star)*[11] affirming its earlier split decision in *New Zealand Shipping Co.*

5 [1959] A.M.C. 879.
6 *Ibid.*, at 888.
7 *Ibid.*, at 885, citing *Boston Metals Co.* v. *Winding Gulf* 349 U.S. 122, 123-124 (1955).
8 *Carle & Montanari Inc.* v. *American Export Isbrandtsen Lines Inc.* [1968] 1 Lloyd's Rep. 260. See also *Tessler Bros. (B.C.) Ltd.* v. *Italpacific Line* [1972] A.M.C. 937 (stevedores entitled to the US$500 limitation figure where the bill of lading extended to "servants or agents of the Carrier (including every independent contractor)").
9 *Grace Line Inc.* v. *Todd Shipyards Corp.* [1974] A.M.C. 1136.
10 Civil Law Act (Cap. 30, Singapore Statutes, Rev. Ed. 1970), s. 5.
11 [1980] 3 All E.R. 257 (appeal from Australia).

Ltd. v. *A.M. Satterthwaite (The Eurymedon),*[12] which revealed a move to sound the death knell to privity of contract in the commercial context of the carriage of goods by sea. To the extent that these cases turned on whether stevedores engaged by the carrier in the discharge or delivery of cargo could derive a measure of protection under bills of lading, it may be argued that on their facts they are of limited application in Singapore: containerised cargo is handled by the Port of Singapore Authority (the PSA), which also supplies stevedoring labour (either its own employees, or "contract" workers hired from private stevedoring companies) at all its common user berths, and the latter portion of section 97B of the Port of Singapore Authority Act[13] exempts the PSA

> from all liability for any loss or damage caused by any act, omission or default of [any stevedore or workman whilst engaged in performing work in or in respect of any vessel].

In addition, section 90(1) provides that neither the PSA nor "any person duly authorised by it" shall be liable for loss caused by mis-delivery, short delivery or non-delivery of goods placed in the custody or control of the PSA (other than transhipment goods and goods accepted for storage under section 98), and if goods acknowledged to be in the PSA's custody are damaged or destroyed, liability is to be ordinarily limited to $2,000 per package or unit. Nonetheless, it is submitted that a study of the Himalaya clause is still of some merit here, since private stevedoring contractors may be directly utilised by carriers in a few appropriated berths, or for lighterage; if the proper law of the contract of affreightment is other than Singapore law, for instance English law, it will be pertinent to consider how English law regards the Himalaya clause (in this connection, as membership of the Judicial Committee of the Privy Council is virtually the same as that of the House of Lords, decisions of the former will be highly persuasive with the latter); and the topic is of general relevance to the doctrine of privity of contract, which is applicable in principle to all contracts, not merely bills of lading. It is perhaps purely fortuitous that both *The Eurymedon*[14] and *The New York Star*[15] concerned stevedores claiming rights under bills of lading, and it is thought that the broad approach evinced there is not confined to such contexts.

The Eurymedon

In 1974, Lord Reid's four conditions were found for the first time to be satisfied by a bare majority of the Privy Council in the well-known case of *New Zealand Shipping Co. Ltd.* v. *A.M. Satterthwaite (The Eurymedon),*[16] where stevedores, who in unloading the carrier's vessel caused £880 worth of damage, were held entitled to the benefit of the one-year limitation period in the bill of lading. The carrier was a wholly owned subsidiary of the stevedore company, and the Himalaya clause read:

> It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by

[12] [1975] A.C. 154 (appeal from New Zealand).
[13] Cap. 173, Singapore Statutes, Rev. Ed. 1970 (as amended).
[14] [1975] A.C. 154.
[15] [1980] 3 All E.R. 257.
[16] [1975] A.C. 154.

> the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions of this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced in this Bill of Lading.

The traditional analysis of the formation of a contract into offer/acceptance components was rejected by the majority of the Board in finding that a contract did come into existence between the stevedore and the consignee on the terms of the bill of lading when the stevedore furnished services in unloading the goods. In the opinion of Lord Wilberforce:[17]

> the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shippers and [the stevedore], made through the carrier as agent. This became a full contract when [the stevedore] performed services by discharging the goods.

In addition, one had to bear in mind the commercial character of the contract, involving service on one side, rates of payment on the other and qualifying stipulations as to both, and to say that a set of promises in such a context was gratuitous or *nudum pactum* was unreal. Nevertheless, there are theoretical difficulties associated with the majority's analysis of the contractual relationship between stevedore and shipper or consignee, and these have been discussed at length elsewhere.[18] Briefly summarised, they are as follows:

1. The wording of the Himalaya clause in question contemplated an immediately binding bilateral contract between the stevedore and the shipper, not an offer of a unilateral contract by the latter. This was certainly the view of the minority (Viscount Dilhorne and Lord Simon), although the majority attempted to get around this (unsuccessfully, it is thought) by describing it as a "bargain". This difficulty, however, can be easily overcome by appropriate redrafting of the clause to make it read like an offer of immunity (as was accepted by the minority).

2. Acceptance of the offer occurs when the stevedore performs services by unloading the goods. Presumably, this means that the offer can be revoked at any time before this by the shipper (revocation communicated to the carrier should suffice); knowledge by the stevedore

[17] *Ibid.*, at 167, 168.

[18] See F.M.B. Reynolds, "Himalaya clause resurgent" (1974) 90 L.Q.R. 301; B. Coote, "Vicarious immunity by an alternative route-II" (1974) 37 M.L.R. 453; F. Dawson, "Himalaya clauses, consideration and privity of contract" (1974-5) 6 N.Z.U.L.R. 161; D.G. Powles, "The Himalaya clause" [1979] L.M.C.L.Q. 331 at 333-336; P.H. Clarke, "The reception of the Eurymedon decision in Australia, Canada and New Zealand" (1980) 29 I.C.L.Q. 132 at 136-139.

of the terms of the offer in the bill of lading is essential, and the unloading of the cargo must have been done with reference to it, since otherwise the consideration provided would not have been referable to the offer; defective performance of his duties by the stevedore still qualifies as acceptance of the offer; and if the stevedore damages the goods prior to unloading them *(e.g.* while unloading other goods), he is not protected. Such distinctions appear artificial in a commercial context.

3. Where a consignee is involved, section 1 of the Bills of Lading Act 1855 [19] may not suffice to transfer an offer of a unilateral contract made by the consignor to the consignee. Section 1 contemplates the transfer of immediate rights of suit and liabilities upon consignment or endorsement of the bill of lading, and the collateral contract envisaged by the Himalaya clause only becomes effective when the stevedore commences to unload the goods (usually long after consignment or endorsement of the bill of lading). The Privy Council, however, preferring not to invoke the Bills of Lading Act 1855 appealed to the principle in *Brandt* v. *Liverpool, Brazil and River Plate S.N. Co. Ltd.*,[20] under which the holder of the bill of lading impliedly enters into a contract with the carrier on the same terms as those in the bill of lading when he presents it to the carrier and requests delivery of the goods. On this analysis, if the bill of lading is presented *after* the goods have been unloaded *(e.g.* into a warehouse), no contract can arise on the Himalaya clause, since past consideration is not good consideration.

The reception of *The Eurymedon* in Commonwealth countries such as Canada, New Zealand and Australia (until recently) has been lukewarm. Thus, in *The Suleyman Stalskiy*,[21] the Supreme Court of British Columbia denied a stevedore the protection of a clause expressly conferring on it the benefit of all limitations and exclusions in the bill of lading when the stevedore failed to comply with the goods owner's instructions regarding the storage of a cargo of steel tubing, distinguishing *The Eurymedon* on the basis, *inter alia,* that Lord Reid's third requirement had not been met, *viz.* that the carrier should have authority to contract on the stevedore's behalf. The stevedore was simply an independent contractor whose services the carrier, Fesco Pacific Line, had retained to discharge its vessel: there was no such interrelationship as had existed between carrier and stevedore in *The Eurymedon. The Eurymedon* was again distinguished in New Zealand in *Herrick* v. *Leonard & Dingley Ltd.*.[22] where a stevedoring company which had carelessly damaged the plaintiff's Jaguar motor car while unloading it at Auckland was found unprotected by the exclusion clause in the contract of carriage, since Lord Reid's first three conditions were not satisfied (the Himalaya clause attempted to benefit only agents and servants of the carrier, while the stevedore was an

[19] S.l reads: "Every consignee of goods named in a bill of lading and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

[20] [1924] 1 K.B. 575.

[21] [19760 2 Lloyd's Rep. 609.

[22] [1975] 2 N.Z.L.R. 566.

independent contractor, nor was there any evidence that the carrier had the stevedore's authority to contract on its behalf). In Australia, the High Court in 1978 in *Port Jackson Stevedoring Pty. Ltd.* v. *Salmond & Spraggon (Aust.) Pty. Ltd. (The New York Star)*[23] by a majority of 4:1 distinguished *The Eurymedon* in holding that a firm of stevedores could not plead the one-year limitation period provided for in a bill of lading. Indeed, of the majority in the High Court two members (Stephen and Murphy JJ.) felt that *The Eurymedon* should not be followed in Australia for policy reasons. However, their positive disquiet with that decision, and its confinement at the hands of the remaining two judges in the majority (Mason and Jacobs JJ.) have now been set at nought by a strong Judicial Committee of the Privy Council.[24] An unreported decision of the New South Wales Supreme Court[25] handed down just prior to the Privy Council judgment hinted at a more ready reception of *The Eurymedon* in the case of an inland carrier performing services under a combined transport bill of lading, and a more recent decision of the same court[26] handed down after the Privy Council judgment in *The New York Star* has demonstrated a marked willingness to adopt both the letter and the spirit of *The Eurymedon*, as affirmed in *The New York Star.* Let us now examine *The New York Star.*

The New York Star

The case is noteworthy from two points of view. First, from an Australian perspective, it will probably rank as the last case from which an appeal will proceed from the High Court of Australia to the Privy Council, since the Privy Council (Appeals from the High Court) Act 1975 (Cth.) abolished all remaining avenues of appeal from the High Court to the Privy Council in all matters, save for appeals which related to proceedings commenced prior to 8 July 1975. The incident out of which the action arose occurred in 1970. and proceedings were started in 1971 in the Supreme Court of New South Wales,[27] which delivered judgment in 1975 in the appellant's favour. In the following year, this decision was reversed by the Court of Appeal. Two years later, a majority of 4:1 of the High Court concurred in that result, but on 10 July 1980 the Privy Council reversed this decision, after granting the appellant special leave to appeal to the Board. With the passage of time, appeals to the High Court arising out of proceedings begun prior to 8 July 1975 must perforce diminish to vanishing point, so that although appeals can still be brought from State Supreme Courts when not exercising federal jurisdiction to the Privy Council,[28] none can be taken from the High Court to the Privy Council. In a climate in which the Privy Council itself is keenly aware of the national and judicial aspirations of former

[23] (1978) 52 A.L.J.R. 337.

[24] [1980] 3 All E.R. 257. The only member of the High Court to welcome *The Eurymedon* enthusiastically was Barwick C.J., whose judgment was unreservedly endorsed by the Privy Council.

[25] *The Broken Hill Proprietary Co. Ltd.* v. *Hapag-Lloyd Aktiengesellschaft & Anor.* C.L. No. 12476 of 1978 (judgment delivered on 28 March 1980).

[26] *Sidney Cooke Ltd.* v. *Hapag-Lloyd Aktiengesellschaft & Anor.* C.L. No. 9557 of 1979 (judgment delivered on 13 October 1980): also to date unreported.

[27] See [1975] A.C.L.D. 186.

[28] The High Court recently reasserted this in *Southern Centre of Theosophy Inc.* v. *State of South Australia* (1979) 54 A.L.J.R. 43.

British colonies, it is not surprising that its role as a final court of appeal is decreasing. In *The New York Star,* however, the Board was persuaded that "exceptionally" it should grant special leave to appeal in the interests of imposing a measure of uniformity in that area of international trade given to utilising the Himalaya clause, especially as views were expressed in the High Court approving, disapproving and distinguishing *The Eurymedon.*

The second point to note is that the Privy Council unequivocally reaffirmed not only the letter but also the spirit of *The Eurymedon,* pointing out in no uncertain language that commercial and practical considerations supported their conclusion, even if (though this was denied by the Board) traditional contractual doctrine must take second place. Viscount Dilhorne and Lord Simon, who both dissented in *The Eurymedon* on the ground that it was impossible to read an offer into a concluded and specific contract, were not on the Board which heard *The New York Star,* nor did their dissent find an echo there. Lord Wilberforce provided the link between, and delivered the Board's judgment in, both appeals.

Briefly stated, the facts were that Schick Safety Razor Co. shipped a cargo of 37 cartons of razor blades worth A$14,684.98 at New Brunswick in Canada for carriage to Sydney on the New York Star. The respondent was named as consignee in the bill of lading. The bill of lading was issued to the shipper and transmitted to and accepted by the consignee. The carrier was the Blue Star Line, which owned 40% of the capital of the appellant stevedores in the Port of Sydney. It was common for the appellant to act as stevedore for the Blue Star Line, and in fact the appellant had for a number of years enjoyed a monopoly of the carrier's business in that port. The New York Star arrived in Sydney on 10 May 1970. In accordance with normal practice at the port, the razor blades were discharged from the ship, and for security reasons placed by the stevedores in a shed called "the dead house" on the wharf under their control. It was found that because of their carelessness, a fraudulent third party was able to make away with the consignment, and indeed the finding of negligence was not contested by the appellant. However, the bill of lading contained a Himalaya clause which purported to extend the benefit of defence and immunities conferred upon the carrier by the bill of lading to any independent contractor employed by the carrier "while acting in the course of or in connection with his employment" (Clause 2). In fact, the clause here was identical to the one in issue in *The Eurymedon,* and it is surprising that it was not redrafted in the light of the difficulties experienced by the majority in the Privy Council (as well as the judges in the New Zealand courts below), and in the light of the comments of the minority. The bill of lading which was subject to the Hague Rules also contained a one-year time bar as authorised under the Rules (Clause 17). By accepting the bill of lading, and (perhaps also) by asking for delivery of the goods, the respondent consignee became a party to the bill of lading contract with the carrier.[29]

[29] *Per* Mason and Jacobs JJ. in the High Court (1978) 52 A.L.J.R. 337 at 352, citing *Brandt's* case *(supra,* fn. 20). Barwick C.J., without citing authority, put it more simply, while going beyond the principle in *Brandt's* case, "By later accepting the bill the consignee became party to the arrangement with the consignor" (*ibid.*, at 342), and again, "The consignee by accepting the bill,

Action having been commenced against the appellant by the respondent more than a year after the event, the question arose whether the former could invoke Clause 17 on the basis that Clause 2 effectively permitted them to do so. Sheppard J. at first instance found against the respondent, holding that *The Eurymedon* applied. Since the bill of lading clearly intended to confer rights on third parties such as the appellant, and the carrier had the necessary authority to contract on its behalf, the appellant could take advantage of the one-year time bar in the bill of lading. However, the Court of Appeal reversed this decision, holding that the stevedores had furnished no consideration referable to the shipper's offer of exemption under Clause 17.[30] In the High Court, only Stephen J. specifically acquiesced in this view, Mason and Jacobs JJ. finding that the stevedores had in fact acted in reliance on the shipper's offer, Murphy J. being inclined to agree with them, and Barwick C.J. stating that the consideration which the stevedores certainly provided sufficed to give binding force to the "consensual arrangement" made by the bill of lading. However, all judges save the Chief Justice ruled that the respondent was entitled to succeed, since the bill of lading ceased to operate after the goods had passed over the ship's rail — a conscious effort to restrict the operation of *The Eurymedon,* which was distinguished on the ground that there the stevedores' negligence occurred *in the course of* unloading the cargo from the vessel. Stephen and Murphy JJ. expressly stated that *The Eurymedon* should not be followed in Australia for policy reasons.[31] Both Justices felt that in a country such as Australia which depended on foreign carriers for the movement of goods, it would be prejudicial to the interests of shippers to allow carriers to exclude liability not only for themselves, but also for others performing services on their behalf, especially where shippers were scarcely able to influence the terms of shipment or the performance of the contract. Australian courts should therefore not assent to a doctrine that simply helped ship-owning nations at the expense of ship-user nations.

The Privy Council which heard the appeal was an exceptionally strong Board. There are normally two Boards, one presided over by Lord Wilberforce, the other normally by Lord Diplock. Because of the unusual nature of the appeal (*i.e.* from the High Court of Australia) and the importance of the issue to the insurance interests behind the parties (notwithstanding the modest amount involved), both Lord Wilberforce and Lord Diplock sat on the appeal, the remaining members of the Board being Lord Fraser, Lord Scarman and Lord Roskill. The Board unanimously reaffirmed the correctness of the

of course, accepts the situation which has been created between consignor and stevedore and becomes in substance a party to the conditions of the bailment" (*ibid.*, at 345). No other reference was made by the remaining two members of the High Court or by the Privy Council as to how the consignee became bound by the terms of the bill of lading, but as the Privy Council endorsed Barwick C.J.'s judgment on the appeal as a whole [1980] 3 All E.R. 257 at 264, their Lordships must be taken to have agreed with him on this point too. Presumably, Barwick C.J. subconsciously applied the New South Wales equivalent of s. 1 of the Bills of Lading Act 1855 *(i.e.* s. 5 of the Usury, Bills of Lading and Written Memoranda Act 1902): an advance on *The Eurymedon* which effectively answers the third difficulty associated with that case, as mentioned above at p. 216.

30 [1977] 1 Lloyd's Rep. 445.

31 (1978) 52 A.L.J.R. 337 at 346, 348-349, 358.

decision in *The Eurymedon.* It was felt that any stevedores employed by the carrier would normally and typically come within the phrase "servant or agent of the carrier" in Clause 2 of the bill of lading, and it was irrelevant that the stevedores were the parent company of the carrier, as in *The Eurymedon,* or that they were partially owned by the carrier, as in *The New York Star.* The normal situation was that stevedores enjoyed the benefit of any arrangement between a carrier and a shipper, where it was understood that the carrier would employ stevedores to perform work in connection with the goods, and where the intention was clearly expressed that the stevedores should benefit from the terms contained in the bill of lading. To say otherwise would be to encourage a search for fine distinctions which would diminish the general applicability of the principle in the light of established commercial practice. The Board did not discuss the requirement of consideration, which had bedevilled the judgments of the Court of Appeal[32] and was the subject of divergent views in the High Court, but simply approved the analysis and judgment of Barwick C.J. on all the issues raised.[33] The difficulties posed by the Chief Justice (namely, whether it is open to a shipper to revoke the promise of exemption as soon as the goods are shipped, so long as this is done prior to the furnishing of consideration by the stevedore) were not pursued.

The argument that the stevedores could not rely on the written terms of the bill of lading contract since they were guilty of a fundamental breach of contract was regarded as unsound and misconceived in view of the fact that Clause 17 specifically discharged the carrier from *all* liability unless suit was brought within one year after the goods were or ought to have been delivered. In any event, the Board felt that this particular clause was not one relating to performance of the contract, since it was a clause that came into operation only after performance under the contract had become impossible or had been given up, and it then regulated the manner in which liability for breach of contract was to be established. It was therefore similar to an arbitration or forum clause, which clearly survives a repudiatory breach.[34] Consequently, on construction and analysis, Clause 17 clearly excluded the respondent's claim.

The main argument, however, related to whether the bill of lading continued to govern the stevedores' rights and liabilities after they had performed the carrier-like duty of unloading the vessel and after the goods had been stacked and stored in the dead house. The respondent contended that the stevedores were not acting as carriers nor carrying out any duties as carriers under the bill of lading, but that they were simply bailees at that stage, with the result that the bill of lading could not regulate the duties resting on the stevedores as bailees (the argument favoured by the majority of the High Court as the common ground for their decision). The Board, however, felt that it would be unreal to suggest that the carrier's obligations terminated as soon as the goods were discharged over the rail, even though Clause 8 spoke of the carrier's liability terminating at that

[32] [1977] 1 Lloyd's Rep. 445.
[33] [1980] 3 All E.R. 257 at 264.
[34] See *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] 2 W.L.R. 283 at 295.

point. Indeed, Clause 5 specifically stated that while the carrier's responsibility *as a carrier* ended as soon as the goods left the ship's tackle, its liability thereafter was to be that of an ordinary bailee. The bill of lading therefore contemplated an on-going responsibility for the goods on those terms, and recognised the normal commercial practice under which a consignee does not wait and take delivery as soon as the goods are discharged from the side of the vessel, but stevedores take delivery of the goods, sorting and storing them until the consignee appears to claim them. If instead of hiring independent contractors the carrier were to act as stevedore itself, quite patently its liability would be governed by the terms of the bill of lading. As stevedores were in fact employed and made privy to the bill of lading contract, their liability should be similarly determined.

In reaching their decision, the Board emphasised the commercial nature of the transaction, and the proper expectations of parties to a business venture which should not be defeated by fine pedantic distinctions. The respondent had agreed to extend the terms of the bill of lading to the stevedores, and legal effect should be given to this arrangement. On the other hand, as Stephen J. pointed out in the High Court, it may be better commercial sense to hold careless stevedores liable to a shipper or consignee who has no say in their appointment and no control over their actions, rather than exonerating them and putting the risk on the shoulders of the shipper or consignee (or his underwriter). Although, if such stevedores were exempt from liability, the shipper derives some benefit to the extent that the rate of freight should be lower, there would be no pressure on the stevedore to exercise himself unduly to take proper care of the goods, and this does not assist loss prevention. Moreover, even if under the stevedoring contract, the carrier agrees to indemnify the stevedore against all liability, the carrier, rather than the shipper, being in a position to influence the conduct of the stevedore should be more justifiably so the risk bearer. Nevertheless, from the insurance angle, the reality is that cargo owners will not drop their cover simply because they may have legal recourse against the wrongdoer, since claims generally can be settled more expeditiously against their underwriters than against the wrongdoer, and to leave the risk ultimately with the carrier or the stevedore therefore involves an element of double insurance, which increases the cost of transportation of cargo, as the carrier will insure its potential liability for cargo damage with its P & I Club, and the cargo owner will insure the same risk of damage to the cargo with his underwriters.

Be this as it may, the trend in current international conventions has in fact been to permit the carrier's "servants or agents" to avail themselves of defences and limits of liability open to the carrier against a shipper. Thus, Art. IV bis, r. 2 of the Hague-Visby Rules (applicable in Singapore under the Carriage of Goods by Sea Act 1972) states, as regards causes of action against the carrier:

> If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

Only direct employees of the carrier, or those in the position of servants appear therefore to be protected. Although under section

97B of the Port of Singapore Authority Act, any stevedore or workman connected with the PSA who performs work in or in respect of any vessel is "deemed to be the servant of the owner and master of such vessel", this provision does not deem him *not* to be an independent contractor, with the result that if he otherwise is an independent contractor, he is not covered by Art. IV bis, r. 2, which expressly excludes independent contractors. However, if such stevedore or workman is a "person duly authorised by [the PSA]" within the meaning of section 90(1) of the Port of Singapore Authority Act, some protection is furnished by that section, as mentioned earlier in the Introduction to this article. Secondly, Art. 7, r. 2 of the Hamburg Rules[35] (which are designed to replace the whole regime of the Hague Rules) reads:

> If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment is entitled to avail himself of the defences and limits of liability which the Carrier is entitled to invoke under this Convention.

A comparison between the two provisions reveals that while independent contractors (such as the stevedore in *The New York Star)* are expressly excluded under the Hague-Visby Rules, the Hamburg Rules neither expressly exclude nor include them, and it is possible that in general the Singapore courts, if asked to determine the question in the abstract, may hold, as McMullin J. did in *Herrick* v. *Leonard & Dingley Ltd.*,[36] that the term does not include independent contractors:

> While the protection of the contract is further extended to cover the agents or servants of the owner or charterer from time to time, there is no reason to suppose that those agents or servants were intended to include the stevedore. In the ordinary sense a stevedore is not an agent or servant of the owner who engages him. He is an independent contractor. If it were otherwise,... the owner would be liable for the negligence of any employee of the stevedore who might cause injury to some stranger.

On the other hand, it is thought that the deeming provision of section 97B of the Port of Singapore Authority Act may effectively operate in this instance to include within Art. 7, r. 2 such stevedores or workmen to which the section applies, even though they may in fact be independent contractors. Finally, Art. 20 of the recently adopted Convention on International Multimodal Transport of Goods[37] specifically permits any person whose services the MTO makes use of for the performance of the multimodal transport contract, and who has acted "within the performance of the contract" to avail himself of the defences and limits of liability under the Convention:

> If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent or such other person shall be entitled to avail himself of the defences and limits

[35] Contained in U.N. Document A/CONF. 89/13. Agreed upon on 31 March 1978, the Hamburg Rules are not yet in force.

[36] [1975] 2 N.Z.L.R. 566 at 575. Contrast *Grace Line Inc.* v. *Todd Shipyards Corp.* [1974] A.M.C. 1136 at 1152 *(per* Carter Ct. J.).

[37] Adopted by the United Nations Conference on a Convention on International Multimodal Transport on 24 May 1980 after seven years of negotiations, in which Singapore took no part: U.N. Document TD/MT/CONF/16. The Convention is not yet in force.

> of liability which the multimodal transport operator is entitled to invoke under this Convention.

As regards the present legal position in Singapore then, *The New York Star* indicates that a generous scope must be given to the principle of *The Eurymedon,* at least in commercial contexts. A question might arise whether the terms of Art. IV bis, r. 2 of the Hague-Visby Rules now preclude a Singapore court from granting benefits under a bill of lading to an independent contractor in spite of those cases (which were decided in relation to bills of lading governed by the unamended Hague Rules, and therefore in the absence of Art. IV bis, r. 2). It is submitted that if independent contractors can be covered apart from the Hague-Visby Rules, they are not thereby deprived of such protection, Art. IV bis, r. 2 being designed principally to extend protection to the carrier's servants or agents where they might previously not have been protected, contractually or otherwise, and not primarily to remove it, where such protection already existed.

Litigation has so far turned on whether the third party can take advantage of the limitation provisions in the bill of lading (the limitation period, and the limitation sum). Will the courts also allow general exemption clauses to enure for the benefit of third parties? Even though he welcomed *The Eurymedon,* Barwick C.J. in the High Court in *The New York Star* was not prepared to say positively that the Australian courts would do so. His Honour pointed out that there were obvious differences between the operation of time limitation clauses and clauses purporting to displace liability. Whether the Himalaya clause was effective to *exempt* the stevedore from all liability in accordance with the contract was a matter on which he preferred to express no opinion.[38] In addition, there may well be in some circumstances an element of "unreasonableness" within sections 2-4 of the (U.K.) Unfair Contract Terms Act 1977 (received as part of Singapore law under section 5 of the Civil Law Act), if we bear in mind, for instance, the inability of one of the contracting parties to influence the conduct of the third party, to ascertain the identity of the third party, or to be fully apprised of the environment in which the third party operates. It should, however, be noted that, in relation to sections 2-4 and 7 of the Act, only a person dealing as "consumer" (as defined in section 12) in the context of contracts of affreightment, salvage or towage is entitled to have "unreasonable" contract terms set aside.[39]

Further developments: an alternative approach

To update developments on the Himalaya clause from the jurisdiction where *The New York Star* arose, we may refer to two recent New South Wales cases involving Hapag-Lloyd as the ocean carrier which affirmed the applicability of *The Eurymedon,* and also revealed another way in which a third party might derive benefits under a bill of lading. Instead of the third party raising the terms of the contract with the carrier, the latter seeks to restrain the shipper or consignee from suing the former contrary to the shipper's express promise in the contract not to claim against the third party, the

[38] (1978) 52 A.L.J.R. 337 at 346.
[39] Unfair Contract Terms Act 1977 (U.K.), Sch. 1, para. 2.

promise being linked to a Himalaya clause. This approach was earlier adumbrated in a non-shipping context in *Gore* v. *Van Der Lann,*[40] and successfully followed in *Smiling* v. *John G. Snelling Ltd.*,[41] where two brothers who had entered into a contract with a third brother were held entitled to the stay of an action brought by the third brother against the family company in violation of their agreement, even though the company could not rely on the agreement in its defence.

In both *Broken Hill Pty. Co. Ltd.* v. *Hapag-Lloyd Aktiengesellschaft and Anor.*[42] and *Sidney Cooke Ltd.* v. *Hapag-Lloyd Aktiengesellschaft and Anor.*,[43] a combined transport bill of lading in a form used by the Australia New Zealand Europe Container Service (A.N.Z.E.C.S.) contained the following clause:

> 4. *Sub-contracting and Indemnity*
>
> (i) The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage,
>
> (ii) The merchant [i.e. the cargo interests] undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage or any part of the carriage is performed or undertaken (other than the carrier) . . . and if any such claim or allegation should nevertheless be made to indemnify the carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the carrier and [sic] if such provisions were expressly for his benefit; and in entering into this contract, the carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such persons.

In the former case, the ocean carrier engaged an inland carrier to take a cylindrical grinding machine from Sydney (where it had arrived from Hamburg) to Newcastle, and the machine was damaged while in the custody of the inland carrier owing to its negligence. The owners of the machine sued the ocean carrier on the bill of lading contract and for negligence as a bailee, and the inland carrier in bailment and negligence. There was a cross-claim for indemnity by the inland carrier against the ocean carrier, and a further cross-claim by the ocean carrier against the cargo owners for any sum recovered by the inland carrier against it. In the same way as the stevedores did in *The New York Star,* the inland carrier pleaded clause 4(ii) above in its defence. Before the hearing of the action, the ocean carrier filed a notice of motion asking that the cargo owners' claim against the inland carrier be permanently stayed, on the ground that a court of Equity would have intervened to restrain the breach of the negative contractual stipulation contained in clause 4(ii), and because of circuity of action *(i.e.* if the cargo owners recovered damages from the inland carrier, the latter could claim an indemnity from the ocean carrier, which would in turn be entitled under the bill of lading to be indemnified by the cargo owners). The cargo owners argued that the ocean carrier lacked a proper interest in bringing the motion, and was also precluded by laches. Relying on

[40] [1967] 2 Q.B. 31.
[41] [1973] Q.B. 87. See further Treitel, *The Law of Contract,* Stevens, 4th ed. (1975), pp. 423-425, 427-430.
[42] See fn. 25.
[43] See fn. 26.

Beswick v. *Beswick*,[44] the New South Wales Supreme Court held that the ocean carrier had more than just a right to nominal damages for breach of clause 4(ii): it had a "legal right to the performance of the contract," and the shipowner had a sufficient interest in enforcing the promise, since rates of carriage and other commercial considerations between the ocean carrier and inland carriers would be affected by the latter's knowledge that clause 4(ii) protected them. On the point of laches, there was no unjust advantage accruing to the ocean carrier nor unfair prejudice visited on the cargo owners as a result of the delay in filing the motion, so the stay was granted. The court did not pronounce on the alternative ground raised by the ocean carrier to support a stay of proceedings *(viz.* circuity of action) nor on the merits of the cross-claim by the ocean carrier against the cargo-owners, as the inland carrier was sufficiently protected by the court order permanently staying proceedings brought against it by the cargo owners.

Similarly, in the *Sidney Cooke* case, a permanent stay of proceedings was granted to the ocean carrier in an action brought by the plaintiffs, owners of a printing unit, against the ocean carrier and the operators of a container terminal. The latter had damaged the unit while it was being lifted by their forklift at an inland depot some 18 days after discharge from the vessel and just prior to delivery to the plaintiffs. As mentioned before, the bill of lading here was identical to that in the preceding case, and the New South Wales Supreme Court again stayed the action against the terminal operators for the same reasons as in the *B.H.P.* case. Two fresh arguments were advanced by the plaintiffs against the stay, *viz.* that clause 4(ii) was null and void because of Art. III, r. 8 of the Hague Rules, and that the clause on its proper construction applied only to the portion of the carriage done by sea, with the result that it did not apply to terminal operators handling the cargo more than two weeks after discharge from the vessel. Both arguments were rejected by the court. The second argument, which is more pertinent to our topic, was refuted by invoking the spirit of *The Eurymedon* as exemplified in *The New York Star.* The latter case was said to discourage a search for fine distinctions which would confine the ambit of the contract of carriage to the mere sea-leg of the entire operation and preclude a stevedore or terminal operator from receiving the benefit of a clause such as clause 4(ii).

Summary

While American courts have been more liberal in allowing a third party to benefit under a contract,[45] English courts have had to struggle to exorcise the ghost of privity of contract. In this respect, *The New York Star* reaffirms the supremacy of commercial considerations in construing business contracts, although the commercial interests of ship-owning nations are apparently favoured in this context at the expense of ship-using countries: which may account for the hitherto unenthusiastic response to the principle of *The Eurymedon* in Australia, New Zealand and Canada.[46] This latest decision of the Privy Council

[44] [1968] A.C. 58.
[45] See *supra,* p. 213.
[46] As articulated by Stephen J. in the Australian High Court (1978) 52 A.L.J.R. 337 at 348.

sitting notionally as an Australian court seeks to achieve a measure of uniformity on both sides of the Pacific. Presumably, international trade would be facilitated if uniformity also prevailed on both sides of the Atlantic. At any rate, it seems clear that there is now judicial willingness in this area to cease cavilling on the theoretical niceties of the doctrine of privity of contract, and to permit third parties to benefit under an agreement, either at their instance or at the behest of one of the principal contracting parties.

C.A. YING*

* Senior Lecturer in Law, The New South Wales Institute of Technology; Visiting Fellow in Law, National University of Singapore.