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Privity and Subcontracting in Multimodal Transport — Diverging Solutions

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When cargo owners engage transport intermediaries to arrange the logistics of carriage, these intermediaries regularly issue multimodal bills of lading and subcontract the actual carriage. This creates a gap in contractual privity between cargo owners and the actual carriers, which can affect the downstream subcontractors' ability to enforce their standard terms against the cargo owners. While this is an international commercial problem, even among the major common law traditions courts have reacted with remarkably varied solutions. Courts in England and the broader Commonwealth have addressed the problem through a bailment framework, while courts in the United States have utilized a form of agency reasoning. This article examines these varying approaches and compares the innovative ways in which courts have responded to the challenges of multimodal subcontracting in international cargo transport.

Keywords: Carriage of goods by sea, multimodal transport, privity of contract, bailment, limited agency.

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1 Introduction

As cargo owners seek door-to-door transport solutions, they often employ third-party experts to help them capitalize on modern multimodal processes. Instead of directly hiring carriers, cargo owners regularly contract with transport intermediaries under multimodal bills of lading designed to cover the entire carriage over both sea and land.[1] These intermediaries, who typically do not operate transportation assets themselves, then subcontract downstream performance across the multimodal chain to ocean, rail, and motor carriers. While this arrangement can reduce costs and enhance efficiency, it removes the privity of contract between the cargo owners and the entities physically handling the cargo. If a dispute arises between the cargo owners and the actual carriers, this missing privity may create a barrier for downstream entities to rely on the terms reflected in their standard contract forms.[2]

This issue surfaces in jurisdictions throughout the world, but the legal frameworks used by courts articulating a solution have varied even among major common law traditions. Courts in England and other Commonwealth jurisdictions have addressed this problem through the lens of bailment, while United States courts have answered similar questions through a remarkably different framework arising out of agency law. This article examines these approaches with the aim of understanding and comparing the innovative ways in which commercial jurists have modified traditional privity principles to more equitably react to the realities of multimodal subcontracting in international cargo transport.

2 Multimodalism and the privity problem

The introduction of the intermodal container during the second half of the twentieth century sparked a revolution that forcefully altered the dynamics of dry cargo transport. It soon became possible to transfer containerized cargo from ship to train to truck with little loss in time or manpower. This also created new opportunities for industry experts to help cargo

1 See eg FIATA Multimodal Transport Bill of Lading, cl 2.

2 For a discussion of this dilemma and corresponding solutions under English and Canadian Law, see John F Wilson, 'A Flexible Contract of Carriage — The Third Dimension?' [1996] LMCLQ 187.

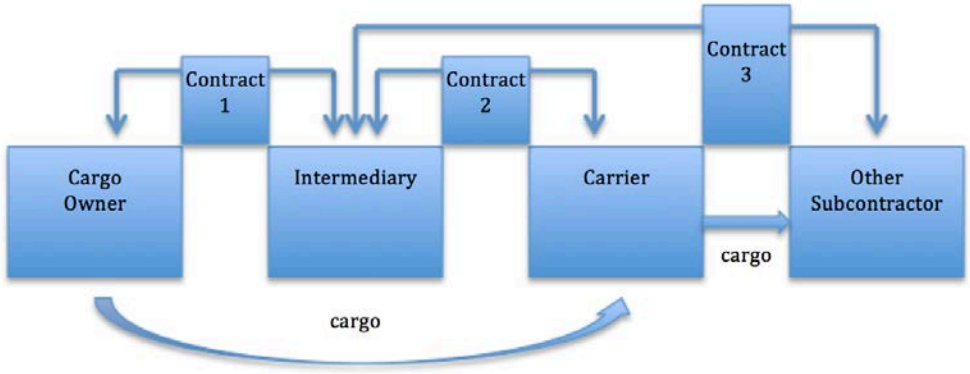
owners take advantage of the possibilities. In this context, transport intermediaries thrived by serving as middlemen between cargo owners and the various entities moving the cargo.

Today, intermediaries of this kind are known by a variety of names: freight forwarders, non-vessel operating common carriers (NVOCCs), third-party logistics providers (3PLs), and ocean transport intermediaries, to name a few. These labels are blurred in practice and are used inconsistently in different parts of the world, but generally intermediaries do not own or operate transportation infrastructure. Instead, on behalf of their cargo-owning customers, they use their logistics expertise and commercial contacts to arrange efficient cargo movements by subcontracting to actual carriers.

The use of these intermediaries unfortunately disturbs the legal relationships between the cargo owner and the carriers. If the cargo owner contracts only with the intermediary, no contractual relationship is formed between the cargo owner and the actual carriers. This missing privity of contract potentially precludes subcontractors from being able to rely on their standard terms against the cargo owner.

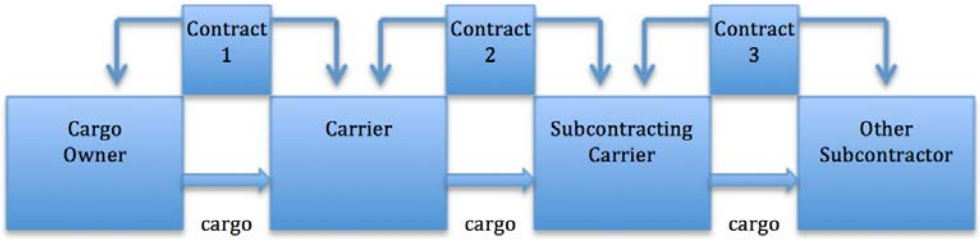
Exhibit A shows a cargo owner contracting with a transport intermediary under Contract 1, which in practical terms could be reflected by the terms of a multimodal or 'through' bill of lading issued by the intermediary. The intermediary then subcontracts the carriage to an actual carrier under Contract 2, which could be evidenced by an 'ocean' bill of lading issued by a container line. The intermediary may further subcontract other segments of the carriage under Contract 3, which could take the form of terms and conditions issued by a rail carrier, road hauler, warehouse, or other subcontractor. This illustration could be extended to include additional subcontracting by the intermediary or the actual carriers downstream. Notice that in Exhibit A the intermediary itself never takes possession of the cargo and instead acts like a carrier by contracting with the cargo owner under a bill of lading, but then subcontracts the actual performance to other actors. While the cargo owner has directly agreed to Contract 1, it has not agreed to Contract 2 or Contract 3, which results in a gap in privity between the cargo owner and the downstream subcontractors.

Exhibit A



A similar problem can emerge when the intermediary is actually the initial carrier. If the cargo owner directly contracts with the lead carrier, such as a container line, that carrier may then subcontract downstream performance to other entities in the multimodal chain. When the lead carrier subcontracts on behalf of the cargo owner, the cargo owner again has no direct contractual link to those downstream entities performing the subsequent carriage. Exhibit B illustrates this scenario. Here, the cargo owner has privity with the lead carrier by directly agreeing to Contract 1, but again the cargo owner has no privity with the subcontractors under Contract 2 or Contract 3.

Exhibit B



This scenario raises doubts as to whether the subcontractors are adequately protected by contract vis-à-vis the cargo owner. One possible solution for the subcontractor is to rely on a so-called 'Himalaya' clause in the lead contract made with the cargo owner. These clauses are designed to extend contractual benefits to defined classes of subcontractors, offering those entities the same contractual rights as the intermediary or initial carrier forming the lead

agreement with the cargo owner. The following is an example of a Himalaya clause drawn from the Mediterranean Shipping Company, Carrier Terms and Conditions:

> …every such servant, agent and Subcontractor shall have the benefit of all terms and conditions of whatsoever nature contained herein or otherwise benefiting the Carrier under this Bill of Lading, as if such terms and conditions were expressly for their benefit.[3]

A Himalaya clause employing such language could protect classes of subcontractors by extending them the right to invoke the terms of the upstream contract to which they are not a party. Although there remains no direct contractual relationship between the cargo owner and the subcontractor, the subcontractor is able to benefit from the provisions of the upstream contract because it is an intended beneficiary of its terms.

But Himalaya clauses have limitations that might deprive a subcontractor from achieving adequate protection. While a subcontractor may be able to invoke contractual rights and defenses via a Himalaya clause, this will only satisfy the subcontractor if the provisions in the upstream contract are identical to (or more favorable than) the subcontractor's standard terms. Unfortunately for subcontractors, such seamlessness and uniformity in contract terms is unlikely in practice.

Take a forum selection clause, for example. Because a forum selection clause tends to be particular to the party that drafts the contract, there may be a direct conflict between a forum selection clause contained in a multimodal bill of lading issued by the NVOCC and a forum selection clause contained in a downstream bill of lading issued by the subcontracted carrier. Although the subcontracted carrier may be legally entitled to invoke the NVOCC's forum selection clause via a Himalaya clause, if it originates from a different jurisdiction, it is unlikely to find this an attractive option.

[3] Mediterranean Shipping Company, Carrier Terms & Conditions, cl 4.2.

Similar difficulties may arise in other instances of disharmony between the terms of the lead contract and the terms of the downstream subcontracts.[4] These may include differences in limitations of liability, time bars, lien provisions — the list goes on. The scope of the protection offered to the downstream subcontractor is limited to the specific terms included in the contract containing the Himalaya clause. A Himalaya clause does not operate to bind the cargo owner to terms negotiated downstream.[5]

Recognizing that the privity barrier is only partially remedied by Himalaya clauses, courts have contemplated whether there may be an alternative basis for subcontractors to invoke terms negotiated further downstream. Addressing this question, English courts and their Commonwealth brethren have taken one approach, while their legal cousins in the United States have taken a surprisingly different path.

3 The Commonwealth solution: sub-bailment on terms

The English approach has its origins in a case involving the stole of a mink fur coat.[6] In *Morris v CW Martin & Sons*, the central legal question was whether a coat cleaning company could invoke an exoneration clause against the owner of the stole who had employed an intermediary to secure its cleaning.[7] The plaintiff, Mrs Lily Morris, gave the stole to a furrier, who was a family friend.[8] The furrier told Mrs Morris that he could not clean the fur himself, but that he would send it to a reputable cleaner with whom he had worked for many years.[9]

The furrier did not tell Mrs Morris that the cleaners had previously sent him 'conditions of trading' that included exonerating language favorable to the cleaners.[10] Without giving notice

4 See Martin Davies, 'The Elusive Carrier: Whom Do I Sue and How?' [1991] Australian Business LR 230, 233 (explaining the terms of standard forms used by freight forwarders tend to be different than those that appear in carrier bills of lading).

5 The Contracts (Rights of Third Parties) Act 1999 (UK) modifies the privity requirement in some respects, but it does not fully remedy the type of privity problem discussed here.

6 *Morris v CW Martin & Sons* [1965] 2 Lloyd's Rep 63.

7 Ibid 68.

8 Ibid.

9 Ibid.

10 Ibid.

of these terms to Mrs Morris, the furrier contracted with the cleaners and assumed responsibility to pay them.[11] While in the cleaners' possession, 'the stole was stolen'.[12] Mrs Morris sued the cleaners directly, which raised the issue of whether the cleaners could invoke the exculpatory terms against Mrs Morris even though she never agreed to be bound by those terms.[13] The Southwark County Court held for the cleaners, and Mrs Morris appealed.[14]

In the Court of Appeal, Lord Denning, writing as the Master of the Rolls, found that the question of the cleaners' liability was most appropriately answered under principles of bailment and sub-bailment.[15] He reasoned that, after the owner of goods tenders those goods to a bailee, the bailee owes the bailor a duty to take all reasonable precautions to protect the goods entrusted to him.[16] If the goods are further sub-bailed by the bailee, the sub-bailee owes the owner of the goods the same duties as the original bailee.[17] As a result, the owner of the goods 'can sue the sub-bailee direct' for any loss of or damage to those goods.[18] Mrs Morris could therefore directly hold the cleaners liable unless it could invoke its exculpatory terms against her.[19]

On this point, Lord Denning proposed a solution: focus on the bailor's consent.[20] He articulated the rule that 'the owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise'.[21] As an illustration, Lord Denning imagined the rule's application to carriage of goods cases. He wrote:

> …if the owner of a ship accepts goods for carriage on a bill of lading containing exempting conditions (i.e. a 'bailment upon terms') the owner of the goods (although not a party to

11 Ibid.
12 Ibid 69.
13 Ibid.
14 Ibid 68.
15 Ibid 72.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.

the contract) is bound by those conditions if he impliedly consented to them as being in 'the known and contemplated form.'[22]

Applying these principles to the clause at issue, the court held for Mrs Morris.[23] It found that, although she had impliedly consented to a contract for cleaning, the language of the exoneration clause was not broad enough to cover the loss at issue.[24]

More than thirty years later, the Privy Council applied this sub-bailment on terms framework in a seminal carriage of goods by sea case: the *Pioneer Container*.[25] In that case, the key issue was whether the carrier could invoke a Taipei forum selection clause against cargo interests who had pursued actions against it in the High Court of Hong Kong.[26] The dispute arose out of cargo loss caused by the sinking of the *KH Enterprise,* which occurred after a collision during a voyage from Taiwan to Hong Kong.[27] The plaintiffs' in rem action was brought against a surrogate vessel, the *Pioneer Container,* which was owned by the same shipowner as the *KH Enterprise*.[28]

The plaintiffs were of two different categories: the 'Hanjin plaintiffs' and the 'Scandutch plaintiffs'.[29] The Hanjin plaintiffs were holders of bills of lading issued by Hanjin Container Lines, who was hired to perform through carriage from the United States to Hong Kong.[30] Hanjin Container Lines carried the cargo to Taiwan and then transshipped the remainder of the voyage from Taiwan to Hong Kong on the *KH Enterprise*.[31] The Scandutch plaintiffs were holders of bills of lading issued by Scandutch I/S covering carriage from Taiwan to destinations in Europe and the Middle East by way of Hong Kong.[32] Scandutch subcontracted the first leg of the voyage between Taiwan and Hong Kong to the defendant on the *KH Enterprise*.[33]

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22 Ibid.
23 Ibid.
24 Ibid 73.
25 *The Pioneer Container* [1994] 1 Lloyd's Rep 593.
26 Ibid 597.
27 Ibid 696.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid 596-597.
33 Ibid 597-598.

On receipt of the cargo in Taiwan, the defendant issued 'feeder' bills of lading to the carriers who had hired it (Hanjin and Scandutch, respectively).[34] The feeder bills contained forum selection clauses assigning Taiwan as the exclusive forum for dispute resolution.[35] The defendants argued that these provisions were binding on the plaintiffs and sought to stay the in rem action in Hong Kong on this basis.[36] The plaintiffs argued that they had never agreed to the feeder bills.[37] The High Court of Hong Kong ruled in favor of the plaintiffs and refused to stay the proceedings, but the Hong Kong Court of Appeal reversed and enforced the forum selection clause.[38] The plaintiffs then appealed to the Privy Council.[39]

Ruling in favor of the defendant, the Privy Council held that the doctrine of 'sub-bailment on terms' allowed enforcement of the forum selection clause against plaintiffs.[40] Through the bailment lens, the Privy Council described the plaintiffs as the bailors, Hanjin and Scandutch as the head bailees, and the defendant subcontracted carrier as the sub-bailee.[41] Explaining that the bailment framework 'does not depend for its efficacy either on the doctrine of privity of contract or the doctrine of consideration', Lord Goff wrote:

> It must be assumed that, on the facts of the case, no direct contractual relationship has been created between the owner and the sub-bailee, the only contract created by the sub-bailment being that between the bailee and the sub-bailee. Even so, if the effect of the sub-bailment is that the sub-bailee voluntarily receives into his custody the goods of the owner and so assumes the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorized the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner.[42]

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34 Ibid 597.
35 Ibid 596.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid 598.
42 Ibid 600.

Under this framework, the critical question is whether the cargo owner as bailor gave express or implied consent to the terms of the sub-bailment. The bills of lading agreed by the plaintiffs and the container lines included language that gave the carriers 'very wide authority' to subcontract 'on any terms the whole or any part of the handling, storage or carriage of the Goods…'.[43] Even with such broad authority granted to the bailees, Lord Goff explained that to warrant enforcement the terms of the sub-bailment must not be 'unusual' or 'unreasonable'.[44] Without specifically defining what terms might be excluded under this limitation, Lord Goff wrote that a forum selection clause does not violate this standard because it corresponds to 'reasonable commercial expectations' of containerized cargo trade.[45]

The Privy Council also held that that a downstream carrier's ability to invoke provisions of the upstream bill of lading through a Himalaya clause does not bar it from invoking the terms of its own bill of lading.[46] The plaintiffs argued that the Himalaya clause contained in the Hanjin and Scandutch bills of lading 'gives sufficient effect to the commercial expectations of the parties' and therefore allowing the defendant to rely on its own terms in the feeder bills was 'unnecessary' and also 'created a potential inconsistency between the regimes'.[47] Lord Goff responded that the 'the mere fact that such a clause is applicable cannot … be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner or the goods'.[48]

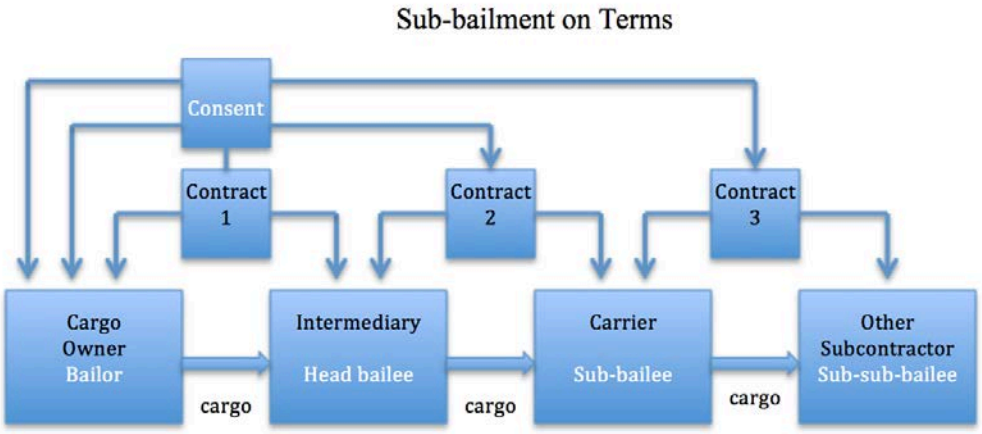
Another question raised by the Scandutch plaintiffs was whether Scandutch could properly be considered a bailee when it allegedly never took possession of the goods.[49] Lord Goff wrote that he viewed this point 'with some concern' and entertained the possibility that the defendants might actually be 'quasi-bailees'.[50] But since it was not clear whether Scandutch had actually taken possession of the cargo at any point, Lord Goff wrote that an analysis of

43 Ibid 604.
44 Ibid 605.
45 Ibid.
46 Ibid 603.
47 Ibid.
48 Ibid.
49 Ibid 604.
50 Ibid.

quasi-bailment issues should 'await decision, after consideration in greater depth, on another occasion'.[51]

On this reasoning, the Privy Council held that the Taiwanese forum selection clause contained in the feeder bills of lading issued by the subcontractor was binding on the Hanjin and Scandutch plaintiffs.[52] Exhibit C demonstrates this sub-bailment on terms rule in which an upstream cargo owner may be bound by the reasonable terms of the subcontract if they fall within the scope of its consent. Exhibit D illustrates the same principle when the intermediary does not take possession of the cargo and therefore performs the role of a quasi-bailee.

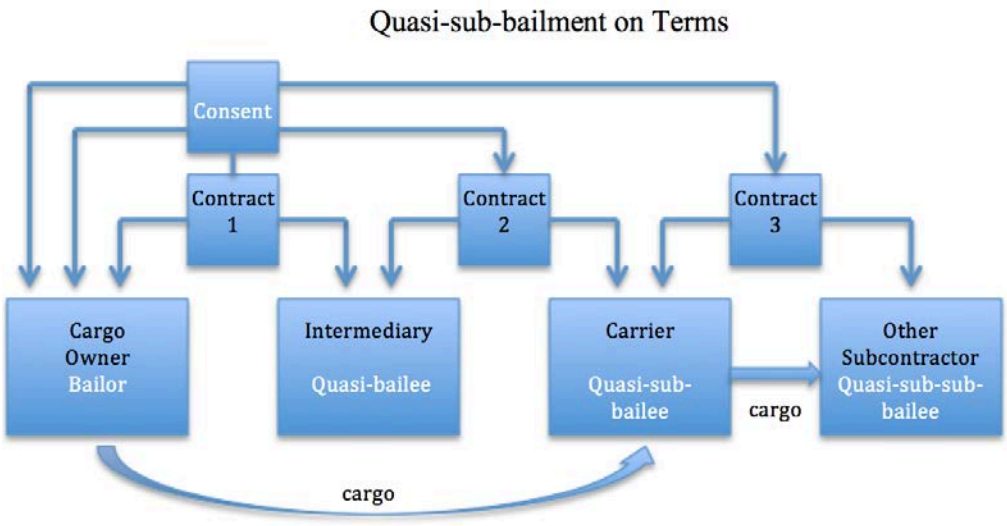
Exhibit C



51 Ibid.

52 Ibid 605.

Exhibit D



4 Applying the *Pioneer Container*

The *Pioneer Container* left open several important questions regarding the mechanics of the sub-bailment on terms doctrine. These include whether the head bailee must actually take possession of the cargo, to what extent the bailor's consent may be implied, and how the boundaries of 'reasonableness' should be defined. Addressing such questions, courts have further clarified the sub-bailment on terms doctrine, not only in England but also in Australia, Canada, Hong Kong, and other jurisdictions.

On the issue of possession, English courts have held that an intermediary bailee who never takes possession of the cargo may still effectuate a sub-bailment on terms through a quasi-sub-bailment. In *Spectra International v Hayesoak Ltd*,[53] the Central London County Court addressed this question when the cargo owning plaintiffs contracted with a transport intermediary to facilitate a shipment of audio equipment from Hong Kong to Southampton.[54] Once the cargo arrived at the port of Southampton, the plaintiffs instructed the intermediary

[53] [1997] 1 Lloyd's Rep 153.
[54] Ibid 154.

to 'arrange' delivery of the cargo to Bradford in Northern England.[55] The intermediary hired a motor carrier to haul the cargo and that motor carrier subcontracted the carriage to the defendant motor carrier.[56] Before reaching Bradford, some of the cargo was stolen out of the defendant's truck.[57] The plaintiff sued for the value of the lost cargo.[58] The defendant argued that it was entitled to limit its liability under the Carriage of the Road Haulage Association (RHA) terms and conditions, which it alleged was agreed through the 'chain of intermediaries' under the sub-bailment on terms framework.[59] The plaintiff countered that the sub-bailment on terms doctrine did not apply since the intermediary never took possession of the cargo and therefore could never be considered a bailee with the authority to sub-bail on the defendant's RHA terms.[60] The court held for the defendant, even though the RHA terms were more onerous than those the plaintiff had agreed with the intermediary.[61] It held that the sub-bailment on terms doctrine applied regardless of whether the intermediary at some point had taken physical possession of the cargo.[62]

The English Commercial Court reached a similar result in *Lukoil-Kalingradmorneft PLC v Tata Ltd*.[63] In that case, the owner of two tugs entered into a contract with an intermediary to arrange marine towage from Canada to India.[64] The intermediary had no capacity to perform the towage and instead arranged performance by the plaintiff.[65] The plaintiff's standard terms included a clause allowing it to assert a possessory lien over the tugs in the case of non-payment of installments during the course of the voyage.[66] The tug owner defendant did not pay as agreed, and the plaintiff arrested the tugs in a Namibian port.[67] The tug owner argued it never agreed to be bound by the contract establishing the basis for the lien.[68] The issue

55 Ibid 155.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid 154-155.
60 Ibid 155.
61 Ibid 155-157.
62 Ibid 155. The court held that consent could be implied because the plaintiff was 'aware that sub-contracted haulage might take place' and the RHA conditions were 'usually current in the trade'. Ibid 156.
63 *Lukoil-Kalingradmorneft PLC v Tata Ltd* [1999] 1 Lloyd's 365, 367.
64 Ibid.
65 Ibid 373.
66 Ibid 367.
67 Ibid.
68 Ibid.

before the court was whether the towage company plaintiff could rely on its lien clause through a sub-bailment on terms, even though the intermediary that sub-bailed to it never took possession of the tugs.[69]

The court held for the plaintiff, reasoning that although the *Pioneer Container* 'formally left open the question whether the doctrine of sub-bailment on terms extends to quasi-bailments' the principle should apply irrespective of the intermediary's possession.[70] The court noted that, even if a towage contract does not create a bailment relationship, when a property owner contracts knowing that the performance will be sub-contracted, 'the sub-contractor ought in justice to be entitled to rely on [its] terms as against the owner to the same degree whether the property was at the material time in the possession of the owner, the main contractor or the sub-contractor'.[71]

Courts in other Commonwealth jurisdictions have employed a similar approach.[72] In *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd*, the Hong Kong Court of Final Appeal addressed a similar question relating to the issue of possession.[73] In that case, the plaintiff cargo owner had contracted with an intermediary to ship cars from Hong Kong to mainland China.[74] The intermediary hired the defendant to put the cars into containers and load them onto a ship.[75] The defendant took the cars to the container yard where they were stolen.[76] The plaintiff sued for the value of the cars, and the defendant sought to avoid liability through exemption and limitation clauses contained in its contract with the intermediary.[77] The plaintiff argued the doctrine of sub-bailment on terms did not apply because the intermediary never took possession of the cargo and the defendant countered that at the very least a quasi-sub-bailment had occurred.[78]

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69 Ibid 374-375.
70 Ibid 375.
71 Ibid.
72 At least two Canadian courts have also applied sub-bailment on terms principles to facts involving an intermediary who never took possession of the cargo. See *Boutique Jacob Inc v Pantainer Ltd* [2006] FC 217, [2008] CAF 85*; Mitsubishi Heavy Industries Ltd v Canadian National Railway* [2012] BCSC 1415.
73 *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd* [1998] 4 HKC 377.
74 Ibid.
75 Ibid 386.
76 Ibid.
77 Ibid.
78 Ibid 390.

The court held in favor of the defendant and reasoned that, irrespective of whether the intermediary was a bailee or quasi-bailee, it had made the bailment to the defendant with the implied knowledge and consent of the plaintiff.[79] It therefore 'made no commercial sense or logic to say that the position, so far as bailment was concerned, must be different simply because there was an intermediary'.[80] Since the plaintiff authorized the intermediary to effect the bailment, it was bound by the sub-bailee defendant's terms.[81]

At least one court in Australia has expressed an alternative view on possession.[82] In *Mathew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd*, the New South Wales Court of Appeal held that the sub-bailment on terms principle requires that the intermediary bailee at some point take possession over the cargo.[83] In that case, a manufacturer of a motor cruiser hired a transportation intermediary to facilitate shipment from Sydney to San Francisco.[84] The intermediary contracted with a trucking company to move the motor cruiser on a truck to the wharf at the Port of Botany and also booked space on a vessel for ocean carriage.[85] En route to the wharf on the truck, the superstructure of the motor cruiser struck a sign attached to an archway, which caused substantial damage.[86] The cargo owner sued the trucking company for its losses.[87] As a defense, the trucking company invoked exclusion clauses contained in its own contract with the intermediary.[88] However, the trucking company conceded in argument that if the intermediary had not acted as a bailee at the time of the loss, then 'the principles stated in the *Pioneer Container* did not apply'.[89]

The court found that the intermediary had never taken possession of the cargo and therefore never acted as a bailee.[90] Instead, since the trucking company itself was the direct bailee

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79 Ibid 391.
80 Ibid.
81 Ibid 393.
82 See *Mathew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd,* [2001] NSWCA 281.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.

(rather than the sub-bailee), the exclusions clauses contained in the contract between the intermediary and the trucking company could not be enforced under a sub-bailment on terms theory.[91] It should be noted, however, that commentators have questioned whether this approach.[92] Subsequent decisions in Australia addressing the possession issue have also been more amenable to the idea of sub-bailment on terms by way of a quasi-bailment.[93]

The Commonwealth progeny of the *Pioneer Container* has also explored the possibility of implied consent. Courts have held that, even if the lead contract does not broadly authorize sub-bailment 'on any terms', consent may still be implied by commercial practice. In *Sonicare International Ltd v East Anglia Freight Terminal Ltd,* the Central London County Court addressed this issue in a case involving a shipment of audio equipment from Jakarta to Southampton.[94] The cargo owner hired a transportation intermediary to 'procure the performance of the entire transport'.[95] The intermediary issued a combined transport bill of lading and then subcontracted the ocean carriage.[96] The subcontracted ocean carrier delivered the cargo to the port in Felixstowe and then hired the defendant for temporary warehousing.[97] Some of the goods were stolen while they were stored in the defendant's warehouse.[98] The consignee filed suit against multiple entities, including the defendant warehousing company.[99] The defendant argued it was entitled to limit its liability under the National Association of Warehouse Keepers (NAWK) conditions reflected in a consignment receipt issued to the carrier that hired it.[100] The question was whether the defendant could invoke sub-bailment on terms principles to hold the consignee plaintiff to the liability limitation.[101]

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91 Ibid.

92 See Hamish Austin, 'The Essentiality of Possession in Bailment: Sub-bailment on Terms, Quasi-bailment and Freight Forwarders' (2004) 20 JCL 145; Martin Davies and Anthony Dickey, *Shipping Law* (4th edn, Thomson Reuters 2016) 362-364.

93 See eg *Westrac Equipment Pty Ltd v The Ship Assets Venture* [2002] FCA 440, [2002] 192 ALR 277.

94 *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48.

95 Ibid 50.

96 Ibid.

97 Ibid 51.

98 Ibid.

99 Ibid 48.

100 Ibid 52.

101 Ibid.

The court held that, even though there was no express consent given to the head bailee to subcontract on 'any terms' as in the *Pioneer Container*, such consent could still be implied.[102] The NAWK conditions were 'in very widespread use' and the terms of the sub-bailment to the defendant's warehouse were likely to be used 'as a matter of routine in the ordinary course of business'.[103] Since the plaintiffs had demonstrated no evidence they would have objected to the NAWK terms if given the opportunity, the court found 'implied consent to the adoption of the NAWK conditions is to be deduced'.[104]

Courts in Australia have been more cautious in finding implied consent. In *WMC Engineering v Brambles Holdings Ltd*, the Supreme Court of Western Australia discussed this issue in a case involving a shipment of pressure filters from Finland to Leinster, Australia.[105] The shipper, who was the seller of the goods, had contracted with a transport intermediary, which subcontracted with the defendant to carry the cargo from the port of Freemantle.[106] The truck overturned en route to Leinster and the cargo was damaged.[107] The consignee filed suit and the defendant raised sub-bailment on terms principles to invoke an exclusion clause it argued was incorporated into the road carriage contract it made with the intermediary.[108] The court found this exclusion clause had not been incorporated into the contract at issue, so it was not necessary to apply the sub-bailment on terms doctrine.[109] Nevertheless, in obiter dicta, the court raised general concerns about applying the sub-bailment on terms framework when the bailor has not given express consent to subcontract 'on any terms' as in the *Pioneer Container*.[110] Here, the court expressed skepticism that, by bailing goods to a bailee, a bailor consents to be bound to 'terms usual in the trade' unless the bailor itself is engaged in that particular trade.[111]

Other courts in Australia and elsewhere in the Commonwealth have linked the concept of

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102 Ibid 53-54.
103 Ibid 54.
104 Ibid.
105 *WMC Engineering v Brambles Holdings Ltd t/as Oilfield & General Transport Co*, Unreported, Supreme Court of Western Australia, Wheeler J, 31 October 1997.
106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid 11-14.
110 Ibid 11-18.
111 Ibid 14-15.

implied consent more directly to the reasonableness requirement.[112] In *Westpac Banking Corp v Royal Tongan Airlines*, the Supreme Court of New South Wales addressed this issue in the context of mail carriage subcontracted to commercial air carriers.[113] The cargo owners had bailed a cargo of New Zealand and United States currency to the Tongan Postal Department, which after a 'chain of sub-bailments' came into the possession of the defendant commercial airline.[114] The airline allegedly lost the cargo during ground handling in Sydney.[115] It sought to invoke liability exemptions contained in the ground handling agreement made with an upstream air carrier that had hired it.[116]

The court held that, even though the cargo owner did not give express consent for the Tongan Postal Department to sub-bail the cargo, 'there must have been an implied consent to the normal incidents of the postal service for such a journey'.[117] However, it found there was no implied consent to the terms at issue. The court reasoned that the terms of the agreement 'were not in a known and contemplated form' and its exemption clause was also 'far different from the words of the registered mail receipts'.[118] Consequently, the 'terms were not terms one would readily take someone who posted an item of mail to have assented to'.[119]

More directly addressing the boundaries of 'reasonableness', English courts have held that even clauses that provide a subcontractor with an affirmative right of action are enforceable through a sub-bailment on terms. In *Jarl Tra AB v Convoys,* the English Commercial Court considered the doctrine's application to a subcontractor's clause providing for a lien over cargo when the head bailee did not pay outstanding charges it owed to a subcontractor.[120] The cargo owning plaintiffs had engaged a carrier operating a liner service to ship several

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112 Courts in Canada and Hong Kong have approached the reasonableness issue in this way. See *Marine Blast Ltd v Targe Towing Ltd and Scheldt Towage Co NY* [2004] EWCA Civ 346; *Max Components Ltd v Cyclo Transportation Co Ltd* [2012] 2 HKC 587.

113 *Westpac Banking Corp v Royal Tongan Airlines,* Unreported, Supreme Court of New South Wales Commercial Division, Giles CJ, 5 September 1996.

114 Ibid.

115 Ibid.

116 Ibid.

117 Ibid 23-24.

118 Ibid 34.

119 Ibid 33.

120 *Jarl Tra AB v Convoys* [2003] 2 Lloyd's Rep 459.

parcels of timber from Sweden to Chatham, England.[121] The carrier issued bills of lading granting it the liberty to subcontract handling, warehousing, and storage 'on any terms'.[122] The carrier engaged a company in Chatham to handle and store the cargo on arrival.[123] The storage company conducted its business under terms and conditions that recognized the cargo as being subject to a general lien for outstanding charges owed.[124] The carrier fell into financial difficulties and could not pay its debts.[125] Invoking the lien clause, the storage company placed a lien on all goods in its possession that had been carried on the carrier's vessels, arguing that the clause was binding on the cargo owners under a sub-bailment on terms.[126] The cargo owner plaintiffs filed suit seeking immediate delivery of their cargo and argued the lien clause was 'so unreasonable and so onerous' that they could not be understood to have consented to it under the terms of the carrier's bills of lading.[127]

The court held for the defendants and enforced the lien clause.[128] It reasoned that businesses involved in handling goods regularly operate under terms providing for a lien.[129] While the court acknowledged that '[t]he effect of a general lien exercisable by a sub-bailee in respect of all charges owed to him by his customer can undoubtedly be very onerous' it found the cargo owner's sweeping grant of authority for the carrier to subcontract on 'any terms' was 'apt to cover any terms of a kind not unusual in the trade concerned'.[130]

5 The United States solution: limited agency

Around ten years after the Privy Council's decision in the *Pioneer Container*, the United States Supreme Court granted certiorari on a similar case. In *Norfolk Southern Railway Co v James N*

121 Ibid 461.
122 Ibid 462.
123 Ibid.
124 Ibid 464.
125 Ibid 463.
126 Ibid 461.
127 Ibid 465.
128 Ibid.
129 Ibid.
130 Ibid 466; The English Commercial Court reached a similar result in *Sang Stone Hamoon Jonoub Co Ltd v Baoyue Shipping Co Ltd* [2015] 2 CLC 415.

Kirby, a critical question was whether a downstream rail carrier could invoke a limitation of liability clause contained in an ocean carrier's bill of lading via a Himalaya clause.[131] The cargo owner had not directly agreed to that ocean bill of lading because it had engaged a transport intermediary, which arranged door-to-door transport on its behalf.[132]

The relevant facts were as follows: Kirby, an Australian cargo owner, contracted with a local transport intermediary, ICC, for through transport of machinery from Sydney to Huntsville, Alabama.[133] The intermediary subcontracted the ocean carriage to Hamburg Süd, which then subcontracted the rail carriage to Norfolk Southern.[134] ICC issued a through bill of lading to Kirby containing a limitation of liability for the inland leg amounting to SDR 666.67 per package.[135] Hamburg Süd issued its own ocean bill of lading to the intermediary containing a lower limitation of liability of USD 500 per package applicable to the rail leg.[136] Both bills of lading contained Himalaya clauses allowing subcontractors to benefit from their terms. Norfolk Southern also issued its own railway circular to Hamburg Süd, which contained a limitation of liability that was much higher than either of the upstream bills of lading: USD 250,000 per container.[137]

During rail transport from the port of Savannah, Georgia, to the final destination in Huntsville, Alabama, the Norfolk Southern train derailed, causing the cargo owner losses exceeding USD 1.5 million.[138] Kirby sued Norfolk Southern, which invoked the favorable limitation of liability provision contained in the Hamburg Süd bill of lading.[139] The question was whether Norfolk Southern, as the downstream subcontractor, could rely on the Hamburg Süd bill of lading even though the cargo owner had never agreed to be bound by its terms.[140]

131 *Norfolk Southern Railway Co v James N Kirby* [2004] 543 US 14.
132 Ibid.
133 Ibid.
134 Ibid.
135 Ibid.
136 Ibid.
137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid.

The Northern District of Georgia granted partial summary judgment in favor of Norfolk Southern.[141] The Eleventh Circuit Court of Appeals reversed and explained that the cargo owner could not be bound by the downstream contract since the intermediary had not acted as the cargo owner's agent when it agreed to its terms.[142] The Supreme Court granted Norfolk Southern's petition for certiorari on the following question:

> Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.[143]

Norfolk Southern argued that a transport intermediary acts as the general agent of the cargo owner when it negotiates downstream subcontracts.[144] It submitted that there is a longstanding rule that, if a cargo owner entrusts goods to an intermediary to deliver to a carrier, this 'constitutes authority to bind the owner to the carrier's terms'.[145] Kirby countered that it never authorized ICC to act as its agent for this purpose so it had no authority to enter into downstream agreements on its behalf.[146]

This agency question generated interest from others in the international maritime community. Various industry organizations and academic observers from around the world submitted amicus briefs to the Supreme Court. Of particular interest was an amicus brief submitted by a group of professors from various jurisdictions recognized as experts in international law governing multimodal transport.[147] The brief presented the view that whether an intermediary acts as the cargo owner's agent depends on the specific circumstances of the transaction — namely whether the intermediary agrees to the downstream contract while acting as principal shipper or as an authorized agent of the cargo owner.[148] The brief further submitted that there is no existing legal rule that '*requires* an intermediary to act as an agent when it has not agreed to do so' as Norfolk Southern

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141 *Norfolk Southern Railway Co v James N Kirby* [2002] 300 F3d 1300 (11th Cir).
142 Ibid 1305.
143 See Questions Presented, *Kirby* (2004) 543 US 14.
144 See Brief of Petitioner, *Kirby* (2004) 543 US 14.
145 Ibid.
146 See Brief of Respondent, *Kirby* (2004) 543 US 14.
147 See Brief of Law Professors as Amici Curiae In Support of Respondents, *Kirby* (2004) 543 US 14.
148 Ibid.

contended.[149] Curiously, despite its apparent relevance to the case, the law professor brief made no mention of the sub-bailment on terms doctrine and did not raise the *Pioneer Container* as potentially instructive.

Both of the parties also failed to raise the possibility of a sub-bailment on terms in their initial briefs. Kirby may have benefitted from the sub-bailment on terms argument by raising the possible application of the much higher limitation of liability contained in the Norfolk Southern railroad circular, but it was careful not to do so likely because the doctrine could simultaneously justify Norfolk Southern's reliance on the more favorable Hamburg Süd limitation of liability. Norfolk Southern, on the other hand, did not want to draw attention to its unfavorable railroad circular. However, in efforts to show the Hamburg Süd limitation was binding on Kirby, it did eventually raise the sub-bailment on terms possibility, albeit indirectly in its final Reply Brief.[150] Responding to the agency argument raised by the law professor amicus brief, Norfolk Southern submitted:

> The international law professors … [analyze] only the subsidiary question of whether certain countries would regard a forwarder-carrier as an agent. They are careful not to suggest, however, that such nations would subject a carrier to unlimited liability for damage to goods in disregard of the contract of carriage simply because the cargo owner used a freight forwarder. The British commonwealth nations are a case in point. American law apparently diverges from British law in treating forwarder-carriers as shippers, and not carriers, in their dealings with other carriers … British courts nonetheless reach the same result as [Norfolk Southern] urges on the theory of 'sub-bailment on terms,' whereby the cargo owner engaging a forwarder-carrier to procure transportation from vessel carriers consents (impliedly or expressly) to the vessel carrier's terms of carriage. This doctrine permits a sub-bailee (the vessel carrier) to assert the terms of its contract with the bailee (the forwarder-carrier) in a suit against it by the bailor (the cargo owner) for loss or damage to the goods, even though the owner is not a party to the sub-bailment contract.[151]

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149 Ibid.

150 See Reply Brief of Petitioner, *Kirby* (2004) 543 US 14. See also Michael F. Sturley, 'Multimodal Transport and Freight Forwarding in the United States: Judicial Response to Changing Commercial Practice' X Hasselby Colloquium 2005: Future Logistics and Transport Law 127-128.

151 Norfolk Southern did not reference the *Pioneer Container*, but it did cite, without explanation, the *Sonicare* case discussed above. Reply Brief of Petitioner, *Kirby* (2004) 543 US 14.

Having considered these submissions, the Supreme Court ruled in favor of Norfolk Southern, enforcing the limitation of liability provision contained in the downstream contract against the non-party cargo owner.[152] It explained that, although an intermediary could not be considered the cargo owner's agent for purposes of negotiating all downstream contracts, it could still bind a cargo owner to certain terms within those contracts.[153] Instead of finding a traditional agency relationship, the Supreme Court announced a 'limited agency' rule in which intermediaries are presumed to be a cargo owner's agent for the narrow purpose of negotiating limitations of liability provisions downstream.[154] The Supreme Court explained that the intermediary should not be considered an agent 'in the classic sense' in which the traditional indicia of agency such as effective control and a fiduciary relationship are required.[155] It determined that such a broad rule would be 'unsustainable' in practice.[156] Instead, under the limited agency rule, the intermediary automatically acts as the agent of the cargo owner for the '*single, limited* purpose' of negotiating limitations of liability with downstream carriers.[157]

The Supreme Court justified its holding first under precedent deriving from a case predating the multimodal era: *Great Northern Railway Co v O'Conner*.[158] In that case, a cargo owner contracted with a 'transport company' to arrange rail transport, which then subcontracted to a rail carrier and agreed to a limitation of liability in the railroad tariff that was below the actual value of the cargo.[159] The goods were lost during the rail transport, and the cargo owner sued the subcontracted carrier.[160] The *Great Northern* court held that since the cargo owner 'entrusted' the goods to the transfer company, the carrier had the right to assume it was authorized to agree to terms on the cargo owner's behalf.[161]

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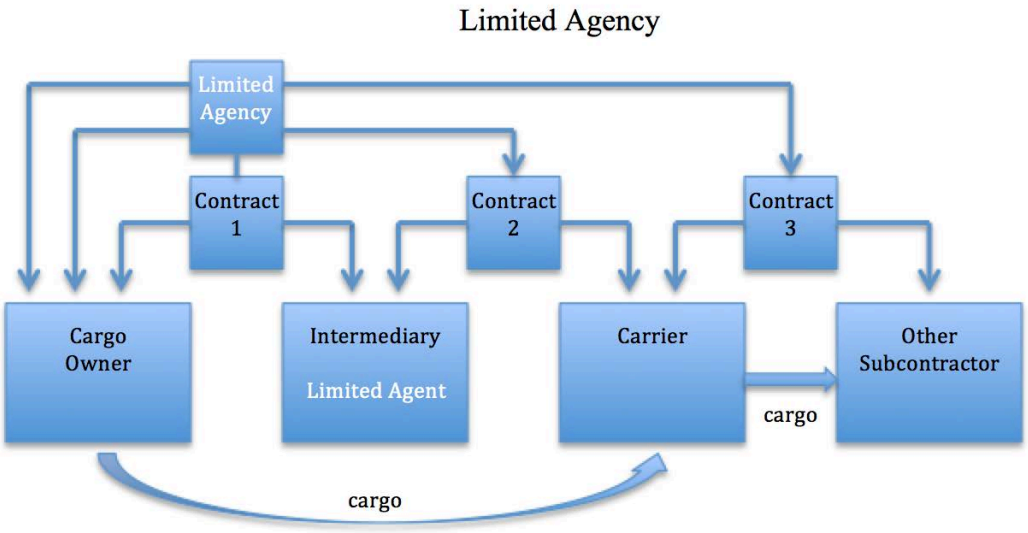
152 Kirby, (2004) 543 US 36.
153 Ibid 34.
154 Ibid.
155 Ibid.
156 Ibid.
157 Ibid.
158 Ibid 33.
159 Ibid, citing *Great Northern Railway Co v O'Conner* [1914] 232 US 508.
160 Ibid.
161 Ibid.

The *Kirby* court did not cite any other cases to justify its limited agency principle and instead emphasized policy considerations.[162] First, the court highlighted the burden of information gathering that would be required of downstream carriers if they were no longer able to trust the contracts they make with customers who are intermediaries rather than true cargo owners.[163] The burden of ascertaining the true identity of each customer, the court determined, could be 'impossible' to manage and might also drive the carriers to want to charge higher rates to intermediaries.[164] This is also complicated by the fact that, in attempts to curtail price discrimination in the liner trade, the United States Shipping Act regulates the rates that carriers are allowed to charge customers.[165] While carriers might wish to charge intermediaries higher rates to protect against the inability to enforce their liability limitations against upstream cargo interests, they are prevented from doing so by statute.[166] The *Kirby* court also reasoned that the limited agency rule produces an equitable result because, even if the carrier could rely on its liability limitation, the cargo owner could still sue the intermediary for the amount it actually agreed.[167]

The *Kirby* court gave narrow instructions regarding the new rule's application to future cases, employing decidedly restrictive language. It signaled that the doctrine could not be used to effectuate any contractual provisions other than limitations of liability. It also made no mention of bailment or sub-bailment on terms, it did not cite the *Pioneer Container* or any other foreign cases, and it did not discuss the relevance of the cargo owner's consent or the fact that the intermediary never took possession of the cargo. The limited agency rule is illustrated in Exhibit E.

162 Ibid.
163 Ibid 34-36.
164 Ibid.
165 Ibid.
166 Ibid.
167 Ibid.

Exhibit E



6 Applying *Kirby* limited agency

During the same term as the *Kirby* case, the Supreme Court granted certiorari in another similar case.[168] In *Green Fire & Marine Insurance Co fka Kukje Hwajae Insurance Co Ltd v M/V Hyundai Liberty*, the issue was whether a downstream ocean carrier could invoke a South Korean forum selection clause contained in its bill of lading against an upstream cargo owner who had contracted with an intermediary to arrange cargo transport.[169] While the cargo owner was not a party to the bill of lading, the carrier argued the intermediary had agreed to the clause while acting as the cargo owner's agent.[170] Holding for the carrier, the Ninth Circuit Court of Appeals reasoned that an intermediary generally acts as the cargo owner's agent when agreeing to forum selection clauses downstream.[171] The cargo owner appealed and the Supreme Court agreed to review the case.[172]

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168 *Green Fire & Marine Insurance Co fka Kukje Hwajae Insurance Co Ltd v M/V Hyundai Liberty* [2004] 543 US 985.

169 *Green Fire & Marine Insurance Co fka Kukje Hwajae Insurance Co Ltd v M/V Hyundai Liberty* [2002] 294 F 3d 1171 (9th Cir).

170 Ibid.

171 Ibid.

172 *Green Fire* (2004) 543 US 985.

But after issuing the judgment in *Kirby*, the Supreme Court chose not to enter a separate opinion in *Green Fire*. Instead, it vacated the judgment and remanded it back to the Ninth Circuit 'for further consideration in light of … *Kirby*'.[173] The Ninth Circuit issued a new judgment on remand, but it did not apply the limited agency framework at all, even though it acknowledged that the Supreme Court 'criticized our agency analysis with regard to the forum selection clause'.[174] Instead, it again ruled in favor of the carrier on separate grounds — namely that the cargo owner had sued the carrier under the bill of lading at issue and therefore consented to all of its terms.[175]

As a result, neither the Supreme Court nor the Ninth Circuit unequivocally explained whether the limited agency rule could apply to a forum selection clause, although the Supreme Court certainly signaled that it could not. This exercise of judicial restraint has unfortunately caused confusion in the lower courts regarding the scope of the limited agency principle. While the *Kirby* court made statements indicating the doctrine should apply only to limitation of liability provisions, a string of cases in lower courts have examined whether the same principles could apply to other terms contained in the downstream subcontracts.[176]

Surprisingly, several lower courts have held that *Kirby* limited agency principles do allow a downstream carrier to invoke a forum selection clause against a non-party cargo owner. In *AP Moller-Maersk A/S v Ocean Express Miami*, a cargo owner contracted with an intermediary to arrange through transport from Guatemala City to Milwaukee.[177] The intermediary contracted with an ocean carrier to perform the carriage and the carrier issued a bill of lading containing a New York forum selection clause.[178] When a delay caused injury to the cargo owner, the cargo owner filed suit against the carrier in Guatemala and Panama.[179] In the Southern District of New York, the carrier moved to stay the foreign litigation by invoking its New York forum selection clause against the non-party cargo owner under and argument

173 *Green Fire* [2005] 408 F 3d 1250 (9th Cir).
174 Ibid 1252.
175 Ibid.
176 See Richard L Kilpatrick Jr, 'How Limited is 'Limited Agency?' Lower Courts Rock the Boat by Broadly Applying the Supreme Courts Narrow Kirby Guidelines for Interpreting Bills of Lading' (2015) 40 Tulane Maritime LJ 52.
177 *AP Moller-Maersk A/S v Ocean Express Miami* [2008] 505 F Supp 2d 454 (SDNY).
178 Ibid 458.
179 Ibid 459.

hinging on an extended application of the limited agency principle.[180] Focusing on the restrictive language from the *Kirby* decision, the cargo owner responded that limited agency was not applicable because 'a forum selection clause is not a limitation of liability'.[181]

The Southern District of New York held for the carrier and reasoned that the downstream carrier could utilize limited agency to enforce its forum selection clause.[182] The court emphasized the policy considerations supporting the limited agency principle and explained that holding otherwise would subject the carrier 'to the inconvenience of defending itself worldwide'.[183] Referencing the *Kirby* policy rationale, the court wrote:

> The 'very costly or even impossible' task of tracking down information about the cargo owner, intermediaries, and the obligations between them does not vary between clauses in the bill of lading. Further, failure to recognize a default rule that a freight forwarder's acceptance of a bill of lading binds the cargo owner to a forum selection clause in the bill of lading would effectively render carriers unable to contract for selection of a forum, an undesirable result in itself, which also implicates the carrier's inability to charge higher rates when contracting with an intermediary.[184]

In *Mahmoud Shaban & Sons Co v Mediterranean Shipping Co SA,* the Southern District of New York again addressed this issue.[185] In that case, a cargo of rice was allegedly contaminated during transport from California to Jordan.[186] In the litigation that followed, the carrier invoked a New York forum selection clause contained in its bill of lading against the non-party shipper.[187] Adopting the *AP Moller-Maersk* approach, the court emphasized the policy considerations applicable to both limitations of liability and forum selection clauses:

> In both situations, the judicial recognition of a limited agency relationship between shipping intermediaries and an upstream merchant is necessary to enable downstream

180 Ibid 463-464.
181 Ibid 463.
182 Ibid 466.
183 Ibid 465.
184 Ibid 465-66.
185 *Mahmoud Shaban & Sons Co v Mediterranean Shipping Co SA* [2013] AMC 732 (SDNY).
186 Ibid.
187 Ibid.

> carriers to allocate important risks by contract. And while the risk of a carrier's having to litigate in an inconvenient forum is perhaps less severe than the risk of unlimited liability, both would create substantial inefficiencies in the maritime shipping industry. [188]

The Second Circuit Court of Appeals has also held that *Kirby* limited agency principles apply not only to dollar amount limitations of liability, but also to exoneration clauses also known as 'covenants not to sue'.[189] In *Sompo Japan Insurance Co of America v Norfolk Southern Railway Co,* cargo owners hired an intermediary to arrange shipment of containers from Asia to the United States.[190] The intermediary issued a through bill of lading back to the cargo owners and subcontracted the actual carriage to other entities.[191] On the inland rail segment, the train derailed and the cargo owners filed suit against the railway for recovery of the damaged cargo.[192] As in *Kirby*, the rail carrier sought protection against a non-party cargo owner under the terms of an upstream bill of lading via a Himalaya clause.[193] Rather than invoking a dollar amount limitation of liability, it relied on a provision that barred cargo owners from filing suit against anyone other than the carrier that issued the bill.[194] The question before the court was whether such an exoneration clause was subject to the *Kirby* limited agency framework.[195]

Ruling in favor of the carrier, the Second Circuit determined that an exoneration clause is 'simply another form of liability limitation' enforceable under *Kirby*.[196] It reasoned that the same policy considerations driving the *Kirby* decision were relevant in the case of an exoneration clause.[197] The court wrote:

> … the reasons supporting the Supreme Court's rule in *Kirby* apply with equal force to a clause that exonerates a remote carrier from liability to the cargo interests. The

188 Ibid. Other courts in New York and one in Texas have followed this controversial approach. See *Laufer Group International v Tamarack Industries LLC* [2009] 599 F Supp 2d 528 (SDNY); *GIC Services LLC v Freightplus (USA) Inc* [2013] WL 6813878 (SD Texas).
189 *Sompo Japan Insurance Co of America v Norfolk Southern Railway Co* [2014] 762 F3d 165 (2nd Cir).
190 Ibid 169.
191 Ibid.
192 Ibid.
193 Ibid.
194 Ibid 170.
195 Ibid 173.
196 Ibid 185.
197 Ibid.

> downstream carrier that contracts with an intermediary to exonerate a remote carrier from liability is just as unlikely to know whether it is dealing with an intermediary or cargo owner as the downstream carrier that contracts with an intermediary for a package limitation. Thus, the information-gathering costs are just as onerous. Furthermore, it is fairer to place responsibility 'for any gap between the liability limitations' in the … bills of lading on [the intermediary], the only entity in a position to know that such a gap exists.[198]

Other courts, most notably the Seventh Circuit Court of Appeals, have taken a more restrictive approach. In *Kawasaki Kisen Kaisha Ltd v Plano Molding Co*, the Seventh Circuit refused to apply the limited agency doctrine to a provision in an ocean bill of lading assigning liability to the cargo owner for damage caused by improper packing.[199]

In that case, the cargo owner contracted with an intermediary to arrange through shipment from China to Chicago.[200] The intermediary issued a multimodal bill of lading to the cargo owner and it subcontracted the carriage to a Japanese ocean carrier and a domestic rail carrier.[201] Due to alleged unsafe packing by the cargo owner, during the rail leg en route to Chicago the cargo fell through the floor of the intermodal container, derailing the train and causing substantial damage to third-party cargo.[202] The ocean carrier sued the cargo owner, arguing that it was bound by the packing warranty contained in the bill of lading it issued to the intermediary by way of an extended application of the limited agency principle.[203]

The district court granted summary judgment to the cargo owner and the Seventh Circuit affirmed.[204] While the Seventh Circuit acknowledged that applying limited agency to the merchant packing warranty 'comports with … the practical need for a second-tier carrier to be able to trust and rely on agreements it forms with a first-tier carrier on behalf of, or in the interest of, a cargo owner' it ultimately recognized the Supreme Court's restraint in finding

198 Ibid. Courts in California have adopted this approach. See *CH Robinson International v Burlington Northern Santa Fe LLC*, [2015] AMC 1859 (CD Cal); *Celtic International LLC v BNSF Railway Company* [2017] AMC 744 (ED Cal).

199 *Kawasaki Kisen Kaisha Ltd v Plano Molding Co* [2012] 696 F3d 647 (7th Cir).

200 Ibid.

201 Ibid 650.

202 Ibid 650-651.

203 Ibid 652-653

204 Ibid 654.

'nontraditional agency relationships'.[205] Demonstrating that the clause at issue was not a type of liability limitation compatible with *Kirby* limited agency, the Seventh Circuit pointed out that the carrier was attempting to use the packing warranty 'as a sword to obtain indemnification and damages … rather than a shield to avoid liability'.[206]

7 More than one way to crack an egg?

When confronted with the privity problem discussed here, courts in the Commonwealth and the United States have reacted creatively yet independently. Courts in both traditions have recognized the need to carefully balance the equities in disputes between cargo owners and subcontractors. To this end, they have demonstrated an extraordinary willingness to modify traditional contract principles. Yet the split between these two approaches highlights their distinct theoretical underpinnings and raises practical concerns for industry players with transnational operations.

From the English perspective, bailment as a principle is a well-known part of the legal tradition. This makes it a rather tidy solution to address the privity problem.[207] In his influential treatise on the subject, Norman Palmer explains, '… bailment stands at the point at which contract, property and tort converge'.[208] As such, it does not depend on privity or other contractual formalities, although it can exist contemporaneously with a contractual relationship.[209] Because of this 'independent character' bailment has the capacity to provide 'a refuge for judges who which to avoid a particular legal consequence dictated by some other cause of action with which bailment overlaps'.[210]

Recognizing these influences, it is understandable that English courts have constructed a sub-bailment on terms framework for subcontractors to rely on the contracts they make

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205 Ibid.

206 Ibid 654.

207 Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009) [1-001]-[1-1003].

208 Ibid.

209 Ibid.

210 Ibid. ('Virtually every claim for damages issued in the Commercial Court in London in respect of goods carried by sea pleads bailment as a cause of action.') Ibid [20-001].

downstream. This provides a workable mechanism to avoid the harsh results that strict contract law principles demand. Under the *Pioneer Container* and its companion cases throughout the Commonwealth, subcontractors are able to trust any clause in a downstream contract as long as it falls within the scope of the bailor's consent and is reasonable and usual in the trade. Under the majority rule, this also does not require that the intermediary physically take possession of the cargo. Measuring the bailor's consent normally entails an examination of the lead contract between the cargo owner and the intermediary bailee. If the lead contract grants the right to subcontract on 'any terms', as in the *Pioneer Container*, then the downstream subcontractor will be able to invoke any of its terms granted those terms are not so onerous that they offend the reasonableness standard. As we have seen, however, even if evidence of broad consent cannot be established under the language of the lead contract, courts may also infer consent from the nature of the transaction. In practice, through decisions in England, Australia, Canada, Hong Kong and other jurisdictions, the doctrine has been utilized to effectuate forum selection clauses, limitations of liability, lien clauses, and certain exclusions clauses. Generally, the results have been quite favorable to subcontractors.

Being uncomfortable with (or ignorant of) this sub-bailment on terms framework, the United States Supreme Court developed an agency-based solution to address the same problem. Traditional agency generally requires a principal to authorize an agent to act on its behalf, which may depend on factors such as the principal's effective control over the agent and the existence of a fiduciary relationship.[211] *Kirby* 'non-traditional' agency explicitly derogates from these requirements. Instead, it automatically assumes the transport intermediary is the cargo owner's limited agent, which empowers it with the implied authority to bind the cargo owner to limitations of liability agreed with subcontractors. Since this approach does not consider the consent of the cargo owner at all, courts applying limited agency do not examine the language of the lead agreement between the cargo owner and the intermediary.[212] The doctrine's scope is instead restricted by a bright line rule that it only applies to limitations of liability provisions. Some lower courts have taken a broader view and have used the doctrine

[211] See Restatement (Second) of Agency (1957) s 1.

[212] In some narrow contexts, a similar implied 'limited authority' has been used by English courts. See Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (4th edn Sweet & Maxwell 2017) [7-089]-[7-090].

to give effect to forum selection clauses and exoneration clauses. But this has depended on a court's willingness to bend the *Kirby* policy rationale to achieve the desired outcome. Accordingly, subcontractors must be cautious in relying on the doctrine to invoke terms that are not reasonably construed as a type of liability limitation.

Since the *Kirby* case came shortly after the *Pioneer Container,* the fact that this divergence exists is surprising. In fact, the United States Supreme Court had the opportunity to adopt the sub-bailment on terms rule as courts in Australia, Canada, and other jurisdictions have done. Part of the reason why it did not may be that bailment is not a concept commonly referenced in United States jurisprudence. In the shipping context in particular, United States courts rarely examine arguments based on bailment reasoning, making it unlikely that the Supreme Court would raise the possibility at its own volition.[213] Despite demonstrating a clear awareness of its existence, the lawyers for both sides in *Kirby* also failed to argue for adoption of a rule akin to sub-bailment on terms.[214] Acting consistently with United States legal culture of almost exclusively citing domestic cases in commercial disputes, none of the parties cited the *Pioneer Container* in any motions or briefs. Neither did any of the various amici. Even if the relevance of the doctrine had been wholeheartedly argued, the language of the lead contract between the cargo owner and the intermediary contained no sweeping authority to subcontract on 'any terms'. For the *Kirby* Court to have reached a similar outcome under a sub-bailment on terms theory, it would have had to find that the cargo owner impliedly consented to the subcontract containing the lower limitation of liability. This might have been difficult to establish since the liability limitation in the downstream contract was explicitly more onerous than the one contained in the lead contract.

Due to this divergence in approaches, it appears that under the same set of facts, there might be different results depending on whether the issue is litigated in a Commonwealth jurisdiction or in the United States. This inconsistency is problematic for industry participants, such as container lines, who regularly operate across jurisdictions while relying on standard

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213 Prior to *Kirby,* at least one court in the United States employed bailment reasoning to enforce a liability limitation against a cargo-owning bailor. See *Lerakoli Inc v Pan American World Airways* [1986] 783 F2d 33 (2nd Cir).

214 See Reply Brief of Petitioner, *Kirby* (2004) 543 US 14.

contract forms. At present, such subcontractors would likely find the Commonwealth approach more favorable. That said, it is still possible that United States courts could begin adopting a sub-bailment on terms approach to address the gaps left by the limited agency framework. If subcontractors begin to argue for its application to enforce provisions plainly outside the scope of the supreme court's narrow guidelines for limited agency (such as towards lien clauses) this might be attractive to some courts inclined to rule in favor of the subcontractors. If this does occur, it is likely to play out at the lower court level since it is unlikely that the Supreme Court would grant certiorari any time soon on questions so similar to those already addressed in *Kirby*.[215]

An alternative view is that while sub-bailment on terms and limited agency are quite different in their theoretical underpinnings, both doctrines give courts a similar flexibility to circumvent the privity problem and achieve equitable outcomes. Courts in both traditions have acknowledged that it is harsh to hold cargo owners to terms which they have not directly agreed, while also expressing discomfort with the prospect of penalizing a subcontractor only because an intermediary was involved in the transaction. Understanding that the best outcomes involve a balancing of these concerns, some Commonwealth courts have utilized consent and reasonableness as a boundary to prevent situations in which sub-bailment on terms leads to an overly-harsh result towards the cargo owner. Similarly, courts in the United States have been willing to bend the *Kirby* policy rationale to allow a subcontractor to invoke certain terms even when the reasoning appears to contravene the supreme court's guidance.

While courts have not noted an overt awareness of these two different solutions, they have at times recognized an intersection between bailment and agency in the multimodal context. As one English court pointed out, sub-bailment on terms provides a solution consistent with traditional contract principles because 'there will be privity, via the agency of the bailee'.[216] Likewise, a recent case out of the United States eleventh circuit applied the limited agency principle under facts in which it described the legal relationships between carriers and

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215 Professor Treitel has contended that *Kirby* limited agency could be useful in England, 'where, for some reason, the requirements of the principle of bailment on terms were not satisfied'. See *Carver on Bills of Lading* (n 212) [7-105].

216 *Sandeman Coprimar SA v Transitos Y Transportes Integrales SL* [2003] 2 Lloyd's Rep 172, 184.

subcontractors as historically informed by 'the common law of bailment'.[217] This suggests that courts in both traditions acknowledge a conceptual overlap using distinct but connected theoretical language. Perhaps then we should be careful not to overstate their differences.

8 Conclusion

Uniformity has long been an elusive goal of international commercial law, particularly in the maritime sphere. The divergence discussed here unfortunately runs against this lofty aim. Although these two approaches may have more in common than first perceived, only further judicial refinement will reveal the full scale of their practical differences. Moving forward, to promote international consensus on such issues, courts, litigants, and scholars must more readily recognize value in comparative legal research. Until we do, given the insular nature of our common law traditions, we should not be surprised if we once again find ourselves kicking at doors that are already open — or at least talking about similar substance in a meaningfully different way.

[217] *Essex Ins Co v Barret Moving & Storage Inc* [2018] 885 F 3d 1292, 1301 (11th Cir).