UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW AND ART

School of Law

THE THIRD PARTIES PROTECTION IN CARRIAGE OF GOODS BY SEA

By

Lijie Song

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ABSTRACT

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The Himalaya clause is a contractual device developed under common law to protect third parties employed by the carriers by extending benefits under the bill of lading to them. Since the invention of the clause, disputes have arisen in terms of their scope, interpretation and validity. These disputes largely impaired the efficiency of the clause. Although the Contracts (Rights of Third Parties) Act 1999 (the "1999 Act") reforms the common law doctrine of privity of contract, the Act has always been regarded as inapplicable to the enforcement of terms other than the exclusion or limitation of liability clauses under the bill of lading by those third parties. Therefore, the Act does not appear to resolve all the difficulties left by the common law Himalaya clause approach.

In response to the difficulties with the application of the Himalaya clauses, a new Himalaya clause revised by the International Group of P & I Clubs and BIMCO was incorporated into BIMCO's 2016 standard form of bills of lading, replacing the Himalaya clauses used in previous versions. Although the new clause was thought to have been widely used in bills of lading, charterparties and other marine contracts, the whole clause has not been fully incorporated into any shipping companies' own terms of carriage. Furthermore, the changes made by this new clause and the difficulties resolved by these modifications have not been examined. The aim of this thesis is to evaluate the effectiveness of the new clause under English law from the perspective of both the common law Himalaya clause approach and the 1999 Act and to suggest whether the shipping companies should adopt it or not.

This thesis starts with the identification of difficulties regarding the satisfaction of requirements set out under the common law Himalaya clause approach. It then focuses on the conditions for a third party to enforce a term under the 1999 Act. More importantly, it will discuss whether the Act applies to other terms under the bill of lading, beyond just its exclusions and limitations. Subsequently, the thesis specifically discusses how the new clause makes sure that third parties could enforce the promise not to sue clause, arbitration clause and exclusive jurisdiction clause by virtue of both the 1999 Act and the common law Himalaya clause approach. Should the new clause fail in the end, the principle of sub-bailment on terms as an alternative approach will be discussed.

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Declaration of Authorship

I, Lijie Song, declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

"The Third Parties Protection in Carriage of Goods by Sea"

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Parts of this work have been published as:
   "International Group of P&I Clubs/BIMCO Revised Himalaya Clause" (2018) 24 Journal of International Maritime Law 11-15.

Signed: .....

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Introduction

1. Background

Under the common law doctrine of privity of contract, a person can neither rely on nor be bound by the term of a contract to which he is not a party. This doctrine emerged alongside the doctrine that only a party who had provided consideration could sue on it.[1] Since the third party to a contract has not provided consideration, he cannot enforce any terms in that contract, even if it was made for his benefit.

In the practice of carriage of goods by sea, due to the complexity of duties involved during the whole transit period, the carriers usually employ or sub-contract with the servants, agents or independent contractors to perform part of their undertakings under the contract of carriage. For example, they might sub-contract with the stevedores to load the cargo on board the vessel or to discharge the cargo from the vessel, or they might employ the warehousemen to stow the cargo before loading or after discharge. These people employed by the carriers are all "third parties" to the contract of carriage. Although the contract of carriage usually gives the carriers such an entitlement to sub-contract, it does not release the carriers' responsibilities. Instead, it often stipulates that the carriers assume responsibility for any loss of, damage to or delay in delivery of the goods during the entire period from the time that the goods have been taken into their charge to the time when the goods are delivered. Moreover, the carriers remain liable for the fault of any third parties employed by them. In light of this, the cargo claimants should always sue the carriers whenever there is a loss of, damage to or delay in delivery of the goods.

In fact, if the location of loss or damage can be ascertained, the cargo claimants prefer to sue the third parties employed by carriers under whose charge the loss or damage occurs in tort, rather than sue the actual carriers.[2] This, however, undermines both the risk allocation and commercial certainty stipulated by the contractual arrangements.

Under the contract of carriage, there are invariably clauses excluding and limiting carriers' liabilities. Similarly, under the sub-contracts between the carriers and third parties, there are usually clauses that exclude and limit third parties' liabilities. These

[1] *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762, 763 (Wightman J), 764 (Wightman and Crompton JJ); *Dunlop Pneumatic Type Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL), 853 (Viscount Haldane).
[2] The cargo claimant cannot sue the third party in contract since there is no contract between them.

exclusion and limitation clauses reflect the risks taken by each commercial party and decide the insurance arrangement made by each of them. When the cargo claimants sue a third party employed by the carriers, the doctrine of privity of contract prevents that third party from relying on any exclusions or limitations under either the contract of carriage or the sub-contract. First, the third party is not party to the contract of carriage, so he cannot enforce the exclusion or limitation clauses in the contract of carriage against the cargo claimants. Secondly, the cargo claimants are not party to the sub-contract, so the third party cannot enforce the exclusion or limitation clauses under the sub-contract against them. Thus, the third party will have to be liable for more than he has agreed to and has insured, and the cargo claimants will be reimbursed more than they insured.

Apart from the exclusions or limitations, there are usually exclusive jurisdiction clauses in both the contract of carriage and the sub-contract providing that disputes arising out of the contracts are brought up in the particular court(s). Since arbitration has become more favourable as a method of dispute resolution, bills of lading and sub-contracts now contain arbitration clauses more often than they used to. The exclusive jurisdiction clause and arbitration clause have the advantage of bringing up all the disputes in one place, which can promote commercial certainty and efficiency. If the cargo claimant sues a third party, the common law doctrine of privity of contract also prevents that third party from enforcing the exclusive jurisdiction clause or arbitration clause under either contract. Consequently, the commercial certainty intended by the clauses will be impaired.

Under English law, three common law approaches have been developed to overcome the difficulties caused by the doctrine of privity of contract to the third parties protection in carriage of goods by sea in particular: the Himalaya clause, the promise not to sue clause and the principle of sub-bailment on terms. The first two approaches are contractual devices, while the third approach derives from the special relationship of bailment. Whenever a promise not to sue clause is used in the bill of lading, it seldom stands alone. Instead, it is often drafted together with, and supplementary to, a Himalaya clause, and the two clauses are usually embraced under one broad provision. Apart from the common law approach, in England, the Contracts (Rights of Third Parties) Act 1999 (the "1999 Act") has been enacted to reform the doctrine of privity of contract. The Act allows the third party to enforce the benefit of a contract if certain conditions under the

Act can be satisfied.[3] As far as the third parties protection in carriage of goods by sea is concerned, s.1(6) of the Act statutorily allows the third parties employed by the carriers to enforce the exclusion and limitation of liability clauses in the contract of carriage.

2. An example of the traditional Himalaya clauses

A typically traditional Himalaya clause can be found in MSC's standard terms of conditions of bill of lading:[4]

> "4.2 The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any servant, agent, or Subcontractor of the Carrier which imposes or attempts to impose upon any of them or any Vessel owned or chartered by any of them any liability whatsoever in connection with the Goods or the carriage of the Goods whether or not arising out of negligence on the part of such Person. If any such claim or allegation should nevertheless be made, the Merchant agrees to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing, 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. In entering into this contract, the Carrier, to the extent of such terms and conditions, does so on its own behalf and also as agent and trustee for such servants, agents and Subcontractors."

3. International Group of P&I Clubs and BIMCO Revised Himalaya Clause

In 2010, the International Group of P & I Clubs (the "IG P&I") and BIMCO reviewed the Himalaya clauses used in bills of lading and other contracts. In September 2010, a drafted clause (the "2010 clause") was circulated to all Clubs within the IG P&I. After that, the clause was amended. In 2014, the amended clause was circulated again. In 2016, this newly revised Himalaya Clause (the "new clause") was finally incorporated into BIMCO's 2016 standard form of bills of lading.[5]

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[3] The Act does not reform the other arm of the doctrine of privity of contract that a third party cannot be bound by the burdens of a contract to which he is not a party.

[4] https://www.msc.com/getattachment/a2c61e0a-90d9-4c80-89aa-686e3464e62a/636355601931487641 accessed 8 August 2018. For similar terms, see CMA CGM, cl 27(2); APL, cl 4; COSCO, cl 3(2).

[5] See e.g. BIMCO's Conlinebill 2016, cl.15; Multidoc 2016, cl.16.

The only material on the origin and explanation of this new clause is available from the IGP&I's two circulars, which can be found on the P&I Clubs' websites and which contain the 2010 version[6] and 2014 version[7] of the clause respectively. In order to get some background information about the new clause, the author interviewed the practitioner from BIMCO. This provided the author with the valuable information that, in contrast to the drafting and amendment of other BIMCO standard clauses or contracts (which were usually launched by BIMCO), this new Himalaya clause originally came from IG of P&I Clubs. However, the author has not obtained other important material other than that available on the Clubs' websites.

According to the "key features" set out by the 2010 circular, the aim of the review was to produce a clause which would be recognised and given effect to in most of the major jurisdictions, including the UK and US. The review was submitted necessary for two main reasons. First, disputes have arisen regarding their scope since the invention of the Himalaya clause. For example, this has happened over the issue of whether a particular person is one of the third parties protected by the clause, or whether a general exemption clause or a promise not to sue clause falls within the scope of provisions extended to third parties. These disputes have impaired the efficiency of the Himalaya clauses and shrouded the status of the clauses in uncertainty. Secondly, the 1999 Act appears to have a particularly limited application: it only applies to the enforcement of exclusions or limitations by the carriers' third parties, but cannot be applied to other terms, e.g., the promise not to sue clause, exclusive jurisdiction clause or arbitration clause. In these circumstances, the amendment of contractual terms is potentially an efficient way to cope with the difficulties caused by the traditional Himalaya clauses and to fill the gap of statute.

According to the 2010 circular, the new clause was intended, where possible, to achieve the following effects:

(1) to wholly exempt the third parties' liability under a contract, subject to the construction by the relevant court;
(2) to confer on the third parties all the rights, limits, defences and exemptions from the liability enjoyed by the carrier under that contract;

[6] See https://www.skuld.com/topics/cargo/general-cargo/revised-himalaya-clause-for-bills-of-lading-and-other-contracts/ accessed 16 August 2018.
[7] See https://britanniapandi.com/wp-content/uploads/2017/09/Revised-Himalaya-Clause-for-bills-of-lading-and-other-contracts-Nov-2014-v2.pdf accessed 16 May 2018.

(3) to impose on the cargo interests an obligation not to sue any third party, and to indemnify the carrier in the event of making such a claim;
(4) to ensure that the clause operates as effectively as possible for protecting the third party, by providing that the carrier acts as an agent for the third parties, and that such third parties are deemed to be a party to such contract; and
(5) to provide protection to third parties other than those who carry out services on board a ship, for example, the third parties whose operations take place before loading or after discharge from a vessel or whose services are involved in multi-modal carriage.

Although intended as such, the IGP&I and BIMCO admitted that, depending on the jurisdiction in which liability might arise, the protection of the clause could not always be guaranteed.

The new clause constitutes five sub-paragraphs. Compared to the Himalaya clauses used in previous versions of BIMCO's bill of lading and the shipping companies' own terms of carriage, it has made changes regarding both content and structure. Here is the text of the IGP&I/BIMCO's new Himalaya clause: [8]

> "(a) For the purposes of this contract, the term "Servant" shall include the owners, managers, and operators of vessels (other than the Carrier); underlying Carriers; stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.
>
> (b) It is hereby expressly agreed that no Servant shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver, holder, or other party to this contract (hereinafter termed "Merchant") for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Servant's part while acting in the course of or in connection with the performance of this contract.
>
> (c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein (other than

[8] Ibid.

Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein) and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant.

(d)(i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant of the Carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with this contract whether or not arising out of negligence on the part of such Servant. The Servant shall also be entitled to enforce the foregoing covenant against the Merchant; and

(ii) The Merchant undertakes that if any such claim or allegation should nevertheless be made, he will indemnify the Carrier against all consequences thereof.

(e) For the purpose of sub-paragraphs (a)-(e) 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 mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract."

The only difference between this version of clause and the 2010 version is that the former adds sub-paragraph (a). As will be discussed later in Chapter 1,[9] the reason behind such an addition was prompted by the difficulties under US law in interpreting "ship managers" as falling within the meaning of "servants" or "agents" of the carrier.

Even though the new clause was officially incorporated into BIMCO's 2016 version of standard terms, in practice, the clause as a whole has not been fully endorsed by any shipping company's standard terms of carriage. Instead, some shipping companies have only adopted some of the sub-paragraphs in the clause. For example, Maerskline has incorporated the changes made by sub-paragraphs (a), (c) and (d) into its Terms for Carriage,[10] MSC[11] and CMA CGM[12] have only endorsed the changes made by sub-

[9] See later 1.3.1.1.

[10] See cl.1 and 4.2(b)(c): https://terms.maersk.com/carriage accessed 16 August 2018.

[11] See cl.1: https://www.msc.com/getattachment/a2c61e0a-90d9-4c80-89aa-686e3464e62a/636355601931487641 accessed 16 August 2018.

paragraph (a) into their Bill of Lading Standard Terms and Conditions, while Hapag-Lloyd has only adopted the changes set out in sub-paragraph (c) into its Bill of Lading Terms and Conditions.[13] The non-widespread adoption of the new clause in its entirety is understandable, given that the clause is relatively new and that the industry might be cautious and require time to explore the result of using the whole clause. However, it should also be noted that the above examples are all standard terms for carriage found in the shipping line's website. These terms could be amended when used in practice. If the carriers and shippers agreed to use all of the IGP&I/BIMCO's new Himalaya clause, they could write it into their contract. Furthermore, for those bills of lading which directly incorporated the BIMCO's 2016 version of standard terms, the entire new Himalaya clause will also be used. Therefore, the use of the new clause might be more extensive than it first appears.

Although the clause is primarily intended for use in bills of lading, it can be adapted for use in charter parties and other marine contracts. Due to its contemplated extensive use, the advantages and disadvantages of this clause are, undoubtedly, worth examining. Even if the clause has already been universally adopted, the legal effects of the changes made by the new clause are still worth discussing in order to prevent unnecessary legal disputes arising out of the application of the clause. Therefore, examining this new clause is of both practical and academic significance. So far, the changes made by this new clause to the traditional Himalaya clauses have not been adequately identified, and the clarifications and potential legal effects brought by these changes have never been systematically evaluated. Moreover, where this new clause is not workable, assistance is required from alternative approaches to this clause.

4. Aims and Objectives

In light of this situation, this thesis focuses on two main issues.

First, it examines this new clause under English law from the perspective of both the common law Himalaya clause approach and the 1999 Act. It should be noted that although the 1999 Act allows a third party to enforce the benefits under a contract to which he is not party, the analysis about common law Himalaya clause approach is still

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[12] See cl.1: https://www.cma-cgm.com/static/eCommerce/Attachments/CMACGM-Terms-and-Conditions-2016-08.pdf accessed 16 August 2018.

[13] See cl. 4(2): https://www.hapag-lloyd.com/content/dam/website/downloads/pdf/Hapag-Lloyd_Bill_of_Lading_Terms_and_Conditions.pdf accessed 16 August 2018.

significant for this thesis. This is because, according to s.7(1) of the Act, the Act does not exclude the availability of the common law Himalaya clause approach to third parties. Also, as the Law Commission discussed it in the Report, the application of the Act can be contracted out.[14] If the shippers and carriers expressly contract the Act out, reference should still be made to the common law approach. Furthermore, if contrary to the author's view,[15] the Act does not apply to the enforcement of the promise not to sue clause, arbitration clause or jurisdiction clause by the carriers' third parties, the enforcement of these clauses by those third parties should still be decided under the common law approach.

Secondly, this thesis aims to clarify some uncertainties regarding the principle of sub-bailment on terms. In contrast to the 1999 Act and Himalaya clause, which extend the benefit under the contract of carriage to the third party, the principle of sub-bailment on terms allows the third party to enforce the terms under his own contract with the carrier. Thus, in cases where the IGP&I/BIMCO's new clause fails, this principle provides a good alternative mechanism to the third parties protection. Also, although the new clause does not contain anything expressly relevant to the principle of sub-bailment on terms, in all shipping companies' terms of carriage, the Himalaya clause is invariably followed by a clause providing that "the carrier shall be entitled to sub-contract on any terms".[16] This apparently points to the principle of sub-bailment on terms. Furthermore, even if the new clause is workable, where the principle of sub-bailment on terms is also available, the relationship between these two approaches has not been adequately clarified.

5. Significance and original contribution

This thesis is significant for various reasons and makes an original contribution to knowledge as outlined below.

Firstly, the issue of third parties protection has been discussed a lot, but none of the current literature has analysed the IGP&I/BIMCO's new Himalaya clause. By using the newest materials and discussing the IGP&I/BIMCO's new clause, this thesis makes an

[14] Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Commission Report No. 242, 1996) [7.18(iii)].
[15] See Chapter 2.
[16] See e.g., Maerskline's Terms, cl.4.1; MSC's Terms, cl.4.1; APL, cl.4; Hapag-Lloyd, cl.4(1); COSCO, cl.3(1); UASC, cl.5.

original point in the area of third parties protection in the carriage of goods by sea and develops a comprehensive and updated discussion of this area in law.

Secondly, the thesis identifies the changes made by the new clause and evaluates whether these changes could resolve the difficulties so as to make suggestions on whether the shipping industry should widely accept the clause or not. In addition, the thesis also suggests how the new clause should be interpreted.

Thirdly, the thesis suggests how the provisions of the 1999 Act should be understood and discusses the interrelationship between the Act and other statutes. For example, Chapter 2 explores how s.6(5) should be understood and examines the relationship between the Act and Carriage of Goods by Sea Act 1992. It also proposes, for the first time, how the section could be amended in order to best reflect the true intentions of the Law Commission. Furthermore, Chapter 4 discusses in detail how s.8 should be understood and examines whether it resolves the particular difficulties posed by the arbitration clauses. Chapter 4 also examines the position of the jurisdiction clauses under the Act, since the Act contains no express provisions on the jurisdiction clauses.

Fourthly, Chapter 5 discusses and resolves some unresolved issues with regard to the principle of sub-bailment on terms. Where the new clause is workable, these solutions are important because the principle of sub-bailment on term can provide a good alternative to third parties protection. These solutions are also significant when the new clause is workable as issues, such as the relationship between the Himalaya clause approach and the principle, have not been properly resolved yet.

6. Methodology and structure

The entire thesis adopts doctrinal research and provides a systematic exposition of the statutes and cases in the area of third parties protection in carriage of goods by sea. It starts with explaining the difficulties with the traditional Himalaya clauses in protecting the third parties by analysing the current case law. It then compares the difference between the traditional Himalaya clauses and IGP&I/BIMCO's new clause. After that, it evaluates whether these changes could resolve the difficulties with the traditional Himalaya clauses by analysing the case law, the 1999 Act, the Arbitration Act 1996 and Brussels Regulation. Lastly, it proposes whether the shipping industry should widely accept the new clause or not.

The thesis also adopts comparative research. It compares the different methods to construe the Himalaya clause used by English law, New Zealand law and US law.

The above methodologies can be consolidated with the following detailed structure of the thesis.

Apart from the general introduction and conclusion, this thesis is divided into five main chapters. Chapter 1 starts with introducing Lord Reid's agency approach, which constitutes the origin of the common law Himalaya clause approach. It then sets out the relevant provisions of the traditional Himalaya clauses, which were designed to satisfy the requirements, and the corresponding provisions in the IGP&I/BIMCO's new Himalaya clause. The chapter also discusses the difficulties with the traditional Himalaya clauses in satisfying Lord Reid's requirements by analysing the current case law. In the meantime, it also compares the different methods of interpreting the Himalaya clauses adopted by English law, New Zealand law and US law. More importantly, the chapter identifies the changes made by the new clause in dealing with those difficulties, and evaluates how some of the changes attempt to deal with some of those difficulties via the analysis of the case law.

Chapter 2 focuses on the 1999 Act. This chapter begins with introducing the general conditions set out by the 1999 Act for a third party to enforce the terms of a contract to which he is not party. It then provides in-depth discussion about the requirements for a third party employed by the carrier to enforce the exclusions and limitations under the contract of carriage under the 1999 Act, compared to those under the common law Himalaya clause approach. By analysing the provisions under the Act, the chapter evaluates whether the new clause satisfies the requirements under the Act. It also investigates the true intentions of the Law Commission behind s.6(5) of the Act by analysing the corresponding discussion in their Report. To this end, it will demonstrate that the true intention behind the Law Commission is that the 1999 Act applies to the enforcement of any benefits under the contract of carriage by the carriers' third parties. Those benefits should include not only the exclusions and limitations but also the promise not to sue clause, arbitration clause and jurisdiction clause. Furthermore, it suggests how s.6(5) of the Act should be amended to reflect the Law Commission's real intention.

From the analysis of the case law and the 1999 Act in Chapters 1 and 2, it will be seen that the issues which gave rise to the tremendous controversy in the usage of the traditional Himalaya clauses were whether and how third parties could enforce the promise not to sue clause, exclusive jurisdiction clause and arbitration clause under the contract of carriage. Chapters 3 and 4 discuss in detail how the IGP&I/BIMCO's new clause deals with these problems.

Chapter 3 focuses on how the new clause makes sure that the promise not to sue clause could be enforceable by third parties. This chapter starts by pointing out the difficulties surrounding the enforcement of the promise not to sue clause by the carrier by analysing the case law; these are the reasons why the third parties want to enforce the clause in their own rights. It then identifies the changes concerning the promise not to sue clause brought by the new clause. In the end, the chapter examines how these changes ensure that third parties could enforce the promise not to sue clause by analysing the provisions under the 1999 Act and the reasoning of the House of Lords' decision in *The Starsin*.

Chapter 4 continues to discuss how the new clause makes sure that the two other provisions, namely, the exclusive jurisdiction clause and arbitration clause, could be made enforceable by third parties. These two clauses are discussed together because they share similar difficulties in their nature and enforcement, and the solutions to those difficulties are analogous. This chapter starts by setting out the reasons as to why the jurisdiction clause and arbitration clause pose problems that do not affect other clauses via the analysis of the Privy Council's decision in *The Mahkutai* and the relevant parts of the Law Commission Report, the Arbitration Act 1996 and the Brussels Regulation. It then analyses the position of the jurisdiction and arbitration clauses under the 1999 Act and examines how the 1999 Act resolves the difficulties with the two provisions by examining the Law Commission Report, the Hansard debates and the Explanatory Notes on the Act. Subsequently, the chapter evaluates how the new clause satisfies the stipulations made under both the 1999 Act and the common law Himalaya clause approach by analysing the 1999 Act, the Arbitration Act 1996, the Brussels Regulation and the relevant case law. This is done in order to ensure that the third parties could enforce the jurisdiction and arbitration clauses.

Should IGP&I/BIMCO's new clause prove unworkable, Chapter 5 proceeds to discuss the principle of sub-bailment on terms as the alternative approach to the new clause. This chapter begins with introducing the general rules of bailment and sub-bailment as

these rules form the foundation to the principle of sub-bailment on terms and explain the difficult question as to why the principle is only confined to the bailment relationship. It then discusses the problems with the principle which have been remain unresolved by authorities, including the relationship between the principle and the Himalaya clause approach. This has been done by analysing and comparing the relevant case law.

Chapter 1 The Himalaya Clause

1.1 Introduction

The common law Himalaya clause[17] approach was inspired by Lord Reid's agency approach in *Midland Silicones v Scruttons*,[18] where he suggested the conditions by which the stevedores could rely on the limitation of liability clause in the bill of lading against the consignees of goods. The Himalaya clauses, which have been drafted in accordance with his propositions, are now the most frequently used contractual device in the protection of carrier's servants, agents and independent contractors and can be found in every bill of lading and transport document.

Since this thesis focuses on the examination of the IGP&I/BIMCO's Revised Himalaya clause, the general rule regarding the common law Himalaya clause approach must be introduced. This chapter will first illustrate the requirements of Lord Reid's agency approach. It will then set out the relevant provisions in traditional Himalaya clauses, which were designed to satisfy those requirements, and the corresponding provisions in IGP&I/BIMCO's new Himalaya clause. More importantly, it will point out the difficulties with the traditional Himalaya clauses in satisfying those requirements, identify the changes make by the new clause, and discuss how some of the changes attempt to deal with some of those difficulties.

1.2 Lord Reid's agency approach

In *Midland Silicone*, the stevedores engaged by the carriers negligently dropped and damaged a drum of chemicals during unloading. The consignees of the drum of chemicals sued the stevedores in tort claiming the damage to the chemicals. The bill of lading between the carriers and shippers incorporated the United States Carriage of Goods by Sea Act 1936, which limited the carriers' liability to $500 per package. The stevedores sought to rely on this limitation clause. The House of Lords held that since the stevedores were not parties to the bill of lading, the doctrine of privity of contract prevented them from enforcing the limitation clause.[19] However, as *obiter*, Lord Reid

[17] "Himalaya clause" is named after the case *Adler v Dickson (The Himalaya)* [1955] 1 QB 158 (CA), where a passenger suffered injuries because of the fault of master of a cruise ship and the master was held not entitled to enforce the exclusion clause in the contract for cruise.
[18] [1962] AC 446 (HL), 474.
[19] Ibid, 467-72 (Viscount Simonds), 477-9 (Lord Reid), 480-1 (Lord Keith) and 494 (Lord Morris).

suggested how the stevedores might be successful in a future case. He named it the "agency argument":[20]

> "I can see a possibility of success of the agency argument that if (first) the bill of lading makes it clear that the *stevedore is intended to be protected* by *the provisions* in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as *agent* for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has *authority* from the stevedore to do that, or perhaps later *ratification* by the stevedore would suffice, and (fourthly) that any difficulties about *consideration* moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply."

Later authorities have repeatedly relied on Lord Reid's speech cited above, and invariably considered the requirements proposed by him whenever the issue of third parties protection arises.[21] It can be seen that this *obiter* statement has turned out to be the binding legal authority and applicable legal principle. Lord Reid's approach owed something, as he himself said, to the "agency" reasoning.[22] However, his approach has been invariably understood and analysed as leading to a direct contract between the shipper and the carrier's servants, agents or independent contractors via the agency of the carrier, so that those third parties will have privity with the cargo claimant for the sole purpose of enforcing the benefits available to the carrier under the bill of lading, e.g. exemptions, limitations, immunities and defences.[23] This resulting contract has been given the name "Himalaya contract".[24]

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[20] Ibid, 474.

[21] See e.g. *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1971] 2 Lloyd's Rep 399 (NZSC); [1972] 2 Lloyd's Rep 544 (NZCA); [1975] AC 154 (PC); *Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty (The New York Star)* [1977] 1 Lloyd's Rep 445 (NSWCA); [1979] 1 Lloyd's Rep 298 (HCA); [1981] 1 WLR 138 (PC); *Godina v Patrick Operators Dty* [1984] 1 Lloyd's Rep 333 (SCNSW); *The Buenos Aires Maru* [1986] 1 SCR 752; 1984 AMC 568 (SCC); *The Mahkutai* [1996] AC 650 (PC); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715 (HL).

[22] Ibid.

[23] *The Eurymedon* [1974] 1 Lloyd's Rep. 534; [1975] AC 154 (PC), 167-168 (Lord Wilberforce); *The New York Star* [1979] 1 Lloyd's Rep 298 (HCA), 305 (Barwick CJ); *The Mahkutai* [1996] AC 650 (PC), 664 (Lord Goff); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715 (HL), [25] (Lord Bingham), [59] (Lord Steyn), [93] (Lord Hoffmann), [152] (Lord Hobhouse), [196] (Lord Millett).

[24] This name was given by Flaux J in *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [40].

It is submitted that this contractual solution based on the agency analysis is also what Lord Reid intended. It can be seen from the case report that the whole of Lord Reid's judgment was actually constituted by his responses to three arguments contented by the stevedores. This agency approach was just the response to the stevedores' agency argument. Lord Reid summarised it as: "through the *agency* of the carrier [the stevedores] were brought into *contractual relation* with the shipper and that they can now found on that against the consignees…"[25] This summary reflects how the later authorities have consistently understood the approach.

1.3 Satisfaction of Lord Reid's requirements

Discussion about how Lord Reid's requirements were satisfied will be illustrated in this section. It will also set out both the relevant provisions of the traditional Himalaya clauses and the corresponding provisions in IGP&I/BIMCO's new clause. More importantly, it will point out the difficulty relating to the traditional Himalaya clauses in satisfying Lord Reid's requirements, identify the changes made by the new clause, and discuss how some of the changes deal with some of the difficulties.

1.3.1 Intention to protect the third party

For a third party to enforce a term in the bill of lading, Lord Reid's first condition requires that the third party must be one of the people who are intended be protected and that the term he seeks to enforce is one of the benefits intended to be extended to him.

1.3.1.1 Third parties protected

Normally the terms used by the traditional Himalaya clauses that refer to third parties are "servants", "agents" and "sub-contractors" or "independent contractors" of the carrier. This is how the 2010 clause was also drafted. The problem surrounding these general terms is that different jurisdictions might have different constructions. For example, US law has faced the difficulty of holding "ship managers" as falling within the categories of "servants" or "agents" under the US Carriage of Goods by Sea Act 1936.[26] Therefore, the US legal adviser suggested that the 2010 clause needed to be

[25] [1962] AC 446, 473.
[26] See e.g. *Steel Coils Inc v M/V Captain Nicholas I* (2002) 197 F. Supp. 2d 560 (ED La); *Steel Coils Inc v M/V Lake Marion* (2003) 331 F.3d 422; 2003 AMC 1408 (USCA, 5th Cir); *Fortis Corporate Insurance SA v Viken Ship Management* (2008) 579 F.3d 784; 2010 AMC 609 (USCA, 6th Cir).

amended in order to clarify that the protections should be extended to ship managers. A similar issue has also arisen under English law. In *The Mahkutai*,[27] the shipowners sought to enforce the terms in the time charterers' bill against the shippers. The shippers argued that the shipowners were not "sub-contractors" within the meaning of the Himalaya clause in that case.[28] These disputes led to the addition of sub-paragraph (a) of the new clause to the 2010 clause, which was specially designed to define third parties protected by the clause. It uses the term "Servant" to refer to all third parties who are to be protected and enumerates them in detail:

> "*(a) For the purpose of this contract, the term "**Servant**" shall include the **owners**, **managers**, **and operators of vessels** (other than the Carrier); **underlying carriers**; **stevedores** and **terminal operators**; and any **direct or indirect** servant, agent or subcontractor (**including their own subcontractors**), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract **whether in direct contractual privity with the Carrier or not**.*"

Here, the specific reference to "managers of vessels" is clearly a response to those US authorities where there have been difficulties in holding the ship managers as "servants" or "agents". Also, the "underlying carriers" undoubtedly include the shipowners in *The Mahkutai*, who were the sea carriers. The term is also specific and clear enough to contain other actual carriers, e.g., road carriers or rail carriers. As such, the new clause can be better used in multimodal transport, where more than one actual carrier might be involved in performing the carriage of goods.

Another problem present in the traditional Himalaya clauses concerns whether or not the sub-sub-contractor employed by the carrier's sub-contractor falls within the meaning of "servants, agents and sub-contractors". The issue is particularly important in multimodal transport operation since it is not rare for the sub-contractor of the carrier to subsequently employ someone else to undertake part of the sub-contractor's obligation. This is precisely what took place in the US case *Norfolk Southern Railway Co v James*

[27] [1996] AC 650 (PC).
[28] Ibid, 665. This argument was actually not dealt with by the Privy Council. Their Lordships had already decided the term which the shipowners sought to enforce, namely, the exclusive jurisdiction clause, did not fall within the meaning of the Himalaya clause. So they said that it was not necessary for them to decide the issue as to whether the shipowners were "sub-contractors".

N Kirby Pty Ltd.[29] One legal issue there was whether or not "any independent contractor" should include the rail carrier, who was the sub-sub-contractor. The US Supreme Court decided that "any independent contractor" should not be subject to a narrow interpretation and there was no justification in interpreting it as an independent contractor who was only in direct privity with the contracting carrier. The phrase was accordingly held to embrace the sub-sub-contractor.[30] Such an issue has also given rise to litigation disputes under English law, albeit in a different context. In *The Global Santosh*,[31] the UK Supreme Court held that the charterers down the chain constituted "agents" of the head time charterer, even though there was no contractual or other legal relationship between them.[32]

It can be seen from the new clause that the latter part of sub-paragraph (a) clearly defines the "Servant" as also including "any direct or indirect servant, agent or subcontractor (including their own subcontractors) […] whether in direct contractual privity with the Carrier or not". These words presumably codify the US Supreme Court's decision in *Norfolk Southern Railway v James N Kirby* and clarify that the protections stipulated under the new clause are also extended to those sub-sub-contractors and other subsequent contractors further down the chain.

By using the specific and explicit terms, sub-paragraph (a) of the new clause makes sure that the clause protects every possible third party involved during the whole carriage transit. It is submitted that the shipping companies should learn this method. So far, the shipping companies have widely adopted the technique to list every possible third party as suggested by the new clause. Instead of naming those third parties in the Himalaya clause, they included the list in the definition of "sub-contractors".[33] However, not every shipping company's terms of carriage have expressly included the sub-sub-contractors down the chain.[34]

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[29] 543 U.S. 14; 2004 AMC 2705.
[30] 543 U.S. at 30-32; 2004 AMC 2705, 2716-2717.
[31] *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20; [2016] 1 WLR 1853.
[32] Ibid, [19] (Lord Sumption JSC).
[33] See e.g., Maerskline, cl 1; MSC, cl 1; COSCO, cl1; Evergreen, cl 1(14); APL, cl 1; CMA CGM, cl 1.
[34] It can only be found in some of the shipping companies' terms of carriage: e.g., Maerskline, cl 1; MSC, cl 1; Evergreen, cl 1(14). *Cf* CMA CGM, cl 1; APL, cl 1.

1.3.1.2 Provisions extended to third parties

According to Lord Reid, in order to enforce the provisions under the contract of carriage by the Himalaya clause, a third party (having proved that he is one of the third parties protected) must also prove that the provisions sought to be enforced by him are intended as being extended to him.

1.3.1.2.1 Extending the carrier's rights

The traditional Himalaya clauses usually specify what benefits are to be conferred upon third parties. They typically provide that:[35]

> "[…] 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 […]."

In this thesis, this part of the Himalaya clause is referred to as "extending the carrier's rights" part. Sub-paragraph (c) of the IGP&I/BIMCO's new clause also contains these words:

> "*(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein […] 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 every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant.*"

These terms have been held to include exclusion clauses, limitation clauses and time bar[36] because they are "characteristically terms for the benefit of the carrier".[37]

[35] *The Eurymedon* [1975] AC 154 (PC), 165. For similar usage, see *The New York Star* [1981] 1 WLR 138 (PC), 141; *The Makutai* [1996] AC 650 (PC), 657; *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [20].
[36] *The Eurymedon* [1975] AC 154 (PC); *The New York Star* [1981] 1 WLR 138 (PC).
[37] *The Mahkutai* [1996] AC 650 (PC), 665 (Lord Goff).

1.3.1.2.2 General exemption clause and promise not to sue clause

Apart from extending the carrier's rights to third parties, traditional Himalaya clauses sometimes additionally provide that[38]

> "It is hereby expressly agreed that *no* servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever…for any loss or damage or delivery…"

Such a clause is normally referred to as the "general exemption clause",[39] the purpose of which is to totally exempt the third party from liability. Sub-paragraph (b) of the IGP&I/BIMCO's new clause also contains such a provision with similar terms:

> "*(b) It is hereby expressly agreed that no Servant shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver, holder, or other party to this contract (hereinafter termed "Merchant") for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Servant's part while acting in the course of or in connection with the performance of this contract*."

The traditional Himalaya clauses might also contain, instead of the general exemption clause, another clause:[40]

> "The Merchant undertakes that no claims or allegations shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the goods."

In this thesis, this clause is referred as the "promise not to sue clause". Under this clause, the shipper promises that he would not sue any third parties employed by the carrier. Sub-paragraph (d)(i) of the IGP&I/BIMCO's new clause also contains such a provision:

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[38] *The Eurymedon* [1975] AC 154 (PC), 165. For similar usage, see *The New York Star* [1981] 1 WLR 138 (PC), 141 (Lord Wilberforce); *Gore v Van der Lann* [1967] 2 QB 31 (CA), 42 (Willmer LJ); 45 (Salmon LJ); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [20].
[39] *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [109] (Lord Hoffmann).
[40] *The Elbe Maru* [1978] 1 Lloyd's Rep 206. For similar usage, see *The Makutai* [1996] AC 650 (PC), 657; *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [7].

> "*(d)(i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant of the Carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with this contract whether or not arising out of negligence on the part of such Servant.*"

However, different from the traditional Himalaya clauses, this part of the new clause additionally provides that

> "…***The Servant shall also be entitled to enforce the foregoing covenant against the Merchant.***"

A comparison between the wording used by the general exemption clause and the promise not to sue clause could show that the promise not to sue clause involves an undertaking and a negative duty on the shipper, while the general exemption clause does not.[41] As will be discussed in Chapter 3, one significance of this distinction is that only the promise not to sue can be enforced by way of stay of proceedings.[42] This distinction has also given rise to disputes as to their enforceability by a third party in his own right by the Himalaya clause. In *The Starsin*,[43] the House of Lords held that a general exemption clause fell within the scope of the Himalaya clause in that case so that the clause was enforceable by the third parties. However, there has still been no conclusive authority on whether a promise not to sue clause could also fall within the Himalaya mechanism so as to be enforceable by the third parties. It is submitted that these issues arose because the wording and the structure of the traditional Himalaya clauses are very ambiguous.[44]

The IGP&I/BIMCO's new Himalaya clause clarifies the enforceability of the two clauses by the third parties by using clearer language and by restructuring the whole Himalaya clause. This aspect is also one of the most important changes brought by the

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[41] As Lord Hoffmann said "[i]t does not say that the shipper is not to sue the third party. It says that he [the third party] shall not be under any liability": *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [100]. See also *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [27] (Flaux J).
[42] See later 3.2.1. In the light of this, it has been suggested that if the carrier wants to include a promise not to sue clause, very clear and unambiguous words are needed and a simple declaration of non-responsibility of the third parties will be construed strictly against the carrier: *Gore v Van der Lann* [1967] 2 QB 31 (CA), 42 (Willmer LJ); *Snelling v John G Snelling* [1973] QB 87, 98 (Ormrod J).
[43] [2003] UKHL 12, [2004] 1 AC 715.
[44] See Chapter 3.

new clause. Because of the complexity of the reasons, the changes made by this new clause to the general exemption clause and promise not to sue clause and the effects brought by these changes will be specifically discussed in Chapter 3.

1.3.1.2.3 Exclusive jurisdiction clause and arbitration clause

Under English law, disputes have also arisen as to whether a third party could enforce an exclusive jurisdiction clause pursuant to the Himalaya clause. In *The Mahkutai*,[45] the charterer's bill of lading included a Himalaya clause, which was in the similar terms as the example under 1.3.1.2.1 above. It provided that every servant, agent and sub-contractor of the carrier

> "…shall have the benefit of all exceptions, limitations, provisions, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit…"

The bill of lading which contained this Himalaya clause also included an exclusive Indonesia jurisdiction clause. The goods were damaged by sea water and the cargo owners brought an action against the shipowners in Hong Kong. The shipowners, although being not parties to the bill, sought to stay the proceedings in Hong Kong on the ground that they were entitled to rely on the exclusive Indonesian jurisdiction clause in the bill of lading by virtue of the Himalaya clause. The Privy Council held that the exclusive jurisdiction clause did not fall within the scope of the Himalaya clause and the reasons given by Lord Goff, who delivered the judgment of the Board, were as follows.

Firstly, Lord Goff defined an exclusive jurisdiction clause as one that "does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes". So unlike the "exception, limitation, condition or liberty", which benefits "only one party", the exclusive jurisdiction clause actually "creates mutual rights and obligations". He went on to say that the word "provision" should be given a limited meaning to refer to "any other provision in the bill of lading which … benefited the carrier … in the sense that it was inserted in the bill for the carrier's protection". The word should also be interpreted to refer to provisions which "ensure for the benefit of the servants, agents and subcontractors of the carrier". As such, he concluded that the word "provision" could

[45] [1996] AC 650 (PC).

also not "extend to include a mutual agreement, such as an exclusive jurisdiction clause".[46] In a word, the unique character of an exclusive jurisdiction clause resulted in it not falling within the meaning of the Himalaya clause.

Secondly, Lord Goff found support from the function of the Himalaya clause. He said that the role of a Himalaya clause was "to prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf". However, making "available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading contract does not contribute to the solution of that problem".[47] This means that, in Lord Goff's view, the function of the Himalaya clause is only to prevent the cargo claimants from avoiding the contractual defences under the contract of carriage by suing the third parties employed by the carrier. However, the exclusive jurisdiction clause is not a contractual defence available to the carrier. Therefore, allowing the third party to enforce the exclusive jurisdiction clause by virtue of the Himalaya clause does not correspond to the function of the Himalaya clause.

In a later case *Bouygues Offshore SA v Caspian Shipping Company and Others (No 2)*,[48] the use of the Himalaya clause in a towage contract was, in substance, similar to that used in the bill of lading found in *The Mahkutai*:

> "…all exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this Agreement [towage contract] … for the benefit of the hirer [charterer] shall also apply to and for the benefit of…all parties performing services within the scope of this Agreement".

Based on the above reasons given by Lord Goff in *The Mahkutai*, Morison J held that only the provisions which benefitted just one party could fall within the Himalaya clause while the exclusive jurisdiction clause created mutual rights and obligations,

[46] Ibid, 666.
[47] Ibid, 666.
[48] [1997] 2 Lloyd's Rep 485 (QB); [1997] ILPr 472 (CA).

causing it to fall outside the ambit of the Himalaya clause.[49] The Court of Appeal affirmed this decision and reasoning.[50]

So far, the issue as to whether a third party could enforce an arbitration clause in the bill of lading pursuant to the Himalaya clause has never given rise to the dispute under English law. Although the focus of *The Mahkutai* was on the exclusive jurisdiction clause, presumably, the reasons given by Lord Goff could be equally applicable to the arbitration clause.[51] Firstly, an arbitration clause might also be regarded as embodying a mutual agreement where both parties agree with each other as to the relevant forum to decide their disputes. Thus, similar to the exclusive jurisdiction clause, it creates mutual rights and obligations instead of benefitting only one party. Secondly, if one is correct in saying that an exclusive jurisdiction clause is not a contractual defence, it might also be said that an arbitration clause is not a contractual defence. Therefore, allowing a third party to enforce it does not correspond to the function of the Himalaya clause. In the New Zealand case *Air New Zealand Ltd v The Ship Contship America*,[52] it was held that an arbitration clause was "merely a procedural arrangement as to the form in which the claim or claims are to be made in which form the defences and limits of liability, whatever they may be, are applicable as much as they would be in a Court of law",[53] so it was not a "defence" or a "limit" of liability within the Himalaya clause. By contrast, the US law adopted a more permissive interpretation, and it has been held more than once that a forum selection clause "warrants dismissal of the action", so it is a "defence" which could be enforceable by a third party.[54]

Contrast to the traditional Himalaya clauses, sub-paragraph (c) of the IGP&I/BIMCO's new clause, in the "extending the carrier's rights" part, additionally and specifically provides that

[49] [1997] 2 Lloyd's Rep 485, 490.
[50] [1997] ILPr 472 (CA), 476 (Hobhouse LJ).
[51] Hon. Justice Bradley Harle Giles, "The Cedric Barcley Memorial Lecture 1999: Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading" (1999) 14 (2) Australian and New Zealand Maritime Law Journal 5, 13.
[52] [1992] 1 NZLR 425 (New Zealand High Court).
[53] Ibid, 343 (Greig J).
[54] *Acciai Speciali Terni USA Inc v M/V Berane* 181 F Supp 2d 458 at 464, 2002 AMC 528 at 533 (D Md 2002) (Smalkin CJ). See also *Marinechance Shipping, Ltd. v. Sebastian* 143 F.3d 216, 221 (5th Cir. 1998) and *LPR, SRL v. Challenger Overseas, LLC,* 2000 A.M.C. 2887, 2892 (S.D.N.Y.2000); *Street, Sound Around Electronics v M/V Royal Constainer* 30 F Supp 2d 661, 1999 AMC 1805 (Southern District of New York); *Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp* 561 US 89, 2010 AMC 1521 (US SC).

> "*(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein … and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder* ***including the right to enforce any jurisdiction or arbitration provision contained herein*** *shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant*."

The additional and specific reference to the jurisdiction clause and arbitration clause is another very important change made by this new clause. It is also a clear response to the the difficulties surrounding the enforcement of exclusive jurisdiction clause (and probably the arbitration clause) by third parties. Due to the complexity of reasons, the effects of this change will be specifically discussed in Chapter 4.

1.3.2 Declaration of agency

Lord Reid's second condition requires the bill to provide that the carrier is contracting as the "agent" of the third party. "Agency" is a relationship which arises when one person, called the "principal" (the "third party employed by the carrier" for the purpose of this thesis), authorises another, called the "agent" (the "carrier" for the purpose of this thesis), to act on his behalf, e.g. to make a contract between the principal and "another party" (the "shipper" for the purpose of this thesis) and the agent agrees to do so.[55] From the perspective of the law of agency, a declaration of agency discloses to and acknowledges the shipper of the fact that the carrier is contracting as the agent for the principal, which is a precondition for the principal's later ratification.[56] As such, it is necessary for the third party's ratification of the carrier's act, which is required by Lord Reid's third condition.[57]

The authorities have shown that a simple word "agent" would be sufficient enough to satisfy this requirement.[58] The traditional Himalaya clauses usually spell out that by

[55] Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 16-001.
[56] *Keighley Mexsted & Co v Durant* [1901] AC 240; see also Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 16-046.
[57] See shortly 1.3.3.
[58] *The Eurymedon* [1971] 1 Lloyd's Rep 399 (NZSC), 404 (Beattie J), affirmed by [1975] AC 154, 167 (PC), 167 (Lord Wilberforce); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715 (HL), [25] (Lord Bingham), [94] (Lord Hoffmann).

entering into the Himalaya clause the carrier is also acting as the agent for the third parties. For example:[59]

> "…the carrier is or shall be deemed to be acting as *agent* or trustee on behalf of all persons who are or might be his servants or agents from time to time (including independent contractors) …"

In this thesis, this part of the Himalaya clause is referred to as the "agency provision". The problem with the traditional Himalaya clauses is that the agency provision normally appears after the "extending the carrier's rights" part. The position, together with the wording used by the provision, makes it unclear whether the provision applies to the general exemption clause or promise not to sue clause, which is normally located before the "extending the carrier's rights" part.[60] In the IGP&I/BIMCO's new clause, such an agency provision can also be found in sub-paragraph (e). It provides that:

> "*(e) For the purpose of sub-paragraphs (a)-(e) 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 mentioned in sub-clause (a) above who are his Servant*** *and all such persons shall to this extent be or be deemed to be parties to this contract.*"

However, the new clause resolves the issue as to whether the agency provision applies to the general exemption or promise not to sue clause by relocating the provision and by using the most unambiguous terms. The changes made and the legal effects brought by the new clause in this regard will be discussed in detail in Chapter 3.

1.3.3 Third party's authority and ratification

Under the law of agency, the agency relationship can be created by the principal's express authority,[61] implied authority[62] or ratification,[63] while only a simple declaration

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[59] *The Eurymedon* [1975] AC 154 (PC), 166. For similar usage, see *The New York Star* [1981] 1 WLR 138 (PC), 141; *The Makutai* [1996] AC 650 (PC), 657; *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [20]; *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [7].
[60] *The Starsin* [2003] UKHL 12; [2004] 1 AC 715.
[61] Peter Watts and Francis Reynolds, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell, London 2014) 2-028; Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 16-016 to 16-017.
[62] *Bowstead and Reynolds on Agency*, 2-032; *Treitel on The Law of Contract*, 16-018 to 16-020.
[63] *Bowstead and Reynolds on Agency*, 2-047; *Treitel on The Law of Contract*,16-043 to 16-053.

of the agency between the agent and another party is not sufficient.[64] Lord Reid's requirement for "authority…or later ratification" only corresponds to this rule. In order to decide whether the carrier's servant, agent or independent contractor authorises the carrier to enter into the Himalaya clause, reference should be made to the conducts between them rather than those between the carrier and shipper. Whether this condition can be satisfied depends on the particular facts of each case, which, unlike the first two requirements, cannot be satisfied simply by drafting the wording used by Himalaya clause.

1.3.3.1 Express authority

Under the law of agency, an express authority from the principal can be conferred by an express agreement.[65] Thus, if the contract between the carrier and his servant, agent or independent contractor expressly confers authority on the carrier to secure the protection of the bill of lading terms, it might be held that the carrier has the express authority from the third party to agree to the protections. This precise situation occurs in *Reymond Burke Motors v Mersey Docks*.[66] There, the terminal agreement between the shipowner (the carrier) and terminal operator provided that "the owners shall include in their bill of lading…a provision to ensure that the terminal operator shall have the benefit of all provisions therein benefitting the owners and the terminal operator hereby accepts such benefit and appoints the owners as the terminal operators' agents for the purpose of entry into the contracts of carriage evidenced by the bill of lading…"[67] Furthermore, it was held in the Canadian case *The Buenos Aires Maru* that if the stevedoring contract between the carrier and the stevedore expressly required the carrier to include the stevedore "as an express beneficiary…of all rights, immunities and

[64] *Cf* Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa Law from Routledge, London 2015) 9.116: an express term can show the existence of a relationship of agency, while the extent of the agency is relevant to authority.
[65] *Bowstead and Reynolds on Agency*, 2-028; *Treitel on The Law of Contract*, 16-016 to 16-017.
[66] [1986] 1 Lloyd's Rep 155.
[67] Ibid, 157. In this case, the act of the terminal operator which caused the damage of the goods occurred before the attachment of the contract of carriage, so it was held that the terminal operators could not enforce the Himalaya protection, which left the "authority" point unnecessary to be decided. However, after citing the above terms in terminal agreement, Leggatt J said that "That provision is, of course, relevant for the operation relied on by the defendants of the relevant Himalaya clause" (at 157). By saying this, Leggatt J meant that this was relevant to the "authority" requirement and he was likely to mean that such a provision was sufficient to establish the terminal operator's authority.

limitation of liability provisions of all contracts of affreightment as evidenced by its standard bills of lading", Lord Reid's third requirement would be satisfied.[68]

1.3.3.2 Implied authority

In cases where there is no express provision in the contract between the carrier and his servant, agent or independent contractor authorising the former to enter into the contractual benefits under the bill of lading, the authorities have shown that a previous connection between them might be helpful in demonstrating that the carrier has the implied authority from the third party. In *The Eurymedon*, the stevedore was the parent company of the carrier and had carried out all the stevedoring work for the carrier for some years, so he was familiar with the use of the bill of lading containing the Himalaya clause and was aware that bills of this type should apply when carrying out work in respect of such cargo. Based on these facts, the carrier was held to have the stevedore's implied authority to contract as his agent for the purpose of entering into the Himalaya clause.[69] In *The New York Star*, there was no such corporate tie between the carrier and the stevedore as was the case in *The Eurymedon*. However, the stevedore had for years enjoyed a monopoly of the carrier's business in the port of Sydney, the bills of lading containing the Himalaya clause had been used for tens of years, and the stevedore proved that it was familiar with the use of the bill containing the Himalaya clause. Moreover, there was evidence that before the loss of the goods in question, claims had been made on the stevedore and he had relied on those terms in the previous judicial proceedings to enforce the exemption clause. Therefore, the carrier was held to have implied authority from the stevedores to contract on the Himalaya clause.[70]

The authorities show that the implied authority can be inferred from a previous connection between the carrier and third party. Such a previous relationship is not hard to prove.[71] It can be established merely by some earlier trading records and by proving that the bill containing the Himalaya clause at issue is normally used in the previous

[68] *ITO-International Terminal Operatorss Ltd v Miida Electronics Inc (The Buenos Aires Maru)* [1986] 1 SCR 752; 1986 AMC 2580 (Federal CA of Canada), [27] (Le Dain J), affirmed in *Saint John Shipbuilding & Dry Dock Co v Kingsland Maritime Corp* 126 DLR (3d) 332; 1984 AMC 568 (Federal CA Canada), 574 (Heald J).
[69] [1971] 2 Lloyd's Rep 399, 404 (Beattie J); [1972] 2 Lloyd's Rep 544, 548 (Turner P), 552 (Perry J); [1975] AC 154, 167 (Lord Wilberforce).
[70] [1977] 1 Lloyd's Rep 445 (NSWCA), 448 (Glass J); [1979] 1 Lloyd's Rep 298 (HCA), 303 (Barwick CJ), 318 (Mason J and Jacobs J); [1981] 1 WLR 138 (PC), 144 (Lord Wilberforce).
[71] A similar longstanding business relationship was found between the carrier and stevedore in an Australian case: *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333 (NSWCA), 335 (Hutley J).

transactions. In practice, it is common for the carrier to engage certain sub-contractors to perform particular undertakings in specific places. As such, the sub-contractors usually know the Himalaya clauses used in the bills.

1.3.3.3 Ratification

Under the law of agency, where there is neither express nor implied authority from the principal prior to the agent's act, the principal's later ratification is also sufficient to establish the agency relationship. One condition for such ratification is that the agent must purport to act on behalf of the principal and disclose this to another party.[72] As discussed above under 1.3.2, this is why the requirement of a declaration of agency as suggested by Lord Reid is necessary.[73] The difficulty, however, lies in when and how the third party can ratify the carrier's unauthorised act.

Under the law of agency, ratification will not be implied unless the principal has full knowledge of the unauthorised act.[74] In *The Eurymedon*, Beattie J held that the bill of lading passed the stevedore's hands before it undertook the unloading operation, so the stevedore was aware of the terms of the bill of lading before carrying out the stevedoring work. With that knowledge, there was implied ratification from him.[75] This judgment indicates that if the stevedore, in the full knowledge of the unauthorised act, ratifies before he performed his undertaking, then the ratification would be valid.[76] However, if the bill passes to the stevedore after he performed the stevedore undertaking, can he ratify the carrier's act? Under the law of agency, the assertion that the principal must ratify no later than the contract is to commence[77] has been disapproved.[78] As will be discussed soon under 1.3.4, the Himalaya contract starts when

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[72] *Keighley Mexsted & Co v Durant* [1901] AC 240; see also Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 16-046.
[73] Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 7.057.
[74] *Lewis v Read* (1845) 13 M & W 834.
[75] [1971] 2 Lloyd's Rep 399 (New Zealand Supreme Court), 404-405, which was agreed by Perry J in the Court of Appeal: [1972] 2 Lloyd's Rep 544, 552.
[76] See *Godina v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333 (Court of Appeal of New South Wales), 336 (Samuels J).
[77] *Metropolitan Asylums Board v Kingham & Sons* (1890) 6 TLR 217, 218 (Fry LJ).
[78] *Celthene Pty Ltd v WKJ Hauliers Pty Ltd* [1981] 1 NSWLR 606, 615*; Life Savers Pty Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431, 438; *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] QB 966, 987 (Parker J); *Morrell v Studd and Millington* [1913] 2 Ch 648. See also *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell, London 2014) 2-090. *Cf* Geroge Russell Northcote (ed), *Fry: A Treatise on the Specific Performance of Contracts* (6th edn, Sweet & Maxwell, London 1985), Additional Note A.

the stevedore performs his stevedoring undertaking. It therefore follows that the stevedore can presumably ratify the carrier's act after he performs the undertaking.

Even if it is correct to say that the stevedore could ratify the carrier's unauthorised act after he performs this undertaking, a problem still exists as to when is the latest time for him to ratify the carrier's act. Furthermore, whether can he ratify late when he is sued by the cargo claimants? The authorities have provided contradictory views about this issue. In *The Eurymedon*, Beattie J held, *obiter*, that "in any event, it appears to me that because the defendant [the stevedore] is relying on the terms of a contract, that *per se* can be regarded as a proper act of ratification".[79] By saying so, Beattie J seemed to mean that the stevedore's reliance on the terms of the Himalaya clause when sued by the shipper could be regarded as valid ratification. When the case reached the Privy Council, their Lordships did not mention this part of the reasoning. On the contrary, the Canadian case *The Tolya Komar* held that the stevedore could not ratify as late in time when the stevedores were sued by the cargo owners for damages, because, otherwise, "a later ratification would always be claimed", which would be equal to "negating the requirement of agency as between the carrier and the stevedore, a situation contrary to what is well established law".[80]

Although Lord Goff said that in the majority of cases recourse to the principle of ratification could solve Lord Reid's third requirement,[81] no authority has so far been decided merely upon the third party's later ratification. There has been a suggestion that the requirement of authority or ratification is not necessary and should be discarded because the Himalaya contract only confers benefits to the stevedore instead of conferring both rights and obligations on him.[82] Also, the requirement of authority or ratification from the third party fails to meet the "commercial need" which Himalaya clauses are intended to fulfil.[83] The "commercial need" here refers to the fact that the third parties employed by the carriers should be protected. Although having been submitted as such, it is not sure whether the English courts would accept this argument,

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[79] [1971] 2 Lloyd's Rep 399, 405.
[80] *Sears Ltd v Ceres Stevedoring Co Ltd (The Tolya Komar)* [1988] CLD 1454 (Federal Court of Canada – Appeal division), [24] (Desjardins J).
[81] *The Mahkutai* [1996] AC 650 (PC), 664.
[82] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 7-056-7-057; Sir Guenter Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, London 2000) 345, 363-364.
[83] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 7-057.

given that the authorities have been continuingly considering this element every time the effectiveness of the Himalaya clause was decided on.

Since the satisfaction of this requirement is a matter of fact instead of construction of the contract, no Himalaya clause could resolve this difficulty by a rewriting of the terms, including the IGP&I/BIMCO's new clause. As such, the new clause cannot be blamed for not responding to this difficulty. In light of this, when the bill incorporated this new clause, the third parties employed by the carrier are suggested, in their contracts, to expressly authorise the carrier to insert a provision in the bill to ensure the third party shall have all the benefits available to the carrier under the bill. In this sense, the terms similar to those used by the terminal agreement in *Reymond Burke Motors v Mersey Docks* or by the stevedoring contract in *The Buenos Aires Maru* mentioned above under 1.3.3.1 could be learnt.

Nevertheless, the difficulty with the requirement regarding the third party's authority and ratification has been realised under English law. As will be discussed in Chapter 2, the 1999 Act finally resolves this difficulty by eliminating this requirement.

1.3.4 Consideration

Lord Reid's fourth requirement is that the third party must have provided consideration to claim benefit under the Himalaya clause. It has been well established that the consideration provided by the third party is the performance of the services for the benefit of the cargo owner in relation to the goods.[84] The Privy Council in *The Eurymedon* also confirmed the principle that the actual performance of an existing duty owed to B by someone can still constitute his consideration under his contract with A.[85] Therefore, it was decided that the performance by the stevedore of the discharging operations for the benefit of the shipper constituted his consideration under the

[84] *The Eurymedon* [1975] AC 154 (PC), 168 (Lord Wilberforce); *The New York Star* [1979] 1 Lloyd's Rep 298 (HCA), 305 (Barwick CJ); [1981] 1 WLR 138 (PC), 144 (Lord Wilberforce); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715 (HL), [93] (Lord Hoffmann), [197] (Lord Millett), [153] (Lord Hobhouse). *Cf* William Terley QC doubted this resolution on consideration and said that "only if the carrier himself also undertakes to discharge the goods and care for them after discharge, may he be able to benefit his servants or independent contractors by his contract with the shipper"; he intended to say that only the carrier's, rather than the stevedores', discharging of the goods constituted consideration: William Tetley, "The Himalaya Clause-Revisited" (2003) 9 JIML 40, 43.

[85] [1975] AC 154, 168 (Lord Wilberforce), relying on *Scotson v Pegg* (1861) 6 H & N 295.

Himalaya contract with the shipper,[86] although the stevedore was already under that obligation under the contract with the carrier.[87]

In *The Mahkutai*, Lord Goff stated that this way of finding consideration was too "technical".[88] However, it is submitted that this way conforms to the rule of general contract law. Under the law of contract, consideration is defined as "some detriment to the promise (in that he may give value) or some benefit to the promisor (in that he may receive value)".[89] To constitute consideration, either of them is sufficient,[90] and the benefit and detriment may be either factual or legal.[91] It follows that there is a consideration from the promisee if the promisor in fact obtained a benefit or if the promisee does something that he was not legally bound to do (regardless of whether he suffers detriment or whether this confers a benefit on the promisor).[92] The performance of services by a third party confers a factual benefit to the shipper because he secured the actual performance of services regarding the shipper's goods. Alternatively, the third party is also doing something he was not legally bound to do - his duty is owed only to the carrier, not the shipper.[93] Therefore, the view that the consideration provided by the third party under the Himalaya contract is the performance of the services for the benefit of the cargo owner concerning the goods is in line with the law of contract.

However, this does not necessarily mean that the performance of any undertakings by the third party under his contract with the carrier can be counted as his consideration under the Himalaya contract. It has been decided that, for the third party's performance to be taken as his consideration under the Himalaya contract, his performance must be "referable to the carrier's contract of carriage".[94] This means that the third party's act must occur within the scope of carrier's obligation under the contract of carriage. The scope of carrier's obligation under the contract of carriage has been decided as depending on "the construction of the relevant provisions of the bill of lading".[95] Therefore, in essence, what act can constitute the third party's consideration under the

[86] [1975] AC 154, 168 (Lord Wilberforce)
[87] Ibid. Although there was no direct evidence of the existence or nature of this obligation, their Lordships were "prepared to assume it".
[88] [1996] AC 650, 664.
[89] Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell, London 2015) 4-004.
[90] Ibid, 4-005.
[91] Ibid, 4-006.
[92] Ibid.
[93] Ibid, 4-075.
[94] *Raymond Burke Motors v Mersey Docks & Harbour* [1986] 1 Lloyd's Rep 155, 161 (Leggatt J); *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [57] (Rix LJ).
[95] *The New York Star* [1981] 1 WLR 138 (PC), 146 (Lord Wilberforce).

Himalaya contract depends on the scope of carrier's obligation under the bill of lading ascertained from the construction of the bill's terms.[96] It is submitted that this is a reasonable limit since, in the shipper's mind, any exclusions or limitations should only be confined to the carrier's period of responsibilities. Normally, the period of carrier's responsibilities cannot be construed from the terms under the Himalaya clauses, but from other terms under the bills of lading. Therefore, this limit could not and should not be dealt with by any Himalaya clause itself, including IGP&I/BIMCO's new clause. Hence, the new clause should not be blamed for not dealing with such a limit of the Himalaya clauses.

Since the new clause can be used in all kinds of transport documents, despite bills of lading or multimodal transport documents, it is worth discussing the period of carrier's responsibilities under different transport documents to decide which part of the third party's act can be protected by the Himalaya clause. Normally, under a port-to-port bill of lading, which provides the carrier's period of responsibility from loading to discharge, without clear words to the contrary, the period of carrier's responsibility does not extend to the pre-loading stage.[97] In this situation, if the third party's conduct which causes the loss of or damage to the goods occurs before loading, he will not be protected by the Himalaya clause.[98] However, as for the other end of the sea transit, it has been suggested, as a practice, that the consignees seldom accept the goods at the ship's tackle but normally collect them at various later stages. The bill of lading also usually recognises this practice and should, therefore, be construed in the light of such a practice.[99] In this sense, the carrier's responsibility period usually extends to post-discharge stage till delivery.[100] Thus, if the third party's conduct which causes the loss of or damage to the goods occurs after discharge but before delivery, he might still be protected by the Himalaya clause. Under a door-to-door bill or multimodal transport document, the carrier's responsibility for the goods is much wider, which normally starts from the time of receiving the goods to the time of delivery.[101] During this whole

[96] Ibid; *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [59] (Rix LJ).
[97] *Reymond Burke Motors v Mersey Docks* [1986] 1 Lloyd's Rep 155; *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA). However, in *The New York Star*, the bill also provides that "any responsibility of the carrier in respect of the goods attaching prior to such loading or continuing after leaving the ship's tackle…shall not exceed that of an ordinary bailee", a construction of this provision shows that the carrier's responsibility extends to pre-loading stage.
[98] *Raymond Burke Motors v Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155, 162 (Leggatt J); *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [72] (Rix LJ).
[99] *The New York Star* [1981] 1 WLR 138 (PC), 147 (Lord Wilberforce).
[100] Ibid; *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [69] (Rix LJ).
[101] e.g. FIATA FBL, cl6.1; BIMCO's Multidoc 2016, cl.10 (a); Combiconbill 2016, cl.9(1).

period, the third parties' performance is referable to the multimodal transport contract so that he can be protected by the Himalaya clause.

1.3.5 Consignee and the Himalaya clause

Where the loss of or damage to the goods occurs after the risk under the sale contract has passed, it is normally the consignees instead of the shippers who would be interested in suing the carrier or the third party engaged. If the first four of Lord Reid's requirements are fulfilled, the third party will be able to enforce the Himalaya clause against the shipper. However, it does not necessarily follow that he can successfully do so against the consignee of the goods. This is because the resulting Himalaya contract is actually between the shipper and the stevedore, while the consignee is the third party to his contract and the doctrine of privity of contract prevents the consignee from being bound by any terms under this contract.

1.3.5.1 Bills of Lading Act 1855

Under English law, the Bills of Lading Act 1855 was the first statute designed to transfer the contractual rights and obligations from the shippers to the consignees of the goods. S.1 of the Act provides that if the property in the goods passes to the consignee of the goods named in a bill of lading or the endorsee of a bill of lading upon or by reason of such consignment or endorsement, the consignee or endorsee will be transferred to and vested in all rights of suit, and be subject to the same liabilities with respect to the goods, as if the contract contained in the bill of lading had been made with himself. Therefore, if the property of the goods passes to the consignee upon consignment or endorsement, the consignee would be bound by the Himalaya contract which has been created between the shipper and the stevedore.[102] The last sentence of Lord Reid's passage as quoted above under 1.2 is necessary when the claimant cargo owners are the consignees and ensures that the Himalaya clause also binds the consignees. Since the 1855 Act was later abolished, when the claimant cargo owners are the consignees, reference should now be made to the common law *Brandt v Liverpool* implied contract approach or the Carriage of Goods by Sea Act 1992.

[102] *The Eurymedon* [1971] 2 Lloyd's Rep 399, 403 (Beattie J); [1975] AC 154, 168 (Lord Wilberforce).

1.3.5.2 *Brandt v Liverpool* implied contract

Under English law, the *Brandt v Liverpool* implied contract was the common law approach which was also developed to prevent the effect of doctrine of privity of contract on the consignee. This approach originates from the Court of Appeal's decision in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd*[103] and a series of earlier cases:[104] on delivery of the goods against tending the bill of lading, a contract was implied between the consignee and the carrier that delivery would be made upon the bill of lading terms. In *The Eurymedon*, Lord Wilberforce held that, apart from the Bills of Lading Act 1855, the stevedore could enforce the Himalaya clause against the consignee if the *Brandt v Liverpool* contract could be successfully implied: by tending the bill and requesting for delivery of the goods thereunder, the consignee was entitled to the benefit of and bound by the stipulations in the bill, including the Himalaya contract created between shipper and stevedore.[105]

1.3.5.3 Carriage of Goods by Sea Act 1992

The disadvantage of the Bills of Lading Act 1855 regards the fact that it had a strong "property gap":[106] the consignee will acquire the contractual rights *only if* the passing of property is "upon or by reason of" the consignment. It follows that in the cases where the property passed before[107] or after[108] the consignment, or the property did not pass at all, the consignee could not achieve the contractual rights even if the risk had already been passed to him.[109] Another drawback of the Act concerns its imposition of liabilities on the consignees at the same time whilst transferring the rights to them. The Act was finally replaced by the Carriage of Goods by Sea Act 1992 (the "COGSA 92"). S.2 of COGSA 92 provides that the lawful holder of the bill of lading, upon becoming the holder, will have all rights of suit transferred to and vested in him under the contract of carriage as if he had been a party to that contract. This abolishes the necessity of the

[103] [1924] 1 KB 575 (CA).
[104] *Cock v Taylor* (1811) 13 East 399; *Yong v Moller* (1855) 5 El & BL 755; *Wegener v Smit*h (1854) 15 CB 285; *Allen v Coltart* (1883) 11 QBD 782; see authorities later than *Brandit v Liverpool*, for instance, *The Aramis* [1989] 1 Lloyd's Rep 213.
[105] *The Eurymedon* [1975] AC 154 (PC), 168 (Lord Wilberforce); see also *The New York Star* [1977] 1 Lloyd's Rep 445 (NSWCA), 447-448 (Glass J); [1979] 1 Lloyd's Rep 298 (FCA), 317-318 (Mason and Jacobs JJ).
[106] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 5.010.
[107] *The Delfini* [1990] 1 Lloyd's Rep 252.
[108] See *The Aramis* [1989] 1 Lloyd's Rep 213.
[109] *The Aliakmon* [1986] AC 785 (HL), the property did not pass because of the reservation of the right of disposal.

connection between the transfer of rights and the passing of property. Moreover, s.3 provides that if the lawful holder, who has had rights transferred to him under s.2, demands delivery of the goods or makes a claim under the bill, he will be subject to the same liabilities under the bill. This limits the imposition of liabilities and makes the transfer of rights a necessary rather than a sufficient condition to the imposition of liabilities. Therefore, the cargo claimant is subject to the Himalaya clause in the bill only if he is the lawful holder of the bill who has been transferred to the rights under s.2 and has demanded delivery of the goods or made a claim under the bill.[110]

1.3.5.4 "Deeming provision"

The traditional Himalaya clauses also usually contain a provision which provides that all the third parties employed by the carrier:

> "shall to this extent be or be deemed to be the parties to the contract in or evidenced by this bill of lading."

This part of the Himalaya clause has been named the "deeming provision".[111] The House of Lords in *The Starsin* mentioned the relevance of this deeming provision in terms of binding the consignee to the Himalaya clause: the purpose of deeming the third party as a party to the bill of lading contract to the extent of enforcing the benefits extended to him by the Himalaya clause was to make sure that the Himalaya clause could be enforceable against subsequent assignees[112] or any of the transferees of the bill;[113] without this "deeming provision", the third party would not have been able to rely upon the Himalaya clause against any of the transferees of the bill.[114]

Such a deeming provision can also be found in sub-paragraph (e) of the IGP&I/BIMCO's new clause, together with the agency provision:

> "*(e) For the purpose of sub-paragraphs (a)-(e) of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit*

[110] *The New York Star* [1979] 1 Lloyd's Rep 298 (FCA), 317-318 (Mason and Jacobs JJ); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [99] (Hoffmann).
[111] The name was given by Flaux J in *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [27].
[112] [2003] UKHL 12, [2004] 1 AC 715, [99] (Hoffmann).
[113] Ibid, [155] (Lord Hobhouse).
[114] Ibid, [155] (Lord Hobhouse).

of all persons mentioned in sub-clause (a) above who are his Servant and ***all such persons shall to this extent be or be deemed to be parties to this contract****.*"

However, the problem with the traditional Himalaya clauses is that the deeming provision is normally located after the agency provision, which appears soon after the "extending the carrier's rights" part. The position, together with the wording of the provision, makes it unclear as to whether the deeming provision applies to the general exemption clause or promise not to sue clause, which is normally located prior to the "extending the carrier's rights" part.[115] Similarly to what it does for the agency provision, the new clause resolves this problem by relocating the deeming provision and by using the most unambiguous terms. The changes made and the legal effects brought by the new clause in this regard will be discussed in detail in Chapter 3.

1.4 Himalaya clause and Art.III(8) of Hague/Hague-Visby Rules

Although English law is generous in implementing the commercial parties' intentions to protect the third parties, the mandatory legal stipulation with the contrary effect might prevent their intentions from being enforced. Art.III(8) of the Hague and Hague-Visby Rules provides that:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

This provision means that if a term of the bill of lading seeks to totally relieve the carrier or the ship from the liability under the Rules, such a term will be rendered void by Art.III(8). It follows that if the bill incorporates the Rules and the third party seeks to rely on the complete immunity, for instance, the general exemption or promise not to sue clause, by virtue of the Himalaya clause, there is a risk that Art.III(8) of the Rules invalidates the resulting Himalaya contract. This is the legal issue arising in *The Starsin* and *The Marielle Bolten*.[116] Sub-paragraph (c) of the IGP&I/BIMCO's new clause provides that:

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[115] *The Starsin* [2003] UKHL 12, [2004] 1 AC 715.
[116] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648.

> "*(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein* ***(other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein)*** *and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant.*"

The sentence in brackets has never appeared in any traditional Himalaya clauses before. It is a reaction to the decisions in *The Starsin* and *The Marielle Bolten* and was intended to expressly highlight the restriction brought about by Art.III(8) to the third parties protection. However, the authorities have left it unclear as to when the Himalaya clause would be caught by Art.III(8). Therefore, the sub-paragraph (c) of the new clause contains no guidance on how this part of sub-paragraph (c) should be understood. In this section, therefore, the sensible explanation to sub-paragraph (c) of the new clause will be proposed by analysing the reasoning of the relevant authorities.

1.4.1 *The Starsin*

In *The Starsin*, the charterer's bill incorporated the Hague Rules and contained a Himalaya clause, which embraced a general exemption clause. The goods were damaged because of the bad stowage provided by the shipowners before the voyage commenced. The cargo owners sued the shipowners for damages, and the shipowners sought to rely on the general exemption clause as a defence by virtue of the Himalaya clause. The cargo-owners argued that the Himalaya contract between the cargo owners and the shipowners was a "contract for carriage of goods by sea" within the meaning of Art.I(b) of the Rules, and since the general exemption clause tended to provide the shipowners with a complete immunity, it should be rendered void by Art.III(8) of the Rules. The majority of the House of Lords decided in favour of the cargo owners, but based on different reasons.

Lord Bingham[117] held that whereas the third party was the shipowner who actually carried the goods, not deciding the Himalaya contract as a "contract of carriage" would

[117] [2003] UKHL 12, [2004] 1 AC 715, [34].

"elevate form over substance". He also said it would be "anomalous"[118] if he were to give the shipowner the benefit of the Himalaya clause but neglect Art.III(8) of the Hague Rules, which was incorporated into the contract. Thus, he regarded the resulting Himalaya contract as a "contract of carriage" within the meaning of Art.I(b) of the Hague Rules and was therefore invalidated by Art.III(8).

Lord Hoffman did not treat the contract between the shipper and shipowner as a contract of carriage within the meaning of the Rules, so in his opinion, the Rules did not apply to it. However, the Himalaya clause also contained a "deeming provision", which, in his view, meant that the shipowner was party to the contract of carriage only for the purpose of taking the benefit of the exemption clause against the shipper and any transferee of the bill of lading. He regarded the relevant provisions of the bill of lading, i.e., Art.III(8), applied to the shipowner, in relation to this specific purpose.[119]

Similarly, Lord Millett held that Art.III(1) and (2) of the Rules indicated that the contract created by the Himalaya clause did not constitute a contract of carriage within the meaning of the Rules: those two provisions imported positive obligations on the person who carried the cargo, while the Himalaya contract did not impose positive obligations on the third party.[120] However, he went on to say that the terms used by the "deeming provision" meant that the shipowner was a party to the contract of carriage between cargo owner and carrier only for the purpose of taking the exemptions contained in the Himalaya clause. Under this particular contract, the shipowner, although not undertaking any positive obligations, agreed to be bound by the relevant provisions of the bill of lading which may affect any exemptions, including Art.III(8) of the Rules.[121]

Lord Hobhouse provided the most complete analysis about the construction and the effect of the Himalaya clause.[122] He said that by providing the consideration, namely, the actual carriage of the goods, the shipowner entered into "a contract of carriage" with the shipper within the meaning of Art.I(b) of the Rules.[123] He relied on the "deeming provision" to defeat the argument that the Himalaya contract was "collateral" to the bill of lading contract instead of "the bill of lading contract". In answering the argument that

[118] *Cf* ibid, [62] (Lord Steyn).
[119] Ibid, [114].
[120] Ibid, [206]-[207].
[121] Ibid, [208].
[122] Ibid, [153]-[156].
[123] Ibid, [153].

the Himalaya contract was a "contract of exemption" instead of a "contract of carriage", he said that, when the completion of the Himalaya contract involves becoming the sub-bailee of the goods and the actual performing carrier, the Himalaya contract is a "contract of carriage", although it did not include any executory obligations.[124]

It can be seen that both Lord Hoffmann and Lord Millett made their decisions on the grounds of "deeming provision" in the bill, while Lord Bingham based his conclusion on a more general basis that the shipowners performed the actual carriage of goods themselves, without mentioning the relevance of "deeming provision". However, Lord Hobhouse mentioned both the relevance of the "deeming provision" and the fact that the shipowners performed the actual carriage of goods. The problem posed by the case is what constitutes the *ratio* of the majority's decisions.[125]

1.4.2 *The Marielle Bolten*

In *The Marielle Bolten*, Flaux J considered this problem left by *The Starsin*. In that case, the clause enforced was not a general exemption but a promise not to sue, which, similar to the general exemption clause, also had the effect of totally exempting the liability of those third parties.[126] The person who sought to enforce the clause was not a third party employed by the carriers but the carriers (shipowners).[127] This is because, as will be discussed in chapter 3, the person who can normally enforce the promise not to sue clause is the carrier instead of the third party, given that the latter is not the promisee to this clause. The shipowners' bill incorporated Hague Rules and contained an exclusive English jurisdiction clause but did not include a "deeming provision". After the grounding of the vessel, the cargo owners' subrogated insurers commenced legal proceedings against the shipowners and the third parties - managers of the vessel, time charterer, sub-charterer and the shipowner's P&I insurers - in Brazil. The shipowners applied for an anti-suit injunction against the insurers restraining the latter's proceedings against the shipowners themselves (relying on the exclusive English jurisdiction clause) and the third parties (relying on the promise not to sue clause) in Brazil. The insurers accepted the first injunction but rejected the second one. They

[124] Ibid, [156].
[125] Lord Steyn dissented that the Himalaya contract was not a contract of carriage within the meaning of the Hague Rules, even with the "deeming provision": ibid, [59]-[61].
[126] See above 1.3.1.2.2.
[127] Different from the general exemption clause, a promise not to sue clause is enforceable by the carrier by applying for a stay of proceedings or anti-suit injunction. However, as it will be submitted in Chapter 2, the promise not to sue clause can actually be enforceable by the third party himself as well.

contended that the decision of the majority of the House of Lords in *The Starsin* established that as long as the third party performed the carriage function, the Himalaya clause would be a "contract of carriage" within the meaning of Art.I(b) of the Hague Rules, and since the third parties here performed the "carriage function", Art.III(8) of the Rules would invalidate the enforcing of the promise not to sue clause for the third parties' benefit.

Flaux J rejected the insurers' contention and held that the performance of the actual carriage function was not the *ratio* of the decision of the majority of their Lordships' decision in *The Starsin*. After analysing their Lordships' judgments one by one,[128] he said that although the starting part of Lord Hobhouse's judgment[129] was stated in general terms and might be thought to support the proposition that the Himalaya contract was a "contract of carriage" whenever the third party performed the carriage functions, his closer analysis[130] showed the reason why he concluded that the Himalaya clause constituted a contract of carriage was the presence of the "deeming provision".[131] Flaux J continued that, amongst the majority, Lord Bingham was the only one to base his judgment on a wider basis that the shipowners were actually carrying the goods.[132] Since both Lord Hoffmann and Lord Millett reached the same result by reason of "deeming provision", the reason why their Lordships concluded that the Himalaya clause constituted a "contract of carriage" within the meaning of the Hague Rules was the existence of the "*deeming provision*", and *not* the relevant third party's performance of the "*carriage function*".[133]

In the absence of the "deeming provision" in the bill, Flaux J could have simply based on this point to hold that the resultant Himalaya contract was not a contract of carriage within the meaning of the Rules, in order that the promise not to sue clause was not contrary to Art.III(8) of the Rules. However, Flaux J continued that it was also "important to test [the insurers'] proposition by reference to the functions which the relevant third parties were actually performing": the time charterers and the sub-time charterers were responsible for the preparation and issuance of the bill of lading on behalf of the master, the managers were just the agents of the shipowners, and the P&I

[128] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [34]-[41].
[129] [2003] UKHL 12; [2004] 1 AC 715, [153].
[130] Ibid, [154] - [155].
[131] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [34]-[36].
[132] Ibid, [42].
[133] Ibid, [42].

insurers insured the shipowners against liability to the cargo owners. It can be seen that none of them performed the "actual carriage of the goods", but only the "services identical to the goods or to the carriage of the goods".[134] Thus, he held that none of them "was in fact the carrier within the meaning of the Hague Rules (unlike the owners in *The Starsin*)" and "the conclusion that the enforcement of the covenant not to sue clause is not contrary to Art.III(8) is clearly correct".[135]

1.4.3 Sensible explanation

The addition of the analysis on the third parties' functions by Flaux J gives rise to doubt as to whether the "deeming provision" ground alone or its combination with the "actual carriage of goods" ground constituted the *ratio* of his decision. In the author's view, it should be the combination of both grounds. This is because even if there were a "deeming provision" in the Himalaya clause but the third parties still had not performed an actual carriage of the goods, Flaux J would not have made a contrary decision. The author also submits that it is also the combination of both grounds that constituted the *ratio* of the decision of the majority of House of Lords in *The Starin* too. The author does not agree with Flaux J's analysis of Lord Hobhouse's judgment that his Lordship's closer analysis showed the reason why he concluded that the Himalaya clause constituted a contract of carriage was the presence of the "deeming provision".[136] On the contrary, most of his judgment focused on the fact that the shipowner performed the actual carriage of goods. More importantly, Art.III(8) of the Rules only invalidates any clause trying to relieve "*the carrier or the ship*" from liability. A third party who does not perform the actual carriage of goods would be neither of these things.[137]

In the author's view, a more sensible explanation regarding the effect of Art.III(8) of the Rules on the Himalaya clause should be as follows. Where there is a deeming provision in the Himalaya clause, the Himalaya contract between the cargo owners and the third party is part of the contract of carriage evidenced by the bill of lading, but only for the purpose of taking the benefit under the Himalaya clause by the third party. However, this contract of carriage is not the one within the meaning of Art.I(b) of the Rules. It is only when the third party performs the actual carriage of goods that the Himalaya

[134] Ibid, [49].
[135] Ibid, [52].
[136] Ibid, [34].
[137] Simon Baughen, "Terminal Operators and Liability for Cargo Claims under English Law" in Bariş Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, Oxford 2014) 267, 273-274.

contract will be a contract of carriage within the meaning of the Rules; it will be rendered void by Art.III(8) if the extended benefit has the effect of entirely exempting the liability of that third party.

Based on this explanation, sub-paragraph (c) of the IGP&I/BIMCO's new clause should be understood in the following way. Since sub-paragraph (e) contains a deeming provision, the Himalaya contract between the cargo owners and the third party is part of the contract of carriage evidenced by the bill of lading, but only for the purpose of taking the benefit under the Himalaya clause by the third party. However, this contract of carriage is not the one within the meaning of Art.I(b) of the Rules. It is only when the third party performs the actual carriage of goods that the Himalaya contract will be a "contract of carriage" within the meaning of the Rules. It is only in this situation and only if the third party seeks to enforce the general exemption clause (sub-paragraph (b)) or the promise not to sue clause (sub-paragraph (d)(i)), that the Himalaya clause will be invalidated by Art.III(8). Therefore, Art.III(8) will not affect the possibility available to him to enforce the exclusion or limitation of liability clauses. Here, the third parties who perform the actual carriage of goods are usually the actual sea carriers, i.e., shipowners or charterers. Where the third parties are, for instance, stevedores, terminal operators or road carriers, Art.III(8) of the Rules becomes irrelevant.

1.5 Conclusion

From the discussion in this chapter, it can be seen that, compared with the traditional Himalaya clauses, the IGP&I/BIMCO's new clause has made the following main changes.

First, the traditional Himalaya clauses usually use "servants", "agents" and "sub-contractors" or "independent contracts" of the carrier to refer to the third parties protected by the clauses. Such terms were also used in the 2010 version of IGP&I/BIMCO's Himalaya clause. The problem caused by these general terms regards the fact that different jurisdictions might have different constructions on them. Therefore, one particular third party who falls within these terms in one jurisdiction might not fall within these terms in another jurisdiction. To deal with this issue, the new clause adds an extra provision – sub-paragraph (a) – particularly to define the third parties. It provides that:

> "(a) For the purpose of this contract, the term "***Servant***" shall include the ***owners***, ***managers***, and ***operators of vessels*** (other than the Carrier); ***underlying carriers***; ***stevedores*** and ***terminal operators***; and any ***direct or indirect*** servant, agent or subcontractor (***including their own subcontractors***), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract ***whether in direct contractual privity with the Carrier or not***."

Compared to the traditional Himalaya clauses, sub-paragraph (a) of the new clause makes the following main changes regarding the scope of third parties. First, it uses "Servants" to refer to the third parties protected by the clause and enumerates them in detail. Secondly, the reference to "the managers of vessel" is a response to those US authorities where there have been difficulties in holding the ship managers as "servants" or "agents". Thirdly, the specific reference to the "underlying carriers" is clear enough to include not only sea carriers, but also other actual carriers, e.g., road carriers and rail carriers. Fourthly, the statement that "any direct or indirect servant, agent or subcontractor (including their own subcontractors)… whether in direct contractual privity with the Carrier or not" means that the protections under the new clause are also extended to the sub-sub-contractors and any subsequent contractors further down the chain. The reference to both the underlying carriers and subsequent sub-contractors can ease the application of the clause to multimodal transport. Therefore, sub-paragraph (a) of the new clause, by using unequivocal and specific terms to define the third parties protected by the clause, ensures that the Himalaya clause protects every possible third party involved in the whole carriage transit and that the clause can be applied to both carriage of goods by sea and multimodal transport situations.

Secondly, in *The Starsin*, due to the structure of the Himalaya clause and the wording used by the agency and deeming provisions, there was a legal dispute as to whether a third party could enforce the general exemption clause by virtue of the Himalaya clause. The House of Lord's decision there also left it unresolved as to whether a third party could enforce a promise not to sue clause pursuant to the Himalaya clause. Similarly to the traditional Himalaya clauses, the IGP&I/BIMCO's new clause contains the general exemption clause (sub-paragraph (b)), the promise not to sue clause (sub-paragraph (d)(i)), the agency provision and deeming provision (sub-paragraph (e)). However, in

contrast to the Himalaya clause used in *The Starsin*, closely after the promise not to sue clause, sub-paragraph (d)(i) of the clause also additionally provides that:

> "…***The Servant shall also be entitled to enforce the foregoing covenant against the Merchant***."

Another related change is made by sub-paragraph (e). It uses different opening words to the agency provision and deeming provision as those found in the Himalaya clause in *The Starsin*. It provides that:

> "(e) ***For the purpose of sub-paragraphs (a)-(e) 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 mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract."

These changes are presumably intended to codify the House of Lords' decision in *The Starsin* that a general exemption clause could fall within the scope of the Himalaya clause. They could also potentially clarify the uncertainties left by their Lordships that a promise not to sue clause could also fall within the scope of the Himalaya clause. A detailed discussion of the changes and their legal effects will be made in Chapter 3.

Thirdly, in *The Starsin*, due to the structure of the Himalaya clause and the wording used by the agency and deeming provisions, there was a legal dispute as to whether a third party could enforce the general exemption clause by virtue of the Himalaya clause. The House of Lord's decision there also left it unresolved as to whether a third party could enforce a promise not to sue clause pursuant to the Himalaya clause. Similarly to the traditional Himalaya clauses, the IGP&I/BIMCO's new clause contains the general exemption clause (sub-paragraph (b)), the promise not to sue clause (sub-paragraph (d)(i)), the agency provision and deeming provision (sub-paragraph (e)). However, in contrast to the Himalaya clause used in *The Starsin*, closely after the promise not to sue clause, sub-paragraph (d)(i) of the clause also additionally provides that:

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These changes are presumably intended to codify the House of Lords' decision in *The Starsin* that a general exemption clause could fall within the scope of the Himalaya clause. They could also potentially clarify the uncertainties left by their Lordships that a promise not to sue clause could also fall within the scope of the Himalaya clause. A detailed discussion of the changes and their legal effects will be made in Chapter 3. Unlike the traditional Himalaya clauses, sub-paragraph (c) of the new clause, in addition to using the above terms, additionally and specifically provides that:

> "***… including the right to enforce any jurisdiction or arbitration provision contained herein*** shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant."

The additional and specific reference to the jurisdiction clause and arbitration clause is presumably a reaction to the Privy Council's decision in *The Mahkutai*. Whether this change could ensure that a third party might enforce the exclusive jurisdiction clause or arbitration clause will be discussed in depth in Chapter 4.

Lastly, for the first time in the history of Himalaya clause usage, sub-paragraph (c) of the new clause expressly restricts the third parties protection to the extent that it does not contradict Art.III(8) of the Hague/Hague-Visby Rules. It provides that:

> "(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein ***(other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein)***… shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant."

This specific restriction codifies the House of Lords' decision in *The Starsin* that the enforcement of the general exemption clause by the shipowner was invalidated by Art.III(8) of the Hague Rules. So far, there has been no guidance as to how this part of the new clause should be understood. The author has submitted that it should be understood as such: if the bill incorporates the Hague/Hague-Visby Rules, a third party who performs the actual carriage of goods, i.e., the shipowners or charterers, cannot enforce the general exemption or promise not to sue clause under the clause, since this will have the effect of totally releasing the liabilities of the carrier or ship under the Rules, which is invalidated by Art.III(8) of the Rules.

There are, nonetheless, two requirements for enforcing the Himalaya clauses by the third parties that have not been dealt with by this new clause.

First, Lord Reid's fourth requirement is that the third party must provide consideration if he wants to claim benefits under the bill. It has been established that the consideration provided by the third party is the performance of the services for the benefit of the cargo owner in relation to the goods. The authorities have shown that to be counted as consideration so as to be protected by the Himalaya clause, the third parties' conduct which causes the loss of or damage to the goods must occur after the commencement of the carrier's responsibility under the bill. It is submitted that this is a reasonable limit because in the shipper's mind any exclusions or limitations, no matter whether claimed by the carrier himself or the third parties, should only be confined to the carrier's period of responsibilities. Furthermore, the period of carrier's responsibilities depends on the construction of other terms in the bill and whether the third party's act falls within this period is a matter of fact. Neither of them could be resolved by merely rewriting the Himalaya clause itself. Thus, the new clause should not be blamed for not dealing with this issue.

Secondly, Lord Reid's third condition requires that, for a third party to enforce the Himalaya clause, the carrier must have the third party's prior authority or later ratification to enter into those benefits on behalf of the third party. The satisfaction of this requirement also depends on the particular facts of each case instead of construction of the Himalaya clause. As such, there is nothing wrong with the new clause not addressing this issue. In the absence of the previous connections between the carrier and the third parties, the third parties are suggested to include in their contract with the carrier a provision that expressly authorise the latter to enter into those benefits. As will

be discussed shortly in Chapter 2, the 1999 Act resolves the difficulties with the third party's authority or ratification by dispensing with the necessity of creating the agency relationship between the carrier and the third party.

Chapter 2 The Contracts (Rights of Third Parties) Act 1999

2.1 Introduction

In Chapter 1, the common law Himalaya clause approach has been introduced, the difficulties with the satisfaction of the requirements of the approach have been pointed out, and the changes brought by IGP&I/BIMCO's new clause have been identified. Since this thesis focuses on discussing the legal effects brought about by this new clause from the perspective of both the common law Himalaya clause approach and the 1999 Act, the current chapter focuses on the application of the 1999 Act to the third parties' protection.

This chapter will first introduce the general conditions for a third party to enforce the benefits under the Act, followed by a discussion of the specific requirements for a third party to enforce the exclusion or limitation of liability clauses under s.1(6) of the Act. In the meantime, this chapter will discuss how the new clause satisfies the requirements set out under the Act. It will also compare the requirements under the common law Himalaya clause, from which the tendency of English law in the third parties' protection will be drawn. More importantly, this chapter will clarify the application of the Act to the enforcement of other benefits under the contract of carriage by the carriers' third parties. The wording used by s.6(5) prompts the misunderstanding that the Act does not apply to the enforcement of the benefits other than exclusions and limitations by those third parties. However, it is submitted that this is not what the Law Commission intended. Furthermore, this chapter will make suggestions as to how s.6(5) should be amended to reflect the true intentions of the Law Commission.

2.2 Conditions

Setting out the general conditions under the 1999 Act in this thesis is important not only for this chapter but also for the discussion that takes place in Chapters 3 and 4. This is so because, if the author is correct in suggesting that the Act is also applicable to the enforcement of other terms than the exclusions or limitations under the contract of carriage by the third parties employed by the carrier, to evaluate whether and how the IGP&I/BIMCO's new clause makes sure that those third parties could enforce the promise not to sue clause, jurisdiction clause and arbitration clause pursuant to the 1999 Act, reference will still need to be made to the general conditions under the Act.

Under the 1999 Act, a third party can enforce a term of a contract to which he is not a party under two circumstances. Firstly, according to s.1(1)(a), a third party could enforce a term if the contract expressly provides that he may enforce that term. Secondly, according to s.1(1)(b), the third party could enforce a term if the term purports to confer a benefit to him, unless, as s.1(2) provides, a proper construction of the contract shows that the parties did not intend the term to be enforceable by him. S.1(1)(b) establishes a rebuttable presumption that the third party may enforce the term and the onus of rebutting this presumption is in practice usually on the promisor.[138]

Under either of the above two circumstances, according to s.1(3), a further requirement involves the third party being expressly identified by name, as a member of a class or as answering to a particular description. However, it is not necessary that the third party must be in existence when the contract is first entered into.

2.3 Section 1(6): exclusions and limitations

The Act allows the third party to enforce not only the positive rights but also the negative ones, which is expressly provided by s.1(6):

> "Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation."

This section makes it clear that the Act is also to be applied so as to enable a third party to take advantage of an exclusion or limitation in the contract.[139] It follows that if there is an exclusion or limitation in the contract and if the conditions mentioned above under 2.2 are fulfilled, the exclusion or limitation will be enforceable by a third party. For the purpose of this thesis, s.1(6) allows the carrier's agents, servants or independent contractors to enforce the exclusion or limitation under the contract of carriage if the conditions under s.1 of the Act are satisfied.[140] It should be noted that this is just an example of the usage of s.1(6). The section has a wider application and can be applicable to the exclusion or limitation in any type of contract, for example, an

[138] Law Commission Report No. 242, [7.18]. *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481; *Laemthong international Lines Co Ltd v Abdullah Mohammed Fahem & Co (The Laemthong Glory (No 2))* [2005] EWCA Civ 519; [2005] 2 All ER (Comm) 167.
[139] The Lord Chancellor's Department, *The Explanatory Notes to Contracts (Rights of Third Parties) Act 1999*, [11]. http://www.legislation.gov.uk/ukpga/1999/31/notes accessed 16 May 2018.
[140] Explanatory Notes, [11].

exemption clause in a Partnership Deed which provides that the Associations of the partner shall not be liable for any loss to the Partnership can be enforceable by one of the Associations.[141]

So far, no legal dispute has arisen concerning the enforcement of the Himalaya clause under the 1999 Act. Whether and how the new clause satisfies s.1(6) of the Act will be discussed in this section. It is also worthwhile to compare the difference between the requirements set out under the common law Himalaya clause approach and the 1999 Act, from which the tendency of English law about the enforceability of the bill of lading terms by the third parties could be discovered.

2.3.1 Identifying the third parties

The above-mentioned general conditions shall also be satisfied for a third party employed by the carrier to enforce the exclusions or limitations in the bill of lading under s.1(6).

Firstly, the contract shall provide that he may enforce the exclusions or limitations,[142] or that the exclusions or limitations are for the benefit of him.[143] This condition can be easily satisfied. Under the "extending the carrier's rights" part, the traditional Himalaya clauses usually provide that the third parties employed by the carrier shall "have the benefit of" the carrier's benefits,[144] or that those benefits shall "be available to" the third parties.[145] These terms can all satisfy s.1(1)(b) of the Act. Sub-paragraph (c) of the IGP&I/BIMCO's new clause goes further and expressly provides that the third parties "shall be entitled to enforce" the carrier's benefits. This way of drafting satisfies s.1(1)(a) of the Act.[146]

Secondly, according to s.1(3) of the Act, the third party must be expressly identified by name, class or as answering a particular description.[147] Here, whether the third party

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[141] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466.
[142] s.1(1)(a).
[143] s.1(1)(b).
[144] e.g., MSC, cl.4.2; CMA CGM, cl.27(2); APL, cl.4; COSCO, cl.3(2); China Shipping Container Lines, cl.4(2).
[145] e.g., Hapag-Lloyd, cl.4(2); Evergreen Line, cl.4(2).
[146] This method has been endorsed by Maerskline Terms of Carriage, see cl.4.2(c).
[147] This is similar to the United States common law station under which, as it was decided by the United States Supreme Court in *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 543 US 423 (2004), the third party is protected if he is a "beneficiary of the…Himalaya Clause" (at [9]), and whether he is a beneficiary of the Himalaya clause is "a simple question of contract interpretation" (at [9]).

falls within the class or the particular description depends on the construction of the terms used by the Himalaya clause. As discussed above under 1.3.1.1, in order to prevent any ambiguity and to embrace as many third parties as possible, sub-paragraph (a) of the new clause defines the third parties by using unambiguous and specific language. This could satisfy s.1(3) of the Act.

The above two conditions are essentially the same as the first condition of Lord Reid's agency test, which requires that the third party must be one of the persons expected to be protected and that the term he seeks to enforce must be one of the intended benefits extended to him. It follows that a Himalaya clause drafted to cope with Lord Reid's first requirement like the IGP&I/BIMCO's new clause can also satisfy the requirements under the 1999 Act. Furthermore, the scope of the protected third parties is the same under the same worded Himalaya clauses, no matter whether it is the common law Himalaya clause approach or the 1999 Act that is relied on.

However, as for the scope of provisions extended to the third parties, s.1(6) only allows a third party to enforce exclusions or limitations. As mentioned above under 1.3.1.2.3, sub-paragraph(c) of the IGP&I/BIMCO's new clause expressly provides that the third parties are also entitled to enforce the jurisdiction clause and arbitration clause under the bill. No matter whether this change is competent to allow the third parties to enforce the jurisdiction and arbitration clauses under the common law Himalaya clause approach, he cannot be allowed to do so under s.1(6) of the 1999 Act.[148]

2.3.2 Dispensing with the requirement of agency, authority and ratification

Lord Reid's second condition requires a declaration of agency, and his third condition requires the third party's prior authority or later ratification. However, the 1999 Act does not request any element of "agency" to enable the third party to enforce the exclusions or limitations. To be more specific, it is not necessary for the contract to clarify that the carrier contracts as the agent of the third party,[149] nor does it require that the carrier has the third party's authority or later ratification to protect him.[150] In the author's view, this is the main and only difference between the 1999 Act and the

[148] Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) para 18-092 footnote 558. However, as it will be discussed in Chapter 4, he may enforce the jurisdiction clause according to other provisions of the Act.
[149] See above 1.3.2.
[150] See above 1.3.3.

common law Himalaya clause approach. Understood as such, the Act simplifies the drafting of the Himalaya clause to a large extent and relaxes the third party's burden to prove his authority or ratification.

As discussed above under 1.3.3.3, the necessity of the third party's authority or ratification is the requirement which has caused controversy and has been criticised for failing to realise the "commercial need" as the Himalaya clauses are intended to fulfil. The complete removal of the requirement of "agency" and "authority or ratification" by the 1999 Act clearly shows the tendency of English law towards giving full effect to the contracting parties' commercial expectation that the third parties employed by the carrier should be able to enforce the exclusions and limitations under the bill.

2.3.3 The scope of third party's conduct

In contrast to Lord Reid's approach, the 1999 Act does not appear to require the consideration of moving from the third party to constitute a binding contract between the shipper and third party. This is because the Act does not operate by bringing a contractual relationship between them. However, as discussed above under 1.3.4, to constitute consideration, the third party's conduct which causes the loss of or damage to the goods must occur within the period of the carrier's responsibilities under the contract of carriage. In the author's view, even under the 1999 Act, this limit still applies, for the same reason that, in the shipper's mind, any exclusions or limitations should only be confined to the carrier's period of responsibilities. Thus, a third party cannot enforce the exclusion or limitation in the bill under s.1(6) of the Act if his conduct which causes the loss of or damage to the goods occurs outside of the period of the carrier's obligations under the bill. Given that the period of carrier's responsibilities depends on the construction of the bill of lading terms, the scope of the third parties' conduct which could be protected is presumably the same whether the third parties invoke the common law Himalaya clause approach or the 1999 Act.

2.3.4 Consignee

Although a third party may rely on the 1999 Act to enforce the exclusions or limitations in the bill of lading against the shipper, he cannot automatically do so against the consignee of the goods. This is because the consignee is not a party to the bill of lading and the doctrine of privity of contract prevents him from being bound by any terms

under the bill. Moreover, s.6(5) of the 1999 Act expressly excludes the application of the Act to the cases where the consignee's rights and liabilities are regulated by COGSA 1992. In the case of multimodal transport, it is not settled law whether the multimodal transport document comes within the scope of COGSA 1992.[151] Even if it does not fall within COGSA 1992 or any international transport convention[152] - thereby ensuring that it is regulated by the 1999 Act - the 1999 Act only allows conferring benefits upon the consignee instead of imposing burdens on him. Thus, the 1999 Act is not helpful at all in binding the consignee of the goods to the Himalaya clause. In this situation, reference should still be made to COGSA 92 or the *Brandt v Liverpool* type implied contract. In this sense, there is no difference between the 1999 Act and the common law Himalaya clause approach.[153] Moreover, to bind the consignee to the Himalaya clause, similar to the situation under the common law Himalaya clause approach, a "deeming provision" might be equally required. This can be satisfied by the IGP&I/BIMCO's new clause, because, as mentioned above under 1.3.5.4, sub-paragraph (e) of the new clause contains the "deeming provision".

2.3.5 Art.III(8) of the Hague/Hague-Visby Rules

Since a general exemption clause has the effect of entirely excluding the third party's liability, it falls within s.1(6) of the 1999 Act. Under the common law Himalaya clause approach, a third party, who performs the actual carriage of goods, cannot enforce the general exemption clause because it will be invalidated by Art.III(8) of the Hague/Hague-Visby Rules.[154] A problem here is whether he can do so and escape the effect of Art.III(8) of the Rules by invoking the 1999 Act. An argument in favour of the third party regards the operation of s.1(6) of the 1999 Act; as it does not create a

[151] For the discussion of the issue as to whether multimodal transport documents fall within the ambit of COGSA 92, see Andrew Tettenborn, "Bills of Lading, Multimodal Transport Documents, and Other things" in Bariş Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, Oxford 2014) 126, 131-133; Rhidian Thomas, "International Sale Contracts and Multimodal Transport Documents: Two Issues of Significance" in Soyer and Tetternborn (ibid) 145, 152-158; Melis Ozdel, "Multimodal Transport Documents in International Sale of Goods" [2012] ICCLR 238, 241-247; David Glass, Peter Marlow and Rawindaran Nair, "The Use and Legal Effects of Carriage Documents in International Multimodal Transport" (2010) 2 (4) *International Journal of Shipping and Transport Logistics* 347-363; Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa Law from Routledge, London 2015) 11.41-11.43; Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Haywards Heath: Tottel, 2008) 2.47. *Cf* Michael G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell, London 2014) 21-078; Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 8-078-8-081.
[152] See the 1999 Act, s.6(8).
[153] See above 1.3.5.
[154] See above 1.4.

contract between the shipper and the third party, no contract of carriage arises between them that falls within the meaning of the Rules. However, it is doubted whether the courts would support this argument. Under English law, the Hague-Visby Rules, including Art.III(8), are given the force of law by the Carriage of Goods by Sea Act 1971 (the "COGSA 1971"). It would lead to an unattractive result should the law allow the third party to evade the statutory restrictions under COGSA 1971 by invoking the 1999 Act.

2.4 Application of the Act to the contracts for carriage of goods

As identified in Chapter 1, the IGP&I/BIMCO's new clause has made substantial changes to promise not to sue clause, jurisdiction clause and arbitration clause. To discuss whether and how these changes satisfy the 1999 Act, one needs to first analyse whether the Act applies to the enforcement of these clauses by the third parties. The Act has always been regarded as not being applicable to these circumstances. However, it is submitted that the wording of s.6(5) of the Act leads to this misunderstanding.

2.4.1 Section 6(5)

S.6(5) of the Act provides that:

> "Section 1 confers no rights on a third party in the case of
> (a) a contract for the carriage of goods by sea, or
> (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention.
>
> except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract."

It can be seen that this section expressly excludes from the Act certain contracts for the carriage of goods by sea and certain contracts for the carriage of goods by rail, road and air. The "contract for the carriage of goods by sea" is defined by ss6(6) and (7) as meaning the contract of carriage contained in or evidenced by a bill of lading, a sea waybill or a ship's delivery order, which are regulated by the COGSA 1992. The certain contracts concerning the carriage of goods by rail, road and air are those subject to the rules of the appropriate international transport conventions having the force of law in

the UK, which have been listed by s.6(8). S.6(5), however, expressly provides that the section does not exclude a third party employed by the carrier to enforce the exclusion or limitation of liability clauses under those contracts.

A glance at these sections gives one the impression that, except for the exclusion or limitation of liability clauses, the Act does not allow the servants, agents and independent contractors employed by the carrier to enforce any other benefits in the bill of lading.[155] This view, however, misunderstands the Law Commission's true intentions.

2.4.2 Law Commission's true intentions

The exclusion of those contracts of carriage from the 1999 Act originates from the Law Commission's concern that to allow the third parties to those contracts to have rights under the Act might contradict the policy underlying the statutes and international conventions regulating those contracts.[156]

First, as far as the contracts for carriage of goods by sea are concerned, the Law Commission said that the promisor would be better off in two specific ways under the COGSA 1992 compared to his position under the proposed 1999 Act. First, under the COGSA 1992, a third party can not only take the benefits but also become liable to the carrier.[157] However, under the proposed 1999 Act, the third party is only conferred on benefits but not bound by any burdens of a contract.[158] Secondly, the basic model for the COGSA 1992 is one of assignment so that the third party's rights are transferred from the promisee, leaving the promisee no rights of enforcement against the promisor. This would lead to the result that the promisor is liable for the third party only but not for the promisee. However, under the proposed 1999 Act, the enforcement of the benefit by the third party does not affect the promisee's right to enforce any term of the contract,[159] which means that the promisor is liable not only to the third party but also to the promisee. Therefore, the Law Commission said that allowing a third party who fell

[155] See eg, Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 7-079; Sir Bernard Elder (et all), *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell, London, 2015) 3-048.
[156] Law Commission Report No. 242, [12.5]-[12.15].
[157] COGSA 92, s.3.
[158] Except to the extent that the benefits are conditional: see s.1(4) and later 4.4.1.
[159] The Draft Bill, cl.4; The 1999 Act, s.4.

within the COGSA 1992 to rely on the proposed 1999 Act would be to the detriment of a promisor, thereby further undermining the COGSA 1992.[160]

Secondly, as far as the contracts for the carriage of goods by road, rail and air are concerned, under the corresponding international conventions, similar to the COGSA 92, where the third parties are given the rights to enforce the contracts, they also take some or all of the burdens under the contracts.[161] However, the proposed 1999 Act only gives the third party the rights to enforce the contracts, which may be with conditions, but does not impose burdens on the third party. Thus, according to the Law Commission, allowing the third party to have rights under the 1999 Act might conflict with such conventions.[162]

The Law Commission's concern is undoubtedly reasonable. However, there are two groups of third parties to a contract of carriage. One group involves those *cargo interests* who are not the original party to the contract, for instance, the lawful holders of the bill, the consignees or the receivers of the goods. The other group consists of those *carriage performing parties* to whom the carrier sub-contracts the undertakings under the contract of carriage, for instance, the servants, agents, stevedores, warehousemen, terminal operators, sea carriers, rail carriers, road carriers or air carriers. The whole purpose of the COGSA 1992 is to transfer the shippers' rights and liabilities under the contract for the carriage of goods by sea to the *consignees or receivers* of goods. Also, the relevant provisions of the international conventions which the Law Commission did not wish to contradict are all those regarding the rights and liabilities of the *consignees* of the goods. For example, Art.14 of the Warsaw Convention 1929, as amended by the Hague Protocol 1955,[163] the MP4 Convention 1975[164] and the Montreal Convention 1999,[165] provides that the *consignee* can require the delivery of the goods if he has carried out the obligations imposed by the contract. Similarly, Art.13(2) of the

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[160] Law Commission Report No. 242, [12.8].
[161] Law Commission Report No. 242, [12.12] and footnote 16: Art.14 of the Warsaw Convention 1929, as amended by The Hague Protocol 1955, given statutory force by the Carriage by Air Act 1961; Art.13(2) of the Geneva Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR) given statutory force by the Carriage of Goods by Road Act 1965; Art.28(1) of Appendix B (CIM) the Berne Convention concerning International Carriage by Rail 1980 (COTIF) given statutory force by the International Transport Conventions Act 1983.
[162] Law Commission Report No. 242, [12.12].
[163] Carriage by Air Act 1961, Schedule 1. Law Commission's report only referred to the Hague Protocol 1955, but now both the MP4 Convention 1975 and the Montreal Convention 1999 have been given the force of law in the UK.
[164] Carriage by Air Act 1961, Schedule 1A.
[165] Carriage by Air Act 1961, Schedule 1B.

CMR 1956 provides that the *consignee* who can require delivery of the goods shall pay the charges shown on the consignment note. Furthermore, Art.17(1) of the COTIF-CIM 1999[166] provides that the carrier should deliver the goods to the consignee if the *consignee* has paid the amount due under the contract of carriage. It can be seen that these statutes and the relevant parts of these international conventions all concern the rights and liabilities of the first group of the above-mentioned third parties. None of them concerns conferring the benefit under the contract of carriage on the third parties in the second group, namely, the *carriage performing parties* employed by the carrier. However, it is just this second group which is the subject of this thesis and the IGP&I/BIMCO's new Himalaya clause.

After the above discussion, it can be seen that the intention of the Law Commission was not to forbid every non-original party of the contract of carriage from enforcing the benefit under the 1999 Act, but only to prevent those cargo interests who are not the original party from doing so. This much should be regulated by the COGSA 1992 or by the relevant international conventions which have the force of law in the UK. Therefore, to allow the third parties, who are in the above-mentioned second group, to enforce the benefits in the bill of lading under the 1999 Act will not conflict with the policy underlying the relevant legislations.[167] Thus, in the author's view, there is nothing in the Law Commission's report preventing the servants, agents and independent contractors employed by the carrier from enforcing their benefits under the contracts for carriage of goods according to the 1999 Act provided that the requirements under the Act are satisfied. If this is correct, those third parties employed by the carrier under the multimodal transport operation should also be regulated by the 1999 Act, no matter whether the multimodal transport documents fall within the scope of the COGSA 1992 and no matter whether the relevant international conventions apply to the particular multimodal carriage of goods.

[166] The Law Commission's report referred to COTIF-CIM 1980, but now COTIF-CIM 1999 has been given the force of law by Railways (Convention on International Carriage by Rail) Regulations 2005.
[167] See Aikaterini Dedouli-Lazaraki, "Third Party Rights of Suit in Contracts for the Carriage of Goods by Sea and the Contracts (Rights of Third Parties) Act 1999" (2008) 14 JIML 208, 214-215, "where a stevedore or a wharfinger who is a third party to the contract of carriage of goods by sea seeks to enforce a terms of the contract, the 1999 Act may apply, because this person is not a holder of a bill of lading, a seaway bill or a ship's delivery order in the meaning of the 1992 Act."

2.4.3 Amendment of section 6(5)

The reason why s.6(5) of the Act fails to reflect the true intentions of the Law Commission is that the wording used by it is too broad. It provides that section 1 confers no rights on "a *third party* in the case of…a contract for the carriage of goods by sea…or a contract for the carriage of goods by rail or road, or for the carriage of cargo by air…". Without qualifying the "third party" here, it causes the misunderstanding that all the third parties to the contracts of carriage, no matter whether those within the above-mentioned first group or second group, are excluded from the 1999 Act. Moreover, the addition of the sentence - "except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract" - intensifies the impression that apart from allowing the above-mentioned second group third parties to enforce the exclusions or limitations, the Act does not allow them to enforce any other benefits under the contract of carriage.

In order to dispel this misunderstanding and to reflect the real intentions of the Law Commission, the author suggests that s.6(5) of the Act should be rewritten with regard to the following two aspects. First, qualification should be made concerning the scope of the "third party" under this section to the effect that the section only excludes the above-mentioned first group of third parties. Secondly, in this case there is no need to retain the sentence which preserves the above-mentioned second group of third parties' rights to enforce the exclusions or limitations under the contract of carriage. The effect of allowing these third parties to enforce the exclusions or limitations could be achieved by s.1(6) of the Act alone.

Based on these two aspects, the author suggests that s.6(5) could be amended as such:

> "Section 1 confers no rights on *the cargo interests*[168] *who are not the original contractual parties* in the case of
>
> (a) a contract for the carriage of goods by sea, or
>
> (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention."

[168] The definition of "cargo interests" should tight into s.2(1)(a)(b)(c) of the COGSA 1992 and should include the "consignee" under CMR, Warsaw Convention and COTIF-CIM 1999.

If s.6(5) were rewritten in this way, the servants, agents and independent contractors employed by the carrier could enforce any benefits or conditional benefits under the contract for carriage of goods so long as the requirements under the 1999 Act were fulfilled. These benefits include, not only the exclusions and limitations which are set out by s.1(6), but also the promise not to sue clause, arbitration clause and exclusive jurisdiction clause.

2.5 Conclusion

In this chapter, the general conditions for enforcing a term by a third party under the 1999 Act have been illustrated. This was followed by an analysis of the particular conditions for enforcing the exclusions and limitations by a third party pursuant to s.1(6) of the Act, which were compared the requirements under common law Himalaya clause approach.

Unlike the common law Himalaya clause approach, which operates by creating a contractual relationship between the shipper and third party, s.1(6) of the 1999 Act enables the exceptions and limitations under the bill of lading to be enforceable by the third party in a straightforward manner. From the discussion in this chapter, it can be seen that the only substantial difference between the requirements under 1999 Act and Lord Reid's approach regards the fact that the 1999 Act dispenses with the need of the agency relationship between the shipper and the third party. It follows that the new clause, which satisfies the requirements under the common law Himalaya clause approach, can also satisfy the 1999 Act so that a third party can enforce the exclusions and limitations in the bill of lading. By dispensing with the need of agency relationship, the Act establishes the attitude of English law: as long as the contracting parties have clearly shown their intentions to allow the carrier's third parties to enforce the exclusions or limitations under the bill, the law would give effect to their intentions.

This chapter has also initially investigated the true intentions of the Law Commission behind s.6(5) of the 1999 Act. It has submitted that the Law Commission intended only to exclude the Act applicable to the enforcement of contract of carriage terms by the cargo interests who are not the original contracting parties to the contract. However, they did not intend to exclude the Act applicable to the enforcement of contract of carriage terms by the third parties employed by the carrier. The wording used by s.6(5) is too broad to reflect this real intention. Therefore, this chapter has gone further and

suggested that the opening words used by s.6(5) should be narrowed down and amended to:

> "Section 1 confers no rights on the cargo interests who are not the original contractual parties…"

If so, there is no need to retain the last sentence which preserves the third parties' rights to enforce the exclusions or limitations under the contract of carriage. If so amended, the Act is applicable to the enforcement of, not only exclusions or limitations, but also any other benefits under the contract of carriage, by the third parties employed by the carrier, including the promise not to sue clause, arbitration clause and exclusive jurisdiction clause.

Due to the misunderstanding caused by the wording of s.6(5) of the Act, the possibility of the enforcement of the promise not to sue clause by the third parties pursuant to the 1999 Act has not been explored. Chapter 3 will discuss the issue as to whether and how the IGP&I/BIMCO's Revised Himalaya clause makes sure that the clause could be made enforceable by the third parties under the 1999 Act. Although s.8 of the Act contains express provisions for the enforcement of arbitration clause by or against the third parties, the issue as to whether those provisions resolve the particular difficulties with arbitration clause has not been adequately examined. In addition, no one has linked s.8 to the third parties protection in carriage of goods by sea. As such, Chapter 4 will focus on reviewing s.8 of the Act and how the new Himalaya clause satisfies that section to ensure the enforcement of the arbitration clause by the third parties. Furthermore, due to the lack of express provisions for exclusive jurisdiction clause, the position of the exclusive jurisdiction clause under the 1999 Act is far from clear. Moreover, nobody has ever linked the Act with the enforcement of the exclusive jurisdiction clause by the third parties employed by carrier. Therefore, Chapter 4 will also focus on this issue, together with discussion of how the new Himalaya clause facilitates the enforcement of exclusive jurisdiction clause by third parties under the 1999 Act.

Chapter 3 The Promise Not to Sue Clause

3.1 Introduction

Chapters 1 and 2 have illustrated the general rules under both the common law Himalaya clause approach and the 1999 Act. In Chapter 1, it has been pointed out that the most substantial changes brought by the IGP&I/BIMCO's new Himalaya clause concern the promise not to sue clause, jurisdiction clause and arbitration clause. From this chapter onwards, the thesis examines the effects of the changes made by the new clause regarding these clauses from the perspective of both the common law Himalaya clause approach and the 1999 Act. This chapter focuses on the promise not to sue clause, whereas Chapter 4 will focus on the exclusive jurisdiction clause and arbitration clause.

An example of the promise not to sue clause can be found under 1.3.1.2.2, from which it can be seen that a promise not to sue clause is an express promise made by the shipper that he will not sue any third party employed by the carrier. If the shipper initiates proceedings against the third parties, he will be in breach of the contract of carriage. Given that the clause is a promise between just the shipper and the carrier, such a clause, when it stands alone, can only be made enforceable by the carrier. Any third party employed by the carrier, as strangers to this promise, cannot directly enforce it in their own right.[169]

This chapter will first explore the reasons as to why the third parties want to enforce the promise not to sue clause by analysing the difficulties with the enforcement of the clause by the carriers. It will then identify in detail the changes regarding the promise not to sue clause brought about by the new clause. Towards the end, the chapter will discuss how these changes ensure that the third parties could enforce the promise not to sue clause, pursuant to both the 1999 Act and the common law Himalaya clause approach.

[169] *Beswick v Beswick* [1968] AC 58 (HL); Snelling v John G Snelling Ltd [1973] QB 87.

3.2 Enforcement by the carrier

Under English law, the promisee can enforce the promisor's promise by recovering damages representing his own loss,[170] or by seeking the specific performance of the promise.[171] In the particular circumstances of a promise not to sue clause, the carrier may apply for a stay of proceedings[172] or an anti-suit injunction[173] to restrain the shipper's action under s.49(3) of the Senior Courts Act 1981.

3.2.1 Stay of proceedings

S.49(3) of the Senior Courts Act 1981 provides that any person, *whether or not a party to the proceedings*, who would formerly have been entitled to apply to any court to restrain the prosecution of an action may apply to the High Court by motion in a summary way for a stay of proceedings in the action. This section replaces s.41 of the Supreme Court of Judicature (Consolidation) Act 1925, which had re-enacted s.24(5) of the Supreme Court Judicature Act 1873. It has been held that the 1981 Act preserved the 1925 position and changed nothing substantively at all.[174] So in order to obtain the stay of proceedings, the application needs to show that, before the Supreme Court Judicature Act 1873, it would have been entitled to apply to the Court of Chancery to restrain the plaintiff from bringing his action against the defendant.[175] The problem arises over what the carrier, as a stranger to the shipper's proceedings against a third party, needs to prove in order to apply to restrain the shipper from bringing the action. To put another way, apart from the promise not to sue clause, whether there is anything else that the carrier needs to prove.

In the carriage of passenger case *Gore v Van der Lann*,[176] the plaintiff was an old-age pensioner who received a free bus pass from the Liverpool Corporation. She fell when attempting to board a Liverpool Corporation bus. As a result, she claimed damages against the defendant, a bus conductor, alleging that his negligence had caused the

[170] Law Commission No. 242, [2.36]-[2.46]; Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 18-049-18-070.
[171] *Beswick v Beswick* [1968] AC 58 (HL); Law Commission No. 242, [2.36] and [2.47]; Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 27-055-27-057.
[172] *The Elbe Maru* [1978] 1 Lloyd's Rep 206 (QB).
[173] *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648.
[174] *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356 (CA), 360-361 (Stephenson LJ).
[175] *Gore v Van der Lann* [1967] 2 QB 31 (CA), 43 (Harman LJ), 45 (Salmon LJ); *European Asian Bank AG v Punjab and Sind Bank* [1982] 2 Lloyd's Rep 356 (CA), 361 (Stephenson LJ).
[176] [1967] 2 QB 31 (CA).

accident. Relying on s.41 of the Supreme Court of Judicature (Consolidation) Act 1925, Liverpool Corporation applied to stay all further proceedings in the plaintiff's action. The corporation relied on the bus ticket's terms of condition which stipulated that "…neither the Liverpool Corporation *nor* any of *their servants or agents* responsible for the driving…are *to be liable* to the holder…for…injury…however caused".

As clarified in Chapter 1,[177] the condition that the corporation relied on constitutes a general exemption clause. The Court of Appeal held that this condition was not to be construed as a promise by the plaintiff not to institute proceedings against the corporation's employee.[178] Therefore, the corporation's application was dismissed. The judges, however, expressed different views as to what was required for a stay to be granted.

Salmon LJ held that, in order to succeed in the application for a stay, the corporation needed to establish that the action was:

> "a *fraud* upon the corporation *either* (1) because the plaintiff had agreed with the corporation for goods consideration not to bring such an action, *or* (2) because of some other good reasons."[179]

In his view, the only "other good reason" was that "the corporation would in law be obliged to indemnify its servant, the defendant, against his liability to the plaintiff in negligence".[180] Salmon LJ appears to regard the plaintiff's agreement not to sue and the corporation's obligation to indemnify the defendant as alternative requirements so that either of them could sufficiently be treated as a fraud on the corporation. Harman LJ only based his judgment on point (2) without even mentioning point (1).[181] It can be seen that, in his opinion, just (2) on its own could be treated as a fraud on the corporation. Willmer LJ's view was not clear. Since there was no promise not to sue clause, he firstly held that the corporation had no justification for interfering with the plaintiff's rights to bring proceedings against the conductor. He continued that:

> "since it has not been shown that there was any contract between the corporation and the conductor rendering the corporation liable in law to indemnify the

[177] See above 1.3.1.2.2.
[178] *Gore v Van der Lann* [1967] 2 QB 31 (CA), 42 (Willmer LJ).
[179] Ibid, 45 (Salmon LJ).
[180] Ibid, 45-6 (Salmon LJ).
[181] Ibid, 43-4 (Harman LJ).

> conductor, there is no ground upon which the corporation could be held to have an *interest* entitling them to relief under section 41 of the Judicature Act 1925".[182]

It seems that, in Willmer LJ's opinion, both (1) and (2) were needed for a stay of proceedings. The case left the issue unsettled as to whether the promise not to sue clause itself alone could justify the stay of proceedings or whether it should be combined with other factors.[183]

In the carriage of goods case *The Elbe Maru*,[184] the carriers sub-contracted the road carriage to the road carriers, a haulier firm, with goods being stolen during their custody. In the combined bill of lading issued by the carrier, unlike *Gore v Van der Lann*, there was an express promise not to sue clause written in the similar terms as the example under 1.3.1.2.2. The sub-contract was on the RHA conditions,[185] which included a limitation of liability clause in favour of the haulier firm and a provision expressly providing that the carrier would indemnify the haulier firm for any claim in excess of the limitation of their liability. The indorsees of the combined bill of lading claimed against the haulier firm for the loss of goods, and the carriers were granted a stay of proceedings according to s.41 of the Supreme Court Act 1925 by Ackner J.

The importance of Ackner J's judgment lies in his statement about the requirement for granting a stay:

> "I do not think it follows that merely by establishing the [promise not to sue]…[the carrier] *ipso facto* obtained his relief because the matter is one for the discretion of the court…If it was basically an academic exercise, that the breach of the agreement not to sue would involve…[the carrier]…in no form of possible prejudice, then I think a court would be reluctant to exercise its discretion or to allow such applications to interfere with a pending action.[186]

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[182] Ibid, 42 (Willmer LJ).
[183] No matter which view was right, the correctness of the decision of *Gore v Van der Lann* itself is out of doubt. Since neither (1) or (2) existed, it was rightly decided that the stay of proceedings should not be granted.
[184] *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206 (QB).
[185] The Conditions of Carriage of Road Haulage Association.
[186] Ibid, 210.

In Ackner J's view, to obtain a stay of legal proceedings, the carriers must prove not only that the cargo claimants have an express contractual undertaking not to sue the third parties but also that the carriers would be prejudiced if the cargo claimants' action was allowed.

According to the facts of that case, Ackner J said that if the indorsees successfully recovered damages from the hauliers, the hauliers would seek an indemnity from the carriers' agent under the RHA terms, who would then seek indemnity by the carriers for the consequences of their so acting. By relying on these facts, the carriers had established that there was a *real possibility* that he would suffer financial loss if the claim were allowed to proceed. As a result, the carriers were granted a stay.[187]

In *The Chevalier Roze*,[188] Parker J cited and approved Ackner J's view. He said that for a stay of proceedings to be granted:[189]

> "it was not enough to show a clear promise not to claim and a breach of that promise in order to obtain relief. The plaintiff must further show a real possibility of prejudice if the action were not stayed."

The Court of Appeal in *Deepak Fertilizers and Petrochemical Corpn v Davy McKie (London) Ltd and ICI Chemicals and Polymers Ltd*[190] clarified the issue again. There, Stuart-Smith LJ said that for a stranger to the proceedings to be granted a stay, fraud on him needed to be proved. Furthermore, for a fraud to be proved:[191]

> "[s]omething more than a promise not to sue is required. The application must show that he has some interest of his own to protect. This has been expressed in various ways viz.: 'Some other good reason', 'the real possibility of prejudice' and 'some legal or equitable right to protect such as an obligation to indemnify the defendant'."

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[187] Ibid, 210. *The Elbe Maru* was followed by later Australian authorities, where the true circular indemnity was upheld under similar circumstances: *Broken Hill Proprietary Co Ltd v Hapag-Lloyd Aktiengesellschaft* (1980) 2 NSWLR 572 (Sup Ct NSW); *Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft* (1980) 2 NSWLR 587 (Sup Ct NSW); *Mercedes Benz Aust Pty Ltd v Scan Carriers SA* (unreported, 25 November 1987); *Schenker & Co (Aust) Pty Ltd v Malpas Equipment and Services Pty Ltd* [1990] VR 834.
[188] [1983] 2 Lloyd's Rep 438.
[189] Ibid, 441.
[190] [1999] 1 Lloyd's Rep 387.
[191] Ibid, [79].

This passage shows that Stuart-Smith LJ regarded the plaintiff's promise not to sue and the applicant's substantial interest to enforce the promise as two cumulative requirements for enforcing the promise. Both *Chitty on Contracts* and *Carver on Bills of Lading* share the same view.[192] As such, the rule can be said that for the carrier to apply for a stay of proceedings, the mere existence of the promise not to sue clause is not enough. Instead, the carrier must also prove that he has sufficient interest in enforcing the clause.

Authorities have established that where the carrier agrees to indemnify the third party against the consequences of any action brought by the cargo owner, the carrier will undoubtedly have the sufficient interest in the stay of proceedings. A typical indemnity clause to such an effect can be found in the hauliers' RHA conditions in *The Elbe Maru*:

> "The Customer shall *indemnify* the Carrier [haulier company] against:
> …all claims and demands whatsoever…by whomsoever made and howsoever arising…*in excess of the liability* of the Carrier under these Conditions in respect of any loss or damage whatsoever to, or in connection with, the Consignment whether or not caused or contributed to directly or indirectly by any act, omission, neglect, default or other wrongdoing on the part of the Carrier, its servants, agents or sub-contractors."[193]

This way of enforcing the promise not to sue clause by the carrier depends mostly on, first, the existence of the contractual indemnity clause in the sub-contract,[194] and secondly, the carrier's willingness to enforce on behalf of the third party.[195] If such a contractual indemnity clause exists in the sub-contract, the carrier could enforce the promise not to sue clause for the third party. However, such an obligation is detrimental and could prove risky to the carrier, who might be concerned about being unable to

[192] Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 18-072; Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, London 2011) 7-068; see also Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 18-072.
[193] From the given facts of the case, the version of the RHA conditions was not clear. This quoted passage is from clause 12 of the 2009 version. See http://www.eimskip.com/media/1279/rha-roadhaulage-association-terms.pdf 16 May 2018.
[194] Sir Bernard Elder (et all), *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell, London, 2015) 3-057: a stay will be granted "only…where the promisee has a legal obligation to indemnify the third party against liability on the claim brought in breach of covenant"; Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London, 2015) 9.128: "such prejudice will normally be an actual or threatened indemnity claim against [the carrier] by [a third party]".
[195] Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading*, (2nd edn, Informa, London, 2015), 9.128; Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London, 2009) 38-154.

receive indemnity from the cargo owner afterwards and might be reluctant to agree to the obligation accordingly.[196] Therefore, the existence of such a clause is not universal. Thus, the difficulty with the enforcement of the promise not to sue clause by the carrier by applying for a stay of proceedings lies in the fact that there might be no enforceable indemnity from the third party to the carrier.

3.2.2 Anti-suit injunction

Where there is a promise not to sue clause and an exclusive English jurisdiction clause, but the cargo claimants sue a third party in another jurisdiction that is not England, the carrier may apply to the English courts for an anti-suit injunction.

In *The Marielle Bolten*,[197] there was an express promise not to sue clause and an exclusive English jurisdiction clause in the bill of lading between the carriers and the cargo interests. After the grounding of the vessel, the carriers issued proceedings in England seeking declarations as to the liability. However, the cargo owners' insurers brought proceedings in Brazil against the managers, time charterers and sub-time charterers of the vessel. Based on the promise not to sue clause, the carriers applied for an anti-suit injunction before English court to restrain the insurer defendants' action against these third parties.

Flaux J held that the test for exercising the Court's discretion to grant an anti-suit injunction should be the same as the test for granting the stay of proceedings set out in the judgment of Ackner J in *The Elbe Maru*: there should be a promise not to sue clause, and the carriers should have a sufficient interest, which was more than merely academic, to enforce the clause.[198] After deciding that there was an express undertaking on the cargo interests not to sue the third parties, Flaux J considered whether the carriers had sufficient interest to enforce the promise.

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[196] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP, London, 1995) 16.15.

[197] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648. The detailed facts of have been illustrated in Chapter 1, see 1.5.2.

[198] Ibid, [56]. This is different from the anti-suit injunction for breach of the arbitration clause or exclusive jurisdiction clause, where it is not necessary for the applicant to prove a sufficient interest (except in exceptional circumstances, e.g. *The Golden Anne* [1984] 2 Lloyd's Rep 489, where English court refused to grant an anti-suit injunction restraining the legal proceedings in the United States District Court, because the proceedings before the District Court were by then far advanced and an injunction would frustrate those proceedings).

He held that if the insurer defendants' claim in Brazil were not restrained, they would intend to continue against the third parties in Brazil, with a view to seeking (at a later stage) to persuade the English court to stay the proceedings in England. They would also seek to persuade the English court not to continue the anti-suit injunction in respect of claims in Brazil on the basis that it would be more convenient for the proceedings against all potential defendants to continue in Brazil.[199] Therefore, the insurers should not be allowed to seek to use their own breach of the promise to their own tactical advantage before the English court at a later date. Furthermore, Hague Rules had no application in Brazil and all the claims made in Brazil against the carrier and third parties were under a strict liability. Therefore, restraining the proceedings in Brazil would avoid the need for the carriers to seek to expedite the present proceedings so as to obtain an English judgment before any judgment in Brazil.[200] In Flaux J's view, either one of these two factors was adequate to show that the carriers had a sufficient interest, which was more than mere academic, in obtaining an injunction to restrain the insurers from suing all the third parties.[201]

Apart from the above two grounds, Flaux J specified that as the managers acted as the carriers' agents, they would in all probability be entitled to an *indemnity* from the carriers if they were held liable in Brazil.[202] As to the time charterers and the sub-time charterers, the carriers also argued that if the insurers succeeded in proceeding against them and obtaining the judgment in Brazil, they would seek an indemnity from the carriers. However, Flaux J said that the charterers' liabilities to the cargo interests in Brazil did not occur as a consequence of something for which the shipowners are liable to indemnify them under the charterparty, but as a consequence of their own decision in ordering the vessel to load cargo in Brazil. As such, it was difficult to see any real risk over the charterers' successfully making such a claim.[203] Nevertheless, since the proceedings in Brazil were carried out in order to frustrate the English proceedings, this element could constitute as the carriers' sufficient interest in itself.

Flaux J's judgment shows that if there is an exclusive English jurisdiction clause, it is not necessary that the carrier must have a contractual indemnity towards the third parties for the carrier to be granted an anti-suit injunction. However, it is unclear as to

[199] Ibid, [61].
[200] Ibid, [63].
[201] Ibid, [64].
[202] Ibid, [65].
[203] Ibid, [58].

what extent this could apply in cases where no exclusive English jurisdiction clause exists. Furthermore, an anti-suit injunction as the remedy for the breach of a promise not to sue clause might attract *The Front Comor*[204] principles. It has been established that an anti-suit injunction infringes the power of the court of a member state under the Brussels Regulation to rule on its own jurisdiction, and that it is contrary to the mutual trust between the legal systems of the member states.[205] In *The Marielle Bolten*, this issue did not arise because Brazil is not an EU member state. If the cargo interests brought proceedings in an EU member state other than England, the English court is unlikely to grant the anti-suit injunction, since that would infringe the EU law.[206] In this situation, the carrier may claim damages or apply for the specific performance, which would not violate EU law.[207]

3.2.3 Damages and indemnity

Under contract law, an innocent contracting party can claim damages when the other contracting party breaches the contract. The general rule is that the promisee is entitled to the damages representing his own loss and not that of the third party.[208] Applying this rule to the promise not to sue extent, when a cargo claimant, breaching the promise not to sue, sues a third party in tort, the carrier can only claim damages for his own loss, rather than that of the third party's. The problem here lies in assessing what loss the carrier suffers.

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[204] Allianz SpA v West Tankers Inc (The Front Comor) [2009] 1 AC 1138 (CJEC).
[205] Ibid, [26]-[30].
[206] Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2005] QB 1; Case C-159/02 *Turner v Grovit* [2005] 1 AC 101.
[207] In the Court of Appeal of *The Alexandros T* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544, Longmore LJ held that the claims in damages and for declaratory relief did not infringe EU law. The reason given by him was that, unlike damages, "the vice of anti-suit injunction is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with *lites alibi pendentes* and related actions": at [15]. Citing and relying on Longmore LJ's reasoning, Flaux J held that a decree for specific performance would also not infringe EU law: [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [73]-[74].
[208] *Beswick v Beswick* [1968] AC 58 (HL), 72-73 (Lord Reid); *The Albazero* [1977] AC 774, 845 (Lord Diplock); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL); *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1993] 1 AC 85 (HL), 114 (Lord Browne-Wilkinson); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 522 (Lord Clyde), 563 (Lord Jauncey); Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 18-051. This general rule was denied by Lord Denning in *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA), 1474, whose view was later disapproved by the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*, although the actual decision in Jackson was supported. Cf see the criticism of this rule: *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 538-539 and 544 (Lord Goff); Professor G H Treitel, "Damages in Respect of A Third Party's Loss" (1998) 114 LQR 527; Ian N Duncan Wallace, "Third Party Damages: No Legal Black Hole?" (1999) 115 LQR 394.

3.2.3.1 Measure of damages

Under the rules of measure of damages, the innocent party's entitlement to claim damages from the breaching party is subject to the "remoteness" rule. That is, the innocent party can receive the damages which may reasonably be considered as arising "in the usual course of things", or "which may reasonably be supposed to have been in the contemplation of both parties" at the time of making the contract.[209] If, in the sub-contract between the carrier and the third party, the carrier has a contractual obligation to indemnify the third party for the damages that the third party has to pay the cargo owner, the carrier might seek to claim against the cargo owner for the substantial damages representing the sums they had to pay out to the third party plus the cost of resisting such claim.[210] However, as discussed above under 3.2.1, it is not necessarily in the usual course of things that a carrier always has such an obligation; nor can it be said that at the time of making the contract both parties always contemplate that the carrier will have such an obligation, especially if the carrier has never told the cargo claimant this.

Thus, in order to claim the substantial damages from the cargo claimant, the carrier has been advised to include a contractual indemnity clause in the sub-contract and to make the cargo owner aware of this contractual obligation at the time of making the main contract. This is essentially what Lord Reid proposed in *Midland Silicones* as a possible "roundabout way" by which the third party could be protected:[211]

> "If A, wishing to protect X, gives to X an enforceable indemnity, and contracts with B that B will not sue X, *informing B of the indemnity*, and then B does sue X in breach of his contract with A, it may be that *A can recover from B as damages* the sum which he has to pay X under the indemnity, X having had to pay it to B."

Presumably, without the contractual indemnity clause in the sub-contract, the carrier himself does not suffer any loss so that he cannot claim substantial damages from the cargo claimant. There is, however, an exception to the general rule that the promisee can only claim damages for his own loss. That is, even if the promisee himself does not suffer the loss, he might be able to claim substantial damages for the loss suffered by

[209] *Hadley v Baxendale* (1854) 9 Ex 341, 354-355 (Alderson B).
[210] *The Elbe Maru* [1978] 1 Lloyd's Rep 206, 210 (Ackner J).
[211] *Midland Silicones v Scruttons* [1962] AC 446, 473 [emphasis added].

the third party and account to the third party for the damages which he has recovered. This is the "narrow ground"[212] of the principle of "transferred loss".[213] This exception originated from the carriage of goods case *Dunlop v Lambert*,[214] which was recognised by the House of Lords in *The Albazero*.[215] In both cases, although the shippers did not suffer loss themselves, they were held entitled to claim the damages suffered by the consignees of the goods from the carriers. This exception was later extended by the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* to the building contracts cases.[216] In this case, the contractor had done defective work in breach of a building contract with the developer, but the loss was suffered by a third party who had purchased the development. The House of Lords held that the developer was entitled to recover the loss suffered by the purchaser.[217] In *St Martins*, Lord Griffiths also suggested an alternative "broader ground". Instead of claiming the substantial damages accounting to anyone else, his Lordship felt that the contracting party itself might have an interest in the performance, which enabled him to claim damages without proving actual loss.[218]

The "narrow ground" has also been applied in an implied promise not to sue context. In *The Alexandros T*,[219] a promise not to sue the third party individuals was implied from a full and final settlement agreement between the assureds and the underwriters.[220] Based on the "narrow ground", Flaux J accepted the argument that if the third party individuals failed to claim damages under the 1999 Act, as an alternative, the underwriters could recover from the assureds the losses suffered by third party individuals. The reasons given by Flaux J were concise: if the third party individuals failed to claim damages themselves and if there was an intention under the settlement agreement to benefit those

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[212] *The Albazero* [1977] AC 774, 848 (Lord Diplock); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 532 (Lord Clyde), 573 (Lord Jaunecy), 575 (Lord Browne-Wilkinson), 582 (Lord Millett).
[213] This name was used in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; [2017] 2 WLR 1161 and *The Ocean Victory* [2017] UKSC 35; [2017] 1 WLR 1793.
[214] (1893) 6 Cl & F 600 (HL).
[215] [1977] AC 774.
[216] [1993] 1 AC 85 (HL), 114-115 (Lord Browne-Wilkinson), who was agreed by all of the members of the House.
[217] See also *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 69 (CA), 75 (Dillon LJ), 80 (Steyn LJ), 81 (Waite LJ); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 532 (Lord Clyde), 573 (Lord Jaunecy), 575 (Lord Browne-Wilkinson).
[218] [1993] 1 AC 85 (HL), 96-97 (Lord Griffiths). This broader ground was reviewed inconclusively by the House of Lords in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL).
[219] [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747.
[220] Ibid, [72] (Flaux J).

third parties, the case would prove exceptional whereby the underwriters could recover substantial damages for the individuals' losses.[221] Flaux J tended to say that wherever C could not claim damages himself and there was an intention from the AB contract to benefit C, B would be able to claim substantial damages for C's loss.

It is doubted whether the exception could apply so broadly. So far, the "transferred loss" exception seems to have only been applied to two circumstances. Firstly, it has been applied to the carriage of goods cases where the property of goods had been contemplated transferred to the consignees, and the consignors were held entitled to claim damages suffered by the consignees.[222] Secondly, it has been applied to the construction cases where the property of the estate had been intended transferred to the third party, and the contracting party was held entitled to claim damage suffered by that third party.[223] As Lord Sumption has said in *Swynson Ltd v Lowick Rose LLP*,[224] the principle of transferred loss is a "limited exception", and it has been recognised "only in cases where the third party suffers loss as the *intended transferee of the property* affected by the breach".[225] The author agrees that the exception should not be easily invoked in other circumstances where the third party is not the intended transferee of the property, for instance, as seen in the full and final insurance settlement agreement context in *The Alaxandros T*, or the promise not to sue clause in the contract of carriage context.

There is another huge difference between the promise not to sue clause context and the situations where the principle of transferred loss has been applied, which constitutes another reason as to why this exception cannot be applied to the promise not to sue context. In the case where there are damages to the goods or defective working on the property, C is the cargo owner or the owner of property who himself has not done anything wrong but suffered the actual loss in possessing or using the property because of A's conduct. In the context of the promise not to sue, however, C was found

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[221] Ibid, [93].
[222] *Dunlop v Lambert* (1893) 6 Cl & F 600 (HL); *The Albazero* [1977] AC 774.
[223] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1993] 1 AC 85 (HL); *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 69 (CA); *Technotrade Ltd v Larkstore Ltd* [2006] 1 WLR 2926 (CA); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL); *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB).
[224] [2017] UKSC 32; [2017] 2 WLR 1161.
[225] Ibid, [14]. See also Lord Mance's judgment at [52]: the exception only exists "where it was in the contemplation of the parties when the contract was made that the property, the subject of the contract and the breach, would be transferred to or occupied by a third party, who would in consequence suffer the loss arising from its breach".

negligent in his performance, which caused the loss of or damage to the goods owned by A. In this situation, if the cargo owner breaches his promise not to sue, one can hardly say that C suffered any actual loss in his possessory interest.

If the carrier cannot claim substantial damages since there is no contractual indemnity clause in the sub-contract, he might argue that the damages are too inadequate, thereby enabling him the grant of a specific performance.[226] In this situation, specific performance might actually provide the only remedy for him since he is also likely to fail in the stay of proceedings or anti-suit injunction for lack of sufficient interest. However, as will soon be discussed, the promise not to sue is a negative obligation, and the court might find it inappropriate to grant a specific performance to enforce a negative duty.

3.2.3.2 Indemnity

Under the traditional Himalaya clauses, a promise not to sue clause is usually followed by an "indemnity provision" obliging the shipper to indemnify the carrier if the shipper breaches the promise not to sue. Such a provision is normally worded as follows:[227]

> "…and, if any such claim or allegation should nevertheless be made, to indemnify the carrier against all consequences thereof."

Sub-paragraph (d)(ii) of the IGP&I/BIMCO's new Himalaya clause also contains this provision. This indemnity provision provides the carrier with "an indemnity" and "the remedy in express terms" against "the cost properly incurred by them in dealing with any claim" which was made following the cargo owners' breach of contract.[228] When there is a contractual indemnity clause in the sub-contract between the carrier and the third party, as the case in *The Elbe Maru*, these two indemnity clauses create a circle of indemnities. Such a circular indemnity operates as follows: if the cargo claimant sues a third party in tort, and the third party pays out damages to the cargo claimant, the third party can claim the amount of those damages from the carrier under the sub-contract, who in turn can claim that amount from the cargo claimant. In the end, the cargo

[226] See later 3.2.4.
[227] *The Elbe Maru* [1978] 1 Lloyd's Rep 206. For similar usage, see *The Makutai* [1996] AC 650 (PC), 657; *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [7].
[228] *The Elbe Maru* [1978] 1 Lloyd's Rep 206, 210 (Ackner J).

claimant is deprived of any benefit in suing the third party. The authorities have affirmed the validity of such a circular indemnity.[229]

As a result of this circular indemnity nature, the combination of the promise not to sue clause and the coupled indemnity provision in the bill of lading is normally referred to as a "circular indemnity clause". However, it is submitted that this name is not precise. The notion of "circular indemnity" depends on the existence of the indemnity provisions in both the main contract and the sub-contract, while only an indemnity provision itself in the main contract could not constitute a "circular" indemnity. In this sense, simply calling the combination of the promise not to sue clause and the indemnity provision in the bill as a "circular indemnity clause" is not appropriate. Therefore, this usage is not adopted in this thesis.

Without the contractual obligation on the part of the carrier to indemnify the third party under the sub-contract, the following scenario can occur: when the carrier seeks to rely on the indemnity provision to seek an indemnity for the sums he had to pay out to the third party together with the costs of resisting those claims, the indemnity provision might be declared invalid and unenforceable for being a penalty.[230] Under English law, the test on penalty used to be the genuine pre-estimate of the loss test: a sum will be penal if it is "greater than the measure of damages to which [the innocent party] would be entitled at common law",[231] i.e. "after taking into account limitations such as remoteness and mitigation".[232] It is true that this test has been criticised by the Supreme Court in *Cavendish Square Holding BV v EL Makdess*,[233] who decided that the test on penalty should be on a broader basis.[234] However, in the particular situation of the "straightforward damages clause", their Lordships held that the genuine pre-estimate of

[229] *The Elbe Maru* [1978] 1 Lloyd's Rep 206; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834 (VSC); *In P S Chellaram & Co Ltd v China Ocean Shipping Co (The Zhi Jiang Kou)*, the Supreme Court of New South Wales Admiralty Court ([1989] 1 Lloyd's Rep 413) decided that the carrier could not claim the indemnity from the cargo owner, which was dismissed by the Supreme Court of New South Wales ([1991] 1 Lloyd's Rep 493).
[230] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 7-069.
[231] The test was laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Ltd v New Garage &Motor Co Ltd* [1914] AC 79 (HL): a clause would be penal if the sum extravagantly and unconscionably exceeds a genuine estimate in advancing the loss which the innocent party would suffer resulting from the breach.
[232] Edwin Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell, London 2015) 20-134.
[233] [2015] UKSC 67; [2016] AC 1172, [22] and [31] (Lord Neuberger and Lord Sumption), [152] (Lord Mance).
[234] Whether the provision is a secondary obligation, and whether it imposes a detriment on the breaching party which is extravagant with regard to the innocent party's legitimate interest in the enforcement of the primary obligation: ibid, [32] (Lord Neuberger and Lord Sumption), [152] (Lord Mance), [255] (Lord Hodge, endorsed by Lord Toulson (dissenting) at [293]).

loss test would be adequate to reach the correct answer.[235] Presumably, the indemnity provision following the promise not to sue clause can be regarded as such a straight forward damages clause. Therefore, if the sub-contract between the carrier and the third party does not contain an undertaking on the carrier to indemnify the third party, or if the cargo interests were not aware of such an undertaking at the time of contract, the cargo owner might argue that the sum paid out by the carrier to the third party is too remote, so that the indemnity provision is extravagant when compared to a pre-estimating of the true loss, which should be seen as invalid as a penalty.

It can be seen that even if the carrier wants to enforce the promise not to sue claim by invoking the coupled indemnity provision in the bill, the law still requires a contractual obligation on the part of him to indemnify the third party, and this obligation should be made known to the cargo interests.

3.2.3.3 Avoidance of circuitous actions

In *The Elbe Maru*, Ackner J also said that if, firstly, there is a promise not to sue clause in the contract of carriage, secondly, there is a contractual obligation on the carrier to indemnify the third party, and thirdly, the carrier can claim substantial damages or indemnity against the cargo owner, allowing "a series of circuitous actions" would contradict "the well-established proposition *interest reipublicae ut sit finis litigium* and that there should be an end of useless litigation".[236] In this situation, an English court will issue a stay of the cargo interests' proceedings directly. Presumably, the English court would grant an anti-suit injunction if the cargo owner brings the proceedings in a non-EU member state. Nevertheless, the court might still allow damages or indemnity if the cargo owner brings proceedings to an EU court, since an anti-suit injunction will infringe EU law.[237]

[235] Ibid, [32] (Lord Neuberger and Lord Sumption), [255] (Lord Hodge). But this is of course subject to the "commercially justifiable" test - a clause which extends beyond compensation would nevertheless not be a penalty if it could be commercially justified: ibid, [32] (Lord Neuberger and Lord Sumption). In the context of an express promise not to sue in carriage of goods, there might not be such a concern.
[236] *The Elbe Maru* [1978] 1 Lloyd's Rep 206, 210 (Ackner J).
[237] *Allianz SpA v West Tankers Inc (The Front Comor)* [2009] 1 AC 1138 (CJEC), [26]-[30]. *The Alexandros T* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544, [15] (Longmore LJ); [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [73]-[74] (Flaux J).

3.2.4 Specific performance

Specific performance is an equitable remedy. Therefore, the courts will consider many factors before exercising their discretion to grant it. In *Beswick v Beswick*,[238] the uncle transferred his business to his nephew, and in return, the nephew promised to pay his uncle's widow £5 a week after his uncle's death. The nephew failed to pay the widow. The House of Lords held that since the nephew's failure to pay the widow caused no loss to the husband, the widow, as his administratrix, could only recover nominal damages.[239] However, their Lordships continued that if it were the only remedy, the result would be very unjust since the nephew would keep the business which he had bought but would only pay a tiny part of the amount he had agreed to pay, avoiding paying the rest of the price.[240] Consequently, a specific performance was awarded. Similarly, in *The Alexandros T*, the full and final settlement agreement involved the promise not to sue being implied and held to be enforced by a decree of specific performance, as the underwriters could only be awarded a certain percentage of the costs of litigation as damages, which would "clearly be an inadequate remedy".[241]

In the context of promise not to sue clause in the contract of carriage, whereby the carrier can be awarded a stay of proceedings or an anti-suit injunction or the substantial damages, the courts might not exercise their discretion to grant the specific performance. Presumably, the only situation the specific performance is applicable is when a cargo owner sues a third party in an EU court, in which case an anti-suit injunction will infringe EU law,[242] and when the carrier does not have a contractual obligation to indemnify the third party, in which case the nominal damage is not an adequate remedy. Even in this situation, the court presumably does not regard the specific performance as an appropriate remedy.

In *Beswick v Beswick*, one consideration for awarding the specific performance was based on the fact that the case involved enforcing the performance of a continuing and positive obligation, i.e. to pay the annuity.[243] Similarly, in *The Alexandros T*, the

[238] [1968] AC 58.
[239] Ibid, 72-73 (Lord Reid), 78 (Lord Hodson), 83 (Lord Guest).
[240] Ibid, 73 (Lord Reid), 81 (Lord Hodson), 83 (Lord Guest).
[241] [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [80] and [94] (Flaux J).
[242] A specific performance does not infringe EU law and will not breach *The Front Comor* principle: ibid, [73]-[77].
[243] [1968] AC 58, 81 (Lord Hodson), 97 (Lord Upjohn); although Lord Pearce held said the if the damages needed to be assessed, it must be substantial, nevertheless he held that damages were unnecessary to be decided, because specific performance was a more appropriate remedy: at 88.

assureds had failed to comply with the court orders for the payment of costs and the performance of the indemnity provisions in the settlement agreements.[244] The specific performance was to enforce the whole settlement agreement scheduled to the court order, which was a positive right of the underwriters and the third party individuals. By contrast, in *Snelling v John G Snelling Ltd*,[245] the promise sought enforced was found in an agreement between the directors of a company, which provided that in the event of a director voluntarily resigning, he would immediately forfeit all monies due to him from the company. The court refused to grant a specific performance to this promise. Ormrod J said that:

> "had these provisions been worded *positively and not negatively*, e.g., as a promise by the resigning director to release the company from its indebtedness to him, I think that, on the authority of *Beswick v Beswick*…this would have been an appropriate case on the facts in which to order specific performance of that promise in whatever was the appropriate form".

It can be seen that a specific performance was not granted there because in that case the promise was a negative instead of a positive one. In the context of the shipper's promise not to sue the third parties, the duty of the shipper is also a *negative* one. As such – and similarly to Ormrod J's decision in *Snelling v Snelling* - the court might hold it is an inappropriate case for a specific performance.

3.2.5 Difficulties

Difficulties arising from the enforcement of the promise not to sue clause by the carrier concern the following three aspects. First, apart from the anti-suit injunction and specific performance, the remedies available to the carrier depend on the existence of a contractual indemnity clause in the sub-contract. However, the presence of such a clause is not universal since it is not for the carrier's benefit at all and could even be risky for him. Where the carrier is reluctant to agree to this clause, those remedies would not be available to the carrier. Secondly, although an anti-suit injunction does not require the carrier to have a contractual indemnity towards the third parties, its application is still limited. Presumably, it is granted only when there is an exclusive English jurisdiction clause and when the cargo interests sue the third party in a non-EU

[244] [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [80].
[245] [1971] 1 QB 87, 97.

court. Thirdly, the promise not to sue clause is a negative right of the third parties, and the courts seldom award a specific performance to enforce a negative right. It is due to these difficulties that the third parties might wish to enforce the promise not to sue clause in their own rights.

3.3 Enforcement by the third parties

In this part, the changes made by the IGP&I/BIMCO's new Himalaya clause regarding the promise not to sue clause will be identified. More importantly, whether and how the changes ensure that the promise not to sue clause could be enforced by the third parties will be evaluated. In the meantime, the effect on the enforcement of the clause by the carrier will be predicated.

3.3.1 Expressly entitling the third parties to enforce

Similarly to the traditional Himalaya clauses, as aforementioned, sub-paragraph (d)(i) of the new clause contains the promise not to sue clause and sub-paragraph (d)(ii) embodies the indemnity provision. However, in contrast to the traditional Himalaya clauses, sub-paragraph (d)(i) (found immediately after the promise not to sue clause) additionally provides that:

> "(d)(i) … ***The Servant*** *shall also be* ***entitled to enforce the foregoing covenant*** *against the Merchant*."

Here, the "foregoing covenant" apparently refers to the promise not to sue clause. This additional sentence therefore means that the third parties employed by the carrier are entitled to enforce the promise not to sue clause.

3.3.1.1 Satisfaction of the 1999 Act

As discussed above in Chapter 2, the wording of s.6(5) of the 1999 Act fails to reflect the true intentions of the Law Commission and gives rise to the misunderstanding that the Act does not apply to the enforcement of terms by the carrier's third parties except for the exclusions and limitations. Consequently, the promise not to sue clause has yet to be related to the 1999 Act.[246] However, as submitted in Chapter 2, the 1999 Act could,

[246] The issue has never been judicially scrutinised as well. In *The Starsin*, the bill of lading contract was made before the 1999 Act and the clause was a general exemption rather than a promise not to sue;

in fact, be applicable to other terms as well, including the promise not to sue clause.[247] Therefore, as long as the conditions under the Act could be satisfied, the third parties employed by the carrier could enforce the promise not to sue clause pursuant to the Act. As discussed above under 2.2, under the Act, a third party can enforce the promise not to sue clause under two circumstances: firstly, if, as s.1(1)(a) requires, the contract of carriage expressly provides that he may enforce it; secondly, if, as s.1(1)(b) requires, the promise not to sue clause purports to confer a benefit to him, unless, as s.1(2) provides, a proper construction of the contract shows that the contracting parties do not intend it to be enforceable by him.[248] The above-quoted sentence under the new clause, by expressly giving the third parties the right to enforce the promise not to sue clause, satisfies s.1(1)(a) so that a third party employed by the carrier could enforce the promise not to sue clause in his own right.

A promise not to sue clause embraces the parties' intention to give the servants, agents and independent contractors a complete and blanket immunity from any liability.[249] As such, it is submitted that the clause itself appears to confer a benefit on those third parties. The Law Commission[250] and *Chitty on Contracts* also shared the same view.[251] Furthermore, in *The Alexandros T*, an full and final insurance settlement agreement provided that the assureds' claim was settled "in full and final settlement of all and any claims they may have…against the Underwriters and/or against any of its servants and/or agents". Flaux J held that such a clause "conferred a benefit" on those servants or agents since it contained "a promise or covenant not to sue" them, which fulfilled s.1(1)(b) of the 1999 Act.[252] Furthermore, in *Scrutton on Charterparties and Bills of*

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although the bill of lading in *The Marielle Bolten* was made after the 1999 Act, the person who enforced the promise not to sue was the contracting carrier, rather than his servant, agent or independent contractor.

[247] See above 2.4.3.

[248] See above 2.2.

[249] In *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, the cargo owners argued that the promise not to sue clause constituted a "blanket immunity" on the third parties and that any attempt to enforce it would be invalidated by Art.III(8) of the Hague Rules (at [31]). Although Flaux J held that the third parties in that case were not performing "carriage function" so the clause did not fall foul of Art.III(8), he agreed that the clause did indeed constitute a blanket immunity.

[250] Law Commission Report No. 242, [2.48]: "in the case of a promise not to sue a third party, the promise may assist the *third party beneficiary* by seeking a stay of action".

[251] Hugh Beale (ed), *Chitty on contracts*, 32nd edn (Sweet & Maxwell, London 2015) 18-072 - 18-073, where "the promise not to sue a third party" was contained under the section "Contracts for the Benefit of Third Parties".

[252] [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [85], [87] and [93]. In *The Marielle Bolten*, Flaux J said that "a covenant not to sue clause…inures only to the benefit of the contractual carrier and not third parties": [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [30]. By saying this, the judge did not mean that the promise not to sue clause was not a benefit for third parties, rather he meant that a promise not to sue clause could only be enforceable by the contractual carrier and not by the third parties. As will be discussed later in this chapter, this is not correct.

Lading, it was said that "such a covenant not to sue clause would be enforceable by the third party under the Contracts (Rights of Third Parties) Act 1999 if contained in a charterparty".[253] It can be seen that, in the authors' opinion, a promise not to sue clause itself can fulfil s.1 of the 1999 Act. Although the authors there confined this view to the charterparty contexts, as the author has submitted in Chapter 2, it should also apply to the bill of lading context. It follows that a promise not to sue clause itself, when standing alone, purports to confer a benefit on the third parties employed by the carrier, which fulfils s.1(1)(b) of the Act.

However, s.1(1)(b) only establishes a presumption, which could be rebutted if the contracting parties do not intend the terms to be enforced by the third party. Since a promise not to sue clause has long been regarded as enforceable by the carrier only, should the court incline to find that the parties do not intend the clause to be exercisable by the third party, the new clause is the most explicit way to ensure that the case falls within s.1(1)(a). Since s.1(1)(a) is not creating a presumption, when the bill incorporates the new clause, it is very likely that the English courts would give effect to the clear intention of the shipper and carrier to allow the third parties to enforce the promise not to sue clause. In this regard, this method taken by the new clause should be learnt and endorsed by the shipping companies in their bills of lading terms.[254]

3.3.1.2 Mutual effect on the rights of the carrier and third party

S.4 of the 1999 Act provides that s.1 does not affect any right of the promisee to enforce any term of the contract. This means that the promisee should retain the right to enforce a term even if the term is also enforceable at the suit of a third party.[255] This will inevitably lead to the result that the promisor might face claims by both the third party and the promisee on the same duty. To prevent the promisor from being exposed to the double liability, the Law Commission made two suggestions.

On the one hand, if the promisee has first enforced the contract and recovered from the promisor the substantial damages, s.5 provides that the award to the third party shall be reduced accordingly. According to the Law Commission's Report, this section will not

[253] Sir Bernard Elder (et all), *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell, London, 2015) 3-057.
[254] So far, only Maerskline has endorsed this method: Maerskline, cl.4(b)(i), see http://terms.maerskline.com/carriage accessed 16 May 2018.
[255] Law Commission Report No. 242, [11.4].

apply where the promisee is not entitled to the substantial damages but nominal damages only.[256] Thus, this section only applies to two situations.

Firstly, s.5(a) provides that it applies where the promisee has recovered substantial damages for the third party's loss. However, as the author has submitted under 3.2.3.1, the "transferred loss" principle does not apply to the context of promise not to sue in the carriage of goods.

Secondly, s.5(b) provides that the section applies where the promisee has recovered substantial damages for the expense of making good to the third party the default of the promisor. This might occur in the promise not to sue context when the carrier has a contractual obligation to indemnify the third party and when he has claimed substantial damages or indemnity from the cargo owner for the money he had to pay to the third party together with the cost of resisting the performing party's claim.[257] If so, under the 1999 Act, after the carrier's claim, the third party might not be able to claim substantial damages from the cargo owner. As discussed above under 3.2.3.3, where there is a contractual indemnity clause in the sub-contract, instead of awarding the carrier substantial damages, the English might grant a stay of proceedings to avoid the circuitous actions. As such, s.5 might only apply when the shipper sues the third party in an EU court, whereby an anti-suit injunction will infringe EU law, causing the court to award substantial damages to the carrier.

On the other hand, if the beneficiary third party has first enforced the benefit and a promisor has fulfilled his duty to the third party, the Law Commission took it as "self-evident" that the promisor should, to that extent, be discharged from its obligation to the promise. As a result, no legislative provision on this was deemed necessary.[258] The effect of the third party's enforcement of the promise not to sue clause on the carrier's remedies will be discussed in greater detail further on.[259]

3.3.2 Common law Himalaya clause approach

The other aspect of changes made by the new clause concerning the promise not to sue clause is its enforcement by the third parties pursuant to the common law Himalaya

[256] Ibid, [11.16].
[257] See above 3.2.3.1 and 3.2.3.2.
[258] Law Commission Report No. 242, [11.5]-[11.6].
[259] See later 3.3.3.

clause approach. Due to the complexity of changes in this regard, it is more virtual and effectual to identify the changes and to evaluate the effects after the current legal position of the enforcement of the clause by the third parties via the Himalaya mechanism has been addressed.

So far, there has been no conclusive authority as to whether these third parties could enforce the promise not to sue clause by virtue of the Himalaya mechanism. Both the court of first instance[260] and the Court of Appeal[261] (collectively "the lower courts") of *The Starsin* decided that a third party could not enforce the promise not to sue clause pursuant to the Himalaya clause. However, the House of Lords dismissed the decisions of the lower courts and decided that the clause relied on by the third parties was actually a general exemption rather than a promise not to sue, and that the general exemption could be enforceable by a third party by virtue of the Himalaya clause used there.[262] Unfortunately, their Lordships did not make any comments on whether the lower courts were correct to hold that a promise not to sue could not be enforced by a third party through that Himalaya clause. In *The Marielle Bolten*, the person who sought to enforce the promise not to sue clause was the carrier rather than his servant, agent or independent contractor. It follows that, although Flaux J held that a promise not to sue clause could not be enforced by the third party,[263] this was not the legal issue which needed to be decided on.[264] Furthermore, his conclusion was absolutely based on the reasons given by Rix LJ in the Court of Appeal in *The Starsin*,[265] who fully endorsed Colman J's decision[266] in the court of first instance. These reasons, however, as will be discussed later, are not binding anymore after the House of Lords' decision. Thus, neither of the above two cases acts as the conclusive authority for the principle that a promise not to sue cannot be enforced by a third party through the Himalaya clause approach.

[260] [2000] 1 Lloyd's Rep 85, 99-100 (Colman J).
[261] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [114]-[117] (Rix LJ), [166]-[171] (Chadwick LJ), [198]-[201] (Morritt V-C).
[262] [2003] UKHL 12; [2004] 1 AC 715.
[263] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [30].
[264] The legal issue was whether the anti-suit injunction sought by the contracting carrier to enforce the promise not to sue was invalidated by Art.III(8) of the Hague Rules, given that this would have had the effect of exempting the performing parties' liability completely.
[265] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [115]-[117].
[266] [2000] 1 Lloyd's Rep 85, 99-100.

3.3.2.1 The court of first instance and the Court of Appeal in *The Starsin*

In *The Starsin*, the provision at issue was a general exemption clause,[267] which was successively followed by an "extending the carrier's rights" clause,[268] an "agency" provision[269] and a "deeming provision".[270] The lower courts regarded the provision invoked by the third party as a promise not to sue clause. The reasoning given by them in holding that it could not be enforced by the third party pursuant to the Himalaya clause can be summarised as below.

The lower courts said that such a clause on its own had effect only as an agreement between the shipper and the carrier, so the third party could not enforce the clause if it stood alone and was independent of the Himalaya clause.[271] The opening words of the "extending the carrier's rights" part, namely, "without prejudice to the generality of the provisions in this Bill of Lading", showed that the promise not to sue clause was not covered by the Himalaya clause.[272] Those words also showed that the "deeming provision" only applied to the "extending the carrier's rights" part of the clause.[273] As such, the third party could only enforce the provisions within the "extending the carrier's rights" part. It followed that the question as to whether a third party could enforce a provision in the bill depended on whether the provision was as an "exemption, limitation, condition or liberty…applicable to the carrier".[274] By using these words, the Himalaya clause gave the third parties the rights which were intended to protect the carrier himself from liability. However, a promise not to sue clause was not to protect the carrier himself but only gave the carrier the right to enforce it by an injunction prohibiting the shipper's actions against the third parties. As a result, the carrier's right under the promise not to sue clause could not be conferred on the third party by the Himalaya clause.[275] In other words, the wording "exemption, limitation, condition or liberty…applicable to the carrier" showed that the effect of the Himalaya clause was to place the third party in the same position as the carrier. Since the carrier himself did not

[267] See above 1.3.1.2.2.
[268] See above 1.3.1.2.1.
[269] See above 1.3.2.
[270] See above 1.3.5.
[271] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [116] (2) (Rix LJ), [168] (Chadwick LJ).
[272] [2000] 1 Lloyd's Rep 85, 100 (Colman J).
[273] Ibid, 99 (Colman J); [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [116] (5) (Rix LJ), [168] (Chadwick LJ).
[274] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [167] (Chadwick LJ).
[275] [2000] 1 Lloyd's Rep 85, 100 (Colman J); [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [116] (4) (Rix LJ), [169]-[170] (Chadwick LJ), [200] (Morritt V-C).

have complete immunity out of the promise not to sue clause, the third party would not obtain that right either.[276]

The lower courts also provided justifications for the conclusion that a third party could not enforce the promise not to sue clause. First, if the third party could enforce the promise not to sue in his own right, cases like *The Eurymedon*, *The New York Star* and *The Mahkutai* would have been reached on different grounds or, at any rate, would have been argued differently.[277] Secondly, the Himalaya clause would have been made redundant and unnecessary if the promise not to sue clause exempted the third party from all liability whatsoever.[278] Thirdly, allowing the third party to enforce the promise not to sue clause would provide the third party with a blanket exemption from liability, which was found incompatible with Art.III(8) of the Hague Rules.[279]

3.3.2.2 The House of Lords in *The Starsin*

The House of Lords dismissed the decisions of both the first instance and the Court of Appeal. Their Lordships held that the provision relied on by the third party did not constitute a promise not to sue; instead it was found to be a general exemption which, as was the case with the clauses limiting or excluding the carrier's liability, could be made enforceable by the third party as a defence by virtue of the Himalaya clause.[280] In *The Marielle Bolten*, Flaux J said that in deciding that the provision could not be regarded as a promise not to sue, the House of Lords in *The Starsin* "did not suggest that Rix LJ's reasoning was wrong".[281] However, by rejecting the reasoning given by the lower courts, their Lordships actually suggested that the lower courts' reasoning was wrong, including Rix LJ's. Moreover, their Lordships also provided their own reasons as to why a general exemption clause could be enforced by a third party, which, the author submits, analogously applies to a promise not to sue clause.

At the outset, the lower courts were right in saying that a third party could not enforce a promise not to sue if the clause was on its own and independent of a Himalaya clause,

[276] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [171] (Chadwick LJ).
[277] Ibid, [116] (1) (Rix LJ).
[278] Ibid, [116] (3) (Rix LJ), [201] (Morritt V-C).
[279] [2000] 1 Lloyd's Rep 85, 100 (Colman J); [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [116] (6) (Rix LJ).
[280] [2003] UKHL 12; [2004] 1 AC 715, [30] (Lord Bingham), [96]-[112] (Lord Hoffmann). Their Lordships rejected the judgment of Colman J ([2000] 1 Lloyd's Rep 85, 99) and Rix LJ ([2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [114]-[117]) on this point.
[281] [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648, [30].

since such a promise is made between the shipper and the carrier, and the doctrine of privity of contract prevents him from doing so (unless the 1999 Act applies[282]). However, citing and relying on what Beattie J said in *The Eurymedon*,[283] Lord Hoffmann stated that it did not matter whether the defence invoked by the third party was the general exemption clause, the limitation of liability, or the time bar. Instead, the issue as to whether he could win depended entirely on the success of the agency mechanism in creating contractual relationships between the third party and the shipper.[284] In the author's opinion, this statement could also be applied to a promise not to sue clause, given that the effect of such a clause is also to give a third party the complete immunity from liability, which is similar to the general exemption clause. Thus, contrary to the suggestions made by the lower courts,[285] whether a third party could enforce a clause in the bill does not depend on whether the clause can be regarded as an "exemption, limitation, condition or liberty…applicable to the carrier", but depends on whether the agency mechanism works and applies to that clause. In other words, the specific part of the Himalaya clause which decides whether the third party could enforce a provision does not concern the "extending the carrier's right" part but the agency provision.

Contrary to Colman J's view,[286] Lord Bingham said that the Himalaya clause, by using the opening words "without prejudice to the generality of the provisions in his Bill of lading", clearly showed that what followed did not restrict the effect of other provisions prior to the Himalaya clause.[287] Lord Hoffmann also said that the agency provision applied to both the general exemption clause and the "extending the carrier's right" part within the Himalaya clause.[288] As such, the carrier entered into the contract as the agent for the third party in terms of both the general exemption clause and the clause excluding or limiting the carrier's liability. It follows that if the promise not to sue clause were one of the provisions prior to the Himalaya clause, contrary to the decisions of the lower courts, the agency provision would also apply to it.

Lord Hoffmann also rejected the argument that the words "shall to this extent" in the "deeming provision" indicated that the agency provision was to apply to the "extending

[282] The bill of lading in *The Starsin* was before the 1999 Act. See also above 2.4.1.3.
[283] [1971] 2 Lloyd's Rep 399 (NZSC), 408.
[284] [2003] UKHL 12; [2004] 1 AC 715, [102]-[103].
[285] [2001] EWCA Civ 56; [2001] 1 Lloyd's Rep 437, [167] (Chadwick LJ).
[286] [2000] 1 Lloyd's Rep 85, 100 (Colman J).
[287] [2003] UKHL 12; [2004] 1 AC 715, [30].
[288] Ibid, [97].

the carrier's right" part only. He held that the function of these words was not to restrict the application of the deeming provision to those extending the bill of lading provisions to the third parties. Instead, they were to make sure that the third parties were parties to the foregoing provisions only, i.e. to the general exemption clause and the provisions benefiting the carrier, not to the remainder of the bill of lading, for instance, those provisions regulating the liabilities of the carrier.[289] It follows that if one of the preceding provisions were a promise not to sue instead of a general exemption, the deeming provision would also apply to it. The effect of the deeming provision would be to make sure that the third parties were parties to the promise not to sue clause and to the provisions benefiting the carrier only, but not to the remaining provisions of the bill of lading.

Their Lordships also rejected the justifications made by the lower courts. Firstly, Lord Hoffmann rejected the argument that some cases would have been decided or would have been argued differently if a general exemption clause could have been enforceable by the third party. Before both the Supreme Court[290] and the Court of Appeal[291] of New Zealand in *The Eurymedon*, the stevedores did indeed seek to rely on the general exemption clause. This was also the only defence raised by them. In the Supreme Court, Beattie J held that Lord Reid's test was fulfilled, while the Court of Appeal allowed the cargo owners' appeal since the court could not find any consideration moving from the stevedores. In the Privy Council, it was admitted that if Lord Reid's test was fulfilled, the time bar would be sufficient enough to enable the stevedores to succeed in gaining complete immunity,[292] so no arguments were raised at all concerning the general exemption clause.[293] In *The New York Star*, the stevedores noticed that there was a risk that the doctrine of fundamental breach might prevent the general exemption clause from applying to the facts, so their arguments were mostly based on the time bar.[294] In *The Mahkutai*, the bill contained a promise not to sue instead of the general exemption clause, so the case concerned no discussion of enforcing the general exemption clause.[295] However, the third parties in that case were the shpowners, who undertook the actual carriage of goods. Therefore, it is submitted that even if the promise not to sue

[289] Ibid, [98] (Lord Hoffmann); see also Lord Bingham at [26].
[290] [1971] 2 Lloyd's Rep 399 (NZSC).
[291] [1972] 2 Lloyd's Rep 544 (NZCA).
[292] [1975] AC 154 (PC).
[293] [2003] UKHL 12; [2004] 1 AC 715, [101]-[107] (Lord Hoffmann).
[294] Ibid, [108] (Lord Hoffmann).
[295] Ibid, [109] (Lord Hoffmann).

clause were relied on, it would have been very likely that the defence would have faced the argument that the clause should be invalidated by Art.III(8) of the Hague Rules.

Secondly, in answering the redundancy argument, their Lordships took the view that the reason why the general exemption clause and the "extending the carrier's rights" part were both drafted was to provide as much protection as possible to the third party, in case one of the instruments should fail.[296] This was deemed necessary as different jurisdictions have different rules about construction. One instrument, even if it were effective in one jurisdiction, might be invalid in another jurisdiction.[297] Furthermore, there was a risk that a general exemption clause could not be invoked in the case of fundamental breach, as occurred in *The New York Star*. In this situation, the third party should at least be able to rely on the exclusions or time bar available to the carrier.[298] In practice, as occurs in the IG P&I/BIMCO Himalaya clause, it is not uncommon for the general exemption clause, the promise not to sue clause and the "extending the carrier's rights" part to all be drafted together in one bill of lading to give the third parties a means of protection as much as possible.[299] Thus, even if the clause at issue in *The Starsin* were a promise not to sue, the lower courts' redundancy argument might still not stand.

Thirdly, since Art.III(8) of the Hague Rules prevents a carrier from being wholly exempted from liability, the lower courts held that the third party was also so prevented, given that the Himalaya clause only gave the third party the rights that were available to the carrier to protect himself. However, as the House of Lords decided, whether a third party could enforce a right by virtue of a Himalaya clause depended on the working of the agency mechanism, rather than whether the right fell within the ambit of "exemption, limitation, condition or liberty…applicable to the carrier". As a result, this aspect of the lower courts' reasoning was deemed invalid.

In addition, it is submitted that the wording used by the lower courts was too broad, with the effect that no matter what undertakings a third party actually performed, he could never have complete immunity. However, as discussed above in 1.4.3, Art.III(8) only invalidates the clause to the extent of relieving the liability of "the carrier or the

[296] Ibid, [112] (Lord Hoffmann). This also superseded Colman J's view in the first instance that "[t]he sense of the whole sentence is not that the second part is there as an alternative safety device in case the protection in the first part of the sentence fails": [2000] 1 Lloyd's Rep 85, 99.
[297] Ibid, [30] (Lord Bingham).
[298] Ibid, [112] (Lord Hoffmann).
[299] See eg Maerskline Terms, cl.4.2(a)(b), UASC's Bill of Lading, cl.5.

ship", and does not affect the clause that relieves anyone else's liability. By rejecting this reasoning, the House of Lords held that whether the clause which gave the third party complete immunity was void by Art.III(8) depended on whether it was a "contract of carriage by sea" within the Rules. It was a contract of carriage only if the third party were seen performing the actual carriage of goods (for instance, he was the shipowner performing the sea carriage) and only if the bill included a provision that deemed him to be a party to the contract. It follows that even if the clause in *The Starsin* were a promise not to sue instead of a general exemption, the lower courts' justification would still be incorrect, since allowing a third party to enforce the promise not to sue clause would not always be incompatible with Art.III(8). As submitted under 1.4.3, the enforcement of the promise not to sue clause by the third party would only breach Art.III(8) of the Hague Rules when the third party performs the actual sea carriage and when the bill includes a "deeming provision".

In actual fact, the raising of the issue concerning the validity of a promise not to sue clause under the Hague Rules also indirectly testifies to the possibility of the Himalaya mechanism being applied to a promise not to sue clause. The basis of the argument that the enforcement of a promise not to sue clause risked threatening Art.III(8) of the Hague Rules was deemed so as such a clause had the potential to constitute a "contract of carriage" within the meaning of the Rules. However, a promise not to sue clause, as a covenant between the cargo owner and the carrier, can never constitute a "contract" between the cargo owner and a third party employed by the carrier by itself, let alone constitute a "contract of carriage". The only way in which the clause can be made a "contract" between the cargo owner and the third party is through the operation of the common law Himalaya approach. The relevant discussion of Art.III(8) of the Hague Rules in both *The Starsin* and *The Marielle Bolten* essentially indicated the courts' recognition that a promise not to sue clause was workable by virtue of a Himalaya clause.

After the above discussion, it can be said that a third party employed by the carrier might be able to rely on a promise not to sue clause against the cargo owner by virtue of a Himalaya clause, just as the third party could also enforce the exceptions or limitation

of liabilities available to the carrier, so long as the other requirements suggested by Lord Reid could also be fulfilled.[300]

3.3.2.3 Restructuring and redrafting the Himalaya clause

Further to the above discussion, it can be seen that the reason why the disputes on the third party' enforcement of the general exemption clause and promise not to sue clause by the Himalaya clause mechanism arose was due to the ambiguity of the wording used by the traditional Himalaya clauses. To be more specific, there has been vagueness as to whether the "agency" provision and the "deeming provision" apply to the general exemption clause or the promise not to sue clause.

The IGP&I/BIMCO's new clause improved the current situations under the traditional Himalaya clauses with regard to the following three aspects. First, instead of writing every provision together in the same paragraph, the new clause separates and numbers each provision: sub-paragraph (a) defines and lists the third parties protected by the clause; sub-paragraph (b) is a general exemption clause; sub-paragraph (c) is the "extending the carrier's rights" part; sub-paragraph (d) is the promise not to sue clause; sub-paragraph (e) includes the "agency provision" and the "deeming provision". Secondly, under a traditional Himalaya clause, the agency provision and the deeming provision usually appear immediately subsequent to the "extending the carrier's rights" part. This gives rise to the misconception that a third party, by invoking the Himalaya clause, can only enforce the benefits within the "extending the carrier's rights" part. By contrast, the new clause relocates the agency provision and the deeming provision to the end of the clause. Thirdly, the opening words used by sub-paragraph (e), instead of the traditional words "without prejudice to the generality of the provisions of this clause", use the phrase "for the purpose of sub-paragraphs (a)-(d)". The whole sub-paragraph (e) is worded as follows:

> "*(e)* ***For the purpose of sub-paragraphs (a)-(d) 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 mentioned in sub-clause (a) above who are his Servants and all such persons shall to this extent be or be deemed to be parties to this contract*".

[300] See above 1.3.

In the author's view, this new clause, by relocating the agency provision and the deeming provision to the end of the clause, and by using the all-inclusive words "For the purpose of sub-paragraphs (a)-(d)", wholly clarifies that the agency mechanism and the deeming provision apply to all those sub-paragraphs prior to sub-paragraph (e). This shows the parties' clear intention that the Himalaya mechanism applies to all of the above sub-paragraphs. If such a clause is used, a third party may enforce the provisions in any of the previous sub-paragraphs, including the general exemption clause and the promise not to sue clause, through an effective Himalaya mechanism. This codifies the House of Lords' decision in *The Starsin* that a general exemption clause could fall within the scope of the Himalaya clause and clarifies the gap left by it that a promise not to sue clause could also fall within the scope of the Himalaya clause.

3.3.3 The way to enforce the clause by the third party and the effects on the carrier

If it is correct to say that the new clause ensures that a promise not to sue clause can be enforceable by a third party by virtue of the 1999 Act or an effective Himalaya mechanism, the next question raised regards how he can enforce it. If he can rely on the 1999 Act, s.1(5) expressly provides that he could enforce the promise by any remedy as if he were a party, and the rules relating to damages, injunctions, specific performance and other relief shall apply. Inevitably, no matter whether the third party relies on the 1999 Act or the Himalaya clause to enforce the promise not to sue clause, the remedies available to the carrier will be affected accordingly. In this part, the possible ways for the third party to enforce the clause and the influence on the remedies available to the carrier will be predicted.

3.3.3.1 Defence

If a third party is sued in an English court, he can invoke the promise not to clause as a defence. If he succeeds in his defence, the carrier does not need to indemnify the third party even if he has a contractual obligation to do so. Thus, the carrier is unlikely to claim substantial damages against the cargo owner, nor can he apply for a stay of proceedings. Furthermore, the court might not exercise direction to grant the carrier a specific performance, since the cargo owner's claim has been successfully defended.

3.3.3.2 Anti-suit injunction

Injunction forms part of the list of remedies available to the third party under s.1(5) of the 1999 Act. If the cargo interests, in breach of the promise not to sue clause, commences proceedings in 0jurisdictions other than England, a remedy available to the third party could involve the application for an anti-suit injunction before an English court. The requirements for granting the injunction in favour of the carrier shall also apply to the third party. It follows that the third party might not be granted an anti-suit injunction if the action is brought before an EU court since it would infringe EU law. In this situation, the third party might bring a proceeding before an English court for damages or a specific performance. If the cargo owner sues in a non-EU state and the third party is successfully granted an anti-suit injunction by an English court, presumably, even if the carrier has a contractual obligation to indemnify the third party, he does not need to indemnify the third party anymore. It follows that the carrier cannot claim substantial damages against the cargo owner, nor can he apply for an anti-suit injunction. Also, the court might not exercise the direction to award the carrier a specific performance.

3.3.3.3 Damages

Since s.1(5) provides that the rules on the measure of damages also applies to the third party, the rules of remoteness and mitigation also apply. In the action brought by the third party, the test of remoteness would be whether it was the third party's (not the promisee's) loss which the promisor ought to have reasonably contemplated.[301] No limit exists whereby the third party's damages are no greater than the carrier's, since neither the 1999 Act nor a Himalaya clause operates by assignment.[302] In addition, s.5 of the 1999 Act, which provides that the damages awarded to the third party should be reduced, does not apply if the promisee has not enforced the contract.[303]

As discussed above under 3.3.3.1, if the cargo owner sues the third party in England, the third party can simply rely on the promise not to sue as a defence, and if he succeeds, the court might order that the cost of proceedings be covered by the cargo owners. If the third party is sued in a non-EU court, he might be able to enforce the promise not to sue by applying for an anti-suit injunction, and if he succeeds, he might be able to claim

[301] Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 18-100.
[302] *Dawson v Great Northern and City Railway Co* [1905] 1 KB 260.
[303] See above 3.3.1.2.

damages for the cost incurred by the foreign proceedings. However, if he is sued in an EU court, he might not be granted an anti-suit injunction because it will infringe EU law,[304] but he might be able to bring a new action before an English court to claim damages for the money he had to pay out to the cargo owners and the cost of foreign proceedings, which will not infringe EU law.[305] For instance, in *The Alexandros T*, the assureds breached the settlement agreements by bringing the Greek court litigation against third party individuals. The third party individuals were held entitled to an award of damages pursuant to the 1999 Act. Flaux J granted an interim payment for the amount of those damages: they were awarded an amount equal to approximately 60% of the costs incurred to date by them in the Greek proceedings.[306] In such circumstances, the carrier would not be able to claim substantial damages from the cargo owner, since he will suffer no loss himself.

3.3.3.4 Specific performance

In *The Alexandros T*, it was held that a promise not to sue, which was implied by a full and final settlement agreement, could be enforced by a decree of specific performance not only by the underwriters (the promisees) but also the third party individuals, who were the beneficiary third parties.[307] Since specific performance is an equitable remedy, presumably, it will only be granted when damages are the only remedy for the third party and when the damages are inadequate. For instance, in *The Alexandros T*, third party individuals were awarded a specific performance to enforce the full and settlement agreement,[308] since the damages awarded to them were just 60% of the costs incurred to date by them in the Greek proceedings, which were not adequate. The court is unlikely to exercise the discretion to grant a specific performance if the third party can successfully defend the cargo owner's claim or be granted an anti-suit injunction or that if the third party is awarded the full cost incurred in the foreign proceedings. Furthermore, as discussed above under 3.2.4, the court might not consider it appropriate to award a specific performance owing to the cargo owners' negative duty to not to sue the third party.

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[304] See above 2.4.3.2.
[305] *The Alexandros T* [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544 (CA), [15]-[17] (Longmore LJ).
[306] [2014] EWHC 3068 (Comm); [2015] 2 All ER (Comm) 747, [83] and [88].
[307] Ibid, [72]. See also *The Laemthong Glory (No 2)*, where Cooke J held that the shipowners (the third party in that case) could enforce the letter of indemnity between the charterers (promisee) and the receivers (promisor) by a specific performance: [2004] EWHC 2738 (Comm), [47]-[51].
[308] [2014] EWHC 3068 (Comm), [80].

3.4 The promise not to sue clause and Art.III(8) of Hague/Hague-Visby Rules

The effect of a promise not to sue clause, as the general exemption provision, is to confer a blanket immunity on the third parties. As such, the enforcement of the clause also bears the risk of being invalidated by Art.III(8) of the Hague or Hague-Visby Rules.[309] It follows that the effect of Art.III(8) of the Rules regarding the promise not to sue clause should follow the same analysis the author has previously submitted about the relationship between Art.III(8) and the Himalaya clause:[310] only when there is a "deeming provision" and the third party is the one who performs the actual carriage of goods, will the clause be caught by Art.III(8) of the Rules.[311] This rule shall apply no matter whether the clause is enforced by the carrier or by a third party himself, and irrespective of whether the third party relies on the common law Himalaya clause approach or the 1999 Act.[312]

3.5 Conclusion

This chapter first discussed the difficulties involved in the enforcement of the promise not to sue clause by the carrier, analysing the reasons as to why the third parties wish to enforce the clause in their own rights. The issue as to whether and how the IGP&I/BIMCO's new clause makes sure that the third parties could enforce the promise not to sue clause was then examined. Towards the end, possible ways for the third party to enforce the clause and the influence on the remedies available to the carrier were suggested.

The third parties employed by the carriers want to enforce the promise not to sue clause because the enforcement of the clause by the carrier by way of a stay of proceedings, damages and indemnity is bedevilled where there is no enforceable indemnity from the third party to the carrier. Also, an anti-suit injunction will only be granted in limited situations, namely, when there is an English exclusive jurisdiction clause and when the cargo interests sue the third party in a non-EU court. In addition, the court might not

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[309] *The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648; Robert Newell, "Privity Fundamentalism" and the Circular Indemnity Clause [1992] LMCLQ 97, 98.
[310] See above 1.4.3.
[311] Where the third party does not perform the actual sea carriage function, the enforcement of the promise not to sue clause will not constitute a "contract of carriage" within the Hague Rules, so the enforcement of the clause would not to be contrary to Art.III(8) of the Rules: in *Broken Hill Pty Ltd v Hapag-Lloyd AG* [1980] 2 NSWLR 572, the third parties were the road carriers; in *Sydney Cooke Ltd v Hapag-Lloyd AG* [1980] 2 NSWLR 587, the third parties were rail carriers; and in *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S (The Tarago)* [1999] FCA 178, the third parties were the stevedores.
[312] See above 2.3.5.

grant a specific performance since the shipper's duty not to sue the third party is a negative one.

The IGP&I/BIMCO's new clause seeks to ensure the promise not to sue clause to be enforceable by the third party by way of two methods. First, in contrast to the traditional Himalaya clauses, closely after the promise not to sue clause, sub-paragraph (d)(i) of the new clause expressly and additionally provides that:

> "(d)(i) … ***The Servant*** *shall also be* ***entitled to enforce the foregoing covenant*** *against the Merchant*".

This means that a third party is entitled to enforce the promise not to sue clause against the cargo owner. By doing so, sub-paragraph (d)(i) satisfies s.1(1)(a) of the 1999 Act and therefore enables the third parties to enforce the clause pursuant to the Act.

Secondly, in *The Starsin*, the Himalaya clause contained all the provisions in a single paragraph. Furthermore, the opening words of the agency provision and deeming provision specify "without prejudice to the generality of the provisions of this clause". These opening words gave one the impression that the agency provision and deeming provision would only apply to the "extending the carrier's right" part which appeared just prior to it, but did not apply to the general exemption provision before the "extending the carrier's right" part. A similar problem would exist if it were the promise not to sue clause instead of the general exemption clause that was used in that case. Rather than drafting all the provisions in one single paragraph, the IGP&I/BIMCO's new clause separates and numbers each provision, using different sub-paragraphs to refer to each one. Among them, sub-paragraph (b) contains the general exemption clause, sub-paragraph (d) is the promise not to sue clause, and sub-paragraph (e) embraces the agency and deeming provision. Moreover, the new clause changed the opening words of the agency and deeming provision to "for the purpose of sub-paragraphs (a)-(d)". It provides that:

> "(e) ***For the purpose of sub-paragraphs (a)-(e) 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 mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract."

The highlighted all-inclusive opening words clearly show that the agency provision and deeming provision apply to the general exemption clause and promise not to sue clause. This codifies the House of Lord's decision in *The Starsin* that a general exemption clause could fall within the scope of the Himalaya clause, and clarifies the gap left by their Lordships that a promise not to sue clause could also fall within the scope of the Himalaya clause. Therefore, the new clause enables a third party to enforce the general exemption clause and promise not to sue clause by relying on an effective Himalaya mechanism.

These two methods fall both in line with the attitude of the English law that gives effect to the parties' clear intentions to protect the third parties. However, the recognition of the parties' intention is not without limit. The enforcement of the promise not to sue clause might become void if it contradicts the mandatory legal stipulations, e.g., Art.III(8) of the Hague or Hague-Visby Rules.[313]

If a third party can enforce a promise not to sue in his own right based on the new clause, the remedies available to the carrier might be affected accordingly. Firstly, if the cargo claimants sue a third party in England, the third party can use the promise not to sue clause as a defence. Secondly, if the cargo claimants sue a third party in a non-EU court, the third party might apply for an anti-suit injunction before the English courts. Thirdly, if the cargo claimants sue a third party in an EU court, after he pays out the cargo claimants in the foreign jurisdiction, he might claim that amount back together with the cost of proceedings before the English court. Presumably, in none of the above situations will the carrier be able to be granted a stay of proceedings, anti-suit injunction or substantial damages.

[313] See above 1.4.

Chapter 4 The Exclusive Jurisdiction Clause and Arbitration Clause

4.1 Introduction

Chapter 3 has examined the changes made by IGP&I/BIMCO's new Himalaya clause and the effects of those changes to the promise not to sue clause. This chapter continues to evaluate another most significant change made by the new clause, namely, regarding the jurisdiction clause and arbitration clause.

Apart from the exemption and limitation of liability clauses, the bills of lading usually also include a clause giving a court or some courts exclusive jurisdiction to decide disputes that arise out of the contract. Nowadays, it is becoming more common that an arbitration clause is used whereby the contracting parties agree to have their disputes decided by arbitration. Where the cargo claimants sue the servants, agents or independent contractors employed by the carriers, these third parties might also seek to enforce the jurisdiction or arbitration clause. The problems arise as to whether, and if so, to what extent those third parties can rely on or be bound by the jurisdiction or arbitration clause. Such problems are caused due to these two clauses posing particular difficulties which do not affect the exemption or limitation clauses. Since the two clauses share similarities in their characters, they will be discussed together.

In this chapter, the difficulties encountered with the exclusive jurisdiction and arbitration clauses in particular will be demonstrated under 4.2 and 4.3. Under 4.4, 4.5 and 4.6, the 1999 Act will be examined in relation to how it accords with these difficulties and suggestions will be made as to how the Act should be properly understood in order to resolve these difficulties. As Chapter 1 has identified, in contrast to the traditional Himalaya clauses, sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause specifically and expressly extends the benefit of the jurisdiction or arbitration clause to the third parties:

> *"...every exemption, limitation, condition and liberty...**including the right to enforce any jurisdiction or arbitration provision** contained herein shall also be available to every Servant of the carrier..."*

Therefore, this chapter will provide the all-important analysis as to how this change ensures that the third parties could enforce the exclusive jurisdiction clause and

arbitration clause, using both the 1999 Act and the common law Himalaya clause approach.

It should be noticed that, so far, there has been minimal discussion of the enforcement of arbitration clause and exclusive jurisdiction clause by or against the servants, agents or independent contractors employed by the carrier pursuant to the 1999 Act. This is probably due to two reasons. First, as previously discussed in Chapter 2, the wording used by s.6(5) of the 1999 Act causes the misunderstanding that, except for the exclusion and limitation clauses, the Act does not apply to other protections of the third parties employed by the carrier in the carriage of goods context. Thus, even if s.8 of the Act has specific provisions for an arbitration clause, no one has related their enforcement to the carrier's third parties in the carriage of goods. Secondly, the Act does not have express provisions for a jurisdiction clause. Given the fact that the Law Commission has expressly excluded the clause from the Draft Bill,[314] it has been misunderstood that the Act does not apply to jurisdiction clause at all in any circumstances.

However, as the author has submitted in Chapter 2, s.6(5) of the 1999 Act fails to reflect the true intentions of the Law Commission, which were actually to not prevent the Act from applying to the enforcement of the arbitration clause and jurisdiction clause by the third parties employed by the carrier. Furthermore, as the author will submit in this chapter, the final Act actually does not exclude its application to the jurisdiction clause. Therefore, an analysis about the Act is very important for the issues raised in this chapter.

4.2 Law Commission's Report and Draft Bill

As discussed in Chapter 1, unlike exclusion or limitation clauses, which "benefits only one party", an exclusive jurisdiction clause was held to create "mutual rights and obligations" by the Privy Council in *The Mahkutai*.[315] This has led to difficulty in its enforcement by the third party by virtue of the Himalaya clause approach. It has also been submitted that the same difficulty would also exist in an arbitration clause since it shares a similar character to the exclusive jurisdiction clause. During the reform of

[314] The Draft Contracts (Rights of Third Parties) Bill http://www.lawcom.gov.uk/wp-content/uploads/2017/02/lc242_privity-of-contract-contracts-for-the-benefit-of-third-parties.pdf accessed 17 May 2018.
[315] [1996] AC 650, 666 (Lord Goff). See above 1.3.1.2.3.

doctrine of privity of contract, the issue on the arbitration and jurisdiction clauses was considered by the Law Commission in their Report and was found as "one of the most difficult issues" they had faced during the reform.[316] The Law Commission initially applied the "conditional benefit" approach but later felt it inappropriate for the arbitration and jurisdiction clauses. In this part, the conditional benefit approach will be introduced, and the difficulties with the application of this approach to the jurisdiction and arbitration clause will be addressed.

4.2.1 Conditional benefit

Although the Law Commission did not intend to change the current rules of the second lamb of the doctrine of privity of contract that the third party cannot be imposed on the pure obligations and burdens,[317] they recommended that the contracting parties could impose conditions upon the enforcement of any benefit by the third party.[318] This is known as the "conditional benefit".

In order to differentiate between "pure burden" and "conditional benefit", the Law Commission gave the following example: if a contract between A and B agrees to grant a right of way over its land to C on the condition that C keeps it in repair, and if C fails to keep it in repair, A can use the condition as the basis of a defence or set-off to a claim by C to enforce the contract. By contrast, C cannot be sued for breach of that repairing obligation. In other words, A cannot bring a claim or counterclaim against C for breach of contract, as a third party cannot have burdens imposed on it by a contract to which he is not a party.[319] The Law Commission took this approach as a "narrow view"[320] of the extent to which a person who takes a benefit must also bear the burden. The reason behind such a narrow approach was to avoid C being overall worse off by being given the right to enforce the contract between A and B.[321]

Consequently, the recommendation given by the Law Commission in the Report deems that if the condition is the basis merely of a defence or set-off to C's claim, it is a "conditional benefit", which falls within the ambit of the reform. However, if the

[316] Law Commission Report No. 242, [14.14].
[317] Law Commission Consultation Paper No. 121, *Privity of Contract: Contracts for the Benefit of Third Parties*, [5.36]-[5.37] and [6.17]; Law Commission Report No. 242, [2.1].
[318] Consultation Paper No. 121, [5.36] and [6.17].
[319] Law Commission Report No. 242, [10.27].
[320] Ibid, [10.28].
[321] Ibid, [10.28].

condition is deemed to be the basis of a claim or counter-claim by A against C, it is interpreted as a "burden", which, as such, falls outside of the reform.[322] The Law Commission also recommended that no legislative provision for this line between the conditional benefit and the pure burden was necessary.[323] In the Draft Bill, no express provision about this "conditional benefit" approach was even included.

4.2.2 Excluding jurisdiction and arbitration clauses

Applying the above "conditional benefit" analysis to the arbitration and jurisdiction clauses, the Law Commission said that the arbitration or jurisdiction clause could be regarded as the procedural condition on C's enforcement of substantive benefit conferred by A and B. This means that if C wants to enforce the substantive benefit, he must submit his claim to the designated arbitral tribunal or court. It follows that if C brings an action in a court or in a court different from that which has been designated by the jurisdiction clause to enforce the substantive benefit, A and B would be entitled to a stay of litigation. Moreover, the arbitration or jurisdiction clause would be enforceable by C by compelling A or B to arbitrate or to sue in the designated court even though A or B does not wish to do so.[324]

However, the Law Commission was later persuaded that this "conditional benefit" approach was not acceptable. The reasons given by them can be summarised as follows:

(1) As mentioned above under 4.2.1, the Law Commission suggested that if a condition was the basis merely of a defence or set-off to C's claim, then it was deemed a "conditional benefit". However, they found that a jurisdiction clause could not be regarded as a mere defence to an action,[325] but could only be enforceable by A or B through a stay of litigation.[326] They considered an arbitration clause to be the same unless it was found to be a condition precedent

[322] Ibid, [10.32], recommendation (26).
[323] Ibid, recommendation (26).
[324] Ibid, [14.16].
[325] Ibid, [10.2].
[326] Ibid, [14.17(i)]. *Cf* Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: the Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.115: it has been decided by *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 that the court cannot, when staying proceedings, direct the parties to go to arbitration, so that an arbitration clause can never be more than a defence to judicial proceedings brought by the claimant and becomes relevant only where the claimant brings such proceedings.

to judicial proceedings in the traditional *Scott v Avery*[327] type. A *Scott v Avery* type of arbitration clause originates from the case *Alexander Scott v George Avery*.[328] In that case, the arbitration clause provides that "obtaining the decision of… arbitrators on the matters and claims in dispute, is…a condition precedent to any member to maintain any such action or suit". It was held that such a clause furnished a complete defence to the court action, so no action was maintainable until arbitral award was made. Therefore, in the Law Commission's opinion, unless otherwise worded, the arbitration and jurisdiction clauses constitute pure burdens rather than a condition of benefits.

(2) Also, in the Law Commission's view, although the conditional benefit approach is workable when C is the claimant trying to enforce the substantive and positive right, where the proceeding is brought by A in tort against C, C would be unavoidably bound by the arbitration clause.[329] For example, if the contract between A and B provides that all disputes including tort claims against C should be referred to arbitration, but A sues C before a court, C would be entitled to a stay of proceedings of the tort action against him. However, C cannot be forced to arbitrate later, since he can in no sense be "bound" to arbitrate. This would lead to A with no forum to enforce its tort claim against C, which would be unfair to A.[330]

(3) Even if the "conditional benefit" approach is only confined to C's enforcement of rights, rather than the enforcement of A and B's rights against C, if A sues C in tort before arbitration and C wants to enforce the negative benefit as a defence, i.e. exclusion clause, it has to go to arbitration. This means that C is bound to arbitrate, which is not allowed by the proposed reform. As such, a "conditional benefit" approach cannot work where the enforceable benefit is negative rather than positive.[331]

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[327] A *Scott v Avery* type of arbitration clause origins from the case *Alexander Scott v George Avery* (1856) 5 HL Cas 811; 10 ER 1121. In that case, the arbitration clause provides that "the obtaining the decision of… arbitrators on the matters and claims in dispute, is…a condition precedent to any member to maintain any such action or suit". It was held that such a clause furnished a complete defence to the court action, so no action was maintainable till arbitral award was made.

[328] (1856) 5 HL Cas 811; 10 ER 1121.

[329] This is also the most important reason for the non-suitability of the conditional benefit approach: Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482.

[330] Law Commission Report No. 242, [14.17(ii)].

[331] Ibid, [14.17(ii)].

(4) Sometimes, A may wish to seek a declaration of its right against C, even though C has not sought to enforce the substantive right. In this situation, the reform does not allow C to be bound to go to arbitration. As a result, the arbitral award would not bind C, and the award would be of little value to A.[332] The Law Commission regarded reasons (2), (3) and (4) should be analogously applicable to an exclusive jurisdiction clause.

(5) A particular concern about the arbitration clause lies in the nomination of arbitrators. If the arbitration agreement provides that the arbitrator is agreed by the contracting parties, or that each party can appoint an arbitrator, and the two arbitrators are to choose a chairman, it is unclear as to how the arbitrators should be appointed if a third party is involved in arbitration.[333]

Based on these reasons and the Privy Council's decision in *The Mahkutai*, the Law Commission reluctantly concluded that the arbitration clause and jurisdiction clause must be seen as conferring both rights and imposing duties, which could not be split. Consequently, binding the third party to the arbitration or jurisdiction clause related to a dispute affecting his rights would contradict the reform's purpose of only conferring rights but not imposing pure burdens on third parties.[334] Therefore, the Law Commission ultimately recommended that the arbitration and jurisdiction clauses should fall outside the reform and could be neither enforced by nor made enforceable against a third party.[335] Hence, in the Draft Bill proposed by them, cl.6(2)(d) and (e) expressly excluded the arbitration and jurisdiction clauses from the ambit of the Act:

> "6 –
>
> (2) Section 1 above confers *no* rights on a third party in the case of –
>
> …
>
> (d) an agreement to submit to *arbitration* present or future disputes; or
>
> (e) an agreement as to the court, or courts, which are to have *jurisdiction* to settle present or future disputes or are not to have such jurisdiction."

[332] Ibid [14.17(iii)].
[333] Ibid, [14.17 (iv)].
[334] Ibid, [14.18].
[335] Ibid, [14.18] and [14.19].

4.3 The enforcement of exclusive jurisdiction clause and arbitration clause

The difficulties with the exclusive jurisdiction and arbitration clauses lie not only in their special nature but also in their enforcement. To this end, this part of the chapter will introduce the general principle regarding the enforcement of the exclusive jurisdiction clause and arbitration clause between the contractual parties[336], which will be used to address the difficulties involved with third party enforcement.

4.3.1 The Brussels Regulation

Under English law, a contracting party may apply for a stay of proceedings before an English court in favour of a foreign jurisdiction clause under Art.25 of the Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "Brussels recast Regulation").[337] Art.25 allows the parties to agree on any of the Contracting States, other than the Contracting State that the defendant is domiciled in, in order to have jurisdiction to settle any disputes arising in connection to a particular legal relationship. Where there is a jurisdiction agreement in favour of a Member State while the plaintiff pursues proceedings before an English court, the English courts must decline jurisdiction and allow the claim to be heard in the designated court.[338] This stay is mandatory and leaves the court with no discretion,[339] even if the court chosen by the parties shares no link with the dispute.[340]

In order to ensure that the court designated by the contracting parties have exclusive jurisdiction, Art.25 of the Brussels recast Regulation requires that the jurisdiction

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[336] See generally Jonathan Hill and Adeline Chong, *International Commercial Disputes* (4th edn, Hart Publishing, Oxford 2010); Lord Collins of Mapesbury (ed), *Dicey, Morris & Collins on the Conflicts of Laws* (15th edn, Sweet & Maxwell, London 2012); Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015); CMV Clarkson and Jonathan Hill, *The Conflicts of Laws* (5th edn, OUP, Oxford 2016); Adrian Briggs, *Private International Law in the English Courts* (Oxford University Press, Oxford 2014); Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016); Rob Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa, London 2014); Michael Mustill and Stewart Boyd, *Commercial Arbitration* (2nd edn, Butterworths, London 1989, together with volume (2001) to the Arbitration Act 1996); Nigel Blackaby, Constantine Partasides QC, Alan Redfern, and Martin Hunter, *International Arbitration* (6th edn, OUP, Oxford 2015); David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, Sweet & Maxwell, London 2015).

[337] It came into force in the UK on 10 January 2015.

[338] Unless the English courts have exclusive jurisdiction in accordance with Art.24 or the defendant has submitted to the jurisdiction of the English courts according to Art.26.

[339] Edwin Peel, "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflicts of Laws" [1998] LMCLQ 182, 202; Toh Kian Sing, "Jurisdiction Clauses in Bill of Lading-the Cargo Claimant's Perspective" [1995] LMCLQ 183, 187.

[340] Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* [1999] I.L.Pr. 492, [52].

agreement must be "in writing or evidenced in writing".[341] Even if the jurisdiction agreement is in writing between the original contracting parties, where the disputes involve the third party, it does not follow that there is an exclusive jurisdiction clause in writing between a contracting party and that third party. Therefore, when the issue as to whether the third party could enforce or be bound by the jurisdiction agreement in that contract arises, the "in writing" requirement under Art.25 is likely to give rise to difficulties.

It should be noted that the Brussels recast Regulation repeals Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation")[342] replaces the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the "Brussels Convention").[343] The provisions concerning the exclusive jurisdiction clause in the latter two instruments are Art.23 and Art.17 respectively. For the purpose of this thesis, the wording used by these two provisions is similar to that used by Art.25 of the Brussels recast Regulation.[344] As such, the authorities on Art.17 of Brussels Convention and Art.23 of Brussels I Regulation might also be equally applicable to Art.25 of the recast Regulation.

4.3.2 The Arbitration Act 1996

Under English law, when a party breaches the arbitration agreement and initiates court proceedings in England, s.9 of the Arbitration Act 1996 gives the other party to the arbitration agreement the right to apply for a stay of proceedings before that court.[345] In this situation, the English court must grant a stay, unless the arbitration agreement is null and void, inoperative or incapable of being performed.[346] Similarly to the position under Art.25 of the Brussels recast Regulation, the stay here is also mandatory, which leaves the English courts with no discretion.

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[341] Art.25(1)(a).
[342] It entered into force in the UK on 1 March 2002 by the Civil Jurisdiction and Judgments Order 2001.
[343] It came into force in the UK on 1 January 1987 and is in Schedule 1 of the Civil Jurisdiction and Judgments Act 1982.
[344] The only important difference is that, unlike the latter two instruments, Art.25 of the Brussels recast Regulation does not limit to cases where one of the parties should be domiciled in a Member State. So even if neither of the parties is in a Member State, as long as they agree to refer their disputes in the court of a Member State and other requirements under the article can be fulfilled, that court in that Member State will have exclusive jurisdiction over the disputes.
[345] s.9(1).
[346] s.9(4).

S.9 confers the right to apply for a stay to "a party to an arbitration agreement" only. Furthermore, s.5 requires that s.9 apply only where the "arbitration agreement is in writing". However, a third party to a bill of lading is not a party to an arbitration agreement, and there is no arbitration agreement in writing between him and a contracting party. Thus, when the issue as to whether the third party can enforce or be bound by the arbitration agreement in the bill of lading is considered, the requirements under ss5 and 9 will give rise to great difficulties.

4.3.3 Common law position

Under English common law, when an agreement gives a foreign court, which lies in a non-EU member state, the exclusive jurisdiction, but the plaintiff commences the court proceedings in England, the English courts have the discretion to decide whether to grant a stay of the proceedings or not. Here, in contrast to the Brussels Regulation,[347] the courts' duty to stay is not mandatory. However, such a stay should generally be granted unless the plaintiff can prove that there is a strong cause for not doing so. In exercising this discretion, the courts should consider all of the case's circumstances. Authorities have also suggested some non-exhaustive factors that courts need to take into account.[348]

Insofar as concerns the arbitration clause, when the Arbitration Act 1996 does not apply, for instance, if there is no arbitration agreement in writing,[349] the courts' inherent jurisdiction to stay proceedings remains.[350] When the action is brought in an English court, the court has the discretion to stay the proceedings. Here, in contrast to the position under s.9 of the Arbitration Act 1996, the stay is not mandatory. Presumably, if a third party cannot enforce an arbitration clause pursuant to s.9 of the Arbitration Act 1996 for not being a party to the arbitration clause, he can only rely on the inherent jurisdiction of the courts.

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[347] See 4.3.1. This is because "outside the context of the Brussels I Regulation … the effect of an agreement on choice of court is a matter for the common law principles of private international law, which will always be more receptive to special circumstances than will a statutory rule": see Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 4.55.

[348] *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749, [23] *et seq*, which overtakes, for instance, *The Eleftheria* [1970] P 94, 99-100 (Brandon J (as he then was)); *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119, 123-124 (Brandon LJ); *The Sennar (No 2)* [1985] 1 WLR 490 (HL), 500 (Lord Diplock).

[349] Arbitration Act 1996, s.81(1).

[350] *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd (The Barito)* [2013] 2 Lloyd's Rep 421.

4.4 Contracts (Rights of Third Parties) Bill 1998 and Hansard Debates

After the issuance of the Law Commission's Report and the Draft Bill, the Lord Chancellor's Department worked closely with the Law Commission and made some improvements to the Draft Bill. This improved Bill – Contracts (Rights of Third Parties) Bill 1998 (hereafter "the 1998 Bill")[351] – was then introduced by the Lord Chancellor in the House of Lords and came to the parliament Hansard Debates on 3 December 1998.[352] In the 1998 Bill, the cl.6(2)(d) and (e) of the Draft Bill no longer appeared, whilst an express clause about "conditional benefit" was added.

4.4.1 Addition of section 1(4) on "conditional benefit"

Although there was no express provision on "conditional benefit" in the Draft Bill, a clause about it – cl.1(4) - was added by the Lord Chancellor's Department in the 1998 Bill. The addition sought to clarify that s.1(1) is open to the parties to place the conditions on the third party's right.[353] Without this express clause, one cannot find the Law Commission's intention that A and B may impose conditions upon C's enforcement of the benefit merely from the wording of the Draft Bill. The addition of cl.1(4) on "conditional benefit" in the 1998 Bill was welcomed during the Hansard Debates[354] and remained as s.1(4) in the final Act:

> "1 –
>
> …
>
> (4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract."

4.4.2 Removal of the provisions excluding arbitration and jurisdiction agreements

In an article subsequent to the publishing of the Law Commission's Report and Draft Bill, Professor Andrew Burrows, one Law Commissioner responsible for the original recommendation, clarified that the Law Commission only rejected the conditional benefit approach as a solution to the difficulties with the arbitration clause, but they did

[351] See https://www.publications.parliament.uk/pa/cm199899/cmbills/118/1999118.htm accessed 17 May 2018.
[352] http://hansard.millbanksystems.com/sittings/1998/dec/3 accessed 17 May 2018.
[353] Explanatory Notes, [9].
[354] House of Lords Debate 27 May 1999vol 601 cols 1047-1048. See https://api.parliament.uk/historic-hansard/lords/1999/may/27/contracts-rights-of-third-parties-bill-hl accessed 17 May 2018

not seek to deny that an arbitration agreement might operate as a condition on the third party's substantive right.[355] He said that A and B could confer a right of enforceability on C on the condition that C should enforce via arbitration so that the right would be lost if C sued in court.[356] Since the exclusion of arbitration and jurisdiction clause by the Draft Bill gave one the impression that no such possibility exists, cl.6(2)(d) and (e) of the Draft bill were eliminated in the 1998 Bill.

Professor Andrew Burrows also explained that subjecting the third party's enforcement of a substantive right to arbitration fell within the mechanism of the Draft Bill. First, it could be viewed as falling within the basic test of enforceability under cl.1(1) and (2) of the Draft Bill. Since there was no express provision for the conditional benefit approach in the Draft Bill, by saying this, he presumably means that the situation should fall within the conditional benefit approach implied by cl.1(1) and (2). After the addition of an express provision about the conditional benefit approach, this situation should fall within s.1(4) of the final Act. Secondly, subjecting the third party's enforcement of a substantive right to arbitration could also be viewed as falling within cl.3(4) of the Draft Bill[357] on the basis that "an arbitration clause that qualifies the third party's right of enforceability constitutes a *defence* to the third party's action – analogous to a *Scott v Avery* arbitration clause".[358] By saying so, Professor Andrew Burrows showed the Law Commission's view that a clause which provides that a third party can only enforce a right by way of arbitration is a type of *Scott v Avery* arbitration clause. This view appears to supersede the Law Commission's reason (1) for excluding the arbitration clause that the clause could not be regarded as a mere defence to an action.[359]

When the 1998 Bill was read the second time in the House of Lords, Lord Wilberforce asked for an explanation as to the elimination of the provisions which excluded the

[355] Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482. This has been regarded as the most helpful article on the 1999 Act, which sets out the background the background to the addition of s.8: *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481, [36] (Colman J).
[356] Ibid.
[357] Which is the same as s.3(4) of the final Act.
[358] Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482.
[359] See above 4.2.2.

arbitration and jurisdiction clauses in the Draft Bill.[360] The Lord Chancellor responded as follows:

> "on further reflection… the Law Commission concluded that, although in theory the third party might seek to rely on an arbitration clause to stay court proceedings without being bound to arbitrate, in practice no say would be granted by the court unless he had shown willingness to go to arbitration. On that basis, the conclusion was that there was no good reason to exclude these clauses from the operation of the reform."[361]

This explanation means that in practice the court would grant the stay of proceedings only if the applicant agrees to go to arbitration. This apparently supersedes the Law Commission's reason (2) mentioned above under 4.2.2 that A would be left with no forum to enforce his claim against a third party.

During the Report stage, the Lord Chancellor went further and introduced an amendment about arbitration to ensure that the third party's right to arbitrate would be given proper effect under the Arbitration Act 1996.[362] It was only until 1 November 1999, when the Bill was under Government amendment in the House of Commons, that a new and detailed clause on arbitration was brought up and read for the first time.[363] On 10 November 1999, the new clause was considered and added as cl.8 of the Bill by the House of Lords.[364] Cl.8 of the Bill was enacted as s.8 of the final Act.

4.5 Arbitration clause under section 8 of the 1999 Act

Since specific provisions regarding an arbitration clause are contained in s.8 of the final 1999 Act, an examination as to how the IGP&I/BIMCO's new Himalaya clause satisfies s.8 will now be considered. It will be seen that sub-paragraph (c) of the new clause only points to s.8(2) of the Act. However, both s.8(1) and s.8(2) are worth

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[360] House of Lords Debate 11 January 1999 vol 596 cols 27-28. See http://hansard.millbanksystems.com/lords/1999/jan/11/contracts-rights-of-third-parties-bill-hl#column_28.

[361] House of Lords Debate 11 January 1999 vol 596 col 33. See http://hansard.millbanksystems.com/lords/1999/jan/11/contracts-rights-of-third-parties-bill-hl.

[362] House of Lords Debate 27 May 1999 vol 601 col 1059. See https://api.parliament.uk/historic-hansard/lords/1999/may/27/contracts-rights-of-third-parties-bill-hl.

[363] House of Commons Debate 01 November 1999 vol 337 cols 23-5. See http://hansard.millbanksystems.com/commons/1999/nov/01/arbitration-provisions.

[364] House of Lords Debate 10 November 1999 vol 606 cols 1362-4. See http://hansard.millbanksystems.com/lords/1999/nov/10/commons-amendment-1. However, Lord Wilberforce expressed his reservation about the inclusion of arbitration agreement in the Bill: at col 1364.

discussed in detail here due to two reasons. First, given that s.8 was introduced very late on, the guidance concerning this section is particularly limited; s.8(2) could not be properly understood without being compared to s.8(1). Secondly, even if the new clause satisfies s.8(2), the issue of whether s.8(2) has managed to resolve the difficulties with the arbitration clause will be discussed for the purpose of this thesis. That said, this can not be done without comparing the situation under s.8(2) with that under s.8(1). Therefore, this section will also make suggestions as to how the whole section should be properly understood in order to resolve those difficulties arising from the arbitration clause.

4.5.1 Section 8(1): arbitration as the procedural condition for a substantive right

S.8(1) of the 1999 Act provides that:

> "(1) Where—
> a right under section 1 to enforce a term ("the substantive term") is subject to a term providing for the submission of disputes to arbitration ("the arbitration agreement"), and
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996,
> the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party."

According to the Explanatory Notes,[365] this sub-section is based on the "conditional benefit" approach under s.1(4) of the Act.[366] The working of this sub-section follows as such: if the AB contract provides C with a substantive right under s.1 and provides that C's enforcement of this substantive right is conditional to the disputes' being referred to arbitration according to the arbitration agreement between A and B, C can enforce that substantive right by way of arbitration only. It follows that if the arbitration agreement between A and B is in writing as required by the Arbitration Act 1996 and if C enforces that right, C will be treated for the purpose of the Arbitration Act 1996 as a party to that arbitration agreement with respect to the disputes relating to the enforcement of that

[365] Explanatory Notes, [34]. See also *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481; *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [42]-[45] (Tolson LJ).
[366] See above 4.4.1.

substantive right by C. If C sues A in the court to enforce that substantive right, A will be able to seek a stay of proceedings under s.9 of the Arbitration Act 1996.

4.5.1.1 Test

A problem with s.8(1) involves how to decide whether the enforcement of a substantive right by a third party is subject to an arbitration agreement or not.[367] The Explanatory Notes[368] regard the approach applied to s.8(1) as:

> "analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, *DVA v Voest Alpine (The Jaybola)* [1997] 2 Lloyd's Rep 279)."

In *The Jaybola*, the sub-charter included a London arbitration clause. The subrogating insurers of the sub-charterers sued the charterers and shipowners under the sub-charter before the Brazilian court. It was held that as the subrogating insurers, the insurance company's rights asserted in the Brazilian action were derived and assigned from the rights of the sub-charterers under the sub-charter. If the sub-charterers made a claim, they were obliged to refer to arbitration in London as required by the sub-charter. It follows that the rights acquired by the insurance company should also be subject to the London arbitration clause in the sub-charter.

The first authority on s.8(1) of the 1999 Act was *Nisshin Shipping Co Ltd v Cleaves Co Ltd*.[369] In that case, the charterparty conferred the payment of commission to the third party brokers and contained an arbitration clause. The provision for payment of commission provided that:

> "A commission of two per cent for equal division is payable by the vessel and owners to… [the brokers] … on hire earned and paid under this Charter, and also upon any continuation or extension of this charter."

The charterparty also contained an arbitration clause, which provided that:

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[367] Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 213; Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 421.
[368] Explanatory Notes, [34].
[369] [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481.

> "All disputes or differences arising out of this contract…shall be referred to arbitration in London…"

The brokers sought payment of commission before the arbitrators according to the arbitration clause in the charterparty. The shipowners challenged the jurisdiction of arbitrators. Colman J held that the effect of the commission clause was to confer a benefit to the brokers which fulfilled s.1.[370] The next issue to be decided by the judge was whether the enforcement of that benefit by the brokers was subject to the arbitration clause in the charterparty.

Based on the above-quoted assignment analogy suggested by the Explanatory Notes, Colman J held that, under the law of assignment, the brokers who have been assigned to the right of the charters to enforce the commission should put themselves in the charterers' position, thereby making them subject to the same restrictions as the charterers. Since the charterers have to enforce the right in arbitration, the brokers should also submit to arbitration to enforce that right.[371] He went on that as long as a similar dispute between the contracting parties fell within the scope of the arbitration clause, the third party would be bound by or entitled to enforce the arbitration clause.[372] He said that the arbitration clause before him was wide enough to cover the dispute between the charterers and shipowners as to the payment of the brokers' commission, so the brokers were obliged and entitled to refer the dispute to arbitration.[373]

With the greatest of respect, the author doubts the validity of Colman J's judgment. First, in the charterparty, neither the above-quoted commission clause nor the arbitration clause stated that the brokers, as third party beneficiaries under the contract, would be subject to the arbitration clause if a dispute arose. No clear language to this effect was given, nor could this be inferred from any terms of the contract.[374] Faced with this situation, Colman J said that:

> "whether [the parties to the arbitration agreement] did or did not express a mutual intention that the third party should be entitled to avail himself of the arbitration agreement for the purpose of enforcing his rights under the

[370] Ibid, [10]-[33].
[371] Ibid, [42].
[372] Ibid, [39].
[373] Ibid, [44].
[374] Masood Ahmed, "Loosening the Grip of the Contracts (Rights of Third Parties) Act 1999 on Arbitration Agreements" (2014) 31 (5) Journal of International Arbitration 515, 530-531.

substantive term in relation to which the 1999 Act has transferred to him a right of action is not relevant".[375]

By saying this, Colman J meant that the intentions of the contracting parties were not relevant in deciding whether the third party's enforcement of the substantive rights was subject to arbitration. The further effect of this understanding is that even if on a proper construction of the contract the parties did not intend that the third party's enforcement of substantive right is subject to the arbitration agreement, the third party finds itself nevertheless so bound.[376] This interpretation potentially leads to the unwelcome result of compelling a third party to bring his claim to arbitration regardless of his consent and the contracting parties' intentions.[377]

Secondly, Colman J's judgment relied too heavily on the Explanatory Notes' assignment analysis as a means of interpreting s.8(1).[378] In fact, it has been suggested that the Explanatory Notes should be read with caution since it was not mentioned at all during the Hansard Debates and have not been endorsed by Parliament.[379] Moreover, even the Law Commission itself in its Report described the assignment analogy as "useful" but "not exact" to understand the "conditional benefit" approach.[380] The author also doubts whether it is right to analogise s.8(1) to the assignment analysis. It is true that if an assignee seeks to enforce the assigned right under the contract and the contract includes an arbitration clause, he could only enforce that right in accordance with that arbitration clause. However, as *The Jaybola*, those authorities on this principle are all confined to the assignment situations.[381] Neither the 1999 Act as a whole nor s.1(4)

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[375] Ibid, [43].
[376] James Hayton, "Hijackers and Hostages: Arbitral Piracy after *Nisshin v Cleaves*" [2011] LMCLQ 565, 570.
[377] Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 LQR 292, 310.
[378] Ibid, 309-310: the "assignment analogy drawn by the court was too literal; James Hayton, "Hijackers and Hostages: Arbitral Piracy after *Nisshin v Cleaves*" [2011] LMCLQ 565, 566; James Hayton, "Contracts (Rights of Third Parties) Act 1999 and Arbitration" (2013) 19 JIML 95, 99; Masood Ahmed, "Loosening the Grip of the Contracts (Rights of Third Parties) Act 1999 on Arbitration Agreements" (2014) 31 (5) Journal of International Arbitration 515, 530-531.
[379] Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 212; Benjamin Parker, "Shipbrokers' Commission and Arbitration Clauses: The Contracts (Rights of Third Parties) Act 1999 Has Its First Outing to Court" [2004] LMCLQ 445, 450-451; James Hayton, "Hijackers and Hostages: Arbitral Piracy after *Nisshin v Cleaves*" [2011] LMCLQ 565, 573-576.
[380] Law Commission Report No. 242, [10.29].
[381] E.g., in *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279, the assignment was by way of subrogation; in *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island) (No 1)* [1984] 2 Lloyd's Rep 408; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum (No 1))* [2004] EWCA Civ 1598; [2005] 1 All ER (Comm) 715;

operates by assignment. As the Law Commission has made clear, the third party is only given a right to enforce the benefit instead of being deemed to be a party to the contract.[382] Therefore, it is incorrect to explain any provisions of the 1999 Act by way of assignment analysis unless the AB contract expressly provides that C is assigned to the rights under the contract. Since nothing showed that the charterers had assigned their rights under the charterparty to the brokers, Colman J was wrong to apply the assignment analogy to *Nisshin Shipping*.

Thus, in the author's view, contrary to Colman J's opinion that deemed the intentions of the contracting parties as irrelevant, in order to decide whether the third party's substantive right would be subject to the arbitration clause or not, the courts need to ascertain the true intentions of the contracting parties by construing the contract.[383] As it accepted during the House of Lords debate, the issue as to whether a third party's enforcement of a benefit is subject to the conditions under s.1(4) is "a straightforward question of construction of the contract".[384] Since s.8(1) is an application of "conditional benefit" approach under s.4(1), whether a third party's substantive right is subject to the arbitration agreement under s.8(1) should also be decided upon a construction of the contract. The words used by of s.8(1) that "where…a right under section 1 to enforce a term …is subject to …arbitration agreement…" also clearly mean that the sub-section only applies when the contractual terms show that the third party's right to enforce a benefit is subject to the submission to arbitration.

It follows that to make sure that C's substantive right is to subject to the arbitration clause, unambiguous language should be used to this effect.[385] The clearer the language

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Shipowners' Mutual Protection And Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret As (The Yusuf Cepnioglu) [2016] EWCA Civ 386; [2016] 2 All ER (Comm) 851, there was statutory assignment under Third Parties (Rights against Insurers) Act 1930 or Third Parties (Rights against Insurers) Act 2010.

[382] Law Commission Report No. 242, [13.2] and recommendation (44).

[383] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [28] (Tomlinson LJ); Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 214; Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 421; James Hayton, "Hijackers and Hostages: Arbitral Piracy after *Nisshin v Cleaves*" [2011] LMCLQ 565. *Cf* Professor Rob Merkin took a wider view: Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.50, "the general effect of this provision is to ensure that, where the contract between A and B contains an arbitration clause requiring disputes between them to be referred to arbitration, any action by C against B must itself be brought in arbitration rather than in the courts".

[384] House of Lords Debate 27 May 1999 vol 601 col 1050. See https://api.parliament.uk/historic-hansard/lords/1999/may/27/contracts-rights-of-third-parties-bill-hl accessed 17 May 2018

[385] See also Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 213 and 216; Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 423; Masood Ahmed, "Loosening the Grip of the Contracts (Rights

used, the more explicit the parties' intentions are shown. For instance, in the substantive terms which conferring benefit on the third party, the contracting parties may make it clear that "the enforcement of this right by the third party is subject to arbitration", or in the arbitration agreement, the contracting parties may agree that "any disputes arising out of this contract, including the third party's enforcement of his rights under the contract, shall be arbitrated". As will be discussed later under 4.5.3, the reason why the "conditional benefit" approach was unworkable in the Law Commission's Report was due to the fact that the Law Commission invariably regarded every generally worded arbitration clause as a procedural condition for the substantive right, without considering the wording used by the contract or the intentions of the parties. If clear language is used to the effect that the third party's enforcement of substantive right is subject to arbitration, the Law Commission's concern will be resolved.

If unequivocal language is used to the effect that C's enforcement of the substantive right is subject to the arbitration agreement, the arbitration agreement should not be regarded as a pure burden on the third party, but a condition which he must fufill in order to enforce his substantive right. As such, he is only bound to arbitrate when he seeks to enforce the substantive right, not otherwise. If C seeks to enforce the substantive right, but he enforces the right before the court, s.8(1) actually gives A a choice as to whether or not to enforce the arbitration clause against C.[386] If A chooses to enforce the clause, he may apply for a stay of proceedings under s.9 of the arbitration Act 1996. A may alternatively allow C to do so and thus decide not to apply for a stay.[387] If A refuses to go to arbitration, he might no longer insist on it but is free to enforce its rights in the courts.[388] In this situation, A would be regarded as having waived the condition.[389] If C commences arbitration against A, A might presumably not be able to challenge the arbitral tribunal's jurisdiction.[390]

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of Third Parties) Act 1999 on Arbitration Agreements" (2014) 31 (5) Journal of International Arbitration 515, 535.

[386] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [43] (Toulson LJ); Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.50.

[387] Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.50.

[388] Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482.

[389] *Toronto Railway Co v National British and Irish Millers Insurance Co Ltd* (1914) 20 Com Cas 1, 23 (Scrutton J): "Conditions precedent may be waived by a court of conduct inconsistent with their continued validity."

[390] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481; *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [24] (Tomlinson LJ).

4.5.1.2 Negative rights

In *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund*,[391] Tomlinson LJ held that s.8(1) applied not only where the substantive right conferred on C was positive, e.g. payment of commission,[392] but also where the substantive right conferred on C was a negative one, e.g. exclusion and limitation of liability. This is because s.1(6) of the 1999 Act, by regarding the "exclusion and limitation" as a benefit, draws no distinction between the third party's enforcement of a positive right of action and a negative right of defence. In fact, the combination of ss1(6) and 8(1)(a) contemplates that the third party's right to take the benefit of an exclusion might also be subject to a term providing for the submission of disputes to arbitration. It follows that, just as the positive right, whether the enforcement of the negative right by the third party is subject to the arbitration clause is also "a question of construction of the agreement".[393]

As to how to determine the contracting parties' intention here, Tomlinson LJ said that although it might be easy to conclude that the parties intended to subject the enforcement of a positive benefit by the third party to an arbitration clause, it was hard to suppose that they intended the reliance on the contractual exclusion by a third party to be likewise subject.[394] Moreover, subjecting the third party's contractual defence to the arbitration clause bears the risk of leading to "fragmented dispute resolution".[395] Since the third party cannot be compelled to arbitrate, arbitrators only hold jurisdiction over disputes directly relating to the enforcement of the contractual defence, while other disputes would still be decided by the courts. To justify such an unwelcoming consequence, Tomlinson LJ suggested that very clear language was required to bring about the result that the right of a third party to enforce an exclusion clause was to be subject to an arbitration clause.[396] In *Fortress Value*, there was no such clear language to this effect, so the enforcement of the immunity clause by the third party was held to be not subject to the arbitration clause.

As to how clear the language should be, it is submitted that specific reference to "exclusion" or "limitation clause" should be used. For example, in the exclusion or

[391] [2013] EWAC Civ 367; [2013] 1 WLR 3466.
[392] E.g., *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481.
[393] [2013] EWAC Civ 367; [2013] 1 WLR 3466, [28] (Tomlinson LJ).
[394] Ibid, [29] and [36] (Tomlinson LJ); [54] (Toulson LJ).
[395] Ibid, [30].
[396] Ibid, [36] (Tomlinson LJ).

limitation clause, the contracting parties may make it clear that "the third party's right to enforce the exclusion and limitation clause is subject to arbitration", or in the arbitration agreement, the contracting parties may agree that "any disputes arising under this contract, including the third party's enforcement of the exclusion and limitation clauses under the contract, shall be arbitrated". If the contract generally provides that "the third party's enforcement of the rights is subject to the arbitration clause" without express reference to "exclusion" or "limitation", it might be inferred that only the positive rights, not the negative ones, are subject to the arbitration clause.

As per reason (3) as mentioned earlier under 4.2.2, the Law Commission was concerned that if the conditional benefit approach is applied to the negative rights and if C wants to enforce the exclusion clause as a defence, he has to go to arbitration. This means that C is bound to arbitrate, which is not allowed by the reform. However, back to the time of their Report, the Law Commission regarded every arbitration clause as the conditional benefit to the negative rights without considering whether the contracting parties intended to or not. In this situation, C would no doubt be forced to go to arbitration. However, where, as Tomlinson LJ has suggested, clear language is used to the effect that C's enforcement of the exclusion clause is subject to arbitration, C will be not taken as being forced to arbitration. Instead, he is only bound by a condition which he must fulfil in order to enforce his substantively negative rights, which is allowed by the Act.

If the unambiguous language is used to the effect that C's enforcement of exclusion or limitation is subject to arbitration, and if C wishes to rely on an exclusion or limitation of liability clause, the combination of ss1(4), 1(6) and 8(1) gives A a choice as to whether to bind C to arbitration. If A initiates proceedings in arbitration, he might be taken as having made his choice, and it might not be open to C to challenge the jurisdiction of the arbitration if he wants to invoke the defence of those exclusions or limitations. As such, he would be bound by the arbitral award regarding, for instance, the interpretation, application and validity of the exclusion clause.[397] However, he can refuse to submit to arbitration regarding other substantive claims.

The problem is if A initiates judicial proceedings in court, whether C can enforce the arbitration clause and apply for a stay of proceedings under s.9 of the Arbitration Act 1996 regarding the disputes relevant to the enforcement of the exclusions or limitations?

[397] Simon P Camilleri, "Third Parties and Arbitration Agreements" [2013] LMCLQ 304, 307.

In *Fortress Value*, Tomlinson LJ decided that the third party could not enforce the arbitration clause to challenge the jurisdiction of the court since there was no explicit language to the effect that the third party's immunity was subject to arbitration.[398] By so deciding, he tended to say that if there were clear language to that effect, C could challenge the jurisdiction of the court by seeking a stay of proceedings. It has also been suggested that there seems no reason as to why a third party under these circumstances could not insist on the procedural condition imposed on him.[399] Nevertheless, it is without doubt that he is unentitled to seek a stay of proceedings to challenge the jurisdiction of the court regarding other substantive disputes.

Sub-paragraph (c) of the IGP&I/BIMCO's new clause, rather than conferring positive rights of action on third parties, provides them with negative rights of exclusion and limitation. It is true that the same paragraph also mentions the arbitration clause. However, there is no clear language in the clause as to the effect that the enforcement of those contractual defences under sub-paragraph (c) should be subject to the arbitration clause. As such, sub-paragraph (c) does not fall within s.8(1) of the Act. It follows that, although the cargo claimants sue a third party in arbitration, the latter is not obliged to defend in arbitration. Instead, he might be able to challenge the jurisdiction of the arbitral tribunal. Also, if an arbitration award is issued against the third party, the award might not be enforceable upon him.

4.5.2 Section 8(2): positive procedural right to arbitrate

s.8(2) of the 1999 Act provides that:

> "(2) Where—
> (a) a third party has a right under section 1 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration ("the arbitration agreement"),
> (b) the arbitration agreement is an agreement in writing for the purposes of Part I of the Arbitration Act 1996, and

[398] [2013] EWAC Civ 367; [2013] 1 WLR 3466, [36]-[37] (Tomlinson LJ).
[399] See Hamid Khanbhai, "Stormy Skies: Uncovering the Problems of s.8 of the Contracts (Rights of Third Parties) Act 1999" (2013) 28 (7) BJIB&FL 421, 423: "in circumstances where P sues T, who seeks to avail himself of his substantive right, if T also wishes to insist on the procedural condition, why should he not be allowed to do so?" See also Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.120; Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 374.

(c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right."

According to the Explanatory Notes,[400] the working of this sub-section follows as such: if the benefit conferred by A and B on C under s.1 is a procedural right to arbitrate a tort claim made by A against C, C is given a choice as to whether to enforce his right to arbitrate. If C chooses to exercise the right, and the arbitration agreement between A and B is in writing for the purpose of the Arbitration Act 1996, he would be treated for the purpose of Arbitration Act 1996 as a party to that arbitration agreement in relation to the matter with respect to which the right is exercised. As such, he may apply for a stay of proceedings under s.9 of the Arbitration Act 1996 if A sues him in court. If he applied for this, he would be unable to later argue that he should not be bound to arbitrate.

As reason (2) as mentioned earlier under 4.2.2, the Law Commission was concerned that if A sues C in court, C can apply for a stay of judicial proceedings, however, since C cannot be bound to arbitrate, he can later reject to submit to arbitration, which would lead to the result that A would be left with no forum to enforce his tort claim against C. By including s.8(2) in the final Act, this reason might not apply at all. As the Lord Chancellor has suggested, in practice, the court would not grant a stay unless it is sure that the applicant would submit to arbitration.[401] So if C wants to enforce the pure benefit of arbitration conferred on him by A and B contract by a stay of proceedings, the court would not grant it unless it is sure that C would submit to arbitration later. In this case, A will have the arbitral tribunal to enforce his tort action against C.

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[400] Explanatory Notes, [35]. See also *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [42]-[45] (Tolson LJ).

[401] House of Lords Debate 11 January 1999 vol 596 col 33. See above 4.4.2. See also Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.115: "it might be argued that if the third party is entitled to claim the benefit of the arbitration clause by having judicial proceedings stayed, his inability to resist arbitration proceedings should be regarded as a justifiable burden as the natural corollary of the benefit of the clause"; Andrew M Tettenborn, "Third Party Contracts – Pragmatism from the Law Commission" [1999] JBL 602, 610: "the Commission may have been too pusillanimous here…while C would not be compelled to arbitrate against his will, if he demanded arbitration he would be deemed to have submitted to it as well. And analogous provision could no doubt be made for exclusive jurisdiction clauses, which raise similar problems".

According to Tomlinson LJ, s.8(2) is "only applicable where the contract on its true construction gives to the third party a right to arbitrate".[402] To be more specific, it applies only where the right given to C by the AB contract under s.1 is an express right to arbitrate. This might occur in two circumstances. Firstly, if the contract expressly provides that third party may enforce the arbitration clause (as the effect of s.1(1)(a)).[403] Secondly, if the arbitration clause purports to confer a benefit of the arbitration clause on the third party (s. 1(1)(b)) and nothing shows that the parties did not intend the arbitration clause to be enforceable by the third party (s.1(2)).[404] It should be noted that it does not apply where a substantive right is subject to a procedural condition as the situation under s.8(1).[405]

Sub-paragraph (c) of the IGP&I/BIMCO's new clause provides that:

> *"(c)… the **right to enforce any … arbitration provision** contained herein shall also be available and shall extend to every such Servant of the carrier".*

The sub-paragraph expressly provides that the third parties employed by the carriers are entitled to enforce the arbitration clause in the bill. This satisfies s.1(1)(a) of the Act. As such, the situation under that sub-paragraph falls within s.8(2) of the Act.[406] Moreover, by using such unequivocal language, the new clause prevents the opportunities that the court would incline to find that the parties did not intend the arbitration agreement to be exercisable by the third party (s.1(2)) when the third party argues that the arbitration clause purports to confer a benefit of an arbitration clause on him (s.1(1)(b)).[407] So far, no shipping company has adopted this method in its own terms of carriage. Since the use of arbitration clauses in the bills of lading is becoming more common, the author

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[402] [2013] EWAC Civ 367; [2013] 1 WLR 3466, [31] (Tomlinson LJ); see also [47] and [55] (Toulson LJ).
[403] Ibid, [47] and [55] (Toulson LJ); Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 374.
[404] Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 215.
[405] The 1999 Act, s.8(2)(c).
[406] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [56] (Toulson LJ): when the third party wants to enforce the arbitration clause, s.8(2) provides the way to do so.
[407] Simon P Camilleri, "Third Parties and Arbitration Agreements" [2013] LMCLQ 304, 308: "From the judgments of Tomlinson and Toulson LJJ, it seems that, where the parties wish to allow the third party to exercise a unilateral right to arbitration, they must say so expressly. In other words, where an arbitration agreement is concerned, a third party arguing that under s.1(1)(b) the arbitration agreement "purports to confer a benefit" on him will face an uphill struggle, with the courts being more inclined to find that "on a proper construction of the contract" the parties did not intend the arbitration agreement to be exercisable by the third party (s.1(2))".

suggests that shipping companies endorse this method taken by sub-paragraph (c) of the new clause and make specific and additional reference to the arbitration clause in the Himalaya clause.

Thus, where such a new clause is used in the bill, if cargo claimant sues the third party in tort before an English court, according to s.8(2), instead of being bound by the pure burden of the arbitration clause, the third party is actually given a choice as to whether he would enforce the right to arbitrate or not. If he chooses to enforce the right, he may apply for a stay of proceedings under s.9 of the Arbitration Act 1996. If he so applies, he will enforce the pure benefit of the arbitration clause instead of being bound to arbitrate. Party autonomy is a principle underpinning the domestic and international commercial arbitration. Under the principle, the parties should be free to agree whether they will resolve their disputes by arbitration,[408] and only those parties who have agreed to arbitrate should be bound to arbitrate.[409] S.8(1) has been criticised for undermining the principle of party autonomy because if the third party seeks to enforce the substantive rights, he is to be bound by something under the arbitration clause which he would not have agreed to.[410] For example, he might not be comfortable with the seat of arbitration which is located in the jurisdiction of the other party so that the law governing arbitration procedure is not favourable to him, or he might be bound by the choice of law which favours the other party.[411] However, there is little chance for him to negotiate these issues. It is submitted that such a criticism is unlikely to exit in s.8(2), the just section which the IGP&I/BIMCO's new Himalaya clause falls within. If the third party is not comfortable with, for instance, the seat of arbitration or choice of law under the arbitration clause, he could choose not to enforce the clause. By choosing to enforce the clause, the third party will be taken to have shown his autonomy to arbitration, including the stipulations under the arbitration clause. Presumably, if the cargo claimant brings judicial proceedings against the third party in some other jurisdiction, the third party can seek to enforce the arbitration clause by applying for an anti-suit injunction before an English court.[412] However, if the third party chooses not to exercise the procedural right, he could submit to the court, and the cargo claimant

[408] Arbitration Act 1996, section 1(b).
[409] For a detailed discussion of the principle of party autonomy, see Michael Pryles, "Limits to Party Autonomy in Arbitral Procedure" (2007) 24 (3) Journal of International Arbitration 327-377.
[410] Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 213.
[411] Masood Ahmed, "Loosening the Grip of the Contracts (Rights of Third Parties) Act 1999 on Arbitration Agreements" (2014) 31 (5) Journal of International Arbitration 515, 524-525.
[412] Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.55.

would be unable to force him to arbitrate. This is to avoid imposing a "pure" burden on the third party by requiring it to arbitrate where there is no other benefit available to him.[413]

One problem that needs to be addressed is if the cargo claimant sues a third party in arbitration, whether the third party can challenge the jurisdiction of arbitrators. Neither the Explanatory Notes nor Hansard Debates mentioned this possibility. The author submits that the third party may be allowed to challenge the jurisdiction of the arbitration, since, otherwise, binding him to the arbitral award while he has not chosen to arbitrate at the very beginning would be a pure burden to him, which is not allowed by the 1999 Act. If he so challenges, he would be taken as having chosen not to enforce the right to arbitrate and presumably could not later challenge the jurisdiction of the court.

Sub-paragraph (c) of the new clause gives the third parties both the benefit of the negative contractual defences, e.g., exclusions, limitations, defences and immunities, and the right to enforce the arbitration clause. Since those negative contractual defences are not expressly subject to the arbitration clause,[414] the whole sub-paragraph shall fall within s.8(2) instead of s.8(1). Under these circumstances, if the third party is sued in court, he could enforce the procedural right to arbitrate by applying for a stay of proceedings.[415] However, he is not bound to arbitrate if he enforces those exclusions or limitations.

4.5.3 Difficulties resolved

Although the above discussion shows that sub-paragraph (c) of the IGP&I/BIMCO's new clause falls within s.8(2) of the 1999 Act, the effectiveness of the sub-paragraph depends on whether s.8(2) has resolved the difficulties with the arbitration clauses or not. The issue as to whether s.8(2) has really resolved those difficulties could not be examined without discussing the whole section. As demonstrated above under 4.2, the Law Commission in their Report first regarded the conditional benefit approach as a solution to the difficulties with the arbitration and exclusive jurisdiction clauses.

[413] House of Commons Debate 01 November 1999 vol 337 col 24, see http://hansard.millbanksystems.com/commons/1999/nov/01/arbitration-provisions; House of Lords Debate 10 November 1999 vol 606 col 1363, see http://hansard.millbanksystems.com/lords/1999/nov/10/commons-amendment-1.
[414] See above 4.5.1.2.
[415] [2013] EWAC Civ 367; [2013] 1 WLR 3466, [56] (Toulson LJ).

However, they found this approach to be non-workable in some situations. In the author's view, the reason why this method did not work is due to the fact that the Law Commission invariably took every generally worded arbitration clause and exclusive jurisdiction clause as a procedural condition for the third party's enforcement of the substantive rights without considering whether the contracting parties had such an intention or whether the third party had consented to this. Under these circumstances, the contracting parties or the third party will inevitably be wronged when they have not shown such an intention or consent. Furthermore, the Law Commission regarded the arbitration and jurisdiction clauses as a procedural condition, not only for C's enforcement of substantive benefits against A and B but also for A and B's right to C, without considering whether A and B had such an intention. Having realised this, Professor Andrew Burrows explained that the Law Commission rejected the conditional benefit approach as a universal solution to the difficulties with the arbitration clause, but they did not seek to deny that an arbitration agreement might operate as a condition for the third party's substantive right.[416]

Under s.8 of the final Act, rather than always regarded arbitration clauses as the procedural condition for enforcing the substantive rights, they are categorised into two types, based on the parties' intentions. S.8(1) embodies the first type, whereby the third party's enforcement of substantive rights under s.1 is conditional on his submission to arbitration. S.8(2) contains the second type, whereby the third party is given the pure procedural right to enforce the arbitration clause. The author has suggested that the contracting parties should use clear language to the effect of either sub-section. This is because the more unambiguous the words used, the better the parties' intention is to subject the third parties' right to arbitration will be inferred. Moreover, it is only when sufficiently clear language is used that difficulties faced by the Law Commission in their Report as summarised above under 4.2.2 can be resolved.

(1) The Law Commission stated that since the arbitration clause and exclusive jurisdiction clause could be enforced only by a stay of action, they were not the basis of the mere defence. According to the distinction between "pure burden" and "conditional benefit", they submitted that the clauses were pure burdens unless written in the traditional *Scott v Avery* type. It might be right to say that a

[416] Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482.

normally worded arbitration clause is not a *Scott v Avery* type. However, where the contract expressly provides that C's enforcement of his substantive right is subject to the arbitration clause, the situation can be regarded analogous to a *Scott v Avery* arbitration clause. Professor Andrew Burrows has also accepted this argument.[417]

(2) The Law Commission said that if the AB contract provided that all disputes including the tort claims against C should be referred to arbitration, but A sued C before a court, C would be entitled to a stay of proceedings of the tort action against him. However, since C could not be forced to arbitrate later, A would be left with no forum in which to enforce its tort claim against C. This situation does not subject C's right to A or B to arbitration. Instead, the Law Commission regarded this situation as subjecting A and B's right to C to arbitration. However, no provision counterpart to this situation can be found in the final Act. In the author' view, subjecting A and B's right to C to arbitration actually equates to giving C a procedural right to arbitrate A/B's action against him. As such, in the final Act, this situation actually falls within s.8(2) rather than s.8(1). If so, as discussed above under 4.4.2 and 4.5.2, the Lord Chancellor has suggested that, in practice, the court would not grant a stay unless it is sure that C would later submit to arbitration.[418] Therefore, instead of being left with no forum, A would still have the arbitral tribunal to decide his claim against C.

(3) The Law Commission said that if C's enforcement of the substantive right is subject to arbitration, but the substantive right sought to be enforced by C is a negative right, when A sues C in arbitration, if C wants to enforce the negative right, he must defend in arbitration. This forced C to arbitrate, which was not allowed by the reform. However, as discussed above under 4.5.1.2, this concern only exists where there is no clear language showing the parties' intention that C's enforcement of the negative right should be subject to his submission to arbitration. If clear language to this effect is used, C cannot be taken as being

[417] See above 4.4.2; Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [1996] LMCLQ 467, 482

[418] House of Lords Debate 11 January 1999 vol 596 col 33. See http://hansard.millbanksystems.com/lords/1999/jan/11/contracts-rights-of-third-parties-bill-hl.

forced to arbitration. Instead, going to arbitration is just a condition to enforce his contractual defence.

(4) The Law Commission was concerned that if A sought a declaration of non-liability to C's right, binding the award to C would force C to arbitrate; but if C was not so bound, the arbitral award would be of little value to A. However, if clear language is used in the contract to the effect that C's enforcement of the substantive right is subject to arbitration and if the non-liability A seeks to declare solely towards that substantive right, C would not be taken as being compelled to arbitrate if bound by the arbitral award.

(5) The fifth reason given by the Law Commission, which only applies to arbitration, is that entitling or binding the third part to arbitrate would in some situations give rise to some procedural difficulties, for instance, in choosing the arbitrator(s). It has been suggested that this might be resolved by the default position under s.15(3) of the Arbitration Act 1996, which allows for the appointment of a sole arbitrator,[419] or by s.18(2) of the Arbitration Act 1996, which allows for one to apply to the courts for discretion.[420]

S.8 of the 1999 Act might also lead to a tripartite arbitration, if A, B and C all go to arbitration at the same time.[421] However, the law of arbitration is generally designed to deal with disputes between two parties, and there is very little authority regarding multipartite arbitration agreements.[422] It has been suggested that in order to resolve this problem, A and B can expressly provide in their contract that the same tribunal govern all disputes. It is also possible for A, B and C to agree that one set of arbitral proceedings are consolidated with other arbitral proceedings by s.35 of the Arbitration

[419] Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 427-428.
[420] Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.51.
[421] Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 427; Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.119; Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.51.
[422] Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 428.

Act 1996.[423] The Law Commission also mentioned that this could be resolved by the application of the standard principles applying to multiparty arbitration agreements.[424]

A detailed discussion of these procedural issues lies beyond the scope of this thesis. Since the 1999 Act includes s.8 as a specific stipulation on arbitration clauses, these procedural difficulties must have been expected to arise. They will be considered in due cause when the legal disputes arise. For the purpose of this thesis, it is sufficient to say that if s.8(1) or s.8(2) is fulfilled, the arbitration clause is enforceable against or by the third party.

4.5.4 Section 9 of the Arbitration Act 1996

As mentioned above under 4.3.2, s.9 of the Arbitration Act 1996 only allows "a party to an arbitration agreement" to apply for or be granted against a stay of proceedings. However, an arbitration agreement is written in the AB contract while C is not a party to the arbitration agreement. As such, the other difficulty with the arbitration clause lies in the enforcement of the arbitration agreement by a stay of proceedings by or against a third party when it has been hindered by the requirements under s.9 of the Arbitration Act 1996. This difficulty is overcome by s.8 since both sub-sections expressly provide that "the third party shall… be treated for the purposes of the [Arbitration Act 1996] as a party to the arbitration agreement". The quoted terms ensure that the Arbitration Act 1996 is applied to enforce third party rights under the 1999 Act.[425] In the author's opinion, this is also the sole purpose of s.8 of the 1999 Act.

From the above discussion under 4.5.1 and 4.5.2, as well as the wording used by s.8, it can be seen that both situations under the two sub-sections use a particular application of the mechanism under s.1 of the Act. To be more specific, s.8(1) is an application of "conditional benefit" under s.1(4) and regards the arbitration clause as a condition to the enforcement of C's substantive right. S.8(2) is an application of the enforcement of the "pure" benefit under s.1(1)(a) or ss.1(1)(b) and (2) and regards the arbitration clause as the pure procedural benefit conferred on C.

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[423] Ibid, 429.
[424] Law Commission Report No. 242, [14.15] at footnote 22. *Cf* for other arguments against s.8(1), see Masood Ahmed, "Loosening the Grip of the Contracts (Rights of Third Parties) Act 1999 on Arbitration Agreements" (2014) 31 (5) Journal of International Arbitration 515, 524-528.
[425] Explanatory Notes, [33]; House of Lords Debate 27 May 1999 vol 601 col 1052; House of Commons Debate 01 November 1999 vol 337 col 23.

It follows that even without s.8(1), if the AB contract provides C with the substantive right and provides that C can only enforce that substantive right in arbitration, the case will fall within s.1(4) of the Act. In this situation, if C sues in court to enforce that right, A can enforce the arbitration clause by applying for a stay of court proceedings. However, since there is nothing treating C as a party to the arbitration agreement for the purpose of the Arbitration Act 1996, A cannot apply for a stay of proceedings under s.9 of the Arbitration Act 1996 but can rely on the court's inherent jurisdiction to grant a stay under the common law only. As mentioned above under 4.3.3, under common law the court does not have a mandatory duty to stay under the common law but has a discretion only. According to the Lord Chancellor's Department, relying on the court's inherent jurisdiction to stay is not safe for A.[426] The addition of s.8(1), or to be more specific, the addition of the terms that "the third party shall be treated for the purpose of [the Arbitration Act 1996] as a party to the arbitration agreement", is just to make sure that A could rely on the court's mandatory duty to stay under s.9 of the Arbitration Act 1996.

A similar analysis can be applied to s.8(2). Even without s.8(2), if the AB contract provides that C can enforce the benefit of the arbitration clause, the case will fall within s.1(1)(a) of the Act. In this situation, if A sues C in tort in court, C can enforce his right to arbitrate by applying for a stay of the court proceedings. However, since there is nothing treating C as a party to the arbitration agreement for the purpose of the Arbitration Act 1996, C cannot apply for a stay under s.9 of the Arbitration Act 1996 but can rely on the court's inherent jurisdiction to grant a stay under the common law only. This duty under common law is discretionary instead of mandatory, which is not safe for C. The addition the terms that "the third party shall, if he exercises the right, be treated for the purpose of [the Arbitration Act 1996] as a party to the arbitration agreement" by s.8(2) is just to make sure that C could rely on the court's mandatory duty to stay under s.9 of the Arbitration Act 1996.

It can be seen that s.8 is actually not designed to set out the requirements for a third party to enforce or to be bound by an arbitration agreement, but only to bring the Arbitration Act 1996 in. As will be discussed later under 4.6.2, this also explains why,

[426] House of Commons Debate 01 November 1999 vol 337 col 24, see http://hansard.millbanksystems.com/commons/1999/nov/01/arbitration-provisions; House of Lords Debate 10 November 1999 vol 606 col 1362, see http://hansard.millbanksystems.com/lords/1999/nov/10/commons-amendment-1.

although no express provision regarding the exclusive jurisdiction clause has been made, the clause still falls within the mechanism of the 1999 Act.

4.5.5 Summary

Further to discussion in this chapter, it can be seen that s.8 of the 1999 Act has resolved the difficulties with the arbitration clauses mentioned under 4.2 and 4.3 by two means. Firstly, it manages to split the benefits and the burdens of the arbitration clauses by categorising them into two types based on the parties' intentions. One type of the arbitration clause is the procedural condition for the third party's enforcement of his substantive rights. The other type of arbitration clause is the procedural benefit given to the third party. Both of the two types are actually a particular application of the mechanism under s.1 of the Act. Secondly, it ensures the enforcement of the arbitration clauses by a stay of proceedings under s.9 of the Arbitration Act 1996 by expressly treating the third party as a party to the arbitration agreement. In order to ensure that the courts would give effect to the parties' intentions, the contracting parties are advised to use unequivocal language in their contract to the effect that the arbitration clause falls within one of the two types. Sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause, by using the most explicit language to give the third parties entitlement to enforce the arbitration clause, falls within s.8(2) of the Act. It follows that if the cargo claimants sue a third party in an English court, the third party is given a choice as to whether to enforce the arbitration clause or not. If he chooses to enforce it, he will be taken by s.8(2) as a party to the arbitration agreement for the purpose of the Arbitration Act 1996, and therefore can apply for a stay of proceedings under s.9 of the Arbitration Act. However, the cargo claimants cannot rely on this clause to force the third party to arbitrate.

4.6 Exclusive jurisdiction clause under the 1999 Act

As discussed above under 4.2.2, the Law Commission made no distinction between the arbitration clause and the jurisdiction clause in their Report and the Draft Bill expressly excluded both of the clauses. However, the final 1999 Act contains express provisions on the arbitration clause but makes no explicit reference to the jurisdiction clause. This gives one the impression that the jurisdiction clause does not fall within the 1999 Act. However, in the author's view, if the jurisdiction clause were to be excluded, the

provision which expressly excluded it in the Draft Bill – cl.6(2)(e)[427] - would not have been eliminated by the 1998 Bill and never appeared in the final Act. As such, the jurisdiction clauses must be within the 1999 Act.[428] Moreover, the arbitration clause and jurisdiction clause share some similarities in their characters and cause similar difficulties. Therefore, if the arbitration clause is seen as lying within the scope of the 1999 Act, there is no reason as to why the jurisdiction clause is not. The inclusion of the arbitration clause by the final Act actually means that most of the Law Commission's reasons for excluding arbitration clause in their Report[429] are superseded. The same should also be held true for the jurisdiction clause.

Sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause makes express reference not only to the arbitration clause but also to the jurisdiction clause. In this part, discussion as to whether the sub-paragraph falls within the 1999 Act or not will be examined. In order to do this, the position of the jurisdiction clause under the Act will be first discussed given that there is no express provision for it in the Act. Furthermore, suggestions will be made as to how the Act should be understood appropriately in order to resolve the difficulties with the jurisdiction clauses.

4.6.1 Analogous to section 8

If it is correct to say that the exclusive jurisdiction clause lies within the scope of the 1999 Act, whether or not a third party could enforce or be bound by it should depend on whether it falls within the Act's mechanism. The mechanism of the Act is provided by s.1. It only allows a third party to enforce a "pure" benefit (s.1(1)(a) or s.1(1)(b))[430] or to be bound by the condition of enforcing a substantive right (s.1(4)).[431] However, it does not allow a third party to be bound by "pure" burden. It follows that if the jurisdiction clause is a "pure" burden, the Act will not allow a third party to be bound by it. If it is a "pure" benefit following within s.1(1)(a) or s.1(1)(b), the Act will allow a third party to enforce it. If it is a condition for enforcing a substantive right falling within s.1(4), the

[427] See 4.2.2.
[428] Catharine Macmillan, "A Birthday Present for Lord Denning: The Contracts (Rights of Third parties) Act 1999" (2000) 63 (5) MLR 721, 733; Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.107 and 5.123-5.125; Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 374-375, the author there suggested that according to para 32 of the Explanatory Notes, the exclusive jurisdiction clauses were now covered by the Act.
[429] See above 4.2.2.
[430] See above 2.2.
[431] See above 4.4.1.

Act will allow a third party to be bound by it but only if he is to enforce that right.[432] Since, as discussed above under 4.5.4, the stipulations on arbitration clause are also based on this underlining mechanism, the rules on jurisdiction clause under the Act should be analogous to those on arbitration clause under s.8.[433]

Support for this submission can actually be found in the Act's Explanatory Notes. In order to facilitate the enforcement by the third party of his rights, ss1(5), 3(3) and (4) give him the remedies, defence or set-off available to the promisee "as if he had been a party to the contract". However, the Law Commission made it clear that these sections only intend to give the third party a right to enforce the term, rather than to deem him an actual party to the contract, nor to give him the "full contractual rights".[434] Therefore, for the avoidance of contradiction, s.7(4) expressly provides that the third party "shall not, by virtue of s1(5) or 3(4) or (6), be treated as a party to the contract for the purpose of any other Act". The Explanatory Note to this sub-section provides that Art.17 of the Brussels Convention is just one of such other Acts.[435] This Explanatory Note means that the third party shall not be treated as a party to the exclusive jurisdiction clause for the purpose of Art.17 of the Brussels Convention simply by relying on the 1999 Act. More importantly, it further states that:[436]

> "the question of whether a third party given a *procedural right* to enforce a jurisdiction agreement under *section 1* of the 1999 Act falls within Article17, or whether a third party with a substantive right under *section 1*, subject to a jurisdiction clause, is 'bound' by that clause under Article 17 (applying a *conditional benefit* analysis) is a matter for the European Court of Justice. Relevant decisions of the ECJ include *Gerling v il Tesoro* [1983] ECR 2503 and *Tilly Russ* [1984] ECR 2417".

This quoted passage does indeed suggest that there are possibilities for a third party being given the procedural right to enforce a jurisdiction agreement under s.1 which is

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[432] Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.123; Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 375.
[433] See also Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" [2000] LMCLQ 540, 552 at footnote 28: "an analogous approach to that taken in section 8 to arbitration clauses should, in principle, also apply to jurisdiction clauses".
[434] Law Commission Report No. 242, [13.2]; recommendation (44).
[435] Explanatory Notes, [32]. Another example is section 3 of the Unfair Contract Terms Act 1977: see Law Commission Report No. 242, [13.9].
[436] Explanatory Notes, [32].

analogous to s.8(2). Furthermore, it is possible that a third party could be given a substantive right under s.1 but still be subject to the jurisdiction clause, which just applies a conditional benefit analysis analogous to s.8(1). It also suggests that if the jurisdiction clause is workable upon the third party under either of these two situations, the question as to whether a third party could enforce or be bound by that exclusive jurisdiction clause for the purpose of Art.17 should be decided by the European Court of Justice (the "ECJ") based on the relevant ECJ authorities. Such ECJ authorities will be discussed shortly under 4.6.3 and 4.6.5.

4.6.2 Reasons for non-express provision on jurisdiction clause

One argument against the inclusion of the jurisdiction clause by the 1999 Act might deal with the issue that if the clause is included, the Act should have expressly referred to it and there should have been an express provision for it. When suggesting the addition of the new clause on arbitration clause during the Report stage, the Lord Chancellor's Department did not mention any jurisdiction clause at all, and no reason for this neglect was given. In the author's view, the reason why specific provisions were provided in the arbitration clause but not in the jurisdiction clause by the 1999 Act was due to the requirement for enforcing the arbitration clause under the Arbitration Act 1996, which is stricter than the requirement for enforcing the exclusive jurisdiction clause under the Brussels Convention.

When the 1999 Act came into force, the Brussels Convention had not been replaced yet. As mentioned above under 4.3.1, to make the court of a Member State designated by the jurisdiction agreement have exclusive jurisdiction, Art.17 of the Brussels Convention requires that the jurisdiction agreement must be "in writing or evidenced in writing". The ECJ has decided that the purpose of this requirement is to ensure that the "*consent*" of the parties to depart from the normal rules of jurisdiction laid down by the Convention[437] and to submit their disputes to the designated court is "clearly and precisely demonstrated and is actually established".[438] Therefore, unlike s.9 of the

[437] The normal rule under the Regulation is that a defendant domiciled in a Member State must be sued in the courts of that State: Brussels Convention, Art.2; Brussels recast Regulation, Art.4.

[438] Case 201/82 *Gerling Konzern Speziale Kreditversicherungs-AG v Amministrazione del Tesoro dello Stato* [1983] ECR 2503, [13]; see also Case 24/76 *Estasis Estasis Salotti di Colzani Aimo e Gianmario Colzani v. Rtiwa Polstereimaschinen G.m.b.H.* [1976] ECR 1831, [7]; Case 25/76 *Galeries Segoura Sprl. v. Rahim Bonakdarian* [1976] ECR 1851, [6]; Case 784/ 79 *Porta-Leasing GmbH. v. Prestige International SA* [1980] ECR 1517; Case 71/83 *Partenreederei ms Tilly Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR 2417, [14]. Case C-106/95 *Mainschiffahrts-*

Arbitration Act 1996, Art.17 of the Brussels Convention does not require that the party who applies for or be granted a stay of proceedings must be "a party to the jurisdiction agreement". Also, it does not require that the parties must have made a "contract".[439] Instead, it simply requires "clear consent" from the parties to submit their disputes to the designated court.

As submitted above under 4.5.4, s.8 of the 1999 Act is merely an application of s.1, and its mere purpose is to make sure that the third party is treated as a party to the arbitration agreement so that a stay of proceedings could be granted by or against him under s.9 of the Arbitration Act. Since a third party does not need to be treated as a party to the exclusive jurisdiction clause for applying for or being granted against a stay under Art.17 of the Brussels Convention, the sole purpose for the addition of s.8 does not exist at all in the exclusive jurisdiction clause. Therefore, there is no need to have a specific provision on the jurisdiction clause in the 1999 Act.

4.6.3 Positive procedural right under section 1(1)(a) or sections 1(1)(b) and (2)

Since the 1999 Act allows to confer the "pure" benefit on the third party, if the jurisdiction clause is the term which provides C with a benefit within s.1 of the Act, C might be able to claim the benefit of it.[440] This is actually analogous to s.8(2) which confers the "pure" benefit of an arbitration clause on C.[441] To be more specific, if, as s.1(1)(a) provides, the AB contract expressly provides that C may enforce the jurisdiction clause, or if, as s.1(1)(b) provides, the jurisdiction clause purports to confer a benefit of jurisdiction clause on him, and on a proper construction of the contract it does not appear that the parties did not intend the jurisdiction clause to be enforceable by C (s.1(2)), C can enforce the jurisdiction clause.[442]

Sub-paragraph (c) of the IGP&I/BIMCO's new clause provides that

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Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL [1997] ECR I-911, [15]; Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* [1999] I.L.Pr. 492, [19]; Case C-543/10 *Refcomp SpA v Axa Solutions Assurance SA* [2013] 1 Lloyd's Rep 449, [28].

[439] Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 2.135.

[440] Catharine Macmillan, "A Birthday Present for Lord Denning: The Contracts (Rights of Third parties) Act 1999" (2000) 63 (5) MLR 721, 733: "it may be that a third party could claim the benefit of a jurisdiction agreement if this is the term which provides them a benefit within section 1 of the Act."

[441] Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 376 footnote 125.

[442] See Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 2.135 and 4.47. See above 2.2.

"(c) ***the right to enforce any jurisdiction… provision*** *contained herein shall also be available and shall extend to every such Servant of the carrier".*

The sub-paragraph expressly provides that the third parties employed by the carriers are entitled to enforce the jurisdiction clause in the bill. This satisfies s.1(1)(a) of the Act. As such, the situation under that sub-paragraph falls within s.1(1)(a) of the Act, and the third party is given a positive procedural right to enforce the jurisdiction clause. Moreover, by using such explicit language, the new clause prevents the opportunities that the court would incline to find that the parties did not intend the jurisdiction clause to be exercisable by the third party (s.1(2)) when the third party argues that the clause purports to confer the benefit of a jurisdiction clause on him (s.1(1)(b)). So far, some shipping companies have endorsed this method in their standard terms of carriage, for instance, Maerskline's terms,[443] UASC's Global Bill of lading terms[444] and Hapag-Lloyd's terms.[445]

It is also submitted that clear language to allow the third party to enforce the jurisdiction clause as to what sub-paragraph (c) does is what is precisely required by Art.25 of the Brussels Regulation. As mentioned above under 4.3.1, the issues as to where the jurisdiction agreement between A and B designates the court of an EU Member State to have jurisdiction, whether that court has exclusive jurisdiction or not and whether C can enforce the jurisdiction agreement by applying for a mandatory stay depends on whether the "in writing" requirement under Art.25 of the Regulation can be fulfilled. As the Explanatory Note has suggested,[446] the relevant authorities of ECJ should be considered in these circumstances. Among those ECJ authorities, only *Gerling v il Tesoro*[447] deals with the enforcement of the pure benefit of a jurisdiction clause by the third party.

In *Gerling v il Tesoro*, the assured, on behalf of himself and the third party beneficiaries, entered into an insurance contract with the insurer. The insurance contract contained a jurisdiction clause, which provided that, in case of a dispute between the insurer and the third party beneficiaries represented by the assured, "the [third party beneficiaries] shall be *entitled to insist on proceedings before the court having*

[443] Maerskline Terms, cl 4(c).
[444] UASC's Global Bill of lading terms, cl 5.3.
[445] Hapag-Lloyd's Terms, cl 4(2).
[446] Explanatory Notes, [32]. See above 4.6.1.
[447] Case 201/82 *Gerling Konzern Speziale Kreditversicherungs-AG v Amministrazione del Tesoro dello Stato* [1983] ECR 2503; [1984] 3 CMLR 638.

jurisdiction in the country in which it has its registered office". Relying on this clause, a beneficiary, which had its registered office in Italy, instituted proceedings in Italy against the insurer for the latter's insurance undertakings. The insurer challenged the jurisdiction of the Italian court and argued that the jurisdiction clause was not signed by the third party beneficiary so it failed to satisfy the "in writing" requirement under Art.17 of the Brussels Convention. The Italian court requested the ECJ to interpret Art.17. The ECJ held that the provision must be interpreted as meaning that[448]

> "in the case of a contract made by a party for himself and for the benefit of third parties and containing a jurisdiction clause relating to actions likely to be brought by the said third parties the latter may rely on application of the clause provided that the parties to the contract have made it or approved in writing."

This means that so long as the jurisdiction clause between the contracting parties is made in writing and the contracting parties' consent that the third party may enforce the benefit of the jurisdiction clause has been clearly and precisely manifested, the "in writing" requirement under Art.17 will be satisfied.[449] In this situation, the third party will not be subject to the same "in writing" requirement.[450] Since such a consent has been clearly and precisely manifested from the jurisdiction clause in *Gerling v il Tesoro*, the Italian court held that the third party beneficiary was entitled to bring proceedings to the Italian court. After this case, there have never been any dispute before the ECJ on the enforcement of the benefit of a jurisdiction agreement by a third party under the Brussels Regulation.[451] This is presumably because the principle set out by it is well-established enough.[452]

Gerling v il Tesoro shows that in order for Art.25 of the Brussels recast Regulation to be satisfied so that a third party can enforce the exclusive jurisdiction clause, the exclusive jurisdiction clause must be in writing between the contracting parties, and the contracting parties must expressly provide that the third party may enforce the clause. It follows that in the case of carriage of goods by sea, where sub-paragraph (c) of the

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[448] Ibid, 647 (Sig Federico Mancini).
[449] Ibid, [20].
[450] Ibid, [14].
[451] Most of the disputes are on the issue as to whether a third party may be bound by the jurisdiction agreement under the Brussels Regulation, see later 4.6.5.
[452] See also Case C-112/03 *Société financière et industrielle du Peloux v Axa Belgium* [2005] ECR I-3707, [23] and [42]: "It is clear from the case-law of the Court that a beneficiary who is not a signatory to a contract concluded by one person on behalf of another may rely on the jurisdiction clause…"

IG&PI/BIMCO's new Himalaya clause is used, which expressly provides that the third parties are entitled to enforce the exclusive jurisdiction clause, both s.1(1)(a) of the 1999 Act and Art.25 of the Regulation will be fulfilled.

Where there is such a new clause in the bill, and the third party has a procedural benefit to enforcing the jurisdiction clause, in order to prevent the pure burden of the clause being imposed (which is not allowed by the 1999 Act), he should not be compelled to submit his claim to the designated court. Instead, analogous to s.8(2), he should be given a choice as to whether or not enforce the exclusive jurisdiction clause.[453] This would be so, for instance, if the bill contains an exclusive Italian jurisdiction clause while the cargo claimant sues the third party in England. It follows that that same third party can challenge the jurisdiction of English court and enforce the jurisdiction clause by applying for a stay of proceedings before the English court. If he so challenges, he will be considered as having made his choice. In this situation, he could not later argue that he should not be bound by the clause so as to reject to submit to the Italian court. This approach can eliminate the Law Commission's reason (2) as mentioned earlier under 4.2.2 that A would be left with no forum to enforce his claim against C.

4.6.4 Benefit of exclusion or limitation under section 1(6)?

As discussed above in Chapter 2, by s.1(6), the 1999 Act allows C to enforce the negative rights of exclusion or limitation in the AB contract.[454] When C is sued by A, a problem arises as to whether he can rely on the jurisdiction clause as an exclusion or limitation. Under English law, the widely-accepted view deems that a jurisdiction clause cannot be treated as a term of "exclusion or limitation".[455] So C cannot enforce a jurisdiction clause under s.1(6). Thus, even if sub-paragraph (c) of the new clause

[453] Catharine Macmillan, "A Birthday Present for Lord Denning: The Contracts (Rights of Third parties) Act 1999" (2000) 63 (5) MLR 721, 733: "At the same time, however, the third party could not necessarily be compelled to either bring or defend an action in another jurisdiction. This would amount to a burden upon the third party."
[454] See above 2.3.
[455] e.g. Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.47; Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) para 18-092 footnote 557. *Cf* Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 375: "the point is debatable".

makes specific reference to the jurisdiction clause, it does not fall within s.1(6)[456] of the Act but only falls within s.1(1)(a).

4.6.5 Conditional benefit under section 1(4)

S.1(4) of the 1999 Act allows imposing conditions on C to his enforcement of substantial benefit. Such a condition can be the submission of his claim to arbitration. It is submitted that there is no reason why the condition cannot be the submission of his claim to a particular court. As such, if the AB contract gives a substantive right to C, s.1(4) of the Act allows A and B to agree that C's enforcement of that substantive right is subject to the jurisdiction clause.

4.6.5.1 Test

As discussed above under 4.5.1.1, the Explanatory Note to s.8(1) regarded the conditional benefit approach applied to arbitration clause analogous to assignment analysis. Under English common law, the assignment approach which applies to the arbitration clause is also applicable to the jurisdiction clause. In *Glencore International AG v Metro Trading International Inc*,[457] the sellers' bank, which was the assignee of the proceeds from a sale of oil, was held to be bound by the exclusive English jurisdiction clause in the sale contract when seeking to recover the price of the oil from the buyers. Moore-Bick J said that as long as the jurisdiction clause between the original parties was clearly established as required by Art.17 of the Brussels Convention, an assignee arising under that contract was bound by that clause if he sought to enforce the substantive right under that contract.[458] Professor David Joseph also expressed the same view in the third edition of *Jurisdiction and Arbitration Agreements and their Enforcement*:[459]

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[456] Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) para 18-092 footnote 557.
[457] [1999] 2 Lloyd's Rep 632.
[458] Ibid, 646 (Moore-Bick J).
[459] David Joseph, Jurisdiction and Arbitration Agreements and their Enforcement (3rd edn, Sweet & Maxwell 2015) 7.23. See also *Aspen Underwriting Ltd v Kairos Shipping Ltd (The Atlantik Confidence)* [2017] EWHC 1094 (Comm); [2018] 1 All ER (Comm) 228, [48]-[51], where the substantive right was not enforced by the assignee, so the assignee was held by Teare J not bound by the exclusive jurisdiction clause. However, by citing David Joseph's passage, Teare J tended to accept that where there was an exclusive jurisdiction clause in the assigned contract and the assignee sought to enforce the assigned right under that contract, he would be bound by that exclusive jurisdiction clause.

> "…in the case of an assignment of a right which as a matter of English law is subject to the obligation to bring proceedings in a chosen forum, the right can only be enforced or asserted subject to the choice of forum obligation…"

Under the assignment approach, as long as the assignee enforces the substantive rights, he will be bound by the jurisdiction clause, no matter whether the contracting parties have such an intention or not. However, in the author's view, similarly to the position of the arbitration clause under s.8(1), this assignment approach is only confined to cases whereby the third party beneficiary is the assignee of the main contract, and should not be broadly applied to other contexts.[460] Since the 1999 Act does not operate by way of assignment, it is inappropriate to use this approach to explain any provision under the 1999 Act, including the "conditional benefit" stipulation under s.1(4). Instead, accepted during the House of Lords debate, whether the third party's benefit is subject to the conditions under s.1(4) is "a straightforward question of construction of the contract".[461] As such, similar to the situation under s.8(1) regarding the arbitration clause, in order to decide the question as to whether the third party's enforcement of the substantive right is subject to the jurisdiction clause or not, the courts need to ascertain the true intentions of the parties by construing the contract.[462]

It follows that in order to make sure that C's substantive right is subject to the jurisdiction clause, similarly to the suggestion under s.8(1),[463] unambiguous language to this effect should be used. For instance, in the substantive terms which confer benefit, the parties may provide that "the third party's enforcement of this substantive right is subject to the jurisdiction clause", or in the jurisdiction clause, the parties may agree that "any disputes arising under this contract, including the third party's enforcement of his rights under the contract, shall be decided by X court".

An example of such a clause to this effect can be found in *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd.*[464] In that case, the

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[460] See above 4.5.1.1.
[461] House of Lords Debate 27 May 1999 vol 601 col 1050.
[462] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [28] (Tomlinson LJ); Anthony Diamond QC, "The Third Man: The 1999 Act Sets Back Separability?" (2001) 17 (2) Arbitration International 211, 214; Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 421; James Hayton, "Hijackers and Hostages: Arbitral Piracy after *Nisshin v Cleaves*" [2011] LMCLQ 565. Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 4.47.
[463] See above 4.5.1.1.
[464] [2009] EWHC 2409 (Comm); [2010] 2 All ER (Comm) 514.

International Swaps and Derivatives Association Master Agreement contained a provision entitled "Jurisdiction", which required any disputes arising out of this contract be submitted to the exclusive jurisdiction of the English courts. It also included a specific provision entitled "Third Party Rights", which expressly provided that:

> "an Affiliate [the third party in that case] may enforce the rights expressly granted to an Affiliate under this Agreement, if any, *subject to* and *in accordance with* … [the exclusive jurisdiction clause] ..."

Construing this provision, Teare J said that the provision showed the contracting parties' clear contemplation that if the third party Affiliate wished to exercise a right expressly granted to him under the contract, he must submit to the English courts.[465]

Moreover, unequivocal language can help resolve the Law Commission's concern towards the conditional benefit approach. As discussed above under 4.5.3, the main reason why the conditional benefit approach was found unworkable in the Law Commission's Report was due to the fact that the Law Commission invariably regarded every exclusive jurisdiction clause as the procedural condition for the third party's substantive right, even if the contracting parties did not have such an intention. It follows that if the contracting parties have expressed this intention in their contract, those reasons against the conditional benefit approach would no longer exist. The clearer the use of language, the clearer the parties' intention to subject the third parties' substantive right to the jurisdiction clause being inferred. Also, if the explicit language to the effect that the third party's enforcement of the substantive right is subject to the exclusive jurisdiction clause is used, the situation can be regarded as analogous to *Scott v Avery* type arbitration clause. This could supersede the Law Commission's reason (1), as mentioned above under 4.2.2, for excluding the jurisdiction clause that the clause could not be regarded as a mere defence to an action.

Furthermore, clear language is what Art.25 of the Brussels Regulation requires. Where the jurisdiction agreement between A and B designates the court of an EU Member State to have jurisdiction, whether that court has exclusive jurisdiction and whether A or B can enforce the jurisdiction agreement by applying for a mandatory stay against C or not depends on whether the "in writing" requirement under Art.25 has been fulfilled. As

[465] Ibid, [28].

the Explanatory Note has suggested,[466] in such circumstances, in order to decide whether or not a third party who is given a substantial benefit is bound by the jurisdiction clause under Art. 25, the relevant authorities of the ECJ should be considered.

The first ECJ authority on binding a third party to the exclusive jurisdiction clause, which is also one of the authorities mentioned by the Explanatory Note, was *Tilly Russ*.[467] In that case, the bill of lading contained a jurisdiction clause which stated that any dispute under the bill would be decided on by the courts of Hamburg. Faced with damages to goods, the bill of lading holder sued the carrier in the Antwerp Commercial Court. Relying on the jurisdiction clause in the bill, the carrier argued that the Antwerp court had no jurisdiction by reason of Art.17 of the Brussels Convention. The Court of Cassation of Belgium referred the case to the ECJ for a preliminary ruling on whether a bill of lading could be construed as providing proof of an agreement regarding jurisdiction as between a carrier and the third party holder of the bill so as to fulfil Art.17. The ECJ held:[468]

> "the conditions laid down in article 17 of the Convention are satisfied provided that the clause has been adjudged valid as between the carrier and the shipper and provided that, by virtue of the *relevant national law*, the third party, upon acquiring the bill of lading, *succeeded* to the shipper's rights and obligations".

Later ECJ authorities have more than once reaffirmed this view.[469] It can be seen that as long as the jurisdiction clause in the bill of lading between the shipper and the carrier fulfils the "in writing" requirement under Art.17, whether or not a third party bill of lading holder is bound by the jurisdiction clause should be decided by reference to the applicable national law over whether the bill of lading holder succeeds to the shipper's rights and obligations.[470] If under the applicable national law, he succeeds to the rights

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[466] Explanatory Notes, [32]. See above 4.6.1.
[467] Case 71/83 *Partenreederei ms Tilly Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* [1984] ECR 2417; [1985] QB 931.
[468] Ibid, [26].
[469] Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA* [1999] I.L.Pr. 492, [41]; Case C-387/98 *Coreck Maritime GmbH v. Handelsveem BV* [2000] ECR I-9337, [23]-[27].
[470] The question as to which national law is applicable for the purpose of determining the rights and obligations of a third party bill of lading holder should be decided by the national court applying its rules of private international law: Case C-387/98 *Coreck Maritime GmbH v. Handelsveem BV* [2000] ECR I-9337, [30]. It has been suggested that it might be the law which governs the bill of lading or other contract succeed to it: Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 2.125.

and obligations of the shipper,[471] he will be bound by the jurisdiction clause. It is not necessary to ascertain whether he has the actual notice of or has accepted the jurisdiction clause in the bill of lading.[472]

It should be noted that the ECJ later suggested that the principle herein must be assessed based on the "very specific nature of bills of lading".[473] In the unique case of the bill of lading, most legal systems of member states allowed the shipper to transfer all the rights and obligations of the shipper under the bill to the holder. It was only in light of this relationship of substitution between the holder and the shipper that the court considered the holder to be bound by the jurisdiction clause.[474] Outside of this relationship, whereby a third party cannot in law be substituted for a contracting party, his actual acceptance of the exclusive jurisdiction clause as required by Art.17, must be shown.[475] Therefore, with regard to authorities beyond the relationship between the holder and shipper, where no actual acceptance of the exclusive jurisdiction clause takes place, the third parties were held not to be bound by it.[476]

It can be seen that in order for Art.25 of the Regulation to be satisfied so that a third party is "bound" by the jurisdiction clause, except for cases whereby the third party is in law substituted for the contracting party, he must have expressly accepted to be bound by the jurisdiction clause.[477] Presumably, the same principle shall apply to the imposition of the jurisdiction clause on the third party as a condition for his enforcement of the substantive right. Since the working of the 1999 Act entails not

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[471] For instance, the English Carriage of Goods by Sea Act 1992, ss2 and 3.
[472] Case C-387/98 *Coreck Maritime GmbH v. Handelsveem BV* [2000] ECR I-9337, [25]; *Knorr-Bremse System for Commercial Vehicles Ltd v Haldex Brake Products GmbH* [2008] EWHC 156.
[473] Case C-543/10 *Refcomp SpA v Axa Solutions Assurance* SA [2013] 1 Lloyd's Rep 449, [35].
[474] Ibid.
[475] Ibid, [35] and [41]; Case C-387/98 *Coreck Maritime GmbH v. Handelsveem BV* [2000] ECR I-9337, [2001] I.L.Pr. 39, [26].
[476] For instance, in Case C-543/10 *Refcomp SpA v Axa Solutions Assurance SA* [2013] 1 Lloyd's Rep 449, the sub-buyer was not regarded as a substitute to the initial buyer, so he was not bound by the jurisdiction clause in the original sale contract. In Case C-112/03 *Societe Fianciere et Industrielle du Peloux v Axa Belgium* [2005] ECR I-3707, a beneficiary under an insurance contract who has not "expressly subscribed" to a jurisdiction clause in that contract was held not bound by that clause: at [43]. Similarly, in an English case *Andromeda Marine SA v OW Banker & Trading A/S (The Mana)* [2006] EWHC 777 (Comm); [2006] 2 All E.R. (Comm) 331, the owners of a vessel were held not bound by a jurisdiction clause in a bunker supply contract between the charterers and suppliers since the owners had not clearly and precisely agreed to be bound by that jurisdiction clause: at [21] (Morison J). Recently, in *The Atlantik Confidence*, Teare J held that there was no evidence that the third party bank had expressly recognised the exclusive jurisdiction clause in the insurance policy, so it could not be said that it had "expressly subscribed to the jurisdiction clause": [2017] EWHC 1904 (Comm); [2018] 1 All ER (Comm) 228, [54].
[477] Simone Lamont-Black, "Third Party Rights and Transport Documents under the DCFR – Potential for an Appropriate and Effective EU Unification and an Improvement for the UK?" (2015) 21 JIML 280, 291.

substituting the third party for the contracting party, in order to be bound by the jurisdiction clause as the condition, the third party must have expressly accepted that he would submit to a particular court in the member state so as to enforce the substantive right. This requires an explicit stipulation in the contract between the contracting parties to the effect that a third party can enforce the substantive rights according to the jurisdiction clause only.

If it is established that C's right to enforce the substantive right is subject to an exclusive jurisdiction clause which requires the claim to be brought in, e.g., Italian court, the jurisdiction clause will not be regarded as the pure burden on the third party, but a condition which he must fufil in order to enforce his substantive right. It follows that, analogous to s.8(1), C is only bound by the jurisdiction clause if he seeks to enforce that substantive right, not otherwise. If C initiates the claim to enforce that right in England, A is in fact given a choice as to whether or not to enforce the exclusive jurisdiction clause against C. On the one hand, A can apply to that English court for a stay of proceedings.[478] On the other, A may allow C to do so and thus decide not to apply for a stay. If it involves an English exclusive jurisdiction clause, and if C sues before an English court, A might not be able to contest the jurisdiction of the English court.[479]

Sub-paragraph (c) of the IGP&I/BIMCO's new clause only extends the benefit of the jurisdiction clause to the third parties. It does not confer any positive substantial benefits to the third party, nor is there anything in it showing that the enforcement of the substantive benefit by those third parties should be subjected to the jurisdiction clause. As such, the sub-paragraph does not fall within the situation under s.1(4) of the Act. Presumably, the cargo claimants cannot compel the third party to be sued in the designated court based merely on the exclusive jurisdiction clause.

4.6.5.2 Negative rights

As discussed above under 4.5.1.2, it has been decided by *Fortress Value* that A and B could not only subject C's positive right but also his negative right to arbitration.[480] The same should be held true for the jurisdiction clause, for the same reason that the s.1(6)

[478] See also Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999 (LLP Ltd, London 2000) 5.124.
[479] This situation is analogous to that in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 All ER (Comm) 481.
[480] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367; [2013] 1 WLR 3466, [28] (Tomlinson LJ).

of the 1999 Act makes no distinction between a positive right of action and a negative right of contractual defence. Also, s.1(4), which enacts the "conditional benefit", does not limit itself to the positive rights.

Similarly to what is required for subjecting the third party's enforcement of the negative right to arbitration, very clear language is also needed in order to ensure that the third party's enforcement of the negative rights is subject to the jurisdiction clause. The reasons are analogous to those for subjecting the negative right to the arbitration clause. Firstly, it might be more difficult to infer that the parties intended the reliance on the contractual defence by the third party to be subject to the exclusive jurisdiction clause than to infer that the parties intended the enforcement of the positive right of action to be so subject. Secondly, since the third party cannot be compelled to submit the dispute to a jurisdiction he has never consented, the designated court only has the jurisdiction over the disputes directly relevant to the enforcement of the contractual defence, not over other disputes. This might lead to the fragmented dispute resolution.[481] As discussed above under 4.6.5.1, an additional reason relates to Art.25 of the Brussels Regulation which requires the necessity for clear words in order to bind the third party to the jurisdiction clause.

If explicit language is used to this effect, and if A sues C in accordance with the jurisdiction clause, it might be hard for C to challenge the jurisdiction regarding the disputes directly relating to the enforcement of the contractual defence. He might, nonetheless, challenge the jurisdiction concerning other disputes. In this situation, C will not be regarded as being forced to submit to that jurisdiction as concerned by the Law Commission.[482] This is because if C had read the contract, he would have known that such a limit exists regarding him invoking the contractual defence only in the designated court. In this sense, he is not purely burdened but is able to enforce the benefit of those exclusions or limitations. If A sues C in another jurisdiction, presumably C could challenge the jurisdiction over disputes directly relevant to the enforcement of the contractual defence and seek a stay of proceedings from that court,

[481] Ibid, [36] (Tomlinson LJ); see above 4.5.1.2.
[482] See above 4.2.2, reason (3).

provided that that local court did not regard themselves as having jurisdiction on any other grounds.[483]

Sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause provides third parties with both contractual defences, e.g., exclusions, limitations, defences and immunities, and the right to enforce any jurisdiction provision. However, there is no explicit language in the clause to the effect that the enforcement of those contractual defences should be subject to the jurisdiction clause. As such, the clause does not fall within s.1(4) but within s.1(1)(a) of the 1999 Act. This is analogous to the situation of the arbitration clause as discussed above under 4.5.2. In these circumstances, the third party's enforcement of the exclusions and limitations are not subject to the exclusive jurisdiction clause. Instead, he has a procedural right to enforce the exclusive jurisdiction clause. In light of this, the discussion made under 4.6.3 shall apply.

4.6.6 Summary

Although the 1999 Act makes no express provision for the jurisdiction clause, the clause is still within the Act's mechanism. The reason why the Act does not make specific provisions for it is due to the fact that, unlike the arbitration clause, the person who enforces or is bound by the jurisdiction clause is not necessarily a party to the jurisdiction clause. Therefore, so long as the case falls within the mechanism of the Act, the third party may enforce or be bound by the jurisdiction clause.

After analysing the different possibilities, it can be seen that an analogous approach to s.8 regarding the arbitration clause is also applicable to the jurisdiction clause. Analogous to s.8(1), the contracting parties may provide the third party with the substantive right and subject his enforcement of that substantive right to the jurisdiction clause. The substantive right can be both positive and negative. Analogous to s.8(2), the contracting parties may give the third party a pure procedural right to enforce the jurisdiction clause. Similar to the suggestions made under s.8, unambiguous language shall be used to ensure that the jurisdiction clause falls within one of the two situations. Where clear language is used, similarly to the arbitration clause,[484] the difficulties mentioned by the Law Commission as previously listed under 4.2.2 will be resolved and

[483] Rob Merkin, "Contracts (Rights of Third Parties) Act 1999" in Rob Merkin (ed), *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP Ltd, London 2000) 5.125 and footnote 162.
[484] See above 4.5.3.

Art.25 of the Brussels Regulation will also be fulfilled. Moreover, the analogous approach, when applied to the jurisdiction clause, will give rise to no procedural difficulties as s.8 itself, e.g., the appointment of the arbitral tribunal.[485] Sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause, by using the most explicit language to give the third parties the entitlement to enforce the jurisdiction clause, falls within s.1(1)(a) of the Act. It follows that if, for instance, the jurisdiction clause gives the Italian courts exclusive jurisdiction, while the cargo claimants sue a third party in an English court, the third party is given a choice as to whether they wish to enforce the jurisdiction clause. If he chooses to enforce the clause, he may apply for a stay of proceedings to that English court. However, the cargo claimants cannot rely on this clause alone to force a third party to submit to the Italian courts if the latter has not chosen to enforce the jurisdiction clause.

4.7 Common law Himalaya clause approach

According to the Law Commission, the application of the 1999 Act can be contracted out.[486] Where the shipper and the carrier expressly exclude the Act, the above submissions on jurisdiction clause and s.8 under the Act will no longer apply. In this situation, reference should be made to the common law Himalaya clause approach. An examination of whether and how the sub-paragraph (c) of the IGP&I/BIMCO's new clause ensures that the third parties could enforce the exclusive jurisdiction clause and arbitration clause pursuant to the common law Himalaya clause approach will take part in this section.

4.7.1 Availability of the exclusive jurisdiction and arbitration clauses to the third party

As the Privy Council in *The Mahkutai* and the Court of Appeal in *Bouygues v Caspian* have decided, under English law, a Himalaya clause written in the general terms, e.g., "exceptions, limitations, provisions, conditions and liberties", does not extend the benefit of an exclusive jurisdiction clause, or presumably an arbitration clause to the third parties.[487] In the author's view, while the decisions of the two cases are correct,

[485] See above 4.2.2, reason (5).
[486] Law Commission Report No. 242, [7.18(iii)].
[487] See above 1.3.1.2.3.

they were decided upon a construction of the particular Himalaya clauses used.[488] In fact, a Himalaya clause could be rewritten to extend the benefit of an exclusive jurisdiction clause[489] and an arbitration clause.[490] This was also the view taken by Hobhouse LJ in the Court of Appeal of *Bouygues v Caspian*. Although Hobhouse LJ held that the exclusive jurisdiction clause did not fall within the Himalaya clause in that case, he recognised that it would be possible to draft a Himalaya clause, by invoking which the third party could take the benefit of the jurisdiction clause.[491] It is submitted that the IGP&I/BIMCO's new Himalaya clause is just such a clause since sub-paragraph (c) clearly provides that the benefit of the jurisdiction clause shall also be made available to a third party.[492] Under English law, a clause similar to sub-paragraph (c) of the new clause has been given the full effect.

In the unreported case *United Arab Shipping v Galleon Industrial Ltd*,[493] the bill of lading used was in UASC's standard terms. The Himalaya clause provided that the third parties should enjoy:[494]

> "the benefit of every defence, exception, limitation, condition and liberty applicable to the Carrier under this bill (*including clauses 24 [jurisdiction clause]* and 25)."

Moore-Bick J held that *The Mahkutai* was decided essentially upon the construction of the clause in question.[495] He admitted that the jurisdiction clause would not usually fall within the words "defence, exception, limitation, condition and liberty". However, he

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[488] See also Guenter Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Chapter 17 of Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, London 2000) 368; Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) para 18-092 footnote 558; Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 375. *Cf* the US law adopts a much permissive method and a choice of law clause has been construed as "defence": see above 1.3.1.2.3.

[489] Neil Andrew, "Strangers to Justice No Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353, 376.

[490] Hon. Bradley Harle Giles, "The Cedric Barcley Memorial Lecture 1999: Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading" (1999) 14 (2) Australian and New Zealand Maritime Law Journal 5, 13; Clare Ambrose, When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 417.

[491] [1997] ILPr 472 (CA), [14] (Hobhouse LJ).

[492] See Guenter Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea" in Chapter 17 of Francis Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, London 2000) 368: "Since this conclusion was based simply on the construction of the phrase, it leaves open the possibility that the parties could by the use of sufficiently clear words make the benefit of an exclusive jurisdiction clause available to a third party".

[493] (Commercial Court, 18 December 2000, unreported).

[494] Ibid, [3].

[495] Ibid, [27].

continued that the clause used in the case before him was different from that found in *The Mahkutai* since it made specific reference to the jurisdiction clause. In distinguishing *The Mahkutai*, Moore-Bick J said that the specific reference to the jurisdiction clause in the UASC's bill "made it quite clear that the parties intended [the jurisdiction clause] to apply to any relationship between the merchant and a party other than the carrier brought into existence under that clause".[496] Therefore, he decided that the exclusive jurisdiction clause fell within the scope of the Himalaya clause so that the shipowner was entitled to invoke it. Presumably, where a specific reference to the arbitration clause exists in the Himalaya clause, as sub-paragraph (c) of the IGP&I/BIMCO's new clause does, the same reason could apply and the arbitration clause is very likely to be held to fall within the scope of the Himalaya clause.

Since Lord Goff's reasons for deciding against the enforcement of the exclusive jurisdiction clause by third parties are confined to the construction of the Himalaya clause used there, where sub-paragraph (c) of the new clause is used in the bill, the two reasons given by his Lordship are rendered invalid.

First, Lord Goff held that the unique nature of an exclusive jurisdiction clause, namely, it "creates mutual rights and obligations" instead of benefitting just one party, led to the result that it did not fall within the meaning of the Himalaya clause. However, as Moore-Bick J has said, the intentions of the contracting parties are more important in determining the issue of the third party's rights than the nature of the clause upon which the third party seeks to reply.[497] The author also submits that it is in fact possible for a third party to be conferred on the benefit of the exclusive jurisdiction or arbitration clause only, without being bound by any burdens of the clauses. In this regard, the method could mirror that adopted by s.8(2) of the 1999 Act. When the Himalaya clause specifically extends the benefit of a jurisdiction or arbitration clause to the third parties, third parties are actually given a choice as to whether to enforce the jurisdiction or arbitration clause. If they so choose, they could enforce the clause. In this situation, they are actually enforcing the pure benefit of the clause. As for the arbitration clause in particular, by choosing to enforce it, the third parties' autonomy to the clause will be inferred. However, they are not bound to submit their claims to that particular court or arbitration. Therefore, if a third party does not want to enforce that right, while the

[496] Ibid, [28].
[497] Ibid. See also Catherine Mitchell, "Privity of Contract: Another Missed Opportunity" [1997] 48 Northern Ireland Legal Quarterly 286, 291.

shipper sues him in that particular court or arbitral tribunal, there is no reason as to why he cannot challenge the jurisdiction of that court or tribunal. Following this approach, the third parties will ultimately not be bound by the burdens of the jurisdiction or arbitration clause, but only be given the pure benefit of the clause.

Secondly, the author also doubts the preciseness of Lord Goff's analysis regarding the function of the Himalaya clause. As Lord Hoffmann has said in *The Starsin*, Lord Goff's analysis was "clearly addressed to the clause used in the case", and his Lordship did not think "it would be fair to treat it as laying down that this was the only function of any Himalaya clause".[498] It might be correct to say that the Himalaya clauses were originally invented to deal with the specific problem of the third party's reliance on the exclusion and limitation clauses. However, by confining the significance of the Himalaya clause to the circumstances in which it first arose, Lord Goff ignored its wider importance as a mechanism for giving effect to the commercial parties' intentions.[499] As Moore-Bick J has said, the considerations which Lord Goff referred to in order to support the Privy Council's conclusion "could not displace the parties agreement which was expressed in sufficiently clear terms".[500]

It should be remarked that even if the bills of lading used the IGP&I/BIMCO's new Himalaya clause which is specific enough to embrace the jurisdiction and arbitration clauses, if the third party wants to enforce the jurisdiction or arbitration clause pursuant to the common law Himalaya clause approach, Lord Reid's other requirements[501] still need to be satisfied. In this regard, one important element relates to the carrier acquiring the third party's prior express authority, implied authority or later ratification to enter into the benefit of the jurisdiction or arbitration clause for the third party.[502] Since the Himalaya clause with specific reference to the jurisdiction and arbitration clause is not as common as the Himalaya clause without such a reference, in order to prove that the carrier has the third party's implied authority to enter into the jurisdiction or arbitration clause, the third party needs to not only show that he and the carrier had a previous business connection, but also prove that the previously used bill of lading contained the Himalaya clause with specific reference to the jurisdiction or arbitration clause. In order

[498] [2003] UKHL 12; [2004] 1 AC 715, [110].
[499] Catherine Mitchell, "Privity of Contract: Another Missed Opportunity" [1997] 48 Northern Ireland Legal Quarterly 286, 292.
[500] *United Arab Shipping v Galleon Industrial Ltd* (Commercial Court, 18 December 2000, unreported), [28].
[501] See above 1.3.
[502] See above 1.3.3.

to promote certainty, the third parties are advised to include in their contract with the carrier a clause expressly authorising and instructing the carrier to include a provision in their bill of lading to ensure that the third parties will have the benefit of all provisions therein benefitting the carrier, "including the jurisdiction or arbitration clause".

4.7.2 Enforcement of exclusive jurisdiction clause

If it is correct to say that sub-paragraph (c) of the IGP&I/BIMCO's new clause can extend the benefit of an exclusive jurisdiction clause or arbitration clause to the third parties, the problem following is whether or not a third party could apply for a stay of proceedings to enforce the exclusive jurisdiction clause under Art.25 of the Brussels recast Regulation or to enforce the arbitration clause under s.9 of the Arbitration Act 1996. As discussed above under 4.6.3, if the exclusive jurisdiction clause in the bill of lading is in writing and if, as sub-paragraph (c) of the IGP&I and BIMCO's new clause does, it is expressly provided that a third party could enforce the benefit of the exclusive jurisdiction clause. This is because the "in writing" requirement under Art.25 of the Brussels Regulation will be satisfied so that the third party may enforce it pursuant to that article.[503]

4.7.3 Enforcement of arbitration clause

Things are invariably more complicated when dealing with the arbitration clause since s.9 of the Arbitration Act requires the person who applies for a stay of proceedings being "a party to the arbitration agreement". Even if sub-paragraph (c) of the IGP&I/BIMCO's new clause specifically provides that a third party may enforce the arbitration clause in the bill, the third party is still not a party to the arbitration agreement, since he is not a party to the bill which contains the arbitration agreement. As such, the cargo claimants might argue that although the third party has been given the right to enforce the arbitration agreement by the new clause, he cannot enforce it by applying for a stay of proceedings under s.9 of the Arbitration Act since he is not a party to that agreement. This problem has been considered by the New Zealand High Court in *Air New Zealand Ltd v The Ship Contship America*.[504] In that case, after holding that an arbitration clause did not fall within the scope of the Himalaya clause, Creig J continued that even if the arbitration clause fell within the Himalaya clause so

[503] Case 201/82 *Gerling v il Tesoro* [1983] ECR 2503.
[504] [1992] 1 NZLR 425.

that the third party shipowner was entitled to enforce it, he would not be entitled to a stay of proceedings under s.4 of the New Zealand Arbitration (Foreign Agreements and Awards) Act 1982,[505] which was similar to s.9 of the English Arbitration Act 1996, because he was not a party to the arbitration agreement.[506]

Under English law, in cases where the 1999 Act applies, as discussed above under 4.5.2, this difficulty could be resolved by s.8(2), which treats the third party as "a party to the arbitration agreement for the purpose of the Arbitration Act 1996". If the 1999 Act is expressly excluded, one possible argument for resolving this difficulty involves the operation of common law Himalaya clause approach: it operates by creating a contract between the cargo claimants and the third parties for the purpose of enforcing the benefits under the clause.[507] In this sense, the third parties may be treated as a party to the arbitration agreement for the sole purpose of enforcing the benefit of that agreement by the operation of the common law Himalaya clause approach. If the courts accept this argument, the third parties may apply for a stay of proceedings under s.9 of the Arbitration Act 1996.

4.8 Conclusion

The traditional Himalaya clauses usually use "exemption, limitation, condition, liberty…defence and immunity" to refer to the benefits that are intended to be extended to the third parties. Unlike the traditional Himalaya clauses, sub-paragraph (c) of the IGP&I/BIMCO's new Himalaya clause additionally and specifically provides that:

> "(c)… ***including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available to every Servant of the carrier***…"

In order to examine the effect of this change made by the new clause, this chapter first discussed the particular difficulties posed by the arbitration clause and exclusive jurisdiction clause. It then analysed the position of the arbitration clause and jurisdiction clause under the 1999 Act, followed by an examination as to whether the change falls within the 1999 Act or not. Towards the end, it also evaluated the effects brought about by the change in terms of the common law Himalaya clause approach.

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[505] It has been repealed by the New Zealand Arbitration Act 1996, but the requirement that only a party to the arbitration agreement may be granted against a stay of proceedings is not changed: see New Zealand Arbitration Act 1996, s.8.
[506] [1992] 1 NZLR 425, 434.
[507] See above 1.2.

The particular difficulties with the arbitration clause and exclusive jurisdiction clause are caused by both their nature and enforcement. First, in contrast to the exclusion or limitation of liability clauses, which benefit just one party, the arbitration clause and exclusive jurisdiction clause embody a mutual agreement in which both parties agree with each other as to the relevant forums to settle their disputes. As such, they simultaneously create and contain both rights and obligations. The Law Commission also found it difficult to split the rights and obligations contained in the clauses even if the clauses were regarded as a procedural condition upon the enforcement of the substantive rights by the third party. Secondly, even if the arbitration clause was made available to the third party, s.9 of the Arbitration Act 1996 requires the party who applies for and the party who is granted against a mandatory stay of proceedings to be a party to the arbitration agreement. However, the third party to a contract is not a party to the arbitration agreement contained in that contract. Similarly, even if an exclusive jurisdiction clause is made available to the third party, Art.25 of the Brussels Regulation requires an exclusive jurisdiction clause to be put into writing between the party who applies for and the party who is granted it against the mandatory stay of proceedings. However, there is no such an exclusive jurisdiction clause in writing between the third party and a contracting party.

This chapter has submitted that the above two difficulties with the arbitration clause are resolved by s.8 of the 1999 Act, which contains specific provisions for the arbitration clause under s.8. It has been argued in this chapter that the reason why the conditional benefit approach was not workable in resolving the difficulties with the arbitration clause and exclusive jurisdiction clause in their Report is that the Law Commission invariably took every generally worded arbitration clause and exclusive jurisdiction clause as a procedural condition for the third party's enforcement of the substantive rights, without considering whether the contracting parties actually had such an intention. S.8 of the final Act corrects this mistake by categorising the arbitration clauses into two types based on the intentions of the parties. S.8(1) contains the first type, whereas the third party's enforcement of substantive rights under s.1 is conditional upon his submission to arbitration. S.8(2) embraces the second type, whereby the third party is given the pure procedural right to enforce the arbitration clause. It has been suggested that unambiguous language should be used to the effect of either sub-section. It is only when sufficiently clear language is used that the difficulties faced by the Law Commission in their Report can be completely resolved. Moreover, both s.8(1) and

s.8(2) also expressly provide that the third party shall be treated for the purpose of the Arbitration Act 1996 as a party to the arbitration agreement. This resolves the difficulty over the enforcement of the arbitration clause and artificially ensures that a stay of proceedings can be granted against or in favour of the third party under the two sub-sections.

Sub-paragraph (c) of the new clause, by specifically and additionally providing that the third parties employed by the carrier are entitled to enforce the arbitration clause, falls within s.8(2) instead of s.8(1) of the 1999 Act. Under s.8(2), if the cargo owner sues a third party in an English court, the third party is given a choice as to whether to enforce the arbitration clause. If he so chooses, he may apply for a stay of proceedings under s.9 of the Arbitration Act 1996 and cannot later argue that he could not be bound by the arbitration clause. If he does not choose to do so, the cargo owner cannot force the third party to submit to arbitration simply based on this sub-paragraph.

Although the Act contains no express provisions about jurisdiction clauses, this chapter has argued that they still lie within the scope of the Act. The reason for the absence of the express provisions is that, unlike s.9 of the Arbitration Act 1996, s.25 of the Brussels Regulation does not strictly require the person who applies for or is granted against a stay of proceedings to be a party to the exclusive jurisdiction clause. Therefore, so long as a jurisdiction clause falls within the mechanism of the Act, the third party may enforce or be bound by the jurisdiction clause. If the procedural right to enforce the jurisdiction clause is the benefit provided to a third party, then the case falls within s.1(1)(a) of the Act; if a third party is provided with a substantive right under s.1 and the right is subject to a jurisdiction clause, then the case falls within s.1(4) of the Act. The discussion has shown that these two circumstances are analogous to s.8(2) and s.8(1) respectively. Sub-paragraph (c) of the new clause, by specifically and additionally providing that the third parties employed by the carrier are entitled to enforce the jurisdiction clause, falls within s.1(1)(a) instead of s.1(4) of the 1999 Act. The sub-paragraph also satisfies the “in writing” requirement under s.25 of the Brussels Regulation. Analogous to the situation under s.8(2), the third party is given the right to choose whether or not to enforce the exclusive jurisdiction clause. If he chooses to do so, he cannot later argue that he would not be bound by the clause. If he does not so choose, the cargo owner cannot force the third party to submit to that designated jurisdiction simply based on this sub-paragraph.

The third parties can also rely on the new clause to enforce the exclusive jurisdiction or arbitration clause under the common law Himalaya clause approach. It has been argued in this chapter that it is, in fact, possible for a third party to be conferred on the benefit of the exclusive jurisdiction or arbitration clause only, without being bound by any burdens of the clauses. That is, the third party is given a choice as to whether to enforce the clause. If he so chooses, he could enforce the clause. In this situation, they actually enforce the pure benefit of the clause. However, if he does not so choose, the cargo owner cannot force him to submit to the particular court or an arbitral tribunal. As for the enforcement of the arbitration clause, it might be argued that a third party is treated as a party to the arbitration agreement for the purpose of enforcing that agreement via the operation of the Himalaya mechanism so that he can apply for a stay of proceedings under s.9 of the Arbitration Act.

Chapter 5 The Principle of Sub-bailment on Terms

5.1 Introduction

Under English common law, another device used to protect the servants, agents and independent contractors employed by the carrier is the principle of sub-bailment on terms. Although the IGP&I/BIMCO's Revised Himalaya clause does not contain anything expressly relevant to the principle of sub-bailment on terms, this principle is still worth discussing in this thesis due to three reasons. First, in all the shipping companies' terms of carriage, the Himalaya clause invariably follows a clause which provides that "the carrier shall be entitled to sub-contract on any terms".[508] The quoted terms clearly point to the principle of sub-bailment on terms. Secondly, in contrast to the 1999 Act and the Himalaya clause, which extend the benefit under the contract of carriage to the third party, this principle allows the third party to enforce the terms of his own contract against the cargo claimants.[509] As such, in cases where the new clause fails, this principle provides a good alternative mechanism in the third parties protection. Thirdly, even if the new clause does not fail, whereby the principle of sub-bailment on terms is also workable, the relationship between these two approaches has not been adequately clarified.

The absolute step to affirm the principle of sub-bailment on terms was taken by the Privy Council in *The Pioneer Container*.[510] However, because of the relatively simple facts and limited legal issues involved in that case, the judgment was concise. As some questions remained unresolved, it gives rise to uncertainties in the reliance of the principle by the third parties. Therefore, clarification regarding these issues is very important in terms of third parties protection. In this chapter, such unresolved issues will be discussed. The most fundamental of those questions concerns why the principle is only confined to bailment relationships. The reason for such a limit will be sought through the discussion of the unique nature of the law of bailment and sub-bailment. More importantly, the relationship between the Himalaya clause and the principle of sub-bailment on terms will be explored.

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[508] E.g., Maerskline's Terms, cl.4.1; MSC's Terms, cl.4.1; APL, cl.4; Hapag-Lloyd, cl.4(1); COSCO, cl.3(1); UASC, cl.5.

[509] Since the cargo interest is not a party to the sub-contract, the principle in essence binds someone (namely, the cargo interest) to the terms of a contract (namely, the sub-contract) to which he is not a party. Given that the 1999 Act only involves conferring a benefit on a non-contracting party, the Act has no application to the matters discussed under this chapter.

[510] [1994] 2 AC 324 (PC).

5.2 Bailment

A bailment relationship arises when one person voluntarily takes another's goods into his possession.[511] It follows that the creation of a bailment relationship does not depend on the existence of a contract,[512] although the duties under the bailment can be modified by the terms of the contract of carriage between the shipper and the carrier, e.g., by adding more excepted perils. Also, the arising of obligations in the bailment is independent of the liability in tort. In the context of carriage of goods by sea, bailment is the underlying relationship between the carrier and the shipper of the goods.

5.2.1 The arising of the bailee's duties

Since a bailment arises when one voluntarily takes another's goods into his possession, a bailee must have the possession of the goods.[513] In the context of carriage of goods, the carriers are usually the bailees of the goods since they usually take possession of the goods from the cargo owners. However, having possession of the goods does not necessarily mean or require holding the physical custody of the goods. Sometimes, the third parties employed by the carriers might accept the goods directly from the cargo owners without any prior physical custody by the carriers. In this situation, as will be discussed later under 5.8, the carriers still owe the duties of bailees towards the cargo owners.

In *The Pioneer Container*, Lord Goff held that to have a direct bailment relationship with the head-bailor, when taking possession of the goods from the bailee, the sub-bailee must have been aware that the goods belong to someone else other than the bailee, and only if so, can the sub-bailee be said to have taken possession of the goods "voluntarily".[514] It has been advised that this principle, although relevant to sub-

[511] *The Pioneer Container* [1994] 2 AC 324, 341 and 324 (Lord Goff), who approved *Morris v Martin* [1966] 1 QB 716, 731 (Lord Diplock); see also *East West Corpn v DKBS A/S* [2003] EWCA Civ 83; [2003] QB 1509, [24] (Mance LJ).
[512] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 2 All ER 768, [46] (Lord Mance).
[513] *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395 (CA), 405 (Bingham LJ): there can be no bailment without the possession by the bailee. Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 1-001: possession is the "essence of bailment".
[514] [1994] 2 AC 324, 342 (Lord Goff).

bailment, should have a wider application.[515] So for a carrier to be the bailee, he must know that the goods do not belong to himself, which is usually the case in practice.

5.2.2 Bailor

Given that the principle of sub-bailment on terms is only restricted to the bailment relationships, for a third party employed by the carrier to invoke the principle, he must prove that the cargo claimant who is suing him is the bailor of goods. In the case of carriage of goods by sea, it is not very straightforward to determine the identity of the original bailor due to the different cargo interests involved. It has been suggested by Mance LJ in *East West Corpn v DKBS A/S* that whether it is the shipper or the consignee who is the original bailor depends mostly on the underlying contractual arrangements for the sale of goods.[516]

Generally speaking, a c&f seller is a bailor.[517] However, situations arising from fob contracts are more complicated since the fob contracts are very flexible. In *Pynene v Scindia Navigation*, Delvin J described three types of fob contracts.[518] Under one type, the buyer nominates, ships goods and takes bill of lading in his own name. In this situation, the buyer is normally the bailor.[519] Under the second type, the seller makes the shipping arrangement, takes the bill in his own name as the shipper and obtains payment against the transfer of the bill, just as his position in a cif contract. So here, as the situation under the cif contract, the seller is normally the bailor. Under another type, the buyer nominates the ship and the seller ships the goods, who acts as the shipper until the bill of lading is taken up in the buyer's name. In such a situation, in order to decide on whether the seller is the bailor, the "crucial point", as *Carver on Bills of Lading* has suggested, is "whether the seller has any commercial interest in being a principal party

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[515] Andrew Bell, "The Place of Bailment in the Modern Law of Obligations", Ch19 in Norman Palmer and Ewan Mckendrick, *Interest in Goods* (2nd end, LLP, London 1998) 461, 469; Graham S McBain, "Modernising and Codifying the Law of Bailment" [2008] 1 JBL 1, 14.

[516] [2003] EWCA Civ 83; [2003] QB 1509, [34]-[35] (Mance LJ); see also Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa Law from Routledge, London 2015) 9.61. *Cf* Lord Hobhouse's *dictum* in *The Berge Sisar* [2002] 2 AC 205, [18]: "The bill of lading…evidences a bailment with the carrier who has issued the bill of lading as the bailee and the consignee as bailor"; *The Albazero* [1977] AC 774, 842 (Lord Diplock): "the presumption was that the bailor was the person named as consignee and that in delivering possession of the goods to the possession of the goods to the carrier the consignor was acting and purporting to act as agent only for a designated principal-the consignee."

[517] *The Aliakmon* [1986] AC 785, 818 (Lord Brandon); Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.61.

[518] [1954] 2 QB 402, 424 (Devlin J).

[519] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 6-012.

to the contract of carriage",[520] or, to put it another way, whether the seller has any commercial interest in "reserving the right vis-à-vis the consignees to deal with and redirect the goods".[521] One factor to be considered in order to decide whether the seller has such an interest is whether the price under the sale contract has been paid at the time of shipment or not. If the price has been paid by the time of shipment, the seller is unlikely to have such an interest, in which case the buyer might be the bailor. If, however, the price has not been paid by then, the seller is likely to have such an interest to reserve the right to redirect the goods,[522] in which case the seller might be the bailor.[523]

5.2.3 Obligations of the bailee

In the case of carriage of goods, the bailee generally takes possession of the goods under a bailment for reward.[524] The two primary duties of a bailee for reward are, firstly, to take reasonable care of the goods to keep them safe[525] and, secondly, not to convert the goods, namely, not to do any intentional act inconsistent with the bailor's rights to the goods.[526] As to the bailee's duty to take reasonable care of the goods, the degree of care varies according to the circumstances in which and the purposes for which the goods are delivered to the bailee. Nevertheless, it goes beyond a non-bailee's duty of care in negligence. A non-bailee in negligence only owes a negative duty to not damage the goods, while the bailee owes a positive duty to protect the goods from damage or loss,[527] e.g. to prevent the goods from being stolen by a third party. As to the bailee's duty not to convert the goods, one classic example of conversion is the stealing of the goods by the carrier or his servants or employees.[528] Another classic example is the

[520] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 6-012.
[521] *East West Corpn v DKBS A/S* [2003] EWCA Civ 83; [2003] QB 1509, [35] (Mance LJ).
[522] *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 2 All ER 768, [20] (Lord Rodger).
[523] Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 6-012.
[524] The corresponding type of bailment is the "gratuitous bailment". A detailed discussion of this is out of the scope of this thesis, for which, see Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) Ch 9.
[525] *Morris v Martin* [1966] 1 QB 716, 726 (Lord Denning MR); 732 (Diplock LJ); 738 (Salmon LJ); *East West Corpn v DKBS A/S* [2003] EWCA Civ 83; [2003] QB 1509, [28] and [59] (Mance LJ). Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 33-049.
[526] *Morris v Martin* [1966] 1 QB 716, 732 (Diplock LJ); 738 (Salmon LJ); *East West Corpn v DKBS A/S* [2003] EWCA Civ 83; [2003] QB 1509, [28] (Mance LJ); Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 33-010.
[527] Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa Law from Routledge, London 2015) 9.51.
[528] *Morris v Martine* [1966] 1 QB 716, 732 (Diplock LJ).

misdelivery of the goods without demanding an original bill or against a fraudulent bill.[529]

The duties of a bailee for reward are non-delegable so he would be responsible for the acts of any servants or agents.[530]

Moreover, the bailee bears a reversed burden of proof. To sue the bailee in bailment, the bailor only needs to prove two things: first, the goods were in the defendant's possession as a bailee, and secondly, the loss of or damage to the goods occurred when they were in the defendant's possession.[531] These things are not usually difficult to prove. As a result, the onus shifts to the bailee, who needs to prove that the loss or damage was caused "without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty".[532] Failing to prove this, the bailee would be liable. The rationale for this rule is that the goods are in possession of the bailee, so it is much easier for him, rather than the bailor, to show what happened to the goods.

5.3 Sub-bailment

5.3.1 Definition

A true sub-bailment has been defined as the "relationship which arises whenever a bailee of goods transfers possession to a third party for a limited period or a specific purpose, on the understanding (express or implied) that his own position as bailee is to persist throughout the subsidiary disposition".[533] As such, a sub-bailment classically occurs where A bails goods to B who then bails them to C.[534] In this relationship, A is the head-bailor, B is the head-bailee, and C is the sub-bailee.

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[529] See *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576; *Trafigura Beheer BV and Another v Mediterranean Shipping Company SA (The MSC Amsterdam)* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622 (CA). See also Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 20-018.

[530] *East West Corpn v DKBS A/S* [2003] EWCA Civ 83; [2003] QB 1509, [29] (Mance LJ); *Morris v Martin* [1966] 1 QB 716, 726; *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 All ER 811; Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 9-003; Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.53.

[531] *G Merel & Co Ltd v Chessher* [1961] 1 Lloyd's Rep 534, 536 (Salmon J).

[532] *Morris v Martin* [1966] 1 QB 716, 726 (Lord Denning MR).

[533] Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 23-002.

[534] Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.64.

5.3.2 The arising of the sub-bailee's duties

Similarly to the position under the law of bailment, a person becomes the sub-bailee of the goods by voluntarily taking the bailor's goods into his possession.[535] It follows that the key requirements for the arising of the bailee's duties can be analogously applied here: firstly, the sub-bailee must be in possession of goods, and secondly, his possession must be voluntary.

5.3.2.1 Sub-bailee must be in possession of goods

In the context of carriage of goods, different third parties might be employed by the carrier to perform part or all of the carriage. However, not every third party is in possession of the goods, so not every one of them acts as the sub-bailee of the goods. Given that the principle of sub-bailment on terms only applies to the bailment relationship, before a third party seeking to invoke the principle, he must establish that he is in possession of the goods.

In *Midland Silicones*, the stevedores dropped the drum while loading it onto a lorry after discharging it from the vessel. Such an action was regarded as the "performance of classic stevedoring duties".[536] This means that the drum was merely handled or used by the stevedores for some temporary purposes and the possession of the drum was not intended transferred to the stevedores. In this situation, although the stevedores had the physical custody of the goods, they were not the bailees.[537] By contrast, in *The Rigoletto*,[538] the stevedores were the "receive authority" who received the goods for shipment and were obliged to take care of them, subject to their own conditions which operated between them and cargo owners directly. This showed the contemplation that the goods were to be in the possession of the stevedores,[539] so they were held as bailees. Similarly, in *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd*,[540] the stevedores were engaged not only to discharge the cargo but also to store it awaiting collection by the consignee, so they were held to be the sub-bailees of goods.

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[535] *Morris v Martin* [1966] 1 QB 716, 731 (Diplock LJ), 738 (Salmon LJ); *Gilchrist Watt & Sanderson Pty Ltd v York Products Pty Ltd* [1970] 1 WLR 1262, 1267 and 1270 (Lord Pearson); *The Pioneer Container* [1994] 2 AC 324, 341 (Lord Goff).
[536] *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [42] (Rix LJ).
[537] [1962] AC 446 (HL), 470 (Viscount Simonds).
[538] [2000] 2 Lloyd's Rep 532 (CA).
[539] Ibid, [42] (Rix LJ).
[540] [1970] 1 WLR 1262 (PC).

From the comparison, it can be seen that the third parties who perform the actual carriage, custody or care services usually have the possession of goods so as to be the sub-bailees of goods. Alternatively, those who perform the simple loading or unloading functions, to whom the possession of goods is not intended transferred, are not usually the sub-bailees.[541]

5.3.2.2 Possession must be voluntary

In contrast to the simple bailment, which requires the bailee's knowledge that the goods do not belong to himself, in order for a third party to be the sub-bailee, he must have the "sufficient notice that *a person other than the bailee* is interested in the goods".[542] This, however, does not require that the sub-bailee must know the exact identity of the head-bailor. Presumably, if he is not aware of the existence of the head-bailor but mistakenly believes that the goods belong to the head-bailee (or himself), he might be an involuntary bailee to both the head-bailee and head-bailor.[543] In the case of carriage of goods, the third parties employed by the carriers are usually aware that the goods do not belong to the carriers themselves but belong to the cargo owners.

5.3.3 Direct bailment relationship between bailor and sub-bailee

When a person's duties as the sub-bailee arise, there is a sub-bailment relationship between the head-bailee and that person. In the context of carriage of goods, such a relationship is between the carrier and the third party, which is usually a sub-bailment for reward. As such, the third party owes the duties to the carrier as the bailee for reward and the carrier can sue the third party for the loss of or damage to the goods unless the third party is protected by some exemptions or limitations.[544] Furthermore, a head-bailment relationship exists between the head-bailor and the head-bailee. In the

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[541] *The Rigoletto* [2000] 2 Lloyd's Rep 532 (CA), [40] (Rix LJ).
[542] *The Pioneer Container* [1994] 2 AC 324, 342 (Lord Goff). See also *Morris v Martin* [1966] 1 QB 716, 731 (Diplock LJ), 738 (Salmon LJ).
[543] The legal position of an involuntary bailee is not clear and a detailed analysis of the legal position of involuntary bailment is out of the scope of this thesis, for which, please refer to Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) Ch 13; Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 33-036. Alice Erh-soon Tay, "The Essence of Bailment: Contract, Agreement or Possession?" (1966) 5 Sydney L R 239. *Cf* "Involuntary bailment" was even regarded as a "contradiction in terms" and the use of the word "bailment" here was regarded as a "misnomer", so it has been suggested that bailment should exclude involuntary bailment and an involuntary bailee should not be treated as a bailee at all: Andrew Bell, "The Place of Bailment in the Modern Law of Obligations", Ch19 in Norman Palmer and Ewan Mckendrick, *Interest in Goods* (2nd end, LLP, London 1998) 461, 468-469; Graham S McBain, "Modernising and Codifying the Law of Bailment": [2008] 1 JBL 1, 14-15 and 61.
[544] *The Winkfield* [1902] P. 42.

context of the carriage of goods, such a head-bailment relationship is between the cargo owner and the carrier. The carrier owes a duty to the cargo owner to exercise reasonable care in choosing his delegates and is responsible for the manner in which the delegated functions are discharged by the third party.

Apart from a sub-bailment relationship between the head-bailee and the sub-bailee and a head-bailment relationship between the head-bailor and the head-bailee, Lord Denning MR in *Morris v CW Martin & Sons Ltd*[545] has established that there is also a direct bailment relationship between the head-bailor and sub-bailee. The famous speech given by him follows:[546]

> "…if the sub-bailment is for reward, the sub-bailee owes to the owner all the duties of a bailee for reward; and the owner can sue the sub-bailee direct for the loss of or damage to the goods."

This passage was cited and approved by the Privy Council in both *Gilchrist Watt* and *The Pioneer Container*. This uniform approach has been suggested to avoid the potential inconsistency of imposing two different standards of care with respect to the same goods.[547]

Since the sub-bailment between the carrier and the third party is usually for reward, the third party would owe the duties of a bailee for reward towards, not only the carrier, but also the cargo owner. As such, the cargo owner can sue the third party directly in bailment for the loss of or damage to the goods. It follows that the third party is responsible to the cargo owner for the acts of any servant whose services he engages in to fulfil his duty,[548] and the burden falls upon the third party to prove that the loss or damage was not caused by fault on the part of him or his servant.[549]

5.4 The principle of sub-bailment on terms

Knowing that he owes directly to the head-bailor the duties of a bailee and that the head-bailor can sue him directly in bailment for the loss of or damage to the goods that have occurred in his possession, the sub-bailee might want to invoke some exemption or

[545] [1966] 1 QB 716 (CA).
[546] Ibid, 729
[547] *The Pioneer Container* [1994] 2 AC 324, 338 (Lord Goff); Peter Devonshire, "Sub-bailment on Terms and the Efficacy of Contractual Defences against A Non-Contractual Bailor" [1996] JBL 329, 342.
[548] This is the ground of the Court of Appeal's decision in *Morris v Martin*.
[549] *Morris v Martin* [1966] 1 QB 716, 728 (Lord Denning MR).

limitation clauses as a defence to the direct action taken by the head-bailor. Since there is no contract between them, the doctrine of privity of contract prevents the sub-bailee from doing so. Now he is able to rely on the terms in the sub-bailment by relying on the principle of sub-bailment on terms.

5.4.1 Lord Denning MR's approach in *Morris v Martin*

The principal origin of the principle of sub-bailment on terms is in Lord Denning MR's judgment in *Morris v Martin*. In that case, the plaintiff Mrs Morris contracted with the furrier Mr Beder to clean a mink stole. Mr Beder made it clear that he did not provide the cleaning service himself and offered to have it cleaned by Martin & Sons Ltd. With Mrs Morris's consent, Mr Beder sub-contracted with the cleaners Martin & Sons Ltd to clean it. The sub-contract included an exemption clause, which provided that "all goods belonging to the Customers…the Company shall not be responsible for loss or damage however caused". The stole was stolen by the servant of Martin & Sons Ltd, and Mrs Morris sued the cleaners for the loss. After deciding that the cleaning company owed the duty of a bailee to Mrs Morris and that she could sue the company directly in bailment, the main issue to be decided was whether the company could rely on the exempting conditions in their contract with Mr Beder against Mrs Morris, to which Mrs Morris was not a party. Lord Denning MR said that:[550]

> "The answer to the problem lies, I think, in this: 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*".

It can be seen that in Lord Denning MR's view, the bailor could not be bound by the terms of the sub-bailment, except and only except when he has consented, either expressly or impliedly, to the bailee's sub-bailing on those terms.

Applying this principle to the facts before him, Lord Denning MR held that Mrs Morris, by agreeing that Mr Beder should send the stole to the cleaning company, impliedly consented to the bailee to make a contract for cleaning "on the terms usually current in the trade".[551] Therefore, if the terms which the company tried to rely on were usual in the trade custom, and the strict construction of the terms showed that they could be

[550] Ibid, 729.
[551] Ibid, 730.

protected, they would be protected as such.[552] Construing the exempting condition, Lord Denning MR held that the terms of sub-contract showed that the condition applied only to "goods belonging to the Customers", while the goods in that case belonged to Mrs Morris, who was not the company' "Customers", so the exemption clause could not protect the cleaners from the actions taken by Mrs Morris. Since the real decision of that case was that the conditions could not exempt the company from liability, Lord Denning MR's above statement on the principle of sub-bailment on terms was just *obiter*.[553]

5.4.2 Donaldson J's view in *Johnson Matthey*

In a carriage of goods case *Johnson Matthey & Co Ltd v Constantine Terminals Ltd and International Express Co Ltd*,[554] the carriers International Express contracted with the owners of the silver to carry the silver from London to Milan, and sub-contracted safe custody of the silver at the London international freight terminal to Constantine Terminal ("CT"). The sub-contract was on CT's conditions, which included a clause limiting CT's liabilities. The silver was stolen while in CT's custody. The owners of the silver sued CT for the loss and CT sought to rely on the limitation clause present in their own conditions.

Donaldson J held that the facts of the case clearly demonstrated to the owners that the silver would be in the custody of CT for a set period. Furthermore, the owners knew that International Express traded on the terms of the Institute of Shipping & Forwarding Agents, which were not different to CT's conditions. As such, the owners were taken to have consented to sub-bail to CT on CT's conditions.[555] Citing and relying on Lord Denning MR's above passage,[556] Donaldson J held[557] that CT could be protected by the limitation clause in their conditions against the owners. Although Donaldson J found the owners' consent here, he continued that:[558]

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[552] Ibid, 741 (Salmon LJ).
[553] Diplock LJ refused to express any view about the principle stated by Lord Denning MR: ibid, 731; Salmon LJ, although strongly attracted to Lord Denning MR' opinion, had formed no concluded view on it: ibid, 741.
[554] [1976] 2 Lloyd's Rep 215.
[555] Ibid, 221.
[556] [1966] 1 QB 716, 729. See above 5.4.1.
[557] [1976] 2 Lloyd's Rep 215, 220.
[558] Ibid, 221-222.

> "But I do not think that consent is relevant in this case. The essence of the plaintiff's cause of action is that Constantine Terminals were bailees for the silver. Unless they prove this, they fail… the plaintiffs cannot prove the bailment…without referring to terms upon which the silver was received by Constantine Terminals from International Express."

It can be seen that, in Donaldson J's view, the head-bailor's consent to sub-bail on the relevant terms does not need to be proved to bind him to those terms, because only if the head-bailor has consented to the terms of sub-bailment, can it be said that there is a bailment relationship between the head-bailor and the sub-bailee. This appears, however, to contradict Lord Denning MR's judgment. In Lord Denning MR's view, the direct bailment relationship between the head-bailor and sub-bailee arises simply when the latter takes the possession of the former's goods voluntarily,[559] which does not require the head-bailor's consent to the possession by the sub-bailee. According to Donaldson J's view, however, the head-bailor's consent is required for such a direct bailment relationship to arise.

5.4.3 *The Pioneer Container*

Although later authorities accepted Lord Denning MR's judgment,[560] the contradiction between his judgment and Donaldson J's reasoning has always past unnoticed. It was not until the Privy Council's decision in *The Pioneer Container*[561] that the doctrine of sub-bailment on terms was firmly established and that Donaldson J's opinion was finally rejected.

In *The Pioneer Container*, the carriers' bill of lading gave the carriers the right to sub-contract the whole or part of the carriage "on any terms". The carriers sub-contracted part of the carriage to the shipowners of *K H Enterprise*, who issued a feeder bill of lading to the carriers. The feeder bill incorporated an exclusive Taipei jurisdiction clause. The vessel sank with the loss of all cargo. The cargo owners commenced legal proceedings in Hong Kong against *K H Enterprise*'s sister ship *Pioneer Container*. The claim was against the shipowners as the bailees. The shipowners applied for a stay of

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[559] See above 5.3.2.
[560] *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *Compania Portorafti Commerciale SA v Ultramar Panama Inc and Others (The Captain Gregos (No. 2))* [1990] 2 Lloyd's Rep 395.
[561] [1994] 2 AC 324 (PC).

proceedings in the High Court of Hong Kong relying on the exclusive jurisdiction clause in the feeder bill. The case was finally appealed to the Privy Council. After affirming that, on voluntary receipt of the goods, the shipowners owed the obligations of a bailee for reward towards the cargo owners,[562] the Privy Council decided on the issue as to whether the shipowners, as sub-bailees, could rely on the exclusive jurisdiction clause in the feeder bill against the cargo owners.

5.4.3.1 Rejection of Donaldson J's view

Having noticed the difference between Lord Denning MR's and Donaldson J's reasonings, Lord Goff said that if Donaldson J's reasoning was adopted by their Lordships, it would lead to the conclusion that "if (as here) the plaintiffs seek to hold the shipowners liable as bailees, they will *ipso facto* be bound by the terms of the sub-bailment under which the shipowners received the goods into their possession, including…the exclusive jurisdiction clause".[563] Lord Goff regarded such a result unacceptable for the following reasons.

First, both the Court of Appeal in *Morris v Martin* and the Privy Council in *Gilchrist Watt* decided that the owner could prove bailment and claim directly against the sub-bailee as long as the sub-bailee voluntarily took the possession of the owner's goods into his custody, and the owner did not need to rely on the contract of sub-bailment between the head-bailee and the sub-bailee. Donaldson J should have been bound by the decisions of the two cases. However, his view was inconsistent with them. Moreover, Lord Goff clarified that the view that the bailor's consent was not necessary for the existence of a bailment relationship was "both principled and just".[564] Therefore, it is now the well-established rule that only the bailee's consent, rather than the bailor's, that is necessary for the existence of a bailment.

Secondly, Donaldson J's reasoning also meant that so long as the owner sought to hold the sub-bailee liable as bailee, he would be bound by all the terms of the sub-bailment,

[562] Ibid, 338 (Lord Goff). See above 5.3.3.
[563] Ibid, 341.
[564] Ibid, 341-342. There used to be contradicting views as to whether the bailor's consent to the bailee's possession of the goods is a prerequisite of the creation of a bailment relationship. Some academic writers thought the answer should be in positive, e.g. Andrew Bell, *Modern Law of Personal Property in England and Ireland* (Butterworth & Co 1989) 88-89; while some thought the answer should be in negative, e.g. Norman Palmer, *Bailment* (2nd edn, Sweet & Maxwell, Sydney 1991) 31; Alice Erh-soon Tay, "The Essence of Bailment: Contract, Agreement or Possession?" (1966) 5 Sydney Law Review 239.

without limit, even if he had not authorised the sub-bailment. In Lord Goff's opinion, this was definitely not an attractive conclusion to reach.[565]

5.4.3.2 Principle and law

It can be seen that a distinction should be drawn between, on the one hand, the existence of a direct bailment between the head-bailor and the sub-bailee, and on the other hand, the issue as to whether or not the head-bailor is bound by the terms of the sub-bailment towards the sub-bailee. In the former situation, the head-bailor's consent is not necessary.[566] Instead, the direct bailment between them automatically arises when the sub-bailee voluntarily takes possession of the head-bailor's goods. The head-bailor's consent is only necessary for the latter situation. The incorrectness of Donaldson J's judgment was caused by his mixing up of these two concepts, regarding the head-bailor's consent essential in both circumstances. Therefore, affirming Lord Denning MR's view, Lord Goff said that:[567]

> "once it is recognised that the sub-bailee, by voluntarily taking the owner's goods into his custody, *ipso facto* becomes the bailee of those goods vis-à-vis the owner, it must follow that the owner's rights against the sub-bailee will only be subject to the terms of the sub-bailment if he has consented to them, i.e., if he has authorised the bailee to entrust the goods to the sub-bailee on those terms. Such consent may, as Lord Denning pointed out, be express or implied."

However, going further than Lord Denning MR, Lord Goff continued that, in the context of "consent" here,

> "the sub-bailee may also be able to invoke, where appropriate, the principle of ostensible authority".[568]

Now the established judicial view on the law of sub-bailment and the principle of sub-bailment on terms can be summarised like this. Once a sub-bailee, with the knowledge that the goods belong to someone other than the head-bailee, voluntarily takes possession of the goods into his custody, will *ipso facto* become the bailee of the goods

[565] [1994] 2 AC 324, 341.
[566] See above 5.3.3.
[567] [1994] 2 AC 324, 341.
[568] Ibid. This actually endorsed the alternative way advised by Styen J in *Singer v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, 168.

towards both the head-bailee and the head-bailor. The head-bailor is only bound by the terms of the sub-bailment if he has expressly or impliedly consented to sub-bailment upon those terms or if there is ostensible authority from him.[569]

Applying the principle to the facts of the case, Lord Goff held that the bill of lading vested in the carrier a very wide authority to sub-contract the whole or any part of the carriage of goods "on any terms". This means the cargo owners had expressly consented to the sub-bailment of their goods to the sub-bailee "on any terms".[570] This express consent was broad enough to include the exclusive jurisdiction clause since the incorporation of such a provision was neither unusual nor unreasonable.[571] Therefore, the cargo owners were held bound by the exclusive Taipei jurisdiction clause in the shipowners' feeder bill.

Nowadays, the shipping companies' own terms of carriage invariably give the carriers such an express authority to sub-contract "on any terms", for example:

> "The Carrier shall be entitled to sub contract on any terms whatsoever the whole or any part of the Carriage."[572]

According to *The Pioneer Container*, such terms show the cargo owners' express and wide consent to sub-bail to the sub-bailee on any terms. From the perspective of the third parties protection, the shipping companies should retain these terms, even if the IGP&I/BIMCO's new Himalaya clause is to be incorporated. However, because of the relatively clear facts and limited legal issues involved in *The Pioneer Container*, some issues remain unresolved. To a large extent, these issues lead to uncertainties in the principle. As such, they are worth discussing, especially as the third parties could not be effectively protected by relying on the IGP&I/BIMCO's new Himalaya clause. Even if they could be effectively protected pursuant to the new clause, *The Pioneer Container* also left it unresolved as to the relationship between the Himalaya clause and the

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[569] The principles and law affirmed in *The Pioneer Container* have been largely approved and applied by latter authorities: e.g., *Spectre International PLC v Hayesoak and Others* [1997] 1 Lloyd's Rep 153 (Central London County Court); *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 (Central London County Court); *Sandeman Coprimar SA V Transitos Y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] QB 1270; *The Starsin* [2003] UKHL 12; [2004] 1 AC 715.
[570] [1994] 2 AC 324, 345.
[571] Ibid, 346.
[572] See e.g., Maerskline's Terms, cl.4.1; MSC's Terms, cl.4.1; APL, cl.4; Hapag-Lloyd, cl.4(1); COSCO, cl.3(1); UASC, cl.5.

principle of sub-bailment. The remaining part of this chapter will focus on these issues that the authorities have failed to resolve.

5.5 The principle is only limited to bailment relationship

In the context of carriage of goods, the cargo interests may bring a non-contractual claim against the defendant either in tort, e.g. negligence and conversion, or in bailment. In negligence, a defendant has a duty to take reasonable care not to damage the owner's goods. In conversion, a defendant has a duty not to deliberately act in a way that is inconsistent with the bailor's rights to the goods, e.g., not to steal the goods or not to misdeliver the goods. As discussed earlier under 5.2.3, a bailee for reward also has two primary duties, firstly, to take reasonable care of the goods to keep them safe, and secondly, not to convert them, that is, not to do any intentional act inconsistent with the bailor's rights relating to the goods. It can be seen that the content of the bailee's first duty appears to be the same as that regarding negligence and the content of the bailee's second duty seems to be identical to that in conversion.

Where the claimant and the defendant are in privity of contract, both the tortious duties and the bailment duties can be qualified by the contractual terms between them. However, despite the similarities of the content of the duties in tort and in bailment, where there is no privity between the claimant and the defendant, the principle of sub-bailment on terms can only be used to prevent the unrestricted non-contractual recovery against a defendant who is liable as the bailee, and the courts have been reluctant to qualify a duty in negligence in the same way.[573]

When giving his reason on why the principle of sub-bailment on terms could constitute an exception to the doctrine of privity of contract, Lord Goff only said that this principle found "its origin in the law of bailment rather than the law of contract", which did not "depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration".[574] However, the law of tort is also independent of the law of contract and also does not depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration. Therefore, Lord Goff's reason could not adequately explain why the principle is only limited to the bailment circumstances while it cannot be extended to tortious actions.

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[573] *Midland Silicones v Scruttons* [1962] AC 446, 482-492 (Lord Denning); *The Aliakmon* [1986] AC 785, 817-818 (Lord Brandon); *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395, 405 (Bingham LJ).
[574] *The Pioneer Container* [1994] 2 AC 324 (PC), 341.

In the author's view, the reason why a similar principle cannot be extended to the tortious actions is due to the fact that a sub-bailee finds himself under a more onerous form of obligations and in a more disadvantageous position than an ordinary defendant in tort.[575]

Firstly, a bailee is under a higher standard of care than a defendant in negligence. As discussed above under 5.2.3, the bailee's degree of care goes beyond a non-bailee's duty of care in negligence in that the latter owes a *negative* duty *not to* damage the goods, while the former owes a *positive* duty to *protect* the goods from damage or loss. For instance, a bailee owes a duty of care to take the positive steps to prevent the theft by third parties of the goods in its possession, while a defendant in negligence does not.

Secondly, the duties of a bailee are non-delegable. As discussed above under 5.2.3, a bailee is liable to the bailor, not only if he fails to take reasonable care in employing the independent contractors, but also for the defaults of any of them. However, a defendant in negligence is only liable in the former situation.

Thirdly, the bailee bears a more onerous burden of proof than the defendant in tort. As discussed above under 5.2.3, the burden of proof under a bailment is reversed. This means that a bailor only needs to prove that the loss of or damage to the goods occurred when the goods are in the possession of the bailee, which is very easy to prove in the usual course of events. The onus then shifts to the bailee to prove that the loss or damage is not caused by any fault on the part of him or his servants or agents. If he fails to prove so, he will be liable.[576] By contrast, in negligence, it is for the claimant to prove that the loss or damage is caused by the fault of the defendant.

Fourthly, under the law of sub-bailment, the above three general principles of bailment all apply equally to the relationship between the owner and the sub-bailee.[577] In fact, a sub-bailee is usually subject to a stricter standard than the head-bailee. Since the head-bailee is in a direct contractual relationship with the owner, he can invoke the contractual terms between them to modify or negate his duties as the bailee for reward. However, the sub-bailee's duties towards the owner cannot be qualified as such, since

[575] For the advantages for the claimant of suing in bailment over suing in negligence, see Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1991] LMCLQ 393, 394-395.
[576] See *East West Corp v DKBS AF 1912 A/S* [2003] QB 1509, at [32], where Mance LJ regarded this aspect as a benefit for the cargo owners to sue in bailment.
[577] See above 5.3.3.

there is no contract between them. As a result, the sub-bailee will still owe the unqualified duties of a bailee for reward to the owner, even if the head-bailee owes a lesser duty towards the owner under the head-bailment.

So far, there has been no authority expressly denying the defendant's duty in conversion to be qualified by any contractual terms where there is no privity of contract between the claimant and defendant. However, it might not be surprising if the courts express their reluctance to qualifying the duty in conversion in the absence of the privity of contract. This is because here the bailee also finds himself in a more disadvantageous situation than a defendant in conversion. To be more specific, firstly, a bailee is liable for converting the goods caused by any independent contractors employed by him, while a defendant in conversion is only liable for failing to take reasonable care in employing those independent contractors. Secondly, the burden of proof in bailment is reversed so that a bailee bears a more onerous burden of proof than a defendant in conversion. Thirdly, the sub-bailee might be in a stricter liability than the head-bailee, since the head-bailee's duties might be limited by the contract between him and the head-bailor, while there is no contract between the head-bailor and sub-bailee qualifying the latter's duties.

Given that the duties of a sub-bailee towards the owner arise automatically with his voluntary assumption of possession[578] and that his position is more vulnerable than a defendant in tort, it is reasonable that the courts have confined the principle of sub-bailment on terms only to the bailment context.

5.6 Bailor's consent

According to Lord Goff, the scope of the owner's consent to the carrier to "sub-contract on any terms" is wide enough to exclude only the terms which are "so unusual or so unreasonable that they could not reasonably be understood to fall within such consent".[579] It has been suggested that to bind the owners the sub-bailment terms is not necessarily universally applicable[580] or invariably governing.[581] Furthermore, it is not

[578] See above 5.3.2.
[579] *The Pioneer Container* [1994] 2 AC 324, 346.
[580] In *Sonicare v East Anglia Freight Terminal*, although the conditions of the UK National Association of Warehouse Keepers (the NAWK conditions) are not universally applicable, they are "in very widespread use", so the bailors were held to have consented to sub-bail on the conditions: [1997] 2 Lloyd's Rep 48, 54 (Hallgarten J).

necessary that they are not more onerous than those in the head-bailment.[582] Even if the relevant clause imposes a positive obligation upon the head-bailor, this factor is not itself sufficient to exclude the clause from the scope of the consent.[583] Moreover, the consent is not confined to the clauses "directly germane to the subject matter of the bill of lading",[584] so it is possible that an exclusive jurisdiction clause and a choice of law clause may fall within the scope of the consent.[585]

5.6.1 Exclusive jurisdiction clause

In *The Pioneer Container*, the exclusive jurisdiction clause in the sub-bailment was found in favour of the Taiwan court. As this is not a Brussels Convention member state, the Convention did not apply. The cargo owners sued the sub-bailee shipowners in Hong Kong, thereby prompting the shipowners to apply before the Hong Kong court for a stay of its proceedings. After deciding that the sub-bailee shipowners are entitled to rely on that exclusive jurisdiction clause against the cargo owners, the Privy Council came to decide on the issue as to whether or not the Hong Kong court should stay its proceedings. Relying on the common law principles stated by Brandon LJ in *The El Amria*,[586] the Privy Council held that where there was an exclusive jurisdiction clause in favour of a foreign court, the court seised had discretion about whether or not to grant a stay of proceedings; the stay should usually be granted unless a strong case for not doing so was shown. After taking into account the factors suggested by Brandon LJ (which should be considered in the exercise of discretion), the Privy Council held that the connection of the case with Taiwan was particularly strong and that the cargo owners would not be prejudiced by having to sue in Taiwan. As a result, the shipowners' application for a stay was granted.[587]

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[581] In *Spectra International Plc v Hayesoak Ltd*, although the conditions of the Road Haulage Association 1991 (the RHA conditions) might not invariably govern domestic road haulage, Hallgarten J held that, to put it at its lowest, the conditions are to be regarded as conditions "usually current in the trade", so the bailors were held to have consented to sub-bail on the conditions: [1997] 1 Lloyd's Rep 153, 156.
[582] *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep 153, 156-157; *Sonicare v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep 48, 54. *Cf* in *Singer v Tees and Hartlepool Port Authority*, Steyn J regarded the fact that there was a wider exception clause in the sub-bailment and a same limitation clause as a factor leading to the conclusion that the bailors had consented to the terms: [1988] 2 Lloyd's Rep 164, 168, but this was just a factor "reinforcing" the conclusion rather than a decisive factor.
[583] *The Pioneer Container* [1994] 2 AC 324, 346 (Lord Goff).
[584] Ibid, 345-346.
[585] Ibid, 346.
[586] *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119 (CA), 123-124. See above 4.3.3.
[587] [1994] 2 AC 324 (PC), 346-8 (Lord Goff).

However, in contrast to the common law position, when the designated court is located in a member state of the Brussels recast Regulation, the "in writing" requirement under Art.25 might give rise to difficulties for the sub-bailee to be granted a stay of proceedings. In *The Duke of Yare*,[588] there was an exclusive Rotterdam jurisdiction clause in the contract of sub-bailment, so the Brussels Convention applied. The bailors sued the sub-bailees in England for the loss of goods. Relying on the principle of sub-bailment on terms, the sub-bailees argued that the bailors should be bound by terms of the sub-bailment, including the exclusive jurisdiction clause. They contended that the jurisdiction clause satisfied Art.17 of the Convention so the English court must mandatorily grant a stay of proceedings in favour of the Rotterdam courts. The case was decided before the Privy Council's decision in *The Pioneer Container* and when the principle of sub-bailment on terms had not been fully established. As such, Bingham LJ decided the case based on the presumption that the principle applied and that the bailor had consented to sub-bail on that exclusive jurisdiction clause.[589] However, he held, *obiter*, that the requirements of Art.17 were not satisfied. He stated that in order to fulfil Art.17 of the Convention:[590]

> "the question which has to be asked is whether the plaintiffs [bailors] agreed with the defendants [sub-bailees] that the Rotterdam court should have exclusive jurisdiction to entertain disputes between them. Even accepting the defendants' explanation of the doctrine of bailment on terms as depending on the bailor's express or implied consent to the bailee's sub-bailment of goods on certain terms, the resulting relationship between the bailor and sub-bailee cannot in my view be aptly described as depending on agreement. The doctrine has evolved because the bailor cannot sue the sub-bailee in contract; but a contract is what, as I think, the first sentence of article 17 demands."

It can be seen that in Bingham LJ's view, what was required by Art.17 was a "contract", while the relationship between the bailor and sub-bailee resulting from the principle of sub-bailment on terms depended only on consent, rather than on contract. Consequently, Art.17 was not satisfied so that the sub-bailees' application for the stay was rejected.

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[588] *Dresser UK Ltd v Falcongate Freight Management Ltd (The Duke of Yare)* [1992] 1 QB 503 (CA).
[589] Ibid, 509 (Bingham LJ).
[590] Ibid, 511 (Bingham LJ).

Bingham LJ's explanation has been criticised for wrongly equating "agreement" with "contract", while Art.17 only requires an agreement instead of a contractual privity. Such an agreement can be reflected by the "existence of consensus", for instance, from the bailor's consent to sub-bail on the exclusive jurisdiction clause.[591] The author agrees with this view since none of the authorities discussed above under 4.6.3 and 4.6.5 on Art.17 of the Brussels Conventions required a "contract". Instead, what they all required was the clear and precise consent from the contracting parties and third parties on the jurisdiction clause. It might be hard to argue that there is such a clear and precise consent when only an implied consent from the bailor exists, as in the case of *The Duke of Care*, or only an ostensible authority from him. However, when an express and wide consent from the bailor to sub-contract "on any terms" exists, such a clear and precise consent might be inferred, in which case Art.17 could be satisfied.

5.6.2 Arbitration clause

No dispute under English law has yet arisen as to whether the principle of sub-bailment on terms could apply to the arbitration clause. In New Zealand, it was decided that the principle can so apply. In *Trackweld Group Ltd v Contship Container Lines Ltd*,[592] the freight forwarding company entered into a contract of carriage to carry the plaintiff's log loaders from Helsinki to New Zealand and issued a bill of lading to the plaintiff. The bill gave the freight forwarder the authority to sub-contract the carriage. The freight forwarder sub-contracted the voyage from Hamburg to Auckland to the sea carrier. The sea carrier issued its own bill of lading, which contained an arbitration clause providing for London arbitration. The log loaders arrived damaged in Auckland, so the plaintiff sued the sea carrier in the New Zealand District Courts to claim the damages. Invoking the principle of sub-bailment on terms, the sea carrier protested the jurisdiction of the New Zealand courts. It was held that the plaintiff was bound by the London arbitration clause in the sea carrier's bill because of the principle of sub-bailment on terms.

[591] Jenard and Schlosser: 1979 OJC 59/1; Case 24/76 *Salotti* [1976] ECR 1831; Case 25/76 *Segoura* [1976] ECR 1851; Adrian Briggs, "Get Your Writs Out?" [1992] LMCLQ 150, 154-155; Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (6th edn, Informa, London 2015) 2.125 and 4.47; Toh Kian Sing, "Jurisdiction Clauses in Bill of Lading-the Cargo Claimant's Perspective" [1995] LMCLQ 183, 187.

[592] [1995] DCR 607 (Auckland District Court); unreported, High Court, Auckland IIC 126/95, Robertson J, 7 May 1996 at 4.

Presumably, an arbitration clause can also come within the broad scope of "sub-contract on any terms" under English law.[593] This is because there is no substantial difference between an arbitration agreement and an exclusive jurisdiction clause as both of them require the parties to resolve their disputes in a particular forum.[594] Furthermore, the inclusion of an arbitration agreement in the sub-contractors' own terms and conditions nowadays is no less common than the usage of an exclusive jurisdiction clause. Moreover, in contrast to the common law Himalaya clause approach, which only extends the benefits to the third parties employed by the carrier, the principle of sub-bailment on terms can bind the shipper to the terms of sub-bailment. As such, even if the arbitration clause creates both rights and obligations, this particular nature would not give rise to difficulty in allowing third parties employed by the carrier to enforce the arbitration clause in the sub-bailment against the shipper. Therefore, in contrast to the common law Himalaya clause approach, which cannot transfer the benefit of the exclusive jurisdiction or arbitration clause to the third party without clear and specific reference to such a clause,[595] a sub-bailee can enforce the clause if an express and wide consent from the owner to sub-contract on any terms exists.

Although the sub-bailee might be able to enforce the arbitration clause in the sub-bailment against the owners by virtue of the principle of sub-bailment on terms, a difficulty lies here over whether the sub-bailee could enforce the clause by applying for a stay of proceedings under s.9 of the Arbitration Act 1996. As compared above under 4.3.2 and 4.6.2, stricter than Art.17 of the Brussels Convention, s.9 of the Arbitration Act does indeed require the person applying for the stay of proceedings to be a party to the arbitration agreement. Thus, a problem is whether the bailor's consent to sub-bail on the arbitration agreement can satisfy the requirement that he is a party to that agreement.

This issue has also been considered by the New Zealand court in *Trackweld Group Ltd v Contship Container Lines Ltd*. After it was held that the sea carrier could enforce the London arbitration clause in his own bill, the sea carrier applied for a stay of New Zealand proceedings under s.4 of the Arbitration (Foreign Agreements and Awards) Act

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[593] Law Commission Report No. 242, page 161, footnote 21; Clare Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] JBL 415, 416; Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.58; Deborah A Laurent, "Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context" (2007) A & NZ Mar LJ 121, 140. *Cf* Hon. Justice Bradley Harle Giles, "The Cedric Barcley Memorial Lecture 1999: Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading" (1999) 14 (2) Australian and New Zealand Maritime Law Journal 5, 7.
[594] Rob Merkin, *Arbitration Law* (4th edn, LLP, London 2016) 17.58.
[595] See above 4.7.1.

1982, which was similar to s.9 of the English Arbitration Act 1996. The Auckland District Court granted the stay. The owners then appealed to the Auckland High Court and argued that they had never agreed on a true agreement with the sea carrier to have the disputes settled by arbitration, so the requirement for granting a stay of proceedings under the 1982 Act was not fulfilled. This argument was rejected by Robertson J and a stay was granted again.[596] The judge said that:

> "Any reluctance there may have been about settling disputes by arbitration is now something of the past… In my view the resort to arbitration is not to be considered as something analogous to a contract of adhesion, nor in any way as comparable to an exclusion clause. It is a common and desirable part of contemporary dispute resolution procedures".[597]

It is submitted that Robertson J's explanation only answers the question as to why a bailor could be taken as having consented to sub-bail to the arbitration agreement in the sub-bailment. However, it fails to explain why a bailor, who is not a party to the arbitration agreement, was to be regarded as the party to that agreement so as to be granted against a stay of proceedings under the 1982 Act.[598]

As mentioned above under 5.1, the principle of sub-bailment on terms in essence binds someone to the burdens of a contract to which he is not a party, so the 1999 Act has no application to this principle. Thus, the difficulty here cannot be resolved by s.8 of the Act, which treats the third party as a party to the arbitration agreement.[599] Furthermore, unlike the common law Himalaya clause approach, the working of the principle of sub-bailment on terms does not operate by creating a contract between the cargo claimants and the third parties. As such, it is hard to argue that the bailor can be regarded as a party to the arbitration agreement in the sub-contract.[600] Therefore, even if a bailor is bound by the arbitration agreement in the sub-bailment by virtue of the principle of sub-bailment on terms, the sub-bailee might not be able to apply for a stay under s.9 of the

[596] Unreported, High Court, Auckland IIC 126/95, Robertson J, 7 May 1996.
[597] Ibid, 4.
[598] See other criticism to this decision: Hon. Bradley Harle Giles, "The Cedric Barcley Memorial Lecture 1999: Some Concerns Arising from the Enforcement of Arbitration Clauses in Bills of Lading" (1999) 14 (2) A & NZ Mar LJ 5, 17-18; Deborah A Laurent, "Foreign Jurisdiction and Arbitration Clauses in the New Zealand Maritime Context" (2007) A & NZ Mar LJ 121, 140-141.
[599] See above 4.5.4.
[600] See above 4.7.3.

English Arbitration Act 1996. In this situation, he may only depend on the court's discretion under the common law to grant a stay.[601]

5.6.3 A chain of bailments

In both *Spectra International Plc v Hayesoak Ltd*[602] and *Sonicare v East Anglia Freight Terminal Ltd*,[603] the sub-sub-bailees were held entitled to rely on the terms of sub-sub-bailment against the bailors once the bailors' consent to sub-bail had been established. The decisions show that the principle of sub-bailment on terms can apply, not only to the sub-bailment relationships, but also to a chain of bailments. This is because as long as the bailor has expressly or impliedly consented to sub-bail to a sub-contractor, he would not have been concerned about the way the sub-contractor would complete the carriage.[604] Sub-paragraph (a) of the IGP&I/BIMCO's new clause defines the third parties employed by the carrier as "Servant" and provides that:

> "*(a) For the purpose of this contract, the term "**Servant**" shall include the owners, managers, and operators of vessels (other than the Carrier); underlying carriers; stevedores and terminal operators; and any **direct or indirect** servant, agent or subcontractor (**including their own subcontractors**), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract **whether in direct contractual privity with the Carrier or not**.*"

As discussed above under 1.3.1.1, this means that the third parties also include the carriers' sub-sub-contractors and other contractors down the chain. This new clause, together with the carrier's express entitlement to sub-contract on any terms, establishes the bailor's consent to sub-bail down the chain in the most unambiguous way.

5.7 Binding the successor in title

In *The Proneer Container*, the cargo interests who sued the sub-bailees in bailment were the original bailors.[605] However, when the ownership of the goods passes from the

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[601] See above 4.3.3.
[602] [1997] 1 Lloyd's Rep 153 (Central London County Court (Business List)).
[603] [1997] 2 Lloyd's Rep 48 (Central London County Court (Business List)).
[604] Ibid, 52 (Hallgarten J).
[605] See also *Elder Dempster* [1924] AC 522 (HL); *Morris v Martin* [1966] 1 QB 716; *The Pioneer Container* [1994] 2 AC 324 (PC); *Singer* [1988] 2 Lloyd's Rep 164 and *Spectra* [1997] 1 Lloyd's Rep 153. For the discussion of "original bailor", see above 5.2.2.

original bailors to the buyers or the consignees of the goods, the persons who have the interest in suing the sub-bailees might be those successors in title instead of the original bailors. The difficulty here is that it has been established that ownership itself is not sufficient to give rise to bailment.[606] Since the principle of sub-bailment is only confined to the bailment situations, the third party employed by the carrier can only invoke the principle against the successor in title if he is liable to that successor in title in bailment. Furthermore, even if the original bailor has consented to sub-contract "on any terms", this consent does not necessarily bind the successor in title so as to bind him to the sub-bailment terms. The successor in title is only bound by the terms of sub-bailment if the third party can prove the consent from the successor himself to sub-bail on those terms. Therefore, in the interests of this chapter, the issue concerning the successor in title shall be discussed.

5.7.1 Attornment

Under the law of bailment, a successor in title can be the new bailor and sue in bailment if the bailee has attorned to them.[607] In the simplest words, attornment by a bailee "consists in an acknowledgement that someone other than the original bailor now has title to the goods and is entitled to delivery of them".[608]

5.7.1.1 Requirements

The definition of attornment shows that to affect an attornment, it is crucial that the bailee has express acknowledgement of the successor in title's right to the delivery of goods. There are no requirements as to the form of that acknowledgement[609] and very little is needed to amount to such an acknowledgement.[610] It is also required that attornment is only effective if the "acknowledgement" is communicated to the buyers or someone acting on their behalf.[611] Nevertheless, the original bailor's consent to the

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[606] *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395 (CA), 404 (Slade LJ).
[607] *The Aliakmon* [1986] AC 785 (HL), 818 (Lord Brandon); *The Captain Gregos (No.2)* [1990] 2 Lloyd's Rep 395 (CA), 405 (Lord Bingham); *The Future Express* [1993] 2 Lloyd's Rep 542 (CA), 550 (Lloyd LJ); *Sonicare v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep 48, 53 (Hallgarten J).
[608] *The Gudermes* [1993] 1 Lloyd's Rep 311 (CA), 324 (Staughton LJ). There was also a similar statement in *The Future Express*: [1993] 2 Lloyd's Rep 542 (CA), 550 (Lloyd LJ): "there is an attornment when, in simple terms, a bailee of goods acknowledges that he holds the goods on behalf of a person other than the original bailor. The relationship of bailment then springs up between the bailee and that other person…"
[609] Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 20-011.
[610] *Laurie and Morewood v Dudin & Sons* [1926] 1 KB 223 (CA), 237 (Scrutton LJ).
[611] Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 20-011 and 1369-1371.

attornment is not required,[612] although the bailee will be liable to the original bailor for breach of the original terms of the bailment if he delivers the goods to the order of successor in title without the original bailor' consent.[613]

5.7.1.2 Consequences

The consequences of attornment are that, firstly, the attornee becomes the new bailor in substitution for the original bailor.[614] Secondly, attornment transfers to the new bailor both the constructive possession of the goods and the rights of suit against the bailee.[615] Thirdly, the bailee is estopped from denying the new bailor's title[616] so that the new bailor can sue the bailee in respect of breaches occurring, not only after, but also before the attornment.[617] Thus, in contrast to the position of a claimant suing in tort, to sue in bailment, the new bailor does not need to prove that he had a possessory interest in the goods at the time of the breach of duty by the bailee.[618]

5.7.1.3 Attornment by the sub-bailee

In the case of sale of goods furnished by the transfer of the bill of lading, "a difficult area"[619] is whether the mere transfer of the bill of lading constitutes an attornment so as to give the transferee the right to sue the *carrier* in bailment.[620] The detailed discussion of this issue lies out of the scope of this thesis, since this chapter focuses on the

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[612] Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 20-011 and 1368-1369.
[613] Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.46.
[614] *The Aliakmon* [1986] AC 785 (HL), 818 (Lord Brandon).
[615] Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1991] LMCLQ 393, 396.
[616] Hugh Beale (ed), *Chitty on contracts* (32nd edn, Sweet & Maxwell, London 2015) 33-030; Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.48.
[617] Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1991] LMCLQ 393, 397.
[618] Ibid, 397. This is also what has happened to the claimants in *The Gudermes* [1993] 1 Lloyd's Rep 311 and *Sonicare v East Anglia Freight Terminal* [1997] 2 Lloyd's Rep 48.
[619] *East West Corpn v DKBS A/S* [2003] QB 1509 (CA), [42] (Mance LJ). See also *Carver on Bills of Lading*, 6-014 to 6-015 and 7-036 to 7-042 for the difficulties in reconciling the conflicting cases.
[620] Attornment is needed: *The Aliakmon* [1986] AC 785 (HL), 818 (Lord Brandon); *The Captain Gregos (No.2)* [1990] 2 Lloyd's Rep 395 (CA), 405-406 (Bingham LJ); *The Future Express* [1993] 2 Lloyd's Rep 542 (CA), 550 (Lloyd LJ); *The Gudermes* [1993] 1 Lloyd's Rep 311 (CA), 324 (Staughton LJ); *Cf The Berge Sisar* [2002] 2 AC 205 (HL), 219 (Lord Hobhouse): the bill of lading "carried with it a transferable attornment". *Cf* Roy Miles Goode, *Proprietary Rights and Insolvency in Sales Transactions* (3rd edn, Sweet & Maxwell, London 2010) 1.23: the issue of the bill of lading is "in loose an attornment in advance". *Cf* Attornment is not necessary: Sir Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, London 2017) 6-015; Gerard McMeel, "The Redundancy of Bailment" [2003] LMCLQ 169, 196-198; Guenter Treitel, "Bills of Lading: Liability of Transferee" [2001] LMCLQ 344, 354-355; Micheal G Bridge, *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell, London 2014) 18-092; Paul Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539, 552-558.

successor in title's right to sue the *sub-bailee* in bailment. As discussed above under 5.3.2.2, it has been established that the sub-bailee's duties arise when he voluntarily takes possession of the goods with the knowledge that a person other than the bailee is interested in the goods. Here, the sub-bailee assumed the duties of a bailee towards the party who at that time is entitled to possession of the goods, rather than to whom may have been the original bailor under the head-bailment.[621] Thus, if the successor in title to that party then seeks to claim in bailment against the sub-bailee, the sub-bailee's attornment to that successor in title is still needed.

Since an effective attornment requires the bailee to *communicate* his acknowledgement of the successor's title to the goods,[622] this indicates that an interaction between the sub-bailee and the successor in title is necessary, for instance, when the sub-bailee delivers the goods to the successor in title against the tender of the bill.[623]

5.7.1.4 The attornee's consent to sub-bail on terms

After establishing that the successor can sue the sub-bailee in bailment because of the sub-bailee's attornment to him, a difficulty arises as to how the attornee could have consented to sub-bail "on any terms" made by the shipper in the bill. This is because the attornee might never have the means to know the terms of the main contract nor have the direct negotiation with the head-bailee. In *Sonicare*, this difficulty was resolved by the notion of estoppel by convention. Hallgarten J said:[624]

> "Attornment is at root a form of estoppel, and in my view any representation that EAFT held the consignment for Sonicare's account was implied on the basis such was subject to terms – i.e. the NAWK conditions – applicable between EAFT and their immediate bailors, viz. NOL."

Here, EAFT acted as the sub-bailee of goods and Sonicare was the attornee. From Hallgarten J's judgment, it can be seen that the effect of attornment is not only to estop the sub-bailee from denying the attornee's title to sue in bailment for the breaches

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[621] Simon Baughen, "Terminal Operators and Liability for Cargo Claims under English Law" in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, Oxford 2014) 282.
[622] See above 5.7.1.1.
[623] e.g. *Sonicare v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48, 53 (Hallgarten J): the sub-sub-bailee EAFT attorned to the buyers of the goods Sonicare when delivered to them upon a computerised cargo proceeding system.
[624] Ibid, 54.

occurring before the attornment,[625] but also to estop the attornee from denying the sub-bailment terms between the sub-bailee and the head-bailee. In *The Captain Gregos (No.2)*, the same estoppel argument was also argued. In that case, the shipowners never attorned to PEAG as bailor. Bingham LJ said that even if there were such an attornment, estoppel by convention "requires communications to pass across the line between the parties".[626] Since there was no communication between PEAG and the shipowners, which was the very reason why there was no attornment between them, the estoppel argument failed. As discussed above under 5.7.1.1, attornment is only effective if the sub-bailee has communicated his acknowledgement of the successor's right to the goods to the successor, which is just what was required by Bingham LJ. Presumably, it might be said that the existence of an effective attornment has already satisfied what has been required for an estoppel. If this is correct, it might be further argued that so long as there is an attornment between the sub-bailee and the successor in title and there is an express consent to sub-bail on any terms from the original bailor, the successor will be estopped from denying that the direct bailment between them is on the terms of the original sub-bailment.

5.7.2 Assignment

In *Sonicare*, Hallgarten J held that the alternative way through which the successor in title could sue the sub-bailee in bailment was the assignment. In *The Captain Gregos (No.2)*, upon deciding whether or not the shipowners owed the duty in bailment towards PEAG, Bingham LJ also took the view that attornment was not necessary for the successor in title to sue in bailment if the original bailor has assigned his benefits under the bailment to the successor in title.[627] In *The Forum Craftsman*,[628] the buyers acquired the rights by assignment from the original buyers, so the only dispute was whether the shipowners could rely on a forum selection clause in the charterer's bill against the buyers. It was not disputed at all on the issue whether the shipowners owed the duties in bailment towards the shipowners. It might be inferred that attornment is not necessary for the successor in title to sue in bailment if the original bailor has assigned his benefits under the bailment to the successor in title.

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[625] See above 5.7.1.2.
[626] *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395 (CA), 405.
[627] Ibid, 404-405 (Bingham LJ). However, the decision of the case was that there was neither assignment nor attornment.
[628] [1985] 1 Lloyd's Rep 291 (CA).

As to how the original bailor assigned to the successor in title, Hallgarten J[629] said in *Sonicare* that:

> "the original bailor has caused the benefit of the contract representing the head bailment to be assigned – i.e. by negotiation of the VTP bill of lading – then it seems to me that the transferee does indeed step into the shoes of the original bailor and is to be treated for all intents and purposes as bailor."

Hallgarten J tended to say that the original bailor assigned his rights to the transferee of the bill of lading by negotiation of the bill. However, in *East West Corp v DKBS AF 1912 A/S*, Mance LJ[630] held that the statutory transfer of rights under the bill of lading under COGSA 1992 did not transfer to the new holder the right to sue in bailment. It seems that English law is reluctant to extend Hallgarten J's assignment reasoning to the statutory assignment situations under COGSA 1992.[631]

As mentioned above under 5.7.1.1, attornment requires the communication between the sub-bailee and the successor in title, so it is improbable to occur in misdelivery cases.[632] By contrast, assignment does not require any communication between the sub-bailee and the successor in title, but only requests something passing from the original bailor to the successor in title.[633] Therefore, the assignment might be helpful for the difficulties with the successor in title's right to sue the sub-bailee when the whole cargo is misdelivered.[634]

Similarly to attornment, an issue also exists in assignment concerns how the assignee could have consented to sub-bail on any terms, given that he might never have the means to know the terms of the main contract nor have the direct negotiation with the head-bailee. In *Sonicare*, after deciding that the original bailor had assigned to Sonicare, Hallgarten J merely considered whether the original bailor had consented to sub-bail on

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[629] [1997] 2 Lloyd's Rep 48, 53.
[630] [2003] EWCA Civ 83; [2003] QB 1509, [45].
[631] Simon Baughen, "Terminal Operators and Liability for Cargo Claims under English Law" in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law, Oxford 2014) 281; *Cf* Paul Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539, 554.
[632] Nonetheless, where only part of the cargo is misdelivered, there can still be such a communication which constitutes attornment: *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395 (CA); Paul Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539, 553.
[633] *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep 395 (CA), 404 (Lord Bingham).
[634] For the difficulties with the title to sue in bailment in misdelivery cases, see Paul Todd, "The Bill of Lading and Delivery: the Common Law Actions" [2006] LMCLQ 539; Simon Baughen, "Bailment and Conversion? Misdelivery Claims against Non-contractual Carriers" [2010] LMCLQ 411.

the terms at issue.[635] Determining that the original bailor had consented to sub-bail on the terms in question, the judge directly held that Sonicare, as the assignees, were bound by those terms. This indicates that so long as there is an assignment, reference is only needed to be made to the original bailor's consent in order to decide the assignee's consent. This is presumably because of the special nature of the law of assignment: the assignee is assigned to not only the assignor's rights but also his obligations. Thus, the assignee will be bound by the assignor's consent to sub-bail on any terms.

After the above discussion, it can be said that so long as the original bailor's consent to sub-bail on any terms has been established and so long as the successor in title becomes the new bailor either by assignment or attornment, the successor in title will also be bound by the original bailor's consent to sub-bail on any terms.

5.8 Where the carrier never takes possession of goods

In *The Pioneer Container*, the cargo owners' goods were firstly loaded on the contracting carrier's vessel. The contractual carrier then sub-contracted part of the carriage to the actual carrier and the goods were then loaded on the actual carrier's vessel. As such, the contractual carrier took possession of goods before the actual carrier. According to the definition of "sub-bailment" mentioned above under 5.3.1, this is a "true sub-bailment". In practice, however, it is not unusual for the third party employed by carrier to take possession of the goods directly from the cargo owners without the carrier's previous physical possession. For example, where the time charterer is the carrier, the goods might be directly loaded onto the shipowner's vessel by the shipper and never have entered the time charterer's possession.[636] Similarly, in the case of multimodal transport, the goods might be taken over by the actual carrier directly without any prior possession by the freight forwarder.[637] In these circumstances, it looks like that the shipowner and the actual carrier are the head-bailees rather than sub-bailees while the charterer and the freight forwarder are not the bailees.

[635] [1997] 2 Lloyd's Rep 48, 53-54.
[636] E.g., *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 52 (HL). If the time charterer receives the goods into his possession and then loads them on to the shipowner's vessel, he will be a bailee throughout the period of its contractual responsibility under its bill of lading: *The Okehampton* [1913] P 173.
[637] *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep 153.

Professor Norman Palmer named this special relationship "quasi-bailment".[638] He defined it as a relationship which arises when (1) an "intermediary party"[639] promises to the owners of the goods that the services will be performed in relation to the goods, but (2) the intermediate party delegates the performance of the whole task to a third party (the "quasi-bailee") without taking possession personally. The problem arises as to whether or not the principle of sub-bailment on terms applies to this quasi-bailment situation, and if so, why.

5.8.1 Does the principle of sub-bailment on terms apply?

In *The Pioneer Container*, the cargo owners argued that there was no evidence that the contractual carrier had ever obtained the actual possession of the goods, so the shipowners were not the sub-bailees but quasi-bailees, to which the principle of sub-bailment on terms did extend. Lord Goff held, *obiter*, that, even if the contractual carrier had never done so, it is hard for their Lordships to see why the shipowners could not rely against the cargo owners on the terms which the contractual carriers had sub-contracted to them, provided that the terms were within the cargo owners' consent.[640] A similar argument was raised by the shippers in *Spectra v Hayesoak*, which was again rejected by Hallgarten J without hesitation by citing Lord Goff's above *obiter*.[641] In *The Starsin*, the shipowners accepted the goods directly from the cargo owners without any prior physical custody by the time charterers. Lord Hobhouse said that his "preferred view" was that the shipment under the charterers' bills was by way of bailment to the time charterers and sub-bailment to the shipowners.[642] He continued that the shipowners as the sub-bailees "would have been entitled to rely upon the terms upon which they had taken the goods into their possession", which was the time charterparty.[643]

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[638] Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 23-011, 23-012 and 23-022; Norman Palmer, "Quasi-bailment" [1988] 1 LMCLQ 34.
[639] Professor Palmer named the intermediary party as the "quasi-bailor": Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 23-022.
[640] [1994] 2 AC 324 (PC), 345.
[641] [1997] 1 Lloyd's Rep 153, 155.
[642] [2003] UKHL 12; [2004] 1 AC 715, [133].
[643] Ibid, [137]. *Cf* Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.82: the contract of time charterparty is just a contract for a use of ship to fulfil the charterer's obligation to carry the goods, rather than a contract of carriage, or even a sub-contract whereby the charterer sub-contracts to the shipowners his obligation owed to the shippers, so it is not sub-bailment at all; also the concept that sub-bailment on time charter terms rather than bill of lading terms is contrary to a commercial man's expectation.

It can be seen that the authorities are inclined to support that the view that the principle of sub-bailment on terms should be extended to the quasi-bailment situations.[644] In the author's view, this proposition is well-founded, since it would be unfair for the quasi-bailee if his immunity should depend upon the intermediate party's own possession of the goods.[645] Moreover, the quasi-bailments have close similarities to the sub-bailments[646] so that they should be treated similarly. The similarities between them can be seen from the court's attitude towards the legal position of the intermediary parties.

5.8.2 Quasi-bailment and true sub-bailment

In *Transcontainer Express Ltd v Custodian Security Ltd*,[647] Slade LJ inclined to accept, *obiter*, that a road carrier who had never taken the physical custody of the goods might still be able to sue its sub-sub-contractor in bailment.[648] This shows that the contractual carrier who has never taken the physical possession of the goods has the rights of a bailor towards the subsequent bailees. Furthermore, in *Metaalhandel JA Magnus BV v Ardfields Transport Ltd*,[649] Gatehouse J held that the contracting party who had never taken the physical possession of the goods would be responsible to the bailor for the defaults of his independent contractors.[650] This shows that the contractual carrier who has never taken the physical possession of the goods has the obligations of a bailee towards the bailor. Furthermore, in *Spectra v Hayesoak*, the contractual carrier was a freight forwarder who sub-contracted the haulage services to the third parties. Hallgarten J said that there was no authority cited to him where someone in the freight forwarder's position could only be regarded as a bailee if he had ever had the physical control of the goods at some stage.[651] It can be seen that the contractual carrier should be in the status of a true head-bailee even if he has never held the physical custody of the goods.

It follows that, where appropriate, the rules of bailment and sub-bailment should also be introduced to the quasi-bailment relationship. That is, the quasi-bailee, by voluntarily taking into possession of the goods and knowing that the goods belong to someone

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[644] Ralph de Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP London 1995) at para 14.40, page 474.
[645] See also Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell, London 2009) 23-002.
[646] Ibid: "quasi-bailments have close similarities to sub-bailments".
[647] [1988] 1 Lloyd's Rep 128 (CA).
[648] Ibid, 135.
[649] [1988] 1 Lloyd's Rep 197 (QB).
[650] Ibid, 203.
[651] [1997] 1 Lloyd's Rep 153, 155.

other than the intermediary party, owes to the intermediary party the duties of a bailee.[652] If the quasi-bailee owes the duties of a bailee for reward to the intermediary party, he should also owe the bailor the duties of a bailee for reward. Also, the intermediary party owes a duty to the bailor to exercise reasonable care to choose his delegates and is also responsible for the manner in which the delegated functions are discharged by his sub-contractor.[653] Presumably, one thing that should not be introduced here is the intermediary party's onus of proof,[654] because he has never been in possession of the goods, for which the reversed burden of proof loses its rationale.[655]

5.8.3 Justification

In *Transcontainer Express*, Slade LJ said that the intermediary party, although it gained no physical possession, had an "immediate right to possession" over the goods, which was sufficient to justify himself as the bailee so as to enable him to sue the sub-sub-contractor in bailment.[656] Similarly, Professor Norman Palmer regarded the intermediary party as enjoying some "ulterior possessory right to the goods".[657] It can be seen that the justification for treating the non-possessing contracting carrier as a true bailee and for treating quasi-bailment and sub-bailment similarly is that the intermediary party has an immediate or ulterior right to the possession of goods.

The problem arises as to how to prove that the intermediary party has such an immediate or ulterior right to the possession. In *Transcontainer Express*, Slade LJ said that to show that Transcontainer (the intermediary parties) had an ulterior possessory right to the goods against Crosslands (the sub-contractor), Transcontainer would need to adduce evidence as to their contract with Crosslands, namely, the sub-contract.[658] To

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[652] Although *The Pioneer Container* involves a true sub-bailment relationship, Lord Goff held, *obiter*, that their Lordships could not find the reason why the shipowners should not, by receiving the owners' goods into their possession, have become responsible as bailees to owners "even if the goods were never in the possession of [the contractual carrier]": [1994] 2 AC 324, 345. See also Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009) 23-022.

[653] *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197 (QB), 203 (Gatehouse J).

[654] *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197, 202 (Gatehouse J); Norman Palmer, "Quasi-bailment" [1988] 1 LMCLQ 34, 37.

[655] See above 5.2.3.

[656] [1988] 1 Lloyd's Rep 128, 135. This analysis was also agreed by the Court of Appeal in *East West Corpn v DKBS A/S*: [2003] EWCA Civ 83; [2003] QB 1509, [27] (Mance LJ).

[657] Norman Palmer, "Quasi-bailment" [1988] 1 LMCLQ 34, 39. See also, Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393, 403: "[t]o treat the shipowners in such a situation as a head bailee is to give insufficient weight to the continuing status of the charterers as bailee when a charterer's bill is issued. The Charterer continues to be in possession of the cargo after it has been loaded".

[658] [1988] 1 Lloyd's Rep 128 (CA), 135.

decide on the same issue, in *Spectra v Hayesoak*, Hallgarten J referred to the contract between the shippers and the freight forwarders, namely, the main contract. That contract provided that the goods were "taken into [Frans Mass'] charge". Hallgarten J held these words "encompassed bailment" between the shippers and freight forwarders, no matter whether the latter held the goods personally or by a sub-contractor.[659]

It can be seen that both the main contract and the sub-contract are relevant in determining whether the carrier has an immediate right to the possession.[660] Presumably, if the main contract prohibits any possessory right by the carrier in the first place, no matter what the sub-contract provides, the carrier cannot be taken as having the immediate possession of the goods. If the main contract allows his possessory right, he can be taken as having the immediate possession of the goods, unless the sub-contract shows that he has assigned the entire possessory interest to the sub-contractor.[661]

In practice, the bills of lading are unlikely to prohibit the contractual carriers' possessory right. Moreover, the shipping companies' own terms of carriage invariably provide that the contractual carriers' responsibility period lasts from the time when the goods are received to the time when the goods are delivered.[662] In this situation, it is unlikely for the carriers to assign all their possessory interest to any sub-contractors. Under these circumstances, even if the contractual carriers have never taken the physical possession of the goods, they always inherit or reserve a sufficient right to possession. As such, they should be treated as the true head-bailees,[663] and the rules of sub-bailment should also apply to the quasi-bailment relationship, including the principle of sub-bailment on terms.

5.9 Sub-bailment on terms or Himalaya clause?

As suggested earlier under 5.4.3.2, when the shipping companies endorse the IGP&I/BIMCO's Revised Himalaya Clause in their own terms of carriage, the

[659] [1997] 1 Lloyd's Rep 153, 155.
[660] See also Norman Palmer, "Quasi-bailment" [1988] 1 LMCLQ 34, 39: the retaining of immediate possessory right without first gaining physical possession should be contractually substantiated.
[661] See Norman Palmer, "Quasi-bailment" [1988] 1 LMCLQ 34, 41-42.
[662] E.g., BIMCO's Multidoc 2016, cl. 10(a); FIATA FBL, cl. 6.1; Maerskline, cl.6; MSC, cl.5; CMA CGM, cl.6; APL, cl.5; Hapag-Lloyd, cl.5.
[663] Presumably, the only situation where a contractual carrier cannot be so treated is that he is liable as the carrier only for half of the carriage and sub-contracts to a third party for that half of carriage. However, he contracts as the shipper's agent with another person for the other half of the transit. In this case, for the other half of the transit, it cannot be said that there is a bailment from shipper to the contractual carrier and that there is a sub-bailment from the contractual carrier to that other person.

provisions which expressly entitle the carrier to "sub-contract on any terms" should be retained. If the conditions required by the common law Himalaya clause approach can be satisfied, a third party could enforce the benefits under the bill of lading. Furthermore, since the consent to sub-bail "on any terms" is very broad, the third party who is the sub-bailee might also be able to enforce the terms under sub-contract against the owners. Where both of these two approaches are available, an important problem following concerns whether the third party can invoke both approaches to rely on both of the clauses under the bill of lading and the sub-contract, or he can only rely on just one of them, and if so, which one.

In *The Pioneer Container*, the cargo owners argued that the Himalaya clause had given the third party shipowners sufficient protections, so that the shipowners could not be allowed to involve the principle of sub-bailment on terms to take advantage of the sub-bailment terms. Rejecting this argument, Lord Goff[664] said that:

> "[Their Lordships] are satisfied that, on the legal principles previously stated, a sub-bailee may indeed be able to take advantage, as against the owner of goods, of the terms on which the goods have been sub-bailed to him. This may, of course, occur in circumstances where no "Himalaya" clause is applicable; but the mere fact that such a clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods…"

Lord Goff's speech indicates that the sub-bailee could choose to invoke either approach, whether or not they are consistent with one another. In *The Pioneer Container*, however, there was no inconsistency between the two approaches because the bill of lading did not contain an exclusive jurisdiction clause.[665] So far, in the English authorities where the issue of the inconsistency between the two approaches has arisen, the cargo owners all argued that the sub-bailment on terms should not apply and this argument was totally

[664] [1994] 2 AC 324 (PC), 345.
[665] *The Rigoletto* [2001] CLC 25 (CA), [48] (Rix LJ); *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [134] (Lord Hobhouse).

rejected.[666] For example, in *Spectra v Hayesoak*, the cargo owners argued that the Himalaya clause in the head-bailment was inconsistent with the sub-bailment so that the sub-bailee could not invoke the sub-bailment terms.[667] Relying on Lord Goff's above speech, Hallgarten J rejected this argument. A question which remains unanswered concerns whether or not the sub-bailee can rely on an inconsistent Himalaya clause rather than the actual terms of the sub-bailment.[668]

This issue has been considered by the Court of Final Appeal in Hong Kong. In *Bewise Motors Co Ltd v Hoi Kong Container Services Ltd*,[669] the shipper contracted with A for the carriage of cars to China, and A sub-contracted with Company B for the stevedore services at Hong Kong docks, where the cars were stolen. The contract of carriage between the shipper and A contained a Himalaya clause, and the contract between A and B was on B's own standard terms. According to one view, the Himalaya clause contained in the contract of carriage entitled B to a larger exemption from liability than B's own terms would give it. As such, the shipper sought to invoke the principle of sub-bailment on terms to rely on B's own terms against B.[670] However, B preferred to rely on the contract of carriage terms via the Himalaya clause. The Court held that only B's terms, namely, the sub-bailment terms, applied. Giving the court's reasons, Ching PJ[671] said that:

> "Both the 'Himalaya' clause and the so-called doctrine of sub-bailment are mechanisms designed to extend the benefit of the terms between the original parties to the sub-contractor or sub-bailee. Neither, however, are mechanisms which can supervene over the actual terms of a sub-contract or a sub-bailment. So, in logic, *where a sub-contractor or a sub-bailee expressly declines to enter into a transaction except upon his own terms alone* there can be no room for the incorporation of the terms of the contractor or bailee…"

Ching PJ's above passage was cited and agreed by Rix LJ in *The Rigoletto*. Considering the aforementioned speeches of both Lord Goff and Ching PJ, Rix LJ said that when the

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[666] E.g., *The Pioneer Container* [1994] 2 AC 324; *Spectra v Hayesoak* [1997] 1 Lloyd's Rep 153; *The Rigoletto* [2001] CLC 25.
[667] [1997] 1 Lloyd's Rep 153, 157.
[668] *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [136] (Lord Hobhouse).
[669] [1998] 4 HKC 377.
[670] It has also been been suggested the principle of sub-bailment on terms could be invoked by both the bailor and the sub-bailee: *Sandeman Coprimar SA V Transitos Y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] 2 Lloyd's Rep 172, [61]-[66] (Lord Phillips MR).
[671] [1998] 4 HKC 377, 390.

sub-bailee expressly declined to enter into a transaction except upon his own terms alone, he would "be taken to have made his choice",[672] as suggested by Lord Goff, "to the extent of any inconsistency between" the Himalaya clause and the sub-bailment terms.[673]

In Chapter 1, it was suggested that in order to satisfy the third requirement proposed by Lord Reid, the third party employed by the carrier should include in the contract between them a clause expressly authorising the carrier to draft a Himalaya clause in the bill of lading to protect the third party.[674] One might argue that, by giving the carrier such express authorities to contract on the clauses benefiting the third party, the third party can rely on the defences contained in the bill only when there is an inconsistency between the Himalaya clause and the principle of sub-bailment on terms.[675] However, as Rix LJ has held, even if such an express authority from the third party exists, the sub-bailee's own terms should prevail where there is inconsistency. This is because the Himalaya clause "applies indiscriminately to any agent or independent contractor employed by the carrier", while the sub-bailee's own terms are "specifically drafted" by him as "appropriate to their individual circumstances".[676]

Thus, it can be said that no matter whether there is an inconsistency between the Himalaya clause approach and principle of sub-bailment on terms, the sub-bailee has the freedom to choose either one of them. However, where the sub-bailee would like to accept the goods solely upon his own terms, he might be taken as having chosen the terms of sub-bailment, to the extent of any inconsistency between the two approaches. In this situation, he cannot invoke the Himalaya clause approach to rely on the bill of lading terms which are inconsistent with the terms of sub-bailment. In practice, it is not unusual for some third parties employed by the carrier, e.g. stevedores,[677] warehousemen,[678] port authorities,[679] shipowners,[680] hauliers,[681] to enter into the contract

[672] [2001] CLC 25 (CA), [49].
[673] Ibid, [51].
[674] See above 1.3.3.
[675] e.g. Andrew Bell, "Sub-bailment on Terms", Ch 6 of Norman Palmer and Ewan Mckendrick, *Interest in Goods* (2nd edn, LLP, London 1998) 159, 179.
[676] *The Rigoletto* [2001] CLC 25 (CA), [53] (Rix LJ).
[677] In *The Rigoletto* [2001] CLC 25, the defendants Southampton Cargo Handling Plc performed the stevedoring services pursuant to their own SCH conditions.
[678] In *Sonicare v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48, the defendants EAFT performed the warehouse services pursuant to the National Association of Warehousing Keepers Conditions 1983 (the NAWK conditions).
[679] In *Singer v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, the defendants Tees and Hartleypool Port Authority performed the loading operation pursuant to their own terms.

with the carrier using their own standard terms, or on the standard conditions of some associations to which they belong. In these circumstances, if there is an inconsistency between the benefits extended by the Himalaya clause and the terms in their own conditions, the latter should presumably prevail.

One possible situation whereby the third party does not accept the goods on his own terms, as in *Elder Dempster*, might occur when the shipowner time charters his vessel to the time charterer and accepts the goods pursuant to the time charterer's bill of lading terms. Under these circumstances, where there is an inconsistency between the Himalaya clause and sub-bailment on terms approach, the Himalaya clause approach presumably prevails. In such a situation, as will be discussed shortly at 5.10.2, the terms of sub-bailment on terms might not actually be incorporated in the direct bailment relationship between the bailor and the sub-bailee at all. As a result, it might be argued that the sub-bailee could only rely on the terms of head-bailment via the Himalaya clause approach (or even via the principle of sub-bailment on terms). In this situation, the issue of inconsistency might not arise at all.

5.10 Can the sub-bailee invoke the principle to enforce the head-bailment terms?

If the conditions required by the common law Himalaya clause are not satisfied, the third party will not be able to enforce the terms under the bill by virtue of the Himalaya clause. However, if the third party is the sub-bailee, a problem arises as to whether or not he could rely on the terms in the bill by invoking the principle of sub-bailment on terms. So far, there has been no conclusive authority on the issue as to whether the principle of sub-bailment on terms could be extended to allow the sub-bailee to rely on the terms of the head-bailment, or, put another way, whether the head-bailment terms could be incorporated into the direct bailment relationship between the head-bailor and the sub-bailee. The answer to this question to a large extent depends upon the scope of the concept of "bailment on terms" raised by Lord Sumner in *Elder Dempster* and the application of the decision of the case.

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[680] *The Pioneer Container* [1994] 2 AC 324, the defendant shipowners accepted the goods pursuant to their own feeder bill.

[681] In *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep 153, the defendants Hayesoak performed his undertakings pursuant to the Conditions of Carriage of the Road Haulage Association 1991 (the RHA conditions).

5.10.1 Lord Sumner's approach in *Elder Dempster*

In *Elder Dempster*, the shipowners time chartered the vessel to the time charterers, who carried a cargo of palm oil belonging to the shippers. The master issued the bill of lading as the agents of the charterers, so the bill of lading contract was between the shippers and the charterers. The bill included a clause exempting "the shipowners hereinafter called the company" from liability for the damage caused by bad stowage. On arrival of the vessel at the destination, part of the goods were damaged and lost. The shippers sued the charterers and the shipowners for damages. The House of Lords held that the damages were caused by bad stowage, so the charterers were entitled to be exempted from their liability. The question concerned whether or not the shipowners, who were not the party to the bill of lading, could equally rely on the exclusion clause in the bill of lading to be exempted from liability for bad stowage. All members of the House of Lords decided in favour of the shipowners. The preferred reason provided by Lord Sumner follows as such:[682]

> "[I]n the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a *bailment upon terms*, which include the exceptions and limitations of liability stipulated in *the known and contemplated form* of bill of lading."

In *Elder Dempster*, the charterers never obtained the physical possession of the goods, and the shipowners received the goods directly from the cargo owners,[683] so the shipowners were just the bailees of the goods rather than the sub-bailees, and there was no sub-bailment involved.[684] However, as discussed earlier under 5.8, this distinction makes no difference - the relationship might at least be regarded as the quasi-bailment which shares the similarities with the true sub-bailment, and the principle of sub-bailment on terms can apply. If so, the shipowners should have been held to rely on the terms in the charterparty, instead of, as the final decision of the case, the bill of lading terms.[685] Therefore, the basis on which the bailment was held subject to the head-bailment terms should be examined.

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[682] [1924] AC 522 (HL), 564.
[683] Ibid; *Midland Silicones v Scruttons* [1962] AC 446, 487 (Lord Denning).
[684] *The Pioneer Container* [1994] 2 AC 342, 339 (Lord Goff).
[685] Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393, 403: after *Morris v Martin*, the parties' relationship in *Elder Dempster* should be analysed "in terms of a head

5.10.2 Legal basis of *Elder Dempster*

From the above-quoted speech, it can be seen that the reason why the bailment to the shipowners was subject to the bill of lading terms regards the shipowners accepting the goods under the bill of lading terms. This understanding was shared by Fullagar J in the Australian case *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*.[686] The judge said that what *Elder Dempster* decided showed that "the *shipowner*, when he receives the goods into his possession, receives them on the terms of the bill of lading".[687]

Fullagar J's view was entirely agreed by Viscount Simond[688] in *Midland Silicones*. Similarly, in *The Pioneer Container*, citing Lord Sumner's above passage, Lord Goff said that in *Elder Dempster* the shipowners' obligations as the bailees were subject to the terms upon which the shipowners "implicitly received the goods into their possession".[689] From Lord Sumner's own speech and later authorities' analysis, it can be seen that one of the main reasons why *Elder Dempster* was so decided is that the shipowners had received the goods upon the bill of lading terms.

In addition, the authorities have also shown that the shippers' consent to the shipowners' acceptance of the goods on those bill of lading terms is the other reason for Lord Sumner's judgment. In *The Pioneer Container*, realising that the bailment in *Elder Dempster* was made by the shipper directly to the shipowners, Lord Goff continued that even if the shipper had not delivered the goods directly to the shipowner, but to the charterers who then had, in turn, loaded the goods on board, the decision would not be different. This was because "the *shipper* may be held to have impliedly *consented* that the *sub-bailment* to the shipowners should be on terms which included the exemption from liability for bad stowage".[690] In *The Mahkutai*, he expressed the same view by saying that the *shippers* in *Elder Dempster* were bound by the terms of the bill of lading because they "may be taken to have *impliedly agreed* that the goods were received by

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bailment to the charterer followed by a sub-bailment to the shipowner, which would be on the terms of the charterparty, not the bill of lading".

[686] [1956] 1 Lloyd's Rep 346 (High Court of Australia).

[687] Ibid, 364.

[688] [1962] AC 446, 470 and 472 (Viscount Simonds). Lord Keith (at 481) and Lord Morris (at 494) also expressed a similar view.

[689] [1994] 2 AC 324 (PC), 340.

[690] Ibid.

the shipowners, as bailees, subject to the exceptions and limitations contained in the known and contemplated form of bill of lading".[691]

From the above discussion, it can be seen that the basis of Lord Sumner's judgment is two-fold. One deals with the shipowners' receiving the goods pursuant to the exclusion clause in the bill of lading. The other concerns the cargo owners' consent to bail to the shipowners on that exclusion clause. As Lord Denning MR said in *Morris v Martin*, Lord Sumner's words meant that:[692]

> "if the *owner of a ship accepts goods* for carriage on a bill of lading containing exempting conditions…the *owner of the goods* …is bound by those conditions if he *impliedly consented* to them as being in 'the known and contemplated form'".

If this understanding is correct, the terms of head-bailment may be incorporated in the direct bailment relationship between the head-bailor and the sub-bailee if two conditions can be satisfied. Firstly, the sub-bailee accepts the goods pursuant to the relevant terms in the head-bailment. Secondly, the head-bailor has consented to sub-bail to the sub-bailee on those terms. Therefore, the sub-bailee could rely on the head-bailment terms against the head-bailor. Professor Francis Reynolds has also expressed a similar view:[693]

> "If sub-bailees, at the time they are employed, … make clear to the head-bailees that they receive the goods not only on their own terms but also (or instead?) on the head bailee's (or charterer's) terms, it would seem that the general permission to sub-bail (or bail) on any terms will enable the inference to be drawn that the shipper has assented to this. Subject to inconsistency problems between the two sets of terms, the head bailee's (or charterer's) terms can be invoked by the sub-bailee."

Owing to the unique facts of *Elder Dempster*, the case has never been followed by any later authorities. As such, the discussion of later authorities where Lord Sumner's reasoning was not applied can be helpful in further understanding the two-fold basis.

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[691] [1996] AC 650 (PC), 661.
[692] [1966] 1 QB 716 (CA), 730. See also Sir Guenter Treitel and FMB Reynolds, *Carver on Bills of lading* (4th edn, Sweet & Maxwell, London 2017) 7-031.
[693] FMB Reynolds, "Bailment on Terms" (1995) 111 LQR 8, 10.

5.10.3 Sub-bailee's acceptance of goods pursuant to head-bailment terms

As discussed above under 5.9, in practice, the third parties employed by the carrier do not usually accept the goods upon the head-bailment terms. Instead, they often enter into the contract with the carrier on their own standard conditions or the standard conditions of some associations to which they belong. As such, it might be hard for the sub-bailee to argue, as the very first step, that he has assented to and taken possession of the goods under the terms of the bill of lading. Actually, in these circumstances, it has been suggested that the need for the sub-bailee to seek to invoke the protection of the bill of lading terms has seldom arisen.[694]

In the context of the carriage of goods, the only situation where the sub-bailee has ever argued to have assented to and accepted the goods under the head-bailment terms is the simple time charterparty circumstance as took place in *Elder Dempster*, *The Forum Craftsman* and *The Mahkutai*. In these particular circumstances, the shipowners accepted the goods pursuant to the charterers' bill and sought to enforce the bill of lading terms against the cargo owners. Presumably, there are two reasons for this unique position of the time charterparty. Firstly, under a time charterparty, in contrast to other cases, the shipowners still manage the ship, which has been chartered out to the charterers and care for the goods under the instruction of the charterer. Secondly, the majority of shipowners normally know that the charterers will issue a bill of lading regarding the goods carried on the shipowners' vessel. As such, it might be inferred that he has assented to receive the goods upon the charterer's bill.[695]

Even in this simple time charterparty situation, it does not necessarily follow that the shipowners have assented to all the terms in the bill. To enforce the certain terms in the head-bailment against the head-bailor, the sub-bailee must also have accepted the goods upon *those terms at issue*. In *The Forum Craftsman*, Ackner LJ said that "the [ship] owners would have been surprised indeed if they had been told, when they received the

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[694] John F Wilson, "A Flexible Contract of Carriage - the Third Dimension?" [1996] LMCLQ 187, 198; in *Lee Cooper v Jeakins* [1964] 1 Lloyd's Rep 300 (QB), it was held that a sub-bailee could not rely on the standard trading conditions incorporated in the bill of lading.

[695] Even in the simple time charterparty situation, it has been suggested that the terms upon which the shipowners had taken the goods into their possession were the time charterparty, rather than the bill of lading: *The Starsin* [2003] UKHL 12; [2004] 1 AC 715, [137] (Lord Hobhouse); Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393, 403. *Cf* Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (2nd edn, Informa, London 2015) 9.82: "the concept of sub-bailment on time charter rather than bill of lading terms appears to us to be contrary to what a commercial man might expect".

goods on board, that it involved as a 'condition of bailment', stemming from a potential charterers' bill of lading, their own submission to the exclusive jurisdiction of a Japanese Court".[696] It can be seen that in Ackner LJ's view the exclusive jurisdiction clause in the bill could not be incorporated in the direct bailment between the cargo owners and the shipowners because the shipowners had not contemplated receiving the goods upon that exclusive jurisdiction clause in the bill.

In Chapter 1, it has been suggested that in order to satisfy the third requirement proposed by Lord Reid, the third party employed by the carrier should include in his own contract a clause expressly authorising the carrier to include a Himalaya clause in the bill of lading to protect him.[697] Where there is such an express authority in the sub-contract, the sub-bailee might be regarded as having consented to accept the goods upon the terms in the bill which could be extended to him by the Himalaya clause. However, as will be discussed shortly,[698] if the sub-bailee could enforce the terms in the bill by invoking the Himalaya clause approach, it is not necessary for him to invoke the principle of sub-bailment on terms. On the other hand, if the third party is unable to enforce the terms in the bill by relying on the Himalaya clause, he cannot enforce those terms pursuant to the principle of sub-bailment on terms either.

According to *The Pioneer Container*, in order to enforce the terms of sub-bailment against the head-bailor, the sub-bailee only needs to prove the head-bailor's consent to sub-bail on those terms. As such, the requirement that the sub-bailee must have received the goods upon the head-bailment seems an additional condition. In the author's view, however, if the sub-bailee wants to enforce the terms of sub-bailment against the head-bailor, his consent to accept the goods upon those sub-bailment terms is also impliedly required. This has never been expressly pointed out because the sub-bailee usually accepts the goods upon the sub-bailment terms.[699]

5.10.4 Head-bailor's consent

Apart from the sub-bailee's assent to accept the goods upon the relevant terms in the head-bailment, in order to bind the head-bailor to those terms, it should also be shown

[696] [1985] 1 Lloyd's Rep 291 (CA), 295.
[697] See above 1.3.3.
[698] See later 5.10.5.
[699] See above 5.9.

that the head-bailor consented to sub-bail on those terms. The problem concerns what might constitute the head-bailor's consent to sub-bail on the terms of the head-bailment.

In *Elder Dempster*, the bill of lading provided that "the shipowners hereinafter called the company" were exempted from liability for the damage caused by bad stowage. By making express reference to the "shipowners", the shippers presumably were taken to have consented to sub-bail to the shipowners on this exclusion clause. In *The Forum Craftsman*, Ackner LJ said that the construction of the terms of the charterer's bill in *Elder Dempster* showed that shipowners were included, while the bill before him referred only to "the company", which only meant time charterers but not the shipowners.[700] He consequently rejected the shipowners' submission to invoke Lord Sumner's "bailment on terms" proposition. It seems that, in Ackner LJ's view, without express and specific reference to the "shipowners" in the bill, the cargo owners could not be taken to have consented to sub-bail to the shipowners on the bill of lading terms.

Presumably, if, as *Elder Dempster*, there is an express reference in the head-bailment to the sub-bailee's right to enforce the head-bailment terms, the head-bailor's consent can be inferred. However, the express reference to "the shipowners" in *Elder Dempster* was actually the result of the misuse of the bill of lading. The bill used in *Elder Dempster* had been designed to the assumption that the goods would be carried by one of the contracting carriers' ships, i.e. in that case, the charterers' own ships. As such, the bill naturally referred to the situation whereby "the shipowners" and "the company" were one and the same person. However, in *Elder Dempster*, the "company", instead of carrying the goods in their own ships, took the unusual step of chartering another vessel. This led to the word "shipowners" used by the bill referring to two different persons. Therefore, *Elder Dempster* is a very exceptional case. Usually, where there is no word capable of referring to the sub-bailee, it might be difficult to infer the head-bailor's consent to sub-bail to the sub-bailee on the terms of head-bailment.

In his speech quoted above under 5.10.2, Professor Francis Reynolds regarded the carrier's right to sub-contract "on any terms" as constituting the head-bailor's consent to sub-bail to the sub-bailee on the head-bailment terms. Alternatively, the Himalaya clauses in the bills always make express reference to a particular group of third parties to confer them some benefits under the bill. As such, it might be argued that if the sub-

[700] [1985] 1 Lloyd's Rep 291 (CA), 295.

bailee is one of those third parties, the head-bailor's consent to sub-bail to the sub-bailee on the head-bailment terms might be inferred. However, in the author's view, in both of these two situations, the scope of the Himalaya clause might limit the scope of the head-bailor's consent.

5.10.5 The relevance of the Himalaya clause

In *The Mahkutai,* after failing in their argument over the Himalaya clause,[701] the shipowners relied on Lord Sumner's "bailment on terms" reasoning to enforce the exclusive jurisdiction clause in the time charterers' bill. Lord Goff held that there was an "insuperable objection" to this argument:[702]

> "the bill of lading under which the goods were shipped on board contained a Himalaya clause under which the shipowners as subcontractors were expressed to be entitled to the benefit of certain terms in the bill of lading, but as their Lordships have held, those terms did not include the exclusive jurisdiction clause. In these circumstances their Lordships find it impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligation as bailees were effectively subject to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading."

Lord Goff dealt very briefly with the argument on bailment on terms, and this was the only reason he gave for rejecting the argument. The above passage shows that the effect of the Himalaya clause could limit the bailment on terms argument.[703] However, the interaction between these techniques is not adequately clear. A literal reading of his speech gives one the impression that since the Himalaya clause did not allow the shipowners as the sub-contractors to enforce the exclusive jurisdiction clause in the bill, the sub-bailee could not be said to have accepted the goods pursuant to that exclusive jurisdiction clause in the bill. If it is understood in this way, it might be said that the reason why the head-bailment terms could not be invoked was that the sub-bailee had not consented to accept the goods upon those terms. In the author's view, a more sensible way to explain the case follows as such: by expressly allowing certain third

[701] See above 1.3.1.2.2.
[702] [1996] AC 650 (PC), 668.
[703] Simon Baughen, "Bailment's Continuing Role in Cargo Claims" [1991] LMCLQ 393, 402.

parties to enforce specific terms in the bill, the Himalaya clause could be taken as an indication of the head-bailor's consent to sub-bail to those third parties on the terms of head-bailment; since the Himalaya clause, in its true construction, did not include the exclusive jurisdiction clause, it might be inferred that the head-bailor had not consented to sub-bail to the sub-bailee on that clause.[704] In this sense, the scope of the Himalaya clause decides the scope of the head-bailor's consent to sub-bail on the head-bailment terms.

Presumably, if it were the exclusion or limitation of liability clause that was enforced by the sub-bailee in *The Mahkutai*, he would have been held entitled to do so. Also, if the IGP&I/BIMCO's Revised Himalaya Clause is used in the bill, which makes specific reference to jurisdiction clause,[705] the sub-bailee might be held entitled to rely on the exclusive jurisdiction clause in the head-bailment by invoking the principle of sub-bailment on terms. It can be seen that the result of invoking the Himalaya clause approach is in fact the same as that of invoking the principle of sub-bailment on terms for the purpose of enforcing the head-bailment terms. However, if the Himalaya approach could work directly, the sub-bailee might not bother to invoke the principle of sub-bailment on terms to enforce the bill of lading terms at all. In this sense, the principle of sub-bailment on terms hardly adds anything more than the Himalaya clause approach in terms of facilitating the third parties to enforce the bill of lading terms. Without any doubt, if there is no Himalaya clause or any other terms referring to the sub-bailee's right to enforce the terms in the head-bailment, the sub-bailee might not be able to enforce the terms of the head-bailment by invoking the principle of sub-bailment on terms.[706]

5.10.6 Summary

So far, there has been no conclusive authority as to whether or not a sub-bailee could invoke the principle of sub-bailment on terms to enforce the terms in the head-bailment against the head-bailor. The authorities tend to suggest that such a possibility might exist, but only if two conditions are satisfied. Firstly, the sub-bailee must have assented to accept the goods pursuant to the terms at issue in the head-bailment. Secondly, the

[704] See Andrew Phang and Tho Kian Sing, "On Himalaya Clause, Bailments, Choice of Law and Jurisdiction-Recent Privy Council Perspectives from *The Mahkutai*" (1996) 10 JCL 212, 224.
[705] See above 4.7.1.
[706] This is also the situation in *The Forum Craftsman*. From the report of that case, it is not clear whether there was a Himalaya clause or not. Since the clause did not appear in the report, presumably, there was no such a clause. It was held that the shipowners could not enforce the jurisdiction clause in the bill.

head-bailor must have consented to sub-bail to the sub-bailee on those terms. However, these two conditions also lead to a very limited application of this principle.

First and most importantly, in practice, the third parties employed by the carrier do not usually accept the goods upon the head-bailment terms, unless the goods are carried under a time charterer's bill of lading. Although the sub-contractor's express authority to allow the carrier to include a Himalaya clause in the head-bailment might count as such an assent, as the next point suggests, the Himalaya clause still limits the application of the principle.

Secondly, without any express reference to the sub-bailee's right to enforce the terms of head-bailment, which is usually the case in practice, the head-bailor's consent could be inferred from the Himalaya clause only. However, the Himalaya clause decides the scope of the head-bailor's consent to sub-bail to the sub-bailee on the head-bailment terms. If the Himalaya clause could not help, the principle of sub-bailment on terms is unlikely to help as well. If the Himalaya clause could help, the sub-bailee might invoke the Himalaya clause approach directly. As such, the Himalaya clause considerably weakens the application of the principle in terms of allowing the third parties to enforce the bill of lading terms.

5.11 Conclusion

Although, as discussed in previous chapters, the IGP&I/BIMCO's Revised Himalaya Clause has resolved and clarified many problems with the traditional Himalaya clauses, the shipping companies are advised to keep the provisions which entitle the carriers to sub-contract on any terms. This could provide an alternative way to protect the third parties who are the sub-bailees by allowing them to rely on their own conditions against the cargo owners. In answer to the problems left unresolved by *The Pioneer Container*, see as follows:

First, the law of bailment and sub-bailment shows that the sub-bailee's duties towards both the head-bailee and head-bailor arise automatically when he voluntarily takes possession of the goods. Furthermore, the duties owed by the sub-bailee to the head-bailee and head-bailor are much heavier than the defendant in tort. These two reasons lead to the sub-bailee's being placed in a more disadvantageous position than a defendant in tort and explain why the principle of sub-bailment on terms cannot be

extended to the tortious actions. Since the principle is only confined to bailment relationship, to invoke the principle, a third party employed by the carrier needs to establish that he is the sub-bailee (or bailee) of the goods. Here, reference should be made to the functions of the task that he is undertaking. Moreover, the sub-bailee needs to prove that the cargo claimant is the bailor. In the case of the carriage of goods, the identity of the original bailor depends a lot on the underlying sale contractual arrangements between the sellers and buyers.

Secondly, in order to bind the original bailor to the sub-bailment terms, the sub-bailee needs to prove that the original bailor consented to sub-bail on the terms in question. To "sub-contract on any terms" is a very broad and express form of consent on behalf of the owners, which could include the exclusive jurisdiction clause and arbitration clause. As such, a sub-bailee could enforce the exclusive jurisdiction or arbitration clause in the sub-contract against the owners. Such an express consent might satisfy Art.17 of the Brussels Convention so that the English court would mandatorily stay its proceedings in favour of the designated court of the EU member state. However, it might not be able to satisfy s.9 of the Arbitration Act 1996, given that the sub-bailee cannot be regarded as a party to the arbitration agreement. Sub-paragraph (a) of the IGP&I/BIMCO's new Himalaya clause provides that:

> "*(a) For the purpose of this contract, the term "**Servant**" shall include ... any **direct or indirect** servant, agent or subcontractor (**including their own subcontractors**), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract **whether in direct contractual privity with the Carrier or not***."

This means that the third parties also include the carriers' sub-sub-contractors and other contractors further down the chain. When this new clause is used, it is more evident that the principle of sub-bailment on terms could be applied to a chain of bailment relationships.

Thirdly, when the person who sues the sub-bailee is not the one to whom he owes the duties of bailee at the time when he takes possession of the goods, the sub-bailee needs to prove that such a successor in title is the new bailor. He can do so, either by proving that he has attorned to the successor in title, e.g. by delivering the goods to the successor in title, or by showing that the original bailor has assigned his rights to the successor in

title. Moreover, in order to bind the successor in title to the terms of sub-bailment, the sub-bailee needs to prove that the successor has consented to the sub-bail on the terms at issue. Due to the special nature of attornment and assignment, so long as the original bailor's consent has been established and so long as the successor in title becomes the new bailor either by assignment or attornment, the successor in title will also be bound by the original bailor's consent.

Fourthly, in the practice of the carriage of goods, it is not unusual for a third party employed by the carrier to receive the goods directly from the shipper without any prior physical possession by the contractual carrier. However, so long as the carrier holds the immediate possession of the goods, he will still find himself in the position of head-bailee, and the principle of sub-bailment on terms can still apply. Where the carrier's responsibility towards the shipper covers the whole period from the time when the goods are received to the time when the goods are delivered, the carrier usually retains such an immediate possession of the goods.

Fifthly, if both the common law Himalaya clause approach and the principle of sub-bailment on terms are available, the sub-bailee has the freedom to choose either of them. However, when there is inconsistency between the bill of lading terms and the sub-bailment terms, the sub-bailment terms usually should prevail since the sub-bailee usually accepts the goods upon his own terms. In this situation, he will be taken as having chosen the principle of sub-bailment on terms to the extent of any inconsistency between the two approaches. If, on the contrary, the sub-bailee accepts the goods only upon the main contract, he might not be able to seek to bind the bailor to the sub-bailment terms in the first place.

Lastly, the principle of sub-bailment on terms can theoretically be extended to allow the sub-bailee to enforce the terms of the head-bailment against the head-bailor. This is conditional on two requirements: (1) the sub-bailee must accept the goods pursuant to the relevant terms in the head-bailment, and (2) the bailor must have consented to sub-bail to the sub-bailee on those terms. In practice, except for the simple time charterparty case, it is rare for the sub-bailee to accept the goods upon the head-bailment terms. Even if the sub-bailee does so, the practical effect of the principle is negligible because the Himalaya clause in the head-bailment usually decides the scope of the head-bailor's consent. Thus, the principle of sub-bailment on terms would add nothing more than the

Himalaya clause approach in allowing the third parties to enforce the bill of lading terms.

Conclusion

1. Difficulties with and limits of the traditional Himalaya clauses

The discussion under Chapter 1 shows that the enforcement of the traditional Himalaya clauses has the following main difficulties and limits:

(1) The scope of third parties protected

The words used by the traditional Himalaya clauses to describe the third party beneficiaries, namely, "servants, agents and independent contractors (or sub-contractors)", are too general and sketchy. Therefore, whether a particular third party falls within the scope depends upon the construction of these terms. However, some jurisdictions may construe some third parties as falling within the scope of those terms, while some jurisdictions may not. For example, US law has met with the difficulty in holding "ship managers" as falling within "servant" or "agents". Moreover, it is not clear to what extent the sub-contractors further down the chain who do not have the privity with the carriers fall within the scope of these general terms. These have caused the limited and uncertain application of the clauses.[707]

(2) The scope of provisions extended to third parties

The enormous controversy that exists in the usage of the traditional Himalaya clauses is the scope of the provisions extended by the clauses. The traditional Himalaya clauses usually provide that:

"…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…"

These terms have given rise to doubt as to, apart from the exclusions, limitations and exemptions, whether the third parties could enforce the promise not to sue clause, the exclusive jurisdiction clause or arbitration clause in the bill.

Under the traditional Himalaya clauses, the promise not to sue clause can be enforceable by the carriers because it embraces a promise between the shippers and the

[707] See above 1.3.1.1.

carriers only. However, the enforcement of the clause by the carriers depends a lot on the carriers' willingness and the existence of a contractual obligation to indemnify the third parties on the part of the carriers. Such a contractual obligation is risky and detrimental to the carriers. In cases where they do not agree to the obligation, the third parties might be left with no way to have the promise not to sue clause enforced. Therefore, the third parties would prefer to enforce the clause in their own rights.[708]

As to the exclusive jurisdiction clause and arbitration clause, there are two particular difficulties with their enforcement by the third parties. Firstly, the English law regards the two clauses as creating both rights and obligations instead of benefiting only one party. Also, it is hard to split the rights and obligations brought by them.[709] Thus, under English law, they do not fall within the broad terms such as "exemption, limitation, condition and liberty…and right, exemption from liability, defence and immunity" used by the traditional Himalaya clauses.[710] Therefore, the traditional Himalaya clauses could not extend the benefit of the exclusive jurisdiction or arbitration clause to the third parties. Secondly, even if the first difficulty is resolved so that the clauses are available to the third parties, the problem still exists as to how to enforce them. If the court designated by the jurisdiction clause is a member state of the Brussels recast Regulation, according to Art.25, the clause could be enforced by applying for a stay of proceedings only if it is "in writing". However, there is no such a clause "in writing" between the cargo claimants and the third parties.[711] Furthermore, in order to enforce an arbitration clause, s.9 of the Arbitration Act 1996 requires the person applying for a stay of proceedings to be "a party to the arbitration agreement". However, the third parties are not a party to that arbitration agreement.[712]

(3) The relationship between the Himalaya clause and Art.III(8) of the Hague/Hague-Visby Rules

Art.III(8) of the Hague/Hague-Visby Rules provides that any terms which relieve the carrier or the ship from liability under the Rules will be void. Where the benefit sought to be enforced by the third parties has the effect of totally relieving them from liabilities, it has been held that the Himalaya clause might be invalidated by Art.III(8) of the

[708] See above 3.2.
[709] See above 4.2.
[710] See above 1.3.1.2.3.
[711] See above 4.3.1.
[712] See above 4.3.2.

Rules.[713] This has been regarded as a limit of the Himalaya clause. In addition, the authorities have left it unclear as to under which circumstances the Himalaya clause would be rendered void by Art.III(8) of the Rules.[714]

(4) The scope of third parties' conduct

Lord Reid's fourth condition requires that the third party must provide consideration in order to be protected by the Himalaya clause. It has been decided that for the third party's performance to be counted as consideration, the performance must be "referable to the carrier's contract of carriage". Therefore, another alleged limit of the Himalaya clause involves the issue of a third party being protected; in order to do so, his conduct which caused the loss of or damage to the goods must occur within the carrier's period of responsibility.[715]

(5) The third parties' authority or ratification

Lord Reid's third condition requires that the carrier must have the third party's prior authority or later ratification to contract for the benefit of the third party. The express authority can be proved if a provision in the sub-contract between the carrier and third party that expressly gives such an authority to the carrier exists. If the third party and the carrier have previous connections, the third party's implied authority could be inferred. So far, no authority has ever decided merely upon the third party's later ratification. Therefore, where no such express authority in the sub-contract and no such a previous connection exist, it is difficult to satisfy this requirement.[716]

2. Application of the Contracts (Rights of Third Parties) Act 1999

The discussion that took place in Chapter 2 shows that it is the true intention of the Law Commission that the Contracts (Rights of Third Parties) Act 1999 actually applies to the enforcement of not only the exclusion or limitation of liability clauses but also any other benefits under the bill of lading by the carriers' third parties. These other benefits include the promise not to sue clause, arbitration clause and exclusive jurisdiction clause. The chapter has suggested that the opening words used by s.6(5) are too broad to reflect the Law Commission's real intentions. To avoid any misunderstanding caused by

[713] *The Starsin* [2003] UKHL 12; [2004] 1 AC 715.
[714] See above 1.4.
[715] See above 1.3.4.
[716] See above 1.3.3.

s.6(5) of the Act, it has been suggested that the wording of s.6(5) should be narrowed down. The words "third party" used in that section should be amended to "cargo interests who are not the original contractual parties". If this is done, there is no need to retain the last sentence of the sub-section which preserves the third parties' rights to enforce the exclusions or limitations under the contract of carriage. Hence, the whole of s.6(5) should be amended to the following:

> "(5) Section 1 confers no rights on *the cargo interests who are not the original contractual parties* in the case of
> (a) a contract for the carriage of goods by sea, or

a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention."

3. Changes made and difficulties resolved by IGP&I/BIMCO Revised Himalaya Clause

The main changes made by the IGP&I/BIMCO's Revised Himalaya Clause and the difficulties with the traditional Himalaya clauses resolved by these changes from the perspective of the 1999 Act and the common law Himalaya clause approach can be summarised as follows:

(1) The scope of third parties protected
(2) The new clause adds an extra provision for defining the third parties employed by the carrier in particular. Sub-paragraph (a) of the new clause provides that:
(3) "*(a) For the purpose of this contract, the term "**Servant**" shall include the **owners**, **managers**, **and operators of vessels** (other than the Carrier); **underlying carriers**; **stevedores** and **terminal operators**; and any **direct or indirect** servant, agent or subcontractor (**including their own subcontractors**), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract **whether in direct contractual privity with the Carrier or not**.*"

Compared to the traditional Himalaya clauses, sub-paragraph (a) of the new clause makes the following main changes regarding the scope of third parties. Firstly, it uses the word "Servants" to refer to the third parties protected by the clause and enumerates them in detail. Secondly, the reference to "the managers of vessel" is a response to those

US authorities where there have been difficulties in holding the ship managers as "servants" or "agents". Thirdly, the specific reference to the "underlying carriers" is clear enough to include not only sea carriers, but also other actual carriers, e.g., road carriers and rail carriers. Fourthly, the words "any direct or indirect servant, agent or subcontractor (including their own subcontractors)… whether in direct contractual privity with the Carrier or not" mean that the protections under the new clause are also extended to the sub-sub-contractors and any subsequent contractors further down the chain. The reference to both the underlying carriers and sub-contractors further down the chain can ease the application of the clause to multimodal transport. Therefore, sub-paragraph (a) of the new clause, by using unequivocal and specific terms to define the third parties protected by the clause, makes sure that the Himalaya clause protects every possible third party involved in the whole carriage transit and that the clause can be applied to both carriage of goods by sea and multimodal transport situations. In addition, the express reference to the sub-contractors further down the chain makes it more evident that the principle of sub-bailment on terms is available to the sub-bailees further down the chain.[717]

(4) The provisions extended to third parties

The new clause uses both explicit and specific language to make sure that the promise not to sue clause, arbitration clause and exclusive jurisdiction clause could be enforceable by the third parties pursuant to both the 1999 Act and the common law Himalaya clause approach.

(i) The promise not to sue clause

In contrast to the traditional Himalaya clauses, closely after the promise not to sue clause, sub-paragraph (d)(i) of the new clause expressly and additionally provides that:

> "(d)(i) … ***The Servant*** *shall also be* ***entitled to enforce the foregoing covenant*** *against the Merchant*".

[717] See above 5.6.3.

This means that a third party is entitled to enforce the promise not to sue clause against the cargo owner. By doing so, sub-paragraph (d)(i) satisfies s.1(1)(a) of the 1999 Act and therefore enables the third parties to enforce the clause under the Act.[718]

On the other hand, in *The Starsin*, the Himalaya clause contained all the provisions in one single paragraph. Furthermore, the opening words of the agency provision[719] and deeming provision[720] were "without prejudice to the generality of the provisions of this clause". These opening words gave one the impression that the agency provision and deeming provision would only apply to "extending the carrier's right" part closely prior to it, but not apply to the general exemption provision before "extending the carrier's right" part. A similar problem would exist if it were the promise not to sue clause instead of the general exemption clause that was used in that case. The IGP&I/BIMCO's new clause makes two main changes concerning the promise not to sue clause. First of all, rather than drafting all the provisions in one single paragraph, the new clause separates and numbers each provision, and uses different sub-paragraphs to refer to each of them. Among them, sub-paragraph (b) contains the general exemption clause, sub-paragraph (d) is the promise not to sue clause, and sub-paragraph (e) embraces the agency and deeming provision. Secondly, the new clause changed the opening words of the agency and deeming provision to "for the purpose of sub-paragraphs (a)-(d)". It provides that:

> *"(e)* ***For the purpose of sub-paragraphs (a)-(e) 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 mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract.*"

The highlighted all-inclusive opening words clearly show that the agency provision and deeming provision apply to the general exemption clause and promise not to sue clause. This codifies the House of Lord's decision in *The Starsin* that a general exemption clause could fall within the scope of the Himalaya clause, and clarifies the gap left by their Lordships that a promise not to sue clause could also fall within the scope of the Himalaya clause. Therefore, the new clause enables a third party to enforce the general

[718] See above 3.3.1.
[719] See above 1.3.2.
[720] See above 1.3.5.4.

exemption clause and promise not to sue clause by relying on an effective Himalaya mechanism.[721]

With regard to the way in which to enforce the promise not to sue clause by the third parties and the influence on the carrier, three possibilities can be drawn. Firstly, if the cargo claimants sue a third party in England, the third party can use the promise not to sue clause as a defence.[722] Secondly, if the cargo claimants sue a third party in a non-EU court, the third party might apply for an anti-suit injunction before the English courts.[723] Thirdly, if the cargo claimants sue a third party in an EU court, after he pays out the cargo claimants in that jurisdiction, he might claim that amount back together with the cost of proceedings from the cargo claimants before the English court.[724] If a third party can enforce a promise not to sue in his own right pursuant to the new clause, the remedies available to the carrier might be affected accordingly. Presumably, in none of the above situations will the carrier be granted a stay of proceedings, anti-suit injunction or substantial damages.

(ii) The arbitration clause

Faced with the difficulties with the arbitration clause and exclusive jurisdiction clause, the Law Commission first proposed to apply the conditional benefit approach to the clauses but later found the approach unworkable.[725] The reason why this method was not operable was down to the fact that the Law Commission invariably took every normally worded arbitration clause and exclusive jurisdiction clause as a procedural condition for the third party's enforcement of substantive rights, regardless of whether the contracting parties had such an intention or whether or not the third party had consented to this. Under such circumstances, the contracting parties or the third party will inevitably be prejudiced if they have not shown such an intention or consent. The final Act corrects this mistake by categorising the arbitration clauses into two types based on the contracting parties' intentions. S.8(1) embodies the first type, under which the third party's enforcement of substantive rights under s.1 is conditional on his submission to arbitration. S.8(2) contains the second type, under which the third party is given the

[721] See above 3.3.2.
[722] See above 3.3.3.1.
[723] See above 3.3.3.2.
[724] See above 3.3.3.3.
[725] See above 4.2.

pure procedural right to enforce the arbitration clause.[726] Moreover, in order to bring the Arbitration Act 1996 in, both of the two sub-sections treat the third party as a party to the arbitration agreement for the purpose of the Arbitration Act.[727]

Sub-paragraph (c) of the new clause provides that:

> "*(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein … and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder* ***including the right to enforce any jurisdiction or arbitration provision contained herein*** *shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant*."

In contrast to the traditional Himalaya clauses, sub-paragraph (c) of the new clause, as seen with the highlighted words, additionally and specifically provides that the third parties are entitled to enforce the arbitration clause. This gives the third parties the right to enforce the arbitration clause, which falls within the situation under s.8(2) of the Act. According to the operation of that sub-section, if the cargo claimants sue a third party in an English court, the third party is given a choice as to whether or not to enforce the arbitration clause. If he chooses to enforce it, he can apply for a stay of proceedings under s.9 of the Arbitration Act. However, the cargo claimants cannot rely on this clause to force a third party to arbitrate if the latter has never chosen to enforce the arbitration clause.[728]

Furthermore, by making specific reference to the arbitration clause, sub-paragraph (c) of the new clause shows the parties' clear intention to extend the benefit of the arbitration clause to the third parties. Such a clear intention is likely to be given effect by the English law so that the third parties can enforce the arbitration clause by virtue of the common law Himalaya mechanism.[729] In this situation, it might be argued that, with the operation of the common law Himalaya clause approach, the third parties are to be regarded as a party to the arbitration agreement for the sole purpose of enforcing the benefit of that agreement. If the English courts accept this argument, the third party may

[726] See above 4.5.3.
[727] See above 4.5.4.
[728] See above 4.5.2.
[729] See above 4.7.1.

enforce the arbitration clause by applying for a stay of proceedings under s.9 of the Arbitration Act 1996.[730]

(iii) The exclusive jurisdiction clause

Although the 1999 Act makes no express provision on jurisdiction clause, the clause still exists within the ambit of the Act. The reason why no express provision is on it is due to the fact that, unlike s.9 of the Arbitration Act, Art.25 of the Brussels recast Regulation does not require the person who enforces or is bound by the jurisdiction clause to be a party to the jurisdiction clause.[731] It follows that as long as the jurisdiction clause falls within the mechanism of the Act, a jurisdiction clause may be enforced by or made binding on a third party. After analysing different possibilities, it can be seen that an analogous approach to s.8 on arbitration clause is also applicable to the jurisdiction clause. Firstly, according to s.1(4) of the Act, the contracting parties may give the third party the substantive right and subject his enforcement of the substantive right to the jurisdiction clause. This is just analogous to the situation under s.8(1) of the Act.[732] Secondly, according to s.1(1)(a), the contracting parties may give the third party a pure procedural right to enforce the jurisdiction clause. This is just analogous to the situation under s.8(2) of the Act.[733] Where clear language is used to show either of the above intentions, similarly to the arbitration clause, the difficulties with the jurisdiction clause concerned by the Law Commission in their Report will be resolved.

Compared with the traditional Himalaya clauses, sub-paragraph (c) of the new clause, as seen with the highlighted words, additionally and specifically provides that the third parties are entitled to enforce the jurisdiction clause. This gives the third parties the right to enforce the jurisdiction clause, which falls within s.1(1)(a) of the Act. If such a new clause is used in the bill and if the exclusive jurisdiction clause in writing, the "in writing" requirement under Art.25 of the Brussels recast Regulation will also be satisfied. Analogous to the position under s.8(2), the third parties are given a choice as to whether enforce the jurisdiction clause or not.[734] However, the cargo claimants cannot rely on this clause to force the third party to submit to that designated court if the latter has not chosen to enforce the clause.

[730] See above 4.7.3.
[731] See above 4.6.2.
[732] See above 4.6.5.
[733] See above 4.6.3.
[734] See above 4.6.3.

Also, by making specific reference to the jurisdiction clause, sub-paragraph (c) of the new clause shows the parties' clear intention to extend the benefit of the jurisdiction clause to the third parties. Such a clear intention is likely to be given effect by the English law so that the third parties can enforce the exclusive jurisdiction clause by virtue of the common law Himalaya mechanism.[735]

(5) The relationship between the Himalaya clause and Art.III(8) of the Hague/Hague-Visby Rules

For the first time in the history of using the Himalaya clauses, sub-paragraph (c) of the new clause also expressly and clearly provides that:

> "*(c) Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein* ***(other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein)****... shall also be available and shall extend to every such Servant of the Carrier, who shall be entitled to enforce the same against the Merchant*."

The words placed in brackets are a codification of the House of Lords' decision in *The Starsin* that the enforcement of the general exemption clause by the shipowner was invalidated by Art.III(8) of the Hague Rules. Such an express limit is reasonable because the law would not recognise the parties' intentions which contradict the mandatory statutory stipulation, no matter how the law is committed to respecting the commercial parties' intentions.[736] Therefore, even if the third parties seek to invoke the 1999 Act instead of the common law Himalaya clause approach, the limit would presumably still exist.[737]

However, it is not clear what constitutes the ratio of the House of Lords' decision in *The Starsin* and the authorities have left it unclear as to when the Himalaya clause would be caught by Art.III(8). Therefore, the new clause contains no guidance on how this part of sub-paragraph (c) should be understood. It is submitted that sub-paragraph (c) should be explained in this way. Since sub-paragraph (e) contains a deeming provision, the Himalaya contract between the cargo owners and the third party is part of the contract of carriage evidenced by the bill of lading only for the purpose of taking the benefit of

[735] See above 4.7.1.
[736] See above 1.4.
[737] See above 2.3.5.

under the Himalaya clause. However, this contract of carriage is not the one within the meaning of the Hague or Hague-Visby Rules. Only when the third party is the one performing the actual carriage of goods, i.e., shipowners or charterers, will the Himalaya contract constitute a contract of carriage within the meaning of the Rules. Moreover, it is only in this situation and only if the third party seeks to enforce the general exemption clause (sub-paragraph (b)) or the promise not to sue clause (sub-paragraph (d)(i)), that Art.III(8) will render the Himalaya clause void. Therefore, Art.III(8) does not affect the possibility for him to enforce the exclusion or limitation of liability clauses. Nor does it affect other third parties, e.g., stevedores or terminal operators, to enforce any benefits under the bill.[738]

(6) The scope of third parties' conduct

The new clause does not react to the limit of the traditional Himalaya clauses that the third party's performance must be within the carrier's period of responsibilities. In fact, this is another reasonable limit, because in the shipper's mind any exclusions or limitations should only be confined to the carrier's period of responsibilities. Such a limit would presumably still exist even though it is the 1999 Act instead of the common law Himalaya clause approach that the third party invokes. Furthermore, the period of carrier's responsibilities depends on the construction of the terms other than the Himalaya clause. Therefore, there is nothing wrong with the new clause not dealing with this limit.[739]

(7) The third parties' authority or ratification

The new clause also does not react to the difficulty of the third parties' authority or ratification with the common law Himalaya clause approach. This requirement was dispensed with by the 1999 Act. As such, it will cause no problem should the third parties invoke the 1999 Act.[740]Although it has been suggested that the requirement of authority or ratification should also be discarded under the common law Himalaya clause approach, so far, such a step has not been taken by any authority. Since the satisfaction of this requirement depends on the particular facts of each case instead of the construction of the Himalaya clause, the new clause should not be blamed for not addressing this issue. In the absence of previous connections between the third parties

[738] See above 1.4.3.
[739] See above 1.3.4 and 2.3.3.
[740] See above 2.3.2.

and the carrier, the third parties are advised to include in their contract with the carrier a provision expressly authoring the latter to enter into the benefits under the bill on their behalf.[741]

Overall, the IGP&I/BIMCO's Revised Himalaya Clause has made corresponding changes and resolved the difficulties with the enforcement of the traditional Himalaya clauses which could be resolved by rewriting the terms. It uses express, specific and clear enough language to reflect the intentions of the shippers and carriers that every possible third party involved during the carriage transit could enforce, not only the exclusions or limitations, but also the promise not to sue clause, arbitration clause and exclusive jurisdiction clause in the bill, under both the Contracts (Rights of Third Parties) Act 1999 and the common law Himalaya clause approach. With the use of clear language is, the parties' above intentions are very likely to be given effect by the English law. The new clause also correctly limits the application of the new clause to the extent that it is not invalidated by Art.III(8) of the Hague/Hague-Visby Rules. Therefore, the new clause should be welcomed and the shipping companies are recommended to amend their contracts of carriage to incorporate this new clause.

4. Alternative approach

An imperfection of the IGP&I/BIMCO's new clause lies in the fact that it fails to highlight the relevance of the principle of sub-bailment on terms. Different from the 1999 Act and the Himalaya clause, which extend the benefit under the contract of carriage to a third party, the principle of sub-bailment on terms allows the third party to enforce the terms of his own contract against the cargo claimants. Thus, in cases where the new clause fails, the principle provides a good alternative mechanism in the third parties protection. In all the shipping companies' current terms of carriage, the Himalaya clause invariably follows a clause providing that "the carrier shall be entitled to sub-contract on any terms". By granting the carrier this right, the cargo owner is taken to have expressly consented to sub-bail his goods to the sub-bailee "on any terms". According to the principle of sub-bailment on terms, the cargo owner will be bound by any terms of the sub-bailment, unless the terms are unreasonable or unusual. Therefore, when incorporating the IGP&I/BIMCO's new clause into their terms of carriage, the

[741] See above 1.3.3.3.

shipping companies are suggested to retain the provisions currently used which give themselves the right to sub-contract "on any terms".

The most important limit of the principle of sub-bailment on terms is that it cannot be invoked by every third party, but only by the third parties who are the sub-bailees of the goods. This restriction exists because the duties owed by the sub-bailee to the head-bailee and head-bailor are much heavier than the defendant in tort and such heavy duties arise automatically when he voluntarily accepts the goods into possession.[742] Usually, the sub-bailees are those who perform the actual carriage, custody or care services of the goods.[743] Furthermore, the sub-bailees can invoke this principle only against the bailors. The identity of the original bailors depends greatly on the underlying sale contractual arrangements between the sellers and buyers.[744] When the cargo claimant who sues the sub-bailee is not the one to whom he owes the duties of bailee at the time when he took possession of the goods, the sub-bailee needs to prove that such a successor in title is the new bailor. The sub-bailee could prove so either by showing that he has attorned to the successor in title[745] or by showing that the original bailor assigned the rights to the successor in title.[746] Due to the special nature of attornment and assignment, so long as the original bailor's consent has been established, the successor in title will also be bound by the original bailor's consent.[747] In practice, it is not uncommon for the third party to take possession of the goods directly from the cargo owners without the carrier's prior physical possession. In this situation, the principle of sub-bailment on terms still applies because the carrier usually holds the immediate possession of the goods during the whole transit.[748]

A sub-bailee could enforce the exclusive jurisdiction or arbitration clause in the sub-contract against the owners where the carrier is given the right to sub-contract on any terms. Such a wide consent might satisfy Art.25 of the Brussels recast Convention so that the sub-bailee could apply to the English court for mandatorily staying its proceedings in favour of the designated EU member state court. However, such a mere consent might not be able to satisfy s.9 of the Arbitration Act 1996, given that the sub-

[742] See above 5.5.
[743] See above 5.3.2.2.
[744] See above 5.2.2.
[745] See above 5.7.1.3.
[746] See above 5.7.2.
[747] See above 5.7.1.4 and 5.7.2.
[748] See above 5.8.

bailee cannot be regarded as a party to the arbitration agreement.[749] Therefore, the third party might only be able to enforce the arbitration clause under the sub-bailment by relying on the English courts' inherent jurisdiction to grant a stay under common law.

If both the IGP&I/BIMCO's new clause and the principle of sub-bailment on terms are effective in protecting a third party, the third party has the freedom to choose either of them. However, the third party usually accepts the goods pursuant to his own terms. In this situation, when an inconsistency exists between the bill of lading terms and the sub-bailment terms, he will be taken as having chosen the principle of sub-bailment on terms over the Himalaya clause to the extent of any inconsistency between them.[750] In theory, the principle of sub-bailment on terms can be extended to allow the sub-bailee to enforce the head-bailment terms, i.e., the bill of lading terms, against the head-bailor. The principle can be so extended provided that two conditions can be satisfied. Firstly, the sub-bailee should accept the goods upon the head-bailment terms. Secondly, the head-bailor should have consented to sub-bail on those head-bailment terms. However, in practice, it is not usual for the sub-bailee to accept the goods upon the bill of lading terms. As such, the primary requirement for enforcing the head-bailment terms by the sub-bailee is not satisfied. Even if the sub-bailee accepts the goods upon the bill of lading terms, the Himalaya clause usually decides and limits the scope of the head-bailor's consent to sub-bail on those terms. Therefore, the principle of sub-bailment on terms actually adds nothing more than the Himalaya clause approach in terms of allowing the third parties to enforce the bill of lading terms.[751]

[749] See above 5.6.
[750] See above 5.9.
[751] See above 5.10.

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