THE HIMALAYA CLAUSE – REVISITED

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Executive Summary

This article brings up to date the author’s previous writings on the law of third-party benefit, particularly in respect of the Himalaya clause in bills of lading covering contracts for the carriage of goods by sea. In Prof. William Tetley, Q.C.’s consistent practice over the years, the article deals principally with the law of the United Kingdom, the United States, France and Canada, but contains additional references to the law of many other jurisdictions, including Australia, Belgium, Germany, Italy, Louisiana, the Netherlands, South Africa and Spain. The questionable circular indemnity clause is also treated, and, of course, the U.K.’s Contracts (Rights of Third Parties) Act 1999, especially its sect. 6(5).

The article is also comparative in the Tetley fashion, in that it relates to civil law (notably the stipulation for another), as well as to the common law, with its case law and (more recently) its statutory law approaches to the problem of third-party benefit. The contribution of the Hamburg Rules in resolving this problem in the international maritime carriage of goods is of course highlighted.

I. Introduction

1) The Himalaya clause

The Himalaya clause, or a clause benefiting a third party (usually a stevedore) in maritime matters, sprang on the world by decisions of the House of Lords and the Supreme Court of the United States just over 40 years ago. Various legal inventions and subtle recourses to ancient decisions and principles were used and the Himalaya clause was at last universally accepted. The civil law had much less difficulty in accepting the concept because of the principle of “stipulation for another”. France had even earlier given the stevedore a statutory benefit in domestic law.

In the last twenty-five odd years, there have been nuances and improvements in the principle by the courts, while the major change has been by statute, in particular in the United Kingdom.

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2) The problem

May a person benefit from the terms of a contract into which he has not entered? Or, more particularly, may a stevedoring firm or terminal operator benefit from the terms of a bill of lading to which it is not a party?

In the various shipping countries of the world a stipulation entitled the ‘Himalaya Clause’ has been added to bills of lading so that the stevedore, the terminal operator and even a dry dock company may benefit by certain terms of the bill of lading. The clause in particular allows third parties to enjoy the package limitation and the one-year delay for suit of the Hague Rules. A modern Himalaya clause may read as follows:1

“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 to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions of this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defense and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.” (Emphasis added).2

Permitting a stevedore not a party to a contract to benefit by that contract may be appealing to ocean carriers because it provides the stevedore with the same rights that a vessel owner has under law, but by throwing aside a basic principle of law, the door is left open to incongruity, abuse and, at times, injustice to persons who have contracted in good faith.

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2 Note that the clause relies on both the agency theory and the trust theory of a third-party benefit. An even more modern Himalaya clause adds a circular indemnity provision to the original Himalaya clause. See *The Circular Indemnity Clause, infra* and *Godina v. Patrick Operations* [1984] 1 Lloyd's Rep. 333 at p. 334. (N.S.W. C.A.).
The problem is exaggerated when the clause not only allows the stevedore to benefit by the package limitation but allows the stevedore to avoid liability altogether by a non-responsibility clause.

3) **Adler v. Dickson (The Himalaya)**

The Himalaya clause arose as the result of a decision of the English Court of Appeal in the case of *Adler v. Dickson (The Himalaya).*

Mrs. Adler a passenger on the S.S. Himalaya, had been injured when a gangway fell, throwing her 16 feet to the quay below. Because the passenger ticket contained a non-responsibility clause exempting the carrier, Mrs. Adler took suit against the master (Mr. Dickson) and the boatswain.

The Court of Appeal declared that in the carriage of passengers as well as in the carriage of goods the law permitted a carrier to stipulate not only for himself, but also for those whom he engaged to carry out the contract. It was held as well that the stipulation might be express or implied. In the case of Captain Dickson, however, the Court held that the passenger ticket did not expressly or by implication benefit servants or agents and thus Dickson could not take advantage of the exception clause.

After this decision, specially drafted Himalaya clauses benefiting stevedores and others began to be included in bills of lading.

4) **The fallacy of the commercial/insurance argument**

The benefit to commerce of allowing stevedores and terminal operators to completely limit their liability is often put forward by supporters of the Himalaya clause.

Such reasoning, however, ignores the fact that in the commercial world it is preferable for persons who cause damage to cargo to be held responsible for that damage. Otherwise they will continue to be negligent and will do nothing to alter their practices.

Transferring the loss to the underwriters of cargo from the underwriters of the stevedores does not merely shift the cost of insurance. If the stevedores and terminal operators who have the care and charge of cargo do not act carefully when carrying out their duties, then responsibility for loss and damage to cargo will not only be shifted but that loss and damage will be increased as well. Nor are all cargoes or risks fully or even

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5 Lord Goff seems to have missed this point. Reviewing prior Himalaya clause jurisprudence, he said in a confusing declaration: “In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties’ respective insurance arrangements” *The Mahkutai* [1996] A.C. 650 at p. 661, [1996] 2 Lloyd’s Rep. 1 at p. 6 (P.C.) (emphasis added).
partially insured. For example, it has been estimated that not much more than fifty percent of shipments by sea on the North Atlantic are actually insured at all.

It is a fundamental principle of good business practice and of efficient, fair and low-cost insurance that persons who are responsible for losses should be held accountable, in some way, for those losses.6

5) Heterodoxy, heresy, genius

Does the Himalaya clause represent heterodoxy or heresy or genius? As Viscount Simonds said in Midland Silicones Ltd. v. Scruttons Ltd.,7 the leading British case on the subject:

“For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius.”(Emphasis added)

To some the clause is heretical, to others it exemplifies genius. To me the Himalaya clause is an ingenious, short-term solution to a difficult problem, but is a solution which raises infinitely more problems than it solves.

The basic problem is to find a way to permit third parties who are neither agents nor servants to limit their liability; specifically, to find a way to allow stevedores and terminal operators, whom the carrier declares are not his agents or servants but independent contractors, to nevertheless benefit under the contract of carriage.

6) The two solutions

a) Amend the law

One obvious solution is to amend the law by extending the $500 package limitation and the one-year delay for suit provision to the stevedore (and terminal operator), while at the same time extending the period of responsibility to cover the goods before and after the tackle to tackle operations. This could be done by amendments

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6 For example, theft and pilferage continued in epidemic proportions in the Port of Montreal until finally stevedores and terminal operators were held responsible for negligence by the Quebec courts. Thereafter, losses were considerably reduced, insurance premiums of shippers and consignees as well as stevedores and terminal operators were reduced and the port experienced a surge in traffic. See O’Connor J. in The Federal Schelde [1978] 1 Lloyd’s Rep. 285 at pp. 287-288 (Qué. Supr. Ct.); Walsh J. in The Tarantel (Circle Sales & Import Ltd. v. The Tarantel) [1978] 1 F.C. 269 at pp. 283 and 295 (Fed. C. Can.); Marceau J. in Marubeni America Corp. v. Mitsui O.S.K. Lines Ltd. & I.T.O., [1979] 2 F.C. 283 at p. 289 (Fed. C. Can.)

to the Hague and Hague/Visby Rules or to national laws. The Law of June 18, 1966 of France which applies to local carriage has done just this. The Hamburg Rules also have a “port to port” provision at art. 4.

b) Extend the contract

A second solution is to include the stevedore (and terminal operator) as a party to the bill of lading contract, either by his becoming a servant of the carrier or, in the inverse, by the carrier contracting as an agent for the stevedore, its disclosed principal. Such genuine contractual arrangements, however, are usually anathema to both carriers and stevedores because neither wishes to be responsible for the other, nor do they wish to extend the period during which they are responsible for the goods.

In effect the carrier and the stevedore (or the terminal operator) wish to add the stevedore to the contract in only one respect: to enable the stevedore to limit its responsibility. Calling the stevedore a party to the contract under a Himalaya clause is thus, at best, a fiction.

c) The new law – amend the privity rule

The major change in the law has been an attack on the privity rule by statute and/or a redefinition by the courts. Some jurisdictions have passed general statutes that either modify or abolish the privity rule. The United Kingdom, in particular, has adopted the Contracts (Rights of Third Parties) Act 1999. Finally, courts in Canada and Australia have modified the privity rule if certain provisions are complied with.

8 Law No. 66-420 of June 18, 1966 (J.O. June 24 at p. 5206), at arts. 50-57.
10 Some enlightened carriers have recently included “port to port” clauses in their bills of lading. This has been true in certain competitive markets (between liner conference) or when the line owns the terminal.
II. The Common Law – Third-Party Benefit

1) Introduction

The common law, traditionally, has not permitted a third party to benefit under a contract. As Viscount Haldane said:\footnote{Dunlop Pneumatic Tyre v. Selfridge and Co. Ltd., [1915] A.C. 847 at p. 853 (H.L.). The classic criticism of this position is A. Corbin, “Contracts for the Benefit of Third Parties” (1930) 46 L.Q.R. 12.}

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a \textit{jus quaesitum tertio} arising by way of contract.”

The foregoing citation was relied on by Viscount Simonds in \textit{Midland Silicones Ltd. v. Scruttons Ltd.}\footnote{[1962] A.C. 446 at p. 467, [1961] 2 Lloyd’s Rep. 365 at p. 371. Relying on Dunlop Pneumatic and Tweddle v. Atkinson (1861) 1 B. & S. 393, 121 E.R. 762, Lord Reid said: “Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him” (A.C. at p. 473, Lloyd’s Rep. at p. 374).} but the “fundamental principle” was questioned by Lord Denning (dissenting) in the same case as not being so fundamental, but only “a discovery of the nineteenth century.”\footnote{Ibid., A.C. at 483, Lloyd’s Rep. at p. 380. See also P. S. Atiyah, \textit{Rise and Fall of Freedom of Contract}, 1979 at p. 413. Lord Denning attempted judicial reform of the privity rule in other decisions, as well. See in particular Smith & Snipes Hall Farm v. River Douglas Catchment Board [1949] 2 K.B. 500 (C.A.); Drive Yourself Hire Co (London) Ltd. v. Strutt [1954] 1 Q.B. 250 (C.A.); Beswick v. Beswick [1966] Ch. 538 (C.A.), aff’d in part, [1968] A.C. 58 (H.L.).}

2) My position

It was and still is my view that under the common law a third party (e.g. a stevedore or terminal operator) may not benefit from the terms of a contract to which he is not a party unless that third party is carrying out at least part of the duties of one of the parties to the contract. In other words, if the carrier undertakes to carry the goods, \textit{discharge and deliver} them, then the stevedore may benefit from the contract terms if the stevedore causes damage during the \textit{discharge or delivery}. This was in effect the position taken by the House of Lords in \textit{Elder, Dempster Co. v. Paterson, Zochonis & Co.}\footnote{[1924] A.C. 522 at p. 534, (1924) 18 L.L. Rep. 319 at pp. 321-22 (H.L.). Rechtbank van Koophandel te Antwerpen, March 14, 1978, [1978] ETL 495. See also The Mahkutai [1996] A.C. 650 at pp. 659-663, [1996] 2 Lloyd’s Rep. 1 at pp. 4-6 (P.C. per Lord Goff); J. Wilson, “A Flexible Contract of Carriage – the Third Dimension?” [1996] LMCLQ 187; C. MacMillan, “\textit{Elder, Dempster} sails on: Privity of Contract and Bailment on” Terms” [1997] LMCLQ 1.} where third-party benefits in the bill of lading between the shipper and the charterer (who signed it) were granted to the shipowner. It is noteworthy that the shipowner and charterer share in the responsibilities of the carrier and in the duties under the contract.
The weakness of the argument that the stevedore (or terminal operator) may benefit under the bill of lading contract arises from the fact that the carrier in the bill of lading undertakes no responsibility after discharge, which is when the stevedore or terminal usually to be benefited.

3) Lord Denning and the tort of negligence

Lord Denning took the view in *Midland Silicones Ltd.*[^19] that the principle, that no person may benefit from a contract to which he is not a party, has been modified by the emergence of negligence as an independent tort, as first enunciated in 1932 in *Donoghue v. Stevenson.*[^20]

Lord Denning argued that the shipper/consignee (he is vague about how the consignee becomes involved) has consented to the stevedore taking the risk on himself. “Even though negligence is an independent tort, nevertheless it is an accepted principle of the law of tort that no man can complain of an injury if he has voluntarily consented to take the risk of it on himself.”[^21] Lord Denning's reasoning, however, has been rarely followed[^22].

4) Lord Reid and agency

The accepted method of permitting a stevedore or terminal operator to benefit by a contract (the bill of lading) to which he is not a party is the agency theory enunciated by Lord Reid in *Midland Silicones Ltd.*[^23] Four conditions must be fulfilled as set out by Lord Reid:[^24]

“I can see a possibility of success of the agency argument 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.”

[^24]: *Ibid.* Actually here are five conditions, the fifth being the last sentence of the dictum – that the *Bill of Lading Act, 1855*, 18 & 19 Vict., c. 111, should apply so as to affect the consignee. The 1855 statute was repealed and replaced by the *Carriage of Goods by Sea Act 1992*, U.K. 1992, c. 50. It now applies to all negotiable bills of lading, as well as to sea waybills and ship’s delivery orders.
The main problem of Lord Reid's agency theory is to find “consideration” passing from the stevedore to the shipper. The answer was supplied in *The Eurymedon* (*New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*). The Privy Council held that the consideration was the discharging of the goods by the stevedore for the benefit of the shipper.  

“The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading.”

The foregoing analysis is generally the law in Commonwealth countries. The rationale is really public policy or the benefit to society. Finally, this approach promotes litigation based on technical points of law that avoids dealing with substantial issues. In the words of Lord Goff:

“[S]o long as the principle continues to be understood to rest upon an enforceable contract as between cargo owners and the stevedores entered into through the agency of the shipowners, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against the stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract.”

5) Consideration and the benefit to society

In my view, the consideration found by Lord Wilberforce for Lord Reid's agency theory and the presumed benefit to society and commerce are doubtful.

It is my view 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.

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28 See *The Mahkutai* [1996] A.C. 650 at p. 664, [1996] 2 Lloyd’s Rep. 1 at p. 8 (P.C.), where Lord Goff held: “Nevertheless there can be no doubt of the commercial need of some such principle as this [the Himalaya clause], and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in *The Eurymedon*, and later developed in *The New York Star*, has been widely welcomed.”
29 *The Mahkutai, ibid.*
Lord Wilberforce gave the rationale for his judgment in the following paragraph in *The Eurymedon*:30

“In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get around exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence.” (Emphasis added).

It is submitted that this rationale is erroneous and that the foregoing paragraph expresses most of the questionable arguments supporting the Himalaya clause. For example, “…the clear intention of a commercial document…” is fallacious because:

a). the document is one of adhesion insofar as it concerns the shipper;
b). the stevedore never became a party to the document; and
c). the stevedoring company was not identified except generically in the document.

The remark “they see no reason to strain the law…” strains, rather the reader’s credulity; extending the rights of a contract to a person who is not a party to the contract is “to strain the law”. It is a concept that has tortured courts and jurists all over the world. The strain was such that in *The Eurymedon* decision itself that the three judges in the New Zealand Court of Appeal31 ruled the clause to be invalid, as did two of the five judges of the Privy Council. (Beattie J. in first instance ruled in favour of the clause.)32

The words “They see no attraction to this consequence” and what proceeds is a commercial and social argument. If the rationale of a judgment, however, is to be the commercial and social attractiveness of the Himalaya clause, then the court of first instance should permit proper argument and proof on the commercial and social advantages of the Himalaya clause. The court should then openly render judgment on the commercial and social merits, as well as (or instead of) on the legal merits.

As to the commercial argument of Lord Wilberforce, it is submitted that it is questionable because it is a principle of society and commerce that the person who causes damage should be held responsible under the law; otherwise that person will continue to be negligent. This is especially true in the carriage of goods by land and sea.

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A fair, commercial, and practical solution is to hold stevedores and terminal agents responsible for their acts but to permit them to benefit by the exculpatory clauses of the Hague and Hague/Visby Rules. Bills of lading which contain Himalaya clauses, however, also often contain non-responsibility clauses which have been ruled effective in relieving the stevedores and other third parties of all responsibility. Seemingly, it is only if the non-responsibility clause is clearly in breach of the Rules that the third party will be deprived of its protection despite the Himalaya clause.

III. Acceptance of the Himalaya Clause

Despite the difficulty of finding the legal basis for its acceptance, the validity of the Himalaya clause is recognized in most jurisdictions today.

1) United Kingdom

Since The Eurymedon decision of the Privy Council, the extension of rights to third parties in virtue of the Himalaya clause has been acknowledged in the United Kingdom. The New York Star tested the clause, particularly after the majority of the High Court of Australia had rules (I consider correctly) that the stevedoring contractor could not be protected from responsibility for negligent acts which took place after discharge if the carrier did not itself take responsibility after the discharge. The Privy Council solved the problem (to its satisfaction, at least) by holding that the contract of carriage ends at delivery to the consignee (despite the fact that the carrier takes no responsibility after discharge) and therefore the stevedores was within the contract terms and could benefit by the exemption clauses of the bill of lading.

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33 See, for example, Glebe Island Terminals Pty. Ltd. v. Continental Seagram Pty. Ltd. (The Antwerpen) (1993) 40 N.S.W.L.R. 206, [1994] 1 Lloyd’s Rep. 213 (N.S.W. C.A.), where a Himalaya clause extended to a terminal operator the benefit of two non-responsibility clauses in a bill of lading, which clauses, read together, resulted in the terminal operator being exonerated from liability even for the willful, unauthorized post-discharge delivery of cargo by its employees to thieves – an occurrence which the Court acknowledged to be a “fundamental breach” of the bill of lading contract.

34 In The Starsin [2001] 1 Lloyd’s Rep. 437 at p. 462 (C.A.), Rix, L.J. held: “Art. III, r. 8 of the Hague Rules is incompatible with the idea that third parties to whom the benefit of the carrier’s defences are extended, should have a blanket exemption from liability…. Since the carrier would have no exemption for negligent stowage, it follows that its independent contractor, typically a stevedore but here the shipowner itself, can have no exemption either.”


38 Ibid., at pp. 310, 323 and 326.

39 [1980] 2 Lloyd’s Rep. 317 at p. 324. “These provisions must be interpreted in the light of the practice that consignees rarely take delivery of goods at the ship’s rail but will normally collect them after some period of storage on or near the wharf. The parties must therefore have contemplated that the carrier, if it did not store the goods itself, would employ some other person to do so.”
On the other hand, it has been held that the forwarding agent who had charge of goods on the dock company’s premises, could not by means of the Himalaya clause benefit from the package limitation in the ocean carrier’s bill of lading, because the contract of carriage had not commenced. Similarly, where a stevedore had not yet performed any services referable to the contract of carriage at the time of the cargo theft (before loading), the Himalaya clause in the bill of lading could not operate to protect the stevedore from liability for that loss.

Nor can anyone entitled to benefit under a Himalaya clause receive greater exemptions than those to which an original party to the contract is entitled. Consequently, if a contract of carriage of goods by sea is governed by the Hague/Visby Rules, the benefits granted by a Himalaya clause in that contract are limited by art. 3(8) of the Rules.

In *The Pioneer Container*, the Privy Council, guided by “common sense and practical convenience,” accepted a wide reading of *Elder, Dempster Co. v. Paterson, Zochonis & Co.* It permitted a shipowner to take advantage of a jurisdiction clause in a contract between the shipper and charterer through the device of bailment on terms, as developed by Lord Denning M.R. in *Morris v. C.W. Martin & Sons Ltd.*

But in *The Mahkutai*, the Privy Council, severely limited this approach, advising that bailment and contract do not operate independently of one another. Rather, the contract, and any Himalaya clause it might contain, were deemed to alter the bailment. The Privy Council thus seriously questioned the use of bailment as an alternative method to the Himalaya clause for avoiding the privity rule. It thus reaffirmed the principle of privity of contract and that the Himalaya clause was the preferred means of conferring a benefit on a third party under a bill of lading.

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46 [1996] A.C. 650, [1996] 2 Lloyd’s Rep. 1 (P.C.). Lord Goff’s speech provides a critical review of prior English Himalaya clause jurisprudence. While the Privy Council (A.C. at p. 665, Lloyd’s Rep at pp. 8-9) assumed without deciding that a shipowner qualifies as a “sub-contractor”, as that term was used in the charterer’s bill of lading, the Court of Appeal of Hong Kong ([1994] 1 H.K.L.R. 212) answered it in the negative. But Colman J., in *The Starsin* [2000] 1 Lloyd’s Rep. 85 at p. 99, held that shipowners did fall within the term “independent contractors” as it was employed in the particular Himalaya clause at issue there and, hence, could enjoy the benefits of the clause — a holding upheld on appeal. See *The Starsin* [2001] 1 Lloyd’s Rep. 437 at p. 461 (C.A.).
Lord Goff also held that a valid Himalaya clause could confer only benefits and had to be distinguished from terms embodying mutual agreements. Because a jurisdiction clause confers mutual rights and obligations, rather than purely unilateral benefits, its protection could not be extended to a third party by a Himalaya clause.\textsuperscript{49} Such protection could, however, be so extended if the clause itself expressly mentioned the exclusive jurisdiction clause as one of the benefits conferred.\textsuperscript{50}

2) The new U.K. law

Finally, in response to longstanding criticism of the privity rule,\textsuperscript{51} and a report by the Law Commission in 1996,\textsuperscript{52} the United Kingdom Parliament, some three years later, passed the \textit{Contracts (Rights of Third Parties) Act, 1999}.\textsuperscript{53} This statute, the full title of

\textsuperscript{49} [1996] A.C. 650 at p. 666, [1996] 2 Lloyd’s Rep. 1 at p. 9 (P.C.), holding that the exclusive jurisdiction clause in the bill of lading at issue was not an “exception, limitation, condition or liberty”, nor was it a “provision”, a term which, in the context of the clause concerned, was interpreted to mean a term benefiting the carrier in the same way as an exception, limitation, condition or liberty. See also \textit{Bouygues Offshore S.A. v. Caspian Shipping (No. 2)} [1997] 2 Lloyd’s Rep. 485 at p. 490.

\textsuperscript{50} See the unreported decision of Mr. Justice Moore-Bick in \textit{United Arab Shipping Co. & Ors. v. Galleon Industrial Ltd.} (High Court of Justice 2000, Folio 792), at paras. 24-29, where the shipowner, held to be an independent contractor under a bill of lading issued by a charterer, was given the benefit of an exclusive jurisdiction clause in the bill of lading the Himalaya clause of which mentioned, not only “every defence, exception, limitation, condition and liberty applicable to the Carrier”, but also referred expressly to the jurisdiction clause.

\textsuperscript{51} The criticism came from both judicial and academic circles. See Jack Beatson, "Reforming the Law of Contracts for the Benefit of Third Parties: a Second Bite at the Cherry" (1992) 44 CLP 1. See also A. Burrows, “The Contracts (Rights of Third Parties Act) 1999 and its implications for commercial contracts [2000] LMCLQ 540, who notes that calls for the reform of the privity rule were voiced as early as 1937 by the Law Revision Committee, chaired by Lord Wright. One of the strongest criticisms was expressed by Lord Diplock in \textit{Swain v. The Law Society} [1983] 1 A.C. 598 at p. 611 (H.L.), where he described the rule as: “an anachronistic shortcoming that has for many years been regarded as a reproach to English private law.” See also Steyn, L.J. in \textit{Darlington Borough Council v. Wiltshire Northern Ltd.} [1995] 1 W.L.R. 68 at p. 76 (C.A): “The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract.” For academic commentary on the privity doctrine, see, for example, Francis Reynolds, “Privity of Contract, the Boundaries of Categories and the Limits of the Judicial Function” (1989) 105 L.Q.R. 1; J.N. Adams & R. Brownsword, “Privity of Contract – That Pesteilential Nuisance” (1993) 56 Modern L. Rev. 722.


\textsuperscript{53} U.K. 1999, c. 31, assented to and in force, November 11, 1999, but which (by sect. 10(2)) is applicable only to contracts concluded six months later (i.e. on or after May 11, 2000), unless the contract expressly provides for the statute’s earlier application to it (sect. 10(3)). Among the many learned commentaries on the statute are those by A. Burrows, “The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts” [2000] LMCLQ 540; C. MacMillan, “A Birthday Present for Lord Denning: The
which is the “An Act to make provision for the enforcement of contractual terms by third
parties”, provides that a third party may “in his own right” enforce a term of a contract
where the contract expressly provides that he may do so (sect. 1(1)(a)). Such enforcement
is also possible where the contract purports to confer a benefit on the third party, even if
he is not designated by name, but only as a member of a class (sect. 1(1)(1)(b) and 1(3))
e.g. stevedores, subsequent owners, subsequent tenants), or as a person answering a
particular description, unless on a proper construction of the contract the parties did not
intend the term to be enforceable by such persons (sect. 1(2)). Even third parties not yet
in existence when the contract is made (e.g. unborn children, future spouses and
companies to be incorporated) may then enforce rights stipulated in their favour. “Negative rights” (e.g. exclusion and limitation clauses) may also benefit third parties
under the statute (sect. 1(6)).

The statute also contains provisions on the variation and rescission of third party
benefits by the contracting parties (sect. 2); defences available to the promisor (sect. 3);
the right of the promisee to enforce contractual terms (sect. 4); and the protection of the
promisor for double liability (sect. 5).

Sect. 6 of the statute deals with exceptions to the right of a third party under sect.
1 to enforce a contractual term benefiting him. In particular, by sect. 6(5)(a), a third party
has no right to enforce such a term for his benefit, in the case of a contract for the
 carriage of goods by sea. A “contract for the carriage of goods by sea” is defined as a
contract either "contained in or evidenced by a bill of lading, sea waybill or a
corresponding electronic transaction" (sect. 6(6)(a)) or one "under or for the purposes of
which there is given an undertaking which is contained in a ship's delivery order or a
corresponding electronic transaction" (sect. 6(6)(b)).

There is, however, one major exception to this exception, permitting the third
party beneficiary, in reliance on sect. 1, to "... avail himself of an exclusion or limitation
of liability in such a contract" (sect. 6(5)(a)). It is this exception to an exception in the
Contracts (Rights of Third Parties) Act 1999 which, in effect, puts the Himalaya clause
on a statutory footing in the U.K. As the Explanatory Note to sect. 6(5) states:

pp. 1003-1017.

contracts”, supra, note 53 at p. 542.

55 Under sect. 6(7)(a), a bill of lading, sea waybill and a ship's delivery order are given the same meaning as
they have in the Carriage of Goods by Sea Act, 1992, U.K. 1992, c. 50, while a “corresponding electronic
transaction” is a “transaction within section 1(5) of that Act which corresponds to the issue, indorsement,
delivery or transfer of a bill of lading, sea waybill or ship's delivery order.” (sect. 6(7)(b)).

56 For a consideration of the effects of the 1999 statute on the carriage of goods by sea, see Sir G.H. Treitel,
17 of F.D. Rose, ed., Lex Mercatoria (Essays on International Commercial Law in Honour of Francis
Reynolds), LLP, London, 2000 at pp. 345-379; Sir G.H. Treitel & F.M.B. Reynolds, eds., Carver on Bills of
Lading, Sweet & Maxwell Ltd., London, 2001 at paras. 7-071 to 7-079.
“Subsection (5), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by the sea to servants, agents and independent contractors engaged in the loading and unloading process to be enforced by those servants, agents or independent contractors (so called ‘Himalaya’ clauses).

It must be noted, however, that the 1999 statute does not repeal existing statutory and common law exceptions to the privity doctrine, such as the exceptions of agency, assignment and trust of a promise. Nor does it modify or repeal pre-1999 statutory provisions which, in some cases, accorded rights to third party contractual beneficiaries. It nevertheless affects English commercial law generally in many important areas, including insurance, construction contracts and contracts for the issuance of securities.

One may therefore conclude that Lord Reid’s agency theory may still be applied to Himalaya clauses in bills of lading subject to English law, where the conditions of that theory are met. But the 1999 statute provides a simpler basis for enforcing the standard Himalaya clause, because the statute merely requires the third party beneficiaries to be identified with sufficient clarity, either expressly (sect. 1(1)(a)), or by class, name or description (sect. 1(1)(b) and 1(3)). Concerns about the carrier’s authorization from the third party to stipulate the clause, the third party’s ratification of the benefit conferred by the provision, and about the passing of consideration, need no longer preoccupy either merchants, lawyers or judges.

3) Canada

a) Lord Reid’s agency theory in Canada

The Supreme Court, in The Lake Bosomtwe (Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.), relied on Midland Silicones and denied the right of a stevedore to benefit from a Himalaya clause. When, however, the Privy Council adopted The Eurymedom, the lower courts of Canada began to validate the third-party benefit of

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57 By sect. 7(1) of the 1999 Act, rights or remedies of third parties existing or available apart from the Act are preserved. See A. Burrows, supra, note 53 at pp. 549-550.
58 Among the existing statutory provisions that continue to operate, and which already provided third parties with enforceable contractual rights before the 1999 statute was adopted, are the Bills of Exchange Act 1882, U.K., 45-46 Vict., c. 61; the Carriage of Goods by Sea Act 1992, U.K. 1992, c. 50; and various U.K. statutes conferring third party rights in accordance with international conventions to which the U.K. is a party in the fields of road, rail and air transport. Accordingly, no rights are conferred on a third party by sect. 1 of the 1999 Act in the cases of contracts on such bills, notes or instruments (sect. 6(1) and 6(5)(b)). Another important exclusion, at sects. 6(3) and (4), prohibits the 1999 Act being used by third parties to enforce terms of an employment or other work contract against the employees or workers covered by it.
59 Burrows, supra, note 53 at pp. 553-554.
the Himalaya clause, on the condition that the prerequisites of Lord Reid’s agency theory in *Midland Silicones* were complied with.63

Finally, the Himalaya clause was upheld in the *Buenos Aires Maru*64 by the Supreme Court of Canada, which, in so doing, provided the following legal justification for the extension of the bill of lading’s exemption clauses to third parties (stevedores and terminal operators) in respect of liability before loading and after discharge.65 According to the Supreme Court the bill is not only evidence of the contract of carriage and of the obligations of the carrier as *carrier* under that contract, but is also evidence of the terms of the bailment which arises from reception of the goods until loading and from discharge until delivery and of the obligations of the carrier as *bailee*. The bill of lading therefore produces effects both before and after the period governed by the Rules. The stevedores and terminal operators employed by the carrier are acting as sub-baillees when the carrier is acting as bailee, and can therefore benefit from the exemptions which the bill grants to the carrier when the latter is acting as bailee. The Supreme Court then went on to give, as its basic reason for accepting the Himalaya clauses, a most dangerous argument: that it does not matter much which party is responsible because the loss will be covered by insurance.66

Whatever may be the validity of the Himalaya clause it must clearly specify who is being benefited, while the stevedore/carryer contract (or terminal agent/carryer contract) must specifically authorize and instruct the carrier to contractually benefit the stevedore (or the terminal agent) in the bill of lading.67 It is, however, not even essential (according

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66 [1986] 1 S.C.R. 752 at p. 800, 1986 AMC at p. 2619: “I think is important in determining what was within reasonable contemplation, to recognize that this is a commercial contract between two parties who, in essence, are determining which of them is to bear the responsibility for insurance at various stages of the contract.” (Emphasis added!) For commentary, see Tetley, supra, note 64.

to the Supreme Court of Canada) that the exemption clause be specific and exclude “negligence”. The clause, one presumes, still cannot exclude gross negligence or faute lourde.

b) Canada’s “principled exception” to the privity doctrine

In *London Drugs v Kuehne & Nagel International*, the Supreme Court relaxed the privity rule. It allowed warehouse employees whose negligent performance of the contract between their employer and a customer had damaged the customer’s property to avail themselves of the limitation of liability clause contained in the contract, even though they were strangers to it and even though there was no Himalaya clause in the warehousing contract. The Court, without abolishing the privity doctrine itself, nevertheless made an incremental change to the common law, which it deemed necessary in the interests of justice and policy. It laid down two basic conditions for relaxing the privity bar to third party benefit. The two-part test, announced in the majority decision of Iacobucci, J., requires that:

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1) The limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and

2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred.
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In the Supreme Court’s subsequent judgment in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, where the issue was the right of the demise charterer of a barge to rely on a waiver of subrogation clause in the insurance contract between the barge-owner and its insurer, Iacobucci, J. made it clear that the Court had not intended the “principled exception” to the privity doctrine announced in *London Drugs* to be limited to the employer-employee context. Rather, he restated the exception in wider terms, so as to make it clear that henceforth in common-law Canada, third parties will be

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permitted to benefit from contracts between other parties where the following two-part test is met: 1) the parties to the contract must intend to extend the benefit to the third party seeking to rely on the contractual provision; and (b) the activities performed by the third party seeking to rely on the contractual provision must be the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intentions of the parties.\footnote{Ibid., at p. 109. See generally M.H. Ogilvie, “Privity of Contract in the Supreme Court of Canada: Fare Thee Well or Welcome Back?” [2002] J.B.L. 163, which also contains a revealing comparison of the Canadian judicial relaxation of the privity doctrine with the statutory approach of the United Kingdom in its \textit{Contracts (Rights of Third Parties) Act 1999}.}

It would appear that the first limb of the test could easily be satisfied in the case of the typical bill of lading Himalaya clause, particularly as the provision ordinarily states expressly the intention of the parties to extend the carrier’s limitations and exceptions to stevedores, terminal operators and often other third parties. The second limb of the test would also appear to pose little problem, because it is normally as a result of performing the “very activities” which the Himalaya clause contemplates that the would-be third-party beneficiary seeks the shelter of the clause’s protection from liability to the cargo claimant.

Nevertheless, because the agency theory of Lord Reid has been so fully accepted and so frequently applied by Canadian courts in decisions dealing with Himalaya clauses, and because the “principled exception” to privity established by the judicial reform effected by \textit{London Drugs} and \textit{Fraser River} does not expressly abrogate the earlier common law exceptions to the privity doctrine, it would seem likely that that the agency theory will remain the principal (although perhaps no longer the sole) pillar supporting the validity of Himalaya provisions in Canadian maritime law, at least in the short term. The “principled exception”, however, like the United Kingdom’s \textit{Contracts (Rights of Third Parties) Act 1999},\footnote{U.K. 1999, c. 31.} provides a simpler mechanism for upholding Himalaya stipulations in bills of lading, excluding as it does complications relating to authority, ratification and consideration which inevitably attend judicial application of the agency theory.

4) \textbf{Australia}

delivery of goods, at ship's rail and therefore the contract of carriage was contemplated to have extended until delivery.\textsuperscript{78}

5) **South Africa**

In *Santam Insurance Co. Ltd. v. S.A. Stevedores Ltd. (The Sanko Vega)*,\textsuperscript{79} the Himalaya clause was upheld under Roman-Dutch law\textsuperscript{80} and Wilson J. adapted Lord Reid’s criteria to conform to Roman-Dutch law. Firstly, he interpreted the third criterion, the requirement that the carrier either have authority from stevedores or else that they ratify the grant, in light of the Roman-Dutch doctrine of *stipulatio alteri*.\textsuperscript{81} Secondly, the fourth criterion, consideration, was dropped as it is irrelevant to a binding contract under Roman-Dutch law.

6) **The United States**

a) **Pre-1959 Jurisprudence**

American law early on accepted the right of the parties to a contract to benefit a third party where the contracting parties clearly so intended, even if the third party had not furnished “consideration” in order to become a participant in the contractual bargain.\textsuperscript{82} America thus rejected the mid-nineteenth English notion of privity as articulated in *Tweddle v. Atkinson*,\textsuperscript{83} and as reaffirmed subsequently in English and Commonwealth case law. This respect for party intention continues to be reflected in the *Restatement (Second) Contracts 1981*,\textsuperscript{84} sect. 304 of which provides: “A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”\textsuperscript{85} Comment (b) to sect. 304 states: “This Section reflects the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person.”

Early American judgments extended bill of lading exceptions even where the bill of lading clauses in question were far from specific. Thus in *National Federation of


\textsuperscript{79} 1989 (1) S.A. 182 (D). See also *Bouygues Offshore v. Owners of the MT Tig* 1995 (4) S.A. 49 (Cape High C.).


\textsuperscript{82} The major early U.S. decision on the point is *Lawrence v. Fox* (1859) 20 N.Y. 268 (N.Y. C.A.).

\textsuperscript{83} (1861) 1 B. & S. 393, 121 E.R. 762.

\textsuperscript{84} American Law Institute Publishers, St. Paul, Minn., 1981.

\textsuperscript{85} Sect. 302(1) of the *Restatement (Second) Contracts* provides: “Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
Coffee Growers of Colombia v. Isbrandtsen Co., the Supreme Court of New York extended the benefits of the one-year delay for suit of COGSA to the terminal operator, who was the carrier's agent, without any specific clause in the bill of lading. In U.S. v. The South Star the Second Circuit extended the one-year delay for suit to the ship's agent and to the stevedore in a charterparty suit.

The turning point in America was Herd & Co. v. Krawill Machinery Corp., when the Supreme Court of the United States refused to extend the $500 per package limitation to stevedores who had been employed orally by the carrier. The Court commented in detail on the text of the Hague Rules and their adoption by the United States Congress:

“The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents. There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence.”

The Court then reviewed and disposed of previous leading decisions, including A.M. Collins & Co. v. Panama R. Co., Gilbert Stokes v. Dalgety, Waters Trading Co. Ltd. v. Dalgety. It then pointed out the true ratio decidendi of Elder, Dempster v. Paterson, Zochonis, relying on Wilson v. Darling Island Stevedoring.

The Supreme Court, in the penultimate sentence of this long, reasoned judgment, left the narrowest of four-word openings:

“No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract.” (Emphasis added).

Against this tiny opening, third parties have surged and quickly passed through.

b) Modern Himalaya Clauses – U.S.

89 Ibid., U.S. at pp. 301-302, AMC at 883.
90 197 F.2d 893, 1952 AMC 2054 (5 Cir. 1952).
Today the Himalaya clause benefiting the stevedore and the terminal operator is valid in the United States in virtue of *Herd v. Krawill*, but certain conditions must be complied with:

(i). There must be a contractual relationship between the contracting party and anyone who purports to claim the benefit of any clause in that contract. Furthermore, the party claiming the benefits bestowed by a Himalaya clause must be performing part of the contract that actually contains the clause. When faced with an independent contractor seeking the benefit of a Himalaya clause, some courts have required that the operation being performed be of a “maritime nature”.

(ii). The language of the Himalaya clause must be very specific as to who is being protected. Courts will not interpret bills of lading to benefit third parties not mentioned in any way whatever. Describing third parties merely as “bailees” or as “all persons rendering services in connection with the performance of this contract” did not meet the test of specificity in the past, although greater flexibility is evident in more recent

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100 In *Herd & Co. v. Krawill Machinery Corp* 359 U.S. 297 at p. 305, 1959 AMC 879 at p. 885 (1959), the U.S. Supreme Court held that: “… contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries.” In *B. Elliott v. J. T. Clark* 542 F. Supp. 1367 at p. 1370, 1983 AMC 1392 at p. 1396 (D. Md. 1982), aff’d 704 F.2d 1305, 1983 AMC 1743 (4 Cir. 1983), the first part of the clause benefited those third parties sued as carriers or bailees and the second part benefited those acting other than as carriers and bailees.

101 See *Steel Coils, Inc. v. M/V Lake Marion* 2002 AMC 1680 at p. 1699 (E.D. La. 2001), where the shipowner’s managing agent was not entitled to the COGSA package limitation incorporated into a charterparty, because none of the relevant shipping documents extended that limitation to it by any Himalaya clause type of provision.

Himalaya clause decisions. The description “independent contractors” was considered sufficiently specific until the 1970s, but then began to be viewed as imprecise. The courts in some cases required that the clause state independent contractors “employed by the carrier” or “whose services the carrier may engage.” The general principle at present is that parties may benefit when properly described, even when not specifically listed in the clause, provided that they at least belong to a readily-identifiable class of beneficiaries. Stevedores and terminal operators in particular are usually found to...
be protected by the clause. Even a railway used in the transhipment of a container can be protected, provided that explicit terms such as “inland carriers” are used in the provision.\textsuperscript{111} Ambiguity in drafting, however, can be fatal to the aspirations of inland carriers, as to other would-be beneficiaries, under the clause.\textsuperscript{112}

(iii) The clause should be specific as to what benefit is being granted.\textsuperscript{113} Nevertheless, in practice, general definitions of the benefit have been permitted.\textsuperscript{114} The benefits granted to the third party by the Himalaya clause include the one year delay for suit,\textsuperscript{115} the package

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285 at p. 286, 1972 AMC 815 at p. 816 (5 Cir. 1971) and held valid the clause which extended all of the carrier's available defenses to “the Carrier's agents, servants and employees and ... any independent contractor performing any of the Carrier's obligations under the contract of carriage”; \textit{Watkins v. M/V London Senator} 112 F. Supp.2d 511 at p. 517, 2000 AMC 2740 at p. 2747 (E.D. Va. 2000) (terms such as "agents" and "subcontractors" held adequate to include any party engaged by the carrier to perform any part of the carrier's duties under the contract of carriage, e.g. stevedores); accord: \textit{Acciat Speciali Terni USA, Inc. v. M/V Berane} 181 F.Supp.2d 458 at p. 464, 2002 AMC 528 at p. 533 (D. Md. 2002).

\textsuperscript{110} \textit{B. Elliott v. J. T. Clark} 542 F. Supp. 1367, 1983 AMC 1392 (D. Md. 1982), aff'd 704 F.2d. 1305, 1983 AMC 1743 (4 Cir. 1983), the clause protected “all terminal operators, stevedores, watchmen and other independent contractors whatsoever ...”. In \textit{Moonwalk Intl. v. Seatrain Italy} 1985 AMC 1270 at p. 1275 (S.D. N.Y. 1984), the COGSA limitation was held to extend to “all stevedores and terminal operators engaged by the carrier.” See also \textit{EM Chemicals v. Sloman Najade} 1987 AMC 1689 (S.D. N.Y. 1987); \textit{Indemnity Ins. Co. of North America v. Schneider Freight USA, Inc.} 2001 AMC 2153 at p. 2162 (C.D. Cal. 2001) (stevedore and terminal operator held sufficiently identified as parties performing "any part of the carriage").

\textsuperscript{111} \textit{Lucky-Goldstar v. S.S. California Mercury} 750 F.Supp 141 at p. 145, 1991 AMC 1018 at p. 1023 (S.D. N.Y. 1991). See also \textit{Classic Fashions, Inc. v. Narrieras N.P.R., Inc.} 68 F.Supp.2d. 1312 (S.D. Fla. 1999), where both a railway and a trucker in a combined transport situation where allowed to benefit from a Himalaya Clause contained in an ocean carrier’s bill of lading; \textit{Fruit of the Loom v. Arawak Caribbean Line Ltd.} 126 F.Supp.2d 1337 at p. 1342, 2000 AMC 387 at p. 393 (S.D. Fla. 1998), where the words “all parties performing services for or on behalf of the Vessel or Carrier as employees, servants, agents or contractors of Carrier” were held adequate to cover an inland trucker hired by ocean carrier.

\textsuperscript{112} See \textit{Sun-Bar Materials International, Inc. v. American Presidential Lines, Ltd.} 1993 AMC 2639 (N.D. Cal. 1993), where the bill of lading “evidence[d] an intent to distinguish between water or vessel carriers... and all other non-vessel carriers... referred to [in the bill of lading] as ‘Joint service Connecting Carrier[s]’.” the use of the generic “agent” and the absence of any explicit reference to this latter type of carrier in the Himalaya Clause barred a railway from taking benefit from the Clause. The fact that there was a direct contractual relationship between the ocean carrier and the railway was held to be insufficient to grant the railway the benefit of COGSA limitations.


\textsuperscript{114} \textit{Ibid.; B. Elliott v. J. T. Clark, supra; Brown & Root v. Peisander, supra; Tessler Bros. Ltd. v. Italciaf Line, supra.} See also \textit{Bigge Equipment Co. v. Maxspeed Int’l Transport Co., Ltd.} 2002 AMC 1404 at p. 1416 (N.D. Cal. 2001), granting “the benefit of all provisions herein for the benefit of the Carrier as if the provision were expressly for their benefit.” See also \textit{Fruit of the Loom v. Arawak Caribbean Line Ltd.} 126 F. Supp.2d 1337, 2000 AMC 387 (S.D. Fla. 1998), where the Himalaya clause provided: “All exceptions, exemptions, defenses, immunities, limitations of liability, privileges and conditions granted or provided by this Bill of Lading, applicable tariff, or by COGSA or by any applicable statute for the benefit of the Vessels or Carrier shall also apply to and for the benefit of . . . all parties performing services for or on behalf of the Vessel or Carrier as employees, servants, agents or contractors of Carrier. . . .”

\textsuperscript{115} When COGSA applies by its own force, a specific provision in the Himalaya clause or in the bill of lading stipulating the one-year delay for suit defence is not necessary to confer the benefit of such a defence on the stevedore or terminal operator: \textit{Grace Line v. Todd Shipyards Corp.} 500 F.2d 361 at p. 375, 1974 AMC 1136 at p. 1155 (9 Cir. 1974); \textit{U.S. v. Panama City Port Authority} 361 F. Supp. 466 at p. 467, 1973 AMC 734 at p. 736 (N.D. Fla 1972). If, however, COGSA has been merely incorporated into the bill of lading by reference, the one-year delay for suit defence may not be available, unless there is a specific
limitation\textsuperscript{116} and a “forum selection clause”\textsuperscript{117} but the shipper/consignee must nevertheless be given a fair chance to contract for a higher limit.\textsuperscript{118}

(iv) The clause may not exclude liability for fraud or conversion and must be construed narrowly so as to cover only the intended beneficiaries.\textsuperscript{119}

c) **Period of responsibility clause**

The stevedore's and terminal operator's liability usually arises from acts or omissions occurring outside the “tackle-to-tackle” period where COGSA applies by its own force.\textsuperscript{120} A clause is therefore necessary to extend the application of COGSA before loading and after discharge, so that the stevedore and terminal operator may benefit from the COGSA defences granted by the Himalaya clause.\textsuperscript{121} This period of responsibility clause is often integrated into the paramount clause and may read as follows:\textsuperscript{122}

“The provisions stated in said Act [i.e. COGSA] ... shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier.”

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\textsuperscript{117} Street, Sound Around Electronics, Inc. et al. v. M/V Royal Container, at al. 1999 AMC 1805 (S.D. N.Y. 1999); Acciai Speciali Terni USA, Inc. v. M/V Berane 181 F.Supp.2d 458, 2002 AMC 528 (D. Md. 2002): “The Himalaya clauses apply to all defenses that the carrier may raise, and the forum selection clause is as valid a defense that the carriers may raise as any other. See Marinechance Shipping, Ltd. v. Sebastian 143 F.3d 216 at p. 221 1998 AMC 2819 at pp. 2826-2827, (5 Cir. 1998).”

\textsuperscript{118} Tessler Bros. Ltd. v. Italpacific Line 494 F.2d 438, 1974 AMC 937 (9 Cir. 1974); Stephen Nemeth v. General Steamship Co. 694 F.2d 609 (9 Cir. 1982); Komatsu Ltd. v. States Steamship Co. 674 F.2d 806, 1982 AMC 2152 (9 Cir. 1982); Wurtembergische v. Stuttgart Express 711 F.2d 621 (5 Cir. 1983); Brown & Root v. Peisander 648 F.2d 415 at pp. 423-425, 1982 AMC 929 at pp. 941-944 (5 Cir. 1981); Carman Tool & Abrasives, Inc. v. Evergreen Lines 871 F.2d 897 at p. 899, 1989 AMC 913 at p. 915 (9 Cir. 1989); Mori Seiki USA, Inc. v. M.V. Alligator Triumph 990 F.2d 444 at p. 451, 1993 AMC 1521 at pp. 1525-1527 (9 Cir. 1993). For a more detailed analysis of how the different circuits treat this requirement, see Zawitoski, supra, note 104 at pp. 355-360.


\textsuperscript{120} Sect. 7 COGSA; 46 U.S. Code Appx. 1307.


\textsuperscript{122} Ibid.
Such a clause has been thought sufficient to displace the applicable state law in favour of COGSA. In Colgate Palmolive v. Dart Canada, however, the Second Circuit held that when the application of COGSA is extended beyond tackle-to-tackle, “COGSA does not apply of its own force, but merely as a contractual term.” Where state law conflicted with the contractual limitation of liability based on COGSA, state law prevailed. Accordingly, the terminal operator was not permitted to limit his liability to $500 package under COGSA; instead, he was imposed with the liability of a warehouseman for conversion, for which under the state law no limitation of liability was effective. This analysis was followed in Moonwalk Intl. v. Seatrain Italy.

Furthermore, the Harter Act applies to the periods before loading and after discharge until proper delivery. Thus if cargo is lost or damaged after discharge but prior to proper delivery, the Harter Act will supersede COGSA and govern the liability of the stevedore and terminal operator. While these latter might rely on the Himalaya clause to benefit from the package limitation in the bill of lading, they will not be permitted under the Harter Act to relieve themselves from liability due to negligence.


126 It should be noted that when state law applies, certain defences may nevertheless be available to the stevedore or terminal operator: see Leather's Best, Inc. v. Tidewater Terminal, Inc. 346 F. Supp. 962 at p. 968, 1972 AMC 1672 at p. 1679 (E.D. N.Y. 1972); B. Elliott v. J. T. Clark 542 F. Supp. 1367 at p. 1374, 1983 AMC 1392 at p. 1403, (D. Md. 1982), aff'd 704 F.2d 1305, 1983 AMC 1742 (4 Cir. 1983). See also the Uniform Commercial Code at sects. 7-204 and 7-309. See Zawitoski, supra, note 104 at p. 342.


130 Sect. 12 of COGSA; 46 U.S. Code Appx. 1131.


133 46 U.S. Code Appx. 190.
Finally, if the cargo is lost or damaged after the period where the *Harter Act* applies, i.e. after proper delivery “to a fit and customary wharf,” the period of responsibility clause might not be effective to permit the stevedore or terminal operator to benefit from the COGSA defences. In such case, the stevedore and terminal operator's liability may be governed by state law. Of course an inland trucker, who had no contractual relationship with the carrier, may not benefit from the Himalaya clause.

### IV The Circular Indemnity Clause

Because of the problems with Himalaya clauses, carriers have found a new expedient - the circular indemnity clause. By such a clause, the cargo owner promises that no claim will be made against agents, servants, stevedores, terminal operators or subcontractors of the carrier, and further provides that, if (contrary to his promise) such a claim is made, then the cargo owner will indemnify the carrier against all the consequences. In consequence, the cargo owner will eventually find himself having to meet his own claim, hence the circular indemnity. A typical circular indemnity clause reads as follows:

“Sub-Contracting ... (2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.”

The circular indemnity clause must be read in conjunction with the definition clause also found in the bill of lading:

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137 See also R. Newell, “Privity Fundamentalism” and the Circular Indemnity Clause, [1992] LMCLQ 97.
138 This was the circular indemnity clause in *The Elbe Maru* [1978] 1 Lloyd’s Rep. 206 at p. 207.
139 This was the definition clause in *The Elbe Maru*, ibid. A more modern circular indemnity clause adds a second sentence which is in effect a Himalaya clause: “Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all provisions herein benefitting the Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for such servants, agents and sub-contractors.” See *Godina v. Patrick Operations*, [1984] 1 Lloyd's Rep. 333 at p. 334 (N.S.W. C.A.).
Definitions ... “Merchant” includes the Shipper, Holder, Consignee, the receiver of the Goods, any person owning or entitled to the possession of the Goods or this Bill of Lading and anyone acting on behalf of any such persons ...

Such a clause was upheld by Ackner, J. in The Elbe Maru, supra, who ruled that the clause would give the carrier an indemnity against costs properly incurred by him in dealing with any claim against a third party by the cargo owner. Furthermore, the Court stated that the carrier could apply to court, under sect. 41 of the Judicature Act, 1925, for a stay of proceedings to prevent the cargo owner from pursuing his claim against the subcontractor. Ackner J. noted that proof of a fundamental breach on the part of the carrier or of his servant, agent or sub-contractor might, however, overcome the circular indemnity clause.

The circular indemnity clause has also been upheld twice by Yeldham J., in the Supreme Court of New South Wales. In B.H.P. v. Hapag-Lloyd Aktiengesellschaft, supra, the carrier sought a permanent stay of the cargo owner's claim against the carrier's subcontractor, asserting that the cargo owner had breached its undertaking in the circular indemnity clause not to make any claim against the subcontractor. The carrier argued that this was a case where a court of chancery would have intervened to restrain the breach of negative contractual stipulation, especially where the breach consisted of the taking of proceedings which the party had agreed not to undertake. According to Yeldham J. the rates of carriage and other commercial considerations between the carrier and its sub-contractors were influenced by the latter's knowledge of the presence in the bill of lading of a clause which purported to protect sub-contractors from liability to the cargo purported to protect the sub owners. Because of these commercial considerations, the cargo owner's contractual undertaking not to make a claim, should be enforced. Yeldham J. also noted that another reason for compelling the cargo owner to adhere to its contractual promise was that it would relieve the carrier, who was the beneficiary of the cargo owner's promise, from the risk of further protracted and expensive litigation.

Yeldham J. had an opportunity to reaffirm his decision seven months later in Sidney Cooke Ltd. v. Hapag-Lloyd Aktiengesellschaft. In particular the Court held that in the circumstances of this case the circular indemnity clause did not contravene art. 3(8) of the Hague Rules because the carrier to whom had been contracted the sea-leg of a combined transport operation, was not a party to the contract -of carriage covered by the

141 Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49.
142 Supra, note 138 at p. 211.
144 Ibid., at p. 578.
145 Ibid., at p. 583.
146 Ibid., at p. 584.
bill of lading and therefore not a “carrier” for the purposes of art. 3(8). At least one other decision has since upheld the circular indemnity clause.

Is the circular indemnity clause valid? It seems to suffer the same defect as the Himalaya clause - it grants a negative right to a third party. Furthermore, if a claim under the clause related to the period when the Hague or Hague/Visby Rules applied, the clause would be contrary to art. 3(8) of the Rules just as the “both to blame clause” has been held invalid in the United States for attempting to deprive the cargo owner of full recovery from the non-carrying ship by means of a stipulation in a bill of lading.

If the circular indemnity clause is to be valid, it should be much more specific than the clause in The Elbe Maru and should refer specifically to “stevedores” and “terminal operators.” These latter should also have entered into a contract with the carrier obligating the carrier to so protect them.

It is the author's view that if the circular indemnity clause is valid, this is one more reason for adopting the Hamburg Rules, 1978, under which the carrier is responsible for loss or damage to cargo after discharge but has the advantage of the package or kilo limitation.

V. Civil Law

1) The basic rule

Under the civil law as under the common law, it is a basic rule that only the parties to a contract are affected by it. There are exceptions, however, to this basic rule.

2) The contract of porte-fort

In the obligation of porte-fort, one of the parties to a contract (the stipulator) promises that a third party will undertake to perform an obligation. The stipulator is responsible in damages to the other contracting party if the third party does not undertake

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151 Art. 1440 c.c. (Québec 1994); art. 1165 c.c. (France); art. 1165 c.c. (Belgium); arts. 1983 and 1985 c.c. (Louisiana); art. 1372 c.c. (Italy); art. 1257 c.c. (Spain). Note that Québec in 1994 put into force an excellent new civil code, enacted by S.Q. 1991, c. 64, which inter alia provides for the stipulation pour autrui (stipulation for another).

152 Arts. 1444-1452 c.c. (Québec 1994); arts. 1119-1122 c.c. (France); arts. 1119-1122 c.c. (Belgium); arts. 1985 and 1978-1982 c.c. (Louisiana); art. 1411-1413 c.c. (Italy); art. 1257 c.c. (Spain); art. 328 BGB (Germany).

153 Art. 1443 c.c. (Québec 1994); art.1120 c.c. (France); art. 1120 c.c. (Belgium); art. 1977 c.c. (Louisiana); art. 1381 c.c. (Italy).
to perform the obligation as promised. Carriers, however, do not want to be held responsible for the fault of the stevedore and, therefore, rely not on the exception of \textit{porte-fort}, but rather on stipulation for another.

3) Stipulation for another

a) Introduction

The civil law allows stipulation for another (\textit{stipulation pour autrui}). For such a stipulation to be successful, however, the law requires that four conditions be complied with. First, at its base, must lie a valid contract. Second, the stipulator must have a valid interest, pecuniary or otherwise, in having an obligation performed for the benefit of a third party. Third, the third party who benefits from the stipulation must be determinable and must exist when the promisor is obliged to perform his obligation.

\footnote{Most doctrinal authorities agree that the obligation undertaken by the promisor in an obligation of \textit{porte-fort} is only to procure the ratification of the contract by the third party. See \textit{Juris-Classeur Civil}, art. 1120, sect. 47 \textit{et seq.}; J.L. Baudouin & P.-G. Jobin, \textit{Les Obligations}, 5 Ed., Les Éditions Yvon Blais, Montreal, 1998, p. 385 at para. 473. According to these authorities, once the third party ratifies the contract so as to be bound by it, the promisor’s obligation has been fulfilled and he cannot be held liable if subsequently the third party refuses to carry out his obligations under the contract or performs them negligently. See \textit{Juris-Classeur Civil}, art. 1120, sect. 74; Baudouin & Jobin, \textit{ibid.} Applying their analysis to the context of carriage, the carrier would promise that the stevedore would agree to be bound by obligations under the contract. Once the stevedore would ratify the contract (by actually beginning to perform the work), the carrier would have fulfilled his promise and could not be made responsible for the stevedore’s negligent performance. This analysis reflects the mechanism of \textit{porte-fort}. See generally P. Malaurie & L. Aynès, \textit{Cour de droit civil}, tome VI (\textit{Les Obligations}), vol. II (\textit{Contrats; Quasi-Contrats}), 11 Ed., Éditions Cujas, Paris, 2001, pps. 259-260 at para. 424. As an alternative to \textit{porte-fort}, the relationship between the shipper, the carrier and the stevedore could be construed as a suretyship arrangement: art. 2333 \textit{c.c. et seq.} (Québec 1994); art. 2011 \textit{c.c. et seq.} (France); art. 2011 \textit{et seq.} (Belgium); art. 3035 \textit{c.c. et seq.} (Louisiana); art. 1936 \textit{c.c. et seq.} (Italy); art. 7:850 \textit{c.c. et seq.} (Netherlands 1991); art. 1822 \textit{c.c. et seq.} (Spain). Whereas the promisor in a \textit{porte-fort} situation does not guarantee that the third party will properly perform the obligations which the latter has ratified, the promisor in a suretyship arrangement makes himself liable as guarantor of the proper performance by the third party of his obligations. See Baudouin & Jobin, \textit{ibid.}, p. 385 at para. 471. There must be some evidence, however, that the carrier really intends to act as surety and that he agrees to be held liable should the stevedore fail to perform properly. Evidence of such an intention on the part of the carrier would, however, be difficult to adduce from the \textit{Himalaya} clause or from the bill of lading itself.}

\footnote{Art. 1444 \textit{c.c.} (Québec 1994); art. 1121 \textit{c.c.} (France); art. 1121 \textit{c.c.} (Belgium); art. 1978 \textit{c.c.} (Louisiana); art. 1411 \textit{c.c.} (Italy); art. 1257 \textit{c.c.} (Spain); art. 328 BGB (Germany); art. 6:253-256 \textit{c.c.} (Netherlands 1991).}


\footnote{J.L. Baudouin & P.-G. Jobin, \textit{Les Obligations}, 5 Ed., 1998, p. 389 at para. 479. While art. 1121 \textit{c.c.} in France requires a valid stipulation for another to be accessory to another operation which involves the stipulator, French courts have interpreted this requirement as entailing nothing more than that the stipulator have a moral interest in the stipulation (H., L. & J. Mazeaud & F. Chabas, \textit{Leçons de Droit Civil}, 9 Ed., 1998, t. 2, vol. 1, p. 899-900 at paras. 779-780). See also P. Malaurie & L. Aynès, \textit{supra}, note 154, p. 258 at para. 423. See also art. 1411 \textit{c.c.} (Italy).}
towards him.\textsuperscript{158} Fourth, the third party beneficiary must accept the stipulation and notice of the acceptance must be brought to the attention of either the stipulator or the promisor.\textsuperscript{159}

It is submitted that the Himalaya clause does not fall within the terms of the civilian stipulation for another, for three main reasons:

\textit{First,} a Himalaya clause does not confer a benefit, but rather, a negative right - the right not to be held liable, the right not to be sued. It is one party stipulating that a third party shall not be sued.

\textit{Second,} at least two conditions for a stipulation for another are not normally fulfilled in a Himalaya clause: the third party is neither determined nor determinable, and the third party does not signify his assent.

\textit{Third,} a stipulation for another is an exception and must be interpreted restrictively.

\textbf{b) May stipulation for another confer a negative benefit?}

(i) A Himalaya clause does not confer a positive right

The term “right” comes up again and again in any discussion of stipulation for another. The beneficiary himself has a right in the contract: he becomes a creditor of an obligation owed by the promisor, and as such, can enforce the execution of that obligation by a direct action. All these terms, and the concepts they represent (right, obligation, creditor), are foreign to the mechanism of exemption clauses. An exemption clause operates to prevent the enforcement of obligations. Thus, from the outset, the Himalaya clause and stipulation for another\textsuperscript{160} are both conceptually and terminologically incompatible.

(ii) Stipulation to create rights, not destroy them

While stipulation for another has been used to serve purposes other than those contemplated at the time of codification, any new uses attributed to it have always


\textsuperscript{160} Art. 1444 c.c. (Québec); art. 1121 c.c. (France); art. 1121 c.c. (Belgium); art. 1978 c.c. (Louisiana); art. 1411 c.c. (Italy); art. 1257 c.c. (Spain); art. 328 BGB (Germany); Art. 6:253-256 c.c. (Netherlands).
followed the path of creating a direct right of action for the benefit of a third party who is outside the contract.

It has been relied on quite extensively in the realm of both automobile and life insurance, to support a contractual claim by a party who was not privy to the contractual agreement. Stipulation for another has been the basis for upholding omnibus clauses, and for explaining the procedure of nominating a beneficiary in a life insurance policy.

In all the above cases, positive rights were created to benefit a third party. In a Himalaya clause, however, a negative right is granted, providing the third party with a defence to a cargo claim which he could not otherwise invoke, while also depriving the cargo claimant of a cause of action against the third party which he could otherwise assert.

(iii) Stipulation for another operates as a “sword”

The benefit arising from a stipulation for another is directly enforceable by the third party. This is not the case with a Himalaya clause. In the case of stipulation for another, initiative rests with the beneficiary; it is he who opts to assert his right to the benefit stipulated in his favour by commencing suit. In a Himalaya clause, however, the beneficiary does not take the initiative - he can only assert his entitlement to the benefit stipulated on his behalf by defending himself in an action taken against him.

In effect, a stipulation for another is to be used as a sword as a basis upon which to commence suit. A Himalaya clause, on the other hand, serves merely as a shield - as a defence.

c) Conditions of a stipulation for another

It is a condition of a stipulation for another that the third party should be determined or determinable at the time when the stipulation produces effects in his favour.

Assuming that the third party need only be determinable, does the Himalaya clause adequately define the third party beneficiary? Are the words “servant or agent of the Carrier (including every independent contractor from time to time employed by the

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Carrier)” sufficient to allow the consignee or shipper to determine in whose favour it has waived its rights? Is this sufficient notice?

In stipulation for another, the third party beneficiary must signify his assent. The carrier and the stevedore and terminal operator make contracts at the beginning of the year and various bills of lading are issued thereafter, benefiting the stevedore or terminal operator. These latter do not signify their assent to each bill among a multitude of different bills of ladings issued by a variety of carriers. Is there signification of assent at all? It might be argued, however, that assent is tacitly given when the beneficiary takes the benefit stipulated in his favour, in other words, when the stevedore begins to perform his tasks.

d) Restrictive interpretation

If a Himalaya clause is valid as a stipulation for a third party, the courts nevertheless must interpret it restrictively. The clause must clearly identify the particular rights accorded to very specific persons.

VI. France

France has solved the problems related to the Himalaya clause by enacting exemplary legislation governing the liability of stevedores.

The Law of June 18, 1966, at arts. 50 and 51, provides an open-ended description of the tasks that may be undertaken by cargo handlers. Art. 52 stipulates that the stevedore is only liable to the person who contracts for his services. Thus, a consignee

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165 Art. 1446 c.c. (Québec 1994). Doctrine and the case law have taken the position, however, that the assent can be either express or tacit. See J.L. Baudouin & P.-G. Jobin, Les Obligations, 5 Ed., 1998, p. 390 at para. 481.
168 Cour d’Appel de Paris, May 15, 1985, DMF 1986, 222. See also Cour d’Appel d’Aix, May 17, 1972, DMF 1973, 206 and Cour d’Appel de Paris, November 24, 1972, DMF 1973, 522, where the two different Courts of Appeal held that under art. 52 of the Law, the stevedore operates only for the person who
who had not contracted with the stevedores cannot take action under this law.\textsuperscript{169} Since art. 38 of the Decree of December 31, 1966 states that the carrier must properly and carefully load, handle, stow, care for and discharge the goods, it is the carrier who will usually have contracted with the stevedore.\textsuperscript{170} If the carrier has been mandated by someone else to contract for stevedoring services,\textsuperscript{171} he is required by art. 81 of the Decree to give notice of such to the stevedore.\textsuperscript{172}

Art. 53 of the Law of June 18, 1966 establishes the basis of the stevedore's liability,\textsuperscript{173} while providing five exceptions which may nevertheless be overcome if the

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\textsuperscript{170} Rodière, supra, note 167, paras. 816 and 840. In the course of performing the discharging and related terminal operations, the stevedore, at some indefinite point in time, will be no longer working for the carrier's account but rather for the consignee's account. The legal problems inherent in such a transition could be cleared up by providing that the carrier is responsible for the goods from the time he is “in charge of the goods” at the port of loading until he has “delivered the goods” at the port of discharge: see Hamburg Rules, art. 4.

\textsuperscript{171} See Cour de Cassation, May 28, 1974, DMF 1974, 717, affirming Cour d'Appel d'Aix, June 13, 1972, DMF 1973, 212, where the shipper had given the carrier the implied mandate to contract for stevedoring services, while stipulating that the beneficiary of these services would be the consignee. In other words, the shipper was the stipulator and mandator, the carrier was the mandatary, the stevedore the promisor, and the consignee the third party beneficiary. This kind of contractual arrangement is also to be found in Cour d'Appel de Bordeaux, November 22, 1966, DMF 1968, 408.

\textsuperscript{172} Ibid. The Cour d'Appel d'Aix, affirmed by the Cour de Cassation, rejected a strict interpretation of art. 52 of the Law of June 18 and of art. 81 of the Decree of December 31, 1966 requiring that the carrier clearly notify the stevedore that the stevedoring operations are for another's account. Proof that the stevedore knows for whose account he is carrying out his tasks can be made by any method, including by presumptions. See the interesting note by P. Bonassies, at DMF 1974, pp. 718-725. See also Cour d'Appel d'Aix, December 1, 1981, DMF 1982, 686.

\textsuperscript{173} Here again the distinction between the stevedore \textit{per se} and the \textit{acconier} is maintained. Regarding the \textit{acconier}'s liability, see Cour d'Appel de Paris, May 15,1985, DMF 1986, 222; Cour de Cassation, May 6, 1996, DMF 1996, 1010, with note by Y. Tassel. See also P. Bonassies, DMF 1995, 100-102 at no. 41.
plaintiff proves that the loss or damage was due to the fault of the stevedore or of his employees.  

The stevedore (except, of course, if there is a fundamental breach) may not be held liable for an amount greater than the limit of liability benefiting the carrier, unless he has been made aware of a declaration of value. The stevedore is not bound by bill of lading clauses in a contract of carriage of a container to which he is a stranger. The stevedore cannot lessen his liability by attempting to reverse the burden of proof nor by means of a benefit of insurance clause: art. 55(b) and (d). Actions against the stevedore are prescribed by one year: art. 56, read with arts. 32 and 46.

Eventual conflicts of laws are contemplated and resolved by art. 57, which stipulates that, in international carriage, stevedoring and terminal operations are governed by the law of the port where those operations were carried out.

Finally, while the carrier is normally responsible until delivery (livraison) is made, this responsibility is curtailed when the stevedores in a particular port are monopolies, usually of the local government. Under such circumstances, the carrier’s responsibility is terminated at the moment when the cargo is handed over to the monopoly. The monopoly is taken to be a mandatary of the consignee (destinataire).

VII. The Hamburg Rules

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174 Also, Cour d’Appel d’Aix, May 5, 1987, barred stevedores from taking advantage of a limitation of liability as their fault was “dolosive”. See commentary by P. Bonassies, DMF 1988, pp. 95-96 at no. 41.

175 Rodière, supra, note 167, para. 835. See also art. 28 of the Law of June 18, 1966, as amended by Law No. 86-1292 of December 23, 1986.

176 Art. 54 of the Law of June 18, 1966. As to the stevedore’s liability before the 1966 reform, see Cour d’Appel d’Aix, February 21, 1956, DMF 1957, 342.


179 When the stevedore has been hired by the carrier, the stevedore may be contractually bound to indemnify the carrier for the total sums paid by the carrier to the shipper due to damage suffered by the goods in the course of stevedoring operations: Cour d’Appel de Rouen, December 9, 1982, DMF 1983, 545. See also Cour d’Appel d’Aix, November 20, 1980, DMF 1981, 407.

180 The prescription period applies to any action against a stevedore whether the damage was done to a ship or to cargo: Cour d’Appel de Rouen, January 22, 1998, DMF 1998, 364 with note by J.-F. Tantin and commentary in P. Bonassies, DMF Hors série no. 3, 1999, no. 82 at pp. 63-64.


The Hamburg Rules solve the problem of the Himalaya clause at art. 4 which extends the responsibility of the carrier from port to port, while art. 10 holds the carrier responsible for the acts of the actual carrier, who by the definition in art. 1(2), would include the stevedore and the terminal agent.

VIII. Conclusion

The civil law has never had trouble with the concept of two parties benefiting a third party, because of the ancient principles found in the stipulation for another, although the stipulation for another may not exactly fit the Himalaya clause. The common law, in the last century, has experimented with various theories to benefit third parties, but the most effective method has been legislation, as found in the Hamburg Rules at arts. 1(2), 4 and 10, and by such statutes as the U.K.’s Contracts (Rights of Third Parties) Act 1999.

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