THE UNIVERSITY OF TASMANIA

THIRD PARTY LIABILITY AND EXEMPTION CLAUSES IN THE CONTRACT OF CARRIAGE BY SEA

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INTRODUCTION

Sea carriers in the past, have extended liability to their servants, agents and sub-contractors through Himalaya clauses in the bills of lading. However, there has been a complicated legal debate over third party liability and exemption clauses in the contract of carriage by sea. Complicated issues have made it difficult to determine who bears responsibility for the goods from carriage to delivery. This will affect the introduction of adequate insurance rates, which will in turn, apply to efficient rates of carriage.

Some of the difficulties had been overcome by an established principle of vicarious liability. However, this principle was short lived, as it was severely restricted and later, well defunct.

The Privy Council decision of A.M. Satterthwaite and Co. Ltd. v New Zealand Shipping Co. Ltd.,[1] did successfully transfer indemnity to a third party. However, the High Court decision of Port Jackson Stevedoring Pty. Ltd. v Salmond and Spraggon (Australia) Pty. Ltd.,[2] failed to apply the Eurymedon doctrine. Therefore, although the Eurymedon was not over ruled, there was still opposition to third party indemnity under bills of lading. The High Court initiated a search for fine distinctions involving the capacity issue, construction of the agreement, consideration, agency and fundamental breach.

The New York Star was appealed to the Privy Council, which reversed the decision of the High Court. The status of third party liabil-

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[1]Hereafter referred to as the Eurymedon

[2]Hereafter referred to as the New York Star

ity was still somewhat unsettled until the matter was again tested and upheld in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengesellschaf and others, and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengesellschaf and Another, decisions.

The principles in the House of Lord's decision in the New York Star, which allowed the exclusion of stevedores under a bill of lading, were transferred to the road haulage industry in Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another, and upheld in Life Savers (Australasia) Ltd. v Frigmobile Pty. Ltd. and Another.

It is apparent from these recent decisions, that a properly worded limitation or exclusion clause, can operate to exempt the carrier's servants, agents and independent contractors, from liability for damage or loss of goods. Such an understanding makes it easier for cargo owners to ascertain the risk they undertake when shipping their freight, and to arrange for appropriate insurance coverage. The carrier, knowing that his servants, agents and independent contractors employed from time to time, are exempted from liability, can set competitive rates of carriage, and discard high insurance costs.

CHAPTER I

THE EFFECT OF THIRD PARTY LIABILITY ON FREIGHT RATES

The Himalaya Clause

The bill of lading is a standard form document which is issued and signed by the carrier, acknowledging that specific goods have been delivered to him for shipment. The bill of lading itself acts as evidence of the previously concluded contract of carriage and its terms. It also acts as a receipt for goods, with reference generally being made to their nature, quantity, condition and packaging.

A carrier's liability with respect to damages to goods may be limited by a clause in the contract. Often the carrier will attempt to extend the limitation of liability to third parties, in particular stevedoring companies which have been hired by the carrier to offload and store the goods in a dockside warehouse. The provision which has been used for the express purpose of exempting the carrier's servants, agents and independent contractors, is known as a 'Himalaya' clause.[1]

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[1] The Himalaya clause had originated on a P&O passenger liner, the Himalaya. In June 1982, the plaintiff decided to take a cruise leaving from Southampton aboard the steamship Himalaya. On July 16th, the ship docked at Trieste. The plaintiff, on returning from a daily excursion in port, fell from the gangway after it had suddenly come adrift from the gantry at the shore end. She suffered severe injuries, and thus claimed damages against the master and the boatswain of the ship, alleging that they were negligent in failing to see the gangway was properly secured. The defendants argued that the limitations of liability set out in the P&O passenger ticket, which exempted P&O from claims alleging negligence, was also available to their employees. The English Court of Appeal ruled that the contract did not refer specifically to the extension of limitation clauses to the employees, and that exemptions were only available to P&O. Adler v Dickson [1954] 3 All E.R. 21

Risk and Freight Rates

Stevedores have been relying on the 'Himalaya' clause, when seeking immunity under the bill of lading. Stevedore immunity, or lack of immunity, under the transfer of exemption clauses contained in the bill of lading, is an important factor in determining the freight rates. If it is possible to distinguish who bears the responsibility for the goods from origin to destination, apportionment of risk may be determined for appropriate insurance coverage.

Insurance coverage will be apparent in the freight rate, if the carrier is to be responsible for the diligence of his employees or subcontractors. Therefore, a limitation on the right of recovery against the carrier, or his servants and agents, will only result in higher premiums. If the carrier is not responsible, then the owner of the goods may take it upon his own initiative to insure his freight. However, it may not be in the cargo owner's interest to bear the burden of increased premiums in a highly competitive market. If insurance coverage is necessary for protection against loss or damage to high value commodities, insurers will need to know the extent to which the carrier has limited his liability.

The legal implications of the validity of the 'Himalaya' clause, would be of interest to the International Cargo Handling Co-ordination Association, in determining efficient rates of carriage. However, the legal debate has been complicated. It has proven difficult for a third party (stevedore), to benefit from an exemption clause in a contract of carriage, as the third party, in a legal sense, has been deemed a stranger to the contract.

In practice, a number of situations arise in which justice in general, and business convenience in particular, requires that a contract be allowed to affect persons outside it. To expand on this point, an ex-

amination of the rules pertaining to privity of contract becomes necessary, as these rules ascertain which parties may benefit under contractual terms.

CHAPTER II

PRIVITY OF CONTRACT

The Strict Doctrines Underlying Privity of Contract

As indicated earlier, the principle parties to the contract of carriage are the cargo owner and the carrier. They are privy to the contract. However, it should be noted that as a usual commercial practice, the carrier may sub-contract to another sea carrier. More often, he will sub-contract the tasks of stevedoring and delivery of the cargo to the consignee. The carrier in the combined transport operation may have sub-contracted several times, to anyone who performs part of the carriage, such as stevedores, road hauliers, or terminal operators, for loading, off loading, storage and final delivery.

The objective of the carrier and his sub-contractors, is to include a provision in the bill of lading which gives the carrier the right to engage sub-contractors from time to time. Therefore, when the cargo owner signs the contract, he is in effect allowing the carrier's sub-contractors to perform some of the obligations of carriage under the bill of lading.

In this way, the cargo owner has, by express agreement, permitted the exclusion of liability of a third party. However, the doctrines underlying privity of contract provide that the jurisdiction of the contract, or its power to affect regulations, should be confined to the parties who created it. Although this reasoning seems sound, the whole contract is of a commercial nature, involving a number of independent services on the carrier's side.

Vicarious Liability

The House of Lords decision in Elder, Dempster & Co. v Paterson, Zochonis & Co.,[1] had overcome some of the problems relating to third party claims under a bill of lading. It was held in that case, that exclusion clauses in the bill of lading would not only protect the charterer, but the shipowners as well even though the shipowners were not parties to the contract. Viscount Cave, in his decision, established a principle of 'vicarious liability'.[2]

> . . . the owners were not direct parties to the contract; but they took possession of the goods . . . on behalf of and as the agents of the charterers, and so can claim the same protection . . .[3]

In a later House of Lords decision, Scruttons Ltd. v Midland Silicones Ltd.,[4] Lord Keith of Avonholm distinguished the Elder, Dempster & Co. case, stipulating that it involved a bailment upon terms.

> . . . the bills of lading were signed by the master of the ship, the cargo was received by the ship and the owners, with the assent of the shippers, on the same conditions as regards immunity in respect of stowage as had been obtained by the charterers under their contract of carriage.[5]

Lord Keith had therefore severely restricted the decision in the Elder, Dempster & Co. case.

In the case of Scruttons Ltd. v Midland Silicones Ltd., the rules under privity of contract were again tested in a situation involving the exclusion of stevedores as third parties in a contract of carriage by

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[1] [1924] All E.R. 135. In that case, a shipping company damaged the plaintiff's cargo through bad stowage. The bill of lading contained a clause of exclusion that purported to exclude liability on the part of the charterers, and the shipowners for bad stowage. The shipowners were not parties to the contract.

[2] Yates, Exclusion Clauses in Contracts, p. 103.

[3] Elder, Dempster & Co. v Paterson, Zochonis & Co. ibid., 141

[4] (1962) A.C. 446

[5] ibid., 481

sea.[1] It was held that they were not entitled to limitations of liability, because they were not parties to the bill of lading and were liable for damages. The stevedores also never obtained possession of the goods and could not gain protection under the rules in Elder, Dempster & Co. v Paterson, Zochonis & Co., as bailees. It should be noted also, that under the United Kingdom Carriage of Goods by Sea Act:

> If an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to envoke under these rules.[2]

In many cases, the stevedore has acted as an independent contractor, and therefore can not be afforded protection. Lord Reid in Scruttons Ltd. v Midland Silicones Ltd., did nevertheless, leave open the situation where one of the parties to a bill of lading contracts as an agent for a third person. In the decision of the High Court of Australia in Wilson v Darling Island Stevedoring and Lighterage Co. Ltd., the point arose as to whether the stevedoring company engaged by the shipowner could be regarded as an agent of the shipowner. Fullager J. stated:

> . . . the word 'agent' appears to me to be often misused in this connection . . . It seems to me quite wrong to say that a stevedoring company engaged by a shipowner to load or unload a ship is an agent of the shipowner, just as it would be wrong to say that a builder is an agent of a building owner. If A engages B to lay out a garden for him, and B engages C to do the actual work, C is not in any intelligible legal sence B's agent. B is an independent contractor with A. Agency in the legal sense does not come into the matter.[3]

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[1] [1962] A.C. 446. In that case, shipowners issued to the shippers of a drum containing chemicals, a bill of lading, by the terms of which they were entitled to limit their liability of the goods were damaged through their negligence. The drum was damaged during its loading by stevedores. The shippers sued the stevedores, who claimed to be entitled to limit their liability in accordance with the terms in the bill of lading.

[2] Carriage of Goods by Sea Act, 1971, art. 4, r. 2.

[3] (1956) 95 C.L.R. 70

Fullagar J. also distinguished Elder, Dempster & Co. v Paterson, Zochonis & Co. upon the fact that the ship's master signed the bill of lading, and overall, "refused to accept Elder, Dempster & Co. v Paterson, Zochonis & Co. as authority for a general rule of law of bailment."[1]

The argument put forward by Fullagar J. above does not suggest that the carrier may never act as an agent for the stevedore. The way was still open for the construction of an agency contract. Lord Reid in Scruttons Ltd. v Midland Silicones Ltd. indicated that, the stevedore must be clearly intended to be covered by the exclusion clause, that the carrier must make it plain that he is acting as agent, that he has the stevedore's authority to so act, and that any questions concerning consideration moving from the stevedore are settled, then a contract between shipper and stevedore, where the carrier acts as agent for the stevedore is quite possible.

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[1] Palmer, Bailment, p. 1002.

CHAPTER III

THE NEW YORK STAR

The New York Star[1] was an appeal to the Judicial Committee of the Privy Council, from the High Court of Australia. In the case, the plaintiffs were the consignees of a cargo of razor blades shipped on the New York Star for delivery at Sydney. Clause 2 of the bill of lading stated:

> . . . 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 . . . for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part . . . the Carrier is or shall be deemed to be acting as agent . . . for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) . . .[2]

Clause 17 of the bill of lading stated:

> In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods . . .[3]

After discharge from the vessel, the goods were placed in a warehouse, and later stolen. After twelve months from the time when the goods should have been delivered, the plaintiffs claimed damages from both defendants (stevedores and carrier) who denied liability.

The bill of lading with its Himalaya or exemption clause is the result of the commercial bargain between the shipper and the carrier. If it can be deemed that the stevedores are also parties to the bill of lading, by reason of the extension of liability in the contract, then they

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[1] [1980] 3 All E.R. 257

[2] (1978) 18 A.L.R. 333

[3] ibid., 334

will be afforded protection under its provisions thereof.

Capacity

In the light of third party liability in the New York Star, the first aspect to be considered is the capacity point, which refers to whether or not the exemption clauses under the bill of lading, cease to have any operation after the goods have passed over the ship's rail during offloading.

In the High Court decision of the New York Star,[1] Barwick C.J. applied the Eurymedon[2] doctrine. The negligent act in that case occurred during offloading, a drill was dropped and damaged. It was clearly an act committed in the delivery of the goods. The carrier in this case was required under provisions in the bill of lading to give actual delivery, and he engaged the stevedore to do this. In the New York Star, the negligent act occurred at a time when the goods were being stored after discharge from ship's tackle. Although Barwick C.J. noted the distinction between the facts of the two cases, it did not deter him from applying the principle to incidents occurring after the goods had left the ship's tackle, to a time when they were stacked and stored in a warehouse awaiting future delivery. Barwick C.J. commented on their Lordship's decision in the Eurymedon, stipulating that they had not restricted the extension of immunity of liability beyond delivery:

> . . . the event which gave rise to liability in the stevedore in the Eurymedon occurred before the ship's obligation to deliver had been performed. Thus the stevedore at the time of that event was excluding on behalf of the carrier part of the contract of carriage. Here (in the New York Star) the event giving rise to liability in the stevedore occurred after the carriage by the ship . . . but before the consignee had obtained delivery of the consignment. Thus it can be properly said that their Lordship's decision related in terms only to the period of carriage. But their Lordships in expressing themselves did not use any language

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[1] (1978) 18 A.L.R. 333

[2] [1975] A.C. 154

> which would confine the principle of their decision to the activities of the stevedore up to the time the goods became free of the ship's tackle.[1]

Barwick C.J. then expressed his reasoning in the following passage:

> To confine the scope of the agreement with the stevedore to a period ending with the discharge of the goods . . . is not only serious to limit the efficacy of the clauses of the bill of lading and to defeat the reasonable commercial expectation of the consignor and carrier, but it is in my opinion an unwarranted interpretation of the language of the bill of lading. I am unable to discover any reason why it should not cover the independent stevedore in the on - movement of the cargo.[2]

There were no other interpretations favourable to that of Barwick C.J. in the High Court decision of the New York Star. His argument may have been better understood if there had been a significant distinction drawn between stevedoring and wharfingering by the court. The distinction between the two is still vague.

The Eurymedon represents the first occasion upon which a Commonwealth Court has allowed a stevedore to claim, as a third party, the benifit of exemption clauses in the contract of carriage. However, the New Zealand courts, had more definite reasons for allowing the extension of liability. There was an unusual relationship between the carrier and stevedore. The carrier was a wholly owned subsidiary of the stevedore. Also, Carruthers, has pointed out:

> . . . I suggest that if the New Zealand Courts were confronted with the facts in the New York Star, they would make short work of the issue, possibly as a result of clearer definition or demarcation of the work on the wharf in New Zealand.[3]

According to Carruthers, the freight charge in New Zealand is calculated

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[1](1978) 18 A.L.R. 344

[2]ibid., 345

[3]Carruthers, 'The impact of the decision in Port Jackson Stevedoring Pty. Ltd. v Salmond and Spraggon (Australia) Pty. Ltd. (the "New York Star") - New Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd. (the "Eurymedon"), Maritime Law Association Conference, Christchurch, 1978

from hook to hook. The carrier may be liable, even in the case of unloading for stevedore work up and until the time the cargo has been taken off the hook. Charges for work beyond the hook are charged to a wharf handling account. Such work is known as wharfingering, and not stevedoring.

The majority in the High Court were very much against extension of immunity beyond the ship's rails. Stephen J. stated:

> So interpreted, the carrier's obligations under the bill of lading determine once and for all when, by discharge ex the ship's rails, the carrier effects due delivery of the goods.
>
> If the carrier's obligations under the bill determine upon delivery of the goods over the ship's rail, the relevant employment of the stevedore referred to in clause 2 will be co-extensive and the immunities conferred by that clause will also determine at that point.[1]

Stephen J. contends that any attempt by the carrier to extend the period of immunity beyond the actual contract of carriage, should be rejected as the carrier's duties and obligations are completed upon discharge. Therefore, the stevedore ceases to be under employment by the carrier.

Mason and Jacobs JJ. were in agreement with Stephen J., that the immunities were not extensions which ought to be made. However, they went on to reject Barwick C.J.'s reasoning that the Eurymedon doctrine should apply.

> The reasoning underlying the finding of a contract between shipper and stevedore is that the immunity or limitation is transferred, that what has been called a vicarious immunity or limitation of action arises in favour of the stevedore. It would be a great extension of the Eurymedon doctrine to apply it to a case where the servants and agents (including independent contractors) all would claim, but is one where no liability would arise in the circumstances in the carrier.[2]

It would appear that Mason and Jacobs JJ. are contending that on the true

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[1](1978) 18 A.L.R. 349

[2]ibid., 356-357

construction of the contract, the carrier's responsibility should be limited to the part of the carriage performed as carrier, and that any exemptions which extended beyond carriage, no matter whose benefit the clause may cover, should be invalid.

The Eurymedon, according to Mason and Jacobs JJ. was an acceptable principle and was one which ought to be binding on the New South Wales Court of Appeal. Their argument of its inapplicability to the New York Star, centres around the fact that the event which gave rise to liability in the stevedore in the Eurymedon occurred before the carrier's obligation to deliver had been performed. Thus, any exemptions which the carrier had to protect himself, his agents or independent contractors could be enforced, as the goods were in carriage at the time of damage.

Stephen and Murphy JJ., disagreed with the Eurymedon decision. Stephen J. had argued that consideration could not move from the carrier, and that the words of the exemption clause must be read as recording a contract then and there concluded. His argument was much the same as those in the dissenting judgements in the Eurymedon. Murphy J. concluded that there was nothing decided in the Eurymedon that would serve public interest.

> As the Eurymedon shows, there is no great difficulty in finding a theory to justify extending to a stevedore the immunities and other advantages which are expressed to be extended to it by a bill of lading. If the adoption of such a theory as part of our decisional law would serve Australia's interest, this should be done.[1]

The public policy argument put forth by Murphy J., has received little comment from the majority of the High Court with respect to the New York Star. Although it was never rejected by anyone in the High Court, with the exception of Barwick C.J., there was a lack of support for it, and its validity was completely rejected by the Privy Council.

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[1](1978) 18 A.L.R. 358

Agency and Bailment

It would appear that the majority of the High Court argued that 'agency' between stevedore and carrier can not exist if the exemption clauses in the bill of lading covered only the period of carriage up and until the goods passed over the ship's rails. Mason and Jacobs JJ. stated:

> . . . it does not follow that the appellant was acting as the agent of the carrier when it stacked and stored the goods on the wharf. The appellant stacked and stored the goods on the wharf on behalf of and at a charge to the holder of the bill of lading. The obligation to stack and store pending delivery was not imposed by the bill of lading upon the carrier or upon anyone else.[1]

As pointed out earlier in the Eurymedon, the goods were damaged in the course of discharge and the capacity of the stevedore as a person acting on behalf of the carrier was upheld. In the New York Star, the stevedore was not acting as an independent contractor employed by the carrier to perform obligations for the carrier under the bill of lading, but as a bailee. His liability in that capacity is separate from the contract of carriage. However, Lork Wilberforce found on the facts of the case that the stevedore could be protected under the exemption clauses in the bill of lading. In the Privy Council decision, Lord Wilberforce stated:

> It appears to have been the view both of Stephen J. and of Mason and Jacobs JJ. in the High Court that the stevedore was remunerated for his services in stacking and storing the goods on the wharf by the consignee; this if correct, might be an argument for finding that it was not, in respect of these matters, acting in the course on employment by the carrier. In fact, however, the evidence, including the actual amount, showed that these charges were paid by the ship's agent on behalf of the carrier, thus if anything, giving rise to an inference the other way.[2]

The Privy Council then dealt with the literal interpretations of the relevant provisions in the bill of lading to determine the stevedore's liability. Clause 5 of the exemptions included:

The carrier's responsibility in respect of the goods as a carrier

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[1](1978) 18 A.L.R. 356

[2][1980] 3 All E.R. 262

> shall not attach until the goods are actually loaded for transportation upon the ship and shall terminate withour notice as soon as the goods leave the ship's tackle at the Port of Discharge from the ship or other place where the carrier is authorised to make delivery or end its responsibility. [1]

Clause 8 of the exemptions included:

> Delivery of the goods shall be taken by the consignee or holder of the bill of lading from the vessel's rail immediately the vessel is ready to discharge, berthed, or not berthed, and continuously as fast as vessel can deliver notwithstanding any custom of the port to the contrary.[2]

Lord Wilberforce indicated that in practice, the consignee seldom takes delivery of the goods on the wharf, at the ship's rail. The goods are usually stored and stacked in a nearby depot, on or near the wharf, awaiting collection from the consignee. It would be common sense to infer that the carrier would hire a third party to unload, stack and store the goods, if the carrier did not do so by common practice.

> 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. Furthermore a document headed 'Port Jackson Stevedoring Pty. Ltd. Basic Terms and Conditions for Stevedoring at Sydney, N.S.W.' showed that it was contemplated that the stevedore would be so employed.[3]

Lord Wilberforce further indicated that if the stevedore is bailee for the goods, and is acting on behalf of the carrier, the carrier would also be bailee for the goods if he is acting on his own behalf and would be afforded protection from the exemption clauses in the bill of lading. It would stand to reason that the stevedore should be afforded protection if he is employed to do tasks that the carrier would have to do otherwise.

> The question may be asked: what is the carrier's position if he acts as his own stevedore and himself stacks and stores the goods? In the High Court, Stephen J. did not provide an answer to this, but, in my view of the provisions referred to above, their Lordships think that the answer is clear, namely that he would be

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[1] [1980] 3 All E.R. 263

[2] loc.cit.,

[3] ibid., 264

> liable for them, as bailee, under the contract. If that is so, it seems indisputable that if, instead, the carrier employs a third party to discharge, stack and store that person would be acting in the course of his employment, performing duties which otherwise the carrier would perform under the bill of lading, and so would be entitled to the same immunity as the carrier. would have.[1]

Consideration and Construction of the Agreement

Barwick C.J. believed that the stevedore's action of unloading the goods was consideration for an offer to perform those services, and that the stevedore should therefore be afforded protection under the exemption clauses. His reasoning was in accord with that of the Privy Council, on the subject of 'consideration and construction of the agreement' in the Eurymedon. He quoted from the judgement of Lord Wilberforce in the Eurymedon:

> . . . the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading.[2]

It would appear that this basis for the Eurymedon doctrine requires that the consignor will make an offer at large. This unilateral offer may be accepted by the stevedore when he acts upon that offer and performs the work for which he has contracted for.

The particular rule of law pertaining to 'offer at large' was tested in Carlill v Carbolic Smoke Ball Co.[3] It was held in that case, that anyone performing the conditions of a unilateral offer may be entitled to the benefit of conditions on that contract.

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[1] [1980] 3 All E.R. 264

[2] (1978) 18 A.L.R. 343

[3] [1893] 1 Q.B. 256. In that case, the defendants, who were the proprietors of a medical aid called the 'Carbolic Smoke Ball', issued an

Bowen L.J. stated:

> . . . why should not an offer be made to all the world which is to ripen into a contract with anyone who comes forward and performs the condition? . . . Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisment.[1]

In the Eurymedon, acting on the offer and performing the work would generally be the unloading of the goods by the stevedores. Performance of the work will be the acceptance to the offer. "The acceptance of an offer is the act which completes the formation of the contract."[2]

If it can be shown that the goods were damaged before unloading has commenced, the damage will have occurred before the completion of the contract. Any attempt by the stevedore to gain protection from the exemption clauses would fail. With a bilateral agreement, the contract is completed at the time the main contract terms have been agreed upon. A promise on one side is exchanged for a promise on the other side. With a unilateral contract, only the promissor is bound to perform. If an offer is made and a party fulfulls the order, the promissor is bound to make payment.

It would appear that the unilateral contract analysis would be a good theoretical basis for the stevedore because of the lack of consideration problems. However, there are two problems with the unilateral con-

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advertisement in which an offer of £100 was conveyed, to any person who succeeded in contracting influenza after specified use of the smoke ball. In the advertisement, it was stipulated that £1000 had been deposited into the proprietor's bank account to show their sincerity. On the faith of the advertisement, the plaintiff purchased and used the ball as directed, but succeeded in catching influenza. She sued for the £100. It was contended by the defendant company, that the advertisement was never meant to create a binding obligation between parties, and that there could be no consideration. In any case, the plaintiff had failed to notify them of her acceptance to the offer. Bowen L.J., however, held for the plaintiff that the advertisement constituted an offer at large.

[1] Carlill v Carbolic Smoke Ball Co. [1893] 1 Q.B. 259

[2] Atiyah, The Law of Contract, p. 42.

tract analysis. One such problem being that the stevedore may not use the 'agency' argument in conjunction with the unilateral analysis. Davies and Palmer stated:

> When a 'unilateral offer' is conveyed from the shipper to the stevedore by the intermediary, the carrier, it might be argued that the carrier is not acting as an agent in the proper sense of the term: he is transmitting an offer rather than acting as a negotiator or participant in the conclusion of the contract which results.[1]

Another problem with the unilateral analysis approach is the difficulty of proving the stevedore's 'reliance' on a particular offer. It was this point that failed to give protection to the stevedore in the New South Wales Court of Appeal. In the Court of Appeal decision in the New York Star, the plaintiffs had contested the fourth prerequisite of Lord Reid's rules in the Scruttons Ltd. v Midland Silicones Ltd. case which would have to be satisfied before the stevedore could rely on the exemption clauses. Namely, that any difficulties about consideration moving from the stevedore must be overcome. The plaintiffs submitted:

> . . . that the stevedore has failed to show that it gave consideration in the present case. He relies on a principle of contract law not discussed in the Eurymedon. It is the rule that where conduct is relied on as the acceptance of and consideration for an offer the acceptor must be shown to have acted on the offer.[2]

Phillip Clarke further submitted:

> The defendant's failure to invoke the clause in its favour in this case can be explained by reference to the facts of the case and not to a disagreement on principle. Adopting this view of the case, it would certainly seem to be a simple matter for stevedores in the future to give evidence that they acted in response to the offer of protection contained in the exemption clause.[3]

It would be insufficient for the stevedore to simply know of the shipper's offer to exempt, there needs to be some proof of his reliance on the offer.

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[1]Davies and Palmer, "The Eurymedon Five Years On," Journal of Business Law, 1979, p. 342

[2][1977] 1 Lloyd's Rep. 449

[3]Clarke, "The Reception of the Eurymedon Decision in Australia, Canada and New Zealand," International and Comparative Law Quarterly 29 (January 1980) p. 142

> Quite what needs to be proven is uncertain. English law at least seems, as far as the authorities go, firmly set against a search for evidence of motivation by the offer; but there are English cases which mention some requirement of "acting on" or "acting in reliance on" the offer. Some mental element is necessary.[1]

In the High Court decision on the New York Star, Mason and Jacobs JJ. indicated that the reliance requirement could be satisfied.

> Common sense and knowledge of human affairs indicate the evident probability of the appellant acting in reliance on the shipper's promise or offer when he discharges the goods so long as he has knowledge of the existence of that promise or offer.[2]

It would seem, according to Mason and Jacobs JJ., that this reliance requirement may be accepted by the courts on the grounds of common sense and human nature. What is not pointed out is what the court's position would be if the work on the wharf is performed without reliance on the offer.

The unilateral contract argument is therefore not without complications. Not only is there the problem of consideration, but a difficulty by the court in determining a unilateral offer in the contract of carriage. It was because of this difficulty that Barwick C.J. in the New York Star, rejected the unilateral contract argument.

> . . . I do not think the bill can be interpreted as containing an offer at large by the consignor.[3]

> He (Barwick C.J.) felt that there was an offer by the consignor to grant immunity to the stevedore on his doing the work. The stevedore accepted this offer when the bill of lading was agreed to. There then existed an "arrangement" which became an enforcable contract only when the stevedore actually did the work and thereby provided the consideration.[4]

The Privy Council decision on the New York Star decided little more on the subject of 'consideration and contract construction', and basically approved of Barwick C.J.'s analysis.

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[1] Davies and Palmer, "The Eurymedon Five Years On", p. 345.

[2] (1978) 18 A.L.R. 345

[3] ibid., 342

[4] Davies and Palmer, "The Eurymedon Five Years On", p. 345

> The provision of consideration by the stevedore was held to follow from this board's decision in Satterthwaite's case and in addition was independently justified through Barwick C.J.'s analysis.[1]

Fundamental Breach

It had been argued by the consignee in the New York Star, that the stevedore had deprived itself of the benefit of clause 17 in the bill of lading, the time bar clause. Clause 17 stated:

> In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.[2]

Counsel for the consignee contended that the bringing of suit within one year was a condition with which the innocent party was obliged to comply and that the repudiatory breach discharged this condition. The breach, being breach of duty as bailee, which resulted in the loss of the consignment of razor blades. The consignee also contended that the stevedore's negligence as bailee gave rise to an action in tort, which was not governed by the time bar. The argument was not accepted in the Privy Council decision in the New York Star. Lord Wilberforce stated:

> The reference to deliver of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It can not be supposed that it admits of a distinction between obligations in contract and liability in tort; 'all liability' means what it says.[3]

It would seem that the carrier need only include the words 'all liability' when attempting to exempt himself and his agents, the stevedores, as third parties to the contract, with respect to a time clause. The Privy Council decision in the New York Star suggests that the words 'all liability' are wide enough to cover the tort of negligence. The

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[1] 1980 3 All E.R. 261

[2] ibid., 262

[3] loc.cit.

reasoning put forth by Lord Wilberforce has rejected arguments in the High Court decision of Mason and Jacobs JJ., stipulating that the carrier could not exempt for the stevedore's negligence.

> . . . it (the stevedore) as bailee failed to take reasonable care of the goods. This separate act of negligence was not the subject of the bill of lading (which provided that the stevedore was not to be under any liability to the consignee for loss, damage, or delay) and therefore the appellant was not entitled to rely on the limitation of action provision in clause 17.[1]

Lord Wilberforce contended that such a clause as clause 17 in a bill of lading, should not be equated with those provisions in the contract which relate to performance.

> It is a clause which comes into operation when contractual performance has become impossible, or has been given up; then it regulates the manner in which liability for breach of contract is to be established.[2]

Their Lordships in the Privy Council found that clause 17 was:

> . . . relevantly indistinguishable from an arbitration clause, or a form clause, which on clear authority, survive a repudiatory breach.[3]

A later case, Ailsa Craig Fishing Co. Ltd. v Malvern Fishing Co. Ltd. and Another,[4] commented specifically on the subject of 'failure of performance' with respect to contractual duties. Lord Wilberforce assumed from the facts of that case that the failure of the respondents to provide the services contracted for was total, and dealt directly with the concept

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[1] (1978) 18 A.L.R. 357

[2] [1980] 3 All E.R. 262

[3] loc.cit.

[4] [1983] 1 All E.R. 101. In that case, the appellants were the owners of a fishing boat which sank due to the respondent's (security company) negligence. Condition 2 (f) of the contract stated that in the event of the respondents incurring liability for any loss or damage, or the failure for provision of services contracted for, liability was to be limited to £1000. The appellants brought an action against the respondents claiming £55,000 for the loss of the appellant's vessel, and submitted that condition 2(f) was not operative as there had been a total failure by the respondents to perform any of the contracted obligations. On appeal to the House of Lords, Lord Wilberforce held for the respondents.

of 'complete failure'.

> This clause (exemption clause) is on the face of it clear. It refers to failure in provision of the services covered by the contract. There is no warrant as a matter of construction for reading 'failure' as meaning 'partial failure', that is, as excluding 'total failure' and there is no warrant in authority for so reading the word as a matter of law.[1]

Therefore, complete failure of performance and breach of contract by one party need not negate limitations of liability provided that the failure of performance is incorporated within the conditions by express terms. As indicated by Lord Wilberforce in the Privy Council decision of the New York Star, the clause itself should regulate the way in which liability for failure and breach of contract is to be established. It is therefore quite possible to provide a clause in the contract of carriage, that stipulates the liabilities and risks of the parties, should the contract come to an end, that is, failure of performance by one of the two parties. The condition which limits the liability may survive the repudiatory breach. This concept is seen as an equitable means of determining risk apportionment by Lord Wilberforce.

> Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives and possibly also the opportunity of the other party to insure.[2]

Counsel for the consignee in the New York Star, referred to observations made by Lord Diplock in Photo Productions Ltd. v Securicor Transport Ltd.[3]. Lord Diplock had specified the obligation of a party to do what he had expressly agreed to do, as a 'primary obligation'. In the event of failure of performance, or of a breach of primary obligations,

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[1] [1983] 1 All E.R. 103

[2] loc.cit.

[3] [1980] 1 Lloyd's Rep. 525

reimbursement for loss and damage were to be termed as 'secondary obligations'. The Privy Council which held that an exemption clause applied after the discharge, interpreted Lord Diplock's reasoning in the Photo Productions Ltd. v Securicor Transport Ltd. case as referring only to primary obligations, whereas the exemption clause in the New York Star gave rise to secondary obligations.

> . . . these words were never intended to cover such 'obligations' to use Lord Diplock's word, as arise when primary obligations have been put an end to. There then arise, on his Lordship's analysis, secondary obligations which include an obligation to pay monetary compensation. Whether these have been modified by agreement is a matter of construction of the contract. The analysis, indeed, so far from supporting the respondent's argument, is directly opposed to it.[1]

Clause 17 clearly excluded the resopndent's claim.

Whether an exemption clause continues to operate after a discharge of the contract, depends on whether the words or express terms upon their proper construction stipulate that it should continue. In the past, courts have applied a deliberate 'restrictive construction'. The meaning of terms have been strained to reach a construction which reflect a greater sense of justice, than what is offered in their ordinary meaning.

> The application of a strict construction leads a court to resolve ambiguities of meaning, against the party seeking to rely on an exemption clause. A deliberately restrictive construction involves a Court in straining to discern a latent ambiguity in the language or from the surrounding circumstances, so that it can resolve it against the party relying on the exemption clause.[2]

Lord Wilberforce, in the Privy Council decision of the New York Star, has applied a strict construction in a search for justice as to the question of whether or not an agreement for secondary obligations had taken place. His intentions are noted with respect to the respondent's argument as to the significance of Lord Diplock's primary and secondary

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[1] [1980] 3 All E.R. 262

[2] Mcgarvie, "Exemption Clauses and Fundamental Breach," Current Problems in Law 7 (1981) p. 15

obligations, when he stated: "The analysis indeed, so far from supporting the respondent's argument, is directly opposed to it."

The use of a strict construction can not construe a different meaning. A modification of the terms or language in the contract which the parties have used in the exemption clause, can not be implicated unless it is necessary to give effect to what the parties had originally intended. In the High Court decision of the New York Star, Barwick C.J. stated:

> . . . whilst exemption clauses . . . should be construed strictly, they are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract or, for some other reason, justify the cutting down of their scope.[1]

However, as indicated previously, the courts may apply to exemption clauses, a deliberately restrictive construction, in which the terms will be strained to reach a meaning which implies a more equitable construction than that indicated by express terms. If there is an imbalance between the competing interests of the stevedore and the owner of the goods, the courts can resolve it against the stevedore relying on the exemption clause, if he (the stevedore) is in a superior bargaining position. Lord Reid had stated:

> Exemption clauses differ greatly in many respects . . . in the ordinary way the customer has no time to read them, and if he did he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it . . . Freedom to contract must surely imply some choice or room for bargaining.[2]

The Photo Productions Ltd. v Securicor Transport Ltd. case suggests that a deliberately restrictive construction will not apply in situations where the parties are of equal bargaining strength.[3] It will also not apply where a statute regulates exemption clauses. Since the Suisse

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[1](1978) 18 A.L.R. 340

[2]Suisse Atlantique Societe d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 406

[3]Lord Wilberforce in Photo Productions Ltd. v Securicor Transport Ltd. [1980] 1 All E.R. 564

Atlantique Societe d'Armenent Maritime S.A. v N.V. Rotterdamsche Kolen Centrale case, parliament has passed the Unfair Contract Terms Act, 1977. Lord Wilberforce in the Photo Productions Ltd. v Securicor Transport Ltd. case, referred to this Act:

> This Act . . . enables exemption clauses to be applied with regard to what is just and reasonable . . . when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said . . . for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.[1]

[1] [1980] 1 All E.R. 561

CHAPTER IV

THE AUSTRALIAN POSITION

The Applicability of the Eurymedon and the New York Star

Much of what had been decided in the Eurymedon with respect to capacity, agency, consideration and contract construction had been either rejected or ignored in the High Court decision of the New York Star.

> . . . the disagreement among the members of the High Court of Australia must give cold comfort to the advocates of the Eurymedon doctrine.[1]

However, the Privy Council upheld the Eurymedon in their decision on the New York Star.

It seemed after the Scruttons Ltd. v Midland Silicones Ltd. case, that courts would eventually allow a third party benefit under a bill of lading, providing Lord Reid's conditions of exemption were applicable and adequately drafted as conditions in the contract.

> Although the immediate result of Midland Silicones was a denial of such protection, its opposition to the principle of third party immunity was not implacable; and in 1974 the Privy Council finally conceded that the relevant third party (in this case a stevedore) could secure relief provided that Lord Reid's conditions were fulfilled.[2]

Most Commonwealth Courts which have considered the conditions in Scruttons Ltd. v Midland Silicones Ltd. have been lower courts, whereas the Privy Council, with the exemption of the Eurymedon and the New York Star, has more often discarded Lord Reid's conditions as being inapplicable in any cases brought forward.

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[1] Carruthers, op.cit., p. 13

[2] Davies and Palmer, op.cit., p. 337

> . . . the most senior court to examine the case (the Eurymedon) has produced not only the strongest outright reservations about its legitimacy but the most diverse and conflicting judgements.[1]

Therefore, the Australian position as to third party liability under the bill of lading had been somewhat vague after the conclusion of the Privy Council ruling in the New York Star. Privy Council decisions on appeal from the High Court should be treated as High Court decisions. It is not surprising however, that uncertainties and doubts about the decision have encouraged cargo owners in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengesellschaf and others[2], and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengesellschaf and Another[3], to bring the matter back before the High Court for reconsideration.

Reinforcement of the Principles

The two recent decisions in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengesellschaf and others, and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengesellschaf and Another, have commented favourably on the Privy Council decision in the New York Star. In Broken Hill Proprietary Co. v Hapag-Lloyd Aktiengesellschaf and others, a carrier's agent damaged goods in transit due to negligence. Clause 4 (1) of the bill of lading provided that the carrier should be entitled to sub-contract the carriage. Clause 4 (2) stipulated that there should be no claims made against any party by whom any part of the carriage was performed. Broken Hill Proprietary Co. Ltd. sued both the carrier and agent. Yeldham J. in the Supreme Court of New South Wales stated that:

> Some of the foregoing defences . . . raise squarely for consideration the application to this bill of lading, and to the circumstances of the present case, of principles enunciated in New

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[1] Davies and Palmer, op.cit., p. 337.

[2] [1980] 2 N.S.W.L.R. 572

[3] ibid., 587

Zealand Shipping Co. Ltd. v A.M. Satterthwaite & Co. Ltd. and in Port Jackson Stevedoring Pty. Ltd. v Salmond and Spraggon (Australia) Pty. Ltd.[1]

Having indicated the relevance of the principles in both the New York Star and the Eurymedon to Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others, Yeldham J. held that the carrier could by express terms in clause 4 (1), sub-contract their duties, and by doing so were able to transfer indemnity to his agent, the third party (clause 4 (2)). Because the plaintiff agreed not to make any claim against the various people, including sub-contractors, a stay of proceedings, equivalent to an injunction, preventing the cargo owner from pursuing a claim against the sub-contractor, was applied. In effect, the exact terms of clause 4 (2) of the bill of lading, which contained a promise that the cargo owner will not make a claim against the sub-contractor, had been given effect to.

In Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another, Hapag entered into a contract of carriage with the vendor of certain goods, the vendor endorsed the bill of lading over to Cooke, the purchaser. The goods were damaged whilst in control of the agent of Hapag before the delivery to Cooke. The bill of lading contained a definition of 'carriage' which included the whole of the operation from receipt until delivery. It had also been stipulated that the carriage could be sub-contracted, as it had been in clause 4 (1) in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others, and, that indemnity to the sub-contractor could be transferred as in clause 4 (2) of the same case. Cooke sued Hapag and the agents for damages.

Yeldham J. held that clause 4 (1) would be binding and that clause 4 (2) of the bill of lading would not be limited in its operation only to

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[1] [1980] 2 N.S.W.L.R. 577

the carriage by sea. Clause 5(B)(2)(a) made reference to three stages in the carriage where damage was possible.

> (A) from receipt of the goods until loading; (B) during the carriage by sea; and (C) from discharge until delivery . . .[1]

Yeldham J., in agreement with Barwick C.J. in the High Court decision of the New York Star, ruled that:

> . . . as a matter of practice, the carrier could be expected to sub-contract to others the unloading and storage of goods, and their delivery to the consignee.[2]

It would appear that sub-contracting, and transfer of indemnity to third parties which have been specifically appointed as agents to the carrier, is now acceptable under contractual arrangements. It also seems possible for the carrier and agents to obtain a promise that the cargo owner will not make a claim against the sub-contractor, as in clause 4(2), in both Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others, and Sidney Cooke, Ltd. v Hapag-Lloyd Aktiengelleschaf and Another. The Himalaya clause need not refer solely to sub-contractors, but any persons performing services covered in the definition of carriage.

The cargo owner will now have a much more difficult task in claiming against the sub-contractor. Not only has he agreed not to make claims against the sub-contractor, or other agents, but to indemnify the carrier as well.

> . . . he (the cargo owner) has to indemnify the carrier against any consequence . . . the carrier has to indemnify the sub-contractor in a user contract and this brings into play what is commonly referred to as the circular indemnity. The merchant ends up meeting his own claim . . . It, I think can probably be said that clause 4 (2) is the ultimate Himalaya clause.[3]

Yeldham J. has agreed with the Privy Council reasoning in the New

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[1] [1980] 2 N.S.W.L.R. 588

[2] loc.cit.

[3] Scotford, "Current Status of the Himalaya Clause", Insurance Broker, (June 1981) p. 15.

York Star, that a search should not be sought for fine distinctions which would:

> . . . confine the contract of carriage to the mere sea-leg of the entire operation and preclude a stevedore or a person in the situation of a second defendant from receiving the benefit of a clause such as that presently under consideration.[1]

As long as no distinctions are sought and the period of carriage is well defined, then the carrier and sub-contractor may avoid liability for damage by express terms in the bill of lading.

Transferability of the Principles

In the 1981 case, Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another[2], Yeldham J. transferred the principles in the New York Star and the Eurymedon to the road haulage industry. In that case, it was decided that the sub-contractor of a carrier was entitled to the protection of exemption clauses contained in a consignment note which had clauses under which the carrier could sub-contract the carriage, and that the carrier would not be liable in tort or contract or otherwise for any loss or damage to the goods.

Counsel for the plaintiff had argued that the New York Star and the Eurymedon were wrongly decided and in any event, only related to sea carriage,

> He argued . . . that those decisions, and the relevant part of Lord Reid's speech to which reference has been made, should in any event be confined to cases of carriage of goods by sea, with which they dealt.[3]

However, Yeldham J. stated:

> Certainly none of the decisions to which I was referred or which I have consulted for myself lend support to the view that the

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[1] [1980] 2 N.S.W.L.R. 596

[2] [1981] 1 N.S.W.L.R. 606

[3] ibid., 610

> principles of the Eurymedon . . . or of Salmond and Spraggon . . . may only successfully be applied in cases concerned, as they were, with sea carriage.[1]

It is common practice to sub-contract either some or all of the carriage of goods in both the sea and road transport industries. Therefore, there is no doubt that both modes of transport will share the same problems as to the right to legally sub-contract and claim exemption for some or all liability incurred, with respect to the carriage. It is necessary for the cargo owner and carrier to know the risk of each party, before carriage takes place. This principle can not differ between modes of transport, if parties are to effectively insure against their risks. A bill of lading may contain clauses that stipulate that the carrier has the right to sub-contract part of the carriage to a different mode of transport. This would not be unusual where final delivery requires a combined transport operation. One set of legal principles covering the carriage by land, and another to cover the carriage of goods by sea, would only complicate the legal positions. Apportionment of risk would be difficult to determine, which would affect not only efficient rates of carriage, but create a dilemma between both parties as to the need of insuring against risks. Yeldham J. stated that:

> . . . it is plain that the same problems are arising and will continue to arise with greater frequency in the future in the case of road transport, especially with the ever increasing tendency for much of it to be sub-contracted, and for consignors to be given the option of insuring the goods or themselves accepting the risk of damage.[2]

It had also been decided that whenever sub-contractors and their servants seek exemption under a contract of carriage by road, to which they are not expressed parties, regard must be taken as to the conditions laid down by Lord Reid in Scruttons Ltd. v Midland Silicones Ltd., much

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[1] Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. [1981] 1 N.S.W.L.R. 611

[2] ibid., 611-612

the same as they would be in contracts of carriage by sea. In the Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another case,

> . . . counsel for the defendants, submitted that each of the criteria referred to by Lord Reid in Scruttons Ltd. v Midland Silicones Ltd. . . . (and treated by the majority of the Judicial Committee of the Privy Council in the Eurymedon , . . as being the relevant matters to be proved) were satisfied.[1]

The decision in the Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another case, was upheld in the recent decision of Life Savers (Australasia) Ltd. v Frigmobile Pty. Ltd. and Another.[2] In that case, perishable goods (chocolate) were spoiled en route in a refrigerated van. The van was operated by an employee (first respondent) of the van owner, (second respondent) who had agreed to carry the goods under a bill of lading. The contract contained an exclusion of liability clause for damage to goods, which included both carrier as agent and other sub-contractors. Hutley J.A. stated:

> . . . the second respondent who accepted the chocolate did so on an invoice which purported to confer immunity upon him, and there is no reason to believe that this was not important to him. When he accepted the goods for delivery, it was pursuant to a form of contract drawn up so as to appear to protect him.[3]

Hutley J.A. indicated that the judgement of Yeldham J. in the Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another case, was correct. He also spoke generally about the commercial aspects of limitation or exclusion of liability clauses in bills of lading, suggesting that commercial reality demands a literal interpretation of the conditions.

> Any businessman's reading of this provision (exclusion of liability) . . . would know that whatever happened to the goods was at his risk and if he wished to protect himself he did so by insurance. . . . In a competitive market, a consignor can, no doubt, find carriers who will carry goods at more favour-

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[1] [1981] 1 N.S.W.L.R. 610

[2] Supreme Court, N.S.W. . Court of Appeal. Hutley, Glass, Mahoney JJ. - 2nd June 1983 No. C.A. 301 of 1982

[3] ibid., 11

able terms as to liability but, no doubt, at higher cost.[1]

Both Hutley J.A. and Yeldham J. refused to limit the decisions in the New York Star and the Eurymedon to sea carriage. Therefore, it is apparent from the Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another, and Life Savers (Australasia) Ltd. v Frigmobile Pty. Ltd. and Another cases, that both the New York Star and the Eurymedon are applicable to all forms of carriage where sub-contracting takes place.

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[1]Supreme Court, N.S.W. . Court of Appeal. Hutley, Glass, Mahoney JJ. - 2nd June 1983 No. C.A. 301 of 1982

CHAPTER V

DISCOURAGING NEGLIGENCE

It has been suggested that the tendency of law relating to contracts which attempt to extend protection to third parties under Himalaya clause provisions, is dangerous, because it neglects the proposition that, it would only be fair and equitable for persons causing damage to cargo, to be held responsible or liable for the damage or loss which had been caused by their negligence, otherwise they may continue to be irresponsible in the course of their duties. There is also the argument that it would be commercially unreal to suggest that warehousemen, hauliers, and stevedores, are going to be negligent in their practices in a competitive environment, for the reasons of having protection under exemption clauses, which have been derived so that the apportionment of the risk can be properly dictated by way of insurance.

Many sub-contractors will attempt to exclude their liability in their user contracts. Some state that if they are negligent, they will only be liable up to a certain amount in respect of damage or loss. Such exemption or exclusion clauses which protect the sub-contractor, may be taken into consideration by the carrier when setting freight rates. However, if the carrier finds the services of the sub-contractor negligent often, the carrier himself will end up meeting the claims of his clients, or if he has exempted himself and the sub-contractor, thereby claiming immunity, he will eventually lose his credibility in an open market. This situation would be unlikely where the carrier has a wide choice of sub-contracting services at his disposal. Also, in the case where a carrier sub-contracts to a road haulier, he will often find that it is an owner/

driver operation, where the due diligence and care of the owner is extended, for the purposes of widening clientel and business contracts. Even if an owner/driver could not be held accountable for acts of negligence, loss of credibility in a competitive environment, would eventually force his services out of the market.

Therefore, it would seem that the carrier should bear the responsibility of providing clauses of limitations and exclusions in the main contract of carriage, and arranging for the proper channels of transport by way of sub-contracting, as opposed to having several individual contracts covering each leg of the journey. Scotford stated:

> . . . for the apportionment of risk and the arrangement of insurance, it seems to me to be sensible for the carrier to say that it is against him that claims should be made and not against sub-contractors.[1]

In accordance with this hypothesis, he also stated:

> . . . in the modern world of combined transport the regime of risk that has been adopted is that the carrier, consistent with his accepting responsibility to move the goods from point A to point B, says: 'I will be responsible for them during that entire operation, subject to some agreed exemptions, and if you have any complaint you should direct it to me and not to one of my sub-contractors.' [2]

If sub-contractors are having to continually honour claims and arrange for protection through insurance policies and employ the necessary clerical branches to cope with claims for damage or loss, not only will freight rates increase, but the additional bureaucracy needed for the expanded operation will degrease its efficiency. The sub-contractor need only execute that portion of the carriage which he has contracted for, with the specialized services and staff under his jurisdiction. Therefore, there is no need to discourage negligent acts, by making the sub-contractor strictly liable for damage or loss, as he will execute his duties with

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[1] Scotford, op.cit., p. 15

[2] loc.cit.

as much care as he can reasonably exercise, as his services are already subjected to the competition of other specialists, in the same field.

Scotford stated:

> If sub-contractors are . . . having to arrange insurance on the basis that they have that exposure, and if they have to have . . . infrastructure to deal with claims handling and the attendant costs, then inevitably their charges will increase. . . [1]

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[1] Scotford, op.cit., p. 15

CHAPTER VI

INSURANCE FOR THIRD PARTY LIABILITY

Cost of Insurance

Freight rates are established with respect to insurance costs and the apportionment of risk. Contractual agreements with expressed terms of exemptions are arranged between the carrier and cargo owner. It would stand to reason that the less risk the carrier assumes, the lower the cost of carriage. This has been recognised by Yeldham J. in Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another:

> . . . the bill of lading is to give effect to the clear intentions of a commercial document . . . the affect of damaging validity to the clause would be to encourage actions against servants, agents, and independent contractors in order to get round exemptions (which are almost invariably and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight.[1]

If insurance rates are a portion of the freight rate, recommended premiums should be practical and lead to improvements in handling performance. This should not only reduce incidence of damage, but lead to a reduction in premiums over the long run.

A practical method of insuring cargo, which would provide both reasonable levels of premiums and discourage acts of negligence, would be to place a limit as to the maximum amount for which the carrier is liable. This limitation contained in the contract of carriage is known as a 'released bill of lading'.[2] Shippers can be induced to use a released bill

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[1] [1980] 2 N.S.W.L.R. 594

[2] Wherry & Newman, Insurance and Risk, p. 46

of lading, through a reduced rate. This will satisfy shippers that the carrier will use reasonable care, as he will be held somewhat responsible for his negligence.

In the case of an all-risk policy, the carrier will cover all his costs in the rates of carriage. However, the shipper need not be concerned with the carrier's ability to pay for that portion of the loss, for which he would be bound to pay under a released bill of lading, and full value of the goods will be guaranteed.

Where high value commodities are shipped, it would be in the cargo owner's interest to have the goods carried under a full-risk policy, by the carrier, or take out the appropriate coverage for the full value of the goods himself, to cover for loss or damage, howsoever caused, if the carrier and his agents have been excluded from liability. Freight rates and insurance coverage, are a small portion of the retail cost of higher value goods, therefore, their related costs of transport are less important to the owner of those goods, than they would be to the shipper of lower valued commodities. The related costs of transport and insurance have a greater impact on the retail price of lower valued commodities. In these situations, the shipper will be encouraged to transport his cargo either under a released bill of lading, or entirely at his own risk to reduce his costs, and market his cargo at a more competitive price. He will have to bear any costs borne through spoilage en route, howsoever caused.

Even though the assured's activities may be restricted to a particular country, the claims arising from those activities should be covered world wide. There should be a degree of uniformity in the handling of claims everywhere, so the parties know exactly their position as to apportionment of responsibility for risk management.

> The Privy Council in both the Eurymedon and New York Star, was at pains to say that the law should if possible, be the

same on both sides of the Pacific and to extend the analogy, on both sides of the Atlantic.[1]

Definition of Carrier and Stevedore for Insurance Purposes

At the present time, the Hague Rules cover the sea carriage of goods in Australia. However, other international conventions such as the Hague Visby Rules, govern European shipments to Australia and the Hamburg Rules, which have not yet come into operation, are also intended to govern sea carriage on an international basis. The Hague Rules themselves do not offer any specific definitions of the term 'carrier' which makes the allocation of risk under bills of lading and insurance contracts difficult. This concept could explain the reasons why Yeldham J. in agreement with the Privy Council in the New York Star had stipulated that a search for fine distinctions need not be encouraged, which would prevent either a stevedore or other sub-contractor from receiving exemptions under a clause in the contract.

> The definition of 'carrier' in Art. 1 of the Hague Rules is not exhaustive and furnishes little assistance in a case such as the present.[2]

In Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another, Yeldham J. had stipulated that those who have been sub-contracted part or all of the sea-leg, are not 'carriers' for the purposes of Article 3, rule 8 of the Hague Rules. Since these sub-contractors were not carriers, no action could be brought against them under clause 4 (1) of the bill of lading.

> A sea carrier, to whom has been sub-contracted the sea-leg of the combined transport operation to which the bill of lading relates, and whose contract is not with the consignor or consignee but with the carrier as defined by the bill of lading in the

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[1] Scotford, op.cit., p. 15

[2] [1980] 2 N.S.W.L.R. 595

present case, is not the carrier . . .[1]

The Hague Visby Rules extend to servants and agents, but there is no mention of independent contractors. If damages are sought against the carrier's servants or agents, then they may seek immunity under limits of liability which the carrier may stipulate under the rules.

Under the Hamburg Rules, servants or agents acting under the direction of their employer may also enjoy exemptions and limitations which the carrier may invoke in the bill of lading. Once again, there is no mention of independent contractors. An authority or precedent will be needed to bring independent contractors within the scope of servants or agents, so as to allow them a deliberate and unquestionable benefit of exemption clauses in contracts for sea carriage. A degree of uniformity would also determine where responsibility for damage will lie.

Whether responsibility for unloading procedures at terminals is the responsibility of ship's management, terminal staff or port authority, adequate insurance cover is essential. Port authorities are generally required by law to take out insurance against liability towards its own employees. However, protection will still be required against third party risks, particularly those associated with stevedoring or wharfingering.

The definition of a stevedore is a person who undertakes the handling of cargo by the loading or discharging of a vessel. The wharfinger handles the cargo in storage. A definition of marine insurance is given in the United Kingdom Marine Insurance Act, as follows:

> A contract whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed against marine losses.[2]

That is to say, the losses incidental to marine adventure. 'To indemnify the assured', means to place the assured, in the event of loss or damage,

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[1] 1980 2 N.S.W.L.R. 595

[2] United Kingdom Marine Insurance Act, 1906

in as near as possible the same position as he would have occupied had the loss not occurred.

Stevedoring itself is an accident-prone operation, and will become even more so as it becomes increasingly important for both port authorities and shipowners to limit the size of the work force, and loading and unloading time at each port, in order to minimise costs. Even normal loading, unloading, and stowage operations can subject cargo to damage. For example, heavy cargoes can not be stowed over light loads. Coal and grain cargoes are liable to combust, if proper ventilation is not provided, and care must be taken so that shifting boards are inserted in holds, to stop the shifting of loads. Also, mistakes in the loading order of goods, will increase not only the chances of accidents through the reshifting of cargo, but handling costs as well. Thus, a ship which calls on ports A, B, and C, must load its cargo in the reverse order of C, B, and A. A fast ship turn-around time may be desirable both from the point of view of the shipowner and the export market, but undue haste leads to less care being taken and to the greater likelihood of claims.

Appropriate wording is needed in the exemption clauses to cover the entirety of the stevedore's activities.

> Coverage should be designed which is all embracing without the word 'stevedore' mentioned in the insuring clauses. Remembering the definition of a stevedore, particularly the relationship with a wharfinger or warehouseman, it must be appreciated that if insurance was merely arranged for Stevedore's Liability the policy would fail to cover the client's full activities with the consequent risks of some areas of activity remaining uninsured - this is a common fault in these policies.[1]

The aim in assessing any risk, is to ascertain the elements of work and aspects of operation and then determine the limit of liability, with respect to the cargo value. The elements of work would include all

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[1]Dawes, et. al., "Cargo Handlers - Liabilities & Insurance" Paper No. 5, for the United Kingdom Section of the International Cargo Handling Co-ordination Association, p. 39.

those services which are related to the entire carriage. In this respect, attention should also be drawn to the services provided by sub-contractors, in a combined operation, such as the road hauliers, when determining the necessary terms and clauses in an insurance policy.

CHAPTER VII

WORDING OF CONDITIONS IN CONTRACTS OF CARRIAGE

In practice, the bill of lading is issued by the carrier and completed by the shipper. When the shipowner agrees to its terms, he signs it. The bill of lading is, by express terms, the agreement between the shipper and the carrier. All limitations of liability will be incorporated within the contract.

The Union Steam Ship Company of New Zealand's Seaway Cargo Express Service, has under its conditions of contract in section 22, a clause which exempts both the carrier and his agents.

> Neither USSCo nor any Carrier's Agent shall be under any duty or liability whatsoever, and no claim shall be made or brought by any owner or other person against USSCo or any Carrier's Agent for or in respect of any loss or damage . . . The provisions of this Condition shall apply not withstanding that such loss, damage, . . . be solely or partly caused by . . . negligence . . . [1]

In light of the vague connotations of the term 'agent', and the fact that the Hague Visby Rules and the Hamburg Rules only extend to servants and agents of the carrier, USSCo has identified the carrier's agent in clause 1 under 'conditions of contract', as one 'who is a contractor or who at any time during the Carriage is or becomes a servant or agent of USSCo or of a contractor'. Such strategy may satisfy the courts, if the reasoning of Yeldham J. is adopted, and fine distinctions as to the status of contractors or their role in the definition of carriage, are discouraged.

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[1] Union Steam Ship Company of New Zealand Ltd., Seaway Cargo Express Service Contract, Section 22

Definition of carriage is also provided in clause 1 to prevent the courts in the event of legal action, from determining whether or not carriage extended beyond the sea-leg.

> The Carriage means the receipt of the Cargo by or on behalf of USSCo at the Despatch Terminal and the transportation of the same to, and the delivery thereof . . . and includes ancillary matters which may be incidental . . . while it is in control of USSCo or any Carrier's Agent.[1]

Furthermore, in clause 13, USSCo has stipulated that after cargo has been discharged, either the carrier or carrier's agent shall be at liberty to abandon it. If unclaimed, it may be stored or transferred at the discretion of the carrier at the risk and expense of the owner. Such a clause was held to be binding in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others, where Yeldham J. ruled, in agreement with Barwick C.J. in the High Court case of the New York Star, that the carrier could sub-contract the unloading and storage of goods to others, if the carrier himself did not stack and store cargo as a matter of practice. USSCo had also stipulated in clause 5 in the bill of lading:

> USSCo may contract or arrange on any terms for the whole or any portion of the carriage to be performed by any other person or persons and in these Conditions 'contractor' means any such person.[2]

Clause 5 has much the same purpose as clause 4 (1) in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another, where the carrier stated that part, or all, of the carriage could be contracted out.

However, USSCo has failed to provide a clause that would prevent the cargo owner from bringing action against servant and agents of the carrier. Furthermore, unlike the conditions of contract in either the Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others

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[1] USSCo, Section 22, op.cit.

[2] loc.cit.

or Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another cases, USSCo has in clause 25 of their conditions, named their agents as parties to the contract of carriage. This would suggest that each party to the contract would have to cover their full activities with the consequent risk of their particular operations, with insurance. Yeldham J. in Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another had stipulated that those who have been sub-contracted part or all of the carriage, were not 'carriers' for the purposes of Article 3 rule 8 of the Hague Rules. Since these sub-contractors were not carriers, they were not parties to the contract, and no action for damages or loss could be brought against them. Therefore, if each agent or contractor employed by USSCo takes out his own insurance, freight rates will increase.

Korea Australia Searoad Service (KASS), specifies in their conditions of contract, that the Hague Rules will be the law governing the bill of lading. The Hague Rules do allow for an extension of liability, and KASS has indicated in clause 4 (1) of their contract of carriage that the carrier is entitled to sub-contract, and under clause 4 (3), that limitation of liability should extend to protect the carrier's employees.

KASS has also included in clause 4 (5), a provision in which the cargo owner promises to make no claims against any carrier's employee, and employee includes sub-contractors. In Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another, Yeldham J. ruled that a promise not to bring action for damages or loss was binding. His reasoning was based on the fact that the freight rate is set in accordance with the risk of loss or damage that the cargo owner must sustain, and the lower insurance costs borne by the carrier.

The carrier is identified in section 1, as the party 'by or on behalf of which this Bill of Lading is signed and issued.' The carrier's

employees, including sub-contractors are therefore not parties to the contract. The carrier in this instance need only insure against his own risks. This factor simplifies the calculation of the freight rate, and makes commercial estimates according to cost more accurate. Having the carrier assume all liability for cargo, including his limitations of liability, also simplifies the basis of agreement between shipper and carrier, as apportionment of risk is more easily determined by both parties.

CONCLUSION

Lord Reid's conditions in Scruttons Ltd. v Midland Silicones Ltd., may permit a stevedore to act as agent for the carrier. Despite this, however, the strict doctrines underlying privity of contract, and the difficulty of proving a principle and agency situation, resulted in the conflicting judgements in the High Court decision of the New York Star. Furthermore, the Hague Rules, Hague Visby Rules, and Hamburg Rules, which have extended protection to agents of the carrier, have made little, or no mention of extended protection to the sub-contractors. These conventions, have merely added to the vague and uncertain aspects of third party liability. The Privy Council ruling which reversed the High Court decision, still left apprehension amongst carriers, stevedores and insurers, as to the status of third parties under a bill of lading, until the matter had been tested again and reaffirmed, in Broken Hill Proprietary Co. Ltd. v Hapag-Lloyd Aktiengelleschaf and others, and Sidney Cooke Ltd. v Hapag-Lloyd Aktiengelleschaf and Another.

After the recent decisions in these two cases, it appears that the Australian High Court will now uphold the Privy Council decision in the New York Star, providing that third parties have been appointed agents to the carrier, and limitation of liability clauses have been clearly defined. The recent deviation that now allows third party protection under a bill of lading, may be celebrated as a new means of fixing efficient rates of carriage, as well as effective insurance coverage. A basic understanding of risk bearing and protective provisions under the contract of carriage, allows both the carrier and the owner of the goods to contract under express terms. This means that the terms operate under their ordinary

meaning, without requiring a search for fine distinctions, which qualify or change the status of the original agreement.

The recent decision in the Celthene Pty. Ltd. v W.K.J. Hauliers Pty. Ltd. and Another case, has encompassed the rule of law pertaining to third party immunity under contracts of carriage by sea, with the road haulage industry. This indicates that third party immunity under contracts of carriage is now possible for all modes of transport, operating on any leg of the journey, providing appropriate limitation and exemption clauses have been drafted. This principle was upheld and reaffirmed in the Life Savers (Australasia) Ltd. v Frigmobile Pty. Ltd. and Another case.

A properly drafted Himalaya clause and exemption clause should be constructed so as to include all of those parties connected with the carriage, as carriage and delivery may require the services of several parties, such as warehousemen, road hauliers, and stevedores. It is also useful if a definition of 'carriage' is expressed in the bill of lading in order to determine which elements of the sea-leg, or road haul, are included under limitation of liability. This would determine the protection afforded to all parties and services connected with the carriage and delivery of the goods. Also, a knowledge of all the segments of transport, connected with the carriage, will assist in determining where the risk of damage or loss is likely to occur, judging from the nature of the goods and the transport services required. Appropriate insurance coverage can then be determined, for the recovery of either the total value of the goods or a portion thereof.

In order to get to a point of commercial reality, the protection and liabilities of all parties to the carriage must be realized. Furthermore, the services required for carriage and delivery must be known and identified before efficient rates of carriage, insurance rates, and effective provisions for exemption and limitation of liability, can be set.

Lord Wilberforce in the Eurymedon summed up the proper principle upon which the contract of carriage is made:

> The whole contract is of a commercial character involving services on the one side, rates of payment on the other and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit.[1]

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[1] [1975] A.C. 167

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