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Finding a Home: The Development of Himalaya Clauses in England and Canada

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ABSTRACT

The protection of third parties under a contract of carriage of goods by sea is the result of an incremental change in the law of England and Canada. Himalaya clauses in contracts of carriage have been devised to extend the protection of the carrier under the contract to its servants, agents, and independent contractors. However, the entitlement of third parties to rely on Himalaya clauses has been highly contentious in English and Canadian law because of the tension between such clauses and the traditional privity rule. Prior to the enactment of the Contracts (Rights of Third Parties) Act 1999 in England and the establishment of the principled exception to privity in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 in Canada, courts had allowed the enforcement of Himalaya clauses on legal bases such as agency, unilateral contract, or broad exemption clauses in order to circumvent privity. Even though these legal bases have been criticized for their artificiality, English and Canadian judges have been willing to allow the contractual protection of third parties for purposes of commercial practicality. This article argues that Himalaya clauses have not yet found their final place in English and Canadian law. In doing so, it critically examines the historic development of Himalaya clauses in England and Canada and discusses some theoretical and practical concerns arising from their enforcement in the shipping context.

Keywords: Himalaya clause; third parties; carriage of goods by sea; England; Canada

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I. INTRODUCTION

This article provides an analysis of the development of Himalaya clauses in contracts of carriage of goods by sea in England and Canada. It critically examines the effectiveness of the legal bases on which Himalaya clauses have been enforced in these two jurisdictions.

Before proceeding with the analysis, it is important to outline the shipping context. An agreement for the transportation of goods by sea ("contract of carriage"), commonly evidenced by a bill of lading,[1] is concluded between the party who supplies the goods to be transported ("shipper" or "cargo owner") and the transporter ("carrier") in exchange for a reward ("freight").[2] The person who takes delivery of the goods after they have been transported is the consignee.[3] In order to perform its obligations under the contract of carriage, the carrier engages servants, agents or independent contractors, including *inter alia* stevedores, terminal or dock operators, charterers, freight forwarders, customs brokers, truckers, and so on ("third parties" or "subcontractors").

Practically, upon arrival of the ship carrying the cargo at port, the carrier enters a contract with stevedores or terminal operators to load, unload, handle or store the cargo.[4] Stevedores and terminal operators are generally considered to be independent contractors of the carrier and bailees of the cargo, thus they owe a duty to take reasonable care of it.[5] If the cargo is lost or damaged during their operations, the shipper or consignee may sue the carrier and/or the stevedores and/or the terminal operators.[6]

The contract of carriage will normally contain a Himalaya clause. A Himalaya clause, named after the ship in the case of *Adler v Dickson*,[7] is a provision in a contract of carriage that extends the carrier's exemptions or limitations of liability under the contract to third parties engaged by the carrier for the performance of the contract. In effect, a Himalaya clause is a term in a contract between A and B by which A promises B that any exemptions from or limitations of liability available under that contract to B shall also be available for the benefit of C, who is typically an employee, agent, or subcontractor of B, for the purpose of performing all or part of B's obligations under the contract.[8]

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1 See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402; *Anticosti Shipping Co v St Amand* [1959] SCR 372; Thomas J Schoenbaum, *Admiralty and Maritime Law* (6th edn, West Academic Publishing 2019) 477.
2 Schoenbaum (n 1) 475.
3 ibid.
4 ibid 493.
5 ibid 495-496.
6 ibid 494.
7 *Adler v Dickson* [1954] EWCA Civ 3, [1955] 1 QB 158.
8 HG Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2017) para 18-092.

Where the shipper or consignee brings an action for loss or damage of cargo against a third party engaged by the carrier, and the contract of carriage includes a Himalaya clause, the third party may seek to enforce an exemption or limitation of liability clause available to the carrier under the contract.

Even though the question whether a person may benefit from a contract to which it is not party arose 160 years ago,[9] it remains a crucial question in shipping due to the substantial involvement of third parties in the performance of carriage. As far as third parties are responsible for carrying out the carrier's obligations under the contract of carriage, legal scholars have necessitated their legal protection.[10]

Currently, the law in England and Canada allows third parties to enforce contractual provisions to their benefit, subject to certain requirements. However, the current law is the result of an incremental change of common law, following a prolonged and complex battle between traditional common law doctrine and modern commercial reality. It is impossible to fully grasp the function of Himalaya clauses without first examining their development in the common law and the judicial perplexity in finding a suitable legal basis for their enforcement.

In this article, I explore the historic development of Himalaya clauses in England and Canada. In particular, I critically analyze the legal bases for the enforcement of Himalaya clauses in the context of carriage of goods by sea, as set out by English and Canadian courts. In Section II.A, I examine the agency basis and its equivocal applicability to the relationship between shipper, carrier and third parties. In Section II.B, I examine the unilateral contract basis and its artificiality in the shipping context. In Section II.C, I discuss the exemption clause basis and the interpretation of Himalaya clauses in a way that accommodates commercial expediency. Finally, in Section II.D, I analyze the ultimate tests for the enforcement of Himalaya clauses and whether they adequately reflect the needs of modern multimodal transport. Based on the analysis, I draw certain conclusions about the overall development of Himalaya clauses in England and Canada and I argue that it is doubtful that Himalaya clauses have found their permanent home in English and Canadian law.

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[9] *Tweddle v Atkinson* [1861] EWHC QB J57, (1861) 121 ER 762; *Burris v Rhind* (1899) 29 SCR 498.

[10] Bruno Zeller and Gabriël Moens, *The Himalaya Clause* (Connor Court Publishing 2020); Carlo Corcione, *Third Party Protection in Shipping* (Informa Law Routledge 2020); Donal Nolan, 'Reforming the Privity of Contract Doctrine' in Mads Andenas and Nils Jareborg (eds), *Anglo-Swedish Studies in Law* (Iustus Förlag 1999) 288.

II. The Development of the Himalaya Clause

Himalaya clauses have always sat uncomfortably with the traditional common law rule of privity of contract. The privity rule entails that no one except for the parties to a contract can be entitled under it or bound by it.[11] The privity rule has two aspects: first, a contract cannot confer enforceable rights or benefits on third parties (the "third party rule"), and second, a contract cannot impose burdens or obligations upon third parties.[12] Although the second aspect of the privity rule is relatively uncontroversial, the third party rule has been extensively criticized.[13] The third party rule provides that only the parties between whom a contractual offer and acceptance is made (the contracting parties) can enforce the resulting contract.[14] In effect, a person who is not party to a contract has no right to enforce it, even if the contract purports to confer a benefit on such person.[15] In the shipping context, the third party rule prevents third parties from enforcing an exemption or limitation clause in the contract of carriage against the claims of the shipper, even if the clause extends its protection to them.

The first case that dealt with this matter in the context of carriage (of passengers) by sea was *Adler v Dickson*.[16] The facts were simple: Adler went for a cruise on a ship and, while walking across the gangway to the ship, the gangway came adrift from the gantry at the shore and consequently Adler fell to the wharf and suffered severe injuries.[17] The Court of Appeal held that the master and boatswain of the ship were liable for negligence and could not benefit from the exemption clause in the passenger ticket, which evidenced the contract between passenger and shipowner, because it could not be construed that the clause was made for their benefit.[18] However, Lord Denning stated that, in the carriage of passengers and goods, a third party may be effectively protected under an exemption clause in the contract of carriage provided that the carrier had stipulated for the exemption clause to include the third party either by express words or by necessary implication, and the other contracting party had assented to

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11 Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (31st edn, OUP 2020) 613; Michael Furmston, *Law of Contract* (17th edn, OUP 2017) 556.

12 Beale (n 8) para 18-003; John N Adams and Roger Brownsword, *Key Issues in Contract* (Reed Elsevier 1995) 125; Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) (Law Commission Report), para 2.1.

13 Nolan (n 10) 288.

14 Stephen A Smith, 'Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule' (1997) 17 OJLS 643, 644.

15 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] UKHL 1, [1915] AC 847; *Beswick v Beswick* [1967] UKHL 2, [1968] AC 58; *Van Hemelryck v New Westminster Construction and Engineering Co* [1920] BCJ No 5; Guenter Treitel, 'The Battle over Privity' in Guenter Treitel (ed), *Some Landmarks of Twentieth Century Contact Law* (OUP 2002) 47, 66.

16 *Adler* (n 7).

17 ibid [1].

18 ibid [14].

the exemption.[19] The reasoning of Lord Denning in *Adler* constitutes the birth of Himalaya clauses.

Currently, English and Canadian law has developed in relation to the third party rule so that a third party may avail itself of a Himalaya clause in a contract of carriage. But it took a lot of effort and imagination to find a way which, consistently with the rules of privity and consideration, could allow third parties to benefit from the contract of carriage.[20] As discussed below, the enforcement of Himalaya clauses could not easily fit into existing legal principles to avoid the third party rule and consequently English and Canadian courts struggled to find a suitable legal basis for their enforcement.

Depending on the claims of parties, Himalaya clauses have been enforced on contractual and non-contractual legal bases: contractual legal bases include agency, unilateral contracts or exemption clauses, and non-contractual legal bases include the bailment[21] or voluntary assumption of risk[22]. This article examines only the contractual legal bases.

A. AGENCY

In England, agency was raised as a legal basis for the enforcement of a Himalaya clause in a contract of carriage in *Scruttons Ltd v Midland Silicones*.[23] The issue in this case was whether the stevedores, who negligently damaged the cargo during loading, could rely on the limitation clause in the bill of lading between the cargo owner and the carrier and/or from the exemption clause in the stevedoring contract between them and the carrier, against the claims of the cargo owner in tort.

The stevedores argued that they could benefit from the limitation clause in the bill of lading on three grounds: (a) the word "carrier" in the limitation clause included stevedores: Viscount Simonds said that the word "carrier" should not be interpreted expansively but rather in the ordinary use of language, according to which a stevedore is not a carrier; (b) the carrier contracted as their agent: Viscount Simonds rejected this ground because the carrier engaged

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19 ibid [11].

20 Martin Dockray, *Cases and Materials on the Carriage of Goods By Sea* (5th edn, Taylor & Francis 2004) 134.

21 *Elder Dempster & Co Ltd and Ors v Paterson Zochonis & Co Ltd* [1924] AC 522; *The owners of cargo lately laden on board the ship or vessel "K.H. Enterprise" v. The owners of ship or vessel "Pioneer Container" Co (Hong Kong)* [1994] UKPC 9.

22 *Scruttons Ltd v Midland Silicones* [1961] UKHL 4, [1962] AC 446 (Lord Denning); *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1957] 95 CLR 43; For the reasoning that an exemption clause in a contract may eliminate a duty of care in tort (the "duty approach" or "tort approach"), see *Norwich City Council v Harvey* [1989] 1 WLR 828; *Pacific Associates Inc v Baxter* [1990] 1 QB 993; Philip H Clarke, 'The Reception of the Eurymedon Decision in Australia, Canada and New Zealand' (1980) 291 ICLQ 132, 148; John G Fleming, 'Employee's Tort in a Contractual Matrix: New Approaches in Canada' (1993) 13 OJLS 430, 433-434.

23 *Scruttons* (n 22).

the stevedores as independent contractors and there was no express contractual indication that the carrier was acting as their agent; and (c) there was an implied contract between them and the cargo owner: Viscount Simonds also rejected this ground because the cargo owner did not know and it was not its concern to know about the relationship between carrier and stevedores.[24] Consequently, a contract between two unconnected parties could not be implied.

Lord Reid added that an implied contract between stevedores and cargo owner was not necessary for business efficiency in the circumstances.[25] Furthermore, Lord Reid found that the exemption clause in the stevedoring contract may protect the stevedores from liability against the carrier, but it certainly cannot bind a third party, therefore the stevedores could not enforce the exemption clause against the cargo owner.[26] The House of Lords held the stevedores liable in tort.

However, Lord Reid left open the possibility that a third party may enforce a contractual provision if the following requirements (the "agency test") are met:

> [I]f (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.[27]

This decision was later adopted by the Supreme Court of Canada in *Canadian General Electric Co v Pickford & Black Ltd*,[28] where the stevedores were found liable for negligent stowage of heavy electrical equipment onto the ship.[29] The stevedores argued that they were entitled to rely on the limitation of damages clause in the contract.[30] However, Ritchie J rejected this argument on the basis that, as discussed in *Scruttons,* the stevedores were complete

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24 ibid 1.
25 ibid 6.
26 ibid 6.
27 ibid 5-6.
28 *Canadian General Electric Co v Pickford & Black Ltd* [1971] SCR 41.
29 ibid 41, 45.
30 ibid 43.

strangers to the contract and should therefore accept the normal consequences of their negligence in tort.[31] The Court in *Canadian General Electric* did not apply the agency test.

Similarly, the Supreme Court of British Columbia in *Calkins & Burke Ltd v Far Eastern Steamship Co et al*[32] maintained the privity rule by reference to *Canadian General Electric* and *Scruttons*.[33] Here, the stevedores were held liable for negligence because they failed to provide in-shed storage for 37 bundles of steel tubing, as per the instructions of the consignee, and as a result the tubing was damaged by rain.[34] The stevedores argued that they could benefit from the exemption clause in the bill of lading, which extended its protection to *inter alia* any stevedores employed for the performance of any of the carrier's obligations under the bill of lading.[35] The Court rejected this argument since the exemption clause referred to the "carrier's obligations", whereas the damage of the goods occurred during storage when the goods were under the stevedores' responsibility.[36] Moreover, in applying the agency test, the Court ruled that the carrier did not have the authority, on the evidence presented, to contract as agent of the stevedores and therefore the third requirement of the agency test was not met.[37]

(i) Discussion

An agency relationship arises where a principal A authorizes an agent B to contract on his behalf with C.[38] For the purposes of the second and third requirement of the agency test, an agency relationship arises where a stevedore (principal) authorizes the carrier (agent) to enter a contract with the shipper on its behalf and stipulate an exemption clause for its benefit. In such circumstances, the stevedore may be able to rely on the exemption clause if the carrier was contracting as an agent to make the stevedore part of the contract or at least part of the exemption.[39] Agency recognizes that the agent (carrier) has the dual status of being a contracting party and an agent whose principal (stevedore) acquires the right of enforcement.[40] Thus, agency may be viewed as an exception to privity in that the principal (stevedore), albeit

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31 ibid 43, 44.
32 *Calkins & Burke Ltd v Far Eastern Steamship Co et al* [1976] BCJ No 1374 (The Suleyman Stalskiy).
33 ibid [32], [35].
34 ibid [9], [10], [14], [27].
35 ibid [28].
36 ibid [4], [48].
37 ibid [44].
38 *Halsbury's Laws of England* (5th edn, 2019) vol 22, para 136 and cited cases.
39 ibid para 199; Beale (n 8) para 15-050.
40 MH Ogilvie, 'Re-Defining Privity of Contract: Brown v. Belleville (City)' (2015) 52 Alta L Rev 731, 738.

a third party to the contract concluded by its agent (carrier) and another party (shipper), is able to sue and be sued on it.[41]

Viscount Simonds in *Scruttons* explained that, since the privity rule prevents the formation of any legal principle entitling third parties to enforce contractual terms, stevedores may exclude their liability for negligence only if there is a contract between them and the cargo owner including an exemption clause to this effect.[42] To establish a contract between stevedores and cargo owner, the stevedores need to prove that the carrier was contracting with the cargo owner as agent for the stevedore or as agent for the cargo owner.[43] These agency relationships cannot be assumed lightly.

As a general rule, agency is construed only where there is a genuine intention of the parties to create an agency relationship.[44] Lord Reid stated that even if one could spell out of the bill of lading an intention to benefit the stevedore, there would still be no indication that the carrier was contracting as agent for the stevedore.[45] Thus, it is required that the parties have made clear in their contract that their relationship or the relationship between carrier and third party is one of agency.

If there is nothing in the contract indicating that the carrier is acting as agent for a subcontractor or for the shipper, an agency relationship cannot be implied in the circumstances. In shipping practice, it is uncommon for carriers to act as agents of stevedores. The main reason is because the relationship between carrier and stevedore is one of independent contractors.[46] It has been accepted that the role of independent contractors in the chain of carriage is distinct

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41 Law Commission Report (n 12) para 2.15; See also John D McCamus, 'Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?' (2001) 35 CBLJ 173, 181; Lance Finch and Karen Horsman, 'London Drugs LTD. v. Kuehne & Nagel International LTD' (1993) 51 Advocate (Vancouver) 409, 410.

42 *Scruttons* (n 22) 4.

43 Beatson, Burrows and Cartwright (n 11) 648.

44 John D McCamus, *The Law of Contracts* (Irwin Law 2005) 303; Brian Coote, 'Pity the Poor Stevedore!' (1981) 40 CLJ 13, 13; However, see *Borvigilant, owners of the Ship v Romina G, owners of the Ship* [2003] EWCA Civ [17] ("Lord Reid [in *Scruttons*] did not say that the clause must expressly state that the carrier is contracting as agent for the stevedores. He simply said that the contract must make that clear… whether it does so or not is a question of the construction of the… contract as a whole").

45 *Scruttons* (n 22) 6. However, see *Borvigilant* (n 44) [23]-[26] where the Court of Appeal ruled that where a contract expressly provides that it is made for the benefit of another person, there is a strong pointer to the conclusion that the contract was made on behalf of that person and that this conclusion is the only one that makes commercial sense. The conclusion in *Borvigilant* may be inconsistent with the reasoning of Lord Reid in *Scruttons* nor with the traditional rules of agency.

46 *Scruttons* (n 22) 1, 4; The Suleyman Stalskiy (n 32) [3], [7], [15]; Fleming (n 22) 430; Schoenbaum (n 1) 495-496; Corcione (n 10) para 2.32. However, third parties may be deemed to be acting as agents of the carrier on the facts, see *ITO - International Terminal Operators Ltd v Miida Electronics Inc* [1986] 1 SCR 752 [44]; *The New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (New Zealand)* [1974] UKPC 4, [1975] AC 154 (*The Eurymedon*) 1, 4; Corcione (n 10) para 3.63 (freight forwarders can act as agents of the carrier in issuing the bill of lading); Chester D Hooper, 'Legal Relationships: Terminal Owners, Operators, and Users' (1990) 64 Tul L Rev 595, 596-597 (terminal operators can act as agents of the carrier in performing its obligations under the bill of lading).

from the role of employees or agents, and there is no strong justification for why independent contractors must be protected under the contract of carriage.[47] It has been argued that the mere fact that independent contractors perform services for the carrier does not justify their entitlement to enforce an exemption or limitation clause in the contract.[48] This position is reinforced by the wording of Article IV(2) of the Hague-Visby Rules[49] which provides that the carrier's servants or agents (but not independent contractors) may have the benefit of the carrier's exemptions and limitations of liability under the Rules. Thus, the distinction between employees or agents and independent contractors became more acute. While employees and agents are engaged to perform a contract *of* service, independent contractors are engaged to perform a contract *for* service.[50] In other words, contrary to employees or agents, contractors do not provide the carrier's services to others but instead they provide independent and professional services to others for the carrier in exchange for a reward. Particularly, contrary to employees, stevedores assume responsibility for performing the carriage and for insuring against the risk of loss or damage of cargo, and they acquire the necessary experience and knowledge to contract for indemnity or protection against liability.[51] It follows that, as long as the carrier and stevedore are independent contractors, there is no reason to *assume* that the carrier had contracted for the stevedore.[52]

Similarly, it is uncommon for carriers to act as agents of shippers. The purpose of the contract of carriage is to allocate the risks of transport and insurance and not to authorize the carrier to contract on behalf of the shipper. This is reinforced by the fact that the shipper is not bound by any downstream contract between the carrier and its subcontractors.[53] Thus, a contract of carriage cannot imply that the carrier engages subcontractors as agent of the shipper, unless there is an express stipulation to that effect.

It is clear from the decisions in *Scruttons* and *The Suleyman Stalskiy* that an agency relationship between carrier and shipper or between carrier and subcontractor cannot be implied, even if the contract expressly conferred a benefit on the subcontractor. Hence, third

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47 Corcione (n 10) para 2.39.

48 Samir Mankabady, 'Rights and Immunities of the Carrier's Servants or Agents' (1973) 5 J Mar L & Com 111, 113.

49 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (The Hague-Visby Rules), which has been enacted in England by the Carriage of Goods by Sea Act 1971 and in Canada by the Marine Liability Act (SC 2001, c 6).

50 This distinction may be drawn by the "control" test, the "organization" test, the "representative" test or the test examining the nature and totality of the relationship between the parties, see Jonathan Burnett, 'Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in Sweeney v Boylan Nominees' (2007) 29 Syd L Rev 163, 166, 169.

51 Fleming (n 22) 430.

52 *Scruttons* (n 22) 1, 4.

53 *Scruttons* (n 22) 6; Treitel (n 15) 59, 64.

parties cannot escape the privity rule by *implied* agency, but they can do so if the contracting parties have used expressed agency as a means of conferring on them a right of enforcement.[54]

On the one hand, the requirement of expressed agency is arguably prejudicial to the interests of those third parties who are not in a position to influence the drafting of the principal contract. Although some stevedoring contracts may obligate the carrier as agent to include an exemption clause in the principal contract to their benefit,[55] most of the downstream contracts between carrier and subcontractors or between subcontractors and sub-subcontractors will be concluded after the bill of lading is issued and therefore most of the downstream parties will not be able to stipulate for expressed agency. It follows that the second and third requirements of the agency test are difficult to meet.

On the other hand, however, the requirement of expressed agency ensures that the shipper *knows* at the time of contract whether the carrier will engage third parties as an agent. Viscount Simonds noted that it is difficult to accept that the carrier was contracting as agent for an undisclosed principal where this is not expressly stated in the contract.[56] In agency for undisclosed principals, the principal has the right to enforce a contract made on his behalf by an agent, even though the agent was not known to be acting for a principal.[57] This is inconsistent with the privity rule since the third party (the shipper) may find itself in a contractual relationship with someone of whom it has never heard, and with whom he never intended to contract.[58] When the contract of carriage is made, the contracting parties are usually unaware of the existence, identity, or number of third parties that need to be engaged for the full performance of the carriage; any downstream contracts between carrier and subcontractors may be concluded after the bill of lading is issued, and the chain of downstream contracts may continue to expand even after the goods have been shipped. Can the agency of the carrier be assumed for any undisclosed subcontractor? Even if it was assumed that the carrier was acting as agent for one undisclosed principal, for example a terminal operator, it could hardly be assumed that this agency relationship expands to an indeterminate number of third parties subsequently engaged by the terminal operator. For example, where a stevedore contracts with the carrier through a terminal agent, it is questionable whether the third requirement of the agency test applies to the stevedore who is the subcontractor of the subcontractor (sub-

54 Robert E Forbes, 'Practical Approaches to Privity of Contract Problems' (2002) 37 CBLJ 357, 361.
55 See for example *ITO* (n 46) [4].
56 *Scruttons* (n 22) 1, 4.
57 Patrick S Atiyah and Stephen A Smith, *Introduction to the Law of Contract* (6th edn, OUP 2006) 346.
58 ibid.

subcontractor).[59] If sub-subcontractors could benefit from the agency of the carrier, the shipper could be exposed to an indeterminate risk of suffering loss or damage of cargo from the negligence of an indeterminate number of third parties who could benefit from an exemption clause in the bill of lading. For this reason, it has been accepted that not every potential or intended third party beneficiary should be permitted to enforce the contract; there must be a limit on the right of third parties to sue.[60]

On the same grounds, it is questionable whether a third party who has not been identified at the time of contract can ratify at all or whether it can ratify without the consent of the other contracting party.[61] It has been argued that where the contract between carrier and subcontractor expressly stipulates that the execution of the contract by the subcontractor shall be deemed to be ratification of the exemption clause in the bill of lading between shipper and carrier, it will likely amount to sufficient ratification.[62] But it is still required to include such intention in the contract in an express manner.

It is thus extremely important for the contracting parties to disclose at the time of contract, even in the abstract, which third parties will benefit from the exemption clause so as to properly arrange insurance and allocate the risks.[63] Whether third parties can benefit from the exemption clause is a key factor in setting the freight rate and insurance.[64] If the carrier obtains a broad exemption clause for itself and its subcontractors, the freight rate will be lower; a shipper who paid a more affordable freight will be generally prevented from evading the exemption clause by suing the carrier's subcontractors.[65] If the carrier bears a higher risk of loss or damage of cargo during transit, the freight rate will be higher.[66] The greater the liability of the carrier and its subcontractors, the greater the rate of freight. It derives that if the shipper does not know at the time of contract which and how many third parties will be exempt from liability, it cannot negotiate the freight rate and the scope of the exemption clause for its best interests.

For all of the foregoing reasons, implied agency is a weak legal basis for the enforcement of Himalaya clauses. The artificial extension of the agency exception is a precarious device for

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59 William Tetley, 'The Himalaya Clause, Stipulation pour Autrui Non-Responsibility Clauses and Gross Negligence under the Civil Code' (1979) 20 C de D 449, 453.

60 Nolan (n 10) 299.

61 Forbes (n 54) 364, note 16.

62 ibid.

63 *Valmet Paper Machinery Inc v Hapag-Lloyd AG* [2002] BCJ No 1271 [53] ("It is desirable that parties be able to ascertain, prior to shipping cargo, where the risk will lie, so that insurance can be placed appropriately and without duplication").

64 C A Ying, 'The Himalaya Clause Revisited' (1980) 22 Malaya L Rev 212, 221; Corcione (n 10) para 2.28; William T J De La Mare, 'Jurisprudential Problems of Attribution of Liability in the Area of Admiralty Contracts for Carriage following Norfolk Southern Railway v. Kirby' (2006) 22 Conn J Intl L 203, 209.

65 Corcione (n 10) para 9.91-9.92.

66 De La Mare (n 64) 210.

avoiding the third party rule.[67] In any case, the agency test "did not open the door very wide"[68]. In fact, it has been argued that stevedores will rarely succeed in proving the requirements of the agency test.[69]

The technicalities arising out of the third requirement of the agency test were eventually abolished by both English and Canadian courts and therefore third parties are no longer required to prove authority or ratification in order to benefit from a Himalaya clause.[70]

B. UNILATERAL CONTRACT

The second legal basis for the enforcement of Himalaya clauses is the finding of an offer for a unilateral contract from the shipper to a third party through the agency of the carrier. This basis was introduced by Lord Wilberforce in *The Eurymedon*[71] stating that:

> [T]he Bill of Lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the [stevedore], made through the carrier as agent. This became a full contract when the [stevedore] performed services by discharging the goods. 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.[72]

A unilateral contract is deemed to be an open offer that matures into a contract when accepted by performance; in the shipping context, the shipper's promise to exempt the carrier's subcontractors from liability constitutes an offer to be accepted by them by performance.[73]

In *The Eurymedon*, the issue was whether the stevedores, who negligently damaged the cargo while unloading, could benefit from the exemption clause in the bill of lading between carrier and cargo owner. The bill of lading included a Himalaya clause which expressly

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67 McCamus, *The Law of Contracts* (n 44) 303.
68 William Tetley, 'Himalaya Clause - Heresy or Genius' (1977) 9 J Mar L & Com 111, 121.
69 Coote (n 44) 13.
70 *Valmet* (n 63) [45], [51]-[54]; *Canada Maritime Ltd v Oerlikon Aerospace Inc* [1998] EWCA Civ 170 [23] (Hirst LJ held that there is no need to consider technicalities such as ratification since the privity rule "may well be tottering on the brink of collapse" in the carriage of goods by sea).
71 *The Eurymedon* (n 46).
72 ibid 4.
73 ibid 5; See also *Carlill v Carbolic Smoke Ball Co* [1892] EWCA Civ 1, [1893] I QB 256.

protected the carrier's servants, agents and independent contractors from any liability against the cargo owner.[74]

Lord Wilberforce ruled that the four requirements of the agency test were met: (a) the carrier had clearly stipulated for certain exemptions in the bill of lading for the benefit of third parties engaged by it;[75] (b) the carrier was contracting as agent of the stevedores since, for many years, the stevedores carried out the stevedoring operations of the vessels of the carrier, who was a wholly owned subsidiary of the stevedores;[76] (c) the carrier was authorized by the stevedores to contract as their agent;[77] and (d) the consideration moving from the stevedores to the cargo owner was the actual performance of the stevedoring services as acceptance to the offer for a unilateral contract.[78] Hence, Lord Wilberforce concluded that the stevedores could benefit from the exemption clause in the bill of lading so as to give effect to the clear intentions of the parties.[79]

This reasoning was adopted by the Supreme Court of Canada in *ITO*[80] where 169 cartons of calculators were stolen from the premises of the stevedores (ITO) who were engaged by the carrier (Mitsui) to unload and store the calculators until delivery to the consignee (Miida).[81] The bill of lading between Mitsui and Miida exempted Mitsui's liability for loss of cargo and extended this exemption to *inter alia* stevedores via a Himalaya clause.[82] In addition, clause 7 of the stevedoring contract between Mitsui and ITO provided that Mitsui would include ITO as an express beneficiary of all rights and exemptions under any bill of lading issued.[83] The issue was whether ITO could invoke the Himalaya clause in the bill of lading to exclude its tortious liability.

The Supreme Court ruled that in order for ITO to benefit from the bill of lading, there must be a link between it and Miida which would sufficiently bring ITO into the contractual arrangement between Mitsui and Miida.[84] Without providing any further analysis on this point, the Court proceeded to apply the agency test as set out *Scruttons* and applied in *The Eurymedon*, and found that all requirements were met: (a) the Himalaya clause explicitly covered stevedores; (b) the Himalaya clause clarified that Mitsui should be deemed to be contracting as

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74 *The Eurymedon* (n 46) 2.
75 ibid 3.
76 ibid 1, 4.
77 ibid 4.
78 ibid 4, 5.
79 ibid 6.
80 *ITO* (n 46).
81 ibid [2].
82 ibid [4].
83 ibid.
84 ibid [43].

agent for stevedores; (c) Mitsui had authority from ITO to contract on its behalf pursuant to clause 7 of the stevedoring contract; and (d) any difficulties of consideration moving from ITO to Miida are overcome by reference to the decision by Lord Wilberforce in *The Eurymedon.*[85] It was held that ITO could rely on the Himalaya clause in the bill of lading.

(i) Discussion

The decision in *The Eurymedon* has been characterized as sounding the "death knell" to the privity rule in the carriage of goods by sea.[86]

The implication of a unilateral contract raised some well-founded concerns. The first concern is that, in theory, the legal basis of unilateral contract should free stevedores from the need to prove the agency test since the unilateral contract would be formed, not at the same time as the contract of carriage, but later when the services are performed in reliance on the offer of immunity.[87] However, the Privy Council treated the Himalaya clause as an immediate bargain rather than an offer for a future contract, and thus the agency test has come to be a precondition to the formation of a unilateral contract.[88] Thus, stevedores are burdened to prove both the agency test and a unilateral contract.

The second concern is reflected in the dissenting opinion of Lord Simon in *The Eurymedon*, which stressed the difficulty in accepting that the Himalaya clause in the bill of lading established a contract or bare promise (*pactum* or *nudum pactum*) between cargo owner and stevedores that consisted only of an exemption clause.[89] Since the stevedores are under no contractual obligation against the cargo owner, the scope of the exemption clause (in the offer for unilateral contract) is unclear.[90] It is a fair point that the content of an offer for a unilateral contract containing only an exemption clause cannot be determined with certainty. It is difficult to extract the content of the relationship between cargo owner and stevedores from the Himalaya clause or the contract of carriage in general between cargo owner and carrier. Additionally, it is doubtful whether the cargo owner, by contracting with the carrier, intended to make an open offer towards and enter a direct contractual relationship with any third party engaged by the carrier for the performance of carriage. To assume that the cargo owner made

85 ibid [44].
86 Ying (n 64) 214.
87 Coote (n 44) 14.
88 ibid.
89 *The Eurymedon* (n 46) 15.
90 ibid.

an offer for a unilateral contract to a third party through the carrier would be to re-write the Himalaya clause.[91]

The third concern relates to consideration. The courts in *The Eurymedon* and *ITO* accepted that defective performance (damaged and lost cargo) qualified as sufficient consideration for a unilateral contract. In the traditional formation of unilateral contracts, the *full* and *proper* performance of an act specified in the offer constitutes the promisee's acceptance and consideration.[92] In this regard, the carrier must make its subcontractors aware of the provisions of the exemption clause in the contract (and in the offer), so that the subcontractors' performance of the services qualifies as acceptance and consideration corresponding to the offer.[93] In order for defective performance to fit the traditional unilateral form, it must be construed that the offer required performance in any manner, even one of reduced quality.[94] Thus, defective performance may amount to sufficient consideration for a unilateral contract only if it is construed that the offer allowed so. Once again, it is extremely difficult to determine the content of a non-existent offer for the purpose of providing corresponding consideration.

Even if it is construed that the purpose of formulating a unilateral contract is exactly to enable stevedores to exclude their liability for defective performance, a line must be drawn in cases where the performance is so defective that cannot logically amount to sufficient consideration.[95] It is unclear whether the court would reach the same conclusion if all of the cargo was stolen and as a result there was no-delivery.[96] Should the court accept that stevedores have provided sufficient consideration if they negligently lost or damaged one or fifty or one hundred packages out of a hundred-packages cargo? If the answer is yes, the principle of consideration would be applied in a distorted manner, contravening the traditional formation of unilateral contracts that require full and proper consideration.

Furthermore, if defective consideration amounted to sufficient consideration, stevedores would be under no obligation or expectation to perform satisfactorily. By accepting that stevedores provide sufficient consideration irrespective of the magnitude of the defect in their performance, stevedores are not encouraged to carry out their operations with diligence nor to

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91 Law Commission Report (n 12) para 2.27.

92 Linda C Reif, 'A Comment on ITO Ltd. v. Miida Electronics Inc. - The Supreme Court of Canada, Privity of Contract and the Himalaya Case' (1988) 26 Alta L Rev 372, 381; Clarke (n 22) 137; *Carlill* (73); *The Queen (Ont.) v Ron Engineering* [1981] 1 SCR 111; *Daulia Ltd v Four Millbank Nominees Ltd* [1977] EWCA Civ 5, [1978] Ch 231.

93 Forbes (n 54) 363; Ying (n 64) 215-216.

94 Reif (n 92) 381.

95 ibid 384.

96 ibid.

promote loss prevention tactics. It is a matter of policy in the context of carriage of goods that the person who causes damage should be held liable under the law, otherwise it will continue to be negligent.[97] This policy was also considered by the High Court of Australia in ruling that a decision in favour of the cargo owner and against the stevedores would encourage carriers to insist on reasonable diligence on the part of their subcontractors.[98]

These concerns were not addressed neither in *The Eurymedon* nor *ITO*. In fact, it has been commented that the issues arising from *The Eurymedon* "were swept under the carpet" by McIntyre J in *ITO.*[99] It appears from both decisions that courts were not yet ready to form an independent and uniform exception to the privity rule allowing third parties to enforce contractual terms. Instead, they preferred to justify the enforcement of Himalaya clauses by traditional principles of contract law. McIntyre J in *ITO* explained that Himalaya clauses cannot be enforced on the basis of a "jus tertii" because this would weaken the privity rule, but they may be enforced by placing the parties' relationship into the traditional mold of contract law.[100] This reasoning is also found in the following passage by Lord Wilberforce in *The Eurymedon*, which has been also adopted by McIntyre J:

> It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life… English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.[101]

I disagree with this approach. The fact that English law has adopted a technical and schematic doctrine which proved to be problematic in other categories of cases, does not justify the application of such problematic doctrine to maritime cases. The alleged practical approach followed by courts not only forces "the facts to fit uneasily into the marked slots of offer, acceptance and consideration" but also stretches traditional principles of contract law like

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97 Tetley, 'Himalaya Clause - Heresy or Genius' (n 68) 122.

98 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* [1978] HCA 8, (1977) 139 CLR 231 overturning the decision of the Privy Council in *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (Australia)* [1980] UKPC 23, [1981] 1 WLR 138 (*The New York Star*).

99 Reif (n 92) 382.

100 *ITO* (n 46) [37].

101 *The Eurymedon* (n 46) 4; *ITO* (n 46) [36].

unilateral offer and consideration. It is argued that the purity of contractual principles is much more severe than protecting negligent third parties against liability.

Although the uniform enforcement of Himalaya clauses across jurisdictions is crucial, it needs to be justified on concrete foundations and proper reasoning. The decisions in *ITO* and *The Eurymedon* do not constitute concrete foundations but merely an acknowledgement that commercial practice necessitates the protection of third parties. In fact, the reasons upon which *ITO* was decided, for example the intentions of the parties, commercial reality, uniformity, legal certainty, proper allocation of risk and insurance, have been characterized as "plain badges" brought forth to achieve the enforcement of Himalaya clauses in Canadian maritime law, even if it leads to the distortion of traditional contractual principles.[102] This is further discussed below at Section II.C.(i).

Based on the foregoing, the reasoning of Lord Wilberforce in *The Eurymedon*, as adopted by *ITO*, has been criticized as artificial,[103] technical,[104] and as sliding to legal fiction[105]. Later in *The Mahkutai*,[106] Lord Goff accepted that insofar as the enforcement of Himalaya clauses lays on a unilateral contract reasoning, technical points of contract and agency will inevitably arise.[107]

C. EXEMPTION CLAUSES

The third basis is the construction and enforcement of exemption clauses in favor of third parties for the purpose of giving effect to the intentions of the contracting parties and to commercial reality. This basis arose from the following reasoning of Lord Wilberforce in *The Eurymedon*:

> [T]o give the [stevedore] 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… [There is] no reason to strain the law or the facts in order to defeat

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102 Reif (n 92) 382.

103 Law Commission Report (n 12) para 2.27; See also *Southern Water Authority v Carey* [1985] 2 All ER 1077 (the court doubted that the unilateral contract reasoning is applicable beyond the carriage of goods context as it is "uncomfortably artificial"); For the argument that the conception of this type of contracts as "bilateral contracts" extinguishes artificiality, see Robert Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 LQR 292, 304-305.

104 Clarke (n 22) 148, 150.

105 Reif (n 92) 380.

106 *The owners and/or demise charterers of the ship or vessel "Mahkutai" (Indonesian Flag) v The owners of lately laden on board the ship or vessel "Mahkutai" (Indonesian Flag) Co (Hong Kong)* [1996] UKPC 71, [1996] AC 650.

107 ibid 11-12.

> 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 round exemptions… accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight.[108]

Even if a third party seeking to rely on a Himalaya clause proves that the requirements of the agency test or unilateral contract are met, it is a matter of construction whether it can rely or not. In general, courts have interpreted Himalaya or exemption clauses broadly.

The leading example in which the court interpreted an exemption clause broadly so as to give effect to the parties' intentions is *ITO*. The Supreme Court of Canada construed that the exemption clause in the bill of lading implied an exemption for liability in negligence, even though it explicitly exempted liability only "for any delay, non-delivery, misdelivery or loss of or damage to or in connection with the goods",[109] because the wording of the Himalaya clause was wide enough to include negligence within the contemplation of the parties in formulating the contract.[110] The Court noted that the implication is reinforced by the fact that the exemption clause only applied to a small part of the full agreed carriage, *i.e.* after loading and before discharge.[111]

Similarly, in *The Eurymedon*, where the Himalaya clause exempted the stevedores' liability for any "act, neglect or default" in the course of their employment,[112] the Privy Council, although acknowledging that the drafting was defective, found that the stevedores were exempted from all liability, including negligence, without providing further analysis.[113]

The leading example in which the court interpreted the contract broadly so as to give effect to commercial reality is *The New York Star*[114]. Here, the Privy Council extended the scope of application of the bill of lading to the period after discharge, contrary to the explicit

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[108] *The Eurymedon* (n 46) 6. See also *"Starsin", Owners of cargo & Ors v "Starsin", Owners and/or demise charterers of* [2003] UKHL 12, [2004] 1 AC 715 [57]; *Borvigilant* (n 44) [23].

[109] *ITO* (n 46) [4].

[110] ibid [48].

[111] ibid.

[112] *The Eurymedon* (n 46) 2.

[113] ibid 3. See also *The Eurymedon* (n 46) 14 (in his dissenting judgment, Lord Simon stated that the Himalaya clause should not be enforced because the wording "act, neglect or default" appears to extend to theft or even malicious damage and not tortious liability).

[114] *The New York Star* (n 98) (in this case, the cargo was stolen from a shed on the wharf under the control of the stevedores and the cargo owner brought an action against the stevedores for negligence. The bill of lading between cargo owner and carrier included a Himalaya clause which extended the carrier's immunities to its independent contractors. The Privy Council did not provide an analysis of the agency test but simply mentioned that all of the requirements were found to be met by the lower courts).

contractual provisions, to protect the stevedores from liability. In this case, the loss occurred after the cargo was discharged from the vessel, when the stevedores were not performing the carrier's obligations under the bill of lading but rather, they were acting as bailees of the cargo[115]. Lord Wilberforce explained that, in light of the commercial practice at ports, the consignees normally take delivery of the cargo after some period of storage on the wharf and not directly from the ship's rail, as it was provided for in the bill of lading.[116] Taking this practice into consideration, he concluded that the carrier would inevitably employ a stevedore to store the cargo on the wharf, therefore the carrier's immunity extended to the period after discharge, despite the expressly defined period in the bill of lading.[117] On this basis, the stevedores were exempted from liability.

It is nevertheless interesting to note that, normally, where a bill of lading applies to the period after loading and before discharge, any loss or damage of cargo caused by a negligent stevedore *while* loading or *during* discharge will normally not be exempted from liability.[118]

Finally, the broad construction of exemption clauses is also evident by the enforcement of circular indemnity clauses embedded in Himalaya clauses.[119] A circular indemnity clause consists of (a) a promise not to sue, by which the shipper agrees not to bring any action against the carrier's subcontractors, and (b) an indemnity clause, by which the shipper agrees to indemnify the carrier if any action is brought contrary to the promise not to sue.[120] Consequently, the shipper ends up facing its own claims.[121]

(i) Discussion

Should courts construe Himalaya clauses in such a broad manner for the benefit of third parties? It is true that whether an exemption clause extends its protection to a third party is decided on ordinary principles of construction.[122] A contract of carriage is construed like any other contract, by considering its terms, the intentions of the parties,[123] all surrounding circumstances,[124] trade practices and implied terms.[125] In determining what was within the

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115 ibid 5.
116 ibid 6.
117 ibid 7.
118 Ying (n 64) 216; See also *Raymond Burke Motors Ltd v Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155; *Southampton Cargo Handling Plc v Lotus Cars Ltd & Ors* [2000] EWCA Civ 252, [2001] CLC 25 (The Rigoletto).
119 *Nippon Yusen Kubishiki Kaisha v Golden Strait Corporation* [2003] EWHC 16 (Comm), [2003] 2 Lloyd's Rep 592; *Bombardier Inc v Canadian Pacific Ltd* [1988] OJ No 1807.
120 Corcione (n 10) para 2.54.
121 William Tetley, 'The Himalaya clause – Revisited' (2003) 9 JIML 3, 27.
122 *Halsbury's Laws of England* (5th edn, 2019) vol 22, para 188, 199; *Borvigilant* (n 44) [17]-[33].
123 Schoenbaum (n 1) 476.
124 *Nisshin Shipping Co Ltd v Cleaves & Co Ltd & Ors* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38 [23].
125 Beatson, Burrows and Cartwright (n 11) 626-627.

reasonable contemplation of the parties, courts must consider that the bill of lading is a commercial contract that determines which party will bear insurance.[126]

Nevertheless, it is a traditional common law rule that exemption clauses should be interpreted strictly and, particularly, exemption clauses that generally exempt all liability will be construed more restrictively than limitation clauses.[127] This means that a Himalaya clause, which does not expressly include the third party seeking to rely on it or exempts such third party from all liability, will be construed strictly and therefore the third party will not be able to enforce it.

This rule has been considerably relaxed in common law. In England, the House of Lords refused to adopt a rule by which courts may invalidate or deprive the effect of exemption clauses, even in the event of fundamental breach.[128] Particularly, the House of Lords explained that the Parliament has passed the Unfair Contract Terms Act 1977 (UCTA 1977) which applies to consumer contracts or standard form contracts and enables the application of exemption clauses only if they are just and reasonable, but the Parliament has nevertheless refrained from regulating commercial contracts, where the parties are not of unequal bargaining power and their risks are normally borne by insurance.[129] This shows that there is no need for judicial intervention to exemption clauses in commercial contracts and the parties are free to allocate the risks as they think appropriate.[130]

This approach has been adopted by the Supreme Court of Canada.[131] Since there is no similar legislation with UCTA 1977 in Canada, the Supreme Court ruled that Canadian courts are responsible for deciding whether an exemption clause is enforceable or not in the circumstances for the purpose of giving effect to the bargain of the contracting parties.[132] In this analysis, exemption clauses should be given their natural and true construction so that their meaning and effect is fully understood as the contracting parties agreed to at the time of

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126 *ITO* (n 46) [48].

127 Reif (n 92) 386 and cited cases.

128 *Suisse Atlantique v Rotterdamsche Kolen Centrale* [1967] AC 361; See *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2, [1980] AC 827 where the House of Lords overruled the traditional doctrine by which a breaching party could not benefit from the exemption clause in the contract if there was a fundamental breach (for the traditional doctrine, see *Harbutt's "Plasticine" Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447; *Karsales (Harrow) Ltd v Wallis* [1956] EWCA Civ 4, [1956] 1 WLR 936).

129 *Photo Production* (n 128) 3-4.

130 ibid 4; *The Starsin* (n 108) [57].

131 *Hunter Engineering Co v Syncrude Canada Ltd* [1989] 1 SCR 426; *Beaufort Realties (1964) Inc v Belcourt Construction (Ottawa) Ltd* [1980] 2 SCR 718.

132 *Hunter* (n 131) [153].

contract.[133] Exemption clauses cannot be considered in isolation from the other contractual provisions and the circumstances in which they were entered into.[134]

This rationale was applied by the Supreme Court in *ITO* in concluding that, in commercial transactions where the parties have equal bargaining power, exemption clauses are likely to be interpreted broadly, considering that the parties have already allocated their risks by insurance.[135] Although the Court acknowledged that a general exemption from all liability in a contract will not *per se* exclude negligence,[136] McIntyre J explained that an exemption clause which does not explicitly exclude liability for negligence, but its wording is so wide and clear that it could do so implicitly, may be interpreted as excluding negligence unless the parties intended otherwise.[137] In construing the parties' intentions in relation to the scope of the exemption clause, the Court must consider whether negligence was the only possible type of liability upon which the clause could operate in the circumstances, as well as whether the parties could be deemed to have contemplated such possibility.[138] Since ITO was a sub-bailee of the cargo after it was unloaded and the bill of lading absolved the carrier's liability for the period before loading or after discharge, the Court found that the only reasonable head of ITO's liability for loss of cargo was its failure to take reasonable care of the cargo – negligence.[139]

In my view, where the contracting parties are sophisticated entities, for example well-established corporations with equal bargaining power, extended insurance coverages and easy access to legal advice, the standard of contract drafting should be raised, at least in relation to third party protection. Where the contracting parties are professional or experienced actors in the shipping industry, it should be reasonably expected that they have expressly included their bargain in the contract. Anything that is not expressly provided for in the contract should be presumed to be outside the contemplation of the parties at the time of contract. Especially in relation to exemption clauses, which are usually subject to long negotiations and careful drafting, the actual wording of the clause is key in determining the parties' intentions and therefore should be given priority over commercial practices.

The implication of words or meanings to exemption clauses for the purpose of exempting the liability of third parties may lead to considerable re-drafting of the clause by courts. Lord Simon, in his dissenting opinion in *The Eurymedon*, explained that as long as the contract did

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133 ibid [153].
134 ibid [151].
135 Reif (n 92) 386.
136 *ITO* (n 46) [48].
137 ibid 45.
138 Reif (n 92) 385-386.
139 See *ITO* (n 46) [48].

not expressly exclude the stevedores' tortious liability, to imply it would be to re-write it.[140] This type of judicial intervention to the contract should always be balanced with the two original criteria set out by Lord Denning in *Adler*: whether it is necessary for business efficiency to imply the third party from the exemption clause and whether the injured party had assented to the exemption.[141] The courts in *The New York Star* and *ITO* did not provide an analysis on these two criteria; they were too quick in allowing negligent third parties to benefit from a broadly interpreted exemption clause. However, where a third party is found to be negligent for loss of cargo and there is no contractual indication that the parties intended to protect it against liability for negligence, it is not necessary for business efficiency to extend the scope of the Himalaya clause by implication; the contract operates properly without this implication and the third party will be liable for the normal consequences of its tort. By extending the scope of the Himalaya clause by implication, the court may interfere with the actual intentions of the parties rather that give effect thereto.

This concern was also expressed by Fullagar J in *Wilson v Darling Island Stevedoring and Lighterage Co*:[142]

> The common law has… allowed the validity of provisions of a contract which limit or exclude liability for negligence. But it has always frowned on such provisions and insisted on construing them strictly… And yet we seem to discern… a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence.[143]

The dissent in *The Eurymedon* adopted the foregoing passage and ruled that the anxiety to protect negligent parties cannot give unnatural or artificial meaning to exemption clauses which, if construed strictly, do not exempt liability in negligence.[144]

Finally, a central judicial concern in such cases is that it is commercially undesirable to allow shippers to circumvent exemption clauses by suing the carrier's subcontractors in tort because it would undermine the general purpose of exemption clauses and would redistribute the risk between the parties, as reflected in the rate of freight and insurance.[145] Put simply, the

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140 *The Eurymedon* (n 46) 15.
141 *Adler* (n 17) [11].
142 *Wilson v Darling Island Stevedoring and Lighterage Co* [1957] 95 CLR 43.
143 ibid [10].
144 *The Eurymedon* (n 46) 9.
145 *The Mahkutai* (n 106) 8; Beatson, Burrows and Cartwright (n 11) 651; Timothy Liau, 'Privity: Rights, Standing, and the Road Not Taken' (2021) 41 OJLS 803, 815-816; Coote (n 44) 15.

non-enforcement of Himalaya clauses would encourage shippers to bring actions against the carrier's subcontractors to get round exemptions.[146] Nevertheless, this concern is not supported. It is equally commercially undesirable to allow any number of unidentified third parties to avoid the consequences of their negligence by relying on the carrier's exemptions and limitations. The wide enforcement of Himalaya clauses merely benefits the interests of great fleet-owning nations whose ocean carriers and their subcontractors are protected from liability; it is nonetheless detrimental to the interests of those countries, such as Australia, which largely depends on those fleets for import and export trade.[147] Besides, if a carrier wishes to prevent a shipper from suing its subcontractors in tort, the carrier may either explicitly exclude the tortious liability of its subcontractors or include a circular indemnity clause in the Himalaya clause. If the carrier does not do so, and there is no other indication in the contract as whole that third parties are protected from tortious liability, it is presumed that the parties did not intend to protect third parties *to that extent* and thus this intention should be given effect by not allowing the third party to enforce the Himalaya clause.

Overall, the broad construction of exemption clauses for the purpose of giving effect to the parties' intentions and commercial reality is not a convincing legal basis. The "commercial reality" and "intentions of the parties" rationale has been criticized as inadequate to justify by itself an exception to the privity rule in favor of third parties.[148] Additionally, it has been submitted that it is difficult to justify ad hoc contractual rights held by third parties on the basis of "commercial necessity" because it requires the artificial creation of an agreement that does not exist.[149] The same is true for the basis of the "intentions of the parties" which requires the meeting of the parties' minds through external communication of offer, acceptance, and consideration.[150] Thus, the deficient justification of contractual rights of third parties for purposes of practicality may result in normative incoherence in contract law.[151]

D. GENERIC TEST

It appears that both English and Canadian courts have been generally willing to enforce Himalaya clauses in favour of third parties. The Privy Council emphasized that there is great readiness to accept the doctrine of vicarious immunity for pragmatic and commercial reasons

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146 *The Eurymedon* (n 46) 6.
147 *Port Jackson Stevedoring* (n 98) [13].
148 Jason W Neyers, 'Explaining the Principled Exception to Privity of Contract' (2007) 52 McGill LJ 757.
149 Liau (n 145) 829.
150 ibid.
151 ibid.

and that, on the appropriate facts, courts may establish "a fully-fledged exception" to privity "thus escaping from all the technicalities with which courts are now faced in English law"[152].

However, as discussed in the analysis, the legal bases for Himalaya clauses have been extensively criticized by judges and scholars. In response to this criticism, English and Canadian law have adopted a generic test as an ultimate solution to the issue of third-party protection: England established a statutory test, whereas Canada established a common law test to allow third parties to enforce contractual terms. The word "generic" is used as both tests are not specifically designed for contracts for the carriage of goods by sea, but they apply to all types of contract (although the English test is subject to exceptions).

(i) The English Test

England has enacted the Contracts (Rights of Third Parties) Act 1999 (1999 Act), which largely implemented the recommendations of the Law Commission's Report.[153] The 1999 Act applies to all contracts except for those listed in section 6. Particularly, section 6(5) excludes the application of the 1999 Act to contracts for the carriage of goods by sea, rail, road, and air, except that third parties may take advantage of exclusion or limitation clauses thereunder. The explanatory notes of the 1999 Act clarify that section 6(5) enables a third party to enforce an exemption or limitation clause if such clause extends its protection to servants, agents and independent contractors engaged by the carrier in the loading and unloading process.[154] It is this exception to the exception that puts Himalaya clauses on a statutory footing.[155]

It should be noted that the contracting parties may exclude the application of the 1999 Act.[156] However, section 7(1) provides that the 1999 Act does not affect any other right or remedy available to a third party, thus the 1999 Act does not preclude the application of the other legal bases for the enforcement of Himalaya clauses. The test allowing third parties to enforce contractual clauses is provided for in section 1:

> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or

[152] *The Mahkutai* (n 106) 8.
[153] Law Commission Report (n 12).
[154] Explanatory notes to the Contracts (Rights of Third Parties) Act 1999, para 26.
[155] Tetley, 'The Himalaya clause – Revisited' (n 121) 15.
[156] *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486.

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

Section 1 of the 1999 Act allows a third party to enforce a contractual clause in two scenarios: (a) when there is an express contractual provision to this effect; or (b) when there is a contractual clause that purports to confer a benefit on the third party and there is nothing in the construction of the contract that indicates that the parties did not intent to allow the third party to enforce it. In both scenarios, the third party must be identified by name, class or description.[157] The identification of a third party during negotiations will not suffice.[158] However, the third party does not need to exist when the contract is made, thus the carrier's present and future subcontractors may qualify.[159]

The second scenario is a revolutionary development for third party protection in English law because it allows a third party to enforce a contractual clause that purports to confer a benefit on it, even if the contract does not give the third party a right to enforce. In other words, the conferral of a benefit on a third party by a contractual clause implies its right to enforce it.[160] Sections 1(1)(b) and 1(2) create a presumption that third parties are generally entitled to enforce a contractual clause if the clause confers a benefit on them and the contract expressly

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[157] See *Laemthong InternationalLines Co Ltd v Artis & Ors* [2004] EWHC 2226 (Comm) [47] (it was construed that the term "agents" in the contract identified third party shipowners by class); *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG & Ors* [2014] EWHC 3068 (Comm) [87], [88] (it was construed that the term "underwriters" in the contract identified the servants and agents of the underwriters by class, including their solicitor and loss adjuster); *The Prudential Assurance Co Ltd v Ayres & Ors* [2007] EWHC 775 (Ch), [2007] 3 All ER 946 [27] (it was construed that the term "any previous tenant" in the contract identified the underlessee of the premises by description); *Themis Avraamides & Anor v Colwill & Anor* [2006] EWCA Civ 1533 [17] (it was construed that the contract did not expressly identify any third party or class of third parties).

[158] Beatson, Burrows and Cartwright (n 11) 626.

[159] ibid.

[160] See Corcione (n 10) para 7.97 (Himalaya clauses and agency may be no longer necessary because the consent of the parties to confer a benefit on a third party by a contractual term may be adequate to allow the third party to enforce it).

identifies them by name, class or description.[161] This presumption is rebutted if, on a proper construction of the contract as a whole and the surrounding circumstances, the parties had not intended the third party to have the right to enforce the clause.[162]

Phrased in the shipping context: the second scenario allows a stevedore to enforce an exemption clause in the bill of lading between carrier and shipper, without an explicit provision to this effect, provided that (i) the exemption clause purports to protect the stevedore against liability, (ii) there is no contractual indication that the parties did not intent to entitle the stevedore to enforce, and (iii) the contract expressly identifies the stevedore by name, class or description.

(ii) The Canadian Test

In Canada, the test for the enforcement of Himalaya clauses was introduced by the Supreme Court in *London Drugs Ltd v Kuehne & Nagel International Ltd*.[163] The facts were that the appellant delivered to a warehouse company a transformer for storage which was damaged due to the negligence of the respondents, the company's employees.[164] Section 11 of the storage contract between the appellant and the employer of the respondents limited the liability of the employer to $40 per package unless the appellant paid the additional warehouse liability insurance.[165] The appellant, having full knowledge and understanding of this provision, chose not to obtain this insurance and instead arranged for its own coverage.[166] The issue was whether the employees, who were third parties to the storage contract, could rely on section 11 to exclude their liability in negligence.

The Court noted that the traditional exceptions to the privity rule, for example agency or trust, did not apply to the present case and, instead of artificially extending them beyond their accepted limits like in *The Eurymedon* and *ITO*, it was preferable to address the matter differently.[167] The Court ruled that the present case called for the relaxation of the privity rule in order to conform with the intentions of the contracting parties,[168] commercial reality,[169] as well as to prevent the appellant from circumventing the limitation clause to which it had

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161 Beatson, Burrows and Cartwright (n 11) 627. See also *Soprim Construction SARL v Republic of Djibouti* [2016] EWHC 3864 (Comm) [9].
162 Beatson, Burrows and Cartwright (n 11) 627.
163 *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299.
164 ibid [2], [155].
165 ibid.
166 ibid [156].
167 ibid [236].
168 ibid [240], [245].
169 ibid [212], [231], [240], [252], [268].

expressly agreed by suing the employees.[170] Thus, the Court adopted the following new test that allows employees to benefit from a limitation clause in a contract between their employer and its customer:

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.[171]

Under this test, an employee may enforce an exemption or limitation clause in a contract between its employer and another party, if the exemption or limitation clause expressly or impliedly includes the employee and the employee was acting in the course of its employment and performing the employer's obligations under the contract when the loss occurred.

In applying this new test to the facts, the Court found that both requirements are met. Under the first requirement, although the contracting parties did not expressly include the word "employees" in the limitation clause,[172] there was nothing in the contractual language and all relevant circumstances precluding the employees from taking advantage of the limitation clause.[173] Consequently, the employees were implied third party beneficiaries of the limitation clause.[174]

The Supreme Court stated that this new test is similar to the agency test, as set out in *Scruttons*, because the first requirement in both tests is identical, the second and third requirements of the agency test are replaced by the identity of interest between employers and employees, and the fourth requirement of the agency test and the second requirement of the new test require the same reasoning with Himalaya clauses.[175] The Court also clarified that the new exception does not exclude the application of other exceptions to privity in case where the requirements of the new exception are not met.[176]

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[170] ibid [246], [250].
[171] ibid [257].
[172] ibid [265].
[173] ibid [264], [266].
[174] ibid [265].
[175] ibid [259].
[176] ibid [261].

Later in *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*,[177] the Supreme Court named the new test set out in *London Drugs* as a "principled exception" to the privity rule which applies not only to the employee-employer relationship but to any contract that confers a benefit on a third party,[178] including a contract for the carriage of goods.

The decision in *London Drugs* has been applauded for noting the criticism of English judges in the development of the Himalaya clause, as well as the commercial reality that third party beneficiaries should not be "thwarted by legal niceties" from relying on a contractual clause.[179]

(iii) Similarities

Admittedly, both tests provide a simpler mechanism for enforcing Himalaya clauses in bills of lading since they exclude technicalities such as agency, ratification, and consideration.[180]

Both the English and Canadian tests are exceptions to the privity rule.[181] It should be noted however that the 1999 Act has been considered as an abolition of the privity rule,[182] whereas the principled exception has been considered as the result of an incremental change to the common law.[183] Although the English test is a statutory exception and the Canadian test is a common law exception, they both allow a person to enforce a provision in a contract to which it is not party, subject to certain requirements. It should be noted that both exceptions have altered the privity rule only to the extent that a contract may confer enforceable benefits on third parties, but they nevertheless left intact the part of the privity rule providing that a contract cannot impose obligations on third parties.[184]

The first requirement of the Canadian test is identical with section 1(1)(b) of the 1999 Act in that, where a contractual term expressly or impliedly confers a benefit on a third party, the third party may enforce such term. Emphasis should be given on three identical points: First, the benefit must be conferred on a third party by a *contractual term* and not by the contract as

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177 *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* [1999] 3 SCR 108 [23], [31]-[39] (the respondent could rely on a waiver of subrogation clause in the contract between appellant and insurer, subject to the principled exception).

178 ibid [31]–[32].

179 Zeller and Moens (n 10) 262-263. However, see Neyers (n 148) 768-774 arguing that the "intentions of the parties" and "commercial reality" reasoning in *London Drugs* (n 163) and *Fraser* (n 177) is inadequate.

180 Tetley, 'The Himalaya clause – Revisited' (n 121) 16, 19.

181 Finch and Horsman (n 41) 415; Law Commission Report (n 12) para 2.8-2.18, 5.16 ("Our proposed statute carves out a general and wide-ranging exception to the third party rule"); *Halsbury's Laws of England* (5th edn, 2019) vol 22, para 143.

182 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] UKHL 43, [2001] 1 AC 518 (Lord Clyde).

183 *Fraser* (n 177) [30] (not "a wholesale abdication of existing principles"); *London Drugs* (n 163) [254], [257].

184 Beatson, Burrows and Cartwright (n 11) 633; Michael Bridge, 'The Contacts (Rights of Third Parties) Act 1999' (2001) 5 Edin L Rev 85, 85-86; Neyers (n 148) 765; *London Drugs* (n 163) [200].

a whole. Second, the conferral of a benefit on a third party by a contractual term equates its right to enforce it. Third, the phrase "expressly or impliedly" in the Canadian test has the same meaning with the phrase "purports to confer a benefit" under the English test. The word "purports" in the English test has been interpreted as signifying the intention of the contracting parties to confer a benefit on a third party either explicitly or implicitly.[185]

Furthermore, both tests have shifted the traditional presumption that third party beneficiaries cannot enforce contractual terms. The current presumption is that third party beneficiaries are entitled to enforce a contractual term unless the parties intended otherwise. Attention should be given to the negative wording of section 1(2) of the 1999 Act which provides that section 1(1)(b) does not apply if it is found, on a proper construction of the contract, that the parties "did not" intend the third party to enforce. This shows that if the contract is neutral on whether the parties intended to give a right of enforcement, section 1(1)(b) applies.[186] Similarly, in *London Drugs*, the employees were implied beneficiaries because there was nothing in the contract or the surrounding circumstances precluding the employees from relying on the limitation clause.[187]

(iv) Differences

The first major difference between the English and the Canadian test is that the 1999 Act distinguishes between the conferral of a benefit on the third party and the right of the third party to enforce the benefit,[188] while the principled exception does not make such distinction. In the Canadian test, the right of the third party to enforce a contractual term depends on the conferral of a benefit. However, section 1(1)(a) of the 1999 Act provides that a third party may enforce a contractual term where the contract expressly provides that it may, irrespective of whether the term confers a benefit on the third party or not, for example a jurisdiction clause, time limitation clause, and any other clause that does not necessarily confers a benefit on a third party. Of course, in contracts of carriage of goods by sea, where the 1999 Act only allows the enforcement of exemption or limitation clauses, this distinction is not so acute.

The second difference is that the English test does not require the third party to prove that it was acting in the course of its employment and performing the services provided in the contract of carriage when the loss or damage occurred, as required by the second requirement

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185 Bridge (n 184) 89.
186 *Nisshin* (n 124) [23].
187 *London Drugs* (n 163) [264], [266].
188 Bridge (n 184) 89.

of the Canadian test. It is presumed that the 1999 Act applies only to the period specified in the bill of lading, *i.e.* usually after loading and before discharge, but this is not clear from the statutory provisions. It is further presumed that a shipper, who brings claims against a third party for damage of cargo, may argue that the third party cannot enforce a contractual clause under section 1 of the 1999 Act because it was acting outside the scope of the bill of lading when the damage occurred, and therefore this requirement will become relevant. But in such circumstances, it is likely that the burden of proof will fall on the shipper and not on the third party. In contrast, under the Canadian test, it is the third party that must prove that both requirements are met.

Another difference is that section 1(3) of the 1999 Act requires the third party to be expressly identified in the contract by name, class, or description, while the Canadian test does not. This means that the 1999 Act may give the right of enforcement to unnamed third parties but not to implied third parties.[189] Emphasis should be given to section 1(3) of the 1999 Act which requires the identification of a third party in the contract and not in the particular term on which the third party wishes to rely. Hence, if a stevedore wishes to enforce an exemption clause in a bill of lading, it must be expressly identified by name, class, or description anywhere in the bill of lading, and not necessarily in the exemption clause.

On the contrary, the Canadian test may give the right of enforcement to implied third parties. In this regard, it has been argued that the implication of an intent to benefit a third party may slide into fiction.[190] It is not easy to infer whether the failure of the contracting parties to include their employees in the contract was an oversight or a drafting glitch, or whether it shows that they did not intent to include them.[191] It should be reminded that Lord Denning in *Adler* ruled that carriers may stipulate an exemption clause for themselves and any third party engaged to perform the contract, either expressly or by necessary implication, provided that the shipper assented to the exemption, either expressly or by necessary implication.[192] Thus, where a contract does not explicitly protect a third party against liability, courts may imply the intent to protect the third party only if it is necessary to give business efficiency to the contract. Otherwise, courts would import to the contract a benefit that was not there nor intended to be there. Although it may be easier to imply that the parties clearly intended to protect their employees under the contract, as employees are often responsible for performing the contractual

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189 ibid 87-88. See *Themis* (n 157) [19] ("section 1(3), by use of the word 'express', simply does not allow a process of construction or implication").
190 Fleming (n 22) 437.
191 ibid.
192 *Adler* (n 17) [11].

obligations of their employer to the plaintiff's knowledge,[193] it may be more problematic to prove that the parties intended to protect independent contractors.[194] As discussed above at Section II.A.(i), stevedores are independent contractors and not employees of the carrier, therefore the implication of an intent to benefit independent contractors is unlikely to be necessary for business efficiency. Consequently, the application of the Canadian test to contracts of carriage requires prudent reasoning.

Another difference is that the 1999 Act clarifies that a third party's right of enforcement may be subject to certain conditions. Section 1(4) of the 1999 Act provides that a third party may enforce a contractual term "subject to and in accordance with any other relevant terms of the contract". Thus, if a benefit is conferred subject to a qualification or condition, the third party must meet such qualification or condition in order to enforce the benefit.[195] For example, a third party seeking to bring claims against a contracting party is bound by the time limitation clause in the contract.[196] Another example is that, under section 8 of the 1999 Act, a third party seeking to enforce a contractual term is bound to do so in arbitration if any dispute arising out of or in connection with such term is subject to arbitration.[197] However, it may be difficult to distinguish between conditional benefits and obligations, especially where the benefit is conditional upon performance by the third party,[198] for example where a stevedore may benefit from an exemption clause subject to the condition that it performs the loading, or worse, where a stevedore may benefit from an exemption clause subject to the condition that it *successfully* performs the loading. In such cases, the conferral of a conditional benefit may be indistinguishable from the imposition of an obligation. Having said that, it is interesting to consider whether a third party could set aside a condition, for example an arbitration agreement, on the basis that it is unreasonable or unconscionable.[199] It has been argued that the third party should be bound by a condition in the limited sense that the promisor (the shipper) may use the condition as a defence to a claim brought by the third party to enforce the contract.[200] The decision in *London Drugs* does not regulate this issue but it is nevertheless presumed from the

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193 Fleming (n 22) 430, 433.
194 Beatson, Burrows and Cartwright (n 11) 651, note 27.
195 ibid 633.
196 Bridge (n 184) 93.
197 *Nisshin* (n 124) [34], [39]; Explanatory Notes to the Contracts (Rights of Third Parties) Act 1999, para 33-35; However, see *The Mahkutai* (n 106) 13-14, where the Privy Council did not allow a third party to enforce an exclusive jurisdiction clause in the bill of lading because jurisdiction clauses, contrary to exemption clauses, embody a mutual agreement between the contracting parties with mutual rights and obligations, thus they are not included in a contract for the sole benefit of the carrier and its subcontractors.
198 Beatson, Burrows and Cartwright (n 11) 633.
199 See for example *Uber Technologies Inc v Heller* [2020] SCJ No 16.
200 Beatson, Burrows and Cartwright (n 11) 633.

reasoning in *Fraser* that a third party may enforce a contractual clause subject to any express qualifying language or limiting conditions in the contract.[201] But this remains to be examined in the common law.

Finally, the decisions in *London Drugs* and *Fraser* suggest that the Canadian test can only be used as a shield and not as a sword.[202] This means that while third parties can rely on exemption or limitation clauses to defend themselves against the claims of a contracting party, they cannot sue the contracting party on the contract.[203] In contrast, the 1999 Act seems to allow third parties to bring an action against contracting parties.[204] However, since the 1999 Act only allows the enforcement of exemption or limitation clauses in contracts of carriage of goods, it is likely that third parties will only use the 1999 Act as a shield.

(v) Discussion

Both tests put subcontractors in a more favourable position. The effect of the tests is substantially similar. The Canadian test is deemed to be a wider exception to the third-party rule than the English test as it does not require the third party to be expressly identified by name, class or description.[205] However, the 1999 Act provides a more complete and comprehensive test for third party rights in that it puts Himalaya clauses on statutory footing and regulates the contracting parties' rights as well.

The disadvantage of both tests, however, is that they do not specifically address the contemporary needs of the shipping industry. Particularly, it may be problematic that neither test regulates multimodal contracts of carriage. In multimodal transport, there is a greater number of third parties involved in the chain of carriage, including maritime parties (ocean carriers, charterers, stevedores) and non-maritime parties (rail/road/air carriers, terminal operators, freight forwarders) and their subcontractors. Can all these third parties benefit from a limitation clause in the principal contract of carriage? The English test allows the enforcement of a limitation clause by third parties engaged in the loading and unloading process,[206] and the Canadian test allows the enforcement of a limitation clause by third parties performing the very

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201 *Fraser* (n 177) [42].

202 *London Drugs* (n 163) [260]; *Fraser* (n 177) [37]; Neyers (n 148) 765.

203 ibid. However, see *Brown v Belleville (City)* [2013] OJ No 1071 [110]-[111] where the successors of the original covenantee had a right to enforce the agreement against the original covenantor.

204 Explanatory notes to the Contracts (Rights of Third Parties) Act 1999, para 15; Law Commission Report (n 12) para 11.14, 11.19; Treitel (n 15) 104-105; Beatson, Burrows and Cartwright (n 11) 634 (in actions brought by third parties, the promisor is entitled to raise any defence or set-off under the contract, eg mistake, misrepresentation, breach, frustration).

205 Beatson, Burrows and Cartwright (n 11) 651.

206 Explanatory notes to the Contracts (Rights of Third Parties) Act 1999 para 26.

services provided for in the contract.[207] This is not easily determined in shipping practice. In fact, it is extremely difficult to accurately define the activities and obligations of carriers in the modern context of carriage because modern carriers assume responsibility for a greater period of carriage, including maritime and inland operations.[208] Suppose that a limitation clause in a bill of lading limits the liability "of all servants, agents and independent contractors of the carrier (including their servants, agents and independent contractors) for any loss or damage of cargo that occurs in the period between loading and discharge" without defining these terms; it is unclear whether a third party may enforce the limitation clause if the loss or damage occurred while loading or during storage or while unloading from truck or rail. This is a matter of interpretation and previous judicial decisions may provide some guidance.[209] Nevertheless, neither test draws a line between maritime and non-maritime operations. Thus, any third party engaged in a multimodal contract of carriage can presumably enforce a limitation clause, even if it is remotely connected (if connected at all) with the principal contract. This may expose the shipper to a high risk of not recovering its losses from negligent third parties in any mode of carriage.

Of course, the English and Canadian tests have not yet been widely applied in the carriage of goods context. It remains to be seen in the common law whether the tests constitute a satisfactory legal basis for the enforcement of Himalaya clauses or whether the shipping industry requires a more targeted test.

III. Conclusion

The development of Himalaya clauses in England and Canada has been very similar. Since Canadian maritime law applies, if not exclusively, the common law of England,[210] the Supreme Court of Canada has consistently affirmed and applied English decisions on the matter.

In both jurisdictions, the enforcement of Himalaya clauses has been incremental due to the factually-limited opportunities given to courts to determine the issue in the context of carriage of goods by sea (almost one case per decade). Since the strict application of the privity rule in *Scruttons* in 1961, it has taken the English Parliament 38 years to regulate third party

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[207] *London Drugs* (n 163) [257].

[208] Corcione (n 10) para 7.94.

[209] See *Raymond Burke* (n 118) (the dock operators negligently damaged the cargo in the container park before it passed the ship's rail, and the court interpreted whether the exemption clause in the bill of lading covered that period); The Rigoletto (n 118) (the stevedores received the cargo some days before the scheduled loading and it was stolen during storage, and the court interpreted whether the exemption clause in the bill of lading covered that period); *The New York Star* (n 98)*; ITO* (n 46).

[210] William Tetley, 'A Definition of Canadian Maritime Law' (1996) 30 UBC Law Rev 137, 146.

protection by statute until the enactment of the 1999 Act. Similarly, in Canada, since the adoption of *Scruttons* in *Canadian General Electric* in 1971, it has taken the Supreme Court 28 years until *Fraser* in 1999, which extended the application of the principled exception to *inter alia* contracts of carriage.

It appears from the analysis that English and Canadian courts have struggled in finding a suitable and widely accepted legal basis for the enforcement of Himalaya clauses, but they had been generally willing to reach a commercially sensible solution. In fact, it was commented that the reasoning of the Supreme Court in *London Drugs*, as well as the close analysis of precedents, reminds of Lord Denning's "American" style that pays more attention to the actual decision than the explanation.[211] Indeed, it is evident from both English and Canadian decisions that courts were more interested in "getting" to the enforcement of Himalaya clauses rather than in providing prudent reasoning for it.

This article underlines the perplexity of each legal basis for the enforcement of Himalaya clauses. Based on the foregoing analysis, none of the legal bases applies to the shipping context in an adequate and generally accepted manner. On the contrary, each legal basis upon which Himalaya clauses have been enforced highlights the tension between commercial practice and existing legal principles. The agency basis, for example, does not easily apply to the commercial relationship between carrier and third parties, and the unilateral contract basis give rise to issues relating to the provision of consideration. Moreover, the exemption clause basis, together with the broad interpretation adopted by English and Canadian courts, entails the risk of implying words to the contract that are simply not there. In response to these issues, England and Canada eventually proceeded with the establishment of new generic tests that allow third party beneficiaries to enforce contractual provisions. Currently, in both jurisdictions, the enforcement of Himalaya clauses does not depend on technicalities such as agency, ratification, offer and consideration, but on contract drafting and the parties' intentions. Nevertheless, the 1999 Act in England and the principled exception in Canada present some important differences which raise concerns as to the extent of the right of third parties to enforce contractual provisions. Thus, the effectiveness of the legal bases for the enforcement of Himalaya clauses is not uncontested.

Whether the 1999 Act in England or the principled exception in Canada is the final home of Himalaya clauses remains to be seen in the common law. As already mentioned, disputes over the enforcement of Himalaya clauses are very sporadic in litigation. Having in mind that

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[211] Fleming (n 22) 438-439.

both tests are dated in the 1990s and do not sufficiently address the current legal issues in the context of multimodal carriage of goods, it is presumed that they are not the ultimate legal basis for the enforcement of Himalaya clauses. Let us hope that it will not take another thirty years to find out.