International Group of P&I Clubs/Bimco Revised Himalaya Clause

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Introduction

Since the invention of the Himalaya clauses, disputes have arisen in terms of their scope, interpretation and validity. This has largely impaired the efficiency of the clauses. In 2010, the International Group of P&I Clubs (IG P&I) and BIMCO reviewed the use of Himalaya clauses in bills of lading and other contracts. The aim of the revision was to produce a clause which would be recognised and given effect to in most of the major jurisdictions, including the US and the UK. In September 2010, a newly drafted clause (2010 clause), together with the key features and intended effects of the clause, was circulated to all members of BIMCO and to all clubs within the IG P&I.[1] In 2014, the 2010 clause was amended and circulated again,[2] and it was suggested that it be read in conjunction with the key features and intended effects set out in the 2010 circular. In 2016, this new Himalaya Clause (2016 clause) was finally incorporated into BIMCO's 2016 standard form of bills of lading.[3] The 2016 clause is constituted of five sub-paragraphs. Compared with previous Himalaya clauses, it has made changes in respect of both the content and structure. This commentary evaluates the clarifications and potential legal effects brought by these changes.

The scope of third parties protected

Similar to most of the shipping companies' own terms of carriage and BIMCO's previous standard form of bills of lading, the 2010 clause gave the Himalaya-type protection to any servant, agent and independent contractor employed by or on behalf of the carrier. However, in the US, there had been authorities where the cargo claimants sued the ship managers to avoid the defences and limitations under the US Carriage of Goods by Sea Act 1936.[4] Therefore, the US legal adviser suggested that the 2010 clause should be amended to make it clear that the protections are to be extended to the ship managers. This led to the addition of sub-paragraph (a) of the 2016 clause, which was specially designed to define the third parties protected by the clause. It uses the term 'servant' to refer to the third parties who are to be protected and, for the first time, enumerates them in detail, with an express reference to the 'managers and operators of vessels'. Also, by including 'underlying carriers' as one of those third parties, the 2016 clause can be better used in multimodal transport, where more than one actual carrier is usually involved in performing the carriage of goods.

Sub-paragraph (a) also provides that, for a third party to be protected by the clause, it does not matter whether he is 'in direct contractual privity with the Carrier or not'. This presumably codifies the decision of the US Supreme Court in *Norfolk Southern Railway Co v James N Kirby Pty Ltd*[5] that 'any independent contractor' should not be interpreted in a narrow way and there was no justification in interpreting it as an independent contractor

who was only in direct privity with the contracting carrier. The phrase was accordingly held to embrace the sub-sub-contractor,[6] who was a railroad carrier in that case.[7]

General exemption clause

Sub-paragraph (b) of the 2016 clause is a classic general exemption clause, which totally exempts a third party from liability for any loss of, damage to or delay in delivery of the goods. It is in essence no different from what has often been used in practice.[8] However, the crucial change to this provision is actually brought by sub-paragraph (e) of the 2016 clause. Under the previous Himalaya clauses, it was not clear whether the agency part and deeming provision applied to the general exemption clause or not. This led to uncertainty on whether a third party could enforce a general exemption clause pursuant to the common law Himalaya clause approach. Sub-paragraph (e), by expressly applying the agency part and deeming provision to each of its previous sub-paragraphs, including the general exemption clause, clarifies that the general exemption clause can be enforceable by the third parties themselves by virtue of an efficient Himalaya approach. This reflects the House of Lords' decision in *The Starsin*[9] that the Himalaya mechanism could be applicable to the general exemption clause, just as it was applicable to extending the carrier's exclusions and limitations to third parties.

Extending the carrier's rights to third parties

Sub-paragraph (c) of the 2016 clause extends the rights, exemptions, defences and immunities applicable to the carrier to the third parties employed by him. In this aspect, it is not different from a traditional Himalaya clause. However, what is new is that it specifically includes 'the right to enforce any jurisdiction or arbitration provision' as one of the benefits extended to the third parties. This is probably a reaction to *The Mahkutai*,[10] where the Privy Council held that the Himalaya clause gave

third parties only the rights which benefited one of the parties to it, while an exclusive jurisdiction clause was a 'mutual agreement' creating 'mutual obligations', so it could not be extended to third parties.[11] Presumably, this reason can be equally applicable to an arbitration clause.[12] It has been submitted that *The Mahkutai* was decided upon a construction of the particular Himalaya clause used in that case, which only gave the third parties 'the benefit of all exceptions, limitations, provisions, conditions and liberties *benefiting the Carrier*'.[13] Therefore, a Himalaya clause might be redrafted to extend the benefit of an exclusive jurisdiction clause[14] and an arbitration clause.[15] The 2016 clause, by making a specific reference to the jurisdiction clause and arbitration clause, may potentially extend the benefit of an exclusive jurisdiction clause or an arbitration clause to a third party under English law.[16] In the US, even without this specific reference, a forum selection clause has been held to be a 'defence' which could be enforceable by a third party.[17] Some of the shipping companies' own terms of carriage, although expressly entitling the third parties to enforce the jurisdiction clause in the bill, make no reference to the arbitration clause.[18] This is because, in their bills of lading, it is jurisdiction clauses, rather than arbitration clauses, that are normally used.

In the UK, even if the Himalaya clause specifically extends the benefit of an arbitration clause to a third party so that he is entitled to claim the benefit of that clause, a problem still exists as to whether he may enforce it by applying for a stay of proceedings pursuant to section 9 of the Arbitration Act 1996. This is because that section requires that the person who applies for a stay of proceedings be already a 'party to the arbitration agreement', while a servant, agent or independent contractor of the carrier is not a party to the arbitration agreement.[19] Arguably, this difficulty could be dealt with in either of the following two ways. One possible argument is that in cases where the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act) applies, the situation falls within section 8(2): by making a specific reference to the arbitration provision, the Himalaya clause in the bill of lading confers on the third party a procedural right to arbitrate a tort claim made by the cargo interests.[20] According to section 8(2), if the cargo interests sue the third party in court, the latter has the right to choose whether to enforce his right to arbitrate; if he chooses to exercise that right, and if the arbitration provision in the bill of lading is 'in writing',[21] he 'would be treated for the purposes of that Act as a party to the arbitration agreement', so as to be able to apply for a stay of proceedings pursuant to section 9 of the Arbitration Act 1996.[22] The other possible argument is that the common law Himalaya clause approach operates by creating a contract between the cargo claimant and the third parties for the purpose of enforcing the benefits.[23] In this sense, it can be said that a servant,

agent or independent contractor is a party to the arbitration agreement for the purpose of enforcing the benefit of that agreement. If this is correct, he may apply for a stay of proceedings under section 9 of the Arbitration Act 1996 if sued by the cargo interests in court.

Promise not to sue clause

Sub-paragraph (d) of the 2016 clause contains what can be traditionally read as a promise not to sue clause (sub-paragraph (d)(i)), under which the merchant promises that he would not sue the third parties employed by the carrier. It also embodies an indemnity provision (sub-paragraph (d)(ii)), which provides that had the merchant nevertheless sued the third parties, he would indemnify the carrier against all consequences. The combination of these two provisions is normally referred to as a 'circular indemnity clause'. Previously, it had been held that a promise not to sue clause could be enforceable only by the carrier by applying for a stay of proceedings.[24] Sub-paragraph (d)(i) of the 2016 clause, however, apart from including the traditional promise not to sue clause, additionally states that the '*Servant* shall also *be entitled to enforce the foregoing covenant* against the Merchant'.[25] This additional phrase, by expressly giving third parties the right to enforce the promise not to sue clause, satisfies section 1(1)(a) of the 1999 Act, which allows a third party to enforce a term of a contract to which he is not a party if the contract expressly provides that he may enforce that term. Thus, in cases where the 1999 Act applies[26] and where this 2016 clause is used, third parties employed by the carrier may enforce the promise not to sue clause pursuant to that Act.

Just as it does to the general exemption clause, sub-paragraph (e) also expressly applies the agency mechanism and deeming provision to the promise not to sue clause. This may provide an answer to the doubt left by *The Starsin* – that is – whether a third party could

enforce a promise not to sue clause pursuant to the common law Himalaya clause approach. In that case, both the court of first instance and the Court of Appeal held that the provision relied on by the third party shipowners was a promise not to sue clause and that it could not be transferred to the third parties by the Himalaya mechanism.[27] The House of Lords dismissed the decisions of the lower courts and held that the clause relied on by the third parties was actually a general exemption clause, which could be enforceable by them pursuant to the Himalaya clause.[28] However, their Lordships did not explicitly decide (and they did not actually need to decide) on, if the clause at issue were a promise not to sue clause, whether the third parties could enforce it by virtue of the Himalaya clause. Now, subparagraph (e), by applying the agency part and deeming provision to the promise not to sue clause, makes it clear that a third party may enforce the promise not to sue clause through an effective Himalaya mechanism.

Agency mechanism and deeming provision

Like the traditional Himalaya clauses, sub-paragraph (e) of the 2016 clause similarly provides that the carrier acts as an agent or trustee for its servants, agents or independent contractors in entering into the benefits (the agency mechanism), and that such servants, agents and independent contractors are deemed to be parties to the contract for the purpose of such benefits (the so-called deeming provision). However, the position and the technology of drafting the wordings of the sub-paragraph

are different from the previous Himalaya clauses. Under a traditional Himalaya clause,[29] the agency part and the deeming provision usually appear immediately subsequent to the 'extending the carrier's rights' part. This always gives rise to the misconception that a third party, by invoking the Himalaya clause, can only enforce the benefits within the 'extending the carrier's rights' part, but cannot enforce any other benefit, eg the general exemption clause or the promise not to sue clause. In contrast, the 2016 clause, by relocating the agency mechanism and the deeming provision to the end of the clause, and by using the all-inclusive words 'For the purpose of sub-paragraphs (a)–(d)', wholly clarifies that the agency mechanism and the deeming provision apply to all those sub-paragraphs prior to subparagraph (e). This, as has been stated in the 2010 circular, is to ensure that the clause 'operates as effectively as possible for the protection of its intended beneficiaries'.

Conclusion

The changes of the 2016 clause are responses to the litigation disputes arising from the use of old versions of Himalaya clause in different jurisdictions. The clause is a response to the various aspects of disputes by clarifying the scope of the Himalaya clause, especially the scope of third party beneficiaries and the transferable benefits. As IG P&I and BIMCO have declared, Himalaya clauses are very complicated and it is not realistic to produce a clause which can be effective on every occasion in every jurisdiction. This is also why the 2016 clause contains various instruments to protect third parties – in case one of the methods should fail.

This commentary submits that these changes and clarifications made by the 2016 clause can resolve some of the difficulties with the previous Himalaya clauses, but surely whether the amendments can be given effect depends on their judicial recognition by different jurisdictions. Judicial recognition is awaited on the issue, for instance, of whether a third party can enforce the jurisdiction clause, arbitration clause and promise not to sue clause pursuant to the 2016 clause under English law, or whether a third party can enforce the arbitration clause by applying for a stay of proceedings under the English Arbitration Act 1996. Also, there are some difficulties inherent in the common law Himalaya clause approach, which could not be resolved simply by a revision of the wordings of the clauses. These difficulties include, for example, the risk of a Himalaya clause's being invalidated by Article III(8) of the Hague and Hague-Visby Rules[30] and the inefficiency of the approach when the third party's act causing the loss or damage of goods occurs prior to the commencement of his employment.[31]

An imperfection of the 2016 clause, which also exists in BIMCO's previous standard form of bills of lading, lies in that it fails to highlight the relevance of the principle of sub-bailment on terms. In almost every shipping company's terms of carriage, the carrier is usually given the entitlement to subcontract 'on any terms' the whole or any part of the carriage. By granting the carrier this right, the cargo owner is taken to have expressly consented to the sub-bailment of its goods to the sub-bailee 'on any terms', with the result that it will be bound by any terms of sub-bailment, unless the terms are unreasonable or unusual.[32]

To sum up, the 2016 clause should be welcomed and members of BIMCO and IG P&I are recommended to amend their contracts of carriage to incorporate this 2016 clause, with the retention of the carrier's express right to sub-contract 'on any terms'.

1 See https://www.shipownersclub.com/media/revised-himalaya-clause-for-bills-of-lading-sept-10.pdf.

2 See https://britanniapandi.com/wp-content/uploads/2017/09/Revised-Himalaya-Clause-for-bills-of-lading-and-other-contracts-Nov-2014-v2.pdf.

3 See eg BIMCO's Conlinebill 2016 cl 15; Multidoc 2016 cl 16. The clause is primarily intended for use in bills of lading and can be adapted for use in charterparties and other marine contracts.

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

5 543 U.S. 14, 2004 AMC 2705.

6 543 U.S. at 30–32, 2004 AMC 2705, 2716–17.

7 For a similar decision made by the UK Supreme Court in the charterparty context see *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20; [2016] 1 Lloyd's

Rep 629, where it was held that the charterers down the chain were 'agents' of the head time charterer, even though there was no contractual or other legal relationship between them: [19] (Lord Sumption JSC).

[8] See eg BIMCO's Conlinebill 2000 cl 15(a); Hapag-Lloyd's Terms cl 4(2); Evergreen Line's Terms cl 4(2); *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, [1974] 1 Lloyd's Rep 534 (PC); *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138, [1980] 2 Lloyd's Rep 317 (PC); *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, [2003] 1 Lloyd's Rep 571 (HL).

[9] [2003] UKHL 12.

[10] [1996] AC 650, [1996] 2 Lloyd's Rep 1 (PC).

[11] [1996] AC 650, 666 (Lord Goff).

[12] See the Hon. Justice Bradley Harle Giles 'The Cedric Barclay Memorial Lecture 1999: Some concerns arising from the enforcement of arbitration clauses in bills of lading' (1999) 14(2) *Australian and New Zealand Maritime Law Journal* 5, 13; Law Commission Report No 242, *Privity of Contract: Contracts for the Benefit of Third Parties* [14.18]. Also, in a New Zealand case, an arbitration clause was held not fall within the Himalaya clause: *Air New Zealand Ltd v The Ship Contship America* [1992] 1 NZLR 425 (High Court Auckland) 434 (Greig J).

[13] See Sir Guenter Treitel 'The Contracts (Rights of Third Parties) Act 1999 and the law of carriage of goods by sea' in Francis Rose (ed) *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP 2000) 345, 368; Hugh Beale (ed) *Chitty on Contracts* (32nd edn Sweet & Maxwell 2015) para 18-092 and n 557; Neil Andrew 'Strangers to justice no longer: the reversal of the privity rule under the Contracts (Rights of Third Parties) Act 1999' [2001] *CLJ* 353, 375.

[14] Andrew (n 13) 376.

[15] Giles (n 12) 13; Clare Ambrose 'When can a third party enforce an arbitration clause?' [2001] *JBL* 415, 417.

[16] See *United Arab Shipping v Galleon Industrial Ltd* (Commercial Court, 18 December 2000, unreported); see also Treitel (n 13) 368.

[17] See *Marinechance Shipping Ltd v Sebastian* (1998) 143 F.3d 216, 221 (USCA, 5th Cir); *LPR, SRL v Challenger Overseas, LLC*, 2000 AMC 2887, 2892 (US SDNY); *Acciai Speciali Terni USA Inc v M/V Berane* 181 F. Supp. 2d 458, 464; 2002 AMC 528, 533 (D Md 2002).

[18] See eg Maerskline's Terms cl 4(c); Hapag-Lloyd's Terms cl 4(2); UASC's Global Bill of lading Terms cl 5.3.

[19] This is also why Greig J held that the third party could not be granted a stay in the New Zealand case *Contship America* (n 12) 434. Section 4 of the New Zealand Arbitration (Foreign Agreements and Awards) Act 1982 (which has been replaced by the New Zealand Arbitration Act 1996) was similar to section 9 of the English Arbitration Act 1996.

[20] *Fortress Value Recovery Fund v Blue Sky Special Opportunities Fund* [2013] EWAC Civ 367, [2013] 1 Lloyd's Rep 606 (CA) at [31] (Tomlinson LJ).

[21] Arbitration Act 1996 s 5.

[22] See Explanatory Notes to the Contracts (Rights of Third Parties) Act 1999 to s 8(2) at [35].

[23] *The Eurymedon* (n 8) 167–68 (Lord Wilberforce); *The New York Star* (n 8) 305 (Barwick CJ); *The Mahkutai* (n 10) 664 (Lord Goff); *The Starsin* (n 8) at [25] (Lord Bingham), [59] Lord Steyn, [93] Lord Hoffmann, [152] (Lord Hobhouse), and [196] (Lord Millett).

[24] *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206; see also *The Marielle Bolten* [2009] EWHC 2552 (Comm), where the cargo interests' suit was brought in Brazil, an anti-suit injunction was granted.

[25] The same approach has been adopted by Maerskline's Terms. See cl 4(2)(b)(i).

[26] Although the Contracts (Rights of Third Parties) Act 1999, by ss 6(5), 6(6) and 6(7), excludes bills of lading which fall within the Carriage of Goods by Sea 1992 from its scope, it is submitted that it only prevents those cargo interests who are not the original parties from enforcing benefits pursuant to the 1999 Act, rather than the servants, agents or independent contractors employed by the carrier who undertake the carriage function. See Aikaterini Dedouli-Lazaraki 'Third party rights of suit in contracts for the carriage of goods by sea and the Contracts (Rights of Third Parties) Act 1999' (2008) 14 *JIML* 208, 214–15, 'where a stevedore or a wharfinger who is a third party to the contract of carriage of goods by sea seeks to enforce a terms of the contract, the 1999 Act may apply, because this person is not a holder of a bill of lading, a seaway bill or a ship's delivery order in the meaning of the 1992 Act'.

[27] [2000] 1 Lloyd's Rep 85, at 99–100 (Colman J), [2001] EWCA Civ 56, [2001] 1 Lloyd's Rep 437, [114]–[117] (Rix LJ), [166]–[171] (Chadwick LJ), [198]–[201] (Morritt V-C).

[28] [2003] UKHL 12, at [30] (Lord Bingham), [96]–[112] (Lord Hoffmann).

[29] Except for BIMCO's Conlinebill 2000 cl 15(d).

[30] The Starsin (n 8).

[31] *Raymond Burke Motors v Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155; *Lotus Cars Ltd v Southampton Cargo Handling Plc (The Rigoletto)* [2000] 2 All ER (Comm) 705, [2000] 2 Lloyd's Rep 532 (CA).

[32] *The Pioneer Container* [1994] 2 AC 324 (PC), at 341 and 346 (Lord Goff).