The enforcement of promise not to sue clauses by third parties

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The promise not to sue clause has been well established as enforceable by the carrier. However, the carrier's enforcement is bedevilled in the absence of his obligation to indemnify the third party in the sub-contract between them. This inevitably cripples the efficacy of the clause, which could be resolved if a third party could directly enforce it. After the implementation of the Contracts (Rights of Third Parties) Act 1999 and given the changes regarding the promise not to sue clause recently made by the IGP&I and BIMCO Revised Himalaya clause, it is time to consider the enforceability of the promise not to sue clause by third parties from the perspective of both the Act and the Himalaya clause approach. This article is the first in the literature to consider this issue and submits that third parties could enforce the clause pursuant to both of the approaches.

1 Introduction

The promise not to sue clause is an express promise made by the shipper in his contract of carriage with the carrier that he will not sue any servants, agents or independent contractors employed by the carrier. This clause was designed to obviate the effect of the common law doctrine of privity.[1] Under this doctrine, if sued by the cargo owner, a third party employed by the carrier cannot rely on the exclusion or limitation of liability clauses in either the contract of carriage or his own contract with the carrier. This would undermine and disturb the risk allocation and insurance arrangements based on these contractual exclusions and limitations.[2] By preventing cargo owners from suing third parties, the promise not to sue clause purports to maintain these contractual arrangements. Hence, the efficacy of the clause is crucial.

Under English law, it has been well established that the promise not to sue clause could be enforced by the carrier, as he is the contracting party to the contract of carriage.[3] However, as will be seen in the next section of this article, the different ways of enforcing the clause by the carrier all depend on his obligation to indemnify the third party in the contract between them. Without such an obligation on his part,[4] the clause is unlikely to be effectively enforced. This would give rise to particular

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[1] A third party can neither rely on nor be bound by the terms of a contract to which he is not a party: see *Tweddle v Atkinson* (1861) 1 B & S 393, 121 ER 762, 763 (Wightman J) 764 (Wightman and Crompton JJ); *Dunlop Pneumatic Type Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 853 (Viscount Haldane) (HL); *Scruttons Ltd v Midland Silicones* [1962] AC 446, 467 (Viscount Simonds) (HL).

[2] *The Mahkutai* [1996] AC 650, 661 (Lord Goff) (PC).

[3] *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206; *Whitesea Shipping and Trading Corp v El Paso Rio Clara Ltda (The Marielle Bolten)* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep 648.

[4] See eg *Gore v Van der Lann* [1967] 2 QB 31 (CA).

difficulties in the multimodal transport context: the contract between the multimodal transport operator and the sea carrier is usually contained in the bill of lading, which rarely imposes such an indemnity undertaking on the multimodal transport operator.[5]

All this is resolved if the clause can be directly enforced by third parties. This possibility, however, has never been properly explored by the current case law or literature. The recent changes regarding the promise not to sue clause made by the IGP&I and the BIMCO Revised Himalaya clause[6] demand an examination of its enforcement by third parties pursuant to the common law Himalaya clause approach. Twenty years after reform of the privity rule made by the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act), which allows a third party to enforce the terms of a contract to which he is not a party, it is also time to explore the enforceability of such a clause by third parties under the 1999 Act.

The significance of examining a third party's independent right to enforce the promise not to sue is threefold. First, as enforcement of the clause by the carrier depends largely on the existence of his obligation to indemnify the third party in the contract between them, in the absence of such an obligation enforcing the clause by the third party directly would be the only way that the clause could be enforced. Secondly, enforcing the clause in the third party's' own right is a more efficient course of action, which can directly prevent the cargo owner from suing them. Thirdly, if third parties can enforce the promise not to sue clause, this right could also apply to other clauses, the enforcement of which by third parties has given rise to difficulties in case law, in particular, exclusive jurisdiction[7] and arbitration clauses.[8]

Upon this basis, this article aims to examine whether or not, and how, third parties employed by carriers can directly enforce promise not to sue clauses. The answer given by this article is that they could do so by relying on both an effective Himalaya mechanism and on the 1999 Act.

To achieve the set aim, this article proceeds as follows. The next section examines the different methods to enforce the promise not to sue clause by the carrier, from which the difficulties with his enforcement are highlighted. The following two sections discuss how third parties themselves can enforce the clause pursuant to the common law Himalaya clause approach and the 1999 Act respectively. The penultimate section considers the broad application of the two approaches to the enforcement of exclusive jurisdiction clauses and arbitration clauses by third parties. The final section concludes.

2 The enforcement of the promise not to sue clause by the carrier

A promise not to sue clause typically provides that: 'The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods'.[9]

If the cargo owner nevertheless sues the third party in tort for damages, he will be in breach of the promise. As the promisee of the clause, the carrier can enforce it. So far, the authorities have shown that the carrier could do so by way of a stay of proceedings or anti-suit injunction, or by claiming damages or an indemnity against the cargo owner. However, the discussion in this section shows that the above methods for the carrier to enforce all depend on the existence of his duty to indemnify the third party. Without such a duty, none of the remedies would be effective.

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[5] See eg *The Pioneer Container* [1994] 2 AC 324; *The Mahkutai* (n 2).

[6] https://britanniapandi.com/wp-content/uploads/2017/09/Revised-Himalaya-Clause-for-bills-of-lading-and-other-contracts-Nov-2014-v2.pdf . For a commentary on this new clause see Lijie Song 'International Group of P&I Clubs/BIMCO Revised Himalaya Clause' (2018) 24 *JIML* 11.

[7] *The Mahkutai* (n 2); *Bouygues Offshore SA v Caspian Shipping Company and Others (No 2)* [1997] 2 Lloyd's Rep 485 (QB), [1997] ILPr 472 (CA).

[8] *Air New Zealand Ltd v The Ship Contship America* [1992] 1 NZLR 425 (New Zealand).

[9] See eg *The Elbe Maru* (n 3); *Broken Hill Co Ltd v Hapag-Lloyd Akeiengesellschaft* [1980] 2 NSWLR 572 (NSWSC); *Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft* [1980] 2 NSWLR 587 (NSWSC); *The Marielle Bolten* (n 3); Conline Bill cl 5.

2.1 Stay of proceedings

In *The Elbe Maru*, ignoring the promise not to sue, the cargo owner sued the haulier employed by the carrier before an English court. The carrier was granted a stay of that proceedings to enforce the promise under section 49(3) of the Senior Courts Act 1981. It should be noted that, under that section, the court has the discretion as to whether to grant the stay. The authorities have shown that to obtain a stay it is not enough for the carrier simply to show that the cargo owner is in breach of the promise not to sue. For example, in *Gore v Van der Lann*, the Court of Appeal held that the carrier could be granted a stay of the cargo owner's action if he could prove that the action was a 'fraud' upon him.[10] Similarly, in *The Elbe Maru*, Ackner J held that, to persuade the court to exercise its discretion to grant a stay, the carrier needed to establish a 'real possibility of [his] being prejudiced' if the cargo owner's claim was allowed to proceed.[11]

As to what constitutes such a 'fraud' or 'real possibility of prejudice', the Court of Appeal in *Gore v Van der Lann* held that the '*only* … reason for holding that the plaintiff's action could be a fraud on the [carrier] would be that the [carrier] would in law be obliged to indemnify its servants, the defendant, against his liability in negligence'.[12] However, in that case, the carrier did not have such a legal obligation, so the Court of Appeal ruled that the plaintiff's action was not a fraud on the carrier. By contrast, in *The Elbe Maru*, under the sub-contract between the carrier and the haulier, the carrier had such a contractual obligation to indemnify the haulier against the cargo owner's action. Ackner J decided that this obligation showed that the carrier had a real possibility of being prejudiced as he would suffer financial loss following the cargo owner's claim against the haulier.[13]

It should be noted that, to date, *The Elbe Maru* was the only authority under English law where the carrier has successfully obtained a stay to enforce the promise not to sue.[14] In other words, until now the only situation where the carrier has been granted a stay to enforce the clause under English law was that the carrier had a contractual obligation to indemnify the third party against the cargo owner's claim. Such an obligation was also what the Court of Appeal in *Gore v Van der Lann* clearly required. Based on these two authorities, *Scrutton on Charterparties and Bills of Lading* suggested that a stay would be granted to the carrier '*only* … where the promise<query?> [carrier] has a legal obligation to indemnify the third party against liability on the claim brought in breach of covenant'.[15] A similar view was shared in *Bills of Lading*.[16] By contrast, in *Carver on Bills of Lading* it was submitted that the carrier should obtain a stay, 'even though the success of such an action would not expose the carrier to any legal liability to the third party'.[17] However, such a submission was based on the judgment of Flaux J on the granting of an anti-suit injunction in *The Marielle Bolten*[18,19] which should not be applied in the same way to the stay of proceedings situation.

Given the limited number of reported cases on this issue under English law, it is uncertain what else can constitute prejudice against the carrier other than his contractual obligation to indemnify the

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[10] *Gore v Van der Lann* (n 4) 43 (Harman LJ), 45 (Salmon LJ).

[11] *The Elbe Maru* (n 3) 210. See also *The Chevalier Roze* [1983] 2 Lloyd's Rep 438, 441 (Parker J) (QB); *Deepak Fertilizers v ICI Chemicals and Polymers Ltd* [1999] 1 Lloyd's Rep 387, [79] (Stuart-Smith LJ) (CA).

[12] *Gore v Van der Lann* (n 4) 45–46 (Salmon LJ). The other two Lords Justice expressed the similar view: see at 42 (Willmer LJ), 44 (Harman LJ).

[13] *The Elbe Maru* (n 3) 210. See also the Australian case *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S (The Tarago)* [1999] FCA 178 (FCA).

[14] A stay was also sought by the carrier in *The Chevalier Roze* (n 11). However, in that case, the act of the third party which caused the loss of cargo was outside the scope of the promise not to sue clause, so that the carrier was not granted the stay. Therefore, Parker J did not consider whether the carrier could prove that there was a real possibility of prejudice against him.

[15] Sir Bernard Eder (ed) *Scrutton on Charterparties and Bills of Lading* (23rd edn Sweet & Maxwell 2015) para 3-057.

[16] Sir Richard Aikens, Richard Lord and Michael Bools *Bills of Lading* (2nd edn Informa 2015) para 9.128: the prejudice which the carrier should show in order to be granted a stay 'will normally be an actual or threatened indemnity claim against him by C [the third party]'.

[17] Sir Guenter Treitel and Francis Reynolds *Carver on Bills of Lading* (4th edn Sweet & Maxwell 2017) para 7-068.

[18] *The Marielle Bolten* (n 3).

[19] *Carver on Bills of Lading* (n 17) fn 476.

third party.[20] It follows that, while it might be accepted that the carrier can prove prejudice without establishing his legal obligation to indemnify the third party,[21] there is no guidance on what other situations could count as such. Thus, it is fair to say that under English law the only well-established situation where a third party could certainly be protected by the carrier's obtaining a stay of the cargo owner's action is when there is a legal obligation on him to indemnify the third party against such an action. Without such an obligation, the carrier might be unlikely to be granted a stay.

2.2 Anti-suit injunction

If the cargo owner sues the third party in a foreign instead of an English court, according to Flaux J's decision in *The Marielle Bolten* the carrier might be able to enforce the promise not to sue by applying for an anti-suit injunction to restrain the cargo owner's action. In that case, the bill of lading contained both a promise not to sue and an exclusive English jurisdiction clause. After the cargo was damaged, the cargo insurer sued the carrier and third parties in Brazil for damages. Relying on the promise not to sue, the carrier applied for an anti-suit injunction restraining the cargo insurer's Brazilian proceedings against the third parties.

Flaux J held that the test for justifying an anti-suit injunction should be the same as that for justifying a stay of proceedings as established in *The Elbe Maru*: the carrier needed to 'show an interest in obtaining an injunction restraining the proceedings against the third parties which is more than merely academic'.[22] In considering whether the carrier had such an interest, he held that the continuation of the cargo insurer's Brazilian proceedings against the third parties would have the result of depriving the carrier of the benefit of the exclusive English jurisdiction clause in the bill of lading. Based on this fact, he decided that the carrier had a sufficient practical interest to obtain the injunction.[23]

It can be seen that the Brazilian proceedings' deprivation of the benefits the carrier could have obtained from the exclusive English jurisdiction clause[24] in the bill of lading is how the carrier would be prejudiced by the cargo interest's suit against the third parties. Presumably, without the exclusive English jurisdiction clause, the carrier might not be able to prove his being prejudiced by the cargo interest's suit. Therefore, it is very unlikely that the judge would grant the injunction merely upon the promise not to sue clause.

Moreover, in *The Marielle Bolten*, the court in which the cargo insurers brought the legal proceedings was a non-EU court. This particular fact is submitted to be another limit to the application of the case: an anti-suit injunction would not be granted in favour of the carrier to restrain the cargo owner's proceedings in an EU court because that would conflict with the power of the court of a Member State under the Brussels Recast Regulation to rule on its own jurisdiction.[25]

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[20] In the New South Wales case of *Broken Hill Co Ltd v Hapag-Lloyd Aktiengesellschaft* [1980] 2 NSWLR 572 (NSWSC), Yeldham J held that the rates of carriage between the contracting carrier and the road carrier (the third party in that case) might be influenced by the latter's knowledge of the existence of a promise not to sue clause in the bill so, if the road carrier was sued by the cargo owner, he would probably increase the rates of carriage afterwards. Based on this commercial consideration, the judge decided that the carrier had a sufficient interest to seek the stay (at 583); see also Norman Palmer *Palmer on Bailment* (3rd edn Sweet & Maxwell 2009) para 38-154. It is debatable whether the English courts would adopt the same view.

[21] Paul Todd *Principle of the Carriage of Goods by Sea* (Routledge 2016) 305.

[22] ibid [60].

[23] ibid [61]–[62].

[24] Article 25 of the Brussels Recast Regulation (Regulation 1215/2012) provides that if the contractual parties agree that a court of an EU Member State is to have exclusive jurisdiction to determine the disputes arising from the contract, that court shall have exclusive jurisdiction. Where the parties designate English courts to have exclusive jurisdiction, but one party sues the other in a foreign court, the other party might want to apply for an anti-suit injunction before an English court to restrain that foreign proceeding. However, under English law, an anti-suit injunction is a decretory <discretionary?> remedy; the justification for granting an injunction to restrain proceedings in breach of an exclusive jurisdiction clause is that 'without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy': see *Aggeliki Charis Compania Maritime SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, 96 (Millett LJ) (CA). Flaux J's reasoning in *The Marielle Bolten* was in line with this principle.

[25] Case C-159/02 *Turner v Grovit* [2005] 1 AC 101; Case C-185/07 *Ilianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (The Front Comor)* [2009] 1 AC 1138, which was followed again by the English court in *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [2018] 2 Lloyd's Rep 80 (QB).

In this situation, the carrier might only be able to claim damages or an indemnity against the cargo owner before an English court.[26] However, as will be discussed below, this is also not easy without the carrier's contractual obligation to indemnify the third party in the case of the cargo owner's suit.

Thus, it can be said that the anti-suit injunction as the carrier's remedy against the cargo owner's breach of the promise not to sue clause has very restricted application: it can only be issued when the bill contains an exclusive jurisdiction clause in favour of the English courts and when the cargo owner brings legal proceedings in a non-EU court.

2.3 Damages

Under general contract law, when there is a breach of contract, the innocent contracting party is entitled to damages. However, the damages he is entitled to are only those representing his own loss, not those of a third party.[27] Applying this rule to the promise not to sue context, when a cargo claimant sues a third party in tort, the carrier can only claim damages for his own loss, not for the third party's loss. However, the problem here is that, without his obligation to indemnify the third party, the loss suffered by the carrier arising from the cargo owner's breach of the promise might only be nominal.

Under the rules of measure of damages, the innocent party's entitlement to claim damages from the breaching party is subject to the 'remoteness' rule. That is, he can receive the damages which may reasonably be considered as arising 'in the usual course of things', or 'which may reasonably be supposed to have been in the contemplation of both parties' at the time of making the contract.[28] If, as in the situation in *The Elbe Maru*, the carrier has a contractual obligation in his sub-contract with the third party to indemnify the latter for the damages the latter will pay to the cargo owner, the carrier might be able to claim against the cargo owner for the substantial damages representing the sums they have had to pay out to the third party plus the cost of resisting such claim.[29] This is essentially what Lord Reid had suggested in *Scruttons Ltd v Midland Silicones* as a possible 'roundabout way' by which the third party could be protected:

> If A, wishing to protect X, gives to X an enforceable indemnity, and contracts with B that B will not sue X, informing B of the indemnity, and then B does sue X in breach of his contract with A, it may be that *A can recover from B as damages* the sum which he has to pay X under the indemnity, X having had to pay it to B.[30]

Here, A, X and B stand for the carrier, the third party and the cargo owner, respectively. However, without such a contractual indemnity obligation on the part of the carrier in the sub-contract, it might be difficult for the carrier to argue that he himself would suffer any loss arising from the cargo claimant's action.

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[26] *The Alexandros T* [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544, [15] (Longmore LJ) (CA): '[u]nlike damages, "the vice of anti-suit injunction is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with *lites alibi pendentes* and related actions"'. Therefore, the claims in damages did not infringe EU law.

[27] *Beswick v Beswick* [1968] AC 58, 72–73 (Lord Reid) (HL); *The Albazero* [1977] AC 774, 845 (Lord Diplock); *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL); *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1993] 1 AC 85, 114 (Lord Browne-Wilkinson) (HL); *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 522 (Lord Clyde), 563 (Lord Jauncey) (HL); Hugh Beale (ed) *Chitty on Contracts* (32nd edn Sweet & Maxwell 2015) para 18-051. This general rule was denied by Lord Denning in *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468, 1474 (CA), whose view was later disapproved by the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, although the actual decision in *Jackson* was supported. See the criticism of this rule: *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 538–39 and 544 (Lord Goff) (HL); G H Treitel 'Damages in respect of a third party's loss' (1998) 114 LQR 527; Ian N Duncan Wallace 'Third party damages: no legal black hole?' (1999) 115 LQR 394.

[28] *Hadley v Baxendale* (1854) 9 Ex 341, 354–55 (Alderson B).

[29] *The Elbe Maru* (n 3) 210 (Ackner J).

[30] *Scruttons Ltd v Midland Silicones* (n 1) 473 (emphasis added).

That said, there is a 'transferred loss'[31] exception to the general rule that the promisee can only claim damages for his own loss: even if the promisee himself does not suffer the loss, he might be able to claim substantial damages for the loss suffered by the third party and account to the third party for the damages which he has recovered. If this exception can be applied to the promise not to sue context, one might argue that the carrier can claim substantial damages suffered by third parties employed by him even if he himself suffers no loss from the cargo owner's claim against those third parties. However, as will be submitted below, this exception does not have wide application.

The 'transferred loss' exception was applied to an implied promise not to sue context by Flaux J in *The Alexandros T*.[32] The case involved insurance settlement agreements between the assureds and underwriters ordered by the English court following the underlying insurance contract disputes between them. The settlement agreements provided that, upon the assureds' accepting certain settlement fees from the underwriters, all and any claims they might have under the insurance policies against the 'Underwriters and/or against any of its *servants* and/or *agents*' would be fully and finally settled. Despite these agreements, the assureds nevertheless sued the underwriters and their servants and agents in Greece. The underwriters and their employees subsequently sought remedies resulting from the assureds' breach of the settlement agreements before an English court.

Having decided that the above-mentioned provision in the settlement agreements implied<correct?> the assureds' promise not to sue the underwriters and their servants and agents,[33] Flaux J considered what remedies the underwriters were entitled to against the assureds. He accepted the argument that if the third party employees failed to claim damages under the 1999 Act, the underwriters could recover the losses suffered by those third parties from the assureds. The reasons given by the judge were concise: if the third party employees failed to claim damages themselves and, if there was an intention under the settlement agreement to benefit them, the case would be exceptional in that the underwriters could recover substantial damages for the third parties' losses.[34] Flaux J suggested that, whenever C could not claim damages himself and there was an express intention from the AB contract to benefit C, B would be able to claim substantial damages for C's loss.

It is debatable whether Flaux J was correct in extending the 'transferred loss' exception to the facts before him. As the Supreme Court has re-emphasised, it was a 'limited exception', which has been recognised 'only in cases where the third party suffers loss as the intended *transferee of the property* affected by the breach'.[35] This proposition was based on the fact that the exception has so far only been successfully applied where the shippers claimed from the carriers the damages suffered by the consignees of the goods,[36] and where the developers of property claimed the damages representing the loss suffered by the third parties who purchased the property.[37] The carrier's claiming damages following the cargo owner's breach of the promise not to sue clause does not fall within either of these two situations. Moreover, the third parties employed by the carrier can hardly be said to be the 'intended transferees of the property' affected by the cargo owner's breach of the promise.

Thus, the 'transferred loss' exception should have no application in the promise not to sue context or the insurance settlement agreement context in *The Alexandros T*. It follows that, without a legal

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[31] This name was used by the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 WLR 1161, [14] (Lord Sumption JSC), [52] (Lord Mance JSC), [102] (Lord Neuberger PSC) and *The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793, [94] (Lord Sumption).

[32] [2014] EWHC 3068 (Comm), [2015] 2 All ER (Comm) 747 (QB).

[33] ibid [72] (Flaux J).

[34] ibid [93].

[35] *Swynson Ltd v Lowick Rose LLP* (n 33) [14] (Lord Sumption JSC). See also Lord Mance's judgment at [52]: the exception only exists 'where it was in the contemplation of the parties when the contract was made that the property, the subject of the contract and the breach, would be transferred to or occupied by a third party, who would in consequence suffer the loss arising from its breach'.

[36] *Dunlop v Lambert* (1893) 6 Cl & F 600 (HL); *The Albazero* [1977] AC 774 (HL).

[37] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* (n 29).

obligation to indemnify the third party against the claim brought by the cargo owner, the carrier might not be able to claim any substantial damages from the cargo owner to enforce the promise not to sue clause.

2.4 Indemnity

In the bill of lading, a promise not to sue clause is usually followed by an 'indemnity provision' obliging the cargo owner to indemnify the carrier if the former, breaching the promise, sues the third party:[38] '[A]nd if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof'.

If, as in *The Elbe Maru*, there is a contractual indemnity clause in the sub-contract between the carrier and the third party obliging the carrier to indemnify the third party against the cargo owner's action, these two indemnity provisions would create a circle of indemnities. Where there is such a 'true circular indemnity',[39] according to Ackner J, the indemnity provision coupled to the promise not to sue clause was 'providing in express terms for the remedy which should follow if there is a reach of the undertaking' not to sue the third party.[40] Under these circumstances, the carrier could be indemnified by the cargo owner for what he would have to indemnify the third party against.

However, similarly to enforcing the promise not to sue clause by applying for a stay of proceedings or by claiming damages, the absence of the carrier's obligation to indemnify the third party in the sub-contract is also likely to cause difficulty in the carrier's claim under the indemnity provision. This is because, under these circumstances, as discussed above, the consequential loss of the carrier following the cargo owner's claim in this situation is zero. Without such an obligation on the part of the carrier, there is a risk that the indemnity provision in the bill might be alleged to be invalid and unenforceable as a penalty:[41] since the carrier does not have a legal obligation to indemnify the third party against the claim by the cargo owner, the cargo owner might argue that the indemnity provision is a secondary obligation which imposes a detriment on him out of all proportion to any legitimate interest of the carrier in the enforcement of the promise not to sue clause.[42]

2.5 Interim summary

The discussion of *The Marielle Bolten* shows that, while the carrier's enforcement of the promise not to sue clause by an anti-suit injunction might not depend on the carrier's indemnity obligation, it has very limited application: it can only be granted when there is an exclusive English jurisdiction clause in the bill and when the cargo owner brings legal proceedings in a non-EU court. The carrier's enforcement of the clause by other means, that is, by applying for a stay of proceedings, by claiming damages or by claiming indemnity all depend on the existence of an enforceable indemnity from the third party to the carrier.

Such an obligation is, however, apparently detrimental and risky for the carrier. He would be concerned about being unable to obtain an indemnity from the cargo owner afterwards and therefore would obviously have a strong incentive not to agree to it.[43] Where the carrier does not have such a contractual obligation to indemnify the third party,[44] the method of enforcement described above will be ineffective, and enforcing the promise not to sue clause by the third party himself will be the only recourse against the cargo owner's breach of the promise.

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[38] See eg *The Elbe Maru* (n 3).
[39] Todd (n 21) 303.
[40] *The Elbe Maru* (n 3) 210.
[41] *Carver on Bills of Lading* (n 17) para 7-069.
[42] For the penalty test see *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67, [2016] AC 1172, [32] (Lord Neuberger and Lord Sumption), [152] (Lord Mance), [255] (Lord Hodge, endorsed by Lord Toulson (dissenting) at [293]) (SC).
[43] Todd (n 21) 304.
[44] See eg *Gore v Van der Lann* (n 4).

It might be true that the stevedores' or terminal operators' own terms[45] historically imposed such an obligation on the carrier. However, this is not necessarily the norm in a multimodal transport context or through bills of lading. For example, when a multimodal transport operator (contracting carrier) sub-contracts the sea voyage to a shipowner, the shipowner would be the third party for the purposes of this article. In this situation, the 'sub-contract' which one should look at in order to determine if the multimodal transport operator has the obligation to indemnify the shipowner in the event of the latter's being sued by the cargo owner is the bill of lading issued by the latter. However, it is very rare for bills of lading to impose such an indemnity undertaking on the multimodal transport operator, that is, the named shipper in the bill.[46]

As multimodal transport becomes more frequent, investigation into enforceability of the promise not to sue by third parties will inevitably become increasingly significant. Even if the carrier agrees to undertake the indemnity obligation, allowing the third party to enforce the promise not to sue clause is obviously a more efficient recourse. The enforcement of the clause by a third party will give the third party, as the defendant of the cargo owner's claim, a direct right to defend. This would render the involvement of and the cost of litigation from the carrier, as a stranger to the legal proceedings, unnecessary.[47]

Also, the methods to enforce the clause by the carrier, namely, stay of proceedings, anti-suit injunction and claiming damages or indemnity, are only to remedy the cargo owner's breach,[48] while allowing the third party to enforce the clause as a defence can directly prevent the cargo owner from suing him.

Given that the third party is a stranger to the promise not to sue clause and because of the privity rule, it is true that he cannot directly enforce it without relying on any devices designed to circumvent the rule.[49] Recently, the new Himalaya clause produced by the International Group of P&I Clubs (IGP&I),[50] which has been incorporated into BIMCO's 2016 standard form of bills of lading,[51] has made apparent changes regarding the promise not to sue clause compared with the traditional Himalaya clauses. Those changes inspired and demanded an examination of the enforceability of the promise not to sue clause by third parties pursuant to the Himalaya clause approach.

Moreover, the 1999 Act has never been linked to the enforcement of the promise not to sue clause by third parties employed by the carrier. As the Act reforms the privity rule and allows a third party to enforce the terms of a contract, it is worthwhile considering the enforceability of the promise not to sue by third parties under the Act.

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[45] See eg APM Stevedoring and Terminal Services Agreement cl 10(g): https://www.sec.gov/Archives/edgar/data/1299064/000119312505065052/dex1018.htm; General Conditions of the Association of Rotterdam Stevedores art 8.6: https://www.broekmanlogistics.com/media/files/terms_conditions/Rotterdam-Stevedores-Conditions—English-.pdf.

[46] For instance, in *The Pioneer Container* (n 5), the third party was in fact the sea carrier and the bill of lading issued by him to the contractual carrier did not impose an obligation on the contractual carrier to indemnify the sea carrier against the cargo owner's action. Instead, as the standard forms of bills of lading usually do, it only provided that the contractual carrier would indemnify the sea carrier against the contractual carrier's claim to third parties employed by the sea carrier: eg, BIMCO's Conlinebill 2016 cl 15(d)(ii) and Maerskline's Terms of Carriage cl 4.2(b)(ii). As mentioned above, this is an indemnity provision coupled with the promise not to sue clause in this contract of carriage. Similarly, in *The Mahkutai* (n 2), the contracting carrier was the time charterer and the actual carrier was the shipowner. The charterparty between them did not contain an indemnity obligation on the charterer as well.

[47] This is also the position in a recent US case, *Royal SMIT Transformers BV v Onego Shipping & Chartering BV*, 898 F.3d 543 (5th Cir CA 2018). In this case, the owners of transformers contracted with an intermediary to arrange the transport of transformers. The intermediary issued a multimodal through bill of lading and sub-contracted the sea carriage to the ocean carriers. Being sued by the owners for the damage to the transformers, the ocean carriers successfully defended themselves by relying on the promise not to sue clause in the bill, with no involvement from the intermediary in the proceedings.

[48] Ralph De Wit *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para 16.19: 'the circular indemnity clause cannot be used preventively, but only remedially'.

[49] *Beswick v Beswick* (n 29); *Snelling v John G Snelling Ltd* [1973] QB 87.

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

[51] See eg BIMCO's Conlinebill 2016 cl 15; Multidoc 2016 cl 16.

As such the two following sections will discuss whether third parties could enforce the clause pursuant to the Himalaya mechanism and the 1999 Act respectively.

3 Himalaya clause approach

The Himalaya clause approach was inspired by Lord Reid in *Scruttons Ltd v Midland Silicones*,[52] who set out conditions for a third party employed by the carrier to rely on the benefits available to the carrier in the bill. A typical Himalaya clause catering for those conditions is usually constituted by the following elements: it normally provides that every exemption, limitation and defence applicable to the carrier under the bill of lading will also be available to the servants, agents and independent contractors of the carrier -– the 'extending the carrier's rights' part; after this, it goes on to provide that the carrier is, or will be, deemed to be acting as agent on behalf of those persons in entering into the clause – the 'agency' part; and, this is sometimes followed by a 'deeming provision', which provides that all those third parties shall to that extent be deemed to be parties to the contract of carriage.

This clause operates by creating a contract between the cargo owner and the third party via the agency of the carrier, so that the third party will have privity with the cargo owner for the sole purpose of enforcing the benefits available to the carrier under the bill of lading, including for example exemptions, limitations, immunities and defences.[53]

As a promise not to sue only exempts the liability of the *third party*, it is not one of the defences cited above protecting the *carrier himself*. Because of this, the court of first instance[54] and the Court of Appeal[55] in *The Starsin* decided that the promise not to sue could not be extended to third parties by the Himalaya clause approach. Dismissing those decisions, the House of Lords held that the defence relied on by the third parties was not a promise not to sue but a general exemption clause.

The decision of the majority was that the third parties in that case – shipowners – could not enforce it, as it had the effect of completely exempting their liabilities, which was invalidated by Article III(8) of Hague Rules. However, as *obiter*, the House of Lords did hold that the clause, on a proper construction, could extend the benefit of the general exemption clause to third parties.

This section of the article argues that their Lordships' reasoning could also be applied to the promise not to sue clause. It then suggests how a Himalaya clause could be drafted to extend the benefit of the promise not to sue clause to the third parties, whilst examining the possible argument against and limit of the third parties' enforcement. It also evaluates how the IGP&I/BIMCO Himalaya clause ensures the promise not to sue clause to third parties.

3.1 *The Starsin*

In *The Starsin*, the shipowners time chartered the vessel out to the charterers, who issued the bills of lading as carriers. After the goods were damaged by the alleged bad stowage, the cargo owners sued the shipowners in tort. The shipowners invoked the following provision in the bill of lading:

> (1) It is hereby expressly agreed that *no* servant or agent of the carrier … and including every independent contractor from time to time employed by the carrier shall in any circumstances whatsoever be *under any liability* to the shipper, for any loss or damage … (2) and, without prejudice

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[52] *Scruttons Ltd v Midland Silicones* (n 1) 474. The clause was named after the case *Alder v Dickson (The Himalaya)* [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158 (CA), where a passenger suffered injuries because of the fault of master of a cruise ship and the master was held not entitled to enforce the exclusion clause in the contract for cruise.

[53] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1974] 1 Lloyd's Rep 534, [1975] AC 154, 167–68 (Lord Wilberforce) (PC); *Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty (The New York Star)* [1979] 1 Lloyd's Rep 298, 305 (Barwick CJ) (High Court of Australia); *The Mahkutai* (n 2) 664 (Lord Goff); *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715, [25] (Lord Bingham), [59] (Lord Steyn), [93] (Lord Hoffmann), [152] (Lord Hobhouse), [196] (Lord Millett) (HL).

[54] [2000] 1 Lloyd's Rep 85.

[55] [2001] EWCA Civ 56, [2001] 1 Lloyd's Rep 437.

to the generality of the provisions in this Bill of Lading, *every exemption, limitation, condition and liberty … applicable to the carrier* … shall also be available to and shall extend to protect every such servant or agent of the carrier [*] is or shall be deemed to be acting *on behalf of* … all … his servants or agents (including every independent contractor) … (3) and all such persons shall to this extent *be deemed to be parties* to the contract contained in or evidenced by this Bill of Lading.

The numbers did not exist in the original clause but were inserted by the House of Lords[56] for ease of reference. It was agreed that there was an omission at the place of the asterisk in the square brackets. Part (1) is a general exemption clause. In part (2), the sentence prior to and subsequent to the square brackets are the 'extending the carrier's rights' part and the 'agency' part respectively. Part (3) is the 'deeming provision'.

As negligence in stowage was not an excepted peril in the exclusion clauses, the shipowners would not defeat the cargo owner's claim by relying on any of the exclusions. They consequently invoked part (1) as a defence, contending that they were entitled to be exempt from any liability whatsoever in respect of the goods.

In order to construe the clause, the House of Lords needed to decide what words had been omitted in the square brackets. Lord Bingham, with whom the other Lordships all agreed, said that the clause relied on by the shipowners was similar to Conline bill, a standard form. According to the Conline bill, the missing words in the brackets were 'acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier'.[57]

With regard to the key for the success of a defence, Lord Hoffmann said that it was the agency mechanism: it depended on whether or not the agency mechanism of the Himalaya clause applied to the defence, regardless of whether the defence was a general exemption, a package limitation or a time bar.[58] As to which part of the Himalaya clause created the agency mechanism, Lord Hoffmann said that it was the 'agency part' in part (2).[59]

Based on Lord Bingham's interpolation, Lord Hoffmann said that 'for the purpose of all the foregoing provisions of this clause' clearly showed that the agency part applied to both parts (1) and (2).[60] Therefore, the clause made it clear that the carrier contracted as agent for the third party for the purpose of both parts (1) and (2). In other words, the general exemption clause was within the scope of the benefits extended by the Himalaya clause. Thus, as Lord Millett held, a construction of the whole clause showed that the Himalaya clause did indeed create a contract between the cargo owner and the third party, which exempted the latter from all liability to the cargo owner.[61]

In essence, the House of Lords overturned the lower courts' construction that the Himalaya clause at issue could only extend to third parties those rights protecting the carrier himself which were listed in part (2).[62] In their Lordships' view, the nature of the defence does not matter; as long as the agency part centring the Himalaya clause applies to it, it could be made available to third parties.

3.2 The application of Himalaya clause to promise not to sue clause

Applying their Lordships' view to the general exemption clause, it is submitted that, as long as the agency part of the Himalaya clause clearly applies to the promise not to sue, the Himalaya clause will extend the benefit of it to the third parties. Presumably, if the general exemption in part (1) of

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[56] *The Starsin* (n 55) [20] (Lord Bingham).

[57] ibid [22]–[23] (Lord Bingham).

[58] ibid [101]–[102] (Lord Hoffmann). This judgment was based on Beattie J's decision in the New Zealand Supreme Court in *The Eurymedon* [1971] 2 Lloyd's Rep 399, 403 and 408, where the third party stevedores were sued by the cargo owners and they sought to rely on three defences – general exemption clause, package limitation under art IV(5) of the Hague Rules and time bar under art III(6) of the Hague Rules.

[59] *The Starsin* (n 55) [97]–[98] (Lord Hoffmann); see also Lord Bingham's judgment at [26].

[60] ibid [97].

[61] ibid [201] (Lord Millett).

[62] *The Starsin* (n 56) 100 (Colman J); *The Starsin* (n 57) [116](4) (Rix LJ) and [171] (Chadwick LJ).

the clause were replaced with a promise not to sue clause, a proper construction of the wording of the whole clause might still show that the agency part in part (2) applies to the promise not to sue so that it could be extended to the third party. This argument could be further supported by the fact that the promise not to sue and the general exemption have a similar effect in terms of third party protection; <rephrase>

It is submitted that the main reason why disputes on the enforcement of the general exemption clause by the Himalaya mechanism have arisen in *The Starsin* is the structure used by and the omission of the wording in the Himalaya clause. There, the general exemption clause, the 'extending the carrier's rights' part and the agency and deeming provisions were written closely one after another in this sequence under one big paragraph without proper separation. In the absence of the opening words of the agency provision, which was supposed to be '… for the purpose of all the foregoing provisions of this clause', the whole clause would mislead one to conclude that the agency part only applies to the 'extending the carrier's rights' part immediately prior to it but not to the general exemption clause.

It should be noted that the interpolation issue was not addressed before the lower courts, so they did not consider this point and simply inserted 'who' as the missing word.[63] Presumably, the lack of clear language applying the agency part to part (1), which was mistakenly regarded by them as a promise not to sue, was the key reason why the lower courts held that it could not be extended by the Himalaya clause.

It follows that if a Himalaya clause clearly provides that the carrier acts as agent on behalf of the third parties in entering into a Himalaya clause for the purpose of a general exemption clause or a promise not to sue clause, it might be decided that the clause falls within the scope of the Himalaya clause.[64] This is exactly what the IGP&I/BIMCO Himalaya clause has done, as discussed further below.

One possible argument against extending the promise not to sue to third parties is the previous authorities' explanation of the function of Himalaya clauses. In *The New York Star*, Lord Wilberforce stated that the Himalaya clause was to extend to third parties 'the benefit of defences and immunities conferred by the bill of lading upon the carrier'.[65] Similarly, Lord Goff in *The Mahkutai* said that the function of the Himalaya clause was to 'prevent the cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules)'.[66] Relying on these two statements, the lower courts in *The Starsin* said that the Himalaya clauses only functioned in extending the contractual defences to the carrier; as the promise not to sue was not a carrier's defence but can only be enforced by him by a stay of proceedings, it could not be conferred on third parties by the Himalaya clause.[67]

Rejecting this argument, Lord Millett[68] and Lord Hoffmann[69] said that those descriptions of functions of the Himalaya clauses were addressed to the clauses used in those cases, which could not be read as laying down the only function of all Himalaya clauses. This indicates that, if it is correctly expressed in writing, a Himalaya clause may function to extend other terms to third parties as well.

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[63] *The Starsin* (n 56) 98 (Colman J); *The Starsin* (n 57) [111] (Rix LJ) and [199] (Morritt V-C).

[64] In the US case *Royal SMIT* (n 47), although the third party ocean carriers were held able to enforce the promise not to sue clause by virtue of the Himalaya clause, the Fifth Circuit Court of Appeal did not expressly mention the relevance of the agency mechanism in this regard. This is presumably because US law adopts a more relaxed approach to Himalaya clauses than English law does: as long as the third party is the intended beneficiary of the Himalaya clause, he will be able to enforce the benefits of it; therefore, it seems there is no need to prove that the carrier acts as the agent on behalf of the third party in entering into the Himalaya clause. This 'intended beneficiary' principle was established by the US Supreme Court in *Robert C Herd Co v Krawill*, 359 US 297 (1959), which was confirmed by the Supreme Court in *Norfolk Southern Railway Co v Kirby*, 543 US 14 (2004), which was in turn relied on by the Fifth Circuit Court of Appeal in *Roya SMIT*.

[65] *The New York Star* [1975] AC 154, 142 <check>(Lord Wilberforce) (PC).

[66] *The Mahkutai* (n 2) 666 (Lord Goff).

[67] *The Starsin* (n 57) [116](1) (Rix LJ), [169] (Chadwick LJ).

[68] *The Starsin* (n 55) [200] (Lord Millett).

[69] ibid [110] (Lord Hoffmann).

This broad understanding even meant that it was possible for a Himalaya clause to extend the benefit of the promise not to sue clause to third parties. In *The Starsin*, after missing words had been interpolated, the Himalaya clause applied the agency part to the general exemption clause so as to function to extend the benefit of the general exemption clause to third parties. It is submitted that a similar way of writing can also ensure the Himalaya clause functions to extend the benefit of the promise not to sue clause to third parties.

Although this article suggests that a third party can in theory enforce the promise not to sue clause directly, it is acknowledged that one possible limit of the enforcement is that it might be invalidated by Article III(8) of the Hague or Hague-Visby Rules if they are incorporated into the bill. This is because the promise not to sue clause has the effect, as a general exemption, of completely relieving third parties of their liabilities, and Article III(8) renders void any provisions purporting to release the liabilities of the 'carrier and the ship'.

However, this does not mean that the clause will invariably be void. As the House of Lords held in *The Starsin*, whether a clause is invalidated by Article III(8) depends on whether the resulting contract between the cargo owner and the third party brought by the Himalaya clause is a 'contract of carriage' within the meaning of Article I(b) of the Rules. A collective of reading of the majority's views[70] showed that it is such a 'contract of carriage' only if the Himalaya clause contains a 'deeming provision' that the third party is a party to the contract of carriage for the purpose of enforcing the benefits contained in it[71] and if the third party performs the actual sea carriage of goods, eg as shipowners or bareboat charterers.[72,73]

Applying this theory to the promise not to sue clause, it is clear that the clause will only be invalidated by Article III(8) of the Hague Rules if the third party is performing the actual sea carriage and if there is a 'deeming provision' in the bill. If the third parties are, for example, stevedores or terminal operators, or if there is no 'deeming provision' in the Himalaya clause, the promise not to sue clause would not be rendered void by Article III(8).

3.3 IGP&I/BIMCO Himalaya Clause

The IGP&I/BIMCO's newly revised Himalaya clause contains a promise not to sue clause under sub-paragraph (d)(i), which is written in terms similar to traditional Himalaya clauses:

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

However, unlike traditional Himalaya clauses, which write all the provisions together in one paragraph, the new clause separates and numbers each provision: sub-paragraph (a) defines and lists the third parties protected by the clause; sub-paragraph (b) is a general exemption clause;

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[70] The majority did not answer the question in exactly the same way. Lord Steyn dissented on this point, holding that the resulting contract did not constitute a 'contract of carriage' within the meaning of the Hague Rules so that it was not invalidated by art III(8): see *The Starsin* (n 55) at [59].

[71] ibid [114] (Lord Hoffmann), [206]–[208] (Lord Millett) and [153]–[156] (Lord Hobhouse).

[72] ibid [34] (Lord Bingham) and [153]–[156] (Lord Hobhouse).

[73] Flaux J said in *The Marielle Bolten* that the reason why the majority in *The Starsin* concluded that the Himalaya clause constituted a 'contract of carriage' within the Hague Rules was the 'deeming provision' in the clause, not the relevant third party's performing of the 'carriage function': *The Marielle Bolten* (n 3) at [42]. However, in that case, the issue of the validity of the promise not to sue clause would never have arisen had the insurers of the cargo owners not argued that the third parties were performing the function of actual carriage of goods. Moreover, art III(8) of the Rules only invalidates any clause trying to relieve *the carrier or the ship* from liability. A third party who does not perform the actual carriage of goods would be neither of these things: see Simon Baughen 'Terminal operators and liability for cargo claims under English law' in Bariş Soyer and Andrew Tettenborn (eds) *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 267, 273–74. Therefore, both of these factors are crucial for determining whether or not a Himalaya contract is a 'contract of carriage'.

sub-paragraph (c) is the 'extending the carrier's rights' part; sub-paragraph (d) is the promise not to sue clause; and sub-paragraph (e) includes the 'agency provision' and the 'deeming provision'.

Moreover, sub-paragraph (e) provides that:

> (e) *For the purpose of sub-paragraphs (a)-(d)* the carrier is or shall be deemed to acting as agent or trustee on behalf of and for the benefit of all persons mentioned in sub-clause (a) above who are his Servants and all such persons shall to this extent be or be deemed to be parties to this contract.

By using the words 'For the purpose of sub-paragraphs (a)-(d)', this final and catch-all provision clearly applies the agency part to all those sub-paragraphs prior to it. This is an obvious and positive improvement to the Himalaya clause in *The Starsin*: it clearly shows the parties' intention that the agency mechanism applies to all of the sub-paragraphs, including the general exemption clause under sub-paragraph (b) and the promise not to sue clause under sub-paragraph (d).

As suggested above, if a Himalaya clause clearly applies the agency mechanism to the promise not to sue clause, it will fall within the scope of the Himalaya clause. It follows that, if the Himalaya clause is drafted as the new clause, the confusion in *The Starsin* will be solved, and a third party may enforce the promise not to sue clause by virtue of the Himalaya clause approach. As the clause contains a 'deeming provision' in sub-paragraph (e), this conclusion applies, with the only exception being when the third party is the shipowner or bareboat charterer who performs the actual sea carriage. In this situation, the promise not to sue clause purports to relieve all of the liabilities of the 'carrier or the ship', which will be rendered void by Article III(8) of the Hague or Hague-Visby Rules if they are incorporated into the bill.

4 The Contracts (Rights of Third Parties) Act 1999

To reform the common law rule of privity, the 1999 Act was enacted and received royal assent on 11 November 1999. It allows a third party to enforce the benefit conferred on him by the contracting parties under certain conditions. However, the Act has never been connected to the enforcement of the promise not to sue clause in the bill by third parties employed by the carriers. This is because section 6(5) of the Act excludes bills of lading from its application. However, this section of the article argues that this exclusion was not the real intention of the Law Commission. It is argued that third parties may rely on the Act, as an alternative to the common law Himalaya mechanism, to enforce the promise not to sue clause in the bill.

4.1 The application of the 1999 Act to contracts of carriage

Section 6(5) of the 1999 Act expressly excludes the application of the Act to certain contracts for the carriage of goods by sea,[74] as well as to certain contracts for the carriage of goods by rail, road and air.[75] The 'contract for the carriage of goods by sea' is explained by section 6(6) and (7) as meaning the contract of carriage contained in or evidenced by a bill of lading, a sea waybill or a ship's delivery order, which have the same meaning as those in the Carriage of Goods by Sea Act 1992 (COGSA 1992). The contracts to which the Act does not apply with respect to the carriage of goods by rail, road and air are those subject to the rules of the appropriate international transport conventions which have the force of law in the UK.[76] Section 6(5), however, also provides that the

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[74] 1999 Act s 6(5)(a).

[75] ibid s 6(5)(b).

[76] Section 6(8) defines those 'international transport conventions':

'(a) in relation to a contract for the carriage of goods by rail, the Convention which has the force of law in the United Kingdom under section 1 of the International Transport Conventions 1983 c. 14. Act 1983,

(b) in relation to a contract for the carriage of goods by road, the Convention which has the force of law in the United Kingdom under section 1 of the Carriage of Goods by Road Act 1965, and 1965 c. 37.

(c) in relation to a contract for the carriage of cargo by air—

(i) the Convention which has the force of law in the United Kingdom under section 1 of the Carriage by Air Act 1961, or 1961 c. 27.

(ii the Convention which has the force of law under section 1 of the Carriage by Air (Supplementary Provisions) 1962 c. 43. Act 1962, or

(iii) either of the amended Conventions set out in Part B of Schedule 2 or 3 to the Carriage by Air Acts (Application of S.I. 1967/480. Provisions) Order 1967'.

section does not exclude a third party from enforcing the exclusion or limitation of liability clause under those contracts. This echoes section 1(6), which allows a third party to enforce an exclusion or limitation in the contract.

A glance at these sections gives one the impression that, with the exception of the exclusion or limitation of liability clause, the 1999 Act does not allow the servants, agents and independent contractors of the carrier to enforce any other benefits in the bill of lading.[77] This view, however, misunderstands the Law Commission's true intentions[78] and therefore deserves to be reconsidered.

The exclusion of certain types of contract of carriage from the 1999 Act stems from the Law Commission's concern that to allow the third parties to those contracts to have rights under the 1999 Act might contradict the policy underlying the statutes and international conventions regulating those contracts.[79]

As far as the contracts for carriage of goods by sea are concerned, the Law Commission said that the promisor was to be better off under the COGSA 1992 than he would be under the proposed <query?> 1999 Act in two aspects. First, under the COGSA 1992, a third party can not only take the benefits but also, according to section 3, become liable to the carrier. However, under the proposed 1999 Act, the third party is only granted the benefits but is not bound by any of the burdens of the contract, except to the extent that the benefits are conditional.[80] Secondly, the basic model for the COGSA 1992 is one of assignment so that the third party's rights are transferred from the promise <promisor?>, leaving the promisee no rights of enforcement against the promisor. This would lead to the result that the promisor is liable to the third party only but not to the promisee. However, under the proposed 1999 Act, the enforcement of the benefit by the third party does not affect the promisee's right to enforce any term of the contract,[81] which means that the promisor is liable not only to the third party but also to the promisee. Therefore, the Law Commission said that allowing a third party who fell within the COGSA 1992 to rely on the proposed 1999 Act would be to the detriment of a promisor, which would further undermine the COGSA 1992.[82]

The Law Commission expressed the same concern towards the contracts for the carriage of goods by road, rail and air. Similarly to the COGSA 1992, the corresponding international conventions regulating these contracts not only give third parties the right to enforce the contracts but also impose on them some or all of the burdens under the contracts.[83] However, the proposed 1999 Act only gives the third party the right to enforce the contracts, which may be with conditions, but does not impose burdens on the third party. Thus, according to the Law Commission, allowing the third party to have rights under the 1999 Act might conflict with those conventions.[84]

The Law Commission's concern is no doubt reasonable. However, it should be noted that there are usually two groups of third parties involved in a contract of carriage. One group is those *cargo interests* who are not the original party to the contract, eg the lawful holders of the bill, the consignees or the receivers of the goods. The other group is those *carriage performing parties* to whom the carrier sub-contracts the undertakings under the contract of carriage, eg the servants, agents, stevedores, warehousemen, terminal operators, sea carriers, rail carriers, road carriers or air carriers.

The whole purpose of the COGSA 1992 is to transfer the shippers' rights and liabilities under the contract for the carriage of goods by sea to the *consignees or receivers* of the goods. Similarly, the

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[77] Eder (n 15) para 3-048; *Carver on Bills of Lading* (n 17) para 7-079.

[78] In *Pepper v Hart* [1993] AC 593 (HL) the House of Lords recognised that parliamentary material, eg the Law Commission Report, was an aid to construing legislation by the courts.

[79] The Law Commission *Privity of Contract: Contracts for the Benefit of Third Parties* Law Commission Report No 242 (1996) [12.5]–[12.15].

[80] 1999 Act s 1(4).

[81] ibid s 4.

[82] *Law Commission Report No 242* (n 79) [12.8].

[83] ibid [12.12] and fn 16. Those provisions will be listed and looked at in more detail shortly at text to nn 87 to 88.

[84] ibid [12.12].

relevant provisions of the international conventions which the Law Commission did not wish to contradict are all those regarding the rights and liabilities of the *consignees* of the goods. To be more specific, Article 14 of the Warsaw Convention 1929 (as amended by the Hague Protocol 1955)[85] provides that the *consignee* can enforce the rights given by the Convention provided that he carries out the obligations imposed by the contract. Article 13(2) of the CMR 1956 provides that the *consignee* who can require delivery of the goods shall pay the charges shown on the consignment note. Similarly, Article 28(1) of COTIF-CIM 1980[86] provides that the *consignee* has the right of delivery if he has paid the amount due under the contract of carriage. It is clear, therefore, that these statutes and the relevant parts of these international conventions all concern the rights and liabilities of the first group of the above-mentioned third parties; not one of them concerns conferring the benefit under the contract of carriage on the third parties in the second group, namely the *carriage performing parties* employed by the carrier. It is this second group which is the precise subject of this article.

It can be said that the intention of the Law Commission was not to forbid every non-original party to the contract of carriage from enforcing the benefit through the 1999 Act, but only to prevent those *cargo interests* who are not the original party from doing so. This much should be regulated by the COGSA 1992 or by the relevant international conventions which have the force of law in the UK. Therefore, to allow third parties who are in the above-mentioned second group to enforce the benefits in the bill of lading by virtue of the 1999 Act will not conflict with the policy underlying the relevant legislation. Thus, there is nothing in the Law Commission's Report preventing the servants, agents and independent contractors employed by the carrier from enforcing their benefits, provided that the requirements under the Act are satisfied.[87] These benefits include not only the exclusions and limitations which are set out in section 1(6) but also any other benefits, eg the promise not to sue clause.[88]

4.2 Amendment of section 6(5)

It is further submitted that the reason why the Act fails to reflect this real intention of the Law Commission is that the opening wording used by section 6(5) is too broad. It provides that:

> Section 1 confers no rights on a *third party* in the case of:
> (a) a contract for the carriage of goods by sea, or
> (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air…

Without qualifying the 'third party' here, the section gives the impression that all of the third parties to the contracts of carriage, no matter whether those within the above-mentioned first group or second group, are excluded from the 1999 Act. Moreover, the addition of the sentence: 'except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract' intensifies the idea that, apart from allowing the above-mentioned second group third parties to enforce the exclusions or limitations, the Act does not allow them to enforce any other benefits under the contract of carriage.

In order to dispel this misunderstanding and to reflect the true intentions of the Law Commission, the author suggests that section 6(5) of the Act be amended in the following two aspects. First,

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[85] Carriage by Air Act 1961 Sch 1. The Law Commission's report only referred to the Hague Protocol 1955, but now both the Montreal Protocol 1975 and the Montreal Convention 1999 have been given the force of law in the UK by Sch 1A and Sch 1B of the Carriage by Air Act 1961, respectively.

[86] COTIF-CIM 1980 has now been repealed by COTIF-CIM 1999, which is given the force of law by the Railways (Convention on International Carriage by Rail) Regulations 2005. The corresponding article is art 17(1).

[87] See also 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'.

[88] The benefits will also include the arbitration and jurisdiction clauses. Understood in this way, the 1999 Act can be adopted to resolve difficulties with enforcing the arbitration and jurisdiction clauses by third parties.

qualification should be made concerning the scope of the 'third party' under this section to the effect that the section only excludes the above-mentioned first group of third parties. Secondly, if so, there is no need to retain the sentence which preserves the above-mentioned second group of third parties' rights to enforce the exclusions or limitations under the contract of carriage. The effect of allowing these third parties to enforce the exclusions or limitations could be achieved by section 1(6) of the Act alone, which enables a third party to take advantage of an exclusion or limitation in the contract, regardless of the types of contracts.

Based on these two aspects, the author suggests that section 6(5) could be amended as such (or to this effect):

> Section 1 confers no rights on *the cargo interests*[89] *who are not the original contractual parties* in the case of:
> (a) a contract for the carriage of goods by sea, or
> (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention.

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

4.3 The satisfaction of the 1999 Act

If it is correct to say that the 1999 Act applies to the enforcement of the promise not to sue clause in the bill of lading by the third parties employed by the carrier, then whether a third party could enforce the clause under the Act depends on whether the conditions set out by the Act could be satisfied. The 1999 Act allows a third party who is expressly identified[90] in a contract to enforce a term of that contract in two circumstances. First, he can do so if 'the contract expressly provides that he may' enforce that term.[91] Secondly, he can do so if that term 'purports to confer a benefit on' the third party[92] unless 'on a proper construction of the contract … it appears that the parties did not intend the term to be enforceable by the third party'.[93]

A promise not to sue clause itself embraces the contracting parties' intention to give the servants, agents and independent contractors complete immunity from any liability. Therefore, the clause itself can be said to confer a benefit on those third parties. This view is also shared by the Law Commission. In its Report, the Law Commission said that 'in the case of a promise not to sue a third party, the promise may assist the *third party beneficiary* by seeking a stay of action'.[94] Also, in *Chitty on Contracts*, 'the promise not to sue a third party' was contained under the section entitled 'Contracts for the Benefit of Third Parties'.[95]

Moreover, authorities and literature also support the view that the benefit conferred by the promise not to sue clause satisfies the 1999 Act. For instance, in *The Alexandros T*, Flaux J held that the 'promise or covenant not to sue' contained in the insurance full and final settlement agreement 'conferred a benefit' on the servants or agents of underwriters, which fulfilled section 1(1)(b) of the 1999 Act.[96] Furthermore, *Scrutton on Charterparties and Bills of Lading* suggested that 'such a

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[89] The definition of 'cargo interests' should tight <fit?> into s 2(1)(a), (b), and (c) of the COGSA 1992 and should include the 'consignee' under the CMR, Warsaw Convention and COTIF-CIM 1999.
[90] 1999 Act s 1(3).
[91] 1999 Act s 1(1)(a).
[92] ibid s 1(1)(b).
[93] ibid s 1(2). *Law Commission Report No 242* (n 79) para 7.18.
[94] *Law Commission Report No 242* (n 79) para 2.48.
[95] Beale (n 27) paras 18-072–18-073.
[96] *The Alexandros T* (n 32) [85], [87] and [93].

covenant not to sue clause would be enforceable by the third party under the Contracts (Rights of Third Parties) Act 1999 if contained in a charterparty'.[97] This shows that, in their authors' view, a promise not to sue clause itself can fulfil section 1 of the 1999 Act. Although the authors there confined this view to charterparty contexts, as discussed above it should also apply to the bill of lading scenario.

It follows that a promise not to sue clause itself, when standing alone, purports to confer a benefit on the third parties employed by the carrier, which fulfils section 1(1)(b) of the 1999 Act. This section establishes a presumption that the third party can enforce the term, which can only be rebutted if the promisor can prove, for the purposes of section 1(2), that the contracting parties do not intend the term to be enforceable by the third party.[98] Thus, the third parties employed by the carrier are entitled to enforce the promise not to sue clause in their own right pursuant to the Act, unless the cargo owner proves that a proper construction of the bill of lading shows that he and the carrier had not intended the clause to be enforceable by third parties. It is, however, debatable whether the cargo owner could successfully prove this.

Nevertheless, since a promise not to sue clause has long been regarded as enforceable by the carrier only, if the court were inclined to find that the parties do not intend the clause to be exercisable by a third party, the most assuring way would be for the bill of lading to expressly provide that 'third parties are entitled to enforce the promise not to sue clause'. Such terms will satisfy section 1(1)(a) of the Act. Since, unlike section 1(1)(b), section 1(1)(a) is not creating a presumption, it is very likely that the English courts would give effect to the clear intention of the shipper and carrier to allow third parties to enforce the clause.

This is the method adopted by the IGP&I/BIMCO Himalaya clause. Unlike the traditional Himalaya clauses, shortly after the promise not to sue clause, sub-paragraph (d)(i) of the new clause expressly and additionally provides that '(d)(i) … *The Servant* shall also be *entitled to enforce the foregoing covenant* against the Merchant'.

The term 'Servant' is defined by sub-paragraph (a) of the clause as all the possible third parties employed by the carrier to perform the contract of carriage.[99] The 'foregoing covenant' here apparently refers to the promise not to sue clause prior to it. This additional sentence, by expressly providing that those third parties may enforce the promise not to sue clause, fulfils section 1(1)(a) of the 1999 Act. Thus, third parties can enforce the promise not to sue clause in their own right by virtue of the 1999 Act if this part of the new clause is used in the bill.[100]

5 Application of the approaches to the exclusive jurisdiction clause and arbitration clause

Not limited to the promise not to sue clause, the analysis of the two approaches can also resolve the difficulties with enforcing other terms by third parties seen in the current case law, in particular the exclusive jurisdiction clause[101] and the arbitration clause.[102]

In *The Mahkutai*, the Privy Council rejected the third party's contention to enforce the exclusive Indonesian jurisdiction clause in the bill by relying on a Himalaya clause. Construing the Himalaya clause, which was similar to the one in *The Starsin*, Lord Goff held that it could only extend to

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[97] Eder (n 15) para 3-057.

[98] *Law Commission Report No 242* (n 79) para 7.18; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38, [23] (Colman J); *Laemthong International Lines Co Ltd v Abdullah Mohammed Fahem & Co (The Laemthong Glory No 2)* [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep 688, [22] (Clarke LJ); *The Alexandros T* (n 32) [85] (Flaux J).

[99] Song (n 6) 12.

[100] This method has been adopted by the Maerskline Terms of Carriage cl 4(b)(i): see http://terms.maerskline.com/carriage.

[101] *The Mahkutai* (n 2); *Bouygues Offshore SA v Caspian Shipping Company and Others (No2)* [1997] 2 Lloyd's Rep 485 (QB), [1997] ILPr 472 (CA).

[102] *Air New Zealand Ltd v The Ship Contship America* [1992] 1 NZLR 425 (NZ).

the third parties those terms benefiting the carrier himself; an exclusive jurisdiction clause was not one of them as it 'embodies a mutual arrangement'.[103]

However, as the House of Lords in *The Starsin* suggested, whether a third party could enforce a defence by relying on the Himalaya clause depends on whether the agency mechanism centring the approach applies to the defence, regardless of the nature of the defence.[104] Applying this theory to the exclusive jurisdiction and arbitration clauses, it might be argued that if the agency mechanism of the Himalaya clause clearly applies to them, they might be extended to the third parties.

It should be noted that the Himalaya clause in *The Mahkutai* did not make specific reference to the exclusive jurisdiction clause. Presumably, if a Himalaya clause makes specific reference to the jurisdiction or arbitration clause and clearly provides that the carrier is acting as the agent on behalf of the third parties for the purpose of that clause, the jurisdiction or arbitration clause might fall within the scope of the Himalaya clause so as to be enforceable by the third parties.

This is precisely what happened in the unreported case of *United Arab Shipping v Galleon Industrial Ltd*.[105] The Himalaya clause provided that the third parties should enjoy 'the benefit of every defence, exception, limitation, condition and liberty applicable to the Carrier under this bill (*including clauses 24 [jurisdiction clause]* and 25) and *for the purpose of the foregoing* the *Carrier* is or shall be deemed to be *acting as agent*…on behalf of such person…'.[106] Distinguishing *The Mahkutai*, Moore-Bick J decided that the exclusive jurisdiction clause fell within the scope of the Himalaya clause so that third party was entitled to invoke it.[107]

Alternatively, the third parties might be able to rely on the 1999 Act to enforce the arbitration clause and the exclusive jurisdiction clause. The Act has so far never been connected to this issue as it has always been regarded as not applying to the enforcement of terms other than the exclusions and limitations by the servants, agents or independent contractors of the carriers. However, this is not the real intention of the Law Commission. If section 6(5) is amended as proposed above, the Act could be applied to enforcing any benefits in the bill of lading by the third parties employed by the carrier, including the arbitration clause and the jurisdiction clause.

Under section 8(2) of the 1999 Act, if a contract gives the third party a procedural right to enforce the arbitration agreement and if the arbitration agreement is in writing, the third party will be able to enforce it and be regarded as a party to the arbitration agreement for the purposes of the Arbitration Act 1996. Presumably, if the bill of lading expressly provides that third parties employed by the carriers could enforce the arbitration clause, section 8(2) of the 1999 Act will be satisfied so that they could enforce the clause. In this situation, if the cargo owner sues him before a court, he could enforce it by applying for a stay under section 9 of the Arbitration Act 1996.[108]

As to the exclusive jurisdiction clause, the 1999 Act does not contain an express provision regarding such a clause. However, as the exclusive jurisdiction clause and the arbitration clause share a similar nature and the Act does not expressly exclude the exclusive jurisdiction clause,[109] it will be within the ambit of the Act.[110] For the same reasons, its position under the Act might be analogous to that

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[103] *The Mahkutai* (n 2) 666.

[104] See above.

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

[106] ibid [3] (Moore-Bick J).

[107] ibid [28].

[108] Lord Chancellor's Department 'Explanatory Notes to Contracts (Rights of Third Parties) Act 1999' [35].

[109] Both arbitration clauses and exclusive jurisdiction clauses were expressly excluded from the Act by cl 2(d)(e) of the Contracts (Rights of Third Parties) Bill. However, these two provisions were eliminated afterwards.

[110] Catharine Macmillan 'A birthday present for Lord Denning: the Contracts (Rights of Third parties) Act 1999' (2000) 63(5) *Modern Law Review* 721, 733; Rob Merkin 'Contracts (Rights of Third Parties) Act 1999' in Rob Merkin (ed) *Privity of Contract: The Impact of the Contracts (Rights of Third Parties) Act 1999* (LLP 2000) 5.107 and 5.123–5.125; Neil Andrew 'Strangers to justice no longer: the reversal of the privity rule under the Contracts (Rights of Third Parties) Act 1999' [2001] *CLJ* 353, 374–75.

of the arbitration clause.[111] It follows that if the contract expressly provides that the third parties employed by the carriers could enforce the exclusive jurisdiction clause in the bill, the clause could be regarded as a pure procedural benefit under section 1(1)(a). The third parties may, therefore, enforce the clause.

6 Conclusion

Given the crucial role of the promise not to sue clause in terms of third party protection, its efficiency needs to be ensured. This article has demonstrated that its enforcement by the carrier is hindered in the absence of his obligation to indemnify the third parties against the cargo owner's suit. In light of this, enabling third parties themselves to enforce the clause can offer either the only or more efficient recourse against the cargo owner's breach of the promise. This article has submitted that a third party could directly so enforce by virtue of both the common law Himalaya clause approach and the 1999 Act.

For one thing, the House of Lords in *The Starsin* in essence held that whether a third party was successful in a defence by relying on the Himalaya mechanism depended on whether the agency part applied to it. Consequently, if the Himalaya clause makes it clear that the carrier is acting on behalf of the third parties for the purpose of the promise not to sue clause, it will fall within the scope of the Himalaya clause so as to be extendable to third parties under this approach.

For another thing, if, as the author suggests, the broad opening wording – 'a third party' – used by section 6(5) of the 1999 Act is replaced by 'the cargo interests who are not the original contractual parties', the section will reflect the Law Commission's real intention that the Act applies to the enforcement of any benefits under the bills by the third parties employed by the carriers, including the promise not to sue clause, the arbitration clause and the exclusive jurisdiction clause. To ensure the enforcement of the promise not to sue clause by the third parties, it is suggested that the bill should expressly provide that the third parties could enforce the clause, which will satisfy section 1(1)(a) of the 1999 Act.

The IGP&I/BIMCO Revised Himalaya clause was structured and worded specifically and clearly enough to ensure that third parties could enforce the promise not to sue clause via both the common law Himalaya approach and the 1999 Act.

The suggestions made by this article are not limited to the promise not to sue clause but have a wider application: they can be extended to the enforcement by third parties of, for example, arbitration clauses and exclusive jurisdiction clauses,. To be more specific, if a Himalaya clause makes specific reference to the jurisdiction or arbitration clause, and clearly provides that the carrier is acting on behalf of the third parties for the purpose of that clause, the jurisdiction or arbitration clause might fall within the scope of the Himalaya clause so as to be extendable to third parties. Alternatively, if the bill of lading clearly provides that third parties are entitled to enforce the exclusive jurisdiction or arbitration clauses, section 1(1)(a) or section 8(2) of the 1999 Act will be satisfied, so that the third parties could enforce either of these clauses, whichever is contained in the bill of lading, pursuant to the 1999 Act.

[111] See also Andrew Burrows 'Reforming privity of contract: Law Commission Report No 242' [2000] *LMCLQ* 540, 552 at fn 28: 'an analogous approach to that taken in section 8 to arbitration clauses should, in principle, also apply to jurisdiction clauses'.