THE DILEMMA FOR TERMINAL OPERATORS UNDER HIMALAYA PROTECTION IN CHINA[1]

Ling Zhu[2], Lianzhi Ding[3]

Abstract:

This paper aims to discuss Himalaya protection for terminal operators, including stevedores, who are engaged in performing duties for a carrier under Chinese law and practice. It questions whether or not the benefits brought about by the Himalaya Clause or the Himalaya protection based upon the relevant statutory provisions can be enjoyed by terminal operators. This paper discusses the problems pertaining to Himalaya protection afforded by a contractual agreement or by the statutory provisions in China, by comparing it with international conventions and laws in other jurisdictions, so that suggestions can be made in the paper's final conclusion, with a view to improving China's legislation and its judicial practice in this respect.

Keywords: Terminal Operator, Third Party, Himalaya Clause, Himalaya Protection, Chinese Maritime Code.

Category: Asian Law

[1] The study is financially supported by a research grant (Project Code: G-UB06) of The Hong Kong Polytechnic University.

[2] Assistant Professor in Maritime Law, Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University. Email: ling.zhu@polyu.edu.hk; phone: +852 2766 4897; Fax number: +852 2330 2704.

[3] Research Assistant (March-June 2014), Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University.

I. Introduction

Third parties involved in cargo claim disputes arise from a great number of differing legal entities.[4] Nowadays, amid the background of an increase in multimodal transport, it often happens that cargoes sustain loss or damage when they are under the care, control or custody of terminal operators, and cargo claims may thus be brought directly against terminal operators. The underlying rationale for the cargo interest to bring a direct suit against the terminal operators instead of the contractual carrier may lie in the fact that the terminal operators are usually not entitled to invoke any benefits conferred by the main carriage contract, since they are the "third parties" to the carriage contract unless certain devices are crafted so as to circumvent direct claims from the cargo interest.[5] The Himalaya clause is one of these devices, and it is also now common for international rules or national laws to design specific legal provisions to offer protection that will be conferred on the third parties. Therefore, there are basically two ways to offer Himalaya protection to non-contractual parties: One is via directly inserting a Himalaya Clause in a bill of lading or similar documents;[6] the other is through a statutory Himalaya provision or, as an alternative, a parallel vehicle via inserting a "paramount clause" to apply certain rules on carriage of goods by sea that recognize the protection offered to third parties.

Whether or not the terminal operators can be protected by either a Himalaya Clause or the statutory Himalaya provisions is of great debate in China. This paper aims to discuss Himalaya protection for terminal operators, including stevedores, under Chinese law and practice, who are

[4] For example, the stevedores, lightering company etc. See also: Michael Tsimplis, "Liability of the carrier for loss, damage or delay", in: Yvonne Baatz and et al. (eds), *The Rotterdam Rules: A Practical Annotation* (Informa Law from Routledge, 2009), p. 64.

[5] The Mahkutai [1996]2 HKLR 199, p.209: "That function is, as revealed by the authorities, to prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf."

[6] Modern Himalaya Clause can be illustrated typically by standard clauses on the back of a bill of lading such as: Conline Bill of Lading Clause 15: "Defences and Limits of Liability for the Carrier, Servants and Agents".

engaged in performing duties for a carrier. It questions whether or not the benefits brought about by a Himalaya Clause, or the Himalaya protection based upon the relevant law, can be enjoyed by terminal operators. This paper discusses the problems pertaining to Himalaya protection afforded by a contractual agreement or by the statutory provisions in China, including the acceptance of the Himalaya Clause by judicial practice, as well as the ambiguity and inconsistency of the statutory Himalaya provisions under China's Maritime Code (CMC). The past and present legal status of terminal operators under other governing rules and regulations in China will also be briefly mentioned.

Accordingly, this paper is divided into six parts. After this Introduction, Part II is dedicated to a discussion of the birth of the Himalaya clause and the development of protection for third parties. Part III briefly introduces Himalaya protection under various Chinese laws. Thereafter, in Part IV, heavier weight will be put on the discussion of Himalaya protection for terminal operators in China's legal environment. In Part V, references will be made to rules in the international conventions and other national laws, so that suggestions can be made in the paper's final Conclusion to improve China's legislation and judicial practice in this respect.

II. The birth of the Himalaya clause and development of protection for third parties

1. The birth of the Himalaya clause

The birth of the Himalaya Clause can be attributed to the accommodation of "commercial expectations".[7] It originated from a well-known and most cited case *Adler v Dickson and Another.* This case is about the personal injury that occurred to a certain passenger named Mrs. Adler on board P. & O. steamship *Himalaya*. So as to be fully compensated, this victim brought a suit against an employee of the carrier instead of the carrier, since the carrier could be relieved

[7] The Mahkutai [1996]2 HKLR 199, p. 202.

of liability through the clauses specifying "…Passengers and their baggage are carried at passengers' entire risk" and "…The company will not be responsible for and shall be exempt from all liability in respect of any . . . damage or injury whatsoever of or to the person of any passenger . . ." contained in the ticket.[8] This exculpatory clause was being invoked by the employees also, but their ploy was rejected by the court. The court held that only the shipowners themselves, not their servants or agents, including the employees in this case, could be relieved of liability according to the expressly stipulated exculpatory clause.

In order to channel the contractual benefits enjoyed by the carrier to any third party, it is important to establish a legal basis as a shield for its channeling. The most direct and significant implication of *Adler v Dickson and Another* is that a more well-drafted clause named after the Steamship *Himalaya* involved in *Adler v Dickson and Another* has since then been inserted into bills of lading or relevant contracts. This is a mechanism to protect third parties under a carriage contract. It also reflects a freedom of contract between contracting parties, and suggests a breakthrough has occurred from strict application of the doctrine of privity of contract.

2. The doctrine of privity of contract

The privity of contract doctrine, as a significant pillar in modern English contract law, can be traced back to the case *Tweedle v. Atkinson*[9] in 1861.[10] It is widely accepted that this doctrine means that a third party has no right of action under a contract between two others. Notwithstanding a number of subsequent cases[11] re-emphasizing the application of the privity of

[8] Adler v Dickson and Another [1954] 2 Lloyd's Rep. 267, p.269.
[9] Tweedle v. Atkinson (1861) 1 B&S 393, at 399.
[10] Robert Flannigan, "Privity – the end of an era (error)". 103 *Law Quarterly Review* 564, at 568-569 (1987), the author pointed out that this case does not really stand as an authority for an independent privity doctrine.
[11] Such cases include: Dunlop v. Selfridge [1915] A.C. 847 (only a person who is a party to a contract can sue on it as per Viscount Haldane L.C. p853), Beswick v Beswick [1968] AC 58 reconfirms a person who is not a party to a contract cannot enforce it.

contract doctrine, a strict adhesion to privity of contract doctrine often gives rise to inconvenience in commerce and injustice in private relationships.[12]

Thus, English courts in the 20th century tried to strike a balance between the privity of contract doctrine and commercial private relationships, especially in the field of shipping. In 1924, the case *Elder Dempster & Co. v. Paterson Zochonis & Co.* held that shipowners were protected by a condition in the bill of lading that was intended to be a stipulation on behalf of all persons having an interest in the ship; although they may not be direct parties to the contract between charterers and shippers, they were nevertheless sued in tort. This was due to the fact that the shipowners took possession of the goods on behalf of and as the agents of the charterers, and so could claim the same protection as their principal.[13] It was also held that cargo owners should not be allowed to get out of the protective clauses of the bill of lading via action in tort,[14] since tortious action would abrogate the defenses and immunities contained in the main contract. *Elder Dempster* has therefore not established a firm enough, well entrenched leading precedent for protecting third parties, but it actually referred to the idea of bailment, which has evolved into a theoretical basis for a departure from the privity of contract doctrine.

3. Bailment theory

Bailment theory entails an innovative idea to conquer the shortcomings of privity of contract doctrine, and has been highlighted throughout a string of Commonwealth cases. In the seminal case *Elder Dempster* (see above), Lord Sumner pointed out that "…the reception of the cargo for carriage to the United Kingdom amounts to a bailment upon terms, which include the exceptions

[12] Robert Merkin, *Privity of Contract:The Impact of the Contracts (Right of Third Parties) Act 1999* (LLP, 2000), p.21.
[13] Elder Dempster & Co. v. Paterson Zochonis & Co. [1924] A.C. 522.548.
[14] Elder Dempster & Co. v. Paterson Zochonis & Co. [1924] A.C. 522.548.

and limitations of liability stipulated in the known and contemplated form of bill of lading…"[15] Therefore, a shipowner who was not a party in the bill of lading contract could rely on the exculpatory clauses therein. The Privy Council has reconfirmed this approach submitted by Lord Sumner from *Elder Dempster* in *Pioneer Container.*[16] If a Himalaya Clause is contained and applied in a contract, bailment and the Himalaya Clause could both be concurrently applied for the purpose of breaking through the privity of contract doctrine.

In *Mahkutai,*[17] it was held that the Himalaya Clause could not confer benefits arising from exclusive jurisdiction clauses, even though the shipowners may fall into the "sub-contractor" category as defined in the Himalaya Clause.[18] This is because an exclusive jurisdiction clause can be distinguished from clauses like exceptions and limitations, since it does not benefit only one party, but embodies a mutual agreement.[19] Moreover, it was of their Lordships' opinion (at the time) that a Himalaya Clause is a preferred mechanism over the principles of bailment on terms.[20]

4. Agency

In *Scruttons Ltd v Midland Silicones* in 1962, that "a party to a contract could sue [and be sued] upon it" was reaffirmed as a fundamental rule in English law. In this case, *Elder Dempster* was

[15] Elder Dempster & Co. v. Paterson Zochonis & Co. [1924] A.C. 522. p564.
[16] In this case, the feeder carrier as sub-bailee is entitled to rely on an exclusive jurisdiction clause contained in the feeder bill of lading against direct action brought by the cargo owner, who is not a party to the feeder bill of lading contract, but is a head bailor with the carrier as bailee. The Pioneer Container [1994] 3 W.L.R. 1 (Also known as: Owners of Cargo Lately Laden on Board the KH Enterprise v Owners of the Pioneer Container [1994] 1 Lloyd's Rep. 593).
[17] The Mahkutai [1996]2 HKLR 199, p. 200-201: The main issue in this case is whether shipowners can invoke against the cargo owners the exclusive jurisdiction clause, either under a Himalaya clause or alternatively on the principle of bailment on terms.
[18] The Mahkutai [1996]2 HKLR 199, p210.
[19] The Mahkutai [1996]2 HKLR 199, p209.
[20] The Mahkutai [1996]2 HKLR 199, p210: "By receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading."

relied on by a stevedore to claim benefits under the contract between the shipper and his principal, i.e. the carrier, in a direct tortious claim from the shipper. However, this proposition claimed by the stevedore was rejected by the House of Lords (except Lord Denning), since the circumstance of *Elder Dempster* is "an anomalous and unexplained exemption to the general principle that a stranger cannot rely for his protection on provisions in a contract to which he is not a party".[21] The fundamental difference between the two cases was that in *Elder Dempster* the master signed the bill of lading, and this may be reduced to the effect that the shipowner received the goods into his possession on the terms of the bill of lading, although the shipowner was not a party to the bill of lading. However in *Scruttons Ltd*, nothing can be inferred by the provisions in the bill of lading that a stevedore can be protected as a "carrier" as defined in the bill of lading. Lord Reid therein also opined that agency argument may be applied successfully if four conditions are met as follows:

> "(first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. and then to affect the consignee it would be necessary to show that the provisions of the Bills of Lading Act, 1855, apply."[22]

[21] Scruttons Ltd v Midland Silicones [1962] AC 446. p479.
[22] Scruttons Ltd v. Midland Silicones [1962] AC 446, by Lord Reid, p. 474.

A failure to meet the said four conditions led to an unsuccessful application of the agency argument in this case, as well as a seemingly different treatment of the stevedore compared to the shipowner in *Elder Dempster.*

It seems that the court had swung back towards the privity of contract doctrine; however, the implied contract or agency had begun to draw the lords' attention toward third party beneficiaries. *Scruttons* illustrates an attempt to break through the privity of contract doctrine so as to confer the contractual benefits on a third party, i.e. stevedores, by means of agency theory, albeit with an ultimate failure of successful application in this case. However, the agency theory was applied by Privy Council in cases such as the *Eurymedon* [23] about a decade later. *Eurymedon* is about the consignee's direct action against the stevedore for cargo damaged during negligent unloading. The stevedore asserted the one-year time bar and £100 package limitation of liability contained in the main carriage contract between the carrier and the shipper. In the appeal trial, the New Zealand Court of Appeal was unanimously against the stevedore, due to no consideration moving from him to the cargo owner after agency theory was carefully examined in detail. However, the Privy Council reversed this decision (by three votes to two) and held that the "performance of unloading cargo for the benefit of the shipper was the consideration for the agreement by the shipper and the stevedore should have the benefit of the exemptions in the bill of lading".[24] Therefore, there has been a trend towards the stevedore's right to limitation of liability being deemed to be a rule rather than any exception.[25]

5. Collateral contract

[23] New Zealand Shipping Co. Ltd. v Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154.
[24] New Zealand Shipping Co. Ltd. v Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154. p155.
[25] *The New York Star*, a case almost identical to *Eurymedonan* and dealt with by Privy Council in 1980, followed the path of *Eurymedon.* Both cases affirmed that the Himalaya clause contained in the bill of lading contract can be invoked by the stevedores to protect independent contractors employed by the carrier. For more details please refer to: Michael F Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation", 27 *Virginia Journal of International Law* (1986), p.761.

Starsin[26] is a noteworthy case for creation of a collateral contract in light of the Himalaya Clause. In this case, the shipowner under the time charterparty tried to rely on the Himalaya Clause in the bills of lading contract, and asked for complete immunity when sued by the cargo owner. But the shipowner was not identified by the House of Lords as the "carrier" in the bill of lading contract. It demonstrated that the third party (the shipowner in the said case), compared to its precedents asked for more benefits than ever to be conferred on it by the Himalaya Clause.[27] The gravity of the Himalaya Clause issue in the noted case was highlighted in this controversy; it was debated whether the Himalaya Clause could be avoided by Article III(8) of the Hague Rules. Apart from Lord Steyn[28], the Lords unanimously held that the shipowner is an independent contractor for a time charterer, and can only be protected by the Himalaya Clause subject to Article III(8) of the Hague Rules.[29] As stated by Lord Millett, the validity of the contractual exemption from liability which the Himalaya clause in the bills of lading purported to afford to the owner or demise charterer of the ship on which the goods were laden is a tough question to answer, and finally he struggled to conclude that:

> "[T]he owner or demise charterer of the ship is to <u>be treated as a party to that contract to the extent of the protective provisions in the Himalaya clause</u>, which are thereby incorporated into a contract of carriage and invalidated by article III, rule 8 of the Hague Rules; but (iii) the owner or demise charterer of the ship is <u>not</u> to be treated as a

[26] Homburg Houtimport BV and Others v Agrosin Private Ltd and Another(Starsin) [2004]1 A.C. 715.
[27] Before the *Starsin*, a line of cases pursuant to third parties' protective coverage were always on time bar limits, package limitation, or even on exclusive jurisdiction, but were seldom on the exemption from obligations. It can also refer to what Lord Millett has pointed out in Starsin [2004]1 A.C. 715,para.198 at p798.
[28] In Lord Steyn's opinion, the exemption is not contained in a contract of carriage, the result of which "is in no way anomalous. It is loyal to the rationale of the advance in the rationality of English law achieved in The Eurymedon and The New York Star…" The Starsin [2004]1 A.C. 715, paras.51-62, at 748-751.
[29] This means that the Himalaya Clause is invalidated by III, rule 8 of the Hague Rules. It is questioned as to why III, rule 8 of the Hague Rules has not made invalid the demise clause in the same case in question. See case comment: William Tetley, "Case Comment: The House of Lords decision in The Starsin" (2004) 35 *Journal of Maritime Law and Commerce*, pp. 121-139.

party to the contract of carriage to any further extent, with the result that the positive obligations in article III, rules 1 and 2 are not incorporated."[30] (Emphasis added)

A line has been drawn by international convention (the Hague Rules in this case) for the application of the Himalaya Clause, and it does not seem to be easy to come across. The Himalaya Clause is severely intervened on by judicial powers, and this reflects the conservative and reluctant attitude towards shipowners adopted by English courts.

However, contrary to the bailment theory's stagnant status in *Starsin*, after a strict construction thereof, there has been a further development for the Himalaya Clause mechanism, on the basis that the Himalaya Clause could create a collateral contract between the cargo owner and the owner or demise charterer of the ship.[31] Additionally, Lord Steyn's dissenting opinion catering to the commercial world[32] represents an opposite direction of pragmatism towards the Himalaya Clause that is similar to US court decisions, which will be discussed in Part V of this paper.

III. Applicable Chinese laws concerning third party beneficiaries

In China's legislation hierarchy, apart from the Constitution Law, laws launched by the National Peoples' Congress rank highest; these are followed by regulations and rules issued by the administrative departments and local people's congress. In addition, China shares a civil law national tradition, with the result that the *stare decisis* doctrine is not complied with under the Chinese legal system. Nevertheless, court decisions on any particular legal case demonstrate a particular direction, or attitudes of the courts, to the provisions in the relevant legislations.

[30] The Starsin [2004]1 A.C. 715, para.209, at 801-802.
[31] The Starsin [2004] 1 A.C. 715, para.202 at 799 by Lord Millett, "…creates collateral contract between the cargo owner and the owner or demise charterer of the ship which exempts the latter from all liability to the cargo owner if it undertakes the actual carriage of the goods."
[32] The Starsin [2004] 1 A.C. 715, para.57, at p749.

In general, legal issues in association with Himalaya protection for third parties fall into the civil law sphere; therefore, three main legislations, including China's Civil Law Code, Contract Law and CMC should be considered. Therefore, are there any rules in those legislations that relate to Himalaya protection? If so, what are their implications in practice?

China's Civil Law Code

In China, the most ancient and important code applicable to liability and responsibility arising from contract or tort is the "General Principles of Civil Law" (hereinafter referred to as "CLC"). The CLC does not specifically stipulate on the rights or obligations of third parties. Nevertheless, agency rules are established in Article 63, which reads:

> "Citizens and legal persons may perform civil juristic acts through agents. An agent shall perform civil juristic acts in the principal's name within the scope of the power of agency. The principal shall bear civil liability for the agent's acts of agency. Civil juristic acts that should be performed by the principal himself, pursuant to legal provisions or the agreement between the two parties, shall not be entrusted to an agent."

More about the agency rules will be discussed in a later part of the paper.

Contract Law (CL)[33]

It is noted that "stipulation for another"[34] has gained popularity in civil law jurisdictions in an attempt to obtain an identical protection as that afforded by the Himalaya Clause. As for China, the Contract Law of PRC (hereinafter referred to as "CL") does not expressly in itself provide

[33] Contract Law of the People's Republic of China (promulgated by National People's Congress, 15 March 1999, effective 1 October 1999),
[34] William Tetley, *Marine cargo claims* (Thomson Caswell, 4th ed., 2008), p. 1895-1898.

rules for "stipulation for another", although this might be inferred from Articles 74 and 75 of the CL.[35] It is also under debate as to whether or not the CL implies such a rule in Article 64.[36]

Nevertheless, the Himalaya clause, as a boilerplate clause in the carriage contract to confer similar benefits, such as a limit on liabilities on third parties, who would not enjoy such privileges if action is filed in tort, can be harshly constrained by the legal provisions in the CL. This is evident from Articles 39[37], 40[38] and 41[39] of the CL. *Fujian Dingyi* [40] is also a cargo claim case providing evidence in this respect. In this particular case, the cargo suffered damage caused by negligence during unloading by the terminal operator, Guangzhou Container Terminal Co. The cargo owner subsequently filed an action before Guangzhou Maritime Court against the carrier and terminal operator together. According to the decision by the court of first instance, the carrier was imposed of the limited responsibility according to Article 56 of the CMC; however, the claim against the terminal operator was dismissed in the same claim because the action in tort against him could not be decided in the current proceedings as per Article 52(1) of

[35] Articles 74 and 75 of CL stipulate subrogation and recession rights of the contractor respectively. Besides this, in specific ambit in the civil law system, the "stipulation for another" rule can also be found in Article 41 of China's Insurance Law (2009).

[36] Article 64 provides: "Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such a third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract." See: Xue, Jun (2010). "On the definition and interpretation of Article 64 of the Contract Law of P.R.C." (in Chinese), 2 *Studies in Law and Business*, p51-57.

[37] Standard definitions of terms, and invocating tips, are provided in Article 39: "Where standard terms are adopted in concluding a contract, the party supplying the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness, and shall inform the other party to note the exclusion or restriction of its liabilities in a reasonable way, and shall explain the standard terms upon request by the other party. Standard terms are clauses that are prepared in advance for general and repeated use by one party, and which are not negotiated with the other party when the contract is concluded."

[38] Invalid standard terms are provided for in Article 40: "When standard terms are under the circumstances stipulated in Articles 52 and 53 of this Law, or the party which supplies the standard terms exempts itself from its liabilities, increases the liabilities of the other party, and deprives the material rights of the other party, the terms shall be invalid."

[39] Article 41 relates to the interpretative approach to be adopted: "If a dispute over the understanding of the standard terms occurs, it shall be interpreted in accordance with common understanding. Where there are two or more kinds of interpretation, an interpretation unfavorable to the party supplying the standard terms shall prevail. Where the standard terms are inconsistent with non-standard terms, the latter shall prevail. "

[40] Fujian Dingyi Food Co., Ltd. v. COSCO Container Lines Co. (2003, Guangzhou Maritime Court, No. 171).

Chinese Civil Procedure Law.[41] In addition, the terminal operator should not be imposed of any contractual liability, since he was not a contracting party to the carriage contract of goods. As a result, another separate action in tort was brought by the cargo owner before the same Maritime Court against the terminal operator. The decision of this separate action held that the tortfeasor, the terminal operator in this case, could be protected by Articles 58 (2) and 59 (2) of the CMC to limit his liability.[42] However, in the court of appeal, Guangzhou High Court reversed the decision made by the Guangzhou Maritime Court and held that the invoked Himalaya Clause contained in the bill of lading issued by the carrier to the cargo owner was avoided due to its violation of Article 40 of the CL.[43] Therefore, the terminal operator was not entitled to such benefits as limitation of liability provided for in the Himalaya Clause. Furthermore, the applicable law in this case should be CLC and CL rather than CMC; this also means that the statutory Himalaya Clause in the CMC, which will be introduced soon, could not play any role in this case.

China's Maritime Code

China has not ratified any international convention; the CMC[44] is China's main applicable law as far as carriage of goods by sea is concerned. However, it is obvious from Chapter 4 of the CMC, which plays a dominant role in international cargo transportation, that a hybrid mode of the

[41] Article 52 (1) of Chinese Civil Procedure Law (amended in 2012) regulates joint proceedings, which provides "A joint action means that one side or both sides of a civil action consist of two or more persons, the subject matter of action for each party is the same or is of the same kind and the people's court deems that the disputes of all the parties may be tried concurrently, to which all the parties agree."

[42] Articles 58 (2) and 59 (2) of CMC provides defence and limitation of liability as well as its loss of liability limitation for the carrier and/or his servants and agents.

[43] Article 40 of CL, see supra note 40.

[44] Maritime Law of the People's Republic of China 1993 (promulgated by the Standing Committee of the National People's Congress 7 Nov.1992, effective 1 July, 1993).

Hague-Visby Rules (hereinafter known as 'HVR') and the Hamburg Rules [45] virtually has an indirect effect on the rules contained in this chapter. In particular, Article 58 of the CMC reads:

> "The defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or in tort.
>
> The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier's servant or agent, and the carrier's servant or agent proves that his action was *within the scope of his employment or agency*."

This article is modeled on Article 4 of the HVR and Article 7 of the Hamburg Rules. Also, it is noted that the term "servant or agent" in Article 58 appears again in Articles 61 and 64 of the CMC, which are provisions for the "actual carrier".[46] One is prompted to consider who can be identified as "servant or agent" in practice, and a detailed discussion of this is in Part IV of this paper.

Article 44[47], which is similar to Article III (8) of the HVR, may deserve the same attention as Article 58. When the Himalaya clause in the carriage contract is construed strictly, it may foul

[45] Guo Yu, *The spirit of the maritime law: the practice and theory of China* (Peking University Press: 2005) (in Chinese).

[46] CMC, Article 42(2): "Actual carrier" means "…the person to whom the performance of carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted under a sub-contract."

[47] CMC, Article 44: "Any stipulation in a contract of carriage of goods by sea or a bill of lading or other similar documents evidencing such contract that derogates from the provisions of this Chapter shall be null and void. However, such nullity and voidness shall not affect the validity of other provisions of the contract or the bill of

Article 44 if the clause in effect delegates or lessens the duties and responsibilities imposed statutorily on the carrier. In the English case *Starsin,* which was briefly discussed above, the majority of the lords were of the opinion that any protection conferred on shipowners shall be subject to Article III(8) of the HVR, which was the applicable law in that case.

However, there is a controversy, since although the CMC is seen as being of a non-delegable nature, as discussed above, it is silent about the mandatory nature of its application. In other words, whether or not Chapter 4 of the CMC could be applied to any sea carriage contract successfully is not clear, both in the CMC and/or other relevant regulations in China.

Article 58 and any contractual clauses of similar effect are challenged in the courts in China. It is often deemed as being null and void, or inapplicable. In the *Minsheng* Case, which is related because of having a cargo claim against an inland terminal operator under a multimodal transport contract[48], Minsheng Co. was the local carrier for an inland water segment on behalf of the multimodal carrier, who issued a bill of lading which contained a "compensation cap clause". The "compensation cap clause" in the instant case is very much identical to a Himalaya clause, and mainly provides that the carrier, its servant, sub-contractor or the vessel shall not compensate more than 666.67 SDR per package or unit or 2 SDR per kilo as per the CMC, for which reason it is normally known as a quasi-Himalaya clause. When it was being discharged by the terminal operator, the cargo was damaged negligently, and this resulted in a suit brought directly by the cargo interests against the terminal operator. The terminal operator, as decided by the court, was not entitled to limit his liability based upon the "compensation cap clause" contained in the multimodal transport bill of lading issued to the cargo owner. This decision shows that Chinese

lading or other similar documents. A clause assigning the benefit of insurance of the goods in favour of the carrier or other similar clause shall be null and void."

[48] *Sichuan Minsheng International freight Co. Ltd v. Sinotrans Container Lines Co.*, Hu Gaofa the Fourth Civil Tribunal Final Trial No. 143 maritime verdict (2010) (in Chinese).

courts are reluctant to acknowledge that the carrier's right of defence or limitation of liability can be contractually extended to any third parties who are sub-contractors of the carrier. More often than not, a Himalaya Clause or quasi-Himalaya Clause may be held as a contravention of the relevant laws and then not applied under the Chinese judicial system.[49]

IV. Identifying the parties for Himalaya protection

A Himalaya Clause may take various forms in the contract; however, it is common to find such terms as "agent, servant or sub-contractor" and "some other person" in the clause. Article 58 of the CMC, which contains similar benefits for third parties, also includes parties such as "the carrier's servant or agent".[50] It is thus important to first determine whether or not the terminal operator can be admitted as the carrier's servant or agent and enjoys such Himalaya protection as that being provided in Article 58.

Although the term "stevedore" is also used in legal practice, the term "terminal (port) operator" or "terminal (port) operation" is more often used in the relevant statutes,[51] court decisions and academic writings in China. In practice, the terminal operator also carries out a stevedore's duties,[52] and the function of stevedores may overlap or be absorbed by terminal operators. In retrospect, this can also be traced back to administrative regulations for terminals. For a long time, up until China's reform and opening-up period (1949-1978), the port authority, under the

[49] Please refer to part III of this paper.
[50] The CMC, Article 58.
[51] For example, in the Port Law of China, a number of provisions expressly refer to "port operators" (including Articles 26-31; Articles 49-51 and Articles 56-57). In the same law, "port operation" is defined in Article 22 as "the operations of dock and other port facilities, port services for passenger transport, cargo loading, unloading, lightering and storing in the port area, and operations of tugs in port."
[52] The concept of "port operator" can be found in Article 3 of the "Port Work on Cargo Rules", which was promulgated by the Department of Communication in 2000. It defines "port operator" as the one who enters into performance contracts with the entrusting party. The performance contract of the cargo at port is a contract of its kind through which the port operator performs loading/unloading, lighterage, storage, packing/unpacking of the container, with the handling fee paid in return by the entrusting party.

state-controlled economy, not only served as an enterprise, but also as an administrative agency. The port authority even performed as a shipping company, thus being a carrier as such.[53] Consequently, in the past the terminal operator was entitled to limit its liability in cargo claims in its capacity as a carrier. The evidence is available in the following two administrative regulations, these being "Several Provisions Concerning Addressing Accidents Occurring in the Port", which was issued by the Communication Department in 1978, and "Supplemental Provisions Concerning Addressing Accidents Occurring in the Port", which was issued by the same administrative department in 1979. These two regulations also expressly conferred the right of limitation of liability on the port operator.[54] Due to the enforcement of "Port Work on Cargo Rules",[55] the above two regulations were repealed. However, the said "Port Work on Cargo Rules" is silent as to the port operator's liability limitation issue, and accordingly the terminal operator has lost this express statutory limitation of liability in negligent cargo claims.[56]

Attempts were again undertaken by the legislation authority during drafting of the Port Law[57]. Terminal operators' civil liability was taken into consideration, and they were considered to be offered a limited liability,[58] which indicated a considerable similarity when compared to the CMC. However, all such provisions, including limited liability provisions concerning terminal operator's civil liability, were ultimately deleted from the draft, because a compromise was unable to be reached due to divergent opinions. Also, there have been other legal developments, in particular the Contract Law, which came into force in 1999 and was believed to be applicable

[53] Ye, Hongjun, *The Interpretation and Analysis of Port Law* (in Chinese), (China Communications Press and Dalian Maritime University Press, 2003), p.72.
[54] A statutory limit of CNY500 per package for the loss to or damage of the cargo is provided in Article 3 of the "Several Provisions Concerning Addressing Accidents Occurring in the Port".
[55] See footnote no. 52.
[56] Like, for example, in the judgment of the *Minsheng* case.
[57] The Port law was adopted at the 3rd Meeting of the Standing Committee of the Tenth National people's Congress of the PRC on June 28, 2003 and came into effect on January 1, 2004.
[58] It provides limits of liability for cargo loss/damage/delay and personal injuries/luggage respectively. See: Ye, Hongjun, supra note 53, pp.371-373.

in private legal relations involving a terminal operator. Therefore, it was felt unnecessary to draft any new provisions in the Port Law for the port industry.[59] It is regrettable that opportunities like this to close the loopholes and clarify whether or not the terminal operator would be protected legally, especially with regard to limitation of liability, slipped away once again.[60]

When rigorously examined, as below, it is hardly possible for any Himalaya Clauses or quasi-Himalaya Clauses to survive for terminal operators under the Chinese jurisdiction. Since it is difficult to gain support from China's judicial courts for a Himalaya Clause mutually agreed in the contract, the port industry has no choice but to turn to the statutory Himalaya provision in the CMC or other alternative approaches,[61] this with the hope that the relevant third parties may ultimately enjoy the same privileges as under the protection of a Himalaya Clause. The main reason to grant limited liability may be attributable to public policy for the purpose of supporting the port industry, and also to create a level playing field for shipping market competitors.[62] However, the terminal operator's protection deriving from such kind of clauses as refer to the statutory Himalaya provision in the contract has also been considerably challenged. This challenge is centered on the question as to whether or not a terminal operator can fall within such beneficiary parties as described in Article 58, which is the main legal provision employed for third party beneficiaries in the shipping area. Various opinions have been asserted by Chinese judges and the parties involved. There are basically two different views: The first takes the

[59] For more discussion about the abandonment of the terminal operator's civil liability in the Port Law please refer to: Ye, Hongjun, ibid, pp.337-342.
[60] The CMC does not use the terminology "port operator", though it is possible that "port operator" falls under the term "servant or agent" in Article 58 of the CMC.
[61] For example, the parties mutually agree a "compensation cap clause" in the contract for indemnity.
[62] As for the latter, this is on the grounds that most claims against terminal operators brought in foreign jurisdiction can be capped in indemnity, but this is not the case in China. It is believed that this is to some extent unfair. See: Ye, Hongjun, supra note 53, p318, p342.

terminal operator as being an "agent or servant of the carrier"; the second argues that the terminal operator may be recognized as the "actual carrier".

1) Is the terminal operator an "agent or servant of the carrier"?

Case 1: Yantai Huanqiu Terminal Co. v. Yantai Binglun Co. (2010)

In *Yantai Huanqiu Terminal Co. v. Yantai Binglun Co.* in 2010,[63] the appellate Yantai Huanqiu Terminal Co. ("Huanqiu") asserted in the court of first instance that they were entitled to limit their liability on three alternative grounds: 1) as being the agent or servant under Article 58 of the CMC; 2) as being the actual carrier under Article 42 of the CMC[64]; or 3) as based upon the Himalaya Clause contained at the back of the bills of lading.[65]

In the trial by the court of first instance, the above-said first proposition had been objected to, and the court held that the agency relationship between Huanqiu and Yantai Shipping was not established, since the terminal operator, i.e. Huanqiu, in this case fulfilled his performance in his own name rather than in the principal's name, and as a result the conditions in Article 63 of the CLC were not satisfied.[66] In addition, the service agreement between Huanqiu and Yantai Shipping[67] could not determine if Huanqiu was Yantai Shipping's servant.

[63] *Yantai Huanqiu Terminal Co. v Yantai Binglun Co.* (2010), the Fourth Civil Tribunal of Shang Dong Supreme Court, Final Trial No. 87 (2010) (in Chinese).

[64] Huanqiu sought to be identified by himself as the actual carrier after a broad construction under Article 42 of the CMC, not only in the 1st trial but also in its appeal, and the carriage of goods from unloading from the vessel to the CY should constitute part of the obligations which ought to be performed by the carrier who entrusted it to the terminal operator under CY-CY bills of lading (bills of lading no.:UKBYNT79387N).

[65] The third proposition submitted by the terminal operator was that via a Himalaya Clause appearing in the bill of lading (bill of lading no.: SYJKYTSS7250005) he could be entitled to the defenses and limits and liability enjoyed by the carrier.

[66] Section (2) of Article 63 of the CLC provides that "An agent shall perform civil juristic acts in the principal's name within the scope of the power of agency."

[67] Such a service agreement is a kind of contract such that the terminal operator performs the loading/unloading duties on the terminal on behalf of the carrier.

Nevertheless, ironically, the decision made in the first trial court held that the terminal operator lost his right to limit liability based upon gross negligence provided in Article 59 of the CMC. Article 59 only applies to two groups of parties: 1) the carrier; and 2) the servant or agent of the carrier.[68] Accordingly, it sounds very contradictory: On one hand, the court held that the terminal operator was not the "servant or agent of the carrier"; on the other hand, the terminal operator lost his right to limit liability due to the gross negligence provided only for "the carrier" or "the servant or agent of the carrier" in Article 59 of the CMC; and the terminal operator in this case was obviously not "the carrier" either.

In the court of appeal, it was reaffirmed that Huanqiu committed negligence to the extent of "recklessly and with knowledge that such loss, damage or delay would probably result", as provided in the CMC, which amounted to rendering the liability unlimited. It is remarkable that the court of appeal still applied the CMC, inter alia, and reaffirmed the categorization of the terminal operator as being the "servant or agent of the carrier". Is this a general assumption or simply a special case as regards identification of the terminal operator? In reality, whether or not the terminal operator acts as "agent or servant of the carrier" has not yet reached consensus in court judgments in China. The following two cases are considered for further illustration:

[68] Article 59 provides that, "The carrier shall not be entitled to the benefit of the limitation of liability provided for in Article 56 or 57 of this Code if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

The servant or agent of the carrier shall not be entitled to the benefit of limitation of liability provided for in article 56 or 57 of this Code, if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the servant or agent of the carrier done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

Case 2: Shenyang Mining Machinery Import & Export Co. v. Wantong Logistic Co. & Hyundai Marine Merchant Co. (2001)

In 2001, in *Shenyang Mining Machinery Import & Export Co. v. Wantong Logistic Co. & Hyundai Marine Merchant Co.,*[69] the first defendant, Wantong Logistic, negligently damaged the cargoes when they were moved across the vessel rail to the container yard for delivery. Wantong Logistic entered into a storage agreement with the second defendant Hyundai Marine Merchant Co. (HMM). The plaintiff cargo owner claimed that Wantong Logistics was the actual carrier, which was disputed by Wantong, who claimed that he was the servant of HMM. Dalian Maritime Court held that the storage agreement was not a carriage contract, and that Wantong fulfilled its obligation under the storage contract in the capacity of HMM's servant.

Case 3: The Oriental Scientific Instrument Zhejiang Import and Export Co. v. Zim Israel Navigation Co. and Others (2000)

In *The Oriental Scientific Instrument Zhejiang Import and Export Co. v. Zim Israel Navigation Co. and Others,*[70] cargo owner (The Oriental Scientific Instrument Zhejiang Import and Export Co., OSI) filed a suit against the carrier (Zim Israel Navigation Co., "Zim") and Beilun Container Co. in Ningbo Port ("Beilun") for their joint and several liability based upon Article 65 (3) of the CLC.

Ningbo Maritime Court held that no agency relationship between Beilun and Zim, evidenced by the "Port Terminal and Liners Service Agreement (Agreement)", can be established; and thus Beilun was not the agent of the carrier. Agency relationship should be established in a situation

[69] *Shenyang Mining Machinery Import & Export Co. v. Wantong Logistic Co. & Hyundai Marine Merchant Co.*, Da Haifa First Trial No. 246, Commercial Verdict, Dalian Maritime Court (2002) (in Chinese).
[70] *The Oriental Scientific Instrument Zhejiang Import and Export Co. v. Zim Israel Navigation Co. and Others*, Yong Haifa First Trial No. 208, Commercial Verdict, Ningbo Maritime Code (2000) (in Chinese).

where a civil juristic act is performed in the name of the principal with a third party, while it could not be established for a factual act disregarding express intention, like Beilun in this case.

2) Is the terminal operator the actual carrier?

The proposition that a terminal operator falls into the category of the actual carrier was asserted by terminal operator *Huanqiu* in its appeal in *Yantai Huanqiu Terminal Co. v Yantai Binglun Co. (2010),* see above. This proposition was not specifically dealt with by Qingdao Maritime Court, so it can thus be inferred that no support could be gained for this proposition from the trial court. Interestingly, the plaintiff cargo owner in *Shenyang Mining Machinery Import & Export Co. v. Wantong Logistic Co. & Hyundai Marine Merchant Co.* also claimed that the terminal operator should be recognized as the actual carrier, although the idea was not supported by this court either. In the former case, the underlying reason for the terminal operator to claim he was the actual carrier was that he could invoke the same defenses and limits of liability as the carrier could do under the CMC. In the latter case, however, the cargo owner asserted the terminal operator to be the actual carrier simply because the terminal operator could then be imposed with similar liability to the carrier under the CMC.

It is not easy to strike a clear-cut line between these parties. The essential reason for such inconsistency existing within judicial practice in China with respect to the identity of the terminal operator is that there are legislation loopholes in the CMC or other laws. Also, there is an apparent contradiction between the CMC and the CLC/CL with respect to the provisions concerning third parties; in particular, the agency rules provided in these laws are not consistent. Agency theory in the Chinese civil law scenario cannot cover all performances carried out by a terminal operator, since some performances are not carried out with the express intentions of the parties; for instance, loading/unloading cargo, which is part of the obligations engaged in by the

terminal operator on the carriers' behalf. This also reflects that, under the CLC, factual acts cannot be entrusted to third parties to fulfill.[71] Furthermore, opinions vary among those in the Chinese academic circle. It is not surprising to find that some scholars support the view that the terminal operator is the actual carrier,[72] but that this view is strongly disagreed with by certain other scholars.[73] Also, the meaning of the term "servant" is not the same as under either common law jurisdictions or international conventions. In China, the "servant" is not governed by China's Labor Contract Law; instead, the CLC, CL or China's Tort Law is accordingly invoked in various circumstances. However, the foregoing provisions do not clearly mention servants' relations, so if there is any dispute arising from servants, the claims are always based upon tort or contract. When terminal operators make a contract with a carrier (or sometimes with a cargo owner), theoretically they may serve as the servant of the contracting party. However, because of the lack of a definition of "servant" and any clear and relevant rules, it is difficult to identify whether or not the terminal operator is actually the servant of the carrier, and it is not easy to gain support for this either from China's judicial practice or from its academic circle.

V. Searching for an appropriate approach to protect third parties

More and more jurisdictions have accepted Himalaya protection for third party beneficiaries in the form of case law or statutes,[74] and the scope of benefits to third parties also seems to have

[71] Article 63 of the CLC provides: "Citizens and legal persons may perform civil juristic acts through agents. An agent shall perform civil juristic acts in the principal's name within the scope of the power of agency. The principal shall bear civil liability for the agent's acts of agency. Civil juristic acts that should be performed by the principal himself, pursuant to legal provisions or the agreement between the two parties, shall not be entrusted to an agent."

[72] See Si, Yuzhuo, "A study on the development and theoretical basis of Himalaya Clause", *Journal of Dalian Maritime University* (in Chinese), No. 2, 2004, pp.4-5.

[73] For example, Xu, Junqiang, "A Case Review of Some Food Co. v. Terminal Co. in Contract", *Annual of China Maritime Law* 2007 (in Chinese), pp.451-461.

[74] Most English and Commonwealth nations, such as UK, Canada, Australia and South Africa now all accept the Himalaya clause in case law or statutes. See: Tetley, William, *Maritime Cargo Claims* (4th ed., Editions Yvon Blais, Canada, 2008), pp. 1864-1890. Also: Girvin, Stephen, "The Law Commission's Draft Contracts (Rights of Third

been enlarged. It may therefore be time to reconsider the legal issues involving Himalaya protection in China. It is clear from the above analysis that the terminal operator, as a third party to the sea carriage contract, actually finds it very difficult to gain support in the Chinese courts in cargo loss or damage claims; thus, it may be necessary to consider whether it is feasible to revise the statutory provisions that concern Himalaya protection. If it is feasible, this would eventually lead to a change of jurisdiction in legal practice. For this purpose, the relevant international rules and national legislations are discussed below.

1. International Rules

An attempt was made under the international framework of the United Nations Convention on the Liability of Operators of Transport Terminals 1991 (hereinafter "1991 O.T.T. convention") to specifically regulate the terminal operator's liability. Apart from the rule of limitation of liability provided for in Article 6 of the convention, Article 7 entitled, "Application to non-contractual claims", provides that:

> "(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.
>
> (2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail

Parties) Bill and the Carriage of Goods by Sea", 1997 *Lloyds Maritime and Commercial Law Quarterly*, p.549. However, civil-law nations, such as France and Germany, are less concerned with the Himalaya problem, and a similar situation occurs with the US. This is also referred to by: Michael F. Sturley, supra note 25, p. 748.

himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention."

The purpose of such an attempt as in the above provision was to reduce the differences that existed at the time under different jurisdictions regarding Himalaya protection,[75] but the said convention never actually came into force.

Prior to the failure of the 1991 O.T.T. Convention, and in order to circumvent the conflicts arising from different interpretations of the Himalaya Clause and after, to some extent, *Adler v Dickson and Another*, the Visby Rules was accordingly later amended, and called the HVR, by adding a statutory Himalaya provision in Article IVbis entitled, "Application of Defences and Limits of Liability".[76] In consequence, it may be acknowledged that Article IV of HVR serves as the precedent of all other statutory Himalaya provisions in both national legislations and international conventions,[77] amongst which was the1991 O.T.T. Convention. However, it is interesting to note that "independent contractor" is not included so as to also enjoy Himalaya protection under the HVR. Under Chinese law and practice, as discussed elsewhere, because of the unpredictability of its effect Himalaya protection in the form of a statutory provision prevails

[75] Joseph C Sweeney, "New UN Convention on Liability of Terminal Operators in International Trade", 14 *Fordham International Law Journal* (1990), P.1119.
[76] The HVR, Article IVbis "Application of Defences and Limits of Liability".
[77] The HVR is for the maritime ambit only; other transportation conventions, such as CMR, also faced the statutory Himalaya problem in the early 1960s. See: K. Grönfors, "Non-contractual claims", in: S. Manka-bady (ed.), *The Hamburg Rules on the carriage of goods by sea*, (A.W. Sijthoff, Leyden/Boston, 1978), p.187, at 193. Also, the legal provisions in different international conventions include: Article 7 of the Hamburg Rules: "Application to non-contractual claims"; Article 15 of the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980), "The liability of the multimodal transport operator for his servants, agents and other persons".

over a pure Himalaya Clause agreed to in a bill of lading or similar carriage contract. The CMC in China sets out its Himalaya provision by making reference to the similar provision in Article IV of the HVR, although the liable parties, including the carrier and actual carrier,[78] are modeled on the Hamburg Rules.

Under the well-known Rotterdam Rules ("RR"), which does not come into effect, the statutory provision about Himalaya protection can be found in paragraph 1 of Article 4, which provides:

> "Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against: (*a*) The carrier or a maritime performing party; (*b*) The master, crew or any other person that performs services on board the ship; or (*c*) Employees of the carrier or a maritime performing party."

Although being clearly stated and adopting a wider coverage compared to earlier international carriage conventions such as the HVR, difficulties may still arise when deciding if the identity of a particular person can fall within this article. In particular, one of the eminent implications for the RR's Himalaya provision is the innovation of Marine Performance Party (MPP). An MPP and their employees are a type of independent third party beneficiary under the RR. Article 1(7),[79] together with Article 1(6) for "performing party", sets forth a geographic criterion for

[78] The CMC, Articles 61-65.

[79] The MPP is defined in Article 1(7) of the RR as: "…a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area." Also, the performing party is defined in Article 1(6) of the RR as being: "a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading,

these third parties, who assist with the carrier's carriage obligations at the carriers' request, or on its behalf, within the port area. The carrier's employees and certain expected persons, such as masters/crew or others working on board, are not subject to such geographic criteria.

The introduction of an MPP concept or a similar one into Chinese law would not solve the legal issues revolving around the terminal operator in China. If the terminal operator is acting on behalf of the shipper, protection conferred by the statutory Himalaya provision would not be available, since he is not the MPP according to the definition in the RR; neither would it be applicable if the terminal operator works outside the sea port, since the geographic test would not be satisfied. On the other hand, one group of parties in Article 4 of the RR is clearly stated to be "the master, crew or any other person that performs services on board", rather than "servant or agent" as stipulated in the CMC. If Chinese law had a similar provision, though, it would still be no easier to ascertain who the agent or servant is in a particular case under the CMC. Since the carrier and performing party are the ones to have liability imposed on them by the RR, and the CMC includes the concept of "actual carrier", it is interesting to further discuss whether the functions of an actual carrier as defined in the CMC are similar to that of the performing party.

If a similar approach to that in the RR were to be adopted in the CMC, it would mean a fundamental change to the liability allocations between the liable parties. Given the fact that the RR is awaiting ratification, it would be sensible, though, not to adopt the concept of "performing carrier" immediately. Also, any amendment to the existing Chinese law or adoption of any new legislation should try to minimize any possible inconsistency with existing Chinese laws.

---

handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."

Therefore, it might be good at the moment to only add phrases such as "any other person"[80] or "another person" [81] in the relevant articles, such as Article 58 of the CMC.

Also, the effect of the Himalaya protection provision in the RR is limited, since it cannot apply to an inland carrier under a multimodal transport contract. [82] The inland carrier can be the beneficiary in some jurisdictions, for example under US case law. Thus, to some extent, contractual Himalaya clauses will "continue to serve their purpose—the protection of third parties—at least for non-maritime performing parties."[83]

2. The Contracts (Rights of Third Parties) Act, the UK

As far as the privity of contract rule is concerned, it is worth mentioning the UK's legislative reform in the 1990s in this respect, its fruitful outcome being The Contracts (Rights of Third Parties) Act 1999 (hereinafter "the 1999 Act"). This Act is not intended to abolish the privity of contract rule, but rather carves out a general and wide-ranging exception to it,[84] which means that it only reforms part of the privity of contract doctrine with respect to the rights and benefits of third parties.[85]

---

[80] For example, Article 15 of the MTC 1980 is about "the liability of the multimodal transport operator for his servants, agents and other persons", and provides "…of any other person of whose services he makes use for the performance of …when such person is acting in the performance of the contract…"

[81] For example, Articles 7 and 8 under the 1991 O.T.T.Convention also adds "*another person of whose services the operator makes use for the performance of the transport-related services*" along with the agents/servants.

[82] Theodora Nikaki, "Himalaya clauses and the Rotterdam Rules" 17 *Journal of International Maritime Law* 20-40 (2011), pp38-39.

[83] Theodora Nikaki, ibid, p40.

[84] See more in "Privity of Contract: Contracts for the Benefit for Third Parties" (1996), by the Law Commission, full text available:
http://lawcommission.justice.gov.uk/docs/lc242_privity_of_contract_for_the_benefit_of_third_parties.pdf
(last visited 19 June 2014).

[85] The common law doctrine of privity is generally thought to have two limbs or branches: One concerns the benefits of the term of a contract between two parties; and the other is that a third party (or parties) cannot be bound by a term in such a contract. Please refer to Sir G. Treitel, "The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea", in Rose, Francis (ed.), Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds (LLP, 2000), p. 346. See also Andrew Burrows, "The Contracts (Right of Third Parties) Act 1990 and Its Implications of Commercial Contracts", (2000) *Lloyds Maritime and Commercial Law Quarterly*, p. 540.

With its primary aim being to respect "the intentions of the original contracting parties"[86] and gain resilience against "injustice to the third party",[87] the 1999 Act took about 10 years for its enactment. As for certain third parties within the ambit of carriage of goods by sea contracts, such as subsequent holders of a bill of lading, or persons to deliver under a sea waybill or ship's delivery order, the 1999 Act tries to circumvent the conflict within the Carriage of Goods by Sea Act 1992 (COGSA 1992), which is the applicable rules for carriage of goods by sea contracts in the UK. If those third parties are permitted to rely on the 1999 Act instead of the 1992 Act, it will "contradict the policy underlying the relevant legislation and would cause unacceptable commercial uncertainty".[88] But for stevedores or terminal operators who are not regulated by the 1992 Act, and if they fall into the class of persons identified by "name, as a member of a class or as answering a particular description",[89] they would be directly protected under the 1999 Act. As a result, it will not be necessary to prove further the existence of any agency relationship, or bailment on terms, or collateral contract with the original contractual parties. There is no need to prove the consideration moving between the concerned parties or to scrutinize the wording of the Himalaya Clause. This reflects a prudent recognition of the long line of decisions which have recognized the efficacy of a Himalaya Clause,[90] and will also considerably simplify its drafting.[91]

The 1999 Act appears to be widely welcomed for the legal certainty which will be given to the vast majority of Himalaya clauses,[92] and the Act may also provide third parties with more benefits and security. However, the existing statutory and common law exceptions to the privity

[86] See supra note 83.
[87] Ibid. In addition, there are seven other leading rationales underlying the reform of privity doctrine, see the same Report in Paragraph 3.3-3.28.
[88] See supra note 84, Para.12.6. Also see Stephen Girvin, "The Law Commission's Draft Contracts (Rights of Third Parties) Bill and the Carriage of Goods by Sea", (1997) *Lloyds Maritime and Commercial Law Quarterly* 541, at 549.
[89] Section 1(3) of the 1999 Act.
[90] Stephen Girvin, supra note 88, at 548.
[91] G. Treitel, Supra note 85, at 364.
[92] Stephen Girvin, supra note 88, p.549.

doctrine should nevertheless be preserved.[93] During cargo claim suits against stevedores or terminal operators, the judicial authority regarding exceptions to the privity of contract doctrine still applies. Meanwhile, the 1999 Act will be applied in carriage of goods by sea cases if the foregoing 1992 Act is not applied accordingly.[94] As for China, making or revising any legislation is not easy and is very time-consuming; efforts should perhaps be made to improve the existing legislation. But if China were to draft a specific law in this respect, the 1999 Act could be referred to in some aspects, such as the dual intention test adopted in Section 1 of this Act.

3. The Pragmatic and Generous Construction of the Himalaya Clause by US Courts

At almost the same time as the seismic case *Adler v. Dickson and another*, the US's case *Robert C. Herd & Co. Inc. v. Krawill Machinery Corporation (Herd)* in 1959 manifests that a negligent stevedore cannot limit his cargo damage liability by virtue of a Himalaya Clause, since he does not fall into the category of "carrier" as defined by the Himalaya Clause in the bills of lading. The first attempt by a US court to protect third parties in a carriage contract in an explicit manner refers to the 1952 Case *A. M. Collins & Co. v. Panama R. Co.*[95] *(Collins)*, where "third parties performing a carrier's duties were automatically entitled to the benefit of the carrier's exculpatory rights",[96] since the carrier's bill of lading controls every step of the transportation. In the *Collins* case, a railroad company was the third party offender who damaged cargo in the unloading process as an agent of the carrier, and finally took advantage of the USD 500 package limitation

[93] Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No. 242" (1996) *Lloyds Maritime and Commercial Law Quarterly*, p. 479.
[94] Such as the situation when shipowners are entitled to enforce receivers' letters of indemnity against receivers under the 1999 Act. See: Laemthong International Lines Company Ltd.V.Artis and Others (The "Laemthong Glory") (No. 2), 1 Lloyd's Law Report 688.
[95] 197 F.2d 893 (5th Cir. C.Z. 1952).
[96] David W. Robertson and et al. (ed.), *Admiralty and Maritime Law in the United States* (Carolina Academic Press, 2nd ed.), p. 329.

under COGSA 1936[97]. In contrast, the stevedore in *Herd* was not allowed to benefit in the same way as the carrier, due to a strict construction from the US 5th Circuit of the so-called intended beneficiaries.[98] The above two cases shared similar facts but ended with an opposite result for the involved third party. The reason why the decisions regarding the third party issue of *Adler v. Dickson and another* did not stand in line with *Collins* can, to some extent, be attributed to the fact that a personal injury claim is quite different from a cargo damage claim in the consideration of offer, acceptance and consideration rules. However, *Adler v. Dickson and another* really shares an identical legal backdrop to that of *Herd* in the characteristics of a much more sophisticatedly drafted Himalaya Clause, especially with it being expressed in a much clearer and unequivocal manner so as to cover as many third parties as possible.

With regard to the issue of depriving or limiting the liability of a stevedore or terminal operator engaged in the performance of a carrier's contractual obligations, this has been aggravated by the development of modern multimodal transport, which has boomed since the 1950s, although it was not unheard of during the first half of the 20th century, when English courts were struggling with privity of contract difficulties with third parties other than stevedores or terminal operators. During the second half of the 20th century, and following on from the *Herd* case, U.S. court rulings seem to be not always consistent as far as application of the Himalaya Clause is concerned, but it is now becoming more and more evident that a broader protection is available for third parties based upon enforcement of the Himalaya clause.

[97] The carriage of Goods by Sea Act 1946.

[98] Robert C. Herd & Co. v. Krawill, 359 U.S. 297 (U.S. 1959), P. 305: '…contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."'

The US Supreme Court has taken a more generous attitude towards interpretation and construction of the Himalaya Clause. As well as stevedores and terminal operators, who fall within the defining scope of "servant and agent" in a traditional sense, third parties even include the "independent contractor", which can, for example, encompass rail carriers who may act as the local carrier for a multimodal carrier. *Kirby* is a leading case showing that the Himalaya Clause can be invoked by a downstream rail carrier against the cargo owner for the protection of package limitation provided for in the relevant bills of lading. Following the dictum of *Kirby*, the 9th circuit in *Mazda Motors of Am., Inc. v. M/V Cougar Ace*[99] clearly rejected the cargo owner's proposition that the name of the vessel should be expressly stated in the Himalaya clause, and upheld that the defendant's vessel was within the language of "sub-contractor" as defined in the Himalaya Clause of the bill of lading.[100] Therefore, the forum selection clause could be invoked as a defense that would be available to the carrier.[101] This case, then, shows that not only can a vessel be covered as a third party within the scope of the Himalaya Clause, but also affirms that the forum selection clause can be asserted and protected by the Himalaya Clause.

It may also be noted that some US circuits have even upheld that a clause called "covenant not to sue" contained in bills of lading is enforceable even when there is a Himalaya Clause, whereby third parties can choose to invoke the "covenant not to sue" rather than the Himalaya Clause,[102] or can invoke both at the same time.[103] The "covenant not to sue" requires the cargo owner to sue the carrier rather than the third parties, amounting to a complete escape from responsibility in

[99] Mazda Motors of Am., Inc. v. M/V Cougar Ace, 565 F.3d 573 (9th Cir. Or. 2009).
[100] '…We must give effect to the contracting parties' use of inclusive language to benefit "anyone assisting the performance of the Carriage"…' Ibid, p.580.
[101] Ibid, p578.
[102] For more about the status quo of such a clause in US judicial development please refer to David W. Robertson and Michael F. Sturley, "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits", 37 *Tulane Maritime Law Journal* 402 (2013), pp. 460-462.
[103] Nipponkoa Ins. Co., LTD v. Norfolk S. Ry. Co., 794 F. Supp. 2d 838 (S.D. Ohio 2011).

legal actions, except in any subsequent recourse action from the carrier. Obviously, this provides a more complete and desirable protection for third parties compared with the Himalaya Clause, in that the latter only affords defenses or limits of liability[104] in the form of negative rights. However, it cannot be concluded that a "covenant not to sue" is always enforceable[105] before the courts.

VI. Conclusion

The Himalaya clause is "an ingenious, short-term solution to a difficult problem".[106] In China, a Himalaya Clause contained in the bill of lading contract or similar will often be avoided by the judicial decision. Thus, the clause "raises infinitely more problems than it solves".[107] Consequently, in China, Himalaya protection has been diverted to focus solely on statutory Himalaya provisions, for example, that in Article 58 of the CMC. Nevertheless, it is observed that the legal identity of the terminal operator and whether or not they can be protected by a Himalaya Clause or any similar mechanism is of great debate under Chinese law and practice.

In this paper, we have discussed the possibility of an appropriate revision of relevant Chinese law, as well as the possibility of a more generous attitude from the courts towards the Himalaya Clause from other jurisdictions, which could in itself improve the application of China's law regarding Himalaya protection. After all, we cannot escape the scenario of fast and increasing development of multimodal transportation, along with which comes an expansive coverage of non-contractual parties under the Himalaya Clause or relevant statutory provisions. Dismissing

[104] David W. Robertson, Michael F. Sturley, supra note 102, p. 461.
[105] For example: *Royal & Sun Alliance Ins. PLC v. Ocean World Lines, Inc.*, 572 F. Supp. 2d 379 (S.D.N.Y. 2008).
[106] William Tetley, supra note 34, p.1856; also see "the Himalaya clause is not a good way to achieve uniformity, as Himalaya clauses apply only when a defendant subcontractor seeks to rely on a defense in the bill of lading", Christopher J. Enge, 'Intermodal Cargo Claims after "K" Line v. Regal-Beloit Pacific Admiralty Seminar: Selected Articles', 23 *USF Maritime Law Journal* 118 (2010).
[107] William Tetley, supra note 34, p. 1856. See also Christopher J. Enge, ibid.

the Himalaya Clause's actual functions and roles within the shipping and commercial world would not be acceptable to these vital industries who work so closely together.