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Himalaya Clauses in Sea Carriage Contracts: Closing the Pandora's Box

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Notes

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Abstract

The enforcement of Himalaya clauses in contracts for the carriage of goods by sea has gone further than it should have in the common law. By operation of a broadly drafted Himalaya clause, virtually *any* third party who participates in the performance of carriage can enforce *any* protection or benefit available to the carrier under the contract as a defense to claims brought by cargo owners for loss or damage to cargo. Following the establishment of a principled exception to the doctrine of privity of contract by the Supreme Court of Canada, broadly drafted Himalaya clauses have been applied expansively in the context of carriage of goods by sea. This Thesis argues that the expansive application of Himalaya clauses in the common law is highly problematic. Such a broad protection of third parties against liability is inconsistent with legal doctrine and it gives rise to a number of legal issues. Thus, this Thesis seeks to find an alternative and restrictive basis for the enforcement of Himalaya clauses in Canadian law.

Keywords

Himalaya Clause – Contract of Carriage – Carriage of Goods by Sea – Subcontractors – Third Parties – Third Party Rights of Enforcement – Principled Exception to Privity – Exemption Clauses – Estoppel by Convention – Common Law – Canada

Summary for Lay Audience

The carriage of goods by sea is a complex venture that requires the employment of several persons, such as shipowners, charterers, crew members, stevedores, terminal operators, and others. These persons are not necessarily parties to the contract of carriage between the cargo owner and the carrier, but they merely participate in its performance (they are third parties to the contract). In case of loss or damage to the cargo in transit, a significant question that arises is: who is liable to the cargo owner? Himalaya clauses are commonly included in contracts of carriage to enable third parties to benefit from contractual terms, such as exemptions or limitations of liability, against claims brought by cargo owners for loss or damage to cargo. As a result, third parties can invoke a Himalaya clause in the contract of carriage to exempt or limit their liability for loss or damage to cargo. This project offers an account of the status of Himalaya clauses in Canadian law and its impact on the liability of third parties against cargo owners. The analysis of the development of Himalaya clauses in the common law reveals the tendency of some courts to read such clauses expansively as extending to a wide range of third parties, a wide range of liability and a wide range of additional contractual benefits. This project argues that the expansive application of Himalaya clauses is unsupported by legal principles and it creates a number of problems under Canadian law. This project also stresses the need to restrict the scope of Himalaya clauses in the context of carriage of goods by sea and it proposes an equitable solution to that effect. The ultimate purpose of this project is to expound the function of Himalaya clauses in Canadian law and make an original contribution to the literature on this topic.

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This work is dedicated to my loved ones, who believed in me since day one.

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Chapter 1

1 Introduction

The carriage of goods by sea is a significant part of our every-day life. Millions of tonnes of products are being shipped daily from every corner of the world to reach our doorstep.[1] Canada is amongst the leading nations in marine transport. As a developed economy which shares a border with the United States, Canada enjoys one of world's largest bilateral flows of merchandise trade,[2] and handles a high volume of goods in its ports.[3]

The transportation of cargo by sea, however, always entails the risk of loss or damage to the goods in transit. In 2021, there were 220 reported marine accidents and 177 reported shipping accidents in the course of commercial marine activity in Canadian waters.[4] In addition, there were 855 reported marine incidents, including *inter alia* cargo shift or cargo loss, risk of collision or sinking, or total failure of any machinery or technical system.[5] The data shows that the loss or damage to cargo during transport is not an uncommon phenomenon.

A significant question that arises in this context is: who is liable for the loss or damage to cargo during transport? The distribution of the risk of liability in marine transport is not an easy

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[1] See United Nations Conference on Trade and Development, "Handbook of Statistics" (9 December 2021), online: *UNCTAD* <https://unctad.org/webflyer/handbook-statistics-2021> [UNCTAD Handbook].

[2] See *ibid* at 20 (The value of traded goods between Canada, the U.S., and Mexico in 2020 was about USD 1.07 trillion). See also Canadian Centre on Transportation Data, "Table 23-10-0269-01 Transportation Activity Indicators" (6 July 2022), online: *Transport Canada* <https://doi.org/10.25318/2310026901-eng> (The total value of exported goods from Canada in April 2022 was CAD 63,552,000 and the total value of imported goods to Canada in April 2022 was CAD 62,058,000). See also UNCTAD Handbook, *supra* note 1 at 74 (4,317,000 tons of goods were loaded onto ships in developed economies, including Canada, for seaborne trade in 2020).

[3] See UNCTAD Handbook, *supra* note 1 at 81, 83 (Canada as a developed economy is amongst the top countries by number of port calls and volume of port container traffic). See also Transport Canada, "Transportation in Canada 2021" (27 June 2022), online: *Transport Canada* <https://tc.canada.ca/en/corporate-services/transparency/corporate-management-reporting/transportation-canada-annual-reports/2021/transportation-canada-2021> at 31.

[4] Transportation Safety Board of Canada, "Statistical Summary: Marine Transportation Occurrences in 2021" (18 March 2022), online: *Transportation Safety Board* <http://www.tsb.gc.ca/eng/stats/marine/2021/ssem-ssmo-2021.html> at 2.

[5] *Ibid* at 9-10, 17.

task. The carriage of goods by sea is a complex venture that requires the participation of several persons. Even though the contract for the carriage of goods by sea is concluded between the owner of cargo and a carrier, the contract is performed by many other professionals engaged by the carrier (third parties). In a simple scenario, the venture begins when the cargo owner takes the goods at the port for shipment; there, stevedores or terminal operators place the goods into containers and load the containers onto a ship; on board the ship, the crew members or other professionals stow the goods either on deck or under-deck; then the shipowner or the charterer carries the goods at sea. When the ship reaches the destination port, stevedores or terminal operators discharge the containers from the ship, unload the goods from the containers, and store the same at the port terminal until final delivery to the new cargo owner. Each of these third parties is obliged to take reasonable care of the goods under their control, and they may be personally liable to the cargo owner in case of loss or damage. Thus, if a third party was negligent in the performance of its duties and as a result the goods were lost or damaged, the third party may find itself liable for damages to the cargo owner.

Due to the fact that cargo owners frequently sue third parties for loss or damage to cargo, lawyers and carriers have sought to protect third parties by contract. By including what are now called “Himalaya clauses” in the contract of carriage, carriers extend their contractual protections, such as exemptions or limitations of liability, to their employees, agents, and contractors. By operation of a Himalaya clause, cargo owners are prevented from recovering from third parties who were engaged by the carrier to perform the contract.

The current state of the law in Canada allows third parties to benefit from Himalaya clauses in contracts of carriage. As discussed in Chapter 3 below, the Supreme Court of Canada has established a test that allows third parties to avail themselves of a contractual term so long as they

are an intended beneficiary of that term. Since this test was established, Himalaya clauses have been applied in an expansive manner. The jurisprudence in Canada and other common law jurisdictions reveals a willingness of courts to permit the application of Himalaya clauses to a wide range of third parties, against a wide range of liability, and for a wide range of benefits under the contract.

The purpose of this Thesis is to argue that the expansive application of Himalaya clauses in the common law of Canada is problematic and that the operation of such clauses should be limited. To make these arguments, the Thesis is organized in the following Chapters. In Chapter 2, I offer a brief account of the context of the carriage of goods by sea in which Himalaya clauses operate. In Chapter 3, I examine the development of Himalaya clauses in the common law of Canada. Here, I provide an analysis of the two tests that allow the enforcement of contractual terms by third parties vis-à-vis the doctrine of privity of contract – the agency test and the principled exception test – and an analysis of the expansive application of Himalaya clauses contained in sea carriage contracts. In Chapter 4, I argue that the expansive application of Himalaya clauses by operation of the principled exception is problematic because it is unsupported by doctrine and because it raises more issues than it solves. In Chapter 5, I propose that the scope of the principled exception, and therefore the scope of Himalaya clauses, should be limited in maritime common law by turning to a traditional equitable tool – estoppel.

Chapter 2

2 The Context of Carriage of Goods by Sea

Before proceeding with the analysis, it is important to briefly examine the background of the carriage of goods by sea. This Chapter explains the terminology to be used in this Thesis and the circumstances of the shipping industry that are relevant in the study of Himalaya clauses. This Chapter also discusses the genesis of Himalaya clauses in the common law and the legal issues arising from their function.

2.1 Contracts of Carriage and Bills of Lading

The terms under which the goods are to be carried are contained in a "contract of affreightment". A "contract of affreightment" is an agreement between a cargo owner and a carrier for the carriage of goods by water in return for a sum of money called freight.[1] This type of agreement is also known as "sea carriage contract", "contract for the carriage of goods by sea", or "contract of carriage", and thus I use these terms interchangeably.

The terms of the contract of affreightment are commonly printed on the back of a bill of lading. A bill of lading is a document issued by the carrier to the cargo owner to process the delivery of goods by sea.[2] It serves as evidence of the contract of affreightment, as a receipt by the carrier for the goods to be carried, and/or as a document of title to the goods.[3] In modern trade, bills of lading have a fairly standardized two page format in which the details of the particular cargo and carriage appear on the front and the carrier's standard trading terms, which are

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[1] Alan A Mocatta, Michael J Mustill & Stewart C Boyd, *Scrutton on Charterparties and Bills of Lading*, 19th ed (London: Sweet & Maxwell, 1984) at 1.
[2] Aldo Chircop et al, *Canadian Maritime Law*, 2nd ed (Toronto: Irwin Law, 2016) at 564.
[3] *Ibid* at 565 citing *Canadian General Electric v Armateurs du St Laurent Inc*, [1977] 1 FC 215; See also *Pyrene Co Ltd v Scindia Navigation Co Ltd*, [1954] 2 QB 402 [*Pyrene*]; Thomas J Schoenbaum, *Admiralty and Maritime Law*, 6th ed (St Paul, MN: West Academic Publishing, 2019) at 477.

incorporated as part of the operative conditions of carriage, appear in fine print on the back.[4] Some shortform or blank back bills of lading do not contain the carrier's terms on the back, but instead they incorporate the carrier's terms by reference to the carrier's business premises (or website).[5] It is important to note that the issuance of a bill of lading is not simultaneous with the conclusion of the contract of carriage. While the contract will be formulated long before the receipt of the goods by the carrier, the bill of lading will be issued at least after receipt and ordinarily after shipment of the goods (after the ship has left the port).[6]

For purposes of clarity, it is also important to identify the parties to a contract of affreightment. On the one hand, the "cargo owner" is the person who sends the goods for shipment or receives the goods after shipment. In either case, the cargo owner is the person who has legal ownership or possessory title over the cargo at the time when the loss or damage occurred.[7] Practically, this means that the cargo owner is the person who holds the bill of lading at the material time, *e.g.*, a shipper[8] or consignee or endorsee of the bill of lading.[9] Thus the cargo owner is entitled to bring claims in contract or in tort against the carrier and any third party who was in custody of the cargo when the loss or damage occurred. On the other hand, the "carrier" is the person who

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[4] Chircop et al, *supra* note 2 at 565.
[5] *Ibid* at 565.
[6] *Ibid* at 567; Frank Stevens, *The Bill of Lading: Holder Rights and Liabilities* (New York: Routledge, 2018) at 17.
[7] Hugh M Kindred, "Goodbye to the Hague Rules: Will the New Carriage of Goods by Water Act Make a Difference" (1995) 24:3 Can Bus LJ 404 at 410; Brian Harris, *Ridley's Law of the Carriage of Goods by Land, Sea and Air*, 8th ed (London: Sweet & Maxwell, 2010) at 24. For a judicial discussion on the identity of the cargo owner, see *The Albazero*, [1976] 2 Lloyd's Rep. 467 (HL); *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)*, [1986] 2 Lloyd's Rep. 1 (HL).
[8] See e.g., *Boutique Jacob Inc v Canadian Pacific Railway Co*, [2008] FCJ No 358 [*Boutique*]; *Valmet Paper Machinery Inc v Hapag-Lloyd AG*, [2002] BCJ No 1271 [*Valmet*]; *Timberwest Forest Corp v Pacific Link Ocean Services Corporation*, [2009] 2 FCR 496.
[9] See e.g., *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (Australia)*, [1980] 3 All ER 257 [*The New York Star*]; *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO*]. See also *Bills of Lading Act*, RSC 1985, c B5, s 2. While the goods are in transit under the control of the carrier, the shipper (transferor) can sell the bill of lading as if he or she was selling the goods to a buyer (transferee). To complete the transaction, the transferor must endorse the bill of lading with the name of the transferee and deliver possession of it to the transferee (Chircop et al, *supra* note 2 at 570). That way, the transferee will be able to present the bill of lading at the port of destination and take delivery of the goods.

undertakes to transfer the cargo via sea. The term "carrier" is statutorily defined as including shipowners or charterers who enter into a contract of carriage with the cargo owner.[10] This means that the carrier is the person who contracts with the cargo owner (the contracting carrier) and not necessarily the actual carrier of the goods (the performing carrier).[11] Thus, the contracting carrier is often identified by the logo, banner heading, or signature on the bill of lading.[12] The carrier may be a shipowner, charterer, freight forwarder, multimodal transport operator, or any other person who, by issuing a bill of lading, makes itself liable as carrier under a contract of carriage.[13]

2.2 The Involvement of Third Parties

In most cases, if not always, the carrier employs other persons to perform the carriage of goods. In other words, the carrier delegates the performance of its obligations under the contract of affreightment to other persons. These persons are not parties to the contract of affreightment (they are "third parties"), but they merely participate in its performance. For example, carriers often enter into subsequent contracts with shipowners or charterers for the use and operation of a ship, and with stevedores for the loading or unloading of cargo upon arrival of the ship at port. These third parties will subsequently engage other third parties to perform the services. For

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[10] *Marine Liability Act*, SC 2001, c 6, Schedule 3, Article I(a).

[11] Anthony Rogers, Jason Chuah & Martin Dockray, *Carriage of Goods by Sea*, 5th ed (New York: Routledge, 2020) at 397; Hugh M Kindred et al, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: DOSP, 1982) at 8. For example, the term "carrier" does not include stevedores (*Scruttons Ltd v Midland Silicones Ltd*, [1962] AC 446 (HL) [*Midland*] at 1-2; *Krawill Machinery Corpn v Robert C Herd & Co Inc*, [1959] 1 Lloyd's Rep 305) or ship masters (*International Milling Co v The "Perseus" and Nicholson Transit Co*, [1958] 2 Lloyd's Rep 272).

[12] Charles Debattista, "Cargo Claims and Bills of Lading" in Yvonee Baatz, ed, *Maritime Law*, 5th ed (New York: Routledge, 2021) 196 at 208. See Uniform Customs and Practice for Documentary Credits (ICC No 600, 2007), Article 20 (which provides that a bill of lading may be accepted by a bank under a letter of credit if it indicates, for reasons of security, "the name of the carrier" and is signed in a way detailing the name of the signatory and the capacity in which it signs the bill). See e.g., *Owners of cargo lately laden on board the vessel "Starsin" v Owners and/or demise charterers of the vessel "Starsin"*, [2004] AC 715 (HL).

[13] See Kindred et al, *supra* note 11 at 7; Mocatta et al, *supra* note 1 at 427; Chircop et al, *supra* note 2 at 600; Patrick Griggs & Richard Williams, *Limitation of Liability for Maritime Claims*, 2nd ed (New York: Lloyd's of London Press, 1991) at 132; Hardy Ivamy, *Payne and Ivamy's Carriage of Goods by Sea*, 13th ed (Toronto: Butterworths Canada, 1989) at 103, n 12; Schoenbaum, *supra* note 3 at 475.

example, shipowners or charterers will hire a captain and crew members for the sea voyage, and stevedores will engage terminal operators or other employees for the handling of cargo. The conclusion of these downstream contracts for the purpose of performing the carriage of goods under the main contract of affreightment creates a "chain of carriage".

2.3 The Liability of Third Parties

The substantial participation of third parties in the carriage of goods by sea has raised questions about the status of their liability. So long as third parties are not in a direct contractual relationship with the cargo owner (the third parties have contracted with the carrier or the carrier's subcontractors), can they be liable to the cargo owner for loss or damage to cargo? In the common law, third parties may be liable to the cargo owner in tort. In particular, third parties owe a duty to the cargo owner to take reasonable care of the goods in their custody as sub-bailees.[14] Thus, if third parties are negligent in the performance of the services and, as a result, they cause loss or damage to cargo, they may be liable for damages to the cargo owner. The cargo owner may choose to seek damages against a third party either because the carrier is protected under an exemption or limitation of liability clause in the contract of carriage or because the third party was actually negligent in the course of its operations and thus was legally responsible for the loss or damage to cargo. There are many examples of cases that I examine throughout this Thesis where the cargo owner brought tort claims against a third party for loss or damage to cargo.[15]

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[14] Norman Palmer, *Palmer on Bailment*, 3rd ed (London: Thomson Reuters, 2009) at paras 1.044, 20-021-20.022; See e.g., *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd*, [1924] AC 522 (HL); *The owners of cargo lately laden on board the vessel "K H Enterprise" v The owners of the vessel "Pioneer Container"*, [1994] 2 AC 324 (PC).

[15] See *Midland*, *supra* note 11; *The New Zealand Shipping Company Ltd v AM Satterthwaite & Company Ltd*, [1975] AC 154 (PC) [*The Eurymedon*]; *The New York Star*, *supra* note 9; *The owners and/or demise charterers of the ship or vessel "Mahkutai" (Indonesian Flag) v The owners of lately laden on board the ship or vessel "Mahkutai" (Indonesian Flag) Co (Hong Kong)*, [1996] 2 Lloyd's Rep. 1; *ITO*, *supra* note 9; *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299; *Saint John Shipbuilding and Dry Dock Co v Kingsland Maritime Corp*, [1981] FCJ No 603; *Valmet*, *supra* note 8; *Boutique*, *supra* note 8; *Norfolk Southern Ry v James N Kirby Pty Ltd*, 543 U.S. 14 (2004) [*Kirby*].

As a defence to the cargo owner's claims for loss or damage to cargo, third parties have argued that they can rely on an exemption or limitation of liability clause in the contract of carriage between the cargo owner and the carrier. In other words, third parties have invoked a provision contained in the contract of carriage, to which they are strangers, to exempt or limit their tortious liability against the cargo owner. This argument has given rise to a significant legal question: are third parties who are involved in the chain of carriage entitled to benefit from the terms of the main contract of carriage?

2.4 The Genesis of Himalaya Clauses

The question whether third parties can benefit from the terms of a contract of carriage has occupied judges, scholars, and lawyers for almost 70 years, since Lord Denning's judgment in *Adler* in 1954.[16] In that case, a passenger on a cruise ship called the "Himalaya" was severely injured as a result of the negligent placement of a gangway between the ship and the shore. The passenger sought damages against the master and the boatswain of the ship. The passenger did not seek damages against the shipowners who issued the passage ticket (the contract), however, because the shipowners were exempted from any liability under the terms of the contract.[17] The master and boatswain of the ship, who were third parties to the contract between the passenger and the shipowners, argued that they could also rely on the exemption clause in the contract.[18] Lord Denning held that the exemption clause was not expressly made for their benefit and thus they could not rely on it against the passenger's claim.[19] This judgment left open the possibility that the servants and agents of a contracting party may be exempted from liability if the contract expressly

[16] *Adler v Dickson*, [1954] 3 All ER 397 [*Adler*]. However, the question whether third parties can benefit from contractual terms in general goes back to *Tweddle v Atkinson*, [1861] EWHC QB J57, 121 ER 762 (QB).
[17] *Adler*, *supra* note 16 at paras 1-2.
[18] *Ibid* at paras 5-6.
[19] *Ibid* at para 7.

stipulates for an exemption for their benefit.[20] For this reason, an exemption for the benefit of third parties has been named a "Himalaya" clause after the ship in *Adler*.

Lord Denning's judgment in *Adler* has been the genesis of Himalaya clauses. After the decision, carriers began to include Himalaya clauses in their contracts to extend their benefits to servants, agents, and independent contractors.[21] Today, a Himalaya clause is a provision in a contract of carriage that intends to:

> … confer a benefit on an entity that is not a party to that contract. This benefit, in a contract of carriage such as a bill of lading, is to exempt, as far as possible, the servants, agents and independent contractors employed by the contractual carrier (the carrier) from liability to other parties to the contract, such as the shipper, consignee or holder of a bill of lading or extend the same protection from liability enjoyed by the carrier.[22]

In other words, a Himalaya clause is a contractual provision that extends to third parties involved in the performance of carriage any exemptions or limitations or any other protections available to the carrier under the contract. In effect, Himalaya clauses ensure that the liability of the carrier's servants, agents, and independent contractors cannot exceed the liability of the carrier against the cargo owner under the contract of carriage. As such, third parties can exempt or limit their liability in relation to cargo as if they were the carrier under the contract of carriage.

2.5 Common Law and Statute

This Thesis is concerned with the application of Himalaya clauses under the Canadian common law framework, as opposed to the Canadian statutory framework. The common law framework fills out the statutory framework in that it applies to cases where the statute does not

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[20] *Ibid* at para 14.
[21] Carlo Corcione, *Third Party Protection in Shipping* (New York: Routledge, 2020) at para 2.42.
[22] BIMCO, "Special Circular No 6 – Revised Himalaya Clause for Bills of Lading and other Contracts" (2014) online: *International Group of P&I Clubs / BIMCO Himalaya Clause for Bills of Lading and other Contracts 2014* <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/international_group_of_pi_clubs_himalaya_clause>.

apply or to cases where the contracting parties have excluded the application of the statute.[23] The statute governing the carriage of goods by sea in Canada is the Marine Liability Act[24] of 2001 ("MLA"). The MLA incorporates the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 ("Hague Rules"),[25] and its two amending Protocols.[26] The MLA applies to "contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea" from and to Canada,[27] and the term "carriage of goods" is defined as covering "the period from the time when the goods are loaded on to the time they are discharged from the ship".[28] The MLA makes clear that parties are free to regulate by contract the liability of the carrier for loss or damage to cargo "prior to the loading on, and subsequent to the discharge from, the ship".[29] Thus, if a third party caused loss or damage to cargo during a period to which the statute does not apply, or if the parties have chosen to exclude the application of the statute to their contract, the ability of the third party to enforce a Himalaya clause in the contract of carriage is governed by the common law.

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[23] For the ability of contracting parties to exclude the application of statute, see *Marine Liability Act*, SC 2001, c 6, Schedule 3, Article 43(2); *Wells Fargo Equipment Finance Co v MLT-3*, [2013] FCJ No 380; *Oceanex Inc v Praxair Canada Inc*, [2014] FCJ No 18 at para 85; Chircop et al, *supra* note 2 at 606.

[24] SC 2001, c 6, Part 5 [MLA].

[25] See MLA, Articles 41 and 43(1). Canada has not ratified or implemented other international conventions such as the United Nations Convention on the Carriage of Goods by Sea 1978 ("Hamburg Rules") and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("Rotterdam Rules"). However, the MLA provides that the Hague-Visby Rules may be replaced by the Hamburg Rules in the future and that the Minister of Transport must, every five years, consider and submit a report on the matter to each House of Parliament (See MLA, Articles 43(4), 44 and 45).

[26] The Visby Protocol, signed at Brussels on 23rd February 1968 ("Visby Protocol") and the Special Drawing Rights Protocol, signed at Brussels on 21st December 1979 ("SDR Protocol").

[27] MLA, Schedule 3, Article I(b); MLA, Article 43; See also Chircop et al, *supra* note 2 at 605.

[28] MLA, Schedule 3, Article I(e). It is not clear, however, whether the period *during* loading or *during* discharge are included within the scope of the MLA. See discussion in *HB Contracting Ltd v Northland Shipping (1962) Co*, [1971] BCJ No 8 at 278. There are cases where the scope of the Hague Rules was extended to cover the process of loading and discharge, see e.g., *Pyrene*, *supra* note 3 at 328; *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*, [1974] SCR 933 at 938-939; *Footwear Company Ltd v Canadian Government Merchant Marine Ltd*, [1957] SCR 801; *Goodwin Ferreira and Co Ltd v Lamport and Holt Ltd*, [1929] 1 All ER 623; *Mayhew Foods Ltd v Overseas Containers Ltd*, [1984] 1 Lloyd's Rep 317; *Captain v Far Eastern Steamship Co*, [1978] BCJ No 1246 at paras 21, 24.

[29] MLA, Schedule 3, Article VII.

It is important to note that Himalaya clauses have a significantly broader scope under the common law rather than under statute. For example, the MLA provides that only a "servant or agent" of the carrier can benefit from the statutory defences and limitations, "such servant or agent not being an independent contractor",[30] whereas the common law has allowed independent contractors such as stevedores, terminal operators, and land carriers to benefit from a Himalaya clause in the contract of carriage.[31] For another example, the MLA only excludes liability resulting from "excepted perils"[32] and not liability resulting from negligence[33] or intentional or reckless misconduct,[34] whereas the common law has allowed third parties to exempt their liability for negligence or wilful misconduct if there was an express contractual stipulation to that effect.[35]

[30] MLA, Schedule 3, Article IV *bis* (2). The distinction between "servants or agents" and "independent contractors" is not always easy. The British Delegation in the *Travaux Préparatoires* of the Hague Rules commented that these words distinguish "persons employed regularly by the shipowner in contradistinction to those employed as independent contractors to do one particular job. No-one could possibly argue that your servants or domestic staff are not your preposés, but when you come to build a house you employ in the loose sense of the word a contractor to build it and you pay him for it. No-one could say that he is a servant, he is an independent contractor. Like the elephant it is very difficult to define, but you know it when you see it" (Comite Maritime International, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI, 1997) at 607, 614 (Great Britain), 610 (Italy), 611-612 (Canada), 612 (Greece)). In general, servants or agents include persons who are directly employed by the carrier to perform the sea carriage, such as ship masters, charterers or loading brokers, crew members and other direct employees (See *Grant v Norway*, [1851] 138 ER 263; *Adler*, *supra* note 16; Mocatta et al, *supra* note 1 at 40-41; Kindred et al, *supra* note 11 at 18). Independent contractors, however, include persons who have been employed by the carrier or the carrier's subcontractors to render a professional service, such as stevedores, terminal operators, freight forwarders, or land carriers. However, some courts have found that the servants or agents of independent contractors are acting as servants or agents of the carrier for the purposes of Article IV *bis* (2) (See e.g., *Hourani v T&J Harrison*, (1927) 28 Lloyd's Rep. 120 (Bankes LJ, Atkin LJ); *Heyn v Ocean Steamship Co*, [1927] 27 Lloyd's Rep. 334 at 337; *Sumac Industries Ltd v Furness Withy & Co*, 1953 CanLII 733 (NL SC) at 33-34; *Grand Trunk Railway Co of Canada v McMillan*, [1889] SCJ No 26).

[31] For stevedores, see e.g., *The Eurymedon*, *supra* note 15; *The New York Star*, *supra* note 9. For terminal operators, see e.g., *ITO*, *supra* note 9. For land carriers, see e.g., *Boutique*, *supra* note 8; *Kirby*, *supra* note 15.

[32] As "excepted perils" are listed in MLA, Schedule 3, Article IV(2).

[33] MLA, Schedule 3, Articles IV(2)(b)(q) and III(8). See *Canadian General Electric Co v Pickford & Black Ltd*, [1971] SCR 41 at 44-46 (the stevedores were not allowed to benefit from the limitation provisions of the Hague Rules because the only cause of damage to the cargo was the stevedores' negligence in the stowing process). However, the MLA excludes their liability where the loss or damage resulted from the negligence of the master, mariner, pilot, or the servants of the carrier "in the navigation or in the management of the ship", see *e.g.*, *The Glenochil*, [1896] P 10; *Kalamazoo Paper Co v CPR*, [1950] SCR 356; *Gosse Millerd Ltd v Canadian Govt Merchant Marine Ltd*, [1929] AC 22 (HL); *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd*, [2018] 2 Lloyd's Rep 551.

[34] MLA, Schedule 3, Article IV *bis* (4).

[35] For negligence, see e.g., *supra* note 31. For wilful misconduct, see e.g., *Fitzgerald v Grand Trunk Railway Co*, [1880] OJ No 106; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd (The Archimidis)*, [2004] 2 Lloyd's Rep 251; *Compania Naviera Bachi v Henry Hosegood & Son Ltd*, (1938) 60 Lloyd's Rep. 236.

Furthermore, while the MLA makes clear that any contractual provision that excludes, limits, or otherwise lessen the statutory liability will be void,[36] the common law has established that exemption or limitation clauses must be generally enforced so as to give effect to the intentions of the contracting parties.[37] It follows that Himalaya clauses have a wider ambit in the common law. The expansive application of Himalaya clauses in the common law framework will be discussed in the next Chapter.

[36] MLA, Schedule 3, Article III(8). See e.g., *Bruck Mills Ltd v Black Sea Steamship Co*, [1973] FC 387; *Canadian Klockner Ltd v D/S A/S Flint*, [1973] FCJ No 121; *Encyclopaedia Britannica Inc v The "Hong Kong Producer" and Universal Marine Corpn*, [1962] 2 Lloyd's Rep. 536; *St-Siméon Navigation Inc v A Coutier & Fils Limitée*, [1974] SCR 1176; *William D Branson Ltd v Adriatic Tramp Shipping (The Split)*, [1973] 2 Lloyd's Rep. 535; *Owners of cargo on board the "Morviken" v Owners of the "Hollandia"*, [1983] 1 Lloyd's Rep. 325; *The Saudi Prince (No 2)*, [1988] 1 Lloyd's Rep 1.

[37] See *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426; *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827 (HL). See also the rationale in *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108.

Chapter 3

3 The Development of Himalaya Clauses in the Common Law

In this Chapter, I examine how Himalaya clauses have developed in the common law of Canada. I argue that courts have placed no limits on the range of third parties that can benefit from Himalaya clauses, the types of liability that are covered by Himalaya clauses, and the number of contractual terms that third parties can benefit from via Himalaya clauses. As such, courts have interpreted Himalaya clauses expansively so as to allow virtually *any* third party to take advantage of *any* contractual term in order to protect itself from *any* ground of liability. After describing these developments in this Chapter, I will proceed in Chapter 4 to argue that these developments are problematic.

In the common law, the carrier's subcontractors owe a duty to the cargo owner to take reasonable care of the goods in their charge as sub-bailees, and consequently the cargo owner can sue the subcontractors for breach of such duty in tort or in bailment.[1] However, carriers often stipulate for generous exemption clauses to exempt their subcontractors from liability arising from loss or damage to cargo. This type of clauses is included in the sea carriage contract in the form of a Himalaya clause. As discussed in Chapter 2 above, Himalaya clauses are provisions in contracts for the carriage of goods by sea which extend the carrier's contractual exemptions to third parties who participate in the performance of the contract. By operation of a typical Himalaya clause, the

[1] Norman Palmer, *Palmer on Bailment*, 3rd ed (London: Thomson Reuters, 2009) at paras 1.044, 20-021-20.022. See e.g., *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd*, [1924] AC 522 (HL) [*Elder Dempster*]; *The owners of cargo lately laden on board the vessel "K H Enterprise" v The owners of the vessel "Pioneer Container"*, [1994] 2 AC 324 (PC) [*Pioneer Container*]. Traditionally, the liability of common carriers, who were carriers engaged in the trade of carrying goods as a regular business, was strict and they were absolutely responsible for the loss or damage to cargo as bailees and insurers (See Raoul Colinvaux, *Carver's Carriage by Sea*, 13th ed, vol 1 (London: Stevens & Sons, 1982) at paras 4, 7).

carrier's servants and agents can enforce an exemption clause in the contract, to which they are strangers, as a defense to the cargo owner's claims.

The enforceability of Himalaya clauses in the common law was originally thought to be in tension with the classical contract doctrine of privity, which limits the enforcement of contractual provisions to parties to the contract. Given that Himalaya clauses confer on third parties, who are strangers to the contract of carriage, the ability to enforce contractual terms as a defense to the claims of cargo owners, their very function contradicts the privity doctrine, which holds that only the parties to a contract can enforce its terms. However, courts have found ways to work around the doctrine of privity and make possible the enforcement of Himalaya clauses by third parties. As discussed below, courts have established two tests that allow third parties to rely on contractual provisions via a Himalaya clause; the one is based on the agency relationship between the carrier and the third party, and the other is based on the intentions of the contracting parties at the time when the contract was concluded.

Nevertheless, following the establishment of these two tests, courts have been ready to construe the scope of Himalaya clauses expansively. In other words, once it became possible for third parties to rely on Himalaya clauses in sea carriage contracts, courts have interpreted Himalaya clauses as extending to *any* third party the benefit of *any* contractual term against *any* ground of liability. This development may be attributable to the lack of firm limitations on the application of Himalaya clauses in maritime common law. As discussed below, courts have not defined the scope of Himalaya clauses in a precise and definite manner and, consequently, questions remain as to the true extent and legal status of such clauses in maritime common law.

To substantiate these claims, this Chapter will proceed in the following parts. In Section 3.1, I discuss the doctrine of privity and how it initially posed an obstacle to the enforcement of

Himalaya clauses. I also examine the two tests that permit the enforcement of Himalaya clauses by third parties. In Section 3.2, I explore some pivotal decisions from Canada and other common law jurisdictions to show the expansive interpretation of Himalaya clauses in the maritime context. Finally, in Section 3.3, I argue that the scope of Himalaya clauses remains undefined in Canadian maritime law.

3.1 Himalaya Clauses versus Privity

Under the traditional common law of contracts, Himalaya clauses would not be enforceable. The classical doctrine of privity provides that no one except for the parties to a contract can be entitled under it or bound by it.[2] One of the elements of the doctrine of privity is the "third party rule" which provides that a person cannot obtain rights or benefits under a contract to which it is not party.[3] In other words, under the third party rule, only persons who have exchanged a contractual offer and acceptance can enforce the resulting contract.[4] The effect of this rule is that only a promisee can enforce a promise. Another element of the doctrine of privity is the "consideration rule" which provides that only a promise that has been paid for by the promisee is enforceable.[5] Under this rule, only promisees who have provided consideration for a promise can

[2] *Greenwood Shopping Plaza Ltd v Beattie*, [1980] 2 SCR 228 [*Greenwood*] at 236-237; *Tweddle v Atkinson*, [1861] EWHC QB J57, 121 ER 762 (QB); Jack Beatson et al, *Anson's Law of Contract*, 31st ed (Oxford: Oxford University Press, 2020) at 613; Michael Furmston, *Law of Contract*, 17th ed (New York: Oxford University Press, 2017) at 556.
[3] Anthony Mason, "Privity – A Rule in Search of Decent Burial?" in Peter Kincaid, ed, *Privity* (Hants/Burlington: Dartmouth/Ashgate, 2001) 88 at 88; HG Beale, ed, *Chitty on Contracts*, 32nd ed, vol 1 (London: Sweet & Maxwell, 2017) at para 18-003; John N Adams & Roger Brownsword, *Key Issues in Contract* (Edinburgh: Reed Elsevier, 1995) at 125; U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) at para 2.1.
[4] Stephen A Smith, "Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule" (1997) 17:4 OJLS 643 at 644.
[5] *Ibid*.

enforce such promise. These two elements of privity are explained by Viscount Haldane in the House of Lords' judgment in *Dunlop*,[6] which has been affirmed by Canadian courts,[7] as follows:

> [I]n the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right… cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor.

In short, a person may acquire a contractual right to enforce a promise on condition that he or she is a promisee and that he or she provided consideration.[8] Taken together, these two elements of privity negate a *jus tertii*, meaning a right on account of third parties,[9] and ensure that only a person who has participated in a mutual exchange of offer, acceptance, and consideration can acquire a contractual right of enforcement.

On its face, the doctrine of privity prevents third parties from taking advantage of a contractual provision, even if the contract purported to confer a benefit on them via a Himalaya clause, because they are not the promisee of the provision (the promisee is the carrier) and they have not provided consideration for it to the promisor (the cargo owner). For example, the Supreme Court of Canada in *Pickford*,[10] following the decision of the House of Lords in *Midland*,[11] ruled that the stevedores could not benefit from the limitation of liability clause in the contract of carriage because they were complete strangers to the contract, and thus they would face the normal

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[6] *Dunlop Pneumatic Tyre v Selfridge and Co Ltd*, [1915] AC 847 (HL) at 853.
[7] See *Greenwood*, *supra* note 2; *Sears et al v Tanenbaum et al*, [1969] OJ No 1530; *Canadian General Electric Co v Pickford & Black Ltd*, [1971] SCR 41 [*Pickford*]; *Van Hemelryck v New Westminster Construction and Engineering Co*, [1920] BCJ No 5.
[8] Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 LQR 292 at 292.
[9] "Jus Tertii" in Jonathan Law & Elizabeth A Martin, *A Dictionary of Law* (Oxford University Press, 2014) <https://www-oxfordreference-com.proxy1.lib.uwo.ca/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2150>.
[10] *Pickford*, *supra* note 7.
[11] *Scruttons Ltd v Midland Silicones Ltd*, [1962] AC 446 (HL) [*Midland*].

consequences of their negligence in tort.[12] Similarly, the British Columbia Supreme Court in *The Suleyman Stalskiy*,[13] held that the stevedores could not avail themselves of the exemption clause in the sea carriage contract because they were not parties to it,[14] even though the clause explicitly exempted the liability of "any stevedores used or employed by the Carrier".[15] It follows that privity prohibits the enforcement of contractual terms by third parties via a Himalaya clause.

The doctrine of privity has been strongly criticized by academics[16] and law reform bodies,[17] and these critiques eventually led to its reform. Canadian law has recognized both statutory[18] and common law[19] exceptions to privity other contexts. In the context of contracts for the carriage of goods by sea, however, there is no general exception to privity that would permit the enforcement of Himalaya clauses by third parties. The validity and enforceability of Himalaya clauses in Canadian maritime law has been subjected to two alternative tests set out by courts: (1) an agency test that works around privity, and (2) a principled exception that directly circumvents privity. I examine these tests in turn below.

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[12] *Pickford*, *supra* note 7 at 43-44.
[13] *Calkins & Burke Ltd v Far Eastern Steamship Co et al*, [1976] BCJ No 1374 [*The Suleyman Stalskiy*].
[14] *Ibid* at para 47.
[15] *Ibid* at para 28.
[16] For a summary of the criticism, see Beatson et al, *supra* note 2 at 623. In support of reform, see Donal Nolan, "Reforming the Privity of Contract Doctrine" in Mads Andenas & Nils Jareborg, eds, *Anglo-Swedish Studies in Law* (Iustus Förlag, 1999) 288; Robert Flannigan, "Privity — The End of an Era (Error)" (1987) 103 LQR 564; John F Wilson, "A Flexible Contract of Carriage - the Third Dimension?" (1996) LMCLQ 187; Mason, *supra* note 3. In support of privity, see Smith, *supra* note 4; Stevens, *supra* note 8; Peter Kincaid, "Third Parties: Rationalising a Right to Sue" (1989) 48:2 CLJ 243.
[17] Canada, Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Toronto: Ministry of the Attorney General, 1987); Canada, Law Reform Commission of Nova Scotia, *Privity of Contract (Third Party Rights)* (Halifax: Law Reform Commission of Nova Scotia, 2004); Canada, Manitoba Law Reform Commission, *Privity of Contract* (Winnipeg, Law Reform Commission, 1993); U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996).
[18] See *Bills of Lading Act*, RSC 1985, c B5, s 2; *Insurance Act*, RSO 1990, c I8, ss 195, 244, 258(1); *Mercantile Law Amendment Act*, RSO 1990, c M10, s 7(1); *Mortgages Act*, RSO 1990, c M40, s 20.
[19] See *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108; John McCamus, "Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?" (2001) 35:2 Can Bus LJ 173 at 181.

3.1.1 The Agency Test

The agency test was originally laid out by Lord Reid in the decision of the House of Lords in *Midland*[20] in 1962. The agency test permits a third party to enforce a contractual term if:

> ([F]irst) the Bill of Lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the Bill of Lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

In other words, a third party, such as a stevedore, can seek protection from an exemption or limitation of liability clause if the carrier was essentially acting as the third party's agent when contracting with the cargo owner.

However, *Midland* also established that an agency relationship between the carrier and the third party seeking to benefit from an exemption or limitation clause in the contract of carriage cannot be assumed lightly or be merely implied. Instead, there must be an express contractual provision that the carrier is authorized to stipulate for an exemption or limitation for the benefit of the third party. Where there is no express indication in the contract that the parties intended to create an agency relationship between the carrier and the third party, such a relationship could not be implied, and the agency test would fail.[21]

The requirements of the agency test set out in *Midland* were met for the first time in the decision of the Privy Council in *The Eurymedon*[22] in 1975. In this case, the stevedores were

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[20] *Midland*, *supra* note 11 at 5-6.
[21] See *The Suleyman Stalskiy*, *supra* note 13 at para 44; *Midland*, *supra* note 11 at 1, 5-6 (Lord Reid agreed with Viscount Simonds that "even if one could spell out of the Bill of Lading an intention to benefit the stevedore there is certainly nothing to indicate that the carrier was contracting as agent for the stevedore in addition to contracting on his own behalf. So it appears to me that the agency argument must fail").
[22] *The New Zealand Shipping Company Ltd v AM Satterthwaite & Company Ltd*, [1975] AC 154 (PC) [*The Eurymedon*].

negligent in unloading a drilling machine from the ship and as a result the machine was damaged.[23] The cargo owner brought a tort claim against the stevedore. In defense, the stevedores argued that they were exempt from liability, because they could benefit from the protection offered by the Himalaya clause in the bill of lading between the carrier and the cargo owner. In this instance, the Himalaya clause expressly excluded the liability of the carrier's servants, agents, and independent contractors.[24] In applying the agency test, Lord Wilberforce found that (1) the contract clearly stipulated for the exemption of liability of third parties engaged by the carrier;[25] (2) the carrier was acting as agent for the stevedores in entering the contract of carriage because the stevedores carried out for many years all stevedoring work for the ships owned by the carrier, and the carrier was a wholly owned subsidiary company of the stevedores;[26] and (3) the stevedores authorized the carrier to enter the contract as their agent.[27] In relation to the fourth requirement of the agency test, Lord Wilberforce ruled that the consideration for the benefit of the Himalaya clause was provided by the stevedores to the cargo owner by the actual performance of the stevedoring services.[28] The rationale of Lord Wilberforce is summarized in the following extract:

> [T]he Bill of Lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the [stevedore], made through the carrier as agent. This became a full contract when the [stevedore] performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the [stevedore] should have the benefit of the exemptions and limitations contained in the Bill of Lading.[29]

[23] *Ibid* at 1.
[24] *Ibid* at 2.
[25] *Ibid* at 3.
[26] *Ibid* at 1, 4.
[27] *Ibid* at 4. The Privy Council was satisfied that the close and long-term relationship between the carrier and the stevedores amounted to an agency relationship which implied the authorization of the carrier to stipulate for an exemption for the benefit of the stevedores.
[28] *Ibid* at 4-5.
[29] *Ibid* at 4.

In effect, Lord Wilberforce implied a direct contract between the cargo owner and the stevedores through the agency of the carrier, for which the stevedores had provided consideration by rendering the services. As a result, there was no difficulty finding consideration moving from the stevedores, and thus the fourth requirement of the agency test was also met. Hence, the stevedores could benefit from the Himalaya clause in the bill, and they could not be held liable in tort.

As a result of the decisions in *Midland* and *The Eurymedon*, the fourth requirement of the agency test requires the implication of a direct contract between the cargo owner and a third party, through the agency of the carrier, which makes the third party the promisee of the Himalaya clause, and the third party provides consideration to the cargo owner for such clause upon the performance of the carriage.

The agency test, as developed in the judgments in *Midland* and *The Eurymedon*, has been widely adopted in Canada.[30] However, Canadian courts have tended to apply the agency test strictly. For example, the Federal Court of Appeal in *Saint John Shipbuilding*[31] held that a third party can benefit from a Himalaya clause in a bill of lading on the basis of the agency test, "provided there had been a stevedoring contract between it and [the carrier] binding the latter to obtain such provisions".[32] In other words, the agency requirement is fulfilled only if there is a written agreement between the third party and the carrier that requires the carrier to include the third party as an express beneficiary of the exemption and limitations contained in the sea carriage

[30] See *Sears Ltd v Ceres Stevedoring Co* (FCA), [1988] FCJ No 528 [*The Tolya Komar*]; *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO*]; *Saint John Shipbuilding & Dry Dock Co Ltd v Kingsland Maritime Corp*, [1981] FCJ No 603 [*Saint John Shipbuilding*] at paras 11-12; *Valmet Paper Machinery Inc v Hapag-Lloyd AG*, [2002] BCJ No 1271 [*Valmet*] at paras 42-44; *Fibreco Pulp Inc v Star Shipping A/S*, [1998] FCJ No 297 [*Fibreco*] at para 21; *The Suleyman Stalskiy*, *supra* note 13 at para 44; *Greenwood*, *supra* note 2 at 238-239; *Kodak v Racine Terminal (Montreal) Ltd*, [1999] FCJ No 632 [*Kodak*] at para 10; *Braber Equipment Ltd v Fraser Surrey Docks Ltd*, [1998] BCJ No 2364 [*Braber*] at para 27.
[31] *Saint John Shipbuilding*, *supra* note 30.
[32] *Ibid* at para 10.

contract.[33] In addition, the Federal Court of Appeal in *The Tolya Komar*[34] held that the third party seeking to enforce a contractual term must have been aware of the existence of such term in order to benefit from it, and the ratification of the term by the third party must have taken place within a reasonable period of time after the contract of carriage was made.[35] The Court noted that if late ratification was accepted as valid ratification, it "would be tantamount to negating the requirement of agency as between the carrier and the stevedore, a situation contrary to what is now well established law".[36] Due to this strict reading, the agency test has had limited success when it has been invoked in relation to Himalaya clauses in Canada.[37]

For this reason, the agency test has been criticized. Some authors have submitted that the requirements of the agency test are so rigid and inflexible that third parties will rarely succeed in proving them.[38] Moreover, many authors have pointed out that the implication of a unilateral contract between the cargo owner and a third party through the agency of the carrier, as per the reasoning in *The Eurymedon*, is highly artificial.[39] For instance, it is difficult to determine the exact

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[33] *Ibid* at para 12. On the facts, the oral agreement between the third party (stevedore) and the carrier was not sufficient to fulfill the agency requirement of the agency test and therefore the stevedore could not benefit from the Himalaya clause in the contract of carriage.
[34] *The Tolya Komar*, *supra* note 30.
[35] *Ibid*. Desjardins J held that "it would be most surprising if the ratification could be done when the stevedore is sued by the owners of the goods. Ratification of a clause in a contract can be done by someone who is aware of such clause. It must take place within a reasonable period of time after the contract is made and before the time, if any, fixed for the commencement of performance by the other contracting party".
[36] *Ibid*.
[37] In the following cases, Canadian courts found that there was no proper authority or agency of the carrier to stipulate for a Himalaya clause for the benefit of third parties: *The Tolya Komar*, *supra* note 30*; Saint John Shipbuilding*, *supra* note 30 at paras 11-12; *Valmet*, *supra* note 30 at para 44; *Fibreco*, *supra* note 30 at para 21; *The Suleyman Stalskiy*, *supra* note 13 at para 44; *Greenwood*, *supra* note 2 at 238-239; *Kodak*, *supra* note 30 at para 33; *Braber*, *supra* note 30 at paras 28, 31. Canadian courts found the agency test to be successful in the context of carriage of goods in the cases of *ITO*, *supra* note 30 at para 44.
[38] See Brian Coote, "Pity the Poor Stevedore!" (1981) 40:1 Camb LJ 13 at 13; William Tetley, "Himalaya Clause - Heresy or Genius" (1977) 9:1 JMLC 111 at 121.
[39] See John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 336; U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) at para 2.27; Philip Clarke, "The Reception of the Eurymedon Decision in Australia, Canada and New Zealand" (1980) 29:1 Int'l & Comp LQ 132 at 148, 150; Linda Reif, "A Comment on ITO Ltd. v. Miida Electronics Inc. - The Supreme Court of Canada, Privity of Contract and the Himalaya Case" (1988) 26:2 Alta L Rev 372 at 380. The Privy Council in *The owners and/or demise charterers of the ship or vessel "Mahkutai" (Indonesian Flag) v The owners of lately laden on board*

contents of an offer for a unilateral contract, which has been implied from the wording of the Himalaya clause.[40] For these reasons, many have sought to find an alternative and more flexible test for the enforcement of contractual terms by third parties.

3.1.2 The Principled Exception Test

The principled exception to privity was established by the Supreme Court of Canada in its unanimous decision in *Fraser*[41] in 1999. The principled exception provides that a third party can benefit from a contractual term subject to the following test:

> (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?[42]

This test focuses on the intentions of the contracting parties: a third party can rely on a contractual provision only if it is proven that the parties intended to extend the benefit of such provision to the third party and that the third party was performing services which fall within the scope of the contract. It follows that the central question under the principled exception test is whether, on a proper construction of the contract as a whole, the third party seeking to enforce a contractual term was an *intended* beneficiary.

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the ship or vessel "Mahkutai" (Indonesian Flag) Co (Hong Kong), [1996] 2 Lloyd's Rep. 1 [*The Mahkutai*] at 11-12 commented that, insofar as the enforcement of Himalaya clauses lays on a unilateral contract reasoning, technical points of contract and agency law will inevitably arise. See also *Southern Water Authority v Carey*, [1985] 2 All ER 1077. For the argument that the implied contract should be understood as a "bilateral contract" to extinguish artificiality, see Stevens, *supra* note 8 at 304; *Owners of cargo lately laden on board the vessel "Starsin" v Owners and/or demise charterers of the vessel "Starsin"*, [2004] AC 715 (HL) [*The Starsin*] at paras 34, 93, 149-153, 196.

[40] Stevens, *supra* note 8 at 304. For example, it is difficult to determine whether, in accordance with the terms of the offer, the defective performance of the carriage, *i.e.*, the lost or damaged cargo, amounts to sufficient consideration for the purpose of implying a direct contract between the cargo owner and the third party (See Reif, *supra* note 39 at 381, 384; Clarke, *supra* note 39 at 137). For another example, it is difficult to determine whether the cargo owner can revoke an offer for a unilateral contract at any time before the performance of the services by the third party (See C A Ying, "The Himalaya Clause Revisited" (1980) 22:2 Malaya L Rev 212 at 215-216, 220).

[41] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 [*Fraser*]. The issue in this case was whether a third party could rely on a waiver of subrogation clause in an insurance contract.

[42] *Ibid* at para 32.

The principled exception test is largely based on a previous test set out by the Supreme Court of Canada in the decision in *London Drugs*.[43] *Fraser* converted the test set out in *London Drugs* from a limited *jus tetrii*,[44] applicable only to the relationship between employer and employee, to a general exception to privity that applies to any third party seeking to benefit from a contractual term.[45] As a result, the principled exception test also applies to third parties seeking to benefit from a contract for the carriage of goods by sea.

The requirements of the principled exception test are not so strict as the requirements of the agency test. For example, the principled exception does not require an explicit reference to the class of the third party seeking to enforce the Himalaya clause, but it is sufficient to show that the party was an *implied* beneficiary of the clause.[46] For another example, the principled exception does not require third parties to prove that they authorized the carrier to stipulate for a Himalaya clause or that they ratified such clause in order to benefit from it.[47] In fact, third parties are not even required to know about the existence of the Himalaya clause at the time of performance of the services in order to be able to benefit from it.[48] Finally, and most importantly, the principled exception does not require the implication of a contractual relationship between the cargo owner

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[43] *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 [*London Drugs*] at para 257. The test was the following: "(1) The limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and (2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred."

[44] See *ibid* at paras 255, 260, 268.

[45] See *Fraser*, *supra* note 41 at paras 31-32.

[46] See e.g., *London Drugs*, *supra* note 43 where the employees of the warehouseman were not explicitly mentioned in the limitation of liability clause in the storage contract between the warehouseman and the customer, but they were nevertheless entitled to enforce the clause as implied beneficiaries.

[47] See *Valmet*, *supra* note 30 at paras 45, 51-54. See also *Bombardier Inc v Canadian Pacific Ltd*, [1988] OJ No 1807 [*Bombardier*] (The Court held that, due to the longstanding relationship between the carrier and the third party, "there was the implied authority for the ratification of the contract of carriage"); *Canada Maritime Ltd v Oerlikon Aerospace Inc*, [1998] EWCA Civ 170 at para 23.

[48] See *Labrador-Island Link General Partner Corp v Panalpina Inc*, [2019] FCJ No 618 [*Panalpina*] at para 80; *Boutique Jacob Inc v Canadian Pacific Railway Co*, [2008] FCJ No 358 [*Boutique*] at para 24; *Timberwest Forest Corp v Pacific Link Ocean Services Corp*, [2009] FCR 496 at para 50. Contrast with *The Tolya Komar*, *supra* note 30; *Saint John Shipbuilding*, *supra* note 30 at paras 10-11.

and a third party through the agency of the carrier and therefore the issues of offer, acceptance, and consideration are no longer relevant. Overall, the requirements of the principled exception test are less stringent in that the ability of a third party to enforce a contractual term ultimately and solely depends on the intentions of the contracting parties. Thus, subject to the principled exception, the enforceability of Himalaya clauses is a matter of contractual interpretation.

3.2 The Expansive Application of Himalaya Clauses

Following the establishment of the agency test and the principled exception in the common law, Himalaya clauses have been applied expansively in the maritime context. In particular, courts have construed broadly drafted Himalaya clauses as (1) including land carriers; (2) implying an exclusion of liability in negligence; and (3) conferring the benefit of additional contractual stipulations on third parties. I examine these examples in turn below.

It is important to note that the expansive application of Himalaya clauses is a phenomenon which has occurred simultaneously in a number of common law jurisdictions, including Canada, England, and the U.S. Thus, in the following Sections, I examine cases from these jurisdictions, with emphasis on Canadian cases, which have been highly influential in the development of Himalaya clauses worldwide.

3.2.1 Land Carriers

The first example of expansive application is the interpretation of Himalaya clauses as covering third parties that perform inland operations, such as rail carriers, road carriers, and stevedores or terminal operators. In other words, Himalaya clauses in sea carriage contracts have been construed as applying to third parties whose operations are not strictly connected with sea carriage.

Rail carriers

There are two pivotal decisions that allowed the application of Himalaya clauses in ocean bills of lading to rail carriers: the decision of the U.S. Supreme Court in *Kirby*[49] and the decision of the Canadian Federal Court of Appeal in *Boutique.*[50]

The case of *Kirby*, as O'Connor J said in the introductory paragraph of his judgment, "is a maritime case about a train wreck".[51] The facts were that Kirby, a cargo owner, contracted with ICC, a freight forwarder, to arrange for the carriage of cargo from Australia to Alabama; ICC then subcontracted with HS, an ocean carrier, for the carriage from Sydney to Savannah; and HS then subcontracted with Norfolk, a rail carrier, for the carriage from Savannah to Alabama.[52] During rail carriage, Norfolk's train derailed and the cargo was damaged.[53] Kirby sued Norfolk and the latter sought to rely on the Himalaya clause in the Kirby-ICC contract.

The Court unanimously allowed Norfolk to benefit from the Himalaya clause, which applied to "*any* servant, agent or other person (including *any* independent contractor) whose services have been used in order to perform the contract".[54] The Court found that the plain language of the Himalaya clause was wide enough to include ICC's sub-subcontractors. The word "any" was deemed to have an expansive and obvious meaning, that is "one or some indiscriminately of whatever kind".[55] In this regard, the Court noted that linguistic specificity is not required in order to allow third parties to benefit from Himalaya clauses in upstream contracts.[56] Since carriers do not usually know if they will employ intermediaries or how many or under what obligations for

[49] *Norfolk Southern Ry v James N Kirby Pty Ltd*, 543 U.S. 14 (2004) [*Kirby*].
[50] *Boutique*, *supra* note 48.
[51] *Kirby*, *supra* note 49 at 18.
[52] *Ibid* at 18-19, 21.
[53] *Ibid* at 18.
[54] *Ibid* at 20-21 (emphasis added by the Court at para 31).
[55] *Ibid* at 31-32 citing *United States v Gonzales*, 520 U.S. 1 (1997) at 5; *Green v Biddle*, 21 U.S. 1 (1823) at 8.
[56] *Kirby*, *supra* note 49 at 31.

the performance of the contract, if linguistic specificity was required, carriers would have to gather more information about their subcontractors before contracting with cargo owners, which is a costly or even impossible task.[57] For this reason, the Court refused to take a narrow approach in construing Himalaya clauses.[58] The broad language of the Himalaya clause was construed as reflecting the multimodal transportation of cargo and thus Kirby must have anticipated that a land carrier would be engaged for the performance of the contract.[59] The court therefore concluded that the Himalaya clause was intended to cover land sub-subcontractors.

The Federal Court of Appeal in *Boutique* had to deal with similar facts. In this case, BJ, a cargo owner, contracted with Pantainer, a non-vessel operating carrier, for the carriage of goods from Hong Kong to Montreal. Pantainer then subcontracted with OOCL, an ocean carrier, for the carriage of goods from Hong Kong to Montreal; and OOCL then subcontracted with CPR, a rail carrier, for the carriage of goods from Vancouver to Montreal.[60] The goods were damaged in rail transit due to a train derailment.[61] BJ sued CPR and CPR invoked the limitation in its contract with OOCL. The Court held that CPR could enforce the limitation against BJ on the basis of sub-bailment on terms.[62]

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[57] *Ibid* at 34-35.

[58] *Ibid* at 31. On this matter, the Court disagreed with and discarded the decision of the Supreme Court in *Robert C Herd & Co v Krawill Machinery Corp*, 359 U.S. 297 (1959) where the stevedores could not benefit from the statutory limitation because the contract of carriage between carrier and cargo owner only extended such limitation to the "carrier" and not to its subcontractors.

[59] *Kirby*, *supra* note 49 at 32.

[60] *Boutique*, *supra* note 48 at paras 6, 8, 9.

[61] *Ibid* at para 10.

[62] The Court ruled that a cargo owner is bound by the terms of a contract between the carrier, as bailee, and its subcontractors, as sub-bailees, if it had expressly or impliedly consented to the sub-bailment of the goods, usually by authorizing the carrier to subcontract the whole or any part of the carriage "on any terms" (*Boutique*, *supra* note 48 at paras 16-17 applying *Morris v Martin*, [1966] 1 QB 716 at 729-730 and *The Pioneer Container*, *supra* note 1. This view has been later endorsed in *Cami Automotive Inc v Westwood Shipping Lines Inc*, [2009] FCJ No 1064 at para 64). On the facts, so long as BJ contractually authorized Pantainer to subcontract the carriage on any terms, BJ knew or ought to have known that the railway portion of the carriage could be performed by sub-carriers on any terms and therefore CPR, as sub-sub-bailee, can enforce its terms with OOCL against BJ (*Boutique*, *supra* note 48 at paras 51-52. See also *Boutique Jacob Inc v Pantainer Ltd*, [2006] FCJ No 292 [*Pantainer*] at paras 32-33 where the trial judge explained that when the parties are sophisticated shippers and businesses, they are bound by downstream contracts because it is assumed that they knew or ought to have known the terms and conditions negotiated by sub-carriers,

The significant part of this judgment, however, is the finding that CPR could alternatively enforce the Himalaya clause in the Pantainer-OOCL contract against BJ.[63] The Himalaya clause provided that "[e]very servant or agent or subcontractor of Carrier shall be entitled to the same rights, exemptions from liability, defences, and immunities in which Carrier is entitled".[64] The Court explained that Himalaya clauses are generally enforceable under Canadian law pursuant to the decisions of the Supreme Court of Canada in *ITO* and *Fraser*,[65] but it nevertheless did not provide an analysis on this matter. It appears from the outcome of the decision that the Court was satisfied that the contracting parties intended to extend the benefit of the Himalaya clause to land sub-subcontractors. In other words, the Court was satisfied that the phrase "every servant or agent or subcontractor" was intended to cover rail sub-carriers.

The only obstacle that prevented CPR from enforcing the Himalaya clause was a provision in the Canada Transportation Act[66] ("CTA"), which regulates the liability of rail carriers like CPR. In particular, Article 137(1) of the CTA provides that:

> Any issue related to liability, including liability to a third party, in respect of the movement of a shipper's traffic shall be dealt with between the railway company and the shipper only by means of a written agreement that is signed by the shipper...

Thus, CPR could not limit its liability unless there was a written agreement to this effect with the shipper. The issue before the Court was the interpretation of the term "shipper" under Article 137(1). The trial judge construed the term "shipper" as meaning the cargo owner, and since there

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especially if such terms and conditions are accessed on the Internet or if the parties frequently use the sub-carrier's services). This outcome is possible by operation of a chain of contractual provisions (subcontracting clauses) and the express consent of the cargo owner. The subcontracting clause in the BJ-Pantainer contract authorized Pantainer to subcontract, and in the same way the subcontracting clause in the Pantainer-OOCL contract authorized OOCL to subcontract. Taken together, these clauses make the cargo owner bound by any limitation negotiated between carrier and sub-carrier. However, it has not been determined where the cargo owner's consent stops.

[63] *Boutique*, *supra* note 48 at para 59.

[64] *Ibid* at paras 23, 51.

[65] *Ibid* at para 24 referring to the judgment of the trial judge in *Pantainer*, *supra* note 62 at para 38.

[66] SC 1996, c 10 [CTA].

was no written agreement between BJ and CPR, CPR could not limit its statutory liability.[67] The Federal Court of Appeal overturned the decision of the trial judge and construed the term "shipper" as the person who directly contracts with and hands over the goods to the rail carrier.[68] Under this definition, OOCL was the shipper because it was the one who directly contracted with and handed over the goods to CPR for rail carriage.[69] Since there was a written agreement between OOCL and CPR, the requirements of Article 137(1) were met and CPR could limit its liability.

The outcome in *Boutique* expands the scope of Himalaya clauses in the common law because the statutory provisions of the CTA were interpreted in a way that permits rail carriers to benefit from Himalaya clauses in upstream contracts of carriage. The Court declined to adopt a narrow definition of the term "shipper" under Article 137(1) for the purpose of protecting the interests of cargo owners, as suggested by the trial judge in *Boutique* and other decisions.[70] As a result, CPR

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[67] *Boutique*, *supra* note 48 at para 27. The trial judge rejected the argument that OOCL was a "shipper" under Article 137(1) of the CTA because (i) the main purpose of Article 137(1) is to protect cargo owners from downstream limitation clauses; and (ii) the CTA clearly distinguishes between "shipper" and "carrier" and OOCL could not be anything else than a carrier (*Pantainer*, *supra* note 62 at paras 45, 50).

[68] *Boutique*, *supra* note 48 at paras 43, 46-47 adopting *Canadian National Railway Company v Sumitomo Marine and Fire Insurance Company Ltd*, [2007] QCCA 985 at paras 48-49. This approach has been later adopted in *Mitsubishi Heavy Industries Ltd v Canadian National Railway Co*, [2012] BCJ No 1987 at paras 48-49 (the Court held that the "shipper" is deemed to be the entity that "chose" to use a railway and had "effective control" in negotiating the terms of carriage), 76 ("…for purposes of s. 137(1) of the *Act*, a 'realistic' approach should be taken in determining who the shipper is, having regard to: whether the entity has a direct contractual connection with the rail carrier; whether the entity made a decision or chose to call on the rail carrier for its services; and, whether the entity has effective and real control over the negotiation of an agreement made with the carrier").

[69] *Boutique*, *supra* note 48 at para 47.

[70] The purpose of Article 137(1) of the CTA is to protect shippers from informal contractual practices in the transportation industry and to ensure that shippers are actually aware or properly informed of the applicable limitations of liability (*ABB Inc v Canadian National Railway Company*, [2020] 4 FCR 303 at para 76; *Canadian Pacific Railway Company v Canexus Chemicals Canada LP*, [2016] 3 FCR 427 at paras 95-99). Thus, it is more likely that Article 137(1) was intended to protect cargo owners against downstream rail carriers, over whom they have no control, rather than sub-carriers, who choose to enter direct contracts with rail carriers and know precisely the applicable limitations. In support of this view, the trial judge in *Pantainer*, *supra* note 62 at para 50 ruled that allowing rail carriers to limit their liability by operation of a Himalaya clause in an upstream contract of another carrier instead of a written agreement with the cargo owner defeats the purpose of Article 137. Particularly, the trial judge explained that "[i]t would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are the railway companies". In general, the term "shipper" has been widely used to describe cargo owners who send

could limit its liability by virtue of a written agreement with OOCL, another sub-carrier, and not by virtue of a written agreement with BJ, the cargo owner. This outcome essentially enables rail carriers to indirectly circumvent the qualification set out in Article 137 of the CTA by enforcing Himalaya clauses in contracts for the carriage of goods by sea. In other words, it allows rail carriers to avoid the stricter statutory provisions regulating inland carriage by relying on contractual provisions in maritime contracts.

Overall, both the decisions in *Boutique* and *Kirby* have extended the benefit of the Himalaya clause in an ocean bill of lading to rail sub-carriers. In both cases, the courts found that the generality in the language of the Himalaya clause showed the parties' intention to exempt the liability of a broad range of third parties, including land carriers, and not that such generality created sufficient ambiguity as to the true scope of the clause.

Road carriers

The British Columbia Supreme Court in *Valmet*[71] considered the application of the principled exception for the benefit of a road carrier. In this case, after the discharge of cargo from the ship at the port in Vancouver, the cargo fell off a truck carrying it to its final destination, and the negligent trucker sought to benefit from a Himalaya clause in the ocean bill of lading. The Court concluded that the trucker could not benefit from the Himalaya clause because the bill only applied to the period of sea carriage to Vancouver.[72]

Nevertheless, the Court proceeded to examine the potential application of the Himalaya clause to inland carriage, as if the bill had been one of multimodal transport.[73] In this regard, the

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the goods for shipment (See *e.g.*, *ABB Inc v Canadian National Railway Company*, [2020] 4 FCR 303 at paras 1, 77; *Canadian Pacific Railway Company v Canexus Chemicals Canada LP*, [2016] 3 FCR 427 at para 101; *Valmet*, *supra* note 30 at paras 67, 82) or consignees who receive the goods after shipment (See Chapter 2 above), but not sub-carriers who send or receive goods through other carriers.

[71] *Valmet*, *supra* note 30.

[72] *Ibid* at para 37.

[73] *Ibid* at para 38.

Court adopted the principled exception test laid out in *Fraser*, even though the case was about the benefit of a waiver of subrogation clause, and found that the test should be also applied to Himalaya clauses since "[t]here is no principled difference to be drawn between a waiver of subrogation clause and a Himalaya clause".[74] In applying the principled exception test, the Court found that the general drafting of the Himalaya clause covering "any Person whomsoever by whom the Carriage is performed or undertaken (including all Sub-Contractors of the Carrier)" made clear that the contracting parties intended to limit the liability of all persons participating in the loading, unloading, and carriage of the goods and therefore, if the bill governed the period of inland carriage, the trucker would be able to benefit from it.[75] In other words, the Court took the view that the use of words "any", "whomsoever", and "all" in the Himalaya clause could be interpreted as including sub-subcontractors performing inland services in the Canadian highways. It follows that, as in *Kirby* and *Boutique*, the generality in the wording of the Himalaya clause was construed in favour of the third party seeking to enforce it.

The decision in *Valmet* is important because it permits a road carrier to enforce a Himalaya clause in a contract for multimodal transport under Canadian maritime law. This decision seems odd in that it mixes up three separate regimes: the inland carriage regime, the sea carriage regime, and the multimodal carriage regime. I will discuss in Section 4.3 of Chapter 4 below how these regimes are governed by different rules of liability and therefore courts normally maintain a line between them. Thus, although one would reasonably expect that a Himalaya clause in a contract for multimodal transport to have a different application or interpretation from a Himalaya clause in a sea carriage contract, the decision in *Valmet* proves otherwise. Subject to the principled exception test, so long as the language of the Himalaya clause is wide enough to cover – even

[74] *Ibid* at para 51.
[75] *Ibid* at paras 39, 52, 55.

abstractly – the third party seeking to enforce it, it will likely be implied that the parties intended to confer the benefit of the clause on it.

Thus, the decision in *Valmet* is an example of the expansive interpretation of Himalaya clauses since it permits road carriers who are not explicitly mentioned in the contract to benefit from provisions contained in contracts for multimodal transport under Canadian maritime law.

Stevedores and terminal operators

Stevedores are independent contractors commonly engaged by the carrier to load or discharge goods from vessels (also known as "longshoremen").[76] Stevedores are generally distinguished from terminal operators who are independent contractors commonly engaged by the carrier or the stevedores to handle or store goods in the port's terminal (also known as "warehousemen").[77] Nevertheless, this distinction has not been given weight in determining whether a third party could benefit from a Himalaya clause in a sea carriage contract. Both stevedores and terminal operators have been allowed to rely on Himalaya clauses.

Following the decision in *The Eurymedon*, in which the Privy Council allowed the stevedores to benefit from a Himalaya clause in the sea carriage contract, courts have been generally willing to do the same. For example, the Privy Council in *The New York Star*[78] held that the stevedores, who were negligent during the storage of cargo in their custody, could rely on the Himalaya clause in the sea carriage contract in order to give effect to commercial reality. In this case, the contract did not govern the period beyond the discharge of cargo from the ship – it explicitly required the

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[76] Carlo Corcione, *Third Party Protection in Shipping* (New York: Routledge, 2020) at para 3.67-3.68; See e.g., *Rideau Bulk Terminals Inc (Re)*, [2011] CIRBD No 56 at para 29.

[77] See *Colgate Palmolive Co v SS Dart Canada*, 724 F.2d 313 (2d Cir. 1983); Thomas J Schoenbaum, *Admiralty and Maritime Law*, 6th ed (St Paul, MN: West Academic Publishing, 2019) at 493, 495-496; Roger Harris, "Liability Equals Responsibility: Canadian Marine Transport Terminal Operators in the 1990s" (1993) 21:2 Can Bus LJ 229 at 229-230.

[78] *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (Australia)*, [1980] 3 All ER 257 [*The New York Star*].

cargo owner to take delivery of the goods "from the vessel's rail immediately [after] the vessel is ready to discharge".[79] However, the Privy Council noted that the scope of the contract must be interpreted in accordance with the shipping practice that cargo owners normally take delivery of cargo after some period of storage at port and rarely at the ship's rail.[80] Given this practice, any third party employed by the carrier to store or handle the cargo after discharge would be entitled to the same protection as the carrier under the contract.[81] The Privy Council went on to say that "irrespective of the period of carriage defined by the contract, the immunity of the carrier is not coextensive with this period but extends both before and after it".[82] In other words, the scope of the Himalaya clause is not coextensive with the scope of the sea carriage contract, as agreed between the parties; the Himalaya clause can be construed as extending to a greater period for the purpose of limiting the liability of stevedores.

In Canada, stevedores and terminal operators have also been permitted to benefit from Himalaya clauses in sea carriage contracts. In the recent decision of the Federal Court in *Panalpina*,[83] where the cargo was damaged during discharge under the control of the stevedores, it was held that the stevedores could enforce a time-bar provision in the contract of carriage via a Himalaya clause. The Himalaya clause provided that the carrier's contractual limitations extended to "any employee, agent or independent contractor engaged by the [carrier]".[84] The Court explained that the effect of the Himalaya clause is that every participant in the contract of carriage, whether explicitly named in the contract or not, such as the stevedores, is entitled to rely on the contractual provisions.[85]

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[79] *Ibid* at 6.
[80] *Ibid* at 6.
[81] *Ibid* at 7.
[82] *Ibid* at 7.
[83] *Panalpina*, *supra* note 48.
[84] *Ibid* at para 77.
[85] *Ibid* at 81.

Similarly, the Supreme Court of Canada in *ITO*,[86] in which part of the cargo was stolen from a shed which was operated and guarded by the terminal operators, found that the terminal operators could benefit from an exemption clause via a Himalaya clause in the sea carriage contract. In this case, the terminal operators were explicitly named in the contract by class, in that the Himalaya clause extended the benefit of the exemption clause to "the master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier".[87] The important part of this decision, however, is that the Court established that the handling and incidental storage of goods by terminal operators at the port area is a maritime matter by virtue of the "close, practical relationship of the terminal operation to the performance of the contract of carriage".[88] In other words, the activities of terminal operators are sufficiently linked to the contract of carriage by sea and thus they fall within the ambit of Canadian maritime law.[89] Consequently, in line with *The New York Star*, even though the contract concerned the carriage of goods by sea, the scope of the Himalaya clause was construed as extending to inland operations for the purpose of limiting the stevedores' liability.

These decisions are examples of expansive interpretation because firstly, the scope of Himalaya clauses may be construed as exceeding the scope of the sea carriage contract, even if the scope of the contract had been explicitly defined by the parties, and secondly, Himalaya clauses have been construed as extending to operations beyond loading and discharge performed by stevedores, such as handling and storage of cargo performed by terminal operators.

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[86] *ITO*, *supra* note 30.
[87] *Ibid* at para 4.
[88] *Ibid* at para 21.
[89] *Ibid*. On this matter, see also *Certain Underwriters at Lloyd's v Mediterranean Shipping Company SA*, [2017] FCJ No 999 at paras 12, 49.

3.2.2 Liability in Negligence

The second example of expansive application is the implication of an exclusion of liability in negligence from the abstract or general wording of Himalaya clauses.

In the modern law of interpretation, broad exemption clauses may be construed as excluding liability in negligence, even if there is no express indication to that effect, provided that there is no other possible ground of liability that the clause was intended to exempt.[90] In other words, an exemption clause that does not explicitly mention negligence may be read as exempting liability in negligence if its wording is wide enough and if the clause cannot operate on any other ground of liability. This test originates from the decision of the Privy Council in *Canada Steamship*,[91] which ruled that:

> If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens* ["*proferens*" are the persons in whose favour the exemption clause is made]. If a doubt arises at this point, it must be resolved against the *proferens*…
>
> If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence'… the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are prima facie wide enough to cover negligence…

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[90] McCamus, *supra* note 39 at 826. See *Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd (The Raphael)*, [1982] 2 Lloyd's Rep 42 at 43, 48-50; *The King v Canada SS Lines*, [1950] SCR 532 at 569; *Salmon River Logging Co Ltd v Burt*, [1953] 2 SCR 117; *Canadian Pacific Forest Products Ltd v Belships (Far East) Shipping (Pte) Ltd*, [1999] FCJ No 938. Traditionally, however, liability for negligence could be excluded by contract only if there was an express stipulation to that effect, see Coote, *supra* note 38 at 30, 34; *Rutter v Palmer*, [1922] 2 KB 87 (CA); *Archdale v Comservices*, [1954] 1 WLR 459 (CA) at 461; *Beaumont-Thomas v Blue Star Line Ltd*, (1939) 63 Lloyd's Rep. 14; *Trainor v The Black Diamond SS Co*, [1889] 16 SCR 156 at 172; *Fitzgerald v Grand Trunk Railway Co*, [1880] OJ No 106 at para 35; *Martin v The Great Indian Peninsular Railway Co*, (1867) LR 3 Ex 9; *Phillips v Clark*, [1857] 140 ER 372; *Grill v General Iron Screw Colliery Co*, (1866) LR 1 CP 600; *Cathcart Inspection Services Ltd v Purolator Courier Ltd*, [1981] OJ No 3114 at para 25. According to this traditional rule, abstract or general words such as "any claim… of any nature" or "under any circumstances whatever", or the complete silence of the exemption clause as to the cause of loss or damage, were construed as not including liability in negligence, see e.g., *Canada Steamship Lines Ltd v The King*, [1952] AC 192 (PC) [*Canada Steamship*]; *White v John Warwick & Co*, [1953] 2 All ER 1021.

[91] *Canada Steamship*, *supra* note 90 at 208 adopting the test in *Alderslade v Hendon Laundry Ltd*, [1945] KB 189 (CA).

The requirements of the *Canada Steamship* test were found to be met in the decision of the Supreme Court of Canada in *ITO*.[92] In this case, thieves broke into a shed, operated by the stevedores, and stole part of the cargo that was to be received by the cargo owner.[93] The contract of carriage between the cargo owner and the ocean carrier contained a Himalaya clause which expressly extended the benefit of an exemption clause in the contract to stevedores.[94] The cargo owner sued the stevedores, and the stevedores claimed the benefit of the exemption clause via the Himalaya clause. The exemption clause provided that:

> The carrier shall not be liable in any capacity whatsoever for any delay, non-delivery, misdelivery or loss of or damage to or in connection with the goods occurring before loading and/or after discharge, whether awaiting shipment landed or stored or put into craft, barge, lighter or otherwise belonging to the carrier or not or pending transhipment at any stage of the whole transportation.[95]

As such, the exemption clause did not make any explicit reference to liability in negligence. The Supreme Court nevertheless found that the wording of the exemption clause was wide enough to include negligence within the contemplation of the parties in formulating the contract, even though it did not explicitly stipulate as such.[96] In construing the parties' intentions in relation to the scope of the clause, the Court considered whether negligence was the only possible type of liability upon which the clause could operate in the circumstances.[97] On the facts, it was found that the stevedores' liability for the period of storage after discharge and until delivery was that of a sub-bailee, *i.e.*, to take reasonable care of the goods, and therefore the only reasonable head of liability for the loss of cargo by theft was the negligence of the sub-bailees in storing the goods in an

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[92] *ITO*, *supra* note 30.
[93] *Ibid* at paras 2-3.
[94] *Ibid* at para 4.
[95] *Ibid*.
[96] *Ibid* at para 48.
[97] *Ibid* at paras 45-47 applying the test set out in *Canada Steamship*, *supra* note 90 at 208.

insecure building.[98] Thus, the exemption clause was construed as excluding negligence by implication.

In the same line of reasoning, the Ontario Court of Appeal in *St Lawrence*[99] held that the phrases "at sole risk" and "at owner's risk" in the exemption clause contained in a towing contract excluded liability in negligence because it was the only meaning they could bear in the circumstances.[100] In particular, the Court noted that, in towing agreements, the only head of liability under which a tugboat operator could be liable in damages to a barge owner is that of negligence.[101] The lack of a specific reference to "negligence" in the exemption clause was not fatal to the claim of the tugboat operator.

In these two decisions, however, the courts did not consider whether the exemption clause could also operate on alternative grounds of liability, as required by the *Canada Steamship* test. The courts did not ask whether the exemption clauses could have been intended to exclude more than one head of liability, including liability for breach of contract, or breach of duty in bailment,[102] or excepted perils and other marine risks,[103] or gross negligence, or deliberate or reckless misconduct, or unexplained loss or damage to cargo.[104] In cases where the court could not conclude with certainty which head of liability was intended to be excluded by the contracting parties, the exemption clauses were not given effect.[105] Thus, one would reasonably expect that the complete

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[98] See *ITO*, *supra* note 30 at paras 47-48.
[99] *St Lawrence Cement Inc v Wakeham & Sons Ltd*, [1995] OJ No 3230.
[100] *Ibid* at paras 53-54, 61, 74.
[101] *Ibid* at paras 23, 54.
[102] See *Elder Dempster*, *supra* note 1; *The Pioneer Container*, *supra* note 1.
[103] See *Marine Liability Act*, SC 2001, c 6, Schedule 3, Article IV(2).
[104] See *Noble v Brooks Chevrolet Ltd*, [1978] 5 Alta LR (2d) 117 at para 11 (the Court found that the exemption clause, "although it may be interpreted to be wide enough to exclude negligence, nevertheless did not deal with another head of damage or liability, namely, in this case, an 'unexplained loss' which could result without negligence on the part of the defendant" and thus it was ambiguous").
[105] See e.g., *Primex Forest Products Ltd v Harken Towing Co*, [1997] BCJ No 1644 at paras 13-14; *Meeker Log and Timber Ltd v Sea Imp VIII*, [1996] BCJ No 1411 at para 14.

silence of the exemption clauses as to the potential causes of loss or damage to cargo would be construed against the stevedores. However, the decisions in *ITO* in *St Lawrence* show that the *Canada Steamship* test does not apply strictly in the maritime context and therefore an exclusion for negligence liability can be implied, even where the exemption clause at issue is silent as to the events causing loss or damage to cargo. The concern arising from these decisions is that a reading of an incomplete exemption clause as excluding liability in negligence may cross the boundary between contractual interpretation and implication.

The loose application of the *Canada Steamship* test, taken together with the fall of the classic doctrine of fundamental breach of contract,[106] and the elastic judicial approach in the construction of exemption clauses in general,[107] gives rise to an additional concern – that a broad exemption clause can be construed as excluding even liability for gross negligence, which is a higher degree of ordinary negligence. This concern is rooted in the fact that courts have allowed the enforcement of Himalaya clauses without considering how serious the negligent act or omission was. For instance, negligent third parties have been permitted to enforce Himalaya clauses in cases of damage to cargo during unloading from the ship,[108] damage to cargo due to train derailment,[109] damage to cargo due to fall from a tractor-trailer in a central highway,[110] damage to cargo by fire

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[106] See McCamus, *supra* note 39 at 869; Gerald McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification*, 2nd ed (Oxford: Oxford University Press, 2011) at 581.

[107] The Supreme Court of Canada in *Hunter Engineering Co v Syncrude Canada Ltd*, [1989] 1 SCR 426 at paras 153-155, which adopted the decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*, [1980] AC 827 (HL), held that Canadian courts are responsible for deciding whether an exemption clause is enforceable or not in the circumstances for the purpose of giving effect to the bargain of the contracting parties. To this effect, exemption clauses should be given their natural and true construction, in the light of the contract as a whole and the surrounding circumstances, so that their meaning and effect is fully understood as the contracting parties agreed to when concluding the contract. Under this approach, in commercial transactions where the parties are not of unequal bargaining power and their risks are normally borne by insurance, there is no need for judicial intervention and therefore broad exemption clauses are likely to be enforced (See Reif, *supra* note 39 at 386; See also *The Starsin*, *supra* note 39 at para 57).

[108] *The Eurymedon*, *supra* note 22.

[109] *Kirby*, *supra* note 49; *Boutique*, *supra* note 48.

[110] *Valmet*, *supra* note 30.

during the process of salvage from train wreck,[111] damage to cargo by sea water on board the ship,[112] loss of cargo during storage,[113] and delivery of cargo to the wrong person.[114] The seriousness of the cause of loss or damage to cargo or the nature of the risk were not taken into consideration in the interpretation and enforcement of Himalaya clauses in the common law. Besides, there is no general rule in the common law that distinguishes between degrees of negligence for the purpose of restricting the scope of exemption clauses.[115] Thus, so long as the language of the exemption clause is wide enough to cover liability in negligence, there is a possibility that grossly negligent third parties may also be able to benefit from it.

Based on the foregoing, Himalaya clauses may be read broadly as implying an exclusion of liability in negligence, and an express contractual reference to that effect is not required.

3.2.3 Additional Benefits

The third example of expansive application is the reading of Himalaya clauses as conferring on third parties the benefit of other provisions in the sea carriage contract, in addition to the benefit of any exemption or limitation of liability provisions. These additional provisions include circular indemnity clauses and dispute resolution clauses.

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[111] *Bombardier*, *supra* note 47.
[112] *The Mahkutai*, *supra* note 39.
[113] *ITO*, *supra* note 30.
[114] *The New York Star*, *supra* note 78. Contrast with *Kishinchand & Sons (Hong Kong) Ltd v Wellcorp Container Lines Ltd*, [1995] 2 FC 37, in which the Federal Court held that the delivery of cargo to the wrong person was such a serious act that rendered the exemption clause in the contract of carriage unenforceable.
[115] Contrast with the civil law of Quebec where a clause contracting out of liability for negligence is ineffective with respect to liability for gross negligence for reasons of public policy. See *Eisen Und Metall AG v Ceres Stevedoring Co Ltd*, [1977] 72 DLR (3d) 660; *Miles International Co v Federal Commerce and Navigation Co and Federal Stevedoring Ltd*, [1978] 1 Lloyd's Rep. 285; *Circle Sales & Import Ltd v The Tarantel et al*, [1978] 1 FC 269. See also William Tetley, "The Himalaya Clause, Stipulation pour Autrui Non-Responsibility Clauses and Gross Negligence under the Civil Code" (1979) 20:3 C de D 449 at 480.

Circular indemnity clauses

Circular indemnity clauses are commonly embedded in Himalaya clauses. A typical circular indemnity clause, which can be found in the standard form Himalaya clause in BIMCO's bills of lading since 2014,[116] reads as follows:

> (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. The Servant shall also be entitled to enforce the foregoing covenant against the Merchant; and
>
> (ii) The Merchant undertakes that if any such claim or allegation should nevertheless be made, he will indemnify the carrier against all consequences thereof.

A circular indemnity clause consists of (i) a covenant not to sue (also known as a forbearance of suit clause), by which the cargo owner agrees not to bring any action against the carrier's subcontractors, and (ii) an indemnity clause, by which the cargo owner agrees to indemnify the carrier if any action is brought contrary to the covenant not to sue.[117] In effect, the cargo owner agrees to indemnify the carrier for any amounts that the carrier must pay its subcontractor as a

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[116] BIMCO, "Special Circular No 6 – Revised Himalaya Clause for Bills of Lading and other Contracts" (2014) online: *International Group of P&I Clubs / BIMCO Himalaya Clause for Bills of Lading and other Contracts 2014* <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/international_group_of_pi_clubs_himalaya_clause> [*BIMCO Special Circular*] at para (d).

[117] Corcione, *supra* note 76 at para 2.54. The circular indemnity clause is based on the theory that, while the contract of carriage cannot control the conduct of third parties, the shipper must compensate the carrier for any loss suffered as a result of the shipper's failure to enter into contractual relations with the third party in order to regulate its activities (John F Wilson, *Carriage of Goods by Sea*, 6th ed (Harlow: Pearson, 2008) at 249). The circular indemnity clause is of particular use in consortium agreements, pursuant to which several container operators agree to pool their carrying capacity by exchanging space slots on their own vessels for space slots on other operators' vessels. Practically, this is done by either chartering space on another operator's vessel or hiring its containers. In order to protect a container operator against claims brought by another operator's customers, there is a chain of indemnity clauses originating in the consortium agreement and carried through the operators' downstream contracts with subcontractors (Wilson, *supra* at 250).

result of the cargo owner's action against the subcontractor.[118] As a result, the cargo owner ends up facing its own claim,[119] and that is why it is called a *circular* indemnity clause.

The purpose of circular indemnity clauses is to prevent cargo owners from bringing claims against third parties. Since cargo owners will have to pay to the carrier any amount that they may recover from a third party by operation of the circular indemnity clause, cargo owners have no incentive to bring claims in the first place. In practical terms, if the cargo owner brings claims against the third party in breach of the covenant not to sue, the carrier may seek a ruling for stay of proceedings on the basis that it has sufficient interest (or entitlement) to enforce the indemnity clause.[120] Therefore, circular indemnity clauses ensure that the carrier and its subcontractors will not suffer any loss, including litigation and legal costs, from the cargo owner's claims.

The situation becomes more complicated if there is a chain of indemnity clauses in the downstream contracts of carriage. Commonly, the contract between the carrier and a third party will include an indemnity clause under which the carrier must reimburse the third party for any amount that the latter must pay to the cargo owner.[121] In such cases, if the cargo owner sues the third party, the third party will seek to be indemnified by the carrier by virtue of their indemnity clause, the carrier will then seek to be indemnified by the cargo owner by virtue of their indemnity clause, and as a result the cargo owner will indemnify its own loss.[122] And this process may be repeated multiple times depending on the number of indemnity clauses in downstream contracts.

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[118] Margaret Stando, "Clause for Concern? The Flawed Expansion of the Himalaya Clause and the Rise of the Circular Indemnity Clause in the United States" (2020) 44:2 Tul Mar LJ 323 at 331.
[119] William Tetley, "The Himalaya clause – Revisited" (2003) 9 JIML 40 at 27.
[120] Bruno Zeller & Gabriel Moens, *The Himalaya Clause* (Brisbane: Connor Court Publishing, 2020) at 313-314; See also *Gore v Van der Lann*, [1967] 2 QB 31.
[121] Stando, *supra* note 118 at 331.
[122] *Ibid*.

Courts have generally allowed the enforcement of circular indemnity clauses.[123] In Canada, the Supreme Court of Ontario has accepted the validity of circular indemnity clauses as early as 1988 in *Bombardier*.[124] In this case, Mitsubishi, the cargo owner, sued CP, the rail carrier, who was subcontracted by NYK, the ocean carrier, for the damage of cargo during salvage from the train wreck. The Court found that the salvage operation fell outside the scope of the contract of carriage and thus CP could not rely on the limitation clause via the Himalaya clause. However, the Court allowed NYK to enforce a circular indemnity clause[125] against Mitsubishi for the benefit of CP. In effect, Mitsubishi had judgment against CP for the total sum of $30,000 plus interest *with* costs, CP had judgment against NYK for the total sum of $30,000 plus interest and *no* costs, and NYK had judgment against Mitsubishi for the total sum of $30,000 plus interest and *no* costs. It follows that not only Mitsubishi did not recover for its loss, but it also bore the costs of litigation.

It follows that not only third parties can exempt or limit their liability against cargo owners, but they can also enforce a covenant not to sue to prevent the cargo owner's claims. Hence, circular indemnity clauses serve as an additional safeguard against third party liability.

Dispute resolution clauses

Third parties may also be able to enforce dispute resolution clauses, such as jurisdiction clauses, arbitration clauses, or choice of law clauses, via a Himalaya clause in the contract of carriage.

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[123] *Bombardier*, *supra* note 47; *Ford Aquitaine Industries SAS v Canmar Pride*, [2004] FCJ No 1743 (covenant not to sue); *Nippon Yusen Kaisha v International Import and Export Co Ltd (The Elbe Maru)*, [1978] 1 Lloyd's Rep. 206; *Godina v Patrick Operations Pty Ltd*, [1984] 1 Lloyd's Rep 333 (NSW CA); *Owners of cargo lately laden on board the vessel "Nedlloyd Colombo" v Owners and/or demise charterers of the vessel "Nedlloyd Colombo"*, [1995] 2 HKLR 53; *Sompo Japan Insurance Co of America v Norfolk Southern Railway Co*, 540 F. Supp. 2d 486 (2008).

[124] *Bombardier*, *supra* note 47.

[125] Clause 5 of the contract of carriage between Mutsubishi and NYK provided that "[t]he Merchant shall indemnify the Carrier against any claims which may be made upon the Carrier by any servant, agent or subcontractor of the Carrier in relation to the claim against any such person made by the Merchant". The Court noted that clause 5 was "clear and unambiguous" and therefore NYK could enforce it.

In Canada, courts have allowed third parties to rely on dispute resolution clauses, even where the contract did not expressly extend the benefit of the dispute resolution clause to them. For example, the Federal Court in *Fibreco*[126] allowed the shipowners, who were third parties to the contract of carriage, to enforce an arbitration clause therein and obtain a stay of proceedings.[127] The shipowners were able to enforce the arbitration clause by operation of a Himalaya clause in the contract of carriage which purported to extend the contractual "benefits and immunities" of the carrier to its servants, agents, and independent contractors, even though there was no evidence to support that the shipowners came within the agency test set out in *Midland*.[128] Similarly, the British Columbia Supreme Court in *Yates*[129] allowed a third party, who was not a signatory to the arbitration agreement, to enforce the agreement and obtain a stay of proceedings.[130] The Court adopted the argument of the third party that a non-signatory may be deemed to be a proper party to the arbitration agreement where there is an agency relationship between a party and the non-signatory.[131] It appears from these decisions that third parties may be able to enforce dispute resolution clauses even where the contract does not make an explicit reference to that effect.

A similar approach has been taken in the U.S., where courts have allowed third parties to enforce forum selection clauses in contracts of carriage via a Himalaya clause on the ground that the forum selection clause was a contractual "benefit" available to the carrier.[132] In these cases, the Himalaya clauses provided that the carrier's servants, agents and independent contractors "shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly

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[126] *Fibreco*, *supra* note 30 at paras 14, 28.
[127] *Ibid* at para 28.
[128] *Ibid* at paras 9, 21.
[129] *Northwestpharmacy.com Inc v Yates*, [2017] BCJ No 1775.
[130] *Ibid* at paras 4, 59.
[131] *Ibid* at para 54 (citing paras 101, 110 of the third party's submissions). See also *Hosting Metro Inc v Poornam Info Vision Pvt Ltd*, [2016] BCJ No 2700 at para 38.
[132] *Mazda Motors of America Inc v M/V Cougar Ace*, 565 F.3d 573 (9th Cir. 2009) at 577; *Chisso America Inc v M/V Hanjin Osaka*, 307 F. Supp. 2d 621 (DNJ 2003) at 625.

for their benefit", but there was no explicit indication that the parties intended to extend the benefit of the forum selection clause to third parties. Hence, although the forum selection clause did not explicitly extend to the third party seeking to enforce it, the courts construed an intention of the contracting parties to that effect.

In earlier common law, however, a stricter approach was taken. Lord Goff in *The Mahkutai*[133] explained that jurisdiction clauses, contrary to exemption clauses, are not included in a contract for the sole benefit of the carrier and its subcontractors, but they embody a mutual agreement between the contracting parties with mutual rights and obligations.[134] For this reason, the jurisdiction clause in question did not fall within the "exceptions, limitations, provisions, conditions and liberties… benefiting the Carrier" which third parties were entitled to enforce via the Himalaya clause in the contract of carriage.[135] This decision appears to suggest that, unless there is an explicit indication to the contrary, third parties cannot enforce a dispute resolution clause in a contract of carriage on the ground that the Himalaya clause generally confers on third parties "all benefits" available the carrier. As a result of this decision, some institutions have revised the Himalaya clause in standard form bills of lading so as to explicitly confer a right on third parties to enforce any jurisdiction or arbitration clause contained in the contract of carriage.[136]

Overall, dispute resolution clauses confer an *indirect* benefit on third parties – the ability to obtain a stay of proceedings which discontinues the claims of the cargo owner or grants jurisdiction to a more lenient forum. This was the case in *The Morviken*,[137] where the English Court of Appeal found that a clause granting exclusive jurisdiction to Dutch courts and Dutch law purported to

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[133] *The Mahkutai*, *supra* note 39.
[134] *Ibid* at 13-14.
[135] *Ibid* at 3, 14.
[136] See e.g., *BIMCO Special Circular*, *supra* note 116 at para (c). Compare with previous version at <https://www.shipownersclub.com/media/revised-himalaya-clause-for-bills-of-lading-sept-10.pdf>.
[137] *Owners of cargo on board the "Morviken" v Owners of the "Hollandia"*, [1983] 1 Lloyd's Rep. 325 at 329. The clause was held to be void under the English statute.

indirectly lessen the carrier's liability under English statute. Thus, contrary to exemption clauses, dispute resolution clauses may indirectly affect the liability of third parties by dismissing the claims of the cargo owner. The enforcement of dispute resolution clauses by third parties expands the scope of Himalaya clauses because third parties can now enjoy an ancillary level of protection against the claims of cargo owners, in addition to any exemption of liability.

3.3 Conclusion

In this Chapter, I have offered an account of the legal status of Himalaya clauses in the Canadian common law. First, I analyzed how the common law has established two tests to overcome the effect of the doctrine of privity – the agency test and the principled exception test. Second, I argued that once Himalaya clauses could be enforced on the basis of these tests, Canadian courts have generally taken a broad and expansive approach in the enforcement of Himalaya clauses in the maritime context. In particular, Himalaya clauses have been construed expansively as extending to (1) a wide range of third parties, including land sub-subcontractors; (2) a wide degree of liability, including liability in negligence; and (3) a wide number of contractual benefits, including circular indemnity clauses and dispute resolution clauses. The judicial tendency to construe exemption clauses broadly in order to protect negligent third parties has been best described by Fullagar J in *Wilson*,[138] who stated that:

> The common law has, I think, from quite early times—consistently with its general policy of freedom of contract—allowed the validity of provisions of a contract which limit or exclude liability for negligence. But it has always frowned on such provisions and insisted on construing them strictly… And yet we seem to discern… a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence—an anxiety which refuses to be baulked even by so well established a general doctrine as that of *Tweddle v. Atkinson*… This seems to me to be an extraordinary phenomenon…

[138] *Wilson v Darling Island Stevedoring and Lighterage Co*, [1957] 95 CLR 43 adopted in *The Eurymedon*, *supra* note 22 at 9.

It is indeed an extraordinary phenomenon how Himalaya clauses have evolved into a wedge that keeps the contract doors open to third parties. Now, third parties from further down the chain of carriage may exempt any and all liability via a Himalaya clause and benefit from additional stipulations such as dispute resolution clauses or circular indemnity clauses.

The expansive application of Himalaya clauses in the common law, as described in this Chapter, gives rise to a significant question: what should be the limits to the scope of Himalaya clauses in the common law? Having in mind that Himalaya clauses are enforceable by operation of an exception to privity as set out in *Fraser*, it is reasonable to pose the question "how far is too far?"[139] The ability of *any* third party involved in the chain of carriage to protect itself against *any* head of liability or to benefit from *any* other contractual provision can hardly fit into an exception. It appears from the analysis, however, that the scope of Himalaya clauses in the maritime context has not been restricted in any way. The common law has not set firm limitations on the application of Himalaya clauses and consequently there are no constraints as to who can benefit from a contract of carriage and in what circumstances. As a result, the scope of Himalaya clauses remains undefined in the maritime context.

In the next Chapter, I argue that the expansive application of Himalaya clauses by operation of the principled exception is problematic for a number of reasons. The enforcement of Himalaya clauses by third parties based on the intentions of the contracting parties raises some issues relating to the status of the doctrine of privity in Canadian contract law, the application of some basic rules of contractual interpretation, and the interaction between the maritime law regime and other unimodal regimes. The purpose of the next Chapter is to discuss these issues and argue that the scope of Himalaya clauses must be limited in Canadian maritime law.

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[139] Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 225-226, 235.

Chapter 4

4 Why is the Expansive Application of Himalaya Clauses Problematic?

In the previous Chapter, I explored the development of Himalaya clauses in the common law vis-à-vis the doctrine of privity of contract, as well as the expansive application of such clauses in the context of carriage of goods by sea. Based on the analysis, I argued that the scope of Himalaya clauses remains undefined in the common law since the application of such clauses has not yet been subjected to any limits or restrictions.

In this Chapter, I argue that the expansive application of Himalaya clauses by operation of the principled exception to privity is problematic for three main reasons. First, I argue that the enforcement of Himalaya clauses is inconsistent with the doctrine of privity because the decision in *Fraser* did not create a genuine exception to the doctrine. Second, I argue that the expansive interpretation of Himalaya clauses is unsupported by two general rules of contractual interpretation, namely the rule to construe contractual provisions in light of the overall object of the contract and the *contra proferentem* rule. Third, I argue that the extension of Himalaya clauses to land carriers under maritime common law enables those land carriers to avoid their liability under statutes governing inland transport. I discuss each of these problems in turn below, and then I conclude that it is necessary to restrict the scope of Himalaya clauses in Canadian maritime law.

4.1 Inconsistent with Doctrine of Privity

In this Section, I argue that the expansive application of Himalaya clauses subject to the principled exception is problematic because it is inconsistent with the doctrine of privity. This argument is rooted in the claim that the Supreme Court of Canada in *Fraser* did not create a

genuine exception to the doctrine of privity, and therefore the enforcement of Himalaya clauses by third parties based on the intention of the contracting parties sits uncomfortably with it.

The Court in *Fraser* purported to create an "incremental change" to the doctrine of privity and not "a wholesale abdication of existing principles".[1] The Court noted that the abolition of privity would create "complex repercussions that exceed the ability of the courts to anticipate and address".[2] Similarly, the Court in *London Drugs* acknowledged that any major reforms to the doctrine of privity must come from the legislature because "privity of contract is an established principle in the law of contracts and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications".[3] It is clear from the reasoning of both decisions that the Court did not intend to abolish the doctrine of privity. In contrast, the Court recognized the importance and status of privity in Canadian contract law and saw itself as merely creating a limited exception to it.

Indeed, one way to understand what the Court did in *Fraser* was to not really establish a genuine exception to privity at all. A genuine exception is one that waives the requirement of promise supported by consideration, as set out by the House of Lords in *Dunlop* and adopted by Canadian courts.[4] As such, a genuine exception to privity allows a third party to acquire a contractual benefit, even if the third party is not the promisee of the benefit and/or if the third party has not provided consideration to the promisor. Examples of common law exceptions to privity

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[1] *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 [*Fraser*] at para 30.
[2] *Ibid* at para 43.
[3] *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 [*London Drugs*] at 436-437.
[4] *Dunlop Pneumatic Tyre v Selfridge and Co Ltd*, [1915] AC 847 (HL) [*Dunlop*] at 853. See *Greenwood Shopping Plaza Ltd v Beattie*, [1980] 2 SCR 228; *Sears et al v Tanenbaum et al*, [1969] OJ No 1530; *Canadian General Electric Co v Pickford & Black Ltd*, [1971] SCR 41; *Van Hemelryck v New Westminster Construction and Engineering Co*, [1920] BCJ No 5. See also Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 LQR 292 at 302.

include agency for undisclosed principals and trust.[5] The common law has also recognized some work-arounds to privity which, although not genuine exceptions, provide an alternative analysis of how the requirement of promise supported by consideration is satisfied. For example, the agency test set out by Lord Reid in *Midland*[6] provided that a third party was the promisee of a Himalaya clause by implication of a direct contract between the cargo owner and the third party through the agency of the carrier, and that consideration moved from the third party to the cargo owner upon the performance of the services.[7] Artificial as it might be, the agency test did not circumvent the doctrine of privity, but it merely provided an alternative mechanism for the creation of third party rights under a contract.

In establishing the principled exception, however, the Court in *Fraser* did not explain whether and how the requirement of promise supported by consideration was satisfied in the circumstances. The Court took a "more direct approach" to determine whether privity should be relaxed in the circumstances,[8] and essentially cut across the doctrinal discussion. The principled exception test simply requires a third party to be an intended beneficiary of the contract and perform services that fall within the contemplation of the parties at the time when the contract was formulated in order to benefit from it.[9] Thus, according to the decision in *Fraser*, the intention of the contracting parties and the participation of the third party in the performance of the contract are sufficient to generate third party rights under the contract.

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[5] Jack Beatson, Andrew Burrows, & John Cartwright, *Anson's Law of Contract*, 29th ed (New York: OUP, 2010) at 635.
[6] *Scruttons Ltd v Midland Silicones Ltd*, [1962] AC 446 (HL).
[7] *Ibid* at 4 (Lord Wilberforce).
[8] *Fraser*, *supra* note 1 at para 27.
[9] *Ibid* at para 32.

Privity versus Intention

Privity and intention are two conflicting angles from which to approach the problem of third party beneficiaries.[10] On a privity-based analysis, intended beneficiaries are strangers to the contract since they are not the promisees of the contract and they have not provided consideration. The two elements of the doctrine of privity, promise and consideration, require that only those persons who have participated in a mutual exchange of offer, acceptance, and consideration can enforce the resulting contract.[11] So long as a contract requires a mutual exchange to give rise to obligations and rights, no one who is not a party to that exchange can be subject to such obligations and rights.[12] Privity effectively bars a *ius quaesitum tertio* (a third party right of enforcement).[13]

On an intention-based analysis, however, intended beneficiaries are not strangers to the contract since they have a legitimate interest in its performance. The common feature of the cases that have allowed the enforcement of contractual terms by third parties is the involvement of third parties in an enterprise where cooperation and an agreed allocation of the risk for loss are necessary to make such an enterprise successful.[14] The involvement of third parties in an enterprise is a form of "contextual identification" that brings those third parties into the scope of the contract,[15] and this contextual identification informs the intention of the contracting parties to confer a benefit on third parties. Thus, on an intention-based analysis, intended beneficiaries who are part of the contractual enterprise are not strangers to the contract.

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[10] Jason Brock, "A Principled Exception to Privity of Contract-Fraser River Pile & (and) Dredge Ltd. v. Can-Dive Services Ltd." (2000) 58:1 U Toronto Fac L Rev 53 at 56, 64-65.
[11] See Section 3.1 of Chapter 3 above.
[12] Brock, *supra* note 10 at 67.
[13] *Dunlop*, *supra* note 4 at 853.
[14] Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 226. See also Carlo Corcione, *Third Party Protection in Shipping* (New York: Routledge, 2020) at para 1.6.
[15] Brock, *supra* note 10 at 63.

The principled exception set out in *Fraser* does not resolve the conflict between these two analyses, but it merely picks a side. By operation of the principled exception, intention substitutes the need to exchange a promise and consideration in order to acquire rights under a contract. In other words, *Fraser* has shifted the doctrinal basis for the creation of third party rights from participation in a mutual exchange to intention.[16] In the decisions of *Kirby*, *Boutique*, and *Valmet*, for example, the courts did not consider the fact that the land carriers did not participate in the mutual exchange of promise and consideration, or the fact that the land carriers, being sub-subcontracted by other carriers, may not have been aware of the existence of the Himalaya clause in the main contract of carriage. Instead, the courts were satisfied that the wide language of the Himalaya clause revealed the intention of the contracting parties to extend a benefit to those parties, and this intention was sufficient to generate a right of enforcement. Consequently, "notwithstanding the doctrine of privity",[17] intention is what entitles the third party to enforce such benefit.

Nevertheless, intention as the basis for the enforcement of contractual terms by third parties cannot be "principled" because it swallows the whole of the doctrine of privity. This has been the concern of many scholars.[18] If intention was the true hallmark of contractual rights, the fundamental doctrines of consideration, offer, and acceptance, would fall by the wayside,[19] since a person would be no longer required to prove an exchange of promise and consideration in order to be bound by or entitled under a contract. Given that an exchange of promise and consideration

[16] *Ibid* at 65.
[17] *Fraser*, *supra* note 1 at para 42.
[18] Jason W Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52 McGill LJ 757 at 760; Swan et al, *supra* note 14 at 225, 235; Stephen Waddams, "Modern Notions of Commercial Reality and Justice: Justice Iacobucci and Contract Law" (2007) 57:2 U Toronto LJ 331 at 334-335; Brock, *supra* note 10 at 60.
[19] Neyers, *supra* note 18 at 769.

is the major requirement of the doctrine of privity, the decision in *Fraser* seems to leave the doctrine rather empty.[20]

Furthermore, an intention-based analysis threatens the status of privity in that intention is not a limiting test. First, intention does not distinguish between categories of third parties that are entitled to benefit. Contrary to the test established in *London Drugs*, which required an "identity of interest" between employer and employee,[21] the test in *Fraser* is broader in that it applies to *anyone* who, on a proper construction of the contract, was an intended beneficiary. As discussed in Chapter 3 above, the principled exception does not require third parties to authorize or ratify the Himalaya clause in order to benefit from it,[22] or to know about the existence of the Himalaya clause before the performance of the services.[23] Second, intention does not explain some central limiting features of a proper exception to privity. For example, intention does not explain why the contracting parties are not free to impose burdens on third parties or modify a contractual benefit without the permission of the third party to whom such benefit extends,[24] or why third parties can only use the exception to defend themselves against claims brought by a contracting party (as a "shield") and not to sue a contracting party to claim a benefit (as a "sword").[25] Third, questions remain as to how far intention can go. Intention is assessed on the facts of each case and it cannot be determined with certainty, even if the parties' reasonable expectations are objectively

[20] Brock, *supra* note 10 at 70.
[21] *London Drugs*, *supra* note 3 at paras 255, 260, 268.
[22] See *Valmet Paper Machinery Inc v Hapag-Lloyd AG*, [2002] BCJ No 1271 [*Valmet*] at paras 45, 51-54; See also *Bombardier Inc v Canadian Pacific Ltd*, [1988] OJ No 1807 [*Bombardier*] (The Court held that, due to the longstanding relationship between the carrier and the third party, "there was the implied authority for the ratification of the contract of carriage"); *Canada Maritime Ltd v Oerlikon Aerospace Inc*, [1998] EWCA Civ 170 at para 23.
[23] See *Labrador-Island Link General Partner Corp v Panalpina Inc*, [2019] FCJ No 618 at para 80; *Boutique Jacob Inc v Canadian Pacific Railway Co*, [2008] FCJ No 358 [*Boutique*] at para 24; *Timberwest Forest Corp v Pacific Link Ocean Services Corp*, [2009] FCR 496 at para 50.
[24] Neyers, *supra* note 18 at 768-769.
[25] *Ibid* at 768.

construed.[26] Scholars have argued that "the conclusion that the two contracting parties intended by the contract to protect the employees of the defendant is the judicial equivalent of making bricks without straw or, for that matter, much mud"[27]. Thus, the test in *Fraser* is essentially content-empty since its application depends on a particular factual situation and not on solid or fixed legal rules. For these reasons, the scope and limits of the "exception" established in *Fraser* remain unknown or even non-existent.

Himalaya clauses as a ramification

The expansive application of Himalaya clauses is arguably an example of a "complex and uncertain ramification"[28] resulting from the disregard of the doctrine of privity. The ability of third parties to enforce Himalaya clauses and other contractual terms on their name against the cargo owner is highly problematic because it is in direct conflict with privity and its requirements. The shift of the judicial focus from the mutual exchange of promise and consideration to the parties' intention does not harmonize the enforcement of Himalaya clauses with privity. The fact that the contracting parties intended to confer the benefit of a Himalaya clause on third parties, who had neither participated in the mutual exchange nor relied on the clause prior to the performance of carriage, does not resolve the tension between the function of Himalaya clauses and privity; it merely ignores it. Similarly, the fact that a third party participates in the contractual enterprise and thus comes within the scope of the contract is not sufficient to confer contractual rights. A formal mechanism that, in line with the doctrine of privity, generates contractual rights is still required. Contrary to other jurisdictions which dealt with the doctrine of privity at the statutory level,[29] the

[26] Swan et al, *supra* note 14 at 225-226.
[27] *Ibid* at 223.
[28] *London Drugs*, *supra* note 3 at 436-437.
[29] For example, New Brunswick has enacted the *Law Reform Act*, RSNB 2011, c 184, s 4 which abolishes the doctrine of privity, and the U.K. has enacted the *Contracts (Rights of Third Parties) Act*, UK 1999, c 31 which creates an exemption to the doctrine of privity (See U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) at paras 5.16, 6.17). It is important to note that, in relation to contracts

principled exception under the common law of Canada does not offer a formal or suitable mechanism for the recognition of third party rights. It follows that the enforcement of Himalaya clauses by third parties subject to the principled exception set out in *Fraser* is inconsistent with classical doctrine.

4.2 Unsupported by Interpretational Rules

In this Section, I argue that the expansive application of Himalaya clauses in the common law is problematic because it is unsupported by two basic rules of interpretation of contract – the rule to interpret contractual terms in light of the contract's objective, and the *contra proferentem* rule. These rules are used by courts to ascertain the meaning and scope of an ambiguous provision in the contract, as such meaning and scope could have been understood by the parties at the time of formulating the contract. In the case of Himalaya clauses, interpretational rules are used to resolve any ambiguities arising from obscure or overly general words contained therein, such as "any", "every", "all", "whatsoever", "howsoever", "in any circumstances", *etc*.[30]

The rule to interpret contractual terms in the context of the object of the contract and the *contra proferentem* rule become particularly important in the interpretation of Himalaya clauses, in light of the recent decision of the Supreme Court of Canada in *Ledcor*,[31] which established that

for the carriage of goods by sea, the *Contracts (Rights of Third Parties) Act* only allows third parties to benefit from exemption or limitation of liability provisions via a Himalaya clause (See *Contracts (Rights of Third Parties) Act*, 1999 c 31, s 5; *Explanatory Notes to the Contracts (Rights of Third Parties) Act*, UK 1999, c 31 at para 26).

[30] See e.g., the breadth of the Himalaya clause in the BIMCO standard form bill of lading in BIMCO, "Special Circular No 6 – Revised Himalaya Clause for Bills of Lading and other Contracts" (2014) online: *International Group of P&I Clubs / BIMCO Himalaya Clause for Bills of Lading and other Contracts 2014* <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/international_group_of_pi_clubs_himalaya_clause>. See also the Himalaya clause in *Boutique*, *supra* note 23 at para 23 ("Every servant or agent or sub-contractor"); *Norfolk Southern Ry v James N Kirby Pty Ltd*, 543 U.S. 14 (2004) ("any servant, agent or other person (including any independent contractor) of the carrier"); *Valmet*, *supra* note 22 at para 39 ("any Person whomsoever by whom the Carriage is performed or undertaken (including all Sub-Contractors of the Carrier)").

[31] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, [2016] 2 SCR 23 [*Ledcor*].

the factual matrix is less relevant in the interpretation of standard form contracts.[32] As a result of *Ledcor*, the intentions of the contracting parties, which are a "fact-specific goal",[33] are less relevant in construing standard form contracts because there is no factual evidence to ascertain the parties' understanding of a term or the parties' expectation regarding a particular interpretation.[34] The underlying goal of *Ledcor* is to prevent the implication of artificial words or meanings from contractual provisions which were concluded on a take-it-or-leave-it basis or which were not negotiated by the parties. The rationale of this decision is in line with the general rule that standard form contracts which contain total exclusion clauses that operate unfairly against one of the parties or dramatically alter the usual allocation of risk must be construed strictly.[35]

The decision in *Ledcor* has a significant impact on the interpretation of Himalaya clauses because of the frequent use of standard form bills of lading in the shipping industry.[36] The terms and conditions printed on a standard form bill of lading are drafted by only one party – the carrier.[37]

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[32] *Ibid* at paras 28, 32. This decision has created an exception to the general rule established in *Sattva Capital Corp v Creston Moly Corp*, [2014] 2 SCR 633 [*Sattva*] at para 50, that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". *Ledcor* creates an exception to this rule in the sense that the interpretation of a standard form contract is not a matter of mixed law and fact, but merely a question of law, since there is no meaningful factual matrix that is specific to the parties and that would assist the interpretation process (*Ledcor*, *supra* note 31 at paras 24, 34).

[33] *Sattva*, *supra* note 32 at paras 46-47, 49.

[34] *Ledcor*, *supra* note 31 at para 65.

[35] Gerald McMeel, *McMeel on the Construction of Contracts*, 3rd ed (New York: Oxford University Press, 2017) at 275. Standard form contracts are construed strictly for policy reasons and to balance the interests of the contracting parties. See *Allstate Ins Co v Int'l Shipping Corp*, 703 F.2d 497 (11th Cir. Fla. 1983) at 500 quoting *Calmaquip Engineering Corp v West Coast Carriers Ltd*, 650 F.2d 633 (5th Cir. 1981) at 639-640 quoting *Encyclopaedia Britannica Inc v SS Hong Kong Producer*, 422 F2.d 7 (2d Cir. 1969) at 14 ("[W]e are reluctant to give effect to limiting clauses with which 'a carrier could shield itself from liability through manipulation of fine print clauses contained in standardized contract forms'").

[36] See e.g., BIMCO Standard Form Contracts <https://www.bimco.org/contracts-and-clauses/bimco-contracts>; Hapag-Lloyd Standard Terms <https://www.hapag-lloyd.com/en/meta/terms-conditions-transport.html>; North Sea Freight Conditions of Carriage <https://www.balticline.no/wp-content/uploads/2016/12/north-sea-freight-conditions.pdf>. In general, the international shipping industry encourages the use of standard form agreements for reasons of legal certainty and uniformity.

[37] William Tetley, *International Maritime and Admiralty Jurisdiction* (Quebec: Yvon Blaiz, 2002) [Tetley, *Admiralty Jurisdiction*] at 117; Thomas J Schoenbaum, *Admiralty and Maritime Law*, 6th ed (St. Paul, MN: West Academic Publishing, 2019) at 501. See also non-negotiable sea waybills which are drafted to fit the needs of the carrier using them (Richard Aikens et al, *Bills of Lading*, 3rd ed (New York: Routledge, 2021).

Cargo owners have some part in the preparation of the bill in that they usually add the description of cargo, but they are not typically involved in the formulation of its terms, which are set out by the carrier.[38] Cargo owners may infer the terms of a standard form bill from the carrier's sailing announcement (or website) or from negotiations with loading brokers before the goods are shipped.[39] It follows that cargo owners do not often negotiate or influence the language of the terms. In some circumstances, standard form bills of lading have been even deemed "contracts of adhesion".[40]

In this context, and subject to *Ledcor*, the intentions of the contracting parties should be given less weight in the interpretation of Himalaya clauses printed on standard form bills. The Supreme Court in *Ledcor* has clarified that, in the interpretation of standard form contracts, courts must consider factors which are not "inherently fact specific", such as the purpose of the contract, the nature of the contractual relationship, and the industry in which it operates.[41] The rationale is that these factors usually apply to everyone who is a party to the particular or a similar standard form contract in the same way, and this underscores the need for standard form contracts to be

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[38] William Tetley, *Marine Cargo Claims*, 3rd ed (Boston, MA: Yvon Blais, 1988) at 217; Tetley, *Admiralty Jurisdiction*, *supra* note 37 at 71; See *Heskell v Continental Express*, [1949] 83 Lloyd's Rep. 438 at 449.

[39] John F Wilson, *Carriage of Goods by Sea*, 6th ed (Harlow: Pearson, 2008) at 127. A standard form bill of lading usually makes references to the carrier's advertisements, the booking note, the freight tariff, or even to certain practices of the carrier which are known and accepted by the cargo owner (Tetley, *Admiralty Jurisdiction*, *supra* note 37 at 130). It is open to the cargo owner to adduce oral evidence to show that the true terms of the contract are not those contained in the bill of lading, but are to be gathered from the carrier's receipt, shipping cards, placards, handbills, announcements, advice notes, freight notes, undertakings by the broker or other agent of the carrier (Alan A Mocatta, Michael J Mustill & Stewart C Boyd, *Scrutton on Charterparties and Bills of Lading*, 19th ed (London: Sweet & Maxwell, 1984) at 55 and cited authorities). In more recent years, the terms of a standard form bill of lading may be inferred by the cargo owner from the carrier's website.

[40] See *Jagenberg Inc v Georgia Ports Authority*, 882 F. Supp. 1065 (SD Ga. 1995) at 1076; See also William Tetley, "Canadian Comments on the Proposed UNCITRAL (Hamburg) Rules" (1977) 9 JMLC 251 at 252; Tetley, *Admiralty Jurisdiction*, *supra* note 37 at 71, 117. Contracts of adhesion are written agreements with the following five characteristics: (1) they are drafted by one party to the transaction; (2) they are printed on a form regularly used by the drafter; (3) they are presented to the adherent on a take-it-or-leave-it basis; (4) the adherent has entered into fewer transactions of that kind compared with the drafter; (5) the principal obligation of the adherent is the payment of money (Geoff R Hall, *Canadian Contractual Interpretation*, 3rd ed (Toronto: LexisNexis Canada, 2016) at 222).

[41] *Ledcor*, *supra* note 31 at para 31 referring to *Sattva*, *supra* note 32 at para 55.

interpreted consistently.[42] Therefore, as discussed below, any ambiguity arising from standard Himalaya clauses is more apt to be construed by reference to the overall object of the contract and *contra proferentem* (against the third party seeking to benefit from it), rather than by reference to the parties' intention alone.

The object of the contract

As a general rule, each contractual term must be construed in the light of the overall objectives of the contract.[43] It has been established by the Supreme Court of Canada as a "key principle of contractual interpretation" that "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context".[44] Thus, the meaning and scope of a provision must be coherent with the purpose the contract as a whole. The effect of this general rule is that courts must not give effect to words or provisions which are inconsistent with the main purpose of the contract.[45] An illustrative example of this rule in the contract of carriage of goods is the case of *Kishinchand*,[46] in which the carrier delivered the goods to a person that was not entitled to receive them and sought to benefit from an ambiguous exemption clause in the contract of carriage. The Federal Court held that:

> If the exemption clause upon its true construction absolved the shipping company from an act such as that, it seems that by parity of reasoning they would have been absolved if they had given the goods away to some passer-by or had burnt them or thrown them

[42] *Ledcor*, *supra* note 31 at para 31.
[43] John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 819. See also Raoul Colinvaux, *Carver's Carriage by Sea*, 13th ed, vol 2 (London: Stevens & Sons, 1982) at para 873.
[44] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69 at para 64. See also Hall, *supra* note 40 at 16 and cited authorities.
[45] Colinvaux, *supra* note 43 at para 873. See *Glynn v Margetson*, [1893] AC 351 (HL) [*Glynn*] at 357 (Lord Halsbury held that "[l]ooking at the whole of the instrument, and seeing what one must regard... as its main purpose, one must reject words, indeed whole provision, if they are inconsistent with what one assumes to be the main purpose of the contract"); *Renton v Palmyra*, [1957] AC 149 (HL) [*Palmyra*]; *Leonis Steamship v Rank*, [1908] 1 KB 499; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*, [1959] AC 576 (PC); *Cathcart Inspection Services Ltd v Purolator Courier Ltd*, [1981] OJ No 3114 at para 25.
[46] *Kishinchand & Sons (Hong Kong) Ltd v Wellcorp Container Lines Ltd*, [1995] 2 FC 37.

> into the sea. If it had been suggested to the parties that the condition exempted the shipping company in such a case, they would both have said: 'Of course not.' There is, therefore, an implied limitation on the clause, which cuts down the extreme width of it: and, as a matter of construction, their Lordships decline to attribute to it the unreasonable effect contended for.
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> … If such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract… [which is] the proper delivery of the goods by the shipping company… It would defeat this object entirely if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract.

In short, the Court refused to construe the clause as excluding liability arising from the poor performance of the very services that the carrier had undertaken to perform, because such a construction would defeat the object of the contract. In this regard, the Court explained that there is an "implied limitation" pursuant to which the exemption clause is read down so as to be harmonious with the purpose of the contract.

A broadly drafted Himalaya clause that virtually exempts *any* third party from *any* liability is arguably not harmonious with the object of a sea carriage contract. The object of a typical sea carriage contract is the transportation of goods by water from one port to another.[47] Sea carriage contracts are maritime contracts that entail marine risks,[48] and therefore their primary objective is to regulate the liability of persons whose operations are integral to the marine adventure. The term

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[47] See e.g., *Glynn*, *supra* note 45; *Palmyra*, *supra* note 45. See also the definition of a "contract of affreightment" pursuant to which a carrier agrees to carry goods by water or to furnish a ship for that purpose in exchange for the freight rate (Mocatta et al, *supra* note 39 at 1). In general, where the contract of carriage is concluded on CIF ("cost, insurance, freight") or FOB ("free on board") terms, its objective is the *shipment* of cargo or the delivery of cargo *for shipment* (See Charles Debattista, *Sale of Goods Carried by Sea* (London: Butterworth, 1990) at 3-4).

[48] In general, maritime contracts are agreements that "intrinsically respect maritime risks, injuries and losses" and "according to mercantile usage, respect or concern maritime negotiations and their incidents", such as "charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and… policies of insurance" (*De Lovio v Boit*, 7 F. Cas. 418 (1815) at 444, n 47; See also *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co*, [1978] 2 FC 691 at paras 6-7; *Coastal Float Camps Ltd v Jardine Lloyd Thompson Canada Inc*, [2014] FCJ No 971 at paras 15-16).

"marine adventure" is defined in Article 2(1) of the Marine Insurance Act[49] as "any situation where insurable property is exposed to maritime perils".[50] Canadian jurisprudence shows that an operation may be deemed to be part of the marine adventure if it is physically and temporarily proximate to the sea carriage.[51] Thus, sea carriage contracts typically aim to regulate any liability that is incurred by reason of maritime perils or risks.

Given the maritime objective of a typical sea carriage contract, an ambiguous Himalaya clause contained therein cannot be reasonably construed to cover land carriers. The operations of land carriers are not integral to the marine adventure since they do not entail maritime risks and

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[49] SC 1993, c 22.

[50] The term "maritime perils" is also defined in Article 2(1) of the Marine Insurance Act as "the perils consequent on or incidental to navigation, including perils of the seas, fire, war perils, acts of pirates or thieves, captures, seizures, restraints, detainments of princes and peoples, jettisons, barratry and all other perils of a like kind and, in respect of a marine policy, any peril designated by the policy; (*périls de mer*)". For the definition of the "perils of the sea", see Simon Rainey, "Piracy and Contracts of Carriage by Sea" in Baris Soyer & Andrew Tettenborn, eds, *Carriage of Goods by Sea, Land and Air: Uni-modal and Multi-modal Transport in the 21st Century* (New York: Routledge, 2014) 3 at 12; *Case Existological Laboratories Ltd v Century Insurance Company of Canada*, [1982] BCJ No 2291 at para 9 citing *Can Rice Mills Ltd v Union Marine & Gen Ins Co Ltd*, [1941] AC 55 (PC) at 68-69 ("Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases").

[51] See *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] SCJ No 38 [*ITO*] at para 22 (the storage of cargo at port for 4 days was integral to the marine adventure because it was proximate to the sea, connected with the sea carriage contract, and short-term pending final delivery); *Captain v Far Eastern Steamship Co*, [1978] BCJ No 1246 at para 21 (the holding of the goods on the dock for 38 days until loading onto the second vessel did not relate to the carriage of goods by sea); *Certain Underwriters at Lloyd's v Mediterranean Shipping Company SA*, [2017] FCJ No 999 [*MSC*] at para 40 (the loading of goods onto trucks to leave port is not part of the marine venture); *Calkins & Burke Ltd v Far Eastern Steamship Co et al*, [1976] BCJ No 1374 (the storage of cargo was outside the scope of the carrier's obligations under the sea carriage contract); *Mayhew Foods Ltd v Overseas Containers Ltd*, [1984] 1 Lloyd's Rep 317 (the storage of cargo at port for 5-6 days until loading onto another vessel related to the carriage of goods by sea). See also *Marine Liability Act*, SC 2001, c 6, Schedule 3, Article I(e). English jurisprudence also suggests that maritime operations are those closely related to sea carriage, see e.g., the English cases *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (Australia)*, [1980] 3 All ER 257 at 6; *Ferruzzi France SA v Oceania Maritime Inc (The Palmea)*, [1988] 2 Lloyd's Rep. 261; *Pyrene Co Ltd v Scindia Navigation Co Ltd*, [1954] 1 Lloyd's Rep. 321 at at 327-328; *Southampton Cargo Handling Plc v Lotus Cars Ltd & Ors (The Rigoletto)*, [2000] EWCA Civ 252; *Schweizerische Metallwerke Selve & Co v Atlantic Container Line Ltd*, [1985] FCJ No 1039.

they are not proximate to sea carriage.[52] It would seem far-reaching to imply that, at the time of entering into the sea carriage contract, the parties understood or expected the Himalaya clause to protect land carriers from non-maritime risks. Even abstract words like "any", "every", or "all" must be construed in light of the purposes of the contract.[53] While the operations of charterers, pilots, crew members, and stevedores (responsible for loading or discharge) would naturally fall within the scope of a Himalaya clause because they assist the performance of the maritime subject-matter of the contract, the operations of rail carriers, road carriers, freight forwarders, and terminal operators (responsible for long-term storage or handling) would not.

In the same line of reasoning, it could be argued that, without an express indication to the contrary, a Himalaya clause could be reasonably construed as excluding liability arising from maritime perils, such as loss of cargo in a shipwreck or damage to cargo by seawater, but not liability arising from torts occurring on land. If Himalaya clauses were construed in the context of the maritime object of the contract of carriage, their scope would be confined to liability resulting from events that take place at sea or in close proximity to the sea. To imply that a Himalaya clause

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[52] See e.g., *Hartford Fire Ins Co v Orient Overseas Container Lines*, 230 F.3d 549 (CA2 2000) at 555-556 (land transport of over 850 miles across four countries is more than incidental to sea carriage); *Sea-Land Serv Inc v Danzig*, 211 F3d 1373 (CA Fed 2000) at 1378 (substantial inland carriage across two countries is not incidental to sea carriage); *Kuehne & Nagel (AG & CO) v Geosource Inc*, 874 F2d 283 (CA5 1989) at 290 (inland carriage of 1000 miles "cannot be viewed as merely incidental to the maritime operations"); *Caterpillar Overseas SA v Marine Transport*, 900 F.2d 714 (4th Cir. 1990) at 726-27 (the Court held that a trucker carrying the cargo in a federal highway was not performing a maritime operation because the road carriage took place outside the port terminal premises and it lacked a connection with the maritime operations, *e.g.*, the driver of the truck issued an outgoing materials pass rather than an interchange receipt). See also *Elroumi v Shenzhen Top China Imp & Exp Co*, [2019] FCJ No 1267 at para 6 ("A claim against a local road transporter or an operator of a warehouse distant from an ocean port is not a claim under Canadian maritime law").

[53] See e.g., *Tebe Trading (Proprietary) Ltd v Mediterranean Shipping Company (Proprietary) Ltd*, [2005] ZAKZHC 17 at 37-39. In this case, the third party failed to inform the cargo owner about the delay in the delivery of the cargo due to a change in the voyage route. The Court ruled that the third party could not benefit from the Himalaya clause because the scope of such clauses is confined "to the acts which are required to assist in the performance of the contract of carriage", and the overly general words "in the course of employment" or "in connection with" are construed narrowly to comply with the main purpose of the contract. Hence, signing the bill of lading, managing the ship, and carrying the goods are acts required to assist in the performance of the contract, whereas marketing services and notifying the cargo owner about any delays are not.

in a sea carriage contract was intended to exclude liability for negligence, theft, fraud, or any other event taking place on land, solely on the basis that its wording is wide enough, would be to expose the contract to a higher risk of non-fulfilment or even defeat its subject-matter.

In the cases examined in Chapter 3 above, the object of the contract was not a controlling factor in the analysis of whether a Himalaya clause applies. And it is questionable whether the cases of *ITO*, *The New York Star*, *Kirby*, or *Boutique*, which involved a Himalaya clause in a standard form bill of lading, would have the same outcome if the scope of the Himalaya clause was construed strictly in the context of the primary objective of the contract, and not in accordance with the parties' expectations.

An important advantage of this interpretational rule is that it gives content to the second requirement of the principled exception test set out in *Fraser*, which provides that the third party seeking to benefit from a contractual term must have been performing services that reasonably come within the contemplation of the contracting parties when formulating the contract.[54] This requirement has been thought to be redundant in that it adds very little to the analysis under the first requirement – that the third party must be an intended beneficiary of the contractual term.[55] The object of the contract, however, which is usually the same for most of standard form bills of lading, becomes the analytical focus of the second requirement and effectively confines the scope of the principled exception to intended beneficiaries who are part of the marine venture. Thus, this rule should prevent the expansive interpretation of Himalaya clauses or the implication of artificial meanings so as to protect remote land carriers from the normal consequences of their negligence.

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[54] *Fraser*, *supra* note 1 at para 32.

[55] Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57:2 U Toronto LJ 269 at 290; McCamus, *supra* note 43 at 348.

The contra proferentem rule

The *contra proferentem* rule holds that ambiguous contractual provisions must be construed against the interest of the person who drafted or proffered them.[56] The rationale of the rule is that the drafters of the contract, having had the opportunity to protect their interests, ought to be able to take advantage of exemptions only to the extent that they are clearly communicated in the language of the contract to the other party.[57] An additional rationale for the rule is to preclude any incentive for the drafters of the contract to strategically draft provisions that are deliberately obscure, with an intention to preserve the opportunity of asserting a more generous interpretation in the future.[58] As a result of the *contra proferentem* rule, exemption clauses by which the drafter restricts its own liability for losses caused to the other contracting party are strictly construed against the drafter,[59] even where the parties are sophisticated entities of equal bargaining power.[60]

Even though the rule did not apply in most cases examined in Chapter 3 above because the courts were satisfied that the ambiguity of the Himalaya clause could be resolved by application of other rules of interpretation,[61] it becomes more relevant following the decision in *Ledcor*. Moreover, it has been established on many occasions under Canadian law that there is an increased propensity to apply the *contra proferentem* rule in the interpretation of contracts of adhesion.[62]

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[56] McCamus, *supra* note 43 at 825; See also *McCelland & Stewart Ltd v Mutual Life*, [1981] 2 SCR 6 at 15.
[57] McCamus, *supra* note 43 at 825.
[58] *Ibid* citing *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at 26.
[59] McCamus, *supra* note 43 at 826; See also Brian Coote, *Exception Clauses* (London: Sweet & Maxwell, 1964) at 15. For the construction of exemption clauses against carriers, see *United States v Strickland Transp Co*, 200 F2d 234 (5th Cir 1952) at 235; *The Caledonia*, 157 U.S. 124 (1895) at 137; *Mitsui v American Export Lines Inc*, 636 F2d at 821 (2d Cir 1981) at 822-823.
[60] *Bombardier*, *supra* note 22 (Chadwick J held that "[n]otwithstanding the equality of the parties certain presumptions of the rules of construction continue to govern the interpretation of the limitation clauses in the contract of carriage. The contra proferentem rule must apply and any ambiguity is to be construed against the party asserting the clause. In addition where the carrier is attempting to limit or exclude liability, then that particular clause must be clearly worded and unambiguous").
[61] The *contra proferentem* rule applies only where the ambiguity cannot be resolved by other general rules of interpretation (See McCamus, *supra* note 43 at 825, n 124; *Ledcor*, *supra* note 31 at paras 50-51).
[62] Hall, *supra* note 40 at 222.

And since, as discussed above, standard form bills of lading have been deemed contracts of adhesion where they were drafted only by the carrier, Himalaya clauses contained therein are more apt to be interpreted *contra proferentem*.

For the purposes of the *contra proferentem* rule, the drafter of the Himalaya clause is the carrier because the carrier is normally the party responsible for stipulating for a clear limitation clause for the benefit of third parties,[63] and is normally the party that formulates the standard terms of carriage. Since the burden (or benefit) of drafting a clear and concise Himalaya clause falls on the carrier, the choice of abstract words such as "any", "all", or "whatsoever" should work against the carrier or against any third party seeking to rely on the clause. This is reinforced by the view taken by some Canadian courts that the failure of the contracting parties to express something clearly and unequivocally when such expression was possible tends to indicate that the parties did not agree on the matter.[64] Put otherwise, when the carrier fails to express clearly whether the Himalaya clause in a standard form bill of lading extends to land carriers, or to liability for negligence, or to additional contractual benefits, such as circular indemnity clauses or dispute resolution clauses, it can be presumed that the clause does not extend this far. This view effectively prevents carriers from deliberately drafting obscure Himalaya clauses that allow third parties to later assert a more generous level of protection against the cargo owner.

The *contra proferentem* rule should prevent the expansive interpretation of Himalaya clauses in that third parties should not be able to take advantage of the generality or unclarity in the

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[63] See Coote, *supra* note 59 at 32; *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at paras 8-9; *Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co*, [1980] 1 SCR 888 at 901; *Adler v Dickson*, [1954] 3 All ER 397 at para 10.

[64] Hall, *supra* note 40 at 111 referring to *Controls & Equipment Ltd v Ramco Contractors Ltd*, [1999] NBJ No 20 (QL) at para 14; *McCain Produce v PEI Lending Agency*, 2010 PECA 4 at para 37; *Geoffrey L Moore Realty Inc v The Manitoba Motor League*, 2003 MBCA 71 at paras 12, 26. This approach complies with the overall contextual approach of interpretation which is grounded in the words used by the parties but mindful of the context in which those words are used, as well as with the proposition that words which are struck out of a contract are not to be considered in the interpretation process (Hall, *supra* note 40 at 111).

wording of such clauses. On the contrary, the rule encourages carriers to employ clear, specific, and unambiguous language when drafting Himalaya clauses. Again, it is questionable whether the cases of *ITO*, *The New York Star*, *Kirby*, or *Boutique*, which involved a Himalaya clause in a standard form bill of lading, would have the same outcome if the scope of the Himalaya clause was construed *contra proferentem*.

4.3 Overreaching Other Legal Regimes

In this Section, I argue that the enforcement of Himalaya clauses by land carriers under maritime common law is problematic because it enables land carriers to avoid their liability under statutes governing inland transport. In other words, the expansion of the maritime law regime over the inland portion of carriage overreaches the effect of other legal regimes.

The Canadian framework of multimodal transport suggests that each mode of transport, *i.e.*, water, rail, road, or air, is governed by a different statute. There is no federal legislation in Canada that regulates the liability of parties involved in multimodal transport,[65] but there are separate federal statutes applicable to each leg of transport.[66] This means that, even if the goods are being carried under one single contractual document of multimodal transport, the liability of the parties involved in its performance will be governed by several legal regimes of unimodal transport.[67]

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[65] Canada has not signed or incorporated any of the intentional conventions on multimodal transport. See e.g., United Nations Convention on International Multimodal Transport of Goods 1980; United Nations Convention on the Carriage of Goods by Sea 1978 ("Hamburg Rules"); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("Rotterdam Rules"); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991.

[66] See *Canada Shipping Act*, SC 2001, c 26); *Marine Liability Act*, SC 2001, c 6; *Canadian Navigable Waters Act*, RSC 1985, c N22); *Canada Transportation Act*, SC 1996, c 10; *Railway Safety Act*, RSC 1985, c 32 (4th Supp); *Carriage by Air Act*, RSC 1985, c C26. Road carriage is regulated at the provincial level, see e.g., *Highway Traffic Act*, RSO 1990, c H8.

[67] This is known as the "network system" of liability in that each leg of the transport is governed by the rules applicable to that particular mode. See Paula Bäckdén, *The Contract of Carriage: Multimodal Transport and Unimodal Regulation* (New York: Routledge, 2019) at 67; Abhinayan Bal, "Legal Aspects of Multimodal Transport" in Jason Monios & Rickard Bergqvist, eds, *Intermodal Freight Transport and Logistics* (Boca Raton, FL: CRC Press, 2017) 195 at 206.

Despite this framework, Canadian federal courts, which have jurisdiction over all matters relating to "navigation and shipping",[68] have been ready to apply maritime law to torts that occurred on land.[69] In the context of carriage of goods by sea, for example, the federal courts in *ITO*, *Valmet*, and *Boutique* applied maritime law to loss or damage to cargo that took place ashore, by operation of a Himalaya clause in the sea carriage contract.

But what about the statutes governing inland transport? Can a land carrier benefit from a Himalaya clause in a sea carriage contract even if there is a concurrently applicable statute with different liability limitations? As a result of the decisions in *Valmet*, *Kirby*, and *Boutique*, the answer appears to be "yes". In *Valmet*, the Court did not allow the trucker to limit its liability under the "Specified Conditions of Carriage" of the British Columbia Motor Carrier Regulations[70] because the trucker failed to issue a proper bill of lading, but it would nevertheless allow the trucker to limit its liability under a Himalaya clause in the contract of carriage by operation of the principled exception to privity.[71] In *Boutique*, the Court allowed a rail carrier to benefit from a Himalaya clause in the contract of carriage by operation of the principled exception, irrespective of the fact that the rail carrier did not have a direct written agreement with the cargo owner, as it was required by Article 137(1) of the CTA,[72] which governs the liability of rail carriers in Canada. The Court rejected to adopt a narrow definition of the term "shipper" under Article 137(1) of the CTA, even though the purpose of the Article is to protect cargo owners,[73] and thus interpreted this

[68] *Federal Courts Act*, RSC 1985, c F7, s 22.
[69] See e.g., *Isen v Simms* (FCA), [2005] 4 FCR 563 [*Simms*] (concerning a claim for personal injury during the loading of a boat onto a trailer); *Pakistan National Shipping Corp v Canada*, [1997] 3 FC 601 (concerning a claim for negligent misrepresentation with respect to the seaworthiness of a ship); *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 (concerning a claim for relational economic loss resulting from a fire on a rig); *Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779 (concerning a claim for demurrage).
[70] BC Reg 59/59.
[71] *Valmet*, *supra* note 22 at paras 55, 72.
[72] *Canada Transportation Act*, SC 1996, c 10.
[73] See the discussion of *Boutique*, *supra* note 23 in Section 3.2.1 in Chapter 3 above.

requirement in a way that facilitates the enforcement of Himalaya clauses in sea carriage contracts by rail carriers. In effect, the liability of the rail carrier in *Boutique* was determined by the contract of carriage and not by CTA; the Court merely found a way to avoid the qualification of Article 137(1). Similarly, in *Kirby*, the Court did not consider the applicability of the Carmack Amendment,[74] which governs the liability of interstate land carriers, but it nevertheless extended the limitation provisions of COGSA,[75] which governs the liability of sea carriers, via a Himalaya clause.[76] It follows from these decisions that the enforcement of Himalaya clauses by land carriers under maritime law can overreach the effect and purpose of statutes governing inland carriage.

One could argue that it is preferable to apply *one* legal regime to the whole period of transportation for reasons of convenience, uniformity, and efficiency.[77] Although this argument may be compelling from a commercial perspective, it is nonetheless unsustainable from a legal perspective on the ground that inland carriage is not sufficiently connected to sea carriage so as to fall under Canadian maritime law.[78] This view is premised in three Canadian decisions of the Federal Court: *The Dart Europe* of 1984,[79]*Marley* of 1995,[80] and *MSC* of 2017.[81] In these cases, the Court held that the inland portion of carriage was not so closely connected to the sea portion

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[74] *Carmack Amendment to the Interstate Commerce Act*, 49 USC at paras 11706, 14706 [*Carmack Amendment*].
[75] *Carriage of Goods by Sea Act*, 1936 USC 46 [COGSA].
[76] On the issue of the interaction between the *Carmack Amendment* and the COGSA, see *Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp*, 561 U.S. 89 (2010) where it was held that the maritime law regime overreaches the inland carriage regime.
[77] For a compelling argument that the liability of carriers in multimodal transport should be regulated by a unique multimodal approach for containerised carriage, and not by the extension of unimodal regimes over the whole period of transport, see Filippo Lorenzon, "Multimodal Transport Evolving: Freedom and Regulation Three Decades after the 1980 MTO Convention" in Malcolm Clarke, ed, *Maritime Law Evolving* (Oxford: Hart Publishing, 2013) 163 at 168, 177.
[78] The Supreme Court of Canada has established that Canadian maritime law extends to torts occurring in the course of land-based activities that are "integrally connected to" or "closely connected to" navigation and shipping (*ITO*, *supra* note 51; *Whitbread v Walley*, [1990] 3 SCR 1273; *Ordon Estate v Grail*, [1998] 3 SCR 437).
[79] *Sio Export Trading Co v The "Dart Europe"*, [1984] 1 FC 256.
[80] *Marley Co v Cast North America (1983) Inc*, [1995] FCJ No 489 [*Marley*].
[81] *MSC*, *supra* note 51.

so as to be "part and parcel" of the marine activities essential to the carriage of goods by sea. In particular, the Federal Court in *Marley* held that:

> It is not because a contract of carriage by rail or by land is entered into in the context of a through bill of lading, a portion of which calls for carriage by sea, that the former contracts necessarily fall within the jurisdiction of this Court. I am certainly not prepared to accept that a contract to carry goods by rail or by truck in the United States, Canada or Europe is within the maritime jurisdiction of this Court simply because they are part of the ongoing movement of a container between Shiller Park, Illinois, to Tiel, Holland.[82]

In essence, just because the contract applies to multimodal transport, including sea and land transport, or just because the dispute involves a ship,[83] the liability of land carriers does not automatically fall under Canadian maritime law.

Based on these decisions, the question of whether a land carrier can benefit from a Himalaya clause in a sea carriage contract by operation of the principled exception to privity is not to be answered under maritime common law. If there is a statute that regulates the liability of a land carrier responsible for loss or damage to cargo, then its liability should be determined by reference to that statute and not by reference to the principled exception under maritime common law. Otherwise, land carriers would be able to invoke the principled exception to avoid their statutory liability for inland carriage.

Another reason why the argument is unsustainable is because Canadian maritime law is not concerned with the individualities and logistics of inland carriage. For example, the liability of rail carriers in relation to cargo is not limited under the CTA, and the liability of road carriers in relation

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[82] *Marley*, *supra* note 80 at para 19.

[83] *Isen v Simms*, [2006] SCJ No 41. See the dissenting judgment of Décary JA in *Simms*, *supra* note 69 at paras 96-97 (with whom the Supreme Court of Canada agreed in [2006] SCJ No 41) stating that "[t]he fact that the incident involved a pleasure craft (*Whitbread*) does not transform this prima facie land incident into a maritime matter. One has to be careful not to confuse 'shipping' (*marine marchande*) with 'ship'. Many matters that relate to ships do not relate to shipping at all… The focus should be less on the fact that a 'ship' was involved… and more on the location where the incident occurred (of course, the further away from the navigable waters one gets the less likelihood of a maritime connection) and on the true essence of the incident".

to cargo is limited to $2 per pound (or $4.41 per kilogram) computed on the total weight of the shipment unless the bill of lading declares a higher value.[84] Would it be just to allow a land carrier to rely on a Himalaya clause in a sea carriage contract to totally exempt its liability, irrespective of the qualifications or limitations of the other regimes? I do not think that it would be reasonable to set the same standard of liability for sea and land carriers. The risk of carrying cargo in Ontario's highways is not the same with the risk of carrying cargo in the Atlantic Ocean; the role of a trucker is not so central to a contract for carriage by sea as the role of a pilot or a crew member; the cost of insurance for inland carriage is not the same with the cost of insurance for sea carriage, nor is the cost of freight. As a matter of policy, each unimodal regime is negotiated and designed to tackle its specific needs: there is no need to protect a lorry driver from "perils of the sea" or to excuse a rail carrier for failure to deliver due to its "attempting to save life or property at sea".[85] Ultimately, maritime law cannot readily define the liability of third parties involved in inland carriage.

Hence, the expansive application of Himalaya clauses to land carriers is problematic because it overreaches the effect and purpose of statutes governing inland carriage and it does not respect the individualities of each leg of transport.

4.4 Conclusion

In this Chapter, I have argued that the expansive application of Himalaya clauses in the common law is problematic in three ways. First, I argued that the enforcement of Himalaya clauses by operation of the principled exception is inconsistent with the doctrine of privity. Since the decision in *Fraser* did not establish a genuine exception to the doctrine but it merely substituted

[84] This is the limit set out in the "Uniform Conditions" of the road regulations of each province, *e.g.*, *Carriage of Goods*, ON Reg 643/05; *Bill of Lading and Conditions of Carriage Regulations*, Alta Reg 313/2002; *Motor Vehicle Act Regulations*, BC Reg 26/58; *Highway Traffic Act*, MB Reg 77/89; *Motor Vehicle Act Regulations*, NB Reg 95-76; *Carriage of Freight by Vehicle Regulations*, NS Reg 24/95.
[85] Lorenzon, *supra* note 77 at 168.

the requirement of mutual exchange with the requirement of intention, the enforcement of Himalaya clauses by complete strangers to the contract of carriage cannot be justified in principle.

Second, I argued that the expansive application of Himalaya clauses is not supported by two fundamental rules of interpretation, namely the rule that contractual terms must be construed in the context of the object of the contract and the *contra proferentem* rule. In light of the recent decision of Supreme Court in *Ledcor*, which established that the intentions of the contracting parties carry less weight in the interpretation of standard form contracts, these rules have become particularly important in the interpretation of Himalaya clauses in standard form bills of lading. Taken together, these rules should call for a narrow interpretation of Himalaya clauses and should effectively prevent further expansion of such clauses in the maritime context.

Third, I argued that the enforcement of Himalaya clauses by land carriers under maritime common law enables those land carriers to avoid their statutory liability under inland transport regimes. In particular, a land carrier may invoke the principled exception to benefit from a sea carriage contract, irrespective of the fact that its liability for inland carriage is regulated by statute. This development essentially expands the scope of the maritime law regime over other unimodal regimes and it does not respect the singular character of each mode of transport.

Taken together, these problems show that the wide enforcement of Himalaya clauses by operation of the principled exception creates more severe issues than the issues it solves. Scholars have commented that the focus of the principled exception on the intention of the contracting parties misses what is really important; the important question is not whether the contractual language can be twisted or wrung out to prove an intention to protect a third party, but whether there are good reasons to protect the third party.[86] So is there a good reason for the expansive

[86] Swan et al, *supra* note 14 at 223.

application of Himalaya clauses that outweighs the problems raised in this Chapter? In my view, the answer is "no". Those who have supported the reform of the doctrine of privity have provided two main reasons for the protection of third parties: the first is to give effect to the intentions of the contracting parties,[87] and the second is to give effect to the expectations of third parties.[88] However, these two reasons have been rebutted by the supporters of the doctrine. As for the first reason, the supporters of the doctrine counter-argued that failing to give C rights under a contract does not frustrate the intentions of A and B, who are the contracting parties, but rather it frustrates the expectations of B, the promisee, and in any event B can bring claims against A to enforce the contract for the benefit of C.[89] In a shipping scenario, the non-enforcement of a Himalaya clause by a third party does not frustrate the intentions of the cargo owner and the carrier because the carrier is free to sue the cargo owner to claim the benefit of the Himalaya clause on behalf of the third party. As for the second reason, the supporters of the doctrine counter-argued that the expectations of a third party alone cannot justify the conferral of contractual rights without it being shown that the third party either assented or relied on the contract.[90] If the concern of the Supreme Court in *Fraser* was simply to protect the reliance of third parties on contractual terms, there are "less innovative, but equally effective" ways to do so, such as estoppel.[91] But the disappointed expectations of the third party alone are not adequate to justify such a wide enforcement of

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[87] See U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) at paras 1.8, 3.1; Donal Nolan, "Reforming the Privity of Contract Doctrine" in Mads Andenas & Nils Jareborg, eds, *Anglo-Swedish Studies in Law* (Iustus Förlag, 1999) 288 at 293; *Darlington Borough Council v Wiltshier Northern Ltd*, [1995] 1 WLR 68 at 76; Robert Flannigan, "Privity – The End of an Era (Error)" (1987) 103 LQR 564 at 582-583. See also *Fraser*, *supra* note 1 at paras 42-43.

[88] See Nolan, *supra* note 87 at 292; U.K., Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, No 242 (London: HMSO, 1996) at para 3.2.

[89] See Stevens, *supra* note 4 at 293. See also Neyers, *supra* note 18 at 770. Another counter-argument is that the intention of the contracting parties justifies the enforcement of contractual terms by third parties by reference to an unarticulated and less coherent "public interest", rather than by reference to the private exchange of promise and consideration, and this shift has significant consequences on contract law theory (Peter Kincaid, "Privity and Private Justice in Contract" (1977) 12 JCL 47 at 50).

[90] See Stevens, *supra* note 4 at 296. See also Kincaid, *supra* note 89 at 51.

[91] Brock, *supra* note 10 at 68.

Himalaya clauses in the common law. It appears that neither doctrine nor other good reason can justify the conferral of contractual rights on third parties who (1) neither had participated in the mutual exchange of offer, acceptance, and consideration, nor relied on the contractual terms because they did not even know about the existence of the contract before the loss or damage to cargo occurred; (2) do not render services that are necessary to the performance of the primary objective of the sea carriage contract; or (3) render services that are regulated by a different statutory regime. Hence, the expansive application of Himalaya clauses on the basis of the principled exception has gone beyond any point that doctrine or prudence can accommodate.

Furthermore, the problems raised in this Chapter show that the breadth of the principled exception to privity, as established in *Fraser*, aggravates the expansive application of Himalaya clauses in maritime common law. The intention of the contracting parties, upon which the principled exception is premised, is not a limiting basis for generating third party rights under a contract. On the contrary, intention allows a broad and permissive reading of Himalaya clauses, even where the contractual language is ambiguous or silent on the issue of third party rights, and intention also makes the application of Himalaya clauses unstable and unpredictable since it is determined on the facts of each case. Thus, the lack of firm limitations on the scope of Himalaya clauses, as discussed in the previous Chapter, is arguably attributable to the breadth of the principled exception. The greater the scope of the principled exception, the greater the scope of Himalaya clauses.

For this reason, in order to prevent further expansion of Himalaya clauses in the common law and to put an end to the problems examined in this Chapter, it is necessary to limit the scope of the principled exception. The principled exception can no longer operate solely on the intention of the contracting parties. The test established in *Fraser* must be explained in such a way so as to

restrict the application of contractual terms, including Himalaya clauses, to a particular category of third parties or to a particular set of circumstances. The underlying goal is to harmonize the enforcement of Himalaya clauses with classical doctrine and define the conceptual framework under which Himalaya clauses operate. In the next Chapter, I propose an alternative justification for the principled exception to achieve this goal.

Chapter 5

5 An Equitable Solution

In the previous Chapter, I discussed three of the problems arising from the expansive application of Himalaya clauses on the basis of the principled exception set out in *Fraser*: the ongoing inconsistency of the enforcement of Himalaya clauses by third parties with the doctrine of privity, the disregard of some central rules of interpretation of contract, and the possible circumvention of the statutory regimes governing inland transport. I argued that the breadth of the principled exception aggravates these problems and that the expansive application of Himalaya clauses in maritime common law has reached a point that doctrine cannot accommodate.

In this Chapter, I seek to find a way to eliminate the problems raised in Chapter 4. In order to bring the application of Himalaya clauses in line with the doctrine of privity, with central rules of interpretation, and with other unimodal legal regimes, it is necessary to define and limit the scope of the principled exception. As discussed in Chapter 3 above, the wide enforcement of Himalaya clauses in the common law may be attributable to the wide ambit of the principled exception. So long as the ability of third parties to enforce Himalaya clauses in contracts of carriage is generated solely by the intention of the contracting parties, the conceptual framework of the principled exception cannot be limited. Thus, it is necessary to determine, by reference to certain fixed rules, to which set of circumstances the principled exception applies.

To do that, it is necessary to adopt a principled justification for the "exception" created in *Fraser*. This Chapter proposes an alternative basis for the "exception" which effectively restricts its scope and justifies the protection of third parties vis-à-vis the doctrine of privity.

5.1 Conventional Estoppel as the Basis of the "Exception"

Many scholars have attempted to provide an alternative justification for the "exception" laid out by the Supreme Court in *Fraser*, including justifications based on the subrogation of the rights of the promisee to the third party,[1] an economic analysis of the doctrine of privity,[2] the essential participation of employees in a multi-partite enterprise,[3] or the voluntary assumption of risk by the promisor.[4]

For the purposes of this Thesis, I adopt the justification provided by Jason Neyers in his 2007 article "Explaining the Principled Exception to Privity of Contract",[5] namely that the principled exception, as set out by the decisions in *London Drugs* and *Fraser*, can only be explained by the concept of conventional estoppel. Neyers submits that, contrary to an intention-based analysis,[6] conventional estoppel offers a principled justification for the central features of the principled exception, since it explains why (1) third parties can only use the exception to benefit from a contract as a defence (as a shield) but they cannot sue on it (as a sword); (2) third parties can use the exception to benefit from either exemption or limitation of liability clauses; (3) the contracting parties are not free to change the contract in a way that causes detriment to the third party; and (4) the exception must be limited since estoppel does not undercut the need for privity and consideration.[7]

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[1] Stephen Waddams, "Breaches of Contracts and Claims by Third Parties" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 191.
[2] Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57:2 U Toronto LJ 269.
[3] Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at 226-229; Carlo Corcione, *Third Party Protection in Shipping* (New York: Routledge, 2020) at para 1.6.
[4] Jim LR Davis, "Privity and Exclusion Clauses" in Peter Kincaid, ed, *Privity: Private Justice or Public Regulation* (Burlington: Ashgate/Dartmouth, 2001) 284.
[5] Jason W Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52 McGill LJ 757.
[6] *Ibid* at 767-772.
[7] *Ibid* at 782-783.

In this Section, I argue that the concept of conventional estoppel is the best justification for the enforcement of Himalaya clauses by third parties in Canadian law because it readily applies to the context of carriage of goods by sea and, most importantly, it provides a clear and limited framework for the "exception". After I examine the basic requirements of conventional estoppel, I will proceed to explain how conventional estoppel applies to Himalaya clauses in the context of carriage of goods by sea and how conventional estoppel resolves the problems raised in Chapter 4 above.

5.1.1 What is Conventional Estoppel?

Estoppel by convention is a doctrine that holds parties to the facts or law or other assumption they have agreed to as the basis for a transaction to which they are parties.[8] A widely accepted definition of estoppel by convention has been given by the British Columbia Supreme Court in *Adtronics*:[9]

> Estoppel by convention operates when the parties rely on an agreed state of facts or a common apprehension of fact or law which has been assumed, by convention of the parties, to be the basis of the transaction they are about to enter. When parties have acted on the agreed assumption that a given set of facts is to be accepted, this prevents the other from questioning the truth of the statement of facts so assumed… In order to rely on the defence of estoppel by convention, a party must establish that they relied on the assumed set of facts to their detriment (much like in promissory estoppel)…

The effect of conventional estoppel is "to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption".[10] Since conventional estoppel is founded on a common assumption of facts or law as between A and B, B will be estopped from denying the assumption and B will be responsible for A's reliance on it.[11] In other words, when

[8] Bruce MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis, 2019) at para 3.1.
[9] *Adtronics Signs Ltd v Sicon Group Inc*, [2004] BCJ No 1885 at para 151.
[10] *Republic of India and Others v India Steamship Company Ltd*, [1998] AC 878 (HL) [*India Steamship*] at 913.
[11] Piers Feltham et al, *Spencer Bower: Reliance-Based Estoppel*, 5th ed (London: Bloomsbury, 2017) at para 8.2.

the parties have acted on a shared assumption, each party is estopped against the other from challenging the truth of the assumption.

The requirements that form the basis of conventional estoppel have been laid out by the Supreme Court of Canada in *Moore*[12] in 2005, and they have been definitive in Canada ever since:[13]

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.[14]

In short, the three elements of conventional estoppel are "common understanding, reliance and detriment".[15]

As for the first requirement, a party must show that there was a common assumption between it and the other party in the sense that "both parties must be 'of like mind'"[16] and "each [party] is aware of the assumption of the other".[17] This means that the convention must be mutual and communicated between the parties. It is not enough for one party to know about the other's belief, but it is necessary that both parties have accepted the belief as the basis of their relationship.[18] If there is no communication between the parties demonstrating that they know they shared an understanding, and the parties merely happen to share the same understanding, conventional

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[12] *Ryan v Moore*, [2005] 2 SCR 53 [*Moore*].
[13] MacDougall, *supra* note 8 at para 3.36 and cited authorities.
[14] *Moore*, *supra* note 12 at para 59 (emphasis in the original).
[15] *Wagman v Obrigewitsch*, [2010] SJ No 118 at para 67.
[16] *Moore*, *supra* note 12 at para 61.
[17] *Ibid* at para 62 citing *John v George*, [1995] EWJ No 4375 (QL) (CA) at para 37.
[18] *India Steamship*, *supra* note 10 at 913.

estoppel does not arise.[19] Put otherwise, there must be a considerable degree of formality or conscious dealing between the parties to create a convention as the basis of the transaction,[20] and this has been described by courts as a statement that "crosses the line" between the parties.[21]

As for the second requirement, a party must show that it changed its course of conduct in reliance on the convention. Reliance means that the convention has produced or strengthened a belief, and that belief caused an action.[22] Thus, reliance has two aspects – an inner and an outer one.[23] The inner aspect requires knowledge and influence of the mind, meaning that the convention must have come to the notice of the party seeking to establish estoppel and also make such party believe and depend on it.[24] The outer aspect requires a change of position, meaning that the convention must have led the party seeking to establish estoppel to take action or not to take action that one would otherwise have taken.[25] The fact that the party abstained from taking measures for its protection, security, or advantage amounts to a change of position.[26] In other words, the outer aspect of reliance may be satisfied where the party "did rest satisfied" in the convention.[27]

As for the third requirement, a party must show that it will suffer some detriment if the other party is allowed to abandon the convention, due to the change of its legal position.[28] Detriment is

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[19] MacDougall, *supra* note 8 at para 3.75. See *HM Revenue & Customs v Benchdollar Ltd*, [2010] 1 All ER 174 at para 52.
[20] *Canacemal Investment Inc v PCI Realty Corp*, [1999] BCJ No 2029 at para 35; *32262 BC Ltd v Companions Restaurant Inc*, [1995] BCJ No 342 at para 18.
[21] *Moore*, *supra* note 12 at para 62.
[22] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000) at 89.
[23] *Ibid* at 89.
[24] *Ibid* at 89-90.
[25] *Ibid* at 93. There is "an important distinction between *refraining or forbearing from acting* and merely *not acting*": the former includes situations where the party seeking to establish estoppel has been in a position to adopt a new course of action and has address its mind to the possibility of doing so but, on the basis of the assumption, did not, whereas the latter includes situations where the party did not have the chance to adopt or did not address its mind to the possibility of adopting any course of action other the one already taken (Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford: Hart, 1999) at 41-42 [emphasis in the original]).
[26] Feltham et al, *supra* note 11 at para 5.45.
[27] *Knights v Wiffen*, (1870) LR 5 QB 660 at 666.
[28] *Moore*, *supra* note 12 at para 69.

the prejudice or cost that the party seeking to establish estoppel suffered flowing from its reliance on the convention.[29] On this note, it is important to emphasize that detriment in the context of estoppel means "reliance loss" and not "expectation loss" in that the cost suffered by a party must come from the action or inaction taken in reliance on the convention, and not from the expectations generated by the convention.[30]

5.1.2 How Does Conventional Estoppel Apply to Himalaya Clauses?

Before explaining how the concept of conventional estoppel applies to Himalaya clauses, it is important to note that this concept fits the multipartite relations in the shipping industry. For example, a concluded agreement is not a pre-requisite for the establishment of estoppel.[31] Estoppel may arise where there was a shared assumption between the parties in the context of an agreement, transaction, or relationship.[32] Thus, third parties involved in the chain of carriage can invoke estoppel against the cargo owner based on a shared assumption between them in the context of the sea carriage contract, irrespective of the fact that they are not in a direct contractual relationship. For another example, conventional estoppel can arise even after the relevant agreement, transaction, or relationship is formulated, if there is a shared understanding between the parties as to how such agreement, transaction, or relationship will operate.[33] This is key for the context of carriage of goods by sea because, as explained in Chapter 2 above, third parties are employed to render services long after the contract of carriage is concluded between the carrier and the cargo owner. At the time when the contract is formulated, the contracting parties do not normally know the identity and number of third parties to be engaged in the course of carriage and therefore the

[29] MacDougall, *supra* note 8 at para 3.108 and cited authorities. For different forms of detriment, see Feltham et al, *supra* note 11 at para 5.42.
[30] Cooke, *supra* note 22 at 96-97.
[31] *India Steamship*, *supra* note 10 at 913.
[32] MacDougall, *supra* note 8 at para 3.39.
[33] *Ibid* at para 3.61 citing *1061403 BC Ltd v Canada Willingdon Holdings Ltd*, [2018] BCJ No 1261.

convention of the cargo owner and a third party cannot always be created at the same moment in time. Nevertheless, this does not prevent the establishment of estoppel if the other requirements are also met.

To explain how the three requirements of conventional estoppel apply to Himalaya clauses, I will refer to the cargo owner, who is the promisor of the Himalaya clause, as "A"; to the carrier, who is the promisee of the Himalaya clause, as "B"; and to the third party, who seeks to establish estoppel, as "C".

As for the first requirement of conventional estoppel, C must prove that there was a convention between itself and A, pursuant to which A cannot sue C for loss or damage to cargo. The convention may well arise from the Himalaya clause in the contract of carriage between A and B. If A and C had a mutual understanding as to the meaning and scope of the Himalaya clause, and such understanding was somehow communicated between them before the performance of the services by C, then there may be a convention. As a first step, C must show that the language of the Himalaya clause can be reasonably read as excluding its liability for loss or damage to cargo so that it can be inferred that A shared the same assumption. In other words, A and C must have been "of like mind" in relation to the effect of the Himalaya clause. Thus, a Himalaya clause which expressly provides that C cannot be liable to A for loss or damage of cargo may create the assumption that the risk of liability will be placed onto the shoulders of A. As a second step, C must show that the assumption created by the Himalaya clause was communicated between it and A. This can be achieved through B. In cases where A and C are both in a direct contractual relationship with B, communication can be easily shown. For example, where A has entered into a contract for the carriage of goods by sea with B, and C has entered into a contract for the provision of services with B, *e.g.*, stevedoring contract, the assumption arising from the Himalaya clause in

the contract between A and B may come to the notice of C by its written or verbal dealings with B. Practically, the communication of the assumption will take place either when the contract between B and C requires B to stipulate for a Himalaya clause in its contract with A,[34] or when C is informed by B about the existence of the Himalaya clause any time before the performance of the services. This kind of communication is a formal and conscious dealing that "crosses the line" between A and C. However, in cases where C is a sub-subcontractor (who is not in a direct contractual relationship with B), communication will be more difficult to prove. The further we move down the contractual chain of carriage, or the more intermediaries there are between A and C, the harder it will be for C to prove that there was a formal communication between it and A about the mutual assumption. And this is something to be taken into consideration by courts in determining whether there was a convention between the parties. Overall, once C manages to prove mutual understanding and communication of the Himalaya clause, the first requirement of conventional estoppel will be met.

As for the second requirement of conventional estoppel, C must prove that it relied on the convention arising from the Himalaya clause in a way that changed its line of conduct. Reliance may arise from the fact that C refrained from arranging for indemnity or insurance against liability for loss or damage to cargo. As already mentioned, inaction can also amount to a change of C's legal position. Thus, the fact that C "did rest satisfied" in the convention and chose not to incur any expenses to obtain protection against the risk of liability, amounts to reliance. However, the mere fact that C entered into the transaction cannot amount to reliance.[35] Under this requirement,

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[34] See e.g., *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO*] at para 4; *Saint John Shipbuilding & Dry Dock Co Ltd v Kingsland Maritime Corp*, [1981] FCJ No 603 [*Saint John Shipbuilding*] at paras 10-11.

[35] *Keen v Holland*, [1984] 1 WLR 251 at 261 followed in *Wilson v Truelove*, [2003] WTLR 609 at para 23; John McGhee, *Snell's Equity*, 33rd ed (London: Sweet & Maxwell, 2015) at 306. It is not the entry into a transaction that establishes estoppel, but the unfairness that would result if one party is allowed to resile from the convention (Piers Feltham, Daniel Hochberg & Tom Leech, *The Law Relating to Estoppel by Representation*, 4th ed (London:

it is of utmost importance that C knew about the existence of the Himalaya clause before the performance of the services. If C was unaware of the Himalaya clause, reliance cannot follow. In this regard, those Canadian decisions that suggest that a third party can benefit from a Himalaya clause notwithstanding the third party's complete ignorance of the existence of the clause at the time of rendering the services,[36] cannot be justified on an estoppel-based analysis. In contrast, those Canadian decisions that required third parties to know about the existence of the Himalaya clause in order to benefit from it[37] reinforce an estoppel-based analysis.

As for the third requirement of convention estoppel, C must prove that, due to the change of its legal position in reliance on the convention, it will suffer a detriment if A is allowed to avoid the effect of the Himalaya clause. The detriment will be the amount of damages that A will recover from C if A is not estopped from going back on the Himalaya clause. So long as C, in reliance on the convention arising from the Himalaya clause, abstained from obtaining indemnity or insurance or any other security against the risk of liability, an award of damages in favour of A would make C liable for an amount that it had not planned for. In equity, it is unfair to permit A to circumvent the effect of the convention where C detrimentally relied on such convention. Thus, by operation of convention estoppel, A becomes liable for C's reliance and A is estopped from recovering against C until the detriment ceases. Thus, conventional estoppel provides an answer to the concern

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LexisNexis, 2003) at 187). For pre-agreement estoppel by convention, reliance may be the entry into the agreement or transaction, but for post-agreement estoppel by convention, reliance will be some action or inaction after the agreement or transaction is already in place as a result of the convention that is made afterwards as well (MacDougall, *supra* note 8 at paras 3.99-3.100). In the context of carriage of goods by sea, since C is informed of or engaged in the carriage long after the contract of carriage is formulated between A and B, reliance cannot flow from C's entry into the transaction but from C's inaction in arranging for indemnity or insurance.

[36] See *Labrador-Island Link General Partner Corp v Panalpina Inc*, [2019] FCJ No 618 at para 80; *Boutique Jacob Inc v Canadian Pacific Railway Co*, [2008] FCJ No 358 [*Boutique*] at para 24; *Timberwest Forest Corp v Pacific Link Ocean Services Corp*, [2009] FCR 496 at para 50.

[37] See *Sears Ltd v Ceres Stevedoring Co (The Tolya Komar)*, [1988] FCJ No 528 (Desjardins J); *Saint John Shipbuilding*, *supra* note 34 at paras 10-11; *Kodak v Racine Terminal (Montreal) Ltd*, [1999] FCJ No 632 at para 10.

of some judges that the non-enforcement of Himalaya clauses would allow cargo owners to circumvent the effect of the contract by suing third parties in tort.[38]

Reliance and detriment will be easily met in cases involving employees of B. This is because employees, due to their close proximity and identity of interest with B, are often aware of B's standard terms and conditions, including any Himalaya clauses, and they often depend on B's protections against liability. It has been commented in this regard that individual employees will certainly not have their own insurance against the risk of liability,[39] as opposed to independent contractors, such as corporations providing stevedoring, terminal, or freight forwarding services, who often have their own insurance. Thus, it may be more readily argued that employees "rest satisfied" in the convention arising from a Himalaya clause by not arranging for their own indemnity or insurance, and such reliance will lead to detriment if A is allowed to go back on the convention.

If one applies the conventional estoppel analysis to the facts of the decisions examined in Chapter 3 above, the outcomes reached by the courts may not always be justified. Of course, since conventional estoppel was not the analytical focus of the decisions, it cannot be determined whether the third parties at issue detrimentally relied on the Himalaya clause in the contract of carriage. It is not certain whether the third parties changed their course of conduct by *not* arranging for indemnity or insurance in reliance on the Himalaya clause. It is nonetheless important to note some key facts in those cases that would be relevant in establishing a convention. First, the fact that the A effected its own insurance for loss or damage to cargo in transit, as was the case in

[38] See *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at para 250; *The owners and/or demise charterers of the ship or vessel "Mahkutai" (Indonesian Flag) v The owners of lately laden on board the ship or vessel "Mahkutai" (Indonesian Flag) Co (Hong Kong)*, [1996] 2 Lloyd's Rep. 1 at 6. See also Swan et al, *supra* note 3 at 224.
[39] Swan et al, *supra* note 3 at 229.

Valmet and *Kirby*,[40] may support a finding that A shared an understanding arising from the Himalaya clause that C would not be liable for such risk. Second, the long-term relation between B and C, as was the case in *The Eurymedon* and *The New York Star*,[41] or the fact that the contract between B and C required B to stipulate for a Himalaya clause in its contract with A, as was the case in *ITO*,[42] may point toward a finding that C knew and relied on B's standard terms and conditions. It would still be necessary, however, to prove that C acted on that reliance in a way that changed its legal position. Third, the fact that the bill of lading containing the Himalaya clause only applied to the period of sea carriage (port-to-port), as was the case in *Valmet*,[43] and there was no indication that A and B intended to regulate by contract the period of inland carriage, shows that A could not have shared an assumption that the Himalaya clause extended to land carriers. In this regard, C's subjective interpretation of the clause would not be sufficient to establish a convention.[44] The object and scope of the contract, as discussed in Section 4.2 of Chapter 4 above, will generally be relevant in detecting a convention.

5.1.3 How Does Conventional Estoppel Resolve the Problems Raised in Chapter 4?

First, conventional estoppel resolves the inconsistency between the expansive application of Himalaya clauses and the doctrine of privity because it does not swallow the doctrine. Contrary to an intention-based analysis, conventional estoppel does not abolish the two elements of the

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[40] *Valmet Paper Machinery Inc v Hapag-Lloyd AG*, [2002] BCJ No 1271 [*Valmet*] at para 35; *Norfolk Southern Ry v James N Kirby Pty Ltd*, 543 U.S. 14 (2004) at 21.
[41] *The New Zealand Shipping Company Ltd v AM Satterthwaite & Company Ltd*, [1975] AC 154 (PC)*; Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (Australia)*, [1980] 3 All ER 257.
[42] *ITO*, *supra* note 34 at para 4 (referring to clause 7 of the stevedoring contract).
[43] *Valmet*, *supra* note 40 at para 37.
[44] MacDougall, *supra* note 8 at para 3.41. See e.g., *1230995 Ontario Inc v Badger Daylighting Inc*, [2011] OJ No 2584 at para 8.

doctrine of privity – promise and consideration. This is because conventional estoppel does not generate third party rights under a contract, but it simply estops a party (the cargo owner) from denying the effect of the convention arising from a Himalaya clause.[45] In other words, estoppel effectively ensures the protection of third parties without slipping into the discussion of whether such third parties participated in the mutual exchange of offer, acceptance, and consideration, or whether such third parties participated in the contractual enterprise. What is relevant for the estoppel-based analysis is whether the third party had detrimentally relied on a shared assumption. In addition, conventional estoppel does not threaten the status of privity because it provides a precise and limited basis for the "exception" created in *Fraser*. On an estoppel-based analysis, only those third parties who had relied on the Himalaya clause and as a result they suffered cost or other detriment are entitled to protection. Hence, the concept of conventional estoppel coexists with privity and harmonizes the application of Himalaya clauses with classical doctrine.

Second, conventional estoppel prevents an overly broad interpretation of Himalaya clauses in sea carriage contracts. It is a common requirement in estoppel that the convention between the parties should be clear and unambiguous.[46] The intentions and expectations of the parties may be relevant, but the language upon which the convention is founded must be such as to be reasonably understood in a particular way. A convention between the cargo owner and a third party cannot be implied lightly from an ambiguous Himalaya clause. Courts should be skeptical about reading

[45] See Neyers, *supra* note 5 explaining that conventional estoppel simply provides that the existence of a contract between A and B does not prevent C from proving that A should be estopped from exercising its legal rights until the detriment suffered by C has ceased or been paid for.

[46] MacDougall, *supra* note 8 at para 3.89 referring to *Low v Bouverie,* [1891] 3 Ch 82 (Bowen J) ("the language upon which an estoppel is founded… must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."). See Hochberg, *supra* note 35 at 187 explaining that "the requirement of unequivocality… is, therefore, implicit in the requirement of communication of the shared assumption between the parties" because the party seeking to establish estoppel must prove that the other party could have reasonably understood the contractual language in the same way without seeking clarification.

assumptions into the mere existence of communications between the parties.[47] For example, the mere fact that a third party participates in the marine venture or knows about the existence of the Himalaya clause does not create a shared assumption. Similarly, the fact that the wording of the Himalaya clause is wide enough to protect *any* third party from *any* liability does not prove that the cargo owner and a third party were "of like mind" as to the ambit of the clause. Where the language of the Himalaya clause is overly general or abstract, the object of the contract will be a significant factor in determining whether there was a shared assumption. In this regard, the burden of establishing clarity and lack of ambiguity is on the party seeking to establish estoppel.[48]

Third, conventional estoppel limits the cases where land carriers can benefit from sea carriage contracts under maritime common law. In general, equitable estoppel cannot be used in a way that undermines the effect of a particular statue.[49] It has been established under Canadian law that it would be against public policy for an estoppel to effect a result that is prohibited by statute.[50] This means that land carriers will not be able to invoke estoppel under the common law where there is an applicable statute governing their liability for inland carriage. Put otherwise, estoppel cannot be used by land carriers to avoid their statutory liability. Moreover, having in mind that a convention must be clear and unambiguous in order to establish estoppel and that it cannot be implied lightly that the cargo owner shared an assumption that goes beyond the object of the contract, a Himalaya clause contained in a sea carriage contract will unlikely give rise to an assumption for the benefit of land carriers. In addition, land carriers who are further down the

[47] MacDougall, *supra* note 8 at pars 3.75.
[48] *Ibid* at para 3.90.
[49] Spence, *supra* note 25 at 72.
[50] MacDougall, *supra* note 8 at para 1.130 and cited authorities.

chain of carriage do not usually know or detrimentally rely on Himalaya clauses in sea carriage contracts; they usually regulate the risk of liability with upstream carriers.[51]

5.2 Conclusion

In this Chapter, I adopted Neyers' alternative justification for the principled exception set out in *Fraser* and I argued that the concept of conventional estoppel is the best basis for the application of Himalaya clauses in maritime common law. On an estoppel-based analysis, only a particular category of third parties can be protected against the claims of cargo owners – those third parties who have detrimentally relied on a Himalaya clause in the contract of carriage. The limited scope of conventional estoppel is desirable because it promotes legal certainty as to *who* can be protected against the cargo owner. Unlike the intention of the contracting parties as the basis of the principled exception, the three requirements of conventional estoppel – convention, reliance, and detriment – define, limit, and clarify the scope of third party protection and they do not lead to unpredictable or dubious results. Thus, conventional estoppel offers a clear and limited basis for the protection of third parties in the common law.

Conventional estoppel is a significant alternative justification for the principled exception because it remedies the problems raised in Chapter 4 above. For example, conventional estoppel brings the function of Himalaya clauses in line with the doctrine of privity because it does not generate third party rights under the contract of carriage, but it merely estops the cargo owner from avoiding the effect of the agreed clause. For another example, conventional estoppel prevents the broad and permissive interpretation of Himalaya clauses in standard form bills of lading since a convention between the cargo owner and a third party can only arise out of unambiguous contractual language. Finally, conventional estoppel cannot be invoked by a third party to avoid

[51] See e.g., *Boutique*, *supra* note 35.

its statutory liability under another legal regime because estoppel cannot override statutory provisions.

For all the foregoing reasons, I propose that Canadian courts should adopt the concept of conventional estoppel to justify the protection of third parties in the context of carriage of goods by sea. The explanation of the principled exception to privity, as set out in *Fraser*, by the concept of conventional estoppel will be a valiant attempt to define and restrict the scope of third party protection in Canadian contract law, as well as to alleviate the relentless tension between the function of Himalaya clauses and common law doctrine.

Chapter 6

6 Conclusion

In this Thesis, I argued that the application of Himalaya clauses in the common law is broader than it should be. Turning back to the decision in *Adler*, from which Himalaya clauses originate, the purpose of such clauses was to extend the carrier's exemptions or limitations under the contract of carriage to the carrier's servants or agents. Now, however, Himalaya clauses may extend *any* benefit available to the carrier under the contract, such as circular indemnity or dispute resolution provisions, in addition to exemption or limitation of liability provisions, to *any* category of third parties, such as land sub-subcontractors. Such an expansive application of Himalaya clauses, without requiring the third party to prove detrimental reliance on the clause, or without requiring the third party to know about the existence of the clause before the loss or damage to cargo occurred, cannot be justified by doctrine or policy. As I noted in the conclusion of Chapter 4, there are no good reasons for such expansive protection of third parties. On the contrary, there are good reasons for *not* applying Himalaya clauses so broadly, such as to avoid the problems raised in Chapter 4 above. Hence, this Thesis questions how deserving of protection a negligent third party who never relied on a Himalaya clause is.

I also tried to stress that the principled exception to privity, as set out by the Supreme Court of Canada in *Fraser*, permits or even encourages the expansive application of Himalaya clauses. In particular, the intention of the contracting parties to confer a benefit on a third party, which is the central requirement and justification of the principled exception, does not offer a clear and limiting basis for the protection of third parties in the common law. By operation of the principled exception, even the broadest of Himalaya clauses may be given effect. Again, as I argued in Chapter 4, an intention-based analysis misses the important point: the enforceability of broadly

drafted Himalaya clauses should not depend on whether the language used by the contracting parties is wide enough to cover the third party seeking to benefit from it, but rather on whether there is an underlying principle or policy that justifies the protection of the third party in the circumstances. Intention alone does not justify such protection. Intention alone cannot circumvent the doctrines of privity, promise, and consideration. And the tension between the function of Himalaya clauses and classical doctrine does not simply go away by "the increased recognition of Himalaya Clauses" in Canadian law, as it was recently asserted by the Federal Court.[1] Indeed, the wide recognition of Himalaya clauses does not make their application any less problematic. But if the principled exception is *not* a suitable basis for the enforcement of Himalaya clauses, then why do courts tend to allow their expansive application in the maritime context?

After setting out this problem, I proceeded to find an alternative justification for the protection of third parties in the context of carriage of goods by sea. As a solution to the problems arising from the expansive application of Himalaya clauses in the common law, I proposed the adoption of conventional estoppel as the basis of the principled exception to privity. In this regard, I adopted the analysis provided by Jason Neyers in his 2007 article "Explaining the Principled Exception to Privity of Contract"[2] that the concept of conventional estoppel is the best explanation of the principled exception. I argued that this concept readily applies to the context of carriage of goods by sea and it also provides a clear and limiting basis for the protection of third parties involved in the chain of carriage. Conventional estoppel is a significant alternative basis for third party protection because it allows third parties to estop the cargo owner from denying the effect of

[1] In *Labrador-Island Link General Partner Corp v Panalpina Inc*, [2019] FCJ No 618 at para 84 ("[A]ttempts by cargo claimants to circumvent the carriers' limitations of liability and other terms, whether it be by suing in tort or by artificially raising privity of contract issues, are long passé now… [T]he increased recognition of Himalaya Clauses have brought an end to these artificial attempts, especially in cases such as the present one").
[2] Jason W Neyers, "Explaining the Principled Exception to Privity of Contract" (2007) 52 McGill LJ 757.

a Himalaya clause that had been mutually understood and communicated between them. By operation of conventional estoppel, a third party's actual reliance on the clause is protected without giving rise to the three problems raised in Chapter 4.

The development of Himalaya clauses in the common law lends itself to analogy with the Greek myth of Pandora's box, according to which Pandora opened a box, which had been given to her as a gift by the Gods, out of curiosity, and in so doing unleashed evils and ills on earth. Like Pandora, courts have been anxious to allow third parties to benefit from Himalaya clauses in contracts of carriage, but in doing so accidentally gave rise to more issues and troubles in the law of contract. In this Thesis, I described some of the issues and troubles arising from the expansive application of Himalaya clauses in the common law, and I highlighted to need to restrict the scope of such clauses in the context of carriage of goods by sea. In this regard, I proposed that the use of the concept of conventional estoppel as the basis of the principled exception to privity will help justify the limited protection of third parties. In other words, the concept of conventional estoppel will help close the Pandora's box and prevent the release of more troubles in the common law.

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