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HIMALAYA CLAUSE

(Its development in the UK and its validity with respect to the Indian Contract Act, 1872.)

AUTHORED BY – JAYANTH

Part I- Introduction

Contracts between shippers of goods and carriers of cargo are probably older than recorded history, and disputes involving such contracts is surely just as old. It is well known that the carrier does not itself undertake all the necessary activities in the maritime adventure. The carrier sub- contracts some parts of the carriage which is evidenced in the bill of lading such as loading and unloading as it lacks the capability to do so. Further, with the development in modes of communication the shippers seeking door-to-door transport solutions, often employ third-party experts to help them capitalize on modern multimodal processes. Instead of directly hiring carriers, shippers regularly contract with transport intermediaries under multimodal bills of lading designed to cover the entire carriage over both sea and land. These intermediaries, who typically do not operate transportation assets themselves, then sub-contract downstream performance across the multimodal chain to ocean, rail and motor carriers.

While this sub-contracting arrangement can reduce costs and enhance efficiency, it removes the privity of contract between the shippers and the entities physically handling the cargo.This in effect prevents the sub-contractors or the downstream entities to benefit from the exclusion/exculpatory clause available to those privy to the contract with the shippers. In such circumstances,the ‘Himalaya clause’ helps the parties to extend the benefits of the exclusion clause to such thirdparties including the sub-contractors working under the contract.

In the subsequent parts, this paper seeks to analyze the different principles brought out byCourts in common law and civil law jurisdictions upholding the validity of the Himalayan clauseand endeavors to demonstrate its validity in the Indian context. Part II of this paper studies the principles derived in the development of the Himalayan clause in UK and Part III seeks to test these principles against the

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Indian contract Act and Indian case laws. Part IV is a brief conclusion.

Part II – The English development of the Himalaya clause

As seen above, the carrier will not himself undertake all the necessary activities in the maritime adventure. He subcontracts some parts of the carriage which is evidenced in the bill of lading such as loading and unloading as he lacks the capability to do so. Therefore, the carrier in effect contracts with the shipper for the benefit of all concerned that is for all parties not directly included in the contract evidenced in the bill of lading. This practice was well understood in civillaw under the principle of *alteri stipulari nemo potest* but not the common law where the privity doctrine was applied[1]. Cases such as *Tweddle v Atkinson*[2] and *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*[3] had established in Britain, the modern privity doctrine, wherein it was established that a third party to a contract could not benefit from it and that only a person who is aparty to a contract can sue on it. The privity rule, thus did not correspond with the actual reality and created a "legal black hole" where the person who had suffered the loss could not sue and theperson who could sue had suffered no recoverable loss. It was not until 1955 the courts understood that commercial custom and understanding were not reflected in the privity rule and an evolutionary shift away from this rule happened with the decision in *Adler v Dickson*[4].

The facts of the case include the plaintiff injuring herself when she fell from the gangwaydue to the negligence of the employees which were not included in the exemption clause. The courthad to deal with the issue whether the protection of the exemption clause could also be extended in contract even though the employees were not connected to the claimant. The court held that "since the contract neither expressly nor by necessary implication deprived the plaintiff of her rightto sue the defendants in tort, she was entitled to pursue her claim against them". Though the full extent of the exemption clause was not fully developed, however it indicated that the privity rule was not the deciding principle in interpreting and applying the contract. The decision indicated that privity of contract is not a principle which must be followed if it does not make commercialsense[5].

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[1] Bruno Zeller, *The development of the Himalaya clause - a study in the change of the law through commercial practices*, CONSTRUCTION LAW JOURNAL (2021).

[2] *Tweedle v Atkinson*, (1861) 1 B&S 393: [1861–73] All ER Rep 369: 124 RR 610.

[3] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*, (1915) AC 847.

[4] *Adler v Dickson*, [1955] 1 QB 158: [1954] 3 All ER 397.

[5] Zeller, supra note 1, at 5

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The first instance of establishing a basis on which stevedores can claim protection under the clauses in a bill of lading can be found in *Midland Silicones Ltd v Scruttons Ltd*[6]. The stevedorenegligently damaged drums and relied on the exemption clause in the bill of lading. The Court reasserted the privity rule and refused to limit the liability of the stevedores under the bill of ladingwhen sued by the consignees, even though the carrier could have done so on the basis of its contractwith the consignee. Nonetheless, the court did not altogether preclude the possibility that a stevedore engaged by the carrier might successfully raise the terms of a contract of carriage enteredinto between the carrier and the shipper. It laid down four conditions for this to happen which stated that the bill of lading must make it clear that the stevedore is intended to be protected, that the carrier is also contracting as agent for the stevedore, the carrier must have authority from the stevedore or perhaps later ratification by the stevedore would suffice and any difficulties about consideration moving from must be overcome[7]. Thus we see a full recognition of the *alteri stipualati* rule, where third party is allowed to come in as beneficiary to the contract. The court acknowledged the view that in cases of shipping the strict contract rule is not conducive and doesnot reflect the realities of carriage of goods by sea[8].

In 1974, the four conditions put forth by the Court in the *Midland Silicones Ltd v ScruttonsLtd* were found for the first time to be satisfied in the well-known case before the Privy Council, the *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite*[9] (The Eurymedon) where stevedores, who in unloading the carrier's vessel caused damages, were held entitled to the benefit of the one-year limitation period in the bill of lading. The carrier was a wholly owned subsidiary of the stevedore company and the Court fully recognized the Himalaya clause. The traditional analysis of the formation of a contract into offer/ acceptance components was rejected by the majority. It held that the contract did come into existence between the stevedore and the consignee on the terms of the bill of lading when the stevedore furnished services in unloading the goods. In the opinion of Lord Wilberforce,

"the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shippers and [the stevedore], made throughthe carrier as agent. This became a

[6] *Midland Silicones Ltd v Scruttons*, [1960] 2 All ER 737 (CA).
[7] C. A. Ying, *The Himalaya clause revisited*, MALAYA LAW REVIEW 212 (1980).
[8] Zeller, supra note 1, at 5
[9] *New Zealand Shipping Co Ltd v AM Satterthwaite &Co Ltd (The Eurymedon)*, [1975] AC 154 :[1974] 1 All ER 1015 (PC).

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full contract when [the stevedore] performed services by discharging the goods".

Thus the issue of flow of consideration was resolved by the court by describing bill of lading as bargain. This case in effect can be regarded as the confirmation that commercial practices do eventually translate into binding legal principles. The final confirmation that the Himalaya clause replaced the privity rule can be attributed to the Privy Council judgment in *The New York Star*[10].

The facts of the case were that Schick Safety Razor Co. shipped a cargo of razor blades at New Brunswick in Canada for carriage to Sydney on the New York Star. The respondent was named as consignee in the bill of lading. The bill of lading was issued to the shipper and transmitted to and accepted by the consignee. The carrier was the Blue Star Line, which owned 40% of the capital of the appellant stevedores in the Port of Sydney. It was common for the appellant to act as stevedore for the Blue Star Line, and in fact the appellant had for a number of years enjoyed a monopoly of the carrier's business in that port. The New York Star arrived in Sydney port. The goods were discharged from the ship, and were placed by the stevedores in a shed on the wharf under their control. It was found that because of their carelessness, a fraudulent third party was able to make away with the consignment. However, the bill of lading contained a Himalaya clause which purported to extend the benefit of defence and immunities conferred upon the carrier to any independent contractor employed by the carrier "while acting in the course of or in connection with his employment".

The Board unanimously reaffirmed the correctness of the decision in The Eurymedon. It was felt that any stevedores employed by the carrier would normally come within the phrase "servant or agent of the carrier" in the Himalayan clause of the bill of lading, and it was irrelevant that the stevedores of the carrier, as in The Eurymedon, or that they were partially owned by the carrier, as in The New York Star. The normal situation was that stevedores enjoyed the benefit of any arrangement between a carrier and a shipper, where it was understood that the carrier would employ stevedores to perform work in connection with the goods, and where the intention was clearly expressed that the stevedores should benefit from the terms contained in the bill of lading.

The other issue in the case was whether the bill of lading containing the exemption clausewas still

[10] Zeller, supra note 1, at 5

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operative after the goods crossed the ship's rails. The court took into consideration that consignee rarely take delivery directly from the ship's rail but after some time of discharge near or at the wharf as it is commercially unreal for a carrier just to dump the goods and hence he has responsibility after the goods leave the ship's tackle and therefore this action is still contemplatedby the bill of lading. This explains how judges in England are aware of commercial customary realities which are never far away when interpreting terms in the bill of lading containing a Himalaya clause[11].

Multimodality and the Himalayan clause

As cargo owners seek door-to-door transport solutions, they often employ third-party experts to help them capitalise on modern multimodal processes. Instead of directly hiring carriers, cargo owners regularly contract with transport intermediaries under multimodal bills of lading designed to cover the entire carriage over both sea and land. These intermediaries, who typically do not operate transportation assets themselves, then sub-contract downstream performance across the multimodal chain to ocean, rail and motor carriers. While this arrangement can reduce costs and enhance efficiency, it removes the privity of contract between the cargo owners and the entities physically handling the cargo. If a dispute arises between the cargo owners and the actual carriers, this missing privity may create a barrier for downstream entities to rely on the terms reflected in their standard contract forms. This scenario raises doubts as to whether the sub-contractors are adequately protected by contract vis-à-vis the cargo owner. One possible solution for the sub-contractor is to rely on a so-called "Himalaya" clause in the lead contract made with the cargo owner. A Himalaya clause could protect classes of sub-contractors by extending to them the right to invoke the terms of the upstream contract to which they are not a party. But Himalaya clauses have limitations that might deprive a sub-contractor from achieving adequate protection. While a sub-contractor may be able to invoke contractual rights and defences via a Himalaya clause, this will only satisfy the sub-contractor if the provisions in the upstream contract are identical to (or more favourable than) the sub-contractor's standard terms. The scope of the protection offered to the downstream sub-contractor is limited to the specific terms included in the contract containing the Himalaya clause. A Himalaya clause does not operate to bind the cargo owner to terms negotiated downstream. Recognising that the privity barrier is only partially remedied by Himalaya clauses, courts have contemplated whether there may be an alternative basis for sub-contractors to

[11] Zeller, supra note 1, at 6

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invoke terms negotiated further downstream. Addressing this question, English courts and their Commonwealth brethren have taken the approach of sub-bailment of terms[12].

This approach has its origins in a case involving the stole of a mink fur coat. In *Morris v CW Martin & Sons*[13], the central legal question was whether a coat cleaning company could invoke an exoneration clause against the owner of the stole who had employed an intermediary to secureits cleaning. The Court found that the question of the cleaners' liability was most appropriately answered under principles of bailment and sub-bailment. It reasoned that, after the owner of goods tenders those goods to a bailee, the bailee owes the bailor a duty to take all reasonable precautions to protect the goods entrusted to him. If the goods are further sub-bailed by the bailee, the sub-bailee owes the owner of the goods the same duties as the original bailee. As a result, the owner of the goods "can sue the sub-bailee direct" for any loss of or damage to those goods, and in returnthe sub-bailee can protect themselves on invocation of exculpatory terms against the bailor.

More than 30 years later, the Privy Council applied this sub-bailment on terms frameworkin a seminal carriage of goods by sea case: the *Pioneer Container*[14]. The claimant was a cargo owner who contracted with a carrier to ship the cargo. As per the bills of lading, the claimant granted the carrier authority to sub-contract their duties 'on any terms', in part or in whole. Subsequently, the carrier sub-contracted a third party, the defendant, using a secondary bills of lading which stipulated that the legal jurisdiction in the event of dispute would be Taiwan. Duringthe chartered voyage from Taiwan to Hong Kong, the ship carrying the cargo sank, and the goodswere lost. The claimants initially attempted to bring an action via the Hong Kong judicial system,whilst the ship owners asserted that the case ought be considered in Taiwan, as per the terms of the exclusive jurisdiction clause of the secondary bills of lading.

Ruling for the defendant, the Privy Council held that the doctrine of "sub-bailment on terms" allowed enforcement of the forum selection clause against claimants. Through the bailmentlens, the Privy Council described the claimants as the bailors, the carrier as the head bailee, and the defendant

[12] Richard L. Kilpatrick Jr, *Privity and sub-contracting in multimodal transport: diverging solutions*, JOURNAL OF BUSINESS LAW, (2019).
[13] *Morris v C.W. Martin & Sons Ltd*, [1966] 1 QB 716.
[14] *KH Enterprise v Pioneer Container*, [1994] 2 All ER 250

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sub-contracted third party as the sub-bailee. The Court here held that the bailment framework "does not depend for its efficacy either on the doctrine of privity of contract or the doctrine of consideration", and that a downstream carrier's ability to invoke provisions of the upstream bill of lading through a Himalaya clause does not bar it from invoking the terms of its own bill of lading. The Pioneer Container sub-bailment on terms framework remains pivotal authority when a multimodal sub-contractor seeks to invoke downstream terms against an upstream cargo interest who has not invoked the contract for its own benefit.

Part III - Indian law and the validity of Himalayan clause

India is a jurisdiction where there is a mix of both common law and civilian laws, which provides ample scope for the accommodation of the Himalayan clause. Indian law, unlike Englishlaw, has been more liberal with the application of privity doctrine wherein it has allowed third parties to benefit from the contract[15]. Also, the Indian contract Act, 1872 is more liberal with the question of consideration where in unlike English law, past consideration[16] and inadequateconsiderations[17] are valid. Further, the Act fully recognizes the customary practices and the IndianCourts, like their US counterparts, have upheld reasonable usage of trade, customs and practice[18].

Hence, the validity of the Himalayan clause with respect to the rules of privity and consideration seem uncontested in the Indian scenario.

Further with respect to multimodal transport, the English principle of sub-bailment on terms was reiterated by the Supreme Court of India in *N R Srinivasa Iyer v New India Assurance Co. ltd*[19], wherein the Court stated that,

"*If the sub-bailee accepts the possession of the goods, he assumes the obligations of a bailee towards the original bailor. The bailor has a right of action against the sub- bailee for breach of any of his duties*".

[15] *Khwaja Muhammad Khan v Husaini Begam,* (1910) 37 IA 152.
[16] Sec. 25(2) Indian Contract Act, 1872.
[17] Explanation 2 of Sec. 25 Indian Contract Act, 1872.
[18] *Premjit theatres v Raschi Mehata & co,* AIR 1990 AP 272.
[19] *N.R. Srinivasa Iyer v New India Assurance Co Ltd,* AIR 1983 SC 899.

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Hence applying this precedent the Indian Courts should not have any hesitation to allow the sub-contractors to invoke the terms of its own bill of lading against the shipper even though the latter is not privy to this bill of lading.

The US Supreme Court, in *Norfolk Southern Railway Co v James N Kirby*[20], took a different approach while according protection to the downstream entities in a multimodal transportof cargo. On the question of whether the carrier acts as an agent of the shipper when it negotiatesterms with the downstream entities, the Court stated that, although an intermediary could not be considered the cargo owner's agent for purposes of negotiating all downstream contracts, it couldstill bind a cargo owner to certain terms within those contracts. Instead of finding a traditional agency relationship, the Supreme Court announced a "limited agency" rule in which intermediariesare presumed to be a cargo owner's agent for the narrow purpose of negotiating limitations of liability provisions downstream. The Supreme Court explained that the intermediary should not beconsidered an agent "in the classic sense" where effective control and a fiduciary relationship arerequired. It determined that such a broad rule would be "unsustainable" in practice. Instead, underthe limited agency rule, the intermediary automatically acts as the agent of the cargo owner for the"single, limited purpose" of negotiating limitations of liability with downstream carriers. Again the Court here based its reasoning on the sustainability of the enterprise and recognized the commercial realities in the sector[21]. The limited agency principle seems valid with respect to the agency principle outlined in section 204 of the Indian contracts Act, 1872 wherein it recognizesthe partly exercised authority by the agent and prohibits the principal to revoke it.

Part IV- Conclusion

It is thus safe to conclude that the principles derived by the courts of UK and USA in upholding the validity of the Himalayan clause are valid in the Indian context as well and the Indian Courts must have no hesitation in upholding the same. The Himalaya clause is not only an expression of customary practices and knowledge but it now a transnational law which has been held valid by Courts in major shipping countries. Indian courts by upholding it, will contribute tothe growth and diversification of Indian maritime trade.

[20] *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 125 S. Ct. 385, 2004 AMC 2705 (2004).
[21] Kilpatrick Jr, supra note 12, at 10.

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