No. T-3177-74

In The Federal Court of Canada
Trial Division

BETWEEN:

MARUBENI AMERICA CORPORATION

- and -

MIIDA ELECTRONICS, INC.,

- and -

MASTERCRAFT ENTERPRISES,

Plaintiffs,

- and -

MITSUI OSK LINES LTD.,

- and -

ITO - INTERNATIONAL TERMINAL OPERATORS LTD.,

Defendants.

REASONS FOR JUDGMENT *

MARCEAU, J.:

The basic facts that gave rise to this multi-party liability action have the simplicity and attraction of a textbook case. A marine carrier agreed, under a contract attested by a bill of lading, to carry 250 cartons containing electronic desk calculators from the city of Kobe in Japan to Montreal, where the consignee, in fact the other party to the contract and the owner, could receive and take delivery of them. On their arrival in Montreal, the goods were picked up by a cargo handling company which had made an agreement with the carrier to unload and store them until they were delivered. When the owner arrived to take delivery, a number of cartons had disappeared, disappearance that may be explained, at least in part, by the fact that a few days previously there had been a theft at the warehouse in which the cartons were

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* This is the English version of the Reasons for Judgment delivered in French on January 5, 1979.

stored. The owner naturally claimed compensation, but both the carrier and the stevedore and provider of terminal services denied all liability: the owner felt that it was not for him to apportion liability between the two and asked the Court for a joint and several condemnation against both of them.

There is thus nothing special or exceptional about the facts and the action that has been instituted is certainly not the first of its kind. The legal difficulties raised by the issue are nevertheless extremely perplexing, first because they are tied up to some of the most obscure aspects of the rules for giving effect to civil liability; secondly, and most importantly, because neither the courts nor legal authors are agreed as to the principles that should govern their solution. They concern in particular the legal situation of the parties in respect of one another, from which the causes of action would arise; the rules of evidence applicable when it comes to verifying the existence of the conditions of liability, having regard to the actual circumstances in which the loss occurred; and finally, and in particular, the effect of the no-liability clauses in the contracts under which the goods were carried and stored. These difficulties are moreover especially acute in this case, as will be seen from the respective contentions of the three opposing parties: *Miida Electronics, Inc.* ("Miida"), the owner; *Mitsui OSK Lines Ltd.* ("Mitsui"), the carrier; *ITO - International Terminal Operators Ltd.* ("ITO"), the stevedore and provider of terminal services.

First, attention should be given to a series of admissions made by the parties through their counsel at the opening of the hearings, and contained in a document that I prefer to reproduce *verbatim* in view of its nature, its significance and the importance of the terms used therein:

> The parties, through their undersigned attorneys, hereby admit the following facts:
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> 1. THAT Plaintiff Miida Electronics, Inc. ("Miida") was, at all material times herein, the owner of a cargo of 250 cartons of electronic desk calculators ("the cargo"), each carton containing 2 sets of electronic desk calculators;

2. THAT Plaintiff Miida is entitled to sue under the contract of carriage;

3. THAT Defendant Mitsui O.S.K. Lines Ltd.'s ("Mitsui's") Bill of Lading No. KBMR-0007, dated Kobe, Japan, July 31, 1973, is produced by consent as Plaintiff Miida's Exhibit P-1;

4. THAT the terms and conditions of Bill of Lading No. KBMR-0007 (Exhibit P-1) constitute the contract of carriage under which Plaintiff Miida's cargo was carried;

5. THAT Defendant Mitsui was the carrier of the cargo and issued Bill of Lading No. KBMR-0007 (Exhibit P-1) and is bound by the terms and conditions thereof;

6. THAT Plaintiff Miida is bound by the terms and conditions of Bill of Lading No. KBMR-0007 (Exhibit P-1);

7. THAT Defendant ITO - International Terminal Operators Ltd. ("ITO") was the stevedore and providor of terminal services who discharged Defendant Mitsui's vessel, the BUENOS AIRES MARU, at Montreal, pursuant to a contract entered into by it with Defendant Mitsui, it being agreed by all parties that ITO and Logistec Corporation Limited are to be considered by the Court as one and the same and synonymous from all points of view;

8. THAT the production of the contract between Defendants ITO and Mitsui is admitted;

9. THAT Defendant ITO was the lessee of Sheds 49, 50, 51 and 52 of the Port of Montreal;

10. THAT Defendant ITO admits that 250 cartons of electronic desk calculators, each containing 2 sets thereof, were loaded at Kobe on board the BUENOS AIRES MARU, but does not admit that the same quantity was discharged from the BUENOS AIRES MARU at Montreal;

11. THAT 169 sets of electronic desk calculators (84.5 cartons) were not delivered to Plaintiff Miida;

12. THAT Plaintiff Miida has suffered a loss of $26,656.37, which is admitted by the Defendants;

13. THAT in the event of a judgment being rendered in favour of Plaintiff Miida, the Defendants admit that Plaintiff Miida will be entitled to receive $26,656.37, with interest at a rate of 8% from September 14, 1973.

These carefully worded admissions clarify, by relieving them of their routine and precautionary allegations, the written pleadings filed by the parties, which contain the position already taken by each of them. In fact, plaintiff commits itself to very little in legal terms in its statement of claim. It is clearly trying to avoid closing any possible avenue in advance. Its goods were lost and it is claiming the value of those goods from the two defendants who successively had custody thereof throughout the period in which the loss could have

occurred. Since it is seeking a joint and several condemnation, its allegations treat the two defendants as if they were both in the same position, using general terms of negligence, imprudence and so on applicable to both of them. These allegations must be analyzed, however, and the claims they contain must be interpreted differently in order for them to be validly applied to one defendant or the other, in view of their different situations. The statements of defence filed provide just such an analysis and interpret plaintiff's claims in this way.

The action against the carrier Mitsui can of course be based only on the contract of carriage and the failure to deliver. Mitsui first makes the general reply that it fulfilled all its obligations as a marine carrier, both under the Act and under the contract it has signed, and that the goods were carried and unloaded at Montreal in good condition after the arrival of its vessel, the *Buenos Aires Maru*, on September 10, 1973. It then adds more specifically that the loss did not occur until after the goods had been unloaded from hold No. 6 in which they had been stowed for the voyage, thus after they had been picked up by the cargo handler, ITO; and that this loss was due to an event equivalent to an act of God, namely a theft, and in any case occurred at a time when Mitsui was exempted from all liability by clause 8 of the contract, which reads as follows:

> 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. "Loading" provided in this bill of lading shall commence with the hooking on of the vessel's tackle or, if not using the vessel's tackle, with the receipt of goods on deck or hold or, in case of bulk liquids in the vessel's tank. "Discharging" herein provided shall be completed when the goods are freed from the vessel's tackle or taken from deck or hold, or the vessel's tank.

Against defendant ITO the cause of action is not as clearly defined, and in fact this definition poses a delicate problem which I regard as fundamental. For the time being,

however, it should be seen that the statement of claim appears to base its argument primarily on delict or quasi-delict. Plaintiff does not expressly claim to be suing ITO in contract; ITO would be liable delictually, since the goods were in fact in its custody. The traditional general allegations of negligence in caring for goods are made, along with more specific allegations regarding the lack of appropriate security measures to prevent thefts. ITO defends itself: first, by disputing the claim that the loss occurred while the goods were in its custody; secondly, by denying any negligence whatever on its part that might have caused the loss of the goods that it had picked up; and thirdly, by stating that in any case it was protected by the same limitation of liability clauses as the carrier itself, in view of clause 4 of the bill of lading which reads as follows:

> 4. It is expressly agreed between the parties hereto that the master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of this contract, shall each be the beneficiaries of and shall be entitled to the same, but no further exemptions and immunities from and limitations of liability which the carrier has under this bill of lading, whether printed, written, stamped thereon or incorporated by reference. The master, officers, crew members and the other persons referred to heretofore shall to the extent provided be or be deemed to be parties to the contract in or evidenced by this bill of lading and the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all such persons.

The three parties to the dispute thus confront one another; even though they are being sued jointly and severally, defendants' means of defence cannot be mingled since each is claiming specifically that the loss occurred while the goods were in the custody of the other and that if an obligation to reimburse plaintiff exists, it must be assumed by the other. It is therefore impossible to avoid dividing the action for purposes of analysis and considering the claim with respect to each defendant separately.

I

First, the action against Mitsui.

Here the cause of action is clear and plaintiff has no problem of evidence to establish its position at the outset: the contract of carriage, the admission that the goods were received on board the vessel, the non-delivery owing to loss, provide sufficient support for the claim. It is up to defendant to clear itself by providing, if it can, the existence of a cause for exoneration.

As we have seen, defendant claims to find just such a good defence in the clause contained in article 8 of the terms and conditions of the contract of carriage. Plaintiff has no difficulty in seeing this provision as a limitation of liability clause. In fact, some of the terms contained therein could be thought as having an even more basic purpose, that of establishing the specific limits of the contract, which would cover exclusively only the time between loading and unloading. I think, however, that such an interpretation would be contrary to the wording used ("not be liable for ... loss of or damage to ...") and would not be an accurate reflection of reality, since practice certainly does not support the idea of dividing the transportation operation into sections in this way, especially if one looks at the operation from the point of view of the shippers. Consequently, I too see it as a limitation of liability clause.

Interpreted in this way, the clause gives defendant a means of defence that is certainly admissible in law since there is no doubt as to its validity so far as it covers the part of the transportation process that is not strictly from port to port. Such clauses are, in fact, in common use and their effect is well known: liability will remain only in case of gross negligence. In order to benefit from the clause, however, defendant must prove that the goods were lost after being unloaded in Montreal. This will not be an easy task.

Indeed, defendant cannot provide direct proof that the cartons in question were unloaded in Montreal, because the goods unloaded at the port of Montreal were not checked or sorted either by itself or by the cargo handler ITO, and the cartons made up only a part of these goods which included several thousand packages. This may seem surprising to a layman, but the evidence has shown that this was the customary procedure in the port of Montreal, a procedure that was introduced, there as elsewhere, in an effort to reduce the time required for unloading, which could otherwise take considerably longer and involve a corresponding increase in costs. In the absence of direct evidence, defendant had no choice but to resort to indirect evidence, by presumption, which it was entitled to do since the unloading of the goods is a fact which may be proved in any manner whatever.

Defendant first undertook to locate the goods in the vessel when it left Kobe, and show that from Kobe to Montreal no other goods were put in or taken out through the same hatchway (hatch No. 5, 'tween decks). To do this, it used all the documents in its possession concerning the loading and stowing of the cargo, the route followed by the vessel, the operations carried out during the voyage and the safety measures taken, the most important of these being the manifest, the loading cargo list, the stowage plan, the loading exception report, the mate's receipt, the instructions to the captain and the ship's abstract log. (I should point out here in passing that a problem arose during the trial as to whether such documents could be placed in evidence without the presence of their authors. However, the objection raised on this ground, on which I initially reserved judgment, is in my opinion without merit. All of these documents were prepared in the normal course of defendant's business and all were customary and necessary to the carrying out of the normal activities of a marine carrier. They were therefore covered

by the exception provided for in s 30 of the *Canada Evidence Act* (R.S.C. 1970, c. E-10) and could be produced by a representative provided that prior notice of the intention to do so was given, which it was (see on this point Sopinka and Lederman, *The Law of Evidence in Civil Cases*, 1974, pp 80 et seq).[1]

Defendant then showed, using documents provided by its co-defendant ITO, that the unloading of the goods stowed in the space served by hatchway No. 5 had proceeded normally and had even required overtime.

Finally, defendant had its Montreal agent testify in order to explain the steps that had been taken to ensure that goods that had disappeared had not been left in the vessel by error or accident when it was unloaded. (Another problem of evidence arose with regard to the possibility of having the agent himself produce the letters of reply that he had received without the presence of those who wrote the letters, but this is of little importance since the point is that these steps produced no results.)

All these facts, argues defendant Mitsui, are conclusive when taken together with these other known facts, namely that a theft took place at the warehouse of defendant ITO, during which many of the cartons containing the calculators were stolen and that a number of these were subsequently traced as a result of the investigation and police searches. In its view they establish a cluster of presumptions showing that the 250 cartons of machines that it had undertaken to carry had in fact been unloaded at Montreal and picked up by the cargo handler ITO. If the evidence had contained the slightest positive indication that the cartons might have disappeared during the voyage or been left on board the vessel,

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[1] Section 30(1) of the *Canada Evidence Act* reads as follows:

> 30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

I would have hesitated, but as the record stands, I agree with defendant that the evidence is satisfactory. I recognize that this evidence contains a cluster of presumptions leading to the conclusion that the goods were all unloaded at Montreal and that the loss of some of these goods only occurred subsequently. (On the force and quality of the evidence required in a civil matter, see *Ralph Hanes v. The Wawanese Mutual Insurance Company*, (1963) S.C.R. 154).

Defendant Mitsui is therefore correct. Since no gross negligence in choosing the cargo handling firm used or in any other doings on its part has been alleged against it, and since the loss has been proved to have occurred after the vessel was unloaded, defendant Mitsui is fully protected by the limitation of liability clause in the contract under which it is being sued. The action brought against it therefore cannot succeed.

II

Now, the action against defendant ITO.

I have already pointed out that in its statement of claim plaintiff did not try to give a precise definition of the legal cause of its action against ITO, the cargo handling firm. At the hearing, its counsel had to be more specific: he pleaded delictual liability. Under Quebec law, the law applicable because the delict or quasi-delict would have been committed in Montreal by a person domiciled there, the liability would be that defined by Art. 1053 of the *Civil Code of the Province of Quebec*.[2] In my view, as I will explain later, the circumstances

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[2] The wording of this article is well known:

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

One might wonder, however, whether on this basis the action does not raise a problem of jurisdiction in this Court. No mention of it was made however, and it seems to me, in any case, that the activity of the cargo handling company is so closely linked to the

of the case at bar and the legal relations that these circumstances create between the parties indicate that the cause of action cannot be defined merely in delictual terms. For the time being, however, the action may be examined on this ground to determine whether the conditions giving rise to a remedy in delictual liability under the ordinary law exist, and especially whether defendant can be said to have committed a fault that caused the loss within the meaning of Art. 1053 cc.

Seen in this way the action again poses a problem of evidence from the outset. It is an established principle that a person suing under Art. 1053 cc cannot take advantage of any legal presumption freeing him of his obligation to establish the existence of the components of liability; he must prove that defendant committed a wrongful act that caused the damage on which his claim is based. If the defendant at bar had given no explanation of the loss that occurred while the goods were in its custody, it would have been possible to speak of a presumption of fact, but the explanation is known: there was a burglary. In order to succeed in its action, plaintiff must prove that the theft was made possible or at least facilitated by wrongful acts for which defendant can be held liable. What, then, is shown by the evidence?

It does not appear necessary to analyze in detail the evidence concerning the circumstances of the theft. A

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contract of carriage by sea that any action in which it is directly involved, especially when joined to an action against the carrier itself, may be regarded as within the jurisdiction of this Court. (Compare *Davie Shipbuilding Limited and Canada Steamship Lines Limited v. Her Majesty the Queen and Robert Morse Corporation Limited and Colt Industries (Canada) Ltd.*, a Federal Court decision dated July 18, 1978 and as yet unreported, Court No. T-1908-72).

There remains the question of whether in exercising this jurisdiction in a maritime matter this Court can base itself on provincial law. On this point, however, it may be remembered that the principles of the common law in matters of tort refer to the law of the place in which the tort was allegedly commited. (Compare: *Stein v. The Ship "Kathy K"* (1976) 2 R.C.S. 802).

summary will be sufficient. The theft took place on the evening of September 14. An employee of the firm used by defendant to provide the necessary security measures surprised the thieves in the act while making his round. Owing to the darkness and the distance, he could see only shadows that fled toward the water and disappeared over the end of the wharf. The thieves had evidently made use of a boat which they had moored along the wharf opposite the shed in which the goods were stored. When they fled they even left a pallet loaded with cartons halfway between the door of the shed and the side of the wharf. The port police were alerted and arrived on the scene at once. It was soon discovered that a hole about six or eight inches in diameter had been made in the wall of the warehouse beside one of the large front doors. Through this hole it was possible to reach the endless chain inside, which is used to operate a lever and raise the door.

This sequence of events leaves a number of questions unanswered, however, and it is in the replies to these questions that plaintiff finds proof of the faults which it alleges against defendant. First, how long were the thieves able to work undisturbed? Normally the security guards make their rounds at least every two hours after 5:30 pm, and in fact this is suggested by the by-laws of the National Harbours Board, from which defendant leased its space. On that particular evening, however, as one of the two guards on duty had been delayed in another shed where work had gone on after normal hours and the other one had to stay in the security guards' shelter, there was no round at 7:30. The first round was the one during which the thieves were discovered. Secondly, was it only necessary for the thieves to reach the chain in order to open the door? Was there no security bolt on the door? Usually, these doors were locked using a padlock that held the two sections of the chain to a metal ring attached to the wall. That evening, however, the padlock was only holding the two sections of chain together, thus leaving two or three feet of play, and this allowed the door to be raised

enough to permit entry. Thirdly, could the thieves handle the cases without any equipment? It was discovered that a motorized lifter had been left in the shed that evening, which was unusual, and that its motor was still warm shortly after the theft. Fourthly, are the premises not provided with some lighting that might hinder operations of this kind at night? Some lights are in fact left on, but there are not many of them and that evening there were even fewer than usual in the shed, since burned-out bulbs had not yet been replaced.

Plaintiff argues that the theft was unquestionably facilitated by defects in the security measures used to protect the goods: insufficient rounds by security guards, somewhat ineffective bolting, the presence of a lifter in the shed, poor lighting. In plaintiff's view this is enough to justify the conclusion that defendant was at fault and is therefore liable. I do not agree.

In order for such a claim to have merit and for the defects in security brought to light by the evidence to constitute faults on the part of defendant, it would of course have to be assumed that defendant was required to adopt and maintain a flawless system of security for safeguarding the goods. But, I do not see how it can be claimed, in the context of a purely delictual action, independent of any contractual relationship, that defendant had to maintain such a foolproof security system. I agree that the normal obligations of a cargo handling firm include that of adopting a faultless security system, but in my opinion these obligations do not exist where there is no contractual relationship. The general obligation of prudence and diligence that the ordinary law imposes on everyone through Art. 1053 cc must certainly be analyzed in accordance with the circumstances, and clearly does not correspond to a uniform objective concept. Its content must be defined having regard to the personality, profession, calling

of the individual sued in liability and to the activity he was engaged in when the damage occurred. This general obligation, however, analyzed with respect to a commercial firm such as defendant, cannot include all the duties that a cargo handling firm might have to assume when acting in its capacity of a commercial undertaking within the framework of a contract. Plaintiff cannot claim to bring its action independently of any contractual relationship and at the same time expect to judge defendant's conduct as if it were a cargo handling firm that had signed a contract assuming in full all the obligations of such an undertaking.

On the purely delictual level plaintiff has, in my view, failed to prove fault within the meaning of the general law.

Such a finding clearly weakens plaintiff's position, especially since the argument defeated is, as I said, the one on which plaintiff's counsel sought to rely most heavily at the trial; it is not, however, decisive. As above noted, the action as instituted does not allow a precise definition of the cause of action and consequently cannot be fully disposed of by a statement that it has no merit in delictual terms: it must also be determined whether it can be admitted on other grounds.

Can plaintiff not proceed against defendant as a cargo handling firm professionally responsible for safeguarding its goods and then criticize the failure in its security system as such? Two conditions would have to be fulfilled, however. First, it would have to establish its legal entitlement to act on that ground; and secondly, it would have to show that the defence argument based on the no-liability clause in the contract of carriage is not an obstacle. It would normally be logical to ensure that the first of these conditions is fulfilled before inquiring about the second, but I shall adopt the contrary approach nevertheless. The means of defence drawn from the

limitation of liability clause is in fact relied on by defendant against any remedy that may be claimed against it; secondly, it has given rise to decisions in the courts that cannot be ignored in trying to determine the merits of an action such as this one; and finally, its consideration will, I believe, automatically lead us to admit the fulfilment of the first condition, namely that plaintiff need not limit itself solely to delictual grounds.

This brings me to the heart of the debate which has occurred in the past few years, in academic forums and in the courts, regarding the legal effect of this clause, now common in marine carriage contracts, by which the carrier, the owner of the vessel, seeks to extend to its agents and those it calls upon to participate in performing the contract of carriage the benefit of the limitation of liability agreements that the shipper or owner of the goods has made with it. The clause is known in the trade as a "Himalaya" clause. It may be worded in various ways (and reading the decisions shows in effect a constant effort to improve its form in order to avoid any allegation of obscurity or ambiguity), but it can easily be identified by its objective. Clause 4 of the bill of lading here in question is certainly a Himalaya clause, and in my view, it cannot be ignored on the pretext that it would have failed to say clearly what it was intending to say. Neither can defendant be denied the right to avail itself of the means of defence it implies on the ground that a limitation of liability agreement has no effect in a case of gross negligence (see in particular *Eisen UND Metal AG v. Ceres Stevedoring Co. Ltd.* (1977) 1 LLR 665; *Circles Sales & Import Limited and Worter Merchandising v. The Ship Tarantel et al.* (1978) 1 FC 269). The shortcomings which may be found in defendant's behavior as a cargo handling firm, in light of the facts that have been proved, in no way correspond to this concept of gross negligence, which, in my view, can be

defined as negligence so serious that it can only be the result of stupidity and is for that reason socially intolerable. It is necessary therefore, to dispose of the argument raised by defendant on the basis of the clause, to come to a decision as to the effectiveness of a stipulation of that nature.

The history of the Himalaya clause in the courts is well known. My brother Walsh J. recently restated it in *The Ship Tarantel* (cited above), and Tetley devoted several pages to it (pp 373 et seq) in the second edition of his book *Marine Cargo Claims*, published quite recently. It is not necessary for me to repeat it here except for a very brief review of its main stages.

The clause takes its name from an English decision of the Court of Appeal in 1954, *Alder v. Dickson (the Himalaya)*, (1954) 2 Lloyd's Rep. 267, (1955) 1 QB 158, wherein its validity was admitted in principle for the first time. In 1961, however, in *Midland Silicones v. Scruttons*, (1961) 2 Lloyd's Rep. 365, (1962) AC 446, the House of Lords refused to allow it any effect, holding in essence that in that particular case the stipulation was not specific enough and that in any event the stevedores had not participated in the contract between the shipper-owner and the carrier, nor been represented by the latter when the contract was signed. In 1970, in *Canadian General Electric Co. LTD. v. The "Lake Bosomtwe" & Pickford & Black Ltd.*, (1971) SCR 41, Ritchie J. of the Supreme Court, in a passage from his reasons for judgment, disputed the stevedore's right (and I quote intentionally) "to have its liability for damages limited in accordance with the provisions of art. IV, Rule 5 of the Rules in the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, which are incorporated in the contracts of carriage evidenced by the 'through bills of lading'". The passage was short: the only argument put forward was that the stevedore could not rely on a clause in a contract to which it had not been

a party, and reference was made to the authority of *Midland Silicones*.

Four years later the Privy Council, faced with a real Himalaya clause in *The New Zealand Shipping Co. LTD. v. A.M. Satterthwaite & Co. Ltd. (The "Eurymedon")*, (1974) 1 LLR 534 (trial); (1971) 2 Lloyd's Rep. (NZSC) 399; (1972) 2 Lloyd's Rep. 554 (NZCA), concluded this time that the clause did in fact protect the stevedore. The majority judges took care first of all to specify clearly the significance of *Midland Silicones*, whose principles they were not seeking to contradict. On the contrary, they wished to follow the reasoning expressed by Lord Reid in that case regarding the conditions under which the "agency" doctrine could be applied in the case of agreements of this type. On the technical level, the reasoning adopted by the judges is difficult to condense, but its essential points, at least insofar as I understand it, may be summed up in two propositions. First, the unilateral undertaking that the shipper had made in the contract of carriage with regard to the stevedore, then represented by the carrier, had become a bilateral and complete contract when the stevedore actually picked up the goods. Secondly, by performing its work the stevedore had provided the shipper with services which formed the "consideration" which, as a contracting party, it had to provide, according to the principles of the common law, if the contract was to be binding upon it. In the final analysis, however, behind these technical explanations, it was the idea of respecting the intent of the parties that was decisive. Lord Wilberforce stated this quite clearly (at p. 540): "In the opinions of their lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat

these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get around exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence".

Finally, the last stage to be mentioned is in 1974, in *Eisen UND AG v. Ceres Stevedoring Co. Ltd.* (cited above), where the Court of Appeal of the Province of Quebec, while finding against a stevedore on the ground that the loss was the result of its gross negligence, nevertheless recognized from the outset its right in principle to avail itself of the Himalaya clause which it was relying on. The Court avoided technical explanations: its decision was based essentially on the finding that the clause reflected the clear intent of the parties.

As can be seen, supporters and opponents of the Himalaya clause can both claim to find support in the case law. Those in Canada who maintain that the clause is ineffective often claim to be in a better position in this respect because they can cite a decision of the Supreme Court (cf Tetley, *op cit*, p. 383 et seq). I think, however, that it would be wrong to exaggerate the significance of the incidental observations of Ritchie J. in his decision on *The "Lake Bosomtwe"*, which are, in fact, so incidental that they seem to have completely escaped the official reporter who did not even mention them in his presentation. There is in fact no reason to assume that these observations were specifically concerned with a Himalaya clause, and taken literally they merely constitute a reminder of a specific principle: a person cannot avail himself of a contract to which he is not a party. It is true that this decision cannot be ignored, in view of its reference to *Midland Silicones*

and the importance of the principle cited in the discussion of the problem that was raised, but it does not provide a clear solution and is not irremediably opposed to the idea that a clause of that nature may be valid.

For my part, I think that it must not be forgotten at the outset that the principle of the relative effect of the contract, the one reaffirmed by Ritchie J., is as applicable in Quebec law as in the common law. It is true that Quebec law more generally admits the possibility of a "stipulation for the benefit of another" within the meaning of Art. 1029 of the *Civil Code of the Province of Quebec*,[3] but it would be difficult to interpret a Himalaya clause in a contract of carriage as such a "stipulation for the benefit of another", since it clearly does not make anyone, and especially not the stevedore or cargo handler, a creditor of the promisor, the shipper-owner. The conclusion that as a result of this principle of the relative effect of the contract the stevedore of cargo handler cannot avail itself directly of a clause in the contract of carriage to which it was not a party, either directly or through an agent, seems to me to be unavoidable. I do not see how, at least in Quebec law and on the basis of the facts in the case at bar, it is possible (despite the affirmation found at the end of the clause in question here) to speak of the carrier as an agent or representative of the stevedore or the cargo handler at the time the contract of carriage was signed.

If, however, pursuing the reasoning in the context of Quebec law as required by the action as instituted, the facts of the case at bar are considered in their entirety, I do not think defendant's position can be defined simply as that of a

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[3] 1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.

stevedore relying on a clause in the contract of carriage between the shipper-owner and the marine carrier. To do this would, I think, be to forget that defendant ITO is here relying primarily on its own contract for services with the carrier, in which it was careful to provide, by means of a clause whose purpose is clear despite its obscure wording,[4] that its liability for the custody of the goods would be limited to the extent permitted by the contract of carriage itself and the Himalaya clause contained therein. It was under this contract for services with the carrier that defendant agreed to take charge of the goods that had been carried and it is in this contract that its obligations with regard to these goods were defined. The shipper-owner itself knew that this contract for services would intervene at one point during the carriage of its goods: this had been revealed by the Himalaya clause and the terms, insofar as they could affect it as owner, had been foreseen and authorized by it. It was this contract that made possible the meeting of the minds of the three parties. The shipper-owner did not formally subscribe to it, but since it was to benefit from it and since it had agreed to it in advance, it must be regarded as present, and whether through a representative or as a third-party beneficiary (in accordance with the theory of stipulation for the benefit of another found in Quebec law) is of little importance.

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4 Namely, clause 7:

> Responsibility for Damage or loss. It is expressly understood and agreed that the Contractor's responsibility for damages or loss shall be strictly limited to damage to the vessel and its equipment and physical damage to cargo or loss of cargo outside through negligence of the Contractor or its employees. When such damage occurs to the vessel or its equipment or where such loss or damage occurs to cargo by reason of such negligence, the vessel's officers or other representatives shall call this to the attention of the Contractor at the time of accident. The Company agrees to indemnify the Contractor in the event it is called upon to pay any sums for damage or loss other than as aforesaid.
>
> It is further expressly understood and agreed that the Company will include the Contractor as an express beneficiary, to the extent of the services to be performed hereunder, of all rights, immunities and limitation of liability provisions of all contracts of all contracts of affreightman as evidenced by its standard bills of lading and/or passenger tickets issued by the Company during the effective period of this agreement. Whenever the customary rights, immunities and/or liability limitations are waived or omitted by the Company, as in the case of *ad valorem* cargo, the Company agrees to include the Contractor as an assured party under its insurance protection and ensure that that it is indemnified against any resultant increase in liability.

In my view, if plaintiff, the shipper-owner, can take action against defendant ITO in its capacity as a professional cargo handler, and thus otherwise than on a strictly delictual basis, it is because plaintiff can avail itself of this contract for services between the carrier and ITO, concluded in part for its own benefit as owner and with its express authorization. It cannot, however, act in this way without accepting the contract in its entirety. This is why I think that defendant is entitled to oppose the action by relying on the limitation of liability clause in the contract that it signed, with a reference to the Himalaya clause originally provided in the contract of carriage itself. In my opinion, legal analysis not only permits but requires that the clear intent of the parties be given effect, as recommended by the Privy Council (in *The "Eurymedon"*) and by the judges of the Court of Appeal of Quebec (in *Eisen UND Metall AG v. Ceres Stevedoring Co. LTD.*).

Those opposed to the Himalaya clause in contracts of carriage seek to use technical arguments to avoid giving effect to the intent of the parties on the pretext, essentially, that the contract is a standard-form contract imposed on the shipper-owner and that limitation of liability clauses contained in it are likely to encourage negligence. I wonder whether giving effect to the intention of the parties places the shipper in a more disadvantageous situation than he would be in if the carrier simply required him to contract directly with the cargo handlers. I also doubt whether the practical effect of these clauses would be anything other than to clarify the division of insurance costs among the parties. In any case, while such considerations (contract of adhesion, abuse of limitation of liability clauses) may well lead to legislative intervention, as was the case for the actual marine carrier, they can hardly serve as the basis of a judge's decision.

I therefore find that defendant ITO cannot be held liable for the loss on the sole ground of delict because it committed no fault that could be regarded as a delict; and that on any grounds other than delict it was protected by the limitation of liability clause provided in its contract with Mitsui, which plaintiff agreed to when it accepted the Himalaya clause in the contract of carriage.

The action is consequently without merit against defendant ITO as well as against defendant Mitsui, and must therefore be dismissed.

O T T A W A
January 5, 1979.

J. F. C. C.