THE DEFENCES AND LIMITS OF LIABILITY AVAILABLE TO THE CARRIER UNDER THE HAGUE RULES AS EXTENDED BY THE VISBY RULES TO THE CARRIERS SERVANTS AND AGENTS WITH REFERENCE TO RELEVANT PROVISIONS OF THE UNCITRAL DRAFT CONVENTION

by J.F. Emmott B.A.

THE HAGUE - VISBY RULES

Article 3 of the 1968 Brussels Protocol provides for an entirely new Article, Article IV bis, to be inserted into the Hague Rules between Articles IV and V. The four rules contained in the new Article IV bis extend the defences and limits of liability, enjoyed only by carriers under the 1924 Rules, to the carrier's servants and agents. In addition Rule 1 of Article IV bis extends the application of the defences and limits of liability to actions founded in tort.

Article IV bis Rule 1

This paragraph provides:

> "the defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort."

The object of this rule is to ensure that the cargo-owner is no better off by suing in tort than he would be if he sued in contract. The clause will have no marked effect because English Courts have, for a long time, assumed that the contracting parties intended the cargo-owner to be no better off by suing in tort rather than contract. As Viscount Finlay stated in Elder Dempster & C. Ltd., v. Paterson Zochonis & Co. Ltd. (1924) A.C. 522 at 548:

> "When the act is done in the course of rendering the very services provided for in the bill of lading, the limitation of liability therein contained must attack, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all storage, by suing the owner of the ship in tort."

It is interesting to note that in 1924 the drafters of the Hague Rules would probably not have contemplated that the effect of the Rules could be so easily avoided. Negligence, as an independent basis of tort liability, did not really become established until the decision of the House of Lords in Donoghue v. Stevenson (1932) A.C. 562. In the same year as the Carriage of Goods by Sea Act 1924 was passed, Salmond in the last personal edition of his textbook "On Torts" still denied existence of negligence as an independent cause of action. The tort was still, at that stage, considered to arise from a contractual liability. Thus, in any action against the carrier for breach of a duty of care (the duty arising from the contract), he could still rely on the defences and limits of liability contained in the Rules.

Article IV bis Rule 2

This paragraph provides that:

> "If such an action (i.e. in respect of loss or damage to goods covered by a contract of carriage) is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention rules."

This rule extends, for the first time, the statutory exceptions contained in the Rules to persons, other than the carrier himself, and brings this aspect of the Rules more in line with international conventions covering the carriage of goods by air or by road.

At the Stockholm Conference of the Comite Maritime International in 1963 the British Maritime Law Association proposed that the defences and limits of liability available to the carrier, should be extended to servants and agents

including independent contractors. There was, however, a great deal of opposition to extending the protection to independent contractors. In the view of these delegations, a contractor who is independent of the carrier should not, by the mere fact that he performs duties which the carrier himself might have performed, become entitled to the limitations and exceptions of the Rules. Therefore, a distinction should be drawn between, on the one hand, the carrier, his servants or agents and, on the other, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Rules, whereas these reasons do not apply to the independent contractor, who should thus not have this benefit. This reasoning was accepted at the Brussels Conference in 1968 and independent contractors were not afforded the protection of the Rules.

The Present Status of the Carrier's Servants, Agents and Independent Contractors

The position of the carrier's servants', agents and independent contractors when sued by cargo-owners for damage to cargo due to their negligent acts is far from clear. Since 1924 various clauses have been included in bills of lading, purporting to extend the protection afforded the carrier by the Rules, to those employed by the carrier and to those with whom he contracts to carry out part of the contract of carriage. The uncertainty which prevails in the law is the result of a conflict between, on the one hand, those who uphold the traditional doctrine of privity of contract, and on the other, those who, in the interests of commercial expediency, are willing to waive the doctrine in certain circumstances. In order to more fully understand the present state of law, it is

profitable to examine its development.

The doctrine of privity of contract is firmly entrenched in English Law. The doctrine can be stated as follows:

> "a contract cannot confer rights or impose obligations arising under it on any person except the parties to it."

This means that, in a contract between a shipper and a carrier for carriage of goods, and which incorporates the Hague Rules, it is only the two contracting parties (i.e. the shipper and the carrier) who can rely on the defences contained in the Rules. Third parties, such as the master and crew of the carrier's ship, are without recourse in any action against them by the shipper. However, in Elder Dempster & Co. v. Patterson Zochonis & Co. (1924) A.C. 522, the House of Lords first indicated courts would be willing to waive the doctrine of privity of contract, in the interests of commercial expediency. In that case, the plaintiffs contracted with charterers for the carriage of palm oil from West Africa to England. The charterers hired a vessel, the Grelwen, from another company for this purpose. The casks containing the palm oil, were damaged so that the oil was lost. The plaintiffs sued both the charterers and the shipowners for the loss. A clause in the bill of lading between the plaintiff and the charterers purported to protect both the charterers and the shipowners and the court held that the clause acted to protect both defendants even though the shipowners were not a party to the contract. The decision seemed to suggest that performance "under a contract" carried with it the benefits contained in that contract, whether one was a party to it or not. Such performance, it was held, created an agency relationship between the third party (the shipowners) and the contracting party (the charterers). As Viscount Cave put it (at p.533-4):

> "It was stipulated in the bill of lading that the 'shipowners' should not be liable for any damage .... and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say charterers and owners alike. It may be that the shipowners were not parties to the contract, but they took possession of the goods on behalf of and as agents of the charterers, and so can claim the same protection as their principals."

The decision in Elder Dempster was much criticised, although for many years was relied on by the carrier's servants, agents and independent contractors in order to claim the protections afforded the carrier where there was a clause in the contract purporting to extend those protections.

Adler v. Dickson and Another (1954) 2 Lloyd's Rep. 267 saw the return of the strict doctrine of privity of contract. The plaintiff was a passenger on the ship "Himalaya". She fell and was seriously injured because the gangway from the ship to the wharf was not properly secured. The carrier and the servants and the agents of the carrier all purported to be exempt from liability for any injuries to passengers under a clause contained on the plaintiff's ticket. The plaintiff sued the master and boatswain and succeeded. The Court of Appeal held that, as the master and boatswain were not parties to the contract between the passenger and the carrier, they could not gain the benefit of the exemption clause. In discussing the Elder Dempster case, Jenkins L.J. said (at 195):

> "The Elder Dempster principle can be explained by reference to its own facts without ascribing to their Lordships any such general principle .... "

In Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd. (1956) 95 C.L.R. 43, Fullagar J. further reiterated that no general principle could be drawn from Elder Dempster. He said (at p.77):

> "I do not think that anybody has succeeded in satisfactorily formulating any new and far-reaching principle as being involved in the Elder Dempster case and the simplest explanation

> of this fact is that there is no such principle involved. It turned, in my opinion, on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship."

The decision in Elder Dempster received a fatal blow in Scruttons Ltd. v. Midland Silicones Ltd. (1962) A.C. 446. In that case, stevedores had damaged cargo while unloading the ship "American Reporter". The cargo-owners sued the stevedores rather than the carrier as the Hague Rules had been incorporated in the bill of lading and thus the carrier could have limited his liability. The House of Lords held that the stevedores were not entitled to rely on the limitation of liability for three main reasons:

(a) the stevedore was not a party to the contract of carriage, thus under the doctrine or privity of contract he could derive no benefit from it;

(b) the carrier did not contract as agent for the stevedore;

(c) there was no implied contract by which the stevedore could have the benefits of the Rules.

It should be noted that in Midland Silicones there was no clause purporting to extend its protection to anyone other than "the carriers" themselves, and no suggestion that protection should be shared by the servants, agents or independent contractors of the carriers.

Although the Elder Dempster doctrine had apparently lost all credence following Midland Silicones, Lord Reid, in his judgment in that case, did provide some hope for servants, agents and independent contractors. He envisaged that a clause in a contract of carriage, which purported to extend the carrier's protection to third parties, might be effective if four conditions were satisfied. They were:

(a) The bill of lading must make clear an intention to protect third parties;

(b) It must be clear that the carrier contract for the third parties protection as well as his own;

(c) The authority of the carrier so to act, or later ratification, must be proved;

(d) Thre must be consideration from the third party for the protection extended to him.

Following Adler v. Dickson shipowners sought to secure for their servants and agents (including independent contractors) the exemptions and immunities which had been held to be personal to themselves and not available to anyone else. A clause known as the "Himalaya Clause" was inserted into bills of lading. This clause provides that in making the contract the carrier is acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors) and these persons are deemed to be parties to the contract in or evidenced by the bill of lading. By making clear an intention to protect third parties and also that the carrier contracts for the protection of the third parties as well as his own, the standard "Himalaya Clause" appeared to have complied with Lord Reid's first and second condition. The third condition was easily complied with since later ratification of the carrier's authority was envisaged. The only difficulty was the question of consideration moving from the third party.

Following Midland Silicones, the industry had to wait thirteen years before the "Himalaya Clause" was first tested by the Privy Council in New Zealand Shipping Co. Limited v. A.M. Satterthwaite & Co. Limited; the Eurymedon (1975) A.C. 154. In that case machinery was dispatched from Liverpool to Wellington, New Zealand, under a bill of lading incorporating

the Hague Rules and also containing what had become the standard "Himalaya Clause". Whilst the machinery was being unloaded at Wellington, it was damaged through the admitted negligence of the stevedores, who were the parent company of the carriers. The owners of the machinery sued the stevedores more than one year after the cause of action arose. The stevedores claimed the protection of the limitation clauses in the bill of lading. A majority of the Privy Council agreed with the stevedores and accepted without question the four necessary conditions set out by Lord Reid in Midland Silicones holding that they had all been complied with. With regard to the fourth condition Lord Wilberforce, delivering the majority judgment, said (at p.167-168):

> ".... the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual between the shipper 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 appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading."

His Lordship relied on the words of Bowen L.J. in Carlill v. Carbolic Smoke Ball Co. (1893) Q.B. 256, 268, viz "why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?", in holding that the "Himalaya Clause" in the bill of lading was an offer, by the shipper, to extend the protection afforded to the carrier under the contract, to anybody who might perform any part of the contract of carriage. Furthermore, Lord Wilberforce could see no problem in the fact that the stevedore was under an existing obligation to discharge to the carrier. His Lordship said (at p.168):

> "An Agreement to do an act which the promisor is under an existing obligation to a third party to do may quite well amount to valid consideration",

and he relied on Scotson & Pegg (1861) 6 H & N 295 to support this view.

Their Lordships did however admit that:

> "English Law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration."

Thus, following Satterthwaite's Case it appeared as if the carrier's servants, agents and independent contractors could comply with Lord Reid's fourth condition, merely by carrying out part of the contract of carriage and therefore obtain the same protection as the carrier with ease. However, the New South Wales Court of Appeal in Salmond & Spraggon (Aust.) Pty. Limited v. Joint Cargo Services Pty. Limited (19th August, 1976 unreported) indicated that it was not willing to ignore the technical and schematic doctrine of contracts and adopt the practical approach envisaged by the Privy Council. In that case, the relevant bill of lading contained the Hague Rules and the standard "Himalaya Clause". The goods were unloaded by the stevedore and stored in his warehouse from where they were stolen. The owner commenced an action against the stevedore seeking damages, more than one year after the goods were stolen. The stevedore sought to rely on the "Himalaya Clause" as extending to him, the protection of the Rules. The Court of Appeal held that Lord Reid's fourth condition had not been satisfied and therefore the stevedore was liable. The Court relied on a principle of contract law not discussed in Satterthwaite's Case. While accepting, that the fourth condition could be satisfied on the basis relied on in Satterthwaite's Case, Glass J.A. went on to say that:

> "the acceptor must act upon the faith of or in reliance upon the offer. There must be a nexus between the offer and the conduct relied on as acceptance."

The court held that, even though the stevedore knew of the shipper's offer to exempt, there may have been no relationship whatever between the conduct of the stevedore and its knowledge of the offer. The fact that the stevedore was bound to carry out stevedoring operations under its contract with the carrier was evidence that the operations were not carried out in acceptance of the offer. Thus the stevedore had not provided consideration for the exemption offer of the shipper.

Satterthwaite's Case and Salmond and Spraggon do not sit comfortably together. The latter case is presently on appeal to the High Court. It is submitted that the "practical approach" adopted by the Privy Council in Satterthwaite's Case is to be preferred to the Court of Appeal in Salmond and Spraggon. The Court of Appeal placed a great deal of weight upon the fact that the stevedore was bound by contract to the carrier and that the acts he performed were done in performance of that contract and not in consideration of the cargo-owners offer to exempt. However, the question arises as to whether the stevedore would have performed the contract with the carrier in the same manner, if by doing so he was aware that the exemption clauses in the bill of lading would not have extended to him. Surely, such knowledge would have affected both the contract he had with the carrier, and the manner in which he carried out the contract. The fact that he assumed he was covered by the exemption clauses, and provided consideration with this belief, is sufficient nexus and relationship with the cargo-owner's offer to constitute a valid acceptance. Above all, as Lord Wilberforce said in Satterthwaite's Case:

> "to give the (stevedore) the benefit of lading is to give effect to the clear intention of a commercial document."

Article IV bis Rule 3

This paragraph provides that "the aggregate amounts recoverable from the carrier and such servants and agents shall in no case exceed the limit provided for in these Rules". Here "recoverable" should be read as "recovered" so that judgment against an insolvent defendant would not bar recovery in full against another defendant.

Article IV bis Rule 4

This paragraph provides that:

> "A servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would result."

This then limits the circumstances in which the servants and agents of the carrier may claim protection of the rules. The paragraph resembles the wording of Article III Rule 5 (e) of the Protocol, which limits the circumstances when the carrier may claim protection of the rules, however, intentional or reckless misconduct on the part of the carrier will only deprive him of his right to limit his liability whereas such conduct on the part of servants and agents will deprive them of all the statutory defences.

THE UNCITRAL DRAFT CONVENTION

Provisions almost identical to those found in Article IV bis of the Hague-Visby Rules were adopted in the UNCITRAL draft convention.

Article 7 Rule 1

Article 7 Rule 1 states:

> "The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or

> damage to the goods covered by the contract of carriage as well as of delay in delivery, whether the action be founded in contract in tort or otherwise."

This is almost identical to Article 4 bis Rule 1 of the Hague-Visby Rules. There is, however, one important extension of the circumstances when the carrier can claim the protection of the Convention. This is for actions arising from losses to the cargo-owner resulting from delay in the delivery of the goods. The Hague-Visby Rules only contemplate actions resulting from loss or damage to the actual goods being carried. Most governments have formerly awarded damages resulting from delay on one of two bases:

(i) that the Hague Rules authorised recovery for physical damages caused by delay because of the carrier's obligation under Article III(2) to "properly and carefully load ...., carry .... and discharge the goods carried."

(ii) in English common law countries it is generally accepted that damages are recoverable for delay on the basis of what could be reasonably foreseen as resulting from the delay, however, there are no specific decisions on this point.

A great many practical problems arise from specifically including a liability for delay in the Convention. For example - would any consequential losses flowing from delay be covered or only those which were "reasonably foreseeable" at the commencement of the voyage? Should there be a separate limit of liability for delay imposed? The International Chamber of Shipping at the February 1974 Working Group meeting urged

the result could further raise the total cost of moving goods by sea. The Chamber noted that, as a matter of practice claims were rarely made for delay and to spell out such liability would encourage claims for the future. The extra risk exposure would increase insurance costs and perhaps jeopardise safety standards if masters were to allow commercial pressures to influence navigational decisions.

The Convention itself attempts to overcome some of the problem by defining delay in delivery in Article 5 Rule 2:

> "Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier having regard to the circumstances of the case."

Article 7 Rule 2

This Rule provides:

> "If such an action is brought against a servant or agent of the carrier, such servant or agent if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention."

It was initially recommended by the Working Groups that the provisions of Article IV bis Rule 2 of the Hague-Visby Rules be retained, thus not extending the carrier's protection to independent contractors. However, there was no support for this proposal and consequently the problems which arise under the Hague-Visby Rules, for stevedores and other independent contractors will no longer be present.

It should be noted that in order to invoke the protection of this rule the servant or agent must prove that he acted within the scope of his employment.

Article 7 Rule 3

This Rule provides:

"The aggregate of the amounts recoverable from carrier, and any persons referred to in paragraph 2 of this article, shall not exceed the limits of liability provided for in this Convention."

This rule is identical to Article IV bis Rule 3 of the Hague-Visby Rules.

Article 8 of the draft Convention provides for the loss of the right to limit liability.

Article 8 Rule 1

This Rule is equivalent to Article IV Rule 5(e) of the Hague-Visby Rules. It provides that the benefit of the limitation of liability shall not be extended to the carrier if loss, damage or delay in delivery resulted from an act or omission done with intent to cause such loss, damage or delay, or recklessly and with knowledge that the loss or delay would probably result.

However, whereas the Hague-Visby Rules only deprive the carrier of the right to limit liability for acts done by himself, the draft convention goes further and specifically deprives the carrier of this right if the intentional or reckless act is of:

(i) an employee of the carrier other than the master and crew while exercising, within the scope of his employment supervisory authority during that part of the carriage when the act or omission occurred or

(ii) an employee of the carrier including the master and crew while handling or caring for the goods within the scope of his employment.

Article 8 Rule 2

This rule provides:

> "Nothwithstanding the provisions of paragraph 2 of Article 7, a servant or agent of the carrier shall not be entitled to the benefit of the limitation of liability provided for in Article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

This rule is the equivalent of Article IV bis Rule 4 of the Hague-Visby Rules. However, that rule deprives the servant or agent of the carrier from all the protections in the case of reckless conduct and not just the limitation of liability as provided in the draft Convention. The servant or agent is then protected to the same extent as the carrier and can only lose that protection to the same extent and in the same circumstances as the carrier.

Conclusion

The UNCITRAL Draft Convention places servants and agents in the same position as the carrier. Furthermore, it extends the carrier's defences and limits of liability to cover independent contractors. However, by specifically including a new basis of recovery for the cargo-owner (i.e. damages for dleay), the convention, in attempting to stardardise bases of recovery in all countries, has only added a new dimension of confusion to an area of the law which is far from simple as it presently stands.