Privy Council Appeal No. 39 of 1994

The owners and/or demise charterers of the ship or vessel "Mahkutai" (Indonesian Flag) *Appellants*

v.

The owners of cargo lately laden on board the ship or vessel "Mahkutai" (Indonesian Flag) *Respondents*

(and cross-appeal)

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.
Delivered the 22nd April 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Nicholls of Birkenhead
Lord Hoffmann
Sir Michael Hardie Boys

*[Delivered by **Lord Goff of Chieveley**]*

There is before their Lordships an appeal by the appellants, the owners of the Indonesian vessel "Mahkutai" ("the shipowners"), from a decision dated 2nd July 1993 of the Court of Appeal of Hong Kong [1994] 1 H.K.L.R. 212, who by a majority (Litton J.A. and Mayo J., Bokhary J.A. dissenting) reversed an order by Sears J. granting the shipowners a stay of proceedings brought in Hong Kong by the respondents, the owners of cargo lately laden on the vessel ("the cargo owners"), on the ground that the proceedings had been brought in contravention of an exclusive jurisdiction clause under which any dispute was to be determined in the courts of Indonesia. The cargo owners have cross-appealed against part of the order of the Court of Appeal relating to security provided by the shipowners to the cargo owners in respect of the proceedings in Hong Kong.

The main issues arise on the appeal, and are concerned with the question whether the shipowners, who were not parties to the bill of lading contract, can invoke as against the cargo owners the exclusive jurisdiction clause contained in that contract, the bill of lading being a charterers' bill issued by their agents to the shippers. The shipowners claim to be able to do so, either under a Himalaya clause incorporated into the bill, on the principles established by the Privy Council in *The Eurymedon* [1975] A.C. 154 and *The New York Star* [1981] 1 W.L.R. 138, or alternatively on the principle of bailment on terms, which originated in the speech of Lord Sumner in *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522. However, before identifying the precise nature of these issues, their Lordships propose first to summarise the relevant facts.

The facts of the case.

By a time charter dated 11th October 1989 the shipowners chartered the vessel for a period of twelve months, later extended by a further twelve month period, to another Indonesian corporation, PT Rejeki Sentosa ("Sentosa"). By a voyage charter evidenced by a fixture note dated 15th January 1991 Sentosa, as disponent owners, sub-chartered the vessel to Indonesian timber exporters called PT Jabarwood ("the shippers") for the carriage of a cargo of plywood from Jakarta to Shantou in the People's Republic of China. On 17th January 1991 a shipping order was issued by Gesuri Lloyd (Sentosa's general agents) directing the vessel to receive the cargo of plywood from the shippers for carriage to Shantou subject to the provisions of "the Companies' Bill of Lading", i.e. Sentosa's form of bill. The shipping order was signed by the Master, stating that the cargo had been received in good order, and as so signed no doubt constituted a mate's receipt for the goods. It provided that "For further terms and conditions the clauses as stipulated in the B/L will apply". On the following day, 18th January, the Master issued an authorisation letter to Gesuri Lloyd, authorising them to sign the bill of lading "in accordance with Mate's receipts and relevant Charter Party". Accordingly on 19th January a bill of lading was issued in Sentosa's form, signed by Gesuri Lloyd as agents for Sentosa, the disponent owners of the vessel. Among the bill of lading clauses were the following:-

> "1. CONDITIONS IN THIS BILL OF LADING
>
> 'Carrier' means the P.T. REJEKI SENTOSA SHIPPING and/or subsidiary companies on whose behalf the Bill of Lading has been signed.
>
> 'Vessels' includes the ship named herein and any ship or craft to which and from which transhipment may be made in the performance of the contract ...

4. SUB-CONTRACTING

(i) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the Carrier in relation to the Goods.

(ii) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carrier, including but not limited to stevedores and terminal operators, which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequence thereof. Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the Carrier, to the extent of these provisions, does so not only on as [sic] own behalf, but also as agent and trustee for such servants, agents and sub-contractors. The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by such Merchant from any such servant, agent or sub-contractor of the Carrier for any loss, damage, delay or otherwise.

(iii) The expression 'Sub-Contractor' in this clause shall include direct and indirect sub-contractors and their respective servants and agents.

19. JURISDICTION CLAUSE

The contract evidenced by the Bill of Lading shall be governed by the Law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian Courts according to that law to the exclusion of the jurisdiction of the courts of any other country."

The vessel, laden with the cargo of plywood, then sailed for Shantou where she arrived on 16th February 1991, following a call for repairs at Manila Bay. A cargo survey was carried out at Shantou, and as a result the cargo owners claimed that plywood in one of the holds had been damaged by sea water. On

completion of discharge at Shantou the vessel proceeded to Hong Kong for the discharge of other cargo.

On arrival of the vessel at Hong Kong the cargo owners issued a writ claiming damages arising from damage to the cargo by reason of breach of contract, breach of duty or negligence, and caused the vessel to be arrested. To obtain the release of their vessel, the shipowners then provided security for the cargo owners' claim in the form of a bank guarantee, reserving the right to seek a stay of the Hong Kong proceedings.

On 5th December 1991 the shipowners issued a summons seeking a stay of proceedings, either on the ground of breach of clause 19 (the exclusive jurisdiction clause) in the bill of lading, or on the ground of forum non conveniens. Sears J. held that the shipowners, although not parties to the bill, were entitled to invoke clause 19 either as a contractual term or as one of the terms on which the goods were bailed to them. He further held that there was no good cause justifying refusal of a stay. Accordingly on 5th March 1993 he ordered that the Hong Kong proceedings be stayed, and on 29th March that the shipowners' guarantee be discharged. On 2nd July 1993 the Court of Appeal [1994] 1 H.K.L.R. 212 (by a majority - Litton J.A. at pages 214-228 and Mayo J. at page 231) allowed the cargo owners' appeal against Sears J.'s order granting a stay of proceedings, on the grounds that the shipowners were not parties to the bill of lading and that there was no bailment on terms including the exclusive jurisdiction clause. Bokhary J.A. at pages 228-231dissented on the ground that there was a bailment to the shipowners on terms including the clause. The cargo owners' appeal against the order for immediate surrender of the guarantee was unanimously dismissed; but subsequently that order was stayed, and the security remains in place. On 15th September 1993, both parties were granted leave to appeal to the Privy Council.

The pendulum of judicial opinion.

The two principles which the shipowners invoke are the product of developments in English law during the present century. During that period, opinion has fluctuated about the desirability of recognising some form of modification of, or exception to, the strict doctrine of privity of contract to accommodate situations which arise in the context of carriage of goods by sea, in which it appears to be in accordance with commercial expectations that the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties to the contract. These cases have been concerned primarily with stevedores claiming the benefit of exceptions and limitations in bills of lading, but also with shipowners claiming the protection of such terms contained in charterers' bills. At first there appears to have been a readiness

on the part of judges to recognise such claims, especially in *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.* [1924] A.C. 522, concerned with the principle of bailment on terms. Opinion however hardened against them in the middle of the century as the pendulum swung back in the direction of orthodoxy in *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] A.C. 446; but in more recent years it has swung back again to recognition of their commercial desirability, notably in the two leading cases concerned with claims by stevedores to the protection of a Himalaya clause - *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] A.C. 174, and *Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty. Ltd. (The New York Star)* [1981] 1 W.L.R. 138.

In the present case shipowners carrying cargo shipped under charterers' bills of lading are seeking to claim the benefit of a Himalaya clause in the time charterers' bills of lading, or in the alternative to invoke the principle of bailment on terms. However they are seeking by these means to invoke not an exception or limitation in the ordinary sense of those words, but the benefit of an exclusive jurisdiction clause. This would involve a significantly wider application of the relevant principles; and, to judge whether this extension is justified, their Lordships consider it desirable first to trace the development of the principles through the cases.

The *Elder Dempster* case.

The principle of bailment on terms finds its origin in the *Elder Dempster* case [1924] A.C. 522. That case was concerned with a damage to cargo claim in respect of a number of casks of palm oil which had been crushed by heavy bags of palm kernels stowed above them in a ship with deep holds but no tween decks to take the weight of the cargo stowed above. The main question in the case was whether such damage was to be classified as damage arising from unseaworthiness of the ship due to absence of tween decks, or as damage arising from bad stowage; in the latter event, no claim lay under the bills of lading, which contained an exception excluding claims for bad stowage. The bills of lading were time charterers' bills, the vessel having been chartered in by the time charterers as an additional vessel for their West African line. The House of Lords (on this point differing from a majority of the Court of Appeal) held that the damage was to be attributed to bad stowage, and as a result the time charterers were protected by the bill of lading exception; but the cargo owners had also sued the shipowners in tort, and the question arose whether the shipowners too were protected by the exception contained in the bill of lading, to which they were not parties.

In the Court of Appeal [1923] 1 K.B. 420, 441-442 Scrutton L.J. (who alone considered that the damage was to be attributed to bad stowage rather than unseaworthiness) rejected the claim against the shipowners on a suggested principle of vicarious immunity. This principle was relied on by the shipowners in argument before the House of Lords, and was accepted (at page 534) by Viscount Cave (with whom Lord Carson agreed), and apparently also (at page 548) by Viscount Finlay. But the preferred reason given (at page 564) by Lord Sumner (with whom Lord Dunedin and Lord Carson agreed) was that:-

> "in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading."

The *Midland Silicones* case.

This was a test case in which it was sought to establish a basis upon which stevedores could claim the protection of exceptions and limitations contained in the bill of lading contract. Here the stevedores had negligently damaged a drum of chemicals after discharge at London, to which the goods had been shipped from New York under a bill of lading incorporating the U.S. Carriage of Goods by Sea Act 1936, which contained the Hague Rules limitation of liability to $500 per package or unit. The stevedores sought to claim the benefit of this limit as against the receivers. They claimed to rely on the principle of bailment on terms derived from the *Elder Dempster* case. But they also sought a contractual basis for their contention on various grounds - that they had contracted with the receivers through the agency of the shipowners; that they could rely on an implied contract independent of the bill of lading; or that they could as an interested third party take the benefit of the limit in the bill of lading contract. All these arguments failed. The principle of bailment on terms was given a restrictive treatment; and the various contractual arguments foundered on the doctrine of privity of contract, Viscount Simonds in particular reasserting that doctrine in its orthodox form (at pages 467-8). For present purposes, however, three features can be selected as important.

First, the case revealed, at least on the part of Viscount Simonds (here reflecting the view expressed by Fullagar J. in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (1956) 95 C.L.R. 43 at page 78), a remarkable shift from the philosophy which informed the decision in the *Elder Dempster* case. There the point in question was treated very briefly by the members of the Appellate Committee, apparently because it seemed obvious to them that the cargo owners' alternative claim against the

shipowners should fail. It was perceived, expressly by Viscount Finlay (at page 548) and, it seems, implicitly by the remainder, that:-

> "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 stowage, by suing the owner of the ship in tort."

By contrast Fullagar J., in the *Darling Island* case at page 71, condemned "a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence", a sentiment to be echoed by Viscount Simonds in the concluding sentence of his speech in the *Midland Silicones* case [1962] A.C. 446 (at page 472).

Second, the *Elder Dempster* case was kept within strict bounds. Viscount Simonds (at page 470) quoted with approval the interpretation adopted by Fullagar J. (with whom Dixon C.J. agreed) in the High Court of Australia in the *Darling Island* case, where he said (at page 78):-

> "In my opinion, what the *Elder Dempster* case decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner, when he receives the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question."

This approach is consistent with that of Lord Sumner. In the *Midland Silicones* case Lord Keith of Avonholm (at page 481) and Lord Morris of Borth-y-Gest (at page 494) spoke in similar terms. Lord Reid (at page 479) treated the decision on the point as:-

> "an anomalous and unexplained exception to the general principle that a stranger cannot rely for his protection on provisions in a contract to which he is not a party."

Lord Denning dissented (at pages 481-492).

It has to be recognised that this reception did not enhance the reputation of the *Elder Dempster* case, as witness certain derogatory descriptions later attached to it, for example by Donaldson J. in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* [1976] 2 Lloyd's Rep. 215, 219 - "something of a judicial nightmare", and by Ackner L.J. in *The Forum Craftsman* [1985] 1 Lloyd's Rep. 291, 295 - "heavily comatosed, if not long-interred".

Third, however, and most important, Lord Reid in *Midland Silicones* case, while rejecting the agency argument on the facts of the case before him, nevertheless indicated how it might prove successful in a future case. He said (at page 474):-

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, 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."

It was essentially on this passage that the Himalaya Clause (called after the name of the ship involved in *Adler v. Dickson* [1955] 1 Q.B. 158) was later to be founded.

The pendulum swings back again.

In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements. Nowadays, therefore, there is a greater readiness, not only to accept something like Scrutton L.J.'s doctrine of vicarious immunity (as to which see, e.g., Article 4 bis of the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971) but also to rehabilitate the *Elder Dempster* case itself, which has been described by Bingham L.J., in *Dresser U.K. Ltd. v. Falcongate Freight Management Ltd.* [1992] Q.B. 502, 511F as "a pragmatic legal recognition of commercial reality". Even so, the problem remains how to discover, in circumstances such as those of the *Elder Dempster* case, the factual basis from which the rendering of the bailment subject to such a provision can properly be inferred. At all events the present understanding, based on Lord Sumner's speech, is that in the circumstances of that case the shippers may be taken to have impliedly agreed that the goods were received by the shipowners, as bailees, subject to the exceptions and limitations contained in the known and contemplated form of bill of lading; see *The Pioneer Container* [1994] 2 A.C. 324, 339D-340B. Their Lordships will however put on one side for later consideration the question how far the

principle of bailment on terms may be applicable in the present case, and will turn first to consider the principle developed from Lord Reid's observations in the *Midland Silicones* case, in *The Eurymedon* and *The New York Star.*

The *Eurymedon* and *The New York Star.*

Their Lordships have already quoted the terms of clause 4 (the Himalaya clause) of the bill of lading in the present case. For the purposes of this aspect of the case, the essential passage reads as follows:-

> "Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the Carrier, to the extent of these provisions, does so not only on [his] own behalf, but also as agent and trustee for such servants, agents and sub-contractors."

The effectiveness of a Himalaya clause to provide protection against claims in tort by consignees was recognised by the Privy Council in *The Eurymedon* and *The New York Star.* In both cases, stevedores were sued by the consignees for damages in tort, in the first case on the ground that the stevedores had negligently damaged a drilling machine in the course of unloading, and in the second on the ground that they had negligently allowed a parcel of goods, after unloading onto the wharf, to be removed by thieves without production of the bill of lading. In both cases, the bill of lading contract incorporated a one year time bar, and a Himalaya clause which extended the benefit of defences and immunities to independent contractors employed by the carrier. The stevedores relied upon the Himalaya clause to claim the benefit of the time bar as against the consignees.

In the *Eurymedon* the Privy Council held, by a majority of three to two, that the stevedores were entitled to rely on the time bar. The leading judgment was delivered by Lord Wilberforce (at pages 164-183). He referred to clause 1 of the bill of lading under which the carrier stipulated for certain exemptions and immunities, among them the one year time bar in Article III, rule 6, of the Hague Rules, and in addition (in the Himalaya clause) the carrier, as agent for (among others) independent contractors, stipulated for the same exemptions. Referring to Lord Reid's four criteria in the *Midland Silicones* case [1962] A.C. 446-474, he considered it plain that the first three were satisfied, the only question being whether the requirement of consideration was fulfilled. He was satisfied that it was. He observed (at page 167B) that "If the choice, and the

antithesis, is between a gratuitous promise, and a promise for consideration ... there can be little doubt which, in commercial reality, this is". He then proceeded to analyse the transaction in a way which showed a preference by him for what is usually called a unilateral contract, though he recognised that there might be more than one way of analysing the transaction.

In *The New York Star*, the Privy Council again upheld (on this occasion unanimously) the efficacy of a Himalaya clause to confer upon the stevedores the benefit of defences and immunities contained in the bill of lading, including a one year time bar. The judgment of the Judicial Committee was again given by Lord Wilberforce. In the course of his judgment, he stressed (at page 143F-G) that:-

> "It may indeed be said that the significance of *Satterthwaite's* case lay not so much in the establishment of any new legal principle, as in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading."

He continued (at page 144A-B):-

> "Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle."

Lord Wilberforce in particular expressed the Board's approval of the reasoned analysis of the relevant legal principles in the judgment of Barwick C.J., which in his opinion substantially agreed with, and indeed constituted a powerful reinforcement of, one of the two possible bases put forward in the Board's judgment in *The Eurymedon*. In his judgment in the court below (the High Court of Australia), Barwick C.J. (see [1979] 1 Lloyd's Rep. 298, 304-5) saw no difficulty in finding that the carrier acted as the authorised agent of the stevedores in making an arrangement with the consignor for the protection of the stevedores. By later accepting the bill of lading the consignee became party to that arrangement. He could not read the clauses in the bill of lading as an unaccepted but acceptable offer by the consignor to the stevedores. However the consignor and the stevedores were ad idem through the carrier's agency, upon the acceptance by the consignor of the bill of lading, as to the protection the stevedores should have in the event that they caused loss of or damage to the consignment. But that consensus lacked consideration. He continued (at page 305):-

> "To agree with another that, in the event that the other acts in a particular way, that other shall be entitled to state a protective provisions only needs performance by the doing of the specified act or acts to become a binding contract ... The performance of the act or acts at the one moment satisfied the test for consideration and enacted the agreed terms."

Such a contract Barwick C.J. was prepared, with some hesitation, to describe as a bilateral contract.

Critique of *the Eurymedon* principle.

In *The New York Star*, Lord Wilberforce (at page 144) discouraged "a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle". He was there, of course, speaking of the application of the principle in the case of stevedores. It has however to be recognised that, so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the shipowner, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract. Indeed, in the present case their Lordships have seen such an exercise being legitimately undertaken by Mr. Aikens Q.C. on behalf of the respondent cargo owners. In this connection their Lordships wish to refer to the very helpful consideration of the principle in Palmer on Bailment, 2nd ed., 1991 at pages 1610-1625, which reveals many of the problems which may arise, and refers to a number of cases, both in England and in Commonwealth countries, in which the courts have grappled with those problems. In some cases, notably but by no means exclusively in England, courts have felt impelled by the established principles of the law of contract or of agency to reject the application of the principle in the particular case before them. In others, courts have felt free to follow the lead of Lord Wilberforce in *The Eurymedon*, and of Lord Wilberforce and Barwick C.J. in *The New York Star*, and so to discover the existence of a contract (nowadays a bilateral contract of the kind identified by Barwick C.J.) in circumstances in which lawyers of a previous generation would have been unwilling to do so.

Nevertheless there can be no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in *The Eurymedon*, and later developed in *The New York Star*, has been widely welcomed. But it is legitimate to wonder whether that

development is yet complete. Here their Lordships have in mind not only Lord Wilberforce's discouragement of fine distinctions, but also the fact that the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protection of those terms as against the cargo owners. This is because (1) the problem of consideration in these cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the shipowners; (2) the problem of authority from the stevedores to the shipowners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle of ratification; and (3) consignees of the cargo may be held to be bound on the principle in *Brandt v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd.* [1924] 1 K.B. 575. Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law. It is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the Supreme Court of Canada (see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992) 97 D.L.R. (4th) 261) and, in a different context, the High Court of Australia (see *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.* (1988) 165 C.L.R. 107). Their Lordships have given consideration to the question whether they should face up to this question in the present appeal. However, they have come to the conclusion that it would not be appropriate for them to do so, first, because they have not heard argument specifically directed towards this fundamental question, and second because, as will become clear in due course, they are satisfied that the appeal must in any event be dismissed.

Application of *the Eurymedon* principle in the present case.

Their Lordships now turn to the application of the principle in *The Eurymedon* to the facts of the present case. Two questions arose in the course of argument which are specific to this case. The first is whether the shipowners qualify as "sub-contractors" within the meaning of the Himalaya clause (clause 4 of the bill of

lading). The second is whether, if so, they are entitled to take advantage of the exclusive jurisdiction clause (clause 19). Their Lordships have come to the conclusion that the latter question must be answered in the negative. It is therefore unnecessary for them to answer the first question; and they will proceed to address the question of the exclusive jurisdiction clause on the assumption that the shipowners can be regarded as subcontractors for this purpose.

The exclusive jurisdiction clause.

The Himalaya clause provides that, among others, sub-contractors shall have the benefit of "all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit". The question therefore arises whether the exclusive jurisdiction clause (clause 19) falls within the scope of this clause.

In *The Eurymedon* (at page 169) and *The New York Star* (at page 143) Lord Wilberforce stated the principle to be applicable, in the case of stevedores, to respectively "exemptions and limitations" and "defences and immunities" contained in the bill of lading. This is scarcely surprising. Most bill of lading contracts incorporate the Hague-Visby Rules, in which the responsibilities and liabilities of the Carrier are segregated from his rights and immunities, the latter being set out primarily in Article IV, Rules 1 and 2, exempting the carrier and the ship from liability or responsibility for loss of or damage to the goods in certain specified circumstances; though the limitation on liability per package or unit is to be found in Article IV, Rule 5, and the time bar in Article III, Rule 6. Terms such as these are characteristically terms for the benefit of the carrier, of which sub-contractors can have the benefit under the Himalaya clause as if such terms were expressly made for their benefit.

It however by no means follows that the same can be said of an exclusive jurisdiction clause, here incorporating, as is usual, a choice of law provision relating to the law of the chosen jurisdiction. No question arises in the present case with regard to the choice of law provision. This already applies to the bill of lading contract itself, and may for that reason also apply to another contract which comes into existence, pursuant to its terms, between the shipper and a sub-contractor of the carrier such as the shipowners in the present case. But the exclusive jurisdiction clause itself creates serious problems. Such a clause can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights

and obligations. Can such a clause be an exception, limitation, provision, condition or liberty benefiting the Carrier within the meaning of the clause?

First of all, it cannot in their Lordships' opinion be an exception, limitation, condition or liberty. But can it be a provision? That expression has, of course, to be considered in the context of the Himalaya clause; and so the question is whether an exclusive jurisdiction clause is a provision benefiting the Carrier, of which servants, agents and sub-contractors of the Carrier are intended to have the benefit, as if the provision was expressly made for their benefit. Moreover, the word "provision" is to be found at the centre of a series of words, viz. "exceptions, limitations ... conditions and liberties", all of which share the same characteristic, that they are not as such rights which entail correlative obligations on the cargo owners.

In considering this question, their Lordships are satisfied that some limit must be placed upon the meaning of the word "provision" in this context. In their Lordships' opinion the word "provision" must have been inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description "exceptions, limitations, ... conditions and liberties", nevertheless benefited the Carrier in the same way in the sense that it was inserted in the bill for the Carrier's protection, should enure for the benefit of the servants, agents and subcontractors of the Carrier. It cannot therefore extend to include a mutual agreement, such as an exclusive jurisdiction clause, which is not of that character.

Their Lordships draw support for this view from the function of the Himalaya clause. That function is, as revealed by the authorities, to prevent cargo owners from avoiding the effect of contractual defences available to the Carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the Carrier's behalf. To make available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading contract does not contribute to the solution of that problem. Furthermore to construe the general words of the Himalaya clause as effective to make available to servants, agents or subcontractors a clause which expressly refers to disputes arising under the contract evidenced by the bill of lading, to which they are not party, is not easy to reconcile with those authorities (such as *Thomas and Co. Ltd. v. Portsea Steamship Co. Ltd.* [1912] A.C. 1) which hold that general words of incorporation are ineffective to incorporate into a bill of lading an arbitration clause which refers only to disputes arising under the charter.

Furthermore, it is of some significance to observe how adventitious would have been the benefit of the exclusive jurisdiction clause to the shipowners in the present case. Such a clause generally represents a preference by the Carrier for the jurisdiction where he carries on business. But the same cannot necessarily be said of his servants, agents or sub-contractors. It could conceivably be true of servants, such as crew members, who may be resident in the same jurisdiction; though if sued elsewhere they may in any event be able to invoke the principle of forum non conveniens. But the same cannot be said to be true of agents, still less of sub-contractors. Take, for example, stevedores at the discharging port, who provide the classic example of independent contractors intended to be protected by a Himalaya clause. There is no reason to suppose that an exclusive jurisdiction clause selected to suit a particular Carrier would be likely to be of any benefit to such stevedores; it could only conceivably be so in the coincidental circumstance that the discharging port happened to be in the country where the Carrier carried on business. Exactly the same can be said of a shipowner who performs all or part of the Carrier's obligations under the bill of lading contract, pursuant to a time or voyage charter. In such a case, the shipowner may very likely have no connection with the Carrier's chosen jurisdiction. Coincidentally he may do so, as in the present case where the shipowners happened, like Sentosa, to be an Indonesian corporation. This of course explains why the shipowners in the present case wish to take advantage of the exclusive jurisdiction clause in Sentosa's form of bill of lading; but it would not be right to attach any significance to that coincidence.

In the opinion of their Lordships, all these considerations point strongly against the exclusive jurisdiction clause falling within the scope of the Himalaya clause. However in support of his submission that the exclusive jurisdiction clause fell within the scope of the Himalaya clause in the present case, Mr. Gross Q.C., for the shipowners, invoked the decision of the Privy Council in *The Pioneer Container* [1994] 2 A.C. 324. That case was however concerned with a different situation, where a carrier of goods sub-contracted part of the carriage to a shipowner under a "feeder" bill of lading, and that shipowner sought to enforce an exclusive jurisdiction clause contained in that bill of lading against the owners of the goods. The Judicial Committee held that the shipowner was entitled to do so, because the goods owner had authorised the carrier so to sub-contract "on any terms", with the effect that the shipowner as sub-bailee was entitled to rely on the clause against the goods owner as head bailor. The present case is however concerned not with a question of enforceability of a term in a sub-bailment by the sub-bailee against the head bailor, but with the question whether a

sub-contractor is entitled to take the benefit of a term in the head contract. The former depends on the scope of the authority of the intermediate bailor to act on behalf of the head bailor in agreeing on his behalf to the relevant term in the sub-bailment; whereas the latter depends on the scope of the agreement between the head contractor and the sub-contractor, entered into by the intermediate contractor as agent for the sub-contractor, under which the benefit of a term in the head contract may be made available by the head contractor to the sub-contractor. It does not follow that a decision in the former type of case provides any useful guidance in a case of the latter type; and their Lordships do not therefore find *The Pioneer Container* of assistance in the present case.

In the event, for the reasons they have already given, their Lordships have come to the conclusion that the Himalaya clause does not have the effect of enabling the shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading in the present case.

Application of the principle of bailment on terms in the present case.

In the light of the principle stated by Lord Sumner in the *Elder Dempster* case at page 564, as interpreted by Fullagar J. in the *Darling Island* case at page 78, the next question for consideration is whether the shipowners can establish that they received the goods into their possession on the terms of the bill of lading, including the exclusive jurisdiction clause (clause 19) - i.e., whether the shipowners' obligations as bailees were effectively subjected to the clause as a term upon which the shipowners implicitly received the goods into their possession (see *The Pioneer Container* at page 340, per Lord Goff of Chieveley). This was the ground upon which Bokhary J.A. [1994] 1 H.K.L.R. 212 (at pages 229-230) expressed the opinion, in his dissenting judgment, that the shipowners were entitled to succeed.

Their Lordships feel able to deal with this point very briefly, because they consider that in the present case there is an insuperable objection to the argument of the shipowners. This is that the bill of lading under which the goods were shipped on board contained a Himalaya clause under which the shipowners as sub-contractors were expressed to be entitled to the benefit of certain terms in the bill of lading but, as their Lordships have held, those terms did not include the exclusive jurisdiction clause. In these circumstances their Lordships find it impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading.

Conclusion.

It follows that the shipowners' appeal against the order of the Court of Appeal refusing a stay of proceedings in Hong Kong must fail. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.

The cross-appeal by the cargo owners relating to the security provided by the shipowners raised a question which arose in the event of the shipowners' appeal being allowed. The present situation regarding the security is that, by a consent order made by the Court of Appeal on 14th September 1993, the cargo owners are entitled to retain the letter of guarantee constituting the security, such security to be available for the purposes stated therein. It was common ground between the parties before their Lordships that, in the event of the shipowners' appeal being dismissed, the cross-appeal would not arise and the cargo-owners should continue to be entitled to retain the letter of guarantee pursuant to the consent order. It follows that no order should be made on the cross-appeal, and their Lordships will humbly advise Her Majesty accordingly.