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WORLD MARITIME UNIVERSITY
Malmö, Sweden

**THE LEGAL STATUS AND CARGO LIABILITY
OF TERMINAL OPERATORS UNDER THE
MARITIME CODE OF THE PEOPLE'S
REPUBLIC OF CHINA**

By

WANG HAIFENG
P. R. China

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

SHIPPING MANAGEMENT

2000

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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Abstract

Title: Terminal Operators' Legal Status and Cargo Liability Under the Maritime Code of the People's Republic of China

Degree: Msc

Terminal operators' cargo liability is a legal vacuum left by transport conventions. Normally, under a through transport contract the relationship between terminal operators and carriers is governed by the terminal contract. But, there is not a contractual relationship between terminal operators and cargo owners. The basic problem is to what extent terminal operators should be liable to cargo owners in case the cargo is lost or damaged while under their control.

In order to determine whether Article 58 (Himalaya Clause) of the Maritime Code of the People's Republic of China applies to terminal operators, their legal status in relation to carriers is examined in various situations. Based on the different services offered by terminal operators, a terminal operator could be an agent, a servant or an independent sub-contractor of carriers, or possess two different legal positions. So, terminal operators can not always be protected from unlimited liability. A series of litigation problems, which might arise therefrom, is identified.

Two devices are frequently used to overcome the above problems, namely a Himalaya Clause and Sub-bailment on term. In order to determine whether these two devices can solve the above problems perfectly, both their effectiveness and limits are analysed.

The most sensitive point with both devices is the amount of limitation of liability. The questions about whether terminal operators should be entitled to limitation of liability and whether the limitation regimes of terminal operators should be uniform with that of carriers are answered.

As recommendations, the following legislative actions are recommended. First, to amend the Maritime Code of the People's Republic of China to increase the amount of limitation of liability of carriers and to make it represent the average weighted unit value of the cargo carried. Second, to enact regulations to formulate terminal operators' cargo liability. Terminal operators should be entitled to the same amount of limitation of liability as the carriers, which is applicable to both action in contract and in tort. The duties owed by terminal operators, who are sub-bailees, to cargo owners should be clearly defined.

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Chapter 1 Introduction

Section 1 The role of terminal operation in shipping

Ports are the critical junctions between major transportation links (Frankel, 1987, p7). They offer services to both vehicles and cargo. The primary function of a terminal is to provide a berth for vessels and loading and discharging cargo onto or from vessels. The secondary function is to be as platforms for intramodal as well as intermodal transport and to provide efficient transshipment infrastructure and service for the efficient flow of cargo. The increased specialisation on the part of shipping has contributed to the emergence of many dedicated terminals. Cargo comes in all types of physical forms—liquid bulk, dry bulk, liquefied or compressed gas, containerised, palletized, or break bulk. More and more terminals dedicate themselves to offer service to a specific type of vessel and cargo.

The specialisation, new automated handling equipment and the adoption of new information technology make terminals more productive and efficient. Consequently, the capacities of terminals are increased and more high value cargo is attracted into shipping. However, the new cargo handling methods are not without problems. Damage and loss of cargo is experienced during the time in port as a result of human error, accidents, poor judgement, poor security measures, lack of training and safety procedures, and pilferage. At the same time, terminals are exposed to higher risks. According to the Technical & Research Report on Damage and Losses in Marine Terminal Cargo Handling made by the Society of Naval Architects and Marine Engineers of the US, “the marine terminals continue to represent the area with the highest accident rates” (1988, p3).

The function of a port is not to provide a separate and distinctive service, but to serve as an integral part of a transport chain that forms an integrated transport system, designed to move cargo from origins to destinations. The terminal operation is most likely linked with the contract of carriage. So, the terminal operators’ cargo liability regime should be considered in the context of carriage.

Section 2 The legislative situation of terminal operators

In contrast to the important role of terminal operators in shipping, the legislative framework of terminal operators is not sound enough to meet the commercial practices. The Hague-Visby Rules and Hamburg Rules say nothing about marine terminals. The International Convention of Carriage of Goods by Road, the International Convention of Carriage of Goods by Rail also do not cover terminal operations. Noticing the loophole left by the international conventions governing different modes of transport, the United Nations adopted the International Convention on the Liability of Operators of Transport Terminals in International Trade in 1994 in order to fill the gap and to unify the terminal operators' cargo liability at the international level. This convention laid down the period of responsibility, the basis of liability, limitation of liability and so on. However, it has received very poor adoption and ratification so far (see Chapter 5). The Maritime Code of the People's Republic of China, whose main legal regimes are inherited from the Hague-Visby Rules and Hamburg Rules left this legal gap open. The legal status and cargo liabilities of terminal operators are a legal vacuum.

Section 3 The problems

The fundamental problem with regard to terminal operators is that there are no regulations to govern the stage before and after carriage when the cargo is staying at the port. The relationship between cargo owners and carriers is governed by the Maritime Code and the contract of carriage. But under a through transport contract, there is not a contract governing the relationship between cargo owners and terminal operators, which makes the legal relationship between cargo owners and terminal operators unclear. This brings problems to both terminal operators and cargo owners. At the cargo owners' side, the questions are whether they can take action against terminal operators in case the cargo was lost or damaged at the terminal; how likely are they to succeed if they take action against the terminal operator? At the terminal

operators' side, the concerns are whether they should be liable to the cargo owners given that they received the goods based on a contract with the carrier; if they are held liable, do the terms in the contract between them and carriers, upon which they agreed to accept the cargo, bind cargo owners?

From a commercial point of view, there are two types of customers for a terminal operator: cargo owners and carriers. A terminal operator may receive cargo from carriers or from shippers. In most cases, especially in container transport, terminal operation is arranged by carriers for the convenience of shippers. Thus, at the starting point, terminal operators accept the cargo on behalf of carriers from the shippers and receive the cargo from carriers after carriage and deliver them on behalf of the carriers to the consignees. Of course, it may be the case that the cargo owners arrange terminal operation by themselves, and they enter into a contractual relationship with both carriers and terminal operators with regard to one shipment. The latter case is not within the discussion of this dissertation, because the legal relationships between three parties are clearly contractual. So, the discussion of this dissertation is on the basis that the period of terminal operation is still within the valid period of the contract of carriage and the terminal operation contract is concluded between terminal operators and carriers under a contract of carriage.

Chapter 2 The legal status of a terminal operator

The legal status of a terminal operator is an area not covered by the Maritime Code. Because the terminal operator was not treated as an independent player during the transport process, there is not a single article dealing with the legal status and legal liability of terminal operators. The carriers' agents and servants are mentioned in many places in the Maritime Code. In Article 58, the defences and the right of carriers to limit their liability are extended to their agents and servants. Article 59 says that carriers' servants or agents will lose the right to invoke Article 56 and Article 57 to limit their liability in case that the loss or damage is caused intentionally or recklessly with knowledge that the loss or damage would probably result. However, the definitions of carrier's agent and servant are not given. The relationship between a terminal operator and the carrier's agent or servant remains unclear. So the Code left the legal position of terminal operators as a vague concept.

Despite the above legislative situation, this problem seems to be addressed in one book called "Interpretation of the Maritime Code of the People's Republic of China" (Interpretation). It is said in the Interpretation that a terminal operator is a type of carriers' agent or servant who can enjoy the benefits of the defences and limitation of the carrier's liability according to Article 58. This interpretation is arguable if it is put under a logical examination.

Section 1 The relationship between terminal operators, cargo owners and carriers

In order to define the terminal operator's legal status relating to cargo liability, the first thing that needs to be looked at is the legal relationships between carriers, shippers and the terminal operators, which are the bases of the liability. Overall, the entire movement of cargo is under the contract of carriage between the carrier and the shipper. Typically, the whole process of the movement of the cargo includes the period during which the cargo is at sea and the periods during which the

cargo is at the loading port and discharging port. In practice, the carriers normally entrust terminal operations to the various terminal operators. So the cargo is not always under the control of the carrier, which means the cargo is under the control of terminal operators when it is at port. The contract of carriage governs the relationship between carriers and shippers. The contract of terminal operation governs the relationship between terminal operators and the carriers. But there is not a contractual relationship between terminal operators and the shippers although the cargo is under the possession of terminal operators at the ports.

With regard to the relationship between terminal operators and cargo owners, different jurisdictions have taken different approaches. The Italian Navigation Code 1942 defined terminal operators are responsible to the consignee as a custodian, and the discharge operation is carried out on behalf of the ship. The French law on marine transport formulates a principle that the stowage company operates on the account of the person who hires it and it is only responsible to this person who has sole action against it; the consignee was not considered as a third party who does not have connection with the contract between terminal operators and the carriers; therefore, the consignee was not entitled to sue the terminal operator even in tort. The German doctrine allows a direct action of the consignee against the stevedores only if the stevedoring company or its employees committed a tortious act; the general conditions of terminal operators do not produce any effect in relation to cargo owners. The Higher Commercial Court of Croatia denied a direct action of the consignee against the stevedore because the bill of lading did not give such a right to the consignee (Cigoj, 1975). In English law, the Carriage of Goods by Sea Act 1924 entitled the stevedores (not warehouse man) to invoke the carrier's defences and limitation against the cargo owner, while the warehouse man might be protected by the law of sub-bailment on term.

It is the author's view that all the above approaches more or less took a one-sided view. They did not take into account the multiplexed role that the terminal operators might play and the complexity of commercial practices. Therefore, the independent legal personality of terminal operators was ignored to some extent, the

doctrines could not be adapted to the commercial reality. The right approach is to look at the commercial operation and legislation from various angles, and then to define the legal relations and legal liabilities appropriately.

Section 2 The distinction between agent, servant and independent contractor

2.1 What is an agent?

According to the “General principles of the Civil Law of the People’s Republic of China”, “an agent shall perform civil juristic acts in the principal’s name within the scope of the power of agency. The principal shall bear civil liability for the agent’s acts of agency.” According to Elizabeth A. Martin MA (Oxon), an agent is “a person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party” (1988, p.14-15). The key words here are “on behalf of the principal” and “within the scope of the power of agency”. An agent does not act for his own account within the scope of agency and he does not assume civil liability for his acts as an agent. Another important feature associated with an agent is that he charges the principals commission (or agency fee) rather than the price of the contract that the agent concludes on behalf of the principals with the third parties.

2.2 What is a servant?

Servant does not appear as a legal concept in Chinese law. According to both the Chinese and English dictionary, a servant is defined as three categories of persons namely “a person employed by another”, “ a person in service of another”, and “a person employed by the government”. Servant is a synonym of “employee”. But why is “servant” and not “employee” used in the Hague –Visby Rules and Hamburg Rules? The question has not received any authoritative explanation so far. In the author’s view, the concept of “servant” is wider than that of “employee”. Servant includes those employees inside the company who normally have a long-term employment contract with the employer and those employed by the employer

temporarily outside the company for the performance of a certain business under the control of the employer, such as stevedores. The latter falls in the category of “a person in service of another”. As a servant, he “does not contemplate that their work might render him legal liability for negligence” (Atiyah, 1988, p392). Instead, the employer will bear the civil liability incurred during his course of performance. It is a tradition that the stevedores are treated as the carrier’s servant in England. The Carriage of Goods by Sea Act 1971 defined that the stevedores are normally the carrier’s servant, and the shipowner or charterer is vicariously liable for the damage done by them. But the stevedores as independent contractors can not be protected by the Himalaya Clause according to the Hague—Visby Rules (Gaskell, Debattista, & Swatton, 1987, p357-358).

2.3 What is an independent contractor?

Another parallel terminology used in Hague-Visby Rules is independent contractor, which has a totally different legal status from agent and servant. An independent contractor is an independent party to the contract who acts on his own account, bears legal liability and is entitled to the performance of the contract.

Section 3 The interpretation of the Hague-Visby Rules

The interpretation of law should not go beyond the intention of the legislator. This terminology, the servant and agent, is inherited from the Hague-Visby Rules and Hamburg Rules. Article 4(bis) (2) of the Hague-Visby Rules says, “ If such an action 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”. In the Hamburg Rules, Article 7 has almost the same wording as above. Article 4(bis) of Hague-Visby Rules expressly excludes the independent sub-contractors, e.g. stevedores, from enjoying the defences and limitation of liability of the carrier. Although Article 7 of the Hamburg Rules does

not expressly say so, it does limit the applicability of this article to only the carrier's agent and servant who is not an independent contractor at the same time. So the intention of the legislator of both rules is to exclude the independent sub-contractor from enjoying the defences and limitation of liability of the carrier.

Section 4 The legal status of terminal operators

In order to examine whether the Interpretation complies with the above intention, the legal status of a terminal operator during the transshipment of cargo should be clarified. Does a terminal operator act as a carrier's agent, a servant or an independent sub-contractor? Depending upon the service offered, a terminal operator may act as an agent, or a servant or an independent sub-contractor, i.e. he possesses different legal positions at the same time.

4.1 The classification of terminal operators

According to the Convention on the Liability of Operators of Transport Terminals in International Trade 1991, terminal operator means "a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage." "Transport-related services include such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing." There is other, different terminology frequently used by different professionals, including container stuffing and stripping, packaging, container and equipment repair, dockage, and wharfage. Wharfage is passing or conveying cargo over, onto or under wharves and the transit sheds built thereon or between vessels or from barge, lighter when berthed at wharf or when moored in slip adjacent to wharf (Port of Morgan City, 2000). Container stuffing and stripping is to put general cargo into or take general cargo out of a

container. Wharfage operation can be included in stevedoring. Container stuffing, stripping and packaging are normally done by a warehouse-man. Besides the above-mentioned services, the other important items are delivery, which includes the documentation of delivering and the physical movement of the goods from the terminal operator's premises to the consignee's premises. For the purpose of this discussion, the container and equipment repair and dockage, which have nothing to do with cargo, is not considered here.

Based on the consideration whether a terminal operator acquires the right of possession of the cargo upon which he offers service, terminal operators can be roughly categorised into two groups. The first group is stevedores, who offer loading, unloading, stowage, wharfage, trimming, dunnaging and lashing services. They do not acquire the right of possession. The second group is warehouse-men, who offer warehousing, storage, container stuffing and stripping, and delivery services. A warehouse-man has the right of possession when the cargo is under his custody. This classification is not definite under all circumstance and they are not mutually exclusive with each other. A big terminal operator may offer many different kinds of services, and its legal status depends on the specific service he is offering at the time of operation. This classification is just for the convenience of analysis.

4.2 Legal status of different types of terminal operators

Warehouse-man

A warehouse-man may act as an independent contractor or an agent of the carrier. Normally he acts as an independent contractor towards the carrier, for he offers warehousing services and consequently charges the carriers for the service offered. But it is also possible that he acts as an agent in case that he offers delivery services. As far as the delivery formality is concerned, it is the carrier's duty to deliver the cargo to the cargo owner under all circumstances. The warehouse man acts on behalf of the carrier to deliver the goods to the cargo owner. Otherwise, if the delivery performed by the warehouse man was in his own name, the consignee could

still claim delivery of the cargo from the carrier even if he has received the cargo he wants, because the carrier owes the duty of delivery to him.

Both the delivery and warehousing are performed by the same person, but the legal implications are different. A warehouse man offers a warehousing service to the carrier as an independent sub-contractor, while he delivers the goods to the consignee as the carrier's agent. The consignee does not care how the goods are delivered and from whom he receives the goods. He cannot claim cargo loss or damage from the person who delivers the goods, he has to claim from the carrier or the shipper. But he does care who stores the cargo. If the consignee can prove the loss or damage is caused by the warehouse man's negligence, then he probably can get full compensation by suing the warehouse man in tort instead of suing the carrier who has the right to limit his liability.

Stevedores

The answer to the question, what is the status of a stevedore, is not uniform. As was said above, in English legal tradition, the stevedores are normally treated as the carriers' servants. In practice it may be agreed that either the charterer or the shipowner shall appoint a stevedore, but it remains the duty of the master to control the stevedore. Even if the stevedore is nominated by the charterer, he is to be employed by and in the service of the shipowner. "For the purpose of the Carriage of Goods by Sea Act 1924, the Stevedores are the carrier's servants, and the shipowner or charterer, as the case may be, is vicariously liable for the damage done by stevedores" (Gaskell, Debattista, & Swatton, 1987, p357-358).

It happens that the stevedore is only a worker hired by the carrier. In such a case all his acts are executed as if they were the carrier's acts. The workers are the carrier's servants. But in most cases the stevedore is not a single employee. It is a firm, which hires its workers at the disposal of the carriers. The workers should be considered as the servants of the stevedoring firm who should be responsible for their acts.

Certainly there are differences between the status of a single worker employed as a stevedore and a stevedore as an independent contractor. The worker relies completely on the instruction of the person who appointed him. The stevedoring firms are professional institutions which execute their profession according to their professional standards (e.g. the London Master Stevedores' Association). Even so, the responsibilities of the stevedores are various. The stevedoring firms seldom bear the whole risk of operation. Some stevedoring firms formulate their general conditions to exempt themselves from any kind of liability. The legal position of these stevedores approaches that of an agent of the carrier rather than that of an independent contractor who should take some degree of risk.

So the conclusion is that a single worker employed as a stevedore by the carrier acts as a servant of the carrier. The stevedoring firms with conditions exempting all liabilities act as agents of carriers; otherwise, they act as independent contractors.

The new development of shipping industry, that is that many large shipping lines are starting to enter into the terminal operation business, makes the terminal operator's position different. The shipping lines prefer to have their dedicated terminal but they may not run all the terminal operations by themselves. The fact is that it is hard to find examples where all the terminal operation activities are operated by a single company, there may be tens to hundreds of terminal operators running business within one terminal. If the terminal operators are independent of the carrier who owns the terminal, they still act as independent contractors. If the shipping company runs terminal operation by itself without establishing an independent legal entity, then the terminal operator itself is the carrier in law, which is equal to say that the terminal operator is the servant of the carrier. This statement is based on the prerequisite that the terminal operation is still within the period of responsibility of the carrier, which is the case of carriage of containerised cargo. If the cargo is non-containerised cargo, then the terminal operation is not within the carrier's period of responsibility. The shipping company should be liable as a terminal operator rather

than a carrier. However, when a terminal operator operated by a carrier offers services to other carriers, his legal relationship with the carriers is the same as being an independent terminal operator. So, the terminal operator may act in different legal status towards different carriers and different types of cargo.

From the above analysis, it is safe to say that a warehouse-man as a terminal operator can be an agent of the carrier, an independent contractor to the carrier, or possesses both legal positions at the same time. When the terminal operators offer other services such as loading, unloading, towage, trimming, dunnaging and lashing, they normally act as independent contractors of the carrier, but some act as agents or servants. As far as the individual performing the tasks is concerned, he might be defined as a carrier's servant if he is in the service of the carrier and under the carrier's control. In this case, servant and independent contractor are not mutually exclusive.

Section 5 Comparison of the liability regimes for different legal status

The significance of the legal status of the terminal operator is that he assumes different liability when possessing different legal positions. The liability regimes for agency, contract, and tort are different according to the General Principles of Civil Law of the People's Republic of China and The Law of Contract of the People's Republic of China.

5.1 Bases of liability

First, the bases of liability are different. Contractual liability is a strict liability. Tortious liability is a fault-based liability and an agent's liability is also a fault-based liability. Article 106 of the General Principles of Civil Law of the People's Republic of China says, "Citizens and legal persons who breach a contract or fail to fulfil other obligations shall bear civil liability. Citizens and legal persons who through their fault encroach upon state or collective property or the property or person of the other people shall bear civil liability." This provision sets the liability

regime for the contractual parties as a strict liability which is independent of the fault on the part of the contractual parties, provided that the contract in question is breached or their obligations laid down in the contract are not fulfilled. While the tortious liability is expressly regulated as a fault-based liability, which means there is not a liability upon the defendant unless the encroachment is caused by his negligence or omission. The agent's liability regime is not specified by the General Principles of the Civil law of the People's Republic of China, but it is said in the interpretation of the General Principles of Civil Law by the Standing Committee of the National People's Congress that the agent does not bear civil liability unless there is a fault on the part of the agent during the course of performing the task of agency. If such a fault is proved, the agent shall be liable to the principal in contract and liable to the third party in tort as well.

5.2 Compensation

Second, the compensation is different with regard to different liability regimes. The most obvious point is probably the economic loss. "It is well established that contractual plaintiff can recover damages in respect of any economic loss which are consequent on that physical or material loss" (Harris, 1988, p218); while "the tort plaintiffs do not have the same rights, they are only entitled to be put in the same position they were in before the tort, which is a different matter altogether" (Atiyah, 1989, P395). The Chinese civil law follows a slightly different approach. The main difference between the liability in contract and liability in tort is on the foreseeable nature of the loss rather than the economic loss. The scope of compensation of both liabilities may include economic loss (indirect loss), but the liability in contract must be foreseeable by the party who breaches the contract at the time of the contract being concluded, while the liability in tort may not necessarily be foreseeable (Wang, 1993, p227). Article 112 of the General Principles of the Civil Law of the People's Republic of China says that "the party that breaches a contract shall be liable for compensation equal to the losses consequently suffered by the other party." The new Law of Contract of the People's Republic of China says that

the party to the contract who failed to perform his obligation or breaches the contractual obligation in the course of performance shall be liable for the compensation for the loss of the other party including the benefit that he could have gained after the contract was performed, but the compensation should not exceed the amount of loss which can be foreseeable at the time the contract is concluded. Article 117 of the General Principles of Civil Law says "Anyone who encroaches on the property of the state, a collective or another person shall return the property; failing that, he shall reimburse its estimated price. Anyone who damages the property of the state, a collective or another person shall restore the property to its original condition or reimburse its estimated price. If the victim suffers other great loss therefrom, the infringer shall compensate for those losses as well." The difference on the foreseeable nature of the loss is also accepted by the common law (Donner, 1999, p46). Another difference between the liability in contract and liability in tort is that the liability in contract only includes damage to the property, while the liability in tort includes personal injury and psychological injury. Therefore, the scope of liability in tort is wider than liability in contract.

5.3 The implication on terminal operators

Because terminal operators are involved in two different legal relations with carriers and cargo owners, they face two different legal liability regimes in respect of one cargo claim. As an independent contractor, the terminal operator assumes strict contractual liability to the carrier, which might be subject to several exceptions and limitation laid down in the contract between them. He assumes tortious liability to the cargo owner if it is proved that the loss or damage was caused by his want of reasonable care which is owed to the cargo owner (in common law) or by his breach of legal obligation imposed by statutes (in Chinese law); otherwise, there is no liability owed by the terminal operator to the cargo owner. This can be illustrated in the following way. Suppose that the cargo is damaged or stolen while under the custody of the terminal operator, the liability is totally different depending on the cause of the incident. If the damage or loss was caused by the servant of the terminal

operator intentionally, it is the terminal operator's responsibility to indemnify the cargo owner's loss; if the cargo was stolen by robbery, then the terminal operator probably is not liable, because there is not a contractual relationship between them and the mere fact that the cargo is in the terminal operator's premises does not evidence that the terminal operator owes the duty of taking care to prevent the cargo from being stolen (in common law) or breach his legal obligation (in Chinese law). This will be explained in detail in Chapter 3, Section 2.

These two different liability regimes impose different liabilities on the terminal operators with regard to one cargo claim. As an agent of the carrier, he does not bear civil liability to both the principal (the carrier) and the third party unless he did something wrong in performing the task of agency. If there is a fault on the part of the terminal operator as an agent of the carrier, then the terminal operator owes a contractual liability to the carrier and at the same time owes the tortious liability to the cargo owner. For example, if the terminal operator mistakenly delivers the cargo to the wrong person without the presentation of the original bill of lading, then he faces two kinds of liabilities, which depends on the approach the cargo owner takes to recover his loss. If the cargo owner sues the carrier for the breach of the contract, the carrier has to compensate the cargo owner's loss up to the limitation of his liability according to the Maritime Code. After that, the carrier should get the same amount reimbursed from the terminal operator on the grounds of his fault as an agent. If the cargo owner sues the terminal operator in tort instead of suing the carrier in contract, then the terminal operator has to compensate the cargo owner for the value of the cargo lost plus the subsequent economic loss suffered by the cargo owner. This distinction between the contractual liability and tortious liability attached to the terminal operator is the same as that when the terminal operator acts as an independent contractor. So the cargo owner always seeks to sue the terminal operator in tort. But the problem is how to settle the possible difference between the compensation that should be paid by the carrier and the terminal operator to the cargo owner, which is caused by the two different contractual liabilities (including

limitations) and the difference between the contractual liability and the tort liability. This will be discussed in Chapter 4 and Chapter 6.

Chapter 3 Cargo liability profile

There is a close relationship between the terminal operator's liability and the contract of carriage. First, both the terminal operation and the carriage activity are in pursuit of the same business adventure—to accomplish the movement of the cargo. Second, the terminal operation, which is ordered by the carrier, is for the fulfilment of the contract of carriage. Third, if the period of responsibility is taken into account, terminal operation is still on the part of the carrier's responsibility which is from the time when the carrier receives the cargo to the time the cargo is delivered to the consignee. For this purpose, the author would like to draw a distinction between responsibility and liability. Although carriers are exempted from liability for the cargo loss and damage which happens before loading and after discharging by the Hague-Visby Rules, and their liability for non-containerised cargo before loading and after discharging is also exempted by the Hamburg Rules and the Maritime Code, carriers' responsibility is not therefore discharged because the contract of carriage is not discharged before the cargo is delivered to the cargo owner.

The terminal operator's liability is not clearly defined by the Maritime Code because there is not even one specific provision dealing with this matter. From the point of view of the doctrine of the privity of the contract, this is not unusual, because the terminal operator is not a party to the contract of carriage. However, the terminal operator is involved in the performance of the contract of carriage in practice and the terms of the terminal operator's business conditions have a strong impact on the cargo owner's interest. At the same time the contract of carriage also has a big influence on the terminal operator's liability, because the terms of the contract of carriage always has some links with the terminal operator's liability.

In this chapter, the author tries to analyse the terminal operator's liability for different types of cargo and compare his liability with the carrier's liability under the provisions related to the contract of carriage of goods in the Maritime Code of the People's Republic of China, hence to identify the existing regulatory problems.

Section 1 Carriers' cargo liability

1.1 Are carriers liable for the cargo loss or damage which happens under the custody of terminal operators?

-- "Catch-all" Clause

Liability for breach of a contract in many cases is strict. It arises quite irrespective of intentional and careless acts. But in some cases a contracting party is entitled to several exceptions. The common ocean carrier under the Maritime Code falls in this category. Basically, a common carrier bears liability subject to several exceptions and limitation towards the cargo owners under the Maritime Code. Article 51(12) states that the carrier shall not be liable for the loss of or damage to the goods which has occurred during the period of carrier's responsibility arising or resulting from any cause arising without fault of the carrier or his servant or agent, which is the so called "catch-all" clause. The question here is whether the carrier should be liable to the cargo owner if the cargo loss or damage happens under the custody of the terminal operators. Some academic writes hold the opinion that the carrier is only liable for his negligence in choosing the sub-contractor. But this opinion was challenged by Professor Wilson. The head contractor is liable for the faults or omissions of any independent contractor engaged in the performance of the contract (Wilson, 1996, p194).

The interpretation of Article 51(12) has great significance in respect to carriers' cargo liability. According to this provision, the carrier can avoid liability for any damage or loss not falling within the named exceptions by Article 51 providing that he can establish that such loss or damage did not result from his own fault or negligence nor did it result from any fault or negligence on the part of his servant or agent. "Subsequent cases have established that the employees of an independent contractor engaged by the carrier must be regarded as the servants or agents of the carrier for this purpose" (Wilson, 1998, p261). Otherwise, a contractual carrier could exempt all the liabilities from the cargo loss or damage caused by the actual carrier, which would be ridiculous.

The point here is that the carrier should be liable for the loss of or damage to the cargo caused by the independent terminal operator's or his employees' fault or negligence. If the loss or damage is caused without the terminal operator's or his employees' fault or negligence, the carrier can avoid liability. So, if a longshoreman of a stevedoring firm employed by the carrier stole the cargo during the operation, then the carrier is liable to the cargo owner, while if it was stolen by somebody else from the ship during the loading or unloading, the carrier can avoid liability if he can prove that the ship officers and crew have taken all reasonable care. This was the case in *Leesh River Tea Co v. British India SN Co*, (Lloyd's Rep. [1966] 1, 450-462). If the cargo was stolen or damaged in the warehouse at the terminal, the carrier should be liable if he can not prove that the loss or damage did not involve the warehouse-man's negligence. Again, the burden of proof is on the part of the carrier. It seems the only way to prove that the loss or damage does not involve terminal operators' fault and negligence is to establish that it was caused by other reasons. If the carrier cannot explain why and how the loss or damage occurred, it is difficult to see how the burden of proof is discharged.

1.2 Different liability regime with regard to different types of cargo

The carriers have different liability with regard to different types of cargo, which is a result of the different liability regimes of the carrier under Article 46 of the Maritime Code. It is said in Article 46,

The responsibility of the carrier with regard to goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading until the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerised goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom. During the period the carrier is in charge of the goods,

the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this section.

According to the above rules, the carrier is responsible for the loss of and damage to the containerised cargo over the whole period including the time the goods are at ports before and after the carriage during which the goods are under the control of terminal operators. So, carriers are liable for the loss of or damage to the goods carried in containers even if it happens at ports after the shipper delivers the goods to the carrier at the port of loading and before the carrier delivers the goods to the consignee at the port of discharging. The carriers assume liability to the cargo owners even when the goods are lost or damaged at ports, and even if it is due to the terminal operator's negligence or omission.

Towards the non-containerised cargo, the carrier's liability is different from his liability to the containerised cargo. According to Article 46, time in port is not within the carrier's responsibility period. The carrier is only liable for the non-containerised cargo loss or damage when the loss or damage happens on board the ship. So if loss of or damage to the cargo happened at ports the liability is not on the part of the carrier, although it is still within the valid period of the contract of carriage between the carrier and the shipper. This provision is inherited from the Hague Rules and Hague-Visby Rules. Why is the period of liability of the carrier different with regard to containerised cargo and non-containerised cargo? From the point of view of the contractual relationship, the period of liability should not be different with regard to the different types of cargo provided the dispute arises from the contract in question. No matter which kind of cargo it is, the carrier should be liable for the cargo loss and damage from the time he receives it to the time he delivers it to the consignee. Although in practice, most non-containerised cargo is delivered and redelivered between the cargo owner and the carrier along the shipside, which means the time the cargo is at ports is outside of the scope of the contract of carriage, it does not make any sense in terms of the legal system; the rule governing the carriage of containerised cargo should still apply. Furthermore, there is still the possibility, at least in theory, that the non-containerised cargo such as break bulk is

treated in the same way as containerised cargo by the shipper and the carrier. In case the non-containerised cargo carried is under the total control of the carrier from the time the shipper delivers it to the carrier until the time the carrier redelivers the cargo to the consignee, which includes the time that the cargo stays at terminals, this provision becomes illogical. On the other hand, there is a barrier for the carrier and the shipper to come to an agreement of carriage of non-containerised cargo in the same manner as dealing with containerised cargo. With the spread of the logistics and supply-chain management concept, this trend is becoming a more popular and practical commercial activity.

Section 2 Terminal operators' cargo liability

In cases terminal operators act as agents or servants of the carriers, they are entitled to the carrier's defences and limitation of liability according to article 58 of the Code. So what is concerned here are their liabilities when they act as independent contractors.

On the one hand, terminal operators face contractual liability to the carrier; on the other hand, terminal operators might face tortious liability to the cargo owners, if the cargo loss or damage happens at ports when the cargo is under his control. This does not make any difference between containerised cargo and non-containerised cargo. There are two problems here.

First, is it possible that the terminal operator is liable to the shipper in tort? Second, what are the conditions under which the terminal operator should be liable in tort to the shipper? In the following, these two questions will be addressed.

2.1 Is it possible that terminal operators are liable to cargo owners in tort?

It is arguable whether it is possible that a terminal operator is liable to the cargo owner in tort with whom he has no contractual relationship. Under the Chinese law, there are two basic civil liabilities: contractual and tortious. So it is certain that it

does not mean that one person will not be liable in tort because he is not involved in a contractual relationship with the counter parties. The peculiarity with the terminal operators is that they receive the cargo for custody through contracts with carriers. The essential question usually is whether it is permissible, or legitimate, for the court to impose tort liability on parties who are involved in some contractual relationships, not necessarily with each other, in such a way that the tort liability may add to the burdens or obligations created by the contract (Atiyah, 1988, p389).

The typical case in which the terminal operator is involved is that shipper A's goods are carried by carrier B, and B subcontracts the storage and delivery function to terminal operator C. During the period of storage, the goods are stolen. Should the terminal operator C be liable to shipper A? There are two fundamental principles clashing here: on the one hand, the terminal operator ought not to have imposed upon him a liability growing out of the contract between him and the carrier, to compensate a plaintiff (the shipper or consignee) who is not a party to the contract and paid nothing to him; and on the other hand, the shipper ought not to be prejudiced in claiming damages by the terms of the contract between the terminal operator and the carrier. If the shipper is allowed to sue the terminal operator, he seems to be building his case on a contract to which he is not a party. If the shipper is barred from suing, it seems that the contract between the terminal operator and the carrier somehow operates to protect the terminal operator from liability.

In common law, the above problem was settled by the important decision in *Donoghue V. Stevenson*. The consumer (who was not the buyer) of the ginger beer with the snail in the bottle was there held entitled to sue the manufacturer for injuries suffered by her from drinking and seeing the unpleasant contents. More generally, manufacturers of defective goods now come to be held liable for negligence to members of public injured through that negligence, even though the plaintiff was not a party to the contract under which the goods were made or sold to the public. The existence of these contracts was, said the majority of the House of Lords, not a ground for denying liability in tort to the plaintiff (Atiyah, 1988, P390,).

So the liability in tort can proceed disregarding the contractual relationship. It is possible that the terminal operator might be liable to the cargo owner even if there is no contractual relation between them. In case the cargo is lost in the custody of the terminal operator, should the terminal operator be liable to the shipper in tort? This question is answered by the law of negligence.

2.2 Conditions for tortious liability

In common law

Probably the single most important area of tort liability today is that of negligence, concerned with the liability for personal injury and property damage not caused intentionally, but through the defendant's negligent acts or omissions. There are specific conditions for liability based on negligence. In common law, the requirement that fault should constitute the basic condition of liability in negligence received its well-known formulation in 1932 in the case of *Donoghue v. Stevenson*, which is mentioned above. The relationship between the plaintiff and the defendant was explained by Lord Atkin in the House of Lords as follows:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (Harris, 1988, p210-211).

This formulation was developed through later cases and formed the basis of the modern law of negligence generally in common law. The key words in the above quotation from Lord Atkin's judgement are "duty", "reasonable care", and "foreseeable". So, in order to claim in the name of tort, the above requirements must be satisfied. Firstly, the claimant needs to establish the duty of care owed by the

defendant. He must prove that the neighbourhood relationship between him and the defendant exists. Secondly, he needs to prove the breach of that duty by the defendant. He has to collect the evidence to prove that the defendant acted in a manner in which a reasonable person, in the circumstance would not act. Thirdly, he needs to show that the injury, damage, or loss was foreseeable.

The question whether the terminal operator should be liable to the cargo owner with regard to the loss of or damage to the cargo under his custody in the terminal should be examined by using the above principles. If there existed a duty of care, the loss or damage was foreseeable and the terminal operator acted in an unreasonable manner, then his liability in tort to the shipper is clear. Otherwise, the cargo owner can not recover his loss or damage from the terminal operator in the name of tort. The latter was the situation in the case of *Johnson Matthey & co. LTD V. Constantine Terminal LTD. and International Express Co. LTD*. In this case, an action was made by the plaintiffs, Johnson Matthey & Co. Ltd., the owners of a metric ton of silver worth £24,514, against the defendants, Constantine Terminals Ltd., under whose custody the silver was stolen, and International Express Co, Ltd., who had made arrangements for the carriage of the silver from the plaintiffs' premises to Milan. The court held that the plaintiffs' claim failed against both defendants. The plaintiffs' contract with International Express was on the terms of the Standard Trading Conditions of the Institute of Shipping and Forwarding Agents, 1956 edition, which includes the following provisions:

11. The company shall not be liable for loss or damage to goods unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful neglect or default of the Company or its own servants.
12. The Company shall not in any circumstance be liable for damages arising from loss of market or attributable to delay in forwarding or in transit or failure (not amounting to wilful negligence) to carry out the instructions given to it.

20. Pending forwarding and delivery, goods may be warehoused or otherwise held at any place or places at the sole discretion of the company at the owners' risk and expense. (Lloyd's Rep. P218. [1976] Vol. 2)

According to the above clauses, International Express could exempt itself from liability due to the loss of the silver happened in the custody of Constantine Terminal. So the plaintiffs' claim against Constantine Terminal was what the action was really about. Their defence was based upon the terms of their contract with International Express, a contract to which the plaintiffs were strangers. That contract was on the terms of Constantine Terminals' "Conditions of Handling", which provided as follows:

1. The rates charged or quoted by the Company are upon the express conditions that the person or company with whom the contract is made (hereinafter called "the customer") is either the owner or the authorised agent of the owner of the goods or property and accepts for himself or itself and all other parties interested therein the conditions hereinafter contained.
2. Goods are received handled stored carried and delivered (whether by the Company or its contractors) and all services are rendered entirely at the owners' risk and the Company will not accept responsibility for any loss or damage unless such loss or damage occurs whilst the goods are in the actual custody of the Company and under its actual control and unless such loss or damage is due to the wilful neglect or default of the Company or its own servants.
3. In no case shall the liability of the Company exceed the value of the goods or sum at the rate of £50 per ton of 20 cwt. of goods lost or damaged, whichever shall be the smaller. (Lloyd's Rep. P218. [1976] Vol. 2)

In this case, the judge held that Constantine Terminal failed to use all

reasonable care and skill in the preservation and custody of the silver, but such a failure to use reasonable care did not amount to wilful neglect or default. So the above terms were able to provide Constantine Terminal with a complete defence.

In Chinese law

The conditions for imposing tortious liability are a controversial topic in civil law. The above approach is different from the Chinese way to determine the tortious liability. According to the Chinese legal tradition, there are three conditions for imposing tortious liability. First, the defendant must have committed an act, which breaches his legal obligations imposed by statute. Second, there must be a fact that a harmful result happens on the part of the plaintiff. Third, there must be a causal link between the illegal act and the harmful result. In the case of *Johnson Matthey & co. LTD v. Constantine Terminal LTD. and International Express Co. LTD.*, beside the second condition, neither of the other two is satisfied. The first condition is not satisfied because there is neither legislation nor a contract imposing such an obligation on the Constantine Terminal to prevent the cargo from being stolen. Although the Law of Contract of the People's Republic of China regulates that the warehouse-man has the obligation to take care of the cargo in his warehouse, but this obligation is based on the contractual relation between both parties. There is no contractual relation between cargo owners and warehouse-men, the obligations imposed on warehouse-men by the Law of Contract do not apply to the Constantine Terminal. The Constantine Terminal's breach of such obligations does not constitute a tortious action to the cargo owner. The third condition is not satisfied because the main reason for the cargo loss is the stealing action of somebody else, the Constantine Terminal failure to take reasonable care is only a contributory condition for the loss of cargo. The tort was committed by the person who stole the cargo rather than Constantine Terminal. So the Constantine Terminal is not liable in tort to the cargo owners. If the silver was stolen by the Constantine Terminal's employee, then the Constantine Terminal is liable to the cargo owner in tort.

2.3 The applicability of terms in the sub-contract

The fundamental problem in the above case was whether the clauses were applicable. There was no contractual relationship between Constantine Terminal and the plaintiffs. Under the doctrine of privity of contract, the above clauses were not applicable. But it could be solved by the law of bailment on term, which will be discussed later. In the Chinese legal system, it seems this is an insurmountable problem. There are two basic civil liabilities, namely contract and tort. Neither of these two legal regimes can embrace this kind of relationship. Although the Chinese law does not have a “privity of contract” as stringent as the English rule, a clause which is detrimental to a third party is not enforceable. (A clause which is in the favour of a third party is valid.) In this case, Mr. Bowsher, who appeared on behalf of Constantine Terminal, accepted that if the plaintiff can sue in negligence without alleging a bailment, the clauses will not protect the defendant (Lloyd’s Rep. P219. [1976] Vol. 2). The present plaintiffs were in a quite different situation. The judge held that the mere fact that the silver was in the premises of Constantine Terminal did not give rise to any duty on their part to take care of it and the further fact that it was stolen from those premises does not provide any evidence of breach of any duty owed by them to the plaintiff. Constantine Terminals did not have the obligation to take a positive step to prevent the silver from being stolen. The silver might have been put in their premises without Constantine Terminals’ acknowledgement or consent in which case Constantine Terminals owes not duty of care to cargo owners.

In order to find a cause of action, the plaintiffs has to establish a relationship between Constantine Terminal and the silver which involved a duty of care. This could only be done by alleging and proving that the Constantine Terminals held the silver from International Express, which was upon the terms mentioned above. In doing so, the plaintiffs were forced to rely upon the terms laid down in the contract between Constantine Terminal and International Express, which provided full defence to Constantine Terminal.

Section 3. Comparison of the terminal operator's liability with the carrier's liability

The carrier and the terminal operator assume different kinds of liability towards the same cargo claim in case the cargo loss or damage happens at ports. With regard to containerised cargo, the carrier is liable to the shipper in contract and the terminal operator might be liable to the shipper in tort; with regard to non-containerised cargo, the carrier is not liable to the shipper, while the terminal operator may still be liable in tort. From the standpoint of the shipper, for the containerised cargo loss or damage, there are two ways available for him to remedy his loss. One way is to sue the carrier for breach of the contract, and another way is to sue the terminal operator in tort. For the non-containerised cargo loss or damage, it seems there is only one way available for the shipper, which is to sue the terminal operator in tort, because the carrier is not liable for cargo loss or damage happening at ports according to Article 46.

The problem is that the liability in tort and the liability in contract are two entirely different kinds of liability. The ideal result is that the plaintiff will get the same amount of compensation so as to keep a balance among the carrier, the cargo owner, and the terminal operator. But the present legal regime created by the Code is far away from this goal. The comparison of the liabilities of the carrier and the terminal operator should be dealt with separately with regard to containerised cargo and non-containerised cargo.

3.1 Liabilities for containerised cargo

With regard to containerised cargo, the carrier is definitely liable if he is unable to prove the loss or damage is caused without terminal operators' fault. Whether the terminal operator is liable or not depends on whether the cargo owner can prove that the loss or damage is caused by the terminal operator's illegal act, which breaches his duty, imposed by statute. If the terminal operator is proved to be liable to the cargo owner, then there are two remedies available to the cargo owner—

the compensation from the carrier based on contract and the compensation from the terminal operator based on tort. As analysed in the previous chapter, there is a difference between them, which is the foreseeable consequential economic loss. Another point here is that the carrier can limit his liability while the terminal operator cannot enjoy the right of limitation of his liability, which is a tortious liability when he acts as an independent contractor. That is why the cargo owners try to avoid claiming contractual compensation, but sue the terminal operator in tort instead. If the cargo owner fails to prove that the terminal operator is liable, the carrier has to pay compensation to the cargo owner at first, and then claims indemnity from the terminal operator according to the contract between them. The problem here is whether the liabilities defined in the contract of carriage and the contract of terminal operation are uniform or not. The answer entirely depends on the actual situation, that is the terms in both contracts. However, it is also influenced by the legislation, which will be discussed later.

3.2 Liabilities for non-containerised cargo

If loss or damage happens to non-containerised cargo, according to Article 46 of the Code, the carrier is absolutely not liable. For the terminal operator, his liability profile is the same as that in the case of containerised cargo. In case the plaintiff fails to prove that the terminal operator is liable in tort, then there is no way for the cargo owner to recover his loss which means that nobody is liable rather than that the liable parties can exempt themselves from liability. This is due to the provision about the period of carrier's responsibility in Article 46, which is totally unfair to the cargo owner in legislation. So, with regard to the non-containerised cargo loss or damage, the only way for the cargo owner to recover his loss is to prove that the terminal operator is liable in tort. This burden of proof adds extreme difficulties to the cargo owner for the cargo was under the full control of the terminal operator at the time the cargo was stolen or damaged.

There are several exceptional situations to the above normal case. If the terminal operator is within the same legal entity as the carrier, then the terminal

operator acts as the carrier's servant. According to Article 58, the terminal operator can enjoy the limitation of liability and the exemption from liability. If the terminal operator is involved in the delivery service, there are two kinds of liabilities attached to him. In case the cargo loss or damage is caused by the mistake in the documentation made by the terminal operator, then the terminal operator can limit his liability as an agent of the carrier. In case the loss or damage is caused during the movement from the terminal operator's premises to the consignee's premises, the terminal operator acts as an independent sub-contractor. His liability is then the same as those discussed above.

So, the problems arise rather when the terminal operators act as agents or servants of the carriers than when they act as independent contractors. The problems in respect of one cargo claim can be classified into three types. First, there are two different indemnities available to the cargo owners, and non-containerised cargo owners face the dangerous situation that he might not be able to recover his loss from either the carrier or the terminal operator. Second, there is a possibility that the carrier gets unjust enrichment through circular litigation due to the difference between the two contractual liabilities and two different limitation regimes. Third, whether the contract between the terminal operator and the carrier binds the cargo owner is uncertain; if it does not bind, then the terminal operators face unlimited liability.

Chapter 4 Himalaya Clause and Bailment on Term

Section 1 The Himalaya Clause

In order to avoid the carrier's exceptions and limitation of liability, cargo owners always attempt to sue those persons who had performed the service, including the carrier's servants, agents and independent sub-contractors. To protect the agents, servants, and independent sub-contractors from unlimited liability, a Himalaya Clause is always inserted into the contract of carriage.

1.1 What is a Himalaya Clause?

Himalaya Clauses were developed to undo the tort liability of parties in the maritime transport of goods and people not governed by the contractual relation of cargo owner and carrier. The name of this clause came from a famous case, which involved a passenger on board the ship called "Himalaya" who sued in tort the master and bosun of the ship on which he was injured rather than the contractual carrier. As a result of the court's failure to extend the exculpatory contract provisions to the master and the bosun, they were held liable to the injured passenger in tort. Thereafter, elaborated exculpatory provisions to benefit servants, agents and stevedores were added to ocean bills of lading and the Himalaya Clause doctrine was recognised by the House of Lords under agency theory in *Midland Silicones, Ltd. v. Scruttons Ltd.* [1961] 2 Lloyd. Rep.365. (Larsen, Sweeney, Falvey, & Zawitoski, 1994, p341).

Nowadays, the Himalaya Clauses have been recognised by international conventions and national legislation. For example, the Hague-Visby Rules Article 4(bis) (2), Hamburg Rules Article 7 and Article 58 of the Maritime Code of the People's Republic of China, all give effect to the Himalaya Clauses. So under the Maritime Code, the Himalaya Clause does not need to be inserted into a contract of carriage any more to protect the carrier's agents and servants.

As far as independent terminal operators are concerned, as analysed in Chapter 3, Article 58 of the Code cannot provide protection for them. So, properly drafted Himalaya Clauses, which expressly extend the benefit of exemption and limitation to independent sub-contractors, still need to be inserted into the contract of carriage to protect terminal operators.

1.2 Problems with the Himalaya Clauses

1.2.1 In common law

The enforceability of Himalaya Clauses contained in bills of lading or other transport documents is a very controversial topic in the common law jurisdictions. The strict rule of the “doctrine of privity of contract” does not allow a third party who is a stranger to the contract to rely on the terms contained in the contract. So, the Himalaya Clauses have no effect on the carrier’s agents or servants or the independent sub-contractors even if they are expressly included in the Himalaya Clauses under such a rule. However, this strict rule was circumvented by the “agency theory” created by Lord Reid in *Scruttons Ltd. V. Midland Silicones* (Powles, 1979). According to the agency theory, the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that those provisions should apply to the stevedore. The aim of the agency theory is to bring the agents, servants or independent sub-contractors and the cargo owners into a contractual relationship, hence to overcome the obstacles created by the doctrine of privity of contract in invoking the Himalaya clauses.

However, there are still some difficulties with the development of this theory. First, the agreement between the carrier and the shipper does not amount to an offer given by the shipper to the carrier’s agents, servants or independent sub-contractors. Further, there is no consideration furnished by the carrier’s agents, servants or independent sub-contractors at the time the contract of carriage is formed. Second, it is difficult to determine when and how the offer and acceptance are accepted by the shipper and the carrier’s agents, servants or independent sub-contractors. If the acceptance from the servants, agents or independent sub-contractors takes place at

the time of receiving or unloading of cargo, that amounts to saying there is no agreement between the agents, servants or independent sub-contractors and the shipper before this time. The offer from the shipper is not accepted until the unloading or receiving of the cargo by the servants, agents and independent sub-contractors. Third, it is doubtful whether a mere exemption and limitation clause can form a contract. The carrier's agents, servants and independent sub-contractors are under no contractual obligations to the shipper with regard to the loading, unloading and safekeeping of the cargo and have no right to claim against the cargo owner for freight, expenses or other disbursements.

1.2.2 In Chinese law

In the Chinese legal system, there is not a strict rule like the “doctrine of privity of contract” in common law. If both contracting parties agreed to give a benefit to a third party, then the respective clause is enforceable. So the terminal operators do not need the protection by virtue of the agency theory. However, there are other existing problems.

First, terminal operators can not be protected by the Himalaya Clauses with regard to the loss of or damage to non-containerised cargo after unloading and before loading. According to Article 46, the responsibility period of the carrier with regard to non-containerised cargo is from the time of loading to the time of discharging. So before loading and after unloading when the non-containerised cargo is under the control of the terminal operators, the carrier is not responsible and liable for the cargo loss and damage. Because there is no liability and limitation of liability attached to the carrier when the cargo stays at the terminal, there are no benefits of limitation of liability and exemption available to the terminal operator.

Second, the terminal operators might limit all different kinds of liabilities by virtue of Himalaya Clauses and Article 59 of the Maritime Code, which is unfair to the cargo owners. The wording used in Article 59 is almost the same as that in the Hamburg Rules, which makes the limitation of liability of both the carrier and the

agents, servants and independent sub-contractors practically unbreakable. Article 59 provides,

The carrier shall not be entitled to the benefit of limitation of liability provided for in Article 56 or 57 of this Code if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the carrier done with intention to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

The servant or agent of the carrier shall not be entitled to the benefit of limitation of liability provided for in Article 56 or 57 of this Code if it is proved that the loss, damage or delay in delivery of the goods resulted from an act or omission of the servant or agent done with intention to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

There are two extreme difficulties for the cargo owners to break this limitation regime. One is that the burden of proof is on the part of the cargo owners. It is very difficult for the cargo owners to prove that the loss or damage is caused by the terminal operators' act or omission because the cargo is under the control of the terminal operators. The other is that even if the cargo owners can prove the loss or damage is caused by the terminal operators' act or omission, it is more difficult to prove that the terminal operators acted with intention or recklessly with knowledge. So the result is that the terminal operators can limit their liabilities in most cases even if the cargo is stolen or damaged by the terminal operator's employees.

Third, it is arguable whether the Himalaya Clauses in the contract of carriage bind the consignee or not in case the consignee sues the terminal operators in tort. According to Article 41 of the Maritime Code, the consignee is not a party to the contract of carriage. Article 41 says, "A contract of carriage of goods by sea is a contract under which the carrier, against payment of freight, undertakes to carry by

sea the goods contracted for shipment by the shipper from one port to another”¹. It is said in Section 5 of Chapter 4 of the Maritime Code that the consignee should give notice of loss or damage upon delivery to the carrier, but the legal position and interest of the consignee to the contract of carriage is not clearly defined by the Code. So the consignee might contend that the Himalaya Clauses do not bind him when he seeks to sue the terminal operators in tort.

Section 2 Bailment on term

In case there is no fault on the part of the terminal operators or the cargo owners are not able to prove such a fault with regard to the cargo loss or damage, e.g. the cargo was stolen from the terminal operator’s warehouse at night, it seems that the Himalaya clauses are not needed any more because the cargo owners can not make the terminal operators liable. In this kind of case, it seems unfair to the cargo owner that his right of suing the terminal operator is blocked by the lack of proof of the terminal operators’ negligence, or by the claim that the terminal operators owe no duty of care to the cargo owners. Under tort, an individual is liable under clear rules of law imposed upon him for a whole range of actions, and is liable to virtually all neighbours, to everyone, yet to no one in particular. However, in case the cargo is stolen or damaged under the custody of the terminal operators, they are responsible to a particular person—the cargo owner. But there is not a contractual relationship in between. The question is how to define their relationship. In order to make the terminal operators liable, a legal relationship must be established between the cargo owners and terminal operators, which is out of contract and tort. That relationship is bailment in both common law and civil law.

2.1 Bailment in general

¹ There is an argument that the contract of carriage is between the carrier and the consignee rather than the shipper under an FOB sale contract. In this case, the buyer (consignee) pays the freight and takes the risk after the cargo is loaded on board. The seller (shipper) arranges loading on behalf of the buyer.

2.1.1 What is bailment?

According to Professor Palmer, the term Bailment is derived from the French word “bailer”, which means delivery. The person who delivers the chattel is the bailor, the person who takes delivery is the bailee (1991, p1-2). It is a compendious expression to signify a contract resulting from delivery. The law of bailment lays the foundation of many commercial contracts, and, therefore, is entitled to receive a distinct and independent consideration. It is of perpetual, although tacit, reference in the law of carriage and factorage (Story, 1870, p1-4). Joseph Story in the preface of his book-- the Story of Bailment indicated that the branch of this jurisprudence-- law of bailment originated in Roman Law; however, as a rich legal resource, it was ignored by many lawyers.

There are several different definitions of bailment in history. Sir William Jones has defined bailment to be “A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions as soon as the purpose for which they are bailed shall be answered”(1836, p.2). He has again in the closing summary of his essay, defined it in language somewhat different, as “A delivery of goods in trust, on a contract express or implied that the trust shall be duly executed, and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed or be performed” (1836, p.117). Joseph Story commented that each of these definitions seems redundant and inaccurate. Both of these definitions suppose that the goods are to be restored or redelivered, but in a bailment for sale, for storage, or for safekeeping, no redelivery is contemplated between the parties. Mr. Justice Blackstone has defined a bailment to be “A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee.” It is doubtful whether a faithful execution constitutes an essential or proper ingredient in all cases of bailment. Again, Joseph Story defined that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust (Story, 1870, p1-5).

According to Professor Palmer, bailment is created by one person's knowing possession of another person's goods; whether there is an express or implied contract and whether there is a consent from the bailor are irrelevant (1991, p3-50).

Bailment is the commonest transaction of daily life provided that the transaction of property or property right is involved. In many respects, bailment stands at the point at which contract and tort converge. In its standard form, it represents a conveyance of personal property, created by contract and enforceable in tort. Bailment, therefore, partakes of both phenomena and its remedies may correspond with remedies available under other forms of actions. But it retains a separate legal personality with much to distinguish it from other concepts (Palmer, 1991, p1).

2.1.2 Bailment and contract

So far, all the above definitions assumed that a valid and enforceable contract was essential to the creation of a bailment. However, if the above assumption is true, it is hard to see any role that the law of bailment can play, because the contractual relationship is governed by the law of contract and the terms in the contract in question. Of course, most bailments arise from a contract and there are heavy overlaps between bailment and contract. From the historical point of view, the identification of bailment with contract is unsound, but bailment is a much older concept than contract; as "Professor Carnegie has observed, there was a relatively fully-fledged law of bailment at a stage when the law of contract had hardly achieved an embryonic existence" (Palmer, 1991, p20).

There is a wide variety of contexts in which a bailment may exist without a contract inter parties. Professor Palmer distinguishes contract and bailment by referring to the following aspects:

1) Incapacity of bailor

There may be a relationship of bailor and bailee although the bailor is drunk, or a mentally disordered person, or an infant, at the time the bailment was created.

2) Failure of condition precedent

The possessor of a chattel may be liable as a bailee for its safety although the chattel was delivered in pursuance of a contract which is unenforceable through the failure of some stipulated anterior event.

3) Expiry of contract

A person may be liable as a bailee to the cargo owner with regard to the undelivered cargo after the period of responsibility defined by the contract of carriage is expired.

4) Lack of intention to create legal relations

The fact that certain terms in the bailment are voidable because the parties did not intend to enter into a binding contract does not detract from the fundamental character or status of those parties as bailor and bailee. The bailee will still be answerable for the safety of the goods, because this is an obligation, which does not depend exclusively upon contract.

5) Lack of privity

There may be a subsisting contract in relation to the goods. In this event, the owner may still be entitled to proceed against the possessor as the bailee of the goods and the bailee may owe to him all the duties which are inherent in the bailment relation, e.g. the cargo owner and the warehouse-man.

6) Lack of consensus

It is established that the finder owes substantially the same duty in relation to the chattel as an ordinary consensual bailee. Another example is the sub-bailment, where the ultimate possessor of the goods takes delivery of them from someone else rather than the owner. It is now established that a delivery of this kind may give rise to a bailment relation between the ultimate possessor and the owner, although there is neither contract, agreement or even communication between them.

One contractual feature of bailment which is essential to the bailment, is the knowing possession of another's chattels by the bailee. According to Professor Palmer, knowing possession of chattels on part of the bailee is an ingredient of the bailment relation. First, a bailee without knowing possession of another's chattels does not take into his possession the chattels of another; the chattel is thrust upon

him and into his possession independently of any conduct or desire on his part. Secondly, the bailee without knowing possession of chattels is under a duty to redeliver the goods only when he is demanded for their surrender. Thirdly, the traditional view of a bailee without knowing possession denies that he is under any duty of care towards them unless he chooses reckless damage. Thus it could scarcely be contended that he owes any responsibility to safeguard them at all (1991, p40-43). But the functional value of bailment as a distinctive source of obligation is to impose duties that would not otherwise exist. The bailment without knowing possession of chattels on the part of the bailee would not comply with these criteria.

2.1.3 Bailment and tort

It has been demonstrated that a bailment may exist independently of contract, and, therefore, give rise to remedies that cannot be characterised as contractual. This realisation has often induced a statement that a non-contractual bailment gives rise solely to remedies in tort. If this conclusion was true it would effectively reduce the importance of bailment in the legal field, for the duty regime of bailment could be defined by the law of tort. In fact, the liability of a bailee may be significantly different from that which would be imposed under the general law of tort (Palmer, 1991, p44-70).

1) Origins of duty

Tortious duties are owed to persons generally, whereas duties of a bailee are owed to his bailor. Tortious liability is primarily established by law, irrespective of the consent of the parties, whereas liability under a bailment is primarily fixed by the parties themselves. A bailee enters into a bailment relation by himself, not by law. This point can be illustrated by the doctrine of “sub-bailment on term”. One example is that a terminal operator as a sub-bailee, received goods from a carrier by means of e.g. a contract of sub-bailment, limiting his liability for loss of goods towards the head bailor—the cargo owner, with whom he has neither contract, agreement, nor communication. Even if the cargo owner has forbidden the carrier (bailee) to enter into a contract of sub-bailment, it seems that the cargo owner will be bound by the

terms of sub-bailment if he sues the terminal operator in breach of the sub-bailment. The relationship between the cargo owner and the terminal operator is a non-contractual bailment, but the duties of the terminal operator is set by himself by virtue of the terms in the sub-bailment contract upon which he received the cargo as a sub-bailee.

2) Special or peculiar duty

A certain liability would not arise if there were not a bailment between the parties, even though the defendant committed a breach of reasonable care, which caused the plaintiff's loss. Perhaps the best example is the duty to protect the goods from theft without a contract between the two parties. As a general rule of tort, there is no such duty imposed on the defendant (The case *Johnson Martthey v. Constantine Terminal Ltd.* is a good illustration). It is most unusual to find decisions, which impose such liability other than by way of contract or through the fact that the defendant is a bailee. In Chinese law, such a duty is also not imposed upon the bailee according to the law of tort because there is no illegal act on the part of the bailee. But the liability of a bailee for the theft of goods, which he or she has accepted into his custody, does not depend upon a contract. In case there is not a contract between the two parties, e.g. the bailment is gratuitous or the plaintiff and the defendant are respectively head bailor and sub-bailee, bailment can provide a valuable solution.

3) Burden of proof

In an action for negligence the general rule is that the plaintiff must prove the breach of the duty of care on the part of the defendant, which caused the loss. This has been discussed in the previous chapters. In Chinese law, the plaintiff must prove that the defendant has committed an illegal act, which caused his loss or damage. When goods are damaged or lost while in the possession of the bailee, the above rules are displaced and the bailee must prove that either he has taken all reasonable care of them or his failure did not contribute to the loss or damage in order to escape his liability. Its justification lies in the fact that the bailee is in possession of the goods, he is best able to provide an explanation for the misadventure and he is most likely to have been at fault if such an explanation is not forthcoming.

4) Exclusion clause and limitation clause

As was discussed above, an exclusion clause and a limitation clause may take effect between a principal bailor and a sub-bailee although there is not a contract or agreement between them. This consequence may follow upon two distinct situations. First, the principal bailor may have consented to such a sub-bailment on such terms. Second, the sub-bailee may have inserted such terms into the sub-bailment agreement upon which he assumed possession. Even in the latter case, the principal bailor is bound by the terms in the sub-bailment. This peculiar nature of the law of bailment overcomes the disadvantage on the part of the third parties to the contract who are not entitled to rely upon or to be bound by such clauses in a contract to which they are strangers in common law.

5) Extra compensatory damages

The general rule of bailment allows a bailor to recover the full value of the bailed goods from the bailee even if the bailor is not the owner of the goods or does not own the goods one hundred percent by himself, or is not answerable to the owner. This represents an exception to the general rule of tort that a plaintiff can recover only to the extent of his immediate personal loss.

2.2 Sub-bailment on term and terminal operators

So far it is clear that the bailment is an independent legal relationship independent of contract and tort. It is created by the delivery of goods from the bailor to the bailee who knowingly takes possession of the goods. In most cases, the obligations and responsibilities created by bailment are either covered by the contract between the bailor and bailee or by the law of tort. That is why bailment is seldom referred to in practice. For example, if the cargo is lost or damaged under the control of a carrier as a bailee due to reasons for which the carrier is not entitled to exempt his liability, the cargo owner can claim compensation from the carrier by asserting that the carrier breached the duties owed to him under the contract of carriage. If the cargo was damaged or stolen due to an independent terminal operator's negligence,

then the cargo owner can recover his loss from the terminal operator by claiming that the terminal operator owes him tort liability.

So, what is the role that bailment can play? This can be illustrated in the following way. The above analysis is not always the case in practice in case the cargo loss or damage happens under the control of the terminal operator. In litigation, the burden of proof plays a very important role. The law of tort puts the burden of proof on the plaintiff—the cargo owners. This is an extremely difficult task for the cargo owners, because the cargo is under the full control of the terminal operator while it stays in his premises. Even if the cargo owner can prove the terminal operator's negligence, whether the negligent act of the terminal operator is of illegal nature is another thing. So, the most probable result, when the cargo owner sues the terminal operator, is that the cargo owner fails to prove that the loss or damage is caused by the terminal operator's negligence even if it is so in reality. While, under the law of bailment, the burden of proof is reserved.

In fact, the relationship between the cargo owner and the terminal operator should not be qualified as tortious with regard to the duty of the terminal operator to prevent the cargo from being stolen, because the terminal operator owes a duty of care of the cargo to the specific persons—cargo owners, not to the general public as defined and imposed by the law. So, because of the lack of legal terms defining this kind of legal relationship in legislation, cargo owners are barred from claiming cargo loss or damage from terminal operators directly in case the cargo owners failed to prove the terminal operator's illegal act, which caused the loss or damage, which is the result in most cases in practice. In the law of bailment, this relationship between cargo owners and terminal operators is sub-bailment. As discussed above, the law of bailment puts the burden of proof on the defendant—terminal operators. This can facilitate cargo owners claiming compensation from terminal operators.

Sub-bailment constitutes the essence of the value of the law of bailment. According to the Chinese legal tradition, it can always be constructed that there is a contractual relationship between the bailor and the principal bailee, either express or implied. So cargo owners can recover their loss by claiming that the carriers breach

their contractual obligations without referring to the bailment relationship. But the contractual relationship cannot be constructed between cargo owners and terminal operators, since it is hardly possible to find any agreement or even communications that have taken place between them. The relationship between cargo owners and terminal operators is neither contractual nor tortious with regard to the cargo loss or damage committed by somebody else. The only way for cargo owners to recover their loss from the terminal operators is alleging that the terminal operators are liable for the loss or damage as sub-bailees. So in the author's view, the sub-bailment is really what the law of bailment is about.

2.3 What is sub-bailment and who is sub-bailee?

According to Professor Palmer, a sub-bailment is a legal relationship which arises whenever a bailee of goods transfers possession to a third party for a limited period or a specific purpose, on the understanding (expressed or implied) that his own position as a bailee is to persist throughout the subsidiary disposition. A sub-bailee is the person to whom actual possession of the goods is transferred by someone who is not himself the owner of the goods but has at present the right to possession of them as a bailee of the owner. A sub-bailee, by taking possession and by consenting to the limit set upon it, assumes the role of a special class of bailee. He will owe to the original bailor all the duties that would traditionally arise upon a direct bailment of the same kind in question. In addition, he will owe these duties to the principal bailee, except they are modified by the terms of the contract between them (1991, p1282).

In relation to the carriage of goods, carriers become bailees to the cargo owners by voluntarily taking possession of the cargo to be carried. Normally, the contractual carrier sub-contracts part or all of the transportation tasks to sub-contracting carriers and terminal operators; therefore, the sub-contracting carriers and terminal operators become sub-bailees to the cargo owners by taking possession of the cargo.

The first question, which should be asked is who are sub-bailees among different terminal operators when the law of sub-bailment is supposed to be used to solve the dispute between terminal operators and cargo owners. An action in bailment is based on the existence of a relationship of bailor and bailee whereby the bailor hands over the goods to the custody of the bailee. The relationship is created by the voluntary assumption of possession by the bailee of another's goods (Palmer, 1991, p37-40). The bailor must have a possessory right to the goods at the time the goods are handed over. For a party to be considered a bailee, it is necessary that it exercise some degree of control over the goods that goes beyond mere handling (Baughen, 1999). Therefore, not all terminal operators are bailees. Stevedores are not sub-bailees because they do not have the intention to acquire the right of possession of the cargo besides the loading, unloading and trimming operation. A warehouseman is a kind of conventional bailee for he possesses the goods when the goods stay in his premises.

2.4 How does bailment assist the cargo owners?

In terms of sub-bailment, the first concern is how to define the duties owed by the sub-bailee to the principal bailor and the bailee. According to Professor Palmer (1991, p1313), "the sub-bailee owes the same duties towards his principal bailor as are owed by the bailee under a conventional, bilateral bailment." This was given by the judicial summary in the case *Morris v. C. W. Martin & Son Ltd*. The following proposition was established by this case:

- (1) Where a bailee, with the consent of the bailor, hands over goods of the bailor to a sub-bailee for reward as between the bailee and the sub-bailee, the sub-bailee owes to the original bailor the duties of a bailee for reward, including the duty to take reasonable care for the safety of the goods.
- (2) The sub-bailee is under a double duty to the original bailor (a) to take reasonable care to keep the goods safe, and (b) not to do any intentional act inconsistent with the bailor's right, such as converting the goods. The

sub-bailee is liable for any breach of these duties on his own part as well as for breaches committed vicariously.

- (3) If the goods are stolen by a servant of the sub-bailee, the bailee is vicariously liable to the original bailor if the servant by whom the goods were stolen was one of the servants to whom the sub-bailee had deputed some part of his duty to take reasonable care of the goods while they were in his possession.
- (4) The original bailor has a right of action against the sub-bailee for breach of the latter's duty if the original bailor has the right to immediate possession of the goods or if they were permanently lost or injured. It remains to be established whether misadventures which are incapable of classification as "loss or damage", such as the prolonged delay and consequent fall in economic value of the goods, are actionable by the principal bailor against a sub-bailee.

In addition, of course, the sub-bailee carries the burden of proving that he took the proper degree of care of the goods. However, this rule comes into operation only when the principal bailor has affirmatively demonstrated both the existence of the bailment and the fact that the goods were lost or damaged while in the sub-bailee's possession (Palmer, 1991, p1313-1314).

A similar statement was given by Joseph Story in his book "Commentaries on the law of Bailment". It is said, "In case of bailment, the question sometimes occurs, how far a second bailee is liable to the original bailor, where the first bailee is a wrong-doer, or where the second bailee claims either by his own tort, or by a defective derivative title under the first bailee. There is no doubt, that in each of these cases the original bailor has a good cause of action, against the first bailee, as well as the second bailee, for each is guilty of a wrong to him" (1870, p39).

According to the above summary, the independent terminal operator—warehouse-man as a sub-bailee to the shipper, assumes the duty to take reasonable care of the cargo, which is under his possession, from being stolen and damaged. If the cargo was stolen or damaged, the cargo owner can sue the warehouse-man

directly in the name of the breach of the above duty on the part of the warehouse-man, except if the warehouse-man can prove that he has exercised all reasonable care or the loss or damage was not caused by his negligence. If he fails to prove this, he is liable to the cargo owner.

The law of sub-bailment gives several advantages to cargo owners over the action in tort against terminal operators. First, the content of the duty imposed by the law of sub-bailment on the warehouse-man is much wider than that imposed by the law of tort. According to the law of tort, the duty of care on part of the warehouse-man is that owed to the general public, which means only those actions of the warehouse-man that are prohibited by the law constitute tort liability no matter who is the cargo owner. So, if the warehouse-man or his employee damaged or stole the cargo intentionally or negligently, he incurred tort liability. Because the law prohibits him from infringement of another person's property, no matter who owns the property and where the property is. The situation would be quite different if the cargo was stolen or damaged by somebody else. The law does not impose the duty on the warehouse-man to prevent the cargo from being stolen or damaged by third parties if he did not know who owns the cargo or how and when the cargo enters into his premises, which was stated in the judgement in the case of *Johnson Matthey v. Constantine Terminals Ltd.* . "A defendant owes no duty of care in negligence to take positive steps to prevent theft by third parties of the claimant's goods which are in his possession" (Baughen, 1999). The warehouse-man can deny his knowing possession if the cargo owners do not refer to the bailment. The law of bailment imposes the duty of keeping the cargo safe on the warehouse-man, including preventing the cargo from being stolen or damaged by himself and third parties.

Second, the burden of proof is reversed. In bailment, once the cargo owner has proved that loss or damage occurred in the custody of the terminal operators, liability will be imposed on the terminal operators unless they can prove affirmatively that they have taken reasonable care of the cargo or the loss or damage was not caused by their negligent or intentional act. By contrast, in tort it is for the cargo owners to prove that it was a want of reasonable care on the part of the

terminal operators which caused the loss or damage. As stated above, this is an extremely difficult task for the cargo owners, so the likely result is that the terminal operators can not be held liable due to the failure of the cargo owners in proving the terminal operators' want of reasonable care.

Third, recovery in respect of pure economic loss is possible in a bailment action, at least where the initial bailment is contractual. This remains the position even though the action may be brought by the consignee as a successor in title to the initial bailor—the shipper, who therefore has no contractual relationship with the principal bailee—the carrier. (The device for bringing the consignee into the bailment relation with carriers and terminal operators is attornment, which will be discussed later.) A claim for pure economic loss is not recoverable in an action in tort in common law as was discussed in Chapter 2, while in the case *Building and Civil Engineering Hollidays Scheme Management Ltd v. Post Office*, Lord Denning was of the view that a bailor could not recover for “indirect or consequential damage (such as loss of profits in a business) because those can only be recovered in cases on contracts (Baughen, 1999). But the courts have invariably assessed damages in such cases either on contractual or tortious principles (Palmer, 1991, p79-80). So it is logical to apply separate principles for the assessment of damages in bailment, given that bailment has established itself as an action independent of contract and tort. Given the strong contractual flavour of bailment and sub-bailment in relation to carriage, it is preferable to assess the cargo loss or damage under the control of the warehouse-man on a contractual basis.

2.5 How does bailment assist consignees?

One major problem for the consignee to act in bailment is that the right of suit in bailment does not automatically follow the transfer of the possessory rights in the bailed goods. The consignee, who is not the shipper at the same time, as the successor to the shipper, has no right to rely on the bailment relations with the carriers and the warehouse-man without the recognition of the warehouse-man that he is the new owner of the cargo. The recognition of the carrier or the warehouse-

man is called attornment, which means the acknowledgement of the relation of a tenant to a new landlord, or to turn over things to another. The carrier or the warehouse-man is called attornor, the consignee is called attornee. An attornment gives rise to a legal effect that the attornor is estopped from denying the attornee's title to the cargo bailed (Palmer, 1991, p1369-1370). Simon Baughen stated that "A successor in title to the original bailor may sue in bailment only if the bailee, or sub-bailee, attorns to it, by explicitly recognising it as the bailor. The attornment will achieve the dual functions of transferring both constructive possession and right of suit against the bailee to the attornee." (1999). So the consignee, who is not the consignor, has no rights to sue the warehouse-man until the warehouse-man attorns the cargo to him, because he is not the original bailor. "The need for an attornment is supported by Lord Brandon of Oakbrook in *The Aliakmon*:

But so long as the sellers remained the bailors, those terms only had effect as between the sellers and the shipowners. If the shipowners as bailees had ever attorned to the buyers, so that they became bailors in place of the sellers, the terms of the bailment would then have taken effect as between the shipowners and the buyers" (Baughen, 1999).

This decision is further supported by the courts' decisions in *The Captain Gregos*, *The Gudermes*, and *The Future Express*. In all these three cases, the decision on the bailment issue depended on the need for an attornment by the carrier if the successor in title were to have rights of suit in bailment (Baughen, 1999).

Then the problem is how to identify the attornment of the warehouse-man which represents his recognition that the consignee is the new bailor. Attornment requires a concrete expression of fact by the bailee to the effect that the goods are now held as attornee's and that the attornor is now his bailee (Palmer, p1369-1370). The warehouse-man did not, merely by receiving the delivery orders without objection, attorn as bailees to the sub-purchaser and was not estopped from denying the plaintiff's title. Mere silence alone did not constitute an attornment (Palmer, 1991, p1371). So in order to meet the above requirements, there must be a concrete fact, which signifies the warehouse-man's acknowledgement that he recognises that

the consignee is the new owner of the cargo, which is currently under his custody. This fact is simply satisfied by the delivery activity from the warehouse-man to the consignee. Attornment would not happen until the warehouse-man delivers the cargo to the consignee. The question is whether the attornment has legal effect on the cargo damage that occurred before delivery, which is the normal case. It seems that it is not an obstacle to the consignee to recover his damage. “An important consequence of the estoppel created by attornment is that the attornee can sue the bailee not only in respect of breaches occurring after the attornment but also in respect of those occurring before the attornment. This was certainly the case in *The Gudermes* and also in *Sonicare v. East Anglia Freight Terminal* (Baughen, 1999).

Another problem is that the delivery activity would not happen in case the cargo is lost from the warehouse-man’s premises. In such case, how to establish the attornment relation between the warehouse-man and the consignee? This problem can be solved by the documentation, which can be served as the evidence that the warehouse-man acknowledges that he is now warehousing cargo for the consignee. A warehouse-man normally either uses the carrier’s document or uses his own document to do business. When he chooses to use the carrier’s document, he will rubberstamp the carrier’s document, record the date and sign it. When the warehouse-man issues his own document, his document must acknowledge receipt of the goods, state the date of receipt and record the condition and quantity of the goods. All these documentation activities enable the consignee to take delivery of the cargo from the warehouse-man himself. These documentation activities are likely to be viewed as an attornment by the warehouse-man.

2.6 How does bailment assist the warehouse-man?

One problem discussed in Chapter 3 is that terminal operators might face unlimited liability in case cargo owners seek to sue them in negligence. When terminal operators act as carriers’ agents or servants, there is no problem at all, because Article 58 of the Maritime Code can provide protection. As far as independent stevedores and warehouse-men are concerned, a properly drafted

Himalaya Clause can provide protection by inserting it into the contract of carriage. But the problems discussed in Section 1 cannot be avoided. The doctrine of sub-bailment on term is able to provide a better solution. This is based on the theory that the basic duty of a bailee can be altered by special agreement (Story, 1870, p35).

In most situations, the head bailment will overlap with a contract of carriage, so the bailment does not have any significance to cargo owners as a cause against carriers. However, this will not be the case where cargo owners seek to sue the terminal operators as sub-bailees. The essence of sub-bailment on term is that the sub-bailment is generally limited by the terms on which the sub-bailee accepts custody of goods. These terms are usually found in a contract between the head-bailee and the sub-bailee. The essential concern about the doctrine of sub-bailment on term is to what extent the principal bailor is bound by the terms in the sub-bailment contract.

In common law, it has been a controversial topic with regard to the application of the doctrine of sub-bailment on term. There exist contradicting judgements involving the doctrine of sub-bailment on term. The point is the relevance of the consent of the principal bailor to the terms in the sub-bailment. In the earlier case *Morris v. Martin*, Lord Denning emphasised consent. He said that “the owner is bound by the conditions contained in the contract between the principal bailee and the sub-bailee if he has expressly or implied consented to the bailee making a sub-bailment containing those conditions, but not otherwise” (Bell, 1995). The opposite view was put forward by Donaldson, J. in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* It was held in this case that the sub-bailee can rely on the terms of the sub-bailment as against the owner whether the latter consented to those terms or not ([1976] 2 Lloyd’s Rep. 215, 222). It seems that the result of *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* is less attractive (Bell, 1995). In the later two cases, *The Pioneer Container* ([1994] 1 Lloyd’s Rep. 593) and *Sonicare v. East Anglia Freight Terminal* ([1997] 2 Lloyd’s Rep. 48), Lord Denning’s view was approved.

In the author's view, it is hard to find the consent of the cargo owners to the terms of the sub-bailment between the head-bailee and sub-bailee, otherwise it amounts to establishing a contractual relation between the principal bailor and the sub-bailee. In practice, there is rarely any communication that takes place between them. In fact there was no real consent of the principal bailor to the terms in the sub-bailment in *The Pioneer Container*. In this case, the bill of lading issued to the shipper included a clause entitling the carrier to sub-contract "on any terms the whole, or any part, of the carriage, loading, unloading, storing, warehousing, or handling" ([1994] 1 Lloyd's Rep. 593) of the goods. Such a term indicates the consent of the owner to the sub-bailment (this is not a necessary condition to create a bailment) rather than the terms of the sub-contract. Because "on any terms" or "on any terms whatsoever" (P&O Container bill cl.4 (1)), or "on any terms which are reasonable in the circumstance" (Visconbill, cl.9 (a)) does not amount to the terms or the meaning of the terms in the sub-bailment contract. So instead of the consent of the principal bailor to the terms of the sub-bailment, the prerequisite of the doctrine of sub-bailment on term should be the reasonableness of the terms of the sub-bailment contract. This was supported by the judgement of *The Pioneer Container* and *Sonicare v. East Anglia Freight Terminal*. In *The Pioneer Container*, the Privy Council held that a jurisdiction clause "would be in accordance with the reasonable commercial expectations of those who engaged in this type of trade and that such incorporation will generally lead to a conclusion which is eminently sensible in the context of the carriage of goods by sea, especially in a container ship, insofar as it is productive of an ordered and sensible resolution of disputes in a single jurisdiction, so avoiding wasted expenditure in legal costs and undesirable disharmony of consequence where claims are resolved in different jurisdictions" ([1994] 1 Lloyd's Rep. 593). In *Sonicare v. East Anglia Freight Terminal*, the judge held that the "NAWK (National Association of Warehouse Keepers) conditions (on which the East Anglia Freight Terminal accepts goods) are plain that they are or were in very widespread use" ([1997] 2 Lloyd's Rep. 48). In both cases, the plaintiffs were held to be bound by the terms in the sub-bailment contract.

As far as the terminal operators are concerned, they can insert limitation and exemption clauses into the contract with carriers to avoid unlimited liability, provided these clauses are “reasonable”. The problem is how to set the standard for the reasonableness test. In both cases, *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd* and *Sonicare v. East Anglia Freight Terminal*, both sub-bailees accepted goods upon the conditions set by the industrial associations. Because such terms are widely used in the industry, the judges held that they are reasonable and bound the bailors. So the industrial association conditions are one recognised standard for the reasonableness test by the courts in common law. The problem is that there are no such industrial associations and standard terms that are widely used in the industry in China. So this solution is not available for the Chinese terminal operators.

However, the industrial association standard is not the only standard for the “reasonableness test”. There are another two ways available for the warehouse-man to satisfy the reasonableness test. If the terms of the sub-bailment contract between the warehouse-man and the carrier is within the scope of or the same as the terms of the head-bailment contact between the shipper and the carrier, then these terms can be said to be reasonable to the cargo owners, because nothing in the sub-bailment contract is out of the cargo owner’s considerations and expectations. “It has been suggested that the terms of a sub-bailment might satisfy the reasonableness test where the exclusions and limitations of liability were no wider than their counterparts in the contract of carriage concluded between the shipper of the goods and the contractual carrier” (Wilson, 1996). Another way is to set the exemption clauses and limitation clauses within the legal framework, which specifically deals with the warehouse-man’s liability. The contract of warehousing is dealt with by the Law of Contract of the People’s Republic of China, but nothing is said in it about exemption and limitation. So, in order to avoid unlimited liability of the warehouse-man by this method, statutory legislation is needed to deal with this matter.

2.7 The limits of the doctrine of sub-bailment on term

The doctrine of bailment or sub-bailment on terms can only be useful to prevent unrestricted non-contractual recovery against a defendant where that defendant is liable as a bailee. They will have no application to a defendant who is not a bailee, such as a stevedoring firm whose employees damage the cargo in the course of loading or discharging. A non-bailee can be sued only in negligence and any recovery will be in full. The only means of limiting recovery will be the Himalaya clause inserted in the contract of carriage. The question that needs to be considered is whether a plaintiff, who can sue a defendant either in negligence or bailment can escape the limitations and exemptions contained in terms in the sub-bailment by proceeding against the sub-bailee by way of negligence.

In some cases, e.g. if the cargo is damaged by the warehouse-man's negligent act, there are parallel actions in contract and in tort available for the cargo owner against the carrier. In general, the defendant is allowed to invoke the limitation clause to limit both contractual and tortious liability, which is recognised by the Hague-Visby Rules Article 4bis(1) and Article 58 of the Maritime Code of the People's Republic of China. Accordingly there will be no advantage to the cargo owner in proceeding in tort rather than in contract. But do similar principles apply when the claimant can proceed either in bailment or in negligence against the warehouse-man? Donaldson, J. considered this problem in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* He said, "if Constantine Terminals had themselves damaged the cargo, quite different considerations would have been involved. The plaintiffs could have set out to prove negligent conduct without any reference to the bailment. Whether, in those circumstances, Constantine Terminals could have relied on the contract of sub-bailment to which the plaintiffs were strangers or on the contract of head bailment to which they were strangers, seems to me to be a problem of some nicety to be tackled only when it arises" ([1976] 2 Lloyd's Rep. 215, 222). Simon Baughen said this problem has not been directly addressed by subsequent cases (1999). But he was inclined to give a negative answer to the above question. He said the implication of the above words of Donaldson, J. is that a claimant who chooses to sue in negligence will not be bound by the terms in

the sub-bailment contract. “It is likely that the doctrine of sub-bailment on terms can be outflanked by pleading the case in negligence” (Baughen, 1999). The same opinion is held by some civil law writers in another way. The tortious liability is related to the public order and social justice, so the clause exempting tortious liability is invalid unless it is agreed by the contractual parties or recognised by statute to exempt non personal injury liability (Wang, 1996, p324). So it has its justification of legal justice not to allow the warehouse-man to rely on the terms of sub-bailment if the cargo owner is able to sue him in tort.

Section 3 About exemption and limitation of liability

An important and sensitive problem involved in Himalaya Clauses and sub-bailment on term is exemption and limitation of liability. The effect of a Himalaya Clause is to entitle the carrier’s agents, servants and independent sub-contractors to the carrier’s limitation and exemption of liability. It is reasonable for the agents and servants to enjoy the same limitation and exemption regimes as the principals, for they act under the control and in the name of the principals. It is arguable whether it justifies entitling the independent sub-contractors to the same limitation and exemption regimes. Although under the doctrine of sub-bailment on term, the terminal operators are able to set out their own exemption and limitation regimes, this also has its own problems.

If terminal operators can set their own liability that is different from the carriers’ limitation of liability, there are several other problems, which need to be considered. First, if their limitation is higher than that of the carriers, then they are more likely to be sued than carriers, which is not unfair because they caused the loss or damage. If cargo owners take action against carriers instead of terminal operators, then carriers may take action against terminal operators later, either in contract or in tort. If the carrier can succeed in taking action against terminal operators, then carriers will be unjustly enriched because the terminal operator’s limitation is higher than that of the carriers. This enrichment is at the expense of cargo owners. If their

limitation is lower than that of carriers, then cargo owners will try to avoid suing them instead suing carriers. The result of circular indemnity is that the carriers can not be fully compensated because of the lower limitation of terminal operators. In this situation, there is nothing to be criticised, because carriers accepted this limitation through the agreement with the terminal operators.

Chapter 5 The Convention on the Liability of Operators of Transport Terminals in International Trade

The Convention on the Liability of Operators of Transport Terminals in International Trade (The Convention) was adopted at a diplomatic conference convened by the General Assembly of the United Nations, in 1991 in Vienna. The Convention is designed to fill the gaps left by the existing liability regimes, which are governed by the international conventions of carriage of goods. It was believed that the Convention will promote international trade by establishing a predictable, uniform liability regime covering the time period during which goods are not governed by the existing maritime, road, rail, and air transport liability regimes. It consists of 25 articles, including: definition of terminal operators; scope of application; period of responsibility; issuance of document; basis of liability, limitation of liability; special rules on dangerous goods; rights of security in goods; notice of loss; damage or delay of goods; limitation of actions; contractual stipulations; and the relationship to other transportation conventions. No reservations may be made to the convention, which will enter into force after ratification by five States. So far, only two states, Egypt and Georgia, have ratified it and only four other states, France, Mexico, the Philippines, and Spain have, signed it (UNCITRAL, 2000).

For the purpose of this dissertation, the legal regime of the Convention related to the terminal operator's liability and the inherent problems will be described and discussed below.

Section 1 The liability regimes created by the Convention

1.1 Period of responsibility

The operator's responsibility for goods begins when the operator has taken them in charge, and ends when the operator has handed them over to, or has placed them at the disposal of, the person entitled to take delivery of them (article 3). The

concept of "taking goods in charge" should be seen in the light of the types of services that an operator might perform and in the light of the fact that an operator may perform the services while another person, usually a carrier, is in charge of and responsible for the goods. When the operator takes goods over in order to put them in a warehouse, he would be in charge of the goods from the time he has custody of or control over the goods. When, however, the operator commences to handle goods by performing services such as loading, unloading, stowage, trimming, dunnaging or lashing, the operator's services may be performed while the goods are "in charge" of the carrier. During the performance of these services, the operator may not be considered to have assumed the custody of or full control over the goods. Being "in charge" of the goods in these cases may be considered to commence when the operator comes in physical contact with the goods.

Similarly, the meaning of the concept of "handing goods over or placing them at the disposal of the person entitled to take delivery of them" depends on the circumstances of the case. If "handing over" is done by releasing goods from the operator's warehouse and putting them in the custody of the carrier or the consignee, the relevant moment would be the one when the operator relinquishes his custody of or control over the goods. If the operator's services were limited, for example, to stowage, trimming, dunnaging or lashing, which are often performed while the goods are in the charge of the carrier, the operator's period of responsibility would end when the operator completes his manipulation of the goods.

Comparing with "handling over", "placing at the disposal" is not as clear cut in terms of time. How to decide whether the goods have been put at the disposal of the person entitled to the goods depends on the form that the placing action takes. If the terminal operator has given a notice to the consignee of the arrival of the goods, should the terminal operator remain responsible for the goods before the consignee actually takes delivery? Under the law of bailment, the terminal operator is still responsible for the safekeeping of the cargo as a bailee, even if the contract of carriage has expired.

1.2 Issuance of document

The Convention, in principle, leaves it up to the operator whether to issue a document acknowledging receipt of goods or not (article 4). However, if the customer requests such a document, the operator must issue it. Such a solution is necessary in order to take into account practices in various types of terminal operations. For example, when the operations are limited to lashing containers, stowing or trimming cargo, or dunnaging, it may be customary not to issue a document. When the operations include warehousing, operators usually issue a document acknowledging receipt of the goods.

The Convention provides that a document may be issued “in any form which preserves a record of the information contained therein”. It is further provided that a signature can be a “hand-written signature, its facsimile or an equivalent authentication effected by any other means”. This provision is not qualified by a requirement that a particular means of authentication must be permitted by the applicable law. The expression “equivalent authentication” should be understood as a requirement that the method used must be sufficiently reliable in the light of the usage relevant to the situation.

1.3 Liability regime

1.3.1 Presumed-fault liability

Article 5(1) provides that the terminal operator is liable for the loss resulting from the loss of or damage to the goods, as well as from delay in handling over the goods if the occurrence took place during his period of responsibility, unless he proves that he, his servants, agents, or other persons of whose services the operator makes use for the performance took all reasonable care. The liability of the operator under the Convention is based on the principle of presumed fault or neglect. This means that, after a claimant has established that the loss or damage occurred during the operator's period of responsibility, it is presumed that the loss or damage was caused by the operator's negligence. The operator can be relieved of his liability if he proves that he, his servants or agents, or other persons of whose services the

operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the loss or damage. “Loss resulting from” refers to the consequential economic loss.

1.3.2 Contributing negligence

The terminal operator is only liable to the extent that it is such failure on his part which causes loss, damage or delay. The customers—shippers and carriers are responsible to the extent to which the loss, damage or delay was caused by their fault.

1.3.3 Delay in handing over the goods

The operator is liable for delay when it fails to hand over the goods within the agreed time period, or, if no time period is stated in the agreement, within a reasonable time after being asked to hand them over.

1.3.4 Presumption that the goods are lost

Failure of the operator to deliver the goods within 30 days after the agreed time runs out or after receiving a request to hand them over, entitles the cargo owner to presume that the goods have been lost and claim total loss of the goods.

1.3.5 Limitation of liability

Because the Convention is designed to fill the gap between liability regimes created by the existing transportation conventions, the liability limits of the connecting transportation conventions must be considered to ensure that the Convention fits into the overall regulatory network. The result of this consideration is that two different financial limits are provided for the operator's liability, depending upon the mode of transport to which the terminal operations relate (articles 6 and 16). The lower limits are applicable to terminal operations relating to the carriage of goods by sea or inland waterways, and the higher limits apply to other terminal operations. If the terminal operation is immediately connected to the sea carriage, then the amount of limitation is 2.75 SDR per kilogram, which is close to that created by the Hamburg Rules (2.5 SDR) and consistent with the Multimodal Transport Convention. Likewise the limitation created by the Multimodal Transport Convention for other means of transport, which is 8.33 SDR per kilogram is also

incorporated. If the loss or damage affected another part of the goods, the weight of the affected goods should be included in the calculation of liability. In addition, the terminal operator's liability for delay is limited to two and a half times the charge for his service.

The Convention does not provide an overall limit of liability when damage is caused by a single event to goods pertaining to a number of different owners. For example, a fire in a terminal can give rise to an extensive liability of the operator despite the limitation applicable to each claimant. Such a "catastrophe" limit was not adopted because a single limit would be likely to be too low for large terminals and would not represent a real limitation of liability for the smaller ones. No satisfactory criterion could be found for providing different overall limits depending on the size of the terminal. However, the terminal operator is entitled to limit his total liability to the extent of the value of the goods lost or damaged. As a general rule, terminal operators are free to increase the limitation of liability by agreement with their customers. These limitation regimes are applicable to non-contractual claims.

The limits for loss of, or damage to, goods are based exclusively on the weight of goods. The Convention does not provide an alternative limit based on the package or other shipping unit as, for example, the Hamburg Rules and the Hague Rules. This will mean that, the lighter and smaller the packages, the lower will be the operator's limits compared to the sea carrier's limits.

Article 8(1) provides that the terminal operator's limitation of liability may be broken when the terminal operator or his servants or agents committed intentional acts causing loss, damage or delay, or committed such acts recklessly and with knowledge that such loss, damage or delay would probably result. ((Larsen, Sweeney, Falvey, & Zawitoski, 1994).

1.4 Service with regard to dangerous goods

Article 9 provides special liability rules for transport-related service to dangerous goods. This Article is, in fact, an exception to Article 5, the liability regime governing the terminal operator's transport-related services. Article 9 gives

the operators not only the right to dispose of and even to destroy dangerous goods without liability, but also the right to receive compensation for his cost and damage incurred for the treatment of the dangerous goods from the liable party who is legally liable to label the goods.

1.5 Rights of security in goods

Article 10, which gives the operator a right of retention over goods for claims due to him, does not itself establish a right of sale of retained goods. The right of sale is dealt with in the Convention only to the extent such a right exists under the law of the State where the retained goods are located.

Section 2 Considerations about the Convention

2.1 Relationship with other transportation conventions—limitation of liability

The Convention actually does not achieve uniform limitation in relation to other transport conventions, although the wording used is for the sake of uniformity with the limitations contained in the other transport conventions. “Because the Convention fills a gap between the existing transportation liability conventions, the liability limits of the connecting transportation conventions must be considered to ensure that the Convention fits harmoniously into the overall transportation network” (Larsen, Sweeney, Falvey, & Zawitoski, 1994). Based on this consideration, Article 6 provides,

- (a) The liability of the operator for loss resulting from the loss of or damage to goods according to the provisions of Article 5 is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.
- (b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the

operator for loss resulting from loss of or damage to goods according to the provision of Article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

There are two problems with the above provisions. On the one hand, the terminal operators' limitation of liability should not be different with regard to the different connecting transportation, because the risk and total liability of the terminal operators do not differ as a result of the different modality of connecting transportation. In fact, almost all the terminal operations within a port is connected to both water and land transport, and all the water transport is hardly finished without the involvement of land transport. It is unreasonable to lower the terminal operators' limitation of liability because of the connection with water transport for the sake of the uniformity with the limitation of liability of shipowners laid down by Hague-Visby Rules and Hamburg Rules. Terminal operators as independent contractors should have their own liability regime irrespective of the connecting carriers. On the other hand, the terminal operators' limitation of liability is not really uniform with the shipowners' limitation of liability. The Hague-Visby Rules and Hamburg rules have adopted dual limitation: one is based on the weight as unit, the other is based on package as unit for calculation; whichever is the higher is the limit of the shipowners' liability. The Convention adopted only one limitation based on the weight of the shipment. In case the shipment is lighter cargo, it is more likely that the limitation based on package as accounting unit will be the shipowner's limitation of liability. The limitation of liability regimes created by the Hague-Visby Rules or Hamburg Rules and that created by the Convention are not uniform in this case. The cargo owner can get different indemnity from terminal operators compared to that from carriers.

2.2 Relationship with Chinese laws

The right of exemption and limitation (partial exemption) of liability

conferred to terminal operators by the Convention does not comply with the Chinese legal tradition. In Chinese law, there are two kinds of exemption and limitation, which are stipulated by statute or defined by contract respectively. The conditions of exemption and limitation are strictly limited to force majeure by the civil law. It is provided in Article 107 of the General Principles of Civil Law of the People's Republic of China, that “civil liability shall not be born for failure to perform a contract or damage to a third party if it is caused by force majeure, except as otherwise provided by law”. So the terminal operators are not entitled to limit their liability, which are not caused by force majeure if there are not other statutes saying so, which is the present actual situation in China.

The validity of exemption clauses contained in contracts is also strictly confined by the courts in practice. Normally, the validity of those clauses exempting liability caused with intention and gross negligence by the defendant is denied by the courts (Wang, 1996, p34). Article 107 of the General Principles of Civil Law of the People's Republic of China is open to allow other statutes to give the right to some categories of persons to exempt or limit their liabilities, so the remaining problem is whether the terminal operators should be given the right to limit their liability in the form of legislation and how to define the validity of the exemption clauses contained in a terminal operation contract. The solution will be given later in this Chapter.

Article 10 of the Convention confers to the terminal operators the right of retention of the goods to secure the payment for the service they offered. This provision also does not comply with the Chinese legal tradition. In the context of the discussion in this dissertation, the contract of terminal operation is between terminal operators and carriers rather than cargo owners. The duty to pay for the terminal operation is on the part of the carriers rather than the cargo owners. The cargo owners' interests in the cargo should not be prejudiced by a dispute between terminal operators and carriers. The case may be that the cargo owner has paid all the freight to the carrier while the carrier fails to pay the terminal operator. In such a situation it is unfair to let the terminal operator exercise the right of retention on the goods. If the cargo owner fails to pay the carrier which leads the carrier to fail to pay the terminal

operator, the terminal operator still should not exercise such kind of right on the cargo for the duty of payment is owed by the carrier rather than the cargo owner. If the carrier instructs the terminal operator to retain the cargo, that is the carrier's right on the cargo, which is a totally different matter.

Section 3 Unification of terminal operators' liability

Unification of terminal operators' liability should be considered on two levels: unification of the terminal operator's liability with the carrier's liability and unification of national legislation relating to terminal operator's liability with international conventions. It is the author's view, that neither level of unification is desirable under the present legislative situation.

Unification of terminal operators' liability with carriers' liability can be achieved by virtue of a Himalaya Clause or incorporation of the bill of lading into the terminal operation contract. The fundamental problem with these approaches is that it is arguable whether it justifies the reason of its existence in the statute. For this purpose, two questions should be discussed. The first one is whether terminal operators should be entitled to limitation of liability. The second one is whether the terminal operators should be entitled to the same amount of limitation as carriers. Further, the question whether the unification should be achieved or not should be answered. The discussion about these topics should start from the history of and the reasons for giving shipowners the right of exemption and limitation of liability.

3.1 Should terminal operators be entitled to limitation of liability?

The primary reason for allowing carriers to limit their liability is policy—to support the development and competitiveness of the national fleet¹. Nowadays, this

¹ Patrick Griggs, 1997, indicated that the limitation rules were first adopted by Sweden in order to ensure their national shipowners' survival. Then the UK followed Sweden in order to avoid putting their national fleet at a disadvantage compared with Scandinavian shipowners.

reason is becoming less important for the existence of the legal system of exemption and limitation¹. The justification of exemption from and limitation of liability is the commercial convenience that it brings. Because the carriers do not know the value of the goods and the perils at sea, the risk of every voyage is unknown and insurance is difficult to find or the premium is too high. The exemption and limitation can make the carriers' business risk become certain, hence facilitates the insurance.

The above reasoning was challenged by William Tetley when he pointed out, "such reasoning, however, ignores the fact that in the commercial world it is preferable for persons who cause damage to cargo to be held responsible for that damage. Otherwise, they will continue to be negligent and will do nothing to alter their practices" (Tetley, 1978, p374). In the author's view, this reasoning is still based on policy considerations—to lower the shipowners' liability and to support the national fleet. If the main reason for the entitlement of exemption from and limitation of liability to shipowners or terminal operators is to avoid uncertainty of liability because of the unknown cargo value and to facilitate insurance, then what is behind the exemption and limitation does not aim at reducing the carriers' and terminal operators' liability. The principle of setting the amount of limitation should be based on the weighted average value per unit of cargo carried. Because exemption and limitation of liability represents the division of risk between cargo owners and carriers (or terminal operators), another challenging reasoning is that the function of the exemption and limitation clauses is to shift the cost of insurance from the carriers, warehouse-men, and stevedoring companies to cargo owners, whose cargo value is higher than the limitation, so the cargo insurance will increase. In fact it is a kind of trade-off for both cargo owners and terminal operators. Without limitation of liability, the insurance cost of terminal operators will increase and the increased cost will eventually be passed to cargo owners in form of increased freight, which may be

¹ John F Wilson, 1998, P369. Originating in the nineteenth century, the limitation rule is one of the first examples of protectionism in the form of State support for shipping. Its retention in present days is justified not so much by its history as by its providing the shipowner with a calculable risk before embarking on a trading

more costly than taking cargo insurance and grant limitation of liability to terminal operators.

Although the above reasoning for the justification of the limitation of liability is mainly concerned with the global limitation, it can be used to explain the justification of the package limitation as well. For the shipowners, charterers, managers, and operators, the global limitation regime created by the International Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) can provide limited liability for the purpose of insurance, so package limitation does not have significance for them given that the modern justification of the existence of the limitation regime is to facilitate insurance. But package limitation plays a significant role for the freight forwarders who are not entitled to the global limitation under the LLMC 1976 convention.

3.2 Terminal operators should not be entitled to the same amount of limitation as carriers' under the present situation.

Since the reason for the existence of both the global limitation and the package limitation is its justification of convenience, the amount of limitation should be set high enough so that most cargo can be fully compensated in case that cargo is lost or damaged. However, the amount of limitation formulated by the Hague-Visby Rules, Hamburg Rules and the Maritime Code is too low to meet the above principle. According to the Hague-Visby Rules the amount of limitation is 666.67 SDR per unit or 2 SDR per kilogram, the Hamburg Rules set the limitation amount at 835 SDR per unit or 2.5 SDR per kilogram. According to the IMF publication, the present value of 1 SDR is 1.33 US dollar (IMF, 2000). So the amount of limitation is \$886.7 per unit or \$2.66 per kilogram under the Hague-Visby Rules and it is \$1110.6 per unit or \$3.325 per kilogram under the Hamburg Rules. Many, if not most, shipments of manufactures, such as cars and electronic products, have much higher value than the above amounts. The limitation regimes have been increasingly criticised by cargo

venture. According to Lord Denning MR, it 'is a rule of public policy which has its origin in history and its justification in convenience'.

owners for many years mainly because of the fact that the amount of limitation is too low to reflect the average value of cargo carried.

If the amount of terminal operators' limitation of liability can be set upon the real weighted average value of the cargo they handle, it will create a well balanced legal framework between cargo owners and terminal operators.

Extending the exemptions of carriers to terminal operators does not make sense. The exemption clauses contained in both Rules and the Maritime Code are based on the special perils at sea. The terminal operation business does not involve these perils, so it is not appropriate to extend these exemptions to terminal operators directly and it does not make any sense.

Because the amount of limitation of carriers' liability is too low to support the justification of convenience, which is the main reason for the retention of the limitation rules, and it is inappropriate to extend the exemptions of carriers to terminal operators, the unification of terminal operators' liability with carriers' liability is not desirable.

Since the Maritime Code has incorporated the low limitation of the Hague-Visby Rules, it is equally undesirable to introduce national legislation with such low levels of liability for terminal operators.

3.3 Terminal operators' liability and carriers' liability should be uniform

Although the unification of terminal operators' liability with carriers' liability is not desirable under the present legislative situation, unification should be achieved for the following reasons.

First, if two parties' limitation regimes are different, the problem that cargo owners face two different liability regimes in respect of one cargo claim in case cargo loss or damage happens at terminals, is still not solved.

Second, one terminal operator may face two different liability regimes, which depends on his legal status at the time when the cargo loss or damage happens. If a warehouse-man damaged cargo when the cargo was stored in his warehouse, he should invoke his own limitation of liability against cargo owners. On the other hand,

if he delivered cargo to a wrong person, he should invoke the carriers' limitation of liability against cargo owners because he is acting as the carriers' agent with regard to delivery. In most cases, cargo owners do not know whether the warehouse-man was acting as an agent of the carrier or as an independent contractor.

Third, the problem that the carrier could be possibly unjustly enriched is still not solved in case the terminal operators set a higher limitation than that of the carriers.

For these three reasons, terminal operators' liability and carriers' liability should be uniform.

3.4 It is inappropriate to formulate global limitation for terminal operators.

It is very difficult to formulate a rule to calculate the total liability of terminal operators in the form of legislation, on which the overall risk and insurance premium can be assessed. Unlike ships, it is hard to find a standard like tonnage to measure overall liability for all different types of terminal operation. According to the 1986 UNCTAD report of Rights and Duties of Container Terminal Operators and Users (p33-34), global limitation sometimes is also used in some container terminal contracts, e.g. "not to exceed an aggregate of \$NZ 750 per tonne or to a maximum of \$NZ 50,000 in respect of any one accident"; "for any damage BF 200,000,000 per occurrence". It could be reasonable for such kind of a clause to apply to a specific terminal operator, given his handling capacity is fixed. The problem is that such an approach cannot be adopted in statute, because the capacity of different operators varies a lot; a fixed limitation for an occurrence may be suitable for one operator but may be too low or too high for another. Actually, a terminal operator's total liability can be roughly calculated according to the package limitation, its business scale or handling capacity.

Chapter 6 Conclusions and Recommendations

Section 1 Problems

Terminal operation is an integrated part of the transport process. As carriers' agents, servants or independent sub-contractors, they assume various liabilities for the cargo, which is under their premises. However, because terminal operators are not treated as independent players in relation to the contract of carriage, their relationship with cargo owners is not touched upon by the Maritime Code. This gives rise to several problems in case the cargo is lost or damaged while under the terminal operators' control.

The fundamental problems are whether the terminal operators can rely on Article 58 (Himalaya Clause) of the Maritime Code against cargo owners and whether the cargo owners are bound by the terms contained in the contract between terminal operators and carriers to which the cargo owners are strangers. In practice, there are several other issues, which need to be considered. First, on the cargo owners' side, they are likely to be blocked in suing terminal operators in tort. There are two contributory reasons: one is the difficulty in proving that the cargo loss or damage was caused by the terminal operators' intentional or negligent act, the other is that the terminal operator can claim he owes no duty of preventing the cargo from being stolen. If the lost or damaged cargo is non-containerised, cargo owners may not recover their loss at all, because the carrier is not liable for the non-containerised cargo loss or damage that happens at port according to Article 46 of the Maritime Code. Second, on the terminal operators' side, Article 58 of the Maritime Code can not provide protection under all circumstances. They may face unlimited liability if they have failed to rely on the Himalaya Clause in the contract of carriage, or if the cargo owners deny that the terms in the contract of terminal operation bind them. Third, there are two different channels available for the cargo owners to recover their loss: taking action against the carrier in the contractual relation and against the terminal operator in tort, which lead to different results because of the different

liability regimes. The two different liability regimes can also unjustifiably enrich the carriers, which is at the expense of cargo owners in case that circular indemnity action is taken.

Section 2 Solutions

In the author's view, if both fundamental problems are solved, the practical problems can be clearly decided. The two fundamental problems should be addressed at the outset.

2.1 The Himalaya Clause

A Himalaya Clause aims to extend the carriers' exemption from and limitation of liability to carriers' agents, servants and independent sub-contractors. Himalaya Clauses were given effect by the Hague-Visby Rules, Hamburg Rules and Article 58 of the Maritime Code of the People's Republic of China. The problem is that the terminal operators as independent contractors are excluded from the benefit of exemption from and limitation of liability. However, in the Interpretation of the Maritime Code, it is explained that terminal operators act as carriers' agents or servants. In the author's view, such an interpretation does not comply with the original intention of the Hague-Visby Rules and Hamburg Rules from which that Article 58 was inherited. It also does not comply with the commercial reality. Terminal operators may play different roles in relation to carriers, they can be carriers' agents or servants, or can be carriers' independent sub-contractors, which is the normal case. For example, an individual longshoreman as stevedore always acts as the carrier's servants; those stevedoring companies who only supply labour without assuming any liability associated to the operation should be recognised as carriers' hiring agents rather than independent sub-contractors. Warehouse-men normally act as independent sub-contractors, but with regard to delivery service, they act as carriers' agents. So in order to avail themselves of the carriers' exemption

from and limitation of liability, a properly drafted Himalaya Clause needs to be inserted into the contract of carriage, which expressly extends such benefits to carriers' independent sub-contractors.

However, a Himalaya Clause may not always provide protection to independent terminal operators under all circumstances. The applicability of a Himalaya Clause contained in a contract of carriage is a very controversial topic in common law. The doctrine of privity of contract prevents the independent terminal operators from relying on the Himalaya Clause contained in a contract of carriage to which they are strangers. The "agency theory" created by Lord Reid can overcome the obstacle created by the privity of contract in the way that carriers enter into the contract of carriage on his own behalf as well as (as agents) on behalf of their independent sub-contractors with shippers in relation to the Himalaya Clause. The "agency theory" is also challenged by the following doubts. First, it is hard to find any communication happening between terminal operators and shippers, there is lack of intention from both sides to enter into a contractual relationship. Second, it is doubtful whether a mere exemption and limitation clause is able to form a contract between parties without any further considerations given. There is not a strict rule like the doctrine of privity of contract in the Chinese legal system; a clause for the benefit of a third party, which is agreed by both contractual parties is valid. But the Himalaya Clause is facing other problems in Chinese law. First, A Himalaya Clause is not able to provide protection to independent terminal operators with regard to non-containerised cargo loss or damage, because carriers are not liable for the non-containerised cargo loss or damage during the time in port and there is no exemption and limitation available. Second, it is uncertain whether the Himalaya Clause will bind the consignee because the consignee is not a party to the contract of carriage and its legal position in relation to the contract of carriage is not defined by the Maritime Code.

So the Himalaya Clause can not solve all the problems mentioned in section 1, especially the disadvantageous situation of cargo owners in suing terminal operators. On the other hand, it is not appropriate to give terminal operators the same

exemption and limitation as carriers have. It seems that bailment on term is able to provide a better solution.

2.2 Sub-bailment on term

The carriage and warehousing is involved in a bailment relationship, which was originally defined by Roman law and laid the foundation of the law of carriage and factorage. The carrier becomes a bailee to the cargo owner by voluntarily taking possession of the cargo to carry. Consequently, the carrier delegates the terminal operation to the terminal operators, and a sub-bailment is created by this delegation. The warehouse-man becomes a sub-bailee to the cargo owner by taking the cargo into his custody. A sub-bailee owes the same duty as an original bailee to the bailor. Although the consignee is not the original bailor, he becomes a bailor of the cargo by the attornment of the warehouse-man. Because the relationship between the bailor and bailee in modern society is normally governed by some sort of contract, the real function of bailment is that of sub-bailment.

Sub-bailment is also distinct from tort. The real function of sub-bailment is to impose duties which will not exist otherwise. In tort, the warehouse-man does not owe a duty to prevent the cargo from being stolen in common law; he does not commit a tort action if the cargo is stolen by somebody else in Chinese law, because he does not breach any obligations imposed by statute, which is a necessary condition of imposing tortious liability. However, under bailment, the warehouse-man is responsible for the safe custody of the cargo. Unless he can prove that he has taken all reasonable care, he is liable for the cargo loss or damage.

The doctrine of sub-bailment on term enables terminal operators to set exemption and limitation clauses into the terminal operation contract with carriers, which can bind both carriers and cargo owners. Normally, the warehouse-man accepts the cargo into his custody under certain conditions agreed between him and the carrier, in which he can set clauses to exempt or limit his liability to some extent. The problem is to what extent these conditions bind the cargo owners. In contract, these conditions are not enforceable against cargo owners, because the cargo owners

are not parties to the contract between carriers and the warehouse-man and those clauses, which prejudice a third party's interest, are invalid according to Chinese law. In bailment, the doctrine of sub-bailment on term allows terminal operators to insert exemption and limitation clauses binding both carriers and cargo owners, providing those clauses are reasonable. There are three standards for the reasonableness test: industrial association conditions, the terms of contract of carriage, and statutory regulations. As far as those clauses do not exceed the scope of one of these standards, these clauses are enforceable against cargo owners.

The limits of sub-bailment on term relate to the following three aspects. First, the doctrine of sub-bailment on term is unable to protect the stevedores because the stevedores normally do not acquire possession of the cargo, besides the handling operation, which is a necessary condition precedent for the creation of bailment. Second, the reasonableness test of the terms of sub-bailment is always a controversial topic. Third, it seems that the doctrine of sub-bailment on term is not applicable whenever cargo owners succeed in proving terminal operators or their employees caused the cargo damage or loss intentionally or negligently, under which terminal operators cannot avoid tortious liability. Finally, if the limitation contained in the terminal operation contract is different from that in the contract of carriage, it will cause confusion for litigation.

Section 3 Recommendations

The present Maritime Code is not able to tackle this kind of complex situation and the adoption of the legal regime of the Convention is not desirable. At the same time both two devices have their limits, so legislative action should be taken to deal with these problems. The following measures are recommended:

1. Amend the Maritime Code to increase the amount of limitation in order to make the limitation amount as far as possible represent the weighted average unit value of cargo carried.

2. Enact mandatory legislation dealing with terminal operators' cargo liability. The following points should be addressed:

2.1 Entitle terminal operators to the same amount of package limitation as that allowed to carriers by amending the Maritime Code, but the total liability should not exceed the actual value of the lost or damaged cargo. The principle of recognising the validity of the global limitation clause contained in a terminal operation contract should be specified to ensure the amount of global limitation is high enough to satisfy the package limitation.

2.2 Stevedores are liable for the cargo damage or loss caused by their employees in the course of the operation. They are not liable for the cargo loss or damage caused by other third parties or caused by their employees outside the normal course of operation, because they are only handling the cargo, which is under the possession of either carriers or warehouse-men.

2.3 Incorporate the concept of sub-bailment on term, define the basic duties of a warehouse-man as sub-bailee of the cargo, which are owed to the cargo owners.

2.3.1 The duty of care

The duty of a bailee is established as one of reasonable care (N. E. Palmer, 1991, p779). The warehouse-man should be liable for the cargo loss or damage if he fails to prove that the loss or damage was not caused by his fault. However, this burden comes into operation only when cargo owners show the fact of loss or damage, that the loss or damage occurred during the bailment, and prove the receipt of the cargo by the warehouse-man. The discharge of the duty of care must be associated with the value and vulnerability of the cargo, the likely hazards, and the condition of the goods upon delivery.

2.3.2 Theft or disappearance

If the goods have disappeared from the warehouse-man's premises, there is a presumption that their disappearance resulted from a breach of duty on his part. He will not escape from liability merely by demonstrating that the goods have been stolen. However, the mere event of theft does not automatically make him liable. If he has taken all reasonable precautions to guard against all foreseeable risks, but the

cargo is stolen by professional criminals, he will not be liable. "Thus, it is held that the warehouse-man is not liable for theft by robbery. A warehouse-man, freight forwarder, and wharfinger are responsible for loss due to ordinary negligence. They are not liable for thefts unless occasioned by their want of proper care, and their care is not to be governed by that required of common carriers"(Story, 1870, P381-383).

2.3.3 Fire

A warehouse-man as a bailee is not liable for the accidental fire nor is he bound to furnish an explanation of how the fire occurred. But if the fire is caused by his want of care, he should be liable for the damage or destruction of the goods caused by fire. Combustible goods clearly demand a greater level of precaution against fire damage, so the burden of disproving fault in case of fire damage to flammable cargo is very difficult to discharge.

2.3.4 Temperature changes and deterioration

Perishable goods demand a higher degree of care and attention than most other commodities, and a failure to make regular inspections of such products such as food, fruit, and vegetables, will constitute a failure in taking reasonable care. Thus if the staff of a container terminal by negligence failed to plug power into a reefer container and cause the contained cargo to be damaged, the terminal operator should be liable. When perishable goods deteriorate for an unexplained reason, the warehouse-man will be answerable unless he can show that the deterioration was unconnected with his breach of the duty of taking reasonable care.

2.3.5 Damage by proximate goods

The warehouse-man must ensure that the goods are not allowed to come into contact with anything else, which might destroy or contaminate them, but he is not liable unless such result is reasonably foreseeable. Thus, chemical products need special attention when they come into the warehouse.

2.3.6 Defective premises and equipment

The warehouse-man should be liable for damage to or loss of the cargo

caused by the defectiveness of the premises or equipment. The defectiveness is a relative concept. A warehouse may be perfect for keeping steel products but not suitable for keeping paper products.

2.4 The cargo owners' duty to disclose the dangerous nature of the cargo

If the cargo is of dangerous nature such as flammable cargo, pollutants, explosive cargo or poisonous goods, the cargo owners should make sure the dangerous nature is properly recorded in the transport document. Otherwise, the cargo owners should be liable for the harm caused by the dangerous goods to the warehouse-man as well as to third parties.

The remaining problem is whether a warehouse-man, as a sub-bailee should be entitled to the right of a lien on the cargo under his custody for the payment of his service. Under the Law of Warranty of the People's Republic of China, one party can exercise the right of lien on the property of the other contractual party only under the condition that he is possessing the property at the time the other party breaches the contract, and the possession must have resulted from performing the contract in question. So according to the above rules, a warehouse-man as a sub-bailee has no right of lien on the cargo. In fact the duty of payment of his service is on the part of the carrier, so a warehouse-man should not be entitled to the right of lien on the cargo even in the context of bailment.

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