THE HIMALAYA: A TROUBLED ASSENT

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[*Until the recent decision of the Privy Council in* The Eurymedon *case, the doctrine of privity in shipping contracts as in all other areas of contract law, had stood unchallenged and admitting of few exceptions. In this article, Mr Forrester analyses the recent decision in* Port Jackson Pty Ltd v. Salmond and Spraggon (Australia) Pty Ltd *wherein for the first time the High Court has had to consider the problems raised by* The Eurymedon *in the same context of bills of lading. As the author notes, this has raised not only issues of the substantive law of contract but also, in light of recent judicial developments, questions of precedent. After suggesting improvements in the form of drafting employed in Himalaya clauses, Mr Forrester concludes that, at least in the near future, these clauses will be construed by Australian Courts in light of the principles laid down in* The Eurymedon.]

(1) INTRODUCTION

In *Port Jackson Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd*,[1] the High Court of Australia considered the effect of a Himalaya clause[2] in a bill of lading which governed the carriage of goods by sea from Canada to Sydney. The plaintiff, who was the consignee under the bill of lading, sued the stevedore for failing to take proper care of the goods after unloading them. The stevedore defended on the ground that the bill of lading contained exemption clauses which protected the stevedore, as well as the carrier, from liability.

In *The Eurymedon*,[3] a majority of the Privy Council had held that a stevedore could rely on exemption clauses in a bill of lading, provided certain criteria[4] were met, even though the stevedore was not a party to the contract of carriage evidenced therein. Although a majority of the High Court appeared to accept *The Eurymedon's* approach to Himalaya clauses,[5] the facts of *The Eurymedon* were held to be distinguishable from

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1 (1978) 18 A.L.R. 333. (Hereinafter referred to as *Salmond & Spraggon's* case.)

2 A Himalaya clause generally provides that the shipowner, as agent for the servants and agents (including independent contractors) from time to time employed by the shipowner, agrees with the cargo owner that these servants, agents and independent contractors shall be protected by the limits of liability and other defences arising from the contract of carriage. The term 'Himalaya clause' derives from *Adler v. Dickson, The Himalaya* [1955] 1 Q.B. 158, which dealt only with the liability of a shipowner's servants for personal injuries to a passenger.

3 *New Zealand Shipping Company Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154 (hereinafter cited as '*The Eurymedon*').

4 The criteria were those set out by Lord Reid in *Scruttons v. Midland Silicones Ltd* [1962] A.C. 446, 474. See discussion, *infra* n. 16.

5 Mason and Jacobs JJ., who decided with the majority, did not question the authority of *The Eurymedon*. In dissent, Barwick C.J. expressly approved *The Eurymedon*. The other two members of the majority, Stephen and Murphy JJ., refused to apply *The Eurymedon* to the instant facts; Stephen J. expressly rejected the Privy Council's approach. See discussion, *infra* nn. 57-63.

those in *Salmond & Spraggon's* case; accordingly, the stevedore's defence was rejected.

The High Court's apparent approval of *The Eurymedon* involved an analysis of the fundamental contractual concepts of offer, acceptance, consideration and privity. This article will focus on the views expressed, in the High Court and in the lower courts, on these fundamental concepts, with emphasis on the application of those views in the peculiar context of the shipping industry's bills of lading.

(2) THE FACTS

On 10 May, 1970, a vessel known as the New York Star arrived in Sydney carrying a shipment of thirty-seven cartons of razor blades valued at $14,684.98. The goods had been shipped from New Brunswick pursuant to a bill of lading in which the shipper was the Schick Safety Razor Company of Canada, and the consignee was Salmond & Spraggon (Australia) Pty Ltd. The shipowners engaged Port Jackson Stevedoring Pty Ltd to discharge the New York Star and store its cargo.[6] The goods were discharged on or about 12 May, 1970, and placed in a separate storage section, known as the 'dead house', for greater security. On the following day a thief, pretending to be a representative of the consignee, informed the supervising watchman that he had come for the razor blades. Although no bill of lading was presented to the stevedore's employees, the thief managed to load thirty-three of the cartons on board his truck and escape. The court at first instance[7] concluded that the loss of the goods was caused by the negligence of the stevedore;[8] this conclusion was not disturbed in the subsequent appeals.

Salmond & Spraggon (Australia) Pty Ltd brought an action against the stevedore in the Supreme Court of New South Wales. It was conceded that the plaintiff's action was not commenced within twelve months of the date when the consignment ought to have been delivered to the plaintiffs. Accordingly, the stevedore relied on clause 17 in the bill of lading, which stated:

> 17. In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered.

[6] The shipping company engaged Joint Cargo Services Pty Ltd as its agent in Sydney. Port Jackson Stevedoring Pty Ltd was retained by Joint Cargo Services Pty Ltd on behalf of the shipping company. The plaintiff sued Joint Cargo Services Pty Ltd as codefendant. Sheppard J., in the Supreme Court of New South Wales, held that Joint Cargo Services Pty Ltd never had possession of the goods, and gave judgment in their favour. No appeal was taken from this judgment.

[7] *Salmond & Spraggon (Australia) Pty Ltd v. Joint Cargo Services Pty Ltd & Anor.*, (Unreported, Supreme Court of New South Wales, 14 July 1975 *per* Sheppard J.).

[8] *Ibid.* transcript, 9. Sheppard J. found that the theft was caused both by negligence in having in force an unsatisfactory tally system and by the negligence of the employees of Port Jackson Stevedoring Pty Ltd in carrying out that system.

The stevedore claimed the benefit of this time limitation through the operation of clause 2 in the bill of lading. Clause 2, a Himalaya clause, purported to exempt the carrier's servants and agents and 'every independent contractor from time to time employed by the Carrier' from liability to the shipper, consignee or owner of the goods for loss, damage or delay 'while acting in the course of or in connection with' their employment. Every exemption and limitation to which the carrier was entitled under the bill of lading was expressly extended to such servants and agents of the carrier. In addition, the Himalaya clause provided that:

> for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of or for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by the Bill of Lading.

The central issue faced by Sheppard J. in the Supreme Court of New South Wales was whether this Himalaya clause entitled the stevedore to rely on the time limitation of clause 17, given that the stevedore was not a party to the contract of carriage.[9]

(3) THE HISTORICAL BACKGROUND

In *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd*,[10] the High Court of Australia had considered the effect of a third-party exemption clause which read:

> Goods in the custody of the carrier or his agents or servants before loading and after discharge . . . are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.

The defendant stevedore relied on this clause to exempt it from liability for negligent damage to the plaintiff's goods during the stacking and storing process. Fullagar J., speaking for the majority,[11] rejected this argument because the stevedore was not a party to the contract of carriage:

> The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee or cargo by contract with the stevedore, and there is . . . no principle of law . . . which compels the inference of any contract between the shipper or consignee and the stevedore.[12]

[9] There was no question as to the consignee's contractual status under the bill of lading. The defendants were sued for breaches of their obligations as bailees of the goods. Moreover, it was held in *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Company Ltd* [1924] 1 K.B. 575 that by accepting the bill of lading and asking for delivery of the goods, the consignee is entitled to the benefit of, and bound by, its stipulations as against the carrier.

[10] (1956) 95 C.L.R. 43.

[11] Dixon C.J., Kitto and Fullagar JJ. gave judgment against the stevedore; Williams and Taylor JJ. dissented.

[12] *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd* (1956) 95 C.L.R. 43, 78-9.

In reaching this conclusion, Fullagar J. observed that it would be incorrect to regard a stevedoring company engaged by a shipowner to load or unload a ship as an 'agent' or 'servant' of the shipowner; the stevedore is an independent contractor.[13] Therefore, the exemption clause at issue in *Wilson's* case did not protect the stevedore in any event.

The decision by the High Court in *Wilson's* case was given express approval by the House of Lords in *Scruttons Ltd v. Midland Silicones*.[14] In that case, the contract of carriage limited the liability of 'the carrier' to a designated sum. The House of Lords held[15] that the stevedore could not rely on the limitation clause because it was not a party to the contract of carriage. Moreover, the clause only limited the liability of the carrier; no reference was made to the liability of the stevedore.

Despite this conventional approach to the doctrine of privity, the *Midland Silicones* case marked a turning point in the effect of bills of lading on stevedores' liabilities. Lord Reid, in passing, left open the possibility of success with the 'agency argument', provided four criteria are satisfied: first, the bill of lading must make clear an intention to protect the stevedore; secondly, it must also make clear that the carrier contracts for the stevedore's benefit as well as the carrier's own; thirdly, the authority of the carrier so to act must be established (or perhaps later ratification by the stevedore would suffice); fourthly, there must be consideration from the stevedore for the protection of the bill of lading's exemption provisions.[16]

These four criteria were put to the test in *The Eurymedon*. There, the plaintiff's goods had been damaged through the negligence of the defendant stevedore during unloading. As in the previous cases, the defendant relied on an exemption clause in the bill of lading;[17] in *The Eurymedon*, however, the Himalaya clause was significantly broader than the clauses in either *Wilson's* case or the *Midland Silicones* case. The exempting provisions were extended to independent contractors, as well as servants and agents of the carrier; in addition, the carrier was deemed to be acting as agent for the independent contractors for the purpose of providing the benefit of the exemptions and limitations of the bill of lading. To this extent, the independent contractors were deemed to be parties to the contract evidenced by the bill of lading.

[13] *Ibid.* 70.

[14] [1962] A.C. 446.

[15] Lord Denning dissented on the ground that the protection granted to the stevedore under the clear wording of the bill of lading should not be defeated by the doctrine of privity.

[16] *Scruttons Ltd v. Midland Silicones Ltd* [1962] A.C. 446, 474, *per* Lord Reid.

[17] The parties had agreed that the Hague Rules, as embodied in the various Carriage of Goods by Sea Acts, were applicable to the contract evidenced by the bill of lading. Article III, rule 6 provided that the carrier is to be discharged from all liability in respect of damage to goods unless suit were brought within one year after delivery of the goods. The plaintiff's action was not brought within the one year period.

Applying Lord Reid's four criteria, the majority[18] of the Privy Council held that the stevedore was entitled to rely on the time limitation provision in the bill of lading. There was no doubt about the first condition: the Himalaya clause expressly conferred the protection of the exemption clauses on independent contractors. Secondly, the clause clearly stated that the carrier was acting as agent for the independent contractors, which included stevedores. The third element, authority of the carrier to act as the stevedore's agent, was established easily under the special facts of *The Eurymedon*: the carrier company was a wholly owned subsidiary of the stevedoring company; this corporate tie led the Privy Council to conclude that 'the carrier was, indisputably, authorized by the [stevedore] to contract as its agent for the purposes of [the exemption clause]'.[19]

The main point of contention before the Privy Council was Lord Reid's fourth condition, consideration moving from the stevedore. The stevedore argued that the acts of discharging and storing the goods provided the necessary consideration for the promised exemptions. This argument met with two difficulties: first, the acts of discharging and storing the goods arose from the stevedore's separate contract with the shipowner, not from the bill of lading. It was not clear whether the performance of an act which the party is under an existing obligation to a third person to do could constitute sufficient consideration. Secondly, the stevedore's argument gave rise to conceptual problems concerning the nature of the transaction. Was the protection extended through the Himalaya clause by way of an offer, open to acceptance by performance as in *Carlill v. Carbolic Smoke Ball Co.*?[20] Alternatively, was there an agreement (offer and acceptance) between the consignee and the stevedore at the time of entering into the contract of carriage, the enforceability of which was conditional upon performance of the necessary consideration by the stevedore?

The first of these difficulties was handled summarily by the Privy Council. Citing the nineteenth century decision of *Scotson v. Pegg*,[21] the majority held that an agreement to do an act which the promisor is under an existing obligation to a third party to perform may amount to sufficient consideration.[22]

The conceptual analysis of the contractual elements required more attention. It was clear that there was no immediately binding contract between cargo-owner and stevedore at the time the bill of lading was signed. At that stage, the stevedore had provided no consideration, either by promise or performance. However, the majority of the Privy Council held that the subsequent act of discharging the goods was valid consider-

[18] Lords Wilberforce, Hodson and Salmond; Viscount Dilhorne and Lord Simon of Glaisdale dissenting.
[19] *The Eurymedon* [1975] A.C. 154.
[20] [1893] 1 Q.B. 256 (C.A.).
[21] (1861) 6 H. & N. 295.
[22] *The Eurymedon* [1975] A.C. 154, 168.

ation which entitled the stevedore to have the benefit of the exemptions and limitations contained in the bill of lading. Performance of this act of consideration converted the initial 'bargain' between the shipper and the stevedore into a 'full contract', entitling the stevedore to the specified benefits. The difficulties in pigeonholing the various parts of the transaction into the marked slots of offer, acceptance and consideration were dismissed as 'a matter of semantics'.[23] Indeed, the majority stated that it was not necessary to distinguish between an agreement which matures into a binding contract through the performance of an act of consideration and a 'unilateral' contract such as was present in *Carlill's* case: the first approach is 'very close to if not identical to' the second.[24]

The Eurymedon left several issues unresolved. First, it was not clear whether Lord Reid's four criteria could be applied in situations other than shipping cases. For example, could manufacturers use the 'agency argument' to gain the benefits of exemption clauses in contracts of sale between consumers and retailers or, could a shipping company act on behalf of its servants and agents to procure the benefits of an exemption clause in a passenger's sailing ticket, so as to relieve the servants and agents from tort liability for personal injuries to the passenger?[25] References by the majority of the Privy Council to the 'commercial considerations'[26] involved in shipping cases suggested that *The Eurymedon* might be narrowly restricted.

Secondly, in view of the Privy Council's call for uniformity 'on both sides of the Pacific' in determining the liability of stevedores,[27] subsequent decisions in other jurisdictions might have been expected to be consistent with the spirit of *The Eurymedon*, despite technical distinctions of fact or variances in the language used in bills of lading.[28] In *Herrick v. Leonard and Dingley Ltd*,[29] however, the Supreme Court of New Zealand preferred the approach of *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd* in holding that a clause in a sea-carriage contract which extended the carrier's exemptions to its servants and agents was ineffective to protect the stevedore, who was an independent contractor. Moreover, in *Herrick* it was held that the carrier had no authority from the stevedore to act as its agent; the corporate tie, present in *The Eurymedon*, did not exist in

[23] *Ibid.*

[24] *Ibid.* In the Supreme Court of New Zealand, Beattie J. had read the Himalaya clause as an offer of immunity. This view was rejected by the New Zealand Court of Appeal [1973] 1 N.Z.L.R. 174 (Turner P., Richmond and Perry JJ.).

[25] See, *e.g.*, the sailing agreement in *Adler v. Dickson, The Himalaya* [1955] 1 Q.B. 158.

[26] *The Eurymedon* [1975] A.C. 154, 169.

[27] *Ibid.*

[28] In addition to lacking privity with respect to the contract of carriage, the stevedore in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd* (1956) 95 C.L.R. 43 was not exempt from liability because it was not included within the "agents and servants" of the carrier. *The Eurymedon* suggested that policy considerations should carry more weight than the technical language of the Himalaya clause.

[29] [1975] 2 N.Z.L.R. 566.

Herrick, and the stevedore was not in fact appointed by the charterer until the ship reached New Zealand.

Similarly, in *Calkins & Burke Ltd v. Empire Stevedoring Co. Ltd*,[30] the British Columbia Supreme Court held that, in the absence of the special facts of *The Eurymedon*, no authority of the carrier to contract as agent of the stevedore could be inferred.

Finally, a series of American decisions determined that the ability of stevedores to rely on exemption clauses in bills of lading varied depending on the precise working of the Himalaya clause.[31] If the clause specifically referred to the stevedores, they could claim the protection of the bill of lading; otherwise, they could not, despite any 'commercial considerations' to the contrary. These decisions exploded any hope for uniformity in extending the spirit of *The Eurymedon* to other jurisdictions.

A third, closely related, question left unresolved by *The Eurymedon* was to what extent the majority's holding, if not the spirit of the decision, would be followed in other jurisdictions. In addition to distinguishing the facts of *The Eurymedon*, the British Columbia Supreme Court, in *Calkins & Burke's* case, tartly observed that:

> neither the judgment of the House of Lords nor that of the Privy Council, while often of strong persuasive value, is binding upon a trial judge in British Columbia. On the other hand, a judgment of the Supreme Court of Canada is determinative of the law in Canada.[32]

Accordingly, the court preferred to base its decision against the stevedore on the 1971 judgment by the Supreme Court of Canada in *Canadian General Electric Co. Ltd v. Pickford & Black Ltd*,[33] rather than on *The Eurymedon*.

In Australia, the High Court had ruled, prior to *The Eurymedon*, that it did not regard itself as bound by decisions of the House of Lords, nor of the Court of Appeal of the United Kingdom.[34] Subsequently, under the Privy Council (Appeals from the High Court) Act 1975 (Cth), no appeal could be brought from a High Court decision to the Privy Council.[35]

[30] (1976) 4 W.W.R. 337.

[31] In *Carle & Montanari Inc. v. American Export Isbrandtsen Lines Inc.* [1968] 1 Ll.L.R. 260 and *Tessler Bros (B.C.) Ltd v. Italpacific Line and Matson Terminals Inc.* [1975] 1 Ll.L.R. 210, in which the bills of lading specifically referred to stevedores, the stevedores were held to be protected. In *Krawill Machinery Corp. v. Robert C. Herd & Co. Inc.* [1959] 1 Ll.L.R. 305 and *The Mormacaster* [1973] 2 Ll.L.R. 485, however, in which the bills of lading did not specifically extend protection to the stevedores, the stevedores were denied the protection of the exemption clauses.

[32] *Calkins & Burke Ltd v. Empire Stevedoring Co. Ltd* (1976) 4 W.W.R. 337, 350.

[33] [1971] S.C.R. 41.

[34] *Parker v. The Queen* (1963) 111 C.L.R. 610; *Skelton v. Collins* (1966) 115 C.L.R. 94.

[35] Under Judiciary Act 1903 (Cth), ss 38A and 39(2), appeals to the Privy Council from State courts in matters of federal jurisdiction were precluded. The Privy Council (Limitation of Appeals) Act 1968 terminated the opportunity to appeal from the High Court to the Privy Council in federal matters. The Privy Council (Appeals from the High Court) Act 1975 removed the power of the Privy Council to grant special leave to appeal from a decision of the High Court. For a discussion of the effect of these Acts, see Barwick, G., 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480 and St. John, E., 'The High Court and the Privy Council; the New Epoch' (1976) 50 *Australian Law Journal* 389.

Finally, in *Viro v. The Queen*,[36] issued only three months before *Salmond & Spraggon's* case, the High Court ruled that whilst decisions of the Privy Council were to be accorded great respect, they were no longer binding on the High Court. Accordingly, the correctness of *The Eurymedon* was open to challenge before the High Court in *Salmond & Spraggon's* case.

Another issue remaining after *The Eurymedon* was whether, as the Privy Council had asserted, the analytical difficulties raised by the transaction were merely semantic. No authority was cited for regarding the Himalaya clause as a 'bargain initially unilateral' becoming a mutual, 'full contract' upon the performance of an act of consideration.[37] Arguably, there was a fundamental distinction between such a bargain and the notion of unilateral contract, as described in *Carlill's* case. Indeed, it seemed that by providing such obfuscatory phraseology as 'a bargain initially unilateral but capable of becoming mutual' and 'full contract', the Privy Council had introduced fresh semantic problems to the conceptual analysis.

Furthermore, the promised exemptions in the bill of lading were addressed to an indeterminate class of agents, servants and independent contractors. 'Acceptance' could be accomplished in a wide variety of ways. To treat the Himalaya clause as an 'offer', even though no indication was given as to how the offer was to be accepted, ran counter to established theory on unilateral contract.[38] The fact situation in *The Eurymedon* was distinguishable from that in *Carlill's* case, in which the use of the smoke balls was the specified act of acceptance of the defendant's offer.

This unsettled background, with its impressive host of unresolved issues, confronted Mr Justice Sheppard in the Supreme Court of New South Wales.

(4) THE DECISION OF THE SUPREME COURT OF NEW SOUTH WALES

After finding that the stevedore had been negligent in allowing the theft of the razor blades, Sheppard J. divided his opinion into three headings. Citing *The Eurymedon*, which was binding on the Supreme Court of New South Wales,[39] he held that Lord Reid's four criteria had been satisfied and that the stevedore could rely on the exemption clauses in the bill of

[36] (1978) 18 A.L.R. 257.

[37] See Duggan, A. J., 'Offloading The Eurymedon' (1974) 9 M.U.L.R. 753. The author notes that the decision in *Great Northern Railway Co. v. Witham* (1873) L.R. 9 C.P. 16, cited by the majority of the Privy Council in support of its analysis, is inapposite.

[38] The New Zealand Court of Appeal in *A.M. Satterthwaite & Co Ltd v. New Zealand Shipping Co. Ltd* [1973] 1 N.Z.L.R. 174, held that an offer to the world at large must make known to the offerees a particular method of acceptance. See Duggan, A. J., 'Offloading The Eurymedon' (1974) 9 *M.U.L.R.* 753.

[39] *Salmond & Spraggon (Australia) Pty Ltd v. Joint Cargo Services Pty Ltd & Anor.*, transcript 11 (Unreported, Supreme Court of New South Wales, 14 July 1975 *per* Sheppard J.).

lading. The first two criteria were expressly met by the Himalaya clause. The fourth, consideration, was found to be satisfied by the stevedore's acts of discharging and storing the goods. Counsel for Salmond & Spraggon conceded that the case was indistinguishable from *The Eurymedon* in this regard. Only the third condition, the carrier's authority to act as agent on behalf of the stevedore, was at issue. The stevedore had for years enjoyed a monopoly of the carrier's business in Sydney, and was familiar with the relevant terms in the bill of lading; however, no corporate tie of the *Eurymedon*-type was present. Sheppard J. concluded that this evidence was insufficient to establish the authority of the carrier to act as agent for the stevedore. Nevertheless, he observed that Lord Reid had referred to agency by ratification. The stevedore's reliance upon the Himalaya clause in the judicial proceedings, together with its prior knowledge of the terms of the bill of lading, supported an inference that it had ratified the agency of the carrier.[40]

The second matter considered by Sheppard J. was that the razor blades had been discharged from the New York Star and stored in the wharf shed before being stolen, rather than damaged during unloading as in *The Eurymedon*. The bill of lading stated that the carrier's responsibility in respect of the goods terminated 'without notice as soon as the goods leave the ship's tackle at the Port of Discharge'.[41] Counsel for the plaintiff argued that once the goods were discharged from the ship's tackle, the bill of lading was exhausted and the stevedore could not thereafter rely upon its provisions.[42]

Sheppard J. rejected this contention on the basis that the bill of lading, in fact, was not exhausted when the goods left the ship's tackle. The bill of lading provided that 'any responsibility of the Carrier in respect of the goods . . . continuing after leaving the ship's tackles . . . shall not exceed that of an ordinary bailee'. In the event the carrier retained some responsibility for the goods after discharge, the bill of lading remained operative. Moreover, the bill of lading continued in force after unloading for the purpose of protecting the consignee, by permitting delivery of the goods only upon presentation of a copy of the bill of lading. Finally, the parties' commercial expectations must have been that the carrier would not dump the razor blades on the wharf and leave them unprotected; it is common knowledge that carriers employ stevedores to stack and store

[40] *Ibid.* 13. In *A.M. Satterthwaite & Co. Ltd v. New Zealand Shipping Co. Ltd* [1972] N.Z.L.R. 385, 404-5, Beattie J. stated that 'because the defendant is relying on the terms of a contract [in the judicial proceedings] that *per se* can be regarded as a proper act of ratification'.

[41] The relevant clauses of the bill of lading are set out by Barwick C.J. See (1978) 18 A.L.R. 333, 336-8. Clauses 5 and 8 of the bill of lading stated that the carrier's responsibility and liability determined upon delivery *ex* ship's rail.

[42] Support for the plaintiff's argument was found in the majority judgment in *The Eurymedon* [1975] A.C. 154, 167-8, where it was stated that 'the whole carriage *from loading to discharge*, by whomsoever it is performed' was covered by the exemption clause (emphasis added). The Privy Council did not discuss the possibility that the goods might be lost or damaged after discharge.

the goods and hold them for the consignee. The bill of lading contemplates these obligations of the ship and its agents or independent contractors, which continue after the goods leave the ship's tackles.[43]

The third question considered by the Supreme Court was whether the exempting provisions of the bill of lading were lost to the stevedore because of its 'total breach' of the obligation, owed to the plaintiff, not to deliver the razor blades otherwise than in exchange for a copy of the bill of lading. Sheppard J. held that the immunity from suit after a twelve month period, conferred by clause 17, protected the carrier no matter what breach of conduct may have been committed; through the Himalaya clause, this immunity was extended to the stevedore. Accordingly, the plaintiff's action, which was instituted after the expiration of twelve months from the date when the goods should have been delivered, was out of time. Judgment was given for the stevedore.[44]

(5) IN THE NEW SOUTH WALES COURT OF APPEAL

The New South Wales Court of Appeal, which was bound by the Privy Council's decision in *The Eurymedon*,[45] examined the conclusions of Sheppard J. in the light of Lord Reid's four *Midland Silicones* criteria. The Court of Appeal agreed that the first two conditions were expressly met by the Himalaya clause. With regard to the third element, the authority of the carrier to act as agent for the stevedore, the Court of Appeal found no need to rely on agency by ratification. The stevedore's monopoly position with respect to the carrier's business in Sydney, its knowledge of the terms of the bill of lading, and its past reliance on those terms clearly demonstrated that the carrier had the actual authority of the stevedore to procure the benefits of the exemption provisions. No corporate nexus, as in *The Eurymedon*, was required.

Before Sheppard J. the plaintiff had conceded that consideration had been provided by the stevedore. In the Court of Appeal, however, the plaintiff raised a point that had not been argued in the court below:[46] consideration

[43] Sheppard J. distinguished the two cases primarily relied upon by the plaintiff in support of the argument that the bill of lading ceased to operate upon delivery *ex* ship's rail. In neither *Keith Bray Pty Ltd v. Hamburg Amerikanische* (unreported decision, Supreme Court of New South Wales, 11 September 1970, *per* Macfarlan J.) nor *York Products Pty Ltd v. Gilchrist Watt & Sanderson Pty Ltd* [1968] 3 N.S.W.R. 551, was the stevedore's right to rely on exemption clauses in a bill of lading at issue.

[44] Sheppard J. also considered the 'total breach' argument with respect to clause 5 of the bill of lading, which exempted the carrier from liability from any non-delivery or misdelivery of the goods. Sheppard J. found that the stevedore had given up possession of the goods in breach of an express obligation to deliver only against a copy of the bill of lading. This total breach of the contract was not contemplated by the exemptions of clause 5, and therefore was not available to the stevedore through the Himalaya clause.

[45] (1978) 18 A.L.R. 333, 352, 367.

[46] In the High Court, Barwick C.J. observed that: 'it should only be in the clearest case and for the most cogent reasons that a party who has conceded matter at trial should be allowed to make the validity of what has been conceded the basis for overturning the result of the 'trial'.' (1978) 18 A.L.R. 333, 342.

moving from the stevedore, it was contended, had not been established because there was no evidence that in performing its stevedoring functions the defendant had acted in reliance upon the 'offer' contained in the bill of lading. Citing *Australian Woollen Mills Pty Ltd v. The Commonwealth*,[47] the plaintiff asserted that mere knowledge of an offer did not support an inference that conduct by the offeree, in accordance with the terms of the offer, was in reliance on that offer. In the instant case, for example, the defendant might have performed its stevedoring duties solely in reference to the contract with the carrier; no proof was offered by the defendant to warrant a contrary inference.

The New South Wales Court of Appeal unanimously accepted this view of the evidence. The Court regarded the instant appeal as on all fours with the hypothetical example given in the *Australian Woollen Mills* case:[48]

> A, in Sydney, says to B in Melbourne: 'I will pay you £1,000 on your arrival in Sydney.' The next day B goes to Sydney. If these facts alone are proved, it is perfectly clear that no contract binding A to pay £1,000 to B is established. For all that appears there may be no relation whatever between A's statement and B's act. It is quite consistent with the facts proved that B intended to go to Sydney anyhow, and that A is merely announcing that, if and when B arrives in Sydney, he will make a gift to him.

According to the Court of Appeal, this passage from *Australian Woollen Mills* contradicted the earlier dictum of Starke J. in *The Crown v. Clarke*.[49] Starke J. had stated that 'as a matter of proof any person knowing of the offer who performs its conditions establishes prima facie an acceptance of that offer'.[50] In *Dalgety Australia Ltd v. Harris*,[51] Glass J. of the New South Wales Court of Appeal had stated that Starke J.'s dictum was 'not a sound proposition of law'.[52] In the instant appeal, he was joined by Hutley J. who insisted that additional evidence must be presented by the offeree, showing some causal connection between the offer and the act of acceptance, before an inference of reliance on the offer could be drawn.[53]

In essence, the Court of Appeal was determining the burden of proof to be met by each party in the unilateral contract situation. Under Starke J.'s approach, the offeree's burden, in establishing that the act of acceptance was in reliance on the offer, is met by proving (1) knowledge of the terms of the offer and (2) conduct in accordance with those terms. The burden of proof then shifts to the offeror, who must present facts to rebut the inference of reliance which was drawn from the offeree's evidence. In contrast, the Court of Appeal required additional evidence from the offeree to support an inference of reliance. The stevedore had met both of Starke J.'s requirements, but had not shown that the acts of discharging

[47] (1954) 92 C.L.R. 424.
[48] *Ibid.* 457.
[49] (1927) 40 C.L.R. 227.
[50] *Ibid.* 244.
[51] [1977] 1 N.S.W.L.R. 324.
[52] *Ibid.* 328.
[53] *Salmond & Spraggon (Australia) Pty Ltd v. Joint Cargo Services Pty Ltd and Anor.* [1977] 1 Ll.L.R. 445, 451-2.

and storing the razor blades were otherwise than solely connected with its contract with the carrier. Therefore, the Court of Appeal held that the stevedore did not satisfy Lord Reid's fourth condition and was not protected by the time limitation in clause 17 of the bill of lading.[54]

(6) IN THE HIGH COURT OF AUSTRALIA

Somewhat surprisingly, neither party in *Salmond & Spraggon's* case challenged the authority of *The Eurymedon* in argument before the High Court of Australia.[55] Under *Viro v. The Queen*,[56] the High Court was free to determine whether *The Eurymedon's* application of the agency argument was to be adopted in Australia. Arguably, the Privy Council's conclusion that the stevedore had satisfied the requirements of the doctrine of privity had been incorrect in terms of policy and precedent.

Among the members of the High Court, Stephen J. was alone in considering the binding effect of *The Eurymedon*. He concluded that the majority opinion in *The Eurymedon* was not good law.[57]

Stephen J.'s criticism of the Privy Council's decision was based on his analysis of the Himalaya clause in *The Eurymedon* and on his interpretation of Lord Reid's four *Midland Silicones* criteria. The Himalaya clause could not be construed as an offer, according to Stephen J., because under any fair reading of the words of the clause, it did not allow for a contract to be completed at a later date. Moreover, if the Himalaya clause were construed as an offer, it would subject the consignee to potential contracts with all of the carrier's servants, agents and independent contractors; acceptance of the offer could be made by a wide variety of acts of performance. Such an interpretation could not have been intended by the parties.[58]

Nor could Stephen J. accept a reading of the Himalaya clause as a bargain which later matured into a full contract upon the performance of consideration:

> That has, no doubt, the advantage that it better accords with the language of the clause, couched as it is in terms of an immediately concluded agreement but, as I would understand it, it differs from a *Carlill*-type unilateral contract only in that the persons to whom the offer is made are present at the time of its making (in the present case, in the shape of the carrier who is their agent to receive the offer). It is their presence and their assent (if that be not too strong a word) to the making of the offer to them that enabled their Lordships [in *The Eurymedon*] to

[54] The New South Wales Court of Appeal discussed the arguments which had been raised in regard to fundamental breach. The Court concluded that the stevedore had been guilty of a fundamental breach of the contract of bailment by delivering the goods to the thief, without receiving the bill of lading. Therefore, the stevedore could not have relied on the exemptions of clause 5 even if it had satisfied Lord Reid's four criteria. However, the Court found that the time limitations of clause 17 could have been enforced despite the stevedore's breach, because full effect could be given to the parties' intentions without modifying clause 17. [1977] 1 Ll.L.R. 445, 451, 453.

[55] (1978) 18 A.L.R. 333, 352.

[56] (1978) 18 A.L.R. 257.

[57] (1978) 18 A.L.R. 333, 352.

[58] *Ibid.* 353-4.

> say that although no binding agreement had been concluded a 'bargain' had been struck which might mature into a 'complete' contract if one to whom the offer was made performs part of the work contemplated under the bill of lading and thereby, at the same time, provides consideration in exchange for the shipper's promise which is involved in the offer.[59]

Lord Reid's four criteria, however, spoke of the carrier 'contracting' as the agent for the stevedore, with the authority 'to do that'. According to Stephen J., these are words which:

> contemplate the creation of a contract having immediate effect as binding both parties and which are as inappropriate to an orthodox *Carlill*-type unilateral contract as they are to the particular formulation [i.e., a bargain maturing into a full contract] favoured by the majority of their Lordships.[60]

Murphy J. agreed with Stephen J. that *The Eurymedon* should not be applied to extend the exemptions and immunities of the bill of lading to the stevedore.[61] His discussion of *The Eurymedon*, however, was somewhat unclear. At the outset, in rejecting the Court of Appeal's conclusion that the stevedore had not satisfied Lord Reid's fourth condition, Murphy J. cited *The Eurymedon* with approval. Nevertheless, he observed that the thrust of a Himalaya clause is to relieve the servants, agents and independent contractors of the carrier from virtually all responsibility. His conclusion was based on policy considerations: it would not be in Australia's best interests to 'conjure up' a contract which would protect the stevedore, particularly where Australian importers and exporters had no real bargaining power in negotiating the terms of a bill of lading.[62]

In a joint opinion, Mason and Jacobs JJ. adopted *The Eurymedon* without questioning its authority. They agreed with Murphy J. that the Court of Appeal's view that there was no consideration provided by the stevedore was in conflict with the actual decision in *The Eurymedon*:

> The adequacy of the consideration was the only matter in dispute in *The Eurymedon* when it was before the Privy Council and its conclusion in this respect on indistinguishable facts becomes a precedent binding the New South Wales Court of Appeal. It was not open to that Court by a different approach through a different line of authorities to find a lack of consideration.[63]

Applying *The Eurymedon*, Mason and Jacobs JJ. concluded that Lord Reid's four criteria for establishing privity of contract through the agency argument had been satisfied by the stevedore.

Despite this difference of opinion among the majority of the High Court as to the authority of *The Eurymedon*, they agreed that judgment should be given for the consignee on the ground that the Privy Council's decision was inapplicable to the facts of *Salmond & Spraggon's* case. In *The Eurymedon*, the goods had been damaged during unloading, rather than stolen after discharge as in *Salmond & Spraggon's* case. Stephen J. noted that the Himalaya clause operated in favour of the stevedore 'while acting

[59] *Ibid.* 354.
[60] *Ibid.* 355-6.
[61] *Ibid.* 376.
[62] *Ibid.*
[63] *Ibid.* 367.

in the course of or in connection with his employment'. The exemptions and limitations of the bill of lading were available to the stevedore 'acting as aforesaid'. The relevant employment, Stephen J. concluded, was limited to conduct of the stevedore in carrying out the obligations of the carrier under the bill of lading.

Under the terms of the bill of lading,[64] the carrier's obligations determined when the goods were delivered over the ship's rail. Upon completion of the unloading operations, the relevant employment of the stevedore determined as well. The subsequent acts of sorting, stacking and storing the goods were not part of the relevant employment. Therefore, the immunities conferred by the Himalaya clause were no longer available to the stevedore.

In reaching this conclusion, Stephen J. acknowledged that his reading of the bill of lading contrasted with that of Sheppard J. in the Supreme Court of New South Wales. These different views resulted from the variety of functions served by a bill of lading. Under the attestation clause, for example, a copy of the bill of lading was required in exchange for release of the goods to the consignee. As Stephen J. observed, however, this provision was concerned with the function of a bill of lading as a negotiable document of title, rather than as a contract of carriage. It did not extend the obligations of the carrier beyond the time of delivery *ex* ship's rail. Similarly, clause 5 of the bill of lading, which stated *inter alia* that 'any responsibility of the Carrier in respect of the goods . . . continuing after leaving the ship's tackles, shall not exceed that of an ordinary bailee', did not extend the carrier's obligations under the contract of carriage. It merely provided a limitation of liability in the event that the carrier should find itself in the position of bailee.

Accordingly, whether *The Eurymedon* were followed or not, Stephen J. held that the stevedore was not entitled to rely on the time limitation clause in the bill of lading to relieve itself from liability for negligence.

Murphy J. agreed with Stephen J. that the immunities and exemptions of the bill of lading ceased to operate upon discharge of the cargo. The one-sidedness of the Himalaya clause, together with the inability of the Australian consignee to negotiate as to its provisions, prompted Murphy J. to construe strictly the exemptions and limitations of the bill of lading.[65] He held that the stevedore could not defend on the basis of the time limitation of clause 17.

Mason and Jacobs JJ. agreed that the facts of the instant appeal were distinguishable from those in *The Eurymedon*. In addition to emphasizing the determination of the relevant employment of the stevedore,[66] Mason

[64] Clauses 5 and 8. *Ibid.* 337.

[65] *Ibid.* 377.

[66] *Ibid.* 367-8. The obligations of either the carrier or the stevedore as bailee are not imposed by the bill of lading, but arise from the fact of actual possession of the goods on behalf of the rightful owner.

and Jacobs JJ. focused on the vicarious nature of the stevedore's immunities:

> The reasoning underlying the finding of a contract between shipper and stevedore [in *The Eurymedon*] is that the immunity or limitation is transferred, that what has been called a vicarious immunity or limitation of action arises in favour of the stevedore. It would be a great extension of *The Eurymedon* doctrine to apply it to a case where the immunity or limitation of action is not one which the carrier, its servants and agents (including independent contractors) all could claim, but is one where no liability would arise in any circumstances in the carrier. It is not an extension which in our opinion ought to be made.[67]

In the instant appeal, the carrier had no need to rely on the twelve-month limitation period of clause 17; it was free from liability for negligence without regard to the exemption provisions once the goods were discharged *ex* ship's rail. Therefore, Mason and Jacobs JJ. held that the stevedore could not claim the vicarious protection of clause 17. Indeed, as there was no applicable immunity of the carrier which could be transferred to the stevedore, Mason and Jacobs JJ. asserted that 'the rule in *Tweddle v. Atkinson* can properly be applied, especially when recourse may properly be had to the rule that immunity and limitation clauses in contracts will be strictly construed';[68] that is, the stevedore could not enforce the exempting provisions of the bill of lading because it was not a party to the contract evidenced therein.

With great respect, this reference to the doctrine of privity seems inappropriate. Mason and Jacobs JJ. had concluded that the stevedore met Lord Reid's four criteria. Therefore, it is not the doctrine of privity which prevents the stevedore from invoking the protection of the exemption clauses of the bill of lading; rather, it is the interpretation given to the contract of carriage, restricting the operation of its protective provisions to the duration of the carrier's potential liabilities, which defeats the stevedore. If the stevedore's negligence had occurred during unloading operations, as in *The Eurymedon*, or if the carrier's potential liability had continued after delivery of the goods *ex* ship's rail, Mason and Jacobs JJ.[69] would have permitted the stevedore to raise clause 17 as a defence.

In dissent, Barwick C.J. concluded that the stevedore was protected under the bill of lading. Counsel for Salmond & Spraggon had expressly conceded that 'it does appear, at least on a fair reading of parts of the bill of lading, that it extends beyond the time the goods pass over the

[67] *Ibid.* 373.

[68] *Ibid.* Note that *Tweddle v. Atkinson* (1861) 1 B. & S. 393 was the first case to establish that consideration must move from the promisee. However, the case has consistently been cited for the proposition that a person who is not a party to a contract cannot enforce it.

[69] 'If the case were one of mis-delivery and not of negligence in the safekeeping of the goods on the wharf, the appellant might be able to claim the benefit of cl. 17. The stevedore was the agent of the carrier to deliver the goods to the consignee in exchange for a copy of the bill of lading. A delivery of the goods to a stranger without requiring the production and exchange of a copy of the bill of lading would be an act which, even though unauthorised by the carrier, might create a vicarious liability in the carrier. Further, it might be outside the immunity provisions of the bill of lading on the true construction of the latter.' (1978) 18 A.L.R. 333, 373-4.

ship's side or are discharged from the ship's tackle',[70] and that if the goods had been stolen as a result of negligence in the performance of the stevedore's obligations as a bailee, this negligence would be covered by the time limitation of clause 17, which was universal in its terms.[71] Therefore, Barwick C.J. regarded the majority's discussion of the duration of the exemption clauses as inappropriate to the area for debate in the case.[72]

Counsel for Salmond & Spraggon argued that the stevedore's conduct, in handing over the razor blades to a person who was not authorized to receive them, stood outside the contract of bailment; it was not a negligent act in the performance of the stevedore's obligations as a bailee.[73] Therefore, they argued, the exemption clauses in the bill of lading were inapplicable.

Barwick C.J., however, concluded that the stevedore's negligence was in the performance of its obligation, as bailee, to deliver the goods to the consignee.[74] Moreover, the time limitation clause, which opened with the words 'in any event', was directed only to the time within which proceedings should have been commenced. The narrow construction proposed by the plaintiff was, according to Barwick C.J., 'misconceived'.[75]

Applying *The Eurymedon* with complete approval, Barwick C.J. found that the stevedore satisfied Lord Reid's four criteria and was discharged from all liability by clause 17.

Perhaps the most troublesome aspect of *Salmond & Spraggon's* case is the difficulty of extracting a clear *ratio decidendi* for the decision.[76] If

[70] *Ibid.* 376 *per* Murphy J.

[71] *Ibid.* 341 *per* Barwick C.J. Clause 17 of the bill of lading, which imposed a one-year limitation on causes of action, began with the words 'in any event'.

[72] Having found that the stevedore was acting on its own behalf as an independent bailee, rather than on behalf of the carrier, Barwick C.J. concluded that clause 17 clearly covered the stevedore's negligence: 'To confine the scope of the agreement with the stevedore to a period ending with the discharge of the goods from the ship's tackle is not only seriously to limit the efficacy of the clauses of the bill of lading and to defeat the reasonable commercial expectation of the consignor and carrier, but it is in my opinion an unwarranted interpretation of the language of the bill of lading.' (1978) 18 A.L.R. 333, 350-1.

[73] *Ibid.* 347.

[74] *Ibid.* 348.

[75] *Ibid.* Barwick C.J. distinguished *The Council of the City of Sydney v. West* (1965) 114 C.L.R. 481, which was relied on by the consignee, on the ground that the exemption clause in West's case was specifically directed to protection for loss or damage to the goods in connection with garaging the car. Delivery of the car to someone other than the bailor fell outside this protective provision. In the instant case, however, clause 17 was universal in scope and directed only to the time for beginning judicial proceedings. It could be fully enforced without defeating the whole purpose of the contract.

[76] This difficulty of extracting a *ratio decedendi* from High Court decisions arises with distressing regularity. In *Penfold's Wines Pty Ltd v. Elliott* (1946) 74 C.L.R. 204, for example the majority refused to grant the plaintiff an injunction, which would have stopped the defendant from using the plaintiff's bottles in an unauthorized manner. Two members of the majority, Dixon and Starke JJ., held that no tort had been committed. The third member of the majority, McTiernan J., agreed with the dissenters, Latham C.J. and Williams J., that a conversion had been committed, but held that an injunction should not be granted on the ground that the plaintiff should be left to his common law remedy of damages.

the four opinions are put in tabular form, listing the two main grounds that were material to the judgment, this is the result:

Was the stevedore protected under the bill of lading?

	Does *The Eurymedon* provide a means for overcoming the privity requirements?	If *The Eurymedon* is followed, does it apply to the instant fact situation?	Judgment
Stephen J.	No	No	for consignee
Murphy J.	No (on policy grounds)	No (on policy grounds)	for consignee
Mason and Jacobs JJ.	Yes	No	for consignee
Barwick C.J.	Yes	Yes	for stevedore

None of these four opinions casts any doubt on the correctness of Lord Reid's four *Midland Silicones* criteria. Even the criticism of *The Eurymedon* by Stephen J. was based in part on His Honour's interpretation of Lord Reid's dictum, which was accepted as authoritative.[77] It seems safe to conclude, therefore, that Australian courts may regard the agency argument as a means for determining the effectiveness of a Himalaya clause.

The status in Australia of *The Eurymedon's* particular application of Lord Reid's dictum is less certain. Stephen J. expressly rejected the Privy Council's analysis. Murphy J. cited *The Eurymedon* favourably, but held that policy considerations rendered the Privy Council's approach inappropriate to the facts before him. Although the other three members of the High Court did not question the authority of *The Eurymedon*, their opinions must be read with caution. Only Barwick C.J., in dissent, gave unqualified praise to the Privy Council's decision.[78] Mason and Jacobs JJ.

More recently, in *Viro v. The Queen* (1978) 18 A.L.R. 257 the members of the High Court divided on whether the trial court should have followed *Palmer v. The Queen* [1971] A.C. 814 (P.C.) or *The Queen v. Howe* (1958) 100 C.L.R. 448 (H.C.) in directing the jury on the issue of self-defence to a murder charge. In dissent, Barwick C.J. expressed a preference for *Palmer's* case. Two members of the majority, Gibbs and Jacobs JJ., agreed with Barwick C.J. that *Palmer's* case was the better view; however, in the interests of certainty in judicial precedent, they agreed with Stephen, Aickin and Mason JJ. that *Howe's* case should be followed. The sixth member of the majority, Murphy J., rejected both *Palmer's* case and *Howe's* case; however, he agreed that *Howe's* case should be followed in the interests of certainty for the trial courts. A similar gulf between individual preference and judicial certainty arose in *Queensland v. The Commonwealth* (1978) 16 A.L.R. 487, with the same resulting difficulty of determining a *ratio* for the High Court's judgment. Perhaps the solution lies in introducing, as a regular practice, the delivery of a joint opinion of the judges constituting the majority, in a manner similar to the practice of the United States Supreme Court. See Paton, G. W. and Sawer, G., 'Ratio Decedendi and Obiter Dictum in Appellate Courts' (1947) 63 *Law Quarterly Review* 461.

[77] (1978) 18 A.L.R. 333, 354.

[78] 'Their Lordships' decision in *The Eurymedon* was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined. It established, as I have said, that the acceptance of the bill of lading by the consignor followed by the acts of the stevedore produced a binding contract to which consignor and stevedore were parties. If I may say so, I entirely and most respectfully agree with their Lordships' decision and I have indicated my own explanation, not disconformable to that adopted by their Lordships, of the legal justification for it.' (1978) 18 A.L.R. 333, 349.

applied *The Eurymedon*, but refused to extend its analysis beyond the narrow confines of its fact situation. Their Honours' reluctance to adhere whole-heartedly to the spirit of the Privy Council's decision suggests that if counsel for the consignee had challenged the correctness of *The Eurymedon*, Mason and Jacobs JJ. might not have been so ready to adopt that approach.

A guarded conclusion is that the approval given to *The Eurymedon* by three members of the High Court establishes that the scope and effect of Himalaya clauses should be determined by Australian courts in the light of *The Eurymedon's* application of the agency argument. It is conceivable, however, that a future challenge to *The Eurymedon*, mounted along the lines suggested by Stephen J. in his criticism of the Privy Council's decision, could be successful.

Although the status of *The Eurymedon* was not defined with certainty, the High Court did resolve some of the questions which remained after that decision. First, *Salmond & Spraggon's* case establishes that the stevedore may satisfy Lord Reid's third condition — authority of the carrier to act as the stevedore's agent — without proving a corporate tie between stevedore and carrier. The carrier's authority was established by the stevedore's familiarity with and past reliance upon the exemption clauses in the bill of lading, together with its monopoly on the carrier's business in the port of Sydney.[79] Whether, in the alternative, the stevedore might meet the third condition by ratification, merely by asserting the applicability of the protective provisions in judicial proceedings, was not decided.[80]

Secondly, in discussing Lord Reid's fourth condition, the High Court examined the nature of the transaction between shipper and stevedore. The New South Wales Court of Appeal had given judgment for the plaintiff on the ground that the stevedore had not shown that its acts of unloading and storing the goods had been in reliance on the offer of exemption contained in the Himalaya clause. Citing *Australian Woollen Mills*, Mr Justice Hutley had expressly rejected the dictum of Starke J. in *The Crown v. Clarke* that 'any person knowing of the offer who performs its conditions establishes prima facie an acceptance of that offer'.[81] Mason and Jacobs JJ., however, held that Starke J.'s dictum 'correctly stated' the position: proof of performance of the conditions of an offer by a person who knows of the existence of the offer 'will in general constitute prima facie evidence of acceptance of the offer'.[82] Murphy J. and Barwick C.J.

[79] *Ibid.* 365 *per* Mason and Jacobs JJ.; 342 *per* Barwick C.J.

[80] In the Supreme Court of New South Wales, Sheppard J. regarded the view that reliance in judicial proceedings upon the terms of a contract is *per se* ratification as having been approved by the Privy Council in *The Eurymedon*. See also n. 40. See, however, *Bird v. Brown* (1850) 4 Ex. 786; 154 E.R. 1433.

[81] *Salmond & Spraggon (Australia) Pty Ltd v. Joint Cargo Services Pty Ltd and Anor.* [1977] 1 Ll.L.R. 445, 451-2.

[82] (1978) 18 A.L.R. 333, 365-6. See also *Williams v. Carwardine* (1833) 4 B. & Ad. 621; 110 E.R. 590.

made similar pronouncements. Murphy J. stated that 'the evidence that the stevedore knew of the terms of the bill of lading and acted in accordance with them raises a presumption that it relied upon them'.[83] Barwick C.J. regarded the transaction between the stevedore and the shipper as a consensual arrangement, conditional upon later consideration provided by the stevedore, rather than as an offer of the *Carlill v. Carbolic Smoke Ball Co.* variety.[84] However, he stated that if the latter interpretation of the transaction were adopted, acceptance by the stevedore could be inferred from the stevedore's knowledge of the terms of the bill of lading and the acts of discharging and stevedoring the goods.[85]

In both *Dalgety Australia Ltd v. Harris*[86] and the instant case, the New South Wales Court of Appeal had erred by confusing two distinct aspects of offer and acceptance in unilateral contracts. As the High Court observed in *Australian Woollen Mills*:

> In cases of this class it is necessary, in order that a contract may be established, that it should be made to appear that the statement or announcement which is relied on as a promise was really offered as consideration for the doing of the act, *and* that the act was really done in consideration of a potential promise inherent in the statement or announcement. . . .[87]

Although the concepts of reliance and request are sometimes regarded as essential elements of the offer-acceptance analysis, they are not always kept distinct. Indeed, in some cases in which the absence of a request in the promisor's statement is the real reason that the promise is not deemed enforceable, the unnecessary and irrelevant reason is given that no consideration moved from the promisee. In *Combe v. Combe*,[88] for example, a husband had promised, during divorce proceedings, to pay his wife an annual allowance. The wife, relying on this promise, forbore from applying to the court for a maintenance order. When the wife later sued to enforce the husband's promise, it was held by the English Court of Appeal that 'her forbearance was not intended by [the husband], nor was it done at his request. It was therefore no consideration'.[89] With respect, if the element of request or inducement is considered essential to the formation of a contract, its relevance lies in the determination of the contractual status of the promisor's statement. Under this analysis, if the husband's promise contained no request, express or implied, for the wife's forbearance, it was not an offer capable of ripening by acceptance into a contract. The conclusion that the wife provided no consideration is misleading. She did, in fact, rely on the husband's promise; but there could be no consideration because there was no offer to which it might refer.

At issue in *Australian Woollen Mills* was the contractual status of an announcement by the Commonwealth Government that a subsidy would

[83] *Ibid.* 376.
[84] *Ibid.* 346.
[85] *Ibid.* 346-7.
[86] [1977] 1 N.S.W.L.R. 324; *supra* nn. 51-2.
[87] (Emphasis added); (1954) 92 C.L.R. 424, 456.
[88] [1951] 2 K.B. 215.

be paid to manufacturers of wool purchased and used for local manufacture after a certain date. The High Court held that the announcement was not an offer capable of ripening by acceptance into a contract because it contained no request, express or implied, to purchase and use the wool according to the terms of the announcement.[90] Under these circumstances, it was irrelevant whether or not the manufacturers had relied on the announcement. Reliance on a promise does not convert that promise into a contractual offer.

The classic example provided by the High Court in *Australian Woollen Mills*[91] was designed to illustrate the defectiveness of A's statement, standing alone, as an offer. A's remarks might be construed, for example, as an unenforceable gift promise. Proof of further facts, showing a request or inducement for B's conduct, could 'throw a different light on the statement on which B relies as an offer'.[92] Once it is clear that A's statement contained an offer to B, it may be inferred 'that the doing of the act was at once the acceptance of an offer and the providing of an executed consideration for a promise'.[93] As Mason and Jacobs JJ. observed, these statements in *Australian Woollen Mills* do not displace what Starke J. said in *The Crown v. Clarke*.[94]

In *Clarke's* case, the Government of Western Australia had offered a reward of £1,000 for information leading to the conviction of the murderers of two police officers. Clarke and another man were arrested and charged with one of the murders. Four days later Clarke, who had seen the reward offer, gave information which led to the arrest of a third man. Clarke was released; the other two men were tried and convicted of the murder. Clarke gave evidence at the trial which was essential to the convictions. Ruling on Clarke's claim to the reward offer, the High Court acknowledged 'the prima facie inference arising from the fact of knowledge of the request and the giving of the information it sought'.[95] Nevertheless, the presumption of reliance on the offer was rebutted by

[89] *Ibid.* 221.

[90] The High Court of Australia in *Australian Woollen Mills* mentioned three alternative tests that may be applied to determine whether a statement is a contractual offer: 'If we ask (what we think is the real and ultimate question) whether there is a promise offered in consideration of the doing of an act, as a price which is to be paid for the doing of an act, we cannot find such a promise [in the government's subsidy announcement]. No relation of *quid proquo* between a promise and an act can be inferred. If we ask whether there is an implied request or invitation to purchase wool, we cannot say that there is. If we ask whether the announcement that a subsidy would be paid was made in order to induce purchases of wool, no such intention can be inferred.' *Ibid.* 461. The result in *Australian Woollen Mills* was the same no matter which test was applied. It is difficult to reconcile the conclusion that there was no offer in *Australian Woollen Mills* with the interpretation, in *Salmond & Spraggon's* case, of the Himalaya clause as an offer. The Himalaya clause makes no mention of consideration; it contains no request that the stevedore discharge the cargo; and it clearly does not induce the stevedore to do so.

[91] *Supra* n. 48.

[92] *Australian Woollen Mills v. The Commonwealth* (1954) 92 C.L.R. 424, 457.

[93] *Ibid.*

[94] (1978) 18 A.L.R. 333, 366.

[95] (1927) 40 C.L.R. 227, 232, 234.

Clarke's own express admission that he had acted to save himself from an unfounded murder charge rather than with any intention of entering into a contract.[96]

In *Salmond & Spraggon's* case the prima facie inference of reliance was not rebutted. Indeed, as Lord Wilberforce had observed in regard to the similar situation in *The Eurymedon*:

> The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all the parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible.[97]

The discussion by the High Court of the reliance aspect of consideration in the unilateral contract situation reveals the difficulties caused by dismissing basic conceptual distinctions as matters of semantics. In his dissenting opinion, Barwick C.J. stated that 'there is a fundamental difference between providing consideration to support a consensual arrangement otherwise made and the acceptance by performance of an act of an offer not otherwise accepted'.[98] In the former situation, the 'offer' of the exempting conditions and acceptance by the carrier as agent for the stevedore is complete; the subsequent acts of discharging and storing the cargo supply both 'the occasion for those conditions to operate and the consideration which makes the arrangement contractual'.[99] There is 'no need for the stevedore to prove that he was acting on an offer otherwise not accepted in order to establish the existence of an agreement with the consignor'.[1] Under the latter analysis, however, performance of the stevedoring operations does not automatically bring the contract into force; a sufficient nexus of reliance must exist between offer and act of acceptance. The dictum of Starke J. has relevance only in this latter context.

As Stephen J. observed in his criticism of *The Eurymedon*, neither of these two views of the Himalaya clause is wholly satisfactory. If the unilateral contract approach taken by the majority of the High Court is applied, the question raised by the New Zealand Court of Appeal in *The Eurymedon* must again be considered: may an offer which fails to indicate the form of acceptance be capable of giving rise to contractual obligations? Such a notion is foreign to established authority on unilateral contracts.[2]

Moreover, if the Himalaya clause is said to contain an offer of exemptions to the stevedore, under what theory can the consignee be said to be an offeror? In both *The Eurymedon* and *Salmond & Spraggon's* case it was stated that the consignee became bound by the bill of lading by accepting it and requesting delivery of the goods under it.[3] Yet there was no evidence

[96] *Ibid.* 242.
[97] *The Eurymedon* [1975] A.C. 154, 167.
[98] (1978) 18 A.L.R. 333, 346.
[99] *Ibid.* 344.
[1] *Ibid.* 345.
[2] See Duggan, A. J., 'Offloading The Eurymedon' (1974) 9 *M.U.L.R.* 753.
[3] (1978) 18 A.L.R. 333, 363 *per* Mason and Jacobs JJ.; 349 *per* Barwick C.J.; *The Eurymedon* [1975] A.C. 154, 168.

in either case that the consignees had presented the bill of lading before the goods had been unloaded and stored. The acts of 'acceptance', therefore, were completed before any 'offer' of exemption could have been made by the consignees.

On the other hand, no authority has been cited, either by the Privy Council in *The Eurymedon* or by Barwick C.J. in *Salmond & Spraggon's* case, for an agreement which is binding on a party but which falls short of being a 'full contract'. If such a refinement of fundamental contract law is to be made, the Himalaya clause would be a most inappropriate vehicle. The stevedore would retain the option of non-performance, as in the unilateral contract situation. Presumably, however, the shippers would have yielded gratuitously their right to withdraw the offered exemptions; once accepted, an offer may not be withdrawn.[4]

Furthermore, it is unrealistic to speak of an 'agreement' or 'bargain' at a stage in the transaction when the parties to the alleged agreement could not be specifically designated. The carrier acts as 'agent' for an indeterminate class of potential promisees. At the time the bill of lading is signed, it cannot be known with certainty which agents, servants or independent contractors will perform the several tasks related to carriage and delivery of the goods. Even the 'undisclosed principal' doctrine requires that the principal must be ascertainable and in the contemplation of the agent at the time of the agreement.[5]

Finally, it should be noted that the strained interpretation necessary to support a finding of offer and acceptance under either theory runs afoul of the general rule that exempting provisions are to be construed narrowly against the party relying on them.[6] If, however, a Himalaya clause arises from a genuine agreement and is consistent with the commercial expectations of the parties, the rule of strict construction should not prevent the parties from relying on the clause. The judicial hostility to exclusion clauses should be restricted to cases in which the clauses operate unfairly or against the public interest.[7] The important question in these shipper-stevedore cases is whether the finding of offer and acceptance is a reasonable one which can be made without violating fundamental principles.

In view of these difficulties with both approaches, it is unfortunate that the High Court of Australia demurred from undertaking a fresh examination of the Himalaya clause. The High Court might have considered, for example, the 'joint promisee' exception to the rule that consideration must

[4] See, *e.g., Abbot v. Lance* [1860] Legge 1283.

[5] *Keighley, Maxsted and Co. v. Durant* [1910] A.C. 240; *Kelner v. Baxter* (1866) L.R. 2 C.P. 174.

[6] See, *e.g., Thomas National Transport (Melbourne) Pty Ltd v. May & Baker (Australia) Pty Ltd* (1966) 115 C.L.R. 353.

[7] 'A general hostility to exemption clauses in personal injury actions has become a familiar part of the judicial process, but it seems utterly wrong and quite unthinking to carry over this same hostility into the commercial sphere.' Atiyah, P. S., 'Bills of Lading and Privity of Contract', (1972) 46 *Australian Law Journal* 212; see also Lücke, H. K., 'Exclusion Clauses and Freedom of Contract: Judicial and Legislative Reactions', (1977) 51 *Australian Law Journal* 532.

move from the promisee. In *Coulls v. Bagot's Executor and Trustee Co. Ltd*,[8] four members of the High Court were prepared to hold that a promise made to two persons jointly can be enforced by either of them, even though consideration was provided by only one of them. According to Windeyer J.:

> The promise is made to them collectively. It must, of course, be supported by consideration, but that does not mean by considerations furnished by them separately. It means a consideration given on behalf of them all, and therefore moving from all of them. In such a case the promise of the promisor is not gratuitous; and, as between him and the joint promisees, it matters not how they were able to provide the price of his promise to them.[9]

Arguably, the carrier and the stevedore are joint promisees under the Himalaya clause. If the dictum of *Coull's* case is applied, the consideration provided by the carrier could support the promise of the exemption clauses, without regard to separate consideration moving from the stevedore personally.

Of course, *Coull's* case might have been distinguished from the instant case. In the first place, the promise in *Coull's* case was directed, it was argued, to two specific individuals, a husband and wife. An application of the joint promisee concept to an indeterminate number of unnamed promisees would be startling extension of the High Court's dictum in *Coull's* case. Secondly, the promise in *Coull's* case involved the payments of royalties to the 'joint tenants'. Had the joint promisee argument succeeded, payment of these royalties to one or the other of the 'joint tenants' would have satisfied fully the promisor's obligations. In contrast, the owner of the goods in *Salmond & Spraggon's* case could be saddled with several contracts involving the promised exemptions. For example, the carrier's reliance on the protective provisions in the bill of lading would not have exhausted the owner's obligation to extend the exemptions to the stevedore. The carrier and the stevedore would be coextensive promisees of identical promises, not joint promisees of a single promise in the *Coull's* sense. Despite these distinguishing factors, however, an analysis by the High Court of the relevance of *Coull's* case would have been timely and instructive.

Alternatively, the High Court might have given more attention to Mr Justice Murphy's suggestion that

> In the carriage of goods by sea, there are special practical considerations which suggest that the requirement of consideration by the stevedore may be undesirable. There are strong reasons for contract law to evolve so that obligations which a consignee undertakes (and the immunities expressed to be conferred by him on the stevedore by a bill of lading) should apply for a stevedore's benefit irrespective of whether there was any consideration.[10]

The idea that some gratuitous promises should be enforceable finds support

[8] (1967) 119 C.L.R. 460.

[9] *Ibid.* 493. Barwick C.J. and Taylor and Owen JJ. joined Windeyer J. in the view that a joint promisee could enforce a contract despite having given no consideration, personally, for the promisor's promise. McTiernan J. did not discuss this issue.

[10] (1978) 18 A.L.R. 333, 376.

in academic circles.[11] It seems inconsistent for the courts to strain the existing legal concepts of offer and acceptance, as in *The Eurymedon* and *Salmond & Spraggon's case*, yet insist upon strict adherence to the requirements of consideration and privity of contract.

For the foreseeable future, however, the effect and scope of Himalaya clauses in Australia must be determined in the light of Lord Reid's four criteria, as construed and applied by the High Court in *Salmond & Spraggon's* case.

(7) THE FUTURE OF THE HIMALAYA CLAUSE

As the Privy Council had done in *The Eurymedon*, Barwick C.J., Stephen and Murphy JJ. made reference to the special practical considerations and commercial expectations which might limit Lord Reid's agency argument to contracts for the carriage of goods by sea.[12] In their joint opinion, Mason and Jacobs JJ. were more specific:

> The importance of *The Eurymedon* is the manner in which on the bare facts of the case their Lordships were able to discern a contract between the shipper and the stevedore, and, we would add, to do so in a manner which limited the approach to those commercial contexts in which immunity of the stevedore was clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended. Thus the chance of the reasoning being allowed to spill over into an application to cases where an ordinary member of the public would not have read the 'fine print' of some contract into which he had entered was minimised. Commercial expectation could thus be reconciled with a strict reading of immunity clauses in general.[13]

These commercial considerations suggest that the agency argument will not be applied against consumers in normal retail transactions.

However, the extent to which the agency argument might be applied outside the context of the carriage of goods by sea is not clear. Presumably, the commercial considerations involved in land and air transport would not differ substantially from those in the shipping industry. Should a *Eurymedon*-type Himalaya clause appear in a road haulage contract, for example, the agency argument might apply to protect the servants, agents and independent contractors of the carrier. On the other hand, the courts would be reluctant to strain basic concepts of contract law in order to give effect to an exemption clause in a personal injury case.[14] It is unlikely, for example, that a *Eurymedon*-type clause in a passenger's ticket could be used by the carrier's agents, servants or independent contractors as a defence in a personal injury action brought by the passenger.[15]

[11] See Atiyah, P. S., *Consideration in Contracts: A Fundamental Restatement*, A.N.U. Press, Canberra, 1971; Ellinghaus, M. P., 'Consideration Reconsidered Considered' (1975) 10 *M.U.L.R.* 267; Stoljar, S. J., *A History of Contract at Common Law*, A.N.U. Press, Canberra, 1975.

[12] (1978) 18 A.L.R. 333, 349-50 *per* Barwick C.J.; 355 *per* Stephen J.; 376-7 *per* Murphy J.

[13] *Ibid.* 369.

[14] See Atiyah, P. S., 'Bills of Lading and Privity of Contract', (1972) 46 *Australian Law Journal* 212; Lücke, H. K., 'Exclusion Clauses and Freedom of Contract: Judicial and Legislative Reactions', (1977) 51 *Australian Law Journal* 532.

[15] *Adler v. Dickson, The Himalaya* [1955] 1 Q.B. 158.

Within the sea-carriage context, much could be done to mitigate future disputes over the operation of Himalaya clauses. Although Lord Reid's four criteria were suggested in 1962, none of the Himalaya clauses in operation since then has been drafted with the specific intention of meeting the criteria.[16] Drafting a satisfactory clause should not, in theory, be an insurmountable problem. For example, in addition to detailing the agency relationship between carrier and stevedore, the clause could expressly state that it contains an offer to the stevedore of the protection of the exemption clauses available to the carrier. The offer should clearly stipulate the acts of unloading and storing the cargo which will constitute acceptance. Upon performance, the stevedore could claim the promised exemptions under a separate unilateral contract with the shipper. The duration of the contract of carriage need not determine the life of the offer, particularly if the phrase 'while acting in the course of or in connection with his employment' is omitted. Presumably, this scheme would meet the objections to *The Eurymedon* voiced by Stephen J.

Alternatively, the clause might contain an exchange of promises, thereby creating an immediate contract. The shipper would promise the exempting provisions; the stevedore would promise to discharge and keep the cargo for the consignee. This bilateral agreement, then and there concluded, would overcome the objection that Lord Reid's criteria are directed only to a contract having immediate effect.

Of course, practical problems could emerge in regard to either of these drafting suggestions. It would be impractical, under the first model, for the shipper to 'offer' the exemption clauses to all of the carrier's servants, agents and independent contractors and to stipulate the potential acts of acceptance by each member of this indeterminate class. Similarly, the second model is based on the assumption that the stevedore could be named at the time the contract of carriage is formed. In most cases, this would be impossible; in any event, it is unlikely that stevedores would subject themselves to potential liability for breach of a contractual duty to the shipper.

A third device which might be included in a bill of lading to avoid the difficulties raised by the agency argument is a promise by the owner of the goods to the carrier not to sue the stevedore. Although a third person may not enforce a contract to which he or she is not a party, a contract for the benefit of a third person may be enforced by a party in some situations.[17] In *Gore v. Van der Lann*,[18] the English Court of Appeal held that a definite promise by A to B not to sue C might be given effect, by permitting B to

[16] Himalaya clauses such as those in *The Eurymedon* and *Salmond & Spraggon's* case were already in use prior to the decision in *Scruttons Ltd v. Midland Silicones* [1962] A.C. 446. *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154, 183 *per* Lord Simon of Glaisdale. A random survey of shipping companies in Melbourne, taken by the author in April 1978, revealed that the Himalaya clauses in use today are substantially the same as those relied upon in *The Eurymedon* and *Salmond & Spraggon's* case.

[17] *Beswick v. Beswick* [1966] Ch. 538; [1968] A.C. 58.

[18] [1967] 2 Q.B. 31.

obtain a stay of A's action against C, provided B has a sufficient interest in the enforcement of A's promise. Such an interest could be provided if B, the shipping company in the Himalaya clause context, promised to indemnify C, the stevedore, in respect of any action brought against C by A, the consignor or consignee of the cargo. If B brought to the attention of A this indemnity provision in B's stevedoring contracts, and obtained from A a promise not to sue the stevedore, the requirements of *Gore v. Van der Lann* would be satisfied.[19]

None of these drafting devices, however, comes to grips with the policy considerations involved in these cases. In *The Eurymedon*, Lord Wilberforce mentioned a commercial factor in support of the majority's judgment in favour of the stevedore:

> It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy of which is reflected in the rates of freight.[20]

In the Supreme Court of New South Wales, however, Sheppard J. observed that whilst the freight rates might be lower if the exemption clauses are broadly applied, the insurance rates payable by shippers and consignees will be higher. This disadvantage would be exacerbated by the shipper's lack of control over the stevedore. If the stevedore is forced to insure, the insurance companies might impose conditions, such as a proper system for the safekeeping of the cargo, upon which the insurance would issue. If, on the other hand, the stevedore is exempt from liability for its negligence, the incentive to care for the goods would derive solely from the commercial good-will of the stevedore.

Finally, the international implications of these shipping cases must be considered. As Mr Justice Stephen pointed out:

> While it is in the interests of great fleet-owning nations that their ocean carriers, and the servants and independent contractors which they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon those fleets for their import and export trade is to the contrary. . . . It is not clear to me that Australian courts should regard it as in any way in the public interest that carriers' exemption clauses, effective before loading and after discharge, should be accorded any benevolent interpretation, either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors.[21]

The international political issues raised by the decisions in *The Eurymedon* and *Salmond & Spraggon's* case, and the need for uniformity in resolving them, suggest that the solution to the problem of Himalaya clauses must be found in international conventions and subsequent national legislation, rather than through piecemeal judicial interpretation.

[19] In *Snelling v. John G. Snelling Ltd* [1973] 1 Q.B. 87, the Court of Appeal went even further in holding that a promisee could obtain a stay of an action by the promisor against the third party beneficiary, despite the absence of a *Gore v. Van der Lann* interest in the promise. See Treitel, G. H., *The Law of Contract* (4th ed. 1975) 430, where the author concludes that the holding in *Snelling* is consistent with the principle of *Beswick v. Beswick* [1968] A.C. 58.

[20] *The Eurymedon* [1975] A.C. 154, 169.

[21] (1978) 18 A.L.R. 333, 355-6.

In 1976, the United Nations Commission on International Trade Law (UNCITRAL) adopted a draft convention which would revise the rules and practices relating to bills of lading.[22] The draft convention, which has been submitted to governments and interested international organizations for consideration, shifts the present risk allocation between carrier and cargo owner, imposing greater liability on the carrier. Under Article 4, for example, the period of the carrier's responsibility is extended to cover the whole of the period during which the goods are in the charge of the carrier. The carrier is deemed to be in charge of the goods from the time of taking over the goods until the time of delivery. Delivery of the goods may be accomplished in one of three ways: first, by handing over the goods to the consignee; secondly, by placing the goods at the disposal of the consignee in accordance with the contract or with the law or usage applicable at the port of discharge; thirdly, by handing the cargo to an authority as required by the law applicable at the port of discharge.[23]

For the purposes of Article 4, 'reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants or the agents, respectively, of the carrier or the consignee'.[24] Article 4 does not discuss the carrier's responsibility while the goods are in the custody of an independent contractor, such as a stevedore, after discharge. A possible interpretation of the second and third methods of delivery is that the carrier's responsibilities could terminate upon handing over the goods to a stevedore at the port of discharge. If this is so, and the goods are lost or damaged while in the custody of the stevedore, the fundamental question posed in *The Eurymedon* and *Salmond & Spraggon's* case remains unresolved: In what circumstances may a stevedore rely on exemption clauses contained in a bill of lading?

Apparently, the working group of UNCITRAL which drafted Article 4 intended that the responsibility of the carrier should extend to the period in which a stevedore has custody of the goods.[25] Unfortunately, the language of Article 4 is not clear in this regard. If the draft convention were amended to include independent contractors within Article 4's references to the carrier, the dilemma raised by Himalaya clauses could be avoided.

[22] For a discussion of the issues examined by UNCITRAL, see O'Hare, C. W., 'The Hague Rules Revised: Operational Aspects' (1976) 10 *M.U.L.R.* 527.

[23] *Ibid.* 553-4.

[24] Draft Convention on Carriage of Goods by Sea, Text, as adopted by UNCITRAL at Ninth Session (April-May 1976), Article 4 (A copy of the Draft convention appears in the Papers of the International Trade Law Seminar, Australian Academy of Science, 19-20 June 1976, issued through the Attorney-General's Department).

[25] Goldring, J., 'UNCITRAL Revision of the Hague Rules on Bills of Lading' (published in the *Papers of the Meeting on International Trade Law*, Australian Academy of Science, 4-5 May 1974; issued by the Attorney-General's Department), p. 54.