The rights of a third party both to sue for breach of a contract term and to rely upon a contract term in his defence — until now constrained by the "privity of contract" rule restricting the right to enforce a contract to the parties to it — have been radically changed by The Contracts (Rights of Third Parties) Act 1999. Nevertheless, just as carriage of goods by sea (though not of passengers) was broadly excluded from the operation of the Unfair Contract Terms Act 1977, so again we have to look to the exceptions provision in the 1995 Act to see what impact, if any, there is on sea transport.

The 1999 Act came into force on the 11th November 1999. It does not apply retrospectively and applies automatically only to contracts made after the expiry of 6 months from its coming into force, i.e. from 11th May 2000. It will apply to any contract made during that six months interim period which expressly says that it is to apply.

A third party may enforce a contract term if it says he may or if it confers the benefit upon him.

The basic principle is at section 1(1), that a person who is not a party to a contract (a "third party") may in his own right enforce a contract term if the contract expressly says that he may do so or the term itself purports to confer a benefit upon him. Section 1(6) provides that "Where a term of a contract excludes or limits liability in relation to any matter, references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation".

The exceptions to the basic rule are at section 5 which sets out various types of contract to which section 1(1) is not to apply. These include contracts for the carriage of goods by sea, which are defined as being either "(a) contained in or evidenced by a bill of lading, sea waybill or corresponding electronic transaction, or

(b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction" in other words, the documents to which the Carriage of Goods by Sea Act 1992 applies. The effect is therefore to exclude from the operation of the 1999 Act, contracts already covered, and those capable of being covered, by COGSA '92.

The exclusion of contracts for the carriage of goods by sea, however, is subject to a proviso — an exception to the exception — that "a third party may in reliance on [section 1] avail himself of an exclusion or limitation of liability in [a contract for the carriage of goods by sea]". In other words, the right of a third party such as an employee, agent or independent contractor to rely, by means of a Himalaya clause, upon exclusions and limitations available to the carrier in the contract of carriage is expressly preserved, and indeed given statutory recognition over and above the relevant provisions in the Athens Convention and the Hague-Visby Rules.

Himalaya Clauses remain necessary, particularly where the Hague-Visby Rules are not compulsory.

Members may be familiar with the case of Adler v. Dickson, in which Mrs. Rose Adler, a passenger on board the P. & O. cruise ship "Himalaya", slipped and fell when walking up the gangway on her return from a shore visit at Trieste. The terms of her contract with the carrier contained a total exclusion of liability which at the time was a legitimate bar to any action against the carrier for her injury. Nevertheless, it was not adequate to prevent Mrs. Adler from successfully suing both the master of the ship and his bosun who were held responsible for the faulty condition of the gangway.

This case was the genesis of the well known "Himalaya Clause", a contractual device designed to give employees, agents and other non-contracting third parties the benefits of defences, exclusions and limitation contained in the primary contract of carriage.

For the carriage of passengers, the enactment into English law of the Athens Convention 1974 itself extended the carrier's defences and limitations under the convention to his employees and agents, though any purported exclusion clause in the contract so far as liability in negligence for death and personal injury where concerned, would, since 1977, fall foul of the provisions of the Unfair Contract Terms Act.

For the carriage of goods, Article IV bis rule 2 of the Hague-Visby Rules similarly extends the defences and limits of the Rules to the carrier's employees and agents. It does not, however, protect the carrier's independent contractors who must therefore rely upon any Himalaya clause in the contract of carriage specifically conferring such a right. Midland Silicones v. Scruttons; The "Evermont", and The "New York Star".

The 1999 Act does not make Himalaya Clauses unnecessary. On the contrary, they are still required for the protection of third parties involved on behalf of the carrier, not just his employees and agents but also his independent contractors such as stevedores and port authorities. For the benefit of section 1(1) to operate, there must be a contractual term which "purports to confer a benefit" on the third party or parties, which must therefore be identified by name or by clause. Midland Silicones v. Scruttons and the subsequent authorities are not affected. Himalaya clauses remain particularly important where the Hague-Visby Rules do not have compulsory application for example, where the contract is contained in a sea waybill or other non-document of title. COGSA '92, whilst elevating sea waybills and delivery orders to bill of lading status for "title to sue" purposes, did not extend the mandatory application of the Hague-Visby Rules as provided by COGSA 71.

Passenger Contracts are not excluded from the Act.

Passenger contracts of carriage are not excluded from the 1999 Act. There are situations where contractual difficulties can arise — for example, with coach and other group bookings where the passengers themselves have no direct contact (or contract) with the sea carrier. For the 1999 Act to confer rights of suit upon such passengers, either there must be an express contractual term to that general effect or the particular term intended to confer benefit must purport to do so.

Similarly, as in Mrs. Adler's case, the passenger contracts must still contain a Himalaya Clause if potential third party defendants to passenger claims are to be able to rely on the carrier's terms and conditions, notably the benefit of limitation under the Athens Convention.

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