BAILMENT ON TERMS, HIMALAYA CLAUSES, AND EXCLUSIVE JURISDICTION CLAUSES: THE DECISION OF THE PRIVY COUNCIL IN *THE MAHKUTAI*

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Introduction

The Privy Council in *The Pioneer Container*[1] expressed such approval of the approach to bailment on terms taken by Lord Sumner in *Elder, Dempster & Co v Paterson, Zochonis & Co*[2] that it was widely expected[3] that the defendant shipowners in *The Mahkutai* would succeed on this ground in their appeal from the judgment of the Hong Kong Court of Appeal.[4] In a surprising volte-face, however, the Privy Council in *The Mahkutai*[5] rendered the concept of bailment on terms subordinate to the contractual principles supporting the Himalaya clause[6] and dismissed the shipowners' appeal.

The Pioneer Container and *The Mahkutai*, decisions rendered within thirteen months of each other, dealt with the enforceability by shipowners of exclusive jurisdiction clauses set out in bills of lading. Both judgments were delivered by Lord Goff of Chieveley[7] and both elaborated upon and applied principles of bailment on terms and the doctrine of privity of contract and its exceptions (particularly the Himalaya clause exception, as enunciated in *Scruttons Ltd v Midland Silicones Ltd*[8] and exemplified by *The Eurymedon*[9] and *The New York*

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1 Also referred to as *The KH Enterprise* [1994] 2 HKLR 134; [1994] 3 WLR 1.

2 [1924] AC 522. See *The Pioneer Container*, ibid, p 143.

3 See, eg, R Margolis, 'Bailment and Sub-bailment on Terms in Marine Cargo Claims Cases' (1994) 3 Songai Hoken Kenkyu 151, 159. Without referring to *The Mahkutai* and confining his comments to the *Elder, Dempster* case, F M B Reynolds, 'Bailment on Terms' (1995) 111 LQR 8, 9–10, appeared also to support this proposition. See also Toh Kian Sing, 'Jurisdiction Clauses in Bills of Lading — The Cargo Claimant's Perspective' [1995] LMCLQ 183, 190, where the author opines: 'To expect, so soon after such a powerful reaffirmation of the validity of jurisdiction clauses in bills of lading as *The Pioneer Container*, a vigorous judicial reaction against these clauses is nothing less than wishful thinking.'

4 [1994] 1 HKLR 212. See S Nossal, 'Bailment on Terms and the Carriage of Goods by Sea: *The Mahkutai*' (1994) 24 HKLJ 19 for a comment on the Court of Appeal decision. However, the analysis on sub-bailment on terms (especially that contained in the third paragraph of p 24) is now obsolete in light of the Privy Council decision in *The Pioneer Container*.

5 [1996] 2 Lloyd's Rep 1; [1996] 3 WLR 1.

6 Also referred to in *The Mahkutai* as 'the *Eurymedon* principle.'

7 Lord Goff was the only member of the Privy Council who heard both appeals.

8 [1962] AC 446.

9 [1975] AC 154.

Star[10]). The two judgments differ with respect to the approaches adopted,[11] and the conclusions reached, by the Board. In *The Pioneer Container*, the shipowners were held entitled to rely as against the cargo owners on an exclusive jurisdiction clause set out in a feeder bill of lading issued by the shipowners, not to the cargo owners, but to the carrier who had agreed to ship the goods for and had issued its own bills of lading to the cargo owners. In *The Mahkutai*, it was held that the shipowners were not entitled to rely on an exclusive jurisdiction clause set out in the bill of lading issued to the cargo owners, not by the shipowners, but by the time charterers. Although the factual matrices of these cases appear to differ, they are substantially similar in that in both cases the shipowners were attempting to enforce against the cargo owners an exclusive jurisdiction clause set out in a bill of lading to which either the cargo owners or the shipowners were not, under traditional principles of contract law, parties.

The decision of the Privy Council in *The Mahkutai* is disappointing in that, on facts substantially similar to those of *Elder, Dempster & Co v Paterson, Zochonis & Co*, the Privy Council chose not to determine the correctness of this controversial decision. It will be argued in this article that the Privy Council failed to recognise that the policy considerations underlying *The Pioneer Container* and entitling the shipowners to rely on the exclusive jurisdiction clause in the relevant bill of lading were identical to those of *The Mahkutai* with the result that the Board in *The Mahkutai* ought to have accorded the shipowners a similar entitlement. It will further be argued that the Privy Council should have continued to develop the concept of bailment on terms in accordance with the obiter dicta of Lord Goff in *The Pioneer Container*, thereby ensuring the co-existence and independence of the techniques currently in use to circumvent the unfairness and rigidity of the application of the doctrine of privity in the context of the carriage of goods by sea.

Before *The Mahkutai* is examined, however, it is necessary to review the decision of the Privy Council in *The Pioneer Container*.

The Pioneer Container

The plaintiffs in this case were the owners of goods laden on board the defendant's vessel, the 'KH Enterprise,' which sank during a voyage between Taiwan and Hong Kong after a collision with another ship. The plaintiffs commenced proceedings in Hong Kong and arrested the 'Pioneer Container,'

[10] [1981] 1 WLR 138.

[11] For example, Lord Goff's speech in *The Pioneer Container* emphasised the underlying commercial policy behind, and enunciated the theoretical underpinnings of, the concepts of bailment and sub-bailment and eschewed technicalities (see note 1 above, pp 146–7), whereas the reasons for judgment in *The Mahkutai* constituted a highly technical interpretation of the words used in the Himalaya clause and appeared purposely to avoid discussion of bailment on terms and the *Elder, Dempster* decision.

a sister ship of the 'KH Enterprise,' claiming damages for the loss of their cargo. The defendant shipowners applied for a stay of proceedings, relying on an exclusive jurisdiction clause in their bills of lading (cl 26) under which claims were to be determined in Taiwan. The plaintiffs fell into two groups. The first group had shipped goods on board the 'KH Enterprise' in Taiwan for carriage to Hong Kong under bills of lading signed on behalf of the shipowners. There was therefore a direct contractual relationship between these plaintiffs and the shipowners and there was no doubt that the exclusive jurisdiction clause contained in the bills of lading was binding upon these plaintiffs. The second group had contracted with other carriers for the carriage of their goods to different destinations and were issued with bills of lading entitling the carriers to sub-contract 'on any terms' the whole or any part of the handling, storage, or carriage of the goods. The carriers sub-contracted the carriage of the goods between Taiwan and Hong Kong to the shipowners, who issued two feeder bills of lading which acknowledged receipt of the goods and contained cl 26, the exclusive jurisdiction clause. The difficulty with respect to the second group of plaintiffs was that, under ordinary principles of law, there was no contractual relationship between them and the shipowners. Accordingly, these plaintiffs argued that cl 26 was not binding on them.[12]

The issue for the Privy Council, then, was whether the shipowners could rely, as against the second group of plaintiffs, on the exclusive jurisdiction clause in the feeder bills of lading to which these plaintiffs were not parties. The Board concluded that they could and held that (1) where a bailee sub-bailed goods with the authority of the owner of the goods, the relationship between the owner and the sub-bailee was that of bailor and bailee;[13] (2) the owner of the goods was bound by the terms on which the goods were sub-bailed if the owner expressly or impliedly consented to the bailee making a sub-bailment containing those terms and the sub-bailee voluntarily received into his custody the goods knowing that they were owned by someone other than the bailee; and (3) where the consent is very wide, only terms which are so unusual or unreasonable that they could not reasonably be understood to fall within such consent are likely to be excluded.[14]

Applying these principles to the facts of the case, the Privy Council held that the consent given by the plaintiffs to their carriers to sub-contract the carriage of goods 'on any terms' was wide enough to authorise consent to the application of an exclusive jurisdiction clause to the sub-bailment. The Board was further satisfied that this determination was in accordance with the reasonable commercial expectations of the parties. In the result, the

[12] Note 1 above, pp 137–9.
[13] Ibid, p 142.
[14] Ibid, pp 145–6 and 149.

shipowners were entitled to rely on the exclusive jurisdiction clause set out in their feeder bills of lading and the plaintiffs' action in Hong Kong was stayed.[15]

In the course of its discussion as to the nature of the relationship between the bailor and the sub-bailee in the context of the carriage of goods by sea, the Privy Council in *The Pioneer Container* examined two cases which are relevant to *The Mahkutai*. First, the Board expressed approval of the approach to bailment on terms taken by Lord Sumner in the decision of the House of Lords in *Elder, Dempster & Co v Paterson, Zochonis & Co*.[16] The Board acknowledged that this case was not directly applicable to *The Pioneer Container* because 'there was in that case a bailment by the shippers direct to the shipowners, so that it was not necessary to have recourse to the concept of sub-bailment.' However, Lord Goff continued:

> Even so, notwithstanding the absence of any contract between the shippers and the shipowners, the shipowners' obligations as bailees were effectively subject to the terms upon which the shipowners implicitly received the goods into their possession. Their Lordships do not imagine that a different conclusion would have been reached in the *Elder, Dempster* case if the shippers had delivered the goods, not directly to the ship, but into the possession of agents of the charterers who had, in their turn, loaded the goods on board; because in such circumstances, by parity of reasoning, the shippers may be held to have impliedly consented that the sub-bailment to the shipowners should be on terms which included the exemption from liability for bad stowage.[17]

Second, the Board rejected the plaintiffs' argument that the Himalaya clause in the carriers' bill of lading[18] gave 'sufficient effect to the commercial expectations of the parties' and that 'to allow a sub-bailee to take advantage of the terms of his own contract with the bailee was not only unnecessary but created a potential inconsistency between the two regimes.' It was held that the shipowners ought to be entitled to choose whether to rely on the terms of the carrier's bill of lading through the vehicle of a Himalaya clause or on the terms of their own bill of lading under the principles of sub-bailment on terms:

[15] For comments on this case, see Reynolds (note 3 above); A Bell, 'Sub-bailment on Terms: A New Landmark' [1995] LMCLQ 177; Toh (note 3 above); and A Phang, 'Sub-bailments and Consent' (1995) 58 MLR 422.

[16] Note 1 above, p 143.

[17] Ibid.

[18] Lord Goff actually referred to the Himalaya clause in 'the *shipowners*' form of bill of lading' (ibid, p 147) but this must be an error. It is clear from the passage as a whole that Lord Goff must have meant the *carriers*' form of bill of lading. Thus, later in the paragraph reference is made to 'exceptions in the bill of lading ... that the carrier has contracted' and a comparison is made with the sub-bailee's (ie, the shipowner's) 'own contract with the bailee.'

> In their Lordships' opinion, however, [the plaintiffs'] argument is not well-founded. They are satisfied that, on the legal principles previously stated, a sub-bailee may indeed be able to take advantage, as against the owner of goods, of the terms on which the goods have been sub-bailed to him. This may, of course, occur in circumstances where no 'Himalaya' clause is applicable; but the mere fact that such a clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods.[19]

The facts of *The Mahkutai*

The shipowners, an Indonesian company, time chartered the 'Mahkutai' to another Indonesian company, Sentosa. The time charterparty gave Sentosa express authority to issue its own bills of lading and absolved the shipowners of any liability thereunder. Sentosa subsequently entered into a sub-voyage charterparty with Indonesian timber exporters, the shippers, for the carriage of a cargo of plywood from Jakarta to Shantou in the People's Republic of China. A shipping order was issued by Sentosa's agents directing the vessel to receive the cargo from the shippers subject to Sentosa's bill of lading. The shipping order was signed by the master, stating that the cargo had been received in good order. This document, constituting a mate's receipt for the goods, provided that 'For further terms and conditions the clauses as stipulated in the B/L will apply.' The master then issued a letter to Sentosa's agents which authorised them to sign the bill of lading 'in accordance with Mate's receipts and relevant Charter Party.' A bill of lading was subsequently issued in Sentosa's form and signed by Sentosa's agents. Clause 1 of the bill of lading provided that '"Carrier" means ... Sentosa ... on whose behalf the Bill of Lading has been signed.' Clause 4 permitted the carrier 'to sub-contract on any terms the whole or any part of the carriage,' and provided that every sub-contractor 'shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit.' Clause 19 was an exclusive jurisdiction clause stating that 'any dispute ... shall be determined by the Indonesian Courts according to that law to the exclusion of the jurisdiction of the courts of any other country.'

[19] Ibid, pp 147–8.

A cargo survey was carried out upon the discharge of the cargo at Shantou. As a result of the survey, the cargo owners alleged that the plywood had been damaged by sea water during the voyage. They issued a writ claiming damages arising from damage to the cargo by reason of breach of contract, breach of duty, or negligence and arrested the vessel in Hong Kong. The shipowners provided a bank guarantee in order to obtain the release of the vessel, reserving the right to seek a stay of the Hong Kong proceedings. The shipowners then applied to the High Court for an order that all further proceedings in Hong Kong be stayed on the basis of cl 19, the exclusive jurisdiction clause in the bill of lading, or forum non conveniens. Sears J held that the shipowners, although not parties to the bill of lading, were entitled to invoke cl 19 either as a contractual term or as one of the terms on which the goods were bailed to them. He further held that there was no good cause justifying refusal for a stay of proceedings. He thus ordered that the Hong Kong proceedings be stayed and that the shipowners' guarantee be discharged.[20] The Hong Kong Court of Appeal allowed the cargo owners' appeal and set aside Sears J's order granting a stay on the grounds that the shipowners were not parties to the bill of lading, the shipowners were not entitled to rely on the Himalaya clause set out in the bill of lading, and the shipowners were 'bailees pure and simple' and were not entitled to rely on the concept of bailment on terms to take advantage of the exclusive jurisdiction clause set out in the bill of lading.[21] The shipowners appealed to the Privy Council.

The issue before the Privy Council

Simply stated, the issue before the Privy Council was whether the shipowners were entitled to invoke as against the cargo owners the exclusive jurisdiction clause contained in the charterers' bill of lading. The shipowners argued that they were so entitled either under the Himalaya clause contained in the bill or alternatively under the principles of bailment on terms.

The decision of the Privy Council

The Privy Council dismissed the shipowners' appeal, holding that the shipowners were not entitled to rely on the exclusive jurisdiction clause contained in the charterers' bill of lading and that the proceedings in Hong Kong ought not to be stayed.

[20] HCt, Action No AJ-71 of 1991 (5 February 1993).
[21] Note 4 above.

The Himalaya clause

The Board recognised that inroads have been made into the doctrine of privity of contract in the law relating to the carriage of goods by sea.[22] It has been clearly established, for example in the cases of *The Eurymedon*[23] and *The New York Star*,[24] that certain persons, such as stevedores, were in limited circumstances entitled to claim the benefit of exceptions and limitations in contracts of carriage to which they were not, under traditional principles of contract law, parties. The underlying rationale of these cases is the recognition of 'commercial expectations that the benefit of certain terms of the contract of carriage should be made available to parties involved in the adventure who are not parties to the contract.'[25] In issue in the appeal was whether the principles set out in those cases should be extended to a situation where a person, who was not under traditional principles of contract law a party to the contract, was seeking to invoke, not an exception or limitation clause, but an exclusive jurisdiction clause.

The application of the *Eurymedon* principle to the facts of *The Mahkutai* involved two steps: first, whether the shipowners qualified as 'sub-contractors' within the meaning of the Himalaya clause (cl 4) of the bill of lading; and second, whether, if they did, they were entitled to take advantage of the exclusive jurisdiction clause (cl 19) in that bill. The Privy Council concluded that the second question must be answered in the negative and it was therefore unnecessary to answer the first question.

The analysis of Lord Goff hinged on the characteristics of the exclusive jurisdiction clause and the wording of the Himalaya clause (that is, that the sub-contractor 'shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier'). He defined an exclusive jurisdiction clause as one that 'does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes.' An exclusive jurisdiction clause, therefore, is a clause that creates mutual rights and obligations. Lord Goff concluded that the exclusive jurisdiction clause in the present case did not fit within the scope the Himalaya clause because it was neither an 'exception,' a 'limitation,' a 'condition,' nor a 'liberty' benefiting the carrier. Further, it was not a 'provision.' The word 'provision' in the bill of lading was held to have a restricted meaning and to refer to 'any other provision in the bill of lading which ... benefited the carrier ... in the sense that it was inserted in the bill for the carrier's protection' and 'should enure for the benefit of the ...

[22] Note 5 above, p 4. See, in general, *Chitty on Contracts* (London: Sweet & Maxwell, 27th ed 1994), ch 18.
[23] Note 9 above.
[24] Note 10 above.
[25] Note 5 above, p 4.

subcontractors of the carrier.' Accordingly, it was concluded that the word 'provision' could not 'extend to include a mutual agreement, such as an exclusive jurisdiction clause.' [26]

Support for this technical interpretation was drawn from the function of Himalaya clauses in general. That function is to prevent cargo owners from avoiding the effect of contractual defences available to the carrier by suing in tort persons who perform the contractual services on the carrier's behalf. It was held that to make available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading does not contribute to the solution of that problem.

Bailment on terms

The Privy Council dealt with the argument on bailment on terms very briefly. It was held that the shipowners were precluded by an 'insuperable objection' from relying on the concept of bailment on terms.[27] For the shipowners to succeed on this concept, they would have to prove that, when they received the goods into their possession pursuant to the bill of lading, their obligations as bailees were subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods. However, it had already been decided that the terms falling under the Himalaya clause of the bill of lading did not include the exclusive jurisdiction clause. Therefore, any argument based on the implication of the exclusive jurisdiction clause under bailment on terms principles must be rejected as inconsistent with the express terms of the bill of lading.[28]

Summary

The decision of the Privy Council in *The Mahkutai* stands for three propositions: (i) a shipowner may, in certain circumstances, be entitled to the protection of the exceptions and limitations contained in a charterers' bill of lading by invoking a Himalaya clause set out in that bill of lading; (ii) general words in the Himalaya clause will not be effective to make available to the shipowner and other sub-contractors an exclusive jurisdiction clause contained in the bill of lading; and (iii) the shipowner and other sub-contractors will not be permitted to rely on the doctrine of bailment on terms to take the benefit of an exclusive jurisdiction clause in the bill of lading if the implication of such a term would be inconsistent with the express terms of the Himalaya clause in the bill of lading.

[26] Ibid, p 9.
[27] Ibid, p 10.
[28] Ibid.

An evaluation of *The Mahkutai*

At the core of the decision in *The Mahkutai* is the Privy Council's determination of the extent to which the law of Hong Kong will continue to adhere strictly to the doctrine of privity of contract. The general principle is that only the parties to a contract are bound by, or are entitled to enforce the obligations under, the contract.[29] The hardship and injustice generated by this common law rule, especially in cases where parties have contracted for the benefit of a third person, have led to numerous calls for its abolition or reconsideration.[30] The rule is particularly inapt in the context of the carriage of goods by sea where, as pointed out by Wilson,[31] the contract of carriage typically is not performed personally by the contractual carrier[32] and is sought to be enforced by persons other than the original shipper who entered into the contract of carriage with the contractual carrier.[33] In such circumstances, it can clearly be seen that the doctrine of privity may have the effect of rendering inapplicable the limitations, exceptions ,and other terms[34] set out in the bill of lading, which constitutes evidence of the contract of carriage.[35] Such an outcome is undesirable because it overturns the allocation of risk agreed upon by the original parties to the contract of carriage and permits the cargo owners to sue in tort or bailment the persons who actually performed the work, thereby evading those contractual limitations, exceptions, and other terms.

Commercial common sense would thus dictate that, in the context of the carriage of goods by sea, the rights and liabilities of shippers (including their consignees and assignees) and contractual carriers (including actual carriers, and employees and independent contractors of the contractual carriers) ought to be governed by the terms of the relevant bill of lading. Indeed, the courts have accepted this course and have developed a number of techniques to circumvent the doctrine of privity of contract.[36] Two of these techniques, relevant to the present discussion, are bailment on terms and the *Eurymedon* principle.

[29] *Chitty on Contracts* (note 22 above), paras 18-001 & 18-014; T A Downes, *A Textbook on Contract* (London: Blackstone Press, 3rd ed 1993), p 340. For a comprehensive review and critique of the doctrine of privity of contract, see R Flannigan, 'Privity — The End of an Era (Error)' (1987) 103 LQR 564.

[30] See Flannigan, ibid, pp 581–2. For law reform proposals, see *Statute of Frauds and the Doctrine of Consideration*, Sixth Interim Report of the Law Revision Committee, 1937, Cmd 5449; and *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Commission Consultation Paper No 121 (London: HMSO, 1991); A M Tettenborn, 'Privity of Contract: The Law Commission's Proposals' [1992] LMCLQ 182; Phang (note 15 above), pp 429–30; H Beale, 'Privity of Contract: Judicial and Legislative Reform' (1995) 9 Jo of Contract Law 103.

[31] J F Wilson, 'A Flexible Contract of Carriage — The Third Dimension' [1996] LMCLQ 187.

[32] The work is usually delegated to the employees of the contractual carrier, to shipowners who act as the actual carriers, or to independent contractors such as stevedores.

[33] In the great majority of cases, the contract of carriage is sought to be enforced by the consignee named in the bill of lading or an assignee of the bill.

[34] Particularly the provisions of the Hague or the Hague-Visby Rules.

[35] *Scrutton on Charterparties and Bills of Lading* (London: Sweet & Maxwell, 19th ed 1984), art 30.

[36] For an excellent summary of these techniques, see Wilson (note 31 above), pp 188–201.

The Privy Council in *The Mahkutai* recognised the usefulness of these techniques to circumvent the rule of privity of contract. It treated the concept of bailment on terms and the principles supporting the Himalaya clause as forming a single thread,[37] and tracked the oscillation of judicial opinion during this century towards the privity rule, culminating in the whole-hearted acceptance of the *Eurymedon* principle.[38] The Board appeared tempted, but ultimately decided not, to recognise in the *Eurymedon* line of cases a fully-fledged exception to the doctrine of privity of contract on the grounds that it had not heard argument specifically directed towards this question and that it was satisfied that the appeal must in any event be dismissed.[39]

In general, though, the Privy Council's decision is disappointing in that it failed to recognise the consonance between *The Pioneer Container* and *The Mahkutai*, it complicated unnecessarily the application of the techniques used to mitigate the harshness of the rule of privity of contract, and it avoided ruling on the correctness of the *Elder, Dempster* decision.[40]

The facts of, and the policy considerations underlying, *The Pioneer Container* and *The Mahkutai* are in all material respects analogous. As is evident from the summaries presented above, the facts of both cases diverge only with respect to the bill of lading relied on by the shipowner. In *The Pioneer Container*, the shipowner sought to rely on the exclusive jurisdiction clause set out in the feeder bill of lading which it had issued to the contractual carrier, whereas in *The Mahkutai* it sought to rely on the exclusive jurisdiction clause set out in the bill of lading which had been issued by the charterer to the shipper. As will be demonstrated below, nothing turns on this difference since, under traditional principles of contract law, the shipper and the shipowner are not both parties to the contract evidenced by either bill of lading.

Further, the policy considerations underlying both cases were the same. In *The Pioneer Container*, the considerations supporting the shipowners' entitlement to rely on the exclusive jurisdiction clause set out in its feeder bill of lading were identified as the desirability of uniformity of jurisdiction and governing law in cases of multiple claims, economic efficiency, the accomplishment of the reasonable expectations of the parties,[41] and the undesirability of legal proceedings for damage to or loss of goods instituted by cargo interests against

37 Note 5 above, p 4.
38 Ibid, pp 4–8.
39 Ibid, p 8.
40 The Board's approach to the construction of the Himalaya clause will not be examined in any detail in this article except to submit that it was excessively technical: the conclusion that an exclusive jurisdiction clause is not one that benefits the carrier and therefore falls outside the scope of the Himalaya clause does not follow from the premise that an exclusive jurisdiction clause is one that 'embodies a mutual agreement' between the parties (ibid, p 9). Further, accepting that the function of Himalaya clauses is to prevent cargo owners from avoiding the effect of contractual defences available to the carrier by suing in tort persons who perform the contractual services on the carrier's behalf, to make available to those persons the benefit of an exclusive jurisdiction clause in the bill of lading *does*, contrary to Lord Goff's opinion (ibid), contribute to the solution of that problem.
41 Note 1 above, p 139.

shipowners and framed outside of the terms of the bill of lading.[42] Lord Goff summarised the opinion of the Board as follows:

> [Their Lordships] consider that the incorporation of the relevant clause in the sub-bailment would be in accordance with the reasonable commercial expectations of those who engage in this type of trade, and that such incorporation will generally lead to a conclusion which is eminently sensible in the context of the carriage of goods by sea, especially in a container ship, in so far as it is productive of an ordered and sensible resolution of disputes in a single jurisdiction, so avoiding wasted expenditure in legal costs and an undesirable disharmony of differing consequences where claims are resolved in different jurisdictions.[43]

These policy considerations are equally applicable to *The Mahkutai*. When a shipowner charters its vessel, the charterer may employ the vessel in one of three ways: it may use the vessel for the carriage of its own goods or of the goods of other persons, or it may sub-charter[44] the vessel. Similarly, the sub-charterer may employ the vessel for the carriage of its own goods or of the goods of other persons, or it may sub-sub-charter the vessel. In those cases where the charterer or the sub-charterer does not use the vessel for the carriage of their own goods, the vessel will be carrying the cargo of numerous shippers. So long as the bills of lading are issued by or on behalf of the shipowner, these numerous cargo interests will be in a contractual relationship with the shipowner. Any claim against the shipowner will proceed in accordance with the terms set out in the bills of lading, which will usually include exception and limitation clauses and incorporate the Hague or the Hague-Visby Rules. Where, however, the shipowner has authorised the charterer to issue its own bills of lading, a contractual lacuna develops. Contractual relationships will exist between the cargo interests and the charterer, and between the charterer and the shipowner, but there will be no contractual relationship between the cargo interests and the shipowner. The cargo interests will be free to sue the shipowner in tort or bailment unimpeded by the terms of the charterer's bills of lading. Thus, the numerous cargo interests individually may sue the charterer and/or the shipowner in different jurisdictions and on different causes of action resulting in the possibility of inconsistent judgments.

The facts of *The Mahkutai* accommodate a multiplicity of claims arising from a single transaction. The vessel was chartered by the shipowners to the time charterers and sub-chartered to the shippers. The plaintiffs comprised at least four parties who claimed an interest in the cargo (the shippers, two notify

[42] Ibid, p 147.
[43] Ibid, p 150.
[44] Assuming that sub-chartering is not impermissible under the head charterparty.

parties named in the bill of lading, and the receivers of the cargo at the port of destination) and who could have independently instituted legal proceedings against the time charterers and the shipowners. That the plaintiffs consolidated their claims and apparently chose not to sue the charterers does not diminish the applicability of these policy considerations. Indeed, these factors were also present in *The Pioneer Container*.[45]

Finally, the reasonable commercial expectations of the parties in *The Mahkutai* would have been that the terms of the bills of lading, issued by the charterers under authority from the shipowners, would govern the rights and liabilities of the parties involved in the adventure. As recognised in the dissenting judgment of Bokhary JA in the Hong Kong Court of Appeal,[46] the cargo interests would have had to have presented the bills of lading in order to obtain delivery of the goods from the vessel, would have been bound as against the time charterers by the exclusive jurisdiction clause contained therein, and would have contemplated that the exclusive jurisdiction clause would equally apply as against the shipowners. The shipowners, having authorised the charterers to issue their own bills of lading, would not have expected that their liability to the cargo interests would be unlimited. Rather, when receiving the goods on board the vessel, the shipowners would have contemplated that the goods were being received in accordance with the terms of the charterers' bills of lading. This conclusion is reinforced by the fact that all of the original parties to the contract of carriage were Indonesian companies.[47]

Taking into account the analogous factual matrices and policy considerations of the two cases, it is difficult to reconcile the judgments of the Privy Council in *The Pioneer Container* and *The Mahkutai*. If the Board was of the view in *The Pioneer Container* that there were sufficient grounds to entitle the shipowners to rely on the exclusive jurisdiction clause in the relevant bill of lading, then it ought to have afforded the shipowner in *The Mahkutai* a similar entitlement. It did not do so because it chose to restrict *The Pioneer Container* to its precise facts and to subordinate the concept of bailment on terms to the *Eurymedon* principle.

The Privy Council in *The Mahkutai* perpetuated a distinction between 'sub-bailment on terms' and 'bailment on terms.' Sub-bailment on terms, typified by the facts of *The Pioneer Container*, applies where the bailor (the shipper) has expressly or impliedly consented to the bailee (the contractual carrier) making a sub-bailment on certain terms and the sub-bailee (the shipowner) has voluntarily taken into his possession the goods of the bailor with the knowledge

[45] In *The Pioneer Container*, the plaintiffs joined together to sue the shipowner for the loss of their cargo. It appears that they did not sue the contractual carriers. The circumstances of *The Pioneer Container* were different from those of *The Mahkutai* in that in the former case litigation had been instituted in some ten jurisdictions with respect to the losses arising from the collision (note 1 above, p 139).

[46] Note 4 above, pp 229–30.

[47] Ibid; and see Nossal (note 4 above), p 27.

that the goods belong to someone other than the bailee and on those terms agreed upon by the bailee and the sub-bailee.[48] Under the principles of sub-bailment on terms, then, the shipowner may be held entitled to rely on the terms of its contract with the contractual carrier when sued by the cargo interests. Bailment on terms, typified by the facts of the *Elder, Dempster* case, applies where the bailor (the shipper) has expressly or impliedly consented that the goods are to be received into the possession of the bailee[49] or the sub-bailee (the shipowner) on the terms of the bill of lading issued by the bailee or the intermediate party (the contractual carrier). Under the principles of bailment on terms, then, the shipowner may be held entitled to rely on the terms of the contract between the shipper and the contractual carrier when sued by the cargo interests.[50]

In the former scenario, Lord Goff held, obiter, in *The Pioneer Container* that the shipowner may be entitled to take advantage of either the terms of its own contract (the feeder bill of lading) under the concept of sub-bailment on terms or the terms of the head contract (the bill of lading issued by the contractual carriers to the shippers) under the Himalaya clause. Further, it was held that it was irrelevant whether or not those regimes gave rise to inconsistent consequences.[51] In the latter scenario, Lord Goff held in *The Mahkutai* that, where the head contract (the bill of lading issued by the contractual carriers to the shippers) contains a Himalaya clause, the shipowner may be entitled to take advantage of the terms of the head contract only under the Himalaya clause (and then only if the wording of that Himalaya clause is sufficiently clear). The shipowner was held not to be entitled to attempt to achieve the same result by means of the principles of bailment on terms.

The reason for this difference of treatment in the two scenarios was held to be the 'insuperable objection'[52] of allowing the shipowners recourse to both the concept of bailment on terms and the principles supporting the Himalaya clause. Simply put, the Board decided that terms could not be implied into the bailment if they did not fall within the express words of the Himalaya clause.[53]

This conclusion has a superficial attraction and it enabled the Privy Council to curtail its analysis of the central problem raised in *The Pioneer Container* and *The Mahkutai*. That problem concerns the nature and scope of the concept of bailment on terms, a concept which has been utilised as a vehicle to circumvent the doctrine of privity of contract and permit the invocation of contractual terms either by,[54] or against,[55] non-parties to the contract. Integral to this issue

[48] Note 1 above, p 145.
[49] In the event of a quasi-bailment, see N E Palmer, *Bailment* (Sydney: Law Book Co, 2nd ed 1991), pp 34, 1291, 1350.
[50] Note 1 above, p 143.
[51] Ibid, pp 147-8.
[52] Note 5 above, p 10.
[53] Ibid.
[54] As in *Elder, Dempster* (note 2 above).
[55] As in *The Pioneer Container* (note 1 above).

is the role of consent to the invocation of those terms by the person against whom they are being invoked.[56]

In *The Pioneer Container*, the analysis was straightforward in that the shippers had consented to the sub-contracting 'on any terms' of all or any part of the carriage by the contractual carriers, which terms included the exclusive jurisdiction clause. It was concluded, then, that the shippers had consented to the exclusive jurisdiction clause contained in the feeder bills of lading issued by the shipowner to the contractual carriers. In *The Mahkutai*, the analysis was more problematic in that the shipowner was attempting to rely on the exclusive jurisdiction clause set out, not in its own contract of carriage with the charterer, but in the bill of lading issued by the charterer to the shipper. Here, when searching for the consent of the shipper to the invocation of the exclusive jurisdiction clause set out in the charterer's bill of lading by the shipowner, the attention of the Board was directed to the Himalaya clause set out in that bill. The concept of bailment of terms was shunted to one side.

There are, however, serious problems with this approach and the consequent subordination of bailment on terms to the *Eurymedon* principle. First, Lord Goff in *The Pioneer Container* stated that the sub-bailee under the principles of sub-bailment on terms can invoke against the bailor those terms of the sub-bailment which the bailor has 'actually (expressly or impliedly) or even ostensibly authorized.'[57] Nothing, then, turns on terms expressly consented to by the bailor.

Second, since the clarification of the concept of sub-bailment on terms in *The Pioneer Container*, it is clearly established that there is no difference between the tests for, and the constituent elements of, sub-bailment on terms and bailment on terms.[58] Indeed, Lord Goff in *The Pioneer Container* used the *Elder, Dempster* decision to support his analysis of sub-bailment on terms. Under both concepts, the shipowners are seeking to rely on terms in a bill of lading contract to which either the shipowners or the shippers are not, under traditional principles of contract law, parties. It is accordingly irrelevant whether that bill of lading is issued by the shipowner or by the contractual carrier. In issue is simply the determination as to whether the shipper consented to the invocation of the terms set out in the relevant bill of lading by the shipowner.

Third, and most importantly, there may not be any inconsistency between the express terms of the Himalaya clause and the terms sought by the shipowner

[56] I am indebted in this and the following paragraph to the most helpful comments of the anonymous referee of this article.

[57] Note 1 above, pp 145–6.

[58] *Morris v CW Martin & Sons Ltd* [1965] 2 Lloyd's Rep 63, 72–3 (per Lord Denning); *The Pioneer Container* (note 1 above), pp 142–3; Margolis (note 3 above), fn 32.

to be implied into the bailment.[59] In *The Mahkutai*, for example, even if it is accepted that the wording of the Himalaya clause set out in the charterer's bill of lading was not specific enough to enable the shipowner to benefit from the exclusive jurisdiction clause, the implication of that exclusive jurisdiction clause into the bailment would have neither been inconsistent with nor contradicted the express terms of the Himalaya clause. In other words, it was not held that the Himalaya clause stipulated that the shipowner could not take advantage of the exclusive jurisdiction clause. It was simply held that the wording of the Himalaya clause was not specific enough to entitle the shipowner to the benefit of that clause.

Finally, there is a flaw in the logic of the decision of the Privy Council. It was decided that the wording of the Himalaya clause contained in the charterer's bill of lading was not sufficiently clear to allow the shipowner to take advantage of the bill's exclusive jurisdiction clause. However, the Privy Council specifically declined to decide whether the shipowners qualified as 'subcontractors' within the meaning of the Himalaya clause.[60] If the shipowners did not qualify as 'subcontractors,' then certainly there would have been no 'insuperable objection' to the shipowners' assertion of their entitlement to the benefit of the exclusive jurisdiction clause under the concept of bailment on terms unimpeded by the Himalaya clause.

It is submitted, therefore, that the two scenarios of sub-bailment on terms and bailment on terms are analogous and do not warrant a difference of treatment. The approach of Lord Goff in *The Pioneer Container* ought to have been re-affirmed in *The Mahkutai*, thus entitling the shipowners to rely on either the bailment on terms or the Himalaya clause regimes. Such an approach would have recognised the 'separate legal personality'[61] of bailment, mitigated the harshness of the doctrine of privity of contract in the context of the carriage of goods by sea, and ensured that the relationship between the cargo interests and the shipowners was regulated by the terms of the charterers' bill of lading in accordance with the reasonable commercial expectations of the parties.

Further and following from the foregoing criticism, by concluding that there was an insuperable objection to the shipowners' argument that they received the goods into their possession on the terms of the charterers' bill of lading, the Privy Council avoided having to rule definitively on the correctness of the heavily criticised[62] decision of the House of Lords in *Elder, Dempster & Co v*

59 As to the implication of terms into contracts, see M P Furmston, *Law of Contract* (London: Butterworths, 12th ed 1991), p 141 et seq.

60 Note 5 above, pp 8–9.

61 Palmer (note 49 above), p 1.

62 *Midland Silicones Ltd v Scruttons Ltd* [1961] 2 Lloyd's Rep 365, 376–7; *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, 295; *The Kapetan Markos (No 2)* [1987] 2 Lloyd's Rep 321, 331; and *Johnson Matthey & Co v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215, 219. See also *Carver's Carriage by Sea* (London: Stevens & Sons, 13th ed 1982), paras 717–19; and *Scrutton on Charterparties and Bills of Lading* (note 35 above), p 251, n 36 and p 458, n 47.

Paterson, Zochonis & Co. The narrow principle extracted from the speeches of that case appears[63] to be that, where goods are laden on board a chartered vessel under a bill of lading issued to the shippers by the charterers, the inference to be drawn is that the shipowners, when receiving the goods into their possession, receive them on the terms of the bill of lading.[64] The decision, however, has not been followed in subsequent cases.[65] Although resurrected in *The Pioneer Container*, the comments of Lord Goff were obiter.[66] In *The Mahkutai*, Lord Goff continued to promote the *Elder, Dempster* decision, referring to its 'rehabilitation' and to its description by Bingham LJ in *Dresser UK Ltd v Falcongate Freight Management Ltd*[67] as 'a pragmatic legal recognition of commercial reality.'[68] However, again these comments were obiter. The problem therefore remains 'how to discover, in circumstances such as those of the *Elder, Dempster* case, the factual basis from which the rendering of the bailment subject to such a provision can properly be inferred.'[69] This problem could have been resolved within the factual matrix of *The Mahkutai* but, as a result of the approach adopted by the Privy Council, its resolution will now have to wait until its reconsideration by the Board or, more likely, by the Court of Final Appeal of Hong Kong.[70]

In conclusion, the decision of the Privy Council in *The Mahkutai* is unsatisfactory in that it appears at variance with *The Pioneer Container* and aimed at ensuring that the defendant shipowners were disentitled from relying on the exclusive jurisdiction clause set out in the charterers' bill of lading. One reason for the hostile orientation of the Board could have been the inference that the shipowners were seeking to gain an unfair tactical advantage by relying on the exclusive jurisdiction clause to defeat the claims of the cargo interests. As contended by Toh,[71] an exclusive jurisdiction clause may operate like an exclusion clause but without the constraints that usually apply to such clauses. He continues: 'When the tactical objective behind stay applications shifts from forcing the action to the agreed forum to settlement of the claim, the avowed justifications of these clauses, namely sanctity of contract and channelling of actions to one agreed forum, lose persuasion.'

63 In *Midland Silicones Ltd v Scruttons Ltd*, ibid, p 376 Lord Reid stated: 'It can hardly be denied that the ratio decidendi of the *Elder, Dempster* decision is very obscure. A number of eminent judges have tried to discover it, hardly any two have reached the same result, and none of the explanations hitherto given seems to me very convincing.'

64 *Elder, Dempster* (note 2 above), p 564 (per Lord Sumner); *Wilson v Darling Island Stevedoring and Lighterage Co* (1956) 95 CLR 43, 78 (per Fullagar J).

65 See *Gadsden v VCSC* [1977] 1 NSWLR 575; *The Forum Craftsman* (note 62 above); *Air New Zealand Ltd v The Ship 'Contship America'* [1992] 1 NZLR 425; and the decision of the Hong Kong Court of Appeal in *The Mahkutai* (note 4 above). See also Wilson (note 31 above), pp 197–8.

66 See the text at note 16 above.

67 [1992] QB 502, 511.

68 Note 5 above, p 6.

69 Ibid.

70 This institution has yet to be established.

71 Toh (note 3 above), p 188 and citing in support observations of Sheen J in *The Al Battani* [1993] 2 Lloyd's Rep 219.

This argument is very weak. Exclusive jurisdiction clauses play an important role in the orderly resolution of transnational disputes. They are freely negotiated and paid for by the party who principally benefits from the choice.[72] Tactical and procedural advantages are an inherent characteristic of these clauses and their invocation for peripheral reasons, such as the settlement or abandonment of the claim, must be within the scope of their utility.

Further, by instituting legal proceedings for loss of or damage to cargo outside of the relevant bill of lading, cargo interests are seeking to gain the substantive advantage of recovery unimpeded by the exclusions, limits, and other terms set out in the bill of lading issued to them and modifying their rights. By so acting, cargo interests are obtaining a benefit that they had not negotiated and had not paid for (in that freight rates are determined in accordance with, inter alia, the extent of the liability of the carrier).

Thus a balance must be struck between, on one hand, the argument that the shipowners are not under traditional principles of contract law a party to the charterers' bill of lading and therefore not entitled to benefit from the exclusive jurisdiction clause set out in that bill and, on the other, the right of cargo interests to sue the contractual carrier in contract as well as other parties involved in the adventure in tort or bailment. It is submitted that the right balance was struck in *The Pioneer Container*. The effect of the decision in *The Mahkutai* is to expose shipowners who authorise the issue of charterers' bills of lading to multiple actions brought by numerous cargo interests in different jurisdictions.

The practical significance of *The Mahkutai*

The decision of the Privy Council in *The Mahkutai* was simply that the shipowners were not entitled to rely on the exclusive jurisdiction clause set out in the charterers' bill of lading. It thus affirmed the decision of the Court of Appeal which had overturned the order of Sears J that the proceedings against the shipowners be permanently stayed. It is important to note that the decision did not disentitle the shipowners from relying on other terms in the charterers' bill of lading, particularly the exclusion and limitation clauses set out in that bill, through the employment of the Himalaya clause or bailment on terms.

However, shipowners and disponent owners who charter their vessels and permit the issuance of charterers' bills of lading will have to seek the amendment of the wording of the Himalaya clause set out in those bills if they want to take advantage of an exclusive jurisdiction clause contained therein. They will not be entitled to fill in any gaps in the Himalaya clause by the application of bailment on terms. The message of the Privy Council was thus a simple one:

[72] A S Bell, 'Jurisdiction and Arbitration Agreements in Transnational Contracts' (1996) 10 Jo of Contract Law 53, 54–5.

for a shipowner to take advantage of an exclusive jurisdiction clause in a charterer's bill of lading, very clear words must be used in the Himalaya clause contained in the bill. It is possible that wording providing that 'every servant, agent, and sub-contractor shall have the benefit of all terms contained in the bill of lading as if such terms were expressly made for their benefit' would be adequate.[73] However, since the determination of the scope of the Himalaya clause is a matter of construction, the safest course would be for the Himalaya clause to make express reference to 'every servant, agent, and sub-contractor, including the shipowner and the disponent owner' having the benefit of 'all terms, including the exclusive jurisdiction clause' contained in the bill of lading.

[73] See, eg, *The Miramar* [1984] 2 Lloyd's Rep 129 and *The Pioneer Container* (note 1 above).