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NOTES

THE RIGHTS OF A THIRD PARTY BENEFICIARY OF A BILL OF
LADING TO A LIMITATION PERIOD ON ACTIONS

I. Introduction

Since May of 1971 the United States District Court for the Southern District of Texas has considered several cases involving the nature and extent of the rights that a stevedore obtains as a third party beneficiary to a bill of lading. In each case, the bill of lading contract for shipment between the shipper and carrier incorporated the provisions of the Carrier of Goods by Sea Act (hereinafter referred to as COGSA). The contract specifically incorporated section 1303(6) of that Act which establishes a one year statute of limitations on all actions regarding damage to the goods which begins to run on the date of delivery. The benefit of this one year limitation period was extended by the parties to various third parties including stevedores.

The cases which were considered dealt with attempts by the third party beneficiary stevedore to bar either (1) direct actions by the cargo interests (i.e., shippers, insurers subrogated to shippers’ claims, consignees of shipment) for damage to the goods, or (2) indirect, third party actions for indemnity brought by the carrier who was currently being sued by the cargo interests. As to the direct actions, the cases are in conflict despite identical facts. In one case it was held that the stevedore’s third party beneficiary status was not a bar to the action, while another case reaches the contrary conclusion. However, with regard to the indirect third party action for indemnity the cases are in accord, each determining that the action could not be barred by the stevedore. This note examines the applicability of the one year limitation period in relation to both direct actions and to indirect indemnity actions brought against stevedores. Particular emphasis will be placed upon the conceptual frameworks which were employed in the cases in order to determine the nature, extent and modifications of the third party beneficiary’s right.

II. Direct Actions

A. The Facts and Issues

Two of the cases, Sumitomo Shoji American, Inc., v. S. S. Aurora, and


Dorsid Trading Co. v. S. S. Fletero,\(^8\) deal with a direct action by a cargo interest against a stevedore initiated after the one year period. In \textit{Shoji} the carrier issued to the shipper a bill of lading containing the following pertinent clauses:

\textbf{Clause 19:}

\begin{quote}
In any event the carrier and the shipper shall be discharged from all liability in respect of loss, damage, delay, or any other claim concerning the goods of their carriage, including, but not limited to, any claims by the preceding or connecting carriers for contribution or indemnification for claims asserted against or paid by such other carriers, unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction has been obtained over the carrier or ship by service of process or by an agreement to appear. Nothing shall be deemed a waiver of any of the provisions of this clause or clause 18 except an express written waiver specifically referring thereto and signed by the carrier or its authorized agent.
\end{quote}

\textbf{Clause 24:}

\begin{quote}
In addition to those hereinabove listed as included in the term "carrier," the owners, managers, charterers, master, officers and crew members of the ship and the carrier's agents, servants, stevedores, longshoremen, representatives, contractors, terminal operators or others dealing with cargo destined for or discharged from the vessel or used, engaged or employed by the vessel and the carrier, and any substituted vessel or carrier, whether any of them be acting as carrier or bailee or as an independent contractor shall have the benefit of all privileges and of all exemptions, immunities from, and limitations of liability granted to, carrier in this bill of lading, or by laws applicable to the carrier, including, but not limited to, those limitations set forth in clauses 17 and 19 of this bill of lading, and the carrier shall be deemed to contract for the benefit of all such parties in this regard. Protections extended to third persons in the foregoing are granted to the extent permitted by law or contract, but shall in no event give rise to any liability of the carrier to such third person.\(^9\)
\end{quote}

The goods arrived and were discharged by the stevedore pursuant to an oral contract with the shipper. The goods were damaged somewhere along the line and the shipper was compensated by its insurer who was thereby subrogated to any claim of the shipper. The insurer then requested the carrier to grant an extension of the period of limitations, and the carrier complied. Then, within the extended period but beyond the one year period of limitations, the insurer brought an action against both the carrier and stevedore. The stevedore contended that the action by the cargo interest (the carrier's insurer) was barred by reason of the one year limitation period to which it was a third party beneficiary.

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The court in *Shoji*, per Judge Singleton, disagreed and held that the action was not barred.\(^{10}\)

The *Dorsid* fact pattern is fundamentally the same. The carrier issued to the shipper a bill of lading with the following provisions:

(a) Because of the relationship between them and as the carrier requires persons and companies to perform or assist it in performance of work or services undertaken by it in this contract, it is expressly agreed between the parties hereto that the . . . stevedores [and certain others] . . . used, engaged or employed by the carrier in the performance of such work or services, shall each be the beneficiaries of and shall be entitled to the same, but no further exemptions and immunities from and limitations of liability which the carrier has under this bill of lading.

(b) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same . . . benefits which the carrier has under clauses 25 and 29 of this bill of lading.\(^{11}\)

Clause 29 provides as follows:

\[\text{[T]}n\text{ any event, the carrier and the ship shall be discharged from all liability for any loss or damage to the goods . . . or any claim whatsoever kind, nature or description, with respect to or in connection with the goods unless suit . . . is brought within one year after delivery of the goods or the date when the goods should have been delivered.}\(^{12}\)

Upon arrival the goods were discharged by the stevedore pursuant to an oral contract with the carrier. The consignee of the shipment contended that the goods had been damaged by mishandling. The consignee requested extensions on the one year period from both the carrier and the stevedore, which extensions were granted. However, the carrier continued to grant still further extensions. Finally, within the period of extension granted by the carrier but well after the period granted by the stevedore, the cargo interest brought an action against both the carrier and the stevedore. The stevedore contended that the action was barred and the court, per Judge Bue, agreed.\(^{13}\)

There are several preliminary points to be made at this time in order to narrow the issue involved. First, it is permissible for the contracting parties to extend such a benefit to a third party.\(^{14}\) Second, the time limitation may effectively be waived or modified by the parties without contravening the purpose of the statute.\(^{15}\) Third, the oral contracts between the carrier and the stevedore would not, in and of themselves, be within the scope of COGSA and conse-

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\(^{10}\) 342 F. Supp. at 298-99. Eventually the carrier in this case brought a third party action for indemnity against the stevedore; this will be discussed in Part III of this note.

\(^{11}\) 342 F. Supp. at 5-6. (Emphasis omitted.)

\(^{12}\) Id. at 6. (Emphasis omitted.)

\(^{13}\) Id. at 5-6.


sequently would not be governed by a one year statute of limitations. Fourth, the difference in language used in the bills of lading in Shoji and Dorsid does not account for the differing results. Judge Bue, in Mitsui & Co. v. Toko Kaiun Kabushiki Kaisha states with regard to language identical to that in Shoji:

"It is unnecessary to discuss Texports' [the stevedore] status as a third party beneficiary to the contract of carriage as evidenced by the bill of lading inasmuch as ... this Court this day entered its Memorandum and Order in Dorsid ... which Memorandum explores the case law and basis for and the nature of such third party beneficiary relationships."

So at least the court in Dorsid, presumably, does not recognize any substantive difference in the language in the two bills of lading. Fifth, in Shoji the opinion in its companion case Toyomenka, Inc. v. Toko Kaiun Kabushiki Kaisha was adopted as "memorandum and order" for the Shoji decision. Therefore, it is to Toyomenka that we look for the analysis appliable in Shoji. Having clarified these points, our consideration can now turn to the central issue which both Dorsid and Shoji share in common:

"When such a benefit ... has been bestowed on a third party ... by the contracting parties ... can such benefit thereafter be waived, withdrawn or rescinded unilaterally by the carrier without the agreement of the third party beneficiary?"

B. Nature of the Benefits: Creditor Beneficiary Versus Incidental Beneficiary

In both Dorsid and Toyomenka-Shoji the analysis is begun by classifying the stevedore into one of the three mutually exclusive standard categories of third party beneficiaries—donee, creditor and incidental. Judge Singleton, expressly, and Judge Bue, implicitly, both conclude that given the overall commercial and business context of the transaction the carrier had no donative intent and the stevedore was not a donee beneficiary. However, in their final determinations, the courts came to contrary results. Dorsid decided that the stevedore was a creditor beneficiary, while Toyomenka-Shoji determined that the stevedore was merely an incidental beneficiary having no enforceable right.

In Toyomenka-Shoji the court reasoned that since (1) the carrier was "contracting for its own benefit as the 'carrier'" and (2) the promised performance

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18 Id. at 18.
was to be rendered to the promisee carrier, the stevedore was an incidental beneficiary. The reasons above do not justify the court's determination that the stevedore is merely an incidental beneficiary. Later in the opinion the court assumes arguendo that the stevedore may be a creditor beneficiary and refers to Simpson's definition of creditor beneficiary which reads in part: "The promisee [which in this case is the carrier] desires to secure the discharge of his own duty to the third party, and so to benefit himself." The fact that the promisee is motivated by a desire to indirectly benefit himself by obtaining a benefit for the third party does not preclude the creditor status but is a prerequisite to that status. The fact that the promisee-carrier also receives the same type of direct benefit from the promisor-shipper is not determinative either. The court in Toyomenka-Shoji has misapplied the Restatement of Contracts principle that "in all cases in which by the bargained-for promise the promisor undertakes a performance which is to be rendered to the promisee, all third parties are incidental beneficiaries" to the relationship which is established.

The contract at issue does not involve one promise alone but two, one in which the promisor-shipper bestows the benefit on the carrier, and another in which the same benefit is bestowed upon the third party stevedore. The court impliedly assumes that since the same type of benefit is being bestowed on both the promisee and the third party in the same contract the third party is necessarily an incidental beneficiary. In effect, the court substituted "contract" in place of "promise" in the Restatement language, and thus it simply misunderstood the law. As Judge Bue pointed out in Dorsid: "[I]t is not necessary under the general rule 'that a contract be exclusively for the benefit of a third person in order to give him a right of action thereon.'" The two reasons offered by the court in Toyomenka-Shoji do not justify the classification of the stevedore as an incidental beneficiary.

Although the court in Toyomenka-Shoji did not refer to it, there may be a third reason to support its determination. Section 133(b) of the Restatement defines a creditor beneficiary as follows: "A [person is a] creditor beneficiary if no purpose to make a gift appears ... and the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary. ..." Since in Toyomenka-Shoji there is no pre-existing duty owed by the carrier to the stevedore, a strict interpretation of the Restatement would render the stevedore an incidental beneficiary. This is not to say that such a result is desirable, but it is consistent with the Restatement position.

The Restatement position itself overlooks certain realities. Apparently the purpose of the "existing obligation" provision is to assure that the promisor is motivated by his own economic benefit in securing the promised performance for the third party. But economic benefit is not only achieved negatively by discharging an existing liability or obligation, but also positively by creating an ad-
vantage in one's bargaining position. A strict interpretation of the Restatement ignores this positive economic motive.

The court in *Dorsid* concluded that the stevedore was a creditor beneficiary, but did not refer to the Restatement's definition and its requisite actual obligation. Rather, *Dorsid* concentrates primarily on the intent of the parties to confer a direct benefit on the stevedore.\(^{31}\) The court found from the language in the bill of lading and the fact that the cargo interest requested an extension initially from the third party stevedore that the stevedore was an intended beneficiary and therefore a creditor beneficiary.\(^{32}\)

The analysis in *Dorsid* in this regard is consistent with the Tentative Draft of the Second Restatement of Contracts\(^{33}\) which proposes that the intent to benefit alone is sufficient to sustain an enforceable right in the third party regardless of the promisor's motive—donative, negative economic or positive economic.

There is one remaining factual difference between the *Dorsid* and *Shoji* cases which should be considered. That is the fact that in *Dorsid* the cargo interest requested the initial extension from both the carrier and stevedore, whereas in *Shoji* the extension was requested only of the carrier. As pointed out above, the request of the stevedore in *Dorsid* was used by the court as an additional indicium of the parties' intent to benefit the third party. The cargo interest manifested by this action his belief in the stevedore's exclusive power to grant such an extension vis-à-vis the latter's own interests.\(^{34}\) The presence of this fact in *Dorsid* certainly assists in showing intent, but the absence of it in *Shoji* should not preclude the stevedore in that case from achieving the creditor beneficiary status. In *Shoji* the language of the bill of lading alone should be sufficient to sustain the status.

The factual differences between *Dorsid* and *Shoji* do not account for the differing results with regard to the classification of the stevedore as a creditor or incidental beneficiary. The contrary determinations are most likely the result of conceptual confusion in *Toyomenka-Shoji*, although, as has been postulated, it may be the result of opposing conceptual frameworks as to whether intent alone is sufficient to create an enforceable third party right.

C. Extent of the Benefit: Variation of the Benefit

At this point it is evident that the stevedore as an intended or creditor beneficiary does have an enforceable right to the one year limitation period but the essential question remains: Can the promisor-cargo interest and promisee-carrier modify that benefit without the agreement of the stevedore? The court in *Shoji-Toyomenka* assumes arguendo that the stevedore is a creditor beneficiary and refers to the Restatement of Contracts, in order to resolve the question.\(^{35}\)

According to section 143 of the Restatement, the primary parties to a contract

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31 342 F. Supp. at 8; See also 17 Am. Jur. 2d Contracts § 304 (1938).
34 342 F. Supp. at 9.
may vary or modify the established rights of a creditor beneficiary except in those situations in which the third party has (1) brought suit upon the promise, or (2) materially changed his position in reliance upon the promise, or (3) the action of the promisee is a fraud upon the creditors. 36

The first exception is really a corollary of the second and is clearly not applicable in this case (i.e., it would be impossible to bring suit on a promise not to sue beyond a certain time). Clearly, the third exception does not apply to this case. Therefore, in order to prevent any modification of the limitation period the stevedore must demonstrate that he has materially changed his position. The court in rather conclusory language found that the stevedore failed to do this: "On the facts presented before the court, Texports [the third party stevedore] has not shown any material change in its position in reliance on the original contract terms." 37 The court does not discuss any of the facts before it, so it remains to the commentator to conjecture upon what evidence might have been sufficient to indicate a material change in position.

Presumably, if the stevedore could show that such a provision in a bill of lading were a standard trade practice or part of the course of dealings between himself and the carrier, then entering into the oral contract with the carrier for the discharge of the goods would be a material change in position in reliance on the promise. If the stevedore could demonstrate that there was a price discount or additional services provided for those carriers who had provided the stevedore with such a benefit, this too would be indicative of a material change in position. However, it is more likely that there is no neat, easily demonstrable one-to-one relationship between benefits and re- liances in the complexity of commercial dealings.

But, even if there were no material reliance on the part of the stevedore upon entering the contract or during his performance there could be a material reliance after the limitation period had passed. One year after delivery or after any extensions granted by the stevedore, the shipper's promise vis-à-vis the stevedore is transformed into one of forebearance. In effect, the shipper has said, "I will not bring an action against you now." Forebearance promises create even more difficult problems in the ability of a third party to demonstrate any material reliance. A promise not to do something elicits a negative reliance; the relying party does not do those things which he would have done but for the forebearance promise. So too, the stevedore might have taken some affirmative action which he might not otherwise have taken had he considered himself susceptible to suit. But there is no reason to expect that the stevedore could point to any one decision which he made in reliance on his supposed immunity. Rather, it is reasonable to presume that the immunity from suit became one of the given factors among many in the corporate decision-making process. The "material change in position" test, which appears extremely inclusive and conceptually satisfying, offers prohibitive difficulties in proof especially when the promise is one to forebear.

In Dorsid the court does not mention the "material change in position" test

36 Restatement of Contracts § 143 (1932).
37 342 F. Supp. at 295.
but after concluding that the stevedore is an intended creditor beneficiary, states:

The fact that the carrier . . . , has chosen to waive one of its benefits accruing under the bill of lading . . . should not mean that Strachan [the stevedore] is concurrently stripped of that same benefit without any voice in the matter. Although the extension of the “exemptions and immunities from and limitations of liability” to the stevedore is dependent upon the carrier’s right to such benefits, the decision whether to exercise or to waive any specific benefit is not so dependent.38

There are at least two possible explanations for this decision by the court. First, once having created the right in the third party stevedore the parties could not vary or modify that right without his permission. This would be an absolutist position which regards enforceable rights of third parties as immutable. This view is at conceptual odds with the Restatement. Second, the court could simply have presumed that the stevedore would materially change its position upon such a promise, that it did so, and that therefore its rights could not be modified.

Besides the failure of the stevedore to demonstrate a “material change of position” the court in Toyomenka-Shoji presented another rationale supporting its finding that the carrier was entitled to unilaterally modify the benefit accruing to the stevedore. The court placed heavy emphasis on the language in the bill of lading: “[T]he carrier shall be deemed to contract for the benefit of all such parties [stevedores] in this regard.”39 The court concludes that these lines created an agency relationship between the stevedore and carrier so that in order to exercise rights under the bill of lading the stevedore implicitly recognized the carrier as his agent and thereby was bound by whatever modifications the carrier had made.40 Given this interpretation, the question as to whether or not the stevedore had materially changed its position is insignificant; even if it had, this agency relationship would presumably overcome the reliance. Furthermore, how could anyone reasonably rely on a promise which the court interprets as totally open-ended?

The court’s interpretation of the “contract for the benefit” clause is questionable. Given the context in which the words appear41 they could have been interpreted as simply emphasizing the fact that when the carrier contracted with the third parties they would receive the benefits. This is probably the interpretation which the stevedore gave the language. The court in Toyomenka-Shoji offers no case law to support the establishment of an agency relationship on such ambiguous language.

Although the Dorsid bill of lading does not employ the “contract for the benefit” language, its rationale was incorporated by Judge Bue in Mitsui & Co. v. Toko Kaiun Kabushiki Kaisha42 which, as was pointed out earlier, has the same bill of lading as that in Toyomenka-Shoji. Therefore, even if Dorsid had

39 342 F. Supp. at 296.
40 Id.
41 Id. at 294 n.2.
contained the "contract for the benefit" language, Judge Bue's decision in that case would not have been altered.

D. Summary

Judge Singleton in Toyomenka-Shoji found that the stevedore could not bar a direct action because: (1) the stevedore was an incidental beneficiary and therefore had no enforceable right to the one year period;\(^{43}\) (2) even if the stevedore was a creditor beneficiary, his right could and was modified by the parties since he did not show a material change in position;\(^{44}\) and (3) even if the stevedore was a creditor beneficiary, and presumably, even had he materially changed his position, the carrier was his agent and the stevedore was bound by his extension.\(^{45}\) In Dorsid, on the other hand, Judge Bue held that the direct action by the cargo interest was barred since (1) the stevedore was a creditor beneficiary,\(^{46}\) and (2) the parties could not waive the stevedore's rights without his permission.\(^{47}\)

III. Third Party Action for Indemnity

As was previously noted, in Shoji, not only did the cargo interest bring a direct action against the stevedore, but the carrier, having been sued by the cargo interest, brought a third party action for indemnity against the stevedore under Fed. R. Civ. P. 14(c). The stevedore, of course, contended that this action was barred by reason of the one-year statute of limitations contained in the bill of lading to which he was a third-party beneficiary.

Toyomenka, the companion case to Shoji, deals with the same factual situation and issue. In fact, there are two other cases with similar facts and issues, Marubeni-Iida, Inc. v. Toko Kaiun Kabushiki Kaisha\(^{48}\) decided by Judge Singleton, and Mitsui & Co. v. Toko Kaiun Kabushiki Kaisha,\(^{49}\) decided by Judge Bue. Since all four cases involve the same defendant-carrier, the pertinent clauses in the bills of lading are identical.\(^{50}\) Furthermore, the only factual differences in the four cases are: (1) the particular identity of the plaintiff-cargo interest (i.e., whether shipper, shipper's insurer or cargo owner) which is not material, since each cargo interest is similarly bound by the provisions of the bill of lading; (2) the timing of the indemnity suit (i.e., whether the action was brought beyond the extended period or, where no extension was involved, beyond the one year period) which is not determinative either, since in each case the action was brought after the limitation period to which the stevedore contended

\(^{43}\) 342 F. Supp. at 294.
\(^{44}\) Id. at 295.
\(^{45}\) Id. at 296.
\(^{46}\) 342 F. Supp. at 6.
\(^{47}\) Id. at 9.
he was entitled. The crucial factors are that the plaintiff is bound by the bill of lading and that the indemnity action was brought after the period to which the stevedore thought he was entitled, which are common to each case.

The central issue in each case was whether or not the one year limitation period could be "transposed and utilized as a defense to the indemnity action which is a separate lawsuit." The stevedores, of course, maintained that it could be. Their rationale was that clause 24 of the bill of lading extended to them "all exemptions, immunities from and limitations of liability granted to, the carrier, . . . including, but not limited to, those limitations set forth in clauses 17 and 19." Clause 19 states that: "[I]n any event the carrier . . . shall be discharged from all liability . . . including, . . . any claims by . . . connecting carriers for . . . indemnification . . . ." The stevedores contend they are entitled to the same benefit, and this argument certainly is a reasonable interpretation of the language of clause 19. However, the court in Toyomenka, Shoji and Marubeni never would have had to consider the nature of the stevedore's rights, since the court felt that if a direct action were not barred, it followed that the third party action also should be upheld.

The court in Marubeni does discuss another reason to support its decision that the stevedore is not entitled to prevent an indemnity action. Judge Singleton contended that to allow the stevedore to bar the carrier's action for indemnity could potentially work a great hardship on the carrier. The court conjectures that the cargo interests could delay filing suit until the final day of the one year period and thereby preclude the carrier from his indemnity suit. The likelihood of this occurrence is questionable at best and certainly does not overcome the actual hardship which the stevedores are undergoing in these four cases by having, as they contend, their liability extended indefinitely. It is not a balancing of hardships or equities which provides the soundest support for these decisions, but a return to the fundamental conceptual framework of third party beneficiary law, that is, the promisee obtaining a promise from the promisor, the performance of which will be rendered to the third party.

One might expect that Judge Bue, having determined in Dorsid that the stevedore could effectively bar a direct action by cargo interests, would have determined in Mitsui that the stevedore could similarly bar a third party action by the carrier for indemnity against the stevedore. However, the court in Mitsui is in accord with Judge Singleton's decisions in Toyomenka, Shoji and Marubeni that the rights obtained by a stevedore through the bill of lading do not empower him to bar a third party indemnity suit by the carrier.

52 Id. at 17.
53 Id. at 17.
Part of the difficulty with interpreting the bill of lading is that in clause 24 the bill of lading includes stevedore and other third parties within the term “carrier.” The court in *Mitsui* concluded that the language of the bill of lading did not make the stevedore a “carrier” for the purpose of COGSA, thereby qualifying the stevedore for the one year limitation vis-à-vis indemnity suit. The court also pointed out that the better interpretation of the bill of lading was not achieved by simply substituting the word “stevedore” wherever the word “carrier” appeared. Even assuming the court’s interpretation is a correct one, it still does not answer why the contract includes stevedores within the term “carrier.” More importantly, how would a third party reasonably interpret this language? Defining the stevedore as a “carrier” need not be considered an attempt to extend the coverage of the statute beyond its scope, but may be an indication that the parties intended to extend the benefits of that statute to the third party. The court in effect attributes no significance at all to the language in the first half of clause 24.

Succinctly stated, the court’s reasoning in *Mitsui* is this: (1) the bill of lading was intended to determine the “relations between the shipper, consignee and the carrier,” not between the carrier and the stevedore; (2) however, the carrier did obtain certain benefits for the stevedore from the shipper, so that the bill of lading also determines certain relations between the shipper and the stevedore; (3) the stevedore was entitled to those benefits which could be said to have been granted to him by the shipper, namely, the one year statute of limitations on actions brought by the shipper against the stevedore; (4) the stevedore was not entitled to those benefits which could only be conferred by the carrier, namely, the one year limitation period on actions for contribution and indemnity brought by the *carrier* against the stevedore.

Underlying this analysis is the fundamental promisor-promisee-beneficiary structure of third party beneficiary law. What the court is saying is that the language in the bill of lading did not transform the carrier into a promisor, vis-à-vis the third party stevedore. More specifically, the promisor-shipper promises the promisee-carrier, by including the provisions of COGSA, not to sue the carrier within one year. The immunity of the carrier from contribution and indemnity are not granted to it by the shipper but are conferred upon it by the operation of the statute. The court interprets the language of clause 24 as extending to the third party stevedore only those benefits “granted to” the carrier by the promisor-shipper, namely the immunity from direct suit by it, the shipper. The only way that the stevedore might obtain immunity from the carrier would be if the carrier were not only the promisee obtaining the benefit for the third party, but also a promisor, promising the shipper-promisee not to bring an action for indemnity against the third party stevedore except within one year. The issue is not whether the right of the stevedore can be transposed

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58 *Id.* at 19.
59 *Id.*
60 *Id.* at 18.
61 *Id.*
62 *Id.*
63 *Id.* at 19.
but whether or not the language of the bill of lading transposed the carrier into a promisor and thereby extended the right to the stevedore. Both Judge Bue and Judge Singleton did not feel that the language in the bill indicated an intent on the part of the contracting parties to extend such a benefit.

As has been indicated, the motivation for the inclusion of the stevedore as a "carrier" was left unanswered. Similarly, a question remains as to why clause 24 states that all the benefits granted to the carrier are also granted to the third parties, if the benefits regarding the immunity from indemnification and contribution are not extended. The court seems to say that the parties did not mean to define the stevedore as a carrier, and they did not mean to say that all the benefits were extended. But the fact remains that the parties did just those things.

Although the court's analysis in Mitsui may be conceptually satisfying, the deeper question is whether or not that conceptual analysis is consistent with the expectations of the parties and the reasonable manifestation of intent conveyed by the language in the bill of lading. Judge Singleton notes apologetically in Toyomenka that "the commercial necessity of bills of lading between carriers and cargo . . . may sometimes be harsh on the less acumen third party stevedore."64 Apparently an extremely high level of acumen is demanded of the average stevedore.

IV. Conclusion

The effect of the Toyomenka, Shoji, Marubeni and Mitsui decisions holding that the action for indemnity against a stevedore is not barred by the one-year limitations period for all practical purposes undermines the significance of the Dorsid decision barring direct actions. A carrier may now unilaterally extend the period in which suit may be brought by the cargo interest against the stevedore and although the shipper will most likely not be able to sue the stevedore, the carrier may still maintain his action for indemnity.65 The stevedore's liability for damage to the goods has effectively been extended beyond one year, albeit indirectly. The stevedore's right to a one-year statute of limitations is a hollow one if the Marubeni, Mitsui, and Toyomenka-Shoji rationales are followed.

In order for the stevedore to assure that his right to a one-year statute of limitations is a meaningful one he should take steps along the following lines. First, the stevedore should make certain that there is no language that could be interpreted as creating an agency relationship between himself and the carrier. This suggestion does not imply that the court in Toyomenka-Shoji was correct in its interpretation of the "contract for the benefit" language, but it is better to avoid any potential controversy. Second, the stevedore should persuade the parties to the bill of lading to include language therein which would make it clear that the benefits extended may be modified or waived only by the stevedore. This would avoid any after-the-fact determinations as to whether or not the stevedore had "materially changed his position" which, as has been indi-

64 342 F. Supp. at 297 (emphasis added).
65 342 F. Supp. at 297.
icated, may be difficult, if not impossible, to demonstrate. Third, as *Toyomenka* suggests, the stevedore should contract directly with the carrier for a one year statute of limitations on all actions between them including indemnification. 66 This is not to say that the stevedore could not (or, in the cases we have considered, did not) receive such a benefit as a third party beneficiary. The point here is that if one can avoid the conceptual complexity and "intricate maze of legal verbosity" 67 it would be best to do so.

This analysis has illustrated several of the conceptual frameworks with which courts approach third party beneficiary problems, and inferentially recommended the preferable positions. Namely, in the determination of whether or not a third party has an enforceable right, the focus should be exclusively on intent and not positive or negative economic motive. The "material change in position" test should be replaced with a presumption that the party would rely on the promise and that the promise is not variable. Taking the reform one step further, the rule should be that the right is not variable unless so stated by the parties or conversely that the rights of the third party are variable unless stated to the contrary. 68 In either case, this area of the law would be given the definiteness it needs, and the rights of the third party would become more certain.

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66 *Id.* at 295.