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Plagiarism declaration

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INTRODUCTION

At the core of this paper lies a quandary which may present itself in a dispute where a bill of lading is issued under a time charter party, i.e. whom to sue? As Hare points out, cargo owners would have to make the essential averment that the defendant carrier is liable.¹ Yet it is difficult to determine on what basis a carrier is so liable.² Chasing the wrong defendant is both costly and may lead to a time-bar, in particular as the prescription period under the Hague/Visby Rules ('the rules') is a mere 1 year.³ A claimant may find it particularly difficult to identify the defendant carrier in circumstances where it has received the bill of lading as a third party endorsee without any privity to the contract of affreightment concluded between the shipowner and charterer.⁴ This contract, particularly in the circumstances of a time charterparty, will regulate the rights and obligations of the parties vis-à-vis a third party for the purpose of the contractual voyage. It may therefore impact on the liability and identity of the carrier in a contract of carriage with a third party shipper and/or endorsee evidenced by the bill of lading.⁵

In the *Starsin*,⁶ where bills of lading had been issued under a time charterparty, the unfortunate claimants were faced with the predicament of an insolvent charterer defendant.⁷ In finding that the bills of lading in question were charterer's bills, the House of Lords declined to consider whether both a shipowner and a charterer could be jointly regarded as carriers.⁸ The Lords based carrier liability on a traditional contractual analysis of the bills of lading, searching for the contractual *nexus* between the defendant carrier and the claimants.⁹ The decision was met with criticism, primarily from Professor Tetley of McGill School of Law. Part I of this paper will analyse the arguments put forth by Tetley in support of a 'third alternative', i.e. that both the shipowner and the charterer are carriers for the purpose of the rules, and cannot be otherwise. The discussion presented below will attempt to establish the 'third alternative' as part of a coherent interpretation of the rules as whole.

The approach taken by the House of Lords to establishing defendant liability in *Starsin* also had impact on their view as to the validity of the demise/carrier-identity clauses found in the

¹ Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 1999 at 557.

² *Ibid.*

³ Article III r 6 the Hague/Visby Rules ('the rules'): International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels 25 August 1924 and entered into force 2 June 1931 as amended by the Protocol to Amend the 1924 Convention, signed at Brussels 23 February 1968 and entered into force 23 June 1977 and again by the Protocol in Respect of Special Drawing Rights, signed at Brussels 21 December 1979 and entered into force 14 February 1984.

⁴ See e.g. the comment by Lord Hobhouse in *Homburg Houtimport B.V. v. Agrosin Private Ltd and Others (The Starsin)* [2003] 1 Lloyd's Rep 571, HL at para 129.

⁵ Wilson *Carriage of Goods by Sea* (5 ed) 2004 at 234.

⁶ *The Starsin* (HL) *op cit* n 4.

⁷ 'Digest of Contemporary Developments – Cargo Claim: *The Starsin*' 9(3) *Journal of International Maritime Law* (2003) 203 at 203.

⁸ *The Starsin* (HL) *op cit* n 4 at paras 10, 49 and 190.

⁹ *Ibid.*

bills of lading. Part II will analyse the courts decision in relation to these clauses and contrast it with the outcome had they applied Tetley's 'third alternative'. Furthermore, Part III will analyse how the court dealt with an attempt by the defendant to exempt itself from liability in terms of a Himalaya clause and argue that had Tetley's 'third alternative' been accepted, the court would have been spared a strained and inconsistent line of reasoning.

PART I – 'THIRD ALTERNATIVE'

A bill of lading is frequently issued by a carrier to a third-party shipper (i.e. a shipper other than a charterer) under a time charterparty.¹⁰ Normally the master or other agent of the shipowner will issue the bill as carrier, yet determining the identity of the carrier may prove particularly problematic where, according to Pejovic, the bill fails to adequately identify the carrier.¹¹ This was the situation in the *Starsin* where the bill of lading issued under a time charterparty were signed on the bill's front page's signature box as agents for the charterer 'as carrier'.¹² However, on the back of the documents the bills contained both a demise clause and an identity-of-carrier clause which clearly revealed an express intention between the shippers and the shipowner that the latter would be bound by the contract.¹³ The House of Lords solved the apparent contradiction by declaring that businessmen would not look for inconsistencies on the back if the 'bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is'.¹⁴

Tetley criticises the judgment as failing to adequately consider whether not both the charterer and the shipowner must be regarded jointly as carriers.¹⁵ His argument is premised on this conditional statement: *if both the shipowner and the charterer carry out any of the responsibilities under the Hague/Visby Rules, then they are both regarded as carriers*.¹⁶ The discussion below will examine the potential of this argument further.

1.1. 'Carrier' under Hague/Visby Rules ('the rules')

English law¹⁷ applies the rules to determine the basic obligations of a carrier towards the cargo-owner.¹⁸ In terms of art I(a) of the rules a "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper'. As will be seen below, the exact scope

¹⁰ Wilson *op cit* n 5 at 234.

¹¹ *Ibid* and Pejovic 'The Identity of Carrier Problem under Time Charters: Diversity Despite Unification of Law' 31 *Journal of Maritime Law and Commerce* (2000) 379 at 379.

¹² *Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin)* [2001] 1 Lloyd's Rep 437, CA at para 32 – 39 and *The Starsin* (HL) *op cit* n 4 at para 14.

¹³ *Ibid*.

¹⁴ *The Starsin* (HL) *ibid* at para 15.

¹⁵ Tetley 'Case Note – The Starsin' 35(1) *Journal of International Maritime Law and Commerce* (2004) 121 at 122.

¹⁶ *Ibid*.

¹⁷ As this paper is written with the House of Lords' decision in *the Starsin* in mind, the discussion will focus on English law and only include comparative observations where relevant.

¹⁸ The English Carriage of Goods by Sea Act ('COGSA'), 1971, includes the rules (as amended) in its Schedule. Article X (a) – (c) lists the scope of application of the rules. See also Wilson *op cit* n 5 at 6.

of this definition is subject to debate. Yet on a superficial reading it seems that a 'carrier' can only be one person due to the wording 'the owner *or* the charterer', which will be determined by virtue of its actions, i.e. by entering into a 'contract of carriage'. This may be why Wilson argues that 'the normal rule in English law is that only one party is liable as carrier under any individual carriage contract'.¹⁹ Baughen similarly avers that there is an 'assumption of the courts that there cannot be two contractual carriers for the same sea voyage, as shown by *The Jalamohan*'.²⁰

In the United States, where the US Carriage of Goods by Sea Act, 1936, contains an identical definition of a 'carrier', '[s]ome courts have ... held that the definition of "carrier" in sect. 1301(a) of COGSA allows for only one contractual carrier'.²¹ The US courts have however been divided as to whether the carrier definition should be given an 'inclusive' or 'exclusive' interpretation.²² An exclusive interpretation would require privity of contract between the carrier and shipper in order to confer liability under the act.²³ Such privity can be found by virtue of the signature contained on the bill of lading with an indication as to on whose behalf the bill of lading is signed.²⁴ In particular, US courts have absolved the shipowner from liability in circumstances where the charterer was named in the bill of lading as 'carrier'.²⁵ Yet certain US courts have accepted an inclusive interpretation and '[s]eizing upon the word "includes" in the statute's definition ..., these cases conclude ... that there can be more than one carrier'.²⁶ However, this position remains to be approved by the US Court of Appeal.²⁷ Still, the claimant will in the US have the option to sue the ship. As Davies points out, due to the Doctrine of Ratification 'even if the time charterer is the contracting carrier directly responsible to the cargo owner on the bill of lading, the cargo owner may nevertheless sue the ship *in rem*'.²⁸

Pejovic argues that the carrier definition as found in art I(a) of the rules fails to clearly define who the carrier is and leaves the term 'carrier' so broad that it 'remains essentially undefined'.²⁹ Perhaps that is why the House of Lords, although defining the 'first and most crucial issue between the parties' as one relating to the identity of the parties to the contract

¹⁹ Wilson *op cit* n 5 at 235.

²⁰ Baughen *Shipping Law* (3 ed) 2004 at 36.

²¹ Tetley 'Case Note' *op cit* n 15 at 124 and cases cited in n 11.

²² Pejovic *op cit* n 11 at 894.

²³ Reilly 'Identity of the Carrier: Issues under Slot Charters' 25 *Tulane Maritime Law Journal* (2001) 505 at 508 – 509.

²⁴ *Ibid.*

²⁵ Tetley 'Chapter 10: Whom to Sue?' *Marine Cargo Claims* (4 ed) at 6 and cases cited therein.

Available at <www.tetley.law.mcgill.ca/maritime/ch10.pdf> last accessed 20 September 2005.

²⁶ Reilly *op cit* n 23.

²⁷ *Ibid.*

²⁸ Davis 'In Defence of Unpopular Virtues: Personification and Ratification' 75 *Tulane Law Review* (2000) 337 at 377 – 378. However, this is not possible to the same extent in English law unless there is a maritime lien or underlying personal liability, see Hare *op cit* n 1 at 32.

²⁹ Pejovic *op cit* n 11 at 384.

evidenced by the bill of lading, never actually refers to art I(a) at all.³⁰ The Lords rather approach the issue as one of construing the true intention of the parties under the bill of lading and applies the general rule that '[a] charterer will be liable as the carrier if it signed the bill of lading in its own name and it appears to have been the charterer's intention to sign on its own behalf'.³¹ As seen above, this concurs with prevalent US practice. The identity of the 'contractual carrier' is essentially approached by the courts as a question of fact and depends on the circumstances of each case, as well as the bill of lading in question.³²

In the *Starsin* the argument was raised *mero motu* by the Court of Appeal that as the charterer was authorised to issue bills of lading on the owner's behalf, both the owner and the charterer could be regarded as carriers.³³ But as the parties had opted for the traditional approach of seeking only one party as the carrier, Justice Rix found that the possibility of jointly liable carriers could not determine the outcome of the case.³⁴ The argument was again raised before the House of Lords where Lord Bingham held that

'[i]n the present case, the suggestion that CPS (the charterer) contracted jointly on its own behalf and on behalf of the shipowner loses credibility when one notes that the possibility, *although not objectionable in legal principle*, first occurred to a member of the Court of Appeal during argument'.³⁵ (My emphasis)

Furthermore, both Lord Steyn and Lord Millet, although rejecting the argument as to multiple carriers, do so on an interpretation of the facts before them.³⁶ At no stage does the House of Lords rule out the legal possibility that both the owners and the charterer could be jointly liable as carriers on a bill of lading. On the contrary, they merely state that on an interpretation of the contract *in casu* this option has not been established. Tetley's argument is, however, that regardless of the intention of the parties to the contract, *the shipowners had responsibilities under the rules and must therefore be regarded as carriers*.³⁷

1.2. Responsibilities under the rules

In terms of the rules arts II, III and IV the carrier has various responsibilities, most notably to exercise due diligence to make the ship seaworthy, but also to make holds fit and safe for the preservation of goods, as well as (subject to art IV) properly and carefully handle, stow, carry, keep and care for the goods carried.³⁸ The underlying policy objective of the rules is to regulate the inequality of bargaining power found between carriers and shippers by regulating

³⁰ *Starsin* (HL) Lord Bingham *op cit* n 4 at para 6.

³¹ Pejovic *op cit* n 11 at 386.

³² *Ibid.*

³³ *Starsin* (CA) Justice Rix *op cit* n 12 at paras 70 – 76.

³⁴ *Ibid* at para 75.

³⁵ *Starsin* (HL) *op cit* n 4 at paras 10.

³⁶ *Ibid* at para 49 and 190.

³⁷ Tetley 'Case Note' *op cit* n 15 at 122.

³⁸ The rules *op cit* n 3 art. III r 1(a) and (c) and r 2.

the obligations of the carrier vis-à-vis the shipper by restricting their freedom of contract.³⁹ This aim is protected by the application of art III r 8 which declares null and void and of no effect any attempt to contractually exclude the carrier's liabilities under the rules. Tetley's argument is that *by excluding the shipowner from the definition as a carrier, he thereby limits his liability under the rules and any such attempt is regarded as null and void on public policy grounds.*⁴⁰

Tetley argues that in terms of the time charterparty the shipowner performs many of the responsibilities of a carrier under the rules and therefore the contract of carriage.⁴¹ These responsibilities flows *inter alia* from the fact that it 'retains navigational control of the vessel, but transfers commercial control to the charterer'.⁴² Furthermore, as Pejovic points out:

'[e]ven if a time charter and a contract of carriage exist independently and autonomously, they largely coincide in actual performance. This coincidence gives rise to the presumption that the shipowner's responsibility for the execution of the voyage is towards both the shipper and the shipper.'⁴³

In essence, therefore, a time charter is a joint venture between the shipowner and the charterer in terms of which they both have responsibilities towards the shipper and must therefore be regarded jointly as 'carriers' for the purpose of the rules.⁴⁴

1.3. Does *Starsin* leave room for the 'third alternative'?

Implicit in the discussion so far is the proposition that only a 'carrier' can be held liable under the rules. This is implied both by the House of Lords in *Starsin* and Tetley in his 'third alternative'. Tetley has however developed the concept of a 'carrier' to also include an 'actual carrier' defined as 'a person or persons who carry out the responsibilities of the carrier under (*sic*) arts. 2, 3 and 4 of [the] rules'.⁴⁵

A lot hinges on the actual carrier being regarded as a 'carrier', because Tetley's argument can only be reconciled with the rules if it can be established that the shipowner *must be regarded as a 'carrier', but for the exclusionary intention of the contractual parties*. This is because only a 'carrier's' attempt to limit liability in a contract of carriage is prohibited by the rules in terms of art III r 8. Yet, if a 'carrier' is defined by reference to the contractual intention of the parties alone, as the definition in art I (a) undoubtedly lead one (and the courts) to believe,

³⁹ *Starsin* (HL) Lord Hobhouse *op cit* n 4 at para 115 and Wilson *op cit* n 5 at 6.

⁴⁰ Tetley 'Case Note' *op cit* n 15 at 122.

⁴¹ *Ibid* at 123.

⁴² Pejovice *op cit* n 11 at 381.

⁴³ *Ibid*.

⁴⁴ Tetley 'Case Note' *op cit* n 15 at 123.

⁴⁵ Tetley 'Chapter 10' *op cit* n 25 at 4.

then in the circumstances the shipowner will never even register as a party liable in terms of the rules.⁴⁶

The concept of an ‘actual carrier’ is not novel. It is found *inter alia* in the Hamburg rules as ‘any person to whom the performance of the carriage of goods, or of parts of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.’⁴⁷ In terms of these rules the carrier and the actual carrier are held jointly and severally liable for those parts of the carriage undertaken by the actual carrier by application of art 10.2. A shipowner would undoubtedly fall within this definition where it remains responsible for the navigational management of a ship under a time charterparty.

A more recent attempt to define the concept of an ‘actual carrier’ is found in the UNCITRAL Draft Instrument on the Carriage of Goods by Sea.⁴⁸ In terms of art 1.17 it is proposed that a ‘performing party’ is

‘a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the *carrier’s responsibilities* under a contract of carriage for the carriage, handling, custody or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, *regardless of whether that person is party to, identified in, or has legal responsibility under the contract of carriage*’. (My emphasis)

The ‘performing party’ would undoubtedly include a shipowner who carries out his responsibilities in terms of a time charterparty. The performing party’s liability is proposed to be much the same as under the Hamburg Rules.⁴⁹

The failure of the Hague/Visby Rules to articulate a similar ‘actual carrier’ or ‘performing party’ with joint and several liability could be read as detrimental to Tetley’s argument. Still, upon a closer analysis of the wording of art I(a) it could be argued that there is nothing which restrains a court from including an ‘actual carrier’ within its ambit. As seen above in 1.1, the article should arguably be given a wider interpretation than what is currently the approach by the courts. In fact, the courts in most instances, as in the *Starsin*, never even attribute their narrow search for the contractual carrier to the wording of art I(a). In particular, the word ‘include’ in art I(a) is so open-ended that the definition of a ‘carrier’ can legitimately be read so as to mean includes, *but is not limited to*, a shipowner who enters into a contract of carriage with a shipper. Hence, a court may validly interpret ‘carrier’ to also ‘include’ e.g. a

⁴⁶ For the validity of this argument see e.g. Lord Hobhouse’s argument in terms of the Himalaya clause below in Part III and *Starsin* (HL) *op cit* n 4 at para 153 – 156.

⁴⁷ Art 1.2. of the Hamburg Rules: United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg 31 March 1979 and entered into force 1 November 1992.

⁴⁸ Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea] (‘Draft Instrument’), document A/CN.9/WG.III/WP.32 available at <www.uncitral.org> last accessed 20 September 2005.

⁴⁹ Art 6.3 of the Draft Instrument *ibid*.

shipowner who 'physically performs any of the carrier's responsibilities under a contract of carriage'.⁵⁰ If therefore a shipowner as an 'actual carrier' is a 'carrier' for the purpose of the rules, then any attempt to exclude the shipowner from this definition, and therefore the operation of the rules, must be regarded as null and void in terms of art III r 8.

Further support to the argument that art I(a) should be given a wide interpretation can be inferred from Justice Goff's *obiter* in the *Khian Zephyr*.⁵¹ Although the case turned on whether the 'contractual carrier' in a bill of lading also was the 'carrier' for the purposes of the rules when incorporated into a time charterparty, Justice Goff offered some guidance as to the appropriate interpretation of a 'carrier' in a situation of charterer's bills:

'In those circumstances the effect of the definition in art. I(a) is to ensure that provisions which apply to the carrier under the Hague Rules shall *likewise apply* not only to the shipowner in whose ship the goods are physically being carried and though whose servants and agents, the master and crew of the ship, he is physically in possession of the goods, but *shall also apply* to a charterer who has contracted as the other party to the bill of lading.'⁵²

(My emphasis)

In other words, the Commercial Court suggests an interpretation of art I(a) to the effect that the 'carrier' in terms of the definition is by default a) the shipowner *but can also include* b) the charterer who enters into a contract of carriage with a shipper. In contrast, the position suggested above is that the 'carrier' is by default a) the 'contractual carrier' but *must also be* b) any other person, including the shipowner, who undertakes the responsibilities of the carrier under the contract.

The distinction is important in that the focus on the shipowner as the primary carrier under the rules may in certain circumstances prove to be misguided. As Charest points out, vessel managers have an increasingly independent role in the performance of traditional shipowner responsibilities under the rules.⁵³ It therefore seems adverse to current business practices to in all cases regard the shipowner liable as carrier. Thus, although the *Khian Zephyr* provides an indication from the lower court that it is not adverse to the possibility of multiple carriers, the interpretation suggested by the Justice Goff may prove problematic.

In conclusion therefore, in this writer's opinion the proposed interpretation of art I(a) of the rules, i.e. that a 'carrier' includes an 'actual carrier', would not only make commercial sense, it would also bring consistency to the international regime of carriage of goods by sea. In effect a shipowner who performs its responsibilities in pursuance of a contract of

⁵⁰ See the definition in art 1.17 of the Draft Instrument *ibid*.

⁵¹ *Freedom General Shipping S.A. v. Tokai Shipping Co. Ltd. (The Khian Zephyr)* [1982] 1 Lloyd's Rep 73.

⁵² *Ibid* at 76.

⁵³ Charest 'A Fresh Look at the Treatment of Vessel Managers under COGSA' 78 *Tulane Law Review* (2004) 885 at e.g. 890.

affreightment (in particular in terms of a time charter) which coincides with those under a carriage contract would invariably be found liable as a carrier for the purpose of the rules. As such, the stock question in the *Starsin* should in the circumstances have been ‘who are the carriers?’ Furthermore, the failure to recognise this had implications for the Lords’ evaluation of the demise and identity-of-carrier clause, as well as the Himalaya clause, incorporated into the bill. The discussion in Part II and III, below, will analyse how the House of Lords’ ruling affects the operation of these clauses, as well as how the clauses may be dealt with if the court recognises the validity of Tetley’s ‘third alternative’.

PART II – DEMISE/IDENTITY-OF-CARRIER CLAUSES

Part I above dealt with the situation, as was evident in the *Starsin*, where the ‘actual carrier’ limited its liability under the rules by establishing a factual intention not to be a ‘contractual carrier’ for the purposes of the ‘carrier’ definition in the rules. In that case the court emphasised the fact that the bills were signed by the charterers as carriers, to the exclusion of the shipowner. However, the claimant attempted to rely on another common device which is frequently utilised to disclaim liability (*in casu* by shifting liability from the charterer to the shipowner) under the rules. This is the incorporation of demise or identity-of-carrier clauses in the bill itself.

Wilson defines a demise clause as ‘an express term in the contract of carriage to the effect that the party issuing the bill is not liable unless he is either the owner of the vessel or a charterer by demise’.⁵⁴ An identity-of-carrier clause achieves the same result, but is perhaps more effective in that it identifies e.g. the shipowner as the liable party without the ambiguity present in the reference to the demise-charterer.⁵⁵ The validity of the demise/identity-of-carrier clauses was recognised by the court in the *Berkshire* where Justice Brandon relied on a demise clause to conclude that an apparent charterer’s bill was in fact a shipowner’s bill.⁵⁶ However, in the *Starsin* the House of Lords limits the reach of the demise/identity-of-carrier clauses by holding that where there is an inconsistency between the identity of the carrier on the front of the document and the one intended by the detailed conditions on the back, the ‘apparently clear and unambiguous statement’ found ‘on its face’ takes precedent.⁵⁷ Hence, according to Lord Hoffman, ‘if the carrier is plainly identified by the language on the front of the document, one never gets to the demise clause at the back’.⁵⁸

⁵⁴ Wilson *op cit* n 5 at 237.

⁵⁵ *Ibid* at 238.

⁵⁶ *The Berkshire* [1974] 1 Lloyd’s Rep 185 in *ibid* and Baughen *op cit* n 20 at 34.

⁵⁷ *Starsin* (HL) Lord Bingham *op cit* n 4 at para 15.

⁵⁸ *Ibid* Lord Hoffman at para 85.

Consensus seems to be that the House of Lords' decision to override the demise clause should be welcomed.⁵⁹ Girvin states for instance that 'many will be pleased to see that a commercially informed outcome has been reached by their Lordships'.⁶⁰ Yet, his prediction that '[d]emise clauses, which hitherto provided much fuel for litigation, are now anomalous' may not prove entirely valid.⁶¹ In particular, the fact that the clause on the front of the bill was in writing and the demise/identity-of-carrier clauses on the back were printed 'in miniscule print' was relied on by the court. Hence, Baughen predicts that '[t]he material on the reverse on the bill may still, however, be significant where there are conflicting indications on the front of the bill which are both of the same order – that is, both are typed, or both are printed'.⁶²

A more fundamental challenge to the demise/identity-of carrier clause is found in Tetley's 'third alternative'. If the submission as to the validity of this argument, as set out above, is accepted, then a demise/identity-of-carrier clause will be invalid in those circumstances where its effect will be to exclude a carrier, and thereby its liability under the rules, by virtue of art III r 8. Wilson claim that '[t]he clause is acceptable since rather than seeking to exclude liability, its aim is merely to identify the party liable under the Rules'.⁶³ However, it is logical that if the possibility of jointly liable carriers is accepted, then the identification of one party as liable under the rules necessarily excludes the liability of the other. Therefore the demise/identity of carrier clauses 'are null and void, inasmuch as they constitute illegal attempts by charterer [or shipowners - there is nothing barring the charterer to be identified as the carrier as was the case in the *Venezuela*]⁶⁴ to limit or exclude their liability contrary to the Rules'.⁶⁵

In conclusion, therefore, although the demise/identity-of-carrier clause is now of limited effect when they are hidden at the back of a bill of lading, the House of Lords does not rule them entirely redundant. However, had Tetley's 'third alternative' formed the basis of the court's decision the clauses would have fallen foul of art III r 8 and therefore been invalid. But this did not bar the claimant from bringing an action in tort. Yet the shipowner attempted again to limit his liability by virtue of a Himalaya clause evidenced by the bill of lading. The paper will in Part III analyse the House of Lords' decision in relation to the Himalaya clause

⁵⁹ Girvin 'Contracting Carriers, Himalaya Clauses and Tort in the House of Lords' *Lloyd's Maritime and Commercial Law Quarterly* (2003) 311.

⁶⁰ *Ibid* at 313.

⁶¹ *Ibid*.

⁶² Baughen *op cit* n 20 at 36

⁶³ Wilson *op cit* n 5 at 238

⁶⁴ See Baughen *op cit* n 20 at 34.

⁶⁵ Tetley 'The Demise of the Demise Clause?' 44 *McGill Law Journal* (1999) 807 under VIII. Six Reasons for the Invalidity of the Demise/Identity of Carrier Clause pt. 6). Available at <www.tetley.law.mcgill.ca/maritime/ch10.pdf> last accessed 20 September 2005.

and suggest how an application of Tetley's 'third alternative' could have saved the court much 'legal gymnastics'.⁶⁶

PART III – HIMALAYA CLAUSE

As one of the cargo owner claimants was able to establish title to sue the shipowner for its negligent actions causing damage to the cargo, the issue was raised in the *Starsin* whether the shipowner had a defence against the claim in tort.⁶⁷ The shipowner attempted to rely on the Himalaya clause found in the contract of carriage entered into by the charterer as carrier. The Himalaya clause has its roots in an endeavour by the courts to provide uniform application of the rules when claimants attempt to sue an independent contractor, such as a stevedore, in tort, as opposed to the carrier under the contract, and thereby achieve unlimited liability.⁶⁸ The clause itself is normally based on an agency relationship between the carrier and an independent contractor whereby the carrier, as agent, contracts on his own behalf as well as on behalf of the independent contractor.⁶⁹ In the *Starsin* the House of Lords unanimously held that the shipowner was an independent contractor or sub-contractor for the purposes of the Himalaya clause. However, the court was split as to whether the shipowner could rely on this clause to exclude or limit their liability without impunity as per art III r 8.

The Lords essentially employed three different lines of reasoning. The one line found that the shipowner had in terms of the Himalaya clause concluded a contract of carriage with the cargo owners. In the words of Lord Hobhouse: 'both the relevant person, here the shipowners, and the contract come within the definition of 'contract of carriage' and 'carrier' in art. I(b) and (a) of the Hague Rules.'⁷⁰ Furthermore, as between the parties to the Himalaya clause, 'the resultant contract is not "collateral"; it is *the* contract' and therefore the rules applies to it.⁷¹ Lord Steyn, on the other hand, found that a 'contract of carriage' for the purpose of the rules and art III r 8 'means an agreement to carry and not an agreement simply for an exemption' and therefore the rules do not apply to it.⁷² Between the two extremes were the view that the relationship created was not a contract of carriage for the purpose of the rules, however, upon the wording of the clause itself the shipowner is 'a party only for the purpose of taking the benefit of the exemption clause' and for this narrow purpose the rules, in particular art III r 8 does apply.⁷³

⁶⁶ See Tetley 'Case Note' *op cit* n 15 at 130.

⁶⁷ See e.g. *Starsin* (HL) Lord Hoffman *op cit* n 4 at para 89.

⁶⁸ *Ibid* at para 109 and Baughen *op cit* n 20 at 57.

⁶⁹ Wilson *op cit* n 5 at 151.

⁷⁰ *Starsin* (HL) Lord Hobhouse *op cit* n 4 at para 153.

⁷¹ *Ibid* at para 155.

⁷² *Ibid* Lord Steyn at para 60.

⁷³ *Ibid* Lord Hoffman at para 114 and Lord Millett at para 207.

The application of the rules was of paramount importance as if they did apply, then the public policy consideration in art III r 8 of the rules would render any attempt to limit liability void. Lord Steyn was of the opinion that the rules clearly did not apply, however the rest of the Lords found that art III r 8 did apply to limit the effect of the Himalaya clause with the result that the shipowner was unable to rely on the blanket exemption but could invoke the limitations found in the rules.⁷⁴

The rather strained application of the rules to the shipowner for the purpose of the Himalaya clause has been criticised by Tetley for its inconsistency.⁷⁵ For instance, Lord Hobhouse relies on the shipowner's status as a 'sub-bailee of the goods and the actual performing carrier' to come to the conclusion that in terms of the Himalaya clause the shipowner had entered into a contract of carriage with the cargo owner.⁷⁶ As quoted above, the Lord explicitly states that its status as 'actual carrier' is sufficient to deem it a 'carrier' for the purpose of the definition of a 'carrier' in art I(a). As seen in the discussion in Part I, this is a very different view than the one the Lords took in relation to the carrier identity issue in terms of the over-all contract of carriage.

However, if the shipowner had been regarded as a 'carrier' to the over-all contract of carriage, then the court would not have been forced to take a strained and inconsistent approach to the shipowner's liabilities in terms of the Himalaya clause. In fact, the Himalaya clause could not have been invoked by the shipowner as a carrier. Tetley therefore correctly maintains that '[h]ad the courts chosen to expand the definition of a "carrier", (*sic*) this would have eliminated the need for the legal gymnastics employed by the House of Lords in *The Starsin*'.⁷⁷

CONCLUSION

This paper has analysed Tetley's 'third alternative' in relation to the House of Lords decision in the *Starsin* i.e. that in circumstances where a bill of lading is issued under a time charterparty both the shipowner and the charterer must be regarded as carriers for the purpose of the contract of carriage in so far they both carry out the responsibilities under the rules. Part I analysed the argument and concluded that the ambit of the definition of a 'carrier' in art I(a) was wide enough to include both a charterer and a shipowner who performed functions as an 'actual carrier'. The discussion then concluded that as an actual carrier is a 'carrier' for the purpose of art I(a) any attempt to limit the liability of such person under the rules would be invalid. Part II examined the courts approach to the demise/identity-of-carrier clause found in the bill of lading, and concluded that an application of the 'third alternative' would have

⁷⁴ *Ibid.*

⁷⁵ Tetley 'Case Note' *op cit* n 15 at 130.

⁷⁶ *Starsin* (HL) Lord Hobhouse *op cit* n 4 at para 156.

⁷⁷ Tetley 'Case Note' *op cit* n 15 at 130.

rendered the clause null and void by virtue of art III r 8. Similarly, in Part III, it was argued that the 'third alternative' would have saved the House of Lords much unnecessary 'legal gymnastics' in order to apply art III r 8 to a shipowner's attempt to limit liability in terms of a Himalaya clause.

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