

To: John Hare
From: Mike Nicaud
Re: The Starsin; Paper #1
Course: Carriage of Goods by Sea

In response to the House of Lords ruling in *The Starsin*¹, Professor Tetley's case note² can best be summed up as follows: They just plain got it wrong. Of course his critique is more polished and reserved, but it nevertheless exudes the same sentiment regarding the disposition of the case, especially in relation to identifying the common carrier(s) under a bill of lading. Professor Tetley states that "[t]here is, however, a third alternative, which is that both the shipowner and the charterer are the carrier and cannot be otherwise."³ This raises an interesting issue. Should the stock question in relation to the interplay between bills of lading and charterparties not be 'Who *are* the carriers?' The House of Lords did not find this to be the case, and so a good place to begin this exegesis is with the *Starsin* itself.

The Starsin and The House of Lords

The Facts in brief:

The dispute arose over a cargo of timber and plywood that was bound for Europe from the Far East, specifically Malaysia. The timber was negligently stowed and soon deteriorated. The cargo was carried pursuant to several contracts of carriage, the terms of which were contained in transferable bills of lading, which the cargo owners made claims under in relation to the damaged wood. Cargo interests made claims against the shipowner (Agrosin Private Ltd.), demise charterer (Oreanda Shipping Ltd.) and also the time charterer (Continental Pacific Shipping, CPS) as "carrier". The shipowner and demise charterer were treated as the same party for purposes of

¹ Homburg Houtimport B.V. v. Agrosin Private Ltd. (The Starsin)[2003] 1 Lloyd's Rep. 571, 2003 AMC 913 (H.L.). (Lords Bingham of Cornhill, Steyn, Hoffmann, Hobhouse of Woodborough & Millett).

² See Tetley, William. "Bills Of Lading: Where Both Sides Of The Bill Of Lading Differ, The Charterer, Not The Shipowner, Is The Carrier, The Shipowner May Not Benefit From A Himalaya Clause, And Only A Claimant With Title At The Time May Sue The Shipowner In Tort. Homburg Houtimport B.V. V. Agrosin Private Ltd. (The Starsin) [2003] 1 Lloyd's Rep. 571, 2003 Amc 913 (H.L.)", 35 J. Mar. L. Com. 121.

³ *Id.* at 122.

framing the issue, with the then recently bankrupted time charterer, CPS, as a co-defendant. At issue were the bills of lading.⁴

Check, please... Now who pays on the bill, charterer or owner?

The primary issue for the Lords to decide concerned the interpretation of conflicting information within the bill of lading regarding the identity of the “carrier”,⁵ and whether the shipowner should be liable to the cargo owners under the bill of lading contract, or in tort or bailment. The bill itself contained a signature box on the front face of the bill, enclosing a signature made by port agents, and was signed expressly “[a]s agent for Continental Pacific Shipping (the carrier)”.⁶ On the back of the bill was a boilerplate demise clause, which, although ultimately ineffectual, provided that “the bill of lading shall only take effect as a contract of carriage ‘with the owners or demise charterers’.”⁷ If the demise clause were to apply, the shipowner would be deemed the contractual carrier and thus liable to the cargo interests under the contract.⁸

Concerning the legal effects of the bill of lading and the demise clause, the court, in an exhaustive opinion, sought to “ascertain and give effect to the intentions of the contracting parties.”⁹ In doing so, Lord Bingham thought it appropriate that the court use both “business sense” and “common sense”, construing the “whole instrument before it...so as not to frustrate the reasonable expectations of businessmen”, all the while keeping in mind that “it is of more

⁴ For purposes of convenience, the court referred to all bills in the singular; so will this paper.

⁵ It is exactly the way in which the court phrased this issue, which Tetley believes, led the court astray. The court presupposed a disjunctive choice that required an exclusion of the other. “Put another way, the question [*that the House of Lords decided*] is whether these were shipowner’s bills *or* charterer’s bills.” See *The Starsin* at 736. (per Lord Bingham of Cornhill), *text and emphasis added*.

Professor Tetley would have liked the court to allow for a third alternative by inserting the conjunctive “and” before the “or”, making it possible that the bills were issued in favor of the shipowner “*and/or*” the charterer. Indeed Tetley goes a step further and suggests that both the shipowner and the charterer *must* be considered as carrier, if either “carry out any responsibilities under the Hague/Visby Rules,” and that this “cannot be otherwise” See Tetley, *supra* note 1, at 122, in reference to the Hague/Visby Rules: International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931 (the “Hague Rules”). The Hague Rules were amended by the Protocol to Amend the 1924 Convention, signed at Brussels, February 23, 1968, which entered into force June 23, 1977, and again by the Protocol in respect of Special Drawing Rights, signed at Brussels, December 21, 1979, which entered into force February 14, 1984. The Hague Rules and the subsequent amendments are known as the “Hague/Visby Rules.”

⁶ See *The Starsin*, at 736.

⁷ *Id.* at 747. (per Lord Steyn’s *dissenting opinion*)

⁸ It is ironic to note that the parties who sought to avail themselves of the application of the demise clause, which was “in miniscule print on the back of a bill crammed full of such print,” were in fact the cargo interests. *Id.* at 719. This was obviously due to the time charterer’s insolvency.

⁹ *Id.* at 737.

consequence that a rule should be certain, than whether the rule is established one way or the other.”¹⁰

In its reasoning, the Court, to a large extent, relied on the law of agency, (whether or not the shipowner was in fact a disclosed/undisclosed principle), as well as the proper interpretation and construction of commercial instruments. Much emphasis was also placed on the signature itself. The resulting application of these principles was the Court’s holding that these were charterer’s bills. CPS was found to be the carrier, and the shipowner was not. The Court’s conclusion was that “one should look for the identity of the carrier on the face of the bill, rather than the clauses on the reverse.”¹¹ Even Lord Steyn favored this ‘mercantile view’¹², finding that assigning a “preponderant effect to boilerplate clauses...would have an adverse effect on international trade.”¹³ To bolster this argument the Court points to the International Chamber of Commerce’s Uniform Customs and Practice for Documentary Credits (UCP 500).

The UCP 500 is a system used by international banking to decide when and how to pay out when Letters of Credit (L/C) are issued. It is well understood that in determining whether documents conform to the terms of a L/C, a bank’s duty of examination under 14(b) of the UCP is only to look at the face of the documents themselves.¹⁴ As the *Starsin* points out, “banks rely on what is written on the face of the bill. It has never been the practice to read the small print on the back and banks are not required to familiarize themselves with it.”¹⁵ The UCP also requires that the carrier be named on the face of the bill of lading. These requirements are illustrative of the desirability that in drafting business documents and interpreting them, one keeps the aims of simplicity and practicality in mind. This, however, still misses the mark regarding the possibility for dual carriers.

First of all, the UCP 500 does not govern the rights and obligations between the parties themselves, i.e. buyer versus seller, shipper versus carrier. It has *no* effect on the substantive rights of the parties. It only governs the right to payment under terms of a L/C. In addition, Professor Tetley illustrates that although it appeared in this case that the technical requirements were met to comply with the UCP, they actually did not, because in “naming *only* the charterer as carrier and not mentioning the shipowner which also participated in performing the obligations of

¹⁰ *Id.* at 737-38, *citations omitted*.

¹¹ See Stephen Girvin, “Contracting Carriers, Himalaya Clauses and Tort in the House of Lords,” 311 L.M.C.L.Q., 2003 at 313.; *see generally The Starsin* .

¹² Girvin at, 312.

¹³ *Starsin*, at 747.

¹⁴ *see e.g. J.H. Rayner & Co. Ltd. V. Hambro’s Bank Ltd.* [1943] 1 KB 37 (CA), in which a bank justifiably refused payment because the bill of lading referred to the cargo as “machine-shelled groundnut kernels” whereas the L/C referred to “Coromandel groundnuts”.

¹⁵ *Starsin* at 721.

the carrier under the contracts of carriage and the Hague Rules, the bills did not reflect the *true* identity of the carrier as article 23(a)(i) undoubtedly requires.”¹⁶ “Putting any name as ‘carrier’ in the signature box of a bill of lading is not in compliance with UCP 500.”¹⁷

In consideration of dual liability, the *Starsin* judgment states that, “[a]s to whether there were dual carriers, the claimants would have had to succeed on each of two issues: whether the contract purported to be with two carriers, and whether it was concluded with the owners’ authority.”¹⁸ The *Starsin* opinion relies heavily on the bedrock common law notion of privity of contract and that there must be some contractual nexus between the consignee/receiver and shipowner/carrier. For the Lords to hold the shipowner liable, this contractual link was essential for them, however, they would not use the demise clause to do so. To skirt this issue, and to keep hope alive for cargo claimants, they allowed for arguments in tort and would have allowed them in bailment, but still denied recovery for all but one claimant. (They also came very close to limiting liability of the owner through a strange application of the contract’s Himalaya clause, which will be discussed in a later section). The question remains, could the court have gone another way? Must they have?

Dual Carriers, The Hague, COGSA and The U.S.A...

To be fair, dual liability on the part of the carriers, was not pled by any parties in the *Starsin*, as Tetley points out. But do the undertakings of the shipowner as well as the charterer bind them both¹⁹ to the obligations set forth under section 3(8) of the Hague Rules²⁰? Factually speaking both the charterer and the owner undertake common duties as a carrier. Tetley argues that regardless of what is included in the contract, a “factual carrier” under a bill of lading cannot avoid the rules set forth in applicable carriage regimes simply by stating so in a contract. To do so would be to disregard mandatory public policy considerations that have been in place since the

¹⁶ Tetley, *supra* note 2, at 6.

¹⁷ *Id.*

¹⁸ *Starsin* at 725.

¹⁹ These concomitant duties include exercising due diligence to provide a seaworthy vessel, to man and equip the ship, to properly load stow and handle cargo, in “choosing the ship’s route, in hiring the stevedore’s and ship’s agents...paying for bunkering, port fees, and pilotage charges, not to mention collection of freight for the carriage.” See William Tetley, “The Demise of the Demise Clause,” (1999) 44 McGill LJ 807 at, 812.

²⁰ 3(8) provides that: “Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.”

negotiation of the U.S. Harter Act, and thereby allowing carriers to lessen their liability beyond prescribed limits.²¹ This argument has merit, and so perhaps a brief departure into another legal system will shed some light on the subject.

The U.S. COGSA²² regime applies to all inbound *and* outbound cargo to and from the United States. It is very similar to that of the Hague Rules, and has its own § 3(8), which likewise prohibits a carrier from lessening its liability in contravention of COGSA. Although demise clauses are struck down by U.S. courts for just this reason,²³ the position of whether or not there can be multiple carriers is not as cut and dry as Professor Tetley wishes it to be. Regarding this issue, there is indeed a split within the U.S. legal system, most notably between the 5th Circuit and decisions doled out by district courts in the 2nd Circuit.²⁴ Some have taken the view that there can be more than one COGSA carrier.²⁵ Others use an “agency approach” which was similarly used in the *Starsin*, to determine who *the* carrier is under rules of privity of contract.²⁶ The modern trend, as Prof. Schoenbaum illustrates, is to use a “practical approach” in at least *initially* allowing for more than one COGSA carrier.

Although one Court has stated that “there is strong statutory support for treating, except in exceptional situations, all owners and charterers involved in the carriage of goods at issue as

²¹ “The purpose behind Harter, the Hague Rules and COGSA, were to achieve a fair balancing of the interests of the carrier, on the one hand, and the shipper, on the other, and also to effectuate a standard and uniform set of provisions for ocean bills of lading.” See William Tetley, *MARINE CARGO CLAIMS*, 2ND EDITION, (Butterworth & Co.) at 410, *citing Encyclopedia Britannica v. Hong Kong Producer*, [1969] A.M.C. 1741, at 1746-47. One should note too that The Hamburg Rules were, in part, designed to take the interests of Cargo one step further than previous carriage regimes, by providing a more expansive definition of the carrier, which was “to relieve cargo interests of some of the burden of establishing the identity of the carrier in a multi-party situation.” John Hare. *SHIPPING LAW & ADMIRALTY JURISDICTION IN SOUTH AFRICA*, (Juta & Co. Ltd. 1999) at 490., *see also Starsin* at 778-779 discussing joint and several liability of the actual carrier and the contractual carrier under the Hamburg Rules.

²² 46 U.S.C. § 1301, et seq.

²³ See *Demsey & Ass. v. S.S. Sea Star Portoria*, 461 F.2d 1009 (2d. Cir. 1972); *Thyssen Steel Co. v. M/V Kavo Yerakas* 50 F.3d 1349 C.A.5 (Tex.), 1995.

²⁴ These two circuits are where the majority of U.S. maritime case law stems from, in large part due to the ports of New York and New Orleans.

²⁵ See Thomas J. Schoenbaum, *ADMIRALTY & MARITIME LAW TREATISE*, 2 Admiralty & Mar. Law § 11-7 (4th ed.), *citing Joo Seng Hong Kong Co., Ltd. v. S.S. Unibulkfir*, 483 F.Supp. 43 (S.D.N.Y.1979); *Hasbro Industries, Inc. v. M/S St. Constantine*, 705 F.2d 339, 1983 AMC 1841 (9th Cir.1983); *Trade Arbed, Inc. v. S/S Ellispointos*, 482 F.Supp. 991 (S.D.Tex.1980). See also *Mente & Co. v. Isthmian S.S. Co.* (The Quarrington Court), 36 F.Supp. 278, 1940 AMC 1546 (S.D.N.Y.1940), *decree affirmed* 122 F.2d 266 (2d Cir.1941).

²⁶ See Schoenbaum, *citing Cactus Pipe and Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1111-12, 1985 AMC 2150 (5th Cir.1985); *Dow Chemical Pacific Ltd. v. Rascator Maritime, S.A.*, 594 F.Supp. 1490, 1985 AMC 523 (S.D.N.Y.1984), *opinion amended* 609 F.Supp. 451 (1984); *Sail America Foundation v. M/V T.S. Prosperity*, 778 F.Supp. 1282, 1992 AMC 1617 (S.D.N.Y.1991). *see also Thyssen Steel*, *supra* note 23.

COGSA carriers, who are potentially liable to cargo interests under the bill of lading,"²⁷ this approach only garners widespread judicial backing as it relates to the initial stages of a case, i.e. when determining who to sue. It is just, however, that at least some of the initial burden should be on the cargo interest. As one judge stated, "While it may usually make sense to deem a charterer a COGSA Carrier despite non-involvement in issuance of the bill of lading, that should only be so where there is some evidence that the time charterer might be ultimately liable to the plaintiff as a result of participation in the loading, handling or stowage of goods."²⁸ Although that Court went on to find that both "the agency approach and the practical approach provide legitimate grounds for imposing liability," the majority of U.S. Courts ultimately want to determine who *the* COGSA carrier is.²⁹

From a survey of the federal caselaw, it appears that the "practical approach" is a suitable one to use when the prescription clock is ticking. This means that there can be several carriers in the initial discovery stages and perhaps at summary judgment, but by final resolution a single carrier should be found, (unless one is in the New York's Southern District for the Second Circuit). This approach is also a fair one. Cargo interests generally have a limited period of time to untangle a vast contractual nexus of relationships and this shotgun approach brings any and all relevant parties into the proper forum.³⁰ The burden of untangling these relationships should fall on the shoulders of those charterers and owners who have the best access to this information and documentation. Through their own charterparties, they can indemnify each other for any losses they would potentially incur.

The U.S. personification and ratification theories³¹ support this stance, as does the joint venture theory³² of shipping. The ratification theory in conjunction with the "practical approach"

²⁷ See Shoenbaum citing Joo Seng at 46. One should note, however, that unlike the Starsin, wherein port agents signed only as agents for the charterer, the Joo Seng case involved a bill of lading that was signed by the master. Regardless, in determining whether the charterer could also be deemed carrier, the court went on to state that while "the statute [COGSA] thus leaves much to judicial interpretation, the question whether [the charterer] is liable to the plaintiff "under" the bills of lading as a carrier is not one which turns on whether [the charterer] "issued" the bills in a strict, commercial law sense." Joo Seng at 45. (*text added*). "The practical result of treating all charterers and owners as carriers would be consistent with COGSA's purpose of alleviating the Congressionally perceived imbalance of bargaining power between carriers and cargo interests." *Id* at 46.

²⁸ Hyundai Corp., U.S.A. v. Hull Ins. Proceeds of M/V Vulca, 800 F.Supp. 124, at 130. D.N.J.,1992.

²⁹ *Id.* at 130.

³⁰ See generally, Shoenbaum.

³¹ "The admiralty doctrine of personification treats the ship as the true defendant in an in rem action, with rights and responsibilities separate (at least in concept) from those of its owner. Under the doctrine of ratification, when a ship completes loading of a cargo, it is assumed to have ratified any bills of lading in respect of that cargo that have been issued by or on behalf of someone other than the shipowner. In combination, the two doctrines produce the result that a ship may be held liable in rem for breach of a bill

sidesteps issues of privity, because, although a shipowner may not be personally liable under contract, his vessel may be. This is solely due to her accepting and sailing with cargo, and thereby binding herself to the contract of carriage. Overall this system can “combine to produce a desirable and efficient means of allocating liability to those best able to determine where it should properly lie.”³³ Although the Lords in the *Starsin* adopted a “mercantile view” it is perhaps ironic that the Lords likely would not have favored this “practical approach” even if they had considered it. This is most apparent in the *Starsin*’s discussion of the Himalaya clause.³⁴

Tort anyone? Bailment? What about a Himalaya?...

As consolation to cargo interests everywhere, the *Starsin* judgment keeps the door open to sue those not a party to the actual contract of carriage, in either tort or bailment or both. This approach is a fair one and is a tactic often undertaken by cargo interests in U.S Courts, in an effort to cover all bases.³⁵ Although most of the claimants in this case did not prevail in tort, because they lacked title to sue,³⁶ and their barristers apparently did not make claims in bailment³⁷, the possibility still remains as a fallback to contract. These theories will not be discussed here. What is interesting, and perhaps bizarre, is the Court’s application of the Himalaya clause and their finding that it could be extended to the shipowner.

of lading contract to which its owner was not a party.” Martin Davies, “In Defense of Unpopular Virtues: Personification and Ratification,” 75 Tul. L. Rev. 337.

³² “The joint venture is the combination of co-owners, bankers, charterers, and other interested parties pooling their resources to reap profits from a trading ship. The interested parties are not partners in the strict legal sense, but they jointly undertake the commercial enterprise of trading the ship, sharing in the profits and risks.” *Id.* at 348

³³ *Id.* at 337.

³⁴ Perhaps with their own dockets in mind, the Lord’s overall view on the benefits of a Himalaya clause coincides with their views on a singular common carrier. In “*channeling all cargo claims into a single contractual carrier who has to be sued by the claimant in a particular designated jurisdiction or in arbitration... (a) discourages cargo claimants from engaging in forum shopping by suing third parties; (b) discourages multiplicity of proceedings for the same cargo damage in different jurisdictions; (c) keeps overall litigation costs down; (d) promotes efficient insurance arrangements; (e) enables the shipping line to make effective arrangements with shipowners under which the line takes sole responsibility for handling and paying the cargo claims; (f) promotes all cargo claims on the line being dealt with in a single forum...; and (g) avoids cargo claimants bypassing the exemptions and immunities conferred on the contractual carrier by the Hague or Hague-Visby Rules by suing third parties.*” *Starsin* at 725.

³⁵ See e.g. *Thyssen Steel*, *supra* note 23, discussing tort, and bailment. Making this a trifecta, is often included the claim for breach of warranty of workmanlike performance.

³⁶ The Court determined that one claimant, Makros Hout, did acquire title to sue before the timber was damaged and their claim was granted in tort with apparently no carriage limitation. If the shipowner was not a carrier, and the Himalaya clause did not apply by virtue of § 3(8) of the Hague Rules then seemingly they would face unlimited liability under the common law, unless they could limit to the value of their vessel. Odd application! See generally *Starsin*.

³⁷ *Id.* at 777.

The Court's reasoning regarding the application of the Himalaya clause is the most confusing and illogical part of the decision. "A Himalaya clause in a contract of carriage is designed to create contractual relations between the shipper and any third parties whom the carrier may employ to discharge his obligations."³⁸ Usually these third parties are stevedores or terminal operators but may include any agents of the carrier, including independent contractors. The Himalaya clause is designed to confer protections over these third parties that the carrier itself enjoys. In the *Starsin*, the shipowner was not found to be a carrier and as such was viewed as an independent contractor of the charterer. Because the shipowner was deemed to have negligently stowed the damaged cargo, he became liable to at least one party in tort. The issue then became whether the shipowner could avail itself of the immunities conferred by the carriage contracts Himalaya clause.

Reducing the Court's reasoning concerning the Himalaya clause to its most basic, goes something like this. *The shipowner is not a carrier for purposes of the contract at large. The shipowner is, however, liable in tort. The shipowner is an independent contractor of the charterer/carrier. Therefore, the shipowner can avail itself of the Himalaya clause. But the shipowner undertook some duties of carrier, although in this case he is "not subject to positive obligations laid on the carrier by article III, rules 1 and 2 of the Hague Rules."*³⁹ *Regarding the Himalaya clause as a collateral contract, the shipowner "is a party only for the purpose of taking the benefit of the exemption (Himalaya) clause."*⁴⁰ *Even though the shipowner is not subject to the positive obligations of the Hague Rules, he is still a "quasi-carrier" and art. 3(8) of the Hague Rules should apply. Because art. 3(8) applies, and the Himalaya clause attempts to relieve the "carrier or the ship" from exonerating itself beyond the Hague Rules prescribed limits of liability, the clause is struck down as null and void and of no effect.*⁴¹ *Therefore the shipowner is liable in tort and at least one party should be able to recover in full.* Make sense? Not really. This is where Tetley's criticism of the *Starsin* opinion is most biting and most warranted.

Tetley points out that had the defendant in this case have been a stevedore, the outcome of the *Starsin* would have been a good one.⁴² As a true sub-contractor or agent of the carrier, they act for the benefit of cargo interests and should be able to rely on the immunities and defenses of the carriers, if contracted for. Stevedores are not in the business of carting goods all over the world and perform functions, which although essential to the business of shipping, are still

³⁸ *Id.* at 758.

³⁹ *Starsin* at 745, per Lord Bingham.

⁴⁰ *Id.* at 763, per Lord Hoffman.

⁴¹ Hague Rules, *supra* note 5.

⁴² Tetley, *supra* note 2 at 7.

ancillary to the contract of carriage and do not involve the carrying of goods in a vessel. For this reason they should not be “subject to obligations and duties of the art. 3(1) and 3(2) of the Hague Rules.”⁴³ Shipowners on the other hand *do* undertake such obligations and share them with other charterers. This is precisely what the joint venture nature of shipping is all about and goes to the root of this debate.⁴⁴ If one supports the joint venture theory, the result of the *Starsin* can only be regarded as absurd.

The reluctance of the Court to allow the shipowner to escape all liability by way of the Himalaya clause, and its subsequent invalidation through a bizarre application of the Hague Rules is a strong indication that the possibility for dual carriers should be available. As Tetley aptly puts it, “Had the courts chosen to expand the definition of ‘a carrier,’ this would have eliminated the need for the legal gymnastics employed by the House of Lords in *The Starsin*.”⁴⁵ The shipowner and charterer would have been carriers and could have availed themselves of the limitations set forth by the Hague Rules.

Conclusion: The Future of Himalaya and Demise Clauses...

Concerning demise clauses, it is unfortunate that the *Starsin* opinion did not rely on the Hague Rules in invalidating them, as they did with the Himalaya clauses. American Courts have taken this approach in relation to §3(8) of U.S. COGSA, which, for all intents and purposes, is a very similar regime to the Hague Rules. These Courts have invalidated demise clauses in principle, finding them to be an attempt on the part of the carrier to lessen liability in contravention of the statute. The Lords, instead, chose to base their opinion on laudable principles of pure construction, using a practical, business, and common sense approach. It appears that in the future, at least in England, boilerplate demise clauses stuck on the back bills of lading will be invalidated along these lines. Should “carriers” begin to place them on the face of the bill in a more prominent position, the Court may have to revisit this issue and evaluate it in a different light, perhaps one tinted by particular carriage regimes.

Regarding Himalaya clauses, the Courts in England will now allow shipowners who are not carriers, in a contractual sense, to avail themselves of the benefits of such clauses, as long as they can show that they were an independent contractor of the carrier. This is tempered by the requirement that the clause be drafted in such a way that it does not contravene whatever carriage

⁴³ *Id.*

⁴⁴ *Id.*, generally.

⁴⁵ *Id.* at 8.

regime forms the basis of law for that particular contract. One must not forget the anomalous facts of the *Starsin*, however. Ordinarily cargo interests will not be the party seeking to *benefit* from a demise clause by pursuing a shipowner, who in turn seeks to avail itself of a Himalaya clause. This still doesn't prevent owners in the future from including a nicely drafted exculpatory clause in bills of lading...just in case.

From what can be gleaned from the *Starsin*, Prof. Tetley's third alternative will continue to be an unacceptable one in the House of Lords. Although the joint venture nature of shipping, as well as the public policy considerations behind the Hague Rules support Tetley's arguments for dual carriers, as do some judgments of other nations, privity of contract is too deeply engrained into the consciousness of the British common law to be overcome, save perhaps *express* language in a convention indicating otherwise. In England the Hague Rules have one carrier, and the courts will look to such rules of privity in finding him.