

## **Paper – CML 626S - 2005**

The Starsin – Tetley’s third Alternative

Erik Reinmuth, 3.10.2005

### 1. Introduction

The House of Lords decided in *The Starsin* about the claims of several consignees of bill of lading for negligently stowed cargo against the shipowner and demise charterer (hereafter just cargo owner and shipowner). The vessel was time-chartered by Continental Pacific Shipping (CPS), which became insolvent, so that the cargo owners sued the shipowner for the damaged cargo based on the bill of lading and tort<sup>1</sup>. The bill of lading contradicted itself regarding the question, who the carrier and therefore the contractual partner of the consignees was and this was crucial, since the tort claim finally failed because of a lack of ownership of the consignees in the moment, when the damage to the cargo occurred.

Prof. Tetley commented this ruling in his case note and proposed to treat both, the shipowner and charterer as carrier, instead of trying to ascertain only one as carrier. This paper will deal with this proposal with regard to the *Starsin* case and the interplay between Bill of Lading and charterparties. Further the effect of this ruling on Himalaya and demise clauses shall be discussed.

### 2. The Starsin bill of lading

#### a) Clauses regarding the identity of the carrier

The *Starsin* bill of lading was apparently signed on the face by employees of United Pansar Sdn Bhd, explicitly acting as port agent on behalf of CPS. It was added in brackets that CPS is the carrier<sup>2</sup>. Further it was stated on the face that the shipper agrees to all stipulations whatsoever on face or reverse of the bill. The clauses on the reverse, barely legible, included a definition of the term carrier which “...means the party on whose behalf this bill of lading has been signed.” Clause 33, headed with “Identity of Carrier”, stipulated that the contract shall be a contract between the shipper and the owner of the vessel and clause 35 finally was a common demise clause and therefore stipulating, that if the issuer of the bill is not the owner or demise charterer of the vessel, the contract shall be a contract of carriage between the owner or demise charterer with the issuing company acting as agent for them<sup>3</sup>.

---

<sup>1</sup> *The Starsin*, *Homburg Houtimport BV and Others v. Agrosin Private Ltd and Another*, Lord Bingham para 1.

<sup>2</sup> *The Starsin*, Lord Bingham para 4.

<sup>3</sup> *Ibid* para 5.

The House of Lords decided, that the more recognisable signature of the port agents with the added ascertaining of CPS as carrier on the face overrides the contradicting clauses on the reverse. It did so, because more attention should be paid to by the contractual parties individually included terms than to pre-printed ones<sup>4</sup> and even if Lord Bingham accepted the necessity for the consignees of a bill of lading to examine the conditions on the reverse to become sure about the contractual situation, he denied a reasonable need for it, if the contractual partner is mentioned apparently clearly on the face<sup>5</sup>.

#### b) Himalaya clause

After deciding that the time-charterer CPS is the carrier, the court had to decide, whether the Himalaya Clause of the bill of lading is applicable for the benefit of the shipowner. Clause 5 (1) excludes any liability of servants, agents or independent contractors of the carrier to the shipper for damages to the cargo while acting for the carrier<sup>6</sup>. Part 2 of clause 5 of the Starsin bill of lading purposes to give any agent servant or independent contractor the same defences or limitation of liability like the carrier<sup>7</sup>. In the former decision the shipowner was treated as such an independent contractor, whose role was circumscribed as a party with whom the contractual partner, the carrier, contracts to fulfil his obligations out of the contract and Lord Bingham agreed<sup>8</sup>. This would make it possible, that the shipowner benefits from the Himalaya clause. But afterwards Lord Bingham denied this consequence with regard to Article 3 (8) of the Hague-Visby-Rules, which nullifies any clause in a contract of carriage which relieves or reduces the liability of a carrier or ship more than provided in the Rules. The reasoning is that the relationship between shipper and shipowner is factual, even if not formal, a contract of carriage, different for instance to the services rendered by stevedores, and therefore has to be subjected under Article 3 (8)<sup>9</sup> with the consequence that the Himalaya clause is not applicable to the shipowner and that he can be sued based on tort (even if this failed in The Starsin).

### 3. Tetley's third alternative

Tetley proposes to treat the charterer as well as the shipowner as carrier. He regards even the clauses stipulating the identity of the carrier as contradicting with Article 3 (8) of the Rules, because in fact shipowner and charterer would share responsibilities according to the Articles 2, 3 and 4 of the rules regarding the cargo in respect of third parties and to ascertain who is the carrier means, that the non-carrier will be relieved of these obligations which contradicts Article 3 (8)<sup>10</sup>. Instead he characterises carriage of goods as a joint venture between charterer and owner and proposes a joint and several

---

<sup>4</sup> Ibid para 11.

<sup>5</sup> Ibid para 15.

<sup>6</sup> Ibid para 20.

<sup>7</sup> Ibid para 25.

<sup>8</sup> Ibid para 28 and 29.

<sup>9</sup> Ibid para 34.

liability based on the supposed shared responsibilities. It should not be the burden of third parties like consignees to ascertain the contractual circumstances of the charter-party. They could claim against the charterer, who himself could seek contribution by the shipowner, after he indemnified the consignee<sup>11</sup>. He avers that several courts in the USA hold the demise Clause invalid regarding s 3 (8) US COGSA, which follows the wording of the Hague-Visby-Rules, and other countries like Canada or the Netherlands also for different reasons<sup>12</sup>. Further he refers to the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (ICC), 1993 (UCP 500). Article 23 (a)(i) requires the naming of the carrier on the face of the bill of lading. In Tetley's opinion mentioning only one as the carrier would contradict Art. 23 (a)(i) regarding the shared responsibilities<sup>13</sup>.

Tetley criticises the ruling of the House of Lords which at first treated the shipowner as independent contractor to make the exemption of the Himalaya clause available and to deny the applicability in a second step with regard to Art. 3 (8) as "*legal gymnastics*", unnecessary if the shipowner would be treated as carrier as well and could then benefit from the protection of the Hague-Visby-Rules<sup>14</sup>.

#### 4. The identity of carrier problem

The problem to determine who the carrier is occurs often, if bills of lading are issued under time-charter parties. To destine the significance of the problem I want to recall the functions of a bill of lading and the consequences of the demise clause, which determines who the carrier is.

##### a) Bill of lading - functions

The Bill of Lading has three functions. It is the receipt for the shipper, that the goods are shipped in good order and condition and that the carrier is obliged to deliver accordingly<sup>15</sup>. It allows to trade the shipped goods since the legal owner of the document is entitled to claim the goods like the shipper, but it can be unclear if the position of the consignee is one of an owner or just a possessor of the goods<sup>16</sup>. Finally the bill of lading in the hand of the consignee is evidence for the contract of carriage<sup>17</sup>. The rights of the legal owner of the bill of lading are secured for instance in English law by s 2 of the English Carriage of Goods Act, 1924 which transfers the contractual rights of the shipper to the consignee of the bill. Thus the bill of lading is in the hand of the consignee the basic document to

---

<sup>10</sup> W. Tetley, Case Note The Starsin, 35 J. Mar. L. & Com. p 122.

<sup>11</sup> Ibid p 123.

<sup>12</sup> Ibid p 124 Fn 11.

<sup>13</sup> Ibid p 127.

<sup>14</sup> Ibid p 129 and 130.

<sup>15</sup> J. Hare, Admiralty Jurisdiction and Practice in South Africa, 1999 p 543.

<sup>16</sup> Ibid p 550.

<sup>17</sup> Ibid p 549.

preserve his transferred contractual rights out of the contract of carriage concluded between shipper and carrier.

b) Demise clause

Especially under time-charter parties it might not be clear, who the contractual partner of the shipper and therefore of the consignee of the bill of lading is. This arises out of the nature of the time-charter contract between shipowner (or demise charterer) and charterer, in which the charterer is allowed to use the ship, but the shipowner still exercises the navigational control over the ship<sup>18</sup>. Thus a bill of lading issued by the master of the vessel is normally regarded as a bill issued on behalf of the shipowner, whereas a bill issued by the charterer or his agents is regarded as one concluded on behalf of the charterer<sup>19</sup>. It is also possible, depending on the circumstances of each case, that the master signs on behalf of the charterer or the charterer on behalf of the shipowner<sup>20</sup>. Often the necessary agency to contract on behalf of a principal is indicated on the face<sup>21</sup>. A typical demise clause like in The Starsin bill of lading has the consequence, that the carriage contract will be concluded through the agency of the issuing company on behalf of the demise charterer or shipowner<sup>22</sup>.

c) Consequences for the consignee

As the demise or identity of carrier clause in a bill of lading determines the contractual partner of the shipper and therefore at the latest of the consignees as well, the consequence of this is, that the addressee of the better contractual claim might be hidden behind a complicated figuration of the contract<sup>23</sup>. It is not even necessary, that the demise charterer or owner is mentioned in a bill of lading, but he can be an unnamed principal<sup>24</sup>. This has the effect that the consignee might not be certain about his contractual partner who is to sue. Obviously the contractual rights are better than the ones based on a general cause of action like tort, which became clear in the case of the consignees in the Starsin, in which their tort claims failed because of the lack of ownership of the carried goods.

This gives rise to some significant disadvantages for the consignees. Since the contract transferred to the consignee depends on the mandate of the issuing company, the existence of this mandate has to be averred and the consignee bears the onus of proof, even if the demise clause for instance would be a prima facie evidence for the mandate of the issuing company to act on behalf of the owner. The consignee might have to claim against the carrier based on both the contract and on tort, if he can not

---

<sup>18</sup> C. Pejovi, The Identity of carrier problem under time charters: Diversity despite unification of law, 31 J. Mar. L. & Com. p 381.

<sup>19</sup> M. T. Reilly, Identity of the carrier: Issues under slot charters, 25 Tul. Mar. L.J. 505 p 507.

<sup>20</sup> C. Pejovi, The Identity of carrier problem under time charters: Diversity despite unification of law, 31 J. Mar. L. & Com. p 386.

<sup>21</sup> J. Hare, Admiralty Jurisdiction and Practice in South Africa, 1999 p 557.

<sup>22</sup> Ibid p 558.

<sup>23</sup> Ibid p 557.

<sup>24</sup> Ibid p 559.

be sure about the existence of the agency<sup>25</sup> and if the contractual claim is the only opportunity to get indemnified for damages to the goods, the consignee would have to claim not only against the charterer, but also against the owner or demise charterer. Not to choose the right party might give rise to additional costs or time-barred claims<sup>26</sup>.

## 6. Consequences of the Starsin ruling

The ruling of the House of Lords takes account of this difficulty for the consignees by deciding, that an apparently clear determination of the carrier on the face shall be binding, even if clauses on the reverse are contradicting. This is a relief for the shipper or consignee, who might rather rely on the stipulation on the face. But it does not relieve the consignee from the necessity to determine who his contractual partner is, if the indication of the agency on the face is not un-ambiguous. He would have to become sure, if a demise clause or something similar is part of the bill of lading or not. This is evident regarding the above mentioned opinion of Lord Bingham, who regards the identity of carrier clauses as common and not unexpected for consignees. Charterer, who want to avoid to be liable as carrier have to ensure, that even on the face of a bill of lading the responsibility of the owner is clearly indicated and they cannot rely anymore on standard terms on the reverse of a bill of lading<sup>27</sup>. Further it becomes clear, that the House of Lords does not want to follow the theory of a joint and several liability of shipowner and charterer as decided by some courts in the USA and opined by authors like Tetley.

With regard to the Himalaya clause it becomes clear that even if the House of Lords decided, that only the shipowner or the charterer can be the carrier, the exemption of liability provided by the Himalaya clause is not applicable to the shipowner, if the bill of lading is considered to be a charterer´s bill. Probably it works the other way around in case of a shipowner´s bill of lading, since the charterer is still rendering services which can be considered as a significant part of the carriage as the time-charterer has the commercial control over the vessel. Consignees can rely in both cases only on a general cause of action like tort and not on a contractual claim.

---

<sup>25</sup> Ibid p 559.

<sup>26</sup> C. Pejovi, The Identity of carrier problem under time charters: Diversity despite unification of law, 31 J. Mar. L. & Com. p 379.

<sup>27</sup> J. Andrewartha & Z. Stone, English maritime law update 2004, 35 J. Mar. L. & Com. 369 p 379.

## 7. Discussion of the joint and several liability

To regard both the charterer and the shipowner as carrier gives rise to a significant difference. The consignee could claim in all cases against them on the better contractual bases and would be relieved from the necessity to determine who his contractual partner is. The above mentioned disadvantages regarding the need to aver the mandate of the agency of the issuing company to act on behalf of the principal would disappear. This is a great relief for the consignees, but the question is, if it is necessary to construct a joint and several liability to encounter these problems. The starting point has to be the ascertaining of the intentions of the contractual partners, as the House of Lords did in *The Starsin*<sup>28</sup>. Accordingly, Lord Bingham denied a dual liability of charterer and shipowner because the contract, as evidenced by the bill of lading, uses the singular and not the plural in defining the carrier<sup>29</sup>. In my opinion this is an expression of the general principle of the freedom to contract. Thus to treat both as the carrier means to override the meaning of the contract and can only be justified, if this is necessary to protect the rights of the contractual parties or by virtue of international conventions like Art. 3 (8) of the Hague-Visby-Rules.

The stipulation of a demise clause is not uncommon and apparently shipping business is able to work with this construction and even with the difficulty to ascertain the shipowner in the case of a shipowner's bill of lading. If somebody becomes holder of a bill of lading, he will know about the possibility that the bill of lading can include a demise clause and it would not be surprising for him as mentioned by Lord Bingham. Problems occur, if the bill of lading is ambiguous and the consignee does not know, who is to sue with the consequences mentioned above. The decision of the House of Lords takes account of this problem and helps to avoid, that a consignee sues the wrong party as contractual partner, because the contractual situation was different as it appeared. To construct a joint and several liability is much more. It gives the contract a meaning, which is in bills of lading like in *The Starsin* not supported by the wording. This would not be necessary, if the ruling in *The Starsin* is sufficient to ease the situation for the consignees significantly and in my opinion this is the case. With regard to the former practice which worked with a demise clause since its origins in the second world war<sup>30</sup>, Tetley's argument that the difficulties to unravel the shipowner make it necessary to relieve the consignees of this task by constructing a joint and several liability appears weak.

So the averred contradiction of the demise clause with Art. 3 (8) of the Hague-Visby-Rules has to be examined. Tetley's argument is, that the stipulation of the shipowner or the charterer as carrier relieves the other one, respectively, from his obligations out of the Hague-Visby-Rules. A slightly different argument for the contradiction of demise clauses with Art. 3 (8) is, that if somebody enters into a

---

<sup>28</sup> *The Starsin*, Lord Bingham para 9.

<sup>29</sup> *Ibid* para 8.

<sup>30</sup> *The Starsin*, Lord Hoffmann para 70.

contract with somebody under the expectation, that this person is the carrier, a clause which shifts the liability of this person as carrier to another one would contradict the Hague-Visby-Rules<sup>31</sup>. The latter argument presupposes in my opinion, that the consignee is confronted with an unexpected contractual partner. If this problem does not occur, because the contractual partner has to be clearly identified on the face of the bill, and if not, it would not be unexpected, because demise clauses are common, than it would not contradict anymore Art. 3 (8) of the Rules. Remains the question of the similar argument of Tetley, that the demise clause is prohibited, because of the shared responsibilities of owner and carrier in the Rules.

According to Art. 1 (a) of the Rules the carrier can include the owner or the charterer, depending on who is concluding the contract of carriage with a shipper. This wording does not mean that both have to be treated as carrier, but only one of them. Further only the carrier is burdened in the Rules with obligations in Art. 3, even if Art. 3 (8) prohibits any clause etc. which relieves the carrier or the ship from liability more than provided in the Rules. Thus mainly the carrier is burdened with obligations and the by Tetley mentioned common liability is mirrored only in art. 3 (8). A reason for the shared responsibilities might be found in the obligation of the carrier to make the ship seaworthy according to Art. 3 (1), which is basically an obligation of the shipowner and not of the charterer<sup>32</sup>, but in my opinion this practical point of view does not hinder an interpretation of this obligation as following: It might be the task of the shipowner to make the vessel seaworthy, but independently the carrier who undertakes to carry goods promises in his contract with the shipper to do it only on a seaworthy vessel with the consequences for his liability if not. This interpretation does not contradict the wording of the Rules. Therefore to say that shipowner and carrier share responsibilities according to the Rules is questionable at the best. Both of them contribute to the carriage, but it is still not clear, if the Rules presuppose, that both are treated as carrier according to it. If this is not the case, Art. 3 (8) does not prohibit a contract which stipulates in a more or less complicated way, who the contractual partner is.

Tetley mentions further the decisions of US courts to support his opinion. But even if US courts have less problems to accept a joint and several liability of owner and charterer, the United States court of appeal did not accept this approach until now, because it requires the privity of contract doctrine necessary to apply US COGSA<sup>33</sup>.

---

<sup>31</sup> C. Pejovi, The Identity of carrier problem under time charters: Diversity despite unification of law, 31 J. Mar. L. & Com. p 402.

<sup>32</sup> Ibid p 384.

<sup>33</sup> M. T. Reilly, Identity of the carrier: Issues under slot charters, 25 Tul. Mar. L.J. 505 p 509.

## 8. Conclusion

Tetley's proposal of a joint and several liability of shipowners and charterers directs to a relief for consignees to determine his contractual partner. But in my opinion it is not necessary to construct such a joint and several liability, if the courts require a clear indication of the carrier on the face of a bill of lading like it was the case in the *Starsin*. Further the demise clause does not contradict Art. 3 (8) of the Hague-Visby-Rules as averred by Tetley. In my opinion the purpose of the Rules is to secure a minimum standard of liability together with a limitation of liability. Even if the bill of lading stipulates that only the shipowner or the charterer shall be the carrier, this one is still subjected under the liability regime provided by the Rules and is liable to the consignee accordingly. I would agree with Tetley, if the demise clause would have the consequence, that the consignee virtually cannot claim based on the better contractual claim at all, because of the practical difficulties to determine his contractual partner and would finally lose this right, but this is apparently not the case and the ruling of The House of Lords made a step to relieve for the consignees the ascertaining of the carrier. Therefore the question should still be, who is the carrier and not, if both the shipowner and the charterer should be liable as carrier.

In the *Starsin*, the House of Lords decided further, that the Himalaya clause is not applicable to the shipowner in the case of a charterer's bill of lading, because in fact the shipowner renders the service which the charterer promised to the shipper, the carriage of the goods, and since the doctrine of privity of contract requires a contractual relationship between the party who wants to benefit from the clause, the so constructed contract between shipowner and shipper would be a carriage contract. To exclude the liability through a Himalaya clause would therefore contradict Art. 3 (8) of the Hague-Visby-Rules. To enable consignees to sue the shipowner who is not the carrier based on tort seems to make sense and it is therefore not necessary to enable them further to sue him based on a bill of lading.

That in the *Starsin* case the tort claim finally failed because of the difficulties to aver the necessary ownership regarding the damaged goods does not contradict this conclusion. The consignees still had the contractual rights out of the bill of lading, but unfortunately their contractual partner went insolvent. But the risk that the contractual partner becomes insolvent is basically the risk of everybody, who chooses somebody to contract with.