<u>The Starsin</u>

"Tetley's Third Alternative"

Paper

Carriage of Goods by Sea

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1. INTRODUCTION

Tetley's third alternative, despite its simplicity, fairness, and viability is unfortunately not the dominant approach in Hague and Hague/Visby regime nations. Tetley's plea for the shipowner and the charterer to both be the 'carrier' has, despite its potential support by Lord Justice Rix of the Court of Appeal in *The Starsin,* been explicitly been rejected by the House of Lords. The joint and several liability of the parties involved in carriage would simplify the law immeasurably in this area, nevertheless a single 'carrier' approach is maintained. Arguably, the rejection of the notion that multiple parties may comprise the carrier by the House of Lords is misguided, for the following reasons. Firstly, when examining the history of the Hague Rules, in particular, the Canadian statute that formed its base, it is by no means clear that 'carrier' was intended to refer to only one party. Secondly, several jurisdictions have allowed multiple parties to be carriers, with the result that it is more equitable for both the defendants and the plaintiffs. Thirdly, a single carrier approach results in actions outside the Hague regime, which is what the Rules were intended to address. Fourthly, performing parties have resorted to a series of clauses in bills of lading in attempts to protect themselves from plaintiffs circumventing the Rules and exempt themselves from responsibility were possible, thus resulting in an incredibly and unnecessarily complex area of shipping law. The question of "who is the carrier" should rather be "who are the carriers?" The House of Lords therefore should not have answered in the singular.

2. HISTORY AND DRAFTING OF THE HAGUE RULES

The Hague Rules, although the first successful attempt at uniform carriage law, was not the first instrument to regulated shipper and carrier relationships. Over the past three centuries prior to the Hague Rules, there has been fluctuations in the balance of bargaining power between shippers and carriers. By the late 17th century in England, the jurisdiction of the courts of common law had been extended to include maritime litigation, and strict liability was imposed on maritime carriers.[1] The reasoning behind imposing strict liability on the carrier was that "[a]t common law it was believed that a cargo owner who shipped his goods by a marine carrier should be afforded special protection; he was prevented, by geographic remoteness, from closely supervising the passage of his goods and he was particularly susceptible to collusion between dishonest carriers and thieves."[2] This level of strict liability imposed on the carrier was not unique to England, rather this approach was adopted in other common law nations, including the United States,[3] as well as civilian nations.[4] In France, the *droit commun* places the carrier under a very strict

[1] Gorton, L. *The Concept of the Common Carrier in Anglo-American Law* (1971) Gothenburg, at p. 94.
[2] Sturley, M. *Benedict on Admiralty,* 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-1.
[3] Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 12.
[4] Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 4.

obligation de résultat, meaning he is liable for any loss or damage to the goods unless he falls within the narrow range of exonerating circumstances that amount to *forces majeures* or *cas fortuits*.[5] In essence, the law regarding carriage by sea was arguably well in favour of cargo interests. By the 19th century however, shipping and the shipping industry had fundamentally changed.[6] The financial position of the shipowner was greatly improved by technological advancements in shipping,[7] and as the shipowner's bargaining power increased, the scope of his liability to cargo interests decreased.[8] By virtue of this superior bargaining power of the ship owners, extensive exculpatory clauses were inserted into the bills of lading resulting in virtually little or no liability on the part of the carriers.[9] The exemption clauses became all encompassing, so much so that it inspired one commentator to remark that "there seems to be no other obligation on a ship owner than to receive the freight."[10] By the later half of the 19th century, the balance of liabilities had therefore swung entirely in favour of the carrier. Shipper and cargo interests in the United States has been lobbying the government for regulation with respect to the shipowners, as the vast majority of the tonnage plying the Atlantic trade at the time was British.[11] As so the Harter Act was drafted. "It was the first national statute which established a compromise between carriers' and shippers' interests by mitigating the strict nature of the common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list."[12] The Harter Act did possess therefore the compromise that has become well known for having been propagated by the Hague Rules as well, however, the Harter Act did not define "carrier". The

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[5] Song, S. *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 124.

[6] Regular liner service in the North Atlantic had begun in the second decade of the 19th century, and by the mid 19th century large iron and steel steam-powered vessels with greater and greater carrying capacity were plying the trade (Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 548).

[7] Karan, H. The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules (2004) Edwin Mellen Press, Lewiston, NY, at p. 13: "The rapid development of ocean steamers, built of iron and steel, with Scotch boilers, reciprocating engines and screw propellers, in the decades following the Civil War, resulted in a great expansion of safe and rapid ocean trade, accompanied by an elaboration of shipping documents, banker's drafts, bills of lading, insurance policies, and devices for the assertion of subrogated tort and contract claims for losses and damages and for avoiding or defending such claims."

[8] Knauth, A. *The American Law of Ocean Bills of Lading, 4th Ed.* (1953) AMC, Baltimore, at p. 119.

[9] *Sturley, M, et al. Benedict on Admiralty, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York*, at p. 2-1 to 2-2. Knauth, *ibid*, at p 116, has noted that a shipowner was able to carry goods "when he liked, as he liked, and wherever he liked."

[10] Scutton, T. *Charterparties and Bill of Lading* (1984) at p. 210, as cited in Lee, S & Kim, S. "A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel." (2000) 27 Transp. L.J. 205, at p. 209.

[11] Sturley, M. "The History of COGSA and the Hague Rules", (1991) 22 JMLC 1, at p. 10.

[12] Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 19. The Harter Act was not however the first attempt to reach a compromise between cargo owners and carriers. In 1882, a committee established by the International Law Association, consisting of Liverpool merchants, shipowners, underwriters and lawyers prepared a model bill of lading that could be adopted voluntarily by shipping interests that included a similar compromise, however, the International Law Association's efforts in the end were unsuccessful, as a final agreement was never reached (Sturley, M. "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 6-7).

Harter Act was exceptionally successful and was used as a template by many nations,[13] such as Australia, New Zealand, and Morocco, but most importantly, Canada.[14] For it was Canada's Water Carriage of Goods Act that would ultimately serve as the principal model for the Hague Rules.[15] What is interesting, is although the Canadian Act did not define 'carrier', many other sections in the Act reflect the conception that multiple parties would be performing the carriage, and multiple parties would be governed by the Act. Section 4(a) referring to exculpatory clauses for negligence covers "the owner, charterer, master or agent of any ship", while Section 4(b) stipulates that any clause whereby: "any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided…such clause…shall be illegal…". Section 8 stipulates: "The ship, the owner, the charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars…". The Canadian Act, therefore clearly demonstrates the intent to protect and regulate the shipowners and charterers. This appears to have become not as evident or explicit in the drafting of the Hague Rules however. In 1921, a draft based on the Canadian Act was prepared by the Maritime Law Committee of the ILA, and was adopted at the ILA's Conference at The Hague later that year.[16] The draft by the ILA, possessed the in essence the same definition of 'carrier' as found in the Hague Rules.[17] Thus one must question, whether all the parties governed in the Canadian Act were simply subsumed into the definition of 'carrier' by the drafters? Was it the intent of the drafters to narrow the scope of the instrument? Arguably, not. One may posit that the use of the term 'carrier' was simply a short-hand drafting device for simplicity in the draft, rather than listing all the parties as the Canadian Act had done. Nevertheless, the definition that perhaps the drafters thought was evident and clear, has caused 80 yrs of interpretive difficulties. Not only that, the aim of the Rules, as shown above was to regulate carrier and shipper interests, thus an interpretation that allows a single party to be the carrier, such that the Rules no longer govern the shipowner, arguably does violence to the intent and aim of the Rules.

[13] Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 555; Knauth, A. The American Law of Ocean Bills of Lading, 4th Ed. (1953) AMC, Baltimore, at p. 122; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY; Sturley, M. "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 15-18.
[14] Water Carriage of Goods Act, 9&10 Edw. , ch. 61 (1910)
[15] Sturley, *ibid*, at p. 17.
[16] Knauth, *ibid*, at p. 125-126; Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 23.
[17] Comite Maritime International, *The Travaux Preparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Anterpen, Belgium, at p. 87.

Given the history of the Hague Rules, one may argue therefore that the House of Lords dismissive attitude towards a multiple party notion of carrier was not entirely justified.

3. MULTIPLE PARTIES AS CARRIERS

It has been noted by Tetley that in *The Starsin,* when considering the demise clause, the jurisprudence of other nations was not considered.[18] Arguably, such an analysis by the Lord would have revealed the practical and theoretical benefits of a finding of joint and several liability on the part of the shipowner and the charterer. Several jurisdictions have been receptive to the notion of multiple parties comprising the carrier or carriers. France and Belgium, on the civilian side, and on the common law side, United States and Canada. In the U.S., there are two principal approaches, one with the requirement of privity, and without. The courts of the 5th Circuit, require privity, although the analysis is nothing like the restrictive English approach. In *The M/V Gloria,* the 5th Circuit Court of Appeals found that the time charterer had entered into a contract of carriage by virtue of having issued bills through its agent and signed by its agent on the payment of freight, while the shipowner had been bound to the contract by virtue of the charterer having been authorized to sign bills "for the master".[19] Both the shipowner and the time charterer were therefore parties to the contract and liable as "carriers".[20] The notion of being a party to the contract, is therefore expansive. Nevertheless, the District courts of New York and New Jersey have taken an infinitely wider view of carrier as exemplified in *The Unibulkfir,* where the court considered whether charterers and owners were carriers, opining that "the statutory language of COGSA itself supports a broad definition of the term "carrier". The statute seems to have been deliberately drawn so as not to limit the term to a party to the bill of lading or contract of carriage."[21] The Japanese have recently adopted an approach that is in line in certain respects with the American approach. In *The Camfair,* the time charterer and the owner were held both to be the carrier.[22] Although, the approach is more in line with the reasoning in the 5th circuit, as the

[18] Tetley, W. "Case Note: The Starsin" (2004) 35 JMLC 121, at p. 124.
[19] *Pacific Employers Insurance Co. v. The M/V Gloria*, 767 F.2d 229 (5 Cir. 1985), at p. 236-237. The 5th Circuit stated the rule that "generally, when a bill of lading is signed by the charterer or its agent "for the master" with the authority of the shipowner, this binds the shipowner and places the shipowner within the provisions of COGSA." (*Ibid,* at p. 237).
[20] *Ibid,* at p. 243. The 5th Circuit upheld the district court's finding that the shipowner and the time charterer were COGSA carriers. The voyage charterer was however not held to be a carrier as he did not enter into a contract of carriage with the shipper (*ibid,* at p. 236).
[21] *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979), at p. 46. The court also noted, at p. 46, "obviously then, there can be more than one COGSA carrier of a given shipment. Second, the courts have not hesitated to impose liability on charterers or owners who are non-signatories to a bill of lading and who cannot in any real sense of the word be said to have issued the bill." One can therefore see the more flexible approach of the 2nd Circuit courts who have rejected the exercise of trying to find some form of evidence to tie the defendant to the bill of lading as is done in the 5th Circuit.
[22] Satori, K. "The Demise Clause in Japan" [1998] LMCLQ 489, at p. 496.

Tokyo district court determined that both parties were "the contractual carrier".[23] The Canadian Federal courts in the mid nineties held shipowners and charters jointly and severally liable on the basis that both parties were performing the essential duties of the carrier,[24] however soon thereafter the paradigm shifted in the Federal court and several decisions adopted an English single carrier approach on the relying on *Scrutton,* stipulating that "the carrier shall either be the owner or the charterer, but not both."[25] There are also several civilian nations that hold both the charterer and the shipowner to be the carrier.[26] Nevertheless, what the United States decisions, Japanese decisions and the Canadian decisions demonstrate is that privity and a carriage regime based on the Hague Rules are not obstacles to the finding that a shipowner and charterer are both the carrier. Rix L.J.'s suggestion in the Court of Appeal that both shipowner and charterer were liable where bills were issued that were on the charterer's form, which indicated on the face of the bill that the charterer was 'the carrer', but nevertheless had a demise and identity of carrier clause on the back, was therefore a completely reasonable one, even within.[27] Rix L.J. stated: "I raised in argument the possibility that there did not have to be a black and white choice between owner's bills and charterer's bill and that the true analysis in such a case may well be that the owners as well as the charterers are liable on the bills."[28] Rix L.J.'s reasoning was largely based on agency theory with the shipowner as a undisclosed principle, and he suggested that the charterer "created a contract in respect of which both they and their principal, the owner, had rights and liabilities."[29] The House of Lords rejected the idea, both implicitly by engaging in the debate of whether the bills were owners or charterers bills, but also Lord Hoffman and Lord

[23] *Ibid.* The basis for the detemination was that both parties had rights to freight and liens on cargo, as well the demise clause, although held invalid with respect to the shipper or consignor, was evidence that the shipowner also voluntarily assumes the carrier's contractual liability.

[24] In *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.), Reed J held that a shipowner and charterer were liable where the bill of lading was on the charterer's form but signed on behalf of the owners. At p. 587 Reed J. reasoned: "The logic of holding both the shipowner and the charterer liable as carriers seems entirely reasonable under a charter such as that which exists in the case. The master will have knowledge of the vessel and any particularities which much be taken into account when stowing goods thereon. He supervises that stowage. He has responsibility for the conduct of the voyage and presumably also has knowledge of the type of weather conditions it would be usual to encounter. In such a case it seems entirely appropriate to find the master and therefore, his employer, the shipowner jointly liable with the charterer for damage arising out of the inadequate stowage."

[25] *Union Carbide v. Fednav Ltd* (1997) 131 F.T.R. 241 (Fed. Ct. Can.), at p. 265. Nadon, J. subsequently found the shipowner to be 'the carrier' and due to the fact that only the time charterers were defendants, the plaintiff's action was dismissed with costs (*Ibid*, at p. 289). See also *Jian Sheng Co. v. Great Tempo S.A.* [1998] 3 F.C. 418 (Fed. C.A. Can.) and *Voest-Alpine Stahl Linz v. Federal Pacific Ltd.* (1999) 174 F.T.R. 69 (Fed. Ct. Can.), for similar holdings relying on Nadon J. in *Union Carbide.*

[26] See the judgments of France and Belgium: Cour d'Appel d'Aix, September 8, 1994 (The Jessica J), DMF 1995, 52, at p. 52, holding that both the time charterer and the voyage charterer "*ont la quailité de transporteur.*"; Cour d'Appel de Rouen, June 14, 1984, DMF 1985, 351, at p. 358, holding the time charterer liable "solidairement" with the voyage charterer; *Hof Van Beroep Te Brussel* March 3, 1972; [1972] E.T.L. 992, where the Belgium Court of Appeal found the shipowner jointly and severally liable for cargo damage. This decision is summarized and cited by Tetley, W. "Identity of the Carrier – The Hague Rules, Visby Rules, UNCITRAL" [1977] LMCLQ 519, at p. 522.

[27] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2001] Lloyd's Rep. 437 (C.A.), at p. 451.

[28] *Ibid.*

[29] *Ibid,* at p. 452. Rix L.J. did not however hold on that point as it had not been pleaded before him (*Ibid*).

Bingham rejected it explicitly on the basis of the bill.[30] Lord Hoffman did so on the basis that no reasonable merchant who examined the bill would imagine that there would be more than one carrier.[31] While Lord Bingham also rejected the notion on the basis of the construction of the bill, noting that all the standard conditions are expressed in singular throughout.[32] While American law does not seem to take issue with the fact that 'carrier' in bills of lading is described in the singular, this was problematic enough for the Lords to discount the possibility of dual liability. Respectfully, this reasoning is questionable. Given the amount of authorities in other jurisdictions that find the that fact that the bill says 'carrier' as opposed to 'carriers' unproblematic, and the fact that when both parties are found to be the 'contractual carrier' it does not offend privity, the House of Lords dismissive attitude towards the option was unfounded. As discussed below the House of Lords also failed to assess the implications of such a finding that both the shipowner and the charterer are 'carrier'. On a final note, the history of the Hague Rules as discussed above, demonstrated its aims of regulating and balancing the shipowner/shipper interests, therefore an interpretation that renders the shipowner not a party governed fully by the Rules does violence to their aim.

4. ACTIONS OUTSIDE THE HAGUE RULES REGIME

In *The Starsin,* the House of Lords failed to discuss and therefore perhaps failed to appreciate that had they been open to a multiple party notion of carrier, it would have been equitable for all parties involved. The defendents would have had the benefits of the Rules and the contract, as discussed in the next section, and the vast majority of the plaintiffs would not have been denied recovery based on the boundaries of tortious liability. In *The Aliakmon,* Lord Brandon determined that "in order to enable a person to claim in negligence for loss caused to him by reason of loss or of damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it."[33] This was problematic for the claimants in *The Starsin,* as the Lords held that where the damage to cargo occurred before title passed to the cargo

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[30] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.).

[31] *The Starsin, ibid,* at p. 590, stating: "Mr. Milligan also submitted that CPS may have contracted for both themselves and the shipowners, the latter being unnamed or undisclosed principals…I do not think that any reasonable merchant or banker who might be assumed to be the notional reader of this bill of lading would imagine that there was more than one carrier or that the carrier was anyone other than CPS."

[32] *Ibid,* at p. 577: "Mr. Milligan submitted that on a proper construction of the whole of the bill the shipowner should be held to be the contracting party, perhaps by regarding the shipowner as the disclosed but unnamed principal of CPS, perhaps by construing the contract as made with the shipowner as well as CPS, perhaps because of the description of CPS as carrier was unauthorized by CPS and so ineffective. There is in my opinion no evidence that CPS contracted as agent for the shipowner as disclosed but unnamed principal, and the terms of the signature are inconsistent with that suggestion. There is, again, nothing to suggest dual liability in CPS and the shipowner; the standard conditions are expressed in singular throughout, with no provision that the singular shall include the plural…In the present case, the suggestion that CPS contracted jointly on its own behalf and on behalf of the shipowner loses credibility when one notes that this possibility, although not objectionable in legal principle, first occurred to a member of the Court of Appeal during argument."

[33] *The Aliakmon* [1986] 1 A.C. 785 (H.L.), at p. 809.

owners, there is no cause of action in tort, [34] which therefore eliminated the action of all the cargo claimants save one.[35] Had the action been governed by the Rules with the shipowner as a carrier, recovery would have been possible. This is compounded by the narrow English interpretation of Article IV *bis* 1, which stipulates that the Rules should govern actions in tort by claimants, as determined in *The Captain Gregos* where the Court of Appeal held that the article only applied only with respect to plaintiffs who are parties to the contract of carriage.[36] Even if the Hague-Visby Rules had governed, the English law as it stands would have ensured that a suit in tort against the shipowners would have failed for the majority of the claimants.

5. HIMALAYA CLAUSE: EXTENSION OF THE CONTRACTUAL BENEFITS

Similarly to the reasoning above with respect to the plaintiffs, if a multiple party notion of carrier had been adopted the confusing and arguably questionable application of the Himalaya clause in this instance would have been rendered unnecessary as by virtue of the shipowner being a carrier, as he would have had both the protections of the contract as evidenced by the bill of lading, and of the Hague Rules. Under English law in a tort action, "should the claimant succeed in establishing both its title to sue and a breach by the shipowner of its duty of care, then recovery for physical loss or damage to the cargo will be made in full."[37] Although the Himalaya clause is generally used to extend benefits of the contract to such parties as stevedores,[38] it has been used for non-carrier shipowners as well. In *The Mahuktai,* the Privy Council considered the question of whether a shipowner, who was not party to the bill of lading as it was a charterer's bill, was entitled to benefit from the jurisdiction clause within it by virtue of a Himalaya clause.[39] With regard to the Himalaya clause, the Lords opined that the function of the Himalaya clause is "to prevent cargo-owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and the limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf."[40] In *The Starsin*, Colman J. at first instance determined that the shipowners were in fact an "independent contractor" with regard to the Himalaya clause, reasoning that he performed a substantial portion of the contractual obligations in the same manner as other parties hired by

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[34] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.), at pp.586, 590-591, and 603. Lord Hoffman stating "It is well established that a claim in negligence for damage to property is only maintainable by a person who had either the legal ownership of or a possessory title to the property at the time when the damage occurred." (*Ibid,* at p. 586).

[35] *Ibid,* at p. 602.

[36] *Compania Portorafi Commerciales v. Ultramar Panama (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310 (C.A.), at p. 318, per Lord Justice Bingham: "If [the Rules] had been intended to regulate relations between non-parties to the bill of lading contract, it is hard to think the language would not have been both different and simpler." As well, at p. 318, per Lord Justice Slade: "These provisions, in my judgment, by themselves show fairly clearly that the purpose of all the articles is to govern the relationship of *the parties to the contract* under a contract of carriage of goods by sea."

[37] Baughen, S. "Charterers' Bills and Shipowners' Liabilities: A Black Hole for Cargo Claimants?" (2004) 10 JIML 248, at p. 251.

[38] See *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.).

[39] *The Mahkutai* [1996] 2 Lloyd's Rep. 1 (P.C.).

[40] *Ibid,* at p. 9.

the 'Carrier'.[41] The House of Lords agreed.[42] The shipowner had submitted that the Himalaya clause should exempt him from all liability whatsoever in respect of the cargo, as Lord Hobhouse noted "they are not content that they should have the benefit of the same exemptions and limitations as are available to the 'contracting' carrier (for the obvious reason that those exceptions would not enable them to defeat the claim)."[43] With regard to the submission that the shipowners should be exempt from all liability, it was viewed that "these are remarkable submissions which seek to carry the reach of a Himalaya clause in a bill of lading far further than any previous decision. If their submissions are correct they are highly significant. They will provide the actual performing carrier with a route for evading by means of a bill of lading clause the Hague Rules scheme."[44] The Lords, with the exception of Lord Steyn,[45] rejected the shipowner's submission and allowed him to benefit from the Himalaya clause only in so far as the limitations and exemptions were allowed by the Hague Rules.[46] Respectfully, when one considers Lord Hobhouse's comment concerning an actual carrier evading the Hague Rules scheme, it is absurd. Under English law, the actual carrier, if not 'the carrier' under the Hague Rules, is <u>not</u> governed by the Hague Rules scheme! This is the very heart of the problem. With a single carrier approach, the party not 'the carrier' does not fall under the regime. If this was a concern of the Lords, then a multiple party notion of 'carrier' would have solved the problem without the absurd logic of using the Rules to limit the ability of a party not governed by them to exculpate himself from liability.

6. DEMISE CLAUSE: INEFFECTIVE AS OPPOSED TO INVALID

Given that there is a single carrier ethos in English law, the demise clause and identity of carrier clause has been used to allow the party who is not 'the carrier' to free himself from responsibility. These clauses have been approached generally in two ways. The first approach is the argument is that such clauses simply confirm the common law rule that the contract is between the shipowner and the shipper,[47] or that

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[41] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2000] 1 Lloyd's Rep. 85 (Q.B.), at p. 99, reasoning: "Ordinarily understood the word "independent contractor" in the context of a head contract means a third party with whom a party to the contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party has undertaken to perform under the head contract, in other words, a sub-contractor. Where a carrier has chartered a vessel to perform the sea carriage which that carrier has contracted with the shipper to perform, he has in effect employed the shipowners to carry out the substantial part of his own contractual obligations. He has therefore employed the shipowner as an independent contractor just as if he had employed a stevedore to carry out the handling of the goods at the port of loading."

[42] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.)

[43] *Ibid,* at p. 603.

[44] *Ibid*

[45] *Ibid,* at p. 584-586, Lord Steyn reasons that the Himalaya clause protected the shipowner against any liability in tort, with the effect of channeling liability to the charterers which he considers is a readily predictable scheme.

[46] *Ibid,* at pp. 582, 610-611.

[47] *Cascade Shipping Inc. v. Eka Jaya Agencies (Grace Liberty II)* [1993] 1 SLR 980 (C.A. Singapore), at p. 993 opining that "the demise clause is really no more than a confirmation of the common law rule that the bill of lading issued pursuant to a time-charterparty is intended to be a shipowner's bill of lading."

they indicate that the bills are owner's bills and thus define who the carrier is.[48] The second approach, is that such clauses have been viewed as non-responsibility clauses in violation of Art. 3(8) of Hague-Visby,[49] or an attempt to by the person who has entered into a contract of carriage with the shipper to exonerate himself from liability.[50] The American courts have adopted the second approach, invalidating them and rendering all performing parties 'carriers'.[51] The English courts have generally held the demise clause to be valid.[52] In *The Starsin.,* the bill of lading was issued on the time charter's form, Continental Pacific Shipping, with the signature box on the face of the bill of lading containing "As agent for Continental Pacific Shipping (carrier)", but contained both an identity of carrier clause and a demise clause stipulating the contract was with the owner of the vessel.[53] The House of Lords held unanimously on the issue of the bills of lading being owner's bills.[54] Lord Steyn noted that Rix L.J. and Colman J. had adopted a "mercantile view" and therefore reasoned accordingly: "Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business sense to for a shipper to turn to the face of the bill, and in particular the signature box, rather than clauses at the bottom of column two of the reverse side of the bill."[55] Lord Bingham adopted a similar approach, noting that "business sense is that which businessmen, in the course of their ordinary dealings, would give the document…the Court must of course construe the whole instrument before it in its factual context, and cannot ignore the terms of

[48] *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 574, noting that "the demise clause does not relieve the carrier from liability but defines who the carrier is." See also Reynolds, F. "The Demise Clause: The Jalamohan" [1988] LMLCQ 285, at p. 285 noting the position of English law as upholding the clause on the basis that it merely identifies the carrier. See also *The Berkshire* [1974] 1 Lloyd's Rep. 185 (Q.B.), where at p. 188, the clause was viewed as stipulating that the contract as evidenced by the bill of lading was one between the shipowner and the shipper, and not the shipper and the charterer.

[49] Tetley, W. "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807, at p. 812, "in particular, article 3(8) of the Hague and Hague/Visby Rules prohibits non-responsibility clauses. Identity-of-carrier and demise clauses are not-too-subtle non-responsibility clauses."

[50] Marler, D. "The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading" (2002) 26 Tul. Mar. L.J. 597, at p. 601. See also *Canadian Klockner Ltd. D/S/ A/S Flint (The Mica)* [1973] 2 Lloyd's Rep. 478 (Fed. Ct. Can.).

[51] *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1353. Although, they have been found valid in certain instances where they have been used for the benefit of the plaintiff. See *Daval Investors v. M/V Kamtin*, 1993 WL 764606 (N.D. Fla. 1993), where the clause was used by the plaintiff to demonstrate that the shipowner should not be relieved of liability.

[52] In English law, Cooke notes that with regard to a demise clause, "such a clause is effective, and is probably unaffected by the manner in which the bill of lading is signed." (Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at p. 381).

[53] *Ibid,* at p. 575.

[54] *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.). Lord Steyn had dissented with respect a Himalaya clause issue and suit in tort against the shipowners, at pp. 584-586.

[55] *Ibid,* at p. 583. Lord Steyn reasoned that one must approach the problem of who is the carrier under the bill of lading "objectively in the way in which a reasonable person versed in the shipping trade would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specifically chosen, such as the words which appear above the signature, rather than standard form printed conditions. Moreover, I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill."

the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen."[56] What is evident is that the reasoning given by the Lords for disregarding the demise and identity of carrier clauses is fundamentally different from the reasoning generally used in the United States.[57] The Lords have in no way invalidated the clause, rather they simply declined to give it effect based on a construction of the bill of lading contract that was in line with commercial practices and expectations. Although, one must question, how in one respect can the House of Lords reason in line with commercial practice, yet in another hold counter to commercial practice. In the modern shipping industry, "[i]t is impossible for the carrier to perform carriage alone due to the increase in his commercial relations and to specialize in the whole transportation area owing to the development in shipping technique and procedure. As a result of developments in maritime commerce the loading, handling, stowage, carriage, custody and discharge of goods by experts have become necessary. Nowadays, almost all segments of carriage are carried out by third parties rather than the contracting carrier."[58] This is modern commercial shipping practice, yet the Lords insist on being rooted in this notion of one shipper one carrier. Recall, that Lord Hofmann stated "I do not think that any reasonable merchant or banker …would imagine that there was more than one carrier."[59] The House of Lords should be applauded for having brought commercial reality into the analysis of 'who is the carrier', but the applause quickly dies down once one is aware that modern commercial practice demands that one ask 'who are the carriers?'

7. CONCLUSION

As demonstrated, had the House of Lords adopted the notion that multiple parties may comprise the carrier, such issues as whether certain plaintiffs could sue, or whether the non-carrier shipowner could be protected, or even the analysis between owners and charterers bills, would have fallen away. As well, the history of the Hague Rules illustrates that a singular notion of carrier is not necessarily what the drafters intended. Jurisprudence from other nations indicates that such a solution can be had without violence to the doctrine of privity, or the definition of 'carrier' under the Rules. It is, therefore, regrettable that Lord Justice Rix's suggestion was dismissed in such an off the cuff fashion without the due consideration that it deserved.

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[56] *Ibid,* at p. 577.
[57] Although, notably *Union Steel America v. M/V Sanko Spruce*, 1999 AMC 344 (D. N.J. 1998), discussed above did disregard the demise clause on a similar basis to *The Starsin.* Nevertheless, generally the U.S. reasoning is public policy based.
[58] Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 85.
[59] *The Starsin,* at p. 590.