The recent judgment of the English Commercial Court in Whitssea Shipping v El Paso is unquestionably the most important decision on the operation of Himalaya clauses since the House of Lords' decision in the "Starlin" and goes a considerable way to steering a clear path through the, at times, conflicting reasoning of the Lords in that case.

By way of background, a Himalaya clause is a contractual provision that seeks to provide servants, agents and subcontractors of a carrier by sea with the same protection afforded to the carrier by the contract of carriage. The clause takes its name from a decision of the English Court of Appeal in the case of Adler v Dickson (The 'Himalaya') [1964] 2 Lloyd's Rep 267. In this case the claimant was a guest onboard the S.S. Himalaya. During the subject voyage she was injured when a gangway fell, throwing her onto the quayside below.

The passenger ticket contained an immunity clause exempting the carrier from liabilities to guests and, consequently, the claimant sued the Master of the ship and the boatswain. The claimant argued that under the normal rules of privity of contract the defendants could not rely on the terms of a contract with which they were not party. However, the Court of Appeal ruled that in the carriage of passengers, just as it would be the case in the carriage of goods, the law permitted a carrier to stipulate not only for themselves, but also for those with whom they engaged to carry out the contract. It was held, as well, that the stipulation might be express or implied.

Ironically, on the facts before the court, it was held that the passenger ticket did not expressly or by implication benefit servants or agents and thus the defendants could not take advantage of the exception clause. However, after the decision, specially drafted 'Himalaya clauses', benefiting stevedores and others, began to be included in bills of lading.

These clauses have subsequently been upheld several times by the Judicial Committee of the Privy Council and are now accepted as settled law in most common law countries.

The main purpose of a Himalaya clause is to prevent cargo owners from avoiding the contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf. It also protects servants, agents and independent contractors of the contractual carrier from being sued outside the regime of the Hague Rules.

Whitssea related to an application for an anti-suit injunction to prevent cargo claimants bringing a claim in tort (or, more accurately, under Brazilian Consumer Statutes), in Brazil, against the owners, the vessel's managers, charterers and the owners' P&I Club ([1]). The owners had issued bills of lading which specified English law, were subject to the Hague Rules and included a Himalaya clause of the more modern variety, i.e. with a covenant not to sue in its first paragraph clause 3b. The clause stated:

"(3) It is hereby agreed that no servant or agent of the carrier (including any person who performs work on behalf of the vessel on which the goods are carried or any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towingage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment.

The facts behind the case are that the vessel grounded due to an error of navigation, which meant that, under English law, owners had a defence to the cargo interests' claims in respect of cargo's share of General Average expenses and losses to cargo. Cargo sought to use the Brazilian legal system to get around the owners' Hague Rules defence.

In the London proceedings that followed, the owners sought to enforce the Himalaya clause covenant not to sue. The cargo interests argued that the covenant not to sue offended Art. III Rule 8 Hague Rules, relying on various older comments in the "Starlin", and that, consequently, the claimant's could not rely upon the first part of clause 3b.

The cargo interests sought to reason that to uphold the covenant not to sue would be equivalent to conferring on the third parties blanket immunity from liability which is contrary to Article III rule 8 Hague Rules which provides as follows:

"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 the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

Such immunities are rendered null and void under Article III. To enforce clause 3b would be, they argued, in conflict with Article III to which the Himalaya contract is subject. The defendant alleged that all of the named third parties, in common with the claimants (Whitssea Shipping and Trading Corporation and others), provided services as maritime carriers of the goods and were subject to the Hague Rules.

Mr Justice Flaux considered three main points. These being, whether the claimants could show sufficient practical interest in having the covenant not to sue enforced, whether the parties who were not actually involved in the carriage of the goods could be considered to be party to it and whether the Himalaya clause could be considered to be part of the contract of carriage.

The claimants had to show that they had sufficient practical, as opposed to academic interest, in enforcing the covenant not to sue VOC (charterers) and Boscolip (sub-charterers). The claimants argued that they had the required practical interest because if the defendants were able to proceed against those third parties and obtain judgment against them in Brazil, the claimants might well face a claim for an indemnity from one.
The judge referred to the case of the “Elbe Maru” [1976] 1 Lloyd's Rep. 206 when deciding upon this issue. In that case the carrier-sub contracted carriage of goods to hauliers. The goods were stolen whilst in the custody of the hauliers and subsequently the endorsees of the bills of lading claimed against the hauliers. The issue then was whether or not the endorsees was bound by the exception clause 4(2) which sought to protect sub contractors from being sued by the merchants. The carrier managed to show that they had an interest in the enforcement of clause 4(2) in that they had established a real possibility that if the claim was allowed to proceed that they (the carriers) would suffer financial loss.

With reference to this case the judge remarked that there is not a particularly high threshold set for the purposes of showing a “practical interest” and all the claimants have to do is to show an interest in obtaining an injunction restraining the proceedings against the third parties which is more than merely academic. He concluded that in this case the claimants had shown that practical interest did exist.

When considering whether the Himalaya contract was a “contract of carriage” within the meaning of the Hague Rules the judge concluded that it could not be characterised as a contract of carriage but was, rather, a contract of exemption which was ancillary to other contractual arrangements. The reason for this being that the collateral contract between shipper and independent contractor is not a contract of carriage so as to attract the application of the Hague Rules. The independent contractor is only deemed to be a party for the purposes of taking the benefit of the exemption clauses against the shipper and any transferee of the bill of lading.

So far as parties not actually involved in the carriage are concerned. VOC were the time-charterers and Bossard were the sub-time charterers. They were responsible for the preparation and issue of bills of lading on behalf of the Master. The managers of the vessel were agents of the claimants but were not responsible as principals for the actual carriage of the goods. The judge held that all of these third parties may thus be said to have performed services incidental to the goods or to the carriage of the goods, however none can be said to have undertaken the actual carriage of goods. The actual carriage was undertaken by the claimants alone. The judge was satisfied that merely by taking the benefit of the Himalaya clause a party does not necessarily become party to a contract of carriage and so a carrier within the meaning of Article 1(a) Hague Rules, wherein the defendants referenced exclusion lies. If the Himalaya clause is not, of itself, a contract of carriage then there is no conflict with the exclusions set out within same, in particular the Hague Rules exclusions.

Flaux J concluded that once it is seen that none of the third parties undertook the sea carriage or were, in fact, the carrier within the meaning of the Hague Rules, unlike the owners in the “Starisar”, the conclusion that the enforcement of the covenant not to sue is not contrary to Article III rule 8 is clearly correct. The claimant’s tried to run the argument that the “Himalaya contract” was the “virtual” contract of carriage to which subcontractors etc became party when they performed a carriage obligation. Flaux J refuted this argument because the Himalaya clause in this case did not include the deeming provision of Rosskil’s “classic” Himalaya clause.

The defendant further argued that by agreeing with their position that this would support the purpose for which the Rules were enacted, to prevent cargo interests from avoiding the effect of contractual defences. The judge felt that, on the contrary, the opposite would be true if he supported the defendant’s position. His view being that it appeared to be the case that the defendants motivation to sue the hauled company was because this was a method, they thought, of circumventing the limitation on their remedies to be found in the R.H.A. conditions of haulage. They did not sue the claimants because this would have resulted in them being presented with limitation of liability and time bar defences. The likely effect of a successful claim against the hauliers would be that they would then seek under the R.H.A terms an indemnity from VOC and then VOC, having acted as agents of the claimants, would then seek an indemnity from the claimant. Thus the defendants would have avoided the error in navigation defence leaving owners to assume liabilities which should not have been theirs under the Hague Rules.

The judge felt that the insurer-defendant was pursuing the third parties, not on the basis that they were parties to the contract of carriage and could rely upon defences under Articles IV rule 2 Hague Rules, but on the basis that they are liable in tort under Brazilian law. The defendant-insurer will not limit their claim in Brazil to a contractual one which is subject to the Hague Rules. They are seeking to take advantage of the fact that the Rules have no application in Brazil.

In conclusion, the judge considered that the claimants were entitled to an anti-suit injunction restraining the defendants from continuing with the proceedings in Brazil against all the parties being sued there.