Crossing the Himalayas: Exculpatory Clauses in Global Transport

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Crossing the Himalayas: Exculpatory Clauses in Global Transport. Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 2004 AMC 2705 (2004)

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I
INTRODUCTION

Contracts between shippers of goods and carriers of cargo are probably older than recorded history, and litigation involving such contracts is surely just as old. An observer of the maritime industry thus might conclude that all possible issues between shippers and carriers had been decided long ago, but that conclusion is premature in view of the Supreme Court's recent decision in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,[1] handed down on November 9, 2004. The essential question in *Kirby* was whether a contract, to which the maritime shipper was not a party, nevertheless limited the rights of that shipper against a land carrier, a railroad. The Supreme Court, in a unanimous opinion, protected the railroad.

The Supreme Court's decision appears to support modern global thinking as it efficiently shifts the risks of cargo damage away from carriers by land or sea and their insurers on to shippers and their insurers. A more cynical view is that *Kirby* is merely a docket-clearing decision to eliminate cargo damage cases that allegedly clog the federal courts. For docket-clearing to work, however, the Court had to do more than provide another approval of

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[1]125 S. Ct. 385, 2004 AMC 2705 (2004). For primitive contracts and dispute settlement, see J. Perillo, Exchange, Contract and Law in the Stone Age, 31 Ariz. L. Rev. 17 (1989).

Himalaya clauses.[2] The task for the Court was also to remove the continued validity of the Supreme Court's first consideration of the problem in 1958 in *Robert C. Herd & Co. v. Krawill Machinery Corp.*;[3] hence an over-ruling rather than a mis-description was required to clear the dockets. Failure to do so means that admiralty lawyers will be unable to agree on the conflicting meanings of *Herd* and *Kirby*. Thus, the goal of predictability remains elusive. This uncertainty was previewed by Justice O'Connor's conclusion in *Kirby*:

> We hold that Norfolk is entitled to the protection of the liability limitations in the two bills of lading. Having undertaken this analysis, we recognize that our decision does no more than provide a legal backdrop against which future bills of lading will be negotiated. It is not, of course, this court's task to structure the international shipping industry. Future parties remain free to adapt their contracts to the rules set forth here, only now with the benefit of greater predictability concerning the rules for which their contracts might compensate.[4]

II
THE *KIRBY* DECISION

The narrow issue for decision in *Norfolk Southern Railway Co. v. Kirby* was whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act (COGSA) to "independent contractors" used to perform the contract of transportation be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.[5]

The more general issue was whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.[6]

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[2]"Himalaya clause" refers to a bill of lading clause that extends defenses afforded to ocean carriers by statute to other transportation industry participants not protected by the statute. See notes 33-36 infra.

[3]359 U.S. 297, 1959 AMC 879 (1959).

[4]125 S. Ct. at 385, 400, 2004 AMC at 2705, 2720.

[5]Id. at 397, 2004 AMC at 2715-16.

[6]Id. at 398-99, 2004, AMC at 1718. Further explanation may be forthcoming shortly. In Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai Liberty, 194 F.3d 1171 (9th Cir. 2002), remanded sub nom. Green Fire Ins. Co. v. M/V Hyundai Liberty, 125 S. Ct. 494 (2004), the shipper contracted with Glory Express, a California NVOCC, to transport a lathe from Busan, Korea to Los Angeles under bills of lading with a choice of forum (New York) clause. Glory then contracted through an agent with a shipowner, Hyundai Merchant Marine Co., Ltd., for ocean transport under bills of lading with Himalaya clauses and choice of forum and choice of law clauses designating Korea. The Ninth Circuit enforced the Korea clauses against the shipper, but the Supreme Court remanded for reconsideration in light of *Kirby*.

Despite the declared issues and the many conflicting voices of amici curiae,[7] the issue for oral argument on October 6, 2004 became one of states' rights versus federal power. Analyzing recent Supreme Court decisions favoring state jurisdiction, the shippers emphasized the land-based aspects of the case, wedded to state law.[8] This proved to be a mistake as the Supreme Court reached into the history of American admiralty jurisdiction to restate Justice Story's concept of admiralty's contract jurisdiction.[9]

International Cargo Control (I.C.C.), a freight forwarder in Australia, issued a "through" bill of lading to James N. Kirby, Pty., Ltd., the shipper, for transport of a cargo of machinery from Sydney to General Motors Corp., the purchaser, in Huntsville, Alabama. That bill included a Himalaya clause extending the ocean carrier's protections to ". . . any servant, agent or other person (including any independent contractor) whose services have been used to perform the contract."[10] Hamburg Süd, the ocean carrier, issued a bill of lading with a Himalaya clause protecting, ". . . all I.C.C. contracted agents, servants, representatives, all participating (including inland) carriers . . . and all independent contractors whatsoever . . . ."[11] Ten containers of machinery were loaded on Hamburg-Süd's vessel for ocean transport to Savannah and then on a train at Savannah that derailed on its way to Huntsville (where the cargo was to be loaded on to trucks for road transport). The derailment caused $1.5 million damage to the goods. The shipper and its cargo insurer sued the Norfolk Southern Railway Co. in federal court in Georgia on the basis of diversity of jurisdiction. (They also sued the freight forwarder in Australia.)

The trial court protected the rail carrier from liability on the shipper's tort claim on the basis of the Himalaya clause in the Hamburg Süd bill of lad-

[7]Amicus curiae briefs appear in most cases before the Supreme Court today. Twenty-four were filed in the *Kirby* case. See Sup. Ct. R. 37. See also J. Kearney & T. Merrill, The Influence of Amicus Curiae Briefs in the Supreme Court, 148 U. Pa. L. Rev 74 (2000).

[8]Alderson Reporting Co., Transcript of Oral Argument at the Supreme Court, October 6, 2004 at pp. 28-54. The Supreme Court directed the parties to brief the following question on Sept. 24, 2004 (12 days before oral argument), "Does federal or state substantive law govern the questions presented?"

[9]Justice Story's decision rejecting the jurisdictional limitations of English admiralty law, which required the contract to be made and performed at sea, appeared in his circuit court opinion in DeLovio v. Boit, 7 Fed. Cas. 418, 1997 AMC 550 (C.C.D. Mass. 1815) (No. 3,776). Supreme Court approval for Story's view of admiralty jurisdiction came in Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870). See generally, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214 (1954). Modern adherence to the doctrine can be found in Exxon Corp. v. Central Gulf Lines, 500 U.S. 603, 1991 AMC 1817 (1991), overruling Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855).

[10]125 S. Ct. at 396, 2004 AMC at 2716.

[11]Id. at 391, 392, 399, 2004 AMC at 2705, 2709, 2720.

ing,[12] but the court of appeals reversed because the railroad was engaged by the ocean carrier and not by I.C.C., since the clause did not specifically identify Norfolk Southern as a member of the class of the Himalaya clause beneficiaries.[13] The Eleventh Circuit clearly rejected "other person" as too vague to define a clearly identifiable class of persons under the Himalaya clause, because of its reading of *Robert C. Herd & Co. v. Krawill Machinery Corp.*[14] The Eleventh Circuit's opinion stressed the necessity for privity of contract, which might have existed if I.C.C. had been Kirby's agent. In *Akiyama Corp. of America v. M/V Hanjin Marseilles,* the Ninth Circuit, however, had concluded that privity of contract, is *not* required in a similar situation.[15] The Supreme Court granted certiorari in the *Kirby* case on January 9, 2004, undoubtedly because of the conflict with *Akiyama,* heard arguments on October 6, and published its decision on November 9, 2004, reversing the Eleventh Circuit in a unanimous opinion by Justice O'Connor.[16]

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[12]James N. Kirby Pty Ltd. v. Norfolk S. Ry. Co., No. 1: 93 cv 2939 (N.D. Ga. Oct. 11, 2000). See 300 F. 3d 1300, 1302, 2002 AMC 2113, 2114 (11th Cir. 2002).

[13]Id., 2002 AMC at 2115.

[14]Id. at 1305, 2002 AMC at 2121.

[15]162 F. 3d 571, 1999 AMC 650, (9th Cir. 1998).

[16]125 S. Ct. 385, 2004 AMC 2705 (2004). Sandra Day O' Connor, first female justice of the Supreme Court was born in El Paso, Texas in 1930, but raised on the family's cattle ranch south of the Gila River on the Arizona-New Mexico border, the Lazy B, begun by her New England grandfather about 1880. She attended schools in El Paso and then Stanford University (A.B. 1950, LL.B. 1952). Her first legal job was as Deputy County Attorney in San Mateo, California. She was in private practice from 1957 to 1965 and then became Assistant Attorney General for the State of Arizona, serving from 1965 to 1969. She was elected to the Arizona State Senate in 1969, eventually becoming Majority Leader for the period of 1973-74. In 1975 she was appointed as a trial judge in Maricopa County, Arizona and in 1979 she was named to the Arizona State Court of Appeals. See S.D. O'Connor & H.A. Day, Lazy B (2002). Sandra Day O'Connor was nominated to be an Associate Justice of the Supreme Court by President Ronald Reagan in August, 1981 and she was quickly confirmed by the Senate on September 21, 1981. See The Supreme Court Justices: A Biographical Dictionary 339-345 (Melvin I. Urofsky ed. 1994).

In her twenty-four years on the Supreme Court, Justice O'Connor has written 651 opinions (to date) and of these, 13 were opinions in important cases related to admiralty or maritime law, thereby making her the Court's admiralty expert. See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 1995 AMC 1817 (1995) (concurring opinion in another cargo case); California v. Deep Sea Research, Inc., 523 U.S. 491, 1998 AMC 1521 (1998) (majority opinion re salvage); Saratoga Fishing Co., v. J.M. Martinac & Co., 520 U.S. 875, 1997 AMC 2113 (1997) (dissenting opinion); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) dissenting opinion re law of the sea); Director v. Perini N. River Assocs., 459 U.S. 297 (1983) (majority opinion re the Longshore and Harbor Workers Act); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 1986 AMC 2113 (1986) (majority opinion re wrongful death); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 1995 AMC 913 (1995) (concurring opinion re limitation of liability and tort jurisdiction); Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 418, 2001 AMC 913 (2001) (majority opinion re personal injury); Miles v. Apex Marine Corp., 498 U.S. 19, 1991 AMC (1991) (same); McDermott Int'l, Inc., v. Wilander, 448 U.S. 227, (1991) (same); Chandris, Inc. v. Latsis, 515 U.S. 347, 1995 AMC 1840 (1995) (same); Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 1988 AMC 1817 (1988) (same). Justice O'Connor has also written significant opinions on abortion rights, affirmative action programs, church-state issues and federalism.

In *Akiyama,* the plaintiff's printing press was shipped from Japan to California where the stevedore unloaded the ship, dropping one section of the press onto other sections, causing a $1 million loss.[17] The shipper sued the carrier, terminal operator, and stevedore. The terminal and the stevedore claimed the benefit of the Himalaya clause and COGSA's $500 package limit of liability, but the shipper argued that they could not benefit from the Himalaya clause because there was no privity of contract with the shipper. The Ninth Circuit rejected the shipper's argument, holding that the Himalaya clause protected those whose services compared to those of the carrier under the contract of carriage.[18] Thus the terminal operator was covered by the Himalaya clause as an independent contractor while the stevedore was covered by the Himalaya clause because it was an unambiguous agent of the terminal operator.[19]

In *Kirby,* Justice O'Connor began the discussion with a shock to those unfamiliar with modern transport: "This is a maritime case about a train wreck."[20] The opinion then offers a mélange of authorities to establish the proposition that the dispute was governed by traditional admiralty concepts rather than state law by reason of diversity of citizenship. The Court's analogies come from cases of personal injury[21] and marine insurance.[22] Justice O'Connor clearly favored Justice Story's expansive vision of admiralty contract law, the "conceptual" approach, rather than the "spatial" or "locational" approach of admiralty tort law[23] (before the reformulation of tort thinking in

[17]162 F. 3d at 572, 1999 AMC at 651.

[18] Id. at 574, 1999 AMC at 652-653.

[19]Id at 574, 1999 AMC at 653.

[20]125 S. Ct. at 392, 2004 AMC at 2712. The opinion treats the case as a problem in railroad law rather than maritime law because the opinion frames the issues and answers it with a precedent from railroad law thus, "But when it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carrier it engages.," citing Great Northern R.R. Co. v. O'Connor, 232 U.S. 508 (1914). Unfortunately for predictability, Justice O'Connor then said that "[t]he intermediary is certainly not automatically empowered to be the cargo owner's agent in every sense." (The *Great Northern* case enforced the freight forwarder's low level tariff valuation of the goods as against the shipper's express choice of a high level tariff valuation.) Lastly, Justice O'Connor repeatedly described COGSA's $500 package doctrine, familiar to all maritime lawyers as "the default rule," an expression familiar to railroad lawyers.

[21]Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 1996 AMC 305 (1996); Am. Dredging Co. v. Miller, 510 U.S. 443, 1994 AMC 913 (1994); Kossick v. United Fruit Co., 365 U.S. 731, 1961AMC 833 (1961); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 1959 AMC 832 (1959); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 1954 AMC 1 (1953): Garrett v. Moore-McCormack Co., 317 U.S. 239, 1942 AMC 1645 (1942).

[22]Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 1955 AMC 467 (1955).

[23]125 S. Ct. at 393, 2004 AMC at 2710-11. See supra note 9.

Executive Jet and its progeny),[24] but Justice O'Connor expands that conceptual rationale with a quantitative element, introducing the idea of *substantial* carriage by sea. Decisions that favor the application of land law over maritime law because of the amount of geography covered in the transit are disapproved and a new rule appears to apply admiralty jurisdiction whenever a sea leg is part of a multi-modal transport; this reflects the negotiated solutions on the amounts of limited liability in both the 1980 Multimodal Convention and the 1991 Terminal Operators Liability Convention.[25]

The equities of the shipper-carrier struggle are handled in the Court's view that, "Kirby had the opportunity to declare the full value of the machinery," but, "accepted a contractual liability for I.C.C. below the machinery's true value resulting, presumably, in lower shipping rates."[26]

The core ruling dismisses the necessity of privity of contract between shippers and carriers because of the customs and practices of world-wide transport, where the number and identity of intermediaries between shipper and tortfeasor are usually unknown.[27] That idea seems to justify a new principle of federal agency law, but even this is qualified by its restriction to "liability limitations" (presumably the $500 per package limit) rather than other provisions of COGSA that sub-contractors of sub-contractors might wish to use. The new world-wide transport industry thus should be grateful because the Supreme Court has spared it the necessity of increasing freight rates because of exposure to liability.[28] However, not everyone is cheering; first the Court notes that there is no special rule for Himalaya clauses, and second the Court notes that Kirby retains the option to sue I.C.C., the carrier, for any loss that exceeds the liability limitation to which they agreed.[29] A new legal industry comparing inconsistent versions of Himalaya clauses seems to have arisen, along with the possibility of re-litigating under *Kirby* earlier decisions made in the light of *Herd*. This may happen because the

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[24]Executive Jet Aviation, Inc. v. City of Cleveland, 469 U.S. 249, 1973 AMC 1 (1972); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 1995 AMC 913 (1995); Sisson v. Ruby, 493 U.S. 358, 1990 AMC 1801 (1990); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 1982 AMC 2253 (1982).

[25]125 S. Ct. at 390, 2004 AMC at 2712. Because of the extreme disparity in amounts of unit imitation of liability: very low in ocean transport (2.75 SDR per kilo) higher in road, rail and air transport (8.33 SDR per kilo), both the Multimodal and O.T.T. Conventions distinguish shipments where sea transport is involved from those without a sea segment. See infra text and notes 223-225.

[26]125 S. Ct. at 399, 2004 AMC at 2719.

[27]Id.

[28]Id.

[29]Id.

Court did not repudiate *Herd* in *Kirby,* but rather described the language of *Herd* to say something that it does not say.[30]

The absence of legislative sanction for the extension of statutory protections to defendants in cargo damage litigation who are not ocean carriers in the COGSA sense did not concern the Supreme Court in *Kirby,* as it had in *Herd.* Justification, if needed for the Court's attempt to legislate, comes from the freedom of contract preserved to maritime interests with the constitutional grant of admiralty jurisdiction to the federal courts.[31] Thus despite its origin in the diversity jurisdiction of the federal court, the case concludes as a maritime contract within the admiralty jurisdiction of that court.

III
THE HIMALAYA CLAUSE

A. English Origins and Development

The extension of carrier defenses to other maritime industry participants began in a case with personal injury claims against the master and boatswain of the *S.S. Himalaya,* whose owners had included in the passage contract the customary exculpatory clauses protecting owners from liability for negligent injury to passengers. In the resulting law suit, it was held that the defendants could not benefit from the owners' exculpatory clauses.[32] Shipowners and their liability insurers, the P & I clubs, soon adapted to the situation, extending liability protection by contractual clause to servants and agents. This contractual extension was eventually recognized as an essential protection for the transport of cargo, as cargo-owning plaintiffs could be expected to sue ships' officers whose orders or actions were involved in loss or damage to cargo.

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[30]Justice O'Connor wrote: "But nothing in *Herd* requires the linguistic specificity or privity rules that the Eleventh Circuit attributes to it. The decision simply says that contracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties." id. at 397, 2004 AMC at 2717.

[31]125 S. Ct. at 393, 2004 AMC at 2710. The Supreme Court continues to struggle with states' rights when it enforces state law that is maritime but local. See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 1955 AMC 467 (1955).

[32]Adler v. Dickinson (The Himalaya), [1955] 1 Q.B. 158, [1954] 2 Lloyd's List L. Rep. 267. See also N. Healy, Carriage of Goods by Sea: Application of the Himalaya Clause to Subdelegees of the Carrier; 2 Mar. Law. 91 (1977), and W. Tetley, The Himalaya Clause Revisited, 9 J. Int'l. Mar. L. 40 (2003).

In 1962, the cargo damage issue reached the House of Lords, which approved the protection of stevedores as agents of the carrier by a "Himalaya" bill of lading clause.[33]

After the general approval of Himalaya clauses by the House of Lords,[34] the Privy Council provided a common law rationale that the Himalaya clause was consideration for a service rendered.[35] In 2003, the House of Lords, however, put limitations on the expansion of Himalaya clause jurisprudence in the case of *The Starsin*.[36] Conflict between the U.S. Supreme Court's expansive decision in *Kirby* and the House of Lords' restrictive decision in *The Starsin* is inevitable. Himalaya clauses are accepted in most shipping nations, but their legal effect varies from total exculpation in some countries to invalidity in others, as was demonstrated in the negotiations of the International Convention on the Liability of Terminal Operators in International Trade in 1991 (discussed infra in Section VI.C).

B. American Himalaya Problems

Contractual exculpation of negligent actors has had a more difficult passage in the United States—possibly because of traditional judicial disapproval of exculpatory clauses for which there was no bargaining or benefit, sometimes called "adhesion" agreements.[37] Rejection by the Supreme Court of such exculpatory clauses even extended to the bill of lading itself in *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*,[38] the case that led to the 1893 Harter Act.[39] This hostility to exculpatory clauses because of

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[33]Scruttons, Ltd. v. Midland Silicones, Ltd., [1962] A.C. 446, [1961] 2 Lloyd's Rep. 365 (H.L.).

[34]Id.

[35]New Zealand Shipping Co., Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon), [1975] A.C. 154, 1974 1 Lloyd's Rep. 534 (P.C.). The consideration from the stevedores was the discharge of the goods from the ship; the consideration from the shipper was the exculpatory and limitation clauses. Id. at 168, 1974 1 Lloyd's Rep. at 536.

[36]Homburg Houtimport B.V. v. Agrosin Pty., Ltd. (The Starsin), [2003] 1 Lloyd's Rep. 571, 2003 AMC 913 (H. L.). See also William Tetley, (Case Note) 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 (2004).

[37]The concept of adhesion, as opposed to contract, is examined in Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943). Extension of the benefits of a contract to a third party was made available in American common law in Lawrence v. Fox, 20 N.Y. 268 (1859).

[38]129 U.S. 397 (1889). See Joseph Sweeney, Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary, 24 J. Mar. L. & Com. 1 (1993).

[39]46 U.S.C. app. §§ 190-196 (2004).

strong public policy continued in the disapproval of the exculpatory towage clause in *Bisso v. Inland Waterways Corp.*[40] and the disapproval of the both-to-blame collision clause in bills of lading in *United States v. Atlantic Mutual Insurance Co. (The Esso Belgium).*[41]

In *Bisso,* the Supreme Court offered this explanation for its disapproval of exculpatory provisions: The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[42]

C. The Supreme Court's 1959 Decision in Herd

It is in this context that the Court took up the issue of the extension of carrier defenses to non-carriers in *Robert C. Herd & Co. v. Krawill Machinery Corp.*,[43] although there was no Himalaya clause in that case. The stevedore's crew dropped an industrial press of nineteen tons into Baltimore's harbor, prompting the shipper to sue the stevedore in tort for negligence. The stevedore denied negligence and pleaded alternatively the $500 package liability limitation of COGSA and a bill of lading clause. The trial court held the stevedore liable for full damages ($47,992) rather than the $500 package limit; the court of appeals affirmed,[44] and the Supreme Court did likewise, unanimously.[45] The stevedore's argument that protection for stevedores in the form of liability limitation like that afforded the carrier must have been included in the Hague Rules and COGSA because of their essential function in the carriage of goods was rejected, as was the argument that stevedores are necessarily agents of the carrier. "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms."[46] The argument was also made that stevedores must necessarily have been included in the exculpatory provisions of the bill of lading (other than the absent Himalaya

[40]349 U.S. 85, 1955 AMC 899 (1955). See N.J. Healy & J.C. Sweeney, The Law of Marine Collision, 246-251 (1998).

[41]343 U.S. 236, 1952 AMC 659 (1952). See Healy & Sweeney, supra, at 317. The both-to-blame collision clause rejected in this case resembles the circular indemnity clause used in the United Kingdom and Australia. See Tetley, supra note 32, at 58-59.

[42]349 U.S. at 90-9, 1955 AMC at 905.

[43]359 U.S. 297, 1959 AMC 879 (1959). See also J. C. Sweeney, The Prism of COGSA. 30 J. Mar. L & Com. 543, 580-584 (1999).

[44]256 F2.d 946, 1958 AMC 1265 (4th Cir. 1958), aff'g 155 F. Supp 296, 1957 AMC 2188 (D. Md. 1957).

[45]359 U.S. at 308, 1959 AMC at 887.

[46]Id. at 301, 1959 AMC at 883, citing Brady v. Roosevelt S.S. Co., 319 U.S. 578, 581, 1943 AMC 1, 9 (1943).

clause) either as third-party beneficiaries of the contract of carriage or as agents of the carrier, because the exculpatory language seemed generally applicable. Absence of express exoneration was a ground for rejecting the stevedore's bill of lading argument.[47]

The American doctrine of the Himalaya clause is based on a suggestion in *Herd* that a future case might consider the application of COGSA defenses to stevedores by bill of lading clause. Justice Whittaker wrote:[48]

> There is, thus, nothing in these provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract. Since they did not do so, it follows that the provisions of the bill of lading did "not cut off (respondent's) remedy against the agent that did the wrongful act.[49]

The opinion, however, specified general rules of interpretation:

> Similarly, contracts purporting to grant immunity from or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence unless the clarity of the language used expresses such to be the understanding of the contracting parties.[50]

Neither Congress nor the Supreme Court imposed a uniform solution to Himalaya clause problems, but the regulatory agency for ports and terminal operations, the Federal Maritime Commission, followed the Supreme Court's aversion to exculpations thirty years later and ruled out the use of exculpatory clauses in the tariffs (service charges) of terminal operators.[51]

From 1959 to 2004, federal courts of appeals dealt with issues of Himalaya clauses without Supreme Court review. Pursuant to the suggestions of the Supreme Court in *Herd*, differently worded clauses (in which neither the defenses nor the beneficiaries are clear) have been invoked by non-carriers responsible for negligent loss or damage to cargo, but courts of appeals have been inconsistent in applying the *Herd* demand for clear and

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[47]Id. at 308, 1959 AMC at 887.

[48]Associate Justice Charles E. Whittaker (1901-73) was a farmer's son from Kansas who went directly from high school to law school (University of Kansas City) and was admitted to the Kansas bar in 1923. He practiced in Kansas City for the next thirty years, with Republican political activity during that time. He was appointed to the U.S. district court in 1954, advancing to the Eighth Circuit after only seven months and shortly thereafter to the U.S. Supreme Court in 1957. He retired in 1962. See The Supreme Court Justices: A Biographical Dictionary 533-534 (Melvin I. Urofsky ed. 1994).

[49]359 U.S. at 302, 1959 AMC at 884-885, quoting Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549, 568 (1942).

[50]359 U.S. at 304-5.

[51]Exculpatory Tariff Provisions, F.M.C. Docket No. 86-15, 1987 AMC 896.

unambiguous identification of parties to be protected contractually by COGSA defenses. These inconsistent decisions will be examined below in Part V.

IV
HISTORY OF CARRIER LIABILITY FOR CARGO LOSS OR DAMAGE

Maritime transport, similar to road, rail and air transport, uses the word "carrier" to describe the party offering to move goods for a fee. (The fee paid by the shipper under bills of lading is "freight,"[52] under charter parties, "hire.")[53] Carrier, carriage, and cargo are English words that probably originated in old French and vulgar Latin. It is uncertain when legal obligations were imposed upon carriers to care for the goods transferred to their control — a relationship called a bailment.[54] The duties of "common carriage" were developed out of the English common law of bailment.[55] The U.S. Supreme Court did not hesitate to apply the English common law liability of carriers as insurers of the safe movement of goods as part of the unwritten general maritime law.[56]

Common carriage required the carrier to carry all goods and people for whom the services were requested and for which there was available space.[57] Further, common carriage was governed by a public policy favoring "innocent" cargo owners.[58] By contrast, private carriage (leases of vessels called "charter parties") is not governed by the same policy because of the presumption of equality of bargaining power as between carrier and shipper.[59]

In order to understand the usage of maritime industry participants other than the "carrier," it is also necessary to examine the ways in which foreign trade by ship have evolved. Before the nineteenth century, the all-purpose

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[52]Charges for the ocean carriage of goods under bills of lading, normally payable at loading, but may be payable at destination as "collect" freight.

[53]This vital obligation of charterers to pay for the use of the vessel, usually in advance, is governed by the language of the particular charter party. Failure to pay on time usually authorizes the owner to withdraw the vessel from charterer's services.

[54]A delivery of goods (personal property) by the lawful possessor to another person for a specific purpose–one of which may be safe-keeping or transportation; a contract (express or implied) to redeliver may be involved but is not required.

[55]F. Sanborn, Origins of the Early English Maritime and Commercial Law (1930).

[56]The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 (1858).

[57]Movement of goods by one who undertakes or contracts to carry them on a regularly scheduled vessel from loading place to discharge place.

[58]Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889).

[59]See Cont'l Grain Co. v. Puerto Rico Mar. Shipping Auth., 972 F.2d 426, 1993 AMC 1573 (1st Cir. 1992).

merchant operated as both shipowner and cargo owner.[60] Ships were owned in shares, often as little as 1/64, while cargoes were also owned in shares, often by the same communal investors. Cargoes were often carried on speculation to likely destinations where sales would be arranged by a shipboard agent for the cargo owners, called the supercargo. Members of the ship's crew did not load or unload vessels; local labor in each port has performed that function for centuries.

In the nineteenth century, however, specialization changed everything. The all-purpose merchant disappeared.[61] Instead of the common interests of a company of merchant adventurers, there emerged the opposing interests of the corporate shipowner and the cargo owner. The new community united shipowners in liner conferences to control the competition[62] and in protection and indemnity (P & I) clubs mutually to underwrite the risks.[63] The cargo-owning interest was either seller or buyer, depending on the agreed term of trade: e.g., C.I., C.I.F. (Cost, Insurance and Freight) or F.O.B. (Free on board) and their many variants. The cargo owning interest was also insured.[64]

The ship-owning industry divided into the liner trade and the tramp trade. In the liner trade, shipments in boxes, bales, bags, barrels, and drums were carried under bills of lading to specific purchasers. The bill of lading served three functions: as a receipt for the goods by the carrier, as the contract of carriage between shipper and carrier; and as a negotiable instrument representing the ownership of the goods.[65] The bill of lading has long been gov-

[60]See generally, R. Albion, The Rise of New York Port, 1815-1860 (1939); S. Morison, The Maritime History of Massachusetts 1783-1860 (1921); A. Nevins, Sail On, The Story of the American Merchant Marine (1946), and A. Chandler, Jr., The Invisible Hand: The Management Revolution in American Business (1977).

[61]Chandler, supra.

[62]Ship-owning companies that offer a regular schedule of service to named ports in a regular rotation, usually for the carriage of break-bulk (i.e., cargo in boxes, bales, bags, barrels or drums) are liners; they belong to rate-fixing "conferences," under an exception to the antitrust laws. A code of conduct for liner conferences was developed as a treaty by UNCTAD in 1974. See Joshua Bar-Lev, UNCTAD Code of Practice for the Regulation of Liner Conferences, 3 J. Mar. L. & Com. 783 (1972).

[63]Societies (clubs) of shipowners provide indemnification to their members for liabilities of the owner or the ship of any type, unless specifically excluded; the clubs belong to an international association and their losses are reinsured. See generally 1969 Tulane Maritime Law Institute on the P & I Policy, 43 Tul. L. Rev. 457-698 (1969).

[64]Cargo insurance usually covers the goods in an international sale from the seller's warehouse to the buyer's warehouse during transport by road, rail or sea. See generally 1971 Tulane Maritime Law Institute on Carriage of Goods, 45 Tul. L. Rev. 988-1013 (1971).

[65]In the United States, bills of lading are governed by the Federal Bills of Lading Act, 49 U.S.C. § 80101 et seq., formerly called the Pomerene Act of 1916; it applies in all modes of transport. Ocean bills of lading are negotiable instruments.

erned by a public policy against over-reaching by carriers, initially by the courts and later by Congress.[66]

The sale and transport of goods in foreign trade were financed through documentary letters of credit.[67] Liner carriers called at a series of ports on a regular schedule, at each of which the shipowner often had created its own infrastructure and hired employees or established permanent contractual relations with service industries. In the tramp trades, bulk cargoes were carried under charters, by which the lessee or charterer acquired the right to use the cargo-carrying capacity (called "the whole reach") of the vessel to a destination selected by him.[68] The loading and unloading of a tramp vessel was usually arranged and paid for by her charterer. As noted, charter party agreements[69] are not governed by a public policy protecting one of the parties from overreaching by the other.

Carriage of goods by sea has been governed by statute in the United States, since 1893 in the form of the Harter Act,[70] never repealed, and since 1936 in the form of the Carriage of Goods by Sea Act (COGSA),[71] drawn from a treaty that has come to be known as the Hague Rules.[72] When the Carriage of Goods by Sea Act is applicable to a transaction of its own force ("*ex proprio vigore*"), the shipper's action for loss or damage to the cargo is against the *carrier*—defined as the owner or charterer who enters into a contract of carriage with the shipper.[73] These terms "owner" and "charterer" are not further defined but have not been interpreted narrowly because the statute uses the word "includes." The party whose goods are being transported is the shipper, also not further defined, but interpreted expansively.

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[66]See Sweeney, Happy Birthday Harter supra note 38.

[67]Lane E. Kendall, The Business of Shipping (5th ed. 1986). See also C. Schmitthoff, Export Trade (9th ed. 1996) and J. Dolan, The Law of Letters of Credit (rev. ed. 1996).

[68]In contrast to liner trades, see supra note 62, carriage of bulk cargos under charters from ports of loading to ports of destination as selected by the charterer.

[69]Charter parties or charters are contracts for lease of a ship. Under a demise, the charterer is responsible for furnishing master and crew, while under time or voyage charters the shipowner is responsible for master, crew and navigation; the charterer controls the use of the vessel, designating ports of call.

[70]46 U.S.C. app. §§ 190-196 (2004).

[71]46 U.S.C. app. §§ 1300-1315 (2004).

[72]International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug. 25, 1924, 120 L.N.T.S. 155, T.S. 931, 51 Stat. 233. See Sweeney, Prism of COGSA, note 43 supra.

[73]Application of COGSA by its terms is in 46 U.S.C. app. § 1312: "This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade" with the limitation of 46 U.S.C. app. § 1301(b), applying the law to "contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea . . ." COGSA, however, may be applied as a contract between shipper and carrier in situations excluded from COGSA (charter parties without a negotiated bill of lading; carrier custody before or after the ocean voyage; or goods carried on deck). See United States v. M/V Marilene P., 433 F. 2d 164, 1969 AMC 1155 (4th Cir. 1969); Nichimen v. M/V Farland, 462 F. 2d 319, 1972 AMC 1573 (2d Cir. 1972).

The owner is clearly the carrier when there is no charterer—demise,[74] time[75] or voyage[76]—and many vessels operate under charter parties at all times as security for ship mortgages.

Charters are excluded from coverage under COGSA,[77] but charters become subject to COGSA when a bill of lading issued by a charterer is negotiated to a third party.[78] Accordingly, charterers can be the carrier for COGSA liability purposes, and any type of charterer—demise, time or voyage—may be the carrier defendant in a cargo damage case, but the demise charterer may be treated as if it were the owner.[79]

There is a division of opinion in the maritime industry as to whether the cargo interest is limited to suit against "the carrier" for cargo loss or damage. The treaty and statute are silent. American plaintiffs' practice is to cast the net widely and bring into the lawsuit (or suits) all the potentially liable parties as joint and several defendants. Thus, in a notorious case of the disappearance of an unseaworthy vessel with all hands, the court imposed joint and several liability on both the demise charterer and the owner where both were part of the same corporate enterprise.[80] The case involved a cargo loss claim arising from a charter, rather than from COGSA *ex proprio vigore*, but

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[74]In a demise or bareboat charter, the owner surrenders the vessel to the charterer's control respecting the navigation, manning and carriage of goods for a fixed period (usually for several years). See Leary v. United States, 81 U.S. (14 Wall.) 607 (1872). In such circumstances, the charterer is often described as the "owner pro hac vice." See Reed v. The Yaka, 373 U.S. 410, 1963 AMC 1373 (1963).

[75]A time charter grants to the charterer the right to load cargoes and carry them to designated ports, while the owner retains the manning and navigation of the vessel. See generally M. Wilford, T. Coghlin & J. Kimball, Time Charters (5th ed. 2003); See also G. Bauer, Responsibilities of Owner and Charterer to Third Parties–Consequences Under Time and Voyage Charters, 49 Tul. L. Rev. 995 (1975).

[76]A voyage charter (sometimes simply referred to as "contract of affreightment") grants to the charterer the right to load a cargo and carry it for one voyage. See generally J. Cooke, T. Young, A. Taylor, J. Kimball, D. Martowski and L. Lambert, Voyage Charters (2d ed. 2003).

[77]"The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this act." 46 U.S.C. § 1305.

[78]"[A]ny bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and holder of the same." 46 U.S.C. app. § 1301(b).

[79]The owner "pro hac vice" is liable *in personam* for the maritime torts of his employees (master and crew) while the vessel is liable *in rem* for the same torts, although the registered shipowner is not liable. See The Barnstable, 181 U.S. 464 (1901); see also Cactus Pipe & Supply Co. v. M/V Montmartre, 756 F.2d 1103, 1985 AMC 2150 (5th Cir. 1985).

[80]In re Marine Sulphur Queen, 460 F.2d 89, 1972 AMC 1122 (2d Cir.), cert. denied 409 U.S. 982 (1972), which arose from the mysterious disappearance of a T-2 tank ship rebuilt as a carrier of liquid sulphur. The court found privity of her owners in her dangerous reconstruction. Professor Tetley has argued for the concept of joint and several liability. See, e.g., W. Tetley, Marine Cargo Claims 242 (3d ed., 1988), reservedly referred to by the court in Lantic Sugar Ltd. v Blue Tower Trading Corp., [1993] F.C.J. No. 1120, (1993) 163 N.R. 191, ¶11, 1994 AMC 2771, 2774. Nevertheless, the charterer may have a right to indemnification despite joint and several liability. See Am. Tobacco Corp. v. The Katingo Hadjipatera, 194 F.2d 449, 1951 AMC 1933 (2d Cir. 1951), cert. denied 343 U.S. 978 (1952).

parts of COGSA applied as a consequence of their incorporation by reference in contractual clauses. Admiralty courts have not hesitated to pierce the corporate veil when confronted with potential abuse of the single-ship corporation as a fleet owner's shield from liability.[81]

Where the charterer's bill of lading has been signed "for the master," both the owner and the charterer will be liable to the cargo interest.[82] Joint and several liability of owner and charterer has also been applied in cases where the documentation was ambiguous as to whether the owner or the charterer was the COGSA carrier.[83]

When the charterer uses its own form bill of lading, the charterer will be the proper party defendant.[84] This charterer liability exists despite clauses that specify another party as the COGSA carrier—known as "demise clauses,"[85]—but held to be invalid because such clauses lessen the liability of the carrier.[86] The cargo owner's suit on the contract of carriage for loss or damage to cargo is normally against the party that is in privity with the cargo owner, but the actual bill of lading is usually signed by the master or more likely by an agent "for the master."[87] Such signature commits the vessel owner to potential liability under the bill of lading,[88] but many charters deny to the charterer the right to sign for the owner by the master; in such cases, the owner will not be liable under the bill of lading.[89] American law, however, permits the cargo owner to bring an action for cargo loss or damage

[81]See Swift & Co. Packers v. Compania Colombiana del Caribe, S.A. 339 U.S. 684, 1950 AMC 1089 (1950). See generally, M. Keriakos, The Case for Recognizing the General Equitable Powers of the Admiralty Courts, 20 J. Mar. L. & Com. 363 (1989).

[82]Nichimen Co. v. M/V Farland, 462 F.2d 319, 1972 AMC 1573 (2d Cir. 1972); Pac. Employers Ins. Co. v. M/V Gloria, 767 F.2d 229 (5th Cir. 1985).

[83]Ore S.S. Corp. v. Hassel (The Cypria) D/S A/S, 137 F.2d 326, 1943 AMC 947 (2d Cir. 1943).

[84]United Nations Children's Fund v. S.S. Nordstern, 251 F. Supp. 833 AMC (S.D.N.Y. 1965).

[85]Epstein v. United States, 86 F. Supp. 740, 1949 AMC 1598 (S.D.N.Y. 1949); Blanchard v. The Anthony II, 259 F. Supp. 857, 1967 AMC 103 (S.D.N.Y. 1966). Thyssen Steel Co. v. M/V Kavo Yerakas, 50 F. 3d 1349, 1995 AMC 2317 (5th Cir. 1995); See also W. Tetley, The Demise of the Demise Clause, 44 McGill L.J. 807 (1994).

[86]"Any clause. . . relieving the carrier or the ship from liability. . . or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect." 46 U.S.C. app. § 1303(8). See Joseph L. Wilmotte & Co. v. Cobelfret Lines S.P.R.L., 289 F. Supp. 601 (M.D. Fla. 1968). See the recent treatment of this issue by the House of Lords in *The Starsin*, [2003] 1 Lloyd's Rep. 571, 2003 AMC 913 (H.L.), discussed infra in notes 138-152 and accompanying text. See also note 36 supra.

[87]Instituto Cubano de Estabilizacion v. T/V Golden West, 246 F. 2d 802, 1957 AMC 1481 (2d Cir. 1957). See also EAC Timberlane v. Pisces, Ltd., 245 F.2d 715, 1985 AMC 1594 (1st Cir. 1985), infra at notes 221-224. See the discussion of privity in *Kirby*, infra n. 45-50 and associated text.

[88]Mente & Co., v. Isthmian S.S. Co. (The Quarrington Court), 36 F. Supp. 278, 1940 AMC 1546 (S.D.N.Y. 1940).

[89]Demsey & Assocs., Inc. v. S.S. Sea Star, 461 F.2d 1009, 1972 AMC 1440 (2d Cir. 1971) and Associated Metals and Minerals Corp. v. S.S. Portoria, 484 F.2d 460, 1973, AMC 2075 (5th Cir. 1973).

against the carrying vessel *in rem*.[90] Thus, a time-chartered vessel will be liable *in rem* although her owner will not be liable *in personam* when bills of lading from an operator are not signed by her master.[91]

As well as suit based on the carriage contract, American law also authorizes suit by the cargo owner in tort for negligent damage to cargo,[92] and it is customary to plead the two actions alternatively. Thus, the charterer will be liable on the contract of carriage he has proffered while the vessel owner and stevedore will be liable in tort where cargo was damaged while being loaded with ship's gear.[93] While there could not be a double recovery in such a case, the cargo owner can recover the difference between the full value of the cargo and the COGSA $500 package limit.[94] It is this possibility of full recovery that the Himalaya clause seeks to prevent.

As a party to the transport of goods, the ship manager[95] (as opposed to the traditional "ship's husband,"—an agent for the ship at a port of call who arranges the furnishing of bunkers, provisions and other necessaries) was unknown in earlier eras of shipping operations. However, with the development of single-ship corporations, the hiring of low-wage crews from developing nations, and unified business offices and maintenance facilities, the ship manager has taken today a prominent position in the reconstitution of fleets to achieve economies of scale. The importance of this new functionary

[90]Bulkley v. Naumkeag Steam Cotton Co., 65 U.S. (24 How.) 386 (1860). See also Cavcar Co. v. M/V Suzdal, 723 F.2d 1096, 1984 AMC 609 (3d Cir. 1983).

[91]See Yeramex Int'l. v. S.S Tendo, 595 F.2d 943, 1979 AMC 1282 (4th Cir. 1979). In this case, the carrying vessel had sunk, the time charterer was bankrupt, and the charter had forbidden the master to sign bills of lading; accordingly, there was no solvent party liable for the loss of plaintiff's goods.

[92]The John G. Stevens, 170 U.S. 113 (1898); Bosnor, S.A. de C.V. v. Tug L.A. Barrios, 796 F.2d 776, 1987 AMC 2956 (5th Cir. 1986).

[93]Autobuses Modernos S.A. v. The Fed. Mariner, 125 F. Supp. 780, 1954 AMC 1650 (E.D. Pa. 1954). (The stevedore was protected by a Himalaya clause.)

[94]See Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 1959 AMC 879 (1959). The package limitation is an artificial minimum value established by law in the United States: "$500 per package . . . or in case of goods not shipped in packages, per customary freight unit." 46 U.S.C. app. § 1304(5). This provision is the most frequently litigated provision in COGSA and is responsible annually for dozens of decisions, not always consistent.

[95]See generally, D. Charest, A Fresh Look at the Treatment of Vessel Managers under COGSA, 78 Tul. L. Rev. 885 (2004). The Baltic and International Maritime Conference (BIMCO) has prepared a standard-form contract of ship management, SHIPMAN 98, available at http://world-register.net/charters/htm. There is also the International Ship Managers Association. Ship management has been discussed in the context of limitation of shipowner liability by Judge Haight in Complaint of Chesapeake Shipping Co., 778 F. Supp. 153, 1992 AMC 769 (S.D.N.Y. 1991) and 803 F. Supp. 872, 1993 AMC 691 (S.D.N.Y. 1992). After dismissing the initial petition, an amended petition survived on different facts.

was recognized by the International Maritime Organization in the new rules for International Safety Management (The ISM Code) effective in 1998.[96]

Foreign trade continues to be carried on by ocean transport (far cheaper than air carriage, which has become the mode of transport for highly valuable cargoes whose location must be known to the sellers, buyers and insurers at all times). The completed transaction from seller's warehouse to buyer's warehouse now involves other participants in the processing and movement of the goods—participants who are land-based and whose services were either unnoticed or unused in the past, and it is these new non-maritime participants for whom the protections of the ocean carrier are sought to be extended by Himalaya clauses. Today, road or rail carriage from the seller's warehouse to the buyer's warehouse are necessary parts of foreign trade and competition is forcing traditional ocean carriers to be involved in services outside their familiar areas of maritime operations. The sub-contracting of cargo-related services has developed to such an extent that the traditional ocean carrier is now sub-contracting even the ocean carriage itself. Under vessel-sharing arrangements among ocean carriers, called "slot charters,"[97] shippers may never contract with an actual shipowner, much less with the owner of the carrying vessel. Ocean carriage by sub-contract is now performed not only for traditional ocean carriers but for the NVOCC (Non-vessel owning common carrier), an entity that may become a carrier to cargo owners or a shipper to ship owners. All other traditional functions of ocean carriage—pre-loading storage, examination, weighing or measuring, packaging, loading, stowage on board, fumigation, documentation, unloading and warehousing—can be expected to be carried out, at least in part, by sub-contractors of the carrier. Thus the concept of "carrier"—on which the twen-

[96]The ISM Code became effective in the United States for tankers, bulk carriers and passenger vessels in 1998 and for all other merchant ships in 2002 by reason of statute. 46 U.S.C. app. § 3201 et seq., enacted in 1996 in compliance with 1994 amendment (Chapter IX) to the 1974 International Convention for Safety of Life at Sea (SOLAS). 32 U.S.T. 47, T.I.A.S. No. 9700. Shore-based management (owners or managers) is thereby required to demonstrate compliance with SOLAS and pollution prevention by preparation of procedures to respond to casualties (SMS or Safety Management Systems) on each vessel. The SMS is subject to an *internal* audit, critically reviewing vessel operations for compliance checks by the Coast Guard and an *external* audit on documents and possibly by inspection. Because of the danger of lack of enforcement by flag states, enforcement by Port States is authorized by detention or threat thereof or denial of entry. Coast Guard Regulations are in 33 C.F.R. § 96. See also Sahatjian, The ISM Code, A Brief Overview, 29 J. Mar. L. & Com. 405 (1998).

[97]Slot charters are used in liner service to fulfill a temporary need for cargo-carrying space; the shipowners are usually part of a pool arrangement and agree to lease cargo-carrying capacity (slots) from other pool members. See M. Reilly, Identity of the Carrier: Issues Under Slot Charters, 25 Tul. Mar. L.J. 505 (2001).

tieth century modal regimes were based—has lost most of its traditional meaning.

V
AMERICAN HIMALAYA DECISIONS BEFORE *KIRBY*

The purpose of this review is to analyze the decisions following *Robert C. Herd & Co. v. Krawill Machinery Corp.* and to explore the effect of *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.* on them. They will be categorized by the nature of the function of parties claiming Himalaya clause protection. There was never a single source for these Himalaya clauses and their language and intent has varied widely. It is unlikely that decisions upholding Himalaya clauses will be overturned, but because of the inconsistencies of language, it is also unlikely that decisions rejecting such clauses will disappear.

A. Servants and Agents of the Ocean Carrier

Actual employees of carriers and agents of carriers create liability for carriers because of "*respondeat superior,*" without eliminating the personal liability of such employee or agent, although the recovery of money damages from uninsured crew members, including officers (as in *The Himalaya,* supra*),* may prove futile.[98] Consequently, cargo plaintiffs usually disregard the crew members or agents despite their personal fault. The general maritime law, like the common law, assumed the liability of shipowner employers for the damage-causing faults of employees,[99] the exceptions being the "frolic and detour" of employees whose acts were not "in the course of [their] employment."[100] Notwithstanding the apparent rigidity of the frolic and detour exception, liability has been imposed on employers who made the damage or loss possible because of the nature of the employment.[101]

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[98]Restatement (Second) of Agency § 213 (1958). See W. Page Keeton et al., Prosser and Keeton on Torts § 70 at 501 (5th ed. 1984). The chief officer was held personally liable for cargo damage in Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835, 1964 AMC 42 (2d Cir. 1963) (per curiam).

[99]Keeton, supra.

[100]In Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 1968 AMC 2729 (2d Cir. 1968), a drunken member of the crew, returning to his drydocked ship, aimlessly opened valves, which eventually resulted in the sinking of both ship and dry dock. His employer was found liable because the employee's conduct was characteristic of his employment and thus foreseeable.

[101]Id.

The first statutory reference to crew liability came in the 1851 Limitation of Liability Act,[102] patterned on similar language in the British statute of 1734.[103] The 1851 statute assumes shipowner liability for crew members' torts, but limits that liability unless the owner can be said to have privity or knowledge of the employees' tortious acts.[104] In cases of this sort, the real issue in American law today is whether an employee is sufficiently high in the chain of command so that his privity or knowledge is chargeable to the owner.[105]

Reference to servants and agents also occurred in the omnibus Q Clause of COGSA 1936,[106] in which the carrier acquires a defense to all causes of cargo damage other than the sixteen listed; but only absent "actual fault or privity of the carrier and without the fault or neglect of the agents or servants of the carrier. . ."[107] and the burden of proof falls on the carrier to establish that there was no contribution to the loss or damage from the afore-mentioned actions of servants or agents of the carrier.[108] It remains to be seen whether under *Kirby* a Himalaya clause will affect the personal liability of servants and agents as recognition of the liability of the Federal government in the Federal Tort Claims Act[109] affected the liability of Federal employees and agents.

B. Stevedores

The Supreme Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*[110] suggested an extension of COGSA's benefits for carriers by contract to stevedores as their agents, but it soon became apparent that carriers did *not* desire stevedores to be agents of carriers for many reasons,

[102] Act of Mar. 31, 1851, ch. 43, 9 Stat. 635, codified at 46 U.S.C. app. §§ 181-189.

[103] 7 Geo. 2 c. 15 (1734). See J. Sweeney, Limitation of Shipowner Liability: Its American Roots and Some Problems Particular to Collision, 32 J. Mar. L. & Com. 241 (2001).

[104] 46 U.S.C. app. § 183. See Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King), 285 U.S. 502, 1932 AMC 503 (1932); Coleman v. Jahncke Serv., Inc., 341 F.2d 956, 1965 AMC 535 (5th Cir. 1965).

[105] In contrast to U.S. law, English law limits to corporate directors the class of those to whom the requisite privity and knowledge may be ascribed. See R.Violino, The Continuing Conflict Between United States and English Admiralty Law on Limitation of Liability: Whose Privity Binds the Corporate Shipowner?, 10 Fordham Int'l. L. J. 388 (1987).

[106] "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting. . . without the fault or neglect of the agents or servants of the carrier. . . ." 46 USC § 1304(2)(q).

[107] Id.

[108] Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426, 1962 AMC 2366 (2d Cir. 1962). Cf. Matter of Inter-Cont'l Props. Mgmt., 604 F. 2d 254, 1979 AMC 1680 (4th Cir. 1979).

[109] See 28 U.S.C. § 2679. Exclusive Remedy against federal government under Federal Tort Claims Act.

[110] 359 U.S. 297, 1959 AMC 879 (1959). See supra text and notes 43-50.

one of the most obvious of which was that service of process on a carrier could then be effected by service of the stevedore as its agent.[111] The Himalaya clause was soon amended to include "independent contractors," the legal relationship preferred by both carriers and the shore-side components that assist the transport of goods.

Under COGSA (as well as the Hague Rules), the carrier is responsible for the goods only during loading, ocean voyage, and unloading,[112] but the Harter Act makes the carrier responsible until proper delivery, a point which is not defined further in the statute.[113] Thus American courts readily extended Himalaya clause protections to terminal operators,[114] although the rationale went unstated. This sort of extension of the Himalaya clause reflects industry practice; stevedore corporations and terminal operating corporations are sometimes branches of the same organization, sharing insurers, officers, and shareholders.

1. Stevedores Protected by a Himalaya Clause

The first American case in which the stevedore was afforded the protection of a bill of lading's Himalaya clause was *Carle & Montanari, Inc. v. American Export Isbrandtsen Lines, Inc.*[115] The stevedore negligently damaged plaintiff's cargo and when sued therefor sought to limit recovery to the $500 per package amount of COGSA. The Himalaya clause provided,

> [N]o person, firm or corporation or other legal entity whatsoever (including the Master, officers and crew of the vessel, all agents and all stevedores and other independent contractors whatsoever) is, or shall be deemed to be liable with respect to the goods as carrier, bailee or otherwise, howsoever, in contract or in tort. If, however, it shall be adjudged that any other than said shipowner or demise charterer is carrier or bailee of the goods or under any responsibility with respect thereto, all limitations of and exonerations from liability provided by law or by the terms hereof shall be available to such other . . . [116]

[111] Fed. R. Civ. P. Rule 4. See also International Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. Cf. Volkswagen A/G v. Schlunk, 486 U.S. 694 (1988).

[112] 46 U.S.C. app. § 1301(e).

[113] The carrier's duties are "proper loading, stowage, custody, care or proper delivery." 46 U.S.C. app. § 190 (2004).

[114] See infra notes 116-130. The contract for stevedoring services is clearly maritime, Am. Stevedores Inc. v. Porello, 330 U.S. 446, 456 1947 AMC 349, 356 (1947).

[115] 275 F. Supp. 76 (S.D.N.Y.), 1967 AMC 1637, aff'd 386 F.2d 839 (2d Cir. 1967), cert. denied 390 U.S. 1013 (1968).

[116] 275 F. Supp. at 78, 1967 AMC at 1638-1639.

The district court found that the stevedore fit the language of the clause exactly and applied the Himalaya clause to limit the stevedore's liability.[117] The court of appeals affirmed per curiam, on the basis of the opinion of the court below,[118] and the Supreme Court denied certiorari.[119]

A long line of cases eventually followed *Carle & Montanari* in accepting the Supreme Court's suggestion in *Herd* that stevedores may be protected by carefully drawn clauses—even when strictly construed.[120]

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[117]Id. at 78-79, 1967 AMC at 1640.

[118]386 F.2d 839 (2d Cir. 1967).

[119]390 U.S. 1013 (1968).

[120]See, e.g., Hiram Walker & Sons v. Kirk Line, 30 F.3d 1370, 1995 AMC 879 (11th Cir. 1994) This case of spilled liquor made three trips to the court of appeals in efforts to limit stevedore's liability to $500. A 23-ton tank containing 5000 gallons of "Tia Maria," a liqueur, was shipped from Jamaica to Miami where the stevedore unloaded it for storage on the dock until a tank trailer would be available for road carriage to New Jersey. The expected pumping operation did not take place because of absent equipment and it was decided to use a gravity feed i.e., to use a fork-lift to hoist the liqueur tank more than eight feet off the ground and pour the contents into the tank-trailer. The liqueur tank eventually slipped off the fork-lift and ruptured with loss of contents. Shipper argued that stevedore/terminal operator could not benefit from the carrier's COGSA protection ($500 package limit) because the carrier's responsibility had terminated and stevedore was a volunteer rather than an independent contractor of the carrier. This third appeal affirmed the trial court's conclusion that delivery had not yet occurred so that the stevedore was protected by the carrier's COGSA limit. In Wemhoener Pressen v. Ceres Marine Terminals, Inc. 5 F.3d 734, 1993 AMC 2842 (4th Cir. 1993), a hydraulic press, crated and lashed to a "mafi" (a wheeled trailer without propulsion) had been unloaded from the carrier's vessel and was awaiting the arrival of rail transport in a terminal storage area when a terminal employee set the packaging on fire while using a welding torch to cut the steel cable lashings of the crate to the mafi (owned by the carrier). The freight forwarder/carrier (Express) in Germany issued the bill of lading which was used for the ocean transport. Clauses from other bills of lading were incorporated by reference, and an indemnity clause was found alongside the Himalaya provisions, ". . . any person whomsoever by whom the carriage is performed . . . every such person shall have the benefit of all provisions herein benefitting the Carrier as if such provisions were expressly for his benefit . . . the Carrier . . . as agent and trustee for such persons." The shipper argued that the identification of beneficiaries was ambiguous, but the court found that removal of the mafi was a peculiarly maritime activity, therefore carriage, so the stevedore was included in the Himalaya clause. In Mori Seiki USA, Inc., v. M/V Alligator Triumph, 990 F.2d 444 1993 AMC 1521 (9th Cir. 1993), a precision lathe shipped from Nagoya to Houston was damaged on the pier after unloading at Los Angeles. The negligent stevedore had been hired by the charterer's port agent, but the Himalaya clause in the ocean carrier's bill of lading protected the defendants. In Seguros Illimani, S.A. v. M/V Popi P, 929 F.2d 89, 1991 AMC 1529 (2d Cir. 1991), after the mysterious disappearance of 1,005 tin ingots, the liability of the stevedore was limited without discussion to $500 per package on the basis of the carrier's bill of lading. In Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656 (1st Cir. 1990), the shipper argued against extending to the stevedore the benefit of the Himalaya clause because the stevedore was not named in the clause, which protected, " . . . every such servant or agent of the Carrier. . . " The court found the stevedore a covered agent carrying out the delivery function of the ocean carrier. In Wuerttembergische und Badische Versicherungs A.G. v. M/V Stuttgart Express, 771 F.2d 62, 1983 AMC 2738 (5th Cir. 1984), a stevedore hired by the carrier dropped a crate of machinery, causing its total loss. The court found that the shipper had failed to prove no fair opportunity to declare a higher value, and limited liability for the carrier and its stevedore. See also Koppers Co. v. S.S. Defiance, 704 F.2d 1309, 1983 AMC 748 (4th Cir. 1983) and Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 1982 AMC 929 (5th Cir. 1981) (other "fair opportunity" cases in which, without discussion, the stevedore got the benefit of COGSA's $500 limitation on the basis of a Himalaya clause). In Bernard Screen Printing Corp. v. Meyer Line, 464 F.2d 934, 1972 AMC

2. Stevedores Not Protected by a Himalaya Clause

Along with the long list of cases approving the extension of Himalaya clause protections to stevedores, there is also a line of cases denying application of the Himalaya clause to stevedores.[121]

1919 (2d Cir. 1972), cert. denied 410 U.S. 910 (1973), the Himalaya clause differed from that in *Carle & Montanari* (which protected "all stevedores and other independent contractors") by omitting the word stevedores. The court found broad enough the phrase " . . . no person, firm or corporation or other legal entity whatsoever (including the master, officers and crew of the vessel and all agents and independent contractors . . .)." Finally, in Secrest Mach. Corp. v. S.S. Tiber, 450 F.2d 285, 286, 1972 AMC 815, 816 (5th Cir. 1971), after the stevedore dropped a steel press while discharging cargo, its liability was limited to $500 on the basis of a Himalaya clause that extended COGSA protections to "Carrier's agents, servants and employees and of any independent contractor performing any of the Carrier's obligations . . . or acting as bailee of the goods. . ." According to the court, the words "independent contractor" protected stevedore because of the clear intent behind them. See generally, Joanne Zawitoski, Limitation of Liability for Stevedores and Terminal Operators under the Carrier's Bill of Lading and COGSA, 16 J. Mar. L. & Com. 337 (1985).

[121]In Philipp Bros. Metal Corp. v. S.S. Rio Iguazu, 658 F.2d 30, 1981 AMC 2864 (2d Cir. 1981), the cargo was discharged by the stevedore from the ship on November 2, 1976 but not moved from the pier until the consignee picked up for sales to its customers - the last on Jan. 19, 1977, when five of the 233 bundles of tin ingots turned up missing. The cargo had been counted and weighed on the pier on November 17, 1976, and the court found that to be the proper delivery. The stevedore/terminal operator claimed the protection of the $500 package limit of COGSA, but the court rejected the defense because it found the stevedore a "common law bailee" after delivery. Id. at 32, 1981 AMC at 2866. The court rejected the district court's theory that the carrier was vicariously liable for the negligence of its stevedore after COGSA responsibility had ended. Id. at 32-33, 1981 AMC at 2866. In La Salle Mach. Tool, Inc. v. Maher Terminal, Inc., 611 F.2d 56, 1980 AMC 1187 (4th Cir. 1979), the stevedore dropped a 31,000 pound crate at the loading terminal. No dock receipt or bill of lading had been issued but the terminal operator, hired by the shipper, argued for COGSA protection under a carrier's bill of lading clause for the benefit of: ". . . the carrier, its agents, servants and employees, but also to the benefit of any independent contractor performing services including stevedoring in connection with the goods hereunder." Id. at 58, 1980 AMC at 1189. The court held that the terminal operator was not an agent of the carrier and that the expectation of the issuance of a bill of lading by the carrier could not bind a shipper to its terms. Id. at 59, 1980 AMC at 1190. In Schiess-Froriep Corp. v. S.S. Finnsailor, 574 F.2d 123, 1978 AMC 1101 (2d Cir. 1978), a consignee's cargo of turret lathes in two cases arrived in Newark and was discharged by the stevedore, the carrier's independent contractor, and stored in the terminal for two days awaiting consignee's trucker, who received only one case because the second had been damaged. One year and two weeks later, consignee sued the owner, the ship management company, and the ship in admiralty, and the stevedore/terminal operator under state tort law. The stevedore raised the COGSA one-year time bar, based on a Himalaya clause. There was no evidence as to when or where the cargo was damaged nor as to the status of the stevedore/terminal operator at the time of damage. Nevertheless the trial court gave summary judgment to the stevedore. The Himalaya clause provided, ". . . no person, firm or corporation or other legal entity whatsoever (including the master, officers and crew of the vessel and all agents and independent contractors) is, or shall be deemed to be, liable with respect to the goods as carrier, bailee or otherwise howsoever in contract or in tort." Id. at 125, 1978 AMC at 1103. The court of appeals reversed, finding the clause ambiguous because it did not indicate to whose agents and independent contractors it referred. The case was remanded for an evidentiary hearing (which never occurred). Id. at 128, 1978 AMC at 1106. In De Laval Turbine, Inc. v. West India Indus., Inc., 502 F.2d 259, 1974 AMC 1156 (3d Cir. 1974), a 16-ton generator was destroyed when it slipped off a trailer during unloading by Heavy Lift Services, Inc., a stevedore and an inland transporter. The clause protected "any one other than the owner or charterer . . . is carrier and/or bailee of the goods." Id. at 265, 1974 AMC at 1162. Neither defendant was protected because

C. Terminal Operators

While the stevedore's functions—loading and off-loading ships—are clearly maritime in nature, those of the terminal operator more closely resemble traditional land-based activities—sorting, packaging, and storing goods before transfer to land carriage.[122] This created an historical problem in admiralty jurisdiction[123] that had been largely resolved by the time terminal operators began to seek protection from the maritime bill of lading.[124] As an issue of international transportation, terminal operator liability required a solution international in scope, which was provided in a treaty in 1991. The subject was taken up by the United Nations Commission on International Trade Law (UNCITRAL) because of the gaps in coverage from mode to mode of transportation, that is, from ocean to air to rail to road.[125]

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of the ambiguity. Id. at 267-269, 1974 AMC at 1164. In Cabot Corp. v. S.S. Mormacscan, 441 F.2d 476, 1971 AMC 1130 (2d Cir. 1971), while loading heavy steel plates, the stevedore dropped them on a previously loaded generator. Id. at 479, 1971 AMC at 1337. The court refused to apply to the stevedore a Himalaya clause defining the carrier as, " . . . all persons rendering services in connection with performance of this contract, " on the grounds that it was unclear and ambiguous. 441 F.2d at 479, 1971 AMC 1138. More recently, in Komori Am. Corp. v. Howland Hook Container Terminal, Inc., 1998 AMC 2894 (S.D.N.Y. 1998), after a containerized of crates comprising a printing press was unloaded by the stevedore/terminal operator and placed in the terminal, its consignee asked the terminal operator to remove the crates from the containers and load them in consignee's truck. Parts were dropped by the terminal operator, which asserted the COGSA limit of $500 per package, relying on the carrier's bill of lading. Because the consignee paid the stevedore extra for loading on consignee's truck, the court found that stevedore was not the carrier's agent and could not be protected by the Himalaya clause. 1998 AMC at 2897-98.

[122]Terminal operator functions were studied extensively by the UNCITRAL Working Group on the Liability of Terminal Operators in International Trade during the preparation of the Draft Convention on that subject. See Report of UNCITRAL Study, U.N. Doc. A/CN.9WGII/WP.55.

[123]Two statutes from the time of one of England's weakest kings, Richard II (1367-1400), limited the Lord High Admiral's jurisdiction to "things done upon the sea," 13 Ric. 2 c.5 (1389), and excluded from the Admiral's jurisdiction "things arising within the bodies of the counties," 15 Ric. 2 c.3 (1391). These English limitations were applied to American admiralty jurisdiction briefly in The Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 1999 AMC 2092 (1825), but rejected definitely in The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). See J.C. Sweeney, The Admiralty Law of Arthur Browne, 26 J. Mar. L. & Com. 59, 96-98, 117-122 (1995).

[124]The extension of admiralty contract jurisdiction beyond the traditional limitations of English law (see supra notes 9 and 123) was accomplished initially by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 1997 AMC 550 (C.C.D. Mass. 1815) (No. 3,776). The Supreme Court agreed with Story's analysis of the conceptual nature of the admiralty contract jurisdiction in Insurance Co., v. Dunham, 78 U.S. (11 Wall.) 1 (1870). See Moore-McCormack Lines v. Int'l Terminal Operating Co., 619 F. Supp. 1406, (S.D.N.Y. 1985), on appeal, 784 F.2d 1542, 1986 AMC 2011 (2d Cir. 1986); cf. Brocsonic Co. v. M/V Mathilde Maersk 120 F. Supp. 2d 372, 2001 AMC 506 (S.D.N.Y. 2000) (no admiralty jurisdiction for cargo lost while stored on land).

[125]Another factor was the hesitation of the major maritime nations to accept the multimodal treaty prepared by the United Nations Conference on Trade and Development (UNCTAD) in 1980, the United Nations Convention on International Multimodal Transport of Goods, UN Doc. TD/MT/Conf. 16, 19 I.L.M. 938, (Geneva, May 24, 1980). The international effort to order the various attempts at fixing limits of liability for terminal operators is discussed further in Section VI.C infra.

These gaps occurred during the movements of cargoes between transport modes while in the charge of terminal operators.[126] It was also believed that damage to the cargo often occurred during these terminal periods; accordingly, UNCITRAL began a study of the industry and its problems in 1982, eventually concluding in 1988 that neither a modal law nor contractual clauses could resolve the problems arising from gaps between the existing international conventions.[127] At the diplomatic conference in Vienna in April of 1991, the most difficult problem was the protective effect of Himalaya clauses in ocean bills of lading. Australia, Germany, Italy, and Japan all sought to eliminate the possibility of exculpation by bill of lading clause and very delicate drafting was necessary so that the terminal operator would continue to be protected by Himalaya clauses.[128]

1. Terminal Operators Protected by a Himalaya Clause

In the first American case in which a terminal operator claimed the protection of a Himalaya clause, the court of appeals struggled with the differences between stevedores and terminal operators,[129] but eventually came down in favor of protecting a stevedore who was acting as terminal operator at the time the goods were lost.[130] Barber Blue Sea Line issued bills of

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[126]The UNCITRAL terminal operator project began in 1982 and ended with the diplomatic conference of April, 1991 in Vienna, Austria. (UN GA Res. 44/33 (1989). The treaty, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, UN Doc. A/CONF. 152/13 (The OTT Convention), is summarized in J.C. Sweeney, New Convention on Liability of Terminal Operators in International Trade, 14 Fordham Int'l L.J. 1115 (1991), also 20 I.L.M. 1503 (1991). See also infra text and notes 211-226.

[127]The development of the treaty has been reviewed in three articles by the members of the United States delegation: Prof. Paul B. Larsen, Prof. Joseph C. Sweeney, Patrick J. Falvey, Esq., David Davies, Esq., and Joanne Zawitoski, Esq.: 20 J. Mar. L. & Com. 21 (1989), 21 J. Mar. L. & Com. 449 (1990) and 25 J. Mar. L. & Com. 339 (1994). See also D. Moran Bovio, *Notas Para La Historia del Convenio sobre La Responsabilidad de los E.T.T.*, 9 *Annuario de Derecho Maritimo* 89 (1991).The United Nations has published the Official Records of the Diplomatic Conference, UN Doc. A/CONF. 152/14 (Sales No. E 93/XI (3) 1993), including the drafting history, the comments of governments and international organizations, the records of the Plenary, Committee One (Substantive issues), Committee Two (Final Clauses), and the Final Act. UNCITRAL Reports, UN Docs. A/CN.9/WGII/WP.56 and 60.

[128]Sweeney, New Convention, supra note 126 at 1120-22.

[129]Certain Underwriters at Lloyds v. Barber Blue Sea Line, 675 F.2d 266, 1982 AMC 2638 (11th Cir. 1982).

[130]Plaintiffs also relied on La Salle Mach. Tool Inc. v. Maher Terminals, Inc., 611 F.2d 56, 1980 AMC 1187 (4th Cir. 1979), discussed briefly supra in note 121. Liability of terminal operators for tort was assumed in Leather's Best Inc. v. S.S. Mormaclynx, 451 F.2d 800, 1971 AMC 2383 (2d Cir. 1971). In that case, the container packed with leather was shipped from Germany to New York where it was offloaded and then moved to the terminal operator's storage yard where the entire container was stolen. Concepts of ancillary or pendent jurisdiction (now called supplemental) were used as well as agency law. The carrier, as well as the terminal operator, was held liable without protection of the COGSA package limitation. In Colgate Palmolive Co. v. S.S. Dart Canada, 724 F.2d 313, 1984 AMC 305 (2d Cir. 1983), cert. denied 466 U.S. 963 (1984), the goods were awaiting arrival of the carrier's vessel, stored in the

lading at Yokohama for the carriage of cameras and advertising to Miami. Harrington & Co. was Barber's agent at Miami where Harrington, as stevedore, unloaded the cargo of forty-six cartons and moved it to a shed in its terminal. Ten days later, when it came time to deliver the cargo, fourteen cartons were missing. The Himalaya clause extended carrier protection to,". . . any insurer, servant, agent or independent contractor, or subcontractor, including stevedores, carpenters and watchmen."[131] Plaintiffs' contention that when the goods disappeared the stevedore was no longer acting as stevedore but as terminal operator was rejected by the court because the carrier's delivery obligation had not yet been met, and the stevedore/terminal operator was agent of the carrier for that purpose since there was, "a clear intent to extend benefits to a well-defined class of readily identifiable persons."[132]

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terminal operator's warehouse near the pier in New Jersey, and therefore beyond the coverage of COGSA *ex proprio vigore*. Application of COGSA as a contractual clause was defeated by New Jersey's common law, which holds a bailee strictly liable for negligence resulting in damage to bailed cargo. See generally, Zawitoski, Terminal Operators, supra note 120; Palmer & De Giulio, Terminal Operations and Multimodal Carriage: History and Prognosis, 64 Tul. L. Rev. 281 (1989); and Hooper, Legal Relationships: Terminal Owners, Operators and Users, 64 Tul. L. Rev. 595 (1989).

[131]According to the bill of lading, "the word 'carrier' includes the shipowner, and any of its employees, agents or contractors. (See Clause 6)." Clause 6 stated:

> (1) The Carrier shall be entitled to substitute any vessel or other means of transport and to subcontract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties servant, agent or independent contractor, or subcontractor, including any stevedores, carpenters and watchmen, such person shall be entitled to avail himself of the defenses and limits of liability which the Carrier is entitled to invoke under this clause, all such persons are party to the contract, made on their behalf by the Carrier." whatsoever undertaken by the carrier in relation to the goods.
>
> . . .
>
> (2) If an action for loss or damage of goods is brought against any insurer, servant, agent or independent contractor, or subcontractor, including any stevedores, carpenters and watchmen, such person shall be entitled to avail himself of the defenses and limits of liability which the Carrier is entitled to invoke under this clause, all such persons are party to the contract, made on their behalf by the Carrier."

[132]"The 'clarity of language' requirement [in *Herd,*] does not mean, however, that COGSA benefits extend only to parties specifically enumerated in the bill of lading. It is sufficient that the terms express a clear intent to extend benefits to a well-defined class of readily identifiable persons. . . Because Barber Blue was obligated to deliver the cargo to the consignee in Miami, and because the bill of lading expresses a clear intent to extend COGSA benefits to Harrington as Barber's independent contractor, the findings of the district court were not clearly erroneous." 675 F.2d at 270, 1982 AMC at 2639-2640.

In Wemhoener Pressen v. Ceres Marine Terminals, Inc., 5 F.3d 734, 1993 AMC 2842 (4th Cir. 1993), a hydraulic press, crated and lashed to a "mafi" (a wheeled trailer without propulsion) had been unloaded from the carrier's vessel and was awaiting the arrival of rail transport in a terminal storage area when a terminal employee set the packaging on fire while using a welding torch to cut the steel cable lashings of the crate to the mafi (owned by the Carrier). The freight forwarder/carrier in Germany issued the bill of lading which was used for the ocean transport. Clauses from other bills of lading were incorporated by reference, and an indemnity clause was found alongside the Himalaya provisions: "[E]very such person shall

2. *Terminal Operators Not Protected by a Himalaya Clause*

Close readings of the Himalaya clause have also produced decisions that fail to protect the terminal operator in a manner similar to those in the cases that denied protection to the stevedore.[133] A number of the cases dealing with

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have the benefit of all provisions herein benefitting the Carrier as if such provisions were expressly for his benefit . . . the Carrier . . . as agent and trustee for such persons." Shipper argued that the identification of beneficiaries was ambiguous, but the court found that removal of the mafi was a peculiarly maritime activity, therefore carriage, so the terminal was included in the Himalaya clause. See also Assicurazioni Generali v. D'Amico, 766 F.2d 485, 1986 AMC 1051 (11th Cir. 1986), in which the subrogated insurer sued the terminal operator at Miami, who was also the stevedore servicing a shipment of water de-mineralizing equipment in two packages shipped from Genoa. The packages were off-loaded from the ship and stored in the terminal operator's warehouse for eighteen days, at the end of which the packages were being loaded onto the consignee's truck by the terminal operator's employee when one fell and was damaged. The Himalaya clause provided that, "If . . . any other than the owner or demise charterer is Carrier and/or Bailee of the goods, all limitations of and exonerations from liability . . . shall be available to such other." Plaintiff's allegation that "Bailee" was too general or ambiguous was rejected and "Bailee" was held to be an appropriate limit of the protected class to those engaged by the carrier handling the cargo, thus effective to limit the terminal operator's liability to $500. In B. Elliot (Canada) Ltd. v. John T. Clark & Sons of Maryland Inc.; 704 F.2d 1305, 1983 AMC 1742 (4th Cir. 1983), a "gear hobbler" was shipped from Hamburg to Baltimore in a container under a Farrell Lines bill of lading stamped "pier to pier". The container was unloaded, placed on a chassis and stored in a container yard; thereafter as the chassis with container was moved from the yard to a shed it tipped over, damaging the cargo. The terminal operator was protected by the Himalaya clause, which included "terminal operator." In Gebr. Bellmer K.G. v. Terminal Services of Houston, Inc. 711 F.2d 622, 1986 AMC 607 (5th Cir 1983), wastewater treatment machinery was shipped from Hamburg to Houston for delivery to Pryor, Oklahoma in four containers under a Hapag-Lloyd bill of lading. At Houston, the carrier's agent hired a stevedore and a terminal operator. The containers were unloaded from the ship by the terminal's crane and the stevedore's employees and then loaded on a chassis pulled by a tractor. The terminal operator's employee was driving the tractor when the containers fell off and were destroyed. The Himalaya clause provided that, "every exemption, limitation, liberty and immunity . . . which under this bill of lading contract apply to the carrier shall in all respects enure also for the benefit of servants, employees, and agents of the carrier as well as such independent contractors, including their servants, employees and agents, whose services the carrier from time to time may engage in the operation of the vessel or any other means of transportation including loading, discharging, and all services in connection therewith." The terminal was protected as the carrier's agent and the stevedore shared ownership, offices and telephone.

[133]In Rupp v. Int'l Terminal Operating Co., 479 F.2d 674, 1973 AMC 1093 (2d Cir. 1973), while the stevedore was unloading containers from flatbed trailers off a "Roll-on-Roll-off" vessel to the pier, an employee of the terminal caused the front of a flatbed to collapse and the machinery-laden containers to fall and be damaged. The terminal operator claimed unsuccessfully the protection of a Himalaya clause extending to "all persons rendering services in connection with performance of this contract." The decision was heavily influenced by the stevedore case of Cabot v. S.S. Mormacscan, 441 F.2d 476, 1971 AMC 1130 (2d Cir. 1971) (lack of clarity) discussed briefly supra in note 121. In Jagenberg, Inc. v. Georgia Ports Authority, 882 F. Supp. 1065, 1995 AMC 2333 (N. D. Ga. 1995), a large crated industrial machine, lashed to a flat track that was attached to a chassis for shipment from Rotterdam to Savannah, had been unloaded and stored for five days. It fell from the chassis while being moved within the Georgia Port Authority's terminal by a GPA employee. GPA was denied the protection of the $500 package limit (against $750,000 actual damages) because it was not a carrier under a Himalaya clause that read: "No claim or allegation shall be made against any person or vessel whatsoever, other than the Carrier including, but not limited, to the Carrier's servants or agents, any independent contractor and his servants or agents, and all others by whom the whole or any part of the carriage, whether directly or indirectly, is procured." The court applied rules of punctuation and grammar to defeat GPA's inferences of intended protection.

other non-carriers should be consulted in connection with the court's failure to apply the Himalaya clause to protect terminal operators because the functions being performed may not have been described in the clause nor fairly included in a review of the permissible language.

D. Miscellaneous Services

While terminal operators may perform a variety of functions beyond the mere safe-keeping of the goods—such as sorting, assembling, preparing, packaging, and delivering to buyers or road transporters—not all of these transport-related jobs are performed by employees of the terminal operator. Many are performed by independent contractors hired by the terminal operator, the ocean carrier, or the freight forwarder.[134]

E. Ship Managers

The ship manager, separately incorporated from the several single-ship corporations that would have once made up a fleet, now attempts to act as

[134]In Grace Line, Inc. v. Todd Shipyards Corp., 500 F.2d at 361, 1974 AMC at 1141 (9th Cir. 1974), plaintiff's cargo was damaged in a collision while the carrying vessel was being maneuvered into a "self-docking" dry dock. Cargo owners sued the vessel, the carrier, the drydock, and the towboat company. The drydock and towboat operators sought the protection of the bill of lading's Himalaya clause, asserting the COGSA defenses of negligent vessel navigation and management. 500 F.2d at 365-66, 1974 AMC at 1141. [The towboat was found not to have been negligent.] The court distinguished the carrier defenses of time bar and package limitation from that of negligent navigation and refused to extend the negligent navigation defense to the drydock, holding, "[A] contract, no matter how clear and express, which purports wholly to immunize a non-carrier from liability for its negligence, is repugnant to traditional law and to sound policy." Id. at 373, 1974 AMC at 1153. In Toyomenka, Inc. v. S.S. Tosaharu Maru, 523 F.2d 518, 1975 AMC 1320 (2d Cir. 1975), the phrase "all independent contractors . . . used by the carrier" did not protect the security company hired by the terminal operator to protect the cargo after its unloading and storage in a shed on the pier. Clarity and precision were lacking because the security company was not employed by the carrier but by the terminal operator. Id. at 522, 1975 AMC at 1324. In Uncle Ben"s, Inc. v. Hapag Lloyd A/G, 855 F.2d 215, 1989 AMC 748 (5th Cir. 1988), the shipper sent cargoes of rice to Europe that were contaminated on arrival, and later claimed that the storage containers provided by the carrier were the contamination's source. Id. Two and a half years after shipments, the shipper sued the carrier and its agent in state court, claiming breach of warranty and negligence, but the carrier and agent removed to federal court and pleaded the one-year time bar in defense. Id. at 217, 1989 AMC at 750-51. The shipper alleged that the actions of the carrier's agent took place before the bills of lading was issued, so COGSA was irrelevant to the claim against the agent. Id. The court however found that the agent was protected by the Himalaya clause by reason of the language, "Every exemption . . . [applicable to the carrier] shall. . . enure to the benefit of the servants employees and agents of the carrier as well as of such independent contractors." Id. at 218, 1989 AMC at 751.

the fleet owner once acted, providing crews, bunkers, provisions, arranging port services and soliciting business.[135]

[135]In Ferrex Int'l. Inc. v. M/V Rico Chone, 718 F. Supp. 451, 1989 AMC 1109 (D. Md. 1988), welding electrodes delivered to the terminal in anticipation of the ship's arrival disappeared before loading could begin. Id. at 453, 1989 AMC at 1111. A dock receipt had been issued, but no bill of lading, although both documents had been prepared in advance by the freight forwarder. Id. The vessel manager was allowed to limit its liability to $500 per package because the COGSA package limit and a Himalaya clause in the bill of lading were incorporated by reference in the dock receipt. 718 F. Supp. at 460-61, 1989 AMC at 1122.

There is hoary authority for the proposition that ship managers, not being carriers, are not protected by COGSA but may be sued for the maritime tort of negligence. The China, 74 U.S. (7 Wall.) 53, 2002 AMC 1504 (1869). (This tort is not related to the carrier defense of negligent management of a vessel that refers to seamanship decisions of master or crew during the voyage. See 46 U.S.C. app. §§ 192 and 1304.)

In Steel Coils, Inc. v. M/V Lake Marion, 331 F. 3d 422, 2003 AMC 1408 (5th Cir. 2003), the owner time-chartered the vessel to Western Bulk, which voyage-chartered the vessel to Itochu for carriage of flat-rolled steel from Russia on a three-week voyage to New Orleans. There, during unloading, the steel was found to have been damaged by salt water, later determined to have entered the hold through a crack in the hull caused by metal fatigue and defective hatch covers. Id. at 424, 2003 AMC at 1409. The consignee sued the vessel, her owner, the time charterer, and the vessel manager, which employed the master and crew and was responsible for vessel maintenance. Id. at 425, 2003 AMC at 1410. The management company had signed the time charter "as agents only." The voyage charter had a clause paramount calling for the application of U.S. COGSA. Id. at 432, 2003 AMC at 1419. Plaintiffs claim against the management company was based on negligence, but defendant asserted the COGSA $500 package limit, on the grounds that COGSA is the sole remedy for cargo damage. Id. at 425-26, 2003 AMC at 1411. Noting that the manager did not argue the protection of a Himalaya clause but rather that the reality of maritime commerce justifies the use of one-ship corporations without employees that must in turn use ship managers, the court held that the ship manager, a non-carrier, was liable in tort for the full damages. 331 F.3d at 438-39, 2003 AMC at 1428-29. While it may be argued that this is merely a charter dispute, COGSA was applied because it was incorporated by reference in the charter, a common practice. See, e.g., Bunge Corp. v. Republic of the United States of Brazil, 353 F. Supp. 65, 1973 AMC 1219 (E.D. La. 1973).

In Citrus Marketing Board of Israel v. J. Lauritzen A/S, 943 F.2d 220, 1991 AMC 2705 (2d Cir. 1991), the owner time-chartered the vessel to Lauritzen Reefer A/S which sub-time chartered to Chiquita Brands, Inc., which sub-chartered on a voyage basis to the Citrus Marketing Board for a shipment of fruit that arrived at the unloading port in damaged condition and short. Id. at 221, 1991 AMC at 2706. The Board and the consignee sued the ship managers, alleging negligent hiring of incompetent officers. Id. at 222, 1991 AMC at 2708. The ship manager urged dismissal based on the Himalaya clause, and the district court obliged, but the court of appeals reversed, without fully deciding the issue. Id. at 221, 1991 AMC at 2707. According to the bill of lading:

> Every agent or employee of the Carrier or Shipowner and every independent contractor who performs any part of the services provided by the Carrier or Shipowner, including the vessel's officers and crew, stevedores, shore side employees, draymen, crane and other machinery operators, shall have the same rights . . . provided the carrier . . . the foregoing contract provisions being made by the Carrier and Shipowner for the benefit of all other persons and parties performing services in respect of loading, handling, stowing, carrying, keeping, caring for, discharging, and delivering the Goods or otherwise.

Id. at 223, 1991 AMC at 2710. The court noted that the managers' claim would extend the application of COGSA's liability limitations where COGSA does not apply of its own force but only as a contract. Id. at 223-24, 1991 AMC at 2711. These contracts had to be strictly construed, but the court indicated that the eventual issue would be whether "a contract . . . which purports wholly to immunize a non-carrier from liability for its negligence, is repugnant to traditional law and to sound policy," id., citing its decision in

The absence of privity of contract between the shipper and the ship manager has been successfully argued against affording the ship manager the protection of COGSA's limitation of liability by extension.[136]

F. Ship Owners Not Carriers

American cases have not fully confronted the issue of whether a registered owner who is not the COGSA carrier is nevertheless protected by COGSA.[137]

Colgate Palmolive Co., v. S.S. Dart Canada, 724 F.2d 313, 1984 AMC 305 (2d Cir. 1983), cert.denied 466 U.S. 963 (1984). In that case, the damage occurred before loading onto the vessel, so COGSA could not apply of its own force but only as a contract which, however, could not overcome the strict liability of bailees under New Jersey state law. 724 F.2d at 317, 1984 AMC at 311. See supra note 130. EAC Timberlane v. Pisces, Ltd., 745 F.2d 715, 1985 AMC 1594 (1st Cir. 1984), might be contrary authority because the ship manager was one of the defendants, although no explanation was offered concerning the manager's liability. See supra text at note 27.

[136]In Mikinberg v. Baltic S.S. Co., 988 F.2d 327, 1993 AMC 1661 (2d Cir. 1993), on remand, 1995 AMC 799, aff'd mem. 60 F.3d 811, 1995 AMC 2408 (2d Cir. 1995), two cases of personal effects shipped from Russia to New York were unloaded into the terminal on January 9, 1990 but were unavailable four months later when the shipper-consignee called for them, because they had been misdelivered to the bearer of a forged document. Id. at 329, 1993 AMC at 1663. The terminal defended with a Himalaya clause protecting every "servant or agent of the Carrier (including every independent contractor) . . . employed by the Carrier," but the court refused the terminal the clause's protection because of the absence of any contract between the terminal and the shipper: "We decline to extend COGSA protections through the 'Himalaya clause' to indefinite and unforeseen defendants who may have only an attenuated connection to the "carriage of goods by sea." Id. at 333, 1993 AMC at 1670. In *Kirby*, the Supreme Court has put to rest the argument that privity limits extension of the Himalaya Clause even to a land carrier acting as the marine carrier's sub-subcontractor. See supra text and notes 27-30.

[137]There is one case that might be used as authority for the proposition that a vessel owner in this position is protected by COGSA, but the case merely includes the owner in a list of COGSA beneficiaries, the court having concluded simply that all defendants had the defense of being without contributory fault. EAC Timberlane v. Pisces Ltd., 745 F.2d 715, 1985 AMC 1594 (1st Cir. 1984), cargo owners and underwriters sued all possible vessel interests in the M/V *Maria*, which sank as the result of an explosion in a cargo of detonator caps. Plaintiffs alleged improper stowage of the dangerous cargo. 745 F.2d at 717, 1985 AMC at 1596. Defendants alleged spontaneous heating and combustion. Id. The district court accepted defendants' explanation and found no contributory fault on the part of any defendant, thereby including the non-carrier vessel owner in a list of non-contributory defendants.745 F.2d at 718, 1985 AMC at 1598. On appeal, plaintiffs argued that different standards of liability were applicable to the various defendants distinguishing the Fire Statute, COGSA and the general maritime law and arguing that COGSA defenses were inapplicable to the ship owner and the ship manager. 745 F.2d at 720, 1985 AMC at 1601. The court of appeals exonerated all defendants under the strict terms of COGSA's Q Clause, which were more than sufficient to exonerate defendants under the Fire Statute and the general maritime law as well. Id. The Q Clause defense requires that the carrier must first prove due diligence to make the vessel seaworthy and that the cause of the loss was without the fault or neglect of the agents or servants of the carrier. There is, however, another decision that protects the non-carrier owner. In Chisso America, Inc. v. M/V Hanjin Osaka, 307 F. Supp. 2d 621, 2003 AMC 2796 (D.N.J. 2003), the shipper handed over to Senator Lines 800 bags of polypropylene for carriage from Japan to California receiving in return a Senator bill of lading with choice of law (Germany) and Himalaya clauses. Availing itself of a slot charter arrangement, Senator used the M/V Hanjin Osaka for the actual carriage. Id. at 622-23, 2003 AMC at 2797. On arrival the cargo

In their uncertainty, the American decisions may be contrasted with a recent decision in England by the House of Lords. In *The Starsin,*[138] a cargo of timber was shipped from three Malaysian ports to Belgium and the U.K. under "clean" bills of lading of Continental Pacific Shipping, the *Starsin's* time charterer. The front of each of the bills of lading was signed by an agent of the time charterer and not by the master, but clearly identified the time charterer as the carrier.[139] Among thirty-five dense printed clauses on the back of the bills were a demise clause and an identity-of-carrier clause that purported to make the owner the carrier.[140] The cargo deteriorated during the voyage because of negligent stow and the invasion of fresh water. The consignees sued the owner and demise charterer (rather than the time charterer, by then insolvent).[141]

The owner first argued that it was a Hague Rules carrier by reason of the clauses on the back of the bill of lading, but this argument was rejected by preferring the typed information on the front of the bill to the printed clauses on the back.[142] The owner then argued that it was protected by the Himalaya clause as an independent contractor of the time-charterer-carrier.[143] It was agreed that according to Himalaya clause reasoning the owner might be an independent contractor, but Article III (8) of Hague Rules (incorporated in the bill of lading) forbids the carrier to use clauses that will lessen the carrier's liability thereunder.[144] Consequently, contractual clauses extending protections beyond those provided in the Hague Rules are null and void.[145] The reasoning of the House is gymnastic but clear; the owner's effort at total immunity by reason of the Himalaya clause as an independent

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was found to have been ruined by salt water. Shipper sued Senator Lines, but settled its claim (presumably on the basis of the $500 COGSA package limitation), and then amended its complaint to add the vessel owner, Laysan, and the demise charterer, Hanjin. Id. These defendants claimed the protection of the Himalaya clause, which purported to cover "Carrier's servants or agents, and all others by whom the whole or any part of the Carriage, whether directly or indirectly, is procured, performed or undertaken." Id. at 623, 2003 AMC at 2797. The Court found for the shipowner and demise charterer as "agents" or "others by whom the. . . carriage is procured,"citing as authority a case with the same Senator clause and similar facts, in which the court had held that defendants were the "others" of the Himalaya clause because they were "intimately involved in the transactions." Street Sound Elecs., Inc. v. M/V Royal Container, 30 F. Supp. 2d 661, 1999 AMC 1805 (D.N.J. 2000).

[138]Homburg Houtimport B.V. v. Agrosin Pty. Ltd. (The Starsin), [2003] 1 Lloyds Rep. 571, 2003 AMC 913 (H. L.).

[139]Id. at 578, 2003 AMC at 920-21.

[140]Id. at 587, 2003 AMC at 940.

[141]Id. at 574-575, 2003 AMC at 914.

[142]Id. at 578, 2003 AMC at 921.

[143]Id. at 580, 2003 AMC at 926.

[144]Id. at 581, 2003 AMC at 928.

[145]Id.

contractor failed.[146] Bingham, L.J. was not prepared to carry out the "undoubted artificiality" of Himalaya clause reasoning to immunize the carrier,[147] and Hobhouse, L.J. was concerned that the owners sought to carry the reach of a Himalaya clause far further than any previous decision, thereby permitting an actual carrier to circumvent the Hague Rules.[148] Steyn, L.J. dissented on the failure to give effect to the Himalaya clause.[149]

The result of this decision was to permit one shipper with title to the goods to recover in tort while denying recovery to other consignees because they lacked an adequate property interest at the time of damage to cargo.[150] This would not be the consequence in America, where a simple financial interest rather than actual title is enough for a plaintiff in a cargo damage case.[151]

To summarize, this case narrowly supports the view that the non-carrier owner of the vessel may not rely on the independent contractor language of the Himalaya clause to shield himself from tort liability to shippers for damage to cargo. Professor Tetley rightly criticizes the decision for its failure to recognize the joint and several liability of owner and charterer.[152]

G. Rail and Truck Carriers

Business interests around the world demand a comprehensive legal system that covers the goods from the seller's warehouse to the buyer's warehouse, although insurers and modal carriers are still hesitant to enter this unknown world. The policy question for governments and courts is whether these important issues should be determined by the exculpatory clauses of one modal participant in clearly multimodal carriage. This policy question arises in the absence of an international solution to multimodal transport.

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146. Id. at 582, 2003 AMC at 929.

147. Id. at 581, 2003 AMC at 928-929.

148. Id. at 603, 2003 AMC at 973.

149. Id. at 586, 2003 AMC at 938.

150. [2003] 1 Lloyd's Rep at 582, 2003 AMC at 931. See generally, C. Debattista, Sale of Goods Carried by Sea (1990).

151. C-ART, Ltd. v. Hong Kong Islands Line Am., S.A., 940 F.2d 530, 1991 AMC 2888 (9th Cir. 1991); Compagnie De Navigation v. Mondial United Corp., 316 F.2d 163, 1963 AMC 946 (5th Cir. 1963); C. Itoh & Co. (Am.), Inc. v. M/V Hans Leonhardt, 719 F. Supp. 479, 1990 AMC 733 (E.D. La. 1989). See generally W. Tetley, Who May Claim or Sue for Cargo Lose or Damage? (Part I), 17 J. Mar. L. & Com. 153; (Part II) id. at 407 (1986).

152. William Tetley, (Case Note) 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, 123 (2004).

When ocean transport is combined with rail transport in the United States, there is a preliminary issue about the traditional jurisdiction of the admiralty and the priority of the federal regulation of railroads, clearly a prerogative of Congress under the Interstate Commerce Clause.[153]

Congress enacted the Interstate Commerce Act after the Supreme Court denied any power over interstate railroads to the states.[154] Originally, the federal commission was empowered only to investigate railroads, not to regulate them. Powers of economic regulation were gradually conferred in 1907 (the Hepburn Act) and 1910 (the Mann-Elkins Act). The Interstate Commerce Commission was abolished in 1995.[155] Legislation relating to the liability of carriers for cargo damage was enacted in 1906 in the Carmack Amendment.[156] Congress did not however require that the Carmack Amendment be applied to a through bill of lading for the international shipment of goods, and if the rail carrier proves that the loss or damage took place while the goods were in the custody of the water carrier, the law to be applied will be COGSA (for ocean shipments) or the Harter Act (for domestic waterborne carriage).[157] The railroad basis of Carmack is clearly demonstrated in that the international reach of the statute extends only for exports to the adjacent nations of Canada and Mexico;[158] Carmack clearly does not

[153]In A. Russo & Co. v. United States, 40 F.2d 39, 1930 AMC 899 (5th Cir. 1930), the court exercised admiralty jurisdiction over a shipment from Palermo to Chicago under two bills of lading: an ocean carrier's bill from Palermo to New Orleans and a railroad through bill from Palermo to Chicago, issued simultaneously. However, admiralty jurisdiction over the railroad was rejected in Loucraft Corp. v. Sociedad Metalurgica Duro-felguera, 63. F. Supp. 892, 1945 AMC 1474 (E.D. Pa. 1945), where the ocean bill of lading covered a shipment from Cadiz to Minneapolis but the railroad bill was not issued until the goods were loaded on the train at Philadelphia for rail carriage to Minneapolis.

[154]Wabash, St. Louis & Pac. R.R. Co. V. Illinois, 118 U.S. 557 (1886). See Act to Regulate Commerce, 24 Stat. 379 (1887).

[155]Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995). The Surface Transportation Board has succeeded to some powers of the I.C.C.

[156]49 U.S.C. § 11706 et seq. (2004). See Missouri Pac. R.R. Co. v. Elmore & Stahl, 377 U.S. 134 (1964), regarding the strict liability of rail carriers. That liability is modified when the carrier proves that the loss or damage was due to an Act of God, the public enemy, or the act or omission of the shipper or the inherent vice of the goods. In movement of goods over successive lines, indemnification is permitted where the defending carrier can prove where the loss or damage occurred, 49 U.S.C. § 11706(b), but in view of the bankrupt status of many railroads, this may not be a viable option. The Carmack Amendment has been extended to road carriage, 49 U.S.C. § 14706. The amount of the liability is the full actual value, unless the I.C.C. has approved a "release rate." 49 U.S.C. §§ 11706 and 14706. See Adams Express Co. v. Croninger, 226 U.S. 491 (1931). Cf. Comsource Ind. Food Svc. Co., Inc. v. Union Pac. R. Co., 102 F.3d 438 (9th Cir. 1996), cert. denied 517 U.S. 1821 (1997).

[157]46 U.S.C. § 1300 et seq. (COGSA); 46 U.S.C. § 190 et seq. (Harter Act). Cf. Mannesman Demag Corp. v. M/V Concert Express, 225 F.3d 587 2000 AMC 2935 (5th Cir. 2000).

[158]49 U.S.C. § 11706(a)(3).

apply when international ocean shipments are involved.[159] The problem of the reach of Carmack does not occur where there are separate bills of lading for the internal rail movement and the ocean transport, in which case Carmack applies to the inland rail movement and COGSA applies to the ocean transport.[160]

Before *Norfolk Southern Railway Corp. v. James N. Kirby Pty Ltd.*, the case law on whether rail and truck carriers were protected by Himalaya clauses was conflicting. In *Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc.*,[161] a truck carrier was afforded such protection. A large industrial machine was shipped on a through bill of lading from Japan to Tacoma by sea, thence by rail to Chicago where it was to be trucked from the rail yard to a Maersk Lines container yard. Bridge Terminal Co. was hired by the carrier to truck the cargo, but its driver ran into a low bridge that caused $50,000 damage to the machine. Shipper's cargo insurer brought a subrogation action against the carrier and the trucker.[162] The trucker had not issued a bill of lading but relied on the carrier's bill of lading.[163] Emphasizing the "through" nature of the bill of lading from seller to buyer, the court found a clear intent for the Himalaya clause to apply to sub-contractors of the carrier, even though they were not specifically named.[164]

However, in *Caterpillar Overseas, S.A. v. Marine Transport, Inc.*,[165] shipper's tractor was brought by truck from Illinois to Portsmouth, Virginia for loading on a vessel expected to call at that port; when the vessel was diverted, the tractor had to be moved by truck to the nearby port of Norfolk where another vessel of the carrier was loading. The terminal operator loaded the tractor on a flat rack to be carried by an independent trucker hired by the carrier. Rounding a highway curve, the tractor slid off and was badly damaged.[166] The terminal operator and the inland trucker sought the protection of

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[159]In Reider v. Thompson, 339 U.S. 113 (1950), 1951 AMC 38 (1950), an ocean bill of lading provided for transport of wool from Buenos Aires to New Orleans, which was then shipped to Boston via connecting rail carriers under a New Orleans-to-Boston "through" bill of lading. The argument that the Carmack Amendment did not apply because of the foreign origin of the shipment was rejected.

[160]Union Pac. R.R. Co. v. Greentree Transp. Trucking Co., 293 F. 3d 1201 (3d Cir. 2002) (cigarettes from Atlanta to Tokyo stolen after derailment en route to ocean port on ocean bill of lading).

[161]796 F. Supp. 336, 1993 AMC 705 (N.D. Ill. 1992) aff'd mem. 7 F. 3d 238, 1994 AMC 608 (7th Cir. 1993).

[162]796 F. Supp. at 337, 1993 AMC at 706.

[163]Id. at 337, 1993 AMC at 705.

[164]Id. at 340, 1993 AMC at 711. In Stolt Tank Containers, Inc. v. Evergreen Marine Corp., 962 F.2d 276, 1992 AMC 2015 (2d Cir. 1992), the court said that "where a party is aware that another is shipping its packages aboard a vessel and has at least constructive notice that liability limitations might apply, that party is bound by the liability limitations agreed to by the shipper." Id. at 280, 1992 AMC at 2020. Admittedly, a different context, but note the use of constructive knowledge.

[165]900 F.2d 714, 1991 AMC 75 (4th Cir. 1990).

[166]Id. at 717, 1991 AMC at 79.

the Himalaya clause. Although no bill of lading had been issued prior to the accident, the court found for the terminal because of its familiarity with carrier's bills of lading and its Himalaya clause—an imputed contract.[167] The Court, however, refused to apply the Himalaya clause to the inland trucker because the court found that transport over public highways between loading ports could not have been intended by the shipper or its freight forwarder and was clearly not a maritime service.[168]

Finally, there are a few lower court cases that also prescribe the limits of the Himalaya clause ashore. In *Garnay, Inc. v. M/V Lindo Maersk,*[169] a container of plaintiff's dried, bailed gingko biloba leaves was stolen from the yard of Bridge Terminal Transport, an inland carrier, before its delivery to the ocean carrier and before issue of the bill of lading for that particular container. Bills had been issued on the two other containers comprising the shipment.[170] Both the ocean carrier and the transporter claimed Himalaya clause protection.[171] The clause protected "any servant, agent, stevedore or sub-contractor of the Carrier." While Judge Haight indicated that the standard form bill of lading - if produced - might protect the carrier, there was insufficient information of previous transactions to determine if the bill of lading unambiguously evidenced an intention to include an inland carrier.[172]

In *Canon, USA, Inc. v. Norfolk Southern Railway Co.*,[173] on the other hand, photocopiers sent from Japan to Seattle by ocean, thence by rail to Atlanta, were damaged when they slid off a truck on a highway near Atlanta.[174] Off-loading from the train to the truck was performed by In-Terminal Services Corp., which sought the protection of a Himalaya clause that defined sub-contractors as "including, owners and operators of Vessel (other than the Carrier), stevedores, terminal operators, warehousemen, road and rail transport operators and any independent contractor employed by the Carrier in

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[167]Id. at 719-20, 1991 AMC at 82.

[168]Id. at 726, 1991 AMC at 90. Respecting the extension of an ocean carrier's Himalaya clause to a successive rail carrier (on a shipment from Korea to New Jersey by way of one rail carrier from Seattle to Chicago and a second rail carrier to New Jersey), the court in Lucky-Goldstar Int'l (America) Inc. v. S.S. California Mercury, 750 F. Supp. 141, 1991 AMC 1018 (S.D.N.Y. 1990), refused to draw such an inference from the proferred Himalaya clause, because the field of international shipping is particularly noted for the exactitude of its documentation. A similar result was reached where the cargo from Japan to Seattle was being moved by an independent trucker in the railyard at Cicero, Illinois. Yasuda Fire & Marine Ins. Co. Ltd. v. Japan Intermodal Transp. Co. Ltd., 1995 AMC 2737 (N.D. Ill. 1995).

[169]816 F. Supp. 888, 1994 AMC 301 (SDNY 1993).

[170]Id. at 891, 1994 AMC at 364.

[171]Id. at 895, 1994 AMC at 308.

[172]Id.

[173]936 F. Supp. 968, 1997 AMC 1510 (N.D. Ga. 1996).

[174]Id. at 970, 1997 AMC at 1511.

performance of the whole or any part of the handling, storage or Carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods."[175] Because In-Terminal Services Corp. was hired by the railroad and not by the carrier, it was not protected, although the road and rail transporters both were.[176]

In a more recent case, the land-based parties prevailed. In *Fruit of the Loom v. Arawak Caribbean Line, Ltd.*,[177] cargo was shipped from Jamaica to Jamestown, Kentucky under an ocean bill of lading described as an intermodal or through bill with a Himalaya clause protecting, "all parties performing services for or on behalf of the Vessel or Carrier as employees, servants, agents or contractors of carrier."[178] The ocean carrier hired Seaside Trucking for transport from Port Everglades to Kentucky, but the trucks were hijacked before leaving Florida.[179] The court held that, although there was no privity with the shipper, the trucker was entitled to the ocean bill's protection in view of the fact that a large sophisticated shipper had shipped with the ocean carrier hundreds of times previously.[180]

VI
EMERGENCE OF INTERNATIONAL MULTIMODAL TRANSPORT AND THE FAILURE OF INTERNATIONAL SOLUTIONS

A. The Hague and Hamburg Rules

At the end of the Second World War, it was readily apparent that there were substantial differences in law, thinking, and even culture and ambience among the modes of international transport: road, rail, air and ocean, not only because each mode was governed by its own international convention, but because of the particular historical experience of each mode in dealing with national governments and industries. Clearly some international legal solution was needed, but this proved impossible to achieve within the individual modal systems. There had been great developments in the movement

[175] 936 F. Supp. at 973, 1997 AMC at 1516.

[176] Id.

[177] 126 F. Supp. 2d 1337, 2000 AMC 387 (S.D. Fla. 1998).

[178] 126 F. Supp. 2d at 1432, 2000 AMC at 393.

[179] 126 F. Supp. 2d at 1346, 2000 AMC at 398.

[180] Id. A similar result obtained in Thiti Lert Watana Co. Ltd. v. Minagratex Corp., 105 F. Supp. 2d 1077, 2001 AMC 80 (N.D. Cal. 2000), a shipment from Thailand to South Carolina by way of Singapore and a bonded customs warehouse.

of cargoes in wartime, but the greatest, containerization, was still on the horizon.

One of the oldest of the international modal conventions is that governing ocean shipping. A set of voluntary rules prepared in 1921 by the International Law Association (The Hague Rules) became mandatory through the international convention of 1924 under the auspices of Comité Maritime International (C.M.I.).[181] The Himalaya problem was not recognized at that time, when shipping operations were either tramp or liner, and the purpose of the Rules was simply to govern the liability (or non-liability) of the carrier during the ocean voyage. The 1924 Hague Rules Treaty entered into force on June 2, 1931with four ratifications and has been amended twice.[182] While the United States enacted a form of the Hague Rules in 1936 (COGSA) before ratifying the Hague Rules Convention, the United States has not ratified either of the amendments to that convention. Not all ratifying or adhering powers to the 1924 Convention have ratified or acceded to these amendments.[183]

By 1967, however, the C.M.I. had become fully cognizant of the Himalaya problem and some delegations to the 1967-1968 Conference on Amending the Hague Rules sought specific language to provide for the broad enforcement of Himalaya clauses by international agreement.[184] The Conference, however, could not agree and settled on one aspect of the Himalaya problem, its coverage of servants and agents of the carrier. Accordingly the resulting Visby Amendments to the Hague Rules included

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[181]International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T. 5, 155. This treaty is the basis of the United States COGSA of 1936, never amended. See J. Sweeney, The Prism of COGSA, 30 J. Mar. L. & Com. 543 (1999). The C.M.I., an international non-governmental organization of maritime law experts from 54 nations was founded in Belgium in 1897. The International Chamber of Commerce also influenced the development of the Rules. See generally M. Sturley, The History of COGSA and the Hague Rules, 22 J. Mar. L. & Com. 1 (1991).

[182]The first amendment is the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1968, 6 Benedict on Admiralty Doc. No 1-2 (1990), in force June 23, 1977 (usually called The Visby Amendments). See A. Diamond, The Hague-Visby Rules, [1974] LMCLQ 375. The second amendment is The Protocol to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 1979. 6 Benedict on Admiralty, Doc. 1-2A (1990), Cmnd. 9197 (usually called the S.D.R. Protocol), in force Feb. 14, 1984. (The author served as chair of the United States delegation to this conference.)

[183]J. Sweeney, The Uniform Regime Governing the Liability of Maritime Carriers, [1992] *Il Diritto Marittimo* 964-980 (1992).

[184]See A. Diamond, supra note 182 at 225, 232-234, 249-253.

new Article IV *bis* whereby the defenses and limitations of liability for carriers are extended to servants and agents of the carrier.[185]

The Hague Rules of 1924 were followed shortly thereafter by the Warsaw Convention of 1929 on the liability of air carriers for death or injury to passengers and loss or damage to cargo.[186] The drafters of the Warsaw Convention did address the use of other transport modes (essentially road and rail) in the provision to cover movement of goods to and from aircraft within the airport.[187]

The international road and rail conventions, while widely ratified in Europe and Africa, have not been ratified by the United States and the other countries of the Americas. The road convention is the International Convention on the Contract for the International Carriage of Goods by Road.[188] The 1893 international railroad convention (CIM) has now been replaced by the 1980 COTIF Convention.[189]

The stevedore industry and its counterparts in the other modes once employed hundreds of thousands of people manually transferring boxes, bales, bags, barrels, and drums to and from each mode en route from the

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[185]Article 3. Between Arts. 4 and 5 of the Convention shall be inserted the following Art. 4 *bis:*

1. The defenses and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under this Convention.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

[186]Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. The Warsaw Convention has been replaced by the Montreal Convention of 1999, in force Oct. 4, 2003. See J. Sweeney, M. Kreindler and C. McKenry, The Warsaw Convention and the Hamburg Rules, 59 J. Air L. & Com. 907-942 (1994).

[187]Article 18 of the Warsaw Convention presumes carrier liability for loss or damage during "transportation by air," thereby limiting the temporal and geographic scope of the convention to loading, flying and unloading the aircraft, excluding independent land, sea or river transport, but including transportation by land, sea or air during the performance of a contract for transportation by air for the purpose of loading, delivery or transshipment. See Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705 (2d. Cir. 1990).

[188](CMR Convention), Geneva, May 19, 1956, 399 U.N.T.S. 190.

[189]*Convention Relative aux Transports Internationeax Ferroviaires*, 5 Int'l Transport Treaties, 183. See generally, Rolf Herber, The European Legal Experience with Multimodalism, 64 Tul. L.R. 569 (1989).

seller to the buyer, but this wasteful use of manpower slowly ended in the 1960's as shipping containers and their infrastructure spread around the world from its origins in North-Atlantic trades.[190] This physical change was soon accompanied by changes in business operations, especially the development of the freight forwarder and electronic data processing to eliminate the mountains of paperwork. Initially described as "intermodal" operations, the terminology changed to "multimodal."

The United Nations Commission on International Trade Law (UNCITRAL) made a major effort to replace the entire Hague Rules system in an eight-year exercise, resulting in the Hamburg Rules, a new convention based on the contract of carriage of goods by sea, rather than the paper bill of lading required by the Hague Rules.[191] By 1978 at the Hamburg Conference, the present method of ship operations by sub-contracting was more readily apparent, but the problems were not discussed in an overall review of carrier operations. Instead, there were two separate discussions of Himalaya issues.

In the first discussion, dealing with what would emerge as Articles 7 and 8 of the Hamburg Rules, it was proposed to eliminate the prohibition on application of carrier defenses to independent contractors in Article IV *bis*, of Visby, and thereby to deal comprehensively with the problem of the enforcement of Himalaya clauses. Most delegations had not been instructed by their governments on this proposal, which had not been extensively reviewed in the Working Group or the UNCITRAL Plenary, so after an inconclusive discussion it was decided not to deal with the independent contractor language and to repeat the Visby formula of "servants and agents."[192]

The second, and far lengthier discussion involved the subject eventually identified as "Transshipment" in Articles 10 and 11. The practical problem centered on the liner trade practice of using coastal "feeder ships" to collect

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[190]C. McDowell & H. Gibbs, Ocean Transportation (2d ed.); Schmeltzer & Peavy, Prospects and Problems of the Container Revolution, 1 J. Mar. L. & Com. 203 (1970).

[191]See United Nations Convention on the Carriage of Goods by Sea, Hamburg, March 30, 1978, U.N. Doc. A/CONF. 89/14 (1978), 17 I.L.M. 608 (The author served as Chair of the United States Delegation to the Diplomatic Conference and traced the drafting history in The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1), 7 J. Mar. L. & Com. 69 (1975); (Part 2), 7 J. Mar. L. & Com. 327 (1976); (Part 3), 7 J. Mar. L. & Com. 487 (1976); (Part 4),7 J. Mar. L. & Com. 615 (1976); and (Part 5), 8 J. Mar. L. & Com. 167 (1977). See also J. Sweeney, UNCITRAL and The Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods, 22 J. Mar. L. & Com. 511 (1991). The Hamburg Rules entered into force on November 1, 1992. See J. Sweeney, The Uniform Regime Governing the Liability of Maritime Carriers, [1992] *Il Diritto Marittimo* 964.

[192]U.N. Conf. Carriage of Goods by Sea, Official Records. A/Conf. 89/14, pp. 86-88, 257-58. In the "Package Deal" concept of the negotiations (O.R. pp. 166 et seq.), articles 5, 6, 7, 8 and 11 were negotiated informally and simultaneously.

and distribute cargoes on each side of the Atlantic, while ocean-going vessels made the transit of the Atlantic. The legal concept under discussion was the channeling of liability—that there could only be one "carrier" at any given time and that other carrier-type entities would not be liable during the liability period of an "actual carrier."[193] Those objecting to such channeling denounced it as an effort by carriers to force cargo owners to sue entities that were uninsured, bankrupt, asset-free or subject only to the jurisdiction of forums hostile to cargo interests.[194] Thus, the discussion, labeled "Transshipment," assumed the use of separate vessels and separate shipowners, but not the use of vessel managers, slot charters, or land carriers. Acknowledging the feeder-ship reality, there was a search for appropriate terminology, and the term "actual carrier" was selected (as distinguished from the contracting carrier). A key word was "entrusted." Presumably entrustment would involve a document of some kind, but the Rules are silent on that point.

The Hamburg compromise added the definition of an "actual carrier" in addition to the traditional definition of "carrier," and Article 10 provides for the joint and several liability of carriers and actual carriers to whom all or part of the performance of carriage by sea has been entrusted.[195] Article 11 however deals with the then unusual situation where the contract of carriage explicitly provides for part of the carriage to be carried out by a named actu-

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[193] Id. at 89-93, 263-273.

[194] Id.

[195] Article 10. Liability of the carrier and actual carrier:

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of Article 7 and of paragraph 2 of Article 8 apply if an action is brought against a servant or agent of the actual carrier.
3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.
4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.
5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.
6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

al carrier. In that circumstance, only the contract may validly provide for the exculpation of the contracting carrier while the goods are in the charge of an actual carrier.[196]

Controversy still rages in the maritime industry about the Hamburg Rules. Opponents view its provisions as too radical, while proponents note that the Rules are not radical enough in light of the changes to globalized trade since 1978. P & I club administrators initially favored the Hamburg Rules because the concentration of liability for cargo loss or damage on the carrier might, arguably, eliminate the need for shippers' cargo insurance.[197] Cargo insurers were well aware of this danger, even though the Hamburg Rules did not eliminate carrier defenses or the unit limitation of liability.[198] Then the attitude of P & I clubs changed; these clubs are mutual associations of shipowner members, and these shipowners came to share the concerns of cargo insurers. The result has been a stalemate in developed industrialized nations. Meanwhile, the Hamburg Rules have entered into force for thirty nations, most of which are developing nations.[199] The United States was a signatory of the Hamburg Rules in 1979, but has not yet become a ratifying power.[200]

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[196]Article 11 Through carriage

1. Notwithstanding the provisions of paragraph 1 of Article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.
2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of Article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

[197]J. Sweeney, UNCITRAL and the Hamburg Rules—The Risk Allocation Problem in Maritime Transport of Goods, 22 J. Mar. L. & Com. 511, 532 (1991).

[198]Id.

[199]The following 29 states have ratified or acceded to the Hamburg Rules as of Jan. 1, 2005: Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, St. Vincent, and the Grenadines, Senegal, Sierra Leone, Syria, Tunisia, Uganda, U. Rep. Tanzania and Zambia. (The status of Slovakia is uncertain after the dissolution of Czechoslovakia.)

[200]The following states have signed the Hamburg Rules convention but have not yet deposited ratifications: Brazil, D. Rep. Congo, Denmark, Ecuador, Finland, France, Germany, Ghana, Holy See, Madagascar, Mexico, Norway, Pakistan, Philippines, Portugal, Singapore, Sweden, United States, and Venezuela.

B. Multimodal Limitation Labors

The issue that has delayed the development of multimodal solutions is the unit limitation of liability—highest in air transport, higher in road and rail, and low in ocean transport. This difference caused ocean carriers and their insurers to insist on the "network system," whereby the limt to carrier liability depended upon the mode in use when the damage occurred. This could never be a satisfactory solution because of the impossibility in so many cases of determining when and where damage to containerized goods had taken place.

The first international effort at resolution was the 1969 Tokyo Rules of the CMI, based on the network principle.[201] Non-governmental organizations also came forward with proposals: the International Chamber of Commerce at Paris, produced "Uniform Rules for Multimodal Transport"[202] and the Baltic and International Maritime Exchange of Copenhagen (BIMCO)[203] and the *Federation Internationale des Associations de Transitaires et Assimilés* (FIATA)[204] produced Rules for this type of transport.

The issue of multimodal liability was then taken up by the United Nations Conference on Trade and Development (UNCTAD), rather than by UNCITRAL, because there seemed to be as many issues of economic policy as there were issues of law, and economic policy was the preserve of UNCTAD.[205] The 1980 UNCTAD Multimodal Convention governs those entities that are deliberately multimodal (as opposed to freight forwarders) and

[201]C.M.I. Conference, Tokyo, 1969, CMI Doc.

The C.M.I. joined forces with UNIDROIT, a multinational organization for the harmonization and progressive development of law, founded in 1926 by the League of Nations, at a Diplomatic Conference in Geneva in 1970 to prepare a convention on intermodal transport. The result was a document for voluntary adoption, the TCM Convention (*Transport Combiné des Marchandises*). This effort was overtaken by the UNCTAD effort at the development of a mandatory multimodal convention, culminating in the 1980 Multimodal Convention. See infra text and notes 205-210.

[202]I.C.C. Uniform Rules for a Combined Transport Document, I.D.C. Pub. No. 298 (1975).

[203]B.I.M.C.O., Combicon bill.

[204]F.I.A.T.A., FBL document.

[205]United Nations Convention on International Multimodal Transport of Goods, U.N. Doc. TD/MT/CONF./16, Geneva (1980) Twenty-five years after negotiation, with only seven ratifications so far, there is little support elsewhere for its ratification. See generally, W.J. Driscoll, The Convention on International Multimodal Transport; A Status Report, 9 J. Mar. L. & Com. 441 (1979). William J. Driscoll & Paul B. Larsen, The Convention on the International Multimodal Transport of Goods, 57 Tul. L. Rev. 193 (1982); William J. Coffey, Multimodalism and the American Carrier, 64 Tul. L. Rev. 569 (1989); S. Mankabady, The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions, 32 Int'l & Comp. L.Q. 120 (1983); D. Richter-Hannes, *Die U.N. Konvention über die Internationale Multimodale Güterbeförderung* (1982).

applies to transport contracts involving at least two modes of transport in international trade.[206] Adherence to the convention by the state of initial custody or the state of delivery is required.[207] The multimodal operator is responsible for the transport of the goods from the "taking in charge" until delivery,[208] but this liability is limited in amount. The weight-based limitation is a careful compromise between the modes; where ocean transport is not involved, the limit is 8.33 S.D.R. per kilogram, but where immediate sea transport occurs, the limit is 2.75 S.D.R. per kilo.[209]

Much of the carrier opposition to the 1978 Hamburg Rules has been extended to the 1980 Multimodal Convention on the grounds that the Convention abandons the network principle and adopts Hamburg principles of liability. There have been few ratifications.[210]

C. Terminal Operators' Liability Limited

As noted previously,[211] UNCITRAL also produced a Convention on the Liability of Terminal Operators in International Trade in April of 1991.[212] This Convention was prepared after a lengthy study of terminal operations around the world. It continued a project begun in 1960 by UNIDROIT[213] on warehousing contracts that had been concerned only with the safe-keeping aspects of the industry. Wide divergences in liability regimes were noted in the study, ranging from a strict and unlimited liability to total exculpation and non-liability. Thus, the principal goal of the convention is uniformity of law.[214] The convention applies to loss or damage to goods, identified objectively as involved in international carriage, when the goods are in the charge of the terminal operator for transport-related services.[215] The definition of terminal operator excludes carriers.[216] The formula for terminal operator lia-

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[206]UNCTAD Multimodal Convention art. 1(1).

[207]Id. art. 2.

[208]Id. art. 14(1).

[209]Id. art. 18. There is also a package limit of 920 S.D.R.

[210]Id. art. 36. The convention requires 30 ratifications or accessories for entry into force.

[211]See supra notes 127-128.

[212]The Conference was attended by 50 nations and 19 specialized agencies of the U.N. and non-governmental organizations.

[213]UNIDROIT began a study in 1960 of warehousing contracts in the context of combined transport, leading to a draft convention in 1982, which became the initial proposal, greatly expanded after a study of the industry.

[214]OTT Convention, Preamble.

[215]Id. art. 2.

[216]Id. art. 1(2).

bility[217] is similar to that in the road,[218] rail[219] and air[220] conventions as well as the Hamburg Rules[221] and the Multimodal Convention.[222] This fact has generated opposition from ocean carriers and their insurers because the carrier defense of negligent navigation is omitted.

As in the multimodal negotiations,[223] the wide differences between the amounts of limited liability in the different transport modes made it impossible to agree on a single amount of limited liability, accordingly, where immediate sea transport has been or is about to be used, the amount is low (2.75 SDR per kilogram);[224] otherwise, the amount is higher (8.33 SDR per kilogram).[225]

The convention only requires five ratifications to bring it into force,[226] but this has not happened yet because of uncertainties connected with the use of Himalaya clauses in each legal system. Given the enormous potential exposures of terminal operators to strict and unlimited liability in some legal systems where Himalaya clauses are not available, it is highly unusual to see an entire industry and its insurers ignore the convention that resolves legal uncertainties as to liability and amount.

Stalemates on the Hamburg Rules, the Multimodal Convention, and the O.T.T. Convention have encouraged UNCITRAL to prepare a new international convention on transport law involving ocean carriage from the seller's warehouse to the buyer's warehouse.[227] Work began in 2003 and may pro-

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217"The operator is liable. . . unless he proves that he . . . took all measures that could reasonably be required to avoid the occurrence and its consequences." Id. art. 5(1).

218" . . . for the total or partial loss of the goods. . . or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent." CMR Convention, art. 17.

219". . . for loss or damage resulting from the total or partial loss of or damage to the goods between the time of taking over the goods and the time of delivery. . . which the carrier could not avoid. . . " COTIF, art. 23.

220". . . for damage sustained in the event of the destruction or loss of . . . cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air." Warsaw Convention, art. 18.

221". . . for loss resulting from loss of or damage to the goods. . . if the occurrence. . . took place while the goods were in his charge unless the carrier proves that he. . . took all measures that could reasonably be required to avoid the occurrence. . . " Hamburg Rules, art. 5.

222Multimodal Convention Art. 16: ". . . liable for loss. . . if the occurrence which caused the loss. . . took place while the goods were in his charge. . . unless the multimodal transport operator proves that he. . . took all measures that could reasonably be required to avoid the occurrence and its consequences." Multimodal Convention, art. 16.

223See supra text and note 209.

224OTT Convention, art. 6(b).

225Id. art. 6(a).

226Id. art. 22(1).

227See UNCITRAL, Draft Instruments on the Carriage of Goods by Sea, A/CN.9/ W.G. III/ W.P. 32 of Aug. 26, 2003. See Michael Sturley, Scope of Coverage Under the UNCITRAL Draft Instrument, 10 J. Int'l. Mar. L. 138 (2004), and Michael Sturley, The United Nations Commission on International Trade Law & Transport Law Project: An Interior View of a Work in Progress, 2004 Texas Int'l L.J. 1-45 (2004).

duce a new convention by 2007 or 2008. The delegations are fully aware that the concept of a single "carrier" entity, carrying out all the traditional liner carrier responsibilities, has ceased to exist. At an early stage of the drafting, a new term, "performing party," subject to a complex definition was prepared, but it may be altered in future negotiations. The definition, since August 2003, is as follows:

> (1) (e) "Performing party" means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person's acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.[228]

At this stage of the drafting it is uncertain what effect the generous approval of Himalaya clauses in *Kirby* may have on the final text. Surely the draft language quoted above will not take bread off the tables of maritime lawyers.

VII
CONCLUSION

Resolution of complex legal problems by legislation, the result of compromise after reasoned arguments, has always seemed preferable to transitory contractual clauses because of the need for predictability about what special protection that the law provides, in this context, for both shippers and shipowners. At present, no legislation supports the extension of ocean carrier protections by private contract to other members of the general community whose business activities become involved in the shipment of goods. Instead, Himalaya clauses that differ greatly in wording and intent have been extended to protect others who are not protected by statute. It was the job of the Supreme Court to explain this extension. They did not, choosing instead to obscure the subject with the blanket of globalization.

Lower courts have provided a series of conflicting rationales for their interpretations of various wordings in Himalaya clauses extending the Carriage of Goods by Sea Act to parties not governed by that statute. This article has examined the conflicting wordings and arguments involved in

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[228]UNCITRAL Draft Transport Law Treaty, art. 1.

contractual exculpation of those who are not statutory ocean carriers, as well as the changes in the maritime shipping industry in the forty-five year interval between the recent decision in *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.* (2004) and *Robert C. Herd & Co. v. Krawill Machinery Corp.* (1958). The rationale for approval and limitation of Himalaya clauses in England now differs from the rationale in the United States provided by the *Kirby* decision and this divergence demonstrates the need for an international solution to this major trade problem. It is not simply an insurance problem, as the nature of globalized trade is involved. The global transport industry needs to operate in a uniform manner from seller's warehouse to buyer's warehouse, but there are legal road blocks. It remains to be seen whether the Supreme Court in *Kirby* has produced clear rules for Himalaya clause problems that will be acceptable on a global basis. Surely the concurrence of shippers and their insurers, and transport services and their insurers, is needed to put an end to this type of expensive litigation.

It is the tenor of this article that the question of liability or non-liability of non-carriers is too important, from the viewpoint of public policy, to be abandoned to the contractual drafting of interested parties. The history of American maritime law for the past century opposes that possibility. In the age of global business the question is not even for Congress. It is clearly an international issue that requires an international solution.