Admiralty and Maritime Law

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I. Introduction

The year 1996 was marked by the lawyers, representing competing industry interests, getting together under the aegis of the Maritime Law Association and putting forth a proposed revision of COGSA, the Carriage of Goods by Sea Act. The draft proposal is currently before Congress and is expected to be taken up sometime during 1997. A brief synopsis of the proposed amendments to COGSA is indicated here. Ultimately the changes are designed to bring American law more in line with those of our major trading partners. Also, during the past year, one Supreme Court case caused ripples in the legal community and several other significant Circuit Court decisions are presented.

II. Proposed Amendments to COGSA

The United States enacted the Carriage of Goods by Sea Act in 1936.[1] The statute embodied a 1924 international convention known as the Hague Rules.[2] This convention, in turn, was modeled on a 1910 Canadian statute called the Water Carriage of Goods Act.[3] The Canadian law was itself modeled on the Harter Act passed by Congress in 1893.[4] The Hague Rules were modified in 1968 by the Visby Protocol such that the Hague-Visby Rules are now in force in most of Western Europe, Japan, Hong Kong, Singapore, Australia and Canada.[5]

In 1978 the United Nations Commission on International Trade Law completed revisions

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1. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. app. §§ 1300-1315 (1988)).
2. Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S.
3. Water Carriage of Goods Act, 1910, 9-10 Edw. 7, ch. 61.
4. Harter Act, Ch. 105, 27 Stat. 445 (1893) (codified) at 46 U.S.C. app. §§ 190-196 (1988).
5. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197).

to the Hague Rules. These revisions, known as the Hamburg Rules,[6] were ratified by twenty-two countries. Most of these countries are in the third world.[7]

Though it is generally agreed that COGSA is in need of overhaul, the conflict between the Hague–Visby Rules and the Hamburg Rules presents a need for compromise. Congress is considering it a proposed bill which attempts to strike a balance. An outline of the proposed changes follows.

A. Tackle-to-Tackle Limitation

The Hague Rules originally did not apply to periods before loading or after discharge.[8] As a result, goods were subject to two liability regimes in a single shipment. In the U.S., bills of lading frequently called for application of COGSA throughout the shipment, though this solution has not always proved effective. The proposed bill repeals Section 12 of the 1936 COGSA, which preserved the application of the Harter Act outside the tackle-to-tackle interval.[9]

B. Voluntary Extensions of COGSA

Because of modifications in the existing tackle-to-tackle provisions, Section 7 of COGSA which permits an extension of COGSA is no longer necessary and would be repealed under the bill.[10]

C. Bills of Lading

With the advent of electronic data exchange and other paperless transactions, there is some question as to whether COGSA in its current form would include such materials as a bill of lading or document of title. The bill would substitute "contracts of carriage" for "bills of lading" in most instances and would recognize an electronic bill of lading as a contract of carriage.[11]

D. Deck Carriage

The original Hague Rules contemplated that deck carriage of goods was particularly risky and it would be unfair to hold ocean carriers to the statutory standards in such circumstances.[12] Modern vessel design, however, accommodates on-deck carriage in many instances. The bill would amend COGSA to include on-deck carriage and thus better define the rights and responsibilities of the parties.[13]

E. Domestic Trade

The proposed amendments would apply to all domestic shipments involving carriage by sea for some or all of the journey. The proposed Act is intended to apply only when blue water voyages are involved as part of the contractual transportation.[14]

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6. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608.
7. The following countries have ratified the Hamburg Rules: Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Egypt, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, and Zambia.
8. Maritime L. Ass'n of the United States, Final Report of the Ad Hoc Liability Rules Study Group as Revised by the Ad Hoc Review Committee 11 (1996) [hereinafter Final Report].
9. *Id.* at 12.
10. *Id.* at 14.
11. *Id.*
12. *Id.* at 15.
13. *Id.*
14. *Id.*

F. Navigational Fault Exception

The proposed amendments eliminate the navigational fault exception under which, in the present statute, carriers may avoid liability by proving negligence on the part of their employees.[15] The amendment would provide further for an allocation of responsibility where loss or damage is attributable partially to carrier fault and partially to excepted perils listed in the Act. The result would be statutory recognition of the contemporary doctrine of comparative fault.[16]

G. The Fire Exception

The proposed bill retains the fire exception but requires that the ocean carrier claim the exception only on a vessel it has furnished and only if the fire was not caused by its actual fault or privity. The exception may also be claimed by a contracting carrier unless the fire was caused by its actual fault or privity.

H. Per Package Limitation

The per package limit of liability would be revised under the proposed legislation to provide a weight-based limitation scheme when the package weighs more than 735 pounds but provides for use of the traditional package limitation when it weighs less than 735 pounds.[17] Further, the proposed amendments make the limitation stronger than in its present form by providing that an ocean carrier will not lose the benefit of unit limitation merely because some action falls within the definition of "deviation" but an unreasonable deviation of such seriousness that the carrier knew or should have known in loss or damage will strip the carrier of limitation rights.[18] By like token, intentional misconduct will strip the carrier of the benefit of limitation.[19]

I. Deviation

Under this change the carrier can still claim the per package limitation in the event of deviation in the voyage unless the deviation was so reckless as to amount to misconduct of the sort described above.[20] The effect is to eliminate the per se rule against even minor departures from the contractual voyage.

J. "Himalaya" Clauses

Because the proposed bill generously expands the definition of "carrier" and thus extends the statutory limitations and defenses to virtually any person or entity performing any of the carrier's functions under a contract of carriage, the Himalaya Clause in bills of lading will become unnecessary under an amended COGSA.

K. Admiralty Jurisdiction and Coverage

The proposed bill specifies that the amended Act shall provide an independent basis for admiralty jurisdiction even in instances arguably outside the scope of 28 U.S.C. § 1333(1).

15. *Id.* at 16.
16. *Id.*
17. *Id.* at 18.
18. *Id.* at 21.
19. *Id.*
20. *Id.*

It would have no impact on "saving to suitors" lawsuits brought in state court but it would specify that COGSA preempts application of any other substantive law or theory of recovery.[21]

L. Qualifying Statements

The proposed legislation amends § 3(3) of the 1936 Act to clarify that the shipper has the option to demand a negotiable bill of lading or other contract of carriage but, once issued, it must contain the information required by subsection 3(3) which information may be qualified.[22] A further provision makes invalid any statement disclaiming responsibility for the accuracy of the information.[23]

M. Forum Selection Clauses

Cargo interests gain greater protection than the current law provides under the proposed amendments in reference to forum selection clauses. The proposed bill provides that if the goods are loaded or discharged in a U.S. port, or if the carrier receives or delivers the goods in the United States, or if it was the intent of any of the parties that any of these events take place in the United States, then a foreign forum selection clause or a foreign arbitration clause would be invalid under the amended Act.[24] The proposed bill provides that the parties are free to agree on foreign litigation or arbitration after a claim has arisen.[25]

N. The Pomerene Act

Some of the proposed changes require modification of the Pomerene Act, chiefly relative to bills of lading and the expanded scope of coverage under an amended COGSA. The changes are intended to bring the statutes into harmony and to provide that to the extent there is any inconsistency COGSA will govern where the statute applies. In cases outside the scope of COGSA, the Pomerene Act is unaffected by the proposed bill.

O. Service Contracts

The existing statute provides that shippers are protected by the rule that the bill of lading can increase a carrier's liability but may not decrease it below levels established in the Rules and under COGSA. The proposed legislation would permit the immediate parties to a service contract to reduce the liability below COGSA levels. Such an agreement would bind only the parties thereto.

III. Significant Case Law Developments

A. Vimar Seguros Y Reaseguros, S.A. v. M/V *Sky Reefer*

One of the longstanding issues in ocean carriage of goods has been whether foreign forum selection and foreign arbitration clauses in ocean bills of lading violate the carriage of goods by Sea Act (COGSA). In *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, the U.S. Supreme Court addressed the validity of these clauses.[26]

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21. *Id.* at 24.
22. *Id.* at 29.
23. *Id.*
24. *Id.* at 31.
25. *Id.*
26. 115 S. Ct. 2322 (1995).

In that case, a U.S. shipper time chartered the Panamanian-owned M/V *Sky Reefer*, a refrigerated cargo ship, from a Japanese carrier to transport a cargo of oranges and lemons from Morocco to Massachusetts. Thousands of boxes of oranges shifted during the voyage, resulting in over $1 million of damage. The shipper sued in a U.S. court and the Japanese carrier moved to compel arbitration in Tokyo pursuant to the Federal Arbitration Act (FAA) and the Bill of Ladings Arbitration Clause which provided that "Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo."[27] The shipper relied on § 3(8) of COGSA, which invalidates any provision in a bill of lading that "lessens" the carrier's liability. The shipper argued that arbitration in Tokyo would cause considerable added expense and, as a practical matter, would lessen the liability of the carrier. The shipper also argued that a conflict between COGSA and the FAA should be resolved in favor of COGSA.

After examining the determinative provision in COGSA, the U.S. Supreme Court found no conflict between the FAA and COGSA because foreign arbitration clauses do not violate COGSA.[28] According to the Court, the prohibition in § 3(8) refers only to liabilities "arising from negligence, fault, or failure in the duties or obligations *provided in this section*."[29] (Emphasis added.) It does not include the cost of proceedings to enforce all obligations arising from COGSA. Further, the Court stated that this rationale applied not only to foreign arbitration clauses but also to foreign forum selection clauses, in general.[30]

In so holding, the Court rejected the rationale of the *Indussa* court where the Second Circuit held that a forum selection clause in an ocean bill of lading governed by COGSA was invalid because it tended to lessen the carrier's liability.[31] The *Indussa* court determined that such a clause put a "high hurdle" on the plaintiff's ability to enforce liability because it forced suit to be brought in an inconvenient forum.[32]

The U.S. Supreme Court noted that its new ruling rejecting *Indussa* was consistent with the goals of the Hague rules, on which COGSA is based, and with contemporary principals of international comity and commercial practice. The Court stated:

> If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements. That concern counsels against construing COGSA to nullify foreign arbitration clauses because of inconvenience to the plaintiff or insular distrust of the ability of foreign arbitrators to apply the law.[33]

The shipper in *M/V Sky Reefer* also argued that the arbitration clause should not be enforced because the bill called for application of Japanese law.[34] The Japanese arbitrators would, therefore, follow the Japanese Hague rules, which provide carriers with a defense based on the acts or omissions of the stevedores hired by the shipper—a defense arguably not available under COGSA that might thereby lessen the liability of the carrier.[35] While the Court found more substance in this argument, it nevertheless held that the issue was premature because it could not predict

27. *Id.* at 2424.
28. *Id.* at 2326.
29. *Id.*
30. *Id.*
31. Indussa Corporation v. SS *Ranborg*, 377 F.2d 200 (2d Cir. 1967).
32. *Id.* at 203.
33. *M/V Sky Reefer*, 115 S. Ct. at 2379.
34. *Id.* at 2329.
35. *Id.*

what the Japanese arbitrators would do. The district court retained jurisdiction over the case and would have the opportunity to review the choice-of-law decision made by the arbitrators when one of the parties moved the court to enforce any arbitration award. If there were no opportunity to review the choice-of-law decision, leading to a loss of the shipper's right to pursue its statutory remedies, the court indicated it "would have little hesitation in condemning the agreement as against public policy."[36] However, because the district court could consider the award at the enforcement stage and determine whether the arbitration clause and choice-of-law clause had operated in such a way as to be repugnant to United States public policy, it upheld the validity of the clause.

B. BANANA SERVICES, INC. v. M/V *TASMAN STAR*

In the *Banana Services* case, the charterer of a vessel entered into a contract with a shipper to transport bananas from Ecuador and Colombia to Florida.[37] During the voyage from Colombia to Florida, a fire broke out in the engine room, thereby damaging the refrigeration control panels. The vessel returned to Colombia where it was determined that timely repairs to the refrigeration system could not be made. The shipowner and charterer decided to proceed to Florida with the cargo, despite the refrigeration failure. When the vessel arrived in Florida, the attending surveyors determined that the fruit was not marketable because the pulp temperature exceeded industry standards.

The shipper filed suit against the charterer and shipowner seeking more than $1.1 million in damages. The shipowner and charterer invoked the COGSA fire exception, 46 U.S.C. § 1304(2)(b), and the fire statute, 46 U.S.C. § 182. After a bench trial, the district court entered judgment against the shipper. The shipper appealed, asserting that the owner and charterer could not assert these defenses without first demonstrating that they had acted with due diligence to provide a seaworthy vessel.

The Eleventh Circuit affirmed the district court's decision and addressed three aspects of COGSA's fire exception and the fire statute. First, the court noted that, although the "actual fault or privity" language of COGSA's fire exception differs from the "design or neglect" language of the fire statute, "the phrases are functionally equivalent."[38] Second, the court confirmed that a fire need not directly ignite the cargo to be the cause of the cargo damage under COGSA. Accordingly, the court affirmed the district court's finding that the cargo was destroyed by fire because fire damaged the vessel's refrigeration control panels, preventing refrigeration of the bananas.[39] Third, the court specifically rejected the Ninth Circuit's applicable test and joined the Second and Fifth Circuits in holding that COGSA does not require a carrier to demonstrate due diligence as a condition precedent to invoking the COGSA fire exception or the fire statute.[40]

C. WORLD TANKER CARRIERS CORPORATION v. M/V *YA MAWLAYA*

In *World Tanker Carriers* two vessels, the M/V *Ya Mawlaya* and the M/V *New World*, collided in international waters off the coast of Portugal.[41] The M/V *New World* was an

36. *Id.* at 2330.
37. 68 F.3d 418 (11th Cir. 1995).
38. *Id.* at 420.
39. *Id.* at 420-21.
40. *Id.* at 421.
41. 99 F.3d 717 (5th Cir. 1996).

oceangoing tanker registered under the laws of Hong Kong and owned by World Tanker Carrier Corporation of Liberia. The *M/V Ya Mawlaya* was an oceangoing bulk carrier registered under the laws of Cyprus, and was proceeding to Italy with a cargo of soybeans owned by Cereol Italia SRL and loaded in Destrehan, Louisiana, within the Port of New Orleans. The ownership of the *M/V Ya Mawlaya* was in dispute, but all parties allegedly having an interest in the *M/V Ya Mawlaya* were named as defendants.

The collision caused an explosion and fire, resulting in numerous personal injuries and property damage. One of the alleged owners of the *M/V Ya Mawlaya* filed a limitation action, and all the suits were consolidated in the limitation.

Defendants then moved to dismiss all the proceedings against them, asserting as a defense lack of personal jurisdiction. The district court granted the Motion to Dismiss holding that neither Louisiana's Long Arm Statute nor Federal Rules of Civil Procedure Rule 4(k)(2) provided a basis for personal jurisdiction over the defendants. The court first found that World Tanker failed to establish a prima facie case of jurisdiction demonstrating the defendants' minimum contacts with Louisiana were sufficient to satisfy the due process requirements of the State Long Arm Statute. The court then dismissed the case for lack of jurisdiction on the theory that it could not order the requested additional jurisdictional discovery under Rule 4(k)(2) because the consolidated cases did not present a claim "arising under federal law," the jurisdictional predicate of Rule 4(k)(2). The court interpreted this phrase as a reference to "federal question cases" and, therefore, found the rule inapposite insofar as World Tanker had not raised a federal question claim against the defendants. The court of appeal reversed.[42]

Initially, the appellate court noted that whether admiralty actions arise under federal law was an issue of first impression for the court. Accordingly, before a determination could be made as to whether admiralty claims fall under Rule 4(k)(2), the court had to consider the meaning of arising under federal law.

The court went on to discuss the Advisory Committee notes following Rule 4(k)(2), and indicated that the use of the word "any" to qualify "federal law" strongly suggested that the Advisory Committee intended Rule 4(k)(2) to reach not just federal question cases under § 1331 but all claims arising under substantive federal law.[43] Further, according to the court, the Rule's legislative history supported a broad interpretation in that, prior to enactment of the Rule, there was a gap in the court's jurisdiction:

> [W]hile a defendant may have sufficient contacts with the United States as a whole to satisfy due process concerns, if she had insufficient contacts with any single state, she would not be amenable to service by a federal court sitting in that state.[44]

According to the court, Rule 4(k)2 was adopted in response to this problem, and the court found no suggestion in the notes discussing Rule 4(k)(2) that the Rule was meant as a companion to 28 U.S.C. § 1331. For these reasons, the court held that, for purposes of Rule 4(k)(2), "arising under federal law" refers not only to federal question cases as understood in § 1331, but to all substantive federal law claims.

With respect to the applicability of Rule 4(k)(2) to admiralty cases, the court made reference to the case of *Romero v. International Terminal Operating Co.*[45] which the district court relied

42. *Id.* at 720.
43. *Id.*
44. *Id.* at 721.
45. 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959).

upon in sustaining the defendants' exceptions.[46] While the court recognized that the *Romero* principal has had procedural importance in the context of removal jurisdiction and the right to jury trial, the court pointed out that Justice Frankfurter's opinion in *Romero* referred repeatedly to "federal maritime law," and uncritically accepted the idea that the general maritime law constitutes federal law.[47]

Further, the court relied on Article 3 § 2, Clause 3 of the U.S. Constitution which extends the judicial power of the federal sovereign to "all cases of admiralty and maritime jurisdiction."[48] The court also cited 28 U.S.C. § 1333 which provides in part:

> The district courts shall have original jurisdiction, exclusive of the courts of the states, of:
> 1. Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all of the remedies to which they are otherwise entitled.[49]

According to the court, the first clause of § 1333 allocates to federal courts the power to hear any matter which is in admiralty, regardless of the existence of a federal statute creating the maritime right, diversity of citizenship, or the minimum amount in controversy. The second clause grants state courts subject matter jurisdiction, concurrent with federal courts, over most maritime matters. The court found it significant that the second clause does not "grant states the right to apply their own substantive law to maritime matters pending in their courts . . ."[50] See Frank L. Maraist, *Admiralty* 10 (3d Ed. 1996). Thus, application of the substantive law of the state with the most significant relationship to the controversy is appropriate only when the "maritime but local" doctrine applies; that is, when the matter is maritime in nature but there is neither an applicable federal statute governing the claim nor a perceived need for uniformity of maritime law.

Thus, according to the court, "[t]he substantive maritime law of the United States is federal law, except in the limited circumstances where the "maritime but local" doctrine applies."[51] Moreover, the court observed that, since the enactment of Rule 4(k)(2), several district courts have recognized its applicability to admiralty cases. For all of these reasons, the court concluded that federal law includes admiralty cases for the purposes of Rule 4(k)(2).[52]

The court then moved on to a consideration of whether the Rule provided a basis for personal jurisdiction over the defendants under the familiar minimum contacts analysis used to determine whether the assertion of personal jurisdiction would offend "traditional notions of fair play and substantial justice."[53] The court noted that "the burden of persuasion lies with plaintiff to make a prima facie showing of the defendants nationwide minimum contacts" and, "based on the record before it, (the court concluded) that World Tanker had not carried its burden."[54] However, the court was persuaded by World Tanker's argument that the district court foreclosed World Tanker's ability to make its prima facie showing when it dismissed the jurisdictional claim.

46. *World Tanker*, 99 F.3d at 722.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* (quoting Frank L. Maraist, Admiralty 10, 3d ed. 1996).
51. World Tanker, Carriers, Corp. v. M/V *Ya Mawlaya*, 99 F.3d 771, 723 (5th Cir. 1996).
52. *Id.*
53. *Id.*
54. *Id.*

According to the Court of Appeal, the district "court's finding was premised on an [erroneous] conclusion that Rule 4(k)(2) did not apply to admiralty cases, and, thus, an analysis of the defendants' nationwide contacts would be irrelevant."[55] Accordingly, the court of appeal "reversed and remanded the case to the district court for additional jurisdictional discovery as to the [defendants'] nationwide contacts and further proceedings consistent with the opinion."[56]

D. Silver Star Enterprises, Inc. v. M/V *Saramacca*[57]

In this matter Transocean, Ltd., a lessor of cargo containers, provided 122 cargo containers to Scheepvaart Maatschappij Suriname N.V. (SMS), a corporate entity which operated a shipping container service and chartered eight vessels including the M/V *Saramacca*. When SMS failed to pay Transocean lease payments for the container rental, Transocean seized the vessel claiming maritime lien rights against the containers aboard the M/V *Saramacca*. Transocean moved for summary judgment demonstrating that 64 of the 122 containers leased were used at least once aboard the M/V *Saramacca* and ten had been used exclusively aboard the seized vessel. The district court granted partial summary judgment in the favor of Transocean acknowledging a maritime lien for past due rentals, repair costs, and depreciated replacement value for the ten containers used exclusively aboard the M/V *Saramacca*. In reaching the conclusion, the court held that for purposes of establishing a maritime lien, it was not necessary that the containers be earmarked for use aboard a particular vessel. Silver Star appealed the judgment and the matter went before the Fifth Circuit.

By way of background, it is imperative to know that the second, fourth, and ninth circuits had held for slightly different reasons that bulk lessors of containers do not have maritime lien rights against vessels operated by owners or charterers of multiple vessels. Whereas the courts recognized that provision of a container to a vessel would constitute a maritime lien, when bulk lessors provide numbers of containers in bulk, the courts did not feel that they were provided for the benefit of individual vessels.

Whereas the Fifth Circuit in *Equilease v. M/V Sampson* gave the "furnishing" requirement of the maritime lien act a very broad application, the Court declined to extend the broad interpretation in the present.[58] They went on to indicate that the reasoning of their sister circuits was dispositive on the issue. They felt that Silver Star furnished containers to SMS, not the SMS vessels, and it was SMS that ultimately dictated what containers were placed on what vessels. Neither party knew aboard which ship in particular a container would be placed at any given time and basically do to the fluidity of intermodal transport, it could not be said that the containers were earmarked to a particular vessel nor that necessaries were provided to a vessel as required by the FMLA. It is also important to note that the Court felt that a decision by it creating a circuit split in permitting the affixation of maritime liens for bulk container lessors in one part of the country would spawn uncertainty compounded by form shopping and extravagant lien claims. They concluded their opinion by indicating "that Transocean arguments are compelling, they should find a sympathetic hearing in Congress."

55. *Id.* at 724.
56. *Id.*
57. 82 F.3d 666 (5th Cir. 1996).
58. 93 F.2d 598 (5th Cir. 1986), *cert denied*, 479 05984 (1986).