Articles

COGSA v. Carmack

Professor Robert Force*

FUNDAMENTALS OF ADMIRALTY JURISDICTION

The judicial power of the United States is set forth in Article III of the Unite States Constitution.[1] The judicial branch, like the executive and legislative branches, is a branch of limited powers. Just as Articles I and II of the Constitution enumerate executive and legislative powers, Article III of the Constitution specifies the types of cases that can be heard in the federal courts. Article III provides *inter alia*: "The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction."[2] Why does the Constitution use two terms, "admiralty" and "maritime"? Both historically and today those two terms are used interchangeably. They do not have distinct meanings. No one knows why both of those terms were used. There has been speculation,[3] but as a practical matter the use of the two words "admiralty" and "maritime" has had no impact in ascertaining the scope of jurisdiction or in respect to the subject matter related to these terms. The crucial question then is what is a case of "admiralty and maritime" jurisdiction? The Constitution itself provides no clue, and Congress has not been very helpful. For example, 28 U.S.C. § 1333, simply states: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other

* Niels F. Johnsen Professor of Maritime Law and Director Emeritus, Tulane Maritime Law Center.

1. U.S. CONST. art. III, § 1.

2. U.S. CONST. art. III, § 2, cl. 1.

3. WEST'S ENCYCLOPEDIA OF AMERICAN LAW 115-116 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2005).

remedies to which they are otherwise entitled."[4] By and large, it has been left to the federal courts to define their own "admiralty and maritime" jurisdiction. The federal courts, led by the United States Supreme Court, have developed tests or criteria to determine whether or not particular types of cases fall within the constitutional and statutory reference to "admiralty and maritime" jurisdiction.

One major test is used in tort cases and a different test is used in contract cases. In tort cases, the courts initially applied a simple locality test.[5] If the tort occurred in "navigable waters,"[6] it fell within the maritime jurisdiction of the federal courts. If the tort occurred on land, then it was not within admiralty jurisdiction.[7] Congress, however, did make a slight modification to this test when it enacted the Admiralty Extension Act,[8] which provides that where a vessel in navigable waters causes injury that occurs on land, admiralty jurisdiction extends to such events. The Supreme Court in more recent years has modified the test for admiralty tort jurisdiction by requiring that in addition to maritime location that the tort bears "a substantial relationship to traditional maritime activity."[9] This connection or nexus test is composed of two components, to wit (1) " [a] court, first, must 'assess the general features of the type incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce,' and (2) "a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[10]

In contrast to the approach in tort cases, where the place where the tort occurred is a crucial element in determining admiralty jurisdiction, in contract cases the jurisdictional inquiry looks primarily to the nature of the contract.[11] Thus contracts that deal with the use of a ship and the performance of transportation of goods and persons over water are generally maritime contracts.[12] There are some anomalies in the cases that fall within admiralty contract jurisdiction. For example, a contract to build a ship is not a maritime contract, whereas a contract to repair a ship

4. 28 U.S.C.A. § 1333 (1948).

5. Thomas v. Lane, 23 F. Cas. 957, 960 (C.C. Me. 1813) (No. 13,902); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531-532 (1995).

6. Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296, 298 (1857); LeBlanc v. Cleveland, 198 F.3d 353, 356 (2d Cir. 1999); *Grubart*, 513 U.S. at 534.

7. *Grubart*, 513 U.S. at 531-532.

8. The Admiralty Extension Act, 46 U.S.C. § 30101 (2006).

9. Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 256 (1972); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675 (1982); Sisson v. Ruby, 497 U.S. 358, 361-362 (1990).

10. *Grubart*, 513 U.S. at 534.

11. Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 26 (1870).

12. CTI-Container Leasing Corp. v. Oceanic Operations Corp., 682 F.2d 377, 379 (2d Cir. 1982).

is.[13] A contract to sell a ship is not a maritime contract but a contract to charter a ship is a maritime contract.[14] These are historical anomalies and there probably are not sound rationalizations for these distinctions today. Nevertheless, there seems to be no movement to abandon these distinctions.[15]

In cases that fall within admiralty jurisdiction what substantive law applies, federal or state law? In other words, does federal law preempt state law? This is a topic that could take several days to discuss and I will make only a few comments. The preemption issue arises more in the regulatory area than in the garden-variety tort or contract areas.[16] There are a considerable number of federal navigation and safety statutes accompanied by even more regulations promulgated by the U.S. Coast Guard.[17] There have been several major cases in recent years where states have tried to impose additional requirements in order to better protect their waters, ports, and other infrastructure.[18] The federal government and the maritime industry have challenged some of these on federal preemption grounds.[19] Sometimes the states win, and sometimes they lose.[20]

In non-regulatory areas of maritime law, especially in the area of the private law of contracts and torts, there are comparatively few federal statutes. Most of the maritime tort law and contract law is jurisprudential,[21] that is, it derives from judicial decisions. In these areas there is a

13. *Id.* at 380; The Jefferson, 61 U.S. (20 How.) 393, 399-400 (1857); The Jack-O-Lantern, 258 U.S. 96, 99 (1922).

14. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 22, (1957).

15. *Id.* at 29-31; *see also* Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1372 (1999) (noting anomalies exist within the general maritime law).

16. *See e.g.*, Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. L. & COM. 517 (2001) (discussing the proposition that preemption is less of an issue in the areas of maritime tort and contract claims than claims concerning regulatory maritime issues).

17. *See, e.g.*, 46 U.S.C. § 501 (2008); 46 U.S.C. §§ 3203-3204 (2004); 46 U.S.C. § 4102 (1998); 46 U.S.C. § 4502 (1998); 33 C.F.R. § 19.01 (2009); 33 C.F.R. § 62.21 (2004); 33 C.F.R. §§ 96.100-96.110 (2003); 33 C.F.R. §§ 96.200-96.230 (2003).

18. *See* Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 14 (1937); United States v. Locke, 529 U.S. 89, 97 (2000).

19. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 440-441 (1960); Ray v. Atlantic Richfield Co., 435 U.S. 151, 154-155 (1978).

20. *Compare Kelly*, 302 U.S. at 15-16 (holding that the state act had a permissible field of operation in relations to the owner's tugs), *and Huron*, 362 U.S. at 448 (holding that the local ordinance could be constitutionally applied to the manufacturer's vessels), *with Ray*, 435 U.S. at 165-166 (holding that enforcement of some of the state Tanker Law requirements would at least frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers), *and Locke*, 529 U.S. at 117 (reversing a decision that state could enforce its laws regulating oil tankers because the federal statutory scheme governing oil tankers preempted the state regulations).

21. Force, *supra* note 15, at 1369-1371.

factor that complicates the determination of whether or not the decisions by the federal courts are preemptive of state law. The basic congressional grant of admiralty jurisdiction to the federal courts in implementing Article III of the Constitution, 28 U.S.C. § 1333, qualifies the grant of admiralty and maritime jurisdiction by adding the clause: "saving to suitors in all cases all other remedies to which they are otherwise entitled."[22] This qualification is referred to simply as the "saving to suitors clause."[23] For all practical purposes, what this means is that virtually any tort or contract case that could be brought in federal court seeking to impose *in personam* liability under admiralty jurisdiction can be brought in an appropriate state court at the option of the plaintiff. In giving support to this statutorily provided option, the federal courts have placed limits on defendants' right of removal.[24] When a suit that could have been brought in federal court under 28 U.S.C. § 1333 is brought in a state court under the saving to suitors clause what law should the state court apply? Is it free to apply its own state law of contracts or state law of negligence or must it apply federal law? This is a very complicated question.[25] As a general proposition, as stated by the Supreme Court on a number of occasions, with admiralty jurisdiction comes the application of substantive maritime law.[26] What this means is that in most cases state courts are not free to apply their own law unless it is harmonious with federal law. This default rule requires the application of federal maritime law.[27] There are exceptions to the rule, most notably in the area of marine insurance where not only state courts but federal courts as well apply state insurance law.[28]

In the area of carriage of goods by sea, Congress has legislated substantively by enacting first the Harter Act[29] and then the Carriage of Goods by Sea Act (hereinafter COGSA).[30] Although COGSA expressly applies only to foreign commerce,[31] (from a U.S. port to a foreign port or from a foreign port to a U.S. port) it does specifically authorize parties to adopt it as a contractual term in shipping documents issued for domestic

22. 28 U.S.C. § 1333 (1948).

23. Force, *supra* note 15, at 1379-1380.

24. *Id.* at 1383-1384.

25. *See* Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1435-1436 (2001); Force, *supra* note 16, at 517-518.

26. *See, e.g.*, *Grubart*, 513 U.S. at 546.

27. *Id.* at 545 (citing East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)).

28. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314-316 (1955).

29. The Harter Act, 46 U.S.C. §§ 30702-30707 (2006).

30. The Carriage of Goods by Sea Act, 46 U.S.C. § 30701 (2006) (the Act is contained in the statutory notes).

31. *Id.* § 30701 note sec. 13.

transport.[32] In domestic water transport, it is not uncommon for the contract of carriage to incorporate the terms of COGSA by reference. Inasmuch as Congress has indicated its intention to establish substantive rules regarding maritime commerce, states are not permitted to interfere with these rules. If a case brought in a state court falls within the parameters of COGSA, the state court must apply COGSA.[33] However, the interpretations of federal courts interpreting and applying COGSA, other than decisions by the Supreme Court, are not binding on state courts.

Two other points are relevant. First COGSA expressly does not apply to the entire period of time for which a carrier may be responsible for goods.[34] It applies only to the period "from the time when the goods are loaded on to the time when they are discharged from the ship."[35] Subject to the provisions of the Harter Act, COGSA, however, expressly authorizes the parties to enter:

> [I]nto any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care of the goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.[36]

This provision, *inter alia*, allows a carrier to insert a clause in a bill of lading that extends the application of COGSA to the entire period of time for which the carrier is responsible for the goods.[37] Furthermore, although COGSA is silent on the matter, a carrier is permitted to insert in a bill of lading a clause, called a Himalaya Clause, that extends the defenses, limitation of liability, statute of limitations, and other benefits provided to a carrier under COGSA to others who play a role in helping the carrier fulfill its obligations under its contract of carriage.[38] The Himalaya Clause has been enforced not only with respect to those actors closely connected to the sea leg of the transportation, such as stevedores and terminal operators, but to overland transporters as well.[39]

Mixed Contracts and the *Kirby* Decision

Contemporary transport contracts are often mixed contracts, as in the case of a through bill of lading, in that they encompass transport both

32. *Id.* § 30701 note sec. 7.
33. *See* Polo Ralph Lauren, L.P. v. Tropical Shipping & Const. Co., 215 F.3d 1217, 1220 (11th Cir. 2000).
34. 46 U.S.C. § 30701 note sec. 1(e).
35. *Id.*
36. *Id.* § 30701 note sec. 7.
37. *See* Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 29 (2004).
38. *See id.* at 20.
39. *Id.* at 32.

by sea and by land. From a maritime perspective, jurisdiction over mixed contracts is not a model of clarity. Prior to *Norfolk Southern Ry. Co. v. Kirby*,[40] the rule was rather simply stated but not so easily applied. A mixed contract did not fall within admiralty jurisdiction except in two instances. First, when the land-based element of the transaction was relatively minor and the dominant substance of the contract was maritime in nature, a court could exercise admiralty jurisdiction.[41] Second, where the maritime segment and land-based segment were severable, a court could exercise jurisdiction over the maritime dispute, but it could not exercise jurisdiction over a dispute involving the land-based segment.[42]

Norfolk Southern Railway Co. v. Kirby, decided by the U.S. Supreme Court in 2004, involved a shipment from Australia to Alabama.[43] Two bills of lading were issued. The first, issued by a freight forwarder, ICC, designated Sidney, Australia, as the port of loading; Savannah, Georgia, as the port of discharge; and Huntsville, Alabama, as the ultimate destination for delivery.[44] The freight forwarder then contracted with the actual ocean carrier, Hamburg Sud, which issued its bill of lading to the freight forwarder.[45] The bill of lading issued by the actual carrier also listed Sidney, Savannah, and Huntsville.[46] The freight forwarder's bill of lading adopted the COGSA limitation of liability regime, but for the land leg it provided for a higher limitation amount.[47] The bill of lading issued by Hamburg Sud, the actual carrier, adopted COGSA's $500 per package limit and extended its application to the point of actual delivery.[48] That bill also contained, as did the freight forwarder's bill, a broad Himalaya Clause which extended the benefits of the bill of lading, including the limitation provision, to any person including independent contractors.[49] Hamburg Sud, the actual sea carrier, contracted with Norfolk Southern to perform the land leg of the carriage by rail.[50] As luck would have it, the train wrecked and the cargo was damaged during the land leg.[51]

There are two issues in the case. The first is whether or not a suit brought to recover damages for property—that was damaged on land

40. *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14.

41. *See id.* at 26-27.

42. *See e.g.*, Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 109 (2d. Cir. 1997).

43. *Kirby*, 543 U.S. at 18.

44. *Id.* at 19.

45. *Id.* at 21.

46. *Id.* at 19.

47. *Id.* at 20.

48. *Id.* at 21.

49. *Id.*

50. *Id.*

51. *Id.* at 18.

while an overland carrier pursuant to a marine bill of lading was transporting it—falls within admiralty jurisdiction.[52] The Court characterizes both bills of landing as maritime contracts because their primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States.[53] The mere fact that transport over land was to occur subsequently is not determinative of admiralty jurisdiction. Unlike the approach in tort cases where the location of the tort is important, with regard to jurisdiction in contract cases, the court reiterated that it takes a "conceptual" approach.[54] "[T]he fundamental interest giving rise to maritime jurisdiction is 'protection of maritime commerce,'"[55] and using a "conceptual approach vindicates that interest by focusing . . . on whether the principal objective of the contract is maritime commerce."[56] In this context "the shore" is not an appropriate place to draw a line.[57] It was significant to the Court that "[m]aritime commerce has evolved along with the nature of transportation and is often inseparable from some land based obligations."[58] "The international transportation industry 'clearly has moved into a new era—the age of multimodalism, door-to-door transport based on the efficient use of all available modes of transportation by air, water, and land.'"[59] Goods stowed in containers are readily moved from one mode of transport to another. The Court specifically noted the use of through bills of lading, which can cover the transportation across oceans to inland destinations in a single transaction.[60] The older approach to contract jurisdiction would have precluded the exercise of jurisdiction "to contracts which require maritime and nonmaritime transportation unless the nonmaritime transportation is merely incidental—and that long-distance land travel is not incidental."[61] Instead the Court fashioned a new rule for determining whether or not a contract is a maritime contract. "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage."[62] "Geography, then, is useful in a conceptual inquiry only in a limited sense: if a bill's *sea* components are in-

52. *Id.* at 30.
53. *Id.*
54. *Id.* at 23-25.
55. *Id.* at 25.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 25-26.
61. *Id.* at 26.
62. *Id.* at 27.

substantial then the bill is not a maritime contract."[63] To phrase it differently, if the sea transport is substantial then the contract will be a maritime contract.

Thus, *Kirby* has changed the approach to admiralty jurisdiction over mixed contracts in a very important way by substantially modifying the old rule. The emphasis pre-*Kirby* was on whether or not the land-based element was either inconsequential or severable. Post-*Kirby*, the focus is on the maritime component. The jurisdictional issue is resolved by determining whether or not the sea leg constitutes a substantial element of the transaction out of which the dispute arose. Notwithstanding that *Kirby* involved extensive overland transport, and the cargo damage occurred on the overland leg; those facts were not sufficient to defeat admiralty jurisdiction.[64] The Supreme Court found that the transportation from Australia to the U.S. by sea was a substantial component in the overall carriage of that particular cargo, and, therefore, it was appropriate for an admiralty court to take jurisdiction.[65] In determining whether or not to exercise admiralty jurisdiction in mixed contract cases post-*Kirby*, courts should ask whether or not the maritime component of the transport is substantial in light of the overall transportation undertaking.

Having determined that the contract is a maritime contract, the next question is whether or not a state law on contract interpretation should be utilized or whether federal rules for contract interpretation should be applied.[66] Here the Court noted that "our touchstone is a concern for the uniform meaning of maritime contracts."[67] The Court believed that the application of state law to bills of lading such as were involved in this case "would undermine the uniformity of the general maritime law."[68] It emphasized that clauses limiting liability in bills of lading are part of "international intermodal transportation", and that such clauses are used in bills of lading involving international transport throughout the world.[69] The Court observed "when a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation."[70] It reverted to the default rule previously mentioned: with admiralty jurisdiction comes the application of substantive admiralty law.[71] Maritime

63. *Id.*
64. *See id.* at 27.
65. *See id.* at 32.
66. *Id.* at 22-23.
67. *Id.* at 28.
68. *Id.*
69. *Id.*
70. *Id.* at 22-23.
71. *See* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 545 (1995) (citing East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)).

rules had to apply, and, if there were no maritime statutory rules, then the jurisprudential rules devised by the Supreme Court and other federal courts would govern the issue.

COGSA v. Carmack: The Circuit Split

The *Kirby* holding that federal law applies to maritime contracts that involve ocean transport, does not necessarily answer all of the questions that arise with regard to through bills of lading. In *Kirby*, the court looked only at the utilization of COGSA principally in terms of the limitation of liability provision. There is, however, another issue that has arisen and has resulted in a split in the circuits, that is: whether or not the COGSA or the Carmack Amendment[72] is the appropriate federal rule to be applied to these contracts? Two recent cases, and as will be discussed in the Postscript to this article, there is yet now a third case, demonstrate that there is a split in the circuits on this very important issue. In *Altadis USA, Inc. v. Sea Star Line, LLC*,[73] the Court of Appeals for the Eleventh Circuit held that the Carmack Amendment was not applicable. In *Sompo Japan Ins. Co. of America v. Union Pacific Railroad Co.*,[74] the Second Circuit, in an opinion issued a month earlier, came to the opposite conclusion.

The arrangement in *Altadis* was a fairly common one. The goods were to be shipped from Puerto Rico to the port of Jacksonville, Florida, and from Jacksonville, they were to be taken overland to Tampa, Florida.[75] The shipper contracted with Sea Star, and Sea Star issued a single bill of lading covering the entire shipment from Puerto Rico to Tampa, Florida via Jacksonville.[76] There was a transportation service agreement (TSA) that governed the relations between Altadis and Sea Star.[77] The TSA stated that the bill of lading would govern the relationship between the carrier and the shipper and be subject to COGSA.[78] It also included "inland carriers" as part of the definition of carrier in the agreement and expressly extended the benefits of the TSA to "all parties performing services for or on behalf of the carrier or vessel, its employees, servants, agents or contractors including without limitation . . . inland carriers."[79] When the ship arrived in Jacksonville, American Trans-Freight (ATF) took possession of the cargo as the inland carrier responsible for deliver-

72. 49 U.S.C. § 14706 (2005).
73. Altadis USA, Inc., v. Sea Star Line, LLC, 458 F.3d 1288, 1290 (11th Cir. 2006).
74. Sompo Japan Ins. Co. of Am. v. Union Pacific R.R. Co., 456 F.3d 54, 69 (2d Cir. 2006).
75. *Altadis*, 458 F.3d at 1289.
76. *Id.*
77. *Id.* at 1289 n.1.
78. *Id.*
79. *Id.*

ing the shipment to Altadis.[80] After the overland truck carrier took possession of the cargo the driver, at some point during the transport, parked the truck in a closed gas station and left the vehicle over night.[81] When he came back, the container was gone and, subsequently, was found empty at another location.[82] Sea Star had also entered into an agreement with ATF in the form of the Uniform Intermodal Interchange and Facilities Access Agreement.[83] Under this agreement, Sea Star stated that it would from time to time hire ATF to transport to various locations containers that Sea Star had transported to Jacksonville by ocean carrier under an intermodal through bill of lading.[84] This agreement governed the relations between Sea Star and ATF including an indemnity provision.[85] The shipper sued the Sea Star and ATF. The issue was whether or not the one-year limitation period authorized by COGSA, or the two-year limitation period provided for in the Carmack Amendment was applicable.[86] The district held that the Carmack Amendment was not applicable and the Eleventh Circuit affirmed.[87]

In affirming, the appellate court stated:

> The case law has established that the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and an overland leg to the final destination in the United States) unless the domestic, overland leg is covered by a separate bill of lading.[88]

The court cites cases from the Sixth Circuit,[89] Fourth Circuit[90] and Seventh Circuit[91] as supporting that position.[92] The court, in part, relied on *Kirby*[93] to reject the contention that a separate bill of lading is not required. The *Altadis* court noted that *Kirby* stood for the proposition that a bill of lading is a maritime contract as long as a substantial carriage of goods by sea is involved.[94] The court stated that the Supreme Court in

80. *Id.* at 1289.
81. *Id.*, at 1289-1290.
82. *Id.*, at 1290.
83. *Id.* at 1289 n.2.
84. *Id.*
85. *Id.*
86. *Id.* at 1290.
87. *Id.*
88. *Id.* at 1291.
89. *Id.* at 1292 (citing Amer. Road Serv. Co. v. Consol. Rail, 348 F.3d 565 (6th Cir. 2003)).
90. *Id.* (citing Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700 (4th Cir. 1993)).
91. *Id.* (citing Capitol Converting Equip. v. LEP Transp. Inc., 965 F.2d 391 (7th Cir. 1992)).
92. The court in *Altadis* states that the only circuit to express a contrary opinion is the Ninth Circuit in *Neptune Orient Lines, Ltd. v. Burlington N. and Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir. 2000). *Cf.*, Sea-Land Serv., Inc. v. Lozen Int'l., LLC, 285 F.3d 808 (9th Cir. 2002).
93. The Carmack Amendment issue was not before the Supreme Court in *Kirby*.
94. *Altadis*, 458 F.3d at 1294.

Kirby stressed the need for uniformity in the general maritime law in order to facilitate efficient contracting for carriage of goods by sea.[95] It also found support for its conclusion in the fact that the Supreme Court in *Kirby* held that "a single Himalaya Clause can cover both sea and land carriers downstream."[96] The court in *Altadis* states that to accept the application of the Carmack Amendment in situations such as this, "would introduce uncertainty and lack of uniformity into the process of contracting for the carriage by sea, upsetting contractual expectations expressed in through bills of lading."[97] The court reads *Kirby* as standing for the proposition "that a rail carrier on the inland leg of a maritime contract is protected by the limitations in a through bill of lading."[98] The *Altadis* court states that "[t]he apparent purpose of COGSA to 'facilitate efficient contracting in contracts for carriage by sea' would be undermined,"[99] and concludes:

> [i]n light of the Supreme Court's opinion in *Norfolk Southern,* and almost uniform case law, and *dicta* in our own *Swift* decision, we hold that—in the absence of a separate domestic bill of lading covering the inland leg—the Carmack Amendment, and its two-year minimum statute of limitations, does not apply to this maritime contract covering a shipment pursuant to a single through bill of lading which governs the ocean voyage from Puerto Rico to Jacksonville and also the inland transportation to Tampa.[100]

Less than a month before the Eleventh Circuit announced its decision in *Altadis*, the Court of Appeals for the Second Circuit in *Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*—a similar fact situation—concluded that the Carmack Amendment did apply.[101] As pointed out by my former student Raymond Waid—in an article he prepared with some direction from me and published in the Transportation Law Journal[102]—the Court of Appeals for the Second Circuit in *Sompo*[103] adopted a rule that conflicts with those adopted in other circuits. As stated in *Altadis*, it has generally been agreed that where both sea and land transport are involved in a transaction, and a separate bill of lading has been issued for each of those stages, the Carmack Amendment—if otherwise applicable—governs the separate bill of lading issued for the land leg of

95. *Id.*
96. *Id.* (citing Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 29 (2004)).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Sompo Japan Ins. Co. v. Union Pac. R.R. Co., 456 F.3d 54 (2d Cir. 2006).
102. Raymond T. Waid, *Piloting in Post-Kirby Waters: Navigating the Circuit Split over whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading,* 34 TRANSP. L.J. 113 (2007).
103. *Sompo*, 456 F.3d at 75.

the transport.[104] However, as *Altadis* and Mr. Waid point out, courts in several circuits have held that the Carmack Amendment does not apply to a single transportation document that covers both sea and land transport such as a through bill of lading.[105]

This paper will not trace the history nor examine the case law on the applicability of the Carmack Amendment to through bills of lading. Although I do not necessarily agree with Mr. Waid's conclusion regarding the application of the Carmack Amendment, his article aptly outlines the history of the Amendment. Instead this paper will offer some comments about the Second Circuit's analysis regarding the relationship between COGSA and the Carmack Amendment. The court in *Sompo* finds crucial substantive differences between the law applicable to liability imposed under the Carmack Amendment, and that imposed under COGSA.[106] It points out that under COGSA, liability is based on fault, but under the Carmack Amendment there is "something close to strict liability."[107] This position, however, is not completely accurate. Although a literal reading of the Carmack Amendment appears to impose liability without fault, even the *Sompo* court acknowledges that Carmack is subject to common law defenses.[108] As a leading treatise on transportation law states:

> At common law and under the Carmack Amendment to the Interstate Commerce Act, once a plaintiff has established a *prima facie* case against the carrier or surface freight forwarder, the burden of proof shifts to the carrier to show that it was free from negligence and that the loss was caused solely by an act of God, the public enemy, the shipper, the public authority, or that the damage resulted from the nature of the goods, or an inherent vice in the goods.[109]

The defenses enumerated above are similar to the defenses in COGSA. COGSA, however, has additional defenses, but many of them are clearly inapplicable to damage or loss that occurs on the land leg. For example, the provisions on unseaworthiness are irrelevant to damage that is sustained during rail or truck transport. Likewise perils of the sea, errors in "navigation or management of the ship," quarantine restrictions, saving or attempting to save life at sea, and probably the fire defense simply are inapplicable to damage or loss that occurs on the land leg. The only COGSA defense that might have some significance is the so-called "q clause" where a carrier is relieved of liability when it can prove that

104. *Altadis,* 458 F.3d at 1290.
105. *Id.* at 1292; Waid, *supra* note 102 at 125-126.
106. *Sompo*, 456 F.3d at 59.
107. *Id.*
108. *Id.* at 59 n.8.
109. 1 SAUL SORKIN, GOODS IN TRANSIT § 5.05 (2005).

neither it nor its servant or agents were negligent, and can also prove what actually caused the damage or loss.[110] This defense does not often succeed, except perhaps, in a collision case where the non-carrying vessel was completely at fault.[111] Furthermore, there are situations where a carrier may be held strictly liable under COGSA, such as where the shipper proves good order/bad order, and the carrier is unable to bring itself within any defense simply because no one knows how the damage occurred.[112] It probably is fair to say, however, that liability under Carmack is stricter than it is under COGSA.

The court in *Sompo* was concerned with the right of a shipper to exchange a lower freight rate for limited liability.[113] In other words, in opting for a lower rate under COGSA a shipper opts for carrier liability based on negligence and a limit on the amount of a carrier's liability. It does not give the shipper the option of full coverage under the strict liability regime of Carmack. As everyone knows—except, perhaps, the *Sompo* court—shippers never declare the full value of their goods because the freight rates would be prohibitive. As interpreted by the *Sompo* court, Carmack requires an overland carrier to offer the shipper certain options such as strict liability, and the opportunity to recover full value in exchange for a higher freight rate.[114] Where carriage is subject to a through bill, this is unrealistic, not only because shippers never opt for the higher rate, but also because the shipper does not contract with the overland carrier. The shipper contracts with an ocean carrier, a non-vessel-operating common carrier (NVOCC), or a freight forwarder; and COGSA is mandatorily applicable to that contract. It is the ocean carrier who actually contracts with the overland carrier. There is no direct contractual relationship between the shipper and the ultimate land-based carrier. There does not have to be any shipping document issued by the overland carrier to the actual shipper. The overland carrier issues the shipping document for overland carriage to the person who entered into the contract of carriage with the overland carrier. Although the Supreme Court has indicated that there is some type of special or limited "agency" relationship between the ocean carrier and the shipper with respect to the overland carriage, there is nothing in that conclusion that requires the ocean carrier to make sure that the provisions required by Carmack are included in the agreement.[115]

The court also distinguishes *Kirby* on the ground that *Kirby* involved

110. *See* M. Golodetz Exp. Corp. v. S/S Lake Anja, 751 F.2d 1103, 1110 (2d Cir. 1985).
111. *Id.* at 1111.
112. *See, e.g.,* Quaker Oats Co. v. M/V Torvanger, 734 F.2d 238, 243 (5th Cir. 1984).
113. Sompo Japan Ins. Co. v. Union Pac. R.R. Co., 456 F.3d 54, 57 (2d Cir. 2006).
114. *Id.* at 58.
115. Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 34 (2004).

a choice between federal law and state law, whereas, in *Sompo* the choice is between two different federal statutes.[116] The Carmack Amendment issue was not before the Court in *Kirby*, and the holding in that case does not resolve the COGSA v. Carmack issue. For a court to hold that Carmack trumps COGSA, the court would have to ignore some of the crucial language provided by the Supreme Court in *Kirby*, to wit:

> Applying state law to cases like this one would undermine the uniformity of the general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to sea and to land. . . . Such liability clauses are regularly executed around the world. . . . *See also* 46 U.S.C. App. § 1307 (permitting parties to extend the COGSA default liability limit to damage done 'prior to the loading on and subsequent to the discharge from the ship'). Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . . Confusion and inefficiency will inevitably result if more than one body of law governs a contract's meaning. As we said in *Kossick*, when 'a [maritime] contract . . . may well have been made anywhere in the world,' it 'should be judged by one law wherever it was made.'[117]

Later the Court, again citing § 1307,[118] states that although COGSA applies tackle to tackle: "COGSA also gives the option of extending its [limitation] rule by contract."[119] COGSA should trump the Carmack Amendment because, as suggested by the Court in Kirby, COGSA is part of an international regime. Many countries in the world have adopted the Hague Rules on which COGSA is based or have amended their Hague Rules with the Visby Amendments.[120]

The *Sompo* court, however, finds that there is no conflict between the COGSA and Carmack statutes because the conflict exists between the contract that adopted the COGSA limitation of liability provision and the Carmack provision.[121] Thus according to the court, the conflict is between a bill of lading (a contract) and a statute, and the statute prevails.[122] It also points out that there are occasions where parties have extended the reach of COGSA in such a way as to conflict with the Harter Act; and, in such situations, courts have indicated that the Harter Act prevails.[123] The problem with this analysis is that COGSA expressly states that, except to the extent that COGSA supersedes the Harter Act,

116. *Sompo*, 456 F.3d at 57.
117. *Kirby*, 543 U.S. at 28.
118. 46 U.S.C. § 30701 note sec. 7 (2006).
119. *Kirby*, 543 U.S. at 29.
120. ROBERT FORCE ET AL., ADMIRALTY AND MARITIME LAW 210 (2006).
121. *Sompo*, 456 F.3d at 69.
122. *Id.* at 70.
123. *Id.* at 72.

the latter shall continue to be in effect.[124] Therefore, nothing in COGSA is intended to override the Harter Act with respect to the pre-loading and post-discharge of the cargo from the vessel. One cannot fairly make the Harter Act analogy because COGSA expressly saves the Harter Act and certain other statutes; but it does not refer to—let alone save—the Carmack Amendment, which was in effect at the time COGSA was enacted. Of course, no one could foresee that transportation technology and practices would develop to the point where they are today, presenting a conflict between the two statutes.

The *Sompo* court makes much of the fact that although COGSA expressly applies only to foreign commerce not to domestic transport, COGSA does authorizes the parties to a domestic transport to incorporate the provisions of COGSA and make COGSA the law governing that contract. COGSA expressly states that where parties do incorporate COGSA, this gives COGSA the force of law as though the statute was expressly applicable to the transaction.[125] In contrast, the provision allowing the parties by agreement to extend COGSA to the pre-loading and post-discharge stages, COGSA does not provide that such agreements have the force of law. The view of the *Sompo* court notwithstanding, this omission, however, is not fatal. Such a provision was essential to permit the extension of COGSA to domestic carriage. COGSA, itself, preserves the Harter Act except to the extent it is displaced by COGSA.[126] COGSA displaces Harter with respect to foreign trade, but Harter remains the law for domestic transport. If COGSA merely invited parties to a domestic carriage contract to incorporate COGSA in that contract without more, the contract would still be subject to the provisions of the Harter Act. Therefore, it was necessary to add the force-of-law provision to assure that Harter is also displaced where the parties incorporated COGSA in a domestic carriage contract. As the Court of Appeals for the Fourth Circuit has explained: "[s]ince the Harter Act was to be expressly preserved for the domestic trade, statutory authority for the incorporation of COGSA had to be provided."[127]

What Congress has done is to set up two different regimes, and the question is whether or not one regime should displace the other. COGSA is intended to operate essentially while the goods are on the ship, tackle to tackle. Where goods are shipped pursuant to an ocean bill of lading, and thereafter shipped over land pursuant to a separate bill of

124. 46 U.S.C. § 30704 (2006); *see* J.C.B. Sales Ltd. v. Wallenius Lines, 124 F.3d 132, 136 (2d Cir. 1997).

125. 46 U.S.C. § 30701 note sec. 7.

126. *Id.* § 30701 note.

127. Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico, 607 F.2d 322, 327 (4th Cir. 1979).

lading, the logical conclusion is that COGSA applies to sea transport—Carmack applies to land transport. The issuance of the second bill of lading signifies the end of ocean transportation. Therefore, there is no conflict between COGSA and Carmack because the application of COGSA has come to an end before Carmack takes over. One should not overlook the fact that COGSA specifically gives the parties the right to make its terms applicable once the goods have been discharged from the ship.[128] This could not apply merely to the time that the goods are on the wharf or in a terminal because every ocean transport scenario contemplates that the goods will then be taken to some inland location via overland transport. COGSA essentially invites the parties to make the terms of COGSA applicable not only to ocean transport but to inland transport as well. Did Congress invite the parties to engage in a vain act? If other legislation, such as Carmack, is applicable and trumps COGSA, why would Congress want to authorize the parties to incorporate COGSA, or any other terms as a regime to govern the post-discharge stages of the transaction? It wouldn't make any sense. Suppose, for example, goods were damaged while they were being transported from the port to a location in the same city, and the parties had extended the application of COGSA until the goods have been actually delivered to the consignee. Would state law, which would otherwise be applicable, trump the provisions of COGSA? *Kirby* says absolutely not![129] This is what Congress wanted to achieve by allowing the parties to contract for the extension of COGSA to the pre-loading and post-discharge periods. That is exactly what parties do in a multi-modal transaction pursuant to a single through bill of lading. They make COGSA applicable to the entire period of transport. To hold that Carmack takes precedence negates the provision in COGSA that allows the parties to extend it to the post-discharge stage. The Second Circuit may be incorrect when it concludes that the conflict is between a mere contractual provision and a statute. One may contend that the conflict is between Carmack and the subsequently enacted provision of COGSA that says that the parties may enter into a contract to define their respective rights and duties in the pre-loading and post-discharge stages.

Conclusion

The Supreme Court, however, will probably resolve this conflict. The Court granted certiorari in the *Altadis* case,[130] but the case settled,[131]

128. 46 U.S.C. § 30701 note sec. 7.

129. Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 27-30 (2004).

130. Altadis USA, Inc., v. Sea Star Line, LLC, 549 U.S. 1106 (Jan. 5, 2007), *cert. dismissed,* 549 U.S. 1189 (Feb. 12, 2007).

and the petition for the writ was eventually dismissed.[132] Is there a practical solution until the Supreme Court or Congress resolves the problem? Ocean bills of lading of foreign carriers often have special clauses directed to cargo shipped to the U.S. The clause paramount or choice of law provision provides that carriage of goods to the U.S. shall be subject to the U.S. Carriage of Goods by Sea statute.[133] In fact, the freight forwarder's bill of lading in the *Kirby* case had a special provision relating to damage or loss of goods during the land leg in that it adopted a limitation amount higher than the COGSA limitation.[134] Until the Carmack Amendment problem is resolved definitively, ocean carriers who utilize through bills of lading may consider adding a clause to the effect that: *"Where the Carmack Amendment is compulsorily applicable to overland transport, such transport shall be subject to the terms of the Carmack Amendment with regard to liability and limitation of liability."* There could be added to the option language, whereby the shipper receives limited liability in exchange for a less expensive freight rate, language to the effect that the *"the liability regime imposed under the Carmack Amendment shall apply where loss or damage occurs during overland transport where that stature is compulsorily applicable."* The clause would also specify the amount of limited liability. The qualification "compulsorily applicable" is inserted because the Carmack Amendment is not compulsorily applicable in most circuits.[135] In circuits that follow the *Altadis* approach, the parties would continue to be free to extend COGSA to the overland segment of the transaction.

POSTSCRIPT

Post *Sompo*, there have been further developments in the Second Circuit. One district court applied the Carmack amendment as per *Sompo* to a trucking company;[136] but another declined to extend the Amendment to both the land and ocean carriers;[137] and another declined to extend liability to an ocean carrier.[138] One district court refused to

131. *See* Court Order, Sompo Japan Ins. of Am. v. Union Pac. R.R. Co., No. 02 Civ. 9523(DAB), 2007 WL 4859462, at *1 (S.D.N.Y. Sept. 26, 2007).

132. *Altadis*, 549 U.S. 1189.

133. 46 U.S.C. § 30701 (2006).

134. *Kirby*, 543 U.S. at 14.

135. *See generally* Royal & Sun Alliance Ins. PLC v. Ocean World Lines Inc., 572 F. Supp. 2d 379, 392 (S.D.N.Y. 2008) (discussing whether the Carmack Amendment applied in a situation where goods were not damaged during the land portion of a transit and whether it should apply).

136. Swiss Nat'l Ins. Co. v. Blue Anchor Line, No. 07 Civ 9423(LBS), 2008 WL 2434124, at *2-3 (S.D.N.Y. June 10, 2008).

137. Mitsui Sumitomo Ins. Co. v. Evergreen Marine Corp., 578 F. Supp. 2d 575, 582 (S.D.N.Y. 2008).

138. Sompo Japan Ins. Co. of Am. v. Yang Ming Marine Transp. Co., 578 F. Supp. 2d 584,

apply *Sompo* on the ground that it is inconsistent with *Kirby*.[139] Finally, the Second Circuit clarified its decision in *Sompo* in *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*[140] In this case, suit was brought against a transportation intermediary, an ocean carrier, and its subsidiary in the United States who arranged for rail transport and improperly released the goods.[141] The district court held that the Carmack Amendment applied to "certain rail carriers," and inasmuch as none of the defendants was a rail carrier, the Carmack Amendment did not control their liability.[142] On appeal the Court of Appeals affirmed.[143] The Carmack Amendment applies only to certain rail and truck carriers.[144] It does not apply to ocean carriers, NVOCCs, freight forwarders, or even to parties who arrange for rail or truck transportation as was the case here.[145] The Carmack Amendment applies to parties that transport goods by rail or truck.[146] This clarification is important. It completely avoids any conflict with COGSA. In essence, the Court of Appeal for the Second Circuit now says that Carmack trumps the Himalaya clause in the ocean bill of lading to the extent that it purports to provide COGSA benefits without complying with the prerequisites of Carmack. In this context the decision is more persuasive because it is easier to accept a rationale that a Himalaya clause is merely a creature of contract. COGSA does not mention Himalaya Clauses and such clauses do not receive any authority from COGSA.[147] A Himalaya Clause is only a creature of contract. If the Court is correct in applying Carmack to through bills of lading, it is easier to accept the differentiation between parties who operate railroads and trucking companies—and whose facilities and personnel are actually involved in providing transportation services—and those who do not. Thus, it is easier to accept that the mandatory provisions of a statute trump a contrary provision that owes its authority only to the agreement of the parties. However, those of us who, in retrospect, overreacted somewhat to *Sompo* certainly had plenty of company in the lower federal courts in the Second Circuit.

Now a third court has weighed and taken approach that differs from

592 (S.D.N.Y. 2008), *abrogated by* Rexroth Hydraudtne B.V. v. Ocean World Lines, Inc., 547 F.3d 351, 354 (2d Cir. 2008).

139. Royal Sun Alliance Ins. PLC v. Ocean World Lines Inc., 572 F. Supp. 2d 379, 389 (S.D.N.Y. 2008).

140. *Rexroth*, 547 F.3d at 355-60.

141. *Id.* at 354.

142. *Id.* at 355.

143. *Id.* at 364.

144. *Id.* at 355.

145. *Id* at 360.

146. *Id.*

147. 46 U.S.C. § 30701 note (2006).

both *Altadis* and *Sompo*. The Ninth Circuit in *Regal Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*[148] has held that an ocean carrier and its agent that arranges for overland transport by rail has provided rail services and, as such is subject the Carmack amendment. In this case the cargo was shipped aboard K-line's vessel from China to the United States pursuant to a through bill of lading by contract that called for a railroad to transport the goods to their destination in the Midwest. The cargo was damaged on the overland leg. The K-Line through bill of lading had a Tokyo forum selection clause. The clause would have been valid and enforceable under COGSA, but Carmack requires special measures for contracting out of that statute's venue provisions. The district court enforced the forum selection clause and dismissed the action. The district court first held that COGSA not Carmack governed ocean voyage. It then held that the inland leg was exempt from the Carmack venue provisions under 49 U.S.C. § 10709 which permits parties to a rail service contracts to contractually agree to litigate in a forum other than the ones specified in Carmack. Thus, the court concludes that the agreement to resolve dispute in Tokyo is permissible. The Court of Appeals reversed. It concluded that49 U.S.C.§ 10709 is not applicable. Section 10502 is the controlling provision. The court looked to 49 U.S.C. § 10102(5) which defines the term a "rail carrier" as a "carrier person providing common carrier railroad transportation for compensation." The statute, in 49 U.S.C. § 10102(6)(A) also defines a "railroad" as including "a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad." Finally as the court points out, under 49 U.S.C. § 10501(a)(1)(B), the jurisdiction of the Surface Transportation Board "includes 'transportation that is by railroad and water, *when the transportation is under common control, management or arrangement for continuous carriage or shipment.*'"[149]

The court concluded that under the foregoing definitions, the ocean carrier and its agent by contracting to provide overland transport by rail were in fact subject to the jurisdiction of the Surface Transportation Board. As a consequence, they were subject to Carmack. The court stated: "The K-line defendants therefore provided 'continuous carriage or shipment' that was 'by railroad and water' via 'intermodal equipment used by or in connection with a railroad.'"[150] Although 49U.SC. § 10709 was not applicable, because the district court did not determine whether or not the railroad could opt out of Carmack under 10502 by giving the shipper the full option for Carmack liability, the court of appeals re-

148. Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd., — F.3d —, 2009 WL 428063 (9th Cir. 2009).

149. *Id.* at *4.

150. *Id.* at *5.

manded the case for such determination. Despite the attempts by the appellate court to take pains to avoid a clear rejection of the Second Circuits decision in *Rexroth*, it seems that the two decisions are in conflict. Hopefully, the Supreme Court will have an opportunity to resolve these conflicts.