



## U. S. Supreme Court: Bills of Lading are Maritime Contracts and Railroad Entitled to Limit Liability Under COGSA byway of Himalaya Clause

Recently, the U.S. Supreme Court decided the much anticipated *Kirby* case. *Norfolk Southern Railway Co. v Kirby*, 125 5. Ct. 385(2004). Kirby, an Australian manufacturing company, sold ten containers of machinery to a General Motors plant located outside Huntsville, Alabama. Kirby hired Australian freight forwarder, International Cargo Control (ICC), to arrange delivery of the containers to GM's plant. ICC issued a "through" bill of lading to Kirby. Rather than exercise its "fair opportunity" and declare a higher value for the cargo in the ICC bill, Kirby obtained cargo insurance for the shipment.

As part of its service to Kirby, ICC hired Hamburg Sud to accomplish the ocean carriage and ultimate delivery to Huntsville. Hamburg Sud hired Norfolk Southern (through a Hamburg Sud subsidiary) to provide inland transportation from the Port of Savannah to Huntsville. Hamburg Sud issued its own bill of lading (covering the ocean and subsequent inland transportation) to ICC. During the inland transport, the train derailed causing significant damage to the cargo.

The Court accepted *certiorari* on two issues: (1) 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 and (2) whether a bill of lading's Himalaya Clause extending COGSA's liability limitations to "independent contractors" must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

In answering the questions, the high court reversed the decision of the Eleventh Circuit which held that the railroad was not entitled to protection under the Himalaya Clause in the ICC bill of lading because it had not been in privity with ICC when ICC issued the bill to Kirby and because "linguistic specificity" was required to extend the clause's protection to an inland carrier. The Supreme Court first analyzed the issue of whether state or federal maritime law applied (the case was originally filed as a diversity matter) and concluded since the bills of lading were each "maritime contracts," federal maritime law applied.

For many years, the lower courts have uniformly held that "mixed contracts with maritime and non-maritime elements" are not subject to admiralty jurisdiction (and thus not subject to federal maritime law) unless (1) the inland portion was "incidental" to the maritime portion or (2) a separable maritime portion was at issue. After *Kirby*, it appears the new rule on "mixed contracts" is that they are maritime contracts, subject to admiralty jurisdiction and federal maritime law, unless the "sea components are insubstantial." The Court noted that the international transportation industry "has moved into a new era -- the age of multi modalism." This "new era" appears to have played a primary role in the decision.

The Eleventh Circuit had held that the railroad was not in privity of contract with the shipper and not entitled to the benefit of the Hamburg Sud bills' COGSA limitation. The Supreme Court disagreed, and allowed the Hamburg Sud COGSA limitations to be applied to Kirby. Despite the fact that Kirby never saw the COGSA limitation in the Hamburg Sud bill entered into between Kirby's freight forwarder and Hamburg Sud. The Supreme Court reasoned that an intermediary can negotiate reliable and enforceable agreements with the carriers it engages and an intermediary binds the cargo owner to the liability limitations it negotiates to downstream carriers.