

HIMALAYA CLAUSES IN MARITIME BILLS OF LADING, AFTER *NORFOLK SOUTHERN RAILWAY CO. V. KIRBY*

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I. Introduction

With a single decision, in *Norfolk Southern Railway Co. v. Kirby*,¹ the Supreme Court has overturned a substantial line of cases that had been developing in some courts of appeal concerning the application of maritime jurisdiction to the interpretation of contracts,² resolved a split of authority between the circuit courts, as to which entities can take shelter in liability limitation provisions appearing in maritime bills of lading,³ and articulated the existence of a limited-purpose presumed principal-agent relationship between certain entities involved in the international transportation of goods.⁴ In so doing, the Court has imposed a streamlining effect on the law of transportation congruent with the earlier streamlining effects on the movement of goods produced by developments in transportation technology.

The steady increase in the volume of international trade, since 1950,⁵ exposed inefficiencies in the system for the transportation of goods.⁶ Two important developments in transportation methods – containerization,⁷ and intermodalism,⁸ – arose to overcome these inefficiencies.⁹ Containerization and intermodalism made it possible for one entity involved in the transport of goods to arrange for the engagement of all subsequent entities necessary to the transport process.¹⁰

This possibility gave rise to the use of through bills of lading,¹¹ and the use of through bills of lading, in turn, gave rise to the possibility that transporting entities remote from, and unanticipated by, the cargo owner might be affected by the terms of a contract of carriage entered into between the cargo owner and the transporting entity that received the goods from the owner. This latter possibility gave rise to the two principal questions presented in *Norfolk Southern*: (1) whether, and under what circumstances, a downstream entity may avail itself of a limitation of liability negotiated between entities upstream from it, in the chain of transportation, and (2) whether damage claims by an upstream entity could be defeated by a liability limitation negotiated between downstream entities, even though the upstream entity had not explicitly consented to the liability limitation, nor been privy to the contract that produced the limitation. These questions had elicited varying responses from the Courts of Appeal.¹² The peripheral question of whether state law or federal law will be used to decide such questions was also taken up and resolved.

The transport of goods in international commerce is often accomplished through the efforts of a series of entities, the first of which accepts the goods from the shipper then passes them along to a subsequent entity downstream in the series. Liability borne by these entities, for the movement and the safety of the goods, is determined by reference to statutory and contractual regimes put in place by the entities. Through the use of a special clause in a contract of carriage, known as a Himalaya Clause,¹³ downstream entities can avail themselves of the protections afforded by liability limitations negotiated between upstream entities. *Norfolk Southern* involved the interpretation and applicability of Himalaya Clauses found in contracts of carriage entered into between a shipper of goods and a freight forwarder, and between the freight forwarder and an ocean vessel operating carrier.

II. The Context of the Dispute

A. The Facts

In 1997, Kirby Engineering (Kirby), an equipment manufacturer in Sydney, Australia, hired International Cargo Control Pty Ltd (ICC) to arrange for the transportation of some equipment from Sydney to a General Motors plant near Huntsville, Alabama.¹⁴ ICC, a freight forwarder,¹⁵ not a vessel-operating common carrier¹⁶ of goods, arranged for Hamburg Südamerikanische

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¹ 125 S.Ct. 385 (2004).

² See *infra* notes 120–128, and accompanying text.

³ See *infra* notes 145–173 and accompanying text.

⁴ See *infra* notes 174–181 and accompanying text.

⁵ World Trade Organization, International Trade Statistics 2004, 28 Chart II.2 (2004).

⁶ See 1 Saul Sorokin, Goods in Transit § 1.13 (2003). See also NLRB v. International Longshoremen’s Assn, 447 U.S. 490, 494-5 (describing the difficulties and inefficiencies of the pre-containerization shipping industry).

⁷ See J. Mahoney, Intermodal Freight Transportation 13-23 (1985) (describing the containerization as one of the most important innovations in the carriage of goods by ocean-going vessel). See also Edward Schmeltzer & Robert A. Peavey, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Comm. 203 (1970) (describing the tremendous importance of the development of the use of shipping containers in the transportation of goods).

⁸ See Richard W. Palmer and Frank P. Degiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 Tul. L. Rev. 281, 283 (1989) (defining multimodal transportation as transportation accomplished by “the integration and coordination of various modes of transportation, commonly by means of a metal shipping container, providing point-of-origin to point-of-destination transportation under a single set of shipping documents and based on a single through-freight rate charged to the shipper, regardless of how many modes of transportation are employed or how many carriers are involved.”). See also 49 U.S.C. § 501(a)(8) (defining intermodal transportation as “successive carriage of a loaded container or trailer from an origin point to a destination point by more than one mode of transportation in interstate or foreign commerce. Such term shall include carriage by more than one mode or transportation in interstate or foreign commerce both under a single bill of lading and under separate bills of lading.”). (repealed 1994).

⁹ See Mar. Admin., Dep’t of Transp., Report to Congress: An Assessment of the U.S. Marine Transportation System 2, 13-14 (1999) [hereinafter Report to Congress] (asserting that “[c]ontainer ships carry 66 percent of the value of U.S. waterborne overseas trade and represent 11 percent of the annual tonnage.”). See also Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 Stan. L. Rev. 1077, 1078 (1969).

¹⁰ See H.R. Rep. No. 53, 98th Cong., 1st Sess., pt.1, at 12-13 (1983), reprinted in 1984 U.S.C.C.A.N. 167, 177-78. And see Report to Congress, *supra* note 9, at 29.

¹¹ Brief of the Petitioner at 5, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028). And see Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 418 nn. 94-95 (defining through bills of lading).

¹² See *infra* notes 141–177 and accompanying text.

¹³ Himalaya Clauses derive their name from the mid-Twentieth century English case, *Adler v. Dickson*, [1955] 1 Q.B. 158 (Eng. C.A.) (involving the assertion of the terms of an adhesion contract appearing on the reverse of the ticket of a passenger, on the ocean-going vessel *The Himalaya*, as a defense, by ship personnel, to a claim of negligence by a passenger injured on the ship’s gangway). And see Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Done At Brussels on 25 August 1924, Feb. 23, 1968, art. 3. (amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 120 L.N.T.S. 155, to provide for the inclusion of a term in a bill of lading purporting to extend the benefit of carrier liability limitations to third parties such as employees, agents, and independent contractors).

¹⁴ Brief of Petitioner at 10, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

¹⁵ See Larry A. DiMatteo & Lucien J. Dhooge, *International Business Law: A Transactional Approach* 343 (2d ed. 2006) (describing a freight forwarder as one who arranges with carriers for the shipment of goods, consolidates freight, and processes required documentation for the international movement of goods).

¹⁶ See 45 U.S.C. app. § 1702(17)(B) (2005) (defining a non-vessel-operating common carrier as “a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier”). And see Peter Jones, *FIATA Legal Handbook On Forwarding* 87

Dampfschiffahrts-Gesellschaft Eggert & Amsinck (Hamburg Süd) to actually transport the goods.¹⁷ Through its subsidiary, Columbus Line USA, Inc., Hamburg Süd arranged for ocean transport.¹⁸ Hamburg Süd entered into a contract with Columbus Line for ocean transport of the cargo to the port of Savannah (which Columbus Line arranged, under a slot charter,¹⁹ aboard the Queensland Star), and Columbus Line entered into a contract with Norfolk Southern (a subcontract from the perspective of Hamburg Süd) to transport the cargo from the port of Savannah to its final destination in Huntsville.²⁰ The cargo arrived in Savannah, apparently without incident, and was loaded onto Norfolk Southern's train, bound for Huntsville.²¹ The train derailed before reaching Huntsville, and the cargo suffered extensive damage.²²

The contract of carriage between Kirby and ICC was memorialized in a bill of lading issued by ICC to Kirby (the ICC Bill).²³ The contract of carriage between ICC and Hamburg Süd was, likewise, memorialized in a bill of lading issued by Hamburg Süd to ICC (the Hamburg Süd Bill).²⁴ Norfolk Southern did not issue its own bill of lading to Columbus Line.²⁵ Both the ICC Bill and the Hamburg Süd Bill contained Himalaya Clauses which limited the liability of the carriers, for transit-related damage to the equipment, to a relatively small amount.²⁶ The presence of Himalaya Clauses in bills of lading is common in the transportation industry, since, by allowing carriers to limit their liability, shippers are able to purchase freight carriage services at much reduced rates.²⁷ In place of full-value liability on the part of the carrier, cargo insurance is routinely purchased to cover the actual value of a cargo.²⁸

1. The ICC Bill of Lading

The ICC Bill indicated Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the final destination.²⁹ Kirby was named as the consignor of the goods, and ICC was named as the carrier.³⁰ As evidenced by the bill, Kirby elected to accept contractual limitations on any liability ICC might incur as ICC carried out its obligations under the contract of carriage.³¹ Two different liability limitation regimes were invoked by the limitation provisions in the ICC Bill. For the sea leg of the journey, ICC invoked the package limitation in the Carriage of Goods at Sea Act³² (COGSA), in order to limit its liability to \$500 per package.³³ The COGSA rule provides that:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in any amount exceeding \$500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted into the bill of lading.³⁴

For the land leg, ICC invoked a package limitation based on Special Drawing Rights (SDR's).³⁵ Special Drawing Rights is a system of international value calculation based on a group of underlying currencies, and the value of an SDR fluctuates with the values of the underlying currencies.³⁶ Consequently, ICC's liability for the land leg, depending upon the values of the underlying currencies at the time the cargo suffered damage, could have been more than, equal to, or less than its liability under the COGSA limitation applicable to the sea leg of the journey. The language invoking the SDR scheme specified that:

[T]he Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor.³⁷

Although though the term "package" is not defined with great precision in COGSA,³⁸ and the issue of whether a cargo container, or a cargo crate, is a "package," for purposes of COGSA is a matter of ongoing dispute,³⁹ this definitional issue did not appear to be of relevance to the courts before which the Norfolk Southern case was heard.

The equipment manufactured and shipped by Kirby was packed into ten crates.⁴⁰ Therefore, for the sea leg of the journey, ICC's liability would be limited to ten times the amount specified under the COGSA rule, or \$5,000, and for the land leg it would be limited to ten times the number of SDR's per package, times the dollar value per SDR. At the time the ICC bill was issued, ICC's liability under the SDR scheme would have been approximately \$17,231.

The Himalaya Clause in the ICC Bill purported to extend the COGSA and SDR liability limitations to "claims relating to the performance of the contract evidenced by this [bill of lading] . . . made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract."⁴¹

(3d ed. 2001) (distinguishing an entity that actually transports goods from a freight forwarder that arranges for the transport of goods by others, and indicating that the latter is sometimes referred to as a Non-Vessel Operating Common Carrier).

¹⁷ Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385, 391 (2004).

¹⁸ Brief for Respondent at 3, Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385 (2004) (No. 02-1028).

¹⁹ See Mary T. Reilly, *Charter Party Symposium: Identity of The Carrier: Issues Under Slot Charters*, 25 Mar. Law. 505, 506 (Summer 2001) (defining slot charter as a vessel sharing arrangement whereby a slot charterer reserves a standard unit of cargo space).

²⁰ Brief for Respondent at 3-4, Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385 (2004) (No. 02-1028).

²¹ Brief for Respondent at 4, Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385 (2004) (No. 02-1028).

²² *Id.*

²³ Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385, 390 (2004).

²⁴ *Id.* at 391.

²⁵ Kirby v. Norfolk Southern Railway Co., 300 F.3d 1300, 1303 (11th Cir. 2002).

²⁶ Norfolk Southern Railway Co. v. Kirby, 125 S.Ct. 385, 385, 391.

²⁷ See Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000).

²⁸ *Norfolk Southern*, 125 S.Ct. 385, 390-91.

²⁹ *Id.* at 390.

³⁰ See Kathleen K. Charvet and Heather A. Waterman, *Recent Developments in Maritime Law*, 28 Mar. Law. 375, 430 (Summer 2004).

³¹ *Norfolk Southern*, 125 S.Ct. at 390.

³² Carriage of Goods at Sea Act, §§ 1-16, 46 U.S.C. app. §§ 1300-1315 (2003).

³³ *Norfolk Southern*, 125 S.Ct. at 390.

³⁴ 46 U.S.C. App. § 1304(5).

³⁵ See <http://www.imf.org/external/np/exr/facts/sdr.HTM> (last visited April 5, 2005) (defining the Special Drawing Right as a unit of account established by the International Monetary Fund, whose value is defined as a basket of currencies consisting of the euro, the Japanese yen, the British pound sterling, and U.S. dollar.) Per package liability limitations expressed in terms of SDR's is a feature of the Protocol Amending the International Convention of the Unification of Certain Rules of Law Relating to Bills of Lading, proposed by the Maritime Law Association.

³⁶ *Id.*

³⁷ *Norfolk Southern*, 125 S.Ct. at 391, n. 1 (quoting clause 8.3 of the ICC bill, as reproduced in Appendix 57a to the Petition for Certiorari).

³⁸ See 46 U.S.C. app. §§ 1304(5) (2005).

³⁹ See Kirby v. Norfolk Southern Railway Co., 300 F.3d 1300, 1304 n.6, and compare *Aluminios Pozuelo, Ltd. v. S.S. Navigator*, 407 F.2d 152, 155 (2d Cir. 1968) (stating that a package is "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods") with *Matsushita Elec. Corp. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 907 (W.D. Wash. 1976) (stating that "if the individual crates or cartons prepared by the shipper and containing his goods can rightly be considered 'packages' standing by themselves, they do not suddenly lose that character upon being stowed in a carrier's container").

⁴⁰ Brief of Petitioner at 10, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁴¹ *Norfolk Southern*, 125 S.Ct. at 391 (quoting cl. 10.1 of ICC bill, as reproduced in App. 59a to Pet. for Cert).

2. The Hamburg Süd Bill of Lading

As a freight forwarder, ICC did not actually transport the goods from Sydney to Huntsville.⁴² Rather, its function was to arrange for actual transport by others who were in the goods carriage business.⁴³ This it accomplished by arranging for ocean carriage by Hamburg Süd.⁴⁴ The Hamburg Süd Bill, issued to ICC, memorialized this contract, designated ICC as the shipper,⁴⁵ Hamburg Süd as the carrier,⁴⁶ and Air Sea International Forwarding Inc., the U.S. agent of ICC, as the consignee.⁴⁷ Other terms of the Hamburg Süd bill were identical to those of the ICC bill in a number of respects: (1) Sydney was designated as the port of loading, (2) Savannah was designated as the port of discharge, (3) Huntsville was designated as the point of final delivery, and (4) the COGSA package limitation rule was adopted to limit its liability for the sea leg of the journey.⁴⁸ Unlike the ICC bill, however, the Hamburg Süd bill contained a clause which extended the COGSA liability regime beyond the sea leg of the journey, to the land leg.⁴⁹ This type of clause, which extends the terms of a maritime bill of lading beyond the sea leg, is known as a Clause Paramount.⁵⁰ A final relevant similarity between the Hamburg Süd Bill and the ICC Bill was the presence of a Himalaya Clause in the Hamburg Süd Bill which purported to extend the limitations available to Hamburg Süd to downstream participants in Hamburg Süd's contract of carriage.⁵¹ This Himalaya clause stated that:

[A]ll exemptions, limitations of, and exonerations from liability provide by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . .⁵²

B. The Decisions Below

1. The District Court

Controversy arose when Norfolk Southern's train derailed, between Savannah and Huntsville,⁵³ causing an estimated \$1.5 million in damage to the equipment.⁵⁴ Kirby, the manufacturer and shipper of the goods, had purchased cargo insurance on the goods through Allianz Australia Insurance Ltd. (AAI), and had recovered under that policy.⁵⁵ AAI joined Kirby in its suit, in the United States District Court for the Northern District of Georgia, against Norfolk Southern, to

recover the cost of the payment under the cargo insurance policy.⁵⁶ The suit by Kirby and AAI was based on state law theories of negligence, bailment, recklessness, and breach of contract,⁵⁷ and in it, the plaintiffs claimed that Norfolk Southern should be liable for the entire amount of the damage to the equipment.⁵⁸ Norfolk Southern sought to limit its liability by using the Himalaya Clauses to claim shelter in the liability limitation provisions in the bills of lading.⁵⁹

Norfolk Southern, in a motion for partial summary judgment, sought a declaration that its liability was limited by the liability limitations in the bills of lading, and that the plaintiffs' state law claims were preempted by federal law.⁶⁰ In an unpublished order, the district court granted summary judgment on both issues, finding that the term "inland carriers" in the Himalaya clause in the Hamburg Süd bill encompassed Norfolk Southern, thereby limiting its liability to \$500 per package.⁶¹ The district court relied on *Great Northern Railway v. O'Connor*,⁶² to support its holding that "[o]ne who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf."⁶³ Pursuant to a request from both sides, the district court certified the issue of Norfolk Southern's liability for interlocutory appeal to the Eleventh Circuit.⁶⁴

2. The Appellate Court

The principal questions before the appellate court were whether the liability limitations provided by these clauses were available to a person in Norfolk Southern's position.⁶⁵ The Eleventh Circuit formulated the issue as "whether a railroad's liability, if any, to a shipper for damage done to goods by the derailment of a train is limited by the 'Himalaya clause' in either [the ICC Bill or the Hamburg Süd Bill] that were issued for the transportation of the goods."⁶⁶ Reversing the district court's grant of summary judgment, the appellate court held that:

[T]he Hamburg Süd bill does not limit Norfolk Southern's liability to Kirby because Kirby was not bound by its terms . . . [and that] . . . although the terms of the ICC bill do bind Kirby, that bill does not limit Norfolk Southern's liability because Norfolk Southern is not a clearly designated beneficiary of that bill's Himalaya clause.⁶⁷

With respect to the Hamburg Süd Bill, the court observed that since it was issued to ICC, not to Kirby, Kirby could not be bound by the limitations of liability set forth therein, unless, at the time of issue, ICC was acting as Kirby's agent.⁶⁸ Thus, the critical determination was whether ICC acted as a principal or as Kirby's agent when it entered into the contract of carriage with Hamburg Süd.⁶⁹ Proceeding under the theory that a freight forwarder is not, *ipso facto*, an agent for the

⁴² *Id.* at 391.

⁴³ *Id.* at 390.

⁴⁴ *Id.* at 391.

⁴⁵ Brief for Respondent at 4, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁴⁶ See Kathleen K. Charvet and Heather A. Waterman, *Recent Developments in Maritime Law*, 28 Mar. Law. 375, 430 (Summer 2004).

⁴⁷ Brief for Respondent at 4, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁴⁸ *Norfolk Southern*, 125 S.Ct. at 390-91.

⁴⁹ *Id.* at 391. *And see* Brief of Petitioner at 11, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁵⁰ Larry A. DiMatteo & Lucien J. Dhooge, *International Business Law: A Transactional Approach* 343 (2d ed. 2006) (providing a definition of clause paramount).

⁵¹ *Norfolk Southern*, 125 S.Ct. at 391.

⁵² Brief of Petitioner at 11, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁵³ *Norfolk Southern*, 125 S.Ct. at 390.

⁵⁴ Brief of Petitioner at 14, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁵⁵ *Norfolk Southern*, 125 S.Ct. at 391.

⁵⁶ *Id.*

⁵⁷ Brief of Petitioner at 14, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁵⁸ *Id.*

⁵⁹ *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1303-04.

⁶⁰ Brief of Petitioner at 14, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁶¹ *Id.*

⁶² 232 U.S. 508 (1914).

⁶³ Brief of Petitioner at 15, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁶⁴ *Norfolk Southern Railway v. Kirby*, 125 S.Ct. 385, 392 (2004). *And see* Brief of Petitioner at 15, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

⁶⁵ *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1302 (11th Cir. 2002).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1305 (citing *Great N. Ry Co. v. O'Connor*, 232 U.S. 508, 513-14 (1914) for the proposition that one who employs a freight forwarder to arrange shipment is bound by the liability limitations negotiated between the forwarder and the carrier).

⁶⁹ *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1302 (11th Cir. 2002).

shipper,⁷⁰ the court articulated two tests for determining the status of the freight forwarder.⁷¹ Under these tests, a forwarder occupies *agent status* when it acts merely to arrange the contract of carriage between the shipper/cargo-owner and the carrier,⁷² but it assumes *principal status* when it takes on the role of carrier.⁷³ A freight forwarder “acts merely to arrange the contract”⁷⁴ of carriage, and is, therefore, an agent, when (1) the carrier issues its bill of lading to the cargo owner (not the forwarder), (2) the bill of lading designates the cargo owner (not the forwarder) as the shipper, and (3) the cargo owner pays the carrier (not the forwarder).⁷⁵ The freight forwarder “takes on the role of carrier,”⁷⁶ and therefore assumes *principal status* when: (1) the forwarder issues its own bill of lading to the cargo owner, (2) the forwarder’s bill of lading designates the cargo owner as shipper, (3) the forwarder’s bill of lading designates the forwarder as the carrier, (4) the cargo owner pays the forwarder to transport the cargo, (5) the forwarder contracts with an actual carrier to transport the goods, (6) the actual carrier issues its own bill of lading to the forwarder, and (7) the bill of lading issued by the actual carrier designates the forwarder as the shipper.⁷⁷

Using these sets of criteria to measure the relationships between Kirby, ICC, and Hamburg Süd, the court determined that ICC had taken on the role of a carrier and was, therefore, as a principal acting for its own account, and not an agent acting on Kirby’s account.⁷⁸ ICC had issued a bill of lading to Kirby designating Kirby as the consignor and ICC as the carrier.⁷⁹ ICC had then contracted with Hamburg Süd to accomplish transportation of the goods.⁸⁰ To evidence this contract, Hamburg Süd had issued a bill of lading to ICC designating ICC as shipper and Hamburg Süd as carrier,⁸¹ and ICC had been paid by Kirby.⁸²

The court supplemented its criterion-based analysis with resort to basic principals of agency law, industry standards, and its own case law. The court observed that the *wording* of the ICC bill supported a finding that ICC acted as principal, since it assumed responsibility “to perform . . . the entire transport,” . . . or, “in [its] own name to procure the performance of the entire transport,”⁸³ an undertaking the court found consistent only with the principal status.⁸⁴ The *form* of the bill was also of significance, because it was a standard form FIATA Multimodal Transport Bill of Lading,⁸⁵ which, according to the court, was consistent with principal status for the forwarder.⁸⁶ Finally, the court harked back to its decision in *Naviera Neptuna S.A. v. All Int’l Freight Forwarders, Inc.*,⁸⁷ in which it approved the lower court ruling that “absent special particular arrangements between a shipper and its freight forwarder, which arrangements would manifest the requisite exclusivity and control incident to a principal/agent relationship, a freight

forwarder is considered as an independent contractor.”⁸⁸ No such special arrangements signaling exclusivity and control were found to exist as between Kirby and ICC.⁸⁹ Concluding that ICC had acted as a principal for its own account, the court held that ICC could not and did not bind Kirby to the terms of the Hamburg Süd bill of lading, and that, consequently, Norfolk Southern could not assert the liability limitation offered by the Himalaya clause in the Hamburg Süd bill, as a defense to Kirby’s suit.⁹⁰

With respect to the ICC Bill, the court found that, because Kirby was a party to the bill, since it was issued by ICC to Kirby, Kirby was bound by the terms of the bill.⁹¹ Consequently, Norfolk Southern would be able to find shelter in the liability limitations of the ICC bill’s Himalaya clause if it could establish that it was “a member of a well-defined class of its beneficiaries.”⁹² The court relied for this upon language from *Robert C. Herd & Co. v. Krawill Mach. Corp.*,⁹³ stating that “contracts purporting to grant . . . limitations of liability must be strictly construed and limited to their intended beneficiaries.”⁹⁴

In *Herd*, the Supreme Court declined to extend the liability limitations of a Himalaya clause to a stevedore, because the bill of lading in which the Himalaya clause appeared named only the carrier as an intended beneficiary.⁹⁵ The Court, in *Herd*, examined the relevant provisions of COGSA and determined that neither they nor their legislative history indicated any intent by Congress to extend the package limitation rule to any person other than the carrier,⁹⁶ which the act defined to include “the owner of the charterer of who enters into a contract of carriage with the shipper.”⁹⁷ The *Herd* Court, likewise, examined the Himalaya clause in the bill of lading and found that:

[T]he limitation provisions of the bill of lading . . . like [COGSA] and its legislative history, do not advert to stevedores or agents. Instead they deal only with the ‘Carrier’s liability’ to the shippers. . . . There is, thus, nothing in those 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 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.’⁹⁸

From the reasoning in *Herd*, the Eleventh Circuit fashioned a clarity-of-language test by which to determine the circumstances under which, and the parties beyond the carrier to whom the liability limitations in a bill of lading would extend.⁹⁹ Under this test, as it had been consistently articulated by the Eleventh Circuit:

[T]he ‘clarity of language’ requirement does not mean, however, that COGSA benefits extend only to parties specifically enumerated in the bill of lading. It

⁷⁰ *Id.* And see Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 413 (1998) (stating that “freight forwarders may act as agents or as principals, depending on the facts”).

⁷¹ *Kirby*, 300 F.3d at 1305.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1303.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1305 (quoting the ICC bill of lading).

⁸⁴ *Id.* at 1305.

⁸⁵ See Documents at <http://www.fiata.com/>, under Documents (last visited April 4, 2005) (describing the FIATA Multimodal Transport Bill of Lading as a standard-form bill developed by the Fédération Internationale des Associations de Transitaires et Assimilés).

⁸⁶ *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1306 (11th Cir. 2002).

⁸⁷ 709 F.2d 663, 665 (11th Cir. 1983).

⁸⁸ *Id.*

⁸⁹ *Kirby*, at 1306.

⁹⁰ *Id.* at 1306-7.

⁹¹ *Id.* at 1307.

⁹² *Id.*

⁹³ 359 U.S. 297 (1958).

⁹⁴ *Id.* at 305.

⁹⁵ *Id.* at 302.

⁹⁶ *Id.* at 302.

⁹⁷ *Id.* at 302 (citing the Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1301(a)).

⁹⁸ *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 302 (1958) (citing *Sloan Shipyards Corp. v. Emergency Fleet Corp.* 258 U.S. 549, 568 (1922)).

⁹⁹ *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1308 (11th Cir. 2002).

is sufficient that the terms express a clear intent to extend benefits to a well-defined class of readily identifiable persons. When a bill refers to a class of persons such as ‘agents’ and ‘independent contractors’ it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage contract. No further degree of clarity is necessary.¹⁰⁰

Applying this test to the language in the ICC bill, the court excluded Norfolk Southern from protection under the bill, on two bases. First, the court observed that the phrase “other person,” which appeared among those listed in the ICC bill as purportedly entitled to protection under the Himalaya clause,¹⁰¹ was “as a category, . . . too vague to define a clearly identifiable class of persons, and so it fails to satisfy the clarity of language requirement.”¹⁰² After judicially subtracting “other persons” from the Himalaya clause, the court then explained that the remaining classes of persons listed in the ICC bill – servants, agents and independent contractors – would be protected under the bill only if they had been engaged by the carrier.¹⁰³ Having determined that ICC was the carrier, and since Norfolk Southern had been hired by Hamburg Süd, not ICC, then Norfolk Southern had not been hired by the carrier, and was, therefore, not entitled to protection under the ICC bill.¹⁰⁴ The court’s limitation of the persons or classes of persons entitled to protection under a bill’s Himalaya Clause, to those engaged by the carrier, appears to have arisen from language in *Secrest Machine Corp. v. S. S. Tiber*¹⁰⁵ stating that:

The bill of lading executed between appellant and carrier... expressly provided that all defenses available to carrier ‘shall inure also to the benefit of the Carrier’s agents, servants and employees and of any independent contractor performing any of the Carrier’s obligations under the contract of carriage or acting as bailee of the goods, whether sued in contract or in tort.’ It is clear that the term ‘independent contractor’ includes stevedores, and therefore the limitation defense is available . . .¹⁰⁶ (emphasis added).

In this context, it seems at least incongruous that the court would have been willing to allow Norfolk Southern to take shelter in the ICC Bill if Norfolk Southern had been hired by ICC, since such an outcome would unmistakably imply that ICC had acted as Kirby’s agent - an implication diametrically opposed to the court’s earlier finding that ICC was in fact, not Kirby’s agent, but a principal acting for its own account.

In sum, the Eleventh Circuit denied Norfolk Southern protection under the ICC Bill on the ground that it was not a member of the bill’s protected classes, and denied it protection under the Hamburg Süd Bill on the ground that Kirby was not bound by that bill’s Himalaya Clause because Norfolk Southern and Kirby had not been in privity as to the contract of carriage evidenced by the Hamburg Süd bill.

III. The Questions Presented for Review

¹⁰⁰ See *Certain Underwriters at Lloyds’ v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982). See also *Generali v. D’Amico*, 766 F.2d 485, 488 (11th Cir. 1985) (stating that “[t]he clause itself must clearly express the understanding of the contracting parties”); and *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (11th Cir. 1998) (same).

¹⁰¹ Brief of Petitioner at 13, *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

¹⁰² *Kirby*, 300 F.3d at 1308 (relying on *Rupp v. Int’l Terminal Operating Co.*, 479 F.2d 674, 676 (2d Cir. 1973)).

¹⁰³ *Kirby*, 300 F.3d at 1308.

¹⁰⁴ *Id.*

¹⁰⁵ 450 F.2d 285 (5th Cir. 1971).

¹⁰⁶ *Id.* at 287.

After having its request for a rehearing denied,¹⁰⁷ Norfolk Southern sought, and was granted, review of the Eleventh Circuit’s ruling.¹⁰⁸ The Supreme Court granted certiorari to determine:

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 to provide that transportation.
2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act (“COGSA”), 46 U.S.C. app. §§ 1300-1315, to “independent contractors” used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill’s issuer.¹⁰⁹

The importance of these questions may be inferred from the fact that three briefs amicus curiae were filed at the petition for certiorari stage, and no fewer than fifteen briefs amicus curiae were filed on the merits, by, among others, the United States, two law professors, and numerous insurance and transportation-related trade associations.¹¹⁰

Subsequent to the granting of certiorari, but prior to argument on the merits, the Supreme Court directed the parties to file supplemental briefs addressing the additional question: “Does federal or state substantive law govern the questions presented?”¹¹¹ With respect to the questions originally presented by the Petitioner, the formulation of the questions in the petition for certiorari is somewhat different from the formulation that eventually appears in the Petitioner’s brief.¹¹² The Court, itself, further reformulated the questions to read: (1) “whether the liability limitation in Kirby’s and ICC’s contract extends to Norfolk, which is ICC’s sub-subcontractor”¹¹³ and (2) “whether [the COGSA] liability limitation, which ICC negotiated, prevents Kirby from suing Norfolk (Hamburg Süd’s independent contractor) for more.”¹¹⁴ It is to its own formulation that the Court ultimately responds.

IV. Mechanism for Determining When Federal Law Applies

¹⁰⁷ 2000 U.S. App. LEXIS 26161; 52 Fed. Appx. 489.

¹⁰⁸ 540 U.S. 1099, 124 S.Ct. 981, 157 L.Ed.2d 811, 2004 U.S. Lexis 8, 72 U.S.L.W. 3446 (Jan. 9, 2004) (granting Norfolk Southern’s petition for certiorari).

¹⁰⁹ See 02-1028 Norfolk Southern Rwy. Co. v. Kirby Pty at <http://www.supremecourtus.gov/qp/02-01028qp.pdf> (last visited Feb. 17, 2005) (listing the questions presented in Petitioner’s petition for certiorari).

¹¹⁰ See Docket for 02-1028 at <http://www.supremecourtus.gov/docket/02-1028.htm> (last visited Mar. 1, 2005) (showing that briefs amicus curia were filed by the Association of American Railroads [sic], the Transportation Loss Prevention and Security Association, the United States, the American Steamship Owners Mutual Protection and Indemnity Association, Inc., the National Association of Waterfront Employers, the World Shipping Council, the Air Transport Association of America, Inc., Jan Ramberg, Francesco Berlingieri, Public Citizen, Inc., the American Institute of Marine Underwriters, the Transportation Intermediaries Association, Martin Davies, the National Industrial Transportation League, and the International Cargo Loss Prevention, Inc.).

¹¹¹ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 25 (Sept. 24, 2004).

¹¹² Compare the text of the questions presented at 02-1028 Norfolk Southern Rwy. Co. v. Kirby Pty at <http://www.supremecourtus.gov/qp/02-01028qp.pdf> (last visited Feb. 17, 2005) with the text of the questions presented at Brief for Petitioner at (i), *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004) (No. 02-1028).

¹¹³ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 397 (2004).

¹¹⁴ *Norfolk Southern*, 125 S.Ct. at 398.

From the outset, both sides to the controversy had assumed, and proceeded upon the assumption, that federal law governed the interpretation of the bills of lading in this case.¹¹⁵ Just before the case was to be argued before the Supreme Court, Kirby objected this assumption,¹¹⁶ prompting the Court to direct the parties to submit briefs on the correctness of this assumption.¹¹⁷ The Court used the analysis it developed in *Kossick v. United Fruit Co.*¹¹⁸ to determine whether federal law was the proper law under which to interpret the bills of lading. Under *Kossick*, this determination is made on the basis of two criteria: (1) is the contract in question a maritime contract, and (2) is the case inherently local?¹¹⁹ Over half of the analysis portion of the Court's opinion in the instant case was devoted to making this determination.

A. Is the Contract a Maritime Contract?

Two approaches to determining whether a contract was a maritime contract were in use when *Norfolk Southern* reached the Supreme Court: (1) the spatial approach, employed by some lower courts,¹²⁰ and (2) the conceptual approach, favored by the Supreme Court.¹²¹

1. The Spatial Approach

Under the spatial approach, favored by some courts of appeal,¹²² a contract could be characterized as maritime on the basis of where the dispute arose, whether a vessel was involved, or where performance under the contract was to occur.¹²³ The *Norfolk Southern* Court discredited the spatial approach on two grounds: (1) developments in modern admiralty law were shifting the inquiry toward whether the nature of the transaction was maritime in nature¹²⁴ and away from such spatial considerations as “whether a ship or other vessel was involved in the dispute,”¹²⁵ or where the contract was formed or to be performed,¹²⁶ and (2) the imprecision of describing “the land carriage required by an intermodal transportation contract as ‘incidental’ [since,] realistically, each leg of the journey is essential to accomplishing the contract’s purpose.”¹²⁷ The Court clearly repudiated the spatial approach by observing that “to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires.”¹²⁸

¹¹⁵ *Id.* at 392.

¹¹⁶ *Id.*

¹¹⁷ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 25 (Sept. 24, 2004).

¹¹⁸ 365 U.S. 731 (1961).

¹¹⁹ *Id.* at 738.

¹²⁰ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 394 (2004).

¹²¹ *Id.* at 395.

¹²² See *Hartford Fire Ins. Co. v. Orient Overseas Container Lines*, 230 F.3d 549, 555-56 (2d Cir. 2000)

(premiering its holding on whether the land leg of a cargo's journey was incidental to the sea leg of the journey, and making this determination by comparing the distance a cargo traveled on land with the distance it traveled at sea); *Sea-Land Serv., Inc. v. Danzig*, 211 F.3d 1373, 1378 (Fed. Cir. 2000) (premiering its holding that intermodal contracts were not maritime contracts because substantial inland transportation, not incidental to the sea legs of the journey, was required); and *Keuhne & Nagel (AG & CO) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989) (premiering its holding that a through bill of lading was not a maritime contract because “extensive land-base operations” were more than incidental to the sea leg of the journey).

¹²³ *Id.*

¹²⁴ *Norfolk Southern*, 125 S.Ct. at 393 (citing *Exxon corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991)).

¹²⁵ *Norfolk Southern*, 125 S.Ct. at 393.

¹²⁶ *Id.*

¹²⁷ *Id.* at 394-95.

¹²⁸ *Id.* at 395.

3. The Conceptual Approach

Early in its description of the conceptual approach, the Court declares that a contract is maritime in nature if it has “reference to maritime service or maritime transactions.”¹²⁹ This rather broad standard is given definition by subsequent guidance requiring that the “primary objective [be] to accomplish the transportation of goods by sea,”¹³⁰ that it be “in furtherance of a ‘peculiarly maritime concern,’”¹³¹ that the fundamental goal is to protect maritime commerce,¹³² and that the contract’s purpose be “to effectuate maritime commerce.”¹³³

Although the Court repudiated the spatial approach, it did not entirely abandon geographical considerations. Instead, the Court inverted and then recharacterized the significance of the roles played by sea transport and land transport. The Court inverted these roles by focusing on whether the sea leg was substantial, rather than on the distance covered by the land leg compared to the distance covered by the sea leg, and by limiting the function of the geographical factor to that of a mechanism to be used to negate the maritime nature of a contract.¹³⁴ The Court recharacterized the significance of land and sea transport by approaching the determination as one of whether the sea leg was *insubstantial*,¹³⁵ rather than as one of whether the land leg was *incidental* to the sea leg.¹³⁶ Asking whether the sea leg is insubstantial recognizes its necessity, but, according to the Court, properly questions its primacy.¹³⁷ This is in contrast to the appellate courts’ inquiry into whether the land leg was *incidental* to the transportation – an inquiry that the Court felt improperly questioned what, in the eyes of the Court, was a land leg’s indisputable necessity.¹³⁸

B. Is the Case Inherently Local

The Court falls back on its characterization, from *Kossick*, of the determination of whether a case is inherently local as one of a normal conflict of laws situation,¹³⁹ and asserts, as the overriding criterion, that a case is not local if state interests “cannot be accommodated without defeating a federal interest.”¹⁴⁰ After noting that “even though [r]espondents have not articulated any specific . . . state interest at stake, though some are surely implicated,”¹⁴¹ the Court, without precisely identifying such interests, explains that federal law must prevail in this case because “vindication of maritime policies demand[s] uniform adherence to a federal rule of decision,”¹⁴² and because “[a]pplying state law to cases like this one would undermine the uniformity of general maritime law [since] the same liability limitation in a single bill of lading for international intermodal transportation often applies both to the sea and to land”¹⁴³ On these bases, the Court determines that federal law – specifically COGSA – will govern interpretation of the contracts of carriage found in the bills of lading.¹⁴⁴

¹²⁹ *Id.* at 393 (citing *North Pacific S. S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)).

¹³⁰ *Norfolk Southern*, 125 S.Ct. at 393 (quoting G. Gilmore & C. Black, *Law of Admiralty* 31 (2d ed. 1975)).

¹³¹ *Norfolk Southern*, 125 S.Ct. at 393 (quoting *Kossick*, at 736-737).

¹³² *Norfolk Southern*, 125 S.Ct. at 394 (citing *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)).

¹³³ *Norfolk Southern*, 125 S.Ct. at 394.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 395 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 396.

By relying so heavily on *Kossik*, the Court broke no new ground on the issue of when a case is inherently local. Thus, the impact of the Court's decision on the issue of whether state or federal law applies to the interpretation of a contract is confined to that part of its holding dealing with how to determine whether a contract is maritime in nature.

V. Interpretation and Effect of Himalaya Clauses on Carrier Liability

A. The ICC Bill

Taking up the ICC bill first, the Supreme Court noted a split among the Second and Ninth Circuits on the question of whether the liability limitation negotiated between a shipper (such as Kirby) and a forwarder (such as ICC) would extend to a sub-subcontractor (such as Norfolk).¹⁴⁵ In *Akiyama Corp. of America v. M.V. Hanjin Marseilles*,¹⁴⁶ the Ninth Circuit held that privity of contract is *not required*.¹⁴⁷ The shipper in *Akiyama* hired Hanjin Shipping Co. Ltd., an ocean vessel carrier, who subcontracted with Total Terminals, a terminal operator, on the destination end of the journey, and Total Terminals sub-subcontracted with Marine Terminals Corporation, a stevedoring company, to unload the cargo at the port of discharge.¹⁴⁸ The stevedoring company damaged the cargo during unloading.¹⁴⁹ The shipper and its insurer sued Hanjin Shipping (and its vessel, the M/V Hanjin Marseilles), Total Terminals, and Marine Terminals Corporation, for the full amount of the damage caused to the cargo.¹⁵⁰ The bill of lading issued by Hanjin Shipping, to Akiyama, to evidence the contract of carriage, contained a Himalaya clause invoking the COGSA package limitation.¹⁵¹ Total Terminals and Marine Terminals sought to have their liability limited under the Himalaya clause.¹⁵² The bill of lading identified terminal operators and stevedores and their agents as subcontractors, and the Himalaya clause extended the COGSA package limitation available to the carrier to “every servant, agent and sub-contractor . . . and the agents of each.”¹⁵³ The Himalaya clause further indicated that in entering into the contract of carriage, the carrier did so, not only on its own behalf, “but also as agent for all . . . subcontractors”¹⁵⁴ After enunciating the basic principles that Himalaya clauses must be strictly construed,¹⁵⁵ that the intent to extend COGSA liability limitations to downstream parties must be clearly expressed,¹⁵⁶ and that “[w]hen a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause,”¹⁵⁷ the court found that Total Terminals and Marine Terminals were clearly within a well-defined class of readily identifiable persons to which the carrier sought to extend COGSA benefits, and thus rejected any requirement of privity between the shipper and such persons.¹⁵⁸

The Second Circuit took the opposite view, in *Motel Mikinberg v. Baltic Steamship Co.*¹⁵⁹ The facts of *Mikinberg* mirrored those in *Akiyama Corp.*, in that there were a number of post-carrier

entities involved in handling the cargo. Mikinberg, the shipper, hired Baltic Steamship Co. (Baltic), the carrier, to transport his cargo to New York. Baltic transported the cargo, aboard its own vessel, to the Red Hook Terminal in Brooklyn, New York, where it was placed in the custody of Universal Maritime Services (a stevedoring and terminal services company).¹⁶⁰ The cargo was lost, and Mikinberg sued the carrier and all downstream entities, including Universal Maritime Services.¹⁶¹ Universal sought protection in the Himalaya clause in the bill of lading issued by Baltic to Mikinberg. The Baltic bill invoked the COGSA package limitation, for Baltic itself, and the bill contained a Himalaya clause that purported to extend the COGSA limitation to every “servant or agent of the Carrier (including every independent contractor) . . . employed by the Carrier.”¹⁶² In its examination of the facts, the court points out inconsistencies in Universals assertions as to whom it was contractually related. At times, the court notes, Universal claimed a relationship with Red Hook and at other times, it claimed to have a contract with Baltic.¹⁶³ Ultimately, the court held that “[t]here must be a contractual relationship between [the carrier and the stevedoring company] in order for the provisions in the ‘Himalaya Clause’ to apply.”¹⁶⁴ Proceeding on the principle that “[n]ot every entity that handles a package in the flow of transport that also includes the carrier is an agent of the carrier,”¹⁶⁵ the court refused to extend the COGSA liability limitations, via the Himalaya Clause, to “indefinite and unforeseeable defendants who may have only an attenuated connection to the ‘carriage of goods by sea.’”¹⁶⁶

In *Norfolk Southern*, the Court reduced the question to one of simple contract interpretation, and held that the Eleventh Circuit's interpretation and application of the *Herd* decision was incorrect, since nothing in that decision “requires the linguistic specificity or privity rules that the Eleventh Circuit attributes to it.”¹⁶⁷ By way of explanation, the Court noted 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 . . . [and that] *Herd* stands for the proposition that there is no special rule for Himalaya Clauses.”¹⁶⁸ The *Herd* decision, itself, is rather clear on this, pointing out that the text of COGSA automatically extends the \$500-per-package liability limitation to *only* the carrier and the ship,¹⁶⁹ and that nothing in the legislative history of COGSA revealed any intent on the part of Congress to *automatically* extend the liability limitation further.¹⁷⁰ Any extension of the limitation further downstream than the carrier and the ship would, therefore, have to be accomplished by contract, and this would be done by the simple expedient of including a Himalaya Clause in the bill of lading. How far downstream such a limitation extended would be determined on the basis of the language in the Himalaya Clause.¹⁷¹ In the instant case, the text of the Himalaya Clause in the ICC

¹⁶⁰ *Id.* at 329.

¹⁶¹ *Id.*

¹⁶² *Id.* at 333.

¹⁶³ *Id.* at 329, 333.

¹⁶⁴ *Id.* at 333.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 397 (2004).

¹⁶⁸ *Id.*

¹⁶⁹ *See* 359 U.S. 297 at 301 (noting that, with respect to the \$500-per-package limitation, COGSA refers only to the carrier and the ship, and that the act is silent with respect to stevedores and agents).

¹⁷⁰ *Id.* at 301-02 (stating that “[t]he legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924 The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade. Those Rules do not advert to stevedores or agents of a carrier. The debates and Committee Reports in the Senate and the House upon the bill that became the Carriage of Goods by Sea Act likewise do not mention stevedores or agents. There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence.” (internal citations omitted))

¹⁷¹ *Norfolk Southern*, 125 S.Ct. at 397.

¹⁴⁵ *Id.* at 397.

¹⁴⁶ 162 F.3d 571 (9th Cir. 1998).

¹⁴⁷ *Id.* at 574.

¹⁴⁸ *Id.* at 572.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 573.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (internal citations omitted).

¹⁵⁸ *Id.* at 573-574.

¹⁵⁹ 988 F.2d 327 (2d Cir. 1993).

Bill purported to extend the COGSA limitation to “any servant agent or other person (including any independent contractor) whose services have been used in order to perform the contract [of carriage].”¹⁷² The Court found this language sufficiently expansive to include Norfolk Southern, since transportation of the goods, by rail, from the port of Savannah to Huntsville, was clearly a contemplated part of the contract of carriage entered into between Kirby and ICC.¹⁷³ Consequently, the liability limitations in the ICC Bill were, thus, made available to Norfolk Southern.

B. The Hamburg Süd Bill

The question arising out of the Hamburg Süd bill was whether ICC could bind an upstream entity (e.g. Kirby, its shipper) to a contract in which it (ICC) negotiated a liability limitation with entities downstream to itself that was lower than the limitation negotiated between itself and its upstream entity (Kirby). Acknowledging that this question has bedeviled courts for centuries,¹⁷⁴ the Court, nevertheless, resolved the question in a straightforward manner in favor of allowing downstream entities, such as ICC, to bind upstream entities to a lower liability negotiated with downstream entities.¹⁷⁵ Despite Kirby’s argument that ICC was not its agent, and could not, therefore, negotiate lower downstream liabilities, the Court found that ICC could do precisely that.¹⁷⁶ The Court founded this outcome on the nearly century-old rule it enunciated in *Great Northern R. Co. v. O’Connor*,¹⁷⁷ in which a transfer company, without the express authority of its shipper, negotiated a liability limit with the carrier (Great Northern R. Co.) that was lower than the value of the shipper’s cargo. The goods were lost, the shipper sued the carrier, and the Court held that:

[T]he railroad must be able to rely on the liability limitation in its tariff agreement with the transfer company [because t]he railroad ‘had the right to assume that the Transfer Company could agree upon the terms of the shipment’; it could not be expected to know if the transfer company had any outstanding, conflicting obligation to another party.¹⁷⁸

The Court distilled the rulings from *Great Northern* into two basic principles:

When an intermediary contracts with a carrier to transport goods, the cargo owner’s recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed...[W]hen it comes to liability limitations for negligence resulting in damage, an intermediary can negotiate reliable and enforceable agreements with the carriers it engages.¹⁷⁹

Applying these principles to the case before it, the Court ruled that:

We think reliance on agency law is misplaced here. It is undeniable that the traditional indicia of agency, a fiduciary relationship and effective control by the principal, did not exist between Kirby and ICC. But that is of no moment. The principle derived from *Great Northern* does not require treating ICC as Kirby’s agent in the classic sense. It only requires treating ICC as Kirby’s

agent for a *single, limited* purpose: when ICC contracts with subsequent carriers for limitation on liability. In holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles. We merely ensure the reliability of downstream contracts for liability limitations. . . . [W]e hold that intermediaries, entrusted with goods, are ‘agents’ only in their ability to contract for liability limitations with carriers downstream.¹⁸⁰ (emphasis in the original)

The Court disagreed with Kirby because it believed its ruling accorded with industry practices and expectations, that unreliable limitations negotiated by intermediaries with downstream entities would increase shipping costs, and that its ruling would produce an equitable result since Kirby could always sue ICC.¹⁸¹

VI. Subsequent Cases

On November 15, 2004, less than a week after issuing its opinion in *Norfolk Southern*, the Supreme Court granted certiorari in *Green Fire & Marine Insurance, Co. v. M/V Hyundai Liberty*,¹⁸² (hereinafter “*Green Fire & Marine*”) and without reasons, vacated and remanded the Ninth Circuit’s judgment,¹⁸³ for further consideration in light of its decision in *Norfolk Southern*. The Ninth Circuit had been confronted with two questions:

(1) whether the owner of cargo, who contracted with an intermediary nonvessel operating common carrier (NVOCC) to arrange for carriage of cargo on a ship, was bound by the forum-selection clause in the bill of lading issued by the ship’s owner to the NVOCC, and (2) whether the NVOCC was entitled to take advantage of a statutory limitation of liability by having given the cargo’s owner a “fair opportunity” to opt for higher limits by paying a greater charge.¹⁸⁴

The court answered both questions in the affirmative.¹⁸⁵

With respect to the first question, the Ninth Circuit had found that since the NVOCC (analogous to ICC in *Norfolk Southern*) was the cargo owner’s agent, the terms of any bill of lading issued to the NVOCC pursuant to the NVOCC’s arrangements with a downstream carrier to transport the cargo, were binding on the cargo owner.¹⁸⁶ In one sense, the facts of *Norfolk Southern* and *Green Fire & Marine* were remarkably similar, in that both involved a shipper dealing directly with a freight forwarder who arranges with additional downstream entities for the transport of goods.¹⁸⁷ There was, however, one significant point at which *Green Fire & Marine* differed from *Norfolk Southern*: in *Norfolk Southern*, the applicability of a cargo damage liability limitation provision was at issue,¹⁸⁸ but in *Green Fire & Marine*, the applicability of a forum-selection clause was at

¹⁸⁰ *Id.* at 399.

¹⁸¹ *Id.*

¹⁸² 125 S.Ct. 494 (2004), *cert. granted* *Green Fire & Marine Insurance, Co., fka Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002).

¹⁸³ *Id.*

¹⁸⁴ *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1173 (9th Cir. 2002).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1175.

¹⁸⁷ Compare the fact pattern described *supra* nn.15–28 and accompanying text with fact pattern described in *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1173 (9th Cir. 2002).

¹⁸⁸ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385, 392 (2004).

¹⁷² *Id.* (citing cl. 10.1 at 59a App. to Pet. for Cert).

¹⁷³ *Norfolk Southern*, 125 S.Ct. at 398.

¹⁷⁴ *Id.* at 398.

¹⁷⁵ *Id.* at 399.

¹⁷⁶ *Id.*

¹⁷⁷ 232 U.S. 508 (1914).

¹⁷⁸ *Id.* at 514 (1914).

¹⁷⁹ *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct.385, 398 (2004).

issue.¹⁸⁹ The Supreme Court held, in *Norfolk Southern*, that the NVOCC was the cargo owner's agent "for a *single, limited* purpose: when [the NVOCC] contracts with subsequent carriers for limitation on liability."¹⁹⁰ Given the specificity of its holding in *Norfolk Southern*, it appears likely that the Court sent the case back to the Ninth Circuit for a determination of whether the policy considerations behind the presumed-agency status allowing the negotiation of binding liability limitations with downstream carriers are sufficiently congruent with the policy considerations involved in a downstream entity to binding an upstream entity to a forum-selection clause to warrant extending the presumed-agency to encompass that function as well. As of this writing, the Ninth Circuit has not rendered a new decision in this case. The issue presented by the second question focused on whether a provision in the bill of lading was sufficiently similar to statutorily specified language to have allowed the shipper a fair opportunity to opt for higher liability limits in exchange for higher freight rates,¹⁹¹ and, consequently, was not implicated by the Supreme Court's holding in *Norfolk Southern*.

In *Littlefield v. Acadia Ins. Co.*,¹⁹² the First Circuit, heeding the Supreme Court's instructions with respect to the applicability of federal maritime law to the interpretation of a contract, declined to enforce an uncontested choice-of-law clause calling for the application of federal maritime law to a contract of marine insurance.¹⁹³ In *Norfolk Southern*, the Supreme Court held that federal maritime law was applicable only if the contract at issue was a maritime contract *and* the case was not inherently local.¹⁹⁴ The First Circuit found that case was inherently local, and, as such, state law applied.¹⁹⁵

In *American Home Assurance Co. v. TGL Container Lines*,¹⁹⁶ the Federal District Court for the Northern District of California, citing *Green Fire & Marine*,¹⁹⁷ held that actions for indemnity between common carriers were not subject to COGSA, unless COGSA was explicitly invoked in the relevant bill of lading,¹⁹⁸ which in this case, it was not. Given that *Green Fire & Marine* has been vacated and remanded,¹⁹⁹ the fate of the rationale in *American Home Assurance* may be in some doubt.

Two other decisions, relying at least in part on *Norfolk Southern*, have confronted the issue of whether to apply federal maritime law on the basis of whether the contracts involved were maritime in nature. In *Doe v. Celebrity Cruises, Inc.*,²⁰⁰ the court extended maritime jurisdiction to encompass an action for sexual battery committed, on shore, by a cruise ship employee against a passenger.²⁰¹ In *Port Authority of New York and New Jersey v. American Warehousing of New York, Inc.*,²⁰² the court declined to extend maritime jurisdiction to a dispute arising out of a pier lease at a New York marine terminal.²⁰³ While neither of these decisions presents remarkable outcomes, both illustrate a certain judicial sensitivity to the need to independently determine whether federal maritime law applies, even in cases where its applicability might seem obvious.

VII. Conclusions

Taking the long view, the outcome in *Norfolk Southern* seems quite rational. Containerization and intermodalism continue to transform and streamline the transportation industry, and this ruling merely orders the expectations of the participants in a fashion that promotes, rather than retards these developments. The ruling does not endow a midstream entity, like ICC, with the ability to reduce its own liability to upstream entities, like its shipper, by way of contracts it negotiates with entities downstream to itself, but it does allow such midstream entities to reliably negotiate reduced liability for entities downstream to itself, and bind its upstream entity to such reduced liability. Nor does the ruling provide such midstream entities with any defenses to liability that it does not already possess as a matter of law, or that it has not explicitly contracted for with its shipper. So, in a sense, the Court merely simplifies the rules to accord with simpler transportation methods.

From a legal standpoint, the ruling is interesting, since it imposes a set of expectations on the participants in the cargo transport industry reminiscent of the set of expectations imposed on entities in the chain of possession of a negotiable instrument. Holder in due course status relieves downstream transferees of a negotiable instrument of the need to investigate the rights of upstream transferors. The purpose of such a scheme in the realm of negotiable instruments is to streamline and reduce the cost of the process of transfer of negotiable instruments, since such a scheme promotes commerce. The Court's policy decisions in *Norfolk Southern* work the same result in the realm of bills of lading, because they will relieve downstream parties of the necessity of investigating the nature of upstream arrangements – investigations that would place unnecessary temporal and monetary burdens on the transportation process.

Perhaps the most interesting feature of the decision is that the Court left the Eleventh Circuit's principal/agent dichotomy, for analyzing the status of the freight forwarder, undisturbed.²⁰⁴ Instead of striking down the dichotomy, the Court carved out a limited circumstance in which the agency status will, apparently, be presumed: when the freight forwarder "contracts with subsequent carriers for limitation on liability."²⁰⁵ The question presented by this exception is what type and what quantum of evidence will be needed to overcome the presumption. Acknowledging that its decision provides only a default presumption, and that "future parties remain free to adapt their contracts to the rules set forth here,"²⁰⁶ the Court leaves open the possibility that a freight forwarder's presumed agency status could be rebutted by the facts a particular case. Given the level of detail with which the Eleventh Circuit had specified the circumstances under which agent or principal status would be found,²⁰⁷ and given that the Court spoke in terms of contracts, as the method for ordering the affairs of the shipping industry, the message from the Court seems to be that rebuttal of the agency status will need to be explicit and expressed, not a matter of implication.

Another interesting question is whether the presumption of agency status would apply to entities other than freight forwarders dealing directly with shippers. The Court offers some guidance with its statement that "[i]n holding that an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers, we do not infringe on traditional agency principles."²⁰⁸ The unqualified use of the term 'intermediary,' appears to indicate that any downstream entity contracting for a liability limitation with an entity downstream from itself would seem to occupy the limited agent status that the Court explicitly attributed to ICC. Eventually, the questions will likely find their way into the lower courts.

¹⁸⁹ *Kukje Hwajae Insuarncce Co.*, 294 F.3d at 1173.

¹⁹⁰ *Norfolk Southern Railway Co.*, 125 S.Ct. at 399 (2004) (emphasis in the original).

¹⁹¹ *Green Fire*, 294 F.3d at 1178 (9th Cir. 2002).

¹⁹² 392 F.3d 1 (1st Cir. 2004).

¹⁹³ *Id.* at 7.

¹⁹⁴ 125 S.Ct. 385, 393, 396 (2004).

¹⁹⁵ *Littlefield*, 392 F.3d at 7.

¹⁹⁶ 347 F. Supp. 2d 749 (N.D. Cal. 2004).

¹⁹⁷ 294 F.3d at 1178 (9th Cir. 2002).

¹⁹⁸ *American Home Assurance*, 347 F.Supp.2d at 763.

¹⁹⁹ See *Green Fire & Marine Insurance, Co. v. M/V Hyundai Liberty*, 125 S.Ct. 494 (2004).

²⁰⁰ 394 F.3d 891 (11th Cir. 2004).

²⁰¹ *Id.* at 901.

²⁰² No. 020153/04, 2005 N.Y. Misc. LEXIS 302 (Civ. Court of City of New York (Feb. 23, 2005).

²⁰³ *Id.* at 18–19.

²⁰⁴ See *supra* notes 68–90 and accompanying text.

²⁰⁵ *Norfolk Southern*, 125 S.Ct. at 399.

²⁰⁶ *Id.* at 400.

²⁰⁷ See *supra* notes 68–90 and accompanying text.

²⁰⁸ *Id.* at 399.