

## THE RESURGENCE OF THE ELEMENT OF HARMONY IN ADMIRALTY

*Of law there can be no less acknowledged, than ... her voice the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care and the greatest as not exempt from her power. (Richard Hooker, 16<sup>th</sup> Century)*

The recognition that admiralty law is to be uniform in application nationally and internationally has been stated by courts for centuries. To this is the corollary that law should be applied in harmony. Harmony and uniformity are often caught up in the tension between federal law and state law, be it contract or tort, or with the law of different nations. Similarly, the law involving maritime commerce attempts to be uniform and harmonious; but, in many instances it has failed.

The spirit and result of the recent case of *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*,<sup>1</sup> appears to be a step forward in the resurgence of harmony. The case serves as an example of harmony that should exist in international commerce, i.e. multi-national harmony needs to exist for the public good and the transportation good. A unified and harmonious system providing certainty for the public in the commercial transportation world is definitely urgently needed. The *Kirby* Court recognized the need for public certainty in today's fast moving world. Acceleration in modes of communication and transportation demand nothing less.

While uniformity is a recognizable and definable goal of the policy of the United States Constitution, harmony is the guiding star for achievement. Federal admiralty law seeks harmony. Several cases in the last few years have been clearly addressing that issue and heading in that direction; however, *Kirby* is a clear explanation of the issue. The end result is that briefs submitted to the United States District Courts, Courts of Appeals, or to the United States Supreme Court should now, more than ever, address the element of harmony paving the way to realistic uniformity. All too often there is a "wooden" attempt to apply "uniformity". Often, uniformity is sought without a reason for the rule. In such cases "uniformity" is illusory. Uniformity without harmony avails very little.

The terms "uniformity" and "harmony" are hardly words of complex meaning. Whether one looks in the New Merriam-Webster Dictionary or the American Heritage Illustrated Encyclopedic Dictionary, the definitions are rudimentary. "Harmony" is defined as "a pleasing or congruent arrangement of parts" or "accord". On the other hand "uniformity" is defined as "identical", "always the same" or "conforming to one rule". It is the intention of this short paper to establish that the terms uniformity and harmony go hand-in-hand and are each equally necessary in establishing effective admiralty and maritime law. These terms and concepts have long been a part of admiralty jurisprudence.

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<sup>1</sup> 125 S.Ct. 385 (2004).

Uniformity and harmony seem to be always in an ebb and flow. I respectfully submit that these concepts in the international setting are now in resurgence. Often, uniformity is sought without so much as a nod to the harmony of an integrated system. Hopefully both concepts and elements will be carefully sought by Courts after *Kirby*.

Uniformity and harmony have the same legal family tree. This paper will discuss the family tree from roots to its top most branch. The trunk of the tree historically would be *De Lovio v. Boit*<sup>2</sup>, *Insurance Co. v. Dunham*<sup>3</sup> and *The Lottawanna*<sup>4</sup>. There followed several branches, *North Pacific S. S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*<sup>5</sup>, *Zane v. The President*<sup>6</sup>, *Kossick v. United Fruit Co.*<sup>7</sup>, and *Exxon Corp. v. Central Gulf Lines, Inc.*<sup>8</sup>, as well as others.

Now, the top most branch of this legal family tree is *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*

This legal family tree bears the fruits of uniformity but its roots are harmony.

The United States Constitution established “cases of admiralty and maritime jurisdiction” as the only specific grant of power of the federal judiciary. Certainly the founding fathers and the first generation of the judiciary fully understood this necessary concept and all that it carried with it.<sup>9</sup>

However, all of this theory is not so easily applied in our system of government. Professor David W. Robertson’s book on the interplay of admiralty law and federalism is a legal work that covers the subject as no other.<sup>10</sup> While it is now over one-third of a century old, the insight and clarity remains viable today.

Professor Grant Gilmore’s wonderful and somewhat whimsical review of Robertson’s brilliant text began as follows:<sup>11</sup>

The legal mind rarely, if ever, resists the temptation to make things appear to be neater, tidier and, above all, more logical than in truth they are, have been or ever will be. Perhaps it is our function, as scholars, judges, even as practitioners, to spend our lives making sense out of nonsense, reducing real chaos to apparent order, finding patterns

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<sup>2</sup> 7 F.Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

<sup>3</sup> 78 U.S. (11 Wall) 1 (1870).

<sup>4</sup> 88 U.S. 558 (1874).

<sup>5</sup> 249 U.S. 119 (1919).

<sup>6</sup> 30 F.Cas. 909 (E.D. Pa. 1824) (No. 18,201).

<sup>7</sup> 365 U.S. 731 (1961).

<sup>8</sup> 500 U.S. 603 (1991).

<sup>9</sup> U.S. CONST. art. III, § 2.

<sup>10</sup> DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONSHIP IN THE MARITIME LAW OF THE UNITED STATES* (1970).

<sup>11</sup> Grant Gilmore, *Admiralty and Federalism: History and Analysis of Federal-State Relations in the Maritime Law of the United States*, 38 U.CHI. L. REV. 431, 431 (1970) (book review).

in the formless waste and imposing our own brand of rationality on the irrational and the absurd. Perhaps it is even a useful function.

The history and current state of American maritime law and of the jurisdiction of the federal courts sitting “in admiralty” make up a story which might have furnished excellent material to the authors of *H.M.S. Pinafore*. There is an engaging idiocy in the story line as it unfolds which reassures us as to its essential truth: no one would have had the wit to invent anything on this level of fantasy.

One of the early founding federal judiciary members was Justice Story. In *De Lovio v. Boit*<sup>12</sup> Justice Story began a meticulous and elaborate essay on admiralty jurisdiction. It was a basis on which later American jurisprudence was built.

Specifically, Justice Story analyzed the *De Lovio v. Boit* case in three parts. He addressed the true nature and extent of the ancient jurisdiction of admiralty. Secondly, he stated how far admiralty had been abridged or altered by statutes or by common-law decisions. Finally, he addressed cases included in the delegation of authority by the Constitution to the judicial power of the United States of “all cases of admiralty and maritime jurisdiction”.<sup>13</sup>

It was a powerful and far-reaching opinion. Story not only declared the law, but also provided a global analysis of where the maritime law had been and was at that time. Later writers are mere tributaries of this scholarly river flow because Justice Story provided a lucid outline of the past for others to follow and amplify.

The three issues raised by Story were answered in an expansive manner. His view was that admiralty was in and of itself expansive.<sup>14</sup> Story regarded the Constitution as requiring him to declare that the law should be based upon a formula of knowledge of the past and creativity.<sup>15</sup> On the more mundane issue, he held that an insurance policy was a maritime contract within the maritime jurisdiction of the court.<sup>16</sup>

Shortly thereafter the Court, in *Zane v. The President*,<sup>17</sup> held that although a contract may be on land, the subject matter of the contract is maritime if it concerns navigation at sea.

In *Insurance Co. v. Dunham*,<sup>18</sup> Mr. Justice Bradley delivered the opinion of the Court in a sixteen-page opinion. The Court decided that an insurance contract was a maritime contract. The Court opinion starts with ancient laws, cites Browne, *A Compendious View of The Civil Law and Admiralty* written in 1802 and continues on to review district and circuit court cases. He states that

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<sup>12</sup> 7 F.Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

<sup>13</sup> *Id.* at 441-44.

<sup>14</sup> *See Id.* at 443.

<sup>15</sup> *See Id.*

<sup>16</sup> *See Id.* at 444.

<sup>17</sup> 30 F.Cas. 909 (E.D. Pa. 1824) (No. 18,201).

<sup>18</sup> 78 U.S. (11 Wall) 1 (1870).

Justice Story, in *De Lovio v. Boit*, will always stand as a monument to his great erudition. The Court further added that Justice Story was not only expansive but also correct. It is hardly surprising that the recent opinion of the *Kirby* case, to be discussed in detail hereinafter, cites a case that predicated its analysis on the *Dunham* case.

In *The Lottawanna*, Justice Bradley, speaking for the Court, denied an *in rem* remedy for a supply lien because the lien had not been perfected under state (Louisiana) law prior to the then-recent changes in the admiralty rules.<sup>19</sup> Moreover, the libel (complaint) was defective concerning the enforcement of a mortgage.<sup>20</sup> However, the language relating to the state of the law was more far reaching than that. The Court even reflected back on *The General Smith*,<sup>21</sup> decided almost six decades earlier, which stated that no lien is applied unless the law of the state so declares.<sup>22</sup> The Court also recognized that, about four decades earlier, in the case of *Peyroux v. Howard*<sup>23</sup> an *in rem* process against a vessel in her homeport was held to be valid based on the state law giving a lien.<sup>24</sup> The Court announced in *The Lottawanna* a rule of law, but perhaps more importantly it announced certain concepts that have been often accepted to the present day. These concepts are:

[(1)] [I]t is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit.<sup>25</sup>

[(2)] This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.<sup>26</sup>

[(3)] That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly

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<sup>19</sup> 88 U.S. 558 (1874). 558, 578-79, 1996 A.M.C. 2372, 2382-83 (1874) retro.

<sup>20</sup> See *id.* at 582-83, 1996 A.M.C. at 2386.

<sup>21</sup> 17 U.S. (4 Wheat.) 438 (1819).

<sup>22</sup> 17 See *The Lottawanna*, 88 U.S. at 571, 1996 A.M.C. at 2377 (citing *The General Smith*, 17 U.S. (4 Wheat.) at 443).

<sup>23</sup> 32 U.S. (7 Pet.) 324 (1833).

<sup>24</sup> See *The Lottawanna*, 88 U.S. at 579, 1996 A.M.C. at 2383 (retro).

<sup>25</sup> 88 U.S. at 572, 1996 A.M.C. at 2377.

<sup>26</sup> *Id.* at 573, 1996 A.M.C. at 2379.

intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.” But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.<sup>27</sup>

The Court ruled in *Southern Pacific Co. v. Jensen*<sup>28</sup> concerning federal/state interplay. Later it ruled in *Knickerbocker Ice Co. v. Stewart*.<sup>29</sup> While these cases have been criticized for many decades, they remain formidable. In the latter case, the Court was quick to point out that there must be no material injury to admiralty and maritime law that would interfere with the proper harmony and uniformity in international and interstate relations. The purpose was to preserve adequate harmony in an appropriate uniform rule relating to maritime matters.

#### M/V SKY REEFER- A CASE THAT BRINGS NEITHER ACCORD NOR UNIFORMITY

In 1995 the Court ruled on an agreement to arbitrate future disputes, *Vimar Seguros v. Sky Reefer*.<sup>30</sup> Justice Kennedy delivered the opinion of the Court in which there was an opinion by Justice O’Connor concurring in the result, and a dissent by Justice Stevens. The facts of the case are simple and are well known. A shipment of fruit carried under a standard form bill of lading covered a shipload of Morocco oranges and lemons purchased by a New York Partnership. The vessel the M/V Sky Reefer, a refrigerated cargo ship, owned by a Panamanian company and time chartered by a Japanese company set sail from Morocco to the United States. When the hatches were opened for discharge in Massachusetts, it was discovered that boxes of oranges had shifted in the cargo hold resulting in over a million dollars worth of damages. The bill of lading had a clause entitled “Governing Law and Arbitration” that stated the contract contained in the bill of lading should be governed by Japanese law and that any dispute arising from the bill of lading should be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission.

Until the opinion of the United States Supreme Court the leading case for invalidation of a foreign Selection Clause was the influential opinion of the Court of Appeals for the Second Circuit.

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<sup>27</sup> *Id.* at 574, 1996 A.M.C. at 2379-80.

<sup>28</sup> 244 U.S. 205 (1917).

<sup>29</sup> 253 U.S. 149 (1920).

<sup>30</sup> 515 U.S. 528 (1995), 1995 A.M.C. 1817.

In *Indussa Corp. v. S.S. Ranborg*.<sup>31</sup> The *Ranborg* decision that had stood for many years and had been followed by other jurisdictions was overruled. I respectfully suggest that wrapping the cloak of uniformity around the forum selection clause without attention to harmony resulted in an unfortunate result. Justice O'Connor raised appropriate storm flags in a concise, specific and erudite concurring opinion. Without fully addressing the preexisting rule of *Indussa* it was stated "I would not without qualification reject the reasoning and the conclusion of the *Indussa* rule itself and moreover would not wholeheartedly approve of an English decision".

Justice Stevens dissenting provided a historical perspective of consistent historical perspective and harmony. Specifically he stated "accordingly courts have always held that such clauses 'lessen or relieve' the carrier's liability". Later he spoke that the majority view was inconsistent with the purpose of COGSA.

The storm warning of the concurring opinion and the strongly worded dissent were harbingers of things to come. The Court considered the concept of "uniformity among nations". The Court makes it appear that there is some monolithic "over law" where the principles of COGSA are or were appreciated as one concept in the world. Such was not and is not the case.

While it is true that some aspects are variations on the same theme, great differences did abound. There are countries that have the pure Hague Rules, there is the United States that has modifications through national legislation, there are countries that have adopted the Hague-Visby Amendments, and finally, there are countries that have adopted the Hamburg Rules.<sup>32</sup> It adds little hope to uniformity or harmony by tabulating the various nations' particular legal regime in effect. It is enough to say that there are substantial variances. Perhaps this will all change.

The purpose of the paper is not to enumerate every case that has had to grapple with issues resulting from the *Sky Reefer*. Only a few will be cited.

There was no accord in case by case application. A discussion of a few of the cases will address some lack of accord over several years.

In *Mitsui & Co. (U.S.A.), Inc. v. Mira M/V*<sup>33</sup>, the Court of Appeals held that a Forum Selection Clause in a bill of lading did not contravene COGSA. Further, the Court held that

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<sup>31</sup> 1967 A.M.C. 589, 377 F.2d 200 (2d Cir. *en banc*). Numerous cases were in accord: *Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon*, 1982 A.M.C. 588, 590-93, 642 F.2d 721, 723-725 (4<sup>th</sup> Cir. 1981); *Conkin & Garrett, Ltd. v. M/V Finnrose*, 1988 A.M.C. 318, 320-22, 826 F.2d 1441, 1442-144 (5<sup>th</sup> Cir. 1987); *see also* G. Gilmore & C. Black, *Law of Admiralty* 145-146, n. 23 (2d ed. 1975) (approving *Indussa* rule) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), the *Indussa* holding has been extended to foreign arbitration clauses as well. *See State Establishment for Agricultural Product Trading, supra*, 1988 A.M.C. at 2334-35, 838 F.2d at 1580-1581.

<sup>32</sup> Hague Rules and the Hamburg Rules (1996), 6 *Benedict on Admiralty International Maritime Law documents and commentary*, 1-57, doc.3A (release no. 56 April 2005) reveals interesting adoptions of conventions in parallel form. Without going into specific numbers as meticulously set forth in the foregoing document, it appears that the Hague Rules are adopted in slightly more than fifty percent, the Hague-Visby Rules adopted in slightly less than thirty percent and the Hamburg Rules adopted in slightly less than twenty percent. Precise counting is somewhat difficult since notes 11 and 12 indicate the United Kingdom acceded to the Hague Rules, the Visby protocol and the S.D.R. protocol on behalf of Bermuda and several others and Yugoslavia is noted as having a certain amount of uncertainty on this former state. *Id.* 1-58.5.

<sup>33</sup> 111 F.3d 33 (5<sup>th</sup> Cir. 1997), 1997 A.M.C. 2126.

plaintiff could not contend that the contract was a “contract of adhesion” since *Mitsui* was a sophisticated international shipper and that *Mitsui* had accepted the terms of the bill of lading by filing suit.

*Fireman’s Fund, Ins. Co. v. M/V DSR Atlantic*<sup>34</sup>, the Court of Appeals reversed the trial Court by holding that the Forum Selection Clause was enforceable notwithstanding that plaintiff could not enforce its *in rem* remedies in Korea. It was held that this was not a lessening of liability but merely a means of enforcing liability.

*M.C. Watkins v. M/V London Senator*<sup>35</sup>, a Forum Selection Clause was enforced in favor of a vessel owner and a Virginia stevedoring company even though there was no remedy *in rem*.

*Kanematsu U.S.A., Inc., etc. v. M/V Ocean Sunrise, etc.*<sup>36</sup> held that a Forum Selection Clause in Japan was not enforceable. This cargo damage action had affidavits on file of Japanese lawyers supporting the conclusion that under applicable Japanese law there was “substantial uncertainty” as to whether the Japanese Court would recognize multiple carriers (including the defendant) as COGSA carriers where such parties would clearly be carriers under U. S. COGSA. The Court relied upon the prior case of *Union Steel America Co. v. Sanko Spruce*<sup>37</sup> where the Court refused to enforce a Forum Selection Clause requiring litigation in Korea because of uncertainty under Korean law as to whether both a ship owner and a time charterer could be considered “carriers”. In accord was *Central National-Gottesman, Inc. v. Gertrude Oldendorf*<sup>38</sup> where an English Court would not adopt construction of the term “carrier”. The Court reached its decision not to dismiss the case based on the real danger that a London Court may not hold in the same manner as if the case had been brought in New York.

*Foster Wheeler Energy Corp. v. An Ning Jing M/V*<sup>39</sup> held that the bill of lading concerning a jurisdiction clause stating that United States law applied and a General Paramount Clause designating Spain’s Hague-Visby Rules as governing law of the shipment provided for application of United States law only during periods of responsibility and to claims of which Spanish Hague-Visby Rules did not apply *ex proprio vigore*.

#### A FEW PRE-KIRBY CASES CONCERNING HARMONY

The cases that are discussed below arose a little more than a year before the *Kirby* case. However, each appears to be a foreshadowing event of the soundness of the *Kirby* case. Each dealt with the complexities of modern day cargo transportation in a multi-modal world.

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<sup>34</sup> 131 F.3d 1336 (9<sup>th</sup> Cir. 1997), 1998 A.M.C. 583.

<sup>35</sup> 112 F. Supp. 2d 511 (E.D. Va. 2000), 2000 A.M.C. 2740.

<sup>36</sup> 2003 A.M.C. 2200 (E.D. La. 2003).

<sup>37</sup> 1999 A.M.C. 366 (D.N.J. 1998).

<sup>38</sup> 204 F. Supp. 2d 675 (S.D.N.Y. 2002), 2002 A.M.C. 1477.

<sup>39</sup> 383 F.3d 349 (5<sup>th</sup> Cir. 2004).

*Hawkspere Shipping Co., Ltd. v. Intamex, S.A., et al.* was a decision of the Court of Appeals for the Fourth Circuit.<sup>40</sup> The shippers were international metal traders that were shipping aluminum in Russia for sale to American buyers. Ocean carriage was booked on a vessel owned by *Hawkspere Shipping Co., Ltd.* The booking was made through a “cargo consolidator”. It was known to the shippers that the cargo consolidator did not use its own vessel for shipping and instead brokered services to other companies. The cargo consolidator entered into a voyage charterparty with *Hawkspere* as owner of the vessel. The vessel also carried the cargo of two other shippers that had been arranged through the cargo consolidator.

Instead of paying *Hawkspere* directly for the ocean freight the shippers claimed to have paid in full to the cargo consolidator but the carrier never received payment. When the vessel arrived in Baltimore, a possessory maritime lien was asserted against the cargo. The District Court entered judgment on the carrier’s complaint for ocean freight. The judgment was *affirmed*. Shippers raised numerous points concerning a maritime contract including that the law of England should control the dispute since the bill of lading and the charterparty should be read together. The Court rejected this and held that *Lauritzen v. Larsen*<sup>41</sup> factors must determine applicable law.

The Court then had the option of adopting the rule of “semi-strict liability for shippers” or the other alternative of “equitable estoppel”. The Court adopted the Eleventh Circuit rule holding that where a Shipper chooses to remit payment by way of a cargo consolidator rather than directly to the ocean carrier, the shipper assumes the risk that the consolidator might not forward freight payments to the carrier. Thus, the Shipper’s duty to pay freight is not discharged absent evidence that the carrier actually released the Shipper from its duty to pay under the bill of lading.

Another case arose in the pre-*Kirby* world that is factually far closer to *Kirby* than the aforementioned cases.

In *Indemnity Insurance Company of North American v. Hanjin Shipping Company*<sup>42</sup> the Shipper needed to move power tools from China to the United States. Shipper contacted with Hanjin Shipping Company to transport a single container hauling these tools from China to the Shipper’s warehouse in North Vernon, Indiana. The waybill covered all legs of the journey and thus involved both sea and land transport. In short, it was an intermodal contract. Black & Decker was indicated as the shipper and the consignee was Lowe’s Companies, Inc. The waybill gave the name of Fritz Companies, Inc. as the “Notify Party”. The waybill provided that it was to be governed by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (commonly known as the Hague Rules) which the court indicated are generally in force because of the Carriage of Goods by Sea Act, 46 U.S.C. App. § 1300 *et. seq.* was its counterpart.

Prior to the arrival in Illinois, the U. S. Customs Service notified Fritz (Lowe’s agent and custom broker) that this container had been selected for intensive Customs’ investigation. Fritz then advised the ocean carrier in writing that the goods were to be released to a trucking company for deliver to O’Hare Services, one of the four companies operating an examination station for the U. S. Customs in the Chicago, Illinois area. The container was taken to the inspection station and

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<sup>40</sup> 330 F.3d 225 (4<sup>th</sup> Cir. 2003), 2003 A.M.C. 1374.

<sup>41</sup> 345 U.S. 571 (1953).

<sup>42</sup> 348 F.3d 628 (7<sup>th</sup> Cir. 2003), 2003 A.M.C. 2705.

on August 26, 1999 Customs Service officials examined the contents of the container and released it from its custody. At that time the shipment was intact and in good order. The container was then moved from the bonded Customs' area to the open yard. Fritz and the ocean carrier were informed that the contents were released and ready to be picked up. The container sat in an unprotected yard awaiting pick up and disappeared. Eventually the Indiana State Police notified the ocean carrier that they had discovered an empty container. The goods were never recovered. Lowe's submitted a claim for the lost shipment to its insurance company and it became subrogated. The ocean carrier and the trucking companies were also named as defendants.

The District Court found that either Illinois or Indiana contract law applied to a claim against a multi-modal through carrier for theft of cargo and container from a terminal in Illinois. The District Court found no admiralty, federal statutory, COGSA, Harter or Carmack Amendment, or Federal Common Law applied. The Court of Appeals reversed the judgment against the ocean carrier. The District Court judgment dismissing the trucking company was vacated and that part of the case was remanded to the District Court for further proceedings.

The Court of Appeals used fundamental ocean transportation law. In this regard, the Court was in a similar pattern with the future *Kirby* case. Basically the Court held that the Hague Rules to which the waybill refers, were for all purposes relevant to this case basically incorporating the U. S. law in the Carriage of Goods by Sea Act. The Court added that when a waybill has a statement that the Hague Rules "shall apply to this waybill", the only reasonable manner to read the language is "as an agreement to apply those rules to all phases of the trip". The Court hastened to add that such an approach makes "eminent good sense, as compared with the inefficient alternative of applying different substantive law to the container depending on whether it is sitting on board a ship, on a railcar or on a truck".

In *Alliance v. Blue Anchor Line*<sup>43</sup>, the bill of lading governing this transportation from Thailand to Ohio, in fact, contemplated inland transportation in the U.S. The shipper paid only a single freight and did not enter into the inland United States contract. The bill of lading was a through bill of lading that applied to all connecting carriers even though they were not parties to it. The bill of lading incorporated United States COGSA for the entire transportation but provided that any compulsory national law should apply. The Court held that the carriage was covered by COGSA and not the Carmack Amendment for loss during the inland carriage. Hence the Court decided that the through bill of lading defining a Participating Carrier to include an inland carrier with a Himalaya Clause should support the inland carrier to summary judgment.

None of the aforementioned Courts used the word "harmony", "uniformity", or other constitutional policy words. But the opinions are practical, sensible and sound applications of those concepts.

These cases are an excellent discussion of the need for uniformity, illustrating the intervening circumstances that often could arise in a lengthy intermodal voyage and is in full concert with the future opinion in *Kirby*.

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<sup>43</sup> 2004 A.M.C. 1266 (S.D.N.Y. 2004).

*NORFOLK SOUTHERN RAILWAY CO. v. JAMES N. KIRBY, PTY LTD.*

On November 9, 2004, the Supreme Court of the United States in a unanimous decision addressed a case involving the delivery of machinery from Australia to Huntsville, Alabama. Doing so was reminiscent of the approach Justice Story took in his many admiralty opinions. The format of the opinion addressed three issues with clarity and regard for precedent. Furthermore, the Court acknowledged the admiralty need in worldwide transportation is harmony, uniformity due to the complexity of the commercial world today.

The Court lightly approached this overarching critical matter by commencing its opinion with the following quote: “This is a maritime case about a train wreck”. The Court, in its in-depth discussion, reversed the United States Court of Appeal for the Eleventh Circuit.

Respondent Kirby was an Australian manufacturing company that sold ten containers of machinery to the General Motors plant outside of Huntsville, Alabama. Kirby hired International Cargo Control, an Australian freight forwarding company to arrange the delivery of these containers by “through” transportation. The contract for carriage thus had International Cargo Control issue an ICC bill of lading to Kirby. The bill of lading designated Sidney, Australia as the port of loading, Savannah, Georgia as a port of discharge and Huntsville, Alabama as the ultimate destination for delivery. Kirby accepted a contractual limitation of liability for ICC below the machinery’s true value that presumably resulted in a lower shipping rate. There was nothing unusual about the “package” limitation as set forth in the bill of lading since it clearly tracked COGSA. The bill of lading also had a “Himalaya Clause”.

The freight forwarder ICC did not actually transport the cargo but instead hired Hamburg Sudamerikanische Dampfschifflahrds-Gesellschaft Eggert and Amsinck (Hamburg Sud). Hamburg Sud thereupon hired Petitioner Norfolk Southern Railroad to transport the machinery from Savannah to Huntsville, Alabama. The Norfolk Southern Railroad carrying machinery derailed en route and alleged 1.5 million dollars in damages. Kirby who had obtained insurance for the voyage was reimbursed by his insurance company, and Kirby and the insurer then sued Norfolk in the United States District Court for the Northern District of Georgia asserting diversity jurisdiction and alleging tort and contract claims.

The District Court granted Norfolk’s Motion for Summary Judgment holding that Norfolk’s liability was limited to \$500 per container and a divided panel of the Eleventh Circuit reversed. Certiorari was granted.

The first issue to be dealt with was whether or not the contract was a maritime contract. The Court cited the case of *Kossick v. United Fruit Co.*<sup>44</sup>

The Court held that the ICC and Hamburg Sud bills of ladings were maritime contracts because their “primary objective is to accomplish the transportation of goods by sea from Australia to the eastern coast of the Untied States”. The Court took comfort in *Kossick*, a

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<sup>44</sup> 365 U.S. 731 (1961).

seaman's maintenance and cure case that dealt with that aspect of a marine contract. The Court stated that the rail journey from Savannah to Huntsville was a "fringe" portion of the intercontinental journey promised in the ICC and Hamburg Sud bills of lading.

The Court thereupon returned to its touchstone that the "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce' ". In so doing it relied upon *Exxon Corp. v. Central Gulf Lines, Inc.*,<sup>45</sup> *Sisson v. Ruby*,<sup>46</sup> and several others. The Court also sought to rely upon precedent to reinforce another point; whether or not an agreement is a maritime contract depends upon the nature and character of the contract and the true criterion is whether it has "reference to maritime service or maritime transactions". *North Pacific S. S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*,<sup>47</sup> and the case cited therein, *Insurance Co. v. Dunham*<sup>48</sup>.

Such reliance is significant. The Court, in *Dunham*, confirmed what Justice Story had said decades before: that a marine insurance contract is within the maritime jurisdiction. It is also a writing that portrays the heart of admiralty law in its founding. So is the case of *North Pacific Steamship* written by Justice McReynolds, who was the disciple of those who came before. Thus, the recitation of these authorities brings great comfort, in that the principles that have been so long accepted are still in place. The Court concluded by stating "conceptionally", so long as a bill of lading requires substantial carriage of goods by sea its purpose is to effectuate marine commerce and that is a marine contract".

The Court turned then to the second significant issue; i.e. whether this case was inherently local? It was here that harmony and uniformity were stressed. The Court stated specifically that applying state law to cases such as the instant case would undermine the uniformity of general maritime law. Once again relying on *Kossick* the Court stated "a maritime contract may well have been made anywhere in the world" adding that it should be judged by one law and here that law is federal. The Court recognized protecting the uniformity of federal maritime law will also reinforce the reliability regime Congress established in COGSA. This is a citation this writer submits is an underlying theme of everything that the Court has done in past cases. The Court looked at personal injury cases, looked at federalism and the part that Congress plays, as well as that portion that admiralty judges play in maritime matters.

As a third issue the Court turned to the limitations contained in the maritime contract and held that it was a basic simple question of contract interpretation. The unanimous Court said it is clear that a railroad like Norfolk was an intended beneficiary of ICC's broadly written Himalayan Clause within its bill of lading, and that Norfolk Southern's liability is limited by the terms of that Clause. The question arising from the Hamburg Sud bill of lading was more difficult. But once again they relied upon older precedent in the *Great Northern R. Co. v. O'Connor*.<sup>49</sup> While Respondents argued that the Court should fashion a federal rule from general agency law principles, the Court held that under *Great Northern* they need not treat ICC

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<sup>45</sup> 500 U. S. 603 (1991).

<sup>46</sup> 497 U. S. 358 (1990).

<sup>47</sup> 249 U.S. 119 (1919).

<sup>48</sup> 78 U.S. (11 Wall) 1 (1870).

<sup>49</sup> 232 U. S. 508 (1914).

as Kirby's agent in the classic sense. It only requires treating ICC as Kirby's agent for a single limited purpose.

The opinion citing numerous authorities to anchor its reasoning used terms such as "a concern for the uniform meaning", "uniformity", "consistency" and "uniform adherence to a federal rule". It also confirmed "that state law must yield to the needs of a uniform maritime law when this Court finds inroads on a harmonious system".

All in all, this case represents a practical approach to world commerce. It deals with the realities of world commerce. It provides clarity and reliance on accepted authorities. It blends an existing statute such as COGSA with the way things really work as seen by the practitioner in his or her everyday considerations. It is a thorough blending of something old that was always accepted, with methods of transportation that are new.

### REFLECTIONS ON UNIFORMITY AND HARMONY

Shortly after the *Sky Reefer* case The Maritime Law Association of the United States overwhelmingly recognized that the Carriage of Goods by Sea Act being sixty years old was in need of reworking. It began its redrafting of the Carriage of Goods by Sea Act in 1994 and this continued for several years thereafter. The Comite Maritime International later began working on a similar project with many law Associations of the world participating, including the United States through the representatives of The Maritime Law Association of the United States.

Currently the United Nations Commission on International Trade Law (UNCITRAL) has created working Group III. The group began in 2002 and has completed its fifteenth session in April 2005. The working draft of this group will undoubtedly adopt a better, fairer approach on a *Sky Reefer* type problem than *Sky Reefer*. There is hope that uniformity truly comes into being and thus, a congruent assembly of all parts (Nations) may result. Thus, alleged uniformity will be matched with harmony.

Many comments of the last decade on uniformity by the most distinguished members of the Bench and the Bar have expressed their dissatisfaction, even their dismay, with lack of uniformity.

Two of the finest members of the judiciary in the admiralty world have written and spoken on the broad aspects of uniformity. The late jurist, the Honorable John R. Brown of the United States Court of Appeals for the Fifth Circuit is in point. In his discussion and paper delivered at the Healy Lecture Series at New York University, Judge Brown dealt with his perception from years of experience as an admiralty judge in interpreting and applying admiralty law.<sup>50</sup> Judge Brown applauded the historical development of admiralty jurisdiction as structured by Justice Story and echoed the fact that admiralty jurisdiction has been given support by the Supreme Court over the years. Judge Brown relies on years of precedent to continue where judges should declare principles of maritime law based on customs and usage of the sea, or based on policies of furthering commerce.

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<sup>50</sup> 24 J. Mar. L. & Com. 249 (1993), The Healy Lectures 1 (2005) Kimball ed., Honorable John R. Brown, Admiralty Judges: Flotsam on the Sea of Maritime Law.

Honorable Charles S. Haight, Jr., United States Senior District Judge, Southern District of New York, expressed his reflections on uniformity and maritime law. In his article *Babel Afloat: Some Reflections on Uniformity in Maritime Law*<sup>51</sup> he lists page after page the foundation cases of uniformity on the national scene and on the international scene. Moreover, he stated that it appeared that the Supreme Court seemed to rekindle its interest in a uniform maritime law when in 1961 it decided *Kossick v. United Fruit Co.*<sup>52</sup>, holding that the general maritime law enforced oral contracts. He was less than sanguine; however, when he stated that the way the tide is running, the Supreme Court may no longer be regarded as a bulwark of a uniform maritime law. His expressions of how admiralty law was created and fostered to be uniform gave insight into the uniformity that is needed today.

It seems impossible to read the *Kirby* case without hearing ringing echoes of Judge Haight's paper. His faith in the *Kossick* opinion on maritime contracts has been reinforced by *Kirby*. Commercial admiralty and the need to protect it by uniform laws throughout may be on its way to finally returning to a firm rule of law. Maybe once again, the tower of uniformity will not be made the dysfunctional tower of babble, but a stronger tower of uniformity and common sense in a commercial world.

## CONCLUSION

Where does all of this leave us?

Applying "uniformity" where there is no harmony will not work. As Judge Haight states when the Hague Rules were passed the world's issuers and holders of ocean bills of lading were of one speech. Sixty years later that speech has been confounded. As previously mentioned most of the United States trading partners have adopted the Hague-Visby Amendments, some with the SDR protocol and others without and many have adopted the Hamburg Rules.

Professor Michael Sturley of the University of Texas who has spent much of his professional life involved in the law of carriage by sea has stated that there is little uniformity to be found presently in the law governing the carriage of goods by sea.<sup>53</sup>

A recent copy of the Benedict's Maritime Bulletin<sup>54</sup> addressed the view points of officers of an international transportation and logistic company and an international freight forwarder. These discussions were enlightening in that it was felt that the *Kirby* decision appears to be in harmony with the state of the current industry practice. The author of that article opined that perhaps on this occasion the Supreme Court had gotten the issue properly solved.

Parties to the shipping contract concerning international shipments to and from the United States can take comfort in the clear pronouncements of *Kirby*. While there may be a few "tags ends" as Honorable John R. Brown said on many occasions in his opinions, they are remediable.

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<sup>51</sup> 28 J. Mar. L. & Com. 189 (1997), The Healy Lectures 57 (2005) Kimball ed.

<sup>52</sup> 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56, (1961).

<sup>53</sup> Sturley, Uniformity in the Law Governing the "Carriage of Goods by Sea" 26 J. Mar. L. & Com. 553 (1995).

<sup>54</sup> Sharpe, Freight Forwarders' Viewpoint on Commerce and Kirby, 3 Benedict's Mar. Bull. 38 (1<sup>st</sup> Quarter 2005).

What is a substantial ocean voyage is certainly more understandable to the average shipper or carrier than a great deal of other factors that confront them.

The *Kirby* case gave a great boost to the return of harmony.

Hopefully, UNCITRAL's efforts will reward all countries with uniformity and harmony. Only time will tell. However, strides are being made. A new document may be able to sustain the test of time for another sixty years.

In the meantime, I would respectfully suggest that issues of uniformity always be coupled with concepts of harmony that help the public as shippers and the carrier industry. Each concept is the equal of the other.

Respectfully, I submit that the incantation of uniformity alone is not enough. It must be coupled with harmony in equal measure so that Courts are convinced with the entire concept of harmonious application of duties, rights and protections to all parties of international agreements. Harmony is not obtained by hoping for accord or citing three quarters of a century old foreign jurisdiction cases or failing to recognize the practicalities of the current transportation world. Neither shipper's, carrier's nor each party's underwriter are a "bottomless pit" of financial resources. The citizen consumers ultimately bear "a loss" whether it is from increased freight rates, increased insurance or increased product costs. Harmonizing the impact of the transportation laws to this end will achieve modernized results. Having a true unified rule, harmoniously applied will provide fairness.

After all, isn't fairness what justice should be all about?