LIMITATION OF LIABILITY BY ARBITRATION

AS AN ALTERNATIVE TO

COGSA AND HARTER ACT

(M/V SKY REEFER)

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The History of Limitation of Liability and/or Exoneration by a shipowner is so universal that to discuss it beings on physical reticence and mental indifference.

If this be the case, then why discuss it at all? Well, the reason is simple. With the ever-increasing economic competitiveness of the world, there is the ever increasing pressure to resolve by legal machination to win rather than by will to solve litigimate disputes within statutory schemes, ergo the recent United States Supreme Court decision in Vimar Seguros Y Reaseguros v. M/V Sky Reefer.

Consequently, a review is necessary to bring into sharper focus the great difference between limitation under statutory schemes such as COGSA, the Harter Act, The Hague Rules, Hamburg Convention, and the attitudes and philosophy which are being advanced.

This paper is not intended to be, and is not, a detailed learned treatise, but is rather a cursory introduction.

The origins of permitting a shipowner to limit his liability to the value of his vessel by surrendering his interest in the vessel under circumstances involving a maritime catastrophe is uncertain. There is some reason to believe that it is based on Roman legal principles; however, it is questionable whether a Roman maritime code even existed. Limitation of shipowners' liability appears to have first appeared in Italy between the fall of the Western Roman Empire (454 A.D.) and the Crusades (1096-1291 A.D.) and eventually spread to Spain and France. England traditionally traces its origin from the Rules of Oleron (Circa. 1150 A.D.). However, the Rules contained on limitation of a shipowner's liability to his investment in his

vessel. The Rules often attribute their origin to Richard I, meaning Richard's mother, Eleanor of Aquataine, who ruled Western France and made the Island of Oleron her seat of government and was responsible for the publication of the Rules of Oleron. Consequently, it is believed that Richard adopted the Rules for use in England.

It is also perceived that when the Rules were published, they included the "Black Book of the Admiralty" a reference book used in English Admiralty Courts. Therefore, English maritime interests were burdened by the Common Law Doctrines of insurer liability of common carriers and "respondat superior." We later see the Hanseatic Ordinances of 1614 and 1644 limiting the liability of a shipowner to the value of his vessel and stating that the proceeds of the sale of the vessel were to the satisfaction of all claims.

There is also at this time the Statutes of Hamburg (1603), the Maritime Code of Charles II of Sweden (1667) and the Dutch ordnance of 1721 in Rotterdam. However, the premier codification was in Louis XIV, compiled in 1681 under the direction of Minister Colbert and known as the "Maritime Ordinance of Louis XIV." The ordinance was an attempt to secure for the French mercantile interests the benefits of existing marine and commercial codes and legal decisions.

The ordinance was so well received universally as the law of maritime nations, except for England, that it was incorporated into the French "Code de Commerce" of 1807. By incorporation into the Code Napoleon, the ordinance eventually became part of the maritime law of several European and Latin

American countries by the German, Netherlands, Belgian, Italian, Russian, Spanish, Portuguese, Brazilian, Argentine and Chiliean maritime codes.

English shipping would be in an economically disadvantaged position for more than 50 years after the codification; until such time as Parliament through a series of laws passed at the petition of London shipowners and merchants in 1733, 1784 and 1786. And again in 1813.

We know that the original concept behind the Doctrine of Limitation was justified as a commercially practical device and necessary as a policy doctrine to encourage the growth of the maritime industry. As previously stated, English maritime interests were always burdened by the common law doctrines of insurer liability of common carriers and "respondat superior." As evidenced in the preamble to the 1813 Act, "Increase the number of ships and vessels belonging to the United Kingdom, registered according to Law and to prevent any Discouragement to Merchants...and others." 53 GEO.3, c 159 (1813).

Likewise the American limitation system introduced by statute in 1851 was based on a policy decision to give American owners the same protection as their British competitors. And while the classical attitudes of Great Britain and the United States towards the shipowners' ability to limit liability are quite different, they are similar to the extend that at common law the liability of the carrier was strict, and, apart from the express contract, absolutely responsible for the safety of the goods while they remained in his hands as carrier absent and "act of God".

The Continental Scheme as opposed to British and American consists basically of two systems: abandonment and maritime lien. In concept

the two are identical. The difference between them relates mainly to the procedure for surrendering of the assets. Under the abandonment system, the owner is personally liable, but with the option of divesting himself of all liability by physical abandonment of the venture assets to the venture creditors, in other words, with an option to declare the venture bankrupt.

Under the maritime lien system, there is no personal liability for the owner. His liability is a liability "in rem," and it is up to the climants whether they want to enforce their liens at once of let them rest on the assets until a better opportunity for realization arises.

The characteristic of the two systems is that the claims share the destiny of the ship; they literally go down with it. So for instance if the owner is allowed to embark upon new ventures without having to give additional security for the claims, new liens attached take precedent over the old ones.

The two systems have the same philosophy and justification, i.e., it is expedient to encourage seafarers to invest in maritime ventures by reducing their liability to the value of the remaining venture assets.

The British system is based on tonnage and could only be invoked with respect to claims arising from wrongful acts committed by the owners' servants in the course of their service to the ship and the limitation unit was "any distinct occasion" giving rise to liability. This concept was clearly inspired by the development of marine insurance, and in this respect, England was more advanced bearing in mind that the running down clause was not included in the English Standard Hull policy until 1836 and the first protection indemnity clause did not come into existence until the second half

of the 1850's, a system which was remarkably modern. Consequently, we see the construction of a limitation fund which reflects a desire from an insurance point of view to standardize the required coverage. Thus, the total limit of liability for each occasion was 15 pounds per ton of the ships' tonnage (the estimated value per ton of British passenger ships in 1854), of which 7 pounds per ton was reserved for personal claims with the remaining 8 pounds per ton to be shared by both property claimants and personal claimants. Thus, the measure was not to venture assets after the catastrophe, but in an amount approximately equal to the owner's investment (the sound value) in the ship before the catastrophe. As to the element of freight as it was contained in the continental system, it was ignored.

One basic disadvantage of the British system was that its limits were expressed in terms of paper money, but that flaw was later cured by subsequent limitation conventions, specifically the 1957 Limitation Convention.

The American system was originally a pure abandonment system but it was refined to the extend that the owner could transfer his interest in the vessel and freight to a court-appointed trustee and, thereby, divest himself of further liability. Later in the 1870's, it was established by court Rules that the posting of a bond in the amount of the appraised value of the ship and freight was an alternative to the transfer of the interest to the court-appointed trustee. This alternative was only formally recognized by statute in 1936.

The limitation unit is the voyage, and the scope of claims subject to limitations as set forth in the statute is very broad. In addition to

liability for damage, the owner can limit his liability "for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred." On its face, the statute appears to be ever broader than the French system, but in practice has been narrowed by case law.

It is curious that the British and American systems, particularly the British system, has not been adopted by other countries when introducing limitation of liability in their maritime codes. One explanation is that neither the British nor American system have ever been expressed in simple principles with philosophical appeal, in spite of the fact that the British system adapted to the concept of insurability and, thus, a plausible justification for the continued "special" protection to the shipping industry.

The American attitude toward limitation of liability is confusing at best. Nowhere has opposition to it been stronger, but surprisingly little has been done to modernize it. For example, in 1886 the Supreme Court of the United States ruled that the shipowner's proceeds were not to be taken into account in computing the limitation fund. However, in 1936 the statute was revised primarily for the purpose of increasing the fund for personal claims, but the decision of 1886 was not included. Then again, in 1954 the Supreme Court allowed claimants to go directly against the owner's liability insurer, disallowing the insured to invoke the assured's right to limitation. The statute has also been narrowed by case law under the "ambiguous and enigmatic" doctrine of "personal contracts", Gilmore & Black, The Law of Admiralty 898 (2d ed. 1975), which brings us to the heart of this paper, the personal contract doctrine.

The early continental systems contained confusion as to whether or not the right of the shipowner to limit extended to contracts of the Master, The Rebecca, 20 F. Cas. 373, 377 (D. Me 1931); while other systems expressly excluded contracts specifically authorized or guaranteed by the owner. The German Code (Article 452), allowed limitation as to contracts of the Master unless made "in virtue of a special Power of Attorney" or "unless the owner expressly guaranteed the performance of the contract", Force v. Providence Wash. Ins. Co., 35 F. 767, 778 (S.D.N.Y. 1888).

So what is a personal contract? In application, this is an equitable doctrine based upon the proposition that a shipowner should not be able to promise an undertaking or performance that was within his personal control and then turn around and limit liability when his performance was faulty. Thus, the shipowner who enters into a charter for his vessel and expressly or impliedly warranted seaworthiness cannot limit as to the claim of a charterer that the vessel sank because the vessel was unseaworthy at the beginning of the voyage, Pendleton v. Bennerline, 246 U.S. 353, (1918). Likewise, the shipowner may limit as to payments due under a salvage or a towing contract entered into on behalf of the vessel owner. The obligation in such a case is not the ship's, but is the personal contract of the owner, Great Lakes Towing, Co. v. Mill Transportation Co., 155 Fed. 11 (6th Cir. 1907).

But the test of the personal contract exception is not merely that the shipowner entered into a contract personally, but whether the obligation (and therefore the breech) was one the shipowner was personally bound to perform, rather than one contemplated he would delegate to his agents or his

servants. Therefore, the shipowner may limit regarding a towing contract personally made by the tug owner, but whose performance was contemplated to be delegated to the Master and the crew of his vessel, The Soerstad, 257 Fed. 130 (S.D.N.Y. 1919). Following this line of reasoning, contracts for repairs, supplies, and services are personal contracts not subject to limitation, The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 415-17, 6 L.Ed. 122 (1824); 1899); Great Lakes Towing Co. v. Mill Transportation Co., 155 Fed. 11 (6th Cir. 1907); Gorkey v. Fort, 44 Fed. 364 (S.D.N.Y. 1'890); The Amos D. Carver, 35 Fed. 665 (S.D.N.Y. 1888). A claim under an indemnity contract is also not limitable. S & E Shipping Corp. v. Chesapeake & O. Ry. Co., 678 F.2d 636 (6th Cir. 1982). Likewise, a ship mortgage contract is also not subject to limitation, Petition of Zebroid Trawling Corp., 428 F.2d 226 (1st Cir. 1970).

The rationale for these decisions and for the doctrine appears to have been based on an analogy to cases determining when a maritime lien for repairs and services and supplies was created against the vessel "in rem". Under the existing lien law, if the necessaries and/or repairs and alike were furnished to a personal contract with the vessel owner, the implication of a lien against the vessel was precluded because the necessaries so furnished was in reliance upon the credit of the shipowner and not the vessel, particularly in the vessel's home port where presumably the contract would have been executed under the owner's supervision and control. The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 415-17 (1824); The Havana, 92 F. 1007, 1008 (3rd Cir. 1899); The Mary Morgan, 28 F. 196, 200-01 (E.D. Pa. 1886).

However, this analogy to lien law was erroneous for two reasons: First, privilege of limitation is available to the shipowner and does not depend on "in rem" liability of the vessel; Second, the question of determination in limitation proceedings is the absence of privity, while in the lien situation, the controlling consideration is the intent of the parties to pledge the credit of the vessel. American Car & Foundry Co. v. Brasset, 289 U.S. 261, 264 (1933); Richardson v. Harmon, 222 U.S. 96, 102 (1911); The Fred E. Hasler, 65 F.2d 589, 590-91 (2d Cir. 1933); Great Lakes Towing Co. v. Mill Transp. Co., 155 F. 11, 15-16 (6th Cir.), cert. denied, 207 U.S. 596 (1907); Castles, The Personal Contract Doctrine: An Anomaly in American Maritime Law, 62 Yale L.J. 1031 (1953).

There appears to be no Supreme Court decisions on this issue in recent years, only a lower court decision holding that contracts of the Master outside the home port and "in the course of the voyage" are not personal contracts and are therefore subject to limitation. Gokey v. Fort, 44 F. 364, 366 (S.D.N.Y. 1890); The Amos D. Carver, 35 F. 665, 669 (S.D.N.Y. 1888).

Contrary to the statute as enacted by Congress and as interpreted by the Supreme Court in Butler v. Boston & Savannah S.S. Co., 130 U.S. 537, 549 (1889), the Court in speaking of the original 1851 Act said: "It extends to liability for every kind of loss, damage and injury. This is the language of the maritime law, and it is the language of our statute which virtually adopts that law," see generally Norwich & N.Y. Transp. Co. v. Wright, 80 U.S. (13 Wall.) 104 (1872), the personal contract doctrine has surfaced as a judge made Rule which is not only ambiguous but comes to us without benefit of any

supporting language in the statute or prior judicial precedent. In McPhail v. Williams, 41 F. 61, 62 (D. Mass. 1980), despite the legislative history and without benefit of citation, the trial court said: "Certainly there was no occasion for Congress to legislate to limit the liability of shipowners on contracts which they enter into personally, or expressly authorize." Similarly, the court in The Amos D. Carver, 35 F. 665, 669 (S.D.N.Y. 1888), construed the wording of 46 U.S.C. Sec. 189 to exclude personal contracts of the owner from the operation of the statute under the language "all debts and liability" incurred "on account of" the vessel.

In 1911, the Supreme Court decision of Richardson v. Harmon 222 U.S. 96 (1911), held the right to limit extended to non-maritime torts as well as to maritime torts and then, without citation or authority, characterize the coverage of limitation acts: "Thus construed, the section [section 189] harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the Master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts."

One theory holds that Justice Lurton, who formulated the basis for the personal contract doctrine, when he was sitting on the bench of the United Stated Court of Appeals that decided the Great Lakes Towing Co., v. Mill Transportation Code case (1907), influenced other members of the Supreme Court, upon his appointment to the Supreme Court that the personal contract doctrine was the path to take in the Richardson v. Harmon decision.

If this sounds confusing, the doctrine is further marred by two different lines of authority, i.e., case decisions in lower courts suggesting different

approaches in defining and applying the concept.

The first line of cases relied on supply and repair contracts meaning that if the owner executed the contract personally, it was deemed a personal contract not subject to limitation. This line of cases is commonly referred to as the "making Rule."

Under this line of authority, the contract was considered "personal" to the individual shipowner if he signs or makes it himself. Pendleton B. Benner Line, 246 U.S. 353 (1982). By analogy, this line of reason has been applied to a corporate entity, it is "personal" if it is signed or made by corporate officers, managing agents, or if it is made under the direct supervision or control of the owner and in the vessel's home port. Thus, where the charter was made and executed by the charterer broker in a foreign port, it was held not to be a personal contract, and the owner was entitled to limit his liability for losses arising from the stranding of the vessel. The Temple Bar, 45 F. Supp. 608 (D. Md. 1942), aff'd on other grounds, 137 F. 2d 293 (4th Cir. 1943). It appeared in this case that a vessel of British registry was chatered in private carriage to a single shipper in New York and the charter party was signed in New York by the New York charter broker for the British owner. The court relied on the discussion in Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd., 287 U.S. 420 (1932), where the Supreme Court, in holding that the owner was entitled to exoneration under the fire statute for losses covered by bills of lading given in common carriage, distinguished its earlier decisions in Pendleton v. Benner Line, 246 U.S. 353 (1918) and Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918),

and held that bills of lading were not personal contracts:

> [T]he rule announced in....[those] cases has been applied by this Court only to private charter parties executed by the owner. The bills of lading, which are said to contain "personal contracts," were not executed by the respondent or by any of its officers or managers. They were given, in large part, by agents of railroads or other steamship companies and are to be regarded merely as ship's documents.

The second line of cases is sometimes referred to the "breach rule" and comes to the same conclusion in applying the personal contracts doctrine, but by a different route by looking not to the relation of the owner to the contract, but rather to the nature and terms of the contract and the relation of the owner to its breach. This approach was first ennunciated in "The Soerstad." That case involved an agreement under which a tug owner towed a vessel that sank after it collided with the tug while under tow as a result of the tug's negligence. Although the contract was presumed to have been personally made by the owner of the tug, the court, in granting limitation, looked instead to the nature of the obligations imposed by the towage agreement and the relation of the tug owner to the breach of the agreement to ascertain whether the owner was to limit its liability. The court went on to hold that a towage agreement, unlike the warranty of seaworthiness, did not impose a duty that the tug owner was personally bound to perform since he was entitled to select a capable Master to perform the towage. Therefore, the breach of the towage contract by the negligence of the Master resulting in the sinking of the tow was not personal to the owner since the acts of negligence causing the sinking were done without the owner's privity or knowledge.

The approach taken "The Soerstad" has attracted considerable following since the case was decided.

The Supreme Court of the United States has addressed the subject of personal contracts in only 5 cases dealing with the loss or damage of cargo. Four of those cases upheld denial of limitation in connection with cargo losses under charter parties. Cullen Fuel Co. v. W.E. Hedger, Inc., 290 U.S. 82 (1933); Capitol Transp. Co. v. Cambria Steel Co., 249 U.S. 334 (1919); Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918);. Pendleton v. Benner Line, 246 U.S. 353 (1918).

Bills of Lading are not considered personal contracts so that the shipowner is entitled to limit against claims for cargo loss and damage occurring without his privity or knowledge. In Earl & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. 287 U.S. 420 (1932), a case in which the ship was unseaworthy at the commencement of the voyage by reason of an engineer's placement of coal on top of hot coal, the Supreme Court granted exoneration under the Fire Statute and limited the scope of the personal contract doctrine where the bills of lading were signed by agents.

It is also conceded that salvage claims are subject to limitation as laid down in The San Pedro 233 U.S. 365 (1912). However, limitation was denied in the Great Lakes Towing Co. v. Mills Transp. Co., Supra. treating the salvage claims as a personal contract because the breach arose in the case of "contract salvage" as opposed to "voluntary salvage" where the owner's breach was his own failure to pay and consequently, within his privity, or because

breach of the implied warranty of seaworthiness resulted in the necessity for salvage on the part of the vessel owner or the cargo owner.

There are numerous lower court decisions holding that the personal contract doctrine does not apply to contracts for storage of grain on a laid up vessel during winter months, a charter of a fishing vessel on shares, a contract for sale of cargo by the Master being made in a foreign port, a contract for the purchase of bunkers on credit where the purchasing vessel collided with the fuel dock and bottomerly obligations.

In summary, the contacts doctrine is applied to: 1) contracts and charters in private carriage that contain or can be construed to contain warranty of seaworthiness; 2) contracts containing special covenants of guarantee, indemnity, or other obligations; and 3) contracts requiring payment for premiums for insurance, necessaries, repairs, services furnished to the vessel in home port and probably elsewhere. On the other side, bills of lading, towage agreements, voluntary salvage are not considered personal.

Common carriage under bills of lading are usually governed by COGSA Harter, Hague Rules with Visby amendments or the Hamburg Convention.

It is usually quite common for COGSA to be incorporated into contracts of carriage. Both cogsa and Harter by their terms reduce the seaworthiness owed by the carrier to an obligation of "due diligence." The same can be said for the Hague Rules with Visby amendments. However, under the Hamburg Conventions there is no prerequisite to defense.

The standard of duty imposed by these acts and those by the Limitation Act and various maritime nations has been a source of dispute and discussion in recent years.

However, specific statutory provisions in both COGSA and Harter expressly preserve the right of the owner to limit his liability under the earlier Limitation Act.

Earlier cases recognized the statutory reservations contained in COGSA and Harter, but refuse to superimpose those reservations on the Limitations Act. In Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd., 287 U.S. 420 (1932), a case seemingly ignored by the more recent decisions, addressed the relationship between the Harter Act and the Limitation Act in a situation where one of the vessel's engineers negligently loaded coal on top of the vessel's hot coal, resulting in fire and loss of cargo prior to commencement of the voyage. The Supreme Court squarely held in this case that, in view of the reserving clause, the Harter Act could not affect the right to limit:

> The Harter Act provides in [section] 3 that the vessel-owner shall not be liable if he "shall exercise due diligence to make the said vessel in all respects seaworthy." And under that Act the requirement of due diligence is not satisfied if there is negligence on the part of any of the ship's employees.... That the provisions of the Harter Act do not refer to liability for losses arising from fire is made clear by [section] 6 which declared that the Act "shall not be held to modify or repeal [sections] 4281, 4282 and 4283 of the Revised Statutes."-[section] 4282 being the fire statute. The courts have been careful not to thwart the purpose of the fire statute by interpreting as "neglect" of the owners the breach of what in other connections is held to be a non-delegable duty.

In Moore-McCormack Lines, Inc. v. Armco Steel Corp. 272 F.2d 873 (2d Cir. 1959), rev'g, 164 F. Supp. 198 (S.D.N.Y. 1958), the court granted limitation

for cargo losses arising under charter parties and bills of lading by looking to the reserving portion of COGSA.

This case involved a vessel under charter to the shipper, which was loaded with ore in South America. The ore was carried under conventional bills of lading and made subject to COGSA. The charterer warranted in usual language that the vessel was seaworthy and incorporated the provisions of COGSA.

The ore was loaded improperly with the knowledge of the Master at the commencement of the voyage and for that reason the vessel was held to be unseaworthy as to stowage, but without the owner's knowledge and or his (its) supervisory personnel in New York.

The improper storage of the ore caused in the vessel to founder and ultimately to sink. The court denied limitation as to loss of life and to loss of cargo claims. On appeal the decision was affirmed with regard to personal injury and death claims because the Master was in privity, but reversed as to cargo loss because the owner, although expressly warranting the seaworthiness of the vessel, had not warranted the sufficiency of the stowage.

The court went on to hold that even though COGSA was incorporated into the charter, the due diligence requirements was "ineffective" to impose liability where the owner was seeking limitation, the court citing the reserving clause of COGSA.

At this point what conclusion can be drawn? It seems to be that in the court's zeal to deny limitation in contract, they, the courts has simply ignored the sections of COGSA and Harter much in the same way that they have stretched privity and knowledge concepts in Limitation proceedings.

A logical consequences of limitation based on assurability appears to be that the right of limitation should be determined by the nature of the claim, not by the person liable for it. It would seem natural to extend the right to any person exposed to liability such as salvors, stevedores, owners, various kinds of installations used by the ship, etc. Further, where the owner is liable for the amount for casualty, that he is reasonably able to insure, it is important that limitation be unbreakable unless he is personally blameworthy to the such an extent that he would be deprived of his insurance cover. Otherwise, the cost of insurance would be higher and the volume of insurance that could reasonably be required will correspondingly be reduced.

The next question is whether or not limitation/the personal contracts doctrine as ennunciated in America if applied would have provided a different result in the case M/V Sky Reefer?

Briefly, the Sky Reefer case involved several charters. The vessel owner had time chartered the vessel to Honma Senpaku Co. Ltd. which time chartered to Nichiro Corp. The cargo was carried under a time charterer's bill of lading providing for the application of Japanese Law, or, in the alternative the COGSA with arbitration of disputes in Tokyo. The cargo shifted in stow, resulting in substantial damage.

The cargo consisted of fruit to be transported on the M/V Sky Reefer from Agadir, Morocco to New Bedford, Massachusetts.

The receiver of the cargo entered into a voyage charter with the Nichiro Corp. which included a London arbitration clause. Rather than arbitrate under

the voyage charter, Vimar as the subrogated underwriter for the cargo receiver sued the vessel and its owner in the Federal District Court of Massachusetts.

Pursuant to the bill of lading, the defendant shipowner moved to stay the law suit and compel arbitration in Tokyo. Virmar opposed the motion, arguing that the bill of lading was a contract of adhesion the terms of which had not been negotiated, and therefore, the arbitration clause was unenforceable since it was prohibited by COGSA.

The trial court rejected the arguments of plaintiff but certified the appeal on the issue of whether enforcement of the arbitration clause violated COGSA.

The Court of Appeals affirmed the trial court's ruling that the law suite should be stayed pending Tokyo arbitration.

The Court of Appeals held that the arbitration clause in the Sky Reefer bill of lading was enforceable since the Federal Arbitration Act governs the validity of arbitration clauses, both foreign and domestic and therefore COGSA does not apply.

The Supreme Court affirmed the Court of Appeals' decision. Plaintiffs' argument that the expense and inconvenience of prosecuting a cargo claim was also rejected by the Court. The court stated there was, "No principle basis" upon which the Court would distinguish between foreign and domestic arbitration clauses with regard to cost and inconvenience. COGSA the Court held addresses specific liability but does not address the means to enforce that liability.

Plaintiffs also argued that foreign arbitration should not be required as the arbitrators might not apply COGSA.

The Court rejected that argument holding that if the arbitrators decide contrary to COGSA, plaintiffs were free to petition the trial court since it retained jurisdiction pending the arbitration to vacate any award, observing that American courts in the past had voided awards where the applicable foreign law was contrary to U.S. statutes.

The court went on to hold that any doubts over a foreign arbitrators ability to apply COGSA or the Hague Rule "must give way to contemporary principles of international comity and commercial practice."

You might ask would the result be different under Limitation? The answer to that is probably no. If in response to the suite by the plaintiff in Sky Reefer, the shipowner had filed for limitation, which is not unusual, the owner would have been able to limit liability anyway whether in the United States or Japan. After all, isn't that the goal?

Limitation seems to have been outmoded in this age of insurance, but it can be justified on the basis of international parity.

It is interesting to note that the various schemes, i.e., Harter, COGSA, Hague Rules and the Hamburg Convention, were all designed to bring about international parity. We still have not achieved it. Maybe the answer is to review and take a look at our old friend Limitation of Liability.

The important thing is to have a system that induces carriers and owners to maintain the maximum amount of insurance cover that they can get and afford. If limitation makes it easier to achieve this goal as opposed to

to COGSA and its cousins, then a good case can be made for its institution, not only for the protection of the owners, but for the protection of claimants.

So, does this mean that limitation has no place in arbitration? No -- clearly after a petition is filed for limitation either as an original action by the shipowner as against possible claimant(s) or in response by a shipowner in defense of an action brought by claimant(s), the matter can be and should be based on the amounts involved and the number of claimants involved referred to arbitrators who can amply apply the Law of Limitation whether in the United States or elsewhere with all its exceptions.

Limitation is universally understood and accepted. Its use is less convoluted with the added benefit of predictability without the suffocating layers of law whether they be COGSA, the Harter Act, The Hamburg Rules, or the Hauge Convention not to mention the enormous waste of time and legal expenses.

The obvious advantage of a global regime for limitation, unlike COGSA, Hague, Hamburg and Harter, makes the total cost of insurance cheaper; however, such a regime would not rank all claims on the same level, but rather introduce priorities.

As we seek to find international parity, Limitation of Liability out of economic necessity may be resuscitated and modernized,