

# **Developments in Supreme Court Jurisprudence on Admiralty Contract Jurisdiction**

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Professor Charles Black famously criticized the rules for admiralty contract jurisdiction with the observation that they have “about as much principle as there is in a list of irregular verbs.”<sup>1</sup> The practical solution, he explained, was that “the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided.”<sup>2</sup> The virtually authoritative Gilmore and Black treatise accordingly provides a useful list “of causes that might be thought to be included [within the admiralty jurisdiction], but actually are not.”<sup>3</sup>

Unfortunately, the Gilmore and Black treatise is almost forty years old. Since the second edition was published in 1975, the general maritime law has developed in important ways — including in admiralty contract jurisdiction. Perhaps most significantly, in *Exxon Corp. v. Central Gulf Lines, Inc.*,<sup>4</sup> the Supreme Court overruled *Minturn v. Maynard*,<sup>5</sup> which lower courts had interpreted as establishing a *per se* rule excluding agency contracts from admiralty. The *Exxon* Court declared that it was not deciding the validity of the preliminary contract doctrine, but in overruling *Minturn* it held that “lower courts should look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature.”<sup>6</sup>

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<sup>1</sup> Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 264 (1950).

<sup>2</sup> *Id.*

<sup>3</sup> GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1-10, at 26 (2d ed. 1975).

<sup>4</sup> 500 U.S. 603, 1991 AMC 1817 (1991).

<sup>5</sup> 58 U.S. 477 (1855).

<sup>6</sup> 500 U.S. at 612.

More recently, the Supreme Court may have altered another basic principle of admiralty contract jurisdiction as those principles were generally understood in 1975. The Court in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*<sup>7</sup> at least altered the lower courts' understanding of the so-called "mixed contract" doctrine. Courts and commentators had long declared that a contract is not within the admiralty jurisdiction unless it is "wholly maritime."<sup>8</sup> Thus a contract to perform some maritime and some non-maritime services or an insurance policy that covers some maritime and some non-maritime risks, to take two simple examples, would traditionally have been considered a "mixed contract" that is not subject to admiralty jurisdiction. But in *Kirby*, the Court held that a multimodal contract of carriage, which the lower courts had universally treated as a "mixed contract,"<sup>9</sup> was nevertheless "maritime" and therefore subject to admiralty jurisdiction.<sup>10</sup>

In this paper, I focus on the Supreme Court's *Kirby* decision as it relates to admiralty contract jurisdiction.<sup>11</sup> I begin with a review of the mixed contract doctrine as it was generally understood prior to *Kirby*. I will then examine *Kirby* itself and discuss how it might affect that doctrine. I will complete the section with a discussion of circuit court decisions applying *Kirby*.

To conclude the paper, I will speculate on the prospect for future developments at the Supreme Court on other issues of admiralty contract jurisdiction. I will consider, by way of example, what the Court might do if called upon to consider whether a contract for the sale of an existing vessel is "maritime" for purposes of establishing admiralty jurisdiction. Although the

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<sup>7</sup> 543 U.S. 14, 2004 AMC 2705 (2004). I represented the respondents in *Kirby*. See *infra* note \*.

<sup>8</sup> See *infra* notes 13-17 and accompanying text.

<sup>9</sup> See *infra* note 20 and accompanying text.

<sup>10</sup> See *infra* notes 40-92 and accompanying text.

<sup>11</sup> The *Kirby* Court addressed a number of other important issues, such as the interpretation of Himalaya clauses, that are beyond the scope of this paper. See, e.g., Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, 2A BENEDICT ON ADMIRALTY § 169 (7th rev. ed. 2013).

Supreme Court itself has not ruled on that question, the lower courts have generally held that such a salty contract is nevertheless non-maritime.<sup>12</sup>

## The *Kirby* Decision and Admiralty Contract Jurisdiction

### I. The Traditional Mixed Contract Doctrine

In the nineteenth century, the Supreme Court emphatically declared that admiralty contract jurisdiction “is limited to contracts, claims, and services *purely maritime*.”<sup>13</sup> In the mid-twentieth century, the Court declared that “admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful,” but suggested that the doctrine might be limited to “contracts for the performance of partly non-maritime activities.”<sup>14</sup> The Court cited two court of appeals decisions with the implicit suggestion that that the mixed contract doctrine might be appropriate in their context: *The Richard Winslow*<sup>15</sup> and *Pillsbury Flour Mills Co. v. Interlake S.S. Co.*<sup>16</sup> Both of those cases involved “mixed” contracts for the maritime carriage of goods followed by storage, a non-maritime service, and in each case the court of appeals held that admiralty jurisdiction was lacking. The leading treatises clearly recognized the rule that a “mixed contract” is not within the admiralty jurisdiction because it is not “wholly maritime.”<sup>17</sup>

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<sup>12</sup> See *infra* notes 106-111 and accompanying text.

<sup>13</sup> *Rea v. The Eclipse*, 135 U.S. 599, 608 (1890) (emphasis added). See also *Grant v. Poillon*, 61 U.S. (20 How.) 162, 168 (1858) (“The whole contract must, in its essence, be maritime, or for compensation for maritime service.”) (misquoting — and misciting — the headnote of *Plummer v. Webb*, 19 Fed. Cas. 891, 4 Mason C.R. 380 (C.C. D. Maine 1827) (Case No. 11,233)); cf. *Plummer v. Webb*, *supra*, 19 F. Cas. at 894, 4 Mason C.R. at 388 (“In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime.”) (Story, J.).

<sup>14</sup> *American Stevedores v. Porello*, 330 U.S. 446, 456, 1947 AMC 349 (1947).

<sup>15</sup> 71 F. 426 (7th Cir. 1896).

<sup>16</sup> 40 F.2d 439, 1930 AMC 774 (2d Cir. 1930).

<sup>17</sup> See, e.g., GILMORE & BLACK, *supra* note 3, § 1-10, at 28 & n.95; STEVEN F. FRIEDEL, 1 BENEDICT ON ADMIRALTY § 183 (7th rev. ed. 2003). See also DAVID W. ROBERTSON, STEVEN F. FRIEDEL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 31-32 (2001) (explanatory note in casebook).

Applying the mixed contract doctrine requires a court to recognize when a contract is “mixed,” *i.e.*, not “wholly” or “purely” maritime. A single contract to perform some maritime and some non-maritime services (such as maritime carriage and subsequent non-maritime storage<sup>18</sup>) or an insurance policy that covers some maritime and some non-maritime risks,<sup>19</sup> to take two simple examples, would traditionally have been considered a “mixed contract” that is not subject to admiralty jurisdiction. Somewhat more complicated is a multimodal through bill of lading, *i.e.*, a bill of lading evidencing a single contract of carriage that requires carriage by two or more modes of transportation (typically by land and water). In the absence of any direct guidance from the Supreme Court, the lower courts in that context uniformly applied the mixed contract doctrine to deny admiralty jurisdiction over multimodal through bills of lading.<sup>20</sup>

Over the years, the lower courts developed two exceptions to the mixed contract doctrine. First, when the maritime and non-maritime elements of a mixed contract are “separable,” admiralty jurisdiction would exist over the maritime element. Judge Learned Hand appeared to treat this exception as already settled by 1927 in *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*.<sup>21</sup> Second, when the non-maritime element of the contract is merely “incidental” to the maritime element, the courts would exercise jurisdiction over the entire contract. Judge

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<sup>18</sup> See *supra* notes 15-16 and accompanying text.

<sup>19</sup> See *infra* notes 93-101 and accompanying text.

<sup>20</sup> See, *e.g.*, *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 555-56, 2001 AMC 25 (2d Cir. 2000) (no admiralty jurisdiction in a multimodal carriage case involving truck, rail, and sea carriage because the contract was not “‘purely’ or ‘wholly’ maritime in nature”); *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 109, 1997 AMC 1772 (2d Cir. 1997) (rail and sea); *Kuehne & Nagel (Ag & Co) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989) (sea and truck); *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880-81, 1992 AMC 1171 (3d Cir. 1992) (sea and rail); *JVC Americas Corp. v. CSX Intermodal Inc.*, 292 F. Supp. 2d 586, 591, 2003 AMC 2184 (D.N.J. 2003) (sea and rail); *Coleman v. Compagnie Generale Maritime*, 903 F. Supp. 45, 48, 1996 AMC 757 (S.D. Ga. 1995) (rail and sea).

<sup>21</sup> 19 F.2d 777, 779-80, 1927 AMC 1325, 1329 (2d Cir. 1927).

Henry Billings Brown, who was later to join the Supreme Court, acknowledged this exception well over a century ago in *The Pulaski*.<sup>22</sup>

## II. The *Kirby* Decision

### A. The Factual Background

As is true in most cases involving the carriage of goods, the story starts with a sale of goods. James N. Kirby Pty Ltd. (Kirby), an Australian manufacturer located in Milperra, NSW (approximately 15 miles southwest of central Sydney), contracted to sell machinery to Delphi Saginaw Steering Systems (Delphi), then a General Motors subsidiary, in Athens, Alabama. The contract covered essentially all of the machines needed to build an assembly/manufacturing line to make the pump housings for automotive power steering hydraulic pumps.

The performance of the Kirby-Delphi sales contract required Kirby to transport about fifty containers of machinery from its facility in Australia to the Delphi plant in northern Alabama. Kirby therefore contracted with an Australian “freight forwarder,”<sup>23</sup> International Cargo Control Pty Ltd. (ICC Ltd.<sup>24</sup>), for the carriage from Milperra to Athens of all of the containers covered by the sales contract. For ten over-height containers, ICC Ltd. arranged for carriage by truck from Milperra to Sydney; by sea from Sydney to Savannah; by rail from Savannah to Huntsville, Alabama; and by truck from Huntsville to Athens. ICC Ltd. sub-

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<sup>22</sup> 33 F. 383, 384 (E.D. Mich. 1888).

<sup>23</sup> ICC Ltd. described itself as a “freight forwarder” as that term is commonly used internationally. It belonged, for example, to the Australian member association of the International Federation of Freight Forwarders Associations (FIATA). In the United States, it would be less ambiguous to use the term “transportation intermediary.” *Cf.* 46 U.S.C. § 1702(17) (defining “ocean transportation intermediary”). The term “freight forwarder” has often been used in the United States in the context of an agency relationship. *Cf.* 46 U.S.C. § 1702(17)(A) (defining “ocean freight forwarder”). This was a source of confusion in the *Kirby* case.

<sup>24</sup> I will use the short form “ICC Ltd.” for International Cargo Control Pty Ltd. despite the fact that both the Supreme Court and the Eleventh Circuit used the even shorter “ICC.” Because “ICC” is widely used in this field as an abbreviation for the International Chamber of Commerce, and is still understood by many in the United States as an abbreviation for the now-defunct Interstate Commerce Commission, using the same abbreviation with a different (and non-intuitive) meaning has the potential to be ambiguous.

contracted with motor carriers for the two truck movements and with a German ocean carrier, Hamburg Südamerikanische Dampfschifahrts-Gesellschaft Eggert & Amsink<sup>25</sup> (Hamburg Süd), for the sea and rail movements.

After the shipment on the ocean vessel in Sydney, ICC Ltd. supplemented the terms of its contract with Kirby (and satisfied certain regulatory requirements) by issuing a bill of lading for carriage from Sydney to Huntsville.<sup>26</sup> ICC Ltd. was the carrier<sup>27</sup> and Kirby was the shipper. The standard form bill of lading included a Himalaya clause extending ICC Ltd.'s defenses to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract."<sup>28</sup> Under another clause, ICC Ltd.'s liability for inland damage was limited at Hague-Visby levels.<sup>29</sup>

Hamburg Süd further subcontracted with another ocean carrier, Blue Star (North America) Ltd.,<sup>30</sup> for ocean carriage from Sydney to Savannah. Hamburg Süd's U.S. subsidiary, Columbus Line USA, Inc.,<sup>31</sup> subcontracted with the Norfolk Southern Railway (Norfolk Southern) for inland rail carriage from Savannah to Huntsville. After shipment from Sydney on

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<sup>25</sup> The court of appeals translated the full German name as "Hamburg South American Steam Shipping Company." See *James N. Kirby, Pty. Ltd. v. Norfolk Southern Railway*, 300 F.3d 1300, 1303 n.2, 2002 AMC 2113, 2115 n.2 (11th Cir. 2002), *rev'd on other grounds*, 543 U.S. 14, 2004 AMC 2705 (2004).

<sup>26</sup> Joint Appendix 78-84. The ICC Ltd. bill of lading did not cover two stages of the transportation that ICC Ltd. had contracted to provide: the truck movement from Milperra to Sydney or the truck movement from Huntsville to Athens.

<sup>27</sup> Even Norfolk Southern, which had based its central argument in the Eleventh Circuit on the proposition that ICC Ltd. did not qualify as a "carrier," conceded in the Supreme Court that it was. See, e.g., Norfolk Southern Brief 1, 12.

<sup>28</sup> Clause 10.1.

<sup>29</sup> Clause 8.3. See Hague-Visby Rules art. 4(5)(a) (limiting liability to 666.67 SDRs per package or 2 SDRs per kilogram, whichever is higher).

<sup>30</sup> Blue Star was acquired by P & O Nedlloyd in 1998.

<sup>31</sup> Hamburg Süd, the corporate parent, did business as "Columbus Line" at the time in question. But the U.S. subsidiary, "Columbus Line USA, Inc.," was a separately incorporated company. In January 2004, Hamburg Süd dropped the trade name "Columbus Line."

the Blue Star vessel *Queensland Star*,<sup>32</sup> Hamburg Süd issued its standard form bill of lading to ICC Ltd. for through carriage from Sydney to Huntsville.<sup>33</sup> The Hamburg Süd bill of lading included a Himalaya clause extending Hamburg Süd's defenses to "all Participating (including inland) carriers."<sup>34</sup> Hamburg Süd limited its own liability for inland damage to \$500 per package,<sup>35</sup> the limit established under COGSA.<sup>36</sup>

Blue Star completed the ocean voyage without incident and the ten containers were transferred to a Norfolk Southern train for carriage from Savannah to Huntsville. On October 9, 1997, the train derailed two miles west of Littleville, Colbert County, Alabama,<sup>37</sup> when it was traveling on Norfolk Southern's tracks and manned by Norfolk Southern's crew. The cause of the derailment was never judicially established, but in the procedural posture of the case the courts were required to assume (as seems likely) that it was caused by Norfolk Southern's negligence.<sup>38</sup> The cargo suffered \$1.5 million in damages,<sup>39</sup> which was reimbursed (except for a modest deductible) by Kirby's cargo underwriter.

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<sup>32</sup> See generally <http://www.bluestarline.org/act/act6.html> (history and photographs of the *Queensland Star*). In February 2003, while the petition for certiorari was pending, the vessel was handed over to Chinese shipbreakers in Shanghai for demolition. *Id.*

<sup>33</sup> Joint Appendix 48-58.

<sup>34</sup> Clause 5(b).

<sup>35</sup> Clause 3(a) (final sentence).

<sup>36</sup> See COGSA § 4(5).

<sup>37</sup> Although Savannah is approximately 366 miles east of Huntsville, see 543 U.S. at 32, 2004 AMC at 2717, the derailment occurred approximately 60 miles west of Huntsville.

<sup>38</sup> Not surprisingly, Norfolk Southern denied that it had been negligent. But the railroad was unable to explain what did cause the derailment.

<sup>39</sup> Kirby asserted its damages at just over 2 million Australian dollars. At the exchange rate in effect at the time of the accident, that was worth approximately 1.5 million U.S. dollars.

## B. The Procedural Background

Kirby filed a claim for its cargo damages with Norfolk Southern, which denied the claim on the ground that it was not in contractual privity with Kirby.<sup>40</sup> Kirby (along with its cargo underwriter) therefore filed a diversity action against Norfolk Southern in the Northern District of Georgia alleging, *inter alia*, a state-law tort claim for the damage to its cargo. Norfolk Southern moved for partial summary judgment claiming that its liability, if any, was limited to \$5,000 (\$500 per container)<sup>41</sup> on the ground that it was a beneficiary of the Himalaya clauses in the Hamburg Süd and ICC Ltd. bills of lading. The district court granted that motion, holding that the Hamburg Süd bill of lading governed (because it was “the one which [Norfolk Southern] contracted and performed under”) and that its Himalaya clause protected Norfolk Southern.<sup>42</sup> The district court certified its order for interlocutory appeal and the Eleventh Circuit agreed to decide the case.

The Eleventh Circuit reversed in a 2-1 decision.<sup>43</sup> The court of appeals held that the Hamburg Süd bill of lading did not bind Kirby because Kirby was not a party to ICC Ltd.’s subcontract with Hamburg Süd.<sup>44</sup> The Hamburg Süd Himalaya clause was therefore irrelevant.<sup>45</sup>

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<sup>40</sup> See Letter of Randy L. Brink (June 9, 1998), *reprinted in* Joint Appendix 102.

<sup>41</sup> This calculation is difficult to understand for two reasons. First, only six of the ten containers were damaged. Second, some of the containers (including two of the damaged containers) held two machines, each of which qualified as a COGSA “package.” See, e.g., *Mitsui & Co. v. American Export Lines*, 636 F.2d 807, 821, 1981 AMC 331, 351 (2d Cir. 1981) (announcing the widely accepted rule, modeled on article 4(5)(c) of the Hague-Visby Rules, that the packages within the container, as enumerated in the bill of lading, constitute the “packages” for limitation purposes). Thus a total of eight packages were damaged. Because the difference between eight and ten packages is insignificant, the calculation was never corrected and the Supreme Court decided the case on the assumption that ten packages were involved. See 543 U.S. at 20 n.1, 2004 AMC at 2708 n.1.

<sup>42</sup> Although the district court opinion is unreported, it is reprinted in the appendix to the petition for certiorari. See Pet. App. 27a-38a.

<sup>43</sup> *James N. Kirby, Pty. Ltd. v. Norfolk Southern Railway*, 300 F.3d 1300, 2002 AMC 2113 (11th Cir. 2002), *rev’d*, 543 U.S. 14, 2004 AMC 2705 (2004).

<sup>44</sup> See 300 F.3d at 1304-07, 2002 AMC at 2117-21.

<sup>45</sup> See 300 F.3d at 1305-07, 2002 AMC at 2118-20.

The court of appeals recognized that the ICC Ltd. bill of lading bound Kirby, but held that the ICC Ltd. Himalaya clause, by its terms (when properly construed), did not extend protection to Norfolk Southern.<sup>46</sup> The Supreme Court granted Norfolk Southern's petition for certiorari.

In this procedural posture, it may not be immediately obvious why admiralty jurisdiction and the mixed contract doctrine were relevant in *Kirby*. Because Kirby and its underwriter (both Australian companies) had sued Norfolk Southern under diversity jurisdiction, the federal courts undoubtedly had jurisdiction to decide the case under 28 U.S.C. § 1332. But the potential existence of admiralty jurisdiction was nevertheless relevant — indeed dispositive — in determining the governing law. Although Kirby did not assert admiralty jurisdiction, Norfolk Southern asserted a defense that made its potential existence relevant. Norfolk Southern claimed the benefit of the Himalaya clauses in the two multimodal bills of lading that governed the shipment. If those bills of lading were “maritime contracts,” then admiralty jurisdiction would follow for any claim under those contracts. As the Supreme Court declared in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, “[w]ith admiralty jurisdiction comes the application of substantive admiralty law.”<sup>47</sup> In other words, the general maritime law provides the rule of decision for most claims that could have been brought within the admiralty jurisdiction even if the case is actually before the court on some other jurisdictional basis. The converse of that broad principle was even more significant: In the absence of some basis for admiralty jurisdiction, the general mari-

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<sup>46</sup> See 300 F.3d at 1307-11, 2002 AMC at 2121-26.

<sup>47</sup> 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986). The general principle that maritime law follows admiralty jurisdiction is subject to some exceptions, exemplified in such cases as *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996) (holding that state law governs a claim for the death in a recreational boating accident of a young girl with no connection to maritime matters except the location of the fatal accident); *American Dredging Co. v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994) (holding that a state court need not follow maritime law procedural rules in a case governed by maritime substantive law); and *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 1955 AMC 467 (1955) (holding that state law can govern a marine insurance dispute when no general maritime law rule had previously been established).

time law does *not* apply. As the Court had explained in *Victory Carriers, Inc. v. Law*,<sup>48</sup> “[w]hether federal maritime law govern[s] [an] accident . . . depends on whether [the case is] within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes.” The *Victory Carriers* Court held that “federal maritime law does not govern this accident” because there was no admiralty tort jurisdiction. Similarly, in *Kossick v. United Fruit Co.*,<sup>49</sup> the Court concluded, as a prerequisite to applying general maritime law, that the contract claim raised in a diversity case would have been within the admiralty jurisdiction. In sum, the analysis of admiralty jurisdiction was essential to deciding what law governed. If the federal courts would have had admiralty jurisdiction over a contract dispute under the bills of lading, then the interpretation of those contracts would be governed by the general maritime law.

The issue came into sharp focus only twelve days before oral argument in *Kirby* — almost three months after the last brief had been filed — when the Court called for supplemental briefs addressing whether “federal or state substantive law govern[s] the questions presented.”<sup>50</sup> Kirby argued that the central issues turned on the proper interpretation of a contract concluded in Australia between two Australian companies (ICC Ltd. and Kirby) that contained an Australian choice-of-law clause and was performed partly in Australia, partly on the high seas, and partly in the United States. Thus Australian law governed under widely accepted conflicts principles.<sup>51</sup> In any event, there was no basis for applying federal law.<sup>52</sup> More specifically, neither COGSA

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<sup>48</sup> 404 U.S. 202, 204, 1972 AMC 1, 3 (1971).

<sup>49</sup> 365 U.S. 731, 735-38, 1961 AMC 833 (1961).

<sup>50</sup> 542 U.S. 963 (2004).

<sup>51</sup> See Kirby Supp. Brief 2-3. Kirby had also argued for the application of Australian law when the petition for certiorari was being considered. See Kirby Cert. Supp. Brief 1 & n.1, 10; Brief in Opposition 30.

<sup>52</sup> There was no particular reason to assume that the substantive analysis would have been any different under maritime law, state law, or Australian law. Because the Supreme Court is responsible for the interpretation of

(by its terms<sup>53</sup>) nor the general maritime law of the United States (due to the mixed contract doctrine) provided a federal rule of decision.<sup>54</sup> Norfolk Southern (apparently unaware of the mixed contract doctrine) argued primarily that maritime law governed because a bill of lading is a maritime contract.<sup>55</sup> The Solicitor General mentioned the mixed contract doctrine in a footnote,<sup>56</sup> but suggested that the Court should nevertheless apply federal law in this case under an extension of the *Jensen* doctrine.<sup>57</sup> At the oral argument, Norfolk Southern did not challenge the mixed contract doctrine. It abandoned its contention that the general maritime law governed and instead argued that the Hamburg Süd bill of lading “is incorporated into a tariff that’s filed with the Federal Maritime Commission under the Shipping Act of 1984, and it’s long been settled that the interpretation of tariff and obligations arising out of tariff filings are questions of Federal law.”<sup>58</sup>

### C. The Supreme Court’s Treatment of Admiralty Jurisdiction

The *Kirby* Court’s treatment of admiralty jurisdiction and the mixed contract doctrine is not the easiest to follow. The ultimate conclusion is clear: A multimodal through bill of lading is typically a maritime contract. Thus a federal court usually has admiralty jurisdiction to resolve

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federal law, however, the parties assumed that the Court would likely dismiss the case as improvidently granted if it concluded that state law or foreign law governed the dispute.

<sup>53</sup> COGSA applies with the force of law only during the so-called “tackle-to-tackle” period. See COGSA § 1(e). Even during the tackle-to-tackle period, there are other limitations on COGSA’s applicability. See, e.g., COGSA § 1(c) (effectively limiting COGSA’s applicability for deck cargo).

<sup>54</sup> See *Kirby* Supp. Brief 3-10.

<sup>55</sup> See *Norfolk Southern* Supp. Brief 1-5.

<sup>56</sup> U.S. Supp. Brief 7 n.3.

<sup>57</sup> See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917). The Solicitor General did not cite the much-criticized *Jensen* case on this point, but he did quote the case indirectly (by quoting the *Jensen* quotation in *American Dredging Co. v. Miller*, 510 U.S. 443, 447, 1994 AMC 913, 916 (1994)). See U.S. Supp. Brief 7 n.3 (quoting *American Dredging*’s quotation of *Jensen* without citing *Jensen*). Earlier in the brief, the Solicitor General had quoted *American Dredging* and identified the internal quotation from *Jensen*. See U.S. Supp. Brief 5.

<sup>58</sup> Transcript of Oral Argument 3-4 (argument of Carter G. Phillips).

disputes arising under a multimodal through bill of lading and the bill of lading's interpretation is usually governed by the general maritime law. Unfortunately the Court was not so clear on the details. Perhaps this is because the Court did not devote much time to resolving the case; the opinion was announced less than five weeks after oral argument. Perhaps it is because the Court did not fully understand the maritime law context of the case or fully consider the implications of its decision.

The difficulties start with the Court's assertion that although the "suit was properly brought in diversity, . . . it could also be sustained under the admiralty jurisdiction."<sup>59</sup> In truth, no plausible argument can be made that a federal court would have had admiralty jurisdiction over Kirby's claim against Norfolk Southern. There could have been no admiralty *tort* jurisdiction because the accident did not occur on navigable waters (as required under the Court's well-established interpretation of the general maritime law<sup>60</sup>) and there was no allegation that the accident was "caused by a vessel on navigable water" (as would have been required in order to assert jurisdiction under the Admiralty Extension Act<sup>61</sup>). Similarly, Kirby could not have asserted admiralty *contract* jurisdiction because there was no contract (maritime or otherwise) between the parties. As the Court recognized, Kirby's contract was with ICC Ltd. Even under an expansive agency theory that Norfolk Southern advocated (and the Court rejected), Kirby's contract ran only so far as Hamburg Süd, the first ocean carrier. Indeed, Norfolk Southern itself disclaimed any contractual relationship with Kirby when it first denied Kirby's claim.<sup>62</sup> Even if the multimodal bills of lading are recognized as maritime contracts, as the Court held, Kirby

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<sup>59</sup> 543 U.S. at 23, 2004 AMC at 2710.

<sup>60</sup> See, e.g., *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995).

<sup>61</sup> 46 U.S.C. § 30101.

<sup>62</sup> See *supra* note 40 and accompanying text.

could still not have sued the railroad under either of those contracts. Thus the Court was simply mistaken to say that Kirby could have brought its suit on the basis of admiralty jurisdiction.

Although the Court's mistake about the existence of admiralty jurisdiction may be revealing, it fortunately was irrelevant to the ultimate analysis. The key issue in the case was the interpretation of the two bills of lading, and thus it was important to know whether their interpretation was governed by the general maritime law. The relevant question was not whether Kirby's tort claim against Norfolk Southern would have been subject to admiralty jurisdiction but whether a hypothetical action arising under those bills of lading would have been subject to admiralty jurisdiction.

The lower courts had uniformly held that multimodal through bills of lading are not maritime contracts because they are "mixed contracts."<sup>63</sup> The ocean carriage from Sydney to Savannah would have been viewed as maritime, while the rail carriage from Savannah to Huntsville would have been considered non-maritime. The two traditional exceptions to the mixed contract doctrine<sup>64</sup> did not apply on the *Kirby* facts. Even if the maritime and non-maritime elements were separable, the maritime element of the contract was not at issue; the accident occurred during the inland portion of the journey. And the *Kirby* Court itself acknowledged that the long train journey could not properly be characterized as "incidental" to the maritime element of the contract.<sup>65</sup>

As the Court was unable to avoid the mixed contract doctrine through one of the established exceptions, it instead announced a new principle. Quoting its 1961 decision in *Kossick v.*

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<sup>63</sup> See *supra* note 20 and accompanying text.

<sup>64</sup> See *supra* notes 21-22 and accompanying text.

<sup>65</sup> See 543 U.S. at 26, 2004 AMC at 2713.

*United Fruit Co.*,<sup>66</sup> the Court reiterated the well-established principle “that ‘[t]he boundaries of admiralty jurisdiction over contracts [are] conceptual rather than spatial.’”<sup>67</sup> It then accused “[s]ome lower courts” of “hav[ing] taken a spatial approach when deciding whether [multi]-modal transportation contracts for intercontinental shipping are maritime in nature.”<sup>68</sup> The Court found that approach to be erroneous:

[T]o 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.<sup>69</sup>

To replace the existing doctrine, the Court created a completely new rule:

[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce — and thus it is a maritime contract.<sup>70</sup>

The new rule is a welcome addition to the general maritime law of the United States. In essence, the *Kirby* Court judicially recognized the commercial reality that forms the basis for the Rotterdam Rules.<sup>71</sup> Although in UNCITRAL the point was controversial at first,<sup>72</sup> the new convention will apply to the entire contract under which the goods are carried, meaning “maritime-plus” coverage in most cases.<sup>73</sup> The Hague Rules’ tackle-to-tackle coverage<sup>74</sup> and the Hamburg

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<sup>66</sup> 365 U.S. 731, 735, 1961 AMC 833, 837 (1961).

<sup>67</sup> 543 U.S. at 23, 2004 AMC at 2710. This had not been true under English law prior to U.S. independence. In the struggle between the admiralty and common-law courts, English law had severely restricted the definition of maritime contracts. But U.S. courts had taken a conceptual approach at least as early as *DeLovio v. Boit*, 7 Fed. Cas. 418, 2 Gall. 398, 1997 AMC 550 (C.C. D. Mass. 1815) (Case No. 3,776) (Story, J.).

<sup>68</sup> 543 U.S. at 26, 2004 AMC at 2712.

<sup>69</sup> 543 U.S. at 27, 2004 AMC at 2713 (citing *Kossick*, 365 U.S. at 735).

<sup>70</sup> 543 U.S. at 27, 2004 AMC at 2713.

<sup>71</sup> U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008) [hereinafter “Rotterdam Rules”].

<sup>72</sup> See, e.g., *Report of Working Group III (Transport Law) on the Work of Its Ninth Session*, U.N. Doc. A/CN.9/510, paras. 27-29 (2002).

<sup>73</sup> See, e.g., *Report of Working Group III (Transport Law) on the Work of Its Eleventh Session*, U.N. Doc. A/CN.9/526, para. 239 (2003). See generally MICHAEL F. STURLEY, TOMOTAKA FUJITA & GERTJAN VAN DER ZIEL,

Rules' port-to-port coverage<sup>75</sup> no longer reflect the way the industry works in practice. Most contracts of carriage today, at least most contracts that would be within the scope of the new convention,<sup>76</sup> provide either for receipt at an inland location or for delivery at an inland destination (often both), and thus require carriage by sea and by some other mode of transportation. UNCITRAL recognized that it makes little sense to subject carriage under a single multimodal contract to two (or more) different legal regimes. In *Kirby*, the Supreme Court has reached the same conclusion.<sup>77</sup> Multimodal contracts will henceforth be recognized as maritime contracts, thus giving admiralty jurisdiction to the federal courts. In most cases, the application of substantive maritime law will follow.<sup>78</sup>

Unfortunately, the *Kirby* opinion gives very little guidance how admiralty contract jurisdiction should be determined in other contexts. This may be due to the Court's failure to appreciate the scope of the mixed contract doctrine that it was (at least partially) overruling, which meant that the Court did not fully consider or explain the implications of its decision. In the early nineteenth century, the U.S. courts had already rejected the restrictive English doctrine that maritime contracts are limited to those concluded at sea and wholly performed at sea. That

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THE ROTTERDAM RULES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA 59-62 (2010).

<sup>74</sup> See Hague Rules art. 1(e); *cf. supra* note 53 and accompanying text (noting COGSA's tackle-to-tackle coverage).

<sup>75</sup> See Hamburg Rules art. 4(1).

<sup>76</sup> Charterparty contracts, which are inevitably port-to-port, are excluded from the scope of the Rotterdam Rules (as they are from the scope of the Hague, Hague-Visby, and Hamburg Rules). See Rotterdam Rules, *supra* note 71, art. 6.

<sup>77</sup> It is more than a little ironic that Norfolk Southern was the beneficiary of the Supreme Court's recognition of the principle that maritime law should govern the entire multimodal transaction. During the UNCITRAL negotiations, the U.S. railroad industry consistently opposed any suggestion that it should be subject to the new maritime-plus convention. See, e.g., UNCITRAL, *Compilation of Replies to a Questionnaire*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 32-34 (Jan. 31, 2003).

<sup>78</sup> See *infra* notes 47-49 and accompanying text.

“spatial approach” would have justified the *Kirby* Court’s criticism,<sup>79</sup> but it was not the basis for the mixed contract doctrine. The lower courts had instead viewed a multimodal contract as involving two separate obligations — one to carry the goods part of the way by sea and the second to carry the goods the rest of the way by land. No one doubted that an agreement to carry the goods by sea, standing alone, would have been a maritime contract.<sup>80</sup> By the same token, no one — not even the *Kirby* Court<sup>81</sup> — would doubt that an agreement to carry the goods by land, standing alone, would *not* be a maritime contract.

The opinion might have been clearer if the *Kirby* Court had explicitly considered whether the mixed contract doctrine, which has long been recognized outside of the carriage context, should be applied to a multimodal bill of lading. Although the ocean and inland portions of the carrier’s obligation, if standing alone, would be characterized as maritime and non-maritime obligations, is that the proper way to consider the transaction? The Court could better have reached its intended result by entirely rejecting the characterization of a multimodal contract as a “mixed” contract. It could instead have treated the carriage as a single obligation, and then determined that this single obligation was maritime in nature. The Court would presumably have agreed with this analysis if it had considered it, for it adopted very similar reasoning to reject the idea that the inland carriage was “incidental.” As the opinion explained, “each leg of the journey is essential to accomplishing the contract’s purpose. In this case, for example, the bills of lading required delivery to Huntsville; the Savannah port would not do.”<sup>82</sup>

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<sup>79</sup> See 543 U.S. at 23, 2004 AMC at 2710.

<sup>80</sup> See, e.g., *The Belfast*, 74 U.S. 628 (1868); *New Jersey Steam Navigation Co. v. Merchant’s Bank*, 47 U.S. 344 (1848).

<sup>81</sup> See 543 U.S. at 27, 2004 AMC at 2713 (“If a bill’s *sea* components are insubstantial, then the bill is not a maritime contract.”) (emphasis in original).

<sup>82</sup> 543 U.S. at 26-27, 2004 AMC at 2713.

Perhaps this was the analysis implicitly behind the decision, but the opinion does not make that clear. If the Court had focused on the questions posed here, it might have given a clearer idea of how its new rule will apply. The opinion is instead ambiguous. Has it overruled the mixed contract doctrine entirely, or only in the context of multimodal bills of lading? It is difficult to see why the result would be any different in a marine insurance case, for example, in which a policy covers goods in storage and in transit.<sup>83</sup> Presumably parties seeking admiralty jurisdiction in that context will no longer need to show that the storage was “incidental.” But has the Court also repudiated its earlier recognition of the doctrine?<sup>84</sup>

Even in the multimodal carriage context, it is unclear how the new rule will be applied. At the end of its discussion of this issue, the Court announces an expansive standard in which virtually every multimodal shipment with a sea leg would be subject to admiralty jurisdiction:

[S]o long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce — and thus it is a maritime contract.<sup>85</sup>

The breadth of this rule is reinforced by the narrow exception — in essence a restatement from the opposite perspective — that the Court recognized: “If a bill’s *sea* components are insubstantial, then the bill is not a maritime contract.”<sup>86</sup>

But did the Court really mean to be so broad? Other parts of the opinion suggest a more restrictive test. The opening paragraph of the discussion on this issue, for example, argues that the bills of lading at issue in the case “are maritime contracts because their *primary objective* is to accomplish the transportation of goods by sea from Australia to the eastern coast of the United

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<sup>83</sup> See *infra* notes 93-100 and accompanying text.

<sup>84</sup> See *supra* note 13 and accompanying text.

<sup>85</sup> 543 U.S. at 27, 2004 AMC at 2713.

<sup>86</sup> 543 U.S. at 27, 2004 AMC at 2713 (emphasis in original).

States.”<sup>87</sup> The next paragraph (echoing the rejected “incidental” exception) minimizes the rail journey as “a ‘fringe’ portion of the intercontinental journey promised in the [bills of lading].”<sup>88</sup> And the paragraph after that speaks of “focusing our inquiry on whether the *principal objective* of a contract is maritime commerce.”<sup>89</sup>

At oral argument, Chief Justice Rehnquist asked what the result should be if the “maritime part of the ship[ment] was 500 miles and the land part was 2,000 miles.”<sup>90</sup> The Deputy Solicitor General struggled in his attempt to answer (or avoid answering) this question, but the Court did no better. If we assume that 500 miles is long enough to be “substantial” but not long enough to be the “primary” or “principal” objective of the contract,<sup>91</sup> then the answer to Chief Justice Rehnquist’s question will depend on which part of the opinion controls.<sup>92</sup>

### III. The Circuit Courts’ Treatment of *Kirby* in Other Mixed Contract Contexts

Although it would have been entirely plausible to limit *Kirby* to the multimodal through bill of lading context, lower courts have read it more broadly to overrule the mixed contract doctrine. In *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*,<sup>93</sup> for example, the Second Circuit held that *Kirby* applied in a marine insurance context. The court of appeals concluded that the mixed contract doctrine would have defeated admiralty jurisdiction prior to *Kirby*

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<sup>87</sup> 543 U.S. at 24, 2004 AMC at 2711 (emphasis added).

<sup>88</sup> 543 U.S. at 25, 2004 AMC at 2712.

<sup>89</sup> 543 U.S. at 25, 2004 AMC at 2712 (emphasis added).

<sup>90</sup> *Kirby*, Transcript of Oral Argument at 22.

<sup>91</sup> If this assumption is unjustified, then some different hypothetical will raise the problem. Some sea legs will be long enough or significant enough to be “substantial” but not to be the “primary” or “principal” objective.

<sup>92</sup> The Budapest Convention, which governs the carriage of goods by inland waterway in Europe, has specific provisions to govern cases in which cargo is carried in part by sea and in part by inland waterways. Under article 2(2), the inland waterways rules apply unless (a) the carrier has issued a maritime bill of lading or (b) the carriage by sea is longer than the carriage by inland waterways. See Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI), Oct. 3, 2000, art. 2(2); see also *id.*, art. 30(2) (providing similar rule for case in which carriage is partly on covered inland waterways and partly on excluded inland waterways).

<sup>93</sup> 413 F.3d 307, 2005 AMC 1747 (2d Cir. 2005).

in a case concerning a policy in which some of the coverages were maritime and others were not.<sup>94</sup> But now that policy qualifies as a maritime contract (governed by maritime law) when “the insurance contract at issue is primarily or principally concerned with maritime objectives, although there were incidental non-maritime elements.”<sup>95</sup>

In *Sentry Select Insurance Co. v. Royal Insurance Co.*,<sup>96</sup> the Ninth Circuit agreed that *Kirby* overruled the mixed contract doctrine in the marine insurance context, but on different facts reached the opposite conclusion. Sentry Select and three Lloyd’s syndicates had issued a P&I policy covering a shipowner’s vessel operations and crewmembers. When they paid over \$5.2 million under this policy to settle a Jones Act claim, they sought indemnification from Royal under an excess/umbrella policy. The first question, therefore, was whether this excess/umbrella policy was “maritime” (and thus governed by general maritime law) or not (and thus governed by state law).<sup>97</sup> The court concluded that the policy’s principal purpose was “to provide umbrella coverage in excess of [the shipowner’s] ‘shore-side’ insurance policies, not to protect [the shipowner’s] maritime commerce operations.”<sup>98</sup> It did not matter whether the maritime obligations in the relevant endorsement could be severed from the overall policy, because the severability exception to the mixed contract doctrine<sup>99</sup> did not survive *Kirby*.<sup>100</sup>

Against the background of the *Kirby* decision, it is particularly interesting to see that both the Second and Ninth Circuits adopted *Kirby*’s “primary” or “principal” purpose test. Under

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<sup>94</sup> 413 F.3d at 314.

<sup>95</sup> 413 F.3d at 315. For a ringing endorsement of *Folksamerica*, see Graydon S. Staring, *Reflections on the Admiralty Prospects of Mixed Policies*, 3 BENEDICT’S MAR. BULL. 349 (2005).

<sup>96</sup> 481 F.3d 1208, 2007 AMC 913 (9th Cir. 2007).

<sup>97</sup> On the merits, the Ninth Circuit affirmed the district court on other grounds.

<sup>98</sup> 481 F.3d at 1219.

<sup>99</sup> See *supra* note 21 and accompanying text.

<sup>100</sup> 481 F.3d at 1218-19.

*Kirby*, it would have been just as plausible to define the insurance policies as maritime contracts if a “substantial”<sup>101</sup> part of the coverage was maritime. But the courts of appeals did not consider whether the policies’ maritime coverages might have been “substantial” under the *Kirby* Court’s primary formulation of the new rule.

### **Prospects for Future Developments at the Supreme Court**

It is notoriously difficult to predict what the Supreme Court will do in a particular case that has already been argued.<sup>102</sup> Predicting how the Court might alter admiralty contract jurisdiction in a hypothetical case — which is not yet pending even in the lower courts — is exponentially more difficult. It is nevertheless interesting to speculate, at least in part because such speculation is highly relevant in deciding whether to challenge an established doctrine.

As a practical matter, the Supreme Court must have a relevant case on its docket before it can address admiralty contract jurisdiction.<sup>103</sup> No one believes that any of the justices are likely to reach out for an opportunity to expand (or restrict) jurisdiction, so the first topic for speculation is whether an appropriate case is likely to come before the Court. The second topic for speculation then becomes what the Court might do when it again has the opportunity to rule on admiralty contract jurisdiction.

To focus the discussion, it will be convenient to consider a single aspect of admiralty contract jurisdiction that the Court might be willing to revisit. The most logical candidate would be the traditional rule denying admiralty jurisdiction over a contract for the sale of an existing vessel. The rule on its face seems bizarre. What contract could be more “maritime” than one for

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<sup>101</sup> *Kirby*, 543 U.S. at 27, 2004 AMC at 2713. See *supra* notes 85-92 and accompanying text.

<sup>102</sup> After the *Kirby* oral argument, many experienced observers in the courtroom predicted that the Court would dismiss the case as improvidently granted.

<sup>103</sup> In theory, the Court might amend the Supplemental Rules in a manner that expands admiralty jurisdiction. That possibility seems unlikely.

the sale of a ship? A contract to lease a ship — a charterparty — is undoubtedly maritime.<sup>104</sup> Why not a sale?

No one seems to believe that the vessel-sale rule makes any sense, or that anyone establishing admiralty jurisdiction today would choose to create a system in which vessel-sale contracts were outside of admiralty jurisdiction. Most lower courts and commentators are critical of the rule.<sup>105</sup> If any rule of admiralty contract jurisdiction is likely to be revisited, therefore, the vessel-sale rule must be at or near the top of the list.

### **I. The Traditional Rule Denying Admiralty Jurisdiction Over a Contract for the Sale of an Existing Vessel**

Although the Supreme Court has never ruled on the issue, it is widely accepted in the lower courts<sup>106</sup> and the secondary literature<sup>107</sup> that contracts to sell a vessel are non-maritime. In the Gilmore and Black treatise's list "of causes that might be thought to be included [within the

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<sup>104</sup> See, e.g., *Morewood v. Enequist*, 64 U.S. (23 How.) 491 (1860); GILMORE & BLACK, *supra* note 3, § 1-10, at 22 & n.65.

<sup>105</sup> See, e.g., *Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54, 58, 1970 AMC 1490 (5th Cir. 1970) (Wisdom, J.) ("the petrified rule that ship-sale contracts are not within admiralty jurisdiction . . . 'arose as an analogy to a case which is inconsistent with basic principles governing the admiralty jurisdiction of United States courts.'") (quoting Note, *Admiralty Jurisdiction and Ship-Sale Contracts*, 6 STAN. L. REV. 540, 540 (1954)) (footnote omitted).

<sup>106</sup> Almost every circuit recognizes the traditional rule that contracts for the sale of a vessel are non-maritime. See, e.g., *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 470, 1986 AMC 490, 493 (1st Cir. 1985); *Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 380, 1982 AMC 2541, 2544 (2d Cir. 1982); *The Ada*, 250 F. 194 (2d Cir. 1918); *Flota Maritima Browning de Cuba v. Snobl*, 363 F.2d 733, 735, 1966 AMC 1999, 2001-02 (4th Cir. 1966); *Lynnhaven v. Dolphin Corp. v. E.L.O. Enterprises*, 776 F.2d 538, 541, 1986 AMC 2659 (5th Cir. 1985); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47, 1981 AMC 1005 (5th Cir. 1980); *Atlantic Lines, Ltd. v. Narwhal, Ltd.*, 514 F.2d 726, 731, 1976 AMC 642 (5th Cir. 1975); *Richard Bertram & Co. v. The Yacht, Wanda*, 447 F.2d 966, 967, 1971 AMC 1841 (5th Cir. 1971) (per curiam); *Cary Marine, Inc. v. MV Papillon*, 872 F.2d 751, 755, 1990 AMC 828, 832 (6th Cir. 1989); *Magallanes Inv., Inc. v. Circuit Sys., Inc.*, 994 F.2d 1214, 1217, 1993 AMC 2301, 2304 (7th Cir. 1993); *Twin City Barge & Towing Co. v. Aiple*, 709 F.2d 507, 507-08 (8th Cir. 1983); *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 804, 2001 AMC 2064, 2066 (9th Cir. 2001); *Chase Manhattan Fin. Servs., Inc. v. McMillian*, 896 F.2d 452, 460, 1990 AMC 1702, 1706 (10th Cir. 1990); *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988).

<sup>107</sup> See, e.g., ROBERTSON, FRIEDEL & STURLEY, *supra* note 17, at 52 ("It is well established in the lower courts that contracts to sell a vessel are non-maritime.").

admiralty jurisdiction], but actually are not,” the first item is “[s]uits on contracts for the building and sale of vessels.”<sup>108</sup>

Six years ago, a single district court challenged the traditional rule in *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co.*<sup>109</sup> But even the *Kalafrana* court did not place sole reliance on its view that admiralty jurisdiction should extend to vessel-sale contracts.<sup>110</sup> Moreover, the *Kalafrana* challenge to the traditional rule was immediately and resoundingly rejected by every other judge in the district to face the issue.<sup>111</sup>

## II. The Prospects for the Vessel-Sale Rule to Reach the Supreme Court

For the Supreme Court to overrule the traditional vessel-sale rule and extend admiralty jurisdiction, an appropriate case must come before it — and that requires a litigant willing to challenge the rule in the lower courts and devote the resources necessary to carry the case through two levels of appeals. In *Kalafrana*<sup>112</sup> and ten other cases,<sup>113</sup> litigants were willing to raise the issue in the district court (although some of those cases involved the construction of

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<sup>108</sup> GILMORE & BLACK, *supra* note 3, § 1-10, at 26 (footnotes omitted).

<sup>109</sup> 591 F. Supp. 2d 505, 2008 AMC 2409 (S.D.N.Y. 2008).

<sup>110</sup> Following *Kirby*, the *Kalafrana* court also relied on the mixed nature of the particular contract before it, which also covered vessel repairs. A contract covering only vessel repairs would undoubtedly have been within the admiralty jurisdiction. Thus a sale contract that included repairs could be viewed as a “mixed” contract, thus arguably opening the way for admiralty jurisdiction if the maritime portion of the contract was a primary or substantial purpose of the contract.

<sup>111</sup> See *Aggelikos Prostatitis Corp. v. Shun Da Shipping Group Ltd.*, 646 F. Supp. 2d 330 (S.D.N.Y. 2009); *Polestar Maritime Ltd. v. Nanjing Ocean Shipping Co.*, 631 F. Supp. 2d 304, 2009 AMC 2857 (S.D.N.Y. 2009); *Great Eastern Shipping Co. v. Maritime Tankers & Shipping Co. International Ltd.*, 631 F. Supp. 2d 392, 395 (S.D.N.Y. 2009); *A. Elephant Corp. v. HiFocus Group Ltd.*, 2009 AMC 983 (S.D.N.Y. 2009); *Ocean Benignity Ltd. v. Ocean Maritime Co.*, 606 F. Supp. 2d 519 (S.D.N.Y. 2008); *Unicorn Bulk Traders Ltd. v. Fortune Maritime Enterprises, Inc.*, 2009 AMC 90 (S.D.N.Y. 2009); *Vrita Marine Co. v. Seagulf Trading LLC*, 572 F. Supp. 2d 411 (S.D.N.Y. 2008); *Primera Maritime (Hellas) Ltd. v. Jiangsu Eastern Heavy Industry Co. Ltd.*, 2009 WL 249249 (S.D.N.Y. Feb 2, 2009) (No. 08 Civ. 11299 (JGK)), *aff'd*, 355 Fed. App'x 477 (2d Cir. 2009); *Exmar Shipping N.V. v. Polar Shipping, S.A.*, 2008 WL 3992290 (S.D.N.Y. Aug. 27, 2008) (No. 06cv12991 (HB)); *Optimum Shipping & Trading, S.A. v. Prestige Marine Services Pte. Ltd.*, 2009 WL 497341 (S.D.N.Y. Feb. 26, 2009) (No. 08 Civ. 9533 (JSR)), *vacated on other grounds*, 354 Fed. App'x 532 (2d Cir. 2009).

<sup>112</sup> See *supra* notes 109-110 and accompanying text.

<sup>113</sup> See cases cited *supra* note 111.

new vessels,<sup>114</sup> a context that raises different concerns<sup>115</sup>). Admiralty contract jurisdiction was an important issue at the time because the Second Circuit then permitted Rule B<sup>116</sup> attachments of electronic fund transfers that passed through New York banks,<sup>117</sup> but Rule B is available only to support an admiralty claim.<sup>118</sup> Although millions of dollars were at stake in most of these cases, only two were appealed — and the court of appeals did not discuss the vessel-sale rule in either case. In *Primera Maritime (Hellas) Ltd. v. Jiangsu Eastern Heavy Industry Co. Ltd.*,<sup>119</sup> the Second Circuit affirmed the district court’s judgment but discussed only the rule that admiralty jurisdiction does not extend to contracts for the construction of a new vessel — an issue on which the court of appeals was bound by Supreme Court authority.<sup>120</sup> And by the time the Second Circuit decided *Optimum Shipping & Trading, S.A. v. Prestige Marine Services Pte. Ltd.*,<sup>121</sup> admiralty jurisdiction was no longer relevant because Rule B attachments of electronic fund transfers were no longer permitted.<sup>122</sup> The court of appeals accordingly vacated the district court’s decision and remanded the case to permit the district court to apply the new interpretation of Rule B. The losing parties did not seek certiorari.

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<sup>114</sup> See *infra* notes 119-120 and accompanying text.

<sup>115</sup> Although the Supreme Court has never ruled that a contract for the sale of an existing vessel is non-maritime, it has ruled that ship-construction contracts are non-maritime. See, e.g., *People’s Ferry Co. v. Beers*, 61 U.S. (20 How.) 393, 402 (1857).

<sup>116</sup> See Fed. R. Civ. P. Supp. R. B.

<sup>117</sup> See *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 2002 AMC 2705 (2d Cir. 2002), *overruled*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 2009 AMC 2409 (2d Cir. 2009).

<sup>118</sup> See Fed. R. Civ. P. Supp. R. A(1)(A)(i).

<sup>119</sup> 355 Fed. App’x 477 (2d Cir. 2009).

<sup>120</sup> See *supra* note 115.

<sup>121</sup> 354 Fed. App’x 532 (2d Cir. 2009).

<sup>122</sup> See *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 2009 AMC 2409 (2d Cir. 2009) (overruling *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 2002 AMC 2705 (2d Cir. 2002)); see also *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 2009 AMC 2705 (2d Cir. 2009) (holding that *Jaldhi* applies retroactively).

For the Supreme Court to rule on the merits, of course, it is not enough for a case simply to reach the Court. The Court must also grant certiorari. As a practical matter in this context, that generally requires a conflict in the circuits that the Supreme Court considers sufficiently important to justify its efforts. Thus it may be necessary for more than one case to reach the appellate courts, and for at least one court of appeals to hold — contrary to the traditional understanding — that admiralty jurisdiction extends to vessel-sale contracts.

### III. The Prospects for the Supreme Court to Overrule the Vessel-Sale Rule

If the Supreme Court were to grant certiorari to review the vessel-sale rule, the chances are very good that it would ultimately decide to extend admiralty jurisdiction to cover contracts for the sale of an existing vessel. Indeed, the Supreme Court has consistently expanded the scope of admiralty contract jurisdiction on every opportunity in recent decades, as demonstrated by such cases as *Kossick v. United Fruit Co.*,<sup>123</sup> *Exxon Corp. v. Central Gulf Lines, Inc.*,<sup>124</sup> and *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*<sup>125</sup> Expanding admiralty jurisdiction would be particularly easy in the vessel-sale context because the Court had never held that the contract for the sale of an existing vessel is not maritime. Although that view is widely held in the lower courts, the Supreme Court has not generally hesitated to overrule the unanimous views of the courts of appeals when it disagrees with them.<sup>126</sup>

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<sup>123</sup> 365 U.S. 731, 1961 AMC 833 (1961).

<sup>124</sup> 500 U.S. 603, 1991 AMC 1817 (1991) (overruling *Minturn v. Maynard*, 58 U.S. 477 (1855)). See *supra* notes 4-6 and accompanying text.

<sup>125</sup> 543 U.S. 14, 2004 AMC 2705 (2004) (rejecting the application of the “mixed contract” doctrine to multimodal through bills of lading, explicitly overruling a long line of circuit court authority, and perhaps implicitly overruling *Rea v. The Eclipse*, 135 U.S. 599, 608 (1890), and *Grant v. Poillon*, 61 U.S. (20 How.) 162, 168 (1858)). See *supra* notes 4-6 and accompanying text.

<sup>126</sup> See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 1995 AMC 1817 (1995) (rejecting the unanimous views of the courts of appeals — and the views expressed in the Gilmore and Black treatise — to uphold bill of lading forum selection clauses).

Most importantly, extending admiralty jurisdiction to cover vessel-sale contracts would be more consistent with the Court's most recent jurisprudence on the subject. In *Kirby*, the Court summarized the correct approach for determining admiralty contract jurisdiction as follows:

Our cases do not draw clean lines between maritime and nonmaritime contracts. We have recognized that “[t]he boundaries of admiralty jurisdiction over contracts — as opposed to torts or crimes — being conceptual rather than spatial, have always been difficult to draw.” 365 U.S., at 735. To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. . . . Nor can we simply look to the place of the contract's formation or performance. Instead, the answer “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.*, 249 U.S. 119, 125 (1919) (citing *Insurance Co. v. Dunham*, 11 Wall. 1, 26 (1871)). See also *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 611 (1991) (“[T]he trend in modern admiralty case law . . . is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime”).<sup>127</sup>

Applying this test, it is difficult to understand how a contract for the sale of a vessel that is already engaged in maritime commerce is somehow not “maritime.” But it would not be the first time that one of my predictions was incorrect.

Michael F. Sturley\*

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<sup>127</sup> 543 U.S. at 23-24.

\* Fannie Coplin Regents Chair in Law, University of Texas at Austin. I represented the respondents in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), but I write here solely in my academic capacity. The views I express do not necessarily represent the views of my former clients or co-counsel.