No. 88-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ET AL.,

Petitioners,

—v.—

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited and others. Petitioners have given consent, but consent, requested orally, has not been received from Respondent and leave to file must be sought pursuant to Rule 36.1.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It

has a membership of about 3500 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-eight years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act ("COGSA")[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-14.

3 *E.g.*, Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-five national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken

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Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1 -78.2 (7th ed. 1988) (hereinafter "Benedict"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913); Ocean Bills of Lading (1924), 51 Stat. 233 (1937); Collision (1910), *reprinted in* 6 Benedict, Doc. No. 3-2 at 3-11 -19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 Benedict, Doc. No. 5-2 at 5-11 -29; Maritime Liens and Mortgages (1967), *reprinted in* 6A Benedict, Doc. No. 8-3 at 8-25 -32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 Benedict, Doc. No. 6-3 at 6-22.103 -76.1; and Limitation of Liability for Maritime Claims, *reprinted in* 6 Benedict, Doc. 5-4 at 5-32.1 -44.2.

to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Eleventh Circuit Court of Appeals has construed COGSA in a way which seriously diverges from other jurisdictions and is at odds with the strong policy of Congress and this Court in favor of arbitration. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

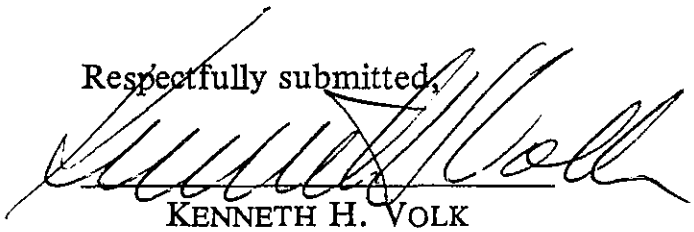
8 *Chick Kam Choo v. Exxon Corp.*, _____ U.S. _____, 108 S. Ct. 1684 100 L.Ed.2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

interested in its outcome as it affects their individual positions. MLA can therefore most effectively treat the need for review by this Court in order to ensure national uniformity on the issues presented.

MLA was an active participant in the drafting and adoption of COGSA and the Federal Arbitration Act, the two pieces of legislation at issue. Thus, MLA can provide a balanced and knowledgeable view on the the most relevant questions and policy considerations at the root of this case.

DATED: August 5, 1988.

Respectfully submitted,



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited; M/V Wesermunde; Marquis Compania Naviera, S.A.; Pateras Brothers, Ltd.; Pateras Investments, S.A.; and Kittiwake Compania Naviera, S.A.

QUESTIONS OF LAW PRESENTED

1. Whether an arbitration clause, incorporated by reference in a contract of ocean carriage, can be in conflict with the provi-

sions of the Carriage of Goods By Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315, and therefore unenforceable.

2. Whether reference to a specified charter party in a bill of lading is a sufficient incorporation of the charter party's arbitration clause so as to require holders of the bill of lading to arbitrate disputes arising from the bill of lading.

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this Brief.

SUMMARY OF ARGUMENT

In view of the number of congressional and judicial pronouncements strongly favoring arbitration, both domestic and international, the Eleventh Circuit's perception of a conflict between arbitration statutes and COGSA presents important issues that should be addressed by this Court.

The holding of the Court of Appeals for the Eleventh Circuit that a bill of lading holder was not bound by an arbitration clause in a charter party incorporated by reference into the bill unless the holder had "actual notice" of the clause, is contrary to the holdings in other Circuits. Accordingly, review by this Court is necessary to resolve the conflict among Circuits.

ARGUMENT

1. APPLICATION OF COGSA TO PRECLUDE ARBITRATION RAISES IMPORTANT ISSUES.

COGSA is the American enactment of the Hague Rules and applies "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. It sets out a number of rules governing risk allocation in the event of loss of or damage to cargo. *E.g.*, 46 U.S.C. § 1304. Although it permits a certain freedom of contracting out of its terms, 46 U.S.C. § 1305, COGSA expressly prohibits any

agreement relieving the carrier of liability "or lessening such liability" as would otherwise arise from the Act. 46 U.S.C. § 1303(8). In the instant case, the Eleventh Circuit held that a clause in the contract requiring arbitration in London *does* lessen the carrier's exposure to liability and is therefore unenforceable. *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1581-82 (11th Cir. 1988).

The only authority cited for this proposition is *Indussa Corporation v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), in which the Second Circuit sitting *en banc* determined that a contract of carriage requiring that a cargo claim be tried in a foreign court runs afoul of COGSA. The court, however, qualified its holding by saying:

> Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained. See Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F. Supp. 396 (S.D.N.Y.1966), appeal dismissed for want of jurisdiction, 372 F.2d 123 (2 Cir. 1967), slip opinions 1103, and cases cited. Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision "in any maritime transaction", § 2, and defined that phrase to include "bills of lading of water carriers," § 1, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that form of procedure. If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947, 61 Stat. 669. See Knauth, Ocean Bills of Lading, supra, at 238-239.

Id. at 204 n.4.

The *Wesermunde* decision is the first to reach the conclusion that a foreign arbitration clause is a "lessening" of the carrier's obligations under COGSA and seems to be at odds with legislation enacted by Congress strongly supporting arbitration. *See* 9

U.S.C. §§ 1-14. Section 2 of the Federal Arbitration Act provides:

> *A written provision in any maritime transaction* or a contract evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract or transaction*, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The section makes no distinction between arbitration clauses specifying arbitration in the United States and those naming a forum abroad. *See also, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985).

A further expression of strong congressional support of arbitration is found in the Recognition and Enforcement of Foreign Arbitral Awards Convention, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3, *reprinted in* 6 Benedict on Admiralty, Doc. No. 7-3 at 7-16 -20 (7th ed. 1988), which was incorporated into our national laws in 1970.[9] 9 U.S.C. §§ 201-208. Article II(1) of the Convention states:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Since both of the arbitration statutes were enacted subsequent to COGSA without any indication of an intention to limit their effect by reason of COGSA, it would seem clear that the

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9 England and Greece are also signatories. 6 Benedict on Admiralty, Doc. No. 7-3 at 7-21 -22 (7th ed. 1988).

will of Congress has been thwarted by the decision of the Eleventh Circuit.

Our courts, led by this Court, have also strongly endorsed the arbitral process. In the case of *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982), the Court, in speaking of the Federal Arbitration Act, said:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25 (footnote omitted). And in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1985), the Court said:

> Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrier & Gulf*, 363 U.S., at 582-583. See also *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 377-378.

The case of *Shearson/American Exp., Inc. v. McMahon*, ____ U.S. ____, 107 S. Ct. 2332, 96 L.Ed.2d 185 (1987), contains the Court's most recent expression strongly favoring arbitration. *See also Mitsubishi Motors*, 473 U.S. at 629-31; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985).

The decision of the Eleventh Circuit relies upon COGSA to frustrate the strong legislative policy favoring arbitration and

this Court's broad application of the Federal Arbitration Act. For those reasons alone the case is worthy of review.[10]

2. THE STANDARD USED BY THE ELEVENTH CIRCUIT TO DETERMINE WHETHER THE CHARTER'S ARBITRATION CLAUSE WAS SUFFICIENTLY INCORPORATED INTO THE BILL OF LADING IS CONTRARY TO THE ESTABLISHED LAW IN OTHER CIRCUITS.

The Eleventh Circuit held that there is an "implied policy" in COGSA that suit may be brought in the United States, notwithstanding an arbitration clause, unless "actual notice" is given that such a clause has been incorporated by reference into the contract of carriage. *Wesermunde*, 838 F.2d at 1581-82. This is contrary to decisions of other circuits which have held that charter party terms may be generally incorporated into the bill of lading by reference and are a binding part of the contract. All that is required is that there be an express reference to the charter party on the face of the bill of lading. That is sufficient to put the holder of the bill of lading on notice. There is no requirement that each and every clause of the charter party be brought to the bill of lading holder's attention, as the Eleventh Circuit would have it. Such a requirement would greatly multiply the number of proceedings arising from the same events and transactions, and could seriously disrupt maritime commerce.

The leading case is *Son Shipping Co., Inc. v. De Fosse and Tanghe*, 199 F.2d 687 (2d Cir. 1952). The question was whether an arbitration clause in a charter party was sufficiently incorporated in bills of lading so that the provisions for arbitration in the charter party were enforceable. The order bills of lading provided in part as follows:

> "This shipment is carried under and pursuant to the terms of the charter dated Antwerp, June 29th, 1948 between Son Shipping Company and De Fosse & Tanghe,

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10 The House of Lords recently wrestled with this problem in *The Hollandia*, [1983] 1 A.C. 565, 576 (H.L.(E)), without coming to any conclusion on the point.

> charterer, and all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment."

Id. at 688. In holding that the charter party's arbitration clause was enforceable against the bill of lading holder the Second Circuit said:

> Where terms of the charter party are, as here, expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the charterer and the shipowner.

Id. (citations omitted).

Son Shipping has been followed by many courts. In *Castle & Cooke, Inc. v. Etoile Shipping Co.*, 622 F. Supp. 609, 610 (D.P.R. 1985), the court said:

> It is well settled that where "the terms of the charter party are . . . expressly incorporated into the bills of lading they are part of the contract of carriage and are binding upon those making a claim for damages for breach of the contract . . ." *Son Shipping Co. v. DeFosse & Tanghe*, 199 F.2d 687, 688 (2nd Cir.1952); *see also*, *Bunge Corp. v. Stalt Hippo*, 1980 AMC 2611, 2614 (S.D.N.Y. 1980); *Midland Tar Distillers, Inc. v. M/T Lotos*, 1973 A.M.C. 1924 (S.D.N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd. v. M/S Galini*, 323 F. Supp. 79, 82 (S.D. Tex. 1971); *Michael v. S.S. Thanasis*, 311 F. Supp. 170, 173 (N.D. Calif. 1970); *Lowry & Co. v. LeMoyne D'Iberville*, 253 F. Supp. 396, 398 (S.D.N.Y. 1966). To compel arbitration pursuant to a clause in a charter party it is not necessary for the claimant to be a party to the charter agreement. Bunge, *supra*, at 2614. It is enough that the clause was unequivocally incorporated in the bill of lading and the shipper was aware of the incorporation. *SS Thanasis*, *supra*, at 173.

In the case of *Michael v. S.S. Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970), referred to in *Castle & Cooke*, the court quoted and followed *Son Shipping* and compelled arbitration. 311 F. Supp. at 173-74. There, as here, the incorporation of the charter party by reference was in broad general terms. *See id.* at 172. The court noted "that there has been no showing that the plaintiffs are unfamiliar with maritime procedures or other common commercial transactions" and concluded "that it is reasonable under the circumstances here to assume that the plaintiffs were aware or should have been aware of the provisions in the bills of lading which they purchased." *Id.* at 174.

The Eleventh Circuit's holding that the bill of lading holder must have "actual notice"[11] of the arbitration clause if it is to be enforceable is thus in direct conflict with the *Son Shipping* line of authority and review by this Court is therefore merited in order to resolve a conflict among the Circuits.

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11 The Circuit Court's contention, in justification, that "actual notice" of the applicability of COGSA was given on the face of the bill of lading is inaccurate. *Compare* 838 F.2d at 1582 *with id.* at 1580 n.1. The bill itself does not mention COGSA, only "legislation relating to the carriage of goods by sea . . . which is *compulsorily* applicable . . . ." *Id.* at 1580 n.1 (emphasis added). As the Circuit Court points out, this was a contract of private carriage, *id.* at 1580, and therefore, provided the bills were not negotiated, COGSA was not applicable on its own terms, *id.*, even assuming COGSA to be the "legislation" involved.

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: August 5, 1988.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On August 5, 1988, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in "The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, et al. vs. State Establishment for Agricultural Product Trading" in the United States Supreme Court, October Term 1988, No. 88-115, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 5, 1988, at New York, New York.

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